



THE ILLEGAL MIAZZE

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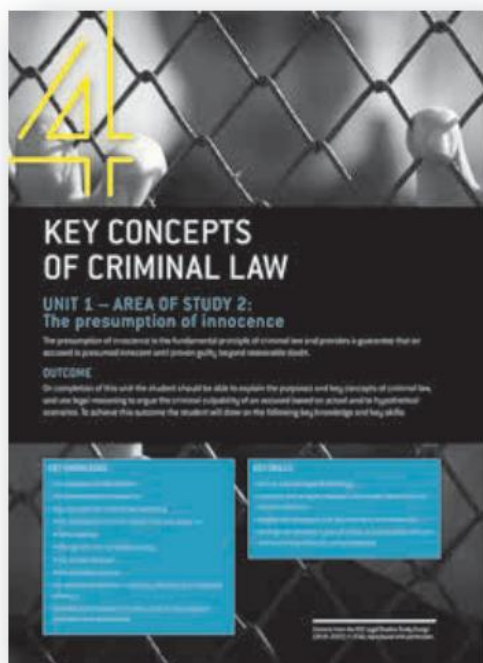
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INTRODUCTION

The Legal Maze Units 1 & 2 deals with all areas of study, outcomes, key knowledge and key skills for Units 1 and 2 of the 2018–2022 VCE Legal Studies study design.



CHAPTER OPENER

Each chapter opens with a two-page spread showing the relevant study design information, a graphic summary of the chapter topics and a list of important key terms.

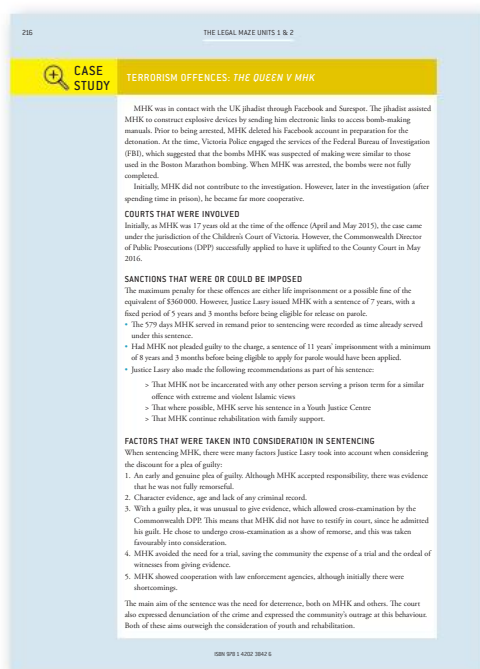
Read through the opener carefully before starting the chapter; it will help you understand what's to come and to take control of your own learning.



APPLY YOUR UNDERSTANDING ACTIVITIES

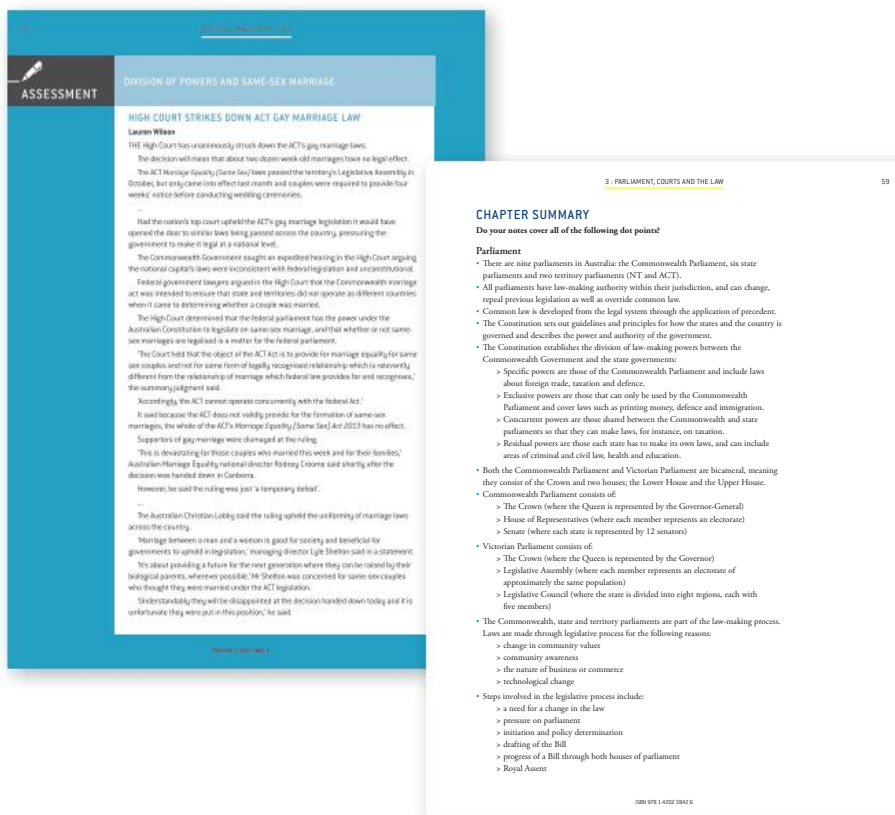
Throughout each chapter, these activities ask you to apply the key skills and knowledge of the unit to the material you have just covered in class.

Some activities are to be done on your own, some with partners or a group. Take these activities seriously—they're an opportunity for you to put your knowledge and skills to use.



CASE STUDIES

Most chapters have case studies that draw upon recent media articles, legal cases or statistics, along with activities that address the case study information.



END OF CHAPTER

Each chapter ends with a chapter summary, a Check your Understanding review activity, a set of Apply your Understanding activities and an assessment task.

Assessment tasks are marked and should be submitted to your teacher; they may be used to determine your academic results for the year.

In most cases, to be guilty of a crime a person must have *actus reus* and *mens rea*.

A summary of key information found in the text.

DETERRENCE: imposition of a sanction to discourage others from taking a similar action

REHABILITATION: improvement through programs that focus on bringing about changes in an offender's behaviour

Key term definitions to help you understand and remember important legal phrases and terms.



ONLINE
ACTIVITIES

Follow this icon to find extra activities in the digital version of the book.



www.macmillaneducationeverywhere.com

Follow these links to find further reading online, including relevant case studies.

MARGINS

In the margins of most pages you'll find definitions of key terms, summaries of key information, source information for media articles and links to relevant websites. These can be helpful when revising chapters and studying for assignments.



Jim Ouliaris is currently an assistant principal at Canterbury Girls' Secondary College. He has taught Legal Studies since 1989 and currently takes a Units 3 & 4 class.

Jim is a VCTA board member and was the VCTA's representative on the re-accreditation of the Legal Studies study design. He is the lead author of Macmillan's *Legal Maze* series and has been a contributor to the *Units 1&2* book for the last four editions.

As well as teaching, Jim has been involved in the world game (soccer) for 30 years as a referee and official.



Bianca Crawford is in her ninth year of teaching and has taught in both government and independent schools. She is the Coordinator of Year 9 Humanities at Haileybury College and teaches VCE Legal Studies, VCE History and Humanities.

A former Australian lawyer, Bianca hopes to bring her knowledge of the legal world once again to students through the new series of *The Legal Maze*.

AUTHOR ACKNOWLEDGEMENTS

JIM OULIARIS: A huge thank you to my wonderful family for your unwavering love and patience. Dimitra, Michael and Labrini, thank you for the sacrifices you make, as this book would not be possible without your support. A big thank you also goes to the VCTA for giving me opportunities to indulge my passion for Legal Studies. To Patrick O'Duffy and the team at Macmillan, a big thank you for your backing and determination to drive this project. To the legal eagles at Canterbury Girls', you girls are amazing! I love teaching Legal Studies, as you continue to challenge me to be an effective teacher, a big thanks!

BIANCA CRAWFORD: Thank you to my understanding husband, Ash, for putting up with me while writing the textbooks and for always believing in me.

We all have our own views about justice. Most of us would probably think that justice involves fairness and equality. Some would take the view that justice involves treating everyone the same. Many would believe that justice is achieved by having laws and processes that make sure people do the right thing, and punish them if they don't.

The reality is more complex than this.

Is it fair that our jails are full of people who have mental health issues, who have an acquired brain injury, who have been victims of family violence, or who have a drug and alcohol addiction?

Is it fair that Aboriginal Australians are jailed at more than 13 times the rate of their non-Indigenous counterparts?

The law and our justice system must be a living, breathing, positive agent of change.

As legal studies students, you will study the law and the meaning of justice, but you also have an obligation to question the law, and ask how it can be better used to have a positive impact on those who come into contact with it.

I wish you well with that difficult but important task.

Rob Hulls

Director, Centre for Innovative Justice

RMIT University

*As Victoria's Attorney-General (1999–2010), **Rob Hulls** instigated significant changes to Victoria's legal system that saw the establishment of the state's first Charter of Human Rights and reforms to the Upper House. He established specialist courts in Victoria, including for the Indigenous community, people with mental health issues, and victims of family violence, and introduced an open tender process for applicants to Victoria's judiciary.*

After retiring from state Parliament in 2012, Rob was appointed Adjunct Professor at RMIT and was invited to establish the new Centre for Innovative Justice as its inaugural Director. The Centre's objective is to develop, drive and expand the capacity of the justice system to meet and adapt to the needs of its diverse users.

Rob Hulls

Director, Centre for Innovative Justice

—GUILT AND LIABILITY—

Criminal law and civil law aim to achieve social cohesion and protect the rights of individuals. Criminal law is aimed at maintaining social order and infringing criminal law can result in charges. Civil law deals with the infringement of a person's or group's rights and breaching civil law can result in litigation.

In this unit students develop an understanding of legal foundations, such as the different types and sources of law and the existence of a court hierarchy in Victoria. Students investigate key concepts of criminal law and civil law and apply these to actual and/or hypothetical scenarios to determine whether an accused may be found guilty of a crime, or liable in a civil dispute. In doing so, students develop an appreciation of the way in which legal principles and information are used in making reasoned judgments and conclusions about the culpability of an accused, and the liability of a party in a civil dispute.



INDIVIDUALS AND THE LAW

UNIT 1 – AREA OF STUDY 1: Legal foundations

What is a legal system? How did Australia's legal system develop? How do we achieve social cohesion? This chapter will provide students with foundational knowledge of laws and the Australian legal system. Students explore the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals.

OUTCOME

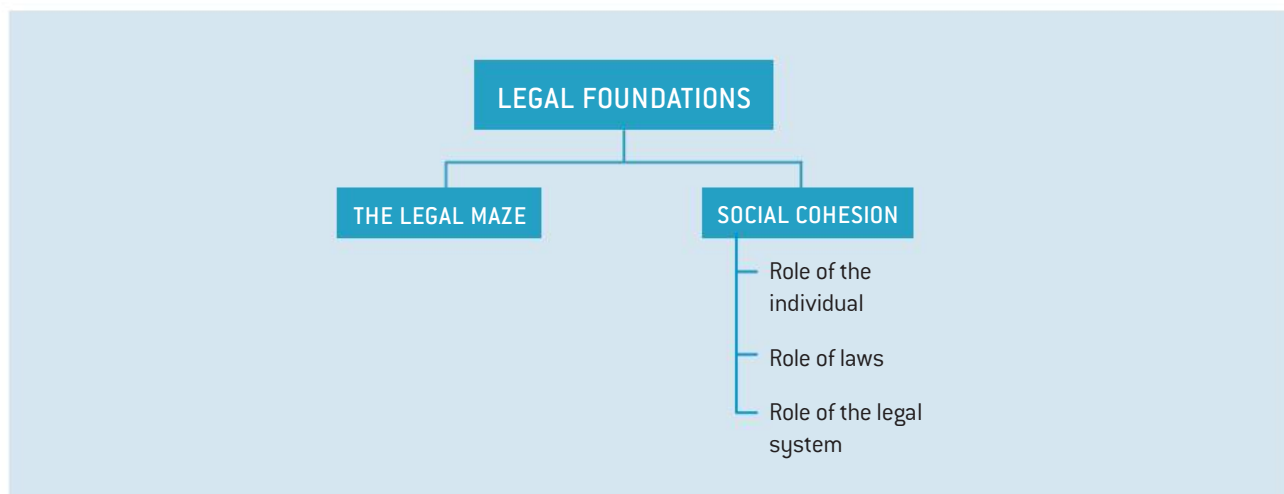
On completion of this unit the student should be able to describe the main sources and types of law, and assess the effectiveness of laws. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

> the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals

KEY SKILLS

> define key legal terminology



KEY TERMS

civil law	Laws regulating the behaviour of private individuals
common law	Laws developed by the courts through the application of precedent
criminal law	Laws dealing with behaviour considered harmful to society as a whole
laws	Legal rules created and enforced by institutions within the legal system
legal system	The processes and procedures to create, interpret and enforce the law
social cohesion	The ability of a community to live together in peace, order and harmony by recognising that all people have rights and responsibilities

THE LEGAL MAZE

A maze is made up of an intricate web of passages through which individuals have to work their way to find the exit. There are many parallels between a maze and the **legal system**. In a maze, the individual is presented with a number of paths to follow. At each turn, there are decisions to be made. Which path to follow? Which way to turn? The legal system can be seen in the same way. We call this complex system ‘the legal maze’.

The law sets out basic rights and responsibilities that provide us with pathways through this maze. Whatever path we choose, there will be times when we are faced with conflicts. We will need to make decisions about the type of action we should take. We will be presented with a range of responsibilities—driving a car, leaving home, starting work, renting a home, getting married—all of which have legal implications.

To work our way through the legal maze we need to understand our rights and responsibilities, the different roles of the courts and tribunals, **criminal law** and **civil law**, sanctions and remedies.

LEGAL SYSTEM: the processes and procedures to create, interpret and enforce the law

CRIMINAL LAW: law dealing with behaviour considered harmful to society as a whole

CIVIL LAW: law regulating the behaviour of private individuals

HAVE YOU...	YES / NO / UNSURE
Seen the police pull someone over in their car?	
Seen people holding a peaceful demonstration?	
Used an indicator in a car? Or seen someone use their indicator?	
Crossed at a pedestrian crossing?	
Seen someone smoking in a ‘No Smoking’ area?	
Purchased a ticket to ride on the train?	
Witnessed discrimination based on a person’s age or race?	

SOCIAL COHESION

The decisions we make and the actions we take in the legal system have very real consequences and we have to live with them. For this reason, it is important to have a basic understanding of our rights and responsibilities, and of how the legal system functions so that we can make the right decisions when it is necessary. If we make the correct decisions, we are helping to ensure that there is **social cohesion**; that is, that society functions peacefully and fairly to minimise conflicts.

It is not only the role of individuals to ensure social cohesion; the laws made by various institutions and the legal system must all work together to make society function peacefully and fairly.

THE ROLE OF INDIVIDUALS IN ACHIEVING SOCIAL COHESION

How many times have you heard someone say ‘But I didn’t know I wasn’t allowed to do that!’? Do you feel that this should let them get away with the behaviour or action they took? Some people may believe that it should, but ignorance of the law is not an excuse; it is up to everyone to know the laws that apply in their state and country and abide by these. If an individual is not sure about a law, they should take steps to find out what rights or responsibilities they have. They can do this by looking on the internet, watching the news, reading the newspaper or listening to the radio. Once a person knows what the law is, it is then up to them to decide if they will follow the law.

SOCIAL COHESION: the ability of a community to live together in peace, order and harmony by recognising that all people have rights and responsibilities

If you answered 'yes' to any or all of the situations in the table above, you have witnessed someone choose, or have yourself chosen, to either follow or break a law. By making the decisions we do, we either contribute to or take away from social cohesion in our communities. By choosing to follow the laws that exist, we ensure that society is peaceful and others in society are free from fear and harm. In an ideal society, all laws would be followed by all people and there would be a cohesive society at all times. This obviously does not occur. If major laws are not followed, people live in fear and may have to rely on the police and courts to seek help.

Individuals can ensure social cohesion by following the law, but can disrupt it by breaking the law.

Individuals cannot act alone to achieve social cohesion. We will now look at how the laws and legal system also help.

APPLY YOUR UNDERSTANDING

As discussed above, ignorance of the law is not an excuse to avoid the consequences of your actions. How knowledgeable of the law are you? Using the internet, determine whether or not the following are laws in Victoria. You may wish to use the 'Victorian Legislation and Parliamentary Documents' website to help.

www.legislation.vic.gov.au



1. It is illegal to play a game in your street and annoy your neighbours.
2. It is illegal to park your car on the nature strip with a sign stating the vehicle is for sale.
3. It is illegal to drive a goat-drawn vehicle in a public street.
4. It is illegal to eat dog or cat meat.
5. It is illegal for a water meter reader to walk onto someone's property to read the meter.
6. It is illegal to post a sticker on a street sign.
7. It is illegal to be drunk on the beach on New Year's Day.
8. It is illegal to sing a rude song in public.

APEX OF FEAR

CASE STUDY

'PEOPLE ARE TERRIFIED': WOMAN REVEALS AFRICAN APEX GANG'S SURPRISE ATTACKS HAVE LEFT HER TOO SCARED TO BE ALONE IN HER HOME AND DRIVEN MELBOURNE FAMILIES TO FORM THEIR OWN VIGILANTE GROUPS

By Belinda Cleary, 6 October 2016

Terrified families have set up armed patrols of their suburbs because they are living in fear of Apex gang members terrorising their suburbs in Melbourne.

And one woman has even revealed how the midnight attack on her home has left her too afraid to either stay at home or to complete simple tasks like putting petrol in her car at night.

Paul, from Caroline Springs in the city's west, told *Daily Mail Australia* he didn't sleep for two-and-a-half days after his next-door neighbour's home was targeted by a group of the young thugs.

He was afraid to rest because he didn't want his family to be attacked.



CASE STUDY

'We had people coming through our street for five days after the first attack,' Paul said.

'They are pretty cocky I know of one incident where they sat on a family's brick fence and drank beer for 30 minutes after they robbed their home because they knew the cops would take a long time to come.

'They came through at all times day and night, took photos of houses and cars in the street, it made us feel like we could be the next target.'

Paul and his family left their home for eight days before reluctantly returning.

Louie lives in the same suburb and leaves his wife and two young children alone every night so he can help keep his neighbours safe.

'People are scared,' Louie told *Daily Mail Australia*.

'There is no hiding that they are worried, we are only on the street to help them.

'Everyone started for their own reasons, I started because my neighbour was broken into and her car was stolen.

'We weren't operating as a group at first but it just happened.'

The woman Louie spoke about is also a friend of Paul's.

'That lady is a widower and was too afraid to replace her car,' Paul said.

'She ended up losing \$30,000 because she didn't want to drive an Audi anymore because she was afraid they would keep coming back.'

Paul calls the neighbourhood patrol guys every time he hears a disturbance.

'We are all fed up,' he said.

'We are fed up with being scared every time we hear a noise, one day someone is going to hurt one of these kids – and then they will be the one who pays for it.

'I think most of us are afraid we will do something extreme if we find them in our homes.'

...

An official patrol group has been set up by residents after smaller groups set out to protect their own streets earlier this year.

Louie told *Daily Mail Australia* he never intended to be part of a big group but realised it was important to help keep everyone safe.

'We patrol 24 hours a day, seven days a week,' he said.

'Police resources are spread too thin so we are here to help'.

He just wants everybody in his community to feel safe.

The group of patrol men don't take photos, use video cameras or weapons against the youths.

'We just show up when people call – as soon as the kids see us they just scatter.'

The patrol group was labelled as 'vigilantes' by police when they first started operating in the area.

'We tried to stop because we didn't want to get in trouble but we had so many messages calling for help we started up again,' Louie said.

WHO ARE THE APEX GANG?

- The group originated in Dandenong, about 30 kilometres south-west of Melbourne.
- The members are primarily from a Sudanese refugee background.
- The gang have been involved in a string of carjackings and home invasions in the Melbourne area.
- They are responsible for the Moomba riots in March [2016].
- They are aged from 12 to early 20s.
- The parents of members are so worried they are sending them back to Africa.

One man, who didn't want to be named, told *Daily Mail Australia* he had armed his wife and children with bats and hammers, and 'taught his eldest son to defend the family if he wasn't home'.

'The two younger kids know to hide in the cupboard and my 13-year-old has his own little bat,' the man said.

'I taught him not to hit people in the head with it but he knows where it is if he does need to use it.'

Louie said while he doesn't know if Apex is behind all of the attacks in his neighbourhood he does know that the young men and women hitting homes in his area are claiming to be affiliated.

'If they aren't Apex they are going by that brand—and saying they are,' Louie said.

All of the residents admitted to adding extra security to their homes following attacks in the area.

APPLY YOUR UNDERSTANDING

Read the case study 'Apex of fear' and answer the following questions.

1. Who are the Apex gang?
2. What have the Apex gang done to terrify people?
3. How has the Apex gang made people feel?
4. What steps have individuals taken in response to their fear?
5. In your opinion, which individuals/groups have acted to increase social cohesion? Justify your answer with specific examples from the case study.
6. In your opinion, which individuals/groups have acted to decrease social cohesion? Justify your answer with specific examples from the case study.
7. Suggest other actions the 'vigilante' group could have taken in response to the Apex gang.
8. The Victorian police claim that youth crime has in fact decreased in recent years. However, the people in this article feel that crime among youths is on the increase and that the police are not acting quickly enough to deal with the Apex gang. Why do you think people might think youth crime is on the rise even though it is not? Consider the impact social media and 24/7 access to news may have on this situation.
9. The Victorian government has responded to the Apex gang's actions and public concern by creating laws that make carjacking and home invasions punishable by a maximum of 25 years' imprisonment. Evaluate the impact these new laws may have on increasing social cohesion and reducing fear in the community. ['Evaluate' requires you to look at both sides of an argument and come to an overall conclusion about the argument. In this case, look at how the laws will increase cohesion and reduce fear and how they won't. Then decide if you think, overall, the laws will be effective.]

THE ROLE OF LAWS IN ACHIEVING SOCIAL COHESION

The main function of law is to maintain social cohesion; in other words, having a community where people are able to live with each other in a peaceful manner. The law enables us to live together by recognising our rights and those of others. The law places responsibilities on individuals to ensure that their actions don't hurt others. The law does this by establishing codes of behaviour. The law also provides ways to resolve disputes when they do happen.

Recognising rights and responsibilities

Laws assist in defining our rights and responsibilities and thus help ensure social cohesion is achieved. By establishing our rights and responsibilities, the law ensures that all individuals are free to act but imposes limits on these actions so that they do not infringe upon the rights of others.

LAWS: Legal rules created and enforced by institutions within the legal system

Criminal law deals with behaviour considered harmful to society as a whole. Civil law is the body of laws regulating the behaviour of private individuals.

Laws include criminal law and civil law. When thinking about the term 'law', most people identify examples of criminal law. Articles in newspapers or programs on television give you some understanding of criminal law. Crimes such as murder, theft or rape are widely reported by the media, but the law is not only concerned with criminal behaviour. The law also deals with other aspects of our relationships with each other. For example, civil law deals with the agreements made between individuals (contract law) and with the ownership of property. You may have heard of cases in which a person goes to court to obtain compensation for injuries suffered as a result of another person's carelessness. This is an area of civil law known as negligence. There are also family laws that govern how and when people may marry, or how and when people may divorce.

Establishing codes of behaviour

All laws are concerned with establishing codes of behaviour for people. They do this in three ways.

Laws may demand that we behave in a certain way. For example, road laws state that we must drive on the left-hand side of the road and must wear a seatbelt when in a car. The first law ensures the safety of all citizens by imposing order on the roads, while the second ensures that those within a car are safe from harm should an accident occur.

Laws may place restrictions on our behaviour. Laws can restrict the behaviour of individuals in the community. For example, traffic regulations set speed limits that motorists are expected to observe. Like driving on the left-hand side of the road, speed limits are there to protect all citizens from injury.

Laws may prohibit certain types of behaviour. Laws prohibit behaviour that may be considered dangerous to others. For example, the law prohibits most forms of violence in order to protect a person's right to feel safe and secure in society.

Establishing ways to resolve disputes

When a law is made (this is discussed in greater detail in Chapter 2), the lawmaker must make sure that, should the law be breached, the community or an individual has a method to resolve a dispute or seek redress for any harm. In criminal law, if a person has committed a crime such as murder or assault, the police will charge the offender and the Department of Public Prosecutions (DPP) will conduct the court case against the accused on behalf of the community. If the accused is found guilty, they will receive a sanction such as a fine or imprisonment. In civil law, the person who has had their right or rights infringed may take the offender to court personally and seek a remedy; this may include a payment of damages or an injunction to stop someone continuing to take harmful action. These methods of dispute resolution will be discussed in greater depth in Unit 2.

By providing the community and individuals with these avenues to resolve disputes, laws help to guarantee the peace and harmony of our society.



APPLY YOUR UNDERSTANDING

GROUP WORK—LAWS

In groups of three or four, copy and complete the following table of laws.

CATEGORY OF LAWS	WHO MUST OBEY THE LAWS? TRY TO BE AS SPECIFIC AS POSSIBLE.	WHO DO YOU THINK MAKES THE LAWS—LOCAL, STATE OR FEDERAL PARLIAMENT?	WHO DO YOU THINK ENFORCES THE LAWS—THE POLICE, INDIVIDUALS OR THE COURT?	WHAT ARE THREE EXAMPLES OF THIS TYPE OF LAW?
Road safety				
Assault				
Human rights				
Homicide				
Marriage and divorce				
Property				

Functions of the law

The main function of the law is to provide a framework in which the community can exist in freedom and harmony. At its most general level, the law defines clearly the kind of community the majority of people want.

The law reflects community values

The law recognises the political values of the community. In Australia, the law requires that we are governed by democratically elected parliaments at the Commonwealth and State levels. The law also sets out the powers to be exercised by each of these parliaments.

The law reflects the social and moral values of the community. For example, the values that the community places on the ideals of equality are recognised in our anti-discrimination laws.

Laws also reflect the economic values of a community. They control the conduct of businesses, which to some extent ensures the freedom of the marketplace. Laws attempt to ensure that trading is generally carried out cooperatively and that individuals are treated fairly in their dealings with others. For example, the *Fair Trading Act 1999* (Vic) establishes rights of consumers.

In recent times the law has moved into areas such as changes to technology and protection of the environment.

The law establishes acceptable behaviour

To achieve a peaceful and cooperative community, the law needs to set down boundaries of acceptable conduct. Many specific laws are made to guide people's behaviour. These specific laws include both criminal and civil law. For example, criminal law prohibits specific acts, such as murder, theft and rape.

The law resolves disputes

The law must establish ways to resolve disputes when they arise. It is the role of courts and tribunals to interpret and apply the law. These bodies operate with the aid of other organisations, such as the police. Laws have been developed to describe how the courts will carry out their functions and, where a criminal offence has been committed, the law lays down the sanction that may be appropriate.

The law provides for change

Finally, laws need to be able to meet the changing needs of society. The types of laws we have today are very different from those that existed early last century. For example, the motor car was a novelty then, and there were few laws to regulate who could drive a car or how fast. Today the car is the main form of transport throughout Australia. As a result of the increased number of vehicles, we need a number of laws to govern their use, their ownership and even their impact on society.

APPLY YOUR UNDERSTANDING

CLASS DISCUSSION—VALUES AND THE LAW

There have been a number of changes to the law recently. Identify the type of value (social, moral, economic, political, technological or environmental) in the following examples. Discuss and justify your responses to the class.

CHANGE TO THE LAW	VALUE/S
Smoking is no longer permitted in pubs and clubs or in outdoor dining areas such as cafes and takeaway shops	
Cyberstalking on the internet is illegal	
Under Hoon Laws, drivers' vehicles could be impounded, forfeited or destroyed if the drivers were charged with dangerous driving	
All immigrants wishing to become Australian citizens must complete a citizenship test	
It is illegal for anyone to tattoo or perform scarification on anyone under the age of 18 years	
Trading or selling goods and services on Anzac Day or Easter Sunday is limited by the law	
It is illegal to vilify or defame someone on racial and religious grounds	
The Australian Renewable Energy Agency was established to help increase the use of renewable energy in Australia	

THE ROLE OF THE LEGAL SYSTEM IN ACHIEVING SOCIAL COHESION

For the law to work, we need organisations with the authority to make the law. We also need ways of ensuring that people obey it. The different bodies and procedures developed by our society to create and enforce the law are part of what we call the legal system. A legal system is a system of rules made by recognised bodies or developed through recognised means, and enforced in a manner acceptable to the community. Each of the elements of the legal system will be discussed in more detail throughout the rest of the textbook; however, a brief discussion is included below.

The legal system promotes social cohesion by establishing and enforcing the rights and responsibilities of individuals.

The Australian legal system's foundation

Australia's legal system was established on 1 January 1901 when the six former British colonies federated to become the six states of the Australian nation. Federation occurred following the enactment of the Australian constitution in the *Commonwealth of Australia Constitution Act 1900* (UK). Australia's legal system is based mainly on the British Westminster system but takes some elements from the United States' 'Washington system'. Thus, Australia's legal system is sometimes said to be the 'Washminster system'.

Our system took three elements from the Washington system; namely, that we would have a federal system with legislative power divided between a central government (the Commonwealth) and the state governments, a House of Representatives or lower house to represent the people and a Senate or upper house to represent the interests of the States.

From the British Westminster system came the idea of responsible government (ministers are responsible to parliament for their actions and parliament is responsible to the voters for its actions), the practice that ministers would come from the parliament and that the government would come from the house with the majority of support in the lower house of parliament.

From both systems came the concept that courts would settle disputes that fall within their jurisdictions and the **common law** system. The common law system is also known as *precedent* and is a system that allows laws to be made by not only the parliament but also the courts. If a court must make a decision on a case where no law currently exists, the court will create a law when the judge makes their decision. Other judges will have to follow this law if they are determining a case with similar issues.

COMMON LAW: laws developed by the courts through the application of precedent

It is this legal system that assists in creating social cohesion in our society.

How does the legal system achieve social cohesion?

The parliaments (at both state and commonwealth level) and the courts create the laws that establish the rights and responsibilities that all citizens must follow. As discussed earlier, the laws tell individuals how to behave and ensure that society functions peacefully. Not only do parliaments create laws to be followed, they also establish the bodies that enforce the laws and resolve disputes. These bodies also make up part of the legal system and help ensure social cohesion.

Bodies that assist in creating social cohesion include the police, courts and tribunals. The police are responsible for enforcing the law and ensure that individuals abide by the codes of conduct established by the law. For example, if a person steals a television from a store, it is up to the police to arrest and charge the offender, then gather the evidence that will be used to try them in court. By arresting and charging an individual, the police ensure that the individual can no longer behave in this manner, and they are also demonstrating to the community that this sort of behaviour will not be accepted. This assists in maintaining peace and protecting the rights of individuals to live in a safe and harmonious society.

Courts and tribunals resolve disputes to bring a conclusion to a case. This may involve sentencing an offender or awarding a remedy in a civil case. It is the role of these bodies to interpret the laws made by the parliaments or other courts, and to apply them to the case before them in order to determine the case's outcome. By resolving disputes, courts and tribunals help maintain social cohesion as they bring peaceful and lawful ends to disputes.



Victoria Police assist in creating social cohesion.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

- The legal system is a complex system, analogous to a maze with numerous paths to follow.
- The legal system is in place to sustain social cohesion, minimising conflict through the community and recognising that all people have rights and responsibilities.
 - > Individuals can ensure social cohesion by following the law.
 - > Individuals can disrupt social cohesion by not following the law.
 - > Ignorance is not an excuse for behaviours or actions that break the law.
- The law achieves social cohesion through a number of components such as:
 - > Recognising our rights and responsibilities
 - > Establishing codes of behaviour by:
 - Demanding that we behave in a certain way
 - Restricting our behaviour
 - Prohibiting certain types of behaviour
 - > Establishing ways to resolve disputes when criminal law or civil law has been breached.
- The law provides a framework in which a community can exist in freedom and harmony. It reflects community values, establishes acceptable behaviour, resolves disputes and provides for change.

- Social cohesion is achieved through the role of the legal system, a system of rules made by recognised bodies or through a recognised means and enforced in a manner acceptable to the community.
- Recognised bodies that can create laws include parliaments at both the state and Commonwealth level.
- Parliaments also establish the bodies that enforce the laws and resolve disputes.
- Bodies that assist in creating social cohesion include the police, courts and tribunals.
- The foundations of the Australian legal system include:
 - > Elements taken from the Washington (US) system:
 - Federal system
 - House of Representatives
 - Senate
 - > Elements taken from the Westminster (UK) system:
 - Responsible government
 - Government from the lower house
 - > Elements taken from both systems:
 - Courts
 - Common law.

CHECK YOUR UNDERSTANDING

1. Explain the concept of the 'legal maze'.
2. Define social cohesion.
3. Explain why 'ignorance is not an excuse' and how people can ensure they are aware of their rights and responsibilities.
4. Explain how a person's actions can help or hinder social cohesion.
5. Compare the terms 'rights' and 'responsibilities'. Use examples in your answer to support your comparison. [Remember: the term 'compare' requires you to state similarities and differences. This means you must say how the two terms are alike and different. You must do more than state they are alike or different. Explain HOW they are alike or different.]
6. Define the terms 'criminal law' and 'civil law'. How do these types of laws aid social cohesion?
7. Suggest how establishing codes of behaviour achieves social cohesion.
8. Describe the main functions of the law. Which of the main functions do you feel best aids the development of social cohesion in our society? Justify your answer.
9. Explain how the Australian legal system developed.
10. Describe how the following elements of the Australian legal system help to achieve social cohesion:
 - a. Parliaments
 - b. Courts and tribunals
 - c. The police.

APPLY YOUR UNDERSTANDING

1. Choose 10 incidents from this cartoon. For each incident you have selected, describe what appears to have happened, the people or groups involved, how the incident has reduced social cohesion and how the behaviour could be altered to improve social cohesion.



2. Create a poster, flowchart, chart, graphic organiser or mind map that outlines how social cohesion is achieved in Australia. Make sure your presentation includes references to the role of the individual, laws and legal system.
3. Find a news article about a law or an action taken by an individual and write a report of between 150 and 250 words that demonstrates your understanding of how the law or behaviour described in the article relates to the issue of social cohesion.
4. Create an advertisement for either newspaper or television that helps explain why following the law is important for our society. You might like to choose a specific law, such as speeding, or discuss abiding by the law in general. Ensure that you make reference to how the actions of individuals help achieve social cohesion. Remember, you should create the advertisement as if people have no understanding of the term 'social cohesion'—explain your point simply but accurately. It is also important to keep in mind that an advertisement on television is usually between 30 and 60 seconds, while the more words a newspaper advertisement has, the more expensive it will be. Thus, be brief and to the point.

SPEED LIMITS – HELPING ACHIEVE SOCIAL COHESION

ASSESSMENT

In Victoria, traffic offences can apply to drivers, motorcyclists, cyclists, pedestrians, rollerbladers or skateboarders. These offences can include speeding, driving under the influence of alcohol or drugs (including refusing to take an alcohol or drug test) and careless or dangerous driving.

'Cameras Save Lives' is a program developed by the Department of Justice and Regulation to explain how red-light and speed cameras work while promoting safer road use. In the six months between July 2016 and December 2016, 710 971 speeding and red-light infringements were issued from mobile and fixed cameras at intersections and on highways. This equates to approximately 148 495 fines a month or 3950 per day.

OFFENCE	TOTAL SPEEDING INFRINGEMENTS FROM FIXED AND MOBILE CAMERA SYSTEMS
EXCEED SPEED BY LESS THAN 10 KM/H	482 938
EXCEED SPEED BY 10 KM/H BUT LESS THAN 15 KM/H	103 092
EXCEED SPEED BY 15 KM/H BUT LESS THAN 25 KM/H	36 578
EXCEED SPEED BY 25 KM/H BUT LESS THAN 30 KM/H	3549
EXCEED SPEED BY 30 KM/H BUT LESS THAN 35 KM/H	1747
EXCEED SPEED BY 35 KM/H BUT LESS THAN 40 KM/H	949
EXCEED SPEED BY 40 KM/H BUT LESS THAN 45 KM/H	520
EXCEED SPEED BY 45 KM/H OR MORE	553
EXCEED SPEED BY MORE THAN 20 KM/H IN 110 KM/H ZONE	330
TOTAL	630 256

1.1 Number of speeding infringements issued (July 2016 to December 2016)

Source:
Cameras Save Lives,
www.camerassavelives.vic.gov.au





ASSESSMENT

A number of speed limits apply throughout Victoria. The law places the responsibility on the motorist to pay close attention to road signs so that speeding does not occur. As a general rule, 50 km/h is the speed limit in built-up areas. Speed limits can vary depending on special conditions such as service roads, school zones or shopping centres (which are limited to 40 km/h). In these places, the limit is displayed on signs.

If a driver is caught for excessive speed and pleads guilty to this offence, their licence is automatically suspended. Excessive speed is defined as 25 km/h (or more) above the speed limit, or more than 130 km/h. If the speeding was less than these limits, a magistrate has the discretion to choose whether or not to suspend their licence.

A driver caught speeding not only incurs a fine, but they also accrue demerit points. This system was set up to penalise drivers for unsafe driving while encouraging people to drive more carefully and change poor driving behaviour. Learner permit or probationary licence holders cannot accrue any more than 5 demerit points in a one-year period or 12 demerit points over three years. Full licence holders cannot accrue 12 points in any three-year period. Table 1.2 shows the demerit points for different levels of speeding.

'Ignorance of the law is no excuse', so it is not a defence for a motorist to say that they were honestly mistaken about the speed limit or did not know what speed they were travelling at. If a driver is unsure of a speed limit, they should travel at the default limit of 50 km/h. In some cases, a driver may have a good reason for speeding. For example, they may need to avoid urgent danger, or they may have had a seizure at the wheel. In situations such as this, or for offences of less than 10 km/h over the speed limit, the police have the discretion to issue a warning providing the motorist accepts responsibility. The result is that the driver does not have to go to court and does not lose their licence. This warning only applies to a driver if they have not been given a speeding or traffic fine or official warning within the last two years, they hold a current licence and they meet the Victoria Police's criteria for a 'Good Driving Record'. That is, they have not had any demerit points in the past two years.

As a general rule, a driver will be given an on-the-spot speeding fine. Every driver has the right to challenge and dispute a speeding fine, but this must be done in writing and within a specified time frame (this is usually four weeks). If the police reject an application for review of an infringement, they must refer the matter to the Magistrates' Court for determination by a judicial officer. The judicial officer will decide whether or not the infringement was appropriate and, if deemed appropriate, the penalty to apply.

1.2 Demerit points for speeding offences in Victoria

DEMERIT POINT OFFENCES	NUMBER OF POINTS
EXCEED SPEED LIMIT BY 45 KM/H OR MORE*	8
EXCEED SPEED LIMIT BY 35 KM/H OR MORE BUT LESS THAN 45KM/H	6
EXCEED SPEED LIMIT BY 25 KM/H OR MORE BUT LESS THAN 35KM/H	4
EXCEED SPEED LIMIT BY 10 KM/H OR MORE BUT LESS THAN 25KM/H	3
EXCEED SPEED LIMIT BY LESS THAN 10 KM/H (POLICE DISCRETION MAY APPLY)	1

***NOTE:** If a driver has exceeded the speed limit by 45 km/h, then Hoon Laws may also apply. If it is the driver's first offence, then their car is impounded or immobilised for 30 days. If this is their second time, then their car will be impounded for up to three months. If it is their third time, then the driver may lose their vehicle forever.

Source:
www.vicroads.vic.gov.au

Read the case study 'Speed limits—helping to achieve social cohesion', then answer the following questions and tasks.

ASSESSMENT HINT: *Refer to the number of marks assigned to each question to determine how long you should spend on each question and how many different points you should make in your answer. As a guide, 1 mark should take about 90 seconds to write and include 1 point; 4 marks should take about 6 minutes to write and include 4 different points.*

1. What do you consider to be the purpose of the laws on speeding? (2 marks)
2. To what extent do these laws reflect community values, establish codes of conduct and provide a means to resolve disputes? (6 marks)
3. Describe three advantages and three disadvantages of having laws to regulate speed limits. (6 marks)
4. Excessive speed is a problem in our community. Suggest two possible solutions to this problem. (2 marks)
5. One suggestion to reduce the incidence of speeding by young drivers is to increase the driving age to 21. Evaluate the advantages and disadvantages of this solution. (6 marks)
6. If the government issues more than 148 000 fines per month, how does this help achieve social cohesion? Use evidence to support your view. (3 marks)
7. What is the penalty for someone who is speeding 45 km/h over the speed limit? Is this excessive? Discuss with relation to the achievement of social cohesion. (5 marks) **ASSESSMENT HINT:** *'Discuss' requires you to present an argument by looking at all sides of the issue. You should present a reasoned argument that looks at both the for and against of this issue. You may include your opinion as part of the argument, but you do not have to.*
8. The case file identifies some good reasons for speeding. Do you think it is ever reasonable to speed? Explain your point of view. (3 marks)
9. 'Evaluate the ability of speeding fines and speed cameras to help achieve social cohesion.' (10 marks) **ASSESSMENT HINT:** *'Evaluate' requires you to carefully consider the statement in this question and comment on the strengths and weaknesses associated with the statement/issue. You must make an overall judgment about the statement to receive full marks.*



ASSESSMENT



WHAT MAKES AN EFFECTIVE LAW?

UNIT 1 – AREA OF STUDY 1: Legal foundations

Justice can mean different things to different people, whether you're a judge, a lawyer or the accused. It boils down to three basic principles: fairness, equality and access.

OUTCOME

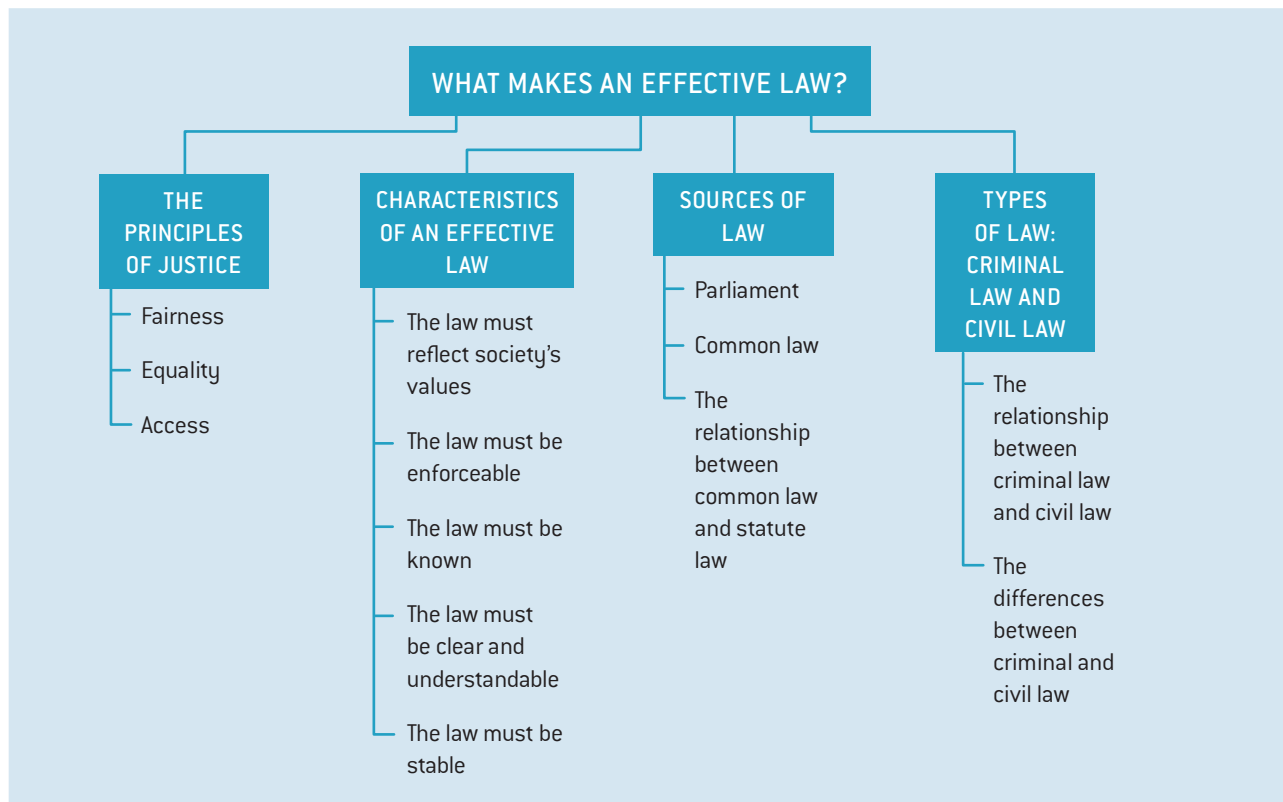
On completion of this unit the student should be able to describe the main sources and types of law, and assess the effectiveness of laws. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > the principles of justice: fairness, equality and access
- > characteristics of an effective law such as it reflects society's values; is enforceable; is known; is clear and understood and is stable
- > sources of law such as common law and statute law
- > types of law such as criminal law and civil law
- > the distinction and relationship between criminal law and civil law

KEY SKILLS

- > define key legal terminology
- > research and analyse relevant information about the sources and types of laws
- > classify a law according to its source and type



KEY TERMS

access	To ensure all have the means or opportunity to attain dispute settlement
Acts	Laws passed by parliament, also known as legislation or statutes
equality	To be treated alike with the same status, rights, and opportunities
fairness	To treat without fear or favour
justice	A universal feature whereby each person is entitled to their rights and bound by their responsibilities
legal rules	Laws created by institutions within the legal system and enforced by the legal system
legislation	Laws made by parliament
norms	Social expectations within social groups
parliamentary sovereignty	Parliament is the ultimate law-making body that can make, change or repeal legislation as well as override common law
precedent	A legal principle developed by the courts
statutes	Laws made by parliament
values	The importance of social, moral, political, economic, technological and environmental standards

THE PRINCIPLES OF JUSTICE

What is justice? For different people at different times it means different things.

The Honourable Marilyn Warren AC

The Honourable Marilyn Warren AC, Chief Justice of Victoria, delivered the Newman Lecture in 2014, where she directly addressed this question. Understanding the notion of ‘justice’ is a complex task; **justice** can mean different things to different people.

