

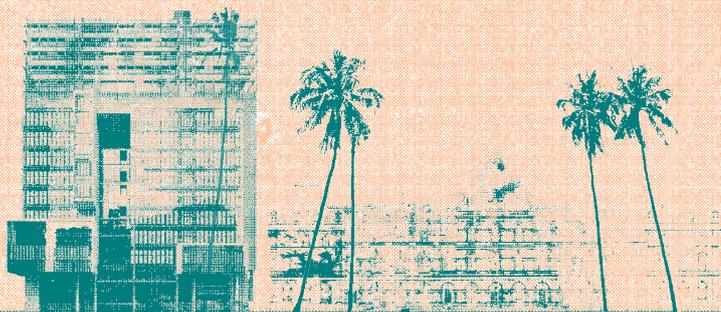
# Legal Studies for Queensland



LEGAL EAGLE  
PUBLICATIONS

Roger Woodgate  
Jeff Biggs  
Kirsten Murray

Legal Studies 2024 - General Senior Syllabus



**UNITS**

# Legal Studies for Queensland

## Units 1&2

### Legal Studies 2024 Syllabus Volume 1 - Ninth Edition

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



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# Unit 1

# Beyond reasonable doubt

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# Preface

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The authors welcome you to the **Ninth Edition** of *Legal Studies for Queensland (Volume 1)* that covers subject matter contained in the *Legal Studies 2024 General Senior Syllabus, Units 1 and 2*. The emphasis of this edition is to provide students and teachers with the foundational learning concepts and experiences that enable them to develop greater independence as learners and navigate the challenges of the curriculum and assessment system.

This text uses a wide range of practical activities, including inquiry and research tasks, case studies, practical applications, hypotheticals and what do you think? activities that we have interpreted and implemented to allow students to experience all syllabus objectives identified as:

- **[C]: Comprehend** legal concepts, principles and processes.
- **[S]: Select** current and relevant legal information from primary and/or secondary sources.
- **[A]: Analyse** legal issues, to apply legal concepts, principles and processes to determine the nature and scope of an issue and to examine associated viewpoints and their consequences.
- **[E]: Evaluate** legal situations, using knowledge from their analysis of legal issues to present legal alternatives then make a recommendation(s) in response to the situation; justifying the decision or recommendation(s) using legal criteria.
- **[R]:** Create a **response** to communicate meaning according to the intended purpose.

The mastery of syllabus objectives are also developed by our use of a **structured inquiry-based learning approach**, that is central to Legal Studies. Throughout each topic, students are given a contemporary legal issue, question or problem, and components (such as source material or activities) to develop their confidence and independence to become learners responsible for their own learning.

As an experienced team of current and former legal practitioners and educators we continue to aim for the highest standards of legal accuracy and scholarship in our writing, so that the content can be used as an authoritative reference source for teachers, whilst ensuring that the text is readable and engaging for senior school students. To the best knowledge of the authors, this text provides an accurate picture of the law at the time of writing.

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Roger Woodgate, Jeff Biggs and Kirsten Murray (Brisbane, November 2023).

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# Unit 1

## Beyond reasonable doubt

Unit 1 focuses on criminal law, from the sources of criminal law to the investigation, trial process and punishment of criminal behaviour.

# Topic 1

Topic 1 introduces you to the foundations, features and processes of Australia's legal system.

## Legal foundations

**Chapter 1:** Law

**Chapter 2:** Law-making

**Chapter 3:** The adversarial system

# Legal foundations

---

## Chapter 1: Law

---

- 1.1 The rule of law
- 1.2 Customs, rules and laws
- 1.3 The purpose of law
- 1.4 Characteristics of an effective law
- 1.5 Forming a legal criteria

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the concept of the rule of law
  - the difference between onus of proof and standard of proof
  - the purpose of laws within society
  - the difference between a rule and a law
  - concepts of just and equitable outcomes as a foundation principle of criminal law in Australia
  - the characteristics of an effective law
  - legal criteria for decisions.
- analyse a range of criminal legal issues by examining different viewpoints.

# 1.1 The rule of law

## Key Terms

Throughout this textbook we will highlight some key terms that are important to each topic. Some of these definitions are drawn from the *Legal Studies General Senior Syllabus* or other sources, such as a legal dictionary. Knowing these key terms will help you understand the larger legal issues you will be asked to analyse and evaluate.

**Code:** a collection of laws or statutes.

**Equitable:** even and impartial; finding an acceptable balance between the rule of law and the rights and freedoms of individuals and society.

**Just:** legally correct, conforming to that which is lawful, fair or reasonable in the circumstances.

**Rule of law:** the doctrine that all people are equal before the law and that the government is subject to the law.

---

*We cannot build foundations of a state without rule of law.*

Palestinian politician Mahmoud Abbas

The doctrine of the **rule of law** is the foundation of our legal system. Although it is made up of many principles, essentially the rule of law asks that every law, process and decision should reflect that everyone, no matter their status or power, **are equal before the law**.

## Origins of the rule of law and democracy

We can trace the many principles that underpin the rule of law from our ancient civilisations.

The *Code of Hammurabi*, a collection of legal rules made by Babylonian King Hammurabi, is one of our longest surviving legal texts and illustrates how some ancient societies sought to create systems that supported the concepts of fairness and justice. The *Code* sets out a list of crimes, punishments and guidelines about how to deal with civil disputes. These rules were binding on all members of the community—even people who held privileged positions. This is evidenced in its introduction, which states the *Code* ensures the ‘...strong should not harm the weak.’

The ancient Greeks created a democratic system that included checks and balances against those who held power by giving its citizens individual freedoms and rights, as well as a voice in law-making (although not everyone was considered a citizen).

Today, modern democracies throughout the world, such as those seen operating in the United Kingdom, United States of America, New Zealand, Canada and Australia believe that no-one, not even the president, premier or prime minister, should be above the law. Perhaps the most recent example of this is the impeachment of the 45th President of the United States, Donald Trump. Although he was found ‘not guilty’ in the Senate (after being impeached by the House of



*Code of Hammurabi*



Representatives) the fact that he was put on trial at all demonstrates that even those that hold the highest office are still answerable to the people. In their own ways, all these societies, whether it be ancient or modern, have created systems that seek to provide stability, fairness, equality and a clear process for resolving disputes.

## Case Study

---

*Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the preservation of integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position.*

*R v Jackson & Hakim* (1988) 33 A Crim R 413 at [435]

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*R v Nuttall* (2008) District Court of Queensland

**Facts:** Gordan Nuttall was a member of the Queensland Legislative Assembly from 1992 to 2006. For most of that time he held a Ministry position.

A Crime and Misconduct Commission (CMC) investigation looked into a number of payments made to Nuttall by Ken Talbot (a Queensland businessman) and Harold Shand (then a director of the Workcover Queensland Board). Shand was appointed a director by Nuttall while he was the Minister for Industrial Relations. He was charged with 36 counts of receiving a secret commission. He pleaded 'not guilty'.



**Legal Issue:** Did Nuttall corruptly receive anything of valuable consideration (such as real or personal property, money or a loan) from Talbot and Shand while holding a Ministry position? Did this influence Nuttall to show favour or disfavour towards Talbot and Shand or provide the expectation of influence?

**Decision:** When summing up the case to the jury, Chief Judge Patsy Wolfe told the jury Nuttall's guilt or innocence hinged on what he believed Talbot and Shand wanted when they gave him the money.

A jury found Nuttall guilty of all charges. He received a sentence of seven years imprisonment. He was eligible to apply for parole at 2 January 2012. He appealed his conviction and sentence, but this was dismissed by the Queensland Court of Appeal.

1. With what criminal offence was Nuttall charged? [C]
  2. What was the outcome of the trial. [C]
  3. Explain how this case shows Nuttall, a person who held a powerful position as a member of parliament, was subject to the law. [A]
  4. Justify whether or not the outcome of this case demonstrates the rule of law operated effectively. Explain your reasons. [E]
-

## Rule of law principles

There are many principles that underpin the rule of law in Australia that work together to help make everyone **equal before the law**. You will see these principles mentioned at various points throughout your Legal Studies course. Some key principles are set out in the infographic below.



Some of you might argue that these principles don't exist in the real world—and that's ok.

**As Legal Studies students, it's important to be critical and question whether the law and our legal processes are just, fair and equitable.**

The rule of law is important as it protects all of us from the misuse of power by restricting what governments, businesses and individuals can do to each other by ensuring everyone must obey and follow the law. This helps our community to function effectively and efficiently.

### Tip

Each time you are asked to analyse or evaluate a legal issue or the law, you may like to think about whether the principles of the rule of law are being applied and to what degree. For example, prior to 2017, the *Marriage Act 1961* (Cth) defined marriage as being, 'between a man and a woman.' Although the law was clear, certain and known; the law also discriminated between same-sex and heterosexual couples. This unequal treatment was a key factor behind the reform of Australia's definition of marriage, which now defines marriage as, 'the union of 2 people to the exclusion of all others, voluntarily entered into for life.' You will notice this definition does not reference a person's sex or gender.





## Practical Application

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1. Match the relevant rule of law principle (A-F) being referred to in each source (1-6). [C]

**A. Law and decisions are made in an open environment**

1. The doctrine is reflected in the structure of the *Australian Constitution*: Chapter I is entitled 'The Parliament'; Chapter II, 'The Executive Government'; and Chapter III, 'The Judicature'. But these powers are not as separate and the distinctions not as clear as some might imagine.

Source: Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Interim Report 127, July 2015).

**B. The independence of the judiciary**

2. ...because there is a considerable imbalance of resources between the State and the defendant...[it] requires that proper measures are taken to ensure that such censure does not fall on the innocent.

Source: Andrew Ashworth 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

**C. A free press**

3. ...the prosecution brings the charge against the accused, and for that reason the prosecution has the burden of proving that charge. The standard of proof required is proof beyond reasonable doubt...

Source: Mark Tedeschi QC and The Rule of Law Education Centre, 'The role of a prosecutor', *Presumption of Innocence* (You Tube, 15 October 2012).

**D. Separation between the bodies that make, administer and interpret the law**

4. Queensland has an open judicial system. As a member of the Queensland public, you're encouraged to see how it works (by going to court).

Source: Queensland Courts, *Courtroom etiquette* (Web Page, 2022)

**E. Presumption of innocence**

5. ...judges need to be able to decide the cases on the evidence before them in accordance with the common law and statute, without influence or pressure from any external source.

Source: The Hon Chief Justice Catherine Holmes AC, 'The fight for independence' (14 June 2019) *The Australian Legal Review*.

**F. Due process is observed**

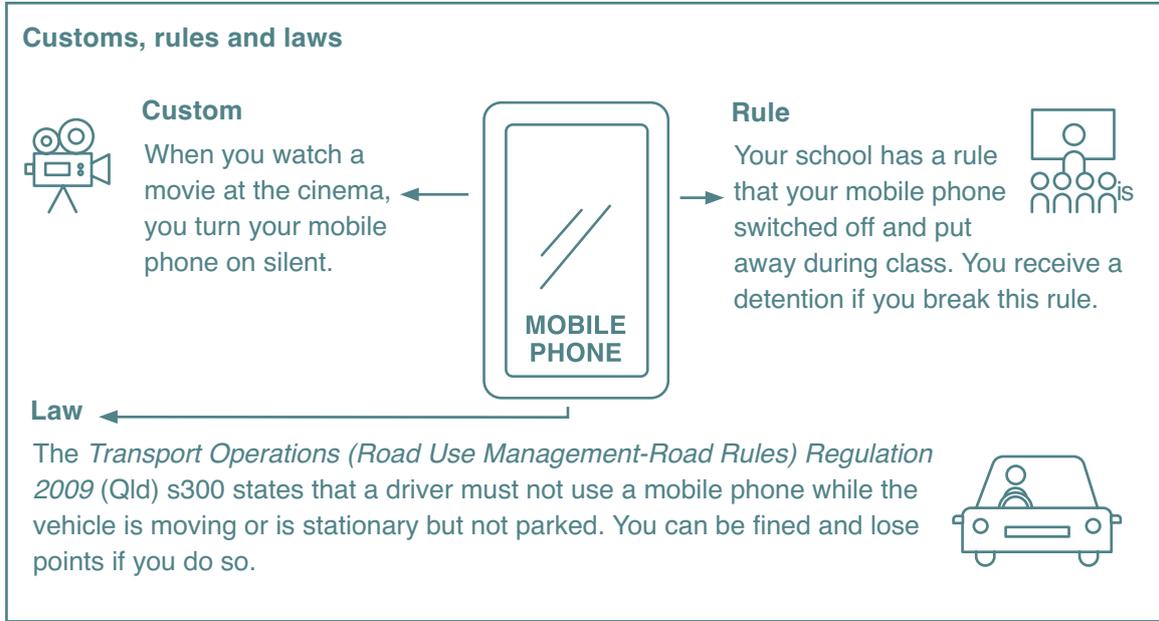
6. Whether it's starving the public broadcaster of funding while forking out millions to Foxtel, the further concentration of media ownership in Australia, or the frequency with which journalists, media organisations and whistle-blowers are being raided and arrested by police – these are not the features of a healthy democracy.

Source: Ebony Bennett, 'Why freedom of the press matters', *The Australia Institute* (Web Page, 6 June 2021).

# 1.2 Customs, rules and laws

Our lives are governed by many customs (which can be influenced by our families, friends and the communities in which we live), rules and laws.

Social customs and rules are important, but they do not have the same status or force that the law does. To help you understand this further here is an example using a mobile phone:



**What do you think?**

---

- Form a group of 3 and together identify one custom or school rule that you think might benefit from becoming a law. Think of reasons that support that choice. Present your choice to the class. [A]



## Authority

The first feature concerns who has the power to make new law—as not everyone can declare when a behaviour has legal consequences. **The authority to make new law in Australia rests solely with parliament and, in certain situations, the courts.** Unless a law is validly made by one of these two bodies with the authority to make laws, it will not be recognised as a law or enforced by the courts. For example, only the Queensland and Federal Parliaments can create a criminal offence.

## Consequence

The consequence of breaking or not observing a law is more serious than failing to comply with a custom or a rule. **Laws involve enforcement by courts, tribunals and other government agencies, such as the police.** When you break a law, the consequences can be quite serious (such as a term of imprisonment, a fine or community service order) and can have life altering consequences. In contrast, breaches of social customs or rules don't have such serious consequences. For example, not wearing the correct uniform won't result in you being sent to jail, but it may result in you receiving a lunchtime detention.

## Application

**Laws apply to all members of society**, whereas rules often only apply to a specific group of people within a specific environment. For example, your school may have a rule that body piercings must be hidden (with the exception of ear piercings), but this rule does not apply to you once you graduate.

Can one action breach a custom, break a rule and see you be charged with a criminal offence? Yes—to see how we will break down a real-life incident that occurred in an Australian Football (AFL) semi-final in Queensland. In this game a player forcefully kicked an opponent's head during the match while he lay on the ground.

### Custom

All players playing in the game are expected to show good sportsmanship, such as being respectful to everyone including teammates, your opponent and the officials.

### Rule

The *Laws of Football (2021)* Rule 18.7 states that a:

*...player shall be protected from unreasonable conduct from an opposition player which is likely to cause injury.*

Queensland AFL's Independent Tribunal banned the player from playing football for 20 years. The player was also deregistered under the AFL's Deregistration Policy.

### Law

The *Criminal Code 1899 (Qld)* s335 states that:

*(1) Any person who unlawfully assaults another is guilty of a misdemeanour, and is liable, if no greater punishment is provided, to imprisonment for 3 years.*

The player was charged with assault occasioning bodily harm by the Queensland Police. The player pleaded guilty and was sentenced to 12 months imprisonment (to be released on parole after serving two months).



## Practical Application

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- For each of the following incidents during a game of rugby league:
    - identify whether the incident involves the breach of a custom, rule or a law (or a combination). [C]
    - for each rule or custom you identify, explain whether or not you believe a law should be introduced to outlaw this behaviour. You are encouraged to consider the implications of your decision. [A]
    - A player refuses to shake hands with a player from the opposing team.
    - When play is stopped for half-time, one player punches a member of the opposing team in the face. The player suffers a broken nose and needs to be taken to hospital.
    - A player accidentally runs into an referee. The referee loses consciousness and is diagnosed with concussion.
    - A spectator runs onto the field during the game.
    - A player throws a forward pass.
    - A player writes a racist message on strapping tape around his or her wrist.
  - '*What happens on the field, stays on the field*'. Justify whether you agree or disagree with this statement, considering the implications of your decision. [E]
- 

## 1.3 The purpose of law

---

Why do we have laws? There are many reasons why our elected representatives enact law. Sometimes laws share a general objective, whilst others may have a specific purpose. Some objectives or reasons include to:

- support society to function effectively and create structure
- protect the community and keep people safe
- punish people who have broken the law
- compensate people who are wronged by others
- reflect a society's morals, beliefs or values
- ensure the health, safety and wellbeing of people
- make sure that people, organisations or the government are not able to abuse their power
- promote an individual's rights and freedoms
- create a legal relationship or make clear the rights and obligations of individuals, organisations or governments.

For example, you are required to wear a seatbelt when in a vehicle. This keeps individuals and other road users safe and ensures the health and wellbeing of people.



### What do you think?

In 2021, New Zealand passed a law that bans people born after 1 January 2009 from ever being able to buy tobacco. Are these laws justified or are they unnecessarily turning society into a 'nanny state' in which the government has gone too far in telling us what we can and can't do in case we hurt ourselves? Justify your point of view, by discussing the implications of your decision. For instance, you might consider the health, social and legal consequences of this law, as well as its impact on individual rights and freedoms (which a newly elected government is considering repealing). [E]



### Tip

When evaluating a legal situation, think about the purpose or objective of the law and question whether it is achieving its aim. Remember, sometimes law makers have to balance competing interests when making law. You may like to think about using this approach when justifying a decision or recommendation too—what is the purpose behind your alternative approach?

Learning how to locate Acts, bills and legislative material is an important skill in Legal Studies. To locate law made by Queensland and Federal Parliament visit:

- Office of the **Queensland** Parliamentary Council—[legislation.qld.gov.au](http://legislation.qld.gov.au)
- **Federal** Register of Legislation—[legislation.gov.au](http://legislation.gov.au)
- Australasian Legal Information Institute (AustLii)—[austlii.edu.au](http://austlii.edu.au) (this covers all Australian jurisdictions)

The task below asks you to locate a bill. As this may be your first time locating law, you may find the steps below helpful. In this example we are locating the Corrective Services (No Body, No Parole) Amendment Bill 2017 (Qld).

1. Identify the correct jurisdiction of the law.  
As this Bill originates in Queensland we will visit the Queensland Parliamentary Council website.
2. Visit the Office of the Queensland Parliamentary Council website—[legislation.qld.gov.au](http://legislation.qld.gov.au)
3. Open the 'Bills' menu (if you wish to view a current law, open the 'In force legislation' menu.)
4. Locate and open the year the bill was introduced. As this Bill was created in 2017, we will open that year.
5. Locate the title of the bill you are looking for. In this example we are looking for Corrective Services (No Body, No Parole) Amendment Bill 2017 (Qld).
6. View the 'Legislative History' of a bill by selecting this menu. It is here you will find the Explanatory Notes, which contains the objectives or reasons behind a proposed law (an extract is shown below):

***Policy objectives and the reasons for them***

*The No Body, No Parole policy is predicated on the notion that by making parole release for particular prisoners contingent on them satisfactorily cooperating in the investigation of the offence to identify the victim's location, it will encourage and provide incentive for these*

*prisoners to assist in finding and recovering the body or remains of the victim. This will in turn, it is hoped, offer some comfort and certainty to the families of the victims.*

One of the main reasons behind this proposed law was that it would encourage prisoners to give the location of their victims remains before allowing them to apply for parole. This would offer some comfort to victim's families.

## Research Task

Below you will see a list of proposed laws (called bills) introduced in Queensland's Parliament:

- Criminal Law (Raising the Age of Responsibility) Amendment Bill 2021 (Qld)
- Waste Reduction and Recycling (Plastic Items) Amendment Bill 2020 (Qld)
- Criminal Code (Non-Consensual Sharing of Intimate Images) Amendment Bill 2018 (Qld)

For each Bill:

1. Locate the Explanatory Notes of the Bill. [S]
2. Select and explain the objectives or reasons why our elected representatives wish to introduce this law as stated in the Bill's Explanatory Notes. Can you add any additional reasons why this law should be in force? [C] [S]
3. Imagine you are a member of parliament. Decide whether or not you would support this proposed law. Justify your decision. [E]

## 1.4 Characteristics of an effective law

To be considered 'effective' a law should reflect the following conditions or features:



We will now discuss each characteristic in more detail.

### The law should be known and have certainty

To be effective, the law needs to be clear so that individuals can understand it. The Australian Law Reform Commission has recommended that plain English be used in legislation and legal documents to make the law more understandable and accessible. This does not mean that every

person needs to know every law that exists—it means that every law can be known if a person wishes to find out what the law is. For example, if a person attempted to use the excuse that they did not know it was illegal to drive without wearing a seatbelt they would still be found guilty—ignorance or lack of knowledge of a law is no excuse. Intertwined with this, is that the law also needs to be stable and consistent. If the law changes too rapidly or frequently people may not know what they can and cannot do. **Ambiguity, complex language and rapid change can lead to uncertainty and confusion.**

### *Criminal Code 1899 (Qld)*

#### **22 Ignorance of the law—bona fide claim of right**

*(1) Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.*



## Practical Application

The use of graphics in areas such as contract law, employment law and consumer law is another way organisations and governments are helping people understand the law.

### HOW CONTRACTS DRAWN UP AS COMIC STRIPS ARE BEING PUT TO USE IN SOUTH AFRICA

Contracts are an important part of our lives.

But, contracts always seem to be documents ‘written by lawyers for lawyers’. They are dense, complex and hard to read even if you’re very literate; and are largely impenetrable if you have low literacy skills.

Comic Contracts are visually dominant contracts ‘written’ in pictures. Parties are represented by illustrated characters, the terms of the agreement are captured as comics and the parties sign the comic as their contract.

Well designed pictures are engaging, easy to understand and easy to remember. When pictures and text are strategically used together, such as in speech balloons or captions, the text becomes less intimidating and comprehension is both invited and enhanced.

Andrew Hutchison, ‘How contracts drawn up as comic strips are being put to use in South Africa’, *The Conversation* (Online, 9 August 2018) <[theconversation.com/how-contracts-drawn-up-as-comic-strips-are-being-put-to-use-in-south-africa-100835](https://theconversation.com/how-contracts-drawn-up-as-comic-strips-are-being-put-to-use-in-south-africa-100835)>

1. Identify the document and legal area that are being turned in comics. [C]
2. Analyse the limitations of many contracts you see and sign today. How may the movement away from lengthy documents to a more visually dominant approach assist people to understand their legal rights and responsibilities? Can you raise any negative implications of the increased use of pictures in legally binding documents? [A]

### The law should be prospective (not retrospective)

It would be unfair if conduct that was lawful when you did it, was later unlawful because a law was back-dated. Laws that have their effect back-dated are called retrospective laws. **Generally, retrospective laws are viewed as unjust and therefore are rarely enacted, although it can happen from time to time.**



### What do you think?

In 1988, the Federal Government passed the *War Crimes Amendment Act 1988* (Cth). This Act made some actions, such as war crimes, that had occurred 50 years earlier in Europe, criminal offences.

Some people felt that the morally indefensible acts that took place in Nazi-occupied Europe legitimised the retrospective operation of this Act. Others argued that regardless of how evil an act was, it was dangerous and unfair to pass retrospective legislation.

State the position you would have taken on the introduction of this Act. Provide a reason for your decision. [E]

### The law must be acceptable to the community

For a law to be effective, citizens must support its introduction and be willing to abide by it. Laws are acceptable when the need for a particular law is understood and when it accords with our individual and community notions of justice. For example, legal responses to domestic and family violence are widely supported by the community. If a law does not have wide-spread support or is incredibly unpopular, it could lead to people intentionally choosing to break it, protest against it or lead to a government losing power. An example of this occurred in the 1960s when the Federal Government introduced compulsory national service during the Vietnam War. Citizens protested against this law, men openly disobeyed it and public support of the war fell. This was one factor (of many) that placed pressure on the government to change the law and eventually withdraw Australian armed forces from Vietnam. Another more recent legal change that reflected the will of the community occurred in 2017, when the *Marriage Act 1961* (Cth) was amended to allow same-sex couples to marry.

### Practical Application



#### SAME-SEX MARRIAGE LEGALISED IN AUSTRALIA AS PARLIAMENT PASSES HISTORIC LAW

Australia has officially become the 26th country to legalise same-sex marriage after the law was passed on Thursday with the overwhelming backing of the Federal Parliament. Thirteen years after changing the Marriage Act to explicitly forbid same-sex unions, federal politicians voted to undo the last major piece of discrimination against gay and lesbian Australians.

‘Australia has done it. What a day for love, for equality, for respect,’ declared a jubilant Prime Minister Malcolm Turnbull, who punched the air as he called it a historic day for the nation. ‘This belongs to us all. This is Australia – fair, diverse, loving and filled with respect for every one

of us. This has been a great, unifying day in our history.’

Attorney-General George Brandis advised the law would formally change on Saturday, allowing same-sex couples to lodge a Notice of Intended Marriage from this weekend. The minimum notice period is one month, meaning the first legally recognised same-sex wedding could take place on January 9.

Only four MPs voted against the change, and so clear was the result that a formal count was not required. A handful of MPs - including former prime minister Tony Abbott and Treasurer Scott Morrison - chose to abstain. When the vote was declared on



## Practical Application ...

the floor of the House, the packed public gallery exploded into cheers and applause, while MPs crossed the chamber to embrace each other, waive rainbow flags and in some cases cry.

Numerous well-known gay and lesbian Australians were present to witness the historic moment, including Olympic swimmer Ian Thorpe and actress Magda Szubanski. Thorpe, who struggled with his sexuality for many years and came out publicly in 2014, said it was a 'momentous day' for young gay and lesbian people. 'We have created an Australia that is more equitable, more fair and more just, and it is the kind of place that more Australians want to see,' he said.

Opposition Leader Bill Shorten said he was 'humbled' by the momentous event and 'privileged' to be part of it. 'This isn't about me or the other 150 members of Parliament - it is about Australians and Australia, the LGBTIQ people and their families and their partners,' he said immediately after the vote.

'We are telling them: we love you, you're equal.'

While gay rights campaigners have fought for marriage equality for decades, the direct path to Thursday's vote began two years ago when the former Abbott government announced it would settle the question of same-sex marriage by a public plebiscite.

Mr Turnbull continued that policy, but it was blocked by opponents in the Senate. The government later opted to hold a voluntary postal survey asking: 'Should the law be changed to allow same-sex couples to marry?'

Australians voted 'yes to that question by 61.6 per cent to 38.4 per cent, prompting the government to allow a free vote in Parliament, which passed on Thursday.

Source: Michael Koziol, 'Same-sex marriage legalised in Australia as Parliament passes historic law', *The Sydney Morning Herald* (Online, 8 December 2017) <[smh.com.au/politics/federal/samesex-marriage-legalised-in-australia-as-parliament-passes-historic-law-20171207-h00cdj.html](http://smh.com.au/politics/federal/samesex-marriage-legalised-in-australia-as-parliament-passes-historic-law-20171207-h00cdj.html)>

1. Identify the law that was passed by the Australian Parliament. [C]
2. Explain how Australians responded to the voluntary postal survey. What implications did this have? [C]
3. Four Members of Parliament voted against changing the law. Research, select and critically analyse a viewpoint which argues against the legalisation of same-sex marriage. [S] [A]

### The law should apply equally to all

For a law to enjoy the confidence and support of the people, it should apply to all citizens equally. Members of parliament, judges and public servants should not be exempted from the law; nor should celebrities or the rich and powerful be treated more leniently or more harshly than others. For instance, in 2016, actors Amber Herd and Johnny Depp were charged with violating Australia's biosecurity laws when they failed to declare their two dogs, Pistol and Boo, when they flew into Australia.



## Case Study

Read the following case notes and answer the questions below:

### Case 1

*R v Baggaley* (2021) Supreme Court of Queensland

Olympic silver medallist Nathan Baggaley was sentenced to 25 years imprisonment for attempting to import a commercial quantity of a border-controlled drug.

### Case 2

*R v Cullen* (2019) Magistrates Court of Queensland

Corey Cullen, a criminal lawyer, was ordered to serve 80 hours of community service after pleading guilty to one count of possession of a dangerous drug.

### Case 3

*R v Pisasale* (2019) District Court of Queensland

The former mayor of Ipswich, Paul Pisasale, was sentenced to two years imprisonment after he was found guilty of two counts of extortion.

### Case 4

*R v Haas* (2019) Magistrates Court of Queensland

NRL footballer Payne Haas was fined \$500 and lost his drivers licence for six months after he was caught driving without a licence and using a mobile phone whilst stopped at a red light.

1. What position of power, influence or celebrity is held by each defendant? [C]
2. Justify, using legal reasoning, how these cases demonstrate that the law is applied equally to all. What implications would occur if a person's position dictated whether or not they were subject to the law? [A] [E]

## Law should be capable of being enforced

If laws are not or cannot be enforced they risk being ignored and lose their effectiveness to regulate society.

You will now apply these features to a practical example.

### Inquiry Task

*Are Queensland's drug possession laws effective at deterring the community from using illegal drugs for recreational purposes?*

In Queensland, the criminal offence of possession of a dangerous drug is found in *Drugs Misuse Act 1986* (Qld) s9:

(1) *A person who unlawfully has possession of a dangerous drug is guilty of a crime.*

Depending on the type of drug, maximum penalties can range from 15 to 25 years imprisonment.

Read the following sources related to drug possession and answer the focus questions that follow.



**Source 1****DRUG USE REMAINS A SERIOUS ISSUE IN QUEENSLAND: WASTEWATER REPORT**

Queensland still has high rates of MDMA (also known as ecstasy), cocaine and methyl amphetamine consumption, according to a report released by the Australian Criminal Intelligence Commission (ACIC).

The April 2021 [wastewater] collection covered 56 per cent of the population, or about 13 million Australians and found methyl amphetamine consumption in Queensland had steadily increased to near pre-pandemic levels, while MCMA use in the state's regional areas was the second highest in the country.

Source: UQ News, 'Drug use remains a series issue in Queensland: Wastewater report', *UQ News* (Online, 28 October 2021) <[uq.edu.au/news/article/2021/10/drug-use-remains-serious-issue-queensland-wastewater-report](http://uq.edu.au/news/article/2021/10/drug-use-remains-serious-issue-queensland-wastewater-report)>

**Source 2****ILLICIT DRUG OFFENCES INCREASED WHILE OVERALL OFFENCES DECLINE**

While the rate of total crime decreased in the COVID-19 months, the rate of illicit drug offences increased. Illicit drug offence rates increased between March and April 2020 (from 119.8 to 146.1 per 100,000 persons), peaked in May (191.2 per 100,000 persons), before starting to fall again in June (160.8)

Source: Queensland Government Statistician's Office, 'COVID 19 and illicit drug offence trends, March to June 2020' *Queensland Treasury* (Web page, 10 July 2020) <[qgso.qld.gov.au/issues/10296/covid-19-pandemic-illicit-drug-offence-trends-202003-202006.pdf](http://qgso.qld.gov.au/issues/10296/covid-19-pandemic-illicit-drug-offence-trends-202003-202006.pdf)>

**Source 3****DRUG OFFENCES AND PENALTIES IN QUEENSLAND: POSSESSING DANGEROUS DRUGS**

Possession requires both knowledge of the item concerned and control of it. Both knowledge and control must be proved beyond reasonable doubt, but proof of knowledge can be based on an inference drawn from all the circumstances.

It is no defence that a person has forgotten that they had the drugs concerned. Also, control over the drugs need only be momentary (e.g. in the course of concealment).

Source: Caxton Legal Centre Inc, 'Drug offences and penalties in Queensland: Possessing dangerous drugs' *Queensland Law Handbook* (Web page, 2022) <[queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/drugs/drug-offences-and-penalties-in-queensland/](http://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/drugs/drug-offences-and-penalties-in-queensland/)>

**Source 4****SENTENCING SPOTLIGHT: POSSESSION OF DANGEROUS DRUGS**

Some of the sentencing outcomes our research found for the offence of **possession of dangerous drugs** included:

- a total of 151,186 offenders were sentenced for possession of a dangerous drug
- the average age of offenders at sentencing was 30.7 years
- the majority of offenders pleaded guilty (97.1%)
- the majority of offenders received a non-custodial sentence (93.2%), of which 56.4% received a fine (\$554.60 average)

Source: Sentencing Advisory Council Queensland, 'Sentencing Spotlight: Possession of dangerous drugs', *Sentencing Spotlights* (Web page, October 2017) <[sentencingcouncil.qld.gov.au/research/reports/sentencing-spotlight/possession-dangerous-drugs](http://sentencingcouncil.qld.gov.au/research/reports/sentencing-spotlight/possession-dangerous-drugs)>

**Source 5****DRUG DECRIMINALISATION WOULD 'SAVE HUNDREDS OF MILLIONS' BUT QUEENSLAND PREMIER RULES IT OUT**

The Queensland Productivity Commission found imprisonment rates had been rising steadily for years, reaching the highest rate per 100,000 people since federation...

At the same time, it declared 'all available evidence' suggested the so-called war on drugs by state authorities had 'failed to curb supply or use', and cost the state about \$500 million a year in law enforcement alone, with about 1,840 people jailed annually for drug crimes.

Source: Matt Wordsworth, 'Drug decriminalisation would 'save hundreds of millions' but Queensland Premier rules it out', *ABC News* (Web page, 31 January 2020) <[abc.net.au/news/2020-01-31/drug-offences-penalties-qld-police-prison/11918390](http://abc.net.au/news/2020-01-31/drug-offences-penalties-qld-police-prison/11918390)>

**Source 6****AUSTRALIA'S RECREATIONAL DRUG POLICIES AREN'T WORKING, SO WHAT ARE THE OPTIONS FOR REFORM?**

Most Australians support some form of decriminalisation (caution, civil penalty or diversion) for all drugs. Only 5% of Australians support a prison sentence for cannabis possession, with support for prison for ecstasy (14%), methamphetamine (21%) and heroin (24%) also relatively low.

Associate Professor Nicole Lee and Professor Alison Ritter, 'Australia's recreational drug policies aren't working, so what are the options for reform?', *The Conversation*, (Web page, 2 March 2016) <[theconversation.com/australias-recreational-drug-policies-arent-working-so-what-are-the-options-for-reform-55493](http://theconversation.com/australias-recreational-drug-policies-arent-working-so-what-are-the-options-for-reform-55493)>

1. In your own words, describe the criminal offence of 'possession of a dangerous drug'. [C]
2. Referring to a specific source, approximately how much is spent by law enforcement on the 'war on drugs'. [C]
3. According to the Queensland Sentencing Advisory Council (Source 4), how many offenders were sentenced for possessing a dangerous drug for the period 2005 to 2016? [C]
4. Explain who must prove the criminal offence in court and to what standard. [C]
5. Analyse one viewpoint presented in Source 6. Hypothesise the reasons behind this perspective and its possible consequences. [S] [A]
6. Evaluate whether the law effectively discourages Queenslanders from using illicit drugs. Select and correctly cite relevant information from as many sources as you can to support your decision. [S] [E]
7. Using the features of an effective law as a legal criteria, justify whether this law is effective. [E]

## 1.5 Legal criteria

When evaluating a legal situation, you will be required to justify your decision or recommendation using a legal criteria. **A criteria is a standard or principle you will use to judge a law, legal decision or legal process.**

Legal criteria suggestion	When evaluating the law, legal process or decision was:
Rule of law and its principles	<ul style="list-style-type: none"> <li>• the defendant given the presumption of innocence?</li> <li>• due process observed?</li> <li>• the law and the decision made in an open and transparent environment?</li> <li>• there access to justice?</li> <li>• the judiciary independent?</li> <li>• the court free from actual or apparent bias?</li> <li>• the law clear, certain, known and accessible?</li> <li>• the law non-discriminatory?</li> <li>• international law recognised?</li> <li>• there freedom of the press?</li> <li>• there an ability to question, seek review or be critical of the government?</li> </ul>
Fairness or justness of an outcome	<ul style="list-style-type: none"> <li>• the outcome fair and just?</li> <li>• the outcome legally correct?</li> <li>• any person or corporation treated unfairly?</li> <li>• the law acceptable to the community?</li> <li>• the law applied equally to all?</li> <li>• the law able to be enforced?</li> </ul>
Common law and/or statute law	<ul style="list-style-type: none"> <li>• the legal reasoning sound, fair and just?</li> </ul>

You will now practice creating and using a legal criteria to justify a criminal law reform that was enacted in 1991.



## Practical Application

Prior to 19 January 1991, consensual adult male homosexual activity was a criminal offence. There were many criminal offences listed within the *Criminal Code 1899* (Qld) that criminalised homosexual activity, one being:



***Criminal Code 1899 (Qld)***  
***211 Indecent practices between males***

*Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment for three years.*

In the early 1990s, the Queensland Government decided to legalise private homosexual acts by consenting adults and proposed a law that repealed relevant sections of the *Criminal Code 1899* (Qld). This law was passed.

1. Locate and select relevant principle(s) or standard(s) that you would like to use as legal criteria. There is no specific number you need to aim for, but remember the more you use, the deeper your justification will be. Ensure they are relevant to the legal issue you are investigating. For example, the principle of equal treatment may be one legal criterion you use here. [S]
2. Justify, using legal criteria, whether the repealing of Section 211 was fair and just. You should also discuss the implications of your criteria (these can be both positive and/or negative). [E]

# Review

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## Comprehend

1. **Define** the rule of law and explain how it may support just and equitable outcomes in the criminal law and criminal justice process. [C]
2. **Explain** the difference between a rule and a law. You are encouraged to use examples to further illustrate your knowledge and understanding. [C]
3. **Explain** the purpose of criminal law in society. [C]
4. **Describe** the difference between the onus of proof and the standard of proof in criminal law in the context of the criminal offence of 'possession of dangerous drugs'. [C]
5. **Describe** and explain five different principles or standards that you could include in a legal criteria. [C]
6. **Explain** the five features of an effective law. You are encouraged to use examples to further illustrate your knowledge and understanding. [C]

# Legal foundations

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## Chapter 2: Law-making

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### 2.1 Sources of law: an overview

### 2.2 Customary law

### 2.3 Separation of powers: the legislative, executive and judiciary

### 2.4 Statute law

### 2.5 Common law

### Learning objectives

At the conclusion of this chapter students will be able to:

- comprehend
  - the sources of law in the Australian legal system
  - the separation of powers doctrine in the Australian legal system
  - the court hierarchy
  - the process of statutory law-making
  - the process of statutory interpretation and the role of the courts.
- analyse
  - a range of criminal legal issues
  - the role of customary law in Australia's legal system.

## 2.1 Sources of law: an overview

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### Key Terms

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**Common law** (*also known as judge-made law, case law or precedent*): a body of law based on judicial decisions that has been developed over time.

**Customary law**: the practices and systems developed by First Nations peoples, which regulated their behaviour towards each other and towards the land in which they lived, and which also included penalties for non-compliance.

**Court hierarchy**: the arrangement of the courts into a specific order guided by jurisdiction. Decisions made in courts located at the top of the court hierarchy have greater authority than courts located at the middle or bottom of the hierarchy.

**Statute law** (*also known as parliament-made law or legislation*): law created and passed by a legislative body.

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### Law in Australia after 1788

When Captain Arthur Phillip declared our continent was part of the British Commonwealth in 1788, our legal system began to change dramatically. In that moment, English law applied to all people living on this continent, sweeping away one of the oldest legal systems in the world developed by our First Nations peoples (which we will discuss in a moment). Throughout the mid to late 1800s, England granted each British colony more latitude to develop their own laws and legal processes. Consequently, England had less say in the day-to-day decisions made by our governments, culminating in the creation of the Commonwealth of Australia through a process of federation, which heralded the beginning of an independent system of government in Australia. However, complete legislative independence was not finally established until the passing of the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK).

Although we make, administer and apply our own distinct laws and legal processes, you will continue to see connections to our legal past—as many features of our legal system are similar to those found in England. It also means you will find similarities between our legal system and that of other Commonwealth countries such as New Zealand and Canada.



### Tip

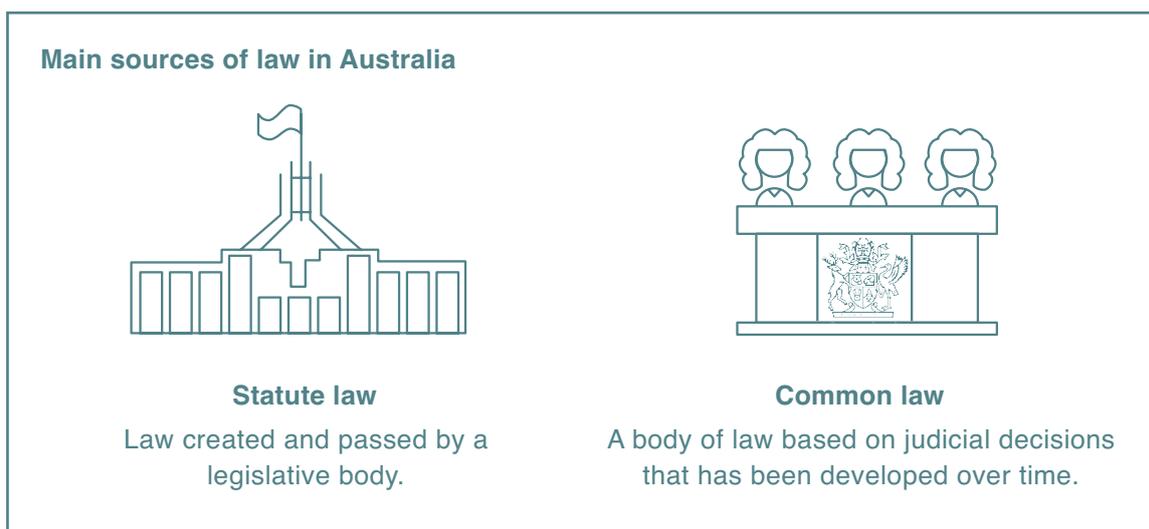
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When researching possible recommendations for an inquiry task you may wish to see how other Commonwealth countries respond to a legal issue.

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Like in England, there are two main sources of law we follow, these being:

- **statute law, and**
- **common law.**



**Statute law is law made in Australia by parliament** or by those to whom parliament has delegated authority. It is also known as **parliament-made law** or **legislation**. It is where we get most of our laws today. It is considered the leading source of law, as it can override law made by the courts. For example, when the Queensland Parliament passed an amendment to the *Summary Offences Act 2005* (Qld), unlawfully entering or remaining on particular land (such as a food production facility) became a summary offence (s13). Most criminal law, the focus of your first unit of study, is made by State and Territory Parliaments (although the Commonwealth Parliament also makes criminal law).

**Common law is law made by the courts.** It is also called **judge-made law**, **case law** or **precedent**. Decisions made by superior courts, such as the Queensland Court of Appeal or the High Court of Australia, are followed by courts located lower in a **court hierarchy** in matters that are similar in a factual or legal sense. For example, in *Kozarov v Victoria* [2022] HCA 12, the High Court of Australia decided that an employer owes an employee a 'duty of care' (a term you will learn more about in Unit 2) to take reasonable steps to avoid excessive stress and mental trauma. This decision will be applied in courts located lower in the court hierarchy, such as the Supreme Court of Queensland.

Although the bodies that make these laws are independent of each other (more on that later) they interact directly and indirectly. For example, when a judge or magistrate sentences a defendant, they will:

- apply and interpret statute law, such as the *Criminal Code 1899* (Qld) and the *Penalties and Sentences Act 1992* (Qld), and
- use common law by applying decisions made by other judicial officers when deciding an appropriate sentence.





### Practical Application

The Supreme Court Library Queensland (SCLQ) publishes decisions made by Queensland courts and tribunals.

1. Locate the case *R v Renata; Ex parte Attorney-General* [2018] QCA 356 on the Supreme Court Library Queensland CaseLaw database (sclqld.org.au). [S]
2. Identify and state the statute law and common law referred to by the Queensland Court of Appeal when they made their decision in the table below. [C] [S]

Statute law	Common law

It is important to re-state that statute and common law are not the oldest sources of law in Australia, nor the only sources of law you will study. **First Nations peoples, the traditional custodians of country throughout Australia, also developed a system of law.**

## 2.2 Customary law

**WARNING:** First Nations students are advised that this section of the text contains images and words of deceased persons.

### Law in Australia prior to 1788

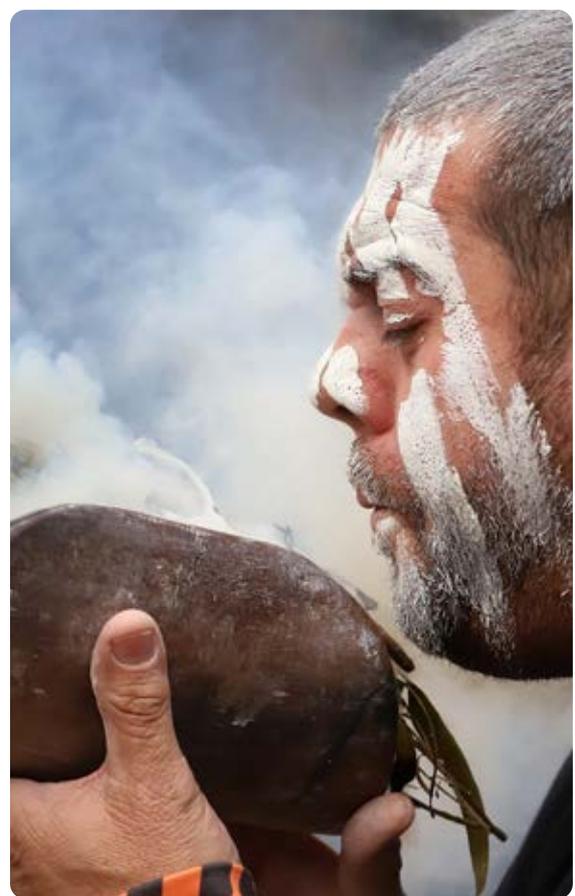
According to the National Museum of Australia, First Nations peoples lived on mainland Australia for at least 65,000 years prior to European arrival. This means that Australia’s first source of law was **customary law**.

Like all types of law, customary law sought to:

- regulate people’s behaviour
- create rights and responsibilities
- set down penalties or reparations
- connect people with the land
- govern relationships.

It was communicated to the community by word of mouth or through cultural practices such as art, dance and song. We will now consider the modern application of customary law in three different areas:

- land (native title)
- hunting and fishing rights
- family law (customary adoption).



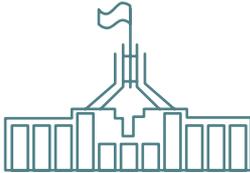
## Native title

*The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.*

The Hon Justice Brennan, 1992

Customary law was not accepted or respected by England. When the English colonised Australia, they ignored any customary laws developed by First Nations peoples'. In particular, they did not recognise First Nations peoples ownership and connection to their land, which we term 'native title'. Instead, the English declared that Australia was *terra nullius* (land belonging to no-one), a legal fiction that was only overturned by the landmark case *Mabo v Queensland (No. 2)* [1992] HCA 23, (1992) 175 CLR 1. One of the outcomes of this decision was that it brought customary law into the common law. This decision also influenced the creation of statute law (as shown below).

### The *Mabo* decision and sources of law

CUSTOMARY LAW	COMMON LAW	STATUTE LAW
		
The Meriam people had a traditional system of law and land tenure, a long and continuous history of occupying and using the land and a deep spiritual connection to the Murray Islands.	The High Court of Australia recognised that Indigenous peoples had lived in Australia for thousands of years and exercised native title according to their own laws and customs. This recognised native title in common law.	The Commonwealth Government enacted the <i>Native Title Act 1993 (Cth)</i> , which determines the nature and extent of native title; as well as provides a process for Indigenous communities to have their traditional rights to land recognised and protected by Australian law.

Before we examine the *Mabo* decision, it is important to understand the factual basis of *Mabo's* claim, as it demonstrates the connection between customary law and land ownership. First Nations peoples organised themselves into clans, who each occupied clearly defined territory. A clan's customs and laws underpinned their traditional rights and obligations with respect to the land. Before *Mabo* could be decided, the High Court of Australia asked the Supreme Court of Queensland to hear and determine the facts of the claim. The case was heard by the Hon Justice Moynihan AO in Brisbane and the Torres Strait. Justice Moynihan heard evidence from many witnesses that showed that the Meriam people had a traditional system of law and land tenure, a long and continuous history of occupying and using the land and a deep spiritual connection to the Murray Islands. This led him to conclude that the Meriam people had a strong system of customary land rights which had existed before the arrival of the English. After Justice Moynihan's determination was made, the High Court of Australia could hear the legal issues in the case.



## Case Study

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*Mabo v Queensland (No. 2)* [1992] HCA 23, (1992) 175 CLR 1

**Facts:** Eddie Mabo (the lead plaintiff) and four others, who lived on the island of Mer in the Torres Strait between Australia and Papua New Guinea, went to the High Court of Australia to seek a declaration (a legal ruling) on whether they had native title (ownership) of their land.

**Legal Issue:** Was there a form of ownership (native title) held by First Nations peoples of their land? If so, does Australia recognise this form of native title and did the Meriam people have native title of their land?

**Decision:** On 3 June 1992 (a date now acknowledged as Mabo Day) the High Court of Australia, by a six to one majority, upheld the Meriam people's claim to native title over their traditional land.

*...The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land... The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists.*

The Hon Justice Brennan [63]

*The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not terra nullius or 'practically unoccupied' in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.*

The Hon Justice Deane and Justice Gaudron [56]

The High Court of Australia ruling recognised that First Nations peoples had lived in Australia for thousands of years and exercised native title according to their own laws and customs. The Court acknowledged that the Meriam people had continued their ownership of the lands of Mer to the present time and held native title over the land. However, the ruling clearly stated that native title claims may only apply to particular types of land (not all land), such as vacant Crown land, national parks and some leased land.

1. Identify the lead plaintiff in this case. [C]
  2. Explain the ruling the court made on the application of the doctrine of terra nullius. [C]
-

## Case Study ...

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3. Explain why Justice Brennan felt that the doctrine of terra nullius would perpetuate an injustice if it were to continue. [A]
  4. Explain why Justice Deane and Justice Gaudron describe the act of dispossession as, 'the darkest aspect of the history of this nation'. [A]
  5. Locate, select and reference at least 2 to 3 secondary sources that assist you to answer this question: Why was the Mabo decision legally significant? [S] [E]
- 

### ***Native Title Act 1993 (Cth)***

*The Native Title Act 1993 is a defining piece of legislation in terms of customary law. As a statute that had its evolution through common law, it is the ultimate recognition that Indigenous Australian societies possessed, and continue to possess, well-developed systems of law.*

Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2006

**As a result of *Mabo*, the Commonwealth Government enacted the *Native Title Act 1993 (Cth)*, which statutorily affirms the recognition at common law of the pre-existing system of customary law. This Act determines the nature and extent of native title over land in Australia; as well as provides a process for Indigenous communities to have their traditional rights to land recognised and protected by Australian law. The Act sought to give certainty, stability and enforceability to both First Nations and non-Indigenous peoples' rights to land. One important objective is outlined in the Act's Preamble:**

*It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests.*

A native title holder's rights and interests might include using the land to hunt and fish, practice ceremonies, camp or teach, but it falls short of providing First Nations peoples with the same rights as one might possess when they purchase freehold title (the most complete form of land ownership).





## Case Study

*Recognition of native title gives our Kunja People the right to negotiate on our Country – it is about working together with graziers and others, and to build up those relationships.*

Traditional Owner, Maureen McKellar, 2022

*McKellar on behalf of the Kunja People v State of Queensland [2022] FCA 245*

**Facts:** Ms Maureen McKellar, and others on behalf of the Kunja People made a native title claim over land located in the South West Queensland region near Cunnamulla.

After connection material was provided and assessed (which forms part of the native title recognition process) the State of Queensland did not oppose the application. Both parties had formed an agreement that the Kunja People had native title of the land. Both parties had also agreed to the nature and extent of the native title rights and interests the Kunja People held over the land. As an agreement was reached, the court was asked to recognise this agreement. This is called a ‘consent determination.’

**Legal Issue:** The Federal Court of Australia was asked to determine and legally recognise whether the Kunja People have native title in relation to the land and waters in the claim area and what rights and interests they possess over the area.

**Decision:** The Kunja People were granted native title. With respect to the nature and extent of the native title rights they were granted, the Court ordered that:

*6. Subject to orders 8, 9 and 10 below the nature and extent of the native title rights and interests in relation to the land and waters described in Part 1 of Schedule 4 are:*

*(a) other than in relation to Water, the right to possession, occupation, use and enjoyment of the area to the exclusion of all others; and*

*b) in relation to Water, the non-exclusive rights to:*

*i. hunt, fish and gather from the Water of the area;*

*ii. take the Natural Resources of the Water in the area; and*

*iii. take the Water of the area,*

*for personal, domestic and non-commercial communal purposes.*

*7. Subject to orders 8, 9 and 10 below the nature and extent of the native title rights and interests in relation to the land and waters described in Part 2 of Schedule 4 are the non-exclusive rights to:*

*(a) access, be present on, move about on and travel over the area;*

*(b) camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters on the area;*

*(c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;*

*(d) take Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;*



## Case Study ...

- (e) take the Water of the area for personal, domestic and non-commercial communal purposes;
- (f) conduct ceremonies on the area;
- (g) bury Native Title Holders within the area;
- (h) maintain places of importance and areas of significance to the Native Title Holders under their traditional laws and customs and protect those places and areas from physical harm;
- (i) teach on the area the physical, cultural and spiritual attributes of the area;
- (j) hold meetings on the area; and
- (k) light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.
8. The native title rights and interests are subject to and exercisable in accordance with:
- (a) the Laws of the State and the Commonwealth; and
- (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.
9. The native title rights and interests referred to in orders 6(b) and 7 do not confer possession, occupation, use or enjoyment to the exclusion of all others.
10. There are no native title rights in or in relation to minerals as defined by the Mineral Resources Act 1989 (Qld) and petroleum as defined by the Petroleum Act 1923 (Qld) and the Petroleum and Gas (Production and Safety) Act 2004 (Qld).

1. Where is the land central to the Kunju Peoples native title claim located? [C]
2. Explain five non-exclusive rights the Kunju Peoples have according to Paragraph 7. [A]
3. Analyse the viewpoint and consequences traditional owner Maureen McKellar raises about the court's decision using the quote provided at the beginning of the case study. [A]
4. Examining the consequences of Paragraph 8 to 10, are the Kunju Peoples completely free to use the land however they wish, or are there constraints on its use? What does this demonstrate about native title. [A]

## Fishing and hunting rights

The *Native Title Act 1993* (Cth) s211 (as well as State legislation such as the *Fisheries Act 1994* (Qld) s14) also allows for First Nations peoples to be exempt from laws that restrict their ability to hunt or fish in accordance with the traditional law and customs of native title holders or Traditional Owners. How State and Commonwealth law interact with each other was clarified in the case of *Yanner v Eaton*, explained below.



## Case Study

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*Yanner v Eaton* sort of sits in that group of cases that really made a mark on the way that native title and native title rights would be interpreted and should be interpreted going forward.

Dr Heron Loban, 2019

*Yanner v Eaton* HCA 53; 201 (1999) 201 CLR 351

**Facts:** In 1994, Murrandoo Yanner, a member of the Gunnamulla clan of the Gangalidda tribe, killed two juvenile crocodiles with a traditional weapon. He and other members of his clan ate some of the crocodile meat and froze the remainder to consume later. When the frozen meat and skins were found at his home, he was charged under the *Fauna Conservation Act 1974* (Qld) on one count of taking the fauna contrary to the Act.

The magistrate dismissed the charge, finding that Yanner acted in accordance with the *Native Title Act 1993* (Cth). The Queensland Government appealed the decision in the Queensland Court of Appeal and was successful. Yanner was given leave to appeal his case to the High Court of Australia.

**Legal Issue:** Can native title co-exist with other legislation?

**Decision:** The High Court of Australia found that Yanner's right to hunt crocodiles in accordance with native title provided in the *Native Title Act 1993* (Cth) had not been extinguished by Queensland law.

1. Identify the different courts that heard this case. [C]
2. Identify which Act was superior—*Fauna Conservation Act 1974* (Qld) or *Native Title Act 1993* (Cth). [C]
3. In an interview with the ABC after the High Court's decision, then Queensland Opposition Leader, Rob Borbidge, stated the decision created two sets of laws in Australia:

*We could conceivably have a situation now where Aboriginal Queenslanders can undertake traditional hunting in traditional Toyotas using traditional rifles, hunting animals that are on the endangered list and not being required to abide by the same laws as other Queenslanders and other Australians.*

Do you agree or disagree with Borbidge's opinion? Provide reasons to support your point of view. [E]

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## Customary adoption

Customary law has also been integrated into other legal areas, including family law. In Torres Strait Islander culture, children can be permanently transferred to relatives or family friends. In Australian law, these adoptions aren't legally recognised unless a formal adoption order is made in a court. In July 2020, Cynthia Lui, the first Torres Strait Islander person elected to the Queensland Parliament, introduced a bill to legally recognise the Torres Strait Island practice of customary adoption. The *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld) received assent later that year.



## Practical Application

### TORRES STRAIT ISLANDER ADOPTION PRACTICES BILL INTRODUCED TO QUEENSLAND PARLIAMENT

History has been made in the Queensland Parliament with the government introducing a bill to legally recognise Torres Strait Islander adoption practices.

If passed, the legislation will allow a child to be adopted by a relative or community member — in a practice known as Omasker — and for that adoption to be legally recognised in the same way as Western adoptions.

Outside Parliament supporter Ivy Trevallion said the bill would end years of heartache for adopted children and their parents.

'Our children will get birth certificates, drivers licences, senior certificates and our children will be able to get registered in the sibling list, all as part of members of their family,' Ms Trevallion said.

Source: Mark Rigby, 'Torres Strait Islander adoption practices bill introduced to Queensland Parliament', *ABC News* (Online, 17 July 2020) <[abc.net.au/news/2020-07-16/torres-adoption-practices-legislation-introduced-parliament/12461488](http://abc.net.au/news/2020-07-16/torres-adoption-practices-legislation-introduced-parliament/12461488)>.

1. Describe the objective of this law. [C]
2. Analyse the role customary law has in this legal context. [A]
3. Examine the viewpoint of Ivy Trevallion, and the consequences of the introduction of this law. [A]
4. Justify, using legal criteria, whether you believe this law will lead to enhanced access to just outcomes for those impacted by the law. [E]

## 2.3 Separation of powers: the legislature, executive and judiciary

### Key Terms

**Concurrent power:** law making powers that are shared by the State and Commonwealth Parliaments. If an inconsistency was to arise between a State and Commonwealth law, the Commonwealth law prevails.

**Constitution:** a written document that sets out the rules, powers and duties of a country, state or other organisation (such as a sporting club).

**Exclusive power:** law making powers that can only be exercised by the Commonwealth of Australia. For example, the Commonwealth Parliament can only make law about immigration.

**Executive power:** the power provided to the executive to carry out and enforce the law.

**Judicial power:** the power provided to the judiciary to interpret and apply the law to individual cases.

**Legislative power:** the power provided to parliament to allow them to make law.

## Key Terms ...

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**Separation of powers doctrine:** a principle that divides the power of the institutions of government into three separate branches, the legislative, executive and judiciary. Each branch has its own role and responsibilities.

**Residual power:** law making powers that are held by State Parliaments.

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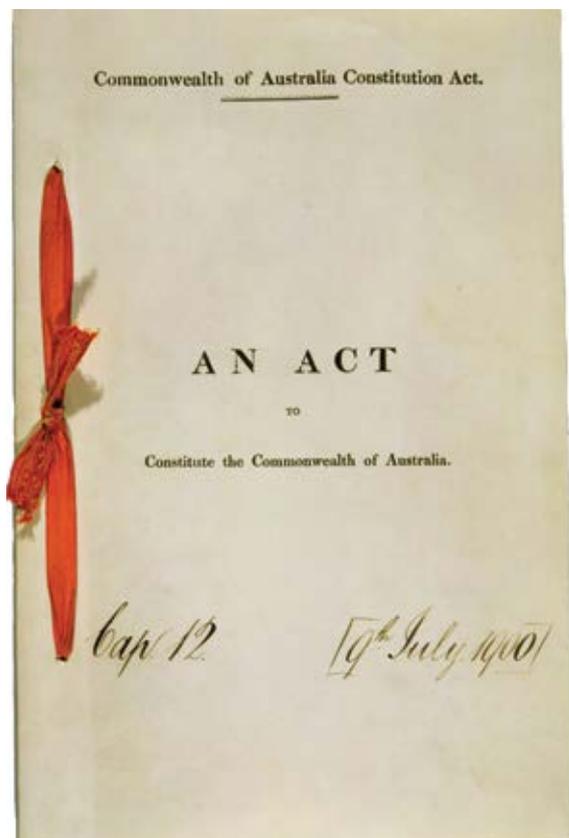
## The Constitution

Before we examine the **separation of powers** doctrine, it is important to identify the legislative basis that gives the different arms of government (which you will learn about in a moment) the power and authority to carry out their role in Australia. This important piece of legislation is the **constitution**.

**A constitution is the set of rules that specify the powers, responsibilities and roles of a governing body.** Australia has a constitution, the *Commonwealth of Australia Constitution Act 1901* (Cth).

Although England does not have a constitution, many of the features within Australia's founding document reflect the British Westminster system, on which Australia's system of government is based. The key elements of the Westminster system that you will see when examining our Constitution are the presence of:

- elected representatives (who represent the people)
- two houses of parliament
- an unelected head of state, known as a constitutional monarch (who today has a mostly ceremonial role)
- an executive government, headed by a Prime Minister
- an opposition.



You will now complete a task that provides you with the opportunity to discover the main features of the *Commonwealth of Australia Constitution Act 1901* (Cth).



## Tip

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Many of the concepts shared in the *Commonwealth of Australia Constitution Act 1901* (Cth) Chapters 1 and 2 have future application. For instance, the Australian Constitution is an important piece of legislation that you will analyse in more detail in Unit 3. Remembering the information shared here will lay a strong foundation for more complex information covered later.

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## Research Task

This research task involves locating, reading and answering questions about *Commonwealth of Australia Constitution Act 1901* (Cth).

To locate Commonwealth legislation, the best websites to visit are:

- Federal Register of Legislation—[legislation.gov.au](http://legislation.gov.au) (*The Constitution* is on the left-hand menu)
- Australasian Legal Information Institute (AustLii)—[austlii.edu.au](http://austlii.edu.au) (Select Commonwealth > Commonwealth Consolidated Acts > C)

In your class form three groups. Each group will research and produce a poster that answers one of the tasks below. Alternatively, you can select one of the research topics below to complete individually.

### Task 1: Parliament

- Identify which bodies make up the Commonwealth Parliament. [C] [S]
- From the *Commonwealth of Australia Constitution Act 1901* (Cth) s51, select six areas where the Commonwealth Parliament has the **exclusive power** to make law. [C] [S]
- Justify why these areas were chosen by the drafters of the *Constitution* as areas best served by a Commonwealth Parliament. Would you recommend any additions to s51? Why? [E]

### Task 2: Executive

- Identify who holds executive power, referencing the section of the *Commonwealth of Australia Constitution Act 1901* (Cth) that confers this power. [C] [S]
- Explain the role and responsibilities of the Governor-General. You are encouraged to conduct further research into the roles and responsibilities of the Governor-General to gain a complete picture of what they do. [C] [S]
- Currently the Governor-General is appointed by the King (or his successors) based on a recommendation made by Cabinet. Do you feel the Governor-General should be selected another way—if so, recommend an alternative approach and if not, why? [E]

### Task 3: Judiciary

- Identify which body is vested with **judicial power** in Australia. Describe the original jurisdiction of this court. [C] [S]
- Explain who appoints judges and how long they can remain in office. Analyse why it may be important that a judge's term in office is decided by age and not according to a government's will. [C] [A]



## Case Study

The process which led to the forming of the Commonwealth of Australia (called federation) was not easy. One issue that required a great deal of negotiation and compromise surrounded the concept of ‘power’—as forming a Commonwealth Parliament would require the States to give up most of their power (something they were not too keen on). One important implication of federation was that all citizens (no matter what State or Territory they lived in) would not be discriminated against on the basis of where they lived, an issue at the centre of the case below.

*Palmer v Western Australia* [2021] HCA 5; (2021) 246 CLR 182

**Facts:** In March 2020 the Minister for Emergency Services for Western Australia (the Minister) declared a state of emergency in Western Australia (WA) caused by the COVID-19 pandemic. This allowed the Minister to direct or prohibit the movement of persons into an emergency area, WA, unless they were exempt.

Clive Palmer bought an action against the WA Government. As a businessman, he travelled regularly between Queensland (where he lived) and WA for business reasons. The border closure meant that he was unable to freely travel between Queensland and WA to conduct his business. Palmer argued that the border closure breached the Commonwealth of *Australia Constitution Act 1901* (Cth) s92:

*On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.*

In response, the WA Government argued that the border closure was justified and reasonable, given the health implications of COVID-19.

**Legal Issue:** Did the *Emergency Management Act 2005* (WA) and/or its Quarantine (Closing the Border) Directions (WA) infringe the *Constitution* s92?

**Decision:** The High Court of Australia held that WA’s emergency management law complied with the *Constitution*. Although WA’s actions did limit freedom of movement, this limitation was justifiable and proportionate. The court found the ‘burden’ placed on interstate movement was suitable—i.e. the border closure was necessary to achieve the purpose of preventing COVID-19 from entering WA. The court also concluded that the state’s quarantine directions didn’t fall within the scope of constitutional law.

1. Identify the plaintiff (the person who took legal action) and the defendant in this case. [C]
2. Identify the relevant section of the *Constitution* that was being examined in this case. [C]
3. During the COVID-19 pandemic our rights and freedoms as individuals were sometimes limited for the good of the whole community. Analyse the perspective of Clive Palmer (representing the individual) and the WA Government (representing the community as a whole). Do you agree or disagree that the actions taken by the WA Government were proportionate? If you were the Minister would you have made a similar decision? Justify your position. [A] [E]

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## The separation of powers doctrine

**An important feature of Australia’s democratic system of government is the separation of powers doctrine.** This doctrine forms the foundation of our legal system. It aims to keep the making, implementation and interpretation of law separate as illustrated below in the context of a specific criminal offence.

**Separation of powers doctrine in action**

Power	Arm of government	Role	Example
 <p>Legislative power</p>	<p>Parliament (also referred to as the Legislature):</p>  <ul style="list-style-type: none"> <li>- Queen (represented by the Governor-General)</li> <li>- Senate</li> <li>- House of Representatives</li> </ul>  <ul style="list-style-type: none"> <li>- Queen (represented by the Governor)</li> <li>- Legislative Assembly</li> </ul>	<p>The Parliament makes, amends and repeals statute law.</p> <p>Since 1901 the Commonwealth Parliament was granted exclusive power to make laws in certain areas (such as immigration); the States retained residual power in some areas (such as education) and some responsibilities are shared (such as the environment).</p>	<p>In 2016 the Queensland Legislative Assembly passed the <i>Criminal Law (Domestic Violence) Amendment Act 2016</i> (Qld). This Act inserted a new criminal offence: Choking, suffocation or strangulation in a domestic setting (s315A) in the <i>Criminal Code 1899</i> (Qld).</p>
 <p>Executive power</p>	 <ul style="list-style-type: none"> <li>- Queen (represented by the Governor-General)</li> <li>- Ministers headed by the Prime Minister</li> </ul>  <ul style="list-style-type: none"> <li>- Queen (represented by the Governor)</li> <li>- Ministers headed by the Premier</li> </ul>	<p>The Executive puts the law into action through government agencies.</p>	<p>The Minister for Police and Corrective Services and Police Services is ultimately responsible for the actions of the police service.</p> <p>Police officers are tasked with investigating and charging defendants with the criminal offence of choking, suffocation or strangulation in a domestic setting (s315A).</p>
 <p>Judicial power</p>	 <ul style="list-style-type: none"> <li>- High Court of Australia</li> <li>-Federal Court of Australia</li> <li>-Federal Circuit and Family Court of Australia</li> <li>-Tribunals</li> </ul>  <ul style="list-style-type: none"> <li>- Queensland Court of Appeal</li> <li>- Supreme Court of Queensland (Trial Division)</li> <li>- District Court of Queensland</li> <li>- Magistrates Court of Queensland</li> <li>- Tribunals</li> </ul>	<p>The Judiciary applies and interprets the law when making a decision in the court system.</p>	<p>Defendants charged with choking, suffocation or strangulation in a domestic setting (s315A) would have their matter heard before the District Court of Queensland.</p> <p>Throughout a trial a judge would make legal decisions and, if a defendant is found guilty, apply and interpret the law to decide an appropriate sentence.</p>



## The benefits of the separation of powers doctrine

The objective of keeping these powers separate is to limit (or avoid) injustice and power imbalances, which could arise if too much authority is held by one arm of government. This assists in protecting an individual's rights and freedoms and ensures the rule of law operates effectively. In the two activities below, you will see this in action.

### Practical Application

#### FEDERAL COURT RULES IN FAVOUR OF LIVE EXPORTERS IN LANDMARK CLASS ACTION AGAINST COMMONWEALTH GOVERNMENT

Northern Australian cattle producers are celebrating after the Federal Court on Tuesday ruled a 2011 live export ban imposed by the Commonwealth was unlawful.

After 18 months of deliberation, Justice Steven Rares ruled former agriculture minister Joe Ludwig acted with misfeasance when the then Gillard government introduced the ban.

Justice Rares found that the then-Senator Ludwig ordered the ban despite knowing that industry representatives had assured him exports could be conducted in a tightly-controlled manner. "He made the Ban Order shutting his eyes to the risk that it might be invalid and to the damage that it was calculated to cause persons in the position of Brett Cattle."

Source: ABC Rural, 'Federal Court rule in favour of live exporters in landmark class action against Commonwealth Government', *ABC News*, (Online, 2 June 2020) <[abc.net.au/news/2020-06-02/federal-court-live-export-class-action-ruling/12308388](http://abc.net.au/news/2020-06-02/federal-court-live-export-class-action-ruling/12308388)>.



1. Identify the group that took action against the Commonwealth Government. [C]
2. Identify and explain the role of each arm of government in this case. [C] [A]
3. Identify which court heard the class action. [C]
4. Explain the decision of the court. In particular, what do you think 'misfeasance' is? How was it demonstrated by Senator Ludwig during his decision making. [C] [A]
5. Analyse the benefits and implications of allowing ordinary Australians the ability to legally question a decision made by the government. Explain how this demonstrates the important role courts play in the application of the separation of powers doctrine today. [A]



## Case Study

*Alexander v Minister for Home Affairs* [2022] HCA 19; 96 ALJR 560; 401 ALR 438; 178 ALD 423

**Facts:** Delil Alexander is a dual citizen of both Australia (the country of his birth) and Turkey (the country of his parents). He departed Australia for Turkey and, at some point, travelled to Syria. The Australian Security Intelligence Organisation (ASIO) conducted a Qualified Security Assessment (QSA) of Alexander which reported that he had joined Islamic State and the Levant, a terrorist organisation. Based on this information the Minister for Home Affairs (the Minister) cancelled Alexander's Australian citizenship in July 2021.

It is also important to state that in 2017 Alexander was arrested by Kurdish militia and later jailed for 15 years by a Syrian court. He was later pardoned by the Syrian government.

**Legal Issue:** The *Australian Citizenship Act 2007* (Cth) s36B empowers the Minister to cancel a person's citizenship if they are satisfied that the person is engaged in certain proscribed conduct, including engaging in foreign incursions and recruitment.

Is s36B of the *Australian Citizenship Act 2007* (Cth) constitutionally valid in terms of:

- Does the Parliament have the power to make laws with respect to 'naturalization and aliens'?
- Is the Minister exercising a judicial function?

**Decision:** The majority of the High Court of Australia held that the *Australian Citizenship Act 2007* (Cth) s36B was supported by the *Constitution*, as s51(xix) gives Parliament the legislative power to make laws to regulate aliens (those who aren't citizens).

In response to the second issue, the Court reasoned that the deprivation of citizenship (and its associated rights, privileges, immunities and duties) was punitive in character. The power to punish or effect retribution after the determination of a person's guilt is a power which is exclusively exercised by a court, not a member of the executive. In the lead judgment The Hon Chief Justice Kiefel, Justice Keane and Justice Gleeson wrote:

*[96] In summary in relation to the Ch III issue, the effect of the Minister's determination under s 36B(1) is to deprive Mr Alexander of his entitlement to enter and live at liberty in Australia. That sanction by the Parliament may be imposed only upon satisfaction of the Minister that Mr Alexander engaged in conduct that is so reprehensible as to be deserving of the dire consequence of deprivation of citizenship and the rights, privileges, immunities and duties associated with it. The power to determine the facts which enliven the power to impose such a punishment is one which, in accordance with Ch III of the Constitution, is exercisable exclusively by a court that is a part of the federal judicature.*

As the law, in effect, gave the Minister both executive and judicial power, it was invalid.

1. Explain what caused the Minister for Home Affairs to cancel Delil Alexander's Australian citizenship? [C]
2. Identify what part of the *Constitution* gives the Parliament the exclusive legislative power to make laws that regulate citizenship. [C]
3. Analyse the implications of this decision on the defendant, the community and the Parliament. [A]



### Case Study ...

4. What does this case demonstrate about the separation of powers doctrine in action? [A]
5. There are some members of the community who would agree with the Minister for Home Affairs' decision to cancel Alexander's citizenship and believe this power keeps Australians safe. Do you share this viewpoint? Why or why not? Why is it important that the Courts (and not the Executive) retain the power to decide a person's guilt and the appropriate penalty? [A] [E]

### Exceptions to the doctrine

**There is overlap between these powers, particularly between the Executive and Legislature.** The Executive is made up of ministers elected from the ranks of the political party that gains the greatest number of seats in parliament (the Legislature) after an election. This means a relatively small group of people propose and pass law, as well as being tasked with overseeing the public servants and agencies that administer and execute the law. A second exception also arises from the situation whereby the Executive appoints members of the judiciary.

## 2.4 Statute law

In Australia there are three levels of government that make law, these being:

### Three levels of government in Australia



Commonwealth Parliament



State and Territory Parliaments, including Queensland



Local Government Areas (also known as councils).



### Tip

Legal change is happening all the time. Therefore, it may be helpful to watch, listen or read news articles on law, politics and the courts to ensure you stay up-to-date and can contribute to classroom discussion.



### Research Task

Form a group of three people. Using print or online news articles locate an example of a new law or by-law passed by:

- the Commonwealth Parliament
- the Queensland Parliament
- your local council. [C] [S]

## The process of statutory law making

**The most important source of law in Australia is statute law, as over time it has become the main source of new law we follow.** A Parliament can:

- make new law—for example in 2019 the Queensland Parliament enacted the *Human Rights Act 2019* (Qld) to respect, protect and promote human rights in Queensland.
- amend (change) existing law—for example, in 2021 the Queensland Parliament amended the meaning of consent in the *Criminal Code 1899* (Qld) s348.
- repeal (remove or cancel) law—for example, in 1922, the death penalty was removed from the *Criminal Code 1899* (Qld), making Queensland the first to abolish this punishment in the entire Commonwealth.

Statute law has become more significant than common law because it:

- is the most common way new law is created,
- overrides common law if there is an inconsistency, and
- does not have some of the same limitations as common law, as parliament can make a law at any time, whereas a court has to wait for a case to come before it.

Before we explore the process of making statute law in both the Queensland and Australian Parliaments, it is important to note that not all laws need to follow this process.

**Subordinate legislation (also known as regulations or delegated legislation) is law not made directly by Parliament. But, not anyone can make subordinate legislation.**

The power to make this type of law is given by Parliament to others. It includes regulations made by the Governor in Council, proclamations that commence provisions of an Act, rules (such as court rules), notices and by-laws. For example, the *Animal Management (Cats and Dogs) Regulation 2019* (Qld) sets out the law regarding the registration of dog breeders and dogs. This subordinate legislation was made by the Governor in Council and administered by the Department of Fisheries and Agriculture.

We will now take you through the steps a parliament is required to follow to make law in Queensland and Australia.



## The legislative process in Queensland

Queensland has a unicameral parliament (one chamber), which makes the process a little different to the Australian Parliament.

The usual path of a bill in Queensland

1		<p>The need for a new law is identified.</p>	<p>Ideas for law come from many places including:</p> <ul style="list-style-type: none"> <li>- public opinion or pressure</li> <li>- changes experienced in society or the economy</li> <li>- innovation or technological change</li> <li>- a recommendation from an inquiry or Law Reform Commission</li> <li>- a pressure or lobby group</li> <li>- a government policy</li> <li>- in response to a significant event.</li> </ul> <p>A proposed law is known as a bill.</p>
2		<p>Presentation and First Reading</p>	<p>The minister presents the bill to the Legislative Assembly explaining the principles and policies underpinning the bill. A copy of the bill, Explanatory Notes and a Statement of Compatibility with Human Rights are tabled.</p>
3		<p>Committee Consideration and Report</p>	<p>A committee considers the bill and tables a report. It is here the community can make a submission about the proposed law.</p>
4		<p>Second Reading</p>	<p>A more detailed discussion of the bill begins. Usually, the minister speaks about the bill first, before the Shadow Minister responds. Other members put forward their views on the bill.</p>
5		<p>Consideration-In-Detail</p>	<p>The Legislative Assembly debates the clauses of the bill. Amendments may be moved at this time.</p>
6		<p>Third Reading</p>	<p>The Clerk reads the bill for the third and final time. If a majority of members present in the house vote in favour of the bill, it is considered passed.</p>
7		<p>Royal Assent</p>	<p>Two copies of the bill are presented to the Governor for signing.</p> <p>A section of the Act will usually state when it will commence or come into force (take effect as law).</p>



## Research Task

The Record of Proceedings (called a Hansard) is where everything that is said on the floor of the Legislative Assembly is recorded and published for anyone to read.

In preparation for one of the first chapters on the criminal trial process, we are going to explore aspects of the law-making process in Queensland. This research task will focus on recent amendments made to the *Bail Act 1980* (Qld).

1. Open the Hansard ([parliament.qld.gov.au/Global/Search](http://parliament.qld.gov.au/Global/Search)) and complete the following tasks.
2. In the 'Required fields':
  - a. Select 'Search Hansard'.
  - b. Select '2021'.
3. In the 'Optional fields':
  - a. Search the exact phrase 'Youth Justice and Other Legislation Amendment Bill 2021'.
4. Within your results:
  - a. Identify the date the bill was introduced, and which minister introduced the bill. [C] [S]
  - b. Reading the minister's introductory speech, identify a key reason why this bill was drafted. [C] [S].
  - c. Identify which committee the bill was referred to. [S] [C]
  - d. Analyse the viewpoint of one Member of Parliament who spoke during the Second Reading of the bill. Why do they hold this viewpoint and what may be the implications of their position on juvenile defendants. [S] [A]

## Tip

Committee inquiries and reports can be good sources of information (particularly for viewpoints). To view current inquiries and publications visit [parliament.qld.gov.au/Work-of-Committees](http://parliament.qld.gov.au/Work-of-Committees).



## The legislative process in Australia

Australia has a bicameral parliament (two chambers), which means a bill must pass through both houses to become law. Contentious bills can move between both houses several times before it becomes law.



The usual path of a bill in Australia

	The need for a new law is identified.
	Presentation and First Reading
	Second Reading
	Committee Consideration*
	Consideration-In-Detail*
	Third Reading
<i>Bill is passed by the House of Representatives and sent to the Senate.</i>	
	Presentation and First Reading
	Second Reading
	Committee Consideration*
	Consideration-In-Detail
	Third Reading
<i>Bill is passed by the Senate.</i>	
	Royal Assent

● House of Representatives

● Senate

\*Optional stage

## 2.5 Common law

### Key Terms

**Appellate jurisdiction:** the power given to a court to hear cases on appeal from a lower court in the hierarchy. For example, the District Court of Queensland hears appeals from the Magistrates Court of Queensland.

**Binding precedent:** a precedent is 'binding' when it is made by a superior court located higher in the court hierarchy. For example, a decision handed down by the Queensland Court of Appeal is binding on the District Court of Queensland in circumstances where the facts are substantially the same.

**Doctrine of precedent:** a process whereby judges follow decisions made by a superior court (a court located higher in the court hierarchy) in circumstances where the facts are substantially the same.

**Original jurisdiction:** a court's power to hear a case in the first instance. For example, the Magistrates Court of Queensland hears cases involving driving under the influence.

**Precedent:** a principle or rule established in a previous decision made by a court.

**Persuasive precedent:** precedent that a court may, but is not required to, rely on in deciding a case.

**Ratio decidendi:** a Latin phrase meaning 'the reason for deciding'.

### A brief history of common law

**Common law is made by the courts.** It is also called judge-made law, case law or precedent. This source of law derives its name from its historical origins. Following the Norman Conquest of England in 1066 a centralised system of courts was introduced. This saw judges travel from community to community to settle disputes. To ensure their decisions were fair and consistent, these judges applied the same law and followed the same process everywhere they went, thus, becoming 'common' across England.

#### Other definitions of 'common law'

When you conduct legal research in response to an inquiry task or activity, you may come across the phrase 'common law countries'. A **'common law country' has its foundations in the English legal system** (such as Australia, New Zealand, the United States of America, Canada and India). **It means that their legal system depends on common law** (as well as statute law) when reaching a decision. Some other countries operate on a 'civil law system', which uses Codes (a collection of laws or statutes) to settle disputes. This system is found in places such as France, Germany and Japan.

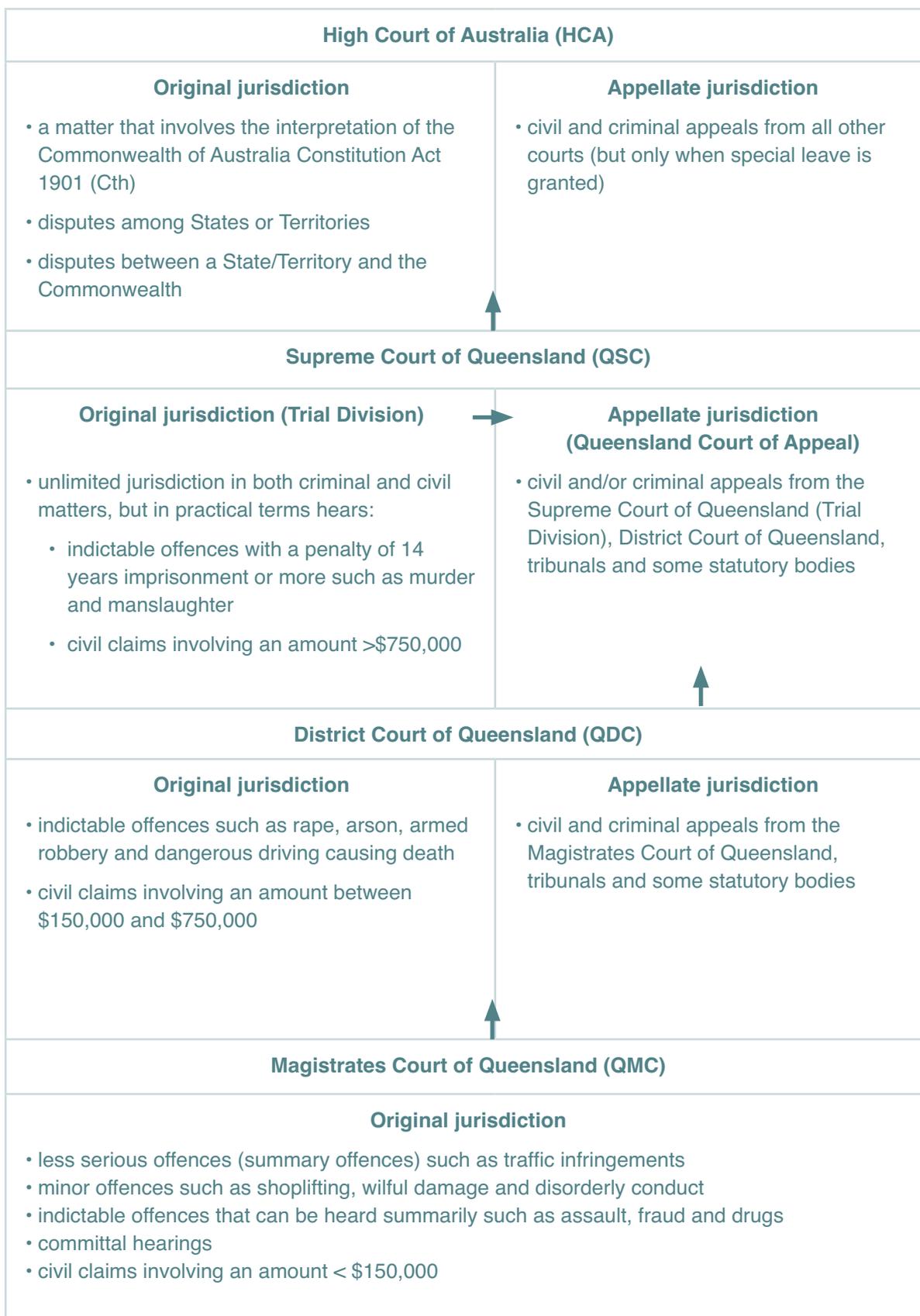
### The Queensland and Australian court hierarchy

**Courts are organised into a hierarchy that gives each court the power to hear and decide different types of cases, called a jurisdiction.** There are two types of jurisdictions, an:

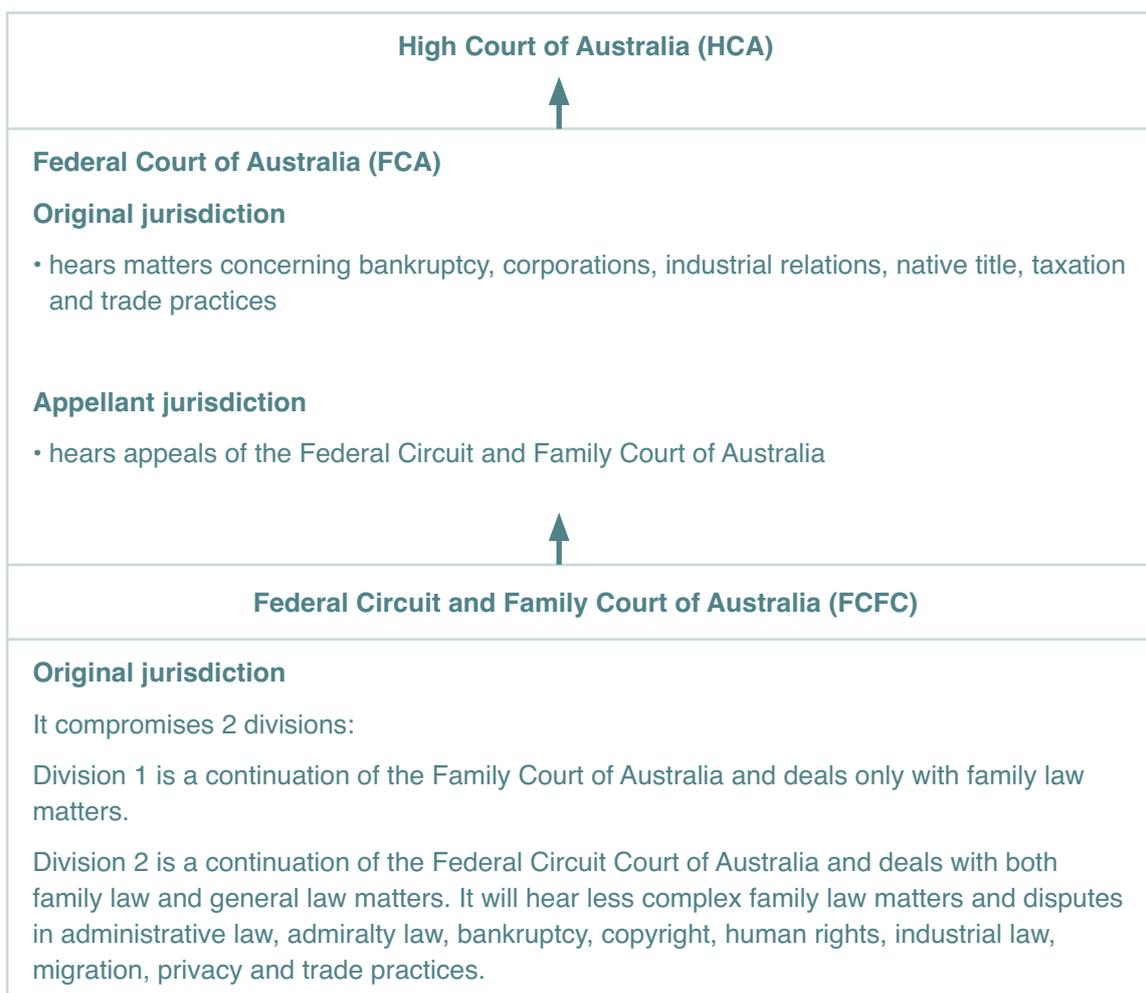
1. **original jurisdiction** (the power to hear a case in the first instance)
2. **appellant jurisdiction** (the power to hear cases on appeal from a lower court in the hierarchy).

The High Court of Australia sits at the top of both the Queensland and Australian court hierarchy.

The Queensland court hierarchy



## The Australian court hierarchy



## Judicial precedent

The way judges made decisions in the 11th century continued to develop into a formalised system **whereby judges are obliged to follow the decisions of earlier cases in higher courts when the factual circumstances or legal issues are essentially the same—a term called ‘judicial precedent’.**

Deciding whether an earlier decision must be followed can be complicated, very nuanced and can consider many rules, legal principles and considerations. For you as Legal Studies students, a simplistic way to determine whether a judge is legally bound to follow an earlier decision is to ask:

1. Is the earlier decision made in a court of an equal or a higher rank in the same court hierarchy as the case being decided now?
2. Are the facts or legal issues substantially (or materially) the same?

If both these questions are answered with a YES, the *ratio decidendi* (reason for deciding) is **binding**. This means that the judge must apply the precedent. For example, a judge in the District Court of Queensland will follow a decision made by the Queensland Court of Appeal (a higher court) if the factual circumstances or legal issues of a case are essentially the same. If a judge does not follow a clearly binding decision, the judge will not be acting according to the common law and it is likely the decision would be overruled or reversed on appeal.

## Hypothetical?

Imagine if members of the judiciary were not bound to follow earlier decisions from higher courts in cases that are similar. What would be the implications of this approach? Would it be a system of decision making you would support? Why or why not? [A] [E]

However, if the facts or legal issues are substantially different, a different decision may be made (called distinguishing). A judge also isn't obligated to follow decisions made in another State, Territory, country or a court located below them, but they can if they wish to.

The whole purpose of precedent is to enable judges to decide cases with similar factors in a like manner. **This helps to ensure decisions are consistent and fair.**



### Tip

Decisions can be reported (an important decision contained within an official system of court reports) or unreported. When referring to a precedent in court, lawyers provide the reported version to the judge, only providing an unreported judgment if the former does not exist.

Each case has a citation (for example *R v Kaporonovski* [1972] Qd R 465) that helps you locate the decision. A citation is what you will reference and refer to in an inquiry task.

The elements of a reported version are:

<b><i>Kaporonovski v The Queen</i></b>	<b>(1973)</b>	<b>(133)</b>	<b>CLR</b>	<b>209</b>
The names of the parties of a case.	The year the decision was handed down.	The volume of the report.	An abbreviation of the name of the law report (CLR = Commonwealth Law Reports)	The page number the case starts on.

The elements of an unreported version are:

<b><i>Kaporonovski v The Queen</i></b>	<b>[1973]</b>	<b>HCA</b>	<b>23</b>
The names of the parties of a case.	The year the decision was handed down.	An abbreviation of the court name (HCA = High Court of Australia).	The judgment number.



## Case Study

Please note: At the time this case was heard, the law on accident as a criminal defence was uncertain. This case laid down a legal principle that is still followed today.

*R v Kaporonovski* [1972] Qd R 465

*Kaporonovski v The Queen* [1973] HCA 23; (1973) 133 CLR 209

**Facts:** The complainant (Bajric) insulted Kaporonovski. Kaporonovski grabbed hold of Bajric's hand (which was holding a beer) and pushed it towards his face. The glass broke, causing profuse bleeding and a severe injury to Bajric's eye. Kaporonovski was charged with grievous bodily harm (*Criminal Code 1899* (Qld) s320).

At his trial in the District Court of Queensland, Kaporonovski argued (among other things) that the injury was an accident. The *Criminal Code 1899* (Qld) s23 states:

*'...a person is not criminally responsible for an act which occurs independently of the exercise of his will, or for an event which occurs by accident'*

**Legal Issue:** What was considered to be the 'act': the breaking of the glass, the insult, the glass injuring Bajric's eye (or some or all of these facts considered together)? What was considered to be the 'event': the breaking of the glass, the pushing of the glass or the injury itself?

**Decision:** Kaporonovski was found guilty by a jury in the District Court of Queensland. The Queensland Court of Appeal supported his conviction, agreeing that the defence of 'accident' could not excuse his actions. The High Court of Australia also affirmed the decision:

*It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.*

*Kaporonovski v The Queen* (1973) 133 CLR 209 [at 231].

The High Court of Australia created a principle (*ratio decidendi*) that still applies today. The 'act' is the physical action over which a person has control (i.e. the act was forcibly pushing the glass into another's face). An 'event' is the consequence of the act (i.e. the grievous bodily harm suffered by the victim).

For an event to be an accident, the grievous bodily harm would need to be a consequence which was not intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person. On these facts, an ordinary person would have reasonably foreseen serious injury (the event) occurring as a result of a broken glass being smashed into his face (the act).

1. Identify the criminal offence and the defence this case involved. [C]
2. Create a flow chart of the different courts that heard this case. Identify which court had original jurisdiction and which court(s) had appellate jurisdiction. [C]
3. Describe and explain the *ratio decidendi* made about the defence of accident. [C]
4. Identify which Queensland courts are bound by this decision. Analyse the benefits and implications of the future application of the *ratio decidendi* established in this case or on other cases that share similar facts. [C] [A]
5. Explain how it would be possible to change the *ratio decidendi*. [C] [A]

## Statutory interpretation and the role of the courts

The separation of powers doctrine gives judges the power to apply the law to a case before the court. It also gives them **the power to interpret the meaning of statute law when required**, as sometimes the impact a particular word and phrase can have on a legal issue can be unclear.

**Generally, when asked to interpret a statute, the judge will try and determine what parliament intended at the time the law was passed.** A judge will examine the Act as a whole, specific sections that set out the definitions and any other primary materials such as Explanatory Notes that set out the objective(s) and purpose of the Act and any other relevant materials or laws that might help.



### Case Study

**Please note:** At the time this case was heard, the definition of 'grievous bodily harm' was different. It has since been changed.

*R v Tranby* [1992] 1 Qd R 432; (1991) 52 A Crim R 228

**Facts:** The accused, Tranby, bit off half the earlobe of the victim. In a trial heard in the District Court of Queensland he was found guilty of the criminal offence of 'grievous bodily harm'. At the time of the offence, the *Criminal Code 1899* (Qld) s1 defined grievous bodily harm as:

*...any bodily injury of such a nature as to...cause or be likely to cause permanent injury to health.*

Tranby appealed his conviction. He argued that the injury inflicted did not amount to a permanent injury to the health of the complainant, it was more cosmetic in nature.

**Legal Issue:** Is a permanent cosmetic disfigurement capable of amounting to an 'injury to health' within the meaning of 'grievous bodily harm' in s1 of the *Criminal Code 1899* (Qld)?

**Decision:** In a two to one majority the Queensland Court of Criminal Appeal acquitted Tranby of the criminal offence of grievous bodily harm because the victim had not received a permanent injury to their health. The court held that the loss of part of the complainant's earlobe, although disfiguring, did not amount to a permanent injury to health. The Hon Justice Derrington wrote:

*In ordinary usage, it is very doubtful that the removal of a part of the body that performs no useful function would be described as an injury to health. For example, it would be quite consistent with ordinary language in the present case if it had been said that the victim lost a part of her ear but her health was not affected.*

The Hon Chief Justice Macrossan dissented, stating:

*I think the better conclusion is that any injury which, if not life endangering or likely so to be, is nevertheless one which either permanently impairs the efficient functioning of the body or permanently impairs its prior condition of physical soundness falls within the definition of 'grievous bodily harm.'*

Since this case was decided, the definition has been changed. Grievous bodily harm is now defined as:



## Case Study ...

(a) *the loss of a distinct part or an organ of the body; or*

(b) *serious disfigurement; or*

(c) *any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;*

*whether or not treatment is or could have been available.*

1. What injury did Tranby cause his victim? [C]
2. What argument did Tranby make to the Queensland Court of Criminal Appeal to have his conviction overturned? [C]
3. In this case one judge dissented. What do you think this means? [C]
4. What conclusion did the court reach regarding whether the injury to the victim amounted to grievous bodily harm? [C]
5. Do you agree or disagree with the decision reached by the majority? Give reasons for your point of view. How would you define 'health' in the context of the circumstances of this case? [E]
6. Applying the current definition of 'grievous bodily harm' would Tranby be able to appeal his conviction on the same grounds? Why or why not? [A]
7. In 2014 the Queensland Court of Appeal was referred a legal question about the meaning of grievous bodily harm. Create a case note for *R v Lovell; Ex parte Attorney-General (Qld)* [2015] QCA 136 describing the conclusion the court reached regarding whether the injury caused amounted to grievous bodily harm. [C] [S]

## You be the judge

You be the judge in the following hypothetical cases involving a hypothetical law.

### ***Litter Act 2023 (Qld)***

#### *Section 1*

*It is an offence to throw down or drop litter in any public place.*

#### *Section 2*

*Litter means any bottles, cans, packages, paper, glass, food or other rubbish.*

1. Alex, as he rushes to catch the bus, leaves his Legal Studies textbook and empty plastic lunchbox on the seat at the bus stop. Has Alex committed an offence under the *Litter Act 2023 (Qld)*? Explain. [A]
2. Chloe parks her car in the carpark at Coles. It leaks petrol and won't start when she returns. She decides to leave it there for a couple of days. Has Chloe committed an offence under the *Litter Act 2023 (Qld)*? Explain. [A]



## Parliament is the supreme lawmaking body

A few years after *R v Tranby* the Queensland Parliament amended the definition of grievous bodily harm, which nullified the decision the court made. As a representative of the people, parliament can pass legislation that confirms, clarifies or overrides a decision made by a judge. **This is because parliament is the supreme law-making body in our legal system.**



### Tip

When you are asked to evaluate a legal situation, you may be asked to propose a recommendation. Your recommendation could be to amend, repeal or create a new section in a current Act in response to a decision made by a court.

## Review

### Comprehend

1. **Define** and **describe** the three sources of law in the Australian legal system. [C]
2. **Describe** and **explain** the separation of powers doctrine in the Australian legal system, using a recent criminal case lately reported in the media to illustrate your understanding of the role each arm plays in criminal law. [C]
3. **List** and **explain** the process of statutory law-making in Queensland. [C]
4. **Create** a simple diagram that communicates the original jurisdiction of the Queensland court hierarchy within a criminal context. [C]
5. **Explain** why a court may be asked to interpret an aspect of statutory law. **Describe** the process a judge may use. [C]
6. **Distinguish** between:
  - a. Binding and persuasive precedent [C]
  - b. Original and appellant jurisdiction [C]

### Analyse and evaluate

#### Source 1

#### CUSTOMARY LAW AND 'WHITE-FELLA LAW' COMBINE AS POLICE AND COMMUNITY TACKLE JUVENILE CRIME UNDER A TREE

Police and residents of Western Australia's biggest Aboriginal community, Bidyadanga, have joined forces to tackle juvenile crime in a bold experiment that combines 'black fella and white fella law'.

Not everyone is sold on the idea.

But, police believe it has helped to reduce offending and keep wayward youth out of the justice system.

Under the collaboration, police divert some young offenders to what residents call the Tree of Knowledge where they face the community, instead of a magistrate.

In one recent case, seven young people were accused of being involved in the theft of \$24,000 cash and \$4,000 worth of cigarettes from the community's only store.

But Sergeant Fox said four co-accused were in the process of being dealt with under the tree instead. 'There was a huge response ... we had 70 to 100 people under the tree ... all expressing their outrage, so it had a big impact,' he said.

Source: Claire Moodie, 'Customary law and 'white-fella law' combine as police and community tackle juvenile crime under a tree', *ABC News* (Online, 28 May 2019) <[abc.net.au/news/2019-05-28/indigenous-law-tree-helps-to-tackle-juvenile-crime-in-bidyadanga/11133068](http://abc.net.au/news/2019-05-28/indigenous-law-tree-helps-to-tackle-juvenile-crime-in-bidyadanga/11133068)>.

- a. **Analyse** the role customary law has in this legal context. [A]
- b. **Justify**, using legal criteria, whether you believe this approach should be trialled in remote communities in Queensland. Remember, it is important to critically evaluate the benefits, limitations and implications of this approach. [E]

#### Source 2

##### 'TO HAVE A CHILD WHO HE WOULD NEVER KNOW' – CONSIDERATION OF THE POSTHUMOUS REMOVAL AND USE OF SPERM

In the recent decision of *Re Cresswell* [2018] QSC 142, her Honour Justice Brown delivered the first Queensland judgment to consider the court's jurisdiction to order a person's entitlement to possess and use spermatozoa (sperm) removed from a deceased person.

Her Honour ordered that the applicant was entitled to permanent possession and use of the deceased's sperm for the purpose of assisted reproductive treatment.

Although this judgment provides clarification of this complex area of law, it may be the case, as was suggested by her Honour, that comprehensive consideration by a body such as the Law Reform Commission is necessary to deal with the unresolved and continually developing legal, technological and ethical questions.

Source: Patrina Clohessy, 'To have a child he would never know'-consideration of the posthumous removal and use of sperm' *News* (Online, No date) <[crownlaw.qld.gov.au/about/news/to-have-a-child-who-he-would-never-know-consideration-of-the-posthumous-removal-and-use-of-sperm](http://crownlaw.qld.gov.au/about/news/to-have-a-child-who-he-would-never-know-consideration-of-the-posthumous-removal-and-use-of-sperm)>.

- a. **Analyse** the court's role as a law maker in this specific circumstance. [A]
- b. One of the reasons why the court was required to make a decision on whether Cresswell could possess and use her dead partner's sperm was because there was no statute law concerning this issue in Queensland. **Justify**, using legal criteria, whether you believe Queensland Parliament should introduce law concerning the collection and use of sperm removed from a deceased person, or whether this decision is sufficient. [E]

# Legal foundations

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## Chapter 3:

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# The adversarial system

### 3.1 Adversarial and inquisitorial systems of criminal justice

### 3.2 Overview of the criminal justice process

#### Learning objectives

At the conclusion of this chapter students will be able to:

- comprehend
  - the difference between adversarial and inquisitorial systems of criminal justice
  - the links between the legal foundations to the criminal justice system as a general overview, including the investigative process, the trial process, and punishment and sentencing.
- analyse a range of criminal legal issues.

## 3.1 The adversarial and inquisitorial systems of criminal justice

### Key Terms

**Adversarial system:** each party presents arguments, makes submissions and provides evidence to support their version of events. A judicial officer or jury decides which party has been able to prove their case to the required standard of proof (in criminal law this is 'beyond a reasonable doubt').

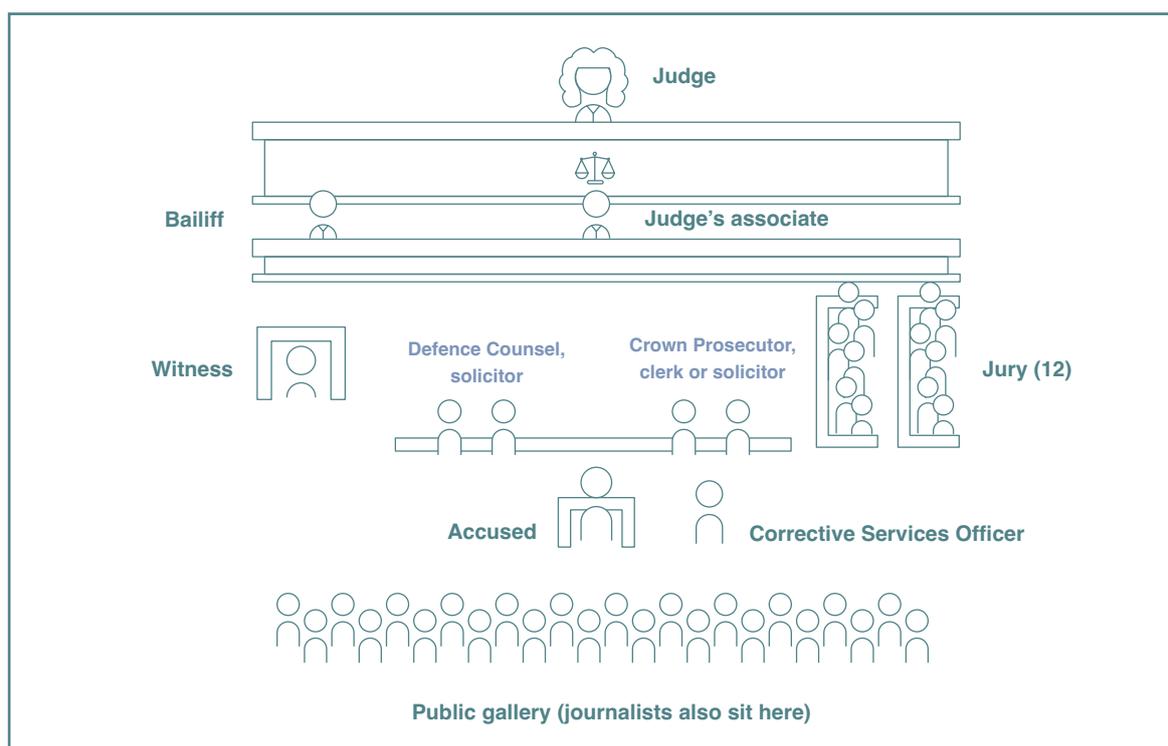
**Inquisitorial system:** the court, with the involvement of both parties, actively investigates the facts of the case.

### The adversarial system of criminal justice

If you were asked to describe the main features of the criminal justice process to another person, you would probably describe the **adversarial system** - which is what we follow in Australia and other common law countries like England, the United States of America, New Zealand and Canada.

The adversarial system provides each party in a criminal trial (the prosecution and defence) with the opportunity to present their arguments (supported by evidence or law) to the court. Each party decides which witnesses will be called and what evidence will be presented. Each witness is examined by the party who called them to the stand (called examination-in-chief) before they are cross-examined by the other side. It is important to note that both sides are required to follow the rules of evidence, as well as any other relevant procedural rules (they do not have the complete freedom to present their case however they like). It is then left to an independent and impartial judicial officer (a magistrate or judge) or a jury to make a decision about whether a defendant is 'guilty' or 'not guilty'.

### A typical courtroom layout in a superior court



## Key characteristics of the adversarial system in criminal law

<p style="text-align: center;"><b>Role of prosecution and defence</b></p> <div style="text-align: center;">  </div> <p style="text-align: center;">In the adversarial system the prosecution and defence control what evidence will be presented, what witnesses will be called and advocate their position to the decision maker.</p>	<p style="text-align: center;"><b>Role of decision maker</b></p> <div style="text-align: center;">  </div> <p style="text-align: center;">In the adversarial system the judicial officer or jury listens to both sides and renders a decision based on what is presented in court.</p>
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## Advantages of the adversarial system

The adversarial system has many advantages, including:

- that each party is in control of his or her own case
- there is an impartial decision maker (a judicial officer or jury) that decides the outcome
- there is an independent judge who ensures the trial is conducted in a fair and just manner
- there are evidentiary and procedural rules to protect both parties and ensure a fair hearing
- the high standard of proof provides confidence and certainty in the verdict.

## Disadvantages of the adversarial system of criminal justice

The adversarial system can be described as a little combative, as each side is working hard to win their case. Some believe it is slow and cumbersome, as evidentiary and procedural rules need to be applied to ensure a fair hearing and this can take some time. This system of criminal justice also relies on each party having access to legal representation, which can be expensive or, for regional and remote parties, located some distance away.

Although the adversarial system has many safeguards to ensure a trial is fair (such as the prosecution and defence are required to follow the rules of evidence and the trial is overseen by an impartial judge), miscarriages of justice or errors do occur. It is also important to raise that the adversarial system relies on those tasked with investigating the criminal offence(s) and gathering the evidence to follow the law, act ethically and consider all possible lines of inquiry. If this does not occur, the wrong person may be charged with a criminal offence(s) or the outcome of a trial may be unfair.





## Case Study

*R v Daley; ex parte A-G (Qld)* [2005] QCA 162

**Facts:** Timothy Daley was convicted on one count of unlawfully killing a goat. The goat was owned by his neighbours, Mr and Mrs Burgess (the complainants).

The complainants said they saw Daley point a shotgun towards their goats and fire a shot. When they discovered a dead goat on their property, they removed the shotgun pellets from its body and contacted the police. They then ate part of the goat and disposed of the carcass. When the police arrived four days later, they took a statement and were provided with a medicine bottle containing the shotgun pellets the complainants said they took out of the goat. Shotgun shells were located on Daley's property by the police, but a shotgun was not found. Daley said the shells were owned by another person who had visited the property previously. At trial Daley's legal counsel suggested the complainants were mistaken in their identification of Daley as the person who shot the goat.

Daley failed to have his conviction overturned by the Queensland Court of Appeal in 1999 and his application for special leave to the High Court of Australia was dismissed.

Since those hearings, statements (gathered by Daley) from six potential witnesses demonstrated that a high level of animosity existed between Daley and the complainants. The pellets provided by the complainants to the police, which were not tested prior to the first trial, were provided to the Forensic Services Branch and found not to have been discharged. The Victorian Institute of Animal Science said there was insufficient DNA present on the pellets.

**Legal Issue:** Considering the new evidence, did a miscarriage of justice occur?

**Decision:** Daley's conviction was set aside, and he was acquitted of the offence of unlawfully killing a goat. The Hon Justice Keane stated:

*It may be said that this new evidence might have been obtained with reasonable diligence prior to the trial...*

He further stated:

*The usual expectation would be that evidence of the kind now available from Sergeant Bruce would be led by the Crown. There can be little doubt that, if evidence of the kind which is now available from Sergeant Bruce had been available at trial, the Prosecutor would have led that evidence in the proper discharge of his or her duty. Mr Daley could reasonably have expected that this would have occurred. It did not occur for reasons which are not apparent. But it can be said that the failure to adduce this evidence was not due to a want of diligence on the part of Mr Daley or his lawyers, especially having regard to the evidence of Senior Constable*

*McDowall to which reference has been made.*

*Mr Daley is critical of the conduct of the trial by his counsel. It is apparent from the transcript of the trial of the proceedings before the Court of Appeal that the issue whether the goat was killed at all has never been seriously addressed. It may be that Mr Daley's counsel at trial felt that he could not properly challenge Mr and Mrs Burgess' evidence on that issue.*

*The new evidence, if believed, makes seriously arguable the case that Mr and Mrs Burgess set out to frame Mr Daley and that they achieved that end by perjured evidence and by misleading the police investigators.*



## Case Study ...

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1. Identify the defendant and what criminal offence he was alleged to have committed. [C]
  2. Identify the key evidence that was raised by the prosecution at trial to support a 'guilty' verdict. [C]
  3. Identify the evidence that the defendant gathered after his conviction that he felt demonstrated a miscarriage of justice had occurred. What does this demonstrate about the adequateness of the initial criminal investigation? Analyse the implications this evidence had on the court's original decision. [C] [A]
  4. One of the weaknesses often raised about the adversarial system is the competency and accessibility of legal representation. Is this weakness present in this case? What implications may this have had on the outcome? [A]
  5. Do you believe the adversarial system failed to get to the 'truth' in this case? Support your point of view. [E]
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## The inquisitorial system of criminal justice

Civil law countries, such as France, Germany and Italy, follow an **inquisitorial system**. It is important to note that there are differences between how the inquisitorial system works in practice between different countries—which can make it difficult to describe how the inquisitorial system operates in a universal way.

**But, perhaps the biggest difference between the two systems is the role of the judge and the lawyers.** In an inquisitorial system the judge:

- supervises or directs the police investigation
- determines which witnesses are called, the order in which they are to be heard and can question the parties directly
- plays a central role in deciding what issues are important and what evidence should be presented at trial
- makes all the legal and factual decisions, including the question of the guilt of the accused (there is no jury)
- does not rely on judicial precedent as much (leaving them free to decide each case independently).

In some countries, a judge may work with another judge (such as in France) or a panel of judges (used in Germany), who have different roles. The judge also works closely with the prosecutor and those investigating the crime. **This means the boundaries between the roles of law enforcement, the prosecution and the judiciary are more blurred and not as distinct as they are in Australia.**

The lawyers assist the judge to find the truth by raising questions and making statements for the judge to consider. In a paper that analysed the role of the criminal defence lawyer in France, Professor Jacqueline Hodgson describes the role of a defence lawyer as being, '*... not so much an autonomous party in the case, as an auxiliary to the juge d'instruction (judge of inquiry). This is her formal status and describes the way in which it is anticipated that she will contribute – that is, not in a conflictual or adversarial way. She acts as a counterbalance, cross-checking what the juge d'instruction does.*'

## Practical Application

### LEGAL SYSTEM OVERHAUL PROPOSAL PUSHES 'INQUISITORIAL' ROLE FOR JUDGES

Judges would play a greater role in gathering evidence and the questioning of witnesses in court proceedings under a proposal for an overhaul of Australia's legal system.

The ACT Legal Aid Commission has suggested that Australia's legal system adopt aspects of the European 'inquisitorial' court process and place less emphasis on the lawyer-driven 'adversarial' system.



Legal Aid said the court system was hard to navigate for people who were not represented by lawyers. 'The system, despite some safeguards, generally favours parties who are legally represented,' the submission said. 'Further, litigation is expensive, stressful, time consuming, and so the justice system by its very nature is often closed to those in our society whose legal rights and interests are most at risk.'

'Having judges play a greater role in proceedings would promote fairness for disadvantaged parties', the submission argued. 'Secondly, it is possible that an inquisitorial-style framework could limit the financial and time cost of bringing an action to court, further enabling disadvantaged would-be litigants to access the justice system.'

Source: Peter Jean, 'Legal system overhaul proposal pushes 'inquisitorial' role of judges', *The Canberra Times*, (Online, 22 January 2014, updated 23 April 2018) <[canberratimes.com.au/story/6146448/legal-system-overhaul-proposal-pushes-inquisitorial-role-for-judges/](http://canberratimes.com.au/story/6146448/legal-system-overhaul-proposal-pushes-inquisitorial-role-for-judges/)>.

1. Identify the legal organisation that is calling for Australia's legal system to adopt aspects of the European 'inquisitorial' court process? [C]
2. What change is this legal organisation calling for? What do they hope it will achieve? [C]
3. Analyse the proposal by examining its legal implications. [A]
4. Do you agree or disagree with the proposal raised? Are there any other solutions that could address the issues raised in the article? Support your opinion by using legal criteria. [E]

### Disadvantages of the inquisitorial system

The common concerns raised about the inquisitorial system include that:

- it puts a great deal of power into the hands of a single judicial officer. If a judge is ignorant of a particular fact, does not attach much weight to a piece of evidence or has a bias, it will impact the outcome.
- there is a lack of separation between the prosecution, the police and the judicial officer.
- the passive role played by the lawyers in this type of process may mean that a defendant is disempowered and, coupled with the fact that a defendant does not have a right to silence, unable to defend themselves adequately.



### What do you think?

In a speech given to the 17th Annual Australian Institute of Judicial Administration Conference held on 7 August 1999, Sir Anthony Mason, the ninth Chief Justice of Australia, stated that:

*Adversarial justice is an expression often used in opposition to the inquisitorial system which is an imprecise label given to the procedure of the European system ... That opposition has the potential to mislead, as there is a degree of commonality and convergence between the two systems. It is a mistake to regard the two systems as static ... Today the European system ... places more emphasis on procedural fairness ... The adversarial system, by moving to case management, begins to resemble the European one in expecting the judge to exercise more control over the litigation...*

If you were asked to develop a new court process for deciding criminal cases, what parts of the inquisitorial system would you like to see included? If there are none, why? [E]

## 3.2 Overview of the criminal justice process

We have now concluded our exploration of the foundations of our legal system. Next, we will turn our attention to the criminal justice system in action examining:

- the criminal investigation process,
- bail and other pre-trial proceedings,
- the trial, and
- punishment and sentencing.

But, before we move to the next topic of study, let us apply some of the knowledge you have developed to a recent criminal case, *R v Trebeck*, as well as take the opportunity to foreshadow some aspects of the criminal justice process you will soon learn about. As this case ran over many years, an overview is provided below.

### *R v Trebeck*: an overview

Investigation occurs and arrest	<ul style="list-style-type: none"> <li>• <b>March 2014</b> - A partially clothed body is discovered on the bank of the Macintyre River, Goondiwindi. The body is identified as Alexis Jeffery.</li> <li>• <b>June 2014</b> - A man (later identified as Robert Ian Trebeck), is arrested and later charged with the murder of Alexis Jeffery.</li> </ul>
↓	
Trial and sentence hearing	<ul style="list-style-type: none"> <li>• <b>October 2016</b> - The murder trial <i>R v Trebeck</i> commences in the Supreme Court of Queensland. Trebeck enters a plea of 'not guilty' but is found 'guilty' by a jury. He is sentenced to life imprisonment (the mandatory sentence for this criminal offence).</li> </ul>

<p>↓</p> <p><b>Appeal occurs</b></p> <p>↓</p>	<ul style="list-style-type: none"> <li>• <b>February 2018</b> - The Queensland Court of Appeal hears an appeal made by Trebeck against his conviction. He argues that the trial judge did not direct the jury correctly.</li> <li>• <b>August 2018</b> - The Queensland Court of Appeal sets aside Trebeck's conviction and orders a retrial.</li> </ul>
<p>↓</p> <p><b>Retrial occurs</b></p> <p>↓</p>	<ul style="list-style-type: none"> <li>• <b>May 2019</b> - The retrial of Trebeck commences. Trebeck enters a plea of 'not guilty' but is found 'guilty' by a jury. He is sentenced to life imprisonment.</li> </ul>
<p>↓</p> <p><b>Appeal occurs</b></p>	<ul style="list-style-type: none"> <li>• <b>March 2022</b> - The Queensland Court of Appeal hears an appeal made by Trebeck against his conviction. He argues that the verdict is unreasonable or insupportable.</li> <li>• <b>June 2022</b> - The Queensland Court of Appeal dismisses Trebeck's appeal.</li> </ul>

### Inquiry Focus

*Did the adversarial system support Trebeck's right to a fair trial?*

### Practical Application

#### POLICE BELIEVE ALEXIS JEFFERY, WHOSE PARTIALLY CLOTHED BODY WAS FOUND IN GOONDIWINDI ON SUNDAY, WAS ATTACKED

Police believe the young mother whose partially clothed body was found on the banks of a river southwest of Brisbane on Sunday was attacked.

Regional crime coordinator for southern region Detective Superintendent Dave Isherwood told media that Alexis Jeffery was last seen alone in a park, walking towards the pathway to the Goondiwindi Cultural Centre between 3am and 3.30am Sunday. The 24-year-old woman's body was found in the Macintyre River just before 11am on Sunday. He said witnesses told police the mother-of-three, who was a local, had been spotted at two pubs earlier in the night.

'At this stage the scene is still being forensically examined,' he told media. 'The post-mortem was commenced yesterday and is still ongoing this morning, so we haven't got a cause of death.'

Source: Kate McKenna, 'Police believe Alexis Jeffery, whose partially clothed body was found in Goondiwindi on Sunday, was attacked', *The Courier Mail* (Online, 18 March 2014) <[couriermail.com.au/news/queensland/police-believe-alexis-jeffery-whose-partially-clothed-body-was-found-in-goondiwindi-on-sunday-was-attacked/news-story/788f44126dd1749469e3859e620f42d](http://couriermail.com.au/news/queensland/police-believe-alexis-jeffery-whose-partially-clothed-body-was-found-in-goondiwindi-on-sunday-was-attacked/news-story/788f44126dd1749469e3859e620f42d)>.





## Practical Application ...

### CCTV FOOTAGE OF ALEXIS JEFFREY, SUSPECTED MURDERED IN GOONDIWINDI, POSTED ON YOUTUBE

CCTV footage of Alexis Jeffrey, a 24-year-old mother of three whose body was found in a river on Queensland's southern border, has been posted on YouTube. The footage shows the 24-year-old, who police believe was murdered, walking down Goondiwindi's main thoroughfare, Marshall Street, at about 2:16am on March 16.

Source: ABC News, 'CCTV footage of Alexis Jeffrey, suspected murdered in Goondiwindi, posted to YouTube', ABC News (Online, 14 April 2014) <[abc.net.au/news/2014-04-16/cctv-footage-of-alexis-jeffrey-goondiwindi-murder-victim/5395018?utm\\_campaign=abc\\_news\\_web&utm\\_content=link&utm\\_medium=content\\_shared&utm\\_source=abc\\_news\\_web](http://abc.net.au/news/2014-04-16/cctv-footage-of-alexis-jeffrey-goondiwindi-murder-victim/5395018?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web)>.

1. Who was the victim? [C]
2. Where was the body of the victim discovered? [C]
3. What organisation is tasked with investigating a possible criminal offence? Is this organisation part of the judiciary, executive or legislature? Why may it be important the organisations involved in investigating and prosecuting a crime are separated? [C] [A]
4. Identify and describe the different types of evidence mentioned in the above articles that appear to have been gathered after the body was discovered? [C]

### POLICE BELIEVE ALEXIS JEFFERY, WHOSE PARTIALLY CLOTHED BODY WAS FOUND IN GOONDIWINDI ON SUNDAY, WAS ATTACKED

Queensland homicide detectives have charged a 33-year-old man with the murder of a young mother in March. The man, who hasn't been named, was arrested in the north Queensland town of Bowen on Saturday morning. He was charged with the murder of 24-year-old Alexis Jeffery hours later.

Source: AAP, 'Man charged with murdering Qld women', *9 News* (Online, 28 June 2014) <[9news.com.au/national/man-arrested-over-qld-woman-s-death/0b971361-af5d-476d-bc18-e3e35cfc297b](http://9news.com.au/national/man-arrested-over-qld-woman-s-death/0b971361-af5d-476d-bc18-e3e35cfc297b)>.

1. Identify the criminal offence the defendant has been charged with. [C]
2. Journalists who report on criminal cases usually follow guidelines that help them decide what details they should and should not report. Sometimes there are also legal rules that prevent the reporting of some cases. The identity of the defendant was initially not disclosed in articles about this case. Why do you think this occurred? Analysing the perspectives of the defendant, the victim's family and the community, how much detail about a crime should be reported publicly? You are encouraged to investigate the implications of your point of view. [A]

### GOONDIWINDI'S ALEXIS JEFFERY ALLEGEDLY KILLED WITH HER OWN JEANS, SUPREME COURT HEARS

A Goondiwindi mother was strangled or smothered with her own jeans by a man she had just met at the pub, a Supreme Court murder trial has heard.

Robert Trebeck has pleaded not guilty to her murder, and has blamed another man who Ms

## Practical Application ...

Jeffery had also met at the pub. The court heard that when the pub closed at 1:00am, all partygoers had to leave.

Later that night, Ms Jeffery and Trebeck were seen being intimate in a park. When [police] officers approached the pair and spoke to Ms Jeffery, she did not say she was concerned, the Supreme Court in Toowoomba heard.

The court heard Trebeck told family he had worn reef boots to the pub, but told police he wore black dress boots. 'The reef boots have never been seen again, Mr Heaton said. 'It became apparent those boots were a thing about which Robert Trebeck was lying.'

Trebeck has tried to blame a third man, Daniel Rowsell, for the alleged murder. He had also met Ms Jeffery at the pub. Trebeck allegedly told his family Rowsell found the pair on the riverbank, kicked Ms Jeffery by accident and Trebeck ran off.

Source: Isobel Roe, 'Goondiwindi's Alexis Jeffery allegedly killed with her own jeans, Supreme Court hears', *ABC News* (Online, 24 October 2016) <[abc.net.au/news/2016-10-24/goondiwindi-murder-alexis-jeffery-killed-own-jeans-court-hears/7959976?utm\\_campaign=abc\\_news\\_web&utm\\_content=link&utm\\_medium=content\\_shared&utm\\_source=abc\\_news\\_web](http://abc.net.au/news/2016-10-24/goondiwindi-murder-alexis-jeffery-killed-own-jeans-court-hears/7959976?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web)>.

1. How many years did it take for Trebeck to stand trial for the murder of Alexis Jeffrey? What may explain this length of time? [C]
2. Identify the court that has the jurisdiction to hear a murder trial in Queensland. [C]
3. Which key characteristic of the adversarial system is identified in this article? How does it assist the court to discover what happened on the night Jeffery was killed and whether Trebeck is responsible? [C] [A]
4. Describe the core argument of the prosecution and defence case (as it was reported in the media). [C]
5. Describe the evidence raised in this article that the prosecution presented at trial? If you were the defence counsel, what arguments or questions may you have raised in response during cross examination? [C] [A]

### ALEXIS JEFFERY MURDER TRIAL: LAST STEPS IN A FATAL NIGHT

On March 15, 2014, 24-year-old mother Alexis Jeffery ventured to a pub in Goondiwindi to socialise. But her planned night of fun was to be her last. After 10am the next day, a father out fishing with his young son spotted what looked like a mannequin on the banks of the Macintyre. Edging closer, Adam Phillips saw it was in fact a body. In a hedge 150m away were Ms Jeffery's bloodstained jeans, with the underwear still entangled 'as if they'd been pulled off in one movement'. 'What is apparent is that the jeans were the murder weapon,' prosecutor Carl Heaton, QC, told Toowoomba Supreme Court this week. The trousers had been 'allegedly used to strangle or suffocate Ms Jeffery, the jury heard.

The first week of the trial has revealed Ms Jeffery's last known movements on the night in question, with Robert Trebeck – one of two men who tried to hit on her – pleading not guilty to her murder.

Source: Kat McKenna, 'Alexis Jeffery murder trial: last steps in a fatal night', *The Courier Mail* (Online, 28 October 2016) <[couriermail.com.au/news/queensland/murdered-mums-final-movements/news-story/29dfe0a43bd08fef0126b53b57deac39](http://couriermail.com.au/news/queensland/murdered-mums-final-movements/news-story/29dfe0a43bd08fef0126b53b57deac39)>.



## Practical Application ...

1. One of the elements of murder is that a person has been killed. What caused Jeffery's death? [C]
2. Thinking back to the start of this chapter, in a criminal case, what is the standard of proof required in criminal law and which party bears the onus of proof? [C]
3. Who is making the decision regarding whether Trebeck is 'guilty' or 'not guilty' of the murder of Alexis Jeffery? [C]

### Research Task

The 'right to a fair trial' is a phrase we often hear, but what rights does an accused have in criminal proceedings in Queensland? One source of our human rights is the *Human Rights Act 2019* (Qld).

1. Locate a copy of the *Human Rights Act 2019* (Qld). [S]
2. Identify which arm of government made this law—the legislature, the executive or the judiciary. [C]
3. List the different rights Trebeck has according to s32?

## Case Study

*R v Trebeck* [2018] QCA 183

**Facts:** The appellant, Trebeck, was convicted of the murder of Alexis Jeffery after a 13 day trial. The evidence presented at trial was circumstantial—Trebeck and Jeffery knew each other, a number of witnesses saw them together the night she died, there were abrasions on his wrist seen the morning of her death and his DNA was found on Jeffery's body and inside her jeans. The Crown case also raised a variety of post event conduct (such as lying about knowing the deceased) as proof of his guilt. Trebeck did not give evidence at trial. He contends that another man, Rowsell, killed Jeffery.

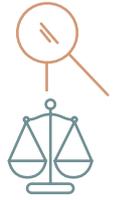
**Legal Issue:** Did the directions given to the jury about Trebeck's post-offence conduct cause a miscarriage of justice to occur?

**Decision:** The Court held that the trial judge failed to properly direct the jury on how they should approach evidence raised at trial of Trebeck's lies and other post-offence conduct.

*[48]...it was necessary to ensure that the jury clearly understood that they might use the evidence of the lies as an indication of consciousness of guilt of murder only if they were satisfied that the lies were not told out of a consciousness of guilt of manslaughter. Having been given no guidance in that respect there is an obvious risk that the jury did not reason properly in dealing with that category of the evidence.*

As this failure may have affected the decision the jury made, Trebeck's conviction was set aside and a retrial was ordered.

1. Which party lodged the appeal and what was its core argument? [C]
2. What was one of the judge's roles in this trial? [C]



## Case Study

3. Explain how the judge's directions may have contributed to a 'miscarriage of justice'? [A]
4. Do you agree or disagree that the ability to ask the legal system to review a decision is an important attribute of receiving a fair trial? Why do you feel this way? You should consider the implications of your decision, including how it impacts the key stakeholders (the Court, the community, the appellant and the respondent). [E]

In May 2019 Trebeck faced a retrial for the murder of Alexis Jeffery. He was found guilty of her murder and sentenced to life in prison, the mandatory penalty for this criminal offence. When sentencing Trebeck the judge reportedly stated:

*We will never know what really happened to Ms Jeffery that morning. Only you will know what actually transpired that night and how she came to die at your hands.*

*By dumping her lifeless body over the escarpment, you made sure she would die.*

*She was not offered any dignity or respect after her death, but rather, was left half naked in the open*

*After her death at your hands, you continued your life as if nothing happened.*

*...you continued to lie, and lie and lie... You maintained that lie under oath.*

*There is only one penalty I can impose for murder. It is mandatory. It is a mandatory sentence of life imprisonment.*

Source: Elly Bradfield, 'Robert Ian Trebeck again convicted of killing Goondiwindi mother Alexis Jeffery, after retrial,' ABC News, (Online, 28 May 2019) <[abc.net.au/news/2019-05-28/trebeck-guilty-murder-goondiwindi-mum-alexis-jeffery-retrial/11153054](http://abc.net.au/news/2019-05-28/trebeck-guilty-murder-goondiwindi-mum-alexis-jeffery-retrial/11153054)>.

### What do you think?

1. Reflecting on the investigation, trial and retrial of Robert Ian Trebeck, do you believe he received a fair trial? Justify your position. You may like to use the characteristics of the rule of law or perhaps *Human Rights Act 2019 (Qld) s32* as your legal criteria. [E]

## Review

### Comprehend

1. **Explain** the key characteristics of the adversarial system. [C]
2. **Distinguish** between the role of a judge and legal representation in each of the adversarial and inquisitorial systems. [C]



# Topic 2

## Criminal investigation process

Topic 2 covers how criminal law is investigated, enforced and the types of crimes that exist.

