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**LEGAL STUDIES FOR VCE**

**UNITS 1 & 2**

**YEAR 11**

LISA FILIPPIN  
MARGARET BEAZER  
JOSIE GRAY  
PETER FARRAR  
ANNIE WILSON



# eBook

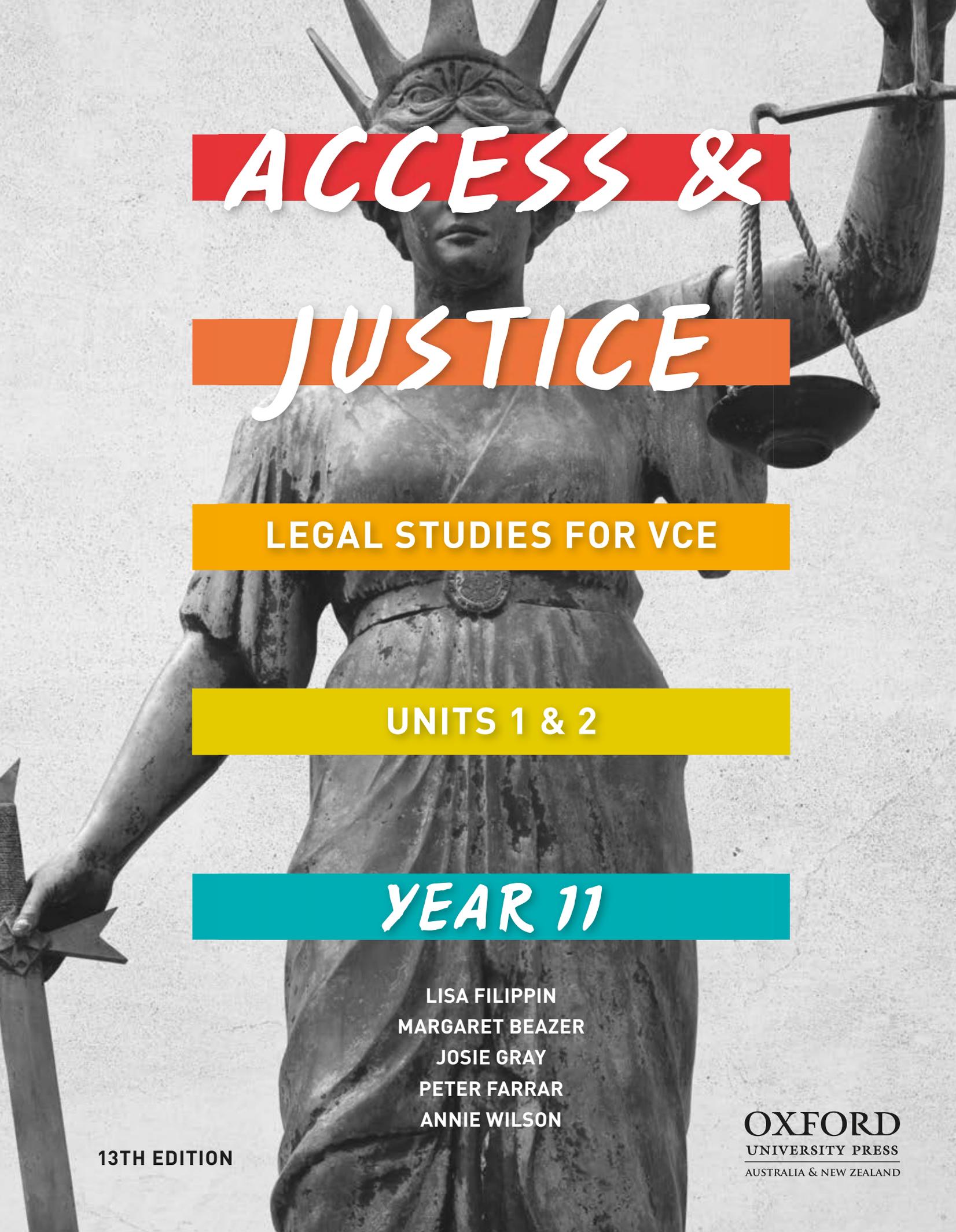
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# USING ACCESS & JUSTICE

## Legal Studies for VCE Units 1 & 2

*Access & Justice Legal Studies for VCE Units 1 & 2* (13th edition) has been fully revised and updated to meet the requirements of the VCE Legal Studies Study Design 2018–2022. It offers complete support for teachers and students completing Units 1 & 2 of VCE Legal Studies.

## Key features of the Student book

### Legal toolkit

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

- tips for success assessment tasks
- advice on mastering legal citation
- information about careers in the law

#### Tip 2 – Understand task words

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

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

Source 2 lists a range of common task words and their definitions. It also provides examples to illustrate. Source 2 lists a range of common task words and their definitions. It also provides examples to illustrate. Source 2 lists a range of common task words and their definitions. It also provides examples to illustrate.

All of these questions have come from exam papers for past Study Designs, so they may or may not reflect key knowledge and key skills that are not in the current Study Design. You should check with your teacher about this.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
Advise	to offer suggestions about the best course of action or make recommendations	Question 7 (2008) James and his friends were celebrating James's 25th birthday at a local restaurant. At the end of the night, James decided that he may have had too much to drink and fell to the floor, causing him a serious injury. After consulting his lawyer, James decides to sue the restaurant for compensation. Advise James on the purpose of two pre-trial procedures which his lawyer might use in this case.
Analyse	to examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	Question 12 (2019) Using one successful referendum and one High Court case, analyse the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers.
Comment on	to express an opinion or reaction (in order to demonstrate your understanding of it)	Question 5 (2009) Pre-trial procedures are designed to speed up the resolution of civil disputes. Comment on this statement. In your answer, describe one civil pre-trial procedure.
Compare	to explain or discuss how concepts, definitions or features are similar and different by identifying the qualities or features they have in common as well as those they don't	Question 5 (2010) Jane and David have been involved in an ongoing dispute. They have been advised to use either mediation or arbitration as a dispute resolution method. Compare mediation and arbitration as methods of dispute resolution.
Examine	to consider in detail and establish the key facts and important issues related to a topic or issue	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically examine these two strengths of the doctrine of precedent.
Define	to state the exact nature, features, or meaning of a term, feature or concept	Question 1 (2015) A plaintiff is seeking an injunction and damages of \$1 million in the Supreme Court of Victoria. Define the term 'injunction'.
Describe	to give a detailed account of a system, process or feature	Question 9a (2014) Describe one reason why a law may not be applied.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
Discuss	give a reasoned argument for and against a particular issue (and provide strengths and weaknesses if applicable). You can also give your opinion, and should do so if the question asks you to give it.	Question 7c (2014) Provide one sanction that may be imposed if Sam is found guilty and discuss the ability of that sanction to achieve its purpose.
Distinguish	explain the differences and distinctive characteristics of two or more things or concepts.	Question 1 (2011) Distinguish between exclusive and residual power.
Evaluate	to identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the overall benefit or worth of what is being evaluated.	Question 10 (2013) Evaluate the effectiveness of two methods that are used by individuals or groups to influence a change in the law.
Explain	to clarify a point, feature or concept by describing it in more detail or by revealing relevant facts about it.	Question 5a (2015) Explain the role of the VLRC in recommending a change in the law.
Identify	to state or recognise a feature or factor (and possibly provide some basic facts about it)	Question 3 (2013) Identify the two types of law-making powers of the state parliaments. In your answer, provide an example of each.
Illustrate	to provide examples in order to better describe or explain a feature or concept	Question 4 (2005) Use one example to explain and illustrate how the law-making powers of the Commonwealth Parliament and the state parliaments have been changed by High Court interpretation of the Commonwealth Constitution.
Justify	to show (or prove) a statement, opinion or contention to be right or reasonable by providing evidence or examples	Question 3 (2014) A referendum proposal was voted on by the electors of Australia. Fifty-six per cent of all voters in Australia voted in favour of the proposal and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal. Was the referendum passed? Justify your answer.
Outline	to give a brief summary of the key features	Question 1 (2014) Outline one effect of the interpretation of statute by judges.
Provide	to give, supply or specify	Question 5 (2014) Audrey has commenced civil proceedings in the Supreme Court of Victoria (Trial Division). The Court will resolve the dispute at trial after mediation was unsuccessful. Provide one reason for the existence of a court hierarchy. Refer to Audrey's dispute in your answer.
To what extent	to describe the degree or level to which a statement, opinion or contention is (or is believed to be) correct or valid	Question 12 (2019) The author of a journal article wrote the following opinion: 'Justices should not decide matters of fact. It should all be left to the judge'. To what extent do you agree with this opinion? Justify your answer.

- an overview of the structure of the VCE Legal Studies course
- a range of helpful study tips.

#### Study tip

A short video explaining the structure of Legal Studies exam questions is provided on your eBook gases. It gives more tips and examples of the best ways to answer questions and will help you maximize your chances of performing well on tests, assessment tasks and exams.

#### TIP 3 – Understand the structure of exam questions

To give yourself the best chance of doing well in VCE Legal Studies exams, it's important for you to become familiar with types of questions that typically appear. Like assessment tasks, exam questions assess your understanding of key knowledge and key skills. The only difference in the exams are completed under exam conditions.

Legal Studies exam questions typically contain a defined set of items arranged in different orders. Once you understand what each component of the questions is asking or telling you, answering the question becomes much simpler. Source 3 explains the most common items that make-up exam questions and Source 4 provides some examples of these in action.

QUESTION COMPONENT	PURPOSE
Question number	This indicates the number of the question on the exam paper.
Mark allocation	This indicates the total number of marks available for the question. The total marks available gives you an idea of how long to spend answering the question.
Quote or extract	Exam questions often include statements (set in quotation marks) or extracts from key pieces of legislation.
Task word	Task words are words that tell you how to demonstrate the knowledge you have learned.
Quantifying words	Quantifying words state the specific numbers (i.e. quantities) of examples or definitions you should provide in your answer. They are bolded for clarity. Follow quantifying words carefully and provide exactly what is asked.
Content words	Content words provide specific details and facts for you to consider in your answer (i.e. the context).

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

- Question 13** (10 marks)  
Discuss the ability of parliament to change the law. In your answer, provide one recent example of an individual or group influencing legislative change.
- Question 17** (marks)  
Murray commences proceedings in the Magistrates Court against the Employer and is seeking \$5000 in damages.
- Question 1** (marks)  
A plaintiff is seeking an injunction and damages of \$1 million in the Supreme Court of Victoria. Define the term 'injunction'.

From *OVCAA Legal Studies Exam, 2016*

- Student book gases for these additional resources and more:
  - Worksheet XX (Title: TRC)
  - Module XX (Title: TRC)
  - assess quiz XX (The quiz asks with an auto-correcting multiple-choice quiz)

## 1.4 MASTERING LEGAL CITATION

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

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

- Acts of parliament (also known as statutes and legislation)
- legal cases (also known as court decisions)

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

#### Citing Acts of parliament

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

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

- **The Name of the Act or Statute** – This is the title that has been given to the statute. It is always written in italics.
- **The year that it was made by parliament** – This is also written in italics.
- **The parliament that passed it** – This will be either a state or territory parliament, or the Commonwealth Parliament. The name of the parliament is written in full, instead of abbreviations for each parliament are used (e.g. Vic or Cth).

#### Example 1 – an Act made by the Victorian Parliament

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

*Crimes Act 1958 (Vic)*

#### Example 2 – an Act made by the Commonwealth Parliament

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

*Competition and Consumer Act 2010 (Cth)*

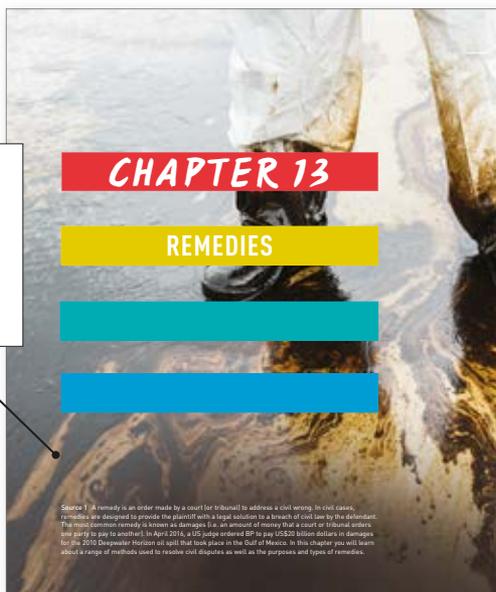


Source 1 Legal citation is a system designed to help people cite (i.e. refer to) specific laws and legal cases in a consistent and accurate way.

# Chapter openers

Each chapter begins with a chapter opener that includes:

an engaging and relevant image that links to core content in the chapter



## CHAPTER 13 REMEDIES

**OUTCOME**  
By the end of Unit 2 - Area of Study 2 (i.e. Chapters 13 and 14), you should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

**KEY KNOWLEDGE**  
In this chapter, you will learn about:  
• the principles of justice: fairness, equality and access  
• methods used to resolve a civil dispute such as mediation, conciliation and arbitration  
• institutions that resolve civil disputes such as tribunals, ombudsmen and complaint bodies  
• an overview of the role and jurisdictions of the Victorian courts  
• the role of the jury in a civil trial  
• the purposes of remedies  
• types of remedies, such as damages and injunctions.

**KEY SKILLS**  
By the end of this chapter, you should be able to:  
• define and use legal terminology  
• research, analyse and apply information in relation to civil law and two recent civil cases  
• describe the institutions that resolve civil disputes  
• explain the role of the Victorian courts and juries in civil cases  
• discuss the principles of justice in relation to the resolution of civil disputes and remedies  
• discuss the ability of remedies to achieve their purposes.

**KEY LEGAL TERMS**  
**access** one of the principles of justice; access means that all people should be able to understand their legal rights and pursue their case  
**arbitration** a method of dispute resolution in which an independent person known as an arbitrator is expected to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award  
**conciliator** the independent third party (i.e. person) appointed to assist a dispute during arbitration; arbitrators have specialised expertise in particular kinds of disputes between the parties and make decisions that are legally binding on them. The decision is known as an arbitral award  
**conclusion** an area of law that defines the rights and responsibilities of individuals, groups and organisations in society and regulates private disputes (as opposed to criminal law)  
**complaints body** an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party  
**conciliation** a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution  
**conciliator** the independent third party in a conciliation who helps the parties reach an agreement that will end the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution to the parties' reach the decision  
**damages** the most common remedy in a civil claim; an amount of money that the court for tribunal orders one party to pay to another  
**equality** one of the principles of justice; equality means people should be equal before the law and have the same opportunity to present their case as anyone else, without advantage or disadvantage  
**fairness** one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events, and the pre-hearing and hearing for trial processes should be fair and impartial)  
**injunction** a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong  
**mediation** a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution  
**mediator** an independent third party who does not interfere or persuade but helps the parties in a mediation as they try to reach a settlement of the matter  
**remedy** a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law of the defendant and be as cost-effective as possible while the plaintiff to their original position prior to the breach of their rights  
**tribunal** a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts  
**KEY LEGAL CASES**  
A list of key legal cases covered in this chapter is provided on pages viii-ix.

- a summary of outcomes, key knowledge and key skills dot points from the VCE Legal Studies Study Design 2018–2022
- a list of key legal terms that appear in the chapter (with supporting definitions)
- a list of key legal cases that appear in the chapter.

**Going further**  
Additional background information and opportunities for extension are clearly identified in text and support students who want to gain a richer understanding of the subject matter.

## Clear topic-based approach

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

**Legal case**  
Relevant legal cases with accompanying legal citation provide real-world examples of the law in action.

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

### 13.8 THE ROLE OF THE JURY IN A CIVIL TRIAL

As discussed in Chapter 11, the jury system is a trial by peers. The jury must listen to all the evidence and make a decision based on the facts. In a civil case the jury considers the evidence having regard to the law that is explained to them by the judge, and decides who is in the wrong.

**When is a jury used in civil trials?**  
Unlike some criminal cases, there is **no automatic right** to a jury in a civil trial. For example:  
• in the Magistrates' Court and the County Court, there is no jury  
• in the County Court and the Supreme Court, a jury is optional. If either party wants a jury they must request a jury trial. They must also pay the fees associated with it (though a judge is able to order that the trial be judge alone).

**LEGAL CASE**  
**Jury trial despite complex issues in the case**  
*Humphris v Connecticut Nominee Company Pty Ltd (No 2) [2016] VSC 419*  
(27 July 2016)  
In this case, the plaintiffs requested that the judge of trial be judge and jury. The claim brought by the plaintiffs related to negligence and nuisance caused by Eastlink, a toll road in Melbourne's western suburbs. The plaintiffs in this case were the plaintiffs in the case.

The defendants sought an order that the trial be heard by a judge alone. The defendants' reasons for the complex issues of law and fact, the large volumes of written material that needed to be considered, and the length of time and resources that would be spent if the jury needed to be discharged.

Associate Justice Day of the Supreme Court, with some hesitation, dismissed the claim. With some hesitation, he dismissed the claim. With some hesitation, he dismissed the claim. With some hesitation, he dismissed the claim.

**Composition of jury**  
There are **six jurors** in a jury in a civil trial. The jury is selected from the Victorian electoral roll. The jury is selected from the Victorian electoral roll. The jury is selected from the Victorian electoral roll.

**→ GOING FURTHER**  
**Jury challenges**  
The Parties have some influence over the composition of the jury. They can do this by challenging some of the jurors before they are empanelled. The plaintiff and the defendant are entitled to a reason. A peremptory challenge in a civil trial is made by striking the name or name(s) of the potential juror from the list of persons to be selected to serve on the jury. There can be an unlimited number of challenges for causes, that is, challenges with a reason.

**Role of the civil jury**  
The role of a civil jury is to consider the facts of the case and decide who is most likely in the wrong. This decision is made on the **balance of probabilities**. If a **unanimous verdict** cannot be reached (i.e. one or more jurors disagree), the jury will be discharged and the case will be decided by the judge. A civil jury may also be required to decide the amount of damages to be awarded. In damages cases, only a judge can decide the amount of damages. A jury is not required to give reasons for their decision (unlike a judge or magistrate). Therefore, the parties will not know the basis upon which the jurors have decided or even know whether the jurors have understood the evidence, the legal issues, or the submissions made by the parties.

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

**Study tip**  
Police can arrest without a warrant any person reasonably believed to have committed an indictable offence either in Victoria or elsewhere which, if committed in Victoria, would be an indictable offence. Police can use **reasonable force** when making an arrest. Though what is reasonable force will depend on the circumstances of the arrest.

An individual, however, has certain rights in relation to an arrest, which ensure a balance between the power of arrest and the rights of an individual. For example:  
• An individual can refuse or arrest the police station unless they are under arrest. This upholds a person's rights to freedom of movement and right to liberty.  
• If a person is arrested, under the Human Rights Charter they must be informed at the time of arrest of the reasons for the arrest, and be promptly informed about any proceedings that are to be brought against them or her.  
• The Human Rights Charter also states that an arrested person must be promptly brought before a court and have the right to be brought to trial within a reasonable time (6 to 96 hours after arrest).  
• If arrested, a person must be released (unconditionally or on bail) or brought before a **bail justice** or refuse to do so.  
• If arrested, a person must be released (unconditionally or on bail) or brought before a **bail justice** or refuse to do so.

**Pepper spray and arrests at Moomba 2017**  
In 2017, the ABC reported that more than 50 people were arrested and weapons were seized during the 2017 Moomba Festival. Activities and events are held near 'Barrs' and surrounding locations and the festival March. Activities and events are held near 'Barrs' and surrounding locations and the festival March.

In 2017, the ABC reported that more than 50 people were arrested and weapons were seized during the 2017 Moomba Festival. Activities and events are held near 'Barrs' and surrounding locations and the festival March. Activities and events are held near 'Barrs' and surrounding locations and the festival March.

**Questioning**  
Under Section 464A of the *Criminal Act*, if a person has been arrested and is in custody the being subjected to questioning, an investigating official has the power to question that person within a reasonable time of committing an offence, an investigating official has the power to question that person within a reasonable time of committing an offence.

**Man arrested over the abduction and murder of Cheryl Grimmer in 1970**  
High Morn. The Daily Telegraph, 23 March 2017  
Police have charged a Victorian man, 63, with murder after one of the most sensational cold case arrests in Australian criminal history.  
Detectives arrested the man in Frankston after a two-year cold case investigation into the disappearance of Cheryl Grimmer, 3, from Fairy Meadow beach on the New South Wales South Coast, on January 12, 1970. Cheryl had never been found.

**IN THE NEWS**  
The Herald Sun understands the man, a security guard with a grown family, was 14 when it is the oldest cold case arrest made in Australia.  
Cheryl vanished from a changing room at the beach.  
It is alleged that about 18 months afterwards he talked about the crime while in the Melbourne home.  
After this was reported to Sydney police, he was taken to Wollongong and interviewed.  
It is alleged that he was 'originally from the United Kingdom, provided details to Melbourne police, who decided not to charge.  
Investigators who decided not to charge.  
The man, who now goes by a different name, voluntarily went to be interviewed by detectives at Frankston police station about 10 am yesterday. After several hours of questioning, he was charged with Cheryl's murder and appeared briefly before Frankston Magistrates Court.  
He is expected to be extradited to Sydney tomorrow.  
Cheryl vanished after spending the day at the beach with her mother, Carol, and her brothers Rick, 7, Stephen, 5, and Paul, 4.

**CHAPTER 11 SANCTIONS**  
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### 9.5 WORK: PAY AND CONDITIONS



**Pay and conditions in Australia**  
Under certain laws, a person's pay may be determined by an award or an enterprise agreement or condition.

**Award**  
An award is a document which sets out the wages that must be paid in a particular occupation or industry. The award will also set out what benefits, such as holidays and allowances, are paid to its employees.

**Enterprise agreement**  
An enterprise agreement is an agreement about wages and conditions between an employer and its employees. Enterprise agreements effectively replace an award for a particular business or industry.

**Individual contracts**  
An individual contract is an agreement directly between an employer and the employee. Each contract is negotiated between the two parties and sets out the pay and conditions of the employee. The wages paid must not be below the award rates. The Federal Court has used to be the appellate court for individual contracts. Individual contracts are popular with private sector employees, such as:

- teachers
- nurses
- pilots
- police officers
- public servants
- university staff
- health care workers
- lawyers
- accountants
- bank staff
- retail staff
- public servants
- university staff
- health care workers
- lawyers
- accountants
- bank staff
- retail staff

**Work conditions**  
The Fair Work Act established 12 National Employment Standards (NES) that employers are entitled to pay their employees. The NES, which are contained in the Fair Work Act, are:

- Maximum weekly hours of work - 38 hours per week, plus reasonable additional hours
- Requests for flexible working arrangements - an entitlement for certain employees to request flexible working arrangements

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

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

### 13.1 INTRODUCTION TO REMEDIES

In society disputes are common. The interaction between different people, groups and organisations can often result in **disputes** being brought, or rights being infringed. These disputes often arise from:

- a person's rights have been infringed, that person may be able to take action against the person they believe has done them wrong.
- the **plaintiff** is the person who commences a civil action.
- the **defendant** is the person who is being sued.

The plaintiff has the burden of proof in civil disputes, and may be able to vary a variety of dispute resolution bodies to be compensated for loss of income. That is, a plaintiff and a defendant can be a human being, a company or an organisation. That is, disputes and actions are not limited to natural persons and organisations, and in one case may be used as an example of a company being sued in the case study below.

**Case study**  
**King Kong features in Supreme Court claim**  
In March 2017, the Herald Sun reported that film and cartoon character King Kong (played by actor James Roland) had sued the Supreme Court of Victoria against the Creative Technology Company. It is alleged that Mr Roland (King Kong) was injured in 2011 when he was required to move King Kong with a crane at a workshop while he was employed at the company. He claims to have suffered back injuries, pain, suffering and depression, and has been unable to undertake suitable work since 2013. He claims that Creative Technology Company was negligent, and in breaching its duty of care, as a result of removal from the company.

**Check your learning**  
1. What are the names given to the two parties in a civil dispute?  
2. What does it mean to sue somebody?  
3. Read the case study King Kong features in Supreme Court claim.  
4. Who is the plaintiff and who is the defendant in this case?  
5. Explain the claim that the plaintiff made.  
6. What loss or harm does the plaintiff claim he has suffered?  
7. What sort of claim is this (e.g. negligence, defamation, contract)?

**Case study**  
Recent examples and scenarios show how key legal concepts are applied in real life situations.

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

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

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

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

## Chapter and unit review

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

**Unit review**  
Unit assessment tasks appear at the end of Unit 3 and Unit 4. These cover the key knowledge dot points for the whole Area of Study and are structured in line with a range of suggested assessment tasks covered in the *VCE Legal Studies Study Design*.

### CHAPTER 15 REVIEW

**CHAPTER SUMMARY**

The way in which Australia protects rights

- Statute law
- The Human Rights and Equal Opportunity Commission
- The Australian Constitution
- International human rights treaties, conventions and regional protocols entered into by Australia
- Examples of international treaties, conventions and regional protocols entered into by Australia:
  - International Covenant on Civil and Political Rights (ICCPR)
  - International Covenant on Economic, Social and Cultural Rights (ICESCR)
  - Convention on the Rights of the Child (CRC)
  - Convention on the Elimination of All Forms of Racial Discrimination (CERD)
  - Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Enforcement of international treaties and human rights

The approach adopted by the Australian government to protect rights

- Constitutional charter or bill of rights
- Statutory bill of rights
- Approach adopted by the United States:
  - A constitutional bill of rights
  - Structure of the Constitution including rights
  - International conventions and treaties
- Similarities and differences between the Australian and US approaches to the protection of rights

Possible reforms to the protection of rights in Australia

- Adopt a statutory charter of rights
- Amend legislation that applies to protect vulnerable minority groups
- Increase legal aid and ensure individuals can legally challenge alleged infringement of rights
- The **Mabo case** - a case study of protection of rights in Australia
- Eddie Mabo along with four other Torres Strait Islander people (the **Meriam people**) challenged the doctrine of terra nullius and the principle of sovereignty.
- The High Court rejected the doctrine of terra nullius and found that the Meriam people had native title rights in their land.
- The High Court rejected the doctrine of terra nullius and found that the Meriam people had native title rights in their land.
- The basic principles of the Mabo decision were:
  - Our system of real property law accommodates native title
  - It may be extinguished by a number of ways either by the Crown or by the Indigenous people themselves, and
  - The High Court found that the Meriam people had native title rights in their land.
- Australia has conflicting views of land rights.

**PRACTICE ASSESSMENT TASK**

Students should read the information at the beginning of the chapter relating to the learning outcomes, key knowledge and key skills before attempting this assessment task. You have been asked to present an oral case about human rights in Australia. The people attending the forum will be those who have recently become Australian citizens. You have had a meeting with the majority of people in Australia, but in particular rights that are related to discrimination. You are required to prepare the speech. It may be either written, or in the form of multimedia using whatever presentation tool you like. The speech must address the following:

**Practice assessment task questions**

- 1 What are rights? (3 marks)
- 2 What it means to be protected from discrimination. (3 marks)
- 3 A brief explanation of sources of rights, including common law, the Charter of Human Rights and Responsibilities, statute law and the Australian Constitution. (3 marks)
- 4 Whether rights to be free from discrimination are protected by common law, the Charter of Human Rights and Responsibilities, or a combination of these three sources of law. (3 marks)
- 5 Whether there are any ways you can improve the protection of minority groups in Australia, as well as people who have recently arrived in Australia. (3 marks)
- 6 The role of Eddie Mabo in the recognition of Australian and Torres Strait Islander peoples in Australia, as well as their rights to land. (3 marks)

# Key features of digital support

Access & Justice Legal Studies for VCE Units 1 & 2 is supported by a range of engaging and relevant digital resources provided via obook assess.

## obook assess

Students receive:

- a complete digital version of the Student book with notetaking and bookmarking functionality
- case study videos (with supporting worksheets) from some of Australia's finest news and current affairs outlets (including ABC and SBS)
- targeted instructional videos by some of Victoria's most experienced Legal Studies teachers, designed to help students prepare for exams and assessment tasks
- a range of engaging worksheets for every chapter, designed to consolidate and extend understanding on key points from the study design
- additional case studies and examples for extension
- access to interactive auto-correcting multiple-choice quizzes.



## TEACHER obook assess

Teachers receive:

- access to all student resources
- detailed course planners, teaching programs and lesson plans
- answers to every question in the Student book
- chapter summary PowerPoint presentations ideal for whole-class revision
- practice exams and SACs with answers.





# CHAPTER 1

## LEGAL

## TOOLKIT

**Source 1** Congratulations on choosing Legal Studies! This chapter provides you with an introduction and overview to the course, but is also a handy reference that can be revisited throughout the year.

## WELCOME TO VCE LEGAL STUDIES UNITS 1 & 2

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

Legal Studies is an exciting, relevant and engaging course that will explore the meaning of justice and help you become active and informed citizens. It will provide you with opportunities to develop problem-solving skills as you navigate your way through criminal cases and legal problems, and explore the meaning of justice.

This student book has been purpose-written to meet the requirements of the *VCE Legal Studies Study Design 2018–2022* and includes content you are required to cover in Units 1 & 2.

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

### TOPICS COVERED

This chapter provides an introduction to:

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

Best of luck with your studies this year!

# UNDERSTANDING THE VCE LEGAL STUDIES COURSE

## Study tip

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

A link to the current Study Design is provided on your [uobook assess](#).

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

The Study Design is the most important document supporting the VCE Legal Studies course. It sets out all of the information you are expected to learn and provides important details about the way you will be assessed. The current Study Design has been accredited from **1 January 2018**.

## Structure of the VCE Legal Studies course

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

UNIT	COMMENTS
Unit 1 – Guilt and liability	<ul style="list-style-type: none"> <li>Units 1 &amp; 2 are most commonly completed in Year 11</li> </ul>
Unit 2 – Sanctions, remedies and rights	
Unit 3 – Rights and justice	<ul style="list-style-type: none"> <li>Units 3 &amp; 4 are most commonly completed in Year 12</li> <li>Units 1 &amp; 2 are not a pre-requisite to complete Units 3 &amp; 4.</li> </ul>
Unit 4 – The people and the law	

**Source 1** Structure of VCE Legal Studies Units 1–4

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

## UNIT 1 – GUILT AND LIABILITY

AREA OF STUDY	OUTCOME	CORRESPONDING CHAPTERS IN THIS BOOK
<b>Area of Study 1</b> Legal foundations	<b>Outcome 1</b> On completion of this unit the student should be able to describe the main sources and types of law, and assess the effectiveness of laws.	<ul style="list-style-type: none"> <li><b>Chapter 3</b> Legal foundations</li> </ul>
<b>Area of Study 2</b> The presumption of innocence	<b>Outcome 2</b> On completion of this unit the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.	<ul style="list-style-type: none"> <li><b>Chapter 4</b> The presumption of innocence</li> <li><b>Chapter 5</b> Indictable offences</li> <li><b>Chapter 6</b> Summary offences</li> </ul>
<b>Area of Study 3</b> Civil liability	<b>Outcome 3</b> On completion of this unit the student should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.	<ul style="list-style-type: none"> <li><b>Chapter 7</b> Civil liability</li> <li><b>Chapter 8</b> Tort law</li> <li><b>Chapter 9</b> Other areas of civil law</li> </ul>

**Source 2** An overview of the content and structure of Unit 1. Extracts from the VCE Legal Studies Study Design (2018–2022) reproduced by permission, © VCAA.

# UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS

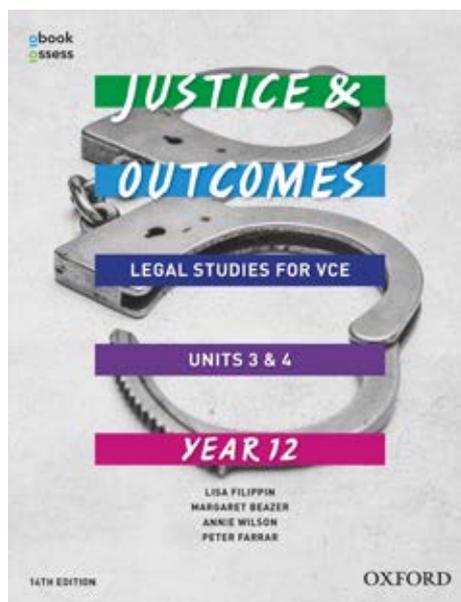
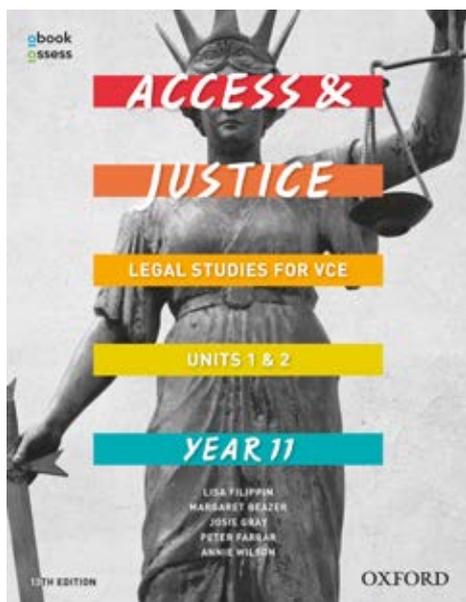
AREA OF STUDY	OUTCOME	CORRESPONDING CHAPTERS IN THIS BOOK
<b>Area of Study 1</b> Sanctions	<b>Outcome 1</b> On completion of this unit the student should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.	<ul style="list-style-type: none"> <li>• <b>Chapter 11</b> Sanctions</li> <li>• <b>Chapter 12</b> Recent criminal cases</li> </ul>
<b>Area of Study 2</b> Remedies	<b>Outcome 2</b> On completion of this unit the student should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.	<ul style="list-style-type: none"> <li>• <b>Chapter 13</b> Remedies</li> <li>• <b>Chapter 14</b> Recent civil cases</li> </ul>
<b>Area of Study 3</b> Rights	<b>Outcome 3</b> On completion of this unit the student should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system.	<ul style="list-style-type: none"> <li>• <b>Chapter 15</b> Rights</li> </ul>

**Source 3** An overview of the content and structure of Unit 2. Extracts from the VCE Legal Studies Study Design (2018–2022) reproduced by permission, © VCAA.

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

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

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



**Source 4** The VCE Legal Studies course is a two-year course made up of four units. Units 1 & 2 are covered in *Access & Justice Legal Studies for VCE Units 1 & 2* (13<sup>th</sup> edition). Units 3 & 4 are covered in *Justice & Outcomes Legal Studies for VCE Units 3 & 4* (14<sup>th</sup> edition).

# Assessment and reporting

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

## Satisfactory completion

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

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

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

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

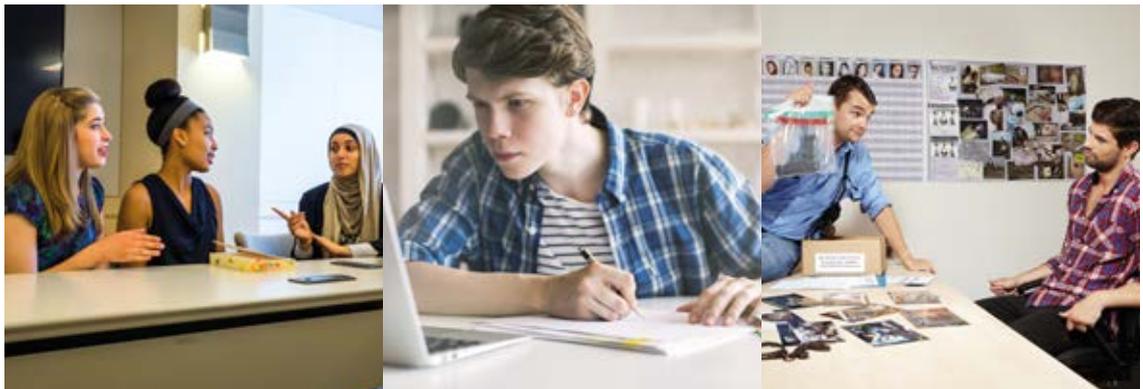
## Assessment tasks

Your level of knowledge and understanding of the Outcomes in each Area of Study (shown in **Source 2**) will be demonstrated through the completion of assessment tasks. All assessment tasks that you complete in VCE Legal Studies Units 1 & 2 are a matter for school decision. This means they will be developed and assessed within your school. Your level of achievement will not be reported to the VCAA and there is no external end-of-year examination.

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

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

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



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

# Key themes of the VCE Legal Studies course

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

KEY THEME	DESCRIPTION
The rule of law	<p>The rule of law is the legal principle that:</p> <ul style="list-style-type: none"> <li>• all people and organisations (including the government) are subject to the same laws and should obey them equally</li> <li>• laws should be written in a way that people agree with</li> <li>• laws should be written so that they can be obeyed.</li> </ul> <p>Many of the legal principles and structures you will learn about in the course are designed to uphold the rule of law. These include the presumption of innocence, the role of the jury, and the right to a fair and public hearing.</p>
The principles of justice	<p>‘Justice’ is a common concept and something that Australians often want to see being upheld – particularly when it comes to serious crimes that have been committed. In this course you will look at the three principles of justice:</p> <ul style="list-style-type: none"> <li>• <b>fairness</b></li> <li>• <b>equality</b></li> <li>• <b>access.</b></li> </ul>
Problem-solving and application skills	<p>A key focus in this course is developing your problem-solving and application skills. Legal Studies requires you to consider a range of real and/or hypothetical scenarios and apply your knowledge and skills to those scenarios. You will consider areas of the law such as:</p> <ul style="list-style-type: none"> <li>• criminal cases and civil disputes</li> <li>• problems with the law and the legal system</li> <li>• problems with the way in which our law-makers operate.</li> </ul> <p>In each of these areas, you may be expected to develop possible strategies to help resolve problems and issues.</p>
Recent focus	<p>An important part of this course requires you to be up to date with what is happening in Australia’s legal system. For example, in Unit 2 you are required to study a number of recent criminal and civil cases. In the context of the Legal Studies course, the word ‘recent’ means within the last four years.</p>

## rule of law

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

## fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

## equality

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

## access

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

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



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

» **Video tutorial**

How to structure an essay

» **Weblink**

VCAA – current Study Design

# 1.2

## SETTING YOURSELF UP FOR SUCCESS IN VCE LEGAL STUDIES

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

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

### Top 10 tips for study success

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

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

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

#### Tip 2 – Study

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

##### Choose the best place to study

- Everyone has their own idea about the best study environment. Whether it's in your bedroom, at your local library, or at your favourite café, you need to find a regular study space that works for you. Ideally, your study space should be quiet, comfortable, bright and airy, and free from distractions.
- Make sure your study space is stocked with the things that you need (such as stationery) and decorated with things that make you feel calm (such as artworks or plants).



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

- If you like to listen to music while you study, make sure you are able to do this without disturbing others.

### Choose the best times to study

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

### Remember that studying can take many different forms

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



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

## Tip 3 – Manage your study time effectively

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

TIME MANAGEMENT STRATEGY	DETAILS
Create a study timetable	<ul style="list-style-type: none"> <li>• Creating a study timetable that helps you schedule periods of regular study and revision in all your subjects is key to your success.</li> <li>• Once you set your study timetable, be sure to stick to it. If your timetable isn't working, revisit it and make a new one.</li> </ul>
Use a diary, wall planner or calendar to record key dates	<ul style="list-style-type: none"> <li>• Recording key dates is essential to your success. Adding due dates for assessment tasks and assignments will help you manage your time effectively and meet your deadlines (especially in weeks when you have multiple assessment tasks due).</li> <li>• Recording the dates of tests and exams will also help you keep your preparations on track.</li> </ul>
Make lists	<ul style="list-style-type: none"> <li>• A simple 'to do' list can be a great tool to help you manage your time and achieve your goals. Creating a short list of daily goals for each study session can also be a great way of keeping you on track each day.</li> <li>• A separate list of weekly or monthly goals can help you keep the bigger picture in mind.</li> <li>• Using lists is a great way to help you break big tasks down into smaller, more manageable tasks, so that you gain a sense of achievement.</li> </ul>
Set reminders	<ul style="list-style-type: none"> <li>• Setting a regular alarm to remind you it's time to study can keep you on track.</li> </ul>

**Source 3** Time management strategies

## Tip 4 – Discover your learning style

Everyone learns differently, so getting to know the way you learn can help you to focus on strategies for study that are most effective for you.

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

**Source 4** Strategies for different learning styles

## Tip 5 – Take care of yourself

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

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

## Tip 6 – Use different strategies to review and revise

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

REVISION STRATEGY	DETAILS
Create detailed revision notes	<ul style="list-style-type: none"> <li>• creating your own revision notes can be time consuming, but it's time well spent!</li> <li>• taking the time to create your revision notes reinforces what you've learned and means that they will be written in language that makes sense to you, not someone else</li> </ul>
Dot-point summaries on index cards	<ul style="list-style-type: none"> <li>• detailed revision notes are great, but you may also benefit from creating really brief study notes in the form of dot-point summaries</li> <li>• copy these summaries onto index cards so you can carry them with you and revise on your way to school or at home on the couch</li> </ul>
Record your revision notes and listen to them	<ul style="list-style-type: none"> <li>• record yourself as you read your revision notes or dot-point summaries aloud</li> <li>• listen to yourself</li> </ul>

REVISION STRATEGY	DETAILS
Quiz yourself	<ul style="list-style-type: none"> <li>quizzes are quick, fun, and a good way to test what you know and find out your areas of weakness</li> <li>use your textbook, revision notes or quiz cards to quiz yourself</li> <li>ask friends or family members to quiz you on key legal terms and key concepts</li> </ul>
Do practice questions, essays and exams	<ul style="list-style-type: none"> <li>practice makes perfect, so the more you test your knowledge and develop your skills by completing practice questions, essays and exams, the better</li> <li>ask your teacher to provide feedback on your practice responses to help you improve</li> </ul>

Source 5 Revision strategies



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

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

The law is constantly changing and evolving to keep pace with changes in society (e.g. changing attitudes and beliefs, advances in technology). In VCE Legal Studies in Units 1 & 2 there is a focus on the study of recent criminal cases, civil disputes and rights issues. To give yourself the best chance of success, it's important to stay up to date with developments in the legal cases you are learning about so that you can incorporate current details and facts into your coursework and assessment tasks.

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

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

### Study tip

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

A link to Google Alerts is provided on your [obook](#) [assess](#).



## Tip 8 – Make time for breaks

Regardless of where or when you study, make sure you plan to take regular study breaks. You should aim to work in 50-minute blocks and then take a meaningful 10-minute break.

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

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

## Tip 9 – Ask for help

- Completing your VCE can be a challenge sometimes – especially if you have other commitments like work, sport, or music outside school hours. If you're feeling stressed or overwhelmed, make sure you talk to people around you and get support if you need it. Your teachers, friends and family are there to help you and many schools have services and programs set up to help you.
- If you're having problems understanding a particular concept or completing a certain task, make sure you ask for help! Your teacher is there to help you in class and will make time to explain things you don't understand. If your teacher isn't available, talk to your friends and other students in your class to see if they can help.



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

## Tip 10 – Stay motivated

- Staying motivated and keeping a positive attitude is important during your VCE. Make sure you reward yourself for achieving your daily and weekly goals!
- Try not to compare yourself to other students in your class. Instead, set goals that are right for you and focus on achieving those.
- Many parts of the VCE Legal Studies course require repetition, practice and resilience to master. Many of the concepts are complex, and you may not understand them the first time you come across them, so don't give up! Try some of the different tips and strategies listed above to understand them.
- Some people find it motivating to decorate their study space with inspirational quotes or pictures of the people they care about. These things can help to remind you of your goals and the reasons why you are working so hard.



Check your [obook](#) [assess](#) for these additional resources and more:

» **Weblink**  
VCAA

» **Weblink**  
Google alerts

» **Study timetable**  
Study timetable template

## TIPS FOR SUCCESS ON ASSESSMENT TASKS

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

### Tip 1 – Use key legal terminology

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

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

Learning these key legal terms and using them correctly in your assessment tasks will show your teacher that you understand them – and will help you achieve a great result.

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

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



**Source 1** Learning key legal terms and using them correctly in your assessment tasks will show your teacher that you understand them. Getting into the habit of adopting and using legal terminology in your everyday language will help you learn key terms quickly!

## Tip 2 – Understand task words

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

Task words range in level of difficulty. Some (such as **identify** or **define**) are simple to understand and master. Others (such as **evaluate** or **justify**) are more challenging to understand and will take practice to master. Source 2 lists a range of common task words and their definitions. It also provides example questions so you can see each task word in context.

All of these questions have come from exam papers for past Study Designs, so they may or may not reflect key knowledge and key skills that are not in the current Study Design. You should check with your teacher about this.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
<b>Advise</b>	to offer suggestions about the best course of action or make recommendations	Question 7 (2008) James and his friends were celebrating James's 35th birthday at a local restaurant. At the end of the night, James decided that he may have had too much to drink and called a taxi. On the way out, James tripped on some worn carpet and fell to the floor, causing him a serious injury. After consulting his lawyer, James decides to sue the restaurant for compensation. <b>Advise</b> James on the purpose of two pre-trial procedures which his lawyer might use in this case.
<b>Analyse</b>	to examine a complex feature, issue or concept by breaking it down into smaller parts and showing how they relate to one another	Question 12 (2013) Using one successful referendum and one High Court case, <b>analyse</b> the impact of referendums and the High Court's interpretation of the Commonwealth Constitution on the division of law-making powers.
<b>Comment on</b>	to express an opinion or reaction (in order to demonstrate your understanding of it)	Question 5 (2009) 'Pre-trial procedures are designed to speed up the resolution of civil disputes.' <b>Comment on</b> this statement. In your answer, describe one civil pre-trial procedure.
<b>Compare</b>	to explain or discuss how concepts, definitions or features are similar and different (by identifying the qualities or features they have in common as well as those they don't)	Question 5 (2010) Jane and David have been involved in an ongoing dispute. They have been advised to use either mediation or arbitration as a dispute resolution method. <b>Compare</b> mediation and arbitration as methods of dispute resolution.
<b>Examine</b>	to consider in detail and establish the key facts and important issues related to a topic or issue.	Question 9 (2010) The doctrine of precedent allows for both consistency and flexibility. Critically <b>examine</b> these two strengths of the doctrine of precedent.
<b>Define</b>	to state the exact nature, features, or meaning of a term, feature or concept	Question 1 (2015) A plaintiff is seeking an injunction and damages of \$1 million in the Supreme Court of Victoria. <b>Define</b> the term 'injunction'.
<b>Describe</b>	to give a detailed account of a system, process or feature	Question 9a (2016) <b>Describe</b> one reason why a law may need to change.

TASK WORD	DEFINITION	EXAMPLE QUESTION FROM PAST EXAMS
<b>Discuss</b>	give a reasoned argument for and against a particular issue (and provide strengths and weaknesses if applicable). You can also give your opinion, and should do so if the question asks you to give it	Question 7c (2016) Provide one sanction that may be imposed if Sam is found guilty and <b>discuss</b> the ability of that sanction to achieve its purposes.
<b>Distinguish</b>	explain the differences and distinctive characteristics	Question 1 (2011) <b>Distinguish</b> between exclusive and residual source.
<b>Evaluate</b>	to identify key features and assess their relative merits by discussing the strengths and weaknesses and providing a concluding judgment about the (overall) benefit or worth of what is being evaluated	Question 10 (2013) <b>Evaluate</b> the effectiveness of two methods that are used by individuals or groups to influence a change in the law.
<b>Explain</b>	to clarify a point, feature or concept by describing it in more detail or revealing relevant facts about it	Question 5b (2015) <b>Explain</b> the role of the VLRC in recommending a change in the law.
<b>Identify</b>	to state or recognise a feature or factor (and possibly provide some basic facts about it)	Question 3 (2013) <b>Identify</b> the two types of law-making powers of the state parliaments. In your answer, provide an example of each.
<b>Illustrate</b>	to provide examples in order to better describe or explain a feature or concept	Question 4 (2005) Use one example to explain and <b>illustrate</b> how the law-making powers of the Commonwealth Parliament and the state parliaments have been changed by High Court interpretation of the Commonwealth Constitution.
<b>Justify</b>	to show (or prove) a statement, opinion or contention to be right or reasonable by providing evidence or examples	Question 3 (2016) A referendum proposal was voted on by the electors of Australia. Fifty-six per cent of all voters in Australia voted in favour of the proposal and the majority of voters in all states, except Victoria, Tasmania and New South Wales, voted in favour of the proposal. Was the referendum passed? <b>Justify</b> your answer.
<b>Outline</b>	to give a brief summary of the key features	Question 1 (2014) <b>Outline</b> one effect of the interpretation of statute by judges.
<b>Provide</b>	to give, supply or specify	Question 5 (2014) Audrey has commenced civil proceedings in the Supreme Court of Victoria (Trial Division). The Court will resolve the dispute at trial after mediation was unsuccessful. <b>Provide</b> one reason for the existence of a court hierarchy. Refer to Audrey's dispute in your answer.
<b>To what extent</b>	to describe the degree or level to which a statement, opinion or contention is (or is believed to be) correct or valid	Question 12 (2015) The author of a journal article wrote the following opinion: 'Juries should not decide matters of fact. It should all be left up to the judge.' <b>To what extent</b> do you agree with this opinion? Justify your answer.

\*Selected VCE Legal Studies examination questions (2008–2016) are reproduced by permission, © VCAA.

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

## Tip 3 – Understand the structure of questions

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

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

QUESTION COMPONENT	PURPOSE
Question number	This indicates the number of the question on the assessment task.
Mark allocation	This indicates the total number of marks available for the question. The total marks available gives you an idea of how long to spend answering the question.
Quote or extract	Questions may include statements or extracts from key pieces of legislation.
Task words	Task words are words that tell you how to demonstrate the knowledge you have learned.
Quantifying words	Quantifying words state the specific numbers (i.e. quantities) of examples or definitions you should provide in your answer. Follow quantifying words carefully and provide exactly what is asked.
Content words	Content words provide specific details and facts for you to consider in your answer (i.e. the context).

### Study tip

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



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

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

#### Question 13 (10 marks)

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

#### Question 1 (7 marks)

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

a. Describe one purpose of damages.

From ©VCAA Legal Studies Exams

**Source 5** Examples of the common items that make up questions.

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

» **Video tutorial**

Understanding the structure of Legal Studies exam questions

» **Flashcard glossary**

Digital interactive to help you learn key legal terms

# 1.4

## MASTERING LEGAL CITATION

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

### What is legal citation?

#### Legal citation

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

#### Act of Parliament

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

**Legal citation** is the system used to refer to legal documents and sources such as cases and Acts of Parliament in a consistent and accurate way.

The most commonly cited legal documents are:

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

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



### Citing Acts of Parliament

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

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

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

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

#### Example 1 – an act made by the Victorian Parliament

*Crimes Act 1958 (Vic)*

Title                      Year                      Parliament

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

#### Example 2 – an act made by the Commonwealth Parliament

*Competition and Consumer Act 2010 (Cth)*

Title    Year                      Parliament

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

## Study tip

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

## Study tip

A short video with tips and examples of how to cite legal cases and Acts of Parliament is provided on your eBook access. Watch it to help develop your skills!

## Citing amending acts

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

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

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

### Example 3 – an amending act passed by the Victorian Parliament

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

Title

Year

Parliament

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

Once the amending act has done its work, it is repealed, and it will no longer appear in the list of current acts. That will occur once the changes it makes to the principal act (the act it is amending) commence. In this example, the *Sentencing (Community Correction Order) and Other Acts Amendment Act* states that it will be repealed on 2 October 2018. That is because the changes it makes to various principal acts take effect on 1 October 2018.

## Citing bills

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

### Example 4 – a bill being presented to the Victorian Parliament

Disability Amendment Bill 2004 (Vic)

Title

Year

Parliament

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

## Citing legal cases

Like acts, decisions from legal cases that are heard in a tribunal or court also have citations. Whenever a written decision or judgment has been handed down by a tribunal or court, it is given a citation so that people can refer back to it.

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

- **The names of the parties** – The name of the person who starts the case (usually called the plaintiff, prosecutor or applicant) goes first. The names of the parties are separated with the letter 'v'

(e.g. *Smith v Jones*). The names are written in italics. If there are multiple parties, the case name is generally shortened to include just the first party in the list.

- **The year of the decision** – This is the year that the decision or judgment is published. It might be in square brackets or round brackets, depending on the report in which the decision is published.
- **The citation it has been given** – All Australian court cases now have a ‘medium neutral citation’, which is the court’s own unique identifier for the decision in its online database.

These citations are given by the court, and they always use an abbreviation that shows the court that heard the case. The most common abbreviations are set out below.

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

**Source 2** Court identifiers in legal citations make clear which court a case was heard in

Examples of ways cases can be cited are as follows.

### Example 5 – a civil case

*Commonwealth v Tasmania* (1983) 158 CLR 1

Parties

Year

Law report

- The parties in this civil case were the Commonwealth of Australia and the state of Tasmania.
- The ‘v’ between the names of the parties is short for versus, but is pronounced ‘and’.
- The decision was published in 1983.
- This is an example of a written judgment published in a law report. It was published in Volume **158** of the Commonwealth Law Reports (**CLR**) on page **1**.

### Example 6 – a criminal case

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

Parties

Year

Court identifier

Date of judgment

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

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

## Citing other laws, rules and regulations

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

### Example 7 – rules passed by the Victorian Parliament

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

Title

Year

Parliament

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

### Example 8 – regulations passed by the Commonwealth Parliament

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

Title

Year

Parliament

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

## Local laws

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

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

**Melbourne City Council Activities Local Law 2009**

Title

Year

This Local Law (i.e. the Melbourne City Council Activities Local Law) was passed in 2009 by the Melbourne City Council.



#### Check your ebook assess for these additional resources and more:

» **Video tutorial**

Citing legal cases and Acts of Parliament

» **Worksheet**

How to find and understand acts and cases

» **Weblink**

Australasian Legal Information Institute (AustLII)

# CAREERS IN THE LAW

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

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

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



**Source 1** While many people who choose to study the law go on to become lawyers, this is certainly not the only career path available. In fact, a sound knowledge and understanding of the law is highly valued in a range of different industries.

## What do lawyers do?

### lawyer

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

### solicitor

a qualified legal practitioner who will give advice about the law and a person's rights under the law

### barrister

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

Members of the legal profession in Australia are known as **legal practitioners**, also called **lawyers**.

Legal practitioners can generally be divided into two groups:

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

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

## Solicitors

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



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

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

TYPE OF LAWYER	DESCRIPTION
Government lawyers	Government lawyers are employed by the government (e.g. government departments). They provide legal services exclusively to the governments they work for. For example, the Victorian Government Solicitor's Office (VGS) provides legal services to the Victorian Government.
In-house lawyers	In-house lawyers are employed by private companies and organisations. They provide legal services to the companies and organisations they work for. For example, Qantas may have its own lawyers who provide the Qantas business with legal services.
Private practice lawyers	Private practice lawyers are employed by private law firms. Private law firms can be: <ul style="list-style-type: none"> <li>• small 'boutique' firms (that specialise in a particular area of law such as intellectual property)</li> <li>• medium-sized firms</li> <li>• large top-tier firms (that have a number of different teams specialising across different areas of the law).</li> </ul> Private practice lawyers provide legal services to their clients in accordance with their needs. For example, a person who believes they have been unfairly treated by their employer, may engage a private practice lawyer to help resolve their legal dispute.

**Source 3** Ways employed lawyers can practise in Australia.

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



**Source 4** Legal studies courses are a stepping stone to careers in law.

There are many different areas of law that a lawyer may specialise in. Some of the most common include:

- wills and inheritance
- family law
- employment law
- personal injury
- commercial disputes
- class actions
- mergers and acquisitions
- telecommunications
- large infrastructure projects
- building and construction
- property
- charities and not for profit
- entertainment
- general dispute resolution.

## Career profile

Damian McGregor is an in-house lawyer, currently working for NBCUniversal, a leading media and entertainment company which produces and distributes film and television throughout the world. Damian oversees legal matters for NBCUniversal's content and TV networks distribution businesses in Australia, New Zealand, India, and a number of countries in southern Asia.



## Barristers

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

## What about other legal careers?

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

- Law clerks
- Paralegal
- Legal assistant
- Legal analyst
- Document database specialist
- Politician
- Police officer
- Court personnel
- Mediator.



Check your **obook** **access** for these additional resources and more:

» **Weblink**

Victorian Bar



The background of the slide features a stack of Australian 100 dollar banknotes, with the portrait of Queen Elizabeth II visible on the top note. A pair of metal handcuffs is positioned in the lower-left corner. Three horizontal bars of different colors (orange, yellow, and teal) are overlaid on the image, containing text.

# UNIT 1

## GUILT AND LIABILITY

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

# UNIT 1 – GUILT AND LIABILITY

## Area of Study 1 – Legal foundations

### OUTCOME 1

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

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 1 – AREA OF STUDY 1 LEGAL FOUNDATIONS	Chapter 3	Legal foundations	<ul style="list-style-type: none"> <li>the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals</li> <li>the principles of justice: fairness, equality and access</li> <li>characteristics of an effective law, such as it reflects society's values; is enforceable; is known; is clear and understood; and is stable</li> <li>sources of law such as common law and statute law</li> <li>an overview of the relationship between parliament and the courts</li> <li>types of law such as criminal law and civil law</li> <li>the distinction and relationship between criminal law and civil law</li> <li>an overview of, and reasons for, the Victorian court hierarchy.</li> </ul>

## Area of Study 2 – The presumption of innocence

### OUTCOME 2

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

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 1 – AREA OF STUDY 2 THE PRESUMPTION OF INNOCENCE	Chapter 4	The presumption of innocence	<ul style="list-style-type: none"> <li>the purposes of criminal law</li> <li>the presumption of innocence</li> <li>key concepts of criminal law, including:               <ul style="list-style-type: none"> <li>the elements of a crime: <i>actus reus</i> and <i>mens rea</i></li> <li>strict liability</li> <li>the age of criminal responsibility</li> <li>the burden of proof and the standard of proof</li> </ul> </li> <li>types of crime such as crimes against the person and crimes against property</li> <li>the distinction between summary offences and indictable offences</li> <li>possible participants in a crime such as principal offenders and accessories.</li> </ul>
	Chapter 5	Indictable offences	<ul style="list-style-type: none"> <li>two criminal offences and for each offence:               <ul style="list-style-type: none"> <li>the elements of the offence and possible defences</li> <li>the role of statute law and common law in developing the elements of the offence and the defences</li> <li>trends and statistics in relation to the offence in Victoria and in one other jurisdiction</li> <li>the possible impact of the offence on individuals and society.</li> </ul> </li> </ul>
	Chapter 6	Summary offences	<ul style="list-style-type: none"> <li>two criminal offences and for each offence:               <ul style="list-style-type: none"> <li>the elements of the offence and possible defences</li> <li>the role of statute law and common law in developing the elements of the offence and the defences</li> <li>trends and statistics in relation to the offence in Victoria and in one other jurisdiction</li> <li>the possible impact of the offence on individuals and society.</li> </ul> </li> </ul>

## Area of Study 3 – Civil liability

### OUTCOME 3

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

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 1 – AREA OF STUDY 3 CIVIL LIABILITY	Chapter 7	Civil liability	<ul style="list-style-type: none"> <li>the purposes and types of civil law</li> <li>key concepts of civil law, including:               <ul style="list-style-type: none"> <li>breach</li> <li>causation</li> <li>loss</li> <li>limitation of actions</li> <li>the burden of proof and the standard of proof</li> </ul> </li> <li>possible plaintiffs and defendants to a civil dispute.</li> </ul>
	Chapter 8	Tort law	<ul style="list-style-type: none"> <li>two areas of civil law and for each area of law:               <ul style="list-style-type: none"> <li>the rights protected by the law</li> <li>the elements required to establish liability</li> <li>the limitation of actions</li> <li>possible defences</li> <li>the role of statute law and common law in developing the elements and defences</li> <li>the impact of the breach on the parties.</li> </ul> </li> </ul>
	Chapter 9	Other areas of civil law	<ul style="list-style-type: none"> <li>two areas of civil law and for each area of law:               <ul style="list-style-type: none"> <li>the rights protected by the law</li> <li>the elements required to establish liability</li> <li>the limitation of actions</li> <li>possible defences</li> <li>the role of statute law and common law in developing the elements and defences</li> <li>the impact of the breach on the parties.</li> </ul> </li> </ul>

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# CHAPTER 2

## INTRODUCTION TO UNIT 1 –

## GUILT AND LIABILITY

**Source 1** Going to prison is a possible outcome of a criminal case if a person is guilty of an offence. In Unit 1 you will explore two criminal offences and determine when a person may be guilty of those offences.

## AIM

The aim of this chapter is to provide an introduction to the basic concepts of Legal Studies. These concepts will provide you with some understanding of the foundations of Australia's legal system.

## TOPICS COVERED

This chapter provides an overview of the following topics:

- the meaning of laws – including why laws are needed and the rule of law
- a history of Australia's political and legal structures
- an introduction to the parliaments of Australia.

## KEY LEGAL TERMS

**Australian Constitution, the** a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the Commonwealth of *Australia Constitution Act 1900* (UK)

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

**by-laws** local laws or regulations made by local councils that apply to residents in local areas

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

**government** the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

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

**law** legal rules made by a legal authority that are enforceable by the police and other agencies

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

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

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

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

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

**Westminster system, the** a parliamentary system of government that developed in Britain and upon which Australia's parliamentary system is modelled

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# 2.1

## THE MEANING OF LAWS

### laws

legal rules made by a legal authority that are enforceable by the police and other agencies

### parliament

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

### sanction

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

### Act of Parliament

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

### non-legal rules

laws made by private individuals or groups in society, such as parents and schools, which are not enforceable by the courts

### rule of law

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

### government

the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

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

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

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

## Non-legal rules

There are also **non-legal rules**. School rules and rules of games are examples of non-legal rules. Non-legal rules are made by private individuals or groups in society. For example, parents, schools and sporting clubs make rules that are imposed upon the members of that specific group (i.e. family members, students, or team members) so the group can operate in a peaceful and unified manner. Non-legal rules are not enforceable by the courts but like laws they have consequences. Any member who breaks a rule may incur a penalty imposed by the group. For example, a sporting club might suspend a member from participating in a scheduled game if they missed a training session.

## Why do we need laws?

Every society has both legal and non-legal rules to regulate behaviour. The main aim of the law is to protect our society and keep it functioning. The law has developed to protect individual rights and stop



**Source 1** There are rules about what is acceptable behaviour while studying in a library.

behaviour that may affect the peace and good order of society. For example, many different laws exist in Australia to protect people – individually, and in specific groups – from danger and abuse. They cover areas including consumer, workplace, family, environmental, and child protection laws, as well as anti-discrimination laws which make it unlawful to victimise, abuse or discriminate against another person on the basis of their race, religion or sex.

Without laws our society would be in chaos. Laws are needed to provide guidelines for acceptable behaviour and prevent conflict.

## The rule of law

The concept of the **rule of law** underpins much of what you will study in Legal Studies. The rule of law means that **everyone** – individuals, groups and **government** – is bound by and must adhere to laws, and

that the laws should be such that people are willing and able to abide by them. That is, even the people who made the laws are bound by them. This includes our Prime Minister, our government departments, our judges and our public officials.

Although you may not have realised it, the principle of the rule of law is often mentioned in the media, in relation to international issues as well as issues here in Australia.

For example, in July 2017 the Prime Minister, Malcolm Turnbull, announced plans to introduce new laws to tackle crime on the 'dark web'. The laws will force technology companies such as Facebook to hand over encrypted messages to the police. This will help the government identify online criminal activity such as terrorism and child pornography. The Prime Minister said at the time of announcing the laws that 'the rule of law must apply online as it does offline'. This means the law applies to everybody. A person should not be able to escape the legal consequences of crime just because it occurs online.

As part of this course, you will come across a number of principles designed to uphold the rule of law. For example, some of the principles of the rule of law are as follows:

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

**presumption of innocence**

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

## 2.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Make a list showing:
  - five laws
  - five non-legal rules
  - three customs or etiquette that are neither laws nor non-legal rules.
- 2 Look at Source 1.
  - a Make a list of all the non-legal rules you can think of that apply in your own school library.
  - b Who will enforce the rules if they are broken?
  - c What is the likely consequence of any rules being broken?
  - d Identify three other places that you go to that have their own non-legal rules.
- 3 Explain the different consequences that may apply if you break a law as opposed to a non-legal rule.

- 4 What is meant by the rule of law? List three ways the rule of law is upheld in practice.

### Synthesise and apply

- 5 Identify a club or group you belong to, or someone you know belongs to. It could be a sporting club, church group, or volunteer society. Investigate and list five non-legal rules that are imposed by the group. Then:
  - a suggest reasons why each rule may have been created
  - b state any consequences associated with breaking each rule
  - c explain whether or not you agree with each rule.
- 6 List five laws that, as an Australian citizen, you must obey. For each law, suggest why the law was most likely made and the likely consequences of breaking the law.



### Check your **obook** **assess** for these additional resources and more:

» **Student book questions**

2.1 Check your learning

» **Video tutorial**

Introduction to Unit 1

» **Video**

What is law?

» **Video worksheet**

What is law?

# 2.2

## HISTORY OF AUSTRALIA'S POLITICAL AND LEGAL STRUCTURES

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

Following the arrival of the British, but before the twentieth century, the Commonwealth of Australia did not exist. Instead, there were six separate British colonies in Australia, each with a parliament able to make laws for the residents of its own colony.

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

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

In the 1890s each of the colonies sent a group of representatives to special meetings (called constitutional conventions), where it was decided that a new central Commonwealth Parliament would be created. On 1 January 1901, the date celebrated as the anniversary of the **Federation of Australia**, the British Parliament passed a law called the *Commonwealth of Australia Constitution Act 1900* (UK).

### Federation of Australia

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

### Australian Constitution, the

a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

## The Australian Constitution

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

A constitution is a legal document that outlines the basic rules of government and the law-making powers of the elected parliament (also known as the legislature). The Australian Constitution established the Commonwealth Parliament, which did not exist before then. It also established the division of law-making powers, setting out which would be given to the Commonwealth Parliament and which would remain with the states.

# 2.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Did Australia exist as a unified nation before 1901? If not, what did exist?
- 2 Why did the six colonies want a central parliament?
- 3 What law-making powers did the colonies feel that a central parliament should have? Give examples.

- 4 What is the Australian Constitution, and what does it do?

### Synthesise and apply

- 5 Why do you think it was the British Parliament that passed the Constitution?



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

» **Student book questions**  
2.2 Check your learning

» **Weblink**  
Federation

» **Weblink**  
The Australian Constitution

# 2.3

## PARLIAMENTS IN AUSTRALIA

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

There are nine parliaments in Australia. They are:

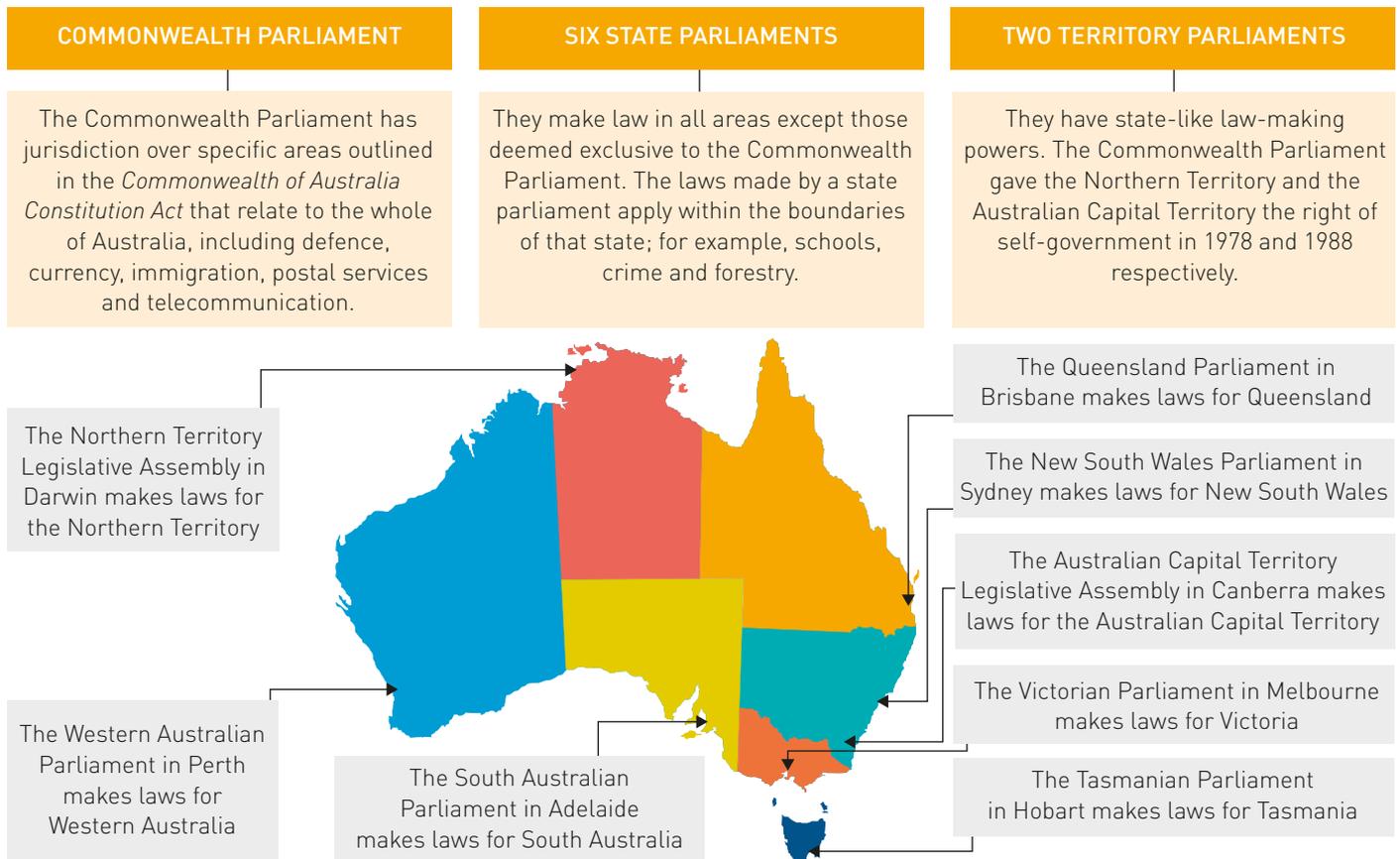
- **one** Commonwealth Parliament (the Parliament of Australia, also known as the Federal Parliament)
- **six** state parliaments (in New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania)
- **two** territory parliaments (in the Australian Capital Territory and Northern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

### Did you know?

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

Each parliament is a supreme law-making body within its law-making power. This means that each parliament can make or change laws whenever it wants to within its area of law-making power, subject to certain restrictions that may be imposed on that power.

The role of every parliament is to pass laws for the good government of the country, state or territory in which it is located.



Source 1 The nine parliaments of Australia

**Westminster system, the** the British parliamentary system, upon which Australia's parliamentary system is modelled

## The structure of Australia's parliaments

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

One of those characteristics is the structure of Australia's parliaments. As in Britain, most of the parliaments in Australia consist of:

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

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

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

The main parties in Australia are set out in Source 2 below.



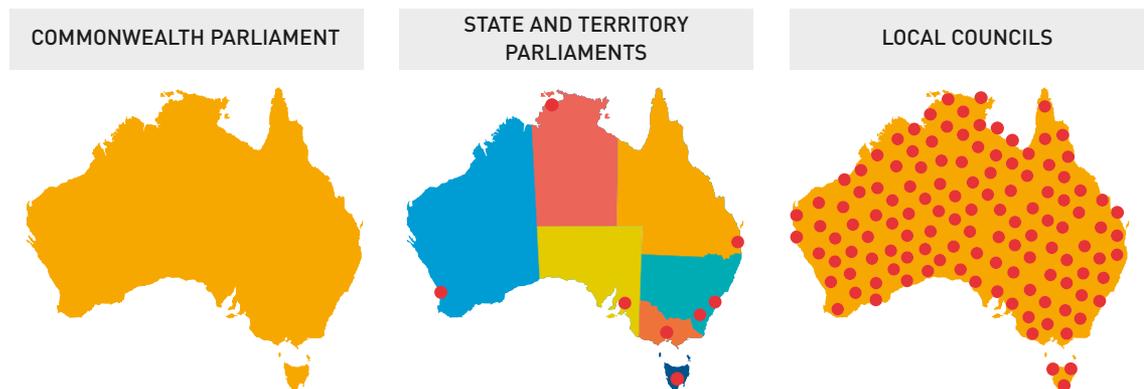
Source 2 The main political parties in Australia

## Levels of law-making

Australia has three levels of law-making bodies (sometimes referred to as 'the three levels of government', although governments do not make law – this is done by parliament):

- the **Commonwealth Parliament** – elected by all eligible voters throughout Australia to pass laws on issues of national interest and issues that apply to the whole of Australia
- **state and territory parliaments** – elected by the residents of the state or territory to pass laws which apply throughout each state or territory
- **local councils (e.g. shires or municipalities)** – established by each state and territory parliament and given power to make local laws (also known as **by-laws** or regulations) on their behalf. These powers apply to smaller local districts within each state or territory (such as a group of suburbs within a city). Local laws generally relate to local matters such as the maintenance of local roads, parks and libraries, building regulations and rubbish collection.

You will learn more about the Commonwealth Parliament and the Victorian Parliament in Chapter 3.



Source 3 The three levels of law-making in Australia

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

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

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

**by-laws**  
local laws or regulations made by local councils that apply to residents in local areas

## Which parliament makes which laws?

The Australian Constitution divides the law-making power between the state and Commonwealth parliaments by listing the areas in which the Commonwealth can make law. There are three types of law-making powers:

- **exclusive powers** – Powers that belong solely to the Commonwealth Parliament, meaning that only the Commonwealth Parliament can make law in these areas. Examples of areas of exclusive power include defence forces and immigration.
- **concurrent powers** – Powers that are shared between the Commonwealth Parliament and the state parliaments, meaning both the Commonwealth and the state parliaments can make law in these areas. Examples of areas of concurrent powers include marriage and taxation.
- **residual powers** – Powers that were not given to the Commonwealth Parliament and belong solely to the states, meaning only the state parliaments can make law in these areas. Examples of areas of residual law-making powers include education, health and criminal justice.

### social cohesion

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

### secondary legislation

rules and regulations made by secondary authorities (such as local councils, government departments and statutory authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

## Subordinate authorities

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

## 2.3

## CHECK YOUR LEARNING

### Define and explain

- 1 How many parliaments are there in Australia?
- 2 What is one of the characteristics of the Westminster system that has been adopted by Australia?
- 3 If you wanted to be a member of parliament but did not wish to join a political party, what sort of parliamentary member would you be?

### Synthesise and apply

- 4 Research and explain why the Queensland Parliament only has one house.
- 5 What is a political party? Name four political parties in Australia. Research one of these political parties.
  - a When was the party created or established?
- 6
  - a Identify and describe the three levels of law-making in Australia.
  - b For each, identify two types of laws that each level is likely to make.
  - c Use the internet to investigate your local council and complete the following tasks:
    - i State the name of your local council.
    - ii How are members of your local council selected?



### Check your **obook** assess for these additional resources and more:

» **Student book questions**

2.3 Check your learning

» **Worksheet**

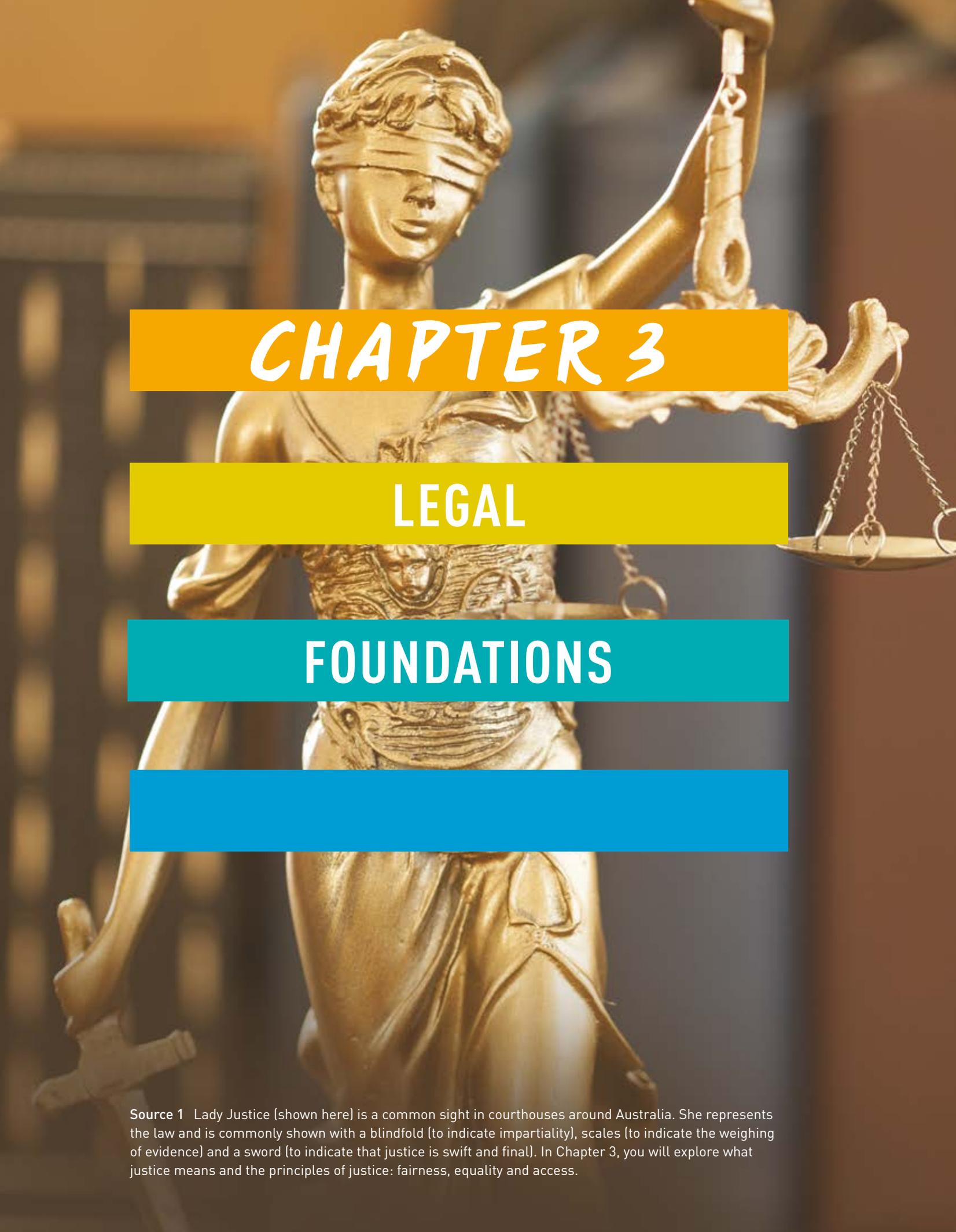
The parliamentary system

**Weblink**

Three levels of law-making

» **Weblink**

Political parties (Parliamentary Education Office)

A golden statue of Lady Justice, blindfolded and holding scales and a sword. The statue is the central focus of the page, with a warm, golden-brown background. The text is overlaid on the image in four horizontal bars of different colors: orange, yellow, teal, and blue.

# CHAPTER 3

## LEGAL

## FOUNDATIONS

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

## OUTCOME

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

## KEY KNOWLEDGE

In this chapter, you will learn about:

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

## KEY SKILLS

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

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

## KEY LEGAL TERMS

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

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

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

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

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

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

**fairness** one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

**government** the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

**House of Representatives** the lower house of the Commonwealth Parliament

**Legislative Assembly** the lower house of the Victorian Parliament

**Legislative Council** the upper house of the Victorian Parliament

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

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

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

**Senate** the upper house of the Commonwealth Parliament

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

**statute** a law passed by parliament, also known as an act of parliament or legislation

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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# 3.1

## SOCIAL COHESION AND THE RIGHTS OF INDIVIDUALS

### social cohesion

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

### Did you know?

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

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

In 2016, Australia scored well in all of those areas but one: acceptance and rejection.

### rule of law

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

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

The Scanlon Foundation is an organisation that was established in 2001 to undertake research and make financial grants that would help to unite Australian society. It describes social cohesion as **the willingness of members of a society to cooperate with each other in order to survive and prosper**. This means individuals are free to make choices in society, and are keen to cooperate with other members of society so that they may live in harmony.

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



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

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

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

## The role of laws

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

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

Laws also protect the rights of individuals. A number of laws establish individual rights, and say what happens if those rights are infringed. For example, a number of laws in Australia state that people must

not discriminate against others based on a personal attribute such as age, race, religion, gender identity or pregnancy. Consequences can occur if a person acts contrary to (inconsistent with) those laws.

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

## The role of individuals

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

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

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

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

## The role of the legal system

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

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

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



**Source 2** Laws set out rules on how disputes are resolved to ensure they are resolved in a peaceful and consistent way.



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

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

## 3.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain what is meant by social cohesion. Provide two benefits of a society which is socially cohesive.
- 2 What role do you play in ensuring a socially cohesive society?
- 3 Do courts have a role to play in protecting individual rights? Explain your answer.

### Synthesise and apply

- 4 Look at Source 3 on page 39.
  - a Make a list of the laws that could apply to the picture (try to think beyond road laws).
  - b Explain how each of the laws help to achieve social cohesion. What individual rights is each one protecting?
  - c Do you think that each of those laws would be accepted in the community? Explain your answer.
  - d Explain one possible consequence of a breach of each of those laws, and justify why you have chosen that consequence.
- 5 The TV series *The Walking Dead* is based on a comic book series in which the world has been overrun by zombies. There is no government, no law and no legal system.
  - a Make a list of the five most critical laws that you think need to be established by the survivors. They can be new laws, or old laws.
  - b How would you seek to establish those new laws?

- c If each of the laws were infringed what would be the consequences?

### Analyse and evaluate

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

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



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

» **Student book questions**  
3.1 Check your learning

» **Video tutorial**  
Introduction to Chapter 3

» **Weblink**  
Scanlon-Monash Index of Social Cohesion

# 3.2

## THE PRINCIPLES OF JUSTICE

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

### Study tip

In Unit 2, you will look at these principles more closely; however, you should have an understanding of what these principles are, and what they mean, in Unit 1. Start to refer to the principles of justice in your answers to questions in your assessment tasks when you are looking at different cases.

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

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

When considering whether there is justice when a law has been broken or when a case needs to be resolved, rather than trying to apply a single definition, you should consider the following three principles:

- **fairness**
- **equality**
- **access.**

These three principles are known as the **principles of justice**, and should be used as a way to determine whether justice has been achieved in a particular case.

## Fairness

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

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

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



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

The right to a fair trial or hearing is a right protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Human Rights Charter), a law which aims to promote and protect human rights in Victoria. The right is also protected by the courts through a series of cases, which recognises that a fair trial is a fundamental part of our legal system.

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

Fairness does not necessarily mean that people are treated the same – but if they are treated differently, it should be because of the laws that have been applied, and because of the circumstances of the case, and not because the person has been discriminated against because of a personal attribute or characteristic.

## Equality

Equality is the second principle of justice. A dictionary definition is 'the state of being equal, especially in status, rights or opportunities'. It means all people should be treated equally before the law regardless of their characteristics or attributes, such as status, race, religion, marital status, or culture.

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

Equality in the legal system means that all people should be treated equally before the law. No person or group should be treated advantageously, or disadvantageously, and people should be given an equal opportunity to present their case. The processes should be free from bias or prejudice, and those who make the decision should be impartial when that decision is being made. This includes judges, who must act impartially, and **jury** members, who must be unbiased and have no links with the parties.

Equality and fairness, while overlapping, are two different concepts. The best way to contrast the two is by considering the following example.

### jury

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

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## EXAMPLE

### Fire at shopping centre

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

A paramedic officer handed out gauze and bandages and had exactly 40 of each. He wanted to treat everybody equally, and so decided to hand out one gauze and one bandage to each of the 40.

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

---

Fairness and equality may need to be balanced. Sometimes it can be impossible to be perfectly fair and equal at the same time. For example, if you were handing out treats, everyone should get the same. That would be fair and equal. But in the above example, providing gauze and bandages based on the person's injuries would be fairer. People are not being treated equally (in the number of bandages) but other kinds of equality are also important. If the distribution was decided based on something other than injuries (say, the age or attractiveness of the injured people) it would mean some people would miss out simply because of some personal characteristic. Then there would be both inequality and unfairness.

# Access

Access is the third principle of justice. A dictionary definition is 'the ability to approach or make use of something'. It is generally accepted that all members of society should have access to education, health, food and shelter.

Access means that the laws and the legal system should make it possible for people to use the procedures, methods and institutions that help to resolve a civil dispute or determine a criminal case. This not only includes being able to access the institutions that will make a final decision in a case, but also being able to have contact with bodies and institutions that provide legal advice, education, information and assistance, and have the ability to be informed about cases. It also means that people should have access to information about their legal rights so they can understand when they may have been infringed.

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



**Source 2** Former Chief Justice Marilyn Warren of the Supreme Court of Victoria. The use of unbiased and impartial judges is one of the ways in which the legal system tries to achieve justice.

## 3.2

## CHECK YOUR LEARNING

### Define and explain

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

### Synthesise and apply

- 5 List three different categories of people who might be affected by a sentence imposed on someone found guilty of an offence. How might people in those categories define what is meant by a 'fair sentence'? Would their ideas of fairness differ?

- 6 Read the example 'Fire at shopping centre'. Identify another scenario where the law has been broken and provide a solution which is both fair and upholds equality.
- 7 Conduct some research on 'Lady Justice'. Who is Lady Justice, and what do the three symbols that she is sometimes associated with mean?

### Analyse and evaluate

- 8 Judges often take into account individual circumstances when sentencing. Do you think that this achieves both fairness and equality? Be prepared to share your opinions with the class.



Check your **obook** **access** for these additional resources and more:

» **Student book questions**

3.2 Check your learning

» **Weblink**

*Charter of Human Rights and Responsibilities Act 2006 (Vic)*

» **Weblink**

What is justice? Speech by Former Chief Justice Marilyn Warren

» **Worksheet**

The principles of justice

**Study tip**

In this Area of Study you are expected to assess the effectiveness of laws. Address each of the five characteristics when you are asked about whether a particular law is effective.

**Did you know?**

In South Australia, a person who intentionally disturbs a wedding is guilty of an offence. The maximum penalty is \$10 000 or imprisonment for 2 years.

**sue**

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

**public place**

an area or location considered open to the public (i.e. anyone in the community has a right to go there)

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

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

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

## Laws must reflect society's values

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

For example, in late 2016, changes were made to adoption laws in Victoria to allow couples to adopt children regardless of their sex or gender identity. This means that any two people who are living together as a couple, on a genuine domestic basis, are now able to adopt a child. Society's views and values about de facto relationships and same-sex couples have changed over time, and the law has also changed to recognise this.

## Laws must be enforceable

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

Imagine if there was a law which stated that it is an offence to dream of going on a holiday. Such a law would be ineffective, because the police could never find out whether people are breaking the law.

On the other hand, it is an offence in Victoria to behave in a disorderly manner in a **public place** while drunk. This type of law is more likely to be effective because it requires the behaviour to occur in public; therefore, the behaviour is more likely to be visible to police officers and members of society, and the police will be able to enforce the law.

## Laws must be known

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

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

However, law-makers also need to keep the public informed of any new laws that are passed. Major changes in the law, or new laws, are usually reported in the media, and many are debated in the media and in society before they are introduced. For example, in 2015 a Victorian law was passed which requires every childcare facility to ensure that children who go to that facility have been immunised. The law,

known as the ‘no jab, no play’ law, is aimed at increasing immunisation rates for young children in the community after there was concern raised about Victoria’s immunisation rates. It was widely discussed before and after its introduction, largely because there are strong ‘anti-vaccination’ feelings in a small section of the community.

## Laws must be clear and understood

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

For example, in some states of Australia, including Queensland, there have been calls for changes to be made to abortion laws which are considered unclear, outdated and ambiguous. Even though women in Queensland can receive an abortion, anybody who assists (such as a doctor) can be prosecuted under the Queensland *Criminal Code Act 1899* (Qld).



Source 1 Road laws in Australia are generally known because of visible signage on roads.

## Decriminalising abortion laws

In some states abortion is a crime. Recent parliamentary debates in Queensland and New South Wales have called for abortion law reform. In these states, medical practitioners who provide, or assist with, an abortion, can be prosecuted under criminal law. This includes the woman accessing the procedure herself, unless it could be proven the pregnancy poses danger to the woman’s physical or mental health.

The *Medical Journal of Australia* published an article in October 2016 pressing for reform. Authors, Heather Douglas and Caroline de Costa said ‘Most Australian states have introduced significant legislative modifications since 2000; however, in NSW and Queensland, the legislation, and specifically the offences, are more than 100 years old and well overdue for reform’. They also argued that these laws created fear and uncertainty about when an abortion might be considered legal or illegal.

Abortion laws are different in every state and territory. Douglas and de Costa argue for the **decriminalisation** of abortion everywhere, and for abortion to be treated as a health issue, not a criminal matter.

CASE

STUDY

**decriminalisation**  
the process of legalising an act or behaviour which was previously considered a crime

## Laws must be stable

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

For example, there have been very few changes to the law relating to theft in Australia. It has always been a crime, and so there is certainty that stealing is against the law.

## AN EFFECTIVE LAW MUST

reflect society's values

be enforceable

be known to the public

be clear and understood

be stable

Source 2 Characteristics of an effective law

### 3.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify and describe three characteristics of an effective law.
- 2 Explain why the 'no jab, no play' law would generally be known by:
  - a people who send their children to childcare
  - b the general public.
- 3 Identify one law in Victoria that you think reflects society's current values. Give reasons for your answer.

### Synthesise and apply

- 4 Identify one law in Australia that you consider to be unclear or ambiguous (or that you don't understand). What it is about the law that you don't understand, or that you think is unclear or ambiguous?
- 5 Do you think a law making it an offence to smoke in private homes would be easy to enforce? Justify your answer.
- 6 Access the news article 'Abortion laws 'ambiguous, outdated' in Qld and NSW, doctors argue'. A link is provided on your [obook assess](#).
  - a What is it about the laws that Professor de Costa says is unclear?
  - b Why does this make doctors cautious when providing abortions?
  - c When would an abortion be legal in New South Wales and in Queensland?
  - d Conduct some additional research. Since this article was published, have there been any changes to

abortion laws in New South Wales or in Queensland, or are there any changes on the horizon?

### Analyse and evaluate

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

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



### Check your [obook assess](#) for these additional resources and more:

- |  |   |  |   |
|--|---|--|---|
| » <b>Student book questions</b><br>3.3 Check your learning | » <b>Video tutorial</b><br>How to assess whether a law is effective | » <b>Weblink</b><br>Abortion Laws 'ambiguous and outdated' in Qld and NSW, doctors argue | » <b>Weblink</b><br>Legislation and Bills, Victorian Parliament |
|--|---|--|---|

# 3.4

## INTRODUCTION TO PARLIAMENT AND THE COURTS

### parliament

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

### government

the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

### opposition

the next-largest political party after the government. The opposition questions the government about policy matters and is responsible for holding them to account

### bicameral parliament

a parliament with two houses (also called chambers)

### Governor-General

the Queen's representative at the Commonwealth level

### Senate

the upper house of the Commonwealth Parliament

### House of Representatives

the lower house of the Commonwealth Parliament

### bill

a proposed law that has not yet been passed by parliament

### political party

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

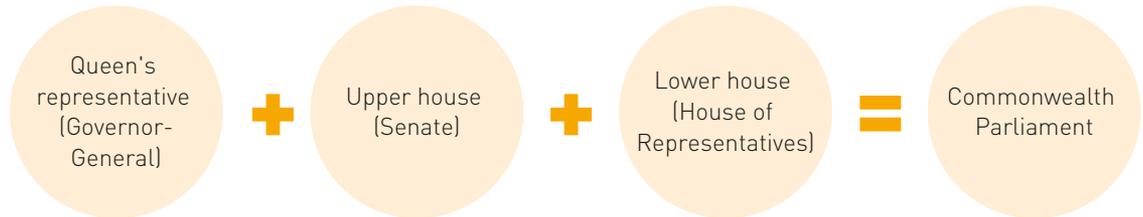
The next few topics in this chapter require an understanding of **parliament** and the courts. This topic provides you with an overview of the Commonwealth Parliament, the Victorian Parliament, **government** and **opposition**, and the courts.

## Commonwealth Parliament

The Parliament of Australia, otherwise called the Australian Parliament or the Federal Parliament, is a **bicameral parliament**. It consists of:

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

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



Source 1 The structure of the Commonwealth Parliament

## House of Representatives

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

At the federal level, each state is divided into geographical areas known as electoral divisions. Each division has approximately the same number of electors. The voters in each division elect their representative, who takes a seat in the House of Representatives. There are 150 electoral divisions in Australia, and therefore 150 members of the House of Representatives. All members of the House of Representatives are elected for a period of up to three years.

## Senate

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

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

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

### Did you know?

A parliament where there is no political party holding a majority of seats in the lower house is called a hung parliament.



Source 2 Left: The Senate, which is the upper house. Right: The House of Representatives, which is the lower house. Members of government sit on one side of the house and the opposition sits on the other side.

## Victorian Parliament

The Victorian Parliament consists of:

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

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

#### governor

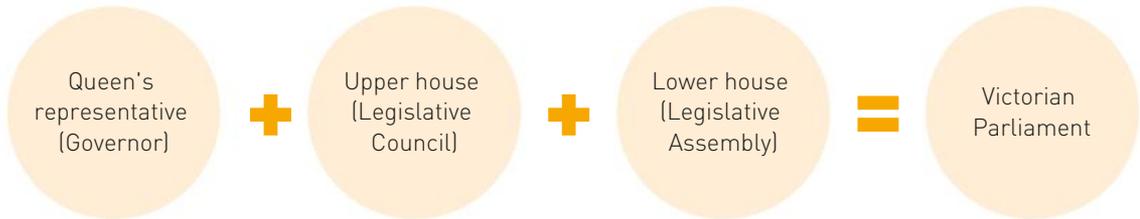
the Queen's representative at the state level

#### Legislative Council

the upper house of the Victorian Parliament

#### Legislative Assembly

the lower house of the Victorian Parliament



Source 3 The structure of the Victorian Parliament

### Study tip

Students often confuse the names of the lower house and the upper house of the Victorian Parliament. One aid you can use is to remember that "C" is above "A" in the alphabet, so Legislative Council is the **upper** house, and Legislative Assembly is the **lower** house.

## Legislative Assembly

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

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

## Legislative Council

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

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

### Did you know?

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

# Government and opposition

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

The Premier of Victoria and the Prime Minister will choose senior members of his or her party who have been elected to parliament (referred to as **ministers**) to be responsible for different areas of government, such as education and health. The **Cabinet** is made up of the Prime Minister and senior ministers (at federal level) and the Premier of Victoria and senior ministers (at state level), and decides the government's policy program and what proposed laws should be put to the parliament.

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

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

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

**Cabinet**  
the policy-making body made up of the Prime Minister (or premier at a state level) and a range of senior government ministers in charge of a range of government departments. Cabinet decides which laws should be introduced into parliament



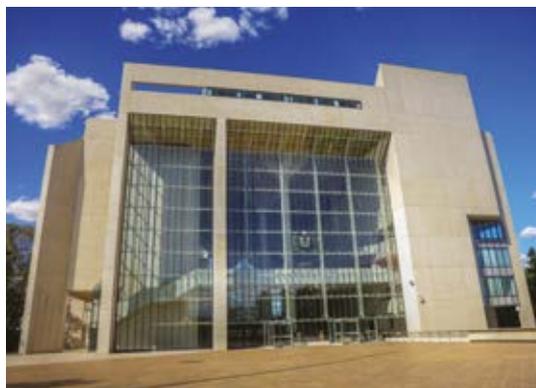
**Source 4** Left: The Legislative Council, which is the upper house. Right: The Legislative Assembly, which is the lower house. Members of government sit on one side of the house and the opposition sits on the other side.

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

## The courts

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

The four federal courts are the High Court, the Federal Court, the Family Court and the Federal



**Source 5** The High Court of Australia in Canberra

### Australian Constitution, the

a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

### court hierarchy

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

Circuit Court. The High Court was established by the **Australian Constitution** and is the highest court in Australia.

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

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

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

Keeping judges and magistrates independent of parliament and government upholds the rule of law, and also ensures fairness in deciding cases (the people who make the law aren't deciding whether the law has been broken).

## 3.4

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain what is meant by a bicameral system of parliament.
- 2 What is the difference between parliament and government?
- 3 Create a visual diagram or table which shows the members in each of the houses of the Commonwealth Parliament and the Victorian Parliament, the names of each house, and the name of the Queen's representative for each of the parliaments.

### Synthesise and apply

- 4 Access the Commonwealth Parliament website. A link is provided on your [obook assess](#).
  - a Which political party is currently in government at a federal level, and which political party is in opposition?
  - b Who is Australia's current Prime Minister?
  - c Who is Australia's current Governor-General?
  - d Identify four political parties who currently have senators in the Senate.
  - e When will the next federal election be?

- 5 Access the Victorian Parliament website. A link is provided on your [obook assess](#).
  - a Which political party is currently in government, and which political party is in opposition?
  - b Who is Victoria's current Premier?
  - c Who is Victoria's current Governor?
  - d Identify four political parties who currently have members in the Legislative Council.
  - e When will the next state election be?
- 6 Create a quiz or crossword for another person in your class about the courts, the Commonwealth Parliament and the Victorian Parliament.

### Analyse and evaluate

- 7 'Parliament should be able to interfere with the way that courts resolve disputes. This is particularly so because courts these days are giving lenient sentences.' Do you agree with this statement? Share your thoughts with the rest of your class members.



### Check your [obook assess](#) for these additional resources and more:

» **Student book questions**  
3.4 Check your learning

» **Weblink**  
Commonwealth Parliament

» **Weblink**  
Victorian Parliament

## SOURCES OF LAW

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

- **the source of law** – (i.e. who made the law). In this topic you will consider two main sources of law: **statute law** (i.e. laws made by the parliament) and **common law** (i.e. laws made by the courts).
- **the type of law** – (i.e. what area the law covers). In particular, this means the behaviour the law is trying to regulate and the possible consequences if the law is broken. In topic 3.7 you will consider two types of law: criminal law and civil law.

### statute law

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

### common law

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

### Act of Parliament

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

### supremacy of parliament

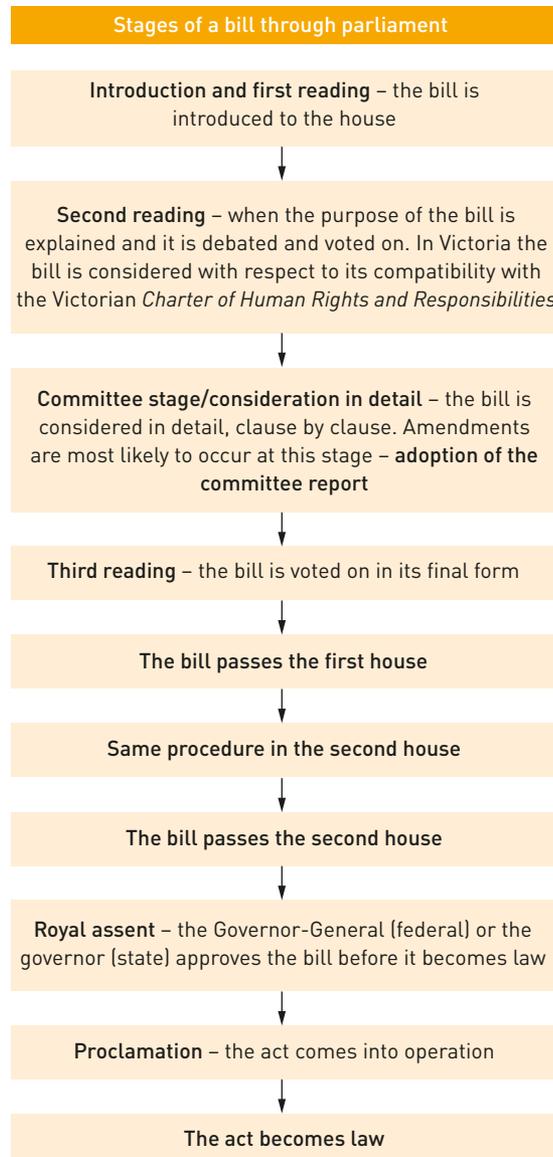
the concept that the final law-making power rests with parliament, which can repeal and amend its own statutes and pass legislation to override common law. Also referred to as sovereignty of parliament

### royal assent

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

### private member's bill

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



**Source 1** Stages of the legislative (law-making) process

that do not have the support of the government) will pass both houses because the government has the majority of votes in the lower house. A bill introduced by a member of parliament who is not a party of the government is referred to as a **private member's bill**.

## Statute law

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

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

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

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

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

Individual members of parliament, who are not a member of the political party which forms government, may also introduce proposed laws (or bills) in the hope that they will be passed by the parliament and become law, although it is unlikely that non-government proposals (or bills

## Study tip

One of the key skills you are expected to demonstrate in this Area of Study is your ability to classify a law according to its source and type. This topic and topic 3.7 will help you to develop this skill.

### statutory interpretation

the process undertaken by judges when they are required to give meaning to words or phrases in an Act of Parliament so it can be applied to resolve a case before the court

## Common law

A court's primary responsibility is to apply existing laws to the facts in cases that are brought before them and make a determination (decision) on the case based on those laws. In this way, it is often said that the main role of courts is to apply the law to resolve the dispute at hand.

As a secondary role, and as part of their determination of cases, courts also occasionally make laws. Court-made law is known as common law, case law or judge-made law.

Courts can make law in two situations or circumstances:

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

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

## Interpreting statutes

An Act of Parliament is often written in general terms to apply to all types of situations. Sometimes an unusual situation arises and the courts have to interpret words within the act. This process, where a judge clarifies or interprets the laws written by parliament, is known as statutory interpretation.

Sometimes the interpretation supports the prosecutor's case. At other times, the interpretation helps the defendant, as in *Deing v Tarola* [1993] 2 VR 163.

## LEGAL

## CASE

### Is a studded belt a weapon?

#### *Deing v Tarola* [1993] 2 VR 163

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

The Supreme Court, hearing the appeal, had to decide what a regulated weapon was, in the context of the Act and the regulations made under the Act, to determine whether a studded belt used to hold up trousers was in fact a regulated weapon.

The regulations contained a list of regulated weapons which included 'any article fitted with raised pointed studs which is designed to be worn as an article of clothing'. Justice

Beach, however, decided that the studded belt was not a regulated weapon, as a regulated weapon should be defined as 'anything that is not in common use for any other purpose but that of a weapon'.

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

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



**Source 2** In *Deing v Tarola* the Supreme Court was required to decide on appeal whether wearing a studded belt could be interpreted as carrying a weapon.

## Precedent

When a court makes a decision in a case that is the first of its kind, and in doing so establishes or creates a legal principle, the court is said to be setting a **precedent**. A precedent may be followed in similar cases that come before the courts in the future. These precedents then form part of the law.

For example, imagine you were leaning back on your chair and your class teacher decided to punish you because your deliberate behaviour was unsafe and unacceptable. The teacher should, in an effort to remain consistent, also punish other students who do the same thing in the future.

However, if in a future case, another student accidentally trips another student in class, rather than deliberately, the teacher may decide the two cases are different, and may choose not to punish the student in the second scenario in the same way as the others. In such a case, the teacher is distinguishing between the facts of the case at hand and the facts of the earlier case, in which the behaviour was deliberately unsafe. The most important aspect of the teacher's decision is the **reason** given for the decision – that deliberate unsafe behaviour is unacceptable. The precedent created in the past should be a guide to teachers in similar situations.

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

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

### precedent

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

### ratio decidendi

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

### stare decisis

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

## Snail in the bottle

### *Donoghue v Stevenson* [1932] All ER Rep 1

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

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

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

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



**Source 3** A decomposed snail was found in the bottom of a ginger beer bottle manufactured by Stevenson.

LEGAL

CASE

### neighbour principle

in relation to negligence, the common law rule that a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours' (i.e. people who would be closely and directly affected by their acts or omissions)

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

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

In this case, the Court established the **neighbour principle** as a way of explaining a person's duty of care. In the eyes of the law, a neighbour is someone you ought to have had in contemplation when carrying out an action. In his judgment, Lord Atkin said:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.

### binding precedent

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

### persuasive precedent

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

### obiter dictum

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

### distinguishing a previous precedent

the process by which a lower court decides that the material facts of a case are sufficiently different to that of a case in which a precedent was established by a superior court so that they are not bound to follow it

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

## Binding precedent

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

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

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

## Persuasive precedent

A precedent can be **persuasive** (that is, the court is not bound by it, but can choose to follow it or can be persuaded by it) on a Victorian court in the following circumstances:

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

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

The case below is an example of an Australian court following a British precedent.

## Dr Grant's underpants

### *Grant v Australian Knitting Mills Ltd* [1936] AC 85

A man (Dr Grant) purchased a pair of long underpants. When he wore them, he got a rash. He had the underwear tested and discovered that the chemical residue from the manufacturing process was still in the finished garment.

At this time, the 'buyer beware' principle applied to the purchase of all goods. It was the purchaser's responsibility to look for defects in goods before buying them. However, in this case the purchaser could not have detected the fault even if he inspected the goods. The Court followed the precedent set in *Donoghue v Stevenson* and ruled that the actions or omissions of the manufacturer directly caused Grant an injury and that the 'manufacturer owed a duty of care to the ultimate consumer'.



**Source 4** Grant was affected by dermatitis from wearing a pair of long woollen underpants.

LEGAL

CASE

## Developing or avoiding earlier precedents

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

- If the material facts of a case are sufficiently different from the material facts in a binding precedent, a lower court may not have to follow the precedent. Instead they may **distinguish** the material facts in the present case from those in the previous case and make a different decision. For example, a person found in the front seat of a car, over the legal alcohol limit, with his keys in his hands was found guilty of being in control of a car while over the legal alcohol limit. The accused appeared to be about to drive the car. This case was distinguished from a previous case, where the accused was found asleep in the car with the engine running, trying to keep warm. He did not appear to be about to drive the car.
- A precedent can be **overruled** by a higher court in a **different case**. For example, the High Court may overrule a decision of an earlier case decided in the Court of Appeal (which is lower than the High Court). When a precedent is overruled, it no longer applies.
- A precedent can be **reversed** when the **same case** is taken to a higher court on appeal. For example, a case may have been decided in the Supreme Court (Trial Division) and then appealed to the Court of Appeal (which is higher than the Trial Division), where the decision is changed. When a precedent is reversed, it no longer applies.
- In some instances a court is bound by a precedent but expresses its disapproval of or disagreement with the precedent. This is known as **disapproving**. This does not change a precedent, but a higher court, when deciding a later case, may choose to agree with the court that disapproved of the precedent and decide to overrule it.

### **overruling a previous precedent**

when a superior court changes a previous precedent, established by a lower court, in a different and later case thereby creating a new precedent which overrules the earlier precedent

### **reversing a previous precedent**

when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

### **disapproving a previous precedent**

when a court expresses dissatisfaction of an existing precedent but is still bound to follow it

**Define and explain**

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

**Synthesise and apply**

- 6 Read the legal case *Donoghue v Stevenson*.
  - a What incident occurred in this case and where did it occur?
  - b Why could Donoghue not sue the café or the manufacturer at that time?
  - c What was the *ratio decidendi* in this case and why is it still important today?
  - d Devise a modern-day scenario where something like this might happen, and which might give rise to you being able to sue a manufacturer.
- 7 Read the legal case *Grant v Australian Knitting Mills Ltd*.
  - a What facts are similar in this case to that of *Donoghue v Stevenson*?
  - b Do you think this case is still considered important today? Why?
  - c Do the precedents in this case and in *Donoghue v Stevenson* apply in the following situations? Justify your answer.
    - i Emma bit into a hazelnut cream chocolate that contained a piece of metal which was not visible. She broke her tooth and suffered severe pain as a result.
    - ii A hospital gave Taylor the wrong drug. As a direct result, he suffered a stroke which left him paralysed on one side.

- iii Jarrod bought some fried chicken from a local takeaway shop. He noticed a mouse tail that was hanging out of part of his chicken. He thought it would be pretty cool to try a fried mouse tail, so he ate it anyway. He felt sick later that night.

- 8 Read the legal case *Deing v Tarola*.
  - a Outline the key facts of the case.
  - b What was the issue that needed to be decided in this case?
  - c Identify the statute that needed to be interpreted, and the word or phrase in that statute that needed to be interpreted.
  - d What was the decision of the Magistrates' Court?
  - e Why was the case heard again in the Supreme Court and who heard the case?
  - f What was the Supreme Court's ruling on the issue, and what reasons did it give for the decision?
- 9 Classify each of the laws below based on their source. For the laws that you have classified as statute law, identify the parliament that passed them.
  - a The *Migration Legislation Amendment (Cessation of Visa Labels) Act 2016* (Cth).
  - b The maximum term of imprisonment for committing the common law offence of kidnapping is 25 years.
  - c The Family Violence Reform Implementation Monitor Bill 2016 (Vic) has just become law.
  - d The *Public Health Act 2016* (WA) aims to promote and improve public health and wellbeing.

**Analyse and evaluate**

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

**Check your ebook assess for these additional resources and more:**

» **Student book questions**

3.5 Check your learning

» **Going further**

Withholding royal assent

» **Worksheet**

How a law is made

## THE RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS

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

There are four main features of the relationship between parliament and courts:

- the interpretation of statutes by courts
- the codification of common law
- the abrogation of common law
- the ability of courts to influence parliament.

Each of these is explored below.

### secondary legislation

rules and regulations made by secondary authorities (such as local councils, government departments and secondary authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

## Statutory interpretation

One of the main features of the relationship between parliament and courts is that parliament creates statutes, and courts interpret them.

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

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

### LEGAL

### CASE

## What does it mean to 'manufacture drugs'?

### *R v Bucic* [2016] NSWCCA 297 (14 December 2016)

In *R v Bucic*, Bucic was charged with knowingly taking part in manufacturing cocaine, which is an offence under the *Drug Misuse and Trafficking Act 1985* (NSW). The case against Bucic was that he and a co-accused were in possession of a number of sheets of A4 paper impregnated with cocaine, and that he and his co-accused took a number of steps to separate the cocaine from the paper. One of the issues that the Court had to decide was what was meant by the term 'manufacture', to determine whether Bucic was involved in manufacturing cocaine.

Manufacture was defined in the Act as including 'the process of extracting or refining the prohibited drug'. A further section in the Act states that a person takes part in the manufacture of a prohibited drug if the person takes part in any step, or causes any step to be taken, in the process of that manufacture.

The New South Wales Court of Appeal was required to determine what was meant by the word 'manufacture', and found that the process of separating the cocaine from the paper was a process of extraction, and therefore the accused took part in the manufacture of the drug. Justice Campbell said, as part of his interpretation of the word:

It is interesting to note that none of the range of meanings attributed to the word 'manufacture' in either the *Macquarie Dictionary* or the *Oxford Dictionary online* editions

includes 'to make something from something different'. The Oxford Dictionary in one sense speaks of making something from raw materials, and in another of 'converting' something, which are, I suppose, broadly similar to the meaning ascribed to 'manufacture' by the learned judge. But reference to the dictionaries demonstrates a wide range of possible meanings including, in the Macquarie Dictionary, to work up (material) into a form for use. This would, in my view, include the type of activity the Crown say the respondent engaged in here.

## Codification of common law

Because parliament is the supreme law-making body, it can make law that confirms a precedent set in a court by passing an Act of Parliament that reinforces the principles established by the court. This is known as codification of common law, because the common law is now 'codified' or put together in one or more statutes.

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

The case study below further explains the codification of common law in relation to complicity.

### CASE

### STUDY

## Codification of common law principles of complicity

'Complicity' is being involved in a crime that was committed by another person, knowing it is wrong. For example, where a person assists or encourages another person to commit an offence, they can be charged as well. Previously, common law set down the principles as to when someone might be complicit in a crime.

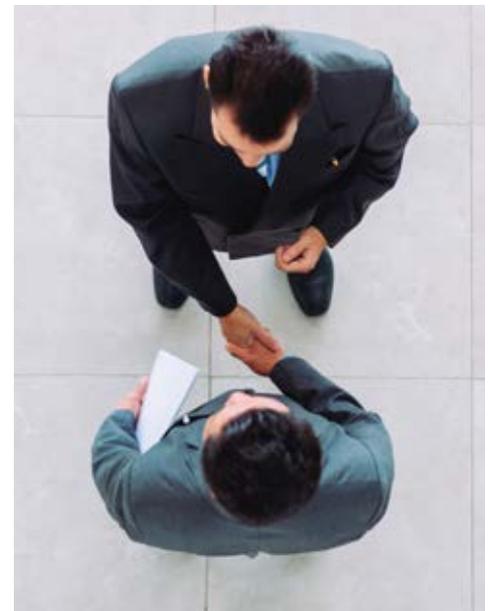
In 2014 the Victorian Parliament passed laws that amended the *Crimes Act 1958* (Vic). The amendments codified most of the common law principles in relation to complicity.

## Abrogation of common law

Parliament, as the supreme law-making body, is able to change or override (**abrogate**) common law. It does this by passing a law which specifically abrogates or abolishes the common law principle.

Parliament may decide to do this for a number of reasons. On occasion, the courts may interpret the meaning of the words in a statute in a way that was not the intention of parliament, or in a way that does not reflect the current meaning of the act. Courts may also develop precedent in a way that the parliament does not agree with. If this occurs, parliament can pass a statute which overrides the common law principles. The following case study further explains the abrogation of common law in relation to wilful exposure.

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



**Source 1** An individual who is complicit is said to be a partner in crime – an accomplice.

## Abrogation of common law wilful exposure

Wilful exposure was an offence created over the years through the courts. Wilful exposure makes it an offence for a person to unlawfully, wilfully and publicly expose his naked person. It was a limited offence, in that it was limited to exposure by a man of his penis, and did not make any sexually suggestive acts beyond exposure a crime.

A review by the Department of Justice in 2013 of sexual offences recommended that the offence be abrogated, as the offence would no longer be necessary if a proposed new sexual offence law was created.

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

CASE

STUDY

## Ability of courts to influence parliament

Courts can also influence changes in the law by parliament through their comments made during court cases. That is, they can make the need for a change in the law known to parliament through their decisions.

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

This occurred in the case of *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

## High Court reluctant to change old common law

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

Mr and Mrs Trigwell were injured when a vehicle collided with their car after hitting two sheep. They sued the driver of the other car and the owner of the sheep for damages.

The High Court decided to follow the old common law that a landowner did not owe a duty of care for their stock straying from their land onto the highway. This followed an old common law principle inherited from Britain that allowed animals to roam free.

Justice Mason said:

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

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

LEGAL

CASE

**Define and explain**

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

**RELATIONSHIP BETWEEN PARLIAMENT AND COURTS**

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

**Synthesise and apply**

- 4 'The main role of the courts is to make laws.' Is this statement correct? Justify your answer.
- 5 Create a mind map starting with the word 'courts' as the central word. In your mind map, cover each of the four features of the relationship between courts and parliament in law-making.
- 6 Read the legal case *R v Bucic*.
  - a What was the charge in this case?
  - b What was the relevant statute that was in question?
  - c What was the critical issue that needed to be determined by the Court?
  - d How does this case show the relationship between parliament and the courts?
  - e Is parliament restricted from changing the relevant statute so that the word 'manufacture' is defined in a different way? Justify your answer.

- 7 Read the legal case *State Government Insurance Commission v Trigwell*.
  - a What was the common law before the parliament changed the law?
  - b Do you think this is an appropriate law for 100 years ago? What about now?
  - c What was the outcome of the case, and why do you think it might be seen to be unfair?
  - d What is the law now that parliament has passed a statute?

**Analyse and evaluate**

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

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3.6 Check your learning

» **Video tutorial**

How to respond to a 'justify' question

» **Going further**

The baseline sentencing regime

# 3.7

## TYPES OF LAW

### criminal law

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

### crime

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

### sanction

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

Other than classifying laws by their source, laws can also be classified based on the behaviour they are trying to regulate and the possible consequences involved if the law is broken.

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

## Criminal law

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

One of the distinct features of criminal law is the consequence that can flow if a crime is committed. If a crime is committed, and a person is guilty of that offence, a **sanction** may be imposed on that person. The sanction could be minor, such as paying a small fine, or could be more serious, such as imprisonment.

In a case involving criminal law, there are two parties: the state, which brings the action against the person alleged to have committed the crime (represented by the prosecution), and the accused.

An example of a criminal case is *DPP v Hughes* [2016] VCC 1762 (8 November 2016), in which the County Court of Victoria handed down a sentence for a crime involving a mother and a daughter.

## LEGAL

## CASE

### Sad case of violence

#### *DPP v Hughes* [2016] VCC 1762 (8 November 2016)

On 28 November 2015, in a drug-induced psychosis, Michelle Hughes for over an hour subjected her 79-year-old mother to a terrifying and violent attack in their home.

Hughes followed her mother into her bedroom and held her down to prevent escape. Hughes brandished a knife at her mother, repeatedly trying to stab her in the chest and neck. Hughes told her mother that she didn't want to kill her, but the voices were telling her that she had to do it, and that if she didn't, 'they' would burn the house down.

After about an hour, Hughes' mother managed to escape. Hughes followed her and again attacked her as she ran into the driveway. A neighbour managed to disarm Hughes.

Hughes pleaded guilty to four charges: false imprisonment, intentionally causing injury, making threats to kill, and reckless conduct endangering life.

Hughes was sentenced in the County Court of Victoria on 8 November 2016, at which time Her Honour Judge Hampel stated that this was 'one of the saddest cases of violence within a family that I have had to deal with'. Hughes was sentenced to a term of 18 months in prison. Hughes had already been in custody for 346 days, which Judge Hampel reckoned to be a period of imprisonment already served and which was to be deducted from the sentence. In addition, Hughes was required to serve a community corrections order (a type of sanction served in the community) for a period of 30 months. Several conditions were imposed as part of the community correction order, including a requirement that Hughes undergo assessment and treatment including testing for drug abuse or dependency as directed, and a requirement that she must not commit another offence while the order is in force.

### civil law

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

### plaintiff

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

### defendant

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

### remedy

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

### damages

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

### Examples of crimes

- **crimes against person** – assault, rape, manslaughter, murder
- **crimes against property** – theft, property damage, robbery, deception
- **crimes against morality** – prostitution, illegal use of drugs
- **crimes against the legal system** – perjury, contempt of court
- **crimes against the state** – treason

### Words commonly used in criminal cases

- **prosecution**, the **Crown**, the **state** – the party bringing the case on behalf of the state
- **accused** – the person who has been charged with an offence
- **suspect** – the person who is suspected of having committed a crime
- **guilty/not guilty** – the person can be found guilty or not guilty
- **charge** – when the police formally allege that a person has committed a crime
- **sanction** – the penalty handed down by the court on the offender
- **conviction** – when an offender has been found guilty, the court records a conviction (the guilty verdict), although in some instances a court decides not to record a conviction so the offender does not have a criminal record

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

## Civil law

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

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

The legal case below is a famous High Court case where the plaintiff sued for negligence.

## LEGAL

## CASE

### Water-skiing accident results in serious injury

#### *Wyong Shire Council v Shirt* (1980) 146 CLR 40

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

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

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

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

The legal case below provides an example of a Hollywood actor, Rebel Wilson, making a defamation claim against a publisher of magazines. A defamation claim involves an allegation that a person's reputation has been damaged because of statements made about them.

## Jury finds Rebel Wilson defamed

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

Rebel Wilson, an Australian actor who has starred in films such as *Bridesmaids* and *Pitch Perfect*, had a legal victory in the Supreme Court of Victoria in June 2017. In 2015, Bauer Media, which publishes well-known magazines such as *Woman's Day*, *The Australian Women's Weekly* and *Harper's Bazaar*, published articles about Rebel Wilson, which she claimed contained false statements about her. In particular, the articles claimed that Rebel Wilson had lied about her age and many parts of her upbringing.

Rebel Wilson sued the publisher for defamation, a type of civil law which aims to protect people's reputation and character from false statements. She claimed that as a result of the articles she had lost the opportunity to earn income by acting in feature films during a period after the publication of the articles. Bauer Media denied the claim and the case went to trial before a jury, which lasted three weeks.

In June 2017 a jury found in favour of Rebel Wilson, deciding that she had been defamed in the articles. In September 2017, Justice Dixon awarded over \$4.5 million in damages to Wilson, who had earlier suggested she would donate the money to charity or scholarships.

Wilson and many parts of the film industry have considered the claim a victory over publishers which they believe often publish false stories about celebrities.

LEGAL

CASE



**Source 2** Rebel Wilson successfully sued Bauer Media after it published articles about her which ruined her reputation. She was awarded a record payment of over \$4.5 million in damages.

### Examples of civil law

- **tort law** – negligence, trespass, nuisance, defamation
- **family law** – marriage, divorce, adoption, de facto relationships
- **industrial and workplace laws** – occupational health and safety, working conditions, work contracts, workplace agreements, union disputes
- **consumer law** – tenancy agreements, sale of goods, advertising laws
- **property law** – wills, planning laws, real estate purchases

### Words commonly used in civil cases

- **plaintiff** – the person bringing the case
- **defendant** – the person defending the case
- **sue** – taking civil action against another
- **compensation** – what the plaintiff seeks
- **damages** – a civil remedy
- **civil wrong** – a tort
- **defamation** – a civil law, under which a person can claim their reputation has been damaged
- **negligence** – a civil law (also a criminal law) under which a person can claim that they have been injured as a result of someone acting negligently towards them

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

## 3.7

## CHECK YOUR LEARNING

### Define and explain

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

### Synthesise and apply

- 4 Read the legal case *DPP v Hughes*.
  - a Identify all of the key words that indicate that this is a criminal case.
  - b Describe the key facts of the case, including the charges that Hughes pleaded guilty to.
  - c Do you agree with the outcome of the case? Give reasons for your answer.
- 5 Read the legal case *Wilson v Bauer Media Pty Ltd*.
  - a Who was the plaintiff in this case, and who was the defendant?
  - b What was the main issue in dispute in this case?
  - c How was this dispute resolved?
  - d What was the outcome in this case, and who decided the outcome?

- e Conduct some research to find out why the jury did not award damages in this case.
  - f Do you agree with the outcome of the case? Give reasons.
- 6 Collect four articles on a criminal case or a civil dispute. For each article, highlight the key terminology which identifies whether it is a criminal case or a civil dispute, and prepare a short summary of the article.

### Analyse and evaluate

- 7 Access a criminal judgment from this year from the County Court of Victoria published on the AustLII website. A link is provided on your [obook assess](#).
  - a How do you know this is a criminal case?
  - b Who are the parties in this case?
  - c What were the charges, and did the offender plead guilty?
  - d Describe the facts that gave rise to the charges.
  - e What factors were taken into account in sentencing?
  - f What was the sentence that was imposed?
  - g Do you agree with the sentence? If not, why not, and what sentence would you have imposed?



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3.7 Check your learning

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Australasian Legal Information Institute (AustLII)

» **Weblink**  
Types of law

# 3.8

## THE DISTINCTION AND RELATIONSHIP BETWEEN CRIMINAL LAW AND CIVIL LAW

### Study tip

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

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

The main differences are the aim of each area of law, and the consequences if the law is not followed. The aim of criminal law is to protect society and sanction offenders who have committed a crime, whereas the main aim of civil law is to regulate conduct between the parties and remedy a wrong that has occurred.

If an accused is found guilty, or pleads guilty, to committing a crime, then the consequence in a criminal case is a sanction – a penalty imposed by the court on the person, such as a fine or imprisonment. If a defendant is found liable in a civil case, then the possible consequence is a remedy such as damages.

Source 1 below sets out the other main differences between a criminal case and a civil dispute. You will learn more about these concepts in Units 1 and 2.

	CRIMINAL LAW	CIVIL LAW
Aim of the law	To protect society and sanction offenders	To regulate conduct between parties and to remedy a wrong that has occurred
Examples of crimes/laws	<ul style="list-style-type: none"> <li>Crimes against the person: homicide offences, assault, sexual offences</li> <li>Crimes against property: theft, arson, fraud</li> <li>Crimes against the state: treason, sedition</li> <li>Crimes against the legal system: perjury, contempt</li> </ul>	<ul style="list-style-type: none"> <li>Tort law: negligence, defamation, nuisance, trespass</li> <li>Contract law</li> <li>Family law</li> <li>Consumer law</li> </ul>
Possible consequences	Sanction	Remedy
Person bringing an action under the law	Prosecution, on behalf of the state	Plaintiff
Person who has the responsibility (burden) of proving the case	Prosecution	Plaintiff
Person defending the action	Accused	Defendant
Police involvement in an action	Yes	No
Common words used in cases	Accused, prosecution, crime, victim, arrest, police, bail, remand, guilty, innocent, sentence, punishment	Sue, plaintiff, compensation, damages, dispute, negligence, remedy, litigation

Source 1 The main differences between criminal law and civil law

### The relationship between criminal law and civil law

The same behaviour can give rise to a civil dispute and a criminal case. For example, a person who hits another person can be charged with assault, and if it goes before a court, that person may be found guilty and sanctioned. The victim of the assault may also sue the offender for assault (trespass to the person). If the victim is successful, the offender may have to pay damages to the victim to compensate the victim for any injury suffered as a result of the assault.

In other circumstances, a victim may sue someone else who they believe is responsible for a crime. The article below provides an example where a mother has sued the State of Victoria in relation to a crime committed against her daughter.

## IN THE NEWS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### compensation order

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

A court that is hearing a criminal matter is also able to order an offender, on having been found guilty or convicted of an offence, to pay compensation to a victim. This is known as a **compensation order**. The case of *DPP v Hitchiner* [2016] VCC 1844 (1 December 2016) provides an example of where a court has made a compensation order.

## Guilty plea for theft

LEGAL

CASE

### *DPP v Hitchiner* [2016] VCC 1844 (1 December 2016)

Stuart Hitchiner was employed by Red Hill Motors for approximately 31 years until November 2015. Between 2009 and 2015, he processed 1985 false refund transactions, each of which were paid into his personal bank account. A total of \$619 338.40 was taken from the business.

Hitchiner was arrested on 16 November 2015 after his offending was detected by his employer and reported to police. Hitchiner pleaded guilty to seven charges of theft.

On 1 December 2016, Judge Grant of the County Court of Victoria convicted Hitchiner and sentenced him to a sentence of imprisonment of three years and six months. Hitchiner will need to serve a minimum sentence of 21 months before he is eligible for release on parole.

The County Court also ordered that Hitchiner pay compensation of \$619 338.40 to the owner of Red Hill Motors.

## 3.8

### CHECK YOUR LEARNING

#### Define and explain

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

#### Synthesise and apply

- 4 Read the article 'Mother sues Victoria after teenage daughter allowed to work as sex predator's cleaner'.
  - a Is this article describing a criminal case, or a civil case, or both? Give reasons.
  - b Who are the parties in this case?
  - c Why is the offender not the defendant?
  - d What are the allegations against the State of Victoria?
  - e The article refers to a series of lawsuits launched by the families of other victims. Conduct some research and identify at least one of those other cases. Describe the facts of the case.
- 5 Read the legal case *DPP v Hitchiner*.

- a Is this a criminal case or a civil case? Justify your answer.
  - b What are the critical facts of this case, and what was the sanction that was imposed?
  - c How does this case show the relationship between criminal law and civil law?
- 6 Create two other scenarios which might give rise to both a criminal case and a civil dispute.

#### Analyse and evaluate

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



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» **Student book questions**

3.8 Check your learning

» **Going further**

Other cases in civil and criminal law

# THE VICTORIAN COURT HIERARCHY

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

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

As you have learnt, the main Victorian courts are as follows:

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

There are also two specialist courts: the Coroners Court (which investigates suspicious deaths and fires) and the Children's Court (which deals with criminal and family matters involving children).

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

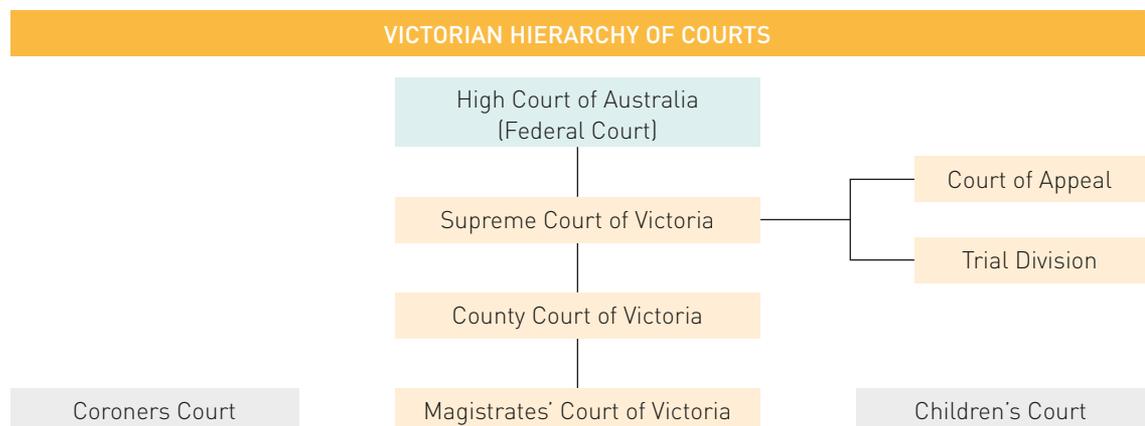
Each of the courts has its own **jurisdiction**, which is the right or power of a court to hear or deal with particular cases. Most of the courts in Victoria have the jurisdiction to hear both civil and criminal cases, and some courts have the power to hear appeals. For example, the Magistrates' Court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

## jurisdiction

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

## Study tip

A practice assessment task for Unit 1 – Area of Study 1 can be found on the Unit 1 Assessment tasks topic on page 290.



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

## Reasons for a court hierarchy

There are four main reasons for a court hierarchy:

- The court hierarchy allows for **specialisation** or **expertise**, with the courts developing expertise in dealing with the types of cases that come before them. For example, the Magistrates' Court hears minor offences, and so will be specialised in offences such as drink driving. The Supreme Court hears serious offences such as murder, and so will have developed expertise around the principles relating to murder.

- The court hierarchy enables the parties to a court case to **appeal** to a higher court if they are not satisfied with the decision in a lower court. This means that a person who believes that an error has been made in the lower court can appeal the case to a higher court for the higher court to review that decision.
- The court hierarchy is a necessary part of the **doctrine of precedent** (law-making through courts) because the process of law-making through courts depends on a decision being made in a higher court which is binding on lower courts. This enables individuals and lawyers to predict the likely outcome of a case. Judges and magistrates can be guided by the wisdom of the more experienced judges in the higher courts.
- Finally, a court hierarchy allows for **administrative convenience**. Because the courts have different jurisdictions to hear different matters, it allows smaller and minor cases (of which there are more) to be heard in the Magistrates' Court (of which there are a number in the state), and more complex and larger cases to be heard in the County Court and the Supreme Court. This allows for some efficiency or convenience with the way that cases are heard.



**Source 2** The Melbourne Magistrates' Court in William Street, Melbourne

#### **appeal**

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

#### **doctrine of precedent**

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

## 3.9

## CHECK YOUR LEARNING

### Define and explain

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

### Synthesise and apply

- 4 For each of the scenarios below, write down why you think the court hierarchy is important.
  - a Samantha's civil dispute was heard in the Magistrates' Court, and she was found liable for \$60 000. She does not agree with the magistrate's decision.
  - b Hanna has been charged with murder. She is concerned about getting a judge that knows what she or he is doing.

- c Anil is suing Jessica for \$20 000. He knows it's a small claim and doesn't want to wait for years to have his case heard.
  - d Harriet is suing her employer. She has been told by her lawyers that her case is strong because of past decisions that are similar to her case.
- 5 Conduct some research on the Magistrates' Court of Victoria. Identify the closest Magistrates' Court to where you live. Explain the benefits of this.

### Analyse and evaluate

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



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

» **Student book questions**

3.9 Check your learning

» **Weblink**

Court Services Victoria

» **Weblink**

High Court of Australia

## CHAPTER SUMMARY

**Social cohesion and the rights of individuals**

- > Social cohesion is the willingness of members of society to cooperate with each other in order to survive and prosper.
- > The law, individuals and the legal system all have a role to play in achieving social cohesion and protecting the rights of individuals.

**Principles of justice**

- > Fairness
- > Equality
- > Access

**Characteristics of an effective law**

- > Reflects society's values
- > Enforceable
- > Known
- > Clear and understood
- > Stable

**Parliament and courts**

- > The Commonwealth Parliament consists of the Governor-General, the House of Representatives and the Senate.
- > The Victorian Parliament consists of the Governor of Victoria, the Legislative Assembly and the Legislative Council.
- > Government consists of members of the political party that has the majority in the lower house. Parliament consists of all members of both houses of parliament and the Queen's representative.
- > There are federal courts and state courts.

**Sources of law**

- > Statute law – made by parliament
- > Common law – made by courts

**The relationship between parliament and the courts**

- > Courts can interpret statutes made by parliament.
- > Parliament can codify common law principles.
- > Parliament can abrogate or abolish common law.
- > Courts can also influence parliament through its judgments.

**Types of law**

- > Criminal law
- > Civil law

**Distinction and relationship between criminal law and civil law**

- > The main difference between criminal law and civil law is the consequence of the action.
- > The same behaviour can give rise to a civil dispute and a criminal case.

**Victorian court hierarchy**

- > The Victorian courts are set up in a court hierarchy. The highest court is the Supreme Court, followed by the County Court, then the Magistrates' Court.
- > There are four reasons for a court hierarchy: appeals, specialisation, administrative convenience and doctrine of precedent.

## REVISION QUESTIONS

- 1 Using an example, define the term 'statute law'.  
(2 marks)
- 2 Would the Supreme Court of Victoria be bound by a decision in the Magistrates' Court? Justify your answer.  
(2 marks)
- 3 What is meant by the word 'appeals'? Why is a court hierarchy needed for appeals?  
(3 marks)
- 4 Classify each of the following laws according to their source and type:  
(4 marks)
  - a The *Crimes Act 1958* (Vic) makes rape an offence.
  - b The sanction for common law kidnapping is set out in the *Crimes Act 1958* (Vic).

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

» **Student book  
questions**

Ch 3 Review

» **Revision notes**

Ch 3

» **assess quiz**

Ch 3

Test your skills with an auto-correcting multiple-choice quiz

- c Vince is required to pay \$50 000 after being found liable under the common law tort of negligence.
  - d In Victoria, intentional murder is not defined in the *Crimes Act 1958* (Vic) but by various case law.
- 5 Using examples, describe two features of the relationship between parliament and the courts. (5 marks)
- 6 Describe two principles of justice. (4 marks)
- 7 How is it that one act or omission can relate to both criminal law and civil law? Use an example to demonstrate your answer. (4 marks)
- 8 'The Victorian court hierarchy is critical to ensuring that courts are decided efficiently'. Do you agree with this statement? Give reasons for your answer. (6 marks)
- 9 In your view, what are the two most important characteristics of an effective law? Justify your answer. (8 marks)
- 10 Describe the role and structure of the Victorian Parliament and the Commonwealth Parliament. Is one parliament more powerful than another? Give reasons. (10 marks)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

### Practice assessment task questions

#### Part 1

(20 marks)

- 1 Collect two newspaper articles. One of the articles must relate to a criminal case, and one of the articles must relate to a civil dispute.
- 2 For each of the articles:
- a Identify and define the legal terminology that is used in the newspaper article. (6 marks)
  - b Identify the crime that is alleged to have been committed, or the area of civil law that is alleged to have been breached. Explain how making that act or omission a crime, or how that area of civil law, aims to achieve social cohesion. (10 marks)
  - c For the criminal law article, explain how the committing of the crime could give rise to a civil dispute. (4 marks)

#### Part 2

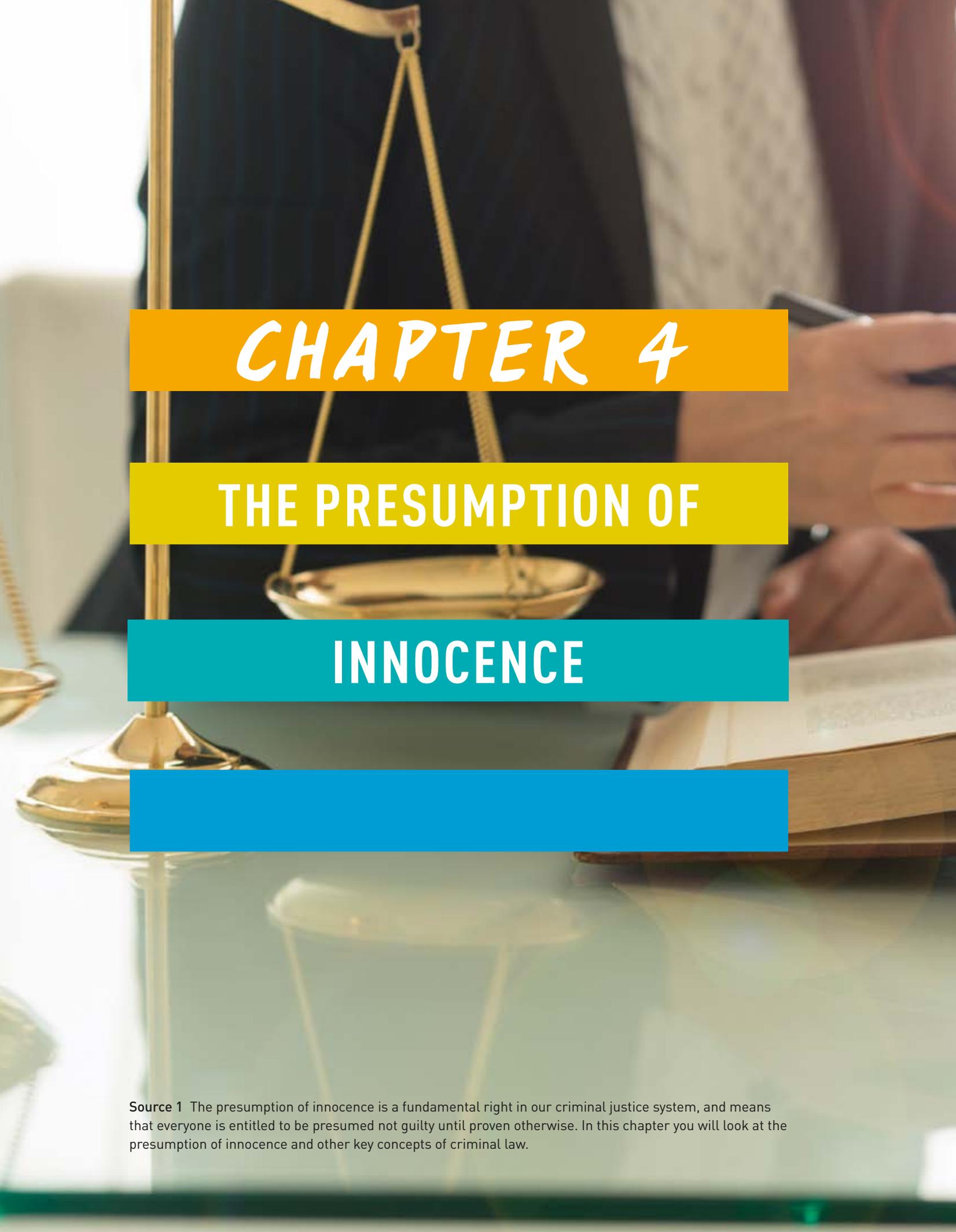
(30 marks)

- 3 You have been asked to write an article which is to be published in a newsletter for Year 6 students.

The purpose of the article is to explain parliament and the courts, and their relationship. Prepare the newspaper article. You can use a variety of multimedia tools if you wish. You will need to address in that article, in appropriate language for Year 6 students:

- a The role of parliament and the courts. (5 marks)
- b The main sources of law, being statute law and common law, and how to distinguish between the two. (5 marks)
- c An overview of the Victorian court hierarchy, and two reasons for a hierarchy of courts. (6 marks)
- d Two features of the relationship between parliament and courts, using examples. (6 marks)
- e How a person could assess whether a law is effective. At least two examples must be included for the students. (8 marks)

Total: 50 marks



# CHAPTER 4

## THE PRESUMPTION OF

## INNOCENCE

**Source 1** The presumption of innocence is a fundamental right in our criminal justice system, and means that everyone is entitled to be presumed not guilty until proven otherwise. In this chapter you will look at the presumption of innocence and other key concepts of criminal law.

## OUTCOME

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

## KEY KNOWLEDGE

In the chapter, you will learn about:

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

## KEY SKILLS

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

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

## KEY LEGAL TERMS

**accessory** a person who knowingly assists another person who has committed a serious indictable offence (i.e. an indictable offence with a punishment of five years or more in prison) to evade arrest, prosecution or conviction

**accused** a person charged with a criminal offence

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

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

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

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

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

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

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

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

### **indictable offence heard and determined summarily**

a serious offence which can be heard and determined as a summary offence if the court and the accused agree

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

**mens rea** a Latin term meaning ‘a guilty mind’; the mental element of a crime (i.e. an awareness of the fact that the conduct is criminal).

See also *actus reus*

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

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

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

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

**summary offence** a minor offence generally heard in the Magistrates’ Court

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# 4.1

## THE PURPOSES OF CRIMINAL LAW

### laws

legal rules made by a legal authority that are enforceable by the police and other agencies

### parliament

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

### criminal law

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

### crime

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

### sanction

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

**Laws** made by **parliament** and courts aim to achieve social cohesion by establishing guidelines for acceptable behaviour, so that members of society can co-exist in harmony. Behaviour considered harmful to society is classified as a criminal wrong and embodied in the criminal law. As you have learnt in Chapter 3, **criminal law** is a body of law that aims to protect the community by defining what is considered a **crime** and outlining penalties (i.e. **sanctions**) for people who commit crimes.

## Purposes of criminal law

Criminal law has several purposes. It aims to:

- **protect individuals** – Criminal law aims to protect us as human beings. It does this by establishing crimes, and by establishing processes and sanctions to punish people who commit those crimes
- **protect property** – Criminal law protects the things we own as individuals, and the things we own together as public property. This includes land and personal property. People are not free to deceive and steal what belongs to others or damage property or the environment
- **protect society** – Criminal law allows the physical, social and financial aspects of society to function. For example, criminal law prohibits the manufacture, distribution and use of certain types of drugs, to ensure that we do not live in a society where too many people are adversely affected by illegal substances
- **maintain public order and security** – Criminal law sets standards and makes clear what behaviour will not be tolerated by the community and the legal system. It makes social interactions predictable and maintains public order. Everyone knows what they can expect from others and what action they can expect from the legal system if someone does break the law
- **protect justice and the rule of law** – Criminal law takes enforcement of rights out of the hands of individuals. Only the state can punish people for criminal offences. If the state did not enforce the law, people would take punishment of criminals into their own hands and society would become chaotic and lawless
- **protect rights and cultures** – Criminal law protects human rights and individual freedoms, including the rights of individuals and groups to engage in cultural or religious activities without being harassed and mistreated
- **improve society generally** – Criminal law improves society by deterring people from committing crimes (out of fear of being punished) and by offering the chance of rehabilitation while serving their sentence.



**Source 1** The purpose of the law is to maintain a peaceful society. Through agencies like the courts and the police, criminal law maintains order. It protects individuals and their property, and safeguards rights.

Without criminal law, our society would be more dangerous and uncertain. People would need to protect themselves, and the weaker members of society would be in danger from those who were physically stronger.

## How criminal law achieves its purposes

The criminal justice system works in four main ways. It:

- **establishes the law** – through **statutes** made by parliament and through court decisions
- **enforces the law** – through Victoria Police and other bodies given power to enforce criminal law
- **decides who is guilty** – through the courts
- **imposes sanctions on offenders** – which aim, among other things, to punish offenders and deter others from committing crime.

Criminal law first developed through **common law**. Now, however, most of the criminal law is found in Acts of Parliament. All criminal laws function in the same way, in that they establish what is unacceptable behaviour and what penalty may be imposed if a person engages in that behaviour.

When a person has been found guilty of an offence, the court may impose a range of sanctions (e.g. giving undertakings, fines or prison).

In this chapter you will explore key concepts of criminal law, such as the presumption of innocence, the burden of proof and standard of proof. Before you do so, it is useful to consider what is meant by a crime.

### statute law

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

### common law

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

## Defining a crime

A crime is defined as an act or omission that is:

- against an existing law
- harmful to an individual or society
- punishable by law.

## Understanding acts and omissions

Before we look at these features of a crime, we first need to understand what is meant by the terms ‘act’ and ‘omission’. In legal terms, a crime can be committed by doing something (i.e. an act), or failing to do something (i.e. an omission). These acts or omissions are both things that society considers to be wrong. The example below will help you understand the difference.

---

### Separating an ‘act’ from an ‘omission’

**An act:** Sarah was invited to a friend’s place for a party. While she was there, she stole a diamond necklace belonging to her friend’s mother.

The *Crimes Act 1958* (Vic) outlaws the act of theft, and states that theft has a maximum penalty of 10 years in prison.

**An omission:** Last year Sarah’s sister was pregnant. The baby was premature, and Sarah’s mother helped her give birth, but the baby was stillborn. The family held a quiet burial in their backyard and told no one what had happened.

The *Crimes Act* makes it an offence to fail to report the death of a stillborn child or a child at birth. This crime (an omission) has a maximum penalty of six months in prison.

---

### EXAMPLE

## Did you know?

The Victoria Police Museum is a good place to visit to get a sense of the history of crime and policing in Victoria, from the 1800s to today. The museum has the largest collection of Kelly Gang armour in Australia as well as convict registers, prisoner records, mugshots, crime scene photographs, confiscated weapons, a bomb disposal robot and forensic evidence.

### abrogate

to cancel or abolish a court-made law by passing an Act of Parliament

### victimless crime

an offence where there is no apparent or immediate victim but the behaviour is illegal because it is goes against what society considers acceptable

### indictable offence

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

### summary offence

a minor offence generally heard in the Magistrates' Court

### Office of Public Prosecutions (OPP)

the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

### Director of Public Prosecutions (DPP)

the independent officer responsible for commencing, preparing and conducting proceedings in relation to an indictable offence on behalf of the Crown

## Against an existing law

For a crime to be committed, it must be an act or omission that is prohibited (not allowed) by a law that is currently in existence (i.e. not a law that has since been cancelled). The parliament and the courts will establish laws that make acts or omissions a crime, and parliaments can also **abrogate** (cancel) laws that used to make behaviour a crime. For example, the *Crimes Act* makes it a crime to steal another person's property.

## Harmful to an individual or society

A criminal act or omission has an impact on both the victim and society. The harm to a victim may be physical, financial or psychological (or a combination of these types of harm). Crimes have a negative impact on society, because they go against what most people believe is acceptable behaviour. Even a crime that is a 'victimless crime' can harm society as a whole.

Examples of acts that are harmful to society include:

- **assault** – For the victim, physical injuries cause pain, suffering and time off work, as well as distress to their family. Someone who has been assaulted can also have long-term psychological issues. For society, expensive resources such as hospitals, police services, courts and prisons need to be available to address the consequences of criminal behaviour
- **taking illegal drugs** – This is often referred to as a **victimless crime**, as the offender is only harming himself or herself. However, the use of illegal drugs is known to have a broader impact on the community, often leading to an escalation in theft and violent crimes
- **unruly behaviour** – Anti-social behaviour such as swearing or being drunk in a public place may not result in injury or damage, but it does have an impact on the general public's enjoyment of shared spaces and people's feelings of goodwill towards others in society.

## Punishable by law

Victoria Police is the main government agency with the power to enforce the criminal law in Victoria. The police are responsible for arresting people and for collecting evidence. Police prosecutors are responsible for presenting the prosecution case for minor offences in the Magistrates' Court.

However, Victoria Police is not the only agency with the power to enforce criminal law in Victoria. Others include the Australian Federal Police, WorkSafe Victoria and the Environmental Protection Authority. You will explore these enforcement agencies in Unit 2.

Serious offences, known as **indictable offences**, are generally tried in the County Court and the Supreme Court. Minor offences, known as **summary offences**, are generally tried in the Magistrates' Court. You will learn more about indictable offences and summary offences later in this chapter.

Victoria Police refers the prosecution of serious offences to the **Office of Public Prosecutions (OPP)**, which consists of the **Director of Public Prosecutions (DPP)** and Crown prosecutors. They work collectively, and on behalf of the Victorian community, to ensure serious offenders are prosecuted before a court.



**Source 2** The Office of Public Prosecutions (OPP) is a government-run office which consists of the Director of Public Prosecutions (DPP) and Crown Prosecutors.

# The definition of a crime can change over time and across countries

How the criminal justice system achieves its purpose is shaped by a country's social, moral and cultural norms. These change over time, so what is considered a crime and how it will be punished can be different from one decade to the next. Similarly, differences in community expectations will result in behaviour that is acceptable in one country being outlawed in another.

For example, in Indonesia, murder and drug trafficking are capital offences and the courts may sentence a convicted offender to death. Australians visiting Indonesia may be executed if they commit these crimes despite the fact that, in Australia, similar crimes would attract only a prison sentence.

The following case study further illustrates how the definition of a crime can differ across countries.

## Study tip

In your study of criminal law, try to consider the purpose of each crime and the community values (social, political or moral values) that are reflected in the behaviour the law considers to be a crime. This will help you be more specific in your answers to questions about the purposes of criminal law.

## Kiss led to jail in Dubai

In 2013 a British woman and her male friend were jailed for one month in Dubai in the United Arab Emirates (UAE) for kissing each other in a family restaurant and for drinking alcohol. They pleaded guilty to the drinking charge, but not guilty to indecency, maintaining that they had merely kissed on the cheek.

However, another female diner considered the behaviour 'indecent' and reported it to the Dubai police. The diner told the court the couple kissed on the mouth and constantly touched each other in front of her and her children.

A court fined the couple 1000 dirham (approximately A \$360) for drinking, and jailed them for acts of indecency. Their passports were confiscated until they had served their prison sentence. The couple was also banned from future travel to the UAE.

## CASE

## STUDY

## 4.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the term 'crime'.
- 2 Describe three purposes of criminal law.

### Synthesise and apply

- 3 Explain how the definition of a crime can change over time or in different locations. Provide two examples to support your explanation.

- 4 Why is the state (and not the victim) responsible for taking a person to court in criminal law?

### Analyse and evaluate

- 5 Search the internet to find an example of how criminal laws differ from those in another country of your choice. Write a brief paragraph on your findings, and discuss whether you agree with the approach taken by the other country.

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

» **Student book questions**

4.1 Check your learning

» **Video tutorial**

Introduction to Chapter 4

» **Going further**

The Bali Nine ring leaders

» **Weblink**

Office of Public Prosecutions

# 4.2

## THE PRESUMPTION OF INNOCENCE

### presumption of innocence

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

### accused

a person charged with a criminal offence

The **presumption of innocence** is an important feature of the criminal justice system. It is a guarantee to a person **accused** of a crime that they are entitled to be treated as, and considered to be, innocent until a charge against them is proved **beyond reasonable doubt**. Beyond reasonable doubt is the **standard of proof** for the prosecution to prove that the accused is guilty.

The presumption of innocence means that if a person is accused of a crime, that person does not have to prove he or she is innocent. It is the job of the prosecutor to prove the accused is guilty, as illustrated in the example below. The accused can stay silent and 'put the prosecution to its proof' (i.e. say nothing and make the prosecution establish its case by presenting reliable and relevant evidence to prove guilt).

It is up to a magistrate (for minor crimes) and the **jury** (for serious crimes) to impartially consider the strength of the evidence and decide whether a person is guilty beyond reasonable doubt.

### EXAMPLE

### Putting the prosecution to its proof

Late last year, a jewellery store was burgled at night. Items stolen included six valuable Rolex watches. The police were unable to immediately identify the offenders. Ted was charged with the crime.

Ted refused to say where he bought his watch. In the Magistrates' Court, the prosecution could only prove that Ted had a watch and that the shop had lost six watches. It could not prove any connection between Ted's watch and the six that were stolen from the shop. Ted was presumed innocent until proven otherwise. The Magistrate found that there was insufficient evidence. The Court found Ted not guilty of theft.

### beyond reasonable doubt

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

### standard of proof

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

### jury

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

### burden of proof

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

The presumption of innocence is a protection against wrongful conviction. It has stood the test of time. In the eighteenth century, Lord Blackstone, an English judge, declared 'it is better that ten guilty men should escape than one innocent man should suffer'. Today, the presumption of innocence is protected as a human right in the International Covenant on Civil and Political Rights 1966, which Australia has signed. It is also protected in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), referred to as the Human Rights Charter or the Victorian Charter of Human Rights.

In Australia (and other countries based on English law) a person is found 'guilty' or 'not guilty'. They are not found 'innocent'. Often people who are interviewed in the media after a trial say they have 'been exonerated' because they received a 'not guilty' verdict, but this is not true. All a not guilty verdict says is that the prosecution did not have enough evidence to make a case.

### Protecting the presumption of innocence

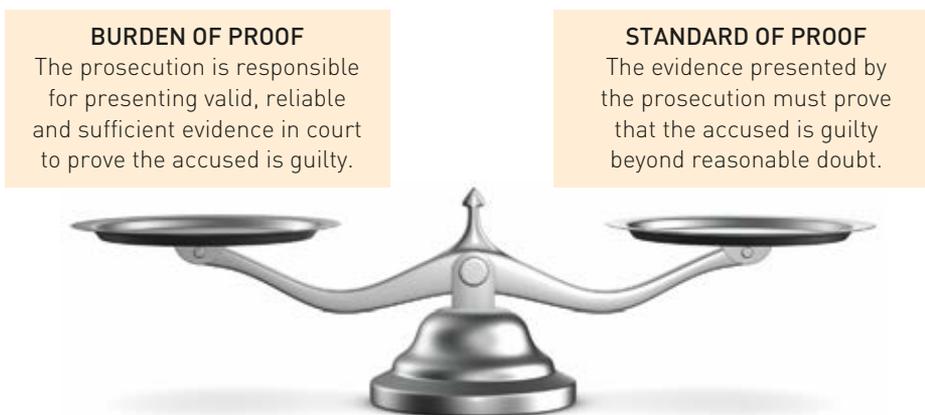
The presumption of innocence is a key concept in criminal law. The following features of the criminal justice system all help to ensure that the presumption of innocence is protected for a person accused of a crime:

- The **burden of proof** is on the prosecution.
- The case against a person must be proved beyond reasonable doubt.
- Most crimes require a person to have acted of their own free will.
- Police must reasonably believe a person has committed a crime before they can arrest them.

- A person who has been arrested and charged generally has the right to apply for **bail** and should be granted bail unless there are circumstances which mean bail can't be granted.
- A person has the right to legal representation in court. In some situations where an accused has been charged with a serious offence, the court can stay the proceedings until such time that the accused has obtained legal representation.
- An accused person also has a right to silence. A person's silence is not to be taken as an admission of guilt.
- As a general rule, a person's previous convictions are not revealed in court until the sentencing process begins.
- A person has the right to appeal a wrongful conviction.

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

**THE PRESUMPTION OF INNOCENCE**  
A person is innocent until he or she is proven guilty



***Did you know?***

Scotland has an extra option for verdicts in criminal trials beyond 'guilty' or 'not guilty'. In Scotland a jury can find an accused person 'guilty', 'not proven' or 'not guilty'. 'Not proven' is the equivalent of our 'not guilty'. With a Scottish 'not guilty' verdict the jury is going further than saying the prosecution case was not proved. They are saying they believe the accused is innocent.

Source 1 The presumption of innocence is a fundamental principle of common law.

**4.2**

**CHECK YOUR LEARNING**

**Define and explain**

- 1 What is meant by the presumption of innocence?
- 2 Explain three ways in which the presumption of innocence is protected in our criminal justice system.

**Synthesise and apply**

- 3 Read the example 'Putting the prosecution to its proof'.
  - a Did the police do the right thing in charging Ted?

- b What evidence do you think the prosecution would have required to obtain a 'guilty' verdict in this case?

**Analyse and evaluate**

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



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

» **Student book questions**

4.2 Check your learning

» **Going further**

The expunction of convictions for homosexuality

» **Weblink**

Presumption of innocence

# 4.3

## KEY CONCEPTS OF CRIMINAL LAW

### actus reus

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

### mens rea

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

### strict liability

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

A number of key concepts in criminal law help to ensure fair outcomes in criminal cases. These include:

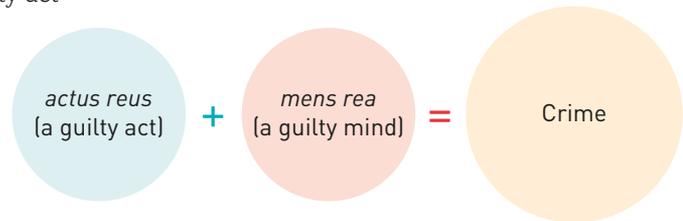
- the elements of a crime: *actus reus* and *mens rea*
- **strict liability**
- the age of criminal responsibility
- the burden of proof
- the standard of proof.

## Elements of a crime

A general principle in criminal law states that there is **no guilty act without a guilty mind**. Generally, and with the exception of strict liability crimes, every crime has two elements:

- *actus reus* – a Latin term meaning 'guilty act'
- *mens rea* – a Latin term meaning 'guilty mind'.

According to this principle, both elements of a crime (i.e. *actus reus* and *mens rea*) must be present at the same time for a crime to be committed.



Source 1 The general elements of a crime

## Actus reus

*Actus reus* is the physical element of a crime. It refers to the actions (or inactions) that a person needs to engage in to be found guilty of an offence.

The nature of the guilty act depends on the nature of the crime. For example, the offence of stalking, which is an indictable offence, can be committed if a person undertakes a certain type of action such as following the victim, or even tracing the victim's use of the internet.

## Mens rea

*Mens rea* is the mental element of a crime. It refers to the person's state of mind when they were engaging in the actions or inactions (i.e. the *actus reus*). The *mens rea* is often expressed using words such as knowingly, intentionally, maliciously, recklessly, negligently and wilfully.

The nature of the mental element will again depend on the nature of the crime. For example, it is a crime to make use of a firearm when resisting arrest. The *mens rea* that is required to be found guilty of this offence is intention; that is, the person needs to intend to resist arrest when using the firearm.

How to determine the *actus reus* and *mens rea* of a crime is explored further below.

## Identifying the specific elements of a crime

Today, most crimes and their elements are defined in Acts of Parliament (though some crimes, like murder, affray and common law assault, have common law definitions, meaning that the definition of the crime and its elements will be found through cases).

The specific elements of a crime are important in determining whether a person will be charged with and found guilty of that crime. For a person to be found guilty, the prosecution must prove *all* elements of the crime beyond reasonable doubt.

The following extract provides the definition of two crimes contained in the *Crimes Act*.

### Study tip

Each of these five key concepts in criminal law is listed in the *VCE Legal Studies Study Design*. This means you may be asked a question in your internal assessment tasks on any one of them. If you are asked a question about these concepts, make sure you are able to use the correct legal terminology, such as *mens rea* and *actus reus*.

### Did you know?

'Affray' is an ancient common law offence. It means creating a disturbance or breach of the peace by fighting or rioting in a public place and putting people nearby into a state of fear or alarm.

## EXTRACT

### *Crimes Act 1958 (Vic)*

#### 18 Causing injury intentionally or recklessly

A person who, without lawful excuse, intentionally or recklessly causes injury to another person is guilty of an indictable offence.

#### 72 Basic definition of theft

(1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

### Did you know?

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

To be found guilty of a crime under section 18 of the *Crimes Act*, a person must have caused injury to another person without lawful excuse (*actus reus*), and must have done so either intentionally or recklessly (*mens rea*).

To be found guilty of a crime under section 72 of the *Crimes Act*, a person must have appropriated property belonging to another (*actus reus*), and done so dishonestly, with the intention of permanently depriving the other person of it (*mens rea*). It would therefore not be theft if a person borrowed the property but had no intention, at the time of borrowing, to deprive the owner of it. In this instance, there would be the guilty act of keeping someone's property, but not the guilty mind.

Two examples of how the definition of a crime can be broken down into specific elements are provided below. In these examples, the mental elements (*mens rea*) for each crime are highlighted in orange to distinguish them from the physical elements (*actus reus*), which are highlighted blue.

## The elements of two different crimes

## EXAMPLE

### 1 Theft

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

These elements can be understood better if they are set out as a checklist.

A person...

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

### 2 Causing injury intentionally or recklessly

A person who, without **lawful excuse, intentionally** or **recklessly** **causes injury** to another person is guilty of an indictable offence.

These elements can be understood better if they are set out as a checklist.

A person ...

- without **lawful excuse** (*may involve a mental element*)
- **intentionally** or **recklessly** (*mental element*)
- **causes injury** to another person (by doing some action – *physical element*)

### Did you know?

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

Many defences raised by accused persons are made on the basis that there was no guilty mind. For example, the law states that a person is incapable of forming the intention to commit a crime (*mens rea*) in certain circumstances. If a person injures another during an epileptic seizure, or while mentally impaired, then he or she would not be guilty of a crime because there is no *mens rea*. That is, the person was acting involuntarily or had little understanding of the nature of their actions.