For example:

- To the ordinary person, justice will often mean due punishment when a criminal is sentenced for a crime.
- To the popular media, justice will generally mean harsh punishment, primarily focused on strong retribution and deterrence.
- To the politician, justice will often equate with a mix of fairness and safety.
- To the accused person, justice means fairness—a fair hearing, a fair sentence that punishes not too harshly and offers hope.
- To the philosopher, justice can be about morality. It can also equate with fairness.
- To the lawyer, justice means the application of the rule of law that is the certainty of applying **legal rules** developed over centuries to resolve disputes between citizens and the citizen and the state.
- To the judge, justice is the application of the rule of law without fear or favour, affection or ill will.

JUSTICE: a universal feature whereby each person is entitled to their rights and bound by their responsibilities

LEGAL RULES: laws created by institutions within the legal system and enforced by the legal system

HAVE YOU...	YES / NO / UNSURE
Wondered how you would react if you were the victim of crime?	
Wondered how you would react if you were accused of a crime?	
Ever been inside or seen a court building?	
Ever considered what would be a just sentence for burglary or manslaughter?	
Known someone who was in need of access to the judicial system in order to resolve a dispute?	
Had someone treat you differently based on your sex, religion, nationality or ethnic descent?	
Been required to provide a testimony or evidence for a criminal or civil case?	
Unknowingly broken a law?	
Read the details of a law but not understood its meaning?	
Read or seen on television about the passing or amendment of a law through parliament?	

The County Court of Victoria has the symbol of justice displayed on its façade. ‘She’ is depicted as a woman wearing a blindfold, holding scales in her right hand and a sword in her left hand. Many courts around Australia have a similar image or symbol of justice. This woman is commonly known as ‘Lady Justice’. As a symbol of justice, she is a very powerful figure. The blindfold represents impartiality, regardless of wealth, position or status. For example, an accused, regardless of who they are, would expect a fair and unbiased hearing. The scales represent balance—the ability of our legal system to consider both sides in a case. That is, all parties in either civil or criminal matters would be given the same opportunities to present their version of the truth. The sword represents the legal system’s authority and its ability to make and stand by its decision.

All Legal Studies students can identify what is unjust; you've surely spoken the phrase 'that's unfair' a number of times in your life. However, the concept of what is just can mean different things to people. This can vary with different situations or even at different times. Take, for example, someone accused of a crime. The concept of justice for this person would be to obtain a fair and unbiased hearing. For the victim of this crime, justice may mean having the wrongdoer punished severely. In the legal system, justice is generally seen as a universal feature, whereby each person is entitled to their rights and bound by their responsibilities.

The principles of justice have many meanings; however, our society aims to allow all individuals to achieve the three basic values of fairness, equality and access.

FAIRNESS

Fairness relates to the processes, procedures and principles in our legal system that ensure all are treated fairly without fear or favour, such as:

- procedural fairness related to the rules of evidence and procedure:
 - > open and public hearings
 - > committal procedures
 - > the right to appeal
 - > the provision of interpreters
- legal rights and protections, such as the right to:
 - > silence
 - > legal representation
 - > trial by jury
 - > rehabilitation
- The adversary system and the use of
 - > independent arbitrator
 - > individual control
 - > burden and standard of proof
 - > innocent until proven guilty
 - > presumption of innocence
- The doctrine of precedent, creating:
 - > consistency
 - > certainty
 - > uniformity.

EQUALITY

Equality relates to the processes, procedures and principles in our legal system that ensure all are treated equally or alike with the same status, rights and opportunities, such as:

- natural justice and equal opportunity for the:
 - > accused
 - > victim
 - > community
 - > legal system
 - > parliament



FAIRNESS: to treat without fear or favour

EQUALITY: to be treated alike with the same status, rights and opportunities

- police investigations counter-balanced with individual rights and protections
- independent judge and jury
- rules of evidence and procedure in:
 - > civil processes and procedures
 - pleadings, discovery and direction hearings
 - > criminal process and procedures
 - bail or remand, committal procedures and direction hearings
 - > anti-discrimination laws.

Statute law is created by parliament.

ACCESS

ACCESS: to ensure all have the means or opportunity to attain dispute settlement

Access relates to the establishment of a range of methods and institutions used to ensure all have the means, understanding and opportunity to attain dispute settlement, such as:

- a variety of dispute resolution methods, including:
 - > mediation
 - > conciliation
 - > arbitration (VCAT or Magistrates' Court)
- complaints bodies such as:
 - > Consumer Affairs Victoria
 - > Ombudsman
 - > government departments
 - > municipal councils
 - > Crimes Compensation Tribunal
- VCAT with its many specialist tribunals (called Lists)
- the use of judicial determination in a range of courts such as:
 - > Drugs Court
 - > Koori Court
 - > Neighbourhood Justice Centre Court
- Legal Aid and pro bono schemes
- access to a range of rehabilitation programs, including:
 - > alcohol and other drug treatment programs
 - > Alcohol and Driving Education
 - > Cannabis Education Program
 - > Relapse Prevention Program
 - > Understanding Substance Abuse and Dependence
 - > mental health intensive treatment
- Education, skills and training, including:
 - > Think First
 - > Managing Emotions
 - > Me and My Family
 - > Managing Our Relationships
- Criminal Justice Diversion Program
- Indigenous education and training.



The Orana Haven drug rehabilitation centre.

FAIRNESS	EQUALITY	ACCESS
Fairness relates to the processes, procedures and principles in our legal system that ensure all are treated fairly without fear or favour, such as: - procedural fairness of rules of evidence and procedure - legal rights and protections - the adversary system - the doctrine of precedent	Equality relates to the processes, procedures and principles in our legal system that ensure all are treated equally or alike with the same status, rights, and opportunities, such as: - natural justice and equal opportunity - police investigations versus individual rights - independent judge and jury - rules of evidence and procedure in civil and criminal cases - anti-discrimination laws	Access relates to the establishment of a range of methods and institutions used to ensure all have the means, understanding and opportunity to attain dispute settlement, such as: - a variety of dispute resolution methods - complaints bodies - VCAT - the use of judicial determination - specialist courts and lists - Legal Aid and pro bono schemes - rehabilitation programs - education, skills and training - Criminal Justice Diversion Program - Indigenous education and training

2.1 The principles of justice

APPLY YOUR UNDERSTANDING

UNDERSTANDING AND APPLYING THE CONCEPT OF JUSTICE

- Complete the following prior knowledge activities:
 - Identify five examples of where justice has been achieved in our legal system.
 - Identify a document that protects justice.
 - Identify an organisation that fights for justice.
 - Identify a famous person who has fought for justice.
 - Identify a book or film about justice.
 - Name an Australian case that illustrates a justice issue.
 - Identify a country where people are denied justice as a result of their ethnicity or race.
 - Identify an issue of justice that is controversial.

- Define the term 'justice'.

- Read the following situation and explain what justice means for each of the individuals, groups or institutions identified in the table on page 24.

James, who was three times over the legal alcohol limit, smashed his car into oncoming traffic injuring Jenny. When police arrived at the scene of the accident, there was no sign of the driver. He was later found at home and claimed that he knew nothing about the accident. Jenny was taken to hospital with life-threatening injuries. During a police interview, James stated that he could not recall getting into the car to drive. A sleep expert gave evidence during the hearing that James was asleep due to his intoxication at the time of the accident.

	WHAT DOES JUSTICE MEAN TO EACH INDIVIDUAL, GROUP OR INSTITUTION?	WHAT IF JAMES WAS GUILTY OF THE CRIME, WHAT WOULD JUSTICE LOOK LIKE TO EACH INDIVIDUAL, GROUP OR INSTITUTION?	WHAT IF JAMES WAS INNOCENT OF THE CRIME, WHAT WOULD JUSTICE LOOK LIKE TO EACH INDIVIDUAL, GROUP OR INSTITUTION?
Parliament, the lawmaker			
Courts, the law enforcer			
The police			
James, the accused			
The defence counsel			
The prosecution			
Jenny, the victim			
The victim's family			
The community			

4. ‘Justice means different thing to different people.’ To what extent do you believe there is truth in this statement? Discuss your response, identifying a number of issues reported in the media.

An effective law reflects society's values and is enforceable, known to individuals, clear, understandable and stable.

CHARACTERISTICS OF AN EFFECTIVE LAW

To achieve social cohesion, the law sets down boundaries of acceptable conduct. Many specific laws are made to guide people’s behaviour. Social cohesion provides members of a community the opportunity to live together in peace, safety and with security, order and harmony, recognising that all people have rights and responsibilities and providing the methods to resolve conflicts. These specific laws include both criminal and civil law. For example, criminal law aims to protect society and prohibits specific acts, such as murder and theft, while civil law enforces breaches of rights between individuals such as negligence and contracts. The law also establishes ways to resolve disputes peacefully when they arise. It is the role of courts and tribunals to apply and interpret the law. These bodies operate with the aid of other institutions, such as the police.

In order for a law to be effective, it must satisfy the following characteristics: it reflects society’s values, is easy to enforce, it can be known, it is clear and understood, and it is stable.

THE LAW MUST REFLECT SOCIETY’S VALUES

The law reflects a range of values our society seeks to regulate. The term value is seen as something of importance. These **values** are social, moral, political, economic, technological and environmental. In some cases, these values overlap (such as social

VALUES: the importance of social, moral, political, economic, technological and environmental standards

and moral values). For example, the law of homicide is there to protect members of the community; however, it also reflects the moral value of protecting life.

Social values

Social cohesion is achieved in many cases through laws reflecting social values—that is, the ability for a society to set down boundaries of acceptable conduct to guide behaviour, including **norms** or qualities considered valuable. The following are good examples of protecting the community from harm:

NORMS: social expectations within social groups

- Banning smoking in the outdoor dining areas of cafes, take-away shops and licensed premises
- Anti-hoon driving laws, which allow the police to impound vehicles for 30 days for the first offence, with repeat offenders three months, with a minimum 45 days, or having their vehicle seized permanently and crushed
- The use of protective services officers (PSOs), who are given powers to patrol railway stations and other regulated areas.

Moral values

Moral values relate to what the community believe is the difference between right and wrong. These values at times can be highly controversial. For example:

- The decriminalisation of abortion, where a woman can access abortion up to 24 weeks
- Euthanasia laws in Victoria that provide for an enduring power of attorney, which allow an individual to make decisions about medical treatment on behalf of another
- One-punch attacks that result in death – *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014 (Vic)*.

Political values

The law recognises the political values of the community. The law also sets out the powers to be exercised by each of the parliaments. In Australia, the law requires that we are governed by democratically elected parliaments, a Constitution and a Federation. Our political values include:

- The division of powers between the Commonwealth Parliament and the states, as set out in the Australian Constitution.
- The requirement of completing a citizenship and English language test in order to become an Australian citizen.
- Enrolling to vote, compulsory voting and secret ballot are all protected by Commonwealth and state law.



Australians exercising their right to vote in the 2016 Federal Election.

Economic values

Laws also reflect the economic values of a community. Laws promote free enterprise, wealth creation and the conduct of businesses, which to some extent ensures the freedom of the marketplace. Laws attempt to ensure that trading is generally carried out cooperatively and that individuals are treated fairly in their dealings with others. These laws include:

- Yearly reviews to the minimum wage by the Fair Work Commission
- Changes to the taxation system such as the Goods and Services Tax (GST) and annual tax rates
- Consumer protection laws, such as preventing dummy bidding or including country-of-origin labelling.

Technological values

Technological advances move very quickly and the law at times can be out of step with these changes. Laws are made by parliament to keep up with changes to technology, such as:

- The use of mobile phones while driving is illegal for learner and P-platers, even with hands-free devices
- Metadata retention, which requires telecommunication companies to retain a range of data for up to two years (such as who has called you and for how long, which internet site you have visited and your email history)
- Identity theft and phishing (an online technique to steal personal information).

Environmental values

Our community has become acutely aware of the issues related to the protection of the environment. Laws have been designed to reflect environmental values. Such laws cover:

- The Environmental Protection Authority (EPA) is charged with caring for the environment on a raft of issues including air, water and noise pollution, public littering offences and emissions from vehicles.
- Recreational fishing and licensing
- The regulation on providers to supply safe drinking water.

THE LAW MUST BE ENFORCEABLE

If the law is meant to reflect a range of values our society and regulate behaviour, then it must be capable of being enforced. If an individual breaches a criminal law or an

individual right, then they should be brought to justice. In order to enforce the law, it must also be consistently applied. In most cases, a law is considered unfair if it is not enforced or applied consistently from one case to the next. Individuals should be able to see how the law has been enforced or applied in the past to judge how it may be applied to their situation. Ways of enforcing the law include using:

- police, transit officers, public service officers
- council or by-laws officers
- official warnings or cautions
- summons or arrest
- court officers such as sheriffs
- on-the-spot fines
- community corrections order
- imprisonment.



Police making an arrest in the Melbourne CBD.

FINING THE HOMELESS – WHAT'S THE POINT?

It is not uncommon for a homeless person to accumulate large amounts in fines for offences such as begging, vagrancy, drinking in a public place and travelling without a valid ticket. Many homeless people accumulate large fines for minor street offences. Although begging in Victoria is illegal, it is not an uncommon sight in our city streets. Is the law on begging effective and is it easily enforceable?

THE LAW MUST BE KNOWN

When a police officer issues a fine for a criminal offence such as jaywalking, the offender cannot use the excuse 'I did not know'. According to the law, 'ignorance [of the law] is no excuse'. The law must be *known*. Knowledge of the law means that we are less likely to break the law.

This does not mean that we need to know every law ever made in Victoria or the whole of Australia, as that would be impossible. However, we do have a duty to know the law as it relates or applies to activities in our everyday lives. Examples of laws known to all of us include those relating to theft, assault, traffic offences, drink- or drug-driving and underage drinking.

THE LAW MUST BE CLEAR AND UNDERSTANDABLE

The law must be *clear* and *understandable*. To be easily understood, the law needs to be written in a way that most people in the community can understand what it means and see how it affects them as citizens. Laws must reflect the views and values of the majority and must be written in plain English that clearly sets out rights, responsibilities and penalties. If people do not understand the law, they will not obey it.

Here is an example of a law that is written in legal jargon or speak. It is unclear and difficult to understand. What do you think it means?



CREDIT ACT 1984—SECT 5

S. 5(1) def. of cash price amended by No. 6/1989 s. 48(a).

Cash price in relation to a contract of sale of, or credit sale contract relating to, goods or services—

- (a) unless the contract is one to which paragraph (b), (c) or (d) applies—means the price payable under the contract for the goods or services;
- (b) where, under the contract, credit for the payment for the goods or services is, or is to be, provided by the supplier or by a linked credit provider of the supplier and, at the time at which the contract is made, the goods or services are available for purchase from the supplier for cash—means the lowest price at which at that time the buyer might have bought the goods or services from the supplier for cash;
- (c) where, under the contract, credit for the payment for the goods or services is, or is to be, provided by the supplier or by a linked credit provider of the supplier and, at the time at which the contract is made, the goods or services are reasonably available for purchase for cash but are not available for purchase from the supplier for cash—means the price at which at that time the buyer might reasonably have bought goods or services of that kind for cash;
- (d) where, under the contract, credit for the payment for the goods or services is, or is to be, provided by the supplier or by a linked credit provider of the supplier and, at the time at which the contract is made, the goods or services are not reasonably available for purchase for cash—means the amount that is—
 - (i) in the case of a sale of goods, the reasonable value of the goods at that time;
 - (ii) in the case of a sale of services, the reasonable value at that time of the services (whether or not they have been supplied); or
 - (iii) in the case of a contract of sale that is a contract of sale of both goods and services, the sum of the reasonable value of the goods at that time and the reasonable value at that time of the services (whether or not they have been supplied); ...

THE LAW MUST BE STABLE

The law cannot be constantly changing. If the law were to constantly change, individuals could not be expected to know what the law is. This does not mean that the law should never change—it should change to meet the changing needs of society. Although the law must be stable, it must also be sufficiently flexible to overcome problems that may occur in the future, or to change to meet new needs. The types of laws we have today are very different from those that existed early last century.

THE INFLUENCE OF CHANGING VALUES

The issue of smoking is an example of how the changing values of society influence laws. There is growing concern in the community about the dangers of smoking.

While smoking itself is not a crime, laws about where a person can smoke, and how smoking can be promoted, reflect these concerns.

Rules have been passed to limit the places where people can smoke. Smoking is now banned in most indoor and outdoor areas, such as schools, hospitals, government departments, private workplaces, restaurants and hotels, shopping centres and public transport stations and shelters. It is illegal to smoke in a motor vehicle if a person under the age of 18 years is present.

The advertising of tobacco products is banned in magazines, newspapers and on television. The display of tobacco products and packaging is also banned in retail outlets, including temporary outlets. The Victorian Minister of Health is able to outlaw tobacco products and packaging that appeal to young people.

Cigarettes must not be sold in vans, tents or other temporary retail outlets, such as an ice-cream van or a food tent.

The sponsorship of major sporting events by tobacco companies is limited. In addition, there has been banning of the sale of tobacco at special events, such as the Royal Melbourne Show, the Grand Prix and the AFL Grand Final.

British American Tobacco Australia (BATA) challenged the Commonwealth Government in the High Court on the constitutional legality of the *Tobacco Plain Packaging Act 2011* (Cth), which is also known as 'the Packaging Act'. BATA lost the case.

The Packaging Act standardises the retail packaging and appearance of tobacco products. It imposes restrictions on the colour, shape and finish of retail packaging for tobacco products. It prohibits the use of trademarks, such as a brand, business or company name, on packaging. Pre-existing health messages and graphic warnings remain in place.

Recent smoking reforms to the law have targeted young people and second-hand smoke, as well as smoking in outdoor dining areas and the regulation of e-cigarettes and shisha tobacco.



Plain packaging for retail tobacco products

As a result of strong community support for this reform, with more than 73 per cent of Victorians supporting the introduction of a ban on smoking in outdoor dining areas, the Victorian Government introduced new laws to ban smoking in outdoor dining areas. From 1 August 2017, new reforms banned smoking in outdoor dining areas and regulated e-cigarettes and shisha tobacco in the same way as other tobacco products.

The *Tobacco Amendment Act 2016* (Vic) received Royal Assent on 18 October 2016. Retailers were given approximately 10 months to prepare for these changes. Smoke-free outdoor dining areas now include:

- premises, such as restaurants, cafes, take-away shops and licensed premises, including courtyard dining areas and footpath dining
- food fairs
- other organised outdoor events, including community or street festivals.

APPLY YOUR UNDERSTANDING

PATROLLED BEACHES IN VICTORIA—NOW SMOKE-FREE

A patrolled beach is defined as the area between the red and yellow lifesaving flags and within a 50-metre radius of the flags. Some local councils have also introduced local by-laws that prohibit smoking in other beach areas. Under these laws, an infringement penalty notice can be issued of up to 2 penalty units.

1. Using the characteristics of an effective law, answer the following questions on outlawing smoking on patrolled beaches in Victoria.

Describe the value/s this law reflects in society's social, moral, political, economic, technological or environmental values.	
Outline how well known this law is by the community and beachgoers.	
State the reasons for this law. Are they clear and understood by the community and beachgoers?	
Discuss how easy is it to enforce this law on beaches.	
Explain the changes to tobacco laws in Victoria. How stable has the law been in this area?	

2. Discuss the extent to which you believe outlawing smoking on patrolled beaches in Victoria is an effective law. Justify your response.

APPLY YOUR UNDERSTANDING

PAIR ACTIVITY—CHARACTERISTICS OF AN EFFECTIVE LAW

In pairs, complete the following activities related to the characteristics of an effective law.

1. Discuss with your partner each of the examples below and classify them according to society's social, moral, political, economic, technological and environmental values.

EXAMPLES OF LAWS	VALUE/S
Smoking is no longer permitted in pubs and clubs	
South Africa has a Bill of Rights	
Domestic partnerships provide equality of all couples, including same-sex and heterosexual	
Cyberstalking on social media is illegal	
Hoon laws keep road users safe	
Water and energy conservation assist us in being more effective global citizens	
Asylum seekers must apply to the Office of the United Nations High Commissioner for Refugees (UNHCR) before coming to Australia	
It is illegal for anyone to tattoo or perform scarification on anyone under the age of 18 years	
Trading or selling goods and services on Anzac Day or Easter Sunday is limited by the law	
The Victorian Law Reform Commission recommended the use of medical marijuana for sufferers of epilepsy	
Freedom of political speech is protected by the Constitution	
An accused individual is afforded the presumption of innocence	
It is illegal to vilify or defame someone on racial and religious grounds	

2. Draw up a table similar to the one below, and use the scale as a starting point for discussion. You will need to justify your response according to your scale.

Example: It is illegal for minors to drink in a private home without parental approval.

MARK THE SCALE WHERE YOU BELIEVE THE CHARACTERISTIC IS:	CRITERIA NOT PRESENT, DISCUSS WHY	CRITERIA PARTIALLY PRESENT, DISCUSS WHY	ALL CRITERIA PRESENT
ENFORCEABLE			
KNOWN			
CLEAR AND UNDERSTOOD			
STABLE			
IDENTIFY THE VALUE IT REFLECTS IN SOCIETY			

Here are three other examples to which you can apply the criteria.

- It is an offence to stalk someone on social media.
 - Hoon laws keep the community safe.
 - Shopping centres, pubs and clubs are now smoke-free.
3. Read the case study below on witchcraft, then answer the following questions.
- a. Discuss reasons why the *Sorcery Act 1971* was introduced by the Papua New Guinea government.
 - b. Using the *Sorcery Act 1971*, apply the characteristics of an effective law. Explain how each element is demonstrated.
 - c. Discuss the factors that limit the effectiveness of this law changing attitudes and values related to sorcery.
 - d. If you were the Attorney-General of Papua New Guinea and wanted to change the attitudes and values related to sorcery, what strategies would you put in place? Justify your view.

TRADITION RULES ON 'WITCHCRAFT' LAWS

CASE STUDY

ACCORDING to villagers and Papua New Guinean law, East Sepik Province villager Augustine Pohou was killed by black magic.

Two men were jailed for a year by a district court for killing Pohou with sorcery. The court ruled that the two men took his spirit from his body, killed it, and returned it to his body, leaving Pohou physically alive but spiritually dead.

A week later Pohou became physically ill and died in hospital. Pohou's family confronted the two men—paid \$27 by a third man—who admitted killing him by sorcery. Their one-year sentences were the maximum available under the *Sorcery Act 1971*.

The Act accepts that people in some regions believe in sorcery and makes the use of sorcery a criminal offence. The Act, in an attempt to reconcile Western law with traditional Papuan beliefs, allows courts to consider the use of sorcery in criminal cases. It does not accept the validity of sorcery—its use is criminal—but accepts that people, both perpetrators and victims, believe in sorcery.

Papua New Guinea has a history of witchhunts and brutal deaths. Four women accused of causing a fatal road accident were tortured with hot metal rods until they confessed to witchcraft. They were then murdered. In another recent case, 15 women were hacked to death with machetes for allegedly practising witchcraft.

In one province of PNG the number of witch killings is estimated at 200 a year. Exact figures are difficult—witnesses rarely speak to authorities. The resurgence of black magic can be attributed to two factors. There has been an AIDS epidemic in PNG. Many villagers do not understand why Western medicine cannot stop people dying from AIDS and are looking to the old beliefs in magic to explain the epidemic. There has also been an increase in marijuana use in some regions.

Violence against alleged sorcerers by superstitious clans has not been confined to the highlands provinces. Allegations of witchcraft have spread to urban centres and a woman from the highlands province of Chuave was recently hacked to death in the Port Moresby suburb of Six-Mile because she was suspected of being a sorcerer.

There is little that the police can do to investigate these killings. Such cases are extremely difficult to bring to court. People are scared of giving evidence and many accept the assaults and killings as part of their culture that recognises the power of sorcery.

There are two main sources of law: statute law and common law

SOURCES OF LAW

There are two main sources of law in Australia: laws made by parliaments (known as statute law) and laws made by judges (known as common law).

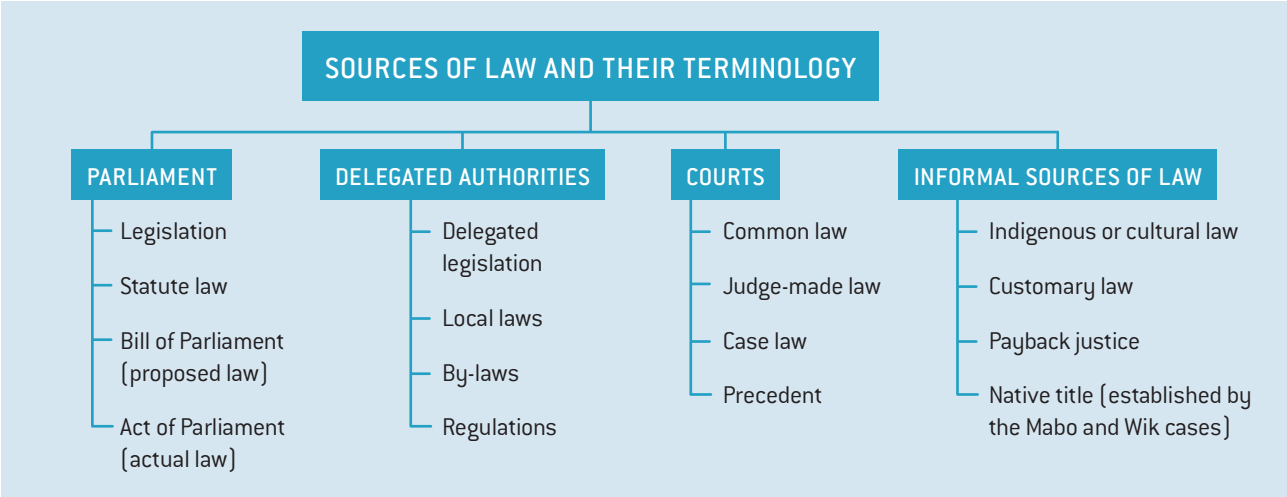
PARLIAMENT

Statute law is created by parliament. There are nine parliaments in Australia: a commonwealth parliament, six state parliaments and two territory parliaments (those of the Northern Territory and the Australian Capital Territory). These parliaments pass written laws in the form of **Acts**, **legislation** or **statutes**. All parliaments have **parliamentary sovereignty**; that is, they have ultimate law-making authority. They can make, change or repeal (cancel) previous legislation as well as override common law. For example, the Victorian Parliament is able to override a case of the High Court of Australia (as it did with the Dietrich case of 1992, which related to whether an accused person has a right to publicly funded legal representation). In 1993, the Victorian Parliament enacted legislation amending the *Crimes Act 1958*. These amendments gave the courts power to direct Victoria Legal Aid to provide legal assistance to an indigent accused if the court was satisfied that failing to do so would lead to an unfair trial.

Parliaments are also able to delegate their law-making powers to government departments, statutory authorities and local councils. The rules made by these bodies are known as regulations, orders-in-council, local laws or delegated legislation.

ACTS: laws passed by parliament, also known as LEGISLATION or STATUTES

PARLIAMENTARY SOVEREIGNTY: parliament is the ultimate law-making body that can make, change or repeal legislation as well as override common law



Parliament House in Canberra



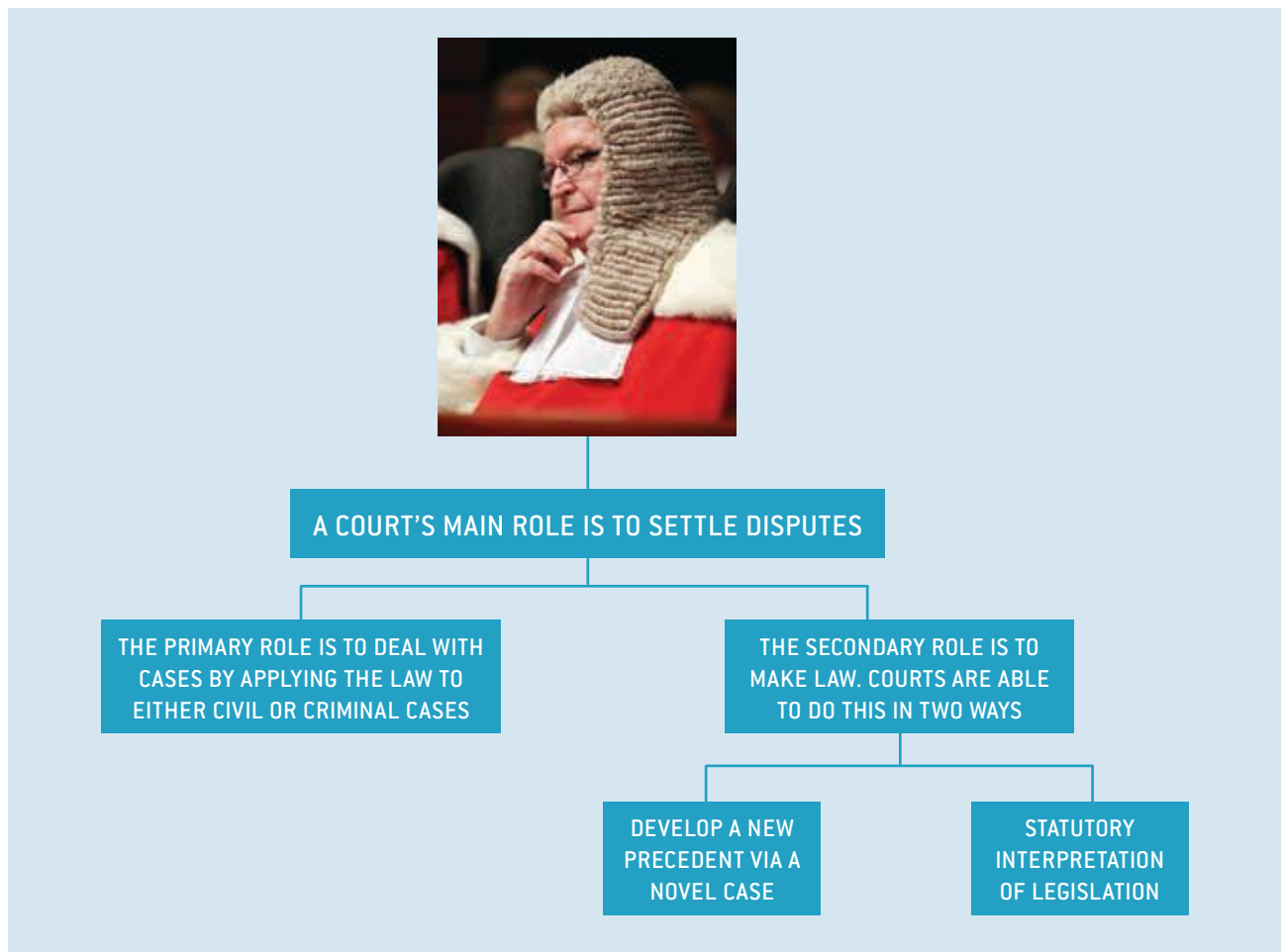
COMMON LAW

The main function of the courts is to settle disputes; however, judges also play an important part in law-making. While judges do not set out to create a new law or change an existing law in the same way as a parliament does, new laws can result from decisions made by judges in order to resolve a particular dispute. This area of law is referred to as case law, judge-made law or common law. Many laws concerning the rights that exist between individuals are set out in common law.

Judge-made law develops through the operation of what is known as the doctrine of **precedent**. A precedent is a legal principle developed by a superior court. Precedents are found in the recorded decisions of judges, which have been written down and collected over time.

Laws made by courts are known as judge-made law, common law or case law

PRECEDENT: a legal principle developed by the courts



THE RELATIONSHIP BETWEEN COMMON LAW AND STATUTE LAW

Parliament's main role is to make law. Within its constitutional jurisdiction, it is able to make, amend, codify or abrogate law to reflect society's values. A court's primary function is to apply the laws made by parliament and settle disputes.

An important relationship that exists between parliaments and courts is that any common law precedent made by the courts can be codified or enacted by passing an Act of Parliament.

An example of this occurred in 1993 after the Commonwealth Parliament passed legislation seeking to enshrine the Mabo precedent in statute law. The *Native Title Act 1993* (Cth) provided a mechanism for recognising and protecting native title, validated

Parliament can abrogate (reject) common law precedents, or codify (affirm) precedents, by passing Acts.

existing freehold and certain leasehold titles, and allowed for compensation to be paid where native title had been extinguished.

The *Native Title Act* established the National Native Title Tribunal (NNTT) to determine native title claims, with the role subsequently assumed by the Federal Court. The NNTT's registers are open for inspection. They record all claims for native title made under the Act for areas of land and water throughout Australia, all determinations of native title made by common law, the Tribunal or by any other source, and all registered Indigenous Land Use Agreements. Courts have been significant lawmakers as they deal with the day-to-day application of the law.



TYPES OF LAW: CRIMINAL LAW AND CIVIL LAW

The purpose of criminal law is to protect society and to control behaviour by punishing the accused, sometimes known as the offender or wrongdoer. Courts enforce the values of society as stated by legislation. When a court establishes the guilt of the accused they can punish to deter, reform or rehabilitate the offender.

The purpose of civil law is to remedy a civil wrong and to enforce individual rights. The remedy restores the plaintiff to their original position prior to the infringement or action. However, it may not be possible to undo or reverse an action suffered, so compensation is used.



THE RELATIONSHIP BETWEEN CRIMINAL LAW AND CIVIL LAW

A single event may involve both criminal law and civil law. A good example to illustrate this is that when a car crash occurs, there may be criminal and civil consequences. If it is the result of one driver breaking the criminal law by driving under the influence of alcohol, they will be regarded as a risk to the community. A criminal prosecution will take place and they will be sanctioned. This action does not resolve all the conflicts that could arise from this event.

What about the damage to the car and the suffering of the other driver or passenger? These issues relate to the private civil rights of the individual. The law provides the innocent driver or passenger with the right to take legal action to obtain compensation from the driver responsible for the accident.

Criminal law provides the basis for the prosecution of the drunken driver, while civil law provides the other driver with the right to sue for damages. The two actions take place independently. To resolve the conflict, the criminal offence will be investigated by the police (provided that it is reported) and the civil action will be initiated by the injured party.

It is important to understand the difference between the two types of behaviour. Criminal law and civil law are dealt with by different procedures and have different consequences for the individuals involved. Criminal law is enforced by the police, the courts and the departments of corrective services. An individual who has been charged with a criminal offence will be prosecuted by the state and, if found guilty of an offence by a court, will be sanctioned. A sanction may include a fine, a community-based order or imprisonment.

An event can involve both criminal law and civil liability issues, such as a car accident. The two legal actions would be separate and independent.



CRIMINAL OFFENCES MAY INVOLVE

- Drink- or drug-driving:
 - Proof of intoxication
 - 0.05 limit
 - Illicit drug-taking
- Driving offences:
 - Speeding
 - Running a red light
 - Failing to render assistance
 - Driving without a licence
- Crimes against an individual:
 - Assault
- Crimes against property:
 - Stolen vehicle
- Crimes against the community:
 - Public nuisance

CIVIL ACTION MAY INVOLVE

- Personal injury where the driver is at fault:
 - Transport Accident Commission (TAC)
 - Effect of alcohol
- Personal injury of the plaintiff:
 - Loss of income
 - Medical costs
 - TAC
- Vehicle damage where the driver is at fault:
 - Insurance
 - The effect of alcohol
- Vehicle damage where the driver not at fault:
 - Insurance—claim against the other driver
 - Civil action

Civil law is concerned with the enforcement of an individual's rights. In civil law, the individual affected by a breach of their legal rights is responsible for taking the case to court. If their case is successful, the court may award monetary compensation or issue a court order to stop any further infringement.

THE DIFFERENCES BETWEEN CRIMINAL LAW AND CIVIL LAW

	CRIMINAL	CIVIL
EXAMPLES	Involves offences against individuals, property, society (public), morality, the legal system and the state	Involves actions of contract law, torts, constitutional law, family law, industrial law, consumer law and property law
AIM	Concerned with the protection of the community as a whole and punishment of offenders	Concerned with the protection by the law of the private rights of the individual to remedy a civil wrong
ACTION	Criminal proceedings start when an offence has been reported to the police or when the police witness a crime. The police then investigate and gather evidence. A person will only be arrested if they have been caught in the act of committing an offence, there are reasonable grounds to believe that they may abscond, or they constitute a danger to the community.	Civil actions arise when one individual believes another person has violated their rights. This person initiates civil action by seeking legal advice from a lawyer. Initially these matters often use mediation or conciliation, but if this does not work then formal legal proceedings take place.
PARTIES	A criminal matter is initiated by the police prosecution in the Magistrates' Court or Director of Public Prosecutions (DPP) in the County or Supreme courts. Other terms often used for the prosecution include: the Crown, the Queen, the State, R (standing for Regina [queen] or Rex [king] depending on who is the monarch at the time). The person defending the criminal matter is known as the accused or the defendant .	A civil action is brought by the individual making the complaint, known as the plaintiff . An individual, group, organisation or institution can initiate a civil action. The person defending the action is known as the defendant .
BURDEN OF PROOF	It is up to the prosecution to prove that the accused is guilty of the crime. As the onus rests on the prosecution, the accused does not have to say a word.	It is up to the plaintiff to prove that the defendant is liable of the action. The person making the accusation must prove that the defendant is responsible.
STANDARD OF PROOF NEEDED	The prosecution must prove the accused is guilty ' beyond a reasonable doubt '. In other words, there must be no doubt as to guilt.	The plaintiff has to prove on the defendant is liable on the ' balance of probabilities '. In other words, was the action likely to have occurred?
EVIDENCE	Strict rules of evidence and procedure apply. For example, prior convictions are not allowed in court, hearsay evidence is inadmissible and confessions under duress are illegal.	Relaxed rules of evidence and procedure apply. For example, juries are optional and admissions are freely accepted.
JURY	Compulsory use in County and Supreme courts with 12 jurors. Not required in guilty verdicts or appeals.	Optional use of jury in the County and Supreme courts with 6 jurors.
OUTCOME	A court will determine an appropriate sanction , such as imprisonment, a fine or a community-based order.	When an individual suffers damage due to the actions of another, civil law aims to restore the injured party to their former position by providing a remedy , such as a monetary award.
EFFECT ON THE INDIVIDUAL	Conviction of a crime usually carries a stigma and general disapproval by the public.	Generally, there is no social stigma or public disapproval. However, financial hardship may occur to the losing party.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

The principles of justice

- Justice means different things for different people at different times. It is a universal feature whereby each person is entitled to their rights and bound by their responsibilities.
- The principles of justice cover three basic concepts: fairness, equality and access.
- Social cohesion sets down boundaries of acceptable conduct.

Characteristics of an effective law

- The law must reflect society's values such as social, moral, political, economic, technological and environmental.
- The law must be capable of being enforced and be consistently applied.
- The law must be known, therefore 'ignorance [of the law] is no excuse'. Knowledge of the law means that we are less likely to break the law.
- The law must be easy to understand by being clear.
- The law cannot constantly change, therefore it must be stable and meet the needs of society.

Sources of law

- Sources of law in Australia are parliament (known as statute law) and courts (known as common law).
- Parliament's main role is to make law, while a court's primary function is to apply the laws made by parliament and settle disputes. This is the main relationship between common law and statute law.

Types of law

- Criminal law is concerned with the protection of the community as a whole and punishment of offenders, while civil law is concerned with the protection by the law of the private rights of the individual to remedy a civil wrong.
- An action can have implications for both criminal matters as well as civil liability, such as a car accident.
- The differences between criminal and civil law include the aim, action, parties, burden of proof, standard of proof, evidence, jury, outcome and effect on the individual.

CHECK YOUR UNDERSTANDING

1. Create an A–Z word list of terms associated with the principles of justice. Be creative and identify as many as you can.
2. Develop a definition of justice that includes fairness, equality and access.
3. Create a table of examples in the media that demonstrate fairness, equality and access.
4. Using an example, explain the characteristics of an effective law.

5. Create the following table in your notes and, with a partner, illustrate how laws demonstrate social, moral, political, economic, technological and environment values.

SOCIAL	MORAL	POLITICAL	ECONOMIC	TECHNOLOGICAL	ENVIRONMENTAL

6. A generation is seen as spanning 20–30 years. How has the law developed to deal with the following issues, given the changes in attitudes from the previous generation?

ISSUE	20–30 YEARS AGO	HOW HAS THE LAW DEVELOPED TO DEAL WITH THE FOLLOWING ISSUES TODAY?
Mobile phones	Known as a 'cell phone' and the size of a brick	
Facebook and social media	Not invented yet	
Underage smoking	Socially acceptable to purchase cigarettes	
Laptops/electronic devices	Desktop computers only, no laptops tablets	
Drink driving	Tolerated to a larger extent than today	
Homosexuality	Considered to be a crime	
Same-sex marriage	Not considered as a social norm	
Domestic partnerships	Laws covered de facto heterosexual couples only	

7. Write a short paragraph outlining the main differences between statute law and common law.
8. Explain the relationship between statute law and common law.
9. Explain the impact of parliamentary sovereignty on common law.
10. Using the following table, identify the differences between criminal and civil law:

	CRIMINAL LAW	CIVIL LAW
Aim		
Action		
Parties		
Burden of proof		
Standard of proof		
Evidence		
Jury		
Outcome		

11. Collect five newspaper articles that illustrate both criminal and civil law. For each article, prepare a report that:
- > records the title, source and date of the article
 - > gives a brief summary of the criminal and civil matters discussed in the case
 - > names the key participants in the article, such as the witnesses, judge and defendant (if stated)
 - > identifies the court that is hearing or will hear the case
 - > justifies why such a rule is needed (use the characteristics of an effective law)
 - > the role of statute law and common law in dealing with these cases
 - > explains the possible impact of the offence/action on individual/s and society.

APPLY YOUR UNDERSTANDING

MIX AND MATCH—MATCH THE DEFINITION WITH THE TERM BELOW

A person (defendant) charged with a criminal offence where the case is heard in the County or Supreme Courts	Damages
A duty by the party making the allegation or assertion to prove their case such as the prosecution or the plaintiff	Imprisonment
Laws regulating the behaviour of private individuals	Defendant
Laws concerned with the welfare of society as a whole, as well as the rights of individuals	Indictable offences
A civil remedy providing monetary compensation	Tort
Written or verbal statements that injure a person's good reputation	Burden of proof
A person charged with a criminal offence, or a person against whom a civil action has been taken	Civil law
To be sentenced to serve time in prison	Defamation
Serious criminal offences heard by judge and jury	Standard of proof
A panel of citizens that listen and reach an outcome based on the evidence	Criminal law
A person taking a civil action to court	Sentence
Every person is considered to be innocent until proven guilty	Plaintiff
A judgment or penalty imposed by a court specifying a punishment for a crime	Jury
The standard against which cases are measured, such as 'beyond reasonable doubt' or 'on the balance of probabilities'	Accused
A civil wrong	Presumption of innocence

APPLY YOUR UNDERSTANDING

GROUP ACTIVITY—SHIPWRECKED!

Divide yourselves into groups of five, and give each member of your group a number from 1 to 5. The following roles will be allocated to each person according to their number. This can be done at random or from top to bottom of the list:

1. a 16-year-old student
2. a 32-year-old parent with a three-month-old baby
3. a 35-year-old lawyer with HIV
4. a 40-year-old nurse
5. a 78-year-old boat captain.

Your group has been shipwrecked on a desert island. The island has coconuts and limited fresh water. You can catch fish. You have salvaged the following stores from the wreck: one mosquito net, one torch, one box of matches, one knife, one spear gun, one bottle of shampoo and one can of peaches.

1. Develop a list of jobs that will need to be done immediately if the group is to survive. How will you organise who is to complete each job?
2. How will your group make decisions about the actions they will need to take to survive?
3. What rules will your group need and how will these rules be enforced?
4. What conflicts may develop between the members of the group? How might you resolve these conflicts?
5. What would your group do in the following situations?
 - a. The 16-year-old says that they should not have to collect food for everyone.
 - b. The nurse is allergic to mosquito bites so does not let anyone else use the mosquito net.
 - c. The parent with the three-month-old steals the can of peaches and eats them.
 - d. The lawyer accidentally drops the box of matches in the sea.
6. After 14 days, it becomes obvious that you will not be rescued and that there is not enough water on the island to support five people. What principles would assist these people to survive on the desert island?
7. Justify the purpose of having rules in this group. How will the principles of justice apply? Illustrate how these rules will demonstrate fairness, equality and access. Is the rationale the same for our community? Explain.



APPLY YOUR UNDERSTANDING

PAIR ACTIVITY—ASSESSING THE EFFECTIVENESS OF LAWS

Pair up and complete the following table. Use the rating scale in the table to answer each section. If you are not sure of the answer, then it is okay to respond with a question mark (?) or NA (not applicable). The first answer is done as an example for you.

Rate the extent to which the characteristics are reflected in the legal example below <table border="1"> <tr> <td>5</td> <td>4</td> <td>3</td> <td>2</td> <td>1</td> </tr> <tr> <td>high</td> <td></td> <td>medium</td> <td></td> <td>low</td> </tr> </table>	5	4	3	2	1	high		medium		low	Tick which value the law represents						Characteristics				Why would lawmakers introduce a law like this? <i>or</i> What would be the purpose of this law? <i>or</i> What problem was it designed to overcome?
5	4	3	2	1																	
high		medium		low																	
Social values	Moral values	Political values	Economic values	Environmental values	Technological values	Enforceable	Known	Clear and understandable	Stable												
E.g. A pedestrian who fails to obey traffic lights can be fined	✓						2	5	5	5	Designed to protect pedestrians from harm on the road										
Only a licensed plumber can replace a pipe																					
Minors cannot purchase cigarettes, but they may smoke them																					
Other... apply your own example																					



ASSESSMENT

FOLIO AND REPORT—WHAT MAKES AN EFFECTIVE LAW?

Collect five articles that illustrate the characteristics of an effective law and the principles of justice. Choose from newspapers, magazines or journals. You may also select articles from internet news services. Each article should discuss a case concerning Victorian or Australian law. For each article prepare a report that:

- records the title, source and date of the article
 - gives a brief summary of the issues raised in the article if stated, names the key participants in the article, such as the witnesses, judge and defendant
 - outlines the right/s protected by the law
 - identifies and explains the elements of the offence (i.e. why the case relates to criminal law)
 - identifies the possible defences to the case
 - identifies the court that is hearing or will hear the case
 - justifies why such a rule is needed (use the characteristics of an effective law and discuss which one it represents)
 - explains the role of statute law and common law in developing the elements of the offence and the defences
 - explains the possible impact of the offence on individuals and society
 - provides trends and statistics in relation to the offence in Victoria and in one other jurisdiction
 - discusses to what extent the principles of justice are demonstrated by this case study.
- The article and report below are an example of what you should provide in your own folio.