### Chapter 4:

Criminal investigation process

### Chapter 5:

Criminal offences

# Criminal investigation process

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## Chapter 4: Criminal investigation process

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- 4.1 Introduction
- 4.2 Different roles in an alleged criminal situation
- 4.3 The role of the police
- 4.4 Types of evidence
- 4.5 Rights and responsibilities of police, suspects, accused persons and victims

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the different roles in an alleged criminal situation
  - the principal role of the police in the search for and the gathering of evidence in the investigation of crimes
  - the *Police, Powers and Responsibilities Act 2000 (Qld)* (PPRA) gives special powers to the police in the gathering of evidence
  - the types of evidence the police may collect at a crime scene and during the investigation process
  - the criminal investigation process and the features that contribute to just and equitable outcomes, including reasonable suspicion and the right to silence.
- analyse and evaluate the extent to which the criminal investigation process balances individuals' rights with society's need for order; DNA testing and storage, databases and data banks, and fingerprints, whether evidence should be destroyed at the completion of a trial; the collection of metadata.

## 4.1 Introduction

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### Key Terms

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**Accused:** persons who have been charged by the police for a criminal offence but have not yet been convicted.

**Arrest:** an arrest occurs when the police take an offender into custody.

**Charge:** a charge occurs when the police formally charge the alleged perpetrator of a crime with a specific criminal offence, stating the details of the specific offence with which such person is being charged.

**Crime scene:** a crime scene is a specific location at which the police reasonably suspect a crime has been committed, which can be secured by the police under the PPRA for the gathering of relevant evidence.

**Offender:** a person who has committed a criminal offence.

**Suspect;** a person that the police believe may have committed a criminal offence.

**Victim:** a person against whom a criminal offence has been committed.

**Warrant:** an authority obtained by police in the form of a document authorising them to search a property, search a person, search a motor vehicle or arrest a person.

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Criminal conduct is behaviour that the law deems to be wrongful. Criminal law sets out the rules that are to be applied and lays down procedures and punishments to deal with criminal conduct. In this way, **criminal law covers the acts and omissions that most people in the society consider harmful**. For an act or omission to be criminal, a guilty mind is also required. It is an established principle of the common law that a person should not be convicted of a criminal offence unless he or she had a 'guilty mind' which accompanied the wrongful act or omission. A person who has a **guilty mind** is said to be **criminally responsible** for the act or omission. As well as **causing harm to a victim**, a crime is also regarded as **harming the society as a whole**. This is why behaviour that breaks one of these criminal rules is called an **offence** – it offends against all of society. Crimes are regarded as offences against the State.

Many **acts are universally held to be crimes**, such as murder or stealing, **whilst others are specific to certain cultures**. Drinking alcohol is a crime in some countries, such as Iran, but not in Australia. However, the taking of some other drugs, such as heroin or marijuana, is a criminal offence in Australia. Adultery, which is when a married person has a sexual relationship with a person other than his or her spouse, is not a criminal offence in Australia because the conduct is no longer seen as warranting prosecution and punishment by the state. In other parts of the world, adultery remains a criminal offence. It is a serious offence under Islamic law, one for which the death penalty can be imposed. Several countries in Asia continue to have the offence of adultery in their criminal laws. In South Korea, for example, a person convicted of adultery can be sent to jail for up to two years.

By identifying and enforcing core values and beliefs, criminal law helps to define the type of society we have. This is why **changes in values and beliefs** in our society may lead to changes in what conduct is considered criminal. This can be seen in regard to homosexuality, which was once the criminal offence of sodomy (see Section 1.5). Changing societal attitudes towards what, for centuries, had been regarded as a crime 'against the order of nature' led all states of Australia to repeal sodomy as a criminal offence for consenting adults over the age of eighteen. Another example of changing values leading to change in the criminal law was the recent abolition of

the rule that a man could not be convicted of raping his wife. Today, marriage no longer means that a wife has given irrevocable consent to sexual intercourse with her husband. The law clearly responds to current social issues, concerns and attitudes. It has also expanded and developed as technologies and other knowledge has changed society.

A clear example of how the use of technology can constitute criminal behaviour is in the crime of stalking. The *Criminal Code 1899* (Qld) s359B defines what constitutes stalking as criminal behaviour. Sending a barrage of unwanted text messages to a girlfriend or spouse has resulted in convictions for stalking.

## 4.2 Different roles in an alleged criminal situation

Read the following scenario in which there is alleged criminal behaviour.

### Hypothetical?

On 4 July 2017 the following occurred. Paul Ryan, a young man, left the Prince of Wales Hotel at about 6.00pm. It was not quite dark. He had been drinking but was not intoxicated. He walked towards his car which was parked in a back street, about half a kilometre away. Two men, one aged 20 years, Tony Frederickson, and the other aged 18 years, Michael Moses, saw Ryan leave the hotel and followed him. Believing he was under the influence of liquor, they intended to take his money from him, take his car keys, and then use his motor vehicle. Frederickson pulled a wooden paling off a fence. He intended to frighten Ryan with the paling and to make him give up his money and his keys. As Ryan approached his car, Frederickson struck him in the head from behind with the paling, without warning. Ryan faltered, fell and hit his head on a metal grate adjacent to the footpath. He bled profusely. Despite his being shocked by the violence of Frederickson, Moses reached down and took the wallet and car keys out of Ryan's pocket. Moses opened the car and drove away with Frederickson, leaving Ryan on the ground bleeding. Mr Bill Tomlins lived in a house in front of where Ryan's car was parked. Just before the incident, Mr Tomlins was sitting on his veranda behind blinds which were partially opened. He saw Frederickson pull the fence paling off his neighbour's house and he saw both Frederickson and Moses following Ryan. Thinking this was suspicious, he pulled out his mobile phone and commenced videoing the men. He saw Frederickson strike Ryan. He saw Moses take money and car keys out of Ryan's pocket. He saw both Moses and Fredrickson drive away. He telephoned the police, giving them a brief description of the men and the registration number of the motor vehicle using the video.

Two hours later police saw the car parked at the Commercial Hotel. They had been given details of the attack on Ryan, of the car, and a description of Fredrickson and Moses phoned in by Mr Tomlins. When they went inside they saw two men who generally fitted the description of the men who had struck Ryan and taken his car. They arrested the men and took them to the police station. They subsequently charged the men with assault occasioning grievous bodily harm and stealing. Paul Ryan later died and the police amended the first charge for both Fredrickson and Moses to murder.

Answer the following questions relating to the above scenario.

## Hypothetical?

1. What happened to Paul Ryan? Would you describe Paul Ryan as the victim? Why? [C]
2. Who are the suspects? [C]
3. Who are the offenders? [C]
4. Who is the witness? [C]
5. Where did the arrest take place? [C]
6. What is the evidence of the offences having occurred, and of the persons who committed the offences? In your answer distinguish between oral evidence and electronic evidence. [C]
7. What are the charges that were made against Frederickson and Moses? [C]
8. The words suspects, the accused and defendants can be applied to both Tony Frederickson and Michael Moses. At what point did Frederickson and Moses become the accused or defendants as opposed to suspects? [C]
9. What role did the police play in this criminal situation? [C]

You will see from the above scenario that the criminal investigation process started with a report made by Mr Tomlins of behaviour of Moses and Frederickson, which was obviously criminal. Reports, therefore, from citizens witnessing a crime are very common ways by which criminal investigations start. Another common way in which a criminal investigation starts is by the police seeing an offence occurring or by their witnessing suspicious behaviour. The most common way is however usually reports by victims of offences which have been committed against themselves. All of these ways commence the criminal investigation process.



## Research Task

Go to the website of Neighbourhood Watch Queensland ([nhwq.org](http://nhwq.org)) and under the heading of Resources, locate the Suspicious Behaviour Brochure(s). Then complete the following tasks.

List five examples of suspicious behaviour. [C]

1. Name ten features of a person important in giving a good description to the police. [C]
2. Name seven details in relation to a motor vehicle which you might observe if it is the subject of suspicious behaviour. [C]
3. Can you think of any other important attributes of a person which could be added to the features of a person in giving a good description to the police as set out in the brochure? [A]
4. Do you agree that community involvement in identifying crime is appropriate? Give your reasons? [E]

## 4.3 The role of the police

The investigation of crimes in our society is conducted by the police. It is the role of the police to search for and gather evidence so that offenders can be brought to justice. To do this the police have been granted powers beyond those of an ordinary citizen. The police need to be able to question people, search people and places, so that they can gather evidence of criminal behaviour. Mostly, citizens cooperate. Even offenders sometimes cooperate with the police.

There are circumstances, however, where people do not cooperate. It is in such circumstances that police need special powers to insist upon searching a person's motor vehicle and premises as well as questioning individuals. It is important for the police to have this lawful authority to conduct their investigation because any evidence relied on in a trial which has not been obtained by police legally may be excluded by the judge. This means such evidence will not be available to determine the innocence or guilt of the accused.

The *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) gives special powers to the police. We shall deal more fully with these powers later in this chapter. The role the police play in the criminal investigation process is to gather evidence using their powers. The police then need to determine whether the evidence is sufficient to charge somebody with an offence. Specific offences are dealt with later in this topic. You will see later that each offence is made up of elements. The police collect evidence and they determine whether the evidence is sufficient to charge somebody with an offence. They need to consider that evidence in light of each and every element of the offence. An example of this is as follows.

The definition of robbery to Question 4 on the next page is a Practical Application

### ***Criminal Code 1899 (Qld)***

#### ***409 Robbery***

*(1) Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the things stolen or to prevent or overcome resistance to it being stolen is said to be guilty of "robbery".*

The definition of robbery is set out in s409 (shown above). To be found guilty of robbery, the Crown Prosecutor must prove:

- the defendant stole something, and
- at the time of, or immediately before, or immediately after, stealing it, the defendant used or threatened to use actual violence to any person or property.

Any degree of violence is sufficient.

### **Practical Application**

Having set out the elements of robbery, look at the following examples and determine whether the police are likely to charge a person with robbery in the following fact situations. (Assume in each of these examples that the item was stolen or in the case of example 3 was intended to be stolen).

1. Mary was at the house of her friend, Jane. She stole Jane's diamond ring by putting it in her purse with the intention of getting her brother to sell it for her. [A]
2. Frank's brother, Tony, owned a rifle that Frank wanted desperately to have. He had asked for it many times but Tony would not give it to him. On a Monday when both were not at work, Frank





## Practical Application

said to Tony that, if he didn't give him the gun, he would bash him in the head with a golf club. Tony did not give him his rifle. Two days later Frank stole the rifle and kept it without Tony's knowledge. [A]

3. Richard had broken into a house because he was hungry and wanted to steal some food. While in there, he disturbed the owner of the house, Francis. Richard then told Francis that, unless he gave him the cash which he had in his wallet then he was going to push him over. [A]
4. Bill was at a party with friends of his. One of his friends owned a Rolex watch which his friend had left on the table. After his friend left, only Bill and Mary were sitting at the table. Bill stole the Rolex watch and Mary said that he should not take it. Bill told Mary not to say anything or he would twist her arm behind her back. [A]

## 4.4 Types of evidence

The main types of evidence the police may collect at a crime scene or during an investigation process are as follows:

- Oral evidence
- Crime scene evidence
- Fingerprint evidence
- DNA evidence
- Facial recognition evidence

### Oral evidence

The most common form of evidence that police collect is oral evidence. These are statements made by the victims of crimes, or by witnesses to crimes, or even by offenders themselves. The first oral information provided to police of an offence having been committed is usually provided by the victim.

The victim goes to the police and complains about a crime having occurred and, on many occasions, asserts that a certain person committed that crime. When such a complaint is made by a citizen, the police will take a statement. That is, the police will listen to his or her oral evidence, reduce it to writing, and have the witness read it and sign it as being true. Similarly if there are any witnesses to that event apart from the victim, the police will also take the oral testimony of those witnesses. After having collected such evidence, they will then approach the alleged offender (suspect) and ask that person to make a statement about the allegations raised by the victim. At this point the alleged offender considers his legal right to silence, which is as follows:

### Right to silence

The alleged offender may or may not make any statement to the police at this point. The alleged offender does not have to answer any questions asked of him by the police. In fact there is **an absolute right to silence** at the police questioning stage of an investigation in all the Australian States. This right to silence is a very old right that existed at common law. **The fact that an alleged offender does not answer questions put to him or her by the police is not allowed to be raised later in a trial.** In other words, **no adverse inference** against the alleged offender can be drawn in a later trial simply because that person refused to engage with the police. In fact, when the police are interviewing a suspect, the police always tell the suspect that he/she is not required to answer questions. Given that these interviews must be audio taped and

very often video taped, the police believe it is important to make it absolutely clear that they have advised the suspect of the existence of his/her right not to answer questions.

### Confessions

As you can imagine the best type of oral evidence that can be collected by the police is confessions. **A confession is when the offender admits to having committed the offence.**

One form of a confession occurs when the offender admits to having committed the offence directly to the police or to another person.

There are also other circumstances in which evidence of confessions is obtained. The following are examples:

- Third parties giving evidence of a confessional statement made to them by the offender.
- Undercover police recording confessions of the offender.
- Ordinary citizens, at the request of the police, recording confessions of the offender.
- The police deliberately placing inmates in a prison to befriend an offender and then having the inmate record the confession of the offender.
- Confessional statements made to fellow inmates in a prison advising the police that the offender has made a confessional statement to him or her and the police then arranging for that inmate to have the offender repeat his admission in circumstances where the inmate is recording that conversation.

In relation to confessional statements made directly to the police by the offender, there have been in the past many confessions which have not been admitted into evidence which have arisen as a result **of threats or coercion on the part of the police**. Any confession obtained by these means is clearly inadmissible. The practice of **verballing** had also developed in the past which, if discovered, made confessions inadmissible into evidence too. **Verballing is where police officers put damaging remarks, especially confessional statements, into the mouths of suspects during police interrogation**. That is, the police either orally or in writing fabricate the confession of a suspect. These practices of verballing and obtaining confessions by threats, intimidation and coercion have subsided greatly since the compulsory requirement of electronic recording of police interviews.

As to the other means of obtaining confessions referred to above, you might regard some of those as forms of trickery. However, generally speaking, such confessions are admitted into evidence (i.e. are admissible) and considered by the court and/or a jury in determining guilt or innocence. The following case study is an example of the police using a third party to record a confession.

### Case Study

*R v O'Neil* [1995] QCA 33

**Facts:** The appellant was convicted of attempted murder and sentenced to twelve years imprisonment. The appellant was a nurse who was found guilty of attempting to murder her husband by injecting him with a potentially lethal dose of insulin whilst he was sleeping. The appellant's husband was an army officer who had returned from service in Somalia. After his return, his marriage with the appellant declined. Evidence was given in the case by Ms Lally, a friend of the appellant nurse, who was also a nurse working with the appellant at a hospital. She was told by the appellant in the course of a conversation that the appellant had tried to kill her husband but had not succeeded. The witness, Ms Lally, responded by suggesting that the applicant was 'kidding', to which the applicant responded, 'I injected him with 300 units of insulin.' The appellant told Lally that, after injecting her husband with insulin, she lay waiting for him to stop breathing, but he didn't do so. He woke up and went into the kitchen





## Case Study ...

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and consumed orange juice and biscuits. Lally told the police of this conversation she had with the appellant. Then, at the request of the police, Lally had a further conversation with the appellant which was tape recorded. Two recordings were made, one by use of a microphone transmitting to a remote tape recorder, and the other by way of a small portable tape recorder carried in Lally's handbag. This recorded confessional statement by the appellant was admitted into evidence and the appellant was convicted at trial. She appealed the decision

**Legal issue:** Was the recorded confession unfair and therefore inadmissible?

**Decision:** The Queensland Court of Appeal held that the confession was admissible and the finding of guilt was not upset (overturned/dismissed).

1. Who recorded O'Neill's conversation of the appellant? [C]
2. How did the police come to know of O'Neill's confession? [C]
3. Do you agree with Pincus the Hon Justice that 'one could hardly object to the use of trickery of the kind' used in this case to identify the offender? Give your reasons. [A] [E]
4. Do you agree with Pincus with the Hon Justice when he says that the possibility of conviction of an innocent person, on false evidence, is reduced if the police take the sensible course of inviting their informant to renew the discussion with the offender and record the conversation? [A] [E]
5. Do you regard it as just and equitable if evidence of recorded conversations, which have been set up by the police and which are unknown to the offender, is accepted to prove the guilt of the offender? Give your reasons. [A] [E]

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One of the most significant criminal cases in recent history in Queensland relates to confessional evidence obtained by recordings made by undercover police. This case illustrates the extent to which the police can go to collect evidence, in this case, confessional evidence, from the perpetrator.



## Case Study

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*R v Cowan; R v Cowan; Ex parte Attorney-General (Qld) [2015] QCA 87 (21 May 2015)*

**Facts:** Daniel Morcombe left his home at Palmwood on the Sunshine Coast to catch a bus to Sunshine Plaza Maroochydore on 7 December 2003. He was killed by Cowan who was charged with the following offences:

1. Murder.
2. Indecent treatment of a child under 16 years of age.
3. Interfering with a corpse.

Cowan was found guilty of those offences. After a trial ending on 13 March 2014, Cowan appealed his conviction to the Queensland Court of Appeal, which delivered its judgement on 21 May 2015.

Cowan had been interviewed by police in relation to these offences in 2003, 2005 and 2006. He denied all involvement in Daniel's disappearance. He continued those denials in a coronial inquest into Daniel's death in March-April 2011. The police suspected Cowan of being involved in the death of Daniel Morcombe.

### Covert police operation

After Cowan left the inquest, the covert police operation commenced. It involved 36 undercover police officers from Queensland, Western Australia and Victoria. On the very plane trip back from giving evidence at the inquest to Western Australia where



## Case Study ...

Cowan was living at the time, an undercover policeman, Joe Emeri, sat next to, met and befriended Cowan. Over the following months Emeri introduced Cowan to a group of men who appeared to be members of a criminal gang. They were, in fact, undercover police. Cowan befriended them and then committed various 'crimes' as part of that criminal gang. The crimes were not in fact real crimes but Cowan believed that they were, and he was paid for his involvement in them.

These crimes included:

- collecting money, sometimes from prostitutes;
- blackmail of a bank manager using photos of the bank manager in the company of a prostitute;
- a burglary involving \$50,000 worth of cigarettes;
- purchasing three pistols;
- buying false passports;
- collecting a stolen luxury car;
- collecting and transporting a large sum of money;
- collecting and transporting "blood diamonds" (diamonds sold to finance war);
- moving drugs from one location to another for \$8,000; and moving ecstasy pills.

Shortly before his confession, there was under discussion a future job worth over \$1 million, from which Cowan was to earn \$100,000. The impression given by the criminal gang was that they were a very powerful organisation that could fix things all over Australia, including within the Queensland Police Service. In turn they emphasised a need for loyalty and trust by each of the gang members. Everything was being recorded by the 'gang'. During these operations, Cowan became close to Jeff and Paul, two of the gang, who were undercover police officers.

On 29 July 2011 the Queensland Coroner's Court issued a notice recalling Cowan on 26 October 2011 to the inquest. It had not been finalised earlier in the year. One of the gang, pretending to be a corrupt police officer, told Cowan's mate, Paul, in Cowan's presence, of the notice of recall but said that it was something that could be fixed without any real difficulty. What was required of Cowan was to be honest with, and loyal to, the gang.

Cowan then told them of his prior sexual convictions and gave that as the reason why the police were pursuing him in relation to the Daniel Morcombe disappearance. He said, however, he had nothing to do with Daniel's disappearance. He claimed to his associates that his alibi was '100%'. Paul, his mate, told Cowan that his 'prior convictions' could be fixed. He told Cowan that they didn't care what Cowan had done but that he had to be honest with them. Paul assured Cowan that the 'bosses will make everything cool'. Paul also told Cowan that he was a good mate of his and that he wouldn't tell anybody what Cowan told him.

Jeff, his other close associate in the 'gang', stressed to Cowan the importance of his being honest and that it didn't really matter what Cowan had done in the past. He assured Cowan that whatever he had done could be worked out, and that the gang could 'work some miracles'.

Paul continued to assure Cowan that 'they'll make it go away' and emphasised the importance of being honest. Paul discussed the big job coming up and Cowan expressed his hope to be part of it still. Paul said that he didn't think the subpoena from the coronial inquest would affect his being involved in the job but it was up to Arnold. Cowan continued to maintain that he had nothing to hide. Paul told him that the boss, Arnold, would want to talk to him.

The next day Arnold called Paul and said he wanted to see Cowan. Paul told Cowan that he should tell the truth to Arnold and that the meeting with Arnold might be about Cowan's problem with the notice recalling him to the coronial inquest going away.



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Cowan met Arnold alone. In that meeting Arnold emphasised loyalty and respect and honesty and that, if Cowan was to adhere to those principles, then the notice to appear at the coronial inquest could be sorted out. Cowan then told him he had two previous convictions for child sex offences in 1987 and 1993. Arnold told him that he had received further information that morning stating that Cowan had murdered Daniel Morcombe. Arnold said that fact didn't bother him. He could sort that out as well and, in particular, find an alibi for Cowan. However Arnold had to work out 'what to do and it was a real dilemma'.

Arnold said he wanted to move forward with a big job but that Cowan was 'too hot'. Cowan again insisted that he had nothing to do with Daniel's disappearance but he explained that he was living in the area when Daniel disappeared and that, because of his previous convictions, the police had hounded him. Arnold said that he had received information that there was also a subpoena coming for Cowan. He said that, even though he understood Cowan was good for the gang, he had to weigh up the risks involved. Arnold then read to Cowan, from paperwork that he held in his hand, that 'coroner's inquest recommencing shortly and Cowan will again be in the spotlight. If you can't sort this out, I suggest you drop him like a hot potato'. Arnold did not discuss with Cowan the source of that document but again emphasised the need for honesty, trust and respect in the gang.

### The Confession

Arnold asked Cowan if there was 'any DNA or that kind of s...' in relation to the disappearance of Daniel Morcombe. Cowan said that there was no DNA and that they'd searched his car but found nothing. It was then that Cowan made all the admissions including pulling down Daniel's pants, killing him and disposing of the body and clothes. All this was recorded by way of an audio device. (The transcript of that conversation is available in the report of the case).

The next day Cowan flew to Queensland with the undercover police officers posing as

gang members. Over the next few days he directed them to the site of the abandoned house where he had assaulted Daniel Morcombe, then to the sand mining site, pointing out where he left Daniel's body, and then to a small bridge over a creek into which he said he had thrown Daniel's clothes. These admissions constituted Cowan's confession.

### The Conviction

Two days later Cowan was arrested by other police officers. He was charged and ultimately convicted at the trial. He was given life imprisonment with parole eligibility only after 20 years on the count of murder. He was given 3½ years imprisonment on the second offence and 2 years imprisonment on the third offence.

### The Appeal

Cowan appealed to the Queensland Court of Appeal, asserting that his confessions and the evidence obtained as a result of his confessions should have been excluded from the trial (i.e. ruled to be inadmissible) under s10 *Criminal Law Amendment Act 1894* (Qld):

*No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown.*

### The Decision

The first point of concern on appeal was whether the confession was made to persons in authority. The Queensland Court of Appeal held that they were not. At all times, the police officers were pretending to be part of a criminal gang and Cowan had made his confession to members of a criminal gang (not police), or so he believed. At no time did Cowan believe the undercover police were persons in authority and **at no time**



## Case Study ...

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**did the undercover police officers invoke their official powers they had as police officers.** It followed, therefore, that the confession was not induced by any promise or threat made by some person in **authority** but by criminal gang members.

The Queensland Court of Appeal then stated that even if the Court was wrong on that first point, the question then arose as to whether Cowan was induced by any threat or promise made by a person in authority to give the confession. The court said that Cowan made his confession because:

- (a) the undercover police officers made it clear that Cowan could only stay in the gang if he told them the truth;
- (b) Cowan would participate in the big job where he would receive his share of approximately \$100,000; and

- (c) whilst he remained a principal suspect in Daniel's disappearance, the gang offered to provide Cowan with a water tight false alibi which would clear him at the inquest. This would only be available to him if he made a full and truthful confession to them.

The court therefore concluded that if there was a threat or promise from a person in authority made to Cowan (which they found there was not), Cowan was not acting upon such threat or promise when he confessed to the undercover police officers. He made his confession for the other reasons set out above. In short there was no threat or promise upon which he acted.

The appeal was dismissed.

1. Who is the victim? [C]
  2. Who is the accused? [C]
  3. What crimes was the accused charged with? [C]
  4. What does the expression 'undercover police officers' mean? [A]
  5. What do the words 'find an alibi' mean? How important would that have been for the accused? [A]
  6. The confession was captured on an audio device without the knowledge of Cowan. It was admitted into evidence. Do you think that it is fair and proper that a police recording of an accused making a confession be allowed into evidence if that audio recording was made without the knowledge of the accused? Give your reasons. [E]
  7. The Court of Appeal concluded that the confession made by the accused was not made to any person in authority. How did the Appeal Court come to that conclusion? Do you think it is a just conclusion? Give your reasons. [A][E]
  8. What were the three reasons that the Appeal Court decided the accused made his confession? [C]
  9. You will see from this case that the police are allowed to become undercover operatives for the purposes of gaining evidence, and in this case, a confession. Do you think that such covert operations by the police should be allowed? Give your reasons. [E]
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You will have seen from the above case that Mr Cowan was unsuccessful in saying that his confession was not voluntary. There are clearly circumstances in which confessions would not be voluntary. As referred to earlier, for example, if police threaten to harm some person who then confesses. It is obvious that in Australia any confession which is made by a person who is subject to threats or violence or other intimidatory acts by police would not be allowed into evidence. In Cowan's case you might think that the police were being deceptive in obtaining his confession. However deception alone by law enforcement officers does not of itself make the evidence inadmissible in court. The confessions obtained in Cowan's case of course did not arise because of threats of violence or other intimidatory acts by police.

### Research Task

This research project if you look at each of the 4 appeals, would take a considerable period of time. You may elect to look at only one of the 4 appeals and engage in a class discussion as opposed to doing a full research project.

1. Look at the case *Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v The Queen* [2007] HCA39 (30 August 2007). This is another High Court case similar to Cowan's case. Go to [austlii.edu.au](http://austlii.edu.au) to access this High Court decision decided in August 2007. Contained within this one decision are four separate cases. In this case there were four appeals being heard by the High Court of Australia at the same time. The court did this because the legal points in the different cases were similar. Each of the appellants was challenging his/her conviction on the grounds that the confessional statements should not have been allowed into evidence. In each of the cases the police used what is now referred to as the scenario technique.
  - a. Read the facts of:
    - i. Tofilau's case described by the Hon Chief Justice Gleeson in paragraphs 70 to 78 of his judgment;
    - ii. Marks' case described by the Hon Chief Justice Gleeson in paragraphs 83 to 85 of his judgment;
    - iii. Hill's case described by the Hon Chief Justice Gleeson in paragraphs 89 to 94 of his judgment; and
    - iv. Clarke's case described by the Hon Chief Justice Gleeson in paragraphs 100 to 106 of his judgment.
  - b. After reading these facts do you agree with the comment that the statements by each of the appellants were:
    - i. not made to a person in authority; and
    - ii. not induced by any threat or promise made to him/her?
  - c. After having considered the scenario techniques used in each of the above cases and in Cowan's case, do you agree that, as a matter of justice and equity, such confessions should be admitted into evidence and used to convict individuals? Give your reasons. [E]

## Crime scene evidence

### What is a crime scene

Crime scenes are extremely important for the police in gathering evidence. The police are given specific powers under the PPRA to enter a place that a police officer reasonably suspects is a crime scene (s164) and then they have power to establish the crime scene.

In establishing a crime scene, a police officer can stop people entering a building, put barricades or tapes around a particular area or display a written notice stating that the place is a crime scene and that unauthorised entry is prohibited (s165). You can see immediately that such action may interfere with people's property rights. However, the PPRA makes the actions of the police in entering and establishing a crime scene lawful.



After establishing the crime scene, the police must, as soon as is reasonably practicable, apply to a judge or magistrate for a crime scene warrant. If it is intended to do something that might cause structural damage to a building, then the application must be made to a Supreme Court judge of Queensland (s166). Once a crime scene is established, it is the responsible police officer at the crime scene who must preserve the evidence at the crime scene (s169) and restrict access to the crime scene (s168). The powers of the police at a crime scene allow for any necessary investigation, which clearly entails searches and inspection of anything at the crime scene, to obtain evidence of the commission of an offence or evidence as to who committed the offence.

The police can open anything at the crime scene that is locked. They can use any electricity at the crime scene for their investigation. They can dig up anything at the crime scene. They can remove a wall or ceiling linings or floors of a building. They can dismantle a motor vehicle. They can seize anything that may provide evidence of the commission of an offence (s176).

It is regarded as extremely important to establish crime scenes and then to carefully examine the scene to obtain any physical evidence that might assist in the police investigation. The evidence found at a crime scene is carefully handled and, as you have seen from many television shows, is carefully bagged and then sent off to scientific laboratories for examination.

### Tip

If you are interested in the range of results possible from the scientific examination of the physical evidence at a crime scene, see the US Department of Justice, Federal Bureau of Investigation Laboratory Division, Handbook of Forensic Services – 2014 which is available on the internet.



### Evidence collected at crime scenes can lead to unfair trials and convictions being set aside

There is a large amount of physical evidence collected at crime scenes. While the crime scene exists it is not known how valuable each piece of physical evidence collected will become. It is therefore very common to err on the side of collecting physical evidence as opposed to not collecting it. Difficulties arise if crime scenes are tampered with. There are instances, but thankfully not common, of evidence being presented at trials which has been planted at crime scenes or tampered with at crime scenes, and which result in convictions. If such tampering is discovered the convictions may be set aside. A recent example of such a case was highlighted in a recent 'Australian Story' on ABC Television.



## Practical Application

Noongar woman Stacey Thorne, 34, was 22 weeks pregnant when she died on a neighbour's front lawn late one night in 2007. She had been stabbed 21 times. Scott Austic, the 45 year old father of her unborn child was wrongfully jailed for the crime and later acquitted after revelations that crucial evidence against him had been planted.

Scott and Stacey had grown up together in the small town of Boddington, South of Perth. About a year after Scott broke up with his daughter's mother, he and Stacey became lovers. On the night of the murder Scott went to the pub and had 'a few bourbons', then he visited Stacey at her home. 'We had a chat for a bit and then we'd had sex and then a little chat again' Scott said. 'Then I'd gone home'. By about 11.00pm Stacey was found bleeding on a neighbour's front lawn after staggering 100 metres down the road desperately calling out for help. She died as a result of knife wounds. Within a week, police had wrapped up their investigation, charging Scott with Stacey's murder. 'The police were convinced in their own mind that Scott Austic was the killer'. Scott's Barrister, David Edwardson QC told Australian Story 'It was a miraculous completion of a murder investigation in a really really short period of time'. The police set out as a motive for the murder the fact that Scott did not want Stacey who was pregnant to him at the time to have the baby. The police found a text message Scott sent to Stacey 10 days before the murder saying he 'Would do anything for her not to have the baby'. They said it proved he had a motive for the murder.

Three pieces of evidence proved crucial in Scott's conviction at his trial. These were:

1. A knife covered with Stacey's blood, which had been found in a paddock between their homes.
2. A cigarette packet with Stacey's blood on it discovered and found on a table at Scott's house.
3. A Jim Beam can with Scott's DNA on it found on the side of the road not far from Stacey's house.

The integrity of all 3 pieces of evidence would later be called into question.

The jury found Scott guilty of Stacey's murder.

Scott's mother who was unconvinced of her son's guilt, in 2010, met Dr Clint Hampson, a lawyer who specialises in forensic pathology. She employed him to take a look at her son's case. He agreed to look at the case pro bono (no fee). A few months after taking on the case Dr Hampson made a startling discovery. "The first thing that stood out to me was the cigarette packet" he said.

### Cigarette Packet

Police found a cigarette packet smeared with the victim's blood on a table at the back of Scott's house. While examining photos and video evidence, Dr Hampson noticed that the packet was only visible in digital photos of the scene taken at 6:25pm on Friday 14 December. The cigarette packet was not in video footage of the table taken by the police who first arrived at the house on 13 December, the day before. It suggested that someone had come in later and placed the packet on the table. The video evidence taken on 13 December was not referred to during the trial. The jury was left with the evidence of a cigarette packet with the blood of the deceased on it being present at the home of Scott Austic. It had clearly been placed there after the video had been taken on 13 December and before the photos were taken at 6:25pm on 14 December.





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### Jim Beam Can

An empty Jim Beam can was found on the edge of the road by a police officer at 7:00am on the second day of the investigation. The police officer who found the empty can was not part of the initial search which was conducted some 12 hours earlier on the first day of the investigation. A photo taken by the police officer on the first day of the investigation of the road and the verge of the road showed no can being there. Furthermore the verge area had been searched the night before by no less than 5 officers of the Western Australia Police, some of whom were forensic officers. They conducted a thorough search. Dr Hampson pointed out that none of them had identified or located a Jim Beam can. The search ceased at about 6:45pm and it was on the following day that the Jim Beam can appeared off the edge of the bitumen and just over the road from Stacey's house. It was clear that the Jim Beam can was placed there after the forensic investigators had completed their search. This can was used in evidence at the trial to show that Scott had been there because it had his DNA and fingerprints on it. The jury at the trial was not told of the photo taken the day before the can was found, or of the search conducted by the police the day before the can was found.



### The Knife

A knife covered with Stacey's blood was found on the day after the investigation started. On the day before it was found, the SES were asked by the police to comb an area in a methodical line search over essentially bare ground over the road from the victim's house and, on the way to Scott Austic's house. That search was conducted. It was part of the prosecution's case that the bloodied knife had been found on the bare ground between Scott and Stacey's home. The specialist SES search team having scoured the same spot a day earlier found no such knife. It was the knife that provided the evidence at the trial of the murder weapon. The detective who found the knife gave evidence that he had casually found the knife after going for a cigarette break during the investigation, walking into the area where the knife was found. The SES, when advised that the murder weapon had been found, having scoured the same spot a day earlier walking and finding nothing, said 'we are trained to search these areas' and 'we found out the next day that they found a knife exactly where we searched, so we failed. And that's when we said to ourselves – 'bullshit'.

### The Appeal

Scott Austic's family with such fresh evidence engaged a Senior Queens Counsel who prepared a petition to the Attorney General of Western Australia to refer the case back to the Court of Appeal. In 2020, the Criminal Court of Appeal found that there was quite credible, cogent, and enough plausible evidence, that crucial evidence against Scott Austic had been planted. The Court of Appeal decided the integrity of some aspects of the police investigation was also compromised. Scott's conviction was quashed. The Court ordered a re-trial.

### The Re-trial

At the new trial in November 2020 the fresh evidence relating to the cigarette packet, Jim Beam can and knife outlined above was presented along with further evidence about the movements of



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Scott on the night of the murder. Scott's defence team of course argued that the evidence relating to the cigarette packet, Jim Beam can and knife had been planted.

There was further evidence led by the defence in relation to the murder weapon. At the trial Dr Richard Shepherd, a UK based forensic pathologist who had worked on more than 20,000 cases (and who had given evidence in the review into Princess Diana's death) testified at the trial. One of the real difficulties for the prosecution at the new trial was that the defence argued that the planted murder weapon could not have been the murder weapon. Dr Shepherd gave evidence that in fact the blade was too short to explain the deep wounds in the deceased's body. Dr Shepherd said 'In 40 years I have seen many things but I have never ever seen such a blatant attempt to plant incriminating evidence in a case. I've seen evidence lost. I've seen evidence mislaid. I've seen evidence misinterpreted, but never such a blatant attempt to try to pervert the course of justice'. Scott's Barrister David Edwardson QC said it is a difficult thing to stand up in front of a jury and 'make very, very serious allegations against police and effectively accuse them of corruption. And that was the case that we had to present to the jury on this re-trial'.

The jury took 2 hours and 16 minutes to acquit Scott after Scott having served 12 years in jail for murder. Finally in November 2020 he walked free.

Source: ABC, 'Trials and Tribulations' *Australian Story*, 25 March 2022 (excerpts of program).

1. What were the 3 pieces of evidence which were found at the re-trial to have been planted? [C]
2. Describe why a conclusion was able to be reached for each of the 3 pieces of evidence that such evidence had been planted? [C]
3. What had the person who planted the murder weapon not taken into account when planting such murder weapon? [C]
4. From what you have read in this particular case do you feel that the system of justice in Western Australia succeeded or failed? [A] [E]

## Fingerprint evidence

Fingerprint evidence is still regarded as extremely strong evidence. A fingerprint is 'an image or impression of friction ridge detail from the palmar surface of a person's hand'. It includes a digital image of such friction ridge detail. The police collect fingerprint evidence where possible at crime scenes. Crime scenes, as you are no doubt aware from television are regarded as places where nothing should be touched. Fingerprint evidence is so seriously regarded that there is a special provision in the PPRA that allows a police officer to pick up or move a knife or pistol or any object which might contain a fingerprint at a crime scene if there is a possibility that the fingerprint could be damaged or interfered with.



Fingerprints have, for a very long time, played an extremely important role in crime scene investigations. The prints are regarded as a unique means of identifying individuals. No two fingerprints are exactly the same. Also, a person's fingerprints do not change over time. The friction ridges on a person's fingers are formed before a person is born and remain unique throughout the whole of that person's life. They are therefore hugely important tools of evidence. Even when a person's fingerprints are not on any murder weapon but are found, for example, on a glass at the scene of a crime, they can still be used in ensuring convictions if the accused denies, for example, ever being at the crime scene. The first time a fingerprint comparison was used as evidence against a defendant was in Argentina in 1892. The first case in the United States was in 1904. Fingerprint evidence has since been used in millions of cases worldwide. Fingerprints can be left on many types of surfaces: glass, china, polished wood, porcelain, polished metal, patent leather, writing papers and similar types of surfaces.

## DNA evidence

### *Deoxyribonucleic acid (DNA)*

A person's DNA is unique. DNA is important because it can help determine the identity of the victim and it can establish that a suspect was present at the crime scene. It can be present in all kinds of evidence including hair, skin, saliva and blood. In fact any part of the body can provide evidence in which a person's DNA is present. Scientific analysis then can determine whether the DNA in the piece of evidence matches the DNA of a suspect.

Even minute amounts of biological material can link a victim to a crime or can establish the identity of the victim of the crime. In Cowan's case (referred to earlier) the human bones found at the Glasshouse Mountains were the remains of the deceased Daniel Morcombe. It was DNA analysis which established that fact.

DNA analysis can also be used to prove that a person did NOT commit a crime and that it was someone else who did. There can be re-examination of evidence collected during old investigations which shows that the DNA profile of a person who was convicted of that crime does not match the DNA profile from biological samples collected at the scene/s of crimes. This has resulted in many pardons being granted. DNA samples can identify weapons used in the commission of crimes where the weapons contain even small amounts of biological material.

The following case study shows the use of DNA profiling in a police investigation. It also illustrates many other ways in which the police conduct a criminal investigation. The case is long but is an excellent example of the diligence and effort required by the Queensland Police in the criminal investigation process.

## Case Study



*R v Hannaford* [2017] QCA 36 (17 March 2017)

**Facts:** Mr Hannaford (H) was charged with the murder of Ms Lynch (L). He had been in a relationship with the deceased until about one month before she went missing. No body was ever found. L had broken the relationship off. H did not accept that the relationship had ended. He repeatedly telephoned L. He appeared unannounced at her unit before being told to get out by the deceased. The deceased had told a witness who gave evidence at the trial that H would telephone her, hang up, and park his car around the corner ... then come back and look through the windows. L's daughter-in-law gave evidence that L felt harassed and threatened. Towards the end of June 2012, H approached L's sister at a country music muster and said, 'If Gail keeps doing the wrong thing by... a bloke, she's going to get hurt.' On a later occasion he told L's sister that he had telephoned L in order to let L know that her 'life was a lie'.



## Case Study

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On 3 July 2012, after speaking to a friend as well as family members, L went missing and was never seen again. L's sister tried to contact her and then took the police to her unit on 5 July. Using a key provided by the landlord, the police and sister entered. The sister noticed that a number of things were out of place and that a rug from the kitchen floor had been removed. The police suspected foul play. H was spoken to several times by the police. He denied knowing where L was, though he admitted that he knew her. He told the police, in answer to the question as to whether he knew where she was, 'No, I don't, her family told me she was on – going on holidays.'

On 10 July 2012, H was spoken to again by the police. A written statement was obtained from him in which he denied any knowledge of L's whereabouts. On the following day searches were conducted of H's car and H's residence. His mobile phone and shoes were seized. After his shoes were seized, he was arrested and subjected to a range of forensic procedures. After these procedures he was released and was accommodated for a night in a hotel because his residence was the subject of a crime scene warrant. During a search of the crime scene the next day the police found an axe and recovered the contents of H's rubbish bin.

After the search of his residence was completed on 12 July 2012 the police wished to speak to H again but couldn't locate him. He was found two weeks later in the toilet block at Picnic Point Park in Toowoomba. He was injured, dishevelled, and in an unresponsive state. The police then charged him with murder. He was subsequently put on trial. At the trial H elected to give no evidence.

Except for DNA, the evidence at the trial was circumstantial. The body of L was never found and nobody witnessed H causing the death of L. The evidence included the following:

- L had not been seen or heard of since 3 July 2012.
- L's bank accounts were untouched from after 3 July 2012.
- CCTV footage was recovered and showed that a motor vehicle similar in appearance to a motor vehicle driven by H was in the vicinity of L's unit at the relevant time. This vehicle drove along the street where L lived at 7.52pm on 3 July 2012 and was filmed again near the unit at 1.50am the next morning.
- A flyscreen in L's unit was partially dislodged. Latent impressions were recovered from the windowsill and architrave of that window. These impressions were consistent with the pattern details of a well-known retail brand of rubber gloves. The packaging for the same brand of gloves was located in H's rubbish bin.
- Bloodstains were found on the floor of L's bedroom, on the mattress overlay on her bed, as well as on a stuffed toy, a wardrobe, a lampshade, a pot plant and the floor of the garage of L's house. Samples were taken of these bloodstains and then subjected to DNA analysis. **The DNA profile obtained from each of the samples was found to be an effective match with H's DNA.** Expressed as a probability, there was a one in 1,700 million chance that the source of the blood on each of these objects and places was not that of H.
- The luminol examination of the bathroom, sink and tapware also revealed the presence of bloodstains. The DNA profiles obtained from these stains were an effective match with H's DNA profile (with the same probability as the bloodstains referred to in the paragraph above).
- There was a missing rug in L's kitchen as identified by L's sister. The missing rug, red in colour, on the floor of L's kitchen was large enough for use in the disposal of a body (the evidence of L's sister was that the rug was approximately three metres in length and width).



## Case Study ...

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Fibres left behind in the kitchen were compared to fibres from the boot of H's car and were found to have several features in common.

- Bloodstains were detected on a number of fabric shopping bags found in the boot of H's car. Those stains were subjected to DNA analysis and a DNA profile was obtained which matched the DNA profile of L. Hairs from L's hairbrush and bristles from her toothbrush were analysed and a DNA profile of L was obtained.
- L's mobile telephone 'communicated' with a cell tower in Rockville at 6.11am on 4 July 2012, suggesting that her telephone had been moved from Warwick to Toowoomba.
- The axe found at H's address was purchased by him from a hardware store in Toowoomba at 4.54pm on 4 July 2012. The blade was swabbed and later analysed. There was a slow, but positive reaction for the presence of blood. **In a similar area on the blade, a DNA profile was obtained which matched the likely DNA profile for L.**
- H was observed by his employer on 5 July 2012 to have injuries to his hands. "A couple of fingers on each hand" were covered with tape. There was also "a scratch or a scrape" on the back of his right hand. H had told his employer that he had been bitten by his own dogs. His employer gave the evidence of H's injuries.
- Evidence was given that H was observed tending a fire in the backyard of his property on 10 July 2012. Two days later police located a number of partially burnt articles in H's rubbish bin. These included ladies' pyjamas, ladies' underpants, sheets, pillowcases, a stuffed toy and socks. The partially burnt sheets and pillowcases matched similar bed clothes found at L's unit (a burnt fitted sheet appeared to match a top sheet found at L's residence). They also shared a similar laundering history.
- Masking tape with bloodstains on it was also found in H's rubbish bin. The masking tape was subjected to DNA analysis and **a mixed profile was obtained**. The major DNA profile in the mix was an **effective match with H's DNA**. The same probability applied as referred to above with respect to the bloodstains on the floor and other places in L's residence. The minor profile **matched the DNA profile of L**.
- The prosecution relied on the following conduct that they argued revealed the consciousness of guilt:
  - Flight after his initial arrest and subsequent release on 12 July 2012 until he was located at Picnic Point on 26 July 2012; and
  - The telling of a lie to a police officer in response to the question as to whether he knew where she was: "No, I don't, her family told me she was on going on holidays." Evidence was given by the family that that did not occur.
- The prosecution argued that there was evidence of motive in:
  - The expression of anger and hurt by H towards the L which is set out above; and
  - A reliance on an unsent letter written by H to L which was found at H's residence. The letter read in part, "So whatever happens to you, you deserve it so no other blokes will cop it from you. The world will be better off without you as you are a nasty cruel, sarcastic person that acts like a 5 year old".

**Decision:** The jury found H guilty of murder. Mr Hannaford appealed but was unsuccessful.

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## Case Study ...



1. How did this criminal investigation process start? [C]
2. Part of the evidence was that L's bank accounts were untouched after 3 July 2012. How do you think the police got this evidence? [C] [A]
3. What is CCTV footage? While we are not told in the case where the footage came from, suggest one way in which the police may have been able to obtain such footage. [C] [A]
4. What do the words "luminol examination" mean? How is it used by police in obtaining bloodstains? [C] [A]
5. The DNA profile obtained from the blood samples was found to be an effective match with H's DNA. What was the probability once the DNA profile was obtained of the blood not being the blood of H? [C]
6. How did the police obtain the evidence that there was a missing rug in L's kitchen? [C]
7. The police located bloodstains of L on fabric shopping bags. Why was that evidence important? [A]
8. How would the police have been able to obtain the evidence that L's mobile phone had communicated with a cell tower in Rockville? Why was that evidence important? [C] [A]
9. How did the police obtain the evidence of injuries to H's hands which were seen on 5 July 2012? What conclusions could be drawn from the state of H's hands? [C] [A]
10. How do you think the police obtained evidence of H lighting a fire in the backyard of his property on 10 July 2012? How important do you regard that evidence? [C] [A]
11. The masking tape had bloodstains of both H and L on it. If you were on the jury determining whether H was guilty or not, what discussions do you think you would have had as to the importance of this evidence? [A]
12. There was no body ever found. Do you think that there should ever be a conviction of a murder when no body is ever found? [E]
13. Looking at the whole of the evidence, give your opinion as to the strength of the evidence against the accused. [A]
14. Should any of the actions of the police in this investigation have not been allowed, for example, the police searching the suspect's rubbish bin? [A] [E]

## Facial recognition

One of the most significant changes to methods used by police in their performance of their duties is now taking place. It is only in its early stages but it already exists. **Facial recognition** available through live automated technology has already been rolled out in many countries across the world. It is mostly used in conjunction with CCTV cameras. This facial recognition is a way of identifying or confirming a person's identity using their face. By the use of a camera or video image the features of a person's face are analysed by the software technology by measuring the distances between people's eyes, the depth of people's eye sockets, the shape of the cheek bones, the contours of ears, lips and chin and generally measuring the distances between features on a person's face. This information is then converted into what is called a FACE PRINT which is unique to an individual.

Face print can be compared to a database of known faces.

In Australia our database is relatively small compared to that in the USA and China. It is said that the FBI in the USA has access to up to 650,000,000 photographs from various State databases.

The most common use of face recognition systems is in airports and border crossings where the faces of passengers are scanned by a camera to have their identity verified without showing passports or boarding passes. The Australian Border Force have set up an automated border processing system called SMARTGATE that uses face recognition and compares the passenger's face with the data in the E-Passport microchip.

Police forces in the United Kingdom and United States use facial recognition systems. Many States of the United States have prohibited the use of facial recognition. In China for the last 15 years a Skynet Project has been set up by the Chinese Government, the object of which is to have CCTV surveillance nationwide which is capable of real-time facial recognition.

### Violation of privacy?

The obvious disadvantage of such a system is violation of privacy of citizens. There is a debate as to whether the advantages of the police using face identification systems is outweighed by the violation of a citizen's privacy. This debate will continue and will become much more important and much more controversial as face recognition systems are set up.

One use of such systems set up around the world is in retail outlets to identify people who have been convicted of shop stealing offences and fraud offences. The leading Australian Consumer Group Choice, whilst analysing the privacy policy of 25 major retailers, discovered that the Good Guys along with Kmart and Bunnings were recording their customers biometric data by using facial recognition video cameras to capture customer face prints. Kmart and Bunnings who are both owned by Wesfarmers paused the use of the technology on their cameras pending any investigation. The Choice analysis was done in June 2022. The Good Guys also reported that it was temporarily pausing the trial of such use of CCTV cameras in their stores (which in fact had been installed only at 2 of their stores) while the Office of Australian Information Commission (OAIC) looked into the complaint by Choice. It required clarification from OAIC regarding the use of the technology. Retailers defended the practice by saying that they were attempting to identify potential shoplifters to reduce theft and further to protect staff from abusive customers by refusing them entry or removing them from the store at an early opportunity. They said that the images were only retained if the images were already included in a database of individuals who were banned or associated with crime in their stores. Generally the reaction from consumers to the Choice analysis was anger and frustration.



## What do you think?

1. There have been no reported criminal case in Australia at the date of this text to the author's knowledge. Should it be a criminal offence in Australia to use facial recognition to record a person's image without their written consent. Justify your decision using legal criteria. [E]



## Case Study

*R (Bridge) v Chief Constable of South Wales* [2020] EWCA CIV 1058

**Facts:** The Police Force in South Wales used facial recognition technology with CCTV cameras taking digital pictures of faces in real time. The software isolated the human faces from the CCTV live feed cameras at the rate of approximately 50 faces per second. It automatically extracted face prints of individuals which are theoretically unique biometric templates for each individual. The software then compared these face prints to the face prints of people on the watchlist held by the police.

If there was a match of the face prints from the camera with those on the watchlist, the 2 images were reviewed by a police officer and action was taken if necessary. The South Wales Police had used this technology around 50 times between May 2017 and April 2019, mostly, at public events. The technology had scanned around 500,000 faces during this period. Those faces scanned which did not produce a match with the faces on the watchlist were automatically deleted and not kept by police.

The use of the technology by the South Wales Police was not covert. In fact the TV cameras were mounted on police vehicles, poles or posts. The police advertised the use of such technology on Facebook, Twitter and by way of large notices on the police vehicles. Police also handed out postcards to the public advising them of the use of this technology. This particular case was brought by a person who attended two events and was a human rights activist. One event occurred on 21 December 2017 at a large shopping centre in Cardiff and one occurred on 27 March 2018 at a defence exhibition.

The watchlist which had been selected by the South Wales Police did, on this occasion, contain images of persons who had escaped from custody, persons who were the subject of warrants, persons who were criminal suspects, missing persons, persons in need of protection, persons of interest for intelligence reasons and persons whose presence at a particular event might cause concern. This watchlist was comprised of approximately 900 persons in total. The facial recognition technology yielded 10 possible matches and arising out of the use of the technology 2 arrests were made.

**Decision:** At first instance the use of this technology by the police was held to be lawful. On appeal the appellant was successful and it was held that, in this particular instance, the use of the technology by the police was unlawful.

1. What were 2 events in this case in which the police used facial recognition technology? [C]
2. Which persons were included in the watchlist by the police. [C]
3. Do you think that the police use of facial recognition technology would be less or more criticised for a breach of a person's right to privacy in each of the following circumstance:

Give your reason for each:

- a. The fact that the police advertised the use of such technology? Please refer to the extent of the advertising in your response [A] [E]



## Case Study ...

- b. Automatic deletion of faces scanned which did not produce the match with faces on the watchlist. [A] [E]
  - b. The categories of persons that were contained in the watchlist. In this response please state whether you would exclude some categories of persons from the watchlist and include other categories of persons in the watchlist.
4. Having regard to all of the facts in this case would you agree or disagree with the proposition that the police should have been allowed to use facial recognition technology in the way that they did in this case. [A] [E]

Given that at this time that there is no law in Australia relating to the regulation of the manufacture or use facial technology please consider the following:

## Practical Application



### PUSH FOR NEW LAW TO REGULATE FACIAL RECOGNITION TECHNOLOGY IN AUSTRALIA

Academics have written a model law suggesting how the regulation of facial recognition technology could work.

Australia's privacy laws aren't keeping up with the growing uses of facial recognition technology and new specific fit-for-purpose legislation is needed, according to academics and advocates.

'Australian privacy law says Professor Edward Santow. It doesn't effectively protect people from harmful uses of facial recognition.'

'The law was never crafted with widespread facial recognition use in mind and we need a specific law to address it.'

In June, a CHOICE investigation revealed that three major retailers, Kmart, Bunnings Warehouse and The Good Guys, were all using facial recognition technology, largely without customers' knowledge or consent.

All three retailers eventually agreed to 'pause' their use of the technology while the Office of the Australian Information Commissioner (OAIC) investigated the legality of its use.

Kate Bower, consumer data advocate at CHOICE, says a dedicated facial recognition technology law, like the one being proposed by Santow and UTS, would give certainty to businesses about legal uses of the technology.

#### A risk-based approach

Santow says that the innovative law being proposed by him and his colleagues at the Human Technology Institute (HTI) would take a 'human rights risk-based' approach with different tiers of regulation for the different uses of the technology.

He says the law would treat the use of facial recognition technology by retail stores as 'high-risk' and would prohibit its use, unless specific exemptions were sought from the regulator.

'The foundation of the law is a human rights one. It says some uses of facial recognition are harmful and should be subject to much stricter regulation, but it also acknowledges that in some settings it is reasonable and should be encouraged,' he adds.



## Practical Application

The proposal calls on the federal Attorney General Mark Dreyfus to introduce a law regulating facial recognition technology as a matter of urgency.

Source: Jarni Blakkarly 'Push for New Law to Regulate Facial Recognition Technology in Australia', *Choice* (Web Page, 27 September 2022) <[choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/new-law-to-regulate-facial-recognition](http://choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/new-law-to-regulate-facial-recognition)>.

1. The law proposed by Mr Santow would take a 'human rights risk-based' approach. In your own words would you describe what you think this approach is? [A]
2. In this proposed law, what level of risk did Mr Santow attribute to the use of facial recognition technology by retail stores? Do you agree with that assessment? Set out your reasons for such agreement or otherwise. [C] [A] [E]
3. Mr Santow suggests that in some settings facial recognition technology is reasonable and should be encouraged. Please set out 3 examples of the use of facial recognition technology in our society which you would regard as being reasonable and therefore encouraged or allowed. Give your reasons. [A] [E]
4. Looking back at the case of the South Wales Police Force do you think that such use of facial technology by the police in that case is reasonable and thus should have been allowed? Do you think the police in Australia should be allowed to use this technology in criminal investigations? Give your reasons. [A] [E]

Another use made by this form of technology by police is to identify persons from images such as those taken at a crime scene by cameras, and compare those images to a much larger database of all images which might be held by the police service so that the person involved in the crime scene might be able to be identified. The database used therefore instead of the watchlist will be much larger, (in the case of the South Wales Police Force 450,000 people). In this use the database is not refined down to particular watchlists. The process involves taking still images of unidentified suspects from crime scenes (from either CCTV camera or mobile phone footage taken at the crime scene) and then comparing those images to the images in the whole of the large database held by the police service. It is highly controversial as to who should be allowed to be included in such large database and what is to be the source of the images in the database.



### What do you think?

Do you support the use of facial recognition technology referred to in the above paragraph. Discuss your reasons. In giving your answer please consider what should be the source of images in the large database and whether such images in such a large database should be restricted in some way from being accessed by the police service. [A] [E]

## 4.5 Rights and responsibilities of police, suspects, accused persons and victims

Police need special powers to investigate alleged crimes. They need to be authorised to go beyond what ordinary people in the community are legally able to do. They need to be able to question people. They need to be able to search people and search places in the community which may be connected with an offence. They need to be able to arrest people. As previously set out in this chapter (5.1) special powers have been given to police under the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA). We will consider the following powers and responsibilities of the police under the following headings:

- Searching of property
- Searching a person
- Searching motor vehicles
- Carrying out forensic procedures
- Taking dna samples
- Arresting and detaining persons
- Rights after detention

### Searching of property

The police must obtain permission from a person in possession of a property to enter and search it. If **permission** is refused they must obtain a **search warrant**. This is a document which gives powers to police to search places. The police can obtain a search warrant which is issued by a Justice of the Peace, a Magistrate or Supreme Court judge, s150 and s151 of the PPRA set out the circumstances in which police can apply for a warrant to enter and search a place (a search warrant). The most common ground for the police to obtain a search warrant is so that they can obtain evidence of the commission of an offence at a particular place. Once a warrant is issued, the police have the power to enter the place stated in the warrant and then to search the place. The search warrant entitles the police to identify and collect any physical and documentary items of evidence which are relevant to their investigation.

The search can involve even a power to dig up the land, to photograph anything, to remove walls or ceiling linings or even panels of a vehicle to search for evidence. However the warrant only allows for structural damage to a building if the warrant was issued by a Supreme Court Judge and authorises the exercise of such a power. It also includes a power to search anyone at the place who the police suspect has been involved in the commission of an offence. The police must give to the occupier a copy of the search warrant, or if there is no person present, leave a copy in a conspicuous place.

The police also have the right to search a person's premises without a search warrant (an emergent search). This power, however, exists only in certain circumstances. It really only relates to where a police officer reasonably suspects that evidence of the commission of an offence will be lost – namely concealed or destroyed – unless the place is immediately entered and searched. This power is set out in s160 of the PPRA. This power also can only be exercised if the offence the police officer suspects has been committed is a 'Part 2 offence' set out in s159 of the PPRA.



## Case Study

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*R v Dang; R v Duong* [2015] QSC 377 (25 August 2015)

**Facts:** Dang was a target of a police investigation and was one of nine people who the police were about to arrest. As part of the police operation which was due to be carried out on 4 September 2013, search warrants were obtained from the Magistrate at Holland Park. The search warrant relating to Dang was for his residential address at Camira which was believed by the police to be where Dang was living. As part of the coordinated operation, there was a briefing at Dutton Park police station at approximately 5.00 pm for all the police officers involved in the closure of the operation. Detective Green had the job of executing the search warrant at Dang's address at Camira. Other police officers were to execute other search warrants on other residences at the same time.

When Detective Green arrived at the Camira address it was in darkness. She decided not to execute the search warrant. She then obtained information that Dang was living at another address at Harvey Place, Calamvale. Detective Green and another police officer then drove to Calamvale to see if they could locate Dang's car at or near that address. Other police officers located Dang's car at Harvey Place and telephoned Detective Green at about 9.05 pm. Detective Green then sighted Dang's car while travelling to Harvey Place. In fact Dang's car pulled in behind Detective Green's police car which was unmarked but which had a red and blue light (not switched on) on the back parcel tray. Detective Green turned off first and Dang's car continued into Harvey Place and stopped outside the residence which was the address the police had for Dang, and where it had been parked previously. The driver of Dang's car was a female and not Dang. The police officers, including Detective Green, discussed what they should do. Detective Green was concerned that the female driver would alert Dang of the police presence and the evidence they expected to find at Dang's residence would be lost. Detective Green was aware of the information the police had received on that very day. Dang had taken possession of a very large quantity of drugs. There was also a concern the other search warrants had been executed and that

Dang may have been telephoned by an associate about the arrests of others. Detective Green then conducted an emergent search (that is, a search without a warrant) of Harvey Place, Calamvale.

Detective Green was successful. She seized evidence of illegal drugs, namely methamphetamine and heroin in the search. Dang was charged along with others. The charges were defended. It was alleged by the defence that any evidence seized from Harvey Place should be excluded as evidence in the trial because the evidence was seized unlawfully.

**Legal Issue:** Was the evidence of drugs seized lawfully by the police and, therefore, could it be allowed to be used (admissible) in the trial of the accused?

**Decision:** The search, without a warrant, would only be lawful if the terms of s160 of the PPRA were met. Section 160, is headed 'Search to prevent loss of evidence'. This section allows a police officer to enter a place and exercise search warrant powers as if a search warrant was already given, if the police officer 'reasonably suspects' that there is something at a place in the possession of a person which is evidence of the commission of a Part 2 offence (in this case the possession of the drugs suspected held by Dang and Duong were a Part 2 offence) and the evidence may be concealed or destroyed unless the place is immediately entered and searched.

Detective Green had received information that Dang was present at Calamvale as opposed to Camira, and, she and other investigators had identified Dang's car parked at the house at Calamvale. There was also a real risk that the police car had been identified by the female

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## Case Study

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driver of Dang's car who had returned to the residence and that the woman would advise Dang and others in the house of the possible existence of police officers watching the house. As a result Dang might conceal or dispose of the drugs or other evidence. It was held, therefore, that the search without a warrant of the address at Calamvale was justified under s160 of the PPRA and that the application by the defence to exclude evidence was refused.

1. What is an emergent search? [C]
  2. What was the evidence seized in the search which the defence was trying to exclude from the trial? [C]
  3. What two things must a police officer reasonably suspect before a search without a warrant is justified under s160 of the PPRA? [C]
  4. What made the police officer believe there was a risk of the evidence being concealed or destroyed? [C]
  5. Do you think that the belief of the police officer referred to in the question above was 'reasonable'? [A]
  6. Do you think the police should have such a right to enter a person's house and search it as is provided for in s160? [E]
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## Searching a person

The police have power to search people without a warrant. This power arises when a police officer reasonably suspects that any of a whole range of circumstances set out in s30 of the PPRA exist. The prescribed circumstances set out in s30 are wide. You will see, for example, that they include a police officer reasonably suspecting that a person has in his/her possession:

- some form of weapon;
- unlawful dangerous drug;
- stolen property;
- some type of house breaking implement;
- something which a person intends to use or cause harm to himself or another; or
- unlawfully obtained property in his or her possession.

There has been a recent change to the requirement that a police officer must have a reasonable suspicion of a person having in his/her possession some form of weapon before they can conduct a search. The change is referred to as **Jack's Law**. Jack's Law was passed in the Queensland Parliament on 29 March 2023. It is an amendment to the PPRA which allows Queensland Police to use handheld metal detectors to randomly stop and search people for knives and other weapons on public transport and in nightclub precincts across Queensland. The police do not have to have any reasonable suspicion that a person is carrying a weapon but can simply use a wand in Safe Night Precincts. The law is named after Jack Beazley who was fatally stabbed in Surfers Paradise in December 2019. The Acting Deputy Commissioner of Police, Mark Wheeler acknowledged the significance of the change being made by agreeing that:

*...this is probably one of the strongest powers that Queensland Police Service has ever been given, in that in an operation we're able to scan a person without any suspicion.*

Police have advised that since the commencement of the Act up until start of August 2023 16,000 people had been scanned and more than 220 weapons seized. As a result of the scanning more than 500 people have been charged (including cautions) on over 900 offences. The Police Acting Deputy Commissioner said that 60% of the weapons were found on people in transport areas and the rest were found in party precincts within Safe Night Precincts. Safe Night Precincts areas are specifically designated areas within towns and cities in Queensland.

It is illegal to physically possess a knife in a public place or school in Queensland without a reasonable excuse (see s51 of the *Weapons Act 1990* (Qld)). It is **not a reasonable excuse** to say that you need a knife for self-defence. A reasonable excuse includes carrying a knife for the purposes of performing some lawful activity or because it is necessary to carry out someone's duty or because it is necessary for a person's employment to carry such a weapon, or because the weapon is required for recreational or sport activities.

The loss in civil liabilities as the result of the passing of Jack's Law has caused some consternation in Queensland. The vital question is whether Queensland should continue with Jack's Law after a period of 2 years or more when it will be reviewed.



### Research Task

The purpose of this research exercise is to determine the answer to the following question:

1. Do the advantages of having Jack's Law outweigh the disadvantages? [A]

In responding to this question please consider the following:

- a. The detriment to our society of victims who have been killed as a result of unlawful knife attacks and the loss and anguish suffered by relatives and friends of such victims.
- b. The success of the police force in the seizure of the number of knives which has been demonstrated since the law came into force.
- c. The reduction (if any) of crimes arising from the use of knives.
- d. The extent to which the law balances individuals rights with society's need for order. In this context consider:
  - i. The objections of the Civil Liabilities Union; and
  - ii. The objections of advocates of the Aboriginal Legal Service to the passing of such law.

There are now provisions in the PPRA about what the police should do in conducting personal searches. These are contained in s624, s629 and s630, which deal generally with:

- limiting embarrassment to the person being searched;
- ensuring that the search is conducted by a police officer of the same sex as the person to be searched or by a doctor if the search requires the removal of clothing during the search, telling the person why it is necessary to remove the clothing and giving the person the opportunity to remain at least partly clothed during the search;
- at all times conducting the search in a way that provides reasonable privacy for the person being searched; and
- if the police officer seizes clothing during the search (for example, clothing which may be evidence of the commission of an offence), ensuring that the person is left with or given reasonably appropriate clothing to wear.



## What do you think?

Are the precautions set out in s624, s629 and s630 reasonable having regard to balancing a persons right to privacy against police having sufficient powers to carry out their work? [E]

## Searching motor vehicles

In a similar way a police officer can search motor vehicles without warrants provided he or she reasonably suspects any of a series of prescribed circumstances set out in s32 of the PPRA exists.

## Practical Application



### ***Police Powers and Responsibilities Act 2000 (Qld)***

#### ***31 Searching Vehicles Without Warrant***

- (1) A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist may, without warrant, do any of the following—*
- (a) stop a vehicle;*
  - (b) detain a vehicle and the occupants of the vehicle;*
  - (c) search a vehicle and anything in it for anything relevant to the circumstances for which the vehicle and its occupants are detained.*
- (2) Also, a police officer may stop, detain and search a vehicle and anything in it if the police officer reasonably suspects—*
- (a) the vehicle is being used unlawfully; or*
  - (b) a person in the vehicle may be arrested without warrant under section 365 or under a warrant under the Corrective Services Act 2006.*
- (3) If the driver or a passenger in the vehicle is arrested for an offence involving something the police officer may search for under this part without a warrant, a police officer may also detain the vehicle and anyone in it and search the vehicle and anything in it.*
- (4) If it is impracticable to search for a thing that may be concealed in a vehicle at the place where the vehicle is stopped, the police officer may take the vehicle to a place with appropriate facilities for searching the vehicle and search the vehicle at that place.*
- (5) The police officer may seize all or part of a thing—*
- (a) that may provide evidence of the commission of an offence; or*
  - (b) that the person intends to use to cause harm to himself, herself or someone else; or*
  - (c) if section 32 (1) (b) applies, that is an antique firearm.*
- (6) Power under this section to search a vehicle includes power to enter the vehicle, stay in it and re-enter it as often as necessary to remove from it a thing seized under subsection (5).*



## Practical Application ...

### 32 Prescribed Circumstances for Searching Vehicle Without Warrant

- (1) It is a prescribed circumstance for searching a vehicle without a warrant that there is something in the vehicle that—
- (a) may be a weapon, knife or explosive a person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or
  - (b) may be an antique firearm that a person possesses and the person is not a fit and proper person to possess the firearm—
    - (i) because of the person's mental and physical fitness; or
    - (ii) because a domestic violence order has been made against the person; or
    - (iii) because the person has been found guilty of an offence involving the use, carriage, discharge or possession of a weapon; or
  - (c) may be an **unlawful dangerous drug**; or
  - (d) may be stolen property; or
  - (e) may be unlawfully obtained property; or
  - (f) may have been used, is being used, is intended to be used, or is primarily designed for use, as an implement of housebreaking, for unlawfully using or stealing a vehicle, or for the administration of a dangerous drug; or
  - (g) may be evidence of the commission of an offence against any of the following—
    - the Racing Act 2002
    - the Racing Integrity Act 2016
    - the Corrective Services Act 2006, section 128, 129 or 132
    - the Nature Conservation Act 1992; or
  - (h) may have been used, is being used, or is intended to be used, to commit an offence that may threaten the security or management of a prison or the security of a prisoner; or
  - (i) it may be tainted property; or
  - (j) may be evidence of the commission of a seven year imprisonment offence that may be concealed or destroyed; or
  - (k) may be evidence of the commission of an offence against the Criminal Code, section 469 that may be concealed on the person or destroyed if, in the circumstances of the offence, the offence is not a seven year imprisonment offence; or
  - (l) may be evidence of the commission of an offence against the Summary Offences Act 2005, section 17, 23B or 23C; or
  - (m) may be something the person intends to use to cause harm to himself, herself or someone else; or



## Practical Application

*(n) may be evidence of the commission of an offence against the Penalties and Sentences Act 1992, section 161ZI.*

*(2) Also, the following are prescribed circumstances for searching a vehicle without a warrant*

–

*(a) the driver or a passenger in the vehicle has committed, or is committing, an offence against the Summary Offences Act 2005, section 10C;*

*(b) the vehicle is being used by, or is in the possession of, a person who has consorted, is consorting, or is likely to consort with 1 or more recognised offenders.*

1. How are s31 and s32 of the PPRA connected? [C]
2. What does 'reasonably suspects' in s31 mean? How does it stop police officers stopping cars randomly? [C] [A]
3. Describe the powers of police under s31. Explain why these may be necessary. [C] [A]
4. Do the 'prescribed circumstances' in s32 include speeding or driving under the influence of alcohol? Should they be included? [C] [E]

## Carrying out forensic procedures

The PPRA sets out the circumstances in which the police can carry out forensic procedures and, in particular, have qualified persons such as doctors, nurses and dentists carry out such procedures. They can be carried out with the consent of the person. If the person refuses to give consent, the police can obtain a forensic procedure order from a Magistrate by making an application. A qualified person who conducts an intimate forensic procedure is a doctor, dentist or forensic nurse examiner. A typical forensic procedure would be having a doctor or nurse inspect a person's body for identifying features. The police might wish for a dentist to take a dental impression of a person's mouth or examine a bite mark on a person.

### Taking DNA samples

These procedures are important because they can help identify victims and explain what happened when a crime was committed. The police may arrange for a doctor or nurse to take a DNA sample for DNA analysis. Police officers themselves may be authorised by the Commissioner of Police to take DNA samples if they have completed a course of training approved by the Commissioner of Police for that purpose and have the necessary experience or expertise to take the sample. The DNA sample can be taken from a person at a police station, a hospital, a prison or detention centre or any other place that the police consider is appropriate in the circumstances. The PPRA sets out in s478 that the person taking the DNA sample can only take it from a person by way of a mouth swab or by the collection of hair (including roots) from the person.

There is a concern in our community that, once a DNA sample has been taken, the results should be destroyed. If the person from whom a sample is taken is innocent, s490 of the PPRA sets out that a DNA sample taken from a suspect must be destroyed. Generally, if the indictable offence is discontinued before a court, or a person is found not guilty of the offence, or if a proceeding for the offence is not started within one year, then the DNA sample should be destroyed immediately. However, if the DNA sample has been given by consent, then unless the person giving the consent limits the purposes of his or her consent to the purpose stated by the police officer when asking for the DNA sample, the results of the DNA analysis of the sample may be included in the Queensland DNA database (QDNA). This can be used by the

Commissioner of Police for performing any function of the police service. If a person, however, has been found guilty of an indictable offence or is not proceeded against for an indictable offence because of that person being unfit for trial because of mental illness, the DNA sample will not be destroyed and will form part of the Queensland DNA database.

### Arresting and detaining persons

If a warrant is issued for the arrest of any person, then it is obviously lawful for a police to act under the warrant and to arrest that person. To arrest a person can include to apprehend, take into custody, detain, and to remove to another place for examination or treatment. The most common form of arrest warrant is issued when a person fails to turn up in court at the prescribed time in breach of his/her bail conditions. Unless there is an explanation made to the court by a defence lawyer who turns up at court and explains to the court the reason why his client is not present, a warrant is usually issued by the court. If there is a failure by a person to turn up on a couple of occasions at the prescribed time in court, then, despite the best efforts of a defence lawyer, an arrest warrant can still be issued. It is also possible for the police to apply for an arrest warrant before proceedings have been started against the person. The usual grounds for such an arrest warrant are that the police reasonably believe that to simply commence proceedings would not be an effective means to bring the suspect or possible offender to court. The police can also arrest a person without a warrant. Traditionally the police have always been able to arrest a person who a police officer reasonably suspects has committed (or is committing) an indictable offence. In the case of children it needs only to be any offence. In addition, there is set out in s365 of the PPRA a whole range of reasons as to when a police officer may arrest a person without warrant. These include the following:

- To prevent a continuation of an offence.
- To prevent the harassment of, or interference with, a person who may be required to give evidence relating to an offence.
- To prevent the fabrication of evidence.
- To preserve the safety and welfare of any person because the offence is an offence under the *Domestic and Family Violence Protection Act 2012* (Qld).

#### Hypothetical?

Mary was living in a defacto relationship with Tony. Mary was often the victim of domestic violence of a physical kind. A neighbour, who had heard on many occasions the sounds of violence, saw Tony repeatedly striking Mary through her window into the kitchen window of Mary's and Tony's house. She called the police. When the police arrived, they found that the physical violence was continuing.

1. In what circumstance do the police have the right to arrest Tony without any warrant? [C]
2. Does the fact that Mary refuses to complain to the police despite her severe injuries make any difference to the police power to arrest? [A]

### Rights after detention

It follows from what has been said above that the police can detain a person for investigation or questioning, if the police suspect that person of having committed an offence. However, it must be an indictable offence. There are very important safeguards set out in the PPRA. These safeguards include:

- time limits for the period of questioning (see s403 and s404 PPRA);
- a person having a right to communicate with a friend, relative or lawyer (s418 PPRA);
- special provisions when questioning Aboriginal people and Torres Strait Islanders (s420 PPRA);
- special provisions about the questioning of children (s421 PPRA);
- special provisions with respect to questioning of persons with impaired capacity;
- special provisions with respect to questioning of intoxicated persons (s423 PPRA);
- a requirement to caution persons (s431 PPRA);
- a right for a person with insufficient knowledge of the English language to an interpreter (s433 PPRA); and
- the right of a person to be electronically recorded (s435 PPRA).

## Review

### Comprehend

1. **Describe** and **explain** each of the following terms:

- |              |                                 |
|--------------|---------------------------------|
| a. Accused.  | g. Confessional evidence.       |
| b. Suspect.  | h. Crime scene.                 |
| c. Victim.   | i. DNA.                         |
| d. Offender. | j. Facial recognition evidence. |
| e. Witness.  | k. Fingerprint evidence.        |
| f. Charge.   | l. Warrant.                     |

[C]

2. **Explain** what a crime scene warrant is. [C]

3. **State** the circumstances when a police officer has the power to search a person without a warrant. [C]

4. **Describe** what restrictions are placed upon the police when conducting a personal search. [C]

5. **Identify** when DNA samples must be destroyed. [C]

### Analyse and evaluate

1. Outline in your own words what constitutes a confession by a person and describe at least 4 circumstances in which evidence of confessions is obtained. In relation to undercover police obtaining confessions from an offender, do you regard it as important that the police be able to go to the extent in the use of undercover police, as they did in *Cowan's* case. [A][E]

2. What conclusion do you draw about the conduct of the police in the *Scott Austic* case. You should reference the answer by referring to the facts of such case [C] [A] [E].
3. Much of the evidence of the accused's guilt in *Hannaford's* case was circumstantial. Select what you regard as the 5 most important items of circumstantial evidence in that case and explain why you consider that those particular items of evidence to be of such importance. Assume those 5 items of evidence which you have selected as being the most important did not exist in that case. Do you think then with such evidence removed that Hannaford would have been convicted, give your reasons [C] [A] [E].
4. With respect to facial recognition and the need for introduction of laws regulating the use of such technology as a tool for collecting evidence by the police, it is suggested by Mr Santow that any new law being proposed should have different tiers of regulation for the different uses of the technology. Mr Santow suggests that the use of such technology by retail stores should be regarded as a high risk adventure and therefore it's use should be prohibited unless there's a specific exemptions given by a regulator. Would you know consider whether future legislation should use the categories of high risk and low risk for the type of offences that are being investigated by the police. For example, if the police are investigating a murder, should the safeguards in the use of facial recognition technology be less rigorous than if they were investigating car theft. Do you agree with this proposition, give your reasons? [A] [E]
5. The same technology as facial recognition technology is used in Australia for identification of animals, particularly cattle. See if you can discover by way of research the extent of the use of such technology explaining the reasons as to why the technology is being used for animal identification. [A] [E]

# Criminal investigation process

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## Chapter 5: Criminal offences

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**5.1 Types of criminal offences**

**5.2 Offences against the person**

**5.3 Offences against property**

**5.4 Traffic offences**

**5.5 Drug offences**

**5.6 Attempts to commit crimes**

**5.7 Accessories and parties to offences**

### **Learning objectives**

At the conclusion of this chapter students will be able to:

- comprehend the difference between summary and indictable offences.
- analyse and apply
  - data to ascertain relationships, patterns and trends in crime
  - the elements of offences to a range of criminal scenarios.
- select legal information and data about crime rates and criminal offences.

## 5.1 Types of criminal offences

### Key Terms

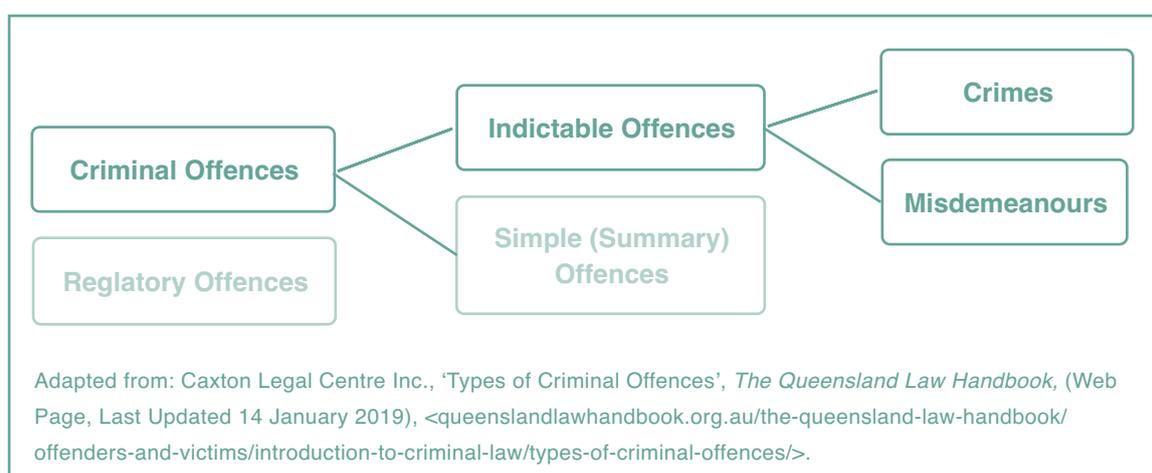
**Crime:** an act or omission that is in breach of the criminal law.

**Indictable offence:** A serious criminal offence. It includes offences such as manslaughter, rape and armed robbery.

**Summary (simple) offence:** A less serious offence. It includes offences such as public nuisance, intoxication in a public place and some minor traffic offences

There are two types of offences in Queensland, criminal offences and regulatory offences. The *Criminal Code 1899* (Qld) s3 classifies offences into the categories shown in the diagram below.

### Types of criminal offences.



The distinction between the different types of offences is important because it determines the:

- court an offence will be heard in
- legal processes or procedures that will apply
- time limits for bringing an offence to court
- penalties available.

### Summary (simple) offences

A **summary (simple) offence** is a less serious offence. Examples of summary (simple) offences include:

- public nuisance,
- urinating in a public place,
- wilful exposure, and
- fare evasion.

Summary (simple) offences are usually heard in the Magistrates Court of Queensland without a jury. If a defendant has pleaded 'not guilty', they will face a summary trial (i.e. a trial before a magistrate only and not a jury). Witnesses give evidence and are cross-examined before a magistrate decides whether the offence has been proven 'beyond a reasonable doubt.'

## Indictable offences

An **indictable offence** is a serious criminal offence. Examples of indictable offences include:

- homicide,
- burglary,
- torture,
- sexual assault, and
- stalking.

You will know whether an offence is indictable or not, because each offence contained in the *Criminal Code 1899* (Qld) will state whether it is a:

- crime,
- misdemeanour, or
- simple offence.

**Indictable offences must be prosecuted on an indictment** (a document written and presented by a person authorised to prosecute a criminal offence that sets out the charge) before a judge alone or judge and jury in the Supreme or District Court of Queensland. **Some indictable offences can be heard summarily when the law allows.** For example, in some cases a defendant charged with possessing a dangerous drug (*Drugs Misuse Act 1989* (Qld) s9) may have the offence heard summarily if no commercial purpose is alleged by the Crown. If convicted this allows the defendant to receive no more than three years imprisonment - see *Drugs Misuse Act 1989* (Qld) s13(3)(b).

## Practical Application

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1. Locate the *Criminal Code 1899* (Qld). [S]
2. For each offence listed below determine if the offence is:
  - a. an indictable offence or a non-indictable offence
  - b. a crime, misdemeanour or simple offence
  - c. an offence against a person, property, morality or the public interest. [A]

**Section 59** Member of Parliament receiving bribes

**Section 80** Piracy

**Section 207** Disturbing religious worship

**Section 229G** Procuring engagement in prostitution

**Section 321A** Bomb hoaxes

**Section 335** Common assault

**Section 475** Traveling with infected animals

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As you discovered in the practical application, criminal offences can be further categorised in different ways. For the remainder of this chapter, you will study a selection of:

- offences against the person
- offences against property
- motor vehicle or traffic offences
- drug offences.



## 5.2 Offences against the person

### Homicide

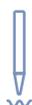
#### Key Terms

**Actus reus:** a Latin term that describes the act or omission that reflects the physical element of a criminal offence. The act or omission must be voluntary and conscious.

**Mens rea:** Latin for a 'guilty mind'. The term describes the mental element of some criminal offences. To be found guilty it must be proven that the person has demonstrated intent to engage in that conduct.

Some definitions drawn from Australian Government Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, (Web Page, 2002), <[ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners](http://ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners)>.

It is unlawful to kill another person, although in some circumstances it can be authorised, excused or justified by law, which we will explore in later chapters. **This crime seeks to protect one of the most fundamental human rights, that being, the right to life.** All homicide matters are decided in the Supreme Court of Queensland.



#### Practical Application

How common is homicide?

Before you read the statistics below, answer the following questions about your knowledge and impressions about the occurrence of homicide in Australia:

- Do you think the homicide rate in Australia is increasing or decreasing?
- What weapon(s) do you think is most often used in homicide incidents?
- Are males or females more likely to be a homicide victim?

The Australian Institute of Criminology (AIC) reported that between 1 July 2020 and 30 June 2021 in Australia:

## Practical Application ...

- there was a decrease of 51 homicide incidents (a 20 per cent decrease in the incident rate per 100,000) when compared to the previous year,
- three-quarters of victims knew the offender and a fifth were killed by a stranger,
- 59 per cent of homicide incidents occurred in a residential setting,
- knives or other sharp instruments were the most used weapon in homicide incidents (35 per cent), with firearms being used in 17 per cent of incidents.

**Table 1: Homicide incidents, victims and offenders, 1 July 2020 to 30 June 2021**

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	TOTAL
Incidents									
Number	61	28	42	29	11	6	6	7	201
Rate	0.75	0.73	0.80	1.05	0.61	1.06	1.32	2.81	0.82
Victims									
Male	43	32	33	21	8	4	6	5	152
Female	20	20	12	9	4	2	0	2	69
Offenders									
Male	53	48	57	31	12	6	7	8	222
Females	10	12	12	4	0	0	0	3	41

Adapted from: Samantha Bricknell, *Homicide in Australia 2020-21* (Australian Institute of Criminology Statistical Report 42, 28 March 2023) 4 <[aic.gov.au/publications/sr/sr42](http://aic.gov.au/publications/sr/sr42)>.

Referring to the statistics and information above, answer the questions below. Ensure you reference any data that you use correctly (i.e. Table 1 or Bricknell, 2023, 4).

1. Is the homicide rate in Australia going up or down? [C]
2. Which state or territory has the highest number of homicide incidents? [C]
3. What weapon is most likely to cause someone's death in a homicide incident? [C]
4. What reasons could you give for the fact that two thirds of homicide victims were male? [A] [E]
5. In 2022 the homicide rate in England and Wales was 1.2 per 100,000 people and in 2021 the homicide rate in the United States was 7.8 per 100,000 people. Why do you think Australia's rate is much lower? [A]
6. Did any of the statistics or information provided in the *Homicide in Australia* report surprise you? Explain. [R]

## Tip

The Australian Institute of Criminology (AIC) ([aic.gov.au](http://aic.gov.au)) is a good primary source for statistics related to crime. Some other statistical sources you may wish to bookmark include:

- Australian Bureau of Statistics (ABS) ([abs.gov.au/statistics/people/crime-and-justice](http://abs.gov.au/statistics/people/crime-and-justice))



## Tip

- Australian Institute of Health and Welfare (AIHW) ([aihw.gov.au/reports-data](http://aihw.gov.au/reports-data))
- Queensland Courts' domestic and family violence statistics ([courts.qld.gov.au/court-users/researchers-and-public/stats](http://courts.qld.gov.au/court-users/researchers-and-public/stats))
- Queensland Government Statisticians Office (QGSO) ([qgso.qld.gov.au/about-qgso/our-services/crime-statistics-research](http://qgso.qld.gov.au/about-qgso/our-services/crime-statistics-research))
- Queensland Police Service (QPS) ([mypolice.qld.gov.au/queensland-crime-statistics/](http://mypolice.qld.gov.au/queensland-crime-statistics/))
- Queensland Sentencing Advisory Council (QSAC) ([sentencingcouncil.qld.gov.au/statistics](http://sentencingcouncil.qld.gov.au/statistics))

## Murder

Murder is defined in *Criminal Code 1899* (Qld), s302. It has a mandatory sentence of life imprisonment (s305), as stated by the Hon Justice Applegarth in *R v Markovski* [2021] QSCSR 567:

*There is only one sentence that can be imposed for the offence of murder. Damian Markovski, you are sentenced to life imprisonment.*

### Elements of murder

**All criminal offences require proof of one or more elements.** These elements can be a physical element (such as an act or an omission to act) or a fault element (such as intention, knowledge, negligence or recklessness).

To be found guilty of murder, the Crown must prove the following elements beyond a reasonable doubt, that:

- a person (the accused)
- unlawfully
- kills
- another person (the victim)
- with intention to kill (or to cause grievous bodily harm).

We will now look at the element of 'kills', 'another person' and 'intention', as well as explore some of the different circumstances that constitute murder.

### 'Kills'

**'Kills' means to cause a death either directly or indirectly.** The issue of causation (the relationship between an act and its result or consequences) is a very important one in homicide, as sometimes there can be more than one event that contributes to someone's death and **a court may need to decide what event was the substantial cause of a victim's death.** It is also important to mention that a person can be held to have caused a person's death if a victim:

- takes evasive action such as jumping out of a window due to a threat or intimidation (s295)
- asks for a person's assistance to accelerate their death, as you cannot consent to your own death (s296), the exception being a death under the *Voluntary Assisted Dying Act 2021* (Qld)
- has a physical defect, weakness or abnormality or the victim makes a decision to refuse medical treatment that contributes to their death (for example, a person with a thin skull)

may die because of a single punch, but another person would be merely injured and recover) (s297)

- dies as a result of medical treatment that is reasonably proper in the circumstance provided by medical professionals in good faith (s298).

The cases of *Levy v R* (1948) 51 WALR 29 and *Royall v R* (1991) 172 CLR 378 demonstrate how causation is applied in the real world.

## Case Study

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*Levy v R* (1948) 51 WALR 29

**Facts:** The victim, who was in a critical condition, was admitted to hospital with stab wounds that were intentionally inflicted by Levy. The hospital treated the victim in line with the best course of treatment available in these circumstances. Unbeknownst to the doctors at the time of treatment was that the victim had a diseased liver. The victim's liver broke down because of the drugs used to treat the stab wounds and died.

**Legal Issue:** Had Levy caused the victim's death?

**Decision:** The treatment provided by the doctors was reasonable and proper given the circumstances. The stab wounds caused by Levy was the key cause of the victim's death ('but for' the stab wound, the victim would be alive).

*Royall v R* (1991) 172 CLR 378; 100 ALR 669; 65 ALJR 451; 54 A Crim R 53

**Facts:** The victim was found in the street below an apartment that she shared with Royall. There was a great deal of blood throughout the apartment and the bathroom door had been forcibly opened. Royall admitted he and the victim had a violent argument during which he punched her in the face and pulled her hair. Royall said the victim went to take a shower to calm down, but, as she was an epileptic, he was concerned for her safety, so he forced open the door. He gave evidence that he saw her voluntarily jump out of the window. The Crown argued that Royall either pushed her out of the window, or that in fear of his continuing violence she either fell while trying to get away from his attacks or believed that jumping was her only means of escape.

**Legal Issue:** Had Royall caused the victim's death?

**Decision:** The jury found Royall guilty of murder. This was upheld by the High Court of Australia.

1. What were the possible causes of the victim's death in both cases? [C]
  2. What did the Court hold was the substantial cause of death in each case? Do you believe that it was just and fair to convict Levy and Royall of murder in these circumstances? Ensure you consider the implications of your decision. [A] [E]
  3. In 2014, New Zealander Warriena Wright fell 14 stories to her death after trying to lower herself onto the apartment balcony below. Wright was at the apartment of Gable Tostee, whom she met on Tinder. He was charged with her murder but was found 'not guilty' by a jury.
    - a. Locate at least two news articles on this case. [S]
    - b. Compare and contrast the facts of Tostee that you were able to locate with Royall. [A]
    - c. Do you believe the outcome of *R v Tostee* was just and fair, taking into account the circumstances and facts you were able to locate? Why do you believe the outcome in this case was different? [E]
-



### 'Another person'

Rarely is this a difficult element to prove, but there have been instances where an unborn child has been killed by the actions of another. Under Queensland law the killing of an unborn child is recognised as a separate offence (s313). The maximum penalty for this offence is life imprisonment.

#### What do you think?

***Criminal Code 1899 (Qld)***  
***292 When a child becomes a human being***

*A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.*

Decide whether you believe that the 'killing of an unborn child' (s313) should continue to be a separate criminal offence or whether the definition of a 'human being' be amended to include an unborn child? Use legal criteria to justify your decision. [E]

### 'With intention to kill'

Some criminal offences have a mental element. That is, to be found guilty the defendant must:

- commit the action that is prohibited by law, and
- have the necessary mental element that constitutes the intention to commit the crime.

**In the offence of murder, the *actus reus* is the killing of another person and the *mens rea* is the intention to kill or do grievous bodily harm to that person.**

To establish an intention, you look at what the defendant had in his or her mind when the act that caused the victim's death occurred. If the accused meant to seriously harm or kill the victim, then the required intention was established. The intention to kill need not be directed at a specific person. For example, if a person with a gun fires at a group of people, he or she has an intention to kill, even though he or she may not have known any of the victims or aimed at a specific person.

### Practical Application

**TIAHLEIGH PALMER: CORONER REJECTS FOSTER FATHER'S CLAIM HE ACCIDENTALLY SUFFOCATED QUEENSLAND GIRL**

The Queensland schoolgirl Tiahleigh Palmer likely died as a result of choking or asphyxiation in a deliberate act by her foster father, a coroner has found.

The convicted sex offender Rick Thorburn told the inquest into Tiahleigh's death he accidentally suffocated his foster daughter but this was rejected by the deputy state coroner, Jane Bentley, on Friday.



## Practical Application

Thorburn ‘pleaded guilty to her murder but has never given an account, either on oath or otherwise, as to how he killed her,’ counsel assisting the coroner, Kate McMahon, said during the hearing.

In the hours before Tiahleigh died, she had been to a hip-hop dance class where she complained of stomach pains.

That same night, Thorburn’s son, Trent, confessed to his mother Julene that he’d had sex with the schoolgirl and feared the stomach pains were a sign she was pregnant. Thornburn and his wife feared a pregnancy could mean Trent would go to jail, according to earlier proceedings.

That night, Julene, Trent and brother Joshua went out, leaving Tiahleigh home alone with Rick Thorburn for two hours. She was never seen alive again.

Source: Australian Associated Press, ‘Tiahleigh Parmer: Coroner rejects foster father’s claim he accidentally suffocated Queensland girl’, *The Guardian*, (Online, 18 June 2021) <[theguardian.com/australia-news/2021/jun/18/tiahleigh-palmer-coroner-rejects-foster-fathers-claim-he-accidentally-suffocated-queensland-girl](https://theguardian.com/australia-news/2021/jun/18/tiahleigh-palmer-coroner-rejects-foster-fathers-claim-he-accidentally-suffocated-queensland-girl)>

1. Identify the defendant and the victim. [C]
2. Explain the findings of the deputy state coroner, Jane Bentley. [C]
3. Explain the *actus reus* required to prove the criminal offence of murder. Apply this element to the facts stated in the article. [A]
4. The defendant told the inquest the victim’s death was an accident. Although we haven’t covered any defences yet, do you think the defendant demonstrated intention or *mens rea*? Why or why not? [A] [E]

## Manslaughter

Manslaughter is defined in *Criminal Code 1899* (Qld), s303. If a person is sentenced for manslaughter, they are liable to imprisonment for life (s310).

As manslaughter shares many of the same elements as murder, we will not discuss these in detail. However, for completeness, to be found guilty of manslaughter, the Crown must prove:

- a person (the accused)
- unlawfully
- kills
- another person (the victim).

At trial the successful application of a defence or excuse may result in a defendant being found ‘not guilty’ of murder, but ‘guilty’ of manslaughter. This will be explored in Chapter 9.

**WARNING:** The following inquiry investigates the homicide of a child.

## Inquiry Focus

*Should Queensland Parliament pass a specific child homicide offence?*

### The statistical picture of child homicide

Children are the most vulnerable victims of crime, as they completely rely on adults to protect them. In 2018, a consultation paper released by the Queensland Sentencing Advisory Council (QSAC) on sentencing arising from the death of a child shared that there are:

#### Source 1

*.....a number of challenges in investigating and prosecuting child homicide offences.*

*These include:*

- the difficulty in determining the cause of death, particularly in very young children and the need for specialist pathology reports which require specialist expertise and time to prepare,*
- the fact there are often few or no witnesses to the events leading to the death and that those involved are often the child's parent or another family member, and*
- the difficulty of establishing clear intent by an offender to harm or kill the child, particularly given the level of force required to cause a fatal injury to a child may be relatively low compared to that required to cause the death of an adult.*

Source: Queensland Sentencing Advisory Council, Sentencing for criminal offences arising from the death of a child (Consultation paper summary, May 2018) 3.

#### Source 2

In February 2019 the Australian Institute of Criminology (AIC) published *Filicide in Australia, 2000-2012: A National Study*. Researchers found that:

- Between 2000-01 and 2011-12, there were 238 incidents of filicide (another term for the killing of a child by a parent or parent like person).
- The incident rate was steady, contrary to the downward trend seen in domestic homicide or all homicide in the same period.
- Most victims were aged less than five years.
- Most victims were killed by their mother, followed by their father and stepfather.
- Queensland had the second highest number of filicide incidents.

Source: Thea Brown, Samantha Bricknell, Willow Bryant, Samantha Lyneham, Danielle Tyson and Paula Fernandez Arias, *Filicide in Australia, 2000–2012: A national study* (Report to the Criminology Research Advisory Council Grant, February 2019), 8, 26.

## What do you think?

1. Did you find these statistics surprising in any way? Explain. [R]

### The death of Mason Jet Lee

Around the time these reports were being released, a Queensland case involving the tragic death of a 22 month old boy, Mason Jet Lee, generated a great deal of public attention. His mother, Ann-Maree Lee and her partner, William O'Sullivan, were charged over his death. They pleaded guilty to his manslaughter.

### Case Study

*R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300

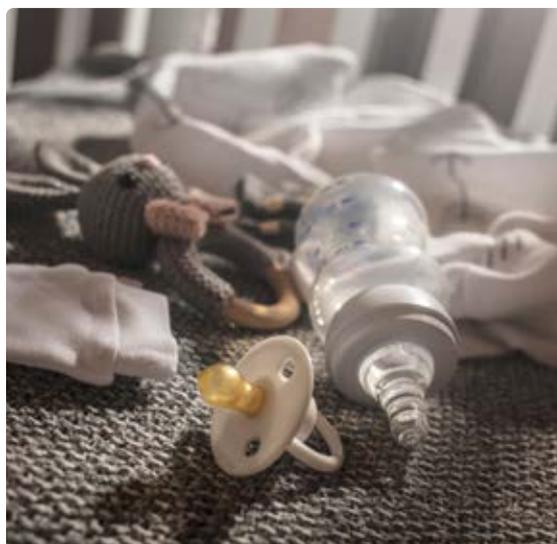
**Facts:** A 22 month old boy, named Mason Jet Lee, was found dead in June 2016. He had a history of illness and injuries. He was also known to the Department of Child Safety, Youth and Women. He died after a punch to his stomach left him with internal injuries that were not treated. His mother, Ann-Maree Lee, and her partner, William O'Sullivan, were convicted of manslaughter and child cruelty. They pleaded guilty to both offences, with O'Sullivan accepting he inflicted the injuries, although he did not recall causing them as he was severely affected by drugs.

O'Sullivan was sentenced to nine years imprisonment for manslaughter with a concurrent sentence of one year for cruelty. Lee was also sentenced to nine years imprisonment for manslaughter with a concurrent sentence of three and a half years for the cruelty offence.

**Legal Issue:** Was the sentence manifestly inadequate?

**Decision:** The Queensland Court of Appeal increased O'Sullivan's sentence to 12 years imprisonment for manslaughter. Lee's sentence remained unchanged.

1. Identify the victim and explain his relationship to O'Sullivan and Lee. [C]
2. State the criminal offence to which O'Sullivan and Lee pleaded guilty and what sentence was handed down by the Supreme Court of Queensland. [C]
3. Locate and select a viewpoint from a newspaper(s) or other news source to understand how a person in the Queensland community reacted to the sentence. Examine this viewpoint and its consequences. [S] [A]
4. When sentencing a defendant a court takes many factors into account, including previous decisions and legislation (you'll find out more about this in a future chapter). As a member of the Queensland community, do you feel the sentence O'Sullivan and Lee received reflects the community's expectations and values? Justify your viewpoint. [E]



## The Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019

In 2019, the Liberal National Party (who were in Opposition), introduced the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019. One of the features of this proposed law was to introduce a new criminal offence, s302A.

### Research Task

1. Locate a copy of the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019. To do this:
  - a. Visit the *Queensland Legislation* webpage ([legislation.qld.gov.au/](http://legislation.qld.gov.au/)).
  - b. Open the *Bills* menu.
  - c. Select *2019*.
  - d. Locate Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 from the list of Bills. [S]
2. View and read the Bill's Explanatory Notes by using the *Legislative History* tab and answer the following questions:
  - a. Identify and state the intent of the creation of a new criminal offence. [C]
  - b. Explain when the offence will apply. [C] [A]
  - c. Identify the other jurisdiction that has a specific child homicide offence. [C]
3. Locate the proposed new section, s302A, *Definition of child homicide* in the Bill and answer the following questions:
  - a. Identify and explain the elements of child homicide. [C]
  - b. Compare and contrast this proposed criminal offence with the current law (murder or manslaughter). What 'gap' or 'shortcoming' do you think this proposed law is seeking to address? [A]

As we learnt in Chapter 2, in Queensland after a law is presented and read for the first time, it is referred to a committee. The committee seeks views of the community and key stakeholders about the proposed law.

### Practical Application

This activity allows you to apply your analysis skills. Below you will find three viewpoints that specifically focus on this proposed law.

1. Select and examine two viewpoints and their consequences. Is the creation of a new offence supported by those in the legal profession, the parliament or organisations who work with children? Why or why not? [A]



### Viewpoint 1

The Queensland Law Society (the peak professional body who represent over 13,000 legal professionals) wrote:

*We acknowledge the vulnerabilities of children and young people. However, we do not consider that a separate offence for child homicide is required. In our view, the current offences of murder and manslaughter contained in the Criminal Code are sufficient. We emphasise that the maximum life sentence is available, when appropriate, for truly depraved manslaughter. We also note that there are other segments of the community may also be considered vulnerable-for example, older persons. Therefore, we do not consider that the offence of unlawful homicide of a child needs to be distinguished from unlawful homicide of an adult.*

Source: Queensland Law Society, *Submission Number 14 to Legal Affairs and Community Safety Committee*, (Web Page, 14 March 2019), <[documents.parliament.qld.gov.au/com/LACSC-4B8C/RN3556PCCO-6506/submissions/00000014.pdf](http://documents.parliament.qld.gov.au/com/LACSC-4B8C/RN3556PCCO-6506/submissions/00000014.pdf)>[queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/introduction-to-criminal-law/types-of-criminal-offences/](http://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/introduction-to-criminal-law/types-of-criminal-offences/)>.

### Viewpoint 2

Bravehearts (an agency focused on the prevention of sexual harm against children) wrote:

*Establishing a brand new offence, as proposed under this Bill, does not address many of the issues that lead to the charge of manslaughter rather than murder...we do not believe there is any evidence-base behind the proposals within it.*

Source: Bravehearts, *Submission Number 5 to Legal Affairs and Community Safety Committee*, (Web Page, 11 March 2019), <[documents.parliament.qld.gov.au/com/LACSC-4B8C/RN3556PCCO-6506/submissions/00000005.pdf](http://documents.parliament.qld.gov.au/com/LACSC-4B8C/RN3556PCCO-6506/submissions/00000005.pdf)>

### Viewpoint 3

When introducing this proposed law in Queensland's Legislative Assembly, David Janetzki MP, a member of the Liberal National Party stated:

*The bill seeks to introduce a new homicide offence in the Criminal Code which will sit between the murder and manslaughter provisions. It will apply to any child under 18 years. Under the new offence, a person who vigorously shakes, punches, kicks, stamps, throws, squeezes, suffocates, strangles or engages in any violent act that causes a child's death will be guilty of child homicide and face a minimum mandatory sentence of 15 years imprisonment... As always, the prosecution still has the discretion to charge a person with the offence of manslaughter if they reach the conclusion that that is appropriate. This bill is deliberately targeted towards those who act violently towards a child or who neglect a child for whom they have a duty of care.*

Source: Queensland, Parliamentary Debates, *Legislative Assembly*, 13 February 2019, 147-148 (David Janetzki, MP).

The Legal Affairs and Community Safety Committee recommended this Bill not be passed, so it failed to become law. Instead, an alternative law was passed. This inserted a new sub-section into s302, Definition of murder:

**Section 302(1), after paragraph (a)—**

insert—

(aa) if death is caused by an act done, or omission made, with reckless indifference to human life;

**What do you think?**

1. Imagine you are writing a submission to the Legal Affairs and Community Safety Committee. Make a decision about whether or not you support the creation of a new child homicide offence, justifying your decision with legal criteria. [E]

**WARNING:** The following section concerns the criminal offence of rape.**Rape**

The following section concerns the criminal offence of rape.

Rape is defined in *Criminal Code 1899* (Qld), s349.

To be found guilty of rape, the Crown must prove that:

- a person (the accused)
- raped
- another person (the victim).

**'Raped'**

Section 349 (2) extends the meaning of 'rape'. Rape can be:

- having carnal knowledge (a historic term for sexual intercourse) without consent, or
- penetrating the vulva, vagina or anus with a thing or body part that is not a penis without consent, or
- penetrating the mouth of another with a penis without consent.

An example of one of the circumstances of rape described above is found below.

**Practical Application****TRIO BEGIN JAIL TIME OVER AUS DAY RAPE**

Three Queensland men have spent their first night behind bars for raping an unconscious friend with a glass bottle at an Australia Day party.

Their week-long trial had heard the victim was held down while passed out drunk in a bedroom and repeatedly penetrated in the anus by the bottle.

The 2015 incident committed by the then-teenagers was also filmed and distributed on Snapchat and in Facebook chats.

Judge Anthony Rafter noted while Hayes-Gordon was the one who penetrated the victim, Jackson's action of holding down the man while Watson filmed it had encouraged each other.



## Practical Application ...

Source: Australian Associated Press, 'Trio begin jail time over Aus day rape', *9 News*, (Online, 29 July 2017) <9news.com.au/national/trio-begin-jail-time-over-aus-day-rape/f26ffc16-519b-4232-8d56-b7382ef1af1a#:~:text=Three%20Queensland%20men%20have%20spent,18%2Dyear%2Dold%20man>.

1. Identify the defendants in this case. [C]
2. Identify the legal issue the jury needed to examine to decide whether they should find each defendant guilty or not guilty. [C]
3. Outline and apply the elements of the criminal offence of rape to the brief facts contained in the article. [C] [A]
4. If you were a member of the jury, would you find the defendants guilty or not guilty. Justify your response. [E]

### 'Without consent'

**Consent is the most important feature of this criminal offence.** A child under 12 years of age cannot give consent. It is important to explain that sub-section (1) establishes that consent must be freely and voluntarily given and sub-section (2) provides a non-exhaustive list of circumstances where consent is **not** given freely and voluntarily given.

#### ***Criminal Code 1899 (Qld)***

##### **348 Consent**

- (1) *In this chapter, consent means free and voluntary agreement.*
- (2) *A person may withdraw consent to an act at any time.*
- (3) *A person who does not offer physical or verbal resistance to an act is not, by reason only of that fact, to be taken to consent to the act.*
- (4) *A person does not consent to an act just because they consented to—*
  - (a) *a different act with the same person; or*
  - (b) *the same act with the same person at a different time or place; or*
  - (c) *the same act with a different person; or*
  - (d) *a different act with a different person.*

##### **348AA Circumstances in which there is no consent**

- (1) *Circumstances in which a person does not consent to an act include the following—*
  - (a) *the person does not say or do anything to communicate consent;*
  - (b) *the person does not have the cognitive capacity to consent to the act;*
  - (c) *the person is so affected by alcohol or another drug as to be incapable of consenting to the act;*
  - (d) *the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;*

*Note—*  
*This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.*

  - (e) *the person is unconscious or asleep;*
  - (f) *the person participates in the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal or property,*

regardless of—

- (i) when the force, harm or conduct giving rise to the fear occurs; or
- (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

Examples of harm—

- economic or financial harm
- reputational harm
- harm to the person's family, cultural or community relationships
- harm to the person's employment
- domestic violence involving psychological abuse or harm to mental health
- sexual harassment

(g) the person participates in the act because of coercion, blackmail or intimidation, regardless of—

- (i) when the coercion, blackmail or intimidation occurs; or
- (ii) whether it occurs as a single incident or as part of an ongoing pattern;

(h) the person participates in the act because the person or another person is unlawfully confined, detained or otherwise deprived of their personal liberty;

(i) the person participates in the act because the person is overborne by the abuse of a relationship of authority, trust or dependence;

(j) the person participates in the act because of a false or fraudulent representation about the nature or purpose of the act, including about whether the act is for health, hygienic or cosmetic purposes;

(k) the person participates in the act with another person because the person is mistaken—

- (i) about the identity of the other person; or
- (ii) that the person is married to the other person;

(l) the person is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act;

(m) both of the following apply—

(i) the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease;

(ii) the other person transmits the serious disease to the person;

(n) the person participates in the act with another person on the basis that a condom is used for the act and the other person does any of the following things before or during the act—

- (i) does not use a condom;
- (ii) tampers with the condom;
- (iii) removes the condom;
- (iv) becomes aware that the condom is no longer effective but continues with the act.

(2) If a person, against whom an offence under this chapter is alleged to have been committed, suffers grievous bodily harm as a result of, or in connection with, the offence, the grievous bodily harm suffered is evidence of the lack of consent on the part of the person unless the contrary is proved.

(3) This section does not limit the grounds on which it may be established that a person does not consent to an act.

(4) In this section—

**sex worker** means a person who provides services to another person that involve the person participating in a sexual activity with the other person for payment or reward.

We will now examine some case law that demonstrates some of the circumstances above so you can understand how the meaning of consent applies to a real world situation.



## Case Study

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*R v Flattery* (1877) 2 QBD 410; 13 Cox CC 388

**Facts:** The complainant, a young adult woman, visited the defendant, John Flattery, who professed to give medical and surgical advice. He told her that her seizures could be treated by a surgical operation. Under the pretence of performing the surgery, the defendant had sexual intercourse with the complainant. The complainant consented to the act but was under the belief he was treating her in a medical sense.

**Legal Issue:** Did the complainant consent to sexual intercourse with the defendant?

**Decision:** Flattery was found guilty of one count of rape. The court held that consent to sexual intercourse was not given. The complainant only allowed the defendant to touch her as a consequence of the fraudulent and false pretences given by the defendant.

1. Describe the relationship between the defendant and the complainant. [C]
  2. Explain why the court held consent was not given by the complainant. [A]
- 

*Papadimitropoulos v R* [1957] HCA 74 (1957) 98 CLR 249

**Facts:** The complainant in this case was a Greek girl, who spoke little to no English. The defendant told her they were married and had sexual intercourse with her on several occasions. He gave her a wedding ring to wear, and also asked her employer for leave due to the fact they were married. In fact, they were not legally married, but had merely applied to the registry office to get married. The defendant left her after having sexual intercourse with her on a number of occasions.

The complainant gave evidence that she never intended to have sex until she was married. The defendant's counsel contended that the complainant had consented to the act of sexual intercourse, and she understood the nature of the act, despite the defendant misrepresenting their marital status.

**Legal Issue:** Did the complainant consent to sexual intercourse with the defendant?

**Decision:** Papadimitropoulos was found guilty of rape by a jury. He appealed his conviction to the High Court of Australia.

In a unanimous verdict, the High Court of Australia found that Papadimitropoulos' actions, whilst contemptible, did not constitute rape. The court asserted that there was a difference between deceiving a person about the act of intercourse itself and deceiving a person about the status of a relationship.

1. Describe the actual and misrepresented relationship between the defendant and the complainant. [C]
  2. Analyse the viewpoints of both the defendant and the complainant in this case. [A]
  3. Examine why a jury may have found the defendant guilty of rape. [A]
  4. In 2014 Professor Jonathan Crowe wrote in a research paper on fraud and consent law in Australia that: 'the common law position, according to the High Court, was that only certain narrow forms of mistake or fraud could potentially form the basis of a rape conviction.' Do you agree or disagree with the High Court of Australia's decision? Justify your decision with legal reasoning that also considers the implications of your position. [E]
-



## Case Study

*R v Pryor* [2001] QCA 341; 124 A Crim R 22

**Facts:** The defendant, George Allan Pryor, broke into the house where the complainant lived with her partner. The complainant and the defendant engaged in sexual intercourse. The complainant gave evidence that at the time she believed she was having sex with her partner. When the complainant realised the man was not her partner she called for help. It is important to state that the complainant and her partner were not married, nor living together in a de-facto arrangement. However, he was her sole sexual partner. The defendant's legal counsel submitted that Pryor did 'nothing to constitute impersonating her husband'.

The definition of consent as it stood on 18 August 1996 was:

*(1) Any person who has carnal knowledge of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.*

*(2) In this section-*

*“married woman” includes a woman living with a man as his wife though not lawfully married to him and ‘husband’ has a corresponding meaning.”*

Pryor was found guilty of rape. He appealed his conviction.

**Legal Issue:** Was the jury's verdict unreasonable in respect to whether or not the facts establish rape within the *Criminal Code 1899* (Qld) as at 18 August 1996?

**Decision:** The Queensland Court of Appeal dismissed his appeal with a 2:1 majority.

The Hon Justice Williams held:

*[21]...consent involved not only an appreciation that sexual intercourse was about to take place, but also an awareness of the identity of the male about to effect that penetration. Here the complainant had no reason to believe that any male person other than her “sexual partner” was in the house at the material time...Her instinctive responses did not constitute a comprehending consent; her reasoning processes were still affected by sleep and the consumption of alcohol. Once she comprehended what was happening – a complete stranger was having intercourse with her - she made it clear that she was not a consenting party. This was a clear case of intercourse without consent, all that is required by the Code.*

The dissenting judge, the Hon Justice Byrne read the section in a different way. He reasoned that the complainant's relationship fell outside the wording of the law and because none of the other circumstances that constituted rape were present, the accused should have been found not guilty.

1. Describe the circumstances leading up to and during the act of sexual intercourse. Who was involved and where did the alleged criminal offence take place? [C]
2. Describe the relationship between the complainant and her sexual partner. Why was this an important fact in the case? [C] [A]



## Case Study ...

3. Re-read the law as it was in 1996. What moral or social assumptions does the law enforce? Do you believe this was an intentional or unintentional decision lawmakers made? What possible consequences (foreseen and unforeseen) could be experienced by complainants at that time reporting this offence? [A]
4. Both *Pryor* and *Papadimitropoulos* involve an act of fraud. Which decision do you think reflected a just and fair result? You are also welcome to state that neither or both decisions were correct. Justify your opinion with legal reasoning. [E]

As stated previously consent, such as whether a complainant gives consent or the defendant believes consent has been given, is a central legal issue in many rape cases that come before the courts. Some members of the community, particularly victims and legal advocates believe more 'affirmative' consent laws (among other possible amendments) are required.

## 5.3 Offences against property

**Property offences are among the most committed offences in Queensland.** In 2020-21, the Queensland Government Statisticians Office reported that offences against property accounted for 45 per cent of all offences in Queensland. Commonly located in the *Criminal Code 1899* (Qld), examples of common offences against property include:

- Stealing (s391)
- Unlawful use or possession of motor vehicles, aircraft or vessels (s408A)
- Fraud (s408C)
- Computer hacking and misuse (s408E)
- Entry or being in premises and committing indictable offences (s421)
- Receiving tainted property (s433)
- Arson (s461)
- Wilful damage (s469)

The *Regulatory Offences Act 1985* (Qld) also contains offences against property, such as unauthorised dealing with shop goods (more commonly known as shoplifting) (s5), leaving hotel etc. without payment (s6) and unauthorised damage to property (s7).

### Stealing

Stealing is found in the *Criminal Code 1899* (Qld) under s391.

To be found guilty of stealing the Crown must prove the accused:

- steals (the physical act of taking something and carrying it away from its owner)
- anything capable of being stolen
- with fraudulent intent (the mental element of the offence).

The offence is generally heard in the Magistrates Court of Queensland or the District Court of Queensland. We will now examine the *mens rea* and *actus reus* of stealing.

### ‘Steals’ (taking or converting)

**Stealing is a physical act, however small that movement is.** In law, taking or converting property means dealing with property in a way that is inconsistent with the rights of its true owner. Examples of converting can include keeping something, selling it or changing how it looks—all acts that deny the rights associated with owning something.



## Case Study

*Wallis v Lane* [1964] VR 293

**Facts:** Neville Lane was an employee in charge of a delivery truck. A witness saw Lane move goods (a card of cycle tow-straps and two pairs of cycle toe clips) from one part of the truck to another part to conceal them, but he did not actually remove them from the truck. At trial Lane admitted to taking the items. The magistrate dismissed the charge as he did not ‘...take the property out of the owner’s possession...’. A review into this finding was heard by the Supreme Court of Victoria.

**Legal Issue:** Was the movement of the goods sufficient to satisfy the act of stealing?

**Decision:** The court said movement, however slight, was enough to prove the physical act of stealing.

1. Explain what Lane did with the goods. [C]
2. Do you agree or disagree that only the slightest degree of movement is required to satisfy the first element of stealing? When writing your response consider the consequences of your position. [A]

### ‘With fraudulent intent’

**This element is mental in nature. It requires the Crown to demonstrate fraudulence (or deceit) is present.** The most common fraudulent intent is to permanently deprive the owner of the thing that is stolen. Another fraudulent intent is to deal with the property in such a manner that it cannot be returned in the same condition as it was at the time it was taken or to use it as a pledge or security. For example, if a person was to steal a car and crash it, it cannot be returned to the owner in the same condition. **A temporary intent is not enough to satisfy this element,** as shown in the case below.



## Case Study

**Note:** At the time this offence occurred there was no criminal offence that captured ‘joy riding’. Today, Bailey would have been charged with unlawful use of a motor vehicle (s408A).

*R v Bailey* [1924] QWN 38

**Facts:** A chauffeur, angry that his employer had just terminated his services, took his former employer’s car for three days for a series of ‘joy rides’ before returning it. A constable found



## Case Study ...

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the car in the possession of the defendant, who said it had been lent to him by the owner. There was no evidence that Bailey intended to keep the car permanently.

**Legal Issue:** Did Bailey possess the fraudulent intention required to prove he had stolen the car?

**Decision:** As Bailey intended to return the vehicle and the wear and tear caused by him driving it was very slight, the court held that he did not have the fraudulent intention ‘...to deal with it in such a manner that it could not be returned in the condition in which it was at the time it was taken from the garage.’ He was found not guilty of stealing the car but pleaded guilty to stealing the petrol.

1. Identify what ‘property’ was allegedly stolen in this case. [C]
  2. In your own words explain how Bailey was found guilty of stealing the petrol, but not the car. Do you think this was a fair and just result? [A]
  3. In December 2022, almost 70 cars were stolen in Queensland every day. At what point does a defendant possess the mental element of fraudulence in relation to taking a car? [A]
- 

## Fraud

The Australian Competition and Consumer Commission (ACCC) defines fraud as, ‘dishonestly obtaining a benefit, or causing a loss, by deception or other means.’ The term ‘dishonesty’ is central to this criminal offence and is something we will examine in a moment when we look at the legal nature and scope of this crime. **Fraud can encompass a wide range of acts that can impact both individuals and businesses.** Some examples include:

- tax fraud
- commonwealth benefits fraud, such as dishonestly claiming childcare benefits, NDIS payments, Medicare benefits or disaster relief payments
- card, bank account or cheque fraud
- scams, including phishing, romance, postal, computer support or financial advice scams
- identity theft (which in Queensland is a separate criminal offence)
- workplace or business fraud, which may involve using fake payroll schemes, fake billing or financial statement deception.

In 2020-21, the Queensland Government Statisticians Office reported that fraud accounted for 11 per cent (or 23,424 acts) of property offences in Queensland. The Australian Bureau of Statistics (ABS) reported that in 2021-22:

- 8.1 per cent (1.7 million persons) experienced card fraud (an increase of 1.2 per cent on the previous year)
- 2.7 per cent (552,000 persons) were the victims of a scam, with scam exposure increasing from 55 per cent in 2020-21 to 65 per cent in 2021-22
- 0.8 per cent (159,000 persons) experience identity theft.

In Queensland, the legal definition of fraud is found in *Criminal Code 1899* (Qld) s408C.

The elements of the offence depend on what sub-section the defendant is being charged under. For example:

***Criminal Code 1899 (Qld)***  
***408C Fraud***

*(1) A person who dishonestly—*

*(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or*

*The elements are that the accused:*

- a. dishonestly*
- b. gains a benefit or advantage, pecuniary or otherwise*
- c. for any person.*

**There are also several fraud offences in Commonwealth law, *Criminal Code 1995 (Cth)*:**

- Dishonest taking or retention of property s132.8
- General dishonesty s135.1
- Obtaining financial advantage s135.2

These are prosecuted by the Commonwealth Director of Public Prosecutions.

As mentioned previously, ‘dishonesty’ is a common element that is part of every instance of fraud. We will now examine this element in further detail:

**‘Dishonestly’**

**Dishonestly is an essential element that the Crown is required to prove for a person to be convicted of fraud.** One test for dishonestly was formulated by the High Court of Australia in *Peters v R* (1998) 192 CLR 493. The case involved a solicitor who helped a client launder money through several false mortgage documents. He was charged and convicted of conspiracy to defraud. The Hon Justice Toohey and Justice Gaudron laid down the test of dishonestly as:

*[18]...Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people...*





## Practical Application

### QUEENSLAND'S FORMER CHIEF SCIENTIST JAILED FOR LAVISH FRAUD

A senior Queensland public servant has been jailed for using taxpayer funds to buy expensive teak furniture, an electric scooter and a \$935 silk jacket while earning up to \$367,000 a year.

The state's former chief scientist, Suzanne Miller, used a government-issued credit card for personal spending 18 times between August 2014 and June 2016.

The 55-year-old held a 'high-profile position' as director and chief executive of the Queensland Museum Network, later also being appointed as the state's chief scientist, Brisbane magistrate Noel Noonan said.

Crown prosecutor Christopher Cook says Miller was able to 'arrogantly commit' the crimes, using her esteemed position to achieve financial gain.

Mr Noonan on Friday sentenced Miller to three years' jail, suspended after three months, for the misuse of about \$75,000 of taxpayer funds.

He said a cheque from Miller for the full amount would be paid to the Queensland Museum Network.

Source: Cheryl Goodenough and Aaron Bunch, 'Queensland's former chief scientist jailed for lavish fraud', *Brisbane Times*, (Online, 1 May 2020) <[brisbanetimes.com.au/national/queensland/queensland-s-former-chief-scientist-jailed-for-lavish-fraud-20200501-p54p0z.html](http://brisbanetimes.com.au/national/queensland/queensland-s-former-chief-scientist-jailed-for-lavish-fraud-20200501-p54p0z.html)>

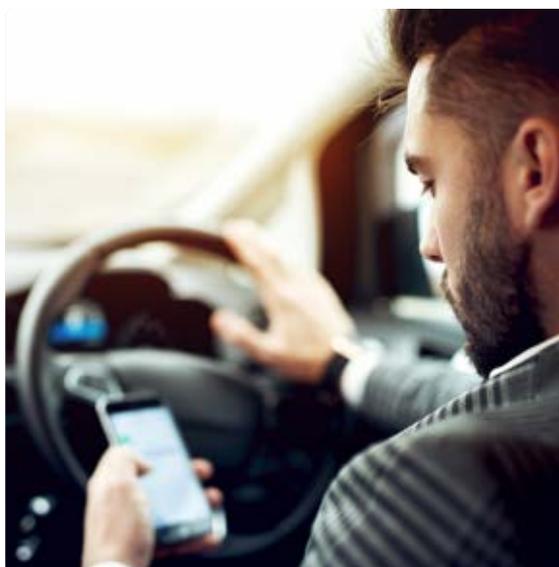
1. Identify the defendant in this case. What position did she once hold? [C]
2. Identify the court in which this matter was heard in. [C]
3. Apply the element of 'dishonestly' to the facts mentioned in the article. [A]
4. Identify the sentence she received for this crime. What feature(s) of this criminal offence may have been an aggravating feature when she was sentenced. [C] [A]

## 5.4 Traffic offences

Although the *Criminal Code 1899* (Qld), the key source of criminal law, does contain some traffic offences, many traffic offences are governed by the *Transport Operations (Road Use Management) Act 1995* (Qld) (TORUM) and its associated regulations. The *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld) and the *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld) contain many traffic offences.

### Use of mobile phones whilst driving

An example of a regulation that potentially impacts every driver is the use of mobile phones.



**Transport Operations (Road Use Management—Road Rules) Regulation 2009 (Qld)**  
**300 Use of mobile phones**

(1) *The driver of a vehicle must not use a mobile phone while the vehicle is moving, or is stationary but not parked.*

*Maximum penalty—20 penalty units.*

(2) *Subsection (1) does not apply to a driver using a mobile phone—*

*(a) to the extent the mobile phone—*

*(i) is in a pocket of the driver’s clothing, or in a pouch worn by the driver; and*

*(ii) kept in a way that—*

*(A) does not allow the driver to operate the phone, or a function of the phone, other than by using only the driver’s voice; and*

*(B) does not allow the driver to see the face of the phone while the phone, or a function of the phone, is operating; or*

*(b) while the vehicle is stationary and to the extent the mobile phone is in a wallet, or has attached to it a wallet, that the driver is using for any of the following purposes—*

*(i) to obtain and produce for inspection a licence, permit, authority or other document, as required under an Act or by a police officer or another person acting under an Act;*

*(ii) to obtain and use money, or another form of payment, to pay for goods or services, if the place where the vehicle is stationary is a place where the goods or services are lawfully paid for;*

*Example of a place for subparagraph (ii)—*

*a drive-through retail outlet*

*(iii) to obtain and use a card or other thing to enter a road-related area or land adjacent to a road-related area.*

....

*use, in relation to a mobile phone, means hold the phone in the driver’s hand, or rest the phone on any part of the driver’s body—*

*(a) whether or not the phone is on or operating; and*

*(b) whether or not for the purpose of operating the phone or a function of the phone; and*

*(c) whether or not the phone is partially or wholly supported by another part of the driver’s body or another thing.*



## Practical Application

Applying the regulation above, could you be penalised under s300 in the following situations? Explain why or why not. [A]

- You are stopped at a red light. You get out your mobile phone from your pocket to respond to a message.
- You are stuck in traffic. You call your workplace to let them know you are late via voice activation. Your mobile phone is sitting in a holder.
- You get out your mobile phone to pay for your order at a MacDonald's Drive Thru.
- You watch a Tik Toc video with your phone in your lap while stuck in traffic.

### Research Task

Driving regulations can often be different for drivers who aren't on an Open Licence. Research the regulations regarding the use of mobile phones for those on a Learners, P1 and P2 licence. [C] [S]

## 5.5 Drug offences

**The law covering drug offences is contained in both Commonwealth and Queensland legislation, namely the:**

- *Drugs Misuse Act 1986* (Qld)
- *Criminal Code 1995* (Cth)
- *Customs Act 1901* (Cth).

The *Drugs Misuse Act 1986* (Qld) contains the key criminal offences related to dangerous drugs, including:

- trafficking in dangerous drugs (s5)
- supplying dangerous drugs (s6)
- producing dangerous drugs (s8)
- possessing dangerous drugs (s9).

**The type and quantity of drug involved, as well as the act itself will dictate which court has original jurisdiction to hear the offence.**



## Case Study

Read the following case notes and answer the questions below:

<p><b>Case 1</b></p> <p><i>R v Findlay</i> (2022) District Court of Queensland</p> <p>Crispin Findlay was sentenced to two years imprisonment, with immediate parole, for trafficking in cannabis.</p>	<p><b>Case 2</b></p> <p><i>R v Dodt</i> (2023) Supreme Court of Queensland</p> <p>Kerry Ann Maree Dodt was sentenced to six months imprisonment for two counts of supplying a dangerous drug with a circumstance of aggravation, namely supplying cannabis to two minors.</p>
<p><b>Case 3</b></p> <p><i>R v Robertson</i> (2022) Magistrates Court of Queensland</p> <p>Justin Wayne Robertson was fined \$1500 for two counts of possessing dangerous drugs (3.8g of cocaine and 99.9g of cannabis) and possessing utensils or pipes. No conviction was recorded.</p>	<p><b>Case 4</b></p> <p><i>R v Turner</i> (2007) Supreme Court Queensland</p> <p>Angus Robert Turner was sentenced to nine months imprisonment, with immediate parole, in respect of the production of a Schedule 1 drug, methylamphetamine.</p>

1. For each case:
  - a. Identify the drug offence committed. [C]
  - b. Identify which court heard the drug offence. [C]
  - c. Identify the sentence handed down in each case. [C]

Commonwealth drug offences, which are investigated by the Australian Federal Police (AFP) and prosecuted by the Commonwealth Director of Public Prosecutions (CDPP), are primarily focused on acts related to the importing and exporting of drugs, as evidenced in this press release:

**AFP SEIZES 336 KILOGRAMS OF HEROIN IN LARGEST EVER QUEENSLAND DETECTION**

Australian authorities have seized the second largest heroin shipment ever detected in Australia after intercepting 336kg of the illicit drug inside a shipment sent from Malaysia to Brisbane.

Source: Australian Federal Police and Australian Border Force, 'AFP seizes 336 kilograms of heroin in largest ever Queensland detention' *AFP News and Media*, (Online, 4 April 2023) <[afp.gov.au/news-media/media-releases/afp-seizes-336-kilograms-heroin-largest-ever-queensland-detection](https://www.afp.gov.au/news-media/media-releases/afp-seizes-336-kilograms-heroin-largest-ever-queensland-detection)>

## 5.6 Attempts to commit crimes

Under the *Criminal Code 1899* (Qld) s4 **you can also breach the criminal law by attempting to commit an indictable offence.** To be found guilty of an attempt to commit an offence, the Crown must prove beyond a reasonable doubt that the accused:

- intended to commit the offence (the mental element of the offence)
- commenced executing that intention into action (the physical element of the offence), and
- carried out some overt act by which that intention was manifested.

For example, in the case of attempted murder, the accused might decide that he wishes to kill his father to inherit his money. This decision reflects the mental requirement (i.e. he plans to kill his father). When he buys poison and starts adding it to his father's meals, he is putting that intention into effect, which satisfies the physical element. The fact that adding poison could be observed by another person (whether it is, or not, observed doesn't matter) makes it an 'overt act', establishing the third element of the offence.

## 5.7 Accessories and parties to offences

Sometimes more than one person can be involved in the commission of an offence. Under the *Criminal Code 1899* (Qld) s7, a person can be a 'party' to an offence if they:

- do an act that constitutes an offence
- enable or assist another person to commit an offence
- aid another person in committing an offence
- encourage or counsel any other person to commit the offence.

For example, four people decide to break into a house. The person who actually breaks into the house and steals the homeowners' belongings is the principal. The person who assists the principal to commit the offence is called an accessory. **Both will be parties to the offence committed, and in the eyes of the law, equally criminally responsible.**

It is also an offence to be an accessory after the fact. For example, a person who hides stolen property or makes false statements to the police in order to enable the offender to evade capture may be charged with a criminal offence (s10).

# Review

## Comprehend

1. **Contrast** summary and indictable offences. [C]
2. **Describe** the *actus reus* and the *mens rea* of the criminal offence of murder. [C]
3. **Classify** the criminal offences listed below into the following categories:
  - Offences against the person
  - Offences against property
  - Drug offences
  - Traffic offences
  - Offences against the public order

Manslaughter

Trafficking in a dangerous drug

Stealing

Stalking

Computer hacking

Unlawful use of a motor vehicle

Fraud

Rape

Arson

Wilful exposure

Sexual assault

Public nuisance

Murder

Armed robbery

Producing a dangerous drug

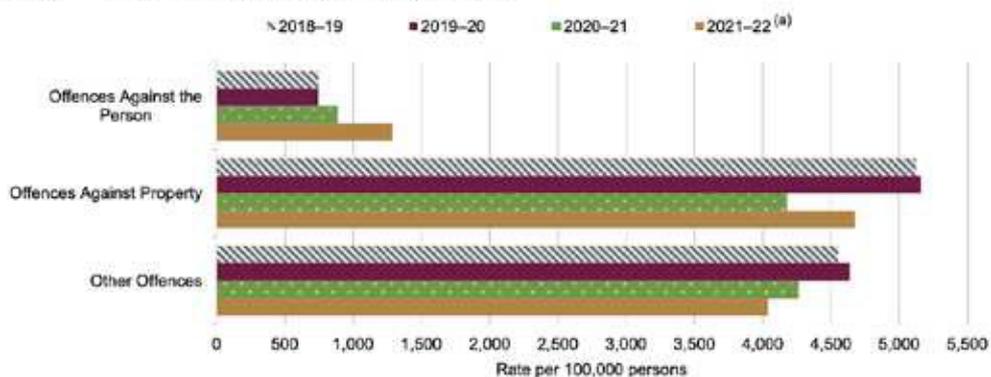
Preventing public meetings [C]

## Analyse

### Task A

Answer the questions below after careful analysis of the graph titled *Annual rates of recorded offences by category*. Ensure you reference any data that you use correctly (i.e. Figure 1 or Queensland Government Statistician's Office, 2023, 7).