Sometimes a person has a lawful excuse for committing a crime. Consider the crime of causing injury intentionally or recklessly, set out in section 18 of the *Crimes Act* (see above), which requires a person to have 'no lawful excuse' when causing the injury. If a person deliberately hit and injured another in self-defence, that person would not be guilty of the crime because the law allows people to take reasonable steps to protect themselves and others.

Other crimes are strict liability crimes. These crimes are explored further below.

## Strict liability

Crimes described as strict liability crimes have **no mental element** in their legal definition, so it is not a defence to say 'I didn't mean to do it'. It is therefore sufficient for a person to have committed the act that is against the law (the *actus reus*), and the prosecution does not need to prove there was *mens rea*.

For some, not all, strict liability crimes, the accused may argue, in his or her defence, that the crime was committed due to a reasonable and honest mistake of fact.

Many strict liability crimes are summary offences. Two examples are provided in the extracts below.

### EXTRACT

#### *Road Safety Act 1986 (Vic)*

##### **49B Offence to consume intoxicating liquor while driving**

(1) A person must not consume intoxicating liquor while the person is driving a motor vehicle or is in charge of a motor vehicle.

### Did you know?

Many legal terms have Latin names. '*Doli incapax*' comes from the Latin word *dolus* (unlawful intention) and *incapax* (no capacity).

### EXTRACT

#### *Summary Offences Act 1966 (Vic)*

##### **13 Persons found drunk**

Any person found drunk in a public place shall be guilty of an offence.

# Age of criminal responsibility

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

Children may not always be held responsible for committing a crime. They may be considered too young to form the intention (*mens rea*) to commit a crime, as seen in *RP v The Queen* [2016] HCA 53 (21 December 2016) (further explored below). Whether a child will be charged with an offence will depend on his or her age. In particular:

- A person under 10 years of age cannot be charged with a crime.
- A person aged between 10 and 13 years will be charged with a crime if the prosecution can prove that the child **knew, at the time of the crime, that his or her actions were wrong**. This is known as the legal principle of *doli incapax*. Whether a child is *doli incapax* will depend on the child's age, upbringing and prior criminal history, medical or psychological reports and what the child said and did before, during and after the crime.
- People aged 14 years or older are criminally liable for their actions.

## *doli incapax*

a Latin term meaning 'incapable of evil'; the principle that a child under 14 years of age cannot form mens rea (guilty mind) because he or she does not have the intellectual or moral capacity to know the difference between right and wrong



### A child under 10 years of age

- Cannot be charged with a crime



### A child 10 to 13 years of age

- Can be charged with a crime if the prosecution proves the child knew his or her actions were wrong at the time of the crime



### A child 14 years of age or older

- Can be charged with a crime

Source 2 The age of criminal responsibility

## Sexual offences committed by 11-year-old boy

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

RP was charged with sexual offences he committed at the age of 11. The victim was his six-year-old brother. The attacks occurred in 2005, when the boys were left without adult supervision.

In 2014, the New South Wales District Court convicted RP of aggravated indecent assault and two counts of sexual intercourse with a child. He was sentenced to two years and five months in prison, with a non-parole period of 10 months.

On appeal to the New South Wales Court of Criminal Appeal, RP's lawyer argued he was *doli incapax* when he committed the offences. The Court agreed that RP was *doli incapax* at the time of the aggravated indecent assault, but not when he forced his brother to have sexual intercourse. The Court upheld the convictions for the two counts of sexual intercourse with a child.

LEGAL

CASE

In 2016, the High Court reviewed RP's case. The High Court summarised the concept of *doli incapax* as 'the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea*'.

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

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

## The burden of proof

The burden of proof (also known as the onus of proof) upholds the principle that a person is innocent until proved guilty. The burden of proof refers to the party that has the responsibility to prove the facts of the case. In general, the burden of proof lies with the person or party who is bringing the case; therefore, in a criminal case, it lies with the prosecution. This means the prosecution must prove that their view of the facts is correct.

One of the justifications for this is that if the prosecution is accusing a person of having committed a crime, then the responsibility should be on the prosecution to establish the facts. It is not up to the accused to prove his or her innocence.

In theory, an accused does not need to do or say anything in his or her defence, and a person's silence is not to be taken as an admission of guilt. The accused may still be found not guilty if the accused does not raise a defence, particularly if the prosecution's case is weak. In reality, however, an accused will do what he or she can to refute the charge and to counter the prosecution's evidence.

## Reversing the burden of proof

There are exceptions to the general rule that the prosecution has the burden of proof. In some instances, the parliament decides to reverse the burden of proof. These statutory exceptions require the accused to prove one or more aspects of the case on the **balance of probabilities**. In reversing the burden of proof, the parliament's aim is to make it easier for the prosecution to prove its case beyond reasonable doubt.

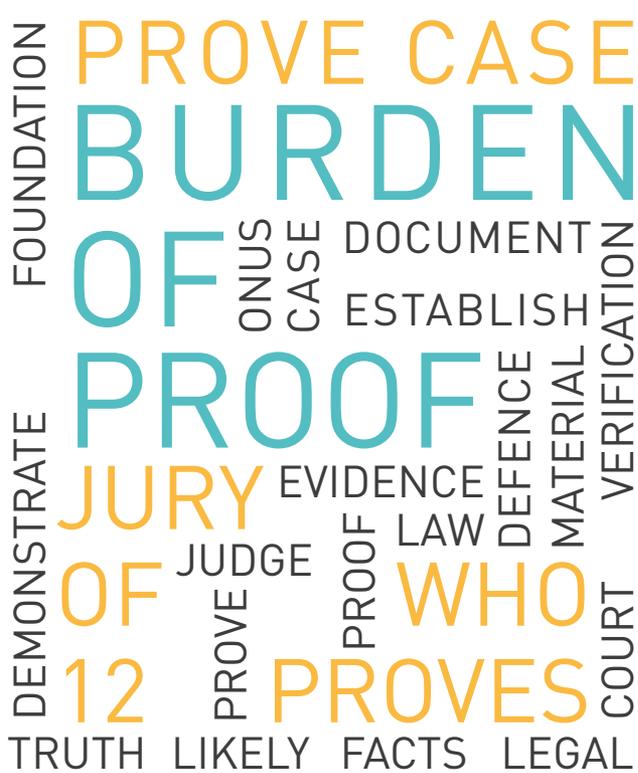
## The standard of proof

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

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

### balance of probabilities

the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right



**Source 3** The burden of proof is the onus or responsibility of proving a case.



**Source 4** The standard of proof refers to the strength of evidence needed to prove a legal case. In criminal law, the prosecution must prove the case beyond reasonable doubt.

### 4.3

## CHECK YOUR LEARNING

### Define and explain

- 1 There are generally two elements of every crime.
  - a Identify the two elements of a crime.
  - b Where can we find the specific elements of most crimes?
- 2 Define the term ‘strict liability crimes’.
- 3 Explain the age of criminal liability in Victoria.
- 4 What is the standard of proof in criminal law?
- 5 What does the reversal of the onus of proof mean in relation to a crime?
- 6 What is the required standard of proof when the onus of proof is reversed?

### Synthesise and apply

- 7 Read the legal case *RP v The Queen*.
  - a What did the prosecution need to prove for the boy to be found guilty?
  - b How did the High Court summarise the criminal law principle of *doli incapax*?
  - c Why was the boy acquitted of the crimes?

### Analyse and evaluate

- 8 Do you think that parliament should be allowed to create crimes of strict liability? Give reasons.



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

» **Student book questions**

4.3 Check your learning

» **Video tutorial**

How to identify elements of a crime

» **Video**

Criminal intent

» **Legal case**

*Momcilovic v R* (2011) 245 CLR 1

# 4.4

## TYPES OF CRIME

Each year in Victoria approximately half a million offences are committed. Unless this mass of offences is categorised in some way, it is impossible to use the information to improve the way the law protects society.

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

Classifying crime according to the social purpose (or nature) of the offence is popular with law enforcement agencies and government departments who track the level of crime in our community.

The Australian Bureau of Statistics (ABS) has developed a uniform crime classification model for use across Australia and New Zealand. By using the same classification model, the level of crime in each state or country can be compared and crime reduction strategies can be evaluated.

The **Crime Statistics Agency (CSA)** is an independent organisation responsible for processing, analysing and publishing **crime statistics** for the state of Victoria. It has adopted a classification model similar to that of the ABS. It categorises crimes in five divisions (the broadest level), then subdivisions (the intermediate level) and groups (the finest level).

The five division and their corresponding subdivisions are summarised in Source 1.

**Crime Statistics Agency (CSA)** an independent organisation responsible for processing, analysing and publishing Victorian crime statistics  
**crime statistics** information (i.e. data) collected by authorities such as the police and analysed to track the level of crime or offending in the community. Crime statistics also track the types and levels of sentence given to convicted offenders

CSA OFFENCE CLASSIFICATION	
CSA Offence Division	CSA Offence Subdivision
<b>Division A:</b> Crimes against the person (i.e. protecting individuals)	Homicide and related offences; Assault and related offences; Sexual offences; Abduction and related offences; Robbery; Blackmail and extortion; Stalking, harassment and threatening behaviour; Dangerous and negligent acts endangering people
<b>Division B:</b> Property and deception offences (i.e. protecting property)	Arson; Property damage; Burglary/Break and enter; Theft; Deception; Bribery
<b>Division C:</b> Drug offences (i.e. protecting society)	Drug dealing and trafficking; Cultivate or manufacture drugs; Drug use and possession; Other drug offences
<b>Division D:</b> Public order and security offences (i.e. maintaining public order and security)	Weapons and explosives offences; Disorderly and offensive conduct; Public nuisance offences; Public security offences
<b>Division E:</b> Justice procedures offences (i.e. protecting justice and the rule of law)	Justice procedures offences; Breaches of orders
<b>Division F:</b> Other offences (i.e. protecting rights and cultures, and improving society)	Regulatory driving offences; Transport regulation offences; Other government regulatory offences; Miscellaneous offences

Source 1 CSA offence classification



**Source 2** Aggravated carjacking is classified as a violent crime.



**Source 3** Arson is classified as property damage.



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

## Classifying a crime according to the type of offender or victim

When criminal behaviour is committed by or impacts on specific social groups, it gains the attention of the media, law enforcement agencies, government and the general community. As a result, the illegal behaviour is often scrutinised and reclassified as a specific category of crime that needs to be monitored and addressed.

### Cyber-crime

**Cyber-crime** (also known as e-crime) involves the offender using computers, the internet or other electronic systems and devices for illegal behaviours such as stealing or harassing. Cyber-crime is largely conducted with the use of the internet; therefore there was generally no need for such laws before these technologies were developed. Examples of e-crimes include false advertising or sales online, and using card skimming devices at automatic teller machines (ATMs).

#### cyber-crime

a criminal offence carried out using an electronic device or the internet (e.g. hacking, phishing, spamming)

### Hate crime

**Hate crimes** are criminal offences motivated by prejudice and bias against other people because of some personal characteristic (e.g. their gender, age or size), their cultural group (e.g. their race or religion) or sexual orientation (e.g. LGBTI – Lesbian, Gay, Bisexual, Transgender or Transsexual and Intersex).

#### hate crime

a criminal offence motivated by hostility and prejudice towards the victim (e.g. because of their race or religion)

Hate crimes are anti-social because they have an impact beyond the person they harm directly. They weaken the fabric of the community and threaten the rule of law. The following case study is an example of a religious hate crime.

## Hate crime stabbing of Melbourne priest

Father Tomy Kalathoor Mathew, a priest from Kerala, India, was stabbed in Melbourne on 20 March 2017. Police believed it was a hate crime.

Father Tomy was about to lead the 11.00 am mass when there was a commotion at the back of the church and a 72-year-old man stabbed him in the neck with a knife. He was helped by parishioners and admitted to hospital. The attacker was charged and required to appear in the Broadmeadows Magistrates' Court. Police said the accused was not dangerous to anyone else, and that it was an isolated incident directed at the priest.



**Source 5** Father Tomy Kalathoor Mathew, stabbed in the neck at church in a hate crime

CASE

STUDY

## Organised crime

Organised criminal syndicates or gangs commit this type of crime, usually in a planned and ongoing way. Organised crime often involves illegal activities such as drug manufacturing and trafficking, money laundering, the sale of illegal firearms and illegal prostitution and gambling, as illustrated in the legal case below.

These gangs or syndicates have their own rules, leadership structure and members. Depending on their level of organisation, the group may operate in a neighbourhood, a country or internationally. Members of these groups may use violence, extortion, bribery and standover tactics to get their way.

### LEGAL

### CASE

## Importation of drugs by criminal gang members

### *DPP (Cth) v Barbaro and Zirilli* [2012] VSC 47 (23 February 2012)

Two Griffiths farmers, Pasquale Barbaro and Saverio Zirilli, were convicted of attempting to import 4.4 tonnes of ecstasy in cans of Italian peeled tomatoes. They pleaded guilty to three drug offences in the Victorian Supreme Court. The two conspired to import the drugs, from Italy into Melbourne, with at least six other men. The estimated street value of the drugs was \$122 million. It was the largest amount of ecstasy seized in Australia.

The Court heard that Barbaro was the head of a criminal gang and Zirilli was his 'right hand man'. The judge commented that the money trail used to pay for the drug deal indicated the group had international crime connections. Barbaro was sentenced to life imprisonment with a non-parole period of 30 years and Zirilli was sentenced to 26 years in prison with a non-parole period of 18 years.

Both Barbaro and Zirilli appealed the severity of their sentences in the Victorian Court of Appeal and then the High Court of Australia. The High Court rejected their appeal. The other co-offenders were also convicted, in separate trials, and are also serving lengthy prison sentences.



Source 6 Ecstasy discovered in cans of Italian peeled tomatoes.

## Juvenile crime

Juvenile offenders are usually persons aged between 10 to 18 years. Common juvenile crimes include fare evasion, assault, property damage (graffiti or vandalism) and theft (shoplifting, theft of a bicycle or theft of a motor vehicle). More often than not, juvenile crimes are committed in groups and in places such as shopping centres, public transport hubs, local parks and streets relatively close to the offender's home.



Source 7 Common juvenile crimes include fare evasion.

## White collar crime

White collar crime is generally described as a crime committed by a person who works in government, businesses or the corporate world. These people are generally well paid and hold trusted positions of employment. White collar criminals use their position and influence to either steal or obtain a financial advantage. Types of white collar crime include theft, fraud, tax evasion, investment scams, price fixing and insider trading.

### Study tip

Crimes can be classified in different ways. For example, when murder is classified according to the social purposes (nature) of the offence it is referred to as a crime against a person. When it is classified according to the seriousness of the offence it is called an indictable offence. So, when you are discussing the way crimes are classified, think about the classification system in use.

## Classifying a crime according to its seriousness

Crimes can also be classified according to the seriousness of the offence. It is common for police, lawyers and the courts to classify crimes into two categories: **indictable offences** (serious crimes) and **summary offences** (minor crimes). This is because the legal system processes these crimes differently, using different legal procedures, personnel and courts to hear each type of offence.

Summary offences are not as serious and have less impact on society, while indictable offences are more serious and have a greater or more immediate impact on victims and the community. However, the fact that smaller crimes are more common may mean they have a greater total impact on the community over the longer term.

More information about the differences between summary and indictable offences is provided in Topic 4.5.

### 4.4

## CHECK YOUR LEARNING

### Define and explain

- 1 What is the role of the Crime Statistics Agency in Victoria?
- 2 Consider the Victorian Crime Statistics Agency's classification model then classify the following crimes according to the social purpose (nature) of the offence.
  - a Murder
  - b Drug trafficking
  - c Home invasion
  - d Possessing a prohibited weapon
  - e Fare evasion
  - f Swearing in public

### Synthesise and apply

- 3 Read the legal case *DPP (Cth) v Barbaro and Zirilli*.

- a What aspects of this case indicate that it is an example of organised crime?
  - b Classify the offences committed in this case according to their social purpose (nature), the type of offender or victim and the seriousness of the offence.
- 4 Conduct some research on the case of *Kamay v The Queen* [2015] VSCA 296 (13 November 2015).
    - a What aspects of this case indicate that it is an example of white collar crime?
    - b Classify the offences committed in this case according to the social purpose (nature), the type of offender and the seriousness of the offence.
  - 5 Research a recent legal case and classify the type of crime committed according to the Crime Statistics Agency Offence Division. Justify your selection.



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

» **Student book questions**

4.4 Check your learning

» **Summary table**

Crime division classification with examples

» **Legal case**

*Kamay v The Queen* [2015] VSCA 296 (13 November 2015)

» **Weblink**

Crime Statistics Agency Victoria

# 4.5

## THE DISTINCTION BETWEEN SUMMARY OFFENCES AND INDICTABLE OFFENCES

### Study tip

In this Area of Study you are expected to distinguish between indictable offences and summary offences using examples. 'Distinguish' means to identify differences between things. To do this, use words such as 'on the other hand', 'whereas' and 'this is different from' when you are drawing out differences between the two offences.

As you have already explored in this chapter, there are two types of offences: summary offences and indictable offences. The criminal justice system uses different procedures when it deals with summary offences (minor crimes) as opposed to indictable offences (serious crimes).

### Summary offences

Summary offences are minor criminal offences generally heard in the Magistrates' Court. They are less serious types of crime, and include offences such as drink driving, disorderly conduct, and minor assaults.

Many summary offences are contained in the *Summary Offences Act 1966* (Vic), but many others are listed in various Victorian statutes and regulations. Most crimes committed in Victoria are summary offences.

To hear a case summarily means to hear it without a jury; therefore, summary offences are determined by a magistrate. The court procedures used in summary offences are less complex than those used in indictable offences.



Source 1 Begging is a summary offence.



Source 2 Homicide offences are indictable offences.

### Indictable offences

Indictable offences are serious criminal offences generally heard by a judge (and a jury if the accused pleads not guilty) in the County Court or the Supreme Court of Victoria. Examples of indictable offences include homicide offences (murder and manslaughter) and rape. As a general rule, an offence in the *Crimes Act* is an indictable offence unless the Act states it is a summary offence.

### Indictable offences heard summarily

The law allows some **indictable offences to be heard and determined summarily**. These are offences that are classed as indictable offences but are less serious in nature. These offences can be heard as if they are minor offences, which means they will be heard and determined in the Magistrates' Court by a magistrate, instead of in one of the higher courts by a judge and/or jury. One example is retail theft.

An indictable offence may not be heard summarily unless the court determines it is appropriate and the accused agrees. Accused people usually choose to have the offence heard summarily because a summary hearing is often quicker and cheaper than a trial. It may also attract a lesser punishment because

#### indictable offence heard and determined summarily

a serious offence which can be heard and determined as a summary offence if the court and the accused agree

the maximum term of imprisonment a magistrate can impose is capped at no more than two years for a single offence and five years for multiple offences.

The distinction between summary offences, indictable offences, and indictable offences heard summarily is summarised in Source 3 below.

DISTINCTION BETWEEN SUMMARY OFFENCES, INDICTABLE OFFENCES AND INDICTABLE OFFENCES HEARD SUMMARILY	
Summary offences	<ul style="list-style-type: none"> <li>• These are minor crimes.</li> <li>• These offences are generally heard in the Magistrates' Court.</li> <li>• The final hearing, at which both parties will put their case before the court, is known as a hearing.</li> <li>• A magistrate will determine whether the person charged with a crime is guilty.</li> </ul>
Indictable offences	<ul style="list-style-type: none"> <li>• These are serious crimes.</li> <li>• These offences are tried in the County Court or Supreme Court.</li> <li>• The final hearing, at which both parties will put their case before the court, is known as a trial.</li> <li>• When an accused pleads not guilty, the court will select a jury of 12 people from the community.</li> <li>• The jury will determine whether or not the person charged with a crime is guilty.</li> </ul>
Indictable offences heard summarily	<ul style="list-style-type: none"> <li>• There are serious crimes that may be heard summarily (i.e. without a jury).</li> <li>• These offences are heard in the Magistrates' Court if the court determines it is appropriate and the accused agrees.</li> <li>• A magistrate will determine whether or not the person charged with a crime is guilty.</li> </ul>

**Source 3** The distinction between summary offences, indictable offences heard summarily and indictable offences.

The example below further explores the distinction between summary offences, indictable offences, and indictable offences heard summarily.

## Freya, Benqt and Knut

## EXAMPLE

### Freya and her record of summary offences

Freya has a record of traffic offences such as speeding and failing to stop at a red light, as well as public order offences. She has been fined for offensive behaviour and offensive language in a public place, posting bills on walls to advertise her singing gig, begging in the city, being drunk in a public place, and setting off fireworks in a public place without permission.

These are all summary offences, and Freya has only ever been fined or ordered to do community service work, because they are relatively minor offences.

### Bengt's indictable offences heard summarily

Freya's older brother, Bengt, is a petty criminal who has committed some serious offences. Bengt stole an old Mitsubishi Verada worth \$8000 and was charged with theft of a motor vehicle. He also broke into a house and stole a television and other electronic equipment. He was charged with burglary and theft (under \$100 000). As he was trying to escape from the police he broke a window and smashed down a gate. The charge was criminal damage (less than \$100 000).

Each offence is considered to be an indictable offence that can be heard and determined summarily, so Bengt was able to avoid going before a jury in the County Court. All the charges were dealt with summarily in the Magistrates' Court.

### Knut's indictable offences

Bengt and Freya have a younger brother, Knut, who has been arrested numerous times. The police describe him as a 'nasty piece of work'. While he has not committed indictable sexual offences (rape) or the homicide-related offences (murder, manslaughter and culpable driving causing death), he's done plenty of other criminal acts.

Some of Knut's charges, like Bengt's, have been for indictable offences heard summarily. He was charged with burglary and theft (less than \$100 000) when he broke into a bar after trading hours and stole cases of alcohol. On a separate occasion, his friend distracted staff while Knut sneakily took drugs from shelves and money from a cash drawer in a pharmacy. On being discovered, Knut ran from the store but tripped over the pharmacist who had stepped into Knut's path. The pharmacist fell and broke an arm and four ribs. Knut was charged with theft (under \$100 000) and recklessly causing serious injury. As these offences were indictable, but triable summarily, Knut chose to have them heard in the Magistrates' Court.

In the past, Knut has committed indictable offences that cannot be tried summarily. They include theft-related offences over \$100 000, intentionally causing serious injury, and trafficking or cultivating drugs in commercial or large commercial quantities. For these offences he had to face a jury trial in the County Court, and was sentenced to prison.



Source 4 Causing criminal damage of less than \$100 000 is an indictable offence that can be heard summarily.

# Determining whether an offence is an indictable or a summary offence

How an offence is classified and whether an offence can be heard summarily is determined by statute. The crimes listed in the *Crimes Act* are mostly indictable offences. Similarly, crimes listed in the *Summary Offences Act* and all other Acts of Parliament and regulations are mostly summary offences. The *Criminal Procedures Act 2009* (Vic) lists indictable offences that can be heard summarily.

INDICTABLE OFFENCES	SUMMARY OFFENCES	INDICTABLE OFFENCES HEARD SUMMARILY
<ul style="list-style-type: none"> <li>Offences in the <i>Crimes Act</i> are generally indictable offences unless the <i>Crimes Act</i> states otherwise. Common law offences are indictable offences.</li> </ul>	<ul style="list-style-type: none"> <li>Offences in the <i>Summary Offences Act</i> are summary offences.</li> <li>Offences in other Acts of Parliament and regulations are generally summary offences unless the act states otherwise.</li> </ul>	<p>The <i>Criminal Procedures Act</i> specifies the crimes that can be heard summarily. These include:</p> <ul style="list-style-type: none"> <li>An indictable offence punishable by 10 years' imprisonment or less <b>or</b> by a fine of 120 penalty units or less.</li> <li>Indictable offences, in more than 30 different statutes, listed in Schedule 2 of the Act.</li> </ul>

Source 5 The classification of a crime as either an indictable or summary offence is determined by statute.

## 4.5

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain three differences between summary and indictable offences.
- 2 Using an example, explain what is meant by the term 'indictable offence heard and determined summarily'.
- 3 Identify the three conditions that must be satisfied before an indictable offence can be heard summarily.

### Synthesise and apply

- 4 Classify the following crimes as either a summary offence, an indictable offence or an indictable offence heard summarily.
  - a Criminal damage less than \$100 000
  - b Shoplifting
  - c Swearing in public
  - d Rape

- e Growing a commercial quantity of marijuana
- f Drink driving

- 5 Conduct some research. Can the County Court hear all indictable offences? Why or why not?

### Analyse and evaluate

- 6 Explain whether you think it is appropriate that some indictable offences can be heard as if they were minor offences. Consider the perspectives of the accused, the prosecution and the victim, as well as issues such as court resources.
- 7 Read the example 'Freya, Benqt and Knut'. A list of offences used in this example is provided on your [obook assess](#). Go to the AustLII website and locate the statute that contains each offence. Comment on how each offence is described in the statute.



Check your [obook assess](#) for these additional resources and more:

» **Student book questions**

4.5 Check your learning

» **Summary table**

List of offences used in the example *Freya, Benqt and Knut*

» **Weblink**

Australasian Legal Information Institute (Aust LII)

# 4.6

## POSSIBLE PARTICIPANTS IN A CRIME

A crime does not necessarily involve only one offender. How criminals are defined – from principal offenders to accessories – varies depending on their participation in a crime.



**Source 1** The man with the firearm, the getaway driver and the person who makes an agreement with another to commit a crime are all principal offenders.

### Principal offender

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

A person who commits an offence is often referred to as the **principal offender**. This is the person who has committed the *actus reus* (the act or omission that constitutes a crime) and has *mens rea* (a guilty mind) when committing the crime.

### Being 'involved' in a crime

The law states that a person 'involved in a crime' is also taken to have committed the crime, and is responsible for the crime to the same degree as the principal offender.

Being involved in a crime is defined in section 323 of the *Crimes Act*. A person is 'involved in a crime' if he or she behaves in any of the ways outlined in Source 2.

#### PARTICIPANTS IN A CRIME

A person is 'involved in' a crime when he or she ...

Intentionally assists, encourages or directs another person to commit a crime

Makes an agreement with another person to commit a crime together

Intentionally assists, encourages or directs another person to commit a crime knowing it is highly likely that another crime may be the result

Makes an agreement with another person to commit a crime together knowing it is highly likely that another crime may be the result

**Source 2** Participants involved in a crime are treated as principal offenders.

In cases where a person encourages another person to commit a crime, the encouragement must be communicated, but the degree of influence over the other person is irrelevant.

The person must try to dissuade or stop the other offenders from committing the crime and must make it clear that his or her support has been withdrawn.

Participation in a crime usually requires the person to be at the scene of the crime. However, a person may still be involved in a crime even if they were not present when some aspects of the crime were committed.

A person involved in a crime can be found guilty whether or not other participants (including the principal offender) have also been prosecuted or convicted.

The following example illustrates how participants who are involved in a crime may be treated as principal offenders.

## Treatment of participants in a crime

## EXAMPLE

All participants in the following crimes may be treated as principal offenders:

- Tomas, Michela and Angelo agree to commit an armed robbery together. The robbery goes wrong and Tomas kills the store owner during the robbery.
- Carl, the leader of a drug trafficking gang, orders Benny to kidnap and injure Brody because he owes Carl money.
- Cheryl, knowing that her friend Dylan wants to torch a building, drives Dylan to a petrol station to get supplies then drops Dylan within walking distance to where the fire is set.

## Accessory to a crime

An **accessory** is a person who, without lawful excuse, assists a principal offender following the commission of a crime. The accessory must believe or know that the offender has committed a serious indictable offence, being an indictable offence with a punishment of five years or more in prison, and must do something to try and stop the offender from being arrested, prosecuted, convicted or punished for the crime.

An accessory can be found guilty of an offence regardless of whether the principal offender is also found guilty.

### accessory

a person who knowingly assists another person who has committed a serious indictable offence (i.e. an indictable offence with a punishment of five years or more in prison) to evade arrest, prosecution or conviction

## 4.6

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the term 'principal offender'.
- 2 How will the law treat people who are 'involved in' a crime?
- 3 What is an accessory to a crime?

### Synthesise and apply

- 4 For each of the following scenarios, nominate the principal offenders and accessories. Assume each person is over 18 years of age.

- a Joe goes into a jewellery store and commits an armed robbery. John keeps a lookout and waits for Joe in a getaway car. Pete knows nothing about the crime until his friends ask him to hide the jewellery. He agrees and buries it in his backyard.
- b Ivan kills a man. He panics and calls his mate Gary. Gary agrees to help Ivan dispose of the body.
- c Helena and her sister, Athena, agree to go 'shopping' so they can steal clothing. Helena is present when Athena stuffs a shirt into her bag. Helena does not discourage Athena but she doesn't personally steal anything.



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

» **Student book questions**

4.6 Check your learning

» **Legal case**

*R v T, JJ* [2012] SASCFC  
61 (1 June 2012)

» **Worksheet**

Principal offenders and accessories

## CHAPTER SUMMARY

**Purposes of criminal law**

- > Protect individuals, property and society
- > Maintain public order and security
- > Project justice and the rule of law
- > Protect rights and cultures
- > Improve society generally

**Presumption of innocence**

- > Guarantee that an accused person is entitled to be treated as innocent until a charge is proved beyond reasonable doubt

**Key concepts of criminal law**

- > Elements of a crime
  - *Mens rea* (guilty mind)
  - *Actus reus* (guilty act)
- > Strict liability
- > Age of criminal responsibility
  - Under 10 years: cannot be criminally responsible
  - Between 10 and 13 years: will be charged if proven that the child knew at the time that his or her actions were wrong (*doli incapax*)

- 14 years and over: criminally responsible for actions
- > Burden of proof – on the prosecution
- > Standard of proof – beyond reasonable doubt

**Types of crime**

- > Classified based on social purpose (nature) of the offence, type of offender or victim, or seriousness
- > Distinction between summary offences and indictable offences
  - Summary offences: minor offences generally heard in the Magistrates' Court before a magistrate
  - Indictable offences: serious offences generally heard in the higher courts before a judge and jury
  - Indictable offences heard and determined summarily: serious offences heard as if they were minor offences

**Possible participants in a crime**

- > Principal offenders and accessories

## REVISION QUESTIONS

- 1 Identify the age/s a person is considered to be criminally liable for their actions. (2 mark)
- 2 Distinguish between the following concepts:
  - a burden of proof and the standard of proof
  - b *mens rea* and *actus reus*
  - c indictable offence and summary offence. (6 marks)
- 3 Where would a person find the statutory definition and specific elements of most crimes? Use an example to support your answer. (2 marks)
- 4 Explain why *mens rea* is an important consideration in determining whether a crime has been committed. (3 marks)
- 5 Classify the following crimes according to the nature and the seriousness of the offence:
  - a murder
  - b begging
  - c shoplifting. (3 marks)
- 6 Consider each statement and identify whether it is true or false. If it is false, explain why.
  - a The only purpose of criminal law is to compensate the victim for their loss during a crime.



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

» **Student book questions**

Ch 4 Review

» **Revision notes**

Ch 4

» **assess quiz**

Ch 4

Test your skills with an auto-correcting multiple-choice quiz

- b The role of the police is to enforce the law and gather sufficient evidence to bring an accused before a court.
- c A crime may be hard to define due to generational change or differences in cultural and social norms.

(10 marks)

- 7 Determine whether the people involved in the following crimes will be considered principal offenders or accessories. Give reasons for your answer.

- a Mandy works in an electrical appliance warehouse. She cuts the wires to the burglar alarm and deliberately leaves a fire door unlocked in preparation for Dominic to steal items from the warehouse that night.
- b Alia knowingly lies to police. She continually claims her boyfriend, Carmello, was with her at the time he intentionally assaulted and caused serious injury to another person.

(4 marks)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task. Read the case study and answer the questions that follow.

### Evelyn caught in police blitz

Evelyn, 16, was caught during a police blitz at a licensed venue, using a proof-of-age card which suggested she was 18. Evelyn used the proof-of-age card to enter the venue.

Evelyn has been charged under section 83A(1) of the *Crimes Act 1958 (Vic)*. That section states that ‘a person must not make a false document with the intention that he or she, or another person, shall use

it to induce another person to accept it as genuine, and by reason of so accepting it do or not do some act to that other person’s, or to another person’s prejudice’. It is punishable by a maximum term of 10 years in prison.

The prosecution are seeking to rely on evidence that Evelyn used her friend’s birth certificate and health care card to then create the proof-of-age card.

### Practice assessment task questions

- 1 Who has the burden of proof in this case and to what standard does it need to be proved?  
(2 marks)
- 2 How would this crime be classified in terms of the nature of the behaviour? Make reference to the Crime Statistics Agency classifications of crime in your answer.  
(4 marks)
- 3 Evelyn believes that she is an accessory to a crime. Explain to Evelyn why her belief is incorrect.  
(4 marks)
- 4 Has Evelyn been charged with a summary offence or indictable offence? In your answer, provide two differences between the two.  
(5 marks)
- 5 Define the term presumption of innocence, and describe two ways that it will be protected in this case.  
(5 marks)
- 6 Describe the elements of the crime that need to be proven before Evelyn could be found guilty of the crime of making a false document, and comment on whether you think that each of the elements will be proved.  
(5 marks)

Total: 25 marks



# CHAPTER 5

## INDICTABLE

## OFFENCES

**Source 1** Indictable offences are serious crimes that are heard before a judge and jury in the Country Court or Supreme Court (if the accused pleads not guilty). In Victoria, murder is an indictable offence. In Chapter 5 you may choose to study a maximum of two indictable offences. Options include murder, culpable driving, rape and theft.

## OUTCOME

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

## KEY KNOWLEDGE

In this chapter, you have the option of choosing up to two indictable offences. For each offence, you will learn about:

- the elements of the offence
- possible defences
- the role of statute law and common law in developing the elements of the offence and the defences
- trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- the possible impact of the offence on individuals and society.

## KEY SKILLS

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

- define and use legal terminology
- research and analyse relevant information about criminal law and offences

## ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6) you are required to study **two criminal offences** in detail.

YOU MAY CHOOSE TO STUDY:	CHAPTERS INCLUDE:	PAGE:
• TWO indictable offences (from Chapter 5)	5.2 & 5.3 Murder	104
	5.4 & 5.5 Culpable driving	118
	5.6 & 5.7 Rape	127
	5.8 & 5.9 Theft	138

OR

YOU MAY CHOOSE TO STUDY:	CHAPTERS INCLUDE:	PAGE:
• TWO summary offences (from Chapter 6)	6.2 & 6.3 Assault	156
	6.4 & 6.5 Public drunkenness	169
	6.6 & 6.7 Offensive behaviour	176
	6.8 & 6.9 Graffiti	186

OR

• ONE indictable offence (from Chapter 5)	See above	See above
• ONE summary offence (from Chapter 6)		

- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
- use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios.

## KEY LEGAL TERMS

**culpable driving** the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol

**murder** the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or more) and of sound mind. Murder is the most serious homicide offence

**rape** the act of sexually penetrating another person without consent

**theft** the act of dishonestly taking property belonging to another person (without his or her consent) with the intention of permanently depriving that person of it

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# 5.1

## INTRODUCTION TO INDICTABLE OFFENCES

### indictable offence

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

### jury

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

### murder

the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or more) and of sound mind. Murder is the most serious homicide offence

### culpable driving

the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol

### rape

the act of sexually penetrating another person without consent

### theft

the act of dishonestly taking property belonging to another person (without his or her consent) with the intention of permanently depriving that person of it

### statute law

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

### common law

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

**Indictable offences** are serious crimes that are generally heard in the County Court or Supreme Court. If a person accused of an indictable offence pleads not guilty, the case will go to trial and a judge and **jury** will hear the matter in court. The jury will be the **decider of facts**. That is, the jury will have to decide whether the accused is guilty of the crime based on the evidence.

This chapter covers four types of indictable offences: **murder**, **culpable driving**, **rape** and **theft**.

For each indictable offence, you will consider:

- the specific elements of the offence
- possible defences
- the role of statute and common law in developing the elements and the defences
- trends and statistics
- the possible impact of the offence on individuals and society.

## Elements of indictable offences

All indictable offences consist of specific **elements** that make up the offence. The specific elements of a crime can be found in either a **statutory definition** of the offence (in Acts of Parliament) or its **common law definition** (developed through judge-made law).

In general, the **prosecutor** must prove all elements are present in a case before the accused can be found guilty. For this reason, the prosecution will charge the accused with crimes that best match the accused's behaviour and actions at the time of the offence. If one or more of the elements are not made out beyond reasonable doubt, then the accused will not be guilty of the offence.



**Source 1** Indictable offences are serious crimes which are tried (heard) in the County Court or Supreme Court. In this chapter you will have the option of studying up to two indictable offences in detail. You may choose to study murder, culpable driving, rape or theft.

# Possible defences to indictable offences

When a person is charged with a criminal offence, they can usually raise a defence. Many defences are known as 'general defences', meaning that they can be used as a defence for many different crimes. An example of a general defence is self-defence. Other defences are specific to a particular crime.

For each indictable offence in this chapter, you will look at the possible defences that can be used by an accused to defend a crime.

## Development of the law

Criminal law first developed through common law. Although now most of the criminal law is found in statutes (Acts of Parliament), some common law definitions and principles still apply to the definitions of offences and relevant defences.

For each indictable offence in this chapter, you will look at the role of parliament and the courts in developing the elements and the defences associated with that offence.

## Trends and statistics

Due to the importance of crime and its effects on individuals and the community, government agencies and other organisations record and analyse **crime statistics**.

The amount of crime occurring in a community (the number of individual offences of the same type) is called the incidence of crime. The Victorian **Crime Statistics Agency (CSA)** gathers and reports on the incidents of crime in Victoria. It was established on 1 January 2015 as an independent statistics agency to improve Victoria's crime reporting.

These statistics are collected and may be compared with those in other states and countries so the government can determine the amount of crime in our community, measure the effectiveness of law enforcement agencies and plan for the best use of resources so our society is as crime-free as possible. A new website launched in June 2017, *Crime Statistics Australia*, provides statistics and data on crime in Australia.

A high crime rate in a particular community has social, economic and political effects. For example, people may not feel safe in their neighbourhood and begin to interact with others differently. Families and businesses may move away from the area. This makes the area less desirable so housing prices and employment opportunities decrease. The community may demand better law enforcement from government, leading to new laws or an increase in taxes and other associated costs.

This chapter will analyse crime statistics in relation to each indictable offence in two jurisdictions. When looking at crime statistics, remember that statistics are not always accurate, and do not always truly reflect the level of crime in a community. This is sometimes because crime is often not reported by victims or members of the community.

Crime statistics may also not truly reflect the level of crime for other reasons. For example, an audit of Queensland crime statistics by the Queensland Audit Office was released on 26 April 2017. The report suggested issues with under-reporting of crimes by police to keep them 'off the books'. Some police had chased clearance targets instead of accuracy, and some officers manipulated figures to give false perceptions about the state's crime rates.

### Study tip

The skill that you need to demonstrate in this Area of Study is your ability to argue the criminal culpability of an accused. This means you should be able to analyse facts given to you in a scenario and argue whether the accused will be found guilty or not of the crime. Make sure you are familiar with all the elements and all of the defences applicable to that crime.

### prosecutor

the Crown in its role of bringing a criminal case to court (also called 'the prosecution')

### crime statistics

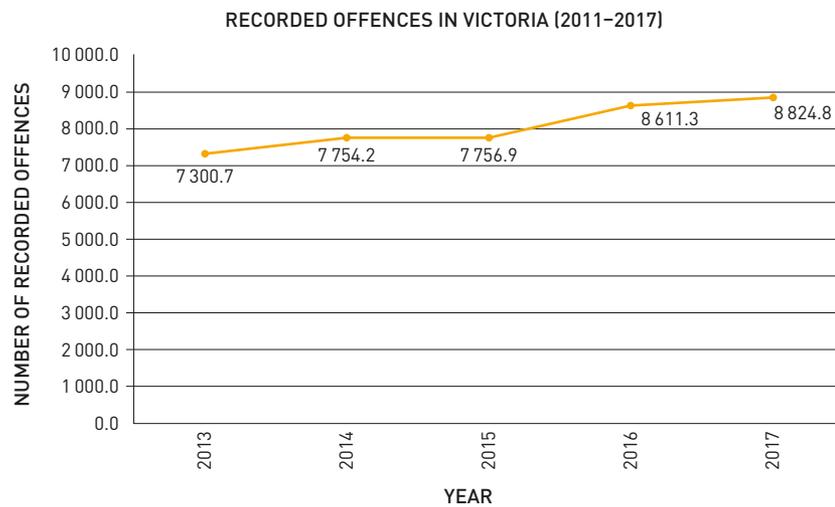
information (i.e. data) collected by authorities such as the police and analysed to track the level of crime or offending in the community. Crime statistics also track the types and levels of sentence given to convicted offenders

### Crime Statistics Agency (CSA)

an independent organisation responsible for processing, analysing and publishing Victorian crime statistics

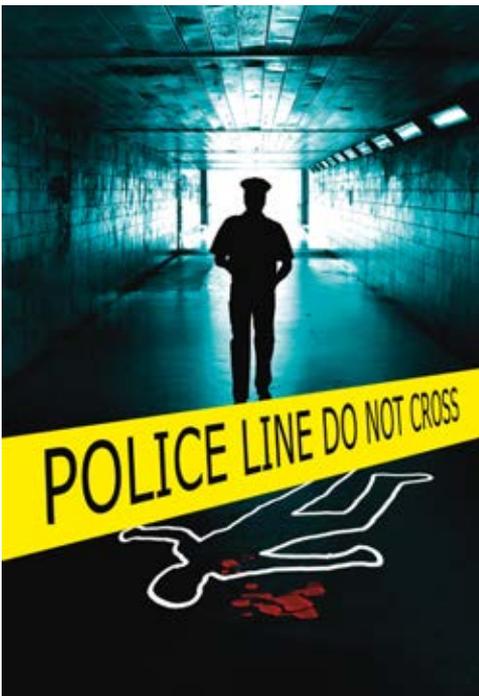
### Did you know?

Criminologists study the social effects of crime on society from various perspectives. In universities they are usually found in the Sociology department, not the Law faculty. Outside universities they generally work for law enforcement agencies. They study normal and abnormal behaviour and develop theories about the best way to reduce crime.



Source: Crime Statistics Agency, Recorded Offences, Year ending 31 March 2017

**Source 2** This graph represents offences recorded in Victoria between April 2011 and March 2017. These offences include crimes that have been reported to police as well as those identified by police.



**Source 3** Indictable offences have a devastating impact on our community.

## Possible impacts of indictable offences

In Australia, indictable offences are committed on a daily basis and the effects can be felt across the community in many different ways. These crimes can have a life-changing and negative impact on victims, the offenders and the general community. They can shatter community trust, make us question our shared values and reduce our enjoyment of a peaceful, cooperative community.

Victims and their families may feel helpless, angry and anxious for months, or years, after a serious crime is committed against them. These crimes often affect a victim's physical and psychological health and their ability to cope at home and at work. Some victims never recover from the trauma associated with a serious crime.

Even if an offender feels remorse and rehabilitates themselves, being punished for their crime has consequences as well. The consequences include a criminal record and the stigma of being found guilty of an indictable offence. These last for a lifetime. These consequences have practical effects, too – having a criminal record may limit a person's ability to work and travel overseas.

The following case study further introduces the indictable offence of murder.

### CASE

### STUDY

## Man charged in cold case

On Melbourne Cup Day in 1984, Kylie Maybury, who was six years old at the time, was walking back home from a convenience store in Preston after buying some sugar for her mum. She never returned home, and for 33 years her mother and her family never found out what happened to her. The crime had a great effect on her family, particularly her mother and grandfather. A number of people were suspected of having murdered Kylie.

Finally, cold case detectives launched an investigation. DNA evidence, which was not available at the time of the crime, and an investigation into a car used at the time, resulted in the charging of Gregory Keith Davies, who was 74 in 2017. He eventually pleaded guilty to Kylie's murder. Finally, her family have some answers to a crime that had a ripple effect on them and on the wider community.

## 5.1

## CHECK YOUR LEARNING

### Define and explain

- 1 What is the relevance of the elements of a crime in a criminal case?
- 2 What is the possible effect of an indictable offence on both the victim and the offender? Provide an example of a case you have studied so far this year.
- 3 Why do communities gather crime statistics?
- 4 What is the role of the Crime Statistics Agency in Victoria?

### Synthesise and apply

- 5 Look back at the data contained in Source 2.
  - a Has Victoria's recorded offence rate increased or decreased in the last five years? Suggest one possible reason for this increase or decrease.
  - b How might this increase or decrease in the recorded offence rate impact on the community in general?
- 6 Conduct some research. Compare Victoria's offender rates with those in other Australian states and write a short paragraph about any similarities or differences.

- 7 Access the Crime Statistics Australia website. A link is provided on your obook assess.
  - a Choose one set of statistics that is contained on the website.
  - b Provide a summary of those statistics and what the trend shows over the years.
  - c Write down two possible reasons why the statistics may not be accurate.
  - d Come together as a class and discuss your views.

### Analyse and evaluate

- 8 Do some internet research to see whether any reforms designed to improve crime statistics have been introduced in Queensland. Seven recommendations were made in April 2017. Have the recommendations been implemented? Discuss the extent to which these recommendations will improve the recording of crime statistics in Queensland.

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

- |  |  |  |   |
|--|--|--|---|
| » <b>Student book questions</b><br>5.1 Check your learning | » <b>Video tutorial</b><br>Introduction to indictable offences | » <b>Going further</b><br>Criminal justice system – reliability and integration of data report | » <b>Weblink</b><br>Crime Statistics Agency |
|--|--|--|---|

Information on a number of other **indictable offences** is also provided on your obook assess. You may wish to use this information as the basis for a study of your choice. These other indictable offences include: Aggravated burglary; Home invasion; Criminal damage.

# 5.2

## MURDER – ELEMENTS & DEFENCES

### murder

the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or more) and of sound mind. Murder is the most serious homicide offence

### unlawful homicide

the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing an infant or baby), child homicide and culpable driving causing death are unlawful homicide offences

### malice aforethought

the intention to kill or cause serious injury to a person. This malicious intention is the mental element (i.e. an intention to inflict harm) necessary for murder

### *doli incapax*

a Latin term meaning 'incapable of evil'; the principle that a child under 14 years of age cannot form *mens rea* (guilty mind) because he or she does not have the intellectual or moral capacity to know the difference between right and wrong

### causation

the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

**Murder** is a form of **unlawful homicide**. It is the unlawful killing of another person with **malice aforethought**, by a person who is of the age of discretion (i.e. 10 years old and over) and of sound mind.

Murder is the most serious of a group of homicide offences. On the scale of seriousness, murder is a 'category 1' offence which must be given a prison sentence. The maximum penalty for murder is life imprisonment.

Whether a person is found guilty of committing murder depends on the elements of the offence being proved.

### Elements of murder

For a person to be found guilty of murder, the prosecution must prove each of the following six elements beyond reasonable doubt:

- the killing was unlawful
- the victim was a human being
- the accused was a person over the age of discretion
- the accused caused the victim's death
- the accused was a person of sound mind
- there was malice aforethought.

### Element 1 – The killing was unlawful

The prosecutor must first establish or prove that the accused did not have a lawful reason for causing the other person's death. Examples of **lawful** killings are:

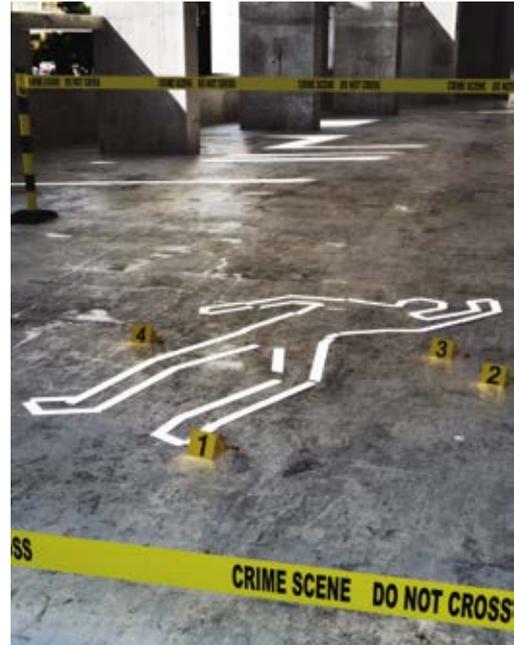
- the use of the death penalty in countries where capital punishment is legal (though this would not be a lawful killing in Australia as the death penalty is no longer used as a sentence)
- a soldier killing an enemy in battle
- a person acting in self-defence or under duress, and a court considers that action reasonable.

### Element 2 – The victim was a human being

The victim must be a living person who has been born (i.e. not an unborn baby or an animal).

### Element 3 – The accused was a person over the age of discretion

The accused must be at least 10 years of age. The law presumes that people under the age of 10 are incapable of forming the intent to commit a crime (i.e. *doli incapax*).



**Source 1** Murder is the unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old and over) and of sound mind.

Tests or exam questions may ask you to determine whether a crime has been committed. To maximise your chances of receiving full marks, check the accused's actions against each of the elements of the crime. For example, all the elements of murder must be proved for an accused to be found guilty of murder.

## Element 4 – The accused caused the victim's death

The accused's actions must have contributed significantly and substantially to a person's death. This is known as **causation**. Causation means there must be a direct or unbroken causal link between the accused's actions and the death of the victim. It is usually left to the jury to decide whether the accused caused the victim's death.

When considering whether the accused caused the victim's death it is useful to ask: 'Would the death have occurred, when it did, without the accused's actions?' If the answer is no, then the accused caused the victim's death. For example, if the accused shoots the victim and the victim dies two days later as a result of the gunshot, then there is a direct, unbroken causal link between the accused's actions and the death of the victim. The victim would not have ordinarily died within two days if he or she had not been shot by the accused.

If something intervenes to break the causal link between the accused's actions and the death, then the accused may not be guilty of murder. The following example demonstrates a break in the causal link.

### A break in the causal link

Jack and Richard had a disagreement and Jack punched Richard. Jack left Richard unconscious under a tree. Minutes later, a bolt of lightning struck the tree. A tree branch fell and killed Richard. In this example, the lightning represents a broken link, which is then a break in the causal link.



### EXAMPLE

**Source 2** A lightning strike created a break in the causal link. As a result, there was no longer a connection between Jack punching Richard, and Richard's death.

However, it is not necessary for the accused's actions to be the **sole cause of death** for it to be murder, but the accused's actions must have contributed 'significantly' to the death.

## Element 5 – The accused was a person of sound mind

The prosecution must establish that the accused was a person of sound mind. This is a person who knows right from wrong, and understands the nature of what they have done. The law presumes that a person of unsound mind cannot form the intention to commit a crime (*mens rea*) because they do not understand what they are doing or they do not know that what they are doing is wrong.

For example, if the accused was in a psychotic state and stabbed another person, because at the time they thought they were being attacked by a wild animal, then they were not 'of sound mind' at the time of doing the act.

### *mens rea*

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

## Element 6 – There was malice aforethought

To prove murder, the prosecution must prove there was malice aforethought (i.e. an intention to cause serious harm). The state of mind that a person can have (i.e. the intention to cause serious harm) can exist in different forms, as outlined in Source 3.

## MALICE AFORETHOUGHT

STATE OF MIND	DESCRIPTION
An intention to kill	The accused intended to kill a person (not necessarily the deceased)
An intention to inflict serious injury	The accused intended to inflict serious injury, but it resulted in death
Reckless indifference	The accused knew it was probable (i.e. highly likely) that their actions would cause death or serious injury to another person and they were indifferent to this fact
An intention to assault a person making a lawful arrest (which resulted in that person's death)	The accused may have had no intention to kill anyone, but they were trying to escape arrest when the death occurred
An unintentional killing in the process of committing a violent crime	The accused may have had no intention to kill anyone, but they were committing a violent crime (punishable by 10 years in prison or more) when the death occurred

**Source 3** Malice aforethought can apply to a number of states of mind (as shown above).

As seen in Source 3 above, if a person unintentionally kills another person while committing a violent crime, the killing can still constitute murder. The following legal case is an example of how an armed robbery – a violent crime – resulted in a finding of murder.

## LEGAL

## CASE

### Jewellery store robbery ends in murder

*DPP v Perry; Perry v The Queen* [2016] VSCA 152 (1 July 2016)

On 12 July 2013 during an armed robbery of a store in Hastings, Gavin Perry stabbed and killed Dermott O'Toole, a jewellery store owner in his sixties. Perry, armed with a 20-centimetre knife and high on the drug 'ice', entered the store and attacked Mrs O'Toole. Her husband, Mr O'Toole, tried to stop the attack and was stabbed twice in the chest while lying on his back on the floor. He died as a result. Perry said he did not intend to kill when he entered the store.

Perry had a long criminal history and was on parole at the time of the killing. He pleaded guilty to murder, intentionally causing injury and armed robbery. Perry also pleaded guilty to two other armed robbery charges. He was sentenced to 20 years for murder. His total sentence, for all offences, was 27 years imprisonment with a non-parole period of 23 years.

Perry appealed against the severity of the sentence. The Director of Public Prosecutions also appealed, on the grounds that the sentence was too lenient. The Victorian Court of Appeal rejected both appeals.

The Court of Appeal said the offender's intention was relevant, and 'it must be proved – or admitted – that the 'act of violence' which caused the death was conscious, voluntary and deliberate'. It also said 'the offence of statutory murder covers the full range of conduct, from the case where the death is an accidental result of the act of violence to the case where the death is the intended result of the act'.



**Source 4** Expressions of community grief at the loss of Dermott O'Toole through placing flowers in a public place.

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## → GOING FURTHER

Murder is not the only homicide offence. If all the elements of the murder offence are not present, the accused may still be charged with, and found guilty of, other offences. Some additional homicide offences include:

- **attempted murder** – Trying to murder someone or a failed attempt at murder
- **conspiracy to murder** – Planning with at least one other person to murder someone
- **incitement to murder** – Encouraging or authorising someone to commit a murder
- **manslaughter** – The unintentional killing of a person due to a reckless, dangerous act or negligent behaviour
- **infanticide** – The killing by a mother of a child under 2 years old while suffering a mental condition caused by the effects of that child's birth
- **child homicide** – The killing of a child under 6 years of age in circumstances that would normally be manslaughter.

Information on these additional homicide offences are provided in your obook assess.

### *Did you know?*

A Victorian man kept his dead wife's body in a drum in his backyard for 23 years. The murder was discovered when his son-in-law found her remains as part of a general clean-up.

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## Possible defences to murder

Each indictable offence consists of specific elements. Failure to prove all elements will result in the accused being found not guilty of the crime, and the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- the killing was lawful
- the accused was under the age of discretion
- there was a break in causation and the accused did not cause the victim's death.

In some cases, the accused may be found guilty of an alternative offence should the elements for the alternative offence be proven. For example, murder may be reduced to manslaughter if the prosecution can prove the unlawful killing, but not the *mens rea* (the intention).

Other than defending the charge for murder on the basis that one or more of the elements has not been satisfied, the accused can rely on a particular defence. Several defences to a charge of murder are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

There are five possible defences to a charge of murder. These are:

- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- involuntary actions.

### Defence 1 – Self-defence

A person is not guilty of murder if:

- they believed that their actions were necessary in self-defence
- their actions were reasonable in the circumstances as the person perceived them.

In murder cases, the accused must believe their actions were necessary to protect themselves or another person from death or really serious injury.



**Source 5** The law allows people to take reasonable action (based on the circumstances) to protect themselves or others in life-threatening situations.

**mental impairment**  
a condition of the mind which impacts on a person's ability to know the nature and quality of his or her conduct, or that the conduct was wrong

## Defence 2 – Mental impairment

Another defence that can be raised by an accused is the **mental impairment** defence. A person is not guilty of murder if, at the time of the offence, they were suffering from a mental illness (or disease of the mind) and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

A successful defence of mental impairment does not immediately result in the accused being released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'.

In these cases, the court will generally impose a custodial supervision order (i.e. an order that involves some form of detention or supervision – often in a medical facility). This order has a nominal term of 25 years, and confines the person to a psychiatric facility so appropriate care and treatment can be provided. The court will periodically review the order.

An example of a legal case where a person was found not guilty due to mental impairment is provided below.

### LEGAL

### CASE

## Undiagnosed psychosis results in a killing

*DPP v Woodhead* [2016] VSC 472 (26 April 2016)

Easton Woodhead, a man who believed he was the son of a werewolf, was charged with the murder of a homeless man. He was found not guilty due to mental impairment. Woodhead believed the homeless man was responsible for the theft of his motorcycle. In the early hours of the morning on 5 January 2014, Woodhead stabbed the homeless man, known as 'Mouse', several times with a large knife when he refused to help Woodhead retrieve his motorcycle. Mouse died soon after the attack.

Extensive psychiatric evidence was given at the trial. It showed Woodhead's actions were due to an undiagnosed psychosis. A witness for the prosecution gave evidence that Woodhead was probably a paranoid schizophrenic and that he knew, at the time of the offence, that what he was doing was wrong.

Since the killing, Woodhead has received treatment and has shown remorse for his actions. He has been detained under a custodial supervision order. The order will be reviewed periodically.



**Source 6** Easton Woodhead leaves court under security escort

**duress**  
strong mental pressure on someone to overcome their independent will and force them to do something

## Defence 3 – Duress

A person is not guilty of murder if they act under **duress**. The defence of duress applies if, at the time of the offence:

- the person has a **reasonable belief** that:
  - a threat of harm exists
  - the threat would be carried out unless the offence was committed
  - committing an offence is the only reasonable way to avoid the threatened harm
- the person's conduct is a reasonable response to the threat.

In murder cases the threat must be to inflict death or really serious injury. Evidence of family violence may be used to prove a person acted under duress.

There is no duress if the threat comes from a person with whom the accused voluntarily associates to commit an act of violence.

## Defence 4 – Sudden or extraordinary emergency

A person is not guilty of murder if they act as a result of a sudden or extraordinary emergency.

The person must reasonably believe that:

- there is a sudden or extraordinary emergency
- their actions are the only reasonable way of dealing with the situation
- their actions are a reasonable response to the situation.

In murder cases, the sudden or extraordinary emergency must involve risk of death or serious injury.

## Defence 5 – Involuntary actions

A person is not guilty of murder if their actions were involuntary. The involuntary nature of the accused's actions may mean that one or more elements of the crime cannot be met. While not technically a defence, the involuntary nature of the accused's actions may mean that a guilty mind (*mens rea*) cannot be proved. This may see the accused acquitted of the offence, and charged or found guilty of a lesser offence.

For a murder charge, the accused may state that their actions were involuntary due to:

- intoxication
- **automatism**
- accident.

### Intoxication

The defence of intoxication exists at both common law (i.e. a common law defence) and statute law (i.e. a statutory defence). A person may be intoxicated by reason of consumption of alcohol, taking drugs, or some other substance.

Under **common law**, gross intoxication is a way of proving that the accused acted involuntarily or without intent. If the accused is so drunk or affected by drugs that he or she cannot form the intention to commit the crime, then the person may be found not guilty. This defence is rarely successful because the level of intoxication required to make a person's actions involuntary is extreme.

In addition, the *Crimes Act 1958* (Vic) specifies the way a court is to deal with intoxication when it is raised in cases involving self-defence, duress and sudden or extraordinary emergency. These defences often require the court to assess whether a person's belief or response was 'reasonable'. In determining reasonableness, the court must use two tests based on whether the accused's intoxication was:

- **self-induced intoxication** – Intoxication is considered to be self-induced unless it is involuntary or due to fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress, force, or the effects of proper use of prescription or non-prescription medication. In this situation, the court must compare the accused's belief or actions to those of a reasonable person who is not intoxicated
- not self-induced intoxication – The court must compare the accused's belief or actions to those of a reasonable person intoxicated to the same level as the accused.

The legal case on the next page highlights an example of murder as a result of self-induced intoxication.



**Source 7** Under duress, a person may have no option but to obey and commit a crime.

#### **reasonable belief**

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct

#### **automatism**

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

#### **self-induced intoxication**

the act of getting drunk of your own free will. Intoxication (i.e. drunkenness) is assumed to occur by a person's own actions unless there was a factor that made it involuntary

## LEGAL

## CASE

### Drunken rage at being woken

#### *R v Cook* [2015] VSC 406 (19 August 2015)

Following a party at his home in 2014, Steve Cook fell asleep in the backyard. He admitted to drinking approximately 15 bottles of beer. When his partner and a female relative tried to wake him, he woke in a rage and hit out at both women. His partner fell to the ground. Cook then picked up the chair and hit her with such force that the chair leg penetrated her skull. Cook was intoxicated at the time, to the point that he could not walk properly. He was remorseful and cooperative during police questioning.

The Supreme Court heard that the couple's relationship was, at times, violent. Cook's violence was attributed to his disadvantaged background, alcohol dependence and borderline personality disorder.

A Supreme Court jury found Cook guilty of murder. He was sentenced to 21 years and 6 months in prison with a non-parole period of 17 years and 6 months.



#### Source 8

Sleepwalking is one condition during which a person might commit an involuntary act. A sleeping person will not be capable of having intention (*mens rea*).

### Automatism

Automatism can be relied on where a person has a total loss of control over their bodily movements. Because they have completely lost control, it is accepted that they cannot form the intention to commit a crime, since they are not conscious or aware of what they are doing. Therefore, the action is considered to be involuntary.

It is not enough to say 'I didn't know what I was doing'. Some external factor had to be the sole cause of the actions. A person may be found not guilty of an offence if they committed the crime:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism does not mean the person has a mental illness. Rather, the person is in a zombie-like state and 'out of it' mentally, but capable of physical acts. For this reason it is sometimes called 'sane automatism' to distinguish it from 'insane automatism', which is also involuntary, but results from a mental illness. Automatism is a defence that is extremely rare and difficult to prove. The leading Australian case on the defence is *R v Falconer* (1990) 171 CLR 30.

## LEGAL

## CASE

### History of violent abuse, sudden shock

#### *R v Falconer* (1990) 171 CLR 30

Mary Sandra Falconer was convicted of the murder of her husband Gordon Robert Falconer. Mrs Falconer had suffered 30 years of violent abuse at the hands of her husband. Just before she killed him, he had sexually assaulted her and she had become aware of facts which made her suspect him of sexually abusing her foster daughter. During the hearing, Mrs Falconer claimed that there was a complete blank in her memory until she woke up with a gun and her deceased husband next to her.

After being convicted, Mrs Falconer appealed on a point of law. The High Court held that if there was evidence of an external psychological factor (i.e. severe trauma and abuse) she could have acted in a dissociative state. This meant that although she was sane (i.e. not mentally ill), it was possible that her actions were not under her conscious control. A new trial was reordered.

## Accident

An accused may claim that their actions were accidental, and that he or she acted without intention to commit the crime. If the defence is raised, the accused may be found not guilty if the actions he or she took to commit the offence were involuntary, not conscious or deliberate and/or the person did not have the mental state of mind required to commit the offence.

### 5.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the following terms:
  - a unlawful homicide
  - b murder
  - c automatism.
- 2 How can a killing be murder when there is no real intention to kill or inflict really serious injury?
- 3 What is a causal link and how can it be broken?
- 4 Explain what is meant by 'self-induced intoxication'.

### Synthesise and apply

- 5 If you had a fight with a person on the beach and left him or her unconscious on the deserted beach, do you think you could be found guilty of murder if the victim had drowned when the tide came in, while still unconscious on the beach? Give reasons.
- 6 Read each of the scenarios below and identify the type of malice aforethought that applies in each. Justify your answer.
  - a A two-year-old child dies. The parents, with the intention of punishing the child, had refused the child food for long periods of time.
  - b Cash was due to inherit a fortune if Sunny died, so after careful planning he poisoned Sunny.
  - c Smith used a rifle to shoot Waterford in the arm. Smith was a terrible shot and Waterford died as a result.
- 7 Argue the cases below on behalf of either the prosecutor or the accused about whether or not a murder has been committed.

- a Alf had a verbal fight with his brother. His brother pushed him and calmly walked away. Alf then punched him hard in the back of the head. The brother fell, hit his head and died.
- b Bree wanted her husband Tom's money, so she laced his food with sleeping tablets and set fire to their house while he slept. Tom died of smoke inhalation.
- c Stan killed his mother. He wrongly thought she was going to evict him from the family home. His psychiatrist confirmed Stan had recently stopped taking medication that helped to control his mental illness (which causes paranoia and violent tendencies). The doctor said 'at the time of the killing, it was highly likely that Stan was in a psychotic state'.

### Analyse and evaluate

- 8 Select one legal case from this chapter and conduct some additional research to answer the following questions.
  - a Briefly describe the facts of the case.
  - b Explain whether the facts of the case meet each element of the offence.
  - c Consider the elements and the defences. In your view, what was the weakest element, or the strongest defence? Write a short paragraph of the arguments you would make, if you were the accused, as to why the offence was not murder.



These additional resources are available via your **obook assess**:

» **Student book questions**

5.2 Check your learning

» **Video tutorial**

How to argue criminal culpability

» **Going further**

Other homicide offences

» **Weblink**

Murder (*Crimes Act 1958* (Vic))

# MURDER – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to murder:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

## The role of the law in developing the elements and defences

### Common law

Murder is an old common law offence and has a long history in cases in both England and Australia. Many of the principles of murder, including the elements, have been developed through common law. The definition of murder is still contained in common law, with Section 3 of the *Crimes Act* specifying the penalty for the crime. That is, all of the elements of murder are not set out in the *Crimes Act*, but have been established throughout the years by the courts.

The courts had also developed what is known as the ‘felony murder rule’. This rule was that a person who **unintentionally** caused the death of another by an act of violence could be convicted of murder as if that person had the intention to kill. Section 3A was inserted into the *Crimes Act*, which **abrogates** (cancels) the felony murder rule.

Various common law defences can still be raised to defend a murder charge. These include the defences of intoxication, accident and automatism.

### Statute law

Although the elements of murder are contained in common law, various additions or changes have been made to the crime, as well as the defences that are available in murder cases. For example, there is now a statutory intoxication defence, set out in Section 322T of the *Crimes Act*.

The Victorian Parliament has also had a significant role in changing the law in relation to killings involving family violence and abolishing certain defences. A summary is provided below.

### The abolition of provocation and defensive homicide

Before the defence of **provocation** was abolished, a person charged with murder could be found guilty of manslaughter instead. In 2005, following the **Victorian Law Reform Commission’s** extensive review of homicide laws, the Victorian Parliament abolished (i.e. removed) the partial defence of provocation. This legal change meant that people who killed their domestic partner out of jealousy, rage or a sudden loss of control could no longer argue that the victim provoked them in some way.

Women’s groups and the families of people killed as a result of family violence welcomed the change. They felt the law was out of date, harked back to days when women had few rights and blamed the victim rather than the offender.

At the same time, the Victorian Parliament created the offence of **defensive homicide** for people who killed an abusive partner or family member after suffering ongoing family violence. This offence applied in cases where a person genuinely believed that the killing of another person was necessary to defend themselves or someone else, but their belief was unreasonable in the circumstances (e.g. it

#### abrogate

to cancel or abolish a court-made law by passing an Act of Parliament

#### provocation

a defence alleging loss of control as a response to the sufficient provocative conduct of another person

#### Victorian Law Reform Commission (VLRC)

Victoria’s leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria’s laws

was not 'self-defence in the moment', so they had time to take another course of action, or it was 'in the moment' but the person used unreasonable force). These offenders would be not guilty of murder, but guilty of defensive homicide.

The new offence of defensive homicide was initially welcomed, but was soon criticised. It was supposed to help women who killed their violent partners, but research revealed it was not achieving its purpose. A Victorian Department of Justice discussion paper noted that between 2005 and 2010 there were 13 defensive homicide cases in Victoria. Many were the result of a single violent incident between males, with a minority of cases involving women or family relationships.

In 2014, the offence of defensive homicide was abolished. To provide a suitable defence for persons who kill following prolonged family violence, the law of self-defence was changed. The law now states that a person is not guilty of murder if the person believes their conduct is necessary in self-defence and their behaviour is reasonable in the circumstances as they perceive them.



**Source 1** Women's groups and the families of people killed by family violence welcomed the abolition (removal) of the partial defence of provocation in 2005.

## Trends and statistics

While Australia's homicide rates fluctuate from year to year, there is generally no significant increase. As shown in Source 2, homicide rates are relatively stable and decreasing in some states and territories over time.

STATE	HOMICIDE RATES IN AUSTRALIA (2012-2016)				
	2012	2013	2014	2015	2016
New South Wales	1.5	1.8	1.5	1.3	1.3
Victoria	1.6	1.4	1.8	1.7	1.9
Queensland	2.3	2.0	2.4	2.2	2.4
South Australia	3.0	2.4	2.0	2.1	2.2
Western Australia	2.2	1.8	1.4	1.9	2.4
Tasmania	2.5	-	1.7	1.2	2.5
Northern Territory	9.8	9.9	4.9	6.5	2.0
Australian Capital Territory	1.6	-	0.8	1.5	1.0

Source: Australian Bureau of Statistics, Recorded Crime – Victims Australia, 2016

**Source 2** While Australia's homicide rates fluctuate from year to year, there is generally no significant increase in murders.

## Victoria

In Victoria, the statistics show that the homicide rate has generally fluctuated, without any real trend of increasing or decreasing. The number of homicide incidents recorded generally reflects the size of the population.

Victoria's **Crime Statistics Agency (CSA)** records show that between April 2016 and March 2017, of the 237 recorded homicide offences recorded during that period:

- 69 were murder offences, 82 were attempted murder offences and 76 were driving causing death offences
- 201 were not family related, and 36 were family related.

**Crime Statistics Agency (CSA)**  
an independent organisation responsible for processing, analysing and publishing Victorian crime statistics

### Sentencing Advisory Council

an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters

The **Sentencing Advisory Council** records that there were 106 murder cases determined between 1 July 2011 and 30 June 2016. Of those cases:

- 6.6 per cent of the offenders were female and the rest were male
- 30.2 per cent of the offenders were aged between 35 and 44 years, 27.4 per cent were aged between 25 and 34 years, and 11.3 per cent were aged 24 or under
- all of the offenders received a term of imprisonment, with the vast majority of offenders receiving a prison term of 18 years or more.

## Queensland

Similar to Victoria, Queensland's homicide rate has generally fluctuated and reflects the size of its population. Queensland's records show that between 1 June 2016 and 30 June 2017, there were 134 homicides. Of those, 38 were murder offences, 75 were attempted murder offences and 12 were driving causing death offences.

The Queensland Sentencing Advisory Council in its Sentencing Spotlight on Murder report, published in April 2017, reported that:

- between 1 July 2005 and 30 June 2016, there were 195 murder offenders
- 10 offenders were aged under 17 years
- 83.3 per cent of offenders were male
- the average age of offender was 37 years. Interestingly, the average age of female offenders was 42.8 years (though this increase may be because of fewer female offenders which therefore can skew averages)
- 18.5 per cent of the offenders were Aboriginal or Torres Strait Islander. This statistic has been criticised, given Indigenous people make up only 3.8 per cent of the population
- all adult offenders received life in prison.

## Possible impacts of murder

The most obvious impact of murder is the loss of the victim's life. However, murder also has a devastating and lasting impact on the victim's family and friends. It results in grief, anger and emotional trauma. This trauma may be exacerbated (made worse) when family members witness the attack, discover the body or find out the attack was excessively brutal. This trauma may be long-lasting, particularly if the police cannot find the offender or if it takes the legal system several years to bring the offender to court. Family members may feel stress long after the legal system has dealt with the case. Significant dates like the anniversary of the death or the victim's birthday can remind family members of their loss.

Family members often feel they have few rights when dealing with the legal system or the media. They are not the immediate victim and are entitled to only limited information about police investigations. They often feel 'invisible' in the criminal justice system. They may want to know exactly how their family member died, but that information may be withheld for legal reasons. They may also be subject to media scrutiny, making their private lives public. Constant media reports, published images of the victim and speculation about the family member's death can cause family members distress.

*Bayley v The Queen* [2013] VSCA 295 (21 October 2013) is a murder case that shocked the community and attracted significant media coverage.

## Adrian Bayley's offences and sentences

### *Bayley v The Queen* [2013] VSCA 295 (21 October 2013)

In 2012 Adrian Bayley, a man with an extensive history of violence, raped and murdered Gillian ('Jill') Meagher, dragging her from the street as she walked home from a pub in Brunswick.

On 19 June 2013, Bayley was sentenced in the Supreme Court to life in prison with a non-parole period of 35 years. He appealed, saying the sentence was too harsh.

The appeal judges found that the gravity of the killing warranted a life sentence. They said:

The non-parole period fixed by His Honour was entirely within range in the circumstances of this offending. We observe that the learned judge made limited moderation for the early plea and some remorse. However, those matters needed to be put in context. Initially the applicant in the record of interview denied involvement. It was only when confronted by the evidence against him that he admitted guilt and assisted the police. Furthermore, the gravity of the applicant's prior history – including 20 sexual assaults involving 17 rapes – were carefully laid out and considered by His Honour.

Three further cases were brought against Bailey in 2014 and 2015, and he was found guilty of three more rapes, which were committed before he killed Meagher. His non-parole period was extended to 43 years. He appealed, and gained a reduction to 40 years. He cannot be released until 2055, when he is 83.



**Source 3** Adrian Bayley was sentenced to life imprisonment for the murder of Jill Meagher.

LEGAL

CASE

## Victim impact statements

To assist victims and their families, courts can take **victim impact statements** into account when sentencing. These can be heart-rending, as the judge in the *R v Zandipour* [2016] VSC 387 (12 July 2016) case noted.

## Brutal murder, random and unprovoked

### *R v Zandipour* [2016] VSC 387 (12 July 2016)

On 18 October 2014, Kyle Zandipour, 29, brutally attacked a stranger, Joshua Hardy at 1.10 am outside a McDonald's store on St Kilda Road, Melbourne. After delivering three vicious kicks he stomped on Hardy's head, causing his vertebral artery to tear. He then turned and walked away. He did not assist the victim or stop to see if he was hurt. Later, he showed some remorse. He had few prior convictions and good prospects of rehabilitation.

The jury found Zandipour guilty. In sentencing, the judge commented that the victim did not represent any kind of threat and that this was a random act of violence. The judge also referred to the need to deter others from committing similar acts.

Zandipour was sentenced to 20 years' imprisonment with a non-parole period of 16 years. The judge referred to the impact on the family and the community, saying:

LEGAL

CASE

#### **victim impact statement**

a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

Your actions have caused untold suffering. Mr Hardy's father, David, told the Court about the 100 feet tall waves of grief that crash over him. Six seconds of mindless violence has unleashed a tsunami of grief that has swept over all of those who loved Joshua Hardy. Their lives will never be the same. I have had regard to their victim impact statements in sentencing you ... In senselessly taking another life, you have cruelled your own future ...

The Court has a duty to uphold the sanctity of human life. There must never be any doubt about the commitment of the community, and the Court through which it speaks, to defend the importance of human life with the imposition of substantial penalties.

Furthermore, crimes of this kind, involving random acts of violence dished out to hapless passers-by on the streets of Melbourne must be strongly denounced and must attract a significant penalty to deter others from engaging in like behaviour.

Murder also impacts on public confidence in the police and the legal system to keep the community safe. People who live in close proximity to where the murder occurred may no longer feel safe. People in the broader community may feel vulnerable and become cautious about where they go and with whom they interact. Sometimes a particularly cruel or brutal murder spurs the community into action. People may march in the street or place flowers in memory of the victim to show solidarity or to advocate for a change in the law. The Bourke Street tragedy, detailed in the case study below, was another incident that unsettled the public's confidence in the law.

## CASE

## STUDY

### bail

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

### bail justice

a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications for bail, remand and interim or temporary accommodation orders relating to children

## Bourke Street tragedy

In January 2017 a tragic incident occurred when a 26-year-old driver, Dimitrius Gargasoulas, drove his car down Bourke Street and through Bourke Street Mall – a major shopping mall in the middle of Melbourne's CBD. Gargasoulas allegedly killed six people, including a 3-month-old and a 10-year-old school girl, and injured many others. Within days of the tragedy, the Victorian Government announced that it would amend the *Bail Act 1977* (Vic) to establish a night court so that magistrates could hear bail applications for people charged with violent offences outside normal operating hours. The Government swiftly announced this proposed law reform because the alleged offender in the tragedy had been released into the community on **bail** by an after-hours **bail justice** only 12 days before the deadly incident.

Bail justices are adults who volunteer to work in the criminal justice system generally outside normal court operating hours (e.g. on the weekends or late at night) hearing applications for bail, remand and the interim or temporary accommodation orders relating to children. While bail justices undertake a Justice of the Peace course, they do not have formal legal training and expertise like magistrates. The purpose of this change in the law was to increase the safety and protection of the community. It is also an example of a law changing as a result of a specific event or incident.



Source 4 Bourke Street floral shrine

Source 5 lists some of the possible impacts that murder can have on individuals (i.e. the offenders, victims and their families) and society.

## POSSIBLE IMPACTS OF MURDER

Impacts on the offender	Impacts on victims and their families	Impacts on society
<ul style="list-style-type: none"> <li>• Guilt or shame in causing a death</li> <li>• Legal costs</li> <li>• Custodial sentence</li> <li>• Lost labour and income in the household</li> <li>• Impact on the family's social standing, finances and health and well-being</li> <li>• Negative influences as a result of exposure to prison</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of life</li> <li>• Disruption to family life</li> <li>• Trauma, grief and loss and related medical issues</li> <li>• Funeral costs</li> <li>• Lost labour and income in the household</li> <li>• Continuing psychological issues</li> <li>• Loss of trust in law and order and community values</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of publicly funded medical treatment (if death was not immediate)</li> <li>• Need for coronial services</li> <li>• Increased need for police, fire and emergency services</li> <li>• Trauma to emergency services workers responding to incident</li> <li>• Loss of workplace productivity</li> <li>• Loss of trust in law and order and community values</li> </ul>

Source 5 A summary of the impacts of murder

### 5.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Briefly explain the defence of provocation and why it no longer applies in Victoria.
- 2 From which sources of law is the crime of murder derived?
- 3 Explain what a victim impact statement is and when it is used in a criminal case.
- 4 How are emergency services workers possibly impacted by a murder?

### Synthesise and apply

- 5 Australia is generally considered to be one of the most liveable countries in the world. What do Australia's homicide statistics tell us about liveability in Australia? Conduct some research online to help you complete this task.
- 6 Read the legal case *Bayley v The Queen*.
  - a Outline the key facts of this case.
  - b Would a jury have been used in this case? Justify your answer.
  - c Conduct some research on this case and provide a summary of the impact this case had on young women in society in particular.

- 7 Consider the crime statistics in relation to murder for both Victoria and Queensland.
  - a In your view, why do crime statistics for murder fluctuate or stay generally stable?
  - b What sort of crime do you think might show an increase or decrease in occurrence?
  - c Discuss as a class your views as to why you believe males predominantly commit the crime of murder. Where possible, undertake further research to support your views.

### Analyse and evaluate

- 8 Read the legal case *R v Zandipour*.
  - a Outline the key facts of this case.
  - b In your view, does a random crime have any more or less impact on society than a crime where the person knows their attackers? Discuss as a class.
  - c Discuss the ability of victim impact statements to influence the judge in sentencing.
- 9 Evaluate the ability of courts to be able to address the impacts that murder has on a society when sentencing an offender.



These additional resources are available via your **obook assess**:

» **Student book questions**  
5.3 Check your learning

» **Sample**  
Victim impact statement

» **Sample**  
Arguing culpability response

» **Weblink**  
Sentencing Advisory Council

# 5.4

## CULPABLE DRIVING – ELEMENTS & DEFENCES

Driving a motor vehicle is a complex task, even though it is an act that occurs millions of times on any given day. It requires concentration and coordination. Responsible drivers are required to obey the road rules and drive safely. **Reckless** drivers (i.e. drivers who take high risks while driving) endanger the health and lives of other drivers, passengers and pedestrians. A driver who kills someone as a result of extreme carelessness or recklessness while driving may be charged with culpable driving causing death (commonly referred to as **culpable driving**).

Culpable driving carries a maximum penalty of 20 years in prison and/or a fine of 2400 penalty units. Whether a person is found guilty of committing culpable driving depends on the elements of the offence being proved.



**Source 1** Section 318 of the *Crimes Act 1958* (Vic) states a person can be found guilty of culpable driving causing death if the person was responsible for the death of another road user while driving a motor vehicle.

### reckless

acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

### culpable driving

the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol

### accused

acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

### Elements of culpable driving

For a person to be found guilty of culpable driving, the prosecution must prove the following two elements beyond reasonable doubt:

- the **accused** was the driver of a motor vehicle
- the accused culpably caused a person's death while driving the motor vehicle.

### Element 1 – The accused was the driver of a motor vehicle

This means that the accused must have substantial control over the movement of a motor vehicle. Motor vehicles are generally motorised vehicles intended to be driven on a highway (namely cars, trucks, buses or motorbikes).

Vehicles that are not motor vehicles include those intended to be used on a railway or tramway, and motorised wheelchairs which cannot go at a speed of more than 10 kilometres per hour and which are used to carry an injured or disabled person.

### Element 2 – The accused culpably caused a person's death while driving the motor vehicle

'Culpability' is a responsibility for a fault or wrong. When the courts talk about 'culpability' in relation to driving it means that the accused must have been driving the motor vehicle in one of the following ways:

- **Driving recklessly** – that is, consciously and unjustifiably disregarding a substantial risk that another person would die or be seriously injured (e.g. driving at high speeds in bad weather)

- **Driving negligently** – that is, failing (to an unacceptable degree) to observe a reasonable standard of care that a reasonable person would have observed in similar circumstances, and others in the community have a right to expect (e.g. driving while fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep)
- **Driving under the influence of alcohol or a drug** – that is, to the extent of being incapable of properly controlling the vehicle.



**Source 2** Culpable driving includes driving negligently by being fatigued to such an extent that the driver ought to have known that there was a risk of falling asleep.



**Source 3** Culpable driving includes driving under the influence of alcohol or a drug to the extent of being incapable of properly controlling the vehicle.

In *DPP v McDevitt* [2016] VCC 1668 (10 November 2016), the offender recklessly and negligently drove a vehicle under the influence of alcohol and killed an elderly pedestrian standing in her own driveway.

## Driver erratic, drunk and unlicensed

### *DPP v McDevitt* [2016] VCC 1668 (10 November 2016)

On 26 July 2015 Allan McDevitt stole a car, drove it negligently and killed a 74-year-old Hadfield woman who had just been dropped home. Prior to the collision, he was driving at an estimated speed of 95 km/h (in a 60 km/h zone) and on the wrong side of the road. The victim was standing near a parked car when McDevitt slammed into it. She was thrown into her driveway and critically injured. She died weeks later.

McDevitt was so drunk that he did not have proper control of the vehicle. He had a blood alcohol concentration (BAC) reading of 0.109 per cent when tested, which is more than twice the legal limit of 0.05 per cent. The County Court heard that McDevitt suffered long-term depression and post-traumatic stress disorder following a collision in which a pedestrian died some eight years earlier. A doctor's report indicated that the earlier incident led to McDevitt's long-term drinking and untreated health issues.

McDevitt pleaded guilty in the County Court to theft, culpable driving and unlicensed driving. He was sentenced to 7 years and 9 months in prison, and was to serve a non-parole period of 5 years and 3 months.

LEGAL

CASE

The following legal case further highlights the effect of negligent driving on an entire family and their community. The incident left four people dead and one child without a family.

## LEGAL

## CASE

### Culpable driving kills four of five family members

*Gill v The Queen* [2016] VSCA 261 (4 November 2016)

On 28 February 2014, all but one member of a family of five died when a truck driver failed to stop at an intersection on a country road near the town of Catani, south of Melbourne. The truck drove into the path of a family's car, which had right of way at an intersection. The truck rolled on its side and dragged the car 35 metres. There was no evidence that the driver was affected by alcohol, drugs or fatigue.

The driver, Jobandeep Gill, blamed his truck's faulty gears for his failure to obey a stop sign at the intersection. An eye witness said that the truck did not slow down prior to driving through the intersection and a mechanical analysis did not find a fault with the truck's gears.

A jury found Gill guilty of four counts of culpable driving causing death. He was sentenced to 10 years in prison and must serve a non-parole period of 6 years and 3 months. Gill's appeal against his conviction was dismissed.



**Source 4** The scene of the crash near the town of Catani in February 2014, which left four members of the same family dead

### *Did you know?*

Using a mobile phone while driving is enough to justify charging a driver with culpable driving if they cause a collision and someone dies as a result.

## Possible defences to culpable driving

Each indictable offence consists of specific elements. Failure to prove all elements will result in the accused being found not guilty of the crime. For example, the accused may argue that:

- the accused was not driving the vehicle
- the driving was not culpable (e.g. the motor vehicle collision and resulting death were not caused by the driver's recklessness, gross negligence, intoxication or drugs, but by unexpected and unpredictable mechanical failure or poor environmental or road conditions).

In the example below, the accused will argue that he was not the driver of the vehicle.

## EXAMPLE

### The accused was not driving the vehicle

A car carrying two men crashed at high speed and flipped over. Both men were ejected from the car. One man suffered a brain injury, and the other died in the crash. The surviving man was charged with culpable driving as a result of the incident. He said he could not remember who was driving at the time.

An expert called in the case said that there was a 75 per cent chance that the accused was ejected from the driver's side of the car, making him the driver. However, a text message sent to a friend just before the collision indicated that the man was not driving at the time of the crash.

In some cases, the accused may be found guilty of an alternative offence should the elements for the alternative offence be proven.

In the following legal case, a collision between a truck and a train resulted in the death of 11 people. The truck driver successfully defended a culpable driving charge, arguing that he was not negligent and that the accident was due to poor road conditions at the time.

## Not driving culpably in the circumstances

### *Christiaan Scholl, Supreme Court of Victoria (unreported, 2009)*

On 6 June 2007, Christiaan Scholl drove his truck onto a level crossing north of Kerang in northern Victoria. His truck collided with a V/Line passenger train bound for Melbourne. Eleven people were killed in the accident. The prosecution alleged that the truck driver did not take proper care when entering the intersection.

The driver gave evidence in his defence and said he could not explain why he did not see the flashing warning lights until it was too late. Experts were able to establish that the intersection was sufficiently flawed and presented difficulties to the driver. Two other truck drivers gave evidence to say they found it difficult to see the flashing red lights at the crossing.

In addition to the 11 people who died, 23 were injured and three were unaccounted for. The driver was found not guilty of 11 charges of culpable driving causing death and eight charges of negligently causing serious injury.

Media reports suggested that families of the victims were left unsatisfied because blame had not been attributed to anyone for the crash.



**Source 5** Police rescue workers remove victims from the wreckage of a passenger train which collided with a semi-trailer at a level crossing, six kilometres north of the country town of Kerang in north-western Victoria.

LEGAL

CASE

Other than defending the charge for culpable driving on the basis that one or more of the elements has not been satisfied, the accused can rely on a particular defence. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

There are three main possible defences for culpable driving. These are:

- duress
- sudden and extraordinary emergency
- involuntary actions (i.e. automation).

## Defence 1 – Duress

A person is not guilty of culpable driving if they act under **duress**. The defence of duress applies if, at the time of the offence:

- the person has a **reasonable belief** that:
  - a threat of harm exists
  - the threat would be carried out unless the offence was committed
  - committing an offence is the only reasonable way to avoid the threatened harm
- the person's conduct is a reasonable response to the threat.

There is no duress if the threat comes from a person with whom the accused voluntarily associates to commit an act of violence.

### **duress**

strong mental pressure on someone to overcome their independent will and force them to do something

### **reasonable belief**

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct

The following example explores how the defence of duress can be used to defend a charge of culpable driving.

## EXAMPLE

### Duress as a defence in culpable driving causing death

A bank robber, holding a gun, jumps into a car halted at traffic lights. The robber shouts 'Get me out of here, or I'll shoot!' The driver is terrified and fears being shot. He speeds off and kills a pedestrian crossing the green light. The driver could raise duress as a defence.

### Study tip

Whether someone has committed culpable driving causing death will be determined by checking the offender's actions against each element of the offence and then considering any defences applicable to the circumstances of the case.

## Defence 2 – Sudden and extraordinary emergency

A person is not guilty of culpable driving if, in extraordinary circumstances, they act as a result of a sudden or extraordinary emergency.

The person must reasonably believe that:

- there is a sudden or extraordinary emergency
- their actions are the only reasonable way of dealing with the situation
- their actions are a reasonable response to the situation.

The following hypothetical scenario provides an example of a type of emergency that may occur when driving.

## EXAMPLE

### Sudden and extraordinary emergency as a defence in culpable driving causing death

In seeing a runaway car rolling down a hill, a man opens the car door, jumps into the driver's seat and tries to steer it away from a crowded street. In the process he hits a large cardboard box. A homeless person is sleeping inside the box.



Source 6 A runaway car rolling down a hill creates a sudden and extraordinary emergency.

## Defence 3 – Involuntary actions

A person is not guilty of culpable driving if their actions were involuntary. The involuntary nature of the accused's actions may mean that one or more elements of the crime cannot be met. While not technically a defence, the involuntary nature of the accused's actions may mean that a guilty mind (*mens rea*) cannot be proved. This may see the accused acquitted of the offence charged or found guilty of a lesser offence.

For a culpable driving charge, the accused may state that their actions were involuntary due to **automatism**.

### Automatism

Automatism can be relied on where a person has a total loss of control over their bodily movements. Because they have completely lost control, it is accepted that they cannot form the intention to commit a crime, since they are not conscious or aware of what they are doing. Therefore, the action is considered to be involuntary.

### automatism

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

It is not enough to say 'I didn't know what I was doing'. Some external factor had to be the sole cause of the actions. A person may be found not guilty of an offence if they committed the crime:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism does not mean the person has a mental illness. Rather, the person is in a zombie-like state and 'out of it' mentally, but capable of physical acts. For this reason it is sometimes called 'sane automatism' to distinguish it from 'insane automatism', which is also involuntary, but results from a mental illness.

Automatism is a defence that is extremely rare and difficult to prove.



**Source 7** Sleepwalking is one condition during which a person might commit an involuntary act. A sleeping person will not be capable of having intention (*mens rea*).

## 5.4

## CHECK YOUR LEARNING

### Define and explain

- 1 Describe the elements of the offence of culpable driving causing death.
- 2 Explain two possible defences for culpable driving.
- 3 Provide an example of when a sudden or extreme emergency might be used as a defence to a culpable driving charge.

### Synthesise and apply

- 4 Read the legal case *DPP v McDevitt*. Explain how the facts of this case meet the elements of the crime of culpable driving causing death.
- 5 Read the legal case *Gill v The Queen*.
  - a Explain how the elements of culpable driving causing death are evident in this case.
  - b What defence did the driver raise and why was it not successful?
  - c Do you think the outcome and sentence in the case were just? Give reasons for your answer.
- 6 Conduct an Internet search to find a newspaper article that involves a case of culpable driving.
  - a Briefly explain the facts of the case.
  - b Explain whether the facts of the case meet each element of the offence.

- c Consider the sentence imposed in the case. Do you think the sentence fits the crime? Justify your response.

- 7 For each of the following cases, argue the case for either the prosecution or the accused.
  - a It was a drizzly, wet day. It was estimated that Dominic was riding at 95 km/h (in a 60 km/h zone) when he hit a pothole and lost control of his motorcycle. It slid sideways into people standing at a tram stop. One person died.
  - b Marita was found in pyjamas, dazed and hurt on the side of the road at 3.00 am. She had driven through a red light and had collided with another vehicle. The other driver was dead. When questioned, she said she did not know what happened. It was later found that she had taken new sleeping tablets after consuming two glasses of wine. Users of this medication are warned that it may cause 'potentially dangerous complex sleep-related behaviours'.

### Analyse and evaluate

- 8 In your view, should culpable driving be abolished as a crime, and people should be charged with murder instead? Discuss as a class.

These additional resources are available via your **obook assess**:

» **Student book questions**

5.4 Check your learning

» **Weblink**

Culpable driving causing death (*Crimes Act 1958* (Vic))

# 5.5

## CULPABLE DRIVING – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

### Study tip

The Sentencing Advisory Council is a Victorian independent statutory body that aims to inform, educate and advise on sentencing issues. It is a useful source of information and statistics about crime and sentencing in Victoria. If you are researching an offence in depth you will find good material here.

### Did you know?

The Locomotive Acts (UK) regulated the use of all mechanically propelled vehicles on public roads at the end of the nineteenth century. The maximum speed was 4 miles per hour (6.4 km/h) in the country and 2 miles per hour (3.2 km/h) in the city. A man carrying a red flag was required to walk in front of a vehicle towing a trailer.

### manslaughter

a crime where one person does not intend to kill, but their reckless or negligent conduct results in the killing of another

### Crime Statistics Agency (CSA)

an independent organisation responsible for processing, analysing and publishing Victorian crime statistics

### Sentencing Advisory Council

an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters

In this topic you will explore, in relation to culpable driving:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

## The role of the law in developing the elements and defences

### Common law

Unlike other offences related to unlawful killing, the elements of the offence do not have a history of long, slow development through the common law. Motor cars were first built in Australia around the 1890s. Because they are comparatively new, the law in relation to their use is also new. South Australia was the first state to regulate car use (in 1904) and other states followed soon after. Therefore, in relation to the elements, the role of courts is largely to interpret the legislation and apply it to the facts of the case.

Automatism, a defence that can be raised to defend a culpable driving claim, is a common law defence, and therefore the common law principles still apply.

### Statute law

Culpable driving is a statutory offence under the *Crimes Act 1958* (Vic). Culpable driving laws were initially defined in statute and have been refined through statutory interpretation as courts hear cases. The offence was developed in direct response to high road tolls and community concerns about irresponsible drivers who put other people's lives at risk.

Reform of the law on culpable driving causing death has been limited to altering the maximum penalty for the offence to reflect changes in community attitudes. The penalty for this offence has increased in the last two decades from a maximum of 10 years in prison to 20 years in prison.

This shows a significant change in people's attitudes. In the past, people were more sympathetic to those who killed while driving a motor vehicle. The community has slowly come to realise that driving causing death is a form of involuntary **manslaughter** and deserving of a similar penalty. The unnecessary carnage on our roads has led to the community wanting drivers whose actions are grossly negligent to be punished appropriately.

## Trends and statistics

### Victoria

In Victoria, the **Crime Statistics Agency (CSA)** has recorded that between April 2016 and March 2017, there were 76 driving causing death offences. However, this number includes all driving offences which result in death, and not just culpable driving. This is an 8.4 per cent decrease in the previous year's number, being 83. Over the past five years, there has been no trend of increase or decrease in the number of culpable driving offences.

In Victoria, **Sentencing Advisory Council** statistics show an increase in imprisonment rates for the offence over time. Over 85 per cent of offenders sentenced for culpable driving causing death receive an

immediate custodial sentence. In 2015, the Council reported that in relation to culpable driving causing death:

- speeding, excessive alcohol and intentional high-risk behaviour were the most common causes
- 89 per cent of offenders were male
- 75 per cent of offenders were between the ages of 18–34
- 87 per cent of offenders charged pleaded guilty
- the most common range of imprisonment length imposed was between five and six years.

## Queensland

A comparison of culpable driving statistics across Australian states is difficult because in some jurisdictions the statistics are not counted separately, but are included in a general category such as ‘other homicide offences’, or the offence is classified differently. For example, in Queensland the statistics are recorded as ‘driving causing death’.

### NUMBER OF REPORTED OFFENCES OF DRIVING CAUSING DEATH IN QUEENSLAND (2011–2016)

	RATE OF OFFENCES PER YEAR				
	2011–12	2012–13	2013–14	2014–15	2015–16
Driving causing death	31	32	23	21	20

Source: Queensland Police Service, Region and District Crime Statistics 1 July 2011 to 30 June 2016

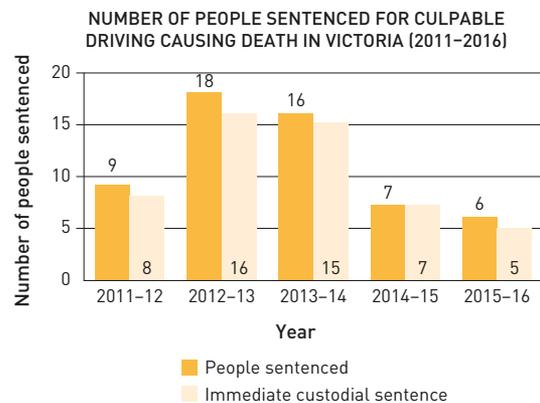
**Source 2** In Queensland, the number of reported offences of driving causing death has fallen.

At first glance, Queensland seems to have more culpable driving deaths than Victoria. This difference may be due to these states having different geographies, road systems, population distributions and driving distances. However, it is more likely to be due to the type of data collated. The Queensland data shows all reported incidents whereas the Victorian data only shows the number of people found guilty and sentenced for the offence.

The number of culpable driving deaths in Victoria and Queensland is relatively low, considering that these states have populations of more than 5 million and 4 million respectively. Data shows that since 2012, the number of culpable driving convictions in Victoria and the number of reported cases in Queensland have decreased. This may be due to advances in road engineering and improved safety features in cars.

## Possible impacts of culpable driving

High-risk behaviour including excessive speed, fatigue, use of a mobile phone and use of alcohol and drugs while driving can result in fatal motor vehicle collisions. These collisions have long-term personal, social and economic effects on the offender, victims, their families and the community.



Source: Crime Statistics Agency, Recorded Offences, Year ending 31 March 2016

**Source 1** The number of people sentenced for culpable driving causing death in Victoria fluctuated from year to year, but there was a general decrease from 2011 to 2016.



**Source 3** The Transport Accident Commission is aiming for a future without serious injuries and lives lost on Victorian roads with the Towards Zero campaign.

Source 4 lists some of the possible impacts that culpable driving can have on individuals (i.e. the offenders, victims and their families) and society.

POSSIBLE IMPACTS OF CULPABLE DRIVING OFFENCES		
IMPACTS ON THE OFFENDER	IMPACTS ON VICTIMS AND THEIR FAMILY	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Medical treatment and costs (if injured)</li> <li>• Guilt or shame in causing a death</li> <li>• Legal costs</li> <li>• Likelihood of a custodial sentence</li> <li>• Lost labour and income in the household</li> <li>• Impact on their family's social standing, finances and health and well-being.</li> <li>• Damage to, replacement or impounding of vehicle</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of life</li> <li>• Disruption to family life</li> <li>• Trauma, grief and loss and related medical issues</li> <li>• Funeral costs</li> <li>• Lost labour and income in the household</li> <li>• Continuing psychological issues</li> <li>• Loss of trust in law and order and community values</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of publicly funded medical treatment</li> <li>• Need for coronial services</li> <li>• Increased need for police, fire and emergency services</li> <li>• Trauma to emergency services workers responding to fatal collision</li> <li>• Increased insurance premiums for motor vehicles</li> <li>• Loss of workplace productivity</li> <li>• Damage to community property</li> <li>• Loss of trust in law and order and community values</li> </ul>

Source 4 A summary of the impacts of culpable driving offences

## 5.5

## CHECK YOUR LEARNING

### Define and explain

- 1 Is culpable driving a common law or statute law offence? Where would you find the statute or case that establishes culpable driving as an offence?
- 2 Describe two impacts that culpable driving can have on:
  - a the offender's family
  - b society
  - c the victim's family.
- 3 Explain how automatism can be used as a defence to a charge of culpable driving.
- 4 Are culpable driving offences increasing or decreasing in both Victoria and Queensland? Explain.

### Synthesise and apply

- 5 Create an infographic which gives the reader a quick overview of current trends for the offence of culpable

driving causing death. Instructions to help you create an infographic are provided on your [obook assess](#).

- 6 Many of your friends often engage in negligent or reckless acts while driving that can result in a collision, possibly causing death. For example many of your friends talk on the phone while driving, text, eat, are distracted by loud music or speed. Devise a way in which you would convince your friends that these sorts of acts can quickly result in a culpable driving charge.

### Analyse and evaluate

- 7 What do you consider to be the major causes of culpable driving and to what extent is culpable driving a problem in Australian states? Give reasons for your answer.
- 8 Discuss the extent to which you believe the Victorian Government has adequately responded to careless or reckless driving which results in death.



These additional resources are available via your [obook assess](#):

» **Student book questions**  
5.5 Check your learning

» **Video tutorial**  
How to create an infographic

» **Weblink**  
Sentencing Advisory Council

» **Weblink**  
Queensland Police Service

# 5.6

## RAPE – ELEMENTS & DEFENCES

### rape

the act of sexually penetrating another person without consent

**Rape** is defined as sexual penetration without consent. It is a form of violence and is punishable by a maximum of 25 years in prison. The legal definitions of rape and other sexual offences are set out in the *Crimes Act 1958* (Vic).

Many victims of rape wrongly blame themselves rather than the offender. Some do not tell their families and many do not report the crime to the police. Rape is therefore under reported as a crime. Victims also do not report because they fear the criminal justice system and its ability to achieve a just outcome in their case.

Whether a person is found guilty of committing rape depends on the elements of the offence being proven.



**Source 1** Rape is defined as sexual penetration without consent. It is a form of violence.

### Elements of rape

To be found guilty of rape, the prosecution must prove, beyond reasonable doubt, that at the time of the offence there was:

- sexual penetration – the **accused** intentionally sexually penetrated another person
- lack of consent – the other person did not consent to this sexual penetration
- lack of reasonable belief – the accused did not reasonably believe that the other person consented to the penetration.

Both sexual penetration and consent are defined in the *Crimes Act*. They are the key aspects of rape offences. If more than one act of rape is committed, each will be charged as a separate offence.

### Element 1 – Sexual penetration

For a person to be found guilty of rape, the prosecution must prove that the accused sexually penetrated the victim either with the accused's penis, another body part (e.g. a finger) or an object. Sexual penetration occurs when the accused does any of the following acts:

- introducing (to any extent) a part of their body or an object into the victim's vagina (which is defined to include external genitalia or a surgically constructed vagina)
- introducing (to any extent) a part of their body or an object into the victim's anus
- introducing (to any extent) their penis into the victim's mouth
- having done any of those things, continues to keep a part of their body, an object or their penis, there (in the vagina, anus or mouth)

A person does not commit rape if the sexual penetration is done in good faith and for medical or hygienic purposes.

Rape can also consist of forcing a victim to sexually penetrate themselves by forcing them to put an object or a part of their body into their own vagina or anus.

Sections 35A(3),(4) and (5) of the *Crimes Act* contain similar provisions that apply to sexually penetrating animals or being sexually penetrated by animals.

### accused

a person charged with a criminal offence

### Did you know?

It is an offence for a person to have sex with their spouse, de facto partner, girlfriend or boyfriend without their consent. The fact that they are married or in a relationship makes no difference to consent, which is required every time.

### Did you know?

The *Crimes Act* states that 'a person who intends and attempts to commit any serious crime (like rape) is guilty of the indictable offence of attempting to commit that offence'. This means that, like attempted murder, a person can be found guilty of attempted rape.

## Element 2 – Lack of consent

Consent means giving permission or agreement for something to happen. As set out in Section 36 of the *Crimes Act*, a person has not consented if any of the following circumstances apply:

- they submit to the act because of force or the fear of force, whether to that person or someone else
- they submit to the act because of the fear of harm of any type, whether to that person or someone else or an animal
- they submit to the act because the person is unlawfully detained
- they are asleep or unconscious
- they are so affected by alcohol or another drug as to be incapable of consenting to the act
- they are so affected by alcohol or another drug as to be incapable of withdrawing consent to the act (this may apply where a person gave consent when they were not affected by alcohol or another drug)
- they are incapable of understanding the sexual nature of the act
- they are mistaken about the sexual nature of the act
- they are mistaken about the identity of any other person involved in the act
- they mistakenly believe that the act is for medical or hygienic purposes
- if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific research purposes
- they do not say or do anything to indicate consent to the act
- having initially given consent to the act, they later withdraw consent to the act taking place or continuing.

There may be other circumstances, apart from these, that show there was no consent. The following legal case illustrates how the element of lack of consent can be present in a case involving an intoxicated victim.

### LEGAL

### CASE

## Taking advantage of a young girl's intoxication

*Jurj & Miftode v The Queen; DPP v Jurj & Miftode* [2016] VSCA 57  
(4 April 2016)

In the early hours of 5 April 2009, Ross Jurj and Daniel Miftode, both in their early twenties, offered a lift to a drunk 14-year-old girl who was sitting at a railway station in the south-east of Melbourne at around midnight. The girl said she did not want to go home intoxicated. The pair drove to a shop to buy her a soft drink before taking her to a factory where one of them worked.

The County Court of Victoria heard that the men took advantage of the girl's intoxicated state. The pair took turns to repeatedly rape her. They repeatedly ignored her crying and pleas to be left alone. The next morning, the girl was dropped off at a shopping centre close to where they had found her.

At the trial, Jurj admitted to engaging in one act of oral penetration but said he thought the girl was over 16 years of age. Miftode testified that he witnessed this sexual act. Both denied all other allegations.



**Source 2** Rape of a child under 16 is a serious offence. Jurj and Miftode took advantage of the fact that a 14-year-old girl they picked up at a railway station was drunk.

A jury found Jurj guilty of five charges of rape and one charge of sexual penetration of a child under 16. He was initially sentenced to 5 years and 5 months in prison. Daniel Miftode was found guilty of 10 charges of rape and was sentenced to 6 years and 9 months in prison.

The prosecution appealed the leniency of the sentence. The Court of Appeal increased Jurj's sentence to 9 years and 6 months in prison with a non-parole period of 6 years and 6 months. Miftode's sentence was increased to 12 years and 2 months with a non-parole period of 8 years and 9 months.

## Element 3 – Lack of reasonable belief

A person is said to have a 'reasonable belief' if an ordinary person with similar characteristics to the accused (e.g. age and maturity) would have formed the same belief in similar circumstances.

In rape cases, whether an accused **reasonably believes** the other person is consenting will depend on the circumstances of each case. The court will consider any steps the accused took to determine the victim's consent. The accused's belief will be judged against the belief of a '**reasonable person**' in similar circumstances. In general, an accused's belief will not be 'reasonable' if he or she knew the victim was not consenting, gave no thought to it or the accused's belief was unreasonable in the circumstances.

In cases involving alcohol or drug intoxication, the *Crimes Act* sets a standard to determine an accused's **reasonable belief**. This standard differs according to whether the case involves:

- **self-induced intoxication** – Intoxication is considered to be self-induced unless it is involuntary or due to fraud, sudden or extraordinary emergency, accident, reasonable mistake, **duress**, force, or the effects of proper use of prescription or non-prescription medication. In this situation, the court must compare the accused's belief or actions to those of a reasonable person who is not intoxicated
- **not self-induced intoxication** – The court must compare the accused's belief or actions to those of a reasonable person intoxicated to the same level as the accused.

## Possible defences to rape

Each indictable offence consists of specific elements. Failure to prove all elements will result in the accused being found not guilty of the crime, and the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- the victim consented
- the accused reasonably believed the victim was consenting
- there was no 'sexual penetration'.

In rape cases, the issue of 'consent' is most often raised to excuse the accused's behaviour, as the following news article exemplifies. Where consent is an issue, the **definition** of consent is used to determine whether the victim consented and whether the accused **reasonably believed** the victim was consenting. It is important to note that a victim does not have to say anything, protest, physically resist or sustain physical injury to show that he or she did not consent. It is also not a defence to say that the victim had agreed to a sexual act with the accused on a previous occasion.

The following news article further details defences in relation to a sleep rape case.

### **reasonable belief**

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct

### **self-induced intoxication**

the act of getting drunk of your own free will. Intoxication (i.e. drunkenness) is assumed to occur by a person's own actions unless there was a factor that made it involuntary

### **duress**

strong mental pressure on someone to overcome their independent will and force them to do something

## DPP challenges ruling in sleep rape case

Adrian Lowe, *The Age*, 21 December 2011

The Director of Public Prosecutions has launched a challenge against a controversial court ruling that a sleeping woman could consent to sex.

It has taken the case to the High Court, and will next year argue that the Victorian Court of Appeal was wrong to acquit Tomas Getachew of rape when the alleged victim refused his advances three times before she fell asleep.

The High Court appeal comes after the President of the Court of Appeal urged the state government to act and change Victorian rape law after an increase in successful appeals against rape convictions.



**Source 3** A High Court appeal in the *Getachew* case led to change in rape law.

In convicting Getachew in 2009, a County Court jury heard that he and the complainant lay on a mattress in a bungalow and as she said that she was going to sleep, he touched her leg.

She testified that she told him to go away but that he touched her again. She told him that if he did not stop touching her, she would go and sleep in her car.

Getachew offered to sleep somewhere else but she replied: 'Don't worry about it. Just don't touch me and let me sleep.' When she fell asleep, she had her back to Getachew, had pulled her coat down as far as possible, buttoned it up and put her arms across her chest.

She told the jury that she woke up to find Getachew thrusting into her, with her skirt up and her clothing dishevelled. When she realised what he was doing, she pushed him away and went out to her car.

In a 2:1 majority decision earlier this year, the Court of Appeal found trial Judge Duncan Allen's instructions – that the prosecution had proved intent if Getachew was aware the woman might be asleep – amounted to a substantial miscarriage of justice and ordered a retrial.

In their High Court submissions, Crown Prosecutor Tom Gyorffy and junior counsel Elizabeth Ruddle said that all the cross-examination of the woman was 'premised on the fact that she was asleep and could not have known' that Getachew had penetrated her.

They said that an awareness that a person might be asleep was sufficient to satisfy the 'might not be consenting' section of the charge of rape.

'It is only a freely given consent which is communicated in some way that can found a defence,' Mr Gyorffy and Ms Ruddle submitted.

'The effect of the decision of the Court of Appeal is that any belief about the consent of the complainant ... no matter how ridiculous or misguided it may be, can found a defence.'

They argue that that defeats Parliament's intent because the law 'insists on a free and communicated consent'.

Other than defending the charge for rape on the basis that one or more of the elements has not been satisfied, the accused can rely on a particular defence. Several defences to a charge of rape are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

There are three possible defences to a charge of rape. These are:

- mental impairment
- duress
- involuntary actions.

## Defence 1 – Mental impairment

Another defence that can be raised by an accused is the **mental impairment** defence. A person is not guilty of rape if, at the time of the offence, they were suffering from a mental illness (or disease of the mind) and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

A successful defence of mental impairment does not immediately result in the accused being released from custody. That is, the verdict is not an ordinary ‘not guilty’ verdict. Instead, it is a special verdict of ‘not guilty by reason of mental impairment’.

In these cases, the court will generally impose a custodial supervision order (i.e. an order that involves some form of detention or supervision – often in a medical facility). This order has a nominal term of 25 years, and confines the person to a psychiatric facility so appropriate care and treatment can be provided. The court will periodically review the order.

## Defence 2 – Duress

A person is not guilty of rape if they act under duress. The defence of duress applies if, at the time of the offence:

- the person has a reasonable belief that:
  - a threat of harm exists
  - the threat would be carried out unless the offence was committed
  - committing an offence is the only reasonable way to avoid the threatened harm
- the person’s conduct is a reasonable response to the threat.

There is no duress if the threat comes from a person with whom the accused voluntarily associates to commit an act of violence.

Rape is generally understood by psychologists to be about power, not about sex. It is often about forcing someone to submit. The following case study illustrates circumstances in which the defence of duress could be used to defend a charge of rape.

**mental impairment**  
a condition of the mind which impacts on a person’s ability to know the nature and quality of his or her conduct, or that the conduct was wrong

### Child soldiers forced to rape

In 2003 in war-torn Sudan, Africa, children as young as 13 were allegedly abducted and conscripted by force into the Sudanese army. These newly-trained child soldiers were then ordered by superior officers to commit offences including rape. They were tortured if they did not comply.

CASE

STUDY

In interviews reported in the media, a Sudanese army deserter, B Kajabier, then aged 34, described what happened just before Sudanese army troops stormed a village in southern Darfur. The officer in charge, Colonel Jaja, commanded his troops to 'Rape the women, kill the children. Leave nothing'. Kajabier refused to take part in any more raids and deserted.

The child soldier's conduct, and whether or not the defence of duress applies, have since been called into question.

## → GOING FURTHER

While the person who committed the rape may be found not guilty because of duress, the person who forced them to do it is guilty of a special kind of rape. It is a separate indictable offence, and it is called rape by **compelling sexual penetration**.

## Defence 3 – Involuntary actions

A person is not guilty of rape if their actions were involuntary. The involuntary nature of the accused's actions may mean that one or more elements of the crime cannot be met. While not technically a defence, the involuntary nature of the accused's actions may mean that a guilty mind (*mens rea*) cannot be proved. This may see the accused acquitted of the offence charged or found guilty of a lesser offence.

For a rape charge, the accused may claim that their actions were involuntary due to **automatism**.

### Automatism

Automatism can be relied on where a person has a total loss of control over their bodily movements. Because they have completely lost control, it is accepted that they cannot form the intention to commit a crime, since they are not conscious or aware of what they are doing. Therefore, the action is considered to be involuntary.

It is not enough to say 'I didn't know what I was doing'. Some external factor had to be the sole cause of the actions. A person may be found not guilty of an offence if they committed the crime:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism does not mean the person has a mental illness. Rather, the person is in a zombie-like state and 'out of it' mentally, but capable of physical acts. For this reason it is sometimes called 'sane automatism' to distinguish it from 'insane automatism', which is also involuntary, but results from a mental illness.

Automatism is a defence that is extremely rare and difficult to prove.



**Source 4** Sleepwalking is one condition during in which a person might commit an involuntary action. A sleeping person will not be capable of having intention (*mens rea*).

#### automatism

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime



**Source 5** In defending a rape charge, the accused may deny that ‘sexual penetration’ occurred. In such cases, the results of medical tests are often provided to the court as evidence.

## 5.6

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the crime of rape.
- 2 What is meant by the term ‘consent’?
- 3 In what circumstances does the law state that consent does not exist?
- 4 Explain one defence to rape.

### Synthesise and apply

- 5 In the following situations, decide if you think there is consent and whether the offender is likely to be charged with rape. Give reasons.
  - a Jaya has a stomach complaint. Her doctor insists on carrying out a vaginal examination. She feels uncomfortable about the way the examination takes place. She later finds out from another doctor that the examination was an unconventional medical procedure and was totally unnecessary.
  - b James knocked Miriam out with a punch to the jaw. While she was unconscious, he had sex with her.

- c Teresa visited her new boyfriend at his flat. He would not let her go home. He tied her to the bed and held her for three days. He said he would let her go only if she had sex with him. She did so because she believed it was the only way to secure her freedom.
- 6 In groups, discuss whether the following acts constitute consent:
  - a the victim did not protest or physically resist the sexual act
  - b the victim did not sustain any physical injury
  - c the victim had previously engaged in sexual conduct with the accused.

### Analyse and evaluate

- 7 Read the article ‘DPP challenges ruling in sleep rape case’ and discuss as a class whether you think the elements of rape are met in this case.
- 8 Discuss the extent to which you believe that automatism can succeed as a defence to a charge of rape.

**These additional resources are available via your obook assess:**

» **Student book questions**

5.6 Check your learning

» **Weblink**

Centre Against Sexual Assault (CASA)

» **Weblink**

Rape (*Crimes Act 1958* (Vic))

## RAPE – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to rape:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

### The role of the law in developing the elements and defences

#### Common law

Rape laws have their origins in common law, which established the elements of the offence. Under common law, rape was defined as carnal knowledge of a woman against her will. It was, however, a narrow crime in that it involved sexual intercourse. All sexual offences in Victoria are now governed by statute law, namely the *Crimes Act*.

Common law defences can be used to defend a rape charge. These include the defence of automatism, which is a defence found in the principles established by the courts over the years.

#### Statute law

Early versions of the rape offence had wording like this: 'Whosoever shall be convicted of the crime of rape shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for life, with hard labour, and may be whipped.'

Today, rape laws across Australia have been modernised. Victoria's rape laws are found in the *Crimes Act*. The law has been amended significantly over the years. The *Crimes (Rape) Act 1991* (Vic) made significant changes to the law. Since then the law has been amended several times.

After amendments were made in 2007, the prosecution no longer had to show that an accused was aware that consent might be absent. It was enough to demonstrate that an accused **did not give thought** to whether the complainant was not consenting (or might not be consenting). The directions that judges gave to a jury were also regulated by the amendments.

The most important amendments over the years to rape laws include:

- the criminalisation of rape in marriage
- the use of gender-neutral language in the definition of rape
- a statutory definition of sexual penetration and a broadening of this statutory definition to include all forms of sexual penetration
- a statutory definition of consent which specifies that consent means free agreement and outlines the circumstances in which a person does not consent
- simplification of the fault element in rape. To be found guilty the prosecution must prove the accused did not reasonably believe the other person consented to the penetration
- restricting the admission of the victim's sexual history as evidence.

These changes aimed to clarify the definition of rape, the concept of consent and the mental element of rape. The changes reflected recommendations made by the **Victorian Law Reform Commission** and a shift in community values and expectations. They were designed to encourage more victims to

#### Victorian Law Reform Commission

Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

report, address low prosecution rates and restore victims' faith in the legal system. However, the changes also made the law complex and difficult for juries to understand. Numerous appeals and retrials occurred because the law could not be explained to juries in a simple and straightforward way.

## Trends and statistics

Historically, many incidents of rape are not reported to police. Some victims will not report for fear of the legal system. Personal factors such as cultural constraints and having a close personal relationship with the offender (in marital or date rape cases) may impact on reporting rates. Victims may fear retaliation, social stigma or the negative impact on their privacy and family relationships. Underreporting could also be due to victims' perceptions that they will not be believed, or that the victim rather than the offender will be blamed for what happened.

### Victoria

The number of reported rapes in Victoria has steadily increased from 62 to 73 per 100 000 population between 2012 and 2016. The increase in reported rape cases is, at first glance, concerning. However, this increase may be due to some victims being more willing to report. There is a greater awareness and support in our community for victims of rape and sexual assault. The subject is no longer taboo and the legal system has implemented a series of reforms to make it easier for victims to report. Nonetheless, the legal system is still failing some rape victims.

Victorian Crimes Statistics Agency (CSA) data shows that, in 2016, of the 4416 rape complaints to police, 20 per cent remained unsolved, 15 per cent were withdrawn and 12 per cent had no offence detected. Sixteen per cent did not proceed beyond arrest and 35 per cent proceeded to prosecution.

The CSA also reported on case progression in other jurisdictions in its 2017 report on the 'Attrition of sexual offence incidents across the Victorian criminal justice system'. It found that New Zealand police charged 31 per cent of offenders, while in the United Kingdom between 25 and 50 per cent of reported incidents got beyond a police investigation. These progression rates are similar to those in Victoria.

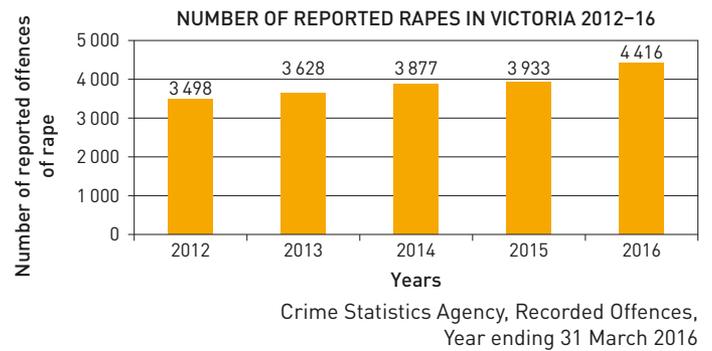
The Sentencing Advisory Council records show that between 1 July 2011 and 30 June 2016:

- there were 204 rape cases heard by the higher courts
- the main age group that committed the crime was between 25–34 years
- 99.5 per cent of the offenders were male
- 95 per cent of the offenders received a term of imprisonment, with a median term of 5 years. The maximum term given for a rape crime during that time was no more than 12 years.

Research indicates that progression rates tend to be better in cases where the victim reports to police within a short time of the incident, when the victim was injured or when the offender used a weapon or had committed other crimes. Conversely, progression rates are not as good when the victim is affected by alcohol or drugs or when the victim withdraws from the legal process due to legal uncertainty and delays.

### Queensland

Reported rapes and attempted rapes in Queensland, over a similar period, also increased from 29 to 35 per 100 000 population. Further comparison is difficult due to the inclusion of attempted rapes in the Queensland statistics.



**Source 1** In Victoria, the number of reported offences of rape has increased.

## NUMBER OF REPORTED OFFENCES OF RAPE AND ATTEMPTED RAPE & RAPE RATES IN QUEENSLAND (2011–2016)

NUMBER					
	2011–12	2012–13	2013–14	2014–15	2015–16
Reported offences	1 301	1 344	1 481	1 699	1 692
VICTIMS PER 100 000 PERSONS					
	2011–12	2012–13	2013–14	2014–15	2015–16
Reported offences	28	29	31	36	35

Source: Queensland Police Service, Region and District Crime Statistics 1 July 2011 to 30 June 2016

**Source 2** In Queensland, the number of reported offences of rape has increased. The first half of the table shows the total number of rape offences, and the second half shows the rate of occurrence for every 100 000 people.

The *Courier-Mail* newspaper reported in December 2016 that since 2012–13, of 507 offenders who were sentenced for rape in Queensland, 1 person received the maximum sentence. This figure, however, is difficult to analyse without information about each of the cases, given the maximum sentence is usually reserved for the most serious crime. There remains, however, ongoing discontent with the sentences that are given for offences such as rape.

## Possible impacts of rape

Victims suffer both physical and psychological trauma following a rape. A victim may suffer physical injuries such as bruising, bleeding or broken bones, depending on the force used during the sexual attack. The victim may also worry about the risk of sexually transmitted diseases or an unwanted pregnancy. Victims also suffer emotionally. They may feel anger, guilt or self-blame. They may be in shock or feel disoriented and they may live in fear of future attack. Long-term psychological effects include the onset of depression or post-traumatic stress disorder.

The victim's partner, parents and other family members may become secondary victims. They may also experience emotional and psychological trauma ranging from anger to feelings of helplessness and depression.

The degree of impact on the victim will, however, depend on a number of factors, such as:

- the severity of the assault and any physical injuries sustained
- the response of family members and/or friends
- the victim's personal history and sense of self-worth
- whether the offender is a family member or known to the victim prior to the attack
- the response of police, medical practitioners and the legal system
- the level of uncertainty and delays in the investigation or prosecution of their case
- their treatment in court and whether they are satisfied with the legal outcome in their case.

Many of these are discussed in a fact sheet on the impact of sexual assault on women produced by the Australian Institute of Family Studies. In it, researcher Cameron Boyd points out that victims may experience 'none, some or many of the possible impacts of sexual assault at different times; there are likely to be impacts of sexual assault that researchers have yet to identify; there is no single way a sexual assault victim should look and act; impacts are not signs of illness, deficiencies or weakness, nor are they characteristics of the individual – rather, they are normal responses to traumatic events.'

Source 3 lists some of the possible impacts that rape can have on individuals (i.e. the offenders, victims and their families) and society.

POSSIBLE IMPACTS OF RAPE		
IMPACTS ON THE OFFENDER	IMPACTS ON VICTIMS AND THEIR FAMILY	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Medical treatment and costs (if injured)</li> <li>• Guilt or shame</li> <li>• Legal costs</li> <li>• Likelihood of a custodial sentence</li> <li>• Lost labour and income in the household</li> <li>• Impact on their family's social standing, finances and health and well-being</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of freedom from fear</li> <li>• Disruption to family life</li> <li>• Trauma, grief and loss and related medical issues</li> <li>• Lost time and income in the household</li> <li>• Physical injuries</li> <li>• Continuing psychological issues (e.g. post-traumatic stress, avoiding social settings and consensual sex)</li> <li>• Loss of trust in law and order and community values</li> <li>• Risk of sexually transmitted disease</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of publicly funded medical treatment</li> <li>• Increased need for police, and counselling services</li> <li>• Loss of workplace productivity</li> <li>• Loss of community security and freedom to walk the streets in safety</li> <li>• Loss of trust in law and order and community values</li> </ul>

Source 3 A summary of the possible impacts of rape

## 5.7

## CHECK YOUR LEARNING

### Define and explain

- 1 Describe the impact of rape on both victims, and family and friends of victims.
- 2 Explain why the offence of rape is so often under reported.
- 3 Are the elements of rape found in common law or statute law? Explain your answer.

### Synthesise and apply

- 4 Using the statistics contained in this topic, create a visual diagram showing the trends and statistics in relation to rape in Victoria. Provide a summary of those trends and statistics.
- 5 Using the Internet, conduct some research about how the courts used to consider rape in marriage. Provide

a summary of the decisions handed down by courts over time about rape in marriage and how the legal principles were changed.

### Analyse and evaluate

- 6 Do you think our legal system is effective in its handling and processing of sexual offence incidents? Give reasons.
- 7 'The impact of rape on society is just as much as the impact of murder, and so the penalties should reflect that impact.' Discuss the extent to which you agree with this statement.
- 8 Discuss why you believe that the vast majority of rape offenders are male.



### These additional resources are available via your obook assess:

» **Student book questions**

5.7 Check your learning

» **Weblink**

Victorian Law Reform Commission

» **Weblink**

Crime Statistics Agency

» **Weblink**

Sentencing Advisory Council

# 5.8

## THEFT – ELEMENTS & DEFENCES

### theft

the act of dishonestly taking property belonging to another person (without his or her consent) with the intention of permanently depriving that person of it

### shoplifting

a general term used to describe a type of theft involving stealing of goods from a retail store. The legal term is 'shop theft' or 'shop stealing'

### robbery

an offence against a person and their property, combining the use of force or the threat of force with theft

### burglary

the offence of entering a building to commit a theft, an indictable assault or to cause criminal damage

### accused

a person charged with a criminal offence

### Did you know?

When people say their home was 'robbed' they are not technically correct. Breaking into buildings or homes to steal or do harm is covered by the crimes of burglary or home invasion, not robbery.

**Theft** is a general legal term meaning dishonest appropriation of property belonging to another, with the intention of permanently depriving the other of it without his or her consent. Stealing is a non-legal term for theft. A person who steals is guilty of theft and a 'thief' is a person who steals.

Most people recognise that theft is the taking of another person's property without the legal right to do so, yet they do not realise that all theft, including minor thefts, like **shoplifting**, are indictable offences. Thefts under \$100 000 or theft of a motor vehicle are generally dealt with summarily. This means minor theft cases will usually be heard in the Magistrates' Court.

Theft is punishable by a maximum penalty of 10 years in prison, and more serious cases of theft will be heard in the County or Supreme Courts. The police may also give a first-time adult shoplifter an 'on the spot fine' if the value of the goods stolen is less than \$600.

Other crimes, such as **robbery** or **burglary**, are a type of theft.



**Source 1** Shoplifting is the act of stealing goods from a retail store (also referred to as shop theft or shop stealing). It is a type of theft.

## Elements of theft

For a person to be found guilty of theft, the prosecution must prove each of the following elements beyond reasonable doubt:

- the **accused** was dishonest
- the accused appropriated property belonging to another
- the accused did so with the intention to permanently deprive another of the property.

### Element 1 – The accused was dishonest

In general, theft involves dishonest behaviour (that is, knowing there was no **legal right** to take the property). In some circumstances, a person's behaviour may be considered dishonest if property is taken (without the owner's consent) but the accused was willing to pay for it.

Section 73 of the *Crimes Act 1958* (Vic) states that a person takes property 'honestly' rather than 'dishonestly' if they genuinely believed:

- they had a legal right to take the property or were authorised by someone with that right
- they would have the owner's consent in the particular circumstances
- the owner of the property could not be found using reasonable steps.



**Source 2** A house is an example of real property and a bike and cash are examples of personal property.

The following is an example of a situation where the accused would have the owner's consent.

## Taking property 'honestly' rather than 'dishonestly'

### EXAMPLE

Sue is off to the beach and intends to use a close friend's umbrella. Even though her friend is not home, she borrows the umbrella believing her friend won't mind. No dishonesty is involved as Sue believed the friend would have given consent in the circumstances.

## Element 2 – The accused appropriated property belonging to another

This means the accused **took the property without the owner's consent**. In taking the property, the accused must interfere with or assume one or more rights of the owner. Behaviours that might show the accused is assuming the rights of the owner include taking and keeping the item, using, devaluing, or damaging it, or trying to sell it or give it away.

The following legal case is an example of a theft involving property belonging to the accused's employer.

### Trusted employee turns thief

#### *DPP v Guy* [2016] VCC 1497 (10 October 2016)

A 50-year-old gambling addict stole \$200 000 from his employer of 17 years. He committed 63 thefts over a period of two years and 10 months. He pocketed the cash by underreporting sales receipts and engaging in improper invoicing. When a work colleague discovered one of his thefts, the man decided to tell his employer about his wrongdoing.

He was sentenced in the County Court to 15 months in prison followed by an 18 month **community correction order**. In sentencing, the judge took into account the man's early guilty plea, his willingness to show remorse and accept responsibility for his actions, his cooperation with police and the fact that he had done a lot to try and turn his life around.

### LEGAL

### CASE

**community correction order**  
a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

## Element 3 – The accused did so with the intention to permanently deprive another of the property

This means that, at the time the property was taken, the accused **intended** to assume the rights of the owner or not give the item back. In some circumstances, borrowing an item without the owner's consent may be considered theft. For example, using a motor vehicle, in any manner, without the owner's consent is sufficient to prove the intention to permanently deprive the owner of their property.

The following examples explain what is intended by 'permanently deprive another'.

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### EXAMPLE

#### Intention to permanently deprive another

- A person receives property by mistake. The property should be returned but the person keeps it instead.
- A person takes property with the intention of returning an equivalent (not the original) item.
- A person initially borrows property but then keeps it for a period of time or in circumstances that mean he or she intends to deprive the owner of the property.

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### Did you know?

If you **knowingly** buy stolen goods you commit an offence. If you **unknowingly** buy a stolen item you do not commit a crime, but you may be required to return the item to the rightful owner.

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### → GOING FURTHER

In your obook assess you will find material about the differences between two related dishonesty offences, robbery and armed robbery, as well as a list of other offences against property.

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### Study tip

Whether someone has committed theft will be determined by checking the offender's actions against each element of the offence and then considering any defences applicable in the circumstances of the case.

---

## Possible defences to theft

Each indictable offence consists of specific elements. Failure to prove all elements will result in the accused being found not guilty of the crime, and the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- the accused acted honestly rather than dishonestly
- the accused took the item with the owner's consent
- the property was abandoned when the accused took it
- the accused made a reasonable and honest mistake in taking the item
- the accused borrowed the item with the intention to give it back
- the accused bought the item with a genuine and reasonable belief that the person who sold it had the right to do so.

In some cases, the accused may be found guilty of an alternative offence should the elements for the alternative offence be proven.

Other than defending the charge for murder on the basis that one or more of the elements has not been satisfied, the accused can rely on a particular defence. Several defences to a charge of theft are available. These defences generally show that the accused did not or could not form the intention (guilty mind) to commit the offence.

There are four possible defences to a charge of theft. These are:

- mental impairment
- duress

- sudden or extraordinary emergency
- involuntary actions.

## Defence 1 – Mental impairment

One defence that can be raised by an accused is the **mental impairment** defence. A person is not guilty of theft if, at the time of the offence, they were suffering from a mental illness (or disease of the mind) and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

A successful defence on the basis of mental impairment does not immediately result in the accused being released from custody. The verdict is not an ordinary ‘not guilty’ verdict. Instead, it is a special verdict of ‘not guilty by reason of mental impairment’.

In these cases, the court will generally impose a custodial supervision order (i.e. an order that involves some form of detention or supervision – often in a medical facility). This order has a nominal term of 25 years, and confines the person to a psychiatric facility so appropriate care and treatment can be provided. The court will periodically review the order.

## Defence 2 – Duress

A person is not guilty of theft if they act under **duress**. The defence of duress applies if, at the time of the offence:

- the person has a **reasonable belief** that:
  - a threat of harm exists
  - the threat would be carried out unless the offence was committed
  - committing an offence is the only reasonable way to avoid the threatened harm
- the person’s conduct is a reasonable response to the threat.

There is no duress if the threat comes from a person with whom the accused voluntarily associates to commit an act of violence.

## Defence 3 – Sudden or extraordinary emergency

A person is not guilty of theft if they act as a result of a sudden or extraordinary emergency. The person must reasonably believe that:

- there is a sudden or extraordinary emergency
- their actions are the only reasonable way of dealing with the situation
- their actions are a reasonable response to the situation.

For example, the defence could be used by a person who runs into a hardware store and takes a fire extinguisher without permission because a car is on fire and ready to explode in a crowded street.

## Defence 4 – Involuntary actions

A person is not guilty of theft if their actions were involuntary. The involuntary nature of the accused’s actions may mean that one or more elements of the crime cannot be met. While not technically a defence, the involuntary nature of the accused’s actions may mean that a guilty mind (*mens rea*) cannot be proved. This may see the accused acquitted of the offence charged or found guilty of a lesser offence.

### mental impairment

a condition of the mind which impacts on a person’s ability to know the nature and quality of his or her conduct, or that the conduct was wrong

### duress

strong mental pressure on someone to overcome their independent will and force them to do something

### reasonable belief

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct



Source 3 Under duress, a person may have no option but to obey and commit a crime.

### automatism

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

### Did you know?

Obtaining property by deception or obtaining financial advantage by deception are two indictable offences which apply in fraudulent behaviour like when a person lies or deceives or 'scams' another person in order to commit a theft.

### self-induced intoxication

the act of getting drunk of your own free will. Intoxication (i.e. drunkenness) is assumed to occur by a person's own actions unless there was a factor that made it involuntary

For a theft charge, the accused may state that their actions were involuntary due to:

- intoxication
- **automatism.**

## Intoxication

The defence of intoxication exists at both common law (i.e. a common law defence) and statute law (i.e. a statutory defence). A person may be intoxicated by reason of consumption of alcohol, taking drugs, or some other substance.

Under **common law**, gross intoxication is a way of proving that the accused acted involuntarily or without intent. If the accused is so drunk or affected by drugs that he or she cannot form the intention to commit the crime, then the person may be found not guilty. This argument is rarely successful because the level of intoxication required to make a person's actions involuntary is extreme.

In addition, the *Crimes Act* specifies the way a court is to deal with the issue of intoxication when it is raised in cases involving self-defence, duress and sudden or extraordinary emergency. These defences often require the court to assess whether a person's belief or response was 'reasonable'. In determining reasonableness, the court must use two tests based on whether the accused's intoxication was:

- **self-induced intoxication** – Intoxication is considered to be self-induced unless it is involuntary or due to fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress, force, or the effects of proper use of prescription or non-prescription medication. In this situation, the court must compare the accused's belief or actions to those of a reasonable person who is not intoxicated.
- not self-induced intoxication – The court must compare the accused's belief or actions to those of a reasonable person intoxicated to the same level as the accused.

The legal case below highlights an example of theft as a result of self-induced intoxication.



**Source 4** Gross intoxication can result in involuntary action. It is a defence a person accused of murder can raise.

## LEGAL

## CASE

## Too drunk to know right from wrong

*R v O'Connor* (1980) 146 CLR 64

O'Connor stabbed an off-duty policeman in an attempt to steal the policeman's car. He was charged with theft and assault but argued that he did not intend to commit the crimes and that he could not remember the incident because of his consumption of a large quantity of alcohol and medication. He appealed his conviction and the appeal was allowed. The High Court of Australia, in a majority decision [4:3], ruled that while intoxication is not a separate defence it may be relevant in proving whether the accused acted voluntarily and with the intent to commit the crime.

## Automatism

Automatism can be relied on where a person has a total loss of control over their bodily movements. Because they have completely lost control, it is accepted that they cannot form the intention to commit a crime, since they are not conscious or aware of what they are doing. Therefore, the action is considered to be involuntary.

It is not enough to say 'I didn't know what I was doing'. Some external factor had to be the sole cause of the actions. A person may be found not guilty of an offence if they committed the crime:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism does not mean the person has a mental illness. Rather, the person is in a zombie-like state and 'out of it' mentally, but capable of physical acts. For this reason it is sometimes called 'sane automatism' to distinguish it from 'insane automatism', which is also involuntary, but results from a mental illness. Automatism is a defence that is extremely rare and difficult to prove.

## 5.8

## CHECK YOUR LEARNING

### Define and explain

- 1 Using an example, define the following terms:
  - a theft
  - b shoplifting
  - c robbery
  - d to appropriate.
- 2 Why is theft both a summary offence and an indictable offence?
- 3 Explain why a person may still be seen to be acting honestly when taking property even if the owner has not expressly given consent.
- 4 Summarise the elements of the crime of theft.

### Synthesise and apply

- 5 Consider the following scenarios and decide whether a theft has occurred by applying each element of the theft.
  - a A bank incorrectly credits money to Angela's bank account in error. Angela quickly spends it so the bank cannot debit it from her account.
  - b Jemila picks up the wrong suitcase at the airport baggage carousel. She returns the bag to airport authorities half a day later.
  - c John takes an irreplaceable and rare antique without the owner's permission. He compensates the owner by leaving money in its place.
- 6 Imagine you are either the prosecutor or the accused. Argue the following case on behalf of that party by

considering the elements and any defences that may apply.

Lisa was walking past a café on Domain Road in South Yarra after having way too many drinks, when she spotted a nice-looking Mustang parked on the street. She noticed the keys were left in the front seat of the car with a note 'Hey Lisa! This is yours!' Lisa was convinced that this must have been left for her by her boyfriend who had mentioned earlier that day he had a surprise for her. Lisa hopped into the car and drove the car away. As she was doing so, the owner of the car raced out of the café, distraught. As a result of her gross drunkenness, Lisa smashed the car but was unhurt.

It later turned out that the keys were accidentally left in the car, and the note was for the owner's sister – a different Lisa. And the note was in relation to a cardigan that his sister had left in the car. The other Lisa – the one who had taken the car – has now been charged with theft.

### Analyse and evaluate

- 7 Find at least three theft cases that have occurred in the past four years. Analyse what defences were raised in response to the charges laid, or what elements were denied by the accused. Provide a summary of your findings and discuss any trends you may have identified.

**These additional resources are available via your obook assess:**

» **Student book questions**

5.8 Check your learning

» **Going further**

The differences between three related dishonesty offences

» **Weblink**

Theft (*Crimes Act 1958* (Vic))

# THEFT – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to theft:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and in another jurisdiction
- the possible impacts of the crime on individuals and society.

## The role of the law in developing the elements and defences

### Common law

#### larceny

an old common law term to describe the act of theft

The law of theft aims to protect property. It has its origins in the common law offence of **larceny**, and the courts still rely on case law to refine the elements of theft and draw out their true meaning.

The law of theft has developed over time. It has been expanded to go beyond the physical act of 'taking and carrying away' another's property.

Some of the defences that can be used to defend a theft charge have their origins in common law. These include automatism and gross intoxication, and continue to apply today.

### Statute law

Today, the *Crimes Act* provides a basic definition of theft. New theft-related offences were created by the Victorian Parliament to cover behaviour such as credit card fraud, theft by electronic fund transfer or theft using electronic accounting systems. These acts do not always involve the physical act of taking someone's property; rather, the offender uses deception to gain a financial advantage.

New laws have also been created in response to the high prevalence of home burglaries and violent thefts of motor vehicles. Most recently, these have included new crimes such as '**carjacking**' and '**aggravated carjacking**'.

#### carjacking

the act of violently stealing an occupied car

#### aggravated carjacking

the act of violently stealing an occupied car committed when the offender possesses a firearm, imitation firearm, offensive weapon, explosive or imitation explosive, or (in the course of carjacking,) causes injury to another person

## Trends and statistics

Australian Bureau of Statistics (ABS) data show that:

- from 2010 to 2016, an average of 700 000 theft-related crimes were reported Australia-wide. This equates to approximately 2 800 theft-related offences per 100 000 populations
- in 2016, there were 56 086 victims of motor vehicle theft and 537 283 victims of other thefts. Unlawful entries are not included in these figures
- in 2016, there were an additional 377 515 unlawful entries, and 33 per cent of those involved a theft.

Only some of these offences will be indictable offences, because most thefts under \$100 000 are heard summarily in the Magistrates' Court.

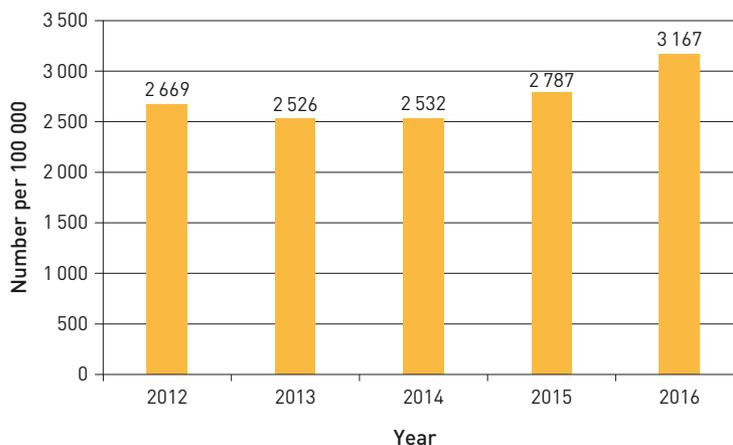
## Victoria

The Victorian Crimes Statistics Agency reported that between October 2015 and September 2016, all property and deception offences in Victoria increased by 12.9 per cent. Theft and burglary make up 74 per cent of these offences. The number of property and deception offences reported to police is five times higher than reports taken for other types of offences.

The Victorian **Crime Statistics Agency (CSA)** reported that in the year ending December 2016, 331 530 property and deception offences were reported to police – an 11 per cent increase from the previous year. Of these, 58 per cent were thefts, 17 per cent were burglaries, 11 per cent were deception offences and 14 per cent were other types of property crime. This equates to 2787 thefts and 837 burglaries per 100 000 (population) in 2015 and 3167 thefts and 904 burglaries per 100 000 in 2016. Some theft is not reported to police, particularly where the property owner was careless in securing the property or its value is low.

**Crime Statistics Agency (CSA)**  
an independent organisation responsible for processing, analysing and publishing Victorian crime statistics

NUMBER OF REPORTED OFFENCES OF THEFT PER 100 000 PERSONS IN VICTORIA (2012–2016)



Source: Crime Statistics Agency, Recorded Offences, Year ending 31 March 2016

**Source 1** In Victoria, the number of reported offences of theft has increased.

The Sentencing Advisory Council records that between 1 July 2011 to 30 June 2016, there were 3 239 theft cases, which were cases of theft of property other than a motor vehicle. Of those cases:

- the main age group that offended was between 25 to 34 years
- 67.3 per cent of offenders were male
- 66.7 per cent of offenders received a term of imprisonment, with the median sentence being 2.5 years.

## Queensland

The Queensland Police Service collates its theft statistics differently, so comparisons between the two jurisdictions are limited. Its statistics include the offences of stealing from dwellings and vehicles, shop stealing and other stealing, and exclude burglaries and deception offences. In 2016, Queensland Police recorded 102 277 theft-related offences and 32 503 unlawful entries. This represents 2114 thefts per 100 000 and 672 unlawful entries per 100 000. These numbers have been relatively stable over the period, as shown in Source 2.

## NUMBER OF REPORTED OFFENCES OF THEFT IN QUEENSLAND (2011–2016)

	NUMBER				
Year	2011–12	2012–13	2013–14	2014–15	2015–16
Reported offences	104 315	104 236	98 914	96 308	102 277
	RATE PER 100 000 PERSONS				
Year	2011–12	2012–13	2013–14	2014–15	2015–16
Reported offences	2 284	2 241	2 096	2 015	2 114

Source: Queensland Police Service, Region and District Crime Statistics 1 July 2011 to 30 June 2016

**Source 2** In Queensland, the number of reported offences of theft fluctuates from year to year. The first row of the table shows the total number of theft offences, and the second row shows the rate of occurrence for every 100 000 people.

## Possible impacts of theft

Theft in our community affects both individuals and businesses alike because they bear the cost of replacing stolen items. Excessive insurance claims will result in a rise in premiums, not only for victims of theft, but for all policy holders. Similarly, the ordinary consumer foots the bill for shop stealing. Stores generally compensate for lost revenue with price rises.

Theft can cause inconvenience, anxiety and distress for victims, particularly if they have lost irreplaceable or sentimental items or if their home has been burgled. Violent theft-related crimes, like robberies, can be traumatic for victims leaving them with long-term mental health issues.

Businesses and individuals, fearing future thefts, will increase store and home security because they are distrustful of others. This comes at a cost. Too many theft-related offences like robberies, burglaries, home invasions and carjackings in an area can also affect property prices, and drive out businesses, as people do not want to live, visit or work in an unsafe neighbourhood.

Source 3 lists some of the possible impacts that theft can have on individuals (i.e. the offenders, victims and their families) and society.

POSSIBLE IMPACTS OF THEFT		
IMPACTS ON THE OFFENDER	IMPACTS ON VICTIMS AND THEIR FAMILIES	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Legal costs</li> <li>• Possible custodial sentence</li> <li>• Lost labour and income in the household</li> <li>• Impact on the family's social standing, finances and health and well-being</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of property</li> <li>• Trauma, grief and loss and related medical issues</li> <li>• Continuing psychological issues</li> <li>• Loss of trust in law and order and community values</li> </ul>	<ul style="list-style-type: none"> <li>• Increased need for police, fire and emergency services</li> <li>• Loss of trust in law and order and community values</li> <li>• Fear of property being stolen from them</li> </ul>

**Source 3** A summary of the impacts of theft



**Source 4** Theft in our community affects both individuals and businesses alike because they bear the cost of replacing stolen items. Excessive insurance claims will result in a rise in premiums, not only for victims of theft, but for all policy holders.

## 5.9

## CHECK YOUR LEARNING

### Define and explain

- 1 What is meant by the term 'larceny' and how was the term developed?
- 2 What is the role of the courts in relation to theft crimes?
- 3 Is the level of theft in the community increasing or decreasing? Give some possible reasons for this increase or decrease.

### Synthesise and apply

- 4 Your friend is a big fan of *Game of Thrones*, and has all of the episodes of all the series on his laptop. He boasts about the fact that he doesn't have to pay for the episodes as he downloads them on torrent sites on the Internet. Your friend doesn't consider this to be stealing, and sees his actions as having no impact on anybody

(he thinks Hollywood stars and producers are rich enough).

Consider the impacts that this type of behaviour can have, and devise a way in which you would convince your friend to see the consequences of his behaviour.

### Analyse and evaluate

- 5 Using the data contained in this topic, create some pie graphs or other visual diagrams which shows the level of crime in both Victoria and Queensland.
- 6 The number of thefts in Victoria and Australia is on the rise. Why do you think the reported number of thefts has increased?
- 7 'The costs of business of shop stealing should be taken into consideration in sentencing, and should be borne by the offender'. Discuss this statement as a class.



**These additional resources are available via your obook assess:**

» **Student book questions**

5.9 Check your learning

» **Weblink**

Crime Statistics Australia

» **Weblink**

Sentencing Advisory Council

## CHAPTER SUMMARY

**Indictable offences**

- > Serious offences heard in the County Court or Supreme Court
- > Impacts are various and can impact on the offender, victims, families and society in various ways

**Murder**

## Elements

- > The killing was unlawful
- > The victim was a human
- > The accused was a person over the age of discretion
- > The accused caused the victim's death
- > The accused was a person of sound mind
- > There was malice aforethought

## Possible defences

- > Self-defence
- > Mental impairment
- > Duress
- > Sudden or extraordinary emergency
- > Involuntary actions

## Development of law

- > Elements of murder contained in common law; also some defences
- > Changes or additions made to elements and defences

## Trends and statistics

- > Generally stable – no increase or decrease

**Culpable driving**

## Elements

- > The accused was the driver of the motor vehicle
- > The accused culpably caused a person's death while driving

## Possible defences

- > Duress
- > Sudden or extraordinary emergency
- > Involuntary actions

## Development of law

- > Largely found in statute law
- Trends and statistics

- > No real increase or decrease

**Rape**

## Elements

- > Sexual penetration
- > Lack of consent
- > Lack of reasonable belief

## Possible defences

- > Mental impairment
- > Duress
- > Involuntary actions

## Development of the law

- > Origins in common law, though rape laws now found in statute law

## Some common law defences apply

- > Trends and statistics
- > Underreported
- > Steadily increasing
- > Vast majority of offenders are male

**Theft**

## Elements

- > The accused was dishonest
- > The accused appropriated property belonging to another
- > The accused did so with the intention to permanently deprive another of the property

## Possible defences

- > Mental impairment
- > Duress
- > Sudden or extraordinary emergency
- > Involuntary actions

## Development of law

- > Common law offence of larceny
- > Basic definitions found in statute
- > New offences developed by parliament

## Trends and statistics

- > Generally increasing



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

» **Student book questions**

Ch 5 Review

» **Revision notes**

Ch 5

» **assess quiz**

Ch 5

Test your skills with an auto-correcting multiple-choice quiz

## REVISION QUESTIONS

- 1 Describe two possible impacts of crime on both the offender and the victim. (4 marks)
- 2 Outline one reason why the specific elements for each offence are important in criminal law. (2 marks)
- 3 Describe two general defences in criminal law. (4 marks)
- 4 Distinguish between self-induced intoxication and not self-induced intoxication, and provide an example of each. (6 marks)
- 5 Explain why you believe automatism is difficult to prove as a defence. (3 marks)
- 6 'Crime statistics are messy and should not be relied on.' Discuss the extent to which you agree with this statement. (5 marks)
- 7 Choose one or two scenarios below based on the offence(s) you have studied. Argue the case for either the prosecution or the defence, addressing each of the elements and any defences.
  - a Melinda had taken a sleeping tablet and was asleep in her boyfriend's bed when she thought her boyfriend had woken her to have sex. When she realised it was not her boyfriend but his brother, she tried to push him away but he continued regardless.
  - b Sabine hit and killed a cyclist with her car. She told police that she had just finished reading a text message on her mobile phone when the cyclist 'appeared' out of nowhere.
  - c Bob is a mechanic. A client owes money for past repairs and has not paid despite reminders. When the client hands over his car for further repairs, Bob takes the car and refuses the owner access to his car until the debt is paid.(8 marks per scenario)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

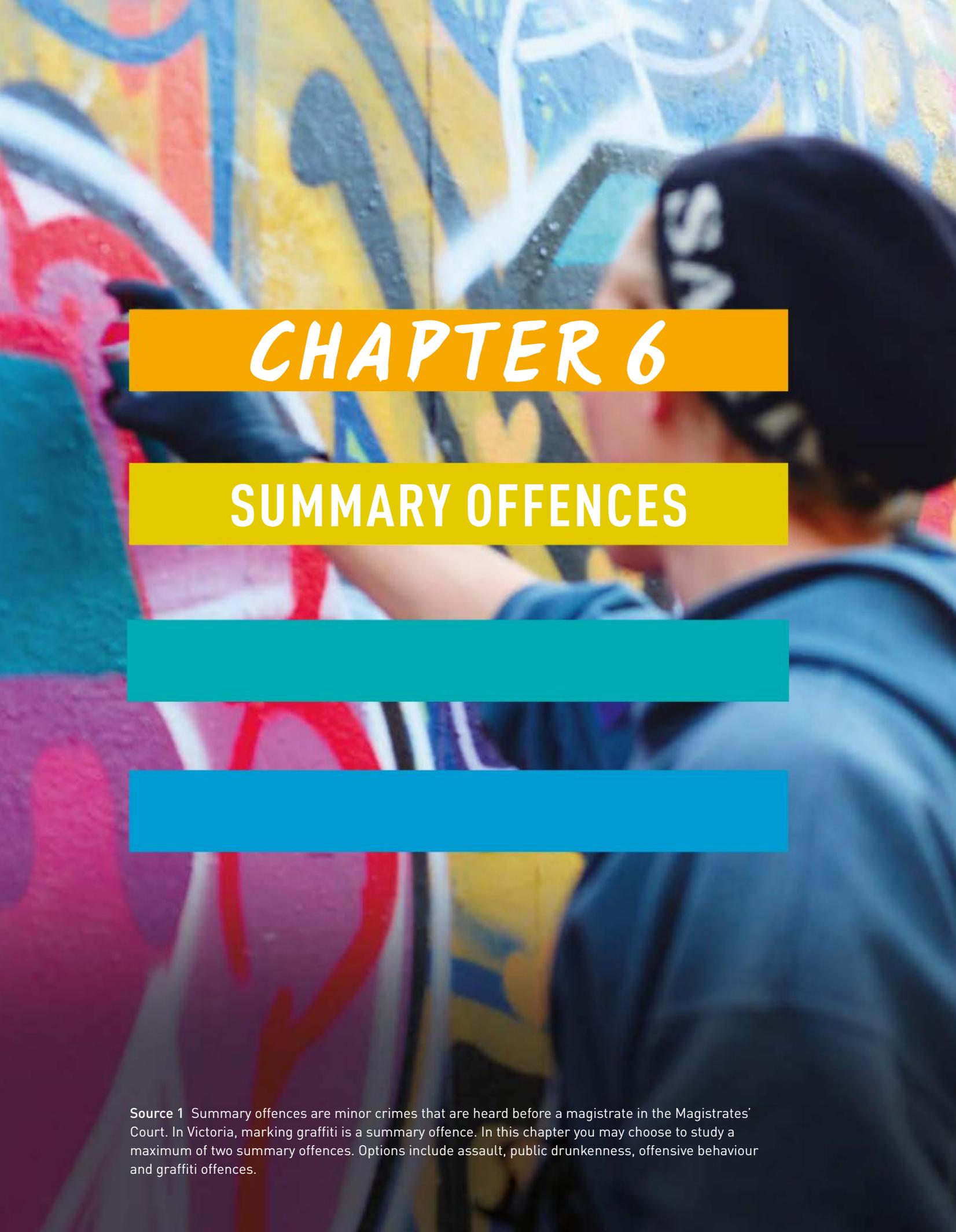
Use the Internet or other sources to find legal cases or news articles involving two indictable offences covered in this chapter. Each case or article should:

- > focus on one indictable offence rather than lots of different offences.
- > explain what the offender did in some detail.
- > state whether the offender was (or was) not punished.

Provide answers to the following questions for each case.

### Practice assessment task questions

- 1 How prevalent is this type of crime in our community? Give reasons for your answer. (5 marks)
  - 2 Who must prove the accused guilty of this crime and to what standard? (2 marks)
  - 3 Explain how each element of the crime was met (or not) met in this case. (8 marks)
  - 4 Describe any defences relied on in this case, and whether they were or could be successful. (5 marks)
  - 5 What effect does this crime have on the victim, the offender and the community? (5 marks)
- Total: 25 marks



# CHAPTER 6

## SUMMARY OFFENCES

**Source 1** Summary offences are minor crimes that are heard before a magistrate in the Magistrates' Court. In Victoria, marking graffiti is a summary offence. In this chapter you may choose to study a maximum of two summary offences. Options include assault, public drunkenness, offensive behaviour and graffiti offences.

## OUTCOME

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

## KEY KNOWLEDGE

In this chapter, you have the option of choosing up to two summary offences. For each offence, you will learn about:

- the elements of the offence
- possible defences
- the role of statute law and common law in developing the elements of the offence and the defences
- trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- the possible impact of the offence on individuals and society.

## KEY SKILLS

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

- define and use legal terminology
- research and analyse relevant information about criminal law and offences

## ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 2** (i.e. Chapters 4, 5 and 6), you are required to study **two criminal offences** in detail.

YOU MAY CHOOSE TO STUDY:	CHAPTERS INCLUDE:	PAGE:
• TWO indictable offences (from Chapter 5)	5.2 & 5.3 Murder	104
	5.4 & 5.5 Culpable driving	118
	5.6 & 5.7 Rape	127
	5.8 & 5.9 Theft	138

OR

YOU MAY CHOOSE TO STUDY:	CHAPTERS INCLUDE:	PAGE:
• TWO summary offences (from Chapter 6)	6.2 & 6.3 Assault	156
	6.4 & 6.5 Public drunkenness	169
	6.6 & 6.7 Offensive behaviour	176
	6.8 & 6.9 Graffiti	186

OR

• ONE indictable offence (from Chapter 5)	See above	See above
• ONE summary offence (from Chapter 6)		

- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
- use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios.

## KEY LEGAL TERMS

**assault** the intentional or reckless use of force or the threat of force against another person without a lawful excuse

**drunk** when a person's physical or mental faculties or judgment are appreciably and materially impaired by alcohol, drugs or another substance, resulting in a substantial lack of capacity or control

**graffiti** any illegal writing, drawing or scratching that defaces (i.e. damages) public property and cannot be removed with a dry cloth

**offensive behaviour** conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# 6.1

## INTRODUCTION TO SUMMARY OFFENCES

### summary offence

a minor offence generally heard in the Magistrates' Court

### sanction

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

### assault

the intentional or reckless use of force or the threat of force against another person without a lawful excuse

### drunk

when a person's physical or mental faculties or judgment are appreciably and materially impaired by alcohol, drugs or another substance, resulting in a substantial lack of capacity or control

### public place

an area or location considered open to the public (i.e. anyone in the community has a right to go there)

### offensive behaviour

conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

### graffiti

any illegal writing, drawing or scratching that defaces (i.e. damages) public property and cannot be removed with a dry cloth

### Did you know?

It is an offence in Victoria to roll a drum, barrel or cask in a public place, or break in a horse to the injury of or danger to any person or damage to any property.

**Summary offences** are minor offences, generally heard in the Magistrates' Court by a magistrate. If the accused is guilty of an offence, the magistrate then imposes a **sanction** (penalty).

Summary offences cover a wide range of behaviour and come from different Acts of Parliament. Summary offences often occur in the community and a significant number of minor offences are heard in the Magistrates' Court every year.

In Victoria, many summary offences are contained in the *Summary Offences Act 1966* (Vic). In general, this Act covers less serious or minor offences against people, property, public order and public decency.

This chapter explores four summary offences:

- **assault**
- public drunkenness (i.e. being **drunk** in a **public place**)
- **offensive behaviour**
- **graffiti** offences.

For each summary offence, you will consider the elements of the offence, possible defences, the role of statute and common law in developing the elements and the defences, trends and statistics and the possible impact of the offence on individuals and society.

## Elements of summary offences

Like indictable offences, all summary offences consist of specific elements that make up the offence. All elements must be proved, beyond reasonable doubt, before a person can be found guilty of the offence. The specific elements of a crime can be found in either a **statutory definition** of the offence (in Acts of Parliament) or its **common law definition** (developed through judge-made law).

The specific elements of a crime can be divided into two types:

- elements that prove the accused committed a guilty act (i.e. *actus reus*)
- elements that prove the accused had a guilty mind (i.e. *mens rea*) when the offence was committed.



**Source 1** Littering is a summary offence under the *Environment Protection Act 1970* (Vic).



#### statute law

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

#### common law

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

#### strict liability

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

#### crime statistics

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

**Source 2** Dumping household rubbish is a summary offence.

In general, the prosecutor must prove all elements are present in a case before the accused can be found guilty. For this reason, the prosecution will charge the accused with crimes that best match the accused's behaviour and actions at the time of the offence.

Unlike the serious crimes you may have learnt about in Chapter 5 (indictable offences), some summary offences do not require the prosecution to prove a mental element such as intention or recklessness.

## Possible defences for summary offences

When a person is charged with a criminal offence they can usually raise a defence of some kind. Even for a **strict liability** offence (one that does not require the existence of *mens rea* for a person to be found guilty), limited defences are available.

For each of the minor offences explored in these chapters, you will consider the defences that can be raised by an accused who is charged with these offences.

## Development of the law

Although most law related to summary offences is found in Acts of Parliament, quite often the act does not define important concepts that have developed through case law. As such, common law definitions and principles that are relevant to defining the elements of the offence, and the defences that can be raised for each crime, still apply.

For each summary offence in this chapter, you will look at the role of both the parliament and the courts in developing the elements and the defences associated with that offence.

## Trends and statistics

Due to the importance of crime and its effects on individuals and the community, government agencies and other organisations record and analyse **crime statistics**.

The amount of crime occurring in a community (the number of individual offences of the same type) is called the incidence of crime. The Victorian Crime Statistics Agency (CSA) gathers and reports on the incidents of crime in Victoria.

These statistics are collected and may be compared with those in other states and countries so the government can determine the amount of crime in our community, measure the effectiveness of law enforcement agencies and plan for the best use of resources so our society is as crime-free as possible.



## CRIME STATISTICS AGENCY

**Source 3** The Crime Statistics Agency is an independent organisation responsible for processing, analysing and publishing crime statistics for the state of Victoria.

### Did you know?

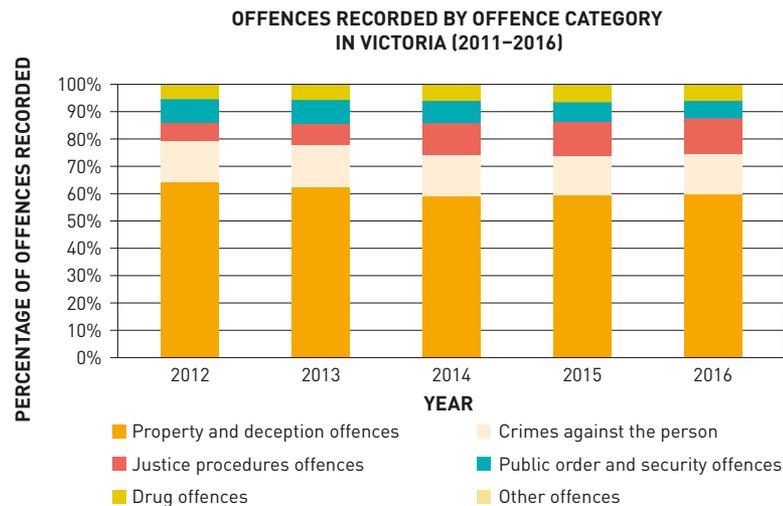
Crime statistics are often expressed as a number per 100 000 (e.g. 5 per 100 000). This means for every 100 000 people, five of them will be a victim of that crime. This helps researchers to compare crime rates in different places regardless of differences or changes in population.