TWO MEN FACE COURT AGAIN OVER BRETT WHITELEY FAKES

IT'S one of the most crazy art thefts imaginable.

Two men hid out in a Melbourne studio, painting exact replicas of Brett Whiteley's paintings and then sold them for millions of dollars.

Whiteley won the Archibald, Wynne and Sulman prizes twice and died in 1992 after overdosing on opiates.

Art restorer Mohamed Aman Siddique and dealer Peter Gant were found guilty in May on charges of obtaining and attempting to obtain financial advantage by deception over the fakes.



The alleged fake Brett Whiteley
Blue Lavender Bay painting



The late artist Brett Whiteley has
had his paintings ripped off.



ASSESSMENT

Barristers said at a pre-sentence hearing on Thursday that Gant would never work in the industry again because of extra punishment he suffered due to publicity around the trial.

Sydney Swans chairman Andrew Pridham fell victim to the art fraud and bought a fake of Whiteley's *Blue Lavender Bay* painting, which he thought was an original, for \$2.5 million.

The men also replicated *Orange Lavender Bay* and sold it for \$1.1 million and they were gearing up to sell a third, *Through the Window*, for almost \$1 million.

A lawyer for the art dealer who sold Whiteley forgeries for millions has told a judge his client shouldn't have to go to prison while an appeal is processed.

Defence barrister Trevor Wraight told the pre-sentence hearing he would make an application for a stay on the sentence because of a strong argument against the jury's verdict.

He told Justice Michael Croucher an appeal would be filed the day the sentence is handed down and he didn't think his client should have to go to jail—if a custodial sentence is imposed—while the appeal is processed.

'We say it is an exceptional circumstance that these men should go to jail when there's a powerful argument against the jury's verdict,' Mr Wraight said.

Justice Croucher said: 'Every person thinks they have a good argument against conviction.'

'We say this is better than a good argument,' Mr Wraight replied.

Mr Wraight also told the court media reports of the long-running proceedings had destroyed the reputation of Gant, who had made a significant contribution to cultural life in Australia, and now would never work again.

'His reputation has been ruined,' Mr Wraight said.

'This amounts to extra punishment.'

He argued that the notoriety of the case should not have an effect on the sentence that is passed.

'It's no different to someone selling something and saying, "It's a Rolex", when it's not.'

Whiteley's former wife, Wendy, gave evidence during a four-week trial before a jury and said she knew something was wrong as soon as she saw the paintings.

In 2008 Ms Whiteley was invited to morning tea at the multimillion-dollar Mosman home of Mr Pridham.

She saw her former husband's artwork as soon as she walked in the door and told the Victorian Supreme Court in April that she thought it wasn't right, but she did not say anything to the chairman.

'It's a big deal to tell someone "you've got a huge fake on the wall",' she said.

The painting was inconsistent with Ms Whiteley's former husband's work, and in 2009 she inspected the *Orange Lavender Bay* replica and could tell again it was fake.

'The lack of spontaneity, the lack of wit, the lack of spirit—the lack of everything,' Ms Whiteley told the court.

'It looked as though, as though it had been traced and knitted together badly.'

Painting conservator Vanessa Kowalski testified that infrared photos of the *Lavender Bay* paintings showed drawings and sketches underneath the paint.

Ms Whiteley said her former husband did not underdraw.

Gant and Siddique have been on bail since they were charged in 2014 and the pre-sentence hearing continues.

Source: news.com.au,
28 July 2016



ASSESSMENT

REPORT

Record the title, source and date of the article:

- 'Two men face court again over Brett Whiteley fakes', news.com.au, 28 July 2016.

Give a brief summary of the issues raised in the article. If stated, name the key participants in the article, such as the witnesses, judge and defendant:

- Two men were found guilty of obtaining and attempting to obtain financial advantage by deception over the forgeries of two Brett Whiteley paintings, which were sold for \$2.5 million and \$1.1 million. A number of witnesses, such as painting conservator Vanessa Kowalski and former wife Wendy Whiteley, believed that the paintings were fake. Defence lawyer for one of the accused lodged an appeal and argued that his client should not be sent to jail while an appeal was pending.

Key participants:

- > Artist: The estate of Brett Whiteley
- > Art restorer: Mohamed Aman Siddique (the accused)
- > Art dealer: Peter Gant (the accused)
- > Defence barrister: Trevor Wraight
- > Chairman of the Sydney Swans: Andrew Pridham (the victim)
- > Justice: Michael Croucher
- > Former wife and expert witness: Wendy Whiteley
- > Painting conservator and expert witness: Vanessa Kowalski.

Outline the right/s protected by the law:

- The court's response is to denounce or disapprove of the particular type of behaviour. The trial and publicity discourages and prevents other offender from committing the same offence. As a result of the action of the two accused, their property was confiscated.

Identify and explain the elements of the offence (i.e. why the case relates to criminal law):

- Obtaining financial advantage by deception, or attempting to obtain financial advantage by deception, by forging two Brett Whiteley paintings and selling them for \$2.5 million and \$1.1 million.

Identify the possible defences to the case:

- The art restorer, Mohamed Aman Siddique (the accused), argued unsuccessfully that he did not receive any benefit from the sale of the paintings or from the provision of the third painting to Mr Gant's creditor, and therefore there was no financial advantage by deception gained.

Identify the court that is hearing or will hear the case:

- The court that would hear this case is the Victorian Supreme Court.

Justify why such a rule is needed (use the characteristics of an effective law and discuss which one it represents):

- Characteristics of an effective law
 - > Forging painting and selling them for millions of dollars is clearly a crime. The two accused could not say that they did not know this was a crime. It is also seen as socially and morally wrong to pass off items when they are not genuine.

- > The law was easily enforced in this case when the matter came to the attention of the police.
- > It is clear, and easily understood by the community, that obtaining a financial advantage by deception is a crime.

Identify the role of statute law and common law in developing the elements of the offence and the defences:

- The *Crimes Act 1958* and the *Confiscation Act 1997*
- The role of statute law in this case is to deprive persons of the proceeds of certain offences and of tainted property. It is also to deter and disrupt parties from engaging in criminal activity by preventing the use of property in further criminal activity. It is also designed to undermine the profitability of serious criminal activities.

Explain the possible impact of the offence on individuals and society:

- Both the art restorer and the dealer have suffered greatly to their reputation. Not only will they have to serve a prison term but the damage to their reputations, as well as the adverse publicity, means that they will find it difficult to work in the art world when they are released. The impact on society is that a crime such as this sends a message to others who may contemplate doing the same or a similar thing. It creates confidence in art dealing and painting, knowing that you are purchasing the correct item.

Identify the trends and statistics in relation to the offence in Victoria and in one other jurisdiction:

- There were 39 158 deception offences in the year of July 2015–June 2016. Retail and private dwellings were the highest recorded locations where this crime took place. Most people who were caught were arrested and tried in court.

To what extent are the principles of justice demonstrated by this case study?

- This case demonstrates the principles of justice in the following ways:
 - > The trial that was undertaken would have been run under the rules of procedural fairness. In other words, both accused would have been provided legal rights and protections throughout the trial, including the right to appeal the verdict.
 - > The trial would have treated both parties equally, with the same status and opportunities, providing them with natural justice and an independent judge and jury.
 - > Prior to this case going to court, a range of mechanisms would have been used to ensure all have the means or opportunity to attain dispute settlement or a just outcome. There would have been a police investigation and a range of criminal pre-trial procedures to ascertain the facts prior to a trial.



ASSESSMENT



PARLIAMENT, COURTS AND THE LAW

UNIT 1 – AREA OF STUDY 1: Legal foundations

Who makes our laws and what types of laws do they make? In this chapter students will learn about the two main lawmakers in Australia and, specifically, Victoria—parliament and the courts. They examine the relationship between parliament and the courts, and the reasons for a court hierarchy in Victoria.

OUTCOME

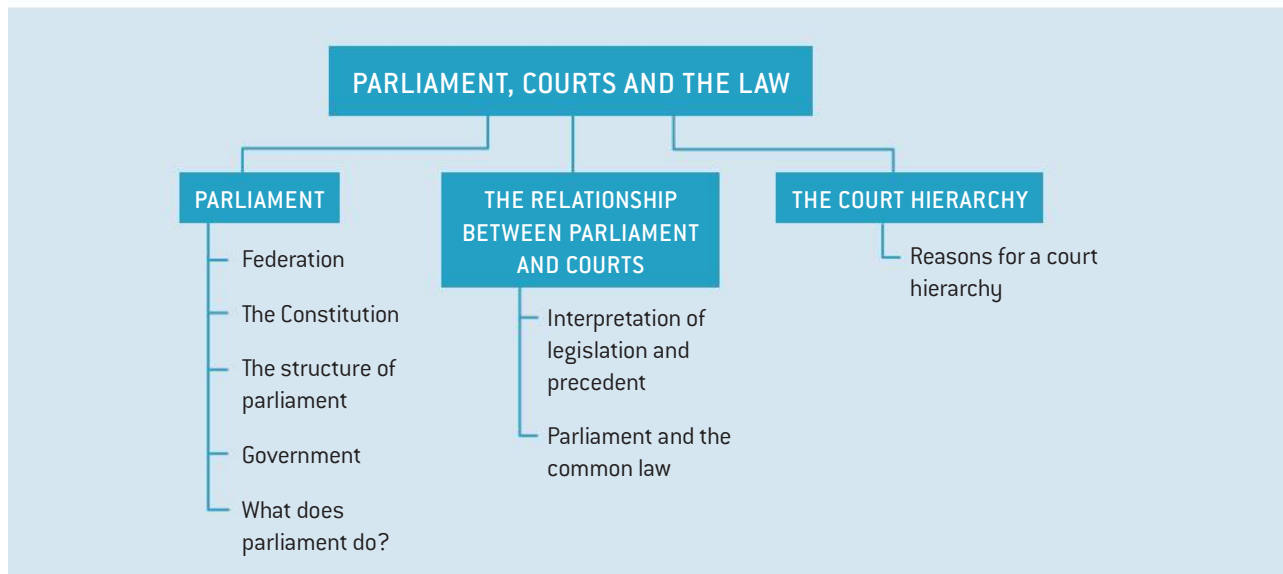
On completion of this unit the student should be able to describe the main sources and types of law, and assess the effectiveness of laws. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > an overview of the relationship between parliament and the courts
- > an overview of, and reasons for, the Victorian court hierarchy

KEY SKILLS

- > define key legal terminology
- > explain the relationship between parliament and the courts, using examples
- > justify the existence of the Victorian court hierarchy



KEY TERMS

appeal	When a case is heard for a second time in a higher court in order to review the lower court's decision
bicameral	A parliament consisting of two houses and the Crown
concurrent powers	Law-making powers listed in the Constitution that are shared by both the state and Commonwealth parliaments
Constitution	A document that sets out the structure and powers of a parliament
Crown	The authority of the Queen in parliament and the legal system
division of power	The way that law-making power is shared between the Commonwealth and state parliaments
exclusive powers	Law-making powers listed in the Constitution that belong only to the Commonwealth Parliament
federation	The joining together of states to form one nation with a common purpose
hierarchy	The ranking of a number of bodies according to their status and authority
House of Representatives	The Lower House of the Commonwealth Parliament
jurisdiction	The power of a court to hear and determine a case
Legislative Assembly	The Lower House of the Victorian Parliament
Legislative Council	The Upper House of the Victorian Parliament
legislative process	The process used by parliament to make laws
residual powers	Law-making powers not listed in the Constitution that belong to the state parliaments
Senate	The Upper House of the Commonwealth Parliament
specific powers	Law-making powers listed in the sections of the Commonwealth Constitution
statutory interpretation	The process of a court interpreting and applying legislation to a case before them

Parliament is the highest law-making authority. Every state and territory has its own parliament, as does Australia as a nation.

PARLIAMENT

‘Parliament’ refers to the highest law-making authority in Australia and the states. Parliament has a long history in Western society, with Australia’s Parliament having its foundations in the British and American systems.

HAVE YOU...	YES / NO / UNSURE
Heard a Minister speaking on the radio or TV?	
Witnessed your parents participate in voting on election day?	
Seen a debate between party leaders?	
Ever wondered who can make laws?	
Heard the term ‘legislation’ but not known what it meant?	
Heard of the Governor-General?	

If you answered ‘no’ to any of these questions, you are about to find out what or who these things and people are. Each situation refers to a person, process or body that is involved in law-making in Australia.

There are nine parliaments in Australia: the Commonwealth Parliament, six state parliaments and two territory parliaments (those of the Northern Territory and the Australian Capital Territory). These parliaments pass written laws in the form of Acts (also called legislation or statutes). All parliaments have parliamentary sovereignty: that is, they have ultimate law-making authority within their **jurisdiction**. They can make, change or repeal (cancel) previous legislation as well as override common law. For example, the Victorian Parliament is able to override a case of the Supreme Court of Victoria.

FEDERATION

As discussed in Chapter 1, Australia has a federal system for the way we are governed. A **federation** is a joining together of states for a common purpose. The power to make laws is shared between a central parliament and state and territory parliaments. The central parliament is the Parliament of Australia, also known as the Commonwealth or Federal Parliament.

To understand how the federal system works in Australia we need to know a little about part of the history of Australia. In the 1800s, Australia consisted of a number of British colonies. These colonies roughly corresponded to the present-day states. Between 1850 and 1890, Britain gave these colonies the power to be self-governing. This power was set out in constitutions, which established a parliament in each of the colonies.

The colonies realised that some areas of power would be better handled if they worked together as a federation. It was felt that defence, currency, immigration and trading relationships with other countries could be better dealt with by a central authority than by each colony acting alone.

Representatives of the colonies met over a number of years to establish a central system (federation). After much negotiation, they drafted a **Constitution** outlining the authority of the new central body and the structure of a federal parliament.

THE CONSTITUTION

A constitution sets out the guidelines and principles for how a particular state or country is governed and lays down the power and authority of the government and parliament. The formal title is the *Commonwealth of Australia Constitution Act 1900* but most people

JURISDICTION: the power of a court to hear and determine a case

FEDERATION: the joining together of states to form one nation with a common purpose

CONSTITUTION: a document that sets out the structure and powers of a parliament

A copy of the Constitution can be found on the Parliament of Australia website: www.aph.gov.au

refer to this Act as the Australian Constitution. The Act came into force on 1 January 1901. With the passing of the Australian Constitution, each colony became known as a state. The colonies gave some of their law-making powers to the new Commonwealth Parliament.

Law-making powers

The Constitution established a **division of power** whereby the Commonwealth Government would look after issues of a national interest, while the state governments would deal with and administer important state issues. Commonwealth and state powers fall into the following categories: specific, exclusive, concurrent and residual.

DIVISION OF POWER: the way that law-making power is shared between the Commonwealth and state parliaments

Specific powers

Under the Constitution, the power of the Commonwealth Parliament to make laws is limited to matters that are specifically mentioned (enumerated) in the Constitution. These powers are called **specific powers** and they can be found in sections 51 and 52 of the Constitution. These include laws about foreign trade, taxation and defence.

SPECIFIC POWERS: law-making powers listed in the sections of the Commonwealth Constitution

Exclusive powers

Some of the specific powers of the Commonwealth Parliament listed in the Constitution can only be used by the Federal Parliament. These powers are known as **exclusive powers**. These exclusive law-making powers cover laws such as printing money, defence and immigration. These law-making powers relate to issues that require a national approach and thus only the Commonwealth Parliament can make these laws to ensure consistency across the nation.

EXCLUSIVE POWERS: law-making powers listed in the Constitution that belong only to the Commonwealth Parliament

Concurrent powers

Some powers listed in the Constitution are shared between the Commonwealth Parliament and state parliaments. These are known as **concurrent powers**. Both the Commonwealth Parliament and state parliaments can make laws in these areas. For example, both parliaments can make laws on taxation. Under section 109 of the Constitution, if a law is made by both a state parliament and the Commonwealth Parliament in the same area of concurrent power and these laws are inconsistent, the federal (Commonwealth) law prevails to the extent of the inconsistency. This may mean that the whole state Act, or only a certain part of it, is void.

CONCURRENT POWERS: law-making powers listed in the Constitution that are shared by both the state and Commonwealth parliaments

Residual powers

After Federation, each state retained its own Constitution and some powers to make laws. Any power not specifically given to the Commonwealth Parliament remained a state law-making power. Such powers are called the **residual powers** of the states. They include large areas of law-making, such as criminal and civil law, health and education.

RESIDUAL POWERS: law-making powers not listed in the Constitution that belong to the state parliaments

APPLY YOUR UNDERSTANDING

1. Create a diagram or chart to explain how the division of powers operates. Make sure to include a definition of each power and an example to help your explanation.
2. 'If a state makes a law in an area of concurrent power, and that law contradicts a federal law in the same area, the state law prevails.' Is this statement correct? Explain your answer by referring to s109 of the Constitution.

BICAMERAL: a parliament consisting of two houses and the Crown

CROWN: the authority of the Queen in parliament and the legal system

HOUSE OF REPRESENTATIVES: the Lower House of the Commonwealth Parliament

SENATE: the Upper House of the Commonwealth Parliament

LEGISLATIVE ASSEMBLY: the Lower House of the Victorian Parliament

LEGISLATIVE COUNCIL: the Upper House of the Victorian Parliament



For more information about the Governor-General, go to www.gg.gov.au



For more information about the Commonwealth Parliament, go to www.aph.gov.au

THE STRUCTURE OF PARLIAMENT

If you remember back to Chapter 1, the structure of most parliaments in Australia is based on Britain's Westminster system and the United States' Washington system. Both the Commonwealth Parliament and the Victorian Parliament are **bicameral** parliaments. This means that they consist of the **Crown** and two houses: the Lower House and the Upper House.

ARE ALL PARLIAMENTS IN AUSTRALIA BICAMERAL?

Most parliaments in Australia are bicameral. A parliament with only one house is called a unicameral parliament. Queensland has a unicameral parliament. The parliaments of the Northern Territory and the Australian Capital Territory are also unicameral.

The Lower House of our Commonwealth Parliament is known as the **House of Representatives**. The Upper House is known as the **Senate**.

In the Victorian Parliament, the Lower House is known as the **Legislative Assembly**. The Upper House is known as the **Legislative Council**.

Members of parliament are elected representatives of the people. In a federal election, all Australians over 18 years of age vote for representatives of both houses of parliament. In a state election, all people in the state who are over 18 vote for representatives in both houses of the state parliament.

The Crown

Due to our ongoing status as a constitutional monarchy and as part of the British Commonwealth, the reigning British monarch is traditionally the head of each of our parliaments. In reality, the Queen does not take part in the processes of parliament, but is represented by the Governor-General (in the Commonwealth Parliament) and by the Governor (in the state parliaments).

The role of the Governor-General or the Governor is limited and includes giving Royal Assent or final approval to the laws made by the parliament.

Commonwealth Parliament

House of Representatives

The House of Representatives (Lower House) consists of 150 members. Each member represents a region known as an electorate. Each electorate contains approximately the same number of people. Representatives are elected for three years and are elected by the preferential voting system. The House of Representatives is said to represent the interests of the majority of Australians.

The Senate

The Senate (Upper House) is formed differently from the House of Representatives. Senate elections are designed to ensure that all states have equal representation. In the House of Representatives, states and territories with larger populations will have more representatives than those with smaller populations. For example, there are only five electorates in Tasmania, while there are 37 electorates in Victoria. To make sure that



The House of Representatives (left) and the Senate Chamber (right)

the interests of all states are represented, the people in each state vote for 12 senators to represent their state. The people in each territory vote for two senators to represent their territory; this means there are 76 senators in total. Senators are elected for six years and are elected by the proportional system of voting. Every three years, half the senators in the Senate stand for election.

Victorian Parliament

Elections for both houses of the Victorian Parliament are held on the last Saturday in November every four years.

For more information about the Victorian Parliament, go to www.parliament.vic.gov.au



Legislative Assembly

The Legislative Assembly (Lower House) consists of 88 members. For elections for the Legislative Assembly, the state is divided into areas of approximately the same population. These areas are called electorates and each electorate is entitled to elect one representative. Representatives are elected for four years and use the preferential voting system. The Legislative Assembly is said to represent the interests of the majority of voters in Victoria.

Legislative Council

The Legislative Council (Upper House) consists of 40 members. It is designed to make sure that the interests of rural areas (which are not as populated as city areas) have equal representation. The state is divided into eight regions, each with five members. Representatives are elected for four years and are elected by the proportional representation system, with optional preferential voting.

GOVERNMENT

How is government formed?

It is important to note that parliament and government are not the same. *Parliament* refers to all the members of both the Upper and Lower Houses of a parliament and the Crown.

Government refers to the political party (or coalition—an alliance formed between two or more parties) that has the majority of seats in the Lower House. The leader of the political party that forms government will become the Prime Minister (at federal level) or the Premier (at state level).



Victorian Premier Daniel Andrews addressing the Legislative Assembly.

Members of parliament from the government will then be nominated as ministers. Ministers are responsible for overseeing the operation of government departments, such as the Department of Education or the Department of Defence. Senior ministers form a group known as the Cabinet, which meets regularly to make important decisions about government policies.

WHAT DOES PARLIAMENT DO?

The most important function of parliament is to pass laws. The Commonwealth Parliament and the state and territory parliaments also have these responsibilities:

- to decide and control finances (through taxes)
- to check the laws made by bodies to which they have delegated law-making powers
- to provide a forum for the discussion and debate of issues
- to investigate and report on various issues relating to government functions.

Making laws

Parliament, at both the federal and state or territory levels, has the important task of making laws. Laws made by parliament are known as legislation, statutes or Acts. The process of making laws by parliament is called the **legislative process**.

LEGISLATIVE PROCESS: the process used by parliament to make laws

APPLY YOUR UNDERSTANDING

RESEARCH—UNDERSTANDING PARLIAMENT

Draw up a table and find out about the Commonwealth and Victorian parliaments. Complete the following information:

- title of the Queen's representative
- name of the current Queen's representative
- name of the Upper House
- number of seats in the Upper House
- role of the Upper House
- name of the Lower House
- name of the Upper House member/s for your state/region
- number of seats in the Lower House
- role of the Lower House
- title of the head of government
- name of the current head of government
- political party in government
- name of your local member of parliament in the Lower House
- name of your Lower House electorate
- frequency of elections.



COMMONWEALTH
PARLIAMENT:
www.aph.gov.au

VICTORIAN PARLIAMENT:
www.parliament.vic.gov.au



APPLY YOUR UNDERSTANDING

POSTER—CAREERS IN PARLIAMENT

Design a poster illustrating the role of one of the following in parliament: your local member, Prime Minister, Leader of the Opposition, Speaker, President, Usher of the Black Rod, Serjeant-at-Arms, Whip and Parliamentary Counsel. You will need to research your chosen role.

The courts interpret the meaning of words in statutes.

STATUTORY INTERPRETATION: the process of a court interpreting and applying legislation to a case before it

THE RELATIONSHIP BETWEEN PARLIAMENT AND COURTS

INTERPRETATION OF LEGISLATION AND PRECEDENT

The main role of the courts is to resolve disputes by applying the law to the case before them. Most of the laws that apply come from an Act of Parliament. An Act sets out, in broad terms, certain rights and responsibilities of individuals. When hearing specific cases, a judge must apply these broad definitions to specific circumstances. To do this they may need to interpret the meaning of the words or terms used in the Act. This is known as **statutory interpretation**.

When a judge interprets the meaning of an Act they will give reasons for the decision they have made. These reasons form a precedent. A precedent is a law made by a court of superior record (a court high in the court hierarchy) that must be followed by courts lower in the hierarchy in similar case situations. In future cases, where the meaning or application of the Act is questioned, the courts will refer back to these reasons to decide what the words or terms in the Act mean. It is this process that creates the common law discussed in earlier chapters.

When judges interpret the law, they must decide two things:

- what the law means
- if and how the law applies to the particular facts in a case.

In many cases, it may be clear that a person's actions have been in breach of the law. For instance, a driver who has been detected driving at 140 km/h in a 60 km/h zone is clearly breaking the law. But the meanings of words or phrases used in legislation are not always clear. Judges will use the tools available to them to assist in interpretation and the application of the law to a case.

Interpreting Acts of Parliament

The Commonwealth Parliament (*Acts Interpretation Act 1901* (Cth)) and the state parliaments (*Interpretation of Legislation Act 1984* (Vic)) have legislative guidelines for judges to follow in the interpretation of Acts. Courts can also use special rules, called legal maxims, to interpret legislation.

Interpretations Acts

Under Interpretations Acts, the courts consider the purpose or objective of the Act when interpreting words or phrases. To determine the purpose, judges may refer to the title of the Act and the purpose section. In addition, most Acts now contain definition sections.

When it is still not clear what parliament intends the Act to do, judges may refer to records of parliamentary debates (called Hansard), minutes from executive meetings, or reports of parliamentary committee meetings, inquiries and law reform bodies. Judges may also refer to dictionaries and recognised legal texts.

Legal maxims

There are also some special rules (called maxims) developed by judges to help them to determine the meaning of words in an Act. For instance, the rule of *ejusdem generis* states that where specific words—for example, ‘any motor car (other than a vehicle for a funeral procession ...), truck, van, tractor, bicycle’—form a general class, general words immediately following are to be given the meaning consistent with that class.

So what are the general characteristics of the specific vehicles described? In this particular example, the general class of vehicles covered by the Act can be described as any form of transportation other than that used for a funeral procession. In-line skates or a skateboard could be classed as a form of transport (in the same way as a bicycle is a form of transport).

PARLIAMENT AND THE COMMON LAW

While courts must apply the laws made by parliaments, and in the process may themselves make a law, the parliament is the supreme law-making body within our legal system. A parliament can decide to abrogate (reverse) or codify (confirm) a law made by the courts.

Parliaments can abrogate or codify any laws made by courts or judges.

Abrogation

Sometimes, a court will interpret a particular piece of legislation in a way that parliament had not intended when it was first created. Parliament may decide to overrule the interpretation of the court and alter the Act to make its intention clearer. When this happens, the law created by the court will no longer be valid and the courts will need to apply the new legislation and not the precedent when a new case comes before them.

An example of abrogation is *State Government Insurance Commission v Trigwell* [1979], also known as *Trigwell's Case*. In this case, a woman was driving along a road in the Western Australian country with her high beams on. As another car approached, she dipped her lights and so failed to see two sheep that had strayed onto the road. The woman hit the sheep and continued to swerve onto the wrong side of the road, where she hit an oncoming car. This car belonged to the Trigwell family. The woman was killed while members of the family were seriously injured.



The Trigwell family sued the farmer and the estate of the deceased woman. The family claimed that the accident was caused by the farmer failing to contain their sheep in the yard and the negligence of the deceased woman. The court in South Australia determined that the woman was partly responsible as she had not taken action to avoid the accident. However, the court determined that the farmer was not negligent, based on an old English case. This case said farmers had no duty of care to road users to ensure their animals did not stray onto roads. The deceased woman's insurance company appealed to the High Court. The High Court agreed with the court in South Australia and thus their decision would apply in all state courts in Australia.

The Victorian Parliament was not satisfied with the outcome of the High Court case, so acted to abrogate (override) the High Court's decision. The Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic) to alter the law so that farmers became responsible for ensuring their animals did not stray onto roads, as well as any incident that results should their animal stray. Thus, the High Court precedent no longer applied in Victoria.

Codification

Sometimes a parliament might not have considered an issue, and thus no law has existed in this area. A court may make a precedent that draws parliament's attention to the issue;

in order to make sure a future court does not change the law, parliament then decides to codify (confirm) the court-made law and create a statute. The Commonwealth Parliament acted in such a manner following the landmark native title case—*Mabo*—in 1992.

You will read more about the *Mabo* case in Chapter 13; this landmark case gave the Indigenous peoples of Australia the right to gain native title over their ancestral land. The High Court of Australia erased the legal concept of *terra nullius* in 1992 and stated that native title existed where there was a continuous link between the current Indigenous inhabitants and their ancestors who had lived on the land prior to the British settlement of Australia.

While the Indigenous community responded positively to the case by lodging numerous claims for native title, there was still some uncertainty amongst other groups about how the decision would affect their claim to land. For example, mining companies were concerned that they would lose the right to access minerals should native title be granted to an Indigenous group. The High Court had not clearly stated in its decision how native title would impact non-Indigenous landowners/users, and thus the Commonwealth Parliament stepped in to clarify the situation.

The *Native Title Act 1993* (Cth) was passed by the Commonwealth Parliament on 22 December 1993. It confirmed that native title existed according to the High Court's decision, but also set up a process to determine claims while clarifying the areas that could be claimed. For example, the Act stated that property such as homes, shops and farms could not be claimed, but that Crown land or land that was under a lease could be claimed. Thus, the Commonwealth Parliament confirmed the High Court's decision through its restatement in statute.

APPLY YOUR UNDERSTANDING

HYPOTHETICAL CASES—STATUTORY INTERPRETATION

Section 13(2) of the *Prostitution Control Act 1994* (Vic) states:

‘A person must not for the purpose of prostitution solicit or accost any person or loiter in a public place.’

Consider the following hypothetical cases, then answer the questions that follow.

CASE A

Two prostitutes gained the attention of men walking by a house. The first prostitute was standing on a balcony on the building's second level and tapped on the rails as each man walked past below. The second was standing behind the window on street level and tapped on the windowpane as each man walked past.

The judge ruled that each prostitute was soliciting for the purposes of prostitution. In giving reasons, the judge remarked that solicitation involved an action that is ‘projected to and addressed to someone’ walking in the street.

CASE B

A prostitute placed an advertisement in a shop window containing information about her availability for services.

The judge ruled that the prostitute was not soliciting because soliciting involves the physical presence of the prostitute and conduct on her part to the pursuing of prospective customers. An advertisement is more in the nature of notice; if there is no physical presence, there is no offence.

CASE C

A prostitute sat on a high stool in a window overlooking the street. The window was lit by a red light and the prostitute was dressed in a revealing top and mini-skirt. She did not make a sound or signal to

communicate with people passing by. She frequently left the window as a man entered the room and resumed her seat on the high stool in the window when he left.

The judge had to decide whether the action of prostitution was soliciting. The judge relied on cases A and B to make the decision that the prostitute was soliciting. The reasons for the decision were that she was soliciting in the sense of tempting or luring prospective customers to come in for the purpose of prostitution, and projecting solicitation to passers-by.

1. Explain in your own words the meaning given to 'soliciting' in case A.
2. Was the meaning of soliciting in case A used to help reach a decision in case B?
3. How does case B add to our understanding of the term 'soliciting'?
4. How does the decision in case C add to our understanding of the term 'soliciting'?
5. Thinking about all three cases, create a summary of the meaning of the term 'soliciting' for the purposes of prostitution.
6. The Victorian Parliament does not agree with the decision of the judge in Case B. A member of Parliament has come to you to seek advice on what the parliament can do about the decision. Explain to the member the relationship between the Parliament and the court, and the options available to Parliament should they wish to alter the law established by these cases. In your answer, make sure you explain both codification and abrogation and suggest which should be used here.

THE COURT HIERARCHY

In Australia, courts are arranged in a **hierarchy**. This means that they are arranged in order from lowest to highest. Each court in the hierarchical structure operates within prescribed limits. In other words, each court can hear certain types of civil or criminal cases. The prescribed limits of a court's power are referred to as its jurisdiction.

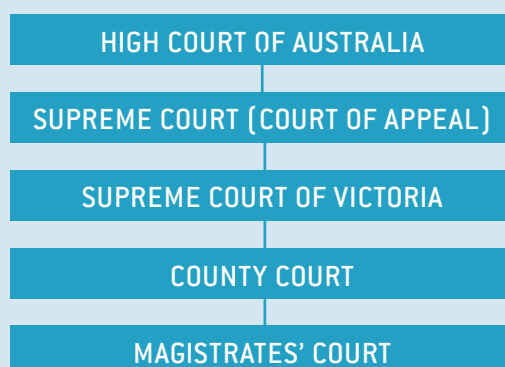
Courts have both original and appellate jurisdiction. *Original jurisdiction* is where cases are heard for the first time and appellate jurisdiction is where a case is heard on **appeal**, or a second time. For example, if a person has been charged with a traffic offence, then the Magistrates' Court will hear the case in the first instance. If the accused is not happy with the outcome, they have the right to appeal the case and have it heard in the County Court. Cases can also be transferred between the County and Supreme courts, depending on the seriousness of the case or the court's workload.

Earlier, we discussed the meaning of federation and the structure of government in Australia. The court system reflects the structure of federalism in Australia, and so there are state and federal courts. The High Court is the final court of appeal from both state and federal courts.

HIERARCHY: the ranking of a number of bodies according to their status and authority

APPEAL: when a case is heard for a second time in a higher court in order to review the lower court's decision

Courts are organised in a hierarchy or ranking in order of importance according to their jurisdiction or the types of cases heard and determined.



Court hierarchy—
Victoria

Each court within the Victorian court hierarchy is able to hear a range of civil and criminal cases in their original and appellate jurisdictions (if applicable). An outline of the jurisdictions is outlined in Table 3.1.

3.1 The Victorian Court hierarchy

COURT	ORIGINAL JURISDICTION		APPELLATE JURISDICTION	
	CRIMINAL	CIVIL	CRIMINAL	CIVIL
HIGH COURT OF AUSTRALIA	Federal matters	Constitutional matters Federal matters	Appeals from a single judge of the High Court Appeals from the full court of the Supreme Court or Court of Appeal	
SUPREME COURT (COURT OF APPEAL)	Nil	Nil	Appeals from the Supreme Court or County Court	
SUPREME COURT OF VICTORIA	Most serious indictable offences (e.g. murder)	Claims over \$100 000	Appeal on a point of law from the Magistrates' Court	
COUNTY COURT	Indictable offences (e.g. rape)	Claims over \$100 000	Appeal on matters of fact or sentence from the Magistrates' Court	Nil
MAGISTRATES' COURT	Summary offences (e.g. traffic offences) Indictable offences tried summarily	Claims up to \$100 000	Nil	

REASONS FOR A COURT HIERARCHY

The primary role of our courts is to resolve conflict by enforcing the law. When conflict arises, we need to provide a way of resolving these disputes in a peaceful manner. Refer to Table 3.2 for an outline of why a ranking of courts is advantageous.

3.2 Reasons for a court hierarchy

PRECEDENT	The use of past decisions in determining current cases relies heavily on the existence of a hierarchy. Usually only the higher courts set precedent, which becomes binding and is followed by lower courts.
APPEALS	A hierarchy allows the decision of a court lower in the system to be reviewed on appeal, if necessary, by a higher court. This appeals process promotes fairness and is a safeguard against unjust decisions. Judges in the superior courts have often been in the legal profession longer, and so are more experienced in the law and its operation.
SPECIALISATION	This allows judges and magistrates to gain great skills and expertise in the particular matters they hear, and promotes consistency in decision-making. For example, a magistrate in the Magistrates' Court will be able to use their expertise to deal with cases heard in this Court in a uniform manner.
TIME AND MONEY	A hierarchy ensures that the simpler cases can be heard quickly and more cheaply in the lower courts, while those cases that are more complex, requiring more time and expertise, are heard in the superior courts. This ensures that simpler cases are not waiting for longer cases to finish before the case is dealt with.
ADMINISTRATIVE CONVENIENCE	It is more efficient to have cases of a similar nature be heard by a particular court. It is also a better use of resources. For example, it makes sense to have more personnel and courts at the magistrate level because the majority of criminal cases are heard there.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Parliament

- There are nine parliaments in Australia: the Commonwealth Parliament, six state parliaments and two territory parliaments (NT and ACT).
- All parliaments have law-making authority within their jurisdiction, and can change, repeal previous legislation as well as override common law.
- Common law is developed from the legal system through the application of precedent.
- The Constitution sets out guidelines and principles for how the states and the country is governed and describes the power and authority of the government.
- The Constitution establishes the division of law-making powers between the Commonwealth Government and the state governments:
 - > Specific powers are those of the Commonwealth Parliament and include laws about foreign trade, taxation and defence.
 - > Exclusive powers are those that can only be used by the Commonwealth Parliament and cover laws such as printing money, defence and immigration.
 - > Concurrent powers are those shared between the Commonwealth and state parliaments so that they can make laws, for instance, on taxation.
 - > Residual powers are those each state has to make its own laws, and can include areas of criminal and civil law, health and education.
- Both the Commonwealth Parliament and Victorian Parliament are bicameral, meaning they consist of the Crown and two houses; the Lower House and the Upper House.
- Commonwealth Parliament consists of:
 - > The Crown (where the Queen is represented by the Governor-General)
 - > House of Representatives (where each member represents an electorate)
 - > Senate (where each state is represented by 12 senators)
- Victorian Parliament consists of:
 - > The Crown (where the Queen is represented by the Governor)
 - > Legislative Assembly (where each member represents an electorate of approximately the same population)
 - > Legislative Council (where the state is divided into eight regions, each with five members)
- The Commonwealth, state and territory parliaments are part of the law-making process. Laws are made through legislative process for the following reasons:
 - > change in community values
 - > community awareness
 - > the nature of business or commerce
 - > technological change
- Steps involved in the legislative process include:
 - > a need for a change in the law
 - > pressure on parliament
 - > initiation and policy determination
 - > drafting of the Bill
 - > progress of a Bill through both houses of parliament
 - > Royal Assent

The relationship between parliament and the courts

- Courts resolve disputes through interpretation of legislation and applying the law to cases.
- A precedent is formed when a judge interprets the meaning of an Act of Parliament and gives their reasons for that interpretation.
 - > Interpretation Acts are where courts consider the purpose or objective of an Act.
 - > Legal maxims are rules developed by judges to help determine the meaning of words in an Act.
- Parliament is the supreme law-making body in the legal system, and it can:
 - > Abrogate common law made by the courts—reverse it
 - > Codify common law made by the courts—confirm it

The court hierarchy

- The Victorian hierarchy arranged from highest power to lowest is as follows:
 - > High Court of Australia
 - > Victorian Court of Appeal
 - > Supreme Court (Court of Appeal)
 - > County Court
 - > Magistrates' Court
- The prescribed limits, or jurisdiction of the Victorian courts have:
 - > Original jurisdiction—where cases are heard for the first time
 - > Appellate jurisdiction—where a case is heard on appeal, or for the second time
- It can be advantageous to have the Victorian court hierarchy as it is (and the acronym PASTA may assist you to remember the five reasons):
 - > Precedent (typically set by the higher courts and followed by the lower courts)
 - > Appeals (decisions by a lower court may be reviewed by a higher court)
 - > Specialisation (skills and expertise in particular courts give more consistency)
 - > Time and money (simpler cases can be heard more cheaply in the lower courts, whereas complex cases are heard in the superior courts requiring more time and expertise)
 - > Administrative convenience (more efficient for similar cases to be heard by a particular court).

CHECK YOUR UNDERSTANDING

1. Define the following terms:
 - a. Parliamentary sovereignty
 - b. Federation
 - c. Government.
2. Identify the Act that sets out the legislative powers of the Commonwealth Parliament.
3. Provide five examples of laws made by the federal and state governments. Identify each example as being either an exclusive, concurrent or residual power.
4. Describe what is meant by the division of power in the Constitution. In your answer, make sure you explain the four types of powers.
5. What is the importance of a bicameral parliament?
6. Describe the structure of both the Commonwealth Parliament and the Victorian Parliament.
7. Explain the role of the Crown in the parliamentary process.
8. The progress of a Bill through Parliament involves a number of steps. Outline the stages through which a Bill must pass before it becomes an Act of Parliament.

9. Describe the role of the courts in dealing with legislation.
10. With the use of an example, explain the relationship between parliaments and the courts.
11. Identify the courts within the Victorian Court hierarchy.
12. Outline the jurisdiction of the courts within the Victorian Court hierarchy.
13. Briefly describe the reasons for a court hierarchy.

APPLY YOUR UNDERSTANDING

THE PROCESS OF MAKING AND APPLYING LAWS

1. 'The Australian Constitution ensures that laws are relevant to only the nation as a whole. There is no provision for law-making by states.' To what extent do you agree with this statement?
Note: When answering a 'To what extent question' it is important that you make a statement about your point of view, e.g. 'To some extent that Constitution ensures laws are only relevant to the nation as a whole; however, ...' before going into your explanation. Your explanation should support the point of view you have stated. In most questions of this type, you will normally not agree fully, so you should provide points that support the statement in one paragraph and then points that are against the statement in another paragraph. Finish your answer with a restatement of your point of view.
2. 'Parliament, as the supreme law-making body, has ultimate power over what the laws are in its jurisdiction.' With reference to this statement, explain the relationship between parliament and the courts. Your answer should include references to common law, abrogation and codification as well as examples you are familiar with.
3. Explain why it would be incorrect to say that there is no need for a court hierarchy.
4. Read the cases below and answer the following for each case:
 - a. Identify the court that would hear the case.
 - b. Justify your identification by referring to the court's jurisdiction. Remember to identify if the case would be in the court's original or appellate jurisdiction.

CASE A

John has been charged with aggravated burglary; an indictable offence that cannot be heard summarily.

CASE B

Marlo is being sued for negligence, a civil matter. The plaintiff is seeking \$40 000 in damages.

CASE C

Poppy has been ordered to pay damages in the amount of \$150 000. She does not agree with the decision of the judge in the County Court and wants to appeal the decision.

CASE D

Ashley has been sentenced to 10 years' imprisonment, without parole, for the theft of goods in the amount of \$5000. He believes the sentence handed down by the magistrate was excessive and will be appealing the sentence.

CASE E

Sadie has been told her house is being acquired by the Commonwealth Government so that the government can increase the size of the airport. Sadie doesn't believe that the amount paid by the Commonwealth is enough and knows that the Constitution requires that the amount paid be 'just'. She wants to take the government to court to get more money.



ASSESSMENT

DIVISION OF POWERS AND SAME-SEX MARRIAGE

HIGH COURT STRIKES DOWN ACT GAY MARRIAGE LAW

Lauren Wilson

THE High Court has unanimously struck down the ACT's gay marriage laws.

The decision will mean that about two dozen week-old marriages have no legal effect.

The ACT *Marriage Equality (Same Sex)* laws passed the territory's Legislative Assembly in October, but only came into effect last month and couples were required to provide four weeks' notice before conducting wedding ceremonies.

...

Had the nation's top court upheld the ACT's gay marriage legislation it would have opened the door to similar laws being passed across the country, pressuring the government to make it legal at a national level.

The Commonwealth Government sought an expedited hearing in the High Court arguing the national capital's laws were inconsistent with federal legislation and unconstitutional.

Federal government lawyers argued in the High Court that the Commonwealth marriage act was intended to ensure that state and territories did not operate as different countries when it came to determining whether a couple was married.

The High Court determined that the federal parliament has the power under the Australian Constitution to legislate on same-sex marriage, and that whether or not same-sex marriages are legalised is a matter for the federal parliament.

'The Court held that the object of the ACT Act is to provide for marriage equality for same sex couples and not for some form of legally recognised relationship which is relevantly different from the relationship of marriage which federal law provides for and recognises,' the summary judgment said.

'Accordingly, the ACT cannot operate concurrently with the federal Act.'

It said because the ACT does not validly provide for the formation of same-sex marriages, the whole of the ACT's *Marriage Equality (Same Sex) Act 2013* has no effect.

Supporters of gay marriage were dismayed at the ruling.

'This is devastating for those couples who married this week and for their families,' Australian Marriage Equality national director Rodney Croome said shortly after the decision was handed down in Canberra.

However, he said the ruling was just 'a temporary defeat'.

...

The Australian Christian Lobby said the ruling upheld the uniformity of marriage laws across the country.

'Marriage between a man and a woman is good for society and beneficial for governments to uphold in legislation,' managing director Lyle Shelton said in a statement.

'It's about providing a future for the next generation where they can be raised by their biological parents, wherever possible.' Mr Shelton was concerned for same-sex couples who thought they were married under the ACT legislation.

'Understandably they will be disappointed at the decision handed down today and it is unfortunate they were put in this position,' he said.

Human Rights Law Centre spokeswoman Anna Brown said the ruling was a blow to the same-sex couples who had tied the knot in the ACT.

'The outcome has laid responsibility for advancing marriage equality squarely at the feet of the federal parliament,' she said.



Read the case study 'Division of Powers and same-sex marriage', then answer the following questions.

ASSESSMENT HINT: Refer back to the Assessment hint in Chapter 1 to remind yourself about the requirements for answers in an assessment.

1. Outline the law that was the question of the court case discussed in the case file. (2 marks)
2. Identify the two parties to the case. (1 mark)
3. Identify the court that heard this case. Explain, with reference to the court hierarchy and jurisdictions, why this court would have heard this case. (3 marks)
4. Outline the court's decision in this case. (2 marks)
5. With reference to the division of powers outlined in the Constitution, explain why the court reached this decision. **Hint:** In your answer, make sure you refer to specific powers, concurrent powers and section 109. (4 marks)
6. Explain how the division of powers and the court hierarchy help to ensure justice, fairness and equality. (6 marks)



ASSESSMENT

Source: *The Australian*,
12 December 2013



KEY CONCEPTS OF CRIMINAL LAW

UNIT 1 – AREA OF STUDY 2: The presumption of innocence

The presumption of innocence is the fundamental principle of criminal law and provides a guarantee that an accused is presumed innocent until proven guilty beyond reasonable doubt.