1. **State** the rate of increase offences against the person has experienced over the last 4 years. Why do you think this crime category has consistently grown over time? [C] [A]
2. **Describe** the trend experienced by offences against property from 2019 to 2022. What reasons may have contributed to this pattern? [C] [A]
3. 'Other offences' include offences such as drug offences, prostitution offences, liquor and gaming offences, good order offences and traffic offences. **Examine** and **explain** the pattern being exhibited by this category of offending. [A]

**Figure 2 Annual rates of recorded offences by category**

(a) From 1 July 2021, police officers are required to record all criminal offences associated with domestic and family violence investigations.

Source: Queensland Government Statistician's Office, Queensland Treasury, *Crime report, Queensland, 2021-22* (Queensland Government Statistician's Office, Queensland Treasury, 2023) <[qgso.qld.gov.au/issues/7856/crime-report-qld-2021-22.pdf](http://qgso.qld.gov.au/issues/7856/crime-report-qld-2021-22.pdf)>

## Task B

For each case study below:

1. **Identify** the criminal offence that is relevant. [C]
2. **Analyse** and **apply** a relevant criminal offence to the facts supplied. [A]

### Case 1

Jessica and David have been dating for a few months. One evening after a date, they go back to Jessica's place. They kiss each other, but when David begins to remove Jessica's top, she tells him she doesn't want to have sex. He laughs and says, 'Of course you do', and continues removing her top and kissing her. Jessica freezes and David continues to kiss and touch her; ultimately having sexual intercourse with her. The next day, she confronts him, but he says, 'If you really didn't want to have sex with me you should have stopped me.'

### Case 2

At 3am, Daniel and his friends are having some pizza after a night of drinking and dancing at a pub. Another group of men want to sit down and agitate for Daniel and his friends to leave the only table outside the pizza shop. When Daniel's friend, Kevin is pushed off his chair, Daniel stands up and pulls a knife out of his pocket. A scuffle occurs and Daniel stabs Gavin. Gavin later dies.

### Case 3

Jane Bellows operates a travel business called *Your Best Holiday*. She arranged a holiday for Brett and Glenda Johnson, who paid \$10,000 for a cruise of the Mediterranean Sea. When they arrived at the airport to board their flight to Athens, they discovered their tickets were not valid. They tried to ring Jane, but her phone number was disconnected. They later discovered that all their travel documentation was false and Jane's business was closed.

# Topic 3

## Criminal trial processes

Topic 3 examines the process and procedures used by courts in the criminal jurisdiction.

### Chapter 6:

The pathways to a fair trial,  
pre-trial processes

### Chapter 7:

The pathways to a fair trial,  
the committal process

### Chapter 8:

The attributes of a fair trial

### Chapter 9:

Defences and excuses

### Chapter 10:

Barriers to justice and equity

# Criminal trial process

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## Chapter 6:

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# Pathways to a fair trial, pre-trial processes

### 6.1 Introduction

### 6.2 Bail

### 6.3 Mentions

### 6.4 Callovers

## Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - pre-trial procedures, including mentions and callovers
  - the meaning of bail, including the role of the police and the courts when determining what happens to an accused prior to trial
  - the contribution of pre-trial procedures to ensuring a fair trial.
- analyse and evaluate
  - arguments for and against releasing an accused person on bail, in particular juveniles and persons accused of family violence
  - the nature of mentions and callovers, and the role they play in progressing matters in court and through the court hierarchy.

## 6.1 Introduction

### Key Terms

**Bail:** releasing defendants from custody providing they follow specific conditions, such as appearing in court on a day and at a place required by the police or a court.

**Callover:** a mention at which the prosecution and defence give information and make submissions to the court to enable decisions to be made about the future conduct of the matter (for example, a trial date).

**Mention:** a court hearing of a procedural nature which a defendant (or his/her legal representative) must attend.

**Remand:** An offender who has been refused bail pending trial and remains in custody is said to be on remand.

**Trial:** the examination before a judicial tribunal of the relevant issues (including issues of law and fact).

**The criminal trial process is not the same for every person** charged with a criminal offence as it can involve different circumstances. These depend on matters such as the age of the defendant, the nature of the offence, whether or not the defendant pleads 'not guilty' or 'guilty', and the many decisions a defendant must make as he/she moves through the trial process to the actual trial where a decision is made about guilt or innocence. The culmination of the trial process is the hearing (called a trial), before a magistrate, judge or a judge and jury, at which witnesses give evidence and are then cross-examined, and it is decided if the offender is 'guilty' or 'not guilty'. The *Macquarie Dictionary* defines 'trial' as:

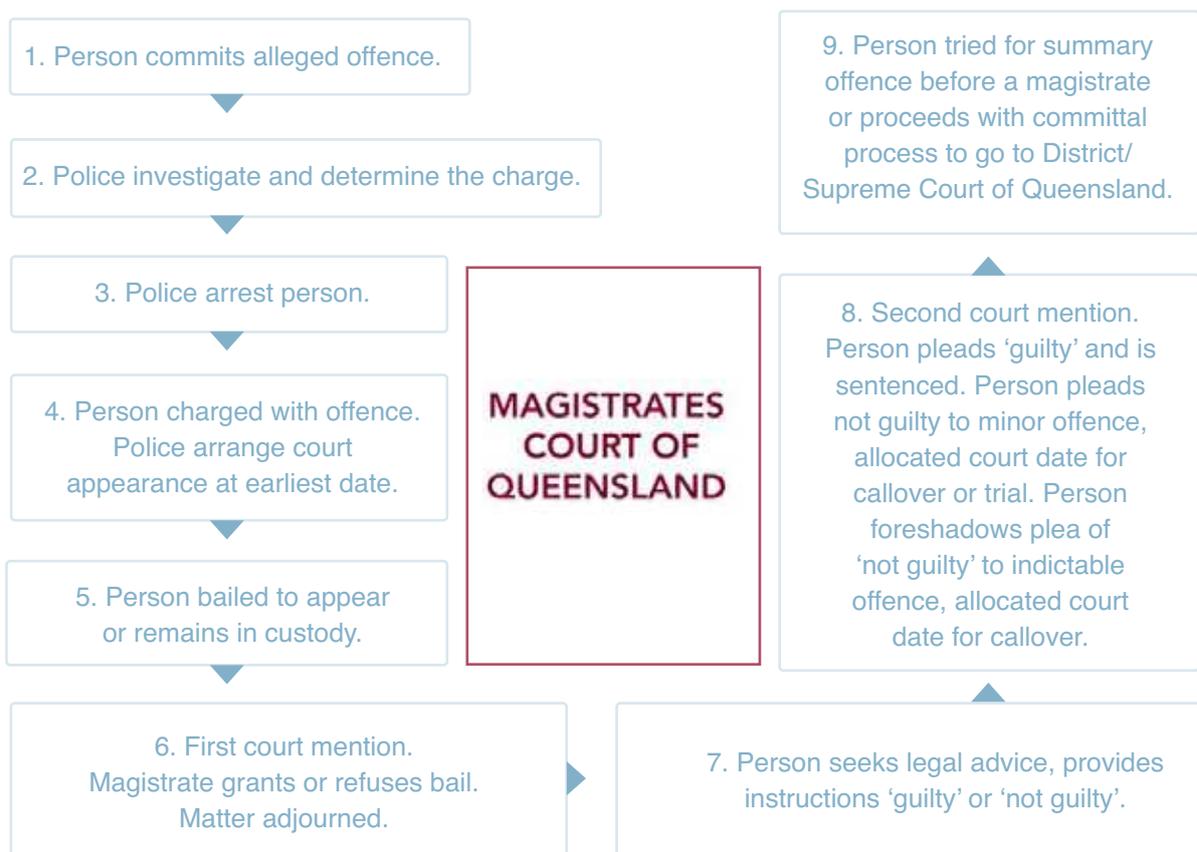
*the examination before a judicial tribunal of the facts put in issue in a cause (often including issues of law as well as of fact).*



**The trial process begins when a defendant is charged, and ends immediately after a defendant pleads 'guilty', is found 'guilty', or is acquitted.** The hearing (trial) is not to be confused with what happens as part of the trial process beforehand. It is also not to be confused with an appeal, which can be made to a higher court, and often involves the defendant asking for a decision to be set aside (overturned).

**The trial processes which occur before and leading up to trial are frequently referred to as pre-trial processes,** in order to distinguish them from the actual trial.

## The pre-trial process



## Summary (simple) offence

**Many offences, such as drink-driving, speeding, and other traffic offences, are dealt with by defendants acknowledging guilt by simply paying a fine without attending a court or being arrested.** Other minor offences may require an appearance in the Magistrates Court of Queensland. If the defendant pleads 'guilty' to a minor offence there will be no trial and the matter proceeds directly to a sentencing hearing. For example, a person charged with, or stealing a small quantity of groceries, who admits doing these things, will be dealt with in such a manner.

**When a defendant pleads 'not guilty' to a minor offence the matter proceeds directly to a trial in the Magistrates Court of Queensland.** The magistrate decides questions of both fact and law and therefore performs the functions of both judge and jury.

### Hypothetical?

Michael suffers from short-term memory loss. He went to a supermarket to shop for himself and his elderly wife. Instead of going through the checkout he walked through the entrance and left without paying. The goods he stole were valued at \$120.00. He was seen on CCTV and reported to the police. The police arrested him and gave him a summons to attend the Magistrates Court of Queensland.

Michael tried to explain what happened to the magistrate. The magistrate was allowed to hear the matter because the value of the items Michael took fell under the *Regulatory Offences Act 1985* (Qld). Stealing goods worth \$150.00 or less is not an indictable offence. The magistrate indicated Michael would need to provide evidence of his condition if he were to plead 'guilty'. She also indicated she would adjourn the matter to a new date for sentencing if he were to plead 'guilty'.

## Hypothetical?

1. Should Michael ask for his matter to be deferred to a later date for mention? [C]
2. Should Michael plead 'guilty' to the charge of stealing? Why or why not? [A]
3. Should Michael ask his doctor to provide him a letter confirming his condition? Why or why not? [A]

## Indictable (serious) offences

The pathway to trial for an indictable offence is quite different. **A defendant who pleads 'not guilty' will have a committal hearing in the Magistrates Court of Queensland, at which a decision is made to either dismiss the charge or to proceed to a trial in the District Court or Supreme Court of Queensland before a judge and jury.** At the committal hearing the magistrate may dismiss the charge if there is insufficient evidence to convict the defendant. The defendant is said to have 'no case to answer'. Committal hearings are an extremely important part of the trial process for indictable offences.

All of the above pathways lead to a defendant being acquitted (found 'not guilty') or being convicted (found 'guilty' or pleads 'guilty') and appropriately punished (sentenced). The question of punishment (sentence) will be considered as a separate topic from the trial process in Topic 4: Punishment and Sentencing (Chapters 11).

Once a defendant is arrested and charged with committing a criminal offence, the police must decide if the defendant can be released on bail, or remanded in custody until the matter is mentioned in the Magistrates Court of Queensland. Here a decision is made to release the defendant on bail or continue to hold the defendant in custody until trial. The hearing in the Magistrates Court of Queensland, where such matters are mentioned in the first instance, is required to be at the first available opportunity. In Queensland, this is usually on the day of the offence or the following day unless the court is closed at the weekend.

## 6.2 Bail

**Bail is freeing or releasing the defendant from custody on the condition that he/she appears in court on a day and at a place required by the police or a court.** Each State and Territory in Australia has laws which govern the process of bail. These are broadly similar, but there are significant differences. The Queensland legislation is found in the *Bail Act 1980* (Qld) (the *Bail Act*).

In *Williamson v The Director of Public Prosecutions (Queensland)* [1999] QCA 356, the Hon Justice Thomas explained the legislative framework of the *Bail Act* as follows:

*Section 9 of the Bail Act prima facie confers upon any unconvicted person who is brought before a court the right to a grant of bail. The court's obligation to grant bail is however "subject to this Act". The principal source of the court's power of refusal is s16. The main grounds for refusal to grant bail are satisfaction by the court that there is an unacceptable risk that the defendant would fail to appear, or satisfaction by the court that while released on bail the defendant would commit an offence. Other recognised grounds are satisfaction that the release of the defendant would endanger the victim or some other person or interfere with witnesses. Another ground is that custody is desirable for the witness' own protection.*

*There is a further provision in s16 of the Bail Act which reverses the defendant's prima facie entitlement under s9, and, when applicable, requires the defendant to show cause why his or her detention in custody is not justified.*

## The defendant's right to bail

**In the criminal justice system in Australia, a person who is accused of an offence or charged with an offence is entitled to the presumption of innocence.** This means that until such a person admits guilt or is proved guilty by due process that he/she is entitled to bail. Bail is probably the first court event faced by an accused. Getting bail in the first instance can be difficult. Some crimes are regarded as being so awful, that community and media opinion may suggest that an accused should be 'put into jail, and the key thrown away'. Judges must take into account many factors when deciding if a defendant is entitled to bail.

### Case Study



Unreported Case, Maroochydore Magistrates Court, Friday 11 March 2022

**Facts:** A young 19-year-old man is charged with stealing a car, driving it erratically, and stealing two motorbikes. The prosecutor alleges he broke into a home, stole a set of keys, and drove the stolen car into two cars and a tree. One of the cars was reversing from a driveway. The driver was injured and taken to hospital. There is strong evidence in support of these charges. At the time, the defendant is also charged with 24 offences to which he is yet to enter a plea, including unlawful use of a motor vehicle, entering premises and committing an indictable offence, attempted burglary, multiple bail breaches, and the dangerous operation of a motor vehicle.

The defendant's lawyer submits that he is still a young man and is likely to receive parole when the matters are finalised. She said the 19-year-old would be able to take up work with his stepfather once released from custody.

**Legal Issue:** Should the defendant be granted bail?

**Decision:** The magistrate refused bail. He said the defendant's history was 'disturbing'. He said there was very 'strong evidence' against the defendant and labelled him a 'menace to society'. The matters were adjourned.

Source: *Courier Mail*, Tuesday 15 March, 2022.





### What do you think?

Persons charged with serious offences such as murder, rape, robbery with violence, assault, and sexual offences, should not be granted bail under any circumstances. Do you agree? Justify your answer by reference to examples. [A] [E]

## The role of the police in granting bail

If a person is arrested by the police, he/she will be taken to the police station and charged. At this point the police are legally obliged to consider if the defendant should be granted bail. The *Bail Act* s7 **gives a police officer the power to grant bail**. Cash bail is often granted for minor offences. Cash bail is a deposit of a sum of money with no written undertaking. If the person does not appear at court on the specified date, the money is forfeited to the Crown and no further action is taken by the police. In addition, in the case of some minor offences, the person can be released by the police on payment of a sum of cash in accordance with the requirements of the *Police Powers and Responsibilities Act 2000* (Qld). For example, a person charged with being drunk in a public place or being in possession of a drug (where it is only a minor offence), fall into this category. Otherwise, it is generally the case that persons released on bail are issued with a notice to attend court on a future date. The notice sets out the penalty for not appearing in court on that date. It also contains an undertaking by the person charged to comply with the bail conditions and must be signed by the charged person. A person who refuses to sign the undertaking will be locked up until he/she appears in court.

## The role of a court in granting bail

**The *Bail Act* s8 states that the court has power to grant bail subject to the Act.** Generally, a person charged will appear before a magistrate in the Magistrates Court of Queensland in the first instance. The defendant is entitled to make an application for bail on this occasion. Where bail is refused by a magistrate the defendant can bring a further application for bail before a judge of the Supreme Court of Queensland.

Section 10 states that the Supreme Court of Queensland has the power to grant, vary, enlarge or revoke bail. Sub-section 10(3) states that this power can only be exercised by the trial judge once the defendant's trial has commenced and proceedings are in the hands of the trial judge.

## The conditions a court or police officer can impose on a person granted bail

Section 11 of the Act sets out the matters that a court or police officer must consider when determining the conditions for release of a person on bail. Sub-section 11(1) of the Act sets out the order in which a court or police officer should impose conditions of release, namely:

- a person's own undertaking, a deposit of money, a security of stated value; and
- a surety or sureties of stated value.

Generally, the court or a police officer must decide the level of commitment the defendant needs to make to grant bail. This section of the Act also states that a court or police officer:



*...shall not make conditions for a grant of bail more onerous for the person than...is necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.*

The above requirement applies to all of the conditions which a court or police officer decides to impose so that the defendant returns at the end the bail period granted, and surrenders into custody in accordance with the bail conditions. The remainder of s11 deals with the special conditions which can be applied. **There is a wide discretion given in the Act to courts and police officers when imposing these conditions.** They must simply consider that conditions are 'fit for any or all such purposes', including those set out in the *Bail Act*.

## Practical Application

Examples of bail conditions the police and courts have imposed on a defendant include requiring a defendant to:



- promise to return to court at a time and on a day specified;
- pay a sum of money which is forfeit if he/she does not return to court when required;
- reside at a specified address during the bail period;
- surrender his or her passport to prevent travel overseas until allowed to do so;
- provide security over real property;
- arrange for a third-party to guarantee any conditions imposed by the court;
- wear an electronic device to identify his/her whereabouts at all times;
- not leave a specified place (i.e. the State of Queensland);
- not approach the victim or potential witnesses.

1. List the bail conditions in an order which illustrates a scale that you think is less restrictive or more restrictive on defendants. [C]
2. Create scenarios or use an actual example you have read about to illustrate when a defendant has been granted bail subject to one or more of the bail conditions. [C] [A]



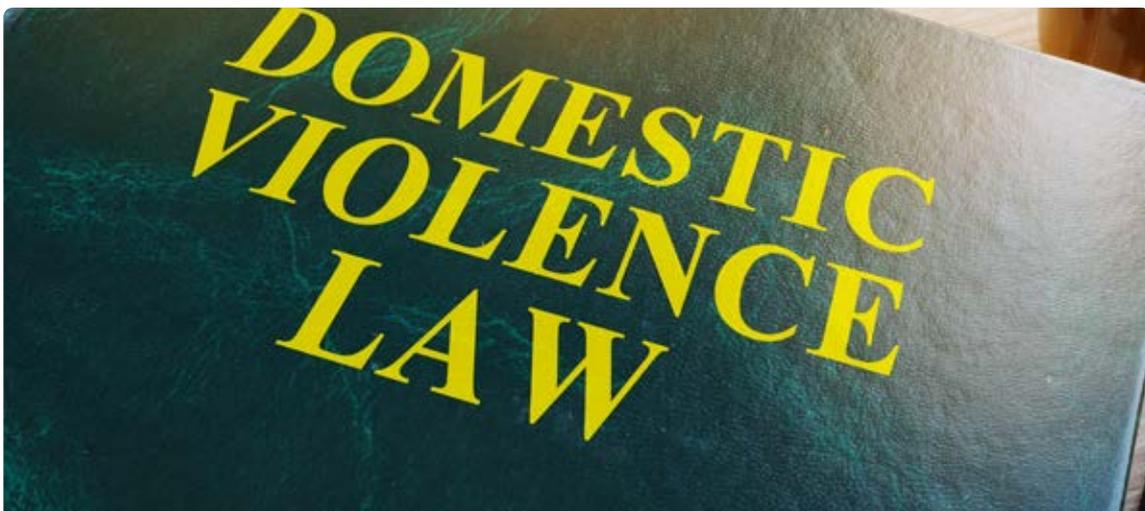
## Practical Application

### Refusing bail: important sections

<i>Bail Act 1980</i> (Qld) section	Explanation
Section 16(1)	The court or police officer shall refuse to grant bail, if they are satisfied that while released on bail there is an unacceptable risk that the defendant would fail to appear and surrender into custody or would commit an offence.
Section 16(2)	There is a requirement that a court or police officer shall have regard to all matters appearing to be relevant to the decision to refuse bail. It then sets out various matters which should be considered, if relevant, including: <ul style="list-style-type: none"> <li>• s16(2)(f) there is a risk of further domestic violence or associated domestic violence</li> </ul>
Section 16(3)	Lists offences which require a court or police officer to refuse bail, including that unless the defendant shows cause why the defendant's detention in custody is not justified and, if bail is granted or the defendant is released under s11A, must include in the order a statement of the reasons for granting bail or releasing defendant.

The effect of section 16(3), when read in conjunction with s16(2)(f) is that amendments in 2017 to the *Bail Act* require a person convicted of a domestic violence offence to prove why his or her detention in custody is not justified.

This is a reversal of the usual onus of proof. It makes it more difficult for a person convicted of a domestic violence offence to get bail.





## You be the judge

### Case 1:

#### *R v Warwick*

**Facts:** Warwick is charged with possession of an illegal drug (cannabis in the form of 3 marijuana plants grown in pots at home) and with possession of a utensil (bong) that enables illegal use of marijuana. Warwick uses cannabis to treat panic attacks and anxiety with the approval of his GP. He thinks this excuses the offences and wants to plead not guilty. Warwick responds to a Notice/Summons to appear in the Brisbane Magistrates Court. At the first mention he asks for bail on his own undertaking to enable him to get legal advice. Warwick has no previous criminal history. The prosecution does not oppose bail.

**Legal Issue:** Should Warwick be granted bail, and on what terms?

**Decision:** Make a decision about bail as if you were the magistrate. Give your reasons. [A] [E]

### Case 2:

#### *R v M*

**Facts:** M and his partner V have a history of domestic conflict. Each of them has taken out a Protection Order against the other. They live apart and have an on and off relationship which usually involves V inviting M to visit and stay overnight. M has access to prescription drugs in his job as a chemist and supplies V with these. V invites M to visit. After an hour or so of drinking and taking drugs V wants to ride her horse and goes to the yard to saddle it. M objects. He wants to have dinner and more drinks. They argue. V tells M to leave and says she will call the police. She goes for a ride, M is waiting for her when she returns. They argue, V rings the police. M strikes the horse giving it a minor flesh wound. M and V fight, the police arrive, M is heard to shout, 'I will kill you, you bitch!'. M is arrested and taken to the watchhouse at Roma Street. He is charged with attempted murder, assault causing bodily harm, injuring an animal and breaching a domestic violence order. M telephones his lawyer to apply for bail when the matter is heard following day. M has permanent work as a chemist and is able to post a significant bond. M has not previously threatened V or harmed her physically.

**Legal issue:** Should the magistrate grant M bail? What conditions should apply if bail is granted?

**Decision:** Make the Magistrate's decision. Give consideration to any conditions which make it possible to grant bail and give your reasons. [A] [E]

### Case 3:

#### *R v Oscar*

**Facts:** Oscar travelled to North Queensland for a holiday. He returned by train, stopping at Roma Street Station. He was carrying a bag of cannabis (more than 500 grams). While waiting for his connecting train he smoked a joint on the platform and offered one to a railway attendant who reported him to the police. He was arrested and charged with supplying and possessing an illegal drug under the *Drugs Misuse Act 1986* (Qld). He expected that he would be granted bail the following morning in court, but the magistrate remanded him in custody. He contacted a lawyer and was advised that he could apply to the Supreme Court of Queensland for bail.

Oscar is a university student in Melbourne. His parents agreed to provide funds to meet any bond or any surety required by the court. The application for bail was made immediately and listed for hearing in the Supreme Court of Queensland. Oscar had no previous criminal record.

**Legal Issue:** Should the judge grant Oscar bail?

**Decision:** Make the decision for the judge. Give your reasons. [A] [E]

## Inquiry Focus

*Do recent changes to bail laws adequately balance the 'right to bail' and 'community safety'?*

In the Australian legal system, a person charged with an offence is entitled to the presumption of innocence. A natural consequence is that alleged offenders are not jailed until they are convicted. However, such defendants may be held on remand until their case is heard. As you have read earlier in this chapter, whether or not a defendant can be held in jail awaiting trial is subject to the *Bail Act*. Judges must exercise their powers to grant bail according to the Act. A person who is refused bail and held in custody is said to be on remand.

**Using Sources 1-6, analyse and evaluate whether or not the *Bail Act* has struck an appropriate balance between the defendants' rights and the right for the community to feel safe.**

### Source 1

#### CHANGING THE RULES OF BAIL: AN ANALYSIS OF RECENT LEGISLATIVE REFORMS IN THREE AUSTRALIAN JURISDICTIONS

Bail decisions are a high-volume and hugely consequential component of the Australian justice system...Working with a dataset of 71 statutes enacted in New South Wales and Victoria and Queensland during the 10 year period between 2009 and 2018, we...illuminate key features and patterns. Our main findings are that bail laws remain an active site of statutory reform, and that the object of harm-risk minimisation routinely takes priority over the fundamental rights of the accused.

A recurring feature of the legislative amendments in recent times is that governments have brought reforms in response to serious and highly publicised tragedies (signal crimes) which are quickly read as an indictment on the adequacy of bail laws. Such instances include the Bourke Street mall attack in Melbourne in January 2017, when, while on bail, Dimitrios Gargasoulas drove his car into pedestrians, killing six and injuring many more, the vicious murder of Teresa Bradford in Queensland by her estranged husband who was on bail with respect to alleged domestic violence offences, and the 2014 Lindt Café siege in Martin Place in Sydney at the hands of Man Haron Monis, on bail at the time, leading to the deaths of 2 hostages and Monis himself. Following such severe and high-profile events, governments seek to urgently review bail regimes...

Source: Lauchlan Auld and Julia Quilter, 'Changing the rules of bail: an analysis of recent legislative reforms in three Australian jurisdictions' (2020) 43 (2) *UNSW Law Journal*, 624, 644-645.

- a. Describe the scope of the article's enquiry into bail laws. [C]
- b. Describe what the authors refer to as 'signal crimes'. [C]
- c. Explain why the occurrence of these signal crimes are 'an indictment on the adequacy of bail laws'. [A]
- d. Identify the common fact (circumstance) of the three signal crimes outlined. [C] [S]
- e. Explain why bail laws are an 'active site of statutory reform'. [A]

Domestic violence offenders are not the only group in our community which have been highlighted by the media to create awareness of the need for community safety and protection of property. Juvenile crime, particularly car theft, has been at the forefront of community concern in some sections of the media. It has led to changes to bail conditions in Queensland for juveniles.

## Source 2

### JUVENILE CAR THEFT AUSTRALIA: IT'S TIME TO TAKE IT SERIOUSLY

The tragic news of the three people killed in Brisbane by a 17-year-old allegedly high on drugs, driving a stolen car, has been devastating for the Brisbane community absolutely sick of youth car theft.

This particular incident involved a 17-year-old kid allegedly stealing a Toyota Land Cruiser, being involved in a road rage incident, whereby he deliberately slammed a Hyundai i30 before minutes later running a red light, colliding with a truck, and rolling the vehicle onto a man and his pregnant partner just walking their dogs. They were killed.

He then allegedly fled from the scene of the incident in the attempt to steal yet another car and get away, but before he could do that locals tracked him down...and held him down for the police to arrive....

The issue is that juvenile car theft is now so common in Brisbane the law and the police are almost powerless or unwilling to do anything about it. The worst part of this unfortunate event is that the teenage driver was out on bail at the time of this incident for other motor vehicle offences. A clear sign the system had failed.

In 2019, 14,239 cars were stolen in Queensland, a 68.6% increase from the 8443 stolen in 2015. Car theft up here was only beaten by Victoria's 16,721 that year, but it has a higher theft per registration given the lower population.

The issue of youth crime and juvenile car theft appears to be directly correlated to the ice epidemic in Queensland.

Source: Alborz Fallah, 'Juvenile car theft in Australia: it's time to take it seriously', *Car Expert* (Online, 27 January 2021) <[carexpert.com.au/opinion/juvenile-car-theft-in-australia-its-time-to-take-it-seriously](http://carexpert.com.au/opinion/juvenile-car-theft-in-australia-its-time-to-take-it-seriously)>.

### THE GOVERNMENT'S 'WAR ON KIDS' WON'T STOP THE YOUTH CRIME PROBLEM IN QUEENSLAND, EXPERTS SAY

'If I had just one person that loved or cared about me... I think that would have reduced a lot of the crime'. Those are the blunt words of Georgia, a young, well-spoken woman who was just 12 years old when she first landed in youth detention on car-stealing charges. 'Kids don't just wake up one day and decide they are going to go out and do crime and steal cars... that comes from extensive trauma history,' she said. She was just a toddler when she was taken off her drug-addicted, abusive and neglectful parents. What followed was a cycle through foster care, residential care, and later stints in police watch houses and youth detention centres. 'I would have been in Children's Court more than 50 times and for probably over 100 offences,' she said.

Source: Kate McKenna, 'The government's 'war on kids' won't stop the youth crime problem in Queensland, experts say', *ABC News* (Online, 22 February 2021) <[abc.net.au/news/2021-02-22/queensland-government-reforms-youth-repeat-offenders/13176562](http://abc.net.au/news/2021-02-22/queensland-government-reforms-youth-repeat-offenders/13176562)>.

## RECORDED CRIME: OFFENDERS

\*Reference period 2020-21 financial year

### Queensland

#### Youth offenders

Offenders aged between 10 and 17 years accounted for 12% of all offenders in Queensland (10,314 offenders). More than a fifth (22%) of youth offenders had a principal offence of acts intended to cause injury (2220 offenders) this was an increase of 13% from 2019-20, making it the most common principal offence type for youth offenders.



#### Aboriginal and Torres Strait Islander offenders

There were 17,564 Aboriginal and Torres Strait Islander offenders proceeded against by the police in Queensland. This was slightly higher than the previous year, increasing by less than 1% (105 offenders). Considering population growth, the offender rate in Queensland for Aboriginal and Torres Strait Islander offenders decreased from 9485 to 9299 offenders per 100,000 persons.

Acts intended to cause injury was the most common principal offence for Aboriginal and Torres Strait Islander offenders (23% or 4063 offenders) an increase of 14% from 2019-20.

Source: Australian Bureau of Statistics, 'Recorded crime: offenders', Australian Bureau of Statistics (Online, 9 February 2023) <[abs.gov.au/statistics/offenders-latest release](https://abs.gov.au/statistics/offenders-latest-release)>.

- Describe the extent of juvenile crime in Queensland. Is car theft the most prevalent type of juvenile crime? [C]
- Identify and describe the factors in the background of juvenile offenders that may have contributed to them committing offences. [C] [S]
- Explain what you think could be done to reduce juvenile crime and also to keep the community safe? [A]

Now you can read the policy and legislative response of the Queensland government to the community's concern about juvenile crime. You will have the opportunity to agree or disagree with the government's approach.

### Tip

You may decide that you need much more information than we have given you so far in the sources that we have provided for you to read in this inquiry. We encourage you to follow your curiosity.



**Source 3****REPORT NUMBER 7****Youth Justice and Other Legislation Amendment Bill 2021 (QLD)****Legal Affairs and Safety Committee****About the Bill**

On 25 February 2021 Hon Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, introduced the Youth Justice and other Legislation Amendment Bill 2021 (the Bill) and referred it to the Legal Affairs and Safety Committee (the committee) for detailed consideration.

**Objectives of the Bill**

The Bill amends the *Youth Justice Act 1999* (YJA) to respond to the characteristics of the offending behaviours of serious recidivist youth offenders and strengthen the youth justice bail framework. The amendments to the YJA build on the Queensland government's five-point action plan, announced in March 2020 which complements the Youth Justice Strategy.

The bill also enacts a range of amendments to the *Police Powers and Responsibilities Act 2000* (PPRA) in relation to knife crime and hooning offences. The primary policy objective of the amendments relating to knife crime is to minimise the risk of physical harm caused by knife crime in Safe Night Precincts (SNPs). The proposed amendments relating to hooning offences will strengthen owner onus provisions by expanding the evasion offence notice scheme outlined in the PPRA to apply to all type I vehicle -related offences listed in the PPRA. This amendment will require owners of motor vehicles involved in these offences to make declarations and provide information that may be used to assist in the investigation of hooning offences.

The Bill aims to achieve its policy objectives by amending the YJA and PPRA to:

Strengthen the youth justice bail framework through:

- Providing the legislative framework required to trial the use of electronic monitoring devices as a condition of bail for some offenders aged 16 and 17 years old who have committed a prescribed indictable offence and have been previously found guilty of one or more indictable offences (with a review after 12 months);
- Explicitly permitting the court or a police officer to take into consideration when determining whether to grant bail, whether a parent, guardian or other person has indicated a willingness to do one or more of the following: support the young person to comply with the bail conditions, advise of any changes in circumstances that may impact the offender's ability to comply with the bail conditions, or advise any breaches of bail;
- Creating a limited presumption against bail, requiring certain young offenders charged with 'prescribed indictable offences' to 'show cause' why bail should be granted;
- Clarifying that, although a lack of accommodation and/or family support is a consideration that bail decision-makers can take into account in determining whether to grant bail, it cannot be the sole reason for keeping a child in custody.

Amend the Charter of Youth Justice Principles to include a reference to the community being protected from recidivist youth offenders.

Source: Legal Affairs and Safety Committee, *Report Number 7: Youth Justice and Other Legislation Amendment Bill 2021*, (Report, April 2021) <documents.parliament.qld.gov.au/TableOffice/TabledPapers/2021/5721T461.pdf>

- a. Describe the changes the proposed bail law makes to the current process?
- b. Identify the changes which you consider will make it harder for offenders to be granted bail. Explain your answer. [C] [S] [A]
- c. Identify the changes which you consider will make it easier for offenders to be granted bail. Explain your answer. [C] [S] [A]
- d. Do you consider that the Queensland government has responded in a balanced way to the issue of dealing with the right of juvenile offenders to bail on the one hand, and the need to maintain community safety and protect community property on the other. [E]

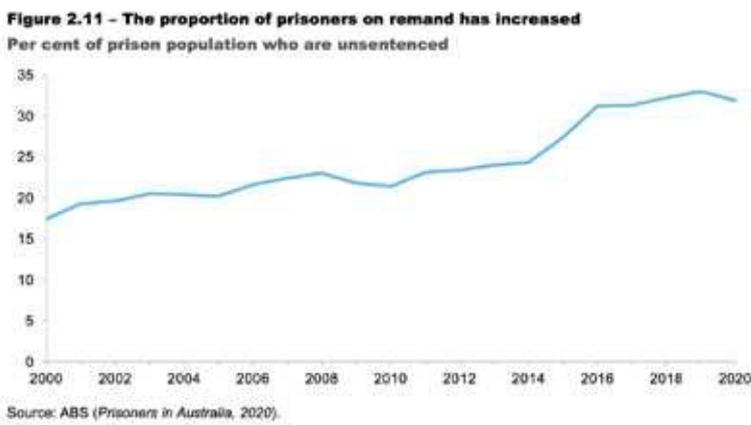
At this point we are going to shift the focus of the inquiry from bail to remand. You met the concept of remand earlier in this inquiry. An offender who has been refused bail and remains in custody is said to be on remand. Examining the statistics of remand will clearly give you a measure not only of how effective bail laws might be to keep dangerous offenders in custody, but also how unfair they might be if offenders are kept in custody (on remand) when they should not be or for longer than they should be.

**Source 4**

**Remand**

One third of Australia’s prison population is on remand, awaiting trial or sentencing. The share of the remand population has nearly doubled in the last two decades. While on remand, prisoners awaiting their trial are in a state of flux. The uncertainty of this for prisoners, victims and corrective services limits access to available services such as education and training and rehabilitation programs. Remanding people in custody means that governments face the fiscal costs of imprisonment itself. Additionally, remandees face indirect costs similar to those associated with short sentences but remand can have a particularly adverse impact on mental health. A study looking at New South Wales and South Australia found that 50 percent of prisoners who committed suicide were on remand at the time.

While the vast majority of remandees (approximately 91%) are found guilty, a small number of remandees are either found not guilty or have their case dismissed. This has likely resulted in a small increase in prisoner numbers. For example, in New South Wales in 2019, 8.7% of remandees were found guilty (2.4%) or had their case dismissed (6.3%). The proportion found not guilty was higher for Aboriginal and Torres Strait Islander people on remand.



A high rate of remand is consistent with a high proportion of violent crimes, for which bail is more likely to be denied. However, the nature of a crime is not the only consideration in granting bail. Factors such as the likelihood of attending a hearing, prior offending and characteristics of the accused are also taken into consideration. By ensuring that defendants attend trial, that witnesses are protected, and that further offences are not committed, remand is an important element of the legal and policy framework surrounding community safety.

Consistent with the overrepresentation of Aboriginal and Torres Strait Islander people in the total prison population, Aboriginal and Torres Strait Islander people are increasingly overrepresented in the remand population, accounting for 31% of remandees in 2020, up from 23% in 2006 (ABS 2020b). The average time on remand increased from 4.5 months to 5.8 months between 2001 and 2020. In 2020, the longest times on remand were experienced in Queensland (6.5 months), Western Australia (6.3 months), and New South Wales (6.1 months).

### Drivers of Overrepresentation in Remand

#### Bail refusal

Aboriginal and Torres Strait Islander people are less likely to be granted bail than Non-Indigenous persons. This has been attributed to the likelihood of accused Aboriginal and Torres Strait Islander peoples having prior convictions-Aboriginal and Torres Strait Islander peoples are up to twice as likely as non-Indigenous accused people to have 10 prior convictions-and are also more likely to have prior convictions for a previous court order.

Source: Australian Government: Productivity Commission, *Australia's prison dilemma* (Research Paper, October 2012).

*Re: Mitchell* [2013] VSC 59

**Facts:** Mitchell, a pregnant 22-year-old Aboriginal single mother was charged with offences relating to begging, and obtaining 'a financial advantage by deception' because she had been travelling on the train on a children's ticket. Mitchell was refused bail at the Magistrates Court of Victoria, because it was found that, due to similar past offending, Mitchell represented an unacceptable risk of committing further offences. Mitchell had previous convictions for shoplifting, burglary, obtaining property by deception and breach of a Community Corrections Order.

**Legal Issue:** Should the Supreme Court grant Mitchell's application for bail?

**Decision:** The Supreme Court granted bail. The court held that the magistrate's decision to refuse bail was 'unassailable'. Nonetheless, it said that at the time of the appeal determination, Mitchell had spent 7 weeks on remand, longer than any sentence she would have received for the charges. It was likely that if not bailed, she would spend up to 9 months on remand before trial. The court referred to the requirement to consider Aboriginality in s3A of the *Bail Act 1977* (Vic), noting the potential to over-police Aboriginal and Torres Strait Islander peoples, and stated that to charge Mitchell with obtaining financial advantage by deception for travelling on a child's ticket was 'singularly inappropriate'.



- a. Described the characteristics of the remand population in Australia and in Queensland. [C]
- b. Describe and explain the relationship between bail and the number of prisoners on remand. [C] [A]
- c. Describe and explain the issues which are often of particular importance to Aboriginal and Torres Strait Islander people who apply for bail. [C] [A] [E]



### Tip

Before completing the task set at the beginning of this inquiry, you should research any topic that you think relevant which is not covered in the text above. Changing the terms of bail to protect the community against forms of criminal behaviour, or to change the criminal behaviour of individuals or groups in the community may simply be addressing the problems superficially. Research into the topic of recidivism, and reading the Coroner's report in the Hannah Clarke 'signal crime', may be useful lines of inquiry for you to follow.

## 6.3 Mentions

**A mention is a court hearing of a procedural nature which a defendant must attend.** As the name suggests, a mention is an occasion when the case comes before the court, but is not finally decided. There are as many mentions as are required by the defendant, the prosecution, and the magistrate, in order to ensure a fair and timely progression of the defendant's matter through the judicial system. After the first hearing date, the magistrate determines when and where a defendant's matter is set down for mention.

If a defendant is not taken directly to court from custody by the police, the first hearing date is shown on the:

- Notice to appear; or
- Complaint and summons; or
- Bail undertaking (if granted bail by a police officer after arrest).

### Hypothetical?

**Facts:** Jack Simon is arrested during Schoolies and charged with being a public nuisance. He is taken to the watch house at Southport and held overnight. Jack rings his mother who says she will be at the Southport court the next day. They agree he is to seek bail on his own undertaking in order to seek legal advice.

#### The court appearance

*Jack waits until his name is called and then goes to stand at the bar table with the prosecutor.*

**Magistrate:** You may sit down Mr Simon. Go ahead. Prosecutor.

## Hypothetical?

**Prosecutor:** Your Honour, the defendant is charged with 1 offence, and one count of public nuisance under s6 of the *Summary Offences Act 2005* (Qld). Does Your Honour require the particulars of the charges to be read out to the court? I understand the defendant has not had the opportunity to seek legal advice.

**Magistrate:** No thank you, Prosecutor, Mr Simon, I will hear from you now.

*Jack stands*

**Jack:** Your Honour, I would like to get legal advice before deciding what to do. I apply for bail on my own undertaking. My mother is outside waiting for me and said she would assist with any of the court's requirements. She has arranged an appointment for me at the family's lawyers early next week.

**Magistrate:** Very well, Mr Simon. Bail is granted on your own undertaking. Your matter is remanded for a period of one month to 12 December. On that day you will need to advise the court whether you intend to plead guilty or not guilty. Do you understand?

**Jack:** Yes, thank you Your Honour, I do.

**Magistrate:** You may go. Please attend at the registry to collect and sign the bail papers before you leave.

1. Describe the roles played by Jack Simon, the police, the magistrate and the prosecutor. [C]
2. Conduct a short role-play of the courtroom scene. Set up your classroom like a courtroom. [C]
3. Go to the local Magistrates Court. Prepare a format beforehand to help you report on what you see and hear. Write a report about 3 to 5 criminal cases you have observed. [C] [A] [E]

## Entering a plea

Once the defendant has received legal advice, he/she should be in a position to respond to a request by the magistrate to plead to any charges, there are only two pleas possible:

- 'guilty', or
- 'not guilty'.

**If the defendant pleads 'guilty', the magistrate will want to sentence the defendant (determine the appropriate punishment) straight away, or at some suitable future date.**

The magistrate expects to hear submissions from the defendant or the defendant's lawyer and from the prosecution (police prosecutor in the Magistrates Court of Queensland) before passing sentence.

**A 'not guilty' plea will mean that the court will require the matter go to trial.** Where the charge is one which can be heard in the Magistrates Court of Queensland, it will be adjourned to a summary callover at which it will be set down for trial.

If the defendant pleads 'not guilty' to a more serious charge which must be heard in either the District or the Supreme Court of Queensland, the matter will be adjourned for mention to a committal callover, at which arrangements for a committal hearing will be made.

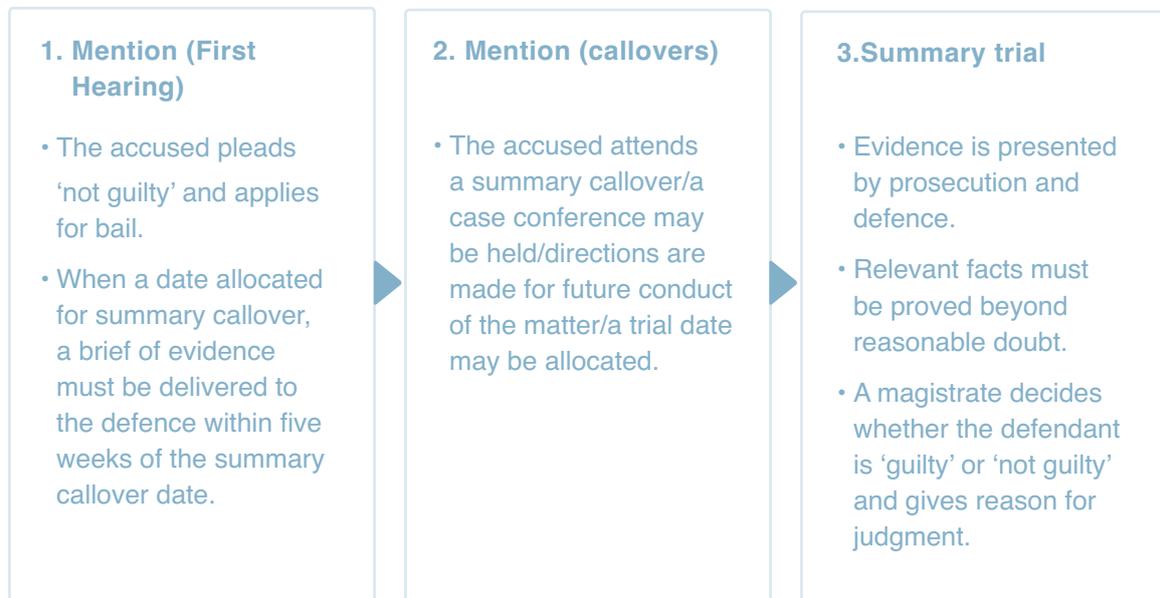
To enable a defendant’s matter to proceed in an orderly and fair manner it must first go to a callover. **A callover is a mention at which the prosecution and the defence give information and make submissions to the court to enable decisions to be made about the future conduct of the matter.**

It is necessary for a defendant on bail to apply for the grant of bail to be further enlarged each time he/she attends court.

## 6.4 Callovers

### Summary callovers for simple offences

The usual pathway followed by a criminal matter in which the defendant pleads ‘not guilty’ and where the trial can be heard before a magistrate in the Magistrates Court of Queensland is set out in the flowchart below.



### Summary callovers

When a defendant pleads not guilty in the first instance, the magistrate sets a date to appear at a mention called a summary callover. The purpose of the summary callover is for.

The defendant to:

- inform the magistrate that the trial is to proceed;
- give the magistrate a preliminary outline of witnesses likely to be called for the defendant, if any;
- advise the magistrate of any proposed legal representation;
- arrange to attend case conferencing with legal representation;
- request the prosecution to provide statements of witnesses, documents, and exhibits needed to facilitate any case conference;
- indicate if any special requests will be made to assist in presenting this case (for example, by video evidence).

The prosecution to:

- attend case conferencing with the defendant’s lawyer;
- advise the witnesses for the prosecution and indicate their availability;
- indicate if there are any special requests to be made for the conduct of the trial; and
- indicate when the Crown (prosecution) expects to be ready to proceed.

**By this process the court ensures procedural fairness, and the defendant is given a proper opportunity to put his/her case so that he/she is treated fairly and impartially.**

### Practice directions

The court regularly makes what it calls Practice Directions in which it sets out what it expects the prosecution and the defendant to do in order to move the matter forward through the court system efficiently and impartially.

This was particularly important during 2020, 2021, and 2022 during COVID-19. The issue for the court was how to maintain and progress the criminal justice system in the face of the many stoppages that were required by health declarations, particularly those which involved preventing people from travelling and gathering in public places.

## Review

### Comprehend

#### 1. Define and describe:

- |                      |                        |     |
|----------------------|------------------------|-----|
| a. Accused           | g. Magistrate          |     |
| b. Bail              | h. Mention             |     |
| c. Callover          | i. Plea                |     |
| d. Case conferencing | j. Practice direction  |     |
| e. Cash bail         | k. Pre-trial processes |     |
| f. Defendant         | l. Prosecutor          | [C] |

#### 2. Describe and explain:

- The role of the police in granting bail.
- The role of the court in granting bail.
- The conditions a court or police officer can impose on a person who is granted bail.
- What happens in court on the first hearing date?
- The role played by the lawyer for the accused during the pre-trial process.

- f. The purpose of the practice directions when a matter is mentioned.
- g. The information an accused person or his lawyer must provide to the magistrate in a summary callover.

[C]

3. **List** and **explain** the different types of mention which can occur during the pre-trial processes of a criminal matter. [C]
4. **Create** a flow chart or diagram to illustrate the stages in the progress of a summary matter in the Magistrates Court of Queensland. [C]

### Evaluate

1. Now that you have reached the end of this chapter are you able to identify the laws, and the practice and procedure of the court system which ensure that defendants and victims alike are treated fairly? Are you able to suggest any laws which should be changed? Any practices or procedures that need to be encouraged or emphasized? Set out your thoughts in writing in a few short paragraphs. [E]



### TIP

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You will almost certainly find that a visit to your local court on at least one occasion to observe the system in practice will be of great assistance.

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# Criminal trial process

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## Chapter 7: Pathways to a fair trial, the committal process

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7.1 The purpose of a committal

7.2 The committal pathways

7.3 Registry committals

7.4 Committals by magistrates

7.5 The role of the Crown Law Office (Office of Director of Public Prosecutions)

7.6 Ex-officio indictments

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - committal proceedings ensure an accused does not face trial on a serious criminal matter without sufficient evidence
  - the committal process ensures the accused is fully informed about the nature and detail of the case against him or her (disclosure)
  - full disclosure means that the accused is given a fair opportunity to meet the case against him or her
  - the nature and role of committal proceedings have been subject to review in Queensland from time to time.
- analyse and evaluate
  - the choices available to a defendant to navigate through committal proceedings and prepare for trial
  - the extent to which committal proceedings ensure that a defendant receives a fair trial.

## 7.1 The purpose of a committal

### Key Terms

**Committal:** a hearing before a judge of the Magistrates Court of Queensland for the purpose of deciding whether or not the person charged with an indictable offence should be committed for trial or sentence.

We have seen that in the Australian legal system it is the job of the police to investigate when a criminal offence occurs. If the investigation discloses who committed the offence, the police will proceed to charge that person(s). Sometimes no-one is ever charged with committing a particular offence. Most of the time the police will charge someone with committing the offence and steps are taken to have the person who is charged dealt with in the criminal trial process. Given that any person charged is presumed innocent until proven guilty, in the Australian criminal justice system, how should such an accused person be treated?

The *Human Rights Act 2019* (Qld) states that:

#### **32 Rights in criminal proceedings**

(1) *A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.*

Section 32 goes on to set out minimum guarantees which a person charged is entitled to without discrimination.

In the Australian legal system, it is important that a person charged with an offence is aware of the evidence against him or her. Consequently, **the committal hearing (where all the evidence available to the prosecution to prove guilt is presented) enables a defendant to understand the case against him/her and to prepare for trial.** The **right to a fair trial** is an essential element of **natural justice** and is enshrined in the *Universal Declaration of Human Rights 1948*, Article 10.

The committal process must be used for all indictable offences and for certain offences normally decided in the Magistrates Court of Queensland, which must be heard in a higher court (District or Supreme Court of Queensland). These are generally more serious offences which are punishable by a custodial sentence.

The committal hearing is designed to test whether the evidence against the accused is strong enough to put him/her on trial before a judge and jury in the District or Supreme Court of Queensland. The decision to be made to commit a person to trial is not **whether the accused is innocent or guilty, but whether the police evidence is sufficient for a jury in a higher court to convict the accused.** The test is not whether a jury would convict the accused but whether, on the evidence presented, if believed and unexplained, a jury could convict the accused.

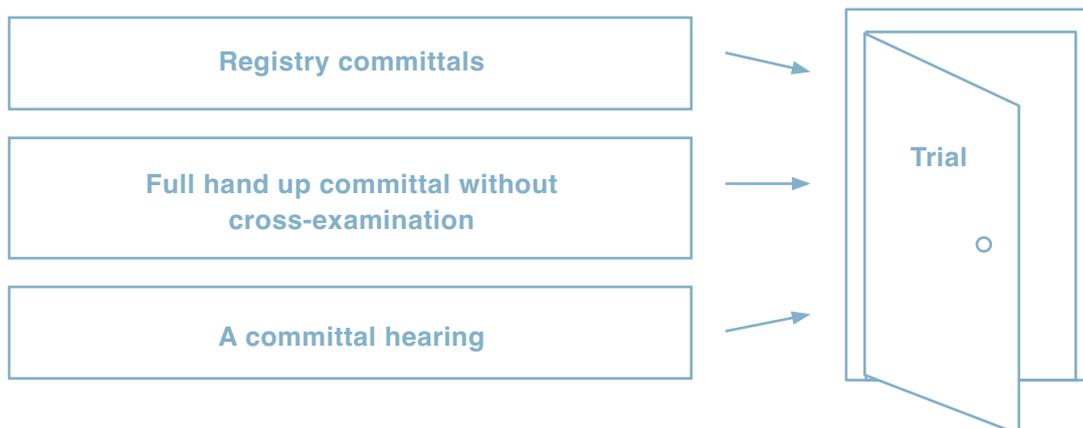
**It is in the interests of justice to have an effective and fair committal process. It adds to the efficiency of the justice system.** Weak cases will be identified and possibly eliminated. Strong cases may help the defendant, who receives legal advice, to plead 'guilty'. The charges brought at committal may be changed after the committal hearing. The Director of Public Prosecutions (DPP) whom the police will brief following a committal always reviews the charges before the trial in the District or Supreme Court of Queensland. At this point in the process submissions can be made to the DPP about the charges or about the need for further investigation and evidence.

If, at the committal hearing, the defence is surprised by part of the prosecution's case, and needs extra time to prepare, it will ask for an adjournment of the trial to a later date. This can delay the trial and is inefficient. For example, the defence may need to find a witness to contradict some evidence brought by the prosecution. This would take time and interrupts the trial if the need to get fresh/new evidence is not apparent before the trial starts. The committal process is efficient because it presents the evidence against the defendant in advance. This allows the defendant to prepare his or her response in a timely manner.

There are several committal pathways which were legislated in amendments to the *Justices Act 1886* (Qld) in 2010.

## 7.2 The committal pathways

At the committal callover the defendant must inform the court which pathway he/she will take to progress to a higher court. The choices for a defendant are set out in the *Justices Act 1886* (Qld). These are:



Each defendant has different reasons for his or her choice of the particular committal pathway. In anything but the most straightforward and uncomplicated of cases, lawyers will tell you that they like to see all of the evidence which is to be faced by the defendant before giving the defendant advice about which pathway to choose. Once the brief of evidence (the statements of witnesses, the statements of police, any expert witnesses, documents, and physical evidence) is available to the defendant it is possible to decide which parts of the evidence need to be tested or further explored in cross-examination. Generally, the more complicated the factual circumstances surrounding the alleged offence, the more likely it will be that the matter proceeds by way of a committal hearing.

In committals before magistrates, the prosecution is required to call its witnesses to give oral evidence in the court and to be cross-examined by defence counsel on their oral testimony as well as on any written statements. There may be arguments as to whether cross-examination of some witnesses will be allowed. If the prosecution consents to such cross-examination, then that is the end of the matter. If the prosecution does not consent to the cross-examination of certain witnesses, then the magistrate will hear arguments and will decide if cross-examination is allowed.

Regrettably, for defendants faced with these choices, an important consideration is always the cost of legal representation.

## 7.3 Registry committals

The *Justices Act 1886* (Qld) s114 sets out the requirements which apply if a defendant decides to proceed with the registry committal performed by the clerk of the Magistrates Court of Queensland. This choice of committal is usually adopted by the defendant who has decided there is little or nothing to gain from requiring a magistrate to rule that there is a case to answer. One way of viewing the taking of this step is that a defendant is consenting to being committed. The advantage to the defendant is that she can later tell the court, if she pleads guilty, that she did not put the State to the expense of a committal hearing.

Section 114 requires that the **defendant must be legally represented**. The defendant's lawyer must communicate in writing to the clerk of the court that:

- the defendant does not intend to give evidence or call any witness in relation to the defendant's committal on the indictable offence; and
- the clerk of the court is not required to make a decision as to whether there is sufficient evidence to commit the defendant for trial or not; and
- the defendant must indicate if the matter should go to a higher court for trial or for sentence.

There are other requirements set out in s114. The defendant's lawyer must acknowledge on behalf the defendant that all of the evidence that the prosecution must present at the committal has been made available. If the defendant intends to plead guilty and notifies the court of this fact, he or she must provide the clerk of the court with a signed written statement to this effect. It must contain words to the effect that:

*The defendant acknowledges that the defendant is not required to enter any plea, and has nothing to hope from any promise, and nothing to fear from any threat, that may have been held out to induce the defendant to make any admission or confession of guilt.*

## 7.4 Committals by magistrates

### Full hand up committal without cross-examination

When a defendant does not require any prosecution witness for cross-examination, one option is to simply inform the magistrate that he or she chooses to be committed to the higher court for trial or sentence. It is not necessary at this stage to plead, but obviously the magistrate will not commit the defendant to a higher court for sentence unless a plea of guilty is entered.

For this type of committal to occur:

- no witnesses give evidence or are cross-examined (it is still possible for the defendant or his/her lawyer, at the committal hearing);
- the prosecutor hands up all the evidence to the magistrate;
- the defendant, if appropriate, submits that there is no case to answer and the magistrate dismisses the charge if the submission is accepted; or
- the magistrate commits the defendant's matter to the higher court for trial or sentence, depending on whether the defendant pleads guilty or not guilty.

Read the facts of this hypothetical case, before answering the questions below.

### Hypothetical?

**Facts:** Primrose needs a special dress for her daughter's wedding. She goes to an expensive boutique in the city. She finds a dress she loves. It is expensive, over \$2000.00. This is not a problem for Primrose as she and her husband Orlando are well off. Primrose has been suffering from short-term memory loss for nearly a year, has been referred to a specialist, but is not on any medication. While in the boutique, wearing the new dress in the changeroom, her daughter telephones about the coming wedding. Primrose becomes distracted and leaves the boutique taking all her belongings except the dress she had worn to the shop. Primrose walks out of the boutique wearing the new dress without paying. She is seen by a member of staff who telephones the police. Primrose is leaving the car park when she is stopped, arrested, and charged with stealing. While there, the police arranged for her own dress to be returned to her from the boutique, and retained the alleged stolen dress as well. Primrose is upset and embarrassed and telephones Orlando who arranges for the family lawyer to meet her at the police station. Despite explanations on her behalf by her lawyer, the police prosecute the charge of stealing. It becomes apparent that the owners of the boutique could not simply accept the explanation that Primrose had a temporary loss of memory. Because of the value of the dress, the charge of stealing against Primrose must be heard in the District Court of Queensland.

The family's lawyer advises Primrose to plead 'not guilty'. The matter proceeds through several mentions while Primrose obtains medical evidence from a psychiatrist which would prove that at the time she took the dress belonging to the boutique, that she had short-term memory loss, and did not know what she was doing. The medical evidence is not ready at the Committal Callover. The family's lawyer advises that the simplest process is for Primrose to plead 'not guilty' and simply accept that the matter be sent to the District Court of Queensland for trial. He advises that it is possible, once the report is available, to provide it to the Crown Law Office (DPP) with a written submission seeking the charge of stealing be withdrawn.

It is not uncommon for an accused to challenge the prosecution's case by making submissions to the Crown Law Office in the period between committal and trial while Crown Law prepares the indictment and reviews the transcripts of the committal proceedings.

1. The offence of stealing is set out in s398 and defined in s390 and s391 of the *Criminal Code 1899* (Qld). The essential elements of the offence of stealing are:
  - taking or converting the property of another
  - with fraudulent intent.

Describe the evidence which the police investigating the charge against Primrose need to present in order to prove the offence of stealing. Set out the possible witnesses with a brief summary of the evidence (including documents) which each witness would provide. [C] [A]

2. Assume that the evidence provided by the prosecution to Primrose's lawyer accurately describes the events which occurred. What advice do you think Primrose's lawyer should give her about the form of committal which would be appropriate? Give reasons. [C] [A] [E]

## A committal hearing (cross-examination allowed)

Section 110A of the *Justices Act 1886* (Qld) applies when a defendant's lawyer wants to cross-examine all or some of the witnesses called by the prosecution. All of the evidence must be presented by the prosecution at the committal hearing and the defendant is entitled to request the prosecution to make the witnesses available to give oral evidence under cross-examination. The prosecution and the defence can agree on the witnesses to be cross-examined. The magistrate, where the prosecution does not consent to a witness being cross-examined, must decide if cross-examination should be allowed. Cross-examination is generally allowed if a substantial reason is given, unless the witness is in a special category (a child or a protected witness). Most defendants want to cross-examine any witness if their evidence is contestable.



In *Dupois v Magistrate Previterra & Anor* [2023] QSC 82 the defendant appealed a decision of the magistrate refusing to allow cross-examination at committal. The appeal was dismissed because the defendant was unable to put forward substantial reasons, for example being able to argue that cross-examination was likely to undermine substantially the credit of a witness. The Court of Appeal noted that the categories of substantial reasons are not closed and depend on the facts and circumstances of each case. The Court of Appeal quoted from the review of the civil and criminal justice system conducted in 2008 by the Hon Justice Moynihan, who concluded:

*Ultimately, I have not been persuaded that the retention of an unrestricted right to call and cross-examine witnesses should be sustained. There are undoubtedly many benefits to the accused, to the prosecution and the criminal justice system generally from a well prepared and conducted committal hearing. On the other hand, there are undoubted effects and costs to the system from unnecessary, inappropriate and wasteful use of the committal court: court costs, delay, excessive 'churning' through unproductive court events. There are also obvious costs to individuals - witnesses who must be available for cross-examination only to be told at the last minute that they are no longer required and excessive legal costs to accused.*

*I am satisfied that cross-examination of witnesses should occur only when it is justified.*

The Hon Justice Martin Moynihan AO, 2008. Review of the civil and criminal justice system in Queensland, *Chapter 9: Reform of the Committal Proceedings Process*, (Final Report, 2008) <[cabinet.qld.gov.au/documents/2009/jul/review%20of%20civil%20and%20criminal%20justice%20system%20in%20qld/Attachments/Review%20by%20Moynihan.pdf](http://cabinet.qld.gov.au/documents/2009/jul/review%20of%20civil%20and%20criminal%20justice%20system%20in%20qld/Attachments/Review%20by%20Moynihan.pdf)>.

At the end of the committal hearing the magistrate must decide whether, **on the evidence presented, if believed and unexplained, a jury could convict the accused.** If **not**, the magistrate rules that there is **no case to answer**, and the charge against the defendant is **dismissed**.



## Case Study

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*Re-Ken* (unreported case in Magistrates Court of Queensland)

**Facts:** Ken is fired from his job at Engineering Works Ltd (EWL). He has an argument with Ross, the manager who had fired him. Ken goes home, gets his father's rifle (.22 calibre) and goes back to the EWL factory. The factory floor is open plan and the six employees who work on the floor can generally see the office window (from waist to ceiling) at one end. Ross sits in the office facing the factory floor. Ken goes to the office window, fitted with the rifle barrel, and yells abuse at Ross. Ross yells back. Ken Fire's arrival at the window then runs away. The bullet shatters the glass and lodges in the ceiling of the office. Ken is arrested at home, taken to the police station, and charged with attempted murder and causing damage to property. Ken is granted bail, and his matter is allocated a date for mention. Ken's lawyer indicates to the prosecution's instructions from Ken to plead not guilty and proceed to a committal hearing. The prosecution delivers a brief of evidence to Ken's lawyer which contains statements from Ross, a forensic expert, and four factory workers.

Before the committal callover Ken gives a statement to his lawyer which is put in writing and signed. It says that he did not intend to harm the manager but simply to frighten him because of what he had done. Ken's lawyer requests the prosecution to call the manager of Engineering Works Ltd (EWL), the forensic expert, and the four factory workers so that they can be cross-examined on the statements they provide to the police. The prosecutor agrees to make all witnesses available for cross-examination.

At the committal callover the prosecutor and Ken's lawyer inform the magistrate of the agreement to make all witnesses available for cross-examination. The magistrate queries the arrangement and asks for reasons. Ken's lawyer submits that when the evidence is tested it may not support the charge of attempted murder although clearly there is evidence that may support other charges. He informs the magistrate that Ken is not giving evidence or presenting evidence from other witnesses. Ken's lawyer and the prosecutor estimate that the hearing may take up to one and a half days so the matter is listed for two days. The magistrate directed the prosecutor to make arrangements for all witnesses to be present for cross-examination.

At the committal hearing each witness responds to cross-examination as follows:

**The manager:** When asked about the circumstances in which he dismissed Ken, he admits that he acted outside the EWL protocol, and immediately, without giving any reasons, summarily dismissed Ken when he came to work one morning. When Ken asked why he was being dismissed the manager stated he had told Ken to leave or he would call the police. He admits Ken left without threatening him. The manager states that when Ken returned and stood outside the glass window to the office, he was frightened, and could not recall if Ken had pointed the rifle at him or not before firing it. He admits he was at least two metres from the window and had crouched down behind his desk almost exactly at the moment he heard the rifle discharge.

**The forensic expert:** When asked about the fact that the bullet fired by Ken through the window was lodged in the ceiling of the office, the forensic expert admits that the rifle must have been pointing in that direction when fired. He is asked about the effect of the glass window and gives evidence that the glass window pane is not shatterproof and is too thin to have any effect on the bullet trajectory. He admits that the rifle could not have been pointing at the manager at the time it was discharged.

**The other witnesses:** The four other witnesses were in different parts of the factory floor. The closest witness to the office window was at least 12 metres away and was wearing goggles and working with dangerous equipment. The other three were further away and occupied with separate jobs. None of them was able to distinguish clearly what was said but all heard a loud commotion and the sound of steel striking glass, followed by the explosion of a shot and glass shattering. They all saw Ken throw down his rifle and run away after the shot. Under cross-examination it is clear none of the witnesses heard clear words from Ken threatening the manager or saw him point the rifle directly at the office window.

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## Case Study

At the conclusion of the prosecution's case, Ken's lawyer informs the magistrate that Ken is not entering a plea at this stage. He then sums up the evidence, and makes the submission to the magistrate, that on the evidence before the court, a jury, properly instructed, could not convict Ken of the offence of attempted murder.

**Legal Issue:** Should the magistrate decide that a properly instructed jury could convict Ken of the offence of attempted murder?

**Decision:** The magistrate commits Ken for trial to the Supreme Court of Queensland.



### What do you think?

***Criminal Code 1899 (Qld)***  
***4 Attempts to commit offences.***

*(1) When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.*

1. In your own words, set out the arguments for and against the magistrate's decision. Do you agree with his decision? Refer to the evidence given to support your point of view. Remember, Ken did not give evidence. [C] [A]
2. Without Ken's evidence, what direct evidence supports an allegation that he intended to kill the manager? What direct evidence refutes the allegation? Is Ken's evidence needed in order to know his state of mind at the time of pulling the rifle trigger to discharge it? [A]

The evidence presented to a Magistrates Court of Queensland at a committal proceeding is recorded, certified by the magistrate and becomes what is known as the **depositions** of the hearing. These depositions, or the documents from a Registry committal are forwarded to Crown Law (DPP) who examine them and decide whether or not to present an indictment against the accused. If they decide not to proceed, they present a **No True Bill**, which discharges the accused. Police officers draft complaints for Magistrates Court of Queensland hearings and Crown Law draft indictments for the District and Supreme Court of Queensland hearings.

## 7.5 The role of the Crown Law Office (Office of Director of Public Prosecutions)

The role of the Crown Law Office, as already indicated, is to prepare indictments (statements of the charges) to be read to a defendant at the beginning of the trial in the District or Supreme Court. This is not an automatic process, and sometimes the Crown Law officer responsible, on reviewing the depositions, does not agree with the magistrate that the charges against the defendant should proceed and that they should be withdrawn. This can include dropping one

charge and replacing it with another. When this happens the indictment issued against the defendant is called an **ex officio indictment**. In such a case the actual charge has not been the subject of committal proceedings.

There is always an opportunity for the legal representative of a defendant to make representations directly to the Crown Law Office that the charge should be withdrawn altogether, or replaced with a lesser charge where the facts contained in the depositions support such a representation.

### *R v Ken continued...*

Take on the role of Ken's lawyer. You have been instructed to make submissions to the Crown Law Office that the charge of attempted murder should be withdrawn and that Ken is prepared to plead 'guilty' to the lesser charge of common assault (*Criminal Code 1899* (Qld) s335).

1. Re-read the facts of Ken's case (found on pages 165-166) carefully. [C]
2. Locate *Criminal Code 1899* (Qld). Find the definition of assault (s245) and common assault (s335). Apply these sections to Ken's case and decide if he should plead guilty to the lesser charge. Give your reasons. [C] [A] [E]
3. Ken has provided a signed statement to you, which admits everything that happened, but states that by the time he had driven back to the factory to confront the manager, he realised that he only wanted to make him frightened because of how he had behaved towards him earlier that day. Complete a legal letter to the Crown Law office on behalf of Ken, on a 'without prejudice' basis, setting out the arguments in support of the withdrawal of the charge of attempted murder and its replacement by the lesser charge of common assault. [C] [A] [E]

## 7.6 Ex-officio indictments

The issue by the Crown Law office of such indictments has already been referred to in this chapter. There are further circumstances when the Crown Law office may issue such an indictment against an accused person. These include:

- when a magistrate does not commit an accused for trial but the Crown Law Office considers there is sufficient evidence for a jury to convict; and
- when the Attorney-General requests the Crown Law Office to issue an ex-officio indictment against an accused without any committal proceeding taking place.

The *Criminal Code 1899* (Qld) s561 says that a Crown Law officer may present an indictment in any court of criminal jurisdiction against any person for any indictable offence whether the accused person has been committed for trial or not.

There are historical reasons for the current position in Queensland law whereby the Attorney-General (Crown Law Office) can issue indictments on an ex-officio basis, even where an accused is not committed to trial after a committal proceeding. A research assignment follows which gives references for any student interested in conducting an inquiry into committal proceedings and their role in the criminal justice system. It is worth stating here what the Hon Justice Philp stated in *R v Webb* (1960) QdR 443 at 446:

*Of course normally in Queensland as in England today the procedure followed towards the indictment of an accused person is by committal proceedings before a magistrate as provided by the Justices Acts. From the depositions of the witnesses taken before the magistrate the accused knows what case he has to meet and the magistrate if he be not satisfied that a prima- facie case of guilt in law and in fact has been made may refuse to commit. The magistrate thus fulfils in part the function of a grand jury...*

*This normal procedure thus provides safeguards against the conviction of innocent persons...*

The fact that an Attorney-General may not agree with the decision of a magistrate and reinstate charges against an accused person, or create new charges by issuing an ex-officio indictment through the Crown Law office means that the court must hear such proceedings. However, once the indictment has been presented and proceedings commenced the courts will control the proceedings so as to ensure that the accused receives a fair trial.

As stated by, the Hon Justices Gibbs and Mason in a joint judgement in *Barton, Gruzman & ors v the Queen, Attorney-General for NSW, Walker and ors* (1980) 147 CLR 75

*... the courts have a general power to prevent unfairness to the accused, even to the extent of preventing an abuse of process resulting from the prosecution of proceedings brought without reasonable grounds...*

*... every court has undoubtedly the right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.*



## Case Study

*R v Rollinson* [2011] QDC 64

**Facts:** There is a brawl on a football field in December 2004 between two teams. The melee is described as being 'like a swarm of bees'. One player receives facial injuries which require surgical intervention. The police are called. One player is charged in December 2005 with grievous bodily harm. In mid-2008, there is a four-day committal hearing in the Magistrates Court of Queensland with full evidence for the most part and extensive cross-examination of all witnesses. The witnesses include the referee, the police who attend the incident, and most members of the victim's team. An experienced magistrate presides at a committal hearing and dismisses the charge. He makes it clear that the evidence does not satisfy the legal test to commit the defendant for trial.

In May 2008 the Director of Public Prosecutions (DPP) presented an ex-officio indictment in the District Court of Queensland charging the defendant with causing grievous bodily harm to the complainant in 2004.

In May 2009 Judge Dearden refused the defendant's application to permanently stay those proceedings as an abuse of process, concluding that, despite the delay by the prosecution and the difficulties of the prosecution case arising from failures in the investigation process, this is not a matter in which it is appropriate to grant a permanent stay.

The trial is listed in May 2011 to be heard before Judge Koppenol, some two years after Judge Dearden's ruling. The prosecutor, Mr Kinsella, informs Judge Koppenol that six further witnesses may be called and asks for a short adjournment so that those people can be



## Case Study

interviewed and witness statements obtained. However, as the defendant's lawyer submitted, apart from the possible additional witnesses, the Crown case was exactly the same as it was when the magistrate found that there was insufficient evidence to commit the defendant on that charge.

### Legal Issues

1. Could Judge Koppenol reopen Judge Dearden's ruling to refuse an application to permanently stay the proceedings for abuse of process?
2. Should the ex-officio indictment be permanently stayed?

### Decision

1. Judge Koppenol states that, although it is not possible to speculate about what the additional possible six witnesses may say and whether, therefore, any of them will be called as witnesses, the fact is the prosecution case against the defendant is currently still precisely the same one that the magistrate held, after a full hearing five years ago, to be insufficient to place the defendant on trial. He exercises his discretion to grant leave to reopen Judge Dearden's ruling because of this.
2. Judge Koppenol further states:

*In the present case the earlier prosecution was disposed of on its merits at the committal. To then further prosecute that same case by way of an ex-officio indictment five years later is unfair to the defendant. In my view it constitutes an abuse of process. The ex-officio indictment will be permanently stayed.*

### What do you think?

1. Did the legal process in *R v Rollinson* achieve a fair balance between the rights of the victim (complainant) and the rights of the accused (defendant)? [A] [E]



### Research Task

Consider the following proposition:

*Committal proceedings ensure that an accused person is treated fairly in our criminal justice system.*

Do you agree or disagree? Prepare a short report based on your research of relevant sources to present to your class setting out the reasons for your point of view. [C] [A] [E]

Some useful sources are:

- Traceyann Mossop, 'Ex-Officio Indictments & Committals', (2011) *Hearsay* 50 <[hearsay.org.au/ex-officio-indictments-committals/](http://hearsay.org.au/ex-officio-indictments-committals/)>
- The Honourable Justice Martin Moynihan AO, *Review of the civil and criminal justice system in Queensland, Chapter 9: Reform of the Committal Proceedings Process* (Final Report, 2008) <[cabinet.qld.gov.au/documents/2009/jul/review%20of%20civil%20and%20criminal%20justice%20system%20in%20qld/Attachments/Review%20by%20Moynihan.pdf](http://cabinet.qld.gov.au/documents/2009/jul/review%20of%20civil%20and%20criminal%20justice%20system%20in%20qld/Attachments/Review%20by%20Moynihan.pdf)>



# Review

## Comprehend

1. **Define** each of the following terms:
  - a. Indictment
  - b. Registry committals
  - c. Full hand up committal without cross-examination
  - d. Committal hearing (cross-examination allowed)
  - e. Ex-officio indictments [C]
  
2. **Describe** and **explain**:
  - a. the purpose of a committal hearing.
  - b. the role of the magistrate in a committal hearing.
  - c. the assistance a lawyer can provide to an accused during the committal process.
  - d. the role of the Crown law office between committal and trial.
  - e. the decision of His Honour Judge Koppenol in the case of *R v Rollinson*. [C]

## Analyse and evaluate

1. **Compare** and **contrast** the different committal pathways available to an accused person in the committal process. Indicate in your answer those matters which are important to enable an accused person to choose an appropriate pathway. [A][E]
2. Consider the following excerpts from the *Human Rights Act 2019* (Qld) s32:

***Human Rights Act 2019 (Qld)***  
***32 Rights in criminal proceedings (extracts)***

*(2) a person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—*

*(a) to be informed promptly and in detail of the nature and reason for the charge in the language or, if necessary, a type of communication the person speaks or understands;*

*(b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;*

*(c) to be tried without unreasonable delay;*

...

*(g) to examine, or have examined, witnesses against the person;*

*(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;*

...

*(k) not to be compelled to testify against themselves or to confess guilt.*

- a. Does the committal process as understood by you set out in this chapter reflect the subsections of s32 set out above? [A] [E]
- b. **Identify** the subsections of s32 which you consider apply to the case of *R v Ken* set out in this chapter. **Decide** if the minimum guarantees required by s32 have been met in this case study of a committal. Explain your answer. [A] [E]

# Criminal trial process

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## Chapter 8: The attributes of a fair trial

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### 8.1 A common law right

### 8.2 Statutory rights to a fair trial

### 8.3 Trial by judge and jury

### 8.4 Trial procedures for indictable offences

### 8.5 Rules of evidence

### 8.6 The right to silence

### 8.7 The right to legal representation

### 8.8 Criminal appeals and double jeopardy

## Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - in Australia, the right to a fair trial originated in the common law, and has been influenced by parliamentary reform
  - the attributes of a fair trial are set out in the *International Covenant on Civil and Political Rights 1976*, Article 14
  - the *Australian Constitution* protects the right to a fair trial only where Commonwealth law applies
  - the principles of a fair trial are set out in Acts of Parliament in Queensland, Victoria, and the ACT
  - the role of the courts is to ensure that the right to a fair trial is not eroded by statute
  - the elements of a fair trial in the court process include the reality and appearance of independence and impartiality, the application of procedural fairness, operating as an open court, and giving reasons for decisions
  - all accused persons are entitled to the presumption of innocence (presumed innocent until proven guilty)
  - the standard of proof in criminal proceedings is proof 'beyond reasonable doubt'
  - the jury system is the cornerstone of our justice system.
- analyse and evaluate the procedures and processes that Australian courts use to conduct fair trials.

## 8.1 A common law right

### Key Terms

**Beyond reasonable doubt:** the criminal standard of proof applied by the jury in criminal trials. A jury must find a defendant 'guilty' of the offence charged beyond reasonable doubt.

**Circumstantial evidence:** proof of circumstances from which, according to the ordinary course of human affairs, the existence of some fact may reasonably be presumed. It is therefore opposed to direct evidence of the fact itself.

**Direct evidence:** evidence directly bearing upon the point at issue, and which, if believed, is conclusive in favour of the party adducing it. It is the making of a statement, orally or in writing, that a particular fact is true because the maker of the statement saw, felt, or heard it.

**Onus of proof:** the duty of proving one's case. It is a rule of evidence that the point in issue is to be proved by the party who asserts the affirmative proposition.

**Presumption of innocence:** in criminal matters, the accused person is presumed to be innocent until proven guilty. The onus of proof is therefore generally on the prosecution, but it may be reversed.

**Right to silence (at trial):** the right of an accused person not to give evidence in his or her defence at trial. The responsibility of the state to ask questions is matched by the right of the suspect or an accused not to answer them.

A fair trial is designed to prevent innocent people being convicted of crimes. By helping to prevent the punishment of the innocent, fair trials justify and promote the prosecution and punishment of the guilty. In *Jago v the District Court of New South Wales* (1989) 168 CLR 23 (at page 29), the Hon Justice Mason said that a right to a fair trial is:

*...commonly manifested in rules of law and practice designed to regulate the course of the trial.*

The attributes of a fair trial, as we know them today, have their basis in English legal history. These attributes are from time to time challenged by statute law. Whenever, for example, the **onus of proof is reversed**, so that the defendant must prove his or her innocence rather than be presumed innocent until proved guilty, this common law right is eroded. There may be good reasons for this, for example the recent changes to the *Bail Act* in Queensland (see Chapter 6).

Since the *Magna Carta* was promulgated in 1215, English law has based the fairness of its criminal justice system on the idea of a jury trial, where decisions of fact are made by the peers of the accused.

In a closely contested jury trial, someone may be disappointed. It will either be the victim, or the accused. The outcome is likely to be seen by one of the parties as 'not natural justice', even though in the criminal trial process the rules of law and practice which regulate the course of the trial have been followed rigorously. **In the Australian legal system, there is a strong view that where there has been procedural fairness, natural justice has been served. Your studies of the criminal justice system will give you the tools to make your own decisions about how well the system works, both in individual cases, and as a whole.**

The rules of practice and procedure, when correctly applied, protect the basic principles of the criminal justice system. Namely:

- the presumption of innocence,
- the jury trial,
- the court rules of evidence,
- the burden of proof, and
- the standard of proof.

Conforming to these principles is often difficult for legislators (politicians) when faced with what they see as overwhelming support for a change to make it hard for criminals to avoid justice. Reversing the onus (burden) of proof is one way legislators attempt to achieve better outcomes for victims. Judge only trials is another. Then Chief Justice of the High Court of Australia Gleeson, explained in *Ex Parte Lam* (2003) 214 CLR 1:

*Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*

## 8.2 Statutory rights to a fair trial

When the *Human Rights Act 2019* (Qld) was passed, Queensland joined Victoria and the ACT as the third state in Australia with legislation setting out the principles of a fair trial. The *Australian Constitution* only applies to trials for offences committed against laws of the Commonwealth.

In other countries, bills of rights or human rights statutes provide some protection in the form of fair trial procedures. The right to a fair trial is protected in the United Kingdom, Canada, and New Zealand by statutes. In the United States the *US Constitution* provides:

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence.*

*United States Constitution (Amendment VI), 1791.*

It is also the case that international treaties and covenants, signed on behalf Australia are not able to override clear and valid provisions of Australian national law. However, where an Australian statute is ambiguous, courts will generally favour a meaning in accordance with Australia's international obligations. This means that, in certain circumstances, Article 14 of the *International Covenant on Civil and Political Rights* (open for signature 16 December 1966, entered into force 23 March 1976) which sets out the elements of a fair trial, can be applied in Australia.

There are two important pieces of legislation that give support in Queensland and in Australia to the common law right to a fair trial. These are the *Commonwealth of Australia Constitution Act 1901* (Cth) and the *Human Rights Act 2019* (Qld).

## The Constitution

The *Commonwealth of Australian Constitution Act 1901* (Cth) s80 states:

*...the trial on indictment of any offence against any law of the Commonwealth shall be by jury.*

The words 'trial on indictment' have been interpreted by the High Court of Australia to mean that Parliament may determine whether a trial is to be on indictment, and thus, whether the requirement for a trial by jury applies. Further, because of this, commentators have said that s80 does not restrict Commonwealth power to enact legislation where citizens can be tried for an offence in the absence of a jury. This of course does happen in the state Magistrates Courts exercising Commonwealth jurisdiction for minor offences and in the Federal Circuit Court where legislation does not require a jury trial.

There is also the question of the power given by the *Constitution* requiring the courts to exercise the judicial power of the Commonwealth. Australian courts, both Commonwealth and State, unless otherwise required by statute, apply common law principles of fairness and equality.



### Practical Application

The Hon Justice Gaudron in *Nicholas v The Queen* (1998) 193 CLR 173, 208-209, after quoting the passage set out above said:

*In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in the manner that does not ensure equality before the law, impartiality, and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, which brings or tends to bring the administration of justice into disrepute.*

1. What criteria does the judge say should be observed to ensure the essential character of a court and the nature of judicial power are observed? [C]
2. The judge identifies criminal proceedings separately and says that it is important that the determination of guilt or innocence by means of a fair trial according to law is what is required in these cases. With regard to the common law principles you have studied so far outline what you consider is 'a fair trial according to law'. [C] [S]
3. Which elements of a fair trial you have listed in answer to Question 2 do you think are clearly present in the Australian legal system? [C] [A]

### Human Rights Act 2019 (Qld)

The courts in Queensland are now subject to the *Human Rights Act 2019* (Qld) which sets out the right to a fair and impartial hearing in s31, and in s32, the practices and procedures required for a trial to be fair. The application of the Act was considered in *Volkers v The Queen*.



## Case Study

*Volkers v The Queen* [2020] QDC 25

**Facts:** The applicant (Volkers) applies for the permanent stay of an indictment charging him with 5 counts of indecent dealing with two complainants who were at the time of the alleged offences under the age of 16.

### Timeline of events

<p>1984-1987</p> <p>↓</p>	<p>The applicant is a former Australian swimming coach. It is alleged that in 1984 and 1985, when he was about 26 years of age, he indecently dealt with a female swimmer then age 13. It is also alleged that in 1987 he indecently dealt with another swimmer, then aged 12.</p>
<p>25 July 2002</p>	<p>The applicant was committed to stand trial on 7 counts of indecent dealing involving the two complainants.</p>
<p>↓</p> <p>September 2002</p> <p>↓</p>	<p>The Director of the Office of the Director of Public Prosecutions (ODPP) enters a 'no true bill' in relation to each of the charges (which meant that were not going to proceed with the prosecution). This decision was made after applicant's lawyers gave to the ODPP 20 redacted statements of witnesses the applicant proposed to rely on at any trial. Those statements, by swimmers trained by the applicant and by some parents, were in part to the effect that the applicant did not have the opportunity to leave the pool deck during training sessions, and in fact did not do so, and so lacked the opportunity to commit offences during that time. This decision attracted significant publicity. The matter was referred to the Crime and Misconduct Commission (CMC) who investigated and provided a detailed report that was critical of the DPP.</p>
<p>December 2003</p>	<p>The Director asked the New South Wales equivalent, Mr Nicholas Cowdrey QC, to advise about the matter. His advice, and that of a senior New South Wales prosecutor, Ms Margaret Cunneen, was there not sufficient evidence to consider recharging the applicant.</p>





## Case Study ...

November 2004	<p>The older complainant herself sought leave under the <i>Criminal Code 1899</i> (Qld) s686 to present an indictment against the applicant in relation to some of the alleged offending against her. The application was dismissed. Her Honour was significantly influenced by the extensive publicity about the matter. The Hon Justice Holmes said in her judgement:</p> <p><i>An ordinary trial conducted by an independent prosecutor has the distance and authority of the Crown. In this case, that will not occur. The effect of the media coverage, has been to characterise the allegations of sexual misconduct as a contest between the applicant and the respondent, both seeking public support.</i></p>
July 2014	<p>The <i>Royal Commission into Institutional Responses to Child Sexual Abuse</i> held a hearing in which each of the complainants gave evidence. Their evidence was again subject to extensive media coverage and public commentary. Subsequently, each complainant, and a third complainant, made submissions to the ODPP for the prosecution of the applicant to be reinstated.</p>
9 June 2016	<p>The Director advised the applicant that submissions about another allegation of sexual interference were received from a third complainant.</p>
13 November 2017	<p>Proceedings were commenced against the applicant.</p>
November 2018	<p>The Applicant was committed to stand trial for counts involving the older complainant in late 1984 and 1985 and for one count involving a younger complainant for an alleged offence in summer 1986/7.</p>

There was an issue relating to statements given by potential witnesses. The statements provided by the defendant to the ODPP in 2004 were destroyed by the defendants' solicitors after the 7 year limit, the time for which records are usually kept. Some of the testimony that the applicant would or might, have relied on at any trial, had, it was submitted, been permanently lost. The Crown now wished to rely on the evidence of 84 persons engaged in the applicant's swimming coaching and who had provided recent statements to police. Some of these statements were from people familiar with the applicant's swimming coaching routines at the relevant time.

His Honour Judge Reid considered the evidence about the statements and concluded that despite the view taken by the ODPP in 2004, it would currently be open to the jury to conclude that the applicant would have had the opportunity on occasions to leave the pool deck without attracting undue interest.

On behalf of the applicant it was submitted that the stay ought to be allowed on two separate but related grounds, namely lack of fairness and oppression amounting to an abuse of process by the prosecuting authority.

### Legal Issues:

1. Was it likely that the prosecution of the defendant would result in an unfair trial or be such as to undermine public confidence in the administration of justice? That is, is the decision



## Case Study

to further prosecute now, contrary to the 2002 decision not to do so, likely to have the effect of undermining public confidence, when there is no critical new evidence to justify a change of view.

2. Does the *Human Rights Act 2019* (Qld) apply to this case? Does the ODPP, as a public entity under the Act, behave in a manner which involves a breach of s29(5)(b) and 32(2) (c) of the Act, being the right to a trial ‘without unreasonable delay’ and of s31, namely the ‘right’ to a fair trial’?

### Decision:

#### 1. At common law

His Honour Judge Reid discussed various cases where decisions were made regarding a permanent stay of criminal prosecutions. He commented that prior to the decision of the High Court of Australia in *Jago v District Court (NSW)* [1989] HCA 46 there was uncertainty over whether the courts power to prevent abuse of process by safeguarding an accused person from oppression extended to stopping the prosecution by granting a permanent stay of proceedings to prevent unfairness generally (as contrasted to a stay to prevent an unfair trial).

He identified 5 key factors the High Court said should be considered in determining whether proceedings should be stayed on the grounds of prosecutorial delay causing unfairness as being:

1. Length of delay.
2. Prosecution reasons to explain or justify delay.
3. The accused’s part in any delay.
4. Proven or likely prejudice.
5. Public interest in the disposition of serious criminal charges and the conviction of the guilty.

His Honour quoted with approval the High Court’s comments in *R v Edwards* [2009] HCA 20 where it was asked to consider approving a stay of proceedings, where there was a delay and evidence was lost. Their Honour’s stated:

*Trials involve the reconstruction of events and it happens on occasions that relevant material is not available: documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon matter does not make the trial unfair.*

His Honour then concluded that he would not be inclined to order a stay on the grounds the trial would be unfair even though:

- there was loss of the knowledge of the identity of a significant number of people whose redacted statements were provided to the ODPP in 2002;
- the Crown had now obtained statements from a significant number of further witnesses, who may be called at trial, and whose evidence is variable; and
- the delay since the 1980s may have an effect on the ability of witnesses to accurately recount exactly what occurred.



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His Honour pointed out that a trial would almost necessarily require a judge to direct the jury about the effect of such delay, and the almost inevitable need for a suitable Longman direction (The High Court in *Longman v the Queen*, held that jury should have been directed that the long delay in hearing the complaint impaired the defendant's ability to test the case against him.). He thought this would significantly ameliorate any unfairness that might arise from such delay.

His Honour then considered the question of abuse of process or oppression.

His Honour reasoned that the sense of justice which inspires the doctrine of double jeopardy was present in this case. He stated that:

*even though in neither case did the applicant face trial he has been confronted by the disruption of his life, legal costs and uncertainty, twice previously. He has also faced extreme public commentary about him over many years... since 2002 when the ODPP first took burdens of these various prosecutions, including the risks to his personal liberty and charge of the matter, another 17 years has passed and the applicant has still not been brought to trial. He has not been responsible for the delay. I am satisfied the applicant will suffer very significant prejudice if the matter were allowed to proceed.*

His Honour then weighed up the prejudice to the applicant against the public interest in ensuring that allegations of sexual assault against children are determined by a court.

He was persuaded that it was appropriate to grant a permanent stay of the proceedings.

### **Under the HRA.**

His Honour stated that pursuant to s31 of the Act, the ODPP's actions in continuing to prosecute would be compatible with human rights if they limited those rights only to the extent that it was reasonable and demonstrably justifiable, by introducing a test of proportionality spoken of in the relevant human rights cases. His Honour referred to his finding that the applicant's trial was not unfair at common law, and that therefore there was not a relevant breach of the provisions of s31 of the Act.

His Honour went on to consider the issue of unreasonable delay under ss29(5)(b) and 32(2)(c). He concluded that under the Act the position reflects the common law position, namely a stay could only be ordered if there could not be a fair trial or it would otherwise be unfair to try the defendant because of the consequences of the unreasonable delay.

His Honour said:

*In the circumstances of this case I would find that the delays since 2002 have been such as to amount to a breach of the appellants rights under the HRA to a trial without unreasonable delay.*

His Honour proceeded to grant a permanent stay of the prosecution because to allow the prosecution to now proceed would be unduly oppressive and an abuse of process requiring the applicant to face, in effect, his third prosecution and in circumstances of widespread adverse publicity and significant adverse effects on the applicant's ability to live and work.

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## 8.3 Trial by judge and jury

It is important to know where a trial fits into the criminal justice system. A trial is a formal examination of evidence by a judge, together with a jury in most serious cases, in order to decide whether an accused is 'guilty' or 'not guilty' in a criminal case. It does not happen until what we have referred to as the pre-trial processes in Chapters 8 and 9 have been completed. At this point, an accused person knows if he or she is going to a summary trial in the Magistrates Court of Queensland, or to a trial before a judge and jury in the District or Supreme Court of Queensland. The court in which an accused is tried generally depends on the nature of the offence with which he or she is charged (see Chapter 5). Simple offences (non-indictable offences) are generally heard in a summary trial which is before a single magistrate (no jury) who acts as both judge and jury. The magistrate makes all decisions of fact and law in the trial. Because trials before a judge and jury are essentially the same process as summary trials, we do not go through the steps that occur in the Magistrates Court of Queensland. However, their importance should not be underestimated, because there are many more trials in this court.

### The state's role in the criminal justice process

**As criminal offences are regarded as offences against all of society, it is the State that brings the charge, gathers the evidence and conducts the trial against a person accused of an offence.** We have seen that in the pre-trial phase of the criminal trial process it is the police who gather evidence and provide it to a prosecutor who appears in the Magistrates Court of Queensland on behalf of the Crown (the State). Generally, when the trial of a charge against an accused is heard in the Magistrates Court of Queensland, a police prosecutor will be instructed by the police to appear on behalf of the Crown (the State). When a trial against an accused is heard in the District Court or Supreme Court of Queensland a barrister (sometimes referred to as counsel) is instructed by the Director of Public Prosecutions (Crown Law Office) to act on behalf of the State (the Crown).

This is why it is easy to recognise most criminal cases, as they are brought in the name of the Crown (the State): either *Regina* (the Queen) or *Rex* (the King) against the accused person (e.g. *R v May*). If the person is found guilty, then the consequences, whether they be jail, a fine or community service, are imposed by the State. The courts are the institutions for hearing of criminal cases and are provided by the State.

### Why are juries important?

A report of the Queensland Law Reform Commission quotes former Chief Justice Gleeson, describing the role of juries in the following terms:

*All institutions of government exist to serve the community, and the judicial branch of government, which has no independent force to back up its authority, depends on public acceptance of its role. That acceptance requires a certain level of faith. What is it that sustains, or threatens, such faith?*

*Public participation in the administration of justice is part of our legal tradition ... Through the jury system, members of the public become part of the court itself. This ought to enhance the acceptability of decisions, and contribute to a culture in which the administration of justice is not left to a professional cadre but is understood as a shared community responsibility.*

Queensland Law Reform Commission, *A review of jury selection*, (Report, 2011).

**An important principle of criminal justice in Queensland, and indeed, in Australia, is that defendants accused of serious offences are judged fairly and impartially by a jury of their fellow citizens.** The jury delivers its verdict based on the law and the evidence led at trial.

**It is only indictable offences that can have juries deciding this question.** In simple offences, a magistrate decides both fact and law. Therefore, the overall percentage of criminal cases heard by a jury is actually quite small. The number has been decreasing as statutory amendments increased the range of offences for which an accused can elect to be tried summarily by a magistrate. During COVID-19 there were legislative changes to allow more judge-only trials because of the difficulty of operating where there were health restrictions.

It is estimated that less than 5% of criminal cases go to a jury trial; the remainder are heard in the Magistrates Court of Queensland. The advantage of a summary hearing is that there is a lower penalty given if the accused is found guilty, and the procedure is simpler.

Juries are regarded as impartial fact finders because they are randomly selected and represent the cross-section of the community. It is hoped that any bias or prejudice will be cancelled out by having 12 persons rather than one person making the decision, as evidenced in *Doney v R* (1990) 65 ALJR 45, 47:

*... the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters.*

## Historical background of the jury

Juries have been used in many legal systems, including ancient Rome and Babylon. In English law, juries were used in criminal trials in the reign of King Henry II (1154-89). In 1215 the *Magna Carta* enshrined the jury system into the common law.

*No free man shall be seized, or imprisoned, or dispossessed or outlawed or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgment of his peers, or by the law of the land.*

Mark Cartwright, 'Magna Carta', World History Encyclopedia (Web Page, 20 November 2018) <[worldhistory.org/Magna\\_Carta](http://worldhistory.org/Magna_Carta)>.

Juries were established in Queensland under the *Jury Act 1867* (Qld), which was later amended. The current law is *Jury Act 1995* (Qld). It is this act to which we turn to see whether or not the law succeeds in making juries representative of the community.



### What do you think?

1. Does the jury system help the public feel involved and to accept the decisions made by the courts in criminal trials? [A] [E]
2. Why might the experiences of ordinary people, rather than trained judges be more impartial in deciding issues of fact? [R]
3. British researchers have reported that data obtained in an experiment shows that jurors are more likely to convict suspects deemed ugly than those seen as attractive. This indicates that jurors may be swayed by irrelevant considerations such as physical appearance. Do you think this could happen? Do you think it would apply equally to judges? [R]

## How representative are our juries?

To have a cross-section of the community, service on the jury is compulsory for all people qualified to serve, unless they have been excused by a judge or sheriff (court officer who supervises the jury) from jury service. Failure to respond to a jury notice can amount to contempt of court and fines can be ordered.

The following people are currently qualified to serve on a jury.

### ***Jury Act 1995 (Qld)***

#### ***4 Qualification to serve as juror***

*(1) a person is qualified to serve as a juror at a trial within a jury district if-*

*(a) the person is enrolled as an elector; and*

*(b) the person's address as shown on the electoral role is within the jury, and*

*(c) the person is eligible for jury service.*

*(2) a person who is enrolled as an elector is eligible for jury service unless the person is mentioned in subsection (3).*



The Act also sets out categories of persons not eligible for jury service. Some examples include:

- the Governor,
- a member of Parliament,
- a person who is or has been a judge or magistrate (in the State or elsewhere),
- a lawyer engaged in legal work,
- a person who is not able to read or write English language, or
- a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror.

Section 21 also sets out different factors a sheriff or judge must apply when deciding whether a juror can be excused from jury service. Some factors include:

- that jury service would result in substantial hardship to the person because of the person's employment or personal circumstances,
- that others are dependent on the person to provide care, or
- the person's state of health.

As you would expect, there have been a few cases where persons have been disqualified as potential jurors, where the disqualification has been challenged, because those persons perceived the disqualification to be discriminatory. An example of this is set out in the case below.



## Case Study

*Lyons v State of Queensland* [2015] QCA 159

**Facts:** In January 2012 the applicant was summoned for jury service at Ipswich. She alerted the Deputy Registrar to the fact she was deaf and would need the services of two Auslan interpreters. In response, the Deputy Registrar advised that it was not possible for the applicant to perform jury service because there was no provision in the *Jury Act 1995* (Qld) to swear in an interpreter, and no person other than jurors and bailiffs could be present in the jury room while deliberations were taking place.

The applicant sought leave to appeal against a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal dismissing the appeal against the order of a Member of the Tribunal. She had made a complaint of indirect and direct discrimination under the *Anti-Discrimination Act 1991* (Qld) s10 and s11 which the Member had dismissed.

**Legal Issue:** Did the Court of Appeal agree with the decision of the Tribunal Member and of the Appeal Tribunal?

**Decision:** The Court of Appeal accepted the findings of the Tribunal Member and the Appeal Tribunal that there was no evidence that the Deputy Registrar in her decision to disqualify the applicant from jury service was discriminatory. The Deputy Registrar did not exclude her because of the need for the assistance of an interpreter but because of the perceived impossibility of an interpreter, as a person extraneous to the jury, being present in the jury room. The Deputy Registrar having acted to apply the statute, it was irrelevant to speak of the reasonableness of a term.

### Selection of jurors

- In Queensland, 15,000 people participate in jury service annually and about 7600 are empanelled.
- In Queensland, an average trial in the District Court lasts for 3-4 days and in the Supreme Court 5-7 days.
- Queensland is split up into 'jury districts' and jurors are selected from within the jury districts, usually covering an area up to 20 km around the courthouse.
- A group of jurors is selected at random by the sheriff from the electoral roll using a computer program.
- Jurors are sent a letter and must complete and return a questionnaire which will determine if they are eligible and able to serve on a jury during the time period for which they have been selected.
- If they are eligible and have not been excused, the juror's name will put into a second ballot. Those

balloted are summonsed for jury service. This does not mean that they will serve on the jury, but means they might have to attend court during the period of jury service to take part in the jury selection process known as empanelment.

- A panel of 36 jurors is chosen from the selected group at random for each case.
- The panel stands at the rear of the court. Their names are put into a barrel which is spun and, as each juror's name is called out, that juror steps forward.
- At this point the potential juror can be rejected by the barrister for the Crown (who says 'stand-by') or by the barrister for the defence (who says 'challenge').
- Neither of them is required to give any reason for their decision which is made by the respective barristers looking at the jury list which contains the name, address and occupation of each potential juror.
- Each juror is sworn in by taking the oath on the Bible or making an affirmation.
- The above process continues until 12 jurors are chosen.
- Reserve jurors can also be sworn in, if the trial will be a lengthy one. If a juror is discharged for some reason, such as illness, the jury can continue hearing evidence as long as the numbers do not go below 10.

### What do you think?

1. Why is there a right to challenge jurors? [C] [A]
2. Should both the Crown and the accused have the right to reject jurors or should this just be the right of the accused? [A] [E]
3. Should both have to accept the random selection of the first twelve names drawn out of the barrel? Why or why not? [E]
4. Is there enough information available on which to make decisions of jury selection? [C] [A]
5. Should the Crown and the accused be given the added right to ask questions of the jurors, as occurs in America? [A] [E]
6. Assess the validity of the following criticism of the right to challenge: *The object of the process of jury selection should be to pick twelve people who can be fair. It should not be a tactical maneuver by which each side tries to secure the twelve most sympathetic jurors from their point of view.* [A] [E]

### What recent changes have been made to the jury system?

#### Majority verdicts

The requirement for a unanimous verdict was once an important feature of the common law jury system. In 2008 Queensland amended the *Jury Act 1995* (Qld) to allow for majority verdicts. Unanimous verdicts are now only required for murder, offences under *Criminal Code 1899* (Qld) s54A(1) and for offences against Commonwealth law. Majority verdicts are allowed for all other indictable offences. A majority verdict can be accepted by the court as long as no more than one juror is in dissent (*Jury Act 1995* (Qld) s59). The judge will only accept a majority verdict after a deliberation of more than eight hours (breaks excluded) or for a period of time that the judge thinks is reasonable.





**What do you think?**

1. What do you think are the benefits and the disadvantages of allowing majority verdicts? [A]
2. Why do you think some criminal offences must require a unanimous verdict? [A]
3. What advantages do you think there are to having uniform laws on this issue throughout Australia? Can you think of any disadvantages? [A]

**Judge only trials**

In late 2008, amendments to the *Code* made it possible for a judge to sit without a jury and to make findings and give any verdict that a jury could have made. A judge’s verdict has the same legal effect as a verdict of a jury.

Either the prosecutor or the accused can apply to the court for an order, called a ‘no jury order’, to allow this. Where the prosecutor makes the application, the accused must also consent. The court will have an overriding discretion to make the order and will do so if it considers it is in the interests of justice. The *Criminal Code 1899* (Qld) s615(4) sets out various factors a court may consider when deciding whether to grant a ‘no jury order’ including:

- the trial (because of its complexity or length or both) is likely to be unreasonably burdensome to a jury,
- there is a real possibility that a juror may be intimidated, or
- there has been significant publicity that may affect jury deliberations.

The court may refuse to make a ‘no jury order’ if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

One difference from a jury trial is that the judge must also include in his or her judgment the principles of law that have been applied and the findings of fact he or she has relied on in coming to the verdict. By contrast, the deliberations of the jury must not be disclosed by anyone.



**What do you think?**

1. What are the benefits and disadvantages to an accused to have a judge only trial? [A] [E]
2. What are the disadvantages to an accused the judge only trial? [A] [E]
3. If you were charged with a serious criminal offence, would you prefer to have a jury or a judge only trial? Why? What factors influence your decision? Would you answer differently if you alone knew you were innocent or guilty of the offence charged? [A] [E]

## Inquiry Focus

*Is it time for juries to be abolished?*

Most countries in the world do not have the jury system. An important question, therefore, is whether our jury system offers greater protection to the rights of an accused person, than do the alternatives. Some alternatives are:

- judge only trials,
- trials by a panel of judges,
- trial by judge and lay assessors (people from the community who served as assessors for a set period),
- trial by judge with a panel of experts in the field relevant to the trial, or
- trial by judge with professional jurors—persons trained, paid and permanently appointed to sit on trials.

## Practical Application

When you have answered the questions at the end of each of the following articles, set out clearly in your own words the point of view which predominates about jury trials. Decide if the point of view you have identified is in favour of the abolition of jury trials, wholly or in part. Set out what you consider to be the legal issues which would arise in the Australian and Queensland jurisdictions if we were to adopt a model of jury reform which made it more possible to have a trial which did not involve a jury.

### Source 1

#### LEGAL FRATERNITY DEBATES THE RELEVANCE OF JURIES IN LIGHT OF THE SOCIAL MEDIA AGE

When Kasim Davey posted on Facebook that he wanted to ‘f... up a paedophile’ he thought his actions were innocent enough.

Davey, a Genyer from North London, had just been selected for jury duty in a trial against an alleged paedophile and wanted to express his ‘spontaneous surprise’ despite being warned by the judge not to discuss or use social media in relation to the matter.

‘Wooow I wasn’t expecting to be in a jury deciding a paedophile’s fate, I’ve always wanted to F... up a paedophile and now I am within the law!’, Davey wrote.

After the judge was alerted to the post, the trial against Adam Kephalas was aborted (he was later retried and convicted of sexual activity with a child) and Davey was charged with contempt of court. He was sentenced to two months jail in July 2013.

Source: Emily Moulton, ‘Legal fraternity debates the relevance of juries in light of the social media age’, *News.com.au* (Online, 11 August 2015) <[news.com.au/technology/online/social/legal-fraternity-debate-the-relevance-of-juries-in-light-of-the-social-media-age/news-story/4af1f5cc4315845f191fe07048271c6e](http://news.com.au/technology/online/social/legal-fraternity-debate-the-relevance-of-juries-in-light-of-the-social-media-age/news-story/4af1f5cc4315845f191fe07048271c6e)>.



## Practical Application ...

1. What does the post which Davey put on Facebook say about his state of mind before hearing the evidence to be given in the trial? [C]
2. Why would the member of the jury ignore the judge's warning not to discuss or use social media in relation to a trial? [A]
3. Do you think the penalty received by Davey was harsh in the age of smartphones and social media? [E]
4. How else do you think Davey and any other member of the jury could be discouraged from posting such a message on Facebook? [A]

### Source 2

#### IS 'TRIAL BY JURY' AS EFFECTIVE IN THE UK

The *R v Ford* 1989 89 Cr App [UK] case concerned (the issue of) a multiracial jury. Ford, as the defendant, confronted an all-white jury. Ford's request for a multiracial jury had been denied by the trial judge. The defendant was convicted and appealed, submitting that the trial judge had been wrong to refuse his request. The Court of Appeal upheld the principle of random selection as the most suitable way to ensure fairness and therefore confirmed that the trial judge had no power to empanel a multiracial jury and no power to discharge a competent juror so as to obtain a multiracial jury. The purpose of this ruling is to support the idea that justice is delivered through the concept of random selection, which is the whole essence of the jury system...

According to the *Criminal Justice Act 2003* (UK), a development to limit jury trials has been established. By this law, trials can be conducted without a jury when there is a real and present danger of jury tampering or where jury tampering has taken place. As a result of this new regulation, the first serious offence to be tried without a jury in England for more than 350 years took place in 2009. The case concerned the four men accused of an armed robbery at Heathrow Airport, London, in 2004. After three juries had been discharged due to jury tampering, the fourth trial took place before a single judge. All four defendants were convicted.

Source: Student Author (Name Withheld) 'Is 'trial by jury' as effective in UK?', *Law Teacher* (Web Page, 7 August 2019), <[lawteacher.net/free-law-essays/constitutional-law/is-trial-by-jury-as-effective-in-uk-law-essays.php](http://lawteacher.net/free-law-essays/constitutional-law/is-trial-by-jury-as-effective-in-uk-law-essays.php)>.

(Note: the above extract has been amended for coherence, without changing the substance of its content.)

1. Is it possible for a First Nation person to face an all-white jury? Should the law be changed to ensure such defendants face multiracial juries? [C] [A] [E]
2. How did Ford's case mean that he was not judged by his 'peers'? [C]
3. What is jury tampering? How often do you think this happens? Search 'jury tampering' online. [C][S]

## Practical Application

### Source 3

#### TRIAL BY JURY: IS IT OUTDATED FOR CRIMINAL CASES?

Why, in the 21st century, do we cling to the quaint but totally unfounded notion that trial by jury is the fairest means of ensuring that criminal justice is not only done, but seen to be done?

The outcome of the Dennis Ferguson case in Queensland in March this year provides an opportunity to reflect on some of these issues.

Ferguson, who had previously been jailed for kidnapping and sexual assault of three children in 1987 was charged with one count of indecent assault on a five-year-old girl, but last year, Queensland District Court Judge Hugh Botting ruled in a pre-trial hearing, that because of the extraordinary level of prejudicial publicity Ferguson could not get a fair trial. Botting permanently stayed the proceedings, a decision which Queensland Attorney General Kerry Shine had overturned on appeal. In the meantime, Ferguson was subjected to rampant vigilantism and media harassment.

Given all this, Ferguson's lawyers applied for a rare judge-only trial and he was acquitted of the charge of sexual assault by Judge Patsy Wolfe on March 6 2017.

Source: Greg Barns, 'Trial by jury: is it outdated for criminal cases', *Crikey* (Online, 6 May 2009) <crikey.com.au/2009/05/06/time-to-take-the-jury-out-of-criminal-judgment/>.

1. What did Judge Hugh Botting decide to do about the Ferguson trial? Normally, in a jury trial, evidence is not allowed to be presented to the jury about the criminal history of the defendant. If the defendant is convicted, the judge can then be informed by the prosecution of the criminal history of the defendant in order to decide an appropriate sentence. What was the nature of the prejudicial publicity Ferguson experienced? Do you agree with the decision of Judge Hugh Botting? [C] [A] [E]
2. Do you think the rise of social media reduces or increases the likelihood that a defendant with a significant criminal history will get a fair trial? Give reasons. [A] [E]

### Source 4

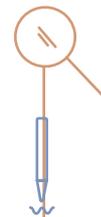
#### LEGAL FRATERNITY DEBATES THE RELEVANCE OF JURIES IN LIGHT OF THE SOCIAL MEDIA AGE

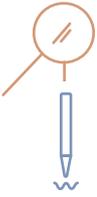
... some of our most prominent legal minds think it's time to abolish the practice and make way for judge-alone trials.

They argue that diverse media coverage and human nature make it virtually impossible to guarantee a non-influenced jury.

'I would be very surprised if there were not many people on juries now, who, quite innocently, just as second nature go to all these various sources on social media, to see what they can find out,' former WA Governor and respected barrister Malcolm McCusker QC told news.com.au.

'It's very dangerous. Even though judges, as a matter of course, regularly informed jurors of the danger of looking outside the evidence and direct them not to go to social media... I think quite frankly it's a losing cause.'





## Practical Application

Despite the risk of jurors going rogue, Pauline Wright from the NSW Law Society says being judged by a group of your peers is still an essential part of our democracy and a good indicator of a fair justice system.

Ms Wright says she thinks those selected for jury duty take their role seriously and are a good representation of a person's peers ... 'I think jurors in general do a good job. It's only the odd person who does the wrong thing.' She does concede that there is sometimes a need for judge-alone trials because of intense media coverage but says it should be the exception, not the rule.

Source: Emily Moulton, 'Legal fraternity debates the relevance of juries in light of the social media age', *News.com.au* (Online, 11 August 2015) <[news.com.au/technology/online/social/legal-fraternity-debate-the-relevance-of-juries-in-light-of-the-social-media-age/news-story/4af1f5cc4315845f191fe07048271c6e](https://news.com.au/technology/online/social/legal-fraternity-debate-the-relevance-of-juries-in-light-of-the-social-media-age/news-story/4af1f5cc4315845f191fe07048271c6e)>.

1. What does Malcolm McCusker suggest should replace juries? [C] [A]
2. From your reading and research, select the evidence which supports Malcolm McCusker's opinion. Organise the evidence into categories and prioritise it, from the most significant/important evidence to the least significant/important evidence. Give your reasons. [C] [A] [R]
3. From your reading and research, select the evidence which supports Pauline Wright's opinion that being judged by a jury of your peers is a good indicator of a fair justice system. Summarise the evidence, setting out what you consider to be the most significant/important evidence. [A] [R]

### Source 5

#### JURY IS OUT: WHY SHIFTING TO JUDGE-ALONE TRIALS IS A FLAWED APPROACH TO CRIMINAL JUSTICE

Last month, Victoria swiftly pushed through a bill introducing judge-only criminal trials as a short-term measure to tackle the absence of court sittings during the coronavirus lockdown.

The ACT also passed an emergency bill last week approving judge only trials temporarily.

In Victoria and other states, there is a requirement for the accused person to consent to such a trial. The new ACT law, however, allows a judge to order such a trial whether the accused agrees or not.

In Australia, one of the few express constitutional rights is a trial by jury at Commonwealth level. Richard Harding, former director of the Australian Institute of Criminology, has noted there is an expectation this right extends to jury trials on state indictments, too.

Even with the ostensible consent of an individual to a judge-only trial, there is a real risk we lose a sense of public accountability for decisions at the state level and the methods used to accuse people of serious crime.

#### Community engagement in justice is vital

It is also worth bearing in mind that jury service is an exercise in democracy. In cases where the public has a vested interest and the verdict could lead to a life changing

## Practical Application

punishment it is vital the community decides on a person's guilt or innocence-and not a privileged professional.

### Guarding against biased decisions

In South Africa jury trials were abolished in 1969 due to racial bias against black people and a new system was set up with an option for two lay assessors to sit with the judge. These assessors are able to overrule a judge when it comes to a verdict on the facts of the case.

Judge only trials in Australia have no similar checks from the community on the judicial process. In cases involving Indigenous people in Australia, it would be worth considering having Indigenous lay assessors similarly accompany judges who sit alone on trials.

Source: Felicity Gerry, 'Jury is out: why shifting to judge-alone trials is a flawed approach to criminal justice', *The Conversation* (Online, 5 May 2020) <[theconversation.com/jury-is-out-why-shifting-to-judge-alone-trials-is-a-flawed-approach-to-criminal-justice-137397](https://theconversation.com/jury-is-out-why-shifting-to-judge-alone-trials-is-a-flawed-approach-to-criminal-justice-137397)>.

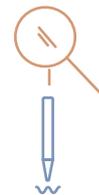
1. Describe the legal arrangements in Victoria and the ACT that determine if a judge only trial can occur. [C]
2. Can you think of examples where it is important for a jury to decide the guilt of an accused so that there is obvious public accountability for any decision? [C] [S]
3. Do you think it is possible to make arrangements in a judge only trial so that it is less likely for bias to occur? Should this also apply to a trial by jury of an Indigenous person where the jury is comprised of non-Indigenous persons? Give your reasons. [A]

### Research Task

1. There are other countries in which the criminal justice system does not involve jury trials (for example, South Africa, Japan, Indonesia, and the Philippines). Investigate at least one example of such a country. Create a fact sheet that shares your findings. [C] [A] [R]

### What do you think?

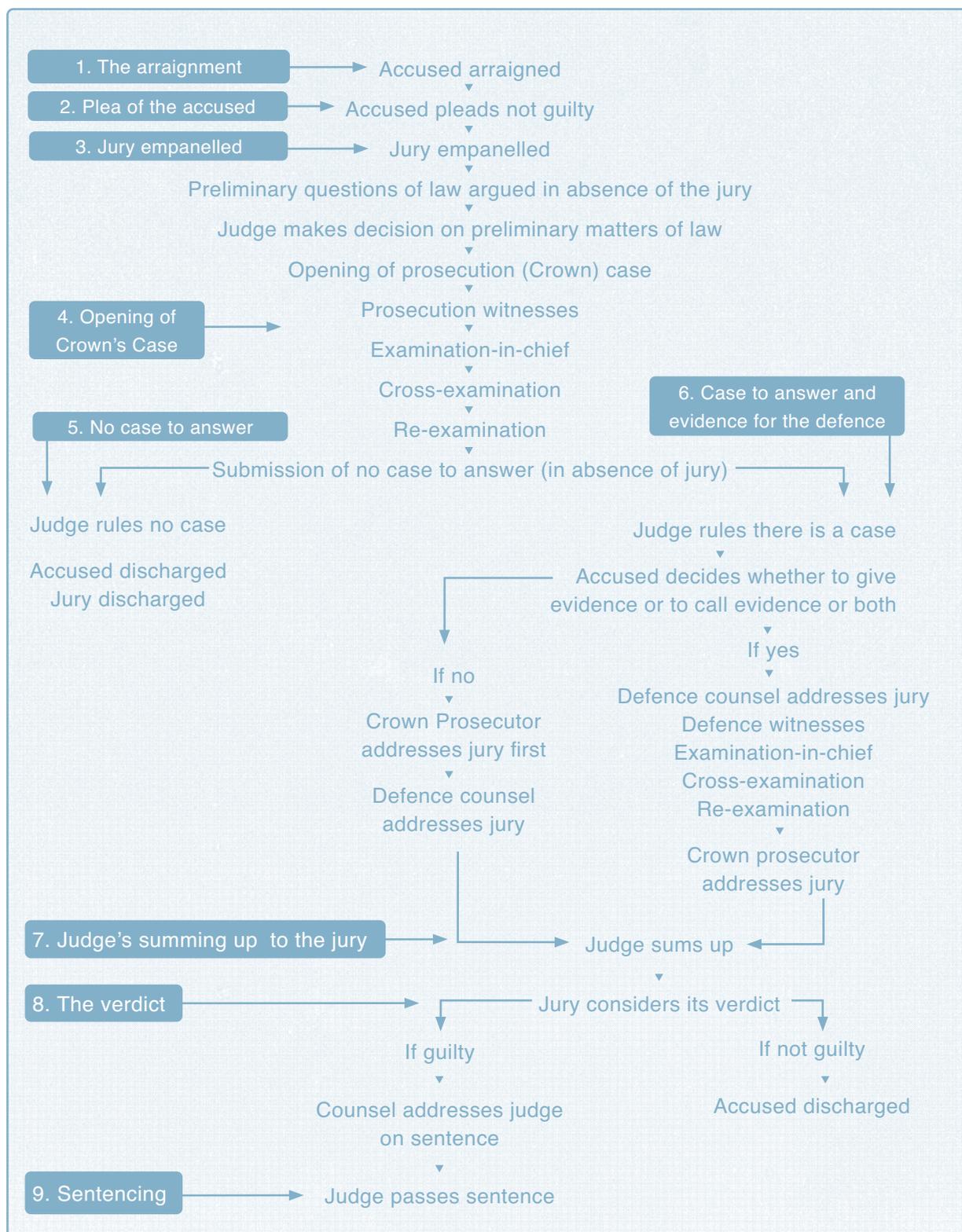
1. You have been asked to prepare a policy paper for the consideration of the Queensland Attorney-General setting out possible reforms to the jury system. In your paper list the various issues and criticisms of the jury system that have arisen both in Queensland, in other Australian states, and in the United Kingdom and the USA. Outline the reforms which have been made to the system in the last decade, and indicate, where possible, if these reforms have been successful or have failed. Include, as a possible reform, the complete or partial abolition of the jury system. Make a list of recommendations for change to be considered. [A] [E] [R]



## 8.4 Trial procedures for indictable offences

The case for the Crown is presented by a government prosecutor. The government prosecutor is a barrister employed by the Office of the Director of Public Prosecutions. He or she will be assisted by an employed lawyer working for that office. The accused is usually represented by both a barrister and a solicitor.

### The trial process (indictable offences)



This infographic will be explained in more detail below. 1. The arraignment

The Crown prosecutor reads out the indictment following which the judge's associate formally reads out the charges to the accused. The accused is required to plead 'guilty' or 'not guilty'.

## 2. Plea

The accused (or lawyer) enters the plea of 'guilty' or 'not guilty'.

## 3. Jury empanelled

If the plea is 'not guilty', the jury is empanelled.

## 4. Opening of crown's case and evidence for the prosecution

The Crown Prosecutor opens the case for the Crown. In the opening address to the jury the prosecutor outlines evidence to be given by the witnesses for the Crown. At the end of the opening address examination-in-chief of each Crown witness occurs.

**Examination-in-chief:** refers to the process by which the prosecutor calls each of the witnesses for the prosecution to the stand, and each of them gives his or her evidence after being sworn in. In some courts, this evidence can be by sworn written statement, but in Queensland the evidence of witnesses is usually given orally from memory, with the assistance of questions asked of them by the prosecutor, unless the trial judge's permission for evidence to be given by sworn written statement or by electronic means. By way of contrast, evidence in the Federal Court and Family Court of Australia is usually by sworn written statement, called an affidavit. Each witness is then subjected to cross-examination by defence counsel. The Crown prosecutor may re-examine on any points arising from the cross-examination which need clarification by the witness.

There are often issues which arise in the course of the hearing about the evidence. Commonly, this is because the defence barrister objects to evidence given in the prosecution's case. The test which is applied to the evidence is whether or not it is admissible. The judge determines the admissibility of evidence. The court rules of evidence are discussed in the next part of this chapter. This will include a discussion about the nature of evidence and how it is decided what evidence is admissible in the criminal trial. There is a case study included in this general discussion which will make this issue clear. You will identify the admissible evidence from the facts of *Murdoch v R* [2007] NTCAA.

**Voir dire:** since the trial judge decides all questions of law, **the jury will be asked to leave the courtroom if legal matters need to be argued.** This commonly happens in criminal trials and can occur a number of times during the course of the trial. An example is the question of admissibility of certain evidence such as confessions made by the accused. The jury is excluded because it is possible that, if it hears the evidence, it may affect its decision and this would be wrong if the judge rules the evidence is not admissible. In the absence of the jury, the Crown prosecutor and defence counsel make submissions to the judge on whether the evidence should be admissible. The judge then makes a ruling. This trial within a trial is called a *voir dire*.

## 5. No case to answer

At the end of the Crown case, defence counsel may make a submission of no case to answer against the accused. If such an application is made the jury leaves while the argument proceeds and the trial judge must give a ruling. If there is no case to answer the accused is discharged.

This is the identical submission that can be made at the end of the prosecution's case in

a committal proceeding in the Magistrates Court of Queensland. You will recall that the submission is that the evidence led by the prosecution is such that a jury, properly instructed could not convict. This is a matter of law and not a question for the jury to decide.

## 6. Case to answer and evidence for the defence

If the judge is satisfied that there is a case to answer, the accused is asked whether evidence will be presented in defence. If the accused does decide to call evidence, defence counsel delivers the opening address and defence witnesses are called to give examination-in-chief, are then cross-examined and re-examined. Council will then deliver the closing addresses the Crown and for the defence.

If the accused elects not to call evidence in his or her defence, the Crown Prosecutor delivers the opening address first and the defence counsel has the advantage of addressing the jury last.

## 7. Judge's summing up to the jury

Following the presentation of their cases by each party the judge sums up the case to the jury, directing it as to the points of law involved and summarising the evidence presented at trial. The jury then retires to consider its verdict.

## 8. The verdict

Once the jury returns, the foreperson is asked if the jury has reached its verdict and is invited to announce the verdict. The jury must be satisfied 'beyond reasonable doubt' that its decision is the correct one.

If the verdict is 'not guilty', the accused is discharged. If the verdict is guilty, the judge's associate turns to the accused and says:

*[Name] you have been convicted of [charge]: have you anything to say why judgement should not be pronounced upon you according to law?*

## 9. Sentencing

The accused is sentenced immediately or is remanded for sentence on another day to enable the judge to consider an appropriate penalty and/or to enable the prosecution and/or the defence prepare submissions. The jury does not have any say in the sentence imposed.





### What do you think?

1. Should the antecedents of an accused be read earlier in the trial before the jury gives a verdict? [A] [E]
2. If the antecedents of Robert Long (who in 2002 was convicted by a jury of murder and arson the Childers Hostel) had been read out in court, the jury would have known his previous history of lighting fires. Would that have been prejudicial or useful information that a jury should have? [E]

## 8.5 Rules of evidence

In a criminal case you have seen that the Crown must prove allegations of fact ‘beyond reasonable doubt’. To do this, the Crown must present evidence to the court. We discussed the different types of evidence police generally collect in Chapter 4.

Evidence is all the information relevant to proving the truth of the allegations of fact in issue that are necessary to prove guilt. **There are rules of evidence to ensure that juries are only presented with relevant evidence and therefore make fair decisions.**

### Direct and indirect evidence

Type of evidence	Description	Example
Direct evidence	A statement (orally or in writing) that a particular fact is true because the witness saw, felt or heard something.	The witness saw the accused punch and kick the victim.
Indirect evidence (also called circumstantial evidence)	Evidence of facts to make it probable that other material (important) facts are true. The evidence is indirect in the sense that the judge or jury must make an inference that another fact is true.	The witness heard the accused say, ‘You are a dead man’ an hour before the incident of violence against the victim. The inference is that the accused intended to kill the victim.

### Admissible and inadmissible evidence

When a judge or magistrate decides that the evidence complies with the rules of evidence it is said to be ‘admissible’. Inadmissible evidence is excluded from a trial. There are many types of inadmissible evidence, as shown in the table below:

Type of inadmissible evidence	Explanation	Example
Irrelevant evidence	Evidence that does not relate to the questions of fact in dispute.	A witness testifies that the accused had been drinking excessive amounts of alcohol 5 days prior to the car accident that he or she was alleged to have caused.
Hearsay evidence	When a witness asserts the witness did not actually see, hear, feel or smell, but instead is relying upon someone else's statement about it.	A prison officer is charged with the assault of a female prisoner, Elsa. Another female prisoner, Paula, is told by her cellmate Christine that she saw Elsa being assaulted. Paula contacts the Crown Prosecutor and offers to give evidence about the assault
Opinion evidence	An inference made by a witness from circumstances which normally can be made only by an expert or by the fact finding body (either the judge or the jury). The opinion of a person who is not an expert that something is probably true is not admissible. However, witnesses can give evidence of facts which they know from experience to be true.	A fingerprint expert is asked a question about a forensic report identifying DNA evidence found at the murder scene and gives an opinion that it connects the accused to the victim's death. The fingerprint expert is not qualified as a DNA scientist to give expert evidence in that field. This is opinion evidence only and is therefore not admissible.
Privileged communication or self-incrimination	<p>Confidential statements made in certain recognised relationships are presumed to be privileged from disclosure in a court hearing (doctor-patient, lawyer-client, 'without prejudice' lawyer to lawyer communications).</p> <p>This extends to privilege against self-incrimination.</p>	In the course of giving evidence that she was present when the body of the deceased was placed in a steel trunk, which was found immersed in a local river, a witness was asked if she knew how the body in the steel trunk came to be in the river. The witness refused to answer on the grounds of self- incrimination. It was alleged that the witness had transported the trunk to the river and disposed of it.

Character evidence	The criminal record or character of an accused in a criminal trial is considered irrelevant to whether the accused is guilty of the current crime. It is also disallowed as being unnecessarily and unfairly prejudicial to the jury's general opinion of the accused.	The accused is a convicted paedophile who has a criminal record of multiple sex offences. He is charged with committing a further offence of sexually assaulting a 5-year-old child. There is widespread media publicity prior to the new trial disclosing his criminal record. The judge makes an order banning media disclosure of his criminal record. The jury is told by the judge to disregard the media publicity and not take into account the criminal record of the accused.
Illegally or unfairly obtained evidence	Evidence obtained improperly or illegally 'is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence' given the way it was obtained.	The accused is of First Nations ethnicity and does not understand the English language sufficiently. Her vulnerability leads to her confessing to certain criminal behaviour and to being led to pleading guilty. She is later exonerated.

## Case Study



### *Murdoch v R* [2007] NTCCA 1

**Facts:** Bradley John Murdoch (Murdoch) was convicted of the murder of British backpacker Peter Falconio and the assault and deprivation of liberty of his girlfriend and fellow backpacker Joanna Lees (Lees). Murdoch appealed his conviction to the Northern Territory Court of Criminal Appeal (NTCCA).

During the trial the following evidence was given:

**Oral evidence** was led from Lees by the Crown to the following effect:

Lees and Falconio were travelling on the Stuart Highway at 8 PM North of Alice Springs. Another vehicle overtook them and waved to them to pull over. The driver got out, spoke to Falconio, and they went to the rear of the van. Falconio got Lees to rev the engine. While doing this she heard a loud bang. Murdoch, whom she subsequently identified, came to the driver's window with

a silver revolver. Murdoch assaulted Lees and handcuffed her with cable ties and put a hood over her head. Murdoch forced her into his utility. Eventually the bag came off her head. She saw his dog in the driver's seat and saw Murdoch's face from a distance only about 18 inches.

Murdoch left her in the rear of utility by herself. Lees managed to sit up, slid out of the back and ran 50 or 60 m into the bush. She tried to loosen the handcuffs with some lip balm from her pocket but dropped it on the ground. She heard cars leaving, waited for some hours, then went onto the highway and flagged down a passing road train and was rescued.

### **Police Evidence**

The police gave evidence that despite extensive attempts to find Falconio and interviewing many witnesses no one saw Murdoch shoot Falconio or dispose of his



## Case Study ...

body. No gun or other weapon was found. The police interviewed Lees at Barrow Creek on the morning of 16 July 2001 where she described Murdoch to the police as a tall man '45+' years of age with a long and ovalish face, deep-set eyes, sunken cheeks and scraggly hair coming out from under a black baseball cap. She identified a standard white Toyota Land Cruiser utility with a green canvas cover as being somewhat similar to the vehicle driven by Murdoch.

### Identification Evidence

Lees gave evidence that she saw Murdoch's image on the Internet while working in Sicily in October 2002. She said she would 'recognise him anywhere'. Her evidence was that she had an unsolicited and spontaneous reaction to the image of Murdoch on the Internet.

Lees gave evidence that she recognised Murdoch as one of the photographs on a photoboard even though he was depicted in quite a different way from his appearance on the Internet. Her evidence was that she was shown the photo board by police in November 2002 and had no difficulty identifying him. This was shown to her by police in the United Kingdom.

Lees identified Murdoch when he was in the dock at trial, which was essentially a formality.

The Court of Appeal said it '*regarded the identification by Ms Lees of the appellant as the assailant as powerful evidence in support of the Crown case*'.

### The truck shop video

The Crown called three witnesses to verify the identity of Murdoch as the person shown in a truck stop video (sufficiently proximate to the crime scene) taken at 12:38 AM on 15 July 2001. The video was of poor quality, but two of the witnesses were able to identify particular physical characteristics said to be similar to those of Murdoch. One, a Mr Hepi, expressed the opinion that the person shown in the video was one and the same as Murdoch. Evidence was also led from the witnesses that the vehicle had similar

characteristics to their recollections of Murdoch's vehicle.

In his evidence in chief in his defence, Murdoch asserted that he did not attend at the Shell truck shop in the early hours of the morning of 15 July 2001.

Despite objections by counsel for the defence that the evidence of the witnesses lacked probative value because of the quality of the video, their evidence was admitted, subject to the warning of the trial judge that the jury should take care when accepting evidence of this kind.

### 'Facial mapping' (Dr Sutisno)

Counsel for the defence raised issues about Dr Sutisno's expertise and the scope of such expertise as a means of identifying Murdoch. Her expertise was limited to being able to testify that the dimensions between facial features of Murdoch meant that the image of the person on the truck stop video was similar to, or the same as, those of Murdoch's face. Her evidence corroborated the evidence of the other three witnesses the Crown produced to verify his presence at the truck stop early in the morning of 15 July 2001, despite his denial.