### Study tip

You should always be careful when comparing two different sets of statistics, especially for summary offences. If there seem to be big differences between states, don't leap to conclusions. The difference could be caused by different collection dates, different ways of counting offences, or different ways of grouping similar offences.

While all crime is harmful to the community, statistical comparisons between legal jurisdictions can prove difficult because of differences in operational procedures, crime classifications and the way incidents are recorded.

Crime statistics tend to focus on indictable offences (more serious crime) rather than summary offences. Summary offence data is often included in crime statistics within general categories such as 'other offences'. This means statistics and trend data for a specific summary offence may not be readily available unless the raw data used to compile the offence category or graph is also published.



Source: Crime Statistics Agency, Recorded Offences, Year ending 31 March 2016

**Source 4** The recorded offences in Victoria do not generally fluctuate from year to year, yet justice procedures offences have shown a slight increase in 2015 and 2016.

For example, in Source 4 most of the offence categories include data for both indictable and summary offences. In this graph, 'Crimes against the person' would include 'Assault and related offences', which can be either a summary or indictable offence depending on the circumstances. In contrast, the 'Other offence' category contains driving offences, public transport offences and other government regulatory offences which are generally summary offences. Another problem is that large numbers of offences are grouped together in a single category. For indictable offences, this is less of a problem (e.g. there are only a handful of different homicide offences). However, for summary offences, having large numbers of different offences under a single category can make a big difference to the statistics.

## Impacts of summary offences on the community

Summary offences are everyday offences, committed by a small but significant portion of the community with relative frequency. These crimes have a negative impact on the victim, but it is less likely to be life-changing than the indictable offences discussed in Chapter 5. While they are not as serious as indictable offences, taken together, summary offences can still have a major impact on individuals and society as a whole. They erode trust, damage our shared values and reduce our enjoyment of a peaceful, cooperative community.

As you will learn in this chapter, individuals, communities or businesses can suffer physical, financial or psychological damage as the victims of summary offences.

While summary offences are considered less serious than indictable offences, they can still lead to negative consequences for offenders, such as a criminal record. This case study further introduces the summary offence of littering.

# Littering takes toll on the community and the environment

CASE

STUDY

Littering can have a significant effect on the community. Litter that is not easily broken down can also have a long-lasting impact on the environment. There are a number of littering offences contained in the *Environment Protection Act*. The Environment Protection Authority (EPA) has the authority to prosecute littering offences, and estimates that 20 000 people are reported to the EPA every year for throwing litter out of their vehicle. Illegal dumping of large goods is also a continuing issue in Victoria, and Parks Victoria, the authority responsible for public parks and reserves in Victoria, has a significant role in collecting waste that has been improperly dumped in public spaces.

## 6.1

### CHECK YOUR LEARNING

#### Define and explain

- 1 Define the term 'summary offence'. Provide one example of a summary offence.
- 2 In which Acts of Parliament are summary offences found?

#### Synthesise and apply

- 3 Provide one example of conduct that may be considered either a summary offence or an indictable offence, depending on its seriousness.
- 4 As a class, discuss the types of summary offences that you have been exposed to or witnessed in your lifetime. These may be summary offences that you have been the victim of, or that a family member has been a victim of, or that you know someone close to you has committed.
  - a Talk as a class about the facts of the crime.
  - b Describe the impact that this crime had on at least one of the people involved in the crime (it could be the offender, the victim or a family member).

- c What are some of the trends or similarities that you see in the stories?
- 5 How could you design a way in which statistics for summary offences can be better recorded? You might wish to look on the Crime Statistics Agency website to see how these crimes are recorded first, and identify any flaws or gaps in the statistics in relation to summary offences.

#### Analyse and evaluate

- 6 Discuss the reasons why you think that crime statistics tend to focus on serious crime rather than summary offences.
- 7 Go to Victoria Law Today website and access the *Summary Offences Act*. A link is provided on your [obook assess](#). Review the list of offences provided in the Table of Provisions, and explain the extent to which you think the *Summary Offences Act* is relevant today.

These additional resources are available via your [obook assess](#):

» **Student book questions**

6.1 Check your learning

» **Video tutorial**

Introduction to Chapter 6

» **Legal case**

Paul Michael Vella

» **Weblink**

Victorian Law Today

Information on a number of other **summary offences** is also provided on your [obook assess](#). You may wish to use this information as the basis for a study of your choice. These other summary offences include: Begging or gathering alms, Food or drink spiking, Making false reports to police, Tattooing of juveniles.

## 6.2

# ASSAULT – ELEMENTS & DEFENCES

### assault

the intentional or reckless use of force or the threat of force against another person without a lawful excuse

### *Did you know?*

In old cases, a distinction was made between common assault (the threat to inflict force) and battery (the actual force). Assault has developed as a concept so that it now covers both a threat and a physical contact. This means the term 'battery' is essentially obsolete in the criminal law.

In simple terms, **assault** is an act that does physical harm (or threatens to do physical harm) to another person. Assault is an old offence that developed through case law dating back hundreds of years in England. In Victoria today, it is now defined in the *Summary Offences Act 1966* (Vic). Like all summary offences, assault is heard in the Magistrates' Court; however, serious assaults can be considered indictable offences. This means they will be heard in one of the higher courts.

Over the centuries, as court decisions clarified and refined the common law definition of assault, additional legal principles have been established through judicial interpretation. They include as follows:

- assault can be committed by the use of force, a threat, or an attempt to use force against another
- force in an assault can be slight, as long as there is some form of contact. It need not result in injury or harm
- in general, words alone are not an assault unless there is an accompanying threatening gesture like a raised fist, the cutting of the throat with a finger or the positioning of the thumb and forefinger to signify the firing of a gun
- the victim must be aware of the threat and reasonably believe that the threat will be carried out then and there. This is not about what the offender intends but what the victim believes might happen
- while some threats by phone may constitute an assault, a threat made in a long-distance phone call does not place the victim in imminent danger and is not an assault
- words can sometimes constitute a threat or undo a threat, as further detailed in the example below.

## EXAMPLE

### Words as a threat

Uttering the words 'Shut your mouth or else' as the person is walking towards their victim is a threat, but saying 'If I wasn't in such a hurry I'd come over and shut your mouth' is not a threat as the person has indicated they do not have the time to act.



Source 1 Threatening words are different in character from 'blowing your stack' through frustration.

While there is no physical harm from spitting, the feeling of disgust and also a fear of disease make spitting a particularly offensive assault, as highlighted in the following legal case.

## Drive-thru spat ends in aggravated assault

*Abdul-Rahim*, Broadmeadows Magistrates' Court  
(unreported, 6 April 2016)

On 13 January 2016, a 25-year-old Melbourne man by the name of Hassan Abdul-Rahim argued with staff and spat at a McDonald's Drive-Thru attendant because he had to wait for his order. During the incident, the man honked his horn, refused to move his car and spat a large amount of saliva at the 19-year-old female attendant, getting it on her face and in her mouth. The victim said she was traumatised by the event. Abdul-Rahim was charged with unlawful assault, aggravated assault and unlicensed driving as a result of the incident. He pleaded guilty in the Magistrates' Court to aggravated assault.

In court, the man said he was frustrated at having to wait, although the police said the delay was only 20 or 30 seconds. He admitted to clearing his throat and spitting in the woman's direction but said he had no intention of spitting at her. Lawyers said the man was remorseful and gave himself up to police after seeing media reports about the incident. The man was on **bail** for other offences at the time of the incident. He was sentenced to one month in prison.



**Source 2** In 2016, a Melbourne man spat at a McDonald's Drive-Thru attendant. He was charged with aggravated assault and was sentenced to one month in prison.

LEGAL

CASE

### **bail**

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

There are many different types of assault. Some are quite minor and do not involve serious violence or harm, while others are serious and violent. Likewise, some assaults are direct (e.g. involving a push, punch or physical blow) while others are indirect (e.g. involving an object being thrown or spitting).

Regardless of type, all assaults share some common characteristics. That is, they involve the **intentional** or **reckless** use of force (or threat of force) against another person without lawful excuse. The seriousness of the assault depends on the actions of the offender and the degree of harm caused to the victim. Where the victim suffers an injury or serious injury (requiring medical attention or hospitalisation) the assault is more likely to be an indictable offence. A serious threat can also be an indictable offence; for example, a threat to kill or inflict serious injury. Less serious threats or minor assaults will be dealt with as summary offences.

### **intentional**

something deliberate; not an accident

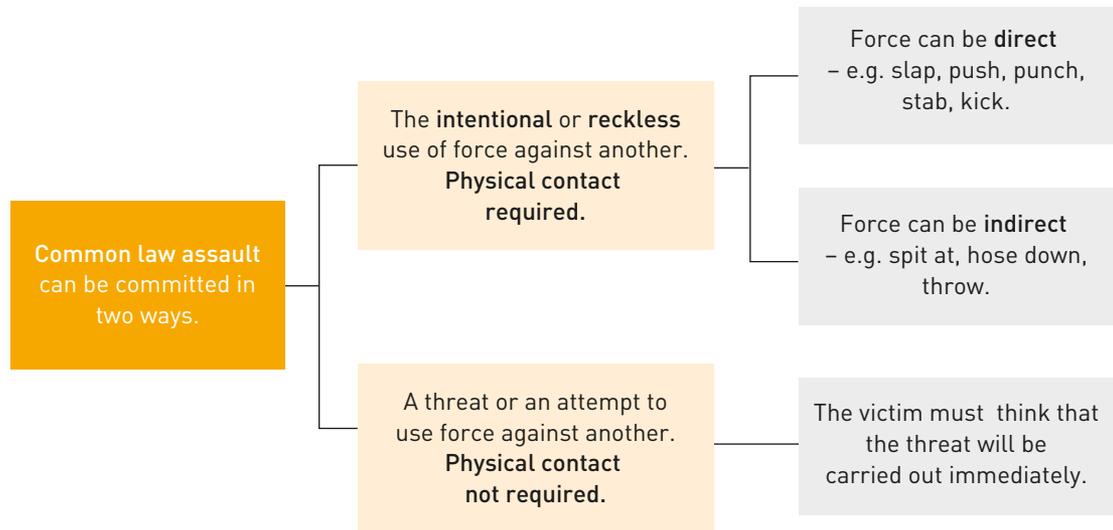
### **reckless**

acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

## → GOING FURTHER

### Other types of assault

In this chapter, we do not cover other types of assault outlined in the *Summary Offences Act*. However, you will find details of these in your obook assess.



Source 3 Common law definition of assault

In this topic we focus on common assault set out in Section 23 of the *Summary Offences Act*. This is a less-serious and common type of summary offence that can be tried in the Magistrates' Court.

## Elements of assault

Section 23 of the *Summary Offences Act* (extract below) is the section which prohibits common assault.

### EXTRACT

#### *Summary Offences Act 1966 (Vic)*

##### 23 Common assault

Any person who unlawfully assaults or beats another person shall be guilty of an offence.

Penalty: 15 penalty units or imprisonment for three months.

### Did you know?

It is an offence in Victoria to drive a dog or goat harnessed or attached to a vehicle in or through a public place.

For a person to be found guilty of assault under Section 23 of the Act (also known as common assault), the prosecution must prove the following elements:

- the accused assaulted or beat another person – that is, the person applied force, or threatened to apply force
- the application or threat of force was intentional or reckless
- there was no lawful justification or excuse.

## Element 1 – The accused applied force, or threatened to apply force

This means that an assault can be either a threat of force or actual physical force. This force does not need to be violent, as even a slight touch can in some instances be considered assault. The following example demonstrates how violent force (e.g. physically punching and head-butting another) will constitute an assault.

## Night out leads to unlawful assault

These facts, or something like them, are heard over and over again in every Magistrates' Court in Victoria. A 22-year-old man is charged with unlawful assault for punching and head-butting a 21-year-old nightclub patron. The pair got into an argument when the victim struck up a conversation with a girl who was also at the club. The victim was left with a bruised cheek and a bump on his forehead.

The man pleaded guilty in the Magistrates' Court. He was fined \$1000 without conviction and placed on a good behaviour bond for 12 months.

## Element 2 – The application or threat of force was intentional and reckless

This means that at the time of the assault, the accused **intended** to deprive the complainant of liberty, or cause discomfort, insult, damage, injury or pain. An accused's **reckless** conduct can also be used to prove that they acted with the intention to commit an assault offence.

Some assault cases attract media attention, which may be just what the offender was after, as highlighted in the following legal case.

### Racecourse antics land woman in court

*Sarah Finn, Melbourne Magistrates' Court (unreported, 11 February 2016)*

On Melbourne Cup Day in 2015, a 25-year-old woman, Sarah Finn, was charged with assaulting police when she recklessly pushed an Acting Superintendent, Steven Cooper, into bushes at the Flemington Racecourse. The officer was in uniform at the time and was waiting to address the media (see Source 4). He was on his phone when the woman struck, in full view of the media cameras. The woman's motive was to 'get on the news'. She later admitted to being 'tipsy' and apologised for her behaviour. She pleaded guilty in the Magistrates' Court and was fined \$800. She was ordered to pay \$117 in costs and \$150 in compensation for the officer's broken glasses.



**Source 4** Sarah Finn shown punching Acting Superintendent Steven Cooper on Melbourne Cup Day in 2015

LEGAL

CASE

## Element 3 – No lawful justification or excuse

This means that the person who committed the assault did so without any authority, or beyond the level authorised by the law. An example of a lawful assault where a person was legally able to use force is when a police officer arrests a person, and when doing so, uses reasonable force.

# Possible defences to assault

Failure to prove all elements will result in the accused being found not guilty of the crime, therefore the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- there was no intention or reckless conduct
- there was no force or threat of force.

Other than defending the charge for assault on the basis that one or more of the elements has not been satisfied, the accused can otherwise rely on a particular defence. There are eight possible defences to a charge of assault. These are:

- consent
- lawful correction of a child
- lawful arrest
- self-defence
- mental impairment
- duress
- sudden or extraordinary emergency
- involuntary actions.

## Defence 1 – Consent

A person cannot be convicted of assault if their actions were consensual. Consent is a partial defence, meaning that it does not completely absolve the accused of an assault charge. This defence will depend on the circumstances in which the assault was committed and the degree of harm inflicted. In general, a person cannot consent to an unlawful act or to the infliction of a serious injury or grievous bodily harm.

We regularly consent to medical treatments that would be an assault if it were not a medical procedure (e.g. dental extraction of a tooth, or injection of a finger). When participating in everyday activities we also accept or consent to physical contact which is reasonable and acceptable in the circumstances. We accept that we may be tapped on the shoulder, patted on the back or bumped on a crowded street.

## Defence 2– Lawful correction of a child

A person may be convicted of assault if they smack a child. However, it will not be an assault as long as it is reasonable in all the circumstances and is genuinely intended for correction (not an angry beating).

That is, parents (or their representative) who smack a child as a form of discipline must do so within strict parameters. The physical act must not be unreasonable or excessive. It must be appropriate to the child's age and physical or mental development. The following legal case outlines an example where a parent's discipline was considered reasonable.

### LEGAL

### CASE

## Smacking must be reasonable

*Police v G, DM* [2016] SASC 39 (21 March 2016)

A divorced man, who was a pilot in the military, smacked his son three times in response to disrespectful behaviour. The boy reported the incident to police during a visit with his mother. The father was found guilty of aggravated assault in the Magistrates' Court of South Australia.

Justice Peek of the Supreme Court of South Australia, on appeal, decided the man's actions were lawful. The judge said three slaps to the boy's thigh, resulting in red marks but no bruising, were reasonable in the circumstances. The father had previously tried to reason with the boy and had given him time-out to consider his behaviour.

## Defence 3 – Lawful arrest

A person may not be convicted of assault if they have the authority to carry out an arrest, such as a police officer, or is assisting a person who has this authority. If the arrest is lawful, they can arrest the person using reasonable force.

Reasonable force depends on the circumstances. Little force would be required to detain a cooperative or compliant offender, but police may use more force when an offender is resisting arrest. A police officer who uses excessive force is going beyond authority and can be found charged with assault, as highlighted in the following legal case.

### Frustrated police officer guilty of assault

*Dean Bradley Anderson*, Melbourne Magistrates' Court (unreported, 9 October 2014)

On 13 December 2012, a commuter, Anton Perry, was asked to show his ticket and give his name, but he refused repeatedly. He was then arrested and taken to a police cell at Flinders Street Station. While he was there he was verbally aggressive, and a 40-year-old senior constable pushed him into a wall, wrestled him to the ground, then stood over him, grabbed him by or near the throat and handcuffed him. All this was captured on CCTV. Charged with assault, the officer pleaded not guilty, saying he feared his male victim was going to spit on him. He said he had a heightened fear of being spat on due to a spitting incident earlier in his career, requiring him to be tested for HIV and Hepatitis C.

In October 2014, Magistrate Elizabeth Lambden found that he had acted beyond his legal authority, out of frustration, and that he was not acting in self-defence. She found him guilty but did not record a conviction. He was required to serve a 12-month community correction order, and as part of the order was required to perform 150 hours of unpaid community work.



Source 5 Flinders Street Station in Melbourne, where Mr Perry was assaulted by a police officer

LEGAL

CASE

## Defence 4 – Self-defence

A person will not be convicted of assault if:

- they believed that their actions were necessary in self-defence
- their actions were reasonable in the circumstances as the person perceived them.

In family violence cases, the accused's actions may be considered 'reasonable in the circumstances as the person perceives them' even if:

- the person responds to harm that is not immediate
- the person responds with excessive force.

Self-defence does not apply if the accused is responding to lawful conduct.

## Defence 5 – Mental impairment

A person will not be convicted of assault if, at the time of the offence, they were suffering from a mental illness (or disease of the mind) and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

A successful defence of mental impairment does not immediately result in the accused being released from custody. That is, the verdict is not an ordinary ‘not guilty’ verdict. Instead, it is a special verdict of ‘not guilty by reason of mental impairment’.

In these cases, the court will generally impose a custodial supervision order (i.e. an order that involves some form of detention or supervision – often in a medical facility). This order has a nominal term of 25 years, and confines the person to a psychiatric facility so appropriate care and treatment can be provided. The court will periodically review the order.

## Defence 6 – Duress

A person will not be convicted of assault if they act under **duress**. The defence of duress applies if, at the time of the offence:

- the person has a **reasonable belief** that:
  - a threat of harm exists
  - the threat would be carried out unless the offence was committed
- committing an offence is the only reasonable way to avoid the threatened harm
- the person’s conduct is a reasonable response to the threat.

There is no duress if the threat comes from a person with whom the accused voluntarily associates to commit an act of violence.

## Defence 7 – Sudden or extraordinary emergency

A person will not be convicted of assault if they act as a result of a sudden or extraordinary emergency. The person must reasonably believe that:

- there is a sudden or extraordinary emergency
- their actions are the only reasonable way of dealing with the situation
- their actions are a reasonable response to the situation.

To grab or push a person is an assault and legal action may follow. However, if this is done to save the other person (e.g. from being hit by a large tree limb) this defence could apply. The court will consider the gravity of the emergency, whether the person’s actions were the only way of dealing with the situation, and whether they were reasonable in the circumstances.

## Defence 8 – Involuntary acts

A person will not be convicted of assault if their actions were involuntary. The involuntary nature of the accused’s actions may mean that one or more elements of the offence cannot be met. While not technically a defence, the involuntary nature of the accused’s actions may mean that a guilty mind (*mens rea*) cannot be proved. This may see the accused acquitted of the offence charged or found guilty of a lesser offence.

### **duress**

strong mental pressure on someone to overcome their independent will and force them to do something

### **reasonable belief**

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct

For an assault charge, the accused may state that their actions were involuntary due to:

- intoxication
- **automatism**
- accident.

## Intoxication

The defence of intoxication exists at both common law (i.e. a common law defence) and statute law (i.e. a statutory defence). A person may be intoxicated by reason of consumption of alcohol, taking drugs, or some other substance.

Under **common law**, gross intoxication is a way of proving that the accused acted involuntarily or without intent. If the accused is so drunk or affected by drugs that he or she cannot form the intention to commit the crime, then the person may be found not guilty. This defence is rarely successful because the level of intoxication required to make a person's actions involuntary is extreme.

In addition, the *Crimes Act 1958* (Vic) specifies the way a court is to deal with intoxication when it is raised in cases involving self-defence, duress and sudden or extraordinary emergency. These defences often require the court to assess whether a person's belief or response was 'reasonable'. In determining reasonableness, the court must use two tests based on whether the accused's intoxication was:

- **self-induced intoxication** – Intoxication is considered to be self-induced unless it is involuntary or due to fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress, force, or the effects of proper use of prescription or non-prescription medication. In this situation, the court must compare the accused's belief or actions to those of a reasonable person who is not intoxicated
- not self-induced intoxication – The court must compare the accused's belief or actions to those of a reasonable person intoxicated to the same level as the accused.

## Automatism

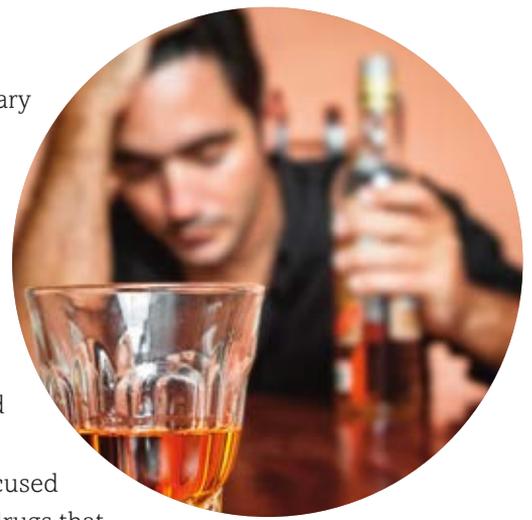
Automatism can be relied on where a person has a total loss of control over their bodily movements. Because they have completely lost control, it is accepted that they cannot form the intention to commit a crime, since they are not conscious or aware of what they are doing. Therefore, the action is considered to be involuntary.

It is not enough to say 'I didn't know what I was doing'. Some external factor had to be the sole cause of the actions. A person may be found not guilty of an offence if they committed the crime:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism does not mean the person has a mental illness. Rather, the person is in a zombie-like state and 'out of it' mentally, but capable of physical acts. For this reason it is sometimes called 'sane automatism' to distinguish it from 'insane automatism', which is also involuntary, but results from a mental illness.

Automatism is a defence that is extremely rare and difficult to prove.



**Source 6** Gross intoxication can result in involuntary action. It is a defence a person accused of assault can raise.

### **automatism**

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

### **self-induced intoxication**

the act of getting drunk of your own free will. Intoxication (i.e. drunkenness) is assumed to occur by a person's own actions unless there was a factor that made it involuntary

## CASE

## STUDY

### Police officer found not guilty of assault due to automatism

In a rare example of automatism succeeding as a defence, a police officer who assaulted a man after a high-speed crash in NSW was found not guilty by reason of automatism.

Senior Constable Christopher Fullick had no memory of the assault or the 10 minutes after the incident. Fullick was involved in a pursuit with the victim. After a near-fatal crash, Fullick was seen on video assaulting the driver by kicking, punching and stomping on him.

Fullick argued he was acting as an 'automaton' at the time. Expert evidence was called by both parties. The prosecution's expert could not rule out that Fullick was acting with 'sane automatism' at the time. The defence relied on expert reports which suggested that Fullick was suffering from post-traumatic amnesia at the time and was therefore acting as an automaton.

### Accident

An accused may claim that their actions were accidental, and that he or she acted without intention to commit the crime. If the defence is raised, the accused may be found not guilty if the actions he or she took to commit the offence were involuntary; not conscious or deliberate and/or the person did not have the mental state of mind required to commit the offence.

## 6.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain why assault can be classified as either a summary offence or an indictable offence.
- 2 Explain two ways in which a person can commit common law assault. What elements need to be proved in each situation?
- 3 Why is the term 'battery' almost now obsolete as a legal term?
- 4 Distinguish between self-induced intoxication and not self-induced intoxication.

### Synthesise and apply

- 5 Read the legal case *Abdul-Rahim*. Explain why this is likely to still constitute assault even though there may have been no intention to commit the crime.
- 6 Read the example 'Night out leads to unlawful assault'. Apply the elements of the crime to explain why this example is an unlawful assault.

- 7 Read the legal case *Police v G, DM*. Apply the elements of the offence to explain why this case was not actually found to constitute assault.
- 8 Consider each of the following scenarios. Argue whether a defence to assault applies in each circumstance.
  - a A paramedic is kicked by a patient who is having an epileptic fit.
  - b A five-year-old child has a tantrum in a supermarket. The mother smacks the child's bottom twice with an open hand.
  - c A person willingly participates in martial arts and is often hit, punched and kicked by opponents during sporting matches.
  - d A person in an aged care home with advanced dementia hits another resident.
  - e A woman who fears she is being abducted punches, bites and kicks a man who grabs at her from behind.
  - f A woman in Queensland says 'I'm so angry at you I could punch your lights out' during an argument over the phone with her sister who is in Melbourne.



These additional resources are available via your **obook assess**:

» **Student book questions**

6.2 Check your learning

» **Going further**

Other types of assault

» **Weblink**

Assault offences in Victoria

» **Weblink**

Assault (Victorian Legal Aid)

## ASSAULT – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to assault:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

### The role of the law in developing the elements and defences

#### Common law

The law of assault and the defences to assault have developed over time through judge-made law. The old common law offence of assault is still relevant in all cases of assault, even where an **Act of Parliament** deals with the offence specifically. That is because the word ‘assault’ is not defined in statute. This means the definition of ‘assault’ comes from common law and not from statute law.

Many of the defences that can be used to defend an assault charge are common law defences. These include intoxication, automatism and accident as involuntary acts. Other common law defences such as self-defence have been abolished by statute.

#### Statute law

The Victorian Parliament has created a range of assault-related crimes in statute law as the need arose. The Parliament has established a number of serious assaults in the *Crimes Act 1958* (Vic). For example, it is a serious crime to either intentionally or recklessly cause injury or serious injury and to threaten to kill or seriously injure another person.

Minor assaults are outlined in the *Summary Offence Act*. The offences of common assault and aggravated assault in the *Summary Offences Act* have remained relatively unchanged since the Act was passed in 1966, because the meaning of assault continues to evolve through case law.

A significant legislative change did occur in 2014 in relation to health care professionals. Section 51A was inserted in the *Summary Offences Act* specifically to protect health practitioners from assault. The law now protects all registered health practitioners from assault while they are working and providing care for patients. This became necessary after medical facilities and hospitals reported a major increase in violence against staff from patients affected by alcohol and drugs. The law was also broadened to protect all emergency services workers on duty, not just police, from summary and indictable assault and to increase the penalties which apply in such cases. A further legislative change is described in the article below.

#### Act of Parliament

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

#### IN THE NEWS

### Victorian paramedics to wear cameras to help counter assaults

Grant McArthur, *Sunday Herald Sun*, 18 December 2016

Victorian paramedics will wear cameras to protect them from spiralling rates of assault as they are confronted with 13 violent call-outs each day. The body cameras will be provided to Ambulance Victoria crews working in the most violent hot spots, including the CBD. Vision recorded by uniform-mounted cameras will be used for investigations and prosecutions

against people who assault paramedics. In the past year, paramedics attended more than 5000 emergency cases where they were exposed to violence or aggression.

The cameras are being rolled out in a \$500 000 trial under the ... Government's Health Service Violence Prevention Fund. [The Victorian Health] Minister ... said threats, abuse and assaults against paramedics were unacceptable. 'Sadly, more and more paramedics are confronted by violence while they are doing their job saving lives,' she said.

While trying to help a drunk woman after she was booted out of a western suburbs pub recently, paramedic Shelly Brown, 34, was punched in the face and slapped despite police being present. 'They will help us feel safe, especially in the city. If people know they are being recorded, hopefully they will be fettered from hitting, kicking, spitting and abusing us as we just try to go about our job,' she said.

## Trends and statistics

The Australian Bureau of Statistics' crime victimisation survey seeks information about both reported and unreported crimes. The 2015–16 survey showed that of the 8.9 million people aged 15 years and over in Australia, 2.4 per cent had experienced at least one physical assault over the past year, while 2.9 per cent experienced at least one threatened assault. Many of the people surveyed said they were involved in more than one incident.

In Australia, the assault rate (per 100 000 people) is steadily increasing. Assaults are most frequent in houses (42 per cent). They also occur in streets (24 per cent), in shops (13 per cent) and in recreational locations such as parks and sports grounds (6 per cent) or backyards (3 per cent).

One form of assault that appears to be underreported is sexual harassment. Most of these events are never reported to police, or even discussed with friends, family or service workers. They may be laughed off as a joke, but they can have serious negative effects on victims.

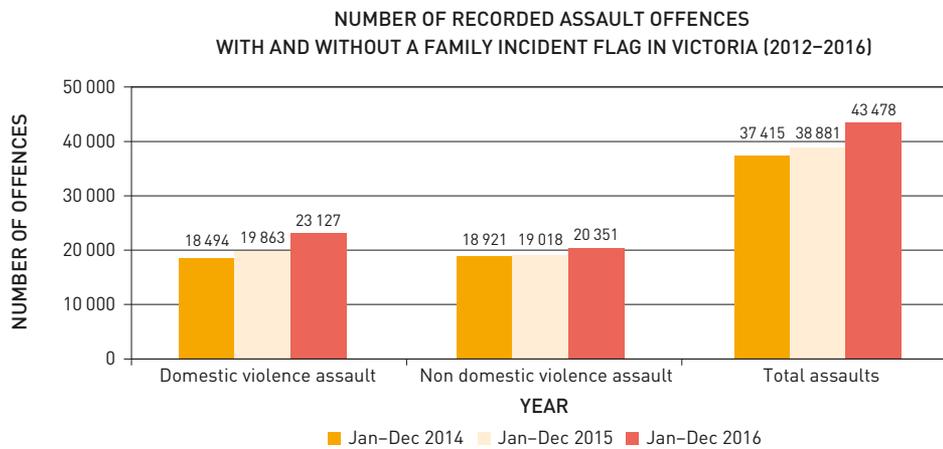
## Victoria and New South Wales

A comparison of data in Source 1 and Source 2 indicates that the number of reported assaults in Victoria is on the rise, while the number in New South Wales remains static. In 2016, the total number of assaults in Victoria increased by 11 per cent. However, recorded assaults in New South Wales outstripped those in Victoria by about one-third (20 000). Some, not all, of this difference may be attributed to the larger New South Wales population (approximately 1.5 million more people than Victoria).

There has been an increase in family violence reports in Victoria, but similar data from New South Wales shows no significant change. In both states, family–violence related assaults represent approximately half of the total assaults recorded. This indicates that family violence is a significant issue in our community. Victoria has tried to address the issue with a Royal Commission into Family Violence. Its report and recommendations were published in 2016. This may have encouraged police and the legal system to review their procedures so victims will have faith in the law and be willing to make a family violence complaint.

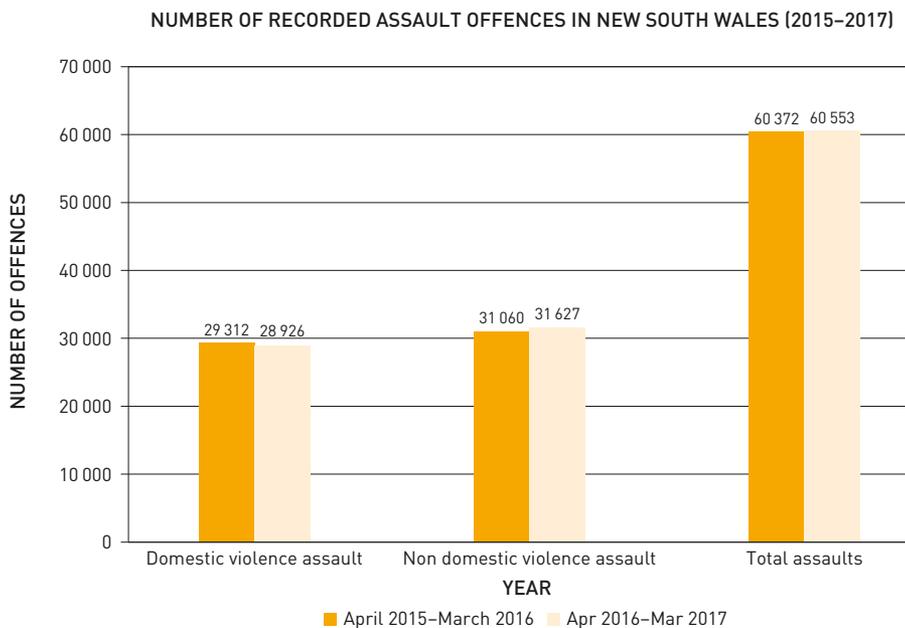


**Source 1** Assault can result in serious or minor injuries.



Source: Crime Statistics Agency, Recorded Offences, December 2016

**Source 2** Assaults in Victoria are flagged if they belong to the 'family incident' class of offences.



Source: NSW Bureau of Crime Statistics and Research, Recorded Crime Statistics, Quarterly update, March 2017

**Source 3** In New South Wales, assault offences with domestic (family) violence and non-family violence occur with equal frequency.

## Possible impacts of assault

Assault-related crime has a range of impacts from physical injuries to psychological effects. An assault may leave the victim with pain and suffering from bruises, tissue damage, cuts or broken bones. These injuries may be short term or long-lasting. Long-term injuries may significantly alter a person's life, and may interfere with the person's work or study and social or sporting commitments.

The impact of violence in a community may also affect future generations. The use of violence is learned behaviour. Young people who witness or experience violence may suffer emotionally and psychologically. They are at risk of resorting to violence when faced with interpersonal issues. They may do so out of frustration, anger or retaliation but it is more likely that they resort to violence because they do not know any other way to handle conflict.

Source 4 lists some of the possible impacts that assault can have on individuals (i.e. the offenders, victims and their families) and society.

POSSIBLE IMPACTS OF ASSAULT		
IMPACTS ON THE OFFENDER	IMPACTS ON VICTIMS AND THEIR FAMILY	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Medical treatment and costs (if injured)</li> <li>• Guilt or shame</li> <li>• Legal costs</li> </ul>	<ul style="list-style-type: none"> <li>• Disruption to family life</li> <li>• Trauma, grief and loss and related medical issues</li> <li>• Lost labour and income in the household</li> <li>• Continuing psychological issues</li> <li>• Loss of trust in law and order and community values</li> </ul>	<ul style="list-style-type: none"> <li>• Cost of publicly funded medical treatment</li> <li>• Increased need for police and emergency services</li> <li>• Loss of workplace productivity</li> <li>• Damage to community property</li> <li>• Loss of trust in law and order and community values</li> <li>• Decreasing percentage of levels of community safety</li> </ul>

Source 4 Possible impacts of assault

## 6.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Describe four possible impacts of assault on the community.
- 2 Explain how both common law and statute law have a role to play in developing the elements of assault.
- 3 Are assaults in Australia increasing or decreasing? Where do they most often occur?

### Synthesise and apply

- 4 Read the article 'Victorian paramedics to wear cameras to help counter assaults'.
  - a What is being introduced, and why?
  - b In your view, should the penalty for assaults be higher if they are committed against emergency workers? Give reasons.
- 5 For each of the following scenarios, describe the two biggest impacts that the assault is likely to have on the individual or on society.
  - a Harriet was out at a nightclub with her friends. While dancing another female went up to her,

slapped her in the face, threw her drink over her head and then spat at her.

- b Arya and her friend the Hound were riding horses one day when they were randomly assaulted by a man who called himself the Mountain. They spent hours in the emergency room of a hospital and Arya has not been able to work for two weeks because of her injuries.
- c Matt got into a fight with his friend Ben when drunk in a local park. A number of pieces of public property were damaged and the fight was seen by a number of children.

### Analyse and evaluate

- 6 To what degree do you think the wearing of cameras will assist to prevent assaults against an emergency worker? Discuss this as a class.
- 7 Discuss the extent to which assault is prevalent in the community, and what factors contribute to its prevalence.



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

» **Student book questions**  
6.3 Check your learning

» **Legal case**  
*Anonymous*, Ipswich Magistrates' Court (unreported, 23 September 2009)

» **Weblink**  
Australian Bureau of Statistics crime victimisation survey

## PUBLIC DRUNKENNESS – ELEMENTS & DEFENCES

### public place

an area or location considered open to the public (i.e. anyone in the community has a right to go there)

### drunk

when a person's physical or mental faculties or judgment are appreciably and materially impaired by alcohol, drugs or another substance, resulting in a substantial lack of capacity or control

### public drunkenness

a general term used to describe a number of specific offences contained in Victoria's *Summary Offences Act* that relate to a person being drunk in a public place

### decriminalisation

the process of legalising an act or behaviour which was previously considered a crime

In Victoria, the law allows people over the age of 18 to drink alcohol in public places (unless these public places have been declared alcohol-free zones). Although the law allows people to drink in many **public places**, it does not permit people to be **drunk** in public. This is an offence under Victorian law known as **public drunkenness**. Victoria and Queensland are the only two Australian states that have laws governing public drunkenness. All other states and territories have **decriminalised** public drunkenness.

Police may suspect a person is drunk in public if their speech, co-ordination, balance or behaviour is noticeably affected. Under the *Summary Offences Act 1966* (Vic), there are three offences relating to public drunkenness that police may charge an offender with. These include:

- Drunk in a public place – that is seen or discovered in a public place by police or protective service officers. No disruptive or disorderly conduct need occur.
- Drunk and disorderly in a public place – this is when a person is not only drunk, but also disorderly. The person must cause a disturbance or behave in such a way as to annoy others in the vicinity or people likely to be there. This will depend on the circumstances of the case.
- Drunk and behaving in a riotous or disorderly manner – this is not only being drunk but acting in a particular way. Riotous behaviour often involves a significant breach of the peace. This offence is generally reserved for more serious cases of drunk and disorderly conduct.

The law prohibiting public drunkenness aims to control offensive and unruly behaviour on the streets, particularly around licensed premises and at major sporting or other public events. The behaviour is only an offence if it occurs in a public place.

While drunkenness on private property may not be an offence, police can still enter the property and intervene if they believe there is a disturbance or breach of the peace. Any unruly behaviour at a private property may therefore result in a person being charged with other offences like assault or property damage (but not the offence of being drunk in a public place).

In this topic we focus on being drunk in a public place as set out in Section 13 of the *Summary Offences Act*.

### Elements of public drunkenness

Section 13 of the *Summary Offences Act* states that, 'Any person found drunk in a public place shall be guilty of an offence.' Merely being 'drunk in public' is sufficient. No disruptive or disorderly conduct need occur.

For a person to be convicted of public drunkenness, the prosecution must prove the following elements:

- the accused was drunk or appeared to be drunk
- the accused was in a public place.

### Element 1 – The accused was drunk or appeared to be drunk

The *Summary Offences Act* does not define what it means to be 'drunk'. This has been left to the courts to determine, based on what an ordinary person would think. Courts will consider the amount of alcohol consumed and the person's behaviour, appearance and demeanour at the time.

Being drunk is more than being under the influence of alcohol or being 'tipsy'. It requires a substantial lack of capacity or control.

Possible indicators of drunkenness include being:

- unable to stand; for example, is stumbling or falling over

- unable to stay awake or maintain consciousness
- unable to speak clearly or make oneself understood
- unable to do ordinary or everyday activities like open a door or pay for items.

## Element 2 – The accused was in a public place

The *Summary Offences Act* provides a statutory definition of a public place. It consists of a list of places which are, for the purposes of the Act, considered public spaces.

The list is both specific and broad in nature. For example, it specifies that government schools, markets and licensed premises are public places. It also states that a public place is ‘any place of public resort’ and ‘any open place to which the public whether upon or without payment for admittance have or are permitted to have access’. These broad descriptors in the definition of a public place mean a public place can be any place which is, at the time, open and accessible to the public.

When there is confusion or uncertainty as to whether a place fits within the statutory definition of a public place, it is left to the courts to decide. The courts have generally ruled that public places are ‘every place to which the public [as the public] may at the relevant time go. It is immaterial that none at such time is present.’



**Source 1** Excessive drinking can result in a substantial lack of control.

### EXTRACT

#### *Summary Offences Act 1966 (Vic)*

##### **3 Definitions**

**public place** includes and applies to—

- (a) any public highway road street bridge footway footpath court alley passage or thoroughfare notwithstanding that it may be formed on private property;
- (b) any park garden reserve or other place of public recreation or resort;
- (c) any railway station platform or carriage;
- (d) any wharf pier or jetty;
- (e) any passenger ship or boat plying for hire;
- (f) any public vehicle plying for hire;
- (g) any church or chapel open to the public or any other building where divine service is being publicly held;
- (h) any Government school or the land or premises in connexion therewith;
- (i) any public hall theatre or room while members of the public are in attendance at, or are assembling for or departing from, a public entertainment or meeting therein;
- (j) any market;
- (k) any auction room or mart or place while a sale by auction is there proceeding;
- (l) any licensed premises or authorised premises within the meaning of the Liquor Control Reform Act 1998;
- (m) any race-course cricket ground football ground or other such place while members of the public are present or are permitted to have access thereto whether with or without payment for admission;
- (n) any place of public resort;
- (o) any open place to which the public whether upon or without payment for admittance have or are permitted to have access; or
- (p) any public place within the meaning of the words “public place” whether by virtue of this Act or otherwise;

Whether the courts consider an area a public place will depend on the context or circumstances of the case, and may mean that an area is considered a public place on one occasion but not on another. For example a shop is considered a public place during business hours but not at other times.

There have been several cases where the courts have considered whether a person in a private car positioned on a public road is 'in a public place'. The courts have ruled that if a motor vehicle is in a public place, then so are the vehicle's occupants. Despite this ruling, whether a vehicle is a public place will depend on the circumstances. For example, a court may not consider a caravan parked on a road with its blinds closed a public place. While courts will follow a decision from a previous case, they may not always do so when the circumstances, in the case to be decided, differ from those in the previous case.

The following legal case highlights how being drunk in a car constitutes a public drunkenness offence.

## Being drunk in a car in a public place

### *McKenzie v Stratton* [1971] VR 848

On 24 October 1970, a drunken man refused to pay a taxi fare, so the driver took him to the police station. The taxi was parked in a public carpark outside the police station. On approaching the car, a police officer saw the man sprawled in the front seat of the taxi. The man was arrested for being drunk and disorderly in a public place. In the Magistrates' Court, the prosecution argued that both the taxi and the carpark were public places. A magistrate dismissed the case on the basis that the taxi was not a public place as defined in the *Summary Offences Act*. The prosecution appealed this point of law in the Supreme Court of Victoria.

The Supreme Court referred to several earlier cases for guidance; particularly *Walker v Crawshaw* [1924] NZLR 93. In this case, a man found having sex in the backseat of a car parked on a public street was convicted of wilfully engaging in a grossly indecent act in a public place.

The Supreme Court decided that the magistrate made an error in law because 'a person in a motor vehicle on a public place is still in that public place'.

LEGAL

CASE

## Possible defences

Failure to prove all elements will result in the accused being found not guilty of the crime, therefore the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- the accused was not drunk
- the accused was not in a public place.

Drunkenness offences are crimes of **strict liability**. That means that the offender's mental state at the time of the crime is, for the most part, irrelevant. Accused persons have little room to argue. It also means that there are few defences available other than contesting the offence on the basis that one of the elements of the crime cannot be proved.

## The accused was not drunk

In some cases, a person may be accused of public drunkenness when they are not actually drunk. This can occur when a person is behaving in a certain manner (or displaying typical indicators of drunkenness). For example, a person with a medical condition or physical disability might display what appear to be the physical characteristics of drunkenness, when in fact they are the symptoms of their condition, as outlined in the following case study.

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

## CASE

## STUDY

### Disabled not drunk

In March 2011, a 25-year-old English tourist was arrested for being drunk and disorderly. Due to cerebral palsy, he walks with a heavy limp and has limited coordination in one arm. He was arrested after a night out in the Melbourne CBD while standing on a road trying to hail a taxi. He tried to explain his condition, but the arresting police officer grabbed him and told him to move back onto the footpath.

### The accused was not in a public place

In some cases, a person may be accused of public drunkenness when they are not in a public place. The argument by the accused will be that he or she was on private property, not in a public area. The following is an example where an auction room was not considered a public place.

## EXAMPLE

### Too many auction wines

Bob attends an auction of rare wines. While there, he is accidentally locked in a wine cellar with no way to get out and no phone. Tired of calling for help, he settles back and starts to drink. At 3.00 am a routine police patrol hears crashes coming from inside the auction house. They find Bob singing. They consider charging him with being drunk in a public place, but realise that, because it is after business hours (and no auction is in progress), this is not a public place.

## 6.4

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain the purpose of public drunkenness laws.
- 2 Using examples, define the following terms:
  - a public place
  - b drunk.
- 3 Explain what is meant by the term 'decriminalisation'. What is its relevance to laws relating to public drunkenness?
- 4 What defences are available to an accused charged with public drunkenness?

### Synthesise and apply

- 5 Decide whether the following people are in places that are legally considered 'public places'. Justify your answer.
  - a A woman is in a licensed restaurant having a meal.
  - b A man attends his friend's funeral service at a local church.
  - c A child is in private school grounds after school hours.
  - d A group of teenagers are at Luna Park during opening hours.
  - e People attend a paid charity music festival which is open to the public but held on privately owned land.
  - f A librarian, employed in a public library, stays after closing hours to catch up on work.
  - g A man is in his car which is parked on a service road.
  - h A family is fishing on St Kilda pier.
- 6 Read the case study 'Disabled not drunk'. On what grounds could the man contest this case in court?



These additional resources are available via your **obook assess**:

» **Student book questions**  
6.4 Check your learning

» **Case study**  
Bar owner spends six hours behind bars

» **Weblink**  
Public drunkenness (Victorian Legal Aid)

» **Weblink**  
Public drunkenness in Victoria

## PUBLIC DRUNKENNESS – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to public drunkenness:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

### The role of the law in developing the elements and defences

#### Common law

Before public drunkenness became an offence under the *Summary Offences Act*, it was outlawed under common law and was described as inebriation and public intoxication. Public drunkenness offences are now contained in statute law.

The courts have had a significant role to play in explaining what is meant by the term ‘drunk’, and interpreting what is meant by the term ‘public place’. This role continues today as the term ‘drunk’ is still defined in common law.

#### Statute law

Three public drunkenness offences are contained in the *Summary Offences Act*, therefore a person will be charged under statute law if they are drunk in a public place. The Act also provides a definition of what is meant by the term ‘public place’, though the courts still need to interpret the meaning of that term to decide on cases before them.

Most Australian states decriminalised public drunkenness in response to the Report of the Royal Commission into Aboriginal Deaths in Custody in 1991. This report recommended that public drunkenness should be a public health or social welfare issue rather than a legal one. It recommended that drunken persons be placed in sobering up centres rather than police cells. This recommendation was in response to the high number of Aboriginal people, across Australia, who died in police custody after being arrested for drunkenness offences. The hope was that decriminalisation would see disadvantaged groups in society

like the homeless, the disabled and Indigenous Australians would receive medical and social support rather than being imprisoned unnecessarily.

The Victorian Parliament did not decriminalise public drunkenness in response to this report. Instead, it tried to redress the overrepresentation of Indigenous Victorians in the criminal justice system with strategies such as Aboriginal Justice Agreements, Koori Courts, Police Aboriginal Liaison Officers and Aboriginal Community Justice Panels, and by tackling underlying issues in Indigenous housing, health, employment and education.

Further, the Victorian Parliament also chose not to act on the recommendation to decriminalise public drunkenness following a **Victorian Law Reform Commission** report in 1989–90 and the 2001 Victorian Parliament’s Drugs and Crime Prevention Committee Inquiry into Public Drunkenness.

In considering these reports, the Parliament highlighted the fact that public drunkenness cannot be easily separated from the big part that alcohol plays in Australian culture. It felt that decriminalisation would not be successful unless

#### Victorian Law Reform Commission (VLRC)

Victoria’s leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria’s laws



**Source 1** Alcohol abuse in the homeless is a social issue highlighted in law reform recommendations.

alcohol consumption changed in Australia. It recognised that alcohol abuse comes in different forms; for example, the homeless or itinerant drunk, the harmless drunk, youth binge drinking, drinking at special events, drinking at licensed venues and drinking in combination with drugs.

## Trends and statistics

The Foundation for Alcohol Research and Education (FARE) conducts a poll each year to gauge the level of alcohol consumption in Australia and community attitudes towards alcohol-related issues. In 2016, FARE reported the following findings:

- the rate of alcohol consumption in Australia remains unchanged
- 78 per cent of adults surveyed said they drink alcohol
- 37 per cent of those surveyed indicated that they drink to get drunk
- 12 per cent of the drinkers surveyed drink to get drunk at least once a week
- 78 per cent of the people surveyed believe Australia has a problem with excessive drinking and thought more needed to be done to reduce the harm caused by alcohol
- 29 per cent of those surveyed have been affected by alcohol-related violence.

## Victoria

In 2007, *The Age* newspaper estimated that 13 500 Victorians (260 per week) were charged with public drunkenness. Estimating the number of people charged with this offence is difficult because these incidents are currently counted under the broader category of disorderly and offensive conduct together with five other offences.

Court data does not show the true extent of the crime because the police generally give the offender an infringement notice (fine) which, if paid, eliminates the need to go to court. Nonetheless, **Sentencing Advisory Council** statistics show that between 2013 and 2016, the Magistrates' Court dealt with 3 645 'drunk in a public place' charges. Of those charges, 60 per cent were dismissed, 25 per cent were dealt with by fine, and 2.6 per cent resulted in imprisonment.

## Queensland

In Queensland, more than 12 000 charges are laid each year in relation to public drunkenness. Like Victoria, however, the true extent of public drunkenness is not known. In Queensland, it is possible for a formal caution or no action to be taken at all if police officers notice a person drunk in a public place. Therefore, any statistics available are unlikely to reveal whether the crime is increasing or decreasing.

### Sentencing Advisory Council

an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters



**Source 2** Drunken behaviour may lead to violence that ties up emergency services in the community.

## Possible impacts of public drunkenness

Excessive drinking in our community has a number of impacts. Some drunk people are anti-social, violent and abusive. They cause problems in licensed venues or entertainment districts and disturb the public order. Alcohol-fuelled violence can ruin people's lives; particularly when it results in death, serious injury, sexual assault, motor vehicle collisions, family violence and child abuse. Alcohol abuse may also result in property damage.

Public drunkenness has hidden costs. Members of the public do not feel safe on the streets and police resources are diverted to deal with drunk and disorderly people. Medical and emergency services workers are subject to abusive and violent behaviour and hospitals or police cells become overcrowded. Sometimes, a person's medical condition or mental health issue is masked by their drunkenness,

so they don't get the care or attention they need. Excessive drinking can also lead to long-term medical conditions that increase health costs for the individual and also the community.

Source 3 lists some of the possible public drunkenness that assault can have on the offender and society.

POSSIBLE IMPACTS OF PUBLIC DRUNKENNESS	
IMPACTS ON THE OFFENDER	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Guilt or shame</li> <li>• Legal costs</li> <li>• Compensation</li> </ul>	<ul style="list-style-type: none"> <li>• Increased need for police</li> <li>• Loss of workplace productivity</li> <li>• Damage to community property</li> <li>• Loss of trust in law and order and community values</li> </ul>

Source 3 Possible impacts of public drunkenness

## 6.5

## CHECK YOUR LEARNING

### Define and explain

- 1 What role do the courts have to play in public drunkenness offences?
- 2 Why was it recommended that public drunkenness be decriminalised? Why did the Victorian Parliament not decriminalise the offences?
- 3 State whether the following statements are true or false:
  - a Four out of five adults drink alcohol in Australia.
  - b Australians believe there is an excessive drinking problem in Australia.
  - c There is a significant amount of public drunkenness that occurs on a daily basis.
  - d 'Public place' is only defined in common law.
  - e 'Drunk' is defined by the courts.

### Synthesise and apply

- 4 How would you change the way in which people view alcohol and its effects, given the amount of alcohol that is consumed by Australians?
- 5 Your friend believes that all public places should be alcohol-free zones. He is trying to seek a way in which to convince the Victorian Parliament to create a law which

ensures that no person can ever drink in a public place. What do you think is the most effective way for your friend to generate support for this change in the law?

- 6 For each of the following scenarios, describe the impact that is most likely to be felt by society.
  - a Luke and Leia, brother and sister, were out partying on New Year's Eve. Leia got really drunk and started smashing her glasses all over the place.
  - b A group of friends were out and got drunk at Federation Square. A significant number of police officers were required to address the behaviour.
  - c Kura got drunk at a child's birthday party held at a local reserve and then peed on a tree.

### Analyse and evaluate

- 7 In your opinion, should public drunkenness be decriminalised in Victoria? Give reasons for your answer.
- 8 Discuss the extent to which institutions such as the police can adequately record incidences of public drunkenness.

These additional resources are available via your **obook assess**:

» **Student book questions**

6.5 Check your learning

» **Weblink**

Public drunkenness one of Victoria's oldest statutes

» **Weblink**

The Foundation for Alcohol Research and Education (FARE)

# 6.6

## OFFENSIVE BEHAVIOUR – ELEMENTS & DEFENCES

### offensive behaviour

conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

In Victoria, there are laws prohibiting anti-social behaviour. Although this behaviour might be considered minor in nature, it can be contrary to community expectations about how people should behave in public. **Offensive behaviour** is defined as any conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in another person. This behaviour is prohibited under Section 17 of the *Summary Offences Act 1966* (Vic).

### Elements of offensive behaviour

Section 17 of the *Summary Offences Act* (extract below) is the main section which prohibits offensive behaviour.

#### EXTRACT

#### *Summary Offences Act 1966* (Vic)

#### 17 Obscene, indecent, threatening language and behaviour etc. in public

(1) Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon—

- (a) sings an obscene song or ballad;
- (b) writes or draws exhibits or displays an indecent or obscene word figure or representation;
- (c) uses profane indecent or obscene language or threatening abusive or insulting words; or
- (d) behaves in a riotous indecent offensive or insulting manner—

shall be guilty of an offence.

Penalty: 10 penalty units or imprisonment for two months;

For a second offence—15 penalty units or imprisonment for three months;

For a third or subsequent offence—25 penalty units or imprisonment for six months.

(1A) For the purposes of subsection (1)(d), behaviour that is indecent offensive or insulting includes behaviour that involves a person exposing (to any extent) the person's anal or genital region.

### public place

an area or location considered open to the public (i.e. anyone in the community has a right to go there)

### Did you know?

To discourage people from urinating in public, the German city of Hamburg is using a special paint on its walls. The hi-tech paint splashes back liquid applied at velocity with almost the same force. Walls are marked with signs saying 'Don't pee here. We pee back'.

For a person to be convicted of offensive behaviour under Section 17, the prosecution must prove the following elements:

- the accused's conduct was obscene or offensive
- the accused's conduct occurred in a **public place**.

While intention does need to be shown for an offensive behaviour charge to succeed, the accused may raise an honest and reasonable belief, held at the time, that the behaviour would not be offensive according to community standards of decency.

### Element 1 – The accused's conduct was obscene or offensive

The *Summary Offences Act* describes offensive behaviour broadly and suggests that any one of the following behaviours is offensive:

- singing an obscene song or ballad
- writing or drawing, exhibiting or displaying an indecent or obscene word or image

- using profane, indecent or obscene language
- using threatening, abusive or insulting words
- behaving in a riotous, indecent, offensive or insulting manner.

However, what is ‘indecent’, ‘obscene’, ‘profane’, ‘abusive’ or ‘insulting’ is left to the courts to decide. What is ‘offensive’ will depend on the circumstances, including community standards. Urinating on someone is clearly a physically offensive act and is further outlined in the following case study.

## Urinating on Spiderbait fan’s leg

In February 2016, Spiderbait played at a popular live music venue in Melbourne. During the performance, a New Gisborne man, aged 25, urinated on 33-year-old Belle Nolan. Police released CCTV footage in August 2016 and called for help from the public. They were able to identify the man, and in November 2016 he was charged with unlawful assault, offensive behaviour and behaving in a disorderly manner in a public place. The band described the act as ‘awful and disgusting’.

The man appeared in the Melbourne Magistrates’ Court on 18 April 2017, where he denied the charges, saying he was drunk at the time of the offence. He was fined \$800 and placed on a 12-month good behaviour bond.



**Source 1** The members of Spiderbait were disgusted at the treatment of Belle Nolan who was urinated on during one of their concerts.

CASE

STUDY

What is offensive to other people can be something you enjoy doing yourself but should not inflict on others who have no choice. The following legal case further explores what can be considered offensive behaviour in relation to loud music.

## Loud profane music considered offensive

*Nathan Wilkie, Warrnambool Magistrates’ Court (unreported, 10 June 2010)*

In March 2010, Nathan Wilkie, aged 19, went into the Timboon supermarket and left his car engine running, the windows down and the music from the album ‘The Creep’ by Melbourne rapper Kid Selzy blasting from the stereo.

Two police officers found the unattended car and thought the rap music was offensive. When Wilkie returned, they asked him to turn the music down but he refused, saying there was nothing wrong with what he was doing, telling them to ‘Go do some real police work’.

Wilkie was charged with failing to immobilise an unattended vehicle, to which he pleaded guilty, and was fined \$100. He was also convicted on the offensive behaviour charge and fined \$250. The Magistrate said the case needed to be considered in its context. The man had broadcast profanity in public with little regard for its effect or the fact that the song was distasteful to others.

LEGAL

CASE

## Study tip

The statutory definition of a 'public place' under the *Summary Offences Act* is provided in Topic 6.4 - Public drunkenness.

## Did you know?

Any of the following can be considered offensive behaviour in a public place:

- A woman baring her breasts in public.
- A person baring their buttocks (mooning) in public.

## Element 2 – The accused's conduct occurred in a public place

This offence is committed if a person behaves offensively in or near a public place or can be seen or heard by people passing in a public place. A person can be on private property and still commit this offence if what they are saying or doing can be heard or seen by people who are in a public place.

Source 2 provides examples of how offensive behaviour can occur in all three circumstances.



**Source 2** Section 17 of the *Summary Offences Act* outlines three circumstances in which the offensive behaviour can occur.

A **public place** is defined in the *Summary Offences Act*. It includes places like the street, sporting grounds, shopping centres, railway stations and government schools. The definition also includes any place which is open to the public. Courts have defined a public place to be anywhere where the ordinary person would think the public has a right to go.

## Possible defences

Failure to prove all elements will result in the accused being found not guilty of the crime, therefore the accused may try to argue that one of the elements is missing. For example, the accused may argue that the behaviour was not offensive and was within current social standards. Whether behaviour is inoffensive is left to the court to decide. The court will consider whether a 'reasonable person' would think the behaviour was inoffensive in the same circumstances.

Other than defending the charge for offensive behaviour on the basis that one or more of the elements has not been satisfied, the accused can otherwise rely on a particular defence. There are four possible defences to a charge of offensive behaviour. These include:

- the behaviour was an exercise of a political or human right
- mental impairment
- sudden or extraordinary emergency
- involuntary actions.

## Defence 1 – The behaviour was an exercise of a political or human right

A person will not be convicted of offensive behaviour if their behaviour can be considered to be an exercise of a political or human right. In democratic countries, behaviour is not ordinarily seen as offensive if it is a

peaceful and appropriate expression of a human right or a political right. Conversely, a person's freedom of expression may be restricted if the manner of expression disturbs public decency and order. The case of *Fraser v Walker* [2015] VCC 1911 (19 November 2015) raised this issue. In this case the woman's actions were not seen as an exercise of her political rights and were deemed offensive.

Where the conduct is obviously 'political', the reasonable person test applies (what would a reasonable person in the same position think of the behaviour).

## Something 'offensive or disgusting' can be 'obscene'

### *Fraser v Walker* [2015] VCC 1911 (19 November 2015)

On 5 August 2014, Michelle Fraser protested outside a Melbourne fertility clinic and was charged with displaying an obscene figure in a public place. The woman displayed posters of bloodied, aborted fetuses while standing on a public footpath. Police attended the protest following complaints from patients at the clinic. The woman was convicted in the Magistrates' Court and fined \$600.

The woman appealed her conviction in the County Court of Victoria on the grounds that the images were not obscene; nor did they contravene current community standards. The woman also argued that being charged with an offence was contrary to her human rights because she was exercising her right to political protest at the time of the alleged offence.

In dismissing the **appeal** the judge said that the word 'obscene' may relate to 'offensive or disgusting' representations and is not confined to images of a sexual nature. He did not consider her protest a political one as it targeted patients and workers at the clinic rather than government representatives.

LEGAL

CASE

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

## Defence 2 – Mental impairment

A person will not be convicted of offensive behaviour if, at the time of the offence, they were suffering from a mental illness (or disease of the mind) and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

A successful defence of mental impairment does not immediately result in the accused being released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'.

## Defence 3 – Sudden or extraordinary emergency

A person will not be convicted of offensive behaviour if they act as a result of a sudden or extraordinary emergency. The person must reasonably believe that:

- there is a sudden or extraordinary emergency
- their actions are the only reasonable way of dealing with the situation
- their actions are a reasonable response to the situation.

The court will consider the gravity of the emergency, whether the person's actions were the only way of dealing with the situation, and whether they were reasonable in the circumstances.

## Defence 4 – Involuntary actions

A person will not be convicted of offensive behaviour if their actions were involuntary. The involuntary nature of the accused's actions may mean that one or more elements of the offence cannot be met. While not technically a defence, the involuntary nature of the accused's actions may mean that a guilty mind (*mens rea*) cannot be proved. This may see the accused acquitted of the offence charged or found guilty of a lesser offence.

For an offensive behaviour charge, the accused may state that their actions were involuntary due to:

- **automatism**
- accident.

### Automatism

Automatism can be relied on where a person has a total loss of control over their bodily movements. Because they have completely lost control, it is accepted that they cannot form the intention to commit a crime, since they are not conscious or aware of what they are doing. Therefore, the action is considered to be involuntary.

It is not enough to say 'I didn't know what I was doing'. Some external factor had to be the sole cause of the actions. A person may be found not guilty of an offence if they committed the crime:

- while sleeping or sleepwalking
- while suffering concussion
- during an epileptic seizure
- as a result of a medical condition or because of a side effect of the proper use of medication.

Automatism does not mean the person has a mental illness. Rather, the person is in a zombie-like state and 'out of it' mentally, but capable of physical acts. For this reason it is sometimes called 'sane automatism' to distinguish it from 'insane automatism', which is also involuntary, but results from a mental illness.

Automatism is a defence that is extremely rare and difficult to prove.

The following example further outlines an instance where the defence of involuntary actions can be used to defend offensive behaviour.



**Source 3** Sleepwalking is one condition during which a person might commit an involuntary act. A sleeping person will not be capable of having intention (*mens rea*).

#### automatism

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

### EXAMPLE

#### Involuntary act

People who suffer Tourette syndrome have a neurological disorder that manifests itself in involuntary behaviours – including physical and vocal tics. These may surface when the person is tired or stressed. The person may suddenly shout swear words or continue to repeat the same words, which may offend those who do not understand the condition.

## Accident

Accident is a way of proving that the accused acted involuntarily or without intent. An accused may claim that their actions were accidental. A person may be found not guilty of an offence if the actions a person took to commit the offence were involuntary, not conscious or deliberate and/or the person did not have the mental state of mind required to commit the offence.

### 6.6

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify three actions or types of behaviour that are considered offensive under the *Summary Offences Act* in Victoria.
- 2 How does a judge decide whether a behaviour is offensive?
- 3 Briefly explain the elements to be proven for a person to be found guilty of offensive behaviour.
- 4 Is it possible for a person to be in a private place but still be charged under Section 17? Give reasons for your answer.

### Synthesise and apply

- 5 Read the legal case *Fraser v Walker*. Apply the elements of the crime to explain why this is a case of offensive behaviour.
- 6 Read the legal case *Nathan Wilkie*. Apply the elements of the crime to explain why this is a case of offensive behaviour.
- 7 For each of the following scenarios, identify whether the prosecutor is likely to succeed in establishing a charge under Section 17 of the *Summary Offences Act*.

You may like to reference any cases you have learnt about so far to support your answer.

- a Iggy Knowles parked at the front of Chemist Warehouse to buy some hair dye. She left her radio on and a Celine Dion song was blasting loudly on it.
- b Voula was protesting on the street arguing in favour of stricter public drunkenness laws. As part of her protesting she used abusive language to demonstrate the way in which public drunkenness can affect society.
- c Anna and Elsa are sisters. They began fighting one day in the front room of their house while the windows and doors were open. Anna started abusing Elsa and then drew an offensive picture of her that could be seen from the street.

### Analyse and evaluate

- 8 Discuss the extent to which you believe Section 17 of the *Summary Offences Act* has kept up to date with what is considered to be offensive behaviour.
- 9 In your view, should there be a defence available to people who are offensive while expressing human and political rights? Discuss as a class.



### These additional resources are available via your obook assess:

» **Student book questions**

6.6 Check your learning

» **Legal case**

*Gul v Creed* [2010] VSC 185 (12 May 2010)  
*Pointon v Police* [2012] NZHC 3208 (30 November 2012);  
*Pointon v Police* [2013] NZHC 2352 (10 September 2013)

» **Weblink**

What behaviour does Australian law consider 'offensive'?

» **Weblink**

Offensive conduct and language crimes

## OFFENSIVE BEHAVIOUR – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to offensive behaviour:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

### The role of the law in developing the elements and defences

#### Common law

The meaning of words such as offensive, obscene, indecent and insulting has largely been left for judges to decide. In doing so, judges consider the facts of the case, the context in which the crime was committed, the legislation under which the offender is charged and current social standards.

In the case of *Worcester v Smith* [1951] VLR 316, the judge commented that for behaviour to be offensive it ‘must be calculated to wound the feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person.’

In *Monis v The Queen* (2013) 249 CLR 92, the High Court commented that the definition of obscenity must keep pace with current social standards. These standards are determined by considering whether a reasonable person would consider the behaviour ‘obscene’ in the given circumstances.

#### EXTRACT

##### *Monis v The Queen* (2013) 249 CLR 92

‘Both “indecent” and “obscene” ... convey one idea, that of offending against recognised standards of propriety – indecent being at the lower end of the scale and obscene at the upper end ... Criminal law provisions concerned with obscenity fall into a category of laws which must necessarily keep pace with prevailing views of society and changing circumstances ... The application of a societal standard may be seen in the use ... of the objective standard of the reasonable person.’

#### Statute law

The provisions in the *Summary Offences Act* in relation to offensive behaviour have been left unchanged for more than 50 years.

There is little general agreement on what constitutes offensive behaviour so, in the absence of a precise statutory definition, it is left to the discretion of police and then to the judgment of the courts to determine what is and what is not ‘offensive’ based on current social standards.

To decide whether behaviour is offensive, obscene, indecent and insulting, a judge may need to first determine the word’s natural and ordinary meaning and then determine whether a reasonable person would consider the behaviour offensive given the context in which the behaviour occurred.

In determining the meaning of words, such as obscene, indecent and insulting, judges may refer to the ordinary English definition of these words and they may also look to past cases for guidance.

In *Coleman v Power* (2004) 220 CLR 1, the High Court summarised past interpretations of insulting to be 'language calculated to hurt the personal feelings of individuals' or 'scornful abuse of a person or the offering of any personal indignity or affront' and 'something provocative, something that would be offensive to some person to whose hearing the words would come'.

The following news article further explores cultural changes in relation to swearing.

## How pop culture is changing legal views on swearing

Elyse Methven, *The Age Online*, 13 April 2017

*Warning: The following article contains explicit language.*

*The Wolf of Wall Street*, one of the sweariest movies of all time, contains 506 'f-bombs'. This year's Triple J Hottest 100 countdown featured the word 'f---' 82 times in 32 songs. And a bedtime storybook urges children to 'Go the F--- to Sleep!'. So, should uttering the f-word in public be a crime? And what about the c-word?

In Australia, swearing is ubiquitous. Yet each year, thousands of Australians incur fines or criminal convictions for swearing. The use of offensive, indecent or obscene language in public is punishable in all Australian states and territories. Police typically punish people for saying the words 'f---' and/or 'c---' in their presence

... It is up to the individual police officer (when issuing an infringement notice) or magistrate (when hearing an offensive language charge) to determine community standards on offensive language. In doing so, decision-makers draw on their 'common sense' and everyday experience. Unsurprisingly, judicial opinions differ when assessing community standards.

In 2007, for instance, a Western Australian Supreme Court judge said that language which challenges police authority is likely to be criminally offensive. More recently, magistrates have held that the word 'prick' used to describe a police officer, and the expression 'f--- Fred Nile' exclaimed at an anti-marriage equality rally, were not criminally offensive.

Is pop culture having an impact on attitudes to swearing in the courtroom? The answer is yes. In the 2003 New South Wales Local Court case *Police v Butler*, Magistrate Heilpern referred to the prevalence of the f-word word on Triple J and its frequent occurrence on television shows *The Sopranos* and *Sex and the City*. He found the defendant not guilty of using offensive language, stating: 'The word f--- is extremely commonplace now and has lost much of its punch.' Although only a Local Court judgment (therefore of limited precedential value), the magistrate's assessment of community standards *has* influenced the criminal law on offensive language.

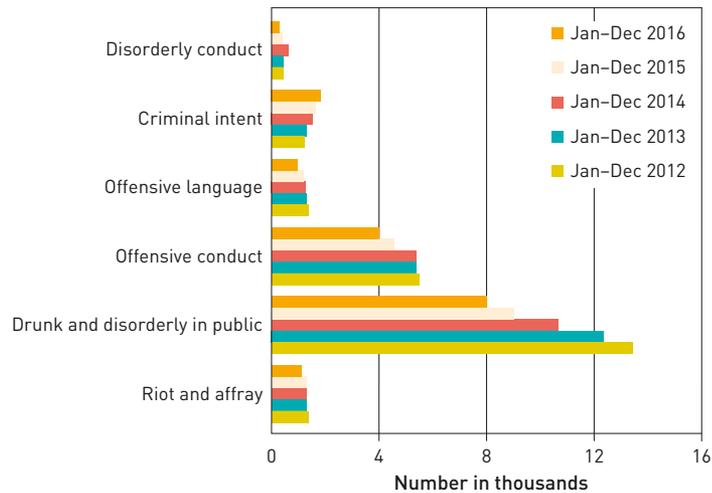
## Trends and statistics

Offensive behaviour is a public order offence. As such, it is categorised for statistical purposes with five other public order offences under the category of 'disorderly and offensive conduct'. Other Australian states may categorise and group their public order offences differently and so a comparison of data between Victoria and other jurisdictions is limited.

### Victoria

The most prevalent public order offences in Victoria are 'drunk and disorderly in public' followed by 'offensive conduct or behaviour'. Data released by the Victorian Crimes Statistics Agency shows the rate of disorderly and offensive conduct in Victoria has decreased. In 2012 there were 420 recorded disorderly and offensive conduct offences per 100 000 population compared with 270 offences in 2016.

**NUMBER OF RECORDED  
DISORDERLY AND OFFENSIVE CONDUCT INCIDENTS IN VICTORIA  
(2011–2016)**



Source: Crime Statistics Agency, Recorded Offences, Year ending 31 March 2016

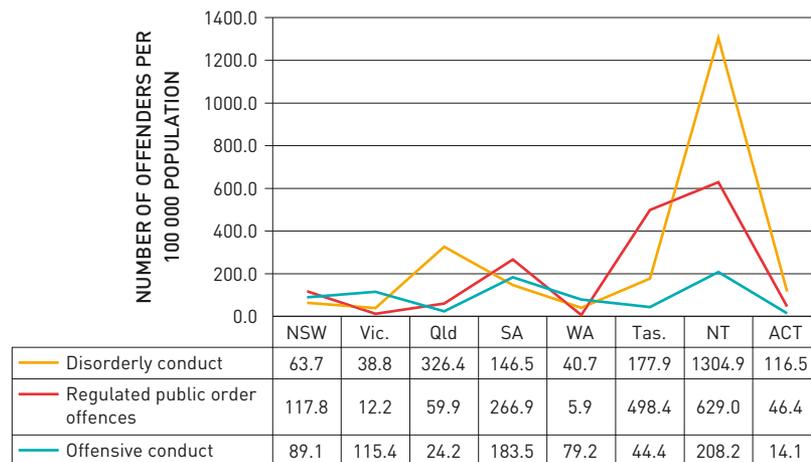
**Source 1** Number of recorded drunk and disorderly offences in Victoria has decreased between 2012 and 2016.

## Northern Territory

The Northern Territory has the highest offender rate for offensive conduct (208.2) while the Australian Capital Territory has the lowest (14.1). In comparison to other states, Victoria has the third highest offender rate for offensive conduct (115.4).

The differences in offence rates between states may be due to a range of factors including the willingness of the public to report crime, the way offences are categorised, the efficiency of police in detecting and recording crime and the methods used in each state to process offenders.

**RATE OF DISORDERLY AND OFFENSIVE CONDUCT  
PER 100 000 IN AUSTRALIA (2015–2016)**



Source: Australian Bureau of Statistics, Recorded Crime – Offenders, 2015–2016

**Source 2** In the Northern Territory, the rate of disorderly and offensive conduct has increased.

## Possible impacts of offensive behaviour

The main aim of offensive behaviour laws is to maintain public order. These laws aim to discourage anti-social, violent and abusive behaviour and maintain a sense of public decorum. Most people in the

community believe they should be able to visit public places or use these spaces without having to put up with unruly behaviour from others.

Being punished for swearing or urinating in public has the potential to cause public shame and embarrassment. Prospective employers tend to favour people who are of good character and conform to social norms, therefore engaging in anti-social behaviour may impact on a person's job prospects. High incidents of anti-social behaviour in a community can ultimately impact on people's perceptions. They may think that their neighbourhood is unsafe or that this anti-social behaviour adversely impacts on their quality of life.

Source 3 lists some of the possible impacts that offensive behaviour can have on individuals (i.e. the offenders, victims and their families) and society.

POSSIBLE IMPACTS OF OFFENSIVE BEHAVIOUR		
IMPACTS ON THE OFFENDER	IMPACTS ON VICTIMS AND THEIR FAMILY	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Medical treatment and costs (if injured)</li> <li>• Guilt or shame</li> <li>• Legal costs</li> </ul>	<ul style="list-style-type: none"> <li>• Disruption to family life</li> <li>• Trauma, grief or fear</li> <li>• Continuing psychological issues</li> <li>• Loss of trust in law and order and community values</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of trust in law and order and community values</li> <li>• Decreasing percentage of levels of community wellbeing</li> </ul>

Source 3 Possible impacts of offensive behaviour

## 6.7

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain how the courts and parliament have worked together in relation to the offence of offensive behaviour.
- 2 Is offensive behaviour increasing or decreasing in prevalence in Victoria? Give reasons.
- 3 Describe three possible impacts of offensive behaviour on the community.

### Synthesise and apply

- 4 For each of the following types of behaviour, state whether you believe the court will consider it to be offensive. Refer to one legal case to support your answer. Legal cases can be sourced from your own research or taken from Topic 6.6.
  - a Gary was swearing on his way home on the train one night, but everyone on the train laughed at him and gave evidence that they were not offended.

- b Shawna was swearing under her breath while she was shopping in Melbourne.
- c Verity yelled loudly at her children to 'get back here you feral kids' – an elderly couple reported this to the police.

### Analyse and evaluate

- 5 To what extent do public order laws and their enforcement infringe on individual rights?
- 6 'What is offensive to one person is not offensive to another, and so it shouldn't be the role of the courts to decide what is offensive. It should be the role of parliaments.' Discuss whether you agree with this statement.



These additional resources are available via your **obook assess**:

» **Student book questions**

6.7 Check your learning

» **Weblink**

*Monis v The Queen*

## GRAFFITI OFFENCES – ELEMENTS & DEFENCES

### graffiti

any illegal writing, drawing or scratching that defaces (i.e. damages) public property and cannot be removed with a dry cloth

### marking graffiti

the act of writing, drawing, scratching or defacing (i.e. damaging) public property in ways that cannot be removed with a dry cloth

**Graffiti** is illegal scribbling, writing or drawing that defaces public or private property. In law it is considered a form of vandalism because the community sees most graffiti as an ‘eyesore’ – not art. Street art is sometimes called ‘legal graffiti’ because it is often done with both property owner and local government permission.

Street art differs to graffiti in that it is an image or picture, often with symbolic meaning, rather than just stylised words. The City of Melbourne, in particular, has become internationally famous for the street art in its laneways. Many tourists view this ‘art’ on a daily basis. However, some say it attracts international graffiti artists, who come to the city on a ‘spraycation’. These ‘fly in and out’ graffiti artists are difficult to catch.

The *Graffiti Prevention Act 2007* (Vic) outlines several graffiti offences, which are summary offences. The purpose of the Act is to stop people from **marking graffiti** and to control the possession and sale of aerosol paint. The Act gives police additional search powers so they can apprehend offenders and seize graffiti-related items. It also gives local councils the authority to remove graffiti from both public and private spaces.

In this topic we focus on the offence of ‘marking graffiti’ in Section 5 of the Act.

### Did you know?

The word ‘graffiti’ dates back to 1851, when it was used to describe the ancient wall inscriptions found in the ruins of Pompeii. It comes from the Italian word graffiti, plural of graffito, a scribbling, from graffiare, to scribble. In 1877 the sense was extended to mean any crude drawings and scribbling done in public places.



**Source 1** This is a graffiti tag. It is a stylised signature in one colour usually drawn quickly with a marker or aerosol paint.



**Source 2** This is a graffiti throw-up. It is large writing or stylised shapes in one or two colours which can be drawn or ‘thrown-up’ quickly.



**Source 3** This is a graffiti piece. It is a large multi-coloured stylised writing or image often with shadowing or a three-dimensional effect.



**Source 4** Legal street art can be ruined by illegal graffiti.

# The elements of the offence

Section 5 of the Act makes it an offence to mark graffiti on property if the graffiti is visible from a public place.

## EXTRACT

### *Graffiti Prevention Act 2007 (Vic)*

#### 5 Marking graffiti

A person must not mark graffiti on property if the graffiti is visible from a public place unless the person has first obtained the express consent of the owner, or an agent of the owner, of the property to do so.

Penalty: Level 7 imprisonment.

For a person to be convicted of this offence, the prosecution must prove the following elements:

- the accused marked publicly visible graffiti
- the accused did so without the owner's consent.

'Marking' graffiti means to write, draw, scratch or deface property in ways that cannot be removed with a dry cloth.

## Element 1 – The accused marked publicly visible graffiti

A person can mark graffiti by writing, drawing, scratching and defacing property using any implement or substance. If the damage or marks cannot be removed easily it is considered graffiti. Stencil art and engraving can also be considered as marking graffiti.

Graffiti artists often want their tags and pieces to be seen by others. They tend to mark graffiti either in a public place or nearby. The crime of marking graffiti can occur if the graffiti is done in a public place or any place where it can be seen from a public place.

A public place is defined in the *Summary Offences Act*. It includes places like the street, sporting grounds, shopping centres, railway stations and government schools, and any place that is open to the public. Courts have defined 'a public place' to be anywhere where the ordinary person would think the public has a right to go.

### *Study tip*

The statutory definition of a 'public place' under the *Summary Offences Act* is provided in topic 6.4 - Public drunkenness.

## Element 2 – The accused did so without the owner's consent

The offence can only be committed if no express consent has been given by the property owner. Given many public places in Victoria are owned by the State of Victoria, then express consent must be given by the state (through a person who is authorised to give that consent). A lack of consent will mean the marking is illegal.

## Possible defences to graffiti offences

Failure to prove all elements will result in the accused being found not guilty of the crime, therefore the accused may try to argue that one of the elements is missing. For example, the accused may argue that:

- the accused had the property owner's permission
- the graffiti could be removed with a dry cloth
- the graffiti is not visible from a public place.

### strict liability

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

The offence of marking graffiti in the *Graffiti Prevention Act* is a crime of **strict liability**. That means that the offender's mental state at the time of the crime is, for the most part, irrelevant. Accused persons have little room to argue. It also means that there are few defences available other than contesting the offence on the basis that one of the elements of the crime cannot be proved.

In very rare circumstances a person could argue that their actions were due to mental impairment, duress or an honest and reasonable mistake.

## Defence 1 – Mental impairment

A person will not be convicted of a graffiti offence if, at the time of the offence, they were suffering from a mental illness (or disease of the mind) and, as a result, they:

- did not know what they were doing because they had little understanding of the nature and quality of their actions
- did not know their conduct was wrong or could not reason, or think about, their conduct like an ordinary person.

A successful defence of mental impairment does not immediately result in the accused being released from custody. That is, the verdict is not an ordinary 'not guilty' verdict. Instead, it is a special verdict of 'not guilty by reason of mental impairment'. This means the accused can still be kept in custody, but it will be under medical supervision.

## Defence 2 – Duress

A person will not be convicted of a graffiti offence if they act under **duress**. The defence of duress applies if, at the time of the offence:

- the person has a **reasonable belief** that:
  - a threat of harm exists
  - the threat would be carried out unless the offence was committed
- committing an offence is the only reasonable way to avoid threatened harm
- the person's conduct is a reasonable response to the threat.

## Defence 3 – Honest and reasonable mistake

A person will not be convicted of a graffiti offence if they can prove that they made both an honest and a reasonable mistake of fact (not law). This could apply if a person charged with marking graffiti genuinely believed they had the property owner's permission when in fact they did not. The belief must also be reasonable. That is, would an ordinary person in similar circumstances have held the same belief? It is important to show that if the facts (as the accused believed them) were true, then the accused would not have committed an offence.

The following case study is an example of graffiti conduct which resulted in serious charges.

### duress

strong mental pressure on someone to overcome their independent will and force them to do something

### reasonable belief

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct

## CASE

## STUDY

### Political prank ends in prison

In March 2003, two 34-year-old men were sentenced to nine months in prison and ordered to pay \$151 000 in compensation for writing 'No War', in red paint, on the top of the Sydney Opera House. The incident – designed to protest the Australian Government's decision to become involved in the Iraq War – resulted in a \$9 million dollar security upgrade for the Opera House precinct.

The men were charged with malicious (criminal) damage. They said they acted in self-defence because they were defending the lives of people who would die in war. They believed

their actions were a peaceful protest against Australia's military involvement in Middle Eastern countries. An appeal to the NSW Court of Criminal Appeal was dismissed.



CASE

STUDY

Source 5 Workers had to clean the anti-war slogan from the Opera House sail.

## 6.8

## CHECK YOUR LEARNING

### Define and explain

- 1 What is graffiti?
- 2 Explain the difference between 'street art' and 'graffiti'.
- 3 Describe the elements that need to be established for a person to be convicted of an offence under Section 5 of the *Graffiti Prevention Act*.
- 4 Why is graffiti so often visible in public places?

### Synthesise and apply

- 5 Explain whether a graffiti offence has been committed in each of these scenarios. Apply the elements of the offence to explain why this is or is not a crime.
  - a A person uses a sharp tool to scratch a graffiti 'tag' into the painted surface of a private property's front fence.
  - b A person has the property owner's permission to spray a graffiti 'piece' on the side wall of a property but neighbours complain it is 'ugly'.

- c A student causes extensive damage by spraying large graffiti tags across 10 toilet doors in a school's toilet block.
  - d A person uses a spray can to write the words 'F... off losers' in large print across a shop window. Shop workers were annoyed and customers visibly upset.
- 6 Conduct some internet research and find at least three cases where people have been charged with graffiti. Apply the elements of the offence to each of those cases.
  - 7 Create a scenario in which a person has marked graffiti, but could raise one of the defences set out in this topic. Exchange your scenario with another class member and identify the elements and possible defences in the scenario. Share your findings.

### Analyse and evaluate

- 8 'Street graffiti is offensive and should be banned.' Discuss this statement as a class.
- 9 Evaluate the ability of police and local councils to identify and convict graffiti offenders.



These additional resources are available via your **obook assess**:

» **Student book questions**

6.8 Check your learning

» **Legal case**

*Jim Clay Harper and Danielle Bremner*, Melbourne Magistrates' Court (unreported, 31 May 2016)

» **Weblink**

Laws of graffiti

## GRAFFITI OFFENCES – DEVELOPMENT OF THE LAW, TRENDS & IMPACTS

In this topic you will explore, in relation to marking graffiti:

- the role of common law and statute law in developing the elements and defences
- trends and statistics in Victoria and another jurisdiction
- the possible impacts of the crime on individuals and society.

### The role of the law in developing the elements and defences

#### Common law

Graffiti as we know it emerged as a global phenomenon in the 1980s as people began to see it as art rather than vandalism. It is in any event a crime that is contained in statute law and not in common law. However, the courts still have a role to play in deciding whether a crime has been committed within the meaning of the statute, including deciding what is a 'public place'.

#### Statute law

The offence of marking graffiti originates in statute law. In 2007, the Victorian Parliament passed the *Graffiti Prevention Act* to quell community concern about unsightly graffiti 'tags' and 'pieces' near railway lines and on the walls and fences of private properties.

The Act made it clear that unwanted or offensive graffiti is a crime, not art, and punishable by a maximum of two years in prison. Unlike wilful damage to property and criminal damage which require proof of the offender's intent, the offence of marking graffiti is a crime of strict liability making it easier for police to prosecute offenders. To help the police catch offenders, the Act gives them the authority to search a person, 14 years or over, without warrant if the police reasonably suspect that the person is carrying a spray paint can on or near public transport property or anywhere else as a trespasser. Any vehicle, bag or thing the person has with them can also be searched. Police can seize any graffiti items found. This often occurs if the person is in an area recently marked with graffiti or known for high levels of graffiti.

The Act also gives local councils permission to enter private property to remove or cover graffiti visible from a public place. Councils are required to seek the property owner's permission before taking action.

### Trends and statistics

Graffiti is an underreported crime. Many offenders are hard to catch. Graffiti gangs take their work seriously, plan their operations carefully and work as a team to avoid detection. Graffiti artists often work at night, in secluded places and dress so they can't be identified. Some victims may remove the graffiti, thinking it is too trivial to report to police, or they may report it to their local council instead. For these reasons, and because some incidents are prosecuted as general property crime rather than a graffiti offence, crime statistics may not accurately reflect the extent of graffiti-related crime in the community.

## Victoria

Graffiti has long been attributed to younger age groups. In 2016, the Victorian **Crime Statistics Agency (CSA)** reported that males are five times more likely to commit property damage than females. The largest age group committing property damage (all offenders) is 15–19-year-olds, followed by 24–29-year-olds. Between 2011 and 2016, the number of graffiti offences in Victoria decreased from approximately 66 (per 100 000) population to 53.

**Crime Statistics Agency (CSA)**  
an independent organisation responsible for processing, analysing and publishing Victorian crime statistics

PROPERTY DAMAGE OFFENCES IN VICTORIA (2011–2016)					
	OFFENCES RECORDED				
	APR 2011 – MAR 2012	APR 2012 – MAR 2013	APR 2013 – MAR 2014	APR 2014 – MAR 2015	APR 2015 – MAR 2016
Criminal damage	44 697	43 333	41 062	38 307	39 997
Graffiti	3 710	3 270	3 464	3 346	3 223
Other property damage offences	371	328	418	413	421
Total offences	48 778	46 931	44 944	42 066	43 641

OFFENCE RATE (PER 100 000 POPULATION)					
	APR 2011 – MAR 2012	APR 2012 – MAR 2013	APR 2013 – MAR 2014	APR 2014 – MAR 2015	APR 2015 – MAR 2016
	Criminal damage	793.6	755.8	703.3	645.2
Graffiti	65.9	57.0	59.3	56.4	53.2
Other property damage offences	6.6	5.7	7.2	7.0	7.0
Total offences	866.0	818.5	769.8	708.5	720.9

Source: Victorian Crimes Statistics Agency, Spotlight: Property damage offences

**Source 1** Property damage offences in Victoria include criminal damage, graffiti and 'other'. Of these, criminal damage is by far the most prevalent.

## New South Wales

The New South Wales Department of Justice graffiti facts and figures for 2011–16 indicate that:

- Property types targeted by graffitiists were residential premises (26.8 per cent), public transport property (19.7 per cent), business premises (18.6 per cent) and public places (15.3 per cent).
- An average of 8063 (108 per 100 000 population) graffiti offences were reported to police per year. This is significantly higher than in Victoria where the average is 3402 incidents (58.4 per 100 000 population).
- At the same time, there was an average 7.5 per cent decrease in incidents reported to New South Wales police and a 3 per cent decrease in Victoria. This decrease may be due to a range of factors aimed at deterring graffitiists including tougher laws, anti-graffiti education programs, legal street art or walls, rapid removal and the use of anti-graffiti surfaces in public places.

### *Did you know?*

Sydney Trains successfully used sniffer technology to catch graffiti offenders. A sensor detected when markers and spray paint were used inside a train. The sensor immediately alerted authorities who then caught offenders in the act.

## Possible impacts of graffiti-related crimes

Lots of graffiti in a neighbourhood lowers the quality of the urban landscape and impacts on people's perception of law and order. While some see it as a harmless activity, graffiti-ridden public places and streets signals a degree of lawlessness and make others feel unsafe. The Australian Bureau of Statistics estimates that one in five people think that graffiti in an area is an indicator of social disorder.

By the twenty-first century, the graffiti problem in Australian towns and cities became an important issue for law enforcement, local government and the community. Graffiti removal and prevention remains a major issue for government organisations and private companies. The cost of removing graffiti from public and private property is huge and diverts financial and human resources from other projects.

Most local councils have graffiti management plans. They spend substantial amounts of money in graffiti removal and prevention. In 2016, it was estimated that the City of Melbourne spent \$800 000 removing or painting over graffiti in the city. The estimated cost for removing graffiti from Metropolitan trains is \$10 million per year, while the cost to VicRoads to remove graffiti from road signs, traffic lights and signal boxes is \$380 000 per year. The hidden costs of preventative measures, like increased lighting, video surveillance, employing security guards and installing graffiti-resistant surfaces, are not included in these estimates.

For private property owners, a graffiti attack is annoying and expensive to remove. It leaves victims angry. Unsightly graffiti on a property or in a neighbourhood can impact on property prices and people generally feel unsafe in areas with a high incidence of graffiti.

Writing graffiti can also be a dangerous activity. Some graffiti artists will risk their lives to paint their 'tag' or 'piece' in a highly visible or inaccessible place. They may 'surf' trains, climb billboards, hang from buildings or bridges or stand beside railway tracks and freeways. Some have fallen from or been hit by moving trains. Others have been electrocuted when they touched high-voltage overhead electrical wires. Graffiti artists not only expose themselves to serious injury but also to serious criminal charges; particularly if their activity is widespread, causes extensive damage or involves the commission of other crimes.



Source 2 Graffiti removal is a costly business for local councils around Australia.



Source 3 Graffiti is a dangerous and risky pastime.

Source 4 lists some of the possible impacts that graffiti offences can have on the offender and society.

POSSIBLE IMPACTS OF GRAFFITI	
IMPACTS ON THE OFFENDER	IMPACTS ON SOCIETY
<ul style="list-style-type: none"> <li>• Legal costs</li> <li>• Compensation</li> <li>• Risk of serious injury</li> </ul>	<ul style="list-style-type: none"> <li>• Increased need for police</li> <li>• Loss of workplace productivity</li> <li>• Damage to community property</li> <li>• Loss of trust in law and order and community values</li> <li>• Cost of removal</li> <li>• Increased council rates due to cost of removal</li> <li>• Reduced feelings of safety</li> <li>• Frustration</li> <li>• Lowering of property prices</li> <li>• Lowering of feelings of community pride</li> </ul>

Source 4 Possible impacts of graffiti

## 6.9

## CHECK YOUR LEARNING

### Define and explain

- 1 Are graffiti offences found in statute law or common law? Explain.
- 2 Describe two impacts of graffiti offences on a community.
- 3 Describe one power that the police has to catch graffiti offenders.

### Synthesise and apply

- 4 What could be done to improve the recording of graffiti offences in Victoria, if anything?

- 5 Prepare a visual presentation of statistics related to graffiti offences in Victoria. Provide a summary of those statistics along with some reasoning as to why those statistics show what they show.

### Analyse and evaluate

- 6 Do graffiti offence statistics accurately reflect the prevalence of graffiti in the community? Why or why not?
- 7 Discuss the extent to which graffiti laws protect and/or impact on individual rights.



These additional resources are available via your **obook assess**:

» **Student book questions**

6.9 Check your learning

» **Going further**

Banksy

» **Weblink**

Graffiti (Victoria Legal Aid)

» **Weblink**

The distinction between art and graffiti (The Conversation)

## CHAPTER SUMMARY

**Summary offences**

- > Summary offences are minor crimes heard in the Magistrates' Court.
- > Impacts are various and can impact on the offender, victims, families and society in various ways.

**Assault**

## Elements

- > Force or threat of force
- > The application or threat of force was intentional or reckless
- > No lawful justification or excuse

## Possible defences

- > Consent
- > Lawful correction of a child
- > Lawful arrest
- > Self-defence
- > Mental impairment
- > Duress
- > Sudden and extraordinary circumstances
- > Involuntary act

## Role of law in developing elements and offences

- > Law developed over time through common law
- > Minor assaults are defined in the *Summary Offences Act*

## Trends and statistics

- > Crime statistics show an increase in reported assaults between 2014 and 2016

**Public drunkenness**

## Elements

- > Drunk, or appeared to be drunk
- > The accused was in a public place

## Possible defences

- > The facts of the case do not meet the elements of the crime.

## Role of law in developing elements and offences

- > Previously outlawed under common law; now contained in statute law
- > Remains a criminal offence in Victoria

## Trends and statistics

- > Survey data shows there is a high tolerance for alcohol consumption in the Australian community.

**Offensive behavior**

## Elements

- > Obscene or offensive conduct
- > The accused was in a public place

## Possible defences

- > Exercise of right
- > In some cases can rely on mental impairment, sudden or extraordinary emergency or involuntary actions

## Role of law in developing elements and offences

- > Governed by statute law; role of courts to determine what is offensive

## Trends and statistics

- > Crime statistics indicate that the most prevalent public order offence in the community is drunk and disorderly in public followed by offensive conduct.

**Graffiti offences**

## Elements

- > The accused marked publicly visible graffiti
- > The accused did so without the owner's consent

## Possible defences

- > Argue that the facts of the case do not meet the elements of the crime.

## Role of law in developing elements and offences

- > Offence of marking graffiti originates in statute law.

## Trends and statistics

- > Graffiti offences are generally underreported
- > Crime statistics may not be accurate (some graffiti offenders are charged with criminal damage or wilful damage to property)

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

- » **Student book** questions Ch 6 Review
- » **Revision notes** Ch 6
- » **assess quiz** Ch 6  
Test your skills with an auto-correcting multiple-choice quiz

## REVISION QUESTIONS

- 1 Using an example, define the term 'summary offence'.  
(2 marks)
- 2 Explain two ways a person may commit common law assault.  
(5 marks)
- 3 Identify three places considered public places under *the Summary Offences Act*.  
(3 marks)
- 4 Explain why the definition of 'public place' is an important consideration in public order offences.  
(3 marks)
- 5 Why is 'offensive' behaviour difficult to define?  
(3 marks)
- 6 How does a person commit the offence of marking graffiti?  
(4 marks)
- 7 Identify the summary offence committed in each scenario.
  - a A man drinking alcohol in a park cannot stand or be understood.  
(1 mark)
- b A pornographic image, visible from the road, is displayed in the front window of a home.  
(1 mark)
- c A man stands in a driveway and swears loudly at people passing by.  
(1 mark)
- d A student 'tags' the inside walls of his private school classroom.  
(1 mark)
- e A teenage boy, 16, tries to hit another boy, 15, with a bat but misses.  
(1 mark)
- 8 Identify two summary offences. For each offence explain a possible defence and the circumstances in which the defence might apply.  
(6 marks)
- 9 Name two summary offences. For each offence provide an example of how the common law contributed to its development.  
(4 marks)
- 10 Select two summary offences and describe the possible impacts of these offences on the community.  
(6 marks)

## PRACTICE ASSESSMENT TASK

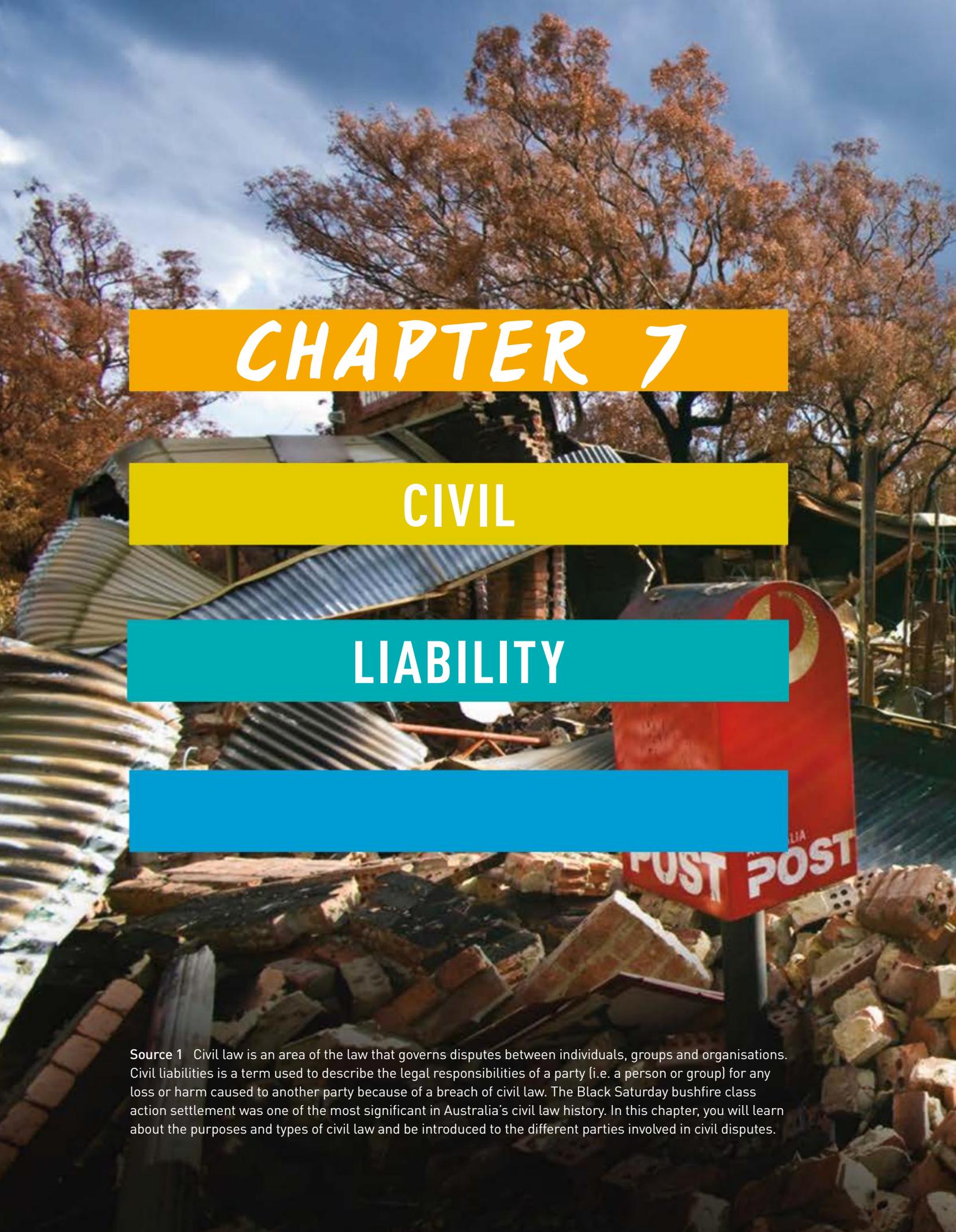
Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

Use the internet or other sources to find legal cases or news articles involving two summary offences covered in this chapter. Each case or article should:

- > focus on one summary offence rather than lots of different offences
- > explain what the offender did in some detail
- > state whether the offender was (or was) not punished. Provide answers to the following questions for each case.

### Practice assessment task questions

- 1 How prevalent is this type of crime in our community? Give reasons for your answer.  
(5 mark)
  - 2 Who must prove the accused guilty of this crime and to what standard?  
(2 marks)
  - 3 Explain how each element of the crime was met (or not met) in this case.  
(8 marks)
  - 4 Describe any defences relied on in this case, and whether they were or could be successful.  
(5 marks)
  - 5 What effect does this crime have on the victim, the offender and the community?  
(5 mark)
- Total: 25 marks



# CHAPTER 7

## CIVIL

## LIABILITY

**Source 1** Civil law is an area of the law that governs disputes between individuals, groups and organisations. Civil liabilities is a term used to describe the legal responsibilities of a party (i.e. a person or group) for any loss or harm caused to another party because of a breach of civil law. The Black Saturday bushfire class action settlement was one of the most significant in Australia's civil law history. In this chapter, you will learn about the purposes and types of civil law and be introduced to the different parties involved in civil disputes.

## OUTCOME

By the end of **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

## KEY KNOWLEDGE

In the chapter, you will learn about:

- the purposes and types of civil law
- key concepts of civil law, including:
  - breach
  - causation
  - loss
  - limitation of actions
  - the burden of proof
  - the standard of proof
- possible plaintiffs and defendants to a civil dispute.

## KEY SKILLS

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

- define and use legal terminology
- research and analyse relevant information about civil law
- explain the purposes and key concepts of civil law
- classify civil law according to its type.

## KEY LEGAL TERMS

**accessorial liability** a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm (for example, they encourage another person to cause that harm)

**balance of probabilities** the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

**breach** breaking or failing to fulfil a duty or obligation

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

**causation** the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

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

**contract law** an area of civil law governing the validity and enforceability of agreements made between two or more parties

**counterclaim** a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

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

**defamation** a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

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

**group member** a member of a group of people who are part of a representative proceeding (i.e. class action)

**limitation of actions** the restriction on bringing a civil claim after the allowed time

**loss** a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

**negligence** a type of tort which involves a breach of a duty of care, causing loss or harm

**nuisance** a type of tort which involves interference with a person's right to use and enjoy property

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

**remedy** a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

**right of subrogation** the right to 'step into the shoes' of an insured person and act on their behalf, including taking legal actions in their name

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

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

**trespass** a type of tort involving interference or intrusion of a person's body, property or goods without the consent of that person

**vicarious liability** the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# PURPOSES AND TYPES OF CIVIL LAW

## civil law

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

## remedy

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

## damages

the most common remedy in a civil claim; an amount of money that the court (or tribunal) orders one party to pay to another **plaintiff** (in civil disputes) the party who makes a legal claim against another person (i.e. the defendant) in court

## contract law

an area of civil law governing the validity and enforceability of agreements made between two or more parties

## negligence

a type of tort which involves a breach of a duty of care, causing loss or harm

## will

a document which specifies how a person would like their assets to be distributed when they die, and who they would like to carry out their wishes

Some of the laws made by parliament and the courts are known as ‘**civil law**’. Civil law regulates disputes between individuals, groups and organisations. It enables people to enforce their rights where harm has occurred.

‘Civil liabilities’ is a term used to describe the legal responsibilities of a party (i.e. an individual, group or organisation) for any loss or harm caused to another party because of a breach of civil law. In this topic, you will explore the purposes and types of civil law.



**Source 1** Victoria has laws that require a minimum number of adults per child in a childcare centre. A failure to follow these laws may put children at risk, which could give rise to a civil dispute.

## Purposes of civil law

Civil law has several specific purposes. It aims to:

- **achieve social cohesion** – For example, civil law provides guidelines for acceptable behaviour, so that individuals can live together in harmony. If those guidelines did not exist, some individuals might exploit or abuse the rights of others. For example, if there was no law regulating the standard and quality of toys, toy manufacturers might make toys using the cheapest materials without concern for the safety of the children playing with them. Similarly, there are laws requiring schools and businesses that provide childcare to make sure they maintain processes and procedures to protect children within their care
- **protect the rights of individuals** – For example, the right to be protected from false statements that might damage your reputation, the right to a promise made under a contract, and a right not to be harmed
- **provide an avenue for people to seek compensation** where a breach of civil law has occurred – For example, through the courts, tribunals, complaints bodies and ombudsmen (you will explore these dispute resolution bodies in Unit 2). If there were no dispute resolution bodies, no specialised bodies would be available to help people resolve their disputes, so disagreement would fester in the community. This would impact on social cohesion
- **provide a means to seek compensation** – For example, when a person’s rights have been infringed, civil law provides a way to return the person harmed, as far as possible, to the position they were in before the harm occurred. This is done through the awarding of civil **remedies**, the most common of which is **damages** (i.e. an amount of money as compensation) payable to the **plaintiff** for loss suffered.

Certain types of civil law also have specific purposes. For example:

- **Contract law** aims to ensure that people who make promises under a contract (agreement) stick to those promises, or else compensate the other party to the contract if they fail to comply with it.
- Laws relating to **negligence** aim to ensure that people who owe reasonable duties of care to each other do not breach those duties. If they do, they are responsible for any loss suffered as a result.
- Laws relating to **wills** aim to provide a consistent set of rules about the way a person’s will (instructions about how to deal with their property after they die) must be carried out. If a deceased person didn’t leave a will, statute law sets out the way this must be done to provide a fair and equitable distribution of assets.

- Laws relating to **nuisance** recognise that people should have a right to enjoy and use their land, or public land, free from interferences or annoyance. Their purpose is to ensure that people can enjoy this right, by establishing guidelines on what counts as an interference or annoyance.
- Laws relating to **defamation** aim to ensure that a person's reputation is not harmed because of false statements that are made about that person.

The following legal case is an example of a civil dispute.

#### nuisance

a type of tort which involves interference with a person's right to use and enjoy property

## A trip to the fish and chip shop ends at the Supreme Court

### *Clarke v Greater Shepparton City Council* [2016] VSC 542 [8 September 2016]

On the evening of 14 September 2008, Steven Graham Clarke tripped on a stormwater pit in a reserve in Shepparton on his way to a fish and chip shop. He fell and was injured. Clarke sued the Greater Shepparton City Council, claiming that the Council breached its duties, because it was the body responsible for the management and control of the reserve and the stormwater pit.

Justice Keogh of the Supreme Court awarded damages of \$359 303 to the plaintiff, which included an amount for past and future medical expenses, and past and future care.



**Source 2** In the case of *Clarke v Greater Shepparton City Council*, a trip to a fish and chip shop ended in a trip to the Supreme Court of Victoria.

LEGAL

CASE

## How civil law achieves its purposes

The civil system works in three related ways to achieve its purpose. It:

- **establishes the law** – For example, through statutes made by parliament and through court decisions. A large body of civil law has been developed by the courts over time. However, parliament has also passed statutes which establish many civil law principles
- **decides the law** – For example, by ruling on which party's claim is correct. In Australia there are courts and other dispute resolution bodies, such as tribunals and complaints bodies, which provide services to parties in a dispute to resolve that dispute
- **enforces the law** – For example, by giving parties mechanisms to enforce any remedies they receive (e.g. regularly taking a portion of a person's wages to satisfy an order that they pay damages).

## Types of civil law

There are a number of types of civil law. These include:

- **Negligence** – This occurs when someone owes a duty of care to another and breaches that duty, causing harm or loss to another person (e.g. a doctor is careless during a medical procedure, and something goes wrong, causing physical injury and pain to the patient).
- **Trespass** – This occurs when someone interferes with another person, their land or their goods, and that interference causes damage (e.g. destroying another person's car may give rise to a claim for trespass to goods).
- **Defamation** – This relates to the publication of material which causes damage to another person's reputation. For example, publication of a statement about another person, in a newspaper article or on social media platforms such as Facebook and Twitter, that is false and harmful to that person's reputation may lead to a claim by the other person.

#### defamation

a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

#### Did you know?

In 1972, a plaintiff who owned a house near a golf course was successful in a private nuisance claim, because over a period of several years golf balls struck her property frequently.

#### trespass

a type of tort involving interference or intrusion of a person's body, property or goods without the consent of that person

- **Nuisance laws** – These deal with the use and enjoyment of people’s property (both public and private property). A nuisance claim may be made by a person who is unable to enjoy their own home because of some sort of interference (e.g. a significant odour coming from a factory nearby).
- **Wills and inheritance laws** – These regulate wills, including when they are valid. They give guidelines about the decisions made by a will-maker and how a person’s estate is distributed if there is no will.
- **Contract law** – This covers the validity of contracts (legal agreements) and the rights available to a person if a valid contract has been breached. A claim for breach of contract may involve a contracting party who has failed to do something, or has done something contrary to what they have agreed to do as part of a contract. Many statutes regulate issues that may arise in contracts, such as unfair terms and guarantees (given by a seller when they sell goods).
- **Family law** – This deals with disputes between family members and which are of a family nature, such as disputes over the division of property between divorced parties and the parenting of children, as illustrated in the example below.

## EXAMPLE

### Sam and Alice

Sam and Alice’s parents separated in July 2016. A month later, their mother commenced proceedings in the Family Court of Australia seeking orders from the Court in relation to custody of Sam and Alice. The Family Court made orders on December 2016 that the children should live with the mother, but that the children are to spend time with their father every second weekend, and each alternate week during the school holidays.

### Study tip

Gather newspaper articles and social media references to these different types of civil law. Make note of the different legal terms used for each type of civil law. For example, in negligence claims you will see the words ‘duty of care’, whereas in will disputes you will see the words ‘executor’ and ‘estate’. Learn these legal terms and definitions and use them correctly to improve your performance in assessment tasks.



**Source 3** Trespassing is an example of the type of civil dispute that can arise.

- **Employment laws** – These deal with disputes between employers and employees. Disputes often arise in the workplace in relation to pay, conditions, harassment, discrimination and termination of employment.
- **Equal opportunity and discrimination laws** – These aim to protect individuals from bias, prejudice or vilification based on a personal attribute such as their sex, marital status, race or religion.

As part of this Area of Study, you will examine two areas of civil law. Some of the areas of law covered briefly above are explored further in Chapters 7 and 8.

The following news article provides further insight into how the digital age is resulting in different types of civil claims.

## IN THE NEWS

### Dentist sues patient for defamation over online review

Cameron Houston and Chris Vedelago, *The Age*, 29 January 2017

A prominent Melbourne dentist has taken defamation action against a patient who posted a scathing online review after claiming he was quoted \$1200 for a filling that would take only 45 minutes.

Carlton resident Mark Robert Bradbury gave Smile Solutions a one-star rating on the practice’s Google listing page before launching a personal attack on the business owner and director, Kia Pajouhesh ...

Mr Bradbury could be left with more than a numb mouth and out-of-pocket expenses over his online critique, which followed a consultation on January 4.

'As a result of the Google review, the plaintiff [Dr Pajouhesh] has been injured in his reputation and occupation, has been brought into public scandal, and ridiculed, and he has thereby suffered loss and damage,' the writ claims.

The defamatory imputations were published to a daily audience of 701 readers, and Mr Bradbury had ignored a request to 'correct, retract and apologise', according to the writ.

Lawyers acting for Dr Pajouhesh are also seeking aggravated damages for a separate review posted to the Word of Mouth website, in which Mr Bradbury claimed he was 'once fleeced' by Smile Solutions.

With more than 65 000 patients, Mr Pajouhesh's dental empire turns over almost \$20 million a year and was the winner of the Telstra 2014 Business of the Year.

## 7.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Describe two purposes of civil law.
- 2 What is a remedy? What is the main purpose of a remedy?
- 3 Identify one purpose of the following types of civil law:
  - a negligence laws
  - b defamation laws
  - c laws governing wills
  - d contract law
  - e nuisance laws.

### Synthesise and apply

- 4 Read the legal case *Clarke v Greater Shepparton City Council*.
  - a What type of civil law is this case about?
  - b What happened to the plaintiff?
  - c Why was the Council sued?
  - d What is the remedy of damages trying to achieve in this case?
- 5 Read the example 'Sam and Alice'.
  - a What type of civil law is this case about?
  - b What was the dispute between the parties?

- c What order did the court make?
  - d Conduct some more research on the Family Court. What sort of disputes does the Family Court hear?
- 6 Look at Source 3 on page 200. Identify the type of civil law that the photo depicts and the purpose the law is trying to achieve.
  - 7 Read the article 'Dentist sues patient for defamation over online review'.
    - a Who is suing in this case, and who is defending the claim?
    - b What is Mr Pajouhesh alleging?
    - c What type of civil law does this article refer to? What is the aim of this law?
    - d What type of remedy is Mr Pajouhesh seeking?
    - e Which dispute resolution body is being used to resolve this dispute? Write down as much as you know about this body.
  - 8 Collect two articles or reports that refer to civil cases. Write a report. Your report should include a description of the main issues of the cases, and a discussion about how the law referred to in each article or report aims to achieve two or more purposes.



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7.1 Check your learning

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Introduction to Chapter 7

» **Video**

Civil Justice

» **Video worksheet**

Civil Justice

# 7.2

## KEY CONCEPTS OF CIVIL LAW

### defendant

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

### sue

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

### burden of proof

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

### standard of proof

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

### breach

breaking or failing to fulfil a duty or obligation

If there has been a breach of civil law, the person whose rights have been infringed is referred to as either the aggrieved party, the wronged party or the plaintiff (in court). The party alleged to be in the wrong is referred to as the wrongdoer or the **defendant** (in court).

The plaintiff may use a dispute resolution body such as a court or a tribunal to **sue** the defendant in an attempt to obtain a remedy to compensate them for the loss suffered.

A number of key concepts of civil law are relevant when a party sues another party. Those concepts include breach, causation, loss, limitation of actions, the **burden of proof** and the **standard of proof**. Each concept will be discussed in detail in this topic.

## Breach

In most types of civil claims, one of the key elements in a case that the plaintiff will have to prove is that there has been a **breach** by the defendant. This means that the defendant has in some way **failed to observe a law or obligation** imposed on him or her. As the plaintiff has the responsibility or onus to prove their case, they need to establish that the defendant is in breach. The defendant may argue as a defence that there has been no breach.

The nature of the breach depends on the area of law. For example:

- In contract law, the plaintiff may allege that the defendant has **breached an agreement** that was reached between them. In other words, the defendant has failed to fulfil an obligation or promise that he or she made to the plaintiff. For example, if a person hires a jumping castle for a birthday party, a contract will be formed with the supplier governing the supply of that castle. One of the terms of the supply may be that the castle is to be set up at the person's house by 11.00 am, in time for the party. If the supplier fails to complete the installation by that time, or if the castle never arrives, there will have been a breach of contract.

The following example provides another possible breach of contract law.

## EXAMPLE

### Contract to provide editing services

Sally runs her own editing business from home. Two months ago she was contracted by a small accounting firm to edit various reports that they were preparing for their clients. Sally and the accounting firm agreed that she would be paid a flat fee of \$2000 per report, and that she would review six reports in total. Sally completed the job on time, and issued an invoice for \$12 000. The accounting firm has only paid \$6000 of the invoice, and now says that the agreed rate was \$1000 per report.

- In negligence, a plaintiff may allege that the defendant **breached his or her duty of care to the plaintiff**. This means that the defendant had an obligation or duty to care for the plaintiff, and that duty was not complied with. For example, in schools, teachers often have obligations to supervise the grounds before, during and after school hours. If a school fails to roster teachers to supervise a

particular area of the school before school starts each morning, and a student is injured in that area, it is possible that the school has breached its duty of care to its students.

- In a sexual harassment claim, a plaintiff may allege that the defendant **breached the relevant laws** which prohibit people from sexually harassing another person. As an example, a law in Victoria states that an educational authority (such as a school) must not discriminate against a person in deciding who should be admitted as a student. If a school chooses not to enrol students because of their race or religion, it is likely to be a breach of that law.

The article below provides an example of an allegation of breach of duty of care.

### *Did you know?*

In negligence cases, there is a rule known as the 'eggshell skull' rule, which says that the defendant is still liable for damage caused to a particularly vulnerable or fragile plaintiff, even if the type of damage suffered by the plaintiff is more than a 'normal' person.

## Junpeng Tan: Mother suing camp operator, Victorian Government after son dies on school excursion

Patrick Wright, ABC, 12 December 2016

The mother of a seven-year-old boy who died on an excursion in Melbourne's outer east is suing the Victorian Government and a camp operator.

Junpeng Tan suffered a cardiac arrest on a trip to the Belgrave Recreational Reserve with grade one classmates in October 2013. Teachers attempted to resuscitate the boy before he died at Melbourne's Royal Children's Hospital ...

The pathologist who conducted the autopsy initially found a snake bite was the likely cause of death, but a supplementary report issued after further laboratory analysis noted no venom was found in Junpeng's system and revised the cause of death to 'unascertained'.

In documents lodged with Victoria's County Court, Ms Tan alleges the school and the owners of the Mount Morton Camp and Conference Centre were negligent in their supervision of her son and breached their duty of care.

Ms Tan has suffered from a major depressive disorder, post-traumatic stress disorder, shock and anxiety since her son's death, the court documents said.

She is suing for injuries, loss of earnings and loss of earnings capacity.

### IN THE NEWS



**Source 1** A tragic accident on a school camp which involved a snake bite resulted in a negligence claim made by the boy's family.

## Causation

Another key element that the plaintiff will normally need to prove in a case is **causation**. The plaintiff will need to prove that the actions of the defendant **caused or resulted in** the harm suffered by the plaintiff, and that the harm would not have occurred if not for the actions of the defendant. That is, there needs to be a **causal link** between the actions (or inactions) of the defendant, and the harm that the plaintiff suffered.

For example, imagine if a plaintiff alleges that the defendant has been playing loud music all night long for several weeks and months. The plaintiff may be able to bring a **nuisance claim** against the defendant, alleging that the defendant has **disturbed his or her enjoyment of property**. If the plaintiff alleges that he or she no longer sleeps at night, is suffering from anxiety, and has lost his or her job, the plaintiff will need to establish that the defendant's actions caused all of those things, and those things were not caused by something else. For example, is the plaintiff not sleeping for another reason like a health condition? Or did the plaintiff lose his or her job not because she can't sleep and concentrate because of the defendant's actions, but because he or she is not very good in performing their duties at work?

**causation**  
the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

## Study tip

You will examine breach, causation, loss and limitation of actions more closely when you investigate two areas of civil law as part of Chapters 8 and 9. For now, you should at least understand what each of these key concepts mean, and be able to list a few examples.

If it can be shown that the harm was **too remote** from the actions of the defendant, then the plaintiff is unlikely to prove causation.

There can be an **intervening event** or a break in the chain of causation. This happens when something occurs after the defendant's actions which may be seen to have actually caused the injury or loss, rather than the defendant's actions. In a negligence case, the plaintiff will claim that the defendant breached a duty of care towards the plaintiff. For example, if Bill injures Babak in a fight, Babak might have a civil claim against Bill. But what happens if Babak went into surgery for his injuries, and the surgeon made the loss suffered by Babak worse? Did Bill cause the loss, or did the surgeon? It could be argued that the surgeon's actions broke the link between Bill's actions and Babak's loss or injury.

The legal case below is another example where the court interprets a break in the chain of causation.

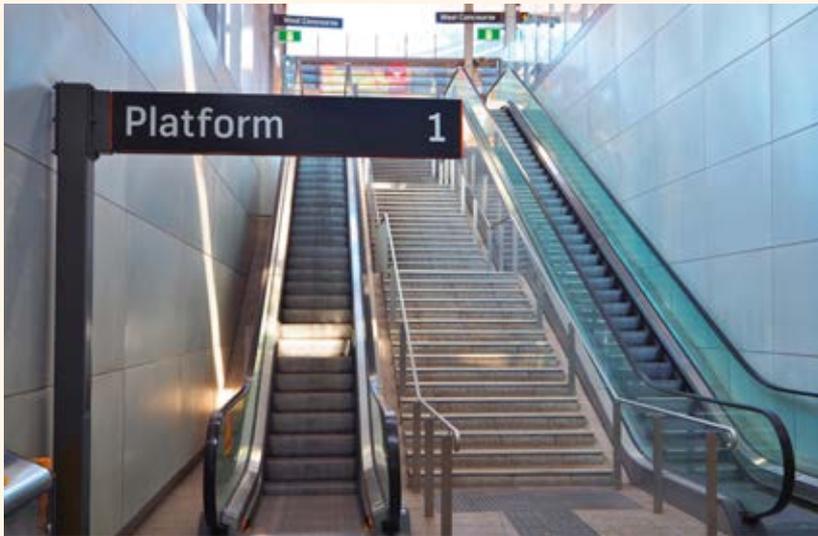
## LEGAL

## CASE

### Break in chain of causation

#### *State Rail Authority of New South Wales v Chu* [2008] NSWCA 14 (6 March 2008)

Ms Chu fell down the stairs at a railway station early in the morning after it had been raining. It was found that the accident was caused by the Rail Authority's negligence, because of some paint that had been applied to the edges of the steps which became dangerously slippery when wet.



**Source 2** Falling on the steps of a railway station raised the issue of causation.

Chu had suffered injuries as a result of the fall, including a fractured left ankle and injury to her lower back. She also suffered a psychological order of a depressive kind. The situation relating to her claim for psychological injury was complicated by the fact that five or six weeks after the accident, she was sexually assaulted by a man who had been assisting her by taking her around and speaking English with her.

Chu argued that the sexual assault was a direct and foreseeable result of her fall at the station. The trial judge agreed and found that her reduced mobility made her more vulnerable, and that this was foreseeable by the Rail Authority. She was

awarded damages of \$239 405, which included damages for her psychological injury.

On **appeal**, the New South Wales Court of Appeal found that the sexual assault was an act which broke the chain of causation, and that the conduct of her assailant was a free, deliberate and informed act. It therefore found there was a clear break in the causal link between the injury suffered as a result of the fall, and the injury suffered as a result of the sexual assault made out some weeks later.

The Court, after considering the grounds of appeal by both Chu and the appellant, reduced damages slightly to \$217 324.

### appeal

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

# Loss

As a general rule, the plaintiff will only be able to obtain a legal remedy, such as damages, if it can be proved that he or she suffered **loss** or harm. The loss in a civil claim can include:

- **economic or financial loss** – For example, loss of wages, loss of earning capacity, or loss of profits if a contract has been breached. For personal injury claims, it might also include money spent on medical expenses.
- **property damage** – For example, a car may have been damaged, or there might be damage to a house, clothing or goods.
- **personal injury** – For example, the plaintiff might have suffered cuts, bruises, broken bones or loss of a limb.
- **pain and suffering** – For example, this might be pain and suffering such as mental anguish, anxiety or depression.
- **loss of amenity** – For example, this can include loss of enjoyment of life, loss of job satisfaction, loss of family life or loss of enjoyment of hobbies.

## loss

a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

# Limitation of actions

For almost all civil claims, there is a time within which a wronged party must sue the wrongdoer. This is known as **limitation of actions**. Once that time period has passed, then the defendant will be able to raise a defence that the plaintiff is too late to obtain any form of remedy.

The reason for imposing a time limit within which a person must initiate a claim is so that disputes can be resolved efficiently, and a defendant does not have to be subjected to a claim a significant time after the alleged acts (or omissions) occurred. A delay in issuing a claim can also risk the reliability of evidence, including the evidence of people who may have seen what happened, and physical evidence.

Each state in Australia has its own statute which is the main statute that sets out the time period within which an action must be commenced. In Victoria, this statute is the *Limitation of Actions Act 1958* (Vic).

Source 3 below provides an example of the time periods within which an action for certain types of claims must be issued.

## limitation of actions

the restriction on bringing a civil claim after the allowed time

TYPE OF CLAIM	TIME PERIOD
Breach of contract	6 years
Under tort law	6 years
Under tort law where there is personal injury consisting of a disease or a disorder	3 years
Defamation	1 years
An action to recover arrears of rent	6 years

**Source 3** An example of the time limit imposed on different types of claims

In some circumstances, the time period can be extended, depending on the nature of the case. For example, a person claiming to have a defamation claim may apply to a court for an order extending the limitation period (which is one year). If the court is satisfied that it was not reasonable for the plaintiff to have commenced an action within one year from the date of the publication of the defamatory material, then it may extend the time period for a period of up to three years.

There are some civil claims for which there is no limitation period. For example, for people who have a civil claim with respect to physical or sexual abuse that they suffered as a minor, or psychological abuse that arose out of that abuse, there is no time period within which that claim might be issued.

## Study tip

There are some useful online resources that provide table summaries of limitation periods for certain types of civil actions. A link to these websites is provided on your [obook assess](#).

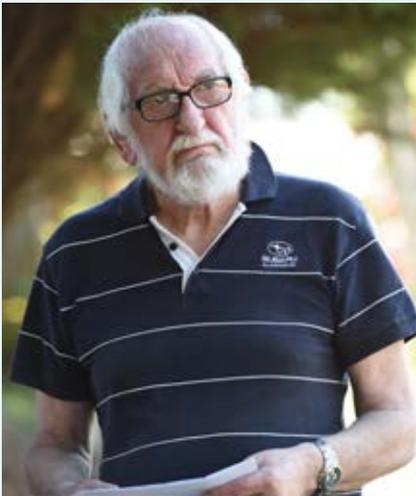
The following news article further explores a claim in relation to sexual abuse which was heard 24 years after the assault

## IN THE NEWS

### Man wins bid to have case heard after 24-year Melbourne jail assault compensation fight

Peter Michelbrough, *Herald Sun*, 9 February 2017

A MAN savagely assaulted in jail while serving a two-month sentence for minor traffic offences has won a record-setting bid to have his case heard after a 24-year fight for compensation.



**Source 4** Clive Goodenough's claim will be allowed to be heard despite the time that has passed since the assaults.

The *Herald Sun* revealed in March last year that Clive Goodenough, 75, had filed a writ in the Supreme Court seeking damages from the State alleging he was sexually abused by three inmates in Pentridge within days of being jailed in 1992 for traffic offences for which he was later pardoned.

The Victorian Government Solicitor's Office asked for the matter to be thrown out of court because the claim was lodged 22 years after the time to do so expired.

However, in a ruling published this week Supreme Court Associate Justice Mary-Jane Lerodiamonou has found it is just and reasonable to allow the claim to proceed in what is believed to be the oldest out of time claim ever allowed...

Associate Justice Lerodiamonou said Mr Goodenough never elected not to pursue common law damages and this task had also been made more difficult by his psychiatric injury.

'The (State) will be prejudiced because of the absence of witnesses, loss of records, and the effluxion of time. However, the prejudice is not fatal and it is not accepted that a trial will be unfair as a result.'

## The burden of proof

The burden of proof refers to the **responsibility** of proving the facts of the case. This is sometimes called the 'onus of proof'. In every court case, one party will have this responsibility. In a civil case, the burden of proof lies with the plaintiff, meaning the plaintiff must present evidence to establish that the defendant is in the wrong (or liable for the harm that has been inflicted on the plaintiff). Placing the burden of proof on the plaintiff follows the idea or principle that it is only fair or just that if someone alleges that another person is liable for the loss or damage suffered by them, then they should prove those allegations.

It is not the responsibility of the defendant to prove they are not liable. However, there are some situations where a defendant may need to prove an allegation. This includes where a defendant raises a **counterclaim**. This is a claim made by the defendant against the plaintiff in response to the plaintiff's claims in the same case.

### counterclaim

a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

### balance of probabilities

the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

## The standard of proof

The standard of proof refers to the degree or extent to which a case must be proven. In civil cases the plaintiff must prove the case on the **balance of probabilities**, meaning the plaintiff must prove that they are most likely in the right, and the defendant is more likely in the wrong.

**Define and explain**

- 1 What is a counterclaim? Why is it relevant in relation to the burden of proof?
- 2 Define the following terms:
  - a breach
  - b causation
  - c balance of probabilities
  - d intervening event
  - e property damage.
 Now use each term in a sentence about a civil dispute (be as inventive as you like).
- 3 What is the justification for imposing a time limit on commencing for a civil claim?
- 4 Identify and describe two types of loss. Provide an example of each.

**Synthesise and apply**

- 5 Read the example 'Contract to provide editing services'. What is the main issue in dispute in this case?
- 6 Read the article 'Junpeng Tan: Mother suing camp operator, Victorian Government after son dies on school excursion'.
  - a What type of law is alleged to have been breached in this case?
  - b Who is the plaintiff, and who are the defendants?
  - c What loss is alleged to have been suffered?
  - d Conduct some research. Try to find out whether this dispute is ongoing, or if there has been a resolution.
- 7 Read the legal case *State Rail Authority of New South Wales v Chu*.
  - a What law did Ms Chu allege that the defendant breached?
  - b Why do you think it was the Rail Authority's responsibility to ensure the stairs were safe?
  - c What loss did Ms Chu suffer in this case?
  - d What was the issue on appeal in relation to psychological injury?

- e One of the key issues in this case was whether the Rail Authority would reasonably foresee that a fall could result in a criminal sexual assault. Do you agree with the trial judge's finding or the Court of Appeal's finding? Give reasons for your answer.
- 8 For each of the following types of claim, identify the limitation period within which the plaintiff must bring a claim.
  - a Nalini is a landlord and is owed rent.
  - b Raja has just found a website that suggests that he is a 'vampire and out to get people's blood because he is so mean and awful'. The website has been viewed over 40 000 times.
  - c Xander and Yilong entered into a contract for the provision of services relating to Xander's business. Xander claims that Yilong has breached the contract by providing the services too late.
  - d Georgos is suing his former employer for contracting a breathing disease as a result of his work conditions.
- 9 Read the article 'Man wins bid to have case heard after 24-year Melbourne jail assault compensation fight'.
  - a Who is the plaintiff in this case and who is the defendant?
  - b What is the nature of the claim?
  - c How long ago did it happen?
  - d In what year did the limitation period actually expire?
  - e Why was the plaintiff allowed to pursue his claim?

**Analyse and evaluate**

- 10 'Limitation periods inhibit justice from being achieved. If a civil dispute arose years ago, a plaintiff should be able to pursue it.' Do you agree? Give reasons.

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7.2 Check your learning

» **Legal case**

*Rogers v Julius*  
(Residential Tenancies)  
[2017] VCAT 55  
(11 January 2017)

» **Weblink**

Summary of limitations

**Did you know?**

Children aged under 18 years can still be plaintiffs. They can sue through what is known as a 'next friend' or 'litigation guardian', who will commence a proceeding on their behalf.

In civil disputes there can be more than one plaintiff and more than one defendant. When looking at a possible civil claim, it is important to consider:

- who the plaintiff might be
- who the possible defendants might be.

Plaintiffs and defendants can be human beings, companies (who are separate legal entities from the directors and managers who run them), or other bodies such as government agencies.

## Possible plaintiffs

The possible plaintiffs in a civil dispute can include:

- the aggrieved party (i.e. the person who has suffered the loss)
- other victims (i.e. victims other than the aggrieved party)
- insurers.

## Aggrieved party

The aggrieved party is the **person whose rights have been infringed and who has suffered loss**. For example, in a contract claim, the plaintiff is likely to be one of the parties to the contract who will suffer loss because of a breach of contract. In a negligence claim, the plaintiff is likely to be the person to whom the defendant owed a duty to care, and has suffered injuries as a direct result of the defendant breaching that duty.

It is possible for a civil action to include more than one aggrieved person. In a nuisance claim, for example, there might be two people whose use and enjoyment of their property might be infringed as explained below.

### representative proceeding

a legal proceeding in which a group of people who have a claim based on similar or related facts, bring that claim to court in the name of one person; also called a class action or a group proceeding

## EXAMPLE

### Property owners sue for trespass to land

Polly and Heather are joint owners of a piece of property in Werribee. They established a fence around their property and created a sanctuary for a large number of animals. Barry, the next-door neighbour, used to go for a walk early every Saturday morning. He would bring with him five of his hounds, cutting across Polly and Heather's land to go for his walk. The hounds would chase and scare the animals. Polly and Heather have told Barry several times that he does not have their consent to go onto their land, but Barry continues to do so. They have now commenced a claim against him.

### lead plaintiff

the person named as the plaintiff on behalf of the group members in a representative proceeding (i.e. class action)

### group member

a member of a group of people who are part of a representative proceeding (i.e. class action)

A **representative proceeding**, also known as a class action or group proceeding, is a particular type of civil proceeding, where seven or more people have claims against the same person, and those claims are in respect of, or arise out of, the same type of circumstances. The people who have the claims will join together to form a 'class' and will issue a proceeding against the person against whom they have a claim. One of the members of the class, known as the **lead plaintiff**, will represent the group in the proceeding, and the people who are part of that group will be **group members**.

There have been a number of class actions issued in Australia and in Victoria, including class actions related to the Black Saturday bushfires which occurred in Victoria in 2009, and a class action in relation to losses suffered as a result of the 2011 floods in South East Queensland.

## Other victims

A plaintiff can be a person who has indirectly suffered loss or damage as a result of actions against another party. For example:

- a family member may suffer loss and damage as a result of the death of a family member, and may sue another person who they allege has caused that death
- somebody may have been close to an event and suffered loss and damage as a result. For example, a person who has seen people badly burnt by an electric explosion caused by another person, and has suffered **nervous shock** as a result, may be entitled to seek damages for loss and damage.

The following news article further explores the possible parties involved in a civil dispute.



**Source 1** In 2017, a class action was commenced against the organisers of the Falls Festival. The class action relates to an incident that took place in Lorne, Victoria in 2016 in which a 'stampede' left 19 people in hospital and dozens more injured.

**nervous shock**  
a psychological reaction, psychiatric harm that is more serious than ordinary grief or stress

## David Friday sues flight school over the death of his wife and son in Germanwings crash

Rania Spooner, *The Age*, 2 April 2016

A Victorian man whose wife and son were among the 150 people killed when suicidal Germanwings co-pilot Andreas Lubitz crashed a jet into the French Alps, is suing a US flight school he alleges failed to stop the tragedy.

Among explosive allegations made on behalf of David Friday are that the US training centre, owned by Germanwings parent company Lufthansa, negligently hid and failed to act on Lubitz's history of serious mental illness.

Lawyers for the Friday family argue US Federal Aviation Authority rules require flight instructors to stop teaching students 'suffering from psychological abnormality' and that they knew or should have known Lubitz was unstable and a danger to passengers.

The lawsuit was filed in the United States District Court in Arizona on Tuesday and states that had Lufthansa's Airline Training Centre Arizona exercised reasonable care it 'could have prevented this predictable tragedy'.

Mr Friday lost his wife Carol, 68, and 29-year-old son Greig when Lubitz locked the pilot out of the cockpit of an Airbus A320 and deliberately crashed the Dusseldorf-bound plane on March 24, 2015.



**Source 2** David Friday, whose wife and son died in the Germanwings plane crash

**IN  
THE  
NEWS**

## Insurers

**Insurers** are individuals or companies who enter into an insurance policy with a person, known as the insured. Under the insurance policy, the insurer will agree to provide insurance (i.e. protection from financial loss) in certain circumstances.

**insurers**  
a person or company contracted to compensate another in the event of damage or loss

### right of subrogation

the right to 'step into the shoes' of an insured person and act on their behalf, including taking legal actions in their name

Usually, the insurance policy will provide the insurer with a **right of subrogation** – the right to 'step into the shoes' of the insured. That means that if the insured has suffered loss or damage caused by another, and the insurer has made a payment to the insured under the insurance policy, then the insurer may be entitled to recover what it has paid out against the person who has actually caused that loss.

## Possible defendants

The possible defendants in a civil dispute can include:

- the wrongdoer (i.e. the person or company who caused the loss or damage to the plaintiff)
- employers
- persons involved in wrongdoing
- insurers.

### Study tip

The best way to identify the possible plaintiffs and defendants in a civil dispute is to read as many actual and hypothetical scenarios as you can, and identify the possible parties. Write your own scenarios, read as many articles online as you can about civil disputes, or work with a friend or classmate to develop and exchange scenarios.

## Wrongdoer

It is often the case that the plaintiff will sue the person or company that has directly caused the loss or damage to the plaintiff (often called the wrongdoer), being the person who is alleged to have caused harm to the plaintiff. In a claim for unpaid wages, this is likely to be the employer. In a nuisance claim, this is likely to be the person who is causing the interference (such as noise, odour or sight) that results in the plaintiff losing the use or enjoyment of property.

Sometimes there may be two wrongdoers, and both of them may become liable for loss or damage suffered by the plaintiff. For example, in a medical negligence claim, a person may sue both the hospital and the doctors as in the news article below.

## IN THE NEWS

### Calwell woman settles lawsuit against Canberra Hospital, doctors for \$12m

Alexandra Back, *The Canberra Times*, 13 February 2017

A Calwell woman who was suing the Canberra Hospital and two doctors over alleged failures stemming from migraine drug treatment has settled the case for \$12 million.

It had been alleged that as a result of the alleged failures, Stacey Louise Cave, 40, suffered a stroke and brain damage, and was left dependent on a wheelchair.

The case stemmed from Ms Cave's use of the drug Deseril over many years to treat migraines, which the former teacher had suffered since she was a teenager.

Since the late 1990s, she had been taking the drug under the supervision of a consulting neurologist and her Woden general practitioner Brenda Jean Tait.

During that time, she took regular 'Deseril holidays'. The holidays, for four weeks roughly every five months, were designed to reduce the known circulatory risks associated with taking the drug non-stop.

It had been alleged that when a different neurologist, Deakin's Colin James Andrews, took Ms Cave on as a patient in October 2007, he and Dr Tait failed to ensure she continued to take 'Deseril holidays'.



Source 3 A claim against a hospital and two doctors has resulted in a settlement.

It was alleged that in July 2011, Dr Andrews advised Dr Tait to prescribe another drug, Maxalt wafer, which she did, when they both should have known it should not be given to patients already taking Deseril.

It was alleged that by September 2011, Ms Cave, who was a teacher at Garran Primary School, had been taking Deseril for four years without a break.

Over a week in October that year, Ms Cave went to Dr Tait and the hospital emergency room several times complaining of blurred vision, pounding in the ear and weak limbs.

It was alleged the hospital and Dr Tait missed the signs Deseril was a possible cause of Ms Cave's symptoms.

On October 11 that year, Ms Cave had a stroke in hospital.

It was alleged she suffered permanent brain injury, limb weakness, blurry vision, and psychiatric injury, and was wheelchair dependent and needed 24-hour care as a result of the hospital and doctors' alleged failures. The doctors and hospital had largely denied the alleged breaches of duty of care, except for Dr Tait who had made certain admissions, including in relation to Deseril holidays.

The matter went to full hearing before a dozen barristers and lawyers in the ACT Supreme Court last week. On Monday, they told the court a settlement had been reached.

## Employers

An employer of an employee who is the wrongdoer may become a defendant because of the principle of **vicarious liability**. Vicarious liability is when **somebody becomes responsible for the actions of another**. The reasoning behind the employer being liable instead of the employee is that the employer has a right, ability or duty to control the activities of the wrongdoer. The employer should therefore be responsible if the wrongdoer, in undertaking those activities, has caused harm. Vicarious liability generally arises in negligence claims.

For an employer to be liable, the plaintiff needs to establish that the employee was acting in the course of employment when the wrong occurred. This means that there must have been some connection between the act and the employment. If the employee was acting in an unauthorised way, then the employer may not be found liable.

**vicarious liability**  
the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

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### → GOING FURTHER

## Criminal acts of employees

It is possible for an employer to be vicariously liable for the criminal acts of an employee, even if the employer did not authorise the acts. In a 2016 decision of the High Court, it held that attention must be given to any special role and position that the employee was given by the employer. Factors such as the authority, power, trust, control and ability to achieve intimacy can give rise to a finding that the employer will be vicariously liable where an employee has engaged in criminal conduct, and the plaintiff has been harmed. This decision confirms that employers can become vicariously liable for the criminal acts of its employees, such as sexual abuse that occurs in organisations such as schools.

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The following case study further explores vicarious liability in a widely reported NRL injury claim.

## CASE

## STUDY

### Alex McKinnon suing NRL and another player

Alex McKinnon, born in 1992, is a former Australian professional rugby league player. In a 2014 NRL match, a tackle on McKinnon left him a quadriplegic and confined to a wheelchair.

In December 2016, it was widely reported in the media that McKinnon plans to sue the NRL and another player, Jordan McLean, over the tackle. It is likely that McKinnon will allege that the NRL is vicariously liable for his injuries.



**Source 4** Alex McKinnon suffered a spinal injury during a match, which ended his NRL career.

## Persons involved in wrongdoing

A person who is **involved** in the wrongdoing of another may also be sued. A person may be involved in wrongdoing if they:

- aided, abetted (i.e. encouraged) or procured (i.e. organised) the wrongdoing
- induced, or encouraged, the wrongdoing
- were in any way, directly or indirectly, a party to the wrongdoing
- conspired with others to cause the wrongdoing.

This is known as **accessorial liability**. A plaintiff may decide to sue somebody else who was involved in the wrongdoing. For example, if a person was injured as part of an armed robbery, which was organised by someone who was not actually present, then this other person may be seen to be involved in the wrongdoing because they were indirectly a party.

The following example further explores accessorial liability.

### accessorial liability

a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm (for example, they encourage another person to cause that harm)

## EXAMPLE

### Friend who 'egged on' a mate is sued

Vernon and his mate Harry went out on Saturday night. After a few drinks, they both started talking about how it would be really funny if they started tripping people up as they walked past them. They agreed that they would take turns to trip someone.

The boys started walking down Domain Road in South Yarra. Harry tripped the first person, who fell over, and both the boys ran away laughing. They then approached 30-year-old Gina, who had a sore leg after playing soccer that day. As the boys walked past her, Harry nudged Vernon and said 'your turn'. Vernon tripped Gina, who stumbled, fell over and broke her ankle. She has sued both Harry and Vernon.

## Insurers

In some instances it may be possible for a plaintiff to sue the insurer of the person who has caused loss or damage. For example, many employers obtain insurance through the Victorian WorkCover Authority (trading name WorkSafe Victoria). If an employee has been injured at work, and has made a proper claim

for compensation for a serious injury but that claim has been rejected, he or she may be able to commence proceedings against the Authority to seek compensation for the work injury. The Authority is often a defendant in civil proceedings involving claims for workplace injuries.

## 7.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Generally, who is likely to be the plaintiff and the defendant in a civil dispute?
- 2 Define the terms 'vicarious liability' and 'accessorial liability' and provide one example of each.
- 3 Why is it possible for an insurer to be a plaintiff in a civil dispute even though the insurer was not the person directly affected?

### Synthesise and apply

- 4 Create a civil dispute in which there are two possible plaintiffs, and two possible defendants. Exchange your scenario with a member of your class and identify the parties to the dispute in your class member's scenario. Give reasons for your answer.
- 5 Prepare a newspaper article about a recent civil case in which a plaintiff has sued a defendant. In your newspaper article, provide a description of:
  - a the type of civil law the dispute involves
  - b the claim the plaintiff is making
  - c the type of loss the plaintiff alleges to have suffered
  - d who the plaintiff is suing and why
  - e whether there are any other possible plaintiffs or defendants.Give your newspaper article to another class member. Assess whether the class member has correctly identified all of the points listed above.
- 6 Conduct some internet research and find:
  - a One representative proceeding (i.e. class action) that has now been resolved and resulted in a payment to the group members.
  - b One representative proceeding that is currently before the court.

- c One representative proceeding that is about to be commenced.

Choose one of those representative proceedings and provide a brief summary about it.

- 7 Read the article 'David Friday sues flight school over the death of his wife and son in Germanwings crash'.
  - a Who is the plaintiff in this proceeding and who is the defendant?
  - b What allegation is the plaintiff making?
  - c What loss has the plaintiff suffered?
  - d Conduct some research. Have there been any developments with this case?
- 8 Read the article 'Calwell woman settles lawsuit against Canberra Hospital, doctors for \$12m'.
  - a What type of civil law did this case involve? Identify the terminology in the article that suggests why this is so.
  - b What loss did the plaintiff suffer?
  - c How was the case resolved and what was the outcome?
  - d Do you consider this to be a fair outcome? Give reasons.

### Analyse and evaluate

- 9 Do you think that representative proceedings (i.e. class actions) provide greater access to justice? If so, how?
- 10 In your view, should an employer be responsible for an employee's actions? In your answer, provide one argument for and one argument against the principle of vicarious liability.



These additional resources are available via your **obook assess**:

» **Student book questions**

7.3 Check your learning

» **Weblink**

Class actions

» **Weblink**

Right of subrogation (insurers)

» **Worksheet**

Parties to a civil dispute

## CHAPTER SUMMARY

**Purposes of civil law**

- > Achieve social cohesion
- > Protect the rights of individuals
- > Provide an avenue for people to seek compensation
- > Provide a means for returning the wronged person back to the position they were in before the wrong occurred

**Types of civil law**

- > Negligence
- > Trespass
- > Defamation
- > Nuisance
- > Wills and inheritance
- > Family
- > Employment
- > Equal opportunity and discrimination

**Key concepts of civil law**

- > Breach
- > Causation
- > Loss
- > Limitation of actions
- > Burden of proof
- > Standard of proof

**Possible parties to a civil dispute**

- > Possible plaintiffs include the aggrieved party, victims and insurers
- > Possible defendants include the wrongdoer, employers, persons involved in the wrongdoing and insurers

## REVISION QUESTIONS

- 1 Define the following terms:
  - a vicarious liability
  - b balance of probabilities
  - c causation.

(3 marks)
- 2 Describe one circumstance in which the defendant may have to prove the facts in a civil dispute.
 

(3 marks)
- 3 Justify two reasons for the need to impose a time limitation within which a plaintiff can bring a claim.
 

(4 marks)
- 4 Provide two examples in which the defendant may have breached an area of civil law, but will be found not to have caused loss or damage.
 

(4 marks)
- 5 For each of the following scenarios, identify the likely plaintiff, the likely defendant, the area of civil law involved and the loss suffered by the plaintiff.
  - a Naimi was a passenger in a car travelling on a road in the centre of Melbourne. Without warning, a tram came off the tram lines and rammed the car, killing the driver (who was Naimi's best friend) and injuring Naimi.
  - b Mariana is employed in a local warehouse. She has been suffering bullying and abuse from a fellow colleague for some time now, despite her complaints to her boss who has done nothing about it. Mariana has now been off work for 12 weeks suffering anxiety and depression.
  - c Gordana's neighbour has been burning rubbish in his yard late at night for some time now. The fumes have now entered Gordana's home, causing her and her whole family to suffer significant respiratory issues. Gordana has recently found out that both her neighbour and her neighbour's best friend were involved in the burning.
 

(12 marks)



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

- » **Student book questions**  
Ch 7 Review
- » **Revision notes**  
Ch 7
- » **assess quiz**  
Ch 7  
Test your skills with an auto-correcting multiple-choice quiz

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

Read the case studies and answer the questions below.

### Case study 1 – Luca’s Facebook post

Luca has been in a fight with his former girlfriend, Steph, for months. Steph has blocked him from Facebook and ignores his regular social media attempts to contact her. In an attempt to get back at her, Luca wrote a public Facebook post which suggested that Steph had faked her results to get her current job, and that she had cheated her way through school to get good grades. To validate the post, Luca’s

friend Bernie responded to the post saying ‘Finally this is out in the open. That girl’s been conning people for years’. Steph’s colleagues and friends have seen the post. Ever since the post was written, she has been ignored by a number of people at work. She has also been told by her boss that she will not get the promotion that she had previously been promised. Steph has been suffering from anxiety as a result.

### Case study 2 – Andrew’s courier run

Andrew worked for a large courier business that had important clients for whom it delivered goods. One afternoon, Andrew’s boss approached him and told him that there was an urgent delivery required that afternoon for a very important client, and that the goods needed to be delivered by no later than 3.30 pm. Andrew’s boss told him that he needed to do ‘whatever it takes’ to get there by that time, even if it meant speeding and breaking the law.

Andrew left and sped all the way to the client. On the way, he lost control of his car and ran into a house, causing significant damage to the front of the house and three of its rooms. The house is now uninhabitable and the house owners have had to live elsewhere. The house owners are insured and have sought compensation from their insurer.

## Practice assessment task questions

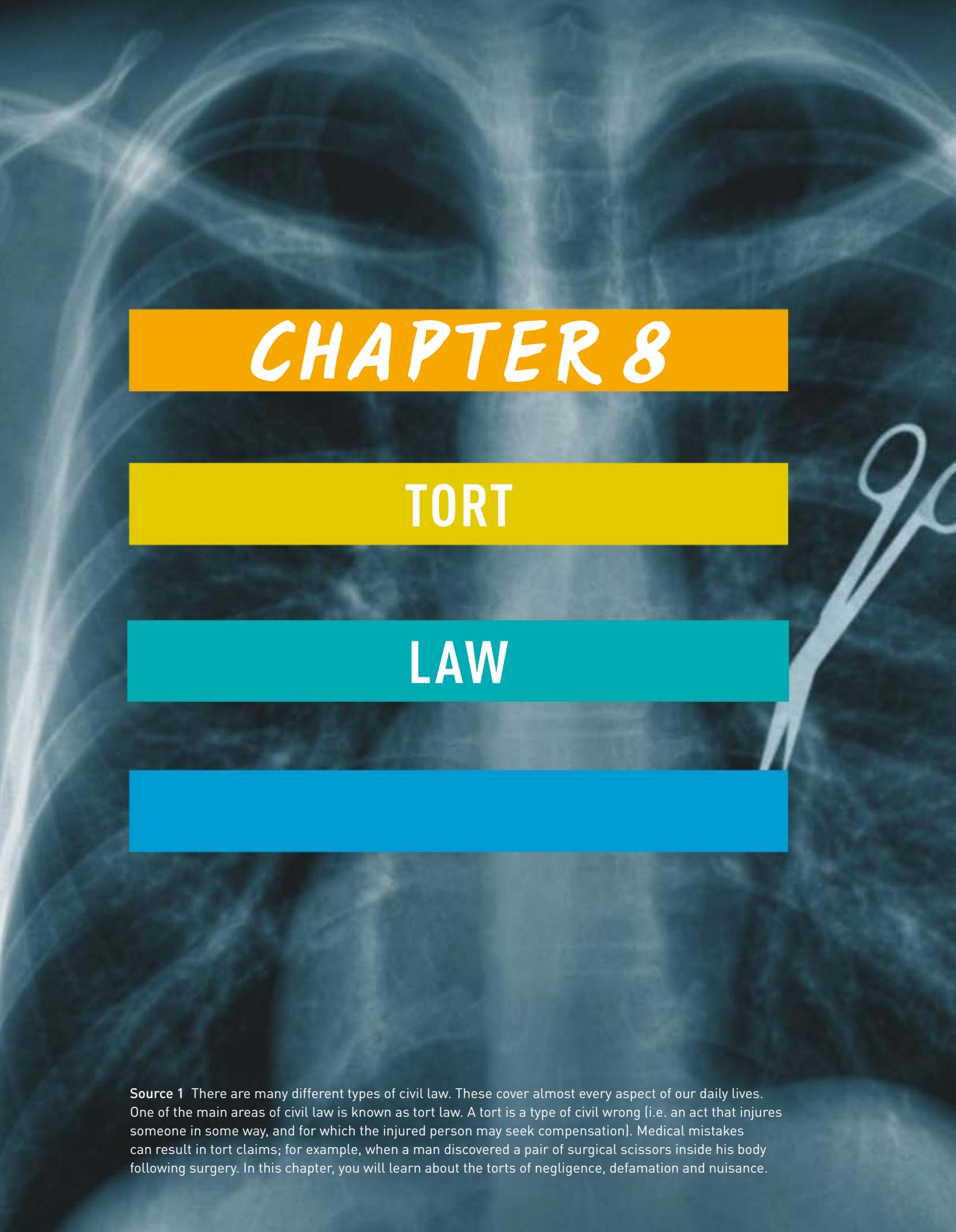
Write a report which addresses the following for each of the case studies (marks allocated are per case study).

You must give a justification for each of your answers:

- the area of law that the dispute involves (3 marks)
- the nature of the claim (4 marks)
- the possible plaintiff(s) (3 marks)
- the possible defendant(s) (3 marks)
- the type of breach involved (4 marks)
- whether causation is likely to be established (4 marks)
- the type of loss that is alleged to have been suffered (4 marks)

Your report may be in writing or oral, or may be completed with the use of technology.

Total: 25 marks



# CHAPTER 8

## TORT

## LAW

**Source 1** There are many different types of civil law. These cover almost every aspect of our daily lives. One of the main areas of civil law is known as tort law. A tort is a type of civil wrong (i.e. an act that injures someone in some way, and for which the injured person may seek compensation). Medical mistakes can result in tort claims; for example, when a man discovered a pair of surgical scissors inside his body following surgery. In this chapter, you will learn about the torts of negligence, defamation and nuisance.

## OUTCOME

By the end of **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

## KEY KNOWLEDGE

In the chapter, you will learn about:

- two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

## KEY SKILLS

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

- define and use legal terminology
- research and analyse relevant information about civil law
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios.

## ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9) you are required to study **two areas of civil law** in detail.

YOU MAY CHOOSE TO STUDY:	OPTIONS INCLUDE:	PAGE:
• <b>TWO</b> torts (from Chapter 8)	8.2 Negligence	220
	8.3 Defamation	228
	8.4 Nuisance	236

OR

• <b>TWO</b> other areas of civil law (from Chapter 9)	9.2 Discrimination	250
	9.3 Void marriages	260
	9.4 Online shopping	268
	9.5 Workplace pay and conditions	278

OR

• <b>ONE</b> tort (from Chapter 8)	See above	See above
• <b>ONE</b> other area of civil law (from Chapter 9)		

## KEY LEGAL TERMS

**defamation** a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

**duty of care** in relation to negligence, the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

**injunction** a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

**negligence** a type of tort which involves a breach of a duty of care, causing loss or harm

**nuisance** a type of tort which involves interference with a person's right to use and enjoy property

**private nuisance** a type of tort which involves an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

**public nuisance** a type of tort which involves an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

**tort** a wrongful act that is recognised by law

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# 8.1

## INTRODUCTION TO TORT LAW

Civil law aims to protect the rights of individuals, groups and organisations. If an individual's rights are infringed, the individual (known as the plaintiff) can take the matter to court (or possibly another dispute resolution body) to ask for compensation as a way of righting the wrong.

There are various types of civil law. One of the main areas of civil law is **tort law**. A **tort** is a civil wrong that one person commits against another. Tort law deals with the rights and obligations that people owe to one another, as well as the infringement of those rights and obligations. The person who commits the wrong, and against whom action may be taken, is often called the **tortfeasor** (who will be generally known as the **defendant** if action is taken against them in court).

The main aim of tort law is to return a wronged person back to the position he or she was in before the wrong occurred. This is usually done through the awarding of a remedy to the plaintiff, the most common of which is **damages**. For example, a person who requires medical treatment such as physiotherapy as a result of being injured by the defendant can be compensated and have their medical costs paid until their health returns to normal.

Historically, tort law has been created through common law, though in Victoria some areas of tort law are now contained in statute.

There are various torts in Australia. They include:

- **negligence** (e.g. when one person fails to comply with a duty of care owed to another)
- **defamation** (e.g. when one person makes untrue statements about another, causing damage to their reputation)
- **nuisance** (e.g. when a person interferes with another person's right to enjoy their property)
- trespass (e.g. assault, battery, false imprisonment, trespass to land and trespass to goods).

Negligence is one of the most common forms of tort and occurs in many different areas of society.

As part of Area of Study 3 you are required to study two areas of civil law in depth. For each area of civil law, you will explore:

- the rights protected by the law
- the elements and defences
- limitation of actions
- the impact of the breach on the parties
- the role of the law (common law and statute law) in developing the elements and the defences.



**Source 1** The tort of negligence imposes a legal duty on school teachers to take care of the safety and wellbeing of their students.

### **tort**

a wrongful act that is recognised by law

### **defendant**

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

### **damages**

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

### **negligence**

a type of tort which involves a breach of a duty of care, causing loss or harm

### **defamation**

a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

### **nuisance**

a type of tort which involves interference with a person's right to use and enjoy property



**Source 2** The tort of defamation protects an individual against attempts to discredit them. Information that is published (including on social media platforms) can be considered defamatory if it is untrue and lowers an individual's reputation.



**Source 3** The tort of nuisance protects an individual's right to enjoy convenience and comfort. This includes a right to the enjoyment of private land which is often an issue between neighbours.

In this chapter you will explore three types of torts: negligence, defamation and nuisance. The following legal case explores the tort of negligence.

## State of Victoria sued

On 14 January 2016, Karen Chetcuti was murdered by Michael Cardamone. Cardamone had been on parole for less than six months at the time of the murder (that is, released from prison early). Cardamone pleaded guilty to the murder in 2017.

In July 2017 it was reported that the family of Karen Chetcuti were planning to sue the state of Victoria. The family claim that the state was negligent in monitoring Cardamone, and that the family has suffered injuries, loss and damage as a result.

**CASE**

**STUDY**

### 8.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the word 'tort'.
- 2 Identify three types of torts.
- 3 Have torts been created through common law or statute law?

### Synthesise and apply

- 4 Read the case study 'State of Victoria sued'. Describe the claim that is being made in this situation.
- 5 Choose one tort mentioned in this topic. Think about an occurrence that could result in the tort claim and write a short paragraph outlining it. Give your scenario to another class member to read and ask them to identify:
  - a the tortfeasor
  - b the wronged party
  - c the tort
  - d the loss or damage.



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

» **Student book questions**

8.1 Check your learning

» **Video tutorial**

Introduction to Chapter 8

» **Weblink**

Do we need a privacy tort?

» **Weblink**

The right to sue in tort

# 8.2

## NEGLIGENCE

### negligence

a type of tort which involves a breach of a duty of care, causing loss or harm

### Did you know?

The American Museum of Tort Law offers a history of cases. One exhibit is devoted to the McDonald's hot coffee case, where the plaintiff, Ms Liebeck, suffered third-degree burns over 6 per cent of her body when she spilt a cup of coffee in her lap. At trial, she was awarded \$640 000 for her injuries on the basis that the coffee was served at an excessively high temperature.

### duty of care

in relation to negligence, the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

### breach

breaking or failing to fulfil a duty or obligation

### standard of care

the degree of caution required by a person who owes a duty of care to another

### causation

the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

In their everyday lives, people regularly come into contact with other people, including strangers. This contact occurs at school, at the local shops, on public transport, in parks and on school excursions. At times, people, including strangers, owe other people a duty to take care to avoid causing harm.

For example, teachers and students owe each other a duty to take care:

- teachers owe a duty to their students to supervise them appropriately
- students owe a duty to each other and their teachers to behave reasonably.

The duty may change or expand when teachers take groups of students away on camping or hiking trips, where the risk of injury is increased and dangers are readily foreseeable.

The law relating to duty of care is known as **negligence**. When a person is negligent in civil law, the person **has failed to take reasonable care that was due to another**. A person is obliged to take care when it is **reasonably foreseeable** that other people could be harmed by their actions or omissions.

## Rights protected by the law

As indicated in the previous topic, laws about negligent conduct have developed over many decades through common law and through statute law. The *Wrongs Act 1958* (Vic) also applies to negligence claims.

The main purpose of the law of negligence is to protect an individual's right to be safe from harm, both to the person and to their property. This right exists in all circumstances in which we engage with others, whether driving a car, catching public transport, playing sport in a local park or preparing food for service in a café. It is expected that while engaging with others, we are aware of the potential for damage or harm that our actions could cause, and we take reasonable steps to avoid causing harm and damage.

The law of negligence also aims to:

- protect people from wrongful conduct by others, particularly where a person acts recklessly or with complete disregard for another person
- allows parties to seek compensation against those people who have acted contrary to those laws.

## Elements required to establish liability

When claiming another person has been negligent, the plaintiff must prove that the following four elements exist:

- **duty of care** – the defendant owed a duty of care to the person injured
- **breach** of duty of care (**standard of care**) – the defendant breached the duty of care
- **causation** – the breach of duty of care caused the harm to the plaintiff
- **injury, loss or damage** – the wronged person has suffered injury, loss or damage.

If it can be proved that the person was owed a duty of care and that the duty of care was breached and harm was caused, then the wronged person may be entitled to a remedy, which will ordinarily be damages.

### Element 1 – Duty of care

The plaintiff must first establish that the defendant owed him or her a 'duty of care'

A person owes a duty of care if:

- the risk was foreseeable (i.e. the person knew or should have known about the risk of loss or harm)
- the risk was significant or not insignificant (i.e. not farfetched or fanciful)

- a reasonable person in the same circumstances would have taken precautions to eliminate any risk of harm.

The courts over time have established that certain categories of persons are presumed to owe a duty of care to another category of persons. For example:

- teachers and schools have a duty of care to their students
- doctors and nurses owe a duty of care to their patients
- motorists who are driving their car owe a duty of care to other road users
- manufacturers owe a duty of care to consumers.

The following legal case explores the element of duty of care.



**Source 1** In general, doctors and nurses owe a duty of care to their patients. This is especially critical in hospital emergency departments, where doctors and nurses are often required to assess patients who arrive with serious injuries.