OUTCOME

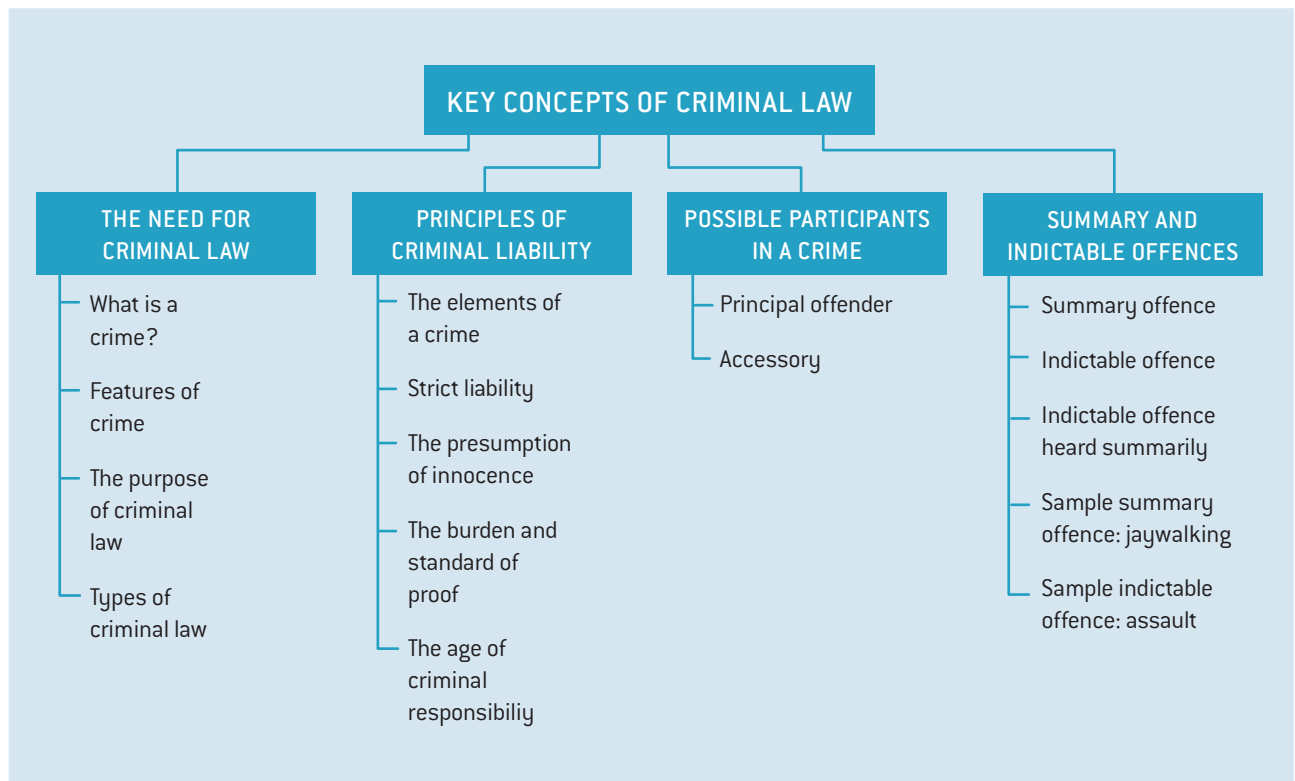
On completion of this unit the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

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

KEY SKILLS

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



KEY TERMS

accessory	A person who is not present at the time of the crime but assists (either before or after)
<i>actus reus</i>	A wrongful act; the physical act constituting a crime
assault	An action that places another individual in fear of violence
burden of proof	A duty to prove what is suspected, which rests with the party making the allegation or assertion
crime	An act or omission that is seen as illegal and is punishable by a court
deterrence	Imposition of a sanction to discourage others from taking a similar action
<i>doli incapax</i>	Lacking the capacity to be guilty of an offence; for example, children
indictable offence	A serious criminal offence, heard before a judge and jury in the County Court or the Supreme Court
indictable offence heard summarily	An indictable offence heard before a magistrate
<i>mens rea</i>	A guilty mind or the state of mind required to commit a wrongful act
presumption of innocence	The principle that every person is considered to be innocent until proven guilty
principal offender	A person who participates in the commission of a crime
punishment	A penalty or sanction imposed on a wrongdoer
rehabilitation	Improvement through programs that focus on bringing about changes in an offender's behaviour
retribution	An act done as revenge or to pay back for a wrong committed
standard of proof	The standard against which cases are measured; in a criminal case the standard of proof is beyond reasonable doubt
strict liability	Offences in which no wrongful intent needs to be established
summary offence	An offence of a less serious nature, such as a minor traffic offence; heard in the Magistrates' Court

THE NEED FOR CRIMINAL LAW

When we think of the word 'law', and the concept of someone breaking the law, chances are that we will think first of criminal law and someone committing a **crime**. The types of actions that come to mind are *murder*, *rape* and *robbery*. This is not surprising, since these crimes are constantly reported by the media and dramatised in television programs and films.

CRIME: an act or omission that is seen as illegal and is punishable by a court

HAVE YOU...	YES / NO / UNSURE
Seen a crime in progress, such as shoplifting, and not reported it?	
Eaten a chocolate bar in a supermarket and not paid for it at the counter?	
Walked across the road when there are pedestrian lights nearby?	
Dropped litter from a vehicle?	
Failed to wear a safety belt in the back seat of a car or bus?	
Cheated, or known of someone who had cheated, on a VCE exam?	
Sprayed graffiti somewhere or vandalised public equipment?	
Driven a car without a learner's permit on a road?	
Consumed alcohol in private premises, without permission, under the age of 18?	
Texted or emailed someone a threatening message?	

One of the key reasons for having laws is to enable us to live together while recognising the rights of ourselves and others. As you can see from the list above, if you answered 'yes' to any of the questions, you may have committed a crime. The law places responsibilities on individuals to ensure that their actions don't hurt others. It also supplies a means or system to resolve disputes when they do happen.

Criminal law establishes a code of conduct for the community.

Criminal law is an established code of conduct and it guides our behaviour. It is primarily concerned with the regulation of conduct in society. For instance, criminal law prohibits specific acts, such as murder, *theft* and rape.

WHAT IS A CRIME?

It is difficult to provide an exact definition of what constitutes a crime. In general terms, we can define crime as:

An act or omission associated with injurious, threatening or immoral conduct considered detrimental to the individual(s) affected or to the interests of a given society (at that particular time) and that incurs some punishment of the guilty offender by the state.

To understand what this legal definition means, we need to look at some common features that distinguish criminal conduct from non-criminal conduct.

FEATURES OF CRIME

Harmfulness

Society considers certain types of conduct to be harmful or damaging, and so classes them as criminal behaviour. There are three ways in which an action may be seen as harmful: physical injury (e.g. murder or rape); economic loss (e.g. theft or embezzlement); and harm against society itself (e.g. pollution or perjury).

A crime is generally something considered harmful, immoral and worthy of punishment.

Immorality

Morality (and immorality) is generally based on what society, at any particular time, believes is right or wrong. In some instances, this is easy to see. A common value held in all societies is the value we place on preserving human life. The criminal law reflects this value by making murder, **assault** and rape criminal offences. By making these actions criminal offences, the law protects the values of the community (as well as protecting individuals from physical harm).

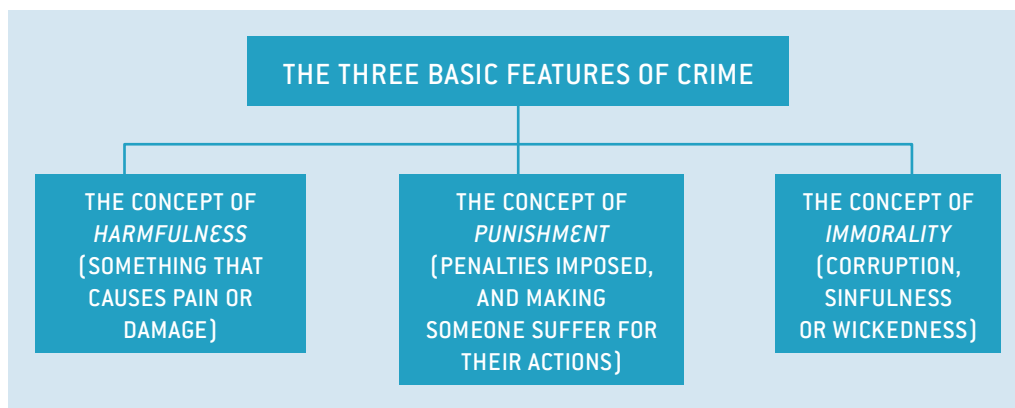
ASSAULT: an action that places another individual in fear of violence

The values that the community attaches to some actions are not always clear. For instance, there is a diversity of community views on issues such as abortion and prostitution. Community views are divided on these issues and, from time to time, there is debate about whether these actions should be considered criminal offences. What we regard as crime seems to depend on what the majority of people in a given society, at a given time, think is immoral. As society changes, so does the view of what should be seen as criminal.

Punishment

The concept of **punishment** is readily identified with crime. Society has determined, through its parliaments and legal system, that those found guilty of crimes should be punished. Punishments for criminal offences include the loss of the right to drive, monetary fines, community-based orders and imprisonment.

PUNISHMENT: a penalty or sanction imposed on a wrongdoer



THE PURPOSE OF CRIMINAL LAW

Criminal law reflects society's views about conduct that the community regards as unacceptable. It performs a balancing act: to protect the interests of society by bringing offenders to justice, while protecting the rights (or civil liberties) of members of society to act freely. The issue of civil liberties needs to be kept in mind constantly.

Criminal law reflects the community's values and imposes sanctions on those who do not behave in an acceptable manner.

Criminal law is also concerned with punishing people who have been found guilty of crimes. It aims, through punishment, to do several things:

- to *punish fairly* by punishing the offender in a manner that is just, given the circumstances in which the offence has been committed. In other words, to impose a sanction on the accused that considers all factors, so that the punishment meets the crime.
- to *deter offenders* from re-offending by imposing a sentence that discourages and prevents other offenders from committing the same or a similar offence. **Deterrence** is a way of reducing criminal behaviour and re-offending.
- to *rehabilitate offenders* by establishing the conditions or programs that would alter or modify the behaviour of individuals so that they will not commit the same offence again. This can include education and or drug dependency programs. **Rehabilitation** aims to bring about changes in an offender's behaviour.

DETERRENCE: imposition of a sanction to discourage others from taking a similar action

REHABILITATION: improvement through programs that focus on bringing about changes in an offender's behaviour

RETRIBUTION: an act done as revenge or to pay back for a wrong committed

- to *impose society's retribution*. **Retribution** is an act of revenge or pay back for a wrong committed. In some cases, this can be demonstrated by denunciation or disapproval of the particular type of behaviour in which the offender has been involved.
- to *remove offenders from society* for the protection of the community by detaining the offender in a humane fashion.
- to *protect the community* against the potentially harmful actions of individuals; removing an offender from the community to prevent any further harm, for example, extinguishes the threat of harm to others. However, imprisonment (removing an individual from the community) is seen as a last resort.

APPLY YOUR UNDERSTANDING

THE PURPOSES OF CRIMINAL LAW

1. Read through the general facts of the situations below and identify the purposes of criminal law. The outcome or sanction of a criminal offence can have more than one purpose. Justify your reasons why that particular sanction was chosen.

SCENARIO	OUTCOME OR SANCTION	THE PURPOSES OF CRIMINAL LAW
1. A woman is convicted of witnessing a crime and not reporting it (first offence)	Fine (2 penalty units)	
2. A man is convicted of eating a chocolate bar in a supermarket without paying for it at the counter (first offence)	Official police caution or warning	
3. A 17-year-old girl is convicted of walking across the road without using the pedestrian crossing nearby (second offence)	Fine (1 penalty unit)	
4. A man is convicted of dropping litter from a vehicle (third offence)	Fine (5 penalty units)	
5. A woman is found guilty of failing to wear a safety belt in the driver's seat of a car (fifth offence)	Licence cancellation for 6 months and a fine (10 penalty units)	
6. A girl is found guilty of cheating on a VCE exam and passing the answers on to other students	Loss of VCE score and imprisonment for 3 months	
7. A doctor is found guilty of defrauding Medicare of \$25 000 (first offence)	Fine (20 penalty units) and a community correction order of 500 hours of unpaid community work	
8. An unemployed 25-year-old woman is found guilty of placing graffiti on public equipment (first offence)	Community correction order of 50 hours of unpaid community work	
9. A 19-year-old student is found guilty of killing her partner, who consistently abused and beat her (first offence)	Imprisonment (Maximum of 8 years, with a minimum of 6 years)	
10. A 20-year-old man is found guilty of using social media to send a threatening message (sixth offence)	Imprisonment (2 years) and a fine (20 penalty units)	

2. Criminal law is meant to reflect the values of our community. In doing so, our courts impose sanctions on those who break the law. Discuss and justify, providing examples, which of the following purposes of criminal law are, in your opinion, the most important:
- > to punish fairly
 - > to deter offenders from re-offending
 - > to rehabilitate offenders
 - > to impose society's retribution (revenge)
 - > to remove offenders from society in order to protect the community.

TYPES OF CRIMINAL LAW

Criminal law can sometime be categorised as public law, as it affects all member of the community. This is different from private (civil) law, which deals with issues between individuals. Civil law will be covered in Chapters 7 and 8.

A good way to understand the types of criminal law is to look at the way the Crime Statistics Agency (CSA) of Victoria categorise crime. This agency is responsible for processing, analysing and publishing Victorian crime statistics, independent of Victoria Police. The Crime Statistics Agency publishes quarterly statistical releases of reported crime data. These releases include the number and rate of offences across Victoria, demographic characteristics of victims and alleged offenders and family and domestic violence incidents.

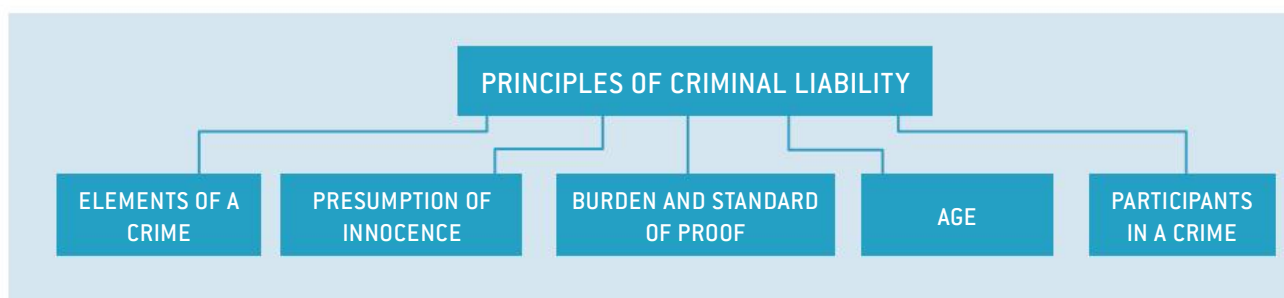
4.1 Categories of criminal law

CRIMES AGAINST THE PERSON	Homicide and related offences Assault and related offences Sexual offences Abduction and related offences Robbery Blackmail and extortion Stalking, harassment and threatening behaviour Dangerous and negligent acts endangering people
PROPERTY AND DECEPTION OFFENCES	Arson Property damage Burglary/Break and enter Theft Deception Bribery
DRUG OFFENCES	Drug dealing and trafficking Cultivate or manufacture drugs Drug use and possession Other drug offences
PUBLIC ORDER AND SECURITY OFFENCES	Weapons and explosives offences Disorderly and offensive conduct Public nuisance offences Public security offences
JUSTICE PROCEDURES OFFENCES	Justice procedures such as breach of bail Breaches of orders

4.2 Other useful ways of categorising crime

CRIMES AGAINST SOCIETY (PUBLIC)	Drink-driving Drug offences
CRIMES AGAINST MORALITY	Incest Prostitution
CRIMES AGAINST THE LEGAL SYSTEM	Perjury Jury offences
CRIMES AGAINST THE STATE	Terrorism Treason

PRINCIPLES OF CRIMINAL LIABILITY



THE ELEMENTS OF A CRIME: *ACTUS REUS* AND *MENS REA*

Generally, a person will only be punished for a crime if the person understood when they committed the act that it was wrong. This accepted notion is expressed in the judge-made legal principle of *actus reus non facit reum nisi mens sit rea*. This literally means ‘an act alone does not make you guilty, unless you have a guilty mind’. Therefore, for a person accused of a crime to be found guilty, there must be two elements:

- ***actus reus***: a wrongful act or the physical act constituting a crime
- ***mens rea***: a guilty mind or the state of mind required to commit a wrongful act.

Section 81 ‘Obtaining property by deception’ of the *Victorian Crimes Act 1958* is a very good example that illustrates the element of *actus reus* (a wrongful act) and *mens rea* (a guilty mind).

ACTUS REUS: a wrongful act; the physical act constituting a crime

MENS REA: a guilty mind or the state of mind required to commit a wrongful act



CRIMES ACT 1958 – SECT 81

Obtaining property by deception

- (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

...

- (4) For the purposes of this section, ‘deception’—
 - (a) means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person

This section provides that a person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum). Deception can be by any behaviour, whether deliberate or reckless, by words or conduct as to the intentions of the person.

As you can see from this example, the physical act of obtaining property belonging to another is the wrongful or physical act and demonstrates *actus reus*. The second element needed to prove this crime is an intent to commit the crime. *Mens rea* is proved when a person dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it.

Generally, if only one of these elements is present at the time of the alleged offence, a crime cannot be established. If the police or Crown Prosecutor cannot prove that the accused used deception or acted dishonestly, the charge cannot be proved.

In most cases, to be guilty of a crime a person must have *actus reus* and *mens rea*.

THE CONCEPT OF STRICT LIABILITY

Parliament has established **strict liability** in some criminal offences. Strict liability means that by committing the act, you are guilty of the offence. It is not necessary to prove that you intended to commit the offence.

STRICT LIABILITY: offences in which no wrongful intent needs to be established

Strict liability offences penalise wrongdoers irrespective of their state of mind. The police or law enforcement agencies do not need to prove guilty mind or intent. Merely committing the act is enough to prove that an offence has occurred.

Strict liability offences require only *actus reus*.

Strict liability applies to behaviour relating to the sale of tobacco products and alcohol to minors and traffic offences. Take the following example:



SUMMARY OFFENCES ACT 1966 – SECT 18

Offensive behaviour by a person in a motor vehicle in a declared area

- (1) A person is guilty of an offence if—
 - (a) the person uses words, or makes a gesture, while in a motor vehicle; and
 - (b) the person does so within the view or hearing of another person in a public place; and
 - (c) the motor vehicle is (wholly or partly) in an area declared by the Minister under subsection (4); and
 - (d) the words are likely to offend, or the gesture is likely to offend, a reasonable person.
- (2) An offence against subsection (1) is an offence of strict liability.
- (3) A person who is guilty of an offence against subsection (1) is liable to a fine not exceeding 5 penalty units.

Section 18 (1) 'offensive behaviour by a person in a motor vehicle' from the *Summary Offences Act 1966* (Vic) is strict liability offence which is punishable by a fine not exceeding 5 penalty units. A person is guilty of an offence if:

- (a) the person uses words, or makes a gesture, while in a motor vehicle and
- (b) the person does so within the view or hearing of another person in a public place and
- (c) the motor vehicle is (wholly or partly) in an area declared by the Minister under subsection (4) and
- (d) the words are likely to offend, or the gesture is likely to offend, a reasonable person.

There is no need to prove the offender's state of mind. Merely using the words, or the gestures, that are likely to offend a reasonable person is enough for a person to be found guilty.

THE PRESUMPTION OF INNOCENCE

PRESUMPTION OF INNOCENCE: the principle that every person is considered to be innocent until proven guilty

According to the law, any person accused of committing a crime is presumed innocent until proven guilty. This principle is called the presumption of innocence.

The **presumption of innocence** is a significant principle, not only in common law, but also in international human rights law. Article 14(2) of the International Covenant on Civil and Political Rights 1966 states that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. The Victorian Parliament included this principle as part of its *Charter of Human Rights and Responsibilities Act 2006*. Section 25(1) states that a person charged with a criminal offence has the right to be presumed innocent until proved guilty.

Under Victorian and international law, reversing the onus of proof may be justified if the nature of the offence makes it very difficult for the prosecution to prove guilt, such as in drug trafficking crimes. However, reversing the onus changes the burden and standard of proof. This can be seen as unfair, as the accused may not have the resources of the state to prove their case.

SHOULD THE PRESUMPTION OF INNOCENCE BE REVERSED IN SOME CRIMES?

There are several arguments for reversing the presumption of innocence.

One is that it may be reasonable to reverse the burden of proof in order to pursue justice in some crimes. This may be necessary and proportionate providing it is done within reasonable limits, such as on the balance of probabilities instead of beyond reasonable grounds. In this case, it would allow for a fair and unbiased hearing.

Another argument is that an individual who voluntarily participates in a criminal activity knows that what they are doing is wrong, and therefore they should have to prove their innocence. It should not be up to the prosecution to prove their guilt. For example, with some Commonwealth drug offences (such as the intent to supply drugs), it is up to the accused to prove on a balance of probabilities that they did not know that the package contained drugs.

The seriousness of a crime can also justify placing a legal burden of proof on the accused. Drug and terrorism offences are seen as huge legal and social problems; therefore, it may be reasonable to reverse this onus of proof to discourage others from entering into these sorts of illegal behaviours.

'Beyond reasonable doubt' is an important principle of our legal system. However, in some instances, it may be difficult for the prosecution to meet this obligation, which may justify reversing the onus of proof. It is reasonable to reverse the onus of proof where the accused has specific knowledge, such as in matters of taxation or matters dealing with wealth, where the accused has specific knowledge of how the assets were accumulated.

Laws that reverse the legal burden

There is a range of federal criminal matters where the legal burden is on the defendant.

Terrorism offences

The Commonwealth Government has created the offence of 'membership of a terrorist organisation', which requires the accused to prove that they took reasonable steps to terminate membership of a terrorist organisation.

Recently, the media has reported a number of cases where Australian citizens have travelled to a war zone or a known terrorist area (such as Syria or Iraq) in order to take up arms against Australian forces. The Commonwealth Government has identified these zones as 'declared areas'. Therefore, it is up to the accused to provide evidence that they were in this area for a legitimate reason.

Drug offences

A number of Commonwealth drug offences relate to dealing a trafficable quantity or cultivating a commercial quantity. These offences assume that the accused intends to traffic or manufacture drugs for a commercial reason. Therefore, the onus lies with the defendant to prove, on the balance of probabilities, that these drugs were not theirs. This is usually done by the accused testifying in the witness box or providing evidence to disprove the prosecution's case.

Child sex offences outside Australia

Sexual tourism has been an issue for some Asian countries. The Commonwealth Government has created laws to protect children outside Australia from sexual offences. This means that if an accused commits an offence outside Australia, that person can be charged with an offence and required to prove that they did not intend to derive gratification from a child being present during sexual activity.

Plastic explosives

A number of criminal offences are related to the trafficking, importing or exporting, manufacturing or possessing unmarked plastic explosives. The burden of proof is reversed if there is no marking stating that the item is a plastic explosive. In other words, the accused must prove that they did not wish to intentionally hide the explosive or that there were no reasonable grounds for possessing the plastic explosive.

Taxation

There are a number of tax offences in which the burden of proof is reversed; for example, making false or misleading statements, or incorrectly keeping records in order to avoid paying tax. In cases such as this, the accused has a degree of personal liability to prove or provide evidence that they did not avoid paying tax.

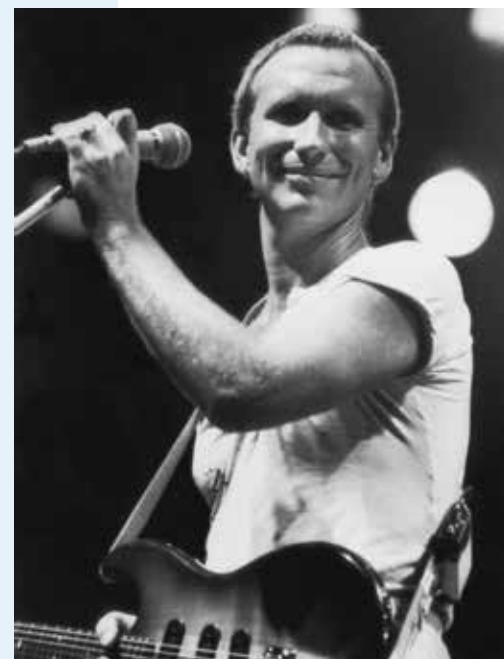
Copyright

There are a number of offences related to copyright infringements where the onus of proof is reversed. The accused must prove that they had permission of the copyright holder, or owned copyright to a piece of work, such as a computer program, piece of music or a film. An example of permission or ownership includes proof of purchase. If an accused person is charged with a copyright offence, they must prove ownership on the balance of probabilities.

Proceeds of crime

There are a number of laws relating to the proceeds of crime that also reverse the onus of proof. If an accused is charged with a Commonwealth unexplained wealth order, it is up to the accused to prove their wealth did not come from the proceeds of crime. The source of a person's wealth is within their own knowledge; therefore, if they are unable to legitimately prove that the wealth was legally obtained, a confiscation order will be made and their assets forfeited.

Colin Hay of Australian band Men at Work was sued for breach of copyright in his song *Down Under*.



APPLY YOUR UNDERSTANDING

1. In your own words, define what is meant by the 'presumption of innocence'.
2. Using two reasons, justify why our legal system should adhere to the presumption of innocence.
3. Using two reasons, justify why our legal system should reverse the presumption of innocence.
4. Collect two recent newspaper articles on criminal law and prepare a brief report that:
 - > states the title, source and date of the article
 - > provides a brief summary of the facts or issues
 - > states the court that is hearing or will hear the case
 - > identifies the party who has the presumption of innocence
 - > justifies why such a rule is needed (use the characteristics of an effective law)
 - > discusses the impact on the individual/s and society if the presumption of innocence is reversed.

The burden of proof means that the prosecution must prove you are guilty.

BURDEN OF PROOF: a duty to prove what is suspected, which rests with the party making the allegation or assertion

STANDARD OF PROOF: the standard against which cases are measured

The prosecution must prove you are guilty beyond reasonable doubt.

DOLI INCAPAX: lacking the capacity to be guilty of an offence; for example, children

THE BURDEN AND STANDARD OF PROOF

Burden of proof

In order to obtain a fair and unbiased hearing, a number of minimum legal requirements need to be met when someone is charged with a criminal offence. There is a legal duty on the party who is making the allegation to prove that the accused is guilty of the crime. (In minor matters, this will be the police prosecutor; in serious matters this will be the Director of Public Prosecutions.) This is known as the **burden of proof**. The prosecution must prove that the accused is guilty; the accused does not have to prove innocence. If the prosecution's evidence is insufficient, then the accused will be acquitted.

Standard of proof

The next important legal requirement is the **standard of proof**; the prosecution must prove the accused guilty 'beyond reasonable doubt'. If a magistrate or jury is not convinced beyond reasonable doubt of the accused's guilt, the accused should be given the benefit of the doubt and found not guilty. 'Beyond reasonable doubt' means that the magistrate or jury must believe 100 per cent that the accused is guilty. If they feel that the accused is 95 per cent guilty, this is not enough for a conviction.

Our system of trial protects basic human rights by placing the burden of proof on the accuser. Defendants have additional rights that are designed to protect their human rights. For example, they do not have to incriminate themselves during questioning, as they have the right to silence. This may hinder the ability of the police to gather all relevant evidence. However, situations involving vulnerable people (such as the homeless, the Indigenous or migrants) can lead to misunderstandings, due to a lack of cultural and social awareness. This leads to problems in the criminal investigation process.

THE AGE OF CRIMINAL RESPONSIBILITY

In Victoria, only people aged 10 years and over are considered by law to be criminally liable; a child under 10 cannot be charged with a crime. It is also assumed that young people aged between 10 and 14 do not possess sufficient understanding or capacity to know when they are doing something that it is wrong. This is known as the principle of *doli incapax*.

However, if the prosecution can provide evidence that the young person knew the difference between right and wrong, a prosecution for a criminal offence can proceed. The following laws and sections provide for the protection of young people in our society.

The principle of *doli incapax* is dealt with by the procedures of the Children's Court of Victoria. Many of these procedures have been developed over time in common law, as courts work to make sense of Acts such as the *Children, Youth and Families Act 2005* (Vic). The burden of proof in these cases is on the prosecution to prove that a child who committed a crime knew that what they were doing was seriously wrong. In other words, the child was capable of understanding that their action was legally and morally wrong. If this understanding is proven, the child is able to stand trial. If they are found guilty, they are subject to punishment.

A child under 10 cannot be charged with a crime. The Children's Court is covered in more detail in Chapter 10.



CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 1

Purposes

The main purposes of this Act are—

- (a) to provide for community services to support children and families; and
- (b) to provide for the protection of children; and
- (c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and
- (d) to continue The Children's Court of Victoria as a specialist court dealing with matters relating to children.

CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 3

Definitions

(1) In this Act—

Child means—

- (a) in the case of a person who is alleged to have committed an offence, a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court

CHILDREN, YOUTH AND FAMILIES ACT 2005 - SECT 344

Children under 10 years of age

It is conclusively presumed that a child under the age of 10 years cannot commit an offence ...

Community responses to dealing with young offenders can be problematic. On the one hand, some members in our society believe that young offenders should be dealt with softly and that rehabilitation should be the prime motive in their dealing with the justice system. However, there are others in the community who believe that young offenders should feel the full force of the law.



Children and the legal system

In order to protect child offenders, the Supreme Court uses initials or provides a pseudonym in its case citations. These can be found when a search is done on the Australasian Legal Information Institute (AustLII) service, which provides free online access to Australian legal materials and cases.

The following cases recorded in Law Reports raise a number of disturbing issues about criminal behaviour and how our legal system deals with young people.

In 2016, a 15-year-old boy known as SL pleaded guilty to 'attempted murder and burglary while on bail'. While SL was awaiting his sentencing hearing, an application for his detention on remand was made. This application covered suitable arrangements for his sentencing hearing, having regard to his age. The order stated that SL needed to be segregated, away from adult prisoners when at court, to avoid intimidation, humiliation and distress, ensuring effective participation in criminal process.

A 14-year-old boy was convicted of manslaughter. He was imprisoned for seven years and six months for stabbing a 50-year-old woman. After egging a house in his local neighbourhood, the teenager became involved in a scuffle with the owners of the property; he stabbed the woman with an 11 cm knife that he had purchased on the internet.

Two youths gate-crashed a party. They were partially drunk and started a fight with four victims. A 17-year-old offender armed himself with a screwdriver and stabbed one victim in the head and another in the arm. One of these victims was permanently visually impaired. Initially, the youth was charged with attempted murder, but the Director of Public Prosecutions accepted the plea of guilty to intentionally causing serious injury as the offender had no prior convictions. He received a term of imprisonment of five years and three months.

Source: law reports from the Supreme Court; AustLII

In response to a great deal of pressure from the community, the Victorian Government has introduced a range of measures to deal with the rising issue of youth crime. The Government has introduced laws to make it illegal for adults to deliberately acquire or use children for criminal activities. If found guilty, the adult offender could face up to 10 years' jail. The Children's Court also has the power to restrict a young offender's associates, including imposing curfews and requiring them to attend school, training or a work plan. The following case study will provide you with more information relating to the issue of youth crime.



CASE STUDY

CHILDREN AS CRIMINALS

VICTORIA YOUTH CRIME: STATISTICS RAISE QUESTIONS ABOUT CALLS TO DEPORT YOUTH OFFENDERS

Sarah Farnsworth and Patrick Wright

Youth crime has been a hot topic in Victoria recently, with regular stories of violent carjackings, aggravated burglaries and riots in youth justice facilities. Commentators have linked a recent spate of crimes to the so-called Apex gang, heightening anti-migration rhetoric, but police statistics show most home invasions, car thefts and aggravated robberies are committed by people born in Australia.

Data from the Victorian Crime Statistics Agency shows home invasions committed by people aged 10 to 18 have almost doubled since 2012.

CASE STUDY

HOME INVASIONS IN VICTORIA BY OFFENDERS AGED 10–18

COUNTRY OF BIRTH	2012	2013	2014	2015	2016
AUSTRALIA	208	278	139	183	415
NEW ZEALAND	12	6	4	5	16
SUDAN	4	10	3	19	40
TANZANIA	0	0	0	0	8
TOTAL	236	307	158	233	537

CAR THEFTS IN VICTORIA BY OFFENDERS AGED 10–18

COUNTRY OF BIRTH	2012	2013	2014	2015	2016
AUSTRALIA	1446	1348	1604	1930	1822
INDIA	0	3	0	3	16
NEW ZEALAND	117	33	154	102	115
SUDAN	12	25	49	65	129
TOTAL	1748	1473	1961	2364	2283

AGGRAVATED BURGLARIES IN VICTORIA BY OFFENDERS AGED 10–18

COUNTRY OF BIRTH	2012	2013	2014	2015	2016
AUSTRALIA	684	670	496	566	526
NEW ZEALAND	125	76	74	146	106
SAMOA	15	18	5	6	11
SUDAN	77	87	31	54	126
TOTAL	1079	964	696	878	907

WHICH YOUTHS ARE COMMITTING WHICH CRIMES?

Commentary about the Apex gang has focused on children from Sudanese and Pacific Island backgrounds, leading to hard-line anti-migrant rhetoric and calls for tougher penalties for youth offenders.

State Opposition Leader Matthew Guy, speaking at a recent forum for crime victims, said: 'If they are not an Australian citizen, then, frankly, I think they [have] worn out their welcome out [sic] and should be deported.'

The Federal Government has cancelled the visas of 172 convicted criminals, just two of those are linked to Apex crimes.



CASE STUDY

Source: ABC News Online,
6 Dec 2016

Victoria Police does not record ethnicity in its official LEAP database, but place of birth is recorded.

The figures show youth born in Australia commit the most crimes in all three categories.

Last year, offences committed by youths born in Sudan jumped significantly and were second highest.

Proportionally, Sudanese-born youths are vastly over-represented in the statistics, responsible for 7.44 per cent of alleged home invasions, 5.65 per cent of car thefts and 13.9 per cent of aggravated robberies.

The latest census data shows people born in Sudan or South Sudan made up 0.11 per cent of Victoria's population in 2011. Peer support worker Deng Maleek, who works with youths in the Sudanese community, acknowledged there was a problem but said focusing on ethnicity was problematic.

YOUTH CRIME: A DEPUTY COMMISSIONER'S PERSPECTIVE

Deputy Commissioner Andrew Crisp

The deplorable behaviour of young inmates at Parkville Youth Justice Centre and a dramatic arrest atop the West Gate Bridge this week has made for some troubling headlines.

Without doubt, there is a hard-core cohort of young offenders who are engaging in very serious, repeat offending.

They are responsible for some alarming crimes that have emerged recently including home invasions, armed robberies, carjackings. Terrifying experiences for the victims.

They are challenging a justice system which rightly views young people as different to adult offenders—and as such tries to make positive interventions and provide them with every opportunity to turn their lives around so that they do not continue offending into the future.

But increasingly there are calls for tougher treatment of these young people, and in some of the more extreme cases, it is easy to see why.

For Victoria Police, protecting the community from criminals with disregard for the common values of decency remains our greatest priority—regardless of the age of offenders.

Our local police are working hard, undertaking intelligence-led patrols and cracking down on people wanted on warrants, ensuring offenders are complying with their strict bail conditions, and managing persons of interest.

To illustrate, in 2014/15, we arrested 158 young people for aggravated burglaries. In 2015/16, as the offending has increased, so have our arrests—to 464. A three-fold increase.

All that said, it is important we retain perspective. It might surprise some to know, but the number of young offenders in this state is actually decreasing. What we are seeing is a rise in a smaller number of repeat youth offenders committing more serious and violent crimes.

Amidst all this, we need to keep a real eye on the future. While no-nonsense policing and tougher sentencing might provide a greater sense of short term justice for the community, it does not address the broader, underpinning issues which are driving this increase in offending.

It is critical we understand that better, so that we can break the cycle of lifetime offending and imprisonment. Every criminal that is rehabilitated is one less person committing robberies, assaults and burglaries on innocent people. This is how we will make our community safe into the future.

That's a process we are committed to. So while police will help continue to take action against all offenders—young and old—we will also continue to work with our critical partners in government and the community.

Source:
www.vicpolice.com.au,
17 November 2016

APPLY YOUR UNDERSTANDING

CASE STUDY—CHILDREN AS CRIMINALS

Read the case study 'Children as criminals', then answer the following questions.

1. Describe the age of criminal responsibility in Victoria. Which law covers this area?
2. Define the term *doli incapax*.
3. What is the main purposes of the *Children, Youth and Families Act 2005* (Vic)?
4. Explain how each purpose is demonstrated by our legal system or society.
5. Reading through the case study, identify and list the crimes committed by young offenders.
6. Can you suggest any reasons why these offences are prevalent among young offenders?
7. The Victorian Government has taken the step of nominating a jail unit within Barwon Prison and the Metropolitan Remand Centre, both maximum-security facilities, to house youth offenders who riot in youth justice centres or who are unmanageable. Critically examine the effectiveness of this solution to manage youth offenders.

Hint: 'To critically examine' is to scrutinise a statement carefully in detailed description, considering both the strengths and weaknesses or the arguments for and against something.
8. Analyse the criminal statistics in the case study. What conclusions do they pose? Do you note any inconsistencies in the data, and, if so, what could cause this?
9. Deputy Commissioner Andrew Crisp states 'While no-nonsense policing and tougher sentencing might provide a greater sense of short term justice for the community, it does not address the broader, underpinning issues which are driving this increase in offending.' In pairs, explain and unpack what he is referring to by the 'broader underpinning issue'.
10. In 2014/15, the police arrested 158 young people for aggravated burglaries. In 2015/16, these arrests went to 464. Suggest reasons for this threefold increase in offending for aggravated burglaries by young people.

Going further

11. Deputy Commissioner Andrew Crisp can see why there are calls for tougher treatment of young people and, in some of the more extreme cases, the community believes that the jail door must be slammed shut. Write a letter to the editor providing your opinion on issues about youth crime. Your letter should be 300–400 words, and take a position agreeing or disagreeing with the above statement. Respond to any or all of the following:
 - > the reasons for youth crime
 - > the Victorian Government's response to youth crime
 - > the Victorian Police's response to youth crime
 - > the community's concern about youth crime.

POSSIBLE PARTICIPANTS IN A CRIME

A participant in a crime can be classified as either a principal offender or an accessory.

There have been a number of recent reforms regarding principal offenders and accessories, including laws regarding complicity related to the involvement and participation in a crime.

PRINCIPAL OFFENDER

PRINCIPAL OFFENDER: a person who participates in the commission of a crime

The person who actually commits a crime is called the **principal offender**. A person can participate in a crime even if they do not physically take part. Any person who aids, abets, counsels or organises another person to commit a serious criminal offence (known as an indictable offence) is also treated as a principal offender. For example, a person who acts as a lookout in a bank robbery can still be considered a principal offender.

Section 323 of the *Crimes Act 1958* (Vic) was recently updated to include the following:



A person is involved in the commission of an offence if the person

- (a) Intentionally assists, encourages or directs the commission of the offence; or
- (b) Intentionally assists, encourages or directs the commission of another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence; or
- (c) Enters into an agreement, arrangement or understanding with another person to commit the offence; or
- (d) Enters into an agreement, arrangement or understanding with another person to commit another offence where the person was aware that it was probable that the offence charged would be committed in the course of carrying out the other offence.

A person who committed the offence may include persons who entered into an agreement, arrangement or understanding to commit the offence. This may also include involvement in the commission of an offence, by act or omission. A person can be a principal offender even if they are not physically present when the offence, or an element of the offence, is committed, and whether or not they realise that the facts constitute an offence.

The prosecution must prove that a principal offender committed the relevant criminal acts or was involved in the commission of an offence with the necessary intention. They must prove in court that the accused had intentionally assisted, encouraged or directed the commission of the offence.

ACCESSORY

ACCESSORY: a person who is not present at the time of the crime but assists (either before or after)

A person who knowingly impedes the apprehension, prosecution, conviction or punishment of a principal offender is called an **accessory**. An accessory may assist or encourage the person who commits the offence by counselling or acquiring goods for the principal offender prior to the commission of the offence. Aiding or abetting the principal offender at the time that person commits the crime is also an offence.

There is no need to prove the existence of an agreement between the accessory and the principal offender. The lack of an agreement is what distinguishes aiding, abetting, counselling or procuring from other forms of involvement. To be an accessory to a crime is an offence when the crime is punishable by five or more years in prison. For example, a person who knowingly hides bank robbers from the police would be called an accessory, and that offence is punishable by a maximum term of imprisonment of five years.

Section 325 of the *Crimes Act 1958* (Vic) covers the area of accessories:



- (1) Where a person (in this section called the principal offender) has committed a serious indictable offence (in this section called the principal offence), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

SUMMARY AND INDICTABLE OFFENCES

In Victoria, the sources of criminal law come from two areas: statute law (either state or Commonwealth legislation) and common law. Many of these offences are contained in legislation such as the *Summary Offences Act 1966* (Vic) or the *Crimes Act 1958* (Vic).

SUMMARY OFFENCE

A **summary offence** is a minor criminal matter heard before a magistrate. Due to the minor nature of these offences, they can proceed and be heard if the accused is not present. A range of statutes specify less serious criminal offences; for example, the *Road Safety Act 1986* (Vic) sets out traffic offences. Municipal councils also have the power to pass local laws.

SUMMARY OFFENCE: an offence of a less serious nature, such as a minor traffic offence; heard in the Magistrates' Court

Summary offences are usually considered to be less serious. Examples include traffic offences (for example, drink-driving, speeding and illegal parking), minor drug usage, graffiti and offensive behaviour.

A person charged with a summary offence will receive a summons, which informs the defendant where the case will be heard and the mention date. The reverse side of the summons provides an explanation of what a person should do when they receive a summons.



Melbourne
Magistrates' Court

INDICTABLE OFFENCE

INDICTABLE OFFENCE: a serious criminal offence, heard before a judge and jury in the County Court or the Supreme Court

The *Crimes Act 1958* (Vic) lists the most serious criminal offences, known as **indictable offences**, and sets maximum penalties for these offences. These offences must be heard in either the Magistrates' Court or the Coroners' Court during a committal hearing. If a magistrate believes the evidence is of sufficient weight to support a conviction, then the accused is committed for trial before a judge and jury of 12 citizens in either the County Court or the Supreme Court.

Indictable offences are more serious offences that cannot be heard in the absence of the defendant. Failure to attend by the accused may result in the court issuing a warrant to arrest. Examples of indictable offences include carjacking, aggravated burglary, sexual assault, murder and manslaughter.

INDICTABLE OFFENCE HEARD SUMMARILY

Some indictable offences may be heard in the Magistrates' Court where the Court believes or is satisfied it is appropriate for the offence to be dealt with by a magistrate. Some offences in the *Crimes Act 1958* (Vic), such as theft of property not exceeding \$100 000, may be an **indictable offence heard summarily**. The accused is offered a choice to have the matter determined as an indictable matter in the County Court or a criminal matter, which can be heard before a magistrate immediately.

When determining which cases are heard summarily, a magistrate weighs up the seriousness of the offence, including its nature, manner and complexity. For example, theft is seen as an indictable offence that carries a 10-year maximum penalty. However, if an accused person steals an iTunes card valued at \$50.00, the seriousness (including its nature, manner and complexity) of the offence is all very low. The nature of this offence would result in the matter being heard summarily.

Other examples of indictable offences heard summarily are minor theft, minor assault and minor burglary.

INDICTABLE OFFENCE HEARD SUMMARILY: an indictable offence heard before a magistrate



Melbourne County Court (left) and Melbourne Supreme Court (right)

EXAMPLE SUMMARY OFFENCE: JAYWALKING

The rights protected by law: Rules for pedestrians

Pedestrians are not allowed to:

- cross the road if they are facing an amber or red traffic or pedestrian light
- cross the road within 20 metres of a pedestrian crossing—they must use the crossing
- get out of a moving vehicle
- cross a railway level crossing when it is not allowed
- cause a traffic hazard by moving into the path of a driver
- walk along, or fail to give way when crossing, a path that is for bicycles and wheeled devices (a path showing a 'bicycle lane' sign).

Source: *Road Safety Road Rules* 2009 (SR 94/2009)

Pedestrians must:

- use the shortest or most direct way to cross a road
- cross to the nearest edge of the road after getting off a tram
- obey traffic instructions from a police officer
- give way to vehicles at roundabouts
- obey a 'no pedestrians' sign.

If you need to walk along a road and there is no footpath or nature strip, or if there is but you can't make use of it for some reason, you may need to walk on the road. If so, you must walk on the other side of the road facing oncoming traffic.

Fines and penalties

Road users will have to pay fines if they are caught breaking the road rules. A notice to pay a fine is called an 'infringement notice'. Infringement notices for a pedestrian include traffic infringement notices. These notices can be handed or even mailed to you. It is recommended that a pedestrian read the infringement notice carefully and if they have any questions they should contact the organisation or agency that issued the ticket (such as Victoria Police) or seek legal assistance.

SECTION	OFFENCE	PENALTY UNIT	FINE (AS AT 2017)
231(1)	FAIL TO OBEY TRAFFIC LIGHTS	0.50	\$78
238(1)	TRAVEL ON ROAD CONTRARY TO RULES	0.50	\$78
230(1)	WALK IMPROPERLY ON ROAD	0.50	\$78
234(1)	CROSSING ROAD WITHIN 20 METRES OF PEDESTRIAN CROSSING	0.50	\$78
239(3)	FAIL TO GIVE WAY WHEN CROSSING A BICYCLE PATH OR SEPARATED FOOTPATH	0.50	\$78

4.3 The penalties for pedestrians who break road safety rules

Pedestrian facts and figures

The following facts are based on police reported crash data (2003–2012).

Fatalities and serious injuries

Over the last ten years, on average:

- 47 pedestrians were killed in Victoria each year
- more than 690 pedestrians were seriously injured in Victoria each year.

Males and females

More males than females are involved in fatal and serious injury pedestrian crashes

- 55% were male pedestrians
- 44% were female pedestrians.

Age groups

Pedestrians most likely to be involved in police reported serious or fatal crashes were aged:

- 0–14 years: 10%
- 18–24: 16%
- 25–34: 16%
- 65 years and over: 21%

Child pedestrian safety

Research shows that young children do not have the skills and experience to be safe in traffic on their own. Parents and carers need to take special care and supervise young children in traffic.

Older pedestrian safety

Pedestrians over 65 years of age are involved in a higher number of crashes because they:

- have more difficulty judging the speed and distance of traffic accurately, as eyesight and hearing begin to decline
- may not move or react quickly to avoid approaching vehicles.

Blood Alcohol Concentration (BAC)

Over 30% of pedestrians killed have a Blood Alcohol Concentration (BAC) level above .05, with the majority being more than 0.15 BAC, which is more than three times above the legal driving limit.

Research indicates that the skills necessary to cross a road safely are impaired at BAC levels of .08 and above.