### Expert evidence (DNA)

Samples of evidence were subject to DNA analysis by Dr Whitaker, an eminent forensic biologist from the United Kingdom, on behalf of the Crown. A smudge of blood was found on the rear of Ms Lees' T-shirt and samples were collected from a forensic examination of the Kombi van from its gearstick and steering wheel, and from the cable tie restraints applied by Murdoch to the wrists of Ms Lees. There was a positive DNA result from the smudge of blood. The Court of Appeal found that it was, '*sufficient evidence to find beyond reasonable doubt that the appellant was the assailant*'.

Both the gearstick, the steering wheel, and the cable tie restraints produced mixed DNA results, with a profile that did not exclude Murdoch.



## Case Study ...

Before the trial commenced there was a challenge to the evidence of Dr Whitaker and, in particular, to the methodology adopted by him which was described as the low copy number test (LCN). The trial judge ruled that LCN had a sufficient scientific basis and general acceptance within the relevant scientific community to render the results received by LCN part of a field of knowledge which is a proper subject of expert evidence. Dr Whitaker then gave evidence before the jury. The appellant called Dr Both, an experienced forensic scientist from the Forensic Science Centre in Adelaide, who also gave evidence before the jury challenging the scientific validity of LCN. Having heard both experts and having revisited his ruling the trial judge affirmed his conclusion that the evidence of Dr Whitaker was admissible and should not be excluded in the exercise of his discretion.

### Real Evidence

Exhibits presented to the court included the hand-made handcuffs, as well as a lip balm container and two pieces of black cape that were found under the bush where Ms Lees had hidden.

### The gun

Six witnesses gave evidence that they had seen Mr Murdoch with a gun before the alleged murder, three of them specifically testifying that the revolver or pistol was silver, while another two of them said it could have been grey. Objection was made to this evidence on the grounds of lacking relevance and lacking probative value as circumstantial/indirect evidence. The trial judge ruled the evidence admissible, but warned the jury to take care when considering its significance.

### Antecedents or character evidence

There was considerable pre-trial publicity. The jury was warned by the judge not to take any notice of any previous charges for which Murdoch had been acquitted, including the alleged abduction and rape of a woman and her teenage daughter in South Australia in August 2002.

### Legal Issue:

1. Should the Court of Appeal set aside Murdoch's conviction on the basis that certain evidence that was ruled admissible and put to the jury, should have been ruled as inadmissible.
2. Was there sufficient evidence available to the jury to conclude 'beyond reasonable doubt' that Murdoch was guilty of murder.

**Decision:** The Court of Appeal unanimously dismissed the appeal and concluded that no substantial miscarriage of justice had occurred in the original trial. The conclusion of their joint judgement was as follows:

*The core issue in this case was the identity of the assailant. In our opinion the presence of the blood of the appellant upon the T-shirt of Ms Lees establishes beyond reasonable doubt the presence of the appellant (Murdoch) at the time Ms Lees was attacked just north of Barrow Creek. When this evidence is considered along with the other evidence properly admitted at trial of events occurring at that location the guilt of the appellant of the murder of Peter Falconio is established beyond reasonable doubt. The case against the appellant becomes overwhelming when the evidence of the identification of the appellant as the assailant by Ms Lees is taken into account.*

1. Who is the defendant/appellant in this case and who is the victim? Briefly outline what the case is about. [C]
2. Identify the person who gave direct evidence of the roadside incident in the trial and state her relationship to the appellant and the victim? In what form was her evidence given? Why was this evidence important in the trial? [C] [A]
3. Briefly state the identification evidence of the appellant admitted into evidence in the trial. Distinguish between the evidence of identification which was direct and which was indirect (circumstantial). Why did Counsel for the defence challenge the circumstantial evidence and object to its being admitted in the trial? What was the



## Case Study ...

- legal test applied by the trial judge and approved by the Court of Appeal to decide if the evidence should be admitted? [C] [A]
4. What real evidence was produced as exhibits at trial? Why was it important? [C] [A]
  5. Why was the circumstantial evidence of the truck stop video important in the trial? Did the Court of Appeal consider this evidence to be crucial to the jury's decision? [C] [A]
  6. Set out the forensic evidence taken from the crime scene and outline the expert evidence of DNA which was produced by Dr Whitaker at trial. What method of analysis did Dr Whitaker use to which Counsel for the defence objected? Which part of the DNA evidence in the Court of Appeal consider to be critical and sufficient as part of the core evidence determining guilt? [C] [A]

## 8.6 The right to silence

The right to silence has two aspects:

- the right of a suspect not to answer questions asked before trial (pre-trial silence), that we discussed in Chapter 4, and
- the right of an accused person not to give evidence in his or her defence at trial (at trial silence).

When examining the right to silence in its report entitled, *Traditional Rights and Freedoms-Encroachment by Commonwealth Laws*, the Australian Law Reform Commission (ALRC) stated:

*The right to silence protects the right not to be made to testify against oneself (whether or not the testimony is incriminating) the privilege against self-incrimination is narrower in that it protects the right not to be made to incriminate oneself. Statute might require a person to answer questions thus breaching the right to silence but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.*

It further wrote:

*...the privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence.' It reflects 'long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.*

The right to silence, particularly in its aspect of privilege against self-incrimination has been suggested to have originated in the 12th and 13th centuries, and in its present form developed as part the rise of the adversarial criminal justice system later in the 19th century. The right evolved in the common law partially as a consequence of the presumption of innocence, and also because of distrust at how police obtained information from suspects.

### At-trial silence

*An incident of that right to silence is that no adverse inference can be drawn against an accused by reason of his or her failure to answer such questions to provide such*

information. To draw such an inference would be to erode the right to silence or to render it valueless.

*Petty and Maiden (1991) 55 A Crim R 322*

It is argued that the right to silence would be weakened if juries could infer guilt or other negative consequences from an accused person not taking the stand and answering questions. Hence, the exercise of this right means that a judge, prosecutor or co-accused **cannot make any adverse (negative or harmful) comments about the fact that the accused remained silent during the trial**. A judge should also warn the jury not to do so.

### What do you think?

Would it be unfair to an accused person if the judge, in his or her summing up to the jury said any of the following? Why or why not? [A] [E]

- You will have noticed that the defendant failed to give evidence. She must have had no possible explanation for her conduct on the night in question.
- You will have noticed that the defendant failed to give evidence. Although the law says she doesn't have to do so, it certainly must make you wonder.
- There can only be one reason why the accused did not give evidence— she is guilty.
- I remind you the accused does not have to give evidence. This is her right. It is the Crown who has the onus of proof.
- There can be many reasons why an accused person chooses to remain silent. You must not treat this as an admission of guilt.

The **reasons for the right** to silence include:

- It protects an innocent defendant from convicting himself/herself by a bad performance on the witness stand.
- It spurs the prosecutor to carry out a complete and competent independent investigation.
- It contributes towards a fair state/individual balance by requiring the government to leave the individual alone and requiring the government in its contest with the individual to shoulder the entire load.

At-trial silence differs from pre-trial silence in the following ways:

- Questioning at trial takes place in a public courtroom and under the control of a judge or magistrate. There is no possibility of threats or pressure being applied as can occur at the police questioning stage.
- By the time of the trial, an accused will have had legal advice and will be in a position to give well-considered answers.
- The accused knows the case that the prosecution has made against him or her, as the accused does not have to testify until after the close of the Crown case.
- At trial, the jury will be aware that the accused has not testified.



Eminent judges of the High Court of Australia argued for the existence of the right to silence (privilege against self-incrimination) in the following judgments.

In *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, at 346, the Hon Justice Murphy explained that privilege is:

*... part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment that privilege presents to invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.*

Privilege against self-incrimination is said to be necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution. In *Cornwell v R* (2007) 231 CLR 260, at 176, the Hon Justice Kirby said:

*... such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrongdoing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.*

## 8.7 The right to legal representation

The *Universal Declaration of Human Rights*, Article 11 states:

*Everyone charged with a penal offence has the right to be presumed innocent until proved in a public trial guilty according to law at which he has had all the guarantees necessary for his defence.*

The responsibility of the government has been to provide a fair and just forum for hearing criminal cases and to conduct the prosecution against the accused. It has been asked how fair a trial can be if the accused is not given skilled legal representation? Does an accused have sufficient knowledge of the law and legal procedure to make the trial fair? Does the accused have sufficient control over his or her emotions to objectively conduct his or her own defence?



**Accused persons have always had the right to be represented by a lawyer.** This is contained in the Code, s616. Generally, however, the financing of the representation has been the individual's responsibility, not that of the state. The High Court of Australia considered this issue in the following case.



## Case Study

*Dietrich v R* (1992) 177 CLR 292

**Facts:** Dietrich was convicted on a charge of importing heroine before the County Court of Victoria. He applied for legal aid and was refused unless he pleaded guilty to the charge. At his trial, lasting 40 days, Dietrich was legally unrepresented. After he was convicted, he appealed to the Victorian Court of Criminal Appeal and was unsuccessful. He appealed to the High Court of Australia.

**Legal Issue:** Was there a miscarriage of justice in his trial by virtue of the fact that he was not provided with legal representation?

**Decision:** The High Court of Australia found there was no absolute right to legal representation through the provision of legal counsel at public expense, but, it held that in criminal trials for serious offences, where the judge felt an accused could not get a fair trial due to the lack of a legal counsel, the judge could stay (stop) the trial until legal representation could be obtained. The Hon Justice Deane wrote:

*The common law does not impose upon the government or any section or member of the community an enforceable duty to provide free legal advice or representation to anyone. What the common law requires is that, if the government sees fit to subject*

*an accused person to a criminal trial, that the trial must be a fair one. Inevitably, compliance with the law's overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of public funds: for example, the funds necessary to provide an impartial judge and jury; the funds necessary to provide minimum court facilities; the funds necessary to provide interpreter services to an accused and an accused's witnesses who cannot speak the language.*

*The effect of the common law's insistence that the trial be fair, is that, if the funds and facilities necessary to enable a fair trial to take place are withheld, the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system of law regards as a great miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt otherwise than after a fair trial.*

*As a general proposition and in the absence of exceptional circumstances, a trial of an indigent person accused of a serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, he is denied legal representation.*

The majority of the High Court (5-2) quashed his conviction and ordered that there be a new trial.

1. Is there a right to legal representation at public expense? [C]
2. When is an accused person entitled to legal representation funded by the public? [C]
3. Who can make that decision? [C]
4. Which people in the community could be considered 'indigent'? [C]
5. The Hon Justice Deane refers to 'serious' cases, but does not define this. How would you define a serious case and give examples? [C] [S]
6. The Hon Justice Deane provides 'circumstances in which a criminal trial will be relatively fair notwithstanding that the accused is unrepresented' including:



## Case Study ...

1. where the accused wants to be unrepresented and refuses legal counsel,
2. where the accused has financial means to pay for a lawyer but decides he doesn't want to spend money on that, and/or
3. non-serious offences 'where there is no real threat of deprivation of liberty'.

Do you agree with the judge that the trial would be fair in these circumstances? [A] [E]

7. One of the consequences of legal aid funding being directed to criminal offences is that other areas of the law, including family law matters will receive less. Is it right that legal aid priority be given to criminal law matters? [A] [E]

## 8.8 Criminal appeals and double jeopardy

It was not until 1908 that the right of appeal in criminal trials was established in England by statute. This is despite the existence of the right of appeal in civil cases for many years prior to 1908, and some miscarriages of justice where persons were wrongly convicted and executed. The only way a convicted person could have an unsafe verdict overturned prior to 1908 in England was by clemency, that is, being pardoned. In Queensland, the Court of Criminal Appeal was established in 1913.

**Now, a person convicted of a criminal offence may appeal to the Queensland Court of Appeal against their conviction or against the severity of the sentence.** The Crown may also appeal against an accused person's sentence being too lenient. The Queensland criminal appellate courts are the District Court of Queensland and the Queensland Court of Appeal. **The Crown cannot appeal an acquittal.** Once a judge or jury finds a person 'not guilty', he or she is acquitted of that offence and generally can never be tried for that same offence again. Even if new, compelling evidence comes to light there cannot be a new trial. This is **the rule against double jeopardy**. It is a rule that has been recently modified in England, New Zealand, and Australia, after considerable debate.

### Grounds of appeal

A person appealing against conviction can allege that there has been a miscarriage of justice because:

- there has been an error of law or fact, or a mixture of errors of law and fact, and/or
- the verdict is unsafe. For example, where a judge misdirects the jury, wrongly allows evidence to be admitted which is inadmissible, or makes some other procedural mistake.

A Queensland case which attracted considerable public interest and involved two appeals is *R v Baden-Clay*.



## Case Study

*R v Baden-Clay* [2016] HCA 35; 258 CLR 308; 90 ALJR 1013; 334 ALR 234; 256 A Crim R 132

**Facts:** Baden-Clay was found guilty of the murder of his wife in the Supreme Court of Queensland. He appealed his conviction to the Queensland Court of Appeal on the ground that the jury's verdict was unreasonable. The Court of Appeal allowed the appeal, setting aside the respondent's murder conviction and substituted a verdict of manslaughter. The Crown appealed to the High Court of Australia. The Crown sought an order that the original decision of the jury (that Baden-Clay was guilty of murder) was upheld.

### The evidence (at trial):

#### Mr Baden-Clay's evidence

Mr Baden-Clay gave evidence that he and his wife did not fight or have a disagreement the night she disappeared. When he awoke the next day, she was not at home. Initially he was not concerned as she often went for an early morning walk. He said he was in a hurry and cut himself shaving. He reported his wife missing to the police at 7:15am when his wife had not returned. Her body was found 11 days later, 13 km from her home on a bank of Kohlo Creek.

On the morning of 20 April 2012, Mr Baden Clay admitted to police that he had had an affair, but told the police that it that ended. He said he and his wife had been to a counsellor who suggested that each night they spend fifteen minutes when his wife could "vent and grill" him about the affair. He said they had spent a 15 minute session talking about some difficult things the previous night.

When cross-examined, Mr Baden-Clay denied that he fought with his wife on the evening of 19 April or the morning of 20 April. He denied that he left his children alone in the house to go to the Kohlo Creek bridge. He denied that he took any steps to dispose of his wife's body.

#### Mr Baden-Clay's relationship with Ms McHugh

Mr Baden-Clay had been in a sexual affair with Ms McHugh since August 2008. It ended in September 2011 when Mrs Baden-Clay found out about it. Ms McHugh gave evidence at the trial that the affair resumed December 2011 and things came to a head with Mr Baden-Clay promising to leave his wife by 1 July 2012. There was a real estate conference which Ms McHugh and Mrs Baden-Clay were to attend on 20 April. Ms McHugh telephoned Mr Baden-Clay on 19 April telling him it was unfair for his wife and her to be together at the conference without his wife knowing the affair had resumed. Mr Baden-Clay told his McHugh he was thinking of selling the business and that he would do that after he had left his wife. Ms McHugh said that she believed that the respondent was 'taking more of a stand' and that 'something was going to be different this time'.

Ms McHugh gave evidence that she attended the conference on 20 April. She called Mr Baden-Clay at lunchtime asking where his wife was. He told her that his wife was missing. On that day, he told her that they 'need to not... communicate and lay low.' On 21 April, Mr Baden-Clay called Ms McHugh and told her that the police would want to speak to her and that she should tell the truth. He asked her whether she had told the police that they were together again, and she replied 'yes'.

In his evidence, Mr Baden Clay admitted that he had told Ms McHugh that he loved her and that he had undertaken to leave his wife by 1 July. However, he said that he had never loved her and merely did that to 'placate' her. He admitted that he told her that he did not love his wife, but insisted that he actually did.



## Case Study ...

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### The forensic evidence

Dr Nathan Milne, forensic pathologist, was unable to determine the cause of death because of the significant level of decomposition of the body. In his opinion, the deceased did not die of natural causes. There were no signs suggestive of drowning or that the deceased fell into the water and drowned. Other medical experts, including some who treated her held no concerns that she was suicidal.

Leaves found on the body were from trees species that grew at the respondent and his wife's home; four of these did not grow at the site at which the body was found.

Blood matching the deceased's DNA profile was found in the rear section of her car which had only been acquired in February 2012.

Tests on the respondent's mobile phone showed that it had been placed on a charger adjacent to the side of the bed on which he slept, at 1.48 am, at a time when he claimed he was asleep.

### Mr Baden-Clay's injuries

Three experts gave evidence that there were two categories of injuries to the respondent's right cheek. One set of scratches were caused by fingernails and another fresher set were consistent with having been caused by a razor moved from side to side across the face.

### **The issue of 'intent'**

- The Crown submitted that Baden-Clay became involved in an altercation in which he killed his wife. He had the intention to kill her or to cause her grievous bodily harm.
- The Defence submitted that Baden-Clay had nothing to do with his wife's death. They listed 4 hypotheses to account for the death, which included:
  - drowning;
  - falling from a height to her death caused drowning;
  - alcohol and/or sertraline toxicity; or
  - the effects of serotonin syndrome, which led to her drowning or falling from a height to her death.

The Hon Justice Byrne canvassed with Baden Clay's Counsel the possibility of a direction to the jury that the defence contended in the alternative that the conduct in question did not tend to prove an intentional killing. Baden-Clay's Counsel said that was 'not our contention' and the direction was not given.

### **The Queensland Court of Appeal decision**

The Queensland Court of Appeal considered that there was a reasonable hypothesis that the respondent was guilty of manslaughter, but was 'not guilty' of murder because he did not have the requisite intention. The hypothesis was: 'that there was a physical confrontation between the appellant and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic, and knowing that he had unlawfully killed her, he took her body to Kohlo Creek in the hope that it would be washed away, while lying about the causes of the marks on his face which suggested conflict.'

**Legal Issue:** Should the High Court of Australia overturn the decision of the Queensland

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## Case Study ...

Court of Appeal?

**Decision:** The High Court of Australia pointed out that the Queensland Court of Appeal's conclusion was not based on evidence. It was mere speculation and conjecture rather than acknowledgement of a hypothesis available on the evidence. There was no evidence presented at trial that suggested that the respondent killed his wife in a physical confrontation without intending to kill her. Mr Baden-Clay gave evidence that he was not present when his wife's death occurred, and therefore he could not have been the unintentional cause of her death.

In addition, the Queensland Court of Appeal's hypothesis was never put to the jury by Mr Baden-Clay's legal representative, either directly or indirectly. The High Court of Australia stated that once it was clear that the hypothesis adopted by the Queensland Court of Appeal was not put to the jury at trial, and was not available on the evidence, the appeal should be allowed and the conviction of Mr Baden Clay for murder should be restored.

1. What evidence could the jury rely on to decide that Mr Baden-Clay intentionally killed his wife? Was there evidence on which the jury could rely that Mr Baden-Clay accidentally caused his wife's death? [C] [A]
2. What four reasonable possibilities as alternatives to murder did Mr Baden-Clay's Counsel ask the Hon Justice Byrne put to the jury in his summing up/directions? Why was accidental or unintentional killing not one of these? [C] [A]
3. What was the reasonable hypothesis outlined by the Court of Appeal that Mr Baden-Clay was guilty of manslaughter not of murder? [C]
4. Was there any reason why the jury could not have formed its own view about whether or not there was a reasonable possibility, based on the evidence, that Mr Baden-Clay killed his wife accidentally? Give your reasons. [A]
5. Do you agree with the High Court's decision to overturn the Court of Appeal and restore the jury's verdict of guilty of murder? Give your reasons. [A]

### Inquiry Focus

*Should the current rule against double jeopardy be overturned or modified?*

The principle against double jeopardy has been part of our legal system for a long time and is recognised in international and domestic law.

*[It is] a universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once the same offence.*

Sir William Blackstone, *Commentaries on the law of England* (1789)

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

*International Covenant on Civil and Political Rights* (1976) Article 14



*A person must not be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.*

*Human Rights Act 2019 (Qld) s34*

There are several reasons for the principle, or rule as it is frequently called, of double jeopardy:

- It allows criminal proceedings to have finality so that an accused person and the community can know when the matter has really ended. Hence, when a person is acquitted of a criminal charge, he or she can then get on with the life without the worry of a possible new trial ever arising from that same incident.
- It protects an accused from being punished more than once for the same act or omission when it is possible that there is more than one offence that could apply.

## Practical Application

### FIRST DOUBLE JEOPARDY KILLER JAILED

The first person in 800 years to be charged with a crime of which he had previously been cleared stood up in Court Number 1 at the old Bailey yesterday and pleaded guilty to murder.

Billy Dunlop's softly spoken plea marked the end of Mrs Ming's 15 year campaign to change the ancient double jeopardy and bring her daughter's killer to justice.

Dunlop, 43 stood trial twice in 1991 charged with Mrs Hogg's murder, but a jury failed to reach a verdict on each occasion. By convention, prosecutors did not ask for a third trial where juries twice failed to agree, and he was formally cleared. As a result of Mrs Ming's campaign the law that prevented an acquitted person being tried again for the same offence was changed last year, when a provision in the *Criminal Justice Act 2003* (UK) came into force. When there is 'new compelling evidence' pointing to the guilt of a former defendant, the Court of Appeal may quash an acquittal and order a retrial. That order was made in Dunlop's case earlier this year.

In fact, Dunlop had formally admitted murdering Spock during a police interview in 1999. He told the police he was aware at the time that a change in the law was under consideration by the Law Commission.

Dunlop, who had previously had a relationship with Mrs Hogg, was always prime suspect. Scientific evidence linked him to the crime. Unable to prosecute him for the murder of which he had been acquitted, the Crown Prosecution Service took the unusual decision to charge him with lying on oath during the murder trials. He was sentenced to serve six years after admitting perjury in Teeside Crown Court in 2000, to follow on from the seven year sentence he was already serving for another crime.

James Spencer QC, prosecuting at that trial, said: 'Had he not committed perjury, he would have been convicted of murder, but because he had committed perjury he has got away with murder.' Or he would have done, if the law had not been changed after 800 years.

Source: Joshua Rozenberg, 'First double jeopardy killer jailed', *The Telegraph*, (Online 12 September 2006) <[telegraph.co.uk/news/1528635/First-double-jeopardy-killer-jailed.html](http://telegraph.co.uk/news/1528635/First-double-jeopardy-killer-jailed.html)>.



## Practical Application

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1. What was the basis on which Billy Dunlop was acquitted in 1991? [C]
2. When did Billy Dunlop admit that he murdered Mrs Hogg? What reason did he give for making this admission? [C]
3. Why was Billy Dunlop charged with perjury not with murder in 2000? [C]
4. For how many years did Julie Hogg's mother, Mrs Ming, wage a public campaign to change the law so that Billy Dunlop could be charged murder despite the fact that this was prevented by the rule against double jeopardy because he had already been acquitted? Billy Dunlop told a shocked television audience some years after he was acquitted that he had indeed strangled Julie Hogg. What effect do you think this had on the public campaign for the repeal of the double jeopardy protection rule? Search for newspaper articles about Billy Dunlop and Julie Hogg's murder to support your opinion. [C] [S] [A]
5. *'Intended to protect the innocent from persecution and repeated trials until a satisfactory verdict is reached the double jeopardy law has also shielded the guilty, allowing them to parade their freedom once they had been acquitted, beyond the reach of justice.'* (The Northern Echo, a local newspaper supporting Julie Hogg's family)

Do you think the amendments to the rule against double jeopardy in the *Criminal Justice Act 2003* (UK) strike the right balance between the accused and the victims? Give your reasons. [A] [E]

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## Double jeopardy in Queensland

Until late 2007 in Queensland a person could not be punished twice for the same offence (*Criminal Code 1899* (Qld) s16) in that it is a defence to any charge that the accused person has already been tried, convicted or acquitted of that same offence (*Criminal Code 1899* (Qld) s17).

In Queensland, it was the case involving Raymond Carroll that caused people to rethink whether the double jeopardy provision is used unfairly by guilty persons to avoid justice. It raised the question whether the state has an overriding responsibility to ensure that the criminal justice system is sufficiently balanced and is not skewed towards protecting criminal offenders over victims.

The three criminal court cases against Raymond Carroll are included in the case study which follows.

## Case Study

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*R v Carroll* (1985) 19 A Crim R 410

**Facts:** In 1973, 17 month old baby Deirdre Kennedy was taken at night from her cot, sexually abused, strangled to death, then abandoned on the roof of a toilet block in the city of Ipswich. There were bruises on her legs that experts said were consistent with teeth marks. After years of investigation, Raymond Carroll, a RAAF electrician at the time of the murder, was eventually charged. At his trial, in February 1985, he denied involvement and gave sworn evidence that he had not killed the baby and that he was at the Royal Australian air force base in South Australia the time stop there were witnesses supported the fact that he had in fact attended course in South Australia but there was one witness who gave sworn testimony





### Case Study ...

that Carroll had been seen in Ipswich on the day of the murder. Odontologists (forensic dentists) gave evidence regarding the bite marks on the baby’s leg using cast impressions to link these to Carroll. There was also similar fact evidence given by Carroll’s former wife testified that he had bitten the thighs of his own baby daughter after locking himself in the bedroom with her. In March 1985, the jury returned a verdict of guilty and Carroll was convicted of Deirdre’s murder. In November 1985, Carroll appealed his conviction to the Court of Appeal.

**Legal Issue:** Was the evidence admitted during his trial prejudicial and inconclusive so that the verdict was unsafe and unsatisfactory?

**Decision:** The Queensland Court of Appeal upheld the appeal and overturned the conviction, entering an acquittal. This was due to differences in expert opinion as to whether the bite marks on the baby’s body precisely matched those of Carroll’s teeth. Carroll had his own expert witness who contested the findings of the Crown’s odontologists. The court found the evidence was inconclusive and ruled inadmissible the testimony of Carroll’s first wife. This verdict therefore was held to be unsafe and unsatisfactory.

The case was reopened in the mid-1990s when witnesses came forward and claimed that Carroll had admitted guilt to them and when further evidence was produced that Carroll was not at the South Australian Base at the time of the murder. Advances in forensic evidence also confirmed a stronger match the bite marks. Despite this new evidence, the rule against double jeopardy meant that Carroll could not be charged with Deidre Kennedy’s murder a second time.

### The second trial

To get around the double jeopardy rule the Crown decided, in February 1999, to charge Carroll with perjury, which is lying under oath, pursuant to *Criminal Code 1899* (Qld) s123(1). The indictment stated that in giving evidence in a judicial proceeding, namely the trial for the murder of Deirdre Kennedy, Carroll had ‘knowingly given false testimony to the effect that he did not kill Deirdre Kennedy’. Carroll’s counsel submitted that the indictment for perjury should be stayed on the basis that these new proceedings constituted an abuse of process. The trial judge ruled that double jeopardy did not apply and there was no abuse of process because the evidence in 2001 was different and stronger than that presented at the first trial.



### Case Study

*R v Carroll* QCA 394 [2001]

**Facts:** Carroll was found guilty of perjury. He appealed his conviction.

**Legal Issue:** Did the trial for perjury constitute an abuse of process because of the similar issue in the murder trial and the trial for perjury?

**Decision:** The Queensland Court of Appeal unanimously upheld the appeal concluding that the perjury trial was effectively a re-trial and was therefore an abuse of process, as ‘the principle of double jeopardy’ had been substantially breached. All common law courts have the inherent power to prevent an abuse of process.



## Case Study

*R v Carroll HCA 55 [2002]*

**Facts:** The Crown appealed the decision of the Queensland Court of Appeal, seeking to have the decision of the jury in the trial court upheld.

**Legal Issue:** Should the decision of the Court of Appeal that the perjury trial amounted to an abuse of process be overturned or upheld?

**Decision:** There was unanimous agreement of the five justices of the High Court of Australia that both trials came to focus upon the same issue—did the respondent kill Deirdre Kennedy? The Hon Justice Gaudron and the Hon Justice Gummow found:

*...the laying of that indictment was vexatious and oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to relitigate the earlier prosecution.*

The Hon Justice McHugh explained that:

*...the long-established policy of the law is that an acquittal is not to be contradicted or undermined by a subsequent charge that raises the same ultimate issue or issues as was or were involved in the acquittal.*

The High Court of Australia upheld the decision of the Queensland Court of Appeal. The decision of the trial court was quashed and Raymond Carroll was acquitted.



### The role of the media and the public response

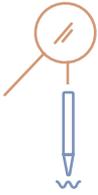
The decision of the High Court of Australia did not put an end to the debate on the reform of double jeopardy. Although the highest court in Australia had clearly and unequivocally ruled that double jeopardy protections were entrenched in our system of justice, **the court of public opinion was not satisfied.**

## Practical Application

### MURDER AS AN EXCEPTION TO THE DOUBLE JEOPARDY RULE

In Queensland, the only exceptions to the rule against double jeopardy are for murder, when 'fresh and compelling evidence' is discovered, and tainted acquittals. These exceptions were introduced in 2007 by way of the Criminal Code (Double Jeopardy) Amendment Bill 2007 (Double Jeopardy Bill) which modified the application of the double jeopardy rule (in relation to murder) 'to enable a person acquitted of murder or a lesser offence retried for murder if there is fresh and compelling evidence of guilt'.





## Practical Application

### ***Criminal Code 1899 (Qld)***

#### ***678B Court may order retrial for murder—fresh and compelling evidence***

(1) *The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for the offence of murder if satisfied that—*

- a) there is fresh and compelling evidence against the acquitted person in relation to the offence; and*
- b) in all the circumstances it is in the interests of justice order to be made.*

This preservation of the rule against double jeopardy, with a narrow exception for murder and some tainted acquittals, strikes an appropriate balance between the need to maintain public confidence in the criminal justice system while upholding fundamental legislated principles.

Source: Dr Brooke Thompson, 'The DNA enquiry and double jeopardy in Queensland', *Proctor* (Online, 9 February 2023) <qlsproctor.com.au/2023/02/the-dna-inquiry-and-double-jeopardy-in-queensland/#:~:text=Presently%2C%20the%20rule%20against%20double,to%20%E2%80%9Cother%20serious%20offences%E2%80%9D>.

### **DOUBLE JEOPARDY EXCEPTIONS EXPANDED**

Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence. The Honourable Yvette D'Ath

The *Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals)* Amendment Bill 2023 will expand the exception to allow an acquitted person to be retried for ten additional offences.

These include manslaughter, attempted murder, unlawful striking causing death, killing an unborn child, rape, incest and repeated sexual conduct with a child.

The new legislation also clarifies that for the double jeopardy exception, evidence is defined to be 'fresh' if it was not presented in trial and could not have been through reasonable efforts by the police and prosecution.

This will ensure evidence is not precluded from being 'fresh' solely because another person – for example an expert witness — failed to exercise reasonable diligence.

The proposed reforms also enhance the ability of the criminal justice system to respond to possible wrongful convictions by establishing a framework for subsequent appeals against conviction.

Currently, the only avenue available to a convicted person who has exhausted their original right of appeal, is petitioning the Governor for a pardon.

The Bill introduces a right of subsequent appeal against conviction on the grounds of fresh and compelling evidence or new and compelling evidence.

Source: Ministerial Statement published 29 November, 2023,

1. What did the Double Jeopardy Bill introduced in 2007 do? What further changes to the law on Double Jeopardy are proposed by Minister D'Ath? [C]
2. What are the tests in s678B of the *Criminal Code* which must be satisfied before a court gives

## Practical Application

permission for charges to be brought against a person who has been acquitted of murder? What changes are proposed by Minister D'Ath in November 2023 to these tests? [C]

- Why is it important to maintain public confidence in the criminal justice system? What does it mean to uphold fundamental legislated principles? Use what has happened to the laws upholding the rule of double jeopardy in Queensland to illustrate your answer. [C] [A]
- Would you describe the balance between the need to maintain public confidence in the criminal justice system while upholding fundamental legislated principles that has been created by law reform in the Double Jeopardy Bill to be 'appropriate'? [A] [E]

### What do you think?

Retrospectivity means applying the law in an Act of Parliament to court decisions which happened prior to the date of passing the act. It is a fundamental legal principle that it is inappropriate to make a law that is retrospective. Do you think that the legal tests which apply to a decision acquitting a defendant are sufficiently robust so that the changes to the rule against double jeopardy do not substantially offend the fundamental legal principle that legislation should not be retrospective? Explain your point of view. [A] [E]

## Review

### Comprehend

- Define the following terms:
 

a. Jury	e. Right to silence at trial
b. Onus of proof	f. Standard of proof
c. Privilege against self-incrimination	g. Trial
d. Presumption of innocence	

[C]

### Analyse and evaluate

- Outline in your own words the essential attributes of a fair trial. How important to our legal system is the role of the jury in ensuring there is a fair trial? [C] [A] [E]
- Describe** the circumstantial evidence raised in the Murdoch and Baden-Clay trials. **Identify** the similarities and differences between the circumstantial evidence of each case and indicate how important the circumstantial evidence was in each trial. [C] [A] [E]
- Murdoch exercised his right to silence at trial and did not give evidence at his trial. Baden-Clay did not exercise his right to silence at trial and gave evidence. Why do you think each defendant made the decision that they did to give or not give evidence? What would you have done in their shoes? Give your reasons. [A] [E]
- Choosing either the affirmative or the negative side, **create** a response to the question: *The right to trial by jury, like the right to vote, is seen as an inseparable part of our democratic system. Do you think the jury provides a safeguard against oppressive rule?* [A] [E]

# Criminal trial process

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## Chapter 9: Criminal defences and excuses

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9.1 Criminal responsibility

9.2 Ignorance of the law-bona fide claim of right

9.3 Independently of the exercise of the will

9.4 Accident

9.5 Mistake of fact

9.6 Insanity

9.7 Intoxication

9.8 Immature age

9.9 Partial excuses for murder

9.10 Self-defence

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - at common law, a guilty mind must accompany a prohibited act for a person to be convicted of a crime
  - the *Criminal Code*, which replaces the common law, sets out the defences and excuses available to accused persons in Queensland
  - the conduct of a fair trial requires that an accused person should be able to rely on the defences and excuses available to him or her under the *Criminal Code*.
- analyse and evaluate the defences and excuses in this chapter as they are applied to cases and scenarios.

## 9.1 Criminal responsibility

### Key Terms

**Criminal defence or excuse:** an argument used to justify the actions of a person committing a criminal offence. It can either be complete or partial.

The criminal justice system allows the defendant to give evidence as to his or her state of mind **at the time of committing an offence**. This is because it is an established principle of the common law that a person should not be convicted of a criminal offence unless he or she had a 'guilty mind' (*mens rea*) which accompanied the wrongful act or omission. In Queensland, it has been replaced by statutory provisions that deal with the same mental element of 'guilt'.

These sections are mainly found in the *Criminal Code 1899* (Qld) Chapter 5. If a person accused of any criminal offence in Queensland can prove that one of these Chapter 5 excuses or defences applies to his or her case, then he or she will not be criminally responsible for the act or omission. Once the evidence supporting an excuse or defence has been raised by the accused, it is up to the prosecution to negate it 'beyond reasonable doubt'. For example, if in a trial the lawyer for an accused raises evidence of self-defence or accident then the Crown has to prove 'beyond reasonable doubt' that the accused was not acting in self-defence, nor was it an accident.

Most excuses and defences are complete, and if successfully made out, mean the accused cannot be convicted of the offence. If it is a partial excuse or defence, then usually the accused will receive the penalty for a lesser offence.

### Criminal defences and excuses of general application

In this section we look at eight of the defences and excuses in the Code which are especially important for determining whether a person can be held to be criminally responsible for their act or omission.

ACCIDENT

INDEPENDENT OF WILL

INSANITY

IGNORANCE OF THE LAW

INTOXICATION

PARTIAL EXCUSES  
FOR MURDER

IMMATURE AGE

MISTAKE OF FACT

SELF DEFENCE

## 9.2 Ignorance of the law – bona fide claim of right

In criminal law ‘ignorance of the law is no excuse’. This means that accused persons cannot use the fact that they did not know what they did was a criminal offence to avoid being convicted.

However, the section also says that a person is not criminally responsible for an offence relating to property if the act is done with a **bona fide** (which means honest) claim of right and without intention to defraud. For example, you would have an excuse under this section to a charge of unlawful use of a motor vehicle, if it could be shown that you honestly believed you were legally entitled to use the car. This could happen if there was a long standing arrangement allowing you to use the car and you had not yet received the note stating this arrangement was over. Your claim of right to use the car was honest. If you had received the note and decided to pretend you had not seen it, your claim would be false, deceitful and fraudulent and the excuse would not apply.



### What do you think?

In 2006, a new offence of ‘scalping’ came into operation. It became a crime to sell tickets for major events at inflated prices. The first person charged and convicted of this offence had put up for sale on an Internet auction site, Ebay, six tickets for the first State of Origin game at SunCorp Stadium. When arrested for scalping, the six tickets which she had originally bought for \$260.40 had reached \$425.00 in bidding. The accused argued that she did not know selling tickets at inflated prices was a crime and if she had known, she would not have done it.

1. In your opinion, was it fair or not that she was convicted of, and fined for, this offence? [A] [E]
2. What is the reason for ‘ignorance of the law’ not being a lawful excuse? [A] [E]

## 9.3 Independently of the exercise of the will

A person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will. An act here means a **physical action** over which a person would normally have bodily control, such as pulling a trigger on a gun or thrusting a knife into another’s chest. So, a person who does such an act without their conscious mental control may be held not responsible for their actions.



Acts done as a reflex by someone, or while they are sleepwalking, or suffering from concussion arising from a sudden blow to the head, or who are in great psychological shock, may be found to have done the act independently of their will.



## Case Study

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*Cooper v McKenna* [1960] Qd R 406

**Facts:** While playing football, the accused received a severe blow to his head and was knocked unconscious. He was still suffering from concussion when he drove home after the game. He was charged with dangerous driving.

**Legal Issue:** Did he have conscious control over his driving or was it an act occurring independently of his will?

**Decision:** There was sufficient evidence that his actions were involuntary because of the concussion suffered. He appeared to be driving without any real knowledge or awareness of what he was doing. Hence, he could not be convicted of the offence of dangerous driving as he was not criminally responsible for it.

**Note:** On appeal to the Queensland Court of Criminal Appeal, Matthews and Stable. upheld this decision. However, they did note that the use of this excuse 'must be closely scrutinised'. It is common knowledge that a 'blackout', to use one of the titles, is one of the first refuges of a guilty mind and a popular excuse'.

1. Do you agree with the two Appeal Court judges that the use of this excuse must be closely scrutinised? [A] [E]
2. Why would the court have given this warning? [A] [E]

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In recent years there has been increasing use of sleepwalking as a defence to serious criminal acts, including rape and murder. Sleepwalking is an act that occurs while a person is in a sleep state and may extend to a range of other behaviours including nonsensical talking. In extreme cases, activities such as driving, emailing, and cooking can be performed while a person is in this state of low consciousness called somnambulism. Is it possible to do a criminal act whilst sleepwalking? Yes.

There are cases where it has been argued that an act occurred independently of the person's will. However, this excuse is not always successful in court.

## Case Study

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*R v Silich* (Supreme Court, Western Australia, 2010)

**Facts:** After his father and mother went to bed, Silich said he fell asleep on the couch about 1am. He was heavily intoxicated and was still affected by alcohol when he woke the next morning to discover his parents lying dead on the bedroom floor. They had been kicked to death. Silich had no recollection of waking during the night or hurting them in any way. Forensic evidence showed that it was Silich's boots that had inflicted the fatal injuries. Later he did admit to kicking them to death, but argued he had no memory of doing so.

Evidence was given that he had sleepwalked as a child. Defence counsel also argued there was no evidence of tension between Silich and his parents on the night they were killed. Evidence from friends showed he was not a violent man. The defence's secondary position was that Silich was 'massively affected by alcohol' and had no intent to kill, in which case the jury should return a verdict of manslaughter.

The prosecution's case was that the sleepwalking claim did not stand up given the number of violent hits his parents had taken. The hits 'were not aimless. They were directed blows, they were controlled....he kept kicking his parents until they were dead. He did that with an intention to kill.'

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## Case Study

Psychiatrist at the trial, Dr Varghese, gave evidence that ‘complex and purposeful actions were limited while sleepwalking’ and it is unlikely that meaningful acts of violence would be committed during a state of sleepwalking.

**Legal Issue:** Had Silich killed his parents whilst sleepwalking? If so, he was not criminally responsible for their deaths, as the act - the kicking - was done independently of his will

**Decision:** The jury found him guilty of murder. Silich was sentenced to life imprisonment. An appeal lodged by Silich against his conviction was unsuccessful.

1. What role did expert evidence play in the trial? [C] [A]
2. Counsel for the defence could not prove Silich had been sleepwalking but claimed it did not have to as it was for the jury to decide if the prosecution had proved Silich wasn't sleepwalking. Is this correct or not? [A]
3. Do you think this was a fair outcome? Give reasons why you would support or reject the jury's decision. [E]
4. Do you think that the s23 excuse of an ‘act exercised independently of the will’ should be used in such cases or should the defence of insanity (see commentary on this defence at 9.5) be preferred? [A]

Sleepwalking as a defence has also been raised in rape and sexual assault cases. In 2006, a man in Toowoomba claimed he had no memory of having intercourse with his best friend's girlfriend. The trio had been out drinking prior to all falling asleep at the friend's home. A sleep physician gave evidence that it was ‘highly probable’ the incident happened as a result of sleepwalking because the accused had two previous incidents of sleepwalking. However, expert psychiatric witnesses for the prosecution said it was unlikely sleepwalking played a role. The prosecutor told the jury that the accused was an opportunist who had developed the sleepwalking defence because he got caught out: ‘There has been an attempt in subterfuge here to hide behind a defence . . . that has no merit whatsoever’. The jury found the accused guilty.



### What do you think?

Many women's groups have been concerned at the use of the sleepwalking as an excuse in sexual assault cases. Suzanne Jay, of the Canadian Association of Sexual Assault Centres, responding to an acquittal based on sleepwalking, wrote: ‘It's another case of the courts not taking a woman seriously, adding yet another to the list of excuses men use for sexual assault.’

1. What other excuses could she be referring to which have been used in rape cases? [S]
2. Write a submission to the Queensland Law Reform Commission setting out whether you support, or do not support, the application of s23 to the consequences of sleepwalking episodes. [A] [E]
3. Do you think this was a fair outcome in the Toowoomba rape case? Give reasons why you would support or reject the jury's decision. [A] [R]

## 9.4 Accident

For centuries the criminal law has recognised the excuse of accident and held that a person is not criminally responsible for an event that occurs by accident. In 2011, the law was amended in Queensland to remove the word ‘accident’ from s23 of the Code. In its place the well established definition of what, in case law, amounted to an accident for the purposes of s23 (1) (b) was inserted. This definition came from the important High Court of Australia case of *Kaporonovski* (see Chapter 2.5). Section 23 now states that a person is not criminally responsible for an event that:

- i. the person does not intend or foresee as a possible consequence; and*
- ii. an ordinary person would not reasonably foresee as a possible consequence.*

The event is the consequence of an act. Typically it is the injury received. Therefore the issue becomes, was an injury of that type intended or foreseen by the accused, and was it foreseeable by an ordinary person? For example, if a person is chopping wood, and the head of the new axe falls off unexpectedly and wounds a passer-by, the wounding would be an accident. The chopper did not intend to injure the passer-by, and neither the chopper, nor would an ordinary person foresee, the axe-head falling off a new axe.

### Inquiry Focus

*What was the process which led to the creation of the offence of unlawful striking causing death (s314A of the Code)? Examine the points of view of stakeholders, and the unintended consequences of the legislative reforms.*

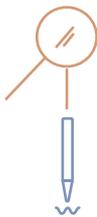
### Victims and the media

Around 2005 and 2006, in the Australian community, there was a significant number of deaths caused by alcohol-fuelled violence among young people. These were reported widely in the media, and a campaign was started by the families of the victims to change the law to make the defence of accident unavailable in such circumstances.

The One Punch Can Kill is the original anti-violence awareness campaign that originated in 2007 after the murder of Queensland teenager Matthew Stanley. The campaign targeted the rising level of youth violence through a series of advertisements. Four bus advertisements presented messages related to consequences of committing an assault. An advertisement featuring Sophie Halipilias presented the perspective and message from a victim’s mother.

The ad was aired and played in movie cinemas across Queensland.





## Practical Application

### TEEN GUILTY OF KILLING MATTHEW STANLEY

The grieving father of teen bashing victim Matthew Stanley is relieved his killer has today admitted guilt but says his claims of remorse meant little to the family.

The 17-year-old offender faced Brisbane Supreme Court this morning where he pleaded guilty to manslaughter over the death of Matthew, 15, outside a suburban party on or about September 24 last year.

Legal-Aid barrister Soraya Ryan told the court this morning her client had shown a 'mature acceptance of responsibility' for the incident by pleading guilty.

She also revealed he had rejected the potential option of pleading not guilty and relying on the defence of accident if the matter went to trial - a defence that could have been open to him in the circumstances.

Other defendants have succeeded in beating murder and manslaughter charges this year partly by relying on the controversial accident defence. The defence is based on the premise that the accused person or an ordinary person in their position could not have foreseen death as the outcome of their actions.

Ms Ryan said the teen's response had been that 'it just wouldn't be right to walk away'. 'The enormity of the offence has never left him,' Ms Ryan said.

But outside court, Matthew's emotional father Paul Stanley - now a campaigner against youth violence since his son's death - said the statements of remorse fell flat and later described his son's killer as a 'bully and a coward'.

Mr Stanley said the family were at least relieved they now did not have to face up to a lengthy trial. 'He was guilty, that is all there is about it, he pleaded guilty, he did it, simple as that,' Mr Stanley said.

'It really is a big comfort to us that we don't have to go through what was predicted to be a two week court case, listening to the pathology report and all that sort of thing. That was something we certainly weren't looking forward to.'

He said if he was an outsider looking in at today's developments - and not the victim's father - he might say the admission of guilt was 'refreshing' given recent high-profile acquittals of young men for murder and manslaughter.

When asked if the juvenile's stated remorse meant anything to him he replied: 'Not in the slightest'. Members of the juvenile's family were in court but declined to speak publicly.

Source: Amanda Watt, 'Teen guilty of killing Matthew Stanley', *The Courier Mail* (Online, 7 September 2007) <[couriermail.com.au/news/queensland/teen-guilty-of-party-bash-death/news-story/ac6862b144724dc8fb0ac3a4fc070106](http://couriermail.com.au/news/queensland/teen-guilty-of-party-bash-death/news-story/ac6862b144724dc8fb0ac3a4fc070106)>.

1. What reasons does barrister Soraya Ryan give to explain why her client pleaded guilty? [C]
2. What defence was available to the client of Soraya Ryan on which he did not rely? [C]
3. On what premise does the article say the defence of accident is based? [C]
4. Why is the accident defence described as 'controversial'? [C][A]

## Practical Application

5. Describe the reaction of Matthew Stanley's father to the fact that his killer pleaded guilty. What did he say was 'a big comfort' to him and his family? Do you think he should have given his son's killer credit for showing remorse? [C] [A] [E]
6. Soraya Ryan thought that her client could have relied on the defence of accident. If he had done so and been successful he would have escaped punishment altogether. By pleading guilty he spent time in jail. If he had gone trial and being acquitted would that have been a fair outcome? Give reasons for your answer. [A] [E]

## Legal Background

In 2010 the Queensland Police Service handed the management of the campaign to the Queensland Homicide Victims' Support Group. Since this time the One Punch Can Kill™ campaign has developed an interactive multimedia education program for high school students, sporting clubs and community organisations. The program is designed as a crime preventative measure to reduce levels of youth violence by educating Queensland youth on 3 focus areas.

- **Health:** harm associated with drug and alcohol use
- **Justice:** Queensland criminal justice system
- **Social behaviours:** Use of social media and peer behaviours

The One Punch Can Kill™ campaign continues to build vital partnerships with business, sporting organisations, the media and government to deliver the One Punch Can Kill™ message across Queensland. The One Punch Can Kill™ campaign has a website, school fight advertisement, educational and teaching resources for high school students across Australia. The One Punch Can Kill™ social media campaign is designed to address the use of social media by youth in the promotion and publication of violence.

### Research Task

Visit the website **One Punch Can Kill** at [onepunchcankill.org.au](http://onepunchcankill.org.au). What are the aims of the campaign? As a class, with the permission of your teacher, prepare a presentation to ask the school administration to invite OHVSG to your school to present their program to educate the school community about alcohol fuelled violence. [C] [A] [E] [R]





## Case Study

*R v Little* (2008) Queensland Supreme Court

**Facts:** Jonathon Little was in Fortitude Valley's Brunswick Street Mall in December 2005. Little was having an argument with his girlfriend on his mobile phone as he walked through the restaurant and club precinct of the Valley. Little, aged 20, had never met 26-year-old Stevens when Stevens said a 'smartarse alec thing' to Little.

Little told police he snapped and lashed out, punching Stevens once in the face. Stevens was knocked to the pavement. According to one witness, he then lined up the unconscious Stevens as he would a football and kicked him between the head and shoulder. Little left Stevens there but was arrested a half hour later. Little was shocked when he was told by police that Stevens' brain injuries were so serious he was on life support. Stevens died of a subarachnoid haemorrhage. He also had a large quantity of alcohol in his system. Medical evidence was given that it was most likely that the fatal blow was the punch rather than the kick to the head. Little was charged and then stood trial for murder.

**Legal Issue:** Was Steven's death an accident? This required the jury to decide whether an ordinary person could reasonably have foreseen Steven's death or serious injury as an outcome of Little's actions, that is, one forceful punch or the kicking of an already unconscious man in the head. If the jury was satisfied that the death was not foreseeable by an ordinary person and Little did not foresee it, then the excuse of accident means by law they must acquit the person of both murder and manslaughter.

**Decision:** The jury found Little was 'not guilty' of murder or manslaughter.

1. What is the legal benefit of arguing the excuse of accident in cases like this rather than either self-defence or provocation? [A]
2. Given the facts of how the victim in this case received his injuries, do you agree or disagree, that an ordinary person in the same position would not have reasonably foreseen death or grievous harm as an outcome? [A] [E]
3. Homicide Victims Support Group acting chief executive Jonty Bush, claimed the defence of accident is puzzling. She said: 'It appears to be OK for people to go around and hit someone as long as they say 'I'm sorry it was an accident, I didn't believe death would be the consequence of what I did''. In your opinion, is accident a valid excuse to murder? Is this interpretation of accident legally correct? [A] [E]
4. Juries represent the community in the criminal justice system. Jurors have to weigh up all of the evidence in a case. As it is not possible for the media to report all that a jury hears in a lengthy trial, do you think it fair to have media commentary on the jury's final decision? [E]

### The Government Response to the Media (victim reports)

Given the significant concern in the community, reflected in the media, and in the publicity campaign in which the victims of prominent 'one punch can kill' (OPCK) cases were involved, the Queensland government, needed to respond. The Attorney-General asked the Queensland Law Reform Commission to review and report to the government on whether the law needed to be changed. After reviewing the Legal Reform Commission's report, the government decided to introduce a new offence in s314A of the *Code*.

## Practical Application

### THE NEW LAW

In 2014, Queensland parliament introduced a new offence of '**unlawfully striking causing death**', into the *Criminal Code* (s314A). Colloquially, this has come to be referred to as 'the one punch law'.

Under the new law, offenders who cause the death of another person by unlawfully striking a blow to the head or neck are guilty of a crime, regardless of whether they intended the victim to die, or foresaw death as a possible consequence of striking the blow. The blow struck does not even need to amount to a common assault, so long as it is delivered unlawfully.

Source: Fernanda Dahlstrom (ed.), 'One Punch Law (Qld)', *Gotocourt.com.au* (Web Page, 8 November 2022) <<https://www.gotocourt.com.au/criminal-law/qld/one-punch-law/>>.

1. What is the difference between an event that is 'accidental' and one which is 'unforeseeable'? [C] [A]
2. There is a special criminal offence category of dangerous driving causing death which can be used in preference to murder and manslaughter when a person dies in a car accident. If you were a juror in the *Little* case, would it have been useful, or not, to have had a separate offence of assault causing death? [R]
3. You work for the Queensland Attorney-General. She asks you to prepare a statement to be released to the media in support of the new s314A of the Code, namely *Unlawful striking causing death*. The statement is to summarise the reasons in favour of the new offence. [A] [E] [R]

## Impact of 'one punch can kill' laws

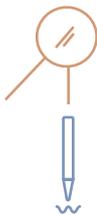
### Practical Application

#### MAJOR DROP IN ALCOHOL-FUELLED VIOLENCE SHOWS NEW LAWS ARE WORKING

The Palaszczuk Government has today released its response to the independent evaluation of the Government's Tackling Alcohol-Fuelled Violence policy (TAFV)

**Some of the accepted recommendations include:**

- Work to ensure lists of banned patrons be available to all venues that operate after midnight.
- A continued commitment to best practice advertising and communication campaigns aimed at reducing risk in alcohol consumption.
- A comprehensive independent review of alcohol and drug safety education in schools.
- Continued focus to implement initiatives that promote safe behaviour and attitudes in venues.
- The Safe Night Precinct Grant Funding Program (\$500,000 in grant funding, a dozen extra officers) is now open to support safe night precinct boards... to fund safety initiatives



## Practical Application

including roving security services and taxi marshals, which improve safety in and around licensed venues.

### Key findings of the TAFV evaluation:

- 49% decrease in the number of serious assaults between 3 AM and 6 AM on Friday/Saturday state wide
- 52% decrease in serious assaults in Fortitude Valley between 3 AM and 6 AM on Friday/Saturday and a 43% reduction in Toowoomba
- the average number of monthly ambulance callouts during high alcohol hours reduced by 26% in Fortitude Valley, and 21% in Surfers Paradise

Source: The Honourable Annastacia Palaszczuk and The Honourable Shannon Fentiman, 'Major drop in alcohol-fuelled violence shows new laws are working', *The Queensland Cabinet*, (Web Page, 25 May 2022) <statements.qld.au/statements/95208>.

1. Describe the government initiatives which have led to a reduction in alcohol fuelled violence. [C]
2. To what extent do you think the success of government initiatives other than changing the law by introducing s314A of *the Code* have contributed to the reduction in serious assaults caused by alcohol fuelled violence? [A] [E]

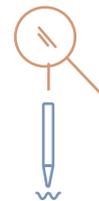
## Practical Application

### Criticisms of one punch law

There has been a lot of criticism of the one punch law, variations of which have now been introduced in all states and territories, with many people feeling that it is in an ineffective way of addressing the problem of alcohol fuelled violence.

Some of these criticisms are:

- That the exclusion of the mental elements of intention and foreseeability from the one punch law means that no assessment of the relationship between the offender's actions and the ensuing death is included. This flies in the face of common law, under which the degree of criminal responsibility for one's actions is generally commensurate with one's level of culpability.
- Harsher criminal penalties are often touted as serving the interests of general deterrence. As the one punch law was designed for alcohol-fuelled impulsive offending, general deterrence has been derided as having little relevance as such offenders are not in a state to assess the likely consequences of their actions. One punch homicides happen precisely because the perpetrator is not thinking.
- That findings of guilt recorded so far under one punch laws have not always targeted the group that the law was intended to target. Instead, many convictions for one punch killings have been in the context of family violence or intimate partner violence. The one punch



## Practical Application

provision means that men who kill women in this way may receive more lenient penalties than they would have previously, because of the existence of the lesser charge (e.g. rather than manslaughter)

- The problem of drug and alcohol-fuelled violence needs to be addressed through broad social measures and the one punch law is a superficial, knee-jerk response to a complex problem.

Source: Fernanda Dahlstrom (ed.), 'One Punch Law (Qld)', *Gotocourt.com.au* (Web Page, 8 November 2022) <gotocourt.com.au/criminal-law/qld/one-punch-law/>.

1. Do you consider any of these criticisms to be valid? Give your reasons. [A] [E]
2. What response do you think the Premier of Queensland would make to these criticisms? Would she accept any of them as valid? [A] [E]

## 9.5 Mistake of fact

A person who does an act under an **honest and reasonable but mistaken belief** in the existence of any state of things is not criminally responsible for the act to any greater extent **than if the real state of things had been such as he or she had believed it to exist**.

To be a mistake under this section, the accused must have a mistaken belief about a fact or set of facts. A mistake as to the law does not relieve one of criminal responsibility. Hence, a person who possesses or sells a prohibited substance, not knowing that it is one of the drugs listed in the *Drugs Misuse Act 1986* (Qld) is not making a mistake of fact. This is a mistake of law because it is about the legal categorisation of a substance. In addition, this belief must be reasonable and honest. A reasonable mistake is one that a reasonable or ordinary person could also have made in those circumstances.

An example of the kind of mistake which is frequently raised in drug offences is one where people believe that there are no prohibited drugs under their control (that is, in their possession, either on them, in their luggage, or in their home) – essentially that the drug was 'planted' on them. Another is when a person is mistaken about a particular substance or item. A person might claim that he or she believed they bought a potted basil herb plant but it is, in fact, a marijuana plant.

The mistaken belief, however, has to be both reasonable and honestly held. If this mistaken belief is established, it relieves a person of criminal responsibility only to the extent that the real state of affairs is as he or she mistakenly believed them to be.

This is not a complete excuse because all it does is say that the accused can rely on his or her mistake only to the extent of that mistaken belief. For example, if a person has heroin in his or her possession but mistakenly believes it to be another prohibited substance classified with lower penalties, he or she can be convicted of possessing the latter substance and receive the lower penalty. Another example is, if a person breaks and enters a dwelling house before 6am believing it is after 6am, that person may be guilty of housebreaking only and not burglary. (Remember, burglary is committed only between 9pm and 6am.) They are still guilty of an offence, but an offence with a lesser penalty.

With drink driving offences the operation of s24 is expressly excluded. This prevents a person from raising the excuse that he or she honestly and reasonably believed they were drinking a beverage with a low, or no, alcohol content.

## Hypothetical?

Consider the following scenarios and advise on whether the excuse of mistake of fact under s24 would assist in the accused's defence. [C] [A]

1. Annabelle is aware that her flatmate has brought into their flat a white powdery substance kept in the jar in the pantry. One day the flatmate puts a label with the words 'rat poison' on the jar. Annabelle is suspicious because she has seen her flatmate taking small quantities out of the jar, but Annabelle has not seen any rats at all. Annabelle and the flatmate are charged with possession of a dangerous drug, namely cocaine.
2. Ben's coach said Ben needed some stimulants prior to competition and gave Ben a bottle of tablets with instructions to take these the morning before a competition. They were in fact a prohibited narcotic, which receives a maximum penalty under the Act. Ben said he believed the tablets were stimulants. Ben's coach said he had no idea that either was prohibited in Queensland.

## 9.6 Insanity

Since Roman times and throughout the following centuries, what was then called 'being mad' has been a way persons could be excused from criminal responsibility for harm caused by their actions. It comes from the moral position that it is **ethically and legally wrong to punish a person who suffers from a severe mental impairment or illness** which stops them either controlling their actions, or understanding what they are doing, or knowing that it is wrongful. Whilst insanity is a defence to all criminal offences in Queensland, not every form of mental impairment meets the requirements for the insanity defence. The requirements for the insanity defence in all Australian jurisdictions come from a famous English case of M'Naghten. In 1843, Daniel M'Naghten shot and killed the English Prime Minister's private secretary mistakenly thinking he was the Prime Minister. M'Naghten, a Scot, had 'morbid delusions' that he was being persecuted by the British government. His acquittal on grounds of insanity caused an outcry at the time and subsequent debate in the House of Lords led to the formulation of what is known as the M'Naghten rules, from which our s26 is derived.

To prove that a person should not be held to be criminally responsible for an act on grounds of insanity, it must be shown that, at the time of doing the act or omission, that person was in 'such a state of mental disease or natural mental infirmity as to:

1. deprive him of capacity to understand what he is doing; or,
2. deprive him of capacity to control his actions; or
3. deprive him of capacity to know that he ought not to do the act.'

What amounts to mental disease and natural infirmity is a **legal question** but expert psychiatric and medical evidence is important in the determination. The court has to distinguish mental disease such as various forms of psychoses from other medical conditions such as epilepsy and hyperglycaemia and also from other states of mind such as jealousy, anger, revenge or lack of self-control.

**Every person is presumed to be of sound mind until the contrary is proved.** Therefore, evidence which establishes that insanity was more probable than not needs to be proved by the

accused. Insanity is, therefore, an **exception to the general rule that the burden of proof in a criminal trial rests with the Crown (prosecution)** and that a defence must be negated beyond reasonable doubt.

In Queensland the mental state of an accused is now determined by the **Mental Health Court**, rather than by a jury. This court consists of a Supreme Court judge who is assisted by two psychiatrists. The judge, using the advice given by the two psychiatrists, determines whether an accused was suffering from 'unsoundness of mind' at the time the criminal act or omission was committed, or whether the person suffered from diminished responsibility if the charge is murder. The court also decides whether the person is mentally fit to plead to the charge. In other Australian states, a jury makes a factual determination based on expert testimony of psychiatrists as to whether a person was insane or not. The jury will return a **special verdict** of not guilty by reason of mental illness.

If the court finds the person was of sound mind and is fit to stand trial, the case is returned to the criminal court. If there was a determination of insanity, a forensic order is made which means the person is detained in an authorised mental health facility for treatment or care.

## Practical Application



### EUNJI BAN: BRISBANE JURY RULES ALEX MCEWAN NOT FIT TO CONTINUE WITH MURDER TRIAL

Alex Reuben McEwan is not mentally fit to continue to stand trial for the murder of Korean woman Eunji Ban, a Supreme Court jury in Brisbane has decided. He (McEwan) has admitted to killing the young Korean woman but denied it was murder. He was planning to use insanity as a defence.

The jury were told they would need to decide whether he was mentally fit to continue the trial, but there would not be a determination of the murder charge. Prosecutor David Meredith told jurors... that the prosecution could continue after Mr McEwan received treatment.

Forensic psychiatrist Dr Donald Grant told the court that Mr McEwan was instructed by demons in his head to attack the prosecutor in the trial on Tuesday and his hallucinations have increased since the start of trial. Defence barrister John Allen told the jury they should accept Dr Grant's evidence that Mr McEwan was not fit for trial because of psychotic hallucinations.

'The defendant is just not able to properly appear, understand and pay attention to evidence, and therefore be able to give sensible instructions to his lawyers.' Mr Allen said. 'If he is to defend the charge against him he will be required to give evidence - he simply cannot have a fair trial'.

Mr McEwan will now be transferred to a mental health facility. His fate in relation to the trial will be determined at a later date.

Source: Ellie Sibson, 'Eunji Ban: Brisbane jury rules Alex McEwan not fit to continue with murder trial', *ABC News* (Online, 5 October 2017) <[abc.net.au/news/2017-10-05/alex-mcewan-eunji-ban-murder-trial-qld/9018358](http://abc.net.au/news/2017-10-05/alex-mcewan-eunji-ban-murder-trial-qld/9018358)>.

1. What is the charge against Mr McEwan? [C]
2. Has the trial already commenced? [C]
3. How has Mr McEwan pleaded? What defence has he indicated he will rely on? [C]



## Practical Application

4. What evidence did Dr Donald Grant give about Mr McEwan's mental health? [C]
5. What submissions did defence barrister John Allen make to argue that Mr McEwan's trial should not be continued? Were these submissions reasonable having regard to Dr Grant's psychiatric evidence? [C] [A]
6. Is it possible that Mr McEwan will eventually be tried for murder? If, in that trial, Mr McEwan pleads not guilty and relies on the defence of insanity, who will determine if he is successful or not in maintaining that defence? [C]



### What do you think?

1. Do you agree that the Mental Health Court is the better forum to determine 'fitness to stand trial' than the criminal court? [A] [E]
2. If, as it has been argued, there is a belief in the community that the insanity defence can be abused, what factors may have contributed to this viewpoint? [A]
3. Do you think the question of insanity in a homicide case should be a legal or a medical determination, or both? [E]
4. Should the families of murder victims be advised when the Mental Health Court approves either the temporary or permanent release of the victim's killer? Or could this adversely affect the privacy of the mentally ill person and impact upon their integration back into the community? [A] [E]

## 9.7 Intoxication

An accused may plead intoxication if his or her mind was so **disordered by drugs or alcohol** that he or she was deprived of the capacities required under s28. That is, capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act. It can only be used if the intoxication has been unintentional. An example would be if a person is given a 'spiked' drink. If you voluntarily and knowingly drink alcohol or take drugs, this part of s28 will not apply.

The law presumes that a person who drinks, and drinks to excess, intends to become intoxicated to some extent. The onus of proving unintentional intoxication rests on the accused and, if successful, the accused must be acquitted on the ground of insanity.

Drugs and alcohol affect mental functioning and so they are particularly relevant to offences where 'intention' is an element of the offence. The issue becomes: **can a drunk or drugged person actually form an intention?** Clearly it is a question of degree. Under the influence of small amounts of drugs or alcohol, a person may still be capable of forming an intention to commit a criminal offence. If so, the element of intention will not be negated by intoxication. However, if a person, because of intoxication, is not capable of forming an intent then he or she cannot be found guilty of criminal offences for which intent is an element; for example, murder, which has intention to kill as an element. They can, however, be convicted of the lesser homicide offence of manslaughter, because intention is not an element of that offence.

## 9.8 Immature age

This section states that a person **under the age of ten years** is not criminally responsible for any act of omission. This means they are considered legally incapable of committing any offence.

It also states that a person **under the age of 14 years** is not criminally responsible for an act unless it is proved that, at the time of doing it, he or she had the capacity to know that he or she ought not to do it. This means that the prosecution has to prove that the child understood and knew what was done was seriously wrong, in the sense of being morally wrong. It must be more than being mischievous.

### Case Study



*R v B* CA 369 of 1997 (Unreported)

**Facts:** B was a 12-year-old student at a Queensland school. He was frequently disciplined and counselled at school, including for aggressive behaviour towards other students.

One day a teacher saw him with a knife pointed at some children. She rushed over. He then turned and pointed the knife at her and lunged towards her with it.

Another teacher came and he gave up the knife. B was charged with assault.

**Legal Issue:** As he was 12, did he have the capacity to know what he was doing was wrong?

**Decision:** The jury found him guilty of the offence and the Court of Appeal upheld their decision. Justice Pincus said: 'It must be proved that at the relevant time the person has capacity (I emphasise capacity) to know that the person ought not do the act. This is, of course, different from actual knowledge. Justice Pincus pointed to three matters:

- (1) In prior discussions the boy had understood the wrongfulness of aggressive behaviour;
- (2) after the assault he was very defensive about his actions; and
- (3) he was not of an 'unusually immature moral sense as to be incapable of understanding that it was wrong to threaten a teacher with a knife.'

1. Explain why B's actions amounted to an assault, even though no physical harm was done. [A]

2. What is the significance of the word, 'capacity', in s29? [A]

What other evidence could be used in cases of children under 14 years to establish that they had the capacity to know what they were doing was wrong? [A] [R]

## 9.9 Partial excuses for murder

There are three partial excuses that are relevant only when a person is charged with murder. These are provocation (s304) diminished responsibility (s304A) and preservation in a domestic relationship (s304B). If they are successfully proven, the accused is not totally relieved of criminal responsibility, but will have a murder conviction reduced to manslaughter. This is called **voluntary manslaughter**.

Section 304 is used to assist an accused who would otherwise be found guilty of murder (with its mandatory life punishment) to receive the lesser penalty that comes with a manslaughter conviction. Where all the elements of murder, including causation and intention, can be proved

'beyond reasonable doubt', an accused may argue he or she was provoked into killing his or her victim. Provocation has been a controversial excuse. It was introduced into England at the time when the common law made duelling unlawful. Until then, men could lawfully carry weapons and fight duels to protect their 'honour'. It has been criticised ever since as a defence that suited men, rather than women. At the time England had capital punishment for murder and this was a way to prevent men defending their honour from being executed.

For provocation to apply, four things are necessary:

- a. a provocative incident;
- b. the accused must actually have lost control in direct response to the provocation;
- c. what was said or done to the accused was such that an ordinary person would also have lost their self-control; and
- d. the accused must have acted suddenly, on the spur of the moment (before there was time for 'passion to have cooled' as some cases say).

Passion here refers to any intense emotion or mixture of strong feelings, such as anger, jealousy, vengeance and hurt. The defence of provocation **gives recognition to human weakness**. Essentially, it says that in extreme, unexpected situations any one of us may lose self-control and do something quite out of character. That does not excuse the act but should be taken into account in assessing how blameworthy a person is and the punishment he or she should receive. To kill when provoked is in law less blameworthy than a cold, calculated and pre-meditated killing. A jury is asked in cases of this nature whether what the accused did in response to the provocation was something an ordinary person would do if faced with that same degree of provocation. Blackstone the great English jurist said that the difference '*principally consists in this – that manslaughter arises from the heat of the passions, and murder from the wickedness of the heart*'. (*Blackstone's Commentaries* 1V 190).



## Case Study

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*Stingel v R* (1990) 171 CLR 312

**Facts:** For about six months Stingel went out on a regular basis with a girl from his school. They broke up. Stingel remained infatuated with her and frequently followed her to places. He had threatened her with violence unless she came back to him. She had a restraining order issued against him.

Some months later Stingel found her late one night with another young man, Taylor, in a parked car. He went up to the car, opened the door, and saw they were engaged in sexual activity. Stingel became angry. He spat at them and Taylor told him to 'piss off' and called him an insulting name. Stingel went back to his own car, smoked a cigarette, then took out a butcher's knife that he had in the car, and stabbed Taylor to death.

**Legal Issue:** Could provocation operate here to reduce murder to manslaughter?

**Decision:** No. The jury convicted Stingel of murder and this was upheld by the High Court of Australia. Of particular importance in the reasoning was 'what an ordinary person' of Stingel's age would have done when faced with a similar provocative situation. The court said: '*No jury acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including his insulting remark and the sexual activities in which he and A were allegedly engaging, was not of such a nature as to be sufficient to deprive any hypothetical ordinary 19-year-old of the power of self-control to the extent that he would go to his own*

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## Case Study ...

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*car, obtain a butcher's knife and fatally stab the deceased with it ... the appellant's reaction to the conduct of the deceased fell far below the minimum level of the range of powers of self-control that must be attributed to any hypothetical 19-year-old.'*

1. Why would the court hold that age was relevant to a person's level of self-control? [A] [E]
  2. Read again the four requirements for s304 provocation. Identify which facts of Stingel's case were relevant for each requirement. [A]
- 

In Queensland, a review of provocation was also undertaken by the Queensland Law Reform Committee in 2008. Cases such as *Sebo* (see the next page) raised questions about whether taunts and threats to leave a relationship were sufficient to amount to provocation for murder and allow for a lesser sentence than mandatory life imprisonment to be imposed.

## Case Study

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Please note from April 2011, other than in circumstances of a most extreme and exceptional character, provocation (s304(1) of the *Code*) does not apply if the sudden provocation is based on words alone, (s304(2) of the *Code*) or when there is a relationship between two persons and the sudden provocation is based on anything done by the deceased to end the relationship; or to change the nature of the relationship (s304(3) of the *Code*).

*R v Sebo* [2007] QCA 426.

**Facts:** Sebo, 28-year-old, admitted he killed his girlfriend, Taryn Hunt, who was 16 at the time. The two had been in a sexual relationship for almost two years and Sebo said he was deeply in love with her. He said that, after they both left a party one evening, he raised the issue of rumours about her seeing other people. Taryn was somewhat 'tipsy' and began to taunt him about her other lovers. She said he was easy to cheat on and she was not going to stop seeing other men. This made him so angry that he lost self-control and in his jealous rage used a steering wheel lock to strike her repeatedly on the head. She died from these injuries.

**Legal Issue:** As Sebo admitted to the killing, the only issue for the jury was one of provocation.

**Decision:** Sebo was found 'not guilty' of murder, but 'guilty' of manslaughter. The jury had accepted the provocation defence. He was sentenced to 10 years.

1. Look at what was required under s304 of the *Code*. What was Sebo's argument in support of provocation? [A]
  2. The jury agreed that Sebo was provoked. Do you agree or disagree with the jury decision? [A] [E]
  3. Was this voluntary or involuntary manslaughter? [A]
  4. Do you think that an admission that 'I killed her because she said she did not love me any more' is a sufficient ground, or not, for reducing murder to manslaughter? [E]
  5. Consider the amendments to the law of provocation noted above in s304 (2) and (3) and determine if the decision would have been the same in the Sebo case if the killing had occurred in May 2011. [A] [E]
-

If a person's mind is in an 'abnormal state' at the time when a killing was committed, the defence of diminished responsibility may operate to reduce what would otherwise be murder to manslaughter. The abnormal mental state must have been such **that the person could not control actions, nor know what was being done was wrong**. This mental state is also determined by the Mental Health Court. Diminished responsibility differs from insanity because:

- insanity can be used as a defence for all criminal charges while diminished responsibility is limited to murder;
- insanity requires the accused to lose completely certain mental capacities while diminished responsibility only requires a substantial impairment of those capacities; and
- where a defence of insanity succeeds, the accused is 'not guilty by reason of insanity' and will be admitted to a psychiatric hospital until he or she is no longer insane, while diminished responsibility still results in a manslaughter conviction.

In a small number of domestic violence cases, victims get to a point where they kill their abuser. Traditional provocation did not always assist in reducing murder to manslaughter. This was because the violence had been on-going over a period of time, rather than being a sudden provocative act, and also because the killing may have been planned in advance rather than being a spontaneous act. Hence the act was not in the heat of the moment 'before passion had cooled'. Former NSW Chief Justice Murray Gleeson noted that with provocation, *'the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.'*

In 2010 Queensland amended the *Code* to specifically include a new form of provocation - killing for preservation in an abusive domestic relationship. It is similar to s304 provocation in that the elements of murder must be established and the Crown has the onus of proof. It also operates to reduce a charge of murder to that of manslaughter but on the basis that the person believed that it was necessary for his or her preservation from death or grievous bodily harm. It must be proved there was a history of an abusive domestic relationship between the two. This partial excuse is in addition to, not instead of, other defences and excuses.

Therefore, a victim of abuse charged with the murder of his or her abuser can raise the complete defence of self-defence for the purposes of an acquittal, the partial defences of diminished responsibility or provocation to reduce a charge of murder to manslaughter, as well as the partial defence of preservation from an abusive domestic relationship.



### What do you think?

Susan Falls was charged with the murder of her abusive husband Rod. She was acquitted. In her interview with *Woman's Day* she described the abusive relationship. She was abused for 20 years. The abuse started immediately she was married. Her life was one of an untold agony and constant beatings. After picking him up at the Powerboat Club one night, Rod accused her of embarrassing him in front of his friends and proceeded to use her as a punching bag for three hours, throwing her around the lounge room, and choking her until she passed out. He threatened to stab her with scissors. He forced her to stay all night when she was six months pregnant on the roof area of their two-storey house. She refused him sex because she was too sore from a previous beating and he raped her. The last straw was demanding that she kill one of their four children. Rod forced her to draw out the name of one of the children from a hat because she refused to choose. He said the child would be killed on her mother's birthday. It was her youngest son.



## What do you think?

Susan decided the only option was to end Rod's life. She laced his meal with 25 sleeping pills, shot him twice in the head, then disposed of his body in bushland.

The jury had to assess the reasonableness of the accused's belief that she faced extreme danger and had no other reasonable way out. In *R v Falls* Justice Applegarth said, in the context of self-defence (of which the common law defence of Battered Wife Syndrome formed part):

It doesn't matter that at the moment she shot Mr Falls in the head he didn't at that moment offer or pose any threat to her. He had assaulted her. There was the threat that there would be another one and another one and another one after that until one day something terrible happened. It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present.

1. Susan Falls was acquitted before the law was changed in Queensland to introduce s304B of the code. Do you think the evidence before the jury was such that the decision to acquit her was due to Battered Wife Syndrome, and if the jury had acquitted her based on this defence, was it a fair verdict? [A] [E]
2. In Susan Falls' case, would the jury have come to a different decision if s304B had been available to the defence? Give your reasons. [A] [E]
3. Does this new defence give a balance between necessarily punishing those who would otherwise be guilty of murder and providing some legal protections for victims of serious domestic abuse? [A] [E]
4. Do you think it was necessary to introduce a new separate defence? [E]
5. How does the onus of proof for s304B operate? [C]
6. Should the onus of proof be reversed to make it harder to rely on the defence under s304B? [A] [E]

Most people would consider that a person should be able to defend themselves if attacked. The law thinks so too. It is not open-ended, however. The law says that people are only able to use an amount of force that is 'reasonably necessary' to defend themselves. If, in defending yourself, you use more force than is reasonably necessary, you cannot rely on 'self-defence' as an excuse for your response.

If, in defending yourself against attack, you kill your attacker or cause grievous bodily harm, self-defence will only apply if the attack would have caused a reasonable person standing in your shoes to think that he or she might be killed or have grievous bodily harm committed by the attacker.



If the person claiming self-defence actually provoked the assault, self-defence can only be used as an excuse if there was a threat of death or grievous bodily harm.

## Practical Application



### FROM ROBERT REID'S REPORT IN *THE COURIER MAIL*, JULY 30, 2002.

**Facts:** In 2002, a Cairns year 12 student was charged with the murder of her younger brother, aged 15 years. She told police she was working on her computer when her brother stormed into the room demanding a CD. He then threw a CD case at her, striking her on the lip, and when she threw it back, he left the room, threatening to get a knife and kill her. Her brother who was taller and heavier than she was did return with a knife which he threw at her. She then threw her jewellery box at him and picked up the knife. He said again he was going to kill her. He returned with a cricket bat. Their mother tried to push him away but he was abusive and still threatening his sister.

She told police: 'He had the bat and I had the knife ... he was swinging the bat and punching me ... I stabbed him the first time, I slashed him across the chest, and that made him even more angry ... I stabbed him again and pulled it out ... I think I got him in the heart. He wouldn't stop and I had to defend myself or I'd be dead now and not him.'

The knife severed the boy's aorta and he died in hospital.

1. With what offence was the Year 12 girl charged? [C]
2. What is the level of force to be used for self-defence to be successfully pleaded? [A]
3. Why is it significant that the brother allegedly threw a CD? [A]
4. How could the brother's size have been relevant to the defence? [A]
5. Could she have argued provocation? [C] [A]
6. Why would self-defence have been a better excuse for her to argue? [A]
7. On the facts outlined above should she, in your opinion, have been found criminally responsible for her brother's death, or not? [A] [E]
8. The magistrate found there was a *prima facie* case to answer and she was committed to stand trial. Some months later, she was advised by her lawyers that the Director of Public Prosecutions had dropped the charge because it recognised that she was not criminally responsible for the death. Why would the Department of Public Prosecutions make the decision not to proceed to trial? Do you agree with the decision of the Director of Public Prosecutions? Give your reasons. [A] [E] [R]

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There are related forms of self-defence in the *Criminal Code 1899* (Qld). One is **defence of others** and another is **defence of dwellings**. Again the level of force used must be believed to be reasonable for the circumstances.

# Review

## Comprehend

1. **Describe** the following defences or excuses:
 

a. criminal responsibility	g. intoxication
b. ignorance of the law	h. immature age
c. independent of the will	i. diminished responsibility
d. accident	j. provocation
e. mistake of fact	k. preservation in a domestic relationship
f. insanity	

[C]
2. **Describe** and **explain** the following, **applying** to cases or scenarios:
  - a. The excuse of 'honest claim of right'.
  - b. The legal test for an event which occurs by accident.
  - c. Mistake of fact.
  - d. An act which occurs independently of the will.
  - e. The meaning of provocation as it applies to the offence of murder.

[C] [A]
3. **Compare** and **contrast** insanity and diminished responsibility. [C]
4. **Describe** and **explain** the defence options open to a person in an abusive relationship who kills his or her abuser. [C]

## Evaluate

5. Once the evidence supporting an excuse or defence has been raised by the accused, it is up to the prosecution to negate it 'beyond reasonable doubt'.

The common law presumes that a child under 14 years of age is *doli incapax* (from the Latin 'incapable of deceit'), meaning that they are considered to lack the capacity to be criminally responsible for their acts. If a child is between the ages of 10 and 14 years, this presumption may be rebutted by evidence that the child knew that it was wrong to engage in the act.

In *RP V The Queen* (2016) the High Court of Australia found that the prosecution's evidence was insufficient to rebut the *doli incapax* presumption, and stated:

*What suffices to rebut the presumption that the child defendant is doli incapax will vary according to the nature of the allegation and the child's capacity to understand the seriousness of an act if it concerns values of which he or she has direct personal experience... Rebutting the presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.*

Consider this statement of the High Court of Australia in the context of your own knowledge of how children that you know behave when they do something which is wrong. Why do you think the criminal law system needs to consider such issues? Do you think it should be a matter which the community and Parliament, guarded by expert medical evidence, should decide? Summarise your reasons. [E]

# Criminal trial process

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## Chapter 10: Barriers to justice and equity

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### 10.1 A fair and impartial approach

### 10.2 Children

### 10.3 First Nations peoples

### 10.4 Persons with a disability

### 10.5 Gender equality

## Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that the criminal justice system in Australia aims to treat persons who come before it, in whatever capacity, impartially and fairly
  - that children have the same rights as adults, but that special arrangements and protections have been set in place to take into account their special needs and their vulnerability
  - that First Nations Peoples, have been, and continue to be, disadvantaged by our criminal justice system, despite policies and procedures implemented to remove impediments in the administration of justice
  - that the criminal courts have rules and procedures that ensure persons the disability are treated fairly and impartially when they come before them
  - that historically, women have been disadvantaged in the criminal justice system, and that many laws have been changed or created, and continue to be, to ensure the scales of justice are more fairly balanced in favour of women.
- analyse and evaluate the legal issues concerning the court processes experienced in the criminal justice system by disadvantaged groups in the community.

## Key Terms

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**Anunga rules:** guidelines formulated by the Northern Territory Supreme Court in 1970 for the questioning of Aboriginal suspects to provide them protection.

**Doli incapax:** (from the Latin ‘incapable of deceit’) a term used at common law describe that a child under the age of 40 years is presumed to lacked the capacity to be criminally responsible for their acts.

**Gag-laws:** laws designed to prohibit the publication of information about persons involved in court cases, in particular, victims and perpetrators (defendants) in cases involving sexual offences.

**Special witnesses:** as defined in the *Evidence Act 1977* (Qld) s21A, these are persons that are able to be assisted by judges and lawyers in the conduct of court cases to give their evidence in accordance with the Act.

**Youth defendants:** used to refer to those not yet 18 years of age and who are dealt with by the courts according to the *Youth Justice Act 1992* (Qld).

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## 10.1 A fair and impartial approach

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In the foreword of the first edition of the *Equal Treatment Benchbook*, The Hon Justice de Jersey, (the Chief Justice of Queensland at the time), said:

*Equal treatment of participants in court proceedings is fundamental to the judicial role. The prospect of differential treatment - whether of litigants, lawyers, or witnesses - is repugnant. All judges and magistrates, commissioners and tribunals members, would strive to avoid it. A risk, however, is that even a conscientious approach may not these days pick up the subtleties of a particular situation.*

*No judicial officer or tribunal member could be expected, in the absence of a work of this character, to comprehend all those subtleties, or necessarily recognise an instance of them.*

Supreme Court of Queensland, *Equal Treatment Benchbook*, (1st ed., 2011).

It has become increasingly important for judicial officers to be aware that they are responsible for the decisions that affect the lives of people who come before them in the courts, and that some of those persons will have special needs. **In Queensland, the *Equal Treatment Benchbook* provides a set of standards against which the operation of the criminal justice system in the Courts can be measured.**



## 10.2 Children

### Children and the courts

#### The common law

The common law presumes that a child under 14 years of age is *doli incapax* (Latin ‘incapable of deceit’), meaning that they are considered to lack the capacity to be criminally responsible for their acts. If a child is between the ages of 10 and 14 years, this presumption may be rebutted by evidence that the child knew that it was wrong to engage in the act. In *RP v The Queen* [2016] HCA 53;259 CLR 641 the High Court of Australia found that the prosecution’s evidence was insufficient to rebut the *doli incapax*, and stated:

*what suffices to rebut the presumption that a child defendant is doli incapax will vary according to the nature of the allegation and the age of the child. The child will more readily understand the seriousness of an act it concerns values of which he or she is direct personal experience... Rebutting (the doli incapax) presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children possess the capacity to understand the serious wrongness of the acts while other children aged very nearly 14 years old will not.*

The Hon Justices Kiefel, Bell, Keane and Gordon [12].

#### Queensland law

The *Criminal Code Act 1899* (Qld) specifies that the person under the age of 10 years is not criminally responsible for any act or omission (s29 (1)). The *doli incapax* presumption is included in s29 (2) which states:

*a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.*

In Queensland, legal adulthood, including adult criminal responsibility, commences at 18 years. The age at which a child can be charged with an offence is stated in the *Criminal Code* where the offence is set out. For example, a 14-year-old child can be charged in the Supreme Court of Queensland with murder. Serious offences are heard in the Supreme Court, but otherwise children appear in the Childrens Court divisions of the Magistrates and District Courts of Queensland, whose processes are governed by the *Childrens Court Act 1992* (Qld).



#### What do you think?

The Australian Institute of Health and Welfare (AIHW), in its report, *Youth Justice in Australia 2021-2022*, stated that:

*On an average day in 2021-2022, there were around 3700 young people aged 10 and over under community-based supervision and around 820 young people in detention. On an average day in 2021-2022 just over 3 in 4 (76%) of young people in detention were unsentenced. Nearly all (95%) young people who were in detention during 2021-2022 had been in unsentenced detention at some point during the year.*



## What do you think?

*By supervision type, when all time during 2021-2022 is considered, young people who were in unsentenced detention during the year spent an average of 56 days almost 8 weeks in unsentenced detention.*

Source: Australian Institute of Health and Welfare, 'Continued decline in the number of young people under youth justice supervision' AIHW media releases (Online, 31 March 2023) <aihw.gov.au/news-media/media-releases/2023/march/continued-decline-in-the-number-of-young-people-un>

1. What does 'youth justice supervision' refer to? [C]
2. How many young people aged 10 and over were in supervision on an average day in 2021-2022? [C]
3. How many young people aged 10 and over were under community-based supervision and how many were in detention in 2021-2022? [C]
4. Should this information about young people be of concern to the criminal justice system? Write a letter to the Premier of Queensland expressing your concerns, setting out the basis for them. Ask the Premier to commit to policy objectives that you consider to be appropriate to address your concerns. [A] [E] [R]

## Tip

The media in Queensland regularly reports the details of offences committed by young people, including the views of community groups, and the need for firmer policing to protect safety. Read these reports in the context of this Australia wide information and form your own views about policy objectives for young people caught up in the criminal justice system



Children have the same human rights as adults and can also have the capacity to make decisions affecting those rights and their lives. When a child appears in court as a **victim, a witness, or an offender**, the court needs to know that the child has achieved:

*a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.*

This is the **test for capacity** set out by the majority in the High Court in *Marion's Case*, (*Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218). This recognises that each child is different because of the way mental development occurs. In addition, research into children's comprehension of legal systems and court processes has shown children and young people lack understanding of the system in which they are to take part. The research has concluded that lack of understanding of the system can lead to considerable anxiety for a child victim or witness participating in court proceedings.

As more and more studies of the behaviour of children, both as offenders and victims, have been conducted by social scientists, the criminal justice system has changed to recognise that young children are vulnerable because of physical and mental immaturity, and in particular, there is reliable research to show that abuse and neglect of children can lead to altered brain functionality. There is a link between child abuse and neglect or involvement with the child protection system and subsequent youth offending (see Judy Cashmore, *The Link between Child Maltreatment and Adolescent Offending, Systems Neglect of Adolescents*).

## Young victims and witnesses

Years of experience, and recent research conducted by the court, and from overseas in New Zealand and the United States, has been available to assist judges and lawyers in the conduct of court cases involving children and young people. Parts of s21A of the *Evidence Act 1977 (Qld)* are reproduced below for you to consider.

### Practical Application

#### ***Evidence Act 1977 (Qld)***

#### ***21A Evidence of special witnesses***

(1) *In this section*

*special witness means*

(a) *a child under 16 years; or*

(b) *a person who, in the court's opinion-*

(i) *would, as a result of mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or*

(ii) *would be likely to suffer severe emotional trauma; or*

(iii) *would be likely to be so intimidated as to be disadvantaged as a witness;*

*if required to give evidence in accordance with the usual rules and practice of the court; or...*

(c) *.....*

(d) *a person---*

(i) *against whom domestic violence has been or is alleged to have been committed by another person;.....*

(e) *a person*

(i) *against whom a sexual violence has been, or is alleged to have been, committed by another person;.....*

(1A) *This section does not apply to a child to the extent division 4A applies to the child.*

(1B) *A party to a proceeding or, in a criminal proceeding, the person charged may be a special witness.*

(2) *Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make or give 1 or more of the following orders or directions--*

(a) *in the case of a criminal proceeding--that the person charged or other party to the proceeding be excluded from the room in which the court is sitting or be screened from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;*

(b) *that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;*

(c) *that the special witness give evidence in a room--*



## Practical Application

- (i) other than that in which the court is sitting; and
- (ii) from which all persons other than those specified by the court are excluded;
- (d) a person approved by the court be present while a special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;
- (e) that a video recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video recorded evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness;
- (f) any other order or direction the court considers appropriate about the giving of evidence by the special witness, including, for example, any of the following-
  - (i) a direction about rest breaks for the special witness;
  - (ii) a direction that questions for the special witness be kept simple;
  - (iii) a direction that questions for the special witness be limited by time;
  - (iv) a direction that the number of questions for a special witness on a particular issue be limited.

The *Evidence Act 1977* (Qld) Division 4A deals with the arrangements the court must make for a child who is a witness in a proceeding where the defendant has a prescribed relationship to the child.

A prescribed relationship is one:

- where the defendant is the parent, grandparent, brother or sister, uncle, aunt, nephew, niece or cousin of the child, or
- where the defendant lives in the same household as the child or has the care of, or exercises authority over, the child in a household on a regular basis.

For these arrangements to apply the proceeding against the defendant must relate to an offence of a sexual nature, or an offence involving violence.

These arrangements are for the protection of the child. Section 21AB (part of Division 4A) requires the child's evidence to be pre-recorded in the presence of a judicial officer, but in advance of the proceeding. If this is not possible, the child's evidence must be given at the proceeding with the use of an audiovisual link or with the benefit of a screen.

Division 4A goes on to set out other requirements which must be followed, for example, preventing repetitive questioning and delay when the child is being cross-examined.

1. Who is a special witness under s21A of the *Evidence Act*? [C]
2. What are the arrangements which can be made for a special witness under s21A(2) of the *Evidence Act*? [C]
3. Describe the additional protections which the court must make where a child is a witness to a sexual offence or an offence of a violent nature involving a person in respect of which the child is in a prescribed relationship. What reasons can you give to explain why these additional protections were added to the Act? [C] [A]

## Hypothetical?

**Facts:** Kyle walks to and from school with some fellow students that live in his neighbourhood. Kyle's neighbourhood is 3 kilometres from the local state high school where they all go to school. On the way they pass another nearby high school and often interact with its students. Some of these students also live in Kyle's neighbourhood and he knows them personally because he attends community activities and the local church with them.

There are usually 4 or 5 in Kyle's group. A regular is an older boy, Sean, who is 17 and is mature for his age. There has recently been some ill-feeling between the two schools because of sport rivalry, which has escalated to name-calling, swearing and occasionally throwing small objects at each other. One day the two groups clash on the footpath. Kyle is knocked down, cutting his knee when he falls. Sean comes to his help and pushes two boys away from Kyle, and in the process, one of them (Jake) trips on the uneven footpath, hits a low brick fence, and breaks his forearm. Jake's parents take him to the police and make a complaint. Sean is charged with assault causing grievous bodily harm. Because he is 17, the matter is heard in the District Court. Kyle is frightened of Jake and is in the same bible study group at the local church. Sean's lawyer asks him to give evidence at Sean's trial, and after talking to his parents, he agrees to do it if one of them can be with him during the process.

**Legal Issue:** How can Kyle be assisted to give his evidence under the *Evidence Act 1977* (Qld) in the trial?

**Decision:** Section 21A of the *Evidence Act* applies to Kyle because he is a child under 16. Division 4A of the Act does not apply because he is not in a prescribed relationship with the defendant Sean. It will be necessary for Sean's lawyer to set out the circumstances which justify special arrangements for Kyle as a special witness and make submissions to the judge as to what arrangements are appropriate.

1. If Sean was Kyle's brother would this make a difference to the legal position applying to Sean under the *Evidence Act*? [C] [A]
2. Imagine you are Sean's lawyer. Prepare submissions to the judge explaining why Kyle is a special witness under s21A of the *Evidence Act* and set out the arrangements that you consider to be appropriate for Kyle to give his evidence. [C] [A] [E] [R]

## Youth Justice Act 1992 (Qld)

The *Youth Justice Act 1992* (Qld) governs how youth defendants (those who are not yet 18 years of age) are to be dealt with by the courts. Youth defendants charged with an offence heard by the Supreme Court of Queensland are committed to trial in that court. All other offences are dealt with by the Magistrates or District Courts of Queensland, and are therefore dealt with by the Childrens Court, subject to the *Youth Justice Act*.

The Childrens Court is a **closed court**. The only persons who are allowed to be present are set out under s20 of the *Childrens Court Act 1992* (Qld). These include the child, a parent or other adult member of the child's family, a victim or a person who is representative of the victim, a witness giving evidence, a party or person representing a party to the proceeding (for example a police officer or lawyer), and if the child is a First Nations persons, representatives of the child's community. Section 20 does allow other persons to be present, subject to the court's discretion, and requires the court to exclude an alleged victim of the child's offence if the court considers that person's presence would be prejudicial to the interests of the child.



## Research Task

### **Youth Justice Act 1992 (Qld) (excerpts only)** **Schedule 1 Charter of Youth Justice Principles**

4. Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.
15. Programs and services established under this Act for children should—
- (a) be culturally appropriate; and
  - (b) promote their health and self-respect; and
  - (c) foster their sense of responsibility; and
  - (d) encourage attitudes and the development of skills that will help children to develop their potential as members of society.
17. A child should be dealt with under this Act in a way that allows the child
- (a) to be reintegrated into the community; and
  - (b) to continue the child's education, training or employment without interruption or disturbance, if practicable; and
  - (c) continue to reside in the child's home, if practicable.
18. A child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances.
19. A child detained in custody should only be held in a facility suitable for children.

1. What do the above excerpts from the *Charter of Youth Justice Principles* suggest to you should be the approach in all matters where children are charged with an offence and brought before the court system? [C] [A] [R]
2. Locate the *Youth Justice Act 1992 (Qld)* on the Internet and read some of its provisions. Do you think the provisions of the Act you read reflect the approach of the *Charter of Youth Justice Principles*? Identify what you consider to be three of the most important features of the Act for the conduct of criminal hearings involving children. Give reasons for your choice. [S] [A] [E]

## 10.3 First Nations Peoples (Aboriginal and Torres Strait Islander Peoples)

As at 30 June 2022:

- First Nations Peoples accounted for 32% of all prisoners,
- 91% (11,744) of these prisoners were male,
- 9% (1106) were female,
- the median age was 33 years,
- 78% (10,025) had experienced prior adult imprisonment.

Source: Australian Bureau of Statistics, 'Prisoners in Australia 2022' *Australian Bureau of Statistics* (Online, 11 December 2022) <[abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release](https://abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release)>.

These statistics reflect poorly on our criminal justice system, and particularly because of the obvious social and economic disadvantages experienced by our First Nations Peoples, who have been the subject of so many reports, enquiries, commissions, and policy interventions to try to improve their circumstances. Many attempts have been made to describe and explain their position in the criminal justice system. The Australian Institute of Criminology identifies the risk factors associated with increased contact of First Nations Peoples with the criminal justice system as being

- the misuse of alcohol, socio-economic disadvantage, childhood exposure to violence and abuse,
- the younger age profile of the First Nations population, and
- previous involvement with the criminal justice system and psychological distress.

Source: Bianca Soldani, 'The facts about Indigenous youth detention in Australia', SBS, (Online, 26 July 2016) <[sbs.com.au/news/the-feed/article/the-facts-about-indigenous-youth-detention-in-australia/l3k23gyuh](http://sbs.com.au/news/the-feed/article/the-facts-about-indigenous-youth-detention-in-australia/l3k23gyuh)>.

The *Equal Treatment Benchbook* identifies a number of issues that it considers are of particular significance in the context of First Nations Peoples involved in the criminal justice system. These are also contained in a report of the New South Wales Public Defender, *Admissibility of Admissions, Aboriginal and Torres Strait Islanders Suspects* (August 2012), quoted in the following Practical Application below.



## Practical Application

### LANGUAGE DIFFICULTIES

Many Aboriginal people are not fluent in English and many are illiterate. In 2006, there were 517,000 Indigenous people in Australia. It has been estimated that there are about 55,000 speakers of indigenous languages in Australia, the majority of whom would have poor or limited understanding of English. Research conducted in remote areas in the Northern Territory found police reluctant to engage interpreter services. The difficulties of finding interpreters can mean courts water down the requirement to conduct interviews with interpreters.

Many common words in English are used very differently by Indigenous Australians. Some words and concepts do not translate.

Indigenous Australians may not be accustomed to question/answer form and may be more comfortable with the use of narratives.

Confusion can arise from either/or questions.

In some communities aboriginal languages have a system similar to English. This is sometimes reflected in a suspect's inability to answer a question about the number of people present at a particular location.

Chronic middle ear infections in large numbers of Aboriginal people mean suffering hearing loss. In *Ebatarinja v Deland* (1998) 194 CLR 444, the High Court said that 'underdiagnosed hearing impairment in a convicted person could, in some circumstances, render that conviction unsafe. It is recommended that every indigenous Australian having communication difficulties should have a hearing assessment before interview.

### CULTURAL DIFFICULTIES

Reluctance of an Indigenous Australian suspect to discuss a particular topic may be because culturally only certain people are allowed to discuss the matter.



## Practical Application ...

Use of long silences in conversations, gestures and reluctance to make eye contact can be misinterpreted.

Some aboriginal people have difficulties distinguishing between what they know personally and what they have been told. Some questions that do not raise offence in other cultures may be offensive to an indigenous Australian person (e.g. Aboriginals do not refer to the name of the deceased).

Deference to authority and a propensity to answer leading questions in the way Indigenous Australian suspects consider the questioner wants, mean they may agree with statements put to them by police. An issue of particular concern is 'gratuitous concurrence', that is, freely saying 'yes' in response to a yes/no question, regardless of the suspects understanding of the question or their belief in the truth or falsity of the proposition. 'Yes' often does not mean 'I agree'. It often means 'I think that if I say 'yes' you will see that I'm obliging, and socially amenable and you will think well of me, and things will work out between us'.

### THE CAUTION

Many indigenous Australian suspects have difficulty understanding the caution. Asking a suspect 'Do you understand that?' may not be helpful.

Misuse of the term 'have to' in 'you do not have to answer the question' can also be unhelpful.

Telling a suspect they do not have to answer questions and asking them to answer a question ('do you understand this?') can be confusing.

Often suspects choose a close friend or family member who may not have any better understanding than a suspect of their role in the rights of the suspect.

Source: Dina Yehia SC, 'Admissibility of admissions, Aboriginal and Torres Strait Islander Suspects', *Public Defenders NSW*, (Research Paper, August 2012.)

1. You have been asked by Legal Aid Queensland, to be the lawyer representing a woman accused of murdering her husband. Both she and her husband are Aboriginal. Consider the above information about the problems of First Nations Peoples encountering the criminal justice system, and prepare a list of matters/guidelines that you will observe when preparing the defence of the accused woman, who is pleading not guilty. Set this out in writing as a checklist for you to observe in the preparation of her case. [A] [E] [R]
2. From the guidelines you have prepared in question 1, what principles can you identify which would ensure that First Nations Peoples are treated fairly in the criminal justice system? Which two Acts of Parliament contain most of the laws that must be followed when applying these principles? Identify which of these principles you think are essential to a fair trial for a First Nations defendant and the fair treatment of a First Nations victim/witness. Give reasons. [A] [E] [R]

## The Anunga Rules

The first attempt to provide protection to Aboriginal suspects, called the *Anunga Rules*, were guidelines formulated by the Northern Territory Supreme Court in 1976 for the questioning of Aboriginal suspects. These have the force of precedent in the Northern Territory and do not necessarily lead to statements being excluded if they are not followed, but in *R v Anunga* (1976) 11 ALR 412 the courts said 'police officers who depart from them without reason may find statements are excluded'.



## Practical Application

### THE ANUNGA RULES

In *R v Anunga* the Supreme Court of the Northern Territory set out guidelines (now known as the '*Anunga Rules*') for the interrogation of Indigenous persons. These guidelines are as follows:

1. When an Aboriginal [or Torres Strait Islander] person is being interrogated as a suspect, unless he [or she] is as fluent in English as the average white [person] of English descent, an interpreter able to interpret in and from the Aboriginal [or Torres Strait Islander] person's language should be present, and his [or her] assistance should be utilised whenever necessary to ensure complete and mutual understanding.
2. When an Aboriginal [or Torres Strait Islander person] is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal [or Torres Strait Islander person] has apparent confidence... .
3. Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal [or Torres Strait Islander person] to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal [or Torres Strait Islander person] has apparent understanding of his [or her] right to remain silent... .
4. Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.
5. Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources... .
6. Because Aboriginal [and Torres Strait Islander] people are often nervous and ill at ease in the presence of white authority figures [ like police officers] it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should also be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.
7. It is particularly important that Aboriginal [and Torres Strait Islander] and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.
8. Should an Aboriginal [or Torres Strait Islander person] seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal [or Torres Strait Islander person] states he [or she] does not wish to answer further questions or any questions the interrogation should not continue.
9. When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

Consider the principles set out in the *Anunga Rules*, and compare them to the principles that you considered should be included in the law of Queensland in question 2 to the previous Practical Application. Now that you have had the opportunity to read the *Anunga Rules*, how would you change your answer, if at all? Give reasons. [C] [A] [E]



In Queensland it has been held by the Queensland Court of Appeal, that although the description of the *Anunga Rules* as ‘guidelines’ suggests they are not intended to be binding as a matter of law, it is relevant to consider a breach of the rules in determining whether it is fair to admit an interrogation of an Indigenous Australian into evidence. The *Equal Treatment Benchbook* points out that the guidelines now form part of the *Queensland Police Services Digital and Electronic Recording of Interviews and Evidence Manual* which is binding on officers and staff. It also points out that the *Anunga Rules* have been transformed into legislation, in part, by various provisions of the *Police Powers and Responsibilities Act 2000 (Qld)* PPRA, which is illustrated in the following table:

<i>Anunga Rules</i>		PPRA Provisions	
1	Right to an interpreter during police questioning.	s433	Right to interpreter
2	Right to communicate with a friend	s418	Right to communicate with friend, relative or lawyer
3	Appropriate cautioning	s431	Cautioning of persons
4	Appropriate questioning	-	
5	Continued investigation of matters despite receipt of a confession	-	
6	Availability of refreshments and facilities	-	
7	Questioning when person is intoxicated or tired	s423	Questioning of intoxicated persons
8	Legal assistance	s420	Questioning of Aboriginal people and Torres Strait Islanders
9	Preserving personal dignity during searches	s630	Protecting the dignity of persons during search

You have already considered the role played by the *Police Powers and Responsibilities Act 2000 (Qld)* in **Topic 2: Criminal Investigation Process**. Here you have examined the way in which the police are required to follow the Act and apply it. The role of the court is to ensure that the application of the Act by the police is correct.



## Case Study

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*R v Bowen* (2004) QSC 364

**Facts:** The accused Cedric Colin Bowen (Bowen) was charged with unlawfully killing his brother Fred. Bowen was an Aboriginal person. The police were called to his residence early in the morning, in an isolated place. A transcript of a record of interview taken by the police at the time discloses that the accused told the investigating police officer he did not want to say anything until he had talked to legal aid. The accused was told of his right to consult a friend or relative and to arrange for them to be present and he said that arrangements had been made for 'Justice lady down there, Gladys' to make those arrangements. Throughout the record of interview it is clear that none of these things happened and he wanted a lawyer to be present as well as a friend. Despite this the police officer proceeded to ask questions about his personal details and about the ownership of a firearm. When the accused was given the standard caution, he said, 'Okay, that's why I am waiting for a call from David Kempton'. Mr Kempton was a solicitor.

At the commencement of the trial, the defence raised the issue of the admissibility of the record of interview.

**Legal Issue:** Should the trial judge exclude the record of interview from the evidence?

**Decision:** Initially the trial judge explains the application of the *Police Powers and Responsibilities Act* (Qld) s251.

Section 251 relates to the question of Aboriginal people being questioned. He says:

*the framework is that certain restrictions apply if a police officer wants to question an Aboriginal person in his company about an indictable offence, and reasonably suspects that the person is an adult Aboriginal person, and does not reasonably suspect that because of the person's level of education and understanding, he is not at a disadvantage in comparison with members of the Australian community generally. He must do and refrain from doing certain things.*

Essentially, the requirements are to inform the person that he or she is entitled to arrange for a lawyer to be present during questioning, and that the police will contact a representative of legal aid as soon as reasonably possible. Also, the police must not question the Aboriginal person until a support person is present, if practicable. Under the Act (s8) evidence to which s251 applies is not expressly excluded, but it is within the discretion of the judge to exclude it.

The trial judge in this case excluded the evidence, 'not only because of the aspect of the right to silence, but also because of the issue of weighing the cogency and probative value of the evidence against the possible prejudice which may unduly be caused'.

The trial judge discharged the jury and ruled that the matter should be set down for a new trial.

1. Do you think that if a judge decides that there has been a breach of s 251 of the Act, the evidence caught by the breach should be expressly excluded by the Act? Give reasons. [A] [E]
  2. Are there any other sections under the Act applicable to Indigenous Australians, which, if breached by the police, should result in the express exclusion of relevant evidence? [A] [E]
-



### Research Task

Select, locate and summarise one of the following cases from the list below using the sub-headings Facts, Legal Issue and Decision. [C] [A]

- a. *R v Wilson* (1997) QCA 265
- b. *R v Brown* (2006) QCA 136
- c. *R v Martin* (2011) QCA 342

### Aboriginal Women

In addition to the problems faced generally by First Nations Peoples set out above, Aboriginal women have been found to have particular difficulties. In *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), the Queensland Criminal Justice Commission identified a number of issues which continue to apply because the various social and cultural factors that existed then still exist today. These issues were said to contribute to a reluctance by Aboriginal women to give evidence. They are:

- the high incidence of domestic and family violence against Aboriginal women, causing low self-esteem and feelings of fear and shame;
- women's issues ('women's business') are only discussed and dealt with by women. For example, Aboriginal women do not discuss matters concerning sex or genitals, which may make it particularly difficult to give evidence concerning sexual assault;
- Aboriginal women find making a complaint difficult because of community pressure. They are afraid of bringing shame upon themselves and their families;
- Aboriginal women do not trust the police, because they are afraid of being harassed by them, and the apparent lack of care and sympathy for their plight, especially in sexual assault matters;
- the court room environment can be intimidating at the best of times, let alone when you are an Aboriginal woman from a remote community; and
- generally the legal profession does not appreciate the issues facing female Aboriginal witnesses and defendants, as its personnel lack training in that regard.

The difficulties experienced by Aboriginal women in the criminal court process who have been involved in domestic and family violence can only really be fully appreciated by examining the case studies.

It is beyond the scope of this book to examine this in detail, but students will find many writings on the topic by conducting online research. We can, however, present to you a case which illustrates the difficulties faced by a defendant who was found guilty of the murder of her *de facto* husband.



## Case Study

**WARNING:** The facts in this case may be confronting to some students as they involve domestic violence. Some students may wish to seek guidance or support before reading.

*R v Kina* (1993) QCA 480

**Facts:** Robyn Bella Kina (Kina) was convicted in the Queensland Supreme Court of murdering her de facto husband Anthony David Black (Black). Kina did not give evidence at her trial, and her chance of acquittal depended solely on the possibility that the jury might not be satisfied from the prosecution evidence that she intended to cause death or grievous bodily harm.

A petition for pardon was delivered to the Governor on behalf of Kina on 24 May 1993. The Attorney-General referred the case to the Court of Appeal to be determined as if Kina had appealed.

The grounds for appeal included that Kina could not receive a fair trial resulting in a miscarriage of justice because of problems, difficulties, misunderstandings and mishaps occurring in the communication of her instructions to the lawyers who prepared her case and represented her upon her trial.

Essentially none of Kina's evidence or that of her witnesses which would have raised issues of provocation, self defence and the lack of the necessary intent, was presented at trial. In her affidavit, presented to the Court of Appeal, Kina gave the following evidence...

Childhood: Kina's life, from childhood, was filled with abuse, trauma and hardship. Her father was violent towards her mother and the children, whom he used to regularly flog. When she was seven or eight years of age, she was sexually molested by an uncle, and these incidents continued regularly for about three years. Kina began to engage in sexual intercourse while still very young, and began to use contraceptive pills when she was almost 12. At this time her mother left her father. She said in her affidavit:

*8... I was in school at Caboolture and my father took me out of school at the age of 12 to look after my three surviving younger brothers and sisters. I always felt very insecure and frightened. I was frightened of my father but was also frightened of the welfare authorities taking the younger children away because my father used to drink most of his money and kept beating the children.*

*9. It was at this time that I started prostituting myself to get some money together to run the household.*

*I also started drinking at this time and on looking back I think I was an alcoholic at the age of 12. I was definitely an alcoholic by the age of 14.*

Kina's childhood continued to be troubled by prostitution, drug taking, and bad behaviour. She developed depression and diabetes, and took an overdose of serapax, her depression medication, in 1984, and was hospitalised for several days. After a brawl at a hotel at the Stradbroke Island in October 1978, she was convicted of unlawful wounding and assault occasioning bodily harm and sent to prison for a period.

Relationship with the deceased, (Black):

Kina initially met Black when she was a prostitute, but almost immediately went to live with him, and says that he was the only man she ever loved. He was violent to her during all of the relationship. Black gambled and drank excessively. Kina gives evidence that in April or May of 1985 Black started to demand anal sex, about which she said 'it made me feel



## Case Study ...

dirty', and when she refused he punched her, and forced her to do this without her consent. On two occasions, to get his way, he threatened to throw her from a balcony and a window several stories high. Kina gave evidence that when Black was on shiftwork she went out with other men and other friends, and when he found out he took her to his work at the Toowong Shopping Centre construction site and made her climb to a higher level where she stayed for fear of the ladders that she needed to climb down to leave. On two occasions while she was there he forced her to have sex with him in front of his workmates and invited them, after he finished, to participate. In her words 'all of the others then had sex with me, one after another. I do not know how many there were. This went on for about two hours while I lay on the concrete, cold and naked on a night in August'. Kina also gave evidence that Black would tie her up to their bed whenever he went on the night shift and did not take him with her, returning in the morning and having sex with her before he released her, sometimes not releasing her immediately until he had had breakfast and returned and had sex with her again. She says— 'Only then did he untie me. I hated it'.

At times over the next few years Kina would leave Black and stay with her relatives, but then she would return or Black would find her. During this time the relationship continued in the same character. Immediately before the incident when Black was killed, Kina's 14 year old niece, Enid Morris, was living with her. On 20 January 1988, the date of the incident, there was an argument during which Black demanded anal sex. Kina refused and Black became aggressive and punched Kina in the face and stomach. He said to her that if she would not have sex with him in that way that her niece Enid would. Kina's evidence was that she became extremely upset and left the room slamming the door behind her. She was going for a shower and passed the kitchen when she saw their kitten and went in to give it some milk. She saw the sharp knives in a container and took one, and went back to the bedroom. In her words:

*When I went into the room with the knife, I did not intend to stab him. I just wanted to threaten him with it so he would not go near Enid. When he saw me come back into the room, he jumped off the bed and grabbed a chair and came towards me. He kept coming until he was very close to me. I thought he was going to hit me with the chair, and I knew that once he started hitting me with the chair he would not stop. Then he said to me: 'You won't use that you gutless c...'. I did not mean to kill him. I did not mean to injure him seriously. I was not aiming at his heart. When I saw that I had stabbed him, I threw the knife away. He staggered and fell to the ground. I was extremely upset. I said to him that I was sorry and that I loved him and also said: 'Please don't die'. I held him in my arms. I asked my niece Enid to go and get an ambulance.*

Kina's legal representatives:

Initially Kina was represented by the Aboriginal Legal Service. A statement was taken by a Ms Hamilton who provided an affidavit to the Court of Appeal. Ms Hamilton stated that Kina 'outlined several instances where the deceased had assaulted her, or treated her badly in some other way,' but she never did so without adding words to the effect that she probably deserved what had happened or caused him to do that by my behaviour. Ms Hamilton stated 'I did not include all of these observations in her statement, as I considered that many of her observations about her own behaviour were unfair, and caused by her extreme guilt over the death of Mr Black.' After the committal, the Aboriginal Legal Service applied for public defence funding but the matter was allocated to The Public Defender to instruct at trial. Subsequently, the evidence before the Court of Appeal essentially made it clear that the lawyers involved on behalf of The Public Defender all had not received any special training in communicating with Aboriginal women, and the initial instructions were taken by a junior male clerk. The brief finally prepared for Counsel did not include the initial statement Ms Hamilton



## Case Study ...

obtained from Kina, even though the difficulties in communication led to the matter being returned to the Aboriginal Legal Service to instruct Mr Shanahan at trial.

Other witnesses:

Evidence was given by other witnesses which corroborated Kina's version of events. Importantly, a social worker, Mr Berry, prepared a report prior to the trial which was delivered to The Public Defender's office. This report, annexed to his affidavit, set out many of the matters which were raised in Kina's Affidavit. He received information from the defendant, Kina, that her legal representatives wished that he 'would not interfere with proceedings.' Mr Berry saw Kina in his counselling capacity after the trial, and assisted her development to improve her self-esteem. There is a history in Kina's affidavit before the Court Of Appeal which explains her difficulty giving evidence at the trial and providing full statements to her legal representatives. She said:

*My own reasons for not wanting to give evidence were that I was scared, shy and embarrassed. I found it hard to talk and I was unable to speak out about the threat to Enid and what I had to say seemed to be irrelevant to my legal representatives so I just did what they suggested. On Monday, 5 September 1988, Mr Shanahan and Ms Hamilton came and spoke to me in the cells of the Supreme Court. They asked me to sign two (2) documents about my admitting the cause of death to Tony and secondly, that I did not wish to give or call evidence. By this date it was clear that that was what they wanted me to do.*

Two psychiatrists gave evidence, both of whom provided a credible analysis as to why Kina could not talk about many of the things that happened to her prior to trial, and why the threat Black made to sodomise her niece was repressed.

**Legal Issue:** Should the Court of Appeal grant Kina a pardon?

**Decision:** The Court of Appeal said:

*... it surely cannot be a proper basis for detriment to an accused person that, for reasons not associated with the offence charged, that person is substantially deterred from communicating effectively in preparing for or participating in his or her trial...*

*The legal system for the most part works well, but we must not shut our minds to the reality that sometimes matters go awry and produce a miscarriage of justice...*

*In this matter, there were insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:*

- (i) her aboriginality;*
- (ii) the battered woman syndrome; and*
- (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased.*

*These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.*

*In the exceptional events which occurred, the appellant's trial involved a miscarriage of justice. Accordingly, the appeal should be allowed.*

## 10.4 Persons with a disability

The World Health Organisation states:

*Disability is a part of the human condition. Almost everyone will be temporarily or permanently impaired at some point in life, and those who survive to old age will experience increasing difficulties in functioning. Most extended families have a disabled member, and many non-disabled people take responsibility for supporting and caring for their relatives and friends with disabilities. Every epoch has faced the moral and political issue of how best to include and support people with disabilities. This issue becomes more acute as the demographics of societies change and more people live to an old age.*

World Health Organisation and the World Bank, 2011.

In the Australian community, Commonwealth and State legislation has steadily improved the status and rights of persons with a disability. Relevant legislation such as the *Disability Discrimination Act 1992* (Cth), the *Anti-Discrimination Act 1992* (Qld), and the *Disability Services Act 2006* (Qld) have helped to move our community to recognise the efforts of families and various organisations who provide help to those who have impairments of all kinds. The *Disability Services Act 2006* (Qld) sets out the rights of persons with disabilities and the responsibilities of government funded service providers. The Act requires each Queensland Government department, including the Department of Justice and Attorney- General, to develop a disability service plan. The *DJAG Disabilities Service Plan 2014-2016* can be accessed online at [justice.qld.gov.au](http://justice.qld.gov.au).

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) in January 2020, the Royal Commission issued its Criminal Justice System Issues Paper and stated:

*People with disability may come into contact with the criminal justice system as a victim of crime, a person accused or suspected of a crime, or as a witness to a crime. People with disability, including young people, are overrepresented across the criminal justice system in Australia and are at a heightened level of violence, abuse, neglect and exploitation in criminal justice settings. People with cognitive and/or psychosocial disability are significantly overrepresented amongst the group who were charged with or accused of criminal offences. They were also disproportionately victims of abuse or violent criminal conduct.*

*First Nations people with disability face particular disadvantages in the criminal justice system. Research indicates they often experience multiple discrimination due to the intersection of racism and ableism (being able to meet the requirements of the system).*

Royal Commission into Violence, Abuse, Neglect and Exploitation of people with a disability, 2020.



## Practical Application

### PEOPLE WITH DISABILITY OVERREPRESENTED AT ALL STAGES OF THE JUSTICE SYSTEM

People with disability, particularly First Nations people with disability, are overrepresented at all stages of the criminal justice system, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has been told in responses to its Criminal Justice System Issues Paper.

Many responses cited the Australian Institute of Health and Welfare's 2018 findings that people with disability form 29% of the prison population in Australia, despite being only 18% of the general population.

The Australian Centre for Disability Law estimated that 95% of First Nations people charged with criminal offences who appear in court have an intellectual disability, a cognitive impairment or a mental illness.

People with disability were also overrepresented as victims of crime... Men and women with cognitive disabilities suffer 'extremely high' rates of sexual violence in the community. The Law Council of Australia explained that behaviour associated with the person's impairment, health condition and past trauma is often interpreted as difficult or defiant behaviour, leading to disproportionate interactions with police and the 'criminalisation of disability'.

Source: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, '*People with a disability overrepresented at all stages of the justice system*' (Media Release, 23 December 2020). <[disability.royalcommission.gov.au/news-and-media/media-releases/people-disability-over-represented-all-stages-criminal-justice-system](https://disability.royalcommission.gov.au/news-and-media/media-releases/people-disability-over-represented-all-stages-criminal-justice-system)>.

1. Select two examples of persons with a disability who are involved in the criminal justice system (courts) as a complainant, witness, victim, defendant, or a perpetrator. For each one identify a procedure or process which could be used to assist in their court experience. Describe and explain your choices. Indicate, if appropriate, where your answer is based on a legal source. [S] [A] [E] [R]

Queensland courts provide assistance to persons who have problems in the areas of language, physical participation, sensory disabilities, intellectual disabilities, acquired brain injuries, and psychiatric disabilities. Legislation and court rules govern the court's obligations. In its processes, judges attempt to meet the needs of court personnel, victims, accused persons (defendants), jurors, and witnesses alike.

What follows is an attempt to give you some factual situations in the form of a hypothetical scenario to enable you to understand the decisions that might be made to enable persons with disabilities to achieve fair outcomes.



## Hypothetical?

### *Diam and Abid*

**Facts:** Diam was born in Australia to Asian parents. Her parents had migrated to Australia when they were children as refugees. Diam was brought up as a Christian and belonged to the local community church where her family worshipped every Sunday. Diam's father was a lay preacher, and often preached on Sundays when the church pastor was unable to do so. Abid and his wife Aishah were respected members of the church congregation. They also had two other children who were older than Diam and had left home.

When Diam was born her birth was complicated and difficult. For a time during her birth, she could not breathe, and suffered brain damage, which left her with significant intellectual disabilities. For example, her memory was poor. She could not easily absorb, comprehend and recall information. Her ability to speak and understand English was impaired, and the impairment was increased by the fact that her parents had tried to get her to learn to speak their native language. Aishah was fluent in her native language and spoke it to the children at home when they were young.

The children's upbringing, including that of Diam, was strict and old-fashioned. When they were naughty, they often received physical punishment from either parent. Punishment was not harsh, although occasionally Abid would use his leather belt when he felt it was warranted. The children were usually hit on their legs.

Diam left school as soon as she could at 15 years of age. She went to work at a laundry operated by a retirement village owned by her church. She was happy there, and came to know her fellow workers and the people in charge well. They were like family to her. She had been there for four years when one day she arrived at work with large bruises on her upper left arm and her left buttock. When asked about them, she began crying but was able to tell a senior lady (Gladys) that her father had hit her with his belt. The senior lady telephoned the police who came to the laundry and took a statement from Diam in the presence of Gladys. Initially the attending police officer asked questions to obtain a statement from Diam, and found her uncooperative and frightened. Gladys was able to calm her and insisted that the officer let her tell her story in her own way. It emerged that Diam and her mother had argued on Sunday morning after church because Diam wanted to go home straight away to watch TV. When they got home, Aishah remonstrated with Diam and refused to let her watch her TV program. Diam argued with her mother and tried to take the remote control from her and there was a physical confrontation. Her father became upset and demanded she submit to discipline. The incident escalated and Abid took off his belt to discipline her but Diam resisted and was hit on the arm as well as on her buttock, and then forcibly removed to her room.

Abid was charged with assault. He was arrested and taken to the police station where he was interviewed.

During the interview, he telephoned his lawyer who advised him to make no comment and to exercise his right to silence. Abid was released on bail and gave his lawyer a statement about the incident. He said that at the church after the morning service, he and his wife were very embarrassed when Diam swore at his wife after she told her to be patient and wait until they were ready to go home as they were talking to other parishioners. This was why Aishah would not let Diam watch TV when they arrived home. His description of the incident at home coincided with the version that was

## Hypothetical?

given by Diam to the police, although this did not become apparent until there were negotiations with the Police Prosecutor prior to trial. Abid stated that although Diam was an adult, he and his wife treated her as a child because of her intellectual disability. He did say that she was now physically larger than his wife and that she had become more assertive in her relationships with them. He was remorseful and prepared to attend counselling to assist him to manage the family relationships better. Aishah confirmed the details of the incident and was also remorseful and prepared to attend counselling. Abid felt, however, that on this occasion he and his wife were provoked, and that because of the history of the family, his attempt to discipline Diam meant that he should plead not guilty.

Although there was an opportunity prior to the Summary Trial Callover for a conference between the Police Prosecutor and Abid's lawyer to negotiate an outcome without trial, this did not occur and directions were made by the Magistrate for the trial to proceed. The Police Prosecutor submitted that Diam should give evidence by way of a pre-recorded video. The magistrate did not allow this and made an order that Diam was to give oral evidence by video so that she could not see her father who was in the court room. Diam did not see the room where she was to give evidence before the trial, and was accompanied by a police woman she met on the day, not by Gladys. No request was made for Gladys to be present with Diam when she gave evidence.

At the trial, Diam gave evidence of her injuries (a photograph of them was shown to her), and evidence was led from her of her argument with her mother about watching TV. She could not recall when this occurred or the prior argument at the church and was unable to recall when and by whom the bruising to her left arm and left buttock was caused. The Police Prosecutor adopted the usual method of leading evidence by attempting to obtain a chronological and orderly statement from Diam, which appeared to confuse her, and she eventually became visibly upset. The magistrate, in the circumstances, decided she had no alternative but to bring Diam's evidence to a close.

Counsel for Abid submitted that he had no case to answer, and that the Crown case's evidence led on Diam's behalf was insufficient to prove his guilt beyond reasonable doubt. The magistrate concurred and acquitted Abid.

### Legal Issues:

1. Should the magistrate have made a direction that Diam pre-recorded her evidence prior to the trial?
2. Should the magistrate have required Gladys to be present during the trial while Diam gave evidence and if she was cross-examined?
3. Should the Crown (Police Prosecutor) appeal against the magistrate's decision to the District Court?

### Decision:

1. After the decision was made to acquit Abid, the matter was referred by the police to the Director of Public Prosecutions for review. The DPP decides to appeal against the decision and you are asked to draft the grounds of appeal. Prepare these in writing. [S] [A] [R]

## Hypothetical?

2. Assume the judge grants the appeal. Set out the reasons for judgment and the orders that you think are appropriate. Consider the different orders that might be made and give reasons for rejecting those you do not choose. [C] [S] [A] [R]

**Re-trial:** An order is made for a retrial. You work for the DPP and the case is assigned to you. You conduct the following preparations for the new trial.

1. The police recorded the first interview with Diam in an electronic form. It can be used to give Diam's evidence in court. Write out what you think she would have said in the interview. [C] [S]
2. Arrange for a report by a police psychologist to interview Diam. Ask her to consider:
  - Will she be disadvantaged if she is required to give oral evidence?
  - Will she be frightened of going to court?
  - Will it be difficult for her to face her father in court?
  - Will she have difficulty remembering what happened?
  - How will she cope with being cross-examined?
  - How can the court make it possible for her evidence to be given fairly, given her intellectual disability?

What do you think the psychologist will say in her report? [C] [S] [A] [E]

2. Prepare submissions to the magistrate setting out the directions for trial which you think she should make to assist the Police Prosecutor to present Diam's case appropriately and fairly. You might like to refer to s21A of the *Evidence Act 1977* (Qld) to understand the powers the Magistrate can use to do this. [A] [E] [R]

## 10.5 Gender equality

While the *Equal Treatment Benchbook* supports equal treatment of all users of the court irrespective of gender, it is appropriate for statistical and historical reasons, to consider an issue concerning women. Historically, most laws were drafted and passed by male parliamentarians. Nevertheless, this could not stop law reform from happening in 1975 when the *Family Law Act* (Cth) introduced no fault divorce laws and a fairer system of property distribution consequent upon marriage breakdown. However, for women, in many areas, the battle to be protected from disadvantage, continues. In the criminal justice system we have seen stronger Domestic violence laws, changes to the *Bail Act*, and legislation making stalking a criminal offence. Rape and other Sexual Assaults

*In 2013-2014, the prevalence of sexual assaults and related offences in Australia grew by 19% from the previous year, representing the largest increase as the principal offence of any type of offending.*

Australian Bureau of Statistics, 2015.

The national Crime Victimization Survey estimated that in 2013-2014, 48,300 adults in Australia (approximately 83% women) had been victims of at least one sexual assault, including rape, in the 12 months prior to the survey. The same data showed that approximately 62% of adult victims did not disclose the most recent incident of sexual assault to the police. Victims' reasons for not reporting sexual assault to the police are similar to those identified in relation to non-reporting of domestic violence: **fear of retribution, a lack of appreciation of the seriousness of the issue, and shame and humiliation, as well as a fear of being disbelieved.**

We will now examine an issue particular to victims of sexual assault.

### Inquiry Focus

*Should the victims of sexual assault be prohibited from making public statements about the perpetrators who assaulted them?*

### Legal background

Each state in Australia has its own laws which govern the right of a victim (complainant) of a sexual offence, to identify himself/herself and make public comments about the circumstances of the offence. This also applies to other persons (for example, media) who want to make public information about a victim. Until recently, it has probably been presumed, that a victim would prefer to maintain his/her privacy, for obvious reasons.

At the same time, if a sexual offence is alleged to have been committed, the law has insisted that the alleged perpetrator is entitled to have his/her identity protected as well, at least up until the point where the perpetrator is committed for trial, or to be sentenced upon that charge. Again, this is presumably because of the concern that the publicity that might happen in today's media might influence a jury and lead to an unfair trial. It should be pointed out as well, that it is possible, and in highly publicised matters quite likely that the trial judge might exercise his or her discretion to make a suppression order prohibiting publicity about the evidence led at trial.

### The law in Queensland

Until 3 October 2023, the law in Queensland prohibited the publication of information about defendants before they were committed for trial. On that date, s7 and s10 of the *Criminal Law (Sexual Offences) Act 1978 (Qld)* were amended, as were other sections of the Act, so that there is now no prohibition on the publication of information about a defendant who has been charged with a proscribed sexual offence. A defendant who does not wish his or her details to be published can apply for a suppression order under conditions laid down by the legislation in s7. There has been no change to the position of a complainant, so that it is possible to publish a complainant's personal details with his or her consent.



## Practical Application

*Criminal Law (Sexual Offences) Act 1978 (Qld)* (as amended 3 October 2023) (excerpts only)

### 7 Application for non-publication order, and notice of application

- (1) This section applies if a defendant is charged with a prescribed sexual offence.
- (2) An eligible person may apply to a Magistrates Court for an order (a **non-publication order**) prohibiting the publication, before the defendant is committed for trial or sentence or sentenced **on** the charge, of identifying matter relating to the defendant.

### 7B Grounds for non—publication order

The court may make a nonpublication order if satisfied on one or more of the following grounds-

- (a) the order is necessary to prevent prejudice to the proper administration of justice;
- (b) the order is necessary to prevent undue hardship or distress to a complainant or witness in relation to the charge;
- (c) the order is necessary to protect the safety of any person.

### 10 When other publication of complainant’s identity is prohibited

- (1) A person who, by a statement or representation made or published otherwise than in a report concerning an examination of witnesses or a trial, reveals the name, address, school or place of employment, or any other particular that is likely to lead to the identification of a complainant commits an offence except where the statement or representation is made or published for an authorised purpose referred to in *section 11*.
- (2) It is a defence to a proceeding for an offence against *subsection (1)* for a person to prove that, before the relevant statement or representation was made or published—
  - (a) the complainant authorised in writing the making or the publishing of the statement or representation; and
  - (b) when the complainant authorised the making or the publishing of the statement or representation, the complainant—
    - (i) was at least 18 years; and
    - (ii) had capacity to give the authorization.

1. When can the details of a complainant in respect of an alleged sexual offence be published (made public) pursuant to s10? [C]
2. Prior to the amendment of the *Criminal Law (Sexual Offences) Act 1978 (Qld)* (the Act) on 3 October 2023, publication of the details of a defendant were prohibited until after the defendant was committed for trial. Does s10 now contain any reference to prohibition of a defendant’s details?
3. What does the Act pursuant to s7 entitled a person charged with a proscribed sexual offence (defendant) to do? What are the grounds for a non-publication order? [C]





## Practical Application

### CHANGES TO QUEENSLAND LAW ALLOW FOR NAMING OF LEHRMANN

Lehrmann can now be named after his lawyers lost their judicial review of a Toowoomba magistrate's ruling that he should not be granted a non-publication order to maintain his anonymity.

Lehrmann is charged with two counts of raping a woman in October 2021, with the case working its way through early committal proceedings at Toowoomba magistrates court since January. He has not yet been committed to stand trial.

Until recently, Queensland law prevented him from named with respect to the Toowoomba allegations. However, the state introduced new laws in September to allow the naming of accused sex offenders after they are charged. Previously they could only be named after being committed to stand trial.

Following the law change, Lehrmann's barrister, Andrew Hoare, sought a non-publication order on two grounds, arguing that revealing his client's identity could prejudice Toowoomba jurors against him and that the intense public scrutiny could deteriorate his mental health and increase the likelihood of his self-harm.