## Child drowns in workers' trench

### *Chester v Waverley Municipal Council* (1939) 62 CLR 1

In 1939, workers of the Waverley Municipal Council in New South Wales had dug a trench. They placed a railing around the trench (which was not childproof) and left for the day. Rain filled the trench with water. Ms Chester's son, who was seven, fell into the hole and drowned. As a result of finding and seeing him hours later, she suffered significant nervous shock and distress. She sued the council for negligence, claiming that it owed her a duty of care.

The High Court on appeal found that the Council owed a duty of care to the child. However, the Court said that the Council did not owe a duty of care to the mother, stating that it was not reasonably foreseeable that their actions towards the child would so affect a mother seeing the dead body of her child. One judge of the High Court dissented (meaning he disagreed with the others).

LEGAL

CASE

## Exceptions to the duty of care

There are some exceptions to the duty of care.

- When participating in a **risky recreational activity**, consumers can sign a waiver to show they accept responsibility for injuries. For example, bungee-jump operators may ask patrons to sign a waiver accepting any reasonable risk associated with the jump, but if the operator has not maintained their equipment or has said the jump was safe when it was not then the operator will still be liable for a patron's injury.
- A **good Samaritan** is a person who gives care, help and advice in an emergency situation. 'Good Samaritans' are exempt from legal liability in negligence claims as long as they act in good faith, within their competence and without payment.
- A person who **donates food** in good faith for charitable purposes is protected from legal liability if a person is harmed from having consumed the food, as long as the food was safe to consume at the time it left the possession or control of the donor.
- **Volunteers** (people who do community work for a community organisation, association, local government or public authority) cannot be held personally liable if they cause damage or injury to another.

## Element 2 – Breach of a duty of care (standard of care)

A breach of a duty of care occurs when a person does not take all the care they should. The duty is breached (broken) when the defendant fails to do what a reasonable person would have done. In determining whether a reasonable person would have taken precautions against a risk of harm, the court considers:

- the likely risk of harm
- the likely seriousness of the harm
- the burden of taking precautions to avoid the risk of harm
- the social utility (benefit or worth) of the activity that creates the risk of harm.

For example in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (see Topic 3.7), in which a waterskier suffered significant injuries, the Council ought to have known that the harm suffered was serious, and the burden of taking precautions would have been small.

## Element 3 – Causation

To succeed in a negligence claim, the plaintiff has to prove that the injury or loss was caused by the breach of duty of care, and the injury would not have occurred without the breach of duty of care.

If it can be shown that the harm was **too remote** from the breach of duty of care, the plaintiff will not be successful in claiming negligence. For example, a person may suffer nervous shock from hearing a car accident but not actually seeing it happen. This harm may be too remote from the actual event.

In other circumstances, there may be a **break in the chain of causation**. This is where some new act occurred between the tort happening and the loss or damage being claimed.

In *Roman Catholic Church v Adair* (2005) 221 CLR 161, the High Court found that a school was not liable in relation to an incident involving a flying fox during recess.

### LEGAL

### CASE

## School incident during recess results in negligence claim

### *Roman Catholic Church v Adair* (2005) 221 CLR 161

In 1999 an eight-year-old girl, Farrah Adair, fell from a flying fox in the playground of St Anthony's Primary School, ACT. The incident occurred during morning recess.



**Source 2** An injury suffered on a flying fox was at the centre of a case that focused on the liability of schools for playground accidents.

According to evidence presented in court, there were two teachers on supervision in the area in which the child was injured. The school had developed a 'hands off' rule when others were using the play equipment. Despite this rule, one boy and one girl grabbed Farrah's legs while she was on the flying fox, and she fell and sustained injuries. The teacher on duty had momentarily looked away when the incident occurred.

A majority of High Court justices found that the school was not liable. The High Court stated that 'it must be remembered that there was no evidence of any serious accident on the flying fox in the past, there was no evidence of pupils having pulled each other from the flying fox in the past, and there was a well-known and enforced school policy against this. The magnitude of the risk of injury was not high, and nor was the degree of probability of its occurrence.'

The High Court also found that the incident may not have been prevented even if the teacher had been watching the playground area. On this basis, the cause of the injury to the child was not the lack of supervision by the school, which the Court ruled had behaved appropriately by having a clearly stated 'hands off rule' that had been communicated to the children.

## Element 4 – Injury, loss or damage

As a general rule, the plaintiff can only seek a legal remedy through the law of negligence if it can be proved that he or she suffered an injury, loss or damage, even if it is minor. The injury, loss or damage can be physical, mental or damage to property.

## Limitation of actions

The *Limitation of Actions Act 1958* (Vic) sets out the limitation periods for negligence claims. These are outlined in Source 4, and range from three to six years, depending on the injury suffered.



**Source 3** If a local council fails to remove a dead branch on a tree when requested to do so, and the branch then falls and causes loss or harm to someone, the council may have breached its duty of care. The maintenance of public gardens is an important role played by local government.

TYPE OF NEGLIGENCE CLAIM	TIME PERIOD
General negligence claims (e.g. a claim for property damage)	6 years
An action for damages for negligence where personal injury includes a disease or disorder	3 years
An action for damages for negligence where the injury was death or personal injury	Either 3 or 12 years

**Source 4** Limitation periods for negligence claims

The court is able to extend the limitation period in certain circumstances.

## Calculation of time

The start of limitation periods for negligence claims depends on the type of injury. For example:

- for general negligence claims, the time starts from the date on which the cause of action accrued (i.e. when the loss or damage was suffered by the plaintiff)
- for actions involving a disease or disorder, the time starts from the date on which the person first knows they have the disease or disorder and that the disease or disorder was caused by the defendant.

## Death or personal injury claims

The limitation period for death or personal injury claims is whichever of the following expires first:

- 12 years from the date of the conduct of the defendant which caused the death or injury (known as the 'long-stop limitation period') or
- three years from the date of which the cause of action was 'discoverable'. A 'discoverable' date is the date the plaintiff knows or ought to have known that the death or personal injury occurred, was caused by the defendant, and in relation to personal injury, it was serious enough to justify bringing the action.

The above does not apply to work injuries or transport accident injuries. They also do not apply to injuries as a result of a dust-related condition.

## Child abuse

In 2015, the Victorian Parliament passed legislation which amended the limitation period for certain actions involving child abuse. This amendment followed the release of a report called *Betrayal of Trust*, after a government inquiry into child abuse allegations against religious and other organisations. The legislation now removes limitation periods in respect of child abuse to allow survivors to bring a civil action regardless of the time that has passed since the act occurred.

### *Did you know?*

In some countries there is a tort for invasion of privacy. In Australia this tort has not yet developed.

## Possible defences

The defendant can claim that the plaintiff has not established the elements of negligence. That is, the defendant may try to prove that a duty was not owed, a duty was not breached, that the damage or injury was too remote from the defendant's act or omission, or that no loss or harm has been suffered. If all elements are proven, the defendant may have to rely on one of the following defences:

### contributory negligence

a formal defence to negligence which claims the plaintiff contributed to the harm caused by the defendant. If proved, this will reduce the damages the defendant has to pay

### *volenti non fit injuria*

a Latin term meaning 'to a willing person, injury is not done'. A defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

- **contributory negligence**
- assumption of risk (*volenti non fit injuria*).

These are discussed in more detail below.

## Defence 1 – Contributory negligence

The defendant may try to prove that the plaintiff contributed to the harmful situation or is partly to blame for the harm done. For example, a person may make a claim that they suffered personal injury as a result of being pushed by the defendant. However, their claim, if proven, would be reduced if it were shown that the plaintiff was intoxicated at the time. Contributory negligence will generally reduce the amount of damages that the defendant would be required to pay to the plaintiff to compensate them for their loss, damage or injury.

In determining contributory negligence, the court will examine the conduct of the plaintiff and assess how they might have contributed to their own loss, damage or injury. In cases where the plaintiff was found to have contributed very significantly to their own loss, the amount of damages awarded might be negligible.

The legal case *Guru v Coles Supermarkets Australia Pty Ltd* [2016] NSWDC 349 (14 December 2016) is an example of a case where the defendant argued contributory negligence.

## LEGAL

## CASE

### Shopper sues Coles for slipping on grape

*Guru v Coles Supermarkets Australia Pty Ltd* [2016] NSWDC 349  
(14 December 2016)

In 2012, Sangeeta Guru was shopping in a Coles supermarket when she stepped on a grape and fell, causing her injuries, including to her knee and back.

Guru sued Coles for negligence. In its defence, Coles claimed that Guru contributed to her harm, because she had failed to look down at her feet as she was walking, as well as failed to maintain a proper lookout. In December 2016, the NSW District Court found in favour of Guru and awarded her \$90,000 in damages. The judge found that Coles had failed to prevent the grapes from causing a safety risk to shoppers. It dismissed the contributory negligence defence, finding that it was not reasonable for a person to keep a lookout while looking at goods on display.

## Defence 2 – Assumption of risk (*volenti non fit injuria*)

The defence of *volenti non fit injuria* refers to the voluntary acceptance of the risk of injury. In Latin, the term literally states 'to a willing person, injury is not done'. This means that the defendant must prove that the plaintiff was aware of an obvious risk and that he or she voluntarily chose to take the risk. For example, a person who knowingly accepts a ride with a drunken driver is accepting an obvious risk of being injured in a car accident, as it is well known that excessive alcohol consumption impairs driving ability.

Similarly, sportspeople accept the risk of suffering common injuries that may occur within the rules of their sport. For example, jockeys consent to injuries of the type reasonably expected in racing. However, assumption of risk does not apply in cases involving the provision of professional or health services as health providers have a legal responsibility to warn people of any inherent risk associated with their work.

## The role of the law in developing the elements and defences

The law of negligence has been largely developed through common law, and was inherited in Australia through English common law.

However, from around 2002, Victoria and other states and territories have passed legislation that either adopts or amends the common law principles of negligence.

### Common law

As explored in Chapter 3, the landmark case of *Donoghue v Stevenson* [1932] All ER Rep 1 firmly established the tort of negligence. The principles in that case were ultimately adopted in Australia and remain important today. They allow plaintiffs to take legal action on the grounds that a defendant did not act in a way to protect the interests of their 'neighbour' (under the **neighbour principle**).

The Australian case of *Grant v Australian Knitting Mills* (1936) AC 85 adopted the principles established in *Donoghue v Stevenson*. This allowed parties to sue manufacturers who were negligent.

The law of negligence was significantly developed by the courts after this time. However, common law has been modified and adopted by various statutes in Australia, including statutes in Victoria. In particular, a series of statutes were passed by states and territories in around 2002 and 2003 after concerns were raised that the law of negligence was unclear and unpredictable, and it had become too easy for plaintiffs in personal injury cases to be successful in negligence claims.

### Statute law

In Victoria, Part X of the *Wrongs Act* is now the main legislation in Victoria which governs negligence claims. That part was inserted into the *Wrongs Act* in 2003 following a committee which inquired into and made recommendations about negligence laws in 2002 after the above concerns about the law of negligence were raised.

The *Wrongs Act* changes many common law principles related to negligence. In other aspects, the common law principles of negligence continue to apply. For example, in Section 54 of the *Wrongs Act*, which allows a defence of *volenti non fit injuria* to be raised, it states that the common law continues to apply.

In addition to the *Wrongs Act*, other statutes also cover negligence claims in some areas. For example, the Australian Consumer Law (ACL), which commenced on 1 January 2011, is the national code for fair trading and consumer protection. Some parts of the ACL incorporate elements of negligence, such as imposing a duty on people who provide services to provide them with 'due care and skill'.



**Source 5** Microchip registration programs can only be successful if owners' contact details are accurate and up to date. Failing to update details can be considered contributory negligence.



**Source 6** Both Victorian and Australian laws in relation to food handling and service can be traced back to the common law principles established in the case of *Donoghue v Stevenson*.

**neighbour principle**  
in relation to negligence, the common law rule that a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours' (i.e. people who would be closely and directly affected by their acts or omissions)

# Possible impacts of the breach

## Study tip

When analysing a case study, apply the elements to the facts of the case. In assessment tasks, write a heading for each element and address whether it can be established or not, and why. Where you can, use cases or examples to justify your response.

## Impact of negligence on the plaintiff

The impact of negligence on the plaintiff varies depending on the nature of the claim. Some of the possible impacts of harm suffered by the plaintiff as a result of negligence are as follows:

- **Loss of life** – This could occur in a workplace setting. For example, an employer fails to maintain machinery so that it is in good working order which causes a fatal accident.
- **Permanent physical incapacity** – This could require the use of personal carers for the remainder of the person's life. For example, a person contracts salmonella from the consumption of poorly prepared food and permanently loses physical capacity as a result.
- **Serious physical injury** – This could require treatment such as surgery and physiotherapy. For example, a customer who trips on a slippery floor and breaks a leg as a result.
- **Emotional impact of the breach** – This could manifest as fear of certain places or engaging in social situations. For example, a person develops a fear of medical procedures after a negligent experience.
- **Loss of wages and livelihood** – This could be a consequence of requiring surgery or treatment. For example, a person is unable to return to work for a certain time after surgery.
- **Unemployment** – This could be a consequence of physical injury or mental health issues. For example, an electrician is unable to return to work after losing physical capacity.
- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person develops mental health issues as a result of being unable to return to work.

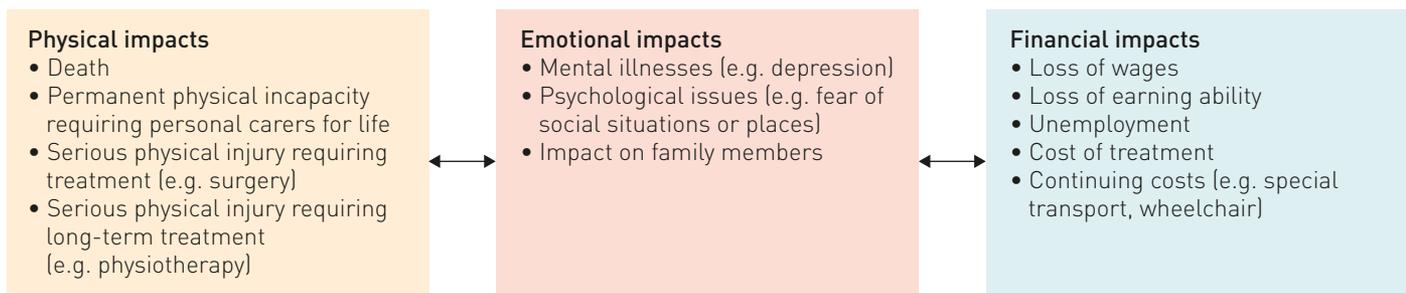
## Impact of negligence on the defendant

The impact of negligence on the defendant can also vary, depending on the extent to which the plaintiff contributed to their own loss, damages or injury. Some of the impacts on the defendant are as follows:

- **Loss of business** – This could be a consequence of the publicity of the claim. For example, a restaurant or café that was sued as a result of the death or injury of a customer from consuming contaminated food.
- **Public humiliation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of an adverse finding in court.
- **Physical injury** – This could occur in cases of contributory negligence or a **counterclaim**. For example, the defendant might also have suffered loss, injury or damage as a result of the conduct of the plaintiff.
- **Costs** – This could occur when the defendant loses the case. For example, the defendant might be ordered to pay the legal costs of the plaintiff, causing financial hardship.
- **Need to sell assets** – This could be a consequence of a high damages award. For example, the defendant might be forced to sell assets to meet the costs of the damages amount.

### counterclaim

a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)



Source 7 Possible impacts of negligence on the plaintiff

**Define and explain**

- 1 What are the key elements necessary to establish a duty of care in a negligence case?
- 2 Using an example, explain what is meant by the term 'contributory negligence'.
- 3 How can the fact that the plaintiff accepted a risk impact on the liability of the defendant?

**Synthesise and apply**

- 4 Why is remoteness of damage important in a negligence case?
- 5 'For a duty of care to be breached, the consequence of the action must be reasonably foreseeable.' Explain the meaning of this statement.
- 6 Explain whether teachers owe a duty of care to the following people. In each case, suggest how you think that duty of care might be carried out.
  - a Students in their class during a regular lesson.
  - b Students on an excursion to the County Court.
  - c Students on a ski trip to Mt Buller.
  - d Visitors to your school to attend a concert in the school hall.
- 7 Read the legal case *Chester v Waverley Municipal Council*.
  - a Why do you think the Waverley Municipal Council was found to owe a duty of care to the child?
  - b Why did the Council not have a duty of care to the mother?
  - c Do you agree with this decision? Why or why not?
- 8 Read the legal case *Guru v Coles Supermarkets Pty Ltd*. In what circumstances do you think a contributory negligence claim might be successful in relation to a slippage in a supermarket?

**Analyse and evaluate**

- 9 Read the legal case *Roman Catholic Church v Hadba*.
  - a Explain the key facts in the case.
  - b What duty of care did the plaintiff claim had been breached?
  - c Explain the decision of the majority of the High Court.
  - d Imagine you have been chosen to represent either the plaintiff or the defendant in this case. Write a 400-word opening or closing address in the case. Address the key elements of the law of negligence and link these elements to the facts of the case.
  - e Imagine that you are in court and the supervising teacher is giving evidence. Write five questions that you would ask the teacher. The focus of the questions you write will depend on whether you are representing the plaintiff or defendant.
- 10 Conduct a review of your school's yard duty policies and the areas that are covered by teachers. Now complete the following tasks:
  - a In your opinion, are all areas of the school (interior and exterior) adequately covered? Are there any 'blind spots' that could result in some students not being supervised at all times?
  - b Justify one change to the current yard duty processes at your school that might improve its operation.
  - c To what extent is it reasonable to expect that every student should be closely supervised at all times before school while on the premises, and during recess and lunch? Justify your answer.

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Changes to negligence

## DEFAMATION

### defamation

a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

One of the purposes of laws and the legal system is to protect the rights of individuals. One of those rights is the right to freedom of expression. That right is protected in Victoria by the *Charter of Human Rights and Responsibilities Act 2006* (Vic), a state charter which aims to promote and protect human rights.

Although there is a right to freedom of expression, the right is subject to duties and responsibilities. That is, we do not have the right to say whatever we think about people, especially if what is being said cannot be proven and ruins the reputation of others. To balance the right to freedom of expression, the law of **defamation** seeks to protect individuals against material that would harm their reputation.

### Rights protected by the law

The tort of defamation is aimed at protecting the **character and reputation of individuals** against attempts to discredit them. A statement or other published material is regarded as defamatory if it is untrue and lowers the reputation of the plaintiff. A person's reputation is considered to be lowered when statements are made and the person's reputation is lowered in the estimation of others, or he or she is shunned, avoided or exposed to hatred, contempt or ridicule.

The rights that are protected by defamation laws include:

- the right to freedom of expression
- the right to a character and reputation
- the right to have that reputation protected by placing limits on freedom of expression
- the right to people whose reputations have been harmed to seek effective and fair remedies
- the right to a quick and effective method of resolving a dispute in relation to defamation.

Defamation laws will place reasonable limits on freedom of expression, but will aim to uphold that right by balancing it against the right to reputation.

### Elements required to establish liability

In order to establish defamation, the following four elements must be proven:

- the statement is defamatory
- the statement is untrue
- the defamatory statement refers to the plaintiff
- the statement has been published (communicated to people other than the person it refers to) by the defendant.

#### Element 1 – The statement is defamatory

The plaintiff must first establish that the statement made by the defendant is **defamatory**. A statement is defamatory if it lowers a person's reputation or standing in the community, exposing them to ridicule, contempt or hatred. The onus is on the plaintiff to prove that his or her reputation has been damaged by the publication of such material. It is not necessary to prove that the defendant had the intention to hurt the plaintiff.

In the case of *Mickle v Farley* [2013] NSWDC 295 (29 November 2013), a former student of a teacher was found to have made defamatory statements on social media platforms.

## Social media platforms used to make defamatory statements

LEGAL

CASE

### *Mickle v Farley* [2013] NSWDC 295 [29 November 2013]

The District Court of New South Wales ordered a former student to pay \$105 000 to a school teacher after making defamatory comments on Twitter and Facebook.

Andrew Farley was 20 years old when he posted a series of defamatory comments on the two social media sites. The Court found that the effect of the publication on the plaintiff was devastating. She took sick leave and later returned to work on a limited basis. District Judge Michael Elkaim ordered that Farley pay the teacher \$105 000 in damages. The judge noted that, 'When defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.'



**Source 1** The tort of defamation has kept pace with developments in social media, especially the use of Twitter and Facebook.

Non-profit organisations and small private companies with fewer than 10 employees can use the law of defamation to protect their business reputations, but all other companies cannot. That is, other companies cannot sue for defamation.

### Element 2 – The statement is untrue

The plaintiff must prove that the defamatory statement is untrue. A plaintiff cannot be defamed if the statement is substantially true.

### Element 3 – The defamatory statement refers to the plaintiff

The plaintiff must establish that he or she was the person to whom the statement refers. While the person defamed need not be mentioned by name, it may be sufficient to prove that people reading, hearing or seeing the statement would reasonably conclude that it was about the plaintiff.

A plaintiff may also be defamed as part of a group. The group must be sufficiently small for it to be recognised that the plaintiff is part of that group and that his or her reputation is lowered by reference to the group.

The example below explores this element in relation to an open letter about a mayor.

### Plaintiff not named

EXAMPLE

A man wrote an open letter to 'the current local mayor' of his hometown, in which he made derogatory and defamatory statements about the mayor. The open letter did not refer to the mayor by name. However, the open letter was clear enough that the people reading it could reasonably assume that it was about the mayor.

### Did you know?

Cartoonists have long been regarded as satirists whose commentary on political and social issues adds to public debate. In 2010, a Saudi Arabian lawyer threatened to challenge a Danish law by bringing a defamation case over cartoons of the Prophet Muhammad that depicted Islam's founder as a terrorist.

## Element 4 – The defendant published the defamatory statement

The plaintiff must prove that the statement was communicated to a person other than the plaintiff. It is not defamation for a person to make untrue or derogatory comments directly to the person concerned if it is done in private. However, these comments will become actionable once a third person reads, hears or sees the defamatory material.

It does not matter whether the material is published to the general public or to a smaller group. In fact, what seems like harmless chat may be defamatory. For example, a case of defamation may exist where Jane tells Peter that Shaun is a convicted thief and Peter repeats this to Paul and Mary knowing that the information might be wrong.

Publications can either be verbal or in writing, though most defamation cases are in relation to written publications. These can include articles, letters and books, as well as online publications such as blogs, websites, articles and comments made on social media platforms such as Twitter and Facebook.

## Limitation of actions

Under Section 5(1AAA) of the *Limitation of Actions Act 1958* (Vic), an action for defamation must be brought within one year from the date of the publication of the matter.

However, a person claiming to have a cause of action for defamation may apply to a court for an order extending the limitation period. A court may extend the limitation period by up to 3 years from the date of the publication of the allegedly defamatory material. This can only be extended if the court is satisfied that it was not reasonable for the plaintiff to have commenced an action within 1 year from the date of publication.

## Possible defences

The defendant may argue that any or all of the elements of a defamation action have not been proved. That is, the defendant may argue that the statement is not defamatory, or that it does not refer to the plaintiff, or that he or she did not publish the statement.

Otherwise, if all the elements have been satisfied, the defendant may be able to rely on one of the defences set out in Source 2.

Justification	Contextual truth	Absolute privilege
Publication of public documents	Fair report of proceedings of public concern	Qualified privilege
Honest opinion	Innocent dissemination	Triviality

**Source 2** If all of the elements are proven, the defendant may rely on any of the above defences.

## Defence 1 – Justification

The defence of justification applies when a defamatory statement is **substantially true**. This means that the vast majority of the article is true. For example, a person who commits an act of indecent exposure before a crowd of 50 people cannot claim defamation if a publication wrongly states that there was a crowd of 30, as the substance (core issue) of the publication is true (being the fact that the person committed an act of indecent exposure).

The following legal case explores how the defence of justification could be used against a defamation charge.

## Stephen Dank and the peptides saga

LEGAL

CASE

### *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 (18 March 2016)

Sports scientist Stephen Dank brought a defamation claim in the New South Wales Supreme Court against Nationwide News Pty Ltd in relation to various articles published in 2013 in the *Daily Telegraph* and the *Sunday Telegraph*.

In this case, Dank sought damages over articles published in relation to supplements administered to Cronulla Sharks players. Part of the case focused on NRL player, Jon Mannah, who the articles alleged had been given peptides by Dank, and that by doing so, he had accelerated Mannah's death from cancer. This claim by the newspaper was found to be true. At the trial, a civil jury found that Dank had acted with 'reckless indifference' to the life of Mr Mannah, who passed away in January 2013 after a relapse of Hodgkin's lymphoma.

There was, however, a small win in the case for Dank, in which the jury found that the defendant had wrongly stated that Dank had injected NRL players from the Cronulla Sharks with the drug warfarin. Dank established that the drug he had used on the players was instead a feed supplement for horses. However, no damages were awarded to Dank.

The Court ordered that Dank pay the legal costs of the defendant. Estimates were that the combined costs of Dank's legal fees and those of Nationwide News would be in excess of \$2 million.



**Source 3** In March 2016, sports scientist Stephen Dank lost a defamation case in the NSW Supreme Court that he had brought against the publisher of newspapers such as the *Daily Telegraph*.

## Defence 2 – Contextual truth

The defence of contextual truth applies when a number of defamatory statements are made within the same context of statements that are substantially true, and the defamatory statements do not further harm the reputation of the plaintiff.

An example of contextual truth is where a publication correctly states that a person caused a serious accident by riding a bike into oncoming traffic while intoxicated, but incorrectly states that the rider was not wearing a bike helmet. If the plaintiff claims that the incorrect statement is defamatory, then the defendant may argue contextual truth because, when read in context, the statement is substantially true, and the claim that the plaintiff was without a helmet does not further harm the plaintiff's reputation. The truth of the more serious allegations overrides the falsehood in the less serious allegation, because the effect of the untrue statement on the plaintiff's reputation is insignificant.

The following legal case provides further insight into the tort of defamation.

## The Club Rawhide case

LEGAL

CASE

### *Hardie v The Herald and Weekly Times Pty Ltd* [2016] VSCA 103 (13 May 2016)

Two articles were published in the *Herald Sun* in 2013 in relation to an alleged corrupt relationship between police officers and outlaw motorcycle gangs. It was suggested that members of the gangs were regulars at Club Rawhide, a strip club in Shepparton of which the plaintiff was part-owner and manager.

Hardie claimed that the articles conveyed a number of defamatory statements about her, including that:

- she ran a venue that was regularly attended by members of an outlaw motorcycle gang
- she ran a venue in which police gave secret tip-offs to gang members that hindered police work
- she was a brothel madam
- she ran a brothel at Club Rawhide.

Hardie claimed the statements were untrue and damaged her reputation, which was especially hurtful because she had children. Hardie explained that while Club Rawhide was a strip club, she did not allow brothel-like activities to take place on the premises.

At trial, Hardie was awarded \$90 000 in damages by the Supreme Court with respect to the second defamatory statement above. The plaintiff appealed to the Court of Appeal (as did the defendants). The Court of Appeal allowed the **appeal** and increased the damages amount to \$250 000.

#### appeal

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

### Study tip

Research and gather as many examples of defamation and the uses of these defences as you can. You may be asked to provide examples in your assessment tasks.

#### ombudsman

an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

## Defence 3 – Absolute privilege

At common law, absolute privilege gives a defendant complete immunity from being sued in certain cases. A person may be able to use the defence of absolute privilege where he or she can prove that the defamatory material was published in relation to proceedings of parliament, parliamentary bodies, courts or tribunals.

## Defence 4 – Publication of public documents

It is a defence to an action for defamation to prove that the published material was a fair copy, summary or extract of a public document, but only if the material was published in the public interest or for educational purposes. A public document is one readily available from a parliamentary body, court, tribunal, local government or statutory authority.

## Defence 5 – Fair report of proceedings of public concern

A defendant can argue that the material is essentially a fair report of proceedings that is published for the information of the public or for educational purposes. ‘Proceedings’ of public concern are those involving:

- a parliamentary body, local government, court or tribunal because their procedures are usually open to public scrutiny
- government inquiries, law reform bodies, the **ombudsman**, international organisations or conferences where governments are represented
- learned, professional, trade, sporting or recreational associations where membership or contractual issues are involved
- company shareholders or other meetings dealing with a matter of public interest.

## Defence 6 – Qualified privilege

Qualified privilege protects a person who has no malice in publishing information that is damaging to another person, and published it for various good reasons. It is based on public policy considerations, to strike a balance between competing interests. It gives the defendant immunity from being sued in certain cases.

The defence of qualified privilege is applicable where the defendant:

- believes that the person receiving the defamatory information has a moral or legal interest in receiving the information
- the person acts without malice or spite and acts reasonably in the circumstances.

In determining whether a defendant's actions were reasonable a court will consider various circumstances to decide whether the defence is available, including the seriousness of the allegations, and the steps taken to verify the information.

## Defence 7 – Honest opinion

A defendant may claim that the defamatory material is an expression of his or her honest opinion (as a commentator) rather than a statement of fact. The matter must be of public interest and the opinion must be based on proper material. Proper material is a statement that is substantially true or relates to public documents or a fair report of proceedings of public concern.

## Defence 8 – Innocent dissemination

The defence of innocent dissemination protects people who may unknowingly distribute defamatory information, such as printing companies, booksellers, libraries and internet or email providers. For this defence to be successful, the defendant would need to establish that they:

- published the material as a subordinate distributor or as an employee or agent of one (a subordinate distributor is any person other than the author, primary distributor or editor of a publication)
- did not know (nor should have known) that the publication contained defamatory information
- did not have an obligation to check for defamatory material.

## Defence 9 – Triviality

This defence applies where the publisher can show that the plaintiff is unlikely to be harmed by the publication of the defamatory material.

# The role of the law in developing the elements and defences

## Common law

Prior to 2006, the law of defamation in Victoria was governed by common law. That is, the elements and the defences were developed through a series of cases.

One of the key principles of defamation at common law was the distinction between libel and slander. Libel referred to defamation in a written form, and slander referred to defamation in spoken form. The relevance of the distinction between written and oral forms of defamation was in relation to injury – in a slander claim, the plaintiff had to prove there was actual injury suffered. Common law also allowed corporations to sue because of an attack on their reputation.

## Statute law

Defamation law in Australia underwent major reform in 2005 when uniform legislation was introduced. Prior to 2005, together with the common law, legislation in states and territories had significant differences,



**Source 4** A theatre critic may make unflattering comments about a performance if it is his or her honest opinion. If, however, the statement is grossly exaggerated or untrue, or goes beyond what would reasonably be expected of a critic, then the 'honest opinion' defence would not apply.

and plaintiffs could choose the appropriate state in which to issue proceedings. This inconsistency in law throughout Australia was considered inappropriate.

On 1 January 2006, new uniform defamation legislation came into force throughout Australia and in the Australian Capital Territory. Each of the states passed a statute (in Victoria it was the *Defamation Act*) that was modelled on the proposed uniform defamation laws, developed through an agreement between the Commonwealth and the states.

Under the law in Australia, any person or organisation who has had defamatory material published about them can take legal action when needed. Such action can be taken against authors, publishers, broadcasters and distributors.

In some places, the common law principles have been amended or abolished by the statute. For example, Section 7 of the *Defamation Act* abolishes the distinction between slander and libel. In addition, the Act now provides that a corporation (other than those excluded) has no cause of action for defamation. However, unless the Act specifies otherwise, it does not affect the operation of common law principles in relation to defamation. That is, the common law principles will continue to apply unless the Act specifically abolishes them.

The courts continue to have a role in determining defamation cases in light of the relevant principles. By way of example, the High Court has found that there is an implied **freedom of political communication** in the **Australian Constitution**. This is not an absolute right to freedom of speech, but is a right to discuss political matters freely and openly without fear of being subjected to a defamation claim. This implied freedom therefore places restrictions on a person's right to claim defamation where a person is speaking freely about political matters.

#### freedom of political communication

the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

#### Australian Constitution, the

a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900 (UK)*

## Possible impacts of the breach

### Impact of defamation on the plaintiff

The impact of a breach of defamation laws on the plaintiff depends on the nature of the statements that have been made about the plaintiff. Some of the typical impacts are as follows:

- **Loss of reputation** – This could include loss of status. For example, the plaintiff could be shunned by people with whom they once associated.
- **Emotional impact of the defamatory material** – This could be a consequence of the publicity of the claim. For example, a person could develop conditions such as depression and anxiety as a result of the defamation.
- **Loss of wages and livelihood** – This could be a consequence of loss of reputation. For example, the plaintiff might need to take time off work to attend court proceedings.
- **Unemployment** – This could be a consequence of loss of reputation. For example, an employee might lose their job if the defamatory statement negatively alters the reputation of their employer.

### Impact of defamation on the defendant

Some of the possible impacts on the defendant include:

- **Costs** – This could occur when the defendant loses the case. For example, the defendant might be ordered to pay the legal costs of the plaintiff, causing financial hardship.
- **Need to sell assets** – This could be a consequence of a high damages award. For example, the defendant might be forced to sell assets to meet the costs of the damages amount.
- **Public humiliation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of widely reported court proceedings.



Source 5 Possible impacts of defamation

## 8.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Can a person sue for defamation if he or she is not named in the defamatory material? Explain, using an example.
- 2 Why must defamatory material be published? Describe different ways that defamatory material can be published.
- 3 Previously, a distinction was made between 'slander' and 'libel'. Explain why this distinction is no longer relevant.

### Synthesise and apply

- 4 Distinguish between the defences of absolute privilege and qualified privilege.
- 5 Read the legal case *Mickle v Farley*.
  - a Who were the parties in this case?
  - b Where were the comments made? Conduct some further research to determine the nature of the comments.
  - c Why do you think defamation was proved in this case?
  - d What remedy did the teacher receive?
  - e Do you agree with the decision in this case? Explain.
- 6 Read the legal case *Hardie v The Herald and Weekly Times Pty Ltd*.
  - a Outline the key facts of this case.

- b Explain the four statements that Ms Hardie alleged were defamatory.
- c In the articles, Ms Hardie was not named, but there was a reference to 'Madam Black Mercedes'. Explain how Ms Hardie could still establish a defamation claim even though she was not named.
- d To what extent could the outcome of this case be regarded as deterring others in the media when reporting on cases similar to this? Explain.

### Analyse and evaluate

- 7 Read the legal case *Dank v Nationwide News Pty Ltd*.
  - a Explain the 'minor win' that Mr Dank enjoyed in this case.
  - b To what extent was this a 'win' for Mr Dank? Could it be argued that the Court's finding on this point, although in his favour, also damaged Dank's reputation? Explain.
- 8 'The dissemination of defamatory material via social media is much more dangerous than via traditional media such as print and radio. For example, a person who did not create defamatory material but shares it by "retweeting" can be found liable under the tort of defamation. Damages awards should be higher for defamation via social media as a means of deterring behaviour that has the capacity to cause significant harm to others.'  
Discuss the above statement.



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Defamation and the internet

# 8.4

## NUISANCE

### nuisance

a type of tort which involves interference with a person's right to use and enjoy property

### private nuisance

a type of tort involving an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

### public nuisance

a type of tort involving an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

### Did you know?

In the British case of *Hussain v Lancaster City Council* [1999] 2 WLR 1142, the plaintiffs, who owned a corner store, suffered racially motivated abuse. They undertook action against the local council for failing to take action against the alleged perpetrators, who were tenants of council properties nearby. One of the issues in the case was whether the council could be liable for the nuisance of their tenants. The court ruled that although the tenants' behaviour was offensive, it did not relate to the use of land, so a nuisance claim could not be made.

### injunction

a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

**Nuisance** deals with the violation of the right of a person to reasonable convenience and comfort in life. In effect, this tort looks at competing land uses and which should take precedence over another. For example, if a new freeway is to be constructed, is it reasonable that people living in the area be inconvenienced for three years by dust, noise, vibrations and lack of access to public roads? In the event of a dispute, questions would be asked about whether this is a reasonable interference.

There are two types of nuisance:

- **private nuisance**
- **public nuisance.**

Private nuisance occurs where there is an act or omission that substantially and unreasonably interferes with a person's use and enjoyment of their own land. The law also covers activities that might cause people to fear for their safety, such as the aerial spraying of crops.

Private nuisance cannot result in criminal charges against the wrongdoer.

If a person occupies land and they allow another person to cause nuisance on that land, then the occupier of that land can also be held legally responsible. For example, if a person owns a facility that is used for public events such as weddings and 21st birthday parties, they remain liable for any excessive noise or other interference to neighbours that occurs on that land. The owner of the facility cannot argue that if they were not present on that night, then they are not responsible.

Public nuisance occurs where, to a considerable degree, there is an act or omission that interferes with the comfort or convenience of a number of people. This can involve the ability to access a public place such as a park, roadway or a building. A public health nuisance can also include rubbish being left on a property. If a group of people decide to block a public road, this would affect a significant number of people, such as those going to work, students attending school and children being taken to medical appointments by their parents.

To have an action for public nuisance, any affected person would need to show that they have suffered **special damage** that extends beyond what may have been experienced by other members of the public.

Under Australian law, public nuisance can also constitute a criminal offence.

## Rights protected by the law

There is a difference between the word 'nuisance' that we use in everyday life and the tort of nuisance. If someone asks us to run down to the shop to get a bottle of milk, that might be 'a nuisance' (a bother) but it is not a legal nuisance. A legal nuisance is a serious impact on our enjoyment of property.

The tort of nuisance is designed to protect our rights to:

- enjoy our own land, which means that others cannot interfere with access to or enjoyment of private land. The law is clear that we are to be protected from excessive interferences with enjoyment of land from nuisances such as dust, noise and vibration
- freedom of movement, such as along roads and waterways (rivers and creeks) unless, for example, there are public works being undertaken that are being managed by a statutory authority
- seek an appropriate remedy from the courts where nuisance has occurred. A useful remedy in these cases can be an **injunction**, being a court order which stops the defendant from engaging in the nuisance any further.

These rights are upheld through dispute resolution bodies, including the courts, where a range of remedies are available to restore the plaintiff's enjoyment of their land. The legal case below further illustrates how the right to enjoy your own land can be affected.

## Wild all-night parties at Ripponlea villa

### *Hallett v City of Port Phillip* [2015] VSC 313 (30 June 2015)

In 2015, the Supreme Court of Victoria heard a case about an old Ripponlea mansion that hosted wild parties, played live amplified music and had a skateboard ramp installed in the backyard. The old mansion had been divided into three separate units.

The local council, the City of Port Phillip, had issued notices to the property owner due to excessive noise that had caused great inconvenience to neighbours. One of the residents had kept a diary of the nuisance caused by noise, and more than 70 incidents were recorded over a four-month period.

In the case, the property owner stated that he was away from the property for six months of the year and was unaware of the noise level being caused by his tenants. When he became aware of this, he evicted them.

The case is a good example of how a local council will try and intervene where a neighbour is causing nuisance.

LEGAL

CASE



Source 1 Wild parties at a Ripponlea villa resulted in a nuisance claim.

## Elements required to establish liability

In order to establish nuisance, the following elements must be proven:

- the plaintiff has a property right in or over the land
- there has been interference with the plaintiff's use and enjoyment of the land
- the plaintiff has suffered damage.

### Element 1 – The plaintiff has a property right in or over the land

Plaintiffs must establish they have some property right in or over the land. This means they must have an interest in the land, usually as the owner of the property or a tenant (someone who is renting the property). Individuals also have the right to access public property, and if there is interference with their right to enjoy public property, a person may be able to sue.

### Element 2 – There has been interference with the plaintiff's use and enjoyment of the land

The plaintiff must establish that the defendant interfered with the plaintiff's use and enjoyment of the land. This interference can involve a range of actions on the part of the defendant, including noises, dust, vibration, water run-offs, or even objects (such as golf balls). The following case provides an example of the way a nuisance can affect a plaintiff's ability to develop a property for commercial gain.

## Nuisance and the endangered froglet

*Gales Holdings Pty Ltd v Tweed SC* [2011] NSWSC 1128  
(21 September 2011)

In this case, the plaintiff (Gales) owned a 27-hectare parcel of undeveloped land in the suburb of Kingscliff (NSW), which was intended for development as a shopping centre. The plaintiff claimed that its land had become undevelopable because the local council had allowed polluted stormwater to run onto the property. In the process, the water lay in pools on the ground, which created an ideal habitat for the Wallum Froglet, an endangered species. The species breeds in swamps with permanent groundwater as well as shallow pools and drainage ditches. Given the endangered nature of the froglet, the plaintiff was unable to develop its land, which it claimed amounted to an interference by the defendant with the plaintiff's use of its property.

The NSW Supreme Court found that the local council had caused a nuisance in allowing stormwater to run onto the property, although there was evidence that the froglet had existed on the land in the past, so the damages sought by the plaintiff were reduced. The Court ruled that the Council must contribute to the plaintiff's additional costs in developing the land to make it suitable for the froglet.

The Court awarded damages of \$600 000, together with other orders to abate the nuisance that had been occurring since May 2004. The Court also ruled that compensation was not payable by the defendant for any loss of value of the area of land that was to be used for the Wallum Froglet habitat.

In her judgment, Justice Bergin said: 'If the defendant knew or ought to have known of the nuisance and the real risk of reasonably foreseeable consequential damage to the plaintiff, it had an obligation to take such positive action as a reasonable person in its position and circumstances would consider necessary to eliminate the nuisance'.

A court would examine the following to determine whether the interference was reasonable:

- what is the nature of the interference? The court would look at the behaviour of the defendant and whether this is reasonable and necessary
- the time of day in which the interference occurs
- the nature of the neighbourhood in which the person lives. Is it inner city, outer suburban or rural?
- is the nuisance or interference necessary for the community?
- is the interference ongoing or is it intermittent?
- how long has the nuisance or interference been in existence? Was it in the area before the plaintiff moved into their property?

### Study tip

When analysing a case of public nuisance, remember that for an individual to have an action for compensation for the inconvenience or interference, they must show that the impact caused them 'special damage'. The impact on the plaintiff must be shown to be greater than that suffered by the general public.

## Element 3 – The plaintiff has suffered damage

The plaintiff must also establish that they have suffered some sort of damage that has a negative impact on their life. The damage can be material or non-material damage. Material damage includes physical damage (e.g. damage to crops), and non-material damage includes non-physical damage (e.g. loss of revenue). For a public nuisance claim, the plaintiff has to establish that the interference caused them a much greater impact than that on the wider public.

The following legal case sets out an example of how a company can suffer damage as a result of a nuisance.

## Guns and silver foxes

LEGAL

CASE

### *Hollywood Silverfox Farm Ltd v Emmett* [1936] 2 KB 468

Hollywood Silver Fox Farm bred silver foxes which, if disturbed during breeding, may refuse to breed, or even kill their young. In this case, there was a dispute between the plaintiff and the defendant, which saw the defendant's son fire a gun on his land where it was close to the fox's breeding pens. As a result, Hollywood Silverfox Farm Ltd brought an action under the tort of nuisance, seeking an injunction to prevent this behaviour in future. The key legal issue in the case was whether a landowner has the absolute right to create noise on their property.

The court granted an injunction on the grounds that where noise has been created, the motive behind the production of that noise must be taken into account. In this case, the primary motivation of the defendant's son when firing the gun was to cause interference with the plaintiff's use of land.



Source 2 The breeding of silver foxes was the centre of nuisance claim.

## Limitation of actions

Under the *Limitation of Actions Act 1958* (Vic), an action for damages for nuisance must be brought:

- for general nuisance claims (e.g. where there has been property damage), six years from the date on which the cause of action accrued (i.e. when the damage occurred)
- where the damages claimed by the plaintiff include damages in respect of personal injuries consisting of a disease or disorder contracted by any person, may be brought not more than three years from the date on which the person first knows that he or she has suffered the injuries and those injuries were caused by the defendant.

The Act allows plaintiffs to apply to a court for leave to extend a limitation period to allow the issue of court proceedings. The application must be considered 'fair and reasonable'. In considering applications, the court takes into account factors such as the reasons for the plaintiff's delay in commencing the action.

## Possible defences

The defendant may argue that any or all of the elements of nuisance have not been proven. That is, the defendant may try to prove that the plaintiff did not have a right to the property, there was no interference with the plaintiff's use and enjoyment of the land, or the plaintiff did not suffer damage. If all elements are proven, the defendant may rely on one of the following three defences:

- statutory authorisation
- consent
- reasonable use.

### Defence 1 – Statutory authorisation

The defendant in cases involving the tort of nuisance can argue the defence of statutory authorisation. This means that legislation passed by the Victorian or Commonwealth parliaments allows the conduct that the plaintiff has claimed constitutes nuisance. This includes post office staff and council officers as well as gas, water and electricity meter readers. Police officers are also allowed to enter property if they

### *Did you know?*

When it comes to noise, Harley Davidsons are the most complained about motorbikes in Victoria. In December 2016, Environment Protection Authority Victoria released data which showed that motorbikes made up about 12 per cent of the 5000 noisy vehicle notices issued since January 2014, with Harleys at the top of the list.

are in possession of a warrant. At all times, property owners are responsible for the safety of visitors when they enter premises.

The defence of statutory authorisation relies on how the courts view the intention of the relevant legislature. It is presumed that because the parliament intended a certain activity such as a major infrastructure project, then the parliament has authorised any consequences of the activity. The building of the Melbourne Metro Tunnel is an example of such a project.

## CASE

## STUDY

### A decade of disruption – The Melbourne Metro Tunnel

In 2016, an Environmental Effects Statement found that the impact on Victorians of the \$11 billion Melbourne Metro Tunnel would be 'substantial'. The Victorian Planning Minister argued, however, that the inconvenience to the public could be limited by careful planning. The Minister said the tunnel was essential to meet future transport needs, and short-term disruption was necessary for the long-term gain of two 9 km underground tunnels connecting some of Melbourne's busiest train lines. The project would also create five new stations – Arden, Parkville, CBD North, CBD South and Domain.



**Source 3** The Melbourne Metro Tunnel project will involve many years of inconvenience to the public. These works have been authorised by statutes of the Victorian Parliament.

Earlier plans for the tunnel were amended to reduce the need to acquire property in Kensington, and revised plans allowed it to run deeper underground to reduce the impact on Fawkner Park in South Yarra. The Government also placed limits on the emission of vibrations and noise, and alternate accommodation would also be provided to affected residents.

As construction began, some Melbourne hospitals raised concerns about damage to buildings as a result of underground drilling. The Royal Melbourne Hospital was at particular risk. The Anglican Archbishop of Melbourne also raised concerns about the impact of tunnelling on St Paul's Cathedral. In response, the Government established an Independent Environmental Auditor to monitor the construction.

### Defence 2 – Consent

In a case arising under the tort of nuisance, the defendant might argue that the plaintiff gave consent to the activity that is now being claimed as having caused damage, loss or injury.

### Defence 3 – Reasonable use

Where the defendant can establish that their use of land is reasonable, the plaintiff will not succeed in their action. As to what constitutes 'reasonable', the court will examine the nature of the alleged nuisance and whether the defendant's use of the property accords with existing standards and expectations for a property of that type and in that location.

The following legal case further explores how a certain type of interference can be considered to be unreasonable.

## Offensively noisy music students

LEGAL

CASE

### *Christie v Davey* [1893] 1 Ch D 316

In this British case the plaintiff, Mrs Christie, was a music teacher who for several years had been giving lessons to students in her house, which shared a common wall with her neighbour, who was the defendant in this case.

The defendant didn't appreciate the noise from the plaintiff's students, and decided to protest by banging on the adjoining walls between the properties, shouting, blowing whistles and bashing tin cans to create as much disturbance as possible.

The plaintiff took the defendant to court claiming private nuisance and arguing that as a music teacher, the lessons were part of her daily work routine. The court held that the defendant's behaviour was 'malicious' in that the intention was to impact the music lessons and therefore the plaintiff's livelihood. The court ruled that such behaviour on the part of the defendant was not a reasonable use of his land. The defendant was ordered to stop such disruptive behaviour.

## The role of the law in developing the elements and defences

### Common law

Laws relating to nuisance have been developed through common law, and common law principles continue to apply.

The law relating to nuisance has existed since the thirteenth century and was based on protecting against the development of land.

In the nineteenth century, and following the rise of industrialisation, the tort of nuisance changed and different standards applied to individuals and companies. This period saw the development of statute law relating to town planning and zoning of land, so that competing interests for land could be addressed more readily. This has continued to the present day, where environmental laws have added another layer to nuisance laws, with strict controls placed on factories and other industries that have the potential to pollute surrounding areas. Governments have also imposed strict penalties for polluting the environment and impeding the free movement of others.

The case study below highlights the development of the law to keep up with present day issues.

## Creating safe zones for abortion clinics

CASE

STUDY

### *Public Health and Wellbeing Amendment (Safe Access) Act 2015 (Vic)*

Under amendments to legislation passed by the Victorian Parliament, women can access lawful medical services free from harassment and intimidation. The new legislation establishes safe access zones around abortion providers.

The legislation imposes a 150-metre safe-access zone around hospitals, GP clinics and health services that perform abortions, where it is an offence to engage in behaviour that harasses or intimidates women seeking to access an abortion. Under the law, it is also illegal to film people without consent within the safe access zone, or for anyone to impede access to a footpath, road or vehicle without a reasonable excuse within the zone.

## Did you know?

In August 2017, in an effort to avoid charges, an anti-abortion protester accused of harassing a couple outside a clinic said that she would argue her constitutional right to freedom of political communication.

### criminal law

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

## Statute law

Although common law generally governs negligence claims, there are some significant pieces of legislation that are aimed to reduce the potential for nuisance in society. Many of these establish offences where someone is interfering with property. For example:

- Under the *Summary Offences Act 1966* (Vic), individuals who light fires on their property that damage, destroy or endanger another property may be prosecuted under **criminal law**.
- The *Public Health and Wellbeing Act 2008* (Vic) provides that it is illegal to allow a nuisance to emanate from any premises owned or occupied by that person. Local councils have the power to ensure that these laws are observed.
- Under the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), fines can be imposed on unions who blockade building sites.
- The *Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015* (Vic) made amendments to legislation to stop people harassing members of the public who are seeking to enter an abortion clinic.

## Possible impacts of the breach

### Impact of nuisance on the plaintiff

The impact of a breach of the tort of nuisance can be significant. Possible impacts on the plaintiff are as follows:

- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop anxiety issues as a result of listening to a barking dog.
- **Quality of life** – This could be a consequence of the breach. For example, malicious creation of noise or vibration can greatly affect a person's right to enjoy their property.
- **Costs** – This could occur as a result the impact of the nuisance. For example, a person who is operating a business may suffer financially through loss of business, loss of productivity or having to spend money to minimise the impact of the nuisance.

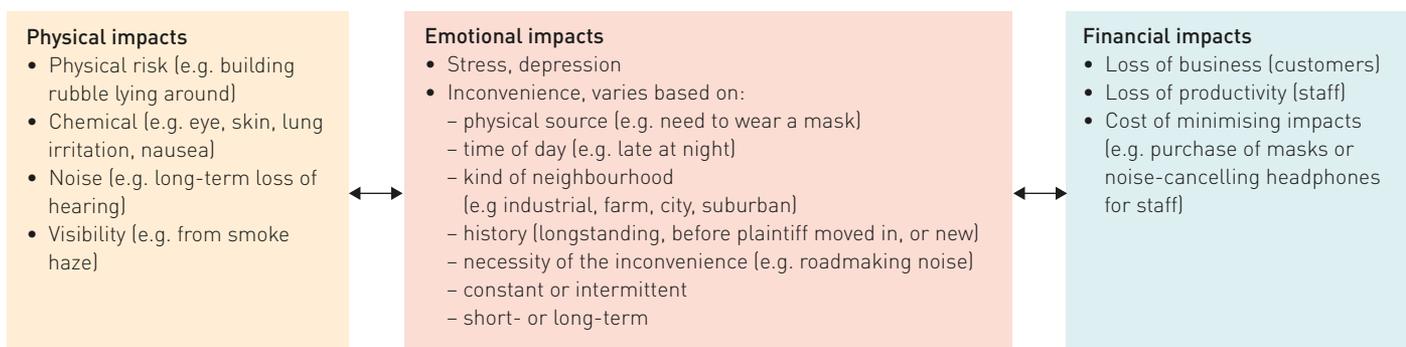
### Impact of nuisance on the defendant

Possible impacts on the defendant of a nuisance claim are as follows:

- **Inconvenience** – This could require the defendant to attend hearings in an attempt to settle the dispute. For example, a neighbour attending a **mediation** hearing.
- **Costs** – This could occur when the defendant loses the case. For example, the defendant might be ordered to pay the legal costs of the plaintiff, causing financial hardship.
- **Business failure** – This could be a consequence of an injunction. For example, a business might suffer financially with an order to minimise the impact of the nuisance.

### mediation

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution



Source 4 Possible impacts of nuisance

**Define and explain**

- 1 Explain the purpose of the law relating to the tort of nuisance.
- 2 Describe two situations in which a person may breach the law relating to public nuisance.

**Synthesise and apply**

- 3 Read the legal case *Christie v Davey*.
  - a In what ways was the conduct of the defendant malicious?
  - b Is it reasonable that the law should allow a music teacher to conduct private lessons that impact on the enjoyment of their neighbour's land?
  - c What restrictions should be imposed on the plaintiff in a case such as this? Give reasons for your answer.
- 4 Read the case study 'Creating safe zones for abortion clinics'.
  - a Explain the elements of public nuisance.
  - b Give two reasons why the Victorian Parliament would have introduced this law.
  - c Outline the impact that this type of nuisance would have on people attending the clinic.
  - d Explain the remedies that could be sought in a civil action if this law is breached. To what extent would these remedies be an effective means of compensating the plaintiff for the nuisance caused? Give reasons for your answer.
- 5 Read the legal case *Hallett v City of Port Phillip*. Assume that the residents who live adjacent to the villa launched legal action for nuisance against the landlord of the property. Draft a paper that could be presented at a hearing where you are representing the plaintiffs. In your address, outline the factors that an adjudicator would consider in a case such as this.

**Analyse and evaluate**

- 6 Read the legal case *Hollywood Silverfox Farm Ltd v Emmett*.
  - a Outline the key facts in this case.
  - b Explain the judgment in this case. To what extent is the intention of the defendant a key issue in cases such as this? Explain.
- 7 'Over the past century, the tort of nuisance has become less available to plaintiffs because parliament has passed statutes that allow for nuisance to occur, with the result that legal action is not available to those affected.'
  - a In your own words, explain the defence under the tort of nuisance in regard to statutory authorisation. In your answer, refer to infrastructure projects such as the Melbourne Metro Tunnel project.
  - b To what extent should governments cater for the needs of local residents and retailers when planning projects such as the Melbourne Metro Tunnel? Does statutory authorisation allow for an unreasonable interference with a person's right to enjoy their land? Discuss.
- 8 Read the legal case *Gales Holdings Pty Ltd v Tweed SC*.
  - a Outline the key facts in this case.
  - b What was the decision of the NSW Supreme Court?
  - c Do you believe it is reasonable that a shopping centre development should be affected by an endangered species of froglet? Justify your response.
  - d What in your opinion would be the impact of this judgment on local councils who are responsible for the management of stormwater in their municipalities?

**Check your ebook assess for these additional resources and more:**» **Student book questions**

8.4 Check your learning

» **Sample**

Arguing liability response

» **Weblink**

Nuisance

## CHAPTER SUMMARY

**Negligence**

- > Elements: duty of care; breach; causation; loss or damage
- > Time limit: depends on damage
- > Possible defences: contributory negligence; *volenti non fit injuria*
- > Development: common law modified by statute law
- > Impacts on plaintiff: death; injury; suffering; financial loss
- > Impacts on defendant: time lost; reputation; financial

**Defamation**

- > Elements: defamatory statement; refers to plaintiff; published
- > Time limit: 1 year
- > Possible defences: justification; contextual truth; absolute privilege; public documents; fair report, public concern; qualified privilege; honest opinion; innocent dissemination; triviality

- Development: common law codified by *Defamation Act 2005* (Vic)
- > Impacts on plaintiff: loss of reputation; emotional; financial
- > Impacts on defendant: financial (legal fees, damages)

**Nuisance**

- > Elements: property rights (public or private); interference; damage
- > Time limit: depends on damage
- > Possible defences: statutory authorisation; consent; reasonable use
- > Development: largely governed by common law
- > Impacts on plaintiff: loss of use and enjoyment of property
- > Impacts on defendant: inconvenience; financial loss

## REVISION QUESTIONS

- 1 **a** Identify the time within which a claim for defamation must be brought. (1 marks)
- b** Provide two reasons why these limitations are imposed under the law. (4 marks)
- 2 **a** Describe the key elements of the tort of negligence. (6 marks)
- b** Explain the rights protected by negligence laws. (4 marks)
- c** Outline two exceptions to duty of care. (4 marks)
- 3 **a** Explain two defences to the tort of defamation. (5 marks)
- b** For each defence mentioned in part a of this question, explain why that defence is important to exist as a way to defend a defamation claim. (5 marks)
- 4 **a** Distinguish between public nuisance and private nuisance. (3 marks)
- b** Explain the key elements required to establish the tort of private nuisance. (8 marks)
- 5 With reference to one case that you have studied in this chapter:
  - a** Explain the purposes and elements of that area of law. (5 marks)
  - b** Explain the ways in which the law seeks to reduce the extent of harm, damage or loss in the community. (4 marks)



Check your obook assess for these additional resources and more:

» Student book questions  
Ch 8 Review

» Revision notes  
Ch 8

» assess quiz  
Ch 8  
Test your skills with an auto-correcting multiple-choice quiz

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

Read the case study and answer the questions below.

### Chaos at the taekwondo club

Julia manages a taekwondo club every night except Sunday. The club is open until midnight, and Julia allows the playing of loud music from bands including AC/DC and Lamb of God.

The man who lives in a flat above the taekwondo club, James, complains repeatedly to Julia, but she ignores his complaints. James owns the flat, which he purchased in August 2017.

Things are made worse by the fact that James is in his final year of a Bachelor of Science degree and the music, combined with the noise made by the young people who gather outside the club, affects his study. James claims the disturbance has led to an increase in his anxiety levels. Also, his enjoyment of the local area has been diminished by young people who have been drawn to the club since the club opened.

In desperation, James posts a message on social media which says that Julia 'has criminal connections and in spite of her demure appearance, is actually a hired "hitman"'.

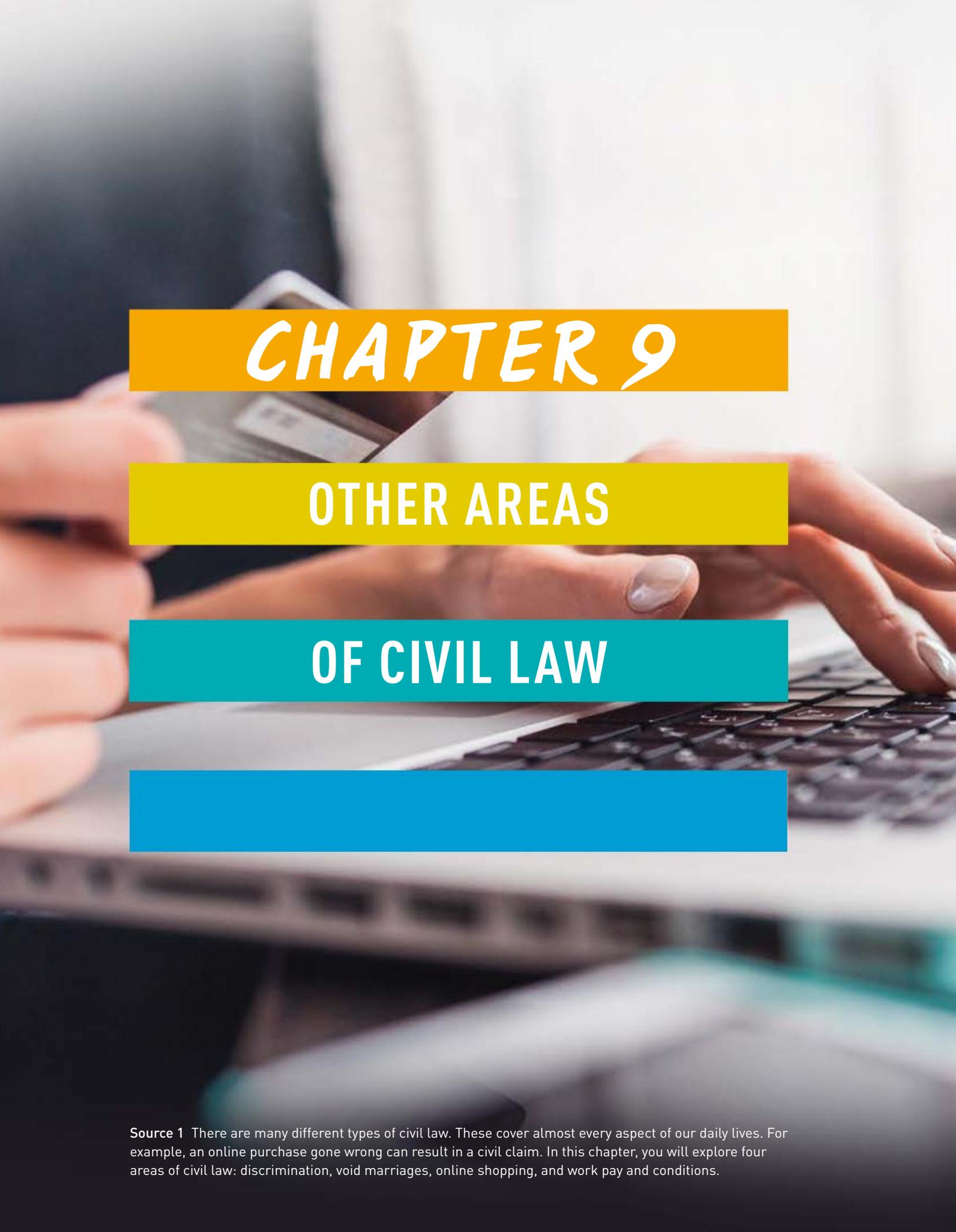
Things become much worse for Julia when one of her regular trainers, Sandrine, is away on holidays and can't take a beginners' class.

In the absence of Sandrine, Julia asks one of her friends, Julian, to take the class, even though the closest he has come to martial arts is playing computer games such as *Absolver* and *Mortal Kombat XL*.

During a 'flying side kick' competition, Julian holds the board at the wrong angle and one of the students, Mimmi, falls and tears ligaments in her ankle.

### Practice assessment task questions

- 1 Choosing one of the torts that you have studied in this chapter:
    - a Identify the likely plaintiff and the likely defendant for the dispute that will arise in relation to that tort.  
[2 marks]
    - b Describe one right protected by that area of tort law.  
[2 marks]
    - c Explain how long the plaintiff has to bring a claim. Can this time be extended? Give reasons for your answer.  
[4 marks]
  - 2 Summarise the role of both common law and statute law in developing the key legal principles of your chosen tort.  
[5 marks]
  - 3 Describe one impact this case might have on the plaintiff, and one impact it might have on the defendant.  
[4 marks]
  - 4 Imagine you are a lawyer assisting either the plaintiff or the defendant. Your client has asked you to prepare a paper which argues to the court why the plaintiff is or is not liable (depending on who you are acting for). Prepare the paper. Make sure you address each of the elements that needs to be established for the chosen tort, and any possible defences.  
[8 marks]
- Total: 25 marks

A close-up photograph of a person's hands interacting with a laptop and a smartphone. The person is wearing a white shirt. The background is blurred, showing a window with light coming through. Overlaid on the image are four horizontal bars of different colors (orange, yellow, teal, and blue) containing text.

# CHAPTER 9

OTHER AREAS

OF CIVIL LAW

**Source 1** There are many different types of civil law. These cover almost every aspect of our daily lives. For example, an online purchase gone wrong can result in a civil claim. In this chapter, you will explore four areas of civil law: discrimination, void marriages, online shopping, and work pay and conditions.

## OUTCOME

By the end of **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9), you should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

## KEY KNOWLEDGE

In the chapter, you will learn about:

- two areas of civil law and for each area of law:
  - the rights protected by the law
  - the elements required to establish liability
  - the limitation of actions
  - possible defences
  - the role of statute law and common law in developing the elements and defences
  - the impact of the breach on the parties.

## KEY SKILLS

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

- define and use legal terminology
- research and analyse relevant information about civil law
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios.

## ADVICE TO TEACHERS AND STUDENTS

In **Unit 1 – Area of Study 3** (i.e. Chapters 7, 8 and 9) you are required to study **two areas of civil law** in detail.

YOU MAY CHOOSE TO STUDY:	OPTIONS INCLUDE:	PAGE:
• <b>TWO</b> torts (from Chapter 8)	8.2 Negligence	220
	8.3 Defamation	228
	8.4 Nuisance	236

OR

• <b>TWO</b> other areas of civil law (from Chapter 9)	9.2 Discrimination	250
	9.3 Void marriages	260
	9.4 Online shopping	268
	9.5 Workplace pay and conditions	278

OR

• <b>ONE</b> tort (from Chapter 8) • <b>ONE</b> other area of civil law (from Chapter 9)	See above	See above
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## KEY LEGAL TERMS

**acceptance** (in relation to contract law) a written or oral statement or act that indicates that the person agrees to the offer being made

**attribute** a quality, feature or characteristic of a person, such as race, gender or disability

**award** the minimum wages and conditions that an employer is legally required to pay a worker for a particular job or occupation

**contract** an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced through the law

**discrimination** the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or sexuality). Discrimination can either be direct discrimination or indirect discrimination

**Fair Work Commission** an independent national tribunal that has the power to establish the minimum wages and employment conditions for a particular job or industry

**National Employment Standards (NES)** a set of 10 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

**offer** (in relation to contract law) a written or oral statement or act that indicates the person is willing to buy or sell goods or services

**solemnised** the act of formalising a lawful marriage in accordance with the requirements of marriage laws in Australia

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# INTRODUCTION TO OTHER AREAS OF CIVIL LAW

## plaintiff

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

## civil law

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

## tort

a wrongful act that is recognised by law

## discrimination

the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or sexuality). Discrimination can either be direct discrimination or indirect discrimination

As you have explored in Chapter 7, civil law aims to protect the rights of individuals. If an individual's rights are infringed, the individual (known as the **plaintiff**) can take the matter to court (or possibly another dispute resolution body) to ask for compensation as a way of righting the wrong.

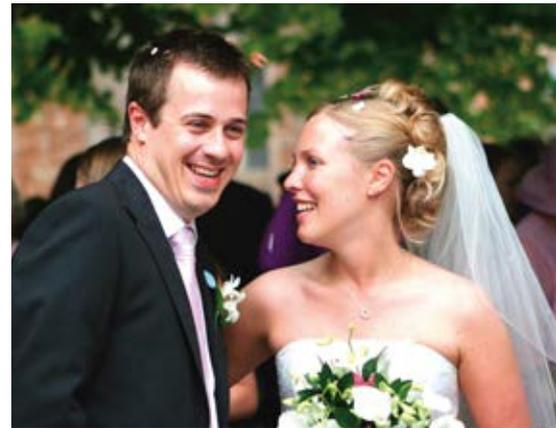
There are various types of **civil law**. One of the main areas of civil law is **tort law**. A **tort** is a civil wrong that one person commits against another. Tort law deals with the rights and obligations that people owe to others and the infringement of those rights and obligations. Tort law is explored in Chapter 8.

However, tort law is not the only type of civil law. There are various other types of law that govern disputes between individuals and groups. They include:

- laws which prohibit **discrimination**
- laws relating to marriage, and when a marriage may be void (not valid)
- laws that apply to online shopping
- workplace laws, including laws that specify what a person needs to be paid in employment, and what conditions they are entitled to.



**Source 1** The law against discrimination aims to protect individuals against less favourable treatment based on certain features such as age.



**Source 2** The law in relation to marriages sets out requirements for a valid marriage.



**Source 3** Contract and consumer law sets out the rights of individuals who shop online.



**Source 4** The law in relation to work pay and conditions protects the rights of employees in the workplace.

## Did You Know?

Rock band Van Halen used to have a clause in their contract with concert venues that a bowl of M&M's must be provided to them, but no brown ones were to be in there. The intention was to work out which concert promoters read the contract, and which ones didn't.

The main aim of civil law is to return a wronged person back to the position he or she was in before the wrong occurred. This is usually done through the awarding of a **remedy** to the plaintiff, the most common of which is **damages**. This is an amount of money to be paid by the **defendant** to the plaintiff. For example, if a person has bought an appliance online, and that appliance is faulty and caused damage to a house, the person may be able to seek compensation for the damage caused. In other types of civil law, such as laws relating to void marriages, the appropriate remedy may be an order that the marriage was not valid (that is, did not comply with marriage laws).

Some of these laws, such as laws which prohibit discrimination and laws relating to marriage, are contained in statute. Other laws, such as laws relating to online shopping, have been created through common law. Even though online shopping is a new phenomenon and has grown substantially because of the development of the internet, the laws that govern this type of shopping are contract laws. This is because online shopping purchases result in a contract being formed which governs that purchase. Contract laws have been around for decades, and have been developed over the years through the courts.

As part of Area of Study 3 you are required to study two areas of civil law in depth. For each area of civil law, you will explore:

- the rights protected by the law
- the elements and defences
- limitation of actions
- the impact of the **breach** on the parties
- the role of the law (common law and statute law) in developing the elements and the defences.

In this chapter you will explore four areas of civil law, being discrimination, void marriages, online shopping, and work pay and conditions.

**remedy**

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

**damages**

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

**defendant**

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

**breach**

breaking or failing to fulfil a duty or obligation

9.1

CHECK YOUR LEARNING

Define and explain

- 1 What is meant by the term 'discrimination'?
- 2 What type of order may be sought by somebody who believes a marriage has not complied with marriage laws?
- 3 Explain why online shopping is only a recent phenomenon, but the laws which govern online shopping have been around for years.

Synthesise and apply

- 4 Choose one area of civil law mentioned in this topic. Devise a scenario that you think depicts the area of civil law occurring. Provide your scenario to another class member and ask them to identify:

- a the plaintiff
  - b the defendant
  - c the area of civil law
  - d the remedy that will be sought.
- 5 Conduct some research and find a recent article about each of the following types of claims or disputes:
    - a a discrimination claim
    - b a marriage which was entered into invalidly
    - c a purchase of goods or services on the internet that went wrong
    - d the underpayment of wages.



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

» **Student book questions**

9.1 Check your learning

**Video tutorial**

Introduction to Chapter 9

» **Sample**

Arguing liability response

» **Weblink**

Fair Work Commission

# DISCRIMINATION

## discrimination

the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or sexuality). Discrimination can either be direct discrimination or indirect discrimination

## attribute

a quality, feature or characteristic of a person, such as race, gender or disability

One right that individuals in Australia have is the right to be free from **discrimination**. Discrimination means treating someone less favourably than others on the basis of **attributes** such as race, religious belief, disability, or age. Discrimination can be **direct discrimination**. For example, if an older applicant is not considered for a job because it is assumed they will not be able to use new technologies compared to a younger applicant, then this person may be directly discriminated against. Discrimination can also be **indirect discrimination**. For example, if a company policy states that all employees must work full-time, people who prefer to work part-time due to family responsibilities may be indirectly discriminated against. Discrimination can occur in all aspects of life, such as in schools, in the workplace, in sporting clubs, in membership clubs, in places of accommodation, or when buying goods or services.

There are many laws that aim to protect people from discrimination. For example, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that every person has the right to enjoy human rights without discrimination, and every person is equal before the law.

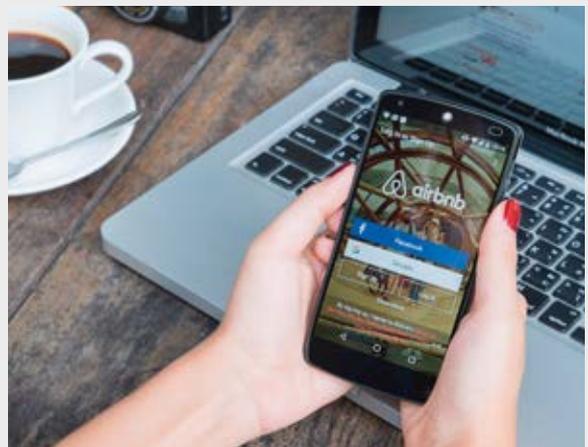
Unfortunately, however, sometimes situations arise where a person is discriminated. This was demonstrated in 2017 when a person was refused a booking through online hospitality service Airbnb. If somebody is discriminated against because of a particular attribute, such as when using Airbnb, then he or she may have a claim against the person or company that has discriminated against him or her.

## CASE

## STUDY

### Airbnb host cancels booking

In 2017, Dyne Suh from southern California claimed she was refused an Airbnb booking at the last minute because she was Asian. In an exchange with the host, who cancelled her booking at the last minute, the host said 'Go ahead. I wouldn't rent to u if u were the last person on earth' followed by a text message "One word says it all. Asian.'



**Source 1** Dyne Suh was denied an Airbnb booking at the last minute. It was reported the host has now been banned from Airbnb.

## direct discrimination

a type of discrimination; when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute

## indirect discrimination

a type of discrimination; when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute

## Rights protected by the law

Discrimination is prohibited in Victoria and in Australia under the statutes listed in Source 2. Some of these statutes are Victorian statutes, which means that they only apply to acts or omissions that occur in Victoria, whereas others are Commonwealth statutes, which means that they apply all over Australia.

The *Equal Opportunity Act 2010* (Vic) is the main legislation in Victoria that makes discrimination unlawful. It prohibits discrimination based on attributes (which are set out in Section 6 of the Act) such as age, breastfeeding, gender identity, disability, lawful sexual activity, marital status, pregnancy and race in areas such as employment, education, goods and services, accommodation, membership and sport.

STATUTE	DESCRIPTION
<i>Equal Opportunity Act 2010</i> (Vic)	This is the main Victorian legislation dealing with protection against discrimination, sexual harassment and victimisation, and equal opportunity. It prohibits direct and indirect discrimination based on various attributes (race, religion etc.) in various areas such as employment and sport.
<i>Racial and Religious Tolerance Act 2001</i> (Vic)	This Act prohibits vilification on the grounds of race or religious belief or activity in Victoria.
<i>Age Discrimination Act 2004</i> (Cth)	This Act makes it unlawful to discriminate on the grounds of age, whether it be direct or indirect.
<i>Disability Discrimination Act 1992</i> (Cth)	This Act makes it unlawful to discriminate against persons on the grounds of disability in areas such as work, education, accommodation, access to premises, clubs and sport and the provision of goods and services.
<i>Racial Discrimination Act 1975</i> (Cth)	This Act makes it unlawful for a person to make a distinction based on race, colour, descent or national or ethnic origin which has the effect of denying that person a human right or fundamental freedom.
<i>Sex Discrimination Act 1984</i> (Cth)	This Act makes it unlawful to discriminate against a person on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in areas such as work, accommodation, education, and the provision of goods and services.
<i>Fair Work Act 2009</i> (Cth)	The Act prohibits an award (being a document which sets out the minimum wages for a certain type of job) from including terms that discriminate against an employee because of certain attributes such as race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibility or political opinion. It also prohibits employers from taking adverse action against an employee because of these attributes.

**Source 2** Victorian and Commonwealth statutes that prohibit discrimination

The main purpose of anti-discrimination laws is to protect people against victimisation, unfair and unwarranted judgment, vilification and persecution. It also aims to protect people's rights to:

- feel safe in various social settings, including at work, at school or on the sporting field
- feel accepted and part of the community by making it unlawful to degrade someone or treat them differently because of a certain attribute
- equality, and in particular the right of equality under the *Charter of Human Rights and Responsibilities Act*. The laws aim to ensure that everyone has the same rights to equality before the law regardless of an irrelevant attribute
- seek retribution against a person who has engaged in unlawful conduct, by imposing penalties on people who engage in unlawful conduct. For example, in some circumstances, the laws make it an offence to engage in certain discriminatory conduct. This aims to punish people for engaging in that conduct, and deter others from doing the same
- a means to seek compensation for those who have suffered discrimination.



**Source 3** A campaign at Glasgow University in Scotland in 2015 aimed to combat discrimination among staff and students by highlighting 'casual' comments that are discriminatory.

### Did you know?

In 2015 in America a baker was found to have discriminated against two males because he refused to bake a cake celebrating their wedding.

# Elements required to establish liability

## Act of Parliament

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

Although various **Acts of Parliament** (both federal and state) deal with discrimination, there are some common elements that need to be established for the discrimination claim to succeed. To establish discrimination, the following elements must be proven:

- the discrimination was based on a certain attribute
- the discrimination took place in a particular area
- the discrimination caused harm or less favourable treatment.

## Element 1 – The discrimination was based on a certain attribute

The person making the complaint must first establish that the discrimination that he or she suffered was because of a certain attribute. The attributes are different in each statute and some statutes focus on very specific attributes. The attributes set out in the *Equal Opportunity Act* are summarised in Source 4 below.

## Did you know?

In 2016, parliamentary rules were changed so that children were allowed into the Commonwealth Houses of Parliament. This change allowed members of parliament to breastfeed their children. In May 2017, Senator Larissa Waters made history by becoming the first politician to breastfeed her daughter in the Senate.

Age	Breastfeeding	Employment activity	Gender identity	Disability	Industrial activity
Lawful sexual activity	Marital status	Parental or carer status	Physical features	Political belief or activity	Pregnancy
Race	Religious belief or activity	Sex	Sexual orientation	An expunged homosexual conviction	Personal association with a person with any of these attributes

Source 4 Attributes set out in the *Equal Opportunity Act*

If a person is hurtful to another simply because he or she doesn't like them, but it is not based on any attribute, then it is unlikely to be able to become a discrimination claim.

The *Equal Opportunity Act* makes it unlawful to discriminate in relation to the above attributes on the basis that they should not be relevant in certain circumstances. For example, if two people are applying for the same job as a lawyer, and one is female and one is male, then there should be no reason why the gender of the person is a relevant factor when employing them. Similarly, if one person is Muslim and the other person is a Bahá'í, and they are both members of the same football club, their religious belief should not be a factor in determining whether they are chosen to play a game.

The legal case below illustrates a claim where the applicants claimed that they were discriminated against based on age.

## LEGAL

## CASE

### Health provider refused birth program participation

*Wilson v Western Health (Human Rights) [2014] VCAT 771 (1 July 2014)*

On 7 November 2011 Tracey Wilson gave birth to a daughter, Sophia, in Sunshine Hospital in Melbourne. In March 2014, Mr and Mrs Wilson issued a claim in the Victorian Civil and Administrative Tribunal (VCAT) on behalf of their daughter against Western Health, which owns

and operates Sunshine Hospital. The applicants alleged they were discriminated against because Western Health decided they were not suitable to participate in its home birth pilot program. The attributes they claimed they were discriminated against, contrary to the *Equal Opportunity Act*, were Mrs Wilson's age (she was 44 at the time) and her 'great grand multiparity' (being a person who has had more than 10 children).

VCAT found that the case for discrimination could not be on the basis of 'great grand multiparity' because it was not an attribute, or had the characteristics of an attribute (that is, it is not a feature that is associated with someone who is of old age, or pregnant, or has some other characteristic that may result in discrimination). Therefore, the case only proceeded on the basis that 'age' was the attribute against which the applicants were discriminated.

In relation to Mrs Wilson's age, VCAT found that the decision that Mrs Wilson was not suitable for the program did not result in her or her unborn baby being treated unfavourably, but on the contrary the decision was in their best medical interests and therefore a favourable one, as it was considered too risky for them to have a home birth with the program.

The applicants ultimately failed in establishing their claim.



**Source 5** The decision to deny a couple from accessing a home birth program resulted in a discrimination claim initiated with VCAT.

## Element 2 – The discrimination took place in a particular area

The person must also establish that the discrimination occurred in a particular area or activity. The statutes vary in terms of describing these areas, but the areas or activities set out in the *Equal Opportunity Act* are in Source 6.

Job applications	Employment	Membership of industrial organisations (e.g. unions)	Occupational qualifications (e.g. renewing qualification)	Education
Provision of goods and services	Sale of property	Provision of accommodation	Club membership	Sport

**Source 6** Areas or activities set out in the *Equal Opportunity Act*

Even though the above areas or activities are broad, they do not cover discrimination in a private setting. For example, if one person is discriminated against by another in a private home (e.g. being served food last because of a certain attribute), then the person who is discriminated against will not be able to do much about it (other than complain loudly).

## Element 3 – The discrimination caused harm or less favourable treatment

If a person has been discriminated against for a particular attribute and in a particular area or activity, he or she must also establish that the treatment caused harm or less favourable treatment.

A person may be treated less favourably, or may suffer harm, as a result of either direct or indirect discrimination:

- **Direct discrimination** is when a person is treated less favourably than another person who does not have the same characteristic or attribute. For example, if a person in school is chosen for a public speaking competition, and another person is not because of their race, then this is direct discrimination. The harm may vary depending on the person, but may include anxiety, or loss of an opportunity.
- **Indirect discrimination** is when a certain policy, practice, behaviour or condition in a particular area (such as in school or at a workplace) results in unfairly disadvantaging someone else. For example, if a sporting club made it a rule that every person who entered a building must first stand and walk up the stairs to say hello to the president of the club, this is likely to discriminate against people with physical disabilities who cannot walk up the stairs. The harm may be a loss of membership because the person didn't comply with the rules.

## Limitation of actions

There is no specific time period set out in the *Limitation of Actions Act 1958* (Vic) for a discrimination claim to be made. However, there are some time limits that a plaintiff needs to be aware of.

### Discrimination claim under a Victorian statute

Victorian statutes that prohibit discrimination state that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (the Victorian complaints body that can provide dispute resolution services in relation to discrimination) may decline to provide dispute resolution services if the discrimination occurred **more than 12 months** before the person complained. This limitation is set out in Section 116 of the *Equal Opportunity Act*.

However, a person can make an application to VCAT in relation to the discrimination, regardless of whether the person has first made a complaint with VEOHRC.

### Discrimination claim under a federal statute

The *Australian Human Rights Commission Act 1986* (Cth) states that a complaint lodged with the Australian Human Rights Commission (AHRC) (the federal complaints body that hears complaints in relation to discrimination contrary to federal statutes) may be terminated if it was lodged **more than six months** after the alleged acts, omissions or practices took place.

## Possible defences

A person who is defending a discrimination claim may argue that the plaintiff has not satisfied all of the elements. For example, the defendant may argue that there was no attribute for which the person was discriminated, or it didn't happen in a particular area or activity, or that the person wasn't treated less favourably.

Otherwise, if all of the elements are satisfied, then the person responding to the claim may be able to rely on one of the following defences:

- an exception applied
- an exemption applied
- inherent requirements
- unjustifiable hardship.

### Study tip

A useful way to get an idea of the types of discrimination claims being made is to access the links provided on your [obook assess](#). These human rights websites often report on recent cases or examples of discriminations. This will help you develop your skills to apply the law to a particular case.

## Defence 1 – An exception applied

There are a number of exceptions that apply to persons or companies, which can allow them to lawfully discriminate against another. A person facing a discrimination claim may raise this as a defence.

Exceptions are usually specified in the relevant statute. For example:

- an educational authority is able to set and enforce reasonable standards of dress, behaviour and appearance for students. Therefore, if a school states that a certain standard of care must be taken in terms of a student's appearance, a school may be able to defend a discrimination claim on the basis that it is enforcing its uniform code
- a club is able to exclude from membership a person on the basis of that person's sex if membership of the club is available only to persons of the opposite sex. This exception allows female-only gyms to operate without being subjected to a discrimination claim by males
- a sporting club is able to exclude a person of another sex from participating in a competitive sporting activity if strength, stamina or physique is relevant.

The following example further details a situation where this defence could be used.

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## Accommodation refused to children

## EXAMPLE

Juliet runs the 'Romeo Hotel' in Daylesford, Victoria. The hotel is especially designed for couples only and, because of its design and location, is unsuitable and inappropriate for children. Juliet is likely to be able to defend a discrimination claim if one is brought by someone because she didn't let their children stay at the hotel. This is because of Section 58A of the *Equal Opportunity Act*, which allows a person to refuse accommodation to children or people with children because of the design or location of the accommodation.

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## Defence 2 – An exemption applied

Particular persons or groups are also exempted from discrimination laws. For example, a person is able to discriminate against another if that discrimination is necessary for the person to comply with their religion. As another example, a person can provide benefits to another person based on age, but not providing benefits to a person who is below that age would not amount to age discrimination (this is often the case for retired people who receive certain benefits).

A person is also able to apply for a temporary exemption not exceeding five years if that exemption is required to undertake a certain activity. This occurred in 2016 in relation to Ivanhoe Grammar School, as it wanted to target more female students to improve its gender balance as detailed in the news article below.

### VCAT green light will let Ivanhoe Grammar School offer more places to girls

Emily Woods, *The Age*, 11 August 2016

A Melbourne grammar school has been granted an exemption from Victoria's *Equal Opportunity Act*, allowing it to target female enrolments to improve its gender balance.

Ivanhoe Grammar School began as a boys' school in 1915, with female students introduced 13 years ago.

## IN THE NEWS

However, the school has struggled to attract female students, and in June almost two-thirds of its students – 62 per cent – were boys.



Source 7 Ivanhoe Grammar School in Melbourne has obtained an exemption to allow them to target female students in advertising.

On Wednesday the Victorian Civil and Administrative Tribunal granted an application by the school under two sections of the 2010 *Equal Opportunity Act*, giving it 'exemption from prohibitions on gender-based discrimination in relation to education and services'.

The decision will allow Ivanhoe Grammar to target female students in its advertising and to offer sweeteners to attract girls, including 'scholarship and bursary assistance'.

Principal Gerard Foley said the move would help the school provide a 'true coeducational experience for all students' and promote gender balance in the community.

### Study tip

See your obook assess for an example of a case which used the defence of inherent requirements – *Shiraz v Commissioner of Police* [2017] FCA 61 (6 February 2017).

## Defence 3 – Inherent requirements

This defence only applies where there is an allegation that there has been discrimination in employment. The employer can argue that the person, because of their age or disability, cannot carry out the 'inherent requirements' – or the essential duties – of the job. For example, it is likely to be an inherent requirement of a baggage handler's job at an airport to be able to lift heavy items. If a person is unable to do this, for example because of their age or disability, then this is unlikely to be discrimination because of the inherent requirements defence.

## Defence 4 – Unjustifiable hardship

This defence is only available to employers. If an employer is facing a discrimination claim by an employee, it could defend the claim on the basis that the working arrangement would cause 'unjustifiable hardship' on the employer. This means that it would be extremely difficult for the employer to be able to accommodate for the employee. For example, if the employer operates out of a particular building that is not accessible to people with disabilities, and adjusting it to allow accessibility would cost a significant amount of money that the employer does not have, the employer may be able to argue that adjusting for the disabled person would cause it unjustifiable hardship.

Whether the defence will succeed depends on an assessment of what is fair and reasonable for the employer to do to make adjustments for the employee. For example, if the adjustments were easy to make and would cost little money, then it is unlikely that the defence will succeed.

## The role of the law in developing the elements and defences

Victorian and Commonwealth statute law have largely developed the elements and the defences to a discrimination claim.

## Statute law

### Victorian statute law

Compared to areas such as negligence, discrimination laws in Victoria are fairly recent. It wasn't until 1977 that the Victorian Parliament introduced the *Equal Opportunity Act 1977* (Vic), which prohibited discrimination because of marital status or gender in the areas of employment, accommodation, education and in goods and services. That is, it was limited in the types of discrimination that it prohibited.

The main areas of development in Victorian statute law are set out in Source 8. Statute law has developed to expand the attributes that a person may be discriminated for, to clarify the language around couples (to include same-sex couples) and gender identity (to include those who identify with a particular gender) and to ensure that discrimination against pregnant and breastfeeding women is prohibited.

### Commonwealth statute law

Similar to Victoria, it is only in the past 30 years or so that the Commonwealth Parliament has passed legislation prohibiting (banning) discrimination in certain areas. The legislation began with the introduction of the *Racial Discrimination Act* in 1975. This came about at the end of the White Australia policy (a policy which aimed to prevent immigration by people of certain countries to Australia) when diversity was embraced more than it was before.

The *Racial Discrimination Act* was expanded in 1995 when the *Racial Hatred Act 1995* (Cth) amended that Act. It was introduced to prevent offensive behaviour based on racial hatred or because of race, colour or national or ethnic origin (which included the introduction of Section 18C, a section which has recently been under scrutiny).

Following the *Racial Discrimination Act*, the following legislation was passed:

- the *Sex Discrimination Act* in 1984
- the *Disability Discrimination Act* in 1992
- the *Age Discrimination Act* in 2004.

In 2012, a draft of the Human Rights and Anti-Discrimination Bill was released. The Bill proposed to combine the Commonwealth anti-discrimination laws into a single Act of Parliament to make the laws clearer and more consistent. The Bill was never passed.

## Common law

While discrimination laws are largely set out in statutes in Australia, it is the role of the courts to interpret that legislation. One of the main areas of interpretation by the courts is to determine whether certain exceptions, exemptions or defences apply. This occurred in the High Court case of *Maloney v The Queen* (2013) 252 CLR 168.

1982	<ul style="list-style-type: none"><li>• Disability was included as an attribute</li></ul>
1984	<ul style="list-style-type: none"><li>• <i>Equal Opportunity Act 1984</i> (Vic) was passed</li><li>• Race, religion, ethnic origin, political belief and de-facto spouse status were added as attributes</li></ul>
1995	<ul style="list-style-type: none"><li>• <i>Equal Opportunity Act 1995</i> (Vic) was passed</li><li>• Attributes were expanded</li><li>• Areas or activities expanded to include sale of property, sport and clubs</li></ul>
2000	<ul style="list-style-type: none"><li>• Breastfeeding, sexual orientation and gender identity were added</li></ul>
2001	<ul style="list-style-type: none"><li>• To recognise same sex couples, 'de facto spouse' was changed to 'domestic partner'</li><li>• <i>Racial and Religious Tolerance Act 2001</i> (Vic) was passed</li></ul>
2006	<ul style="list-style-type: none"><li>• The <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) was passed to provide for certain rights such as equality before the law.</li></ul>
2010	<ul style="list-style-type: none"><li>• <i>Equal Opportunity Act 2010</i> (Vic) was passed</li><li>• Direct and indirect discrimination were clarified</li></ul>

**Source 8** The role of Victorian statute law in developing the area of law in discrimination

### Did you know?

The Australian Human Rights Commission website states that a 2008 report claimed that one in ten Australians believe that some races are 'inferior' or 'superior' to other races. It also states that a 2014 report found that 18 per cent of Australians said they had suffered discrimination because of skin colour, ethnic origin or religion.

## Buying alcohol on Palm Island

*Maloney v The Queen* (2013) 252 CLR 168

The Queensland Parliament had passed a law which restricted the possession of alcohol on Palm Island. Palm Island's community was composed almost entirely of Indigenous people.



Source 9 Palm Island was the centre of a case involving the interpretation of anti-discrimination laws.

On 31 May 2008, Joan Monica Maloney was charged with possession of more than the allowable amount of liquor on Palm Island. She ultimately challenged the Queensland law, claiming it was inconsistent with the *Racial Discrimination Act* because it meant that she could not enjoy a right enjoyed by persons of another race.

The High Court dismissed the appeal, because it found that a law could be passed if it was a 'special measure' designed to protect a certain group of people – in this case, the Queensland law was passed to protect the Palm Island residents from the effects of alcohol abuse and violence.

However, the court's role in interpreting discrimination laws is much less significant than its role in interpreting laws such as those relating to negligence. This is because the Commonwealth and state human rights commissions resolve many of the discrimination cases, so very few discrimination cases go to court.

## Possible impacts of the breach

Discrimination based on a certain attribute can have wide-ranging consequences for the parties.

### Impact of the breach on the plaintiff

The impact of defamation can be significant. Possible impacts on the plaintiff are as follows:

- **Public humiliation** – This could include degradation or vilification. For example, a person might tell an inappropriate joke in a workplace setting that discriminates against the plaintiff.
- **Loss of opportunity** – This could occur as a direct consequence of the discrimination. For example, a female could be denied a promotion based on her gender.
- **Inconvenience** – This could occur when accommodation, goods or services are denied. For example, an accountant could deny their services to a person of a particular race.
- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person develops depression as a result of continued discrimination based on a particular attribute.

### Impact of the breach on the defendant

Possible impacts on the defendant of a discrimination claim are as follows:

- **Public humiliation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of widely reported court proceedings.
- **Loss of business** – This could be a consequence of loss of reputation. For example, a hotel may receive less business because people may not want to support an organisation that they think is being defamatory.
- **Inconvenience** – This could require the defendant to attend hearings in an attempt to resolve the dispute. For example, an employer attending a court hearing.



Source 10 Discrimination impacts on the plaintiff

## 9.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the following terms:
  - a direct discrimination
  - b attribute
  - c indirect discrimination
  - d gender identity.
 Provide an example of each.
- 2 Describe three rights that are protected by anti-discrimination laws.
- 3 Explain one defence that may be used in defending a discrimination claim.
- 4 Why have the courts played less of a role in developing anti-discrimination laws than parliament?

### Synthesise and apply

- 5 Angela recently applied for a casual job at a local Chinese restaurant. Her interview went really well, but she believes that it started going wrong when she mentioned a recent holiday to Italy to visit relatives. Angela has recently received a letter from the restaurant saying she was not successful. Angela believes she has been discriminated against. Advise Angela whether she can argue she has been discriminated against.
- 6 Your friend Cindy is a member of a local sporting club. All members of the club have been invited to a fundraiser at which they are only allowed to bring a date of the opposite sex. As Cindy is gay, she has told

the club that she will be bringing her girlfriend. She has been told this is against the rules and she will not be allowed to attend the fundraiser.

- a Consider each of the elements that Cindy needs to establish.
  - b Consider any defences the club might be able to raise.
  - c Write a summary about whether you think Cindy will succeed in claiming discrimination.
- 7 Access the *Equal Opportunity Act*. A link is provided on your [obook assess](#).
    - a Choose one of the exceptions that are included in the Act (e.g. Section 59).
    - b Write a scenario about a person who has been discriminated against, but make sure that the exception you have chosen applies.
    - c Exchange scenarios with another person in your class. Using the Act, see if you can identify the exception that applies to your classmate's scenario. Your classmate should do the same with your scenario.

### Analyse and evaluate

- 8 Do you think that a school should be able to set and enforce reasonable standards of dress, appearance and behaviour for students, and therefore be exempt from discrimination laws? Engage in a class discussion about this.

### Check your [obook assess](#) for these additional resources and more:

» **Student book questions**

9.2 Check your learning

» **Legal case**

*Shiraz v Commissioner of Police* [2017] FCA 61 (6 February 2017)

» **Weblink**

Victorian Equal Opportunity & Human Rights Commission

» **Weblink**

Australian Human Rights Commission



**Source 1** Marriage was first defined in the English case of *Hyde v Hyde and Woodmansee*.

The Commonwealth Parliament makes laws in relation to marriage (and divorce), and its laws apply nationwide. In particular, the *Marriage Act 1961* (Cth) provides guidelines for people who want to marry.

Marriage was first defined in the case of *Hyde v Hyde and Woodmansee* [1866] UK LRP&D 130 as a ‘voluntary union for life of one man and one woman to the exclusion of all others’. The definition of marriage has been one of the more debated Australian legal definitions in recent times, in particular in relation to allowing same-sex marriages.

The *Marriage Act* sets out the requirements for a valid marriage. Sometimes, a dispute arises about whether a marriage is valid, which may require the court to consider whether the marriage is **null and void**. This is often called ‘marriage annulment’. It is different to a divorce proceeding – if a marriage is annulled, then it will be considered to have

never existed in the first place. In a divorce proceeding, however, the marriage is recognised as being in existence, but one or both parties wish for that marriage to come to an end.

The husband and the wife are normally parties to a proceeding about whether or not a marriage is valid.

## Rights protected by the law

The laws which establish whether a marriage is valid aim to protect the following rights:

- **the right of free will** – This means that marriage laws require the parties to have given voluntary and real consent, which upholds the right to a person to choose whether they want to marry
- **the right to a marriage that is exclusive** – This means that marriages in Australia must be to the exclusion of others (i.e. **monogamous**)
- **the right to be old enough to marry** – This means that both parties must be 18 years of age, unless in exceptional circumstances where the person can be 16 years of age
- **the right to seek the court’s assistance to make a marriage null and void** – This means that marriage as an institution is protected, and that there are laws about which marriages are valid and which ones are not.

### monogamous

the state of being married to only one person at a time

## Elements required to establish liability

In disputes involving void marriages, there is generally no liability that is imposed on one party. That is, one party generally is not ordered to pay compensation to the other, or there is generally not even an order that somebody is in the wrong. Rather, there is usually an order made by a court that the marriage is either valid, or it is null and void. Sometimes an order that a marriage is null and void is referred to as a ‘decree of nullity’.

Section 23B of the *Marriage Act* sets out when a marriage might be void. A marriage will be void if one or more of the following five elements are established:

- the parties were married to someone else at the time
- the parties are within a prohibited relationship
- the marriage was not properly solemnised

### Did you know?

On 19 December 1922, Theresa Vaughn told a court in Sheffield, England, that since 1917, she had married 61 men (in addition to her first) in cities in Europe, South Africa and England, without ever having obtained a divorce from any of them.

- there was not real consent
- one of the parties was not of a marriageable age.

## Element 1 – The parties were married to someone else at the time

For a marriage to be valid, the parties must prove that they are not married (that is, they are single, divorced or widowed) at the time of the marriage. If they are lawfully married to someone else at the time of the second marriage, then the marriage will be null and void, as illustrated in the legal case below.

### Migrant's bigamous marriage

#### *Choi & Figuera* [2017] FamCA 90 (24 February 2017)

On 26 October 2016, Ms Choi, the wife of Mr Figuera, filed an application for her marriage to be declared a nullity. Choi migrated to Australia in May 2009 and met her husband in January 2010. They married in early 2011. Choi was aware that her husband had two children but did not know that he had been previously married.

A few months after the marriage, she became aware that her husband was previously married in a different country in 2005. He remained married, even though he falsely described his status at the time of the marriage as 'never validly married'. The Family Court found that it was established that the husband was lawfully married to another person at the time of the second marriage, and declared the marriage a nullity.

LEGAL

CASE

## Element 2 – The parties are within a prohibited relationship

There are some relationships that are prohibited in Australia, which means that these people cannot marry. A marriage must not be between a person and his or her:

- **ancestor or descendant** (including mother, father, grandmother, grandfather, son, daughter, granddaughter or grandson)
- **brother or sister** (including adopted relations and half-relations, but not step-relations).

Marriage between cousins is not prohibited.

## Element 3 – The marriage was not properly solemnised

For a marriage to be valid, it must be properly **solemnised** (that is, the ceremony must be properly performed). A person could argue that the marriage was not solemnised because it did not comply with the following requirements under the *Marriage Act*.



**Source 2** In 1959 in the Northern Territory, Mick Daley and Gladys Namagu were refused permission to marry because Gladys was considered a ward of the state and could not be married without written consent.

**solemnised**  
the act of formalising a lawful marriage in accordance with the requirements of marriage laws in Australia

**marriage celebrant**  
a person registered in Australia to perform marriage ceremonies

- notice was given to the **marriage celebrant** at least one month before and not earlier than 18 months before the date of the intended marriage. There are certain requirements for a person to be able to be a marriage celebrant, including the requirement that he or she be over 18 years of age, have proper training and qualifications, and be a fit and proper person
- the parties had produced to the celebrant each person's birth certificate or other identity document which shows their date and place of birth
- the parties had declared in writing to the celebrant about their conjugal status and their belief that there is no legal impediment (barrier) to marriage
- the marriage was witnessed by at least two people over the age of 18 years
- the celebrant explained to the parties the nature of marriage.



**Source 3** The marriage ceremony needs to be properly performed for it to be legal.

## Element 4 – There was no real consent

Consent to marry must be given voluntarily and knowingly. It is not real consent if:

- it was obtained by duress or fraud. **Duress** usually involves an element of force, constraint or threat of violence, but can include pressure from family
- one party was mistaken about the identity of the other party or as to the nature of the ceremony that was to be performed (i.e. they did not know it was a marriage ceremony)
- one party was mentally incapable of understanding the nature and effect of a marriage ceremony.

The legal cases below illustrate how a marriage can be declared null and void based on the element of real consent.

**duress**  
strong mental pressure on someone to overcome their independent will and force them to do something

**LEGAL**

**CASE**

### Married by surprise

*Breust & Devine* [2016] FamCA 892 [24 October 2016]

On 5 July 2016, Ms Devine sought a decree of nullity of marriage on the grounds that she was mistaken about the nature of the ceremony that she was participating in, and was not aware at the time that she was marrying Mr Breust.

Devine migrated to Australia in 2009. She lacked English proficiency and had not undertaken a course to learn to speak English. She met her husband in 2015 through friends while the respondent was in Australia on a temporary visa. She stated that they decided to undergo a 'promise night', conducted in accordance with cultural customs and which is when the man promises the girl and her family that he is serious about commencing a relationship, and that he has a genuine interest in becoming married. After the promise night, it is then appropriate for the couple to date.

Devine was told by Breust that they should get their relationship registered so that he would be able to work. The applicant was surprised at the idea of registering a relationship but

agreed as she thought it would help them financially. On the day of the ceremony, she attended a house in a semi-formal dress. A marriage celebrant was present, whom the applicant thought was able to register the relationship. He said some things, but the applicant did not understand it, and there was no interpreter present. After about 5 –10 minutes the parties were given a piece of paper to sign which they did, as did her sister and the respondent's sister. They left immediately to go to a baptism.

Some months later, the parties separated. She contacted the person whom she thought had registered the relationship (the marriage celebrant) and told him that she wanted to cancel the registration. She was told that the parties were married, and she'd need to wait a year for a divorce. Devine was shocked. She told the Court she did not believe she was participating in a marriage ceremony at the time, and had she been aware, she would not have agreed. She waited 12 months, after which time she was advised she could seek a decree of nullity.

Breust did not contest the application. The Court accepted on the **balance of probabilities** that she was mistaken about the nature of the ceremony, and declared the marriage null and void.

COMMONWEALTH OF AUSTRALIA  
*Marriage Act 1961*  
**OFFICIAL CERTIFICATE OF MARRIAGE**  
paragraph 50(1)(b) Marriage Act 1961 (Cth)

Marriage was solemnised between the parties, details of whom are given below, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

at \_\_\_\_\_  
(Location of marriage ceremony)

\* (according to the rites of \_\_\_\_\_).

Detail	Bridegroom	Bride
Surname		
Other names		
Usual occupation		
Usual place of residence		
Conjugal status		
Birthplace		
Date of Birth		
Father's name in full		
Mother's maiden name in full		

Signatures of Parties to the Marriage } \_\_\_\_\_

Witnesses to the Marriage

Full names \_\_\_\_\_

Signatures \_\_\_\_\_

---

I, \_\_\_\_\_ (full name)  
certify that, on the date and at the place specified above, I duly solemnised marriage in accordance with the provisions of the *Marriage Act 1961* between the parties specified above.

Dated this \_\_\_\_\_ (day) day of \_\_\_\_\_ (month) \_\_\_\_\_ (year)

\_\_\_\_\_  
(Signature of Celebrant) \_\_\_\_\_  
(Authorisation number)

\*The words in brackets may be omitted.

**Source 4** A Certificate of Marriage form, which must be filled out to confirm that the marriage was properly solemnised in accordance with the law.

## Element 5 – One of the parties was not of a marriageable age

The marriage age is the age at which individuals are free to marry without any restrictions or requirement for parental consent. In Australia, the marriageable age is 18 years. In exceptional circumstances, a court may make an order authorising a person who is 16 or 17 years of age to marry a particular person.

If a person is not aged 18 years, and has not obtained such an order, then the marriage will be null and void.

### balance of probabilities

the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

## Coerced marriage under threat

### *Radtke & Pagano* [2016] FamCA 784 (16 September 2016)

On 24 May 2016, Ms Radtke, filed an application for a declaration that her marriage was null and void.

Radtke commenced a relationship in early January 2013 with Pagano when she was not yet 18 years old. Pagano was in Australia on a working holiday visa which Radtke believed expired in November 2013.

Radtke gave evidence that Pagano imposed himself on her by moving in to her rented apartment uninvited. After she found he regularly smoked marijuana, she insisted he stop or move out. He got angry for the first time, scaring her and striking the bedside table beside her head.

After Pagano mentioned the need to return to his country when his visa expired, he raised the idea of marriage with her. By this stage he had become very controlling of the relationship, which had begun to deteriorate. At one stage he confronted her with a knife after an argument.

In August 2013 they met with a marriage celebrant after which Radtke told him she was not ready to get married. He told her 'If you don't go along with getting married you will be sorry'. Five days before the proposed marriage there was an argument and Radtke told him she was not going to marry him. Pagano opened the kitchen cutlery drawer and she went to the bathroom and locked herself inside. Pagano tried to get in. Pagano seemed apologetic after the incident.

On the morning of the wedding, on 23 August 2013, Radtke continued to say that she wasn't ready to get married. Pagano threatened her and they argued. He forced her to get ready. Ms Radtke said she was terrified and felt trapped, and the ceremony took place later that day. That night Radtke stayed at a friend's house.

The couple remained living together until 27 October 2013 at which time Radtke ended the relationship. Pagano returned to his country a short time later.

The Family Court concluded that Pagano took advantage of Radtke's youth and lack of maturity, and that his conduct was coercive, controlling, threatening and abusive. It was satisfied that the consent of Radtke was not real consent but was obtained by duress. It declared the marriage void.

### *Did you know?*

In Libya, the marriageable age for both males and females is 20 years. However, in Estonia a person aged 15 years can get married with the consent of the court.

## Limitation of actions

There is no limitation of actions to seek an order from the Family Court that a marriage is null and void. This means that a claim for a marriage to be made null and void is not restricted by any time period.

## Possible defences

There are no defences that apply in response to a proceeding where a party is seeking an order that the marriage is null and void. However, a respondent could argue that all of the elements of a valid marriage were present, and therefore the court does not have the power to order that the marriage is null and void.

If the respondent is successful, then the applicant can still seek a divorce, but the marriage will stand.

# The role of the law in developing the elements and defences

Both common law and Commonwealth statute law have developed the legal principles around marriage.

## Statute law

Before the introduction of the *Marriage Act*, each state and territory was responsible for passing laws in relation to marriage. This is because marriage is a law-making power that is **shared** between the Commonwealth and state parliaments, and so the states had the powers (and still do) to make laws in relation to marriage. This, however, meant that there was no consistency in marriage requirements across the country – for example the marriageable age was different from state to state.

In 1961, the Commonwealth Parliament passed the *Marriage Act*. At the time, it did not include a definition of marriage. However, it did set out a requirement for the marriage celebrant to explain, at the ceremony, that marriage was the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, therefore there was some indication in the *Marriage Act* that marriage was limited to that between a man and a woman. In 2004, a formal definition of marriage was included to make it clear that it did not include same-sex marriages.

States have still passed laws that relate to relationships. For example, the Victorian Parliament has passed the *Relationships Act 2008* (Vic) which allows people to register domestic relationships, which includes a relationship between two persons who are not married to each other but are living together as a couple (irrespective of gender). However, if the states passed marriage laws that are inconsistent with the *Marriage Act*, then this is likely to be challenged as being inconsistent with the *Marriage Act* and the parts of the Victorian law that are inconsistent are likely to be declared invalid (because under the **Australian Constitution**, Commonwealth laws prevail over state laws if they are inconsistent).

## Common law

The Family Court's role is to interpret the *Marriage Act*, for example by determining whether a particular marriage meets the validity requirements. This role of statutory interpretation is different from the role of the courts in other areas, such as negligence, where they have greatly expanded the law.

For example, the Family Court has adopted old English law to determine whether there was 'real consent'. In *Hirani v Hirani* (1983) 4 FLR (Eng) 232, the English Court of Appeal stated that the real question of whether there is consent in marriage is whether the threats or the pressure destroyed the consent of the individual, or overtook his or her will. The Family Court will generally look at previous cases when determining whether the marriage requirements have been met.

The case of *Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 172 FLR 300 was also a landmark case, as it involved an issue about whether a marriage between a woman and a female-to-male post-operative transsexual was valid.

**Australian Constitution, the** a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)



**Source 5** In 2017 a postal survey was conducted about changing the definition of marriage to include same-sex marriages.

### Study tip

The Family Court judgments related to the validity of marriage are sometimes short and can provide you with some useful ways to argue a case. Access the judgments on the Australasian Legal Information Institute (AustLII) website provided on your [obook assess](#) and try to summarise one or two cases for your own learning.

## The *Kevin and Jennifer* case

### *Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 172 FLR 300

In this case, the Full Court of the Family Court ruled that Kevin (a female-to-male transsexual) and his female partner, Jennifer, were legally married.

Jennifer met Kevin in 1996. Kevin had presented as a male since 1994, was given hormone treatment in 1995 and had sex reassignment surgery in 1998. By the time the couple married in 1999, they had lived together for two years and Jennifer had become pregnant using donor sperm and IVF treatment. In 1999, they sought a declaration that their marriage was valid. The couple argued that they were not a same-sex couple and that at the time of the marriage Kevin was a male. The Attorney-General argued that Kevin was not a male for the purpose of the marriage law.

The Court accepted that Kevin had presented as a male, was considered a male by family, friends and work colleagues, and had undergone hormonal treatment and surgical procedures to align his physical attributes with his psychological sex. The Court ruled that a person's sexual status is not linked to their sex at birth to be a valid marriage under the *Marriage Act*. The Court accepted that psychological, social and cultural sexual identity should be taken into account when determining such cases.

## Possible impacts of the breach

### Impact of void marriage on the applicant

Possible impacts on the applicant are as follows:

- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop depression if the marriage was obtained by duress or fraud.
- **Humiliation** – This could include feelings of shame and anguish. For example, a person may be embarrassed to discover their marriage is not legal.



Source 6 Possible impacts on the applicant

### Impact of void marriage on the respondent

Possible impacts on the respondent are as follows:

- **Humiliation** – This could include feelings of shame and anguish. For example, a person may be shameful of their actions in obtaining the marriage
- **Costs** – The costs of performing the marriage or having to consider the court proceedings.

**Define and explain**

- 1 What is the difference between a void marriage and a divorce?
- 2 Is there any time limitation to seek an order that a marriage is void?
- 3 Identify and describe the five elements for a marriage to be valid.
- 4 What are the requirements for a marriage to be properly solemnised?

**Synthesise and apply**

- 5 Read the legal case *Choi & Figuera*.
  - a Who was the applicant in this case?
  - b What was the applicant seeking?
  - c Which element of marriage did the applicant argue had not been satisfied?
  - d Would it have been possible for a party to argue that the marriage was valid in this instance?
  - e What impact would this situation have had on the applicant?
- 6 Read the legal case *Breust & Devine*.
  - a Who was the applicant in this case?
  - b What element of marriage did the applicant argue had not been satisfied?
  - c Why did the applicant argue that the element had not been satisfied?
  - d What impact would this situation have had on the applicant?

- 7 Read the legal case *Radtke & Pagano*.
  - a Who was the applicant in this case?
  - b What were the events that lead to the marriage ceremony?
  - c In your view, was there real consent in this case? Give reasons.

**Analyse and evaluate**

- 8 Visit the AustLII website. A link is provided on your [obook assess](#). Choose one Family Court judgment which was in relation to whether a marriage was null and void (Hint: use the keyword “23B”, being the relevant section about valid marriages).
  - a Write a summary of the circumstances of the case you have chosen. Make sure you include the material facts of the case. Do not include in your summary the outcome of the case.
  - b Exchange your summary with one of your classmates.
  - c Read your class member’s summary, and write a short (half to one-page) argument that you would present to the Family Court as to why you believe that the marriage is void.
  - d Present your argument to the class. As a class, vote whether or not the Family Court should make the marriage null and void.

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

» <b>Student book questions</b>	» <b>Legal case</b>	» <b>Weblink</b>	» <b>Weblink</b>
9.3 Check your learning	<i>Kreet v Sampir</i> [2011], FamCA 22 (18 January 2017)	Australasian Legal Information Institute (AustLII)	Getting married



Source 1 Online shopping continues to grow in popularity in Australia.

Australians love online shopping. Today, more and more people in Australia are shopping online rather than shopping in traditional stores. More than 40 per cent of Australians buy one or more products over the internet in any four-week period. Online stores such as Amazon, eBay, Groupon and ASOS are among the most popular in Australia.

There are laws in place which aim to protect consumers and vendors in online shopping. These include laws relating to contracts, and consumer laws which aim to ensure that the terms of a contract are fair. Although online shopping is a popular form of purchasing goods and services, it can sometimes go wrong, and a party may potentially have a civil claim as a result.

## Rights protected by the law

There are two main areas of law that govern online shopping and which give rights to people:

- **contract law**, which governs agreements (oral or written) between two or more parties
- consumer law, which aims to protect consumers and vendors when buying or selling goods and services.

### Contract law

A **contract** is an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced by law. A contract can be written or oral, though online shopping contracts are normally in writing (as it generally involves some electronic communication or exchange between the purchaser and the vendor in which there is a record of the agreement to sell and purchase).

Online shopping involves a contract between two people or companies. Each time a product or service is bought online, a contract has been made. The contract normally comes into place when a consumer clicks the 'I agree' or 'Purchase' button on the website. Once that happens, Australian contract law may apply to the purchase, just like a purchase that happens in a shopping centre.

### Consumer law

Once a purchase has been made, then the purchase may be subject to Australian consumer law, and the consumer will have the same protections as a person who has walked into a store to buy the product.

Various statutes in Australia govern the provision of goods and services. The main law is the Australian Consumer Law (ACL), passed in 2011. The ACL promotes and encourages fair trading practices, protects



Source 2 A contract may be created with a single click on a 'Buy Now' button.

#### contract law

an area of civil law governing the validity and enforceability of agreements made between two or more parties

#### contract

an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced through the law

consumers and provides legal uniformity across Australia for the purchase of goods and services. The ACL applies to most domestic transactions (where goods or services costing less than \$40 000 have been bought for personal or domestic use) where the buyer has purchased in a commercial environment (e.g. where the seller is a retailer of goods). It provides various guarantees to the consumer, and the supplier must comply with them. Some of the guarantees that a supplier gives to any purchaser of goods and services include the following:

GUARANTEES RELATING TO THE SUPPLY OF GOODS	GUARANTEES RELATING TO THE SUPPLY OF SERVICES
The goods are of an <b>acceptable quality</b> . Goods are of an acceptable quality if they: <ul style="list-style-type: none"> <li>• are fit for purpose</li> <li>• are acceptable in appearance and finish</li> <li>• are free from defects</li> <li>• are safe and durable</li> </ul>	The services will be performed with <b>care and skill</b>
The goods are <b>fit for any purpose</b> which was made known to the consumer	The services will be <b>fit for the purpose</b> for which the consumer acquired them
The goods match the <b>description</b> when purchased by the consumer	The services will be supplied within a <b>reasonable time</b>
If an express <b>warranty</b> is given, that the supplier will comply with any express warranty	

**Source 3** Types of guarantees that automatically apply to the purchase of goods and services

The rights that are protected by contract law and consumer law are as follows:

- the right of consumers and suppliers to be protected in the purchase of goods and services
- the right to goods and services paid for and which should meet the description and quality that a consumer expects, and the right to the money for the goods and services
- the right to be protected from unscrupulous business practices of some traders
- the right to seek a remedy for any problems that may arise.

## Elements required to establish liability

If an online shopping order has gone wrong, it may give rise to a civil claim. Some of the things that can go wrong with an online shopping order are as follows:

- the goods never showed up, or the services purchased were never performed, even though the money has been paid
- the goods arrived, but they were broken or faulty
- the goods arrived, but they do not fit the description, are not fit for purpose, or are not of a good quality
- there was a significant delay in the goods arriving, or the services being performed.

If any one of these occur, the party may have a contractual claim. To establish liability, the plaintiff will need to establish the following four elements:

- a binding contract existed
- the contract was breached
- the breach caused loss
- loss or damage was suffered.

## Element 1 – A binding contract existed

### offer

(in relation to contract law) a written or oral statement or act that indicates the person is willing to buy or sell goods or services

### acceptance

(in relation to contract law) a written or oral statement or act that indicates that the person agrees to the offer being made

### consideration

(in relation to contract law) something of value that passes from one party to the other at which time a contract is complete; can also be a promise to pay

### duress

strong mental pressure on someone to overcome their independent will and force them to do something

### express terms

(in relation to contract law) provisions or conditions that are written in the contract or are clearly stated or discussed between the parties as forming part of the contract

### implied terms

(in relation to contract law) provisions or conditions that are not expressed or written down but are assumed and intended to be included in the contract

First, for a binding contract to exist, there must be a valid contract. For there to be a valid contract, the plaintiff must establish the following three elements:

- there was an **offer** – An offer is normally some sort of oral statement or act which indicates that an offer is being made. An offer must be clearly communicated, and can be withdrawn before acceptance as long as the withdrawal is clearly communicated
- there was **acceptance** – Acceptance can also be in the form of an oral or written statement or an act (though in online shopping it is normally written through some sort of electronic communication). The acceptance must be in exact terms as the offer – if it differs, it is seen as a counter-offer
- there was **consideration** – Consideration is something of value that passes from one party to the other. In an online shopping context, the consideration from the supplier to the purchaser is the goods or services, and from the purchaser to the supplier is the money. For example, if Victor purchases an iPhone online for \$1200, the consideration from Victor to the business is \$1200, and the consideration from the business to Victor is the iPhone.

For a binding contract to exist:

- there must be **capacity to contract** – That is, the parties must be 18 years old or over, though there are a number of exceptions (e.g. where the minor is buying necessities)
- there must be **real consent** – If there is a mistake or **duress**, or undue influence, the contract may be voidable (though this is unlikely to occur in most online shopping purchases, there have been occasions when there has been a mistake)
- the contract must be **legal** – For example, if the online shopping purchase was for stolen or illegal goods, the contract is not valid.

Purchasers of online goods or services should be aware of the location of the supplier, as this can impact on whether Australian law applies.



**Source 4** Buying goods through illegal sites is unlikely to help someone make a legitimate claim for compensation if something goes wrong.

## Element 2 – The contract was breached

When a contract is made, an agreement is reached between the parties to carry out a service or supply goods for payment. If one of the parties fails to fulfil the agreement, then the party can be in **breach of the contract**. For example, a breach of contract can occur when one of the parties fails to pay for the goods or services, or fails to deliver the goods or services on time.

Failure to fulfil any terms and conditions of the contract can lead to a breach of contract. Contract terms can include **express terms** as well as **implied terms**. Express terms are those that are clearly set out in the contract. In an online shopping contract, they are often included in the 'terms and conditions' section of the purchase.

The legal case below illustrates how contract terms can be contested in court.

## It's a legal contract, so no refund

### *Joyner v Intrepid Travel Pty Ltd (Civil Claims)* [2017] VCAT 233 (17 February 2017)

On 12 August 2016, Ms Joyner paid \$5390 via direct deposit to Intrepid Travel Pty Ltd for a 29-day trip from Vienna to Dubrovnik commencing on 3 September 2016. On 15 August, Intrepid sent her an email to say that the transport and accommodation had not been booked as this usually took 3–4 days. After checking her finances and realising she could not afford the trip, Joyner requested a cancellation but stated falsely that she had a specialist appointment. She contacted them again the next day and was told she would have to forfeit the entire amount she had paid. The trip was confirmed by email on 16 August 2016.

On 28 August Joyner requested a postponement. This was refused. Joyner felt that the refusal to refund any money was in excess of any expenses that would have been incurred by Intrepid, and the cancellation term in the contract was unfair. She sought a full refund or a postponement.

Intrepid argued that because Joyner booked online, she was aware of the terms and conditions of the contract when she booked. In particular, the terms and conditions stated that they would retain 100 per cent of the moneys if a trip was cancelled 30 days or less prior to departure. Intrepid stated it had suffered loss and damage because it had commenced booking accommodation and travel once Joyner had made the booking, and they therefore should retain the amount.

VCAT found that Intrepid was entitled to the money. It found that she had entered into a contract, and that she had paid the full amount to Intrepid and they accepted this, and that she was not entitled to the money because she changed her mind. The Tribunal found that the cancellation clauses were not harsh or unconscionable, and therefore the application was dismissed.



**Source 5** Intrepid Travel was not required to pay back the money in a case which involved the applicant changing her mind.

LEGAL

CASE

Implied terms are those that are implied at law, or are implied by reason of the conduct of the parties. For example, if an online shopper communicates with the seller that they need the goods before Christmas and the seller acknowledges that, the shopper might argue that there was an implied term that the goods would be supplied before Christmas.

Implied terms at law include the guarantees that are set out in the Australian Consumer Law. These terms are not expressly agreed by the parties, but are assumed by the law to be operating in the background. For example, there is a guarantee that the goods will be fit for purpose. If they are not, then the purchaser can argue that there has been a breach of contract.

### causation

the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

## Element 3 – The breach caused loss

To be successful in claiming damages, the plaintiff must prove that the breach of contract has **caused** loss. For example, if a person purchased the boxed set of *Game of Thrones* online, but it never arrived, the purchaser has suffered loss of the amount of the boxed set, and the financial loss was caused by the breach of contract by the original purchaser.

The defendant could argue that his or her conduct did not cause the loss or damage. In the above situation, if the seller did in fact send the goods to the purchaser, but the set was stolen from the purchaser's mailbox, then the seller could argue that it did not cause the loss, but rather the theft did (the seller would also argue that there was no breach, as the contract was fulfilled).

The person who has not fulfilled the contract is only liable for the financial loss that could be reasonably contemplated as likely to result from the failure to perform the contract. If the financial loss is too remote from the wrongful act, the defendant will not be liable.

Parties to a contract cannot make a claim for worry or anxiety that may have been caused by the failure to perform the contract. However, in some instances they are able to claim loss of enjoyment; for example, when there is an online contract with a travel agency and the holiday goes horribly wrong.

## Element 4 – Loss or damage was suffered

The party seeking compensation will also need to establish that they have suffered some form of loss or damage. In an online shopping context, this is normally the money (or part of the money) paid for the goods or services, or the goods and services that have been delivered but not paid for, as illustrated in the legal case below.

LEGAL

CASE

### Bad buy on eBay

*Carpenter v Fraser (Civil Claims)* [2016] VCAT 45  
(18 January 2016)

In July 2014, Mr Carpenter agreed to buy a 1956 Chevrolet 3100 custom pick-up truck from Fraser on eBay – sight unseen. Carpenter was from Victoria, and the truck was in Queensland. Carpenter agreed to pay for the freight.

When it arrived, Carpenter became concerned about its mechanical quality. He was told by a mechanic that it would cost him approximately \$20 000 to make it roadworthy. Carpenter sought a refund from Fraser for the car and the freight costs, but Fraser claimed that the truck delivered was as described. Carpenter took the matter to VCAT.

VCAT considered the advertisement that was on eBay. The truck was described as being roadworthy and ready for full registration, and accompanying photos showed the truck in excellent condition. The advertisement also stated that the seller would not accept returns for the item. VCAT found that the advertisement strongly promoted the quality of the truck and that a person could conclude that it was in such a condition that minimal effort was required to have it registered. VCAT found that the contract had been breached because the truck was not



**Source 6** A pick-up truck purchased on eBay required significant work in order to make it roadworthy.

in any condition to be registered in Victoria without a great deal of expensive work being carried out. VCAT ordered that Fraser pay Carpenter \$30 341.50 in damages, being the refund of the purchase price, the freight costs and the cost of the roadworthy inspection, plus interest, and that the truck be available for Fraser to collect upon receipt of the money.

## Limitation of actions

Under the *Limitation of Actions Act 1958* (Vic), a party must issue a claim under contract law within six years of the cause of action accruing. In contract law, the cause of action accrues at the time of the **breach**. Once the breach occurs (e.g. when the goods become faulty), the six years will start running.

However, the time period can be extended in two circumstances:

- where there has been fraud or mistake (e.g. where the defendant has fraudulently concealed the breach)
- where the plaintiff is under a disability.

For contract claims involving a death or personal injury, the time limit will be either 3 years from the date on which the plaintiff discovered the cause of action, or 12 years from the date of the act or omission which caused the death or personal injury.

## Possible defences

If a person is sued for breach of contract, then there are no standalone defences. Instead, the defendant could argue that one of the elements does not exist, and therefore the plaintiff cannot establish the claim.

The defendant could argue that:

- there was no valid contract – This means that one or more of the elements of a valid contract did not exist.
- they had not breached the contract – This means that the conditions of the contract had been fulfilled.

A person could also argue that he or she did not have the capacity to form a contract, that consent was not freely given or that the contract was not legal.

## The role of the law in developing the elements and defences

Both common law and statute law have developed the elements and defences to a breach of contract claim.

### Common law

The principles of contract law in Australia are largely developed and found in common law (law made by courts). That is, the law relating to offer, acceptance and consideration has mostly been developed through cases and **precedent**, and there is no single statute in Australia which governs the law of contract (though as discussed below, there are some statutes that establish laws relating to contracts). Therefore, if a person wanted to understand the basic legal principles about contract law in Australia, such as when someone has accepted an offer, or when an offer is considered to be made, that person will need to look at case law rather than statute law to work out those principles.

### Study tip

You are required to argue liability and defences in relation to two areas of civil law. Make sure, when doing so, that you look at the other party's perspective and rebut any arguments they might be able to make in your responses. This will show that you have an objective view of all the possible arguments that could be made.

### precedent

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

Australian contract law is largely inherited from English contract law cases. Many of those cases and principles still remain relevant today. An example is the case of *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1, an English case from the late 1800s.

LEGAL

CASE

Breathe smoke for your health

*Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1

In 1981 as a response to the 1889–1890 flu pandemic, a product appeared in a newspaper advertisement. The Carbolic Smoke Ball Company was advertising a carbolic smoke ball which, if used correctly, they said, would stop people getting influenza. In the advertisement, the company offered to pay £100 to anyone who used the carbolic smoke ball as instructed and was not protected from catching influenza.

A woman used the carbolic smoke ball as instructed and still caught influenza. She asked the company for £100. The company told the woman that it was not an offer to pay the sum of money; it was merely an advertising ‘puff’, and was not intended as an actual promise. The woman won the case because the court decided that an offer can be made to the public at large, and in this case, by using the carbolic smoke ball as instructed, she was in fact accepting the offer.

For this offer to be revoked, Carbolic Smoke Ball Company would have to communicate the revoking of the offer in the same manner as the offer was made; for example, by an advertisement.

After the judgment, the Carbolic Smoke Ball Company’s attempts to appeal the decision were rejected. The company continued to aggressively advertise the Carbolic Smoke Ball with heavy restrictive conditions outlined in small print. However, the company soon fell on hard times and ceased trading in 1896.

**CARBOLIC SMOKE BALL**  
WILL POSITIVELY CURE

<b>COUGHS</b> Cured in 10 weeks	<b>CATARRH</b> Cured in 1 to 2 months	<b>HOARSENESS</b> Cured in 10 days	<b>THROAT DEAFNESS</b> Cured in 1 to 2 months	<b>INFLUENZA</b> Cured in 10 hours	<b>CROUP</b> Relieved in 1 minute
<b>COLD IN THE HEAD</b> Cured in 10 minutes	<b>ASTHMA</b> Relieved in 10 minutes	<b>LOSS OF VOICE</b> Fully restored	<b>SNORING</b> Cured in 1 week	<b>HAY FEVER</b> Cured in every case	<b>WHOOPING COUGH</b> Relieved in 10 applications
<b>COLD ON THE CHEST</b> Cured in 10 hours	<b>BRONCHITIS</b> Cured in every case	<b>SORE THROAT</b> Cured in 10 hours	<b>SORE EYES</b> Cured in 1 week	<b>HEADACHE</b> Cured in 10 minutes	<b>NEURALGIA</b> Cured in 10 minutes

As all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy

**£100 REWARD**  
WILL BE PAID BY THE  
**CARBOLIC SMOKE BALL CO.**  
to any Person who contracts the Increasing Epidemic,  
**INFLUENZA,**  
Colds, or any Disease caused by taking Cold, after having used the  
**CARBOLIC SMOKE BALL** according to the printed directions  
applied with each Ball.

**£1000 IS DEPOSITED**  
with the ALLIANCE BANK, Regent Street, showing our ability in  
the matter.

During the last epidemic of **INFLUENZA** every thousand  
**CARBOLIC SMOKE BALLS** were sold as a precaution against this  
disease, and in an occasional case was the disease contracted by those  
using the **CARBOLIC SMOKE BALL.**

**THE CARBOLIC SMOKE BALL,**  
TESTIMONIALS.

The *Times* or *Post* writes: "I am much obliged to the Carbolic Smoke Ball which you have sent me, and which I had used often."

Sir FRANCIS STURGEON, Bart., M.P., writes from New Street, 1, 1891: "Early Winter and my children have derived much benefit from the Carbolic Smoke Ball."

Early Murray writes from Goodham, City Council, Toronto, Jan. 16, 1891: "Early Winter follows the Carbolic Smoke Ball to be a certain shield and a cure for cold, and will have great pleasure in recommending it to her friends. Early Winter hopes the Carbolic Smoke Ball will have all the success for which it is famous."

Early Murray writes from Spenton Hall, Nottingham, Jan. 1, 1891: "Early Winter is pleased to say that the Carbolic Smoke Ball has given every satisfaction; she considers it a very good investment."

Mrs. HARRISON writes: "She says the Carbolic Smoke Ball has done her a great deal of good."

Baroness ANNE FLEMING writes: "Baroness Fleming has found the Carbolic Smoke Ball very beneficial, and the only thing that would enable her to get well at night when having a severe cold."

The Originals of these Testimonials may be seen at our Consulting Rooms, with hundreds of others.

One **CARBOLIC SMOKE BALL** will last a family several months, making it the cheapest remedy in the world at the price—10s., post free.

The **CARBOLIC SMOKE BALL** can be refilled, when empty, at a cost of 5s., post free. Address:  
**CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.**

Source 7 The Carbolic Smoke Ball Company offer

The principles established in *Carlill v Carbolic Smoke Ball Company* still apply today. In an online shopping context, for example, if a website promoted a product that they said would help people with a certain disease or illness, then this would be considered to be an offer rather than ‘advertising puff’ (or hype).

## Statute law

The Australian Consumer Law (ACL) came into force in 2011. It is a Commonwealth statute; however, Victoria has passed a law, being the *Australian Consumer Law and Fair Trading Act 2012* (Vic), which adopts the ACL so that it also applies to goods and services supplied in Victoria.

The ACL replaced the *Trade Practices Act 1974* (Cth) as the law which provides consumers with protections. It **supplements** or adds to the common law contract principles by:

- establishing consumer guarantees which a supplier must comply with when providing goods or services to a consumer
- creating bans on conduct such as misleading and deceptive conduct and unconscionable conduct
- making unfair contract terms void (e.g. a term that creates significant imbalance between the parties)
- banning specific practices such as misrepresentation, harassment or coercion in the sale of goods or services
- providing consumers with the right to seek remedies for breaches.

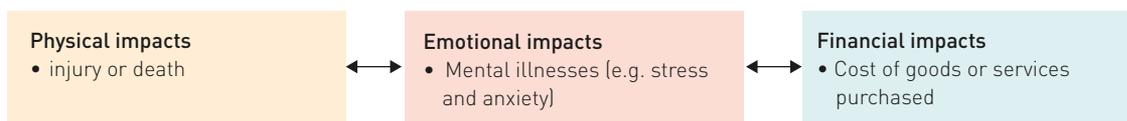
These statutes operate alongside the common law principles of contract law. That is, they do not replace the common law principles, but rather add additional protections or principles that need to be considered when determining whether there has been a breach of contract. A person claiming breach of contract may simply rely on common law principles of contract law to sue the other party, or they may also claim that there have been breaches of the ACL.

## Possible impacts of the breach

### Impact of the breach on the purchaser

Possible impacts of a breach of contract on the purchaser are as follows:

- **Financial loss** – This could include the loss of money used for the goods or services. The purchaser may also indirectly suffer other financial loss. For example, if the purchaser had bought various goods to make up a special hamper for a birthday present, and one of the key goods for the hamper doesn't arrive so that the hamper cannot be made up, then the purchaser may suffer loss beyond the goods that didn't arrive (though it may not be possible for the purchaser to seek compensation from the seller for all of this loss).
- **Loss of confidence** – This could include losing confidence in online shopping. For example, a person may have a bad experience with online shopping and this may deter them from shopping online in the future.
- **Effect on mental health** – This could include conditions such as stress or anxiety. For example, a person may suffer stress if the goods purchased arrive late.
- **Inconvenience** – This could include the time and cost involved in making the claim. For example, a purchaser may be inconvenienced by the time it takes for the breach of contract to be resolved.
- **Personal injury or death** – This could occur as a result of the breach of contract. For example, a person might buy a washing machine online which then explodes, seriously injuring them.



Source 8 Impacts on the applicant

## Impact of the breach on the seller

Possible impacts on the seller are as follows:

- **Financial loss** – This could include loss of profit. For example, a person may suffer financially as a result of goods or services that have been delivered but for which payment has not been received.
- **Loss of reputation** – This could be as a result of bad reviews or negative feedback. For example, a business may receive adverse publicity as a result of failing to properly supply goods or services. The news article below illustrates how a contract claim can financially impact the seller.

### IN THE NEWS

## Jeweller forced to sell \$34,000 diamond ring for \$1100

John Rolfe, *The Daily Telegraph*, 9 November 2016

Nicholas Buttle bought his [fiancé] a two-carat diamond engagement ring online for \$1100 but the retailer wouldn't deliver it, saying the price was wrong. It should have been \$34,000.

Mr Buttle took the matter to court and won. The retailer, Sydney-based Royal Diamonds Pty Ltd, appealed but lost again and must deliver a 'substitute ring' with a 'diamond of similar or higher grade' — plus pay Mr Buttle's legal costs as well as its own solicitor's bill of \$15,000.

'This company is going to be closing down because of this,' said a Royal Diamonds director, who asked not to be named.

'We are going to make the ring and close the company.'

The director said any person on the street would know a two-carat diamond ring does not cost \$1100: 'I can't believe how the tribunal allowed for that.'

The director said he believed the NSW Civil and Administrative Tribunal (NCAT) was not aware Royal Diamonds does not sell 'off the shelf' products but custom-made rings, where a purchaser selects a setting then a diamond from a list based on size, clarity, cut – and price.

He said the NCAT decision would 'open the door – it will set the precedent' for other consumers to buy valuable goods advertised at incorrect prices.

Both sides in the case relied on contract law, not the Australian Consumer Law (ACL). The tribunal found there was an 'absolute contract of sale made between the parties ... that payment for the ring had been accepted' and the retailer 'was unable to avoid the agreement by virtue of its claimed mistake'.

The NCAT appeal panel was told that previous cases had found one party is entitled 'to an order rescinding the contract' if the other party 'is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake'.

'(But) in this appeal there is simply no evidence to support the application of such principles.'

'The only matters ... justifying a finding that the respondent knew or must have known of the mistake lies in the fact that he was a mathematician, that he conducted a web search at some unspecified time and located the ring on the cheapdiamonds.com website which advertised a 2.15 carat ring for the price of \$US4499.99 (\$5844) and in his application to the tribunal, the respondent (Mr Buttle) stated that the value of a similar ring is \$34,429,' NCAT said.



Source 9 Nicholas Buttle bought an engagement ring for his fiancé online.

**Define and explain**

- 1 In terms of entering into a contract, explain why purchasing goods online is no different to purchasing goods in a store.
- 2 Are the principles of contract law in Australia found in statute or in cases? Explain.
- 3 Using an online shopping example, distinguish between an express term and an implied term.
- 4 Identify and describe the elements that a plaintiff will need to establish to prove a claim in relation to online shopping.

**Synthesise and apply**

- 5 Access an online shopping website. Go through the steps to select and purchase an item (but don't complete the purchase!):
  - a Who was making the offer?
  - b Who was accepting the offer?
  - c What was the consideration that was passing between you and the seller?
  - d Describe three terms and conditions that applied to the purchase.
  - e Was the seller based in Australia? If not, what problems might arise if a remedy is sought?
- 6 For each of the following scenarios, identify the element the plaintiff might have difficulty proving. Justify your answer.
  - a Bernadette is Susan's mother. Susan purchased some golf clubs for Bernadette online that never showed up. Bernadette is intending to sue the supplier for loss and damage.
  - b Theo purchased a toy for his grandson some weeks ago online. During the course of the past week the toy has stopped working. Theo doesn't know that his grandson stuffed some banana inside the battery part of the toy. Theo is intending to make a claim on the basis that the toy is not fit for quality.
  - c Olivio purchased some underwear months ago online, and they never showed up. Finally, they showed up. Olivio plans to make a claim because of how late they arrived.
  - d In 2010, Frodo bought a ring online. A few months after he bought it, it started fading in colour and the engraving on the side of the ring started to wear out. He woke up this morning and he's angry about this ring. He wants to sue the supplier.
- 7 Read the legal case *Carpenter v Fraser*.
  - a What was purchased online?
  - b Why do you think that the Australian Consumer Law did not apply to this case?
  - c What did VCAT order?
  - d Do you agree with this decision? Give reasons.

**Analyse and evaluate**

- 8 Read the article 'Jeweller forced to sell \$34,000 diamond ring for \$1100'. Discuss the extent to which you think this outcome was fair.
- 9 Read the legal case *Joyner v Intrepid Travel Pty Ltd*. In your view, was this the right outcome? Discuss as a class.

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9.4 Check your learning

» **Video**

Contracts

» **Video worksheet**

Contracts

» **Weblink**

Shopping online (ACCC)



**Source 1** Young workers often need greater protection in relation to workplace pay and conditions because they are underpaid more often than older workers.

#### award

the minimum wages and conditions that an employer is legally required to pay a worker for a particular job or occupation

#### Fair Work Ombudsman

a statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and ensures compliance with Australia's workplace laws

#### Fair Work Commission

an independent national tribunal that has the power to establish the minimum wages and employment conditions for a particular job or industry

Workplace laws are essential to the employers and to the operation of businesses. They protect the rights of employees in the workplace. Many legal issues can arise from employment situations and can involve issues such as:

- underpayment of workers
- workplace safety
- bullying
- discrimination and harassment.

The workplace is governed by various federal and state laws, which are designed to ensure the safety of employees and to promote harmonious and cooperative work environments. Many of these laws establish minimum requirements that employers must abide by in relation to an employee's pay and conditions.

In Australia, the main law that governs pay and work conditions is the *Fair Work Act 2009* (Cth). This and associated laws set out what employees should be paid, and what work conditions they

are entitled to (e.g. annual leave, sick leave, working hours and lunch breaks). Most employees are covered by the *Fair Work Act*, one exception is employees who are employed by a state body such as a state electricity body.

## Pay and conditions in Australia

Under current laws, a person's pay and conditions can be determined by an award or an agreement.

### Award

An **award** is a document which sets out the wages that must be paid to a particular occupation or industry. The award will also set out what overtime rates, penalties and allowances will be paid to an employee and the amount of leave the person will receive.

An award is often seen as a 'safety net', because wages cannot fall below the amount set out in the award. The **Fair Work Ombudsman**, a government body which has online information for employers and employees, allows people to find out what their minimum wage is.

The minimum wages are reviewed annually by an expert panel of the **Fair Work Commission**.

The underpayment of staff can significantly affect employer–employee relationships as well as the reputation of the organisation.

## EXAMPLE

### Fast food award

Anastassia, 16, has started working at a local fish and chip shop as a casual worker. She is paid \$9.50 an hour. She wants to know whether she is getting the right pay. Anastassia accesses the Fair Work Ombudsman website and works out she is covered by the Fast Food Industry Award 2010. She then finds out that she should actually be getting paid \$12.55 per hour, which increases for evening and weekend work and for public holiday work.

## Agreement

It is possible for an employee to be covered not by an award, but by an agreement. Two types of agreements are:

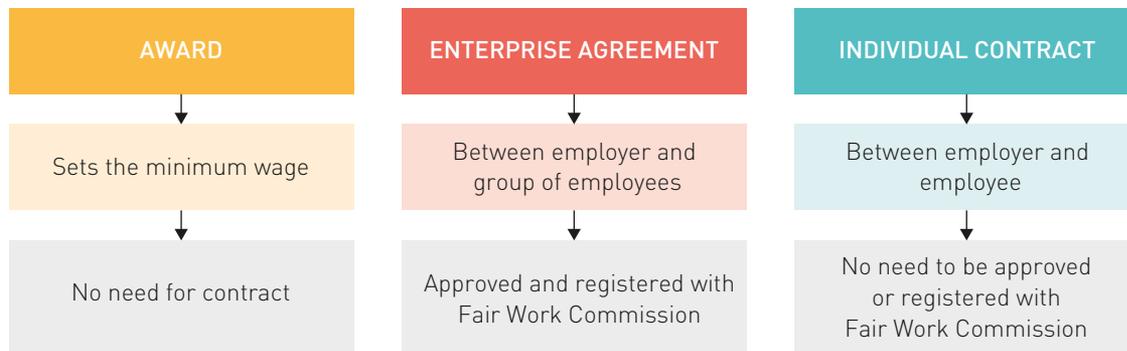
- an **enterprise agreement**
- an **individual contract**.

### Enterprise agreements

An enterprise agreement is an agreement about wages and conditions between an employer and two or more employees. For this reason, enterprise agreements are also commonly known as collective agreements. Enterprise agreements effectively replace an award that is in place and create an enforceable set of terms and conditions of employment that cover those employees. The wages set out in the collective agreement must not be below the award wages, and are usually higher than those wages. The collective agreement must be approved by, and registered with, the Fair Work Commission so that it is publicly available and searchable.

### Individual contracts

An individual contract is an agreement directly between an employer and the employee. Each contract is negotiated between the two parties and sets out the pay and conditions of the employee. The wages again must not be below the award wages. The contract does not need to be approved by or registered by the Fair Work Commission. Individual contracts are popular with private sector companies such as accountancy firms and law firms.



Source 2 The three main types of ways that a person's pay is set.

## Work conditions

The *Fair Work Act* established 10 **National Employment Standards (NES)**. All employees are entitled to the minimum conditions set out in the NES, which are considered to be a 'safety net' to ensure that employees are not taken advantage of. Set out in the extract below are the 10 NES.

### EXTRACT

#### *Fair Work Act 2009 (Cth)*

##### Section 61 The National Employment Standards

- **Maximum weekly hours of work** – 38 hours per week, plus reasonable additional hours.
- **Requests for flexible working arrangements** – an entitlement for certain employees to request flexible working arrangements.

**enterprise agreement**  
an agreement or contract about wages and conditions between two or more employees and their employer

**individual contract**  
an agreement between an employee and their employer relating to wages and work conditions (which is legally binding and enforceable at law)

**National Employment Standards (NES)**  
a set of 10 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

- **Parental leave and related entitlements** – up to 12 months unpaid leave per employee, plus a right to request an additional 12 months unpaid leave, plus other forms of parental and adoption-related leave.
- **Annual leave** – four weeks paid leave per year, plus an additional week for certain shift workers.
- **Personal/carer's leave and compassionate leave** – 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required.
- **Community service leave** – unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.
- **Long service leave** – a transitional entitlement for employees that comes from an applicable pre-modernised award, pending the development of a uniform national long service leave standard.
- **Public holidays** – a paid day off on a public holiday, except where reasonably requested to work.
- **Notice of termination and redundancy pay** – up to five weeks notice of termination and up to 16 weeks severance pay on redundancy, both based on length of service.
- **Fair Work Information Statement** – must be provided by employers to all new employees, and contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, union rights of entry, transfer of business, and the respective roles of the Fair Work Commission and the Fair Work Ombudsman.

In addition to the NES, an individual contract or collective agreement may set out further conditions that the employee is entitled to, such as extra leave, a company car, shares in the company, incentives or extra breaks.

## Rights protected by the law

Workplace pay and conditions laws mainly aim to protect the rights of employees, and in particular the following rights:

- the right to fair and equitable wages and conditions, and in particular the right to be fairly compensated for the work that employees perform
- the right to a safe, productive, harmonious and cooperative workplace
- the right to be able to balance their work and family responsibilities by ensuring appropriate conditions are put in place
- the right to seek compensation if they have not received the correct pay and conditions.

The news article below highlights a case of staff underpayment.

### IN THE NEWS

## George Calombaris' restaurants underpaid staff \$2.6 million

Marissa Calligeros, *The Age*, 4 April 2017

Nearly 200 staff at George Calombaris' restaurants have been underpaid \$2.6 million, with the celebrity chef blaming 'historically poor processes' for the bungle.

Calombaris underpaid 162 of the 430 current staff at restaurants including The Press Club, Gazi and Hellenic Republic, which form part of the chef's Made Establishment Group, over the past six years.

Staff were not paid the correct salaries or overtime due to the 'poor processes in classifying employees', Calombaris said.

Employees at his Greek street food restaurant chain Jimmy Grants were not affected, he said.

The MasterChef judge said he was 'devastated' by the blunder, which will see affected employees back-paid an average of just over \$16,000 each.

'You, our amazing team, are the key to our success. I am so sorry we have messed up and let you down on a fundamental issue,' Calombaris said in an email to staff on Monday.

'I am devastated by what has happened and we have been working extremely hard to fix this. I want to be clear that getting it right means ensuring that every single one of our team members is paid what they are entitled to under the industry award, and that any outstanding money owed to staff is rectified.'



**Source 3** George Calombaris, whose restaurants had been underpaying staff members for years

## Elements required to establish liability

If an employee has not been paid the right amount of pay, or has not been provided with the appropriate or minimum work conditions, he or she can take action against the employer. A person is able to issue a small claim in the Magistrates' Court if the claim is less than \$20 000.

To establish the claim, the employee must establish the following elements:

- the plaintiff was an employee of the employer
- the plaintiff received less than what he or she was entitled to.

### Element 1 – The plaintiff was an employee of the employer

The plaintiff must first establish that he or she was an employee of the employer, and not another type of worker such as a contractor. Contractors normally negotiate their own fees and working arrangements, and have different obligations and rights because they run their own business.

There is no set criteria which establishes whether a person is an employee or a contractor, but usually a person is an employee if they are paid wages regularly, are entitled to paid leave, work set or standard hours, have an ongoing expectation of work, and their work is directed and controlled by their employer.

If a person is a contractor, then the wages and conditions provisions may not apply to them.

### Element 2 – The plaintiff received less than what he or she was entitled to

The main element that the employee will need to establish is that he or she was paid (or received conditions) less than what they were entitled to. To establish this, the employee will need to establish that:

- a particular award or agreement applied to them



**Source 4** A breach of employee pay or work conditions can result in a claim issued in the Magistrates' Court.

- they were classified under the award or agreement as casual, part-time or full-time, and classified as a certain type of employee (e.g. a 'Level 3 employee')
- they received **less** than what the award or agreement specified at any particular point in time.

To establish this, the employee will need to have details about the relevant award or agreement, details about the type of work they performed and details about what they were paid.

The case of *Turley v The Laminex Group* [2015] VMC 28 (3 September 2015) further details how this element can be argued in court.

## LEGAL

## CASE

### Allegation regarding underpayment of wages

#### *Turley v The Laminex Group* [2015] VMC 28 (3 September 2015)

Linda Turley had been employed full-time by The Laminex Group for 7 years as a 'Customer Service Representative'. She was paid under the Clerks-Private Sector Award 2010.

The dispute was about whether the employee had been properly classified as a 'B.3 Level 3' employee, or whether she should have been properly classified as a 'B.5 Level 4' employee. If she had been incorrectly classified, then she had been underpaid wages along with other benefits. The employee stated she had a lack of knowledge about the award and her classification until around September 2014 when she found out about another person's remuneration at the company.

The Magistrates' Court considered the duties of the employee and found that they satisfied the characteristics of a B.3 Level 3 employee, and therefore she had been properly paid.

## Limitation of actions

Under Section 545(5) of the *Fair Work Act*, a court is not able to make an order in relation to an underpayment that relates to a period that is **more than 6 years** before the proceedings were commenced.

If an action is commenced because of breach of contract (i.e. the employee is on an individual contract), then under the *Limitation of Actions Act 1958* (Vic), the employee also has six years to recover the underpayment.

## Possible defences

There are no defences to a claim that an employee has underpaid an employer. The minimum wages and conditions established under statute law means that an employer must pay that minimum amount, even if he or she believed that the minimum amount did not apply (e.g. the employer believed it could contract with the employee to pay him or her less).

The only way in which an employer can defend the claim is by arguing that one of the elements is not satisfied. The defendant could argue that:

- the plaintiff was not an employee – This could mean that the person was a contractor rather than an employee.
- the employee had received what they were entitled to – This means the employee received what they were entitled to under the relevant award or agreement.

# The role of the law in developing the elements and defences

Statute law, and in particular Commonwealth statute law, has largely developed work pay and conditions laws. However, the courts were fundamental in establishing what is now known as the modern award system.

## Common law

Before 1900, and before the existence of the Commonwealth of Australia, Victoria had set down minimum wage rates for Victorians for certain industries.

It was, however, not standardised until an Australian court called the Commonwealth Court of Conciliation and Arbitration (now no longer in existence) handed down a decision which established a system of minimum wages. This court had the power to make awards and increase awards. In *Ex parte H.V. McKay* (1907) 2 CAR 1, the court found that an unskilled male worker needed to be paid fair and reasonable wages for him to be able to live and support his wife and three children, and that a skilled worker should receive an additional margin for their skills. This decision, often referred to as the Harvester Judgment, formed the basis for the minimum wage system which is now in place in Australia.

By the 1920s the states had increased their award rates and many workers were covered by the minimum wage system. At around the same time, the Commonwealth Court of Conciliation and Arbitration stated in a decision that the basic wage should be increased in line with inflation so that the wages could reflect standards of living. Over the years, it continued to increase minimum wages depending on the circumstances at the time. Now, it is the role of the Fair Work Commission to determine the minimum wages in modern awards.

The courts have also played a role in relation to defences. In particular, the courts have confirmed that there is no defence available to an employer who believes that the safety net did not apply when entering into a contract with an individual. This was confirmed in *ACE Insurance Ltd v Trifunovski* [2011] FCA 1204 (25 October 2011), where the Federal Court found that an employer cannot ‘contract out’ of the minimum wages and conditions – that is, a person cannot be given less than minimum wages and conditions by entering into a contract, even if the employee is willing to be paid less than the minimum wage.

## Statute law

The Commonwealth Parliament has actively passed various pieces of legislation which were aimed at reforming the laws around minimum wages. These included:

- the *Industrial Relations Act 1988* (Cth), which introduced enterprise agreements
- the *Workplace Relations Act 1996* (Cth), which introduced further changes to workplace pay and conditions
- the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), commonly known as Work Choices, which was a controversial law strongly opposed by many employees and unions
- the *Fair Work Act*, which replaced Work Choices as the law which governed pay and conditions.



**Source 5** Workers in McKay’s factory in Sunshine. The factory was the centre of a case which established the world’s first national minimum wage.

### Did you know?

In 1896 the Victorian wages boards set the first minimum wages in Australia. The Boot and Shoe Board set a minimum wage of 7 shillings and 6 sixpence per day for adult males, and 3 shillings and 4 sixpence for adult females in October 1897.

Therefore, both the courts and the Fair Work Commission (through deciding the minimum wages of awards) and the parliament (by passing legislation around pay and conditions) have had a significant role to play in developing work pay and conditions laws.

## Possible impacts of the breach

### Impact of the breach on the employee

The impact of a breach of work pay and conditions on an employee can be significant, particularly if the employee relies heavily on his or her wage. Possible impacts on the employee are as follows:

- **Effect on mental health** – This could include conditions such as depression or anxiety. For example, a person may develop anxiety as a result of not being paid enough.
- **Loss of income** – This could occur as a direct result of the underpayment. For example, young students may struggle to afford their everyday living expenses.
- **Vulnerability** – This could include workers who do not know their rights. For example, young workers or migrants who struggle with the idea of having to dispute their employer. These individuals are left even more vulnerable in situations where there is a deliberate manipulation of payment records as illustrated in the case study below.



Source 6 Possible impacts on the employee

The case study below further details a case involving a breach of work and pay conditions.

## CASE

## STUDY

### 7-Eleven wage underpayments

In 2015, a joint investigation by Fairfax Media and *Four Corners* revealed that there were widespread issues with 7-Eleven franchises underpaying its workers. Many of the workers were underpaid, and there was in some instances deliberate manipulation of records to disguise the underpayment. The investigation led to a significant amount of underpayments recovered for the workers, as well as matters taken to the Federal Circuit Court. 7-Eleven established a Wage Repayment Program to investigate all claims of underpayment by the franchises.



Source 7 7 significant amount of media attention was placed on 7-Eleven as a result of the underpayments.

## Impact of the breach on the employer

Possible impacts on the employer are as follows:

- **Financial loss** – This could occur when the employer loses the case. For example, the employer might be ordered to pay penalties as a result of underpaying its workers, causing financial hardship
- **Loss of reputation** – This could be a consequence of the publicity of the claim. For example, the defendant might suffer public humiliation as a result of an adverse finding in court and may also not be seen as an ‘employer of choice’ because people do not want to work for them.

### 9.5

## CHECK YOUR LEARNING

### Define and explain

- 1 Using an example, define the following terms:
  - a Award
  - b Enterprise agreement
  - c National Employment Standards.
- 2 Explain how establishing minimum wages protects the rights of workers.
- 3 Does a statute or a tribunal establish the minimum wage for a job? Explain your answer.
- 4 Are there any defences to an underpayment claim? Give reasons for your answer.

### Synthesise and apply

- 5 Read the article ‘George Calombaris’ restaurants underpaid staff \$2.6 million’.
  - a Why do you think that it is possible that 162 staff members did not know they were getting underpaid?
  - b Describe two possible impacts of the breach on these staff members.
  - c Describe two possible impacts of the breach on the employer.
- 6 Read the legal case *Turley v The Laminex Group*. Why was the employee unsuccessful in this claim?
- 7 Imagine that you are an employment lawyer and a man called Ozem comes to see you. He tells you that he thinks he is being underpaid after having a chat to a colleague at work. Ozem tells you that:
  - he is 22 years of age

- his business does not have a registered agreement and he is covered by the award, but doesn’t know what it’s called
- he works full-time as a help desk operator in the graphic arts industry
- he is not a trainee, not eligible for a supported wage and not an apprentice
- he does not work in a place that publishes newspapers
- he believes he is a Level 5 worker
- he gets paid \$16.50 an hour.

Access the Fair Work Ombudsman website. A link is provided on your [obook assess](#). Research and prepare a summary for Ozem which outlines:

- a What his hourly pay rate should be.
- b Whether he is being underpaid.
- c Whether he has a possible claim for underpayment and, if so, what possible defences or arguments may be raised by the employer.

### Analyse and evaluate

- 8 Do you think there should be a limitation period for bringing a claim seeking recovery of unpaid wages? Why or why not?
- 9 ‘There should be a defence allowed which is an “honest mistake” defence. This defence will allow employers who genuinely believed they were paying their workers properly not to have to compensate those workers.’ Discuss this statement as a class. In your discussion, consider the perspective of the employee, the employer and society.



Check your [obook assess](#) for these additional resources and more:

» **Student book questions**

9.5 Check your learning

» **Weblink**

Fair Work

## CHAPTER SUMMARY

**Discrimination**

- > Rights protected by the law
  - To feel safe, feel accepted and part of the community, equality, seek retribution and a means to seek compensation
- > Elements required to establish liability
  - Based on an attribute
  - Took place in a particular area
  - Harm or less favourable treatment
- > Limitation of actions
  - No specific time period, but complaint made to a commission must be brought within 6 or 12 months
- > Possible defences
  - Exception or exemption applies
  - Inherent requirements defence
  - Unjustifiable hardship
- > Role of law
  - Mainly role of statute law
  - Statutes expanded in the past 30 years to expand attributes and areas
  - Court's role is to interpret statutes
- > Impact of breach on parties
  - Plaintiff: humiliation, degradation or vilification, loss of opportunity, inconvenience, pain and suffering
  - Defendant: loss of reputation

**Void marriages**

- > Rights protected by the law
  - Free will, exclusivity, be old enough, seek the court's assistance
- > Elements required to establish liability
  - Married to someone else
  - Prohibited relationship
  - Not properly solemnised
  - Not real consent
  - Not of a marriageable age
- > Limitation of actions (none)
- > Possible defences (none)
- > Role of law
  - Governed by statute

- Court's role is to interpret statute
- > Impact of breach on parties
  - Stress, anxiety, mental anguish, financial hardship, possible shame

**Online shopping**

- > Rights protected by the law
  - Protection, goods and services meeting description and quality
  - unscrupulous business practices, seek a remedy
- > Elements required to establish liability
  - Contract existed
  - Breach of contract
  - Breach caused loss or damage
- > Limitation of actions
  - 6 years from the date of breach
- > Possible defences (none)
- > Role of law in developing elements
  - Mainly common law
  - Statute law controlling trading practices and guarantees
- > Impact of breach on parties
  - Purchaser: financial loss, personal injuries, loss of confidence, stress, anxiety and inconvenience, cost and time in bringing a claim
  - Seller: financial impact, reputational risk, cost, time and inconvenience involved in a claim

**Work pay and conditions**

- > Rights protected by the law
  - Fair and equitable wages and conditions, safe and cooperative workplace, balance work and family, seek compensation
- > Elements required to establish liability
  - Person is an employee
  - Employee paid less or given less conditions than entitled
- > Limitation of actions
  - 6 years



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

- » **Student book questions**  
Ch 9 Review
- » **Revision notes**  
Ch 9
- » **assess quiz**  
Ch 9  
Test your skills with an auto-correcting multiple-choice quiz

- > Possible defences (none)
- > Role of law in developing elements
  - Courts and tribunals established minimum wages for over 100 years
  - Statute law established conditions
- > Impact of breach on parties
  - Employee: financial loss, stress, anxiety, inconvenience
  - Employer: financially, adverse media attention, not seen as employer of choice

## REVISION QUESTIONS

Answer the questions that are applicable to the area(s) of civil law you have studied in this chapter.

- 1 For each of the areas of law you have studied, identify the time period within which a claim must be brought. (4 marks)
- 2 For each of the areas of civil law you have studied, describe the rights that are protected by that law. (4 marks)
- 3 For each of the following scenarios, identify the element that the plaintiff may have the **most** difficulty in proving. Justify your answer.
  - a Geraldine went for a job interview at a local hairdressing shop. When she mentioned that she loves pizza, the interviewer paused, coughed and muttered something under her breath. Two weeks later, Geraldine was informed she did not get the job. She wants to claim discrimination.
  - b Joffrey purchased some apple pies online from Aria Foods. When they arrived by freight, Joffrey opened them up and realised they were cherry, not apple pies. One of the terms and conditions of the online purchase was that Aria Foods could substitute products if the original products are not available.
  - c Selma has been working at a local restaurant for five years. She gets paid a rate based on her classification as a Level 3 employee. She believes that she should get paid higher based on duties she does every now and then which are duties that are more than what a Level 3 employee is supposed to do.
  - d Victoria wants her marriage to be declared null and void. She was 19 at the time of the marriage, and the ceremony was properly solemnised. Neither her nor her husband was married to anyone else at the time of the marriage. They are not within a prohibited relationship. However, she thinks that she didn't really give consent to marry as she was drunk at the time of her husband proposing. (8 marks)
- 4 For each of the following inaccurate statements, rewrite them so that they are correct. (4 marks)
  - a The principles of contract law are set out in the Australian Consumer Law, which outlines rights available to a person when their express rights have been breached.
  - b The common law principles of marriage establish when a person is able to be legally married, including the marriageable age.
  - c The *Equal Opportunity Act* is the main statute in Australia which governs discrimination claims. The role of the courts is to modify the *Equal Opportunity Act*, which includes expanding the attributes for which a person may be discriminated against.
  - d The Commonwealth Government establishes what the minimum wage is for each job within each industry, and it is the role of the Fair Work Commission to consider that minimum wage to determine whether a person has been underpaid.
- 5 Identify and explain one possible defence that can be raised in relation to each of the four areas of civil law in this chapter. (8 marks)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

Read the following case study and answer the questions that follow.

### A series of disputes

#### Dispute one: Defamation

Seema is currently on parental leave with her first child. She is looking to return to work after resigning from her previous job while she was on leave. She is highly qualified as an accountant, having worked in the industry for over 10 years. Seema applied for a job at a small accountancy firm based in Melbourne.

The first interview went well. She spoke freely about her child and her parental leave, and spoke about how her values align with the values of the firm. The interviewer seemed impressed with Seema's experience and qualifications.

The second interview also started off well. Again, Seema spoke freely and the two interviewers got along well with Seema. At the end, when they asked Seema whether she had any questions, Seema asked what their breastfeeding facilities were like. The interviewers looked at each other and told Seema that they would have to get back to her. Two weeks later, Seema was informed that she did not get the job. A week after that, the small accountancy firm received a letter of complaint from Seema claiming that she had been discriminated against.

Imagine that you are a lawyer. The accountancy firm is seeking your advice about whether they may be liable to Seema. They tell you that they did not feel that they had the facilities available for breastfeeding and chose somebody else who didn't need those facilities, and it would be too hard to move storage out of a particular room that might be used for breastfeeding as it would take a couple of days to do so.

#### Dispute two: Void marriages

Angelique Golly met her husband Brad Bidds in August 1997. Angelique had been married before to

Robert Horton, but that marriage had been dissolved in 1991 and a divorce had been granted.