Common features of crashes involving intoxicated pedestrians:

- more often occur on weekends, at night and the early morning
- often happen close to urban drinking venues
- often involve regular drinkers from a hotel or licensed venue
- occur on the near side of the road as the pedestrian begins to cross
- the majority of victims are male.

Source: www.vicroads.vic.gov.au/safety-and-road-rules



www.vicroads.vic.gov.au/safety-and-road-rules/pedestrian-safety

APPLY YOUR UNDERSTANDING

JAYWALKING

Read the above information on jaywalking, then answer the following questions.

1. What do you consider to be the purpose of the laws on jaywalking and rules for pedestrians?
2. Describe three advantages and three disadvantages of having laws to regulate jaywalking and rules for pedestrians.
3. What is the penalty for someone who jaywalks? Is this excessive? Discuss.
4. Can you think of any good reasons for jaywalking?

5. Comment on how effective you consider the laws on jaywalking and pedestrian safety reflect the characteristics of an effective law (including how they reflect society's values and whether they are enforceable, known, clear, understood and stable).
6. Jaywalking and pedestrian safety is a problem in our community. Suggest some possible solutions to this problem.
7. One suggestion to reduce jaywalking and improve pedestrian safety is to increase the cost of the fine issued to the offender to 10 penalty units. Evaluate the advantages and disadvantages of this solution. Would increasing the cost of the fine change behaviour? Discuss.
8. If the police and other law enforcement agencies issue more fines for failing to obey traffic lights or crossing roads within 20 metres of a pedestrian crossing, this would raise a lot of money. Where and how could this money be spent?
9. Police are given the discretion to issue a warning for these offences. Considering the number of pedestrians most likely to be involved in a serious or fatal accident, should this be the case? Is this fair?
10. To what extent do the penalties of jaywalking or penalties for pedestrians demonstrate the principles of justice (including fairness, equality and access)? Discuss your response, indicating whether fines for these offences should be increased.

Going further

11. Investigation: go to the VicRoads webpage on pedestrian safety. This webpage has a range of resources and strategies designed to keep pedestrians safe. Describe three strategies presented on this webpage to reduce serious or fatal accidents by pedestrians. Do you believe they would be effective in reducing the road toll?

VICROADS

www.vicroads.vic.gov.au

561 jaywalkers fined in 19 days in Melbourne CBD crackdown

Aleks Devic

THIRTY jaywalkers a day were busted in a police blitz triggered after the death of a cafe worker in Collins St.

Victoria's top traffic cop, Assistant Commissioner Robert Hill, is staggered that even with Josie Edden losing her life in the early morning dash, pedestrians continue to gamble with their lives.

In a 19-day period, days after the 23-year-old's death, 561 pedestrians were nabbed in the operation and fined \$74.

Ms Edden tripped and fell in February at 6am while running across the busy intersection of Collins and Spencer streets to get to work on time and was then hit by a truck.

The accident horrified onlookers but police said it did little to curb behaviour.

'We do not want to see any more pedestrians die needlessly on our roads,' Mr Hill said. 'This tragic incident was the first pedestrian fatality in the city since 2013.'

'It's a terrible reminder that we must all obey the road rules—they are there to protect us.'

It comes as a new VicRoads survey of 1000 people shows 50 per cent of motorists say the habit most affecting their driving is pedestrians crossing the road without looking.

A further 30 per cent get annoyed when pedestrians are distracted by music or mobile phones when crossing the road.

And 60 per cent of pedestrians would be happier if motorists gave way at crossings.

There were 44 pedestrian deaths across the state last year—a 22 per cent increase on the year before.

Mr Hill pleaded with road users to change their ways and stop dicing with death.

'Recently, we've seen too many pedestrians killed on our roads. This is a tragedy for our whole community,' he said.

'It is of great concern that the number of pedestrian deaths continue to go up.'

During the planned police blitz, which was brought forward following Ms Edden's death, 10 cyclists and 279 motorists were also fined for breaking road rules, including 50 talking on mobile phones.

VicRoads' James Holgate said: 'Unhappy road users are more likely to be aggressive and lack compassion for others, which can lead to frustration, anger and risky behaviour.'



Source: *Herald Sun*, 3 May 2015

APPLY YOUR UNDERSTANDING

JAYWALKING—APPLICATION AND ANALYSIS

- Using the facts in this article, apply and synthesise the legal information learned about jaywalking. Use legal reasoning and principles to identify and argue the elements of the offence of jaywalking, possible defences and criminal culpability. Your report should include the following:
 - a brief summary of the case
 - the rights protected by the law
 - the elements of the offence
 - possible defences
 - the role of statute law and common law in developing the elements of the offence and the defences
 - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
 - the possible impact of the offence on individual/s and society.

EXAMPLE INDICTABLE OFFENCE: ASSAULT

The rights protected by law

The Victorian Charter of Human Rights and Responsibilities outlines a number of rights and freedoms granted to all Victorians. Every person has the right to move freely within Victoria and the right to liberty and security of person. However, there are times where wrongdoers break the law by assaulting other individuals. If found guilty of assault, the law in Victoria is designed to punish individuals. There are two types of assault, statutory and common law. Statutory assault is defined by legislation such as the *Crimes Act 1958* (Vic) and common law assault is defined by judge-made decisions.

The elements of assault

Assault is covered by section 31 of the *Crimes Act 1958* (Vic). **Assault** is action that places another individual in fear of violence. It is the unlawful interference with the body of another person through the intentional application of force or the threat of force. This may include either the direct or indirect application of force. For example, to threaten to hit a person is an indirect application of force. To actually hit a person is a direct application of force. The application of force includes the use of force against the body of another person, as well as the use of force against the clothing or equipment of another person. The application of force includes the use of heat, light, electric current or chemical substances.

ASSAULT: an action that places another individual in fear of violence

There are five elements needed by the prosecution to prove assault occurred:

1. The application of force
2. Intention to apply force such as pain, discomfort, damage, insult, etc.
3. The actions of the accused resulted in pain, discomfort, damage, insult, etc.
4. Intention to commit the serious offence
5. There was no lawful excuse/defence.

Assault is seen as an indictable offence, and if the accused is found guilty, then it carries a maximum penalty of five years in jail.

Possible defences to assault

Self-defence

A person accused of assault can claim self-defence if they genuinely believe that their behaviour is necessary to defend themselves. The court will examine if it was reasonable to expect that self-defence was required in the circumstances as the person perceived them. Self-defence also applies to a person who comes to the defence of another person, to prevent unlawful imprisonment and to protect property. However, the self-defence excuse cannot be used to respond to any lawful conduct (such as to prevent a friend from being arrested by police).

OTHER EXAMPLES OF ASSAULT	IMPRISONMENT
COMMON ASSAULT	3 MONTHS
AGGRAVATED ASSAULT	6 MONTHS
ADMINISTERING CERTAIN SUBSTANCES	5 YEARS
CAUSING INJURY RECKLESSLY	5 YEARS
THREATENING TO CAUSE SERIOUS INJURY	5 YEARS
USING FORCE OR THREATENING TO USE FORCE TO RESIST LAWFUL ARREST	5 YEARS
CAUSING INJURY INTENTIONALLY	10 YEARS
ENGAGING IN CONDUCT ENDANGERING LIFE	10 YEARS
NEGLIGENTLY CAUSING INJURY	10 YEARS
THREATENING TO KILL	10 YEARS
SETTING TRAPS TO CAUSE SERIOUS INJURY	10 YEARS
STALKING	10 YEARS
NEGLIGENTLY CAUSING INJURY	10 YEARS
CAUSING SERIOUS INJURY RECKLESSLY IN CIRCUMSTANCES OF GROSS VIOLENCE	15 YEARS
RECKLESSLY CAUSING SERIOUS INJURY	15 YEARS
SETTING TRAPS TO CAUSE DEATH	15 YEARS
CAUSING SERIOUS INJURY INTENTIONALLY IN CIRCUMSTANCES OF GROSS VIOLENCE	20 YEARS
INTENTIONALLY CAUSING SERIOUS INJURY	20 YEARS

4.4 Overview of other assault offences

Duress

Duress is where an accused reasonably believes that there is a threat of harm against them. The accused acted to avoid any harm out of the reasonable belief that the threat or harm could be avoided.

Sudden or extraordinary emergency

This defence can be used if the accused believes a sudden or extraordinary emergency exists. The accused must have the belief that their action was the only way to deal with the emergency. For example, if someone is drowning and the accused throws out a life buoy to assist them, but it hits the victim on the head and they drown, this would be seen as a sudden or extraordinary emergency. It is unlikely that the person who threw the life buoy would be charged.

If the accused relies on self-defence, duress or sudden or extraordinary emergency as a defence, they must supply evidence suggesting a reasonable possibility of the facts. The prosecution will have the burden of proving the accused was guilty beyond reasonable doubt and that the facts in self-defence, duress or sudden or extraordinary emergency were not correct.

Intoxication

Intoxication can be due to the influence of alcohol, a drug or any other substance. It is generally assumed that being under the influence of alcohol, a drug or any other substance is self-induced and therefore does not apply as a defence. The standard used to judge this is what a reasonable person who is not intoxicated would do.

However, in some situations, if it can be proved that the intoxication was not self-induced, it can be used as a defence (as alcohol, drug or other substances can significantly impair a person's judgment or control). This could take place involuntarily or as a result of a fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force. In some cases, people may use prescription drugs that impair their judgment.

The role of statute and common law in assault

Parliament's main role is to make law. In the process of doing this, it can also amend, categorise, combine and repeal any law it wants to (within its jurisdiction) to meet the needs of the community. Parliament has created many laws related to assault. Assault is categorised as an indictable offence (heard in a higher court before a judge and jury). It comes under section 31 of the *Crimes Act 1958* (Vic), whereas minor offences come under section 24 of the *Summary Offences Act 1966* (Vic). (See 'The elements of assault' on page 82 for a detailed overview of the summary offences law.)

Common law is created by courts. A court's primary function is to settle disputes by applying the law made by Parliament. They use the purpose approach, as outlined in legislation, to ensure that the intention of the legislation is adhered to. In other words, the courts give meaning or effect to the legislation. In some cases, courts will make a ruling which is used to assist or further define the legislation. For instance, courts have to deal with the issue of intent and *mens rea*.

The case of *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 became an authority on this point. Read the facts below.

FAGAN V COMMISSIONER OF METROPOLITAN POLICE [1969] 1 QB 439

The defendant accidentally drove his car onto a police officer's foot. When the police officer asked him to move the car, he refused. He was charged with assaulting a police officer in the execution of his duty, to which he pleaded not guilty. His defence was that he had not had the necessary *mens rea* (guilty state of mind) at the time of the incident (when he actually drove onto the police officer's foot). This defence failed because the court ruled that the offence was not complete until the moment the defendant realised that he had driven onto the foot of the officer and, in deciding not to cease this continual act, formed an intent amounting to the necessary *mens rea*.

THE VICTIM	The law considers the degree of harm inflicted, the identity of the person assaulted and the nature of the assault in determining the extent of punishment to be imposed on the guilty person. The harm caused may include bodily injury, pain, damage, deprivation of liberty or insult.
THE ACCUSED	The accused should receive a fair hearing and a sentence that punishes not too harshly, and offers hope in terms of rehabilitation, if found guilty of assault.
THE COMMUNITY	A harsh punishment, primarily focused on strong retribution and deterrence, helps to keep members of the community safe from assault.
LAWMAKERS	Lawmakers create laws that equate fairness and safety. They respond to the needs of society to feel safe by creating new laws or increasing the penalties on the various laws on assault.
LAWYERS	Lawyers apply the rule of law—that is, the certainty of legal rules developed over time—to resolve disputes of assault and to defend their clients to the best of their abilities.
THE LEGAL SYSTEM	The system should provide for a fair hearing and application of the rule of law without fear or favour. When sentencing, judges consider a range of factors to adequately punish the wrongdoer for their assault.

4.5 The impact of the laws of assault on the individual and society

Trends and statistics—Victoria

Assault is the unlawful interference with the body of another person through the intentional application of force or the threat of force. The following information provides us with trends and statistics in relation to assault (and related offences) in Victoria for 2015-16.

- Total number of assaults recorded: 41 806
- Total number of serious assaults recorded: 17 059
- (Note: 'serious assaults' is a similar category to 'aggravated assaults' in the United States)
- Percentage of all assaults attributed to family incidents: 52.4 per cent
- Percentage of all assaults at residential premises: 57.4 per cent
- The street or footpath was the next highest location for crimes against the person
- The highest number of assaults occurred in February and March
- The majority of victims were male: 56.7 per cent
- The average age for male victims was 39.8 years and the average age for females was 38.3 years
- Most offenders were summoned (or intended to be summoned) to court: 51.9 per cent.

Source: Crime Statistics Agency

4.6 Crimes against the person in Victoria for the year ending 30 June 2016

	JUL 2011 – JUN 2012	JUL 2012 – JUN 2013	JUL 2013 – JUN 2014	JUL 2014 – JUN 2015	JUL 2015 – JUN 2016
Assault					
Serious assault	16 367	17 800	17 250	16 393	17 059
Assault of police, emergency services or other authorised officer	2387	2562	2710	2961	2931
Common assault	14 688	16 685	17 672	18 279	21 816
Total	33 442	37 047	37 632	37 633	41 806

Trends and statistics—United States

The following statistics were taken from the FBI website, which reports all crime statistics in the United States.

4.7 Types of weapons used in aggravated assaults in the US, 2015

	FIREARMS	KNIVES OR CUTTING INSTRUMENTS	OTHER WEAPONS [CLUBS, BLUNT OBJECTS, ETC.]	PERSONAL WEAPONS [HANDS, FISTS, FEET, ETC.]	TOTAL ALL WEAPONS
TOTAL	24.2% 176 057	18.1% 131 679	31.4% 228 438	26.3% 191 335	100.0% 727 509

Source: <https://ucr.fbi.gov/crime-in-the-u.s>

4.8 US states with the 15 highest number of aggravated assault charges, 2015

STATE	POPULATION	TOTAL AGGRAVATED ASSAULTS IN 2015
Alabama	4 347 946	14 365
Arizona	6 748 833	17 650
California	38 983 164	98 640
Florida	20 222 616	63 738
Georgia	9 062 259	19 666
Louisiana	4 353 824	16 718
Massachusetts	6 229 960	17 309
Michigan	9 438 412	25 838
Missouri	6 022 304	20 465
New York	19 290 785	43 938
North Carolina	7 746 842	17 474
Pennsylvania	11 944 992	20 834
South Carolina	4 498 982	16 280
Tennessee	6 544 994	29 724
Texas	27 293 812	67 216

APPLY YOUR UNDERSTANDING

ASSAULT

Using the information about assault on pages 86–90 complete the following activities.

1. Define the term 'assault' in your own words.
2. Create a graphic organiser of the elements of assault.
3. Explain what is meant by the 'application of force'. Illustrate your answer with examples.
4. In your own words, explain the defences to assault. Provide examples of these defences reported in the media.
5. Paraphrase the ruling of *Fagan v Commissioner of Metropolitan Police [1969]*. Explain its importance.
6. How many assaults recorded occurred in Victoria in 2015/16? Research if this is more, or less, than recent figures released by the Crime Statistics Agency.
7. Does it surprise you that assaults attributed to family incidents in Victoria were recorded at 52.4 per cent? Give reasons why you think this is the case.
8. According to the Victorian crime statistics, almost 52 per cent of offenders were summoned (or intended to be summoned) to court. What does this tell you about the nature of the assault?
9. Most assaults occur in Victoria occur in February and March. Can you suggest any reasons for this?
10. Look at Table 4.4, 'Crimes against the person', and answer the following questions:
 - a. What statistics stand out to you?
 - b. Identify the increase in percentage terms from 2011–2012 to 2015–2016.
 - c. Speculate why you think there has been an increase in assaults in this time frame.
11. Examine Table 4.4 and discuss the reasons why some offences carry sentences of 3 months, while others carry sentence of 20 years.
12. Victoria's population is just over 6 000 000 people, and in 2015–2016 just over 17 000 serious or aggravated assaults occurred. Look at Table 4.6 (which contains data recorded by the FBI) and choose a US state that has a similar population size to Victoria. Compare the number of serious or aggravated assaults. Can you suggest any reasons for the difference in numbers?
13. Describe the impact of assault on the community. Where possible, break this down into the following groups—the victim, the accused, the community, the lawmakers, lawyers, the legal system, and other.
14. Read through the following hypothetical cases and, copying the following table into your workbook, analyse whether an assault has taken place.

CASE	WAS THERE AN APPLICATION OF FORCE?	WAS THERE AN INTENTION TO APPLY FORCE? USE EXAMPLES TO ILLUSTRATE YOUR ANSWER	DID THE ACTIONS OF THE ACCUSED RESULTED IN PAIN? USE EXAMPLES TO ILLUSTRATE YOUR ANSWER	WAS THERE AN INTENTION TO COMMIT THE SERIOUS OFFENCE?	WAS THERE A LAWFUL EXCUSE/ DEFENCE?

CASE A

Ms M, knowing her colleague had an allergic reaction to perfume, sprayed her with perfume. Her colleague's tongue became swollen and she had trouble breathing. Ms M was charged with recklessly causing injury.

CASE B

A man who was drunk fell from a balcony and was initially rendered unconscious. As he came to, he became physically and verbally abusive to the ambulance officers as they tried to assist him. The ambulance officers were forced to flee, leaving their equipment behind, fearing for their personal safety.

CASE C

A driver sneezed in a police officer's face when she was pulled over for a routine vehicle check. The woman told police: 'I must warn you that you are placing yourself in danger of an assault. I have a medical condition'. The police officer claimed the sneeze was deliberate. He described the impact of the sneeze as spraying his face with saliva. The woman later falsely told the police officers that she was HIV-positive and that she also had syphilis and hepatitis.

CASE D

Mr X had been drinking heavily and decided to crash a friend's party. At the party, he became loud and violent towards other guests. His friend intervened and tried to calm him down. Mr X threw a few punches at his friend, who responded by pushing Mr X and knocking him to the ground.

CASE E

An Australian student pleaded not guilty to a charge of assault after hitting a co-worker with a snowball. The University of Sydney student, working in a ski resort in Colorado, claimed that he was joking around. The prosecution claimed the student had maliciously thrown the snowball filled with ice at the victim and her boyfriend as they waited for a bus.

CASE F

A mother hears that a young friend of her children has chicken pox, a disease that is more serious in adults than in children. Her own children have not had chicken pox. She invites the ill child over for a party, hoping that her children will catch the disease and thus acquire immunity.



CCTV emerges of an assault at a Melbourne train station

A MELBOURNE man narrowly avoided death earlier this month after a sickening assault where he was repeatedly punched then pushed onto the train tracks.

Crimestoppers has released CCTV vision of the frightening attack which shows how close the victim came to being hit by a train.

It shows him being struck repeatedly in the head before being shoved off the platform and onto the train tracks at Yarraman train station in Noble Park. It then shows the

moment he narrowly escapes being hit by an oncoming train.

The attacker then gets on his bike and rides away but still continues to yell abuse at the victim, who is helped back onto the platform by a bystander.

He was dragged to safety just two minutes before an express train hurtled past. Channel 9 reported that he was left with a broken leg.

The offender appears to be of Pacific Islander appearance and aged in his 20s.

APPLY YOUR UNDERSTANDING

ASSAULT—APPLICATION AND ANALYSIS

- Using the facts in this article, apply and synthesise the legal information that you have learned about assault. Use legal reasoning and principles to identify and argue the elements of the offence of assault, possible defences and criminal culpability. Your reports should include the following:
 - > a brief summary of the case
 - > the rights protected by the law
 - > the elements of the offence
 - > possible defences
 - > the role of statute law and common law in developing the elements of the offence and the defences
 - > trends and statistics in relation to the offence in Victoria and in one other jurisdiction
 - > the possible impact of the offence on individual/s and society.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

The need for criminal law

- Criminal law establishes a code of conduct for the community.
- A crime is an act or omission that is illegal and is punishable by a court of law.
It includes:
 - > Harmful action, whether physical, economic or against society
 - > Action against morality or values of right or wrong
 - > Punishment.
- The purposes of criminal law is to punish, deter, rehabilitate or take retribution against the offender, and to protect the community.
- Types of criminal law can be categorised as:
 - > Crimes against the person
 - > Property and deception offences
 - > Drug offences
 - > Public order and security offences
 - > Justice procedures offences
 - > Crimes against society (public)
 - > Crimes against morality
 - > Crimes against the legal system
 - > Crimes against the state.

Principles of criminal liability

- The key concepts of criminal law include:
 - > The elements of a crime: *actus reus* (guilty act) and *mens rea* (guilty mind)
 - > The concept of strict liability—action without intent is enough for guilt
 - > Everyone charged with a criminal offence has right to be presumed innocent until proved guilty

- > The burden of proof rests on the prosecution, and the standard of proof in a criminal matter is beyond a reasonable doubt
- > No-one under the age of 10 years can be charged with a crime. The prosecution must prove that young people aged between 10 and 14 knew the difference between right and wrong, before they were charged with an offence.

Possible participants in a crime

- The person who actually commits a crime is called the principal offender. This can include a person who participates in a crime even if they do not physically take part.
- An accessory is a person who knowingly impedes the apprehension, prosecution, conviction or punishment of a principal offender.

Summary and indictable offences

- A summary offence is a minor criminal matter heard before a magistrate.
- An indictable offence is a serious criminal matter heard before a judge and jury in the County or Supreme Court.
- An indictable offence heard summarily is dealt with in the Magistrates' Court, usually due to the nature and seriousness of the offence.
- Assault is an indictable offence that carries a maximum penalty of 5 years imprisonment. It is the unlawful interference with the body of another person through the intentional application of force or the threat of force.
- Possible defences to assault include self-defence, duress, sudden or extraordinary emergency, and intoxication.

CHECK YOUR UNDERSTANDING

1. Define the term 'crime'. Include in your definition the basic features of a crime.
2. Explain the purposes of criminal law.
3. Using a concept map, create a graphic organiser outlining the main ways of classifying the types of criminal law. Where possible, use examples and cases studies to illustrate your categories.
4. Explain the difference between *actus reus*, *mens rea* and strict liability. Can someone be found guilty of committing a crime if one of these two elements cannot be proven?
5. Write a paragraph describing the importance of the presumption of innocence in our legal system.
6. There are a number of criminal matters in Commonwealth law where the burden of proof has been reversed and is on the defendant. Using examples, justify why this is the case.
7. Differentiate between the standard of proof and burden of proof.
8. If you were a prosecutor in the Children's Court and an 11-year-old committed a serious crime, what sort of evidence would you use to prove that the 11-year-old was guilty and knew the difference between right and wrong?
9. Why does the law provide a distinction between a principal offender and an accessory?
10. Using examples, distinguish between a summary offence, an indictable offence and an indictable offence heard summarily.
11. Find newspaper articles for a summary offence, an indictable offence and an indictable offence heard summarily. Research each case, and create a report containing the following information:
 - > a brief summary of the case
 - > the rights protected by the law
 - > the elements of the offence

- > possible defences
- > the role of statute law and common law in developing the elements of the offence and the defences
- > trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- > the possible impact of the offence on individuals and society.

APPLY YOUR UNDERSTANDING

KEY CONCEPTS IN CRIMINAL LAW

1. Fill in the blanks.

accessory	participants in a crime	<i>actus reus</i>	strict liability
burden of proof	innocent until proven guilty	the prosecution	<i>mens rea</i>
standard of proof	<i>doli incapax</i>	beyond a reasonable doubt	child under the age of 10
principal offender			

Two elements are required to be convicted of a crime. _____ is known as the wrongful act of committing a crime and _____, is the intent to commit a crime. In some cases, such as traffic offences or jaywalking, Parliament has established that intention does not need to be proved. Just committing the act is enough for a person to be guilty. This is known as _____. The offender is assumed _____ and the accused does not need to say anything in court to incriminate themselves. This upholds the principle of the presumption of innocence.

The party making the allegation in a criminal matter bears the _____ and must prove the accused is guilty. The _____ required in a criminal matter is _____, that is, no doubt to exist at all. It is presumed that a _____ cannot commit an offence. Between the ages of 10 to 14, if it can be proved that the child understands, then they can be charged with a crime. This is known as the principle of _____.

The _____ is the person who commits the crime or aids, abets, counsels or organises a crime.

An _____ is anyone who obstructs the apprehension or conviction of the offender or is aware of the crime after the fact and says nothing.

2. In each of the following cases, identify if an offence has taken place and if so, who is the principal and accessory to the crime.
- a. James has escaped from police custody after being charged with theft. His mother offers him money to buy an airfare to Europe.
 - b. Lauren and Michaela devise a plan to steal the VCE Legal Studies exam paper. Their friend Rebecca is aware of the theft but does not inform the school.
 - c. Sofia encourages her friend Chloe to steal make-up from the local chemist. Outside the store, both girls take a picture and post it to Instagram, telling their friends that they have stolen make-up. Thirty of Chloe's friends like the image.
 - d. Nick, a 15-year-old, encourages his 8-year-old sister to scratch the neighbour's car.
 - e. Jenny agrees to buy a ski mask, which she knows will be used in an armed robbery. James carries out the robbery three months later.
 - f. Ahmed learns of a theft from school. When questioned by the police, he pretends not to know what is going on.

- g. Jamila sees her neighbour's house being burgled. She thinks nothing of it and goes about her business. When the police ask if she witnessed anything, she states that she did not want to get involved.
- h. Ruby overhears her friend Olivia planning to commit murder with someone over the phone. Ruby knows Olivia very well and does not believe she could go through with the crime; she forgets about the conversation. Olivia commits the crime.
3. Read through the following cases and identify if each is a summary offence, indictable offence or an indictable offence heard summarily.

	TYPE OR CATEGORY OF CRIMINAL LAW	PURPOSE OF CRIMINAL LAW	ELEMENTS OF A CRIME	SUMMARY, INDICTABLE OR INDICTABLE HEARD SUMMARILY
a. Anabelle is convicted of a minor theft in the Magistrates' Court and is sentenced to six months' imprisonment. This was her third offence.	Crime against property			
b. Eleanor, who is 11 years old, has been charged with manslaughter and pleads guilty. She is sentenced to 8 years in youth detention.		Rehabilitation		
c. Amy was issued with a traffic infringement fine of \$200. She was unaware of the parking restriction.			Strict liability	
d. Brionie and Renee have been convicted of terrorism offences in Victoria. They both appeal their life imprisonment.				Indictable offence
e. Sabrina, who has P-plates, has been caught speeding in a 50 k/ph zone. Her friend Chloe was in the car with her.				
f. Celine is convicted of burglary in the County Court. She appeals the decision. The basis of Celine's appeal is that Judge Francesca misdirected the jury.				

	TYPE OR CATEGORY OF CRIMINAL LAW	PURPOSE OF CRIMINAL LAW	ELEMENTS OF A CRIME	SUMMARY, INDICTABLE OR INDICTABLE HEARD SUMMARY
g. Emily is found guilty of speeding. Magistrate Ashley issues her with a 10-year licence cancellation. Emily decides to appeal.				
h. Sarry is appealing against a conviction for arson in the County Court. He decides to appeal the decision. The basis of Sarry's appeal is that Judge Josie misdirected the jury.				
i. Cassie has been caught selling a large amount of drugs to support her family and pleads not guilty.				

4. Children and crime investigation

With the support of your teacher or educator, go to the Australasian Legal Information Institute (AustLII) website and find a recent case involving young people and crime. Remember, these cases will not state that the case is a young person, so you will need to look for initials or a pseudonym. Look for a case name like *DPP v J O U* or *Joseph (pseudonym)*.

Complete a report containing the following information:

- > Provide a brief summary of the case.
- > What crime and/or offences was the accused charged with?
- > Which court heard the case?
- > Use the characteristics of an effective law and discuss which one it represents.
- > Identify the key participants in the case, such as the judge, prosecutor, defence, etc.
- > Explain the outcome of the case and justify if the outcome was effective.

AustLII: www.austlii.edu.au





ASSESSMENT

ESSAY—PRINCIPLES OF JUSTICE

Complete the following extended response questions. This should take two to three lessons to complete and the essay should be approximately 800 to 1000 words in length.

TOPIC

‘With the rise of young people committing crimes, youth detention is seen as a soft option for these offenders. They should be placed in jail, not youth holiday camps.’

Discuss the above statement and indicate the extent to which you agree with it, giving reasons for your answer. Include in your response an explanation of the purposes of criminal law, the age of criminal responsibility and the ability of our youth justice system to achieve the principles of justice.

What to include in your extended response

- Essay conventions—introduction, main body and conclusion
- The introduction should include:
 - > Taking a position and stating your opinion ‘to what extent you agree’. Do you agree, disagree or partially agree/disagree?
 - > Provide a basic outline to your response.
- The main body should be structured in paragraphs.
- Start every new idea in a new paragraph, and avoid writing in point form. Paragraphs provide a sense of order and development to your response. Your paragraphs should discuss the following points:
 - > Youth crime statistics and examples
 - > Youth detention and the purpose/s of criminal law
 - > The age of criminal responsibility
 - > Adult jails versus youth detention facilities
 - > Youth detention and the achievement of justice (use the principles set out in Chapter 2).
- Your conclusion should summarise your main arguments and respond to the question.



STUDENT SELF-ASSESSMENT CRITERIA	WELL ABOVE THE STANDARD	ABOVE THE STANDARD	AT THE STANDARD	BELOW THE STANDARD	WELL BELOW THE STANDARD
PROVIDES AN UNDERSTANDING OF YOUTH CRIME STATISTICS AND EXAMPLES					
APPLIES THE PURPOSE/S OF CRIMINAL LAW TO YOUTH DETENTION					
DISCUSSES THE AGE OF CRIMINAL RESPONSIBILITY IN RELATION TO THE QUESTION					
ILLUSTRATES THE DIFFERENCE BETWEEN ADULT GAOLS VERSUS YOUTH DETENTION FACILITIES					
EXAMINES THE ABILITY OF YOUTH DETENTION CENTRES IN ACHIEVING JUSTICE					
USES CONVENTIONS OF AN EXTENDED RESPONSE FORMAT—INTRODUCTION, MAIN BODY AND CONCLUSION					



ASSESSMENT



CRIMINAL LAW IN ACTION: CRIMES AGAINST THE PERSON

UNIT 1 – AREA OF STUDY 2: The presumption of innocence

Society views crimes directed against the person as some of the most serious offences. These include crimes such as murder, assault, blackmail and harassment.

OUTCOME

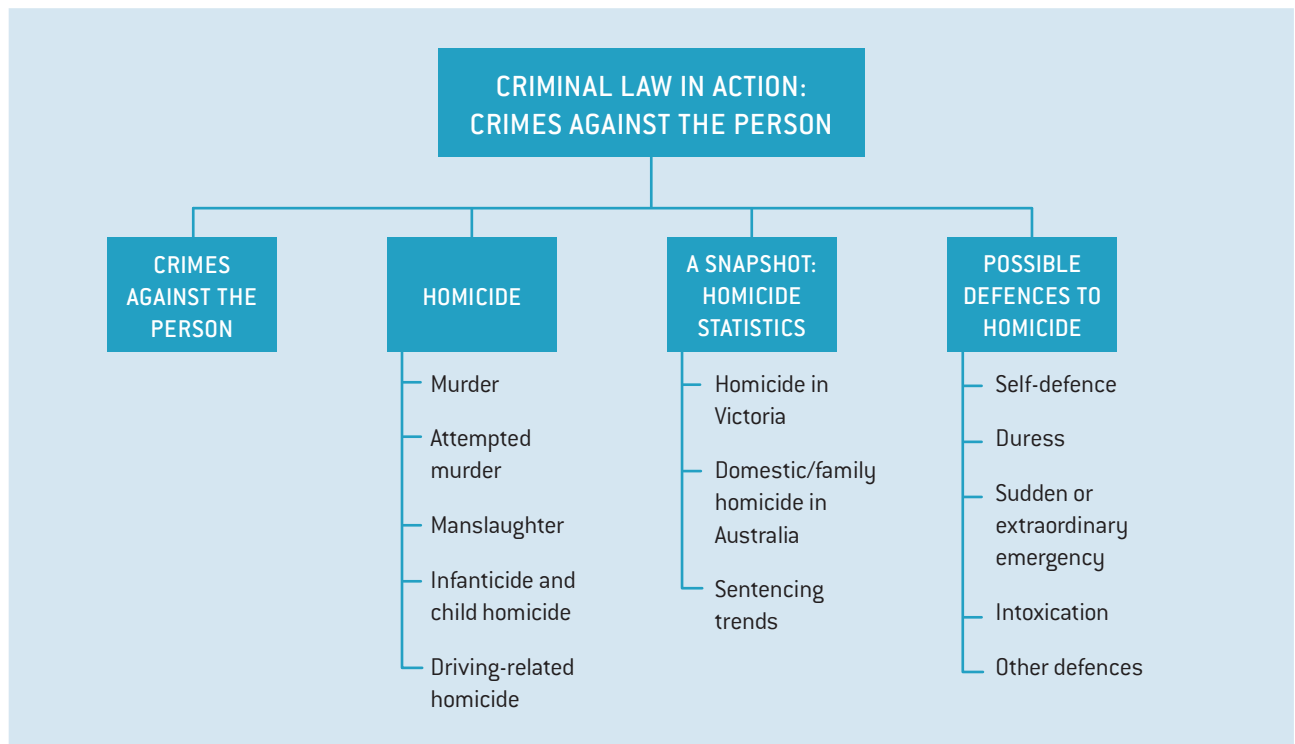
On completion of this unit the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > types of crime such as crimes against the person and crimes against property
- > two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
- the role of statute law and common law in developing the elements of the offence and the defences
- trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- the possible impact of the offence on individuals and society

KEY SKILLS

- > define and use legal terminology
- > research and analyse relevant information about criminal law and offences
- > synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
- > use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios



KEY TERMS

accident	An action beyond a person's control
alibi	Evidence that shows a defendant was somewhere else at the time of the crime
automatism	Where the actions were involuntary and beyond the control of the defendant
battered spouse syndrome	Learned helplessness' of some victims of domestic violence
consent	Informed legal permission
child homicide	Where person who kills a child (who is under the age of six years) in circumstances that would be considered manslaughter
culpable driving	Causing the death of another while driving a car
duress	Threats, violence or other action used to coerce someone into doing something against their will
homicide	The killing of a human being
infanticide	Where a woman kills her own child (who is under the age of 24 months)
malice aforethought	An intention to do wrong and commit murder
manslaughter	An unlawful homicide that is not considered to be murder because there was no intention to kill or there were other special circumstances
mental impairment	A state in which a person is not mentally able to recognise either the nature and quality of their actions or that the conduct was wrong
murder	The unlawful killing of any reasonable creature in being with malice aforethought either expressed or implied
self-defence	The use of necessary and reasonable force to protect oneself or another
sudden or extraordinary emergency	An emergency that involves a risk of death or serious injury

CRIMES AGAINST THE PERSON

A crime is an act or omission (that is, the failure to act) by a person (the accused) for which a sanction could be imposed by a court. As you saw in Chapter 4, two elements are required in order to be convicted of a crime. The physical element is referred to as *actus reus* and the mental element referred to as *mens rea*. The prosecution must prove that both elements exist in order to be found guilty of a crime.

The Crime Statistics Agency (CSA) is in charge of maintaining crime statistics in Victoria.

There are many crimes against a person; the list is almost endless. As society changes, so does our legal system and lawmakers. In the past, the Victoria Police were in charge of maintaining crime statistics, and they developed the categories of crime. Nowadays, this service is carried out by an independent government-funded organisation known as the Crime Statistics Agency (CSA).

HAVE YOU...	YES / NO / UNSURE
Heard of a homicide occurring in the city you live in?	
Heard of the death sentence being given to a criminal?	
Seen a traffic accident?	
Heard mention of ‘one-punch’ attacks on the news?	
Heard of someone acquitted of the crime of homicide?	
Been accused of doing something, but were actually somewhere else at the time of the incident?	
Been forced to act in a way you did not want to?	
Acted suddenly when you saw there was a fire?	



CRIMES AGAINST THE PERSON

Homicide and related offences are defined as to unlawfully kill, attempt or conspire to unlawfully kill, or kill another person as a result of culpable, reckless or negligent act. Examples include **murder**, attempted murder, accessory or conspiracy to murder, **manslaughter** and driving causing death.

Assault and related offences are defined as the direct (and immediate/ confrontational) infliction of force, injury or violence upon a person or a group of people. Examples include serious assault, assault of police, emergency services or other authorised officer and common assault. (See Chapter 4 for a further discussion of assault.)

Sexual offences are defined as acts, or intent of acts, of a sexual nature against another person, which are non-consensual or where consent is proscribed (that is, the person is legally deemed incapable of giving **consent** because of youth or temporary/permanent incapacity). Examples include rape, indecent assault, incest, sexual offences against children and other sexual offences.

Abduction and related offences are defined as acts that unlawfully deprive another person of their freedom of movement, that are against that person's will or against the will of any parent, guardian or other person having lawful custody or care of that person. Examples include abduction, false imprisonment and slavery and sexual servitude offences.

Robbery offences are defined as the unlawful taking of property, with intent to permanently deprive the owner of the property, from the immediate possession, control, custody or care of a person, accompanied by the use, and/or threatened use, of immediate force or violence. Examples include aggravated robbery and non-aggravated robbery.

Blackmail and extortion are defined as the unlawful demanding of money, property, or any other benefit from another person, accompanied by the threat of coercive measures if the demand is not met. Coercive measures may include divulging information about a person, or the use and/or threatened use of force or violence if the demand is not met.

Stalking, harassment and threatening behaviour are defined as acts intended to cause physical or mental harm, or arouse apprehension or fear through a repeated course of unreasonable conduct. This includes actions that are intended to harass, threaten or invade the privacy of an individual.

Dangerous and negligent acts endangering people are defined as dangerous or negligent acts which, though not intended to cause harm, actually or potentially result in injury to oneself or another person. Examples include dangerous driving, neglect or ill-treatment of people and throwing or discharging objects endangering people.

MURDER: the unlawful killing of any reasonable creature in being with malice aforethought either expressed or implied

MANSLAUGHTER: an unlawful homicide that is not considered to be murder because there was no intention to kill or there were other special circumstances

CONSENT: informed legal permission



Source: Crime Statistics Agency (CSA)

CRIME STATISTICS AGENCY:
www.crimestatistics.vic.
gov.au



Crimes against the person made up 14 per cent of overall crime. The most serious of these crimes is homicide. For the rest of this chapter, we will examine the offence of homicide in depth, as an example of crimes against the person.

HOMICIDE: the killing of a human being

5.1 Trends and statistics of homicides recorded by offence in Victoria 2015–16

Source: Victorian Crime Statistics Agency; Australian Bureau of Statistics; Federal Bureau of Investigation

HOMICIDE

The word **‘homicide’** comes from two Latin words: *homo* meaning ‘a person’ and *cide* meaning ‘kill’. Put simply, homicide means the killing of a person by another person.

TYPE OF OFFENCE	NUMBER OF OFFENCES IN VICTORIA
Murder (e.g. set trap or device with intent to kill)	66
Attempted murder (e.g. shoot or wound with intent to murder)	47
Accessory or conspiracy to murder (e.g. incite, aid and abet suicide; incite murder: accessory after the fact to murder or manslaughter)	9
Manslaughter (e.g. infanticide, defensive homicide, child homicide [under 6 years], arson causing death and child destruction)	4
Driving causing death (e.g. culpable driving, driving in a dangerous manner causing death, driving at dangerous speed causing death)	82
Total homicides	208

The Australian Bureau of Statistics states that there were 416 homicide offences in Australia in 2015. The Federal Bureau of Investigation estimates that there were 15 696 murders in the United States in the same period.

Lawful versus unlawful homicides

Lawful homicides

In some situations, the law recognises that the taking of another person’s life is lawful. Lawful homicides include the advancement of justice, and death caused by **accident** or misadventure.

There are three categories of homicides committed in the advancement of justice:

- Use of the death penalty, where the law allows state sanctioned death. Until 1975, offences such as murder and treason could be punished in Victoria by a judgment of death by hanging. In this situation, the hangman could not be charged with murder because the execution was required by law. Today, no state or territory in Australia imposes a death sentence. Some countries around the world still practise the death penalty as part of a sanction or penalty for murder.
- The law allows the reasonable use of force to carry out and enforce the law. In cases where a person has been killed while resisting arrest or escaping lawful custody, the death may be seen as a lawful homicide. In these cases, an inquiry into the death would be held to determine whether the circumstances were lawful. This mainly applies to law enforcement agencies.
- The law allows killing that is committed in self-defence. This applies only in exceptional cases where the death is the result of an action that is ‘no more than reasonably necessary to defend yourself’.

Accident or misadventure

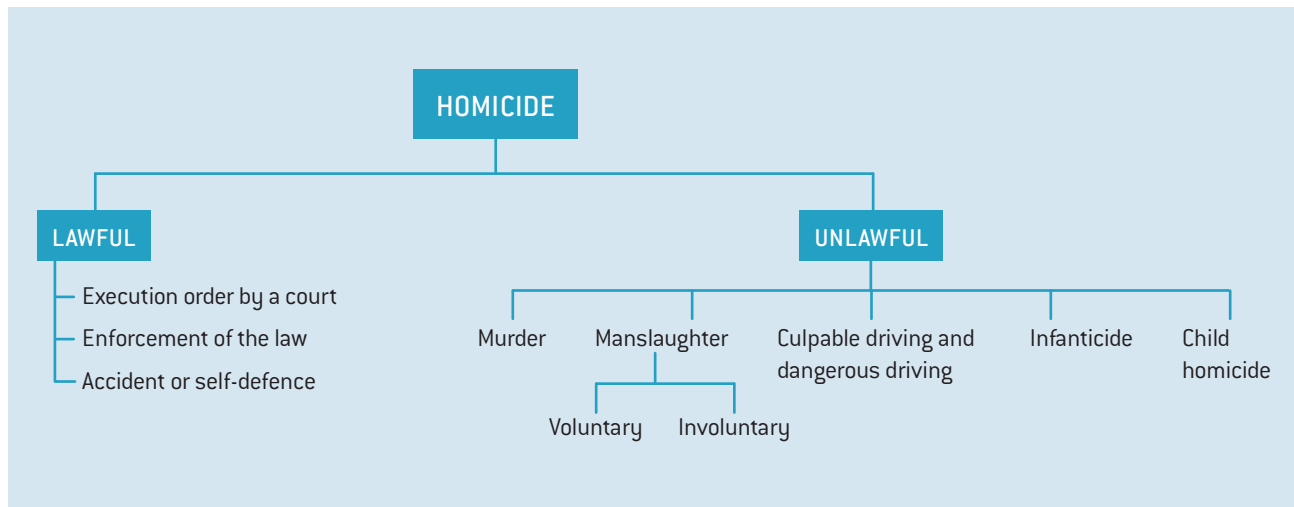
In cases of death caused by accident or misadventure, the homicide may be lawful if the death occurs unexpectedly in the course of a lawful action. For example, if a boxer

ACCIDENT: an action beyond a person’s control

dies during a lawful boxing match, provided the death occurs in circumstances where no-one could foresee that death would result, no crime is committed. In these cases, an inquiry into the death would be held to determine whether the circumstances were lawful.

Unlawful homicide

Criminal law sets out possible situations in which homicide is unlawful: murder, manslaughter, infanticide and culpable driving or dangerous driving causing death.



MURDER

Murder is considered to be the most serious crime in our community. The offence of murder applies when a person intentionally or recklessly kills another (this is known as reckless indifference to life with the probability that death would result). The *Crimes Act 1958* (Vic) states that the punishment for murder is life or as fixed by the court, but it does not provide the definition of the term ‘murder’. This was developed in common law by a judge through the application of precedent in *R v Doherty, 1887* stating that when:

... a person of sound memory and discretion unlawfully kills any reasonable creature in being and under the Queen’s peace, with malice aforethought either express or implied ... then he or she has committed murder.

Murder, the most serious crime in our community, is the intentional or reckless killing of another person.

MURDER OR ACCIDENT?

The application of legal definitions is not always straightforward. Consider the following case, which came before the English Court of Appeal in 1996. Does this case meet the definition of an unlawful homicide of ‘any reasonable creature in being’? If so, what offence do you think the accused has committed?

A man stabbed his girlfriend, who was 22–24 weeks pregnant with his child, during a drunken argument. Two weeks later she went into premature labour and a baby girl was born. The baby sustained injuries when the knife perforated the mother’s uterus, and required several operations. The baby died 121 days after she was born. Her death was not the result of the knife wounds, but due to her lungs not being properly developed.

The elements of murder

To be found guilty of murder, the prosecution must prove a number of elements. These elements have been tested and defined by many court cases. An examination of the different terms of *Doherty* will help to clarify the law relating to murder.

...a person	Only an individual can commit or be charged with murder.
...of sound memory	Only people who are sane at the time of the act can be found guilty of murder.
...and discretion	In Victoria, only people aged 10 years and over are considered by law to be of the age of discretion, and able to be charged.
...unlawfully	This word distinguishes murder from lawful homicide.
...any reasonable creature in being	The victim, irrespective of disabilities, must be alive at the time of the murder. The laws of homicide do not define an unborn child as 'in being'—the rights of unborn children are protected in other parts of the law.
...under the Queen's peace	This term is applied to mean 'within the legal jurisdiction of the country or state in which the killing took place'; in our case, the Victorian legal system.
...with malice aforethought	This refers to the intention to commit murder. This element will be covered in greater detail below.
...either express or implied	The intention of a person can be either deliberate or assumed from action (implied malice includes situations where a killer intends to kill one person but kills another instead).
...he or she has committed murder (causation)	The murder follows a direct causal chain of events from the action. This element will be covered in greater detail below.

Malice aforethought

Malice aforethought refers to the intention to kill. It must be shown that the act of killing was undertaken in one of these circumstances:

- with intent to kill the victim (a voluntary and premeditated action)
- with intent to inflict serious bodily harm but death resulted (for example, kicking someone in the head, causing their death, even though the intent was merely to injure)
- with reckless indifference as to whether the act will kill or do serious physical harm (here intent is implied because of the reckless indifference to the possible consequences of the act)
- as a result of a chain of events after committing—or attempting to commit—a serious criminal offence that leads to the death of another (for example, killing a person while robbing a bank, even though there was no intention to kill).