However at a hearing on 13 October, magistrate Clare Kelly rejected both arguments, and this decision was upheld by the supreme court on Thursday. (Evidence was led in the hearing that Lehrman had appeared on national television to give an interview about another criminal matter in which he was involved prior to the current charge)



At the judicial review heard on Thursday, Hoare tried to convince Justice Peter Applegarth that Kelly made an error by considering his client's failure to seek out a mental health plan or medication in assessing his risk of self harm.

In announcing his decision, the judge said that while the potential to be named 'weighed heavily' on Lehrmann, this 'unfortunate effect on his mental health' did not compel a finding that 'a non-publication order was necessary' to protect his safety.

'The supreme court concluded that, given the state of the evidence, it was open to a reasonable decision-maker to not be satisfied that the non-publication order was necessary to protect the safety of the applicant.'

Source: Joe Hinchcliffe and Eden Gillespie, 'Bruce Lehrman revealed as high-profile man charged with Toowoomba rape', *The Guardian* (Online, 26 October 2023) <[theguardian.com/australia-news/2023/oct/26/bruce-lehrmann-rape-charge-toowoombaliberal-2021](https://www.theguardian.com/australia-news/2023/oct/26/bruce-lehrmann-rape-charge-toowoombaliberal-2021)>.

1. What weight do you think Justice Applegarth gave to the evidence that Lehrman had voluntarily appeared on national television to discuss other criminal charges against him? Do you think the decision would have been different if Lehrman had not done this? Give your reasons. [A] [E]

## The law in Tasmania

### Practical Application

#### GAG-LAWS IN TASMANIA

Prior to Grace Tame's fight for her story to be heard and the #Let Her Speak campaign, s194K of Tasmania's Evidence Act 2001 required a court order to allow information pertaining to sexual assault offences to be published. It required the judge to consider whether it would be in the public's interest to publish such information before making an order. This is because s194K(2) expressly states that a court 'is not to make an order unless satisfied that it is in the public interest to do so'. Therefore, the courts were limited in how they could interpret and decide [to give permission on this] version of S194K and things such as the consent of the victim to publish details of the story would not have been so easily considered.

Source: Tarisa Yasin and Holli Edwards, 'Surviving the silence: reforms to gag-laws allow survivors of abuse to speak', *Legal Research Hub*, (Online, 31 January 2021) <[legalresearchhub.wixsite.com/home/post/surviving-the-silence-reforms-to-gag-laws-allow-survivors-of-abuse-to-speak](http://legalresearchhub.wixsite.com/home/post/surviving-the-silence-reforms-to-gag-laws-allow-survivors-of-abuse-to-speak)>

1. Compare and contrast the current law in Queensland to the law in Tasmania which existed prior to Grace Tame's campaign to change the law in Tasmania. If you were a victim, which of the jurisdiction's laws would you prefer? [A] [E]

## The campaign to change the law

### Practical Application

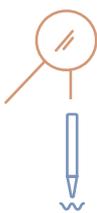
#### GRACE TAME-AUSTRALIAN ACTIVIST AND ADVOCATE FOR SURVIVORS OF SEXUAL ASSAULT. NAMED 2021 AUSTRALIAN OF THE YEAR, ON 25 JANUARY 2021.

##### Abuse and aftermath

At age 15 she (Tame) was groomed and then repeatedly sexually abused by her 58 year old teacher, Nicolaas Bester. The abuse stopped in 2011 when Tame reported the attacker. Bester was arrested and convicted of the offence of 'maintaining a sexual relationship with someone under the age of 17'. Bester was also sentenced for possessing child pornography. In sentencing Tame's abuser, Justice Helen Wood said Tame had been 'particularly vulnerable given her mental state' and that her abuser knew her psychological condition was precarious. At the time of the abuse, Tame had undiagnosed autism spectrum disorder. In 2017, social commentator Bettina Arndt conducted an interview with Tame's abuser. Tame criticised Arndt, who did not seek out Tame for her side of the story, and published her name and photo without consent. Bester spoke publicly about the case many times, but Tame was gagged by Tasmanian law.

##### Advocacy

Tasmania's *Evidence Act* had prohibited publication of information identifying survivors of sexual assault since 2001. In practice this prevented Tame and other survivors speaking publicly about their experiences. Tame and Nina Funnell (journalist) created a campaign called #LetHerSpeak, in partnership with Marque Lawyers and End Rape on Campus Australia, seeking to overturn this law and a similar law in the Northern Territory. The campaign attracted global support (from the MeToo movement). Tame successfully applied to the Supreme Court of Tasmania for an exemption from the gag law. She was the 1st female sexual assault survivor in Tasmania to do so.



## Practical Application ...

Tame has become an advocate for others focusing on helping them understand grooming and psychological manipulation and breaking down the stigma associated with sexual assault.

On 15 March 2021, Tame lead the Women's March4Justice event in Hobart.

On 9 February 2022, Tame and former Liberal party parliamentary staffer and alleged rape survivor Brittany Higgins gave an address at the National Press Club of Australia, which sold out quickly and garnered a huge amount of coverage in the press and on social media.

Source: *Wikipedia* (Downloaded 1/08/2023, excerpts only).

## The political and legislative response

### Practical Application

Consider the following sources. Supplement these sources with your own research of the legislation that exists in each state of Australia about gag-laws. What do you think is an appropriate legal test/criteria to apply to the laws of each state to decide if each of them has laws which are now acceptable to the community and to you? Evaluate the contribution made by Grace Tame and the #LetHerSpeak campaign to these law reforms. [S] [A] [E]

#### Source 1

##### Tasmanian Government

Victims of sexual crimes can now tell their story (changes to Tasmanian *Evidence Act* 2001-s194K)

A person can publish their story or give permission to someone else to publish a story that identifies them as a victim of a sexual crime.

A person who is not the victim can ask the court for permission to publish a story which identifies a victim of a sexual crime.

The identity of a victim can be made public with the permission of the victim or with the permission of the Court.

The victim must be at least 18 years old at the time that they agree to the information being made public. The agreement must be in writing. The person must understand that they will be identified and freely agree to this happening.

The information cannot include the identity of any person, other than the victim and the offender, unless the other person has also agreed to be identified.

Information identifying a victim of a sexual crime can only be released after the criminal court case has finished. An offender can appeal (ask another court to reconsider) the decision that they were guilty of the offence or against the sentence. If there is an appeal the information can only be released after any appeal has been decided by the court and the case has been finalised.

A victim can choose not to make their identity public.

Source: Tasmanian Government, Department of Justice, *Victims of sexual crimes can now tell their story* (Web page, No date) <[justice.tas.gov.au/publications2/fact-sheet-on-changes-to-the-tasmanian-evidence-act-2001-section-194k](https://justice.tas.gov.au/publications2/fact-sheet-on-changes-to-the-tasmanian-evidence-act-2001-section-194k)>.

**Source 2****CONTROVERSIAL GAG LAWS ON IDENTIFICATION OF DEAD SEXUAL ASSAULT SURVIVORS FAILED TO WIN SUPPORT IN VICTORIAN PARLIAMENT**

Proposed laws forcing families of dead sexual assault victims to seek court orders to tell their loved ones' stories have been rejected by the Victorian Parliament.

The rules were proposed by the State Government as a temporary measure while further work was completed to reform laws that required a court order for any victim to tell their story.

But living victims will now be able to tell their story without a court order by simply agreeing to give consent to the story being told by a third party such as the media.

Previously it was illegal, although rarely enforced, for victims to speak out publicly without a court order about their experience.

After passionate debate... (the house).. passed an amendment to maintain the status quo- the act remain silent on whether it is an offence to publish information in regards to a sexual offence after the victim has died.

Attorney-General Jill Hennessey conceded the law was not perfect but said the change was necessary while further consultation was held to better design the law.

Law Institute of Victoria criminal Law section co-chair Mel Walker said: 'the court must take into account the views of family members who may present valid opposing opinions, to ensure that the release of highly sensitive material is properly considered and in the public interest.'

Richard Wittlingham, 'Controversial gag laws on identification of dead sexual assault survivors failed to win support Victorian Parliament', *ABC News*, (Online, 10 November 2020) <[abc.net.au/news/2020-11-10/law-gagging-families-dead-sexual-assaultvictims/](http://abc.net.au/news/2020-11-10/law-gagging-families-dead-sexual-assaultvictims/)>.

## REVIEW

### Comprehend

1. **Describe** each of the following:
  - a. *The Equal Treatment Benchbook*
  - b. Children's Court Divisions,
  - c. the test for capacity in *Marion's* case
  - d. a special witness who is a child
  - e. other special witnesses under s21a of the *Evidence Act* [C]
2. **Describe** and **explain** each of the following:
  - a. The arrangements that can be made for special witnesses under s21A of the *Evidence Act*
  - b. *The Charter of Youth Justice Principles*.

- d. The language and cultural difficulties which disadvantage First Nations Peoples when encountering the criminal justice system.
- e. The strategies and arrangements the court can use to ensure a person with a disability is able to achieve a fair outcome in the court process
- f. The issues raised by Grace Tame and the #LetHerSpeak campaign about the Tasmanian gag-laws.

[C]

### Analyse and evaluate

3. How does *R v Kina* illustrate the various issues faced by Aboriginal women when they encounter the criminal justice system? To what extent are these issues addressed by the Anunga Rules? Prepare a policy paper for consideration by the Queensland Attorney-General in which you make significant proposals for change to the criminal Justice system so that there is less likelihood of Kina's Case repeating itself. [S] [A] [E] [R]
4. Why do you think there was a need to change the Tasmanian gag laws? What issues were raised Victorian Parliament about the rights of the relatives of a dead victim where a person was seeking to publicise details of the victim and any relevant offence? How do you think this issue could be resolved in the legislation? Do you think victims are better off as a result of the reforms to the gag laws? [C] [A] [E] [R]

# Topic 4

## Punishment and sentencing

Topic 4 introduces you to the sentencing process and the theories and purposes behind it.

**Chapter 11:** Sentencing in Queensland

# Punishment and sentencing

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## Chapter 11: Sentencing in Queensland

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11.1 What is sentencing?

11.2 Types of penalties and sentences

11.3 Purpose of sentencing

11.4 Sentencing principles and factors

11.5 Mandatory sentences

11.6 Sentencing children

11.7 Appealing a sentence

### Learning objectives

At the conclusion of this chapter, students will be able to:

- describe the range of sentencing options.
- explain the principles that affect sentencing decisions in the *Penalties and Sentences Act 1992* (Qld).
- analyse the principles of sentencing as they apply to scenarios.
- select legal information, analyse legal issues about criminal justice and evaluate legal situations involving:
  - sentencing trends over time
  - the rate of incarceration of children
  - the appeals process.

# 11.1 What is sentencing?

## Introduction to sentencing

*Most judges regard sentencing in the criminal court as their most awesome responsibility. At that climactic moment when the jury returns a verdict of 'guilty' or the accused pleads 'guilty', a coalition of considerations weighs down upon the judge now obliged to pass sentence: fairness to the accused, solace to the victim, satisfying the community's reasonable expectations. Judges do their conscientious best to balance those considerations.*

The Hon Paul de Jersey AC CVO, former Chief Justice of Queensland, 2001.

Sentencing is a legal process that determines according to law the fair and just penalty for a particular offence. Sentencing occurs after a defendant:

- is found guilty by a jury, magistrate or judge alone, or
- pleads guilty to a criminal offence.

At the sentencing hearing:

### The sentencing process (simplified)

The Police Prosecutor or Crown Prosecutor makes submissions to the court about the circumstances of the offence and raises any other relevant facts including whether the defendant has any previous convictions; before making submissions about what an appropriate sentence may be, using precedent and statute law to support his or her submission.



Next, the defendant's legal representation will make submissions to the court. This may include providing information on the defendant's socio-economic circumstances, responding to points made by the prosecutor, and any contextual information about the offending; before also making submissions about what an appropriate sentence may be.



The judicial officer (a magistrate or judge) decides a sentence, giving reasons explaining the decision.

**Sentencing is a complex exercise** that involves a magistrate or judge considering a range of factors. Some include:

- the maximum or mandatory penalty for the criminal offence,
- the nature and circumstances of the offence and its seriousness,
- any harm caused to the victim,
- the extent to which the defendant is to blame for the criminal offence, and
- any sentences imposed for similar cases committed in similar circumstances.

**This means that judicial discretion is an important aspect of the sentencing process.**

In this chapter you will learn more about the different types of sentences a defendant can receive, the factors or guidelines found in law that are applied by judicial officers when deciding a sentence; as well as investigate several issues concerning sentencing in Queensland.



### Tip

You may like to visit the Queensland Sentencing Advisory Council webpage ([sentencingcouncil.qld.gov.au](http://sentencingcouncil.qld.gov.au)) to view a range of information, research, statistics and resources (including the interactive Judge for Yourself program) when completing work in this chapter.

## 11.2 Types of penalties and sentences

### Key Terms

**Concurrent sentence:** a concurrent sentence may be applied when someone is sentenced for different crimes. It allows the sentences to be served at the same time. For example, if a defendant was sentenced to 6 months imprisonment for the most serious criminal offence (count 1) and 2 months imprisonment (count 2), they would serve a total of 6 months imprisonment.

**Cumulative sentence:** cumulative sentences are served sequentially. For example, if a defendant was sentenced to 6 months imprisonment for the most serious criminal offence (count 1) and 2 months imprisonment (count 2), he or she would serve a total of 8 months imprisonment.

**Custodial sentence:** a custodial sentence involves a term of imprisonment.

**Incarceration:** an alternative term for imprisonment.

**Non-custodial sentence:** a non-custodial sentence does not involve a term of imprisonment. Examples of a non-custodial sentence include a fine, community service order or a good behaviour bond.

**Recidivism:** the tendency of a person who has been convicted of a crime to reoffend.

As there are a wide range of criminal offences and regulations that can attract a legal sanction, **there are many different types of sentencing options a magistrate or judge can hand down.** Generally, sentences are divided into two broad categories:

- **non-custodial sentences** (which do not involve being sentenced to term of imprisonment), and
- **custodial sentences**, which do involve a defendant being sentenced to be imprisoned or incarcerated.

We will now discuss each of these categories in detail.

## Non-custodial sentences

Some common non-custodial sentences are:

Type of sentence	Explanation
Absolute discharge	An order where no punishment is imposed.
Fine	<p>A fine is an amount of money that a defendant pays to the Queensland Government. The fine can be given in addition to, or instead of, any other sentence.</p> <p>Some criminal offences have mandatory fines, such as traffic offences.</p> <p>The non-payment of a fine can be a criminal offence.</p> <p>Fines are referred to the State Penalties Enforcement Registry (SPER) for collection. If a fine cannot be paid by the due date, it can be paid by instalments.</p>
Good behaviour bond	A requirement for a defendant to 'be of good behaviour' (not break the law) for a set period of time. A court can make an order that the defendant is pay money if the bond is broken and attach additional conditions, such as attending education courses.
Community service order	An order that sees the defendant do unpaid work in the community for between 40 to 240 hours within a specific time period. The defendant must consent to this order, and it can be given in conjunction with other conditions.
Graffiti removal order	An order of up to 40 hours to remove graffiti, which usually needs to be completed within 12 months.
Probation order	<p>An order releasing the defendant to serve their sentence in the community under the supervision of the Probation and Parole Service (PPS). A probation order can be for a period of 6 months to 3 years.</p> <p>A probation order requires the defendant to fulfil certain conditions, such as:</p> <ul style="list-style-type: none"> <li>• reporting to a PPS district office as directed,</li> <li>• getting permission before leaving Queensland,</li> <li>• telling a correctional officer if you change your address or employment status,</li> <li>• participating in programs or counselling, and/or</li> <li>• promising not to commit another offence.</li> </ul> <p>If defendants breach a probation order, they are brought back before the court to be re-sentenced.</p>
Compensation order	An order that requires a defendant to pay for any property loss or damage, or to compensate for an injury caused by the defendant's actions.
Driver licence disqualification	<p>An order disqualifying a person from holding or obtaining a Queensland drivers licence for a period of time.</p> <p>Some driving offences have a mandatory disqualification period which the court must impose.</p>



## Practical Application ...

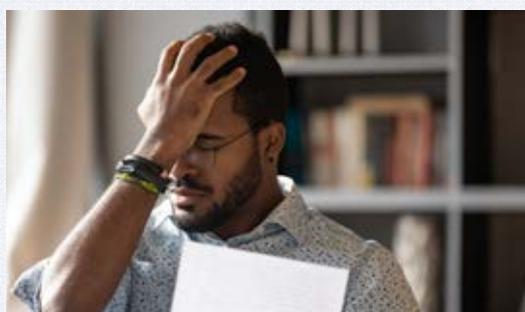
### WE NEED EVIDENCE-BASED LAW REFORM TO REDUCE RATES OF INDIGENOUS INCARCERATION.

#### Minor fines create a cycle of poverty

Indigenous and vulnerable Australians are more likely to fail to pay fines on time and incur further sanctions. Fines coupled with enforcement costs become impossible to pay for people on low incomes, or those who are homeless or unemployed.

Fine amounts can be prohibitive. In 2014, the NSW government increased the fine for the continuation of intoxicated and disorderly behaviour following a move-on direction from A\$200 to A\$1,100. A report by the NSW Ombudsman found Indigenous Australians accounted for 31% of the 484 fines and charges issued for this offence in the review period.

Every state and territory has progressive sanctions regimes for fine default. If fines are not paid on time, people accumulate further debts, have their drivers licence suspended or disqualified, have property seized, perform community service work, and — in some cases — are imprisoned.



Drivers licence sanctions operate especially harshly on Aboriginal people living in regional, rural or remote communities. Private vehicles are often the only practical means of transport available to access work or basic services, such as health care.

Source: Elyse Methven, 'We need evidence-based law reform to reduce rates of indigenous incarceration', *The Conversation* (Online, 9 April 2018) <[theconversation.com/we-need-evidence-based-law-reform-to-reduce-rates-of-indigenous-incarceration-94228](http://theconversation.com/we-need-evidence-based-law-reform-to-reduce-rates-of-indigenous-incarceration-94228)>.

1. Identify the specific group(s) of Australians that are more likely to face difficulty paying a fine. [C]
2. How much did the NSW government increase the fine for intoxicated and disorderly behaviour following a move-on direction in 2014? [C]
3. What further consequences may a person experience if a fine is not paid or a person's licence is suspended? [C]
4. Although people may receive the same fine for the same offence, this article makes the case that it leads to unequal results. Do you think fines are fair and just? Use legal reasoning to support your decision. [E]

## Recording a conviction

**Courts also have the power to decide whether to record a conviction or not.** This is a separate decision from deciding what sentence to give. This means that a defendant can state that he or she has not been convicted of a criminal offence, which can be important when traveling outside Australia or for employment reasons.

## Custodial sentences

*In sentencing an offender, a court must have regard to...a sentence of imprisonment should only be imposed as a last resort...*

*Penalties and Sentences Act 1992 (Qld) s9(2)(a)(i)*

**Custodial sentences involve the defendant being given a sentence of imprisonment.**

Sometimes a court ‘suspends’ the entire custodial sentence for a period of time. This means that the defendant does not have to serve their term of imprisonment immediately, but if they commit another serious offence, the court can order them to serve all or part of their original sentence in addition to any punishment given for the new offence.

A court may also give them an intensive correction order, which allows a defendant to serve their custodial sentence in the community under the supervision of Queensland Corrective Services (QCS).

Custodial sentences include:

Type of sentence	Explanation
Imprisonment	<p>Imprisonment (also called <b>incarceration</b>) is the most severe penalty a court can impose since the death penalty was abolished in Queensland in 1922.</p> <p>If a defendant receives several sentences of imprisonment for multiple criminal offences, a judge can decide whether each sentence is served sequentially (called a <b>cumulative</b> sentence) or <b>concurrently</b> (which sees a defendant serve one sentence).</p> <p>A defendant may be imprisoned for their entire sentence, or they may be eligible or be granted parole by the Parole Board Queensland. If a defendant is given parole they must follow certain conditions.</p> <p>We will investigate the incarceration rate more deeply in a moment.</p>
Indefinite detention order	<p>The <i>Dangerous Prisoner (Sexual Offences) Act 2003</i> (Qld) gives the Attorney-General the power to keep a person who has committed a very serious offence (such as a violent, sexual offence) in prison after their sentence has been served. This is called an indefinite detention order as there is no ‘end date’.</p> <p>This order is given by the Supreme Court of Queensland and is regularly reviewed. An example of this process is explored in the case study below.</p>

## Case Study

*Attorney-General for the State of Queensland v Fardon* [2019] QSC 2; [2019] 4 QLR

**Facts:** The respondent, Robert Fardon, had a significant criminal history. He had been convicted of many serious sexual offences involving children. His last conviction occurred in 1989 with the sentencing judge commenting that he, ‘brutally assaulted her and then you inflicted a series of most degrading acts upon her’.

After serving a 14 year term of imprisonment, Fardon was due for release in 2003. The Attorney-General successfully applied for respondent be detained in custody for an indefinite





## Case Study

term for control, care and treatment (a continuing detention order). The order stayed in place until late 2006, where he was released subject to a supervision order.

He returned to custody when he was charged with raping a woman in 2008. Although he was found 'guilty', his conviction was set aside, and he was acquitted by the Queensland Court of Appeal. He was released from custody subject to a supervision order in 2013 after the Attorney-General failed to apply for a further continuing detention order to be made against the respondent.

In 2019 the Attorney-General applied for a further supervision order for the respondent.

**Legal Issue:** Does Fardon present an unacceptable risk of committing a serious sexual offence and should continue to be subject to a supervision order?

**Decision:** His treating psychologist reported that Fardon had progressed from tight 24 hour supervision to a 'maintenance' level of supervision, which saw him take regular outings in the community to approved locations independently and in company. He had abstained from alcohol and drugs for many years and there was an absence of evidence of a sexual paraphilia.

Three other psychologists also agreed that Fardon had a low risk of reoffending. The Attorney-General's application was dismissed. The Hon Justice Bowskill stated:

*[3] I am not satisfied that the evidence establishes to the requisite high degree of probability that the respondent is a serious danger to the community in the absence of a further supervision order. Accordingly, the application will be dismissed.*

1. Identify the respondent in the case. [C]
2. How many years had Fardon been subject to continuing detention order? What caused him to return to custody in 2008? [C]
3. Analyse the viewpoint of both parties of the case and their consequences. [A]
4. After the decision was published, the ABC News called Fardon '[o]ne of Queensland's worst sex offenders.' Based on the evidence given by all psychologists, do you think it would be fair to keep Fardon subject to a supervision order? Justify your decision using legal criteria. [E]



**Inquiry Focus**

*What is the incarceration rate of First Nations peoples in Australia and how can we address these disparities to promote justice and equity?*

### Introduction

At an event marking the seventh anniversary of the apology to the Stolen Generation in 2017, former Prime Minister Kevin Rudd said: 'Australia is now facing an indigenous incarceration epidemic.'

First Nations Peoples are overrepresented in the Australian criminal justice system. The reasons for this are multi-faceted and include:

- the loss of cultural identity, disconnection from culture and the ongoing impacts of dispossession,
- institutional discrimination and bias,
- socio-economic inequality,
- policy and legislative changes, and
- a reliance on incarceration as a response to crime instead of diversion or culturally appropriate rehabilitation programs.

The overrepresentation of First Nations peoples in the criminal justice system has been the subject of many inquiries, the most recent being the Australian Law Reform Commission (ALRC) inquiry in *Pathways to Justice—Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, which was tabled in Parliament in 2018.

As a starting point, to understand how many First Nations peoples are being incarcerated and the rate of reoffending, we will read and analyse some statistics from various sources.

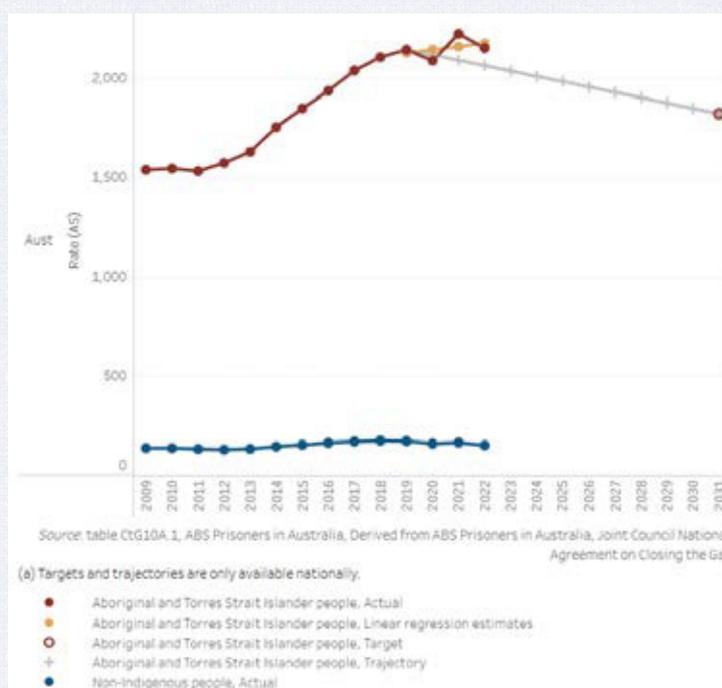
## The statistical picture of First Nations peoples incarceration and reoffending rates

### Practical Application

Read the following sources and answer the questions below:

#### Source 1

#### PRISONERS IN AUSTRALIA (2022, RATE PER 100,000 ADULT POPULATION)



Source: Australian Government Productivity Commission, 'Socioeconomic outcome area 10: Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system', *Closing the Gap* (Web Page, 2023) <[pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10](http://pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10)>.



## Practical Application ...

### Source 2

#### PRISONERS IN AUSTRALIA, 2022

The Aboriginal and Torres Strait Islander imprisonment rate decreased by 3% from 2,412 to 2,330 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population.

At 30 June 2022:

- Aboriginal and Torres Strait Islander prisoners accounted for 32% of all prisoners.
- 91% (11,744) of Aboriginal and Torres Strait Islander prisoners were male.
- 9% (1,156) were female.
- The median age was 33.0 years.
- 78% (10,025) had experienced prior adult imprisonment.

Source: Australian Bureau of Statistics, *Prisoners in Australia, ABS* (Web Page, 24 February 2023) <[abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release](https://abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release)>.

### Source 3

#### PROPORTION OF PRISONERS WITH A PRIOR RECORD OF IMPRISONMENT (2016)

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUS
ATSI	70%	68%	80%	69%	80%	72%	80%	85%	76%
Non ATSI	46%	48%	56%	45%	47%	58%	30%	72%	49%

Source: Australian Law Reform Commission, 'Recidivism and prior record of imprisonment', *Pathways To Justice—Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples* (ALRC Report 133) (Online, 2018) <[alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/recidivism-and-prior-record-of-imprisonment/](https://alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/recidivism-and-prior-record-of-imprisonment/)>.

1. Identify the Aboriginal and Torres Strait Islander peoples and non-Indigenous people's imprisonment rate as at 2022. Is this an increase or decrease from the previous year? [C]
2. Identify which gender was more likely to be imprisoned. [C]
3. Examining Source 1, how would you describe the imprisonment rate per 100,000 Aboriginal and Torres Strait Islander adults over the last 10 years? How does this compare to the rate of imprisonment of non-Indigenous peoples? [A]
4. Examining Source 3, identify the percentage of Queensland Aboriginal and Torres Strait Islander prisoners that had previously been imprisoned. How does this compare to other states and territories? [C] [A]
5. Did any of these statistics surprise you? Explain. [A]

## Practical Application

### ONE INDIGENOUS OFFENDER COSTS FIVE TIMES MORE THAN A NON-INDIGENOUS ONE

A teenage Indigenous offender will cost the criminal justice system about \$380,000, five times more than a non-Indigenous offender, an Australian Institute of Criminology report revealed.

This difference is due largely to the greater frequency and length of youth detention experienced by Indigenous offenders in Queensland, the study states.

Despite efforts to reduce Indigenous over-representation in the criminal justice system, the gap has widened.

Indigenous children are three to 16 times more likely to be charged by police, and seven to 10 times more likely to appear in Children's Court than non-Indigenous children.

Indigenous children are 17 times more likely to be under community supervision than non-Indigenous children, and 23 times more likely to be in detention, while Indigenous adults are 12 times more likely to be incarcerated than non-Indigenous adults.

Source: Jocelyn Garcia, 'One Indigenous offender costs five times more than a non-Indigenous one' *Brisbane Times* (Online, 13 April 2020) <[brisbanetimes.com.au/national/queensland/one-indigenous-offender-costs-five-times-more-than-a-non-indigenous-one-20200408-p54ia9.html](https://www.brisbanetimes.com.au/national/queensland/one-indigenous-offender-costs-five-times-more-than-a-non-indigenous-one-20200408-p54ia9.html)>.

1. According to a report published by the Australian Institute of Criminology, how much will a teenage Indigenous offender cost the criminal justice system? [C]
2. Why are the costs associated with an Indigenous offender higher than that of a non-Indigenous offender? [C]
3. How much more likely is for an Indigenous adult offender to be incarcerated? What do you think the consequences of this are? [C] [A]

### Why is it important to address this issue?

The National Indigenous Australians Agency (2023) states that imprisonment and the returning to prison can:

- compound existing social and economic disadvantage (such as adverse employment, housing, mental or other health consequences),
- affect family, children and the broader community with intergeneration effects, and
- lead to a normalisation of incarceration.

Addressing this issue will lead to better outcomes for First Nations peoples.





### Research Task

There are many ways State, Territory and Federal governments have sought to address the overrepresentation and high reoffending rates of First Nations peoples in the criminal justice system over the last few decades. Examples include developing and delivering:

- maternal health, parenting skills and family-based programs,
- actions targeting those at high risk of offending,
- therapeutic and holistic support to address criminogenic factors,
- programs targeting aggression and problem sexual behaviour,
- prison-based rehabilitative programs, including prison services for people with a cognitive disability, and
- prisoner through-care programs, including employment-focused re-entry programs.

Select one of the above responses and:

- a. Locate and select relevant legal information that demonstrates this method being used in Queensland. Using this research:
  - i. Identify who primarily administers and/or delivers this method and to what degree it involves First Nations peoples. [C][S]
  - ii. Explain where and how this method operates in Queensland in your own words. [C][S]
- b. Justify whether this method should be continued using legal criteria and a discussion of its implications. [E]



### Tip

In the future, when searching for legal alternatives or recommendations including the terms or phrases 'reform', 'law reform', 'evidence based', 'First Nations justice initiative' and 'best practice' in a search string might be useful.

### Parole

*Parole is not a privilege or an entitlement. It is a method developed to prevent reoffending and plays an integral part in the criminal justice system.*

Parole Board Queensland (2020)

**Parole is the conditional and supervised release of a prisoner before he or she has served the full term of imprisonment.**

There are two types of parole in Queensland:

- court ordered parole (which occurs at the sentencing hearing), or
- board ordered parole.

A prisoner can apply for board ordered parole after they reach a parole eligibility date. Whether

a person should be released on parole is a decision made by the Queensland Parole Board.

If a prisoner is granted parole, they must follow general and specific conditions. Examples of general conditions include:

- regularly reporting to a parole officer,
- telling the parole office if there are any changes to a defendant's address or job, and
- seeking permission to travel within Australia or overseas.

Specific condition differs from person to person. For example, a prisoner with a mental health condition may be required to continue psychological counselling.

One category of prisoner that is not eligible for parole are those who are convicted of homicide offence, but the body or remains of the victim have not been located (*Corrective Services Act 2006* (Qld) s193A).

## Practical Application



### 'NO BODY, NO PAROLE' LAWS COULD BE DISASTROUS FOR THE WRONGFULLY CONVICTED

#### The effectiveness of 'no body' laws

We recently looked into the effectiveness of Queensland's 'no body, no parole' laws, which were passed in 2017.

Our analysis showed that of the ten cases that came before the parole board during our collection period, six involved cooperation by the applicant but none resulted in remains being found.

We believe 'no body' laws lack evidence to support their use and may offer false hope to victims' families if remains cannot be found. They rely on many assumptions about how crimes occur, how offenders may cooperate, and effective policing investigations post-disclosure.

They may also prove disastrous for the wrongfully convicted.

Source: Jarryd Bartle, Greg Stratton, Michele Ruyters and Monique Moffa, 'No body, no parole' laws could be disastrous for the wrongfully convicted', *The Conversation*, (Online, 23 September 2022) <[theconversation.com/no-body-no-parole-laws-could-be-disastrous-for-the-wrongfully-convicted-191083#:~:text=These%20laws%20are%20designed%20to,who%20have%20been%20wrongfully%20convicted](https://theconversation.com/no-body-no-parole-laws-could-be-disastrous-for-the-wrongfully-convicted-191083#:~:text=These%20laws%20are%20designed%20to,who%20have%20been%20wrongfully%20convicted)>

1. What year did Queensland pass 'no body, no parole' laws? [C]
2. How many cases did the authors analyse in their research? How many remains were found? [C]
3. Two viewpoints central to this issue is those convicted of homicide and victims' families. Examine these two viewpoints, considering their consequences. [A]
4. One of the most well-known miscarriages of justice in Australia was the conviction of Lindy



## Practical Application ...

Chamberlain, who was found guilty of the murder of her daughter. At trial she asserted her daughter was killed by a dingo, a finding that was upheld at a coronal inquest. Her daughter's body was never found. Imagine her conviction was not overturned and this law was in place. Analyse its intended and unintended consequences. [A]

5. The Explanatory Notes for this law state that it '...will encourage and provide incentive for these prisoners to assist in finding and recovering the body or remains of the victim. This will in turn, it is hoped, offer some comfort and certainty to the families of the victims.' Given the research shared in this article, has the law been effective in achieving its objective? Do you believe the law should be repealed or remain? Justify your decision using legal criteria. [E]

## 11.3 Purpose of sentencing

### Key Terms

**Denunciation:** a formal expression of a society's condemnation or disapproval of the criminal offence and the behaviour of the defendant.

**Deterrence:** the belief that punishment or penalty a defendant receives will deter or stop them from committing further criminal offences (called specific deterrence) and that this knowledge will discourage other members of society from committing similar criminal offences as they wish to avoid a similar consequence (called general deterrence).

**Protection (prevention):** in some circumstances a penalty or sentence may aim to protect the community by physically preventing a defendant from causing harm by imprisoning them for a period of time (or indefinitely).

**Rehabilitation:** providing a defendant with access to treatment or education to assist them build skills and/or knowledge to stop committing a criminal offence in the future and re-engage with society.

**Retribution:** more accurately referred to as 'punishment' it is a theory that a penalty or sentence should punish a defendant in a just and fair way.

### The purpose of sentencing

*The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from others when determining what is an appropriate sentence in a particular case. There are guideposts to the appropriate sentence but sometimes they point in different directions.*

*Veen v The Queen [No 2] (1988) 164 CLR 465, 476-477*

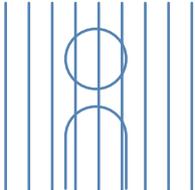
The *Penalties and Sentences Act 1992* (Qld) s9 states that a sentence can only be imposed for the following reasons:

- to **punish** the offender to an extent or in a way that is just in all the circumstances; or
- to provide conditions that help the offender to be **rehabilitated**; or
- to **deter** the offender or other persons from committing the same or a similar offence; or
- to make it clear that the community **denounces** the offender's conduct; or
- to **protect** the Queensland community from the offender; or
- a combination of these purposes.

For example, an offender with a drug addiction who is sentenced for supplying a dangerous drug may be given probation which gives them access to a drug treatment program. This assists them to become rehabilitated. On the other hand, an offender who has committed a series of violent armed robberies may be imprisoned to protect the community.

People sometimes refer to these different as purposes the 'theories of punishment', which are illustrated below:

### The theories of punishment

1		Punishment	<i>Penalties and Sentences Act 1992</i> (Qld) s9(1)(a)
2		Rehabilitation	<i>Penalties and Sentences Act 1992</i> (Qld) s9(1)(b)
3		Deterrence	<i>Penalties and Sentences Act 1992</i> (Qld) s9(1)(c)
4		Denunciation	<i>Penalties and Sentences Act 1992</i> (Qld) s9(1)(d)
5		Protection	<i>Penalties and Sentences Act 1992</i> (Qld) s9(1)(e)

Now that you understand more about the purpose of punishment, let's see how this is applied in the real world.



### Research Task

- Some sentencing remarks are published online by the Supreme Court Library Queensland ([sclqld.org.au/caselaw/sentencing-remarks](http://sclqld.org.au/caselaw/sentencing-remarks)). To begin, select three criminal offences from the list below:
  - Armed robbery
  - Grievous bodily harm
  - Fraud
  - Manslaughter
  - Trafficking in a dangerous drug
  - Choking, suffocation or strangulation
- Locate one sentencing remark for each offence on the Supreme Court Library Queensland webpage. [S]
- After reading each sentencing remark:
  - identify the different purpose(s) the judge refers to in the sentencing remark,
  - identify the sentence given for the criminal offence, and
  - explain how the sentence will achieve that purpose. [C] [A]

### Inquiry Focus

*Will harsher penalties be effective in deterring young offenders in Queensland?*

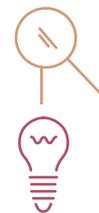
### Is there a youth crime 'crisis'?

In 2022 and 2023 media outlets shared countless stories of young people committing serious crimes that included young people causing the deaths of innocent members of the community. On 21 February 2023, the front page of *The Courier Mail* stated, 'Our community wants decisive action and sweeping reforms to finally turn the dial on the out-of-control youth crime epidemic gripping our city.'

### Tip

Media literacy is an important skill you should use whenever you read, watch or listen to any type of media. When you undertake research for assessment or are just clicking a story think about:

- What is the purpose of the media? Is it trying to inform, educate, entertain, sell or convince you about a particular point of view?
- Who is behind the media—is the source qualified, credible or trustworthy? You can find out more about a source by viewing the 'About us' section or researching the author or content creator.



## Tip ...

- Can you see any spelling errors, grammatical mistakes or incorrect dates?
- Is the content balanced or one-sided?
- Does the media contain evidence to support its key message?
- Does the media source refer to and agree with a diverse range of sources?
- How does the choice of facts and words used in the the source reveal the point of view of the creator?

To find out what the crime rate of youth offenders is, we will now look at a number of sources sharing statistical information.

## Practical Application

### Source 1

*According to Griffith University, the term unique offender is used to describe 'each offender that was recorded in an occurrence in a given annual period'.*

#### RATE OF UNIQUE YOUTH AND ADULT OFFENDERS LOWEST ON RECORD

An independent report just released by the Queensland Government Statistician's Office shows the rate of youth offenders and the rate of adult offenders was the lowest on record.

The report analysed crime statistics from the 2021/22 financial years and found the rate of unique child offenders had continued its steady decline, to 1,926.4 per 100,000 persons aged 10–17 years, the lowest level recorded over the 10 year time series.

And the report found that there were more than 20% fewer unique youth offenders in 2021–22, compared to 2012–13.

While it is heartening to see the rate of youth offenders continuing to decline, the stark reality is that a small cohort of hardcore offenders is responsible for a disproportionate number of youth offences.

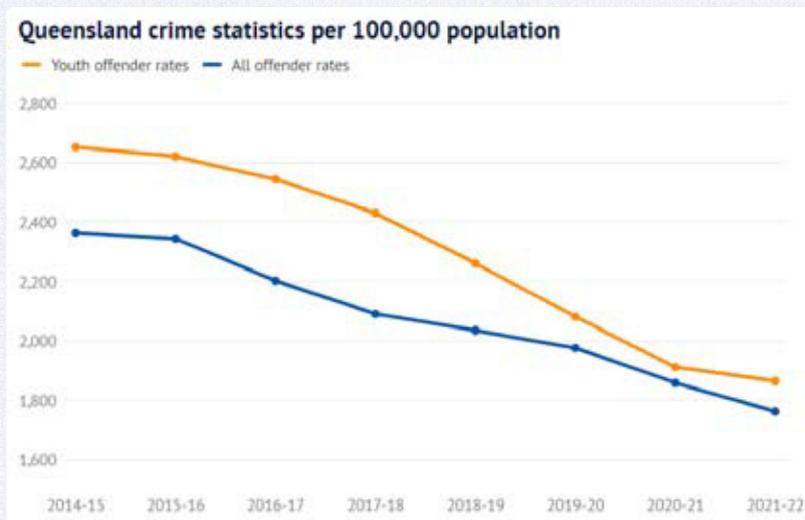
It is those offenders that the Palaszczuk Government's tough new youth justice laws are targeting.

Source: Minister for Police and Corrective Services and Minister for Fire and Emergency Services, 'Rate of unique youth and adult offenders lowest on record' (Media Release, 6 April 2023).



## Practical Application

### Source 2



Source: Zach Hope, 'Is youth crime a 'crisis'? Here's what Queensland figures really show', *Brisbane Times* (Online, 10 March 2023) <[brisbanetimes.com.au/politics/queensland/is-youth-crime-a-crisis-here-s-what-queensland-figures-really-show-20230301-p5coo2.html](https://brisbanetimes.com.au/politics/queensland/is-youth-crime-a-crisis-here-s-what-queensland-figures-really-show-20230301-p5coo2.html)>.

### Source 3

#### RECORDED CRIME-OFFENDERS YOUTH OFFENDERS

There were 10,304 offenders aged between 10 and 17 years in 2021–22, comprising 13% of total offenders proceeded against in Queensland.

The number of youth offenders remained stable from the previous year. However, after accounting for population change in that time, the youth offender rate decreased from 1,910 to 1,863 offenders per 100,000 persons aged between 10 and 17 years.

The most common principal offence for persons aged between 10 and 17 years was acts intended to cause injury.

Source: *Australian Bureau of Statistics*, 'Recorded Crime – Offenders', (Web Page, 9 February 2023) <[abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#queensland](https://abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#queensland)>.

1. What was the rate of unique child offenders reported by the Queensland Government Statistician's Office? [C]
2. What was the total number of offenders aged between 10 and 17 years in 2021-22 in Queensland? [C]
3. Identify the most common principal offence committed by those aged 10 to 17? [C]
4. Describe the youth offending trend from 2014-15 to 2021-22 shown in Source 2. Is this corroborated by the other sources or not? [C] [A]
5. In mid-2023, as part of the Queensland Government's response to youth crime, the Queensland Police Service ran operation Victor Unison, which involved high-visibility police patrols across Queensland. How might operations like this impact statistics and what may be the long-term implications (positive and negative) of this? [A]

## The ‘tough on crime’ approach

In January 2021, Katherine Leadbetter and Matthew Field, were killed by a 17-year-old driver of a stolen car. On Boxing Day 2022, Emma Lovell died after two 17-year-olds broke into her home in North Lakes. In response, the Queensland Government announced a range of initiatives to target youth offending.

The Strengthening Community Safety Bill 2023 (Qld) (that was passed into law) was introduced increased the maximum penalties for the offence of unlawful use or possession of a motor vehicle and introduced several circumstances of aggravation a judge can consider when sentencing, including the posting of material connected to an offence on social media.

This particular circumstance of aggravation was influenced by young offenders posting content online of them committing criminal offences. *The Guardian* reported that the Victorian Crime Statistics Agency (CSA) and NSW Bureau of Crime Statistics and Research (BOCSAR) hypothesized that social media platforms allowing teenagers to brag about crimes might be contributing to an increase in youth offending.

*‘The executive director of the NSW Bureau of Crime Statistics and Research (BOCSAR), Jackie Fitzgerald, said on Thursday that newly released data showing an increase in car theft was partially a ‘bounce-back’ from a Covid-driven decline.’*

*‘Another factor, however, may be young people being spurred on by social media posts encouraging vehicle thefts on TikTok,’ Fitzgerald said.*

Source: Adeshola Ore, ‘Police and crime researchers fear social media’s effect on crime in NSW and Victoria’, *The Guardian* (Online, 15 June 2023) <[theguardian.com/australia-news/2023/jun/15/police-and-researchers-fear-social-medias-affect-on-in-nsw-and-victoria#:~:text=The%20Queensland%20government%20this%20year,in%20more%20children%20being%20incarcerated](https://www.theguardian.com/australia-news/2023/jun/15/police-and-researchers-fear-social-medias-affect-on-in-nsw-and-victoria#:~:text=The%20Queensland%20government%20this%20year,in%20more%20children%20being%20incarcerated)>.

The contents of the Bill were designed to be tougher on youth offenders. The Bill’s Explanatory Notes state: *‘The increase to the maximum penalties reflect the seriousness of this type of offending and the communities denunciation of such conduct.’*

But, many people have different viewpoints on whether harsher penalties will reduce youth offenders from committing crime.

## Practical Application

Examine and explain two viewpoints and their consequences in response to the issue of harsher penalties for youth offenders. [A]

### Viewpoint 1

#### **Emeritus Professor Ross Homel AO (School of Criminology and Criminal Justice)**

Prof Ross Homel, a criminologist at Griffith University, says the detention of young people ‘makes the community less safe’.

‘Detention centres are the worst possible places for fixing our broken kids,’ Homel said.



## Practical Application ...

Homel said increased penalties would not deter young offenders. 'I've never met any youth offender who would even know what the maximum penalty was, or if it's about to go up. If they did, it would not be likely to affect their decision making at 2am.'

Source: Ben Smee, 'Australian's urged to ditch 'tough on crime' mindset for youth justice as it does not work', *The Guardian* (Online, 23 January 2023) <[theguardian.com/australia-news/2023/jan/25/australians-urged-to-ditch-tough-on-mindset-for-youth-justice-as-it-does-not-work](https://www.theguardian.com/australia-news/2023/jan/25/australians-urged-to-ditch-tough-on-mindset-for-youth-justice-as-it-does-not-work)>.

### Viewpoint 2

#### Russell and Ann Field (Victims of crime)

Standing at the intersection where their son and his pregnant partner were killed by a drunk driver last year, Russell and Ann Field spoke to the youth justice debate sparked by their deaths.

'Everybody in the community knows that this sentence is inadequate,' Russell Field told reporters on Friday. 'It needs a total overhaul, a total review. We have got to stand up, people like us and other victims of crime ... and support a change, a change for the law to be reviewed.'

He was referring to a 10-year sentence for manslaughter – the maximum sentence under the Youth Justice Act – handed down to an 18-year-old this week over the deaths of Matthew Field and Kate Leadbetter.

Source: Eden Gillespie, 'Victims of crime seek tougher youth sentencing laws in Queensland, but could that make things worse?', *The Guardian* (Online, 19 June 2022) <[theguardian.com/australia-news/2022/jun/19/victims-of-see-tougher-youth-sentencing-in-queensland-but-could-that-make-things-worse](https://www.theguardian.com/australia-news/2022/jun/19/victims-of-see-tougher-youth-sentencing-in-queensland-but-could-that-make-things-worse)>.

### Viewpoint 3

#### Luke Twyford (Queensland Family and Child Commission)

'I am deeply concerned there's a contradiction between what is evidence-based good practice in youth justice and what the public expects youth justice to do,' Twyford said.

Twyford said people in the youth justice system were disproportionately from lower socioeconomic communities, came from families with domestic violence issues, and had disengaged from schooling. 'Young people should not be in a prison-like setting. They don't work, they're more harmful,' he said.

'They come back into the same life situation before they entered, and they repeat crime.'

Source: Ben Smee, 'Australian's urged to ditch 'tough on crime' mindset for youth justice as it does not work', *The Guardian* (Online, 23 January 2023) <[theguardian.com/australia-news/2023/jan/25/australians-urged-to-ditch-tough-on-mindset-for-youth-justice-as-it-does-not-work](https://www.theguardian.com/australia-news/2023/jan/25/australians-urged-to-ditch-tough-on-mindset-for-youth-justice-as-it-does-not-work)>.



### Viewpoint 4

#### Katherine Hayes (Youth Advocacy Centre Chief Executive)

‘Locking up young people means that we’re going to get better criminals in the future,’ Ms Hayes said. ‘It might keep them off the street for a short period of time, but it’s creating a problem down the track when they get released, because they will not re-engage productively with society, and they’re more likely to cause these kinds of serious incidents.’

She said young people and their families needed support to put those at risk of offending on a ‘better path’.

‘My fear is that we are going to get more and more young people becoming more criminalised because we’re not as a society collectively looking at what works and what doesn’t work,’ she said.

Source: Lillian Rangiah and Jessica Black, ‘Killing of Emma Lovell at North Lakes should not prompt ‘knee jerk’ youth crime crackdown, advocates warn’, *ABC News* (Online, 29 December 2022) <[abc.net.au/news/2022-12-29/emma-lovell-youth-crime-reaction-teens-murder-charge-north-lakes/101812482](http://abc.net.au/news/2022-12-29/emma-lovell-youth-crime-reaction-teens-murder-charge-north-lakes/101812482)>.

### Viewpoint 5

#### Belinda Beasley (Victim of Crime)

For Brett and Belinda Beasley, whose teen son Jack was stabbed to death in a fight in Surfers Paradise in 2019, the introduction of Jack’s Law has given police greater search powers to try and lower the rate of knife crime in Queensland. But it hasn’t made a difference to the punishments handed down to youths convicted of these crimes, which the families say aren’t tough enough.

‘They say it’s not a reflection on your child’s life, but it is,’ Belinda told Karl. ‘He killed our son, I just don’t understand why the kids are going out doing what they’re doing - it just affects so many people, the police, the first responders, the ambulance, witnesses, all these people suffer all the time from what they have to see - it’s just not fair.’

Source: Tom Livingstone, ‘Special report: Karl Stefanovic’s youth crime crisis panel’ *9 Now* (Online, May 2023) <[9now.nine.com.au/today/youth-crime-crisis-karl-stefanovic-special-report/b6fb0c8d-2ad7-454b-926a-02d3538b030d](http://9now.nine.com.au/today/youth-crime-crisis-karl-stefanovic-special-report/b6fb0c8d-2ad7-454b-926a-02d3538b030d)>.





### What do you think?

#### Strengthening Community Safety Bill 2023 (Qld)

#### 8 Amendment of s 408A (Unlawful use or possession of motor vehicles, aircraft or vessels)

(3) Section 408A (1B) and (1C) —  
omit, insert—

(1B) If the offender publishes material on a social media platform or an online social network to—

- (a) advertise the offender's involvement in the offence; or
  - (b) advertise the act or omission constituting the offence;
- the offender is liable to imprisonment for 12 years.

1. Creating a specific circumstance of aggravation targeting the posting of content online was one amendment made to the *Criminal Code 1899* (Qld) by this Bill. Do you agree or disagree with this amendment? Do you think it will achieve its intended purpose? Why or why not? [E]



### Research Task

Examining and analysing viewpoints is an important part of the inquiry process when you are trying to understand a legal issue, but academic research or studies can also provide you with insight that you can use to justify a decision or recommendation.

1. Locate and select two sources that provide evidence to support or disagree with the proposition 'harsh penalties deter crime'. Explain their reasoning. [C] [S]



### What do you think?

Now you have engaged with a range of information do you think harsher penalties will deter young offenders in Queensland? Justify your decision using legal criteria. [E]

## 11.4 Sentencing principles and factors

### Sentencing factors

In addition to balancing the different purposes of sentencing, magistrates and judges also must consider other factors when sentencing offenders. The *Penalties and Sentences Act 1992* (Qld) s9 further lists a wide variety of factors a court must also look at when sentencing a person. Some examples include:

- the maximum penalty prescribed for that offence,
- the nature of the offence and how serious it was, including the harm done a victim (especially if the victim is under 16 years old)

- the extent to which the offender is to blame for the offence,
- any damage, injury or loss caused by the offender,
- the offender's character, age and intellectual capacity,
- the previous convictions of the offender,
- whether the offender was a participant in a criminal organisation, and
- how much assistance the offender gave to law enforcement agencies in the investigation process.

### Mitigating and aggravating factors

Some of the factors listed above can mitigate or aggravate the final sentence an offender receives.

Factor	Definition	Example
Mitigating factors	Features concerning the offender or the offence that tend to reduce the severity of the sentence	<ul style="list-style-type: none"> <li>• The offender is young, and this is the first offence they have committed.</li> <li>• The offender is employed and is completing an apprenticeship.</li> <li>• The offender is a primary caregiver.</li> </ul>
Aggravating factors	Features about the offender or the offence that tend to increase their culpability and the sentence they receive.	<ul style="list-style-type: none"> <li>• The victim was a police officer or ambulance officer.</li> <li>• The offence involved an abuse of trust.</li> <li>• The offender has a previous conviction for the same offence.</li> </ul>

The *Penalties and Sentences Act 1992* (Qld) s9 also contains sub-sections that specifically identify factors that should be considered aggravating (although it does provide exceptional circumstances when its not reasonable to apply these sub-sections). Some examples include:

- the manslaughter of a child under 12 years, s9(9B),
- the offender has 1 or more previous convictions, and
- a domestic violence offence s9 (10A).

The *Justice and Other Legislation Amendment Act 2023* (Qld) also added that the courts must treat the destruction of an unborn child's life that is caused by a person convicted of a relevant serious offence as an aggravating factor. The Explanatory Notes for this law explain why this sub-section was inserted:

*Another principal objective of the Bill is to better recognise the deaths of unborn children as a result of criminal conduct. As under Queensland law an unborn child does not have legal status as a person and becomes a person capable of being*

*killed only when it has completely proceeded in a living state from its mother (a legal position, known as the 'born alive' rule), offences such as murder and manslaughter do not apply in relation to an unborn child. Since 2014, following the death of an unborn child as a result of culpable driving, there have been calls to recognise unborn children as a legal persons (also called 'foetal personhood') and the Government is committed to consider reforms to better recognise the deaths of unborn children as a result of criminal conduct.*

Explanatory Memorandum, *Justice and Other Legislation Amendment Bill 2023* (Qld) 2.

We will now look at how one of the aggravating factors is applied in the real world in determining an appropriate sentence.



## Case Study

Before you read this case, it may be useful to read the law relevant to this case:

### ***Penalties and Sentences Act 1992 (Qld)***

#### ***9 Sentencing guidelines***

*(10A) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.*

*R v Hutchinson* [2018] QCA 29, [2018] 2 Qd R 505

**Facts:** Michael Hutchinson was charged with two criminal offences. At the commencement of his trial, he pleaded 'guilty' to one count of fraud and 'not guilty' to one count of murder.

The defendant and his wife had been married for some time and had two children. One day Mrs Hutchinson did not attend her place of work. Mr Hutchinson reported to family, friends, her employer, the police and the community they had an argument and she left. Ultimately, he suggested he had killed his wife in self-defence.

A jury convicted him of manslaughter. He was sentenced to 15 years, six months imprisonment for both offences. The sentencing judge took into account the fact the offence was a domestic violence offence, despite the fact that the crime occurred 13 months prior to the assent of the *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld), which established domestic violence as an aggravating feature.

Julie Hutchinson's body was discovered in bushland at Harvey Range Road after his conviction.

**Legal Issue:** Was Hutchinson's sentence manifestly excessive?

**Decision:** Hutchinson's appeal against his sentence was refused. The Hon Justice Mullins wrote:



## Case Study ...

[40] The enactment of subsection (10A) of s 9 of the Act reflects the implementation of the policy of the Legislature that the fact the offender has been convicted of a domestic violence offence is an aggravating factor, when the sentencing judge takes account of all the relevant factors on the sentencing. That is likely to have an effect over time on the sentencing for offenders convicted of offences that are also domestic violence offences, but the effect in any particular case will depend on the balancing of all the relevant factors related to that offending and offender...

[53] ...Taking into account that Mr Hutchinson was convicted of a domestic violence offence which under s 9(10A) of the Act must be treated as an aggravating factor...

1. Identify the defendant and the victim. [C]
2. What law inserted the sub-section that provides that courts may treat a domestic violence offence as an aggravating feature? [C]
3. Explain why the manslaughter was a 'domestic violence offence'? [A]
4. What did the Queensland Court of Appeal conclude about the impact the fact that the manslaughter was a domestic violence offence? How might similar cases be treated in the future? [C] [A]

## Guilty plea

The *Penalties and Sentences Act 1992* (Qld) s13 also directs magistrates and judges to consider whether the offender has entered an early guilty plea. The Queensland Sentencing Advisory Council shared that there are several reasons why a court may reduce a sentence after an offender enters a guilty plea. These include that a guilty plea:

- means a victim does not have to give evidence, which can be traumatic,
- may show offenders are remorseful for their actions,
- saves the criminal justice system considerable cost and time, as there is no need for a trial.

### What do you think?

Should the *Penalties and Sentences Act 1992* (Qld) s13 be repealed to remove the benefit an offender may receive for pleading guilty early? When formulating your response, consider the implications of your decision. [E]



## 11.5 Mandatory sentences

### What is mandatory sentencing?

You have learnt so far that magistrates and judges apply a range of guidelines when sentencing a defendant and are required to exercise discretion when sentencing an offender. **This gives them the ability to consider a wide range of factors when deciding what sentence is fair and just.**

**In contrast, a mandatory sentence is a sentence that provides a fixed or minimum sentence for a particular crime.**

There are few mandatory sentences in Queensland, although from time-to-time politicians and political parties call for 'get tough', 'flat time' or 'truth in sentencing' reforms to address growing community concern about crime. Examples of current mandatory sentences include:

- mandatory life imprisonment for murder or a repeat serious child sex offence,
- mandatory driver licence disqualification periods for certain traffic offences
- mandatory sentences for certain weapon offences.

### Inquiry Focus

*How effective is mandatory sentencing in creating a fairer and just response to criminal offending?*

### Key terms:

**Nature:** (of a legal issue) the essence and elements of the legal issue being considered.

**Scope:** (of a legal issue) the extent of the components of the legal issue.

Analyse Sources A to E to determine that nature and scope of the legal issue, and examine two viewpoints and their consequences. Justify, using the legal criteria of just and equitable outcomes, whether Queensland Parliament should introduce further mandatory sentencing, discussing the implications of your decision. [A] [E]

#### Source A

#### MANDATORY SENTENCING

#### Criticisms of discretionary sentencing systems

A number of criticisms have been levelled at discretionary sentencing systems. The criticisms generally involve one or more of the following concerns:

- inconsistency—discretionary sentencing leads to unjustified disparity. Calls for mandatory sentencing reflect a lack of confidence that the courts can impose consistent sentences.

- leniency—discretionary sentencing results in sentences that are too lenient and that do not accord with contemporary community values.
- relationship between courts and parliament—it is sometimes suggested that courts are simply failing to sentence in accordance with the will of parliament (and its constituents, the community).

### Rationales for mandatory sentencing

Of the various rationales of sentencing, mandatory sentencing tends to emphasise deterrence and incapacitation [restricting an offenders freedom]. It also aims to provide for greater consistency in sentencing and to reflect community expectations of punishment more closely.

Source: Dr Adrian Hoel and Dr Karen Gelb, 'Mandatory sentencing' (Research Paper, Sentencing Advisory Council Victoria, 2008) 5, 12 <[sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Mandatory\\_Sentencing\\_Research\\_Paper.pdf](http://sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Mandatory_Sentencing_Research_Paper.pdf)>.

### Source B

#### IMPACT OF MANDATORY SENTENCES

8.8 There is evidence that mandatory sentencing increases the incarceration rate. For example, the Senate Legal and Constitutional Affairs Reference Committee noted that:

*The Chief Magistrate of the Northern Territory provided the committee with evidence of incarceration rates as a result of the imposition of mandatory sentencing in the Northern Territory during the period 1997 to 2001. The Chief Magistrate noted that the imprisonment rate was 50 per cent higher during this period than following repeal of the laws.*

8.11 Similarly, Kingsford Legal Centre noted that:

*Mandatory sentencing undermines the fundamentals of the Australian legal system such as the Rule of Law and is inconsistent with the separation of powers, by allowing the executive branch of government to direct the exercise of judicial power and to limit judicial discretion.*

Source: Australian Law Reform Commission, Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Report 133, January 2018) <[alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/8-mandatory-sentencing/impact-of-mandatory-sentencing/](http://alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/8-mandatory-sentencing/impact-of-mandatory-sentencing/)>.

### Source C

#### POLICY DISCUSSION PAPER ON MANDATORY SENTENCING

The Law Council of Australia has consistently opposed the use of mandatory sentencing regimes, which prescribe mandatory minimum sentences upon conviction for criminal offences. Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles.

In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate



penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.

Source: The Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Policy Discussion Paper, 2014) 5 <[lawcouncil.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf](http://lawcouncil.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf)>.

**Source D**

**MANDATORY SENTENCING: DOES IT REDUCE CRIME?**

Don Weatherburn, director of the NSW Bureau of Crime Statistics, told Fact Check there was evidence that mandatory sentencing reduced the amount of crime being committed but the topic of the effectiveness of mandatory sentencing is controversial.

'There is a substantial body of evidence that higher imprisonment rates produce lower crime rates but the size of the effect and the cost-effectiveness of prison is much debated,' he said.

Geraldine Mackenzie, Dean of the Faculty of Law at Bond University, say there's only slim proof mandatory sentencing is an effective deterrent. 'There is little evidence mandatory sentencing has direct results in terms of deterrence to offenders, although it is true some penalties influence behaviour in various ways, so you can't really say there's no evidence.'

Source: ABC News Fact Check, 'Mandatory sentencing: does it reduce crime? ABC News (Online, 5 February 2024) <[abc.net.au/news/2014-02-05/does-mandatory-sentencing-reduce-crime/5225986](http://abc.net.au/news/2014-02-05/does-mandatory-sentencing-reduce-crime/5225986)>.

**Source E**

**THE LAW SOCIETY STRONGLY OPPOSES MANDATORY SENTENCING**

The Law Society of Western Australia is firmly opposed to mandatory sentencing in any form as there is no evidence that it works to deter criminal behaviour and is in fact more likely to result in harsh and disproportionate sentences.

Law Society President Jocelyne Boujos said that mandatory sentencing laws raise serious concerns as to a Government's respect for the independence of the judiciary. Mandatory sentences are also inconsistent with international human rights law, especially in relation to their disproportionate impact on Indigenous people.

Ms Boujos said that limiting judicial discretion can lead to injustice, and research demonstrates that lengthy custodial sentences do little to rehabilitate offenders or protect the community.

Source: The Law Society of Western Australia, 'The Law Society Strongly Opposes Mandatory Sentencing' (Media Release, 18 January 2021) <[lawsocietywa.asn.au/news/the-law-society-strongly-opposes-mandatory-sentencing/](http://lawsocietywa.asn.au/news/the-law-society-strongly-opposes-mandatory-sentencing/)> 1.

**Source E**

**MANDATORY MINIMUM SENTENCING INTRODUCED FOR FEDERAL CHILD SEX OFFENDERS**

The Coalition thinks some offenders are being given punishments of jail terms counted in months rather than years.

'The overarching point ... is the community has an expectation that punishment should reflect the seriousness of the offence, and there are no more serious offences than the type of things this legislation deals with,' Attorney-General Christian Porter said.

The Opposition also cited numerous studies casting doubt on whether minimum sentences served as a deterrent, and its limited effect on preventing reoffending. 'While we maintain our opposition to mandatory sentencing, because it doesn't work and makes it harder to catch, prosecute and convict criminals, we will not insist on our amendments,' Labor's Murray Watt told the Senate.

Source: Matthew Doran, 'Mandatory minimum sentencing introduced for federal child sex offenders', *ABC News* (Online, 16 June 2020) <[abc.net.au/news/2020-06-16/mandatory-minimum-sentencing-introduced-child-sex-offences/12361104](http://abc.net.au/news/2020-06-16/mandatory-minimum-sentencing-introduced-child-sex-offences/12361104)>.

## 11.6 Sentencing children

### Key Term

**Restorative justice:** a process that brings together everyone impacted by a person's criminal offending with the aim to resolve or repair the harm caused.

### *Youth Justice Act 1992 (Qld)*

Throughout this chapter, you have learnt that the *Penalties and Sentences Act 1992 (Qld)* provides the courts with guidance around how to sentence a defendant appropriately. When the defendant is a child (a person under the age of 18 when the criminal offence was committed), a different Act applies. This Act is called the *Youth Justice Act 1992 (Qld)*.

Section 150 of the Act outlines the different factors that a magistrate or judge sitting in the Childrens Court (although serious offences such as murder are heard by the Supreme Court of Queensland) must consider when handing down a sentence. These factors (which are similar to sentencing guidelines used for adults) can include:

- the nature and seriousness of the offence,
- the child's previous offending history,
- whether the child is a victim of, or has been exposed to, domestic violence,
- any information about the child, including a pre-sentence report and bail history, and
- any impact of the offence on a victim.

Section 150(2) also outlines several special considerations that apply to children, including that:

- a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and

- a non-custodial order is better than detention in promoting a child’s ability to reintegrate into the community; and
- the rehabilitation of a child found guilty of an offence is greatly assisted by the child’s family; and opportunities to engage in educational programs and employment; and
- a child who has no apparent family support, or opportunities to engage in educational programs and employment, should not receive a more severe sentence because of the lack of support or opportunity; and
- a detention order should be imposed only as a last resort and for the shortest appropriate period.

It is important to emphasise that the Act directs courts to hand out a period of imprisonment as a last resort, as exposing children to prison can have long term consequences



## Practical Application

### PENALTIES AND SENTENCING OUTCOMES

#### A reprimand was the most common penalty for children in Magistrates Courts

Non-custodial penalties comprised the majority of penalties in Magistrates Courts, with children reprimanded in 29.8 per cent of cases, followed by good behaviour bonds (16.0%), probation (15.4%) and community service (14.0%).

#### The rate of custodial penalties increased in Magistrates Courts

The use of custodial penalties in Magistrates Courts gradually increased over time, from 4 per cent of cases in 2005–06 to 7 per cent in 2018–19. The number of detention orders more than doubled in the data period, from 95 to 209 cases.

#### More than half of children sentenced to detention received an order less than 6 months

The majority of children sentenced to detention (51.3%) received an order of under 6 months, while 30.3 per cent received between 6 and 12 months. The average head sentence for children sentenced to detention in the Magistrates Courts was 4.5 months. The average head sentence for children sentenced to detention in the higher courts was 16.8 months.

Source: Queensland Sentencing Advisory Council, Kids in court: *The sentencing of children in Queensland*, (Report, November 2021) <[sentencingcouncil.qld.gov.au/\\_\\_data/assets/pdf\\_file/0017/700433/Kids-in-Court-The-Sentencing-of-Children-in-QLD.pdf](http://sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0017/700433/Kids-in-Court-The-Sentencing-of-Children-in-QLD.pdf)>.

1. Identify whether custodial or non-custodial penalties were most often handed down by magistrates to children. [C]
2. State what percentage of custodial sentences were handed down by magistrates in the period 2018-19. Was this an increase or decrease on the previous period studied? Why do you think the use of this penalty type has changed? [C] [A]
3. Identify what the average head sentence is for a child sentenced in the Magistrates Court of Queensland and the higher courts (Supreme or District Court of Queensland). Does this surprise you? Why or why not? [C] [E]

## Restorative justice conferencing

One approach we have not mentioned previously that is relevant to child defendants as a response to criminal behaviour is the use of restorative justice conferencing. **Restorative justice** conferencing can occur:

- as part of a practice of diversion (which aims to keep children out of the criminal justice system altogether), or
- before a sentence is decided (going on to form part of a pre-sentence report), or
- after an order is given by a court.

Restorative justice conferencing can involve the victim, but it may not if the victim does not wish to take part. Other people that may attend include the child's parents or caregivers, a police officer, the child's legal representation, representatives of the victim or counsellors. At the end of the conferencing process, the child may agree to some form of restitution (such as completing a task) to repair the damage or harm caused. If the child fails to comply, further action may be taken against them.

## 11.7 Appealing a sentence

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After a sentence has been handed down in by a magistrate or a judge either side may consider filing an appeal. There are two grounds of appeal with regard to a sentence, these being the sentence was:

- manifestly excessive, or
- manifestly inadequate.

This appeal will be heard by a higher court. For example a sentence handed down by a:

- magistrate will be heard by a judge of the District Court of Queensland, and
- judge of the District Court of Queensland or a judge of the Supreme Court of Queensland will be heard by the Queensland Court of Appeal (made up of three judges).

The last court of appeal is the High Court of Australia, but to have an appeal heard in this court requires a party to apply for and be granted special leave.

The appellant court can:

- leave the sentence as it is,
- change the sentence (such as making it longer or shorter), or
- give a different sentence.

We will see these key concepts and processes in action through the case study below.



## Case Study

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*R v Eric (a pseudonym); Ex parte Attorney-General (Qld) [2021] QCA 81*

**Facts:** The respondent, a 17 year old male, was at a party. Some partygoers went to a petrol station to buy cigarettes. At the station was another car. This car contained people a female partygoer identified as being friends with a person she believed had sexually assaulted someone she knew. When she shared this information some of the young men at the party, they decided to take revenge for the alleged sexual assault.

The respondent approached one of the men, Mr Ali Abdi Ali. He struck him on the head with a metal pole. Ali fell unconscious to the ground.

The blow fractured his skull and he suffered external and internal bleeding. As a result of the assault, Mr Ali now relies on others to complete basic tasks such as cooking, cleaning and doing his laundry. He lacks capacity to manage his finances or make decisions about his health.

The respondent pleaded guilty to the offence. He was sentenced to a period of detention of five months to be followed by a period of 12 months probation commencing after his release. No conviction was recorded.

The Attorney-General appealed this sentence to the Queensland Court of Appeal.

**Legal Issue:** Was the sentence so manifestly inadequate that it must be taken that the sentencing discretion miscarried?

**Decision:** The appeal was allowed as the sentencing judge gave too much weight to matters of mitigation and failed to give appropriate weight to the objective seriousness of the offence. The respondent's sentence was varied to a period of two years detention. He is to be released after he has served 12 months. President Sofronoff, who wrote the lead judgment, held:

*[24] This was a pre-meditated violent offence. It was a brutal and dangerous attack with a weapon upon a young man who had done nothing to provoke the attack and who must have been entirely unprepared to react defensively to protect himself. The injuries which the respondent inflicted upon Mr Ali seem to be largely permanent and are severe. Their effect upon Mr Ali's life has been tragic. These consequences of the offence cannot be ignored or regarded as less significant than the respondent's mitigating factor.*

*[25] The sentence of five months' detention imposed upon the respondent was the result of erroneous reasoning and was, in any case, inadequate having regard to the nature of the offence, its objective circumstances and the effect upon the offender's victim.*

1. Identify the criminal offence the respondent was charged with and the initial sentence he received. [C]
  2. Identify who appealed this sentence and the ground of appeal provided. [C]
  3. Explain the decision made by the Queensland Court of Appeal. Do you agree or disagree with this decision? Why or why not? [C] [E]
-

# Review

## Comprehend

1. **Describe** four non-custodial sentence types. [C]
2. **Compare and contrast** a mitigating and aggravating feature. [C]
3. **Explain** five sentencing guidelines outlined in *Penalties and Sentences Act 1992* (Qld) s9. [C]

## Select, analyse and evaluate

For each case:

- a. **Identify** and locate the maximum penalty for the criminal offence in the case study, as well as *Penalties and Sentences Act 1992* (Qld) s9. [S]
- b. **Identify** at least two cases that share similarities to the key facts of the case study and could be useful to cite as precedent. [S]
- c. **Apply** the relevant common law and statute law to decide an appropriate sentence. [A] [E]

### Case 1

*R v Hastings*

Wayne Hastings, a 25 year old male, has entered an early guilty plea to one count of ‘Choking, suffocation or strangulation in a domestic setting’. He put both his hands around the neck of his partner of two years, Brianna, during a heated argument at their home. Photographs taken of Brianna’s neck after the attack show red marks around her throat. He has a criminal record, with two previous convictions of stealing and shoplifting.

### Case 2

*R v Martin*

Charlotte Martin, a 35 year old female, has entered a guilty plea to two counts of ‘Trafficking in a dangerous drug’, specifically methamphetamine. She is a single parent to two teenage children. Her current partner, Adam, with whom she has been in a relationship for 5 years, was recently convicted for the same offence. A police investigation showed that that she supplied at least 12 grams of methamphetamine to at least 11 customers over a two month period. Charlotte has one entry on her criminal record, a conviction of possession of a dangerous drug when she was 21 years old. She is employed as an accountant and coaches her youngest child’s netball team.

### Case 3

*R v Thompson*

Ryan Thomson, a 19 year old male, was found guilty of one count of ‘Unlawful striking causing death’ by a jury. Prior to the incident, Ryan had been drinking for six hours at Goldie’s, a bar and nightclub in Fortitude Valley. The victim, Ben Jenkins, was dating Ryan’s former partner, Hailey. At trial, Ryan alleged that Ben had provoked him into punching him by saying Hailey was better off with a ‘real man’. Ryan has no criminal record.

## Analyse and evaluate

### Source 1

#### THE EFFECTIVENESS OF LICENCE RESTRICTION FOR DRINK DRIVERS

The available evidence indicates that loss of licence for drink driving is a very effective deterrent, compared to other penalties and sanctions commonly applied to drivers (Nichols & Ross, 1990; Vingilis et al, 1990). It is also evident that licence disqualification reduces overall offences and crashes among offenders, despite the fact that some continue to drive during the term of the sanction (Zaal, 1994). For example, a recent Queensland study examining the records of over 25,000 disqualified drink drivers found that crash and offence rates during the disqualification period were about one third of the rate incurred during legal driving (Siskind, 1996). While these reductions are impressive, they confirm that there is considerable scope to improve the effectiveness of the measure.

Accordingly, the scale of illegal driving among disqualified drivers remains a major issue of concern. While it is difficult to estimate the full extent of disqualified driving, the limited research undertaken in Australia tends to suggest that it is a common problem (Job, Lee & Prabhakar, 1994; Smith & Maisey, 1990; Staysafe, 1990; Watson et al, 1996). Surveys of disqualified drivers in Victoria (Robinson, 1977) and Western Australia (Smith & Maisey, 1990) found that over 30% of respondents admitted driving while disqualified.

Source: Barry C Watson and Victor Siskind, *The effectiveness of licence restriction for drink drivers*, (Paper, Road Safety Research and Enforcement Conference Hobart, 1997) <[eprints.qut.edu.au/1556/1/1556.pdf](http://eprints.qut.edu.au/1556/1/1556.pdf)>.

1. **Analyse** the effectiveness of the penalty of licence restriction as a means of deterring, protecting, denouncing, rehabilitating and punishing a drink driver. [A]
2. **Make a recommendation** as to how this legal issue could be addressed, **justifying** your decision with legal reasoning. [E]

### Source 2

#### NUMBER OF WOMEN SENTENCED TO JAIL IN QUEENSLAND JUMPED 338%, WITH A THIRD BEING INDIGENOUS

The number of women sentenced to prison in Queensland increased by a staggering 338% over the 14 years to 2019, with Aboriginal women making up a third of cases, according to a new report.

The number of women sentenced to imprisonment more than quadrupled from 485 cases in 2005 to 2,128 cases in 2019, according to the report 'Engendering justice', released on Wednesday by the Queensland sentencing advisory council.

Aboriginal women and girls in Queensland were more likely to be sentenced for nonviolent and minor crimes than non-Indigenous women, the report found.

Aboriginal and Islander women and girls were also more likely to receive short sentences – of less than six months – for these offences, but these penalties were found to have

exacerbated existing disadvantage and had devastating effects on families. Children were left extremely vulnerable to being removed from their care, the report said.

Source: Lorena Allam, 'Number of women sentenced to jail in Queensland jumped 38%, with a third being Indigenous', *The Guardian*, (Online, 17 August 2022) <[theguardian.com/australia-news/2022/aug/17/number-of-women-sentenced-to-jail-in-queensland-jumped-338-with-a-third-being-indigenous](https://www.theguardian.com/australia-news/2022/aug/17/number-of-women-sentenced-to-jail-in-queensland-jumped-338-with-a-third-being-indigenous)>.

1. **Examine** the viewpoint of First Nations women and girls in Queensland and their consequences. [E]
2. The article states that First Nations women and girls were more likely to receive short sentences. **Decide** whether imprisonment is a fair and just penalty for nonviolence and minor crimes, **justifying** your point of view with legal reasoning. [E]

# Unit 2

## Balance of probabilities

Unit 2 focuses on the civil justice system, its court processes and dispute resolution methods, and the principles and processes of contract law, consumer law, and the law of negligence.

# Topic 1

Topic 1 introduces you to the civil law, its different branches of law, and the role it plays in resolving disputes between parties through various processes, including the courts, tribunals and other dispute resolution methods.

## Civil law foundations

**Chapter 12:** Introducing the civil law

**Chapter 13:** Dispute resolution in civil law

**Chapter 14:** Alternative dispute resolution

**Chapter 15:** Resolving issues through the civil justice system

# Civil law foundations

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## Chapter 12: Introducing the civil law

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12.1 What is civil law?

12.2 Sources of civil law

12.3 Distinguishing civil law from criminal law

12.4 The branches of the civil law: contract and torts

12.5 The doctrine of precedent

12.6 How does international law influence Australia's civil law?

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that the civil law of Australia, its subject matter and processes are derived from customary law and English common law and statute
  - there are fundamental differences between the civil and criminal law
  - there are two predominant branches of the civil law, contract and torts (including negligence), which originally existed in English law
  - that all Australian law is subject to the doctrine of precedent, and it is with the High Court of Australia, that final authority rests
  - some Australian civil law is determined by international obligations.
- analyse and evaluate equitable access to, and legal barriers preventing, access to the civil justice system.

## Key Terms

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**Civil law:** the law established to define the rights and responsibilities of individuals, government entities, and private or non-government organisations, in their interactions with each other.

**Contract law:** the body of law which governs the legal rights and obligations entered into between two or more parties making an agreement.

**Precedent:** the process whereby courts are obliged to follow the decisions (the *ratio decidendi*) of the higher courts in the hierarchy, unless they can be distinguished.

**Tort law:** the body of law which governs the legal relationship between a person who causes an actionable wrong to another person thereby causing that person damage and loss.

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## 12.1 What is civil law?

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### Introduction

One of the purposes of law is that it assists society to operate in an orderly, fair, and efficient manner. When people interact each other, or with an organisation that affects their lives, these interactions, are in many cases governed by laws which have been established to regulate interactive behaviour. When individuals do something, it is usually because they think they are entitled to do it. It might be walking across a busy road where cars travel up and down. When you do that, laws regulate your conduct. In certain circumstances, crossing a busy road is not breaking the law. However, if you are careless, or a driver is not sufficiently careful to look out for you, and you are struck and injured by the driver of a car, certain questions might arise.

- Should you have walked an extra 200 metres to cross at a pedestrian crossing?
- Was the driver of the car travelling too fast?
- Did the driver of the car fail to slow down when he saw you?

Sometimes what you think you are entitled to do involves interaction with another person or organisation. Suppose you need to travel by public transport to go shopping. To do so in most Australian cities, involves buying a ticket (or travel card) to ‘tap and go’ to pay for the journey. If you do this, and get on the train or bus, you are entering an agreement with the Department of Transport, who is responsible for the train or bus system. By paying you have the right to travel for the journey for which you have paid. Are there laws governing what you can and can’t do while travelling? You can be sure there are.

### Practical Application

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Individually, or in small groups, conduct a class exercise about an activity in which you or another person is involved, where there is interaction between individuals, or between individuals and an organisation. Identify rights that the individuals and organisations have, and the obligations that the law has imposed on the parties. For example, find out what happens when you decide to get a car driver’s licence or work as a casual employee for a local business, or choose your own activity. Write a short report you can present to the class orally. [C] [A] [R]

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## The nature and scope of civil law

**Civil law defines the rights and responsibilities of individuals, government entities and private or non-government organisations in their interactions with each other. In other words, it defines rights, imposes obligations, and resolve disputes.** Some of these rights are set out below, and the area of law which imposes obligations relevant to that right is identified. You may not recognise all of these rights and obligations at this stage. Search each of them on the internet and make notes to help you understand each of the rights set out.

CIVIL RIGHTS	LAWS IMPOSING OBLIGATIONS
First Nations Peoples' right to land	<i>Native Title Act 1993</i> (Cth)
The right to protect a significant First Nations Peoples' cultural site from mining damage	<i>Native Title Act 1993</i> (Cth)
Protecting your property	Tort law-trespass to property
Use and enjoyment of land	Tort law-nuisance
Compensation for injury to your person at work	<i>Workers Compensation and Rehabilitation Act 2003</i> (Qld)
Compensations for injury to your person in a car accident	Tort law-negligence
Protecting your name and reputation	<i>Defamation Act 2005</i> (Qld)
Reinstatement for unfair dismissal and lost wages	<i>Fair Work Act 2009</i> (Qld)
Protecting your person	Tort law-trespass to the person
Damages for breach of contract	Contract law



### Practical Application

With respect each of the sources set out below, answer the following questions:

1. What is the right which is the basis for the legal action? Who is making the claim? [C]
2. Who is the party against whom the legal action has been taken or is proposed? [C]
3. What outcome has occurred, if any? Describe what has happened. [C]

#### Source 1

#### **GEOFFREY RUSH CASE: DAILY TELEGRAPH AND NATIONWIDE NEWS LOSE DEFAMATION APPEAL AGAINST ACTOR**

Oscar winner to be awarded full \$2.9 million in damages after judges reject all publishers grounds of appeal



## Practical Application ...

The Sydney Daily Telegraph will have to pay the actor Geoffrey Rush a record \$2.9 million damages after the tabloid lost its appeal against a historic defamation ruling.

The newspaper and its publisher Nationwide News had challenged the Australian Federal Court decision from April 2019 that found claims conveyed in two of its news articles from 2017 that the Oscar winner had behaved inappropriately towards a colleague were not credible.

On Thursday the full court of the Federal Court upheld the 2019 ruling that the articles portrayed the actor as a sexual predator and 'pervert' in detailing his behaviour towards a co-star during the 2015-16 run of the Sydney Theatre Company production of King Lear.

Source: Elias Visontay, 'Geoffrey Rush case: Daily Telegraph and Nationwide News lose defamation appeal against actor', *The Guardian*, (Online, 2 July 2020) <[theguardian.com/film/2020/jul/02/geoffrey-rush-case-daily-telegraph-and-nationwide-news-lose-defamation-appeal-against-actor](https://www.theguardian.com/film/2020/jul/02/geoffrey-rush-case-daily-telegraph-and-nationwide-news-lose-defamation-appeal-against-actor)>.

### Source 2

#### ROBODEBT CLASS ACTION LAW FIRM PREPARED TO SUE FOR ALLEGED 'MISFEASANCE IN PUBLIC OFFICE'.

The law firm behind the \$1.8 billion robodebt class action says it is prepared to launch a fresh civil case alleging misfeasance in public office, against former ministers and public servants, unless a settlement for further compensation is reached.

Peter Gordon, a senior partner at Gordon legal, confirmed on Tuesday the firm had written to the Albanese government seeking to address the claims of persons who weren't compensated by the original case.

Gordon told Guardian Australia the firm has already received instructions from robodebt victim clients and was 'exploring a number of possible claims including a claim of misfeasance in public office-which is both a civil tort and a crime-' and a range of other causes of action'.

The settlement approved was for the claim in unjust enrichment, it did no more than get the money back the government had stolen,...

Source: Paul Karp, 'Robodebt class action law firm prepared to sue for alleged misfeasance in public office', *The Guardian* (Online, 11 July 2023) <[theguardian.com/australia-news/2023/jul/11/robodebt-class-action-law-firm-prepared-to-sue-for-alleged-misfeasance-in-public-office](https://www.theguardian.com/australia-news/2023/jul/11/robodebt-class-action-law-firm-prepared-to-sue-for-alleged-misfeasance-in-public-office)>.

### Source 3

#### QANTAS FACES CLASS ACTION LAWSUIT FOR NOT REFUNDING TICKETS FOR COVID CANCELLED FLIGHTS

Qantas has been hit with a class action lawsuit seeking millions of dollars in refunds and compensation for customers who had flights cancelled following the COVID outbreak.

Echo law filed a lawsuit against Australia's national carrier in the Federal Court on Monday, alleging the airline misled customers about their refund options, withheld funds, and engaged in a 'pattern of unconscionable conduct'. Qantas has completely rejected the allegations.

Source: AAP/ABC, 'Qantas faces class action lawsuit for not refunding tickets for COVID cancelled flights', *ABC News* (Online, 21 August 2023) <[abc.net.au/news/2023-08-21/qantas-hit-with-lawsuit-for-holding-over-1b-credits/102755916](https://www.abc.net.au/news/2023-08-21/qantas-hit-with-lawsuit-for-holding-over-1b-credits/102755916)>.1b-credits. (excerpts only)

## 12.2 Sources of civil law

### What do we mean by sources of law?

The phrase ‘**sources of law**’ is used in two ways and it is important to distinguish between those two different meanings. **First**, it is used to refer to the **authoritative source of a law**, that is, whether a law has been made by parliament (statute law) or by judges (common law). **Second**, it is used to refer to the **historical development of the law or a legal system**.

It is important to study the historical development of the law because it informs our understanding of our current system of laws. This is because our laws evolve and change to reflect changes in society. They are a living thing, as you have no doubt discovered in your study of the criminal law.

### The historical development of our legal system

The medieval common law in England (in the 12th century) was largely concerned with serious crime and land tenure (ownership and other rights). It was not concerned with breach of informal agreements reached by word-of-mouth or damage to persons or to property caused unintentionally by accident. The central courts administering justice on behalf of the King were concerned with breaches of the King’s peace. Such cases were decided by the Royal law of the central courts, but otherwise:

*...It is not the custom of the court of the Lord King to protect private agreements*

*Glanville, tractatus de legibus et consuetudinibus angliae, 1180*

At the time, the common law was therefore not concerned with remedies for breach of informal agreements (oral agreements), although there were remedies available for what are now described as intentional torts (e.g. trespass to the person). It was possible, however, to seek justice elsewhere, in county courts, borough courts, and courts of markets and affairs, for example.

In the 13th century, the common-law system recognised formal contracts (agreements in writing) first. The practice was to authenticate these agreements by sealing them. Sealing a document involved placing a wax seal on it thereby identifying the documents owner and establishing its importance as an agreement. Sealed agreements became actionable in central law courts.

By the 13th to the 17th centuries, the common law courts in England allowed actions to be brought on informal (oral) contracts. In reaction to these developments, a view took hold that the unregulated character of the 17th century jury trial had made it too easy for plaintiffs to bring actions on verbal promises inadequately proved. The *Statute of Frauds* (1677) (UK) required that there be formal agreements in writing under signature to transfer land and to sell goods worth more than £10. This was the first statutory intervention in the common law of contract.

You will find in Topic 2: Contractual Obligations, which follows, that the 19th century was a period during which many decisions were made in the common law of contract, when it was necessary to decide the many disputes in the commercial world of the Industrial Revolution. During this period the idea reached its peak that men of full age and competent understanding should have the utmost liberty in contracting, and that their contracts should be enforced by the courts. You will also find that as the world became more complicated, it became more necessary for governments to intervene and pass laws to make the common law of contract more equitable.

Until the case of *Donoghue v Stevenson* [1932] AC 562, the law of torts had not been able to formulate a general test for whether or not a person who was negligent owed a duty of care. Therefore, unless the courts had previously decided that a particular duty of care to a particular

class of persons was enforceable by the law, actions in negligence would fail unless the court created a new duty of care category. This case marked the beginning of the modern law of tort, and this is where Topic 3: Negligence and the Duty of Care essentially begins later in this book.

A number of matters should be clear to you after following this brief simplified history of our common law from the 12th century and from revising key concepts raised in Chapter 2.

1. Customary law existed prior to British settlement in 1788.
2. British settlement brought English common law and statute law to Australia in 1788 and applied it in Australia. It became the Australian common law, and statute law, to the extent that it applied in Australia.
3. In 1992, in *Mabo (No 2)*, the High Court of Australia recognised common law native title and it became part of Australian common law.
4. Common law native title was enshrined in Australian statute law in the *Native Title Act 1993* (Cth).
5. In 1901, the *Australian Constitution Act 1901* (Cth) was passed, creating the Commonwealth of Australia and a Federation of six Australian States, each of which, according to its powers and jurisdiction, passes laws which must be observed by the people each state or the whole of Australia.
6. Each state has a judicial system, in which its own laws are applied, and where allowed, they apply the law of the Commonwealth, and vice versa.
7. The High Court of Australia since 1968, when appeals to the Privy Council in Great Britain were abolished, has generally (some states did not accept this as appropriate initially) been the ultimate Court of Appeal and interpreter of the *Australian Constitution*.

## Tip

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We will now look at the meaning of the common law as it is applied in the Australian courts, and in Queensland courts in particular. The topic has already been covered in Chapter 2.5: **Common Law**. Go back of this chapter and read it. As you read it make notes under the following headings to help you revise what it said. [C]

1. The Queensland hierarchy of courts.
  2. Judge-made law.
  3. Judicial precedent.
  4. *Ratio decidendi* and *obiter dicta*.
  5. *R v Kaporonovski* [1972] Qd R 465; *Kaporonovski v R* (1973) 133 CLR 209.
  6. Statutory interpretation.
- 

## Statute law and the common law

We have seen in Chapter 2.3: Separation of powers: the legislature, executive, and judiciary, and in Chapter 2.4: **Statute Law**, that the Parliaments of the Commonwealth of Australia and Queensland have the authority to make laws which apply to our lives, and that these laws override the common law to the extent that they are applicable. Again, it would be very useful for you to read these earlier chapters. Make notes to describe and explain statute law and common law, what they mean, where they come from, and how they are applied.



### What do you think?

The process by which the relationship between common law and statute law is maintained, involves interaction between parliaments as law-makers, courts as guardians and sources of the common law, and courts as interpreters of statutes. This is illustrated for you in Chapter 2.3: Separation of Powers: the legislature, executive, and judiciary.

What do you think are the advantages and disadvantages of the separation of powers doctrine? Try to give actual examples in your answer of legal situations in which the doctrine is important. [C] [S] [A]

## 12.3 Distinguishing civil law from criminal law

The development of the civil law involved separation of the criminal law from the civil law. The first modern paid police force was started in metropolitan London by Sir Robert Peel in 1829, when the *Municipal Corporations Act* (1829) was passed. Whatever crimes established by the common law and statute law in Britain, applied in Australia in accordance with the legal position set out above, until 1899.

A great Queensland lawyer, Sir Samuel Griffith, wrote the *Criminal Code 1899* (Qld), which codified into statute all of the common law relating to criminal offences. This was and still is a remarkable achievement, and the *Code* continues to be the basis of the criminal law today in Queensland, and also in Tasmania and Western Australia, where it was adopted.

Importantly, the civil law is very different from the criminal law, not only in Queensland, but everywhere in Australia. You can see this in the comparative table which follows.

CIVIL LAW
<ul style="list-style-type: none"> <li>Under the civil law, the person who has suffered damage (the <b>plaintiff</b>) must bring a private claim (set) against the alleged wrongdoer (the <b>defendant</b>). Private legal disputes may arise between individuals, organisations and governments.</li> </ul>
<ul style="list-style-type: none"> <li>Under the civil law, the chief remedy usually sought is <b>compensation</b> (damages). Other remedies such as specific performance, injunctive relief, and declaratory relief, may be sought if appropriate, in both contract and in tort.</li> </ul>
<ul style="list-style-type: none"> <li>Civil law is <b>based mostly on common law</b> (case law) although an increasing number of statutes have been passed that have altered both contract law and the law of torts.</li> </ul>
<ul style="list-style-type: none"> <li>The standard of proof according to which the plaintiff must prove his or her case in a civil action is on the <b>balance of probabilities</b>.</li> </ul>
<ul style="list-style-type: none"> <li>In civil trials, <b>judges decide both questions of fact and questions of law</b>. It is very unusual to have a jury trial in a civil matter, although it is not unheard of in defamation cases, particularly those involving high profile plaintiffs.</li> </ul>

- The cost of bringing a civil court action is usually **paid by the loser** in the case. This will include the cost of court fees, lawyer's fees, and other expenses relating to the claim. Quite often, these amount to thousands of dollars and make it difficult to bring a claim which is uncertain. There are ways of dealing with this issue which will be looked at in the context of the next two topics, but there is no substitute for good legal advice for a plaintiff. Legal aid is rarely granted in civil cases, the exception being family law cases involving children.

## CRIMINAL LAW

- Criminal charges are made by the police. Court cases are commenced and argued by a **prosecutor** on behalf of the victim and the general public (the State) against the **accused**. Although rare, it is possible for a citizen to bring a private prosecution.
- One of the main aims of criminal law is usually to **punish the offender**, and thus preserve the peace and good order of the society in which we live. Increasingly, victims seek the opportunity to have a voice in criminal proceedings and to seek restitution (compensation) from the offender or from the state under the *Criminal Offence Victims Act 1995* (Qld) and the *Victims of Crime Assistance Act 2009* (Qld).
- The criminal law in Queensland, Tasmania, South Australia and Western Australia is all contained in Acts of Parliament, which owe their existence to Sir Samuel Griffiths codification of the criminal law in *Criminal Code 1899* (Qld). The basis of the criminal law in New South Wales and Victoria is the common law, but this has been significantly the subject of statute law in both states.
- A much higher standard of proof of **beyond reasonable doubt** is required for the prosecution to prove its case against an accused person in a criminal trial.
- In criminal trials, it is nearly always the case, where a person is charged with a serious offence, that it will be heard before a **judge and jury**. The jury decides questions of fact, and a judge decides questions of law.
- In criminal prosecutions, the **State usually pays the cost of bringing the matter to court, and even where the accused is found not guilty, the accused pays his or her own costs**, unless entitled to legal aid.

### Hypothetical?

**Facts:** Tessa celebrates with her team mates after winning the netball grand final. She has too much to drink, and despite being told not to drive by friends, decides to drive home because it is a short distance. On the way she must pass through a *Give Way* sign, drives over the speed limit, and fails to give way to another vehicle travelling through the intersection from her right. There is a collision, with the other vehicle hitting the rear of her four-wheel-drive. The other driver's car is a write-off and he is badly injured, suffering a broken leg, cuts to his face, and concussion. The police attend the scene almost immediately. Tessa is breathalysed and records a reading of .09, over the legal limit. The police take statements and investigate the accident.

### Hypothetical? ...

1. What criminal charges are the police likely to bring against Tessa? [C]
2. Could the driver of the other vehicle argue that Tessa was negligent and caused his injuries? Why? [C] [A]
3. Could the driver of the other vehicle recover damages for the loss of his vehicle against Tessa? Why or why not? [C] [A]
4. How does this illustrate that the same fact situation can give rise to both a criminal court action and a civil court action? Explain your answer. [C] [A]

In some cases, a person's negligent action or omission is so extreme that he or she is charged with a criminal offence. This is known as criminal negligence, which means that the person has been reckless to the point of almost knowingly causing harm to the victim of the accident in the eyes of the law. In other words, the jury is asked to consider whether the actions of the charged person was so grossly negligent that he or she must have known that someone else was likely to be injured.

## 12.4 The branches of the civil law: contract and torts

We have seen above the different characteristics of the civil law and criminal law. Within the civil law, we have seen that historically there were two important and separate branches, namely contract law and the law of torts.

A tort is a civil wrong, other than a breach of contract, which causes personal injury, property damage or financial loss and for which the innocent party usually claims damages. **The law of civil wrong has developed to compensate a person who suffers injury, damage or loss due to another person's (the tortfeasors) act or omission.** Such act or omission, depending on the particular tort, can be done intentionally, negligently, and even can be unintended or accidental (in cases involving strict liability). It is found mainly in the common law. The purpose of the law of civil wrongs is for justice to be achieved by transferring the loss from the victim to the wrongdoer. It is based on the principle that each citizen should take responsibility for the consequences of his/her actions.

Like torts, the law of contract is contained largely in the common law and does not deal with criminal behaviour. **When a contract comes into existence, however, it creates a legal binding relationship between two or more people in which each person usually makes a promise which he or she intends to keep.** An example would be a promise by a customer to pay for a new car when it was delivered in exchange for a promise by a car dealer to order a new car for delivery to the customer.

## 12.5 The doctrine of precedent

You have already studied this topic earlier in this chapter when revising Chapter 2.6: Courts: Sources of Common Law. You will understand then, that when courts make decisions, they are

obliged to follow the decisions (the *ratio decidendi*) of the higher courts in the hierarchy, unless they can be distinguished. When they are distinguished it means the judge has decided the earlier decision does not apply to the facts of the case before him or her. Judicial precedent is a process whereby new law is made in the court system. This and other features of the doctrine of precedent are illustrated in the cases that follow to the end of this chapter.

### Keeping dangerous animals

To see the development of judicial precedent, we could look at almost any area of the law. The following is one example of many important principles for the operation of a civilised society:

*To what extent should a person who keeps an animal be responsible for damage caused by that animal?*

Formal recognition of the need for a law dealing with this problem is not new. The *Code of Hammurabi*, which was previously referred to in Chapter 1, dealt with it as follows:

*If a mad (and wild) bull meet a man in the highway and gore him and kill him, that case has no remedy. If a man's ox is known to be addicted to goring, and he has not blunted his horns, or fastened up his ox, then if his ox has gored a free man and killed him he shall give half a mina of silver. If it be a man's slave, he shall give a third of a mina of silver*

*Code of Hammurabi, Sections 250–252 (circa 1700 BC)*

This *Code* recognised that it was not fair to deal with people who kept different types of animals in the same way. From about the 17th century onwards, the English common law developed a legal principle along the same lines as *Hammurabi's Code*. The first statement of this legal principle in England was made in the decision of Lord Holt in 1699 in the case of *Mason v Keeling*, 12 Mod. 332. The rule was next applied (followed by a later judge) in 1858 in the following case.

### Case Study

*Besozzi v Harris* 1 F & F 92, 1858



**Facts:** The plaintiff, Besozzi, was visiting the home of the defendant, Harris, with his permission. Harris was the owner of a bear which he kept fastened on a chain. The plaintiff walked past the bear's house and was grabbed and injured by the bear.

**Legal Issue:** Was Harris responsible for the personal injuries suffered by the plaintiff?

**Decision:** He was responsible. Justice Crowder said, 'The statement that the defendant knew the bear to be of a fierce nature must be taken to be proved, as everyone must know that such animals as lions and bears are of a savage nature. A person who keeps such an animal is bound so to keep it that it shall do no damage without having them disputed in law courts in the future.'

1. How did the judge describe bears? [C]
2. What did the judge say about the state of knowledge of people who keep bears? [C]
3. What did the judge say people who keep bears must do? [C]
4. What is the principle of law developed by the judge in this case? You will need to combine all of your answers to the previous three questions in stating the legal principle. [A]



## Case Study

*Filburn v People's Palace and Aquarium Co Ltd* (1890) 25 QBD 258

**Facts:** The plaintiff was injured by an elephant kept by the defendant in its amusement park.

**Legal Issue:** Was the respondent liable for the damage to the plaintiff?

**Decision:** Yes. The elephant fell into the category of a dangerous animal. Lord Esher MR (Master of the Rolls – a senior judge in England) said at page 261, '*The law of England recognises two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous.*' The three judges in this case, Lord Esher, Lord Justice Bowen and Lord Justice Lindley, gave judgments that agreed (that is, the court's decision was unanimous).

1. What are the two classes of animals that the law of England recognised in this case? [C]
2. Into what class did the elephant fit? [C]
3. When does a person's state of knowledge of whether an animal is dangerous or not become important? [A]

From the above cases, you can see that judges in England developed a legal principle, or rule, which was in fact the law about damage caused by animals kept by people. The judges, in deciding later cases, were required to divide animals into two classes. These were:

1. dangerous animals (*ferae naturae*); and
2. tame animals (*mansuetae naturae*).

If an animal fell into the category of a dangerous animal, it was presumed by the judge as a matter of law that the keeper of the animal knew that the animal was dangerous and was responsible for any damage that it did. If the animal fell into the category of a tame animal (non-dangerous) then, as a matter of law, the keeper of the animal was not liable for the damage that it caused unless the keeper knew that the animal was dangerous. His state of knowledge needed to be proved in cases involving the second category of animals.

Once the legal principle was established, it became a precedent which judges in subsequent cases followed. An interesting question also is whether, after one judge had decided that a particular animal belongs or does not belong to the category of a dangerous animal, were judges in subsequent cases required to follow that decision as a precedent?





## Case Study

*Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1

**Facts:** Mr Behrens and Mrs Behrens occupied a booth in a fun fair under the control of the defendant. One day Mr Whitehead, the manager of Mrs Behrens, was in the booth with his small daughter and her pomeranian dog, Simba. The elephants of the defendant passed the booth on their way to the circus ring. Simba ran out and snapped and barked at the elephants. The third elephant in the procession, Bullu, ran after her along with another elephant. Bullu knocked down the front of the booth and seriously injured Mrs Behrens. She suffered personal injuries as well as a loss of earnings.



**Legal Issue:** Was the fun fair owner (defendant) responsible for the damages suffered by the plaintiff?

**Decision:** The plaintiff was successful. The defendant had to pay for all the injuries suffered by the plaintiff. This was so, even though the circus elephant was docile and, as the judge put it, 'no more dangerous than a cow'. The judge said that he was bound to ignore 'the world of difference between the wild elephant in the jungle and the trained elephant in the circus'. The judge, Justice Devlin, said as follows: '*Filburn's case held that as a matter of law an elephant is an animal *ferae naturae* ... (it) must be regarded as an authority for the legal proposition that all elephants are dangerous*'. It was argued before the judge that the elephants in this case were Burmese elephants and that therefore he could hold that, while elephants generally are *ferae naturae*, Burmese elephants were not. The argument was rejected. Justice Devlin said as follows: '*It is not open to me to consider this submission*'.

It is not stated in *Filburn v People's Palace* what the nationality of the elephant was with which the court was there dealing, and the case must be regarded as an authority for the legal proposition that all elephants are dangerous.'

1. Why was it essential that the judge had to decide whether the elephant was *ferae naturae*? [A]
2. What evidence is there in the judgment that suggests the judge was not entirely happy with having to classify the elephant as a dangerous animal? [A]
3. In what way did the defendant attempt to distinguish this case from *Filburn's case*? [A]
4. How would the division of animals into sub-species such as Burmese, Indian, African elephants have weakened the effect of the precedent already established? [A]

These cases were all decided by English courts. They are not binding on the courts in Australia. You will recall from earlier in this chapter that only courts in their jurisdictional hierarchy are bound by decisions handed down by superior courts in the hierarchy. **Nevertheless, such English decision are considered to be persuasive in Australia and, after carefully taking them into account, Australian courts adopted these principles also. In two Australian cases our native animals have featured.** The judge had to decide whether they were *ferae naturae*.



## Case Study

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*Lake v Taggart* [1978]1 SR (WA) 89

**Facts:** The plaintiff lived in a residential area in the hills with bushland nearby. She had seen her children off to school and was pedalling her bicycle home at about 8.30am. The defendant lived nearby on a two acre block of land. From time to time he kept kangaroos as pets on his property. On the day before the incident, he obtained from another person three kangaroos, a male, a female and a joey. He placed the female and the joey into an enclosure on his property but the male kicked its way out of the bag in which it had been transported and escaped.

The plaintiff was attacked by the kangaroo. She described the terrifying attack. This is part of her description. 'I pedalled faster and I looked behind but it was still coming after me. I couldn't believe it. I stood on my bike and tried to pedal as fast as I could and I started to panic as I knew that I was going to nothing – it was a brick quarry and just bush. I got off my bike and I automatically just held the bike up in front of me to protect myself. The kangaroo was on the other side of my bike. I could see its front teeth and it was making a hissing sound. Then all of a sudden it stood on its tail and knocked the bike away from me. I put my head down to protect my face and next I knew I was doing a complete somersault and my neck gave a great crack and I remember thinking I had had it. It is going to break my neck. As I went over I remember seeing grey fur over me. I somersaulted and think he must have thumped me because I had two scratches on my thigh in almost identical places.'

'I got up and I realised I must get some help so I opened my mouth to call 'help' and squeaks came out and the kangaroo started coming at me with his claws out. My voice came. I was screaming 'help' – I grabbed the kangaroo's paws in instinct I suppose. I just held on. I found I couldn't scream loud enough to call for help. I just opened my mouth and screamed as loud as I could. I could see his back legs thrashing at me. We stumbled backwards but I didn't go down ... All this time I was screaming. We both regained our balance when he started to come at me again. I knew what he was going to do this time. All the time I was screaming.'

**Legal Issue:** Was the defendant, Taggart, liable for the damages suffered by the plaintiff, Lake?

**Decision:** The kangaroo was not a dangerous animal. His Honour Judge Pidgeon referred to both Lord Esher's and Lord Justice Bowen's words in *Filburn's case*. He said, '*Filburn's case had been followed consistently in England and elsewhere*'. He said that if he applied the test of Lord Justice Bowen, the question would be whether, '*...according to the experience of mankind, the particular class of animal is dangerous or not dangerous*'. He then went on to say:

*'I would find it difficult to come to the view that the experience of mankind would find kangaroos in the wild as dangerous ... My view is that the kangaroo as a class is harmless by its very nature and that this is the view held generally. It is known ... that there have been some attacks by reason of the animal being cornered or surprised or worried by dogs and probably there have been spontaneous attacks without any obvious reason, but I do not consider these incidents, which appear isolated, would be sufficient to alter the general view of the species.'*

There was no evidence that the defendant had any knowledge of any vicious propensity (tendency) in the kangaroo and, consequently, the plaintiff was unsuccessful.

1. From the facts in this case, why would the defendant have had no knowledge of any vicious propensity (tendency) in the kangaroo? [C]
  2. In light of the description of the attack by the plaintiff, do you agree that the kangaroo should not be categorised as a dangerous animal? [A] [E]
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## 12.6 How does international law influence Australia's civil law?

The Australian Government has formally committed itself to passing laws that uphold the international laws to which it is a signatory as a member of the United Nations, including, but not limited to, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* and the *Convention Relating to the Status of Refugees*.

In Year 12 Legal Studies you will read explanations and study practical applications of the way international law affects Australia's law.

### Review

#### Comprehend

1. **Describe** the following:

- a. Agreements under seal
- b. Informal agreements
- c. Contract law
- d. Torts law

- e. *Ratio decidendi*
- f. *Obiter dicta*
- g. Civil law

[C]

2. **Describe** and **explain** the following:

- a. Customary law
- b. Justice dispensed by the Royal Courts in 12th century England.
- c. The *Statute of Frauds* (1677)
- d. Law in Australia when it was first settled.
- e. The doctrine of the separation of powers.
- f. Doctrine of precedent.

[C]

#### Analyse and evaluate

1. **Analyse** the differences between civil law and criminal law. [A]
2. **Analyse** and **evaluate** how the separation of powers doctrine contributes to a fair and democratic Australia? [A]
3. **Analyse** the differences between the meaning, importance and application of *ratio decidendi* and *obiter dicta* in a court's judgement. [A]

# Civil law foundations

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## Chapter 13: Dispute resolution in civil law

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13.1 What is a civil dispute?

13.2 Different methods of resolving civil disputes

13.3 Why go to court?

13.4 Differences between civil and criminal court actions

13.5 Which court?

13.6 Differences between courts and tribunals

13.7 Tribunals involved in civil dispute resolution

13.8 Complaints and appeals against government decisions

13.9 Commissions of inquiry

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the nature of a civil dispute in Australia
  - there are many options for resolving civil disputes in Australia
  - that care should be exercised when choosing to go to court, as opposed to other forms of dispute resolution
  - civil and criminal courts follow different procedures, including rules of evidence
  - tribunals offer an alternative to the court system
  - there are avenues for complaints and appeals against, and the judicial review of, government decisions
  - that governments set up commissions of inquiry to resolve matters of public interest.
- analyse and evaluate the legal issues which arise in the civil law system to resolve disputes.

## Key Terms

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**Balance of probabilities:** the judge or jury must be satisfied that the majority of evidence favours the conclusion that the plaintiff's claim is more credible than the defendant's claim.

**Onus of proof:** the responsibility carried by a party to a court hearing to convince the judge or jury that what is being said is true.

**Standard of proof:** the degree to which a party must convince or satisfy the judge or a jury that an alleged fact, or series of facts necessary to prove a claim did actually occur.

**Ombudsman:** a Queensland statutory public office which receives complaints, oversees the public service, detention services, and other government (state and local) agencies, and reports to Parliament.

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## 13.1 What is a dispute?

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The potential for a dispute begins with a person (the aggrieved party) believing that he or she has been wronged in some way by another person (the wrongdoer). This perception of being wronged could be one-sided (where a drunk driver mounted the footpath and hit an innocent pedestrian) or each party could have a conflicting claim against the other (where one driver was over the legal blood alcohol limit and the other was driving over the speed limit when they collided). The feeling of being wronged grows into a dispute once there is communication of the perceived wrong to the other party, either personally or through a third party (usually a mediator or a solicitor) and a disagreement or conflict results.

## 13.2 Different methods of resolving civil disputes

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The following range of options for people in dispute to bring about a resolution to the dispute, beginning with doing nothing about the problem through to going to court to seek a decision. .

- |                                 |  |
|---------------------------------|--|
| 1. 'Lumping' the grievance      | 6. Mediation                           |
| 2. Exit and avoidance           | 7. Expert determination/case appraisal |
| 3. Redirecting                  | 8. Arbitration                         |
| 4. Naming, blaming and claiming | 9. Adjudication by a court or tribunal |
| 5. Negotiation                  |  |

To explain how these options arise, we will consider two incidents at the local hairdresser's salon.



**Incident 1: You arrive at the hairdressers for your appointment. The hairdresser is running one hour behind schedule. This causes you to return to work later than expected and your pay for that day is reduced.**

**Response**

**1. ‘Lumping’ the grievance**  
 Most people will simply be annoyed and not even mention it to their hairdresser. The wait was irritating but you accept that this frequently happens so you ‘lump the grievance’.

**2. Exit and avoidance**  
 You might decide that you will never go to that hairdresser again, which is a means of avoiding future conflict by exiting from it.

**3. Redirecting**  
 You may redirect the cause of the problem by deciding that it was not the fault of the hairdresser, but that of the person before you who was late for his or her appointment.

**Outcome**

**By deciding to adopt any one of these responses, you have stopped the conflict escalating into a dispute.**

**Incident Two: The hairdresser leaves the colour in your hair for too long on your wedding day and, instead of having subtle red foils, your hair has turned bright purple. You complain and refuse to pay. He says you didn’t clearly explain what you wanted and demands that you pay \$350. You have to rush to another hairdresser, who charges a further \$450 to take out the colour and give you the foils you wanted.**

**Response**

**4. Naming, blaming and claiming**  
 You decide against lumping the grievance and avoidance options. Instead, by speaking about it, you have named the grievance. You have blamed the hairdresser as the one responsible for the state of your hair and, by refusing to pay for the service, you have claimed a remedy or compensation of some sort. If the hairdresser denies she or he is to blame and insists on being paid, the two of you are clearly in dispute.  
 There is a range of options to deal with this dispute.

## 5. Negotiation

To settle it, you may both decide to negotiate, which means you will discuss alternatives and agree to a compromise. The hairdresser may offer to recolour your hair at no extra cost. By accepting that compromise, the dispute has been resolved by negotiation.

## 6. Mediation

If you and the hairdresser are unable to agree on a compromise, then the assistance of a third person may be needed. Mediation is when the third party tries to assist both of you to resolve the dispute without imposing a legally binding solution. This means the mediator helps both parties to think of ways to settle the dispute and provides a neutral and helpful environment for discussion. The mediator helps to generate a range of possible solutions for you both – such as recolouring your hair, paying lesser amounts, paying it off over a period of time, or receive as compensation – but what you decide to do is totally up to you. The mediator cannot force a decision on either of you.

The different forms of mediation, including those which are imposed by a court, which are considered in the next chapter.

## 7. Expert determination or case appraisal

Another alternative, often used to assist mediation, is to seek the opinion of an expert and have him or her advise you of the best possible outcome.

Case appraisal is a form of expert determination where the decision or solution is advisory or provisional, and is not binding on the parties. It is hoped that, when the parties hear what a neutral, independent expert has to say, it will assist in the resolution of the dispute.

## 8. Arbitration

Where no compromise has been possible, arbitration can be used. Here you choose the arbitrator and agree to accept his or her decision and abide by it. For example, you may decide to go back to the person who was the mediator and ask them to make a fair decision for you. This becomes an arbitration, which means that the third party has the consent of the parties to impose a decision which will be binding upon them. It is a more formal process than mediation and is governed by relevant Acts. For example, the *Commercial Arbitration Act 2013* (Qld). Commercial contracts often contain a clause that requires the parties to submit to arbitration.

## 9. Adjudication by a court or tribunal

The second way to have a third person impose a decision is to take the matter to a court or tribunal for a formal hearing and testing of the evidence. An adjudication is then made, which means that the judge, magistrate or tribunal member will impose a decision on both parties who will usually be legally required to abide by that decision.

It is unlikely that a dispute involving a hairdresser, involving only \$800 in damages, would ever go to court for resolution. Most disputes are resolved by the first four options ('lumping' through to a negotiated settlement).



### What do you think?

*It is not possible to shake hands properly with a clenched fist.*

Think of three conflicts or disputes that you or a friend or a member of your family may have had. Look at the list in Chapter 13.2 above and write down which processes, if any, were, or could have been, used to resolve those disputes. [C]:[A]

## 13.3 Why go to court?

At the very heart of an effective legal system are the courts, whose judicial officers are charged with the responsibility of resolving disputes according to the law by giving all disputing parties a fair hearing. A large measure of the success of a legal system is the extent to which laws are consistently applied to resolve legal disputes. In our democratic society, the law is assumed to be fair to all. This ideal of fairness is intended to apply equally to both the victim of a wrongdoing and the alleged wrongdoer. A legal system should not play favourites or provide benefits to one person or group in society at the expense of another. Everybody should receive a satisfactory 'deal' before the courts.

If a dispute is not resolved by the processes of alternative dispute resolution (ADR), a formal hearing in a court or tribunal is often the last resort to resolve the dispute. In many instances, court is the best or the only option. The best option for a victim of repeated domestic violence is to go to court to obtain a protection order. The best option for a worker who is unfairly dismissed, where the employer refuses to negotiate, is to go to the Industrial Relations Tribunal. Often it is necessary to go to court because the other party rejects an ADR option. Of course, where a serious criminal offence has been committed, the police have no option other than to charge the offender and take the matter to court.

In disputes of a commercial kind, there is usually a 'paper trail' (a series of documents such as invoices, receipts, emails, faxes or letters between the parties. These can indicate if the matter(s) in dispute are likely to lead to a court action). A common dispute occurs when a person does not pay his or her debts. This can be because of a cash flow problem or simply because a person is slow to pay. When this happens, the threat of going to court is often enough to make such a person pay. In the Hypothetical that follows, you are asked to think about this issue.

### Hypothetical?

**Facts:** Virtue Pty Ltd (Virtue) delivers stationery in perfect condition to Dodgy Marketing Pty Ltd. The stationery has been ordered on the letterhead of Dodgy Marketing. Virtue quotes for the stationery. The quote sets out price, quantity and the quality of the stationery to be provided. Virtue delivers a tax invoice to Dodgy Marketing, which says payment is to be made within 30 days. Dodgy Marketing does not pay its bill. It does not raise any issue about the quality of the stationery. The amount of the account is \$8 500. Virtue telephones repeatedly and writes requesting the bill to be paid. No response is received for three months. Virtue's director speaks to her lawyer and is advised that the company could sue Dodgy Marketing to recover the amount owing, interest from the date of issuing proceedings, and potentially, legal costs for issuing proceedings.

**Legal Issue:** Is immediate court action the best option for Virtue? Why or why not?  
[A] [E]

## 13.4 Differences between civil and criminal court actions

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In a civil trial, the personnel that occupy the courtroom, and the roles they play are much the same throughout Australia. In the District Court of Queensland and the Supreme Court of Queensland, these personnel are set out as key terms below.

### Key Terms

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**Judge:** Controls the running of the court hearing to ensure a fair trial. In civil matters the judge, hears evidence and decides the matter, usually without a jury.

**Judge's associate:** Assists the judge with administrative tasks and research of relevant legal cases and principles.

**Bailiff:** *'All rise! Hear ye, hear ye! This honourable court is now in session!'* A court officer who assists the court in managing behaviour of parties and other people in courtroom, brings witnesses into court, administers oaths and looks after the jury.

**Plaintiff:** a person seeking relief against any other person by any form of proceeding in court (other than by way of counterclaim as a defendant).

**Defendant:** a person sued by any plaintiff in any civil court.

**Legal practitioner:** this term refers to all barristers and solicitors in the courtroom. Barristers address the court on behalf of the plaintiff and defendant, while solicitors handle other aspects of their respective cases such as, organising witnesses and their statements, ensuring all evidence to prove the case of each party is available, and being present to assist the barrister to take instructions from the plaintiff or defendant as the case may be.

**Witness:** a person who gives evidence (oral testimony or opinion, if an expert) by answering questions put to him or her by legal practitioners.

**Court reporter:** Records what is being said in a court hearing, usually by electronic means.

**Jurors:** A group of ordinary citizens who collectively decide on the facts of the case. Crucial in a trial of indictable (serious) offences. Juries are rarely used in a civil trial today.

**Public gallery:** Members of the public may observe court proceedings unless the court is closed.

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### Practical Application

Go to [courts.qld.gov.au/courts-district](http://courts.qld.gov.au/courts-district) where you will find a layout for a room where a civil trial is conducted. Copy the plan and using appropriate symbols locate the position of each of the personnel in the civil court. With the role of each of these personnel is different in a criminal trial, state the nature of that role and explain the differences. [S] [C] [A]

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In the administration of the Australian system of justice, a basic distinction is made between legal disputes that are criminal and civil. The question of whether a wrongful act should be classified as civil or criminal, or both, depends upon the legal consequences that usually follow from it. The usual consequence of a serious criminal offence is that the wrongdoer (the accused) is arrested, charged by the police and, once sufficient time has been allowed for the Crown and the accused to prepare their cases, tried by a judge and/or a jury in a criminal hearing (trial).

A civil case, on the other hand, involves one person or organisation taking another person, organisation, or the government to court, usually to try to obtain compensation for loss or damage that has been suffered because of an alleged wrongdoing, such as negligence or a breach of contract. Other consequences of a successful civil court action can be a declaration by the court of a legal entitlement (for example, that one of the parties is the legal owner of property in dispute) or an injunction, an order which requires a party either to stop doing a particular act (for example, playing loud music until 2am three times a week) or to carry out a particular act (for example, cutting down a large tree because its branches are hanging dangerously over a neighbour's house).

### Summary of differences between civil and criminal court actions

Distinguishing features	Civil court hearing	Criminal court hearing
Person who brings legal action	Plaintiff	Prosecutor/complainant
Person who defends the action	Defendant	Accused/defendant
Name of court action	Suit/trial	Trial
Party with the onus of proof	Plaintiff	Prosecutor/Crown
Standard of proof	On the balance of probabilities	Beyond a reasonable doubt
Consequences of a successful court action	Defendant ordered to pay plaintiff damages (compensation for the loss or injury); and defendant also may be ordered to pay the plaintiff's legal costs (i.e. the amount of money spent in bringing the matter to court)	Accused is found guilty of offence and is sentenced to a criminal penalty such as a fine or imprisonment
Consequences of an unsuccessful court action	Plaintiff's case is dismissed and plaintiff may be ordered to pay the defendant's legal costs	Accused is found 'not guilty' (i.e. acquitted) of the offence and is free to leave the court

The approach to a civil dispute is different. At the heart of resolving a legal dispute to the satisfaction of one or both of the parties is seeking to have their claims verified, either informally in negotiations, or formally in a tribunal or court. When it comes down to it, the successful resolution of a legal dispute, whether winning in court or having strong bargaining power in negotiations for the settlement of a dispute with the opposing party, evidence is the key.

### The onus (burden) of proof

The onus of proof is the responsibility carried by a party to a court hearing to convince the judge or a jury that what is being said is true. The onus of proof rests on the person bringing the case against another to court.

#### Criminal jurisdiction

Prosecution (Crown) carries the onus of proving the accused is guilty



#### Civil jurisdiction

Plaintiff carries onus of proving the case against the defendant

In criminal cases the prosecution must establish the guilt of the accused by providing sufficient evidence.

In civil cases the onus of proof falls on the plaintiff, but in many cases, the defendant will admit many facts which means they do not have to be proved. Unlike criminal cases, civil defendants must prove any claims made in their own defence other than a simple denial of the plaintiff's claims.

### The standard of proof

The standard of proof is the degree to which a party must convince or satisfy the judge or a jury that an alleged fact, or series of facts necessary to prove a claim did actually occur.

#### Criminal jurisdiction

Prosecution (Crown) must prove beyond reasonable doubt



#### Civil jurisdiction

Plaintiff must prove on the balance of probabilities

In criminal cases, it is the prosecutor who must present evidence with such weight or certainty that the accused's guilt is 'beyond a reasonable doubt' in the mind of the judge or the members of a jury.

In civil cases, the plaintiff must establish the case by proving it on the 'balance of probabilities'. This means that the judge or a jury must be satisfied that the majority of evidence favours the conclusion that the plaintiff's claim is more likely than not to be the true position than the defence of the defendant.

Despite the significant differences between civil and criminal trials, the nature and types of evidence and the questions about its admissibility, are essentially the same. It is not necessary to repeat here an explanation of the types of evidence and when they are admissible as it can be revised by reading Chapter 8.5. However, the private nature of civil disputes means that

there are quite distinct and separate court processes which apply when matters are not resolved and end up in a court or tribunal for resolution. Where an intending plaintiff goes to seek resolution, and hopefully justice, depends upon where the particular claim or dispute can be heard.

### Hypothetical?

State whether each of the following legal disputes is criminal or civil. Briefly explain why. [C] [A]

1. A dispute between the son and ex-wife of a recently deceased man as to who should receive his possessions under his will.
2. A Government employee has been sacked from her job without any warning or reason being given.
3. A person at a night club is arrested for selling cocaine.
4. Having signed a contract to play for the Bayside Eagles for three years, a player decides, after one year of playing for the club, that he would prefer to play for the West Coast Falcons.
5. The owner-driver of a truck, in defiance of repeated directions from a police officer, refuses to move her truck from a major road in a blockade protesting against a government decision to increase petrol taxes.

## 13.5 Which court or tribunal?

Each court or tribunal has been set up by an Act of Parliament. Some courts, such as the Family Court and Federal Circuit Court of Australia, are set up by the Commonwealth Parliament. The State courts and tribunals are established by the Queensland Parliament.

The *Commonwealth of Australia Constitution Act 1901* (Cth) enables the Federal Government to pass laws about divorce and disputes between married couples about their property and their children. It does not allow the Federal Government to pass laws about de facto or same sex partners. State governments have agreed to cede (pass over) their powers to the Commonwealth to pass laws and resolve disputes in relation to de facto and same sex relationships. This means, for example, that the Family Court of Australia now has the power to deal with children who are not children of the marriage because that power has been given to by the Queensland Government.

The first question a lawyer would consider, if you take a particular problem to him or her, is which court has the authority to make a decision in relation to the legal issues raised. This is known as its jurisdiction.

There are two types of court jurisdiction:

- original jurisdiction, meaning those types of cases which commonly are heard for the first time at that level in the court structure; and
- appellate jurisdiction, being the authority to hear cases brought on appeal from a lower court in the hierarchy. As you learned earlier, our courts are in a hierarchy. This means that the decisions of most courts may be re-examined by a higher court in specific circumstances.

Most courts have original jurisdiction over both civil and criminal cases. Simple offences are heard by a magistrate alone, while indictable (more serious) offences are usually heard by a judge with, or without, a jury in the District Court of Queensland or Supreme Court of Queensland. The courts have limits set as to the amounts they can order to be paid to successful parties in civil suits. You should appreciate, however, that the choice of a court can be very complicated. It can be legally challenged and the consequences of choosing the wrong court can be extremely expensive for an unsuccessful litigant. Legal advice should, therefore, be obtained before commencing a court action.

## Practical Application

Refer to the court hierarchy diagram on page 51 and QCAT on page 323 and decide in which court a dispute should be heard in each of the following examples. Give your reasons. [C] [A]

1. Alice built three patrol vessels for a client in Brisbane. The vessels did not go as fast as they should, to meet the requirements of the agreement between Alice and the client. Peters were the naval architects responsible for the design of the vessels and ensuring they would reach the speed required. Modifications to the vessels cost \$1,200,000. Alice brings a claim against Peters in negligence.
2. Kate is in a car accident for which Daniel is responsible. Kate suffers injuries and has been advised that similar cases had resulted in damages being awarded to the plaintiff between \$575,000 and \$650,000. Kate brings a claim against Daniel in negligence.
3. Roslyn loses her claim for damage to her car in the Magistrates Court of Queensland. She decides to appeal.
4. The Brisbane City Council grants a development approval to Dodgy High Rises Pty Ltd to develop a suburban high-rise nursing home by changing it to residential units for private sale. Local residents decide to object.
5. James and Maria are in dispute about which of them should care for their children. Maria decides to begin court proceedings.
6. Thomas makes a pest spray to control the pests in orchards. On the spray container, and in literature for advertising, Thomas makes claims about the performance of the spray and its contents. These are strikingly similar to those of a larger company, Pest Spray Inc which also makes a pest spray for the same purpose. Pest Spray Inc decides to ask the court to make an order to stop Thomas from using the words in his advertising and to sue Thomas for damages.
7. On the boundary of Mari's yard Jack grows a very large mango tree, which is colonised by flying foxes when mangoes are ripe. The mangoes fall on Mari's veranda together with a lot of flying fox droppings. Mari asks Jack to cut the tree back. Jack refuses. Mari makes an application for an order for the mango tree to be severely pruned regularly.



## 13.6 Differences between courts and tribunals

Tribunals are set up to deal with legal disputes that arise in special areas. They are not courts, and for this reason, they are not bound by many of the formalities of the court system. Tribunals differ from courts in the following ways:

- Court cases are usually conducted by lawyers; tribunal hearings may not be.
- Courts allow and encourage legal representation; tribunals are less insistent, sometimes refusing the use of legal counsel.
- Formal procedures and protocols, such as referring to judges as ‘Your Honour’ and wearing wigs and gowns, are followed in courts; tribunals are often more relaxed and informal.
- Courts apply strict rules of evidence, but these may be relaxed or not followed in tribunals.
- Courts have a permanent place in the legal structure, but tribunals may be established for the completion of a specific task. You should note, however, that some tribunals, such as the Australian Human Rights Commission and Queensland’s Crime and Corruption Commission, have a continuing role in our legal system.
- Courts must follow the decisions of a court higher in the hierarchy, but tribunals are free to disregard previous decisions. There are some exceptions, however, especially when tribunals are acting to decide appeals from lower tribunals. In the giving of the decision, the appellate tribunal may lay down principles to be followed by the lower tribunal in future hearings. This does not mean that they do not act within the law as their decisions can usually be challenged in the courts by way of review or on appeal.

## 13.7 Tribunals involved in civil dispute resolution

Tribunals may be established by Commonwealth and State governments or by non-government organisations and associations.

### Commonwealth tribunals

Commonwealth tribunals do a variety of things. Some develop and apply policy. Others help people to resolve disputes by coming to an agreement. Others determine disputes in a way similar to a court. Most tribunals do a combination of these things. Many have powers to investigate situations and enforce the law.



### Practical Application

The Administrative Appeals Tribunal (AAT) ([aat.gov.au](http://aat.gov.au)) reviews administrative decisions by a range of government and non-government bodies. At the time of writing, the federal government has announced that it intends to replace the AAT with a new Administrative Review Tribunal (ART) to which existing matters will transition for completion when the ART has been established and the AAT closed. In the meantime, the AAT will continue. Matters that the AAT hears includes reviews of:



## Practical Application ...

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- migration and refugee matters, including certain decisions about who is to travel to, enter into or stay in Australia and character-related these decisions,
- Centrelink and Child Support Agency decisions,
- veteran entitlements and military compensation decisions by the Department of Veterans Affairs,
- National Disability Insurance Scheme (NDIS),
- workers compensation,
- citizenship, and
- freedom of information.

Other federal tribunals include the:

- Australian Competition and Consumer Commission ([acc.gov.au/](http://acc.gov.au/))
- Australian Human Rights Commission ([humanrights.gov.au/](http://humanrights.gov.au/))
- Fair Work Commission ([fwc.gov.au/](http://fwc.gov.au/))

1. Select one of the above federal tribunals. Outline the matters it deals with and do an internet search for some recent articles in the media commenting on your chosen tribunal. Write a short response setting out your findings. [S] [C] [R]

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## Queensland tribunals

The Queensland Civil and Administrative Tribunal (QCAT) commenced operation on 1 December 2009, replacing many tribunals such as the Anti Discrimination Tribunal, Small Claims Tribunal and the Guardianship Tribunal. It now makes decisions about matters such as:

- residential tenancy disputes,
- small debt disputes (up to \$25,000),
- consumer and trade disputes and minor civil disputes (such as a car accident damages or personal injuries claims up to \$25,000),
- building disputes,
- anti-discrimination matters, and
- appointment of attorneys to manage a person's affairs.

It should be noted that unresolved complaints under the *Anti-Discrimination Act 1991* (Qld) may be referred to QCAT because the Queensland Court of Appeal has determined that the QCAT is a court of the State (often referred to as a Chapter III court), which means it can exercise judicial power to determine matters arising under the *Constitution* and under Commonwealth law. This was decided in the case of *Owens v Menzies* [2013] 2 Qd R 327; [2012] QCA 170. It was significant that the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides in s164 that the QCAT is a court of record.

Other tribunals and commissions in Queensland include:

- Anti-Discrimination Commission
- Crime and Corruption Commission
- Electoral Commission of Queensland
- Land and Resources Tribunal
- Legal Services Commission
- Queensland Industrial Relations Commission
- Queensland Law Reform Commission
- Residential Tenancies Authority



### Research Task

Select one of the above tribunals. Search its website to see what it does, to whom it reports, and its function in the Queensland community. Write a short report you can deliver orally to your class. [S] [C]

## 13.8 Complaints and appeals against government decisions

### State complaints and appeals

Any citizen wishing to appeal against an administrative decision or action of the Queensland Government or its agencies must consult the relevant Act or regulations. In some instances the Act will provide for appeals and a tribunal may exist.

If no provisions exist under the Act, the following options are available:

- a. Lodging a complaint with the Queensland Ombudsman.
- b. Seeking judicial review in the Supreme Court of Queensland.
- c. The government commissioning an independent review.

#### a. Complaint to the Queensland Ombudsman

**The role of Ombudsman (Swedish for ‘agent or representative of the people’) is to investigate and report on any complaints by members of the public about government administration where a citizen has complained to the relevant government officials and had no success.** The Commonwealth and all States have Ombudsmen established under an Act of Parliament. The Ombudsman cannot impose penalties, but can have a report tabled in Parliament. This type of action can draw unfavourable publicity to the government minister or authority referred to in the report.

An action by the Ombudsman begins with a written complaint from a member of the public, although the Ombudsman is not required to investigate every complaint. Before commencing the inquiry, the Ombudsman must notify the Minister concerned that an inquiry is to occur. He or she may enter any place of government activity, inspect any document, issue written questions for answer, and require any person to appear and answer questions under oath.