After dating for three years, Angelique and Brad decided to marry. They were both in their 30s at the time. They both knew that they were distant cousins, but that was not of concern to them. They gave the proper notice to the marriage celebrant 2 months before the wedding, and they provided their proof of identity to her at the time. The marriage ceremony was witnessed by each of their brothers aged 24. The celebrant explained in detail the nature of marriage to Angelique and Brad.

Three months later, Angelique found out that Brad's real last name is not Bidds, but it's Pollyhuckle. She discovered this after rummaging through Brad's things one day and found a birth certificate. She's horrified. She believes that she has been duped into marrying Brad, and that she hasn't really provided consent to the marriage because had she known his name was Pollyhuckle, she wouldn't have married him.

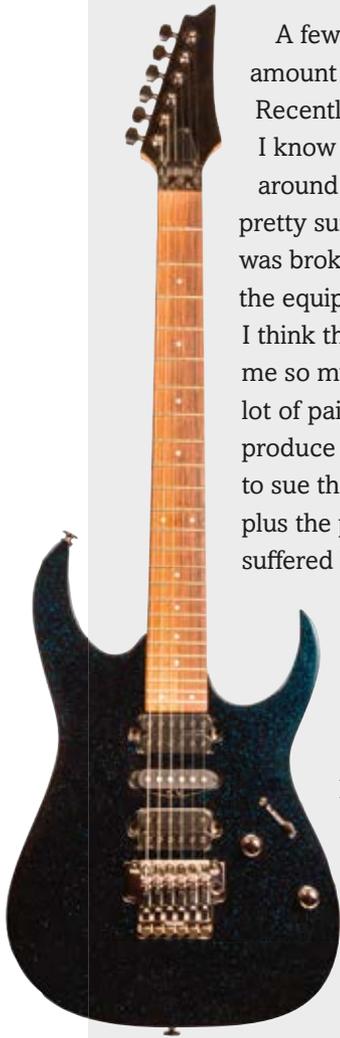
Imagine that you are a lawyer. Angelique comes to see you. She wants to apply to the Family Court for a declaration that the marriage is void. You have never practised in family law before, but your colleague mentions that there is a case that might help you. He refers you to *Nigam & Majumdar* [2015] FamCA 595 (20 July 2015), and tells you that you can access it on the AustLII website by looking at the 2015 Family Court cases.

#### Dispute three: Online shopping

Imagine that you are a lawyer. On Monday morning you checked your emails, and you read an email from Justice Belieber, a female musician who lives in an outer Melbourne suburb. She has asked you for advice.

The email reads in part as follows:

'I need your help in suing an online retailer.



A few years ago I purchased a fair amount of musical instruments online. Recently, most of them stopped working. I know that my little bro was fiddling around a bit with the equipment, but I'm pretty sure that's not the reason why it was broken. I've always had problems with the equipment, particularly the guitar, and I think they are faulty. The equipment cost me so much money, and I've suffered a lot of pain because I haven't been able to produce music as good as I used to. I want to sue them for the cost of the equipment, plus the pain and humiliation that I have suffered because I haven't been able to get a record deal.

I checked out the terms and conditions that I agreed to online, but I reckon I didn't read them at the time and so I can say that I didn't actually agree to them. Plus I'm told that there's some consumer law which protects me anyway.'

#### Dispute four: Work pay and conditions

Sofia started working at Hairball Choppers, a hairdressing salon, eight years ago as a hairdresser. When she was employed there, she signed a contract which set out her wages and conditions. She understands it's an individual contract. Sofia works at the salon from 8 am to 5 pm every day from Monday to Saturday. She receives annual leave and she gets her wages paid on a fortnightly basis.

A week ago, Sofia was talking with her colleague, who is also a hairdresser, and they happen to talk about the amount of pay they receive. Sofia's colleague is also employed full-time and has the same qualifications and level of experience as her. Her colleague mentions that her hourly pay rate is \$25. Sofia is horrified. She is getting paid \$20 per hour. After some searching, Sofia finds out that her pay is below the award wage.

Sofia raises this with her boss, Gerard, one afternoon. Gerard assures Sofia he will look into it. Two days later, Gerard approaches Sofia and says that she can't do anything about it because Sofia's contract says she is a contractor, and not an employee, and that she is too late in making a claim anyway.

Imagine you are a lawyer. Sofia comes to see you to help her out.

## Practice assessment task questions

Choose **one** of the above disputes.

- 1 Consider the facts of the case and advise whether, in your view, and on the balance of probabilities, they have a claim or defence (depending on the dispute). In your answer, address:
    - a The relevant law in question. (1 mark)
    - b A summary of the rights that are protected by the relevant law. (3 marks)
    - c If each of the elements is likely to be established by the plaintiff. (8 marks)
    - d Whether any defences might be able to be used by the defendant, and if so, the likelihood of those defences succeeding. (8 marks)
    - e Your conclusion on whether the plaintiff will be successful, and the reason(s) why. (5 marks)
- Total: 25 marks

## PRACTICE ASSESSMENT TASK

## UNIT 1 – Area of Study 1

## Changes to bail laws after tragic incident in Melbourne

In 2017, the Victorian Parliament passed the *Bail Amendment (Stage One) Act 2017* (Vic). The Act makes changes to bail laws in Victoria. Bail is the release of an accused person from custody on the condition that they will appear at the next court hearing. The changes to the laws means that it is now difficult for a person accused of certain offences, such as murder, aggravated home invasion, and certain drug offences, to be granted bail. Bail will only be granted if there are exceptional circumstances.

The changes came about after a tragic incident in Melbourne in January 2017. Dimitrios Gargasoulas has been charged with six counts of murder and 28 counts of attempted murder after he allegedly drove his car through Bourke Street in Melbourne during lunchtime, tragically

killing six people and injuring many others. It was reported that Gargasoulas was on bail at the time of the incident. Following this, Premier Daniel Andrews said that ‘We need to have a really close look at each other and every element of our bail system and we need to make profound change for the future to keep Victoria safe’.



## Practice assessment task questions

- 1 Define the following terms:
  - a fairness
  - b common law
  - c civil law.

(3 marks)
- 2 Is the *Bail Amendment (Stage One) Act 2017* (Vic) statute law or common law? Justify your answer.
 

(2 marks)
- 3 In relation to the case against Dimitrios Gargasoulas, justify one reason for the Victorian court hierarchy.
 

(3 marks)
- 4 What is the relationship between the law which makes murder a crime, and the role of individuals in achieving social cohesion?
 

(4 marks)
- 5 Describe two roles that a court will have to play in relation to bail laws.
 

(5 marks)
- 6 Will criminal law or civil law, or both bodies of law, be relevant to the tragic incident in Melbourne in January 2017? Give reasons for your answer.
 

(5 marks)

- 7 Explain how bail laws aim to achieve social cohesion and protect the rights of individuals. (6 marks)
- 8 Using examples, explain two features of the relationship between parliament and the courts in relation to bail laws. (6 marks)
- 9 Explain one way in which the legal system will try to achieve fairness and equality in the case against Gargasoulas. (6 marks)
- 10 Do you think that the new bail laws will be effective? Give reasons. In your answer, address each of the five characteristics of an effective law. (10 marks)
- Total: 50 marks

## PRACTICE ASSESSMENT TASK

### UNIT 1 – Area of study 2

#### Part 1

#### SIRSEI LION CHARGED

Sirse Lion is a 25-year-old university student from Lannister in Victoria. She is part of a ‘Lannister gang’. The Lannister gang’s main enemies are people who are part of the Stark gang, who live in the neighbouring suburb of Stark.

One night Sirsei and a few of her gang members decided to drive over to Stark and damage a few letterboxes, and egg a few houses. They continue to do this throughout the night, until Sirsei decides to ‘step things up’ and substantially damages a car parked outside one of the houses.

Before they could drive home, the Lannister gang members are confronted by several Stark gang members. They get into a big fight. The police arrive, and several people are arrested, including Sirsei. After some weeks, Sirsei is also charged with destroying property, an indictable offence.



### Practice assessment task questions

- 1 Referring to the above case study, describe two purposes of criminal law. (4 marks)
- 2 ‘Sirsei will need to prove her innocence’. Is this statement true? Justify your answer. (3 marks)
- 3 Who has the burden of proof in Sirsei’s case, and to what standard does it need to be proven? (2 marks)
- 4 Distinguish between a crime against the person and a crime against the property. Use examples from the above case study to demonstrate your response. (4 marks)

5 Is Sirsei a principal offender or an accessory? Justify your answer.

(3 marks)

6 Explain one difference between a summary offence and an indictable offence.

(3 marks)

7 Sirsei has been charged under Section 197 of the *Crimes Act 1958* (Vic). That act states that 'A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence'. Identify and describe the *mens rea* and the *actus reus* for this crime.

(6 marks)

Total: 25 marks

## Part 2

You have studied two criminal offences in this Area of Study. Choose one of those offences, and identify one recent article in which a person has been charged with that offence. Conduct as much research as you can about the circumstances of the crime and the offender.

Once you have done so, address each of the following for the offence:

1 What elements need to be proven by the prosecutor, and whether those elements will likely be proven. If you are unable to comment on one or more of the elements, then identify this, and explain what further information you might need.

(10 marks)

2 Any possible defences that may be raised, and whether those defences are likely to succeed. If you are unable to comment on one or more of the defences, then identify this, and explain what further information you might need.

(12 marks)

3 Your conclusion as to the likely culpability of the accused person.

(3 marks)

Total: 25 marks

## PRACTICE ASSESSMENT TASK

### UNIT 1 – Area of Study 3

Imagine you are a Melbourne barrister. You work in the areas of contract law, discrimination, void marriages and work pay and conditions. You have been approached by a prominent news channel to be interviewed about one of those areas of law (they have told you that you can choose). They have given you a set of questions that they are likely to ask you during the course of the interview, which will take only 3 minutes. They suggest that you prepare some answers for the questions, and that the answers be as clear and concise as possible. They tell you not to use any legal jargon, but that if you do, then the jargon needs to be explained.

You need to choose one of the above areas of law.

### Practice assessment task questions

The questions that they have given to you are as follows:

1 Does the area of law fall into the area of criminal law or civil law? Why?

(3 marks)

2 What is the main purpose of civil law?

(3 marks)

3 What are the rights that are protected by this area of law?

(4 marks)

4 What do the phrases 'burden of proof' and 'standard of proof' mean, and how are they relevant to a civil claim that can be commenced in this area of law?

(5 marks)

- 5 What do the terms 'remoteness' and 'break in chain of causation' mean? (2 marks)
- 6 Who are the potential parties to a claim in this area of law? (4 marks)
- 7 If somebody wanted to bring a claim in relation to this area of law, what do they need to prove? (6 marks)
- 8 Is there any time by which they need to make a claim, and if so, why is there a time limit? Shouldn't people be able to decide when they want to make a claim? (7 marks)
- 9 Can you provide a hypothetical example of somebody who may have a potential claim in this area of law for the audience, and explain:
- the elements the person would need to establish, and whether there are any that the plaintiff is weak on (6 marks)
  - the likely defences the defendant would raise, and whether one or more will succeed (6 marks)
  - whether the plaintiff is likely to be successful in establishing liability, and why. (4 marks)
- Total: 50 marks







# UNIT 2

## SANCTIONS, REMEDIES

## AND RIGHTS

**Source 1** The Supreme Court of Victoria (shown here) is the highest court in the state of Victoria. In Unit 2 you will look at how the courts such as the Supreme Court resolve criminal and civil cases.

# UNIT 2 – SANCTIONS, REMEDIES AND RIGHTS

## Area of Study 1 – Sanctions

### OUTCOME 1

On completion of this unit the student should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 2 — AREA OF STUDY 1 SANCTIONS	Chapter 11	Sanctions	<ul style="list-style-type: none"><li>• the principles of justice: fairness, equality and access</li><li>• institutions that enforce criminal law, such as the police and delegated bodies</li><li>• the balance between institutional powers and individual rights</li><li>• an overview of the role and criminal jurisdictions of the Victorian courts</li><li>• the role of the jury in a criminal trial</li><li>• the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation</li><li>• types of sanctions such as fines, community correction orders and imprisonment</li><li>• factors considered by judges in sentencing</li><li>• aspects of sentencing practices in Victoria and in one other jurisdiction</li><li>• alternative approaches to sentencing, such as the use of the Drug Court, the Koori Court and diversion programs.</li></ul>
	Chapter 12	Recent criminal cases	<ul style="list-style-type: none"><li>• two recent criminal cases and for each case:<ul style="list-style-type: none"><li>– an overview of the charges and the central facts of the case</li><li>– courts that may be or were involved</li><li>– sanctions that could be or were imposed and their appropriateness</li><li>– factors that may be or were taken into consideration in sentencing</li><li>– possible avenues of appeal</li><li>– the extent to which the principles of justice could be or were achieved.</li></ul></li></ul>



## Area of Study 2 – Remedies

### OUTCOME 2

On completion of this unit the student should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 2 – AREA OF STUDY 2 REMEDIES	Chapter 13	Remedies	<ul style="list-style-type: none"><li>• the principles of justice: fairness, equality and access</li><li>• methods used to resolve a civil dispute such as mediation, conciliation and arbitration</li><li>• institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies</li><li>• an overview of the role and civil jurisdictions of the Victorian courts</li><li>• the role of the jury in a civil trial</li><li>• the purposes of remedies</li><li>• types of remedies, such as damages and injunctions</li></ul>
	Chapter 14	Recent civil cases	<ul style="list-style-type: none"><li>• two recent civil cases and for each case:<ul style="list-style-type: none"><li>– an overview of the claim and the central facts of the case</li><li>– dispute resolution bodies that may be or were involved</li><li>– methods of dispute resolution and their appropriateness</li><li>– remedies that could be or were awarded and their appropriateness</li><li>– possible avenues of appeal</li><li>– the extent to which the principles of justice were or could be achieved.</li></ul></li></ul>

## Area of Study 3 – Rights

### OUTCOME 3

On completion of this unit the student should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system.

	CHAPTER	TITLE	KEY KNOWLEDGE
UNIT 2 – AREA OF STUDY 3 RIGHTS	Chapter 15	Rights	<ul style="list-style-type: none"><li>• an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law</li><li>• the influence of international declarations and treaties on the protection of rights in Australia</li><li>• the approach adopted by one other country in protecting rights</li><li>• possible reforms to the protection of rights in Australia</li><li>• one Australian case that has had an impact on the protection of rights in Australia, including:<ul style="list-style-type: none"><li>– the role of the individual in taking a case to court</li><li>– the facts and issues central to the case, including the rights in question</li><li>– the laws that applied to the case</li><li>– the outcome of the case and its impact on the rights of individuals and on the legal system</li><li>– possible conflicting attitudes in relation to the case.</li></ul></li></ul>

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# CHAPTER 10

## INTRODUCTION TO

### UNIT 2 – SANCTIONS,

### REMEDIES AND RIGHTS

**Source 1** In May 2015, Olga Neubert died after being shot in her car by her estranged husband Klaus Dieter Neubert. This makeshift memorial was erected at the site of the shooting in Hobart. A jury ruled Klaus Dieter Neubert was guilty of murdering his wife and of causing grievous bodily harm to Josephine Ramos Cooper, a passenger in the car. Cooper has now sued Neubert. This chapter provides an introduction to criminal and civil disputes, including the sanctions, remedies and rights involved.

## AIM

The aim of this chapter is to provide an introduction to the basic topics covered in Unit 2 of the VCE Legal Studies course. It is intended to support students who did not complete Unit 1 of the course, but also provides useful revision for those who did. Many of the topics covered in this chapter will be explored in greater detail throughout Unit 2.

## TOPICS COVERED

This chapter provides an overview of the following topics:

- the meaning of laws – including sources of law and the rule of law
- foundations of criminal law
- foundations of civil law
- the relationship between criminal cases and civil disputes.

## KEY LEGAL TERMS

**accused** a person charged with a criminal offence

**balance of probabilities** the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

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

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

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

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

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

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

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

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

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

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

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

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

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

**remedy** a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

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

**sanction** a penalty or sentence imposed by the courts on a person who has been found guilty of, or has pleaded guilty to, an offence

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

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

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

**summary offence** a minor offence generally heard in the Magistrates' Court

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# THE MEANING OF LAWS

## laws

legal rules made by a legal authority that are enforceable by the police and other agencies

## parliament

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

## sanction

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



**Source 1** Laws are enforceable legal rules. They define a range of different behaviours and actions as acceptable or unacceptable for individuals in a society.

Laws aim to achieve **social cohesion**; that is, a peaceful, unified and cooperative society in which all individuals respect one another, and the rules that govern them, in order to survive and prosper. Laws also aim to **protect the rights of individuals**. Individual rights include the right to freedom of expression and the right to freedom of movement.

## social cohesion

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

## statute law

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

## common law

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

## bicameral parliament

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

## Sources of law

'Sources of law' is a term used to refer to the people and organisations who make the laws. There are two main sources of law in Australia:

- **statute law** – law made by parliament
- **common law** – law made by the courts.

## Statute law

Statute law is law made by parliament. Parliament is the supreme (highest) law-making body in Australia, meaning that the final law-making power rests with parliament.

Laws made by parliament are known as statutes and are also called Acts of Parliament or legislation.

The Parliament of Australia (which sits in Canberra) and the Parliament of Victoria (which sits in Melbourne) are both **bicameral parliaments**, meaning that they each have two houses (or chambers).

The Commonwealth Parliament is made up of:

- The House of Representatives (also known as the lower house)
- The Senate (also known as the upper house).



**Source 2** Statute law is law made by parliaments such as the Parliament of Australia (shown here). Parliament is the supreme law-making body in Australia.

The Victorian Parliament is made up of:

- The Legislative Assembly (also known as the lower house)
- The Legislative Council (also known as the upper house).

Each of these houses of parliament is made up of members of parliament who are elected by the people at a general election. Within each parliament there is also a representative of the Queen, who acts as Australia's head of state.

Each parliament's role is to pass laws for the good government of the country, state or territory. For an Act of Parliament to pass in the Commonwealth Parliament or the Victorian Parliament, it must pass through both houses of parliament. After that, it will receive royal assent from the Queen's representative in that parliament.

An example of a new law made by the Victorian Parliament is the kilojoule labelling scheme. The law makes it compulsory to label all processed food with its energy content in kilojoules. To bring in the new law, the parliament made changes (called amendments) to the *Food Act 1984* (Vic), which was already an existing statute.

## EXTRACT

### *Food Amendment (Kilojoule Labelling Scheme and Other Matters) Act 2017* (Vic)

(No. 2 of 2017)

[Assented to 14 February 2017]

The Parliament of Victoria enacts:

#### Part 1 – Preliminary

##### 1 Purpose

The purpose of this Act is to amend the **Food Act 1984** –

- (a) to provide for a kilojoule labelling scheme; and
- (b) to make miscellaneous and technical amendments.

## Did you know?

There are nine parliaments in Australia:

- one Commonwealth Parliament
- six state parliaments
- two territory parliaments.

## Did you know?

Parliament also delegates its law-making powers to bodies called delegated authorities (or subordinate bodies). These bodies include local councils who will make specific types of laws.

## Common law

Common law is law made by the courts. It is also referred to as judge-made law or case law.

There are both federal courts and state courts in Australia. The Victorian courts are the Supreme Court (which has two divisions: the Trial Division and the Court of Appeal), County Court, Magistrates' Court, Children's Court and Coroners Court. The federal courts are the High Court of Australia, the Family Court, the Federal Court and the Federal Circuit Court.

The courts in Australia are ranked in a hierarchy, with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with minor cases.

The main or primary role of the courts in Australia is to apply existing laws (e.g. laws made by parliament) to the facts of the case and make a ruling on the case.



**Source 3** Common law is law made by the courts such as the High Court of Australia (shown here). Common law is also referred to as judge-made law or case law.

## precedent

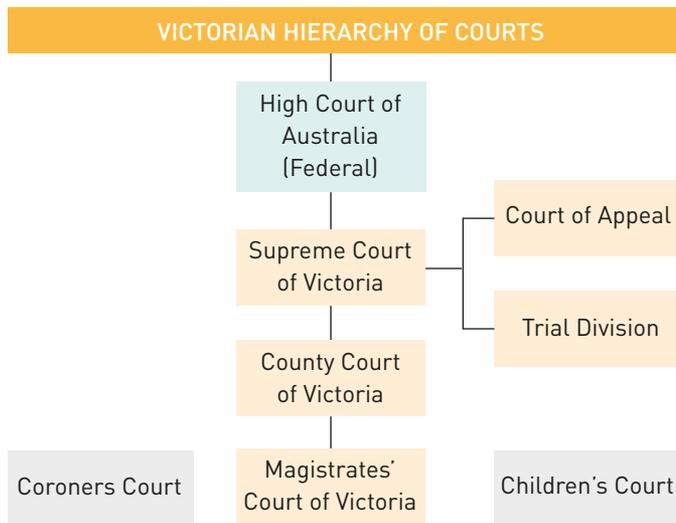
principle established in a legal case that is followed by courts in cases where the material facts are similar. Precedents can either be binding or persuasive

Judges can sometimes make common law when deciding a particular case before the court, although only superior courts (for example, the Supreme Court of Victoria or the High Court) can make law.

Judges in superior courts can make law when deciding the outcome of a case because the legal reasoning behind their decision can set a **precedent** (a principle of law) to be followed by other courts ranked lower in the same court hierarchy, in cases where the circumstances are similar.

For example, judges and magistrates in the lower courts (the Magistrates' Court and County Court) must follow the precedents or legal principles made by judges in the higher courts (such as the Supreme Court and High Court). This is the basis of the doctrine of precedent or common law principle by which the reasons for the decisions of courts higher in the hierarchy are binding upon courts lower in the same hierarchy. It has the benefit of ensuring that the laws made by courts are consistent and predictable.

Often, judges will make common law when they interpret statutes (legislation) made by parliament. This is known as **statutory interpretation**, and occurs when judges have to give meaning to words or phrases in a statute so it can be applied to resolve the case before them. An example of statutory interpretation is provided in the case of *Wright v McMurchy* (2011) 42 WAR 113 (5 August 2011) below.



**Source 4** The Victorian court hierarchy. Although the High Court is a federal court, it can hear appeals from the Supreme Court of Victoria, so it is considered part of the Victorian court hierarchy.

## LEGAL

## CASE

### What is a public place?

#### *Wright v McMurchy* (2011) 42 WAR 113 (5 August 2011)

In this case, the court was required to interpret the words 'public place' to determine whether conduct that took place in a taxi was conduct which occurred in a public place. The case involved a taxi driver who had used his mobile phone to take images of a female passenger while she was in the front seat of the taxi (including some that were taken up her skirt). The taxi driver argued that the conduct did not occur in a 'public place'.

The court considered past cases which had interpreted the words 'public place', and found that it has been generally held that a person in a motor vehicle located in a public place is treated as being in a public place. The court also noted that the interior of the taxi can be seen from the outside, and that the passenger photographed was a member of the public. It therefore held that the conduct in the taxi was conduct that occurred in a public place.

The accused was convicted. He appealed, but the Court of Appeal (WA) dismissed the appeal.



**Source 5** What is the meaning of a public place? In *Wright v McMurchy* the court was required to give meaning to the words 'public place' in a statute to resolve the case. This is known as statutory interpretation.



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

**Source 6** There are two main sources of law in Australia – statute law and common law.

## The rule of law

The **rule of law** means that laws apply equally to all members of society – including individuals, groups and members of the government – and that everyone must adhere to them. Nobody is above the law; not even the people who make the laws (such as politicians and judges). Everyone is bound by the same laws and can be held accountable if they break them.

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

The rule of law also means that laws should be made in such a way that people are willing and able to abide by them. The rule of law is a central foundation of Australia's legal and political systems. You will learn more about many of its principles, as part of the VCE Legal Studies course. In Unit 2, you will look at concepts such as:

- the right to silence
- the protection of rights in Australia
- the presumption of innocence.

### 10.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify two aims of laws.
- 2 Identify two sources of law, and who makes each type of law.
- 3 Define the term 'bicameral parliament'. Name the houses of the Victorian and Commonwealth parliaments.
- 4 What is statutory interpretation?

### Synthesise and apply

- 5 Look back at the pictures at Source 1.
  - a For each picture, identify the type of legal rule this is.
  - b What individual rights is each rule protecting?
  - c How does each rule aim to achieve social cohesion?
- 6 Read the extract from the *Food Amendment (Kilojoule Labelling Scheme and Other Matters) Act 2017* (Vic).

- a Who made the law?
  - b What is one of the purposes of the law?
  - c When was this law given royal assent?
- 7 Read the legal case *Wright v McMurchy*.
    - a What was the issue that needed to be decided by the court?
    - b What is the 'law' that was created in this case?
  - 8 Access the Rule of Law Institute of Australia's website. A link is provided on your obook assess.
    - a Go onto their education website and choose one video that interests you.
    - b Watch the video, and prepare a short summary to report back to your class on the video.
    - c Where other people have chosen the same video, join together to collate your summaries and present as a group.



Check your obook assess for these additional resources and more:

» **Student book questions**

10.1 Check your learning

» **Video tutorial**

Introduction to Unit 2

» **Weblink**

VicRoads

» **Weblink**

Australia's privacy laws  
(*The Conversation*)

**criminal law**

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

**crime**

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

**Criminal law** is the body of law that protects the community by:

- defining acts or omissions that are considered crimes
- setting down sanctions for people who commit crimes.

There are a number of laws which make certain acts (doing things) or omissions (not doing things) a **crime**. A crime is an act or omission that is:

- against an existing law
- harmful to individuals and society as a whole
- punishable by law.



**Source 1** Criminal law is the body of law that aims to protect the community by defining acts that are considered crimes and setting down sanctions for people who commit crimes. If you were to steal something from a shop, you would be breaking a criminal law.

For example, if you were to steal something from a shop, you would be breaking a criminal law because you would be committing the offence of theft (stealing). By stealing, you are causing harm to an individual (the owner of the shop) and doing something that is punishable by law.

An omission is something you should do, but do not do. For example, if you walked through a shop and a scarf became snagged on your bag, you might walk out of the shop with it perfectly innocently. But if you fail to return it as soon as you realise what has happened, you have omitted to do something. That omission can be an offence.

## Parties to a criminal case

There are two parties to a criminal case:

- the **accused** – i.e. the person who has been charged with allegedly committing the crime
- the **prosecution** – i.e. the lawyers responsible for taking a criminal case to court on behalf of the state, the victim and society.

In most criminal cases, some person or company has been the victim of the offence committed, but they are not a party to the case. That is, the case is between the prosecution and the accused (the defendant). The victim may, however, be a witness for the prosecution.

### Study tip

In your answers to questions in assessment tasks, where you can, use examples. For example, if you are asked to define 'summary offence', provide an example of one. This will help demonstrate your understanding of the legal concepts you are asked about.

**accused**

a person charged with a criminal offence

**prosecution**

see prosecutor

The result of a successful criminal prosecution is a finding of guilt and the imposition of a sanction. When there is a finding of guilt, the accused will generally then become known as the **offender**.

## Key concepts of criminal law

There are three key concepts of criminal law that you should become familiar with: the **presumption of innocence**, the **burden of proof**, and the **standard of proof**.

### Presumption of innocence

The presumption of innocence is a fundamental right in Australia. It is a guarantee to an accused that they will be assumed to be not guilty (innocent), and as far as possible treated as not guilty, until they are proven or plead otherwise (guilty).

### Burden of proof

The burden of proof (also known as the onus of proof) refers to the party with the responsibility of proving the facts of the case. In a criminal case, the prosecution holds the burden of proof.

However, in certain circumstances the burden of proof can be reversed; for example, if the accused pleads a defence such as mental impairment. In this situation the accused has the responsibility of proving he or she was not of sound mind at the time he or she committed the offence.

### Standard of proof

The standard of proof refers to the strength of evidence required to prove or succeed in a case. In a criminal case, the prosecution must prove the case **beyond reasonable doubt**; that is, there must be no reasonable doubt for an accused to be found guilty. If an accused has pleaded a certain defence (for example, mental impairment), then he or she must prove this defence on the **balance of probabilities**; that is, it is more probable than not that the defence applies.

## Summary offences and indictable offences

There are two types of crimes or offences:

- **summary offences**
- **indictable offences**.

Summary offences are **minor** criminal offences that are generally heard before a magistrate in the Magistrates' Court. Summary offences include minor theft, drink driving and minor assaults. The *Summary Offences Act 1966* (Vic) establishes a number of summary offences, as do various other statutes. These statutes also set down what the maximum sanction will be if a person commits that offence.

Indictable offences are **serious** criminal offences that are generally heard before a judge and **jury** in the County Court or the Supreme Court if the accused pleads not guilty. If the accused pleads guilty, there is no need for a jury (as a jury is only required to determine guilt). Many indictable offences are found in the *Crimes Act 1958* (Vic). Examples of indictable offences are rape, arson and manslaughter. The case of *DPP v Trueman* [2017] VSCA 24 (on the next page) also provides an example of an indictable offence.

Certain indictable offences can be heard in the Magistrates' Court as if they were summary offences. These are known as **indictable offences heard and determined summarily**. For example, in Victoria a magistrate may hear and determine any offence punishable by no more than 10 years imprisonment such as obtaining property by deception or destroying property where the amount involved does not exceed \$100 000. The accused must also give their consent to have the case heard in the Magistrates' Court rather than by a judge and jury.

#### **presumption of innocence**

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

#### **burden of proof**

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

#### **standard of proof**

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

#### **beyond reasonable doubt**

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

#### **balance of probabilities**

the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

#### **summary offence**

a minor offence generally heard in the Magistrates' Court

#### **indictable offence**

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

#### **jury**

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

#### **indictable offence heard and determined summarily**

a serious offence which can be heard and determined as a summary offence if the court and the accused agree

## LEGAL

## CASE

### Car accident leads to various charges

*DPP v Trueman* [2017] VSCA 24 (23 February 2017)

On 12 August 2015, Michael Trueman was driving on the wrong side of a road in Rosebud. He crashed into a minibus from a nursing home and killed two passengers. A third person was seriously injured and became a quadriplegic. Trueman's blood was found to contain significant levels of drugs. He was also found to be in possession of a glass ice pipe and a small plastic bag containing ice.



**Source 2** On 12 August 2015, Michael Trueman was driving on the wrong side of a road in the town of Rosebud in Victoria. He crashed into a minibus from a nursing home and killed two passengers.

Trueman pleaded guilty to two charges of culpable driving, one charge of negligently causing serious injury and one charge of possession of a drug of dependence, as well as a summary charge of driving while disqualified. He was sentenced to a total of 11 years in prison, and is required to serve a minimum term of 7 years and 6 months before he is eligible to be released.

The prosecution appealed the decision, including on the ground that the sentence imposed was manifestly inadequate. The Court of Appeal dismissed the appeal.

## 10.2

## CHECK YOUR LEARNING

### Define and explain

- Using two examples, define the term 'crime'.
- Fill in the following gaps.
  - The \_\_\_\_\_ and the \_\_\_\_\_ are the parties to a criminal case.
  - The possible outcome of a criminal case is a finding of \_\_\_\_\_ and the imposition of a \_\_\_\_\_.
  - The \_\_\_\_\_ of \_\_\_\_\_ is on the prosecution.
  - The standard of \_\_\_\_\_ is \_\_\_\_\_ doubt.

### Synthesise and apply

- Your friend believes that a person accused of a crime should be guilty until proven otherwise. Devise a way

in which you will seek to convince him or her that it is better that a person is presumed innocent until proven guilty.

- Conduct some research and find three examples of indictable offences and three examples of summary offences.
- Read the legal case *DPP v Trueman*.
  - Identify the words that suggest that this is about a criminal case and not a civil dispute.
  - What was the incident in this case that led to the charges?
  - Would there have been a jury trial in this case? Why or why not?
  - What was the sanction that was imposed?



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

» **Student book questions**

10.2 Check your learning

» **Weblink**

Innocence (Rule of Law Institute)

» **Weblink**

Presumption of innocence

**civil law**

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

**remedy**

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

**damages**

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

**plaintiff**

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

**defendant**

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

**counterclaim**

a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

**Civil law** deals with disputes between two individuals, groups or organisations over an alleged breach of rights by one of the parties. Civil law protects the rights of individuals by providing a way of returning the party who has had their rights breached to the position they were in before the breach took place. This is done through civil **remedies**, the most common of which is **damages** – an amount of money paid by the party in the wrong to the party whose rights have been infringed.

## Parties to a civil case

There are two parties to a civil case:

- the **plaintiff** – the party that is undertaking or initiating the civil action and may choose to commence court proceedings to seek redress (or compensation) for the wrong they have suffered, or use another dispute resolution body such as a tribunal
- the **defendant** – the person, group or organisation that the plaintiff claims has caused him or her loss.

## Key concepts of civil law

There are two key concepts of civil law that you should become familiar with: the burden of proof and the standard of proof.

### Burden of proof

In a civil dispute, the burden of proof lies with the plaintiff. This means that the plaintiff must establish that he or she is in the right; that is, their version of the facts is true.

The burden of proof can be reversed if the defendant pleads a **counterclaim** (that is, makes a claim against the plaintiff, in which case the roles are reversed) or pleads a particular defence to the claim. For example, if a defendant in a negligence claim argues that the plaintiff contributed to the harm or loss suffered, then the defendant has the burden of proving that fact.

### Standard of proof

In a civil case, the plaintiff must prove the case on the **balance of probabilities**, meaning the plaintiff must prove that the defendant was most likely in the wrong or breached their rights.



**Source 1** Civil law deals with disputes between two individuals, groups or organisations over an alleged breach of rights by one of the parties.

## Study Tip

You should start collecting articles which relate to both civil law and criminal law. Try and aim for one article per week for each. When you do so, write a short summary of the case. This will help you understand key concepts of criminal law and civil law.

## Types of civil law

Civil law disputes can take many different forms, including the following:

NEGLIGENCE	Acting carelessly, doing something that a reasonable person would not do (or failing to do something a reasonable person would do), which causes loss to another person (e.g. driving in a way that causes a collision).
TRESPASS	Going onto, or invading, another person's land, body, or goods (e.g. refusing to leave someone's property when told to go, or doing a medical procedure on someone without their consent).
DEFAMATION	Making false statements that lower a person's good reputation (e.g. spreading rumours that a butcher adds sawdust to his hamburger meat).
NUISANCE	Causing the loss of enjoyment or use of personal or public property (e.g. playing drums in your garage at 2:00 am).
FAMILY LAW	The law about divorce and family matters, including disputes between family members (e.g. financial agreements after a divorce, or which parent will look after the children on weekdays).

**Source 2** There are many types of civil disputes.

The case study below explores negligence claims issued by family members of the victims of Malaysia Airlines Flight 370. This case is explored in further detail in Chapter 14 on your [obook assess](#).

### CASE

### STUDY

## Disappearance of Flight MH370 results in civil claims

The mysterious disappearance of Malaysia Airlines Flight 370 (often referred to by flight number MH370) on 8 March 2014 has resulted in civil claims around the world.

The international passenger flight was carrying 12 crew members and 227 passengers from 15 nations. After departing Kuala Lumpur at 12.42 am, it disappeared from Malaysian military radar at approximately 2.22 am and never landed at its destination. The search for the plane, the passengers and crew continued for nearly three years, but they have never been found.

Since the tragic incident, family members of those who were on board the plane have issued claims in Australia and overseas. In February 2016, it was reported that Yen Li Chong, the wife of Chong Lin Tan, a passenger on the plane, had issued a claim in the Supreme Court of Victoria against Malaysia Airlines. Ms Chong alleges that Malaysia Airlines owed a duty of care to the passengers and crew, and failed to ensure that the flight was safe, monitored and tracked, that reasonable safety precautions were taken, and that the crew and employees did not commit any wrongful acts. Ms Chong sought damages against Malaysia Airlines.



Source 3 Malaysia Airlines Flight MH370 became an aviation mystery when it disappeared without a trace. Several civil claims have commenced in the years following its disappearance.

## 10.3

## CHECK YOUR LEARNING

### Define and explain

- 1 What is a civil dispute?
- 2 Who are the two parties to a civil dispute?
- 3 Identify two types of dispute resolution bodies.
- 4 Who has the burden of proof in a civil case? To what degree does this party need to prove the case?
- 5 What is a counterclaim?

### Synthesise and apply

- 6 Read the case study 'Disappearance of Flight MH370 results in civil claims'.
  - a Identify the words in this case study which give an indication that this is about a civil dispute, not a criminal case.
  - b What is the type of civil law that was relevant in this case? What does this area of civil law aim to protect?
  - c What were the allegations that Ms Chong made?
  - d Conduct some further investigation into this case. Has there been any update? Provide a summary of your findings.
- 7 Identify two other articles that are in relation to a civil case. Highlight the words in each article which give an indication that this is so. Briefly summarise the facts of each.



### Check your **obook** **access** for these additional resources and more:

» **Student book questions**

10.3 Check your learning

» **Weblink**

*Hockey v Fairfax* should start the debate on defamation law reform (*The Conversation*)

» **Weblink**

Family Law (Victoria Legal Aid)

# 10.4

## THE RELATIONSHIP BETWEEN CRIMINAL CASES AND CIVIL DISPUTES

### assault

the intentional or reckless use of force or the threat of force against another person without a lawful excuse

There is some overlap between criminal cases and civil disputes. Some crimes, such as an **assault**, can give rise to a criminal prosecution brought by the state as well as a civil action brought by the victim. The difference is that when a crime has been committed, the offender's actions give rise to a court action by the state, and a sanction (penalty) of some kind. In a civil action, the defendant's actions give rise to a court action by another citizen, and if successful generally leads to the payment of money as compensation for the harm caused.

In cases such as defamation and negligence, where this occurs, it is only the more serious examples of wrongdoing that are treated by the state as criminal acts. They are then called, for example, 'criminal defamation' or 'criminal negligence' because they are extremely serious.

### Key differences between criminal cases and civil disputes

In instances where the same wrongdoing gives rise to both a criminal case and a civil action, the two cases will be heard separately and may be heard in different courts. The outcome of one does not affect the outcome of the other, but a guilty verdict in the criminal case may provide a stronger basis for the plaintiff to succeed in the civil action.

It is possible for an accused to be found not guilty in a criminal case, but found liable in a civil case relating to the same wrong. This may be because the standard of proof in a criminal case is much higher than in the civil case. The jury (or magistrate if it was a summary offence or an indictable offence heard summarily) may not have found beyond reasonable doubt that the accused was guilty. However, in the civil case, the judge or the jury of six may believe that the plaintiff's version of facts is more believable than the defendant's version, and may therefore find the defendant liable.

The case study below highlights how a criminal case can also result in a corresponding civil lawsuit.

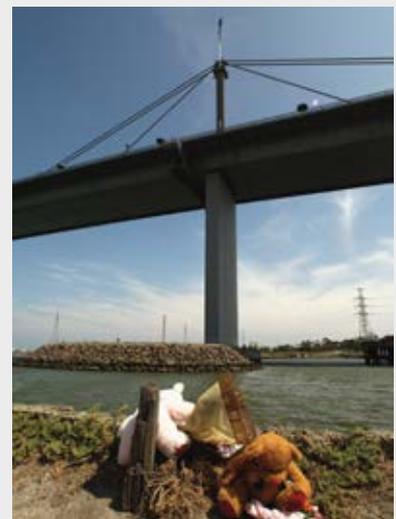
### CASE

### STUDY

### Darcey Freeman death leads to civil claim

On 29 January 2009, a four-year-old girl by the name of Darcey Freeman died when she was thrown off Melbourne's West Gate Bridge by her father Arthur Freeman. It was supposed to be Darcey's first day at school. In 2011, Freeman was sentenced to 32 years in prison for Darcey's murder.

Senior-Constable Tamara Wright – the officer in charge of the murder scene where Darcey's body was retrieved – has won the right to sue the state. The *Herald Sun* reported that she watched paramedics frantically try to save Darcy and suffered injury, loss and damage as a result. Wright claims Victoria Police and VicRoads failed in their duty of care to her following the incident.



**Source 1** A tribute left for Darcey Freeman at the base of the West Gate Bridge

# Differences between criminal cases and civil disputes

The key differences between criminal cases and civil disputes are set out in Source 2 below.

	CRIMINAL CASE	CIVIL DISPUTE
Person bringing the action	Prosecution, on behalf of the state	Plaintiff
Person defending the action	Accused	Defendant
Case name	<i>DPP v Accused</i> (also <i>R v Accused</i> )	<i>Plaintiff v Defendant</i>
Consequence of action	Sanction	Remedy
Burden of proof	Prosecution	Plaintiff
Standard of proof	Beyond reasonable doubt	On the balance of probabilities
Evidence/investigations	The police investigate on behalf of the state	The plaintiff gathers the evidence to establish the case
Jury	<ul style="list-style-type: none"> <li>No jury in the Magistrates' Court</li> <li>Jury of 12 in higher courts when the accused pleads not guilty</li> </ul>	<ul style="list-style-type: none"> <li>No jury in the Magistrates' Court</li> <li>Jury of six in higher courts is optional</li> </ul>

**Source 2** The differences between criminal cases and civil disputes

## 10.4

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain how one action can give rise to both a criminal case and a civil dispute.
- 2 Why is it possible for an accused to be found not guilty in a criminal case, but liable in a civil case?

### Synthesise and apply

- 3 Read the case study 'Darcey Freeman death leads to civil claim'.
  - a What happened to Darcey Freeman?
  - b Who is Senior Constable Wright and what was her role in the Darcey Freeman case?
  - c Who is the plaintiff and who are the defendants in this case?
- 4 Look back at Source 1 on page 298 and conduct some further research on the case.
  - a What happened to Olga Neubert?
  - b What was the outcome of the trial against Klaus Dieter Neubert?
  - c Josephine Ramos Cooper has made a civil claim against Klaus Neubert in relation to the murder. What is the claim that Ms Cooper is making?
  - d What is Ms Cooper seeking?
  - e If Klaus Neubert had been found not guilty, would Ms Cooper still have a claim? Give reasons.
  - f What is the current status of Ms Cooper's claim?



### Check your **obook** assess for these additional resources and more:

» **Student book questions**

10.4 Check your learning

» **Going further**

OJ Simpson

» **Weblink**

Family Violence and Criminal law

A photograph of several Victoria Police officers in uniform walking on a city street. They are wearing blue uniforms with high-visibility yellow-green vests and blue helmets with checkered bands. The background shows a busy urban environment with buildings, a bridge, and traffic lights. A red banner is overlaid on the image with the text 'CHAPTER 11'. Below it, a yellow banner contains the word 'SANCTIONS'. There are also two solid blue horizontal bars below the yellow one.

# CHAPTER 11

## SANCTIONS

Source 1 A sanction is a penalty or punishment imposed by the courts on individuals or companies that have committed a criminal offence. In Victoria, there are a number of institutions that enforce criminal law, but Victoria Police is the largest and most visible of these. In this chapter, you will learn about the institutions that enforce criminal law and discover how criminal cases are heard and how sanctions are imposed.

## OUTCOME

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 11 and 12), you should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.

## KEY KNOWLEDGE

In the chapter, you will learn about:

- the principles of justice: fairness, equality and access
- institutions that enforce criminal law, such as the police and delegated bodies
- the balance between institutional powers and individual rights
- an overview of the role and criminal jurisdictions of the Victorian courts
- the role of the jury in a criminal trial
- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
- types of sanctions such as fines, community correction orders and imprisonment
- factors considered by judges in sentencing
- aspects of sentencing practices in Victoria and in one other jurisdiction
- alternative approaches to sentencing, such as the use of the Drug Court, the Koori Courts and diversion programs.

## KEY SKILLS

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

- define and use legal terminology
- research, analyse and apply information in relation to criminal law
- describe the institutions that enforce criminal law
- explain the role of the Victorian courts and juries in criminal cases
- discuss the principles of justice in relation to the enforcement of criminal law and sanctions
- discuss the ability of sanctions to achieve their purposes
- discuss approaches to sentencing.

## KEY LEGAL TERMS

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

**community correction order (CCO)** a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

**delegated body** an authority or agency given power by the Victorian Parliament to make and/or enforce laws

**denunciation** one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

**diversion program** a method used in the Magistrates' Court and Children's Court to divert offenders away from the court and avoid a criminal record by placing them on a plan

**Drug Court** a specialist court of the Magistrates' Court which sentences offenders to a Drug Treatment Order where drugs or alcohol contributed to the commission of the offence

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

**fairness** one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

**fine** a sanction that requires the offender to pay an amount of money to the state

**imprisonment** a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

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

**Koori Court** a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people

**protection** one purpose of a sanction; a strategy designed to safeguard the community from an offender in order to prevent them from committing further offence (e.g. by imprisoning them)

**punishment** one purpose of a sanction; a strategy designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

**rehabilitation** one purpose of a sanction; a strategy designed to reform an offender in order to prevent them from committing offences in the future

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# INTRODUCTION TO SANCTIONS

## criminal law

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

## prosecution

the Crown in its role of bringing a criminal case to court (also called 'the prosecutor')

## Director of Public Prosecutions (DPP)

the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

**Criminal law** aims to protect the community by defining what a crime is and determining appropriate penalties for people who commit crimes. Even though various laws are in place which establish crimes and sanctions, often crimes are committed in the community, and a criminal case will need to be heard and determined by the relevant court. The role of the court will be to decide whether the person is guilty of the offence, and impose a penalty on that person.

Criminal cases are commenced by the **prosecution**, who pursues or undertakes the case on behalf of the state. In Victoria, the **Director of Public Prosecutions (DPP)** along with the **Office of Public Prosecutions (OPP)** prosecute **indictable offences**. For **summary offences**, sometimes an officer of the Victoria Police will prosecute the case, though this depends on the body that is enforcing the law. Indictable offences and summary offences are dealt with differently by the courts because of their seriousness. You will explore in this chapter the ways in which they are dealt with.

An **accused** can be a human being, a company or an association. That is, there are some laws that enable a company to be charged with a crime. These include crimes such as tax fraud and workplace health and safety offences. It is not possible for a company to go to jail, but it is possible for a director to go to jail if he or she was also involved in the crime.

An example of a company being charged and receiving a sanction is provided in the case study below.

## CASE

## STUDY

### Office of Public Prosecutions (OPP)

the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

## Backpacker injury results in fine for company

T&R Contracting Shepparton is a labour hire company that provides the fruit packing industry with backpacker workers.

In 2015, an Irish backpacker by the name of Annie Dunne was travelling in Australia. After being hired through T&R Contracting Shepparton, Dunne started working for Kalafatis Packing Pty Ltd in its packing factory in Shepparton. While Dunne was cleaning under

an operating conveyor, her hair got caught in the machines and she was seriously injured. The accident resulted in her scalp being torn off and one of her ears being ripped off.

WorkSafe Victoria, which has the power to prosecute offences in relation to work health and safety, charged T&R Contracting Shepparton for failing to ensure that instructions and training was provided by Kalafatis Packing to its employees. T&R Contracting pleaded guilty and was fined \$60 000 in the Shepparton Magistrates' Court in January 2017. It was reported that Kalafatis Packing and its manager were also facing charges.



**Source 1** In 2015, a labour hire company that provides the fruit packing industry with backpacker workers was charged and fined after a horrific workplace incident.

When a crime has been committed, people expect that justice will be achieved. In this chapter you will consider the principles of justice in relation to criminal cases. You will look at the ways that criminal law can be enforced, the role of the courts and the jury in determining (i.e. ruling on) criminal cases, and sentencing practices. In particular, you will explore:

- institutions that enforce criminal law
- the balance between institutional powers and individual rights
- the role and jurisdiction of the Victorian courts when determining criminal cases
- the role of the jury in a criminal trial
- sentencing practices (including the purposes and types of sanctions, alternative approaches to sentencing and sentencing practices in Victoria and in Norway).

These topics are designed to help you develop an appreciation for how criminal law is enforced and how criminal cases are resolved. Unlike civil disputes (which can be heard by bodies other than the courts), criminal cases must be heard by the courts. The courts decide a person's guilt and hand down a **sanction**.

**indictable offence**

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

**summary offence**

a minor offence generally heard in the Magistrates' Court

**accused**

a person charged with a criminal offence

**sanction**

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

**11.1**

**CHECK YOUR LEARNING**

**Define and explain**

- 1 Who are the two parties to a criminal case?
- 2 Outline two aims of criminal law.
- 3 Identify two crimes that a company may commit.

**Synthesise and apply**

- 4 Read the case study 'Backpacker injury results in fine for company'.
  - a Who was injured?
  - b What was the crime?
  - c Who was charged with the crime?
  - d Would Annie Dunne have been a party to this case? Give reasons for your answer.
  - e What sanction was imposed?
  - f Who else is facing criminal charges? Why?
  - g Conduct some research. Can you find anything about what happened to the other parties facing charges?

**Analyse and evaluate**

- 5 A new Prime Minister has been elected in Australia, and has radical ideas about the need for laws. She believes that there is no need for laws setting out what is criminal and what is not, and that people will know what is acceptable behaviour and what is not based on their own values and moral standards.
 

Conduct a debate in class arguing for and against this position.
- 6 'Summary offences have more of an effect on the community than indictable offences, because they occur more often and they often lead to more serious offences. The DPP should therefore prosecute all summary offences.'
 

Do you agree with this statement? Give reasons for your answer.



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

» **Student book questions**

11.1 Check your learning

» **Video tutorial**

Introduction to Chapter 11

» **Going further**

An insight into the DPP's office

# THE PRINCIPLES OF JUSTICE IN CRIMINAL LAW

Justice is a word you often hear when people talk about the law – particularly when it comes to verdicts in criminal cases.

Every day, newspaper articles, news reports, websites and radio commentators talk about the outcome of certain criminal cases being ‘just’, while others are seen as ‘unjust’. There is even a common saying that ‘justice delayed is justice denied’. So, while most people would agree that the criminal justice system should achieve justice, what does ‘justice’ actually mean?

In criminal law, justice can mean different things to the different parties or people involved. For example, if a person accused of committing a crime is seeking **bail**:

- the police may think justice is achieved if bail is refused because the accused could be a danger to society
- the victim and his or her family members may think justice is achieved if bail is denied because they have suffered as a result of the accused’s actions
- the magistrate deciding the bail application may think justice is achieved if bail laws are correctly applied to the accused’s circumstances, regardless of whether bail is granted or refused
- the accused may think justice is achieved if he or she is granted bail because they will not be held in custody before pleading, or being found, guilty of the offence.

To determine whether justice has been achieved in a particular case, you should consider the following three principles of justice:

- **fairness**
- **equality**
- **access.**

If an objective and reasonable person, after considering all of the factors in the case, and the various aspects of the criminal justice system, believes that each of those three principles of justice have on the whole been achieved, then it is likely that there has been justice.

## Fairness

In the criminal justice system, fairness means there should be fair legal processes and a fair hearing or trial. That is, laws should be reasonable, and processes (including investigative, pre-hearing and trial processes) should ensure that people have an opportunity to present their case and challenge or question the other party’s case. A fair hearing or trial also means that the processes used to determine guilt in a criminal case should be objective and without discrimination.

We expect laws to be fair. For example, in criminal law we expect that the maximum penalty or sanction for a crime shouldn’t be any more than what society expects for that particular crime. If the penalty was far more or far less, then we may consider that law to be unfair. In a criminal trial, if a person does not have an opportunity to present their arguments to the judge, or they are confronted with compelling evidence which they have seen for the first time at trial, then this would be considered unfair.



Source 1 Is this a fair race?

### bail

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

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

# Equality

Equality is the second principle of justice. It means that all persons are treated equally regardless of certain attributes or characteristics, such as status, race, religion, sex, or culture.

In criminal cases, it means that people should be treated equally before the law, and people should have an equal opportunity to present their case. Laws and processes should not discriminate against another person, and the laws should ensure that another person or body cannot discriminate against another. When a person is accused of a crime, it means that their case should be heard and determined by people who are objective and unbiased, and they should not be treated with favour or disadvantageously.

In some circumstances, however, for fairness and equality to be achieved, a person may need to be treated differently. For example, consider an accused person who has learning difficulties. Is it appropriate for the accused to be treated exactly the same as the prosecutor who may have no learning difficulties and would most likely have significant experience in criminal law and processes? In this situation, for fairness to be achieved, the accused person may need to be treated differently.



**Source 2** In 1955, an African-American woman by the name of Rosa Parks was arrested for refusing to give up her seat to a white passenger on a public bus. This was a key event in the struggle for civil rights. At this time in America, African-Americans were not treated equally by the law.

# Access

Access is the last principle of justice. Access means that all parties should be able to understand their legal rights, and should have the right and opportunity to use the institutions, processes and systems that are used for criminal cases. This not only includes access to the courts, but also to all of the institutions and people that provide legal information, advice and representation, and to information about a person's rights. It also means that victims should get access to information about the criminal case, including information about the hearing dates, whether the accused has pleaded guilty, or about the release date of the prisoner if the offender was imprisoned.

Australia's legal system is often criticised for failing to provide adequate access to justice to many groups within our society. One of the biggest reasons for this is because our legal system is considered to be too expensive, and only accessible to those who are able to afford it.

The following extract from the [Australian Bar Association](#) website provides further insight into the principle of access.

## EXTRACT

### Access to justice

It is a key priority area of the Australian Bar Association to advocate for fair and equal access to justice for all. The concept of fair and equal access to justice requires that, regardless of means, all people have access to high quality legal services or effective dispute resolution alternatives necessary to protect their rights and interests. Fair and equal access to justice also requires that all people, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities before the law, and in employment, education and other sectors and services within our society.

Source: Australian Bar Association, *Access to Justice*

## Study tip

Keep each of these three principles in mind when exploring the topics in Unit 2. In the margin of your notes, make a comment when you see one of these principles touched on. The more you are able to apply each of these three principles to actual cases, the more you will be able to understand what they mean.

## Australian Bar Association

the main organisation that represents barristers in Australia. It aims to promote the rule of law and advocates for fair and equal access to justice for all

## EXAMPLE

### Don Pepp and his pet turtles

Don Pepp is from Mauritius. Two months ago he visited Australia and brought with him his two pet turtles without authorisation from the government, and in breach of various quarantine laws. A subsequent search of the turtles found drugs attached to their shells. Don has been charged with drug trafficking and various other offences. The DPP is the prosecutor, and the trial will start next month in the County Court. Don has been getting information and assistance from legal aid bodies about his rights and about the trial process. He has also been getting help from the County Court's self-represented coordinator about trial processes.

## 11.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify and define the three principles of justice.
- 2 Describe one of the principles of justice and explain how it could be achieved in a criminal case.

### Synthesise and apply

- 3 Conduct some research and find at least three definitions of 'justice'. What does this tell you about the concept of justice?
- 4 Link each of the following statements to the principle of justice that you think it **most** closely describes.
  - a The use of an unbiased judge.
  - b Free legal information to an accused.
  - c An information session about knowing your legal rights.
  - d The prosecution telling the accused the witnesses that will give evidence at trial.
  - e The use of a randomly selected jury.
  - f Both parties given the opportunity to make opening submissions.
  - g The victim being told by the police about the progress of the case.
  - h The accused assisted by the judge about procedural matters.
  - i The jury not being told about the accused's prior convictions at trial.

- 5 Form pairs or small groups and look at Source 1.
  - a Is this a fair race?
  - b If not, how would you make this a fair race?
  - c Draw a cartoon or picture of your own that you think reflects two or more people being treated equally, but not fairly (you may wish to find something online if you prefer). Present this to the rest of the class, and engage in a debate about fairness and equality in relation to the cartoon or picture.

### Analyse and evaluate

- 6 Read the example 'Don Pepp and his pet turtles'.
  - a Identify how the example demonstrates the criminal justice system achieving fairness, equality and access.
  - b Is it still possible for justice not to be achieved in this example? Give reasons.
  - c Imagine it is now Don Pepp's trial. Identify all the features of the trial that would be needed for justice to be upheld. Write these features down on separate post-it notes and place them on the whiteboard. Discuss these as a class.
- 7 In your view, which individuals or groups in society do you think might be most disadvantaged if they were charged with a crime? Give reasons.



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

» **Student book questions**

11.2 Check your learning

» **Video tutorial**

How to incorporate the principles of justice in an answer

» **Worksheet**

Fairness, equality and access

» **Weblink**

Jurors and social media (*The Conversation*)

## INSTITUTIONS THAT ENFORCE CRIMINAL LAW

If an individual or company has broken the law by committing a crime, the law must be enforced so that the individual or company is brought to justice. But who actually has the power to enforce criminal laws?

In Victoria, the following institutions have the power to enforce certain types of criminal laws:

- the police, including Victoria Police and the Australian Federal Police
- other delegated bodies, including WorkSafe Victoria and local councils.

### The police

The role of the police is to serve the community and the law and to enforce criminal law. The police preserve the peace, protect life and property, prevent crime, detect and apprehend offenders and assist victims of crime or other people in times of emergency.

If a crime is committed in Victoria, depending on the nature of the crime, Victoria Police or the Australian Federal Police may be involved. These two bodies are explored further below.

### Victoria Police

**Victoria Police** was established in 1853, not long after the Colony of Victoria was established. The police force is governed by the *Victoria Police Act 2013* (Vic). As at 30 June 2016, there were 18 146 members of the police force, which includes its Chief Commissioner, deputy commissioners, assistant commissioners and various ranking police officers such as constables, sergeants and senior sergeants.

The role of Victoria Police is to serve the Victorian community and **uphold the law** to promote a safe, secure and orderly society.

Victoria Police is the main institution that enforces criminal law relating to indictable offences and most summary offences in Victoria. Their role in enforcing criminal law is to:

- talk to victims or witnesses about what happened
- question possible suspects
- examine the scene(s) of the crime
- look for and gather physical or forensic evidence
- conduct searches of people or property
- arrest accused persons
- charge people with the offences that most fit the crime.

Victoria Police also has forensic experts to assist with investigations, who are able to analyse evidence such as drugs, paint, fibres and biological material such as hair and blood.

For summary offences, police officers have the power to prosecute the case in court. These are normally undertaken by police prosecutors who are specialised in conducting these cases. For indictable offences, the police will undertake the investigations, gather the evidence and charge the accused persons. The information gathered will then be given to the Office of Public Prosecutions (OPP) who will be responsible for the prosecution in court.

From January to December 2016, there were 552 005 offences recorded by Victoria Police.



**Source 1** Victoria Police officers in action

#### *Did you know?*

In 1924 women were allowed to be sworn members of Victoria Police. However, it was not until 1972 that married women were allowed to join the force.



**Source 2** The investigation of possible terror attacks, and response to terror-related emergencies, are roles played by the Australian Federal Police (AFP).

To allow Victoria Police to enforce the law, various statutes provide it with a number of powers. For example:

- Section 458 of the *Crimes Act 1958* (Vic) provides a Victorian police officer with the power to arrest a person without a warrant (a document issued by a court that allows a person such as a police officer to undertake an action such as arrest) in some circumstances
- the *Criminal Procedure Act 2009* (Vic) enables a police officer to take fingerprints of suspects in certain circumstances.

## Australian Federal Police

In Australia, there is also the **Australian Federal Police** (AFP), established under the *Australian Federal Police Act 1979* (Cth). The AFP consists of a Commissioner of Police, deputy commissioners, AFP employees, special members and special protective service officers.

The role of the AFP is to investigate and enforce offences that have a federal aspect. Offences that have a federal aspect include those offences that are against the law of the Commonwealth or a territory. For example, the Commonwealth Criminal Code establishes a number of Commonwealth offences. The AFP is able to enforce the Commonwealth Criminal Code and investigate any breaches of that Code.

The AFP is provided with various powers to enforce criminal law. For example, protective service officers have the power to arrest a person without a warrant and conduct searches of a person.

Depending on the nature of the offences, the AFP may work with Victoria Police or other investigative agencies (including other state police forces) to identify and arrest possible offenders, as illustrated in the following case study.

### CASE

### STUDY

## Terror raids involve AFP and Victoria Police

On 23 December 2016, four men were charged over an alleged plan to attack Federation Square, Flinders Street Station and St Paul's Cathedral. It is alleged that the attack was to take place on Christmas Day in 2016 and would involve explosives and weapons.

Abdullah Chaarani, Hamza Abbas, Ahmed Mohamed and Ibrahim Abbas, all in their 20s, were arrested and charged in relation to the alleged plan. The charges relate to preparing or planning a terrorist attack in December 2016, contrary to Section 101.6 of the Australian Criminal Code.

The arrests took place across various locations in Melbourne, including Flemington, Meadow Heights and Gladstone Park, and involved approximately 400 officers from both Victoria Police and the Australian Federal Police, and other agencies including the Australian Security Intelligence Organisation (ASIO). The operation was coded 'Operation Kastelholm'.

The accused persons appeared in the Melbourne Magistrates' Court in April 2017.



**Source 3** Police move in on a house in Meadow Heights, Victoria during terror raids on 23 December 2016.

## Delegated bodies

In addition to state and federal police forces, there are a number of bodies in Victoria that are given authority by the Victorian Parliament to enforce criminal laws. These bodies are known as **delegated bodies** because they are delegated (or given) power by the parliament to make and/or enforce laws.

The power to enforce criminal law is given by an **Act of Parliament**, which will specify who has the power to enforce the law. For example, Section 48 of the *First Home Owner Grant Act 2000* (Vic) gives power to the Commissioner of State Revenue to impose a penalty if a person has been dishonest when obtaining a first home owner grant (being a payment to a person who buys their first home and who is eligible for a payment by the Government to help them buy their home).

**delegated body**  
an authority or agency given power by the Victorian Parliament to make and/or enforce laws

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

## Victorian delegated bodies

Delegated bodies in Victoria that have the power to enforce criminal law are listed in Source 4.

DELEGATED BODY	DESCRIPTION
Consumer Affairs Victoria	Consumer Affairs Victoria can take action in relation to breaches of consumer trading laws and tenancy laws.
Environmental Protection Authority (EPA)	The EPA has the power to investigate breaches of environmental laws and commence proceedings for offences committed in relation to the environment.
Local councils	Local councils govern at a local level and have the power to enforce local laws where a local law makes an act or an omission a criminal offence.
State Revenue Office (SRO)	SRO is Victoria's tax collection agency and administers laws relating to taxes, duties and levies. For example, the SRO can take action in relation to providing false and misleading information to obtain a first home owner grant.
VicRoads	VicRoads has authority to prosecute certain road and traffic offences. It can also issue infringement notices for breaches of road rules.
Victorian Work Cover Authority (WorkSafe Victoria)	WorkSafe monitors and enforces compliance of Victoria's occupational health and safety laws. It can investigate breaches of laws and prosecute in relation to any breaches.

**Source 4** Types of delegated bodies in Victoria that have the power to enforce criminal law

## Commonwealth delegated bodies

There are also Commonwealth bodies that have the power to enforce criminal law. Some of these are set out below.

DELEGATED BODY	DESCRIPTION
Australian Securities and Investments Commission (ASIC)	ASIC will investigate breaches of legislation, including where directors have acted in breach of their duties. Sometimes the matter will be prosecuted by the Commonwealth Director of Public Prosecutions (CDPP).
Australian Taxation Office (ATO)	The ATO investigates serious tax-related fraud offences. They will prosecute summary offences, such as failing to lodge tax returns, and will generally refer serious cases to the CDPP.

**Source 5** Types of Commonwealth delegated bodies that have the power to enforce criminal law

There are also a number of other bodies and agencies that can refer matters to the DPP or CDPP to prosecute. They include the Department of Human Services (in relation to welfare fraud) and AUSTRAC, the Commonwealth's anti-money laundering and terrorist financing intelligence agency.



**Source 6** WorkSafe Victoria is a delegated body established by the Victorian Parliament to monitor and enforce workplace health and safety laws.

## Focus on WorkSafe Victoria

WorkSafe Victoria is the trading name of the Victorian Work Cover Authority, established under the *Occupational Health and Safety Act 2004* (Vic). The *Occupational Health and Safety Act* is the main statute in Victoria which aims to ensure the health, safety and welfare of employees and other persons at work. Laws that regulate safe work conditions are designed to ensure that workers are protected, and do not feel their safety is at risk when working. These laws also ensure that businesses do not have to pay the financial costs that are associated with having unsafe practices.

One of the functions of WorkSafe Victoria is to monitor and enforce compliance with the *Occupational Health and Safety Act* and other statutes such as the *Dangerous Goods Act 1985* (Vic). Various sections of these and other statutes make it a criminal offence if that section is not complied with.

For example, Section 21 of the *Occupational Health and Safety Act* imposes a duty on an employer to provide and maintain a working environment that is safe and without risks to health (as shown in the extract below).

### Study tip

You can find out about recent WorkSafe prosecutions on their website, which provides a detailed summary of the action taken and the penalty imposed. It is a useful way to get an idea of the sorts of incidents that WorkSafe will investigate and prosecute. A link is provided on your [obook assess](#).

### EXTRACT

#### *Occupational Health and Safety Act 2004* (Vic)

##### 21 Duties of employers to employees

(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Penalty: 1 800 penalty units for a natural person; 9 000 penalty units for a body corporate.

In many prosecutions, WorkSafe will work with the OPP to prosecute the matter. This will normally mean that WorkSafe will investigate the breaches and prepare the evidence, but the preparation and conduct of the hearings will be conducted by the OPP. This is a result of a memorandum of understanding entered into between WorkSafe and the OPP which regulates the management of prosecutions.

The following case study highlights a tragic incident in relation to occupational health and safety.

## CASE

## STUDY

### Swanston Street wall collapse

In March 2013, a tragic incident occurred in Melbourne, Victoria, when a 15m section of a brick wall tumbled from a former brewery site in Swanston Street. The wall and attached advertising hoarding (i.e. signage) were pulled down when strong winds hit the city. Three people were killed as a result – brother and sister Alexander and Bridget Jones, and Marie Fiawoo.

Building company Grocon was in charge of the building site. In November 2014, Grocon was fined \$250 000 as a result of the incident after pleading guilty to one charge of breaching Section 26 of the *Occupational Health and Safety Act*.

Aussie Signs also pleaded guilty to one charge made under Section 23 of the *Occupational Health and Safety Act*. The charge was in relation to the company's involvement in the attachment of the timber hoarding to the wall, which increased the risk of it collapsing. It was fined \$250 000 by Judge Parsons of the County Court.



Source 7 A tribute to Bridget and Alexander Jones left at the site

## Focus on local councils

Local councils, sometimes referred to as municipal councils, are established to ensure the peace, order and good government of local districts. They govern at a local level, and make laws and ensure compliance with laws in their geographical area. Each local area has different needs, and local councils should be aware of the needs of the people in their local area.

There are 79 different local councils in Victoria. They have been given authority by the Victorian Parliament under the *Local Government Act 1989* (Vic) to make and enforce local laws, often called **by-laws**, for their own local district. These include laws relating to building and planning permits, childcare centres, rubbish and local libraries.

For example, the General Purposes Local Law 2015 is a law passed by Maribyrnong City Council. Section 13 of that law makes it an offence for a person to consume alcohol or be in possession of alcohol, other than in a sealed container, on a road or council land. The penalty for committing that offence is 20 penalty units. If that law is broken, the Maribyrnong City Council could enforce the law by:

- warning the person who has breached the law
- directing the person to cease the activity
- issuing an infringement notice
- commencing legal proceedings.

In addition to local laws, there are certain Victorian statutes which give the power to local councils to enforce the law if there has been an offence committed. For example, the *Food Safety Act 1984* (Vic) establishes a number of offences in relation to food handling. The purpose of establishing these offences is to ensure that food for sale is safe and suitable for human consumption. The *Food Safety Act* gives power to a council to bring proceedings for offences under the Act.

The following legal case is an example of a food safety offence.

## Mordialloc café charged

### *Kingston City Council v Wong* [2013] VMC 6 (10 April 2013)

Proceedings were commenced by Kingston City Council against a company and its director, which runs a food business in Mordialloc.

In 2012, the business was inspected by an officer of Kingston City Council. The inspector found improper storage of food, improper refrigeration and temperature control, mouldy food, a lack of separation of raw and cooked food, an abundance of cockroaches and evidence of

#### by-laws

local laws or regulations made by local councils that apply to residents in local areas

#### Did you know?

Acts of Parliament refer to 'penalty units' when identifying the maximum penalty for crimes. The use of 'penalty units' instead of fixed monetary fines enables the government to increase all fines by increasing the value of a penalty unit every year without having to change every statute.

LEGAL

CASE

pest infestation. Charges were laid against the defendants in relation to contraventions of food standards laws.

The defendants pleaded guilty to the charges and submitted that a moderate fine should be imposed without conviction. The Kingston City Council submitted that a significant fine with conviction should be imposed given the number and seriousness of the breaches and the period during which they occurred.

The magistrate fined the defendants a total of \$50 000, with conviction. He ordered that the prosecution costs of \$7990 be paid by the defendants.

## 11.3

## CHECK YOUR LEARNING

### Define and explain

- 1 What does it mean to enforce criminal law?
- 2 What are delegated bodies? Where do they get their power to enforce criminal law?
- 3 Identify at least five different bodies or institutions that have the power to enforce criminal law.
- 4 Distinguish between Victoria Police and the Australian Federal Police in terms of the offences they investigate.

### Synthesise and apply

- 5 For each of the following breaches of law, identify the body that you think will most likely enforce the law.
  - a A street party has been organised without a permit.
  - b A house has just been deliberately burnt down and has injured two of its occupants.
  - c Bernard runs a sushi shop. A customer has complained because she just found maggots in her sushi.
  - d Scaffolding has fallen down on a construction site, injuring three workers.
  - e There has been asbestos dumped on a vacant block of land in Prahran.
  - f A real estate agent in Yarraville has been underquoting properties for sale.

g There have been some murmurs of a proposed terror attack in Melbourne.

- 6 Read the legal case *Kingston City Council v Wong*.
  - a Describe the nature of the offence.
  - b Why did the local council have the authority to prosecute this offence?
  - c Describe one way in which the principle of fairness was upheld in this case.
- 7 Read the case study 'Terror raids involve AFP and Victoria Police'. Why did this investigation involve both Victoria Police and the Australian Federal Police?
- 8 Visit the website of your local council.
  - a Find the page which shows their local laws.
  - b Find a general local law.
  - c Identify at least three offences in that law. What are the sanctions for those offences?

### Analyse and evaluate

- 9 Conduct some further research on:

- one police force
- one delegated body.

Prepare a report explaining how these bodies ensure fairness in the way that they enforce criminal law.



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

» **Student book questions**

11.3 Check your learning

» **Weblink**

WorkSafe Victoria

» **Weblink**

Australian Federal Police

» **Weblink**

Victoria Police

# INSTITUTIONAL POWERS AND INDIVIDUAL RIGHTS



**Source 1** Victoria Police has various powers in relation to gathering fingerprints.

### Human Rights Charter

the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

### institutional powers

the authority (i.e. power) given to bodies (i.e. institutions) such as Victoria Police to undertake certain actions

Australians are entitled to a number of rights and freedoms. These come through various sources of law, including statute law. For example, the Victorian Parliament has passed the *Equal Opportunity Act 2010* (Vic), which is designed to protect people from discrimination, sexual harassment and victimisation.

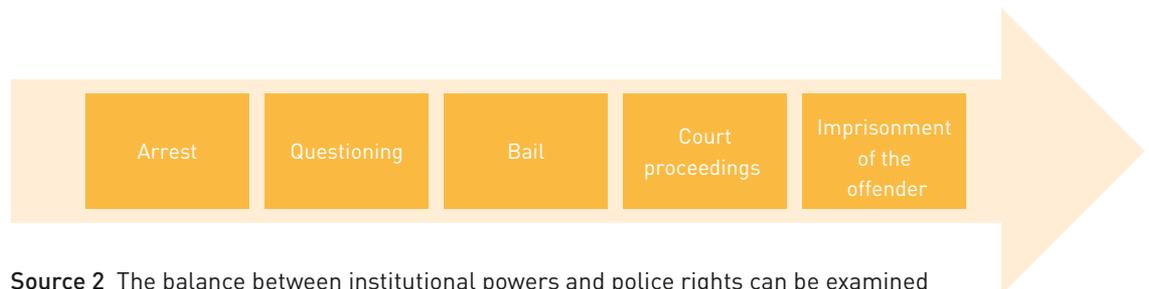
Rights are also given to people who are suspected or accused of committing a crime, and people who are guilty of crimes.

For example, every accused has the right to be presumed innocent until proven guilty. This is a right that is recognised internationally (through documents such as the 1966 International Covenant on Civil and Political Rights) and protected in Victoria by the **Human Rights Charter** (i.e. the *Charter of Human Rights and Responsibilities Act 2006* (Vic)), a statute which protects and promotes human rights in Victoria.

On the other hand, investigative and prosecution agencies such as Victoria Police and the OPP have powers to enable them to investigate crime and bring offenders to justice. The powers given to these bodies to carry out their job of enforcing the law are sometimes referred to as **institutional powers**. They include powers such as gathering fingerprints, charging an accused and initiating criminal proceedings against an accused.

Those powers, however, must be balanced against the rights of individuals. If institutions have too much power, individuals may be unjustly treated. However, if their powers are too few or too limited, crime prevention and law enforcement can become difficult or almost impossible.

In this topic you will explore how institutional powers are balanced against individual rights in the following stages of a criminal case: arrest, questioning, bail, court proceedings and the imprisonment of the offender.



**Source 2** The balance between institutional powers and police rights can be examined through the stages of a criminal case listed above.

## Arrest

Once a crime has been committed, the police will have the power to arrest. The power of arrest, with or without a warrant, is found in the *Crimes Act* (the main provisions are Sections 458 and 459 of that Act). Most arrests are made without a warrant.

Police can arrest without a warrant any person found committing an offence if the police believe it is necessary to:

- ensure the appearance of the offender in court
- preserve public order
- prevent the continuation or repetition of an offence or the commission of a further offence
- ensure the safety or welfare of the public or the offender.

### Did you know?

A member of the public can arrest another person if that person is found committing an offence and the arrest of the offender is necessary. This is often referred to as a 'citizen's arrest'.

## Study tip

It is often difficult to remember all of the institutional powers and rights. Research suggests that many people learn well by teaching others – why not try and teach someone else in your class, or even someone not in your class, about some of these rights and powers?

### bail justice

a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications for bail, remand and interim or temporary accommodation orders relating to children

Police can also arrest without a warrant any person reasonably believed to have committed an indictable offence either in Victoria or elsewhere which, if committed in Victoria, would be an indictable offence. Police can use **reasonable force** when making an arrest, though what is reasonable force will depend on the circumstances of the arrest.

An individual, however, has certain rights in relation to an arrest, which ensures a balance between the power of arrest and the rights of an individual. For example:

- An individual can refuse to attend the police station unless they are under arrest. This upholds a person's right to freedom of movement and right to liberty.
- If a person is arrested, under the Human Rights Charter they must be informed at the time of arrest the reason for the arrest, and be promptly informed about any proceedings that are to be brought against him or her.
- The Human Rights Charter also states that an arrested person must be promptly brought before a court and have the right to be brought to trial without unreasonable delay.
- A person does not need to say anything other than provide their name and address (it is an offence to refuse to do so).
- If arrested, a person must be released (unconditionally or on bail) or brought before a **bail justice** or magistrate in the Magistrates' Court within a reasonable time of being taken into custody. What is a reasonable time depends on the circumstances.

The following case study highlights a recent incident in which Victoria Police made numerous arrests.

## CASE

## STUDY

### Pepper spray and arrests at Moomba 2017

Melbourne's Moomba Festival is an annual and free community festival held in Melbourne in March. Activities and events are held near Yarra River and surrounding locations and the festival is a family-friendly event.



**Source 3** Police were out in full force for Moomba in 2017 and made several arrests.

In 2017, the ABC reported that more than 50 people were arrested and weapons were seized during the 2017 Moomba Festival. Weapons such as knives, scissors, knuckle-dusters and a taser were found on people during searches. Pepper spray was used on some teenagers at Federation Square who were looking to fight.

At a press conference held on 12 March 2017, Victoria Police Deputy Commissioner Andrew Crisp stated that the arrests were made in relation to drunkenness, weapons offences, riotous behaviour (mainly in relation to men who were at Federation Square who wanted to fight), assaults and one robbery.

## Questioning

Under Section 464A of the *Crimes Act*, if a person has been arrested and is in custody for being suspected of committing an offence, an investigating official has the power to question that person within a reasonable time. The person will be questioned to determine what involvement, if any, he or she had in the offence.

However, to balance out this power, rights are given to a person who is questioned:

- the person must first be informed that he or she does not have to do or say anything but that anything the person does say or do may be given in evidence, and the giving of that information must be recorded if the crime is an indictable offence
- the person must be informed that he or she is able to communicate with or attempt to communicate with:

- a friend or relative (to inform them of his or her whereabouts)
- a legal practitioner and is allowed to do so unless the communication would result in the escape of an accomplice, or the fabrication or destruction of evidence, or the questioning is so urgent that it should not be delayed
- the person has a right to an interpreter if the person does not have sufficient knowledge of the English language
- communications with the person's legal practitioner must be such that the communication will not be overheard
- the questioning can only occur within a reasonable time (that time will depend on the circumstances such as the number and complexity of offences to be investigated)
- the person being questioned can stay silent and does not need to respond to any questions (other than a question which asks for their name and address)
- if the person is under 18 years of age, a parent, guardian or independent person must be present during the questioning.

The following news article details a cold case in which a suspect was questioned many years after committing the offence.

## Man arrested over the abduction and murder of Cheryl Grimmer in 1970

Mark Morri, *The Daily Telegraph*, 23 March 2017

Police have charged a Victorian man, 63, with murder after one of the most sensational cold case arrests in Australian criminal history.

Detectives arrested the man in Frankston after a two-year cold case investigation into the disappearance of Cheryl Grimmer, 3, from Fairy Meadow beach on the New South Wales South Coast, on January 12, 1970. Cheryl has never been found.

It is the oldest cold case arrest made in Australia.

The *Herald Sun* understands the man, a security guard with a grown family, was 16 when Cheryl vanished from a changing room at the beach.

It is alleged that about 18 months afterwards he talked about the crime while in the Mt Penang boys' home.

After this was reported to Sydney police, he was taken to Wollongong and interviewed.

It is alleged that the teenager, originally from the United Kingdom, provided details to investigators, who decided not to lay charges.

The man, who now goes by a different name, voluntarily went to be interviewed by detectives at Frankston police station about 10 am yesterday. After several hours of questioning, he was charged with Cheryl's murder and appeared briefly before Frankston Magistrates' Court.

He is expected to be extradited to Sydney tomorrow.

Cheryl vanished after spending the day at the beach with her mother, Carole, and her brothers Ricki, 7, Stephen, 5, and Paul, 4.



**Source 4** Cheryl Grimmer disappeared from a Fairy Meadow beach in 1970.



**Source 5** Grimmer's brothers Paul, Ricki and Stephen Grimmer in 2016

# Bail

Bail rights and procedures are set out in the *Bail Act 1977* (Vic). The decision to grant or refuse bail is normally determined by either a court, a bail justice or a police officer, depending on the circumstances.

A person is entitled to bail in certain circumstances. In particular, the *Bail Act* states that any person accused of an offence and is held in custody in relation to that offence shall be granted bail (subject to certain exceptions):

- within 24 hours after he or she is taken into custody if it is not practicable to bring the person before a bail justice or the Magistrates' Court
- during any postponement of the hearing of a charge for the offence or while awaiting trial
- where the case has been adjourned or when awaiting sentence (except where the court does not consider it desirable).

However, the right to bail and the right to apply for bail are balanced by powers given to the prosecutor to oppose bail, and to the person deciding on bail to refuse bail or impose certain conditions. The prosecutor can also apply to revoke (i.e. cancel) bail.

Bail must be refused in certain circumstances; including where the person has been charged with certain offences such as murder, or where the court is satisfied there is an unacceptable risk that the accused if released on bail would fail to surrender into custody when it is time to do so, commit an offence, endanger the public or interfere with witnesses or the course of justice. The ability of an accused person to be released on bail has been made more difficult after the passing of legislation in 2017 by the Victorian Parliament which amends the *Bail Act*. These amendments came about following the tragic incident in Bourke Street, Melbourne, in January 2017 which resulted in the death of six people and the injuries of many more. The person charged with the crimes was on bail at the time.

Conditions that can be imposed as part of bail include the requirement that the accused report to a police station, reside at a particular address, not contact specified persons, surrender his or her passport or not drive a motor vehicle.

## Court proceedings

As you have learnt, many bodies have power to enforce the law. Along with that power is the power to commence criminal action against an accused for the purposes of obtaining a guilty verdict (or plea) and to punish the offender for his, her or its actions.

For summary offences, the Magistrates' Court will hear and determine the charges and the magistrate will decide on guilt. For indictable offences, the Magistrates' Court will determine whether there is evidence of a sufficient weight to support **conviction** at trial (through procedures known as the **committal proceeding**) before the matter is then transferred to either the County Court or Supreme Court for pre-trial procedures and, eventually, trial.

Various powers are given to the prosecutor as part of the proceedings. Prosecutors have the power to prepare the case, speak with witnesses, obtain evidence and negotiate with the accused (or his or her legal practitioners) about an early guilty plea.

In those proceedings, however, the accused also has certain rights. Many of those rights are protected by the Human Rights Charter, and include the right to:

- have the charge or proceeding decided by a competent, independent and impartial court after a fair and public hearing
- be presumed innocent until proven guilty
- be informed promptly and in detail about the nature and reason for the charge

### **conviction**

a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

### **committal proceeding**

the processes and hearings that take place in the Magistrates' Court for indictable offences

- have adequate time and facilities to prepare the defence
- be tried without unreasonable delay
- have **legal aid** if the interests of justice require it
- have the assistance of an interpreter if needed
- have the opportunity to challenge and rebut the evidence put against him or her, which includes examining the prosecution's witnesses, and examining his or her own witnesses.

**legal aid**  
legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

Many of these rights aim to ensure the principles of justice are achieved. For example, the right to have the assistance of an interpreter will aim to uphold equality, by aiming to put an accused person who is not proficient in the English language on an equal footing with a prosecutor who does.

## Imprisonment of the offender

The sanction of last resort is **imprisonment**, which involves the removal of an offender out of society and into a jail for a period of time. You will learn more about imprisonment later in this chapter, but imprisonment aims to protect the community as well as punish offenders by depriving them of their liberty.

**imprisonment**  
a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

If the maximum penalty for a crime is a term of imprisonment, and the court considers it the most appropriate sentence, then the court has the power to imprison the person for a period of time. Once that occurs, Corrections Victoria, which is a business unit of the Victorian Government's Department of Justice & Regulation, will oversee the detention of the offender.

The management of prisons is governed by the *Corrections Act 1986* (Vic). That Act provides prison officers with various powers to enable them to manage prisons. These include the power to search and examine any person, seize unauthorised goods, arrange for medical tests for alcohol or drugs, or require a prisoner to be electronically monitored. It also includes other powers such as the power to open, inspect and read a letter sent to a prisoner.

However, every prisoner has certain rights under Section 47 of the *Corrections Act*.

- the right to be in the open air for at least an hour each day (weather permitting)
- the right to be provided with adequate food and, where necessary, special dietary food (for example, where the prisoner is vegetarian or has religious beliefs)
- the right to be provided with suitable clothing
- the right to have access to reasonable medical care and treatment as well as reasonable dental treatment
- if the prisoner is intellectually disabled or mentally ill, the right to the appropriate special care and treatment
- the right to practice a religion, which includes the right to join with other prisoners to practice that religion (so long as it does not jeopardise prison security)
- the right to receive at least one half-hour visit a week.



**Source 6** HM Prison Barwon is a high risk and maximum security prison for males in Victoria.

In addition, young persons who are detained have certain rights given to them under the *Children, Youth and Families Act 2005* (Vic). These include an entitlement to have their development needs catered for, the right to receive visits from family and legal practitioners, and the right to have their medical, religious and cultural needs met.

The importance of the rights of youth offenders was highlighted in the case of a group of children who were placed in Barwon Prison, an adult prison (see below).

## LEGAL

## CASE

### Legal proceedings to get youth offenders out of Barwon Prison

*Certain Children v Minister for Families and Children* [2016] VSC 796 (21 December 2016) and *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251 (11 May 2017)

Following a series of incidents at the Parkville Youth Justice Precinct which resulted in extensive damage to some areas of the facility, the Victorian Government used the Grevillea unit at Barwon Prison to hold youth offenders.

A series of proceedings were commenced in the Supreme Court which alleged that the detention of children at the Prison was unlawful. Proceedings were commenced through a **litigation guardian** (a person who commences proceedings on behalf of children). One of the issues raised was that the decision to transfer the children was contrary to certain rights under the Human Rights Charter, including the right of children to be protected from cruel, inhuman or degrading treatment. Evidence was given about the conditions at Barwon Prison, which included long periods of confinement in cells meant for adults, fears and threats by staff and lack of space.



**Source 7** Incidents at the youth justice centre in Parkville sparked a series of proceedings in the Supreme Court about the rights of youth in detention.

The children were successful in challenging the transfer decision in 2016. Despite an appeal, the Court ordered that the children be removed by 30 December 2016.

The Victorian Government ultimately issued new directions which meant that the children remained at Barwon Prison, and two other children were transferred there. A proceeding was again issued in the Supreme Court of Victoria, which was heard in April 2017. Judgment was handed down by Justice Dixon on 11 May 2017, who held that the directions were incompatible with human rights afforded under the Human Rights Charter, and the transfer of the two children was unlawful. The decision resulted in the removal of teenagers from Barwon Prison back to the Parkville Youth Justice Precinct.

**Define and explain**

- 1 Identify two sources of individual rights and two sources of institutional powers.
- 2 Identify two institutions that have powers in criminal law and describe one power that each of those institutions have.
- 3 Explain why there is a need for a balance between powers and rights.
- 4 Identify whether the following statements are true or false.
  - a A police can arrest using force.
  - b A person must give their name and address when asked by police at any time.
  - c A person can be asked any questions by an investigating official about the crime.
  - d A person charged with an offence has an absolute right to bail.
  - e Solitary confinement of a prisoner 24 hours a day is allowed.
- 5 Explain why youth prisoners have particular rights and entitlements.

**Synthesise and apply**

- 6 Create a poster or multimedia visual which demonstrates the balance between individual rights and institutional powers in three of the stages of a criminal case.
- 7 Read the case study 'Pepper spray and arrests at Moomba 2017'.
  - a Identify and describe two powers that were used by Victoria Police during the Moomba Festival.
  - b Would the arrests have been made with or without a warrant? Justify your answer.
  - c What reasonable force may have been used as part of the arrests?
  - d What rights would have been available to the individuals arrested?

- 8 Read the article 'Man arrested over the abduction and murder of Cheryl Grimmer in 1970'.
  - a Describe the crime that was committed.
  - b Did the detectives have the power to question this man? Why or why not?
  - c Describe two rights that were available to the accused during questioning.
  - d Why was an appearance in the Magistrates' Court necessary once the man was charged?
- 9 As a class, find a recent article that describes a serious offence that has been committed. Separate into four different groups, representing the magistrate who will decide bail, the victim, the accused, and the police. Summarise the reasons why bail should or should not be granted, based on the person you are representing.

**Analyse and evaluate**

- 10 'The balance is too much in favour of the individual. We need to pull back some of their rights, and give more power to the institutions.' With reference to at least two rights and powers, discuss the extent to which you agree with this statement.
- 11 Conduct some further research about youth offenders kept in Barwon Prison.
  - a Explain the circumstances in which the youth offenders were transferred to a unit of Barwon Prison.
  - b Why do you think that there is particular concern with youth offenders being kept in those conditions, and not adults? Give reasons.
  - c In your view, should youth offenders be given greater rights than adult offenders? Discuss as a class.
- 12 The Bourke Street tragedy in January 2017 resulted in new laws being introduced which make it even harder for accused people to get bail. To what extent do you agree with bail laws being tightened in light of the presumption of innocence? Give reasons for your answer.

**Check your ebook assess for these additional resources and more:**» **Student book questions**

11.4 Check your learning

» **Worksheet**

Matching rights and powers

» **Weblink**Man to face court over allegedly attacking his wife (*The Age*)

# THE ROLE AND CRIMINAL JURISDICTIONS OF VICTORIAN COURTS

In Australia, there are a number of courts which provide a means of resolving and determining both criminal cases and civil disputes.

There are two types of courts: state courts, and federal courts. Generally, state courts deal with issues arising under state law, and federal courts deal with issues arising under federal law.

The courts in the Australian court system are ranked in a hierarchy with the higher courts hearing the more serious and complicated cases, and the lower courts dealing with minor issues.

## Reasons for a court hierarchy

There are four main reasons for ranking the courts in a hierarchy:

- The court hierarchy allows for **specialisation** or **expertise**, with the courts developing expertise in dealing with the types of cases that come before them. For example, the Magistrates' Court hears minor offences, and so will be specialised in offences such as drink driving.
- The court hierarchy enables the parties to a court case to **appeal** to a higher court if they are not satisfied with the decision in a lower court. This means that a person who believes that an error has been made in the lower court can appeal the case to a higher court for the higher court to review that decision.
- The court hierarchy is a necessary part of the **doctrine of precedent** (law-making through courts) because the process of law-making through courts depends on a decision being made in a higher court which is binding on lower courts.
- Finally, a court hierarchy allows for **administrative convenience**. Because the courts have different **jurisdictions** to hear different matters, it allows smaller and minor cases (of which there are more) to be heard in the Magistrates' Court (of which there are a number in the state), and more complex and larger cases to be heard in the County Court and the Supreme Court.

### appeal

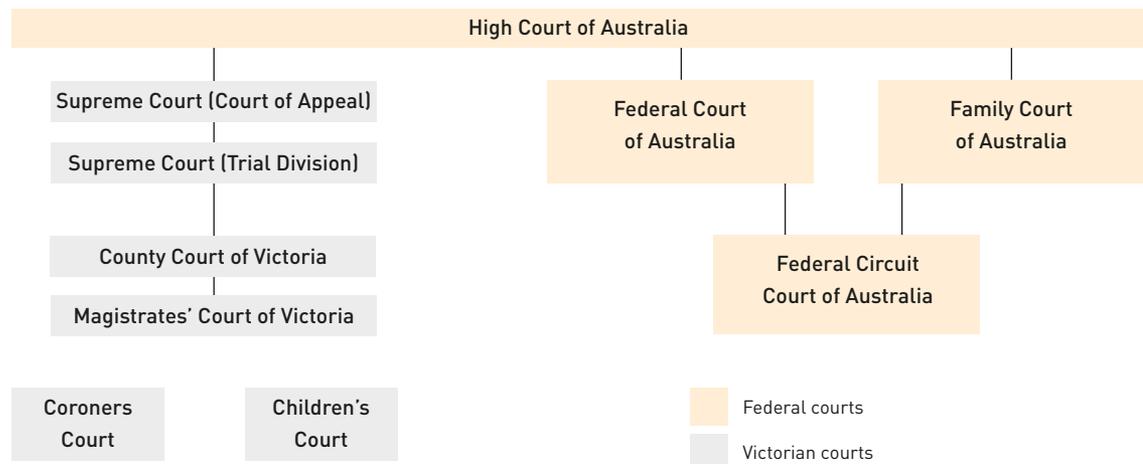
an application to have a higher court review a ruling (i.e. decision) made by a lower court

### doctrine of precedent

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

### jurisdiction

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



Source 1 The court hierarchy in Victoria and Australia

# The role of Victorian courts

Even though laws provide guidelines for acceptable behaviour, laws will be broken and crimes will be committed. The role of the Victorian courts in criminal cases is to:

- determine a criminal case (by deciding whether the accused is guilty)
- impose a sanction (if a person has been found, or has pleaded, guilty).

## Determine a criminal case

If an accused pleads **not guilty**, then it is the role of the courts to determine whether the accused is guilty by managing and hearing criminal proceedings. If an accused continues to plead not guilty, then his or her guilt will be determined at a hearing in the Magistrates' Court for a summary offence, or at a trial in the County Court or Supreme Court for an indictable offence. A judge or magistrate will oversee the trial. The judge or magistrate, in doing so, will act as an impartial referee, and with no bias or connection with either party.

If the accused is charged with an indictable offence, the case will first go to the Magistrates' Court for a committal proceeding. This is a proceeding which requires the prosecution to establish that there is evidence of a sufficient weight to support a conviction at trial, before the proceeding goes to trial in one of the higher courts. Several stages occur during committal proceedings. The final stage is a **committal hearing** at which the magistrate will decide whether there is evidence of a sufficient weight to support a conviction at trial, following which the proceeding will continue in either the County Court or the Supreme Court.

As part of the court's role in determining the guilt of an accused, it will:

- **provide specialisation and expertise** in the type of case it is hearing – The Magistrates' Court is specialised in minor criminal offences such as minor thefts and assaults, whereas the Supreme Court deals with the most serious indictable offences such as manslaughter
- **manage the case** – Judges and magistrates have significant powers of **case management**, which means they can give **orders** and **directions** to the parties. This includes setting down a timeline of when certain steps are to occur, so that delays can be managed and parties are provided with an opportunity to present their case
- **hear appeals** – Certain Victorian courts have the power to hear an appeal made by one or both parties following a guilty verdict. An appeal may be in relation to a conviction, sentence or on a point of law. The party who appeals is known as the appellant, and the other party is known as the respondent.

The following legal case details the appeal proceedings of a murder cold case.

**committal hearing**  
a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

**case management**  
a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

**orders**  
a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

**directions**  
instructions given by the court to the parties about time limits and the way a proceeding is to be conducted

## Appeal refused in cold case

### *Bradley v The Queen* [2017] VSCA 69 (30 March 2017)

On the night of 21 October 1983, Michelle Buckingham, who was 16 at the time, was stabbed to death. The next morning, Steven Bradley told his brother-in-law that he and two friends had 'killed a girl last night'. He also told him that they had left Michelle's body by the side of a rural road outside Shepparton. Despite his brother-in-law advising him to go to the police station, Bradley sold his car and moved interstate. Michelle's body was found on 7 November that year with at least 19 knife wounds to her back.

In 2012, almost 30 years later, a local newspaper published articles about Michelle's murder. Bradley's brother-in-law came forward and spoke to police. This eventually led to Bradley being

LEGAL

CASE



**Source 2** Nearly 30 years after her death, a man was convicted of the brutal murder of Shepparton teenager Michelle Buckingham.

charged. In 2015, he was convicted of Michelle's murder in the Supreme Court sitting at Shepparton, and was sentenced to 27 years' imprisonment with a non-parole period of 21 years.

Bradley appealed to the Court of Appeal against his sentence, arguing that it was manifestly excessive in light of a number of factors, including his age at the time of the offence (being 21 years of age), his good prospects of rehabilitation and the possible recurrence of his depressive disorder.

The Court of Appeal refused leave to appeal. It found that the sentence was not outside the range of current sentences for murder. It also stated '...it must not be forgotten that the applicant pleaded not guilty, and showed no remorse...'.

## Impose a sanction

### jury

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

If an accused pleads guilty, or the magistrate or **jury** finds the accused guilty, then the court will set a date for the plea hearing. Both parties make submissions about the facts of the case, the circumstances of the offender, the relevant factors that should be taken into account in sentencing and the type of sentence the offender should receive.

Following the hearing (on that day or on a later date), the judge or magistrate will hand down a sanction at a sentencing hearing. In higher courts, judges will normally write a written judgment about the sanction they have imposed which can be available to the public at a later date.

The following legal case is an example of the sanction the court imposed in a hit and run incident.

## LEGAL

## CASE

### Jail for hit and run incident

*DPP v Stewart* [2017] VCC 390 (3 April 2017)

On Good Friday morning in 2016 at approximately 6.22 am, Christian Ashby was riding his bicycle in Wendouree, a suburb in the city of Ballarat. Rebekah Stewart, who had been consuming ice and amphetamines during the night, was driving a car and entered into the wrong lane,

colliding head-on with Ashby. Stewart fled the scene, leaving Ashby on the road in the dark, and then sought to conceal her role. She hid the car and told a false story to people who assisted her. She was eventually arrested six days after the accident.

Ashby was found by three people who helped him. He was transferred by helicopter to hospital and suffered significant injuries. Ten major procedures or operations were performed. Ashby spent over a month in hospital and was discharged to inpatient rehabilitation at Epworth Hospital.

Stewart pleaded guilty to two charges: dangerous driving causing serious injury, and failing to stop after the accident.



**Source 3** Rebekah Stewart was charged at the Ballarat Magistrates' Court for a hit and run incident that severely injured Christian Ashby.

She also pleaded guilty to two summary offences: one of driving whilst disqualified, and one of using an unregistered vehicle.

Judge McInerney in his reasons for sentence commented that this was a 'most serious example of this offence'. He stated that 'It gives the Court no joy to send a young woman of the age of 24 years to gaol', but said there was no alternative. She was sentenced to a total of six years' imprisonment, and was to serve a minimum of four years before she was eligible to be released. She was also ordered to pay a fine of \$1000 for one of the summary offences. Had Stewart not pleaded guilty, the sentence she would have been given was eight years in prison, with a minimum of five years and four months.

## The criminal jurisdiction of the Victorian courts

**Jurisdiction** refers to the right or power of a court to apply the law and hear cases. There are two types of jurisdiction: **original jurisdiction** and **appellate jurisdiction**. When a court is hearing a dispute for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

Source 4 summarises the criminal jurisdiction of the Victorian courts.

**original jurisdiction**  
the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

**appellate jurisdiction**  
the power of a court to hear a case on appeal

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court	<ul style="list-style-type: none"> <li>• Summary offences</li> <li>• Indictable offences heard summarily</li> <li>• Committal proceedings</li> <li>• Bail and warrant applications</li> </ul>	<ul style="list-style-type: none"> <li>• No appellate jurisdiction</li> </ul>
County Court	<ul style="list-style-type: none"> <li>• Indictable offences except murder, attempted murder, certain conspiracies, corporate offences</li> </ul>	<ul style="list-style-type: none"> <li>• From the Magistrates' Court on a conviction or sentence</li> </ul>
Supreme Court (Trial Division)	<ul style="list-style-type: none"> <li>• Serious indictable offences</li> </ul>	<ul style="list-style-type: none"> <li>• From the Magistrates' Court on a question of law</li> </ul>
Supreme Court (Court of Appeal)	<ul style="list-style-type: none"> <li>• No original jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• From the County Court or the Supreme Court (with leave)</li> </ul>
Children's Court	<ul style="list-style-type: none"> <li>• Offences committed by children between 10 and 17 years of age (except for certain offences)</li> </ul>	<ul style="list-style-type: none"> <li>• No appellate jurisdiction</li> </ul>
Coroners Court	<ul style="list-style-type: none"> <li>• Investigation of deaths and fires</li> </ul>	<ul style="list-style-type: none"> <li>• No appellate jurisdiction</li> </ul>

**Source 4** A summary of the criminal jurisdiction of the Victorian courts

**Study tip**

If you are asked in an assessment task to outline or describe 'the criminal jurisdiction' of a Victorian court, remember that jurisdiction means **both** original and appellate jurisdiction. Don't forget one or the other!

## The Magistrates' Court

### Original jurisdiction

The Magistrates' Court has jurisdiction to hear summary offences and **indictable offences heard and determined summarily**. When the accused pleads not guilty, the hearing that is conducted to determine guilt is called a hearing (not a trial).

The Magistrates' Court also has the power to hear applications in relation to bail and warrants, and conducts committal proceedings for indictable offences.

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

## Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it is not able to hear any appeals from other courts.

## The County Court

### Original jurisdiction

The County Court hears all indictable offences except those set out in Section 36A of the *County Court Act 1958* (Vic), which includes treason, murder, attempted murder and certain conspiracies. If the accused pleads not guilty, the hearing at which guilt is determined is known as a trial.

### Appellate jurisdiction

Criminal appeals can be heard from the Magistrates' Court against a conviction or sentence. This means that people can appeal to the County Court if they think they have been wrongly convicted and no reasonable magistrate would have convicted them on the facts presented in the case, or their sentence was too harsh. The DPP can also appeal on the basis of the sentence being too lenient.

## The Supreme Court (Trial Division)

### Original jurisdiction

The Trial Division of the Supreme Court has jurisdiction to hear all indictable offences, but generally hears those most serious indictable offences not able to be heard by the County Court, such as treason, murder and attempted murder. If the accused pleads not guilty, the hearing at which guilt is determined is known as a trial.

### Appellate jurisdiction

The Trial Division can hear criminal appeals from the Magistrates' Court that are made on a question of law. An appeal on a question of law occurs when the application of the law in the case is in question. For example, an appeal can be made on a question of whether the magistrate incorrectly applied the law when determining whether an offence was committed.

## The Supreme Court (Court of Appeal)

The Court of Appeal has no original jurisdiction. It hears appeals from the County Court and Supreme Court, which are usually determined by three justices. These appeals may question a conviction, the severity or leniency of a sentence or a question of law. Leave (consent) of the Court of Appeal is required for the offender, but no leave is required for the DPP to appeal to the Court of Appeal against a sentence imposed.

Any further appeals from the Court of Appeal would be heard by the High Court of Australia, which is the final appeal court. Leave (permission) is required from the High Court to appeal a decision.

## Specialised Victorian courts

### The Children's Court

The Children's Court is a specialist court for children aged 10 to 17 years at the time of the offence, and under 19 years when proceedings begin.

The Children's Court has two divisions:

- the Family Division

- the Criminal Division.

The Criminal Division deals with all cases in which a child has been charged with an offence, except for certain offences (i.e. murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death). Those offences are dealt with in the County or Supreme Court.

### *Did you know?*

The Magistrates' Court has various specialist lists and courts, such as the Sexual Offences List, the Assessment and Referral Court List, the Drug Court and the Koori Court.

## The Coroners Court

The Coroners Court of Victoria performs the special function of investigating any death that is considered unexpected, unnatural or violent or resulted from an accident or injury, or a death that occurs during or following a medical procedure. The coroner will also investigate fires that involve death, serious injury or significant damage to property.

## 11.5

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify and describe the two main roles of Victorian courts in criminal cases.
- 2 Identify two specialised courts in Victoria, and explain the extent to which they have jurisdiction to hear and determine criminal cases.
- 3 Why doesn't the Magistrates' Court have an appellate jurisdiction?
- 4 Explain what is meant by a committal proceeding, and what its main purpose is.

### Synthesise and apply

- 5 Read the legal case *Bradley v The Queen*.
  - a Explain what happened to Michelle Buckingham.
  - b Why was this cold case reinvestigated 30 years later?
  - c Why did the Supreme Court and not the County Court hear this case?
  - d What was the sentence that was imposed by the Supreme Court?
  - e Why did Bradley appeal the case?
  - f What was the decision of the Court of Appeal?
  - g Do you think this is an appropriate sentence? Give reasons.
- 6 Read the legal case *DPP v Stewart*.
  - a What did Stewart do in this instance which led to her being charged?

- b Would a jury have been involved in this case? Justify your answer.
  - c Which court sentenced Stewart, and why?
  - d If Stewart was to appeal, which court would hear the appeal?
  - e Do you think this is an appropriate sentence? Give reasons.
- 7 For each of the following scenarios, identify whether a committal proceeding is required, whether a trial or hearing is necessary, and which court would hear the case.
    - a Akala has been charged with petty theft and is pleading not guilty.
    - b Valentin has been charged with manslaughter and is pleading guilty.
    - c Simone has pleaded not guilty to 17 charges of sexual assault.
    - d Kenji has pleaded guilty to a minor assault.

### Analyse and evaluate

- 8 Do you think that it is appropriate that children charged with murder are tried as adults? Give reasons.
- 9 Discuss two strengths of the role of the courts in resolving criminal cases.



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

» **Student book questions**

11.5 Check your learning

» **Going further**

World legal systems

» **Weblink**

The court system

# THE ROLE OF THE JURY IN A CRIMINAL TRIAL

In Australia, the jury system is sometimes used to determine whether a person is guilty of an offence.

The jury system began in medieval Europe around 1215. Before this time, the way in which a person's guilt or innocence was determined was by **trial by ordeal**. This involved subjecting the accused to some sort of experience (i.e. ordeal), after which time his or her guilt or innocence was declared. For example, an ordeal by water involved throwing the accused into a river or lake. If the accused sank, he or she was taken out of the water and presumed innocent. If they floated, they were considered guilty.

Trial by ordeal was abolished in 1215. By this time a **trial by jury** had started to become more common. A trial by jury is a **trial by peers** in which an impartial group of people are randomly selected to hear the evidence and hand down a verdict as to whether the accused is guilty or not guilty.

## trial by ordeal

a type of trial common in early medieval Europe which required an accused person to prove their innocence by being subjected to a painful or unpleasant test (i.e. ordeal)

## trial by jury

a type of trial by peers in which an impartial group of randomly selected people hear evidence and hand down a verdict (i.e. decision)

## jury directions

instructions given by a judge to a jury either during or at the end of trial

## When are criminal juries used?

Criminal juries are used in the original jurisdiction of the County Court and Supreme Court. That is, criminal juries are used to determine the guilt of an accused person who is charged with an indictable offence.

Juries are never used in the Magistrates' Court and are not used in appeals. Juries are also not used when an offender has pleaded guilty, because its only role is to determine guilt or innocence, and not the sanction.

The *Juries Act 2000* (Vic) governs the selection, composition and role of a jury in Victoria. The *Jury Directions Act 2015* (Vic) is also an important statute which establishes the way in which **jury directions** are to be given to a jury by a judge (being instructions about the law or about the way that certain evidence should be looked at by the jury).

## Did you know?

In 1994 in the UK, four members of the jury who were staying overnight during deliberations in a hotel room used a Ouija board to conduct a séance about what happened to the murder victims. A retrial was ordered.

## Composition of a civil jury

A jury of 12 is compulsory in criminal cases in the County Court or Supreme Court, where the accused pleads not guilty. Three extra jurors can be empanelled for lengthy trials in case a situation arises where one of the jury members has to withdraw from the trial; for example, if a jury member falls ill.

The selection of the jury is **random**. Persons aged 18 years or over who are enrolled to vote in Victoria are qualified and liable for jury service. Persons are selected at random and will be sent a questionnaire by the Juries Commissioner (the individual responsible for overseeing the jury system in Victoria) for the purposes of determining their eligibility for jury service. If they are eligible, they will be sent a jury summons requiring them to attend court for jury service at a later date. On the day, people who are summoned may or may not end up on a jury. That is, some people may be excused or challenged to be on a jury.

## → GOING FURTHER

### Selection of jurors

There are generally four categories of people who will be unable to serve on a duty: ineligible people, people who are excused, people who are disqualified and people who are challenged.

## Ineligible

Some people are ineligible to serve as jurors because of their occupation. This includes people who in the last 10 years have worked as governors, police officers, legal practitioners, judicial officers, bail justices, ombudsmen, parliamentarians and public servants employed in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice or penal administration.

People who cannot understand or effectively take part in the proceedings are also ineligible. These people may have a certain intellectual disability, be a mental health patient, have a physical disability which excludes them from performing the duties of a juror, or they may have inadequate understanding of the English language.

## Disqualified

Certain people are disqualified from serving as jurors. These people either have a particular type of criminal conviction, or have been declared bankrupt and remain a bankrupt person. For example, a person who is remanded in custody in respect of an alleged offence is disqualified from acting as a juror.

## Excused

People can apply to the Juries Commissioner to be excused from jury duty if they have a good reason. Possible reasons include ill health, excessive inconvenience to get to the court, substantial hardship in attending court, or having to care for dependents.

## Challenges

If a person is eligible, not disqualified and hasn't asked to be excused, then he or she may, on the day summoned to attend court, be taken to a courtroom for the final selection process. At this stage, it is possible for either the prosecution or the accused to challenge a person being on a jury – either with or without cause. There is no limit on the number of challenges with cause, but there is a limit on the number of 'without cause' challenges (known as peremptory challenges – a party is given two each).

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## Role of the criminal jury

The jury in a criminal trial must:

- listen to all the evidence
- concentrate during trial
- piece the evidence together and decide whether the accused is guilty or not guilty.

It is the judge's role to explain the law to the jury. The jury considers the evidence with respect to the law and makes its decision.

A key part of a jury trial is the directions given by a judge to a jury. The *Jury Directions Act* was passed in 2015 with an aim to reduce the complexity of jury directions in criminal trials and to simplify and clarify the issues that juries must determine. In particular, there are now legal requirements as to what directions should be given to the jury in trials related to sexual offences and family violence offences. For example, if requested by either party to do so, the judge must give a direction to a jury that family violence is not limited to physical abuse, and may include sexual abuse and psychological abuse.



**Source 1** One of the roles of a jury is to concentrate during trial. In 2008, a trial in the Sydney District Court was abandoned after it was found that some of the jurors were playing Sudoku during trial.

The following news article explores a trial by jury which was aborted.

## IN THE NEWS

### Yahoo7 fined \$300 000, convicted of contempt of court after publishing article that aborted murder trial

Jane Lee, *The Age*, 17 February 2017

Yahoo7 has been fined \$300 000 and convicted of contempt of court for publishing an article that aborted a murder trial, with a judge saying that one of Australia's biggest media companies put profits before professional journalism.

Its employee, Sydney journalist Krystal Johnson, who wrote the article, has escaped with a good behaviour bond, the Supreme Court in Melbourne heard on Friday.

Johnson, who had not been in court in Melbourne to report on the case, copied details from an accurate report of an earlier hearing to use in her article.



Source 2 Yahoo7 reporter Krystal Johnson

She then bypassed subeditors to directly publish it on Yahoo's news website.

Justice John Dixon last year found both Yahoo and Johnson in contempt of court, saying that the article was prejudicial.

The judge ordered on Friday that Yahoo7 be fined and convicted over it, saying it had 'primary responsibility for the contempt'...

... The article was published last year in the first week of the trial of Mataio Aleluia, who was charged with murdering his girlfriend Brittany Harvie, and revealed material that had not been put to the jury.

The trial was aborted to prevent the risk of an unfair trial.

Aleluia was later found guilty of murder in a separate trial.

Johnson promised the court through her lawyers to be on good behaviour for two years.

Justice Dixon said that provided she did this, the contempt charge against her would be dismissed on this day in 2019.

Neither Johnson, nor the head of Yahoo7's editorial team, Simon Wheeler, appeared in court on Friday.

Justice Dixon said it was a serious contempt which caused stress and inconvenience to the victim's family, Aleluia and the jury members who were discharged.

It also wasted a considerable amount of time and put a burden on court resources.

Johnson's offending article included a Facebook post Ms Harvie wrote before she died, in which she feared Aleluia might one day put her 'six feet under'.

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

The finding of guilt by a jury must be made **beyond reasonable doubt** in a criminal case. This means that if a member of the jury is not sure that the accused is guilty, he or she must state 'not guilty'. It is not possible for a juror to be absolutely certain because he or she was not there when the crime was committed, but they must be as sure as rationally possible. Reasonable in this instance is what the average person in the street would believe to be the case; that is, when the evidence is looked at in a logical and practical manner. Reasonable doubt does not include a doubt that is imaginary or fanciful, or an unrealistic possibility.

A criminal jury must first try to reach a **unanimous verdict**; that is, 12 out of 12 must agree. If this is not possible, a judge may allow a majority decision for criminal offences other than murder, treason, trafficking or cultivating a large commercial quantity of drugs or narcotic plants and Commonwealth offences. For a **majority verdict**, 11 out of 12 jurors must agree. If a majority verdict cannot be reached,

there is a hung jury. This means that the accused has not been found either guilty or not guilty, and can be tried again at a later date.

A jury does not have to give reasons for the verdict reached. All deliberations that take place in the jury room are confidential and cannot be revealed to the parties, the judge or the public. Therefore, the parties will have no way of knowing how the jurors decided, or whether they understood the facts and law that were relevant to making a decision.

At no stage are members of a criminal jury, once they are selected to be on a jury and until they are excused from jury service, allowed to make enquiries about trial matters. This includes using the internet to search for information about the case.

The following legal case is an example of a trial which was reordered as a result of the conduct of the jury.

**unanimous verdict**  
a verdict or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty)

**majority verdict**  
all but one of the members of the jury agree with the decision

## Jurors attend crime scene

### *R v Skaf* (2004) 60 NSWLR 86

One of the most horrific and brutal series of gang rape attacks in Australia serves as an example of the responsibilities of a criminal jury in Australia. During August 2000 in New South Wales, a series of rape attacks were committed against young girls. Bilal Skaf led and orchestrated the attacks. The rape attacks resulted in the conviction of nine men who were involved and a total of 240 years in jail for the men.

One of the attacks occurred on 12 August 2000, when Bilal Skaf and another man raped a 16-year-old school student in a park in Greenacre, New South Wales. Twelve other men were present at the time.

The day before the verdict, the jury went home early. The foreman called one of the other jurors, and they decided to visit the park. They spent about 15–20 minutes there, walked through, and noticed the lighting. The reason for attending the park was that the foreman felt he had a duty to the court to be right, and he wanted to clarify something for his own mind. The lighting was relevant in the case because a key issue was whether the victim had properly identified Bilal Skaf as the man who first sexually assaulted her, and whether he was present when the second man did so.

As a result of the jurors attending the park and conducting their own investigations, the convictions were quashed, and a new trial ordered.

**LEGAL**

**CASE**



**Source 3** Gosling Park, where two jurors conducted their own investigations. Their actions, although well-intentioned, caused a serious waste of time, costs and court resources.

## Strengths and weaknesses of the jury system

Some of the strengths and weaknesses of the jury system are set out in Source 4 below.

STRENGTHS	WEAKNESSES
Jurors are <b>independent and impartial</b> , and in particular independent of the legal and political system, thus ensuring equality and fairness in their decision	Jurors do not <b>give reasons for their decision</b> , and deliberations occur <b>behind closed doors</b> , so some may question whether there has been procedural fairness in the decision that has been made
It allows for the <b>community to be involved</b> in the process. This increases the confidence that the community has in the system, and ensures that the verdict reflects the values of the community	The task is <b>difficult</b> , particularly where there is complicated evidence or a significant amount of evidence. One might question whether ordinary members of the public are able to understand this evidence to be able to come to the right decision

Cont.

STRENGTHS	WEAKNESSES
It ensures <b>fairness</b> by requiring the jury to deliberate based on the evidence and facts and not on their own independent research or investigations	Jurors may be <b>unduly influenced</b> by skilled lawyers or by the emotional elements of a trial
It <b>spreads the responsibility</b> , and therefore the decision is more likely to be fair and correct rather than it being made by one person (the judge)	Jurors may have <b>biases</b> that may play a role in their deliberation, even if they aren't aware of those biases
It <b>reflects community values</b> and brings a common-sense approach to decision-making to the court	The jury trial may result in <b>delays</b> because legal terms have to be explained and the judge must give directions to the jury over time

Source 4 Strengths and weaknesses of a criminal jury

## 11.6

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain what is meant by a 'trial by jury'.
- 2 How many criminal jurors are there?
- 3 How and why are jurors selected at random?
- 4 Explain the role of a jury in a criminal trial.
- 5 What does beyond reasonable doubt mean?

### Synthesise and apply

- 6 Read the article 'Yahoo7 fined \$300,000, convicted of contempt of court after publishing article that aborted murder trial'.
  - a What did Krystal Johnson report about Aleluia's trial?
  - b Why was this a concern?
  - c Why was the jury discharged, and what effects did this have on the jury, the court and the accused?
  - d What eventually happened to Aleluia?
  - e Conduct some further research about the role of the media in a criminal case. What role and obligations do the media have once:
    - i A person has been charged with a crime?
    - ii A jury trial has commenced?
- 7 Read the legal case *R v Skaf*.
  - a What happened in this case?

- b What did two of the jurors do, and why?

- c Do you think that this was appropriate? Discuss with a member of your class.

- 8 Read the following scenarios and state whether a jury is necessary for each. Justify your answers.

- a Belinda's committal proceeding in the Magistrates' Court starts next week.

- b Paolo has appealed against his conviction and sentence to the Court of Appeal.

- c Drago has pleaded not guilty to drug trafficking.

- d Jacqueline has pleaded guilty to murder.

- e Oendrilla has pleaded not guilty to offensive behaviour (she peed in a public place).

### Analyse and evaluate

- 9 Do you think that majority verdicts result in fairness in a criminal case? Give reasons.

- 10 'Jurors should be able to conduct their own research into a case. It will help them become more informed, and will help them understand the evidence that is presented to them.' Do you agree? In your answer, make reference to the principle of fairness.

- 11 Evaluate the ability of the jury system to achieve the principle of equality in a criminal case.



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» **Student book questions**

11.6 Check your learning

» **Going further**

Selection of a jury

» **Worksheet**

Jury cases

» **Weblink**

Jury service

# THE PURPOSES OF SANCTIONS

## Did you know?

Different countries have different approaches to sentencing. For example, in 2016 the Indonesian Parliament passed a new law which provided tougher punishments for child sex offenders, including the death penalty, chemical castrations and electronic tracking of released prisoners.

If society is to keep functioning, and offenders are to be adequately dealt with, those who break criminal laws must be penalised in court.

In Australia, an offender has the right to be given a penalty that is proportionate to the crime committed. The victims or their families also have the right to see the offender punished for the harm they have done. However, it is possible that each person affected by the outcome will feel differently. An accused who has been found guilty but given a lenient sentence may feel that the outcome is just. The victim may disagree.

If an accused pleads guilty or is found guilty, the judge or magistrate will decide on a suitable penalty for the offender. Criminal penalties imposed by the courts are known as **sanctions**.

The law in Victoria which governs sentencing is the *Sentencing Act 1991* (Vic). The *Sentencing Act* sets out the purposes for which sanctions (or sentences) may be imposed.

The purposes of sanctions are set out in Source 1.



Source 1 The five purposes of sanctions

When sentencing an offender, a court can hand down a sentence which achieves one or more of these purposes (which is often the case). However, the court must not sentence an offender for any purpose other than these five. A court must also not impose a sanction that is more severe than is necessary to achieve the purposes for which it is being imposed. This is known as the **principle of parsimony**.

## Punishment

One of the purposes of sanctions is to **punish** (i.e. penalise) the offender. This allows victims and their families to seek **retribution** without taking the law into their own hands. If individuals did take the law into their hands, crime would increase and there would be no social cohesion. Therefore, the courts take it upon themselves to ensure that they seek revenge on behalf of society by imposing a sanction that will punish the offender.

Imprisonment and the deprivation of freedom is the ultimate punishment in our society. Australia no longer uses capital punishment or corporal punishment as a sanction, as these punishments are considered inhumane and unacceptable in the twenty-first century.

## Deterrence

The law aims to deter or discourage the offender and others in society from committing the same or similar offences in the future by imposing a penalty that is severe enough that the offender and others can see the serious consequences of committing the crime. There are two types of deterrence: **general deterrence**, and **specific deterrence**. A sanction imposed as a general deterrent is one that discourages people in general from committing the crime, whereas a specific deterrent is aimed at stopping the particular offender who is being sentenced from repeating the offence.

The following legal case is an example of the application of deterrence in court.

### punishment

one purpose of a sanction; a strategy designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

### general deterrence

one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

### specific deterrence

one purpose of a sanction; a process by which the court can discourage the offender from committing similar offences

## LEGAL

## CASE

# Murder of friend and father figure results in jail time

*DPP v Horneshaw* [2017] VSC 111 (15 March 2017)

On 21 November, Anna Horneshaw pleaded guilty to murdering Zvonimir Petrovski at his Thomastown home. Petrovski was a friend and father figure to Horneshaw, as well as the tenant in the unit she shared with her partner.

At the time she killed Petrovski, Horneshaw was four months pregnant. The deceased and Horneshaw's partner were both in poor health and had physical disabilities. On the night of the murder, Horneshaw wanted cigarettes and asked Petrovski to help her out. An argument



Source 2 Detectives at the scene where Zvonimir Petrovski was killed in 2015

resulted and Horneshaw eventually stabbed Petrovski several times, killing him. She was charged with murder and was remanded into custody. She gave birth to her son while in custody. The son was removed from her care soon after birth.

The Court noted that it was bound to impose a sentence which reflects general deterrence, just punishment and denunciation, given the seriousness of the crime of murder. Specific deterrence was not considered as applicable, given Horneshaw's chances of rehabilitation, support from family, plea of guilty, remorse and lack of prior offending. She was sentenced to 17 years' imprisonment with a non-parole period of 13 years.

### denunciation

one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

## Denunciation

When deciding on an appropriate sanction for a crime, the court may impose a sentence that is harsh enough to show its disapproval. This is known as **denunciation** and it is designed to convey the message that this type of criminal behaviour will not be tolerated by the courts. This purpose of sanctions is further detailed in the following news article.

## IN THE NEWS

# 'Greedy' bureaucrat jailed for corruption

AAP, 9 news, 6 April 2017

A former Victorian public servant was motivated by 'personal greed' as he defrauded the state over seven years of millions of dollars through corruptly awarded contracts.



Source 3 In 2017, Albert Ooi was sentenced to a term of eight years imprisonment for the embezzlement of millions of dollars of taxpayer funds.

Albert Hoe Ooi, 66, was sentenced in the Supreme Court on Thursday to eight years' jail, with a minimum of six, for siphoning off millions of taxpayer dollars by corruptly awarding civil works contracts to companies he controlled.

'Your crime involved corruption of the trust that citizens of this state place in public servants that taxpayer funds will be honestly expended and accounted for in the public interest,' Justice John Dixon told him.

'Corruption of this kind strikes at the heart of our civilised democracy.'

During the seven years of offending, Ooi personally profited from more than \$2.3 million.

'I am satisfied the path of dishonesty you chose was motivated by personal greed,' Justice Dixon said.

The 66-year-old's poor mental health, age, remorse and naivety about violent fellow prisoners were all factors taken into account in sentencing, Justice Dixon said.

However, punishment and denunciation were important too to deter others from such crimes, he said.

## Protection

One of the aims of sentencing is **protection**. This aim seeks to ensure the safety of society by imposing a sanction that will prevent the offender from harming again. An offender may be required to serve a term of imprisonment to remove the offender from society so that they cannot commit any more harmful acts and ensure the safety of all members of the community. While imprisonment is seen as a sanction of last resort, some offenders are given very long periods of imprisonment because the courts deem them to be a danger to society. The horrendous nature of the crime, the lack of remorse and the offender's callous attitude indicate that the person should be kept out of society for as long as possible.

### protection

one purpose of a sanction; a strategy designed to safeguard the community from an offender in order to prevent them from committing further offence (e.g. by imprisoning them)

## Rehabilitation

A further aim of sentences is to **rehabilitate** (treat) the offender. It is in society's interests to try to help offenders change their ways, otherwise crime rates and prison costs will escalate. In providing offenders with improved opportunities in the form of education, training, assistance and support (for example, counselling), the legal system hopes that offenders will grasp the chance of a better future, change their offending ways and become law-abiding citizens.

The following legal case illustrates how the prospects of rehabilitation are considered in court.

### rehabilitation

one purpose of a sanction; a strategy designed to reform an offender in order to prevent them from committing offences in the future

## Excellent prospects of rehabilitation for armed robber

### *DPP v Edwards* [2017] VCC 354 (3 April 2017)

The offender pleaded guilty to one charge of armed robbery. The offence occurred at a house in Wodonga on 10 January 2016. The offender, Edwards, found that a bracelet had been stolen from a friend of his and then took it upon himself to retrieve the bracelet. He attended a house where he believed the bracelet was with his co-accused, at which time he accused the person at the house, who was not the owner, of having the bracelet. At one stage Edwards' co-offender produced a knife and left the house with \$110.

At the plea hearing, it was noted that Edwards was part-way through a program of drug rehabilitation. It was also recognised that he had a significant history of offending in Victoria and New South Wales which included many assaults and driving offences. The Court noted, however, that the reports from Odyssey House, at which Edwards was undertaking a drug rehabilitation program, were positive, that he had taken a significant role of responsibility as an aide to the medical staff, and that he was on his way to being free from drugs.



**Source 4** In the case of *DPP v Edwards*, a lost bracelet resulted in a charge of armed robbery.

LEGAL

CASE

**community correction order (CCO)**

a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

The Court also recognised that as an Aboriginal man, he had contributed to the welfare of the Aboriginal community in Wodonga in the past.

The Court was convinced that Edwards' prospects of rehabilitation were excellent and believed that imprisoning him would be a tragedy for all. He was sentenced to a **community correction order (CCO)** and required to complete 300 hours of community work over 3 years. He was 39 at the time of sentencing.

## 11.7

## CHECK YOUR LEARNING

### Define and explain

- 1 What is the main statute that governs sentencing in Victoria?
- 2 Identify the five purposes of a sanction and briefly describe each one.
- 3 Distinguish between general deterrence and specific deterrence.

### Synthesise and apply

- 4 Read the legal case *DPP v Horneshaw*.
  - a Who were the two parties to this case?
  - b What is meant by the term 'remanded in custody'?
  - c What were the main purposes of sentencing Horneshaw, and why?
  - d Do you agree with the sentence? Give reasons.
- 5 Read the article "'Greedy' bureaucrat jailed for corruption'.
  - a What was Ooi charged with?
  - b Why is this crime considered to be serious?
  - c Was there a jury trial in this case? Why or why not?
  - d Why did the Supreme Court hear this matter?
  - e Explain why the purposes of punishment and denunciation were important in sentencing Ooi.
  - f Was the sanction appropriate in this case? Give reasons for your answer.

- 6 Read the legal case *DPP v Edwards*.
  - a What were the circumstances which gave rise to the charges?
  - b Do you think this is a minor, medium or serious example of armed robbery? Give reasons for your answer.
  - c Conduct some research online. Was there a jury trial in this case? Why or why not?
  - d Given Edwards' prior offending and chances of rehabilitation, do you agree with the sentence? Give reasons.
- 7 Create your own scenario of a crime that has just been committed. You can be as inventive as you want to be, but you should address matters such as the nature and gravity of the offence, the accused's prior offending, the type of crime and whether there is any need for rehabilitation. Exchange your scenario with that of another class member. Identify the purposes of sanctions that you think are most appropriate in each case. Discuss your findings with each other.

### Analyse and evaluate

- 8 Which one do you believe is more important: rehabilitation or punishment? Discuss this question as a class.



### Check your **obook** assess for these additional resources and more:

» **Student book questions**

11.7 Check your learning

» **Worksheet**

Purposes of sanctions

» **Weblink**

Australia's booming prison population (The Conversation)

## TYPES OF SANCTIONS

### Sentencing Advisory Council

an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters

When an offender pleads guilty or is found guilty, it is the role of the court to impose a sanction (penalty). Given most crimes committed in Victoria are minor offences, the **Sentencing Advisory Council** found that about 90 per cent of sentencing in Victoria occurs in the Magistrates' Court.

If a statute makes an act or omission a crime, it will state the maximum penalty that may be imposed on a person for committing that crime. For example, Section 38 of the *Crimes Act* states that the penalty for rape is 25 years maximum in prison. Section 19 of the *Summary Offences Act 1966 (Vic)*, which makes obscene exposure of a genital area in public place a crime, states that the maximum penalty for that crime is 2 years imprisonment.

The *Sentencing Act* sets out a hierarchy of possible sentencing options. The most serious sanction that can be imposed, and which is considered to be a sanction of last resort, is imprisonment.

	SANCTION	DESCRIPTION
↑ MOST SEVERE	<b>Imprisonment</b> with conviction	Record a conviction and order that the offender serve a term of imprisonment.
	<b>Drug treatment order</b> with conviction	Record a conviction and order that the offender undertake a judicially supervised drug or alcohol treatment program. Only available from the Drug Court in the Magistrates' Court if a person pleads guilty and the Drug Court is satisfied that the offender is dependent on drugs or alcohol.
	<b>Youth justice centre order</b> with conviction <b>youth residential centre order</b> with conviction	In the case of an offender aged 15 or older, record a conviction and order that the young offender be detained in a youth justice centre. In the case of an offender aged under 15 years, record a conviction and order that the young offender be detained in a youth residential centre.
↓ LEAST SEVERE	<b>Community correction order</b> with or without conviction	With or without recording a conviction, make a community correction order in respect of the offender. The order will be made with certain conditions attached to it.
	<b>Fine</b> , with or without conviction	With or without recording a conviction, order the offender to pay a <b>fine</b> , which is a sum of money payable to the court.
	<b>Adjournment</b> with or without conviction	Record a conviction and order the release of the offender with conditions attached; or without recording a conviction, order the release of the offender on the adjournment of the hearing, with conditions attached.
	<b>Discharge</b> with conviction	Record a conviction and order the discharge of the offender.
	<b>Dismissal</b> without conviction	Without recording a conviction, order the dismissal of the charge for the offence.

Source 1 An overview of the sentencing hierarchy in Victoria

Sanctions can be divided into two types: custodial sentences (where the offender is removed out of society and into an institution), and non-custodial sentences (where the offender serves the sentence in the community).

In this topic you will explore three possible sanctions: fines, community correction orders (CCO) and **imprisonment**.

### fine

a sanction that requires the offender to pay an amount of money to the state

### imprisonment

a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

# Fines

A fine is a **monetary penalty** that is paid by the offender to the State of Victoria (not the victim). Fines are expressed in penalty units, ranging from 1 penalty unit to 3000 penalty units. Fines are expressed in this way to make it easier to change the dollar amount of fines across all offences every year. Up until 30 June 2018, one penalty unit was \$158.67.

## When can a fine be imposed?

A fine can be imposed in addition to another sentence. When deciding the fine, the court will consider:

- the financial circumstances of the offender
- any loss or destruction of, or damage to, property suffered as a result of the offence
- the value of benefit received by the offender from the offence
- any forfeiture, compensation or restitution order imposed (being orders that may have already resulted in the offender paying compensation or handing over property).

## Conditions of fines

The court can order that the fine be paid by instalments. If the person defaults in making payments, the court can issue a warrant to arrest the person. The court may instead order the offender to do community work, or may allow further time to pay, depending on the offender's circumstances.

The following news article highlights a recent case where the court ordered payment of a record fine.

### IN THE NEWS

## Record fine for shipping company Toll Transport after stevedore crushed to death

ABC, 14 December 2016

A shipping company has been fined a record \$1 million after a stevedore was crushed to death while working at a dock in Port Melbourne more than two years ago.

Toll Transport was convicted and fined after pleading guilty in the Melbourne County Court to failing to maintain a safe system of work, WorkSafe Victoria said.

Anthony Attard, 42, was crushed to death while helping load the Tasmanian Achiever at Webb Dock on May 20, 2014.

WorkSafe Victoria said the incident happened when Mr Attard was working on the deck of the ship, placing rubber mats for flat trailers to hold shipping containers in transit.



**Source 2** A tragic accident involving a stevedore working at a dock resulted in a significant fine being imposed on a company.

## Purposes of fines

The general purposes of fines are to punish the offender, deter the offender from committing crimes any further and deter the general community. If a high enough fine is given, the court may also denounce the particular crime. A fine is not likely to help in the rehabilitation of the offender, nor does it protect the community, unless it is imposed in addition to another sentence such as imprisonment.

# Community correction order

A community correction order (CCO) is a sanction that allows an offender to remain in the community whilst serving the sanction. The sanction requires them to comply with certain basic conditions which are attached to the order. In addition, the offender is required to comply with at least one other 'optional' condition, such as performing unpaid community work.

Given the range of conditions that can be imposed, a CCO is seen as a flexible sentencing option that can be given as a sanction for a wide range of crimes. A CCO can be combined with either a fine or imprisonment of one year or less.

## When can a community correction order be imposed?

A CCO can be imposed if:

- the offence is punishable by more than 5 penalty units
- the offender consents to the making of a CCO.

For offences committed on or after 20 March 2017, a CCO cannot be imposed on an offender who has committed a 'Category 1' offence (which includes murder and rape). It also cannot be imposed on an offender who has committed a 'Category 2' offence (which includes manslaughter and kidnapping) unless special circumstances exist (such as where the offender has impaired mental functioning).

A CCO must not exceed five years if it is made in the Magistrates' Court in respect of three or more offences (or two years in respect of one offence), or five years if made in the County or Supreme Court.

## Conditions of community correction orders

There are two types of conditions imposed on an offender when given a CCO:

- mandatory conditions – conditions which apply to every offender
- optional conditions – conditions that are specific to an offender.

At **least one optional condition** must be attached to the CCO. Source 3 sets out the mandatory conditions and the optional conditions.

MANDATORY CONDITIONS	OPTIONAL CONDITIONS
<ul style="list-style-type: none"> <li>• Must not commit an offence punishable by imprisonment during the period of the order</li> <li>• Must report to and receive visits from the community corrections officer</li> <li>• Must report to the community corrections centre within 2 clear working days after the order comes into force</li> <li>• Must notify of any change of address or employment</li> <li>• Must not leave Victoria except with permission</li> <li>• Must comply with any direction given</li> </ul>	<ul style="list-style-type: none"> <li>• Unpaid community work condition: perform unpaid community work (which must not exceed 600 hours in total)</li> <li>• Treatment and rehabilitation condition: undergo treatment and rehabilitation</li> <li>• Supervision condition: be supervised, monitored and managed</li> <li>• Non-association condition: not to contact or associate with a particular person</li> <li>• Residence restriction or exclusion condition: reside at a particular place</li> <li>• Place or area exclusion condition: not enter or remain in a specified place or area</li> <li>• Curfew condition: remain at a particular place between specified hours of each day</li> <li>• Alcohol exclusion condition: a ban on entering and/or consuming alcohol on licensed premises</li> <li>• Bond condition: payment of an amount of money as a bond which will be forfeited if there is a failure to comply</li> <li>• Judicial monitoring condition: offender be monitored by the court</li> <li>• Electronic monitoring: attachment of a monitoring device</li> </ul>

Source 3 The types of conditions that must be and can be imposed on an offender as part of a CCO

The following legal case is an example of the court imposing conditions when sentencing.

## LEGAL

## CASE

### Mental health assessment part of CCO

#### *R v Majok* [2017] VSC 72 (27 February 2017)

Late in the night on 10 January 2015, David Majok punched Kuach Deng to the side of the head as they were crossing a road. Deng fell and Majok kept walking. He turned back intending to help Deng. Tragically, a car ran over Deng and killed him. Majok was only 20 years old at the time.

Majok pleaded not guilty to manslaughter. After two aborted jury trials, the DPP eventually charged Majok with reckless conduct endangering life. Majok pleaded guilty to this offence.

The Supreme Court acknowledged Majok's plea of guilty, his remorse and limited prior criminal history (though noted he was sentenced in 2015 for unrelated matters which occurred between 2013 and 2015). The Court accepted that general deterrence, denunciation and just punishment had a significant role to play in sentencing Majok, but felt that specific deterrence was less important given the mental anguish that Majok had endured and his plea of guilty and remorse. Majok was sentenced to a community correction order for a period of 18 months with certain conditions imposed on him, which included the requirement to complete 100 hours of unpaid community work over a period of nine months and to undergo mental health assessment and treatment and rehabilitation.

### Purposes of community correction orders

A CCO is a **punishment** because it can often impose certain conditions on an offender that are an imposition or an annoyance – for example, the condition to undertake unpaid community work, or have a curfew imposed. A CCO can also serve as a specific deterrent as well as a general deterrent.

Depending on the conditions that are imposed, a CCO can help to rehabilitate an offender. This is particularly so if the treatment and rehabilitation condition or alcohol exclusion condition is imposed, both of which aim to address the reasons for offending. A CCO can also protect society if the offender is kept busy, is prevented from entering certain areas, or must reside at certain places as part of the conditions.

### Imprisonment

Imprisonment is the most serious sanction that can be imposed, and involves the removal of the offender out of society and into a facility known as a jail or prison.

### When can imprisonment be imposed?

Each offence has a maximum penalty that can be imposed for that offence. This is set out in the relevant statute. For example, the maximum penalty for murder is Level 1, being life in prison. Maximum penalties are reserved for the worst examples of an offence; therefore it is rare for an offender to be given the maximum penalty.

For 'Category 1' offences committed on or after 20 March 2017, imprisonment is the only option as a sanction. Category 1 offences include murder, rape and incest.

LEVEL	MAXIMUM TERM OF IMPRISONMENT
1	Life
2	25 years
3	20 years
4	15 years
5	10 years
6	5 years
7	2 years
8	1 year
9	6 months

Source: *Sentencing Act 1991* (Vic)

**Source 4** Sentencing levels and their maximum term of imprisonment as set out in the *Sentencing Act*.

## Conditions of imprisonment

### Parole

**Parole** is an early release from prison. In certain situations (for example, where an offender has been imprisoned for a term of 2 years or more), the court must fix a non-parole period. This period is the time an offender must serve in prison before applying for parole.

Being granted parole is not automatic. The offender must prove to the Parole Board that he or she is worthy of serving the rest of the sentence in the community.

### Concurrent and cumulative sentences

If the offender is guilty of more than one offence, more than one sentence may be imposed, and therefore more than one term of imprisonment may be imposed. If that is the case, the court will need to specify whether the terms of imprisonment are to be served concurrently, or cumulatively.

Most sentences are concurrent sentences (served at the same time). This means that if an offender is given, for example, three years for burglary, and one year for stealing, he or she would serve three years because the sentences are served at the same time.

## Purposes of imprisonment

Imprisonment, as it removes the offender from prison, serves to both protect the community and punish the offender (by denying him or her of liberty). Imprisonment also generally serves to act as a deterrent (both generally and specifically for the offender), and shows the court's disapproval of the acts committed.

Imprisonment may lead to rehabilitation, but this largely depends on the circumstances of the offender, the nature of the time served in prison and the support network of the prisoner. The high rate of return of prisoners also suggests that imprisonment is not an effective means of rehabilitating people if they continue to commit crimes. For example, in Victoria, it is estimated that approximately 44 per cent of prisoners return to custody within two years of their release.

## The ability of sanctions to achieve their purposes

Even though sanctions are intended to achieve certain purposes, in some cases they may not always be effective in doing so. Source 7 provides some factors to consider when determining if fines, imprisonment and CCOs are able to achieve their purpose.



**Source 5** The Dame Phyllis Frost Centre is located in the suburb of Ravenhall in Melbourne's outer west. It is a women's maximum security prison with capacity for 482 female prisoners.

### parole

the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

### *Did you know?*

Section 74AA of the *Corrections Act 1986* (Vic) is made for one person: Julian Knight. It states that he is only to be given parole if he is in imminent danger of dying or is seriously incapacitated, and cannot do any harm to any person and does not pose a risk to the community.

SANCTION	FACTORS
Fines	<ul style="list-style-type: none"> <li>• If high enough and given to the appropriate person, can act as a general and specific deterrent</li> <li>• Can act as punishment if it is a burden on the offender</li> <li>• Can demonstrate the court's disapproval if high enough</li> <li>• Many fines don't get reported so may not act as a general deterrent</li> <li>• Unlikely to rehabilitate or protect unless imposed with another sentence</li> <li>• If offender has capacity to pay, may not be specific deterrent</li> </ul>
CCOs	<ul style="list-style-type: none"> <li>• Can enable the offender to rehabilitate and serve punishment away from influences of prison</li> <li>• Can act as a burden on the offender, thus specifically deterring him or her</li> <li>• Provides flexible rehabilitation conditions</li> <li>• Can address underlying issues of offending such as alcohol or association with certain persons</li> <li>• May not punish an offender if inappropriate conditions imposed</li> <li>• Rehabilitation depends on the willingness of the offender</li> <li>• Unlikely to punish as much as imprisonment</li> <li>• Not able to be given for many offences</li> </ul>

Cont.

SANCTION	FACTORS
Imprisonment	<ul style="list-style-type: none"> <li>• Serves as an effective method of protection</li> <li>• Most serious punishment with deprivation of liberty</li> <li>• Widely reported and can act as an appropriate general deterrent</li> <li>• Rehabilitation depends on the offender, the programs and the environment</li> <li>• High <b>recidivism</b> rates may suggest imprisonment is ineffective</li> </ul>

**recidivism**  
re-offending; returning to crime after already having been convicted and sentenced

**Source 6** Some of the factors to consider when determining whether fines, imprisonment and CCOs will achieve their purposes

## 11.8

## CHECK YOUR LEARNING

### Define and explain

- 1 Why are fines described in penalty units?
- 2 What is a CCO?
- 3 Why do you think that imprisonment is considered a sanction of last resort?
- 4 Distinguish between a cumulative sentence and a concurrent sentence.

### Synthesise and apply

- 5 Read the article 'Record fine for shipping company Toll Transport after stevedore crushed to death'.
  - a Who was the offender in this case, and what was the offender charged with?
  - b Was there a jury trial? Why or why not?
  - c What sanction was imposed?
  - d In your view, to what extent does this sanction act as a deterrent for:
    - the offender
    - individuals in society
    - companies?
- 6 Read the legal case *R v Majok*.
  - a Why do you think that the DPP decided that the charge of manslaughter was not appropriate?
  - b What were the circumstances that the court took into account in sentencing?

c Do you agree with a CCO as being an appropriate sanction in this case? Give reasons.

- 7 For each of the following statements, state whether you agree or disagree. Your teacher may use this activity as the basis for a class discussion or debate.
  - a Prisoners should be able to access government funding to complete university degrees.
  - b All prisoners should have the right to vote.
  - c There should not be any consideration of the offender's financial circumstances when imposing a fine.
  - d There should be a public register of people who are on a CCO.
  - e Prisoners should be electronically monitored at all times following their release.

### Analyse and evaluate

- 8 Conduct some research into current recidivism rates in Victoria. In your view, is imprisonment an effective sanction? Give reasons, in light of the statistics you have found.
- 9 Discuss the extent to which a CCO can serve to rehabilitate an offender.
- 10 In 2017, Senator Derryn Hinch launched a campaign seeking to pass legislation to create a national public register of convicted sex offenders. Provide one argument for and one argument against such a register.



### Check your **obook** assess for these additional resources and more:

» **Student book questions**

11.8 Check your learning

» **Going further**

Other types of sanctions

» **Weblink**

Community correction orders

# 11.9

## FACTORS CONSIDERED BY JUDGES IN SENTENCING

### Study tip

You don't need to know section numbers of statutes to answer questions. However, accessing relevant sections, such as Section 5 of the *Sentencing Act*, will help you in understanding many of these concepts. Use the AustLII or the Victorian Parliament websites to find current statutes.

**aggravating factors** circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

**mitigating factors** circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

When sentencing an offender, the court must ensure the sentence that is given is appropriate to the crime committed.

Section 5(2) of the *Sentencing Act* sets out the factors a court must take into consideration when sentencing an offender. They include current sentencing practices, the maximum penalty for the offence, the personal circumstances of any victim, and the presence of any **aggravating factors** or **mitigating factors**.

Some of these factors may help to **reduce** the sentence, whereas other factors may **increase** the sentence that may be imposed.



**Source 1** An early guilty plea will be taken into consideration in sentencing and is likely to reduce the sanction.

### Factors that may reduce the sentence

Some of the factors below may help in reducing the sentence imposed. These are likely to be factors that the offender, when submitting to the court what the appropriate sentence should be, will emphasise as being important considerations.

FACTOR	DESCRIPTION
Nature and gravity of offence	If the offending is on the low end of the scale, then this may persuade the court that a sentence much less than the maximum penalty should be imposed.
Early guilty plea	If the offender has pleaded guilty, and the earlier the guilty plea is, the court may impose a lesser sentence. This is often because of the resources and time saved by not having to run a trial, and the trauma and inconvenience saved for witnesses and victims.
Mitigating factors	Mitigating factors are factors which reduce the seriousness of the offence or the offender's culpability. Examples of mitigating factors include where the offender was acting under duress, prospects of rehabilitation, any personal strain the offender was under, the lack of injury or harm caused by the offence, or full admissions made by the offender.
Lack of prior offending	If the offender has not offended before, this is likely to work in his or her favour as it may demonstrate a one-off incident or a lack of criminality.
Remorse	If the offender shows significant remorse, then the court may take this into account. Remorse can be demonstrated through an early guilty plea, apologies to victims, early confessions or admissions or full cooperation with investigative agencies such as the police.

**Source 2** Some of the factors that may help in reducing the sentence

The following news article illustrates how the court can take certain factors into consideration when sentencing an offender.

**IN  
THE  
NEWS**

## Armed robber with dreadful childhood ‘doesn’t know how to live in society’: judge

Adam Cooper, *The Age*, 6 April 2017

He has six children to six partners. He first used cocaine at 11 and pulled his first armed robbery a year later.

The man is now 20.

He was sexually, physically and emotionally abused at age six by men in his aunt’s life and was treated in a psychiatric unit for children when he showed signs of aggressive behaviour. He went into foster care several years later.

Then came the drugs. At age nine it was alcohol and cannabis, by 11 it was cocaine and ecstasy, a year later he was trafficking and by 13 or 14 he was addicted to ice.

By this stage he was a regular in the Children’s Court, where he had convictions for armed robbery.

It was this ‘dreadful childhood’ that on Thursday prompted a County Court judge to mitigate the jail term she imposed for two armed robberies that the man, whom Fairfax Media has chosen not to name in order to report details of his childhood, committed across three days in Springvale in July last year.

On the night of July 2, the court heard, the man wore a hoodie and cloth over his face and threatened two bottle shop staff with a knife and robbed them of cash and alcohol.

Two nights later, he disguised himself and used a knife to rob a service station attendant — in her first week on the job — of cash and tobacco.

Despite his offending, the judge said she took the impact of the man’s childhood into account in setting a jail term of three years and four months after he pleaded guilty to two charges of armed robbery.

She said he was let down by just about every adult who featured in his childhood, and that it was ‘a very sad situation’ to come across a young illiterate man who had children he didn’t know, a drug habit he couldn’t beat and ‘who doesn’t know how to live in society’.

## Factors that may increase the sentence

Various factors may help to reduce the sentence imposed. Some of these are set out in Source 3.

FACTOR	DESCRIPTION
Nature and gravity of offence	If the offending is on the high end of the scale, then it is possible that the court will view a higher sentence as more appropriate. For example, use of weapons, or the intentional conduct of the offender is likely to increase the sentence.
Aggravating factors	Aggravating factors increase the seriousness of the offence and the offender’s culpability. Aggravating factors include the use of violence or explosives, the offence taking place in front of children, the offender being motivated by hatred or prejudice, or the offender being in a position of trust and has breached that trust (for example a parent committing a crime against a child).
Previous offending	If the offender has engaged in previous criminal behaviour, then this may result in the sentence being increased.

FACTOR	DESCRIPTION
Impact of the offence on any victim	If the victim has significantly suffered as a result of the offence, then this can persuade the court in sentencing. The victim can demonstrate his or her loss or suffering by filing a victim impact statement which will be read in court during sentencing.
Injury, loss or damage as a result of the offence	If there was significant injury, loss or damage to property or a person, then this is likely to increase the sentence. For example, if someone lost a life, or there was widespread property damage, this will be taken into account.

Source 3 Some of the factors that may increase the sentence

## 11.9

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify the point in a criminal case when a judge will consider factors that are relevant to sentencing.
- 2 Using examples, identify one factor that may help reduce the severity of a sentence and one factor that may increase the severity of the sentence.
- 3 Using examples, distinguish between mitigating factors and aggravating factors.

### Synthesise and apply

- 4 For each of the following scenarios, identify at least two factors that may be taken into account in sentencing. For each, state whether the factor is likely to increase or decrease the sanction imposed.
  - a Barty is a first-time offender and has committed a violent assault against his former wife. She is now in a coma in hospital.
  - b Giovanna has pleaded guilty at the time of arrest to drug trafficking. She has been found to have been a significant trafficker in the Melbourne area.
  - c Cassius laughed when he was arrested and pleaded not guilty to the charges. He has had a terrible childhood and suffered from physical and mental abuse from his parents.

- 5 Read the article 'Armed robber with dreadful childhood "doesn't know how to live in society": judge'.
  - a Identify the parties in this case.
  - b Which court had a role in sentencing, and why?
  - c Identify and describe three factors that are likely to have been taken into account in sentencing this man, and whether they would have reduced or increased his sentence.
  - d Do you agree that these factors ought to be taken into account in sentencing? Give reasons.
- 6 Access the 'You be the Judge' page on the Sentencing Advisory Council website. A link is provided on your [obook assess](#). Choose one of the scripts. Watch the video and undertake the activity. Once you have finished, discuss what you learned during the activity.

### Analyse and evaluate

- 7 Do you think that early guilty pleas should reduce a sentence? Write down all of the possible different views on this question, and particularly consider the views of the accused, the victim, society and the courts. Consider what the most objective view is in light of these views, and in light of the principles of justice.



### Check your [obook assess](#) for these additional resources and more:

» **Student book questions**

11.9 Check your learning

» **Weblink**

You be the judge

» **Weblink**

*Sentencing Act 1991 (Vic)*

» **Weblink**

A Quick Guide to Sentencing (Sentencing Advisory Council)

How does Victoria approach sentencing? Is it tough on crime, or does it take alternative approaches to sentencing that do not always involve punishing the offender?

This topic explores aspects of sentencing practices in Victoria and then explores sentencing practices in Norway.

#### Drug Court

a specialist court of the Magistrates' Court which sentences offenders to a Drug Treatment Order where drugs or alcohol contributed to the commission of the offence

#### Koori Court

a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people

## Sentencing practices in Victoria

Sentencing in Victoria in the past 10 years or so has seen a reduction in the number of sentences available to a court, with the Victorian Parliament passing legislation to this effect. The Victorian Parliament has also passed laws which limit the ability of the court to impose sanctions such as a community correction order instead of imprisonment, leaving imprisonment the only option for some offences. The aim of these changes is to be 'tougher' on offenders who commit serious offences such as murder and sexual offences involving children.

On the other hand, the courts have sought to adopt a **therapeutic approach** to sentencing for some crimes by utilising courts such as the **Drug Court**, the **Koori Court** and specialist divisions and lists in the Magistrates' Court.

## Sentencing options in Victoria

Within the past decade, there have been substantial changes to the sentences that can be imposed on offenders. As at 1 January 2012, the possible sentences available were as follows:

SANCTION	DESCRIPTION
Dismissals, discharges and adjournments	<ul style="list-style-type: none"> <li>The release or discharge of the accused person</li> </ul>
Fines	<ul style="list-style-type: none"> <li>The payment of an amount of money into the court</li> </ul>
Community-based orders	<ul style="list-style-type: none"> <li>Similar to a CCO, a sentence served in the community with certain conditions attached (though fewer conditions may be imposed than a CCO)</li> </ul>
Youth justice centre orders and youth residential centre orders	<ul style="list-style-type: none"> <li>The detention of a young offender in a youth justice centre or a youth residential centre</li> </ul>
Suspended sentences	<ul style="list-style-type: none"> <li>An order that the term of imprisonment is suspended wholly or in part (that is, served in the community and not in prison)</li> </ul>
Home detention orders	<ul style="list-style-type: none"> <li>An order which imposes a sentence of imprisonment which is served at the person's place of residence</li> </ul>
Intensive correction orders	<ul style="list-style-type: none"> <li>A term of imprisonment served by way of intensive correction in the community with strict conditions imposed, including attending a centre for 12 hours a week to complete rehabilitation or community work</li> </ul>
Drug treatment orders	<ul style="list-style-type: none"> <li>An order given in the Drug Court for drug offenders to undertake a rehabilitation program</li> </ul>
Combined custody and treatment orders	<ul style="list-style-type: none"> <li>An order that the offender serve a term of imprisonment partly in custody and partly in the community where alcohol or drug addiction contributed to the offence</li> </ul>
Hospital security orders	<ul style="list-style-type: none"> <li>Detention of a person in an approved mental health service</li> </ul>
Imprisonment	<ul style="list-style-type: none"> <li>The removal of the offender from society and into prison</li> </ul>

**Source 1** Sentencing options as set out in the *Sentencing Act* as at 1 January 2012

Since that time, however, several changes have been made in the *Sentencing Act*. For example:

- in 2011, suspended sentences were abolished as an option to the Supreme Court and the County Court for serious or significant offences committed on or after 1 May 2011
- in 2012, home detention was abolished, and the new community correction order (CCO) was created, which abolished the community-based order, intensive correction order and the combined custody and treatment order. That is, the CCO significantly expanded so that it could be flexible to deal with certain types of offences and offenders by imposing various conditions
- in 2013, the Victorian Government introduced non-parole periods of at least four years for a number of 'gross violence' offences, which meant that for those offences, a court was required to impose a term of imprisonment for that minimum period unless there were 'special reasons' (such as the accused had an acquired brain injury or mental illness)
- in 2014, suspended sentences were completely abolished in Victoria for all offences
- in 2016, the Victorian Parliament passed legislation which limited the ability of courts to hand down a sentence other than imprisonment for 'Category 1 offences'. It also restricted the ability of the courts to hand down a sanction other than imprisonment for 'Category 2 offences', except in certain circumstances.

In April 2017, the Opposition Leader Matthew Guy stated that, if elected, his Government would introduce a 'two strike plan' which would mean that offenders who commit further violent crimes would face tough new minimum sentences. For example, a convicted murderer who has committed a violent offence in the past would automatically face 20 years behind bars. If introduced, it would be one of the toughest sentencing regimes seen in Victoria.

In 2017, the Victorian Parliament passed legislation which introduced a new standard sentence scheme into the *Sentencing Act*. The scheme introduces 'standard sentences' for certain indictable offences. A standard sentence is intended to be the middle of the range sentence to be given for the offence based on objective factors. For example, the standard sentence for rape is 10 years. The intention by the Government is to increase the sentences that can be imposed for these type of offences.

The above has seen a trend of the Victorian Parliament wanting to be 'tough on crime' by substantially controlling what sentences can be imposed by the courts for certain offences. For some offences, imprisonment is the only option. Suspended sentences and home detention orders are now not available.

This, however, has placed significant pressure on Victoria's prison system, as well as pressure on Corrections Victoria when dealing with people on community correction orders. It was reported that the number of offenders on CCOs has jumped from 5871 in 2013 to 11 730 in 2016, but the recidivism rate of those on CCOs remains over 30 per cent.

In addition, many have questioned the effectiveness of prisons as a rehabilitative tool, given Victoria's recidivism rate which suggests that imprisonment does not deter people from committing crimes again.

**therapeutic justice**  
a method used in the criminal justice system to deal with offenders in a way that addresses the underlying causes of crime and seeks to provide offenders with support to avoid further reoffending

## Therapeutic justice

**Therapeutic justice** is a term given to a process used in the criminal justice system where underlying health and personal issues are addressed to prevent offenders from reoffending. It is recognition that a pure punishment approach – imprisoning offenders or sentencing them without considering the causes of crime – is not effective in changing behaviour and keeping communities safe. Rather, therapeutic justice aims to look at the causes of crime and deal with those causes. It reflects the idea that the traditional approach of sentencing and taking a 'tough stance on crime' may not be appropriate for everybody, and that imprisonment is not an effective way of preventing reoffending.



**Source 2** The Neighbourhood Justice Centre adopts a therapeutic justice approach.

**Law Institute of Victoria (LIV)**  
the legal body which represents lawyers in Victoria and provides professional development relating to their practice

In the past 20 years, Victoria has seen the adoption of some therapeutic justice approaches. These include as follows:

- in 2002, the Drug Court was established in Dandenong Magistrates' Court. The Drug Court aims to deal with offenders who have committed crimes as a result of a drug or alcohol addiction, and aims to place offenders on a treatment plan to deal with the underlying causes. You will explore the Drug Court in the next topic
- in 2002, the first Koori Court was opened in the Magistrates' Court in Broadmeadows. The Koori Court is a sentencing court for Aboriginal people, and aims to include the Aboriginal community and views into the sentencing process, which uses an informal atmosphere. You will explore the Koori Court in the next topic
- in 2007, the Neighbourhood Justice Centre (NJC) was established in 2007. The NJC attempts to determine criminal matters by addressing the underlying causes of harmful behaviour and tackling social disadvantage
- in 2010, the Assessment and Referral Court List (ARC) was established as a specialist court list in the Magistrates' Court. It aims to meet the needs of an accused person who has a mental illness and/or cognitive impairment.

Therapeutic justice approaches are not without critics. Many people believe it is taking a 'soft on crime' approach and results in an increase in criminal activity, not a decrease. In response to some of these critics, in 2017 the **Law Institute of Victoria (LIV)** issued the following statement.

## EXTRACT

### Therapeutic justice the solution, not the cause of criminal activity

1 February 2017

The LIV is concerned about recent media commentary that suggests a therapeutic approach by magistrates and the judiciary is to blame for the spate of criminal activity in Victoria over the past year.

Therapeutic justice is an evidence-based approach to law and sentencing that recognises that a purely punitive approach is not effective in changing behaviour and keeping communities safe. LIV president Belinda Wilson said. 'Punishment alone does not prevent crime. Addressing the causes of crime prevents crime.'

Contrary to some reports, therapeutic justice does not let offenders off lightly, Ms Wilson said. 'It is not soft justice. In fact it holds offenders accountable for their actions, requiring them to face up to their actions, take steps to repair the harm they have inflicted, and make changes in their lives.'

Therapeutic justice does however, recognise that crime has a social dimension and takes into account the context and issues that have led to offenders' harmful behaviour, Ms Wilson said.

Last year's report by the Victorian Ombudsman on the rehabilitation of prisoners showed that a large proportion of offenders come from the most disadvantaged backgrounds – with high rates of poverty, unemployment, family violence, substance abuse and mental health issues.

Therapeutic justice aims to halt the social and intergenerational aspect of crime by addressing its causes and providing offenders with the tools and support to avoid further reoffending.

Ms Wilson pointed to the reduced recidivism rates among those involved in therapeutic justice programs in Victoria's 'problem-solving courts' such as the Drug Court and the Assessment and Referral Court (ARC), which deals with offenders diagnosed with mental illness, and participants in Youth Justice Group Conferences, where offenders engage with their victims, family members and other court and support staff to make reparations for their crime.

'These programs have been shown to be highly effective and economical,' she said.

The current spate of crime does not mean therapeutic justice does not work, she said. 'Therapeutic justice is an ongoing process. More work needs to be done to find ways to address the underlying causes of the crime and to help steer these offenders away from becoming hardened lifelong criminals,' she said.

'Cultural issues, intergenerational trauma, and the impact of the drug ice created new challenges that needed to be dealt with by skilled experts, not responded to with a retributive approach that would not solve the crime problem in the long term,' she said.

Source: Law Institute Victoria, 'Therapeutic justice the solution, not the cause of criminal activity' (Media Release, 1 February 2017)

## Sentencing practices in Norway

Norway has a population of just over 5 million. Similar to Australia, Norway has a parliament and is a constitutional monarchy. This means it has its own constitution, but its head of state is the King (currently King Harald V). Norway is considered to be a highly advanced democratic nation, ranking No. 1 in the 2016 Economic Intelligence Unit Democracy Index. Norwegians value the right to vote, and their people are engaged in politics. It has a low unemployment rate, no national debt and significant wealth.

Norway also has a low crime rate. The United Nations Global Study on Homicide found in 2014 that the rate of homicide in Norway was 0.6 per 100 000 population, with 29 homicides occurring that year. Australia's homicide rate was 1.0 per 100 000 population in the same year (with 238 homicides). The United States' Overseas Security Advisory Council (OSAC) reports that the majority of criminal offences reported in Norway are theft-related offences, and that organised crime exists only on a small scale (though reporting of sexual offences increased in 2015).

Norway has one of the lowest recidivism rates in the world. A report by Salve Regina University in March 2014 reported that Norway has a recidivism rate of 20 per cent.

## Sentencing options in Norway

The sentencing options in Norway are in some ways similar to those of Victoria. Some of the forms of punishment include:

- **imprisonment** – The maximum term of imprisonment that can be imposed in Norway is 21 years (though a 30-year maximum sentence can be imposed for certain crimes such as war crimes,



Source 3 Norway's *Storting* (parliament)



Source 4 The 2011 Norway attacks included an attack on a youth camp on Utoya Island. This resulted in the right-wing extremist, Anders Breivik, receiving a preventive detention.

genocide and crimes against humanity). Some of the term of imprisonment can be served at home, depending on the circumstances, and some of the sentence can also be suspended

- **preventive detention** – This is reserved for dangerous and sane offenders. Once the minimum period of detention (21 years) has been served, an assessment will be made about the offender, and the detention can be increased by up to five years. This is repeated, such that a life sentence may result. There are generally less than 100 offenders in Norway at any one time that are serving a preventive detention
- **community sentence** – This can be imposed instead of a term of imprisonment and will generally require the person to undertake community service
- **fines** – Similar to Victoria, consideration will be given to the offender’s financial position as to whether a fine is appropriate
- **loss of rights** – Where an offender is unfit for a particular position or activity, he or she may be deprived of that position or undertaking that activity in the future.

Norway focuses far more on rehabilitation and restorative justice (that is, trying to heal and put things right), and less on punishment. It believes that prisons do not work. Fines, suspended sentences and community service are often used as sanctions, with imprisonment reserved for the most serious offences.

The death penalty is prohibited in Norway.

Victim–offender mediation is also used as part of sentencing in Norway. It can be used as an alternative sentence for some offences. Both the victim and offender must voluntarily participate, but the mediation service is part of the therapeutic justice (or restorative justice) approach which aims to involve the offender in putting things right.

## Imprisonment in Norway

The International Centre for Prison Studies reported the following prison population totals and prison population rates for each of the following countries:

COUNTRY	AS AT	PRISON POPULATION TOTAL (INCLUDING REMAND PRISONERS)	PRISON POPULATION RATE (PER 100 000 OF NATIONAL POPULATION)
Australia	28 September 2016	39 152	162
Norway	28 September 2016	3874	74
United States of America	31 December 2015	2 145 100	666
India	31 December 2015	419 623	33

Source: International Centre for Prison Studies, World Prison Brief

Source 5 Prison population totals and rates for Australia, Norway, United States of America and India

Generally, the maximum term of imprisonment that can be imposed is 21 years, with life sentences abolished. Over 89 per cent of the jail sentences imposed in Norway are less than a year long.