Causation

There must be a link (a direct relationship) between an act of the defendant and the death of the victim. In other words, it is the conduct of the defendant that directly caused the death of the victim although the defendant need not be the sole or the main cause of death. There are a number of legal rules that apply here:

- *substantial cause test*: the defendant's conduct was a substantial cause of the victim's death.
- *natural consequence test*: due to the conduct of the defendant, the victim seeks to escape and is injured, causing death. There is also the 'But for' test—in other words it must be proved that, but for the defendant's act, the death of the victim would not have occurred.

MALICE AFORETHOUGHT: an intention to do wrong and commit murder

- *reasonable foreseeability test*: objectively, how would a reasonable person foresee this situation?
- *intervening acts or events*: the defendant is not responsible for the death where the victim dies as a result of some intervening act or unconnected event that is the primary cause of death. If the death is caused by a combination of two causes, the defendant may still be liable.

ATTEMPTED MURDER

An accused person who fails to carry out a murder can still be charged with an offence. The general category of attempted murder covers a wide range of crimes. We know from Chapter 4 that to be convicted of a crime you need both elements of *mens rea* (guilty mind) and *actus reus* (guilty act). With attempted murder, although the death did not actually occur (no *actus reus*), the accused intended to kill or to cause serious harm knowing that death would result (*mens rea*).

Attempted murder is also a crime, reflecting the accused's intent to kill another person (*mens rea*).

THE ROLE OF COMMON LAW—ATTEMPTED MURDER

CASE STUDY

THE QUEEN V BYRNE [2016] VSC 580 (28 SEPTEMBER 2016)

In the Supreme Court of Victoria, Criminal Division, Melbourne, Dwayne Byrne, 23 years old, was found guilty of attempted murder and one count of being in possession of a weapon by a jury.

Byrne was out on the streets of St Kilda with a friend in February 2015, and was carrying a small knife. While walking on the jetty, he provoked an argument with his victim, and then stabbed him six times. Immediately after the stabbing, Byrne and his friend ran away to avoid arrest.

Some days later, Byrne was arrested; he declined to participate in either an identification parade or a record of interview. On searching Byrne's premises, the police found a penknife on a bedside table in the main bedroom.

The victim was taken to The Alfred Hospital with life-threatening injuries. The crime scene photographs confirmed the medical evidence that he had lost a considerable amount of blood.

The judge stated that there were a number of aggravating features of this crime:

- Byrne left home carrying a knife with no apparent justification.
- The attack upon the victim was completely unprovoked.
- The victim was attacked with a knife when he was unarmed.
- The attack came from behind when the victim was sitting in a vulnerable position, unable to immediately and readily defend himself.
- The attack involved a series of wounds inflicted in rapid succession.
- The victim's injuries were severe, requiring the immediate attention of emergency services, and with ongoing consequences for him.

Byrne showed no remorse for his actions, insisting that he was not the offender responsible for the attack on the victim. He only acknowledged he was in the area based on CCTV footage.

As a result of his upbringing and mitigating factors considered by the judge at sentencing, Byrne was given 12 years' imprisonment with a fixed minimum non-parole period of 9 years.

APPLY YOUR UNDERSTANDING

STRUCTURED QUESTIONS ON COMMON LAW

Read through the case study ‘The role of Common Law–Attempted murder’ and answer the following questions.

- 1. Briefly outline the facts in the case of *The Queen v Byrne*.
- 2. Differentiate between lawful and unlawful murder. Discuss how malice aforethought applies to Dwayne Byrne.
- 3. Explain the crime of attempted murder. How does it apply in this case?
- 4. Describe what is meant by the term ‘aggravating factors’.
- 5. Using the elements of murder, apply them to the case of *The Queen v Byrne*.
- 6. Discuss to what extent aggravating factors had an impact on the sentence of Dwayne Byrne. In your answer, comment on the effectiveness of the sentence. To what extent are the principles of justice served by 12 years imprisonment with a fixed minimum non-parole period of 9 years?

5.2 Other categories of attempted murder

THREATS TO KILL	An accused who makes a threat to kill to another with the intent that the victim would fear the threat would be carried out, if found guilty, can receive a maximum of 10 years’ imprisonment.
SETTING TRAPS TO KILL	An accused who sets a trap or device with the intention of killing another person, if found guilty, can receive a maximum of 15 years’ imprisonment.
EXTORTION WITH THREAT TO KILL	An accused who makes an ultimatum of another with a threat to kill, if found guilty, can receive a maximum of 15 years’ imprisonment.
CONSPIRACY TO COMMIT MURDER	An accused who makes arrangements (such as an agreement or contract) with the intent to kill, if found guilty, can receive a maximum of 25 years’ imprisonment.
INCITEMENT TO COMMIT MURDER	An accused who spurs on another person, with the intent to kill, if found guilty, can receive a maximum of 25 years’ imprisonment.

Source: Adapted from the Crimes Act 1958 (Vic)



MANSLAUGHTER

Manslaughter applies when there is no intent to kill but the offence still results in death. The maximum sentence for manslaughter is 20 years' imprisonment.

The degree of 'malice' by an offender determines whether an unlawful homicide is classified as murder or manslaughter. The unlawful killing of another person without malice aforethought is manslaughter. This offence is committed where the death is caused by an unlawful and dangerous act or by omission, or where the death is caused by 'criminal negligence'. Manslaughter applies in situations where the accused does one of the following:

- performs an unlawful act that was so dangerous that a reasonable person would have foreseen the likelihood of a serious injury or death; for example, throwing large stones at passing trains so that one stone smashes a carriage window, striking a passenger and causing death
- intentionally causes bodily harm without intending to cause serious injury or death
- acts in a manner that is considered to be criminal negligence. Criminal negligence is when the accused failed to maintain the standard of care a reasonable person would have used in the same situation. Criminal negligence includes a situation in which a criminal act is undertaken so recklessly that the consequences are not considered.
- fails to act in situations where the law has imposed a duty (or responsibility) to act; for example, a parent neglecting a small child so much that it dies of malnutrition.

Manslaughter in when one person unlawfully kills or causes the death of another, but without the intent (*mens rea*) of doing so.

One-punch laws—Statute law

Recently, our community has been concerned with the prevalence of alcohol-fuelled violence. There have been a number of manslaughter cases reported in the media that involve an action known as either the 'coward's punch' or the 'one punch'. In response, the Victorian Government introduced the offence of 'a single punch or strike is to be taken to be dangerous' (*Crimes Act 1958* (Vic), section 4A). The offence carries a maximum of 20 years' imprisonment.

A single punch or strike delivered to any part of a person's head or neck that causes an injury or death is to be taken to be a dangerous act for the purposes of the law relating to manslaughter. For example, if the accused strikes another person with a blow to the head, and that other person falls, hits their head on the road, and dies from the injury resulting from their head hitting the road, the punch may be the cause of their death.

Inciting another person to commit suicide

Under section 6B(2) of the *Crimes Act 1958* (Vic), it is an offence to incite another person to commit suicide. It is also an offence to cause another person serious injury, either intentionally or recklessly, without a lawful reason. Serious injury includes unconsciousness, hysteria, pain and any substantial impairment to bodily functions. It is an indictable offence to administer a substance to another person that interferes substantially with their bodily functions without that person's consent.

INFANTICIDE AND CHILD HOMICIDE

Infanticide applies where a woman kills her own child (in circumstances that would be murder) by reason of mental disturbance resulting from the effects of giving birth or a disorder consequent on her giving birth, and the child is under the age of 24 months. The offence of infanticide is punishable by a maximum of five years' imprisonment.

INFANTICIDE: where a mother kills her own child [who is under the age of 24 months]

According to section 5A of the *Crimes Act 1958* (Vic), child homicide applies to a person who kills a child who is under the age of six years in circumstances that would be considered manslaughter. The offence of child homicide is punishable by a maximum of 20 years' imprisonment.



CASE STUDY

CASE STUDY—*THE QUEEN V ZZMM [2015] VSC 524*

In the Supreme Court of Victoria, Criminal Division, the accused, ZZMM (a pseudonym used to protect the offender), pleaded guilty to one charge of infanticide as a result of not fully recovering from the effect of giving birth. The prosecution accepted her plea of guilty as she was disturbed from the effect of giving birth, not aware that she was pregnant prior to going into labour at her father's house.

The birth of ZZMM's daughter occurred in the early hours of the morning on Wednesday, 26 February 2014. The baby was born at 36 weeks. In shock, ZZMM placed her hand over the mouth of her daughter so as to not wake up her family. However, when ZZMM realised that the baby was no longer breathing, she cut the umbilical cord in the hope this would make her breathe. The baby died. ZZMM then placed the baby in a cotton bag and hid it under a tree near her mother's house.

Ten days later, ZZMM informed her sister of what occurred and both girls went to the police station. As a result of police investigations, ZZMM was charged with infanticide. In the trial, ZZMM's lawyer presented psychiatric reports stating that the accused was acutely stressed and that her mental state was one of shock on learning of her pregnancy. The trauma of having to live with the death of her daughter was also taken into account by the judge, Justice Rush, when sentencing.

ZZMM was sentenced to a community correction order (CCO) for one year with two conditions: (1) that she attend at a Community Correctional Office and (2) that she underwent a mental health evaluation and receive treatment accordingly.

Source:
Adapted from *The Queen v ZZMM*

APPLY YOUR UNDERSTANDING

Read the case study above on infanticide and answer the following questions:

1. Apply the elements of murder (page 106) to the above case. Explain each element as it relates to this case.
2. Describe the element that you believe does not apply in this case. What evidence do you have for this in the case study?
3. Describe the outcome of this case. Do you think it is fair and just?
4. To what extent were the principles of justice applied by Justice Rush in his sentencing of ZZMM?

DRIVING-RELATED HOMICIDES

Culpable driving means causing death through the driving of a motor car. A driver who, through lack of proper control of their car, causes the death of another person in a car accident can be charged with culpable driving. Culpable driving includes these circumstances:

- driving recklessly—consciously and unjustifiably disregarding the risk of death or injury that may result from one's driving.

CULPABLE DRIVING: causing the death of another while driving a car

- driving negligently—failing to observe the standard of care that can be expected of a reasonable person. Driving while fatigued to such an extent that there is a risk of falling asleep may constitute culpable driving causing death, especially if this ought to have been known.
- driving under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of a car.

Culpable driving and dangerous driving are crimes in which offenders cause death or serious injury while driving.

The maximum penalty for culpable driving causing death is 20 years' imprisonment.

Dangerous driving causing death or serious injury

A person who, by driving a motor car at a speed or in a manner that is dangerous to the public and causes the death of, or serious injury to, another person, is guilty of an indictable offence.

The maximum penalty for dangerous driving causing death or serious injury is 10 years' imprisonment.



APPLY YOUR UNDERSTANDING

CULPABLE DRIVING

In each of the following hypothetical cases, the driver has been found guilty of culpable driving.

1. Explain how the definition of culpable driving applies in each case.
2. How does culpable driving differ from manslaughter?
3. Do you think that culpable driving should be different from manslaughter? Justify your view.

CASE A

A television quiz winner killed one person and seriously injured two others when she drove the car she had won into the back of a parked car. Her breathalyser reading was 0.091 and she had been without sleep for 24 hours before the accident. She was sentenced to 2 years and 6 months' imprisonment, with a 2-year suspended sentence.

CASE B

An exhausted truck driver was found guilty of culpable driving when his truck smashed into the back of a small cattle truck, killing the driver. He had been driving for up to 14 hours a day for 18 days. He was sentenced to three years' imprisonment with a non-parole period of two years.

CASE C

An 18-year-old apprentice killed his best mate when the car he was driving hit a power pole. The driver was over the legal alcohol limit and driving a car he was not familiar with. He was sentenced to three years' imprisonment, which he was able to serve in a minimum-security prison while continuing his apprenticeship.

CASE D

An unlicensed driver who killed a motorcyclist, while under the influence of drugs and driving on the wrong side of a Victorian freeway, pleaded guilty to eight charges, including culpable driving causing death, theft of a car and aggravated burglary. He had consumed heroin, ecstasy and 10 tablets each of codeine and an anti-anxiety drug.

A SNAPSHOT: HOMICIDE STATISTICS

The reasons people commit homicide are varied and complex. While it is not possible to describe in detail the reasons behind acts of murder, this snapshot examines and provides some insights into the profile of offenders and victims, the issue of domestic/family homicide and the trends in sentencing in Victoria.

HOMICIDE IN VICTORIA

A 2007 study released by the Sentencing Advisory Council reveals that in Victoria, men are overwhelmingly more likely than women to be the offenders or victims of homicide. In most cases, the homicide is likely to occur in the home of either the offender or the victim.

Men account for the following statistics:

- 54 per cent of all murder victims
- 89 per cent of all murder offenders
- 71 per cent of all manslaughter victims
- 85 per cent of all manslaughter offenders.

Forty-two per cent of murder victims are killed without a weapon.

Source: 'Homicide in Victoria: Offenders, Victims and Sentencing', Sentencing Advisory Council Victoria, November 2007

5.3 Profile of Victorian homicide offenders and victims

THE ACCUSED	THE VICTIM
Highly likely to be male	Most likely to be male
Approximately 35–49 years old	Approximately 39 years old [average age]
Unemployed	Employed or seeking employment
Likely to have at least one conviction for a prior offence (property, drug-related offences or assault)	Most likely to have no prior convictions

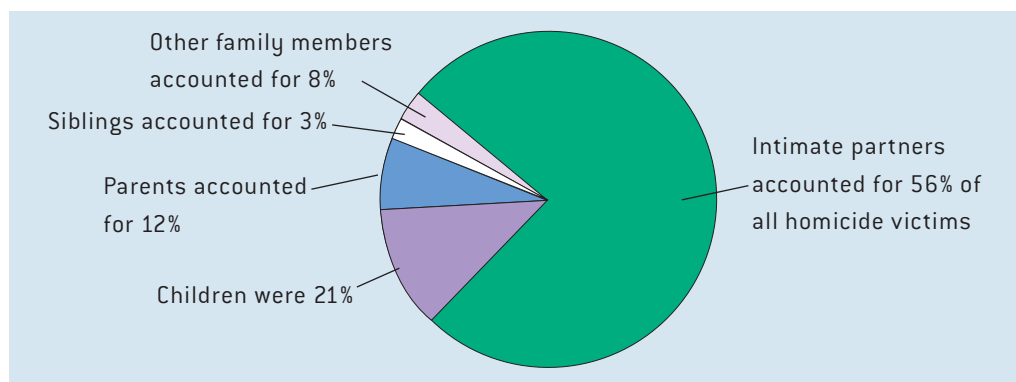
Source: Australian Bureau of Statistics

5.4 Homicide and related offences recorded by location, Victoria July 2015–June 2016

RESIDENTIAL LOCATION	COMMUNITY LOCATION	OTHER LOCATION	TOTAL
75	111	12	208
'Residential location' includes private and non-private dwellings and lands surrounding residential properties.	'Community location' includes education, health, religious, public transport, other transport, justice, open space, street/footpath and other community locations.	'Other location' includes administrative, professional, financial, retail, wholesale, warehousing/storage, manufacturing, agricultural, recreational and other locations.	

Source: Crime Statistics Victoria

DOMESTIC/FAMILY HOMICIDE IN AUSTRALIA



Australian Bureau of Statistics, 2014, 4510.0 - Recorded Crime - Victims, Australia © Commonwealth of Australia, CC BY 2.5 International

Of the 2631 homicide incidents documented within a 10-year period to 30 June 2012, 41 per cent were classified as domestic/family homicides.

- The victim's home was the most frequently recorded incident location for domestic/family homicides (54%) than for non-domestic/family homicides (33%).
- All homicides were more likely to occur in the evening (from 6 pm to before midnight).
- Males were more likely than females to be both homicide victims and offenders.
- Where females were involved in a homicide, they were more likely to be the victim or offender in a domestic/family homicide.
- A consistent finding across 23 years of homicide monitoring by the AIC has been that stab wounds most frequently caused the injuries that led to death.

From the statistics, alcohol is more of a factor than illicit drugs in both domestic/family and non-domestic/family homicides.

Source: *Research in Practice* No. 38 May 2015, Australian Institute of Criminology

HOMICIDE IN THE UNITED STATES

AGE	TOTAL	SEX		
		MALE	FEMALE	UNKNOWN
UNDER 18	667	616	51	0
UNDER 22	2684	2403	239	6
18 AND OVER	9456	8327	1109	4587
TOTAL	15 326	9553	1180	4593
PER CENT DISTRIBUTION	100.0	62.3%	7.7%	30.0%

5.5 Age and sex of offenders in murder cases in the US, 2015

Source: <https://ucr.fbi.gov/crime-in-the-u.s>

SENTENCING TRENDS

The Sentencing Advisory Council produces a snapshot describing the sentencing outcomes for the offence of murder over a five-year period in the Supreme Court of Victoria. From 2010–11 to 2014–15, 119 people were sentenced for murder.

- Over the five-year period, 89 per cent of offenders (106 people) received a sentence of imprisonment, while 11% (13 people) received a custodial supervision order.
- The median length of non-life imprisonment imposed was 20 years.
- Life sentences were given to 12 people during this period. Male offenders were the only ones to receive life sentences of imprisonment.
- Over the five years investigated, the majority of those sentenced were men (92.3 per cent or 96 of the 104 people).

Source: Sentencing
Advisory Council Victoria

- Sentences of imprisonment were most likely to be given to people aged 35 to 44.
- Sentences of imprisonment were least likely to be given to people under the age of 20 (only 3 cases).
- The most common range of imprisonment length imposed was 18 years to less than 19 years.
- The median length of the non-parole period was 16.5 years.

APPLY YOUR UNDERSTANDING

HOMICIDE PROFILES

Using the information on murder above, prepare a 'Homicide profile' report discussing the following:

1. Define the terms 'murder' and 'homicide'.
2. Describe the statistics that stand out in relation to homicide.
3. Explain the profile of an offender; in other words, who is most likely to be the offender in a homicide case?
4. Who is most likely to be the victim in a homicide case? Discuss the relationship of male and female victims to the offender.
5. Identify the possible influences or motives for homicide. What factors (personal, economic or social) do you think might contribute to these motives?
6. If you were a lawmaker, what strategies would you put in place to reduce the incidence of homicide?
7. Research the strategies that have been put in place to reduce domestic violence. Outline the link between domestic violence and homicide.

'Defensive homicide' is no longer recognised by the law, but there are other possible defences against charges of homicide.

POSSIBLE DEFENCES TO HOMICIDE

Sometimes there are situations when a person commits an act that would normally be a crime, but the circumstances surrounding the events or reasons for the person's action should be taken into account by the court. These reasons can be used in court as part of the accused person's defence. Over the years, the law has come to recognise various defences. These defences are found mainly in common law and various Acts of Parliament, such as:

- *Crimes Act 1958* (Vic)
- *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

The law has changed to remove the defence of 'defensive homicide'. This is where the accused committed an act causing death believing that they were acting in self-defence but, in the court's view, the actions or beliefs were not reasonable. Initially, defensive homicide was meant to replace provocation, which was mainly a defence used by men in cases where they were accused of killing their partner. If successful, this defence reduced the charge of murder to manslaughter.

As a result of a number of high profile cases, the law was amended by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic). This law also re-stated the defences to be used by homicide cases, which are self-defence, duress, sudden or extraordinary emergency and intoxication.

Onus of proof

If an accused relies on self-defence, duress or sudden or extraordinary emergency, they have the onus of proof to demonstrate that there is a reasonable possibility of the facts. If the court

accepts this defence, the prosecution has to prove beyond reasonable doubt that the accused did not meet the actions in self-defence, duress or sudden or extraordinary emergency.

SELF-DEFENCE

Self-defence is based on the need to repel an attack and relates to the use of force to protect oneself. The force one uses must be reasonable: that is, not greater than the force the attacker uses. For example, if a person attacks you with their fists, you are not necessarily entitled to defend yourself with a gun. This is seen as a complete defence, and if found not guilty, the accused is set free.

A person is not guilty of murder if they kill someone when they have a *necessary belief* their *response was reasonable* in order to defend themselves, or another person, from death or serious injury. The defence of self-defence cannot be used in situations of murder or manslaughter if the force threatened was lawful conduct, such as the use of force to prevent escape of lawful imprisonment.

Usually, self-defence will not apply unless the person was responding to an immediate attack. However, this is not an absolute requirement in cases of family violence. In family violence cases, the court can look at the impact of the history of violence in the family. Violence includes physical, sexual and psychological abuse. These special provisions in cases of family violence recognise cases of 'battered spouse syndrome'.

Family violence and self-defence

Battered spouse syndrome is a term coined to explain the 'learned helplessness' of some victims of domestic violence. In cases of this type, the spouse, through constant fear of attacks, cannot take any independent action to escape the violence. This syndrome has been used as a defence by some spouses who have, after years of abuse and terror, killed their violent partners. The killing does not usually take place in response to the first or a one-off act of abuse by the partner. It is now seen as self-defence as the victim had a necessary belief that their response was reasonable in order to defend themselves.

SELF-DEFENCE: the use of necessary and reasonable force to protect oneself or another

Self-defence may be a valid defence for homicide, if the accused can argue that they believe it was a reasonable and necessary response to an attack.

BATTERED SPOUSE SYNDROME: 'learned helplessness' of some victims of domestic violence



Melbourne woman acquitted of bashing her long-term partner to death

It took a Supreme Court jury just over 20 minutes to find Gayle Dunlop, 60, innocent of murdering John Reed after retiring to consider their verdict.

Ms Dunlop struck Mr Reed, 63, twice over the head with a wooden stool during a drunken struggle in her Seaford unit on July 18, 2015.

She said she'd never intended to kill Mr Reed and was simply trying to escape to her sister's house to seek refuge from her enraged partner.

'I looked at him and then this look on his face that I've seen before, it's just like everything

just drains away and he just looks like the devil, and I know that look, that I'm in for one hell of a beating or dead,' Ms Dunlop said.

She was originally charged with intentionally causing serious injury, but the charge was upgraded to murder when Mr Reed died in hospital two days after he was struck.

Ms Dunlop admitted in evidence to lying to Triple-O operators that she had been in bed when Mr Reed fell because she was panicking.

She said the pair had met in the 1980s and,

Source: *Herald Sun*,
25 November 2016

while Mr Reed was initially charming, he soon became jealous and controlling. They often moved house at short notice to conceal the abuse he consistently rained upon her.

Ms Dunlop detailed to the court shocking tales of physical and sexual violence inflicted upon her during the couple's longstanding relationship in both Western Australia and Victoria.

Their daughter, Mika, was also subjected to violence and death threats and, according to Ms Dunlop, had once told Mr Reed, 'you'll end up

killing Mummy,' to which he replied, 'I hope she dies, the b..ch.'

Ms Dunlop said that one time Mika threw a knife at Mr Reed in a desperate bid to stop his attacks. The court heard Mr Reed also committed vile acts of sexual abuse against Ms Dunlop with objects such as bottles. 'He just treated me like an animal, basically,' she said.

After she testified, the jury left the court at 4.25pm and returned shortly after at 4.47pm to find her not guilty.

DURESS

A person is not guilty of an offence if they committed the act under duress. **Duress** is the use or threat of force to make someone do something. A person can claim the defence of duress if they reasonably believe all of the following:

- a threat has been made that will be carried out unless an offence is committed
- carrying out the conduct is the only reasonable way that threatened harm can be avoided
- the conduct is a reasonable response to the threat.

A person cannot claim the defence of duress if the offence was committed while they were voluntarily part of a group to commit some other offence. For instance, if a person is part of a group robbing a bank, they cannot claim duress if other gang members insist on the use of violence to force the bank manager to open the safe.

Duress only applies in the case of murder if the threat is to inflict death or serious injury. It is seen as a complete defence, and if found not guilty then the accused is set free. The law also recognises that duress may be used within the context of a family violence situation.

SUDDEN OR EXTRAORDINARY EMERGENCY

A person is not guilty of a homicide if the act is necessary due to a **sudden or extraordinary** emergency. This defence can be claimed in murder and manslaughter cases. The defence applies in murder cases only if the emergency involves a risk of death or very serious injury. The accused can claim the defence of sudden or extraordinary emergency if the accused reasonably believes all of the following apply to their situation:

- circumstances of sudden or extraordinary emergency exist
- committing the offence is the only reasonable way to deal with the emergency
- the conduct is a reasonable response to the emergency.

For instance, if the accused assists the victim who was involved in a motor accident and, as a result of their action, they cause the victim to die, the accused may claim that it was necessary in the case of a sudden and extraordinary emergency. The car was leaking petrol and it was on fire, and there was a reasonable belief that it would explode. This is seen as a complete defence, and, if found not guilty, the accused is set free.

INTOXICATION

The defence of intoxication can be claimed if the accused was so under the influence of alcohol, a drug or any other substance that they did not know what they were doing, thus limiting their ability to form the *mens rea* to commit a crime. Alternatively, this defence can be claimed when the influence of a drug or alcohol affected the individual's judgment as to the facts. If found not guilty, the accused is set free. Intoxication is a complete defence.

DURESS: threats, violence or other action used to coerce someone into doing something against their will

Duress may be a valid defence for homicide if the accused was forced to commit the act.

SUDDEN OR EXTRAORDINARY EMERGENCY: an emergency that involves a risk of death or serious injury

A possible defence for homicide is that a sudden or extraordinary emergency could only be dealt with by an act that led to someone's death.

The law distinguishes between self-induced intoxication and intoxication that is not self-induced. Generally, the law assumes intoxication is self-induced unless it can be proven that it was:

- involuntarily
- due to fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force
- from the use of a prescription drug that was used according to the directions
- from the use of a non-prescription drug used as recommended by the manufacturer.

Intoxication is self-induced if the person using the drug knew, or had reason to believe, that when they took the drug it would significantly impair their judgment or control. In cases of self-induced intoxication, the accused's actions or beliefs will be compared to a reasonable person who is not intoxicated. In other words, the courts will not accept that intoxication reduces the accused's responsibility. Voluntary intoxication is not a defence.

The courts will take into consideration the impact of intoxication that is not self-induced. In these cases, the courts will compare the actions of the intoxicated person to a 'reasonable person who is intoxicated to the same extent as the accused'.

Intoxication may be a valid defence for homicide, but only if it was involuntary, which is difficult to prove.

OTHER DEFENCES FOR THE ACCUSED

Mental impairment

The defence of **mental impairment** may be used when a person suffered from a mental impairment at the time they committed the offence. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) covers the conditions or requirements of what must be proved in a court. The following must apply:

- The person did not know the nature and quality of their actions.
- The person did not know that their actions were wrong (that is, they could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).

Mental impairment means that the person either did not know what they were doing or did not know that the act committed was wrong. If the defence of mental impairment is established, the person is found not guilty due to mental impairment.

Although it is seen as a complete defence, if found not guilty then the court will make a supervision order placing the person in custody or releasing them on conditions. A supervision order is for an indefinite period. The court will set a date for the order to be reviewed by the Supreme Court. For example, in the article on the next page, Justice Cameron Macaulay found Gavin John Brooker not guilty by reason of mental impairment and ordered Brooker to serve a nominal 25-year custodial supervision order at Thomas Embling Hospital, a secure forensic hospital for the mentally ill.

MENTAL IMPAIRMENT: state in which a person is not mentally able to recognise either the nature and quality of their actions or that the conduct was wrong

Mental impairment may be a valid defence for homicide, but a supervision order will then be placed on the accused.

Automatism

Automatism as a defence comes under the area of mental impairment. To plead the defence of automatism, it must be shown that the defendant's actions were not controlled by the defendant's conscious mind. If this is established, automatism can be a complete defence. Common instances are where the accused was sleepwalking, hypnotised or suffering from an epileptic fit or concussion.

This defence is uncommon, although in 1994, a Victorian boy was found not guilty of murdering his father using this defence. The circumstances of this case and another case where the defence of automatism was upheld are outlined in the following articles.

AUTOMATISM: a defence where the actions of the defendant were involuntary and beyond their control



Hammer killer mentally impaired: Judge

A Victorian man who killed his niece by bashing her with a hammer and then stabbing her has been found not guilty by reason of mental impairment. Gavin John Brooker, 53, attacked his niece Annette Brooker, 31, in her Benalla home after she refused to let him use her computer. Brooker believed Victoria Police, motorcycle gangs and the mafia were out to get him and had wanted to use the computer to write about his fears, the Victorian Supreme Court heard.

When Ms Brooker refused to let Brooker use the computer, he bashed her with the hammer,

knocking her to the ground, before stabbing her. Brooker carried the knife and hammer in a backpack because of his fears, the court heard.

Justice Cameron Macaulay found Brooker not guilty by reason of mental impairment.

He ordered Brooker serve a nominal 25-year custodial supervision order at Thomas Embling Hospital.

Both prosecution and defence agreed Brooker should be found not guilty by reason of mental impairment.

Source: adapted from
Herald Sun, 2 August
2012



CASE STUDY

CASE STUDY—DIMINISHED CAPACITY

A FATHER'S MIND

Darcey Freeman, a 37-year-old father of three children, was convicted of the murder of his four-year-old daughter and was sentenced to 32 years in prison without parole after throwing his daughter off the Westgate Bridge in January 2009. His two young sons were in his car, which was stopped on the bridge, at the time.

Freeman and his ex-wife had been involved in a bitter custody dispute over their children and the accused was in fear of losing the battle. Freeman's defence barrister argued the defence of diminished capacity and mental impairment, and stated that this was an act of madness. The judge in his sentencing stated that this act was a breach of the basic trust between parents and children.



APPLY YOUR UNDERSTANDING

Read the case study 'Diminished capacity', then answer the questions that follow.

1. Apply the elements of murder to the facts in this case.
2. One issue raised in this case was a question of diminished capacity. That is, was the person sane at the time of committing the crime? The question then is, from what you have read, did this person know what he was doing?
3. Do you think the penalty for this case was appropriate? Apply the principles of justice in your response when justifying your view.

No memory of shooting

A 17-year-old boy who shot his father was found not guilty of murder. Claiming that the boy acted in a 'robot-like' state, the boy's barrister told the jury that the boy was not mentally aware of what he was doing and therefore not responsible for his actions.

The jury heard psychiatric evidence that the boy, aged 16 at the time of the offence, was in an automaton-like state when he shot his father in the back of the head. The prosecution alleged that the boy had demonstrated increasing hostility to his father following his mother's recent death. The boy's sister testified that there had been increasing tension in the relationship between father and son, mainly due to her father's high expectations of the boy. However, the defence claimed the boy's state of mind was like sleepwalking, and he had no memory of the shooting.

'Night terror' husband cleared of murder

A British man who suffered night terrors has been acquitted of murdering his wife of 40 years after prosecutors accepted he had not been in control of his actions, but was not a danger to anyone else. He was in the throes of a nightmare about a 'boy racer' who had broken into the campervan they were sleeping in. The accused had been prone to sleepwalking and other sleep disorders since he was a boy. At home, he and his wife slept in separate rooms, but they shared a bed when sleeping away in their campervan.

The accused made an emergency call. He said to the operator: 'What have I done? I've been trying to wake her. I think I've killed my wife. Oh my God. I thought someone had broken in. I was fighting with those boys but it was Christine. I must have been dreaming or something. What have I done? What have I done? Can you send someone?'

At first police were sceptical but tests carried out on the accused, some while he spent 10 months in prison on remand, confirmed he suffered from night terrors. The jury had been told that he was in a state of 'automatism'—his mind was not in control of his body.

Accident

The defence of **accident** applies where something happens beyond a person's control, or as an unexpected result of a lawful act. If a court accepts this defence, then it believes that *mens rea* did not exist, and therefore is seen as a complete defence. The accused would be found not guilty and would be set free.

ACCIDENT: an action beyond a person's control

Consent

Only in certain circumstances can the defence that the victim consented to the act be applied. One example would be on the sports field, where physical contact is acceptable and players accept a certain level of risk. Under these circumstances, the defence of consent to an assault charge against one player by another might be successful. But a person consents only to normal risks implied in the rules of the game. Players do not consent to hostile or violent assaults. Consent to an act that is against the law does not make the act lawful just because the victim consented. Although limited, it is seen as a complete defence, and if found not guilty then the accused is set free.

In limited circumstances a person can agree or consent to a criminal act.

An alibi or excuse

As part of the investigation, police will check all evidence related to the ‘person of interest’. If this person is able to offer an **alibi**—that is, evidence showing that they were somewhere else at the time of the homicide and therefore could not have committed the offence—then no charges are laid. An alibi is seen as a complete defence to murder.

ALIBI: evidence that shows a defendant was somewhere else at the time of the crime

‘Necessity’ is no longer a valid defence for homicide.

Necessity

The defence of necessity no longer exists. It has been replaced by the defence of duress (see page 116). Necessity was used in circumstances where a person caused harm in order to prevent a greater harm. To use the defence of necessity, the following conditions were needed:

- The criminal act was done to avoid an irreparable evil or harm to the accused (or others that the accused has a duty to protect)
- The accused believed on reasonable grounds that there was a situation of imminent peril
- The act done was proportionate to the peril to be avoided.



CASE STUDY

CASE STUDY—NECESSITY AND SURVIVAL

TRIALS OF THE *MIGNONETTE*

Dudley, Stephens, Brooks and Parker (a 17-year-old cabin boy) were all members of the crew of an English yacht called the *Mignonette*. The yacht sank in a storm on 5 July 1884. The boy and the three crew members escaped in a lifeboat that had no supply of water or food except for two tins of turnips. For the first three days, the four sailors lived on the turnips.

On the fourth day they caught a turtle, which they ate that day and for the next seven. For the following eight days, they had nothing to eat. The only fresh water they had was the small amount of water that collected in their oilskin coats at night. During all this time, their boat drifted. They were a long way from shore and there was no sign of help.

On the eighteenth day, after seven days without food or water, Dudley and Stephens discussed a plan with Brooks. Their plan was that if no help came they should sacrifice Parker to save the rest. Brooks disagreed. The plan was not discussed with Parker.

On the twentieth day, no vessel being in sight, Dudley told Parker to go and have a sleep. Dudley told Stephens and Brooks that the time had come to kill Parker. Brooks disagreed. At this time Parker was lying at the bottom of the boat, quite helpless. Dudley offered up a prayer for forgiveness and, with the consent of Stephens, went to Parker and told him that his time was up. He killed Parker by cutting his throat with a knife.

For the next four days, Dudley, Stephens and Brooks fed on Parker’s body and blood. On the fourth day, a passing vessel picked up their lifeboat and they were rescued. Dudley and Stephens thought that they had done nothing wrong. When rescued, they presented themselves to the harbourmaster at Falmouth to report the loss of the *Mignonette*. He took down their story (a full confession) and asked them to stay a few days in case any further details were needed. They were arrested when police read the report.

Dudley and Stephens were charged with the murder of Parker. At the trial, it was established



that if the men had not fed on the boy's body they would not have survived to be rescued and that Parker was likely to have died before the rescue boat arrived. At the time of the killing there was no sail in sight and no possibility of rescue.

After his rescue, Dudley felt no concern talking about his meal. This led to his prosecution for murder. Dudley and Stephens were both found guilty. They were sentenced to death. This was later changed to six months' imprisonment. No evidence was given against Brooks. When Dudley was released from jail, he emigrated to Australia, became a wealthy boat fitter, and died from bubonic plague in 1900.

CASE STUDY

APPLY YOUR UNDERSTANDING

Read the case study 'Necessity and survival', then answer the questions that follow.

1. Do you think that Dudley and Stephens should have been found guilty of murder in these circumstances? Why or why not?
2. Under what circumstances, if any, would killing the cabin boy be justified?
3. Suggest why Brooks was not charged with an offence.
4. The jury hearing this case left it to the judge to decide whether the act amounted to murder. This is very unusual. In reaching his decision the judge stated:

We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we cannot ourselves satisfy. But a man has no right to declare temptation an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder.

Do you think that the law is effective if it establishes standards that 'we cannot reach ourselves'? Discuss.

5. Dudley and Stephens were sentenced to death, but were released after serving only a very short term of imprisonment. Does this additional information alter your opinion about the outcome in this case? Explain.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Crimes against the person

- Crimes against the person cover:
 - > Homicide—murder, attempted murder, accessory or conspiracy to murder, manslaughter and driving causing death
 - > Assault—serious assault, assault police, emergency services or other authorised officer and common assault
 - > Sexual offences—rape, indecent assault, incest, sexual offences against children and other sexual offences
 - > Abduction—abduction, false imprisonment and slavery and sexual servitude offences
 - > Robbery—aggravated robbery and non-aggravated robbery
 - > Blackmail and extortion—coercive measures or threatened use of force or violence

- > Stalking, harassment and threatening behaviour—actions that are intended to harass, threaten or invade privacy
- > Dangerous and negligent acts endangering people—dangerous driving, neglect or ill-treatment of people and throw or discharge object endangering people.

Homicide

- Homicide is the unlawful killing of a person by another person.
- Lawful homicides include advancement of justice (death penalty, enforcement of the law and self-defence), and death caused by accident or misadventure.
- Unlawful homicides include murder, manslaughter, infanticide and culpable driving or dangerous driving causing death.
- Murder is intentionally or recklessly killing another. To be found guilty of murder, the prosecution must prove the following elements:
 - > Individual
 - > Sane
 - > Age of discretion
 - > Alive
 - > Jurisdiction
 - > Malice aforethought
 - > Deliberate or assumed
 - > Causation.
- Attempted murder covers intending to kill, threats to kill, setting traps to kill, extortion with threat to kill, conspiracy to commit murder or incitement to commit murder.
- Manslaughter is where there is no intent to kill but the action results in death. A person is charged with manslaughter if death is foreseeable, if there is an intention to cause bodily harm, acts with criminal negligence and fails to act where the law has imposed a duty. One-punch situations and incitement of another to commit suicide are also considered as manslaughter.
- Infanticide applies when a mother kills a child (aged up to two years old), due to the effects of child birth.
- Child homicide applies where a person kills a child who is under the age of six years in circumstances that would be considered manslaughter.
- Driving-related homicides include culpable driving (such as being reckless, negligent or intoxicated) or dangerous driving causing death or serious injury (such as driving at speed).

Possible defences to homicide

- A defence is a lawful reason that an accused person uses that should be taken into account by the court. These include:
 - > Self-defence—action that was necessary and reasonable
 - > Duress—where a threat or force is used to make someone do something
 - > Sudden or extraordinary emergency—applies in murder cases only if the emergency involves a risk of death or really serious injury
 - > Intoxication—under the influence of alcohol, a drug or any other substance
 - > Mental impairment—the accused did not know what they were doing or that the act was wrong
 - > Automatism—the accused was not in control of his/her actions such as sleepwalking or suffering concussion
 - > Defences not used very often can include accident, consent, alibi or necessity.

CHECK YOUR UNDERSTANDING

1. Draw a table identifying crimes against the person. Provide examples where possible.
2. Define the term 'homicide'. Distinguish between lawful and unlawful homicide.
3. There is no legislative definition of murder. Discuss the importance of *R v Doherty* in defining what is meant by murder. Outline the elements of murder.
4. The notion of 'guilty mind' is crucial to proving murder. Explain the concept of malice aforethought.
5. Describe what is meant by 'a direct relationship' in causation.
6. Distinguish between attempted murder and manslaughter.
7. Investigate a recent 'one-punch' case, and write a report that covers a brief summary of the case, the rights protected by the law and the possible impact of the offence on individuals and society.
8. To what extent is there a link between domestic/family situations and homicide in Australia?
9. Describe the main differences between infanticide and child homicide, and culpable driving and dangerous driving causing death.
10. Describe the penalties for the different types of homicide.
11. Draw a table similar to the one below, and complete the columns on defences to crimes.

DEFENCE	DEFINITION / EXPLANATION	POSSIBLE EXAMPLE/S	PARTIAL OR COMPLETE DEFENCE

12. Using a graphic organiser, create a visual representation of the types of homicide, the elements required and the defences of a crime.
13. Find a newspaper article about a homicide case and create a report containing the following information:
 - a brief summary of the case
 - the rights protected by the law
 - the elements of the offence
 - possible defences
 - the role of statute law and common law in developing the elements of the offence and the defences
 - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
 - the possible impact of the offence on individuals and society.

APPLY YOUR UNDERSTANDING

MURDER AND INTENT

Using legal argument, copy and complete the following table on how you would decide the following cases in which a person was killed. You have several issues to consider.

CASE	WHAT IS THE <i>ACTUS REUS</i> ?	WHAT IS THE <i>MENS REA</i> ?	SHOULD THE ACCUSED BE CHARGED? IF SO, WITH WHAT CRIME?	WHAT DEFENCE (OR NO DEFENCE) SHOULD BE USED? GIVE REASONS FOR YOUR ANSWERS.	IF CHARGED, SHOULD THE ACCUSED BE FOUND GUILTY? GIVE REASONS FOR YOUR ANSWERS.
a.					
b.					
c.					
d.					
e.					
f.					
g.					

- Libby fought with Mia in shallow water, dragged her unconscious from the water, and left her alive on the beach below the high-water mark. Libby went to sleep on the beach and, when she woke up, Mia was in the sea and had drowned.
- Peter stabbed Massimo in the stomach in a cafe brawl. Massimo was treated for the injury in hospital. A drug to which Massimo was allergic was used. It was found to be unsuitable for his treatment and its use was temporarily discontinued, but unfortunately was later administered again. Massimo died.
- Kirk, a serviceman, stabbed Grigori with a bayonet during a brawl—once in the arm and once in the back. The wound in the back pierced Grigori's lung. Grigori was dropped twice by accident while being taken to a first-aid post. There he was given extensive treatment, but he died some hours later. Medical evidence suggested that if Grigori had been given a blood transfusion, his chances of recovery would have been good, though not certain.
- Gorgi took part in robbing a bank. The gun Gorgi was holding went off accidentally, killing Christos, a customer of the bank.
- Olivia took part in robbing a bank using a classic imitation gun. Rubi, a customer in the bank, believed that the gun was real. During the robbery, Rubi suffered a heart attack and died.
- Zara earned her living as a professional boxer. During a contest, Patricia was knocked out by Zara and later died.
- Guan hunted deer in a park that had been recently declared open for deer hunting. Guan saw movement in the bushes and fired, killing Dian, a bushwalker.

APPLY YOUR UNDERSTANDING

WHAT DEFENCE?

Copy and complete the following table. In each of the following cases, consider the defence an accused might use and decide the likely outcome of each case. Give reasons for your decision.

CASE	WHAT DEFENCE MIGHT THE DEFENDANT USE?	WHAT IS THE LIKELY OUTCOME OF THE CASE?	IF CHARGED, SHOULD THE ACCUSED BE FOUND GUILTY? GIVE REASONS FOR YOUR ANSWERS.
a.			
b.			
c.			
d.			
e.			
f.			
g.			
h.			
i.			

- Mark, who was married to Sue, came home unexpectedly for lunch. He found Sue in bed with the next-door neighbour. He stabbed the man, who later died in hospital.
- Matthew was walking home with Daniel when they were attacked by four youths. They were thrown to the ground and kicked savagely. Matthew managed to grab a piece of iron lying on the ground and lashed out, hitting one of the youths. This youth died. The police arrested everyone at the scene, charging Matthew with murder.
- Maria, who had a history of psychiatric problems, smothered her young daughter while she slept. Maria had no recollection of her action because she was a sleepwalker.
- Madeleine killed her husband, William, while he slept after he had beaten her and threatened to kill her and their three children. She had suffered years of physical and emotional abuse from her husband and had tried to leave several times, but each time William threatened to harm the children.
- Daniel, who had been drinking heavily, was thrown out of a pub. He left the pub and climbed into the driver's seat of his road train. He drove his road train into the crowded front bar of the pub, killing five people.
- Dave, who had been drinking heavily, found his de facto partner embracing another man. He picked up a metal pipe and struck her on the head, killing her.
- Josh entered into a suicide pact with his girlfriend. She shot herself but did not die and asked Josh to get help. While Josh was away getting help, but still in the area, there was a second shot. The girlfriend had shot herself a second time and died.
- Foy deliberately struck his wife on the head with a tomahawk, killing her. Foy has been epileptic since he was a child.
- Parris, who was three times over the legal alcohol limit, smashed his car into a lamppost. When police arrived at the scene of the accident, there was no sign of the driver. He was later found at home and claimed that he knew nothing about the accident. During a police interview, Parris stated that he believed that he did it but could not recall getting into the car to drive. A sleep expert gave evidence during the hearing that Parris was asleep at the time of the accident.

APPLY YOUR UNDERSTANDING

MURDER OR MANSLAUGHTER?

Read the following case study, then answer the questions that follow.

A group of school students were waiting at a tram stop. One student was celebrating the end of his VCE exams with his friends. A verbal altercation took place between the Year 12 student and a 14-year-old boy. The younger boy called a girl with the group a 'slut'. The Year 12 student responded by calling the 14-year-old boy 'unibrow'. The 14-year-old boy speared the Year 12 student with the metal tip of his umbrella. Four days later, the Year 12 student died as a result of the blow. The boy, who had turned 16 by the time of his trial, pleaded not guilty to murder. He was convicted and sentenced to 12 years in prison.

1. In which court would this case be heard? Explain.
2. If you were a member of the jury in this case, what factors would you need to take into account in deciding whether this is a case of murder or manslaughter?
3. What impact, if any, would the age of the offender have on your decision?
4. To what extent are the principles of justice served by a sentence of 12 years?

APPLY YOUR UNDERSTANDING

IS IT MURDER?

Read the following case studies and explain how the principles of murder or manslaughter may apply to each.

CASE A

The defendant dressed in camouflage gear and waited in a 'sniper's nest' for 90 minutes before shooting dead her abusive husband. He had subjected her to years of physical, psychological and sexual abuse and had raped her on the night of his death.

CASE B

A mother was jailed for poisoning her baby. The mother had fed her 10-month-old baby poison four times over a period of several weeks. In sentencing the woman, the judge stated that her actions were not a spontaneous act of violence stemming from the stress of parenthood. Her actions stemmed from a deeply disturbed background and severe personality disorder. The court heard evidence that she poisoned her baby in an attempt to attract the attention of the baby's father.

CASE C

The defendant, who was a qualified electrician, had been growing a crop of marijuana plants in the backyard of his family home. To protect the plants from being stolen or damaged by animals, he placed chicken wire and some electrified wire around them. Late one night, another man entered the property with the intention of stealing some of the illegal crop. The intruder was electrocuted when he touched the electrified wire and died.