The powers and responsibilities of the Queensland Ombudsman are contained in the *Ombudsman Act 2001* (Qld). Examples of areas of complaints that the Queensland Ombudsman investigates are:

- unfair treatment by a government department or official;
- a prior complaint being ignored; and
- delays in carrying out administrative action or responding to concerns (for example, a police officer failing to respond to a complaint).

The Queensland Ombudsman holds very wide powers of investigation. When the findings are complete, the Ombudsman can request information from the body concerned about the steps it intends to take in order to satisfy the recommendations in the report. If no steps are taken within a reasonable time, the Ombudsman may advise the Premier and the Parliament.

### b. Judicial review by the Supreme Court of Queensland

The review of a State Government decision or action can be sought by a dissatisfied citizen under the *Judicial Review Act 1991* (Qld) by taking the matter to a hearing in the Supreme Court of Queensland. The court will only interfere with an administrative decision if it can be established that the government body acted in a manner that was beyond the powers given to it or if the body carried out its powers in an improper manner. If the court finds in favour of the complainant, it may overturn the decision or compel the government body to take a certain action or refrain from doing an act.

### c. Government-commissioned independent review

In cases where there is a public outcry over a decision made by a government official, the government may be pressured into conducting its own independent review. This means that the aggrieved parties do not need to bring their own private case to court. This occurred where the Deputy Coroner made findings about the death of the child Mason Jet Lee. There was a public outcry following the publication of the findings.

## Practical Application

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On the 2 June 2020, the Deputy Coroner released the *Findings of Inquest into the death of Mason Jet Lee*.

The inquest found that the handling of Mason's case was a failure by employees of the (then) Department of Communities, Child Safety, and Disability Services to comply with their statutory obligations, manuals, policies and procedures.

On the 3 June, the Director-General, Department of Premier and Cabinet instructed the then Public Service Commission (PSC) to conduct an independent review to:

- look closely at the conduct of the public servants involved
- review the previous ethical standard investigation
- advise whether there are any grounds for further disciplinary action for those public servants involved.

The *Review of public servants' conduct* provides the results of the independent review, providing three recommendations that have been accepted by government for action:

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## Practical Application ...

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- **Recommendation 1** – The department delegates authority to the PSC to commence a disciplinary process against Manager 1 for the failures noted in the coroner’s report and the Ethical Standards Unit investigation.
  - **Recommendation 2** – The department delegates authority to the PSC to conduct an investigation into the management decision making chain to determine whether disciplinary action should be taken against responsible officers for their role in the management of resourcing and workloads of the Caboolture Child Safety Service Centre.
  - **Recommendation 3** – To improve the department’s practice with respect to discipline under the Public Service Act 2008, the department be required to seek independent expert advice from Crown Law on all disciplinary processes for the next two years, subject to periodic review by the PSC.
1. What did the inquest find about the handling of Mason’s case by the (then) Department of Communities, Child Safety, and Disability Services? [C]
  2. What was the purpose of the independent review and who conducted it? [C]
  3. Do you think the recommendations made that were accepted by the government for action would have serious consequences for the employees concerned? Why? [A] [E]
- 

## Commonwealth complaints and appeals

Complaints or appeals against the actions or decisions of Commonwealth Government administration may be made in one or more of the following ways:

- a. Complaint to the Commonwealth Ombudsman.
- b. Appeal to the Administrative Appeals Tribunal.
- c. Judicial review by the Federal Court of Australia.

### A. Complaint to the Commonwealth Ombudsman

The Commonwealth Ombudsman was created by the *Ombudsman Act 1976* (Cth) and is located in Canberra. The Ombudsman can investigate problems arising from government administration or policy but not legislative (parliamentary) or judicial (court) decisions. Some examples of Ombudsman inquiries include:

- delays in obtaining taxation refunds from the Australian Taxation Office
- complaints involving aged care facilities and refugee centres, and
- Austudy and other matters involving universities.

To complement the general powers of the Commonwealth Ombudsman, the Federal Government has also established specialised Ombudsmen to investigate complaints from consumers and businesses in specific industries, such as telecommunications and banking. The Telecommunications Industry Ombudsman is a free alternative dispute resolution scheme, which is independent of industry, government and consumer organisations, for small businesses and residential consumers in Australia who have a complaint about their telephone or Internet service. Similarly, the Australian Banking Industry Ombudsman operates throughout Australia to help resolve complaints between banks and their customers, whether they are individuals or small businesses.

## b. Appeal to the Administrative Appeals Tribunal

The Commonwealth Administrative Appeals Tribunal (AAT) was established to provide one central body, which persons could use to appeal against an administrative action or decision. As we have seen, appeals against Queensland decisions must proceed through the terms of each Act, but at the Commonwealth level the AAT covers a wide range of Acts. (It is expected that the Administrative Review Tribunal (ART) will replace the AAT in due course.)

The Tribunal is not bound by legal procedures and aims to investigate the reasons for actions rather than engage in legal debate. The hearings are usually in public and lawyers frequently appear on behalf of their clients. Each party is required to pay their own costs although legal aid is available if the person meets the qualifying criteria.

### Practical Application

#### PROMINENT CRITIC OF ROBODEBT RULED AGAINST SCHEME FIVE TIMES, LOST AAT JOB.

Inquiry hears Terry Carney, who says robodebt's legal foundation was 'completely missing', was surprised to not be reappointed to the tribunal.

Emeritus professor Terry Carney, who sat on the AAT and its predecessor over nearly four decades, ruled five times against the federal government's robodebt program in separate cases throughout 2017.

Carney told the royal commission on Tuesday the 'income averaging' method central to the scheme was flawed due to a lack of sufficient evidence and "simple mathematics".

Carney's first AAT decision, handed down in March 2017, came at the initial height at the robodebt scandal but was not known to the public because its decisions are not published and the government did not appeal to a higher jurisdiction.

When his five-year term came to an end in September 2017, Carney sought reappointment at the AAT but the royal commission heard his application was rejected by the federal cabinet.

Carney went on to become one of the most prominent critics of the robodebt scheme, after first publishing a journal article in 2018, arguing the scheme was unlawful.

The 'income averaging' process used in the robodebt scheme used annual tax office data to assume a person's income over a period had been earned equally over each fortnight they were required to report to Centrelink.

The Guardian, 'Prominent critic of robodebt who ruled against scheme five times lost AAT job, inquiry hears', *The Guardian* (Online, 24 January 2023) <[theguardian.com/australia-news/2023/jan/24/prominent-critic-of-robodebt-who-ruled-against-scheme-five-times-lost-aat-job-inquiry-hears#:~:text=Carney%20told%20the%20royal%20commission,my%20mind%2C"%20he%20said](https://www.theguardian.com/australia-news/2023/jan/24/prominent-critic-of-robodebt-who-ruled-against-scheme-five-times-lost-aat-job-inquiry-hears#:~:text=Carney%20told%20the%20royal%20commission,my%20mind%2C)>.

1. What role did Professor Carney hold for four decades? [C]
2. How many times in 2017 did Professor Carney rule against the federal government's robodebt program? [C]
3. Did Professor Carney find that the robodebt scheme used by the federal government was unlawful? Why? [C]
4. Why do you think Professor Carney was not reappointed to the AAT? [A] [E]
5. What were the consequences of Professor Carney's decisions for the federal government? [C] [A]



### c. Judicial review by the Federal Court of Australia

In applying remedies under an ‘order of review’, the Federal Court of Australia can use the same types of orders as the High Court of Australia. It can direct that particular actions be taken or not taken, overturn decisions originally taken, or refer the matter back to the original decision-maker for reconsideration subject to whatever directions the court may apply.

#### Case Study

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*Green v Daniels* (1977) 13 ALR 1

**Facts:** Miss Green, aged 16 years, left school in December and, unable to gain employment, applied for unemployment benefit. The Department of Social Security refused the benefit immediately because departmental policy was that school leavers were not eligible for benefit until the end of the school vacation, in February.

**Legal Issue:** Could Miss Green successfully require the Department to review its decision?

**Decision:** The High Court of Australia agreed with Miss Green’s argument that the policy being followed was not specified in the *Social Security Act 1947* (Cth) and that the Department of Social Security had misused its powers.

It recommended that she should receive benefits from the date of leaving school. However, only the Director-General of Social Security has the authority to grant benefits. He was required to reconsider the case again following the High Court of Australia recommendation. The Director-General came to the same decision, but this time based it on a clause of the Act requiring that a person receiving a benefit be willing to undertake work. He decided that Miss Green had not established her willingness to work. So, she did not receive the benefits for the holiday period.

1. Did the High Court of Australia have the power to change the Director-General’s decision in Miss Green’s case? [C]
  2. What recommendation did the High Court of Australia make? Did the Director-General follow the High Court’s recommendation? Do you agree with the High Court of Australia or the Director-General? Justify your decision [C] [A] [E]
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#### A difficult choice: judicial review vs. administrative appeal

The case of *Green v Daniels* illustrates how judicial review may not always achieve the desired result.

**It is necessary to understand that judicial review and administrative appeal serve different purposes.** Judicial review is concerned with jurisdiction to make a decision or take an action. It is concerned with legality, deciding questions such as whether the government body had power to make that decision or whether the power was exercised in a legal manner. Administrative appeal is concerned with the ‘rightness’ of the decision considering the facts. It is not concerned with legality but with the validity of the case being presented.

Because *Green’s case* was a judicial review before the High Court of Australia, all the court could find was that the decision reached was illegal. The Department of Social Security accepted that decision and commenced the administrative procedures once again – this time finding against Green on a legal basis. Had Green taken the matter to administrative appeal, it would have been the task of the Administrative Appeals Tribunal to determine the merit of her case on the basis of the facts presented. If the tribunal had found in her favour, it is very likely that the department would have had to pay the benefit.

## 13.9 Commissions of inquiry

Usually in response to a public outcry about the allegedly improper or illegal actions of a particular government official or department, governments at both the federal and state levels have the power to set up independent commissions of inquiry to investigate the truth of the allegations and to make recommendations to the government as to whether further legal action should be taken against the officials in question. The Commissioner (often a senior or retired judge or barrister) usually has wide investigatory powers, which are broader than the powers of judges in courts of law, including the power to summons witnesses, offer indemnities, seize documents and obtain other forms of evidence that may not have been admissible in a court of law. After the findings and recommendations have been issued by the Commissioner, the government decides if and how it will respond to them.

Federal commissions of inquiry are called Royal Commissions and are created and operated under the *Royal Commissions Act 1902* (Cth). Examples of matters of public interest which have been the subject of Royal Commissions set up by the Federal Government include:

- The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1987–1991)
- The Royal Commission into Institutional Responses to Child Sexual Abuse (2012-2017)
- The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2017-2019)
- The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2019-2023)

States also have their own Acts that give them the authority to set up Royal Commissions or commissions of inquiry to resolve disputes that have become matters of public interest and importance. A recent example was the 2005 Queensland Public Hospitals Commission of Inquiry, including the highly publicised complaints against Dr Patel at Bundaberg Base Hospital.

### The Robodebt scheme

The Robodebt scheme was an unlawful method of automated debt assessment and recovery implemented under the Liberal-National Coalition Governments of Tony Abbott, Malcolm Turnbull and Scott Morrison, and employed by the Australian government agency, Services Australia, as part of its Centrelink payment compliance program. Put in place in July 2016 and announced to the public in December of the same year, the scheme aimed to replace the formerly manual system of calculating overpayments and issuing debt notices to welfare recipients with an automated data-matching system that compared Centrelink records with averaged income data from the Australian Taxation Office.

The scheme has been the subject of considerable controversy, having been criticised by media, academics, advocacy groups, and politicians due to allegations of false or incorrectly calculated debt notices being issued, concerns over impacts on the physical and mental health of debt notice recipients, and questions around the lawfulness of the scheme. Robodebt has been the subject of an investigation by the Commonwealth Ombudsman, two Senate committee inquiries, and several legal challenges.



## Practical Application

### A Robodebt timeline

#### Late 2016

Robodebt is introduced, using income averaging from ATO data to raise debts and implementing a reverse onus on recipients to disprove the amounts owed.

#### April 2017

Commonwealth Ombudsman makes recommendations to improve the scheme, amid growing public criticism.

#### June 2017

Senate Community Affairs References Committee hands down its first report, concluding significant lack of procedural fairness, questions of legality and recommending Robodebt be put on hold.

#### April 2019

Commonwealth Ombudsman delivers implementation report and makes four further recommendations to improve the Robodebt scheme.

#### July 2019

Senate refers Robodebt to the Community Affairs References Committee for the second time.

#### November 2019

Victoria Legal Aid files proceedings in the Federal Court on behalf of Deanna Amato. A week later, the Department of Human Services (now Services Australia) ceases Robodebt.

The Amato case establishes that Robodebt is unlawful.

Private law firm Gordon Legal leads a class action.

#### November 2020

The class action is settled, with the Australian Government repaying more than \$751 million in unlawfully claimed debts and \$112 million in compensation to approximately 400,000 people.

#### May 2022

Senate Community Affairs Reference Committee hands down its second report, calling for a royal commission into the scheme.

#### August 2022

A royal commission is announced, with public hearings beginning from October. It is due to deliver its final report in July 2023.

### ROBODEBT ROYAL COMMISSION FINDINGS REVEALED, INDIVIDUALS REFERRED FOR CRIMINAL PROSECUTION

Unnamed individuals will be referred for criminal and civil prosecution after a royal commission handed down its report into the unlawful Robodebt scheme on Friday.

#### Key points:

- The 990-page report includes 57 recommendations – the culmination of hundreds of hours of evidence and nearly a million documents
- A sealed chapter, separate to the bound report, recommends referrals of individuals for civil and criminal prosecution
- The report has now been released to the public

Commissioner Catherine Holmes branded the former Coalition government's debt-raising scheme an extraordinary saga of venality, incompetence and cowardice.

The report paints a picture of how the Robodebt [scheme] ... was put together on an ill-conceived, embryonic idea, Commissioner Holmes wrote.



## Practical Application

'It is remarkable how little interest there seems to have been in ensuring the scheme's legality, how rushed its implementation was, how little thought was given to how it would affect welfare recipients and the lengths to which public servants were prepared to go to oblige ministers on a quest for savings.'

The ABC has confirmed that people are being referred to the Australian Federal Police, the National Anti-Corruption Commission, the Law Society (although it is unclear which jurisdiction), and the Australian Public Service Commissioner.

Those individuals, whose identities remain a secret, have been referred to four authorities for further investigation.

'I do not propose to name the entities to which I have made referrals, because it would only lead to speculation about who had been referred where, which would almost certainly be wrong,' she said.

Alexander Lewis and Ciara Jones, 'Robodebt royal commission findings revealed, individuals referred for criminal prosecution', *ABC News* (Online, 7 July 2023) <[www.abc.net.au/news/2023-07-07/robodebt-royal-commission-findings-revealed/102531450](http://www.abc.net.au/news/2023-07-07/robodebt-royal-commission-findings-revealed/102531450).>

1. Conduct your own investigations into the Robodebt Royal Commission, concentrating on the victims of the Robodebt scheme and what the royal commission would have meant for them. What do you think were the most important outcomes achieved as a result of the commission's work? Describe the outcomes you have chosen and explain why they are important. [S] [A] [E]

## REVIEW

### Comprehend

1. **Describe** the following:
  - a. The dispute resolution processes which involve the assistance of a third party and those which do not.
  - b. The nature of the judge's responsibility.
  - c. The differences between civil and criminal court actions.
  - d. A hierarchy of courts [C]
2. **Describe** and **explain** the following :
  - a. The difference between 'lumping' a grievance and 'naming, blaming and claiming'.
  - b. How mediation differs from conciliation.
  - c. The differences between courts and tribunals. [C] [A]

### Analyse

1. **Analyse** the judicial review process and explain how it is different from an administrative appeal. [A]

### Analyse and evaluate

1. **Describe** the nature of commissions of inquiry set up by governments, and explain the circumstances in which might occur. **Analyse** and **evaluate** the value of such an inquiry. [C] [A] [E]

# Civil law

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## foundations

### Chapter 14: Alternative Dispute Resolution

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14.1 What is alternative dispute resolution?

14.2 Alternative dispute resolution in statute law

14.3 Types of alternative dispute resolution

14.4 The mediation process

14.5 Setting aside a mediation agreement

#### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the nature and scope of alternative dispute resolution forms and processes
  - the support for alternative dispute resolution in Commonwealth and State legislation
  - the nature of mediation, its benefits and disadvantages, and how it is conducted.
- analyse and evaluate the legal issues which arise for litigants seeking to use alternative dispute resolution processes.

## Key Terms

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**Alternative dispute resolution (ADR):** a catch-all phrase or term used to quickly identify those dispute resolution processes that do not require adjudication by a judicial officer.

**Mediation:** a structured process whereby an impartial third party assists in resolving a dispute, but lacks the authority to impose a binding decision.

**Arbitration:** outside the court process, the parties present their arguments and evidence to an arbitrator who acts as a judge and makes a binding determination.

**Case appraisal:** where an assessment is made of the merits of each party's case by a relevant expert, who decides the dispute, and files a written decision in the court. The case appraiser meets the parties to decide how the appraisal proceeds.

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## 14.1 What is alternative dispute resolution?

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The term Alternative Dispute Resolution (ADR) was coined in the late 1970s as a way of promoting **a means of settling disputes other than by taking cases to court.**

At that time, many members of the legal profession, including judges, had become concerned that:

- taking cases to court had become **too expensive**,
- the process was **too lengthy** often with parties waiting for years to have their dispute resolved,
- it was an **alienating process** for many people.

The above concerns have not disappeared with time. If anything, they have grown and become drivers of reform, particularly with regard to legislative changes, building alternative dispute resolution processes into the court process.

ADR was used as a catch-all phrase or an umbrella term to quickly identify those dispute resolution processes that did not require adjudication by a judge. Although labelled 'alternative', these ADR processes, such as mediation, are well recognised and accepted by the courts as useful and important means to settle disputes. Mediation, for example, can also be integrated with going to court. The courts, in many cases, encourage parties to go to mediation and can make it compulsory for them to do so when this is permitted or required by legislation. An example of compulsory mediation is that under the *Family Law Act 1975* (Cth) (as required by the *Family Law Rules* introduced in 2004) parents must go to a mediation before asking a court to decide where a child should reside after parents separate.



## 14.2 Alternative dispute resolution in statute law

In Queensland, laws that recognised ADR were passed and incorporated into court processes. A tribunal was established which promoted the resolution of disputes before it was necessary to determine them by formal adjudication.

### Queensland Civil and Administrative Tribunal (QCAT)

QCAT was established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). Section 3 sets out the objects of the Act, among which are:

- (a) to have the tribunals deal with matters in a way that is accessible, fair, just, economical, informal and quick; and
- (b) to enhance the openness and accountability of public administration.

QCAT's homepage reinforces and interprets the objects of the Act in its opening statement by describing itself as '**independent, accessible, quick, inexpensive and efficient**'. It also advises that persons who attend QCAT are expected to represent themselves, and need to apply for permission from the tribunal if they wish to have a lawyer represent them. QCAT has a wide-ranging jurisdiction:

- adult guardianship matters
- reviewing administrator decisions
- building disputes
- consumer disputes
- residential tenancy disputes
- retail shop leases, and
- tree disputes.

There is a monetary limit of \$25,000. When it was first established, this tribunal represented a real attempt to make justice fairer and more accessible.

### *Civil Dispute Resolution Act 2011* (Cth)

On 1 August 2011 the *Civil Dispute Resolution Act 2011* (Cth) passed into law. The object of the Act is set out in s3 as follows:

#### **3 Object of Act**

*The object of this Act is to ensure, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.*

The Act requires parties:

- to take 'genuine steps to resolve the dispute' before commencing proceedings in the Federal Court and Federal Magistrates Court; and
- to file a 'genuine steps statement' with their application to demonstrate such steps have been taken.

The steps taken must constitute a sincere and genuine attempt to resolve the dispute. For example, offering to discuss the issues in dispute with a view to resolving the dispute, giving the other party information they need to understand the issues involved, or suggesting a method of alternative dispute resolution.

There are consequences for failing to comply with the Act, including adverse costs orders, but proceedings are not invalidated by non-compliance.

### **Civil Proceedings Act 2011 (Qld)**

The *Civil Proceedings Act 2011* (Qld), Part 6, deals with alternative dispute resolution. It is compulsory under the court rules in Queensland that a court action founded on a personal injuries claim must undergo mediation before the court allows it to proceed to trial. Otherwise, mediation can occur voluntarily if the parties decide to do so, or the court can require it. The court can also require a case appraisal, an alternative form of mediation which is discussed later, which involves an independent assessment by a case appraiser. These methods can lead to settlement in part or in full of a claim.

The objects of Part 6 of the *Civil Proceedings Act 2011* (Qld) are set out as follows:

#### **37 Objects of Part 6**

*The objects of this part are—*

- (a) *to provide an opportunity for litigants to participate in ADR processes in order to achieve negotiated settlements and satisfactory resolution of disputes; and*
- (b) *to improve access to justice of litigants and to reduce cost and delay; and*
- (c) *to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible; and*
- (d) *to safeguard ADR processes—*
  - (i) *by extending the same protection to participants in an ADR process as they would have if the dispute were before a court; and*
  - (ii) *by ensuring that they remain confidential.*

The *Civil Proceedings Act* also sets out certain ADR processes and incorporates them formally as part of court procedures in Sections 39 to 40.

#### **39 ADR process**

- (1) *An **ADR process** is a process of mediation or case appraisal under which the parties are helped to achieve an early, inexpensive settlement or resolution of their dispute.*
- (2) *In this part, an **ADR process** includes all the steps involved in an ADR process, including—*
  - (a) *pre-mediation and post-mediation sessions; and*
  - (b) *a case appraisal session; and*
  - (c) *joint sessions; and*
  - (d) *private sessions; and*
  - (e) *any other step prescribed under the rules.*

**40 Mediation**

**Mediation** is a process under the rules in which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication.

**41 Case appraisal**

- (1) **Case appraisal** is a process under the rules in which a case appraiser provisionally decides a dispute.
- (2) A case appraiser's decision is not binding on the parties until—
  - (a) the time prescribed under the rules for filing an election to go to trial has passed; and
  - (b) a court, by order, gives effect to the decision.

**42 Parties may agree to ADR process**

- (1) The parties to a dispute may agree to refer their dispute to an ADR process.
- (2) If the parties agree to the referral, they must file a consent order in the approved form.
- (3) A consent order filed under this section is taken to be a referring order. (Ver. 2.7.20 Rev. 7491)

**Practical Application ...**

1. Describe and explain the differences between the objectives and processes of the *Civil Dispute Resolution Act 2011* (Cth) and Part 6 of the *Civil Proceedings Act 2011* (Qld). [C] [A]
2. Describe the approach taken by QCAT when it deals with civil disputes. How is it different from the processes of the other courts, federal and state? [C] [A]

## 14.3 Types of alternative dispute resolution

The Queensland Law Society has developed a website which provides a full explanation of the different types of ADR. For the practical application below we have shared an extract of the website content. To view it in its complete form use the source details provided.

**Practical Application****TYPES OF ALTERNATIVE DISPUTE RESOLUTION (ADR)****Mediation**

Mediation is a popular way of settling disputes without going to court. A mediator is an impartial third party who will guide you through a structured process to assist in the resolution of your dispute. It is up to the parties to reach an agreement and decide what is included in that agreement. Parties in a mediation may choose not to accept the agreement if they are unhappy with the terms reached or the suggested outcome. Agreements reached



in mediation are not legally binding, unless the parties sign a statement agreeing to be bound to the agreement in law. If drafted effectively, such agreements can be enforceable contracts. They may contain terms which prohibit the parties from seeking enforcement of the contract in a court of law.

Mediation can save considerable time, legal fees and court costs for parties and for the community. Often, outcomes reached in mediation cannot occur in court, where a judge is bound to interpret what a contract means, rather than taking into account the wishes of the parties. Unless directed to mediation by a court or tribunal, mediation is a voluntary process. If an agreement cannot be reached through mediation, the parties may then choose to take the matter to court.



### *When is mediation compulsory?*

Some courts and tribunals have compulsory dispute resolution procedures. For example, the Family Court requires compulsory mediation in parenting matters. Court actions in the Federal Court of Australia or the Federal Circuit Court can only commence if parties have taken genuine steps to resolve their disputes (*Civil Dispute Resolution Act 2011* (Cth)) though there are some proceedings which are excluded such as criminal, civil penalty or appeals.

### **Arbitration**

Arbitration is a form of alternative dispute resolution outside of the courts to obtain a decision that will legally bind the parties. The parties present their arguments and evidence to an arbitrator who acts as a judge and creates a binding determination, called an award. Arbitration offers a flexible and efficient means of solving disputes. Arbitration can be ordered by consent in matters in which there are current proceedings before the court or parties can agree to arbitration.

### **Expert Determination**

Expert determination is a type of alternative dispute resolution process in which parties agree to have their dispute resolved (i.e. 'determined') by an independent third party (i.e. 'the expert'). Sometimes the expert is a lawyer, but in many disputes the expert is a person with some technical expertise (such as an engineer, an accountant or a valuer). Parties to commercial contracts will often include a dispute resolution clause which requires the parties to refer disputes that arise under the contract (That usually means there is no right of 'appeal' (as there usually is with a court or tribunal judgment) and there are only limited ways in which the parties can seek to challenge the expert's decision. Expert determination differs from an 'arbitration' in that an arbitration gives the arbitrator and the party's rights and obligations under the *Commercial Arbitration Act 2013* (Qld), whereas an expert determination is governed by the contract between the parties.



## Practical Application ...

### Conciliation

If your legal issues revolve around discrimination in the workplace or relate to services, the best way to resolve the dispute may be conciliation. This process assists parties in identifying the disputed issues and discussing possible terms of settlement while receiving expert advice from the conciliator who does not act as a judge for the parties. As with mediation, some courts and tribunals may require you to try conciliation before going to trial. For example, under the *Family Law Act 1975* (Cth), in property disputes, the parties must attend a mediation conference or conciliation conference before the matter will be set down for trial.

### Collaborative law - negotiations without court involvement

Collaborative law involves both parties and their legal representatives specifically agreeing in writing to reach a settlement without resorting to litigation (a participation agreement is signed at the start of the process). The focus of all participants is to actively participate, negotiate and minimise conflict in order to avoid going to court. Although collaborative law can be used for commercial areas, the primary purpose in Australia is to resolve family law matters. The legal representatives are required to remove themselves from the matter if the parties are unable to reach an agreement.

Source: Queensland Law Society, 'Types of Alternative Dispute Resolution (ADR)' (Web Page, No Date) <qls.com.au/Practising-law-in-Qld/ADR/Alternative-Dispute-Resolution/Types-of-Alternative-Dispute-Resolution-(ADR)>.



1. Describe and explain mediation as a method of (ADR). [C] [A]
2. Describe and explain the circumstances in which compulsory mediation occurs. Why do you think compulsory mediation has been adopted in these circumstances? [C] [A] [E]
3. Compare and contrast mediation to conciliation and Collaboration. [C] [A]
4. Explain why there are different methods of ADR. Do you think this makes the litigation landscape too complex to navigate, or does the wider range of choice make it easier to find a suitable pathway to resolve a dispute? Justify your decision with legal reasoning. [A] [E]
5. Does the use of the methods of ADR mean that individuals who choose ADR make savings of both time and money for themselves and for the wider community? Give some examples to support your opinion. [A] [E]

## 14.4 The mediation process

When a third person assists in resolving a dispute, but lacks the authority to impose a binding decision, it is called mediation. There are many forms of mediation found around the world and also many variations within Australia. The ADR movement has put forward certain characteristics that generally apply to mediations in Australia.

Usual characteristics of the mediation process are:

- Participation in mediation is voluntary in many cases.
- Limited number of procedural rules.
- No rules of evidence.
- Informal discussion of the parties' concerns, which allows for the venting of emotional issues.
- Mediator's power is restricted to control of the process.
- Parties decide the content of what is discussed.
- Parties decide on the outcome.
- The process is private and confidential.
- Flexibility of possible solutions.

### Benefits of mediation

- Mediation is considered empowering as it gives control over the outcome of a dispute back to the parties rather than having it controlled by the State, as occurs with an adjudication in the courts of law.
- Mediation is considered cheaper than going to court. This is because there is less formality and paperwork involved, legal costs are lower, and settlement is likely to occur at an earlier time. The mediation process is thought to be less stressful for parties than going to court, partly because mediation is less formal and less adversarial.
- Mediation is private and confidential so no one else needs to know the details of the dispute or any agreements reached. As mediation often involves a compromise by both parties, the emphasis is on finding common ground between the parties rather than finding a winner of the dispute. This differs from court cases where the process is adversarial, and generally results in a winner and a loser. This is why mediation is often referred to as providing a 'win/win' solution. For this reason, you are more likely to stay friends or keep a workable relationship with the other party than occurs when people go to court.

### Disadvantages of mediation

- As the mediator does not impose a solution both parties should be equally able to speak for themselves and promote their interests. However, if there is a significant power imbalance between the parties, mediation may not be recommended. For example, a wife who has been physically and emotionally abused by her husband may not wish to go to mediation to decide issues in dispute about children unless protected by independent representation.

- If a party has a clear legal right, it may be argued that a compromise in a mediation may cause him or her to receive less than if the matter went to court. As mediations are private and confidential, no one knows how other similar disputes have been resolved. This means that there can be significant variations in settlements. It also enables precedent to occur. Privately settled mediations do not allow a clear and consistent history of decisions (precedent) to develop.
- Any decision given by a judge in a court of law will be enforced by the State. If the court orders a sum of money to be paid to one of the parties there are mechanisms to ensure this occurs, such as using a court-sanctioned bailiff to collect the money owed. As mediations are voluntary agreements, enforcement may be more difficult. If a party agrees to do something and then does not adhere to it, the matter may still have to be taken to court.

### Who can mediate?

Mediations can occur informally without using professional mediators. However, there are many professional mediation services available where persons trained in mediation provide dispute resolution services. These range from highly expensive professional services to free mediation services provided through professional and government organisations.

Some examples are:

- the Queensland Law Society, which refers people to its current list of legal practitioners who are accredited (trained) mediators,
- the Caxton Street Legal Centre that focuses on community-based mediations,
- the Australian Disputes Centre, which focuses on business-related disputes,
- the Resolution Institute, which offers services or private mediation, arbitration, case appraisal, and training for members to become accredited nationally
- Relationships Australia and the Family Court provide mediation services for family with 'disputes'.

In addition, mediation has been integrated into the dispute resolution process in the courts. Both federal and state courts at each level provide court-annexed mediation, which means that magistrates and judges have the power to make mediation compulsory for parties before they are allowed to have a court hearing



## Situation 1

You are a lawyer. A client, Mrs Day, comes to you with a problem she is having with her neighbour, Mr Night. Mrs Day and her young children are disturbed by the loud music and by the frequent parties that Mr Night has in his backyard. She has called in the police on many occasions – every time he plays music or has a party. Now she wants you to put a stop to his nocturnal partying and polluting the air with loud music. Mr Night has told her that she ‘ought to get a life’ and that he is entitled to do what he likes in his own backyard up until midnight.

Write a letter of advice to Mrs Day, based on your reading of the Dispute Resolution Centres website and the earlier discussion of mediation, that responds to the following questions:

1. Should she take the matter to court or try mediation?
2. What would be involved in a mediation and how long would it take?
3. Would you, as her lawyer, attend with her?
4. What are the potential benefits and concerns associated with mediating this dispute?

[C] [S] [A] [R]

## Situation 2

**Facts:** Ryan is a handyman who regularly repairs stairs and outdoor decks (verandahs). He quotes to repair Sam’s and Molly’s back deck for \$7000. He discusses with them the materials he intends to use, and it is agreed that the decking will consist of Australian hardwood. When Ryan sources the decking, all of the timber merchants and hardware stores are unable to supply the quantity of Australian hardwood he needs for the job. The shortage, according to the suppliers is likely to last for three months. Ryan telephones Sam who agrees that Ryan can use imported Merbau (Kwila) hardwood which comes from Indonesia. There is no discussion about the price, but usually the imported Indonesian hardwood is cheaper by approximately 30%. Ryan does the job, and when he finishes, Molly asks him why he did not use Australian hardwood and says she had heard that importers sometimes obtained their product from overseas suppliers who did not comply with environmental standards. Ryan’s supplier was unable to give him this assurance. Molly complains to Sam, and they decide that they want Ryan to remove the imported hardwood and replace it with Australian hardwood when it becomes available. Ryan refuses. He is not paid and takes his dispute to QCAT. A mediation is ordered.

1. Prepare a written statement of complaint (opening statement) for Ryan, indicating that he seeks payment in full. [C] [A]
2. Prepare the mediator’s summary of the essential points that Ryan made in his opening statement. [C] [A]
3. Prepare a response (opening statement) from Sam and Molly setting out their version of what happened, indicating that they want the decking replaced with Australian hardwood. [C] [A]

### Situation 2 continued...

4. Prepare the mediator's summary of the whole dispute. Identify the facts and issues where the parties have common ground (are in agreement) and those where they are in dispute. [C] [A]
5. With a group of three or five fellow classmates, suggest options which might be possible to resolve the dispute. Initially, list these as they are suggested, and then make separate lists, one for Ryan, and the other for Sam and Molly, in the order of preference for each of the parties. Take a vote on what you think is the best option to resolve the dispute. [C] [S] [A]
6. Prepare an agreement in writing to reflect what is agreed. [R]

## What happens in mediation?

Unlike court hearings where the procedural rules are fixed, mediations are marked by a great deal of flexibility. However, most professional mediations follow a similar pattern. Usually the parties can decide whether or not they wish to have a lawyer present with them at the mediation. If the hairdresser and the dissatisfied client from the hairdressing salon (from our earlier example) went to mediation, it is likely to be in the following format.

### 1. Defining the problem and the issues in dispute

#### 1. *Mediator's opening*

The mediator makes an opening statement introducing all the parties and explaining the mediator's role, the ground rules and procedure for the mediation, and the goal of the mediation. The goal is usually to find a mutually satisfactory solution to the problem that both parties can live with. The mediator explains that the meeting is confidential until agreement is reached.

#### 2a. *First party (the client) – opening statement*

One of the disputants/parties gives their view on the nature of the conflict and the dispute.

The mediator summarises the essence or essential points in the first party's opening, so that both parties clearly understand what has caused the complainant to pursue the matter to this point.

#### 2b. *Second party (the hairdresser) – opening statement*

The mediator summarises the second party's main points of contention.

## 2. Addressing each issue, exploring options for solving problem



**3. Mediator summarises whole dispute** stressing areas of common agreement.

These may be written up in a list on a board in order to identify the main issues to be discussed and negotiated. Parties are asked if they agree with these, and if they do, the next stage commences. If not, the list may be changed until both parties feel satisfied with the accuracy of the dispute summary.

## 4. Discussions and exploration of options

This occurs jointly with both parties and the mediator.

At times, the mediator may ask for a private meeting with each of the parties.

The process of joint discussion and further private meetings will continue until an agreement is reached, or it is clear that there is no compromise solution to which both parties will agree.

## 3. Resolution



## 5. Settlement or no settlement

If the parties agree, this will be written down as an agreement and signed by the parties and the mediator (usually in the form of a binding agreement).

If there is no agreement reached, the parties may adjourn with an option to try mediation a second time. Otherwise they will go on to resolve it by some other means, whether it is 'lumping' it or going to court.

## Practical Application

Conduct a role-play of either the hairdresser situation or the hypothetical involving Mrs Day and Mr Night. One person can be the mediator or you may like to try having two mediators who work together to assist the parties to reach an agreement. The other two are either Mrs Day and Mr Night, or the hairdresser and her dissatisfied client. Follow each stage of the procedure outlined above in conducting the mediation.

If an agreement is reached, write it out as a contract that both parties could sign. [C] [A] [R]



## 14.5 Setting aside a mediation agreement

The law which entitles a party to a mediation agreement to set it aside is complex. It can only be understood in the context of full knowledge of the law of contract, which you study in the next topic. This means it is outside the scope of this chapter, and parts of it are probably outside the scope of this textbook. However, the following brief sources of information, we hope, may whet your appetite, and you will go on to appreciate some of the issues.



## Practical Application

### Source 1

#### MEDIATION AND INCAPACITY: WHETHER AN AGREEMENT SHOULD BE SET ASIDE

*Macura v Sarasevic* [2019] NSWSC 1409

In this case, Chief Justice Ward considered whether a settlement agreement reached at mediation should be set aside where one party claimed to have been under and incapacity. The judge decided the and to be tested agreement in this case should stand. The judge noted that the test for capacity was 'issue specific' and to be tested by reference to the particular transaction or conduct in which the person proposed to engage. The judge indicated that she was not satisfied that, at the time of the mediation, evidence showed that the plaintiff was unable to understand information carefully explained to him or to give proper instructions.

Source: Claire Roberts, 'Mediation and incapacity: whether an agreement should be set aside', *NSW Bar News*, (Online, Autumn 2020) <[barnews.nswbar.asn.au/autumn-2020/recdev-macura-v-sarasevic-dzk/](http://barnews.nswbar.asn.au/autumn-2020/recdev-macura-v-sarasevic-dzk/)>.

### Source 2

#### IN WHAT CIRCUMSTANCES WILL SETTLEMENT AGREEMENTS BE SET ASIDE IN HISTORICAL SEXUAL ABUSE CASES?

The recent decision of *TRG v Board of Trustees of the Brisbane Grammar School* is the first case to consider the newly-amended s 48(5A) of the *Limitations of Actions Act 1974* (Qld) (LAA) that confers the courts with the discretion to set aside previously reached settlement agreements for historical child sexual abuse claims.

Source: Rebecca Stevens, 'In what circumstances will settlement agreements be set aside in historical sexual abuse cases', *Carter Newell Lawyers*, (Web Page, August 2019) <[### Source 3](http://www.carternewell.com/page/Publications/Archive/in-what-circumstances-will-settlement-agreements-be-set-aside-in-historical-sexual-abuse-cases/#:~:text=lf%20a%20settlement%20agreement%20was,to%20set%20aside%20the%20agreement.></a>>.</p>
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#### SETTING ASIDE AGREEMENTS REACHED AT COURT-ANNEXED MEDIATION: PROCEDURAL GROUNDS AND THE ROLE OF UNCONSCIONABILITY

There is an emerging body of case-law concerning the circumstances in which an agreement reached at mediation may be set aside both at law and in equity. In such cases procedural aspects of the mediation in question are often challenged and equitable intervention may be sought on the basis of an alleged unconscionable bargain. This article considers some of the circumstances in which a mediation agreement may be set aside at law, or in equity

Source: Tina Cockburn and Melinda Shirley, 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability', (2003) 31, *Western Australia Law Review*, 70.

1. Do you think that it is fair that someone who did not have the legal capacity to enter into a mediation agreement or through no fault of their own, was in a vulnerable situation and taken advantage of by another party who made them enter into an agreement, which on its face, was unfair? [E]

# Review

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## Comprehend

1. **Define** the meaning of
  - a. mediation
  - b. conciliation
  - c. case appraisal [C]
2. **Describe** and **explain** the following;
  - a. The role played by alternative dispute resolution in the Queensland Civil and Administrative Tribunal.
  - b. The objectives of the *Civil Proceedings Act 2011* (Qld).
  - c. The objectives of the *Civil Proceedings Resolution Act 2011* (Cth). [C]

## Analyse

1. What are the advantages and disadvantages of mediation compared to the court system?  
[A]

# Civil law

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## foundations

### Chapter 15: Resolving issues through the civil justice system

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#### 15.1 Access to the civil justice system

#### 15.2 Making a complaint to the Queensland Ombudsman

#### 15.3 Resolving a family issue in the Queensland Civil and Administrative Tribunal (QCAT)

#### 15.4 Resolving a contract dispute in the Magistrates Court of Queensland

#### 15.5 Court-ordered alternative dispute resolution

#### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the issues raised in the civil justice system for persons seeking access to use it
  - there is a large number of different jurisdictions to which civil issues/disputes can be taken for resolution
  - these different jurisdictions are all governed by their own rules, and can only exercise authority in accordance with the laws which establish them
  - where a person goes to seek an outcome resolving an issue/dispute depends on the nature and factual circumstances surrounding it
  - the cost of resolving an issue/dispute varies enormously, depending on the choices made about jurisdiction, legal representation, and procedures chosen during the litigation.
- analyse and evaluate the different pathways available to access the civil justice system.

## Key Terms

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**Action:** a word used to describe the process of pursuing a right. A civil action is brought to enforce a civil right, for example claiming a sum of money. Sometimes referred to as a civil suit.

**Litigant:** a person involved in a civil action or civil suit.

**Litigation:** the legal proceedings between two or more parties which follow the filing of a lawsuit.

**Pleadings:** the written statements exchanged by a plaintiff and defendant in the civil action or civil litigation.

**Statement of claim:** a written statement setting out the material facts a plaintiff claims to support his or her civil action.

**Defence:** a written statement setting out the response of a defendant to the statement of claim of the plaintiff in a civil action.

**Counterclaim:** this is a claim made by a defendant, in it's defence, for the loss and damage it has suffered as a consequence of the plaintiff's failure to observe the contract, or mitigate it's damages

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## 15.1 Access to the civil justice system

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The cost of getting legal advice, and going to court in the civil system to seek justice, has become more of an issue in the community over time. Community organisations and lawyers are extremely aware that the people who have money are advantaged in the system. That is not to say that there are not lawyers who will take on a good cause and be paid if they are successful in achieving an outcome for their client or work 'pro bono'. Today there is a great deal of support for people who want to access the civil justice system but find it difficult to do so because of lack of funds, language difficulties, living in remote communities, discrimination, difficult family circumstances, and other issues. What we all would like the community to offer such people, indeed everyone, is set out on the website of Community Legal Centres as follows:

*All people, regardless of their background or present circumstances, should be able to access sufficient assistance (legal or non-legal) to enable them to know, understand and stand up for their rights in the public domain. Individuals should be able to seek and achieve justice through the system of courts established to achieve this end.*

Community Legal Centres Queensland, 2023.

The 2021 Queensland Law Society (QLS) President Elizabeth Shearer, launched the *QLS Policy Position on Access to Justice*. She wrote of the opening paragraph that it encapsulates the essence of why access to civil justice is so important:

'Access to justice is a human right. It also makes other human rights a reality. In the absence of access to justice, people are unable to exercise their rights, hold decision-makers accountable, challenge discrimination and have their voice heard.'

While access to justice in criminal law matters remains imperfectly realised, at least there is a framework for it in the *International Covenant on Civil and Political Rights*, the *Queensland Human Rights Act*, and case law.

**Access to civil justice, which is critical to the rule of law and the maintenance of our civil society, lacks even that framework.**

**The Human Rights Act enacts that every person is equal before the law and is entitled to equal protection of the law. It enacts that a party to a civil proceeding has the right to have the proceeding decided after a fair hearing.**

**But there is no civil case law equivalent to *Dietrich v The Queen* (the case that established a criminal trial could not proceed in the interests of justice if there was no legal representation for the accused), and, with few exceptions, no legal aid for civil law cases.**

Source: Elizabeth Shearer, 'A roadmap for access to civil justice', *Proctor* (Online, 23 December 2021) <[qslsproctor.com.au/2021/12/a-roadmap-for-access-to-civil-justice/](https://qslsproctor.com.au/2021/12/a-roadmap-for-access-to-civil-justice/)>.



## Practical Application

1. Consider the statement quoted from the website of *Community Legal Centres Queensland*. Describe and explain how the system of courts you have studied provides a way for individuals to achieve justice. Describe how the diversity of the court and tribunal structures might make it possible for different claims to be heard effectively. How might the appeal system help? [C] [A]
2. What, according to former QLS President Elizabeth Shearer makes access to civil justice a human right? What do you think she means when she says that access to civil justice is critical to the rule of law and the maintenance of our civil society? [C] [A]
3. What does former President Shearer say the *Human Rights Act* says which protects the rights of every person who enters the civil justice system to seek a remedy? Are these rights different from those of alleged perpetrators (defendants) and victims who enter the criminal justice system? Explain the differences. [C] [A]



## Research Task

There is a wide diversity of views about the extent to which the objectives of social policy should be funded by our State and Federal governments. There is a public health system in Queensland which is free, and we also enjoy a universal health care system funded by the Commonwealth through Medicare. There is now the NDIS, which has recently been the subject of a review, in which the cost of the services it provides are being examined. It is pretty well accepted in our society that if you can afford to pay for legal services (legal representation) you should do so yourself. These things are not cut and dried. As former President Shearer has commented, the network of assistance for persons involved in the criminal justice system is much more advanced than in the civil justice system. Some entities which provide legal advice and legal representation to assist litigants (persons involved in court/tribunal cases in the civil justice system are set out below.



## Research Task

Legal Aid Queensland - [legalaid.qld.gov.au](http://legalaid.qld.gov.au)

Aboriginal and Torres Strait Islander Legal Service (Qld) - [atsils.org.au](http://atsils.org.au)

Free Bond Law Clinic - Free Legal Service - [bond.edu.au/bond-law-clinic](http://bond.edu.au/bond-law-clinic)

QLS Pro Bono Referral Service - [qls.com.au](http://qls.com.au)

1. Investigate either Legal Aid Queensland or the Aboriginal and Torres Strait Islander Legal Service (Qld). Report on your chosen entity using the following:
  - a. Describe the services your chosen entity provides. [C] [A]
  - b. Who is entitled to apply for assistance? Are there guidelines to limit the assistance the entity provides? How does the entity ensure that those persons with the greatest need are provided legal assistance? [C]
2. Investigate the other types of free legal services shown.
  - a. What is meant by 'Pro Bono'? How does the Queensland Law Society Pro Bono Referral Service work? Give some examples of the types of legal services which have been accessed through the scheme. [C]
  - b. Describe the free legal services offered by the Bond Law Clinic. [C]
3. Many advertisements state that a legal service is offered to prospective clients on the basis of 'No Win – No Fee' by the law firm advertising the service. What does this mean? Do you think this might be helpful to a person who could not pay for legal advice or assistance? Investigate online or contact a law firm that does this and make appropriate inquiries. [C] [A] [E]



Access to justice in the civil law system depends on the correct selection of the court or tribunal to which a litigant (claimant) makes a claim against another person or organisation. In Chapter 13 we outlined for you the different methods available to a person or persons needing to resolve civil disputes. In this chapter, a number of civil disputes with different factual circumstances will be considered, giving you the opportunity to participate in the processes required to make the decisions to take each of these to a satisfactory resolution.

## 15.2 Making a complaint to the Queensland Ombudsman

### Inquiry Focus

*When is it appropriate to complain to the Queensland Ombudsman and what is the process involved?*

### Research Task

Go online to [ombudsman.qld.gov.au](http://ombudsman.qld.gov.au) where you will find useful information about the Office of the Queensland Ombudsman, the source and scope of its authority, the nature and extent of its obligations, and its processes. Some of what you will find is:

- the Queensland Ombudsman is an officer of Parliament and reports to Parliament through the Legal Affairs and Community Safety Committee;
- its vision is to achieve a fair and accountable public administration in Queensland;
- it regards itself as independent and impartial, ensuring a fair outcome is achieved;
- it was originally tasked in 1974 with investigating the administrative actions of government departments and authorities;
- it now has the dual role of investigating complaints against government agencies and helping agencies improve their decision-making and complaint handling; and
- it has a section on its website giving advice to a person who wishes to make a complaint to an organisation such as a state school.

Make notes of the suggested approach to procedures to be followed when contacting a school with a complaint.

### Hypothetical?

**Facts:** Toby attends a large state high school in Queensland. He is in Year 12, and is hoping to proceed to tertiary studies. His results are important to determine what he will be able to study. Toby goes to a end of year social event on Saturday night run by another school to mark the approaching end of the academic year with some of his friends from school in his grade. Toby does not drink alcohol, but his friends do, and they smuggle alcoholic beverages into the venue. At the venue, Toby is sitting with his friends in a specified area set aside for them. A security person discovers alcoholic beverages in the area and confronts them. He ejects them from the function and promises to advise their school administration of their behaviour. One of their teachers who accompanied the students from their school as a condition of them being allowed to attend, is immediately notified of the incident.

## Hypothetical?

Toby is aware of a rule that the consumption of alcohol on school premises (including premises at other schools) attracts possible suspension and fears the worst. His fears are realised when he is suspended the next Monday for the remainder of the school year, and to return only to attend final assessment in the last three weeks. All the other students (his friends) receive the same punishment.

Toby tells his parents, who ring the school to speak to the administration (the headmaster) but are informed that the decision has been made and will not be changed. Toby's parents immediately send an email to the school administration

expressing their concern about the nature of the decision and the consequences for Toby. Toby will miss approximately 10% of his assessment over the final six weeks, as well as valuable class time when the teachers conduct revision and assist students to prepare for exams. Toby is told by his Form master it will affect his grades and his potential score which determines tertiary entrance.



Toby's parents read the school rules and policy document given to them when Toby first enrolled at school. It informs them that the school has a policy of receiving complaints in writing, arranging an interview with a panel that includes the headmaster and a parent nominated by the Parents and Citizens Association of the school, which will review any serious punishment. It is now the Tuesday after the weekend on which the incident took place.

**Legal Issue:** Does Toby have grounds for a complaint about his punishment? If the school administration does not react urgently to a written complaint, would Toby also have grounds to seek urgent intervention by the Queensland Ombudsman in the school review process on the grounds of procedural unfairness?

**Decision:** Toby's parents decide that they have no alternative but to prepare for the worst. They prepare an appropriate complaint letter to the school administration, and lodge a copy of that letter with the Queensland Ombudsman, making a complaint about the refusal of the school to adopt its own written procedures to resolve the issue.

1. Who are the stakeholders in this dispute? [C]
2. Describe the issue in dispute between Toby, his parents and the school administration (headmaster). [C]
3. What are the options each stakeholder could take to resolve the dispute? [C] [A]
4. Complete a letter on behalf of Toby to the school administration using the complaint letter guidelines provided on the Queensland Ombudsman website. [C] [A] [R]
5. Complete a letter of complaint on behalf of Toby to the Queensland Ombudsman, asking for the school review process to be bypassed, and for an urgent decision to be made for an alternative punishment which allows Toby to return to the school and complete his assessment without disadvantage. [C] [A] [R]

## 15.3 Resolving a family issue in the Queensland Civil and Administrative Tribunal (QCAT)

You have studied in a general way in Chapter 13.8 the different areas of the law which QCAT can hear. When a family member needs to be appointed as attorney to manage the financial affairs of an elderly person who is no longer able to look after himself or herself, any dispute is usually taken to QCAT. The following action taken in the tribunal, is a straightforward illustration of how such a dispute could arise and be resolved.

### Inquiry Focus

*Does QCAT have the jurisdiction to hear a family issue? Are its processes suitable for the resolution of such issues?*

### Hypothetical?

**Facts:** Gwen is an elderly widow. She receives a weekly visit from a Legacy volunteer, Sam, who helps her with chores. Gwen has two adult children, Cynthia and Jack. Gwen is a client of Cameron, who has been her solicitor for many years. Cameron has been Gwen's attorney pursuant to the *Powers of Attorney Act 1998 (Qld)* since 1 October 2011.

Gwen instructs Cameron that she will need him to manage her affairs pursuant to his role as her attorney because Cynthia and Jack frequently argue with each other about what should happen to her and her property. Cameron suggests Gwen should change her existing power of attorney to an enduring power of attorney, but Gwen says it is too late to do this, because her general practitioner has already told her that she has the early indications of Alzheimer's disease. Sam, who has brought Gwen to Cameron's office for her appointment with him, confirms that he has observed the early symptoms which Gwen claims to have.

Cameron advises Gwen that it will be necessary to bring an application before a tribunal member at QCAT so that an order can be made to activate the existing power of attorney and confirm that he can continue as Gwen's attorney after she is no longer able to give him instructions (that is, change it to an enduring power of attorney).

Cameron tells Gwen that he will need a letter from her medical practitioner about her medical condition, and an affidavit from Sam confirming his observations of her symptoms of Alzheimer's, and for her to attend at the tribunal with him when the application is heard. Cameron adds that both Cynthia and Jack will need to be served with the application to give them an opportunity to appear and object, or to seek alternative orders, such as for either of them to replace him as Gwen's attorney.

Cameron seeks instructions to:

- apply to QCAT for an order that Gwen's power of attorney be activated and confirmed to continue with him as attorney to manage her financial affairs, even after she loses capacity.

## Hypothetical?

- write to her general practitioner seeking a letter from him confirming his diagnosis as to her medical condition.
  - obtain an affidavit from Sam confirming his observations of her symptoms.
  - write to Cynthia and Jack informing them of Gwen's instructions, and inviting them to contact him to discuss the matter before they receive formal notice from QCAT serving them with the application.
1. Locate and select relevant legal information from the QCAT website and the *Powers of Attorney Act 1998* (Qld) to answer the questions below. Ensure you correctly reference the law if required.
    - a. Does QCAT have the jurisdiction to hear Cameron's application to be appointed as Gwen's enduring Power of Attorney under the *Powers of Attorney Act 1998* (Qld)?
    - b. Does QCAT have the power to make an order activating Gwen's power of attorney for Cameron to manage her financial affairs and to confirm it will continue even after she loses capacity?
    - c. Will QCAT serve Cameron's application on Cynthia and Jack once it is filed?
  2. List the information required to be included in Cameron's application, and prepare the draft order that he seeks. [C] [S] [A]

### THE TRIBUNAL PROCESS

#### a. The application

Cameron prepares the application and files it at QCAT. The application contains full names and addresses of Gwen, Sam, Gwen's general practitioner, Cynthia, Jack and Cameron. It contains details of Gwen's financial circumstances, her health history, and family history. It sets out the reasons for the application, including her relationship with Cynthia and Jack, and their relationship with each other. It sets out the order which Cameron is seeking on Gwen's behalf.

Each of the persons named in the application receives a letter from QCAT, informing each of them that a preliminary conference with a Registrar will occur on a given date, and each of them is expected to attend, unless permission is granted to be excused. Prior to the due date of the preliminary conference, Cameron contacts the Registrar, who gives permission for Sam, Gwen, and the general practitioner to be excused.

#### b. The preliminary conference

Cameron, Cynthia and Jack attend before a Registrar. Cameron is given permission by the Registrar to represent Gwen at the preliminary hearing. The Registrar invites Cameron, as the applicant, to summarise the relevant facts and explain the order that is being sought. He goes through the application that Cameron filed on Gwen's behalf and notes that Cameron has not attached a certified copy of the original

## Hypothetical?

power of attorney document. Cameron has that with him and shows the Registrar, who informs Cameron that it will be necessary for him to prove that he is Gwen's attorney by filing a certified copy before any hearing can take place.

Cynthia, and then Jack, are invited by the Registrar to respond. Each of them tells their story, and both of them acknowledge that there have been frequent disagreements with their mother and each other, and that each of them has told Gwen that they do not trust the other to act as her attorney. When asked if this is still their position, both say it is. When asked if they know of any reason to oppose Cameron as the person to manage their mother's financial affairs, each of them says no.

The Registrar confirms that it is not possible for Cameron to act as Gwen's attorney without an order of the Tribunal, because her capacity to manage her financial affairs is impaired. Cameron asks the Registrar if it is possible for the order to be made by consent (that is, by filing documents signed by all parties by agreement). The Registrar indicates that this is not possible as the medical evidence suggests that Gwen is already not fully capable of managing her financial affairs, and that a Tribunal Member needs to conduct a hearing and be satisfied that the order will be in Gwen's interest.

The Registrar checks the Tribunal's diary and allocates a hearing date for three hours from 10am on a date suitable to Cameron, Cynthia and Jack. Cameron submits that it is not necessary for Gwen's general practitioner to be present. The Registrar disagrees. The Registrar makes the following orders:

### IT IS DIRECTED THAT:

1. The matter of Gwen's power of attorney be heard at 10am on 6 May 2023.
2. Cynthia and/or Jack to file any cross-application and serve it on Cameron by 22 April 2023.
3. Gwen's general practitioner to file an affidavit attaching his medical opinion by 22 April 2023.
4. Cameron to file a certified copy of Gwen's original power of attorney by 22 April 2023.

Prior to the hearing Cameron files a certified copy of Gwen's original power of attorney and an affidavit from her general practitioner stating that Gwen is experiencing symptoms of early Alzheimer's disease. In his opinion she is unable to manage her financial affairs. Cameron also files an affidavit by Sam giving evidence that he has observed Gwen confused about her banking arrangements. Neither Cynthia nor Jack filed any documents.

### c. The hearing

All of the required parties attend the QCAT hearing on 6 May 2023.

The Tribunal Member welcomes everyone and invites each of them in turn to announce his or her presence. She says that she has already read all of the material filed. She then explains that the hearing will not be conducted as a court of record,

## Hypothetical?

witnesses are not required to be sworn in, and she expects everyone to be respectful and listen to each of them as they speak. She then opens proceedings by inviting Cameron as the applicant to outline his application, the orders he is seeking, the evidence he is producing through witnesses, and the submissions he proposes to make.

Cameron seeks permission to represent Gwen, explaining their long relationship, that she wants him to represent her, and that he is prepared to continue as her attorney if the Tribunal so orders. The Tribunal Member gives permission, saying it is justified in the circumstances.

Cameron asks the Tribunal Member if she could consider the evidence of the general practitioner first, so he can be excused, if possible. She agrees. Cameron summarises the evidence of Gwen's general practitioner, and refers to Sam's affidavit supporting his opinion that Gwen's capacity is impaired. The Tribunal Member asks Gwen if she is comfortable with her doctor's opinion and Sam's evidence. Gwen said she trusts both Sam and her doctor and agrees with their views. She gives Cynthia and Jack the opportunity to comment, but both of them decline. The Tribunal Member excuses the general practitioner and thanks him for his attendance and contribution.

The Tribunal Member asks Gwen to describe the relationship with her solicitor, Cameron. Gwen does so, expressing her total confidence in Cameron, that he will honestly act in her interests if his powers are activated and if he continues to be her attorney until her death. The Tribunal Member asks Cynthia, and then Jack, to confirm that neither of them opposes Cameron's appointment, and that neither of them wishes to be their mother's attorney. They both answer in the affirmative, and indicate that they have discussed Cameron's fees with him, and will be happy if the Tribunal permits him to charge for his services from the date of his appointment. The Tribunal Member asks Gwen if she agrees with this, and Gwen responds that she does.

At this point in the proceedings the Tribunal Member indicates that she is in favour of granting the orders, then proceeds to give reasons for doing so. Initially, she summarises the facts, then says that she is satisfied that the future arrangements for Gwen are satisfactory. She then makes the following orders:

### IT IS ORDERED THAT:

1. Pursuant to the power of attorney dated 1 October 2011, Cameron shall be Gwen's duly appointed attorney from 6 May 2023 until further order.
2. Cynthia and Jack shall be entitled to give Cameron 30 days notice to file in this tribunal a statement of the financial circumstances of Gwen at the conclusion of each financial year.
3. Cameron shall be paid at a reasonable hourly wage for any services rendered by him pursuant to his role as the attorney of Gwen.

1. Who are the stakeholders? [C]
2. Describe and explain the issue in dispute. [C] [S]
3. What are the options available to resolve the dispute? [C] [S]

### Hypothetical?

4. Write your version of the Tribunal Member's summary of the facts prior to making the orders. [C]
5. List the findings of law that the Tribunal Member would need to make in order to make her orders. [C] [A]
6. Set out the reasons the Tribunal Member might give to explain Order 1. [C] [A]
7. Set out the reasons the Tribunal Member might give to explain Order 2. [C] [A]
8. Describe the processes in this matter from start to finish in QCAT. Describe and explain the steps in the process. Do you consider the processes in this matter meet the objectives of QCAT? [C] [S] [A] [E]

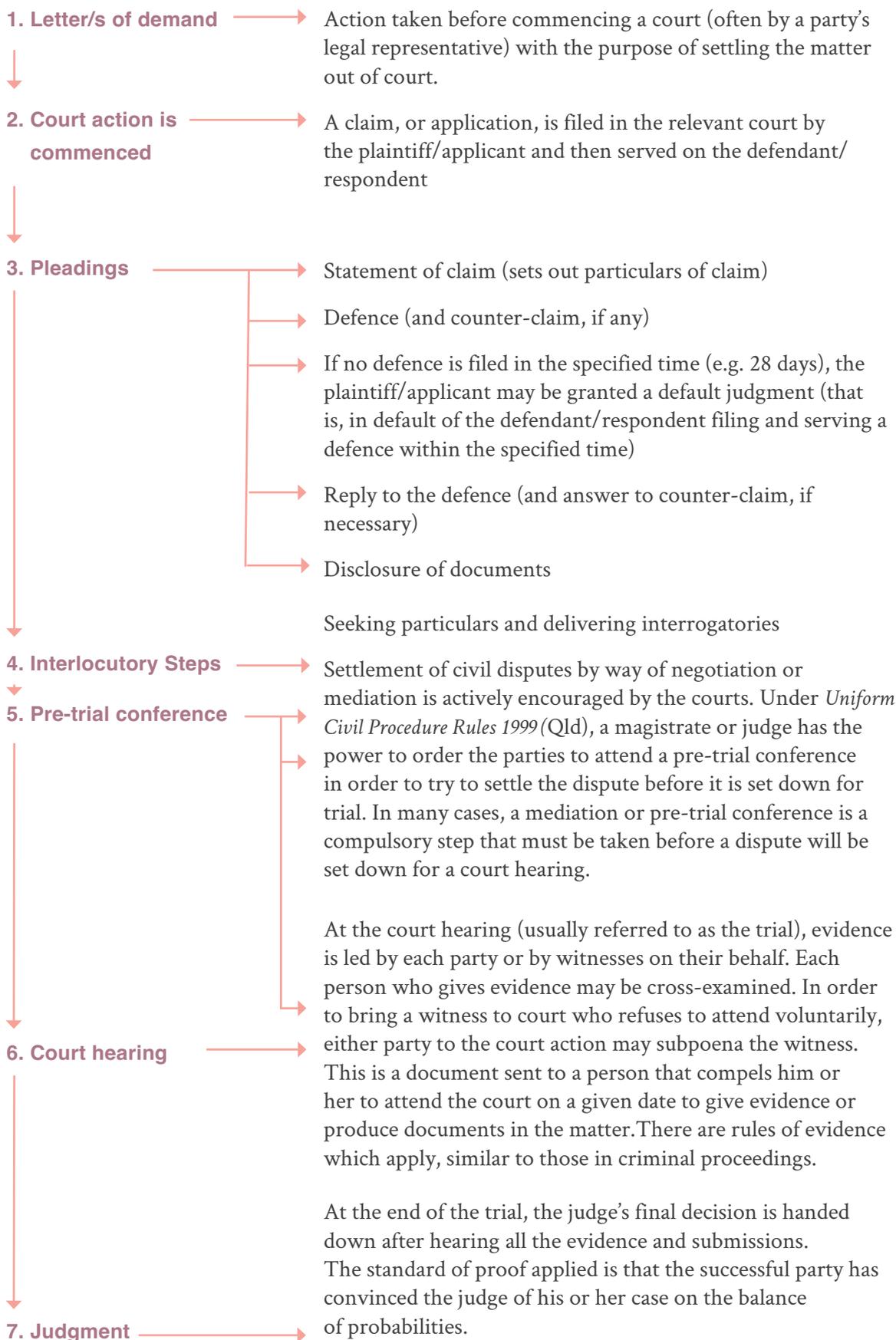
## 15.4 Resolving a contract dispute in the Magistrates Court of Queensland

Civil court matters, commonly called actions, civil suits or civil litigation, are usually between private citizens, or between private citizens and organisations. A complaint is brought against another person, usually seeking payment of money or the ceasing of an unlawful act. A clear set of procedures must be followed correctly before a court will deal with the matter. Failure by a party to fully comply with each step in the litigation process may cause the matter to be thrown out of court by the judge. This can prove to be very time-consuming and expensive, particularly if a party decides to begin the whole court action again. Because of the number of issues of legal procedure that must be properly addressed by each party in a civil court case, it is a wise policy to consult a lawyer (legal practitioner) for assistance and guidance in conducting a civil action. It is very important to start your civil action in the correct court jurisdiction.

It should be remembered that by far the majority of disputes are settled by agreement without going to court. Alternative Dispute Resolution procedures, such as mediation, are being utilised more frequently as a means of settling a dispute, either before the matter makes it to court or before the judge has made a final decision in a court hearing. It is only when the system of private negotiation fails to provide a satisfactory solution to all parties that a court hearing becomes necessary.



### Usual flow of documents and steps taken in a civil court action



## Inquiry Focus

*Do the procedures under which court actions are conducted ensure that the parties are treated fairly?*

In a court action, a set of procedures must be followed to make sure that each party to the action has as much information as possible before the court hearing goes ahead. The general procedure is the same in each court in the state and federal jurisdictions. In Queensland, the *Uniform Civil Procedure Rules 1999 (Qld)* apply to each state civil court. There are also *Federal Court Rules* which apply to matters heard in the federal jurisdiction.

### Hypothetical?

**Facts:** Jodie Sherman and Nicole Sprintall have created a successful interior design business called Sherman and Sprintall Interior Designs Ltd (SSID). They are concerned that a customer, Stephen Lister, has not paid more than the 10% deposit of \$3000 on a total bill of \$30,000 for the renovation of the lounge room in his home overlooking Mermaid Beach on the Gold Coast. When telephoned and e-mailed on many occasions, Stephen has promised to pay 'as soon as possible'. It is now three months since Stephen agreed to pay the balance amount of \$27,000. He has a reputation in the local business community for failing to pay debts as they fall due. A credit rating check (information that shows how well a person or business has paid its debts in the past) confirms that Stephen has a poor credit rating.

Stephen has claimed on a number of occasions that SSID has done a shoddy job. He claims that the wallpaper is of an inferior style and quality to that selected and that much of the wallpaper is peeling off the walls in his lounge room. He also objects to the non-delivery of items of furniture: a Bohemian oil painting, a genuine Huon Pine coffee table and Thai silk curtains. Stephen estimates the value of the unfinished work, the undelivered items and the cost of fixing up shoddy workmanship is \$25,000 and, therefore, wishes to strenuously defend any court action. He relies on a written report by an expert in the interior design industry which estimates the cost of fixing the wallpaper will be \$14,500, and the cost of acquiring and installing the missing furniture items \$10,500.

In preparation for the court hearing, SSID pays for its own interior design expert to assess the cost of replacing the wallpaper, which he advises will cost \$8000 (the SSID report).

The original written quotation did not refer specifically to what furniture and materials would be included in the renovation. Stephen, however, claims that he had spoken to Nicole Sprintall a week before accepting the quotation and had come to a verbal agreement about the inclusion of the Bohemian oil painting, genuine Huon Pine coffee table and Thai silk curtains. Nicole Sprintall recalls the conversation but denies agreeing to the specific inclusions, claiming that it is the company's business policy for all quoting to be in writing and that, in order to reduce overall costs of the makeover, low-cost furniture and curtains had been agreed upon verbally.

#### Letter of demand

SSID instructs their solicitors, Strongarms Solicitors, of 39 Cavill Avenue, Surfers Paradise, Qld 4217, to send a letter of demand to Stephen Lister requiring payment.

## Hypothetical?

within seven days of the date of the letter. Their further instructions are for Strongarms to issue proceedings for recovery of the debt if no payment is made. Because the debt is over \$25,000 but less than \$150,000, the action must be commenced in the Southport Magistrates Court.

### 1. Write the letter of demand on behalf of Strongarms. [C] [A]

Stephen Lister does not pay. Court action is therefore initiated (initial proceedings)

SSID issue proceedings by filing a claim using *Uniform Civil Proceedings Rules 1999* (Qld) Form 2 which can be found on the Queensland Courts website under UCCPR forms. The same form is used for the Supreme Court, the District Court and the Magistrates Court. There are formal parts which must be completed on the form, such as the name of each of the plaintiff and defendant (in this case, SSID and Stephen Lister). Part of the form contains the words seeking the relief (remedy) sought by the plaintiff.

#### CLAIM

The plaintiff claims: *(state concisely the relief claimed by the plaintiff)*

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

1. Obtain a copy of Form 2 from courts.qld.gov.au by going to the UCCPR, and complete the formal parts. [S] [C]
2. Some words which must be included on the form where the plaintiff is asked to state concisely the relief claimed include 'balance of \$27,000', 'damages' and 'breach of contract'. Attempt to state in a sentence the relief claimed by the plaintiff SSID. [C] [A]
3. What is the purpose of the notice to the defendant on the form? [A]

#### Pleadings

Strongarms complete the Statement of Claim (Form 16, UCPR) on behalf of SSID. A statement of claim contains the facts that SSID relies on in order to make its claim. These are called pleadings. Part of the form which contains the pleading is set out in the exercise below.

#### STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts: (in consecutively numbered paragraphs, each containing, as far as is practicable, a separate allegation)

1. *(set out as briefly as the nature of the case permits all material facts relied on as required in the Uniform Civil Procedure rules, Chapter 6, Parts 1, 2 and 3)*
2. The plaintiff claims the following relief: *(set out in full the relief claimed including full particulars of the nature and amount of each type of damages claimed and full particulars of interest required by Rule 159)*
3. The plaintiff does not require a jury.

### Hypothetical?

In paragraph form, set out the material facts on which SSID needs to rely to establish there is a binding agreement, the terms of the agreement, and the term which Stephen Lister has breached in order to give rise to SSID's claim. Note that the relief claimed will repeat your answer to question 2 in the previous section of the Hypothetical. [C] [S] [A]

As you read on the claim form, the defendant, Stephen Lister, is given 28 days to file a defence. His defence is also a pleading, and there is a form under the UCPR which he must use. Again, this process is quite technical. Each fact alleged in the statement of claim must be addressed. Lawyers say that if the defendant agrees with a fact it should be 'admitted', if it is a fact that is not within the knowledge of the defendant, then it is 'not admitted', and if the defendant does not agree with an alleged fact, it should be 'denied'.

If the defendant has a different version, then the defendant sets these out as material facts in its defence, which the defendant will need to prove on the balance of probabilities. If the defendant's version has had the result that it suffers damage, it can claim that damage as a counterclaim against plaintiff's claim.

Stephen Lister instructs Fightback Solicitors to act for him, and arranges for them to file his defence within the 28 day time limit.

### Hypothetical?

#### NOTICE OF INTENTION TO DEFEND

TAKE NOTICE that the Defendant intends to defend this proceeding.

The facts relied on by the Defendant are set out in the attached defence (*and counterclaim*).

Filed in the Southport Registry on (*date*):

Registrar: (*Registrar to sign and seal*)

1. Obtain a copy of the Notice of Intention to Defend, Form 6, UCPR. Complete the formal parts to the best of your ability. [C] [S]
2. Address each paragraph of the SSID statement of claim, using the terminology explained above, admitting, not admitting and denying the facts alleged in the Statement of Claim in accordance with Stephen Lister's version of events. Then plead the material facts of Stephen Lister's version of events, concluding that he has a counterclaim. This is essentially the same as claim which can be set off against the plaintiff's claim. The final paragraph of Stephen Lister's defence and counterclaim would read *and the defendant claims damages for breach of contract in the sum of \$25,000*. [C] [S] [A]

## Interlocutory steps

It is the usual procedure for litigants to require Disclosure of Documents in order to ensure that the other party does not have a document which corroborates his or her version of the facts. Remember, the court decides who is successful on the balance of probabilities. Sometimes, litigants use interrogatories, which are questions that can be asked in order to understand some allegation of fact which is not clear in the pleading.

### Hypothetical?

1. Nicole Sprintall keeps a business diary, and it contains a diary note of a conversation with Stephen Lister as follows:

*the Bohemian oil painting, genuine Huon Pine coffee table and Thai silk curtains, are not to be supplied*

Should SSID disclose Nicole Sprintall's diary? Does it corroborate her likely evidence at trial? [C][A]

2. Stephen Lister's defence pleads the value of his damages as \$25,000, without giving particulars of the detail of what it comprises. Strongarms write to Fightback, asking for the particulars, and for details of any evidence that will be used at trial to support the counterclaim for damages. They threaten to ask the court for an order to obtain this information if it is not provided by return correspondence. Should Fightback respond to Strongarms request? Do you think the court would be sympathetic if Fightback refuses to give to Strongarms the information requested? Give your reasons. [C][A]



### Pre-trial conference

SSID and Stephen Lister agree to attend a pre-trial conference, a voluntary conference at which they are required to attempt to resolve the dispute. The conference is held at the court and is chaired by a Deputy Registrar. SSID and Stephen Lister are unable to compromise on the cost of re-wallpapering the walls and the quality of furniture that was to be supplied. The Deputy Registrar checks the court diary and allocates the matter for a hearing date of one day, the estimated time the parties consider it will take to finish the trial.

### Court hearing

SSID arranges through Strongarms to be represented by Denise, a barrister. Stephen Lister does the same. The plaintiff, SSID, presents its case first. Jodie Sherman, Nicole Sprintall and the independent interior design expert give evidence on behalf of SSID. Each of them is cross-examined by Rob, the barrister representing Stephen Lister. Stephen Lister and his interior design expert then give evidence and are cross-examined by Denise. Rob is the first to sum up his client's case. This is the usual order in which submissions are made. Denise goes last. At the conclusion of the court hearing the magistrate reserves her decision. She announces that she will deliver judgment at 9 am on the following day.

## Judgment

At the end of the trial, the magistrate makes a decision (called a judgment) in favour of the party who has succeeded in convincing her that it's case is stronger (on the balance of probabilities) than the case of the other party.

### Hypothetical?

Assume that you are the magistrate, and make the following findings of fact:

- There is a binding contract.
  - The terms of the contract include a price of \$30,000 to do work and deliver materials.
  - The defendant Stephen Lister has not paid the \$27,000 debt.
  - The Bohemian oil painting, Huon Pine coffee table and Thai silk curtains were not included in the original quote for work and materials of \$30,000. There was no concluded agreement requiring SSID to deliver those specific items.
  - Nicole Sprintall's version of the details of what was verbally agreed between her and Mr Lister is accepted, except that the quality of furniture and curtains to be included in the makeover, is held to be inferior (to a total value of \$1500) to what would reasonably have been expected for such a quotation. This is the evidence of SSID's expert under cross-examination.
  - The evidence of Stephen Lister's expert is accepted that the wallpaper is peeling off the walls in places and needs repair. However the evidence of the SSID expert is accepted that the cost of repair and replacement is \$8000.
1. Who are the stakeholders? [C]
  2. Describe and explain the issue/dispute. [C]
  3. What options are available to the stakeholders to resolve their dispute? [C] [A]
  4. Describe each step taken in the litigation process and explain why each of them was necessary. [C] [A]
  5. Do you think it would be possible to make the litigation process simpler/less complex? Give your reasons. [A] [E]
  6. Was there a fair balance in the litigation process between the interests of the plaintiff and the interests of the defendant? Did each of them receive procedural fairness? [A] [E]
  7. Weigh up the evidence that you, as the magistrate, have accepted on the balance of probabilities and deliver judgment in favour of one of the parties. Write out your reasoning, including relevant calculations, clearly and concisely in the form of a judgment. [C] [S] [A] [E]



## The appeal process

In civil cases, any party can appeal a decision, but some appeals can only be heard if the court gives permission for the appeal. Generally appeals are made from a lower court to the next court above it in the court hierarchy. Sometimes appeals are made by going direct to the Supreme Court of Queensland, bypassing the District Court of Queensland. For example, where a judicial member of QCAT makes a decision on a question of law alone, any appeal against this decision must be made directly to the Court of Appeal of the Supreme Court of Queensland. The decision about to which court an appeal lies, is complex and requires legal advice.

To bring a civil appeal in the District Court of Queensland from the Magistrates Court of Queensland or QCAT, where the amount in dispute is less than \$25,000, you will need leave to appeal. Otherwise, leave is generally not required.

## Case Study



*Pullen & Anor v Lambert Willcox Estate Agents Pty Ltd* [2019] QDC 104

### Facts:

- [1] The appellants Mark and Tiana Pullen, appeal under s 45 of the *Magistrates Court Act 1921* (Qld) (“the MCA”), against the decision of a Magistrate on 22 March 2018, ordering them to pay \$38,500.00 to the respondent Lambert Willcox Estate Agents Pty Ltd for real estate commission on the sale of the appellant’s Property at 19 Cheval Court Benowa.
- [2] The central issue for determination is whether the Magistrate erred in finding that the respondent was the effective cause of sale of the Property.

### Nature of the appeal

- [3] By section s45(1) of the MCA, a party dissatisfied with a judgment in an action in which the amount involved is more than the minor civil dispute limit (\$25,000) may appeal to the District Court as prescribed by the rules. On an appeal from a Magistrates Court this court has the same powers as the Court of Appeal has to hear an appeal.
- [4] It follows that this appeal is one as of right and is made under Chapter 18 r783 of the *Uniform Civil Procedure Rules 1999* (Qld)) (UCPR).
- [5] On appeal, this court may relevantly: draw inferences of fact from facts found by the magistrate, or from admitted facts or facts not disputed; order a new trial on such terms as it thinks just; order judgment to be entered for any party; and make any order on such terms as it thinks proper.
- [6] Rule 765(1) [made applicable by r785] provides that an appeal under Chapter 18 of the UCPR is an appeal by way of rehearing. A rehearing involves a ‘real’ review of the original record of proceedings below rather than a fresh hearing. The appeal judge is required to review the evidence, to weigh the conflicting evidence, and to draw his or her own conclusions. This may mean overturning a finding of primary facts made by a magistrate. In undertaking this task, the judge should afford respect to the decision of the magistrate and bear in mind any advantage the magistrate had in seeing and hearing witnesses. But an appeal court may interfere if the conclusion is ‘contrary to compelling inferences’ in the case. An appeal court will not usually disturb findings of fact if the evidence is capable of supporting the conclusion. If this court concludes that an error has been shown such that the decision of the magistrate is wrong, the decision below should be corrected.

**Legal Issue:** Should the magistrate’s decision in the lower court be overturned and the appeal upheld?



## Case Study

**Decision:** Her Honour Judge Muir, on considering the evidence, determined that it did not support the test of whether or not the respondent was the effective cause of the sale of the Property. The magistrate made the wrong decision. The appeal is allowed. Judgment of the Magistrates Court dated 22 March 2018 is set aside. The respondent's claim is dismissed.

1. Do you think it is a fair system that decisions made by a judge in a lower court can be overturned on appeal? Give your reasons. [A] [E]

## 15.5 Court-ordered alternative dispute resolution

You saw in the previous example that SSID and Stephen Lister had an opportunity in a pre-trial conference to resolve their dispute. Almost always, in disputes of that kind, there is an opportunity for dispute resolution, ranging from a simple discussion between the parties, or their lawyers, or to formally arranged mediation of which the court would be aware. In some jurisdictions, for example under the *Family Law Act 1975* (Cth), it is compulsory for a conciliation conference before a court Registrar to occur, or for a private mediation ordered by the court to be held where the parties can afford it, before the court is prepared to set the matter down for trial. Conciliation conferences and mediations held between parties and their legal advisors in the Family Court jurisdiction, are very successful, and resolve many disputes about children and property.

### Hypothetical?

**Facts:** Whitney and Coby were married for 17 years. They own their own home at Jimboomba which is now worth \$860,000. They paid \$300,000 for the home and still owe a mortgage debt of \$120,000. Whitney does casual work at the local supermarket. Coby is a self-employed electrician. They have two children aged 14 and 12. They have been separated for three years. During that time Coby has lived with his parents at Jimboomba and Whitney has lived with the children in the home. They are not divorced.

Coby has been paying the mortgage repayments monthly, and helps Whitney financially with the children's expenses. Coby's electrician business earns him approximately \$90,000 profit per year. Whitney earns approximately \$48,000 per year from her part-time work. She also receives social security payments. Coby has been able to put some money into superannuation, and his superannuation balance is \$160,000. Whitney has a superannuation balance of \$54,000. Neither of them has any other significant assets and some time ago agreed to keep the furniture and contents which were in their possession respectively as their own.

After trying to negotiate an outcome for six months, Coby applies to the Federal Circuit Court (division of Family Court), seeking orders that the house be sold, and the net proceeds divided 50-50. He also sought an order that each of he and Whitney keep their respective superannuation entitlements and any other property in their possession. Whitney files a response to Coby's application, and seeks an order that she be entitled to retain the house until the youngest of the children is 18 or leaves

## Hypothetical?

school, whichever is the earlier. Alternatively, she seeks a greater share of the net proceeds of sale of the house (75-25 in her favour), and otherwise she agrees to the orders sought by Coby.

### First hearing date/Directions hearing

On the first hearing date, Coby and Whitney and their lawyers attend court before a judge of the Federal Circuit Court. Coby's lawyer is invited by the judge to explain the matter and the issues in dispute. She outlines the pool of assets, and identifies the areas of dispute. She submits that the parties are not far apart and a conciliation conference should be ordered by the court before any trial. Whitney's lawyer agrees. The judge notes that Whitney wants to keep the house until the children leave school, but she says that she would not normally make such an order. She makes a direction that the parties attend mediation at their own expense. Whitney's lawyer objects because Whitney is unable to afford her share of the \$6000 needed to pay the mediator. The judge points out that neither of them is unemployed or on Legal Aid, and the anticipated costs for trial for one day would be around \$17,000 each. The court has scarce resources and children's matters have priority in the conciliation conference list. Coby instructs his lawyer that he will pay for the mediator. The judge makes the directions, including a direction that Coby's lawyer is to seek a further hearing date in due course if the matter does not settle.

### Mediation

Coby's lawyer organises a mediator and the date for the mediation. The parties attend at free rooms offered by the Queensland Law Society. The mediation proceeds. They agree to the following orders:

- a. The joint ownership of the home is to be severed and changed to tenants in common, 60% to Whitney, 40% to Coby.
- b. Coby is to be entitled to use the home to secure a loan to buy himself a new property, supported by up to 40% of the agreed value of \$860,000. Whitney is to sign any documents needed for Coby to do this.
- c. Coby is to be responsible for payment of the balance of the mortgage of \$120,000.
- d. Whitney is to keep the home in good condition until it is sold.
- e. Whitney and Coby are to sell the home at auction within 60 days of the date that the youngest child leaves school or turns 18, whichever is the later.
- f. Whitney and Coby are to be paid 60% and 40% respectively of the net proceeds of the sale of the home.
- g. Each of Whitney and Coby are otherwise be solely entitled to any asset they own or use in their possession respectively at the date of the orders.

Coby's lawyer organises a new hearing date, the parties attend with their lawyers, and the orders are made by consent. The judge congratulates them on reaching a compromise which saved them the considerable costs of a trial.

1. Who are the stakeholders? [C]

### Hypothetical?

2. Describe and explain the issue in dispute? [C] [A]
3. Describe and explain the options available to the stakeholders to resolve this dispute? [C] [A]
4. Divide the class into groups of at least five students per group. There are five roles, and each student must be responsible for a role. Revise from Chapter 17.2 The Mediation Process, and then each of you prepare your respective roles and conduct the mediation, attempting to reach the same outcome as Coby and Whitney. [C] [S] [A] [R]



### What do you think?

1. Could any of the stakeholders in the four activities presented to you in this chapter, have resolved their dispute before commencing any litigation process? Describe what each of them could have done, and explain the process by which a resolution could have been achieved without court process. [C] [A] [E]
2. Could any of the stakeholders in the four activities presented to you in this chapter, have used a different litigation process other than that presented as chosen in the activity, to resolve the dispute? Explain your answer. [C] [A] [E]

## Review

### Comprehend

1. **Describe** the following:
  - a. Office of the Queensland Ombudsman
  - b. Queensland Civil and Administrative Tribunal
  - c. Magistrates Court of Queensland
  - d. Federal Circuit Court [C]
2. **Describe** and **explain** the jurisdiction of each of the entities listed in question 1 above. [C]

### Analyse and evaluate

1. **Compare** and **contrast** the different jurisdictions used to present civil actions in this chapter. Ensure, among other things, you evaluate their characteristics using the criteria of procedural fairness. [C] [A] [E]

# Topic 2

Topic 2 develops your understanding of the key concepts, principles and processes of contract law.

## Contractual obligations

**Chapter 16:** How a contract is formed

**Chapter 17:** The terms of the contract

**Chapter 18:** Ending a contract

**Chapter 19:** Remedies and other contractual issues

**Chapter 20:** Australian consumer law

# Contractual obligations

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## Chapter 16: How a contract is formed

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### 16.1 Introduction

### 16.2 Intention to create legal relations

### 16.3 What is an offer?

### 16.4 What is acceptance?

### 16.5 What are consideration and formalities?

### 16.6 Contract law and technological change

## Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the need for contract law
  - the elements of a legally binding contract found in case law
  - the precedents derived from case law which determine the outcomes of contract disputes
  - the flexibility of common law when faced with technological change.
- analyse and evaluate
  - the legal issues which arise in the study of the formation of contracts
  - selected legal information to resolve legal issues involving online contracts and transactions.

## Key Terms

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**Contract:** a valid contract is an agreement made between two or more parties that creates legal rights and obligations which the law will enforce.

**Offer:** an offer is a proposal by one party to enter into a legally binding contract with another. An offer can be made orally, by conduct, or in writing.

**Acceptance:** acceptance occurs when the party to whom an offer is made (offeree) agrees to the proposal of the person making the offer (offeror).

**Mutuality:** a word used to describe the relationship of parties who intend to be legally bound by a mutual set of obligations in a contract.

**Consideration:** the gain or benefit given by each party to a contract to the other in return for something of value.

**Valid:** legally sound, effective, or binding.

**Illegal:** not legal, not authorised by law.

**Formalities:** the process of putting a contract in writing to make it valid and enforceable. For example a deed.

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## 16.1 Introduction

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**A valid contract is an agreement made between two or more parties that creates legal rights and obligations which the law will enforce.** Certain elements must be present for a binding or valid contract to be created. These are:

- intention to create legal relations
- offer
- acceptance
- consideration

Even though a legally binding agreement exists, it may be able to be challenged for other reasons. Generally, a contract can be set aside if one of the parties lacks legal capacity, there is not genuine consent to the agreement or the contract has an illegal purpose

In the 18th century English case of *Everet v Williams* (1725) Ch., Everet sued Williams. Everet claimed he was in business selling silver, rings and watches. When Williams asked to be taken into partnership, Everet agreed. After dealing together for some time, they had a disagreement over their respective shares of the profits. Everet claimed that Williams was not keeping to the contract and was holding onto more than his proper share. Everet commenced court proceedings and filed 'a bill against his partner for an account'. That is, to calculate what the partnership was worth and divide it equally.

It turned out, however, that the business was illegal. Everet and Williams were highway robbers! The agreement was illegal and unenforceable at law. The bill was dismissed with costs. The barrister who signed the bill was made to pay the costs. The solicitors acting in the case were fined £50 and the parties were both hanged!

This case raises a special problem. When should a court enforce the promises people make to each other? What is the reason for doing so? Why should the law enforce promises and why should we have to keep them?

People seeking to rely on another person's promise need certainty and predictability. A broken promise by a friend is upsetting. However, it is not the function of our courts to become involved with purely social arrangements. In the commercial world and, at times, in a domestic or social context, a broken promise can mean financial loss. Our court system has developed a body of law (contract law) to decide which agreements will be enforced. **The law becomes correctly involved when the parties intend that their promises to each other will have legal consequences if not carried out.** In such cases both parties intend to be legally bound. The promises exchanged can be described as occurring in a mutual set of obligations. All legal contracts have this characteristic of mutuality.

Contract law has its origins in the decisions made by judges, as they have adjudicated a variety of disputes in the courts. **Decisions made by judges form the body of law known as common-law, hence the term common law of contract.** It can be contrasted with statute law which is law made by Parliament. Over the years, the common law of contract has been changed and modified by statute law which has been introduced from time to time. For example, the Commonwealth Parliament passed the *Trade Practices Act 1974* (Cth) to;

- promote competition and fair trading, and
- provide for consumer protection.

Each of the Australian States and the Territories have passed similar laws applying to their respective jurisdictions.

## 16.2 Intention to create legal relations

In some cases people making agreements do not intend to be legally bound. **Private and social arrangements are not usually intended to carry legal consequences.** If they did, and every private or social arrangement was legally enforceable, life would be complicated, expensive and very difficult. The courts have, on many occasions, considered whether or not an arrangement is intended to have legal consequences. Consider the following cases.



### Case Study

*Simpkins v Pays* (1955) 107 ALR 1, 66 ALJR 408

**Facts:** An elderly woman and her boarder frequently entered competitions in newspapers. The boarder drew up the form in the name of the woman and the entry fees were shared. The woman promised to share any winnings. However, when she won a prize of £750 in a competition, she refused to share it with her boarder.

**Legal Issue:** Was the arrangement with the boarder a binding contract?

**Decision:** It was the combined effort of the woman and the boarder and the sharing of expenses which led to the prize. The woman was obliged to share the prize. An intention to create legal relations was evident from the conduct of the parties and the promise of the woman.

### You be the judge

In *Simpkins v Pays*, suppose that the elderly woman always drew up the form on her own and she mostly paid the entry fees herself. Sometimes the boarder contributed.

Do you think that the court would have made the same decision? [A] [E]



### Case Study

*Todd v Nicol* (1967) SASR 72

**Facts:** Mrs Nicol wrote to her sister-in-law in Scotland. She invited Mrs Todd to migrate with her daughter to Australia and to share her home on a permanent basis. They accepted this invitation and travelled to Australia and took up residence. Soon they were in dispute. Mrs Nicol would not share her home with Mrs Todd.

**Legal Issue:** Did the parties intend the agreement to be binding?

**Decision:** The court decided it was a binding agreement. Mrs Todd had incurred considerable expense and inconvenience. She had relied on Mrs Nicol's promise. This took the arrangement beyond the social to the commercial realm.



### You be the judge

In *Todd v Nicol*, suppose the facts were different as follows:

Mrs Nicol only wrote to Mrs Todd telling her how wonderful it was to live in Australia. Mrs Nicol did not promise Mrs Todd that she could live in her home on a permanent basis. Mrs Todd was attracted by Mrs Nicol's description of Australia and came out to Australia to live on her own accord. When she arrived in Australia she did not like it and blamed Mrs Nicol.

Do you think that the court would still decide that Mrs Nicol and Mrs Todd had a binding agreement? Why or why not? Justify your decision. [A] [E]



## 16.3 What is an offer?

**An offer is a proposal by one party to enter into a legally binding contract with another. An offer can be made orally, by conduct, or in writing.** The offer must be clear and certain.

In our cartoon example, an offer is made by the words, 'I'll buy it for that'. The words 'I wish I could sell my car. It's probably only worth \$2000', are merely an invitation to make an offer. They are not an offer because they are too ambiguous. Their intention is uncertain. The words do not convey a clear, unambiguous offer.



**An invitation to make an offer is called an invitation to treat. An invitation to treat is not an offer.** For example, what might appear to be an offer is a mere willingness to trade or deal. When shopkeepers display their stock in windows or on shelves, they are usually inviting the customer to make an offer. This is an 'invitation to treat'.

The system used in each shop will determine when the offer occurs. For example, if the customer simply hands all the items to an attendant at a cash register, who enters a price on each item producing a total, and then says ‘that will be \$54.25 please’ then these words are the offer. Clearly a customer can change his or her mind at this point and take out any items so that the total cost is changed. Acceptance would then be the act by the customer of tendering the money.



It is not hard to think of different scenarios which may occur at the point of sale in a self-service shop which would change this. For example, people who buy a newspaper from a corner store often go into the store, pick up the paper, hand the correct money across the counter and the owner or attendant says thank you and nothing else. In this case the act of tendering the money would be an offer and the act of accepting the money and saying thank you together would constitute acceptance.

There are a number of cases in which the courts have distinguished between statements (orally or in writing) to decide if they constitute an offer or not. An important and well known case, in which this question was considered, was set in a self-service chemist in 1953 in the United Kingdom. This case is set out below, then followed by another case in which the same question was important in the judge’s decision.



**Case Study**

*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern Limited)* (1953) AC 1 QB 401

**Facts:** Drugs and medicines were displayed on shelves in packages or other containers in a shop. The shop was one room with two exits. The customers used a wire basket to collect what they wanted themselves. The customers then took the articles they collected to a cashier at one of the exits. The cashier totalled the price and received payment. One of the items submitted by the customer was labelled with the wrong price. The cashier refused to sell the item at the labelled price and the customer objected.

**Legal Issue:** Did the display of goods at specified prices (self service system) amount to an offer by the owner of the shop to sell the goods which could be accepted by the customer?

**Decision:** The self service system was not an offer to sell but merely an invitation to treat. The offer was made when the cashier offered to sell the articles by telling the customer the price. Acceptance occurred when the customer paid the cashier for the articles.



**You be the judge**

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In a modern supermarket, sometimes the price of an item is labelled incorrectly. If the cashier scans the bar code and the price displayed electronically is greater, a dispute can arise.

1. Are these facts similar to those in the case of *Boots Cash Chemists* above? [A]
2. Would the same decision be made? Why? Check with your local Woolworths, Coles or IGA [A]
3. What would you do if you were in charge of the supermarket? [A] [E]



## Case Study

*Harris v Nicolson* (1873) 8 QB 286

**Facts:** The defendant advertised that certain things would be sold at auction on named days. The plaintiff went to the auction with the intention of bidding for certain pieces of furniture. Some of the lots in which the plaintiff was interested had been withdrawn from sale. The plaintiff claimed to be entitled to compensation for breach of contract. The plaintiff said that the defendant's advertisement was an offer of an opportunity to bid for the particular pieces of furniture. The plaintiff said that he accepted that offer by travelling to the auction.

**Legal Issue:** Was the advertisement an offer which the plaintiff could accept?

**Decision:** The court decided that the advertisement only set out items for auction to indicate an intention to sell those items. It was not an offer which could be accepted, but was merely an invitation to treat.

### You be the judge

Suppose that in the above case the defendant's advertisement reads –

*'The dining room suite in the picture can only be bought at the auction on Friday and will be sold on that day. Come and bid for this wonderful piece of furniture!'*

1. If the plaintiffs travelled to the auction on Friday specifically to buy the dining room suite and the defendant had withdrawn it from the auction, would the decision in *Harris v Nicolson* be the same? [A]
2. Can you think of a different advertisement which would make the plaintiff succeed? [A] [E]



From time to time, the courts have been required to consider the nature of an offer which has been made, and whether or not the person purporting to accept the offer (the offeree) has been able to do so in a valid manner. This is led to many precedents to which judges have had a valuable source of law to refer to and follow, if appropriate. Where a statute does not impose a legal obligation, the common law has found appropriate solutions which have met the needs of our private and commercial arrangements. Some of these are set out in the cases that follow.

In each case, the precedent is set out before the case study.

**An offer may be made to a particular person, to a class of persons, or to all the world.**

The case of *Carlill v Carbolic Smoke Ball Company* set out below established this precedent. It is a very famous case. Mrs Carlill successfully sued the company by responding to their advertisement. Do you think Mrs Carlill would respond to this advertisement in the same way today? We are much more cynical about reacting to such advertisements.

**£100 REWARD**

WILL BE PAID BY THE  
CARBOLIC SMOKE BALL CO.

To any Person who contracts the increasing Epidemic,  
**INFLUENZA,**  
colds, or any diseases caused by taking cold, after having  
used the CARBOLIC SMOKE BALL according to  
the printed directions supplied with each ball.

**£1,000 IS DEPOSITED**

with the ALLIANCE BANK, Regent Street, showing  
our sincerity in the matter.

During the last epidemic of INFLUENZA many  
thousand CARBOLIC SMOKE BALLS were sold as  
preventives against this disease, and in no ascertained  
case was the disease contracted by those using the  
CARBOLIC SMOKE BALL.



**Case Study**

*Carlill v Carbolic Smoke Ball Company* (1893) CA 1 QB 256

**Facts:** (See above). Mrs Carlill met the conditions in the advertisement, and sued for £100 pounds when the company refused to pay her.

**Legal Issue:** Was the advertisement an offer or an invitation to treat? If it was an offer, did Mrs Carlill accept the offer by performing the conditions set out in the offer or should she have communicated her acceptance of the offer to the company before doing so?

**Decision:** The advertisement was not merely an invitation to treat, but was an offer to become liable to anyone who, performed the condition. The offer impliedly dispensed with the need for notification of acceptance, and anyone who performed the conditions accepted the offer.



**You be the judge**

Suppose that in Carlill's case, the advertisement said: *'You must produce the printed directions used at Carbolic Smoke Ball Company and a receipt to show that you bought the Smoke Ball yourself'*. If Mrs Carlill could not produce the printed directions and a receipt, do you think that she would have been successful? Justify your response with legal reasons. [A] [E]

**The offer must be communicated to the person accepting the offer.**

Imagine the difficulty the owner of a talent agency would have, if a singer who wanted to sing at a concert in the Queen Street Mall in Brisbane could argue that his or her offer did not need to be communicated. Knowing an offer must be communicated gives certainty, both to the person making the offer and the person who is accepting it. Sometimes, the court has been obliged to intervene, where parties cannot agree about what has happened. For example, in the case of *Taylor v Laird* which follows:



**Case Study**

*Taylor v Laird* (1856) 25 LJ Ex 329

**Facts:** The plaintiff was under contract to captain a ship. During the voyage he resigned the captaincy. This left the ship without a competent navigator. Even though the plaintiff had resigned, he rendered services in navigating the ship to its destination. The owner of the



## Case Study ...

ship had not requested the captain to provide the navigation services. The captain did not communicate to the owner that he would provide such services.

**Legal Issue:** Could the captain recover remuneration for the navigation services he provided?

**Decision:** The court said that the owner was not in a binding contract with the captain for the navigation services. The captain had not communicated to the owner that he offered to provide such services and the owner did not have the opportunity to refuse the services. There was no binding contract.

**All the terms of the offer must be communicated to the person accepting the offer (the offeree) and brought to his or her notice.**

## Case Study



*Causer v Browne* (1952) VLR 1

**Facts:** Causer took a dress to Browne for dry cleaning. Causer received a docket when depositing the dress. On the docket there were printed conditions purporting to exempt the firm from liability for loss or injury. When Causer collected the dress it was damaged. When Causer deposited the dress, no one pointed out to her the conditions on the docket exempting Browne from liability. It was given to Causer as though it was simply a docket entitling her to collect the dress when it was dry cleaned.



**Legal Issue:** Were the conditions exempting Browne from liability part of the contract?

**Decision:** The conditions on the docket ought to have been made clear to Causer at the time the docket was given to her. It was delivered merely as a voucher or a receipt. The exemption term was not communicated and therefore was not part of the contract.

### You be the judge

1. Suppose Brown said to Causer, when depositing the dress, words to the effect: *'I will not be responsible if your dress is damaged and you should read the conditions on the docket I have given you!'*

What would the decision be, given the above facts? Give reasons. [A]

2. Suppose that Brown said nothing to Causer, but there was a large sign behind the counter behind Brown stating:

**'NO RESPONSIBILITY ACCEPTED FOR DAMAGE DURING DRYCLEANING TO ANY GARMENT.'**

Would Brown be responsible for the damage? Give reasons. [A]



## 16.4 What is acceptance?

**Acceptance occurs when the party to whom the offer is made (offeree) agrees to the proposal of the person making the offer (offeror).** As with an offer, the courts are usually concerned with the same question when issues arise about acceptance. Is the acceptance which someone claims to have made binding on the person who makes the offer, so there is a valid contract? Like an offer, the courts have also developed precedents as to the legal meaning of acceptance.

One important difference between an offer and an acceptance is that when we refer to communication of an offer we mean that an offer must be actually communicated. That is, it must be brought to the knowledge of the other party.

**Acceptance can occur without actual communication.** It is always necessary to look at the manner prescribed or indicated in the offer which may determine how an offer is to be accepted. A good example of this is in the case of *Carlill v Carbolic Smoke Ball* which you have previously read.

The court said:

*If the acceptance is made in the manner laid down for acceptance by the offeror, then it is immaterial that the acceptance does not in fact come to the notice of the offeree.*

On the other hand, there are times when acceptance must be actually communicated. An example of this is given *obiter dicta* by a judge of the English Court of Appeal in *Entores Limited v Miles Far East Corporation* (1955) 2 QB 327.

*Suppose, for instance, that I shouted an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait until the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound.*

Clearly, in the *Entores* case, the judges were referring to a situation where a contract was being made by way of word of mouth. So, when you read the cases and examples that follow, remember each case is different, and the precedent can only be applied where circumstances are the same.

**Acceptance must be actually communicated unless the offer requires an act to be done which does not have to be communicated to the person making the offer.**

An example of a case where acceptance is communicated by performing an act is *Carlill's* case.



### Case Study

*Felthouse v Bindley* (1862) 11 CB(NS) 869

**Facts:** A wrote to B offering to buy B's horse for a stated price and adding 'if I hear no more about him I consider the horse is mine at £30.15 shillings'. B made no reply to this offer although it appeared from subsequent dealings that he had made up his mind to accept it.

**Legal Issue:** Was there a binding contract? Did B accept the offer even though he had not communicated it expressly?

**Decision:** The court decided that there was no contract. Silence in such a case does not constitute acceptance.



## You be the judge

Suppose B said, 'You can have the horse for £30.15 shillings if you collect him by Friday'. B did not arrive on Friday, so A sold the horse to someone else on Saturday. B arrived late on Saturday to collect the horse and tender his money.

Was there a binding contract? Give your reasons. [A]

### A qualified acceptance cannot be made. Any offer must be wholly accepted.

A qualified acceptance amounts to a counter-offer. An example of how this precedent can arise is as follows:

#### Hypothetical?

**Facts:** Ruth offers to sell her eight year old Toyota RAV 4 to James. She says, 'I will sell you the car for \$3,000'. James replies, 'I accept. However, you will need to provide a new tyre because one tyre is faulty'. The next day James arrives with a cheque for \$3,000 for Ruth. The new tyre has not been put on the car. James says, 'I will not take the car. The new tyre has not been done'. Ruth says, 'You must take the car, we have a binding contract'.

**Legal Issue:** Is the contract binding? Do the words 'You will need to put a new tyre on the car before I take it' constitute a counter-offer?

**Decision:** Clearly the words 'You will need to provide a new tyre' is a counter-offer which qualifies James' acceptance. He can refuse to perform. There is no contract.

### Any conditions stated in the offer must be followed before an acceptance can be said to have taken place.

An example of where this precedent applies is as follows:

#### Case Study

*Gilbert J McCaul (Australia) Pty Ltd v Pitt Club Limited* (1957) 59 SR(NSW) 122

**Facts:** A lease contained an option to renew. The lease said that the tenant had to:

- give three months notice in writing prior to the end of the lease; and
- pay the rent punctually; and
- otherwise perform all of the terms of the lease.

If the tenant did not do these things then it could not exercise the option to renew the lease validly unless the landlord agreed. During the term of the lease the tenant was rarely on time paying the rent. The landlord did not object. The lease said that it did not matter whether the landlord objected or not. The tenant sought to renew the lease by exercising the option. The landlord said the option was not validly exercised and refused to grant a new term.

**Legal Issue:** Was the punctual payment of rent a condition which had to be fulfilled before the tenant could validly exercise the option?

**Decision:** The court said that it was clearly a term of the acceptance by the landlord of an option to renew that the rent must have been paid on time. The tenant was not entitled to renew the lease and exercise the option.





## You be the judge

Suppose Emily was a member of Mr Lawson's class, but she was away sick on the day that he made the offer to his class to work on his farm.

Could Emily accept Mr Lawson's offer in those circumstances? Give your reasons. [E] [A]



## Case Study

*R v Clarke* (1927) 40 CLR 227

**Facts:** In 1927 a man was murdered. A reward of £1,000 was issued by the government for information leading to the arrest and conviction of the murderer. Clarke was charged with the murder. When interviewed he gave police information which led to the arrest and conviction of the murderers. He did not remember about the reward at the time of the interview. He later claimed the reward.

**Legal Issue:** Could Clarke accept the offer of a reward in exchange for information?

**Decision:** The High Court of Australia held that he was not entitled to the reward because at the time he gave information to the police it was in order to clear himself of the charge of murder, not in response to the offer of a reward. Therefore, there was no legal acceptance and therefore no contract.

# 16.5 What are consideration and formalities?

## Consideration

At the beginning of this chapter we asked the question, 'When should a court enforce the promises people make to each other?' The same question can be asked in another way. How does the law decide whether a promise is serious enough to concern the courts?

We have seen that one measure of the seriousness of the parties to an agreement is whether or not they intend to create legal relations. What if someone makes a promise in a really serious way and intends to keep it but does not do so? Should we make such promises enforceable at law? How do people make it absolutely clear that they are being serious? Some people wear special clothes (like judges). Other people speak in a special place (like a church). Some people say what they say under oath and swear it. Children say 'cross my heart and hope to die', when emphasising the truth of what they say. Some people have written down their words in a special document. They then sign the document and have it witnessed. In early England, if you were lucky enough to have a seal (for example a coat of arms) you melted some wax and applied the seal. We have seen this same question concerned the common law courts as far back as the mid-16th century, when it was asked to enforce a promise made by one party to another.

Historically, the last method above was chosen by the common law as a recognised way of making a promise serious and binding. It had to be written on parchment, signed by its maker and sealed with wax. Such documents became known as deeds and are still known as deeds today. The promises contained in deeds are known as covenants or promises under seal. Early English law recognised only those promises which were made under seal as having legal force. All others were just 'bare' promises. Bare promises had no legal effect.

There was one exception. The exception becomes the rule in common law. As Napoleon remarked, England was a nation of shop keepers. There is nothing more important to a shop keeper than a deal or a bargain. For commerce to work, a bargain must be kept by both sides.

**For an agreement to be binding some gain or benefit must pass to the person making the promise.** If you buy a mobile phone, you pay for the phone. The seller of the mobile phone gives you possession of the phone in return for payment. Each party has given something of value in return for something of value. This gain or benefit is called consideration. Except where the promise is 'under seal', it must be present in all contracts if they are to be valid (legally enforceable agreements). The most common type of consideration is payment of the price in a form acceptable to the seller, but in more complex contracts it can be something else. A gift can only be made enforceable by putting it into writing in the form of a deed (a promise under seal) which by definition does not require the return of any gain or benefit. Normally a gift is a 'bare' promise which is not enforceable.

## Deeds

The above precedent was decided in *Rann v Hughes* (1778) 4 Brown 27; 101 ER 1014 n. Court of Exchequer, and continues to be good law. A deed is a written contract that has a clause added at the end which says 'signed, sealed and delivered by.' Both parties sign next to this expression and their signatures are witnessed. The form of a deed is consideration in itself.

In other words, the form of the deed is what makes it enforceable.

## Simple contracts

Simple contracts are all contracts which are not deeds. This definition may sound over simplified, but it is correct! Deeds are really a special form of agreement. Simple contracts may be formed by verbal agreement (oral contracts), implied from the conduct of the parties or made in writing (evidenced by some written note). In simple contracts an agreement can only be enforced if the party who wants to rely on the agreement can show that he or she has given or promised to give something in return for the other party's promise. If consideration cannot be shown then the agreement is not legally enforceable unless it is in the form of a deed.

## The form of the contract-oral or in writing?

Oral contracts frequently occur in everyday situations such as when buying a small item from a department store. Most contracts which occur are of this type and reach a satisfactory conclusion by all parties meeting their obligations. On occasions, quite important agreements are made orally. They may be perfectly valid in the technical sense, but if something goes wrong there will be great difficulties involved in proving the terms agreed to orally. Important agreements are mainly detailed in writing in order that all parties have a clear record of the agreement made.

It may be that a contract is neither in writing nor oral but nevertheless the parties did enter into a contract. In these cases the contract is said to be implied by conduct. Sometimes this can arise where goods are delivered following a pattern of behaviour. An example would be putting milk bottles and money out in front of a house and the milkman delivering milk in response.

## Contracts required to be in writing

In September 2002, the Queensland Fair Trading Minister at the time, Merri Rose, proposed new laws to control dating agencies.

The industry had been plagued by corrupt and fly-by-night operators who did not live up to the promises of helping clients who paid for their services to find love. The Minister proposed reforms to the introduction industry to regulate how agencies charged clients fees for their services; required them to obtain a licence; to issue written contracts; and to provide a three (3) day cooling off period

The Queensland Government kept its promise and passed The *Introduction Agents Act 2001* (Qld) proclaimed in March 2002. The Act:

- defines the meaning of an introduction agent and persons carrying on the business of an introduction agent in s8;
- defines an introduction service in s9;
- requires introduction agents or persons carrying on the business of an introduction agent to be licenced (s18);
- requires introduction agreements to include a pre-contractual disclosure statement;
- requires agreements to be in writing easily legible and clearly expressed; and
- requires that the client must be given a copy of the agreement.

If any of the above requirements are not met, the agreement can be set aside. There are many other matters set out in the Act, which ensure that persons who seek the services of an introduction agent or persons who carry on business as an introduction agent are protected.

The idea that some contracts need a special form has been retained. As the law of contract has developed, laws have been passed to make simple contracts into contracts which must be in writing or be evidenced in writing.

Some contracts which must be in writing are:

- a. Bills of exchange, cheques and promissory notes *Bills of Exchange Act 1986* (Cth).
- b. Assignments of copyright *Copyright Act 1968* (Cth).
- c. Contracts of marine insurance *Marine Insurance Act 1909* (Cth).
- d. Contracts for the employment of seamen *Navigation Act 1912* (Cth).
- e. An acknowledgment of debt to extend the limitation period *Limitations of Actions Act 1974* (Qld).
- f. A transfer of the shares in a company *Corporations Act 2001* (Cth) s59.
- g. Contracts for sale of land *Property Law Act 1974* (Qld).
- h. Guarantees.

Like offer and acceptance, there have been many important case decisions establishing precedents about consideration. These decisions provide a basis for the settled common law of contract which judges follow unless the factual circumstances in the cases before them can be distinguished or there is legislation which applies and the precedent is no longer able to be followed.

## Consideration must exist in every simple contract



### Case Study

*Heaton v Richards* (1881) 2 LR (NSW) 73

**Facts:** The plaintiff wanted to print and publish a book. The government agreed to do this if the plaintiff paid for all of the costs of printing. The agreement made it clear that the government was not receiving any benefit from printing and publishing the book for the plaintiff. The government was unable to print and publish the book when the plaintiff required it to be done. Eventually, the plaintiff sued the government for not carrying out the contract.

## Case Study ...



**Legal Issue:** Was there a binding agreement? Was there any consideration passing from the plaintiff to the government?

**Decision:** The government could not be sued for not carrying out the contract because there was no consideration passing to it from the plaintiff. There was no contract.

### You be the judge



Suppose that the agreement required the plaintiff to pay for the cost of printing and the government to add 10% of the costs as a fee.

Has consideration passed from the plaintiff to the government? Is there a binding agreement? Justify your decision. [E] [A]

**As long as there is consideration, the court is not concerned as to its adequacy, provided it is of some value.**

## Case Study



*Chappell and Co. Limited v Nestle Co. Limited* (1960) AC 87

**Facts:** The respondents offered to sell a record for one shilling and six pence plus three chocolate bar wrappers. The applicants sued the respondents because the respondents refused to deliver the record for one and six. The applicants did not supply the chocolate wrappers as requested by the respondents in the offer. The argument brought by the applicants was that the chocolate wrappers were of no value to the respondents. That is, it did not matter if the applicants gave the respondents the chocolate bar wrappers or not.

**Legal Issue:** Were the chocolate wrappers part of the consideration?

**Decision:** A contracting party can stipulate whatever consideration he or she chooses. Because the respondent, as a term of the offer required the chocolate wrappers to be provided, it was within its rights to refuse the offer of the applicants and therefore there was no binding contract.

**Consideration must not be illegal or unlawful.**

## Case Study



*Alexander v Rayson* (1936) 1 KB 169

**Facts:** Alexander let a flat to Rayson at a rental of £1,200 per year.

Two agreements were entered into – one to let the flat for £450 per year and the other for Rayson to pay £750 per year for services in connection with the flat. The two agreements were made so that the local authority would rate the property by reference to the rental agreement for the lower amount of £450. Alexander sued Rayson when he did not pay the instalment of £750. Evidence was led that the two agreements were made to defraud the rating authority.



**Case Study ...**

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**Legal Issue:** Could Alexander successfully recover £750 from Rayson?

**Decision:** The court held that because the agreement was made to defraud the local authority it was illegal and therefore void. Alexander did not succeed.

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**You be the judge**

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Suppose the cost of services was included in the one rental agreement and disclosed to the local authority. The agreement was not unlawful. The local authority was entitled to make its own decision about rating the property because it had full information.

Is the changed agreement fraudulent? Could Alexander succeed? Give your reasons: [C] [A] [E]

**Consideration must be definite.**



**Case Study ...**

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*Shiels v Drysdale* (1880) 6 VLR 126

**Facts:** A daughter promised to look after her aged father and mother as long as they lived. In return, the father agreed, when requested by her, to transfer to her his interest in some of his land. The father did not transfer any land to the daughter when she made the request. She sued on the agreement claiming that the land should be transferred to her.

**Legal Issue:** Could the subject matter of the contract be identified? That is, could the land which was to be the consideration for the promise to look after the father and mother be identified so it could be transferred?

**Decision:** Because the land was not identified clearly, it was not possible to transfer any land to the daughter. The court held that the contract was void because of uncertainty. Consideration must be definite.

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**Consideration offered now in return for past performance is not good consideration.**



**Case Study ...**

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*Roscorla v Thomas* (1842) 3 QB 234

**Facts:** Roscorla bought a horse from Thomas. After Thomas delivered the horse to Roscorla, Thomas said that the horse was 'free from vice'. In fact the horse was a vicious animal. Prior to the sale there had been no representation by Thomas about the horse and Roscorla had satisfied himself that the animal was sound. Roscorla sued Thomas saying that he promised that the horse was 'free from vice' and should receive his money back.

**Legal Issue:** Was the promise made by Thomas that the horse was 'free from vice' part of the consideration?

**Decision:** The court held that the prior sale was not consideration for the promise that the horse was 'free from vice'. The promise made by Thomas was therefore not enforceable, as it was made after the sale had been completed.

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If someone promises to do something then does something which he or she is already obliged to do under a contract, then that promise is not further consideration.



## Case Study

*Folkes v Beer* (1884) 9 AC 605

**Facts:** The plaintiff won a court judgment against the defendant. The defendant asked for time to pay. The plaintiff was entitled to payment of the judgment debt plus interest which accrued on any outstanding balance. It was agreed by the plaintiff that the defendant would pay a certain sum at once and the balance by instalments. The defendant eventually paid the whole of the judgment debt but did not pay the interest which had accrued on the unpaid balances. The plaintiff sued the defendant.

**Legal Issue:** Was the agreement by the plaintiff to accept payment by instalments consideration for the whole of the judgment debt plus interest?

**Decision:** It was held that the defendant was not relieved from the obligation to pay interest. The defendant had not promised to do anything other than what he was obliged to do in any event. There was no further consideration

## 16.6 Contract law and technological change

### Inquiry Focus

*How has contract law responded to technological change?*

The views of one author about the ability of the common law of contract to adapt to changing technology is set out in the following practical application.

### Practical Application

#### THE RESILIENCE OF CONTRACT LAW IN LIGHT OF TECHNOLOGICAL CHANGE

The principles of contract law have shown continued resilience in light of constant technological advancements, including the mainstream adoption of the Internet. The ability to absorb technological change may be attributable to the broad manner in which such principles are formulated. Contract law centers on the 'intention' of the parties. Intention must be 'manifested' or 'communicated'. All of these terms can be easily reinterpreted to allow for the idiosyncrasies of email, instant messengers, tweets etc. Similarly, the foundational proposition that 'intention can be expressed in any manner' has enabled a nearly seamless integration of online contracting. If intention can be manifested by a nod or a handshake, it can also take the form of a click or a swipe.

Source: Mik, Eliza. 'The resilience of contract law in light of technological change' in the Michael Furmston (ed), *Future of the Law of Contract* (Routledge, 2020)





## Practical Application ...

1. To which form of communication does the author refer that the 'principles of contract law' must adapt to? [C]
2. What is the author's view about the ability of contract law to adapt to 'online contracting'? [C]
3. To what characteristics of the principles of contract law does the author attribute its ability to seamlessly integrate online contracting? [C]

Australian common law of contract is derived from English common law, and this heritage is shared with other English speaking countries whose legal systems are based in common-law. This means that judges in our civil justice system, although bound to follow precedents in our Australian court hierarchy, often look to the other common law countries for guidance. The following Canadian case study, does not set any precedent for a Queensland or Australian court, but would probably be regarded as **highly persuasive** if a dispute with similar facts needed to be decided in Australia.



## Case Study

*South West Terminal Ltd v Achter Land & Cattle* [2023] SKKB 116

**Facts:** *Achter Land & Cattle* (ALC), for five years had sold various types of grains to South West Terminal (SWT). There was a standard practice between the parties for SWT's representative to draft each contract then text a photo of the signed version to ALC's representative to accept via text. The ALC representative would often accept such contracts with 'looks good', 'ok' or 'yup'.

In March 2021 SWT's representative texted ALC a photo of a contract to purchase 87 tonnes of flax with a message attached: 'please confirm flax contract'. ALC replied with a thumbs-up emoji (Jennifer insert symbol). ALC never delivered the flax. SWT replaced the order from another supplier and paid \$82,000 (CAD) above the contract price.

SWT sued ALC for breach of contract, claiming damages in the sum of \$82,000 (CAD).

**Legal Issue:** Was there a valid contract? In effect, the King's Bench in Saskatchewan (the equivalent of the Supreme Court of Queensland) was being asked if there was an intention to create legal relations and that the thumbs up emoji 👍 constituted acceptance of the contract.

**Decision:** It was submitted by SWT that the thumbs up emoji (👍) could be used to confirm a contract, and also met the requirements of the *Sale of Goods Act* that required that required 'some note or memorandum in writing of the contract[being] made and signed.'. The court agreed. It did not accept the ALC defence that the emoji (👍) merely confirmed that the contract was received, and no more.

The court considered whether or not the touching or clicking of the emoji (👍) Was an appropriate method of acceptance under the local Electronic Information and Documents Act, which applied to the transaction. It looked at the definition of the emoji by dictionary.com: 'a thumbs up emoji is used to express assent, approval, or encouragement in digital communications'. It concluded that in the circumstances there was compliance with the requirement that the emoji (👍) was 'an action in electronic form' and touching or clicking the emoji on an appropriately designated icon or place on the computer screen expressed acceptance.



## Case Study ...

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1. Describe the method of communication adopted by the parties in this case. [C]
  2. Describe the method of communicating acceptance by ALC of contracts delivered by SWT and the act of acceptance it usually carried out. [C]
  3. Would a reasonable person independently observing the actions of the parties in relation to the contract in dispute agree that ALC's reply to SWT by clicking on an emoji is binding acceptance of the contract? Give your reasons. [C] [A]
  4. Excluding consideration of any relevant legislation in Queensland (Australia) is this a decision that, applying your knowledge of the common law of contract, you agree with? Give your reasons. [A] [E]
- 

## Online contracts

You read earlier in the chapter that the established precedent is that acceptance must be actually communicated. Despite many changes to the method of communication used by parties in contracts, this established precedent continues to be applied. The court has consistently held that contracts are made when the acceptance of an offer is actually received. The exception to this was established in circumstances where parties used the post as a means of communication. In *Adams v Lindsell* (1818) 106 ER 250 the court decided that acceptance, in the case where using the post is within the contemplation of the parties to the contract to be used for communication, occurs when the letter of acceptance is posted. Otherwise, the other methods of communication—telephone, telex, facsimile, and email—all fall within the general rule. The courts do not appear to have had any problem in establishing when a contract has been validly formed and when acceptance has taken place in these instances.

When buyers and sellers started to use emails (the Internet) to enter agreements, the technology was new and many people found transactions via the Internet difficult. Groups in the community representing consumers, large businesses (retail stores) banks, and event managers lobbied Australian governments to deal with the issues that arose in the marketplace. This led to Acts of Parliament being passed by the Commonwealth and State governments, the *Electronic Transactions Act 1999* (Cth) and the *Electronic Transactions (Queensland) Act 2001* (Qld) which we will refer to as the Electronic Acts. Both the Commonwealth and State Governments decided that there was a need for legislation in an increasingly electronic environment.

## Electronic Acts

Existing law applies to electronic transactions. To prove a binding contract online, it is still necessary to prove that:

- a. There is an intention by all parties to create legal relations when entering the contract;
- b. A valid offer has been made by one party to another;
- c. The offer has been accepted by the other party or parties; and
- d. The promises made by the parties in the contract are for valuable consideration.



## Practical Application ...

### **Electronic Transactions (Queensland) Act 2001**

#### **3 Object**

*The object of this Act is to provide a regulatory framework that—*

- (a) recognises the importance of the information economy to the future economic and social prosperity of Queensland; and*
- (b) facilitates the use of electronic transactions; and*
- (c) promotes business and community confidence in the use of electronic transactions; and*
- (d) enables business and the community to use electronic communications in their dealings with government.*

#### **4 Simplified outline**

*(1) The following is a simplified outline of this Act—*

- (a) a transaction is not invalid under a State law merely because it took place by 1 or more electronic communications;*
- (b) the following requirements imposed under a State law can generally be met in electronic form—*
  - (i) a requirement to give information in writing;*
  - (ii) a requirement to provide a signature;*
  - (iii) a requirement to produce a document;*
  - (iv) a requirement to record information;*
  - (v) a requirement to keep a document;*
- (c) for a State law, provision is made for determining the time and place of the dispatch and receipt of an electronic communication;*
- (d) the purported originator of an electronic communication is bound by it under a State law only if the communication was sent by the purported originator or with the purported originator's authority.*

*2) Chapter 2, part 4 contains provisions applying to contracts involving electronic communications, including provisions (relating to the internet in particular) for the following:*

- (a) an unaddressed proposal to form a contract is to be regarded as an invitation to make offers, rather than as an offer that if accepted would result in a contract;*
- (b) a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention;*
- (c) a portion of an electronic communication containing an input error can be withdrawn in certain circumstances;*
- (d) the application of certain provisions of chapter 2, parts 1 to 3 to contracts involving electronic communications to the extent they do not apply of their own force.*



## Practical Application

Consider the following scenarios. Describe and explain how each:

- a. Falls within the scope of matters set out in s4 above. [C] [A]
- b. Promotes an object set out in s3 above. [C] [A]

### Scenarios:

1. A real estate agent posts a contract to a buyer to sign. Part of the contract is accidentally omitted. He then sends the omitted part by email to the buyer.
2. John reads a proposal on the webpage of 'Gardens Galore' to pay for the right to operate their business in an area near where he lives. He wants to accept the offer. The proposal is not addressed to him.
3. Richard wants to buy a new leather chair. He finds one he wants advertised on a webpage. The seller sets out terms of sale and procedures to select the chair, given his delivery address, and pay for the item. He does this online, making payment with his credit card.

## Acceptance online

The *Electronic Transactions Act 2001* (Qld) states:

### **25 Time of receipt**

- (1) *Unless otherwise agreed between the originator and the addressee of an electronic communication*
- (a) *the time of receipt of the electronic communication is the time the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; all*
  - (b) *the time of receipt of the electronic communication at another electronic address of the addressee is the time when both*
    - (i) *the electronic communication has become capable of being retrieved by the addressee at that address; and*
    - (ii) *the addressee has become aware that the electronic communication has been sent to that address.*

In other words, when you go online and tick the box or enter the word which says 'accept' or 'final acceptance' (or its equivalent) and your message enters the information system online, acceptance takes place.

As we have seen from the cases on acceptance, it is frequently not only when an acceptance occurs, but where it occurs, which can be important. Where it occurs is usually the place at which either party can commence a legal action, unless the contract says otherwise. The *Electronic Transactions (Queensland) Act 2001* (Qld) also addresses this issue as follows:

**25 Place of dispatch and receipt**

- (1) Unless otherwise agreed between the originator of electronic communication and the addressee of the communication –
- (a) The communication is taken to have been dispatched from the originator's place of business; and
- (b) The communication is taken to have been received at the addressee's place of business.

**Practical Application**

**Facts:** Michael wants to buy a teddy bear for his grandson. He does a search on the Internet. A seller of teddy bears in the United States advertises a bear which sings Christmas carols in Greek. Just what he wants! The seller's requirements are that Michael must pay the price by direct electronic transfer of funds or by credit card, including postage, and the bear is posted to his address. Michael completes the requirements on the Internet. The teddy bear, paid for by Michael, does not arrive. The website does not specify when and how acceptance takes place, just that any order is concluded by clicking on the appropriate box and making payment.



**Legal Issue:** Was there a legally binding contract between Michael and the seller? If there was, can Michael sue the seller in Australia to get his money back or compel the seller to deliver the teddy bear?

If Michael is not able to sue the seller in Australia, could Michael sue the seller in the United States?

**Decision:**

1. Suppose before the box which was ticked to conclude the order, there was a statement which read: '*Any order placed will be governed by the law of the USA*'.
  - a. Do the *Electronic Acts* apply? [A]
  - b. Michael concludes the order and pays after reading the above statement. Where does acceptance take place, in Australia or in the United States? [C] [A]

**What do you think?**

Do the provisions of the *Electronic Transaction Acts* provide support for consumers and businesses that operate in the Australian economy? Give your reasons. [A] [E]

# Review

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## Comprehend

1. **Define** the following:
  - a. Contract
  - b. Invitation to treat
  - c. Offer
  - d. Acceptance
  - e. Consideration
  - f. Formalities [C]
  
2. **Describe** and **explain** the following.
  - a. The essential elements of a contract.
  - b. The difference between an invitation to treat and an offer.
  - c. The concept of mutuality and intention to create legal relations.
  - d. The difference between a simple contract and a deed.
  - e. The purpose of the *Electronic Transactions Acts*.
  - f. The requirement for some contracts to be in writing. [C]

## Analyse and evaluate

1. **Analyse** how contract law has responded to the needs of the modern Australian economy. How well do you think the common law has been able to adapt to technological change? Give reasons to **justify** your decision. [A][E]

# Contractual obligations

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## Chapter 17: The terms of the contract

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### 17.1 Identifying the terms of a contract

### 17.2 When is a representation a term of the contract?

### 17.3 When can terms be implied into a contract?

### 17.4 Distinguishing between conditions and warranties

### 17.5 Exclusion clauses

## Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - interpreting a contract involves ascertaining its terms
  - a representation may or may not be a term of the contract
  - terms can be implied into a contract by a court or by statute
  - the more important terms of a contract are called conditions, and the less important terms are called warranties
  - exclusion (exemption) clauses attempt to limit the liability of the parties to a contract.
- analyse and evaluate
  - how the courts apply legal tests to interpret the meaning and effect of the terms of a contract in legal disputes
  - the legal tests the courts have developed to determine the role and application of exclusion clauses in a contractual dispute.

## Key Terms

**Terms of a contract:** the details of the promises exchanged by the parties to a contract which, if given effect, will ensure performance in accordance with the contract.

**Representations:** statements made in the course of negotiations to enter a contract, some of which are terms of the contract, others of which are mere representations or sales talk.

**Conditions:** the more important terms of a contract, essential to the contract, and which, if not carried out, would make the performance of the contract totally different from what was agreed.

**Warranties:** less important terms of the contract which are subsidiary to the main purpose of the contract, and which, if not performed, do not change its main purpose.

**Exclusion clauses:** also called exemption clauses, these clauses attempt to limit or exclude altogether the liability of one party to another under a contract in general terms, or all for specified events.

## 17.1 Identifying the terms of a contract

Read the following witness statement relating to a contract dispute.

**Hypothetical?**

**The MPD Contract  
Witness Statement  
dated 30 November 2002**

1. My name is Owen Thomas. I live at 12 Perry Street, Brighton.
2. I know Max Patrick. I met him before August 2001. I also know his family and his wife Dell.
3. In August 2006, I was talking to Max about the possibility of constructing a house for investment. Max said,
 

‘I own a building construction company MPD Pty Ltd (MPD) which could build a house for you.’

Dell said, ‘I am a director.’

I said, ‘Perhaps we could build a house together as an investment?’

Dell said, ‘Max, I don’t think we have enough money.’
4. I said to Max and Dell, ‘I’ll go ahead and get the land anyway and we’ll see.’
5. I bought the land and arranged for the building plans for the house to be approved by the council.

Negotiations  
not directly  
relevant

## Hypothetical?

6. I negotiated a price of \$300,000 with Dell for MPD to build the house. This price did not require Max to supervise the construction. A written contract for the construction of the house was signed by myself and by Dell as a Director of MPD to construct the house for a fixed price of \$300,000 ('the building contract'). There was no discussion about sharing the profit if the house was sold and no term in the building contract to that effect.
7. Soon after I signed the building contract, Max asked me on behalf of MPD for \$10,000 for initial expenses to clear the site and prepare it for building. I paid MPD this on 20 October 2006. I have a copy of this cheque here with me.
8. The day before the construction started, Max presented me with a written proposal. It said that I was to pay him a fee of \$20,000 up-front for supervising the construction and to lend him a further \$30,000 which he would pay back before 30 June 2007 together with 10% interest. He said, 'I do not want to share the profits from the sale of the house with you. MPD will not build your house unless I supervise the construction.' I agreed and said, 'That's fine. Let's go ahead on that basis' ('the loan agreement').
9. On 30 November 2006, I paid Max \$20,000 up-front to supervise the construction and a second cheque for \$30,000 as the loan.
10. Before the house was finished, Dell wanted something in writing about the arrangement. I wrote out a handwritten memo for Max to sign which said:  

'I owe Owen Thomas \$30,000 and will pay him interest at 10% per annum on any amount of the principal owing. I will pay it back before 30 June 2007.'
11. I have a copy of the written memo signed by Max.
12. The house was completed on time and I paid MPD the remainder of the price for building it.
13. Max is still refusing to pay me back the loan. He now says that I promised to share the profit from building the house with him. He also says that Dell is not a Director and had no authority to sign the building contract for MPD. I have paid MPD for the construction of the house and I have sold the house. After taking everything into account, I have actually made a loss.
14. Max is refusing to pay back the \$30,000.

Documentary evidence

Written offer

Terms of loan agreement

Oral acceptance

Documentary evidence

Breach of loan agreement

1. Is the loan agreement wholly oral? Partly oral and partly in writing? Wholly in writing? Established by a course of conduct? Set out its terms. [C] [A]
2. Is the loan agreement separate from the building contract? Set out your reasons. [C] [A]
3. What are the important terms of Owen's contract with MPD? Did MPD perform its side of the bargain? [C] [A]
4. Do you think Max had any legal right to say MPD would not build the house if he did not get paid to supervise the construction? [C] [A]

## Hypothetical?

5. How has Max taken advantage of the situation? Is this, in your view, fair and reasonable behaviour? Give your reasons. [A] [E]
6. How the contractual arrangements between Max and Owen used by each of them to achieve their respective objectives. Were they able to satisfy their respective competing interests without dispute? Give your reasons. [C] [A] [E]

It is often the case that once parties have entered into a contract questions arise between them which involve interpreting the meaning of the contract. **The first step in interpreting a contract is for the terms of the contract to be determined by looking at all the available evidence.** The terms are the details of the promises made by each party, for example, the price, when goods will be delivered and who will be responsible for delivery, and so on. **The next step is to interpret the terms by reference to the set of rules developed by the courts.** In determining the terms of the contract the approach will vary according to the form in which the contract was made.