If people are imprisoned, then Norway believes that they should be able to live their life as if they were on the outside to the extent that this is possible. Norway believes that removing freedom is enough of a punishment, and there is no need to punish them further by denying them what they need to live on the inside. There is also a view taken that because most prisoners return back to society, then they should

be treated fairly so that they are able to reintegrate back into society. Therefore, the offender is given the same rights as all others in society, and they are placed in the lowest possible security facility.

For example, Halden Prison is one of Norway's maximum-security prisons. It aims to replicate life on the outside as much as possible. Vocational programs are offered to prisoners, and there are running tracks, recording studios, and fully equipped kitchens with sharp knives. Classes and workshops in various vocational activities such as assembly and cooking are also provided. The cells have televisions, computers and sanitation.



Source 6 Inside Halden Prison in Norway

## 11.10

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the following terms:
  - a Therapeutic justice
  - b Preventive detention
  - c Suspended sentence
  - d Home detention
- 2 Explain two aspects of sentencing practices in Victoria.
- 3 Explain how Victoria has adopted the therapeutic justice approach to sentencing.
- 4 Describe crime in Norway. Refer to statistics in your description.
- 5 What is the maximum penalty that can be imposed in Norway?

### Synthesise and apply

- 6 Describe two influences that may encourage the Victorian Government to be 'tough on crime', and two influences where the Victorian Government may adopt more therapeutic justice approaches.
- 7 Draw a timeline of sentencing in Victoria.

- 8 Draw a table in your notebook which identifies similarities and differences between the sentencing approaches in Norway and in Victoria.
- 9 Conduct some more research on the 2011 Norway attacks.
  - a What sentence was imposed?
  - b Did Breivik appeal? Why or why not?
  - c Do you think this is an adequate sentence? Give reasons.

### Analyse and evaluate

- 10 Do you think that Victoria could, and should, adopt the sentencing approaches adopted in Norway? Be prepared to discuss your views with your class members.
- 11 Do you think a 'tough on crime' approach is the right approach? Discuss as a class.
- 12 Conduct some research on Halden Prison and comment on whether you believe Victoria should adopt a similar model for its prisons.



### Check your **obook** assess for these additional resources and more:

» **Student book questions**  
11.10 Check your learning

» **Going further**  
A comparison with the US

» **Weblink**  
Tightening community correction orders

» **Weblink**  
Victorian Sentencing Process

# ALTERNATIVE APPROACHES TO SENTENCING

Courts sometimes adopt different approaches to sentencing (rather than sentencing through the traditional method of a plea hearing in court). Three of these approaches are through the use of the Drug Court, the Koori Courts and diversion programs.

## The Drug Court

### Drug Treatment Order

a type of sanction imposed by the Drug Court which aims to treat the underlying causes of offending, and which includes both the treatment and custody of the offender

The Drug Court was established in 2002 as a division of the Magistrates' Court. The first Drug Court was located at Dandenong Magistrates' Court, and a second Drug Court opened in Melbourne in March 2017. The Drug Court deals with offenders who commit crimes while under the influence of drugs or to support a drug habit.

The Drug Court is intended to respond to the failure of traditional methods of sentencing offenders to adequately address drug use and offending, by directly addressing the issue of drug and alcohol dependency. It does this by imposing a **Drug Treatment Order** (DTO) on the offender.



**Source 1** One Drug Court is located at Dandenong Magistrates' Court.



**Source 2** Magistrate Tony Parsons speaks at a hearing of the Drug Court

## Eligibility

Not every offender is eligible to be sentenced in the Drug Court. To be eligible, the following criteria must be met:

- the offender must reside within an area serviced by the Drug Court
- the offender must plead guilty to the offence
- the offence must be within the jurisdiction of the Magistrates' Court (i.e. a summary offence, or an indictable offence heard summarily) and punishable by imprisonment
- the offence must not be a sexual offence or an offence which involved actual bodily harm
- the Drug Court must be satisfied that the offender is dependent on drugs or alcohol, and that dependency contributed to the offence being committed.

## Process

The screening process will first determine whether the offender is suitable to participate in a DTO. This will involve determining the offender's location, prior and current offences, whether the drug or alcohol abuse is a significant factor in committing the crime, and whether the offender is willing to participate.

The assessment process will then determine whether the program will be able to address the offender's behaviour. Once the screening and assessment processes are complete, a treatment plan will be prepared and a DTO will be imposed.

## Drug Treatment Order (DTO)

A DTO is an order which aims to rehabilitate the offender by providing a judicially-supervised, therapeutically-oriented drug or alcohol treatment program. There are two parts to a DTO:

- the treatment and supervision part. This consists of core conditions and program conditions
- the custodial part. This part requires the Drug Court to impose a sentence of imprisonment of no more than 2 years, which is what it would have imposed if it had not made the DTO.

The conditions of the DTO which must be imposed (core conditions) and which may be imposed (program conditions) are as follows.

CORE CONDITIONS	PROGRAM CONDITIONS
<ul style="list-style-type: none"> <li>• Must not commit an offence punishable on conviction by imprisonment</li> <li>• Must attend the Drug Court when required</li> <li>• Must undergo treatment for drug or alcohol dependency as specified in the order</li> <li>• Must report to and accept visits from a relevant officer</li> <li>• Must give notice of any change of address</li> <li>• Must not leave Victoria except with permission</li> <li>• Must obey all lawful instructions and directions given</li> </ul>	<ul style="list-style-type: none"> <li>• Submit to drug or alcohol testing</li> <li>• Submit to detoxification or other treatment</li> <li>• Attend vocational, educational, employment or other programs</li> <li>• Submit to medical, psychiatric or psychological treatment</li> <li>• Not associate with specified persons</li> <li>• Reside at a specified place for a specified period</li> </ul>

**Source 3** Core conditions and program conditions associated with a DTO

The Drug Court has the power to give a reward from time to time to an offender who has been compliant, such as supermarket vouchers and tickets to a football game. However, failure to comply with conditions can result in negative actions, such as requiring that the offender perform unpaid community work, or ordering that the custodial part of the DTO be activated for a specified period (but for no more than 7 days). The intention of imposing a short period of time in custody is to encourage offenders to stay on the program, rather than risk the effects associated with time in prison.

A DTO can be cancelled if the offender is no longer willing to participate, or its continuation is not likely to be effective. The offender will be resentenced or sent to custody to serve out the custodial part of the DTO.

The following news article details the success of the Drug Court.

### The Dandenong Drug Court that wants to do more

Nino Bucci, Tammy Mills and Jane Lee, *The Age*, 7 March 2015

Spring sunshine licks Steve's worn face as he stands near a vegetable garden in Dandenong. He has been addicted to heroin for more than 20 years, and has used drugs since he was 10.

The garden has been tended by addicts enrolled in the little known Drug Court program. Steve, 37, graduates today.

Six of Steve's friends have overdosed since he started the program at the Dandenong Drug Court, about two years ago. The court aims to help drug addicts stay clean, instead of jailing them.

Steve speaks warily about his past life, as if mere mention will send him careening back to drugs. He talks about the friend who overdosed two months earlier, about his body turning black before his partner woke and found him beside her.

He talks about driving through pharmacy windows to steal drugs, and two young daughters he wants to see more.



Source 4 Sejkan Zekirovski at the Drug Court

The court has helped almost 200 people cut their drug use and crime over the past 12 years but it has never been expanded. The Drug Court's sole magistrate Tony Parsons borders on evangelical when it comes to the program. He knows it is not a complete success. Not everyone who starts the program graduates drug and crime free. His argument is that the order is far better than the alternative, which, for those on the program, would be prison.

Of the roughly 500 who have completed the program, about 19 per cent overcame addiction, and a further 19 per cent greatly reduced drug use and criminal offending. The rest did not complete the order. If that 38 per cent, about 200 people, had gone to prison, it would have cost more than \$300 a day to keep them. And once released, at least 80 would reoffend, according to state government average recidivism statistics published by *The Age* in January.

## Effectiveness of the Drug Court

The Drug Court is seen to benefit both participants and the community. For participants, it is seen to break the cycle of offending by addressing the underlying causes of offending helping connect the offender to the local community, providing him or her with improved health and wellbeing, self-esteem and employment prospects, and rehabilitating so as to reduce the possibility of reoffending.

In December 2014, KPMG released a report which evaluated the Drug Court in Victoria. Some of the key findings of the KPMG evaluation found that:

- there was a significant reduction in the rate of reoffending compared to those who were imprisoned. For example, the rate of reoffending in the first 12 months for Drug Court participants was 31 per cent lower than those who were imprisoned
- there was a cost saving of approximately \$1 212 840 over a two-year period as a result of fewer imprisonment days
- there were significant improvements in the participants' health and wellbeing.

There are limits on the number of offenders who can be given a DTO. This is largely because of the intensity of the treatment plan and the resources required to ensure participants are given adequate treatment. The new Drug Court which opened in March 2017 in Melbourne will increase the capacity of the court to deal with 240 offenders at any one time (as opposed to 70 offenders).

There have been increasing calls to expand the Drug Court into other regional areas. In particular, there has been a desire for one to be established in Geelong to deal with drug offences. Parts of society are hopeful that the Drug Court will expand to other areas in 2018 and beyond.

Some have criticised the Drug Court and in particular the rewards program following the launch of the Melbourne Drug Court in 2017. Opposition Attorney-General John Pesutto was reported by the *Herald Sun* as suggesting that the rewards program 'bribed' people to obey the law, saying 'people should abide by the law because it's the right thing to do, not because there's something in it for them'.

# The Koori Court

The Koori Court was first established as a division of the Magistrates' Court in 2002. Since then, it has expanded to become a division of the Children's Court and County Court. The Koori Court is a sentencing court available to an Aboriginal accused person. Its aim is to provide an informal atmosphere for sentencing, and to allow representation from the Aboriginal community in the sentencing process. This is achieved by having elders and family members present during sentencing. Koori Courts are particularly important given the over-representation of Aboriginal and Torres Strait Islander people in the justice system, and the negative experiences that are associated with that over-representation.

The Koori Court system has been successful in Victoria, as it aims to explore sentencing alternatives to imprisonment and increase Aboriginal ownership and participation in the justice system.

Source 5 identifies where the Koori Court sits in each location as at September 2017. The latest Koori Court to open was the County Koori Court in Mildura in 2016.

	MAGISTRATES' COURT	CHILDREN'S COURT	COUNTY COURT
Number	7	9	3
Locations	Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton, Swan Hill, Warrnambool	Bairnsdale, Hamilton, Latrobe Valley, Melbourne, Mildura, Portland, Shepparton, Swan Hill, Warrnambool	Latrobe Valley, Melbourne, Mildura

Source 5 Locations of the Koori Courts

## Eligibility

To be eligible to be sentenced in the Koori Court, the following criteria must be met:

- the accused must be Aboriginal
- the offence must be within the jurisdiction of the relevant court
- the offence must not be a sexual offence, or a contravention of a family violence intervention order or personal safety intervention order
- the accused intends to plead guilty or has pleaded guilty
- the accused consents to the case being dealt with by the Koori Court.

### lawyer

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

## Process in the Magistrates' Court

The Koori Court is less formal than the Magistrates' Court. All court participants sit around a table. The magistrate sits opposite the offender, who may have the support of a **lawyer**, a family member, an Indigenous elder and an Indigenous justice worker. The magistrate can take advice from Aboriginal elders on cultural issues and appropriate sentencing. However, the magistrate is the ultimate decision-maker and uses the same sentencing options that are available in the Magistrates' Court.

An Indigenous justice worker, community corrections officer, special police prosecutor and lawyer for the accused assist the magistrate with the case. A range of sentences can be imposed on the offender, depending on the offence and relevant sentencing factors.



Source 6 A sitting of the Koori Court in the Children's Court

## Effectiveness of the Koori Courts

An independent university study concluded that Koori Courts reduce recidivism with an average of 14 per cent of accused reoffending compared to the general recidivism rate of 29 per cent.

An evaluation conducted for the County Court in 2011 also found that:

- of the 31 accused included in the analysis, only one had reoffended for a low level offence
- the experience of the accused in the justice system was vastly improved, with the majority finding the process more engaging, inclusive and less intimidating
- there was an identification of a need to have greater participation of service providers in process to address underlying causes of offending behaviour, such as drug and alcohol service providers
- the Koori Court provided access to fair, culturally relevant and appropriate justice.

## Diversion programs

A **diversion program** is available in the Magistrates' Court and Children's Court for summary offences. It is a way in which a criminal matter can be dealt with out of court by placing the offender on a program (sometimes called a plan), rather than entering a plea or being found guilty. It is an opportunity for an offender to avoid a criminal record, and avoid having being sentenced by a court, on the basis that he or she will comply with certain conditions as part of the plan.

The program is intended for first-time offenders, and allows those offenders to avoid a criminal record. It aims to reduce re-offending, and assist rehabilitation rather than causing the entry of first-time or low risk accused people into the criminal justice system. It aims to save court resources by avoiding the need for a hearing, and aims to enable the accused to avoid a criminal record and access assistance such as rehabilitation and counselling. The program can also involve victims who can participate in the process.

### Eligibility

Section 59 of the *Criminal Procedure Act* establishes the diversion program in the Magistrates' Court. For a person to be eligible to partake in the program, the following criteria must be met:

- the accused must acknowledge to the Magistrates' Court responsibility for the offence
- it must appear appropriate to the Magistrates' Court that the accused should participate in the program
- both the prosecution and the accused consent to the matter being diverted
- the offence is not one that is punishable by a minimum or fixed sentence or penalty (such as a suspension of a licence).



**Source 7** Travis Cloke, former AFL player, was placed on a diversion program in 2009 in relation to a prank which resulted in a minor charge.

Generally, first-time offenders are afforded the opportunity to undertake a diversion program if the offence is not too serious. More common offences that the offender may have committed include criminal damage, theft or minor drug offences.

Following a 12-month pilot, from January 2017 a youth diversion program became available in all Children's Courts across Victoria. The youth diversion program will operate in the same way as that in the Magistrates' Court. It aims to ensure offenders take responsibility for their actions, address underlying causes of offending and avoid the stigma associated with a criminal record. The Sentencing Advisory Council reported in December 2016 that children who are sentenced between 10 and 12 years of age are more likely to reoffend than those first sentenced when they were older, suggesting that diversion programs may assist in reducing recidivism rates for children.

The following news article details the importance of diversion programs for youth offenders.

## Victorian budget: statewide push to divert youth from a life of crime

Farrah Tomazin, *The Age*, 23 April 2016

Teenage lawbreakers will get more chances to avoid jail as part of a statewide plan to divert young people from a life of crime.

As Victoria's crime rate continues to rise – partly on the back of youth offences – Wednesday's state budget will pump millions of dollars into early intervention, aiming to get young people back on track rather sentence them to juvenile detention.

Under the plan, \$5.6 million will be spent on a new diversion program in the Children's Court, allowing young people to avoid a criminal conviction and get the support they need, if they accept responsibility for their behaviour.

Four new full-time youth justice workers will also be employed to support offenders, and a further \$1 million over two years will be spent expanding the Youth Justice Bail Supervision program, which helps to safely manage young people on bail in the community.

The notion of a statewide, government-backed diversion program builds on a pilot scheme run by the Jesuit Social Services, which has helped more than 270 young people since June 2015.

Figures suggest that in the pilot program's first quarter, 35 out of 38 young people who completed the program had their matters successfully dismissed.

Children's Minister Jenny Mikakos said that by intervening early, young people had a chance to stay in education or work, remain connected to their family or community, and not reoffend.

'No one wants to see one mistake define a young person's entire life. Avoiding further progression into the criminal justice system is in the best interests of the young person and the community,' she said.

IN  
THE  
NEWS



**Source 8** Young offenders are able to avoid a criminal record with the introduction of a diversion program in all Children's Courts in Victoria.

## Process

Generally the onus is on the offender to ask for a diversion. The Court may seek the victim's views on the matter.

If the magistrate agrees that the offender should be diverted away from sentencing in court, the offender will be put on a diversion plan, and the proceeding will be adjourned for up to 12 months to enable him or her to participate in and complete the plan.

The diversion plan might involve the offender having to:

- obtain treatment, such as counselling or drug or alcohol treatment
- write a letter of apology to the victim
- compensate the victim
- undertake an appropriate education course
- make a donation or do some other service such as community work.

If the diversion program is successfully completed, then the offender does not need to enter a plea, and he or she will be discharged without any finding of guilt. If the diversion program is not successfully completed, then the case will go back to the court for a hearing, and the offender will be sentenced.

## Effectiveness of diversion programs

A report prepared by Turning Point Alcohol and Drug Centre Inc. (in collaboration with Health Outcomes International Pty Ltd) in 2004 found that between July 2001 and September 2003, over 90 per cent of the diversion program participants were first-time offenders, with males representing over double the number of females. It also found that the re-offending rate was very low: of 100 participants, 0 to 7 per cent would be convicted of a subsequent offence in the 12 months following commencement of the program. Ninety-four per cent of participants completed the program.

The evaluation also suggested that the program was successful in achieving rehabilitation and found that generally the diversion program was successful.

It was reported that in January 2015, Chief Magistrate Peter Lauritsen ordered a further review into the diversion program. One of the concerns raised is whether the prosecution should be allowed to prohibit the offender from participating in the diversion program because it did not consent to it. A possible reform could be for the magistrate to still have the power to order the offender to be diverted after hearing from both parties.

## Strengths and weaknesses of alternative approaches

Some of the strengths and weaknesses of the Drug Court, Koori Court and diversion programs are set out in Source 9 below.

ALTERNATIVE APPROACH TO SENTENCING	STRENGTHS	WEAKNESSES
Drug Court	<ul style="list-style-type: none"> <li>• Addresses underlying causes of crime – drug and alcohol dependency</li> <li>• Avoids effects of imprisonment</li> <li>• Ongoing support and supervision</li> <li>• Reward system provides positive reinforcement</li> <li>• Better alternative to prison</li> <li>• More cost-effective</li> <li>• Breaks cycle of offending and helps connect offender with local community</li> </ul>	<ul style="list-style-type: none"> <li>• Not every offender is eligible to be sentenced</li> <li>• It is not always successful in reforming offenders</li> <li>• Drug Court is limited in its capacity to accept offenders</li> <li>• Expensive to establish</li> <li>• Some have criticised the rewards program</li> </ul>
Koori Court	<ul style="list-style-type: none"> <li>• Increases Aboriginal ownership and participation</li> <li>• Provides an informal atmosphere for sentencing</li> <li>• Reduces recidivism</li> <li>• Experience of the accused is vastly improved, with the experience being more engaging, inclusive and less intimidating</li> </ul>	<ul style="list-style-type: none"> <li>• Not available to all offenders</li> <li>• Not available in all locations</li> <li>• Limited to sentencing only and does not extend to trials</li> <li>• Overrepresentation of Aboriginal people in criminal justice system has not generally improved over the years</li> </ul>

ALTERNATIVE APPROACH TO SENTENCING	STRENGTHS	WEAKNESSES
Diversion programs	<ul style="list-style-type: none"> <li>• Allows avoidance of criminal records</li> <li>• Saves court resources</li> <li>• Provides offenders with access to assistance such as rehabilitation and counselling</li> <li>• Can involve victims</li> <li>• Reduces recidivism rates</li> </ul>	<ul style="list-style-type: none"> <li>• Limited to certain offenders and offences</li> <li>• Effectiveness depends on the offender</li> <li>• Prosecution can prohibit the offender from participating</li> <li>• May be seen as 'soft option' for punishing offenders</li> </ul>

Source 9 Strengths and weaknesses of alternative approaches to sentencing

## 11.11

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain how each of the following is a method of therapeutic justice:
  - Drug Court
  - Koori Court
  - diversion program.
- 2 What are the two parts of the Drug Treatment Order (DTO)?
- 3 Using an example for each, distinguish between the core conditions and program conditions of a DTO.
- 4 Explain three features of a Koori Court hearing.
- 5 What is a diversion program? Who is it intended for?
- 6 Describe one benefit of each of the Drug Court, Koori Court and diversion programs.

### Synthesise and apply

- 7 In each of the following situations, identify whether the accused would be eligible for the Drug Court, Koori Court or diversion program. Justify your answer.
  - a Josiah has pleaded not guilty to petty theft.
  - b Zoran from Wodonga has pleaded guilty to petty theft which was caused when he was drinking heavily. He has an alcohol addiction.
  - c Ivy is an Aboriginal person from Dandenong. She wants to plead guilty to murder.

- d Nicola has been charged with offensive behaviour. She has no prior convictions.
  - e Ray is an Aboriginal person. He has been charged with vandalism.
- 8 Read the article 'The Dandenong Drug Court that wants to do more'.
    - a Of the 500 people who have completed the program available in the Drug Court, what percentage were successful, and what percentage were not?
    - b Describe three benefits of the Drug Court that are mentioned in the article.
    - c In your view, should the Drug Court be expanded into other regional areas? Give reasons for your answer, referring to the principles of justice.

### Analyse and evaluate

- 9 Discuss the benefits of a diversion program for youth offenders.
- 10 There has been a suggestion that the Drug Court is 'soft on crime' and the rewards it gives to participants are over the top. Do you agree? Give reasons for your answer.
- 11 Evaluate the ability of the Koori Court to achieve two of the three principles of justice.



### Check your **obook** **assess** for these additional resources and more:

» **Student book questions**  
11.11 Check your learning

» **Weblink**  
Jail for repeat drink driver (*The Age*)

» **Weblink**  
Drug Court

» **Weblink**  
Koori Court

## CHAPTER SUMMARY

**Principles of justice**

- > Fairness
- > Equality
- > Access

**Institutions that enforce criminal law**

- > Police and delegated bodies (WorkSafe, local councils, others)

**Balance between institutional powers and individual rights****Role and criminal jurisdiction of Victorian courts**

- > Magistrates' Court
- > County Court
- > Supreme Court (trial and appeal divisions)

**Role of a criminal jury**

- > Listen, deliberate, decide guilt

- > Unanimous or majority verdict

**Purposes of sanctions**

- > Punishment, deterrence, denunciation, protection, rehabilitation

**Types of sanctions**

- > Fines, community correction orders, imprisonment

**Factors considered by judges in sentencing**

- > Early guilty pleas, aggravating factors, mitigating factors, impact on victims, loss, injury or harm, nature or gravity of offence, prior character

**Sentencing practices**

- > Victoria and Norway

**Alternative approaches to sentencing**

- > Drug Court
- > Koori Court
- > Diversion programs

## REVISION QUESTIONS

- 1 Outline the criminal jurisdiction of the County Court. (2 marks)
- 2 Describe one power that Corrections Victoria has over a prisoner. (2 marks)
- 3 Distinguish between aggravating factors and mitigating factors. (3 marks)
- 4 Explain one right that an individual has if questioned by an official. (3 marks)
- 5 Describe two purposes of a community correction order. (4 marks)
- 6 Identify two types of delegated bodies that are able to enforce criminal law in Victoria. For one of those bodies, describe the type of offences they are able to prosecute for. (4 marks)
- 7 Compare the use of the Drug Court and the Koori Courts as an alternative approach to sentencing. (5 marks)
- 8 Explain how the use of a jury in a criminal case upholds two of the principles of justice. (5 marks)
- 9 Do you think that imprisonment in Victoria is an effective method of rehabilitation? Give reasons. (5 marks)
- 10 Compare the sentencing approaches in Victoria and in Norway. In your view, should Victoria adopt the approaches used by Norway? Give reasons for your answer. (8 marks)
- 11 'Drug Courts, Koori Courts and diversion programs is a soft on crime approach. They don't achieve justice, and they should be abolished.' Discuss this statement. (10 marks)



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

» **Student book questions**

Ch 11 Review

» **Revision notes**

Ch 11

» **assess quiz**

Ch 11

Test your skills with an auto-correcting multiple-choice quiz

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

### Night out leads to crime

Amedeo is 22 years of age. He attends university and is a good student.

One night Amedeo went out drinking with his mates. He wanted to get home early to study, but was convinced by his friend Victor to continue drinking at one of the local pubs.

During their time at the pub, Victor suggested it would be a good idea to rob the convenience store next door. Amedeo knew that Victor had had quite a bit of alcohol, and that he had issues with drug and alcohol addictions. Victor also seemed to be under the influence of drugs.

Amedeo disagreed, but Victor pressed him that it would be fun. Amedeo, drunk, agreed. They got to the front of the convenience store and Victor pulled

out a small handgun. Amedeo went to walk away, but Victor grabbed him and said 'You owe me one. If you don't do this I'll hurt you'.

Victor went inside the convenience store. The convenience store employee was terrified, and screamed. Victor started yelling and pointing the gun at her, and told her to open up the till.

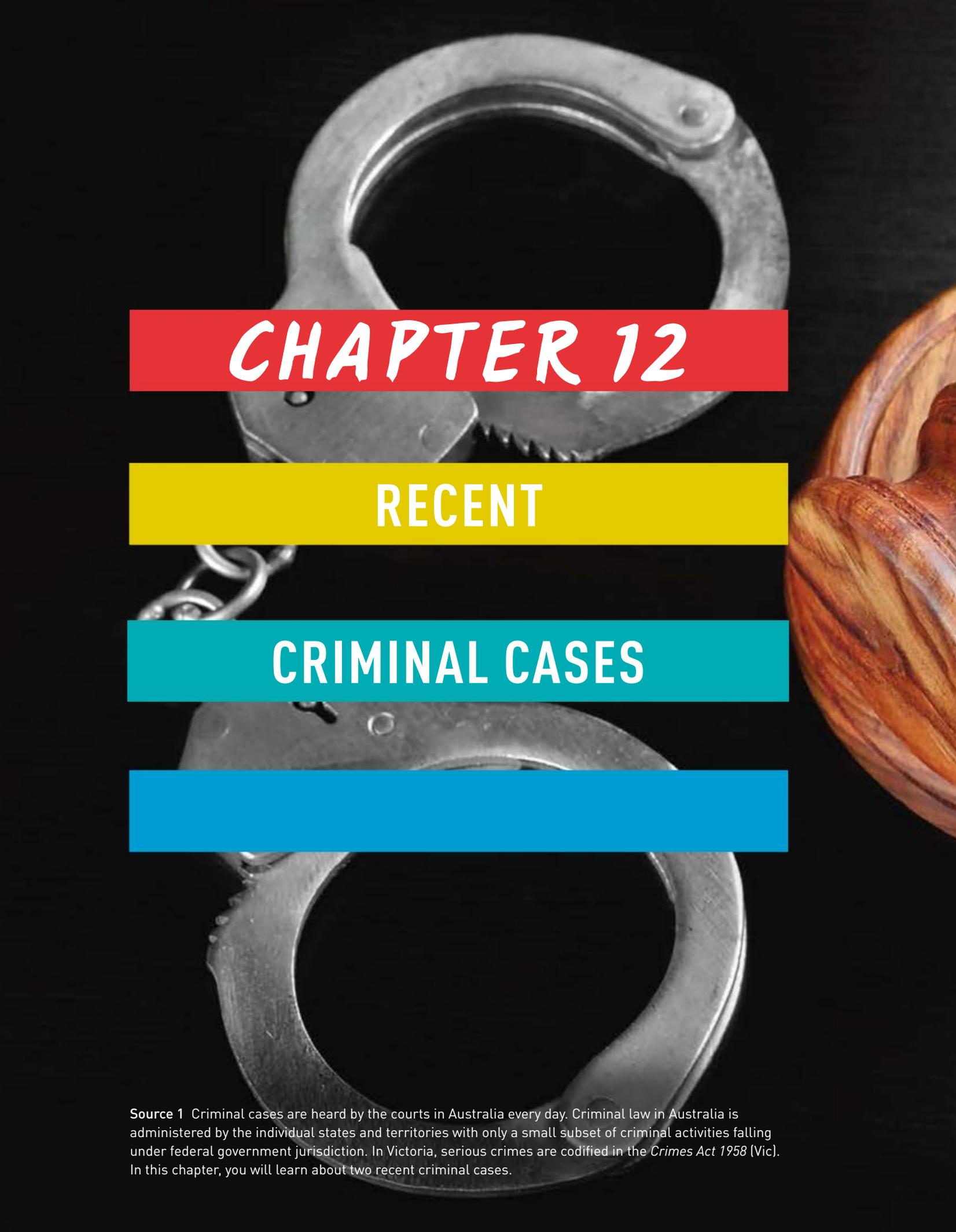
Amedeo stood frozen at the door, not knowing what to do. Victor grabbed all the money from the till and ran out of the store. He took Amedeo with him.

Both Victor and Amedeo were charged with aggravated burglary. Amedeo wants to plead guilty, but Victor has laughed, saying he's going to 'take the case all the way'.

### Practice assessment task questions

- 1 Outline the original criminal jurisdiction of the court that is likely to hear this case. (2 marks)
- 2 Describe one right that is available to Amedeo during court proceedings. (3 marks)
- 3 Explain the role of the police in this case. (4 marks)
- 4 Do you think that WorkSafe Victoria or the local council would have had power to arrest Amedeo or Victor in this case? Justify your answer. (5 marks)
- 5 If Victor was questioned, to what extent was he able to remain silent? Give reasons. (5 marks)
- 6 Explain whether any of the courts below will be involved in this case. Give reasons for your answer. (6 marks)
  - a Magistrates' Court
  - b Drug Court
  - c Koori Court
- 7 Is Victor eligible for a diversion program? Justify your answer. (3 marks)
- 8 Explain the role of the court in relation to Amedeo's case. (4 marks)
- 9 Describe two factors that are likely to be relevant in sentencing Amedeo. (4 marks)
- 10 Discuss the extent to which two of the principles of justice can be achieved in Victor's case (7 marks)
- 11 If Victor is found guilty, identify one sanction that is likely to be imposed on him, and discuss the extent to which it will achieve rehabilitation and punishment. (7 marks)

Total: 50 marks



# CHAPTER 12

## RECENT

## CRIMINAL CASES

**Source 1** Criminal cases are heard by the courts in Australia every day. Criminal law in Australia is administered by the individual states and territories with only a small subset of criminal activities falling under federal government jurisdiction. In Victoria, serious crimes are codified in the *Crimes Act 1958* (Vic). In this chapter, you will learn about two recent criminal cases.

## OUTCOME

By the end of **Unit 2 – Area of Study 1** (i.e. Chapters 11 and 12), you should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches.

## KEY KNOWLEDGE

In this chapter, you will learn about two recent criminal cases. For each case you will study:

- an overview of the charges and the central facts of the case
- courts that may be or were involved
- sanctions that could be or were imposed and their appropriateness
- factors that may be or were taken into consideration in sentencing
- possible avenues of appeal
- the extent to which the principles of justice could be or were achieved.

## KEY SKILLS

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

- define and use legal terminology
- research, analyse and apply information in relation to criminal law and two recent criminal cases
- analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases.

## ADVICE TO TEACHERS AND STUDENTS

In **Unit 2 – Area of Study 1** (i.e Chapters 11 and 12) you are required to study **two recent criminal cases** in detail.

Recent cases means cases from the previous four years. You may choose cases that have already been heard and determined by a court, or a case in which charges have just been laid.

YOU MAY CHOOSE TWO CRIMINAL CASES FROM THE FOLLOWING OPTIONS:		PAGE:
12.1	Recent criminal case 1 – The man who shot a corpse <ul style="list-style-type: none"><li>• <i>R v Darrington</i> [2016] VSC 60 [29 February 2016]</li></ul>	374
12.2	Recent criminal case 2 – Learner driver causes death <ul style="list-style-type: none"><li>• <i>DPP v Singh</i> [2016] VCC 1826 [25 November 2016]</li></ul>	380
12.3	Recent criminal case 3 – High Court steps in on domestic violence case <ul style="list-style-type: none"><li>• <i>R v Kilic</i> [2016] 339 ALR 229</li></ul>	388
12.4	Recent criminal case 4 – Violent armed robbery by young offender <ul style="list-style-type: none"><li>• <i>DPP v Gatkuoth</i> [2016] VCC 634 [17 May 2016]</li></ul>	396

## KEY LEGAL TERMS

**aggravated carjacking** the act of violently stealing an occupied car committed when the offender possesses a firearm, imitation firearm, offensive weapon, explosive or imitation explosive, or (in the course of carjacking,) causes injury to another person

**aggravating factors** circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

**attempted murder** an act carried out with the intention of causing the death of another human being

**carjacking** the act of violently stealing an occupied car

**cumulative sentence** when a defendant is found guilty of more than one offence, the judge may sentence them to consecutive (i.e. cumulative) terms for each crime. This means each sentence must be served one after the other rather than at the same time

**general deterrence** one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

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

**mitigating factors** circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

**victim impact statement** a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# RECENT CRIMINAL CASE 1 — THE MAN WHO SHOT A CORPSE

## attempted murder

an act carried out with the intention of causing the death of another human being

## indictable offence

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

## Did you know?

'R' in a case name (meaning the Crown) stands for Regina (the Queen) or Rex (the King), depending on whether a king or a queen is on the throne. In a criminal case, if the Crown is named first, it is written '*R v Smith*', but pronounced as 'The Queen against Smith' (never 'versus'). If the Crown is the respondent, it is written out in full, as '*Smith v The Queen*', and pronounced the same way.

## *R v Darrington* [2016] VSC 60 (29 February 2016)

### Introduction

The case of *R v Darrington* [2016] VSC 60 (29 February 2016) is a Victorian Supreme Court criminal case which involved a finding of **attempted murder** – a serious **indictable offence**. The crime took place in March 2014 and caught the attention of the mainstream media with headlines such as 'Vic man jailed for trying to kill a dead man'. It is considered one of the most interesting criminal cases in Australian legal history because of the bizarre circumstances of the crime.

In this topic we will explore each of the following aspects of *R v Darrington* in detail:

- an overview of the charges and central facts of the case
- courts involved in the case
- sanctions imposed and their appropriateness
- factors taken into account in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

### Overview of the charges and central facts of the case

On 21 March 2014, Daniel Darrington, aged 39, and his friend, Steve Domotor spent the day looking for another man, Rocky Sparticus Matskassy, aged 31. Matskassy had been living at Domotor's house in Melton South as a tenant for several months, and Domotor wanted to evict him. The reason for wanting to evict him was unclear, but it seemed to be because Domotor was unhappy with Matskassy's behaviour.

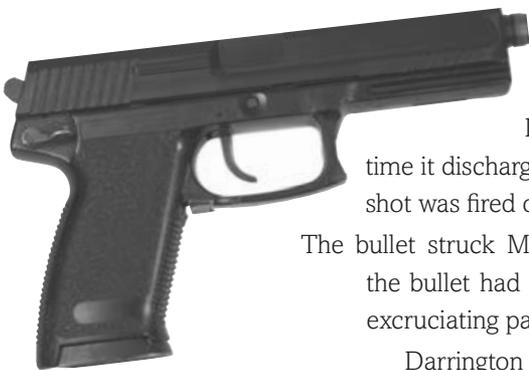
Darrington and Domotor eventually found Matskassy at the back of Domotor's house. Darrington had a fight with Matskassy, during which he punched and kicked Matskassy, causing his head to bleed. After the fight, Darrington told Matskassy to go to the bathroom to 'clean himself up'.

In his interview with the police some time later, Darrington said that Matskassy returned from the bathroom with a firearm, which he used to threaten Darrington.

In court, Darrington claimed that there was a struggle over the firearm, during which time it discharged. Darrington claimed he had no intention of discharging the firearm and that the shot was fired only due to the struggle for the weapon.

The bullet struck Matskassy in the head and he collapsed to the ground. Darrington thought that the bullet had severely injured Matskassy, who was 'twitching' in what Darrington thought was excruciating pain.

Darrington then reloaded the firearm and shot Matskassy a second and third time, because he 'didn't know what to do' and he 'didn't want the bloke suffering'. A medical examination of the body found that Matskassy had in fact died from the first bullet. Therefore, when Darrington discharged the additional two shots into Matskassy, he was already dead. Darrington was charged with Matskassy's murder. He pleaded not guilty.



**Source 1** Darrington claimed that there was a struggle between himself and Matskassy over a gun. During this struggle, the gun discharged and Matskassy was shot.

## Courts involved in the case

Because Darrington was charged with an indictable offence, to which he pleaded not guilty, a **committal proceeding** would have been held in the Magistrates' Court. One of the purposes of a committal proceeding is to determine whether there is evidence of a sufficient weight to support a conviction for the offence. If the magistrate decides that the evidence is of such weight, the accused person will be directed to stand trial in a superior court.

Darrington's trial was heard in the Supreme Court of Victoria. Under Section 36A of the *County Court Act 1958* (Vic), the County Court does not have jurisdiction to hear a case involving a charge of murder, so only the Supreme Court had jurisdiction to hear Darrington's case. At the opening of the trial, Darrington had pleaded not guilty, so a **jury** of 12 was chosen, with the role to decide the key facts in the case and reach a verdict.

The trial lasted 16 days. The jury was not satisfied **beyond reasonable doubt** that the first shot fired by Darrington had not killed Matskassy. The jury was also not satisfied that Darrington deliberately fired this shot. Ultimately, the jury found Darrington guilty of the attempted murder of Rocky Sparticus Matskassy.

A person can be found guilty of attempting to commit an offence, including murder, even though actually carrying out that offence would have been impossible in the circumstances. The person might be unaware that committing the offence is impossible, but they can still be charged and found guilty for attempting it. In this case, Darrington could not have murdered Matskassy when he shot him for the second and third time, because he was already dead. However, Darrington didn't know that at the time.

## Sanctions imposed and their appropriateness

Under Section 321P of the *Crimes Act 1958* (Vic), the penalty for the offence of attempted murder is Level 2 **imprisonment**. This offence carries a maximum prison sentence of 25 years. The court is not compelled to give the maximum sentence in every case. This would only be imposed in the most extreme circumstances.

Justice Paul Coghlan, who heard the case, noted that the circumstances of the offending were 'unusual' and the task of sentencing was difficult. He stated that with the exception of one case, there were no similar cases. Other sentences drawn to his attention by the prosecutor involved different factual situations and were of limited assistance in determining the appropriate sanction.

His Honour explained that the jury must have been satisfied that Darrington **believed that Matskassy was still alive** when the second and third shots were fired. If Darrington did believe it, then according to the law he had an intention to kill, even though Matskassy had died by that stage. Justice Coghlan found that this was 'a reasonably serious example of the crime'.

Justice Coghlan sentenced Darrington to a term of imprisonment of eight years with a non-parole period of five years. He considered general and specific deterrence and retribution (i.e. punishment) to be the purposes for which the sentence should be imposed.

Imprisonment is considered one of the most effective forms of retribution, since it deprives a person of liberty. It is also likely to be successful in achieving general and specific deterrence, given the nature of imprisonment and Darrington's personal circumstances. These are considered further on the following pages.



Source 2 The judge in *R v Darrington*, Justice Paul Coghlan

**committal proceeding**  
the processes and hearings that take place in the Magistrates' Court for indictable offences

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

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

### *Did you know?*

Between 2011–12 and 2015–16, a total of 123 people were sentenced in the higher courts in Victoria for the principal offence of murder. There were 34 people sentenced for this offence in 2015–16, up by 19 from the previous year.

**imprisonment**  
a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

# Factors taken into consideration in sentencing

**mitigating factors** circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

**aggravating factors** circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the judge as a reason to give a higher penalty (e.g. prior record or repeat offences).

The comments in the extract below were made by Justice Paul Coghlan when sentencing Darrington. They cover many of the key factors taken into consideration in sentencing Darrington.

## EXTRACT

### *R v Darrington* [2016] VSC 60 (29 February 2016)

- 9 You are the middle child of three children. Your early childhood was difficult, living in a household marked by domestic violence. You suffered from asthma and some kind of hyperactive disorder. You were lonely at school, as a result of having been picked on and bullied. You left school after Year 8. You had been an average student but needed help which was not readily available. You were at times suspended for truancy and fighting. You left home at about 15, but returned periodically.
- 10 You have had two significant relationships, the latter of which was with Michaela Reedyk, to whom I will refer later.
- 11 You have worked mostly in unskilled positions, although you did complete what was described (in the report tendered on the plea of Mr Ball, a psychologist, to whom I refer later) as a traineeship in panel beating. Your back injury has prevented you from engaging in physical work.
- 12 You have a number of prior convictions in both Victoria and Western Australia. You have convictions for dishonesty, motor car offences, street offences, failing to answer bail, breach of bail, breach of bail conditions, and assault. The assault conviction was in 2012 and appears to have been in a family context. I further note that you have a conviction for assault occasioning actual bodily harm. You have served one term of imprisonment in 1997 for burglary, and you have been placed on a number of community based orders, most of which appear to have been successfully completed. You were on a community correction order at the time of this offence for burglary, theft, and going equipped to steal.
- 13 Your criminal history seems to reflect abuse of alcohol, and other illicit substance abuse ...
- 17 You had been in a relationship with Ms Reedyk, who was a witness at the trial, for about four years. She thought that she was pregnant to you at the time of this offence, and she subsequently lost the baby (she says, as a result of the events of that night). You appear to entertain some doubt about the pregnancy. In any event, the relationship is at an end. At some time in 2013, Ms Reedyk and Phil went up to live with your mother in Oberon, New South Wales, because of Phil being in trouble in Melbourne and you worked in Penrith and lived with your mother's brother. You all returned to Melbourne at Christmas 2013, so you had been back in Melbourne for at least three months at the time of the offending.
- 18 You appear to have been a good worker but your opportunities for work in recent times have been limited by your injured back, and you were at the time of the offending on a pension of some kind.
- 19 I also received a reference from Cheryl Thompson, who is a family friend. It appears that you will have support from your extended family on release.
- 20 I received a report from Mr David Ball, a Forensic Psychologist, dated 29 January 2016, which I had marked Exhibit 6D. There do not appear to be any psychological or psychiatric issues

which will affect your sentencing. It emerged from the report that Mr Ball regarded you as dull with a lowish IQ, and not a good sequential thinker. That seems to reasonably describe your conduct on the night of the offending.

- 21 I also received a copy of your prison medical file and a report from your GP, Dr Reza. I accept that you do suffer from chronic lower back pain, hepatitis C, and restless leg syndrome. You did suffer from substance abuse problems, which are now in remission. Mr Ball does not appear to note any psychological or psychiatric issues arising from your lower back pain and injury.
- 22 I am satisfied that your back condition is such that it will make your term of imprisonment harder than it would have been for other persons, and that will be taken into account in your sentence.

Justice Coghlan also took the following factors into consideration in sentencing:

- Darrington had behaved reasonably well in prison, having already served 709 days. During this term of imprisonment he had completed a number of training courses, was usefully employed, and was permitted to take part in the Combined 250 km Ultra Marathon for White Ribbon Day, receiving a certificate of acknowledgement
- the **victim impact statement** from Matskassy's sister, Mercedesz, which caused Justice Coghlan to be 'reminded yet again of the profound effect that crimes such as this have on those who are left behind'
- the fact that Darrington showed no remorse for his actions
- that Darrington's prospects for rehabilitation are limited.

## Possible avenues of appeal

Any appeals from this decision would need to be made to the Court of Appeal. Appeals must usually be lodged within 28 days after the **conviction**. An offender can:

- **appeal against conviction** – the offender can claim that the verdict was unreasonable, based on the evidence; or that it was based on an error of law; or that a miscarriage of justice occurred. The offender will need to get leave to appeal
- **appeal against the sentence** – the offender can appeal against a sentence that is too harsh, and the prosecution can appeal against the sentence being too light
- **appeal against both** – the offender can appeal against conviction and sentence.

There is no evidence to suggest that Darrington has in fact appealed.

The prosecution can also appeal on a question of law, or on the leniency of the sentence. The prosecution does not need leave to appeal.



Source 4 Possible avenues of appeal for Daniel Darrington

From the Court of Appeal, either the offender or the prosecution could file an appeal with the High Court, which is the ultimate court of appeal in Australia. Leave is required by the High Court to appeal.

### Study tip

When reading about recent criminal cases, apply the principles of justice and purposes of sanctions to the facts of the case. Doing so will help you answer scenario-based questions you might get in an assessment task.

### victim impact statement

a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence



Source 3 Daniel James Darrington arrives at the Supreme Court, Melbourne, during his trial

### conviction

a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

## Did you know?

Although an accused can appeal against a conviction, the prosecution cannot appeal if the accused is acquitted. This is because, under the rule of 'double jeopardy', a person cannot be tried twice for the same offence. There are now, however, exceptions to the double jeopardy rule following legislative changes in 2011, such as where there is fresh new evidence.

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

# The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in *R v Darrington* is provided below. For each principle, the assessment is made on the evidence available.

## Fairness

The principles of fairness mean people should be treated fairly and impartially. Every person should be aware of the case against them and be able to present their case. The criminal justice system relies on fair legal processes and fair hearings. In this case:

- Darrington would have been able to exercise rights prior to and during the trial (e.g. the **right to silence** when being interviewed by police).
- Darrington was **legally represented**, which the courts have recognised is necessary for a fair trial of a serious indictable offence.
- At the committal proceeding, Darrington and his defence team knew what the prosecution **evidence** was, giving them an understanding of the strength of the case the Director of Public Prosecutions (DPP) would present to the court at the trial. This would have helped the defence prepare for **cross-examination of prosecution witnesses**.
- The **prosecution had the burden** of establishing that Darrington committed the offence.
- The **standard of proof in this case is beyond reasonable doubt**. Darrington could not be found guilty unless the DPP satisfied the jury of his guilt according to this high standard. Darrington was presumed innocent until proved guilty.

## Equality

The principle of equality requires that all people should be equal before the law and have the same opportunity to present their case. Equality in the criminal justice system relies on parties being treated equally. In this case:

- Both parties had the right to engage **legal representation**, which is designed to ensure equality. According to the rules of procedure, parties can **examine the evidence presented** by their opponent.
- Justice Coghlan acted as an **independent and impartial adjudicator** at the trial. He ensured that the rules of evidence would have been applied, meaning that only reliable facts were heard by the jury.
- Darrington had the benefit of trial by a jury of people **selected at random** from the electoral roll, who reached a **verdict based on evidence** from both parties (i.e. the prosecution and the defence).
- Both parties could call **witnesses in the case** and have those witnesses examined before the jury.

## Access

The principle of access requires that everyone should have equal access to legal agencies and institutions and be given every opportunity to understand their legal rights and pursue legal claims. For access to be achieved, the criminal justice system relies on accused people having legal advice and representation. Legal representation is essential for parties attempting to navigate through complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence prior to the trial. The burden of proof in a criminal trial rests on the prosecution, and it is their role to lay out all evidence required to establish the case. This helps legal counsel prepare for trial. In this case:

- The trial and the sentencing hearing were conducted as an **open hearing**, and the sentencing remarks are **available to the public**, including the victim's family members.
- During trial, both parties had an equal opportunity to **present evidence**. Interestingly, Justice Coghlan noted that the complete details of what happened on the night have never emerged and are unlikely to do so. The parties control the evidence so some material may not be revealed.
- At the end of the trial, both parties have **the right of appeal** on grounds relating to the sentence imposed by the judge and the decisions made during the trial about the admissibility of evidence.
- Prior to the sentencing of Darrington, members of the Matskassy family presented **victim impact statements** to the court. These expressed their grief at the death of Rocky, and allowed their suffering to be considered by the judge in sentencing.

## 12.1

## CHECK YOUR LEARNING

### Define and explain

- 1 In your own words, describe the offence of attempted murder.
- 2 Outline the key facts of the case against Daniel James Darrington.

### Synthesise and apply

- 3 Explain why you think that the law is such that an offender can be guilty of the offence of attempt when the commission of the actual offence was impossible. In your answer, make reference to the Darrington case, referencing the fact that the later shots fired by Darrington had no impact on the death of Rocky Matskassy.
- 4 Read the extract on page 376.
  - a Prepare a table which identifies all of the factors that were taken into account in sentencing.
  - b For each factor, identify whether it was a mitigating or aggravating factor.
  - c Provide a short statement justifying your decision for each factor.
- 5 Comment on two reasons why the following evidence would have been important for Justice Coghlan when considering the appropriate sentence for Darrington:

- a prior convictions
- b the victim impact statements from members of the Matskassy family
- c Darrington's back condition.

### Analyse and evaluate

- 6 Identify the difficult circumstances that were faced by Darrington in his personal life. To what extent do you think these factors should be taken into account when sentencing Darrington? Justify your response.
- 7 Justice Coghlan said in sentencing Darrington that he needed to take account of general and specific deterrence in this case.
  - a Define the terms general deterrence and specific deterrence.
  - b What type of community behaviour would the judge be seeking to discourage in this case? Justify your response.
- 8 Discuss whether you agree with the verdict and the sentencing of Darrington in this case. In your answer, refer to the fact that the later shots fired by Darrington had no impact on the death of Rocky Matskassy.



### Check your **obook** **assess** for these additional resources and more:

» **Student book questions**

12.1 Check your learning

» **Video tutorial**

Overview of  
*R v Darrington*

» **Weblink**

*R v Darrington*  
judgment

## RECENT CRIMINAL CASE 2 – LEARNER DRIVER CAUSES DEATH

*DPP v Singh* [2016] VCC 1826 (25 November 2016)

### Introduction

A major focus of law-making for the Parliament of Victoria is road safety. In recent years, a range of new strategies and laws have been developed by the Victorian Parliament in an effort to reduce the frequency of road accidents and the impact they have on the community. Where road trauma is involved, there are different levels of offences, which range in seriousness depending on the culpability (degree of blame) of the offender.

*DPP v Singh* [2016] VCC 1826 (25 November 2016) is a criminal case heard in the County Court in 2016. In particular, the circumstances surrounding the commission of the offence and the behaviour of the offender on the day of the accident make it an important example of the trauma that can be caused by motor vehicle collisions.

In this topic we will explore each of the following aspects of *DPP v Singh* in detail:

- an overview of the charges and central facts of the case
- courts involved in the case
- sanctions imposed and their appropriateness
- factors taken into account in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

### Overview of the charges and central facts of the case

On 31 July 2015 at around 3.15 pm, Sukhuinder Singh, age 22, was driving his Holden Commodore west along Bridge Inn Road in Wollert (a suburb in the outer northwest of Melbourne) on his way to work. It was a sunny day and driving conditions were good. The section of Bridge Inn Road along which Singh was travelling was a single lane in each direction and at certain points along the way double lines on the road indicated that overtaking was unsafe.

At that time of day, Bridge Inn Road is generally a busy road. There was a reasonable amount of traffic at the time, and the speed limit on the road was 80 kilometres per hour.

Singh began approaching the rear of a Toyota Kluger that was driving ahead of him and eventually decided to overtake the car. A short distance ahead of the Kluger was a Toyota Corolla. Singh overtook the Kluger, crossing double white lines to do so. As he was alongside or almost alongside the Kluger, and while partly on the wrong side of the road, he saw a Ford XR8 coming his way. The Ford was driven by John Voss.

Singh responded by accelerating instead of slowing and pulling safely back onto his side of the road. He reached a speed of 116 kilometres per hour. In his attempt to get in front of the Corolla, the rear passenger side of his car clipped the front driver's side of the Corolla. He lost control of the car and veered into the path of John Voss's car. John was killed as a result.



**Source 1** In *DDP v Singh* Sukhuinder Singh was tried in the County Court of Victoria over driving offences that led to the death of another motorist.

Singh was charged with one charge of culpable driving causing death and two charges of conduct endangering lives (in relation to the passengers in the two Toyotas). The offence of **culpable driving** causing death is set out in section 318 of the *Crimes Act 1958* (Vic) (see below).

**culpable driving**  
the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol

## EXTRACT

### *Crimes Act 1958* (Vic)

#### **318 Culpable driving causing death**

- (1) Any person who by the culpable driving of a motor vehicle causes the death of another person shall be guilty of an indictable offence and shall be liable to level 3 imprisonment (20 years maximum) or a level 3 fine or both.
- (1A) The standard sentence for an offence under subsection (1) is 8 years.
- (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle --
- (a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or
  - (b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or
  - (c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or
  - (d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.
- (2A) Without limiting subsection (2)(b), negligence within the meaning of that subsection may be established by proving that—
- (a) a person drove a motor vehicle when fatigued to such an extent that he or she knew, or ought to have known, that there was an appreciable risk of him or her falling asleep while driving or of losing control of the vehicle; and
  - (b) by so driving the motor vehicle the person failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case.

\* as at 1 April 2018

## Courts involved in the case

Culpable driving is an indictable offence that is generally heard in the County Court. The Supreme Court can also hear a criminal trial involving culpable driving if the facts of the case suggest that this is appropriate.

Initially, Singh pleaded not guilty to the charges. As a result, a **committal proceeding** was held in the Magistrates' Court, where it was established that there was evidence of a sufficient weight to support a **conviction** at trial. Singh was ordered by Magistrate Robertson to stand trial in the County Court.



**Source 2** Singh was a learner driver at the time of the incident.

**committal proceeding**  
the processes and hearings that take place in the Magistrates' Court for indictable offences

**conviction**  
a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

## Did you know?

In 2008, Thomas Towle was tried in the Supreme Court in Melbourne on six counts of culpable driving arising from a collision in Mildura that killed six teenagers. The trial was held in Melbourne rather than in Mildura in an attempt to reduce the emotional stress on all parties involved in the case. The County and Supreme courts both have authority to hear the serious offence of culpable driving.

At the commencement of the trial, Singh entered a plea of guilty to one charge of dangerous driving causing death. The extract below further details this crime in Section 319 of the *Crimes Act*. A trial was heard on the other charges, including one charge of culpable driving causing death and conduct endangering life. The jury acquitted him of those charges.

Because Singh was only a learner driver, he also pleaded guilty to a summary charge of driving without an experienced, licensed driver in the car.

## EXTRACT

### *Crimes Act 1958 (Vic)*

#### **319 Dangerous driving causing death or serious injury**

- (1) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes the death of another person is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
- (1A) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes serious injury to another person is guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

The following article is an example of how this case was reported in the news.

## IN THE NEWS

### Call for lone L-plater who 'got into strife' and killed driver to be spared jail

Adam Cooper, *The Age*, 21 November 2016

An L-plate driver who killed another motorist when he crossed a double white line to overtake and caused a head-on crash should be spared jail, a court has heard, because his moral culpability was low.

Sukhuinder Singh, 23, was illegally alone in his Holden Commodore when he overtook two cars in Bridge Inn Road in Wollert on July 31 last year, and ploughed into the car driven by John Voss at more than 110km/h.

Mr Voss, 30, was remembered in the County Court on Monday as a caring, loving and responsible son, brother and friend.

During victim impact statements read to the court, Mr Voss' girlfriend and one of his friends called on Singh to face the consequences of his actions.

But defence counsel Gideon Boas told the court his client should not be jailed and instead serve a community [correction] order, as his moral culpability was 'quite low', as he made a 'grave error' in overtaking the cars, was remorseful and took responsibility for his actions.

Singh pleaded guilty to dangerous driving causing death and was last week found not guilty by a jury of the more serious charge of culpable driving causing death. He also pleaded guilty to failing to have a driver with a full licence with him in the car.

The jury was not told Singh had a small amount of the drug ice in his system, as judge Wendy Wilmoth previously ruled the evidence inadmissible to ensure he received a fair trial.

On Monday, Mr Boas said Singh 'did not appreciate' there was a double white line when he moved to overtake cars about 3.15pm and only saw Mr Voss' car when he was parallel with one of the cars he was overtaking.

'What happened from there is he got into strife,' the lawyer said. 'There wasn't enough room for him to pull in. He increased his speed only when he perceived no oncoming car and took evasive action, and we know what happened thereafter.'

Singh hit at least 116km/h in the 80km/h zone seconds before the crash, the court heard. Prosecutor Andrew Grant said the court had to 'send a message' that dangerous driving by young motorists would not be condoned, and called for Singh to be jailed given his actions put many drivers at risk.

'The driving he undertook was a result of a conscious and wilful decision ... that put other road users in danger,' he said.

Singh's case was a serious example of the offence, the prosecutor said, and not an example of low-level culpability. Mr Voss' girlfriend called on Singh to imagine the person he was closest to being killed for no reason.

'How would it feel to know that this person was killed by someone's stupid, mindless, idiotic, careless and heartless actions?' she said.



**Source 3** Overtaking on a road with double white unbroken lines resulted in a fatal car crash.

## Sanctions imposed and their appropriateness

The penalty for the offence of culpable driving causing death is Level 3 imprisonment (20 years maximum). The penalty for the lesser offence of dangerous driving causing death is Level 5 imprisonment (10 years maximum).

At the sentencing hearing, counsel for Sukhuinder Singh submitted that a community correction order should be imposed on the offender. This was rejected by Judge Wilmoth on the grounds that the circumstances of the offence were too severe to allow for a non-custodial sentence to be given.

Singh was ultimately sentenced to four years imprisonment. He was required to serve a minimum period of two years and six months before being eligible for parole. As an additional punishment, Singh's licence or permit to drive was cancelled and he was disqualified from obtaining a further permit for four years. For the summary charge, he was convicted and fined \$1 000.

The sentencing judge was required to specify the sentence that would have been imposed had the offender pleaded not guilty. In this case, her Honour Judge Wilmoth stated that she would have sentenced Singh to five years imprisonment with a non-parole period of four years, and a fine for the summary offence of \$1 500 had he pleaded not guilty.

Judge Wilmoth indicated that there was a need for **general deterrence** because of the serious and great harm that was suffered in this instance. This is particularly so because of the circumstances of offending. This case serves as a reminder that dangerous behaviour on the roads can lead to significant harm.

In this case, Judge Wilmoth also considered it important that younger and less experienced drivers should be singled out for general deterrence, and that it was important for the community to see that justice has been achieved by dangerous driving offences receiving a custodial sentence. She found **specific deterrence** to be less important, given **recidivism** is rare in circumstances such as these.

Judge Wilmoth also found that rehabilitation was important, particularly for such a youthful offender, but found that general deterrence remained the primary purpose of sentencing.

It was reported that John Voss' father was critical of the sentence, stating that the term of imprisonment should have been much higher so that an example was made of Singh. In particular, Singh's term of imprisonment, where he may be released in just over two years, was considered to be substantially less than the life that was lost as a result of the incident.

### **general deterrence**

one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

### **specific deterrence**

one purpose of a sanction; a process by which the court can discourage the offender from committing similar offences

### **recidivism**

re-offending; returning to crime after already having been convicted and sentenced

**mitigating factors** circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

## Factors taken into consideration in sentencing

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- mitigating factors are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- aggravating factors are factors or circumstances that count against the accused and may be considered by the judge as a reason to give a higher penalty (e.g. prior record or repeat offences).

The factors taken into consideration in sentencing Singh are further detailed below.

### LEGAL

### CASE

## Road trauma sentencing and young drivers

### *DPP v Singh* [2016] VCC 1826 (25 November 2016)

In sentencing Singh, Judge Wilmoth heard victim impact statements from Mr Voss's girlfriend, his parents, his brother and other friends. Judge Wilmoth spoke of the need for general deterrence because of the harm caused by road trauma, such as in this case. In response, defence counsel submitted to the Court that a non-custodial sentence was appropriate due to the low level of moral culpability on the part of Singh. Also, his counsel submitted that he had been learning to drive for four years without breaching any traffic laws, which showed some level of responsibility.

In contrast, the prosecution argued that Singh's culpability was in the medium range because his driving on that day brought an extremely high level of risk. Judge Wilmoth agreed, on the basis that the offender decided to overtake in the process of crossing double lines while driving at speed. Judge Wilmoth also noted that an additional aggravating factor was that Singh was a learner driver who was driving without a licensed driver in the car.

In noting the need for general deterrence, Judge Wilmoth said that young and less-experienced drivers needed to be the target of any sentence designed to discourage such behaviour. Justice also needed to be demonstrated for the community that in such cases a custodial sentence was necessary. The Judge did note that, on the evidence, Singh was unlikely to offend again in this way.

In relation to other mitigating factors, Judge Wilmoth observed that Singh had pleaded guilty at an early stage. This early plea meant that Singh was entitled to a discount on his sentence. The early plea also indicated an element of remorse, which was also shown by a letter that Singh had written to the Court. As a young offender with no prior convictions, good prospects and strong family support, Judge Wilmoth balanced the potential for Singh's rehabilitation against the need for general deterrence. Her Honour also mentioned that Singh was seriously injured in the collision himself.



**Source 4** John Voss was killed when Singh ploughed into his Ford XR8.

## Possible avenues of appeal

Any appeals from this decision would need to be made to the Court of Appeal. Appeals to a higher court must usually be lodged within 28 days after the conviction. An offender can:

- **appeal against conviction** – the offender can claim that the verdict was unreasonable, based on the evidence; or that it was based on an error of law; or that a miscarriage of justice occurred. The offender will need to get leave to appeal

- **appeal against the sentence** – the offender can appeal against a sentence that is too harsh
- **appeal against both** – the offender can appeal against conviction and sentence.

In this case, because Singh pleaded guilty to the offence on which he was convicted, he can only appeal against the sentence.

The prosecution could appeal on some point of law or on the grounds that the sentence was too lenient. The prosecution does not need leave to appeal, but the offender generally does.

From the Court of Appeal, either the accused or the prosecution could file an appeal with the High Court, which is the ultimate court of appeal in Australia. The High Court will only hear criminal appeals if it grants leave, and there must be a serious legal issue to decide.



Source 5 Possible avenues of appeal for Sukhuinder Singh

However, because Singh pleaded guilty, he could only appeal against his sentence, and the High Court would not give him leave to appeal because there would be no important legal argument to decide.

## The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in *DPP v Singh* is provided below. For each principle, the assessment is made on the evidence available.

### Fairness

The principles of fairness mean people should be treated fairly and impartially. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the criminal justice system relies on fair legal processes and fair hearings.

In this case:

- the law was **properly applied**. The case makes reference to the nature of the offence and the relevant factors that are required to be taken into account in sentencing.
- Singh was able to **exercise his rights**, including the right to enter a plea to the charges at different stages of the process, and the right to consider the evidence at the committal stage.
- Singh was **legally represented**, which assists in ensuring he receives a fair trial.
- Singh and his legal counsel would also have been able to **examine the evidence** for the prosecution during the committal proceeding.
- The standard of proof in a criminal case is **beyond reasonable doubt**. This meant that Singh could only be found guilty if the prosecution was able to satisfy the jury of the guilt of Singh according to this high standard. This upholds the presumption of innocence and the rule of law.
- Judge Wilmoth ruled evidence in relation to a small amount of the drug ice in Singh's system as **inadmissible** to ensure he received a fair trial. This decision has, however, been criticised by other people, including Voss' family, claiming that the jury should have been told about this fact.
- Due to Singh's **early plea of guilty** to the lesser charge of dangerous driving causing death, Judge Wilmoth took this into account in setting a lesser term of imprisonment.

**aggravating factors**  
circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

**fairness**  
one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

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

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

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

### Did you know?

The charges that are laid in a criminal case depend on the evidence. One offence may have multiple levels of severity, so an offender could appear before either the County Court or Supreme Court, depending on the level of blameworthiness of the offending. The jury could then be presented with a range of alternative charges and would be required to find the accused guilty or not guilty on each one. This can be a complex task.

### Study tip

Make use of proper legal terminology in your answers to questions. For example use the word 'offender' rather than 'accused' once the person is guilty of an offence. Say 'Judge X' when referring to a County Court judge, and 'Justice X' when referring to a Supreme Court judge or a High Court justice.

## Equality

The principle of equality suggests that all people should be equal before the law, regardless of who they are. Every person in society should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the criminal justice system relies on both parties being treated equally.

In this case:

- Both parties had the **right to engage legal representation**.
- Equality was ensured at the trial because Judge Wilmoth acted as an **independent and impartial adjudicator** and decided the sanction based on the facts.
- Singh had the benefit of **trial by a jury** of randomly selected people, who listened to the case and reached a verdict based on evidence presented from both parties. In this case, Singh was acquitted on all other charges.
- Both parties were entitled to **call witnesses** in the case and have those witnesses examined before the jury.

## Access

The principle of access suggests that everyone should have equal access to legal agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the criminal justice system relies on accused people having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid may be entitled to legal representation at no charge. Legal representation is essential for parties attempting to navigate through complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence prior to the trial. The burden of proof in a criminal trial rests on the prosecution, and it is their role to lay out all evidence required to establish the case. This helps legal counsel prepare for trial.

In this case:

- The sentencing hearing was conducted such that members of the public and victims were **able to attend**, and the sentencing remarks are **publicly available**.
- The prosecution must **lay out all evidence** required to establish that Singh had committed all of the elements of that offence. Access to this material must be provided to the defence, which helps legal counsel to prepare for trial.
- At the end of the trial, both parties had the **right of appeal** on grounds including the sentence that was imposed by the trial judge and the decisions made during the trial regarding the admissibility of evidence.
- Prior to the sentencing of Sukhuinder Singh, members of the Voss family were able to present **victim impact statements** to the court, which outlined their sense of grief and loss at the death of their loved one. This allows victims to have their response to the offence heard and acted upon by the sentencing judge.

**Define and explain**

- 1 Explain two differences between the offences of culpable driving causing death and dangerous driving causing death.
- 2 Outline the key facts in the case of Sukhuinder Singh.
- 3 Explain the possible avenues of appeal in this case.

**Synthesise and apply**

- 4 Make notes on the key factors that were taken into account in sentencing in this case.
  - a Prepare a table which identifies all of the factors that were taken into account in sentencing.
  - b For each factor, identify whether it was a mitigating factor or aggravating factor.
  - c Provide a short statement justifying your decision for each factor.
- 5 Consider some of the road rules in Victoria. Use a visual diagram or poster which shows at least three road rules in Victoria and how breaching those road rules could lead to a charge of culpable driving causing death. Use some of the road rule signs as part of your diagram or poster.
- 6 Access the judgment of this case. Examine how the victims were taken into consideration in sentencing in this case.
- 7 Go onto the Sentencing Advisory Council website. A link is provided on your [obook assess](#). Access 'SacStat Higher Courts', which contains the sentencing statistics for offences sentenced in the Supreme and County Courts.
  - a Draw a pie graph or line graph showing the sentences imposed for culpable driving causing death.
  - b What age group is the highest in being sentenced for culpable driving causing death?

- c Draw a pie graph or line graph showing the sentences imposed for dangerous driving causing death.
- d What is the main difference between the sentencing for culpable driving causing death and dangerous driving causing death?
- e Which gender is more likely to be sentenced for these crimes? Engage in a discussion with your class about why this is so.

**Analyse and evaluate**

- 8 There were numerous victim impact statements given in the Singh case.
  - a What effect does a victim impact statement have on the sentencing of the offender?
  - b To what extent does the use of victim impact statements in court allow for greater access to the trial process? Explain.
- 9 Mr Singh was badly injured in the collision that killed Mr Voss. To what extent should injuries sustained by the offender in a case such as dangerous driving causing death reduce the sentence that is given by the judge in that case? Give reasons.
- 10 In her sentencing, Judge Wilmoth said that this 'was a serious example of a serious offence'.
  - a Comment on whether the judge in this case should have accepted the submission by defence counsel to impose a community correction order on Mr Singh.
  - b In her sentencing, Judge Wilmoth said, 'General deterrence is of great importance, as I said earlier, and so your youth must be given relatively less weight.' To what extent do you believe that this outcome provides for general deterrence in the area of driving offences? Give reasons.

**Check your [obook assess](#) for these additional resources and more:**

- |   |   |   |   |
|---|---|---|---|
| » <b>Student book questions</b><br>12.2 Check your learning | » <b>Video tutorial</b><br>Overview of <i>DPP v Singh</i> | » <b>Weblink</b><br><i>DPP v Singh</i> judgment | » <b>Weblink</b><br>Careless driving (Victoria Legal Aid) |
|---|---|---|---|

# RECENT CRIMINAL CASE 3 – HIGH COURT STEPS IN ON DOMESTIC VIOLENCE CASE

## *R v Kilic* (2016) 339 ALR 229

### Introduction

*R v Kilic* (2016) 339 ALR 229 is a Victorian criminal case in which the accused, Yavaz Kilic, was charged with intentionally causing serious injury. The victim of the crime was covered in petrol and set alight by Kilic, her boyfriend, when she tried to leave him. At the time of the incident, the victim was 12 weeks pregnant with his child.

**domestic violence**  
violent or aggressive  
behaviour and abuse of  
a spouse or partner

The case brought the issue of sentencing for **domestic violence** charges into the media spotlight. During the case, the sentencing judge noted that it was important to impose a sentence that was both appropriate to the crime and to send a message to the community that violence against women will not be tolerated.

The case went all the way from the County Court to the High Court. It is a significant case to study as it highlights how the courts can sometimes be in disagreement with each other about the appropriateness of the sanction that has been imposed on an offender. It also demonstrates the way in which the High Court is the ultimate court of appeal, and can overrule decisions of lower courts in the same case.

In this topic we will explore each of the following aspects of *R v Kilic* in detail:

- an overview of the charges and central facts of the case
- courts involved in the case
- sanctions imposed and their appropriateness
- factors taken into account in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

### Overview of the charges and central facts of the case

In July 2014, Yavaz Kilic set his girlfriend on fire. The victim (who was unnamed in the case) was living with Kilic at his father's home at the time of the incident. She was 23 years old and 12 weeks pregnant with Kilic's child. People had described the relationship between the pair as 'dysfunctional' and 'controlled by drug-use'. The victim herself described Kilic as controlling and paranoid.

On the day of the incident, the victim and a friend, Mr Bond, arrived at Kilic's house. Mr Bond went to open the door to get out of his car and saw Kilic running across the road in an aggressive manner, holding a samurai sword above his shoulders. He thrust the sword through the car window and walked away, verbally abusing Bond and the victim.

Bond followed Kilic to the house and then inside the house, where he hid the sword in the bathroom ceiling fan. While Bond was in the bathroom, Kilic went outside and walked up to Bond's car. The victim was in the backseat and locked the car door in fear when she saw the look on Kilic's face. Kilic still managed to get in using a door on the other side of the car. He climbed in and sat in the backseat with the victim.

**Source 1** Kilic threatened the victim (his girlfriend) and another person with a samurai sword during the incident.



A struggle broke out between Kilic and the victim, who tried to fight him off. Kilic picked up a fuel container from the back seat of the car and poured petrol all over her. He got out of the car and then returned a few minutes later. The victim tried to get out of the car, but Kilic pulled her back in using abusive language. He held a cigarette lighter to her chest and ignited the petrol. Straight away the victim's clothes, face and hair were in flames. She escaped from the car where she attempted to put out the flames. Other people at the scene assisted her and called 000.

The victim was taken to hospital in a critical condition and was placed in an induced coma for five days. She remained in intensive care for nine days.

The forensic clinician reported that the victim would have died had she not been treated for her injuries. Only a small section of her skin area was left unhurt. The burn injuries were deep and complex surgery including skin grafting was required. The victim would remain scarred, possibly to large areas of her body, and the future functionality of her hands and limbs would be diminished. Due to the nature and seriousness of her injuries and her long-term prognosis, the victim terminated her pregnancy.

At the time of the offence Kilic was on **bail** and was also serving a community correction order. He was 22 years old in 2015 when he was first sentenced in the County Court of Victoria. He pleaded guilty to one charge of causing serious injury intentionally and two summary charges (possessing a prohibited weapon and possessing property suspected of being the proceeds of crime).

## Courts involved in the case

The courts involved in this case were the Magistrates' Court and the County Court. The role of the Magistrates' Court was to determine, at a committal hearing, whether there was evidence of sufficient weight to support a conviction of Kilic at his trial in a higher court. Kilic pleaded guilty at the committal stage, which saved the legal system and the witnesses in this case the burden of a trial in a superior court.

The offence of causing serious injury intentionally is an indictable offence, which can be heard in the County Court or the Supreme Court of Victoria. Cases involving intentionally causing serious injury are most often heard in the County Court. Where summary offence charges have also been laid, these are heard and determined at the same time as the indictable offence.

In this case, his Honour Judge Montgomery of the County Court sentenced Kilic. There was no **jury** trial, as Kilic pleaded guilty.

## Sanctions imposed and their appropriateness

In Victoria, a person who, without lawful excuse, intentionally causes serious injury to another person is guilty of a crime. This crime is an indictable offence under the *Crimes Act 1958* (Vic), and the potential penalty is severe: judges are able to impose a term of imprisonment of up to 20 years. This indicates how seriously the Victorian Parliament views any behaviour that causes serious harm to another person and is intentional (that is, the person deliberately set out to seriously injure another person). The law also serves to provide an element of **general deterrence** for the community, so that people are discouraged from causing harm in this way.



**Source 2** In *R v Kilic*, the accused Yavaz Kilic poured petrol over the victim and ignited her with a cigarette lighter.

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

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

**general deterrence**  
one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences



**Source 3** Kilic's case began in the Magistrates' Court (top) and continued in the County Court (bottom).

At the sentencing hearing on 30 March 2015, the judge took the view that imprisonment was the only sentencing option that was available in this case, because of the seriousness of the crime. The sentencing remarks are contained in *DPP v Kilic* [2015] VCC 392 (30 March 2015).

On the charge of causing serious injury intentionally, Judge Montgomery sentenced Kilic to a period of imprisonment of 14 years. On the first summary offence, Kilic was sentenced to 12 months imprisonment, six months of it to be served cumulatively with the indictable offence charge. On the second summary offence, Kilic was sentenced to a further 12 months imprisonment, six months of that to be served as a **cumulative sentence**. The total period of imprisonment was 15 years. Judge Montgomery set a non-parole period of 11 years. The time that Kilic had already served in prison (242 days) was declared as part of the term of imprisonment.

The Judge stated that if Kilic pleaded not guilty, he would have been sentenced to 18 years in prison, with a non-parole period of 15 years.

In sentencing Kilic, Judge Montgomery took into account general deterrence. He stated that 'I find it hard to recall a more serious example of this type of offending in my 38 years in the criminal law', and indicated that it was important that people were deterred from committing similar type offences. Judge Montgomery also noted that the Court had to send a message to the community about violence against women (see extract below).

#### **cumulative sentence**

when a defendant is found guilty of more than one offence, the judge may sentence them to consecutive (i.e. cumulative) terms for each crime. This means each sentence must be served one after the other rather than at the same time

## **EXTRACT**

### *DPP v Kilic* [2015] VCC 392 (30 March 2015)

The courts have to send a message to the community that violence against women will not be tolerated under any circumstances. The problems of differences in a relationship and the use of drugs such as ice in no way excuse the horrific violence that you inflicted on someone you supposedly cared for. Can we open the newspapers on any day without an account of some man inflicting violence on a woman in a minor or major way?

#### **specific deterrence**

one purpose of a sanction; a process by which the court can discourage the offender from committing similar offences

#### **denunciation**

one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

Judge Montgomery also took into account **specific deterrence**, noting that Kilic has had numerous convictions, and at the time of offending was on bail and on a community correction order. The aim of specific deterrence is designed to discourage the offender from committing more offences in the future. He also expressed his **denunciation**, and stated that he had to consider protection of the community, as the way that Kilic acted posed a risk to the community (and there were no psychiatric or psychological reports to explain his offending). He noted that it was difficult to assess Kilic's prospects of rehabilitation.

The appropriateness of the sentence was challenged by Kilic on appeal, and challenged further by the DPP when the Court of Appeal reduced the sentence (see the next page). Ultimately, the sanction imposed on Kilic was such that it reflected the seriousness of the crime committed. In particular, it is clear that imprisonment was the only appropriate sanction in this case; though views differed on the years of imprisonment that ought be imposed.

# Factors taken into consideration in sentencing

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the judge as a reason to give a higher penalty (e.g. prior record or repeat offences).

In sentencing Kilic, Judge Montgomery took the following factors into consideration:

- the seriousness of the offending
- the fact that Kilic had numerous convictions, though none for violence, and was on bail and on a community correction order at the time of the offending
- Kilic was 22 at the time of sentencing, and though it weighed heavily on the judge when he first read the case documents, he noted that there must come a time when the age of the offender is pushed into the background in light of the circumstances of an offending
- Kilic's plea of guilty, which saved the witnesses the trauma of a **committal hearing** and a trial. It also showed Kilic's acceptance of responsibility for the offending
- Kilic showed remorse by writing a letter to the judge stating that he felt pain and shame in every bone in his body, and that he acted in a cowardly manner.

Judge Montgomery also took into account the submissions made by Kilic's counsel. They are provided in the extract below.

## EXTRACT

### *DPP v Kilic [2015] VCC 392 (30 March 2015)*

He submitted the gasoline used was not purchased and available for the purpose for the infliction of serious injury, but was used opportunistically.

I accept that submission in relation to the offending insofar as it refers to spontaneity and opportunism. He drew my attention to the authorities in relation to sentencing youthful offenders. He outlined your background. You are 22 now, as you were at the time of the offending. You have an older sister, who is aged 28. Your parents separated when you were eight and you went to live with your mother. You did not have much contact with your father until you were 20. You grew up in the Carlton area and left school in Year 9. You did two years as a bricklayer's labourer.

You began using drugs, he told me, at around the age of 13 and that substantially increased when you became homeless at the age of 18. Your drug of choice was the drug known as ice and at the time of this offending, he told me that you were using a gram a day. You had gone to live with your father at the age of 20, following release from custody for previous offending.

He submitted that you had shown remorse. He referred to your plea of guilty. He referred me to the statement of the victim. He referred me to your attempts at the hospital to contact the victim or to find out how she was going. In the references tendered to me, you have expressed remorse for your actions. You suffered extensive burns to your arms and wrists. You provided a letter to the court, detailing your remorse. I accept on the basis of that material, that you have shown remorse.

#### **mitigating factors**

circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

#### **aggravating factors**

circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

#### **committal hearing**

a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

## Study tip

When referring to cases in answers to questions in assessment tasks, you don't need to write out the full citation of the case. However, it is important that you name the case correctly, or describe it in enough detail so that your teacher knows the case you are writing about.

## Did you know?

Domestic violence in Australia is considered by many to be an epidemic. The Australian Bureau of Statistics has reported that one in three women have experienced violence, caused by someone known to them.

### conviction

a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

# Possible avenues of appeal

Any appeals from this decision needed to be made to the Court of Appeal. Appeals to a higher court must usually be lodged within 28 days after the **conviction**. An offender can:

- **appeal against conviction** – the offender can claim that the verdict was unreasonable, based on the evidence; or that it was based on an error of law; or that a miscarriage of justice occurred. The accused will need leave to appeal
- **appeal against the sentence** – the offender can appeal against a sentence that is too harsh
- **appeal against both** – the offender can appeal against conviction and sentence.

In this case, because Kilic pleaded guilty to the offence on which he was convicted, he could not appeal against his conviction, but he could appeal on the harshness of the sentence, and raise legal points in making that argument.

The prosecution can also appeal on a question of law, or on the leniency of the sentence. The prosecution does not need leave to appeal, but the accused generally does.

From the Court of Appeal, either the accused or the prosecution could file an appeal with the High Court, which is the ultimate court of appeal in Australia. Leave is required by the High Court for all criminal appeals. This means that the Court itself decides if and when the case will proceed.

In this case, both parties lodged appeals at different stages, with the matter eventually proceeding to the High Court of Australia.



**Source 4** Possible avenues of appeal for Kilic. Because Kilic pleaded guilty, he could only appeal against his sentence. The case went to the High Court because the prosecution appealed the decision made in the Court of Appeal.

## Appeal to the Court of Appeal

Kilic appealed to the Court of Appeal on the grounds that the sentence was too harsh. He was granted leave to appeal on 12 August 2015, on two grounds:

- first, that the individual sentences were excessive and the judge gave too much weight to aggravating factors and too little weight to mitigating factors, which in the view of the defence should have reduced the sentences that were imposed. Kilic also argued that the judge did not take account of current sentencing practices and the applicable maximum penalties
- second, that evidence regarding the impact of the offending on the victim, which was obtained after the sentences had been imposed on the offender, threw a 'different light' on the circumstances which existed at the time of the sentence.

The appeal hearing was held on 27 October 2015, and judgment was handed down on 8 December 2015 (see *Kilic v The Queen* [2015] VSCA 331 (8 December 2015)). The Court of Appeal justices who presided over the appeal were Justice Redlich and Justice Whelan.



### Source 5

The use of methamphetamine, commonly known as ice, was a factor in the commission of these offences by Yavaz Kilic.

The second ground of appeal was refused. Kilic sought to produce evidence to suggest that the true significance of the victim's injuries were not fully comprehended at the time of sentence. He tried to rely on Facebook photos which showed the victim 'out and about' and with minimal scarring. Kilic's father and sister also gave evidence which suggested that the victim could move with little difficulty.

The Court of Appeal rejected that this was fresh evidence, and found that it did not contradict the findings made by the trial judge about the use of the victim's hands or the functionality of her limbs. It refused leave to appeal on this ground.

However, the Court of Appeal upheld the appeal on the first ground, and found that the sentence that had been given at the trial by Judge Montgomery had significantly exceeded those that had previously been given for convictions involving more horrific assaults.

The Court of Appeal also mentioned:

- Kilic's youth was a relevant consideration, and held that Judge Montgomery did not completely take this into account
- the fact that Kilic had also suffered extensive burns in the incident when he attempted to extinguish the flames after setting the victim alight
- the fact that the sentence was handed down immediately after the plea hearing. The Court of Appeal suggested it would have been prudent to take some further time to consider the submissions.

The Court of Appeal reduced the sentence to 10 years and 10 months' imprisonment. The non-parole period was set at 7 years and 6 months.

The judgment came under significant scrutiny in the media.

## Appeal to the High Court

The prosecution appealed the case. The High Court had to consider whether the Court of Appeal made an error in its consideration of current sentencing practices.

The High Court handed down its decision on 7 December 2016, and allowed the appeal, agreeing with the DPP. The citation for that case is *R v Kilic* (2016) 339 ALR 229. The High Court stated that it was correct to consider 'current sentencing practices' to promote consistency of approach in sentencing and to ensure that current sentencing reflects current community attitudes (such as attitudes towards crimes involving domestic violence). However, past sentences do not impose 'boundaries' for future sentences. The High Court found that the Court of Appeal used past sentences in the few cases mentioned as 'defining' the sentencing range. The Court then made an error in finding that because Kilic's sentence exceeded those sentences, it was excessive.

The High Court found that cases involving the offence of intentionally causing serious injury by fire are uncommon, and the few cases that had been examined by the Court of Appeal could not be considered as a sentencing pattern that could be used as a guide in the *Kilic* case. It also held that given the offending in this case was at the upper end of the range of seriousness, and a sentence of 20 years imprisonment was the maximum, 14 years imprisonment should not be regarded as manifestly excessive.

The High Court upheld the appeal by the DPP and reinstated the original sentence that had been imposed in the County Court.

## The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in *DPP v Kilic* is provided below. For each principle, this assessment is made on the evidence available.

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

## Fairness

The principles of fairness mean people should be treated fairly and impartially. Every person should be aware of the case against them and be able to present their case. The criminal justice system relies on fair legal processes and fair hearings. In this case:

- There were two appeals, and the matter was ultimately heard in the High Court. Both parties had the **opportunity to appeal** to ensure the law was properly applied and sufficient weight was given to **sentencing factors**.
- Kilic and his legal counsel were able to **examine the evidence** presented at the committal stage before Kilic pleaded guilty. This would have given the defence a good understanding of the weight of evidence against Kilic, which is appropriate, given that Kilic was presumed to be **innocent** until such time that he pleaded guilty.
- Kilic was able to exercise his rights, including the **right to enter a plea** to the charges at different stages of the process, the **right to make submissions during sentencing**, and the right to appeal.
- The Court of Appeal and the High Court both considered **relevant sentencing practices** and **previous cases** to determine the **sentence**. Both parties had an opportunity to present submissions at these hearings.

## Equality

The principle of equality requires that all people should be equal before the law and have the same opportunity to present their case. Equality in the criminal justice system relies on parties being treated in equally. In this case:

- Both parties had the right to engage **legal representation**, which is designed to ensure equality between the parties, who **examine evidence** presented by their opponent. Both parties were represented, which ensured they were on equal footing.
- The judges were **independent and impartial adjudicators**, with no connection to the parties.
- Both parties had equal opportunity to make submissions at the sentencing hearing and during the appeal process.



**Source 6** The principles of justice – fairness, equality and access – govern how the accused was judged in this case.

## Access

The principle of access requires that everyone should have equal access to legal agencies and institutions. They should be given every opportunity to understand their legal rights and pursue legal claims. For access to be achieved, the criminal justice system relies on accused people having legal advice and representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid may be entitled to legal representation at no charge. Legal representation is essential for parties attempting to navigate through complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence prior to the trial. The burden of proof in a criminal trial rests on the prosecution, and it is their role to lay out all evidence required to establish the case. This helps legal counsel prepare for trial. In this case:

- The victim's **name was not identified** and is not revealed in the court judgments. This practice allows **greater access** to the courts for victims who may be reluctant to go through the court process if they are publicly identified.
- The hearings were likely to have been **open to the public** and to the victim and her family. The reasons for the decisions of each of the three courts are **publicly available**.
- Kilic had the opportunity to **plead guilty**.
- Kilic was able to **appeal against the sentence** imposed in the County Court and had the opportunity to have his counsel **present arguments regarding sentencing**.
- After the Court of Appeal upheld the defence appeal, the DPP had the opportunity to **appeal against** this decision to the **High Court**, and Kilic would have equally been able to present his or her case. Both parties had equal **access to the appeals process**, which enhances public confidence in the eventual outcome.

## 12.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Outline the key facts of the *Kilic* case.
- 2 Prepare a timeline of events in the *Kilic* case. Include the handing down of each of the decisions made by the three courts.

### Synthesise and apply

- 3 At the time of this offence, Kilic was on a community correction order.
  - a Outline two purposes of a community correction order.
  - b Explain two conditions that can be imposed along with such an order.
  - c Is this a mitigating or aggravating factor? Why?
- 4 In what ways does the outcome imposed in this case provide for deterrence on both Kilic and the community?
- 5 Explain how the availability of appeals can enhance the principles of justice in a criminal case.
- 6 Describe how you think the following people would have reacted to the decision of the Court of Appeal.
  - a Kilic's family

b The victim

c Victim groups

- 7 Make notes on the key factors that were taken into account in sentencing in this case.
  - a Prepare a table which identifies all of the factors that were taken into account in sentencing.
  - b For each factor, assess whether it was mitigating or aggravating.
  - c Provide a short statement justifying your decision for each factor.

### Analyse and evaluate

- 8 In sentencing, Judge Montgomery said, 'However, there must come a time when the circumstances of the offending push the age of the offending into the background. In my view, this is such a case.' To what extent do you agree with the judge in this case? Give reasons for your answer.
- 9 Discuss the extent to which the right of the parties to make submissions in sentencing achieve the principles of justice.



### Check your **obook** **assess** for these additional resources and more:

» **Student book questions**

12.3 Check your learning

» **Video tutorial**

Overview of *R v Kilic*

» **Weblink**

*R v Kilic* judgment

» **Weblink**

What police do about family violence

## RECENT CRIMINAL CASE 4 – VIOLENT ARMED ROBBERY BY YOUNG OFFENDER

*DPP v Gatkuoth* [2016] VCC 634 (17 May 2016)

### Introduction

The offence of armed robbery is one of the most serious crimes in Victoria. It is a crime under Section 75A of the *Crimes Act 1958* (Vic) and involves the committing of a robbery with the use of a firearm, imitation firearm, offensive weapon, explosive or imitation weapon. Armed robbery is an indictable offence which can lead to imprisonment of up to 25 years. In 2016, the Victorian Parliament passed legislation which amended the *Crimes Act*, creating the new offences of **carjacking** and **aggravated carjacking**.

The case of *DDP v Gatkuoth* [2016] VCC 634 (17 May 2016) is a recent criminal case involving a carjacking, but the accused was charged with armed robbery (as the carjacking crime was not created at this time). The case sparked widespread outrage and the perpetrator's life became the centre of media attention.

#### **carjacking**

the act of violently stealing an occupied car

#### **aggravated carjacking**

the act of violently stealing an occupied car committed when the offender possesses a firearm, imitation firearm, offensive weapon, explosive or imitation explosive, or (in the course of carjacking,) causes injury to another person



**Source 1** The offence of armed robbery can have a lasting effect on a victim.

In this topic we will explore each of the following aspects of *DPP v Gatkuoth* in detail:

- an overview of the charges and central facts of the case
- courts involved in the case
- sanctions imposed and their appropriateness
- factors taken into consideration in sentencing
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

The events surrounding this case raise broader questions about the principles of justice, and in particular how the community views sentencing and sentencing practices.

# Overview of the charges and central facts of the case

On 5 November 2015, Sam Newman and Daniel Sibberas were returning home from a club in the early hours of the morning. Isaac Gatkuoth (then 18 years old) and others were in a stolen white BMW. They stalked Newman's car and rammed it from behind. Newman and Sibberas walked towards the BMW and asked them what they were doing. Gatkuoth and two others got out of the BMW, walked up to Newman, and pointed a sawn-off shotgun at his head. Newman was scared and handed over his keys when told to. He begged Gatkuoth not to shoot him, and ran for safety with Sibberas when their car was driven away.

The police observed the stolen car travelling at great speed, followed by the BMW. Gatkuoth was arrested two weeks later. During the interview, Gatkuoth admitted that he was armed with a single barrel shotgun, and had purchased it two days earlier along with ice, which he had been using at the time of the offence. He admitted to wearing a mask with a smiley face when the offending occurred and said he'd been drinking. He said the gun was not loaded. Gatkuoth was charged with, and pleaded guilty to, armed robbery.

A number of facts about Gatkuoth's upbringing have come to light since the crime. He was born in Sudan, Africa, where he lived with his extended family. He came to Australia shortly before turning 10. His memories of Sudan are of gangs, violence and weapons. Two of Gatkuoth's brothers died in Sudan and when he was 16 he became aware that his father had been killed by a rival group in Sudan.

In February 2017, it was reported that Sam Newman, one of the victims of Gatkuoth's crime, took his own life in January that year. His mother said that while she appreciated that Gatkuoth had a terrible upbringing, he had damaged the very community that had reached out to help him, and that he and other teens involved in carjackings and home invasions were not being punished severely enough.

It was also reported that a number of offenders, including Gatkuoth, would face deportation as they were considered to be associated with the 'Apex gang'. Federal Immigration Minister Peter Dutton also said that the Victorian Government needed to 'do more' to address gang violence.

A petition was created online to stop the Australian Government from deporting Gatkuoth. Online blogs and commentary discussed Gatkuoth's case, as well as questioned whether an 'Apex gang' exists or whether it is even a gang. Gatkuoth has consistently denied he is part of any gang.

## Study tip

If you are asked to describe the central or key facts of a case, you don't need to mention every single fact of the case. Instead, write about only those facts of the case that are relevant to the question you are being asked.

## Courts involved in the case

The offence of armed robbery is an indictable offence. Both the County Court and the Supreme Court have jurisdiction to hear this offence. In almost all instances, it is heard by the County Court. This case was heard in the County Court.

Gatkuoth was 18 at the time of offending. Had he been 17 years or younger, then the case would have been heard in the Children's Court.

Because Gatkuoth pleaded guilty early, there was no need for the Magistrates' Court to be involved by way of a **committal hearing**. There was also no **jury** trial.

## Sanctions imposed and their appropriateness

Gatkuoth's counsel submitted that he should be sentenced to a period of detention in a Youth Justice Centre. There were a number of factors to support this including his youth, admissions, early guilty plea, fragile mental health, commitment to self-improvement and rehabilitation, and the support he enjoyed from his older sister.

Judge Taft agreed. On the charge of armed robbery, Gatkuoth was ordered to be detained in a Youth Justice Centre for 16 months. On the charge of being a prohibited person carrying a firearm, he was ordered to be detained in a Youth Justice Centre for four months. The sentences were ordered to be served concurrently and with the sentence that he was currently undertaking.

Judge Taft noted that if Gatkuoth had pleaded not guilty, he would have been sentenced to a period of detention in a Youth Justice Centre for 24 months.

### committal hearing

a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

### jury

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

# Factors taken into consideration in sentencing

The two main types of sentencing factors are **mitigating factors** and **aggravating factors**:

- **mitigating factors** are factors or circumstances that count in the offender's favour and may be considered by the judge as a reason to give a lesser penalty (e.g. a difficult childhood, an existing mental illness, or remorse)
- **aggravating factors** are factors or circumstances that count against the offender and may be considered by the judge as a reason to give a higher penalty (e.g. prior record or repeat offences).  
Judge Taft took a number of factors into consideration when sentencing Gatkuoth including:
  - Gatkuoth's childhood. Judge Taft stated that after Gatkuoth arrived in Australia, he attended language school in Springvale and finished primary school in Endeavour Hills. The judge said Gatkuoth was involved in fights on a daily basis, and was bullied because people did not like him. His life improved from Years 7 to 9, when he was Year 7 sports captain, and then transferred to Hallam Secondary School for Year 10, hoping to join the sports academy. However, he was not successful. He lost hope and began skipping school and using drugs. He was expelled in Year 10 for using cannabis.
  - Gatkuoth's drug use. Gatkuoth started using anti-depressants once he started serving time in detention, and admitted to smoking ice. He recognised he was a 'mess', and would often stay awake for several weeks at a time, hallucinating and hearing voices.
  - Gatkuoth's significant criminal history. This included multiple thefts and aggravated burglary. He considered the offending was serious and alarming, and that his offending terrified his victims.
  - Gatkuoth's formative years had been wretched, but it did not excuse the violent nature of the offending.
  - Gatkuoth had undertaken academic study at Parkville College, where he had been 'highly respectful and enthusiastic'. Gatkuoth's Youth Justice Worker at Dandenong had also noted that he is 'very bright' and that he does show remorse for his offending. She was hopeful that upon release, Gatkuoth could be connected to further study via TAFE, where he hoped to pursue an apprenticeship in the building industry.

Judge Taft also took into consideration factors submitted by Gatkuoth's counsel (including youth, early plea of guilty, fragile mental state as well as the likelihood that he was suffering from Post-Traumatic Stress Disorder, commitment to self-improvement and rehabilitation, and support he enjoys from his older sister).

In this case, the judge also made sentencing remarks in the form of a direct comment to Mr Gatkuoth (see below).

## EXTRACT

### *DPP v Gatkuoth [2016] VCC 634 (17 May 2016)*

Mr Gatkuoth, can I ask you to stand once more. Somewhat to my surprise, the report from Parkville College was very positive. I had not expected it. If it had not been for that report and the opinions expressed by the teachers, you would have been sentenced to a longer term of detention.

I do not know whether you will change your ways, but if you commit violent offences in the future you must expect to be sentenced to significant terms of imprisonment in an adult gaol. Our community will not accept and will not tolerate hijackings, use of firearms and intimidation. Do you understand that?

**mitigating factors**  
circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

**aggravating factors**  
circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

### *Did you know?*

Under section 501 of the *Migration Act 1958* (Cth), any person sentenced to a minimum of 12 months' jail faces cancellation of their visa and deportation on 'character grounds'. Some offenders who had been convicted of armed robbery of motor vehicles (now known as carjacking) have been deported to their country of origin.

# Possible avenues of appeal

Any appeals from this decision would need to be made to the Court of Appeal. Appeals to a higher court must usually be lodged within 28 days after the **conviction**. An offender can:

- **appeal against conviction** – the offender can claim that the verdict was unreasonable, based on the evidence; or that it was based on an error of law; or that a miscarriage of justice occurred. The accused will need to get leave to appeal
- **appeal against the sentence** – the offender can appeal against a sentence that is too harsh
- **appeal against both** – the offender can appeal against the conviction and sentence.

In this case, because Gatkuoth pleaded guilty to the offence on which he was convicted, he could not have appealed against his conviction, but he could appeal on the harshness of the sentence, and raise legal points in making that argument. In fact, Gatkuoth did not appeal at all (though he did appeal a separate conviction for his involvement in riots which occurred at a youth justice centre in January 2017).

The prosecution can also appeal on a question of law, or on the leniency of the sentence. The prosecution does not need leave to appeal.

From the Court of Appeal, either the offender or the prosecution could file an appeal with the High Court, which is the ultimate court of appeal in Australia. Leave is required by the High Court for all criminal appeals, and there must be an important legal issue to decide.



**Source 2** Possible avenues of appeal for Gatkuoth. However, because Gatkuoth pleaded guilty, he could only appeal against his sentence.

## The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were achieved in *DPP v Gatkuoth* is provided below. For each principle, this assessment is made on the evidence available.

### Fairness

The principles of fairness mean people should be treated fairly and impartially. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the criminal justice system relies on fair legal processes and fair hearings.

In this case:

- the offender, Isaac Gatkuoth, would have been able to **access rights** prior to the trial, such as the right to silence when being questioned by police
- Gatkuoth was **represented** at the plea hearing and sentencing hearing, which meant he had assistance in ensuring his case was presented in the best light possible
- Gatkuoth's sentence was imposed by an impartial judge, who took into account relevant sentencing factors
- Gatkuoth had the opportunity to make submissions about sentencing through his legal counsel.

### conviction

a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

### Did you know?

If someone is charged with aggravated carjacking, they are unlikely to be granted bail. This is because of tough new laws which aim to address crimes such as these - which are few in number, but have a traumatic effect on their victims.

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

## Equality

The principle of equality suggests that all people should be equal before the law, regardless of who they are. Every person in society should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the criminal justice system relies on both parties being treated equally.

In this case:

- Both parties had the right to **engage legal representation**. The availability of legal representation aims to achieve equality between the parties, who are able to examine the evidence being presented by their opponent.
- Equality was ensured at the sentencing hearing because Judge Taft played the role of an **independent and impartial adjudicator**, who enforces rules of evidence and procedure to ensure that both parties had the opportunity to make submissions about sentencing
- Both parties were **represented** at the plea hearing and sentencing hearing.

## Access

The principle of access suggests that everyone should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the criminal justice system relies on accused people having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid may be entitled to legal representation at no charge. Legal representation is essential for parties attempting to navigate through complex legal processes.

In a criminal trial, there are strict processes for the sharing of evidence between the parties, especially the key facts that must be revealed by the prosecution to the defence prior to the trial. The burden of proof in a criminal trial rests on the prosecution, and it is their role to lay out all evidence required to establish the case. This helps legal counsel prepare for trial.

In this case:

- At the end of the sentencing hearing, both parties had the **right of appeal** on grounds including the sentence that was imposed by the trial judge.

### Study tip

A practice assessment task for Unit 2 – Area of Study 1 can be found on the Unit 2 Assessment tasks topic on page 534.



**Source 3** In 2016, the *Crimes Act* was amended to create new offences including carjacking and aggravated carjacking. This followed cases such as the *Gatkuoth* case and the push by some parts of the community to have tougher sentences for these crimes.

- Prior to the sentencing of Gatkuoth, professionals in the fields of youth justice and education were able to **present evidence** to the court about Gatkuoth's potential for rehabilitation. This evidence was vital in the eventual sentence that was delivered by the judge in this case. This aspect of the evidence allowed for access to justice because when sentencing Gatkuoth, the court could be aware of the experiences of others in the area of youth justice who had positive contact with him.
- Victims would have been entitled to information about the case, and could have provided **victim impact statements** to demonstrate the impact that the crime had on them.

**victim impact statement**

a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

## 12.4 CHECK YOUR LEARNING

### Define and explain

- 1 Outline the key facts in the Gatkuoth case.
- 2 What sentence was imposed on Gatkuoth?
- 3 Why weren't the following courts involved in this case?
 

a Magistrates' Court	c Supreme Court
b Children's Court	d High Court

### Synthesise and apply

- 4 Explain the avenues of appeal that were available to the parties in this case. In what ways does the availability of appeals assist in achieving the principles of justice?
- 5 Access the AustLII website. A link is provided on your [obook assess](#). Read the judgment of the Gatkuoth case.
  - a Identify the prior convictions of Isaac Gatkuoth in this case. To what extent do these prior convictions affect sentencing?
  - b Make notes on the key factors that were taken into account in sentencing in this case. Prepare a table which identifies all of the factors that were taken into account in sentencing.
  - c For each factor, identify whether it was a mitigating factor or aggravating factor.
  - d Provide a short statement justifying your decision for each factor.

### Analyse and evaluate

- 6 In sentencing Issac Gatkuoth, Justice Taft said, 'I had not expected it. If it had not been for that report and

the opinions expressed by the teachers, you would have been sentenced to a longer term of detention.'

To what extent does this highlight the importance of providing evidence at a sentencing hearing? Explain.

- 7 Discuss whether you believe that the positive conduct of an offender while in detention should affect the eventual sentence that they receive.
- 8 Under section 6AAA of the *Sentencing Act 1991* (Vic), judges are required to indicate to offenders the sentence that they would have received had they not pleaded guilty in that case. How do you think this information from the judge might assist the efficient and effective functioning of the legal system?
- 9 Conduct some research on the 'Apex gang' and the proposed deportation of Gatkuoth.
  - a Find at least one newspaper article that promotes Gatkuoth's deportation and one that argues against it.
  - b Summarise your own personal views about whether you support the proposed deportation.
  - c In your class, find someone with whom to discuss your views. Try and find someone who has a very different view to your own. The conversation should last for between two and three minutes.
  - d Find another two classmates to discuss your views with.
  - e Come together as a class and discuss your views collectively. Be open-minded about your own views and discuss whether they have changed as a result of speaking to somebody else.



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

» **Student book questions**

12.4 Check your learning

» **Video tutorial**

Overview of *DDP v Gatkuoth*

» **Weblink**

*DDP v Gatkuoth* judgment

» **Weblink**

Tough new laws for carjacking and home invasions

## CHAPTER SUMMARY

**Recent criminal case 1 –****The man who shot a corpse**

- > Darrington fought with Matskassy
- > Firearm, death, repeated shooting
- > Charge of attempted murder
- > Magistrates' Court (committal)
- > Supreme Court sentencing
- > Factors in sentencing (childhood, prior convictions, substance abuse, back condition, victim impact statement, lack of remorse, limited prospects of rehabilitation)

**Recent criminal case 2 –****Learner driver causes death**

- > Learner driver's permit
- > Broke road rules, overtaking, killed Voss
- > Culpable driving and two related charges
- > Magistrates' Court (committal)
- > Supreme Court
- > Factors in sentencing (difficult childhood, mental illness, remorse, prior record, repeat offences)

**Recent criminal case 3 –****High Court steps in on violence case**

- > Struggle with girlfriend, poured petrol, ignited
- > Victim suffered extensive injuries
- > Charge of intentionally causing serious injury
- > Guilty plea at committal (Magistrates' Court), County Court sentence
- > Appeal to Court of Appeal on sentence
- > Appeal to High Court on sentence
- > Factors in sentencing (seriousness of offending, priors, early guilty plea, remorse)

**Recent criminal case 4 –****Violent armed robbery by young offender**

- > Random violence, sawn-off shotgun, stolen car
- > County Court (sentencing)
- > Youth Justice Centre order
- > Factors in sentencing (mental health, PTSD, youth, early plea of guilty, rehabilitation, support)

## REVISION QUESTIONS

- 1 With reference to at least two of the criminal cases in this chapter, describe the three principles of justice. (6 marks)
- 2 If an offender has pleaded guilty, the judge will indicate at the end of the trial the sentence that would have been given had the offender pleaded not guilty. Explain one reason why you think this might be done. Make reference to one case you have studied in this chapter. (4 marks)
- 3 Outline one factor that may be considered by a court when sentencing an offender for:
  - a attempted murder
  - b dangerous driving causing death. (4 marks)
- 4 Imagine you are the judge presiding over a trial. Explain whether or not denunciation – sentencing that sends a clear message to the community that the offence is serious – would be a significant factor in your sentencing decision. Give reference to a case you have studied in this chapter. (4 marks)
- 5 As seen in the *Kilic* case, in the commission of some offences, the offender sustains significant injuries as a result of their behaviour.
  - a Explain the harm that Kilic sustained when committing this offence. (3 marks)



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

» **Student book questions**

Ch 12 Review

» **Revision notes**

Ch 12

» **assess quiz**

Ch 12

Test your skills with an auto-correcting multiple-choice quiz

**b** In your opinion, should such injuries and losses be taken into account by judges when sentencing offenders when the injuries sustained by the victim are permanent in nature? Give reasons.

(5 marks)

**6** Discuss the extent to which you believe that the personal circumstances of an offender (including ongoing family support after the trial) should be taken into account when sentencing. In your answer, refer to two cases that you have studied in this chapter.

(6 marks)

**7 a** Explain each of the appeals that were made in the *Kilic* case.

(6 marks)

**b** Describe how the ability to appeal a case achieves each of the principles of justice.

(6 marks)

**8** This chapter features four cases that involve varying levels of illicit drug use by the offenders involved.

**a** For each case, describe the level of illicit drug use involved and its impact on the commission of those offences.

(6 marks)

**b** If the drug use is linked to a troubled childhood or significant personal hardship, such as in the *Gatkuoth* case, should this evidence reduce the severity of the sentence that is imposed by the court? Give reasons.

(5 marks)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

### Practice assessment task questions

**1** Choose two of the cases examined in this topic and access the judgment of the case on the Australasian Legal Information Institute (AustLII) website (hint: access the court, then year, and then search for the offender's name). Using the judgment and the information in this chapter, answer the following questions:

**a** Describe the material facts of the case.

(3 marks)

**b** Identify the offence(s) the accused was charged with, and the offences that the accused was ultimately guilty of.

(1 marks)

**c** Identify the courts that were involved and the purpose of their involvement.

(3 marks)

**d** Describe two aggravating factors and two mitigating factors that were taken into account when sentencing.

(6 marks)

**e** Discuss the extent to which the sentence imposed will achieve two of its purposes.

(5 marks)

**f** Describe whether there were any appeals, who appealed, and why.

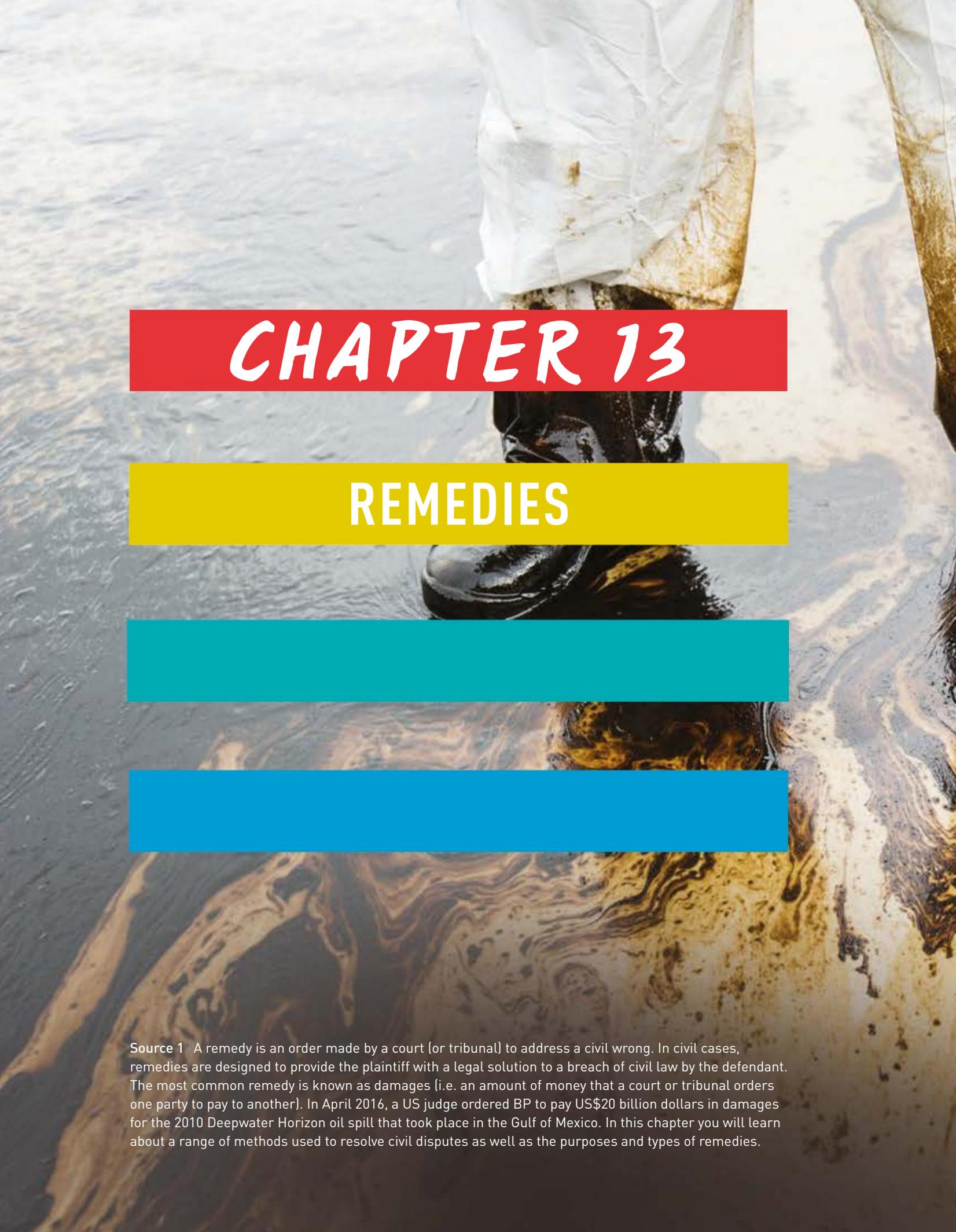
(2 marks)

**g** Comment on the extent to which fairness was achieved in this case.

(5 marks)

Total: 25 marks

**CRIME SCENE - DO NOT CROSS**



# CHAPTER 13

## REMEDIES

**Source 1** A remedy is an order made by a court (or tribunal) to address a civil wrong. In civil cases, remedies are designed to provide the plaintiff with a legal solution to a breach of civil law by the defendant. The most common remedy is known as damages (i.e. an amount of money that a court or tribunal orders one party to pay to another). In April 2016, a US judge ordered BP to pay US\$20 billion dollars in damages for the 2010 Deepwater Horizon oil spill that took place in the Gulf of Mexico. In this chapter you will learn about a range of methods used to resolve civil disputes as well as the purposes and types of remedies.

## OUTCOME

By the end of **Unit 2 – Area of Study 2** (i.e. Chapters 13 and 14), you should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

## KEY KNOWLEDGE

In the chapter, you will learn about:

- the principles of justice: fairness, equality and access
- methods used to resolve a civil dispute such as mediation, conciliation and arbitration
- institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies
- an overview of the role and civil jurisdictions of the Victorian courts
- the role of the jury in a civil trial
- the purposes of remedies
- types of remedies, such as damages and injunctions.

## KEY SKILLS

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

- define and use legal terminology
- research, analyse and apply information in relation to civil law and two recent civil cases
- describe the institutions that resolve civil disputes
- explain the role of the Victorian courts and juries in civil cases
- discuss the principles of justice in relation to the resolution of civil disputes and remedies
- discuss the ability of remedies to achieve their purposes.

## KEY LEGAL TERMS

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

**arbitration** a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

**arbitrator** the independent third party (i.e. person) appointed to settle a dispute during arbitration; arbitrators have specialised expertise in particular kinds of disputes between the parties and make decisions that are legally binding on them. The decision is known as an arbitral award

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

**complaints body** an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

**conciliation** a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

**conciliator** the independent third party in a conciliation who helps the parties reach an agreement that will end the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision

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

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

**fairness** one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

**injunction** a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

**mediation** a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

**mediator** an independent third party who does not interfere or persuade but helps the parties in a mediation as they try reach a settlement of the matter

**remedy** a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

**tribunal** a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

# INTRODUCTION TO REMEDIES

## civil law

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

## plaintiff

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

In society, disputes are common. The interaction between different people, groups and organisations can often result in **civil law** being broken, or rights being infringed. These everyday events often result in civil disputes that need to be resolved.

If a person's rights have been infringed, that person may be able to take action against the person they believe has done them wrong.

In civil law:

- the **plaintiff** is the person who commences a civil action
- the **defendant** is the person who is being sued.

The plaintiff has the **burden of proof** in civil disputes, and may be able to use a variety of dispute resolution bodies to be compensated for the infringement of civil law.

A plaintiff and a defendant can be a human being, a company or an association. That is, companies and associations are entitled to certain rights, and owe certain obligations, and so can sue and be sued. An example of a company being sued is provided in the case study below.

## CASE

## STUDY

### defendant

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

### burden of proof

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

### damages

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

## King Kong features in Supreme Court claim

In March 2017, the *Herald Sun* reported that fitter and turner Lliam Edwin Anstey-Sprigg had issued a claim in the Supreme Court of Victoria against the Creature Technology Company.

It is alleged that Mr Anstey-Sprigg was injured in 2011 when he was required to move King Kong with a rope at a workshop while he was employed at the company. He claims he has suffered back injuries, pain, suffering and depression, and has been unable to undertake suitable work since 2013. He claims that Creature Technology Company was negligent, and is seeking **damages** (i.e. an amount of money) from the company.



**Source 1** The Melbourne production of King Kong resulted in a claim in the Supreme Court of Victoria. The *Herald Sun* has reported that a worker claims he was injured pulling the giant puppet with a rope. In this chapter you will explore how disputes such as this are resolved.

### *Did you know?*

A child under the age of 18 can sue another through a litigation guardian, often known as a 'next friend'. This is usually a parent or guardian. Children can also be sued.

When a civil dispute is resolved, people expect that justice will be achieved. In Chapter 11 you considered the principles of justice in relation to criminal cases. The principles of justice also apply to civil disputes, and can be used to determine whether justice has been achieved in the civil justice system, or in the resolution of a civil dispute.

In this chapter you will look at the ways that civil disputes are resolved. You will explore:

- methods used to resolve civil disputes
- the role of tribunals, ombudsmen and complaints bodies in resolving disputes
- the role and civil jurisdictions of the Victorian courts
- the roles of the jury in a civil trial
- remedies and their purposes.

The purpose of these topics is so that you can develop an appreciation of how civil disputes can be resolved, and the effectiveness of dispute resolution bodies and remedies.

## 13.1

### CHECK YOUR LEARNING

#### Define and explain

- 1 What are the names given to the two parties in a civil dispute?
- 2 What does it mean to sue somebody?

#### Synthesise and apply

- 3 Read the case study 'King Kong features in Supreme Court claim'.
  - a Who is the plaintiff and who is the defendant in this case?
  - b What is the claim that is being made?
  - c What loss or harm does the plaintiff claim he has suffered?
  - d What sort of claim is this (e.g. negligence, defamation, contract)?

#### Analyse and evaluate

- 4 You are on the train on your way back from a school excursion and you overhear two people talking about civil disputes.

The two people both work at the same company which is being sued by a colleague of theirs. This colleague is suing for being discriminated against based on their religious preferences.

You overhear the two people agreeing that a company should not be able to be sued, and that people with claims against companies should not be able to take action against those companies as it can affect business and other colleagues.

As a class, discuss the benefits and downsides of people being able to sue companies.



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

» **Student book questions**

13.1 Check your learning

» **Video tutorial**

Introduction to Chapter 13

» **Going further**

Can children sue and be sued?

# THE PRINCIPLES OF JUSTICE IN CIVIL LAW

## fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

## equality

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

## access

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

## Study tip

Make a note when you come across something in this chapter that relates to one of these principles. For example, when you look at the role of the courts in resolving civil disputes, identify how the courts can achieve fairness, equality and access.

## tribunal

a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

Throughout this chapter, you will look at the way in which civil disputes are resolved and how outcomes are achieved. In order to assess whether outcomes are just, it is helpful to apply the principles of justice. The three principles of justice include: **fairness**, **equality** and **access**.

A brief summary of the principles, and how they apply to civil disputes, is provided in this topic.

## Fairness

Parties to a civil dispute must be dealt with fairly, and any outcome reached must be fair. What does this mean? In civil disputes, it means that there should be fair processes and a fair hearing or trial. This means that laws should be properly applied, the parties to a civil dispute should know what the claims and defences are and what evidence will be used to support the other side's case, and should have the opportunity to present their case and rebut the other person's case. The people who are deciding the dispute should be impartial and unbiased.

For example, by the time the matter gets to trial or hearing, the plaintiff (the party suing another), should know why the defendant says that he, she or it was not in the wrong.

Fairness means there should be a fair hearing or trial, but the processes involved in resolving a civil dispute should also be fair, including any processes used to resolve the dispute before hearing or trial. For example, one of the procedures in a civil dispute is that each party discover relevant documents, which requires the party to list the documents that are relevant to the dispute and provide copies to the other side. This enables a fair playing field by ensuring the parties have knowledge of the documents that the other party has well before trial (or hearing as it is called in the Magistrates' Court).

## Equality

Equality means that all people should be treated equally before the law, with an equal opportunity to present their case. In the civil justice system, this means that **no person or group should be treated better or worse because of a personal attribute or characteristic**. That is, the processes should be free from bias or prejudice, and the persons who help to resolve a civil dispute should be impartial. In

the civil justice system, equality is often upheld through the use of an impartial and unbiased judge or magistrate, who has no connection with either party when hearing the case and making a determination. It is also upheld through the use of a civil jury (as required), whose members must also have no connection with either party. Responsibilities are also imposed on a civil jury to ensure that they do not conduct their own research or investigation into the case.

Processes in the civil justice system should also ensure that certain groups in society, particularly vulnerable groups such as people with disabilities or mental health issues, or those who do not have significant financial resources, are not disadvantaged. Because of the way that our civil justice system operates, particularly the processes and high costs involved, many people are not equal before the law, even without deliberate discrimination.



Source 1 Are the principles of equality and fairness being achieved here?

# Access

Access means that people should be able to understand their legal rights, and should be able to pursue their case (either the claim that they have against one party, or their defence). People should be able to **use the procedures, methods and institutions that resolve a civil dispute**. This includes the courts, **tribunals**, and bodies and institutions that provide legal advice, education, information, assistance and representation. People should also be able to get information about their rights, about when those rights may have been infringed, and about what **remedies** may be available to them.

At times, the civil justice system has been criticised for being inaccessible for many people, particularly those who are not able to afford legal representation. Legal aid through **Victoria Legal Aid (VLA)** is limited for civil disputes, because of limited funding, the significant number of people seeking free legal aid, and the large amount of funding that goes towards criminal cases and family law matters. Other people who have found it difficult to access the civil justice system are those who live in rural areas, and those who have limited or no understanding of the law, the legal systems or court processes and procedures.

## remedy

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

## Victoria Legal Aid (VLA)

a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

## 13.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Identify and briefly describe the three principles of justice.
- 2 Distinguish between the principles of fairness and equality.
- 3 Identify two ways in which the principles of justice are upheld when resolving a civil dispute.

### Synthesise and apply

- 4 Get into groups of three or four in your class. Each group is to be allocated one of the following people (your teacher will decide which person to allocate if there are too many):
  - a newly arrived migrant
  - a person with an acquired brain injury
  - a 15-year-old girl
  - a person who lives in rural Victoria
  - a person with little money.

For your allocated person, brainstorm the following:

- the issues that the person may face if they are involved in a civil dispute
- where the person may be able to go and get information about legal rights and how disputes can get resolved
- how the civil justice system can ensure that the principles of justice are achieved for that person.

Share your ideas with the rest of the class.

- 5 Look closely at Source 1. Identify three personal attributes or characteristics that might form the basis of discrimination in this image.

### Analyse and evaluate

- 6 Form small groups and conduct a debate about the following statement:  
'It is not the role of government to provide free legal aid or assistance. It should be a "user pays system".'



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

» **Student book questions**

13.2 Check your learning

» **Worksheet**

The principles of justice

» **Weblink**

Victorian Legal Aid

# METHODS USED TO RESOLVE A CIVIL DISPUTE

## Study tip

Start to copy and save articles that you come across about the resolution of civil disputes. This will help you to apply your knowledge to actual cases, and you will be able to use them in your assessment tasks to demonstrate your understanding.

### alternative dispute resolution methods

ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration); also known as appropriate dispute resolution

### mediation

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

### conciliation

a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

### arbitration

a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

### mediator

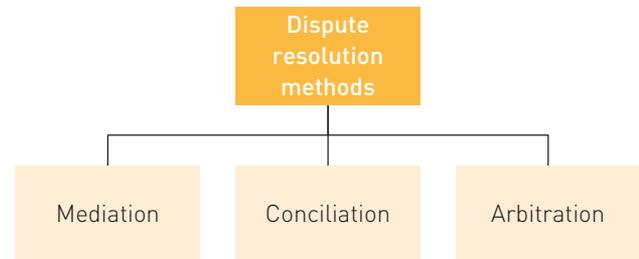
an independent third party who does not interfere or persuade but helps the parties in a mediation as they try reach a settlement of the matter

A party to a civil dispute can use various methods to reach an agreement and settle the dispute. These methods are called **dispute resolution methods**. They are a way to obtain an outcome in a civil dispute that does not involve a court or tribunal making a binding decision on the parties. Dispute resolution methods are sometimes known as **alternative dispute resolution methods**, but these methods are now so often used to resolve disputes that the word 'alternative' is becoming less appropriate to describe them.

These methods include:

- **mediation**
- **conciliation**
- **arbitration.**

The legal system encourages the use of mediation, conciliation and arbitration to resolve disputes because they are often less stressful and less expensive than court action, and in some situations even less stressful and less expensive than issuing a claim through a tribunal.



**Source 1** Mediation, conciliation and arbitration are ways to resolve a civil dispute without a court or tribunal making a binding decision on the parties.

## Mediation

Mediation is a cooperative method of resolving disputes. It is widely used by courts, tribunals and other dispute resolution bodies. It is a joint problem-solving process in which the parties in dispute sit down and discuss the issues they disagree on, put their side of the case and try to reach an agreement through negotiation. They do this with the help of a **mediator**, who is neutral and impartial.

Mediators are trained to assist the parties to reach a decision. The mediator tries to 'empower' both parties. That is, the mediator helps the parties feel more in control of the situation and more confident during negotiations. The mediator discusses the issues with the parties and tries to even out any imbalance between the parties while providing them with support. The mediators do not necessarily need to be experts in the area of law that is the subject of the dispute, but they do need to have good people skills and a high level of conflict resolution skills. Their job is to help people come to a decision, not make the decision for them. A mediator will not make decisions about whether there has been a breach of the law, or offer legal advice.



**Source 2** In 2015, Stuart MacGill sued Cricket Australia in the Supreme Court of Victoria for losses of \$2.6 million, claiming he was owed payments for matches and prize money. The parties were ordered by the Court to attend mediation before the matter was set down for trial. The case settled in July 2017.

Any discussions during mediation will be ‘without prejudice’, meaning that the parties are free to discuss the case, and the strengths and weaknesses of each case, without those discussions later being used against them. This can allow the parties to speak freely and without fear of it being detrimental to their case if the matter does not settle at mediation.

If the parties resolve the case through mediation, they will normally enter into a legally binding contract known as **terms of settlement**, or a deed of settlement. This means that the parties will be bound by the promises they make at mediation. This deed of settlement or agreement may be enforceable through the courts.

Mediation is available to parties in a civil dispute in the following ways:

- parties can organise a private mediation between them. Mediators can be accessed through the Victorian Bar website, and through organisations such as the Dispute Settlement Centre of Victoria and a Family Relationship Centre that offer free or low-cost mediation services
- parties in a court case are often referred to mediation by a court before the final trial or hearing to see if a resolution can be reached. Each of the Magistrates’ Court, County Court and Supreme Court actively orders parties to attend mediation before the matter is set down for hearing or trial
- parties in a tribunal case are also often referred to mediation to try and resolve the dispute before the hearing.



**Source 3** Both mediation and conciliation seek to achieve a ‘win-win’ situation.

**terms of settlement**  
a document that sets out the terms on which the parties agree to resolve their dispute

## Conciliation

Conciliation is also a process of dispute resolution involving the assistance of an independent third party, with the aim of enabling the parties to reach a decision. In many ways it operates the same way as mediation, but the role of the third party is different.

The third party, known as the **conciliator**, listens to both sides of the dispute and makes suggestions about appropriate ways of resolving the matter. The conciliator assists the parties by exploring solutions to the dispute, and is usually someone with specialist knowledge about the subject matter of the dispute (for example, is skilled in employee/employer relations if it is an issue about worker’s pay).

The final decision is made by the parties and is not binding. However, like mediation, it is often the case that the parties will enter into terms of settlement, which can be legally enforceable. Like mediation, any discussions during conciliation are on a ‘without prejudice’ basis, meaning that those discussions cannot be used against either party if the matter does not settle at conciliation.

Conciliation is available to parties in a civil dispute in the following ways:

- many dispute resolution bodies (some of which you will explore in the next topic) use a form of conciliation to resolve disputes. These include the Victorian Equal Opportunity and Human Rights Commission and Consumer Affairs Victoria
- parties in a dispute at the Victorian Civil and Administrative Tribunal (VCAT) are also often sent to what is called a **compulsory conference**. The compulsory conference uses conciliation as a way to help the parties come to a resolution
- some of the more specialised courts use a form of conciliation. For example, in the Family Court of Australia, which has power to hear family disputes, a conciliation conference is organised between the parties to try and reach an agreement about financial or parenting issues.

**conciliator**  
the independent third party in a conciliation who helps the parties reach an agreement that will end the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision

**compulsory conference**  
a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

## Strengths and weaknesses of mediation and conciliation

Because conciliation is similar to mediation in many ways, the strengths and weaknesses are similar. A summary of the strengths and weaknesses of both methods is provided below.

STRENGTHS	WEAKNESSES
A decision made by the parties is <b>more likely to be acceptable</b> to the parties, as they have reached a decision themselves rather than it being imposed on them by a third party	The <b>participation and willingness</b> of the parties is required for a mediation or conciliation to be successful. If one or both parties are unwilling to cooperate, it will be a waste of time and money
Mediation and conciliation are held in a more <b>informal</b> atmosphere than a courtroom, which can help alleviate stress that the parties might otherwise feel	Unless the parties enter into terms of settlement, decisions reached during conciliation and mediation are not <b>binding</b> on the parties
Mediation and conciliation are far <b>less confrontational</b> than a courtroom, without any examination of witnesses, and can be better for continuing relationships and to alleviate the stress of the parties	Both the mediator and the conciliator have <b>no power</b> to order the parties to come to a decision
Matters can be discussed openly <b>without publicity</b> or the discussions being held against a party if the matter doesn't settle	Conciliation and mediation are <b>not appropriate for some disputes</b> , such as where there is an unfair bargaining power or advantage that one party has
There is <b>more flexibility</b> for the parties in resolving the dispute, as the parties are free to explore options to resolve the dispute that the court or tribunal might not have the flexibility to	One party <b>may dominate</b> the other and may influence either the third party or the other party, particularly if the other party does not have legal representation
Due to the <b>confidential</b> nature of conciliation and mediation, parties can avoid publicity that comes with an open court or tribunal hearing	It is not useful for civil disputes where an <b>urgent injunction</b> is required, or where the court's involvement is necessary
<b>Conciliation only:</b> The conciliator will have specialised knowledge in the field and will be able to guide the parties in reaching a solution	<b>Mediation only:</b> The mediator is generally not able to give advice or offer suggestions

Source 4 Strengths and weaknesses of mediation and conciliation

## Arbitration

### arbitrator

the independent third party (i.e. person) appointed to settle a dispute during arbitration; arbitrators have specialised expertise in particular kinds of disputes between the parties and make decisions that are legally binding on them. The decision is known as an arbitral award

### arbitral award

a legally binding decision made in arbitration by an arbitrator

Arbitration is more formal than mediation or conciliation, but can be less formal than a court process. Arbitration involves an independent third party (the **arbitrator**) who listens to the parties and tries to help them reach an agreement. If this is not possible, the third party makes a binding decision on the parties. The arbitration decision is known as an **arbitral award**, and is fully enforceable if the party does not comply with it.

In taking their case to arbitration, the parties agree to abide by the arbitrator's decision. For example, in a commercial contract a clause may be included stating that the parties agree to take any dispute between the parties to an arbitrator, and agree to be bound by the decision of the arbitrator.

Professional arbitrators charge the parties a fee for acting as an arbitrator in a dispute. The arbitrator will generally have knowledge of the subject matter, and will also have an understanding of the applicable law. Arbitration is often used in commercial situations and in international disputes. Legal representation is usually allowed during the arbitration process. It can therefore be an expensive process. The way the arbitration is conducted often depends on what has been agreed. That is, the parties can choose how evidence is presented, how formal the arbitration is, and what procedural rules will apply.

There are generally two reasons that an arbitration may be conducted in Victoria:

- where the parties have previously agreed (normally in a contract) that any dispute that arises will be resolved by arbitration, the parties will normally generally arrange the arbitration between themselves and agree with each other how it is to be conducted. This will include choosing an appropriate arbitrator and agreeing on the rules of arbitration. The Victorian Bar has trained arbitrators available to parties in dispute
- the Magistrates' Court uses arbitration to resolve civil claims of less than \$10 000. The court attempts to facilitate an agreement between the parties. If unsuccessful, a magistrate or registrar can make a binding decision.



**Source 5** The Melbourne Commercial Arbitration and Mediation (MCAM) Centre is located in Melbourne's legal precinct in the William Cooper Justice Centre. Custom built for arbitration, the Centre has state-of-the-art facilities and the latest communications and audio visual equipment.

*Did you know?*

Singapore is considered to be one of the preferred places to conduct an arbitration. Parties to a contract will often agree that any arbitration will be conducted in Singapore. It is considered to be a leading jurisdiction for the resolution of international disputes through arbitration.

## Strengths and weaknesses of arbitration

Source 6 provides a summary of the strengths and weaknesses of arbitration.

STRENGTHS	WEAKNESSES
Arbitration decisions are <b>binding</b> on all of the parties, ensuring certainty that the parties are required to follow it	It is <b>more expensive</b> than mediation and conciliation because evidence is often gathered and put before the arbitrator, and legal representation is normally used. It can also be as expensive as courts, depending on how it is conducted
Arbitration is <b>more informal</b> than court processes (though for private arbitrations it depends on what the parties have agreed on in terms of how it is to be conducted), thus allowing the parties to feel more at ease	It is <b>not always available</b> to the parties in dispute, and is generally only available where the parties have agreed on arbitration, or for small claims in the Magistrates' Court
The third party will have <b>expertise</b> in resolving these types of matters and will bring that expertise when making a binding decision	It can take a <b>long time</b> for a decision to be reached if the parties go through several stages such as producing evidence
Because it is often conducted privately, the parties have <b>flexibility</b> in the way it is to be conducted	The parties have <b>no control</b> over the outcome, which will be imposed on them by a third party
It can be <b>cheaper</b> than resolving the dispute through court (though for private arbitrations this will depend on how the parties have agreed to conduct the mediation)	It can be <b>as formal as a court process</b> , depending on how the parties have agreed for the arbitration to run
Private arbitration is <b>private and confidential</b> , so it is attractive for parties who wish to avoid the publicity of a trial	

**Source 6** Strengths and weaknesses of arbitration

**Define and explain**

- 1 Define the term 'arbitration'.
- 2 Describe two main differences between conciliation and mediation.
- 3 In your notebook, draw up a table with four columns and seven rows. Leave the first column title blank, and head the others 'Mediation', 'Conciliation' and 'Arbitration'. In the first column, label your six rows: (1) Description; (2) Name of third party; (3) Role of third party; (4) Who makes the decision? (5) Is it available for all disputes? and (6) Do any courts use it? Now fill in the six rows for each column, so you have a summary of each of these three methods of dispute resolution.

**Synthesise and apply**

- 4 For each of the scenarios below, identify:
  - one dispute resolution method that may be used
  - two advantages and two disadvantages of using this method.
  - a Jacqi, who is from Nigeria, wants to rent a house. The real estate agent keeps telling her that the house she wants is not available, even though it is still empty and available for rent. She thinks she is being discriminated against.
  - b Jock and Jack are neighbours who are constantly feuding. Jock decides to put garden lattice on the fence between their properties. Jack doesn't like the lattice. He says it's an eyesore. He wants it removed but Jock refuses to take it down. Jack asks Jock to attend the Dispute Settlement Centre so they can discuss the issue on neutral ground.

- c Jenny has separated from Max. They cannot agree on custody arrangements but they do not want to take their dispute to court.
  - d Hong and Simon entered into a building contract which sets out how disputes are to be resolved if they arise. The clause says that the parties must first try to mediate and then they must arbitrate. Hong refuses to attend mediation after a dispute arose about the quality of Simon's building.
- 5 Access the Supreme Court website. A link is provided on your [obook assess](#). Find out information about mediation offered as a means of settling disputes. Then answer the following questions.
    - a When is mediation used?
    - b What are the benefits of mediation?
    - c Who can act as a mediator?
    - d Who pays for mediation?
  - 6 Compare mediation and arbitration as methods of dispute resolution.
  - 7 Conduct some research and find at least two civil cases that have recently (in the past four years) been resolved through mediation. Prepare a summary about those cases, which should address the benefits and downsides of mediation being used to resolve each of those cases.

**Analyse and evaluate**

- 8 In your view, which method do you think is the best method to resolve disputes? Give reasons for your answer.
- 9 How do each of the dispute resolution methods achieve each of the principles of justice?

**Check your [obook assess](#) for these additional resources and more:**» **Student book questions**

13.3 Check your learning

» **Video**

Mediation

» **Video worksheet**

Mediation

» **Weblink**

Victorian Bar

## TRIBUNALS

### Study tip

Choose one tribunal, one ombudsman and one complaints body and become an expert in them.

#### ombudsman

an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

#### complaints body

an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

#### Productivity Commission

the Australian Government's independent research and advisory body, which researches and advises on a range of issues

If parties are unable to reach a resolution between themselves, courts are often seen as the main bodies available in Victoria to parties that are in a civil dispute. However, courts are not the only dispute resolution bodies. There are three other main types of dispute resolution bodies. They are:

- tribunals
- the office of **ombudsman**
- **complaints bodies**.

A 2014 **Productivity Commission** report into access to justice in Australia found that there were a significant number of matters and complaints that each of the bodies heard each year. These are shown in Source 1.

NUMBER OF MATTERS HEARD BY COMPLAINTS BODIES, TRIBUNALS AND CIVIL COURTS (2011–2013)

	OMBUDSMEN AND COMPLAINT BODIES	TRIBUNALS	CIVIL COURTS	
NUMBER OF INSTITUTIONS/ PROVIDERS	<b>71 Ombudsman and complaint bodies</b> <ul style="list-style-type: none"> <li>• National: 22</li> <li>• States/territories: 49</li> </ul>	<b>58 Tribunals</b> <ul style="list-style-type: none"> <li>• Commonwealth: 22</li> <li>• States/territories general: 4</li> <li>• States/territories specialist: 43</li> </ul>	<b>43 Courts</b> <ul style="list-style-type: none"> <li>• Commonwealth: 4</li> <li>• States/territories general: 21</li> <li>• States/territories specialist: 18</li> </ul>	
NATURE OF SERVICE	<ul style="list-style-type: none"> <li>• Receive and resolve complaints</li> <li>• Conduct inquiries into individual or systemic cases</li> </ul>	<ul style="list-style-type: none"> <li>• Administrative review</li> <li>• Civil dispute resolution</li> <li>• Binding decision</li> </ul>	<ul style="list-style-type: none"> <li>• Judicial dispute resolution</li> <li>• Binding decision</li> <li>• Some courts provide 'in-house' alternative dispute resolution services</li> </ul>	
VOLUME OF MATTERS	<b>Total 542 000 complaints</b> arising from 3 709 000 contacts) <ul style="list-style-type: none"> <li>• National: 277 000</li> <li>• States/territories: 265 000</li> </ul>	<b>Total 395 000</b> <ul style="list-style-type: none"> <li>• Commonwealth: 71 000</li> <li>• States/territories general: 194 000</li> <li>• States/territories specialist: 130 000</li> </ul>	<b>Total 673 393</b> <ul style="list-style-type: none"> <li>• Magistrates: 420 144</li> <li>• District: 28 214</li> <li>• Supreme: 28 309</li> <li>• Probate: 65 787</li> <li>• Federal: 5 277</li> <li>• Family: 33 120</li> <li>• Federal Circuit: 92 542</li> </ul>	
COST FOR DISPUTANTS	No cost	<ul style="list-style-type: none"> <li>• Tribunal fees</li> <li>• Expert fees</li> <li>• Cost of attendance</li> <li>• If represented – lawyers' fees</li> </ul>	<ul style="list-style-type: none"> <li>• Court fees</li> <li>• Lawyers' fees</li> <li>• Counsel fees</li> <li>• Expert fees</li> <li>• Cost of attendance</li> <li>• Risk of adverse cost award</li> </ul>	
FUNDING ARRANGEMENTS	Cwith	\$232 million	\$244 million	\$309 million
	States	\$136 million	\$264 million	\$517 million
	Industry	\$113 million	-	-

Source: Australian Productivity Commission report, 2014

**Source 1** Courts hear a significant number of matters each year, but so do tribunals, complaints bodies and ombudsmen. The diagram above shows data for ombudsmen and other complaints bodies and tribunals from 2011 to 2012, and data for courts from 2012 to 2013.



**Source 2** The Fair Work Commission is a national tribunal which has jurisdiction to hear certain workplace disputes.

## Role of tribunals

Tribunals are dispute resolution bodies which obtain their power from parliament to resolve certain types of disputes. That is, parliament will pass a statute giving a particular tribunal the authority to hear and determine certain types of matters and applications. For example, the *Mental Health Act 2014* (Vic), a statute passed by the Victorian Parliament, establishes the Mental Health Tribunal and gives it powers, including the power to hear an application to determine whether neurosurgery for mental illness should be performed on a person. Tribunals develop expertise in particular types of disputes and are able to make binding decisions on the parties.

The purpose of tribunals is to provide individuals with a **low-cost, efficient and speedy method of dispute resolution**

**process.** Tribunals therefore increase the community’s access to justice. It provides Australians with an alternative option to resolving disputes to that of courts, which can often be seen as a more formal, costly, stressful and lengthy way of resolving disputes, particularly small disputes that can be readily dealt with without having to deal with courts.

Tribunals are not able to hear every type of dispute. For example, tribunals have no power to hear **representative proceedings** (also known as class actions).

Some tribunals have similar characteristics to courts. For example, similar to courts, an **independent third party** will hear the dispute and make a **binding decision** on the parties, and the parties are often referred to a form of dispute resolution method such as mediation to resolve the dispute before the final hearing. However, there are significant differences between the two – the costs involved in having a dispute resolved at a tribunal, in particular, can often be much less.

### representative proceeding

a legal proceeding in which a group of people who have a claim based on similar or related facts, bring that claim to court in the name of one person; also called a class action or a group proceeding

## Tribunals in Australia

In Australia, there are both Commonwealth and state tribunals. Some of the Commonwealth tribunals are set out in Source 3.

COMMONWEALTH TRIBUNAL	DESCRIPTION
Administrative Appeals Tribunal (AAT)	The AAT allows parties to seek an independent review of a decision made by the Commonwealth Government. For example, a party can seek a review of a decision made by a government body about taxation, child support or passports. The AAT also has specialist divisions such as the Migration and Refugee Division, which reviews decisions about the refusal or cancellation of visas.
Fair Work Commission	The Fair Work Commission is the national workplace relations tribunal, which has the power to carry out a range of functions, including resolving workplace disputes through mediation, conciliation and in some cases public hearings.
National Native Title Tribunal	The National Native Title Tribunal can hear and determine certain native title applications, being applications in relation to the recognition of land title unique to Aboriginal people.

**Source 3** Types of Commonwealth tribunals

Some of the tribunals in Victoria are set out in Source 4.

VICTORIAN TRIBUNAL	DESCRIPTION
Victims of Crime Assistance Tribunal (VOCAT)	VOCAT was established to provide financial assistance to victims of violent crime. Victims include not only those who were injured or died as a result of a crime, but also certain people who were close with a deceased primary victim or a person who was present at the scene. Victims can be awarded compensation from VOCAT, who will hear and determine an application and make a decision as to the financial assistance that should be awarded.
Victorian Civil and Administrative Tribunal (VCAT)	VCAT is a 'one-stop shop' for parties and deals with a broad range of civil disputes, including small civil claims, residential tenancy disputes, discrimination claims and guardianship issues.
Mental Health Tribunal	The Mental Health Tribunal seeks to protect people with mental illness. One of its functions is to hear applications made by mental health patients who wish to challenge a treatment order that has been made against them, or wish to be transferred to another designated mental health service.

Source 4 Types of Victorian tribunals

## Focus on the Victorian Civil and Administrative Tribunal

The **Victorian Civil and Administrative Tribunal (VCAT)** deals with a large number and type of civil disputes. It is made up of four divisions:

- Administrative Division
- Civil Division
- Human Rights Division
- Residential Tenancies Division.

Each division is divided into one or more 'lists' (or sections) which hear particular types of disputes. For example, the Residential Tenancies Division has one list, the Residential Tenancies List, which hears a range of disputes between tenants and landlords about claims related to renting a property (such as where the tenant has failed to pay rent, or where the landlord has failed or refused to repair the property).

VCAT's President (who is a sitting Supreme Court judge) and vice-presidents (who are County Court judges) are responsible for the administration and management of VCAT. It is one of Australia's busiest tribunals. It receives over 85 000 claims per year, the majority of which are lodged in the Residential Tenancies List.

VCAT's purpose is to provide Victorians with a **low cost, accessible, efficient and independent tribunal delivering high quality dispute resolution processes**. It does this by:

- generally charging low fees for a person to file his or her claim and have the case heard, and by disallowing legal representation except in certain circumstances
- having a variety of locations in Victoria. While its main centre is in Melbourne, it has a number of venues across the state, many of which are in rural areas

**Victorian Civil and Administrative Tribunal (VCAT)** a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

### member

the person who presides over final hearings and compulsory conferences at VCAT. Members include the President, vice-presidents, deputy presidents and senior and ordinary members

- aiming to have cases heard within weeks of the application being filed. The Residential Tenancies List has a median wait time of around 2 weeks to have the application heard and determined
- having the case heard and determined by an independent third party, known as a VCAT **member**, who has no affiliation with either party. VCAT's President and vice-presidents are also VCAT members who can hear and determine disputes
- providing a less formal atmosphere than courts. VCAT is required to conduct cases with as little formality and technicality as possible, thus ensuring it is accessible to ordinary Australians with limited to no experience in the legal system
- offering dispute resolution methods such as mediation and compulsory conferences (which uses the process of conciliation) before making a binding decision on the parties.

The person who makes an application to VCAT is known as the applicant. The other party is known as the respondent (being the person who is responding to the claim or application).

The news article below highlights a VCAT case in relation to the demolition of a pub.

## IN THE NEWS

### Cowboy developers thumb noses at planning minister, fight order to rebuild pub

Clay Lucas, *The Age*, 13 February 2017

The developers who illegally demolished Carlton's Corkman Irish Pub and then promised to rebuild it, are fighting an Andrews government reconstruction order.

The developers had told Planning Minister Richard Wynne they would reconstruct the 159-year-old hotel they destroyed without a permit last October.

But they have now told the state planning tribunal that 'no minister acting reasonably' can compel them to replace it.

In an about-turn on their promise to rebuild the historic pub, the pair have filed a statement of grounds with the Victorian Civil and Administrative Tribunal. In it, they reject outright Mr Wynne's order to rebuild.

Stefce Kutlesovski and Raman Shaqiri bought the Corkman Irish Pub in 2015 for \$4.76 million.

Despite having no permission to demolish the pub, which was inside a heritage overlay, Mr Shaqiri's Shaq Demolitions knocked down the building. Waste from the pub, including asbestos, was dumped on a site the pair owns in Cairnlea.



**Source 5** The Corkman Irish Pub in Carlton, which was demolished by developers who did not have a permit to do so.

While VCAT is generally quicker and less expensive than taking claims to a court, in recent times its fees have increased, particularly in relation to disputes where a party challenges a planning decision made by a local council. In some of its lists, delays have also blown out to 6 months for a matter to be heard and determined. Issues such as these have caused some people to question whether VCAT is still accessible to all individuals.

**Define and explain**

- 1 Identify four types of dispute resolution bodies.
- 2 What are tribunals?
- 3 What is the purpose of VCAT?
- 4 Suggest two reasons why tribunals are an important means by which people can resolve their disputes.
- 5 Explain one way that VCAT aims to be accessible to all Victorians.

**Synthesise and apply**

- 6 Using the data provided in Source 1, create a pie graph which shows the percentage of matters or complaints that ombudsmen and complaint bodies, and tribunals and courts hear per year.
- 7 For each of the following scenarios, suggest the most appropriate tribunal that may have jurisdiction to hear the dispute or claim.
  - a Janie has failed to pay rent for her property in West Footscray for the past 4 months despite constant demands by her landlord.
  - b Hugo recently witnessed the murder of a person on the streets of Toorak and has suffered anxiety and depression ever since.
  - c Osama works for a government agency and has recently become aware of the fact that he is not being paid the minimum award wage.
  - d Thierry has just had his work visa cancelled and has been told he has 30 days to leave Australia.
  - e Eduardo has been suffering discrimination in the workplace for some time and has been called various names that makes him feel vilified.
  - f Yolanda has suffered from a mental illness for some time. An order has just been made in relation to her treatment, and her mother believes it is not the right order.
- 8 Read the article 'Cowboy developers thumb noses at planning minister, fight order to rebuild pub'.
  - a What happened in this case?
  - b Who has applied to VCAT in this case, and who will be the respondent in this case?
  - c What will the tribunal have to decide in this case?
  - d Conduct some research. Has there been any outcome in relation to the case?
  - e Explain two advantages of VCAT hearing and determining this case.

**Analyse and evaluate**

- 9 Form pairs or small groups in order to complete the following tasks:
  - a Choose one Commonwealth tribunal or one Victorian tribunal other than VCAT (make sure every group or pair in the class has chosen a different tribunal).
  - b Conduct some research on the tribunal including:
    - i Which statute it gets its powers from.
    - ii What its role and purpose is.
    - iii What dispute resolution methods it uses.
    - iv Whether it has online services such as lodging application forms online.
    - v A recent case which has been heard or determined, or an article which suggests a claim has recently been made.
    - vi The benefits of having this tribunal in Australia.
    - vii Any disadvantages or weaknesses of this tribunal.
  - c Prepare a PowerPoint presentation summarising your findings for the rest of the class.
  - d Prepare a quiz or assessment for your classmates about your chosen tribunal. Ensure to include the information discussed in your presentation.

**Check your obook assess for these additional resources and more:**» **Student book questions**

13.4 Check your learning

» **Weblink**

VCAT

» **Weblink**

Administrative Appeals Tribunal

» **Weblink**

Fair Work Commission

## THE OMBUDSMAN



**Source 1** Judi Jones is currently the Telecommunications Industry Ombudsman.

### Did you know?

The word 'ombudsman' was borrowed from the Swedish language, and has been used in English since 1959. The word in Swedish literally means 'commission man', referring to a complaints office called the *justitieombudsmannen*, which hears and investigates complaints by individuals against abuses of the state. The office of ombudsman is always held by a single person. Because the word is a direct borrowing, it is never turned into 'ombudsperson' in English.

An ombudsman is an official appointed by the government to investigate complaints made by individuals against certain bodies or institutions. Like tribunals, an ombudsman obtains power to hear and determine complaints through parliament. The parliament grants the ombudsman powers by passing a statute. For example, the Victorian Ombudsman was established by the *Ombudsman Act 1973* (Vic).

### Role of an ombudsman

The role of an ombudsman is to provide individuals with **independent, timely and accessible dispute resolution services** in particular industries. They are intended to provide a fair, free and independent way of handling complaints and resolving disputes. There are two types of ombudsman:

- a **government ombudsman**, who deals with disputes or complaints about government agencies
- an **industry ombudsman**, who deals with disputes between consumers and businesses in particular industries such as telecommunications, financial services, public transport, and energy and water.

An ombudsman is not a court or a tribunal. Therefore, power of the office is often limited to certain industries and businesses over which the ombudsman has power to hear complaints. In many instances, the ombudsman will not hear a complaint unless the individual has first tried to resolve the complaint with the business.

Unlike courts and tribunals, an ombudsman is free. Further, unlike courts and tribunals, most ombudsman services hear complaints from individuals against industry providers, agencies and businesses (and not vice versa). That is, they are generally designed to offer individuals and small businesses with a service to hear and determine complaints about services that have been provided to them. This helps to overcome some power imbalances that people may feel when dealing with large service providers or government agencies.

An ombudsman will first try and resolve the complaint by working with the two parties. Where an agreement cannot be reached, the ombudsman **may** have the power to make a binding decision on the parties, though whether that decision has to be followed depends on the ombudsman.

Although every ombudsman is appointed by government, they act impartially and independently of government when handling claims. One of the key features of an ombudsman is that they ensure **procedural fairness** by giving parties an opportunity to respond to a complaint, and by giving reasons for any decision that is made.

### Ombudsmen's offices in Australia

In Australia, there are both Commonwealth and state offices of the ombudsman. Some of the areas which have a Commonwealth ombudsman are set out in Source 2 below.

COMMONWEALTH OMBUDSMAN	DESCRIPTION
Commonwealth Ombudsman	The Commonwealth Ombudsman investigates complaints made about the actions of a government department. There are various types – for example, the Overseas Students Ombudsman investigates student complaints about education providers.

COMMONWEALTH OMBUDSMAN	DESCRIPTION
Telecommunications Industry Ombudsman	The Telecommunications Industry Ombudsman provides people with a dispute resolution service in relation to complaints about their telephone or internet service in Australia.
Fair Work Ombudsman	The Fair Work Ombudsman provides services to workers and employers, including assessing complaints or suspected breaches of workplace laws and in some instances enforcing workplace laws (including those related to pay and work conditions).

**Source 2** Types of Commonwealth offices headed by an ombudsman

Some of the ombudsman offices in Victoria are set out in Source 3 below.

VICTORIAN OMBUDSMAN	DESCRIPTION
Victorian Ombudsman	The Victorian Ombudsman has the power to enquire into or investigate any administrative action (such as decisions made) by an authority. Authorities include any Victorian department or administrative office. The Victorian Ombudsman does not have the power to investigate actions taken by certain people, such as police personnel, judges, magistrates or officers of the Governor of Victoria.
Energy and Water Ombudsman	The Energy and Water Ombudsman hears complaints about energy and water companies. Complaints may be about high bills or billing mistakes, energy disconnections, outages, power surges or water meters.
Public Transport Ombudsman	The Public Transport Ombudsman investigates and resolves complaints about certain public transport operators, including Public Transport Victoria (which operates myki), Metro Trains Melbourne, V/Line and Yarra Trams. Issues they look at include ticketing, penalties, customer service and the conduct of public transport staff.

**Source 3** Types of Victorian offices headed by an ombudsman

## Focus on the Public Transport Ombudsman

The Public Transport Ombudsman (PTO) investigates and resolves complaints about Victorian public transport operators. To be able to investigate a complaint, the public transport operator needs to be a member of the PTO scheme. Members include the Melbourne Metro Rail Authority, Metro Trains Melbourne, Public Transport Victoria, Southern Cross Station, V/Line and Yarra Trams.

The PTO's **jurisdiction** is set out in its Charter. The PTO can investigate and facilitate the resolution of complaints that relate to:

- the supply of (or the failure to supply) public transport
- the sale of tickets including ticketing machines and ticket refunds
- infrastructure, including graffiti, vandalism and the cleanliness of the transport
- the conduct or behaviour of staff members
- the use by the public transport operator of land or premises, or its impact on land or premises.

The PTO only has jurisdiction to review a complaint if the public transport operator has first investigated and considered the complaint, and it remains unresolved. That is, the public transport operator must first have the opportunity to resolve the dispute before the PTO hears it.

The PTO does not have jurisdiction to hear certain complaints, such as complaints about the setting of prices for public transport, public transport legislation, the routes of operation or frequency of service, or complaints that have been heard and determined by a court or tribunal.

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

### Did you know?

The term 'ombudsman' refers to a person who is appointed by government, and is loosely defined as 'representative of the people'. The relevant ombudsman will be supported by an office of staff members who will assist in handling complaints and executing the powers of the ombudsman.

The Charter states that the PTO must handle complaints in a **fair, reasonable, just, informal and expeditious manner**. The PTO is independent and unbiased, has the power to gather documents from the parties so it can make a fair decision, and aims to conduct itself in an informal way.

The PTO can require the individual making the complaint (known as the complainant) and the public transport operator to attend conciliation, which will require the parties to reach a resolution between them. If the matter cannot be resolved between the parties through conciliation, the PTO has the power to make a determination, including a determination that:

- the public transport operator pay compensation or provide a service to the complainant
- corrective or other work be undertaken to resolve the complaint
- the operator do or not do a certain act.

The PTO does not have authority to order compensation beyond \$10 000.

The determination of the PTO is binding on the public transport operator, but the complainant **can choose whether to accept the decision of the PTO within 21 days of the decision being made**. If the decision is accepted, it will be binding on the parties and the complainant will not be able to make any further claims against the operator in relation to that complaint. However, if the complainant does not accept the decision, he or she may choose to pursue his or her remedies in any other forum (such as through a court or tribunal).

The news article below highlights recent complaints lodged with the Public Transport Ombudsman.

## IN THE NEWS

### Melbourne transport: Concerning increase in complaints about 'intimidating' ticket inspectors

Jean Edwards, ABC, 17 November 2016

Complaints about the behaviour of ticket inspectors on Victoria's public transport system have increased by 16 per cent in the past year, despite repeated calls to improve their training standards.

Commuters lodged 228 formal complaints about authorised officers' conduct with the Public Transport Ombudsman in 2015–16, up from 198 the previous year, including 50 describing an inspector as 'intimidating'.



**Source 4** An authorised officer was condemned for using heavy-handed tactics to restrain a girl without a valid myki.

Passengers who thought they had a valid myki said inspectors also made them feel humiliated and upset, and in some cases threatened to arrest them.

Women felt the most discomfort, making 64 per cent of the 50 complaints about intimidation.

Last year the Victorian Ombudsman condemned the heavy-handed tactics of an authorised officer who used excessive force to restrain a 15-year-old girl without a valid myki by slamming her into the ground.

#### Inspectors actions seen as 'unwarranted'

Public Transport Ombudsman Treasure Jennings said the increase in complaints was concerning in light of three Victorian

ombudsman's investigations dating back to 2010 and work by Public Transport Victoria to improve authorised officers' training...

Most complaints were about the way ticket inspectors handled fines or penalty fares, which 'can be a confronting experience for anyone,' the ombudsman's annual report said.

A recent review of the enforcement regime found only 1.7 per cent of the population were recidivist fare evaders.

## 13.5

## CHECK YOUR LEARNING

### Define and explain

- 1 What is an ombudsman?
- 2 Describe two similarities and two differences between an ombudsman and a tribunal.
- 3 In what ways might ordinary Australians benefit from the existence of an ombudsman?
- 4 What sorts of complaints does the Public Transport Ombudsman hear?

### Synthesise and apply

- 5 For each of the following scenarios, identify the ombudsman that is most likely to have jurisdiction to hear the complaint.
  - a Bernie has been waiting seven months to receive a copy of her child's birth certificate from the Victorian Registry of Births, Deaths and Marriages.
  - b Wayne Shawn has just realised that he has been overcharged for his internet for the past 6 months, and his service provider refuses to refund him the money.
  - c Verity was fined for not having 'tapped on' her myki when setting on a tram, but all of the myki readers were broken.
  - d Oren is studying as an overseas student in Australia, and has been suffering discrimination from one of his teachers.
  - e Kourtney's application for welfare benefits has been refused.

- 6 Read the article 'Melbourne transport: Concerning increase in complaints about 'intimidating' ticket inspectors'.
  - a How many formal complaints about authorised officers' conduct were lodged with the Public Transport Ombudsman (PTO) in 2015–16? Are these the only types of complaints that the PTO hears? Give reasons.
  - b Describe the types of complaints that the PTO hears about officers' conduct.
  - c If you had a complaint with a public transport operator, would you lodge it with the PTO? Be prepared to discuss your views with your class members.

### Analyse and evaluate

- 7 Provide two strengths and two weaknesses of the office of an ombudsman as a dispute resolution body.
- 8 Conduct some research into one ombudsman other than the PTO.
  - a Find an article or report on one type of complaint that the ombudsman has heard (or which has been lodged) with the ombudsman.
  - b Provide a summary of this matter.
  - c In your view, is the ombudsman an effective dispute resolution body? Give reasons for your answer, making reference to the complaint that you have identified.



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

» **Student book questions**

13.5 Check your learning

» **Going further**

The Telecommunications Ombudsman

» **Weblink**

Victorian Ombudsman

» **Weblink**

Public Transport Ombudsman

## COMPLAINTS BODIES

Other than tribunals, courts and the ombudsman, there are a number of complaints bodies who can help individuals who have a complaint about goods, services or about a certain industry body. Similar to a tribunal or an ombudsman, complaints bodies obtain their power through parliament.

### Did you know?

In 2015 the Australian Government established the Office of the eSafety Commissioner, a complaints body which provides complaints services for young Australians who experience serious cyberbullying. The Office was established to help address the negative and harmful experiences that young people often suffer online.

### The role of a complaints body

Complaints bodies deal with complaints about the provision of goods and services, or decisions made by certain bodies or authorities. They are intended to provide a **free complaints and dispute resolution service** so that ordinary Australians have access to dispute resolution services without any cost to them.

Most dispute resolution services focus on a particular industry or service. For example, the Disability Services Commissioner can hear complaints by people who receive disability services about their providers, but will not be able to hear and determine disputes about lawyers (this type of service is offered by the Legal Services Commissioner).

Like an ombudsman, complaints bodies are designed to hear complaints from individuals and small businesses about services or goods provided to them, and generally do not hear disputes about individuals. However, unlike an ombudsman, complaints bodies generally **do not have the power to conduct a hearing or make binding decisions on the parties**. That is, their services are limited to offering free or low cost dispute resolution services where the parties agree to settle the dispute between them.

Complaints bodies do not use formal procedures to resolve disputes, and most offer flexible services so that they are accessible to everyone. For example, many will offer the ability for people to make complaints online or over the phone.

In addition to providing dispute resolution services, many complaints bodies are able to take enforcement action against persons or companies that do not comply with certain laws. For example, in 2016 and 2017, Consumer Affairs Victoria, a Victorian complaints body, took action against Belle Gibson in the Federal Court. This legal case is further explored below.

### LEGAL

### CASE

### Blogger lies to cancer sufferers

*Director of Consumer Affairs  
Victoria v Gibson* [2017] FCA 240  
(15 March 2017)

Belle Gibson was a blogger, app publisher and alternative health treatment promoter. Her company developed, promoted and sold a successful app called 'The Whole Pantry' and a book with the same name. While developing and promoting these products, Gibson made a number of statements claiming she had been diagnosed with brain cancer in 2009, and that she had pursued natural remedies to treat the cancer. Various social media



**Source 1** Belle Gibson was found to have contravened consumer legislation by misleading and deceiving consumers, and making misrepresentations.

posts referred to Gibson as having had brain cancer. Gibson also made various statements regarding the donation to charity or to people in need of proceeds of sales from the app and the book.

From around March 2015, a number of newspaper articles questioned Gibson's claims about donations and her brain cancer diagnosis. The book was withdrawn from sale and the app was removed. Gibson's social media accounts were also taken offline. An interview with Gibson in June 2015 on the television program *60 Minutes* revealed that she had never had brain cancer. A charity Gibson allegedly donated to subsequently made a claim with Consumer Affairs Victoria.

Consumer Affairs Victoria commenced its investigation in April 2015 and issued a proceeding in the Federal Court of Australia in May 2016. Consumer Affairs Victoria claimed Gibson had engaged in misleading and deceptive conduct and made misrepresentations to consumers about her health and about her company's charitable donations. The Federal Court ruled in favour of Consumer Affairs Victoria on 15 May 2017, and in September 2017 fined her \$410 000.

## Complaints bodies in Australia

In Australia, there are both Commonwealth and state complaints bodies. Some of the Commonwealth complaints bodies are set out in Source 2. Other Commonwealth complaints bodies include the Australian Human Rights Commission and Aviation complaints.

COMMONWEALTH COMPLAINTS BODY	DESCRIPTION
Office of the eSafety Commissioner	The Office of the eSafety Commissioner was established to provide education for young people about online safety, and to provide a complaints service for young people who suffer serious cyberbullying. An online application can be made.
Inspector-General of Taxation	The Inspector-General of Taxation can hear complaints about the Australian Taxation Office (ATO), such as administrative actions taken by the ATO. These include issues around the conduct of ATO officers, and the timeliness of responses to requests made to the ATO.
Inspector-General of Intelligence and Security (IGIS)	Members of the public can make complaints to the IGIS about certain security agencies such as the Australian Intelligence Community (AIC), the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS).

**Source 2** Types of Commonwealth complaints bodies

Some of the complaints bodies in Victoria are set out in Source 3 below. Other complaints bodies include the Freedom of Information Commissioner, Legal Services Commissioner and the Mental Health Complaints Commissioner.

VICTORIAN COMPLAINTS BODY	DESCRIPTION
Consumer Affairs Victoria (CAV)	CAV has the power to conciliate disputes between consumers and traders, and tenants and landlords, about the provision of goods and services and the provision of tenancy. It also has jurisdiction to hear disputes in relation to retirement villages.

Cont.

VICTORIAN COMPLAINTS BODY	DESCRIPTION
Disability Services Commissioner (DSC)	The DSC helps people with a disability resolve their complaints about disability service providers. It offers conciliation services to parties, and also has the power to investigate complaints where conciliation has failed or is not suitable. Where a complaint is justified, the DSC has the power to issue an action to remedy the situation.
Health Complaints Commissioner (HCC)	The HCC hears complaints about health services providers such as doctors, dentists and surgeons if the complaint has not been resolved directly with the health service provider.
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	The VEOHRC hears disputes in relation to equal opportunity, discrimination and any infringement of human rights.