CASE D

An 18-month-old boy died of a methadone overdose. The parents, both recovering heroin addicts on a methadone program, fell asleep after shooting up methadone on the morning of the child's death. When the father woke up, the boy was asleep on his mother's lap. The mother woke up about two hours later. She didn't notice anything wrong with the child and thought that he was asleep. Another hour passed before the parents realised that the child was dead and called an ambulance. The

prosecution told the court that there were three possibilities: that the boy was fed the methadone as a sedative, drank residue from a cup used to dilute it, or consumed the contents of a misplaced syringe of the drug.

CASE E

The defendant was returning his three children to his divorced partner late at night. On his way home, he claimed he had a coughing fit that led him to lose control of his vehicle. The car careered into a dam and all three children drowned. The defendant made it out of the vehicle. The police could not confirm the story as there were no visible tyre marks on the road.

APPLY YOUR UNDERSTANDING

REPORT—A CREATIVE HOMICIDE INVESTIGATION

Complete an investigation on one of the different types of homicide. Make sure you include the elements required to prove that homicide and the possible defences that can be used. Present your work using one of the following options:

- Create a talk show radio program outlining your investigation about your homicide topic.
- Perform a role-play or interview that explains your understanding of your homicide topic.
- Create a YouTube clip outlining your understanding of your homicide topic.
- Give a presentation using mnemonics or memory cues that explains your understanding of your homicide topic.
- Write a journal or diary of what it would be like to be in legal trouble about your homicide topic.
- Share and explain a collection of cards, objects or events that describe the legal issues involved about your homicide topic.





ASSESSMENT



AustLII:
www.austlii.edu.au



CRIME STATISTICS AGENCY:
www.crimestatistics.vic.
gov.au

RESEARCH, INVESTIGATION AND ANNOTATED REPORT

On completion of this activity, you should be able to describe homicide, the elements and defences, and use legal reasoning to determine the criminal responsibility of an accused based on an actual case. Your report should be approximately 800 to 1000 words in length.

- Go to the Australasian Legal Information Institute (AustLII) website
 - > Under the tab 'Cases and Legislation', click on the 'Victoria' link
 - > Click on the 'Supreme Court of Victoria 1994– (AustLII)' link
 - > Click on the '2018' Link.
- Scroll through the list of cases and find one that takes your interest. Homicide cases begin with **R v <Name>**, or **DPP v <Name>** or **The Queen v <Name>**
- When you decide on your case, write a one-page report on your case study providing the following information:
 1. Identify the case citation, include the judge, date of sentencing, counsels (lawyers for the DPP and defence).
 2. Explain what crime of homicide has been committed. Was it:
 - murder
 - attempted murder
 - manslaughter
 - infanticide
 - child homicide or
 - driving offences causing death?
 3. Give a brief summary of the facts of the case.
 4. Identify and explain the issues discussed in the judgment (look at the topic headings).
 5. Describe the sentencing considerations issued by the judge.
 6. Outline the sentence issued and explain whether you believe it was effective.
 7. Identify and explain the laws that regulate your chosen case study by completing the following:
 - the legal elements needed to convict this individual
 - the defences available for this crime
 - the penalty for this crime
 - explain whether your crime is categorised as summary, indictable heard summarily or indictable
 - describe which court mainly deals with this offence or crime.
- 8. Go to the Crimes Statistics Agency (CSA) website and complete the following activities:
 - Go to the heading 'Crime Statistics' and scroll to the 'Latest Crime Data', find the 'Download Data' tab and summarise the current police statistics on your chosen crime.
 - Analyse the crime statistics for your suburb in the 'Explore crime by location' tab. Just use your postcode. Identify any issues or trends for your area.
- 9. Using the principles of justice, to what extent do you believe the sentence reflects a just outcome for society, the accused and the victim's family? This section should be at least 200 words in length.

STUDENT SELF-ASSESSMENT CRITERIA	WELL ABOVE THE STANDARD	ABOVE THE STANDARD	AT THE STANDARD	BELOW THE STANDARD	WELL BELOW THE STANDARD
WRITTEN REPORT OUTLINING THE BASICS OF THE CASE STUDY					
THE LEGAL ELEMENTS NEEDED TO CONVICT THIS INDIVIDUAL					
THE DEFENCES AVAILABLE FOR THIS CRIME					
THE PENALTY FOR THIS CRIME					
TYPE OF CRIME AND WHICH COURT					
ANALYSIS ON CURRENT HOMICIDE STATISTICS					
THE PRINCIPLES OF JUSTICE REFLECTED IN THE OUTCOME OF THE CASE					



ASSESSMENT



CRIMINAL LAW IN ACTION: CRIMES AGAINST PROPERTY

UNIT 1 – AREA OF STUDY 2: The presumption of innocence

When there has been an infringement against a person's property, this is seen as a crime against property, the most common offence in Victoria, and includes crimes such as burglary, carjacking and arson.

OUTCOME

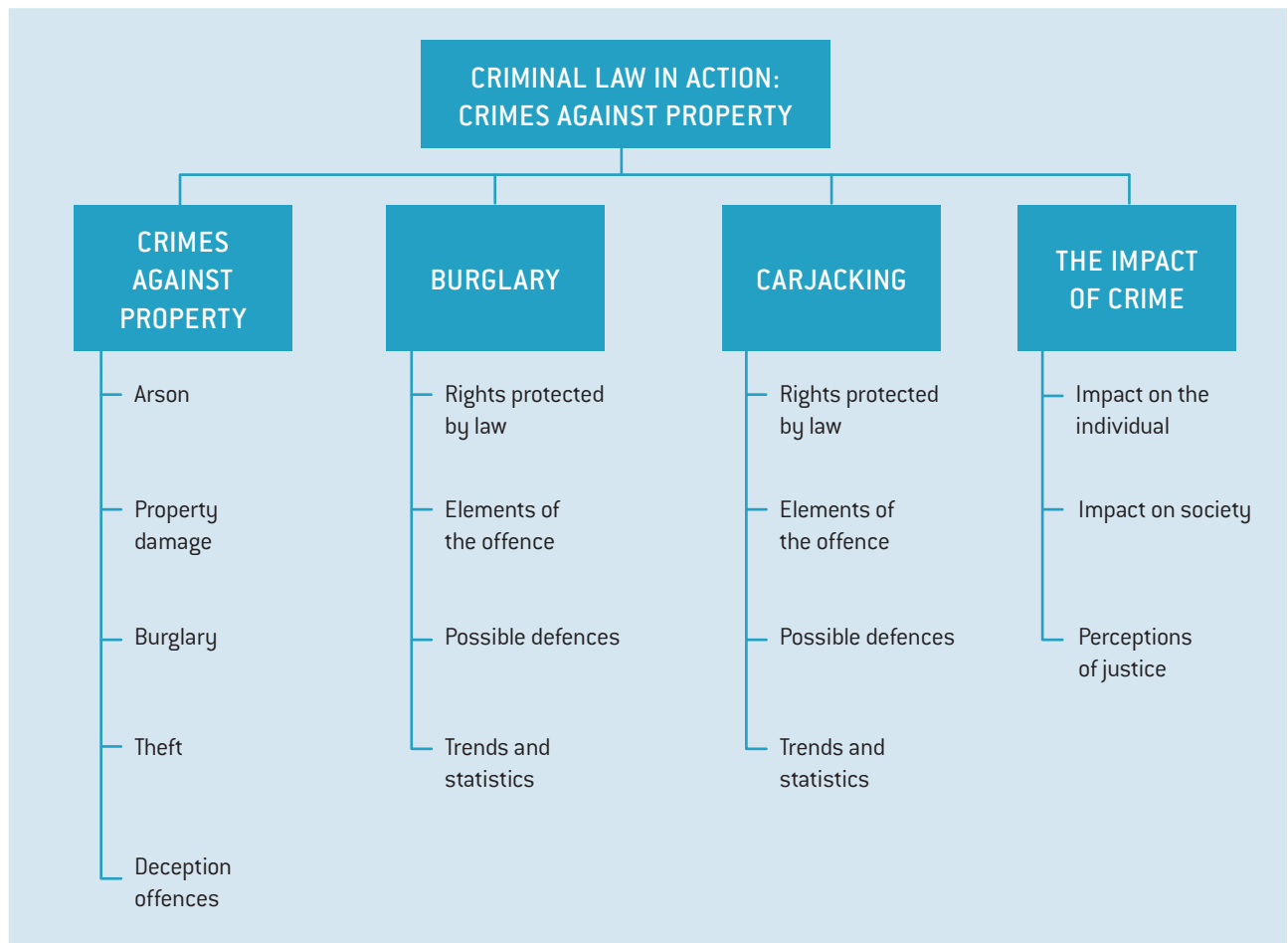
On completion of this chapter the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > types of crime such as crimes against the person and crimes against property
- > two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
- the role of statute law and common law in developing the elements of the offence and the defences
- trends and statistics in relation to the offence in Victoria and in one other jurisdiction
- the possible impact of the offence on individuals and society

KEY SKILLS

- > define and use legal terminology
- > research and analyse relevant information about criminal law and offences
- > synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two offences
- > use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to two actual and/or hypothetical scenarios



KEY TERMS

aggravated burglary	Burglary committed with the presence or use of an offensive weapon
arson	Deliberately destroying property by fire
burglary	Entering premises with the intent either to steal or to commit assault/property damage
carjacking	Intentionally using fear of force to steal a car
deception	A dishonest act or omission
property	Items that are of a tangible nature
theft	Dishonestly taking the goods of another person with the intention of depriving them of the use of those goods

CRIMES AGAINST PROPERTY

PROPERTY: items that are of a tangible nature

Crimes against property are the most common offences in Victoria.

People tend to care about the things they own. Crimes against **property** are the most common offences in Victoria and for this reason we have many offences against property. Analysis from the Crimes Statistics Agency shows that property crime makes up the bulk of criminal statistics. (The CSA includes property and deception offences together.) These crimes include arson, property damage, burglary or break and enter, theft, deception and bribery.

HAVE YOU...	YES / NO / UNSURE
Seen someone deliberately light a fire?	
Lied to someone to obtain something you wanted?	
Known someone to have purchased their own fireworks for New Year's Eve?	
Smashed a window while playing backyard cricket?	
Witnessed someone entering a building they were not meant to?	
Seen crime statistics in a Neighbourhood Watch newsletter for the area you live in?	
Realised that your parent's taxes go towards funding the police and housing criminals in jail?	
Heard of a drug trafficking crime overseas?	

In the eyes of the law, property is defined as anything of a tangible nature. This can include anything real or personal, such as money or livestock. The owner of the property must have control, or the right of control, as well as the ability to place a charge on it.

6.1 Crimes against property in Victoria, 2015–16

Source: Crime Statistics Agency

TYPE OF CRIME	NUMBER OF CASES
Arson	4504
Property damage	43 513
Burglary	52 087
Theft	180 988
Deception	39 158
Bribery	26
Total	320 276

ARSON

ARSON: deliberately destroying property by fire

Arson is the crime of deliberately damaging property by fire; it carries a maximum penalty of 15 years' imprisonment.

The offence of **arson** is covered under section 197 of the *Crimes Act 1958*. It is an offence to destroy or damage property by fire (arson) and the maximum penalty for this offence is 15 years' imprisonment. Any person who intentionally or recklessly causes a bushfire can also be liable for an offence with a maximum prison term of 15 years. In order to be found guilty of arson, the following elements need to be proved beyond reasonable doubt by the prosecution:

- the accused damaged or destroyed property by fire
- the property belonged to another person
- the accused intended to damage or destroy the property by fire. This also includes the knowledge that damage or destruction by fire was likely due to their actions
- the accused had no lawful excuse for damaging or destroying the property.

Defences to arson or destroying or damaging property

The defence to arson or destroying or damaging property is covered by section 200 of the *Crimes Act 1958*. The acceptable defence is that at the time of the offence, the accused:

- solely owned the property in question
- was authorised to engage in this conduct
- was entitled to destroy or damage property in question.

Fireworks

Fireworks are defined as an explosive, which means they are manufactured or used to produce an explosion or a pyrotechnic visual or sound effect. The law states that only a registered pyrotechnician may use fireworks, Chinese firecrackers or theatrical fireworks. A pyrotechnician must hold a licence to use fireworks. The maximum penalty for an individual discharging a firework without permission is five penalty units.

Bringing in the New Year with a bang

Each year, New Year's Eve creates work for emergency services and medical staff with revellers. Many individuals present at hospital with injuries due to the illegal use of fireworks. These victims suffer from injuries ranging from minor burns to the loss of limbs and blindness. Emergency services, such as the police and fire authorities, need to respond to unnecessary fires that are started by people who have little or no experience with the dangers of fireworks. Seaside suburbs on the Mornington Peninsula warn partygoers not to set off fireworks. Local councils also require permits to use fireworks to protect residence and their property.



APPLY YOUR KNOWLEDGE

ONLINE RESEARCH—BRINGING IN THE NEW YEAR WITH A BANG

Research recent cases on the illegal use of fireworks in your local area. Write a paragraph of what occurred, who was involved and what, if any penalties resulted.

PROPERTY DAMAGE

A person who intentionally destroys or damages any property belonging to another shall be guilty of an indictable offence. The maximum penalty for criminal damage to property is 10 years' imprisonment. In order to be found guilty of criminal damage, the prosecution must prove beyond reasonable doubt that:

- the accused destroyed or damaged property
- the property belonged to another
- the accused intended to destroy or damage property
- the accused did not have a lawful excuse.

Intentionally damaging or destroying someone else's property is an offence; it carries a maximum penalty of 10 years' imprisonment.

6.2 Property damage offence statistics in Victoria, April 2012–March 2017

Source: Crime Statistics Agency

OFFENCE	APR 2012–MAR 2013	APR 2013–MAR 2014	APR 2014–MAR 2015	APR 2015–MAR 2016	APR 2016–MAR 2017
CRIMINAL DAMAGE	43 332	41 062	38 316	40 101	39 323
GRAFFITI	3270	3464	3337	3190	3277
OTHER PROPERTY DAMAGE OFFENCES	328	418	413	424	489
TOTAL	46 930	44 944	42 066	43 715	43 089

THEFT: dishonestly taking the goods of another person with the intention of depriving them of the use of those goods

Theft is the act of dishonestly taking someone else's property with the intention of keeping it; it carries a maximum penalty of 10 years' imprisonment.

THEFT

According to the *Crimes Act 1958*, persons are guilty of **theft** if they:

dishonestly appropriate property belonging to another with the intention of permanently depriving the other of it.

The prosecution must prove the following elements in court for a person to be found guilty of theft. A brief examination of the different parts or terms of the definition should help in clearly understanding the law.

- *Dishonestly.* Whether a person acted dishonestly will depend on the circumstances; clearly, when a customer enters a store, takes an item and leaves the store without paying for the item, there has been an act of dishonesty.
- *Appropriate.* A person is considered to have appropriated (assumed rights of ownership of) property if the person treats it as their own.
- *Belonging to another.* Belonging, according to previous case law, relates to more than ownership; possession or control of property is also considered to mean 'belonging'.
- *Intention of permanently depriving.* The intention must be to keep the item permanently, rather than to borrow it temporarily.

The maximum penalty for a charge of theft is 10 years' imprisonment.

6.3 Victorian statistics on theft, July 2015–June 2016

Source: Crime Statistics Agency

THEFT	
MOTOR VEHICLE THEFT	21 929
STEAL FROM A MOTOR VEHICLE	62 423
STEAL FROM A RETAIL STORE	21 869
THEFT OF A BICYCLE	6658
RECEIVING OR HANDLING STOLEN GOODS	16 497
FARE EVASION	122
OTHER THEFT	51 490
TOTAL	180 998

DECEPTION OFFENCES

Obtaining property by **deception** is defined in the *Crimes Act 1958*. It is where an accused person, by their deception or fraud, dishonestly obtains property belonging to another person, with the intention of permanently depriving the other of it. An accused can also be guilty of obtaining financial advantage by deception by dishonest means for themselves or another. The penalty for these indictable offences is a 10-year maximum prison term. A deception can be

DECEPTION: a dishonest act or omission

both a dishonest act or an omission and can include bribery, which is the offering, giving or accepting of an inducement involving an official while exercising their authority.

The prosecution bears the responsibility to prove the following elements beyond reasonable doubt:

1. The property obtained belonged to another.
2. The intent was to permanently deprive the other of that property.
3. The property was obtained by deception.
4. The property was obtained dishonestly.

Top 10 deception offences include:

1. credit card deception
2. false invoicing
3. contactless payment
4. online banking fraud
5. false documents
6. identity-related fraud
7. counterfeit currency
8. scam-related deception
9. fraudulent loan
10. online trading (no goods).



A number of offences fall under the umbrella of obtaining property by deception; these offences carry a maximum penalty of 10 years' imprisonment.

BURGLARY

Entering premises without permission, regardless if the entry is unforced, with the intent either to steal something from the building, or to commit an offence involving assault or damage, is the crime of **burglary**. When the burglary is committed with the presence or use of a firearm, an imitation firearm, an offensive weapon, explosives or imitation explosives, the crime is **aggravated burglary** and carries with it a higher penalty. The maximum penalty for a charge of burglary (an indictable offence) is 10 years' imprisonment, while the maximum for aggravated burglary is 25 years.

BURGLARY: entering premises with the intent either to steal or to commit assault/property damage

AGGRAVATED BURGLARY: burglary committed with the presence or use of an offensive weapon

RIGHTS PROTECTED BY LAW

Laws governing burglary are there to protect a person's property. Section 76 of the *Crimes Act 1958* Victoria covers the offence of burglary, while section 77 covers the offence of aggravated burglary.

Burglary is where an accused enters a building or part of a building as a trespasser and intends to steal, assault a person in the building, or damage the building or property in the building. Aggravated burglary occurs if the person has with them a firearm, imitation firearm, offensive weapon, explosive or imitation explosive.

Both burglary and aggravated burglary are considered indictable offences heard in the County Court and requiring a judge and jury. However, burglary carries with it a maximum penalty of 10 years' imprisonment or a fine of up to 1200 penalty units, whereas aggravated burglary has a maximum penalty of 25 years' imprisonment, or a fine of up to 3000 penalty units.

Burglary and aggravated burglary can also be considered as indictable offences heard summarily in the Magistrates' Court. This is due to the minor nature of such offences (if under \$100 000) and where the prosecution and the accused agree to have them heard in a lower court. The maximum penalty a magistrate can issue per offence is two years' imprisonment.

Burglary is the act of entering premises and stealing property; the maximum penalty is 15 years' imprisonment. Aggravated burglary involves the additional use of a weapon; it carries a higher maximum penalty of 25 years' imprisonment.

ELEMENTS OF THE OFFENCE

The elements needed to be found guilty of burglary are as follows:

- Did the accused enter a building?
- Was the accused a trespasser?
- Did the accused intend to commit theft or criminal damage?

In the situation of aggravated burglary, one other element is required as well:

- At the time of the entry, did the accused use a weapon such as a firearm, offensive weapon or explosive?

POSSIBLE DEFENCES

The following defences apply to burglary and aggravated burglary.

- **Self-defence**—The use of reasonable force coupled with the necessary belief to defend one's self when an immediate attack.
- **Duress**—Where an action is committed due to a reasonable belief of a threat or force to make someone do something.
- **Sudden or extraordinary emergency**—Where the accused reasonably believes that they were involved in a sudden or extraordinary emergency.
- **Intoxication**—Where a person was intoxicated and committed an offence under the influence of alcohol, a drug or any other substance and they did not know what they were doing. In this situation the intoxication is not self-induced.
- **Mental impairment**—Where the accused is mentally impaired and they did not know the nature and quality of their actions or what they did was wrong.
- **Consent**—Where the accused had the right to be there as a result of permission to enter or allow them to take an item of property by the owner. The consent needs to be voluntary, and the owner needs to be legally capable of consenting.

TRENDS AND STATISTICS

Trends and statistics in Victoria

The Crime Statistics Agency provides quarterly snapshots of burglary and aggravated burglary offences.

6.4 Sentencing for burglary and aggravated burglary in Victoria, 2010–2015

BURGLARY	AGGRAVATED BURGLARY
63 people were sentenced in a higher court as a principal offender of burglary	671 people were sentenced in the higher courts for a principal offence of aggravated burglary
67% of people were given a sentence of imprisonment	61% of people were given a sentence of imprisonment
5% were given a community corrections order	7% were given a community corrections order
The most common length of imprisonment imposed for burglary was 1 to 2 years	The most common length of imprisonment imposed for aggravated burglary was 2 to 3 years
Male offenders = 93.5%	Male offenders = 94.0%
Female offenders = 6.5%	Female offenders = 6.0%

Source: Sentencing Advisory Council

- The number of non-aggravated burglary offences in July 2015 to June 2016 was 48 400, whereas there were 3687 cases of aggravated burglary.
- Just under 48 per cent of items stolen were valued at \$500 or below, whereas less than 15 of items stolen were worth \$10 000 or above.

- Most points of entry were through a door, either from the front or the back.
- The tools mainly used were a jemmy, lever, screwdriver or physical force.
- The main method of entry is to force a window or door.
- The top five items taken were jewellery, electrical appliances, personal property, cash and tools.

Source: Crime Statistics Agency

Trends and statistics for the United States

- In 2015, there were an estimated 1 579 527 burglaries, a decrease of 20.2 per cent when compared with 2011.
- Burglaries accounted for 19.8 per cent of the estimated number of property crimes.
- Forcible entry was involved in 57.9 per cent of burglaries, 35.5 per cent were unlawful entries and 6.6 per cent were attempted forcible entry.
- Victims of burglary offences suffered an estimated \$3.6 billion in property losses. in 2015. Overall, when the average value was applied to the estimated number of burglaries, the average dollar loss per burglary offence was \$2316.
- Burglaries of residential properties accounted for 71.6 per cent of all burglary offences.

Source: Federal Bureau of Investigation

THE IMPACT OF THE OFFENCE

Burglary offences have an impact on the accused, the victims and on society as a whole.

- The accused—The impact of the offence of burglary on the accused is generally a prison term. However, if the accused is charged with aggravated burglary, then their prison term may be much longer due to the violence used.
- The victim—Victims of burglary suffer a loss of property and a sense of safety. It can be very inconvenient to replace items and repair property. If a person is a victim of an aggravated burglary, then they have to contend with the violence used and this can be traumatic.
- Society and our legal system—The offences of burglary and aggravated burglary are generally heard in the County Court before a jury. As a result, these trials can be very expensive and time-consuming if the accused does not plead guilty. Generally, a person found guilty of this crime tends to serve a term of imprisonment—again, very expensive to our society.

APPLY YOUR UNDERSTANDING

BURGLARY AND AGGRAVATED BURGLARY

Using the information on burglary above, complete the following activities:

1. Define burglary and aggravated burglary and explain the main distinction between these two crimes.
2. Compare the penalties between burglary and aggravated burglary. Why are they so different?
3. Identify the main punishment issued for burglary and aggravated burglary. Do you believe it should be another sanction, such as a fine or community corrections order?
4. Describe the possible defences to burglary and aggravated burglary.
5. Suggest possible conclusions from the trends and statistics of burglary in the USA.
6. Write a paragraph outlining the main trends and statistics of burglary in Victoria.

7. Suggest possible strategies that could be put in place to reduce the prevalence of burglary and aggravated burglary.
8. Research the up-to-date figures of burglary in Victoria and update the information in this section.

GOING FURTHER

9. Read the case below and answer the following questions:

DPP V SUN [2016] VCC 1952

In the County Court of Victoria, Criminal Division, before Her Honour Judge Hampel, the accused John Sun, 28 years old, pleaded guilty to a number of drug-related charges, including possession of a firearm. Sun, prior to these offences, had a history of drug abuse including significant convictions for multiple driving and traffic offences, dishonesty and violence, including aggravated burglary, some drug possession offences and weapons offences. When Sun was 24 years of age, Judge Chettle sentenced him to a term of imprisonment due to aggravated burglary. Regardless of the rehabilitative focus of the sentence, Sun has spent 9 years in prison. During this time he was a serious ice user; he had an extraordinary level of family support, including work prospects, but he squandered these opportunities to rehabilitate himself.

This time, Sun was caught with methylamphetamine, proceeds of crime and a firearm. Sun consistently chose to be less than truthful throughout the police interviews, the recorded interview, at the committal proceeding and in cross-examination. It was not until the end of the trial that Sun decided to settle on the charges and negotiate a guilty plea.

In handing down her sentence, Judge Hampel used denunciation and just punishment as the justification for Sun's term of imprisonment. As a drug addict, Sun also dealt ice, and therefore used the gun for protection. However, Judge Hampel felt that no civilised community should allow this and that she needed to deter others from the same behaviour.

Sun was sentenced to 4 years and 10 months, with a fixed period of 2 years and 4 months before being eligible for parole. Sun also served 383 days in remand, which was counted as part of the sentence already served. Had Sun not changed his plea of not guilty to guilty, he would have been sentenced to 6 years and 6 months, with a fixed period of 4 years and 6 months before being eligible for parole.

- a. Apply the elements of aggravated burglary to the above case. Explain each element as it relates to this case.
- b. Describe the outcome of this case. Do you think it is fair and just? Why are Sun's prior convictions taken into account?
- c. Outline the impact of this crime on the individual and society.
- d. Explain the difference between a guilty plea versus a not guilty plea in terms of sentencing. Why is there such a difference?
- e. To what extent were the principles of justice applied by Judge Hampel in her sentencing of Sun?

CARJACKING

THE RIGHTS PROTECTED BY LAW

The term **carjacking**, until recently, was only referred to in movies, mainly from the United States. It was a crime that was practically unknown in Victoria; however, it has become an issue reported in greater numbers in the daily media. This has caused the community to become aware of the issue and place pressure on Parliament to change the law.

CARJACKING: intentionally using fear of force to steal a car

Carjacking involves the intent to deprive another of their property (theft) with force or the fear of force. The offence of carjacking carries with it a maximum 15 years' imprisonment and aggravated carjacking increases to 25 years' imprisonment. This is covered by section 79 of the *Crimes Act 1958*. The law also creates a statutory minimum term of imprisonment of 3 years for adults for a conviction of carjacking and 5 years for adults for a conviction of aggravated carjacking.



ELEMENTS OF THE OFFENCE

Carjacking is similar to theft and robbery—in other words, the accused dishonestly appropriated a car belonging to another with the intention of permanently depriving the other of it. The prosecution must prove beyond reasonable doubt that the following elements exist:

1. The accused committed carjacking (theft)
2. The accused used force or fear before or at the time of the carjacking
3. The accused acted in a way to steal the car while being driven.

The role of common law and statute law

This crime was created by Parliament in response to community concern about the issue of people stealing vehicles in the early hours of the morning. In many cases, the accused bumps the victim's vehicle from behind. The victim then gets out to assess the damage and exchange information, but the victim's vehicle is taken, usually by fear or force. As this offence is a new crime to the statutes, the courts will use the elements of theft and carjacking to assess the guilt of an accused.

POSSIBLE DEFENCES

The *Crimes Act 1958* (Vic) provides a number of defences for an accused if charged with carjacking. These are:

- **Self-defence**—The use of reasonable force coupled with the necessary belief to defend oneself when an immediate attack occurs.
- **Duress**—Where an action is committed due to a reasonable belief of a threat or force to make someone do something.
- **Sudden or extraordinary emergency**—Where the accused reasonable belief that they were involved in a sudden or extraordinary emergency.
- **Intoxication**—Where a person was intoxicated and committed an offence under the influence of alcohol, a drug or any other substance and they did not know what they were doing. In this situation the intoxication is not self-induced.
- **Mental impairment**—Where the accused is mentally impaired and they did not know the nature and quality of their actions or what they did was wrong.
- **Consent**—Where the accused had the right to be in possession of the motor vehicle as a result of permission to take the car by the owner. The consent needs to be voluntary, and the owner needs to be legally capable of consenting.

Carjacking involves theft of a vehicle with force or the fear of force. It carries a maximum penalty of 15 years' imprisonment, but aggravated carjacking increases the maximum to 25 years.

Similar defences to those for homicide can be presented for carjacking.

TRENDS AND STATISTICS

The Crime Statistics Agency has reported that the number of crimes that fit the condition of carjacking increased by 80 per cent in 2015–2016 alone.

6.5 Motor vehicle theft
(including carjacking)
in Victoria, 2012–2017

THEFT	APRIL 2012 –MARCH 2013	APRIL 2013 –MARCH 2014	APRIL 2014 –MARCH 2015	APRIL 2015 –MARCH 2016	APRIL 2016 –MARCH 2017
MOTOR VEHICLE THEFT	15 570	15 659	16 619	20 272	23 641

An international experience of carjacking

Carjacking laws exist in a number of jurisdictions around the world. A good example of a jurisdiction dealing with this issue is California. All offences go into its Penal Code. This is similar to the *Crimes Act* in Victoria. Section 215 of the Penal Code covers carjacking. It is a serious offence to take a car from another person by the use of force or fear, regardless if the person in the car is a driver or a passenger.

The maximum penalty for carjacking is up to 9 years' imprisonment. The prison term could be greater if the victim is injured, a gun is used, it is for the benefit of a gang or a kidnap occurs during the carjacking. California has a 'three strikes law', and carjacking is seen as a crime that is a strike. This means that an offender must serve at least 85 per cent of their sentence before they can be eligible for parole.

The following defences apply to carjacking in California:

- The accused was a victim of mistaken identity
- No fear or force was used.

IMPACT OF THE OFFENCE ON SOCIETY AND THE INDIVIDUAL

- The accused—The impact of the offence of carjacking will be a minimum three-year prison term if found guilty of this offence. This is aimed at deterring young offenders.
- The victim—Victims of carjacking often not only suffer the loss of their vehicle, but a sense of loss of their safety and wellbeing as well, especially if fear or force is used, which may be traumatic.
- Society and our legal system—The police power to arrest carjackers should send a strong message of deterrence to offenders. It would also make members of society feel a little safer. As there is a minimum sentence to be served, this will increase prison rates and possibly lead to an increase in prison numbers.

APPLY YOUR UNDERSTANDING

CARJACKING

Using the information on carjacking above, complete the following activities:

1. Create a definition of the law of 'carjacking'. Make sure you include the penalty for this crime.
2. Describe the elements needed to be convicted of carjacking.
3. The law creates a statutory minimum term of imprisonment for carjacking and aggravated carjacking. Outline the purpose of a statutory minimum term of imprisonment.
4. Speculate at what time of the day the offence of carjacking is likely to take place. Justify your answer.
5. Identify the possible reasons or motives for carjacking. What are the main influences (personal, economic or social)?
6. Evaluate the defences of carjacking—in other words, explain the advantages and disadvantages of each defence.

7. Compare California's carjacking laws to those in Victoria. Identify two similarities and two differences in your comparison. Which country has the tougher set of laws and why?
8. Identify three strategies road users would be able to put in place to reduce the incidence of carjacking.
9. Write a paragraph summarising in your own words the impact of carjacking laws.
10. Research the up-to-date figures of carjacking and annotate the information in this section.

GOING FURTHER—FOLIO AND REPORT

11. Collect two articles that illustrate the offence of carjacking. Choose from newspapers, magazines, journals or internet news services. Each article should discuss a Victorian or another Australian case. For each article, prepare a report that:
 - > records the title, source and date of the article
 - > gives a brief summary of the issues raised in the article
 - > if stated, names the key participants in the article, such as the witnesses, judge and defendant
 - > outlines the right/s protected by the law
 - > identifies and explain the elements of the offence (i.e. why the case relates to carjacking)
 - > identifies the possible defences in the case
 - > identifies the court that is hearing or will hear the case
 - > justifies why such a rule is needed (Use the characteristics of an effective law and discuss which one it represents)
 - > explains the possible impact of the offence on individuals and society.

THE IMPACT OF CRIME

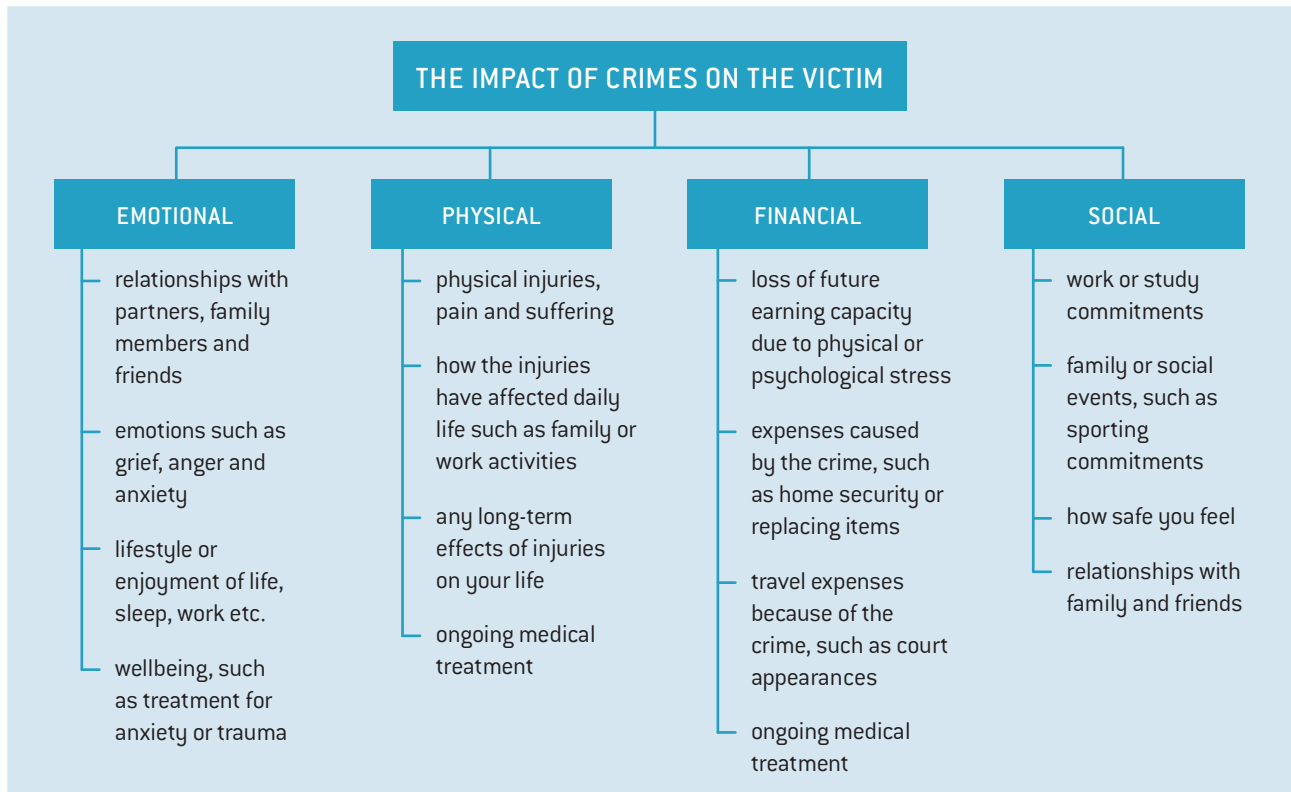
Crime costs society a great deal in financial resources. The cost of running our criminal justice system—the police force, the court system and the prison system—is significant. But perhaps the most telling cost is the effect crime has on individuals. Victims of crime and their families can face serious financial and personal loss through the criminal acts of others. Some Australians are afraid of criminal intrusion into their lives. This can affect such decisions about where and how people live, the type of work they do and the hours they work, how they raise their children, and the quality of their lives as they grow older. Carjacking and home invasions have become a common occurrence in media reports, fuelling this fear.

IMPACT ON THE INDIVIDUAL

Impact on the victim

Victims of crime face the consequences of the criminal act in many ways. First, they suffer the shock of the offence. Second, they are then questioned by the police and face the difficult experience of giving evidence in court if someone is charged with an offence. When the police do not catch the offender, this greatly affects victims' lives. The effects can range from extreme anxiety and stress through to disturbed sleep and nightmares, marriage breakdowns and dependence on drugs.

The impact of crime extends beyond the victim and may include family members, friends, work colleagues and people who witnessed the act. They may all be in some way affected by the crime committed against the victim.



Impact on the offender

Being found guilty of a crime also has an impact on the offender. Some of those impacts are the same as for the victim, shown in the diagram above.

There are a number of reasons why a person may commit crime or engage in criminal behaviour, including:

- family issues (e.g. poor parenting and neglect)
- school-based factors (e.g. poor performance and truancy)
- peer group pressure and influences
- poverty and unemployment
- substance abuse.

Use the table below to identify some of the impacts of crime on the accused. Note: this does not excuse what the accused has done, nor does it absolve them of their responsibility.

IMPACT	DESCRIBE THE IMPACT OF CRIME ON THE ACCUSED
Emotional	
Physical	
Financial	
Social	
Other...	

IMPACT ON SOCIETY

The impacts of crime on society are considerable and include the financial, physical and psychological suffering of victims. Just the fear of becoming a victim can directly affect the quality of life of individuals, families and communities. Fear of crime can include a perception of general risk, fear of being a victim or general concern about policing of crime in the community.

The staggering cost of crime

Crime in Australia has a \$47-billion-a-year price tag. This is the cost of fighting it and dealing with it. The figure includes costs such as medical treatment and lost productivity from victims of assaults and homicides, property lost in burglaries and car thefts, credit card and employee fraud, arson and vandalism.

According to a 2011 report by the Australian Institute of Criminology, the costs attributed to drug offences do not include policing and prosecuting offenders. The cost of homicides (\$1.9 million for each homicide, mostly in lost productivity from victims) does not include investigations or imprisonment of offenders.

The Institute estimates that the annual costs of crime in Victoria are at least \$9.8 billion. The estimated total cost of homicide in Victoria is just under \$400 million. This means that crime costs each Victorian approximately \$1678 each year.

COSTS ASSOCIATED WITH CRIMINAL JUSTICE SYSTEM	\$ MILLION
Police costs	850
Court costs	158.5
Corrective services	480.3
Commonwealth agencies	916.3
Juvenile justice	153.6
Legal Aid Victoria	131
Subtotal	2689.7
VICTIM ASSISTANCE	
Criminal injury compensation	37.6
Victim support services	4.8
Value of volunteer time	21.6
SAAP expenditure for domestic violence	24.1
Child protection	223
Total	311.1
Security industry	838
Insurance administration	165
Subtotal	1625.2
Total	4314.9

6.6 The cost of crime in Victoria

Source: 'Crime statistics, 2009–10', Victoria Police

Economic impact of crime

Estimates of the economic costs of crime are not easy to obtain. These are the different factors that may be included when calculating the costs of crime:

- victim costs—medical expenses, cash losses, the theft of or damage to property, and lost wages
- mental health care costs—cost of post-victimisation counselling and related services
- criminal justice system costs—police protection, legal and adjudication costs and corrections
- insurance costs—cost of replacing goods or repairing damages, as well as the cost of insurance premiums to consumers
- business costs—increased costs of security to prevent loss in stores (these costs are ultimately passed on to consumers).

Surveys conducted in Australia and overseas suggest that victims only report about 40 per cent of crimes to authorities. There are a number of reasons a victim may choose not to report the crime. These are some of them:

- the seriousness of the crime
- attitudes towards police
- past experience
- the relationship between the victim and the offender
- fear of reprisal
- the likelihood of compensation or a successful insurance claim.

PERCEPTIONS OF JUSTICE

The Australian Bureau of Statistics has conducted a number of surveys on crime victimisation. The aim of these surveys is to measure public perceptions and confidence on various aspects of the justice system, including perceptions of justice relating to the court system, police and prisons. Table 6.7 provides the attitudes of a range of individuals over 18 who were surveyed in 2011–2012 about our legal system. More than 17 000 individuals responded to the survey.

6.7 Public perceptions of the justice system

	STRONGLY AGREE	AGREE	NEITHER AGREE NOR DISAGREE	DISAGREE	STRONGLY DISAGREE	ALL PERSONS
POLICE						
The police treat people fairly	16.8	63.0	11.3	7.2	1.7	100.0
The police are approachable and easy to talk to	18.4	63.7	10.5	6.2	1.1	100.0
The police enforce the law	13.2	66.8	9.9	8.9	1.3	100.0
The police ensure public safety	16.0	70.7	6.8	5.5	1.0	100.0
The police can be relied upon	13.2	60.6	11.8	12.5	1.9	100.0
CRIMINAL COURTS						
The criminal courts are effective in giving punishments that fit the crime	2.9	32.9	21.0	32.0	11.2	100.0
The criminal courts deal with matters quickly	1.3	21.1	31.6	37.2	8.6	100.0
The criminal courts ensure a fair trial	3.9	53.1	27.6	12.7	2.5	100.0
PRISONS						
The prisons act as a form of punishment	8.5	53.0	18.1	17.0	3.3	100.0
The prisons rehabilitate prisoners	1.6	27.4	28.8	35.2	6.9	100.0

Source: adapted from 'Crime Victimisation, Australia 2011–12, Australian Bureau of Statistics. All figures are given as percentages.

What do the statistics indicate?

Statistics indicate that very few people are actually the victims of crime, but fear of crime has an impact on how people live in the community.

Victoria has the lowest crime rate in Australia. Just under 60 per cent of all crimes reported to police in Victoria are property and deception crimes. These include theft,

breaking and entering, and bribery. Crimes against the person account for only 14 per cent of crimes and include homicide, assault, robbery and sexual assault.

Who commits crime?

Statistics indicate that males commit more crime than females. A minority of offenders commit the majority of crime. Young men commit most offences.

Who fears crime?

Although males are more likely to be the victims of crime, females continue to fear crime more than males. Older Australians are the least likely to be the victims of crime but fear crime more than young people.

APPLY YOUR UNDERSTANDING

1. In groups of three or four, outline the possible impact that a crime might have. Create a table similar to the one below. For each crime, consider who or what might have been affected by the crime, and the impact of the crime on the affected group:
 - a. victims and their family
 - b. offenders and their family
 - c. society
 - d. the legal system.

CRIME	IDENTIFY WHO IS AFFECTED	DESCRIBE THE IMPACT OF THE CRIME ON THE AFFECTED GROUP
Murder		
Burglary		
Arson		
Home invasion		
Drug use		
Drug trafficking		
Shop-stealing		
Begging		
Carjacking		

2. Describe the costs of crime in Australia and, specifically, Victoria. What does crime cost each individual in Victoria? Do some research and see if this figure has changed.
3. The cost of each homicide is approximately \$1.9 million. In pairs, take an educated guess and break down the costs of this crime.
4. The Australian Bureau of Statistics has conducted a number of surveys on Crime Victimization. Summarise the information in Table 6.7 in a paragraph.
5. To what extent do you believe spending taxpayers' money is a good use of public funds? In your answer, consider the impact of crime on all groups.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Crimes against property

- Crimes against property include arson, property damage, burglary, theft and deception.
- Arson is the offence of destroying or damaging property by fire. The defences to arson include ownership, authorisation and entitlement.

- Only a registered pyrotechnician may use fireworks. An individual discharging a firework without permission is liable for a sanction of five penalty units.
- Property damage is when a person intentionally destroys or damages property belonging to another. Four elements are needed to be found guilty of this offence. The penalty is 10 years' imprisonment.
- Theft occurs when the accused unfairly takes property with the view of not returning it. Four elements are needed to be found guilty of this offence. The penalty is 10 years' imprisonment.
- Deception offences include obtaining property by deception and obtaining financial advantage by deception or bribery. Four elements are needed to be found guilty of this offence. The penalty is 10 years' imprisonment.
- Burglary occurs when an accused enters premises and steals property. The penalty is 15 years' imprisonment. Aggravated burglary occurs with the use of a weapon and carries with it a higher penalty of 25 years' imprisonment. The defences to burglary and aggravated burglary include self-defence, duress, sudden or extraordinary emergency, intoxication, mental impairment and consent.
- Carjacking comprises the use of fear or force to steal a car. The penalty is 15 years' imprisonment. The defences to carjacking include self-defence, duress, sudden or extraordinary emergency, intoxication, mental impairment and consent.

The impact of crime

- Crime can have a big impact on the individual, including the victim and the offender. These can be broken down into emotional, physical, financial and social impacts.
- Crime can also impact society in terms of costs, economics and perception.

CHECK YOUR UNDERSTANDING

1. Draw a table similar to the one below and create a summary on crimes against property.

CRIME OR OFFENCE	BRIEF EXPLANATION	BASIC ELEMENTS	DEFENCE	PENALTY

2. According to Table 6.1, 'Crimes against property and deception' (page 132), which type of crime has the highest and lowest number of cases? Why is this the case?
3. Unpack each defence to arson and provide an example or illustration.
4. The law states that a pyrotechnician must hold a licence to use fireworks. Provide three reasons for this.
5. What do you think is meant by the term 'property damage'?
6. Suggest three possible ways to reduce property damage in our community.
7. Identify and state the main distinction between burglary and aggravated burglary. In the USA, the average dollar loss per burglary offence is \$2251, whereas in Victoria 48 per cent of items stolen were valued at \$500. Why are these figures so different?
8. Using Table 6.4, 'Theft', create a pie chart and identify the reasons why these figures are so high for theft from a motor vehicle.
9. Summarise the law on carjacking. In your summary include the law, the elements, the defences and the impact.

10. Deception can be a dishonest act or an omission. What is meant by the term 'omission'?
11. Investigate a recent deception offence and write a report that covers a brief summary of the case, the rights protected by the law and the possible impact of the offence on individuals and society.
12. Using a graphic organiser, create a visual representation of the impact of crimes against property on the individual and society.
13. Find a news article for each of the crimes against property and create a report containing the following information:
 - a brief summary of the case
 - the rights protected by the law
 - the elements of the offence
 - possible defences
 - the role of statute law and common law in developing the elements of the offence and the defences
 - trends and statistics in relation to the offence in Victoria and in one other jurisdiction
 - the possible impact of the offence on individuals and society.

APPLY YOUR KNOWLEDGE

ANNOTATED VISUAL DISPLAY—CRIMES AGAINST PROPERTY

Design an annotated visual display illustrating the different types of rules for crimes against property. Your annotated visual display should include all of the following:

- a. Crime or offence
- b. A brief explanation of each crime or offence
- c. A brief statement of the elements and defences
- d. An explanation of the penalty of the crime or offence.

Use the table from question 1 of 'Check Your Understanding' to assist you with this visual display.