If the contract is wholly or partly oral, and the parties disagree as to the terms of the contract, they may take their dispute to court. The court will hear oral evidence and decide what the terms of the contract are, before it attempts to interpret them. That is, the court will decide what promises were agreed to by the parties and then it will make a judgment about their meaning. In the Hypothetical on the previous page, Owen and Max would both need to give evidence about what was said, and produce copies of the documents exchanged to the court. This would enable the court to decide the terms of the contract.

Courts frequently consider a range of circumstances in which they are asked to rule on what are the terms of a contract. Sometimes this is to ask the court to say that a part of a written contract should be left out or excluded from the contract. Sometimes it is to ask the court to include a promise which has been made orally when it has not been included in documents which set out the other terms. The two case studies follow which illustrate these points:

## Case Study



*L'Estrange v F Graucob Limited* (1934) 2 KB 394

**Facts:** The buyer bought an automatic slot machine. The buyer signed the seller's order form which contained a number of terms. Some of the terms were in ordinary print and others were typed in small print. One of the terms in small print was an exemption clause. This said that the seller was not responsible for damages under any warranty including one that was provided for in any legislation. The machine did not work satisfactorily and the buyer claimed damages for breach of a warranty implied by legislation which said that the slot machine should be fit for the purpose for which it was sold. The legislation expressly permitted the parties to agree that the warranty did not apply. The contract did not say this.

**Legal Issue:** Was the seller able to rely on the exemption (exclusion) clause or not? This depended on the court deciding whether or not the exemption clause was part of the contract.

**Decision:** The court held that the exemption clause formed part of the contract. It was effective to deny the buyer damages for breach of the implied warranty. This is an example of the general principle that if a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing the document is bound by its terms. It does not matter whether the signing party has read the document or not. What matters is that the signing party had the opportunity to read it and it was contained in the document which was signed.

## Hot Topic

The law in Australia has moved beyond the law as set out in the case of *L'Estrange v F Graucob Limited*. The *Trade Practices Act 1974* (Cth), which is now the *Competition and Consumer Act 2010* (Cth) (CCA), now makes all contracts subject to implied warranties and it is not possible to exclude them even if they are not written in the contract. In addition, the CCA now changes the law so that consumers are protected if the written terms in a standard contract which they sign are unfair. The court can exclude the unfair terms. Do you think consumers should be protected from unfair contracts by legislation. Give your reasons. [A] [E]

## 17.2 When is a representation a term of the contract

Not every statement made in the course of negotiations to enter a contract is a term of the contract. Some statements are only mere representations (sales talk). These are relatively insignificant comments about the subject of the contract used to draw the other party into the contract. Whether a statement is a term of the contract depends on the intention of the parties, having regard to all the circumstances of the case. **It is very important to decide which statements made in the course of negotiations are terms of the contract.** The importance of establishing if a statement is a term of the contract is that damages for breach of contract will not be available unless the statement which is breached is a term. The only exception is that representations which are not a term of the contract may give rise to damages if fraud or negligence can be proved.



### Case Study

*Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41

**Facts:** The United States Surgical Corporation (USSC) sold product in Australia. Mr Blackman was to be the sole Australian distributor of USSC products. At a meeting at a restaurant Mr Blackman promised representatives of USSC that he would promote USSC products in Australia and would not deal with or promote any products that would be in competition with the USSC products. Letters were exchanged confirming the agreements, but this promise by Mr Blackman was not included. Later, a company owned by Mr Blackman called Hospital Products International Pty Ltd (HPL) changed places with Mr Blackman as a distributor. It began to distribute someone else's products to the existing customers of USSC in direct competition with those of USSC. USSC sued HPL and Blackman.

**Legal Issue:** Were the oral statements made at the restaurant by Mr Blackman a term of the contract?

**Decision:** The High Court of Australia by majority of 4 to 1 held that they were. It said that the intention of the parties was that the promise by Mr Blackman was to be binding on the parties and found in favour of USSC. They said the oral statement was not a mere representation.





## Case Study

*Oscar Chess Ltd v Williams* (1957) 1 WLR 370

**Facts:** A dealer accepted a trade-in of a Morris car from a customer. The customer described the car as a 1948 model because the logbook showed the first date of purchase (by someone else earlier) as 1948. Eight months later the dealer found out that the Morris was a 1939 model. Someone else (prior to the customer owning the vehicle) had fraudulently altered the log book.

The dealer sued the customer for damages on the ground that the customer's representation as to the model of the Morris car was a term of the contract.

**Legal Issue:** Was the customer's statement that the car was a 1948 model a term of the contract or a mere representation?

**Decision:** The court held that the customer's statement to the dealer was a mere representation and not a term of the contract and found in favour of the customer. The dealer should have made the necessary checks to ascertain the correct model.

### What do you think?

Having regard to the circumstances of each of the above cases, explain why the court may have made two different decisions. Do you think the outcomes for the parties in each case were a satisfactory balance of their competing interests? [C] [A] [E]



## 17.3 When can terms be implied into a contract?

**Express terms are specifically included in the contract. Implied terms are not included but they are assumed to be included.**

Apart from the terms agreed by the parties which are written into the contract there are often terms implied into the contract by the court, custom or trade usage, and/or statutes.

A court will imply terms into the contract to give it business efficacy (that is, make it capable of being put into operation). It will also imply terms into certain types of contract which have been historically established. For example, where a worker carries out repairs, there is an implied term that reasonable care and skill will be exercised in the performance of the work and that the materials used will be reasonably fit for the purpose intended.

Where parties have contracted against the background of a particular trade, the customs or usages of that trade may be implied into the contract.

In some cases there are terms implied into the contract by statute. Some examples include the *Fair Work Act 2009* (Cth), the *Fair Trading Act 1989* (Qld) and the *Competition and Consumer Act 2010* (Cth).

## Hypothetical?

Consider the following scenarios. Decide if there is an implied term which applies to the agreement of the parties. Set it out in writing. Is the term implied reasonable and fair in the circumstances? [A] [E]

1. Helen needed a tree lopped and trimmed. Greentree Services were working in her street. She asked them to come in when they could do the job. No price was discussed or set. Two weeks after she spoke to them, she was away for a week, and during this time they did the job. She was not happy that they did it without confirming with her and refused to pay the invoice. Is she required to pay?
2. Josh needed a plumber to check a leak on his roof. When the plumber arrived he did not have a ladder high enough to allow him to get on the roof. Josh had one in his garage, but was nervous about lending his ladder to the plumber. Should the plumber get his own ladder?
3. Di works as a cleaner. She is not careful and uses the wrong kind of polish on a client's furniture. The furniture is damaged. The client wants compensation to fix the damage. Is there a contractual obligation on which the client can rely?
4. Stephen rents a couple of rooms in a friend's house. His friend (the owner) visits so often that Stephen feels that he is under scrutiny and is losing his privacy. Is there a contractual obligation Stephen can rely on to ask his friend to stop being so nosy?

## 17.4 Distinguishing between conditions and warranties

Once it has been established that a statement is a term of a contract, it is then important to establish if it is a condition of the contract. Some terms of a contract are more important than others. **The more important terms are referred to as conditions and the less important terms are called warranties.** These words are used in a legal sense.

The distinction between a condition and a warranty is important when remedies for breach of contract are considered.

The court has certain tests that are applied when deciding whether a term of a contract is a condition or a warranty. **A term will be a condition if:**

- **the term is an essential part of the contract; and if**
- **the term is not carried out, it would make the performance of the rest of the contract totally different from what was agreed.**

**A warranty is a less important term of the contract and is regarded as subsidiary to the main purpose of the contract.** The basic nature of a contract is not changed by a failure to perform a warranty term. Failure to do so is still a breach of contract, but, as will be seen later, the injured parties' remedies are different.





## Case Study

*Bettini v Gye* (1876) 1 QBD 183

**Facts:** Bettini, an opera singer, contracted to sing exclusively for Gye's opera company, in London, for three months. It was a term of the contract that Bettini would be in London at least six days before the first performance for rehearsals. Bettini fell ill and did not arrive until two days before the first performance. Gye told Bettini, when he arrived in London, that he had breached the contract and refused to accept his services as a singer.

**Legal Issue:** Could Gye terminate the contract?

**Decision:** The court held that the term relating to the time of Bettini's arrival was not a condition but a warranty. Accordingly, Gye could not treat the contract as terminated and was only entitled to damages because of Bettini's late arrival.

## Case Study

*Poussard v Spiers and Pond* (1876) 1 QBD 410

**Facts:** Madame Poussard agreed in writing to sing and play the lead role at Spiers and Ponds' French opera at the Criterion Theatre including performing at the opening night. It was a new opera never before performed. Madame Poussard arrived on time for rehearsal but became ill and missed the last part of the rehearsal and the first three days of the Opera. Spiers and Pond engaged an understudy when Madame Poussard became ill and the understudy continued in the role for the first three days. After three days of illness Madame Poussard returned to work but was told she was no longer required. Her husband sued Spiers and Bond on her behalf. Evidence was led that it was of great importance to the defendants that the Opera should start well, and that the failure of Madame Poussard to be able to perform on the opening night and early performances was a very serious detriment to Spiers and Bond. The trial judge found that employing the understudy was reasonable in the circumstances, and Spiers and Bond were given permission to claim money they had paid Madame Poussard in advance. The Poussards appealed.

**Legal Issue:** Did Madame Poussard breach the terms of the agreement? Were Spiers and Bond entitled to rescind the contract?

**Decision:** The Court of Appeal held that failing to turn up at the first performance entitled Spiers and Bond to rescind the contract. It said this went to the root of the matter. The court confirmed the view of the trial judge that the term of the contract requiring Madame Poussard to be present on the opening night and early performances was an important condition of her engagement.

### What do you think?

Having regard to the circumstances of each of the above cases, explain why the court may have made two different decisions. Do you think the outcomes for the parties in each case were a satisfactory balance of their competing interests? [A] [E]



## 17.5 Exclusion clauses

**A clause which attempts to limit or exclude altogether the liability of one party to another under a contract is called an exemption clause or an exclusion clause.**

Contracts that have been drafted by lawyers or people in business often contain exemption clauses. Business people attempt to limit their responsibilities under contracts or exclude them altogether so that the risk in any particular transaction is reduced.

### Practical Application

#### BRISBANE CITY COUNCIL COUNCIL CAR PARK CONDITIONS OF ENTRY

By entering and using this car park, you agree to the following terms and conditions:

1. Brisbane City Council's Parking and Control of Traffic Local Law applies and is enforced within this car park. You must comply with this Local Law in addition to any obligations under these terms and conditions.
2. You enter and use this car park at your own risk.
3. We are not responsible for your security, the security of your vehicle or any property brought into this car park.
4. Brisbane City Council is not liable for:
  1. any injury, loss or damage to a person, vehicle or thing at this car park; or
  2. any injury, loss or damage caused by or resulting from the delivery of a vehicle to a person not entitled to take such delivery.
5. You agree to indemnify us in respect of any claim made against us, or expenses incurred by us, as a result of your use of this car park.
6. We may refuse entry to this car park by any vehicle or person.
7. A parking fee is payable each time a vehicle enters here. If you bring a vehicle into this car park, you agree to pay the parking fee in full and any other applicable charges that may be incurred.
8. Electric vehicle discount is valid on day parking rates only (Monday to Friday). Discount is not valid on already discounted, promotional or special offer rates.
9. We may prevent the exit of a vehicle from this car park until the fee is paid and we are not liable for preventing the exit of a vehicle until the fee is paid or for any injury, damage or loss which results.
10. While in the car park, you must comply with all signs and all reasonable directions and requests made by us.
11. If there is any inconsistency between these terms and conditions and the Parking and Control of Traffic Local Law, the Local Law prevails to the extent of the inconsistency.
12. In these conditions, references to 'we', 'us' and 'our' mean Brisbane City Council, its employees, agents and independent contractors.
13. Electronic monitoring is underway at all times in all car parks including the use of CCTV cameras and licence plate recognition technology. All information is treated in accordance with Council's Privacy Policy.

Source: Brisbane City Council, *Council car park conditions of entry*, (Web Page, 9 January 2023) <[brisbane.qld.gov.au/traffic-and-transport/parking-in-brisbane/car-parks/council-car-park-conditions-of-entry](http://brisbane.qld.gov.au/traffic-and-transport/parking-in-brisbane/car-parks/council-car-park-conditions-of-entry)>.



### SUNCORP STADIUM TERMS OF ENTRY

#### Entry to Suncorp Stadium is subject to the following terms:

- The right of admission to Suncorp Stadium is reserved. In particular, the Manager and the Hirer reserve the right to refuse entry to, or to remove from, the Stadium any Patrons who:
  - are in breach of, or refuse to comply with, these Terms of Entry;
  - engage in any conduct, act towards or speak to any player, participant, umpire or other official or other person in a manner (whether through the use of language, gestures or otherwise) which is likely to offend, insult, humiliate, intimidate, threaten, disparage or vilify that other person on the basis of a personal attribute of that other person, including, but not limited to, that other person's sex, gender, age, race, religion, culture, political belief...
- Patrons under the age of 12 must be under the direct supervision of an adult at all times. The Manager and the Hirer reserve the right to refuse entry to, or to remove from, the Stadium or to refer to the police any Patrons under the age of 12 who are without adult supervision.
- Patrons are prohibited from entering the Stadium performance area, field of play, or any other area designated as not being accessible by the public.
- Patrons must not wear or display commercial, political, religious or offensive signage or logos, sell any goods or services or give away political, religious, advertising or promotional materials without the prior written approval of the Manager and the Hirer.
- Bags and other items may be subject to inspection and Patrons may be searched. Patrons who refuse inspections or searches may be denied entry to the Stadium.
- Items which, in the opinion of the Manager, have the potential to cause injury or a nuisance or inconvenience to any other person will not be permitted into the Stadium.
- Patrons acknowledge that the Stadium owner, Manager, or the Hirer may use a person's image or likeness as part of any recording of the Event.
- Patrons assume all risk of any damage or loss (including property damage, personal injury, economic and consequential loss) however it arises at the Stadium. Patrons bring personal effects onto the premises at their own risk. The Manager will not be responsible for any damage to or loss or theft of a person's personal property.
- Patrons who smoke in the Stadium, do not comply with any Queensland Government Chief Health Officer health direction, or who fail to obey a direction from the Manager or another authorised person to cease smoking or comply with a health direction in the Stadium or its precincts:
  - may commit an offence against the *Tobacco and Other Smoking Products Act 1998* (Qld) or the *Public Health Act 2005* (Qld), to which fines apply; and
  - may be immediately evicted from the Stadium.
- the Manager collects, uses and discloses personal information in accordance with the Stadiums Queensland Information Privacy Plan. Without limiting the above, by entering the Stadium, each Patron acknowledges and consents to the Manager collecting, using and disclosing their personal information for the purposes of contact tracing and Stadiums Queensland's Banning, Refusal of Entry and Removal Policy. This may include disclosure to third parties including, but not limited to, Stadiums Queensland, the Queensland Police Service, Stadium managers, Stadium hirers, security contractors and sporting codes.
- Patrons acknowledge and accept that these Terms of Entry may be amended at any time.

Source: Suncorp Stadium, *Conditions of Entry*, Stadiums Queensland (Web Page, No date) <[suncorpstadium.com.au/the-venue/conditions-of-entry.asp](http://suncorpstadium.com.au/the-venue/conditions-of-entry.asp)>.



## Practical Application ...

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With respect to each of the above sets of conditions, answer the following questions:

1. Describe the powers which the Brisbane City Council and Suncorp Stadium (the providers) state they are entitled to exercise in the administration of the King George Square car park and the Suncorp precinct respectively. [C]
  2. Do you think the powers that you set out in your response to Question 1 are necessary and reasonable in the circumstances? Justify your answer. [E]
  3. For what events do each of the providers seek to exclude responsibility? Outline what you think is the purpose of these exclusions/exemptions. [A]
  4. Are the exclusions/exemptions reasonable having regard to the nature of the facilities the providers manage and to the circumstances of each? Justify your answer. [E]
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## Enforcing exemption clauses

Parties who enter into contracts are presumed to do so of their own free will and courts will enforce exemption clauses subject to any requirements under Acts of Parliament.

For example, there are some sections in the *Competition and Consumer Act 2010* (Cth) which state that the parties cannot rely on exemption clauses if they are inconsistent with the law as stated in the Act.

However, although the courts will enforce exemption clauses as part of a contract, they will not do so lightly. The court will not allow a party to a contract to avoid liability unless it is satisfied with certain things. For example, before an exemption clause can be relied upon the parties seeking to rely on it must show that it is a term of the contract. To decide this, a court would look at a number of matters, not the least of which would be whether or not the clauses were included in a written document which the parties had signed. Another important consideration is whether or not the clause has been brought to the attention or notice of the party affected by it.

Reasonable notice of the exemption clause must be given before the contract has been formed, that is, before an offer has been accepted. Notice given after the contract has been formed is not sufficient. Obviously this is because the contract is already formed.

The exemption clause can only be enforced against a party to the contract, not against strangers.

In addition to these requirements, if the wording of an exemption clause is ambiguous or unclear, a court will interpret the clause against the party seeking to rely on it. This is known as the *contra proferentem* rule. The court will reject words or clauses in the exemption clause if they are inconsistent with the main purpose of the contract.

A good example of the way a court interprets an exemption clause is found in *Noosa Shire Council v Farr and Ors* [2001] QSC 60. The Noosa Shire Council engaged Farr's company, who were engineers, to design and build a scheme to move water from the Mary River by pipeline to Lake Macdonald, the storage area for the Noosa Shire Council water supply. The design the engineers constructed failed. There were exclusion clauses in the contract limiting the liability of Farr to the damages directly caused by the consulting engineer. In the course of the judgment, the judge had to consider the meaning of the exclusion clause, and set out the test for the interpretation of an exclusion clause as follows:

*The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears, including the nature and object of the contract and, where appropriate, construing the clause contra proferentem in case of ambiguity.*



## Case Study

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*Curtis v Chemical Cleaning & Dyeing Co Ltd* (1951) 1 KB 805

**Facts:** Mrs Curtis took a dress to ACME Dry Cleaners to be cleaned and was asked to sign a receipt which contained, among other terms, a clause that the article 'is accepted on condition that the company is not liable for any damage howsoever arising'. Mrs Curtis asked why she had to sign and was told that ACME Dry Cleaners would not accept liability for damage to beads or sequins. She then signed. The dress was returned stained.

**Legal Issue:** Could ACME Dry Cleaners rely on the clause and prevent Mrs Curtis recovering damages for the stained dress?

**Decision:** Mrs Curtis could recover. The exemption clause never became part of the contract. Mrs Curtis' signature was obtained by innocent misrepresentation as to the effect of the document. She was only told about the exclusion for damage to beads or sequins.

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*Alameddine v Glenworth Valley Horseriding Pty Ltd* (2015) NSWCA 219

**Facts:** The plaintiff's mother telephoned the defendant to arrange a quad bike excursion. She paid for the excursion over the telephone. When she paid over the telephone, there was no mention of a 'waiver' clause. At the park the next day the plaintiff's sister signed an 'application form' which included a waiver clause. The defendant argued the waiver clause was included in the contract, thereby excluding the plaintiff's claim alleging negligence, for injury she sustained during the excursion. At the trial the primary judge held that the contract was made when the application form was signed, and therefore the defendant could rely on the waiver because it was incorporated in the contract. The plaintiff Alameddine appealed this decision to the New South Wales Court of Appeal.

**Legal Issue:** Was the contract made when the application form was signed or when the plaintiff's mother paid over the telephone the day before the excursion? In other words, was the application form containing the waiver signed after contract was made?

**Decision:** The New South Wales Court of Appeal held that the contract was made when the plaintiff's mother paid for the activity the day before the excursion. The waiver could not be relied on.

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## Practical Application

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1. Collect examples of contracts from local businesses or from other sources. Classify the contents of each under the following headings:
  - Object of contract
  - Main terms (conditions)
  - Minor terms (warranties)

Are the contracts in 'standard form'? [C]

2. If possible, examine several contracts concerning the same activity, for example, the purchase of a mobile phone, a motor vehicle, or the contract for use of a credit card. Compare and contrast the clauses. [A]
  3. Do you think any of the terms are unfair? Why or why not? [A] [E]
  4. Describe and explain how the contract balances the rights and obligations of the parties to the contracts. Should any changes be made to the contracts? [S] [A] [E]
- 



# Review

## Comprehend

1. **Describe** the following:
  - a. A mere representation
  - b. Condition
  - c. Warranty
  - d. Implied term
  - e. Exclusion clause
  - f. The *contra proferentem* rule [C]

## Analyse

1. **Describe, explain and analyse** the following:
  - a. How a court decides disagreements about the terms of an oral contract.
  - b. How a court decides which statements made in the course of negotiations are terms of a contract.
  - c. Why is it important to decide which statements made in the course of negotiations are terms of a contract?
  - d. How does a court distinguish between conditions and warranties?
  - e. The approach a court will take to an exclusion (exemption) clause contested by a party to a contract.

[C] [A]

## Analyse and evaluate

The plaintiff was injured while engaging in a dolphin-watching cruise with the defendant. The plaintiff went online to the defendant's website, filled in a standard booking form, made payment, and received an email from the defendant in response. On the booking form, it stated that the contract was conditional upon paying the fee, attending on time, and signing a waiver. The terms of the waiver were available for perusal on the website.

The day after she made the booking the plaintiff collected the tickets from the defendant's office, signed a 'waiver', and went on the cruise. She received an injury on the cruise which she alleged was caused by the negligence of the defendant.

One of the issues at trial was whether or not the waiver signed at the defendant's office was incorporated into the contract.

You do not need to know the terms of the waiver to make that decision. Decide if the waiver was incorporated into the contract and give your reasons. Consider your decision, and indicate if you are satisfied that the competing interests of the plaintiff and the defendant mean that they were fairly treated. Give your reasons. [A] [E]

# Contractual obligations

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## Chapter 18: Ending a contract

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### 18.1 Setting aside a contract

### 18.2 Discharge of a contract

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that legal contracts may be set aside (ended) because a party lacks legal capacity, the parties lack genuine consent, or because of illegality of object
  - that legal contracts may be discharged (ended) by performance, by agreement, by breach, by operation of law or by frustration.
- analyse and evaluate
  - the legal principles applied in different situations where contracts may be ended, by being **set aside** or by being discharged.

## Key Terms

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**Breach:** where one of the parties to a contract does not fulfil a required term.

**Consent:** where there has been genuine agreement by the parties about the terms of a contract.

**Frustration:** where circumstances outside the control of the parties prevented from being performed.

**Illegal:** not legal, not authorised by law

**Legal capacity:** the power or ability to enter a contract. For example, persons under the age of 18 do not have legal capacity.

**Minor:** a person who has not reached the age of 18 years is by law a minor or an infant.

**Necessaries:** things needed to maintain the life and standard of living a person enjoys.

**Object of a contract:** the purpose for which the contract came into being.

**Operation of law:** when the law acts to end the contract without reference to the wishes of the parties.

**Performance:** completing the obligations required in the terms of a contract.

**Ratification:** confirming a prior agreement which is not already binding, thereby making it binding.

**Void:** this means that the contract never existed in the first place.

**Voidable:** this means that the injured party (the innocent party) can decide if the contract is to continue.

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## 18.1 Setting aside a contract

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Even after a contract has been validly entered, it can be set aside for several well-established grounds. These are:

- lack of legal capacity
- lack of genuine consent
- legality of object.

**The effect of being able to set a contract aside is that it may be found to be void or voidable.** Void means that the contract never existed in the first place, whereas voidable means that the injured party (the innocent party) can decide if the contract is to continue.

### Lack of legal capacity

This topic is of particular importance to children (or minors) because, generally, **all minors lack legal capacity**. Before a court will enforce an agreement, it insists that the parties to the agreement have the power or ability to enter into that agreement. For example, a person who

is bankrupt, a person with mental illness, and some intoxicated persons are said to lack capacity to enter a contract.

**There are also special rules which apply to many groups which must be satisfied before a valid contract can be created.** For example, there are rules which apply to persons who are not Australian citizens and to corporations (companies).

Many contracts are obviously made between parties who are not equals. Here the law asks the question, *'Is this agreement fair or has the stronger party driven too hard a bargain?'* One category of contract which is not between equals should be of particular interest to you. These are contracts which are entered into by people below the age of majority – those whom the law describes as infants.

## Infants

In Australia, an infant is defined as a person who has not reached the age of 18 years. An infant lacks capacity to enter a contract. **There are four main exceptions to this general rule.** These are:

- contracts for necessities
- contracts for the benefit of infants
- long term contracts (contracts of continuing benefit)
- circumstances where an infant needs to ratify a contract for it to be binding.

### Contracts for necessities

**An infant who contracts for necessities is bound by that contract. 'Necessaries' are not confined to things which are needed to maintain life but include things that are used to maintain the infant in question at his or her standard of living (such as food, clothing, shelter).** The infant's social position, age and occupation are all relevant factors that the court will take into consideration. For example, a court held that an infant who bought a bicycle to ride 20 kilometers to work each day was obliged to pay for the bicycle. The court said that this was a necessary.

In *Sultman v Bond* (1956) St R Qd 180 the court held that a contract to build a house for an infant who was engaged to be married was a contract for necessities. The contract to build the home involved borrowing money to pay for it. Once it is determined the contract is one for necessities, and in particular, price is mentioned in the contract, then the *Sale of Goods Act 1896* (Qld) provides that where necessities are sold and delivered to an infant, they must pay a reasonable price for them.

## Practical Application

### *Sale of Goods Act 1896 (Qld)*

#### **5 Capacity to buy and sell**

- (1) *Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.*
- (2) *However, when necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, the person must pay a reasonable price therefor.*





## Practical Application

(3) In this section—

**necessaries** means goods suitable to the condition in life of such infant or other person, and to his or her actual requirements at the time of the sale and delivery.

1. What generally regulates the capacity to contract? [C]
2. How are 'necessaries' defined by the Act? [C]
3. What must an infant who purchases necessaries do? [C]
4. Is it fair and reasonable for an infant to pay for necessaries purchased? Your response should discuss the implications of your decision and be justified using legal criteria [A] [E]

An infant is also liable to pay for services which are necessaries. This may include medical services, transportation, legal services or contracts for education.

### Contracts for the benefit of infants

**Where an infant enters a contract for an apprenticeship or some other agreement which is to his or her benefit, he or she is usually bound by such agreements.**

The question of benefit is determined by the facts of each case. For example, in *Mercantile Union Guarantee Corp Ltd v Ball* (1937) 2 KB 498 a minor was sued for arrears of instalments under a hire purchase agreement for a lorry which he used in his haulage business. The court held that the purchase of a large and expensive lorry on very expensive hire purchase terms could not be for the infant's benefit. By way of contrast, in *Mercantile Credit Ltd v Spinks* (1968) QWN 32 the Supreme Court of Queensland held that an infant was liable to repay a loan to a finance company. The infant had fraudulently misrepresented his age. The loan was for a vehicle which was indispensable to the infant in his occupation as a sales representative. In *Minister for Education v Oxwell Moreschini* (1966) WAR 39 the Supreme Court of Western Australia held that a teacher training agreement signed by an infant was enforceable against both her and her father who had also signed the agreement as a guarantor. The court found that the contract was for the benefit of the infant. Her defence of infancy failed because the terms of the contract provided her with a profession and with financial support while she was training.



### Case Study

*Chaplin v Leslie Frewin (Publishers) Ltd* (1966) Ch 71

**Facts:** In March 1965, Michael Chaplin was aged 19 (the age of majority was then 21). He was the son of Charlie Chaplin the famous actor in silent movies. He entered into two written agreements with a publisher to write his autobiography, to earn money to support his wife and child.

**Legal Issue:** Could the publisher enforce the agreement against Michael Chaplin?

**Decision:** The English Court of Appeal held that the contract was like a contract of service because it would enable him to earn his living and support his family. It was therefore a contract for his benefit and was enforceable by the publishers.



## You be the judge

Suppose Michael Chaplin was not married, did not have a child and lived at home, but was being supported by his parents. Do you think the same decision would be made? Why? [A]

### Long term contracts

**A third exception is those contracts which involve a continuing obligation and contracts where a minor acquires property of a permanent nature.** A minor can buy shares in a company, join a partnership, or purchase the goodwill of a business. Unless the minor repudiates such contracts within a reasonable time after turning 18, the agreements become legally binding. What is a 'reasonable time' is a matter for interpretation by the court.

### Where an infant needs to ratify a contract for it to be binding

**On reaching the age of 18 an infant may elect to confirm an agreement made previously, so that he or she becomes legally bound by the terms of the contract.** This is known as ratification. Generally, any contract which is not already binding, such as the purchase of goods which are not necessities, must be ratified for it to be binding on the infant.

## Practical Application

Conduct a survey of your class using the following questions:

1. Give your age and the name of the other party to any agreement you have entered as a party. [C]
2. What is the purpose of the agreement? [C]
3. What are the terms of the agreement? [A]
4. What will happen to the agreement when you turn 18? [A]
5. Select two of the students who have entered agreements. Write to each of them advising about their current legal position and recommending a course of action when he or she turns 18. [E]

## Lack of genuine consent

Previously, you have read that it is necessary for there to be a 'meeting of the minds' for parties to enter a valid binding agreement. **Sometimes the state of mind of each party when an agreement is reached means that this 'meeting of the minds' does not occur.** This can be because of:

- mistake of law
- mistake of fact
- misrepresentation
- duress
- undue influence
- unconscionability
- unfair contract terms

We will now explore the above legal situations.

## Mistake of law

Sometimes parties to contracts seek to avoid their obligations by claiming they did not know the applicable law when they entered the contract. These parties claim that if they had known the law, they would not have entered the contract. Many laws are not widely known. Despite this, if one or both parties to a contract makes a mistake as to the law, such a mistake cannot be used to set aside the contract. Everyone should know that 'ignorance of the law is no excuse'. Everyone is presumed to know the law and cannot say that lack of knowledge of the law is a reason for setting aside a contract.

## Mistake of fact

One or both of the parties to a contract may make a mistake of fact. The courts do not necessarily set aside contracts when a mistake of fact is made. It is only where the court can say that mistakes were such that 'a reasonable man' would not have entered the contract that it would set aside such a contract.



## Case Study

*Lewis v Averay* (1972) 1 QB 198

**Facts:** Lewis sold his car to a man who said he was Richard Green, a well-known film actor, and showed a studio pass to prove it. The man gave a valueless cheque and, before the fraud was discovered, the man (Richard Green) sold the car to Averay who bought it in good faith. Lewis sued Averay for the value of the car.

**Legal Issue:** Could Lewis recover the car or its value from Averay?

**Decision:** On the face of the dealing, Lewis made a contract with the man who said he was Richard Green. The mistake as to his identity did not mean that there was no contract with the man who said he was Richard Green (though it could be set aside for fraud). This however did not apply to Averay who bought the car in good faith (with no knowledge of the fraud) for value. Property in the car had therefore passed to Averay and Lewis could not recover.



## You be the judge

Suppose Averay admitted that he and 'Richard Green' had discussed giving Lewis a valueless cheque and that Averay at the same time agreed to buy the car from 'Richard Green' for a lesser amount. Do you think the judge would have made the same decision? [A]



## Case Study

*Taylor v Johnson* (1983) 151 CLR 422

**Facts:** Johnson made an offer in writing to sell 10 acres of land to Taylor for \$15,000. Taylor accepted the offer. Johnson subsequently said she had been mistaken about the terms of the offer. She said she had intended to offer the land for sale at \$15,000 per acre, not \$15,000 for the whole 10 acres. She was mistaken about what was contained in the written offer she sent to Taylor. On appeal to the High Court of Australia, the court decided when reviewing the evidence that Taylor must have known that the price was too good to be true but he said nothing. The inference was that Johnson had made a mistake in her offer.



## Case Study

**Legal Issue:** Did Johnson's mistake justify setting aside the contract?

**Decision:** The High Court of Australia held that this was a case of unilateral mistake, which on its own does not make a contract void. However, if one party enters a contract under a serious mistake in relation to a fundamental term, the contract will be made void if the other party was aware of circumstances that indicate the first party is mistaken, and deliberately sets out to ensure that the first party did not discover their error until it was too late. In such cases it is contrary to good conscience for the party who deliberately ignored the signs and acted to prevent discovery of the error to hold the mistaken party to the contract. The court found that Taylor had acted in this way.

In the circumstances the contract should be set aside.

1. Apply the legal test, that a 'reasonable man' would not have entered the contract if he had known of the mistake in the above case. Do you think the decision fits within the test? Give your reasons. [A] [E]

## Misrepresentation

Usually when parties are negotiating a contract, they will say things to help each other reach a concluded agreement. When it is argued that a contract should be avoided because of misrepresentation, one party is usually seeking to avoid the contract because he or she has relied on something said by the other party.

### Beyond the Black Stump



A **misrepresentation is a representation which is untrue**. It does not have to be a term of the contract, it may simply be an oral statement to draw the other person into a contract. A misrepresentation may be made deliberately or innocently. This distinction is important because it affects the rights of the injured party.

If there is misrepresentation, the injured party may then terminate or end the contract. Such a contract is said to be voidable. That is, the contract may be ended by the injured party. This will give the injured party certain rights against the party making the misrepresentation.

### The difference between innocent misrepresentation and fraud

A misrepresentation may be made innocently or fraudulently. A person may make a statement believing it to be true and not knowing that what he or she says is incorrect. This would be an example of innocent misrepresentation. According to the decision *Derry v Peek* (1889) 14 AC 337 it is fraud if a person makes an untrue statement:

- a. knowingly,
- b. without belief in its truth, or
- c. recklessly, not caring whether it be true or false.

So, for fraudulent misrepresentation to exist, it must be established that:

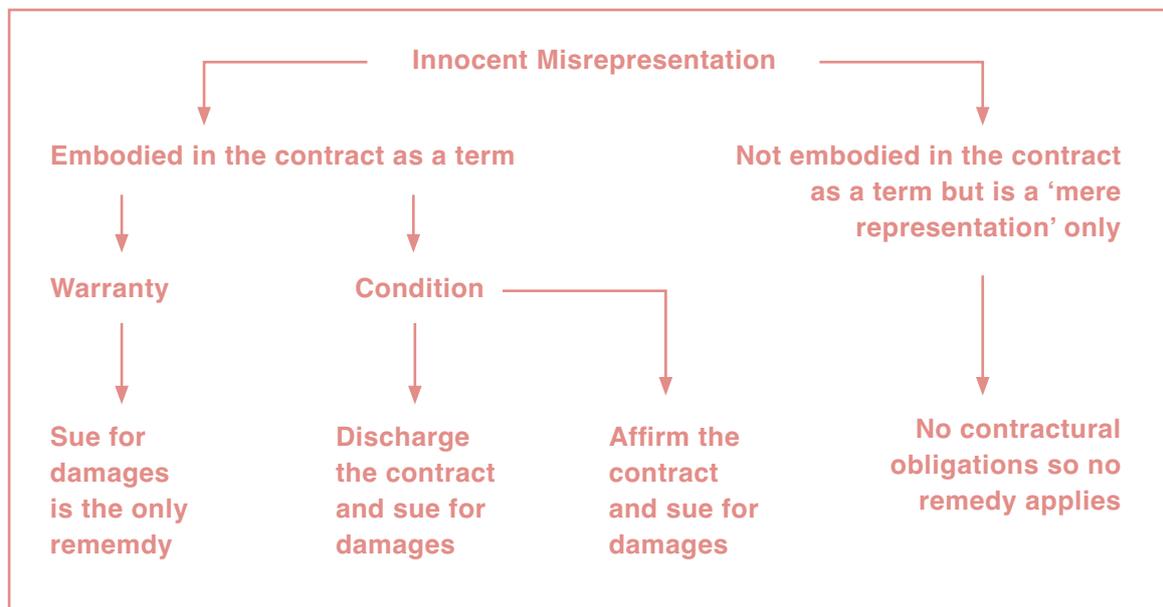
1. There is a representation of fact (not opinion),
2. The representation must be untrue if the person making the statement,
  - knows it is false, or
  - believes it is true, or
  - does not care whether it is true or false
3. The person who makes the representation must intend the other party to act on it,
4. The representation must have been acted on by the other party, and
5. The party claiming must have suffered damage.

If all the above elements are established, an action to terminate a contract because of fraud will succeed.

If a misrepresentation has been made innocently the remedies available depend on whether the misrepresentation concerns a term of the contract. Should it be classified as a 'mere representation' (sales talk is a good example), and not a term, then no remedy exists. The contract is valid. On the other hand, if a term of the contract is affected, the remedies depend on whether the term is a warranty or a condition.

Only in the case of an innocently misrepresented condition may the contract be ended or discharged, though the injured party does have the option to continue with the contract and sue for damages later. In the case of a warranty, the only remedy is to sue for damages. What can happen in the case of innocent misrepresentation is shown in the diagram below.

**Responding to innocent misrepresentation in contract law**





## Case Study

*Holmes v Jones* (1907) 4 CLR 1692

**Facts:** Jones and others purchased a pastoral property from Holmes. During negotiations, Holmes wrote a letter to Jones stating the number and ages of the cattle upon the property.

This information was incorrect. Subsequently, Jones and his fellow purchasers sent an agent to inspect the property and he was given the correct information. The contract was then signed.

**Legal Issue:** Jones and his fellow purchasers sought rescission of the contract on the basis that there was fraudulent misrepresentation as to the number and ages of the cattle upon the property in the letter sent to them.

**Decision:** The action failed. Jones and the other purchasers could not show that the misrepresentation induced the contract, since they had chosen to rely upon the report of the agent. They had not relied upon the misrepresentation in the letter as they entered the contract after receiving the correct information.

## Duress

Duress is actual or threatened violence (or imprisonment) to the contracting party, or his or her immediate family or near relatives, by the other party to the contract, or some person acting on behalf of such other party. A person will not be held to the terms of a contract into which he has been forced by actual or threatened violence, because he has been deprived of his free will to act.

## Undue influence

**Undue influence occurs when one person uses the power, he or she holds over another person to cause that person to enter into a contract.** It is not a free voluntary act. Undue influence is a type of moral pressure. Settled cases have set out certain relationships where undue influence is presumed to exist. The onus of proving that it was not exercised is on the party denying it. That party must prove that he or she did not exercise undue influence. These relationships are:

- parent and child
- guardian and ward
- trustee and beneficiary
- solicitor and client
- religious adviser and devotee
- physician and patient

It is also possible to establish that a relationship of undue influence has occurred in other circumstances as well. **The onus of proof is on the claimant to establish that a relationship of undue influence exists if it is not one of the settled categories.**





## Case Study

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*O Sullivan v Management Music Agency Pty Ltd* (1985) QB 428

**Facts:** In 1976 a rock star, Gilbert O'Sullivan, sued his manager for the profits earned by his manager as a result of an agreement entered into in 1970 when he was still an unknown postal clerk.

**Legal Issue:** Was the contract able to be set aside because of undue influence?

**Decision:** The court found in favour of O'Sullivan and held that the copyrights of the songs and the master tapes were to be handed over to him. It said that the agreement was the result of undue influence exercised over him by his manager.

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If a relationship of undue influence, or actual undue influence has been established in relationships other than those listed above, the onus of proof then shifts from the person claiming the undue influence to the other party. That is, it shifts to the person who has been influencing the first party. To successfully defend the case, that party must prove that the transaction in question was the 'pure voluntary and well-understood' act of the other. The claim would be, therefore, that though the weaker party entered a contract with him or her it was not because of any undue influence on his or her part.

## Unconscionability

It should be already apparent from reading the earlier parts of this chapter that people are presumed to know their own minds and that the court will not interfere where contracts are entered into by parties of their own free will. A court will not interfere simply because a part of a contract or a term of the contract operates harshly against a party to a contract.

**Sometimes, however, there is inequality of bargaining power.** For example, in *Lloyds Bank Limited v Bundy* (1975) QB 326, an elderly farmer guaranteed the indebtedness of his son's company. The elderly farmer was not able to resist the pressure put on him to sign the guarantee. He did not understand the terms of the guarantee and he was not given independent advice. The court set aside the guarantee on the ground of undue influence. Lord Denning said:

*English Law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers power for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of another.*

In Australia, it was not until *Amadio's* case, that the High Court of Australia had an opportunity to deal with these issues. In that case, the court said that **where someone is placed at a special disadvantage and unfair or unconscionable advantage is then taken of the opportunity, it could set aside the transaction.**



## Case Study

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*Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447

**Facts:** Mr and Mrs Amadio were an elderly Italian couple. They had little formal education and limited knowledge of English. They signed a mortgage to the Commercial Bank of Australia over a block of shops they owned as security for payment of the bank debts by

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## Case Study ...

one of their son's building companies. The mortgage included a guarantee under which they became liable for the total present and future indebtedness of their son's company.

When they signed the mortgage and the guarantee they believed their son's company was prosperous. It was, in fact, in serious financial difficulty and the bank knew this. Their son telephoned them just before they signed and told them their liability was limited to \$50,000 and would end after six months. Later the same day the manager of their son's bank called on Mr and Mrs Amadio at their home with the contract. They did not try to read the document. The manager did not try to explain its meaning or effect except to tell Mr and Mrs Amadio that it was not correct that it would end in six months. After they signed, the bank manager left without even leaving them a copy of the agreement. The son's company went into liquidation and the bank claimed nearly \$240,000 from Mr and Mrs Amadio under the terms of the mortgage/guarantee.

**Legal Issue:** Could Mr and Mrs Amadio have the contract set aside?

**Decision:** The High Court of Australia held that Mr and Mrs Amadio were entitled to have the contract set aside on the grounds of unconscionable dealing. They were in a position of special disadvantage. They were mistaken about the extent of their responsibility for the debts of their son's company. They mistakenly believed their son's company was financially viable. Their age and background contributed to their position of special disadvantage. Their son's misleading advice also contributed to this position. Also, it must have been obvious to the bank manager that it was not a prudent transaction for Mr and Mrs Amadio to enter into. It should have been clear to the bank manager that they did so because they were unable to make a judgment as to what was in their best interest.

### What do you think?

Is it possible to describe all circumstances which might give rise to a situation of special disadvantage? Discuss the implications of your answer. [E]



The remedy of unconscionability is now enshrined in statute law. Where the terms of a contract have been found by a court to be 'unjust' or 'unconscionable, harsh or oppressive' then the court can grant relief of the kind granted in *Amadio's* case. This has been the situation in New South Wales since the *Contracts Review Act 1980* (NSW). Now, the *Competition and Consumer Act 2010* (Cth) (the CCA) that applies Australia wide includes provisions which contain a general prohibition against persons and corporations:

- in trade or commerce
- engaging in unconscionable conduct
- in connection with the supply of goods or services to individuals and corporations (not a listed public company)
- where the acquisition of the goods or services was for use by a consumer for individuals and for business purposes for corporations.

The CCA is broader in its application than the common law concept of unconscionability, which is imported into the Act. It allows the courts to apply the remedies under the former *Trade Practices Act*.

The CCA contains a series of considerations to which the court may have regard for the purpose of determining that unconscionable conduct has taken place. These are set out in the *Australian Consumer Law (ACL)* Sch. 2, s21(2) as they relate to consumers. Sections 22(2) and 22(3) relate to circumstances where goods or services are supplied to a business. Broadly speaking, the court may have regard to a number of matters set out in the CCA, including the following:

- the relevant strengths of bargaining positions of the parties;
- whether consumers are required to comply with conditions not reasonably necessary to protect a supplier's legitimate interest;
- whether the consumer is able to understand documentation;
- whether undue influence or pressure was exerted or unfair tactics used; and
- the price for alternative identical or equivalent goods or services.

Additional requirements where businesses are involved are found at s22(2) and s22(3).

It is important to note that all the common law concepts set out earlier in this section about unconscionability have now been taken up and extended by the statute law in the ACL. Despite this, when the opportunity has arisen, the High Court of Australia has added to our understanding of when it will apply the principles and precedents of unconscionability. A recent case illustrates this.



## Case Study

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*Stubbings v Jams 2 Pty Ltd & ORS* [2022] HCA 6

**Facts:** The respondents (Jams) were in the business of asset-based lending. Their system of lending operated on the basis that potential borrowers, such as the appellant (Stubbings), meet with an intermediary working with a law firm. The law firm provided a service to clients, including the respondents, to facilitate the making of secured loans by those clients. It acted as an agent for the respondents and, because of the intermediary, never dealt directly with the appellant. The appellant was unemployed and had no regular income. He owned two properties, both of which were mortgaged. In 2015, the appellant sought to purchase another property and he met on several occasions with the intermediary. In accordance with the system of lending, the appellant acted as guarantor for a loan made to a company by the respondents, of which she was a sole director and shareholder, with the three properties as security for guarantee. As part of the transactions, the law firm prepared a certificate of 'Independent Financial Advice' and a certificate of 'Independent Legal Advice' to be signed by an accountant and the lawyer respectively, whom the law firm referred the appellant to. The property was purchased in late 2015. When the company defaulted on the third months interest payments, the respondents commence proceedings against the appellant, seeking to enforce a guarantee and their rights as mortgagees of the properties. The Court of Appeal overruled the primary judge, concluding that there was nothing inherently unconscionable about asset-based lending, and that the respondent's agent had neither actual or constructive knowledge of the appellants desperate personal and financial circumstances and was entitled to rely on the certificates of independent advice.

**Legal Issue:** Was the enforcement of the respondent's rights against the appellant, in the context of asset-based lending, unconscionable?

**Decision:** The High Court of Australia held that the respondents had acted unconscionably contrary to equitable principle. It was not in dispute that the appellant suffered from a special disadvantage, because of his poor financial literacy, inability to understand the nature and risks of the transactions, and poor financial circumstances. The respondent's agent had

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## Case Study ...

sufficient appreciation of the appellants vulnerability and the likelihood that loss would be suffered. A finding of actual knowledge was not essential for the appellants case for relief. The dangerous nature of the loan, obvious to the agent but not the appellant, was sufficient to establish that the agent had exploited the appellants vulnerability, contrary to good conscience. It was open to the primary judge to infer that the certificates were mere 'window dressing', so that they could not negate the agent's actual appreciation of the dangerous nature of the loans and the appellants vulnerability. It was therefore unconscionable for the respondents to insist upon their rights under the mortgages.

## Legality of object

The object of a contract can be described as the purpose for which it came into being. **If the object of a contract is illegal, the contract is void and of no legal effect.** Agreements entered by two or more people to commit a crime are not enforceable at law. An obvious example is the agreement made by a person driving a getaway vehicle for a group of bank robbers. He promises to wait outside the bank for a share of the robbery and to drive the bank robbers away from justice. Such an agreement is illegal because the object of the contract is illegal. The purpose of the agreement is to rob a bank.



This is an extreme example but there are other situations where it is not acceptable to the community to enforce agreements between people as these contracts are regarded as illegal. Some common examples of contracts which are illegal include agreements:

- to commit a crime or tort
- that hinder the administration of justice
- that prejudice the relationship of one country with another
- that tend to injure the public services
- designed to defraud the Deputy Commissioner of Taxation
- that is an unreasonable restraint of trade

There are contracts which are illegal because Commonwealth or State law says that they are. For example, in Queensland it is not possible to enter a contract or wager with a starting-price bookmaker. It is also not possible in Queensland to transfer the ownership of a motor vehicle without producing a roadworthy certificate. Therefore, any agreement to sell a car without a roadworthy certificate is void and of no legal effect.

If a contract is illegal then it is void.

## Practical Application

In class discussion develop an example of each of these illegal contracts. Explain what aspects of good order are disturbed by these contracts. [S] [A] [E]



In our modern free enterprise economy, there are many commercial agreements in which organisations try to restrict the free movement of labour. This happens between employers and employees, in business relationships, and in sport. Courts are frequently asked to adjudicate in these disputes.

### Restraint of trade

Contracts which contain unreasonable restraints of trade will have an unlawful purpose and therefore be void. What is unreasonable is always a question of fact but generally the courts have approached this issue by considering the following:

- The restraint must be no wider than is reasonably necessary to protect the person for whose benefit it is imposed.
- It must be in no way injurious to the public.



### Case Study

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*Woolworths v Banks* [2007] NSWSC45

**Facts:** Woolworths sued Mr Banks, a former executive employee. Mr Banks employment contract said that he could not be employed by 'a business competitor' for a period of up to 12 months after his employment with Woolworths ended. Mr Banks was employed by Myer.

- Woolworths argued that Myer was 'a competitive business' as defined in the contract; and
- Mr Banks should be restrained from accepting employment at Myer for a six month period after leaving Woolworths in order to protect information confidential to Woolworths and known to Mr Banks. It argued that this restraint was reasonably necessary to protect Woolworths.

**Legal Issue:** Was Myer a business competitor? Was the restraint sought by Woolworths reasonably necessary in the circumstances?

**Decision:** Woolworths was not successful. The court found that the needs of the two companies were quite distinct. Myer was not a business competitive with Woolworths. Further, the court found that Mr Banks did not have confidential information belonging to Woolworths that would benefit Myer. The restraint was not reasonably necessary.

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*Clifford Davis Management Ltd v WEA Records Ltd* (1975) 1 WLR 61

**Facts:** Two members of the rock group 'Fleetwood Mac' entered into an agreement with the group's publisher/manager. It provided for the copyright in any musical composition to be vested in the publisher for the consideration of one shilling per composition. The agreement was to last for a period of five years and at the option of the management could be extended for a further five years. The copyright was worldwide.

**Legal Issue:** Could the agreement be set aside so that the group could compose for another publisher?

**Decision:** The court set aside the contract on the ground that it was an unreasonable restraint of trade as it required the composers to give their services to one person only, to the exclusion of all others, for a long term of years. It was considered that the songwriters were in a disadvantageous position. There was inequality of bargaining power. The needs of the songwriters were dependent upon the publisher's will, the publisher being skilled in business and finance whereas the composers were not. The composers had received no independent advice, legal or otherwise, when the agreements (which were in standard form contract style and full of legal phrases) were signed.

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## Case Study ...

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*Adamson v West Perth Football Club (Inc)* (1979) 27 ACR 475

**Facts:** Adamson was a footballer who had played for West Perth. He moved to South Australia and applied to the National Football League of Australia Ltd (NFL) for clearance to play for Norwood in South Australia. The rules of the National Football League included clearance and permit regulations which imposed restrictions on the ability of players to change clubs.

**Legal Issue:** Were the regulations of the NFL an unreasonable restraint of trade?

**Decision:** The Federal Court held that the market to which the regulations applied could not be limited and therefore the regulations operated as a restraint of trade which was unreasonable and unjustified.

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## 18.2 Discharge of a contract

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A contract may be discharged by:

- performance
- agreement between the parties
- operation of law
- frustration
- breach of contract.

### Discharge by performance

Most contracts are discharged by performance. This means that once the parties to a contract have carried out all their obligations under the contract, the contract is over.

## Case Study

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*Cutter v Powell* (1795) 6 TR 320

**Facts:** A shipowner gave Cutter a written note promising to pay him 30 guineas if he did his duty as second mate in the Governor Parry on its voyage from Kingston to Liverpool. Cutter died during the voyage, and his executor sued for his wages.

**Legal Issue:** Could Cutter be paid his wages even though he did not finish the voyage?

**Decision:** The court decided that it was a condition precedent to any payment that Cutter perform his duty during the whole voyage. The executor's action failed.

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### Discharge by agreement

In the same way that a contract is created by agreement, it may be ended by mutual agreement. The original contract can be ended by the parties cancelling or by substituting a new contract for the old one.



Sometimes the original contract may contain a term of which allows either party to end the contract by giving appropriate notice. Alternatively, a term of the original contract may provide for discharge or termination when some event occurs.

When drafting a contract the parties should always include a term which says how the contract is to be ended if a party wishes to do so. This is particularly important in contracts such as partnership agreements.

### Hypothetical?

Adam agrees to allow Colin to use his flat, rent-free, while Adam is overseas for a year. The agreement contains a clause requiring Colin to vacate the flat if he marries during the period of the contract.

If Colin gets married, could Adam require him to vacate the flat? [A]

## Discharge by operation of law

**A contract can be discharged without reference to the wishes of either party by operation of law.** For example, where one party becomes bankrupt, he or she is generally released from personal liability under contracts entered into prior to bankruptcy. However, the Trustee in Bankruptcy who winds up the bankrupt's estate is required to pay the bankrupt's debts to the extent possible considering the financial resources available. Some people owed a debt will receive a part payment (which fully discharges the debt) while others may receive nothing at all. A bankrupt may not be sued later for debts existing at the time of the bankruptcy action, providing the bankrupt fully discloses them.

## Discharge by frustration

There have been occasions when contracts could not be performed because of circumstances outside the control of the parties. When this occurs, the law says that the contract is frustrated. What are frustrating circumstances is a matter of fact, and the courts have developed tests for assessing whether or not the frustrating event does end the contract. The test most commonly applied is that if the frustrating event makes performance of the contract something radically different from that which was contemplated by the parties then the contract is said to have been frustrated.



### Case Study

*Krell v Henry* (1903) 2 KB 740

**Facts:** The plaintiff hired a flat in Pall Mall to the defendant for 26 and 27 June 1902. The defendant wanted the flat to enable him to view the coronation procession of Edward VII. The procession was cancelled due to the King's illness.

**Legal Issue:** Could the plaintiff compel the defendant to pay the rent?

**Decision:** The court held that the contract was 'frustrated', because performance was rendered pointless.



Sometimes government interference can have this effect. Other examples would be when a person who is bound to perform certain personal services dies or the subject matter of the contract is destroyed before performance can take place. For example, a building which is hired for a future date may be burnt down before the hiring can take place.

## Case Study

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*Jackson v Union Marine Insurance Company Limited* (1874) LR 10 CD 125

**Facts:** The defendants contracted to ship a cargo by the SS Orlando. The cargo was to leave Alexandria in January. The ship became stranded before the date of the contract and was not available as a cargo vessel.

**Legal Issue:** Could the defendants avoid the contract because of the unavailability of the SS Orlando?

**Decision:** The court held that the contract was at an end due to frustration. The ship, while still in existence, was no longer available for the purposes of the contract.

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When a contract is ended by 'frustration', the parties do not lose all their rights under the contract. Any rights which the parties are entitled to up until the exact moment of frustration may be enforced each against the other. Similarly, any liabilities the parties have under the contract may be enforced up until the moment of frustration. **It must be stressed that just because a contract becomes tiresome or a burden does not amount to frustration. The performance of a contract must be no longer possible.**

## Discharge by breach of contract

To breach a contract means to break it. A party can breach a contract either by breaking a part of the contract, or by repudiating the whole of the contract. A repudiation occurs when one party renounces the contract completely. This can be done by simply saying, 'I do not wish to proceed with this contract' or by making it impossible to perform the contract. Repudiation can also occur by one party doing something totally inconsistent with his or her obligations under the contract.

A contract is not automatically terminated when one party repudiates it. The other party is entitled to reject the repudiation and treat the contract as still being on foot. When it is decided to treat the contract as being still in existence, the injured party can insist on performance. However, if the injured party accepts the repudiation, damages are then the only remedy available.

When one party is in breach by not fulfilling a term of the contract, the nature of the term which has been breached will decide whether or not the injured party can elect to end the contract. If the term breached is a condition, then the injured party can elect to discharge the contract and sue for damages. On the other hand, if the breached term is a warranty then the injured party cannot elect to terminate or discharge the contract but only has a remedy in damages.

## Case Study

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*Brien v Dwyer* (1978) 141 CLR 378

**Facts:** The parties entered a contract for the sale and purchase of land. It was a term of the contract that a deposit had to be paid within fourteen days of the date of the contract. The deposit was 10% of the purchase price. The buyer failed to pay the deposit in the time stipulated by the contract. The seller immediately gave notice terminating the contract on

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## Case Study ...

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the basis that the buyer's failure to pay the deposit was a breach of a fundamental term of the contract. The seller alleged that the requirement to pay a deposit was a condition of the contract. As such, it was a fundamental term that goes to the root of the contract entitling the seller to immediately terminate and renounce further performance. The buyer disputed this.

**Legal Issue:** Was the requirement to pay the deposit within fourteen days of the date of the contract a condition of the contract which entitled the seller to terminate?

**Decision:** The court decided that the term relating to the deposit was an essential term (a condition) going to the very root of the contract. The breach of that term would immediately entitle the seller to terminate the contract.

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## Review

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### Comprehend

1. **Describe** the following:

- |                |                 |
|----------------|-----------------|
| a. Void        | d. Repudiation  |
| b. Voidable    | e. Ratification |
| c. Necessaries |                 |

[C]

2. **Describe** and **explain** the following:

- |                          |                       |
|--------------------------|-----------------------|
| a. Illegality of purpose | e. Undue influence    |
| b. Mistake of fact       | f. Restraint of trade |
| c. Misrepresentation     | g. Unconscionability  |
| d. Duress                | h. Breach of contract |

[C]

### Analyse and evaluate

- Explain** the legal test which the High Court of Australia applied in the *Amadio* case to set aside the contract for unconscionability. **Describe** the additional criteria which the High Court of Australia regarded as being important in making this decision? **Analyse** why it is not sufficient for a contract to simply be harsh and oppressive. Do you think this is fair? **Justify** your decision by using legal criteria. [C] [A] [E]
- In some circumstances events occur which are outside the control of the parties to a contract. When a party decides that this means it is unable to continue with the contract and seeks to end it, what is the test that the court will apply in the circumstances? **Analyse** and **justify** whether the test that is applied to a contract which is said to be frustrated, is a reasonable and fair response by the common law. [A] [E]

# Contractual obligations

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## Chapter 19: Remedies and other contractual issues

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### 19.1 Introduction

### 19.2 Common law remedies

### 19.3 Unjust enrichment

### 19.4 Rental agreements

### 19.5 Sports contracts

### 19.6 Mobile phone contacts

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the common law remedies available to the plaintiff
  - legal defences available to defendants in response to plaintiff's claims.
- analyse and evaluate how the High Court of Australia uses the idea of unjust enrichment to develop precedents which find acceptable balances between the competing interests of contracting parties in legal disputes.
- analyse and evaluate the mechanisms and avenues of dispute resolution in selected contract issues.

## Key Terms

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**Damages:** the loss incurred by a party to a contract as a consequence of the breach of contract by another party.

**Injunction:** an order restraining a person from doing a wrongful act

**Mitigation:** the reasonable steps plaintiff must take to reduce the loss caused by a breach of contract

**Rescind:** the act of advising the other party the contract is ended as of right

**Repudiation:** the act of unilaterally deciding to inform the other party to a contract that you renounce it in whole or in part

**Specific performance:** an order requiring a party to carry out the contract as originally agreed

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## 19.1 Introduction

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This chapter is about the common law remedies for breach of contract, and the remedy of unjust enrichment, an equitable remedy which does not necessarily arise from breach of contract. It also provides selected factual information about contractual issues for your consideration.

The remedy of unjust enrichment illustrates the ability of the common law to adjust to unusual claims (that is, claims which arise outside the scope of the settled common law of contract) to provide a remedy which gives fairness to the competing parties in a dispute.

## 19.2 Common law remedies for breach of contract

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**A party can breach a contract either by breaking a part of the contract, or by repudiating the whole of the contract.** A repudiation occurs when one party renounces the contract completely. This can be done by simply saying, 'I do not wish to proceed with this contract' or by making it impossible to perform the contract. Repudiation can also occur by one party doing something totally inconsistent with his or her obligations under the contract.

**However, a contract is not automatically terminated when one party repudiates it.** The other party is entitled to reject the repudiation and treat the contract as still being effective. When it is decided to treat the contract as being still in existence, the injured party can insist on performance. However, if the injured party accepts the repudiation, damages are then the only remedy available.

When one party is in breach by not fulfilling a term of the contract, **the nature of the term which has been breached will decide whether the injured party can elect to end the contract.** If the term breached is a condition, then the injured party can elect to discharge the contract and sue for damages. On the other hand, if the breached term is a warranty, the injured party cannot elect to terminate or discharge the contract but only has a remedy in damages.

If the nature of the breach of contract gives one party the right to end the contract, he or she can either continue on with the contract or rescind. **To rescind a contract simply means to tell the other party that you regard the contract as having been ended.**

If one party decides to end the contract because of another's breach, he or she may:

- refuse to perform his or her part of the contract
- resist any action brought by the defaulting party either for damages or specific performance
- recover any money paid provided there has been a total failure of consideration
- take action against the offending party for the damages sustained by the breach
- take action against the offending party for an amount equivalent to the value of labour performed or goods supplied.

If the nature of the breach does not entitle one party to the contract to end the contract, or if the innocent party decides not to elect to treat the contract as having being ended when entitled to do so, the innocent party may:

- in certain cases sue for specific performance
- in certain cases sue for an injunction
- sue for damages.

### Specific performance

Specific performance is a remedy which involves making the defaulting party carry out the contract as originally agreed. It will only be granted by the court if damages are not an adequate remedy and the court can supervise the carrying out of the order for specific performance. There are other considerations the court looks at, but the above two are the most important. Most orders for specific performance have been made where the contracts are for the sale of land or the subject matter of the contract is of a unique nature, for example, a famous painting or an item of jewellery.

### Case Study

*JC Williamson Limited v Lukey and Mulholland* (1931) 45 CLR 282

**Facts:** J C Williamson Limited gave the plaintiffs (Lukey and Mulholland) a lease of a shop for five years in a theatre in which drinks, confectionary and ice-cream could be sold to the audience. The contract contained conditions about how the confectionary could be sold and about the arrangements for sales attendants to move around the theatre at certain times under the supervision of the theatre manager to sell the confectionary.

Before the term of the agreement expired, the defendant company said that no fixed period had been agreed upon and repudiated the contract. The plaintiffs sued the company.

But, instead of suing for damages which is a remedy for the breach of contract (caused by the repudiation) the plaintiffs asked the court to grant an injunction for specific performance. That is, they asked the court to make an order that J C Williamson must allow Lukey and Mulholland to continue to operate the shop in the theatre under the supervision of the manager.





## Case Study ...

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**Legal Issue:** Would the court make an order for specific performance making the company perform the contract for the balance of the term so that the plaintiffs could continue to operate the shop in the theatre?

**Decision:** The court said that the performance of the contract on an ongoing basis would have required its supervision. If it made an order compelling the defendant (J C Williamson) to perform its obligations for the balance of the term it could not guarantee that the company would fully carry out its obligations as contemplated by the agreement. In those circumstances, the court was not prepared to grant the order for specific performance.

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## Injunction

**An injunction is an order of the court restraining a person from doing a wrongful act.**

For example, there may be a term in the contract which prevents the defaulting party from doing something during the term of the contract. If the defaulting party ignores the restricting term of the contract, the other party may apply for an injunction prohibiting the defaulting party from taking the action. A common example is the situation where someone has contracted to provide a personal service on the understanding that he or she would not provide that service to anyone else.



## Case Study

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*Page One Records Limited v Britton* (1968) 1 WLR 157

**Facts:** The Troggs (a pop group) appointed Page One Records Limited as their manager for five years. It was a term of the contract that The Troggs would not appoint anyone else to act for them during the five year period. After one year, The Troggs dismissed Page One Records Limited and decided to appoint another manager.

Page One Records Limited went to court to ask for an injunction to restrain The Troggs from appointing another manager.

**Legal Issue:** Would the court give Page One Records an injunction restraining The Troggs from appointing another manager?

**Decision:** The injunction was refused. The court recognised that pop groups could not operate successfully in the entertainment industry without a manager. An injunction would have indirectly compelled The Troggs to continue to employ Page One Records Limited or remain idle. The court said that this would amount to enforcing a contract for personal services and the court was not prepared to grant an injunction which would have that effect. Effectively, it said, that such an injunction would amount to specific performance of the contract.

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## Case Study

*Warner Bros Pictures Inc v Nelson* (1937) 1 KB 209

**Facts:** The defendant, a film actress, whose stage name was Bette Davis, was contracted to work exclusively for the plaintiff for one year. It was also a term of the contract that she would agree, during the period of the contract, not to work as an actress for any other person. In breach of the contract, she agreed to work as an actress for someone else at the same time. The plaintiffs, Warner Bros Pictures Inc, sought an injunction to restrain Bette Davis from acting in breach of her contract with them.

**Legal Issue:** Would the court grant an order (injunction) stopping Bette Davis from working for another film company as an actress?

**Decision:** The court granted the injunction. The court took the view that granting the injunction did not make Bette Davis work for the plaintiffs (Warner Bros). She could, if she wanted, work in some capacity other than as an actress. As a result, the injunction did not have the effect of enforcing a contract for personal services.

### What do you think?

Compare and contrast the *Page One* and the *Warner Bros* judgments. Do you think there is any difference between the two decisions? Explain your answer. [A]



## Damages

**When one party is entitled to sue the other for breach of contract there is no point in doing so unless the breach has caused a loss. The loss is referred to as damages.**

The court awards a money judgment as damages, that is, the court compensates the injured party by either awarding an actual loss or estimating an amount that compensates the injured party for the loss.

Calculating what someone has lost as a result of breach of contract is not an easy task and the courts have established various principles to enable calculations to be made consistently and fairly.

**The general principle:** the basic principle is that the injured party is entitled to recover an amount which will put him or her in the same position as if the contract had been properly performed.

The classic statement of this common law principle is in judgment of James Parke, 1st Baron Wensleydale in *Robinson v Harman* (1848) 154 ER 363 [365]:

*Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*

**The damage must not be too remote:** quite often a breach of contract results in a chain of events so that the injured party loses something quite removed from the event or act originally causing the breach.

The question which arises is whether or not a loss which is well removed from the original event can still be recovered by the injured party. The legal principle which governs this area is the principle of remoteness of damage. Where the loss is too far away from the original event causing the breach, it is said to be 'too remote'.

In the landmark case of *Hadley v Baxendale* (1854) 156 ER 145 the principle used by the court is clearly stated in the words of Sir Edward Alderson:

*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*

Briefly summarised, the above statement of principle means that a recoverable loss is not too remote if the loss:

1. **arises naturally from the breach** (in the usual or normal course of things), or
2. **is actually contemplated as a probable result of the breach** (because special or exceptional circumstance were made known to the party in breach at the time of entering the contract).



## Case Study

*Hadley v Baxendale* (1854) 156 ER 145

**Facts:** The plaintiffs were owners of a flour mill. They contracted with the defendants who were couriers, to have a broken crankshaft carried to engineers for the purpose of manufacturing a new shaft. Delivery of the shaft was delayed and the consequence for the plaintiffs was that the mill was stopped for five days longer than it should have been and profits were lost.

**Legal Issue:** Could the plaintiff recover the lost profits?

**Decision:** The court held that the defendants were not liable for the lost profits as they were merely carriers who did not know that the mill would be stopped. The plaintiffs' loss of profits was not something which the defendants should have contemplated as occurring in the usual course of things.

If an injured party wants to recover some loss which does not meet this test, it is only possible if the other party knew of the existence of exceptional circumstances likely to cause a special loss if the contract was breached. The time at which the circumstances have to be made known to the defaulting party is when the parties enter into the agreement, not at the time of the loss.





## Case Study

*Victoria Laundry Ltd v Newman Industries* (1949) 2 KB 528

**Facts:** Victoria Laundry contracted for the installation of a new boiler by Newman Industries. When the boiler was not forthcoming, the plaintiffs sued to recover losses incurred. Newman Industries was aware that the Victoria Laundry Ltd wanted it for immediate use for the purposes of their laundry and dyeing business. The boiler was delivered twenty weeks late.

**Legal Issue:** Could Victoria Laundry Ltd recover their loss of profits for the twenty week period or for a longer period?

**Decision:** Victoria Laundry Ltd were successful in obtaining damages equal to the loss of profits during the period of inaction as these fell within the 'reasonable contemplation' test. However, they were not able to claim for loss of potential profits from a very substantial contract they would have gained had the boiler been in place.

The court ruled that the potential profits were too remote from the defendants as they did not know of the possible contract now missed.

### What do you think?

Assume Victoria Laundry Ltd had entered a contract for additional work for a customer for a 10 week period due to start 20 weeks after the boiler was delivered and installed. Newman Industries defends the allegations of loss and damage by Victoria Laundry which includes the additional work, on the basis that the damage is too remote. Would Newman Industries be successful in its defence? Give your reasons. Do you think the test you have applied is fair in the circumstances? [A] ]E]



### The duty to mitigate the loss

**The law imposes a duty upon a person claiming damages to take all reasonable steps to mitigate the loss caused by the breach of contract.** This means to minimise the loss. **What are reasonable steps is a question of fact in each particular circumstance.**

Some standard form contracts include clauses that specify amounts that are payable as anticipatory losses in the case of a breach. If the sum is excessive, the court may treat it as a penalty and not enforce it.

## Case Study

*Payzu Limited v Saunders* (1919) 2 KB 581

**Facts:** The defendant was selling goods to the plaintiff by instalments. It was a term of the contract that the buyer (plaintiff) would pay for the goods delivered within one month of each delivery less 2.5% discount. The buyer (the plaintiff) did not make the first payment on time. The seller treated the buyer's failure to pay as a breach of a condition justifying the repudiation of the contract.

At the same time, the seller offered to continue deliveries at the contract price (without the discount) if the buyer would pay cash at the time of each order. The buyer refused the offer. The price of the goods in the market place rose and the buyer had to pay more for the product from someone else. The buyer sued the seller for breach of contract.





## Case Study ...

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### Legal Issues:

1. Could the buyer recover damages for the breach of contract from the seller?
2. Should the buyer have mitigated its loss by accepting the seller's offer to supply the goods at the contract price on a cash basis without discount?

**Decision:** The court found that the seller had breached the contract by wrongly terminating the contract when the buyer did not pay the first instalment. It therefore found that the buyer was entitled to damages. However, the buyer, the court said, should have accepted the seller's offer to take delivery of the goods at the contract price.

In other words, the buyer did not mitigate its loss when it should have. The court added that the loss suffered by the buyer was not the difference between the contract and the market price. The loss it was prepared to award was the loss that would have been suffered if the offer of the seller had been accepted. This loss would be the 2.5% discount which the seller removed and the cost of interest on the amount normally paid at the end of each month because the seller required the buyer to pay cash on delivery.

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### Damages are not usually recoverable for disappointment or distress

Historically the common law has not been prepared to compensate an injured plaintiff for mere inconvenience, distress, or injured feelings arising from a breach of contract. However, the High Court in Australia has been prepared to give damages where a promise has been made in the contract which entitles the party who is suing to pleasure, enjoyment or personal protection, and where the resulting distress or disappointment has occurred as a result of being injured or suffering physical inconvenience.

In *Baltic Shipping Co v Dylan* (1993) 176 CLR 344 the High Court of Australia awarded compensation for disappointment and distress to a plaintiff who paid for a fourteen-day cruise in the South Pacific. After eight days the ship struck a rock and sank. In addition to the damages for loss of belongings the plaintiff was awarded \$5,000 for disappointment and distress. There have been a number of similar cases where people have been promised holidays of a particular kind and the promise has been breached. Clearly, if the court is satisfied that there is a breach of an express or implied term that a benefit which flows to a party in the contract is pleasure and enjoyment, the court will award damages for disappointment or distress when those benefits are lost.

### Punitive and nominal damages

Occasionally, the court will award damages to punish the party in default, or nominate a sum even though the party has not suffered actual loss in order to compensate it for the infringement of its legal rights. Punishment situations have arisen in cases where the court considers the conduct to be not only in breach of contract, but also reprehensible in some way. Nominal damages may be awarded when there has been a breach of a contract but no real loss has occurred.

### Time limits

The right to sue someone for a breach of contract may be lost if:

- it is compromised, or
- there is something in the contract itself which says that after a period of time neither party is allowed to sue for breach.

However, as a matter of public policy, all States have Acts (called ‘Statutes of Limitations’) which prevent suits for breach of contract after a specified time. In all States, if the contract is a simple contract any action after six years is barred. The States do not have uniform laws with regard to contracts under seal (deeds). In Queensland, a contract under seal is barred after 12 years. The time restriction runs from the date upon which the cause of action arose, not from the date on which the contract was commenced.

## 19.3 Unjust enrichment

**Unjust enrichment is the legal principle that no person should make an unjust gain through another’s loss.**

It has been described as a unifying principle, an idea that underlies a variety of distinct categories of case in which the law has recognised an obligation on the part of the defendant to account for a benefit derived at the expense of a plaintiff. In *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 the Hon Justice Deane said it was:

*...a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of the plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.*

### What do you think?

Do you think that the High Court of Australia, if given the opportunity to make a decision in a new category of case, would apply legal reasoning to decide the case, or simply decide on the basis that it thought it was the right thing to do? Give your reasons. [A] [E]



### Inquiry Focus

*In what circumstances has the High Court of Australia made decisions based on the idea of unjust enrichment?*



### Restitution

**Restitution is the legal word which is used to discuss one remedy based on the idea of unjust enrichment.** Where a defendant would be unjustly enriched at a plaintiff’s expense, the High Court of Australia has made decisions obliging a defendant to make restitution for a benefit derived at the plaintiff’s expense.

Restitution will usually be awarded only where:

- the defendant had received some form of benefit (that is, has been ‘enriched’),
- the benefit or ‘enrichment’ was at the plaintiff’s expense,
- it would be ‘unjust’ to permit the defendant to retain the benefit, and
- there are no defences available to the defendant, for example, change of position, estoppel, incapacity or illegality.



## Circumstances where restitution applies

There are two basic situations in which restitution may provide an appropriate remedy:

1. where the plaintiff is claiming the return of money, for example, because of a total failure of consideration, or it was paid under a mistake, and
2. when the plaintiff is claiming a 'reasonable remuneration' for work done or services provided and there is no enforceable contract between the parties.

## Recovery of money paid

### Case Study

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*McCormack v Commonwealth* (1984) 155 CLR 273

**Facts:** McCormack leased some land from the Commonwealth Government. Eventually, the government decided that it wanted to use the land for something else and that McCormack should leave. McCormack had a long lease and had spent considerable money putting buildings and other improvements on the land. There was a dispute about compensation for the improvements.

To convince McCormack to leave straight away the Government paid McCormack an advance of \$75,000 while both parties waited for an arbitration hearing to decide how much compensation McCormack should receive. The arbitration determined that the government should pay a total of \$215,000 to McCormack. The government mistakenly paid the full amount and McCormack refused to pay back the \$75,000 advance which was made before the arbitration.

**Legal Issue:** Should McCormack be ordered to return the \$75,000?

**Decision:** The High Court of Australia held that the Commonwealth Government made a mistake when it paid the full award of \$215,000 and it was entitled to recover the \$75,000 over payment. McCormack would be unjustly enriched if he kept the \$75,000.

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*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516

**Facts:** Roxborough bought cigarettes from Rothmans. The parties thought tax was payable to the government on the sale by Rothmans. The price for the cigarettes included an itemised amount for the tax. The transaction proceeded but it turned out that Rothmans did not have to pay the tax to the government. Roxborough requested Rothmans to pay back the tax component of the price. Rothmans refused, and Roxborough sued, claiming restitution from Rothmans of the tax element of the price. The matter eventually found its way on appeal to the High Court of Australia.

**Legal Issue:** Was Roxborough entitled to restitution (that is, to be paid back the tax component) of the amount Rothmans did not have to pay the government?

**Decision:** The High Court of Australia found that there had been a failure of consideration in the sense that the expected state of affairs did not happen, that is, Rothmans were not required to pay the tax. It did not matter that Rothmans had 'passed on' the cost of the tax to its own customers as part of the price of cigarettes sold. It was also despite the fact that the money had been paid to Rothmans pursuant to a valid contract. The High Court of Australia said that tax component should be returned because there was unjust enrichment.

1. Do you think the High Court of Australia achieved a fair balance between the competing interests of the parties by making this decision? Give your reasons. [A] [E]
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## Quantum meruit

The Latin translation of *quantum meruit* is 'how much he has deserved'. The phrase has been used to describe a court action by a plaintiff who has not been paid for work and labour done, where there has been a request to do work and there has been a promise, express or implied to pay for it. Often this arises where there is no actual contract, or where the contract does not state the amount to be paid for the work.

### Case Study

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*Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221

**Facts:** In New South Wales the *Builders Licensing Act 1971* (NSW), s45(1) provided that the contract under which a licensed builder undertakes to carry out any building work is not enforceable against the other party to the contract unless it is in writing and signed by each of the parties. The builder orally agreed to carry out certain renovations for Mrs Paul. When the work was completed, Mrs Paul refused to pay the balance of the money owing to the builder. The builder sued Mrs Paul. Mrs Paul defended the action on the basis that there was no written contract.

**Legal Issue:** Was there a binding contract? If there was not a contract, could the builder recover a reasonable sum for the work he carried out by way of an action on *quantum meruit*?

**Decision:** The majority of the High Court of Australia reversed a decision in the New South Wales Court of Appeal. It agreed there was no contract because of the provisions of the *Builders Licensing Act 1971* (NSW).

However, it also said that the builder was entitled to recover a reasonable sum for the work he carried out by way of an action on *quantum meruit*. The court said that the action was based on a claim for restitution or unjust enrichment arising from Mrs Paul's acceptance of the benefit accruing to her from the builder's performance of the unenforceable oral contract.

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*Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27

**Facts:** W Cook Builders Pty Ltd (Builders) contracted with Cook & Sons (Sons) to do the building work for Sons, who had contracted with Lumbers to build a house for them. Four years after Builders finished constructing the house, it was still owed \$261,715. Builders was in liquidation. The liquidator decided to sue Lumbers, not Sons. Builders contract was with Sons. It had no contract with Lumbers, so it brought a direct claim against the owner, Lumbers, who still owed the money to Sons. The Full Court of the Supreme Court of South Australia accepted the claim for restitution by Builders against Lumbers. Lumbers appealed to the High Court of Australia.

**Legal Issue:** Was Builders entitled to restitution against Lumbers? In other words, should the High Court of Australia overturn the decision made by the Full Court of the Supreme Court of South Australia?

**Decision:** Previous cases on restitution had rested on establishing that the benefit or 'enrichment' was at the plaintiff's expense. In this case, Lumbers did not owe any debt to Builders. It had no contract with Builders, only with Sons. In the words of the Hon Chief Justice Gleeson, 'If [the Lumbers] have been enriched, it is at the expense of Sons.' The High Court of Australia also said that to grant restitution would undermine a valid contract between Lumbers and Sons. The High Court of Australia granted the appeal and denied restitution to Lumbers.

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### What do you think?

Explain how the idea of restitution is subject to the principle of privity of contract. That is, to sue someone you must be in a contractual relationship with them, and not rely on someone else's contract to sue them. Do you think this is an acceptable limitation to the operation of the claim for restitution for unjust enrichment? [A] [E]

## 19.4 Rental agreements

The importance of knowing and understanding the nature of your contract, and being able to identify how any dispute affects your rights and obligations, cannot be overstated. It obviously affects your bargaining position. If you have strong legal advice which supports your position, you are more likely to want to enforce your rights. If the matter is important to you, there is no substitute for good legal advice. You can then approach resolving the dispute with confidence.

A person who rents a home is called a tenant. A person who owns a home and provides it for rent is called a lessor. Whenever a tenant rents a home there will be an agreement between the tenant and the lessor as to the terms and conditions upon which the tenant occupies the property. In Queensland, residential tenancies are subject to the *Residential Tenancies and Room Accommodation Act 2008* (Qld) ('the Act'). Where the Act applies to a residential tenancy a standard tenancy agreement must be used, and s54 says that the parties to a residential tenancy are not allowed to make an agreement inconsistent with the standard tenancy agreement or the Act.

### Holding deposits

The Act allows a lessor to require a prospective tenant to pay a holding deposit for a tenancy of the premises. If this happens, s160 of the Act requires that the lessor must give the prospective tenant a receipt for the holding deposit which is to be signed by the prospective tenant. If the prospective tenant does not enter into the tenancy agreement, or does not notify the lessor that he or she does not intend to enter the tenancy agreement, then the holding deposit is forfeited. Otherwise, the lessor must return the holding deposit.

### Hypothetical?

**Facts:** Kim and Christina planned to leave New South Wales to live in Brisbane. Kim travelled to Brisbane to look at homes to buy. They could not make up their minds about which one to buy, so they decided to rent for three months. They agreed to put a holding deposit on a home in an area they liked. They paid \$800 for the holding deposit and the agent provided them with a receipt setting out all the information required by the Act which they signed. The receipt stated that Kim and Christina had to take up the option to sign a tenancy agreement by 1 November 2018. After a month, Kim and Christina found a home and entered a contract with a settlement date which allowed them to take up occupation on 31 October 2018.

In the excitement of buying a new home, they forgot to inform the agent that they did not wish to exercise the option. It was not until 4 November 2018 that they contacted the agent.

### Hypothetical?

1. Are Kim and Christina entitled to the return of their holding deposit? [C]
2. What reasons can you give for the Act entitling a lessor to keep the holding deposit of a prospective tenant? [A]
3. Suppose the agent does not provide Kim and Christina with the receipt setting out all of the information required by the Act, although he sends them an e-mail saying they must take up the option by 1 November 2018 or he will find another tenant. Do you think Kim and Christina are entitled to the return of the holding deposit? [A]
4. Suppose that in the circumstances set out in Question 3, the agent refuses to return Kim and Christina's holding deposit. They ask you, as their lawyer, to prepare a plan of approach to resolve the dispute including, if necessary, going to litigation. Set out the steps you propose and the jurisdiction to which you will apply, if litigation is required. Provide them with advice about how to get ready for the litigation. [S] [A] [E]

### Research Task

1. Visit the website of the Residential Tenancy Authority ([rta.qld.gov.au](http://rta.qld.gov.au)) and click on 'disputes'. If you scroll down you will see a set of headings which are links to
  - Dispute resolution
  - Helping to resolve tenancy issues
  - Applying for dispute resolution
  - Applying to QCAT
 Investigate each of these headings/topics online and select information which would be useful in providing advice to Kim and Christina. Make notes of your investigations. [S]
2. Describe and explain how the information on the website would be useful to anyone experiencing a dispute about a residential tenancy agreement. [C]



## 19.5 Sports contracts

There are many stakeholders with an interest in modern professional sport. Typically, they all enter contracts to protect their interests. Sponsors enter agreements with national sporting organisations that they expect to be reflected in agreements with the players and clubs involved in the sport. Sponsors do not like being identified with violence, racism, criminal acts and other behaviours which reflect poorly on the sport they sponsor. This means they usually want the right to withdraw from a sponsorship agreement if the behaviour of players and clubs does not reflect the values they want associated with their products. A practical application follows which gives you the opportunity to make your own judgments about an effective contract meeting the needs of all stakeholders.



## Practical Application

### Sponsorship agreement-Sports Organisation and Sponsor

#### Typical Terms

##### 1. Payment

The sponsor shall pay to the club a fee of \$..... for the sponsorship rights to be paid in equal instalments on 1 June and 1 December in each year of the agreement.

##### 2. Exclusivity

The club must not identify itself or the competition with any other sponsor without the permission of the sponsor.

##### 3. Application of sponsorship rights

The club will make sure that throughout the term of the agreement the competition will be known as the (insert name of the sponsor) cup. The club must refer to the sponsorship rights and display the sponsor's logo in all promotional and advertising material, official programs (including in editorials, fixtures and results in such programs), stationery, official functions, public announcements, interviews, press releases and in all material relating to the competition. Any promotional material produced by the club featuring or making reference to the sponsorship rights shall require the prior approval of the sponsor. The club will use its best endeavours to ensure that the media, in all its forms, will refer to the sponsor as sponsor of the competition in articles regarding the competition.

##### 4. Television advertising

The club must ensure that any commercial television stations which broadcast live competition matches do not give any advertiser other than the agreed nominated sponsor of the telecast, naming rights to any program featuring the competition matches. Television replays of competition matches are permitted as long as the telecast identifies the sponsor of the premiership competition clearly in any promotion or the actual replay of the event.

##### 5. Promoting through media

The club agrees to promote the competition through all available media outlets obtaining as much media space as possible.

##### 6. Ground promotion

The club must give every assistance to the sponsor to obtain a prominent identification of the sponsorship rights at all grounds where the sport is played.

1. Assume the sponsor is a promoter of healthy foods and sells pre-packaged ingredients in retail outlets and online for delivery. The sponsor is very concerned to promote a clean, healthy and community-minded image. It does not condone domestic violence, racism and criminal acts of any kind. Search online 'racism in Australian sport'. List the key issues that will need to be addressed in the sponsorship agreement to satisfy the sponsor. [S] [A]
2. If you were the lawyer acting for the sponsor in this agreement, would you be satisfied that the sponsor will receive maximum exposure for each sponsorship dollar? Give your reasons. [E]



## Practical Application

3. The above agreement does not contain clauses dealing with any obligation the players have to promote the sponsor and to adhere to a code of conduct. Why do you think the sponsor might wish to include such clauses? Draft suitable clauses about these issues. [A] [E]
4. If you were the lawyer acting for the club to finalise this agreement with the sponsor what suggestions would you make to your client about issues to include which would be helpful to their interests? [A]
5. There is no default clause in this agreement. In what circumstances could either party end the agreement. Draft such a clause for each party to rely on. [A]

### Inquiry Focus

*Can young athletes (minors) be bound by contracts?*

Earlier you studied the circumstances in which a minor (a person under the age of 18 years) can be bound by contractual obligations even though they are not adults. All major sports organisations have access to, and can afford, good legal advice. This means that they take special care to draft player contracts which take into account the age of the player. They generally structure the contracts so that they make it clear that the benefits being provided at least include the 'necessities of life' and they often pay for the young athlete to obtain independent legal advice before signing. Modern sports organisations are quite sensitive in these days of media scrutiny and publicity about young athletes.

### Hypothetical?

**Facts:** Joan made a living as a swimming coach. She trained a number of state swimmers and one swimmer of international status. She also trained a number of junior swimmers in a large squad. Joan went to the state titles at Toowoomba. While she was there, she saw an outstanding young swimmer, Mimi, from Charleville who was 13 years of age. Joan met Mimi's parents and suggested that Mimi might like to come to Brisbane where she could join the elite squad that Joan trained, could live with Joan as a boarder and go to the local school. Joan explained to Mimi and her parents that if Mimi became successful at national and international level she would be able to organise sponsorship contracts for her and that normally she (Joan) would be entitled to a commission. Joan and Mimi's parents exchange regular e-mails over a period of at least two years during which these matters are discussed, and agreed. Mimi is not always involved in these communications, but did know about them from conversations with Joan and her parents.

For three years, Joan cared for Mimi as though she was her daughter. Mimi's parents sent financial support but Joan often paid for extra equipment for Mimi, for example, goggles and a special swimming suit for Mimi. Mimi became a very successful swimmer representing her state and breaking a world record in her best event at the national titles when she was 16. She made a dramatic improvement that year and came to national and international attention.



## Hypothetical?

Mimi's parents were approached by an agent to manage her sporting career and offer financial advice as she was an attractive and intelligent girl who was very marketable and sought after by different marketing groups. Joan objected, and Mimi was put in the position of deciding between the agent and Joan. Mimi left Joan for another highly qualified swimming trainer, Alfred, signed many sponsorship agreements, continued to swim successfully and within twelve months won a gold medal at the Commonwealth Games. Mimi and Alfred admitted that before Mimi left Joan she was already going to achieve this success. Mimi turns 18 years of age in one month. She is still a minor.

1. You have been Joan's lawyer for many years. She contacts you about the problem with Mimi and her parents. In the first interview with Joan you go through the details of their contractual relationship in chronological order to establish the terms of the contract. You then give Joan advice about the likely outcome if the matter proceeds to litigation. From the information you have, identify the terms of the contract between Joan and Mimi and her parents. Write these up in the form of a 'Heads of Agreement' document for Joan to confirm and sign. [A]
2. Joan tells you that 4 of the 6 sponsors with whom Mimi and her parents have signed agreements are sponsors of the national swimming team and that they also sponsor some of Joan's other elite swimmers. The other two sponsors are not businesses with whom she has any relationship, although she could have approached them if asked to do so. The value of the commissions from the 4 sponsors she deals with over an 18 month period would total \$300,000, excluding the training fees and financial support she provided Mimi and her parents while Mimi was with her. Joan says the 4 sponsors that support her squad have agreed to give evidence that they would have sponsored Mimi if she had stayed with Joan. You give advice to Joan that if she took Mimi and her parents to court and was successful, she would be likely to recover damages of at least \$300,000. What are the arguments in favour of this advice? [A]
3. You explained to Joan the different options to resolve the dispute. You tell her that if she goes to court she will be in the District Court of Queensland. Give Joan advice about the civil trial processes involved, and the likely costs including the cost consequences if she loses the court action. Set out your advice in writing. [C] [A]
4. Joan decides that she will seek alternative dispute resolution and leave court action as a last resort. She asks for your assistance with the process of negotiation, including preparing for formal mediation before a mediator. Give Joan a plan in writing outlining the steps that you propose to take to resolve the dispute, ending with a formal mediation if required. Set out your plan in writing. [C] [A]

## 19.6 Mobile phone contracts

The statistics show that possession of a mobile phone is extremely widespread. It is probably the electronic device that is owned by nearly everyone, and is frequently changed for a new model. Everyone can understand clearly what it means to enter a contract to buy a mobile phone.



## Practical Application

### MOBILE PHONE PROVIDERS: UNFAIR CONTRACT TERMS

Mobile phone providers generally use standard form consumer contracts—that is, contracts prepared by the business and offered on a ‘take it or leave it’ basis. All businesses, including mobile phone providers, should ensure their contracts comply with laws about unfair contract terms. We have worked with mobile phone providers to encourage the removal or modification of unfair contract terms, including terms that:

- give providers the right to vary prices and other terms and conditions but do not allow the consumer to cancel the contract without penalty,
- restrict the liability of the supplier or its employees or agents (for example, allowing the provider to suspend the service without notice or liability),
- penalise the consumer for breach or termination of the contract (for example, allowing the provider to charge an early termination fee that requires the consumer to pay out the remaining contract price); and
- prevent or restrict the consumer’s dispute resolution options.

Source: Consumer Affairs Victoria, *Mobile phone providers - unfair contract terms*, (Webpage, 2023) <[vic.gov.au/consumers-and-businesses/products-and-services/business-practices/contracts/mobile-phone-providers-unfair-contract-terms](http://vic.gov.au/consumers-and-businesses/products-and-services/business-practices/contracts/mobile-phone-providers-unfair-contract-terms)>.

- 1 Search for the above article on the Internet. In groups of three or more, obtain copies of standard contracts to buy a mobile phone from Telstra and one other provider. Go through the contracts and identify any terms which you regard as being unfair. [C] [A]
2. Does the provider reserve the right to vary prices without consent? Can the contract be terminated if this happens? Give your reasons. [C]
3. Can the provider suspend the service without notice or incurring liability? Explain your answer. [C]
4. Can you pay cash for a mobile phone and prepay for the services you require? On what terms? [C]
5. Identify a payment plan which seems appropriate for you. Find out what arrangements are available to you if you enter the payment plan. [A]
6. Discuss as a group the legal obligations you would have if you:
  - a. bought a prepaid phone; or
  - b. entered a payment plan to buy a phone. [A]
7. Discuss as a group the differences and similarities between the two options (prepaid/payment plan) to buy a mobile phone. As a group which do you prefer? Is one or the other fairer to the consumer? Explain your reasons. [A] [E]
8. Summarise the group’s findings in a short report and present it orally to the class. [R]
9. Were the experiences and conclusions of other groups in the class similar to, or different from, your own? Explain your answer. [A]



# Review

## Comprehend

1. **Describe** the following key terms:

- |                         |                        |                    |
|-------------------------|------------------------|--------------------|
| a. Breach of contract   | f. Unjust enrichment   | j. Tenant          |
| b. Repudiation          | g. Sponsorship         | k. Lessor          |
| c. Specific performance | h. Minor               | l. Holding deposit |
| d. Injunction           | i. Necessaries of life | m. Code of conduct |
| e. Restitution          |                        |                    |

[C]

2. **Describe** and **explain** the following:

- a. The options for the injured party when the other party reaches the contract.
- b. The circumstances in which a court will order specific performance.
- c. The circumstances in which a court will order an injunction.
- d. The legal tests used by the court to determine if damages are paid to the injured party.
- e. In a typical contract between a sponsor and sporting organisation, identify and explain:
  - i. The contractual obligations of the sponsor to a sporting organization,
  - ii. the contractual obligations of a sporting organisation to its participating clubs,
  - iii. the contractual obligations of the players in a professional sport to their employer clubs.
- f. How is it possible for a minor to be bound by contract in professional sport?

[C]

## Analyse and evaluate

1. A contractor sued an owner for restitutionary relief in *quantum meruit* for variations to a building contract which were unpaid. The owner was in breach and the contractor was entitled to sue the owner for damages consequent on the breach. In the trial and appellant court, the contractor was successful. The value of *quantum meruit* was much greater than the contractor would have received if it had brought an action to remedy the breach under the contract. Do you think the High Court of Australia would cap the *quantum meruit* claim against the contract price, restricting the amount of restitutionary relief? Give your reasons. [A] [E]
2. **Analyse** how contract law has provided the means whereby the various stakeholders involved in each of the contract law issues presented to you in this chapter, have dealt with the legal issues that they have needed to resolve. Have the competing interests of the different stakeholders been adequately met? Give your reasons. [A] [E]

# Contractual obligations

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## Chapter 20: Consumer law

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### 20.1 The need for consumer protection

### 20.2 *Australian Consumer Law (ACL)*

### 20.3 Australian Competition and Consumer Commission (ACCC)

### 20.4 Resolving disputes and remedies

#### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - that consumer protections provisions are needed in addition to the general law of contract
  - the role of the *Australian Consumer Law* in providing consumer protection
  - the remedies available to consumers.
- analyse the role of the Australian Competition and Consumer Commission (ACCC) in consumer contractual arrangements.
- analyse and evaluate the mechanisms and avenues of dispute resolution in consumer disputes.
- select legal information, then analyse and evaluate to resolve a contract law issue.

## 20.1 The need for consumer protection

### Key Terms

**Caveat emptor ('let the buyer beware')**: the notion that a buyer needs to complete their due diligence and check the quality and suitability of a good or service before making a purchase.

The relationship between a consumer and a business has changed considerably over time.

Today, the size, influence and resources held by big businesses and global corporations has left many consumers vulnerable to unethical practices, manipulation and exploitation. In response the State and Federal governments have created law to:

- develop and maintain an environment that fairly balances the rights and interests of larger corporations, businesses and the individual consumer,
- equalise the power between consumers and manufactures,
- keep consumers safe from faulty goods,
- encourage ethical behaviour and practices, and
- create market conditions that encourage competition to provide consumers with greater choice at lower prices.

Current legislation covering consumer protection includes:

- *Fair Trading Act 1989* (Qld)
- *Competition and Consumer Act 2010* (Cth).

These laws share a similar objective and operate in parallel with each other, as they aim to protect and attempt to achieve just outcomes for the consumer. The *Australian Consumer Law* (ACL) is found in Schedule 2 of the latter Act.



### What do you think?

Are notions such as *caveat emptor* (buyer beware) still relevant today in the face of size, influence and resources held by big businesses and global corporations? Analyse your own viewpoint and its consequences on modern consumer law. [A]

## 20.2 Australian Consumer Law (ACL)

*The Australian Consumer Law is the largest overhaul of Australia's consumer laws in 25 years. It will introduce a single, national consumer law that will apply consistently in all Australian jurisdictions.*

Dr Steven Kennedy, 'An introduction to the Australian Consumer Law', 2009.

The *Australian Consumer Law* (ACL) replaced 17 Commonwealth, State and Territory consumer protection laws and applies nationally into a **single uniform Act that applied throughout Australia**. It was a key recommendation of the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*.

The ACL came into force on 1 January 2011. It applies to goods and services purchased after this date in any part of Australia. If a good or service was purchased prior to 1 January 2011, the customer would look to the law that was in force at the time of the purchase.

### Defining the 'consumer'

The meaning of 'consumer' is defined in s3 as:

*...in relation to an industry, means a person to whom goods or services are or may be supplied by participants in the industry.*

### Consumer guarantees

The ACL sets out several consumer guarantees (or rights) in statute law. These guarantees are not expressly stated in a consumer transaction, but are obligations that are implied into the consumer contract. **In consumer law, implied terms are used to protect consumers and ensure that certain minimum standards are met in transactions involving goods and services.** These guarantees can't be taken away by a business and are in addition to any product warranty.

**Guarantees apply to goods and services bought for personal or household use.** However, a business can also be covered by a consumer guarantee if the good or service:

- costs less than \$100,000 (GST inclusive)
- is commonly bought for personal, domestic or household use
- is a vehicle or trailer used mainly to transport goods on a public road.

Consumer guarantees related to the supply of goods include that the:

- supplier must have a right to sell (s51)
- consumer has a right to undisturbed possession of the goods (s52)
- goods must be free from any security, charge, or encumbrance not disclosed to the consumer (s53)
- goods must be of acceptable quality (s54)
- goods must be reasonably fit for any disclosed purpose (s55)
- goods must match their description (s56).
- goods must match the sample or demonstration model (s57).
- manufacturer of goods must take reasonable action to ensure that facilities for repair and parts for the goods are reasonably available for a reasonable period (s58).
- supplier and manufacturer must comply with any express warranty given or made by the manufacturer (s59).

Consumer guarantees related to the provision of services include that the:

- service will be provided with due care and skill (s60)
- any product resulting from the provision of a service is fit for the purpose articulated by the customer (s61)
- service will be supplied in a reasonable time period (unless a time is fixed or agreed to by the consumer and supplier) (s61).

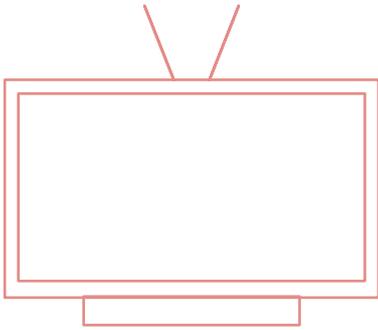
We will now look at some of these in more detail.

### Acceptable quality

**When a consumer purchases a good from a supplier or manufacturer they have a guarantee that what they buy will be of an acceptable quality.** The ACL s52(2) defines acceptable quality as being a good that is:

- fit for all the purposes for which goods of that kind are commonly supplied, and
- acceptable in appearance and finish, and
- free from defects, and
- safe, and
- durable.

Let's apply this to the purchase of a television.

	<ul style="list-style-type: none"> <li>• the television is <b>fit for all the purposes</b> it should be—for example, you should be able to watch a program</li> <li>• the television is <b>acceptable in appearance and finish</b>—for example, it should be free from scratches</li> <li>• the television is <b>free from defects</b>—for example, the power button is securely fastened</li> <li>• the television is <b>safe</b>—for example, a user shouldn't feel a shock when they turn it on</li> <li>• the television is <b>durable</b>—for example, it works for a reasonable time.</li> </ul>
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When making a decision about whether a good is of acceptable quality the law also takes into account:

- the nature of the goods
- the price paid for the goods
- any statements about the goods made on its package or labels
- any representations made about the goods by the manufacturer or supplier.

If a customer damages a good through abnormal use or doesn't take reasonable steps to care for it, this guarantee does not apply.



### Case Study

The case below occurred before the ACL came into force, but considered the application of the concept of 'acceptable quality' under the *Trade Practices Act 1974* (Cth). The ACL replaced this Act.



## Case Study

*Courtney v Medtel Pty* [2003] FCA 36

**Facts:** Mr Courtney had a Tempo pacemaker implanted in his body. The purpose of a pacemaker is to regulate a person's heartbeat to ensure it is regular and normal. It delivers an electrical pulse when it detects an irregular pulse in the heart. The Therapeutic Goods Administration (TGA) issued a hazard alert on 5 June 2000 warning that a particular batch of pacemakers:

- had an increased risk of early battery depletion; and
- affected some 1,048 people in Australia.

The only way Mr Courtney's pacemaker could be checked was by taking it out of his body and testing it. Courtney's pacemaker, when removed, was found to be functioning normally.

A class action, of which Mr Courtney belonged, was brought against Medtel Pty Ltd. Mr Courtney alleged that the pacemaker was not of acceptable quality.

The manufacturer argued that the quality of an item should be considered on a case-by-case basis, as not all pacemakers were faulty. They submitted the question that must be asked is whether a particular item was fit for purpose or of merchantable quality.

**Legal Issue:** Was Courtney's pacemaker not of acceptable quality, given that both before and after removal, the device was found to be operating normally?

**Decision:** The judge concluded that a reasonable consumer would expect that the Tempo pacemaker would not be manufactured using materials that would create a substantially greater risk of premature failure than that applicable to pacemakers generally. As each of the pacemakers were subject to a hazard alert and many of them had actually failed, even though Courtney's was not actually defective, the judge found that none of the pacemakers were of acceptable quality.

Courtney was successful and was awarded compensation for pain and discomfort, but he did not receive compensation for stress, worry and anxiety (damages available under the ACL) because he said that he was already worried before the hazard alert and was only 'slightly worried' upon becoming aware that his pacemaker might be defective and would need to be removed to be checked.

### Research Task

1. Visit the Supreme Court Library Queensland CaseLaw database ([scld.org.au](http://scld.org.au)). [S]
2. In the *Full text* field type 'acceptable quality'. [S]
3. In the *Limit to:* field select 'QCAT & QCATA'. [S]
4. In the *Advanced search* field *Legislation cited:* type 'Australian Consumer Law'. [S]
5. Locate two recent Queensland Civil and Administrative Tribunal (QCAT) decisions that have addressed the legal concept of 'acceptable quality' in consumer goods and services and explain how these cases contribute to your understanding of the application of this section of the ACL. [C] [A]



## Fit for any disclosed purpose

The ACL includes a guarantee that a good must be fit for a particular purpose specified by a business or consumer. This guarantee applies when:

- a consumer tells a business they want to use a product for a particular purpose
- the consumer buys the product based on the advice given by the business
- the business advertises that a product can be used for a particular purpose

This guarantee does not apply if:

- the consumer did not rely on the businesses' skill or judgment, or
- under the circumstances it was unreasonable for the customer to have relied on the supplier's skill or judgment (or lack of it).



## Case Study

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*Campbell v Lane (No 2) [2013] QCATA 307*

**Facts:** Mr and Ms Campbell placed an advertisement for the sale of horse which was described as having, 'clean sound legs, vet check welcome'.

Miss Lane responded to the advertisement, as she required a horse as a show hack (a horse that performs at horse shows). She rode the horse and arranged for an examination by a veterinarian. She asked the Campbells whether the horse had ever had any problems with its legs and whether she should obtain an x-ray. The Campbells replied that the horse had never had any problems and the cost of an x-ray would not be justified. Shortly after Miss Lane purchased the horse for \$12,000, it became lame.

**Legal Issue:** Was the horse reasonably fit for the disclosed purpose?

**Decision:** Miss Lane clearly disclosed the purpose of wishing to purchase the horse to the Campbells. She asked questions about the horse's suitability as a show hack and the soundness of the horse's legs. The Tribunal found this was a disclosed purpose for the purposes of section 55.

The Campbells were ordered to pay Ms Lane \$12, 975.00.

*Ryan v Great Lakes Council [1999] FCA 177*

The case below occurred before the ACL came into force, but considered the application of the concept of 'merchantable quality' under Trade Practices Act 1974 (Cth). The ACL replaced this Act.

**Facts:** After heavy rain in late November 1996, the Great Lakes Council allowed faecal matter to escape from its sewage system into Wallis Lake. As a result, oysters growing in the lake became contaminated with the Hepatitis A Virus (HAV). Mr Ryan had consumed oysters grown in Wallis Lake over Christmas and contracted HAV. Approximately 440 people had contracted HAV from eating oysters.

Ryan, as the lead plaintiff in a class action, sued the Great Lakes Council and a number of oyster growers from Wallace Lake for negligence and breaches of the *Trade Practices Act 1974* (Cth). It is the specific allegation that the oysters were of 'unmerchantable quality' and 'not fit for their purpose' that we will focus on.

**Legal Issue:** Were the oysters 'not fit for purpose' and of 'unmerchantable quality'?

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## Case Study

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**Decision:** The Hon Justice Wilcox held that 'the contaminated oysters were not reasonably fit for human consumption. The judge also found that the contaminated oysters were not of merchantable quality. Ryan was granted compensation.

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### You be the judge

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Rebecca is a self-employed graphic designer and wishes to purchase a computer. Rebecca tells the salesperson at City Computers that she requires a computer with a fast-processing speed, large memory size and high-quality screen resolution to create advertising campaigns, promotion and marketing material and branding work. Almost immediately, she discovers that the computer she purchased is slow, freezes frequently and she cannot load all the programs she wishes to use.

Is this good fit for purpose? Apply the legal concept of 'fit for any disclosed purpose' to Rebecca's case. [A]



### Matches description

The ACL provides consumers with a guarantee that any description of a product must be accurate, whether written or spoken.

## Case Study

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*Decorative Imaging Pty Ltd v Stewart Homes Pty Ltd* [2018] QCATA 36

**Facts:** Decorative Imaging Pty Ltd supplied Stewart Homes Pty Ltd with an aluminium product that was powder coated with a woodgrain finish coloured American Oak. When the product arrived Stewart Homes contacted Decorative Imaging to advise them the colour of the product did not match the colour of previous products supplied by the company and the homeowner would not accept the product and refused to pay the final instalment of the building contract until the product was rectified.

Decorative Imaging attempted to resolve the issue but could not match the colour of the previous product it supplied. Stewart Homes found another powder coating company to complete the job. They filed a civil claim asking Decorative Imaging pay the cost incurred by them to rectify the issue.

**Legal Issue:** What forms part of the contract description? Do the goods supplied by Decorative Imaging correspond with the description?

**Decision:** As the catalogue of the business asks customers to select their finish and colour, American Oak forms part of the description of the goods supplied by Decorative Imaging. Member Allen also found that the colour of the goods supplied did not match, applying the test set out in *Arcos v Ronaasen* [1933] AC 470:

*If the goods do not fit the contractual description then, unless the discrepancy is of a trivial character as to justify it being disregarded by the court, the buyer is entitled to reject the goods as failing to conform to the description even though the goods are merchantable and 'commercially' within the contract*

Therefore, Stewart Homes was entitled to a remedy.

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### Hypothetical?

1. You order a rug based on a photograph and description that it is 'yellow'. When it is delivered the rug is brown. Do you have a right to seek a remedy? [E]
2. You buy an armchair based on a sample of fabric. When the couch is delivered, it is a different colour from the sample. Do you have a right to seek a remedy? [E]

### Unfair contract terms

The ACL also contains provisions that protect consumers when the term of a standard form consumer contract is unfair. **Standard form contracts are very common and will typically be ones pre-prepared by one party and offered to the other party on a 'take it or leave it' basis.** This might be a contract for:

- the supply of goods, or
- the supply of services, or
- the sale or grant of an interest in land.

The goods, services or land must be wholly or predominantly for personal, domestic or household use or consumption. You have probably signed one when you purchased a mobile phone or joined a gym.

Sometimes disputes arise about whether a contract is a standard form contract. **The ACL s27(1) presumes a contract is a standard form contract unless another party to the proceeding proves otherwise.** To determine whether a contract is a standard form contract, a court may consider the following matters, including:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented; and
- whether another party was given an effective opportunity to negotiate the terms of the contract.

When a court is asked to decide whether a term of a contract is unfair, they will apply the three-limbed test for unfairness. As set out in s24 a term is unfair if it:

- would cause a significant imbalance in the parties' rights and obligations under the contract, and
- it must not be reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- would cause detriment (whether financial or otherwise) if it were to be applied or relied on.

All three limbs must be proven to exist on the balance of probabilities.



## Case Study

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*Australian Competition and Consumer Commission v Fujifilm Business Innovation Australia Pty Ltd* [2022] FCA 928

**Facts:** Fujifilm supplied photocopies and associated goods and services to businesses. In its standard form contracts Fujifilm included terms that:

- gave Fujifilm the right to unilaterally vary all or some of the charges payable for the customer
- required customers to pay for software irrespective of whether it was delivered or not
- required customers to pay extensive exit fees if the contract was terminated.

Some small businesses complained to the ACCC and the Australian Small Business and Family Enterprise Ombudsman.

**Decision:** At mediation both parties agreed that 38 terms in eleven of Fujifilm's standard form contracts were 'unfair' and therefore unlawful. Fujifilm was:

- restrained from relying on the terms deemed to be unfair,
  - to publish a corrective notice on its website,
  - to communicate to each individual party affected that some of its terms were void and unenforceable,
  - administer a compliance program, and
  - to pay \$250,000 in the ACCC's costs.
- 

*Director of Consumer Affairs Victoria v AAPT Limited* [2006] VCAT 1493

**Facts:** AAPT Limited required consumers to sign a standard form contract for mobile phone services. The contract contained:

- a unilateral variation clause that allowed AAPT to change a supplier or its products, or vary our charges from time to time without notice, and
- a clause providing for the customer to pay a rent connection fee if the service was disconnected for any reason.

**Legal Issue:** Were the terms of the AAPT contract unfair?

**Decision:** The Tribunal decided that both terms set out above were unfair.

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### What do you think?

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Prior to this case reaching court, AAPT reviewed and redrafted the terms and conditions that formed part of its standard form mobile phone contracts. What does this demonstrate about the power and effectiveness of consumer affairs bodies in influencing legal reform? When writing your response discuss the implications of your decision. [E]





## New penalties

The Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 that passed both Houses of Parliament on 27 October 2022, introduced penalties for businesses that include unfair contract terms into their standard form contracts with consumers. These penalties came into effect after 12 months had passed after the bill received Royal Assent. Maddocks (an Australian law firm) wrote that if the *Fujifilm* case was prosecuted under these laws, it could have faced a maximum penalty of up to \$50 million for each unfair term.

## Practical Application

### INTRODUCTION OF FIRST-EVER PENALTIES FOR UNFAIR CONTRACT TERMS WELCOMED

The changes also include the introduction of penalties for businesses that include unfair contract terms in their standard form contracts with consumers and small businesses.

Previously, the Courts could declare specific terms of a contract unfair and therefore void, but they were not prohibited and the Court could not impose any penalties on businesses that included them in standard form contracts.

'Businesses have 12 months to review and update their standard form contracts before these penalties apply. These changes will improve small business and consumer confidence that they will not be taken advantage of when entering into or renewing standard form contracts in the future,' Ms Cass-Gottlieb said. '...it will be an enormous boost to small businesses that there will be a far stronger deterrent against the use of such terms.'

The changes will also expand coverage to more small business contracts. The protections will apply to contracts with small business which employ fewer than 100 persons or have an annual turnover of less than \$10 million... 'Standard form contracts provide a cost-effective way for many businesses to contract with significant volumes of customers. However, by definition, these contracts are largely imposed on a 'take it or leave it' basis. The unfair contract terms laws are vital to protect consumers and small businesses against terms in these contracts that take advantage of this imbalance in bargaining power.

Source: Australian Competition and Consumer Commission, 'ACCC welcomes new penalties and expansion of the unfair contract terms laws', *Commonwealth of Australia* (Media release, 1 November 2022) <[accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws](https://www.accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws)>.

1. Outline the legal issue(s) that arose with the former provisions of the ACL regarding unfair contract terms. What has changed? [C]
2. Analyse one advantage and one disadvantage of standard form contracts from the viewpoint of a business (big or small) and a consumer, and their consequences. [A]
3. Do you think these changes were necessary? Justify your opinion with legal criteria. [E]

## Unfair practices

The ACL also provides consumers with protections against many unfair practices, some of which include:

- misleading or deceptive conduct (s18)
- unconscionable conduct in connection with goods and services (s21)
- false and misleading representations (s29)
- offering rebates, gifts, prizes etc. with the intention of not providing it, or of not providing it as offered (s32)



- misleading conduct as the nature etc. of services or goods (s33, s34)
- bait advertising (s35)
- wrongly accepting payment (s36)
- misleading representations about certain business activities (s37)

## Practical Application

### OTHER RECENT ACCC ENFORCEMENT ACTIONS

The ACCC is not only focusing on retailers in the tech space however. In recent periods, the ACCC has commenced proceedings or accepted court-enforceable undertakings against numerous companies across a range of industries, including LG, Fitbit, various airlines, various vehicle suppliers, nine AFL clubs, 12 NRL clubs and Jenny Craig.

Recently, the Federal Court of Australia awarded judgment against Jetstar Airways Pty Ltd for making false or misleading representations about what guarantee rights were available to consumers. Jetstar was ordered to pay \$1.95 million in penalties for claiming fares were not refundable and if consumers wished to have any entitlement to a refund, it was first necessary for those customers to purchase a separate flight bundle at an additional cost.

In June 2019, the ACCC also accepted a court-enforceable undertaking from jewellery retailer Pandora Jewellery Pty Ltd for misrepresenting consumers about their consumer guarantee rights. Pandora undertook that it would conduct a comprehensive review of its ACL compliance program including Pandora's policies and procedures relating to exchanges, repairs and refunds as well as a review of Pandora's training program and customer complaints handling system.

Source: Adrian Kuti and Mitchell Donohue, 'Enforcement guaranteed: ACCC continues to regulate alleged misleading consumer guarantee representations', *Clayton Utz* (Web Page, 11 July 2019) <claytonutz.com/knowledge/2019/july/enforcement-guaranteed-acc-continues-to-regulate-alleged-misleading-consumer-guarantee-representations>.

1. Identify two companies the ACCC has commenced proceedings or accepted court-enforceable undertakings against. [C]
2. Analyse the role the ACCC had in providing consumer protection in the cases involving Jetstar and Pandora Jewellery Pty Ltd. [A]
3. Identify and explain the remedies or legal consequences undertaken by Jetstar and Pandora Jewellery Pty Ltd. [C]
4. Selecting either Jetstar or Pandora Jewellery Pty Ltd, analyse the viewpoint of an affected consumer and the business and their consequences. Justify whether the legal consequence was fair and just, taking into consideration the law, ethical business practices and societal expectations. [A] [E]

By now, you have learned the essential role the ACCC plays in enforcing the ACL. We will now examine this organisation in more detail.

## 20.3 Australian Competition and Consumer Commission (ACCC)

*The ACCC has come to be perceived as the most powerful regulator in Australia, and one that is now feared by many major corporations in the country.*

Roger Featherson, 2003.

Created in 1995, the Australian Competition and Consumer Commission (ACCC) investigates and enforces the competition and consumer protection provisions of the *Competition and Consumer Act 2010* (Cth). In addition, the ACCC educates people on how to navigate legal issues within the scope of consumer law and advocates for legal or policy change that promotes competition and protects consumer rights. Whether it is enforcing the law, providing education or being an advocate for law reform, the independent statutory authority headquartered in Canberra, aims to ensure the Australian economy is competitive, fair and safe for Australian consumers. The ACCC uses its power and resources to:

- respond to and address anti-competitive conduct and promote competition by enforcing laws that promote fair and open competition and investigating behaviour such as cartels, price fixing and misuse of market power
- prevent anti-competitive mergers by assessing mergers and acquisitions to ensure they do not substantially lessen competition in the marketplace (it even has the power to block or approve mergers)
- protect consumers from misleading and deceptive conduct, unfair contract terms and issues related to consumer guarantees
- promote fair trading practices
- protect customers from unsafe products
- educate consumers and businesses about their rights and obligations under the law
- regulate monopoly infrastructure and monitor concentrated markets.

We will now evaluate its effectiveness in some of these areas through the inquiry below.

### Inquiry Focus

*How effectively does the Australian Competition and Consumer Commission (ACCC) protect consumers?*

Consumers are susceptible to abuse, unethical behaviour and manipulation in our complex, global market economy. It is essential that the bodies, such as the Australian Competition and Consumer Commission (ACCC), that regulate business behaviour and enforce the *Australian Consumer Law* keep pace with change to ensure the law supports just and fair outcomes for consumers.

Consider the wide range of actions taken by the ACCC in recent years in the activities that follow and decide if it has achieved its objective.

### Practical Application

1. Read each source and answer the questions below:

- Identify the parties involved in the dispute. [C]
- Identify the possible legal issue(s) contained within the article. [C]
- Explain the role of the Australian Consumer Law in the dispute. [C]
- Explain the legal process being used to resolve the dispute. [C]
- State the outcome of the dispute (if raised). [C]



## Practical Application ...

2. Analyse the similarities shared in Sources 1 to 3. What does this demonstrate about the nature and scope of the legal issues that involve the ACCC in consumer protection? [A]

### Source 1

#### GOOGLE FINED \$60 MILLION FOR MISLEADING AND DECEPTIVE CONDUCT

On 12 August 2022, the Federal Court handed down its judgment ordering Google to pay \$60 million in penalties, following the ACCC's successful case that Google had misled consumers in the collection of their location data through Android devices.

Source: Thomas Crowe and Susan Kantor, 'Google fined \$60 million for misleading and deceptive conduct', *MinterEllison*, (Web page, 18 August 2022) <[minterellison.com/articles/google-fined-60-million-for-misleading-and-deceptive-conduct](https://www.minterellison.com/articles/google-fined-60-million-for-misleading-and-deceptive-conduct)>.

### Source 2

#### ACCC BRINGS QANTAS BACK DOWN TO GROUND FOR ALLEGEDLY ADVERTISING CANCELLED FLIGHTS

The Australian Competition and Consumer Commission (ACCC) has recently instituted proceedings in the Federal Court against Qantas Airways Limited (Qantas), alleging it breached the Australian Consumer Law (ACL) by advertising and selling tickets for more than 8,000 flights that had already been cancelled. It is understood that the ACCC will seek a record penalty of more than \$250 million against Qantas to deter future conduct of this nature.

Source: Falcia Quagliata, 'ACCC brings Qantas back down to ground for allegedly advertising cancelled flights',  *Holding Redlich* (Web page, 6 September 2023) <[holdingredlich.com/accc-brings-qantas-back-down-to-ground-for-allegedly-advertising-cancelled-flights](https://www.holdingredlich.com/accc-brings-qantas-back-down-to-ground-for-allegedly-advertising-cancelled-flights)>.

### Source 3

#### JEEP DISTRIBUTOR PLEDGES TO ADDRESS CONCERNS OVER COMPLAINTS HANDLING PROCEDURES

Ashton Wood dismantled then set fire to his family's car in frustration in 2014, after it experienced 22 faults in four years.

The Australian Competition and Consumer Commission (ACCC) recently investigated the company that imports and distributes Jeep vehicles in Australia, Stellantis Australia. 'When we received this large number of complaints, we engaged with the distributor,' Mr Keogh said. 'They have agreed to a court-enforceable undertaking to improve the way they handle the issues that have been put in front of them by their customers.'

As part of the undertaking, Stellantis Australia will be required to make any necessary changes to ensure consumers who experience a 'major failure' with their vehicle are given the refund or replacement they are entitled to. Buyers will also be advised in writing of their consumer guarantee rights.

Source: Jessica Ross, 'Jeep distributor pledges to address concerns over complaints handling procedure', *ABC Sunshine Coast* (Online, 27 October 2023) <<https://www.abc.net.au/news/2023-10-27/sc-jeep-man/103024156>>.



## Case Study

### Case 1:

*Australian Competition and Consumer Commission v Trivago N.V* [2020] FCA 16

**Facts:** Trivago ran television advertisements that stated its website would assist customers to identify the cheapest price for hotel accommodation. The ACCC alleged that Trivago's website prioritised listings of businesses that were willing to pay Trivago a higher cost-per-click.

**Legal Issue:** Did Trivago engage in conduct that was misleading or deceptive or is likely to mislead or deceive?

**Decision:** The Federal Court found that Trivago had engaged in conduct that was likely to mislead or deceive customers. This was because the advertisement conveyed a customer would be able to quickly and easily compare the cheapest rates for a hotel room when this was not the case. Instead, Trivago used an algorithm that gave prominence to businesses that paid Trivago a higher payment fee. The Hon Justice Moshinsky wrote, '... in at least some cases, the cheapest offer for the hotel room did not appear on the Trivago website. This made the Cheapest Price Representation misleading or deceptive...'

The Federal Court has ordered Trivago to pay a total of \$44.7 million in pecuniary penalties for misleading consumers. Trivago lodged an appeal with the Full Federal Court, but this was dismissed.



### Case 2:

*ACCC v Jayco Corporation Pty Ltd (No 2)* [2021] FCA 453

**Facts:** Jayco Corporation Pty Ltd is Australia's largest caravan and recreational vehicle (RV) manufacturer. A customer purchased an RV manufactured by Jayco from a dealer, Jayco Newcastle. The RV had many issues. For example, the pop-up roof failed to raise and the water tanks on the RV didn't work. The customer contacted Jayco, asking for a refund or a replacement. The customer was told by a customer service employee that the terms and conditions of the warranty only allowed for the issues to be repaired.

The ACCC alleged that Jayco made a false and misleading representation about the existence of a right or remedy under the Australian Consumer Law.

**Legal Issues:** Was the customer service employee's statements false and misleading? Did the RV have manufacturing defects that would be considered a 'major failure' under consumer law?

**Decision:** The Court held that the RV had serious defects and was not of acceptable quality. The Court stated that, *'the vice with [the employee's email] is that it represented that the only remedy to which [the consumer] could be entitled was repair, because that was the claimed effect of [Jayco's] warranty. That was not the case, because the warranty did not limit the rights of a consumer under the ACL to reject the goods and to seek a refund or replacement goods in the event that there was a 'major failure' to comply with a statutory consumer*



## Case Study

*guarantee.'*

The court found other representations made to three other customers were not false and misleading.

The Court ordered Jayco Corporation Pty Ltd pay a penalty of \$75 000. As the judge found Jayco's conduct was not systematic or deliberate, the ACCC was ordered to pay back 80% of Jayco's legal costs, whereas Jayco will pay 20% of the ACCC's costs.

1. Identify the common legal issues prosecuted by the ACCC in the two selected cases. [C]
2. Analyse the role the ACCC had in one case. [A]
3. Analyse the viewpoint of a customer in one of the cases about whether the ACCC was effective in protecting their interests. Contrast this against the viewpoint of the business involved, considering the implications of the decision. Judge whether the ACCC achieved a just and equitable outcome, justifying your decision with legal criteria. [A] [E]

## Practical Application

### THE ACCC: GUARDIAN OF VIABLE MARKETS AND CONSUMER RIGHTS

...Fels' [the ACCC Chairman] media presence also put government and (big) business on notice about the support ACCC was gathering from consumers, small business and farmers. Ultimately, this did not preclude big business from lobbying publicly against the hard enforcement line of the ACCC (and its celebrity Chairman in particular). The public shaming of corporate misdemeanours brought ferocious counteraction from business precisely because such public moral disrepute was far more damaging to them than financial penalties (Parker 2006). Settlements often followed when businesses considered their position in this light.

Notwithstanding the tough and very public battles ACCC action prompted, the ACCC's enforcement strategies bore fruit. Leading from the front, Fels managed to instil a zealous appetite among staff for turning the ACCC into a no-nonsense, widely known regulator 'with teeth', whose actions were designed to make Australia a more productive and just society.

Source: Amanda Smullen and Catherine Clutton, 'The ACCC: Guardian of Viable Markets and Consumer Rights' in Boin, A., Fahy, L.A., Hart, P. (eds) *Guardians of Public Value* (Palgrave Macmillan, 2021).

1. Analyse the viewpoint of businesses raised in this source, examining the implications of their position. [A]
2. Identify the author's position on whether the ACCC has had a positive or negative impact on consumer protection. What reasons do they provide to justify their position? [E]

### What do you think?

As a consumer, do you think the ACCC has been effective at protecting your rights? Justify your decision by using legal criteria. Ensure you use evidence from the sources provided to support your point of view. [A] [E]



## 20.4 Resolving disputes and remedies

If a consumer guarantee isn't met, a term in a standard form contract is considered 'unfair' or a business intentionally misleads a consumer, consumers are entitled to a remedy (which is also referred to as a solution).

The type of remedy a consumer may receive differs depending on:

- what was bought or what service was provided, and
- the seriousness of the problem (whether it is major or minor).

**Sometimes the consumer gets to choose the remedy they prefer and in other situations the law dictates what the solution will be.**

Throughout this chapter, as well as other chapters concerning contract law, you have read about a variety of mechanisms and avenues available to consumers to resolve a dispute (from lumping the grievance to filing a civil claim in a court), as well as a number of remedies that are available according to law to address an issue with a good or service.

For example:

- In the *Jayco* case the Court held the RV had serious defects (called a 'major failure') and was not of acceptable quality. This allowed the customer to seek a refund, replacement or repair of the RV.
- In the *Fujifilm* case, as their standard form contracts were 'unfair', these terms were void, unlawful and unenforceable. In addition, Fujifilm were restrained from relying on these terms; along with a range of other penalties including paying the ACCC's costs and publishing a notice on their website.
- In the *Lane (No 2)* case, the cost of the horse was completely refunded.
- In the *Ryan* case, he was compensated for the impact the contaminated oysters had on his health.

It is important to note that there are situations when a customer is not entitled to request a repair, replacement or refund. These include when a customer:

- changes their mind (although if a business has a 'change' of mind' policy, they must follow it)
- asked for a service to be completed a particular way (going against the advice of the service provider)
- knew about the problem but decided to buy a product anyway (for example, you knew the car roof leaked)
- misuses a product.



### Practical Application

For this activity select an online shop and select a product you wish to buy, or locate the last product you purchased online. Applying the consumer guarantees, the policies of the business and any terms expressed on the website, what remedy would be available to you if:

1. You changed your mind about the product. [A]
2. You discovered the product was not reasonably fit for its disclosed purpose. [A]
3. You discovered the product was 'unsafe' and subject to a product recall. [A]

### Tip

In Queensland, there are several consumer protection agencies you can contact for advice or to complain about a good or service. These include:

- Office of Fair Trading (OFT)—[qld.gov.au/law/fair-trading](http://qld.gov.au/law/fair-trading)
- Australian Competition and Consumer Commission (ACCC)—[acc.gov.au](http://acc.gov.au)
- Queensland Civil and Administrative Tribunal (QCAT)—[qcat.qld.gov.au](http://qcat.qld.gov.au)

## Review

### Comprehend

1. **Explain** the role of the *Australian Consumer Law* in providing consumer protection, using examples to illustrate your understanding. [C]
2. **Describe** four examples of consumer guarantees contained in the *Australian Consumer Law*. [C]
3. Looking back on the cases raised in this chapter, **identify** the different remedies available for consumers if a business breaches a consumer guarantee, engages in unfair or unconscionable conduct or includes an unfair term in a contract. [C]
4. **Explain** why the statute law such as the *Australian Consumer Law* is required in addition to the general law of contract to protect consumer rights. [C]

### Analyse

#### Source 1

#### ACCC APPROVES \$18.7BN ORIGIN ENERGY BUYOUT TO ‘ACCELERATE RENEWABLES ROLLOUT’

Australia’s market regulator has approved the takeover of Australia’s largest energy retailer on condition the new owners submit to independent audits to ensure they do not discriminate against rival firms.

The Australian Competition and Consumer Commission on Tuesday said it would not block the \$18.7bn takeover of Origin Energy by private equity giants Brookfield and EIG Partners. Other approvals are needed, including by the Foreign Investment Review Board, before the deal is complete.

The ACCC chair, Gina Cass-Gottlieb, said Brookfields’ 45.4% stake in AusNet, the former ASX-listed Victorian energy transmission unit, meant ongoing competition in Victoria in particular would need to be monitored closely to ensure the new owners did not act to stymie other energy companies’ plans.

The takeover approval was ‘finely balanced’ between the benefits and drawbacks of the deal, Cass-Gottlieb told Guardian Australia. ‘It was given serious and robust consideration.’

Source: Peter Hannam, 'ACCC approves \$18.7bn Origin Energy buyout to 'accelerate renewables rollout'', *The Guardian* (Online, 10 October 2023) <[theguardian.com/australia-news/2023/oct/10/accc-approves-origin-energy-buyout-to-accelerate-renewables](https://www.theguardian.com/australia-news/2023/oct/10/accc-approves-origin-energy-buyout-to-accelerate-renewables)>.

- a. **Analyse** the role of the Australian Competition and Consumer Commission (ACCC) as provided in Source 1. [A]

### Source 2

#### PROVE IT: ACCC BLASTS WORST GREENWASHING SECTORS

The cosmetics, clothing, and food and drink sectors have the highest proportion of companies making 'concerning' statements about their green credentials, a sweep of 247 Australian companies' marketing claims has found.

The most common issue was businesses using vague language such as 'green' or 'kind to the planet'. This language had 'little value' for consumers as it rarely provided enough information to make informed decisions, the ACCC said.

Businesses may have also said their products were sustainable or biodegradable, without providing sufficient qualifying information. And they may have used third-party certifications, without stating whether the certification applied to a specific product, or the brand more broadly.

Source: Lucy Green, 'Prove it: ACCC blasts worst greenwashing sectors', *Australian Financial Review* (Online, 2 March 2023) <[afr.com/wealth/personal-finance/prove-it-accc-blasts-worst-greenwashing-sectors-20230301-p5cokw](https://www.afr.com/wealth/personal-finance/prove-it-accc-blasts-worst-greenwashing-sectors-20230301-p5cokw)>.

- a. **Applying** the *Australian Consumer Law* to the behaviour of businesses outlined in Source 3, identify what possible breaches to the law may have occurred. If they are found to have breached the ACL what remedies might the ACCC seek to enforce? [A]

## Evaluate

### Source 1

#### BIG BUSINESS ACCUSED OF USING INFLATION TO DISGUISE PROFIT HIKES DURING COST-OF-LIVING CRISIS AS PRICE GOUGING INQUIRY BEGINS

An inquiry into price gouging in Australia has seen big business accused of using rising inflation to disguise their increasing profits while households struggle to make ends meet during a cost-of-living crisis.

...

Although the inquiry has just commenced, Professor Fels has already compiled some recommendations he plans to take to the federal government — including strengthening price surveillance laws, giving more power to the ACCC to investigate prices, and stronger laws to block anti-competitive mergers.

Source: Kate Ainsworth and Emily Stewart, 'Big business accused of using inflation to disguise profit hikes during cost-of-living crisis as price gouging inquiry begins', *ABC News* (Online, 21 September 2023) <[abc.net.au/news/2023-09-21/price-gouging-inquiry-inflation-business-profits-cost-of-living/102885814](https://www.abc.net.au/news/2023-09-21/price-gouging-inquiry-inflation-business-profits-cost-of-living/102885814)>.

- a. Professor Fels identifies three recommendations he plans to take to the federal government to address price gouging. **Justify**, using legal criteria, which recommendation you believe would be most effective, before discussing the implications of your recommendation. [E]

### Source 2

#### REGULATORY REFORM RECOMMENDATIONS

Other key concerns for consumers include scams, a lack of effective dispute resolution options, and an inability to make informed choices online.

While Australia, like many other countries, has robust competition and consumer laws, these laws are insufficient by themselves to address the harms we have identified. Investigation and enforcement action can take considerable time. Even successful litigation and available remedies may have limited ability to address systemic and widespread harmful conduct after it has occurred.

Digital platform services markets are fast-moving and our regulation must be able to keep pace with the rate of technological change. For these reasons, we consider new regulatory tools are necessary.