Source 3 Types of Victorian complaints bodies

## Focus on the Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is an independent body. It offers a free, fair and timely dispute resolution service.

The VEOHRC receives its powers from various Victorian statutes to help people resolve complaints about discrimination, sexual harassment, victimisation and vilification. The two main statutes that confer power on the VEOHRC are the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic). Each of these statutes, in various ways, seeks to protect human rights and prevent people from being discriminated against, harassed or vilified.

The *Equal Opportunity Act* is the main statute in Victoria which makes it unlawful for a person to be discriminated against. The Act sets out the attributes that a person can be discriminated against (such as age, breastfeeding, gender identity, parental status, physical features and disability), and the areas or activities in which a person may be discriminated against (such as in employment, education, sport or the provision of goods or services).

The *Racial and Religious Tolerance Act* makes it unlawful for a person to incite hatred or ridicule against a person or a group of people based on race or religion. It also makes it unlawful for one person to victimise another person.

The services provided by the VEOHRC include a free, fair and timely dispute resolution service for people who believe that they have been harassed, vilified, victimised or discriminated against.

The complaint process that is used by the VEOHRC is conciliation. A person will assist the parties to talk through the issues with the aim of reaching agreement on how the dispute will be resolved. This can involve financial compensation, an apology, job reinstatement (where a person has lost their job on the basis of discrimination) or an agreement that the behaviour will stop.



Source 4 VCAT ruled in September 2017 that a Sikh boy had been discriminated against because he would be unable to wear his pakta to school. The VEOHRC intervened in the family's case to VCAT. The case is seen as a win for the VEOHRC and the position it took on the case.

The Commission **has no powers to make orders, award compensation or make binding decisions on the parties**. If the conciliation process does not assist in resolving the dispute, then the parties will need to consider alternative options, such as issuing a claim at VCAT, or abandoning the claim.

The case below is a recent example of a discrimination claim that can be heard by the VEOHRC.

## Changes to school uniform policies that may be discriminatory

In 2017, the Victorian Government announced that it was going to overhaul uniform policies in state schools so that girls are not required to wear dresses and skirts. Kristen Hilton, the VEOHRC Commissioner, has said that if girls are prevented from wearing shorts and pants to school, this could amount to unlawful discrimination.

The VEOHRC has said that school policies should allow girls the option to choose what uniform they wish to wear, including pants or shorts. A discrimination claim in relation to uniform school policies can be lodged with the VEOHRC.

CASE

STUDY

## Strengths and weaknesses of dispute resolution bodies

Now that you have considered three types of dispute resolution bodies, it is useful to consider their strengths and weaknesses in light of the three principles of justice. Some of the strengths and weaknesses are applicable to all three, whereas some are applicable to one or two of them.

STRENGTHS	WEAKNESSES
The dispute resolution bodies increase access to justice by providing <b>alternative methods</b> of making complaints or resolving disputes other than through courts	Many individuals are <b>not aware</b> of some of the offices of ombudsman and complaints bodies that are available to help resolve disputes
The <b>costs</b> are generally lower than courts and, in relation to the office of ombudsman and complaints bodies, can be free, thus increasing the availability to people who may not be able to otherwise afford the civil justice system	Given the vast number of tribunals, complaints bodies and offices of ombudsman, some members of the public <b>may find it difficult</b> to find the right type of service to help them, and so they may not pursue their claim or complaint
Generally, the complaints bodies resolve complaints and applications relatively <b>quickly</b> , and generally between one month and six months from a complaint or application being made	Some of the services are <b>not free of charge</b> . VCAT has recently increased its fees for some lists and matters, and parties may still feel the need to engage a lawyer to help them
The services are <b>freely available</b> , thus increasing access – most if not all of the bodies have websites, information about the application process, and some have telephone and online services, thus upholding access	An ombudsman or a complaints body has <b>limited power</b> to make binding decisions, and in some instances those binding decisions do not have to be followed by an individual
The <b>informality</b> of the processes enables parties to feel more at ease, thus upholding equality	The dispute resolution bodies are not appropriate for <b>large, complex claims</b>
The office of ombudsman or a complaints body provides an avenue for individuals to resolve disputes with larger service providers and government agencies <b>without fear of intimidation</b> , thus upholding equality before the law	The dispute resolution bodies are not appropriate where <b>large sums of money</b> are sought by way of compensation, as in some cases there is a limit on the compensation that can be awarded, or in other cases, there is no ability to award compensation

Cont.

STRENGTHS	WEAKNESSES
All of the dispute resolution bodies ensure that whomever is assisting the parties is <b>independent and impartial</b> , equity and fairness	The office of ombudsman and complaints bodies, in particular, are <b>specialised</b> in particular areas or industries, and so for certain types of complaints, there is no option but to issue a claim in a court or tribunal
The dispute resolution bodies are often <b>specialised</b> in a particular industry or area of law, thus increasing fairness in the process	Tribunals, the office of ombudsman and complaints bodies <b>cannot create binding precedents</b> , and so there may be inconsistency in the way that matters are decided or dealt with
The dispute resolution bodies ensure <b>procedural fairness</b> by giving parties the opportunity to present their case	

Source 5 Strengths and weaknesses of tribunals, the ombudsman and complaints bodies

## 13.6

## CHECK YOUR LEARNING

### Define and explain

- 1 What are complaints bodies?
- 2 Explain two ways that complaints bodies aim to help ordinary Australians.
- 3 What is the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)? What sort of complaints does it hear?
- 4 Describe the dispute resolution method that is used by the VEOHRC.
- 5 Does VEOHRC have the power to make a decision for the parties involved in a complaint? What other options do the parties have to reach agreement?
- 6 Identify two statutes in Victoria that make it unlawful to discriminate or vilify people.

### Synthesise and apply

- 7 For each of the following scenarios, identify a complaints body that could help resolve the dispute.
  - a Magdeline has waited weeks for a response from the taxation office about her taxes.
  - b Randall believes that he is being spied on by a security intelligence officer.
  - c Cassius believes that he was inappropriately treated by his physiotherapist.

- d Every time Zina goes to work, she hears the receptionist say under her breath 'Monkey'. Zina believes it is because of her race.
  - e Indiana recently bought a TV from a store in Maribyrnong. The TV is now no longer working and the store refuses to refund her.
  - f Perez has suffered from serious bullying on Snapchat.
- 8 Conduct some research about the Sikh family. Describe the position that VEOHRC took on the case, and the reasons why.

### Analyse and evaluate

- 9 Discuss the following statement, indicating whether you agree with it. In your discussion, make reference to at least one complaints body, one tribunal and one ombudsman.
 

'Complaints bodies and the office of ombudsman are confusing and pointless. There should just be two dispute resolution bodies: courts, and tribunals.'
- 10 Engage in a class debate about the following statement: 'If uniform policies are to be overhauled so that girls can wear shorts and pants, then boys should be able to wear skirts and dresses'



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

- |   |  |   |   |
|---|--|---|---|
| » <b>Student book questions</b><br>13.6 Check your learning | » <b>Weblink</b><br>Consumer Affairs<br>Victoria | » <b>Weblink</b><br>Office of the eSafety<br>Commissioner | » <b>Weblink</b><br>Victorian Equal<br>Opportunity and Human<br>Rights Commission |
|---|--|---|---|

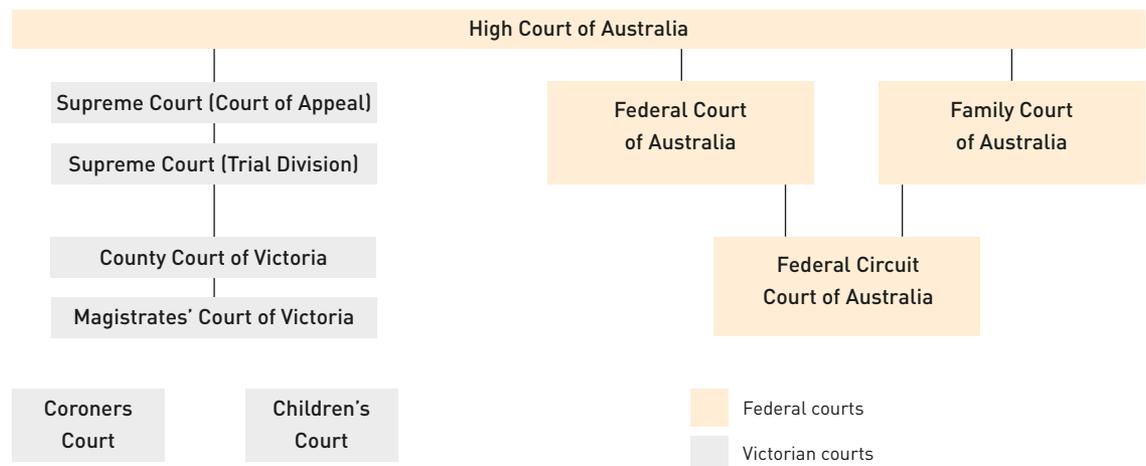
# THE ROLE AND CIVIL JURISDICTIONS OF THE VICTORIAN COURTS

## court hierarchy

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

As you explored in Chapter 11, there are a number of courts that can hear both criminal cases and civil disputes. The courts are arranged in a **court hierarchy**.

Both state courts and federal courts have jurisdiction to hear certain types of civil disputes. Because civil disputes often involve a combination of both state law and federal law, many of the state courts have jurisdiction to hear matters arising under federal law.



Source 1 The Victorian and Commonwealth Court hierarchies

## The role of the Victorian courts

Civil disputes often arise, even though there are laws which set down guidelines for acceptable behaviour. When civil disputes arise, they need to be resolved.

The courts are the main dispute resolution body in Victoria. However, given the vast range of dispute resolution bodies and methods available to the parties to resolve a civil dispute, and the costs involved in using the court system, having a full civil trial or hearing to decide on liability is often considered a last resort for parties.

The role of the Victorian courts in resolving disputes can generally be described as having two separate features:

- determining the liability of a party
- deciding on the remedy (if required).

These will be explored in more detail in this topic.

## Determine liability

If a plaintiff sues a defendant in court, then it is the role of the courts to determine whether the defendant is liable and, if so, to what extent that defendant is liable. This means that the judge or magistrate (or jury if there is one) will consider all of the evidence that is put during trial. They will determine whether the plaintiff, on the **balance of probabilities** (being the **standard of proof** in civil disputes), has established or proven that the defendant caused the loss or harm suffered by the plaintiff. This is often called deciding the facts, and the judge or magistrate (or jury) is the **decider of facts**.

The decider of facts may also have to determine whether the defendant is 100 per cent liable for the plaintiff's loss or harm. For example, if the defendant has claimed that the plaintiff is partly responsible, then this may reduce the defendant's liability. Similarly, if the plaintiff has sued more than one party, then

## Study tip

Trials and hearings in Victorian courts are open to the public. Your teacher may arrange a visit to one of the courts, or you may wish to arrange your own visit. Doing so will help you see many of these roles in action, and will help you be more specific in your answers to questions in assessment tasks about the role of the courts.

## balance of probabilities

the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

## standard of proof

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

the decider of facts may have to determine whether all of the defendants are liable and, if so, what portion they are liable for.

#### counterclaim

a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

#### case management

a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

#### directions

instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

#### discovery of documents

a pre-trial procedure which requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

#### appeal

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

If the defendant has made a **counterclaim**, the judge or magistrate (or jury) will also need to determine whether the plaintiff is liable for that claim.

The court, in hearing a dispute, will adopt formal rules of procedure. For example, there are rules around which party is to present their case first (generally, the plaintiff), though the judge does have power to change the rules of procedure. The *Evidence Act 2008* (Vic) also establishes laws around what evidence is to be accepted. For example, a witness is not able to give evidence of an opinion to prove a certain fact. At a final hearing or trial, witnesses give evidence either orally or in writing.

As part of the court's role in determining liability, it will:

- **provide specialisation and expertise** in the type of dispute it is hearing – For example, the Supreme Court, being the highest court in the Victorian court hierarchy, deals with major complex cases such as large commercial disputes and class actions, whereas the Magistrates' Court deals with minor civil disputes



**Source 2** The Supreme Court can hear complex and large class actions, and has courtrooms (such as this one) which cater for e-trials and multiple parties.

- **manage the case** – The judges in the courts have significant powers of **case management**, which means that they can give orders and **directions** to the parties. That is, the court will assist the parties through the stages of the proceeding before it reaches the final hearing or trial. Those stages may include requiring the parties to disclose relevant documents through the process of **discovery of documents**, or requiring the parties to attend mediation before trial
- **hear appeals** – Some of the courts in Victoria, including the Supreme Court, have the power to hear appeals. If a party is dissatisfied with a decision of the judge or magistrate, that party may be able to appeal the decision if there are grounds to do so. The higher court will then review the decision.

## Decide on the remedy

If the plaintiff establishes that the defendant is liable, or the defendant establishes that the plaintiff is liable for the counterclaim, then it is the role of the court to decide on the **remedy**. A remedy is a way in which a court can right the wrong that has occurred to the party who has suffered loss. You will explore remedies

later in this chapter, but the most common remedy is damages (an amount of money to be paid by one party to the other – usually the defendant to the plaintiff). The court can also award the successful party their costs (though it is usually the case that not all costs are recoverable), and interest on any damages amount that might have accrued.

In a civil dispute, either the judge or the jury may be required to assess damages (that is, calculate the amount of damages, normally based on evidence that is presented by both parties about what the damages amount is). However, in **defamation** cases (where the plaintiff is suing for untrue statements made about him or her which have lowered the plaintiff's standing in the community), only the judge can assess damages.

It is often the case that the court will hand down a written judgment about the reasons why it has come to the decision it has. Many of these judgments are publicly available. If the parties settle the case, they may either obtain orders from the court which dismisses or discontinues the case, or they may ask the judge to make orders in the terms they have agreed, although the judge can refuse to make any particular order the parties want. In the case of a class action, the judge must approve any terms of settlement.

The legal case below is an example of a class action dispute that reached a settlement agreement before a remedy was ordered by the court.

#### **defamation**

a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

## Settlement after trial but before judgment

### *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569 (14 November 2014)

A class action was commenced in 2010 on behalf of a group of investors in managed investment schemes. The trial commenced on 29 October 2012 and concluded on 24 October 2013.

Shortly before 25 July 2014, His Honour Justice Croft of the Supreme Court notified the parties that he intended to deliver judgment on that day. A few days before that, however, the parties notified His Honour that they had entered into a settlement agreement.

Former Chief Justice Marilyn Warren, in a speech delivered at Monash University – Australian Centre for Justice Innovation on 17 February 2016, commented on the magnitude of the case. Discovery consisted of 10 million documents, there were 90 days of hearing over a 12-month period, 104 witnesses and, on average, 13 barristers and 15 solicitors in court each day.



**Source 3** The Great Southern class action is a good example of the size and magnitude of the cases the Supreme Court hears, and the way out-of-court settlements can resolve disputes.

**LEGAL**

**CASE**

## The civil jurisdiction of the Victorian courts

Each of the courts in Victoria has specific jurisdiction or power (authority) to hear and determine civil disputes. There are two types of jurisdiction: **original jurisdiction** and **appellate jurisdiction**. When a court is hearing a dispute for the first time, it is operating in its original jurisdiction. When a court is hearing an appeal, it is operating in its appellate jurisdiction.

A summary of the civil jurisdiction of the Victorian courts is set out in Source 4.

#### **original jurisdiction**

the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

#### **appellate jurisdiction**

the power of a court to hear a case on appeal

## Study tip

Students often find it difficult to recall the appellate jurisdiction. Try to think of a way that you will be able to remember which court hears appeals from which courts. For example, try to turn it into a rap or a poem, use a visual diagram, or learn it through accessing as many appeal cases as you can, taking particular note of which court heard the case first.

## Did you know?

If the plaintiff has a claim for more than \$100 000, but wants to issue the claim in the Magistrates' Court, the plaintiff is able to still issue in the Magistrates' Court but must not seek any more than \$100 000, and will not be awarded any more than that amount.

## Did you know?

Class actions (also known as group proceedings or representative proceedings) are cases that are usually brought by one individual on behalf of a group of people who have suffered similar injuries caused by the same individual or group.

	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court	claims up to \$100 000	no appellate jurisdiction
County Court	unlimited	no appellate jurisdiction, unless given under a specific Act of Parliament
Supreme Court (Trial Division)	unlimited	appeals on a question of law from the Magistrates' Court and VCAT
Supreme Court (Court of Appeal)		appeals from the County Court, Supreme Court (Trial Division) or VCAT when constituted by the President or a vice-president

Source 4 The civil jurisdiction of Victorian courts

## Magistrates' Court of Victoria

### Original jurisdiction

Minor civil disputes of up to \$100 000 are heard in the Magistrates' Court. That means that the Magistrates' Court is not able to award damages greater than \$100 000 to the plaintiff, who will have to file the claim in a higher court (the County Court or Supreme Court) to seek an amount greater than that.

When the amount sought in civil damages is less than \$10 000, the Magistrates' Court may refer the matter to **arbitration**.

### Appellate jurisdiction

As the Magistrates' Court is the lowest court in the Victorian court hierarchy, it has no appellate jurisdiction. That means it is not able to hear any appeals from other courts.

## County Court of Victoria

### Original jurisdiction

The jurisdiction of the County Court for civil claims is **unlimited**. This means that there is no upper or lower limit of its jurisdiction, and it can hear claims of any amount.

Parties can choose to have their case heard in either the County Court or the Supreme Court. In civil cases, they have a choice of trial by a judge alone or by a judge and jury (six jurors). Many cases, in particular personal injury cases, are heard in the County Court because it is generally more expensive to take a case to the Supreme Court; though many of the more complex cases are heard in the Supreme Court.

### Appellate jurisdiction

The County Court does not have the jurisdiction to hear appeals in civil matters except where an Act of Parliament specifically provides for appeals to be heard in the County Court. For example, certain appeals under the *Children, Youth and Families Act 2005* (Vic) can be made to the County Court (such as an appeal against an order made by the Children's Court in relation to a therapeutic treatment order, which requires a child to participate in a treatment program).

## Supreme Court of Victoria (Trial Division)

### Original jurisdiction

The Trial Division's jurisdiction for civil claims is **unlimited**. This means, like the County Court, the Supreme Court can hear claims of any amount. As in the County Court, a jury of six is optional in civil cases.

The Supreme Court is used for many complex and large civil disputes, such as class actions, matters involving complex areas of law, and disputes between large corporations.

## Appellate jurisdiction

In civil cases, a single judge in the Supreme Court can hear appeals from the Magistrates' Court on a point of law. A single judge can also hear appeals from the Victorian Civil and Administrative Tribunal (VCAT) (although when the tribunal is constituted for the purpose of an order being made by the president or a vice-president, an appeal from that order would go to the Court of Appeal).

In the legal case below, the Supreme Court heard an appeal case from VCAT.

## DJ successful in discrimination claim

### *Obudho v Patty Malones Bar Pty Ltd* [2017] VSC 28 (9 February 2017)

Antony Kwenda Obudho, of African descent, operated a business which organised or promoted music events with an African theme. Obudho often appeared as DJ. In 2011, Obudho's wife and business partner contacted Patty Malones Bar Pty Ltd, the owner of Inflation Nightclub, about hiring the basement for a night in October 2011. Five days before the event, Patty Malones cancelled the booking after learning that the proposed event was to be an African music event.

Obudho and two others issued a claim in VCAT, claiming that Patty Malones was discriminating against them, having cancelled the services based on race. VCAT ultimately held that Patty Malones had discriminated against Obudho and the two other applicants, but dismissed the claims for compensation. Obudho appealed to the Trial Division of the Supreme Court (as did Patty Malones against VCAT's decision). One of the grounds for appeal by Obudho was that VCAT had failed to consider his claim for economic and non-economic loss, including loss because of personal upset and humiliation that he suffered as a result of the discrimination.

Justice Emerton of the Supreme Court upheld Obudho's appeal and found there was evidence of both economic and non-economic loss. She ordered that Patty Malones pay Obudho \$13 000 for loss suffered by him. She dismissed Patty Malones' appeal.



**Source 5** Mr Obudho, a DJ, was vindicated by a Supreme Court judgment after appealing a decision of VCAT.

LEGAL

CASE

## Supreme Court of Victoria (Court of Appeal)

The Court of Appeal, in its appellate jurisdiction, hears appeals from the County Court or Supreme Court on questions of law, questions of fact or the amount of damages awarded. It also hears appeals from the president and a vice-president of VCAT.

In almost all civil cases, leave (permission) of the Court of Appeal is required to appeal the decision. The Court of Appeal can hear and determine leave applications 'on the papers'; that is, without the need for an oral hearing.

An appeal on a question of fact in a civil case would look at whether the facts of the case had been applied appropriately to reach the decision which was given – either that the defendant was in the wrong or was not in the wrong.

### Did you know?

The first female High Court justice was Justice Gaudron, who was appointed to the High Court in 1987.

## → GOING FURTHER

### Appeals to the High Court

The Court of Appeal is not the final court of appeal for Victorian matters. Any party who wishes to appeal a decision of the Court of Appeal can appeal to the High Court of Australia, but will need leave (permission) to do so.

## Strengths and weaknesses of courts as dispute resolution bodies

Like other dispute resolution bodies, there are both strengths and weaknesses of courts in resolving disputes. These are set out in Source 6 below.

STRENGTHS	WEAKNESSES
Judges are <b>impartial</b> referees who make decisions based on fact and law, not on bias, thus ensuring equality and fairness in decision-making	Courts have been criticised for being <b>too expensive</b> for many Australians, largely due to the need for legal representation and the costs involved in undertaking procedures such as discovery
Courts aim to reduce delays and costs through <b>active judicial case management</b> and giving directions or orders to the parties	Despite reforms to civil procedure in relation to case management, there can still be <b>delays</b> in a matter being resolved
Because of the court hierarchy, judges and court personnel are <b>specialised</b> , thus ensuring fairness and expertise in the way that proceedings are managed	The <b>formalities</b> of the process can result in parties feeling stressed, intimidated or nervous
Encouraging parties to attend <b>mediation</b> and enter into an out-of-court settlement before trial has assisted in matters being resolved more quickly and more cheaply than having a full trial or hearing	The onus on the parties to prove their case can mean that they are <b>inconvenienced</b> by having to gather evidence and produce documents
Formal court processes, the way in which cases are managed and rules of evidence ensure <b>procedural fairness</b> by allowing a party to present their case and rebut the other party's case	Without legal representation, which can be expensive, a party may be at a <b>disadvantage</b> in presenting their case, therefore meaning that they are not as equal as another party who may have skilled legal representation
Many courts have adopted practices to <b>reduce delays</b> , such as 'fast tracking' some matters and reducing the pre-trial procedures that need to be undertaken	Some courts have been slow to adopt and embrace technology in some areas, such as e-filing, thus reducing <b>access to justice</b> for some people, particularly those in rural areas
Courts are able to make <b>binding decisions</b> which ensures certainty in the outcome	
The <b>doctrine of precedent</b> applies in court cases, therefore allowing consistency in decisions in similar cases	
The court hierarchy allows for a party to <b>appeal</b> a case	

Source 6 Strengths and weaknesses of courts as dispute resolution bodies

**Define and explain**

- 1 Identify and explain the two main roles of Victorian courts in hearing civil disputes.
- 2 Outline the civil jurisdiction of the Magistrates' Court.
- 3 In which court can a civil matter be appealed from the Magistrates' Court?
- 4 Can a \$50 000 claim be issued in more than one court? Explain.

**Synthesise and apply**

- 5 Identify which court the following cases would most likely be heard in. Justify your answer.
  - a Magnus's fence has been damaged by a man who lives two houses down from him. He has a quote for repair of the amount, which is \$9900. The main dispute is liability.
  - b Noah has lost his case against his employer for damages for a serious injury suffered at work. He was seeking \$3 000 000 in the County Court. He wants to appeal the case.
  - c Marianna was a defendant in an action in VCAT, which was heard by the President. She wants to appeal.
  - d Andrew is looking to start a class action against a large corporation for misleading and deceptive conduct. He is seeking an unknown amount of damages.
  - e Mohamed is seeking \$6 000 000 for loss of damages as a result of a breach of contract with a property developer.
- 6 Read the legal case *Clarke v Great Southern Finance Pty Ltd (in liquidation)*.
  - a What is a class action?
  - b How long did the trial go for?
  - c What does it mean by 'deliver judgment'? Why do you think that there was time in between the trial concluding and judgment being delivered?
  - d What happened shortly before judgment was to be delivered?
  - e Do you consider it a benefit to the parties and the court for the parties to have entered into a settlement agreement? Discuss.
- 7 Read the legal case *Obudho v Patty Malones Bar Pty Ltd*.
  - a What was Mr Obudho's claim?
  - b Where was the claim issued and what was the outcome?
  - c Why did Mr Obudho appeal to the Trial Division of the Supreme Court and not the Court of Appeal?
  - d Who was the appellant in the appeal case?
  - e What was the decision of the Supreme Court?
  - f Do you think that this case demonstrates that all of the principles of justice are achieved in civil dispute? Give reasons.
- 8 Conduct some research into the current status of the Falls Festival class action.
  - a What type of proceeding is this? Explain the nature of this proceeding.
  - b Who is the plaintiff? Who is he or she represented by?
  - c What allegations have been made in this proceeding?
  - d Has there been a resolution in this case? If so, how did the case get resolved? If not, what is the current status of the proceeding?

**Analyse and evaluate**

- 9 In your view, should the courts be treated as a last resort for resolving civil disputes? Give reasons for your answer and refer to the strengths and weaknesses of courts in terms of the principles of justice.

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Court Services Victoria

## THE ROLE OF THE JURY IN A CIVIL TRIAL

As discussed in Chapter 11, the jury system is a trial by peers. The jury must listen to all the evidence and make a decision based on the facts. In a civil case the jury considers the evidence having regard to the law that is explained to them by the judge, and decides who is in the wrong.

### When is a jury used in civil trials?

Unlike some criminal cases, there is **no automatic right** to a jury in a civil trial. For example:

- in the Magistrates' Court, and in appeal cases, there is no jury
- in the County Court and the Supreme Court, a jury is optional. If either party wants a jury, then they must request a jury trial. They must also pay the fees associated with it (though a judge is able to still order that the trial be by judge alone).

It is also possible for the judge to require a jury for a civil trial. If this is the case, the state will pay for the jury. It is not common for a judge to request a jury trial.

Civil jury trials are rare, largely because of the fees involved, and often because civil trials are so complex that parties will elect to have a trial by judge alone. Juries, however, are sometimes used in defamation cases. In the legal case below, a jury was requested by the plaintiffs.

### LEGAL

### CASE

### Jury trial despite complex issues in the case

*Humphris v Connecteast Nominee Company Pty Ltd (No 2)* [2016] VSC 419  
(27 July 2016)

In this case, the plaintiffs requested that the mode of trial be by judge and jury. The claim brought by the plaintiffs related to negligence and nuisance caused by EastLink (a toll road in Melbourne's eastern suburbs). The plaintiffs in the case were self-represented.



Source 1 A jury box in the Supreme Court – there are six jurors in a civil trial.

The defendants sought an order that the trial be heard by a judge alone. The defendants referred to the complex issues of law and fact, the large volumes of written material that needed to be considered, and the length of time and resources that would be spent if the jury needed to be discharged.

Associate Justice Daly of the Supreme Court, 'with some hesitation', dismissed the defendants' application. She decided she would not lightly interfere with the right of a self-represented party to a trial by jury. Her Honour referred to the fact that previous jury trials were able to deal with complex and detailed evidence.

# Composition of a civil trial

There are **six jurors** in a civil jury in the County Court and the Supreme Court. Each juror is randomly selected from the Victorian electoral roll. Up to two extra jurors can be selected if the trial is expected to be lengthy, though two jurors will be discharged once it comes to deliberating. This means only six jurors will be involved in deciding the verdict.

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## → GOING FURTHER

### Jury challenges

The parties have some influence over the composition of the jury. They can do this by challenging some of the jurors before they are empanelled. The plaintiff and the defendant are entitled to a limited number of peremptory challenges each. Peremptory challenges are challenges without a reason. A peremptory challenge in a civil trial is made by striking the name or number of the potential juror from the list of persons to be selected to serve on the jury. There can be an unlimited number of challenges for cause; that is, challenges with a reason.

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### Role of the civil jury

The role of a civil jury is to consider the facts of the case and decide who is most likely in the wrong. Their decision is made on the **balance of probabilities**. If a **unanimous verdict** cannot be reached (i.e. one in which all six jurors agree), then a **majority verdict** of up to five out of six will be accepted. If present, a civil jury may also be required to decide on the amount of damages to be awarded. In defamation cases, only a judge can decide the amount of damages.

Jurors are not required to give reasons for their decision (unlike a judge or magistrate). Therefore, the parties will not know the basis upon which the jurors have decided, or even know whether the jurors have understood the evidence, the legal issues, or the submissions made by the parties.

Like criminal juries, there are obligations on civil juries in relation to gathering research and evidence. Penalties apply to jurors who make enquiries for the purposes of obtaining information about anything related to the trial (for example, using the internet to search for information, or viewing or inspecting a place that is relevant to the trial).

In conducting their role, juries are seen to ensure justice is administered in line with community standards, rather than in line with the views of a small number of people (that is, judges). The use of the jury system also enables the community to participate in the administration of justice, which can enhance the confidence of the community that justice is being achieved.

The jury system also seeks to uphold equality and impartiality. It does this by ensuring that jury members have no knowledge of a party or a witness, have no biases or preconceived notions, and are able to make a decision based on facts, and not based on any biased views that may be held by them.

The legal case on the next page is an example of a negligence case that was heard by a jury.

**unanimous verdict**  
a verdict or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty)

**majority verdict**  
all but one of the members of the jury agree with the decision

## LEGAL

## CASE

### contributory negligence

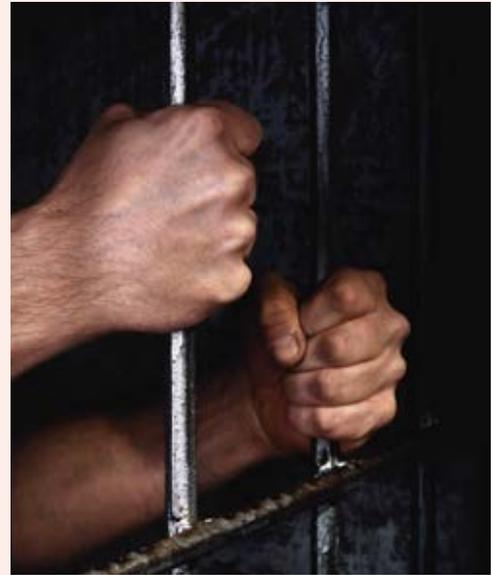
a formal defence to negligence which claims the plaintiff contributed to the harm caused by the defendant. If proved, this will reduce the damages the defendant has to pay

## Prisoner's trial by jury

*Khodr v G4S Custodial Services Pty Ltd* [2016] VSC 800 (19 December 2016)

In 2016, Mr Saleh Khodr sued G4S Custodial Services for negligence. Khodr was a prisoner at Port Phillip Prison when he sustained injuries as a result of an assault on him. The defendant was the operator of the prison.

The trial was heard by a jury. The jury unanimously found the defendant liable and assessed damages at \$363 167. The jury then applied a reduction of 25% for **contributory negligence** (i.e. a defence to negligence which claims the plaintiff contributed to the injuries caused by the defendant). After reducing the damages and adding interest of \$10 000, the total amount of damages was \$282 375. Costs were also awarded in favour of the plaintiff.



**Source 2** Saleh Khodr suffered injuries at Port Phillip Prison after being thrown from a second-floor balcony. He was awarded damages by a jury.

## Strengths and weaknesses of the jury system

Some of the strengths and weaknesses of the jury system are set out in Source 3.

STRENGTHS	WEAKNESSES
Jurors are <b>independent and impartial</b> , and in particular independent of the legal and political system, thus ensuring equality and fairness in their decision	Jurors do not <b>give reasons for their decision</b> , and deliberations occur <b>behind closed doors</b> , so some may question whether there has been procedural fairness in the decision that has been made
It allows for the <b>community to be involved</b> in the process. This increases the confidence that the community has in the system, and ensures that the verdict reflects the values of the community.	The task is <b>difficult</b> , particularly where there is complicated evidence or a significant amount of evidence. One might question whether ordinary members of the public are able to understand this evidence to be able to come to the right decision
It ensures <b>fairness</b> by requiring the jury to deliberate based on the evidence and facts and not on their own independent research or investigations	Jurors may be <b>unduly influenced</b> by skilled lawyers or by the emotional elements of a trial and, although unlawful, may conduct their own online investigation into the facts and parties involved in a case, which may bias their decision
It <b>spreads the responsibility</b> , and therefore the decision is more likely to be fair and correct rather than it being made by one person (the judge)	Jurors may have <b>biases</b> that may play a role in their deliberation, even if they aren't aware of those biases

STRENGTHS	WEAKNESSES
It <b>reflects community values</b> and brings a common-sense approach to decision making to the court	The jury is <b>expensive</b> , and in a civil trial the party requesting it must pay for it, therefore decreasing access to justice
	The jury trial may result in <b>delays</b> because legal terms have to be explained and the judge must give directions to the jury over time
	Civil juries have often been criticised for the <b>inconsistency</b> in assessment of damages

Source 3 Strengths and weaknesses of the jury system

## 13.8

## CHECK YOUR LEARNING

### Define and explain

- 1 Is there always a jury to determine liability in civil disputes? Explain, making reference to each of the following courts: Magistrates' Court, County Court and Supreme Court.
- 2 Describe circumstances in which a civil trial may be heard by a jury.
- 3 How many jurors are there in a civil trial?
- 4 If a unanimous decision cannot be reached will the case be dismissed? Explain.
- 5 Does everyone who is summonsed for jury duty become a member of the jury panel? Explain.
- 6 What does a civil jury have to decide? How do they decide this?

### Synthesise and apply

- 7 Read the legal case *Humphris v Connecteast Nominee Company Pty Ltd (No 2)*.
  - a Who requested the jury in this case?
  - b Which party resisted this? Why?

- c What was the decision of the judge?
  - d Do you think that judges should have powers to interfere with the right of a party to request a jury? Give reasons.
- 8 Read the legal case *Khodr v GAS Custodial Services Pty Ltd*.
    - a Who was the plaintiff and what happened to him?
    - b What did he allege?
    - c What was the decision of the jury?
    - d Why were damages reduced in this instance?

### Analyse and evaluate

- 9 'Jurors should not be able to deliberate behind closed doors. Deliberations should be made public so that the parties can feel confident that the decision has been properly made.' Do you agree? Give reasons for your answer.
- 10 Evaluate the ability of the jury system to achieve fairness in a civil trial.



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Jury reforms

» **Worksheet**

The role of a jury

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Jury trials in Victoria

# THE PURPOSES AND TYPES OF REMEDIES

In a civil case, the plaintiff normally seeks a remedy. Put simply, a remedy is a way in which a court can right the wrong that has occurred to the plaintiff.

## The purposes of remedies

The general purpose of civil remedies is to **restore (as much as possible), the party who has suffered loss or injury to the position they were in before the loss or injury occurred.** This is usually in the form of a payment of money, known as damages. If a person is owed an amount of money, they can make a claim through the courts. An injured person may claim a sum (amount) of money to compensate for any pain or suffering incurred as a result of the civil wrong.

There are two main types of remedies: damages and **injunctions**. These will be further explored in this topic.

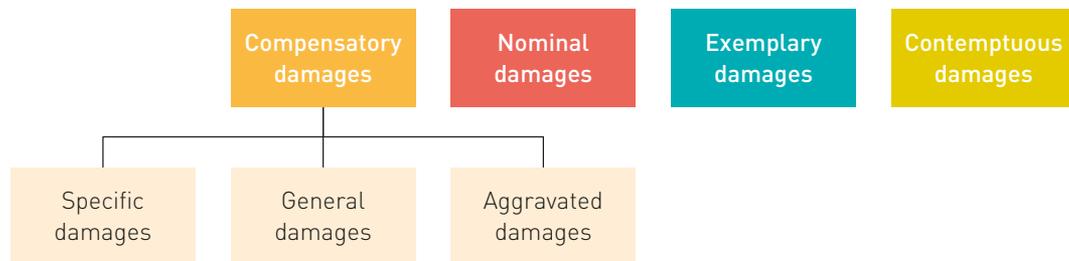
### injunction

a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

## Damages

Damages is an amount of money to be paid by the defendant to the plaintiff, in satisfaction of a claim made by the plaintiff (it can also be sought by a defendant who makes a counterclaim). The main purpose of damages is to compensate the plaintiff for losses suffered. If there is any permanent damage, such as the loss of a limb, it will not be possible to physically restore the injured party to how they were before the injury. Damages are therefore given to try to compensate for the loss or injury suffered.

There are four main categories of damages as shown in Source 1:



Source 1 Types of damages

## Compensatory damages

Compensatory damages are the main type of damages usually sought. There are three types of compensatory damages:

- **special or specific damages** – These are awarded to compensate the injured party (usually the plaintiff) for items that can be calculated objectively and exactly; for example, loss of wages, medical expenses and hospital expenses.
- **general damages** – These are awarded to compensate the plaintiff for pain and suffering. These cannot be calculated objectively because they include consideration of the extent of the plaintiff's emotional suffering and loss of enjoyment of life. The plaintiff's **counsel** may make submissions about the appropriate amount.
- **aggravated damages** – Aggravated damages are awarded to compensate the plaintiff further if the court believes that the defendant's conduct injured the plaintiff's feelings by causing humiliation and insult.

### Study tip

Draw up a table in your notebook which shows the name of damages, the purpose of each, and an example of when it might be awarded. This will help you distinguish between them.

### counsel

a lawyer appearing in court to represent a party

## Nominal damages

Nominal damages are awarded by a court if the court believes that the defendant has infringed the rights of the plaintiff, but the plaintiff did not suffer any actual loss. The court therefore awards a very small amount as compensation.

The legal case below is an example of nominal damages being awarded in a contract case. The contract was broken but there was no loss or damage.

### \$100 awarded in contract case

#### *Dupois v Galley Commodities Pty Ltd* [2016] QSC 167 (3 August 2016)

Mr Dupois was a recording artist. He and his company were interested in obtaining finance to produce music videos for his work. Discussions occurred between the plaintiffs and the defendants about the costs of producing the two music videos, and contracts were entered into. The parties fell out and the defendants sought to terminate the contracts. The plaintiffs sued them for breach of contract and claimed significant sums of damages.

The Queensland Supreme Court found that the defendants had breached the contract. However, the Court found that the plaintiffs had failed to prove that they had suffered loss and damage. He ordered that the defendants pay the plaintiffs \$100 of nominal damages.

LEGAL

CASE

## Exemplary damages

Exemplary damages, sometimes known as punitive damages, is the only example in civil law of a court seeking to punish the defendant. Exemplary damages may be awarded if the defendant's action was so negligent that the court wishes to deter others from similar action and to show disapproval of the defendant's action. Exemplary damages cannot be awarded in defamation cases.

The court may also decide to award exemplary damages if the defendant has shown total disrespect for the wishes of the plaintiff.

The case below is an example of a court awarding exemplary damages.

### Significant damages awarded in WA

#### *Cunningham v Traynor* [2016] WADC 168 (9 December 2016)

In 2011, Robert Cunningham and Catherine Atoms commenced proceedings as a result of the conduct of police officers in the early hours of the morning of 2 November 2008. Outside a hotel in Fremantle, Cunningham and Atoms were detained by police, tasered, arrested and taken to the police station. At the time, they were trying to help a man in the bushes. They were charged with obstructing a police officer, but the charge was dismissed after a trial in 2010. The plaintiffs claimed damages from the three defendants, who were police officers, as well from as the State of Western Australia, for numerous claims, including battery and false imprisonment. Both had suffered post-traumatic stress disorder as a result of the arrests and charges, and Atoms suffered a back injury.

The Western Australian District Court was satisfied that all of the defendants were liable to the plaintiffs for damages and awarded a total

LEGAL

CASE



Source 2 Robert Cunningham and Catherine Atoms were arrested after stopping to help a stranger.

amount of damages to the first plaintiff of \$110 304.10. The total amount awarded to the second plaintiff was \$1 024 822.11, including:

- aggravated damages \$20 000.00
- past expenses \$12 978.50
- exemplary damages \$10 000.00
- future loss of earning capacity \$336 658.50.

In June 2017 an appeal against the decision was lodged on behalf of the three police officers.

## Contemptuous damages

A court might feel that the plaintiff has a legal right to damages, but does not have a moral right; that is, the plaintiff did not really deserve to be paid damages. In such a situation, a small sum of damages might be awarded to show contempt for the claim that is made, while admitting the plaintiff's right to make the claim.

## Effectiveness of damages

Are damages as a remedy effective in achieving their purposes? This will largely depend on the facts of the case, and the loss that the plaintiff has suffered. Some of the factors to consider are as follows:

- the type of loss that has been suffered (for example, economic or non-economic loss)
- has the plaintiff suffered significant physical injury, or irreparable damage?
- has there been loss of life?
- how accurate is the estimate for future loss (for example, loss of future earning capacity)?
- what about injuries that are suffered following the award of damages (for example, pain or suffering)?
- is there another remedy that is better for the plaintiff?
- what about compensation for time, stress and inconvenience of initiating court proceedings?
- does the defendant have the capacity to pay?

## Injunctions

**Injunctions** are a type of civil remedy when the court makes an order for the defendant to undertake an action or do something (or refrain from undertaking an action, or from doing something) in an attempt to restore the plaintiff to the position they were in prior to the loss or harm suffered. They can be granted on a temporary or long-term basis. There are two types of injunction:

- **restrictive injunction.** This is an injunction stopping someone from doing something; for example, a person could apply for a restrictive injunction to stop a building being destroyed if it were in the interests of the nation to preserve it.
- **mandatory injunction.** This is sought when a person wishes to compel someone to do a particular act; for example, to remove something from their land.

### CASE

### STUDY

## The Bachelor wins hearts – and an injunction

In 2017 a new series of *The Bachelor* featuring Matty Johnson was aired on Channel Ten. The finale was filmed in Thailand. During filming, two photographers, Jonathon Marshall and Liam Mendes, took photos of the 'winner' of the TV series. To stop the finale from being spoiled, Channel Ten applied to the Supreme Court of New South Wales for a temporary injunction, which was granted. The injunction prevented Marshall and Mendes from publishing any of their 318 photos, or disclosing details of the finale.

## Effectiveness of injunctions

Like damages, whether an injunction will be effective will depend on the facts of the case, and the loss that the plaintiff has suffered. Some of the factors to consider are as follows:

- whether the defendant has already caused too much damage
- whether the defendant will stop the actions or may do other things to cause the plaintiff loss
- whether the defendant will comply with the injunction
- will the plaintiff be returned back to his or her position? For example, if the defendant is stopped from publishing any more defamatory material, will that rectify the loss suffered to the plaintiff's reputation?
- is there another remedy that is better for the plaintiff?
- what about compensation for the time, stress and inconvenience of initiating court proceedings?

### 13.9

## CHECK YOUR LEARNING

### Define and explain

- 1 What are the purposes of remedies?
- 2 Identify and describe three types of damages.
- 3 What is a mandatory injunction? How is this different from a restrictive injunction?
- 4 Distinguish between specific damages and general damages.

### Synthesise and apply

- 5 Identify two scenarios in which you think a mandatory injunction may be a useful remedy. Now identify scenarios in which you think damages is more appropriate.
- 6 Read the legal *Cunningham v Traynor*.
  - a What was the nature of the claim that the plaintiffs made?
  - b What was the amount of damages awarded to each of the plaintiffs?
  - c For each of the damages that the second plaintiff was awarded, describe the nature of these damages, including why some are precise amounts and some are round figures.

- 7 Read the case study 'The Bachelor wins hearts – and an injunction'.
  - a Who were the parties in this case?
  - b What did the plaintiff want to stop from happening?
  - c Why is an injunction (rather than damages) the appropriate remedy in this instance?
  - d In each of the following scenarios, discuss the extent to which the injunction can achieve its purposes:
    - the photographs have already been published and seen by 10 000 people
    - the defendants defy the court order
    - the photographs have been sold to a media outlet but not yet published.
  - e Conduct some research and find at least two other instances where an injunction was sought in relation to a TV show. Discuss as a class the extent to which the injunction achieved its purposes in each case.

### Analyse and evaluate

- 8 Do you think that damages will ever be able to be a suitable remedy? Give reasons for your answer, referencing at least two cases that you have studied or that you have identified through your studies.



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Other types of remedies

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Damages (ALRC)

## CHAPTER SUMMARY

**Principles of justice**

- > Fairness
- > Equality
- > Access

**Methods used to resolve a civil dispute**

- > Mediation
- > Conciliation
- > Arbitration

**Institutions that resolve civil disputes**

- > Tribunals
- > Ombudsman
- > Complaints bodies

**Role and civil jurisdiction of Victorian courts**

- > Role
  - Determines liability
  - Awards a remedy if required
- > Original civil jurisdiction
  - Magistrates' Court (up to \$100 000)
  - County and Supreme Court – unlimited
- > Appellate civil jurisdiction
  - Magistrates' Court – none

- County Court – only under a specific act
- Supreme Court (Trial Division) – from Magistrates' Court and some VCAT appeals
- Court of Appeal – appeals from the County Court or Supreme Court, and some appeals from VCAT

**Role of the jury**

- > Decider of facts and determines who is most likely in the wrong on the balance of probabilities
- > May assess damages

**Remedies**

- > General purpose is to restore party back to the position they were in before loss occurred
- > Damages: compensatory, nominal, exemplary, contemptuous
- > Injunctions: restrictive and mandatory
- > Various factors need to be considered to determine whether damages and injunctions are effective

## REVISION QUESTIONS

- 1 Using an example, define the term 'damages'. (2 marks)
- 2 Outline the civil jurisdiction of the Supreme Court (Trial Division). (3 marks)
- 3 Distinguish between a tribunal and a complaints body. Give an example of each. (4 marks)
- 4 Describe two ways that courts ensure procedural fairness. (4 marks)
- 5 Describe one similarity and one difference between mediation and conciliation. (4 marks)
- 6 For each of the following scenarios, identify the most appropriate remedy and comment on whether it can achieve its purpose in each case. (15 marks)
  - a Jennifer is about to knock down her neighbour's fence.
  - b Minami fell two stories on a construction site and has suffered significant back injuries.
  - c Ashika recently was offered a job position, but two weeks later the employer withdrew the offer. Ashika got a job a couple of days later at another firm earning less than she would've earned at the other place.
  - d Cindy has been waiting months for her employer to pay her some annual leave that she is owed.



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- e Xavier was walking in a shopping mall, slipped on a hot chip and has suffered extensive injuries. He has had to pay significant medical expenses and is expected to pay a lot more.
- 7 Describe the role of a civil jury. How does the use of a jury both ensure and inhibit fairness in a civil trial? (6 marks)
- 8 'The office of ombudsman and complaints bodies are always a better alternative to resolving disputes to courts and tribunals.' Do you agree with this statement? In your answer, make reference to at least two principles of justice. (8 marks)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

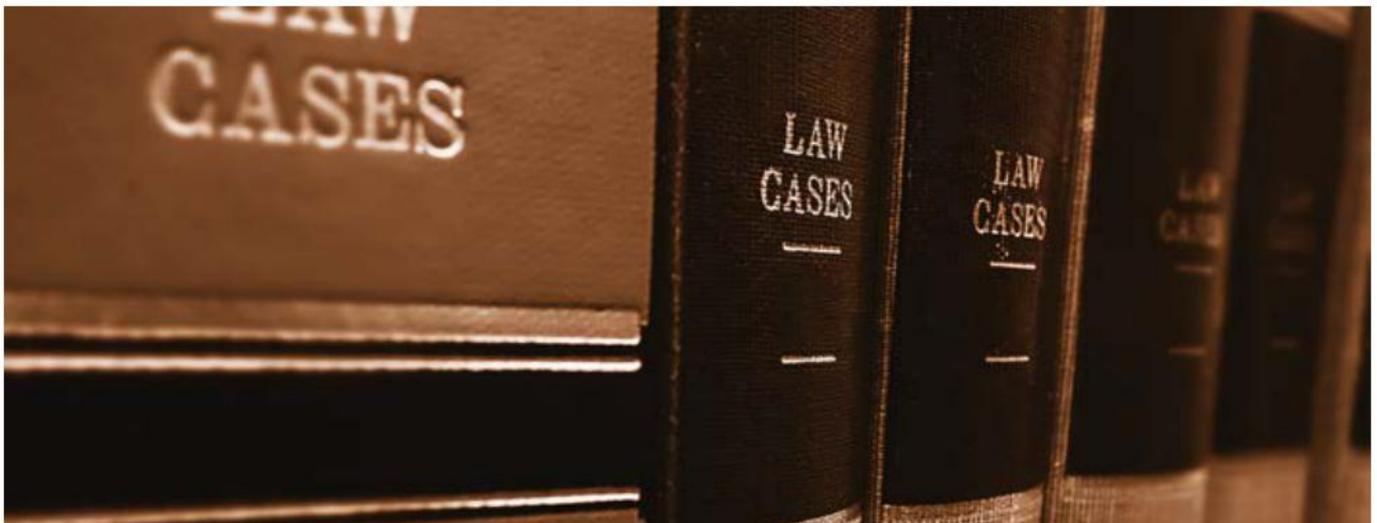
You are required to undertake research and collect information from hard copy and electronic sources for the purposes of preparing a report. The report can either be in writing or oral, with or without the use of technology. For example, your report is able to be:

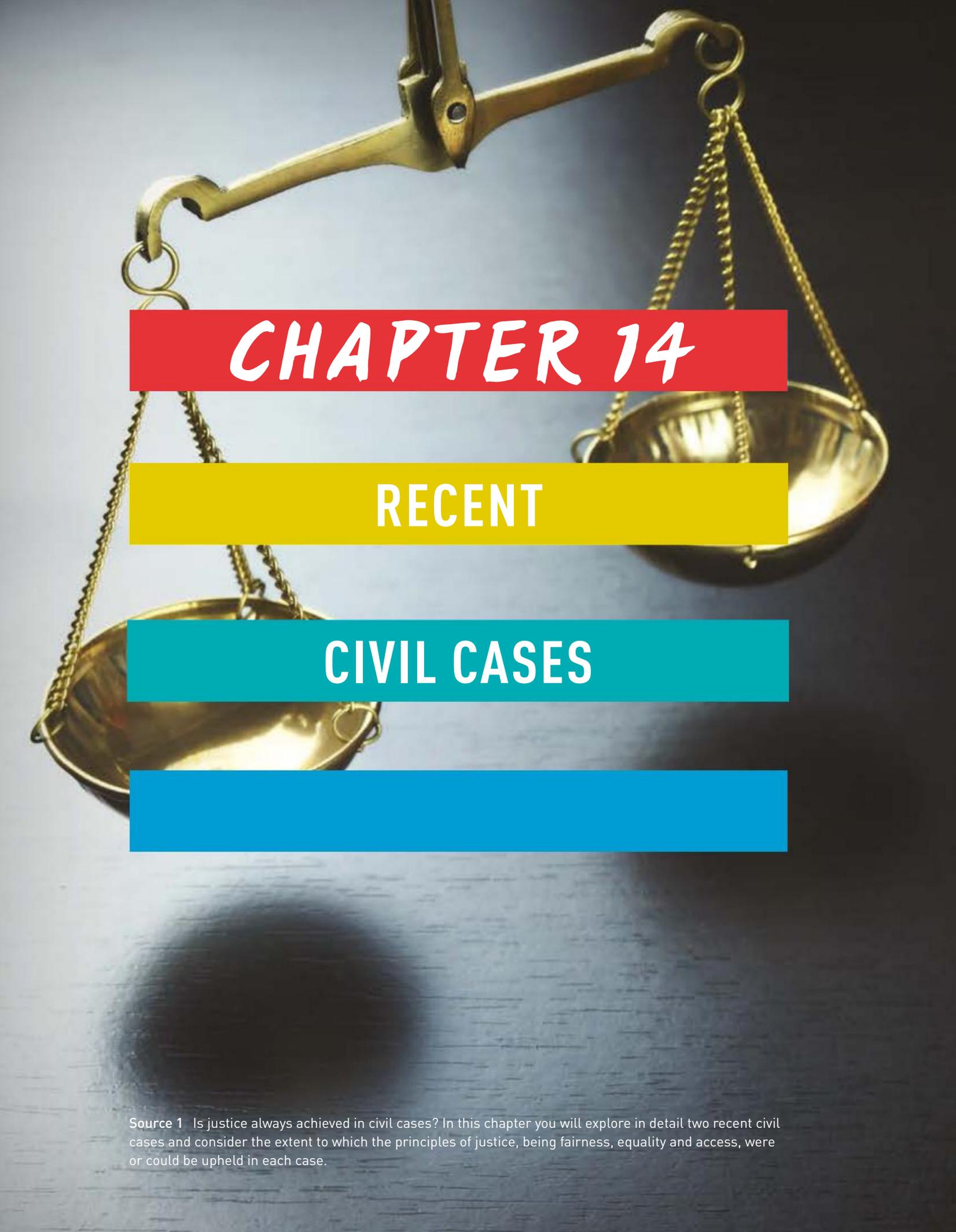
- a PowerPoint presentation
- a web page
- a written report
- a speech.

### Points to address

Your report needs to address the following points. In addressing the points, you must make reference to at least one case for each of the points:

- 1 The role of complaints bodies and the ombudsman in 'filling the gaps' left by courts and tribunals. (5 marks)
- 2 The cost of pursuing legal remedies. (3 marks)
- 3 The role of a civil jury. (4 marks)
- 4 The ability of remedies to achieve their purposes. (5 marks)
- 5 The ability of dispute resolution methods and institutions to achieve the three principles of justice. (8 marks)
- Total: 25 marks





# CHAPTER 14

RECENT

CIVIL CASES

**Source 1** Is justice always achieved in civil cases? In this chapter you will explore in detail two recent civil cases and consider the extent to which the principles of justice, being fairness, equality and access, were or could be upheld in each case.

## OUTCOME

By the end of **Unit 2 – Area of Study 2** (i.e. Chapters 13 and 14), you should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies.

## KEY KNOWLEDGE

In this chapter, you will learn about two recent civil cases and for each case:

- an overview of the claim and the central facts of the case
- dispute resolution bodies that may be or were involved
- methods of dispute resolution and their appropriateness
- remedies that could be or were awarded and their appropriateness
- possible avenues of appeal
- the extent to which the principles of justice were or could be achieved.

## KEY SKILLS

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

- define and use legal terminology
- research, analyse and apply information in relation to civil law and two recent civil cases
- analyse the extent to which the principles of justice were or could be achieved in two recent civil cases.

## ADVICE TO TEACHERS AND STUDENTS

In **Unit 2 – Area of Study 2** (i.e. Chapters 13 and 14) you are required to study **two recent civil cases** in detail. Recent cases are cases that took place within the past four years. You may choose cases that have already been heard and determined by a dispute resolution body, or cases where a claim is either threatened or has just been initiated.

YOU MAY CHOOSE TWO CIVIL CASES FROM THE FOLLOWING OPTIONS:		PAGE:
14.1	Recent civil case 1 – Rebel with a cause <ul style="list-style-type: none"><li>• <i>Wilson v Bauer Media Pty Ltd</i> [2017] VSC 521 (13 September 2017)</li></ul>	448
14.2	Recent civil case 2 – Battle over the Bendigo mosque <ul style="list-style-type: none"><li>• <i>Hoskin v Greater Bendigo City Council</i> [2015] VCAT 1124 (6 August 2015) and <i>Hoskin v Greater Bendigo City Council</i> [2015] VSCA 350 (16 December 2015)</li></ul>	456
14.3	Recent civil case 3 – Manus Island Detention Centre class action <ul style="list-style-type: none"><li>• <i>Kamasae v Commonwealth</i> [2017] VSC 537 (6 September 2017)</li></ul>	464
14.4	Recent civil case 4 – The bird deterrent in Bairnsdale <ul style="list-style-type: none"><li>• <i>Courtney &amp; Jackson v Howell</i> [2016] VMC011 (26 July 2016)</li></ul>	472
14.5	Recent civil case 5 – The disappearance of Malaysia Airlines Flight 370 <ul style="list-style-type: none"><li>• Available online via <a href="#">gbook assess</a></li></ul>	

## KEY LEGAL TERMS

**directions** instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

**duty of care** in relation to negligence, the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

**negligence** a type of tort which involves a breach of a duty of care, causing loss or harm

**nuisance** a type of tort which involves interference with a person's right to use and enjoy property

**orders** a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

**representative proceeding** a legal proceeding in which a group of people who have a claim based on similar or related facts, bring that claim to court in the name of one person; also called a class action or a group proceeding

**standard of care** the degree of caution required by a person who owes a duty of care to another

**statement of claim** a document filed by the plaintiff in court which sets out the nature of the claim and the remedies sought

**writ** usually the first document filed by the plaintiff to start a civil proceeding in court, which explains the action being taken against the defendant and the place and mode of trial

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi – vii.

# RECENT CIVIL CASE 1 – REBEL WITH A CAUSE

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

## defamation

a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

## jury

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

## damages

the usual remedy in a civil claim, being an amount of money the court (or tribunal) orders one party to pay to another

## appeal

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

## Introduction

In 2016, the Australian actor and comedian Rebel Wilson brought an action for **defamation** in the Supreme Court of Victoria. Wilson, best known for her work in popular Hollywood blockbusters such as *Bridesmaids*, *Pitch Perfect* and *How to Be Single*, sued Bauer Media Pty Ltd over a series of articles it had published in 2015. Wilson claimed the articles contained incorrect and untrue statements about her. When the **jury** considered its verdict, it found in favour of Wilson, agreeing that she had been defamed. The judge awarded her \$4 567 472 in **damages**.

As one of only a few high-profile legal cases in recent years involving a civil jury, *Wilson v Bauer Media Pty Ltd* provides an excellent opportunity to learn about the features of a civil trial, including:

- the role of the judge and the jury
- the remedies that may be awarded to compensate a plaintiff for loss suffered.

In this topic we explore each of the following aspects of *Wilson v Bauer Media Pty Ltd* in detail:

- an overview of the claim and the central facts of the case
- dispute resolution bodies involved in the case
- methods of dispute resolution and their appropriateness
- remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.



**Source 1** A poster promoting the Hollywood blockbuster *Pitch Perfect* showing Rebel Wilson as 'Fat Amy'. In May 2017, Wilson commenced proceedings in the Supreme Court of Victoria against Bauer Media for defamation.

## Overview of the claim and central facts of the case



**Source 2** The plaintiff in the case, Rebel Wilson, is an Australian comedian and actress who has achieved international success in Hollywood films.

## Background to the case

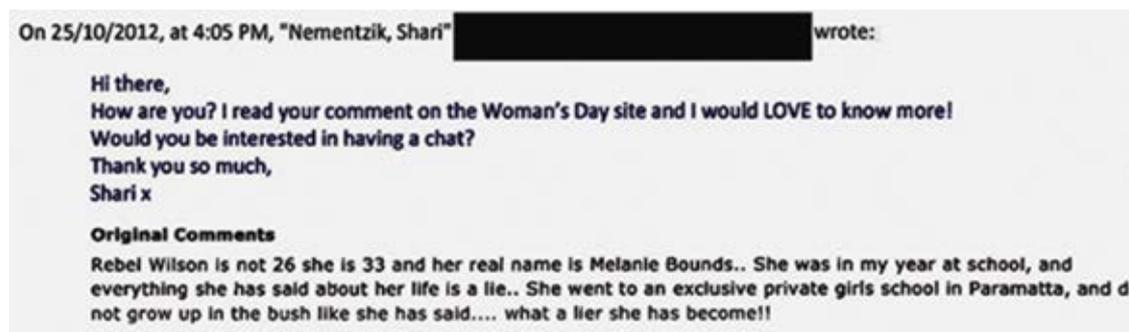
The **plaintiff** in the case, Rebel Wilson (birth name Melanie Elizabeth Bownds), is an Australian actor and comedian born in New South Wales on 2 March 1980. Wilson first became known in Australia for her appearances in television series such as *Pizza*, *The Wedge*, *Bogan Pride*, and *Thank God You're Here*. She went on to gain international fame in Hollywood films including *Bridesmaids*, *Pitch Perfect*, *Pitch Perfect 2* and *Pitch Perfect 3*. Wilson has also written and produced numerous episodes for various films and TV series such as *Super Fun Night* and *Nasty Women*.

The Australasian Legal Information Institute (AustLII) is an excellent resource to find recent court judgments. Identify the jurisdiction (Commonwealth or Victoria), court or tribunal, and year you are looking for. Once you have the judgment, you can find other resources (e.g. commentary in media articles), but final judgments are always the best way to get accurate details of the claims, the facts and the decision of the court. A link to the AustLII website is provided on your [gbook assess](#).

The **defendants** in the case are part of Bauer Media Group – a multinational media company based in Hamburg, Germany. Bauer Media Group manages a portfolio of more than 600 magazines, 400 digital products and 50 radio and TV stations around the world. Its Australian division publishes a number of well-known magazines, including *The Australian Women's Weekly*, *Woman's Day*, *Harper's Bazaar*, *NW*, *OK Magazine*, *New Weekly*, *Cosmopolitan*, and *Australian Gourmet Traveller*.

## Information sought about Rebel Wilson

From mid-2012, Bauer Media began conducting research on Rebel Wilson, wanting to publish a magazine article about various aspects of her life. At that time, a *Woman's Day* reporter by the name of Shari Nementzik contacted a person who had left a comment on the magazine's website about Wilson. The person who left the comment claimed to have attended school with Wilson and said she had lied about various details of her life (including her age). The comment (posted on 25 October 2012) suggested Wilson was actually 33 years old rather than 26. Nementzik sent an email to the anonymous person (referred to as a 'source') who left the comment asking if she would be interested in having a chat (see Source 3).



**Source 3** One of a number of emails exchanged between *Woman's Day* reporter Shari Nementzik and an anonymous commenter

Over the following months, a number of emails were exchanged between the two. In one, the source wrote that she wanted maximum payment for the information she would give about Wilson. In another, Nementzik referred to some research she had conducted that indicated Wilson may indeed be 33 (and queried whether Wilson was lying). During the court case, it was revealed that at some stage Bauer Media raised concerns that publishing the articles may be problematic as it was questionable whether Wilson had in fact lied.

## Publication of articles

Despite concerns raised in 2013 about the accuracy of the information provided by the source, in 2015 Bauer Media published a series of eight articles about Rebel Wilson in *Woman's Day* and other online publications. According to Bauer Media's website, *Woman's Day* has a weekly readership of more than 1 300 000, which made it 'Australia's number one weekly magazine'.

In an article titled 'Just Who is the REAL Rebel?' (published in May 2015), Nementzik quoted a source and claimed Wilson's real name was Melanie Elizabeth Bownds and that she was 36 years of age. The article also claimed Rebel Wilson had said she was 29 years of age and that she had fabricated many aspects of her life, including key facts about her upbringing.

The publication of this and other articles (a total of eight publications) coincided with the release of the movie *Pitch Perfect 2* (a sequel to the popular 2012 release *Pitch Perfect*).

It was later revealed that in the days leading up to the publication of the articles, concerns had been raised within Bauer Media about calling Wilson a liar.

### writ

usually the first document filed by the plaintiff to start a civil proceeding in court, which explains the action being taken against the defendant and the place and mode of trial

### statement of claim

a court document, filed by the plaintiff, which sets out the nature of the claim and the remedy or relief sought

### injunction

a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

### Did you know?

An earlier Bauer Media publication about Rebel Wilson (published in February 2015) stated that Rebel claimed she was distantly related to Walt Disney by marriage. The defendants wanted to rely on the evidence of a genealogist to prove that this wasn't true. The judge declined to allow this evidence, saying that whether Rebel was related to Walt was not a relevant issue during the trial.

## Claim issued in the Supreme Court

In May 2016, Wilson issued a **writ** in the Supreme Court of Victoria identifying Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd as defendants. In a **statement of claim** accompanying the writ, Wilson claimed she had been defamed. The purpose of defamation laws is to protect character and reputation. A person whose reputation has been damaged (that is, a person who has been defamed), may be able to sue for defamation.

To establish a claim for defamation, Wilson needed to prove that:

- the statements made in the articles published about her were defamatory (i.e. defamed her)
- the articles contained false statements about her which injured her reputation
- the statements referred directly to her
- the statements had been published (communicated to other people) by the defendants.

Wilson claimed the articles portrayed her as a liar who had invented stories about herself to become successful. Wilson also claimed that her reputation was ruined as a result of the articles, and that she had been publicly humiliated and embarrassed by them. In particular, she said that because of the articles, she lost the opportunity to earn income by acting in feature films in the US.

It was reported that Wilson sought \$5.893 million in special damages (i.e. money awarded to compensate for items that can be calculated objectively, such as lost earnings), and \$1.2 million in general damages (i.e. for pain and suffering caused). In total, Wilson sought just over \$7 million in damages. She also sought interest and costs.

Finally, in addition to damages, Wilson sought a permanent **injunction** to stop Bauer Media from publishing the articles again.

## Dispute resolution bodies involved in the case

Wilson issued her claim in the Supreme Court of Victoria, which has unlimited jurisdiction to hear civil disputes. The County Court has jurisdiction to hear a \$7 million claim, but the Magistrates' Court does not.

Bodies such as Consumer Affairs Victoria and the office of ombudsman do not have jurisdiction (power) to hear a defamation claim, nor does the Victorian Civil and Administrative Tribunal.

This dispute was resolved in court. A trial was held in May and June 2017, with a jury of six members – in this instance, all female. The jury in this case was the **decider of facts**, meaning they had the responsibility of hearing the evidence and making a decision about whether Wilson had proved her claim and whether the defendant was successful in relation to any defence raised.

Juries in defamation cases decide on liability, but they do not decide the remedy. This is because of section 22 of the *Defamation Act 2005* (Vic), which states that the jury is not to determine damages (in the past juries did award damages, but the amounts were inconsistent, and sometimes extremely high. Parliament then gave judges the task of setting a reasonable amount of damages).



Source 4 Rebel Wilson with part of her legal team in Melbourne during her trial.

The trial took place over three weeks in the Supreme Court in Melbourne. Wilson gave evidence during the trial and was **cross-examined** by the defendants' legal counsel. She broke down while giving evidence about the lies contained in the articles, saying 'this group of people who don't know me want to rip me to shreds on information they know is false'.

The daily events of the trial were reported enthusiastically by the media and during the trial Wilson's behaviour was at times reported as 'bizarre' (e.g. she briefly rapped an Oscar acceptance speech while giving evidence and told personal anecdotes about her interest in boys).

The defendants denied the allegations made by Wilson on various grounds. They argued that Wilson was not fired from her movie roles as a result of the articles. They also denied that Wilson had actually suffered any loss.

The defendants also raised a number of defences that can be used to defend a defamation claim in relation to one or more of the publications. These include the defence of justification and triviality:

- The justification defence can be used where the defendants claim that a statement that is made is **substantially true**.
- The triviality defence can be used where the defendants believe that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

## Methods of dispute resolution and their appropriateness

It is not clear whether the parties attempted to resolve the case through **mediation** prior to going to trial, but the Supreme Court generally requires parties to mediate before trial, so it is likely that mediation occurred. Whatever the case, it is clear that this was not successful.

The Supreme Court generally does not order parties to participate in **conciliation** to resolve a dispute (preferring mediation). Given there was no contract between the parties, the parties would not have been required to participate in **arbitration** to resolve the dispute, unless they agreed to do so themselves.

Since the parties were unable to settle the dispute between themselves, the only available option was to proceed to trial. In this instance, a jury was the decider of facts.

After two days of deliberation, the jury found in favour of Wilson. Juries do not have to provide reasons for their decision, so the reasons why they found in favour of Wilson are not clear.

A jury trial can be an appropriate means of resolving a dispute, and it is often used in defamation cases. A strong argument in favour of using a jury is that a jury ensures that justice is administered in line with community standards, rather than in line with the views of a small number of people (i.e. judges).

The fact that members of the community form the jury and participate in the trial helps to ensure fairness and equality. The decision is made by people who are not connected with any of the parties, which reduces the chances of bias.



**Source 5** After two days of deliberation, the jury found in favour of Rebel Wilson. Here, Rebel Wilson talks to the media after receiving the jury's verdict.

### **cross-examination**

the questioning of a witness called by the other side in a legal case

### **Did you know?**

During the trial, Rebel Wilson made personal remarks about defence counsel Georgina Schoff QC, accusing her of leaking Wilson's financial details. She also said, 'I understand you're being paid per day and you're trying to drag this out as much as possible.' The judge warned Wilson that the defendants' barrister was 'just doing her job ... She is speaking on her clients' behalf and with their instructions'.

### **mediation**

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

### **conciliation**

a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

### **arbitration**

a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

# Remedies awarded and their appropriateness

Wilson sought over \$7 million in damages (in a combination of special damages and general damages) as a result of the claim. She also sought a permanent injunction to prevent Bauer Media publishing articles of this nature in future, as well as interest and costs.

Following her win, Wilson tweeted that she would give any damages awarded to her to charity or scholarships, and that some would be invested back into the Australian film industry.

As at 1 July 2017, damages for non-economic loss (i.e. general damages) in defamation proceedings are **capped** at \$389 500 (unless the court allows otherwise). In defamation proceedings, a plaintiff cannot be awarded exemplary damages (i.e. damages aimed at punishing the defendant).

The defendants claimed that Wilson had not proved that she had lost money or movie roles as a result of the published articles. They also claimed that because the articles were published in Australia, they had not come to the attention of people in the United States.

On 13 September 2017, Justice John Dixon handed down his judgment. He awarded Rebel \$650 000 in general damages, which included aggravated damages, and special damages of \$3 917 472. Special damages was calculated as 20 per cent of US\$15 million for the possible income that Wilson could have received for featuring in films. That amounted to US \$3 million. The discount was to take into account the possibility that the lost opportunity was not entirely caused by the defendants.

## Possible avenues of appeal



Source 6 The appeal route for this case

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

Either party is able to appeal the decision to the Court of Appeal. However, in accordance with Section 14A of the *Supreme Court Act 1986* (Vic), the Court of Appeal must give leave (permission) to appeal the case. All applications for leave to appeal must be filed within 28 days from the date that judgment was handed down.

The defendants are able to appeal the decision. In October 2017 it was reported that the defendants have appealed the decision to the Court of Appeal and believed it was important that the amount of damages awarded be reviewed by a higher court.

Any appeal from the Court of Appeal would be heard by the High Court. This could not be done unless the High Court granted leave to appeal.

## The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – **fairness**, **equality** and **access** – were or could be achieved in the case of *Wilson v Bauer Media Pty Ltd* is provided below. For each principle, this assessment is made on the evidence available.

### Fairness

The concept of fairness suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.



Source 7 Rebel Wilson with some of her legal representatives during trial

In this case:

- The **directions** and **orders** given by the Supreme Court would have allowed each party an opportunity to **present their case** and rebut the other side's case. For example, in this case a number of emails were used as evidence about Bauer Media's concerns at the time they decided to publish (e.g. whether there was any risk with publishing the articles). Those emails would have been seen by Wilson and her legal team before trial during the process of **discovery**. The discovery process thus ensured that relevant documents such as these were not withheld from the plaintiff.
- The **rules of procedure** allowed the parties to present their case. There are general rules of procedure about which party presents their case first at trial, though the Court does have the power to decide on the rules in each particular case. Each party was entitled to, and did, call evidence, make submissions to the Court and address the judge and the jury.
- The jury was the **decider of facts**. The jury would have been required to **consider the evidence** and the law to come to a **verdict**. However, juries do not have to give reasons for their decision, therefore it is unclear whether the jury has properly considered the evidence, or understood the law, when arriving at a verdict. This may be seen by some as unfair.
- The laws relating to defamation were properly applied. This includes the fact that the judge decided on the **amount of damages**. This means the most legally experienced person in the courtroom, the judge, decided on the remedy.
- There was a **timely resolution** of the case. The claim was issued in May 2016, and a final judgment was handed down in September 2017. This may be seen as timely, having regard to the complexity and size of the dispute. Some, however, may see this as too long to reach a decision even in this complex case. The impact of a delay can also be greater for some parties than for others.
- Both parties had **adequate legal representation**. This assisted in ensuring a fair trial.

**directions**

instructions given by the court to the parties about time limits and the way a proceeding is to be conducted

**orders**

a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

**discovery**

a pre-trial procedure which requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

- Justice Dixon handed down a number of **rulings** during trial. For example, the parties had to file **expert evidence** (evidence which is given by a person who is a specialist in their field) by a certain date. The defendants tried to rely on an expert report which was not filed by that time. Justice Dixon decided that the defendants were not permitted to do so, partly because they should have done so earlier, and filing the report so late would have hampered the plaintiff's opportunity to consider the report and respond.

### Study tip

When discussing the principles of justice, it is important that you explain **how** a particular principle of justice is achieved for each point you make. Avoid simply saying 'legal representation achieves equality'; instead, say something like 'legal representation achieves equality by allowing both parties to present their case through an objective legal representative'.

## Equality

The concept of equality suggests that all people should be equal before the law regardless of who they are. For equality to be achieved, every person in society who is involved in a civil claim should have the same opportunity to present their case without advantage or disadvantage.

In this case:

- The judge was required to **act impartially and without bias**, and have no connections with the parties. In overseeing the trial, Justice Dixon would have been required to make decisions along the way in an unbiased manner.
- The plaintiff and the defendants both had experienced **legal representation**. The availability of legal representation to both parties will ensure that they equally have the ability to present their case. One party being unrepresented may result in significant inequality.
- The jury members would have been required to have had no connection or relationship with the parties, and would have been required to **decide on the facts** and not on any other matter. However, given the high profile of this case, and the high profile of the plaintiff, it is possible that one or more of the jury members would have known of Wilson or of the publications in question before trial. This prior knowledge could have influenced jury members, but given they do not have to give reasons for their decision, there is no way of knowing whether any prior knowledge influenced their decision.
- Both parties had the **right to appeal**.

## Access

The concept of access suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid can have legal representation at no charge. This is essential for parties attempting to navigate their way through complex legal processes.

A civil trial includes strict processes for sharing evidence between the parties, especially for the key documents that will be used as evidence to the trial. This helps legal counsel on both sides prepare for trial.

In this case:

- It is likely that the use of **mediation** will increase access to justice, as it provides the parties with an alternative method of resolving the dispute outside trial. However, it is not clear that mediation was held in this instance.
- Costs may be a factor in determining whether access to justice can be achieved. While there is no suggestion that either party cannot afford to pay the costs, both parties are likely to be out of pocket for their costs. It is likely that all of the parties had the legal funds to pay for their costs, but another person in Wilson's situation may not have been able to **afford the costs** and therefore may not have pursued the case.

- Wilson gave **evidence** in Melbourne during trial. Although the Court is actively using technology including video links in cases, **witnesses** still have to attend trial in person to give evidence if required to do so. This can be problematic for people who are unable to attend personally, though the Court did allow at least two witnesses, including Wilson's talent agent, to give evidence via video link.
- The trial was conducted by way of an **open hearing**. This ensures that the parties and members of the community have access to information about the way the dispute was resolved, thus ensuring transparency in the process. It also shows members of the community how courts work.
- The rulings that were handed down during the trial by Justice Dixon have been made available to the parties and to the public, thus **ensuring access to the reasons** that the Court made its decision along the way.
- The parties have a **right to appeal**, ensuring access to a higher court to review the lower court's decision if necessary.

### Study tip

The points provided are not the only ones you can make about fairness, equality and access. Can you think beyond the points provided about how these principles were achieved in this case?

## 14.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Describe the claim that Rebel Wilson made against the defendants.
- 2 What remedies did Rebel Wilson seek? In particular, what would be the purpose of the injunction if the articles have already been published?
- 3 Explain the role of each of the following parties in this case:
  - a Rebel Wilson
  - b Justice Dixon
  - c Georgina Schoff QC
  - d the jury.
- 4 Identify one other dispute resolution body that could have heard this dispute. Give reasons for your answer.

### Synthesise and apply

- 5 Identify whether each of the following statements is true or false. Justify your answer.
  - a The Magistrates' Court would have first been required to determine whether there was enough evidence for Rebel Wilson to succeed.
  - b Any income that Rebel Wilson could have earned would be compensated through special damages.

- c Only the defendants are entitled to appeal the decision, as they lost.
- 6 Why do you think the claim was made against the publishers, and not the journalists?
  - 7 Conduct some research on the appeal. Provide a summary of your findings about what the final decision was.

### Analyse and evaluate

- 8 Rebel Wilson has indicated that she will give any damages amount to charity, scholarship or invest back into the Australian film industry. In your view, should damages be awarded if they are not retained by the plaintiff? Give reasons.
- 9 'There is no way that a jury would have acted impartially in this case. It was too high profile. A jury should not be used in these sorts of cases.'  
Engage in a class discussion about this statement, indicating the extent to which you agree or disagree with it.
- 10 Evaluate the ability of a jury trial to achieve fairness and access in a defamation case such as this.



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Overview of *Wilson v Bauer Media*

» **Weblink**

*Wilson v Bauer Media* judgment

» **Weblink**

*Defamation Act 2005* (Vic)

# RECENT CIVIL CASE 2 – BATTLE OVER THE BENDIGO MOSQUE

*Hoskin v Greater Bendigo City Council* [2015] VCAT 1124 (6 August 2015) and [2015] VSCA 350 (16 December 2015)

## Introduction

Early in 2014, an application for a permit to build Bendigo's first multi-use Islamic centre (including a **mosque**) was submitted to the Greater Bendigo City Council for approval. The application included plans for two prayer halls, a community sports hall and other facilities. Because of the intended use of the centre (explored further below), the application attracted significant media attention and was the cause of several large public demonstrations. Over the next two years, the case was escalated from the **Victorian Civil and Administrative Tribunal (VCAT)** all the way to the High Court of Australia. It was finally resolved in 2016.

In this topic we will explore each of the following aspects of *Hoskin v Greater Bendigo City Council* in detail, including:

- an overview of the claim and the central facts of the case
- dispute resolution bodies who were involved in the case
- methods of dispute resolution and their appropriateness
- remedies that could be or were awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

## Overview of the claim and central facts of the case

In January 2014, the Australian Islamic Mission Incorporated applied to the City of Greater Bendigo for a planning permit to develop a mosque. Plans for the mosque included a community sports hall, education facilities, an office, a shop and a café. The site for the proposed mosque was a 5-acre area of land off Rohs Road in East Bendigo (close to the site of the Bendigo Airport).

It was proposed that the buildings would be centrally located on the site and would provide a purpose-built facility for the Muslim community, who – at the time of the application – were using a prayer room located at the La Trobe University campus in Bendigo to worship.

The application for the planning permit was made to the Council, which was the responsible authority to determine whether to approve the application. Approximately 254 objections were submitted to the Council from 435 persons in relation to the application. The Council also received a number of expressions of support for the proposal. The



**Source 1** In January 2014, an application for Bendigo's first mosque was submitted to the Greater Bendigo City Council for approval. This artist's impression shows the proposed design for the mosque.

### mosque

a place of worship for followers of the Islamic faith

### Victorian Civil and Administrative Tribunal (VCAT)

a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

### appeal

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

main concern by the objectors was the fear that the granting of the permit would result in an increased practice of the Islamic faith within Bendigo, resulting in cultural change and behaviours.

The application for a planning permit and the proposal to develop the mosque attracted a high level of public interest and media attention, including interest from outside Bendigo. Despite opposition from some residents, on 18 June 2014 the Council decided to grant a permit for the use and development of the land for the proposed purpose (as detailed in the news article below).



**Source 2** Approximately 254 objections to the application for a permit to build a mosque were submitted to the Greater Bendigo City Council.

### *Did you know?*

A significant number of the protestors who attended protest rallies against the mosque were not from Bendigo. Instead, many travelled large distances from other parts of Victoria. Some even travelled from as far away as Queensland to express their anger at the proposal.

## Bendigo mosque: Council approves construction despite fiery public meeting

*ABC, 24 June 2014*

The Bendigo Council has approved plans for the city's first mosque, despite fierce opposition from some locals who claim the council has failed to protect them from terrorists.

More than 200 people packed into the public gallery at the central Victorian city's council meeting on Wednesday night.

Most had come to voice their objections to a planning application for the mosque in East Bendigo and police were on hand in case things got out of hand.

During the debate, which lasted more than two hours, councillors were constantly shouted down by the gallery, accused of being liars and not listening to ratepayers.

Opponents said the mosque would bring violence to Bendigo and the city would be overtaken by Sharia law.

'If you're Muslim and you want a mosque, go back to the Middle East. This is Australia,' one member of the public said. Councillors voted seven to two to support the development, but agreed the matter was likely to end up at the Victorian Civil and Administrative Tribunal.

Councillor James Williams, who voted in favour of the project, addressed the audience, saying we all live in a tolerant country that does not allow extreme actions and racist behaviour.



**Source 3** A number of public rallies and demonstrations – both supporting and opposing the mosque – were held in Bendigo in relation to the approval to build the mosque.

**IN  
THE  
NEWS**

## The claim

Following the decision of the Council to grant the permit under the *Planning and Environment Act 1987* (Vic), a group of objectors sought to have the Council's decision reviewed by the Victorian Civil and Administrative Tribunal (VCAT) under Section 82 of that Act. An extract of the Act is provided below.

### EXTRACT

#### *Planning and Environment Act 1987* (Vic)

##### 82 Applications for review where objectors

(1) An objector may apply to the Tribunal for review of a decision of the responsible authority to grant a permit.

Initially, there were 16 group objectors. Objectors in VCAT applications are known as 'applicants'. The group of applicants was represented by Ms Julie Hoskin, a resident of Bendigo who lived more than three kilometres from the proposed mosque site.

Five group objectors withdrew from the application, leaving 11 group objectors by the time the dispute was heard by the Tribunal.

The respondent to the VCAT application was Greater Bendigo City Council.

### Basis for objection

A number of reasons were raised by the applicants as to why the decision to grant the permit should not have been made. One of these reasons was in relation to the alleged social impact of the development. The applicants claimed that:

- the quantity and quality of objections was a significant factor
- a large proportion of the Bendigo community opposed and were offended by the development
- a 'social impact assessment' should have been required
- the Council failed to consider the social impacts and effects referred to in the objections
- a mosque has special and different attributes to other places of worship
- there were concerns about Islam and its integration with western culture
- there was fear there would be a change in character of the area and an 'Islamification of Bendigo', and that the use of the land for this purpose would affect social cohesion and a sense of belonging.

Significant other objections were raised by the applicants in their VCAT application, such as concern about the inadequacy of information accompanying the application for the permit, and the questioning of the need for the facility. A number of these objections expanded beyond those that were originally raised with the Council at the time of the objections.

The objection ultimately had to be decided by VCAT.

### Study tip

The VCE Legal Studies Study Design requires you to study recent civil cases, being cases from the past four years. This case was finalised in June 2016, so it can be used up until June 2020.

## Dispute resolution bodies involved in the case

The dispute resolution body involved in this case initially was VCAT. VCAT has the exclusive jurisdiction to undertake a review of a decision made by a responsible authority such as a local council. Therefore it is the only dispute resolution body to which the objectors could have applied. In doing so, VCAT will take on the role of the responsible authority and will determine the application on the submissions and evidence presented to it.

The application was heard over six days between December 2014 and May 2015 at VCAT's centre in Melbourne. The VCAT **members** hearing the case were Justice Greg Garde AO RFD, the President of VCAT, and Senior Member Margaret Baird.

The hearing was highly contested and involved a number of significant and complex issues that VCAT needed to decide on. After the hearing, the group applicants even made an application for Justice Greg Garde to recuse himself (i.e. step down from hearing the case) on the basis that he was biased and his decision would be unfair. That application was dismissed.

A number of other procedural matters were also raised by the group applicants, where they raised a series of concerns about the conduct of the hearing, suggesting they were denied procedural fairness or had been disadvantaged in preparing and presenting their case.

An example of one of the objections is set out below. It is an extract from VCAT's decision in the case. Mr Balzola was the solicitor for the group applicants.

VCAT handed down its decision on 6 August 2015. The application for review of the decision to grant the permit was not allowed (that is, the group applicants were unsuccessful).



**Source 4** Justice Greg Garde AO RFD, President of VCAT, who presided over the case

## EXTRACT

### *Hoskin v Greater Bendigo City Council [2015] VCAT 1124 (6 August 2015)*

- 35** Mr Balzola submitted that the statements of expert evidence filed by the respondents were filed out of time, causing the group applicants disadvantage. While the statements of expert evidence in question were filed towards the end of the time frame allowed by the Tribunal under Expert Evidence Practice Note PNVCAT2 ('PNVCAT2'), nonetheless, they were filed and served within time. The permit applicant and the responsible authority complied with the requirements of PNVCAT2.
- 36** It should be noted that some of the material filed and served by the group applicants following the Tribunal's order dated 1 December 2014 was filed out of time. Neither the responsible authority nor the permit applicant objected to the receipt of this evidence by the Tribunal despite late service by the group applicants.

#### **member**

the person who presides over final hearings and compulsory conferences at VCAT. Members include the President, vice-presidents, deputy presidents and senior and ordinary members

#### ***Did you know?***

'AO RFD' means that Justice Garde is an Officer of the Order of Australia (AO) – he received this award under the Australian Honours system. He also has a Reserve Force Decoration (RFD) – he received this military award for long service in the defence force.

#### **social cohesion**

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

Ruling on the procedural matters and objections raised by the group applicants, VCAT dismissed those concerns. It noted that VCAT takes its **duty of fairness very seriously**, and seeks to ensure that all parties receive a fair hearing, and that all parties are treated with courtesy and respect. VCAT found that while there were frequent submissions that there had been disadvantage, the applicants did not provide evidence about what this was, and how it affected their ability to present their case.

In reviewing the merits of the decision of the Council to grant the permit, VCAT decided that the decision was appropriate. VCAT stated that it had not been presented with evidence that the concerns around social impact were warranted. It also said there was no evidence or submissions that the fears about the proposed mosque would become reality. It said that there was no evidence of abuse, harassment, intimidation, or loss of wellbeing or **social cohesion** in relation to the operation of Islamic worship places in Bendigo or in any other location in Victoria and beyond. VCAT also said that 'the speculation of the group applicants associated with growth of Islamic education or other facilities is not persuasive.'

VCAT otherwise considered all of the objections raised, and found that they were without merit. An extract of VCAT's decision is provided below.

## EXTRACT

### *Hoskin v Greater Bendigo City Council* [2015] VCAT 1124 (6 August 2015)

**150** As a matter of principle, it is entirely appropriate for a major regional city such as Bendigo, which welcomes all faiths and nationalities, to have a purpose-built mosque. That is the case even though there might be people who come to Bendigo for that reason alone. The Muslim population associated with the permit application is not large when considered in the context of an estimated 2013 population of Greater Bendigo of over 100,000 people, and a projected 2030 population of 143,685. The Muslim population, as well as that of other faiths, will grow as a result of a number of factors – particularly population growth and not merely as a result of access to a place of worship.

#### mediation

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

#### compulsory conference

a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

#### arbitration

a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

Two of the group applicants – Julie Hoskin and Kathleen Howard – would ultimately appeal the VCAT decision.

## Methods of dispute resolution and their appropriateness

In this case, VCAT was reviewing a decision made by a responsible authority. Given the large number of issues to be decided, it was not a case appropriate for **mediation** or a **compulsory conference**. That is, the case needed to be heard and determined by VCAT for it to make a binding decision on whether to affirm, vary or set aside the decision by the Council to approve the permit. **Arbitration** is also not an appropriate dispute resolution method where a decision of a council is reviewed.

VCAT does have the power, at any time, to invite a responsible authority to reconsider the decision, though in this case the matter went to a full hearing, and a binding decision was made.

## Remedies awarded and their appropriateness

The objectors in this case were not seeking remedies (such as an injunction or damages). Instead, they were seeking orders that the decision of the Greater Bendigo City Council be reviewed so that the mosque and associated facilities would not be built.



**Source 5** Former Greater Bendigo City Council Mayor Cr Peter Cox – VCAT's decision was welcomed by Greater Bendigo City Council.

## Possible avenues of appeal

Decisions from VCAT can be appealed on questions of law to the Supreme Court (Trial Division or the Court of Appeal). In this case, the decision was appealed by two of the objectors.

### Court of Appeal

Because the President of VCAT heard the application and made a decision, any appeal by the group objectors needed to be made to the Court of Appeal. Leave (consent) was required by the Court of Appeal to appeal.

Any appeals from VCAT are limited to appeals on **questions of law**. That is, a party who is unhappy with the decision cannot appeal based on the facts of the case found by VCAT. They can only appeal based on the way VCAT applied the law to the facts.

Two group objectors, Julie Hoskin and Kathleen Howard, appealed against the decision of VCAT. The focus of the appeal was on the way that VCAT dealt with the alleged significant social effects that they feared the proposed mosque would have on the community.

The Court of Appeal decided that the application for leave to appeal should be refused. It found that the grounds of appeal did not raise questions of law, and the grounds had no prospects of success for various reasons. An extract is provided below.

## EXTRACT

### *Hoskin v Greater Bendigo City Council* [2015] VSCA 350 (16 December 2015)

**134** It was open to the Tribunal in these circumstances to fail to be satisfied that the possibility of a relevant adverse social effect was material unless the group objectors put forward some objective factual basis on which to conclude that the risks they feared were or might be significant.

## High Court

In 2016, Hoskin sought special leave to appeal to the High Court. The special leave application was refused on the grounds that an appeal would have been pointless.

In their judgment, High Court Justices Patrick Keane and Susan Kiefel stated ‘that an appeal has insufficient prospect of success.’

As lead objector, and with no more avenues of appeal available, Hoskin was ordered to pay full court costs.

The decision gave final approval for the Bendigo mosque project to go ahead.

## The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – i.e. **fairness**, **equality** and **access** – were achieved in *Hoskin v Greater Bendigo City Council* – is provided below. In each case, this assessment is made on the evidence available.

### Fairness

The concept of fairness suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

In this case:

- Section 97 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) states that VCAT **must act fairly** and according to the merits of the case – VCAT found that there was no evidence of procedural fairness being denied to the group applicants.
- The parties were given the **opportunity to present their case** – VCAT found that the group applicants had been given every opportunity to present their case, and there was even an adjournment allowed for them to obtain expert evidence.
- The laws were **properly applied** – The case was considered by VCAT, the Court of Appeal and the High Court, and there was no finding by the appeal courts that VCAT improperly made its decision.

#### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

#### equality

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

#### access

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



**Source 6**  
Anti-mosque  
campaigner Julie  
Hoskin (left) was  
required to pay the  
other party's costs.

### Study tip

The points provided are not the only ones you can make about fairness, equality and access. Can you think beyond the points provided about how these principles were achieved in this case?

- There was a **timely resolution** of the case, based on the complexity and size of the dispute – In this case the last day of the hearing was on 11 May 2015, and a decision was made by VCAT on 6 August 2015. Given the size and complexity of the issues, this can be seen to be a reasonable time in which VCAT handed down its decision. The Court of Appeal heard the leave application on 6 November 2015, and handed down its decision on 16 December 2015. There was some delay in between appeals, which may be seen to be unfair in relation to the building and development of the facilities and the impact on the parties in obtaining a resolution.
- **Reasons are given for the decision** – In this case, VCAT and the Court of Appeal provided substantial reasons for their decisions which enabled the parties to consider whether the decision was right.

The group objectors may have different views about whether there was procedural fairness in the VCAT hearing, given the substantial submissions it made. For example, the group applicants raised a number of concerns about the way the hearing was conducted, arguing that they were denied procedural fairness or had been prejudiced. This included the argument that expert evidence was filed out of time by the other side. VCAT in its decision rejected the claim that there was any procedural unfairness.

## Equality

The concept of equality suggests that all people should be equal before the law regardless of who they are. For equality to be achieved, every person in society who is involved in a civil claim should have the same opportunity to present their case without advantage or disadvantage.

In this case:

- **Both parties had legal representation** – The availability of legal representation aims to ensure equality in the parties being able to present their cases.
- An issue at VCAT was that the group applicants claimed that Justice Greg Garde was **biased and partial** – The claim was made after the last day of hearing and was in relation to letters that were sent on behalf of VCAT to the Secretary of Rights for Bendigo Residents Inc. The letters requested removal of publications on the group's website and Facebook page which were considered defamatory of Justice Garde and a Deputy President of VCAT. Justice Garde noted that he had no role or involvement in sending the letters, and wasn't aware of them until the application was made to remove him. The President concluded that there was no logical conclusion between the matter that had arisen and him being able to make a decision on the merits, and declined to disqualify himself.
- There was **no jury** in this case – There was no risk of any bias arising from jury members.
- The group applicants also argued that because of a **lack of procedural fairness**, that they had been prejudiced or disadvantaged in preparing and presenting their case – VCAT did not find that there was anything to suggest that they were disadvantaged. It otherwise found that they had not been prejudiced.

## Access

The concept of access suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid can have legal representation at no charge. This is essential for parties attempting to navigate through complex legal processes.

In a civil trial, there are strict processes for the sharing of evidence between the parties, especially the key documents that will be used as evidence in the trial. This helps legal counsel on both sides prepare for trial.

In this case:

- All parties were able to access both VCAT and the courts to **resolve the issues in dispute** – Costs were not a factor that restricted the parties from accessing justice. However, it is not clear why some objectors withdrew as applicants in VCAT. If the reason was cost-related, it is possible that the matter would have been withdrawn completely if they had been the only objectors.
- Hoskin was ordered by the Court of Appeal and the High Court to **pay the respondent's costs** – She has noted that the costs were substantial and in excess of \$200 000. Costs like this are often prohibitive for people to access justice.
- The **court hierarchy** enabled the applicants to appeal the decision – This allowed greater access to bodies that can review the decision of VCAT.
- Leave to appeal is required for the Court of Appeal and the High Court to hear the matter – While some might believe this restricts access, both courts still consider the merits of the appeal to determine whether it has prospects of success.

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

## 14.2

## CHECK YOUR LEARNING

### Define and explain

- 1 Briefly describe the nature of the planning application submitted to the Greater Bendigo City Council in January 2014.
- 2 How many objections to the mosque in Bendigo were raised and what was the general nature of the objections?
- 3 Briefly describe the role played by the following individuals and organisations in the Bendigo mosque case:
  - a Julie Hoskin
  - b Greater Bendigo City Council
  - c Justice Greg Garde
  - d Court of Appeal
  - e Australian Islamic Mission Incorporated.
- 4 What was the role of VCAT in this case?
- 5 Were the objectors seeking damages or an injunction? Why or why not?
- 6 Outline the bias issue that was raised before VCAT. How was it decided?
- 7 What was the decision of VCAT, the Court of Appeal and the High Court in relation to the mosque in Bendigo?

### Synthesise and apply

- 8 Conduct some research about 'leave to appeal'. Why is it necessary to seek leave to appeal?
- 9 Access the VCAT judgement. A link is provided on your [obook assess](#).
  - a Identify and copy one paragraph in the judgment that touches on one of the principles of justice.
  - b Other than objecting on the grounds of social effects, identify one objection that was made by the applicants about the development (see paragraphs 135 to 206). Summarise VCAT's decision on this objection.
  - c Read paragraphs 25 and 26 of the judgment. Summarise how these paragraphs are relevant to the principle of fairness. In your view, was there fairness in relation to the transcripts?

### Analyse and evaluate

- 10 Do you think that this case demonstrates that people will have different views about whether fairness has been achieved in a civil dispute? If not, why not? If so, how should fairness be judged? Give reasons for your answer.
- 11 Evaluate the ability of VCAT and the courts to uphold access to justice in this case.



### Check your [obook assess](#) for these additional resources and more:

» **Student book questions**

14.2 Check your learning

» **Video tutorial**

Overview of *Hoskin v Greater Bendigo City Council*

» **Weblink**

*Hoskin v Greater Bendigo City Council* VCAT judgment

» **Weblink**

*Planning and Environment Act 1987* (Vic)

# RECENT CIVIL CASE 3 – MANUS ISLAND DETENTION CENTRE CLASS ACTION

*Kamasae v Commonwealth* [2017] VSC 537 (6 September 2017)

## Introduction

Many countries around the world have been grappling with the issue of refugees for decades. According to the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol (**Refugee Convention**), a **refugee** is defined as:

Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country.

In recent decades, Australia has seen an increase in the number of **asylum seekers** embarking on dangerous boat voyages to reach the safety of Australia. In an attempt to reduce the number of refugee boats coming to Australia, both major Australian political parties (i.e. the Liberal Party and the Labor Party) have endorsed policies of **offshore processing** of refugees; that is, diverting the boats to other countries for processing to decide if the passengers are genuine refugees. These offshore processing centres are known as **detention centres**.

In Victoria in 2014, a class action (also known as a **representative proceeding**) was issued in the Supreme Court on behalf of persons detained at one of the detention centres maintained by Australia on Manus Island in Papua New Guinea.

The class action was one of the biggest ever commenced in Victoria in relation to human rights, and settled in June 2017 before a lengthy and complex trial commenced.

In this topic we will explore each of the following aspects of the Manus Island Detention Centre class action in detail, including:

- an overview of the claim and the central facts of the case
- dispute resolution bodies that were involved in the case
- methods of dispute resolution and their appropriateness
- remedies awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice were achieved.

## Overview of the claim and central facts of the case

Australia provides protection to refugees, and is one of the few countries in our region that has signed the Refugee Convention. The Refugee Convention sets out the rights of refugees and the legal obligations of states who have signed the Convention. This means that Australia has voluntarily agreed to be bound under international law to protect people fleeing persecution and to treat those seeking asylum equally.

In Australia, the law relating to refugees and asylum seekers is set out in the *Migration Act 1958* (Cth).

## Manus Island and the detention centre

Manus Island is part of Manus Province in northern Papua New Guinea. It has an area of 2 000 km<sup>2</sup> and as at 2011 had a population of 60 485. Its capital is Lorengau.

### refugee

a person who has been recognised under the Refugee Convention to be a refugee; that is, someone who is in fear of being persecuted and who cannot be protected by his or her own country

### asylum seeker

a person who is seeking international protection, but has not yet been determined to be a refugee

### offshore processing

the use of overseas locations to determine the refugee claims of asylum seekers

### detention centre

a facility used to hold asylum seekers whilst their refugee claims are determined

### representative proceeding

a proceeding in which seven or more persons have claims against the same person, and those claims are in respect of or arise out of the same, similar or related circumstances. Also known as a class action or group proceeding

### appeal

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

### Did you know?

As at May 2017, there were still over 370 refugees at the detention centre in the Manus Province.

In 2001, in response to the number of boats arriving in Australia, the Commonwealth Government introduced a process by which asylum seekers on board unauthorised vessels would be intercepted and transferred to offshore processing centres. One of those offshore processing centres (i.e. detention centres) was located on Manus Island. A Memorandum of Understanding was signed between Papua New Guinea and Australia on 11 October 2011 which established the detention centre for the purposes of assessing people's claims. In addition, the Government also announced there would be a processing centre based in Nauru. This offshore processing arrangement was part of what was known as the 'Pacific Solution'.

Although it is officially known as the Manus Regional Processing Centre, it is more commonly referred to as the 'Manus Island Detention Centre'.

Between 2001 and September 2003, around 1544 asylum seekers were accommodated on Nauru and Manus Island. By September 2003, there were none remaining on Manus Island, with Nauru becoming the preferred offshore processing centre. In February 2008, the Australian Government (under instruction from then Prime Minister Kevin Rudd) abandoned the 'Pacific Solution'.



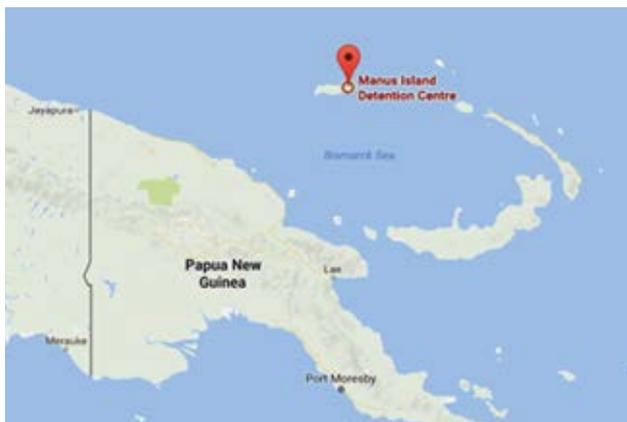
**Source 1** The Manus Island Detention Centre became the focus of a class action commenced in Victoria in 2014 on behalf of a number of asylum seekers held at the centre.

## Reopening of Manus Island

In 2012, the Commonwealth Government (then led by Prime Minister Julia Gillard) reopened the Manus Island Detention Centre to deal with an increase in the number of asylum seekers coming into Australia.

Amendments to the *Migration Act* were made to allow for offshore processing in both Nauru and Manus Island in 2012.

The first asylum seekers arrived at the Manus Island Detention Centre in November 2012. The centre was operated by a private security services company called G4S, with welfare services to be provided by the Salvation Army.



**Source 2** Manus Island is part of Papua New Guinea and lies to its north. It is the largest island in Papua New Guinea.

YEAR	NUMBER OF BOATS	NUMBER OF PASSENGERS (EXCLUDING CREW)
2005	4	11
2006	6	60
2007	5	148
2008	7	161
2009	60	2726
2010	134	6555
2011	69	4565
2012	278	17204
2013	300	20587

**Source 3** Boat arrivals in Australia between 2005 and 2013



Source 4 An aerial view of the Manus Island Detention Centre (including a photo of the living conditions)

In 2013, the Commonwealth Government (then led by Kevin Rudd) announced a policy which outlined plans to expand the Manus Regional Detention Centre, so that it could house 3 000 people as opposed to its original capacity of 600. At that stage, around 145 people were in detention at the Centre. This was despite a report by the United Nations High Commission for Refugees into the conditions of the Centre, which it noted were harsh and did not meet required international protection standards.



Source 5 The UN criticised the living conditions for asylum seekers at the Manus Island Detention Centre.

## Background to the case

Significant problems have occurred at the Manus Island Detention Centre, and it came under domestic and international criticism for the alleged treatment of asylum seekers. In particular:

- detainee protests took place in early 2014. More than 60 asylum seekers were injured, and on 17 February 2014, a 23-year-old Iranian asylum seeker, Reza Barati, was murdered as a result of serious head trauma. Two detention workers, a security guard and a Salvation Army worker, were arrested and sentenced to 10 years' jail for his murder
- on 24 August 2014, a 24-year-old Iranian asylum seeker, Hamid Kehazaei, died at the centre after he became critically ill from a leg infection which could not be treated at the centre. He was not flown off the island until 3 days later, and was declared brain dead in a Brisbane hospital on 2 September 2014. An inquest into his death commenced in November 2016.

## The claim

On 19 December 2014, a **writ** was filed in the Supreme Court of Victoria in Melbourne by Majid Karami Kamasae against the Commonwealth of Australia, G4S Australia Pty Ltd and Broadspectrum (Australia) Pty Ltd (formerly known as Transfield (Australia) Pty Ltd).

According to a **statement of claim** dated 22 April 2015 (amended several times, including an amended claim filed on 7 April 2017), Kamasae was born on 31 December 1981 in Tehran, Iran and, after entering Australia as an unauthorised arrival on or about 14 August 2013, was transferred to Manus Island on about 4 September 2013 and was detained there for about 11 months.

The proceeding in the Supreme Court of Victoria was a representative proceeding (also known as a class action). Kamasae issued the proceeding on his own behalf and on behalf of all persons who met the criteria set out in the extract below.



**Source 6** Hamid Kehazaei died after he became critically ill at the Manus Island Detention Centre.

### writ

usually the first document filed by the plaintiff to start a civil proceeding in court, which explains the action being taken against the defendant and the place and mode of trial

### statement of claim

a document filed by the plaintiff in court which sets out the nature of the claim and the remedies sought

## EXTRACT

### Fourth Amended Statement of Claim Negligence group members and false imprisonment group members

- 5 The Plaintiff brings this proceeding on his own behalf and on behalf of all persons who at any time during the period 21 November 2012 until 19 December 2014 (the **Negligence Claim Period**):
- (a) were detained by or on behalf of the Commonwealth pursuant to the *Migration Act*; and
  - (b) as detainees, were taken by officers of, or on behalf of, the Commonwealth from Australia to PNG; and
  - (c) were detained at the detention facility known to the parties as the 'Manus Island Regional Processing Centre' (the **Centre**) on Los Negros Island in Manus Island Province in PNG; and
  - (d) suffered personal injury (including but not limited to psychological or psychiatric injury) as a result of the conduct of the Commonwealth, G4S and/or Transfield, described in this Statement of Claim;
- (together and severally **Negligence Group Members**)
- 6 The Plaintiff also brings this proceeding on his own behalf and on behalf of all persons who at any time during the period 21 November 2012 until 12 May 2016 (the **False Imprisonment Claim Period**) were confined at the Centre by or on behalf of:
- (a) the Commonwealth;
  - (b) Transfield; and/or
  - (c) G4S
- (together and severally **False Imprisonment Group Members**)

Source: Fourth Amended Statement of Claim dated 7 April 2017, Slater & Gordon Lawyers Website

The plaintiff claimed that G4S and Transfield each carried on businesses of providing security services to the Commonwealth at detention centres or immigration detention facilities. The plaintiff claimed **negligence** and false imprisonment against each of the Commonwealth, G4S and Transfield. He alleged, in relation to the negligence claim, among other things, that:

### negligence

a type of civil law in which a person who is owed a duty of care claims that the duty was breached, and the person has suffered loss and damage

### standard of care

the degree of caution required by a person who owes a duty of care to another

### duty of care

in relation to negligence, the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

- each of the defendants owed the plaintiff and the detainees at the centre a duty to take reasonable care to avoid foreseeable harm to them
- the **standard of care** that was provided to the detainees was well below that which was required. The plaintiff alleged that the provision of food and water, accommodation, healthcare services and security services in particular was well below the standard required. For example, the plaintiff alleged that the detainees at the centre had limited access to fruit, at times were provided with food contaminated by worms, maggots, flies, human hair, teeth or sweat, were accommodated in areas that smelt of garbage, sewerage, body odour or medical waste, and that supplies such as painkilling medication were often not available

- the **duty of care** owed by each of the defendants was breached
- injuries were suffered by the plaintiff and the group members as a result of the failure to provide adequate food and water, shelter and accommodation, medical treatment and health care and/or security services. These included physical and psychological injuries.

The plaintiff also alleged that the group members were falsely imprisoned by the defendants during 21 November 2012 until 12 May 2016.

The plaintiff sought damages. As against the Commonwealth and G4S, the plaintiff also sought aggravated damages and exemplary damages.



Source 7 Slater & Gordon Lawyers acted for the plaintiff.

## Dispute resolution bodies involved in the case

The class action was issued in the Supreme Court of Victoria. This is the only court in which the claim could have been issued in Victoria, because it is a class action.

The matter was listed for trial, due to commence on 1 May 2017, and was expected to be one of the largest trials concerning immigration detention in Australia. However, after some delays in the start date, the Supreme Court was informed on 14 June 2017 during a short hearing that the parties had agreed to a settlement of the matter, and that there was no need for a trial. Justice McDonald vacated the trial date (that is, the trial was abandoned). The defendants, as part of the settlement, have denied any liability (that is, they are not admitting the allegations, by agreeing to settle the claim). Immigration Minister Peter Dutton said that 'An anticipated six month legal battle for this case would have cost tens of millions of dollars in legal fees, along with an unknown outcome'. He went on to say that 'In such circumstances a settlement was considered a prudent outcome for Australian taxpayers'.

Had the trial gone ahead, it would have been one of the largest concerning immigration detention. According to Slater and Gordon, there were over 200 000 discovered documents, 17 reports from experts, and 104 witness outlines (documents which provided an outline of the evidence of each witness). The trial was expected to last up to 6 months.

## Methods of dispute resolution and their appropriateness

The parties attended mediation before an associate justice of the Supreme Court during the course of the proceeding; however, the matter did not settle until just before trial was to commence, in June 2017. Mediation can be effective in resolving complex and large claims, including class actions. There have

been a number of cases where class actions have been resolved by the parties outside of trial, including the class action relating to Great Southern. In several instances class actions have been settled by the parties after the trial. They include class actions over the Great Southern investment scheme and the Black Saturday bushfires.

As this claim was commenced as a class action, the Supreme Court was the most appropriate Victorian court to hear the dispute and make a binding decision as to liability. Ultimately, however, the parties themselves reached an agreement as to settlement, without the need for the Court to make a binding decision.

Arbitration was not an appropriate method of dispute resolution for this claim, given it is a class action between parties. The parties also did not agree to arbitrate the dispute.

## Remedies awarded and their appropriateness

The remedy sought by the plaintiff was damages for loss and injury suffered by the group members. On 14 June 2017 it was announced that the Commonwealth had agreed to pay \$70 million in compensation plus costs, which some have estimated to be in the vicinity of \$20 million. The settlement was approved by the Supreme Court of Victoria on 6 September 2017. This is because the dispute was a class action, and under the *Supreme Court Act 1986* (Vic), the Supreme Court must approve any settlement of class actions, including the way the money will be distributed among the group members.

The purpose of damages is to return the plaintiff and the group members back to the position they were in before the loss occurred. Whether the damages, if approved by the Court, can achieve its purpose in this case will in part depend on the nature and type of harm suffered by each of the asylum seekers. Given it is possible that some of the detainees have suffered mental harm and long-term injuries, damages may never be able to return them to the position they were in before the harm occurred.

The effectiveness of damages may also depend on how long it will take for any damages amount to be received by the group members. This will depend on when there is a final distribution of the settlement amount.

## Possible avenues of appeal

As this proceeding settled without the need for trial, there will be no need for any appeal. However, if the case did go to trial, any appeal would have been heard by the Court of Appeal, but leave would have been required for an appeal to have been heard.



Source 8 The appeal route for this case

Any appeals from the Court of Appeal would have been heard by the High Court of Australia, if it had granted leave to appeal.

## The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – i.e. **fairness**, **equality** and **access** – were achieved in the case of the Manus Island Detention Centre class action is provided below.

### Fairness

The concept of fairness suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and

#### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

#### equality

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

#### access

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

to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

In this case:

- The **directions** and **orders** given by the Supreme Court would have allowed each party an opportunity to present their case, and rebut the other side's case. In this case it appears that there was a substantial amount of evidence and documents obtained and exchanged by the parties, thus enabling the parties to know the case that was put against them.
- Pre-trial procedures such as **mediation** were ordered, which would have allowed the parties an opportunity to resolve the case before trial.
- The parties were given an **opportunity to settle without the need for a trial**. In this case, the trial was delayed at least twice, possibly to allow the parties an opportunity to engage in discussions about settlement without the need to go to trial.
- There was a timely resolution of the case, having regard to the complexity and size of the dispute. The claim was issued in December 2014. There has been some delay in the matter going to trial; however this may be because of the **size and complexity** of the case, the number of group members, the number of defendants, and the issues that would have to have been resolved by the parties.



Source 9 The Manus Island Detention Centre

### directions

instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

### orders

a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

## Equality

The concept of equality suggests that all people should be equal before the law, regardless of who they are. Every person in society should also have the same opportunity to present their case without advantage or disadvantage. For equality to be achieved, the civil justice system relies on both parties being treated in the same way.

In this case:

- The plaintiff's statement of claim elected **trial by judge and jury** – This means that a jury, if the case went to trial, would have made a determination as to liability (but not damages).
- The jury would have been required to be **impartial, unbiased and objective**, and make a determination based on facts and not on any pre-conceived notions or bias – It would have been important that jury members had no pre-conceived views about the rights of refugees, the unauthorised arrival of asylum seekers, and the use of offshore centres to process them. There have been significant conflicting attitudes and views in Australia about the rights of refugees and Australia's policies towards the increasing number of people seeking asylum here. Given those conflicting attitudes, it would have been particularly important to ensure that the jury members brought an objective mind to the task.
- The judge, in overseeing the management of the case and pre-trial procedures, would have ensured equality by acting **impartially and without bias**.
- The plaintiff had **legal representation**, as did each of the defendants – The availability of legal representation to both parties would have ensured that they equally had the ability to present their case. One party being unrepresented can result in significant inequality.

### Study tip

The points provided are not the only ones you can make about fairness, equality and access. Can you think beyond the points provided about how these principles were achieved in this case?

## Access

The concept of access suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the civil

justice system relies on defendants having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid can have legal representation at no charge. This is essential for parties attempting to navigate through complex legal processes.

In a civil trial, there are strict processes for the sharing of evidence between the parties, especially the key documents that will be used as evidence to the trial. This helps legal counsel on both sides prepare for trial.

In this case:

- It is likely that the use of **mediation** would have increased access to justice. It provided the parties with an alternative method of resolving the dispute outside trial.
- **Class actions** are seen by many to be an effective way of accessing justice – People who become a member of the ‘class’ get access to the courts and to a possible remedy when they might otherwise not be able to. This is particularly so in this case, where the group members consist of people who are offshore, are likely to have some difficulties in understanding English or court processes, and are vulnerable people who are unlikely to have immediate access to lawyers and funds to pay the costs.
- The achievement of a **settlement** in this case is likely to result in a payment to many group members – They would otherwise not have been able to achieve a remedy had they initiated the claim themselves.
- In addition, in this case the Supreme Court of Victoria had intended to **broadcast the trial** via its website, thus allowing access to the progress of the trial online – This would have made the courtroom and the procedures of the Court much more accessible to people, particularly those who were not able to attend the trial in person.

## 14.3

## CHECK YOUR LEARNING

### Define and explain

1 Define the following terms:

- class action
- refugee
- offshore processing
- the Pacific Solution.

2 What is the main international law and the main Australian law that deals with Australia’s powers and obligations in relation to refugees?

3 What were some of the issues that were faced at the Manus Island Detention Centre?

4 What was the nature of the claim made in the class action, and who were the defendants?

5 Describe the damages that the plaintiff was seeking.

### Synthesise and apply

6 Create a timeline of events that are relevant to the class action.

7 If the matter had not settled, comment on how the Supreme Court of Victoria could have upheld the principles of justice during trial.

### Analyse and evaluate

8 Discuss the extent to which the principle of fairness was upheld in this case.

9 ‘Class actions are important for claims like this – otherwise, detainees have no other access to justice.’ Discuss this statement as a class.

10 After the settlement, Member of Parliament Tony Abbott was reported to have said that ‘We’ve got a judiciary that takes the side of the so-called victim rather than the side of common sense’. Conduct a class debate about whether you agree with this statement by Mr Abbott. In your debate, address the principle of equality, how an outcome was reached in this case, and the role of the court and the judges in this case.



### Check your **obook** **assess** for these additional resources and more:

» **Student book questions**

14.3 Check your learning

» **Video tutorial**

Overview of *Kamasae v Commonwealth*

» **Weblink**

The 1951 Refugee Convention

» **Weblink**

*Kamasae v Commonwealth* judgment

## RECENT CIVIL CASE 4 – THE BIRD DETERRENT IN BAIRNSDALE

*Courtney & Jackson v Howell* [2016] VMC011 (26 July 2016)

### Introduction

**Question:** What does the use of an acoustic bird deterrent result in?

**Answer:** A bitter dispute between two neighbours that lasts for four years and ends in a five-day hearing in the Bairnsdale Magistrates' Court.

In 2012, a couple living in Eagle Point, a small town near Bairnsdale in Victoria, began using an electronic device to scare away birds that were making a mess on their property. The device, known as an acoustic bird deterrent (ABD), produced bird distress cries and predator calls to scare off unwanted birds.

Shortly after the device was installed, the neighbours began complaining about the level of noise and claimed the device was a **nuisance**.

The case is a good example of how simple neighbourly disputes can escalate and require the intervention of the civil justice system. It also shows how the court system can help resolve disputes that the parties cannot resolve themselves.

In this topic we will explore each of the following aspects of *Courtney & Jackson v Howell* in detail, including:

- an overview of the claim and the central facts of the case
- dispute resolution bodies that were involved in the case
- methods of dispute resolution and their appropriateness
- remedies awarded and their appropriateness
- possible avenues of appeal
- the extent to which the principles of justice were achieved.

### Overview of the claim and central facts of the case



**Source 1** The parties involved in *Courtney & Jackson v Howell* lived in an idyllic setting near the city of Bairnsdale in East Gippsland, Victoria.

The plaintiffs, Thomas Joseph Courtney (76) and Megan Jackson (67), live on a semi-rural 5-acre property at Eagle Point near Bairnsdale, which they purchased in 1993 and had lived in since 1996. Their property is tranquil and idyllic, situated on an area which overlooks the Mitchell River and Lake King. The area is well known for its bushland and tourism.

The defendants, Peter Maxwell (72) and Sally Anne Howell, lived on a property next door to the plaintiffs. They purchased the property in 1996 and, after repairing and renovating the house, moved in permanently in 2000.

Initially the plaintiffs and defendants got along well as neighbours, but over time minor disputes broke out between them.

In January 2012, the defendants installed an acoustic bird device (ABD) on their property. It cost \$1990 and its purpose was to combine actual bird distress cries and predator calls to ward off pest birds. The device contained eight different bird sounds, and included a control unit with four speakers which were mounted onto the defendants' machinery shed. The ABD was purchased to scare off swallows on the Howell's property that were defecating on the house roof and patio area. The birds were also flying under the verandas, therefore requiring constant cleaning. They had tried many other methods before this to scare off the swallows, but had all failed.

The bird repeller could be programmed and controlled by the defendants to change the number of sounds, the volume and the intervals between sounds.

## The claim

During 2012, the plaintiffs became aware of noise coming from the defendants' property. Jackson complained to the East Gippsland Shire Council in December 2012. After the complaint, the operating times of the device were re-programmed. Further complaints were made, and in February 2013 the volume of the ABD was reduced.

The plaintiffs issued the claim in the Magistrates' Court of Victoria on 5 September 2014. Their claim was a nuisance claim, as they alleged that the noise from the defendants' device constituted an interference. Nuisance involves an infringement or interference with a person's right to enjoy or use their property. Examples of interferences can include noise, vibrations, dust, smells, smoke and pollution.

A nuisance claim involves the court balancing the rights of one owner to do what he or she likes on their land, with the rights of a neighbour not to have his or her use or enjoyment of the property interfered with.

The plaintiffs claimed that the ABD had a significant effect on them. Ms Jackson claimed that her multiple sclerosis, which she was diagnosed with in 1993, had gotten worse as a result of the noise. She also claimed that she had become increasingly frustrated, annoyed and angry. She also argued that her social life took place away from her property and that she rarely invited people to her home.

Mr Courtney alleged that he was becoming increasingly angry and irritated about the issue, which caused him to spend more time in his office rather than his house, even though his house used to be his favourite spot on the property.

The plaintiffs sought damages for **loss of amenity** and for injuries in the form of an anxiety state, depression, distress, insomnia and an exacerbation of Ms Jackson's multiple sclerosis symptoms. They also sought **injunctive** relief (i.e. an order to restrain the defendants from continuing the nuisance).



**Source 2** An electric bird repeller was purchased by the defendants to protect their property from unwanted swallows.



**Source 3** A nuisance claim can involve different types of interferences with the enjoyment of a person's land, such as pollution.

### **loss of amenity**

reduction in the use or pleasure a person is entitled to have from using public or private property (e.g. through the actions of others)

### **injunction**

a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

# Dispute resolution bodies involved in the case

The dispute between neighbours resulted in a long hearing in the Magistrates' Court and also involved the Victorian Ombudsman.

## Magistrates' Court

The dispute resolution body used in this instance was the Magistrates' Court of Victoria. The Magistrates' Court's civil jurisdiction is limited to \$100 000, therefore the plaintiffs, if they were awarded damages, would have received no more than this amount.

The Magistrates' Court is an appropriate dispute resolution body for a claim such as this. It has monetary jurisdiction to hear the claim, it can be used to resolve neighbourhood disputes, and it has a court in Bairnsdale at which the hearing was held.



**Source 4** Bairnsdale Magistrates' Court heard the dispute over 5 days.

The Magistrates' Court ultimately found that the ABD was not a nuisance. Magistrate Garnett reached the conclusion after engaging in a balancing exercise between the rights of the Howells to protect their property, and the rights of the plaintiffs not to have their use and enjoyment of the property unduly interfered with. He found that the defendants had made ongoing adjustments to appease the plaintiffs. After considering the evidence of experts about the sounds, and attending two viewings of the property, he found that the noise emitted from the ABD was appropriate, and that he could not hear the ABD when inside the plaintiffs' house.

Magistrate Garnett also was not satisfied that the plaintiffs had suffered the type of loss alleged. The claim was therefore dismissed. An extract of the judgment is provided below.

### EXTRACT

#### *Courtney & Jackson v Howell* [2016] VMC011 (26 July 2016)

In this case, Magistrate Garnett commented on the use of the ABD:

**[105]** I found Mr Howell to be a credible and honest witness. I accept his evidence that he tried various methods to deter the swallows, which were unsuccessful, prior to investigating and researching other alternatives and then ultimately installing the ABD, which has had its desired result. I do not accept the plaintiffs submission that the Howells were high handed and arrogant and had an attitude that they would 'protect their property at any cost'. It is understandable that the Howells were prepared to go to extraordinary lengths and incur significant cost in installing the ABD as they have a beautiful property consisting of what appeared to be highly maintained gardens, manicured lawns and a truly magnificent timber house containing a glassed roof atrium. The evidence also disclosed that they modified and adjusted the operation times and settings of the ABD when they became aware of the complaints by the plaintiffs and offered to mediate prior to the issue of proceedings.

### Study tip

If you would like to know more about nuisance, there is more information about the area of law in Chapter 8. This will help you add to the responses you provide in your assessment task about recent nuisance cases such as this one.

### ombudsman

an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

## Victorian Ombudsman

The other dispute resolution body that was involved in this case, though indirectly, was the Victorian **Ombudsman**. The Victorian Ombudsman, as you learnt in Chapter 13, hears complaints made by people about decisions made by government authorities. In this case, the Victorian Ombudsman was involved in considering a complaint made by the plaintiffs against the East Gippsland Shire Council.

In April 2013, the East Gippsland Shire Council, after visiting the properties, concluded that the ABD was being operated within the proper regulations. Not satisfied with the Council's response, Mr Courtney lodged a complaint about the Council on 5 May 2013 with the Victorian Ombudsman. The Ombudsman considered that the Council's investigation was appropriate. The plaintiffs sought a review of the Ombudsman's decision, which was refused (i.e. the plaintiffs were not successful).

## Methods of dispute resolution and their appropriateness

In April 2013, after the East Gippsland Shire Council got involved, the Council suggested that if there were ongoing issues between the parties, that they should attend a formal **mediation**. This was after the Council concluded that the ABD was being operated within the proper regulations.

In January 2014, after a letter of demand was sent by the plaintiffs' lawyers to the defendants alleging nuisance, and requesting that the nuisance cease, the defendants' lawyers responded. The defendants invited the plaintiffs to participate in a mediation. That mediation never occurred. It is not clear whether mediation would have resolved this dispute, particularly as the Magistrates' Court commented on the animosity between the parties.

It is possible that mediation may have been appropriate in this case, despite the animosity, given the great deal of anxiety and stress likely to have been caused to the parties in having to attend a five-day hearing, and the significant legal costs that would have been incurred. If mediation had taken place and was successful, any costs, stress and anxiety associated with the hearing would have been avoided. An extract of the case is provided below.

### EXTRACT

#### *Courtney & Jackson v Howell [2016] VMC011 (26 July 2016)*

In this case, Magistrate Garnett commented on the animosity between the parties:

**[104]** At the outset it is worth noting that the pre-hearing procedures were hard fought, protracted and involved numerous applications to the court for determination. It was obvious to the court prior to evidence being given that a great deal of animosity exists between the parties which resulted in them incurring significant legal costs and undoubtedly causing a great deal of anxiety and stress to them. The court heard evidence over 5 days and at the conclusion of the hearing was presented with very detailed (and helpful) written submissions comprising 87 pages.

## Remedies awarded and their appropriateness

In this case the plaintiffs sought two types of remedies: injunction and **damages**. The injunction sought was a restrictive and final injunction; that is, an injunction to stop or force the defendants from using the ABD. Although the injunction would have stopped the noise going forward, the injunction would not have compensated the plaintiffs for any loss they had suffered before the injunction was granted.

The damages sought were for loss of amenity, distress, insomnia, anxiety and an exacerbation (worsening) of multiple sclerosis symptoms. If the Magistrate had accepted the claim, then the damages combined with the injunction may have put the plaintiffs back to the position they were in before the wrong occurred for some types of loss, but not for others. For example, it is unlikely that a payment of money will bring back any lost sleep or any distress that the plaintiffs had suffered.

#### **mediation**

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

#### **damages**

the usual remedy in a civil claim, being an amount of money the court (or tribunal) orders one party to pay to another

# Possible avenues of appeal

Any appeals from the Magistrates' Court are limited to appeals on a point of law, and would be heard by the Supreme Court (Trial Division). There is no evidence that the plaintiffs, who would be the party to appeal, have appealed the decision.

Any further appeal from the Supreme Court (Trial Division) would be heard by the Court of Appeal, which would need to grant leave to appeal. The final avenue of appeal would be from the Court of Appeal to the High Court, but again leave would need to be sought and granted.



**Source 5** Possible avenues of appeal if the plaintiffs appealed the decision of the Magistrates' Court on a point of law

## fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

## equality

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

## access

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

## Study tip

The points provided are not the only ones you can make about fairness, equality and access. Can you think beyond the points provided about how these principles were achieved in this case?

# The extent to which the principles of justice were achieved

An assessment of the extent to which the principles of justice – i.e. **fairness**, **equality** and **access** – were achieved in *Courtney & Jackson v Howell* is provided below. In each case, this assessment is made on the evidence available.

## Fairness

The concept of fairness suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings.

In this case:

- The parties were given the **opportunity to present their case** – Both the plaintiffs and the defendants presented substantial evidence to the Magistrate for him to be able to decide the case. Both called experts to give evidence about the acoustics of the ABD, both the plaintiffs and one of the defendants gave evidence, and the plaintiffs called evidence from medical experts about the loss suffered.
- The laws were **properly applied** – The Magistrate considered a significant number of authorities in relation to private nuisance, including one South Australian case involving the use of an audible bird scaring device.
- There was some **delay** in hearing the case – delays can result in unfairness.
- The Magistrate gave **substantial reasons for his decision** – These reasons which can assist parties in understanding why the claim was successful or (in this case) was dismissed.

## Equality

The concept of equality suggests that all people should be equal before the law regardless of who they are. For equality to be achieved, every person in society who is involved in a civil claim should have the same opportunity to present their case without advantage or disadvantage.

In this case:

- Both parties had **legal representation** – The availability of legal representation will aim to ensure equality in the parties being able to present their cases.
- There was **no jury** – There was no risk of any bias arising from jury members.

- The parties did not seem to suffer from any particular **vulnerability** that would make them subject to possible discrimination.

### Study tip

A practice assessment task for Unit 2 – Area of Study 2 can be found on the Unit 2 Assessment tasks topic on page 535–536.

## Access

The concept of access suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid can have legal representation at no charge. This is essential for parties attempting to navigate through complex legal processes.

In a civil trial, there are strict processes for the sharing of evidence between the parties, especially the key documents that will be used as evidence to the trial. This helps legal **counsel** on both sides prepare for trial.

In this case:

- It is likely that **the use of mediation** would have increased access to justice, as it provided the parties with an alternative method of resolving the dispute outside trial. However, mediation was not used to try and resolve this case.
- All parties were able to **access the courts**. Although significant legal costs were likely to have been incurred, this did not deter the parties from proceeding to hearing. The plaintiffs were ultimately ordered to pay the defendants' costs. A risk of having to pay another party's costs can often deter parties from using the court system to resolving their disputes.
- The hearing was held at Bairnsdale Magistrates' Court, in the town where the parties resided. This would have assisted both the parties in attending the 5-day hearing and, in particular, giving evidence.

### counsel

a lawyer appearing in court to represent a party

## 14.4

## CHECK YOUR LEARNING

### Define and explain

- 1 What was the relationship between the two parties in this dispute?
- 2 What did the defendants do that the plaintiffs complained about?
- 3 What type of claim was this? Briefly describe what the plaintiffs were required to prove to be successful.
- 4 What type of loss did the plaintiffs allege they suffered?
- 5 How was the case decided? What was the final outcome?

### Synthesise and apply

- 6 Create a timeline of key events for this dispute.
- 7 Could the Victorian Ombudsman have heard and determined this case? Why or why not?

### Analyse and evaluate

- 8 Do you think that mediation should have been forced on the parties when the claim was issued? In your answer, provide two advantages and two disadvantages of mediation.
- 9 Of the two types of remedies sought, which one would have been the most effective? Give reasons.
- 10 Discuss the extent to which delays in this case would have resulted in unfairness.



### Check your **obook** assess for these additional resources and more:

» **Student book questions**

14.4 Check your learning

» **Video tutorial**

Overview of *Courtney & Jackson v Howell*

» **Weblink**

*Courtney & Jackson v Howell* judgement

» **Weblink**

Nuisance laws

# RECENT CIVIL CASE 5 – THE DISAPPEARANCE OF MALAYSIA AIRLINES FLIGHT 370

## Malaysia Airlines civil claim

### Introduction

Malaysia Airlines is the national carrier of Malaysia. It has operated since 1947, offering flights each year to, from and around Malaysia. Its headquarters are at Kuala Lumpur International Airport and it employs more than 14 000 people.



**Source 1** This Malaysia Airlines Boeing 777-200ER aircraft – shown here taking off in 2011 – is the exact plane that disappeared on 8 March 2014 while travelling from Kuala Lumpur to Beijing as Flight MH370.

### Did you know?

Given the mysterious disappearance of the plane, there have been numerous conspiracy theories about how and why it vanished. None of these have been proved. There have also been unsubstantiated and false allegations about the conduct of the plane's pilots.

### appeal

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

**Malaysia Airlines Flight 370** (often referred to by flight number MH370) was a scheduled international passenger flight that disappeared on 8 March 2014 while flying from Kuala Lumpur International Airport in Malaysia to Beijing Capital International Airport in China. The aircraft was carrying 12 Malaysian crew members and 227 passengers from 15 nations.

The disappearance of MH370 triggered a frenzy of international media attention and sparked a global outpouring of grief for the families of victims. It also resulted in the longest, largest and most expensive search and recovery efforts in history – involving 26 countries and costing somewhere between \$180 million and \$215 million.

Despite these efforts, the fate of the passengers on board MH370 and the location of the plane remains a mystery. Questions are still being asked of civil aviation and international safety authorities and

several civil cases are currently being heard around the world. This includes a civil case initiated in the Supreme Court of Melbourne by one of the victims.

In this topic we will explore each of the following aspects of the civil case involving the disappearance of MH370 in detail, including:

- an overview of the claim and the central facts of the case
- dispute resolution bodies that may be involved
- methods of dispute resolution and their appropriateness
- remedies that could be awarded and their appropriateness
- possible avenues of **appeal**
- the extent to which the principles of justice could be achieved.

### Claim and central facts of the case

On 8 March 2014, Malaysia Airlines Flight 370 departed Kuala Lumpur International Airport at 12.42 am local time, a few minutes late. The aircraft, a Boeing 777-200ER (see Source 1), was expected to land at Beijing Capital International Airport at 6.30 am the same day based on an estimated flight time of approximately 5 hours and 49 minutes.

The pilots on the flight were Captain Zahari Ahmed Shah (in command) and First Officer Fariq Abdul Hamid (the co-pilot). On takeoff, MH370 was carrying a total of 239 people – 227 passengers and 12 crew members. Of the 227 passengers on board, the vast majority – 154 people – were Chinese citizens.

Another 38 passengers were Malaysian citizens. The remaining 36 passengers were from 13 different countries and including six Australian citizens.

Contact was maintained between the flight crew and Subang air traffic control between take-off and 1.19 am, at which time Captain Shah's final words to air traffic control were: 'Good night. Malaysian three seven zero.'

No further voice contact was made between air traffic control and the plane. All attempts to contact the plane after this time went unanswered.

A signal that is normally emitted from the aircraft – which can be identified through a different radar system – was also not functioning after 1.21 am, suggesting the aircraft's transponder was not working.

At around 1.39 am, the whereabouts of the plane was queried on the ground. After that time, various air traffic control centres attempted to establish its location. The flight never landed in Beijing, and to this day its whereabouts and reasons for disappearance are unknown.

The flight disappeared from Malaysian military radar at approximately 2.22 am. The military radar showed the plane off route, having made a right turn, but then almost immediately a constant left turn at around 1.21 am. About 20 minutes before it disappeared from the military radar, it was heading towards Pulau Perak, a small island over the Straits of Malacca.

### Study tip

You can find more details about negligence in Chapter 8. It will help you to explain the facts of this case if you refer back to the elements of negligence.



Source 2 Malaysia Airlines Flight MH370 departed Kuala Lumpur at 12.42 am and was expected to arrive in Beijing at 6.30am – an estimated flight time of approximately 5 hours and 49 minutes. After contact with air traffic control was lost, a military radar tracked the plane.

At 7.24 am, Malaysia Airlines issued a media statement announcing that contact had been lost, and that a search and rescue operation had commenced (see extract below).

## EXTRACT

### Media Statement released by Malaysia Airlines on Saturday 8 March 2014 at 7.24 am

Selangor, 8 March 2014: Malaysia Airlines confirms that flight MH370 has lost contact with Subang Air Traffic Control at 2.40 am, today (8 March 2014).

Flight MH370, operated on the B777-200 aircraft, departed Kuala Lumpur at 12.41 am on 8 March 2014. MH370 was expected to land in Beijing at 6.30 am the same day. The flight was carrying a total number of 227 passengers (including 2 infants), 12 crew members.

Malaysia Airlines is currently working with the authorities who have activated their Search and Rescue team to locate the aircraft.

The airline will provide regular updates on the situation.

### Did you know?

Australasian Legal Information Institute (AustLII) is an excellent resource to find recent judgments in Victoria and in other state and federal courts. Identify the jurisdiction that you would like to find cases in, select the court, and then select the year. You can add to the information you find in the judgment from other resources such as articles, but final judgments should be your primary way of finding out about the claims, the facts and the decision of the court.



**Source 3** Media interest and public speculation regarding the fate of those on board MH370 was intense in days and weeks following the disappearance.

The search for the aircraft, passengers and crew continued for over three years, and involved an initial extensive search involving Australia. The search focused on various parts of the world, and at times authorities shifted their focus to different locations based on information they had received.



**Source 4** Debris washed up on the beach at Reunion Island, which was later confirmed to be from flight MH370

On 29 July 2015, debris was found on the coast of Reunion Island in the western Indian Ocean. A week after its discovery, the Malaysian Prime Minister announced that the debris was from flight MH370.

On 22 July 2016, *New York* magazine reported that the pilot was believed to have flown a suicide route on his home flight simulator, and that it closely matched the final flight of MH370. It suggested that Malaysian authorities 'suppressed at least one key piece of incriminating information'. They claimed that this was not surprising, since national safety boards have a tendency to 'refuse to believe that their pilots could have intentionally crashed an aircraft full of passengers'. The article cited similar denials following EgyptAir 990 and SilkAir 185 crashes in 1999 and 1997. It added, 'Australian and

U.S. officials involved in the MH370 investigation have long been more suspicious of Zaharie than their Malaysian counterparts’.

In January 2017, nearly three years after the plane disappeared, it was announced that the search efforts had been suspended. It remains unclear what happened to the plane.

## MH370: Search for missing Malaysia Airlines plane suspended

Henry Belot, *ABC*, 17 January 2017

The search for missing Malaysia Airlines flight MH370 has been suspended, with authorities unable to locate the aircraft in the Indian Ocean.

The passenger plane carrying 239 passengers and crew, including six Australians, disappeared on March 8, 2014 while travelling between Kuala Lumpur and Beijing.

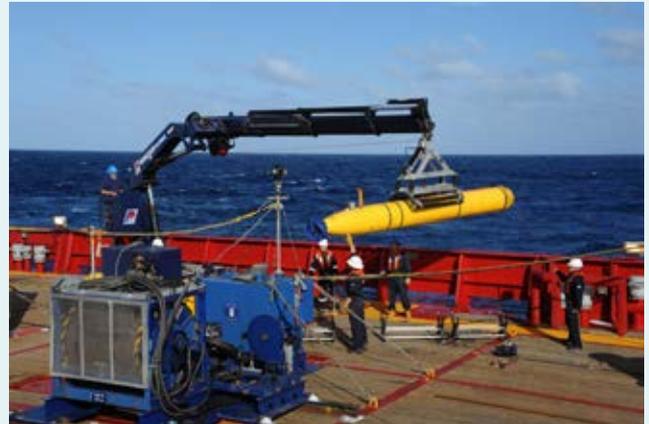
Its disappearance is one of the greatest mysteries in aviation history, with authorities unsuccessfully searching 120,000 square kilometres of the ocean floor.

In a joint statement, the Australian, Malaysian and Chinese governments said the decision to abandon the search was not taken lightly, or without sadness.

‘Despite every effort using the best science available, cutting-edge technology, as well as modelling and advice from highly skilled professionals who are the best in their field, unfortunately, the search has not been able to locate the aircraft,’ the statement said.

‘Whilst combined scientific studies have continued to refine areas of probability, to date no new information has been discovered to determine the specific location of the aircraft.’

In July last year authorities warned the hunt would be suspended if the latest search did not yield any results.



Source 5 Australia was involved and took the lead in the early search for the plane.

IN  
THE  
NEWS

## Claim issued in the Supreme Court

Since the tragic incident, family members of those who were on board the plane have issued a number of claims in Australia and overseas.

In February 2016, it was reported that Yen Li (Jennifer) Chong, the wife of Chong Ling Tan, had issued a **negligence** claim in the Supreme Court of Victoria against Malaysia Airlines.

Mr Chong Lin Tan was a business class passenger in seat 1C on flight MH370. Mrs Chong alleges in the claim that Malaysia Airlines owed the passengers and crew on the flight a **duty of care** in relation to their safety and wellbeing. She alleges that Malaysia Airlines failed to ensure that:

- the flight was safe, monitored and tracked
- reasonable safety precautions were taken
- the crew and employees did not commit any wrongful acts.

According to various news reports published in February 2016, Mrs Chong alleges that Malaysia Airlines failed in a number of ways.

### negligence

a type of civil law in which a person who is owed a duty of care claims that the duty was breached, and the person has suffered loss and damage

### duty of care

an obligation imposed on one person to ensure the safety and wellbeing of another

## Kew widow Jennifer Chong sues Malaysia Airlines over doomed MH370 flight

Mark Russell, *The Age*, 24 February 2016

The Australian widow of a passenger who died on board the missing Malaysia Airlines flight MH370 is suing the airline for compensation.

Jennifer Chong, 48, from Kew, has launched legal action in the Victorian Supreme Court over the death of her husband of 23 years, Chong Ling Tan.

In her writ filed with the court, Mrs Chong said her husband had been seated in business class seat 1C on the doomed March 8, 2014, flight from Kuala Lumpur to Beijing when it disappeared.

Mrs Chong said that in late January 2015, the Malaysian Department of Civil Aviation declared the plane's disappearance had been an accident and there were no survivors.

She said Malaysia Airlines was liable for damages over the crash.

Mrs Chong claimed she and her two sons, aged 19 and 15, had suffered 'nervous shock' over Mr Chong's death.

'Further the defendant (Malaysia Airlines) owed a duty of care to the deceased and other passengers and crew on the flight in relation to their safety and well-being,' the widow said in her writ.

Mrs Chong said the airline was vicariously responsible for the actions of its crew 'who failed to ensure the aircraft safely reached its destination and/or who deliberately altered the course of the aircraft resulting in its loss at sea'.

She said the airline had breached its duty of care to her husband and could not prove his death was not due to their negligence or other wrongful act.

Mrs Chong said the airline was negligent in failing to ensure:

- the flight was safe for her husband and the other passengers.
- reasonable and adequate precautions were taken on the flight.
- the flight was supervised.
- the flight was carried out in a safe and proper manner.
- the flight was monitored and tracked at all times.
- the airline and its crew followed all proper procedures.

She claimed that if the airline had not been so negligent, the plane would not have disappeared.

Mrs Chong, whose home was robbed in February 2015 soon after learning her husband had been presumed dead, is suing the airline for damages which have yet to be quantified.

She said the amount being sought was still being worked out and the total claim for economic loss would be provided to the airline in due course.

## Dispute resolution bodies involved in the case

The dispute resolution body that Mrs Chong is using to resolve the civil dispute she has with Malaysia Airlines is the Supreme Court of Victoria. The Supreme Court is the highest Victorian court in which a civil claim can be issued. Although Mrs Chong has not specified the amount of damages she seeks, the Supreme Court has **unlimited jurisdiction**, which means that it is able to hear the claim.

Although the County Court also has jurisdiction to hear this type of claim, the Supreme Court is likely to be a more appropriate forum, given the complexity of the issues that will need to be decided. The court may need to consider substantial evidence and documents about whether the flight was safe, what precautions were taken on the flight, how the flight was monitored and tracked (which will likely require a consideration of the radars and the systems used by air traffic control), and whether the airline and its crew followed all proper procedures. Many of these issues will be difficult to prove, as there were no survivors who can give evidence about what exactly happened on the flight.

This type of claim is not appropriate for a tribunal such as the Victorian Civil and Administrative Tribunal given its size, complexity and international focus, and it is not a claim that an **ombudsman** or complaints body would have jurisdiction to hear.

## Methods of dispute resolution and their appropriateness

As there was no private contract between Mrs Chong and Malaysia Airlines, **arbitration** is not available to the parties, and therefore is not an appropriate method of dispute resolution.

However, given the Supreme Court's practice of directing the parties to attend **mediation** before trial, it is highly likely that Mrs Chong and Malaysia Airlines will be required to mediate the dispute before it is set down for trial. The Supreme Court can order parties to **conciliate**, but it is more likely to order the parties to attend mediation. Mediation can be beneficial in resolving disputes such as these, as it avoids the time, stress, costs and inconvenience of a civil trial, and it can provide certainty to parties about the outcome.

## Remedies awarded and their appropriateness

Mrs Chong is seeking **damages**, meaning she is seeking an order that Malaysia Airlines pay her a sum of money for the loss she has suffered.

It is reported that Mrs Chong is claiming damages for loss of earnings and **nervous shock**. The loss of earnings claim may be for both past and future loss of earnings and is a type of compensatory damages. **Nervous shock** is a type of harm that is suffered by a plaintiff, and is also compensable through compensatory damages.

Damages can only compensate Mrs Chong for the loss she has suffered, in particular the loss of her husband, though it can be effective in compensating a party for past and future loss of earnings. As for nervous shock, though damages can compensate for such loss, Ms Chong may still experience the psychiatric illness long after she receives any such remedy.

## Possible avenues of appeal

If the claim is heard by the Supreme Court of Victoria, and either party wishes to appeal the decision, then the appeal would be heard in the Court of Appeal. The Court of Appeal will first need to grant 'leave to appeal' to the party wishing to appeal the decision.



**Source 6** The dispute resolution body that Mrs Chong is using to resolve the civil dispute she has with Malaysia Airlines is the Supreme Court of Victoria. The Supreme Court is the highest Victorian court in which a civil claim can be issued.

### **ombudsman**

an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

### **arbitration**

a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

### **mediation**

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

### **conciliation**

a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

### **damages**

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

### **nervous shock**

a type of psychiatric illness which has resulted from the actions of another person

If the Court of Appeal hears and determines the appeal, and either party wishes to appeal that decision, then a special leave application would need to be made in the High Court of Australia. If the High Court grants special leave, then it will hear and determine the appeal.

There are no other avenues of appeal after the High Court.



Source 7 The appeal route for this case.

## The extent to which the principles of justice were achieved

### fairness

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

### equality

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

### access

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

### directions

an instruction given by the court to one or more parties to do a certain thing

### orders

formal directions given by a court to do or not do something

An assessment of the extent to which the principles of justice – i.e. **fairness**, **equality** and **access** – were achieved in the case of MH370 is provided below. At the time of publication, it was not known whether the claim had been heard and determined by the Supreme Court. As such, this assessment is made on the evidence available.

## Fairness

The concept of fairness suggests that the law should be properly applied to all people regardless of who they are. Every person should be given an opportunity to know the case that is being put against them and to present their case. For fairness to be achieved, the civil justice system relies on fair legal processes and fair hearings. In this case, fairness may be upheld if:

- The **directions** and **orders** given by the Supreme Court allow each party an opportunity to present their case, and rebut the other side's case. For example if Mrs Chong has evidence that establishes the extent of her loss, then Malaysia Airlines should have the opportunity to see that evidence. This is likely to be effected by the Court making orders for the exchange of documents and evidence.
- The **Court properly applies the laws of evidence**. The Supreme Court will need to rule on the admissibility of evidence, and will need to apply the relevant legislation and the authorities to determine whether evidence is admissible or not.
- The **rules of procedure** allow the parties to present their case. There are general rules of procedure about which party presents their case first at trial, though the Court does have the power to decide on the rules in each particular case.
- The **evidence is properly considered** and taken into account when determining liability.
- The laws relating to negligence and the awarding of damages are taken into account when determining the outcome.
- There is a **timely resolution of the case**, having regard to the complexity and size of the dispute. The claim was issued in February 2016, and though there is no particular deadline by which the dispute should be resolved, to ensure fairness in the process, there should not be unreasonable delays.

## Equality

The concept of equality suggests that all people should be equal before the law regardless of who they are. For equality to be achieved, every person in society who is involved in a civil claim should have the same opportunity to present their case without advantage or disadvantage. If the trial proceeds by judge alone, then one of the critical features of ensuring that equality is upheld is if the judge acts **impartially and without bias**, and makes a decision based on the facts as opposed to any preconceived or unconscious bias. The judge will also be supported by court personnel whose duty it is to ensure that they act independent of the parties.

The plaintiff has legal representation, and the defendant will certainly be represented, given it is a large international company. The availability of legal representation to both parties will ensure that they equally have the ability to present their case. One party being unrepresented may result in significant inequality.

## Access

The concept of access suggests that everyone covered by the legal system and its laws should have equal access to the agencies and institutions of that system. They should be given every opportunity to understand their legal rights and pursue their legal claims in court. For access to be achieved, the civil justice system relies on defendants having good advice and legal representation. Those who satisfy the tests for assistance imposed by Victoria Legal Aid can have legal representation at no charge. This is essential for parties attempting to navigate through complex legal processes.

In a civil trial, there are strict processes for the sharing of evidence between the parties, especially the key documents that will be used as evidence to the trial. This helps legal counsel on both sides prepare for trial.

In this case:

- It is likely that the use of mediation will increase access to justice, as it provides the parties with an alternative method of resolving the dispute outside trial.
- Costs may be a factor in determining whether access to justice can be achieved. While there is no suggestion that either party cannot afford to pay the costs, both parties are likely to be out of pocket for their costs regardless of whether they are successful.

## 14.5

### CHECK YOUR LEARNING

#### Define and explain

- 1 Briefly describe what happened to flight MH370.
- 2 Yen Li Chong has issued a claim in relation to the disappearance of flight MH370.
  - a Identify the plaintiff and the defendant in this dispute.
  - b What is the claim that the plaintiff is making?
  - c Which dispute resolution body is being used to resolve the dispute?
  - d Identify and describe one possible dispute resolution method that is likely to be used.
  - e Describe the remedy that the plaintiff is seeking.
- 3 What are the claims that are being made in these two cases?
- 4 Which dispute resolution bodies are being used?
- 5 Are the two claims similar to the claim being made by Mrs Chong?
- 6 Identify at least three pieces of evidence that may assist the Supreme Court in resolving Yen Li Chong's dispute. Is that evidence available? Give reasons.
- 7 What is the current status Yen Li Chong's dispute? Has it been resolved, and if so, how was it resolved?

#### Synthesise and apply

- 3 On your own or in pairs, conduct some additional research and identify at least two other civil disputes that have arisen out of the disappearance of flight MH370. Now answer the following questions:

#### Analyse and evaluate

- 6 'Justice can never be achieved in this case, even if there is fairness, equality and access. There is no remedy that can achieve justice'. Discuss this statement.



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

» **Student book questions**

14.5 check your learning

» **Weblink**

The search for MH370 is over

## CHAPTER SUMMARY

**Recent civil case 1 – Rebel with a cause**

- Rebel Wilson is an Australian actress. The defendants are a publisher of Australian magazines.
- In 2015, Bauer Media published a series of articles about Wilson which implied that she had lied about her life, including about her age and real name.
- Wilson issued a claim in defamation, claiming her reputation was ruined as a result of the articles.
- Claims issued in the Supreme Court of Victoria
- Binding decision in court – jury trial
- Damages of over \$4.5m awarded
- Appeal – Court of Appeal and High Court

**Recent civil case 2 – Battle over the Bendigo mosque**

- Permit application to build a mosque
- Application to VCAT to review
- Order to vary council decision – refused
- Appeal – Court of Appeal and High Court

**Recent civil case 3 – Manus Island Detention Centre class action**

- Refugees, offshore processing
- Negligence class action in Supreme Court
- Resolved out of court – payment to group members
- No appeal
- Appeal
- Resolved before trial – no appeal

**Recent civil case 4 – The bird deterrent in Bairnsdale**

- Acoustic bird device
- Nuisance to neighbours
- Magistrates' Court claim (damages, injunction)
- Victorian Ombudsman (separate claim)
- Appeal – Supreme Court and High Court

## REVISION QUESTIONS

- 1 Identify two different dispute resolution bodies that have been used in the four different recent civil cases you have studied in this chapter. For each body, describe the role they needed to undertake in the case. (6 marks)
- 2 Describe the key facts and the claims made in relation to one recent civil case you have studied. (6 marks)
- 3 Describe two methods of dispute resolution that were used, or could have been used. How effective were they in obtaining a resolution? (6 marks)
- 4 Did any of these matters get heard and determined by the High Court of Australia? Explain two reasons why you think this might be so. (4 marks)
- 5 For one of the cases, discuss the extent to which you think that the parties were able to access the methods and bodies used to resolve the civil dispute. (8 marks)
- 6 'Each of these cases shows that nobody wins in a civil dispute, and justice can never be achieved.' Discuss this statement, referring to at least two of the cases in your answer. (10 marks)



Check your obook assess for these additional resources and more:

» Student book questions

Ch 14 Review

» Revision notes

Ch 14

» assess quiz

Ch 14

Test your skills with an auto-correcting multiple-choice quiz

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

### Part One

You are a journalist reporting on one of the civil cases you have studied in this chapter. You have been asked to appear on a prominent TV show addressing the claim, the outcome (if there is one) and your view on whether justice has been achieved in the case.

Prepare a script of what you think are likely to be the questions and your answers. Make sure the script addresses who the questions are coming from (choose a prominent TV show host), what you think their views are likely to be, any challenges they put to you, and your own views on justice.

### Points to address

In particular, your script must address the following:

- 1 The central facts of the case, including the parties.
- 2 The nature of the claim and the remedies sought.
- 3 The dispute resolution bodies and methods used.
- 4 The remedies sought and their appropriateness.
- 5 The outcome of the case (if there is any).
- 6 Your views on the extent to which justice was or could be achieved.

Your teacher may require you to submit the script in a written format, or may require you to play out the script with the assistance of another class member.

(25 marks)

### Part Two

Again, you are a journalist who works for a prominent newspaper. You have been told by your boss that the newspaper will be featuring an editorial in the next few weeks about recent civil cases, and whether justice can be achieved in civil law.

You have been asked to contribute to an editorial by reporting on a recent civil case, but one which is not featured in this chapter. The case must be from the last four years.

You will first need to find an appropriate civil case. Possible sources include:

- the Supreme Court of Victoria class action website
- the class action websites of law firms such as Slater & Gordon and Maurice Blackburn
- judgments from the AustLII website
- High Court case summaries, located on their website
- good newspaper articles
- media releases on the websites of any organisations that are suing or are being sued.

You have been told by your boss that your report needs to focus on all of the following points, but must be prepared in the most succinct way possible, because they have limited space in the editorial to give too much coverage to all of the cases they are focusing on. She has asked you to think of the best way possible to present the information – either in dot point form, timeline of events, brief snapshot of the case, through pictures or even a video. She's left the format up to you, noting that it needs to be succinct, brief and to the point.

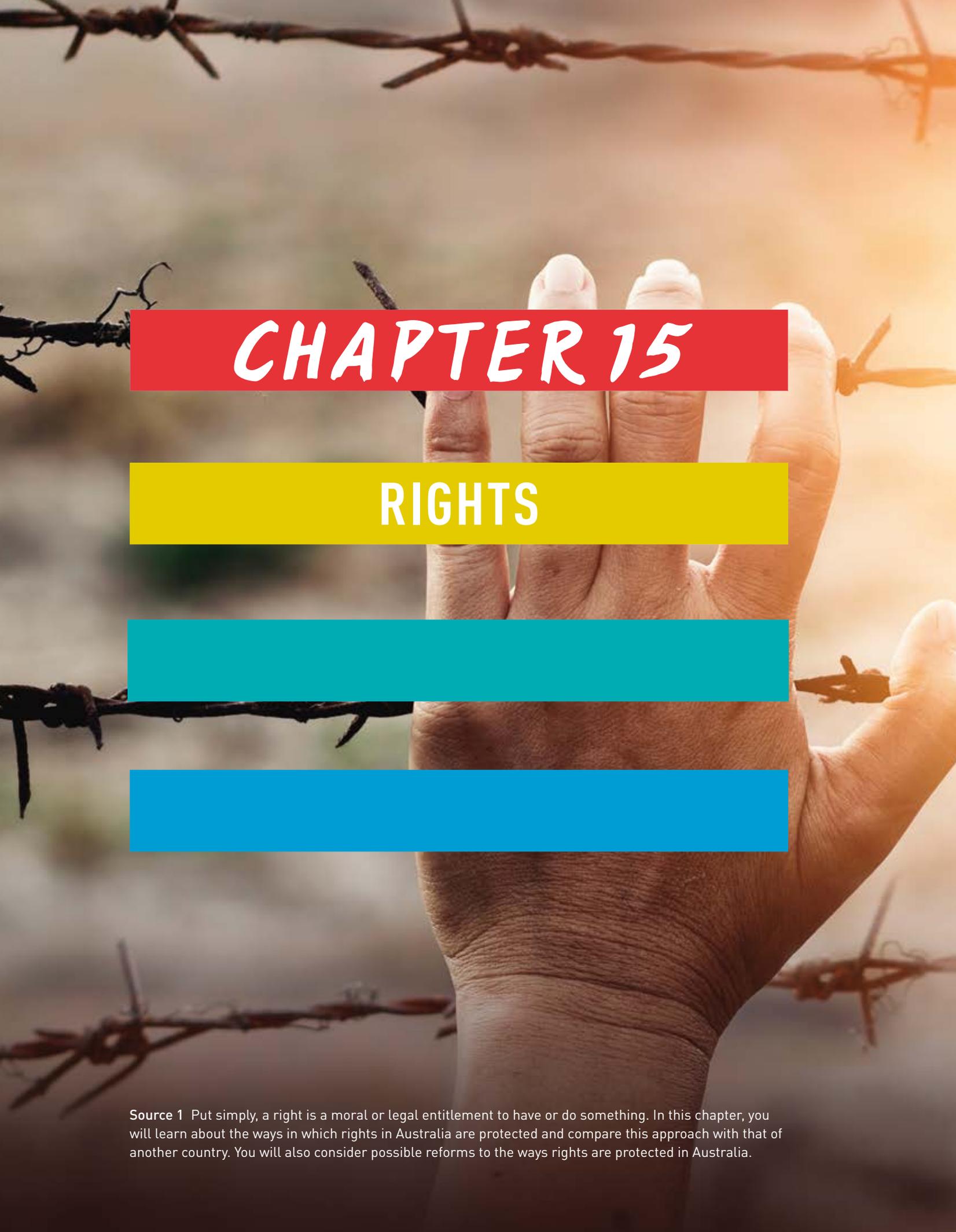
### Points to address

What is critical is that you need to address all of the following:

- 1 The central facts of the case, including the parties.
- 2 The nature of the claim and the remedies sought.
- 3 The dispute resolution bodies and methods used.
- 4 The remedies sought and their appropriateness.
- 5 The outcome of the case (if there is any).
- 6 Your views on the extent to which justice was or could be achieved.

(25 marks)

Total: 50 marks



# CHAPTER 15

## RIGHTS

Source 1 Put simply, a right is a moral or legal entitlement to have or do something. In this chapter, you will learn about the ways in which rights in Australia are protected and compare this approach with that of another country. You will also consider possible reforms to the ways rights are protected in Australia.

## OUTCOME

By the end of **Unit 2 – Area of Study 3** (i.e. Chapter 15), you should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system.

## KEY KNOWLEDGE

In the chapter, you will learn about:

- an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law
- the influence of international declarations and treaties on the protection of rights in Australia
- the approach adopted by one other country in protecting rights
- possible reforms to the protection of rights in Australia
- one Australian case that has had an impact on the protection of rights in Australia, including:
  - the role of the individual in taking a case to court
  - the facts and issues central to the case, including the rights in question
  - the laws that applied to the case
  - the outcome of the case and its impact on the rights of individuals and the legal system
  - possible conflicting attitudes in relation to the case.

## KEY SKILLS

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

- define and use legal terminology
- research and analyse relevant information about the protection of rights
- compare Australia's approach to the protection of rights with the approach of another country
- evaluate the ways in which rights are protected in Australia
- discuss possible reforms to the protection of rights in Australia

- describe the role of individuals in bringing about changes in the protection of rights through cases
- analyse the impact of a case on the rights of individuals and on the legal system
- apply legal principles to actual cases.

## KEY LEGAL TERMS

**Australian Constitution, the** a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

**charter or bill of rights** a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

**express rights** rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

**Human Rights Charter** the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

**implied rights** rights not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

**international declaration** a non-binding agreement between countries which sets out the aspirations (hopes) of the parties to the agreement

**international treaty** a formal document, signed by countries (called states) or international organisations, in which they undertake to follow the law set out in the document and include it in their own local laws

**locus standi** a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

**terra nullius** a Latin term meaning 'empty land'; a false common law principle that Australia belonged to no one when the British first arrived in Australia to establish a colony in 1788

**ultra vires** a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

## KEY LEGAL CASES

A list of key legal cases covered in this chapter is provided on pages vi–vii.

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### Please note

Aboriginal and Torres Strait Islander readers are advised that this chapter (and the resources that support it) may contain the names, images, stories and voices of people who have died.

# INTRODUCTION TO RIGHTS

One of the aims of the Australian legal system is to protect the rights of Australians. But what is a right, and what types of rights should be maintained and guaranteed by law?

## What is a right?

In simple terms, a right is a moral or legal entitlement to have or do something. In reality though, defining what rights are can be difficult. This is due to the fact that what people consider to be their 'rights' can vary a great deal depending on who they are, what they believe, and what country they live in. Although people's understanding of rights can vary, most definitions include some common themes such as the promotion of respect, dignity, equality and justice. They also include reference to the protection of basic freedoms. In democratic societies, these basic freedoms include things like:

- the right to life
- the right to access clean water, food and shelter
- freedom from slavery, cruel punishment and **discrimination**
- freedom of speech and religion
- the right to a fair and unbiased legal system
- the right to vote.

## The five fundamental freedoms of the Australian people

The Australian Government is responsible for making laws to ensure the wellbeing and protection of all Australians.

In accordance with Australia's commitment to a range of **international treaties**, the Commonwealth Department of Social Services, which is responsible for improving the welfare of immigrants and refugees who settle in Australia, states that all Australians are entitled to five fundamental freedoms. These are:

- **freedom of speech** – being free, subject to some legal restrictions, to speak or write about any topic, including criticising the government without fear of being arrested, provided the remarks are true and do not cause harm
- **freedom of association** – being free to join any lawful group or organisation (including **political parties** or trade unions) to discuss and debate views
- **freedom of assembly** – being free to meet together with other people in private and public spaces, including meeting in groups to peacefully demonstrate for a change in the law or protest against government policies
- **freedom of religion** – being free to practise any lawful religion and not have any religion imposed upon them by the Commonwealth Government



**Source 1** On 10 December 2016 a group of demonstrators gathered in Sydney to mark International Human Rights Day and raise awareness about human rights abuses suffered by Indigenous Australians.

### **discrimination**

the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or sexuality). Discrimination can either be direct discrimination or indirect discrimination

### **international treaty**

a formal document, signed by countries (called states) or international organisations, in which they undertake to follow the law set out in the document and include it in their own local laws

### **political party**

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

### **statute law**

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

### **common law**

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

- **freedom of movement** – generally being free to move from one state or territory to another and able to leave and enter Australia at any time.

## How does Australia protect rights?

Australia protects the rights of its citizens in a number of ways. In particular, rights are protected through:

- **statute law** – The Commonwealth, state and territory parliaments have passed Acts of Parliament (legislation) to protect a wide range of rights, including passing legislation to uphold **international treaties** and, in the case of Victoria and the Australian Capital Territory, passing a specific human rights legislation to ensure the protection of basic human rights within those states or territories
- **common law** – Over the years the courts have enforced various rights in their judgments and precedents that are now commonly known such as the **right to silence** (the general right of an accused not to be required to answer police questions or give evidence, and be subject to cross-examination, during a trial) and the **right to a fair trial**
- the **Australian Constitution** – The Australian Constitution protects a limited number of rights of Australian people. For example, as explored in this chapter, among other rights, the Australian Constitution guarantees five express rights of the Australian people which are specifically written in the Constitution.