We've recommended new service-specific mandatory codes of conduct for particular 'designated digital platforms,' based on principles set out in legislation. Each code would introduce targeted obligations to address the types of anti-competitive conduct most relevant to that service.

Source: Gina Cass-Gottlieb (ACCC Chair), 'Regulatory priorities and challenges posed by the digital economy' (Speech, KWM Digital Future Summit, 17 October 2023).

- a. **Justify**, using legal criteria, whether you support the ACCC recommendation made in Source 2. When writing your response ensure you discuss the implications of the reform. [E]

# Topic 3

Topic 3 develops your understanding of the key concepts, principles and processes of negligence and duty of care.

## Negligence and the duty of care

**Chapter 21:** The elements of negligence

**Chapter 22:** Defences and remedies  
in negligence

**Chapter 23:** Negligence law in  
contemporary contexts

# Negligence and the duty of care

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## Chapter 21: The elements of negligence

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21.1 What elements must the plaintiff prove?

21.2 What is a duty of care?

21.3 When does a person breach the duty of care?

21.4 When is the damage caused by the breach?

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the elements of negligence, including duty of care, breach of duty of care, damage and the effective of the *Civil Liability Act 2003* (Qld) on those elements
  - the legal concept of 'neighbour' through relevant case law, including *Donoghue v Stevenson* [1932] AC 562
- analyse and apply the elements and precedents to evaluate legal outcomes in civil negligence scenarios.
- analyse the ability of the law of negligence to find just and equitable outcomes for parties by determining the nature and scope of the legal issue and examining different relevant viewpoints and their consequences.

## Key Terms

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**Neighbour principle:** the obligation to take reasonable care of your neighbour (stated by Lord Atkin in his decision in *Donoghue v Stevenson* [1932] AC 562).

**Proximity:** the state of nearness.

**Foreseeability:** the ability of a person to see that a risk is foreseeable, that is, one of which he or she knew or ought reasonably to have known.

**Reasonableness:** the test for the standard of care which is applied to a person who has breached his or her duty of care is that of the ordinary reasonable person possessing the skills and experience and qualifications appropriate in the circumstances.

**Causation:** the act of causing.

**Vicarious liability:** a form of strict liability whereby an employer is liable for the negligence of an employee where the employee is acting in the scope of his or her employment.

**Remoteness:** the distance in relationship or connection.

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## 21.1 What elements must the plaintiff prove?

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**Negligence is the breach of a person's duty to another person to take reasonable care in the circumstances where such a breach of duty causes damage to another person.** For the defendant to be negligent, the plaintiff must prove to a judicial officer (a judge or magistrate) on the **balance of probabilities**, the existence of the following **three elements**:

1. The defendant must **owe a duty of care to the plaintiff**.
2. The defendant must **breach this duty** by failing to meet the required standard of care.
3. **Damage** to the plaintiff **must be caused by the breach of the duty of care**.

Before turning to each of these elements that need to be proved, it will be helpful to look at some specific instances of negligence that you will recognise.



### Case Study

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*State of Victoria v Bryar* [1970] 44 ALJR 174

**Facts:** Bryar was a student in the Heidelberg Technical School in Victoria. While in class, supervised by the teacher, Mr Keyte, he suffered an injury to his right eye from a blow from a pellet. This blow eventually caused a total loss of sight of the eye. The paper pellet was fired by another student using a rubber band. A large number of the class were firing paper pellets over a substantial part of the lesson. Mr Keyte's evidence was that he was unaware of the firing of the pellets but that, if he had have been aware, he could have, without difficulty, restored order. The jury at the trial took the view that the teacher did see the majority of his students engaged in a concentrated exchange of paper pellets and had done nothing about

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## Case Study ...

it. At the trial the student was successful. The appeal to the Full Court of the Supreme Court of Victoria was dismissed. The defendant appealed to the High Court of Australia.

### Legal Issues:

1. Did the school teacher owe a duty to the student to take reasonable care for his safety?
2. Was the failure of the teacher to prevent the exchange of pellets a breach of this duty?
3. Was the damage to the student's eye caused by the breach of the duty?

**Decision:** The High Court of Australia held that the school teacher did owe a duty to the student to take reasonable care for his safety. The teacher's failure to discipline the class was a breach of this duty. He didn't act reasonably in the circumstances. A reasonable teacher would have disciplined the class. Further, given that the teacher himself said that he could have brought the class to order, it was his failure to do so that caused the damage to the student.

1. What duty of care did the teacher owe to the student? [C]
2. What steps do you think the teacher should have taken so it could be said he had acted reasonably? [A]
3. What other events could be regarded as having caused the harm to the student? Do you think it is fair for the teacher to shoulder the whole of the legal burden? [A] [E]

### You be the judge

Assuming the facts in *Bryar's* case were the same, other than the changes in the situations referred to below, say whether you think Mr Keyte would have been negligent in each of the following situations.

1. Imagine that the injury was caused by a pellet (being the only pellet fired throughout the lesson) which was fired without any warning. [A]
2. What if the pellet that harmed the student was fired from outside the room by a student walking by? [A]
3. Imagine that the students were adults, instead of being teenagers, attending a conference at which Mr Keyte was a lecturer delivering a paper. [A]



The Court found that the teacher in *Bryar's* case did not act reasonably in the circumstances. To establish that the teacher has breached his or her duty of care it must be shown that a teacher failed to act as an '**... ordinary reasonable teacher...**' (the Hon Justice Kitto, in *Ramsay v Larson* (1964) 111 CLR 16 at 27). In determining the standard of care required of a teacher in a negligence action, **courts today generally use the test of what steps a reasonable teacher, with similar skills, experience and qualifications possessed by the defendant teacher, would have taken in a similar situation.**

Because *Bryar's* case was heard in the High Court of Australia, this means that the decision and its legal principles are **binding on every court in Australia**. If another case with similar facts were to come before a court, then the same decision as *Bryar's* case must be applied to the later case, unless it can be proved to the court that the facts of the later case are materially (significantly) different from the facts in the High Court of Australia authority of *Bryar*. If there are **materially different facts** in the later case, then its facts will be distinguished from the facts of the case authority (precedent) and the decision in the earlier case will not be followed.

That is what happened in the following the Supreme Court of South Australia case of *Johns v Minister of Education, Chinner and Beck*, which also involved a classroom teacher with unruly students who were firing objects at each other. It sounds very familiar but did the later case have any facts that were materially (significantly) different from the facts in *Bryar's* case?

**Material facts** are those which are **significant or important to proving the main legal elements of the case**. In *Johns' case*, as in *Bryar's case*, the main legal element in dispute was whether the teacher had breached the duty of care owed to the students in the classroom. Clearly, the different sex of the teacher was not a material fact and neither would have been the fact that a different subject was being taught.

Did the judge apply or distinguish *Bryar's case*? Let's find out by reading the case study below.



## Case Study

*Johns v Minister of Education, Chinner and Beck* (1981) 28 ASR 206

**Facts:** A female secondary teacher, Mrs Chinner, became aware of two boys who were using catapults to fire ballpoint pens at other students in the classroom. The teacher ordered all students with catapults to put them in a bin and several students did so. She was not aware that any student had retained a catapult. Later in the same lesson, the plaintiff, Johns, a boy of twelve years of age, was struck in the eye by a ballpoint pen discharged from a catapult by another twelve-year-old boy, Robert Beck.

**Legal Issue:** Did Mrs Chinner breach her duty of care to the injured student by failing to take steps that would be expected of a reasonable teacher in the situation?

**Decision:** No. According to the Hon Justice Sangster the teacher had not breached her duty of care. She had acted reasonably in the circumstances to prevent or minimise the injury occurring. Thus, the negligence action against the teacher and her employer, the Minister for Education in South Australia, was dismissed by the judge. The plaintiff was, however, entitled to an award of damages against the other schoolboy, Robert Beck, who had caused the injury by firing the ballpoint pen.

1. What decision was made by the judge in *Johns v Minister of Education, Chinner and Beck*? [C]
2. How were the facts in *Johns' case* similar to those in *Bryar's case*? [A]
3. How were the facts in these two cases different? [A]
4. Why was the decision made in *Johns' case* different from the decision in *Bryar's case*? [A]
5. Do you think the decision made by the judge in *Johns' case* was fair? Justify your decision with legal criteria. [E]

Because of its similar facts, the High Court of Australia decision in *State of Victoria v Bryar* was a legal precedent (a case authority) that the South Australian judge was bound to consider in deciding whether the teacher was negligent in *Johns' case*. The decision in *Bryar's case* was not, however, applied to *Johns' case*. The facts of *Bryar's case* were **distinguished** from the facts of this case because they were **materially different**.

In *Bryar's case*, the teacher must have been aware of the fact that paper pellets were being fired by a majority of the students but took no steps to stop the unruly and dangerous behaviour. In *Johns' case*, by contrast, the teacher had taken reasonable steps to stop or minimise injury to the students by ordering all students to dispose of their weapons in the bin and then supervising their disposal.

Mrs Chinner, in contrast to the inaction of Mr Keyte, had acted promptly and decisively to take control of the class. This was the major point of distinction between the two cases. Mrs Chinner had made a reasonable attempt, using her teaching skills and experience, to stop the dangerous behaviour. If, however, Mrs Chinner had totally ignored the firing of ballpoint pens by the two boys, the decision in *Bryar's* case would have been applied to *Johns's* case and she would have been found negligent.

### Hypothetical?

As a class, brainstorm as many potentially dangerous situations as possible that could occur during lunchtime at your school if no teachers were supervising the school grounds. Write the situations in a column down the left side of the board and then write beside each situation on the right side of the board different ways in which your teachers can reduce the potential danger. [A]

### Vicarious liability

Although a teacher is usually at the centre of initial allegations of negligence in a school, the relevant school or an educational authority, such as the Department of Education (state schools) or a Board (some private schools), is most often sued for negligence instead of, or as well as, the teacher concerned. **This is generally based on the principle of vicarious liability, which stems from the contract of employment between the school authority and the teacher.** Vicarious liability is a form of strict liability, in the sense that the school or higher educational authority may be liable for damages, even though it has not been personally negligent.



A major purpose of the legal principle of vicarious liability is to shift the burden for payment of damages from the negligent teacher to the broader shoulders of the teacher's employer. Another purpose is to ensure that the school authority trains and supervises its staff so that they meet acceptable standards when supervising children.

The injured student will normally bring the school authority to court, because the school authority is, in most cases, better able to pay any damages that may be awarded. It should be noted that, even if a claim of vicarious liability is made, **the plaintiff must still prove that the teacher was negligent before the school authority can be held vicariously liable for the injury.**

Since Mr Keyte's employer at the state school was the Victorian Government (referred to as the State of Victoria in the official case title), it was held to be vicariously liable for the damage caused by Mr Keyte's negligence. Thus, the order for compensation was made against the State of Victoria as well as personally against Mr Keyte, effectively meaning that the compensation was paid by the State of Victoria rather than its employee, Mr Keyte. Similarly in *Geyer v Downs and Another* (1978) 52 ALJR 142 (referred to later in this chapter), the headmaster of the school was sued and the New South Wales Government was vicariously liable.

You will see from the above that vicarious liability results in liability being imposed on one person for the wrongful act of another. **It is most commonly seen in our society where an employer is responsible for the negligence of its employee when the employee acts within the usual scope of his or her employment.**



### Research Task

1. Survey a number of teachers in your school about their knowledge and attitudes in relation to the legal principle of vicarious liability, especially as it relates to situations where teachers are negligent, but their employer pays any compensation granted by the courts. [R]
2. Invite a representative of the Education Department to Queensland Department of Education (EQ) or the Queensland Teachers' Union (QTE) to present its policy on the question: 'Should the employees (such as the Queensland Department of Education or a Board) be vicariously liable for the negligence of its employee teachers?' [R]
3. Write a report which summarises the results of your survey. [R]
4. Based on your research, what is your opinion of the legal principle of vicarious liability – is it fair for the employer to be held legally responsible for an employee's negligence? Justify your decision with legal reasoning that also considers the implications of your decision. [E]

## 21.2 What is a duty of care?

For a plaintiff to be successful the court must decide that the plaintiff is owed a duty of care by the defendant. To understand how a court decides whether a person is owed a duty of care or not, we must look briefly at the historical development of the duty of care.

### Development of the duty of care

The starting point and the cornerstone of determining whether a duty of care exists is the famous case of *Donoghue v Stevenson*, which was decided by the House of Lords (the highest court in England) in 1932. Prior to 1932, no legal relationship was recognised as existing between the manufacturer of a product and a person (the consumer) who used the product, unless there was a legally binding contract made between them. As you can suppose, there was not a contract in most cases because a consumer very rarely bought directly from a manufacturer. Most consumers bought from retailers. This case, however, changed the law.



### Case Study

*Donoghue v Stevenson* [1932] AC 562

**Facts:** The plaintiff and her friend were in a cafe when her friend bought her a bottle of ginger beer in a bottle made of dark glass through which the contents could not be seen. The owner of the cafe poured some of the ginger beer from the bottle into a glass. Once the plaintiff had drunk some of the ginger beer from the glass, the plaintiff's friend poured the remainder of the ginger beer into the glass, at which point the decomposed remains of a snail fell from the bottle. The plaintiff suffered shock at the sight of the snail and severe gastro-enteritis (stomach upset).

**Legal Issue:** Did the defendant owe the plaintiff a duty of care? Because the plaintiff did not buy the ginger beer, she had no contractual relationship with the cafe owner (seller). She therefore couldn't sue the café owner for breach of contract and sued the manufacturer of the bottle of ginger beer, claiming that the manufacturer had a duty of care to her. Thus, the basis of the plaintiff's claim was that her shock and illness had been caused by the defendant's failure to take reasonable care in making and bottling the ginger beer.



## Case Study ...

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**Decision:** A majority of the House of Lords (3-2) decided that the defendant owed a duty of care to the plaintiff and had breached that duty in manufacturing the product in question. Significantly, the court held that the fact there was no contractual relationship between the plaintiff and the defendant did not stop the plaintiff from suing someone for a tort.

As a result of this case, a very important new principle, which became known as the 'neighbour principle', was established by Lord Atkin, one of the majority judges in *Donoghue v Stevenson*.

This obligation to take reasonable care of your neighbour became a legal duty. As happened in *Donoghue v Stevenson*, it is very important to understand that this legal duty can arise independently of any contract between the people involved. In practice, however, it is sometimes the case that there is both a contract and a duty of care in tort arising out of the same situation. For example, imagine that you purchased a meal from a restaurant and the food used in the preparation of the meal was so old and so far beyond its use by date that it was poisonous to your system, and you suffered damage. In that situation there would be both a breach of contract between you as the consumer and the restaurant owner and also a breach of a duty of care to you which the owner of the restaurant owed you as a customer. In those circumstances, you could sue for both a breach of contract and in negligence.

Although Lord Atkin stated that he was merely summarising the existing law of negligence, his above words actually brought about a fundamental change in the scope of the tort of negligence. The duty to take care could now arise where there was a risk of injury, damage or loss being suffered, even though no duty of care had previously been imposed by the courts in that type of case.

1. Who was the plaintiff? [C]
  2. Who was the defendant? [C]
  3. Before the case of *Donoghue v Stevenson* was decided, did consumers have the right to sue manufacturers if there was no contract made between them? Why was this a new principle of law? [C]
  4. Why is the neighbour principle so important to consumers? [C]
  5. What fact meant that the plaintiff could not prove that the owner of the cafe who sold the bottle of ginger beer had been negligent? [A]
  6. In your opinion, was this a wise decision? In answering this question, consider the long-term effects the decision has had on the way manufacturers, suppliers, retailers and consumers do business in our modern world. [A] [E]
- 

### **The neighbour principle provides the starting point for testing whether a duty of care is owed by one person to another.**

The High Court of Australia has pointed out that the cases which have been decided over the years have **clearly established situations in which duties of care are owed**. However, there is a difficulty associated with determining whether a duty of care exists or not in new cases arising out of new situations. Nevertheless, we can say that, **for a duty of care to exist, the plaintiff must show at least two things**. These are:

1. that the plaintiff is a **reasonably foreseeable person** who would suffer harm as a result of the negligence on the part of the defendant; and
2. that the **type of damage** actually done to the plaintiff is **foreseeable** when looking at the circumstances of the case.

To illustrate this, we turn to the specific example of a hotel or club. There is no doubt that a hotel or club serving liquor owes a duty of care to its customers in certain circumstances, but it does not owe a duty of care to its customers in all circumstances. A customer in a hotel or club is a reasonably foreseeable person who might be injured by the negligent acts of the club or hotel. The first test above, therefore, is met. In particular the club would owe a duty of care to its customer not to sell the customer adulterated liquor and thus make the customer sick. It would owe a duty of care to the customer to ensure that the premises were sound and that the bar did not collapse and injure the customer when a customer leans on the bar. It would owe a duty of care to the customer to have sufficient exits in the event of a fire occurring in the club. There are circumstances, however, where the court has found that a duty of care is not owed to a customer. The following case illustrates this.



## Case Study

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*Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469

**Facts:** Mrs Cole (the plaintiff) had been present on the club's premises for approximately eight hours. She had consumed free wine supplied by the club at a champagne breakfast. After that she continued to drink alcohol. By 3.00 pm she was intoxicated and the club refused further service to her at that time. At 5.30 pm the club manager asked her to leave the club. He offered her the use of the club's bus or to call her a taxi. The plaintiff rejected those offers and left the premises on foot in the company of two men who said that they would look after her. They were apparently sober. Approximately fifteen minutes later the plaintiff was struck by a car about 100 metres from the club premises. She was severely injured. At hospital her blood alcohol content was measured at .238% (the equivalent of sixteen alcoholic drinks). The plaintiff sued not only the driver of the motor vehicle but the club, alleging that the club owed her a duty of care and that the club had breached its duty.

**Legal Issue:** Did the club owe the plaintiff a duty of care in the circumstances?

**Decision:** A majority of the High Court of Australia held the club had no duty to protect a customer from a risk of injury resulting from self-induced intoxication. The Hon Chief Justice Gleeson said that the harm suffered by the plaintiff was personal injury resulting from her careless behaviour. He said that most adults know that drinking to excess is risky and that a supplier of alcohol in either a commercial or social setting is usually in no position to assess the risk. He said that the consequences of the plaintiff's argument involved both an unacceptable burden upon ordinary social and commercial behaviour and an unacceptable shifting of responsibility for individual choice.

1. Why wasn't the plaintiff successful? [C]
  2. What duty of care did the Chief Justice say did not exist? [C]
  3. What type of injury did the plaintiff suffer? [C]
  4. If the champagne was contaminated and Mrs Cole's injury was paralysis due to poisoning, do you think the result would have been different? [A]
  5. Imagine if the plaintiff suffered the same type of personal injury as a result of her being hit by a glass in a fight between other customers in the club. Do you think the result would have been different? [A]
  6. Do you think that the decision of the High Court of Australia was fair? In answering this question, consider whether or not the type of damage done to the plaintiff, namely personal injuries from a motor vehicle when the plaintiff was intoxicated, was reasonably foreseeable by the club. [E]
-

The then Chief Justice of the High Court of Australia Robert French said in a recent case, *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 that ‘reasoning by analogy (seeing if a duty of care exists by looking at earlier decisions of the courts) should be helpful to a coherent development of the law of torts.’ It is fair to say that, in new cases, the courts will assess whether a duty of care exists by referring to well established duties in cases already decided. It is also fair to say that there will only be a gradual recognition of new duties of care.

## 21.3 When does a person breach the duty of care?

Before turning to the general principles, the following case study illustrates the common sense nature of how a court determines whether a duty of care has been breached or not.

### Case Study



*Lawes v Nominal Defendant* [2007] QSC 92

**Facts:** The plaintiff was riding his motorcycle from Gympie to Rainbow Beach in Queensland. After overtaking a utility, the plaintiff shortly thereafter saw and then struck a horse lying directly in his path on the road. The plaintiff fell off his motorcycle and was injured. The plaintiff contended that the horse had been previously struck by a car or a truck and that the driver of the car or truck had taken no steps at all to warn of the danger of the horse being on the road or to remove the horse from the road. The Nominal Defendant (the defendant in cases where drivers of motor vehicles are unknown or unidentified) argued that the evidence did not identify any earlier injury to the animal and that the horse could have died through other mishap, for example, by way of a snake bite or from slipping and falling. In other words the Nominal Defendant argued that another misfortune (other than being struck by an unidentified or unknown motor vehicle driver) might account for the presence of the otherwise healthy horse lying on the road. It was an issue for the trial judge to decide whether it was more probable than not that the horse was lying on the road because of a recent collision with an unidentified motor vehicle or that the collision between the horse and an unidentified motor vehicle may have occurred without any negligence on the part of the driver of the unidentified motor vehicle. The plaintiff could not, however, prove that it was more probable than not that the impact between the horse and the unidentified motor vehicle resulted from negligence of the driver of the unidentified motor vehicle.

#### Legal Issues:

1. Was it more probable than not that the horse was lying on the road because of a recent collision with an unidentified motor vehicle?
2. Given that the Nominal Defendant is responsible for the negligent acts of unknown or unidentified drivers, was it liable for the loss suffered by the plaintiff?

#### Decision:

1. The trial judge concluded that it was more probable than not (which is the standard of proof in a civil action) that an earlier driver had struck the horse and had left the prone horse on the road.
2. Even though such striking of the horse may have been blameless, there was a duty on that driver to exercise reasonable care to prevent that hazard from harming other road users. There was a breach of the duty by the driver in that he did not either remove the horse or remain and warn any oncoming drivers of the presence of the horse.



## Case Study ...

1. What was the duty of care that the judge found? [C]
2. In what two ways was the duty of care breached? [C] [A]
3. Do you agree that a driver should have such a duty of care imposed on him or her? [E]

Once a court decides that a duty of care exists, the next question is whether or not the defendant has breached that duty. To decide this, we must first turn to the *Civil Liability Act 2003* (Qld). This Act was passed after an Australia-wide review of the law of negligence. The Act applies to all types of claims in tort, including claims of personal injuries, economic loss, and damage to property. **In many parts of the Act it sets out the common law principles that were adopted by the courts over many years**, while other parts of the Act set out significant changes. In relation to breach of duty of care, s9 of the Act provides as follows:

### 9 General principles

- (1) A person does not breach a duty to take precautions against a risk of harm unless
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things):
  - (a) the probability that the harm would occur if care were not taken;
  - (b) the likely seriousness of the harm
  - (c) the burden of taking precautions to avoid the risk of harm; and
  - (d) the social utility of the activity that creates the risk of harm.

The factors set out in s9(2) of the *Civil Liability Act 2003* (Qld) are some of the factors laid down by the Hon Justice Mason in the High Court of Australia decision of *Wyong Shire Council v Shirt* (1980) 146 CLR 40 [47]. These and others are set out below. They provide other judges with useful guidelines to follow in deciding what constitutes a breach of the duty of care in each case. The first four factors set out below are clearly seen in the *Civil Liability Act 2003* (Qld) s9(2).

### Factors to be considered in deciding whether a reasonable person would have taken precautions.

#### a. The probability that the harm would occur if care were not taken

**The greater the risk of injuries occurring in a particular situation, the higher is the associated standard of care in relation to the activity.** In the earlier case of the horse being left on the road, there was a very high probability of harm occurring to other motorists if care wasn't taken. A further example was when a teacher was found negligent in failing to closely supervise at all times a high risk activity in the form of shot put practice (*Thomas v State of South Australia*, unreported, Supreme Court of South Australia, 1992).

Greater caution is needed when students participate in potentially dangerous activities, such as camping, hiking and mountain climbing. In *Nicholas v Osborne & Ors* (Unreported, Victoria Country Court, 1985), 20 students were accompanied on a hike by three teachers (a student-teacher supervision ratio that was approved by the State Education Department). The judge found the school negligent in relation to the death of a student and the physical injury, nervous shock and insomnia of another student who had been walking on the high part of the track at the time of the accident. The deciding factors for the judge in determining that the teachers had not met the required standard of care were the degree of supervision possible (despite existing guidelines, the ratio should have been greater), the inexperience of the children and the large amount of rain both during and immediately before the hike.

On the other hand, consider the following case study.

## Case Study



*Donald Joseph Mizzi v Trevor William Haines* [1996] NSW SC 279

**Facts:** Donald Mizzi was a child in Year Six, aged almost twelve. He jumped from the top of a blackboard cupboard in his classroom striking his head on a rotating ceiling fan. He suffered injuries. This occurred on the second last day of term, when teachers and pupils were engaged in cleaning and re-organising school rooms. Mizzi, without permission, left the task he was given and went into Miss Jardine's classroom. She had given permission for two other students to climb onto the top of a cupboard next to the blackboard to clean it. Mizzi, without permission, climbed up to the top of the cupboard. Miss Jardine, when she noticed him, asked him to climb down and to 'get down carefully'. Instead of climbing down he put his feet up towards the top of the blackboard and put his hands on the edge of the blackboard and propelled himself forward, jumping outward. He hit the fan and suffered injuries. He would not have hit the fan if he had climbed down the way he got up or if he dropped straight down from his position on the ledge. Miss Jardine gave evidence that she knew that the fan was 'a danger to somebody on top of the blackboard'. However it was not a danger to anyone who ascended the blackboard in a manner prescribed or dropped down from the top of the blackboard without springing outwards into the fan.

**Legal Issue:** Did Miss Jardine breach her duty of care to the plaintiff?

**Decision:** There was no breach of duty. Mizzi was directed to descend as soon as Miss Jardine saw him. It was not reasonably foreseeable that the boy would propel himself outwards and upwards from the shelf in a way which would bring his head into contact with the fan. Furthermore, it was held that there was no breach of duty in not turning off the fan before directing Mizzi to descend because it was not reasonably foreseeable that he would propel himself outwards into contact with the fan.

1. Was Miss Jardine held to be negligent? [C]
2. How was the injury to Mizzi caused? [C]
3. Why was not turning off the fan not a breach of duty? [A]
4. Imagine that Mizzi had been given permission along with the other two students to climb on to the top of the cupboard. If that was the only change in the facts, do you think the result of the case would be different? [A]
5. Mizzi was injured at school. He was unsuccessful in this claim. Do you think that was fair? [E]

### b. The likely seriousness of the harm

**The more serious the injuries are likely to be, the higher is the standard of care to be taken and the more necessary it would be for a reasonable person to take precautions.**

Obviously, when a teacher takes students on a snow trip, snow tobogganing and skiing are inherently dangerous activities that require greater precautions to be taken than when supervising other less dangerous activities such as a game of soccer on the oval. Those responsible for supervising more dangerous activities should have experience and training in the particular activity and should be able to show that they have carefully considered and acted upon all foreseeable risks and eventualities.

In the case of *Beck v State of NSW & Anor* [2001] NSWSC 278 (*Beck's case*), an engineer gave expert evidence about the substantial dangers involved in tobogganing. According to the engineer's evidence, riding a crudely made toboggan in the form of a real estate 'For Sale' sign head-first down a steeply sloping snow-covered hill was an extremely hazardous activity. It placed a very high standard of care, which was not reached in this case, on the school's principal and teachers to ensure the safety of the school's students and practice teacher who were on a snow trip. It was the practice teacher who, tragically, as a result of losing control of his toboggan while participating in the unacceptably dangerous activity, became a high level quadriplegic who was dependent on others for most of his personal functions. He was awarded \$9 million in compensation, less a 20% deduction for contributory negligence. Both the school and the ski resort were found to have been negligent. The ski resort should have placed warning signs of the dangers of tobogganing at both, rather than just one, of the exit levels from the resort onto the nearby slope in question.

### c. The burden of taking precautions to avoid the risk of harm

How costly and practically difficult would it have been for the defendant to take steps to prevent the injury, damage or loss from occurring? In *Beck's case*, it would have taken the teacher-in-charge of the snow trip very little time and effort to enquire of a Blue Cow resort staff member whether the intended tobogganing adventure, using the makeshift signs as toboggans, was advisable in the prevailing icy snow conditions. A simple telephone call would have alerted the school to the activity's inherent dangers. If the burden of taking precautions is small, then a reasonable person is more likely to have taken precautions.

### d. The social utility of the activity that creates a risk of harm

What is the defendant hoping to achieve by his or her conduct? Was the activity's purpose to benefit those taking part in it?

In *Kretschmar v State of Queensland* [1989] Aust Torts Reports 68,888, an intellectually disabled child was injured during a game at a special school, but the court found the school was not negligent because the game's purpose was to improve the student's manipulative skills and encourage team spirit. The court also took into account the fact that the risk of injury was small and that the game was in a State Government handbook of recommended activities. On the other hand, in *Beck's case*, there was no obvious benefit to be derived from careering head-first down an icy slope on a make-shift toboggan.

### e. Whether standard procedures in the profession have been followed

Has the defendant changed the usual practice that is adopted in the activity in question? With respect to the duties of schools to students, all schools have playground supervision rosters for school staff during breaks. In *Commonwealth v Introvigne* (1982) 56 ALJR 749, the High Court of Australia recognised that educational authorities are responsible for proper supervision by teachers. In that case, it was negligent for only one teacher to be supervising 900 boys, even if for only five minutes, when the top of a flagpole, loosened by a student swinging on the halyard, fell on another student.

In *Geyer v Downs and Another* (1978) 52 ALJR 142, an eight year old student was severely injured before school at Blacktown, New South Wales, when she was accidentally hit on the head with a softball bat. Even though it was before school, and there was a school rule that the students were not to run around and play games before lessons commenced, there was evidence to show that, even though attempts had been made by the staff to enforce the rule, the children continued to play on the grounds before lessons. No measures had been taken to ensure regular supervision of the playground before lessons began. This was a breach of the duty of care and the girl successfully sued the school and the New South Wales Government was vicariously liable.

## Case Study



*Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* (2005) 221 CLR 161

**Facts:** The plaintiff, a school student, was playing on a flying fox in the playground. A boy and girl each grabbed one of the plaintiff's legs. The plaintiff struggled to free herself and told the other children to let her go. However, she was pulled off the flying fox, striking her face on the platform as she fell. There were two teachers supervising the area in which the children were playing. There was a 'hands-off' school rule requiring that the children not touch each other while playing in the playground. This rule was enforced by the school and there was evidence that teachers had in the past insisted on the rule being observed. When the incident occurred the school teacher on playground duty was supervising the toilet block and the classrooms. The accident occurred in the 20 or 30 seconds which elapsed between the moment when the teacher had left the area in the playground where she could see the flying fox and when her attention was drawn to the toilet block and classrooms. The plaintiff sued the school for negligence.

**Legal Issue:** Both the plaintiff and the defendant agreed that the school owed a duty of care to the plaintiff. Both agreed that the plaintiff had suffered injury. The issue was whether the school had breached its duty of care to the plaintiff.

**Decision:** The High Court of Australia, by a majority of 4:1, held that the school was not in breach of its duty of care. Even though there was not constant supervision by teachers, the school had deployed competent supervising teachers. The school had a 'hands-off' rule. There was no prior accident of a serious kind in nearly 6 years with the flying fox and there was no sign of trouble immediately before the accident occurred. Most importantly, the court found there was no requirement that, in these circumstances, a teacher was required to be permanently stationed to monitor the flying fox.

### f. Whether the standard procedures meet the standard of care required by law

Merely following standard procedures, however, may not be enough. In the case of *Rogers v Whitaker* (1992) 109 ALR 625, the doctor, before performing the operation, had followed standard medical practice of only warning of the most likely complications that could result from the surgery but not warning the plaintiff of the unlikely event that occurred, namely, a one-in-14,000 chance that the surgery might result in her going blind in her good eye. The High Court of Australia stated that, despite following standard medical practice, the doctor failed to meet the standard of care required by law which, in this case, was to inform the patient of every possible adverse event, no matter how remote it might be. This failure to warn the patient amounted to a breach of the doctor's duty of care to the patient.

There is now an Act of Parliament in Queensland that tends to reduce this burden on doctors and other professionals. Section 21(1) of the *Civil Liability Act* provides that professionals who acted in a way that is regarded widely by the opinion of peer professionals as competent behaviour are not liable in negligence. Furthermore, this section provides that there will be a

breach of duty by a doctor by failing to give information to a patient only if a reasonable person in the patient's position requires information. This means that, if a person requests information about the medical procedure which is unreasonable, the doctor will not breach his duty if he fails to give that information to the patient. This statutory provision was passed in direct response to a community concern that doctors may well become uninsurable.

#### g. Any special characteristics of the plaintiff or the defendant

A plaintiff may have a disability, such as epilepsy or attention deficit disorder. The reasonable teacher must be able to foresee fairly exotic possibilities. In addition to having to take into account the mischievous tendencies of young children, the reasonable teacher needs to consider the unusual susceptibility of some students such as asthmatics or wheelchair-bound students. Although a defendant is not generally bound to anticipate the presence of an especially susceptible person, it should be remembered that the amount of care to be provided should be in proportion to '...the inability or disability of those who are immature or feeble in mind or body...' (Lord Sumner in *Glasgow Corporation v Taylor* [1922] 1 AC 424).

#### h. Whether the requirements of relevant Acts and Regulations have been followed

Is there a statute that regulates conduct in the matter? For example, has the defendant breached any traffic regulations, such as travelling faster than the speed limit, failing to give way to other traffic, running a red light, or driving while under the influence of alcohol or other prohibited substances? This may be used as evidence of failure to act as a reasonable driver.

It is against the law to use a hand-held mobile phone while driving. Motorists are risking their lives and the lives of others each time they dial a number, send a text message or hold a conversation while driving. In fact, an overseas study has branded texting as dangerous as drink-driving. Obviously, this breach of the law would be an important factor in a court's decision about the negligence of the mobile phone motorist in relation to any accident caused by the motorist. A reasonable motorist does not use a hand-held mobile phone while driving.

Seat belts have been required by law for drivers and passengers since 1972 and for all interstate buses built since 1994. Thus, failure to provide a seatbelt to a passenger or to request passengers to wear them on such vehicles would be an important factor taken into account by a court in deciding whether the vehicle's owner or driver has breached his or her duty of care.

These are some of the factors that the courts consider. However, the list of such factors is ever expanding. The phrase, 'among other relevant things', in s9(2) of the *Civil Liability Act* caters for other factors. For example, if there is a relationship of dependency between the plaintiff and the defendant, then the breach of a duty of care might more easily be found. This is true of school/student relationships. It is also true of other relationships of dependency, as illustrated by the following case.



### Case Study

*New South Wales v Bujdoso* [2005] HCA 76; (2005) 27 CLR 1

**Facts:** The plaintiff had been convicted of sexual assault on minors. He had requested, and been granted, a place in the Work Release Program and was housed within the section of the prison which had minimal supervision by prison officers. The plaintiff was allocated the room at the end of a unit despite requesting a room closer to the prison officer's station. One night at about 11.00 pm, two to four men dressed in balaclavas burst into his room and bashed him with iron bars. Most blows struck were to his head. He suffered injuries, including a fracture of the skull. The system of supervision by prison officers was such that during the night there were some periods when there was no officer at the units where the plaintiff lived at all. There was evidence at the trial that the plaintiff had been taunted in the dormitory and lunch room



## Case Study ...

and been called a 'rock spider'. He had received a threatening letter and had often reported incidents in which he had been threatened. The prison authorities had solicited from the plaintiff a signed document (a release form) which said that he accepted responsibility for his own safety and welfare at the institution.

**Legal issue:** There was no issue as to whether a duty of care was owed. Was, however, there a breach of the duty of care?

**Decision:** The High Court of Australia concluded that there was a breach of the duty of care owed by the prison administration (the Government of New South Wales) to the prisoner. There was more than a merely foreseeable risk of injury to the plaintiff. There was a risk that had actually been expressly threatened. Such a risk, once known to the authorities, called for the adoption of measures to prevent it. No effective measures were adopted so the plaintiff didn't merely rely on a well known fact that people convicted of sexual offences faced threats of grave physical danger but was able to show that the prison authorities had actual knowledge of the threats made against him. Further, the fact that the prison authorities solicited a form of release from liability from the plaintiff showed that the State must have been aware that the plaintiff was at greater risk from the threat of physical harm than other prisoners.

1. What was the evidence of this plaintiff being at greater risk than the ordinary prisoner? [C]
2. In the context of the decision, what was the effect of the prisoner signing a form of release? [C]
3. Do you think a prisoner who has been convicted of a sexual assault should be successful in a claim against a State Government in these circumstances? When considering your response, consider the implications of your decision and justify if with legal reasoning. [R]

## 21.4 When is the damage caused by the breach?

For a plaintiff to be successful, he or she must show that:

- a. Damage was suffered;
- b. The damage was caused by the defendant's negligence; and
- c. The damage is not too remote from the defendant's negligent act or omission.

### a. Damage must be suffered

If there is no damage, a negligence action will fail. Even if there is a duty of care and it has been breached by the defendant, a negligence action will fail if the plaintiff is unable to prove to the judge that he or she has suffered damage of some kind.

The following newspaper report of a case clearly illustrates this point.

#### 'FACELIFT FLOP' WOMAN SUES

A woman who claimed a facelift left her looking like a gargoyle [a grotesque carved face], yesterday lost her battle for damages against a plastic surgeon who performed the operation.

Retired photographer Roma Blackwell, 78, had sued Sydney plastic surgeon Michael Baldwin over the December 1998 operation, to get rid of a double chin and baggy eyes.

She claimed the surgery left her looking like 'a gargoyle', with a lopsided face, an increase in the size of the whites of her eyes, dragging upper eyelids and chronic eye irritation.

However, Judge Richard Rolfe in the NSW District Court did not agree, finding she looked no worse after the \$9,000 surgery than she did before.



He found Dr Baldwin had properly carried out a limited facelift, taking into account Ms Blackwell's age, bad heart condition, smoking habit and previous facelift scars.

Judge Rolfe ordered Ms Blackwell to pay the doctor's costs.

Once the fact that damages were suffered is established, there must be a connection between the breach of a duty of care and the damages suffered by the plaintiff. If the plaintiff's damages were not caused by the defendant then there is no claim even though the defendant might have suffered damages.

Source: Author unknown, 'Facelift flop' woman sues', *Gold Coast Bulletin*, (2 June 2001).

### b. Caused by the defendant's negligence

The common law principles developed in the courts have now been set out in s1 of the Civil Liability Act which states that, for a breach of duty to have caused particular harm, it must have been a necessary condition of the occurrence of the harm (factual causation).

This really involves asking the question:

*Did the defendant cause the harm or did somebody else or some other action cause the harm?*

In the past the 'but for' test was the one used widely by the Courts to determine whether the action which constituted the defendant's breach was a necessary condition for the harm or damage suffered by the plaintiff.

A negligence action against a teacher or a school will fail if the student's injury would have occurred regardless of whether there had been a breach of the teacher's duty of care. Even reasonable supervision or precautions will not prevent injuries where an incident happens suddenly. In *H v Pennell* (1987) 46 SASR 158, the court decided that the temporary absence of a supervising teacher in the school grounds during lunch would not have prevented the injury which was caused by a 15 year old student throwing a car aerial which struck another student in the eye. In *Warren v Haines* (1986) Aust Torts R 80-014, a student suffered a serious back injury when she landed on her tailbone after a school bully had dropped her onto a cement slab. The Court held that the plaintiff had not been able to prove that adequate supervision would have prevented the injury, because the incident took place very quickly and the manoeuvre became dangerous only when the plaintiff struggled to free herself.

The following newspaper report of a case clearly illustrates this point.



### PARKS NOT LIABLE FOR DIVE INJURY

Queensland's national parks could not be held liable for a schoolboy who became a paraplegic after diving into a rock pool, despite having breached its duty-of-care to him, a judge has found.

Justice Kerry Cullinane found the State Government had breached its duty by not having taken greater steps to provide a warning in prominent locations about the risks of diving or jumping into rock pools.



However, he found that the Government could not be held liable because it was likely that, even had there been adequate warning signs, Craig John Reardon would still have dived into the rock pool.

Justice Cullinane found that Reardon had not established a causal link between the absence of a warning sign and his injury.

The Supreme Court in Townsville had heard that Reardon, 18 at the time of the accident and now 26, suffered spinal injuries when he dived into the water in Alligator Creek National Park on November 18, 1998.

He was rescued from the water by friends and airlifted to safety by helicopter. Reardon, now permanently confined to a wheelchair, was a final year student at Kirwan High School when he and friends went to the swimming hole.

His lawyers argued that the Queensland Parks and Wildlife Service had not provided proper and adequate signage to warn visitors about the dangers of swimming, and particularly diving, in the creek.

The court heard Reardon and four friends had visited Alligator Creek, staying overnight before trekking to a waterfall and swimming hole for about half an hour before Reardon hit his head on a submerged ledge.

In a written judgement, which became available yesterday, Justice Cullinane said that, while the State Government had failed in its duty of care, "I think it quite unrealistic to expect had Reardon and his colleagues seen such a sign it would have altered their conduct on the day."

Source: Mark Oberhardt, 'State not liable for dive injury', *The Courier Mail* (Online, 16 May 2007) <[couriermail.com.au/news/queensland/state-not-liable-for-dive-injury/news-story/734f5f89e50499cbf6da639ed077a6b5](http://couriermail.com.au/news/queensland/state-not-liable-for-dive-injury/news-story/734f5f89e50499cbf6da639ed077a6b5)>.

1. How did National Parks breach its duty of care to the school boy? [C]
2. What injuries did the schoolboy suffer? [C]
3. Why did the Judge decide that there was no 'causal link between the absence of a warning notice and his injury'? [C] [A]
4. Do you think this is a fair result? Justify your decision with legal reasoning. [E]



Consider the following High Court of Australia decision.

## Case Study

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*Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48

**Facts:** Adeels Palace carried on a reception and a restaurant business at Punchbowl, in New South Wales. The premises were licensed premises and were open for business on New Year's Eve. At about 2.30 am on 1st January there was a dispute between some women dancing on the dance floor. Words were exchanged. Relatives and friends intervened. Fighting erupted and onlookers joined in. Punches were thrown. Chairs, plates and bottles were thrown. One man who was involved in the fight was hit in the face, drawing blood. He left the restaurant and returned soon after with a gun. Someone called out 'gun, gun, run away!' One of the plaintiffs, Mr Najem, did just that, running into the restaurant's kitchen but slipping on the floor. The gunman came in. Mr Najem tried to get up. The gunman pointed the gun at him. Despite Mr Najem's pleading not to shoot, the gunman did shoot, wounding him in the leg. The gunman then left the kitchen and went back into the restaurant. There he found the man who had struck him in the face – Mr Moubarak. The gunman shot Mr Moubarak in the stomach and then left the premises. Both Mr Najem and Mr Moubarak brought proceedings in the District Court of New South Wales against Adeels Palace, claiming damages for personal injury. Each alleged that they had suffered injury as a result of negligence of the restaurant. It was argued by the plaintiffs that a duty of care was owed by Adeels Palace and that such duty was breached in that Adeels Palace failed to provide any or sufficient security staff to prevent the plaintiffs' injuries.

**Legal Issue:** The court found that Adeels Palace owed a duty of care. The real issue in the case was whether a failure to provide sufficient security staff at the entrance to the restaurant caused the injuries suffered by the plaintiffs.

**Decision:** The defendant did not cause the injuries suffered for the following reasons:

- The evidence at the trial did not show that the presence of security personnel would have deterred the re-entry of the gunman.
- Nor did the evidence show that the security personnel could, or would, have prevented re-entry by the gunman who was a determined person armed with a gun and irrationally bent on revenge. The evidence given by security consultants called on behalf of Adeels Palace emphasised that the overriding principle which governs the conduct of security personnel confronted by a gunman is 'safety for all parties' and that 'once a determined gunman is targeting a victim there is no guaranteed safe or effective option'. Do you believe this was a just decision? [E]

1. Do you believe this was a just decision? [E]

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It becomes much more difficult to determine whether the breach of the duty by the defendant was a necessary condition of the harm if there are two or more causes of the harm that the defendant has suffered, as occurred in the following case.



## Case Study

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*Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32; [2002] UKHL 22

**Facts:** There were three separate employees whose claims as plaintiffs were considered together in one case. One employee, Mr Fox, had developed mesothelioma (a deadly disease) because of exposure at work to asbestos dust. He was employed as a lagger by one employer for two years, using asbestos materials on a daily basis. He was covered in

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## Case Study ...

asbestos dust 'from head to foot' while he was working there. After that he was employed for thirty four years on the Liverpool docks where asbestos fibre was imported and handled by Mr Fox. There was no evidence available of the frequency of Mr Fox's handling of cargo containing asbestos but Mr Fox was exposed to substantial amounts of the dust. He died because of his exposure to asbestos dust. There was no question of whether the employers owed him a duty of care or whether in fact it had been breached by the employers.



**Legal Issue:** Did either employer cause the damage to Mr Fox?

**Decision:** In the Court of Appeal it was concluded that, since mesothelioma was a disease that could be triggered by one inhalation of dust alone and not by an aggregation of inhalation of fibres, the plaintiff could not prove where he had been exposed to the fibres and therefore which employer had caused the harm. Therefore he was unsuccessful. On appeal the House of Lords said that there needs to be a modified approach to the proof of causation. In a case such as this, proof that each defendant's wrongdoings had materially increased the risk of contracting the disease was sufficient to satisfy the causal requirements. Both defendants were held liable. It was simply impossible to show where he had contracted the disease and it would be unjust for him not to have a remedy.

1. What did the House of Lords say was sufficient for the plaintiff to satisfy the test of causation? [C]
2. Strictly apply the 'necessary condition' test (or the 'but for' test) to the breach by each of the employers. Could the plaintiff be successful against either of them? [A]
3. Do you think the House of Lords provided a just result? Look at this question from the plaintiff's viewpoint and each of the defendant's viewpoints. [E]

The state of medical science in *Fairchild v Glenhaven Funeral Services Ltd* was such that it was impossible for the plaintiff to prove that it was the negligence of either of the employers that resulted in his loss. Remember that this is an English decision and therefore not binding on Australian courts. There is now a recognition in the *Civil Liability Act* that, for cases where there is real difficulty with evidence, the Court may be able to find factual causation. A section (s11(2)) has been inserted in the Act which allows the courts, in deciding exceptional cases, to impose liability on a defendant even where the necessary condition test has not been satisfied.

The extent of the use of this clause will be determined in the future as cases arise, but no doubt it will be used very rarely. **The necessary condition (or 'but for') test will continue to be the primary test.**

### c. The damage must not be too remote from the defendant's negligent act or omission

The *Civil Liability Act* did not affect the common law principles developed in the courts in determining whether damage is too remote from the defendant's breach of his duty. The common law principles still apply. Consider the following hypothetical.

### Hypothetical?

Tarnya was injured in a car accident. While she was in hospital recovering, she fell down some steps and hurt herself again. When she fell down the steps, she was being supervised by a nurse. Tarnya sued the driver of the car and the nurse. The driver of the car was found to have been negligent and to have caused her original injuries and the nurse was also found to be negligent.

Was the damage suffered in hospital too remote from the car driver's initial act of negligence? [A]

In the context of whether damage is too remote or not it is often argued by the defendant that a new action has occurred which makes the damage too remote from the defendant. It has also been argued that mental harm is not reasonably foreseeable and therefore too remote. Both of these are considered below.

### An intervening act (*novus actus interveniens*)

In the High Court of Australia case of *Chapman v Hearse* (1961)106 CLR 112 in which a doctor had stopped to help an injured accident victim, but was struck and killed by another vehicle, the driver who caused the first accident tried to transfer the blame from himself to the second driver. He argued that the second accident intervened between the initial negligent act and the injuries suffered by the doctor. The argument was that, even if he had been negligent, the injury suffered by the doctor was too remote because it was caused by the intervening act of the last driver. In *Chapman v Hearse*, however, the court decided that the damage was not too remote because it was reasonably foreseeable to a driver that, if he or she causes an accident, assistance will be given as soon as possible on the roadside.



### What do you think?

*McCarthy v Wellington City* (1966) NZLR 481

**Facts:** The Wellington City Council (the defendant) operated a quarry on which it kept detonators. Boys broke open the safe in which the detonators were kept with a crowbar they had found. The boys took the detonators home. One of the boys gave the detonators to a younger brother, who later gave some to the nine year old plaintiff who was injured while playing with them.

**Legal Issue:** Given that the Council had negligently failed to adequately secure the detonators, did the acts which followed the taking of the detonators amount to a *novus actus interveniens* so that the injury to the plaintiff was not a foreseeable consequence of the Council's negligence?

1. Imagine you are the judge hearing this case. What would you decide? When making your decision ensure you refer to the facts and legal issues, justifying your outcome with legal reasoning. [E]

**TIP:** Locate the case *McCarthy v Wellington City Council* online and read about the case. This will help you produce an informed answer.

### Mental harm

The common law position once was that mental harm was a psychiatric illness and could not arise from negligent acts, because it was too remote and damages could not be recovered by a plaintiff. The law of negligence has, over time, been extended by the courts to provide

compensation for mental harm as well as the traditional cases of physical damage. This means that an increasing number of negligence court actions have been successful in claiming damages for nervous shock, or trauma, suffered by the plaintiff in the aftermath of an accident that has been caused by a negligent act or omission. Mental harm, therefore, is no longer considered as being too remote. The courts prefer to use the expression 'psychiatric injury' or 'mental harm' to the expression 'nervous shock'.

## Case Study

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*Jaensch v Coffey* (1984) 58 ALJR 426

**Facts:** A man was severely injured by a driver who had been driving negligently. The wife of the injured man sued the driver for negligence, claiming that, even though she did not witness the accident, she had suffered nervous shock (a psychiatric condition) as a result of seeing her husband in obvious pain in the hospital's casualty ward immediately after the accident. For several weeks, she did not know if he would survive.

**Legal Issue:** Was the wife's damage (nervous shock) too remote from the negligent driving?

**Decision:** On appeal to the High Court of Australia, she succeeded in her claim for damages by convincing the court that her nervous shock was caused by the driver's negligence. Mrs Coffey was considered by the court to have been caught up in the immediate aftermath of the accident.

Thus, the damage was not too remote from the initial negligent act.

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The courts must consider each case on its individual facts in deciding whether a nervous shock condition has been caused by an initial negligent act or whether the condition is too far removed (or remote) from it. In *Wagon Mound No. 2* [1967] AC 617, the meaning of reasonable foreseeability of damage was explored.

It was recognised in that case that there is a range of risk of damage from fantastically remote through to possible, probable and highly likely. The Privy Council in *Wagon Mound No. 2* held that the damage is not too remote if there is a real risk, that is, one which would occur in the mind of a reasonable person in the defendant's position and would not be brushed aside as far-fetched.

In *Wyong Shire Council v Shirt* (1980) 146 CLR 40, a High Court of Australia judge, the Hon Justice Mason, summarised the current position as follows: "... a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable."

The facts in *Jaensch v Coffey* were, however, distinguished from the facts in the following case.

## Case Study

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*Spence v Percy* [1992] 2 Qd R 299

**Facts:** The mother of a child who died as a result of a negligent driver did not suffer nervous shock until three years after the child died.

**Legal issue:** For the third element (causation of damage by the negligence of the driver) to be proved, the court had to be satisfied that the mother's nervous shock was not too remote (distant) from the original accident in which her child had been killed.

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## Case Study ...

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**Decision:** The time lapse between the negligent act and the nervous shock, combined with the fact that the mother had several sources of stress in her life, led the court to hold that the damage was too remote from the negligence. The mother's negligence claim was unsuccessful.

1. What decision was made in the earlier case of *Jaensch v Coffey*? [C]
  2. What decision was made in this later case of *Spence v Percy*? [C]
  3. What facts were materially different in this case to distinguish it from the case authority precedent of *Jaensch v Coffey*? [A]
  4. In your opinion, were both the decisions fair, taking into account the competing interests of the plaintiff and the defendant in each case? [A] [E]
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Now consider the following case which illustrates *novus actus interveniens*.



## Case Study

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*Kavanagh v Akhtar* (1998) 45 NSWLR 588

**Facts:** The plaintiff was an Indian Muslim born in Fiji. She was injured while shopping at the defendant's premises. A heavy box containing perfume fell on her as it was being passed between two employees. The box knocked her on to shelving and then onto the floor. The defendant was found to be negligent. Damages were awarded, including damages for psychiatric injury. These damages created problems of causation (remoteness of damage) because six months after the accident the plaintiff cut her hair because she was no longer able to care for it, because of her physical injuries. Her husband took objection to that conduct which he had not authorised and which was contrary to a scripturally based control over his wife. Furthermore, it was against the Muslim religion for a woman to cut her hair. The husband, a very devout Muslim, lost control, became insulting to his wife, stopped sleeping with her and started sleeping with another woman, stopped doing household chores, and on one occasion threatened his wife with a knife.

The marriage broke down and the plaintiff suffered psychiatric injury.

### Legal Issue:

1. Was the wife's psychiatric injury caused by the defendant (factual causation)?
2. Were the psychiatric injuries too remote from the negligent handling of the perfume box by the defendant (remoteness of damage)?

### Decision:

1. The Court held that the breakdown of the marriage resulting in the psychiatric injury was caused by the negligence of the defendant (factual causation).
  2. The psychiatric injuries suffered by the plaintiff were not too remote. It was foreseeable that a severe shoulder injury would affect the plaintiff's capacity to attend to matters of personal hygiene and adornment and further that the psychiatric injuries were foreseeable as a result of her disabilities in that regard. The argument that the woman voluntarily cut her own hair and the husband's extreme reaction were intervening acts (*novus actus interveniens*) was rejected.
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## Case Study ...

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1. Using the 'necessary condition' test, what was the Court's finding on factual causation? [C]
  2. Do you agree with the Court's finding on factual causation? [A]
  3. Do you agree with the Court's finding that the damages, that is, the psychiatric damage, was not too remote? [A]
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## Review

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### Comprehend

1. **Describe** the following:
  - a. proximity
  - b. causation
  - c. foreseeability
  - d. remoteness
  - e. vicarious liability
  - f. mental harm [C]
  
2. **Describe** and **explain** the following:
  - a. The three elements the plaintiff must prove in an action for negligence.
  - b. The two things a plaintiff needs to show for a duty of care to exist.
  - c. The three general principles in relation to breach of the duty of care set out in s9 of the *Civil Liability Act 2003* (Qld).
  - d. The four matters in the *Civil Liability Act* (Qld) that the court must consider in determining whether a reasonable person would have taken precautions against a risk of harm.
  - e. The test used in determining whether the defendant caused harm complained of by the plaintiff.
  - f. *Novus actus interveniens*. [C]

# Negligence and the duty of care

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## Chapter 22: Defences and remedies in negligence

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22.1 Defences in negligence

22.2 *Volenti non fit injuria* (voluntary assumption of risk)

22.3 Contributory negligence

22.4 Remedies in negligence law

### Learning objectives

At the conclusion of this chapter, students will be able to:

- comprehend
  - the effect of the *Civil Liability Act 2003* (Qld) on defences and remedies available to parties in a civil negligence action.
- analyse the ability of the law of negligence to find just and equitable outcomes for parties by determining the nature and scope of the legal issue and examining different relevant viewpoints and their consequences.
- evaluate legal situations in civil negligence actions.

## Key Terms

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**Apportionment:** if the person who makes a claim is also partly to blame, the court can decide what percentage she or he contributed to the loss suffered (*Law Reform Act 1954* (Qld)).

**Assumption of risk:** when a person voluntarily accepts responsibility for the risk of his or her own injuries.

**Contributory negligence:** when an injured person is found partially responsible for their own injuries.

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## 22.1 Defences in negligence law

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In civil law, the standard of proof is on the 'balance of probabilities'. The onus of proof is generally carried by the plaintiff, who must prove each of the elements of negligence we have learned about previously. **When a defendant pleads a defence, they have the onus of proving it (unless the law says otherwise).**

This chapter will examine two defences that are commonly used in a negligence action:

- *volenti non fit injuria* (voluntary assumption of risk), and
- contributory negligence.

## 22.2 *Volenti non fit injuria* (voluntary assumption of risk)

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*Volenti non fit injuria* is Latin for 'to one who consents no injury can be done'. If the defendant can prove that there was 'voluntary acceptance of the risk' by the plaintiff, then a negligence claim will fail, even if all three elements of negligence have been proven. **Thus, voluntary acceptance of risk is a complete defence to a claim for negligence.**

The legal test used to decide if there is voluntary acceptance of risk **has two sub-elements.**

The plaintiff must:

- know the facts which make up the danger, and
- submit freely and willingly to that danger.

There are a number of areas where there has been fertile ground for defendants to raise the defence of *volenti non-fit injuria* to avoid liability completely. One of these is that participants in a dangerous sport or pastime have accepted risks that are inherent in the sport or pastime, and therefore as plaintiffs, cannot successfully claim that a duty of care is owed to in the circumstances. As you will see in the following case, it is the circumstances, and the facts of each case which decide how the court applies the law.



## Case Study

*Rootes v Shelton* (1967) 116 CLR 383

**Facts:** The appellant (plaintiff), a water skier, was being towed by a tugboat together with two other skiers, performing 'crossovers'. During a crossover, he was temporarily blinded, and collided with a stationary boat. The driver of the towing boat did not signal the presence of any obstacle which was seen in or on the water along which the skier was being towed, as was usually done. The appellant successfully sued the driver in negligence, where the jury found in his favour. The driver appealed to the Supreme Court of New South Wales, who set aside the verdict on the ground that the respondent driver of the towing vehicle 'owed no relevant duty to the appellant, both being participants in sport who had, by engaging in it, accepted the risks of injury which might be involved in taking part in it'.

**Legal Issue:** Did the High Court of Australia find in favour of the appellant (plaintiff) and restore the decision of the trial court?

**Decision:** The Court decided in favour of the appellant (plaintiff). It said, words to the effect:

*The risk of a skier running into an obstruction which, because submerged or partially submerged or for some other reason, is unlikely to be seen by the driver or observer of the towing boat, may well be regarded as inherent in the pastime. But neither the possibility that the driver may fail to avoid, if practicable, or, if not, to signal the presence of an observed or observable obstruction nor that the driver will tow the skier dangerously close to such an obstruction is, in my opinion a risk inherent in the nature of the sport. There is a recognised practice amongst participants that the driver should signal the presence of an observed obstruction and the skier does not accept this possibility as a risk which he must run without recourse.*

If it is said that a participant in a sport or pastime has voluntarily assumed risk which is not inherent in that sport or pastime so as to exclude a relevant duty of care, it must rest on the party who makes that claim to establish the case in accordance with recognised principles.

1. What is the defence on which the driver (defendant) relied? [C]
2. What was the reasoning on which the Supreme Court of New South Wales relied to find for the defendant? [C]
3. Analyse the decision of the High Court of Australia when it found for the plaintiff on appeal. Do you regard the decision as fair? Justify your decision with legal reasoning. [A] [E]

Some believe that people who take obvious risks and engage in dangerous recreational activities should be responsible for their own behaviour and should not receive compensation for their injuries. This view is reflected in the *Civil Liability Act 2003* (Qld).

### Obvious risks

The *Civil Liability Act 2003* (Qld) s14 provides that, where a defendant has raised the defence of voluntary assumption of risk and the risk is an obvious risk, the plaintiff is presumed to be aware of the risk unless the plaintiff proves he or she was not aware of the risk. **This is a reversal of the onus of proof which usually lies on the defendant.**

**The definition of obvious risk is set out in the *Civil Liability Act 2003* (Qld) s13.** As cases come before the courts, judicial officers will interpret this definition as they apply it to different factual circumstances. Section 13(5) sets out that a risk is not an obvious risk if it arises because of a failure to properly operate, maintain, replace, prepare or care for something (unless the failure itself is an obvious risk).

The *Civil Liability Act 2003* (Qld) s15 further states that the defendant has no duty to warn of obvious risks unless the plaintiff has requested advice or information about the risk, or the defendant is required by law to warn of it. The effect of these provisions is that if the risk is an obvious risk, the plaintiff cannot say he was not aware of it, and therefore the plaintiff cannot say he or she was not aware of the facts making up the danger. That is, the first of the two sub-elements of voluntary assumption of risk is proven if it is an obvious risk.

### Dangerous recreational activities

The *Civil Liability Act 2003* (Qld) s19 provides that a defendant is not liable for the plaintiff's harm when an obvious risk of dangerous recreational activity materialises and causes the harm to the plaintiff. A dangerous recreational activity is defined in s18 and is one *engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to that person.*

You can see that this is a very wide definition that the courts will be required to interpret and apply. This section ensures that the plaintiff will not be successful where he or she engages in a dangerous recreational activity because:

- the risk is obvious (the plaintiff knew of the facts making up the dangers), and
- if the risk materialises then that section deems that the plaintiff has submitted freely to it.

There is no doubt that the defence of voluntary assumption of risk has been widened by the Act from the narrow definition it was previously. This may see plaintiffs being unable to file a negligence action, which may be the intention of law makers.

### Case Study

*Felhaber v Rockhampton City Council* [2011] QSC 23

**Facts:** The plaintiff was rendered a paraplegic. He had been swinging on an improvised rope swing attached to the bough of a tree on the bank of the Fitzroy River, Rockhampton. Letting go of the rope, he dived head-first into the water, struck his head on the river bank and effectively broke his neck. It was a serious accident and his injury were great. Both parties agreed before the case on liability. It was decided that the quantum of damages was \$5 million. It was also agreed that the incident happened in a recreational area known as the 'Ski Gardens' and that the defendant owed a duty of care to entrants to that recreational area (such as the plaintiff) to take reasonable care to protect them from being injured.

**Legal Issue:** Had the council breached its duty of care?

**Decision:** The judge found that the activity being engaged in had obvious risks and found that the council could expect that a person in the plaintiff's position with his age, knowledge and experience would not need a warning that to dive from a swing could be a dangerous activity. The plaintiff himself had engaged in this very activity up to 1,000 times before. It was suggested by the plaintiff that the action that the council should have taken was to remove the bough of the tree from which the rope was hung, to remove the rope swing, or to erect a sign warning the public that the depth of the river may change and that diving was prohibited. The judge, however, pointed out that such measures do not meet the risk presented by other trees or by other branches even on this tree, which line the Fitzroy River. Generally, the judge concluded that the exercise of reasonable care did not require the council to take those steps because the activity in which the plaintiff was engaged was a voluntary recreational activity, commonly enjoyed in waterways around the district, that the risks inherent in the activity were obvious and the exercise of care by members of the public could be expected to keep them safe. Further, the judge pointed out that the council was not armed with any special





## Case Study ...

knowledge relating to the risks inherent in carrying out this activity. These risks were obvious to all. Further the council was responsible for a significant area of parkland and waterway abutting that parkland and the area where the accident occurred was in no way physically different to any area of the Fitzroy River where such swings might be erected. Furthermore, the council in no way required or invited or encouraged entrants to engage in such activities and so was not instrumental in putting any of such people in harms way. Furthermore, there had been a long history of no report of injury from such activities despite the wide spread and frequent engagement in the activity.

The judge went on to consider the issue as to voluntary assumption of risk by the plaintiff in the possibility that the duty owed by the defendant to the plaintiff had been breached (the judge found that it had not). The judge found that there was no compulsion or obligation on the plaintiff to accept what was an obvious risk and that the plaintiff had an opportunity to avoid the risk and did not take it. He therefore concluded that there was a voluntary assumption of risk.”

1. Summarise the reasons the judge gave for the finding that there was no breach of a duty by the council? [C]
2. Do you agree or disagree with the judge’s conclusion that there was a voluntary assumption of risk? When making a decision you are encouraged to apply a legal criteria and also discuss the implications of your choice and the alternative. [A] [E]

## 22.3 Contributory negligence

Negligence involves a person seeking compensation for physical injury, property damage or financial loss caused by another person’s carelessness. **Once the plaintiff is able to prove all the elements of negligence, then the defendant may be able to allege that the plaintiff failed to exercise reasonable care for his or her own protection.** Under past laws, if the defendant could show that the plaintiff had also been even slightly careless, then the plaintiff could not recover his or her loss from the defendant.

The *Law Reform Act 1952* (Qld) changed this. If the person making the claim is also partly to blame, the court can decide what percentage she or he contributed to the loss suffered. This is called apportionment and is very important in practice as it renders **contributory negligence to be a partial-defence**. If successfully pleaded by the defendant, it will reduce the amount of damages to be paid to the plaintiff, rather than fully absolving (releasing) the defendant from all responsibility. Prior to this Act if the defendant established that the plaintiff’s own negligence contributed to the harm he or she suffered, it was a complete defence.

The plaintiff’s negligence could take the form of either breach of duty to the defendant or failure to take care of his or her own safety.

### *Law Reform Act 1954 (Qld)*

#### **10 Apportionment of liability in case of contributory negligence**

- (1) *If a person (the claimant) suffers damage partly because of the claimant’s failure to take reasonable care (contributory negligence) and partly because of the wrong of someone else—*

- (a) a claim in relation to the damage is not defeated because of the claimant's contributory negligence; and
- (b) the damages recoverable for the wrong are to be reduced to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage.

Let's imagine a teenager is speared by a protruding hook in a supermarket aisle. His injury is held to be 70% the fault of the supermarket owner and 30% his own fault for running down the aisle and trying to side-step another customer. Before the *Law Reform Act 1954* (Qld), if the court held he contributed to his injury, he would have received no compensation. Today, he is entitled to 70% of the damages (70:30 apportionment).

If we look back at *Lawes v Nominal Defendant* [2007] QSC 92 the evidence was that the plaintiff did not slow down after he saw the horse. The court found that his failure to slow down was more than a mere error of judgment on the spur of the moment. What confronted the plaintiff was an obvious danger and he should promptly have decreased his speed considerably which would have enabled him to pass around the horse safely. However, the court found that, the greater proportion of responsibility for the injuries had to be borne by the unidentified driver who had struck the horse. The court found that having regard to the respective degrees of responsibility for the harm that the plaintiff suffered, it was just and equitable that the apportionment of liability be 80:20 in favour of the plaintiff.

On the question of contribution between the plaintiff and the defendant, there has been a further development in the *Civil Liability Act 2003* (Qld).

### ***Civil Liability Act 2003* (Qld)**

#### ***24 Contributory negligence can defeat claim***

*In deciding the extent of a reduction in damages by reason of contributory negligence a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated.*

It is clearly now possible that the plaintiff may suffer 100% reduction in damages because of contributory negligence. That is, the whole claim may be defeated even though the plaintiff has shown negligence on the part of the defendant. This section of the *Civil Liability Act* contemplates circumstances in which the defence of contributory negligence acts as a complete bar to the plaintiff, as was the position of the law prior to the *Law Reform Act 1954* (Qld).

As you can imagine, an area in which contributory negligence has been levelled at a plaintiff is where the plaintiff travels in a motor vehicle with an intoxicated driver. As motor vehicle accidents give rise to the largest number of actions in negligence in the courts, the issue of the willingness of a plaintiff to risk travelling with an intoxicated driver is a frequent one.

### **Travelling with intoxicated drivers**

The *Civil Liability Act 2003* (Qld) s48 deals with the situation when the plaintiff relies upon the skill and care of a person known to be intoxicated. If the plaintiff is over sixteen years of age, relies upon the skill and care of the defendant, and is aware of the intoxication, then the plaintiff is presumed to be contributorily negligent to the extent of at least 25%. The plaintiff can rebut the presumption of this contributory negligence by showing either:

- the intoxication of the defendant did not contribute to his breach of duty; or
- the plaintiff could not reasonably be expected to have avoided relying on the care and skill of the defendant.

The first of these may be very difficult to show. This is so because the definition of intoxication in the *Civil Liability Act 2003* (Qld) is very wide. It only requires that a person who is under the influence of alcohol or a drug have his or her capacity to exercise proper care and skill impaired. It does not take much alcohol to impair a person's capacity to exercise proper care and skill. A defendant then who has taken a little amount of alcohol will be intoxicated. The onus then is on the plaintiff to show that the defendant's intoxication did not contribute to his breach of duty. That would be very difficult to prove.

The second of these would also be very difficult to show. The plaintiff would need to show that he or she really had no other reasonable way of getting where he or she was going. The plaintiff most often could reasonably be expected to have walked, taken some public transport, or taken a lift with another person.

Applying s49 to this legal situation, the Act states that there is a minimum contributory negligence of the plaintiff of 50% where the plaintiff (as a passenger in a motor vehicle) relies on a driver who has a blood alcohol content of .15% or above, or is so much under the influence that he can not exercise effective control of the vehicle.

Every person should now be wary of taking a lift with another person who is under the influence of alcohol or a drug.



## Case Study

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*Robbins v Skouboudis & Suncorp Metway Insurance Ltd* [2013] QSC 101

**Facts:** The plaintiff was a passenger on a motorcycle driven by the first defendant Skouboudis. The first defendant lost control of his motorcycle and the plaintiff was thrown off. She suffered severe injuries and brought an action against the first defendant and Suncorp Metway Insurance, which was the compulsory third party insurer of the first defendant.

On the evening in question the plaintiff had been to a friend's house at about 9.00 pm with the intention that both of them would then travel into the city for a 'night out'. She shared a number of drinks at the friend's house. She and her friend then went to a bar in the Sofitel Hotel arriving about 11.00 pm. At the hotel she met the first defendant. They commenced talking and after a while he offered to drive her to the Chalk Hotel, Woolloongabba.

Witnesses called for the defendant recall seeing a motorcycle travelling at a high speed and in a reckless manner. Another witness saw the motorbike travelling at about 80 kilometres per hour and saw the first defendant lean over to negotiate a kerb in the road and saw the exhaust of the motorcycle scrape along the bitumen. When the defendant tried to straighten the motorcycle he struck the median strip and both he and the plaintiff were thrown off. There was no issue in the case about a duty of care being owed. Nor was there any issue in the case about whether the defendant was negligent or not. The second defendant however relied upon *Civil Liability Act 2003* (Qld) s24, s47 and s49.

### Legal Issues:

There were four main legal issues to be determined by the judge. These were:

1. Was the plaintiff intoxicated at the time of the accident, and, if so did a presumption of contributory negligence of 25% apply pursuant to the *Civil Liability Act 2003* (Qld) s47?
-



## Case Study ...

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2. Was the first defendant intoxicated at the time of the accident and did the plaintiff rely upon the skill of the defendant, at the same time being aware (or reasonably should have been aware) that the defendant was intoxicated and, if so, did a presumption of contributory negligence of 25% apply pursuant to *Civil Liability Act 2003* (Qld) s48?
3. Once having decided that the plaintiff's contributory negligence was 50% after considering s47 and s48, should such percentage be increased by virtue of the *Civil Liability Act 2003* (Qld) s49?
4. Should there be a reduction of 100% of the plaintiff's claim by virtue of her contributory negligence thus defeating the claim pursuant to the *Civil Liability Act 2003* (Qld) s24?

### Decision:

1. After the plaintiff and the defendant were taken to the Princess Alexandra Hospital a test was taken of the plaintiff's serum ethanol level. The doctor gave evidence that the reading equated to a blood alcohol concentration of approximately 0.18%. That evidence was consistent with the other evidence of the doctor who examined the plaintiff saying that she was 'intoxicated and smelt strongly of liquor'. Further the plaintiff admitted to a doctor that she was 'drunk at the time'. The blood alcohol content reading together with other evidence satisfied the judge that the plaintiff's capacity to exercise proper care and skill was impaired and thus she was intoxicated within the meaning of that expression in the Act. Thus, s47 came into effect. Contributory negligence was then to be presumed to an extent of at least 25% unless the plaintiff could establish that the intoxication did not contribute to the breach of duty or that the intoxication was not self-induced. The evidence was very clear that the plaintiff's intoxication was self-induced. The judge concluded that a contributory negligence of 25% must be presumed against the plaintiff.
  2. After the accident the first defendant pleaded guilty in the District Court of Queensland to a charge that he caused grievous bodily to the plaintiff and at the time he was adversely affected by alcohol and that the concentration of alcohol in his blood at the time was 0.134%. A blood sample was taken at the hospital at 4.00 am after the accident. Evidence was called from a clinical forensic medical officer who stated that a person with a blood alcohol concentration of 0.134% has a marked impairment of perception, judgment and of the ability to concentrate and focus attention. He was also asked by the solicitors for the defendant to undertake a calculation which would allow him to estimate the blood alcohol content at the time of the accident. His estimate was that the first defendant's blood alcohol content at that time was in the range of 0.15 to 0.18. From that evidence the judge concluded that the first defendant was intoxicated at the time of the accident. Thus s48 came into effect. The plaintiff was over 16 years of age and the judge found that she had relied on the care and skill of the defendant. She was offered a lift to the Chalk Hotel and took it. She knew also that the first defendant was going to be the driver as he had told her that. The judge also found that the plaintiff ought reasonably have been aware that the first defendant was intoxicated. It didn't matter that the plaintiff was under the influence of alcohol at the time and may not have realised the defendant was intoxicated because the test at law is whether an ordinary reasonable person (a sober person) would have regarded the defendant as being intoxicated. The judge found that an ordinary person would have so regarded the defendant. There was therefore a presumption of 25% contributory negligence. This presumption was not overturned by the plaintiff because the plaintiff could not show that the first defendant's intoxication did not contribute to the accident (which it did) or that she herself couldn't reasonably have been expected to have avoided relying on the first defendant's care and skill (which she could – she could have taken a cab). The judge therefore held that there should be a reduction of damages under s48 by 25%.
-



## Case Study

3. At this point damages were reduced by 50% due to the operation of s47 and s48. The judge then considered the operation of s49. He found that the evidence established at s49 did apply. Where the concentration of alcohol in the first defendant's blood was greater than 0.15 this allows the judge to consider a greater percentage over and above 50%. The judge however refused to do so.
  4. The judge also refused the argument under s24 that there should be 100% reduction by virtue of the contributory negligence of the plaintiff. He found that the plaintiff was most likely intoxicated when she met the defendant. He found that the plaintiff really never contemplated travel with the first defendant until the time he offered to take her, and that the plaintiff had not been on a drinking spree with the driver contemplating from the very beginning that she would be a passenger in the vehicle driven by the driver. Damages were assessed at \$238,649.00. This was to be reduced by 50%. Judgment was entered for the plaintiff in the sum of \$119,324.50.
1. Do you think it is fair for damages to be reduced by 50% in circumstances where an intoxicated plaintiff accepts a ride in a motor vehicle from an intoxicated defendant? When making a decision you are encouraged to apply a legal criteria and also discuss the implications of your choice and the alternative. [E]

What if the plaintiff is intoxicated? The *Civil Liability Act 2003* (Qld) s47 provides that, if the plaintiff was intoxicated at the time the defendant breached his duty to him or her, then contributory negligence of a minimum of 25% is presumed. If the plaintiff was driving a motor vehicle and either had a blood alcohol level of .15% or over, or was incapable of exercising actual control of the vehicle, then the contributory negligence of the plaintiff increases to a minimum of 50%.

The plaintiff can rebut such a presumption if he can show that his intoxication did not contribute to the breach of the duty by the defendant or the intoxication was not self-induced. An example where a plaintiff could rebut such a presumption is where he was driving a motor vehicle but was stationary at traffic lights when another motor vehicle driven by the defendant struck his car in the rear. That would be a circumstance in which he may be able to show that his intoxication did not contribute to the breach of duty of care owed to him by the defendant driver.

## 22.4 Remedies in negligence law

If the plaintiff is successful in proving that the defendant has been negligent, the judge will usually award the plaintiff one or both of the following major remedies:

- damages
- injunction.

### Damages

In assessing how much a court will award to a plaintiff for general damages, restraints have been placed upon the judge by the *Civil Liability Act 2003* (Qld) s61 and s62. The judge is required to decide how severe a particular plaintiff's general damages are by ranking them on a scale of 1 to 100, with 100 being the most severe general damages a plaintiff could suffer and 1 being the least severe.

**This is referred to as the injury scale value (ISV).** In the *Civil Liability Regulation 2014* (Qld), Schedule 4 there is a range of ISVs listed for a wide range of injuries. The purpose of the Schedule 4 table is to provide the judge with an ISV for the injuries suffered by any particular plaintiff. After

the judge has determined the ISV then the judge has regard to the *Civil Liability Regulation 2014* (Qld) Schedule 7. Schedule 7 is a table which gives the appropriate general damages figures for the ISV suffered by the plaintiff. The damages set out in Table 14 are increased over time. For example, (for injuries arising on or after 1 July 2023) if the ISV assigned to a person's general damages is 35 the general damages awarded to the plaintiff will be \$97,700.00.

If one looks at the highest limit of general damages that may be awarded under the ISV approach the maximum amount that could be awarded in Queensland for an injury arising on or after 1 July 2023 is now \$436,100.00. This sum is an ISV of 100.

Furthermore, a judge has the discretion to increase the amount of general damages paid if the case is a multiple injury case (that is if the plaintiff suffers more than one type of injury), and if the dominant injury is so severe that the maximum ISV is inadequate to reflect the level of damages that ought to be awarded. In these circumstances the judge can increase the general damages by up to 25% but the general damages cannot be increased beyond the sum of \$436,100.00.

### Special damages

Special damages are awarded on top of any general damages and they can be for monetary compensation for expenses by the plaintiff which are capable of being given a precise value. Examples are doctors and hospital bills, physiotherapy charges, travel expenses, pharmaceutical expenses, prosthetic limbs and even the cost of taxis to and from healthcare professionals.

### Future economic loss

Future economic loss is quite often the largest claim being sought by the plaintiff, often much larger than general damages sought. The future economic loss claim is most commonly seen in the loss of future earnings. This is to compensate the plaintiff for the fact that the injury arising from the negligence prevents the plaintiff from returning to work for a time or, perhaps, at all. It is calculated by looking at what the plaintiff's net pay would have been each week and multiplying that figure by the time that the plaintiff was expected to be out of work (based on expert medical opinion). This sum is then discounted by what is known as the 5% tables (an accounting calculation which takes into account the fact that the lump sum payment received by the plaintiff would be capable of earning interest at the rate of 5% and thus the actual lump sum paid to the plaintiff is reduced by that possibility). That sum is further discounted by what are referred to as contingencies. These will vary in each case. There may be some contingent circumstances which demonstrate that there is some possibility that the plaintiff would not be able to achieve the length of work which is being calculated on his behalf because of other illnesses that he or she may have. The usual contingency discount in most cases is 15%. In effect therefore the future economic loss calculations are a calculation of how much money the plaintiff would have been able to earn in his usual employment for the period of time that he will not be able to work in the future, discounted by 5%, and then further discounted by a further 15% (or higher depending upon the existence or extent of the contingencies).

A further restriction has also been placed on the award of future economic loss claims by the *Civil Liability Act 2003* (Qld) s52. The Act provides that the maximum amount that can be claimed is: *The present value of three times the average weekly earnings per week for each week of the period of loss of earnings.*

As this textbook goes to print the average weekly earnings are \$1,390.00 per week. The maximum amount therefore that can be claimed is three times that sum of money namely \$4,170.00 a week. That maximum applies irrespective of the earning capacity of the plaintiff. Some people regard this as an unfair limitation placed on a plaintiff who earns above average weekly earnings. For example, medical practitioners who commonly earn \$15,000.00 a week can only claim for loss of earnings in the sum of \$4,000.00 a week. The overriding purpose of negligence claims has been to put plaintiffs

who have been injured by the negligent acts of others in the same position they would have been in, if they had not been so injured.

That was the compensatory nature of damages that previously applied to negligence cases. The *Civil Liability Act 2003* (Qld) s54 does not allow plaintiffs who have large incomes from being fully compensated. They are restricted in the amount of damages that they can claim for future earnings.

## Injunction

If the plaintiff succeeds in convincing the court that the defendant is continuing to engage in negligent acts, the court may grant the plaintiff an injunction. This is a court order that usually commands a party to stop performing an unlawful act, in this case a negligent act. An example may be an unsafe work environment, such as a coal mine where the owners of a mining company are ordered not to send any more miners underground until certain unsafe procedures and structures are improved.

An example of the development of the duty of care in schools is a duty to prevent bullying. Seeking an injunction may well be part of the process by a plaintiff, when he or she is being bullied at school, to stop the bullying continuing. In short, this action could be brought against the school to prevent the school breaching its duty of care to the student by preventing bullying.

# Review

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## Comprehend

- Describe** the following legal concepts:
  - Volenti non fit injuria*
  - Contributory negligence
  - Apportionment [C]
- Explain** the following sections of the *Civil Liability Act 2003* (Qld):
  - Section 14
  - Section 19
  - Section 24 [C]
- State:**
  - An example of a risk that is not an obvious risk.
  - The test used to determine whether the plaintiff ought reasonably have been aware that the defendant driver in a motor vehicle negligence action was intoxicated. [C]

## Analyse and evaluate

- Analyse** the effect that the *Civil Liability Act 2003* (Qld) has on common law claims for negligence. What are the advantages and disadvantages to claimants and to the community of this statutory intervention. **Justify** your answer with legal reasoning. [A] [E]

# Negligence and the duty of care

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## Chapter 23: Negligence law in contemporary contexts

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23.1 The changing landscape of negligence

23.2 Defective goods

23.3 Drivers of motor vehicles

23.4 Teachers

23.5 Rescuers

23.6 Doctors and healthcare professionals

23.7 Negligence in sport

### Learning objectives

At the conclusion of this chapter, students will be able to

- comprehend
  - the effect of the *Civil Liability Act 2003* (Qld) on the civil law of negligence
  - that class actions have removed barriers experienced by different groups to claims where plaintiffs have a common interest
  - governments can change the law to set higher or lower levels of compensation for injured workers
  - there are well established duties of care owed by drivers of motor vehicles, teachers, professional persons (doctors and lawyers), employers, manufacturers and retailers.
- analyse and evaluate
  - the legal issues and competing interests of litigants in contemporary negligence actions
  - the ability of the law of negligence to find just and equitable outcomes for plaintiffs and defendants.

## Key Terms

**Class Actions:** where large numbers of plaintiffs join together, in accordance with the court rules, to pursue the same or a sufficiently similar claim, with the permission of the court.

## 23.1 The changing landscape of negligence

The basic proposition that has been presented to you about negligence is that the courts must find that the plaintiff is owed a duty of care before being able to award compensation to the plaintiff. The categories of negligence are never closed. It is always possible that a new set of factual circumstances will give rise to a new duty of care. **To combat this ever-growing octopus of negligence, with its variety of claims, Australian governments have tried to limit the rights of individuals to claim by both limiting the scope of the duty of care, and by putting ceilings on the amount of compensation that can be claimed.** We will look at two different areas which illustrate how negligence has developed. On the one hand, we will look at an example where the Queensland government introduced a ceiling to claims for compensation, but then reversed that when there was a change of government. On the other hand, we will look at examples of how persons with similar claims have joined together in what are called class actions.

### Class actions

An area which is of great interest is the increased use by lawyers of class actions to make claims. This is where large numbers of people pursue the same or a sufficiently similar claim for the court to allow them to join a class action. **It is not so much any change in law but a change in the way cases are brought to court which represents one of the most significant current developments in the tort of negligence.**

The purpose of a class action is to allow plaintiffs who have the same interest in a legal case to obtain a court order in one action rather than in separate actions. **This assists the administration of justice by reducing the number of cases the court may need to deal with, reducing the costs of litigation, and speeding up the court process for the litigants.**

For a class action to proceed there must be at least seven members of the class, the claims of each of the class members must arise out of similar circumstances and raise a substantial common issue of law and fact. In short, a court will only allow one plaintiff to represent other plaintiffs if each of the plaintiffs have the same sort of interest in the court action.

A class action is either brought as an open or closed class. In an open class action everyone is included unless they expressly opt out. A closed class action occurs when a lead plaintiff brings a claim on behalf of the group of people who are all known and any further potential parties must opt in to the proceeding.

### Inquiry Focus

*Do class actions remove barriers and improve access to justice for plaintiffs (claimants) in our adversarial civil justice system?*

*Does the Australian Class Action Regime operate in a balanced way?*

### OPERATION OF THE AUSTRALIAN CLASS ACTION REGIME

#### Introduction

...representative procedures themselves are not new, having been available under English law for a long time. For example, Order 16 rule 9 of the *Rules of the Supreme Court 1883* (UK) provided that ‘... where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued ... on behalf or for the benefit of all persons so interested’. These rules were replicated in Australia. However, interpretation of these provisions by the Courts led to procedural difficulties, which meant the provisions fell into disuse.

The modern class action procedure was introduced in response to the deficiencies of the former representative scheme... This modern procedure is an attempt to deal with the problems of mass claims arising from the very large civil wrongs that sometimes occur in modern economies - that is, a mass solution for mass wrongs.

In 1977 the Federal Attorney General requested advice from the Australian Law Reform Commission (“ALRC”) as to whether class actions ought to be introduced into Australia.

The ALRC said yes, for the expressly stated aim of enhancing access to justice by reducing the cost of court proceedings to the individual and improving the individual’s ability to access legal remedies. It also aimed to promote efficiency in the use of Court resources, increase consistency in the determination of common issues, and make the substantive law more enforceable and effective.

#### The Class Action Regime in the Federal Court

Part IVA of the *Federal Court of Australia Act 1976* (Cth), which contains the class action provisions, came into effect on 5 March 1992. It set out a prescriptive regime for the conduct of class actions.

Section 33C sets out the threshold requirements for the commencement of a class action, namely that:

- (a) there must be claims by seven or more persons against the same person;
- (b) the claims must arise out of the same, similar or related circumstances; and
- (c) the claims of all those persons must give rise to a substantial common issue of law or fact.

Other important provisions cover:

- the consent of a person is not required to be a class member (s 33E);
- the right of a group member to opt out of a representative proceeding (s 33J);
- the determination of issues not common to all group members, that is, sub-group issues (s 33Q);
- the determination of individual issues (s 33R);
- the prohibition on ordering costs against class members (except in relation to specific individual or sub group issues) (s 43(1A)).

#### The climate in which the regime was introduced

The new class action regime was enacted by Federal Parliament following vigorous debate, and in a climate of concern that class actions would cause serious impediments to business through:





### Practical Application ...

- legal entrepreneurialism;
- US style litigation; and
- misuse of the media in a litigation context.

In particular, there was a concern that the introduction of the new class action regime in Australia would:

- open the floodgates of litigation; and
- induce substantial out of court settlements (regardless of the merits of a case) due to financial and reputational pressures.

These early fears have gone unrealised in practice. Some important differences are apparent in the ways that class actions operate in the US and in Australia and these differences have assisted our system to remain balanced. It is now broadly accepted that the Australian class action regime is working well and this conclusion is supported by empirical and anecdotal evidence.

Source: The Hon Justice Bernard Murphy, *'The Operation of the Australian Class Action Regime'*, (Speech, 8-10 March 2013) <fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy>.

1. What did order 16 rule 9 the *Rules of the Supreme Court 1883* (UK) say about 'representative' or class actions? Why were these rules not successfully adopted in Australia? [C]
2. Why was the modern class action procedure introduced in Australia? What were the Australian Law Reform Commission's reasons for recommending the introduction of the scheme? [C]
3. What legislation first set up the class action regime in Australia? What are the threshold requirements to commence an application set out in the legislation? [C]
4. Assume you have been invited to join as a member of a class action in the Federal Court. Read the provisions set out from the *Federal Court Act*. What would help you to make a decision to join or opt out. Give your reasons [C] [A]
5. Form small groups within your class. As a group discuss the matters set out in 'the climate in which the regime was introduced.' What did you think was meant by 'class actions would cause serious impediments to business'? What did your group decide is meant by each issue raised? Explain your answers. [A]

### A statistical view of class actions

In his speech, the Hon Justice Bernard Murphy quotes empirical research which covers the period from March 1992 to 31 December 2009. This research was performed by Prof Vincent Morabito.

### Practical Application

Professor Morabito's research shows that:

- The number of class actions that have commenced in Australia has been modest. The studies show that, in the Federal Court of Australia and the Supreme Court of Victoria, a total of about 281 class actions commenced in the 17 year period between March 1992 and 31 December 2009.

## Practical Application ...

- Despite early concerns of an avalanche of such litigation, shareholder class actions still represent only 25 per cent of all class actions in the past five years.
- Close to 70 per cent of all class actions concluded within two years and, at the time of publication of Professor Morabito's research, the average duration was declining.
- Class actions are not always successful and in fact, 51 per cent of the time, class actions either do not continue or do not continue in that form. This result undermines the basis of concerns that defendants would be placed in such a disadvantageous position that claims would succeed despite a lack of merit.
- The 'typical' class representative was a married, middle aged, professional male residing in New South Wales. Professor Morabito's research indicates that, in Australia, there is no culture of organising class actions such that the obligation to pay costs would be avoided in the event the litigation was unsuccessful.
- 'Closed' or opt in classes has not led to any significant increase in competing class actions.
- During the 17 year period from 1992 to 2009, every class action under the federal system that was supported by a litigation funder resolved in favour of the class.

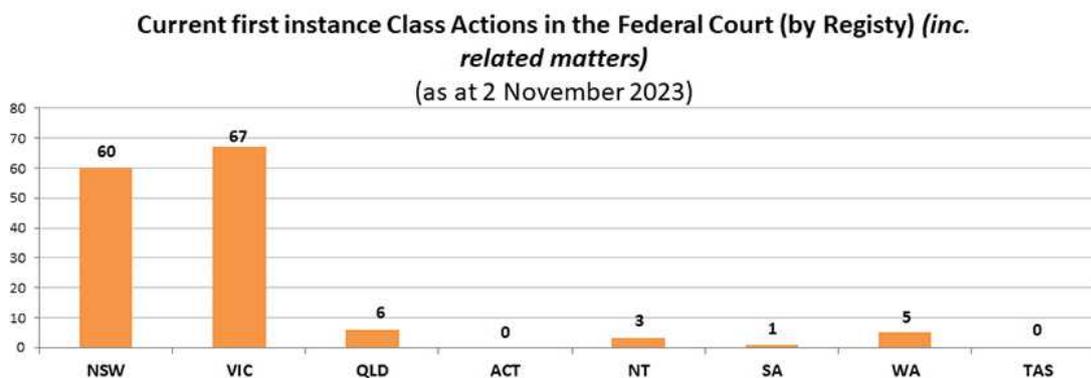
Source: The Hon Justice Bernard Murphy, 'The operation of the Australian class action regime' (Speech, 8-10 March 2013) [fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy](https://fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy)

1. Do you support the view that the research results set out above show that the class action system is working well? Give your reasons. [C] [A] [E]

## Practical Application

### CLASS ACTIONS STATISTICS

There are currently 145 current first instance Representative Proceedings in the Court nationally.



Source: Federal Court of Australia, Current Class Actions, *Federal Court of Australia* (Webpage, 15 August 2023) [fedcourt.gov.au/law-and-practice/class-actions/class-actions](https://fedcourt.gov.au/law-and-practice/class-actions/class-actions).

1. What is the total number of class actions that are current as at 15 August 2023? [C]
2. What is the percentage of class actions (Australia 100%) for Queensland, NSW, Victoria? Can you explain the distribution of class actions among the States? [C] [A]
3. Do the 'current statistics' support the view that the class action regime is working well? [A]



## The law in Queensland

Prior to 1 March 2017, it was possible for a representative action to be brought under the *Uniform Civil Procedure Rules 1999* (Qld), but specific legislation enabling class actions to be brought did not occur until that date.

From 1 March 2017, it became possible to bring a class action in the Supreme Court of Queensland, under Queensland legislation.

The Queensland legislation adopted the regimes already in place in the Federal Court and the New South Wales and Victorian Supreme Courts, meaning that decisions in these jurisdictions are useful in interpreting any issues which might arise out of the Queensland scheme.

The key features of the Queensland ‘representative proceeding’ regime, as set out in the *Civil Proceedings Act 2011* (Qld), Part 13A include that:

- there must be at least seven members of the ‘group’ for a proceeding to be commenced
- the action is brought by a single representative on behalf of all members of the group
- the claim must arise out of similar circumstances and raise a substantial common issue of law of fact and
- consent of a person to be a group member is not required, however, all members of the group must be notified of the action and their right to opt-out of the group (by a set date) should they not wish to be bound by the judgement or settlement.

A representative proceeding may be started in the Supreme Court of Queensland even if the cause of action arose before 1 March 2017. However, class actions already on foot in other jurisdictions are not be able to be transferred to Queensland.



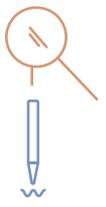
**What do you think?**

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What advantages do you think there are in having the same procedures for class actions in the Federal Court of Australia and each of the State courts in Victoria, New South Wales, and Queensland? [C] [A]

## The stakeholders

The Hon Justice Murphy discusses the views of various stakeholders about class actions in his article. From his own personal contacts, and from publications attributable to different stakeholders he concluded that generally there was a positive perception about the successful implementation of class actions in the Federal Court. He canvassed the views of the Australian Law Reform Commission, the lawyers acting for defendants in class actions, Australian corporate regulators (The Australian Securities and Investment Commission), and his fellow judges. He stated that a good indication that the Federal regime was operating well was the fact that Victoria (in 2000) and New South Wales (in 2010) introduced class action regime is substantially the same as the federal regime. It is his comments about the relevance of the claimants’ experience that is most telling.



### THE CLAIMANTS (EXCERPTS ONLY)

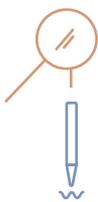
Another obvious touchstone with regard to the success of the class action regime is its application to a large number of different causes of action, and on behalf of many hundreds of thousands of claimants in diverse areas. Examples include the following:

- **Personal injury through food, water or product contamination**
- **Personal injury through defective products** (eg defective breast implants )
- **Shareholder class actions**  
Class actions on behalf of shareholders against various listed companies for misleading or deceptive conduct and/or breaches of the continuous disclosure regime on the share market (eg the Centro and National Australia Bank class actions which settled for \$200 million and \$115 million respectively in 2012).
- **Investor class actions** - complaints about conduct by the promoters of various investments.
- **Anti-cartel class actions** - commenced on behalf of consumers and businesses against cartelists.
- **Disaster class actions** - commenced in Victoria in 2009 on behalf of thousands of people who suffered personal injury, property damage and economic loss as a result of bushfires. In broad terms they alleged that negligent maintenance and operation of power lines by power companies caused the fires.
- **Consumer class actions** - commenced by consumers induced by misrepresentations to purchase goods which were not as represented.
- **Environmental class action** -for example, an action brought on behalf of landowners who suffered losses when gas from a nearby former rubbish tip entered into their houses. This last case was settled for \$23.5 million.
- **Human rights class actions** - an action commenced in 2011 on behalf of children and young adults wrongly arrested and jailed because of out of date or incorrect bail information in the New South Wales police computer system,.
- **Trade union class actions** - 40 class actions were commenced in Australia in the period between 1992 and 2011, (including).. employment issues such as underpayment claims, disputes about employer conduct in obtaining workplace agreements, and orders against imminent termination of employment.

**The variety of these causes of action, the large numbers of claimants, and the various kinds of claimants (including ‘mums and dads’, private individuals, small companies, public companies and institutions) that sign fee and retainer agreements or litigation funding agreements so as to ‘join’ the actions indicates acceptance of the regime by the community.**

In my view they do so because they expect some justice through the regime. Whilst there is no empirical research as to the total damages paid as a result of representative proceedings to date, the total appears to be well over \$1 billion.

**Laws which purport to provide protections to citizens but which are not capable of being used by them are no more than an illusion, and a balanced and effective class actions regime is important in improving access to the protection of substantive laws.**



## Practical Application ...

While the regime is working well at present, of course there remain numerous issues in the operation of class action law in Australia. There is a need for vigilance to ensure the regime remains balanced and sustainable.

Source: The Hon Justice Bernard Murphy, '*The operation of the Australian class action regime*' (Speech, 8-10 March 2013) <[fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy](http://fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy)> (excerpts only)

1. Do you agree with the view that the class action regime is working well, is delivering justice to claimants and defendants alike, and has the acceptance of the community? [S] [A] [E]

### Tip

To improve your understanding of this topic, conduct some research into recent class actions. Try the class action taken by victims of the Queensland 2011 floods which was initiated in the NSW Supreme Court against Queensland government, Sunwater, and Seqwater. The case was finalised, including an appeal, but there have been difficulties distributing the \$400 million awarded as damages. Maurice Blackburn Lawyers acted. Another is the Robodebt class action successfully brought by Gordon Legal.

## Workers' compensation

WorkCover Queensland provides insurance for workers to recover damages for work related injuries. WorkCover is State Government owned, but self-funded. All Queensland employers must take out a WorkCover accident insurance policy which provides compensation to employees who suffer work related injuries including physical injuries, psychological disorders, diseases contracted at work, or even the occurrence of death at work.

The injuries covered by WorkCover are those that occur while a person is at work, or travelling to and from their work, or arising as a direct result of their doing their job.

There are two main types of insurance provided to workers by WorkCover. These are:

- (a) A right to payments under the No Fault Statutory Scheme.
- (b) A right to sue the employer at common law in negligence.

### No fault statutory scheme

A good example of a no fault statutory claim is where a worker employed in the office, stumbled on his or her shoes causing the worker to fall over at work and suffer a broken arm. No fault could be sheeted home to the employer. The worker would be able to obtain his or her statutory benefits in a statutory claim. Compare that fact situation with a worker in Queensland employed in the office who was attempting to walk through an office area which was poorly lit, with a power cord stretched across a main thoroughfare, which caused the worker to trip over and sustain injuries in the form of a broken arm. In both the first incident and the second incident the worker would be able to make a statutory no fault application for WorkCover Queensland benefits and in the second incident the worker could potentially proceed with a common law claim for personal injuries based on the negligence of his/her employer for having the cord in a

poorly lit area in a workplace used by persons, such as the injured worker ('the common law claim').

To make the claim the injured worker must apply pursuant to s132 of the *Workers' Compensation Rehabilitation Act 2003* (Qld) for the statutory benefits. The statutory WorkCover Queensland benefits scheme is the no fault based system which pays the worker initially 85% of his/her wages (for the first six months) and 100% of their rehabilitation costs and 100% of the costs of medical treatment. The injured person **must apply** for such compensation in the approved form pursuant to s132 of the Act within **six months** of the date of injury.

After the claim has been made and once the worker's injuries are stable and stationary then either the worker or the insurer may apply for an assessment of permanent impairment. This involves a doctor of appropriate specialty assessing the injured worker's injuries to assess that they are stable and stationary before a report is then furnished stipulating the type of injury and the degree of permanent impairment. After such assessment is made a claimant is then furnished with a Notice of Assessment. The notice of assessment will stipulate:

1. The worker's WorkCover Queensland claim number
2. The worker's name
3. The date of injury
4. The degree of permanent impairment assessed for physical injury / injuries and/or psychiatric / psychological injury / injuries
5. If there is a degree of permanent impairment a lump sum compensation offer.

After receipt of the notice of assessment the worker has to take the following steps:

1. The injured worker is required to make a decision as to whether or not he or she agrees or disagrees with the stated degree of permanent impairment in the notice of assessment. If the worker disagrees with such level of impairment he or she may request WorkCover to either refer him or her for further medical assessment or request WorkCover Queensland to refer the worker for assessment by the Medical Assessment Tribunal. If the worker's physical injuries are assessed by the Medical Assessment Tribunal then such decision is final with respect to the level of impairment.
2. If the worker agrees with the level of permanent impairment assessed in the notice of assessment the worker is required to then make a decision about the offer of lump sum compensation. The worker has twenty days to either accept the offer or reject the offer. If the worker's degree of permanent impairment is assessed at less than 20% and the worker chooses to take the lump sum offered then the worker is then precluded from proceeding with any common law claim for negligence against the employer.

### **Proceeding with the common law claim for damages in negligence against the employer**

If the worker rejects the offer contained in the notice of assessment, then the worker is able to seek damages for the injuries by way of a common law claim against the employer. The worker then needs to issue a Notice of Claim Form which is served upon the employer and WorkCover Queensland. That notice must include particulars of the damages claimed. A Notice of Claim Form for Damages must be provided by the worker within 3 years from the date of the incident otherwise the claim may be statute barred. The case then proceeds as a normal negligence claim case in which the worker may or may not be successful depending upon whether he or she can show that the employer was negligent. That is, the worker must establish fault on the part of the employer.



### Research Task

Conduct research by going online and exploring the topics available on the WorkCover Queensland website, or by contacting WorkCover Queensland and requesting brochures or information which will assist you to form a view about the policy change on 31 January 2015, and to compare it to the policy which existed between 15 October 2013 and 31 January 2015, including explaining the reasons given by the respective governments at the relevant time about their policies.

Write a short opinion piece to be offered to your local paper for publication, expressing your point of view about the appropriate balance between the rights and obligations of WorkCover, employers, and employees. [C] [S] [A] [E] [R]

## 23.2 Defective goods

There is a clear **duty on manufacturers of goods to ensure that the process of manufacture is not negligent** and that the goods that arise from the manufacturing process are not defective and liable to cause damage to users. This is a well established principle. The case of *Donoghue v Stevenson* referred to in Chapter 21 is an early example of a defective goods case. There have been many examples since then.

## 23.3 Drivers of motor vehicles

There are very well established duties of care **owed by drivers of motor vehicles to other drivers, to pedestrians, and to owners of property**. The duty of care is to people whose property might be damaged or whose person might be injured if a driver does not drive in a reasonable manner. These are so well established that the majority of negligence cases in the courts arise out of breaches of duties of care owed by motor vehicle drivers.

## 23.4 Teachers

There is a clearly developed principle of law that **teachers in schools owe a duty of care to students**. You have already seen this in *Bryar's* case and *Johns'* case earlier. In situations where students are injured while at school the question is really whether there has been a breach of the duty of care, not whether a duty of care exists.

## 23.5 Rescuers

There are two aspects to be looked under the general heading of rescuers. These are:

1. Is there a duty upon a person to rescue another when he or she is in danger (duty to rescue)?
2. Is there a duty of care owed by persons who create conditions of emergency or danger to those who come to the rescue of persons in such danger (duty to rescuers)?

## Duty to rescue

The first of these is a very important question. **The law of negligence does not impose a duty upon a person to take a positive action to protect another from harm.** This approach is regarded as fundamental to our law of negligence. This applies even if it is within the power of one person to remove another person from danger with little effort. The law of negligence draws a distinction between creating and increasing a risk of harm to another person (in which case a duty of care would be owed) and the failure to prevent something which a person has not brought about (in which case a duty of care is not owed). In our legal system there has been a reluctance historically to interfere, or to encourage interference, with the freedom of an individual. Where a person is in danger from some source which is unconnected with another person, the other person is not required to come to his assistance. This means, in effect, that a citizen is not required to render assistance to any other person in a road accident. A good surfer is not required to go to the aid of another weaker surfer in distress.

A good swimmer is not required to go to the assistance of another person who is in danger of drowning.

The refusal of the law to impose a general duty to act has been criticised. **Some countries impose criminal sanctions where a person fails to assist.** German law imposes such an obligation in circumstances where there is imminent peril and the person can act without damage or harm being done to themselves.

The Northern Territory imposes such a duty.

***Criminal Code Act 1983 (NT) - Schedule 1  
155 Failure to rescue, provide help, etc.***

*Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for seven years.*

Once a rescuer, however, embarks upon a rescue, then the rescuer will have a duty of care to the person whom he is rescuing. For example, if you went to the aid of a person who was drowning, you would have a duty of care to that person to act reasonably as a rescuer in those circumstances. This seems to lead to a strange result. A person who takes no action whatsoever to help another cannot be negligent. The good samaritan, on the other hand, may be liable in negligence.



### What do you think?

Is it fair for a good Samaritan to be liable in negligence while there is generally no liability for failing to go to another person's aid? Give your reasons. [A] [E]



## Duty to rescuers

A person who commits the tort of negligence by creating conditions of danger or emergency for another person is liable to third persons who come to rescue another. This is illustrated by the High Court of Australia decision in *Mt Isa Mines Ltd v Pusey* (1971) 125 CLR 383 in which Mr Pusey sued Mt Isa mines after going to the rescue of two electricians very badly burnt in the defendant's powerhouse. Mr Pusey suffered a serious mental disturbance. The court decided there was a duty of care owed to Mr Pusey who came to the rescue of a burnt electrician, and he could recover damages for his serious mental disturbance arising from his seeing and helping the burnt electrician. More recently this approach has been confirmed by the Queensland Court of Appeal.



### Case Study

*AAI Limited v Caffrey* [2019] QCA 293

**Facts:** Caffrey was a Senior Constable in the Queensland Police Service when he was called upon to attend a scene where a car had crashed into a tree and where the driver of the car had been driving at excessive speed while intoxicated with drugs. Caffrey rendered first aid to the driver who was critically injured and who died very soon afterwards. Caffrey saw that the driver's legs were very squashed and the driver was in a very bad way and was gasping for breath. He rendered first aid and encouraged the driver with words like 'come on mate', 'don't give up'. The parents of the injured driver came onto the scene because they were worried about him and were looking for him. Caffrey consoled the mother of the driver holding her by the hand and saying 'come on stop let's go to say goodbye'. He accompanied her to where her son lay and soon afterwards the driver died.

This incident had a deleterious effect upon Caffrey. He began drinking a great deal of alcohol. He began to show undue anger and irritation. He contemplated committing suicide. One day he slung a rope in preparation for suicide. He fantasied about going back to the police so he could secure a pistol and fantasied about using that weapon. The evidence of a psychiatrist was that he had been a previously well adjusted individual without significant psychological problems but that now he had developed a range of psychological symptoms such as insomnia, anxiety, depression and specific post-traumatic symptoms such as flashbacks and reliving experiences. He was diagnosed as having post-traumatic stress disorder. He sued the driver (who was deceased) in negligence. The CTP insurer of the driver conducted the case on behalf of the deceased driver. The judge held that the driver owed Caffrey a duty to take reasonable care to avoid causing him harm in the form of psychiatric injuries. He found also that the driver was negligent (which wasn't in dispute) as he had been driving at an excessive speed while intoxicated with drugs. He found that he suffered damages which the trial judge assessed in the sum of \$1,092,947.88. The case went on appeal to the Court of Appeal in Queensland.

**Legal Issues:** It was argued by the insurer that because Caffrey had attended and harm had been caused to him in the course of his duty as a Queensland Police Officer. Then, no duty of care for pure psychiatric harm was owed to him. It was argued by the insurer that:

1. Because Caffrey was a police officer it would be unreasonable for the deceased driver to foresee the possibility of psychiatric injury to a police officer attending at the scene.
2. No duty of care ought to be owed to the police officer in these circumstances as a matter of public policy because if a police officer could recover damages in these circumstances then that would create a whole indeterminate class of prospective plaintiffs including not only police officers but firefighters, paramedics, doctors and nurses etc.

### Decision:

The Court of Appeal upheld the trial judge's decision dismissing the arguments of the insurer. The Court of Appeal held that there was a duty of care to a police officer in these



## Case Study ...

circumstances who suffered only psychiatric injury and that this duty of care was breached because a reasonably foreseeable response to that situation of risk was created by the negligence of the defendant.

1. What type of injuries did the police officer suffer from? [C]
2. Would any appeal have been made by the insurer if the rescuer was not a police officer but simply a bystanding citizen. [A]
3. How powerful do you regard the argument that if this police officer was successful then there would a very large and indeterminate number of possible plaintiffs by persons who were just simply acting in the course of their employment? Do you think the rejection of such an argument by the Court of Appeal was just? [A] [E]

## 23.6 Doctors and health professionals

For a long time the law has imposed on doctors and health care professionals a duty to exercise reasonable care and skill in providing treatment and giving advice to patients. Medical specialists, general medical practitioners, dentists, physiotherapists, laboratory technicians and nurses all have such a duty to use reasonable skill and care towards their patients.

A very large number of examples could be given of cases which have come before the courts in which health care professionals were alleged to have breached a duty of care. Doctors of course have always owed a duty of care to their patients in relation to a diagnosis or in the conduct of a surgical procedure. However, in the High Court of Australia case of *Rogers v Whitaker* (1992) 175 CLR 479 the court widened the duty of care to include a duty to warn patients of material risks of the treatment. The duty of care and standard of care expected of medical practitioners in relation to their patients was summarised as follows by the High Court of Australia in *Rogers v Whitaker*:

*The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case.*

In *Rogers v Whitaker* the plaintiff had suffered a penetrating injury to her right eye when she was young. She was almost totally blind in that eye. Some 40 years later she sought advice from an eye specialist who suggested that an operation might improve the sight in her right eye. The operation, although performed with all due skill and care (as determined by the trial judge), was unsuccessful. The patient developed a very rare condition 'sympathetic ophthalmia' in her left eye, which meant that her left eye lost sight in sympathy with her right eye. She was left blind in both eyes. She sued her doctor in negligence because of his failure to warn of the risk of this happening. The evidence at the trial was that this condition occurred only once in 14,000 procedures. Even so, she was successful and was awarded slightly over the sum of \$808,000 in damages.

Since *Rogers v Whitaker*, there is an obligation on the medical practitioner to make sure that the patient understands the treatment that the doctor is going to perform. This was confirmed in the following case:



## Case Study

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*Chappell v Hart* (1998) 55 CLR 232

**Facts:** Mrs Hart was a teacher and librarian suffering from a condition which meant that, when she swallowed food, small parts of the food collected in a pharyngeal pouch. This caused a sore throat which was very stressful. She saw Dr Chappell, an ear nose and throat surgeon. He proposed an operation in which the pouch could be surgically removed. One ordinary complication of such surgery was the possibility of the perforation of Mrs Hart's oesophagus. This usually does not have any lasting effects. However, if an infection sets in at the same time, there may be damage to vocal cords. An infection did set in after the operation and Mrs Hart was left with a husky voice which prompted an early retirement. The Court accepted that perforations can and did occur without any negligence on the part of Dr Chappell and that Dr Chappell had advised Mrs Hart about the risk of a perforation occurring. He did not, however, advise Mrs Hart about the risk of the combination of the perforation and the infection. It was accepted that the operation was performed competently. It was held at the trial that Mrs Hart had expressed a concern about the safety of her voice. However, she said that, if she had been warned of the risk of damage to her vocal chords, she would have put off the operation and had the operation later at the hands of a more experienced surgeon. There was also evidence from reputable medical practitioners, some of whom said they would have warned the patient of the risk of the condition, and some who said that they would not have.

### Legal Issues:

1. Did Dr Chappell owe Mrs Hart a duty of care to advise her of the risk of the combined effect of the perforation of the oesophagus and an infection?
2. Was the failure to warn of the risk a cause of Mrs Hart's injury?

**Decision:** The High Court of Australia held (by a majority of 3:2) that:

- Dr Chappell did owe a duty of care to advise Mrs Hart of the risk; and
- his failure to warn her about the risk to her vocal chords constituted a breach of the duty of care, and such breach caused Mrs Hart's injury.

1. What warning did Dr Chappell fail to give? [C]
  2. What would Mrs Hart have done if she had received the warning? [C]
  3. Do you think *Rogers v Whitaker* was applied to this case? Compare the material (important) facts of each case? [A]
  4. Do you think it is just that a surgeon can perform an operation in a competent manner and still be held liable because he failed to warn of the risk? [E]
  5. Describe and explain how the court's decision in *Chappell v Hart* balances the risk taken by the patient, Mrs Hart, against the nature and scope of the duty of care owed to her by Dr Chappell. [A]
- 

Apart from a specific duty imposed on doctors to warn of the risks of a particular procedure there is a general standard of care required of a doctor in carrying out procedures and giving advice. There were two main approaches to determining whether a doctor had breached his or her standard of care and, thus, was negligent.

The first of these was based on the English decision of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118. In this case, Mr Bolam, a patient at an English hospital, underwent electro-convulsive therapy. The staff, however, did not either manually restrain him as he underwent the therapy or give him any drugs to relax his muscles to prevent him from causing himself harm. He suffered fractures and sued the hospital. The court found that there was no breach of duty of care by the staff. The test applied (known as the Bolam principle) was set out by McNair J:

*A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... merely because there is a body of opinion that would take a contrary view.*

In *Bolam's* case there was a responsible body of medical opinion which agreed with the practice adopted by the staff of the hospital. Consequently, there was no negligence.

The second approach which developed in Australia is best seen in the case of *Rogers v Whitaker* (1992) 175 CLR 479. In that case the High Court held that Dr Rogers had breached his duty of care and so was negligent. The High Court came to this conclusion even though there was evidence that a respectable body of medical practitioners would have acted as Dr Rogers had when he failed to warn Mrs Whitaker. If *Rogers v Whitaker* had been decided on the same principle as *Bolam*, then the court would have held that there was no breach of duty of care. The High Court held that it is the courts that must decide whether there has been a breach of duty of care and it is not sufficient to discharge a duty of care simply because a responsible body of skilled medical practitioners (in this case in the art of ophthalmia) determined that the doctor was not negligent.

A report by Judge Ipp recommended a compromise of the two positions. As a result of that recommendation the law has now been set out clearly in s22 of the *Civil Liability Act 2003* (Qld)

### **22 Standard of care for professionals:**

- (1) *A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.*
- (2) *However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.*
- (3) *The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of this section.*
- (4) *Peer professional opinion does not have to be universally accepted to be considered widely accepted.*
- (5) *This section does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information, in relation to the risk of harm to a person, that is associated with the provision by a professional of a professional service.*



This reform is generally regarded as tending to reduce the liability of doctors. You can see from the above clause that the *Bolam* principle is contained in sub-section one. However, the Act allows Queensland Courts not to accept the *Bolam* principle if the court considers that the opinion is **irrational** or **contrary to a written law**. A recent illustration of this principle occurs in the following case study.

### Case Study

*Mules v Ferguson & Anor* [2014] QSC 51 (25 March 2014)

**Facts:** The plaintiff became blind and deaf as a result of contracting cryptococcal meningitis. Her illness was diagnosed and treated in time to save her life but too late to prevent irreversible neurological harm. The plaintiff alleged that her doctor, the defendant, should have referred her to specialist assessment earlier. The plaintiff alleged that as a result of that referral illness would have been diagnosed and treated earlier and she would not have suffered the loss of sight and hearing which devastated her life. She alleged that the doctor breached her duty of care.

**Legal Issue:** Did the defendant doctor breach her duty of care to the plaintiff?

**Decision:** The judge held that one of the ways a doctor is called upon to exercise skill and judgement is to determine whether a patient ought to be referred for specialist assessment. Failure to refer a patient for further investigation or consultation can potentially constitute a breach of duty. After an exhaustive assessment of the evidence the trial judge concluded that the symptoms that the plaintiff exhibited fell considerably short of the classic symptoms of cryptococcal meningitis and therefore the doctor did not breach his duty of care in not referring the plaintiff to a specialist. The trial judge said that the symptoms only suggested that the plaintiff's illness was likely caused by a musculo-skeletal condition and that the plaintiff did not have a discernible collection of symptoms which should have caused the defendant doctor, acting with reasonable skill, to conclude she should have referred the plaintiff for urgent or specialist assessment. It followed from that finding that the defendant doctor did not have to rely upon a s22 defence. However, the judge went on to say that on the whole of the evidence it was his conclusion that the defendant doctor had acted in a way that was widely accepted by peer professional opinion and by a significant number of respected practitioners in the field as a competent professional practice.

The plaintiff had also argued that s22(5) had the effect of excluding the doctor from relying on a s22 defence where the alleged breach involved a failure to refer a patient for specialist treatment. The judge concluded however that s22(5) was applicable to those cases where any breach flows from the failure by a doctor to properly provide a patient with sufficient information to allow that patient to make an informed decision about the risk of harm in undergoing a particular medical service. The s22 defence therefore is open to the doctor in this case. However, because there was no breach the judge did not have to consider the s22 defence.

## 23.7 Negligence in sport

### Inquiry Focus

*In what circumstances do participants in sporting activities owe a duty of care, and to whom?*

Participants in sport include players, coaches, organisers, spectators, and board members. Accidents in sporting activities often raise the issue of whether or not a participant can seek compensation from some other person by establishing that they are owed a duty of care. In some cases the circumstances in which an injury occurs may mean that compensation may even be sought from State.

## The Department of Education

### Case Study

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*Watson v Haines* (1987) Aust Torts R 80-094

**Facts:** The plaintiff, Watson, was a 15 year-old schoolboy, who was playing hooker for his school's first grade rugby league team against another school's team in the competition. As a result of a scrum collapsing, he suffered a fractured spine and became a quadriplegic. He sued the State, through its Education Department, on the grounds that he should not have been allowed to play in the first or second row because he had a long thin neck. There was evidence that the Minister of Education had been advised of the risk of spinal injuries through a kit, entitled 'Don't Stick your Neck Out'. Copies of the kit were sent to schools, but there was no check by the Department as to whether teachers had seen the kits and knew of the risks involved.

**Legal Issue 1:** Did the State owe a duty of care to Watson?

For a negligence claim it must first be established whether there was a duty of care owed by the defendant to the person injured.

Whether this duty exists or not is a question of law, and will depend on the individual circumstances of each case and the nature of the relationship between the parties. Recent decisions by the High Court indicate that the court takes into account a range of factors such as foreseeability, proximity and policy considerations of fairness and justice. To decide if there was a duty owed the court will determine whether the damage suffered by the plaintiff was a reasonably foreseeable consequence of the defendant's actions.

**Decision 1:** The State, through its staff, owed a duty to take reasonable care for the safety of school children including the safety of boys like Watson. Football was a school activity and as such it was the duty to take reasonable care for all safety aspects of sport played. As members of the State's Education Department knew that injuries of this type could occur, it was the State's duty to make sure teachers were informed of this.

**Legal Issue 2:** Did the State breach its duty of care to Watson? There must be a breach of the duty of care owed.

Here it has to be shown that the duty of care was breached by falling below the standard required by law. This is a question of fact to be answered after a duty of care has been established. The standard is that of a reasonable person, so that a duty will be breached if the conduct of the defendant falls below that of a reasonable person with knowledge of that sport. Children playing sport are required to do what a child of similar age and knowledge of the sport would reasonably be expected to do in the circumstances.

**Decision 2:** The State failed to ensure reasonable care was taken for the safety of boys with long thin necks, who play football. By letting him play, Watson was exposed to unnecessary risk of injury. Hence the State breached its duty.

Obiter: The duty would also have been breached if a boy with a long thin neck had merely been warned of the risk. The duty required a person in authority to prevent a player with that physique from playing hooker or any position in the first or second row.





## Case Study

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### Legal Issue 3: Did the State cause the injury?

#### Causation of damage

A negligence action will only succeed if the victim plaintiff suffered damage and the defendant caused the damage.

**Decision 3:** The injury to his spine was caused by the fact that the school allowed him to play as hooker. There was nothing unusual about the scrum and there was no other explanation for the injury apart from his long thin neck.

#### Defences to negligence

There are two defences that are relevant to negligence in the context of sport. These can be argued by the defendant to reduce liability for the injury. They are (a) voluntary assumption of risk, and (b) contributory negligence. Both were raised in the case of *Watson v Haines*.

### Legal Issue 4 (a): Had Watson by agreeing to play as hooker voluntarily assumed the risk of serious injury?

#### a. Voluntary assumption of risk

Because sport involves inherent risk and players know that injuries occur frequently, it can be said that playing a sport voluntarily means the player is agreeing to assume those risks. If the player has freely decided to play that sport, knowing the nature and likelihood of the risks involved, then the defence of voluntary assumption of risk is relevant.

**Decision 4 (a):** Although he played the sport voluntarily, he was never warned of the risk involved. The duty, however, was to stop schoolboys with long thin necks from playing in these positions and a mere warning would have been insufficient in the context of school sport.

**Obiter:** ‘If after leaving school, men with thin necks choose to go into first or second row in adult competition that is their own concern’. In such cases this defence of ‘voluntarily assuming risk’ may apply.

### Legal Issue 4(b): Had Watson failed to take reasonable care for his own safety.

#### b. Contributory negligence

To successfully plead this defence, a defendant has to show that the plaintiff’s own actions were also negligent and contributed to the injuries or damage suffered. The court in working out the damages for the plaintiff will reduce the amount by what it decides

is the plaintiff’s share of responsibility for the damage.

**Decision 4 (b):** There was ‘not a scintilla of evidence’ on the facts for contributory negligence.

What different facts can you think of that may have given rise to the defence of contributory negligence? [C] [A] [E]

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## Children playing sport

Children are required to do what a child of similar age and knowledge would reasonably be expected to do in the circumstances.



## Case Study

*McHale v Watson* (1966) 115 CLR 199

**Facts:** A twelve year old boy threw a dart at a dartboard, which missed, hitting instead the nine-year old plaintiff in the eye.

**Legal Issue:** Did the twelve year old breach his duty to take reasonable care when throwing darts, which would make him liable in negligence?

**Decision:** No. Although an adult would have been negligent in those circumstances, the child did not have to meet the adult standard. The standard here was the degree of care one would expect from a twelve year old with the same level of experience in dart throwing.

## Coaches

Coaches are required to be reasonably competent in their level of sport. Coaches who use extreme or potentially harmful techniques in training can breach that duty. One example has been gymnasts whose training regime has resulted in health problems, such as anorexia nervosa, bulimia and psychological stress disorders. Twins, Kate and Emma Major, elite gymnasts at the Australian Institute of Sport sued their coach, doctor and other members of the Australian Sports Commission for an obsessive eating disorder which left them without sufficient nutrition to maintain good health. Coaches are required to have a working knowledge of injuries common in their field of sport to enable appropriate rest or for specialists to be called. Allowing an injured player to continue playing, encouraging aggression or the use of dangerous manoeuvres can all breach the standard of care required by a coach.

## Case Study

*Foscolos v Footscray Youth Club* [2002] VSC 148

**Facts:** Foscolos took up boxing at Footscray Youth Club and then in 1997 when aged 22, he commenced wrestling under the guidance of Samuel Parker, an experienced coach at the club. During one training session, Foscolos agreed to a practice bout with Bassi, who was younger but more experienced than Foscolos. During the bout, Bassi executed a 'suplex' throw. This was a recognised move used at the highest levels of the sport but was dangerous in inexperienced hands. The throw fractured Foscolos' spine rendering him a quadriplegic.

**Legal Issue:** Had Parker, the coach, breached his duty of care by failing to stop the bout when Bassi commenced the 'suplex' throw?

**Decision:** Coach Parker's failure to stop the training bout when Foscolos' opponent commenced the 'suplex' throw was a cause of the injury. Parker failed to adequately supervise the wrestling contest and was, therefore, in breach of his duty of care to Foscolos. The coach was the person in effective control of the bout.

The damages awarded were \$5,744,244.31. Parker, the coach, had indemnity insurance for \$5 million but as the award of damages exceeded that amount he was personally liable for the balance.



### What do you think?

1. Bassi was not sued? Why do you think this might be? Do you agree with the plaintiffs decision? [A] [E]





**What do you think?**

2. How does a coach decide when a person is ready for new techniques and when they should be removed from training or a competition? [A]
3. Should the duty of care be different when children, rather than adults, are involved? [A]

**Hypothetical?**

As a lawyer employed by the Australian Swimming Federation, advise the following swimming coaches what they should do and not do in order to meet the required standard of care?

- Taking a learn-to-swim class.
- Training a school swimming team.
- Personal coach of an Olympic swimmer.

[A] [E]

**Organisers**

Organisers of sporting events also have duties of care to the participants and the spectators. This was seen in the 1998 Sydney to Hobart Yacht race when organisers allowed the race to go ahead despite difficult and potentially dangerous weather conditions on the ocean. Six sailors died in the extreme conditions, 55 sailors had to be rescued and five yachts went down in the huge seas. Only 44 of 115 boats completed the race. The South Wales Coroner found that Cruising Yacht Club of Australia (CYC) had, ‘abdicated its responsibility to manage the race.... during this crucial time the race management team played the role of observers rather than managers and that was simply not good enough.’

The CYC was subsequently sued for negligence for not calling off the race when it knew, or ought to have known, that the weather conditions had become dangerous and life-threatening. The CYC argued that ‘no one cause can be identified as being responsible’ and that the decision to continue or retire, is for the skippers or captains of the boats in the race, not the organisers to decide. The skipper of one boat the ‘Winston Churchill’ was also sued for negligence. The claims against both settled out of court for an undisclosed amount in 2005.



**What do you think?**

1. In an ocean race, such as the Sydney to Hobart, do you think is it the duty of the organisers or the captain of the boat to decide whether to continue to sail after a report of bad weather is received? Do you think that both the organisers and a captain of a boat could both have a duty of care to the sailors on the boat, independently of each other? Give your reasons. [A] [E]
2. What risks, if any, do participants continue to accept when they enter one of the world’s acknowledged ‘toughest three ocean races’? [A] [E]

Similarly, a lawsuit was brought in 2011 against the organisers *Racing The Planet*, which was an ultra-marathon of 100km through the Kimberleys. Two women suffered horrific injuries when fire swept through a rocky gorge during the marathon. The government of Western Australia gave each an ex-gratia payment but negligence claims against Racing The Planet

were commenced on the basis that the organisers should not have allowed runners to proceed through the course once they become aware of fires in the area. 'Racing The Planet' argued that reasonable and adequate steps to protect competitors were in place and that remote location sporting activities can never be free from risk.

### What do you think?

1. If competitors desire to challenge themselves in extreme sports in remote locations is there the same or a different duty of care/standard of care required from the organisers than would be required in a city location? Is there a greater or lesser duty? Why might the standard of care in each location be different? [A] [E]
2. If each competitor signs a waiver in which they legally accept that emergency medical services may not be available should that make a difference to the organisers' duty of care? [A] [E]

Organisers must ensure that spectators are reasonably protected and safe from harm. This may include providing safety barriers, ground security, restricting entry and prohibiting or limiting the sale of alcohol.

### Case Study

*Wilkinson v Joyceman* (1985) 1 Qd R 567

**Facts:** Wilkinson's husband was killed by one of the racing cars at a stock car race. (These are also known as speedway races. Cars frequently collide, crash, overturn and roll off the track during these races.) Wilkinson was standing near the unprotected pit area, where cars come in for mechanical attention during the race. There were pit marshals patrolling the area to keep away spectators. A protective fence had been previously trampled down and not replaced.

#### Legal Issues:

1. Did the organisers and owners of the speedway breach their duty of care to the spectator?
2. If so, was the spectator also negligent by standing in the pit area?

#### Decision:

1. The organisers owed a duty of care to the spectators and breached their duty. It was foreseeable that if a spectator stood in that place to watch the race, a serious injury could result if a car rolled off the track. The organisers were liable in negligence.
2. The spectator, by standing in an unprotected place during a stock race, where cars are known to roll and collide was also being negligent. His actions contributed to his death. Damages were reduced by 50% due to contributory negligence.

The *Civil Liability Act* (Qld) s19 that there is no liability to persons who suffer injuries from obvious risks of dangerous recreational activities. This section provides a defence to most sporting clubs or organisations of a sport or leisure activity where the risk is obvious for the persons partaking in the sport or activity.

### Spectators

When spectators attend a sporting event they can have a duty of care to other spectators and to participants in the sport. Fans who run onto the field during, or at the end of a game, have a





duty not to assault or injure players, sporting officials or other spectators. Organisers of these events have to make sure crowd control measures are adequate.

### Board members.

The High Court of Australia considered the issue of whether persons responsible for making and monitoring the rules of a sport owe a duty of care to the players of that sport.

### Case Study

*Hyde v Agar & Ors; Worsley v Australian Rugby Football Union Ltd & Ors* (1999) Aust Torts Reports 81

**Facts:** Two young rugby players received serious spinal code injuries playing the game. The players brought an action against the Board's members who were responsible for writing and interpreting the rules of the Rugby Union. It was argued by the players that rules must ensure the safety of the players and that the Board owed them a duty of care.

**Legal Issue:** Because players rely on the board to make rules for their safety, do the members have a duty of care to all rugby players to minimise the risk of harm to them?

**Decision:** There is no duty of care owed by the Board to the players. The High Court of Australia felt it was unrealistic for the Board to owe a duty to each person who played the game. The Board, as the law-making authority, did not encourage breach of laws, which was responsible for the injuries received by the two players. The court noted that it is an inherently dangerous sport, and that the only way to avoid risk of injury is to not play the game.

### What do you think?

In the case outlined above, the players were adults who had voluntarily decided to play the game, aware that it was a contact sport and there were risks of injury. Do you think that if it were at school where students played the game as part of PE classes that there may have been a different decision? Give your reasons. [A] [E]

### Hypothetical?

Who may have breached their duty of care on these facts?

1. Supporters of a home team throw empty and full cans of soft drink at a group of supporters from the visiting team. Cans of soft drink could be bought at the venue, but there were signs saying that no drinks were to be taken into the grandstand. [A] [E]
2. Disappointed at their team's loss, several spectators start spitting and kicking the referee. After questioning, the spectators admit to consuming alcohol prior to the game. [A] [E]
3. A spectator takes a flash photograph during a gymnast's routine. The flash momentarily blinds the gymnast who falls and is injured. An announcement was made at the start of the competition requesting people not to take photographs. This spectator arrived late. [A] [E]

As well as contributory negligence, voluntary assumption of risk also can apply to spectators. The general principle is that, as long as organisers of sporting events have

## Hypothetical?

taken all reasonable steps to ensure the safety of spectators, spectators voluntarily assume risk for events that could not reasonably have been foreseen by the organisers.

Consider the following scenarios and determine whether the spectators have voluntarily assumed risk of injury.

1. A high school hockey game is held on a school oval. A parent spectator brings a one year old daughter to the game. Both sit on a picnic blanket near the sidelines. A ball hits the daughter in the face causing injury. [A] [E]
2. A spectator at a car race is standing behind a screen labelled a safety barrier. A car hit the barrier, it falls down, killing the spectator. [A] [E]
3. During the running of a horse race a clap of thunder in the distance frightens one of the horses. The horse, in panic, gallops off the track, jumps the barrier and knocks over several spectators, causing various injuries. [A] [E]
4. A sprinter, having won a Gold medal, throws one of his spiked running shoes into the crowded stadium. It hits a spectator in the face, causing permanent eye damage. [A] [E]

## Review

### Comprehend

1. **Describe** and **explain** each of the following:
  - a. The legal arrangements for class actions under the Federal Court Rules.
  - b. The duty on manufacturers of goods to ensure manufacturing processes do not result in defective goods which are liable to cause damage to users.
  - c. The duty of care owed by drivers of motor vehicles that other drivers, pedestrians, and to owners of property.
  - d. The duty of care owed by teachers to students.
  - e. The issue of whether or not duty of care exist when a person rescues someone to protect them from harm.
  - f. The duty of care owed by doctors and healthcare professionals when providing treatment and giving advice to patients.
  - g. The duties of care owed by the various participants in sporting activity to persons injured while participating in the sport. [C]

### Analyse and evaluate

1. Describe and explain the changes that were made by successive governments to the ceiling of compensation for general damages in common law claims for injuries at work. Set out the reasons that were given for making these changes. Do you agree with the decisions that governments made to make these changes? Write a short piece stating your position and point of view with regard to the changes. [C] [A] [E]

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# Legal Studies for Queensland

## Units 1&2

### Legal Studies 2024 Syllabus Volume 1 - Ninth Edition

This **Ninth Edition of Legal Studies for Queensland, Volume 1**, is the first book in a revised and substantially updated two book series, with **Solutions and Resources Manuals**, specifically for teachers and students of the dynamic subject Queensland Senior Legal Studies. Electronic use is available to users of the book.

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Topics 1-3: Civil Law Foundations, Contractual Obligations, Negligence and the Duty of Care.

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