The rights that Australia protects are often influenced by **international declarations** and treaties such as the Universal Declaration of Human Rights, created by the **United Nations** in December 1948 after the end of World War II. This Declaration sets out the most basic human rights that all nations, governments and people should strive to uphold and promote.

You will explore in this chapter the influence of international declarations and treaties on the protection of rights in Australia.

The way in which Australia protects the rights of its people is different to many other similar western democracies (including the United States of America, New Zealand, the United Kingdom, Canada and South Africa). After we have examined the main ways rights are protected in Australia, we will consider whether having a Commonwealth charter or bill of rights would improve the protection of rights in Australia.

### Australian Constitution, the

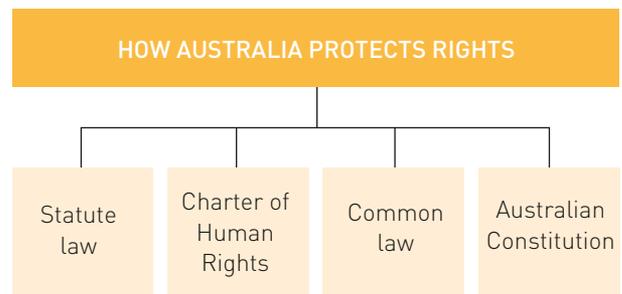
a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

### international declaration

a non-binding agreement between countries which sets out the aspirations (hopes) of the parties to the agreement

### United Nations

an international organisation formed in 1945 made up of various countries. It aims to take action on issues facing humanity



**Source 2** Four ways in which Australia protects the rights of its citizens

## 15.1

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain two of the five fundamental freedoms of Australians guaranteed by the Australian Government.
- 2 Outline three ways in which rights are protected in Australia.

### Synthesise and apply

- 3 Using the internet, find a definition of the following types of rights and provide two examples of each:
  - a political rights
  - b economic rights
  - c social rights.



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

» **Student book questions**

15.1 Check your learning

» **Video tutorial**

Introduction to Chapter 15

» **Worksheet**

What are rights?

» **Weblink**

Universal Declaration of Human Rights

# PROTECTION OF RIGHTS THROUGH STATUTE LAW AND THE VICTORIAN CHARTER

**Human Rights Charter**  
the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

In this topic you will explore how Australia protects the rights of individuals through statute law, and through the *Charter of Human Rights and Responsibilities Act 2006* (Vic), known as the **Human Rights Charter**.

## Statute law

Most rights in Australia are protected by Commonwealth, state and territory legislation. Over the years, the parliaments have passed many statutes that outline and protect a broad range of rights in Australia. The Commonwealth Parliament has the power to pass legislation that applies to and protects the rights of all Australians, while each state and territory parliament has the power to pass laws that protect the rights of the residents of that state or territory.

Source 1 below provides some examples of rights that are protected by Victorian and Commonwealth legislation.

TYPE OF RIGHTS	EXAMPLES OF LEGISLATION THAT PROTECTS THIS RIGHT
<ul style="list-style-type: none"> <li>• <b>The right to privacy</b> Various acts regulate the use, storage and disclosure of private information by the government and private organisations</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Freedom of Information Act 1982</i> (Vic)</li> <li>• <i>Information Privacy Act 2000</i> (Vic)</li> <li>• <i>Privacy and Data Protection Act 2014</i> (Vic)</li> <li>• <i>Privacy Act 1988</i> (Cth)</li> <li>• <i>Freedom of Information Act 1982</i> (Cth)</li> </ul>
<ul style="list-style-type: none"> <li>• <b>The right to security of person</b> Many acts protect the right of Australian citizens to feel secure and safe including legislation that defines and prohibits crime, outlines minimum and maximum sanctions for criminal offenders and aims to prevent and reduce the risk of terrorism</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Crimes Act 1958</i> (Vic)</li> <li>• <i>Sentencing Act 1991</i> (Vic)</li> <li>• <i>Family Violence Protection Act 2008</i> (Vic)</li> <li>• <i>Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014</i> (Cth)</li> <li>• <i>Terrorism (Community Protection) Act 2003</i> (Vic)</li> <li>• <i>Road Safety Act 1986</i> (Vic)</li> <li>• <i>Child Wellbeing and Safety Act 2005</i> (Vic)</li> <li>• <i>Crimes Act 1914</i> (Cth)</li> </ul>
<ul style="list-style-type: none"> <li>• <b>The right to freedom from discrimination</b> A range of acts protect individuals from being discriminated against on the basis of race, religion, ethnicity, sex, sexual orientation, gender identity, age, disability and other characteristics in a range of areas including the workplace, schools, accommodation, sporting and religious organisations and the like</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Age Discrimination Act 2004</i> (Cth)</li> <li>• <i>Sex Discrimination Act 1984</i> (Cth)</li> <li>• <i>Australian Human Rights Commission Act 1986</i> (Cth)</li> <li>• <i>Disability Discrimination Act 1992</i> (Cth)</li> <li>• <i>Racial Discrimination Act 1975</i> (Cth)</li> <li>• <i>Racial and Religious Tolerance Act 2001</i> (Vic)</li> <li>• <i>Equal Opportunity Act 2010</i> (Vic)</li> </ul>
<ul style="list-style-type: none"> <li>• <b>The right to vote</b> Two acts protect the rights of Australian citizens to vote in elections</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Commonwealth Electoral Act 1918</i> (Cth)</li> <li>• <i>Electoral Act 2002</i> (Vic)</li> </ul>

Source 1 Rights protected by specific state and Commonwealth legislation

One problem associated with rights being protected by Acts of Parliament is that these rights are not permanently guaranteed. That is, as the **supreme law-making body**, parliament can always pass legislation to change or **abrogate** (cancel) an existing right that is protected by statute law.



**Source 2** The Victorian Equal Opportunity and Human Rights Commission was set up by the Victorian Government to resolve complaints of discrimination or victimisation.

## International treaties and conventions

In addition to Commonwealth, state and territory parliaments passing legislation, many basic human rights are also protected by treaties. The Commonwealth Government gives its commitment to uphold a range of international human rights treaties and conventions by becoming a **signatory** (committing to them). The Australian Government signs the treaty to demonstrate its intent to adopt the treaty and incorporate it into our law. However, being a signatory to an international treaty or convention is not enough to make its rights and standards part of the signatory nation's law. For that to happen, the signatory nation must specifically pass legislation to approve and adopt the various rights outlined in the international treaty or convention. This is called **ratification** of the treaty. When it ratifies a treaty, the nation is legally bound to accept and implement the rights.

Over the years, the Commonwealth Parliament has passed various Acts of Parliament to incorporate the rights and principles included in international treaties and conventions into Australian law. For example, in 1975, Australia adopted and ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), which aimed to abolish any laws that discriminated against people on the basis of their race, colour, descent or ethnicity and introduce laws and policies that promote racial tolerance and understanding. This was achieved by the Commonwealth Parliament passing the *Racial Discrimination Act 1975* (Cth) to give effect to Australia's obligations under that convention. The *Racial Discrimination Act* was important because it was the first Commonwealth statute to promote equality before the law for all persons, irrespective of their race, colour or national or ethnic origin, and make unlawful the discrimination of people on the basis of their race, colour, descent or national or ethnic origin.

The influence of international declarations and treaties on Australia's protection of rights will be examined in more detail later in this chapter.

## The Victorian Charter of Human Rights and Responsibilities

While Australia does not have a national **charter or bill of rights**, the Victorian and Australian Capital Territory parliaments have both passed Acts of Parliament that aim to promote and protect the basic rights of the people of each state and territory.

The *Charter of Human Rights and Responsibilities Act*, referred to as the Human Rights Charter (or simply the Charter), sets out the basic rights, freedoms and responsibilities of the Victorian people. It requires bodies such as the Victorian Parliament, state and local government departments and organisations (including the Department of Health and Human Services, Department of Education and Training, VicRoads, Victoria Police and local councils) and people delivering government services to act in a manner that complies with and upholds the basic human rights in the Charter.

### **supreme law-making body**

the body (e.g. the parliament in the Westminster system) responsible for changing existing law and creating new law

### **abrogate**

to cancel or abolish a court-made law by passing an Act of Parliament

### **signatory**

a state or organisation that has signed an international treaty to demonstrate a nation's intent to adopt the treaty and incorporate it into their law

### **ratification**

confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires them by law to adopt the various rights and responsibilities set out in the treaty

### **charter or bill of rights**

a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

The Charter outlines **basic rights** that belong to the Victorian people including, but not limited to, the right to:

- life
- protection from torture and cruel, inhuman or degrading treatment
- freedom of movement (e.g. people who live lawfully in the state have the right to leave and return to the state whenever they desire and can choose where they live)
- freedom of thought, conscience, religion and belief (e.g. people are free to hold their own beliefs and practise a religion of their choice)
- take part in public life (e.g. people have the right to vote or run as a candidate in state or local government elections).

### Study tip

The VCE Legal Studies Study Design requires you to evaluate the ways in which rights are protected. You should do this by considering the strengths and weaknesses, and providing a concluding judgment about the overall benefit or worth of Australia's protection of rights.

Included in the 20 basic human rights in the Charter are specific rights that help ensure our legal system achieves justice. For example, among other freedoms, the Charter also protects the right to:

- **recognition and equality before the law** – every person must be regarded as equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination
- **a fair hearing** – a person charged with a criminal offence or a party to a civil proceeding has the right to have their proceeding decided by a competent, independent and impartial court or tribunal. This includes having the right to a fair and public hearing, although in some circumstances a court or tribunal may lawfully exclude members of media organisations or other persons or the general public



**Source 3** The Victorian Parliament passed the *Charter of Human Rights and Responsibilities Act* in 2006 which sets out the basic rights and freedoms of the people of Victoria.

#### legal aid

legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

#### conviction

a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

- **not to be tried or punished more than once** – a person must not be tried or punished more than once for an offence for which he or she has already been finally convicted or acquitted in accordance with law, although a retrial can be ordered in limited circumstances.

The Charter also sets out the rights of adults and children in criminal proceedings. For example, all Victorians are entitled to minimum guarantees once they have been charged with a criminal offence. These include rights to:

- be provided with **legal aid** if the denial of such assistance would lead to an unfair hearing or trial (provided the accused meets the eligibility criteria)
- the free assistance of an **interpreter** if necessary
- not be compelled to testify against himself or herself (i.e. the **right to silence**) or to confess guilt.

In addition, any person convicted (found guilty) of a criminal offence has the right to have the **conviction** and any sentence imposed reviewed by a higher court.

## Strengths and weaknesses of statute law and the Human Rights Charter

Some of the strengths and weaknesses of statute law and the Human Rights Charter in protecting rights are set out in Source 4.

STRENGTHS	WEAKNESSES
Parliament can amend statutes and charters to incorporate further rights, particularly as society changes	Because parliament is the supreme law-making body, it can amend statutes and charters, so rights may become limited or no longer exist
Statutes and charters are often detailed and precise, and protect human rights specifically, rather than being implied	Parliament can include limitations or restrictions in statutes or charters so protected rights are not always absolute
Rights contained in statutes are generally enforceable and need to be recognised by government organisations	Statutes and charters do not always enable a person to be awarded any damages in the event their rights are breached
Parliament does have the ability to pass laws quickly if there is a need to quickly protect additional rights	The rights protected in statute law and charters are not as well protected as rights contained in a constitution, as constitutional rights can only be altered or removed with public approval

### Did you know?

The Victorian Government has established an independent body, the Victorian Equal Opportunity and Human Rights Commission, to educate Victorians about the Human Rights Charter and report back to the Government on the operations of the Charter.

**Source 4** A summary of the strengths and weaknesses of statute law and the Human Rights Charter in protecting rights

## 15.2

## CHECK YOUR LEARNING

### Define and explain

- 1 What is statute law?
- 2 Explain the difference between signing a treaty and ratifying a treaty.
- 3 What is the *Charter of Human Rights and Responsibilities Act 2006* (Vic)? Identify five broad rights protected by the Charter. Describe two rights that are included in the Charter to help ensure the justice system upholds rights.

### Synthesise and apply

- 4 Prepare a PowerPoint, poster or brochure that identifies and briefly explains the main ways Australia protects rights.
- 5 Research two Victorian and two Commonwealth Acts of Parliament that aim to protect the rights of the Australian people. For each act, briefly summarise the rights it aims to protect.

### Analyse and evaluate

- 6 Use the internet to research one international treaty or convention adopted by Australia. Prepare a report that includes:
  - a the name of the treaty, when it was created, when it was signed and ratified by Australia, and the other countries that have also adopted the treaty
  - b the basic rights protected by the treaty
  - c any optional protocols related to the treaty
  - d any Australian legislation that protects the rights contained in the treaty
  - e a discussion of the extent to which Australia protects the rights guaranteed by the treaty.
- 7 Evaluate the ability of statutes to protect Australians from discrimination.



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

» **Student book questions**

15.2 Check your learning

» **Worksheet**

Discrimination laws

» **Weblink**

Victorian Equal Opportunity and Human Rights Commission

» **Weblink**

Victoria's Charter of Human Rights and Responsibilities

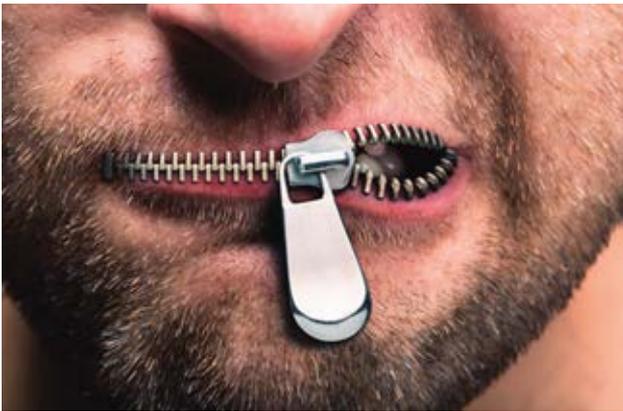
# PROTECTION OF RIGHTS THROUGH COMMON LAW

## precedent

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

Many rights are protected in Australia by common law; that is, law that has been established by the state and federal courts through **precedent**.

Judges can play a significant role in protecting rights when resolving disputes in which there has been an alleged breach of human rights, and by interpreting the meaning of Commonwealth and state legislation that protects human rights. When giving their decisions in human rights disputes (or possibly other kinds of dispute), judges may establish a **legal principle** (referred to as a precedent) that protects the rights of the Australian people. Legal rights that are established in this way are referred to as common law rights. Common law refers to legal principles or laws established by judges in the higher courts. These legal principles or laws must be followed by lower courts, in the same hierarchy, in cases where the facts are similar.



**Source 1** The right to silence was established by common law. It ensures that an accused cannot be forced to give evidence that may incriminate them.

## cross-examination

the questioning of a witness called by the other side in a legal case

## Common law rights

Some examples of rights established or upheld by the courts (i.e. common law rights) include:

- the right to silence (i.e. the general right of an accused not to have to answer police questions or give evidence and be subject to **cross-examination** during a trial, to protect them against self-incrimination)
- the right to a fair trial to the extent that a court may stay (i.e. stop) a trial from proceeding if it considers it will result in an unfair trial
- the right to freedom of movement
- the right to a limited freedom of speech.

Some of these common law rights are explored further in this topic.

## The right to legal representation

Being charged with an indictable offence is a serious matter. Many common law cases have recognised the right of an accused to have access to legal representation (a lawyer) for a criminal trial. Indeed, in some instances, the judges have adjourned (i.e. paused) trials to give an accused time to access that legal representation. The right of an accused to legal representation was recognised by the High Court in the case of *Dietrich v The Queen* (1992) 177 CLR 292, discussed below.

## LEGAL

## CASE

## The right to legal representation

### *Dietrich v The Queen* (1992) 177 CLR 292

In December 1986, Olaf Dietrich was charged with smuggling 70 grams of the illegal drug heroin into Australia. Prior to his trial Dietrich applied for legal assistance from **Victoria Legal Aid**, but was told he would not receive that assistance unless he agreed to plead guilty. Dietrich did not want to plead guilty and so his case went to trial without him having legal representation. Dietrich was found guilty of three charges and sentenced to a term of imprisonment.

After the verdict, Dietrich lodged an application to have an **appeal** heard in the Supreme Court. This was denied. Ultimately, Dietrich lodged a successful application to have his appeal

heard in the High Court, which ruled that he had a right to a fair trial and that this right was breached because he had no legal representation. In its ruling, the High Court upheld the principles outlined in the *International Covenant on Civil and Political Rights* (1966) and established a common law right (through its judgment) that an individual who is charged with a serious offence has a right to legal representation. The High Court also ruled a trial judge can delay a trial until a person charged with a serious offence has legal representation.

Interestingly, in 2009, over 25 years after he was first charged with importing illegal drugs, Dietrich (who was by this time aged 52 years and had changed his name to Hugo Rich) was sentenced to life imprisonment, with a minimum non-parole period of 30 years, after being found guilty of murdering a security guard during an armed robbery at Blackburn North Shopping Centre in Melbourne's eastern suburbs (in *R v Rich* [2009] VSC 515 [13 November 2009]).

**Victoria Legal Aid**  
a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

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

## Recognition of Charter rights

The courts have also recognised the various rights that are available to people under the Charter. These include the right to equality before the law, and the right to effective protection against discrimination. In recent cases involving children held at Barwon Prison (an adult prison), the Supreme Court of Victoria ruled that holding youth offenders there was a breach of their rights.

This is further explored in the legal case below.

## Holding children at Barwon Prison breaches rights

### *Certain Children v Minister for Families and Children* [2016] VSC 796 (21 December 2016)

In November 2016, a group of approximately 40 teenage offenders were transferred to Barwon Prison (an adult prison) after a group of youth offenders damaged sections of the Parkville Youth Justice Precinct during riots.

In December 2016, the Supreme Court of Victoria ruled that the Victorian Government's policy to detain children who had committed serious offences at the adult prison, one of the state's maximum security prisons, was a breach of the rights of the children, and as such was invalid.

During the case, it was alleged by some of the children's lawyers that some of the children held at Barwon Prison were locked in their cells for up to 23 hours a day and handcuffed during the one hour they were released from their cells. It was also alleged that some children suffered bruising from an overuse of force by security officers. In contrast, the Victorian Government claimed it had no option other than housing some young offenders in a specific section of Barwon Prison, completely separate from the adult section of the prison, after a series of riots, taking place over 18 months, had left sections of the Parkville Youth Justice Precinct damaged, and because all other youth facilities were full.

In his judgment, Supreme Court Justice Garde ruled that the decision to transfer young offenders to Barwon Prison for 'emergency accommodation' did not take into account various rights of children as outlined in the *Children, Youth and Families Act 2005* (Vic) and the *Charter of Human Rights and Responsibilities Act*, and as such was unlawful. This decision was upheld by the Victorian Supreme Court of Appeal.

LEGAL

CASE

## Rights of transgender people

In a 2003 case, the Family Court had to consider whether a person who was born as female and had full gender reassignment surgery to become a man was considered to be a man for the purposes of marriage laws in Australia. The case, explored below, is considered to be an important decision in relation to the rights, of transgender people to marry.

### LEGAL

### CASE

#### *The Kevin and Jennifer case*

#### *Attorney-General for the Commonwealth v Kevin and Jennifer* (2003) 172 FLR 300

In this well-known case, the Full Court of the Family Court made a ruling that helped establish the rights of transgender people.

In 1999 Kevin and Jennifer married. Kevin was registered at birth as female, although after identifying from an early age as male, Kevin had full gender reassignment surgery to become a man in 1997.

In October 1999, the couple had their marriage validated (confirmed) by the Family Court of Australia. This was challenged by the Commonwealth Government (through the federal Attorney-General) on the basis that Kevin, despite undergoing successful gender reassignment surgery prior to their marriage, was not a man for the purposes of the *Marriage Act 1961* (Cth).

While a successful court appeal would have made Kevin and Jennifer's marriage void, the Full Court of the Family Court dismissed the Attorney-General's appeal and upheld the validity of Kevin and Jennifer's marriage in 2003. The Court ruled that the meaning of the term 'man' for the purpose of the *Marriage Act* was a person who was a man at the time of the marriage, including a post-operative transsexual person. In doing so, the Court established the right of post-operative transgender people to lawfully marry in Australia.

## *Ultra vires*

The courts can also protect the rights of the Australian people by using their power to declare Acts of Parliament invalid if they are made outside or beyond the parliament's law-making power. Acts are referred to as being made **ultra vires**. *Ultra vires* is a latin term meaning 'beyond the powers'.

For example, if the Commonwealth Parliament passes an Act of Parliament which is beyond its law-making powers (outlined in the Australian Constitution), the party who alleges their rights have been breached may challenge the legislation in the High Court of Australia. The High Court can declare the legislation invalid if it considers the act to have been made outside the Commonwealth's power. Furthermore, the parliament cannot override any ruling made by the High Court in relation to constitutional matters such as these. As we will examine later in this chapter, the High Court can also declare legislation invalid if it rules that it has breached a right that is protected by the Constitution.

## Codification or abrogation of common law rights

Court judgments (i.e. precedents) that establish human rights may also be **codified** (i.e. confirmed) by the parliament. This means that the parliament passes legislation that reinforces or endorses the legal principles established by the court in their ruling. For example, in 1983 the Commonwealth Parliament passed the *Native Title Act 1983* (Cth) to reinforce or enshrine the principles established in the case of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, which recognised land rights for Indigenous Australians. The *Mabo* case is examined in more detail later in this chapter.

#### **ultra vires**

a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

#### **codify (codification)**

to collect all law on one topic together into a single statute

As the supreme law-making body, the parliament may be able to abrogate (i.e. cancel) human rights that have been established in common law, although it cannot override rights established in High Court matters involving the interpretation of the Australian Constitution.

## Strengths and weaknesses of common law

Some of the strengths and weaknesses of common law in protecting rights are summarised in Source 2 below.

STRENGTHS	WEAKNESSES
The courts and judges are independent of parliament and can establish precedent free from political pressures	Common law rights are not always easy to define or identify (as opposed to statutory rights)
Courts and judges are able to make decisions to establish rights in areas where the parliament has not	Courts must wait for a case to come before them to be able to declare the existence of rights
The courts are able to infer rights without the need to consider how those rights may need to be limited	Parliament, as the supreme law-making body, can abrogate common law rights
Courts are able to highlight to parliament gaps in the law that protect rights, which may encourage parliament to change the law to further protect rights	Often judges are reluctant to recognise certain rights (such as the right to privacy), leaving it up to parliament to protect those rights
Historically, courts have been able to protect rights and parliament has not overly interfered with those common law rights by abrogating them	Judges are limited in applying the law to the case that is before them. They cannot simply 'create rights' in any dispute

Source 2 A summary of the strengths and weaknesses of common law in protecting rights

### 15.3

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the terms 'abrogate' and '*ultra vires*'.
- 2 Read the legal case *Dietrich v The Queen*.
  - a Why was Olaf Dietrich arrested in 1986?
  - b On what grounds did Dietrich lodge an appeal against his conviction?
  - c What was the ultimate ruling of the High Court? In your answer identify the international treaty the Court ruled had been infringed.

### Synthesise and apply

- 3 Read the legal case *Certain Children v Minister for Families and Children*. State the name of the plaintiff and defendant in this case. Outline the basic facts

of the case and identify the acts that were allegedly infringed.

- 4 Read the legal case *Attorney-General for the Commonwealth v Kevin and Jennifer*.
  - a Explain why Kevin and Jennifer believed their rights had been infringed.
  - b Describe the ruling of the Family Court.
  - c Examine the ability of the court to establish the rights of people to marry.

### Analyse and evaluate

- 5 Examine one feature of the relationship between the courts and parliament in relation to protection of rights.



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

» **Student book questions**

15.3 Check your learning

» **Video**

Free speech

» **Video worksheet**

Free speech

» **Weblink**

Rights and freedoms under common law

# PROTECTION OF RIGHTS THROUGH THE AUSTRALIAN CONSTITUTION

The Australian Constitution (formally referred to as the *Commonwealth of Australia Constitution Act 1900* (UK)) is one of the most important documents in Australia's legal system. It outlines how Australia is to be governed. In addition to creating and outlining the structure and law-making powers of the Commonwealth Parliament, the Constitution also establishes some basic rights for Australian citizens. However, the Constitution does not contain a bill of rights; that is, a comprehensive list of the basic rights of the Australian people.

The Constitution protects the rights of the Australian people in three main ways, being through:

- **express rights**
- **implied rights** (i.e. indirectly protected through the text or structure of the Constitution).
- rights in the Constitution's structure.

## Express rights

The Australian Constitution protects five express rights of the Australian people. An express right is explicitly stated (or entrenched) in the wording of the Constitution. It can only be removed or altered by changing the wording of the Constitution. In Australia, the Constitution can only be changed through a successful **referendum** or public vote. This differs from rights that exist in common law or in statute, which can be abolished or altered at any time by parliament passing a law to override them.

The five express rights protected in the Australian Constitution are the right to:

- **free interstate trade and commerce (Section 92)** – this right prevents parliament from treating interstate trade differently between states. It provides freedom of movement between states, without burden or hindrance. For example, it restricts imposing taxes on goods moving from Victoria to New South Wales
- **not be discriminated against by the Commonwealth on the basis of the state where you reside (Section 117)** – it is unlawful for the Commonwealth to discriminate against someone based on the state in which they live. This means, for example, that a resident of New South Wales in Victoria cannot be subject to a law that would make them in a worse position than if they were from Victoria. However, the High Court has said that states can favour their own residents in limited circumstances, such as the right for only residents of a state to vote in elections for that state
- **receive 'just terms' when property is acquired by the Commonwealth (Section 51(xxxi))** – this means that the Commonwealth must pay fair and reasonable compensation for property that they compulsorily buy. The Commonwealth is only able to acquire or obtain property for a purpose or area for which it has the power to make laws (e.g. for airports)
- **trial by jury for indictable Commonwealth offences (Section 80)** – this provides citizens with the limited right to trial by jury, as it is guaranteed for indictable (or serious) Commonwealth offences (although most indictable offences are state offences)
- **a freedom of religion (though limited) (Section 116)** – provides citizens with a limited right to freedom of religion.

### express rights

rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

### implied rights

rights not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

### referendum

the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

### Did you know?

The iconic Australian film *The Castle* was based around a fictional story about the property of the Kerrigan family, which was to be compulsorily acquired by the Commonwealth to expand Melbourne's airport. The film is a quirky and insightful look into the constitutional protection of acquisition of property.



**Source 1** The Australian Constitution protects five express rights

## Focus on the freedom of religion

Section 116 of the Australian Constitution provides the Australian people with a limited right to freedom of religion. This section prevents the Commonwealth Parliament from passing a law that:

- establishes a state religion (i.e. it cannot declare a particular religion as the official national religion)
- imposes any religious observance (i.e. requires the people to recognise a religious ceremony or formality)
- prohibits the free exercise of any religion (i.e. prevents people from practising their religion, although this can be limited in situations where the practising of a religion may breach Australian law or threaten national security)
- requires a religious test as a requirement for holding any Commonwealth office (e.g. working as a member of the federal police).

An extract of Section 116 is provided below.



**Source 2** The Australian Constitution protects the right of Australians to practise their religion. These young girls are helping our nation celebrate Australia Day.

### EXTRACT

#### *Commonwealth of Australia Constitution Act 1900 (UK)*

##### **116 Commonwealth not to legislate in respect of religion**

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 only protects freedom of religion to a limited extent because it only applies to and restricts the powers of the Commonwealth Parliament with respect to religion. It does not apply to the states (or territories).

Over the years, when resolving disputes in which individuals or organisations have alleged that Commonwealth law breaches the express right to freedom of religion, the High Court has interpreted the meaning of 'religion' in different ways. For example, in the case of *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, the High Court broadly interpreted the meaning of Section 116

by ruling the term 'religion' to include non-believers and provided for the right of a person 'to have no religion'. By contrast, in other cases the High Court has interpreted other parts of Section 116 narrowly. This occurred in *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559 when the High Court ruled the Commonwealth Government has the ability to provide funding to religious schools.

## LEGAL

## CASE

### The *DOGS* case

#### *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559

In this case, known as the *Defence of Government Schools (DOGS)* Case, the plaintiffs claimed legislation passed by the Commonwealth Parliament, which allowed for the Commonwealth Government to give financial assistance to non-government schools in states and territories, was invalid. The plaintiffs claimed that giving money to schools was in breach of Section 116 of the Constitution, which bans the Commonwealth from establishing any religion or for imposing any religious observance.

In its decision the High Court reinforced the right to freedom of religion and confirmed that the Commonwealth cannot establish a religion. However, the High Court ruled that the legislation was valid and that allowing the Commonwealth to give grants (money) to the states to be used to provide financial assistance to non-government schools did not breach the right to freedom of religion as stated in Section 116. More precisely, the High Court ruled there was no religious inequality, because the grants did not differentiate between different schools based on religion. The decision therefore allowed the Commonwealth to give financial assistance to non-government schools, which included assisting religions by continuing to fund religious schools.

Further insight into the right to freedom of religion is provided in the following case.

## LEGAL

## CASE

### Chaplaincy in government schools program

#### *Williams v Commonwealth* (2012) 248 CLR 156

In this case, Ronald Williams challenged the Commonwealth Government's power to fund a school chaplain program that was running in his children's government primary school in Queensland. The Commonwealth Government had entered into a funding agreement with Scripture Union Queensland to provide chaplaincy services, such as 'general religious and personal advice to those seeking it, [and] comfort and support to students and staff, such as during times of grief'. The chaplain was not to seek to 'impose any religious beliefs or persuade an individual toward a particular set of religious beliefs'.

Williams argued that the funding agreement was invalid on various grounds, including because it breached Section 116 of the Constitution, which states that 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. Williams argued that the school chaplain is an 'office ... under the Commonwealth' and, further, that there is a religious test to hold such an office.

The High Court unanimously dismissed the challenge under Section 116 relating to a 'religious test', because the chaplains were not employees of the Commonwealth. The High Court did, however, rule the legislation to be invalid on other grounds and so the plaintiff succeeded in the case. In short, the High Court found that because the Commonwealth Parliament had not passed specific legislation allowing the Federal Government to make the payments for the

school chaplaincy program, the Government did not have the authority or power to do so.

Immediately following the High Court's decision, the Commonwealth Parliament passed the Financial Framework Legislation Amendment Bill (No. 3) 2012 (Cth) to give the Commonwealth Government the power to fund the chaplaincy program and other similar programs. Williams then challenged the constitutional validity of this legislative change and its funding arrangements and once again the High Court found in his favour, declaring that the legislation was invalid because it was made beyond the parliament's law-making power. The Commonwealth-funded school chaplaincy program did not go ahead.



**Source 3** Ron Williams (shown here outside the High Court) challenged the Commonwealth Government's power to spend taxpayers' money on the national school chaplaincy program.

## Implied rights

An implied right is a right that is not explicitly stated in the wording of the Australian Constitution but is rather considered (or implied) to exist by the High Court when interpreting the Constitution's meaning.

The High Court is able to imply the existence of rights when resolving disputes between individuals and the state and Commonwealth governments over the meaning of the Constitution. When resolving a dispute over whether or not the Constitution protects a particular right, the High Court Justices can decide that a word or phrase within the Constitution implies that a right exists even though it might not be explicitly stated. For example, although the Constitution does not explicitly state that Australians have the right to freely discuss and debate political issues – referred to as the **freedom of political communication** – in various cases throughout the years, the High Court has decided that this freedom is implied in the Constitution. The first case to recognise the implied freedom of political communication was *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

**freedom of political communication**  
the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

## High Court implies the freedom of political communication

### *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

In this case, the High Court was required to determine whether the Commonwealth Parliament's *Political Broadcasts and Political Disclosures Act 1991* (Cth), which basically banned individuals and organisations from making political broadcasts and placing advertising on radio and television during election campaigns, was unfair and in breach of the Australian Constitution.

In simple terms, the justices of the High Court ruled that while our Constitution does not expressly mention or protect the broad right to freedom of speech, it does recognise that the Australian parliamentary system is based on the principle of **representative government**, which requires freedom of political communication. In accordance with the principle of representative government, the parliament must make laws that reflect the views and values of the people. This means that Australians should be able to advertise and discuss their views, policies and opinions in a public forum (such as on television or radio) prior to an election so that voters can make an informed decision electing the government.

**representative government**  
a political system in which the people elect members of parliament to represent them in government

LEGAL

CASE

Once a right is implied by the High Court, it may be made clearer or confirmed in later cases. For example, the freedom of political communication implied in the *Australian Capital Television* case was considered again in two High Court cases: *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. These cases confirmed the existence of the right to political communication. The *Theophanous* case extended the implied right to allow comments about members of parliament and their suitability for office. The *Lange* case went further, stating that the right to freedom of political communication **exists at all times, not just prior to an election**. This right is not a general right to free speech, but only a right to free communication on matters relating to political issues.

## Absolute freedom of political communication

The High Court has ruled in various cases that Australians have the right to freedom of political communication. But should this right be unlimited?

While we have a right to freely discuss and debate political issues, some people think that we should not have the right to make cruel or offensive public comments on political issues such as same-sex marriage, adoption, abortion, or euthanasia. In other words, they believe the right to freedom of political communication should be restricted.

Other people believe the right to free political speech should never be restricted. They generally argue that free speech has a higher value than people's hurt feelings.

In various cases, however, the High Court has found that the implied freedom of political communication can be restricted when it is reasonable to do so (for example, if it offends against a person's privacy, or if the communication ruins a person's reputation).

### Did you know?

In 1902, the newly created Commonwealth Parliament passed legislation called the *Commonwealth Franchise Act 1902* (Cth) to make Australia one of the first countries in the world to give women the right to vote in Commonwealth (federal) elections. New Zealand had given women the right to vote in 1893.



**Source 4** Australia was one of the first countries in the world to give women the right to vote in federal elections.

## Rights in the Constitution's structure

The Australian Constitution outlines various parliamentary principles and concepts which form the basis of our parliamentary system. These systems and concepts which are included within the text and structure of the Constitution also **indirectly protect some rights of the Australian people**. For example, the Constitution indirectly protects the right of the people to elect the Commonwealth Parliament by specifically stating that Australia's parliamentary system must be based on the principle of representative government. This means the parliament must be elected by the people to make law on their behalf.

More precisely, Sections 7 and 24 of the Constitution state that individuals elected to the **Senate** (the upper house) and the **House of Representatives** (the lower house) must be **directly chosen by the people**, guaranteeing the right of the people to elect the Commonwealth Parliament. Sections 8 and 30 also support the principle of representative government by requiring that each elector is only allowed to vote once.

**Senate**  
the upper house of the Commonwealth Parliament

**House of Representatives**  
the lower house of the Commonwealth Parliament

Interestingly, however, the Constitution does not specifically guarantee the right of people aged 18 or over the right to vote. These rights were guaranteed by the Commonwealth Parliament passing separate Acts of Parliament. For example, in 1973 the minimum voting age was lowered from 21 years to 18 years in 1973 by the Commonwealth Parliament passing an amendment (change) to the *Commonwealth Electoral Act 1918* (Cth).

The following legal case explores how the High Court has considered the right to vote.

## Prisoners' right to vote

### *Roach v Electoral Commissioner* (2007) 233 CLR 162

In 2006, the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), which amended the *Commonwealth Electoral Act* to ban all prisoners from voting in Commonwealth elections. Before this Act was passed, only prisoners who were serving sentences longer than three years were banned from voting, but this new Act changed the law so that all sentenced prisoners were unable to vote (affecting approximately 20 000 prisoners).

After the Act was introduced, a prisoner who was serving a six-year sentence, Vickie Lee Roach, mounted a High Court challenge claiming that Commonwealth legislation that banned prisoners from voting breached the right of the people to vote, as protected in the Australian Constitution.

In simple terms, the High Court ruled that the Commonwealth's 2006 changes to the *Commonwealth Electoral Act* breached Sections 7 and 24 of the Australian Constitution, which requires that parliament be chosen 'directly by the people' and legally protected the right to vote. As such the 2006 Act was declared invalid. The High Court found that the Parliament should only be able to restrict a person's right to vote in cases where the offender has committed very serious misconduct (e.g. for prisoners serving a prison sentence of more than three years). The Commonwealth Parliament was not able to override the decision and precedent set by the High Court.

LEGAL

CASE

The Constitution also indirectly protects the rights of the Australian people by ensuring our parliamentary system is based on the principle of **separation of powers**, which helps reduce the possibility of the Commonwealth Parliament misusing their power. In simple terms, the separation of powers refers to the requirement that no one body (that is, the parliament, the government or the courts) can hold all of the main types of power within our parliamentary system. This means neither the parliament, the government or the courts can perform all three tasks of making the law, administering the law and applying and interpreting the law.

For example, while the Commonwealth Parliament holds the power to make the law, it does not have the power to resolve disputes over the **meaning or application** of its laws because this power, referred to as the **judicial power**, is only held by the courts and tribunals.

In fact, the High Court is the only court with the power to resolve disputes concerning allegations that the Commonwealth Parliament has made a law beyond its constitutional power or in breach of the constitutionally protected rights of the people, and declare the Commonwealth's law invalid. In this way the High Court, or independent judiciary, can act as a checking system to ensure the Commonwealth Parliament makes law within its power and upholds the rights of the Australian people that are protected by the Constitution.

#### **separation of powers**

a principle established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate. This principle provides a set of checks and balances to ensure that no single body has the power to make, implement, apply and interpret the law

#### **judicial power**

the power (authority) given to courts and tribunals to enforce the law and settle disputes



Source 5 The High Court in Canberra

## Enforcement of constitutional rights

All rights protected by the Australian Constitution are fully enforceable by the High Court. If a party (e.g. an individual or state government) believes the Commonwealth Parliament has passed legislation that infringes a constitutionally protected right, they can challenge the law in the High Court.

When resolving disputes about an alleged breach of a right protected by the Constitution (any express or implied right) the High Court can declare the Commonwealth's law unconstitutional and invalid.

If the High Court declares legislation invalid, the parliament's options are to:

- amend the legislation so that the unconstitutional provisions (or sections) are removed from it
- try to change the Constitution by holding a referendum or public vote, which in accordance with Section 128 of the Constitution is the only way its actual wording can be changed.

## Strengths and weaknesses of the Australian Constitution

Some of the strengths and weaknesses of protecting rights through the Australian Constitution are set out in Source 6 below.

STRENGTHS	WEAKNESSES
Express rights cannot be changed unless through a referendum; that is, with the support of the community via a public vote	Rights contained in the Constitution are difficult to change due to the referendum process. Rights may therefore lag behind attitude changes
The implied freedom of political communication shows that rights can be interpreted and clarified by the High Court	Very few rights are expressly protected under the Constitution
There are some rights that are indirectly protected through the text and structure of the Constitution, such as the right of the people to elect the parliament which is indirectly protected by the principle of representative government	The rights that are expressly protected in the Constitution are very limited in scope, such as the limited right to trial by jury
All rights protected by the Constitution are fully enforceable through the High Court and any statute that is found to breach those rights can be declared invalid	It is expensive and time-consuming to take a case to the High Court to challenge a statute that breaches a right
The courts can interpret the meaning of the words and phrases in the Constitution so it can keep pace with changes in community values and remain relevant over time	The High Court cannot interpret the meaning of the Constitution and declare an infringement of rights until a case is brought before it

Source 6 A summary of the strengths and weaknesses of the Australian Constitution in protecting rights



**Source 7** The Australian Constitution can only be changed with the approval of the Australian people through a referendum.

## 15.4

## CHECK YOUR LEARNING

### Define and explain

- 1 Define the following key terms and provide an example of each:
  - a express rights
  - b implied rights.
- 2 What is meant by the parliamentary principle of representative government? How can it protect the rights of the Australian people?
- 3 Explain how an independent High Court is able to protect the rights of the Australian people.
- 4 Identify two rights that are explicitly stated in the Australian Constitution. Describe how these rights can be altered.

### Synthesise and apply

- 5 Read the legal case *Roach v Electoral Commissioner*.
  - a Why did Vickie Lee Roach think the Commonwealth Government had breached her rights?

- b Explain why the High Court found that the 2006 Act was unconstitutional.
  - c Explain the effect that this case had on the right to vote.
- 6 Read the legal cases *Attorney-General (Vic); Ex Rel Black v Commonwealth* and *Williams v Commonwealth*.
  - a Explain how each case is relevant to the protection of constitutional rights.
  - b Explain the significance of each case in relation to the protection of rights in Australia.
- 7 Describe the implied freedom of political communication. Do you agree with the decision in *Australian Capital Television Pty Ltd v Commonwealth*? Give reasons for your response.

### Analyse and evaluate

- 8 Evaluate the ability of the Australian Constitution to protect rights through express rights.
- 9 'Statute law is a better way to protect rights than the Australian Constitution'. Do you agree with this statement? Justify your answer



### Check your **obook** **assess** for these additional resources and more:

» **Student book questions**

15.4 Check your learning

» **Legal case**

*Attorney-General for the State of South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1

» **Going further**

Trial by jury

» **Weblink**

*Lange v Australian Broadcasting Corporation*

# DECLARATIONS AND TREATIES THAT PROTECT THE RIGHTS OF AUSTRALIAN CITIZENS

## Did you know?

An International Declaration on the Protection of Journalists was created in 2016 to promote a culture of safety within the media industry. It raises awareness among journalists about international standards and encourages best practice for dangerous assignments or hostile environments. It also emphasises the responsibilities of states to guarantee journalists' safety.

Australia often plays a leading role on an international level to ensure global harmony and peace, and was one of the founding members of the United Nations. As part of this global cooperation, Australia has signed a number of international treaties and declarations, many of which aim to protect the rights of citizens around the world. Many of these treaties and declarations have influenced the way in which Australia protects the rights of its own citizens.



Source 1 The United Nations General Assembly in New York, 2016

An international treaty (or convention) is an agreement between countries (or other organisations such as the World Bank) to be bound by international law. When a nation signs a treaty, it demonstrates its intention to adopt the treaty and incorporate its requirements and conditions into its nation's law. However, the requirements and conditions of a treaty do not become a part of a nation's law until the treaty has been ratified. This means the parliaments must pass specific legislation to give effect to the obligations of the treaty and make them a legally binding part of the nation's law.

A declaration is a document that outlines a set of standards that nations (or other organisations such as the World Bank) voluntarily agree to but are not legally bound to uphold or implement. It sets out certain 'aspirations' or 'intentions' of the parties to the agreement. Countries can include those aspirations or intentions in their own law. A declaration can ultimately lead to a treaty being made on the topic.

## Study tip

You can use acronyms in your responses to Legal Studies questions, but make sure you first define the acronym, as many are not universally known. You can do this by writing out the full name of the word or phrase first, then putting in brackets the acronym. You can then use the acronym in the rest of your response.

## International declarations

Over the years Australia has signed and ratified a number of major international declarations that protect human rights. In doing so, it has given its commitment to uphold the rights and basic principles contained in these declarations and treaties.

### Universal Declaration of Human Rights

In December 1948, after the end of World War II, the United Nations established the *Universal Declaration of Human Rights* (UDHR). The UDHR states that 'Human rights are rights inherent to all human beings,

whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.’

The UDHR sets out the most basic human rights that all nations, governments and people should strive to uphold and promote including:

- the right to life, liberty and security of person
- the right not to be held in slavery or subjected to torture or to cruel, inhuman or degrading treatment or punishment
- the right to be treated equally before the law and to a fair and public hearing by an independent and impartial tribunal
- the right to seek and to enjoy in other countries asylum from persecution
- the right to marry and to found a family, and that marriage shall be entered into only with the free and full consent of the intending spouses
- the right to take part in political processes
- the right to freedom of opinion and expression.

Since its creation, the UDHR has been recognised, to a varying extent, by more than 180 countries (or Member States) that are members of the United Nations and has become the basis of many international laws on human rights.

## Other declarations

Other international declarations relating to human rights that Australia has supported include:

- the *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly of the United Nations in September 2007 and supported by the Australian Government in 2009 (interestingly, the Australian Government initially voted against the Declaration in 2007). The Declaration provides Indigenous peoples with various rights, including the right to be free and equal to all other peoples and individuals, the right to all human rights and freedoms recognised in the UDHR, the right to a nationality and the right to life
- the *Universal Declaration on Cultural Diversity*, adopted by the General Council of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 2001. It recognises that cultural rights are integral to human rights, that people should be able to express themselves in the language of their choice, and should be entitled to rights irrespective of their cultural identity.

## International treaties

In addition to the basic human rights established by the UDHR, there are also many other international treaties that aim to protect a range of more specific rights. Australia is a signatory to a number of those treaties.

### International Covenant on Civil and Political Rights

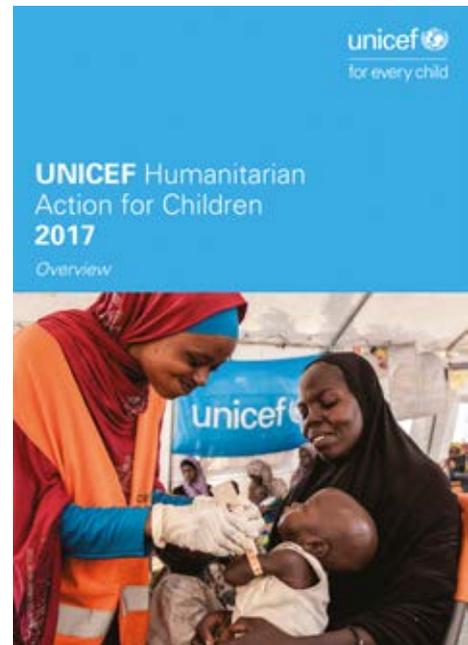
The *International Covenant on Civil and Political Rights* (ICCPR) was signed in December 1966, and came into force in March 1976 (though Australia didn’t become a signatory until 1980). It aims to commit parties to protect the civil and political rights of individuals.

The ICCPR aims to guarantee many of the broad rights established by the UDHR, such as the right to life, freedom from torture and slavery, a fair legal system, freedom of speech, religion and privacy, and the right to vote. The rights protected by the Human Rights Charter are based on the rights contained in the ICCPR.

## Other treaties

Other international treaties that Australia has signed include:

- *International Covenant on Economic, Social and Cultural Rights* (1966) – which aims to protect many of the rights set out in the UDHR. These include the right to an adequate standard of living (e.g. adequate food, clothing and shelter, health care and education), work (including the right to equal pay for equal work and safe, healthy working conditions and equal opportunity for promotions), and the right to participate in cultural life and enjoy the benefits of scientific progress and creative activity
- *Convention on the Elimination of all forms of Discrimination against Women* (1979) – which commits member nations to undertake action to eliminate all types of discrimination against women. This includes, for example, abolishing laws that discriminate against women (such as laws that ban women from voting, or preventing them working in particular occupations, such as mining and those that involve physical labour and driving, and being able to initiate a divorce). It also includes introducing laws and systems to ensure women are provided with equal opportunities in all areas including employment, education, health and political life (which may include the right to vote or run as a candidate in an election)
- *Convention on the Rights of the Child* (1989) – which commits member nations to acknowledge and provide laws and systems to protect the basic rights of children. These include the right of a child to life, survival and development; to be protected from abuse and violence; to be raised by and have a connection with their parents and not be sold into slavery or subject to child prostitution or pornography
- *Convention relating to the Status of Refugees* (1951) – which establishes a set of legal responsibilities for the treatment of refugees and asylum seekers that member nations agree to uphold. For example, refugees cannot be sent to a place where they will be exposed to persecution (such as maltreatment, harassment and torture) and should have the same rights as citizens with respect to basic rights such as the freedom of religion, the provision of basic education and social security, and access to the legal system. Refugees also have the right to be issued with identity and travel documents
- *International Convention on the Elimination of all forms of Racial Discrimination* (1963) – which commits member nations to abolish any laws that discriminate against people on the basis of their race, colour, descent or ethnicity and to introduce laws and policies that promote racial tolerance and understanding
- *Convention on the Rights of Persons with Disabilities* (2006) – which requires member nations to ensure that people with disability are given the same rights and freedoms as all citizens and are not discriminated against. This may include being provided with additional services and facilities to ensure their needs and rights are met. For example, people with a disability must be treated with dignity, given their independence and the freedom to make their own choices, offered equal opportunity as other citizens and be consulted by the government when it is developing relevant laws and policies.



**Source 2** UNICEF is an organisation that aims to promote the wellbeing of all children around the world. Its goals include improving the life expectancy, health, safety, welfare, education and development of all children.

## Optional protocols

Australia has also signed and adopted a number of **optional protocols** to these treaties. Optional protocols can be created after the formation of a major treaty to address additional matters or specify procedures to help achieve the aims of the main treaty. Optional protocols are treaties in their own right and nations who support the main treaty can decide to also adopt and ratify any optional protocols. For example, after the ICCPR was established by the United Nations, in 1989 the United Nations established the *Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty* (which was adopted by Australia in 1990).

Other examples of optional protocols that Australia has adopted include the:

- *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* (2000) (CEDAW) – which gives people and groups of women the right to complain to the Committee on the Elimination of Discrimination against Women about violations of rights that are protected under the main CEDAW treaty
- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000) – which expands the rights of children protected in the *Convention on the Rights of the Child* (CRC) by offering specific protection to children regarding their recruitment to armed services and use in hostilities and war. For example, nations that adopt the optional protocol commit to not recruiting or enlisting children under the age of 18 years to fight on a battlefield or conscripting children aged under 18 to the armed services
- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2000) – which expands the main CRC treaty by requiring nations that adopt the optional protocol to undertake measures to guarantee the protection of children from being sold and exploited through child prostitution and child pornography. The optional protocol was introduced in response to concern over the increase of and widespread trafficking of children.

**optional protocols**  
additional treaties in their own right that can be adopted and ratified by nations who are a party to the main treaty



**Source 3** Australians against the death penalty demonstrated prior to the execution of two Australians, Andrew Chan and Myuran Sukumaran, in Indonesia in 2015.

## Enforcement of international conventions and treaties

There is no global court or international legal system to monitor and impose sanctions or penalties on nations that might infringe an international treaty or convention. However, various bodies aim to enforce them. For example, the United Nations has established the **International Court of Justice** (ICJ) to resolve legal disputes between nations that are members of the United Nations. There are, however, limitations in taking a case to the ICJ to be resolved. They include a requirement that the nations involved must agree to accept the authority of the ICJ. This means nations cannot be compelled to attend the ICJ.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) educates and assists member nations to uphold their commitments under various human rights treaties. In 2006, the OHCHR set up a system called the Universal Periodic Review (UPR) to review the human rights records of all 192 United Nations member states and highlight areas where breaches have occurred.

Likewise, many of the main international human rights treaties include terms that establish committees to monitor treaties to encourage nations that may be acting in breach of a treaty to implement changes and comply with it. For example, the United Nations Human Rights Committee was established to hear disputes under the ICCPR. Similarly, the Committee on the Elimination of Discrimination against Women was set up to hear and deal with complaints against violations of rights protected by CEDAW.

### *Did you know?*

In 2014, a report from the International Labour Organization (ILO) estimated that 21 million people were victims of human trafficking each year. This means they were recruited or taken by force or deception, and used for forced labour, sexual exploitation and even organ removal. Over half of trafficking victims worldwide are women and girls, and approximately 26 per cent are children aged under 18 years.

An example of a committee in action is provided in *Brough v Australia* (2006) Communication No. 1184/2003.

## LEGAL

## CASE

### Australian prison conditions – a human rights issue

#### *Brough v Australia* (2006) Communication No. 1184/2003

The United Nations Human Rights Committee ruled that the alleged ill treatment of Corey Brough breached the *Optional Protocol to the ICCPR* adopted by Australia. Brough was 21

years old at the time he was being held in a New South Wales Youth Detention Centre. He suffers from a mild mental disability. In particular, the Committee found that the treatment of Brough infringed both article 10 of the Protocol, which required the humane treatment of persons deprived of their liberty, and article 24, which related to the special protection of children.

In August 2016, a Police Youth Detention Task Force was set up to investigate allegations that young offenders, as young as 10 years of age, were being denied their basic rights, were detained in poor and cruel conditions and were subjected to maltreatment while held in the Don Dale and Alice Springs Detention Centres in the Northern Territory.



**Source 4** A scene from a 2016 *Four Corners* report titled 'Australia's Shame' shows a young offender receiving 'attention' from staff inside Don Dale Youth Detention Centre, Northern Territory.

## 15.5

## CHECK YOUR LEARNING

### Define and explain

- 1 Distinguish between an international treaty and an international declaration.
- 2 What is an optional protocol? Provide one example to support your response.

### Synthesise and apply

- 3 Read the legal case *Brough v Australia*.
  - a What body was responsible for resolving this complaint?

- b Why was the complaint taken to this body?

### Analyse and evaluate

- 4 Using the internet and information contained in this chapter, research the reason why the Don Dale Youth Detention Centre in the Northern Territory was the subject of controversy in 2016. Discuss any similar alleged infringements of the optional protocol that may have taken place in Australia since this time.



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

» **Student book questions**

15.5 Check your learning

» **Weblink**

International Covenant on Civil and Political Rights

» **Weblink**

International Court of Justice

## THE INFLUENCE OF DECLARATIONS AND TREATIES ON RIGHTS

When Australia becomes a signatory to an international convention or treaty it does not mean the rights outlined in that document automatically become law. For this to happen, the parliament must pass legislation to formally adopt the provisions of the document and make it legally binding.

Examples of significant international human rights treaties and conventions that have been specifically incorporated into Australian law through the passing of specific legislation are included in Source 1.

INTERNATIONAL DOCUMENT	PURPOSE	LEGISLATION
<i>Convention on the Rights of the Child</i> (1989)	This treaty aims to protect the rights of all children and was ratified by Australia in 1990. However, our Commonwealth Parliament and Government has been criticised for implementing laws that allegedly breach this treaty by allowing the detainment of children of asylum seekers in detention centres.	<ul style="list-style-type: none"> <li>• <i>Migration Act 1958</i> (Cth)</li> <li>• <i>Family Law Act 1975</i> (Cth)</li> <li>• <i>Australian Human Rights Commission Act 1986</i> (Cth)</li> <li>• <i>Working with Children Act 2005</i> (Vic)</li> <li>• <i>Child Wellbeing and Safety Act 2005</i> (Vic)</li> <li>• <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)</li> <li>• <i>Commission for Children and Young People Act 2012</i> (Vic)</li> </ul>
<i>Convention on the Elimination of All Forms of Discrimination Against Women</i> (1979) (referred to as CEDAW)	This treaty aims to protect the human rights of women and requires signatory nations to commit to implementing laws and systems that ensure that women are equal under the law and not discriminated against on the basis of their sex. It was ratified by Australia in 1983.	<ul style="list-style-type: none"> <li>• <i>Sex Discrimination Act 1984</i> (Cth)</li> <li>• <i>Equal Opportunity Act 1995</i> (Vic)</li> <li>• <i>Workplace Gender Equality Act 2012</i> (Cth)</li> <li>• <i>Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011</i> (Cth) (which aimed to improve the response to domestic and family violence and child abuse)</li> <li>• <i>Family Violence Protection Amendment Act 2014</i> (Vic)</li> <li>• <i>Fair Work Act 2009</i> (Cth)</li> </ul>
<i>International Convention on the Elimination of All Forms of Racial Discrimination</i> (1965)	This treaty aims to abolish any laws that discriminate against people on the basis of their race, colour, descent or ethnicity and to introduce laws and policies that promote racial tolerance and understanding. It was ratified by Australia in 1975.	<ul style="list-style-type: none"> <li>• <i>Racial Discrimination Act 1975</i> (Cth)</li> <li>• <i>Racial and Religious Tolerance Act 2001</i> (Vic)</li> <li>• <i>Equal Opportunity Act 2010</i> (Vic)</li> <li>• <i>Broadcasting Services Act 1992</i> (Cth)</li> <li>• <i>Fair Work Act 2009</i> (Cth)</li> <li>• <i>Crimes Amendment (Bullying) Act 2011</i> (Vic) (referred to as Brodie's law)</li> </ul>

Source 1 Victorian and Commonwealth legislation that upholds international treaties adopted by Australia

In 2017 the Australian Government gave a commitment to ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

This is further explored in the case study below.

## CASE

## STUDY

### Australia pledges to ratify OPCAT

In February 2017 the Government announced that Australia will ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). The ratification will encourage continuous improvement of inspection and conditions of detention.

OPCAT is an international treaty that will improve the way Australia's prisons and detention centres are managed and monitored.

The Commonwealth Attorney-General, George Brandis, announced that OPCAT would be ratified by the end of 2017.

Under the new arrangements, independent inspection agencies will monitor Australia's prisons and immigration detention centres. The Commonwealth will consult the states and territories about the most appropriate bodies to undertake the monitoring. Existing human rights organisations could be appointed.

The intention is to 'assist states to better protect people in detention from torture and mistreatment' not to shame them. This 'is not to engage in an act of moral vanity, it is to cooperate in a mutual endeavour to bring about a tangible improvement to the treatment of people in detention', Senator Brandis said.

The Office of the Commonwealth Ombudsman would coordinate the inspecting bodies.

The Human Rights Commissioner, Ed Santow, praised the commitment to ratify, saying it was good for Australian human rights.

Although legislation must be passed to ratify and give effect to rights and obligations of an international treaty, sometimes our Commonwealth and state parliaments already have legislation in place that protects many of the rights contained in the document. For example, the *Convention on the Rights of Persons with Disabilities* (CRPD) was adopted by the United Nations and became available for nations to sign in 2006. Yet the Commonwealth Parliament had already passed the *Disability Discrimination Act 1992* (Cth), which protected many of the rights contained in the CRPD. In recent years, the passing of the *National Disability Insurance Scheme Act 2013* (Cth) has also reinforced many of the rights and obligations included in the CRPD by improving the support offered to people with a disability and their families and carers.

In Australia, the Commonwealth, state and territory governments have also committed to providing a range of organisations and systems to enforce human rights legislation and resolve alleged breaches of human rights. For example, when an alleged human right has been breached the affected individual may seek to have their rights enforced through the Australian court system or through various other organisations. This includes the Australian Human Rights Commission (which can investigate and resolve complaints under various Commonwealth legislation such as the *Age Discrimination Act 2004* (Cth)) and the Victorian Equal Opportunity and Human Rights Commission.

An example of a legal case involving the National Disability Insurance Agency is detailed on the next page.

# Challenging the National Disability Insurance Scheme

## *McGarrigle v National Disability Insurance Agency* [2017] FCA 308 (28 March 2017)

LEGAL

CASE

In July 2013 the *National Disability Insurance Scheme Act 2003* (Cth) (NDIS Act) was passed by the Commonwealth Parliament to introduce the National Disability Insurance Scheme (NDIS). The NDIS aims to provide support to people with a permanent or significant disability. This is so that they are able to participate in the community and the workplace, and access a range of services including health, education, housing, legal and community services, so they may 'live an ordinary life'.

One of the aims of the NDIS was to enable the Government to contribute to **some** of the transport costs for people with disability and their family and carers. As such the NDIS Act stated that the National Disability Insurance Agency (NDIA), the independent statutory authority responsible for implementing the NDIS, was **only required to fund reasonable and necessary supports** taking into account 'what is reasonable to expect families, carers, informal networks and the community to provide.'

In 2017, however, this part (provision) of the NDIS Act was challenged in the Federal Court by Liam McGarrigle, a young man aged 21 years who qualified for the NDIS due to an intellectual disability and autism spectrum disorder. McGarrigle, who was represented by Victoria Legal Aid, challenged the NDIA's ability to only make partial payments for transport costs. He also challenged the meaning of what is a 'reasonable' amount of money to expect people with a disability and their families, carers and support groups to contribute to the funding of 'necessary supports' after the NDIA would only pay 75 per cent of the total transport costs (\$16 000) he incurred in getting to and from work and support programs. This left McGarrigle to pay the balance, which placed great financial strain on him and his family. Living in a small country town 25 kilometres from Geelong, McGarrigle was unable to drive or access public transport.

McGarrigle was successful in the proceeding after the judge ruled that, provided all necessary criteria are met, people who live in rural areas and are unable to drive or use public transport should have the full cost of their transport needs (e.g. taxi fares) paid by the NDIA, and not just receive partial funding.

In addition to requiring the NDIA to pay the full amount of costs incurred by McGarrigle in accessing his workplace and appropriate support services, the decision also potentially allows other people with a disability to seek transport costs for appropriate support fully, rather than partially, funded.

The NDIA appealed the decision to the Full Court of the Federal Court. On 21 August 2017, the application for appeal was dismissed.



Source 2 Liam McGarrigle

International organisations such as Amnesty International and Human Rights Watch can also place pressure on nations, including Australia, to enforce legally protected human rights. Both are large global organisations devoted to exposing human rights abuses. They draw attention to nations that allegedly breach or ignore human rights abuses in the media, and also petition governments and advocate for the release of individual prisoners. They use a variety of methods and activities including the reporting and publishing of human rights abuses and the undertaking of large-scale awareness campaigns.

Amnesty International uses both the traditional media (such as television and print) and social media to raise local, national and global awareness of human rights abuses in the hope that negative attention and widespread public pressure will force governments and bodies to undertake action to stop or at least minimise the occurrence of such abuses.

Over recent years the Australian Government has been criticised by various international human rights organisations in relation to a number of human rights issues, as highlighted in the following news article. These include its treatment of asylum seekers in offshore detention centres, the treatment of Indigenous Australian children held in youth detention centres, and the high **imprisonment** rates for Aboriginal and Torres Strait Islander peoples. Amnesty International has also criticised the Australian Government's previous unwillingness to legislate for marriage equality.

#### **imprisonment**

a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

## **IN THE NEWS**

### Human Rights Watch highlights human rights issues in Australia

Human Rights Watch, World Report 2017, Annual Review of Human Rights Around the Globe- Australia Events 2016

Australia is a vibrant multicultural democracy with a strong record of protecting civil and political rights, but serious human rights issues remain. In 2016, the government continued its draconian policy of offshore transfers of asylum seekers to Manus Island in Papua New Guinea (PNG) and Nauru. There were growing calls to address abusive offshore detention conditions and resettle those found to be refugees in Australia.

Indigenous Australians remain disproportionately subject to the criminal justice system. In 2016, the government of Prime Minister



**Source 3** Organisations including the Human Rights Watch raise awareness for human rights abuses.

Malcolm Turnbull announced a royal commission into the mistreatment of children in detention facilities in the Northern Territory.

Australia does not recognize the right of same-sex couples to marry. The Australian Government announced a plebiscite on the right of same-sex couples to marry, but political opponents blocked it, arguing a plebiscite is expensive and wasteful and that the issue should be determined by a parliamentary free vote.

In November, controversy over the *Racial Discrimination Act*—including attacks on the Australian Human Rights Commission for its handling of discrimination complaints—led the government to set up a parliamentary inquiry to examine whether the Act imposes unreasonable limits on free speech. Other human rights concerns include overly broad counterterrorism laws and limits to the rights of people with disabilities.

## 15.6

## CHECK YOUR LEARNING

### Define and explain

- 1 Explain two ways in which Australia's signing of international treaties and declarations have influenced the protection of rights in Australia.

### Synthesise and apply

- 2 Read the case study 'Australia pledges to ratify OPCAT'.
  - a Identify the optional protocol the Australian Government committed to ratifying in March 2017.
  - b Explain how the ratification of this optional protocol could impact upon the protection of human rights in Australia.
- 3 Conduct some research on the Australian Human Rights Commission (AHRC).
  - a What is the role of the AHRC?

- b List five different areas of human rights that are monitored by the AHRC.
- c Outline three current human rights issues highlighted on the AHRC website.
- d Explain the dispute resolution method used by the AHRC to resolve complaints.
- e Suggest some difficulties that might face individuals who wish to challenge an alleged breach of their rights.

### Analyse and evaluate

- 4 Discuss the ability of international treaties and declarations to influence rights protection in Australia.
- 5 In your view, should and could international treaties be automatically adopted as law in Australia? Discuss as a class.



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» **Student book questions**

15.6 Check your learning

» **Worksheet**

Australian Human Rights Commission

## THE APPROACH ADOPTED BY THE UNITED STATES IN PROTECTING RIGHTS

There are various ways that countries can protect the rights of their citizens. Different countries around the world adopt different approaches, and protect rights to varying degrees.

As we have examined, Australia mainly protects rights through Commonwealth and state legislation (including passing Acts of Parliament to uphold the rights contained in international treaties) and the common law. Australia's approach to the protection of rights differs from many other countries that have a national charter or bill of rights, either contained within their national constitution or passed as a separate Act of Parliament. In fact, Australia is the only Western democracy in the world that does not have either a constitutional or statutory charter or bill of rights to list and protect the basic rights of the people.

Source 1 provides a snapshot of the difference between a constitutional charter or bill of rights, and a statutory charter or bill of rights.

CONSTITUTIONAL CHARTER OR BILL OF RIGHTS	STATUTORY CHARTER OR BILL OF RIGHTS
<ul style="list-style-type: none"> <li>An approach where a nation's constitution includes a comprehensive list of the basic rights of the people (referred to as a charter or bill of rights).</li> <li>As the rights are contained or entrenched within the Constitution they are express rights that can only be removed or altered by changing the Constitution. They cannot be changed by an ordinary Act of Parliament.</li> </ul>	<ul style="list-style-type: none"> <li>An approach where a nation protects a comprehensive list of basic rights of the people (often referred to as a Charter or Bill of Human Rights Act) through the passing of an Act of Parliament.</li> <li>The act is not a part of the nation's constitution, but a separate statute (or legislation) that can be changed by the parliament that passed the act at any time.</li> </ul>

**Source 1** Key features of a constitutional and statutory charter or bill of rights

Source 2 provides examples of countries that have adopted a constitutional charter or bill of rights, or a statutory charter or bill of rights.

COUNTRIES WITH A CONSTITUTIONAL CHARTER OR BILL OF RIGHTS	COUNTRIES WITH A STATUTORY CHARTER OR BILL OF RIGHTS
<b>United States</b> – America Bill of Rights (1791)	<b>United Kingdom</b> – <i>Human Rights Act</i> (1998)
<b>Canada</b> – Bill of Rights (1960)	<b>New Zealand</b> – <i>Bill of Rights Act</i> (1990)
<b>South Africa</b> – Bill of Rights (1996)	<b>Hong Kong</b> – <i>Bills of Rights Ordinance</i> (1991)
<b>India</b> – Fundamental Rights (1950)	<b>European Union</b> – <i>Charter of Fundamental Rights of the European Union</i> (2005)

**Source 2** Examples of countries that have a constitutional or a statutory charter or bill of rights

In some countries that adopt a constitutional approach to the protection of rights, the parliament may pass legislation to override or cancel a right protected by the charter or bill of rights. But in these cases, full consideration must be given to the benefits and problems associated with the right before changes are permitted to take place. Similarly, some charters and bills of rights also contain a **limitation clause**; that is a clause that restricts the application of the rights. For example, the South African Bill of Rights includes a clause which states that the rights may be limited if it is reasonable and justifiable in an open and democratic society.

Countries that protect rights through a constitutional or statutory charter or bill of rights will also have a range of state and national (federal) laws that protect the rights of their citizens. These nations will also protect rights through their adoption and commitment to various international treaties and via their court system.

This topic explores the way that the United States of America protects rights.

## The government of the United States

The system of government in the United States (US) is based on a **federal system**, similar to Australia's. The country is divided into 50 states, each of which has its own legislature (elected law-making body) that makes laws applicable in that state.

The US has one central or **federal legislature** – referred to as the **Congress** – with the power to make laws that apply to and benefit the entire country. In general, matters that mainly concern the states, such as internal communications, regulations relating to property, industry, business and public utilities (e.g. electricity, water and gas) and **criminal law**, solely belong to the **state legislatures**, while other matters of more national concern belong to the federal legislature (or Congress), such as health, education, welfare, transportation, housing and urban development.

The US has a number of courts. Its highest court is the Supreme Court. Sitting below the Supreme Court are 13 courts of appeal (called US Courts of Appeal) and 94 district or trial courts (called US District Courts).



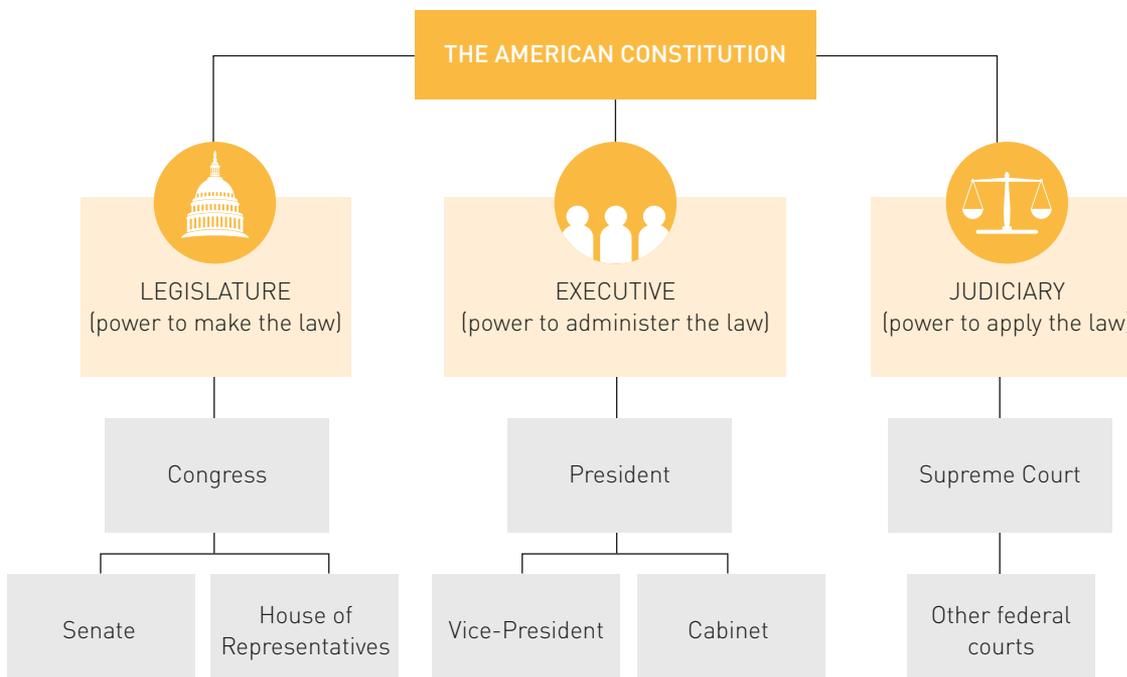
**Source 3** The US Government is based on a federal system.

**federal system**  
a system of government in which a country is divided into states (each with its own parliament to make laws applicable in that state), in addition to having one central parliament (i.e. federal parliament) with the power to make laws that apply to the entire country

**federal legislature**  
a national law-making body; for example, the Commonwealth Parliament in Australia and the Congress in the US

**Congress**  
the federal or national legislature or law-making body in the US

**state legislatures**  
the state law-making bodies in the US (the equivalent of Australia's state parliaments)



**Source 4** The federal legislature of the United States has a number of similarities to Australia's own federal system of government.

The US protects rights in a variety of ways, some of which are similar to the way in which Australia protects rights but others are very different. For example, the US protects rights in a similar manner to Australia through Acts of Parliament passed by the state and federal legislatures (referred to as parliaments in Australia) and court decisions. However, its constitutional protection of rights differs significantly to Australia's in that the US Constitution contains a Bill of Rights that protects a comprehensive and broad range of rights, whereas the Australian Constitution does not.

The main ways in which the US protects rights are as follows:

- in its Constitution, through the Bill of Rights
- in the structure of its Constitution
- through implied rights
- through international documents.



**Source 5** From 1919, the Eighteenth Amendment to the US Constitution banned the sale of alcohol. This was reversed by the Twenty-first Amendment in 1933.

## The Bill of Rights

The main way in which the US differs in its approach to the protection of rights with Australia, is that the US Constitution expressly contains a comprehensive list of broad rights of the American people, called a **Bill of Rights**, whereas the Australian Constitution does not.

More specifically, the US Bill of Rights consists of what is referred to as a series of **amendments** or rights of the American people. The first 10 amendments were accepted in 1791, with another 16 added since, including the last in 1971 that gave the right to vote to 18-year-olds.

The amendments or rights in the US Bill of Rights are fully enforceable by the US Supreme Court. Because they are expressly stated in the Constitution, they can only be removed by changing the US Constitution. This involves a process that is relatively difficult to achieve. For example, for a right to be added or removed from the Bill of Rights the proposed change must be passed by two-thirds of both houses of Congress (the House of Representatives and the Senate) and subsequently be passed by three-quarters of the fifty US state legislatures.

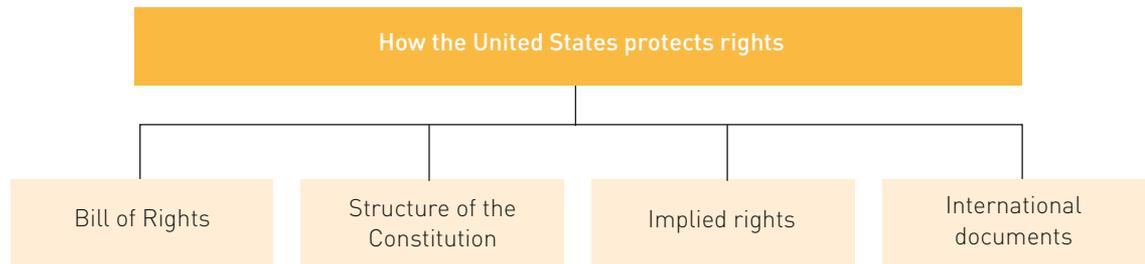
Unlike the Australian Constitution, the US Constitution explicitly gives citizens the right to bear arms (carry a gun), under what is known as the Second Amendment, as highlighted in the legal case below.

### US Bill of Rights

a US law contained within the US Constitution that establishes the most important basic rights of the people and aims to protect them

### Bill of Rights amendments

sections of the US Bill of Rights that state the specific rights of the American people



**Source 5** Four ways in which the United States protects the rights of its citizens

## LEGAL

## CASE

### The right to bear arms

*District of Columbia v. Heller* 5, 54 US 570 (2008); *McDonald v Chicago* 561 US 742 (2010)

According to the Gun Violence Archive (GVA), an independent, not-for-profit organisation that provides information about gun-related violence in the United States, just over 15 000 people were killed by guns in the US in 2016, with over 30 000 more being injured by gun violence. In addition there were 384 mass shootings (being four or more people being shot and/or killed in a single incident, not including the perpetrator (the shooter)).

Given the high rate of gun violence in America, it is not surprising that many state legislatures and the US Congress have, over the last decade, tried to implement gun reform to restrict the sale and purchase of guns. Such change has, however, been difficult to implement given the US Bill of Rights protection of the right to keep and bear arms (guns) via the Second Amendment, which states that 'a well regulated Militia, being necessary to the security of a free state, [and] the right of the people to keep and bear arms, shall not be infringed'. Court decisions have reinforced this right.

For example, in *District of Columbia v. Heller*, the US Supreme Court ruled that a ban on individuals owning handguns, which was introduced by various states, including the District of Columbia (which includes the city of Washington and the White House) was unconstitutional and invalid because it infringed the right to bear arms (as stated in the Second Amendment). The Court ruled this right extended to the individual, not just the states' right to maintain militias and police forces. The reason for this decision was that a ban interfered with the lawful right of citizens to defend themselves.

This decision was later strengthened in *McDonald v. Chicago*. Otis McDonald challenged a Chicago law, implemented in 1982, that required people to register their possession of a handgun. The court held the Chicago law breached an individual's right to keep and carry a gun, which was protected by the Bill of Rights.

Also unlike the Australian Constitution, the US Constitution explicitly protects freedom of speech, in the First Amendment. The case of *Snyder v. Phelps* 562 US 443 (2011) provides an example of how the courts have upheld this right.

## The freedom of speech

### *Snyder v. Phelps* 562 US 443 (2011)

Albert Snyder was the father of Matthew Snyder, a soldier killed in Iraq in 2006. In 2010, Albert brought a case against the Westboro Baptist Church (in the US state of Kansas) after members of the church disrupted and ruined Matthew's funeral. At the funeral, they held a protest outside and displayed posters claiming that 'God hates soldiers' and that Matthew 'deserved to die' as God's vengeance against America's growing acceptance of homosexuality, which in the Church's opinion is a sin.

While Matthew's funeral had not been the only service disrupted by the Church, Snyder was the first person to take action against it claiming it had invaded his privacy and caused great emotional stress. By contrast, the Church claimed under the First Amendment it had a right to freedom of speech and a right to protest.

In the original trial, the state court found in favour of Snyder and the jury awarded him \$10 million in compensatory and punitive damages, which was later reduced to \$5 million. However, the Church ultimately won the case after lodging a successful appeal in the US Court of Appeal (a federal court), which ruled that the Church's right to protest and freedom of speech was guaranteed by the First Amendment. In their decision, the judges stated that despite the 'distasteful and repugnant (disgusting) nature of the protests', the (Church's) speech was constitutionally protected.

LEGAL

CASE



**Source 7** Members of the Westboro Baptist Church protesting in the US. Do these 'offensive' signs represent an exercise of the right to freedom of speech or an abuse of the right to freedom of speech?

## Comparison to Australia

As we examined earlier in this chapter, the Australian Constitution only includes five relatively limited express rights, and so the constitutional protection of rights is vastly different. For example, while the US Bill of Rights protects the broad and general right of the American people to **freedom of religion**, the Australian Constitution only expressly protects a **limited right to freedom of religion** in that the Commonwealth is prohibited (banned) from passing legislation that imposes or restricts religious practice. There is no mention of any restriction on the Australian states to make such laws.

The US Constitution also expressly contains and protects a broad range of rights that are not mentioned in the Australian Constitution including the right of the American people to freedom of speech, equal protection under the law, the right to keep and bear arms and not be subject to cruel punishment.

## Rights within the US Constitution's structure

In addition to containing a Bill of Rights, the US Constitution also protects rights, in a similar way to the Australian Constitution, through its text and structure. That is, the US Constitution establishes various systems and parliamentary principles that indirectly protect the rights of the American people. For example, like Australia, the US Constitution also includes the parliamentary principle of **representative government** which ensures that Congress must be elected by the people and make laws that reflect the views and values of the majority of people, which protects the right of the people to directly elect the Congress.



**Source 8** The structure of the US Constitution protects the right of the people to elect Congress through the principle of representative government.



**Source 9** The US Supreme Court

In addition, as in Australia, the US Constitution protects the principle of separation of powers. In the US, the legislative, executive and judiciary are kept separate at a federal level so that no one body or group can exercise all three powers.

However, the US Constitution also expressly protects the right to vote for all US citizens aged over 18 (Eighteenth Amendment), which is not included in the Australian Constitution.

## Implied rights

The US legal system is based on English common law. As such, the US courts are able to resolve disputes involving an alleged breach of rights.

The US Supreme Court has the power to enforce the rights of the American people, including the rights protected by statute law and the US Constitution, and can declare any legislation that infringes the basic rights of the American people to be invalid. The US Supreme Court can also imply the existence of rights when resolving constitutional disputes. It can also fully enforce all constitutional rights. If the court makes a ruling that legislation has infringed a right protected in the US Constitution, it can award a remedy, such as the payment of damages, to the party whose rights have been breached.

In a situation where the US Supreme Court does make a ruling that legislation breaches the rights contained in the US Constitution, the Congress (like the Australian Commonwealth Parliament) cannot override this decision.

## The US right to privacy

### *Griswold v. Connecticut* 381 US 479 (1965)

In this US case a doctor had been arrested for giving information about contraception to a married couple, because his actions breached Connecticut legislation that banned the use of 'any drug, medicinal article, or instrument for the purpose of preventing conception'. In its ruling, the US Supreme Court overturned the Connecticut state law, finding that it infringed people's right to privacy, which although not being explicitly stated in the US Constitution was implied to exist in various sections or amendments. In particular, the Fourth Amendment (covering the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches) and the Fifth Amendment (right against self-incrimination) protected against government invasion of the sanctity of the home and the privacies of life.

The right to privacy was further extended in the case of *Roe v. Wade* 410 US 113 (1973) to include the right of privacy in a doctor and patient relationship. In this case, which helped protect the right of a woman to have an abortion, the Supreme Court found that the discussion and advice given as part of the patient–doctor relationship was a private matter, and accordingly, any state legislation that made certain abortions unlawful interfered with that private relationship. On this basis, the Supreme Court could declare such state law invalid. In this case the Court found the right of privacy was implied in the Fourteenth Amendment that provides that no state 'shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'.

LEGAL

CASE

## International conventions and treaties

Like Australia, the US also protects a range of basic rights by being a signatory to international human rights documents. However, many of the major international treaties to which the US is a signatory have not yet been fully ratified through the passing of local, state or federal legislation. For example, while President Obama signed the *Convention on the Rights of Persons with Disabilities* in 2009, it has not yet been ratified. So while the US has its own local, state and federal laws to protect against discrimination, it has been slow to accept the international system of human rights protection, preferring to rely on its own internal laws and protections.



**Source 10** In January 2017, millions of people around the world, including approximately 500 000 in Washington US, joined the Women's March to demonstrate for the protection of women's rights.

### Study tip

In accordance with the *VCE Legal Studies Study Design*, you are required to compare Australia's approach to the protection of rights with the approach of another country. The task word compare (or compare and contrast) means to consider the similarities and differences.

# Australia and the US – a comparison

Source 11 below sets out some of the similarities and differences between the approaches taken by the US and Australia in the protection of rights.

FEATURE	AUSTRALIA	UNITED STATES
Both countries have federal systems of government where the state and federal legislatures can make laws in designated areas, including passing legislation to protect rights within their given authority.	Australia is divided into six states, each of which has its own elected parliament to make laws applicable in that state, in addition to the federal Commonwealth Parliament with the power to make laws that protect rights that apply to the entire country.	The US is divided into 50 states, each of which has its own elected legislature to make laws applicable in that state, in addition to the federal legislature, Congress, which has the power to make laws that protect rights that apply to the entire country.
Both countries have adopted various international treaties to uphold human rights.	Australia has signed and ratified more international human rights treaties than the US.	While being a signatory to some major international human rights treaties, the US has not yet ratified some.
Both countries have common law systems where judges can resolve disputes over an alleged breach of rights and set precedents that must be followed by lower courts in cases where the facts are similar.	Australian courts, including the most superior High Court of Australia, are able to establish legal principles or precedents that provide protection of common law rights.	The US courts, including the most superior federal US Supreme Court, are able to establish legal principles or precedents that provide protection of common law rights.
All rights expressly stated in the Constitution can only be altered, added or removed by changing the Constitution.	The process of changing the Australian Constitution requires a compulsory public vote called a referendum.	The process of changing the US Constitution (including the Bill of Rights) requires support of two-thirds of the Congress and three-quarters of the state legislatures.
The highest court has the ability to interpret the Constitution and imply the existence of rights.	The High Court of Australia has implied the freedom of political communication.	The US Supreme Court implied the right to privacy.
Both Constitutions indirectly protect the rights of their citizens by including concepts and principles within its text and structure.	The Australian Constitution contains the principle of representative government that indirectly protects the rights of the people to elect the Senate and House of Representatives. It also upholds the principle of the separation of powers which minimises the risk of one body (that is, either the parliament, government and the courts) holding all the power.	The US Constitution contains the principle of representative government that indirectly protects the rights of the people to elect the Congress. It also upholds the principle of the separation of powers so that no one body or person (that is, either the Congress, President or the courts) can hold all the power.
All constitutional rights are fully enforceable by the courts and any legislation that infringes a right can be declared invalid and not overridden by the legislature.	The High Court can enforce the rights protected by the Constitution and the parliament cannot override its ruling. The High Court does not award a remedy to the party whose rights have been breached.	The US Supreme Court can enforce the rights protected in the Constitution (and Bill of Rights) and the Congress cannot override its ruling. The US Supreme Court can also award a remedy to the party who has suffered a breach of rights.

FEATURE	AUSTRALIA	UNITED STATES
Individuals and groups can bring a complaint that an act infringes their rights set out in both Constitutions.	The High Court can declare legislation that breaches a constitutionally protected right to be invalid.	The US Supreme Court can declare legislation that breaches the Bill of Rights right to be invalid.
The number of rights expressly protected in each constitution greatly differs.	The Australian Constitution only contains five relatively narrow express rights. It does not contain a comprehensive Bill of Rights.	The US Constitution contains a comprehensive list of broad rights in its Bill of Rights.
As mentioned above, the process for changing the Constitution to remove, alter or add an express right differs.	The process of changing the Australian Constitution requires a compulsory public vote called a referendum. The public vote takes place on a set day.	The process of changing the US Constitution (including the Bill of Rights) requires support of two-thirds of the Congress and three-quarters of the state legislatures. The procedure is complex and can be lengthy.

Source 11 Similarities and differences between the approaches adopted by the US and Australia in protecting rights

## 15.7

## CHECK YOUR LEARNING

### Define and explain

- 1 Distinguish between a constitutional and a statutory charter or bill of rights.
- 2 List the four main ways in which rights are protected in the United States of America.
- 3 Explain what is meant by the US Bill of Rights.
- 4 Describe how rights that are explicitly stated in the US Constitution can be changed.

### Synthesise and apply

- 5 Explain the significance of *Griswold v. Connecticut* in relation to the US protection of rights.
- 6 Read the legal cases *District of Columbia v. Heller* and *Snyder v. Phelps*.
  - a According to the US Bill of Rights, what is the 'right to bear arms'?

- b Describe the two laws that were overridden by the US Supreme Court in the *District of Columbia v. Heller* and *McDonald v. Chicago*.
- c Outline the facts and outcome of *Snyder v. Phelps* and explain whether you agree with the final decision of the US Supreme Court.

- 7 Compare two similarities and two differences between the approaches taken by Australia and the United States in protecting rights.

### Analyse and evaluate

- 8 In your view, does the comparison of rights between Australia and the US demonstrate weaknesses in Australia's protection, or strengths? Discuss.



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US Bill of Rights

## POSSIBLE REFORMS TO THE PROTECTION OF RIGHTS IN AUSTRALIA

Australia has many laws and systems in place to ensure the rights and freedoms of all Australians are upheld. However, there are often concerns that the rights of particular individuals and groups and the community are not adequately protected. It is therefore important that the way we protect and enforce rights is constantly reviewed, and governments are willing to implement reforms to improve the protection of rights.

Three possible reforms to the protection of rights in Australia include:

- introducing a national charter or bill of rights
- amending legislation and systems to provide increased protection to minority groups
- increasing the availability of legal aid and assistance.

### Should Australia have a national charter or bill of rights?

Australia is the only Western democracy in the world that does not have a federal constitutional or statutory charter or bill of rights. In fact, as we have examined earlier in this chapter, while the Australian Constitution does provide some structural protection of rights and the ability of the High Court to imply the existence of rights, it only contains five express rights. Similarly, while the Victorian and the Australian Capital Territory parliaments have passed legislation to establish a statutory protection of rights within their state and territory, the Commonwealth Parliament has not passed legislation to create a charter or bill of rights outlining the basic rights of all Australians.

Whether or not Australia should have a charter or bill of rights is a topical issue. If Australia did adopt a charter or bill of rights, it is commonly agreed that it would adopt a **statutory approach**. This means the Commonwealth Parliament would pass an Act of Parliament which sets out the basic rights for the Australian people. This is because the process of changing the Constitution to include more rights is very difficult, as any change must be supported by a majority of the Australian public in a referendum, and a majority of electors in the majority of states. This would make it very unlikely that a proposal to include a comprehensive list of basic rights to the Constitution would be successful.

**statutory approach**  
in relation to rights,  
the protection of rights  
through passing Acts of  
Parliament



**Source 1** Successive Australian Governments have been criticised by human rights groups including Amnesty International and Human Rights Watch for their treatment of people seeking asylum in Australia.

### Arguments in favour of adopting a charter or bill of rights

Those in favour of the introduction of a statutory charter or bill of rights argue it would:

- strengthen the protection of rights in Australia by clearly stating the basic rights of all citizens. This would help assist in educating the community about their rights so individuals would be more willing to seek action when their rights have allegedly been breached. It may also discourage possible infringements

- make governments in Australia more accountable for the improvement of rights legislation and the provision of services to uphold the rights
- improve Australia's international image. As we have seen earlier in this chapter, over recent years organisations such as Human Rights Watch, Amnesty International and the United Nations have criticised the Australian Government for various breaches of human rights. This includes criticism in relation to its treatment of asylum seekers being held in detention, children being held in youth detention centres, poor human rights record with respect to Indigenous Australians and other minority groups, and its previous unwillingness to legislate for marriage equality.

## Arguments against adopting a charter or bill of rights

Those against the introduction of a charter or bill of rights argue that:

- The basic rights of Australians are already adequately protected by hundreds of Acts of Parliament, at both the state and Commonwealth levels such as the *Sex Discrimination Act 1984* (Cth), the *Child Wellbeing and Safety Act 2005* (Vic) and Commonwealth legislation which makes slavery and people trafficking a crime. Individuals who believe their rights have been breached are already able to challenge the matter through the court system.
- Individuals who feel their rights are not protected by the law can try to influence the government to introduce a change in the law. If enough people support them, it is likely changes will occur. However, those in favour of a charter or bill of rights argue there are many minority groups, such as Indigenous Australians, people with a disability, children, women who are victims of family violence and those in the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community, whose rights may be ignored.
- The Commonwealth has passed the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which requires all proposed legislation to be checked for compatibility with rights, according to various international treaties. However, the parliament can choose to ignore suggestions that a proposed Act of Parliament will contravene a right.
- Australia has already adopted and ratified many major international treaties and optional protocols that protect a vast range of human rights such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (1985) and optional protocols.

## Providing increased protection to minority groups

One other possible reform to the improvement of the protection of rights in Australia is to amend existing legislation to improve legal processes, government policy and the provision of services in a range of areas. This is particularly important in those areas where governments have been accused of neglecting rights and failing to uphold Australia's obligations under international treaties and optional protocols. While Australia protects a vast range of rights, over recent years Australian governments have come under pressure to implement changes to improve the protection of rights for:

- Indigenous Australians
- asylum seekers
- people accused of terror-related crimes
- people with a disability
- members of the LGBTIQ community.



Source 2 Protesters and Aboriginal rights activists rallied against the 2017 Australia Day celebration, calling it 'Invasion Day'.

## Indigenous Australians

The Australian Government has come under pressure to improve the living standards of Indigenous Australians. Such changes could include improving access to health care, education and housing services and improving their access to and treatment by the legal system. Alarming, Aboriginal and Torres Strait Islander peoples are 13 times more likely to be imprisoned than non-Indigenous Australians and, while making up only 3 per cent of Australia's population, account for 27 per cent of the adult prison population and approximately 40 per cent of children in youth detention centres. It has also been recommended that the Australian Constitution be changed to include recognition of the Aboriginal and Torres Strait Islander peoples as the first Australians.

## Asylum seekers

The Australian Government has come under pressure to significantly improve the treatment of asylum seekers. This includes ensuring efficient processing of their claims and abolishing Commonwealth Government policies and legislation that allows for the indefinite detainment of asylum seekers in offshore detention centres, under extremely harsh conditions (causing distress, conflict and violence). Current policies have been criticised for failing to protect vulnerable individuals (especially women and children) and violating Australia's international responsibilities under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1985).

## People accused of terror-related crimes

With the present threat of terrorism, the Government has been called upon to ensure that Commonwealth anti-terrorism laws do not breach basic human rights. The *Counter-Terrorism Legislation Amendment Act 2016* (Cth) and the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth) amended the Commonwealth Criminal Code (the main legislation which establishes Commonwealth offences) to allow for the indefinite detainment of convicted terrorists who have completed their sentence on the basis of relatively subjective claims. This legislation has been criticised by a number of human rights groups.

## People with disabilities

The Australian Government is under pressure to continue to implement state and federal reforms to support people with a disability, ensuring that they (and their family and carers) are treated in a manner that allows them to live an 'ordinary' life and have access to a range of basic services like health, education and housing support. Of particular concern is that a 2011 independent investigation estimated that 45 per cent of people with disability in Australia live near or below the poverty line, which is twice the OECD average.

## Members of the LGBTIQ community

As popular support increased for the rights of the LGBTIQ community, the government is under continuous pressure to pass legislation to recognise members of this community. Same-sex marriage is legally recognised in countries including Belgium, Ireland, New Zealand and the United States among others. The introduction of laws in relation to marriage equality has varied by jurisdiction. In August 2017, Prime Minister Malcolm Turnbull announced that Australia will participate in a postal **plebiscite** to gauge public opinion on the same-sex marriage debate.

### plebiscite

a direct vote by all members of an electorate on a matter of national significance that does not affect the Constitution. Unlike a referendum, the outcome of a plebiscite is non-binding

# Providing greater access to legal aid and assistance

Rights are protected in Australia by common law and the ability of the High Court to imply the existence of constitutional rights and declare legislation that infringes a constitutionally protected right to be invalid. Yet the ability of an individual or group to pursue a matter can be severely limited due to the cost and time involved in taking a case to court. For example, a person may be discouraged from taking a case to court because they cannot afford the cost of legal representation, gathering evidence and court fees or are deterred by the prospect of being involved in a lengthy legal battle (that may then be challenged through the appeal process).

To address this issue, more state and federal funding could be allocated to legal aid and assistance bodies, such as Victoria Legal Aid. In addition to providing vital legal representation and assistance to people involved in criminal cases, Victoria Legal Aid could also undertake more civil matters involving the alleged infringements of rights.

Another possible reform is for governments to provide greater funding to organisations such as Victoria Legal Aid and the Victoria Law Foundation so that all members of the community, especially those in minority groups may be more likely to have their rights breached, are aware of their basic rights and the available options to challenge an alleged infringement of these rights. The Victorian and Commonwealth governments committed additional funding in 2017 to address the serious issues these organisations were facing to assist people. However, that funding is not considered enough, given the vast number of people who are ineligible for legal aid.

## 15.8

## CHECK YOUR LEARNING

### Define and explain

- 1 Distinguish between a constitutionally entrenched charter of rights and a statutory charter of rights.
- 2 Explain why it is unlikely that Australia will ever have a constitutionally protected charter of rights.
- 3 Explain two difficulties that an individual who wishes to pursue an alleged breach of rights through the courts may face. Suggest one reform that could address one of these difficulties.

### Synthesise and apply

- 4 Research one country that has a statutory charter of rights and prepare a summary that:
  - identifies the name of the charter and the date it was implemented
  - describes the main type of rights protected

- explains how a protected right may be removed or added to the charter
  - explains how the charter is enforced
  - discusses the benefits of a statutory approach to protection of rights compared to a constitutional approach.
- 5 Research the outcome of the 2017 Australian plebiscite on marriage equality. Compare the plebiscite with the 2015 same-sex marriage referendum in Ireland.

### Analyse and evaluate

- 6 Conduct a debate in class on the following statement: 'Australia needs a constitutional bill of rights to adequately protect the rights of Australians.'



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Does Australia need a bill of rights?

# THE MABO CASE – THE PROTECTION OF RIGHTS IN AUSTRALIA

## Introduction

Over the years there have been court cases which have had a significant impact on the protection of rights in Australia. Perhaps one of the most well-known and important cases is *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, more commonly known as the *Mabo* case. In this case, the High Court made the historic decision to overrule the long-established false common law principle that Australia was *terra nullius* (i.e. an ‘empty land’) when it was colonised by the British in 1788. In doing so the High Court recognised land rights for Aboriginal and Torres Strait Islander people.

In this and the next topic you will explore the facts, issues and outcome of the *Mabo* case, the role of people involved in this case, how it impacted on the rights of individuals and the legal system, and any conflicting attitudes associated with the case.

### *terra nullius*

a false common law principle that Australia was an ‘empty land’ and belonged to no one when the British first arrived and established colonisation in the late 1700s

## Eddie Mabo

Edward Koiki Sambo was an Indigenous Australian born on 29 June 1936 on a small island in the Torres Strait known as Murray Island. In the language of the native Meriam people, the island is called Mer. He was the fifth child of Robert and Poipe Sambo. His mother died shortly after he was born and he was adopted by his uncle Benny Mabo and his wife, Maiga Mabo. By islander law, Edward Koiki became Benny Mabo’s son and could inherit Mabo land. He became known as Eddie Mabo.



Eddie Mabo dedicated his life to fight for the land rights of his people. In 1982, Eddie Mabo and four other members of the Meriam people – Sam Passi, David Passi, Celuia Mapo Salee and James Rice – joined together to have their traditional ownership of the island of Mer in the Torres Strait legally recognised. The case was brought as a **test case** to determine the legal rights of the Indigenous Meriam people. The final High Court decision established an important legal principle and precedent that recognised the right of all Aboriginal and Torres Strait Islanders to have native title over their traditional land.

Without Eddie Mabo and the four other members of the Meriam people who joined him having the courage to initiate court proceedings against the Queensland Government, this case would never have been resolved. It may have taken many more years for Indigenous land rights to be recognised. This is because an individual or party can only take a dispute before the courts for resolution if they have a standing in the case (*locus standi*). This Latin term literally means ‘place of standing’ and means that the issues or matters in the case directly affect them. In relation to the *Mabo* case, only a member of the Meriam people, whose right to ownership of their traditional land was being denied by the Queensland Government, could have taken the case to court.

### Source 1 Eddie Mabo

#### test case

a legal action undertaken with the aim of having the court establish a legal principle or precedent which can be followed for future similar cases

#### *locus standi*

a Latin term meaning ‘standing in a case’; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

## The facts and issues central to the case

### Before colonisation

Aboriginal and Torres Strait Islander peoples occupied Australia for a minimum of 75 000 years before the first British colony was established. They spoke their own languages and had their own laws and customs. An essential part of their laws and customs is a strong connection to the land.

## After colonisation

In 1788, the British claimed sovereignty over part of Australia and established a colony. In 1889, the British courts applied the doctrine of *terra nullius* to Australia. This meant that the British regarded the land of Australia as ‘nobody’s land’ or ‘empty land’ when it was colonised.

## The birth of a campaigner

When Eddie Mabo was growing up, the Torres Strait Islands were administered by Queensland’s Chief Protector of Aborigines and the Department of Native Affairs. The department provided every island child with schooling, but this was very limited and it was assumed that no child would progress beyond primary school.

Mabo became disillusioned with his lack of rights. He started drinking heavily and was exiled from the Torres Strait Islands. Even 15 years later he was not allowed to return.

In the 1960s, Mabo threw himself into the campaign to give Indigenous people the right to be counted in the census. Vigorous campaigning led to increased support for the rights of Indigenous people. In 1967, a referendum was held and was successful in bringing about a change in the Constitution to allow the Commonwealth Parliament to legislate in respect of Aboriginal people.

During the campaign, Mabo initiated a conference in Townsville called the Inter-Racial Seminar. Mabo urged the conference to address issues of employment, housing, education and Indigenous civil rights.

Public support for land rights grew quickly in the late 1960s. The Australian Labor Party, trade unions and churches were behind the demand for change.

## Mabo land rights campaign

The election of the Whitlam Labor Government in December 1972 led to increased money for Indigenous programs. Eddie Mabo became involved in the Townsville Aboriginal and Islander Legal Service and the Townsville Aboriginal and Islander Health Service. He was elected president of Yumba Meta, a housing association that purchased houses in Townsville to be rented by Indigenous people, using Commonwealth funds.

Following this, Mabo became a full-time community activist. He needed money to live so he worked at James Cook University, Townsville, as a gardener. During his time there he spent every spare minute in the university library, reading all he could about his people and country, including the six-volume report on the Torres Strait by the Cambridge Anthropological Expedition. He became very knowledgeable about the Torres Strait Islands and he also had firsthand knowledge, being an Islander himself. He used this knowledge to give lectures on the subject to students at the university.

## The 1981 Land Rights Conference

Mabo’s real push for land rights began in the 1980s. He attended the Land Rights Conference in 1981 and explained his position on land rights.

The following extract is from Eddie Mabo’s address to the Land Rights Conference in 1981.



Source 2 An Indigenous school in Queensland in the 1950s

## EXTRACT

### Eddie Koiki Mabo: Land Rights in the Torres Strait

Struggle for land rights has been a major issue in Aboriginal and Islander politics for the last decade. It is interesting to note that our struggle for land rights has attracted so many of our fellow white Australians to join with us. Some larger institutions such as the churches and trade unions have also made public announcements giving their support for Aboriginal and Islander land rights claims.

In the Torres Strait, landownership is the same throughout. It is different from Aboriginal landownership on the mainland. Although we have tribal regions, we go much further into the clan area and then to individual or family holdings. This system existed as long as we could remember. When the first white men arrived in our islands they found people as village dwellers who lived in permanent houses and in well-kept villages. They also discovered that we were expert gardeners and hunters.

The land was inherited always by the male descendants just as male children in white societies always retained the family name. The terms we use for the male name-holders are Neai Borom or Neai Lied-Lied. Girls inherited land only in cases where the couple had no male children. In some instances, daughters were given land as a wedding present.

Before the father died, or during his lifetime, he would make sure that his family and friends knew his wish as to which one of his sons would be the heir to his land. He would also insist that the heir to his land must not deprive the rest of his sons or daughters of the use of his land. In most instances the decision for the use of their father's land remains at the goodwill of the heir. Such was the case of my father allowing his sisters to garden in the land that I now inherit.

Source: Eddie Mabo, 'Eddie Koiki Mabo: Land Rights in the Torres Strait'  
(Address delivered at the Land Rights Conference, Townsville, 1981)

#### barrister

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

#### writ

usually the first document filed by the plaintiff to start a civil proceeding in court, which explains the action being taken against the defendant and the place and mode of trial



Source 3 The Torres Strait

Those at the Townsville conference sensed that it was time to launch a test case in the courts. Islanders Eddie Mabo, Flo Kennedy and David Passi were prepared to take it on. They became the plaintiffs in the original case. Lawyers Greg McIntyre, Barbara Hocking and Garth Nettheim backed the idea. Doctor 'Nugget' Coombs and anthropologist Nonie Sharp, from the Aboriginal Treaty Committee, were also part of the original team of people that started the ball rolling.

After the Townsville conference, things began to move quickly. McIntyre, who worked at the Aboriginal Legal Service in Cairns, was engaged as solicitor for the Islanders. Hocking, a Melbourne **barrister** and long-time advocate for Indigenous people's rights, was briefed to advise the plaintiffs, and to consult other barristers with expertise in customary land cases. Ron Castan QC was selected to argue the case for the Murray Islanders. A short time later, the legal team was further strengthened with the engagement of barrister Bryan Keon-Cohen.

### Claiming customary ownership

In 1982, Mabo and four other Islanders filed a **writ** in the High Court of Australia. They claimed customary ownership of their ancestral lands on Murray Island. In doing so, they challenged the doctrine of *terra nullius*.

Mabo was under no illusion about the scale of the task; he and his co-plaintiffs were facing the combined resources of the Queensland and Commonwealth governments.

The most important ingredient that was missing was money. Mabo often had to rely on the benevolence of family members and friends to help him to attend court or hold meetings to raise support for their cause. As the work intensified, so did the search for funding. The breakthrough came with a \$50 000 Commonwealth Government grant, just as the **statement of claim** was ready to be filed.

The case could not have continued without the help of lawyers who were prepared to work for nothing. Mabo was unable to work because he was required to attend conferences, make statements and go around the country trying to raise money. Mabo gave his all, financially and physically, to the needs of his case.

**statement of claim**  
a document filed by the plaintiff in court which sets out the nature of the claim and the remedies sought

## The laws that applied to the case

The existing law in Australia was based on the principle of *terra nullius*: that Australia was officially considered an empty land before British settlement. This meant that Indigenous Australians had no property rights. Even though they had occupied the land for many thousands of years, according to Australian law, they did not own their land.

The first land rights case was heard in 1971. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (in the Northern Territory Supreme Court), the Indigenous inhabitants of the Gove Peninsula in Arnhem Land fought against the bauxite mining of their traditional lands without their consent. In this case, Justice Blackburn concluded that the doctrine of native title did not form part of the law of Australia.

Following this case, the then prime minister, William McMahon, responded by promising a policy statement on Indigenous access to land. When this statement was finally released, it did little to further the cause of Indigenous access to land.

### 15.9

## CHECK YOUR LEARNING

### Define and explain

- 1 What is a test case?
- 2 Explain the legal position of Indigenous people in relation to the ownership of land before the Mabo decision.
- 3 What led Mabo to lodge a land rights claim in court? Refer to his life and circumstances in your explanation.
- 4 What help did Mabo receive when making his claim in the courts?

### Synthesise and apply

- 5 **a** On 2 June 2017 the 25th anniversary of the Mabo decision was celebrated. Search the internet to find more information on Indigenous land claims. Be sure to visit the '25 years of native title recognition' website. A link is provided on your [obook assess](#).

- b** Identify and explain the significance of two events that helped Indigenous people gain land rights prior to the *Mabo* case. For example:
  - the Yirrkala Bark Petitions 1963
  - the Freedom Ride 1965
  - Wave Hill Station walk off 1966–75
  - the *Gove Land Rights Case* 1968–71.

### Analyse and evaluate

- 6 'For something as big as changing the law around native title, this should have been left to the parliament to legislate on. The courts should not have gotten involved'. Discuss the extent to which you agree with this statement.
- 7 Discuss some of the main difficulties or challenges Mabo and the other plaintiffs had to overcome in order to launch their court action.



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25 Years of Native Title Recognition

» **Weblink**  
Mabo

## The Mabo case in the Supreme Court of Queensland

In February 1986, Chief Justice Gibbs of the High Court of Australia ordered that the Supreme Court of Queensland conduct the hearings into the *Mabo* case on its behalf. Justice Moynihan, of the Supreme Court, was appointed to hear all the evidence, determine the facts and report back to the High Court in Canberra.

On 13 October 1986, proceedings commenced in Brisbane and Eddie Mabo was called to give evidence. He was questioned by his barristers, Keon-Cohen and Castan QC. He then faced 10 days of gruelling cross-examination by the Queensland Government's well-briefed lawyers. His evidence became the focus of the attack by the Queensland Government.

Justice Moynihan of the Supreme Court described the case in the following terms:

The case pleaded and particularised was claims by the various individual plaintiffs in respect of very specific pieces of land or areas of sea or reef. And their claims, their individual claims, were founded on chains of descent ... for example, 'I'm Eddie Mabo, I claim this piece of land which is situated here, which has this description and I claim it because I was adopted into a particular family and there is a line of descent'. And in that sense it was almost a series of mini cases in respect of each piece of land claimed by each plaintiff ...



**Source 1** The legal ownership of Mer (Murray Island), located in the Torres Strait between Australia and Papua New Guinea, was at the centre of the *Mabo* case.

The Murray Islander witnesses explained Meriam custom and the sacred laws, which underpin both their traditional rights and obligations to land and sea. The Meriam people are the people of the Torres Strait Islands.

The Meriam people's laws relate to occupation of the land, and trespass and inheritance. These laws are fundamental to their traditional system of ownership. They hoped this evidence would establish the Murray Islander claim to those areas of land, sea and reef specified in the court documents.

The Islanders had to fight two entrenched principles of the Australian legal system. These were the concept of *terra nullius* and the principle of sovereignty over all the land of Australia, which it was claimed abolished any native title rights that may have existed before colonisation.

There were 27 witnesses ranging from one man aged over 80 to young men and women.

In May 1989, the Supreme Court of Queensland visited Murray Island to hear evidence. By later that year, Mabo and James Rice were the only plaintiffs left and Rice was under pressure to withdraw as a plaintiff. Celuia Salee had died shortly after the claim had been filed. The Reverend David Passi and his brother Sam Passi both withdrew as plaintiffs.

The Supreme Court hearings were completed in Brisbane on 6 September 1989, and Justice Moynihan then faced a formidable task. His task was to decide on the facts surrounding the Murray Islanders' claims. He had to sort through the conflicting evidence of 44 witnesses, which, together with the submissions from both sides, generated 3464 pages of transcript. There were also more than 330 exhibits.

Justice Moynihan's decision in the Supreme Court of Queensland was handed down on 16 November 1990, more than four years after Mabo first entered the witness box. He ruled that Mabo's claims must be denied.

This finding was shattering to Mabo's morale, but it did pave the way for taking the case back to the High Court.

## The Mabo case in the High Court

The High Court hearings concluded in May 1991. The High Court justices retired to consider their verdict and write their judgments. It took many months before the decision was finally announced in June 1992. The journey through the courts had taken 10 years, and it had taken its toll on Eddie Mabo.

All of the judges, except Justice Dawson, agreed that:

- there was a concept of native title at common law
- the source of native title was the traditional connection to or occupation of the land
- the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs
- native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was manifest.

The order of the court was a declaration which, in part, reads as follows:

- (2) that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title;
- (3) that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

Put simply, the decision said that under Australian law, Indigenous people have rights to land, that these rights had existed before colonisation and still exist. This right is called native title.

By a majority of six to one, the High Court ruled that native title to land is recognised by the common law of Australia. This finding threw out the notion that when the land was 'discovered' by Captain Cook in 1788 it was *terra nullius*, an empty land or 'land belonging to no one'. An extract from the case is provided below.

### EXTRACT

#### *Mabo v Queensland (No. 2) (1992) 175 CLR 1*

Aborigines – Constitutional Law – Real Property

High Court of Australia, Mason C.J. (1), Brennan (2), Deane (3), Dawson (4), Toohey (5), Gaudron (3) and McHugh (1) JJ.

#### Catchwords

Aborigines – Native title to land – Whether extinguished by annexation by Crown – Reception of common law in Australia – Effect on native title – Terra nullius – Whether doctrine applicable in Australia.

Constitutional Law (Q.) – Reception of common law in settled colony – Effect on title of Indigenous people – Annexation of territory by colony – terra nullius – Whether doctrine applicable in Australia – Power of Parliament of Queensland to extinguish native title.

### Study tip

A practice assessment task for Unit 2 – Area of Study 3 can be found on the Unit 2 Assessment tasks topic on page 536–537.

Real Property – Tenures and estates – Application on settlement of New South Wales – Effect on native title – Land over which native title exists – Whether Crown land – Land Act 1962 (Q.), s. 5 – ‘Crown land.’

### Hearing

Canberra, 1991, May 28–31; 1992, June 3. 3:6:1992

### Decision

MASON CJ AND McHUGH J We agree with the reasons for judgment of Brennan J. and with the declaration which he proposes.

- 2 In the result, six members of the Court (Dawson J. dissenting) are in agreement that the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the Court who constitute the majority is that, subject to the operation of the Racial Discrimination Act 1975 (Cth), neither of us nor Brennan J. agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J. supports the conclusion of Brennan J. and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.
- 3 We are authorised to say that the other members of the Court agree with what is said in the preceding paragraph about the outcome of the case.
- 4 The formal order to be made by the Court accords with the declaration proposed by Brennan J. but is cast in a form which will not give rise to any possible implication affecting the status of land which is not the subject of the declaration in par.2 of the formal order.

BRENNAN J. The Murray Islands lie in the Torres Strait, at about 10 degrees S. Latitude and 144 degrees E. Longitude. They are the easternmost of the Eastern Islands of the Strait. Their total land area is of the order of nine square kilometres. The biggest is Mer (known also as Murray Island), oval in shape about 2.79 kms long and about 1.65 kms across. A channel about 900 m. wide separates Mer from the other two islands, Dauar and Waier, which lie closely adjacent to each other to the south of Mer. The Islands are surrounded for the most part by fringing reefs. The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. Although outsiders, relatively few in number, have lived on the Murray Islands from time to time and worked as missionaries, government officials, or fishermen, there has not been a permanent immigrant population.

Anthropological records and research show that the present inhabitants of the Islands are descended from the people described in early European reports. The component of foreign ancestry among the present population is small compared with most communities living in the Torres Strait.

The Meriam people of today retain a strong sense of affiliation with their forbears and with the society and culture of earlier times. They have a strong sense of identity with their Islands. The plaintiffs are members of the Meriam people. In this case, the legal rights of the members of the Meriam people to the land of the Murray Islands are in question.

The High Court said native title could continue if the following conditions existed:

- where Aboriginal and Torres Strait Islander people had maintained their connection with the land through the years of European settlement – native title was extinguished if the Aboriginal clan or group had ceased to acknowledge traditional laws and lost its connection to the land
- where native title had not been extinguished by valid acts of state or Commonwealth parliaments
- where the content of native title could be determined according to the traditional laws and customs of the Aboriginal and Torres Strait Islander people.

Plainly, it meant that where Indigenous people had continued living on their land and their customs showed a traditional attachment to their land, they could claim ownership of the land under native title. The exception to this is where valid Australian law meant the land was legally owned, or used by others, for example private land for housing.



**Source 2** Left to right: Greg McIntyre, Ron Castan QC, Eddie Mabo and Bryan Keon-Cohen at the High Court in Canberra

## The death of Mabo

Sadly, Eddie Mabo died on 21 January 1992, just five months before the High Court's final decision was handed down. For 10 years his passion, intelligence and commitment had driven the case forward, from its beginning through to the final arguments put to the High Court. The claim could not have been pursued without him.

The *Australian* newspaper selected Eddie Mabo as Australian of the Year on 26 January 1993.

## The impact on the rights of individuals and the legal system

The High Court's *Mabo* decision had a profound effect on the whole nation. According to Justice Michael Kirby (a former High Court justice), the basic principles of the *Mabo* decision are:

- our system of real property law accommodates native title
- native title may be extinguished
- it may be extinguished in a number of ways either by the Crown or by the Indigenous people themselves
- where it has been extinguished there may (or may not) be a right to compensation.

The High Court's rejection of *terra nullius*, and recognition of native title, has led to legislation being passed to clarify the situation and protect property interests. It has generated intense political debate and vast amounts of academic writing. Media attention was enormous at the time and the case still creates interest.

The decision fundamentally altered the legal, political and social relations between Indigenous and non-Indigenous people. In recognising the traditional rights of Murray Islanders, the case has recognised the rights of all Indigenous people who have a continued connection to their land. The decision changed Australia and the Australian legal system forever.

### Study tip

More information on the life of Eddie Mabo and the *Mabo* case can be found in the ABC documentary *Mabo – Life of an Island Man* (1997). A link is provided on your [obook assess](#).

## The *Native Title Act 1993* (Cth)

The Commonwealth Parliament passed the *Native Title Act* in December 1993. The Act established the Native Title Tribunal and confirmed the *Mabo* decision. The Act protects people's homes and businesses by validating titles granted after 1975.

The purposes of the *Native Title Act* are:

- to provide for the recognition and protection of native title, and to set down some basic principles in relation to native title
- to establish ways in which future dealings affecting native title may proceed and be protected
- to establish a mechanism for determining claims to native title
- to provide for a range of other matters, including the establishment of a National Aboriginal and Torres Strait Islander Land Fund.

The *Native Title Amendment Act 2009* (Cth) amended the *Native Title Act* to give the Federal Court a central role in managing native title claims and expands provisions for mediation of native title claims.

## The *Wik* decision

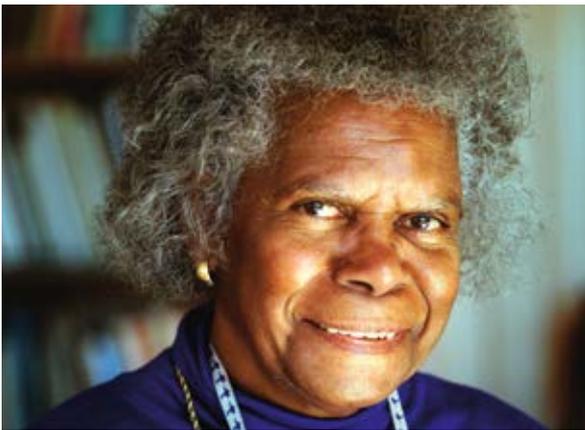
The *Mabo* decision and the subsequent *Native Title Act* did not resolve the issues of native title on pastoral leases and native title to the seas. The pastoral lease issue was decided by the High Court in its 1996 *Wik* decision (being *Wik Peoples v Queensland* (1996) 187 CLR 1).

Pastoral leases are a form of land tenure unique to Australia created by the British Colonial Office after concern by British officials over the massive land grab by squatters in the 1830s and 1840s. The British authorities explicitly stated the leases did not grant squatters exclusive tenure, but that the land was owned on behalf of the Australian public by the government.

In the *Wik* case, the governments argued that the mere granting of a pastoral lease last century extinguishes native title, even though the land was never developed.

The High Court decided that native title rights could coexist with the rights of pastoralists on cattle and sheep stations. The Court also said that when pastoralists and Indigenous rights were in conflict, the pastoralists' rights would prevail, giving pastoralists certainty to continue with grazing and related activities.

The pastoralists wanted native title wiped out completely on pastoral leases. Conservative leaders backed their demands. The then Howard Government followed the *Wik* decision with the *Native Title Amendment Act 1998* (Cth), which amended the *Native Title Act* to incorporate a 10-point plan for native title. The plan not only effectively extinguished native title on pastoral leases, but also on other types of landholdings such as Crown land (government land), waterways and airspace.



Source 3 Eddie Mabo's wife, Bonita

The National Indigenous Working Group on Native Title (NIWG) launched a major campaign against the 10-point plan. NIWG put forward a plan for negotiation with Indigenous Australians to achieve coexistence. The Australians for Native Title and Reconciliation (ANTaR) gathered support from the broader Australian community. This support continued to grow.

The United Nations Committee for the Elimination of Racial Discrimination asked Australia to explain its native title changes.

Since this time, a number of changes have been made to the *Native Title Act* to improve its effectiveness and make it fairer for Indigenous Australians.

# Possible conflicting attitudes about the case

Despite the impact of this case on the legal system and the rights of individuals, there are conflicting attitudes and different responses to the *Mabo* case.

Sections of the mining and pastoral industries, and conservative politicians, reacted angrily to the High Court's 1992 decision and urged the Commonwealth Government to overturn it by legislation. They conducted a massive fear campaign against the newly established land rights of Indigenous Australians.

Indigenous land councils and other Aboriginal organisations throughout Australia lobbied the Commonwealth Government to legislate to protect any native title that had survived 200 years of colonisation. At the same time, sections of the mining and pastoral industries and conservative politicians lobbied the Commonwealth Government to overturn the *Mabo* decision.

In 2004, a study seeking public opinion towards *Mabo* found that not everyone was in favour of land rights for Indigenous people. The Australian Election Study was based on information obtained from surveys. Twenty-five per cent of the respondents in the 2004 survey felt that change in Aboriginal land rights had not gone far enough. Almost twice that many considered that change had gone too far. In addition, about one-third of the respondents were of the view that change had been to the right extent. In other words, most of the respondents were either satisfied with the progress in land rights or were of the view that the progress had gone too far.

The study found that those with fewer years of education, working class background, home owners and those who felt 'very proud' to be Australian were more likely to report that the changes to Aboriginal land rights over the years had gone too far.

Australians' once-hard attitudes against Indigenous people have softened remarkably over the past two decades, election research shows.

The proportion of voters who felt Indigenous Australians' land rights were excessive fell between 1996 and 2010, from 61 per cent to 35 per cent.

## 15.10

## CHECK YOUR LEARNING

### Define and explain

- 1 What is native title?
- 2 Explain the decision in the *Mabo* case. How did this decision improve the rights of Indigenous people?

### Synthesise and apply

- 3 How do you think this case changed the landscape of the Australian legal system?
- 4 Explain the conflicting attitudes about the *Mabo* decision and Indigenous land rights.

### Analyse and evaluate

- 5 'Two hundred and four years after the British flag was planted on Australian soil, the High Court of Australia's 1992 *Mabo* decision established that native title is recognised under Australian law.' Discuss this statement in terms of what it says about the courage and tenacity of *Mabo* and how people can be effective in bringing about a change in the law.
- 6 Evaluate the ability of people to be able to use the courts to change laws in relation to Indigenous people.



### Check your **obook** assess for these additional resources and more:

» **Student book questions**  
15.10 Check your learning

» **Video**  
Mabo

» **Video worksheet**  
Mabo

» **Weblink**  
Mabo: Life of an Island Man

## CHAPTER SUMMARY

**The way in which Australia protects rights**

- > Statute law
- > The Victorian Charter of Human Rights and Responsibilities
- > Common law
- > The Australian Constitution

**The influence of international declarations and treaties on the protection of rights in Australia**

- > Examples of international treaties, conventions and optional protocols adopted by Australian
  - *International Covenant on Civil and Political Rights* (1966)
  - *International Covenant on Economic, Social and Cultural Rights* (1966)
  - *Convention on the Rights of the Child* (CRC), *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)
  - *Convention on the Elimination of All Forms of Racial Discrimination* (CERD)
  - *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)
- > Enforcement of international treaties and human rights

**The approach adopted by one other country in protecting rights**

- > Constitutional charter or bill of rights
- > Statutory bill of rights
- > Approach adopted by the United States—rights are protected via:
  - a constitutional bill of rights
  - structure of the Constitution
  - implied rights
  - international conventions and treaties.

- > Similarities and differences between the Australian and US approaches to the protection of rights

**Possible reforms to the protection of rights in Australia**

- > Adopt a statutory charter or bill of rights
- > Amend legislation and systems to provide increased protection to minority groups
- > Increase legal aid and assistance so individuals can legally challenge an alleged infringement of rights

**The *Mabo* case – a case study on the protection of rights in Australia**

- > Eddie Mabo along with four other men initiated a case for land rights against the Queensland Government (it had *locus standi*). Mabo claimed customary ownership of their ancestral lands on Murray Island and challenged the doctrine of *terra nullius* and the principle of sovereignty.
- > The Supreme Court of Queensland denied Mabo's claims.
- > The High Court verdict found that under Australian law, Indigenous people have rights to land, and that these rights had existed before colonisation and still exist (native title).
- > The basic principles of the *Mabo* decision are:
  - Our system of real property law accommodates native title
  - Native title may be extinguished
  - It may be extinguished in a number of ways either by the Crown or by the Indigenous people themselves
  - Where it has been extinguished there may (or may not) be a right to compensation
- > Australians had conflicting views of land rights



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

- » **Student book questions**  
Ch 15 Review
- » **Revision notes**  
Ch 15
- » **assess quiz**  
Ch 15  
Test your skills with an auto-correcting multiple-choice quiz

## REVISION QUESTIONS

- 1 Explain how most rights are protected in Australia. (5 marks)
- 2 Outline the purpose of the Victorian Charter of Human Rights and Responsibilities, and explain one way the Charter aims to specifically protect the rights of an accused. (5 marks)
- 3 'Once the Australian Government signs an international treaty the rights within the treaty are protected by Australian law.' Do you agree with this statement? Give reasons for your response. (4 marks)
- 4 Discuss the extent to which the courts can protect individual rights. (6 marks)
- 5 Discuss whether or not Australia should have a federal charter or bill of rights. (6 marks)
- 6 'The US protects rights better than Australia, and we should therefore adopt their approach.' Do you agree with this statement? Discuss. In your answer, explain two differences between the US and Australian approach of protecting rights. (10 marks)

## PRACTICE ASSESSMENT TASK

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting this assessment task.

You have been asked to present at a local council function about rights in Australia. The people attending the function will be those who have recently become Australian citizens. The mayor thinks that rights against discrimination should be the focus of the speech. You are required to prepare the speech.

### Points to address

- 1 What are rights? (3 marks)
  - 2 What it means to be protected from discrimination. (3 marks)
  - 3 A brief explanation of sources of rights, including common law, the Charter of Human Rights and Responsibilities, statute law and the Australian Constitution. (4 marks)
  - 4 Whether rights to be free from discrimination are protected by common law, the Charter of Human Rights and Responsibilities, statute law, the Australian Constitution, or a combination of these sources of law. (5 marks)
  - 5 Whether Australia has signed any international treaties or declarations which protect people from discrimination, and if so, whether these have been adopted by Australia. If they have been adopted by Australia, you should explain how. (7 marks)
  - 6 A critique of the way Australia protects rights. (8 marks)
  - 7 How Australia compares to another country in protecting rights against discrimination. (6 marks)
  - 8 Whether there are any ways we can improve the protection of minority groups in Australia, as well as people who have recently arrived in Australia. (6 marks)
  - 9 The role of Eddie Mabo in the recognition of Australian and Torres Strait Islander peoples in Australia, as well as their rights to land. (8 marks)
- Total: 50 marks

## PRACTICE ASSESSMENT TASK

## UNIT 2 – Area of Study 1

**Crime and punishment**

Alex is a 19-year-old man who has spent time in the juvenile justice system. He has an addiction to the drug methamphetamine, also known as ice. Alex's use of the drug costs him \$500 per day. Alex planned on stalking people as they left Crown Casino, taking their money as they walked to their cars. Alex asked his mate, Ben, to assist in the commission of this offence. Ben is aged 20 years and is not a drug user.

One night a middle-aged couple, Renee and Tony, were walking along Clarendon Street at 10.00 pm when Alex emerged from the shadows, produced a flick knife and demanded money. Renee escaped and ran down the street in the direction of Ben, who

was waiting, armed with his knife. Fortunately for Renee, a taxi drove into a driveway in front of her and she screamed for help. Ben remained in the shadows, unnoticed.

After Alex managed to grab Tony's wallet, he ran towards the city, where he had earlier parked a stolen car. He headed towards Kings Way. Such was Alex's speed that his car swerved onto the wrong side of the road, where he struck and killed a cyclist who was riding without lights or a helmet.

When presented at court, Alex pleaded not guilty to all charges. He has eight prior convictions, all for property offences.

**Practice assessment task questions**

- 1 In this case, Alex has pleaded not guilty to all charges. If he is eventually found guilty how might this affect the sentence that he receives?  
(3 marks)
  - 2 Describe two powers that each of the following bodies has, and two rights that Alex will have when dealing with these bodies.
    - a Victoria Police
    - b Corrections Victoria
 (8 marks)
  - 3 Outline the original and appellate jurisdiction of two courts that may be or were involved in this case.  
(6 marks)
  - 4 a For each of the two crimes that you identify in this case study, identify and explain two sanctions that could be imposed.  
(5 marks)
  - b Discuss the appropriateness of these sanctions for a case such as this, making reference to factors that would be taken into account in sentencing.  
(6 marks)
  - 5 Imagine that you are the solicitor representing Alex. Explain to Alex the importance of the principles of justice as they apply to criminal cases.  
(6 marks)
  - 6 Explain the role of the jury in this case. In your answer, discuss the extent to which the jury ensures fairness and equality.  
(8 marks)
  - 7 Discuss the extent to which a therapeutic justice approach to sentencing is appropriate and available for Alex.  
(8 marks)
- Total: 50 marks

# PRACTICE ASSESSMENT TASK

## UNIT 2 – Area of Study 2

### Horror trip away for Penny and Manny

Penny works for a local supermarket on Wednesday evenings and on weekends. She's been working at the supermarket for over four years on a casual basis and gets paid by the hour.

On Thursday, Penny left for a cruise with her best friend, Manny. On the first night of the cruise, Penny and Manny talked about their jobs – Manny also works at a supermarket, but in a different store to that of Penny. Manny mentioned a store in which one of the other supermarket employees, Mia, had found out that she was being seriously underpaid. Manny then mentioned to Penny what Mia was getting paid – more than what Penny is, even though Mia is younger.

Penny and Manny had an enjoyable time on the cruise, but Penny often felt she was getting looked over by a particular crew member, Andrew. Andrew ignored Penny when she was at the bar requesting drinks, would stare at her in a condescending and threatening way, and refused to let Penny into a theatre room once to watch a movie, saying the movie theatre was 'full'. Penny only found out the next morning from another passenger that there were only 12 people in the theatre – less than half full.

Four days into the cruise, Manny started feeling unwell. Two days later, Penny began to feel unwell and started vomiting incessantly. It was later discovered that more than 80 per cent of the cruise passengers had been struck by the same or similar illness. The crew members started to play it down, suggesting there was some virus that one of the passengers had. However, Penny later overheard another crew member mentioning that the crew members were sick as well, and that they had discovered some of the seafood that had been given to the passengers on one of the dinner nights was not good quality.

When the cruise was finally at an end, Penny tried to disembark early, but kept on getting pushed back to the end of the queue by Andrew, the crew member. She queried why to Andrew who said 'You just need to wait your turn. Go back to the end of the line'. She challenged him, and Andrew turned to her and said, 'Listen you wog. Go back to where you came from. Aussies first.' Penny was horrified. She thinks that Andrew said this because she remembers telling him on the first day when she embarked on the ship that she was part Italian.

### Practice assessment task questions

- 1 Identify the three civil disputes referred to in the above case study, and the likely plaintiff and defendant in each.  
(6 marks)
- 2 Identify the type of claim that Penny is likely to have for each dispute.  
(3 marks)
- 3 Identify the civil dispute that is best to be heard by the following dispute resolution body. Justify your answer.
  - a Supreme Court of Victoria
  - b Victorian Civil and Administrative Tribunal
  - c Fair Work Ombudsman(6 marks)
- 4 'There are two possible avenues of appeal from VCAT, depending on who heard the case.' Explain this statement.  
(3 marks)

- 5 In your view, which is the civil dispute that is best for mediation, and which is the civil dispute that is not appropriate for mediation? Give reasons. (4 marks)
- 6 Describe the role of the jury in a civil trial. Explain two circumstances that need to exist for a jury to be used in a civil trial. (6 marks)
- 7 Is an injunction an appropriate remedy for any of these cases? Why or why not? (3 marks)
- 8 Describe the purposes of damages, and evaluate its ability to achieve one of its purposes. (5 marks)
- 9 Penny is worried that even if she pursues one or more of these disputes, justice is unlikely to be achieved.
- a Describe to Penny the three principles of justice. (6 marks)
- b Discuss the ability of the civil justice system to achieve justice in one or more of these disputes. (8 marks)
- Total: 50 marks

## PRACTICE ASSESSMENT TASK

### UNIT 2 – Area of Study 3

#### Freedom of speech and the *Racial Discrimination Act 1975 (Cth)*

One basic feature of our democratic system of government is that citizens have the broad right to freedom of speech.

The First Amendment in the US Bill of Rights guarantees the right of the American people to freedom of speech. But should freedom of speech be limited? For example, should individuals have the right to make offensive or insulting remarks about another person on the basis of their race or should making such comments be unlawful?

In 1975, the Commonwealth Parliament passed the *Racial Discrimination Act 1975 (Cth)* (RDA), a law designed to ensure that all people, regardless of their nationality and background, are treated equally by making it illegal to discriminate against a person on the basis of their colour, race, or national or ethnic origin. Section 18C of the RDA makes it unlawful for a person to undertake an act that is reasonably likely to ‘offend, insult, humiliate or intimidate’ another person or group due to their race or ethnicity.

In 2014, the Liberal-National coalition created controversy and debate by announcing their intention to, among other changes, alter section 18C in the RDA by removing the words ‘offend, insult and humiliate’ and adding the words ‘racial vilification’ so it is only

an offence to undertake action that ‘intimidates or vilifies’ another person or group on basis of their race or ethnicity.

The proposed changes to the RDA were introduced by the Australian Government in response to a 2011 decision of the Federal Court. In this case, a judge ruled that controversial journalist Andrew Bolt breached section 18C of the RDA when he wrote a series of columns and a blog (one under the title ‘White is the new black’). In those publications, Bolt expressed the view that some ‘fair skinned Aboriginal people’ sought to gain ‘professional advantage’ (which might include being eligible for government financial grants and advancing in their chosen careers) by identifying themselves as Aboriginal or, as Mr Bolt stated, by the ‘colour of their skin’.

In his decision, Federal Court Justice Bromberg held that Mr Bolt’s comments (and the actions of the Herald and Weekly Times (HWT) who published the articles) were reasonably likely to ‘offend, insult, humiliate or intimidate’ some Aboriginal persons of mixed descent or ancestral heritage.

In November 2013, the newly appointed Attorney-General, George Brandis, announced that he would seek to have the Commonwealth Parliament change

the RDA to protect freedom of speech and prevent other similar situations where simply 'expressing an opinion' to encourage community discussion can be regarded as unlawful.

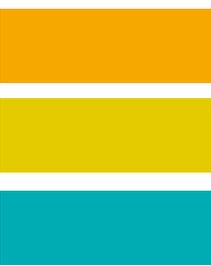
The 2014 proposed changes to the RDA were abandoned by the Government because the issue had become too controversial and they did not want to pursue any changes that could harm our 'national unity' at a time when there was growing conflict in Iraq and terrorism concerns associated with Australia's military and diplomatic role in the middle east. However, in March 2017, the Government once

again announced its intention to pursue the changes. Interestingly, at the same time, the Government announced it would also introduce a bill into the parliament to amend the *Australian Human Rights Commission Act 1986* (Cth) to improve the way in which the Australian Human Rights Commission processes and deals with complaints against alleged human rights infringements.

In 2017, the proposed amendments to section 18C were struck down by the Senate. However, no doubt the section will be the subject of controversy for many years.

## Practice assessment task questions

- 1 Freedom of speech is one of the five fundamental rights guaranteed by the Australian Commonwealth Government. Define the term 'freedom of speech'.  
(2 marks)
  - 2 What is the *Racial Discrimination Act 1975* (Cth) (RDA) and what is the purpose of section 18C?  
(4 marks)
  - 3 Which major international treaties and conventions adopted by Australia might be upheld by the RDA?  
(4 marks)
  - 4
    - a Distinguish between an express right and an implied right.  
(3 marks)
    - b Explain how the Australian Constitution protects the right to freedom of speech. Provide an example to support your response.  
(4 marks)
    - c Describe how the United States Constitution protects the right to freedom of speech.  
(4 marks)
    - d Evaluate the way in which Australia protects freedom of speech.  
(6 marks)
  - 5 Consider the following quotes about the right to freedom of speech and discuss the extent to which you agree with them.  
(8 marks)
  - 6
    - a 'People do have a right to be bigots (racists), you know. In a free country, people do have rights to say things that other people find offensive, insulting or bigoted.' Federal Attorney-General, George Brandis.
    - b 'Section 18C empowers minorities with the ability to fight back, with the force of the law and the sanction of our state, in the face of the outrageous and malign, which could otherwise be the first step down a dark and evil path.' Leader of the Federal Opposition, Bill Shorten.
- Conduct research into another Australian case that involves freedom of speech. Prepare a report that:
- states the name and legal citation of the case  
(1 mark)
  - outlines the facts and main issues involved  
(5 marks)
  - outlines the outcome of the case and any subsequent appeals  
(4 marks)
  - explains whether or not the outcome resulted in the protection of rights.  
(5 marks)
- Total: 50 marks



# GLOSSARY

## A

### **abrogate**

to cancel or abolish a court-made law by passing an Act of Parliament

### **acceptance**

(in relation to contract law) a written or oral statement or act that indicates that the person agrees to the offer being made

### **access**

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

### **accessorial liability**

a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm (for example, they encourage another person to cause that harm)

### **accessory**

a person who knowingly assists another person who has committed a serious indictable offence (i.e. an indictable offence with a punishment of five years or more in prison) to evade arrest, prosecution or conviction

### **accused**

a person charged with a criminal offence

### **Act of Parliament**

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

### **actus reus (pronounced ac-tus RAY-us)**

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

### **aggravated carjacking**

the act of violently stealing an occupied car committed when the offender possesses a firearm, imitation firearm, offensive weapon, explosive or imitation explosive, or (in the course of carjacking,) causes injury to another person

### **aggravating factors**

circumstances considered in sentencing that can increase the seriousness of the offence or the offender's culpability (i.e. responsibility) resulting in a more severe sentence

### **alternative dispute resolution methods**

ways of resolving or settling civil disputes that do not involve a court or tribunal hearing (e.g. mediation, conciliation and arbitration); also known as appropriate dispute resolution

### **appeal**

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

### **appellate jurisdiction**

the power of a court to hear a case on appeal

### **arbitral award**

a legally binding decision made in arbitration by an arbitrator

### **arbitration**

a method of dispute resolution in which an independent person (known as an arbitrator) is appointed to listen to both sides of a dispute and make a decision that is legally binding on the parties. The decision is known as an arbitral award

### **arbitrator**

the independent third party (i.e. person) appointed to settle a dispute during arbitration; arbitrators have specialised expertise in particular kinds of disputes between the parties and make decisions that are legally binding on them. The decision is known as an arbitral award

### **assault**

the intentional or reckless use of force or the threat of force against another person without a lawful excuse

### **asylum seeker**

a person who has applied for recognition (or sought protection) as a refugee

### **attempted murder**

an act carried out with the intention of causing the death of another human being

### **attribute**

a quality, feature or characteristic of a person, such as race, gender or disability

### **Australian Bar Association, the**

the main organisation that represents barristers in Australia. It aims to promote the rule of law and advocates for fair and equal access to justice for all

**Australian Constitution, the**

a set of rules and principles that guide the way Australia is governed. The Australian Constitution was passed by the British Parliament and its formal title is the *Commonwealth of Australia Constitution Act 1900* (UK)

**automatism**

a state in which a person has a total loss of control over their bodily movements (i.e. is not conscious or aware of what they are doing), so that they cannot form an intention to commit a crime

**award**

the minimum wages and conditions that an employer is legally required to pay a worker for a particular job or occupation

**B****bail**

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

**bail justice**

a volunteer who works within the justice system, generally outside normal court operating hours, to hear applications for bail, remand and interim or temporary accommodation orders relating to children

**balance of probabilities**

the standard of proof in civil disputes. This requires the plaintiff to establish that it is more probable (i.e. likely) than not that his or her side of the story is right

**barrister**

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

**beyond reasonable doubt**

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

**bicameral parliament**

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

**bill**

a proposed law that has not yet been passed by parliament

**Bill of Rights amendments**

sections of the US Bill of Rights that state the specific rights of the American people

**binding precedent**

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

**breach**

breaking or failing to fulfil a duty or obligation

**burden of proof**

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

**burglary**

the offence of entering a building to commit a theft, an indictable assault or to cause criminal damage

**by-laws**

local laws or regulations made by local councils that apply to residents in local areas

**C****Cabinet**

the policy-making body made up of the Prime Minister (or premier at a state level) and a range of senior government ministers in charge of a range of government departments. Cabinet decides which laws should be introduced into parliament

**carjacking**

the act of violently stealing an occupied car

**case management**

a method used by courts and tribunals to control the progress of legal cases more effectively and efficiently. Case management generally involves the person presiding over the case (e.g. the judge) making orders and directions in the proceeding (such as an order that the parties attend mediation)

**causation**

the direct relationship between one event (i.e. Event 1) and another event (i.e. Event 2), where Event 1 was the reason Event 2 happened, and Event 2 would not have happened by itself, without Event 1

**charter or bill of rights**

a document that sets out the basic rights and/or freedoms of the citizens in a particular state or country

**civil law**

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

**class action**

see representative proceeding

**coalition**

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

**codify (codification)**

to collect all law on one topic together into a single statute

**committal hearing**

a hearing that is held as part of the committal proceeding. At the committal hearing, the magistrate will decide whether there is sufficient evidence to support a conviction for the offence charged

**committal proceeding**

the processes and hearings that take place in the Magistrates' Court for indictable offences

**common law**

law made by judges through decisions made in cases; also known as case law or judge-made law (as opposed to statute law)

**community correction order (CCO)**

a non-custodial sanction (i.e. one that doesn't involve a prison sentence) that the offender serves in the community, with conditions attached to the order

**compensation order**

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

**complaints body**

an organisation established by parliament to resolve formal grievances (i.e. complaints) made by an individual about the conduct of another party

**compulsory conference**

a confidential meeting between the parties involved in a dispute (in the presence of an independent third party) to discuss ways to resolve their differences

**conciliation**

a method of dispute resolution which uses an independent third party (i.e. the conciliator) to help the disputing parties reach a resolution

**conciliator**

the independent third party in a conciliation who helps the parties reach an agreement that will end the dispute between them. The conciliator can make suggestions and offer advice to assist in finding a mutually acceptable resolution but the parties reach the decision

**Congress**

the federal or national legislature or law-making body in the US

**consideration**

(in relation to contract law) something of value that passes from one party to the other at which time a contract is complete; can also be a promise to pay

**contract**

an agreement or promise (or set of promises) between two individuals or groups that is intended to be legally binding and can be enforced through the law

**contract law**

an area of civil law governing the validity and enforceability of agreements made between two or more parties

**contributory negligence**

a formal defence to negligence which claims the plaintiff contributed to the harm caused by the defendant. If proved, this will reduce the damages the defendant has to pay

**conviction**

a criminal offence that has been proved. Prior convictions are previous criminal offences for which the person has been found guilty

**council**

a lawyer appearing in court to represent a party

**counterclaim**

a separate claim made by the defendant in response to the plaintiff's claim (and heard at the same time by the court)

**court hierarchy**

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

**crime**

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

**crime statistics**

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

**Crime Statistics Agency (CSA)**

an independent organisation responsible for processing, analysing and publishing Victorian crime statistics

**criminal law**

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

**cross-examination**

the questioning of a witness called by the other side in a legal case

**culpable driving**

the act of causing the death of another person while driving a motor vehicle in a negligent or reckless manner or under the influence of drugs or alcohol

**cumulative sentence**

when a defendant is found guilty of more than one offence, the judge may sentence them to consecutive (i.e. cumulative) terms for each crime. This means each sentence must be served one after the other rather than at the same time

**cyber-crime**

a criminal offence carried out using an electronic device or the internet (e.g. hacking, phishing, spamming)

**D****damages**

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

**decriminalisation**

the process of legalising an act or behaviour which was previously considered a crime

**defamation**

a type of tort which involves the action of damaging a person's personal or professional reputation in the community through the communication of false and untrue statements or information

**defendant**

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

**delegated body**

an authority or agency given power by the Victorian Parliament to make and/or enforce laws

**denunciation**

one purpose of a sanction; a process by which a court can demonstrate the community's disapproval of the offender's actions

**detention centre**

a facility used to hold asylum seekers while their refugee claims are determined

**direct discrimination**

a type of discrimination; when an assumption is made about what a person can or cannot do because of a personal characteristic or attribute

**directions**

instructions given by the court to the parties about time limits and the way a civil proceeding is to be conducted

**Director of Public Prosecutions (DPP)**

the independent officer responsible for commencing, preparing and conducting prosecutions of indictable offences on behalf of the Crown

**disapproving a previous precedent**

when a court expresses dissatisfaction of an existing precedent but is still bound to follow it

**discovery of documents**

a pre-trial procedure which requires the parties to list all the documents they have that are relevant to the case. Copies of the documents are normally provided to the other party

**discrimination**

the unfavourable treatment of a person based on a certain attribute (e.g. age, gender, disability, ethnicity, religion or sexuality). Discrimination can either be direct discrimination or indirect discrimination

**distinguishing a previous precedent**

the process by which a lower court decides that the material facts of a case are sufficiently different to that of a case in which a precedent was established by a superior court so that they are not bound to follow it

**diversion program**

a method used in the Magistrates' Court and Children's Court to divert offenders away from the court and avoid a criminal record by placing them on a plan

**doctrine of precedent**

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

***doli incapax*****(pronounced do-li in-KA-pax)**

a Latin term meaning 'incapable of evil'; the principle that a child under 14 years of age cannot form *mens rea* (guilty mind) because he or she does not have the intellectual or moral capacity to know the difference between right and wrong

**domestic violence**

violent or aggressive behaviour and abuse of a spouse or partner

**Drug Court**

a specialist court of the Magistrates' Court which sentences offenders to a Drug Treatment Order where drugs or alcohol contributed to the commission of the offence

**Drug Treatment Order**

a type of sanction imposed by the Drug Court which aims to treat the underlying causes of offending, and which includes both the treatment and custody of the offender

**drunk**

when a person's physical or mental faculties or judgment are appreciably and materially impaired by alcohol, drugs or another substance, resulting in a substantial lack of capacity or control

**duress**

strong mental pressure on someone to overcome their independent will and force them to do something

**duty of care**

in relation to negligence, the legal obligation to be cautious and careful, keeping other people in mind when doing anything that could harm them

**E****enterprise agreement**

an agreement or contract about wages and conditions between two or more employees and their employer

**equality**

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

**express rights**

rights that are stated in the Australian Constitution. Express rights are entrenched, meaning they can only be changed by referendum

**express terms**

(in relation to contract law) provisions or conditions that are written in the contract or are clearly stated or discussed between the parties as forming part of the contract

**F****Fair Work Commission**

an independent national tribunal that has the power to establish the minimum wages and employment conditions for a particular job or industry

**Fair Work Ombudsman**

a statutory body that promotes harmonious, productive and cooperative workplaces, investigates workplace complaints and ensures compliance with Australia's workplace laws

**fairness**

one of the principles of justice; fairness means having fair processes and a fair hearing (e.g. the parties in a legal case should have an opportunity to know the facts of the case and have the opportunity to present their side of events; and the pre-hearing and hearing (or trial) processes should be fair and impartial)

**federal legislature**

a national law-making body; for example, the Commonwealth Parliament in Australia and the Congress in the US

**federal system**

a system of government in which a county is divided into states (each with its own parliament to make laws applicable in that state), in addition to having one central parliament (i.e. federal parliament) with the power to make laws that apply to the entire country

**Federation of Australia**

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

**fine**

a sanction that requires the offender to pay an amount of money to the state

**freedom of political communication**

the right of the Australian people to freely discuss and debate political issues, subject to certain restrictions

**G****general deterrence**

one purpose of a sanction; a process by which the court can discourage the offender and others in the community from committing similar offences

**government**

the ruling authority with power to govern, formed by the political party that holds the majority in the lower house in each parliament. The members of parliament who belong to this political party form the government

**Governor**

the Queen's representative at the state level

**Governor-General**

the Queen's representative at the Commonwealth level

**graffiti**

any illegal writing, drawing or scratching that defaces (i.e. damage) public property and cannot be removed with a dry cloth

**group member**

a member of a group of people who are part of a representative proceeding (i.e. class action)

**H****hate crime**

a criminal offence motivated by hostility and prejudice towards the victim (e.g. because of their race or religion)

**House of Representatives**

the lower house of the Commonwealth Parliament

**Human Rights Charter**

the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Its main purpose is to protect and promote human rights

**I****implied rights**

rights not expressly stated in the Australian Constitution but are considered to exist through interpretation by the High Court

**implied terms**

(in relation to contract law) provisions or conditions that are not expressed or written down but are assumed and intended to be included in the contract

**imprisonment**

a sanction that involves the removal of the offender from society for a stated period of time and placing them in prison

**independents**

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

**indictable offence**

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

**indictable offence heard and determined summarily**

a serious offence which can be heard and determined as a summary offence if the court and the accused agree

**indirect discrimination**

a type of discrimination; when there is a rule or policy that is the same for everyone, but it has an unfair effect on some people who share a particular attribute

**individual contract**

an agreement between an employee and their employer relating to wages and work conditions (which is legally binding and enforceable at law)

**injunction**

a remedy in the form of a court order to do something or not to do something. An injunction is designed to prevent a person doing harm (or further harm), or to rectify some wrong

**institutional powers**

the authority (i.e. power) given to bodies (i.e. institutions) such as Victoria Police to undertake certain actions

**insurers**

a person or company contracted to compensate another in the event of damage or loss

**intentional**

something deliberate; not an accident

**international declaration**

a non-binding agreement between countries which sets out the aspirations (hopes) of the parties to the agreement

**international treaty**

a formal document, signed by countries (called states) or international organisations, in which they undertake to follow the law set out in the document and include it in their own local laws

## J

### **judicial power**

the power (authority) given to courts and tribunals to enforce the law and settle disputes

### **jurisdiction**

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

### **jury**

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

### **jury directions**

instructions given by a judge to a jury either during or at the end of trial

## K

### **Koori Court**

a division of the Magistrates' Court, Children's Court and County Court that (in certain circumstances) operates as a sentencing court for Aboriginal people

## L

### **larceny**

an old common law term to describe the act of theft

### **Law Institute of Victoria (LIV)**

the legal body which represents lawyers in Victoria and provides professional development relating to their practice

### **laws**

legal rules made by a legal authority that are enforceable by the police and other agencies

### **lawyer**

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

### **lead plaintiff**

the person named as the plaintiff on behalf of the group members in a representative proceeding (i.e. class action)

### **legal aid**

legal advice, education or information about the law and the provision of legal services (including legal assistance and representation)

### **legal citation**

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

### **Legislative Assembly**

the lower house of the Victorian Parliament

### **Legislative Council**

the upper house of the Victorian Parliament

### **limitation of actions**

the restriction on bringing a civil claim after the allowed time

### **locus standi**

#### **(pronounced loh-kus STAN-dye)**

a Latin term meaning 'standing in a case'; that is, the litigant must be directly affected by the issues or matters involved in the case for the court to be able to hear and determine the case

### **loss**

a type of harm or damage suffered by a person, and can involve both economic and non-economic loss

### **loss of amenity**

reduction in the use or pleasure a person is entitled to have from using public or private property (e.g. through the actions of others)

## M

### **majority verdict**

all but one of the members of the jury agree with the decision

### **malice aforethought**

the intention to kill or cause serious injury to a person. This malicious intention is the mental element (i.e. an intention to inflict harm) necessary for murder

### **manslaughter**

a crime where one person does not intend to kill, but their reckless or negligent conduct results in the killing of another

### **marking graffiti**

the act of writing, drawing, scratching or defacing (i.e. damaging) public property in ways that cannot be removed with a dry cloth

### **marriage celebrant**

a person registered in Australia to perform marriage ceremonies

### **mediation**

a method of dispute resolution, using an independent third party (the mediator) to help the disputing parties reach a resolution

### **mediator**

an independent third party who does not interfere or persuade but helps the parties in a mediation as they try reach a settlement of the matter

### **member**

the person who presides over final hearings and compulsory conferences at VCAT. Members include the President, vice-presidents, deputy presidents and senior and ordinary members

### **mens rea (pronounced menz-REE-uh)**

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

### **mental impairment**

a condition of the mind which impacts on a person's ability to know the nature and quality of his or her conduct, or that the conduct was wrong

### **minister**

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

### **mitigating factors**

circumstances (i.e. factors) considered in sentencing that reduce the seriousness of the offence or the offender's culpability and lead to a less severe sentence

**monogamous**

the state of being married to only one person at a time

**mosque**

a place of worship for followers of the Islamic faith

**murder**

the intentional unlawful killing of another person with malice aforethought, by a person who is of the age of discretion (i.e. 10 years old or more) and of sound mind. Murder is the most serious homicide offence

**N****National Employment Standards (NES)**

a set of 10 conditions (i.e. minimum entitlements) of all workers (i.e. employees) protected by Commonwealth legislation

**negligence**

a type of tort which involves a breach of a duty of care, causing loss or harm

**neighbour principle**

in relation to negligence, the common law rule that a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their 'neighbours' (i.e. people who would be closely and directly affected by their acts or omissions)

**nervous shock**

a psychological reaction, psychiatric harm that is more serious than ordinary grief or stress

**non-legal rules**

laws made by private individuals or groups in society, such as parents and schools, which are not enforceable by the courts

**nuisance**

a type of tort which involves interference with a person's right to use and enjoy property

**O****obiter dictum****(pronounced OB-iter DIK-tum)**

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

**offensive behaviour**

conduct that is calculated to wound feelings or arouse anger, resentment, disgust, or outrage in the mind of a reasonable person

**offer**

(in relation to contract law) a written or oral statement or act that indicates the person is willing to buy or sell goods or services

**Office of Public Prosecutions (OPP)**

the Victorian public prosecutions office which prepares and conducts criminal proceedings on behalf of the DPP

**offshore processing**

the use of overseas locations to determine the refugee claims of asylum seekers

**ombudsman**

an officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities

**opposition**

the next-largest political party after the government. The opposition questions the government about policy matters and is responsible for holding them to account

**optional protocols**

additional treaties in their own right that can be adopted and ratified by nations who are a party to the main treaty

**orders**

a way in which a court or tribunal controls the progress of a case by making formal, written requirements and giving directions so that cases are resolved efficiently

**original jurisdiction**

the power of a court to hear a case for the first time (i.e. not on appeal from a lower court)

**overruling a previous precedent**

when a superior court changes a previous precedent, established by a lower court, in a different and later case thereby creating a new precedent which overrules the earlier precedent

**P****parliament**

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

**parole**

the supervised and conditional release of a prisoner after the minimum period of imprisonment has been served

**persuasive precedent**

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

**plaintiff**

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

**plebiscite**

a direct vote by all members of an electorate on a matter of national significance that does not affect the Constitution. Unlike a referendum, the outcome of a plebiscite is non-binding

**political party**

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

**precedent**

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

**presumption of innocence**

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

**principal offender**

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

**private member's bill**

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

**private nuisance**

a type of tort which involves an act or omission that substantially and unreasonably interferes with the use and enjoyment of land

**Productivity Commission**

the Australian Government's independent research and advisory body, which researches and advises on a range of issues

**prosecution**

see prosecutor

**prosecutor**

the Crown in its role of bringing a criminal case to court (also called 'the prosecution')

**protection**

one purpose of a sanction; a strategy designed to safeguard the community from an offender in order to prevent them from committing further offence (e.g. by imprisoning them)

**provocation**

a defence alleging loss of control as a response to the sufficient provocative conduct of another person

**public drunkenness**

a general term used to describe a number of specific offences contained in Victoria's *Summary Offences Act* that relate to a person being drunk in a public place

**public nuisance**

a type of tort which involves an act or omission that interferes with the comfort or convenience of a number of people to a considerable degree

**public place**

an area or location considered open to the public (i.e. anyone in the community has a right to go there)

**punishment**

one purpose of a sanction; a strategy designed to penalise (i.e. punish) the offender and show society and the victim that criminal behaviour will not be tolerated

**R****rape**

the act of sexually penetrating another person without consent

**ratify (ratification)**

confirmation by a nation's parliament of its approval of an international treaty signed by its government. The parliament expressly passes legislation that requires them by law to adopt the various rights and responsibilities set out in the treaty

**ratio decidendi**

**(pronounced RAY-shee-oh des-ee-DEN-dee)**

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

**reasonable belief**

an honestly held opinion about the way things are, which would seem to another ordinary person with similar characteristics (e.g. age or maturity), in similar circumstances, to be sensible or correct

**recidivism**

re-offending; returning to crime after already having been convicted and sentenced

**reckless**

acting, or not acting, with conscious awareness of the potential harm that is likely to be suffered

**referendum**

the method used for changing the wording of the Australian Constitution. A referendum requires a proposal to be approved by the Australia people in a public vote by a double majority

**refugee**

a person who has been recognised under the Refugee Convention to be a refugee; that is, someone who is in fear of being persecuted and who cannot be protected by his or her own country

**rehabilitation**

one purpose of a sanction; a strategy designed to reform an offender in order to prevent them from committing offences in the future

**remedy**

a term used to describe any order made by a court designed to address a civil wrong or breach. A remedy should provide a legal solution for the plaintiff for a breach of the civil law by the defendant and (as much as possible) restore the plaintiff to their original position prior to the breach of their rights

**representative government**

a political system in which the people elect members of parliament to represent them in government

**representative proceeding**

a legal proceeding in which a group of people who have a claim based on similar or related facts, bring that claim to court in the name of one person; also called a class action or a group proceeding

**reversing a previous precedent**

when a superior court changes a previous precedent set by a lower court in the same case on appeal, thereby creating a new precedent which overrides the earlier precedent

**right of subrogation**

the right to 'step into the shoes' of an insured person and act on their behalf, including taking legal actions in their name

**robbery**

an offence against a person and their property, combining the use of force or the threat of force with theft

**royal assent**

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

**rule of law**

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

**S****sanction**

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

**secondary legislation**

rules and regulations made by secondary authorities (such as local councils, government departments and secondary authorities) which are given the power to do so by the parliament. Also referred to as delegated legislation

**self-induced intoxication**

the act of getting drunk of your own free will. Intoxication (i.e. drunkenness) is assumed to occur by a person's own actions unless there was a factor that made it involuntary

**Senate**

the upper house of the Commonwealth Parliament

**Sentencing Advisory Council**

an independent statutory body that provides statistics on sentencing in Victoria, conducts research, seeks public opinion and advises the Victorian Government on sentencing matters

**separation of powers**

a principle established by the Australian Constitution that ensures the three powers of our parliamentary system (i.e. executive power, legislative power and judicial power) remain separate. This principle provides a set of checks

and balances to ensure that no single body has the power to make, implement, apply and interpret the law

**shoplifting**

a general term used to describe a type of theft involving stealing of goods from a retail store. The legal term is 'shop theft' or 'shop stealing'

**signatory**

a state or organisation that has signed an international treaty to demonstrate a nation's intent to adopt the treaty and incorporate it into their law

**social cohesion**

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

**solemnised**

the act of formalising a lawful marriage in accordance with the requirements of marriage laws in Australia

**solicitor**

a qualified legal practitioner who will give advice about the law and a person's rights under the law

**specific deterrence**

one purpose of a sanction; a process by which the court can discourage the offender from committing similar offences

**standard of care**

the degree of caution required by a person who owes a duty of care to another

**standard of proof**

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

**stare decisis**

**(pronounced STAR-ray di-SYE-zis)** a Latin term meaning 'let the decision stand'; the basic principle underlying the doctrine of precedent

**state legislatures**

the state law-making bodies in the US (the equivalent of Australia's state parliaments)

**statement of claim**

a document filed by the plaintiff in court which sets out the nature of the claim and the remedies sought

**statute law**

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

**statutory approach**

in relation to rights, the protection of rights through passing Acts of Parliament

**statutory interpretation**

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

**strict liability**

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

**sue**

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

**summary offence**

a minor offence generally heard in the Magistrates' Court

**supremacy of parliament**

the concept that the final law-making power rests with parliament, which can repeal and amend its own statutes and pass legislation to override common law. Also referred to as sovereignty of parliament

**supreme law-making body**

the body (e.g. the parliament in the Westminster system) responsible for changing existing law and creating new law

**T****terms of settlement**

a document that sets out the terms on which the parties agree to resolve their dispute

### ***terra nullius***

**(pronounced ter-ra NULL-ee-us)**

a Latin term meaning 'empty land'; a false common law principle that Australia belonged to no one when the British first arrived in Australia to establish a colony in 1788

### **test case**

a legal action undertaken with the aim of having the court establish a legal principle or precedent which can be followed for future similar cases

### **theft**

the act of dishonestly taking property belonging to another person (without his or her consent) with the intention of permanently depriving that person of it

### **therapeutic justice**

a method used in the criminal justice system to deal with offenders in a way that addresses the underlying causes of crime and seeks to provide offenders with support to avoid further reoffending

### **tort**

a wrongful act that is recognised by law

### **trespass**

a type of tort involving interference or intrusion of a person's body, property or goods without the consent of that person

### **trial by jury**

a type of trial by peers in which an impartial group of randomly selected people hear evidence and hand down a verdict (i.e. decision)

### **trial by ordeal**

a type of trial common in early medieval Europe which required an accused person to prove their innocence by being subjected to a painful or unpleasant test (i.e. ordeal)

### **tribunal**

a dispute resolution body that resolves civil disputes and is intended to be a less costly, more informal and faster way to resolve disputes than courts

## **U**

### ***ultra vires***

(pronounced ul-tra VYE-reez)

a Latin term meaning 'beyond the powers'; a law made beyond (i.e. outside) the powers of the parliament

### **unanimous verdict**

a verdict or decision where all the jury members are in agreement and decide the same way (e.g. they all agree the accused is guilty)

### **United Nations, the**

an international organisation formed in 1945 made up of various countries. It aims to take action on issues facing humanity

### **unlawful homicide**

the killing of another person without legal justification. Murder, manslaughter, infanticide (i.e. killing an infant or baby), child homicide and culpable driving causing death are unlawful homicide offences

### **US Bill of Rights**

a US law contained within the US Constitution that establishes the most important basic rights of the people and aims to protect them

## **V**

### **vicarious liability**

the legal responsibility of a third party for the wrongful acts of another (e.g. an employer's liability for what their employees do)

### **victim impact statement**

a statement filed with the court by a victim, and considered by the court when sentencing. It contains particulars of any injury, loss or damage suffered by the victim as a result of the offence

### **victimless crime**

an offence where there is no apparent or immediate victim but the behaviour is illegal because it goes against what society considers acceptable

### **Victoria Legal Aid (VLA)**

a government agency that provides free legal advice to the community and low-cost or no-cost legal representation to people who can't afford a lawyer

### **Victorian Civil and Administrative Tribunal (VCAT)**

a tribunal that deals with disputes relating to a range of civil issues heard by various lists (sections), such as the Human Rights List, the Civil Claims List and the Residential Tenancies List

### **Victorian Law Reform Commission (VLRC)**

Victoria's leading independent law reform organisation. The VLRC reviews, researches and makes recommendations to the state parliament about possible changes to Victoria's laws

### ***volenti non fit injuria***

**(pronounced vo-LEN-tee non fit in-JOO-ree-a)**

a Latin term meaning 'to a willing person, injury is not done'. A defence in which the defendant claims that the plaintiff accepted the dangers of a known and understood risk, either expressly or by implication

## **W**

### **Westminster system, the**

a parliamentary system of government that developed in Britain and upon which Australia's parliamentary system is modelled

### **will**

a document which specifies how a person would like their assets to be distributed when they die, and who they would like to carry out their wishes

### **writ**

usually the first document filed by the plaintiff to start a civil proceeding in court, which explains the action being taken against the defendant and the place and mode of trial



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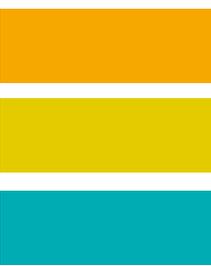
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