APPLY YOUR KNOWLEDGE

THE LAW IN ACTION—*GRAFFITI PREVENTION ACT 2007* (VIC)

The *Graffiti Prevention Act 2007* (Vic) makes it an offence to graffiti. A person must not graffiti property if the graffiti is visible from a public place unless the person has first obtained the express consent of the owner to do so.

A person must not, without lawful excuse (for instance, as part of their work) possess a prescribed graffiti implement on public transport, in a public place, or in a place where the person is trespassing or has entered without invitation. Police are able to search a person if they believe the person has or is about to graffiti. Police are able to conduct a search of a person's property, such as a bag or coat. The maximum penalty for the offence of graffiti is two years' imprisonment.

This Act also affects the sale of aerosol paints to minors under 18 years of age. Businesses are forbidden to sell aerosol paints to a minor unless they can produce a statutory declaration from an employer, stating that the minor requires the paint for their employment. The sanction is 20 penalty units. The prosecuting body is also able to recover all penalties in relation to the offence.

Read the information related to the *Graffiti Prevention Act 2007* (Vic) and complete the following activities:

1. Explain the purpose of creating the *Graffiti Prevention Act 2007* (Vic).
2. Describe the lawful excuse or defence in the *Graffiti Prevention Act*. List examples of this defence.
3. To what extent is 2 years' imprisonment a severe sentence for graffiti? In your response, consider the impact of this crime on the community versus the individual.
4. The definition of graffiti is 'to write, draw, mark, scratch or otherwise deface property that is not easily removable by wiping with a dry cloth'. Do you agree with this definition? Create an alternative definition of graffiti.
5. Research graffiti prevention measures used by law-enforcement agencies. Evaluate their effectiveness in reducing public graffiti.

APPLY YOUR KNOWLEDGE

GLOSSARY WORDS—CRIMES AGAINST PROPERTY

One of the key skills in this chapter is to define and use legal terminology. Provide a definition or meaning of these terms but use your own words. This will be useful for your end-of-semester revision.

KEY TERM	DEFINITION OR EXPLANATION

APPLY YOUR KNOWLEDGE

DEBATE—PIRACY AND THEFT

In groups of three, identify the positions/beliefs of the following groups in relation to the question. Debate this question as a class. Let each group have their say as to whether they support or reject this power.

IS DOWNLOADING MUSIC, MOVIES AND TV SHOWS WITHOUT PAYING FOR THEM THEFT?			
	What are the key values involved for each group?	Advantages of this change	Disadvantages of this change
The government			
The Federal Police			
Lawyers			
Music artists			
Youth organisations			
Copyright Australia			

APPLY YOUR KNOWLEDGE

RESEARCH—COSTS ASSOCIATED TO THE PREVENTION OF CRIME

The Australian Security Industry Association Limited estimates the cost of crime in both hardware and equipment, and personal costs. The Australian Institute of Criminology estimates that crime costs approximately 70 per cent of the total costs for this calculation.

CATEGORY	COST (\$M)
HARDWARE AND ELECTRONICS	
Hardware and equipment (alarms, CCTV, access control)	760
Installation	810
Monitoring	390
Other	383
Total	2343
Personnel costs including service/concierge, loss prevention/retail security, corporate risk, investigation services, cash management, armed escorts, ATM servicing, event security, critical infrastructure protection, passenger screening, mobile patrols, maritime security, crowd control	2514
Overall total	4857
Total to be attributed to crimes dealt with in this report (70% of total)	3400

6.8 Expenditure on private security in Australia, 2012–2013

- Describe the costs associated with private security in Australia.
- The Australian Security Industry Association Limited estimates the cost of crime at approximately just under \$5 billion, whereas the Australian Institute of Criminology estimates this at \$3.4 billion. Discuss the reasons why you think there is a difference in these figures.
- Do research and identify the latest cost of crime in Victoria in relation to costs associated with the criminal justice system, such as police costs, court costs, corrective services, juvenile justice, victim of crimes and Legal Aid Victoria.

APPLY YOUR KNOWLEDGE

CASE STUDIES—CRIMES AGAINST PROPERTY

In each of the following situations, decide whether an offence has taken place. Explain your answers.

CASE A

The defendant took goods from the shelf of a supermarket. He peeled off the price tag and replaced it with another tag showing a lower price. He then went to the checkout and paid the lower price for the goods.

CASE B

The defendant found a wallet on the floor of his local TAB. He put the wallet in his pocket and did not check the contents. Two days later he looked in the wallet and found money, as well as documents that identified the owner of the wallet. He decided to keep the wallet and money for himself.

CASE C

The defendant decided to take a holiday interstate. She updated her Facebook page with comments and photos on a regular basis. One photo that appeared on her wall was of a train station that was covered in a mural, which she took without the consent of the local public transport authority.



ASSESSMENT

RESEARCH, INVESTIGATION AND ANNOTATED REPORT

On completion of this activity, you should be able to describe one crime against property, the elements and defences, and use legal reasoning to determine the criminal responsibility of an accused based on an actual case. Your report should be approximately 800 to 1000 words in length.

- Go to the Australasian Legal Information Institute (AustLII) website
 - > Under the tab 'Cases and Legislation', click on the 'Victoria' link
 - > Click on the 'County Court of Victoria 1993– (AustLII)' link
 - > Click on the '2018' Link.
- Scroll through the list of cases and find one that takes your interest. Crimes against property cases begin with: **R v** <Name>, or **DPP v** <Name> or **The Queen v** <Name>
- When you decide on your case, write a one-page report on your case study using the following questions:
 1. Identify the case citation, including the judge, date of sentencing and counsels (lawyers for the DPP and defence).
 2. Explain what crime against property has been committed. Was it:
 - Arson or destroying or damaging property
 - Property damage
 - Burglary or aggravated burglary
 - Theft or carjacking
 - Deception offences?
 3. Write a brief summary of the facts of the case.
 4. Identify and explain the issues discussed in the judgment (topic headings).
 5. Describe the sentencing considerations issued by the judge.
 6. Outline the sentence issued and explain whether you believe it was effective?
 7. Identify and explain the laws that regulate your chosen case study by completing the following:
 - The legal elements needed to convict this individual
 - The defences available for this crime
 - The penalty for this crime
 - Which court mainly deals with this offence or crime?
- 8. Go to the Crime Statistics Agency website and complete the following activities:
 - Go to the heading 'Crime Statistics' and scroll to the 'Latest Crime Data', find the 'Download Data' tab and summarise the current police statistics on your chosen crime.
 - Analyse the crime statistics for your suburb in the 'Explore crime by location' tab. Just use your postcode. Identify any issues or trends for your area.
- 9. Applying the principles of justice, to what extent do you believe the sentence reflects a just outcome for society, the accused and the victim's family? This section should be at least 200 words in length.



AustLII:
www.austlii.edu.au



CRIME STATISTICS
AGENCY:
www.crimestatistics.vic.
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ASSESSMENT

STUDENT SELF-ASSESSMENT CRITERIA	WELL ABOVE THE STANDARD	ABOVE THE STANDARD	AT THE STANDARD	BELOW THE STANDARD	WELL BELOW THE STANDARD
WRITTEN REPORT OUTLINING THE BASICS OF THE CASE STUDY					
THE LEGAL ELEMENTS NEEDED TO CONVICT THE ACCUSED					
THE DEFENCES AVAILABLE FOR THIS CRIME					
THE PENALTY FOR THIS CRIME					
TYPE OF CRIME AND WHICH COURT					
ANALYSIS ON CURRENT CRIMES AGAINST PROPERTY STATISTICS					
THE PRINCIPLES OF JUSTICE REFLECTED IN THE OUTCOME OF THE CASE					



KEY CONCEPTS OF CIVIL LAW

UNIT 1 – AREA OF STUDY 3: Civil liability

When people think about the law, the first things that usually pops into their minds are police, criminals and jail. However, the vast majority of laws within the country are not criminal; rather, they fall under the broad title of 'civil law'.

OUTCOME

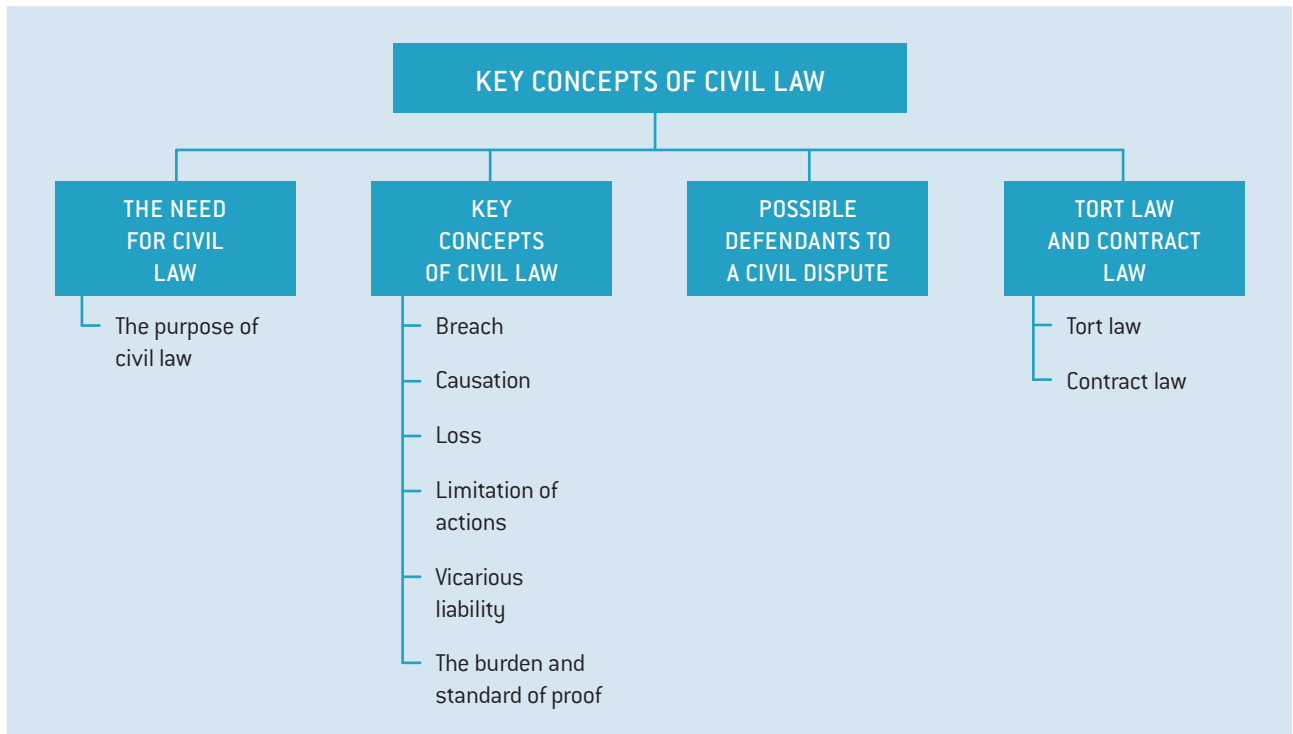
On completion of this unit the student should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law, based on actual and/or hypothetical scenarios. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > the purposes and types of civil law
- > key concepts of civil law, including:
 - breach
 - causation
 - loss
 - limitation of actions
 - the burden of proof
 - the standard of proof
- > possible plaintiffs and defendants to a civil dispute

KEY SKILLS

- > define and use legal terminology
- > research and analyse relevant information about civil law
- > explain the purposes and key concepts of civil law



KEY TERMS

breach	A violation of law, promise or obligation
causation	A connection between a defendant's action/s and the plaintiff's loss/es
contract	A legally binding agreement
defendant	The person against whom a civil action is brought in the courts
nuisance	Interference with the enjoyment of either public or private property
plaintiff	A person who brings a civil action to court
remedy	The means by which the court restores a successful plaintiff to their original position
tort	A civil wrong
tort law	A broad area of law made up of a number of separate wrongs that aim to protect individual interests
tortfeasor	The wrongdoer or person who has committed the tort
trespass	Direct and intentional interference with a person or their goods or land
vicarious liability	When a person is held responsible for the actions of another person, whether or not they were personally involved or at fault

THE NEED FOR CIVIL LAW

Most of the law that affects our lives within the community is civil law, as it is concerned with the protection of the private rights of the individual.

HAVE YOU...	YES / NO / UNSURE
Seen a person trip over on an uneven footpath and hurt themselves?	
Eaten a pie and found a bandaid in it?	
Entered into a mobile phone contract?	
Played music loudly after midnight?	
Seen a 'Caution: Hot' warning on a coffee cup?	
Said something about someone on a Facebook feed that wasn't true?	
Known someone who has been or is divorced?	
Purchased an item of clothing only to have it fall apart after the first wear?	
Walked onto someone's property without permission?	

Civil law is concerned with protecting the private rights of individuals.

If you answered 'yes' to any of the statements above, you have either witnessed or taken part in an area of civil law. There are many situations in which people need protection, not only from injury to themselves or damage to their property, but also in relation to their financial affairs and those of their families.

People who feel that others have infringed their rights may take action to protect themselves. They may sue or take the offending party to court to fix the situation. The person who has suffered damage is called the aggrieved party. An aggrieved party who takes a case to court is called a **plaintiff**. If the court agrees that an individual's civil rights have been infringed, it may award some form of **remedy** (usually monetary) against the wrongdoer, known as the **defendant**.

THE PURPOSE OF CIVIL LAW

While criminal and civil law serve two different purposes, they work together to ensure that members of society are able to live their lives free from unwanted interference.

In the case of civil matters, the law is concerned with enforcing the rights of the individual and the obligations that exist between people, rather than protecting the community from harm, which is the role and purpose of criminal law (see Chapters 4–6 for more on criminal law).

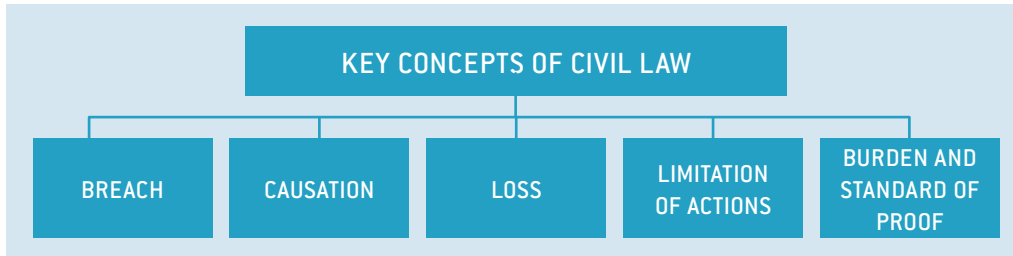
Civil law is concerned with the enforcement of individual rights. For example, in the case we looked at in Chapter 2—a car crash—the accident may be the result of a driver breaking criminal law. While this may result in criminal charges against the driver, if a person was injured in the same crash, the injured person may be able to initiate a claim for damages against the driver. This claim would be dealt with separately from the driver's prosecution for the criminal offence. The injured person would sue the driver for the damage suffered as well as for the damage to their vehicle. In this civil case, the injured person would be called the plaintiff and the driver the defendant.

PLAINTIFF: a person who brings a civil action to court

REMEDY: the means by which the court restores a successful plaintiff to their original position

DEFENDANT: the person against whom a civil action is brought in the courts

KEY CONCEPTS OF CIVIL LAW



In order for a person, the plaintiff, to bring about a case against the wrongdoer, the defendant, in civil law the following must be established:

- a. that the defendant is at fault, or has breached their obligation
- b. that the defendant was the cause of the fault or breach
- c. that the plaintiff suffered some form of loss due to the defendant's fault or breach.

We will look at these three key concepts in turn.

BREACH

A person can only make a claim under civil law if there has been some form of **breach** or fault on the defendant's behalf. In this sense, a breach can mean that a person has failed in their responsibilities under **tort law** or they have contravened a term in a **contract**. In either case, a person may be entitled to sue for compensation or some other form of remedy.

In tort law, a breach generally needs to be either intentional or negligent. Intentional means the **tortfeasor** (the wrongdoer or person who has committed the tort) meant to commit the act. It does not need to be shown that the tortfeasor intended the harm. Negligent means that the tortfeasor failed to do something a reasonable person would have done or would not have done, if they were in the same situation (more on this in Chapter 8). In both situations, the motive is not relevant to whether they are liable for their actions.

For example, if you enter into a contract with a lawyer, the lawyer has promised to provide you with accurate advice and you have promised to pay them for that advice. If the lawyer gives you inaccurate advice, and you suffer loss because of that advice, you are able to sue the lawyer as they have breached the contract; that is, they have failed to fulfil their promise to you. This would be covered under contract law. Further, under statute law, a lawyer must provide their client with careful legal advice. Thus, in this situation, the lawyer has also been negligent and would be considered at fault, or to have breached their responsibility under the law. This would also allow you to sue the lawyer for negligence under tort law (we will discuss the difference between contract law and tort law in more detail later in this chapter).

CAUSATION

Just as in criminal law, in civil law it is important to prove that the actions of the defendant led to the plaintiff's loss. In other words, the plaintiff must show **causation**.

When looking at causation for either a tort or breach of contract, the plaintiff must prove that the defendant's breach was the cause of the plaintiff's damage or loss. This is also referred to as factual causation. In other words, the plaintiff must prove that it was the action or inaction of the defendant that led to the loss or harm they have suffered. If the plaintiff cannot sufficiently prove that the defendant caused the plaintiff's loss, then the plaintiff's case will be unsuccessful. The plaintiff will also be unsuccessful if the court decides that the damage or loss suffered by the plaintiff would have happened regardless of the defendant's actions.

Let's have a look at an example of a negligence case to see how this might apply in reality.

A civil case must establish that the defendant breached their obligations in some way.

BREACH: a violation of law, promise or obligation

TORT LAW: a broad area of law made up of a number of separate wrongs that aim to protect individual interests

CONTRACT: a legally binding agreement

TORTEASOR: the wrongdoer or person who has committed the tort

CAUSATION: a connection between a defendant's action/s and the plaintiff's loss/es

A civil case must establish that the defendant's breach led to the plaintiff's loss.

PERISHER BLUE LTD V HARRIS (2013) NSWCA 38

Facts: The plaintiff, Harris, attended a school excursion with 49 other students to the Perisher snowfields in New South Wales. He attended lessons on a 'green' slope and then began to ski down it, with his instructor following behind him. Harris skied over a mound only to find himself confronted with a ditch ahead. Despite trying to avoid the ditch and to slow down, he caught a leg in the ditch. He flipped and injured two vertebrae, and spent 26 days in hospital. Harris sued Perisher Blue Ltd, the operators of the ski fields, stating that they had negligently conducted lessons in an area that was dangerous.

Decision: The trial judge held, and the NSW Court of Appeal confirmed, that the ski fields were the cause of Harris' injuries. The judges held that 'but for' the presence of the ditch, the damage to Harris would not have occurred. The court stated that Perisher Blue either knew or should have known about the ditch and taken steps to minimise risk, as a reasonable person would have done in the same situation.

It can be seen from this case that:

- a. the plaintiff was injured by falling into the ditch
- b. the ditch was there because the defendant (Perisher Blue Ltd) had failed to take steps to fix the ditch
- c. the only cause of the injury was the ditch. If the ditch had not been there, Harris would not have been injured.

Thus, the plaintiff proved that there was causation in this case and he was able to claim a remedy from the defendant.

[We will look more at the 'but for' test in Chapter 8 when we look more closely at negligence.]

In contract law, the courts will also ask whether 'but for' the failure of the defendant to follow through with the contract, the plaintiff would have suffered the loss anyway. If the answer is 'No, the plaintiff would not have suffered the loss', then the defendant will become liable for the damage suffered by the plaintiff.

LOVELOCK V FRANKLYN (1846) 8 QB 371

Facts: Dell entered into a contract with Lovelock to sell Lovelock a block of land, provided Lovelock paid £140 within seven years. Before the seven years expired, Dell sold the land to a third party, which meant that Lovelock could no longer pay for the land. Lovelock sued Dell's executors for breach of contract.

Decision: Dell's actions led to a breach of contract as Lovelock could no longer purchase the land. Thus, Lovelock could recover damages from Dell's estate. Despite this being a very old case, it is a very clear example of a direct link between the defendant's actions and the plaintiff's loss:

- a. Lovelock still had time left in which to pay the money as the seven years had not expired
- b. Dell ignored their contract and sold the land to someone else
- c. Lovelock could no longer purchase the land and therefore suffered a loss (the ability to own the land)
- d. If Dell had not sold the land to someone else, Lovelock could have purchased the land.

LOSS

Once it has been established that there has been a breach of civil law by the defendant and that the defendant caused the breach, it is necessary to determine whether the plaintiff has suffered loss due to the defendant's breach.

Loss, sometimes referred to as harm, can take many forms. One of the most common types of loss that is suffered is personal injury; that is, physical harm to a person's body. This is usually the result of the tort of negligence. In cases of breach of contract, the most common form of loss is economic loss. A plaintiff may also suffer loss in the form of mental illness, loss of income, loss of reputation, property damage, interference with the use and enjoyment of their land or even death.

In order to receive a remedy for loss, the loss must be legally cognisable; that is, it must be recognised by the law as a loss. For example, where a plaintiff has suffered a loss that is connected to or a result of criminal or fraudulent behaviour, that loss is not legally cognisable and the plaintiff's claim will be unsuccessful.

The loss must also be able to be quantified. If the court cannot recognise the loss because the loss is too vague, the loss or damage will also not be legally cognisable. For example, where a disabled person sues a doctor for wrongful life (the plaintiff alleges that in failing to inform their parents of a possibility of disability and the parents state they would have terminated the pregnancy had they known of the possibility of disability), the High Court has stated that it is impossible for the court to judge the loss—how can a judge compare a life lived with a disability to nonexistence?

If the loss is recognisable and can be linked to the defendant's breach, the plaintiff will be successful in their claim and awarded a remedy by the court that will try, as much as is possible, to return the plaintiff to their position before the loss occurred (see Chapter 12 for more information on civil remedies).



The Essendon Football Club agreed to pay settlements to 31 players who lost earnings as a result of playing bans for taking part in the club's illegal supplements program in 2012.

A civil case must establish that the plaintiff suffered loss or harm due to the breach.

LIMITATION OF ACTIONS

Even though a plaintiff may have suffered a loss due to a breach of tort or contract, they may not be able to take action against the defendant or may have their case thrown out of court due to a limitation of action. There are limitations of actions proscribed by the law such as time, or the type of damages recoverable for certain forms of loss. There are also limitations that are not covered by law but may still stop or hinder a person's ability to seek redress; these may include a lack of money to pursue a claim or the defendant may have no money to pay compensation should the plaintiff be successful.

Limitations on civil actions mean that some cases cannot be taken to court, no matter what has been established.

Statutory limitations

Limitation periods

Under common law, there is no limitation period within which a plaintiff must commence their claim against a defendant. In order to provide certainty and avoid delays, the various parliaments have introduced statutory limitation periods in order to ensure justice and fairness.

In Victoria, the *Limitation of Actions Act 1958* (Vic) sets limitation periods for certain claims. In the case of personal injuries, a plaintiff must commence their claim within three years of first knowing that they have suffered a personal injury and that injury was caused by the act or omission of a person (section 5(1A) of the Act). For a simple breach

DEFAMATION: a written or oral statement that injures a person's good reputation

of contract, the plaintiff has six years within which to bring their claim (section 5(1)(a) of the Act). If a person wishes to sue for **defamation** they have only one year from the date of publication of the matter to commence their claim (section 5(1AAA) of the Act).

The Act does allow the period to be extended if the court believes that an extension is 'just and reasonable'.

Limitation of types of damages recoverable

Where personal injury has been caused and it is not a result of a workplace injury or transport accident, a plaintiff will make a common law claim for damages under the *Wrongs Act 1958* (Vic).

The *Wrongs Act* is the main Act covering claims for personal injury due to negligence or fault in Victoria. For example, if you are injured due to a fall in a supermarket or your doctor was negligent in their treatment, you may be able to claim compensation under the *Wrongs Act*. However, the *Wrongs Act* does place limits on accessing compensation for both economic and non-economic loss arising from personal injury or death.

Non-economic loss

If a person wishes to claim compensation for non-economic loss, such as pain and suffering or loss of enjoyment of life, the *Wrongs Act* states that the injury must be 'significant'. What is a 'significant injury'? Section 28LF of the *Wrongs Act* states that an injury is significant if:

- (c) the injury is loss of a foetus; or (ca) the injury is psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth; or (d) the injury is loss of a breast.



If the plaintiff's injury does not fall within one of these categories, an independent medical practitioner must assess the injury and provide a certificate of assessment that states the degree of permanent impairment to the plaintiff.

The *Wrongs Act* names a series of threshold levels that must be met for an injury to be considered significant. If the injury is psychiatric, the degree of permanent impairment must be 10 per cent or more. For spinal injuries, the degree must be five per cent or more and for all other injuries the degree must be more than five percent.

Non-statutory limitation of actions

Even if a plaintiff is still within the statutory period given to make a claim, they may be unable to commence a claim as either they do not have the funds to pursue the claim or they discover that the defendant has insufficient funds to pay any damages that might be awarded to the plaintiff.

Cost of action as a limitation

The possible cost of a civil action can be a significant limitation or deterrent to a plaintiff taking action. 'I'll see you in court' may be the reaction of some people confronted with a legal problem—easy to say, but going to court is not cheap. A senior solicitor or partner in a city law firm is likely to charge \$300–\$500 an hour. A suburban solicitor may charge \$150–\$250 per hour. If a specialist legal expert is required, the costs will be greater. A top-flight barrister will charge around \$8000 a day and legal fees continue to rise.

Lawyers' fees are not the only costs. There are also expenses (known as disbursements) and court fees to be paid. Your day in court may cost \$1000–\$2000 per day in the

Magistrates' Court. The costs are even higher in the County or Supreme courts. Thus, for many people, going to court is financially impossible.

Defendant's financial situation

The plaintiff must not only consider their ability to financially support what could be a lengthy trial, but must also determine whether there is any sense in pursuing a claim against the defendant. The outcome of most successful civil cases will be an award of damages payable by the defendant. If the plaintiff has suffered significant loss, the award of damages may be significantly high. While this will go a long way to compensate the plaintiff, it will only be of use to the plaintiff if the defendant can pay the amount awarded. For example, if a plaintiff sues a defendant for \$10 000 000, and is successful but the defendant is unemployed, then the plaintiff is unlikely to ever see any of that money. So, not only will the plaintiff have suffered the loss caused by the defendant, but they will also be out of pocket for all court and lawyer fees.

When providing initial advice to a client, a lawyer should not only explain the likely chance of success of their claim, but also the likely chance of payment by the defendant should the claim be successful. It is then up to the plaintiff to decide whether or not to pursue their claim based on this advice. If the plaintiff's solicitor provides said advice, the plaintiff may decide not to pursue a claim at this point in time. This does not preclude the plaintiff from pursuing their claim later, should the defendant's position change, so long as the claim is made within the required statutory period.

VICARIOUS LIABILITY

Generally, the person involved in causing the harm will be the one held responsible for the loss and/or damage suffered by the plaintiff. However, this is not always the case. A person or persons may be held liable due to the concept of **vicarious liability**. This is a form of strict liability, where a person can be deemed responsible merely by an association with another person (refer back to Chapter 4 for further discussion about strict liability).

Vicarious liability of employers for employees is the largest and most significant category. Under this category, employers may be liable for the conduct of their employees, if it can be proved that:

- a. The tortfeasor was the employer's employee
- b. The tortfeasor was acting in the course of their employment when the tort was committed.

If both points can be proved, the employer becomes a defendant in the case.

Employee

An employer is only responsible for the actions of their employees, not someone who has been hired as an independent contractor. To determine whether or not someone is an employee, the courts generally look at how much control the employer has over the worker. To determine this, the court might look at things such as:

- Right to dismiss
- Right to the exclusive services of the person working
- Right to control hours, place of work, performance of the work
- Provision of equipment, tools, uniforms
- Payment of taxes and business expenses.

For example, a law firm could be held responsible for the acts of a lawyer who works full-time and only for the firm as they provide the place of work (the office), deduct tax

VICARIOUS LIABILITY: when a person is held responsible for the actions of another person, whether or not they were personally involved or at fault

from the employee's wage and set the hours of work. However, the firm would not be responsible for the actions of an electrician they have hired to fix a light switch at the office; the firm does not have exclusive right to the electrician's services, does not deduct tax from their pay and does not provide their tools or uniforms.

Course of employment

An employer is only responsible for the tortfeasor's actions if the conduct occurred during the course of the tortfeasor's employment. That is, the act must be related to the work the employee was employed to perform. If, however, the employee is acting in an unauthorised or wrongful manner but undertaking authorised work, the employer may still be liable. For example, it has been held that an employer may be liable for the actions of a security guard who uses excessive force. Even though the way the guard acted was not authorised by the employer, the act of providing security was authorised and closely related to the work, so is considered to be within the course of the guard's employment.

However, where an employee is considered to be on a 'frolic', the employer will not be vicariously liable for the employee's actions. A 'frolic' may occur when an employee is acting so far outside of the scope of their employment that there is no connection between the act and the course of employment, or when the employee uses work hours and resources to perform work of a personal nature.

Why have vicarious liability?

Vicarious liability allows the plaintiff to sue the person who has the means to adequately compensate them for the loss suffered (that is, the employer, rather than the employee), but it also encourages employers to take care when hiring and training employees so that they ensure loss is minimised.

Unlike criminal law, in civil law the burden of proof is on the plaintiff. However, the standard of proof—the balance of probabilities—is generally easier to meet.

THE BURDEN AND STANDARD OF PROOF

As you learnt in Chapter 4, in order to achieve fairness in a criminal hearing, the law places a burden and standard of proof on one of the parties. The same occurs in civil trials.

Burden of proof

In civil law, the burden of proof is on the plaintiff, as they are the party bringing the allegation to court. The plaintiff has the responsibility of proving that the defendant is liable; the defendant has no responsibility to prove that they are not liable. If the plaintiff cannot provide enough evidence to prove their allegation, their case will be unsuccessful and the defendant will be found to not be liable for the plaintiff's loss.

Standard of proof

The plaintiff must discharge their burden of proof by meeting the standard of proof. The standard of proof in a civil case is 'the balance of probabilities'. In other words, the plaintiff must prove that the defendant was more likely than not responsible for the plaintiff's loss.

In Chapter 4, you looked at the standard from a numerical point of view and learnt that 'beyond reasonable doubt' is essentially 100 per cent certainty of guilt. If you were to look at the civil standard of proof from a numerical view, it would be at least 51 per cent certain that the defendant was responsible for the loss. Thus, it is easier for a plaintiff to meet their burden in a civil case than it is in a criminal case. The reason the standard of proof in a civil case is lower than the standard required in a criminal case is because, in a civil case, a defendant's liberty is not at stake. The worst that can happen in a civil case is that the defendant will have to pay a large sum of money to the plaintiff.

BREACH OF CONTRACT AND NEGLIGENCE

CASE STUDY

HAPLESS TRADIE HURT WHILE COMING DOWN LADDER FACING FORWARD AWARDED \$1.1M IN DAMAGES

David Killick

A CARELESS and accident-prone tradesman who suffered head injuries when he fell off a ladder while helping a friend work on his home has been awarded \$1.1 million.

Dale John Hendrex, then aged 36, was hurt falling from the ladder onto a concrete driveway while working at a home in Snug, south of Hobart, in July 2008.

He sued his friends Matthew and Lisa Keating, claiming damages for negligence and breach of contract and statutory duties.

The couple's lawyers countered his claim with assertions Mr Hendrex has failed to use the ladder properly and that he was malingering and overstating his injuries.

Chief Justice Alan Blow handed down his decision in the case after nine days of hearings in the Supreme Court in Hobart.

He said on the day of the incident a ladder was placed on a concrete path next to a carport roof where Mr Hendrex was working.

It was not secured and did not reach the level of the roof.

When Mr Hendrex tried to leave the roof, he for some reason decided to descend the ladder facing forward and fell, suffering serious injuries for which he required hospital treatment.

Chief Justice Blow found that the couple owed Mr Hendrex a duty of care.

'It was reasonably foreseeable that any person travelling to or from the roof of the house that day via the ladder and the carport roof could fall, and be injured as a result. It was reasonably foreseeable that the ladder might tilt if it were not secured,' he said.

'It was reasonably foreseeable that a fall onto the concrete path could have caused severe injuries.'

But he found Mr Hendrex contributed to his own injuries because he used the ladder when it was clearly unsafe and increased the risk by descending it facing forwards.

The court heard Mr Hendrex continued to suffer from serious memory impairment, was unable to work and needed care and supervision from his wife and others to get through his day.

Chief Justice Blow took into account Hendrex was 'never a person of high intelligence' and was careless and accident prone.

He said Mr Hendrex was entitled to damages for past and future loss of earnings, medical care, and pain and suffering.

'He is substantially disabled. His life is in ruins. He is fully aware of all of his problems, and of what his life used to be like,' he said.

The judge assessed damages in the amount of \$2.6 million, reducing them by 60 per cent to \$1.1 million because of the plaintiff's contributory negligence.

Mr Hendrex said he felt vindicated and hoped that he and his family could now start to rebuild their lives.

'Had the right ladder been provided to me, I would not have fallen and suffered this life-changing brain injury,' he said in a statement issued by his lawyers Slater and Gordon.

Slater and Gordon lawyer Nicolas Messel said Mr Hendrex had suffered greatly as a result of an injury.

'Before the ladder fall, Dale was fit and healthy, was able to work, he enjoyed fishing and had coached his son's soccer team,' Mr Messel said.



Source: *The Mercury*, 14 April 2016



CASE STUDY

'Now he relies on the care of his wife, he suffers from constant headaches and sadly he has lost precious memories—he doesn't remember his wedding day or the birth of his children.

'This case highlights the importance of safety in all workplaces. Whether it's a building site or a private home, those doing the hiring and providing the equipment have an obligation to ensure that workers are safe.'

APPLY YOUR UNDERSTANDING

Read the case file 'Breach of contract and negligence', then answer the following questions.

1. In your own words, define the terms 'breach', 'causation' and 'loss'.
2. Briefly explain the facts of this case. That is, explain what happened to Mr Hendrex before the court case.
3. Explain what the breach was in this case and who committed the breach.
4. Explain how Matthew and Lisa Keating caused the loss in this case. In your answer, make sure that you outline what the loss suffered was.
5. In this case, who had the burden and standard of proof? What is the standard of proof in a civil case? Was the standard met? Explain your answer.

Individuals, groups, organisations and insurance companies can all be defendants in a civil case.

POSSIBLE DEFENDANTS TO A CIVIL DISPUTE

The person who is alleged to have caused harm or loss to the plaintiff is known as the defendant. Often, it is quite obvious who the defendant is; in our earlier example of the contract between client and lawyer, the lawyer who is alleged to have breached the contract would be the defendant. However, at other times, the person who allegedly caused the harm may not be the person you end up suing, or there may be more than one person who becomes the defendant.

A defendant does not have to be a person or persons. An organisation, such as a company, may also be a defendant in a civil claim. We have already discussed vicarious liability, where an employer may become a defendant in a civil case because they are responsible for the actions of their employee. In a case where vicarious liability may apply, the plaintiff may sue both the employer and employee, or perhaps just the employer if the employee has limited financial means to pay damages.

If a plaintiff has been injured in a motor vehicle accident, the plaintiff may sue the driver of the other vehicle and the Transport Accident Commission (TAC). The TAC in Victoria is funded in part by a charge on all vehicle registrations and registration renewals, and uses some of these funds to pay damages to people injured in an accident on the roads. Generally, the TAC does not concern itself with who is at fault; damages will be paid to any injured party. However, if the TAC does not feel that a plaintiff's injuries are serious injuries, they may refuse to pay a plaintiff's claim. In this case, the plaintiff can take the TAC to court and pursue damages through the County Court.

An insurance company may also be a defendant in a claim. Many small business owners take out public liability insurance to protect themselves against claims made by clients, employees, customers and the general public. If a plaintiff sues the insurance holder and they are found liable, the company will make a claim on their insurance. The insurance



THE TRANSPORT ACCIDENT
COMMISSION (TAC):
www.tac.vic.gov.au

company may become a defendant to a claim as they do not believe that they should make a payment. Suing an insurance company can be a way of ensuring that, should your claim be successful, the defendant will have the funds to pay the damages awarded.

TORT LAW AND CONTRACT LAW

We have already been using the terms tort law and contract law in this chapter. While you may already know that both are large areas under the broader heading of civil law, it is important to know that they are very different areas of law and often result in different remedies for breach or fault by a defendant. Let's take a look at the two areas now.

CONTRACT LAW

A contract is an agreement that is legally enforceable. This means that it is possible for the parties to a contract to enforce their rights under the agreement in a court of law. If obligations agreed to under a contract are not carried out, the party who suffers may take legal action to obtain a remedy for any loss.

People make contractual agreements daily. Simply going into a shop and making a purchase or leaving clothes to be dry-cleaned involves a contractual arrangement. Some agreements may include substantial sums of money, while others may not be concerned with money at all. The terms and obligations are determined by the parties to the contract and are unique to the people entering into the contract. It is essential in most agreements that all parties abide by their part of the bargain. If one party departs from the terms agreed to in the contract, the other party is free to sue for a breach of contract.

A contract is a legally enforceable agreement.

TORT LAW

The law of torts is a major area of common law. **Tort** is a French word meaning 'wrong'. A tort is a civil wrong; that is, a wrong that allows the individual who has suffered an injury to take legal action. The law of torts is designed to give a person remedy for suffering some sort of damage or harm due to the actions of another person. Most of the rules relating to torts come from common law; however, more recently, parliaments have introduced a number of statutes to clarify and limit the rights and obligations of individuals under tort law. The most common torts are negligence, **trespass**, **nuisance** and defamation. You will look more closely at the torts of negligence and defamation in Chapter 8.

As you can see, contracts and torts are two vastly different areas of civil law. Examine Table 7.1, a summary of the differences, to consolidate your understanding of the distinctions between contract law and torts law.

TORT: a civil wrong

TRESPASS: direct and intentional interference with a person or their goods or land

NUISANCE: interference with the enjoyment of either public or private property

	CONTRACT LAW	TORT LAW
OBLIGATIONS CREATED BY	Parties to the contract	Common law Statute law
OBLIGATIONS OWED TO	Parties to the contract	Members of the community, including stranger to stranger
SUE FOR	Breach of contract	Negligence Defamation Nuisance Trespass
LIKELY REMEDIES	Specific performance Rescission Damages	Damages Injunction

7.1 The differences between tort law and contract law



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Key concepts of civil law

- Civil law is concerned with enforcing the rights of the individual and obligations between people.
- For the plaintiff to bring a case against the defendant, the following must be established:
 - > that the defendant is at fault or has breached their obligation
 - > that the defendant was the cause of the fault or breach
 - > that the plaintiff suffered some form of loss due to the fault or breach.
- If the defendant has breached an obligation or is at fault, they may have failed in their responsibilities (tort law) or contravened a term in a contract (contract law). In tort law the breach may be either intentional or negligent.
- When looking for causation for a tort or breach of contract, it must be proven that the defendant's breach was the cause of the plaintiff's damage or loss, or whether the damage or loss would have happened regardless of the defendant's actions.
- Loss, also referred to as harm, can be a personal injury or be in the form of mental illness, loss of income or reputation, property damage or interference with the plaintiff's use of their land, or even death.
 - > Loss must be 'legally cognisable', meaning that the form of the loss must be recognised by the law.
- Even if a plaintiff has suffered loss due to the defendant's actions, a case may be thrown out of court due to a limitation of actions.
 - > Limitation of actions includes:
 - Statutory limitations
 - Limitation periods (time)—limitation on the period of time in which a plaintiff can commence a claim against the defendant
 - Type of damages recoverable
 - Non-economic loss—for compensation such as pain and suffering, the plaintiff must have suffered a 'significant injury' as per the *Wrongs Act*
 - Non-statutory
 - Cost of action—the actual cost of going to court is prohibitive for the plaintiff to pursue the claim
 - Defendant's financial situation—the defendant has insufficient funds to pay any potential damages
- A person or persons may be held liable for loss/damage suffered by the plaintiff due to vicarious liability where a person is deemed responsible merely by association with another person.
 - > An employer is responsible for the actions of their direct employees, not independent contractors.
 - > An employer is responsible for an employee's actions only if actions occurred during the course of employment.
 - > Vicarious liability exists to encourage employers to take care when hiring and training employees.
- In order to achieve fairness in a civil hearing, the law places a burden of proof and a standard of proof on one of the parties.

- > In civil law, the burden of proof is on the plaintiff—the party bringing the allegation to court.
- > The plaintiff must meet the standard of proof or the ‘balance of probabilities’ that the defendant was more than likely to have been responsible for the plaintiff’s loss.
- Examples of possible defendants to a claim may include individuals, organisations, corporations, insurance companies, or the TAC in the case of motor vehicle accidents.
- There are distinctions between tort law and contract law in:
 - > Obligations created by and owed to the plaintiff and defendant
 - > Claims that can be sued for by the plaintiff
 - > Remedies for breach or fault.

CHECK YOUR UNDERSTANDING

1. Define the following terms:
 - a. Plaintiff
 - b. Defendant
 - c. Tortfeasor
 - d. Tort law
 - e. Contract law.
2. Identify the parties to a claim in civil law.
3. Explain the main purpose of civil law.
4. Outline how civil law and criminal law work together to ensure that members of society are able to live their lives free from unwanted interference.
5. Identify the three main elements that a plaintiff must demonstrate in order to successfully sue under civil law.
6. Define the term ‘breach’.
7. Explain the difference between a breach in contract law and in tort law.
8. Outline the concept of causation.
9. Using an example, explain how the ‘but for’ test operates.
10. Outline the types of loss that may be suffered by a plaintiff under civil law.
11. What does the term ‘legally cognisable’ mean? Use examples to support your explanation.
12. Define the term ‘vicarious liability.’ Explain when an employer will be held vicariously liable for the actions of an employee.
13. Under statute law, a plaintiff may be unable to make a claim for a civil wrong. Explain the main situations when this will be the case. Refer to specific examples in your answer.
14. Why might a plaintiff choose not to pursue a claim under civil law? Refer to specific non-statutory limitations in your answer.
15. Apart from an individual, describe each of the other possible defendants to a civil claim.
16. Compare tort law and contract law. Remember: ‘compare’ requires you to explain similarities and differences.

APPLY YOUR UNDERSTANDING

CONTRACT LAW OR TORT LAW?

1. 'All contracts are part of civil law but not all civil law relates to contracts.' Discuss this statement with reference to the distinction between contract law and tort law.
2. Read the cases below. For each case, determine if it relates to contract law or tort law. Justify your choice by referring to the differences between the two areas of civil law.

CASE A

Ashley offers to sell Annabelle his mountain bike. Annabelle agrees to his asking price of \$320 but wants him to include his special riding jacket. Ashley tells her that he will think about it and tell her tomorrow if he agrees. He contacts Annabelle the next day and states he will sell her both the bike and jacket for \$320. She agrees to pay Ashley in two days.

CASE B

Ms Strong successfully sued supermarket giant, Woolworths, after suffering severe spinal injuries outside one of their Big W stores. The disabled Ms Strong fell after one of her crutches slipped on a hot chip that was on the ground being occupied by an outside stall set up by the store. It was determined that the store did not have an adequate inspection and cleaning regime in place, which would have seen Ms Strong's injury avoided. The woman was awarded \$580 299.12 in compensation in the NSW District Court.

CASE C

Stella Liebeck bought a cup of coffee from McDonald's. Her grandson was driving and pulled over so she could add sugar to her coffee. While removing the cup's lid, Liebeck spilt her coffee and burnt her legs. She suffered third degree burns to at least 16 per cent of her body. Liebeck sued McDonald's. She was awarded US\$200 000 in compensatory damages by the jury, which was reduced to US\$160 000 because she was found to be 20 per cent at fault. The jury also awarded her US\$2.7 million in punitive damages, later reduced to US\$480 000 by the presiding judge.

CASE D

Olivia is a keen Kangaroos supporter. Her mother follows the Demons. The Kangaroos and Demons have made it to the Grand Final. Olivia and her mother have a bet about which team will win. When the Demons win, Olivia refuses to pay.

3. 'The concept of vicarious liability ensures justice and fairness for plaintiffs who have suffered a loss due to a breach of civil law.' To what extent do you agree with this statement? In your answer make sure that you explain what vicarious liability means, how it does achieve justice and fairness for a plaintiff and how it may not achieve justice and fairness.
4. Create a diagram, chart or poster that explains the main limitations of actions in civil law. Ensure that you cover both statutory limitations and non-statutory limitations.
5. Create a visual explanation of the following key concepts of civil law: 'breach', 'causation' and 'loss'. Your explanation should include a series of images that explain each concept and show the connections between them. Use a limited number of words; the images you choose should convey the majority of information.

NEWSPAPER FOLIO AND REPORT

ASSESSMENT

1. Find a series of newspaper articles that are concerned with civil law. Your teacher will provide you with the number of articles to find, but ensure that you have at least one article for each of the following:
 - a. Contract law
 - b. Tort law
2. Create a table like the one below and complete the fields for each article that you have collected.

ARTICLE TITLE		
DATE OF ARTICLE		
SOURCE OF ARTICLE		
TYPE OF CIVIL LAW		
PLAINTIFF		
DEFENDANT/S		
FACTS		
OUTCOME		
ANY OTHER IMPORTANT INFORMATION, E.G. VICARIOUS LIABILITY		

3. Using the information you have collated, and the knowledge you have gained from reading this chapter, create a written report containing the following information:
 - a. An explanation of the purposes of civil law.
 - b. An explanation of each of the key concepts of civil law. You must make reference to examples from the cases you have collected to illustrate each key concept.
 - c. A detailed explanation of the facts and outcome of one of the cases you have collected. Make sure to include information on the type of case, the plaintiff/s, defendant/s, whether there was vicarious liability and or whether there were any issues in terms of limitation of actions that was overcome.
 - d. A summary of the effectiveness of the civil law to ensure justice and fairness.

Your report should be approximately 500 words in length and include direct quotes from the article where relevant.



CIVIL LAW IN ACTION

UNIT 1 – AREA OF STUDY 3: Civil liability

Now that you know the purpose of civil law and its key concepts, you might be wondering how civil law operates. What do you have to do to sue someone who you believe has caused you harm? In this chapter students will look at two areas of tort law: negligence and defamation. We will also discuss what a plaintiff must prove to make a successful claim against a tortfeasor.

OUTCOME

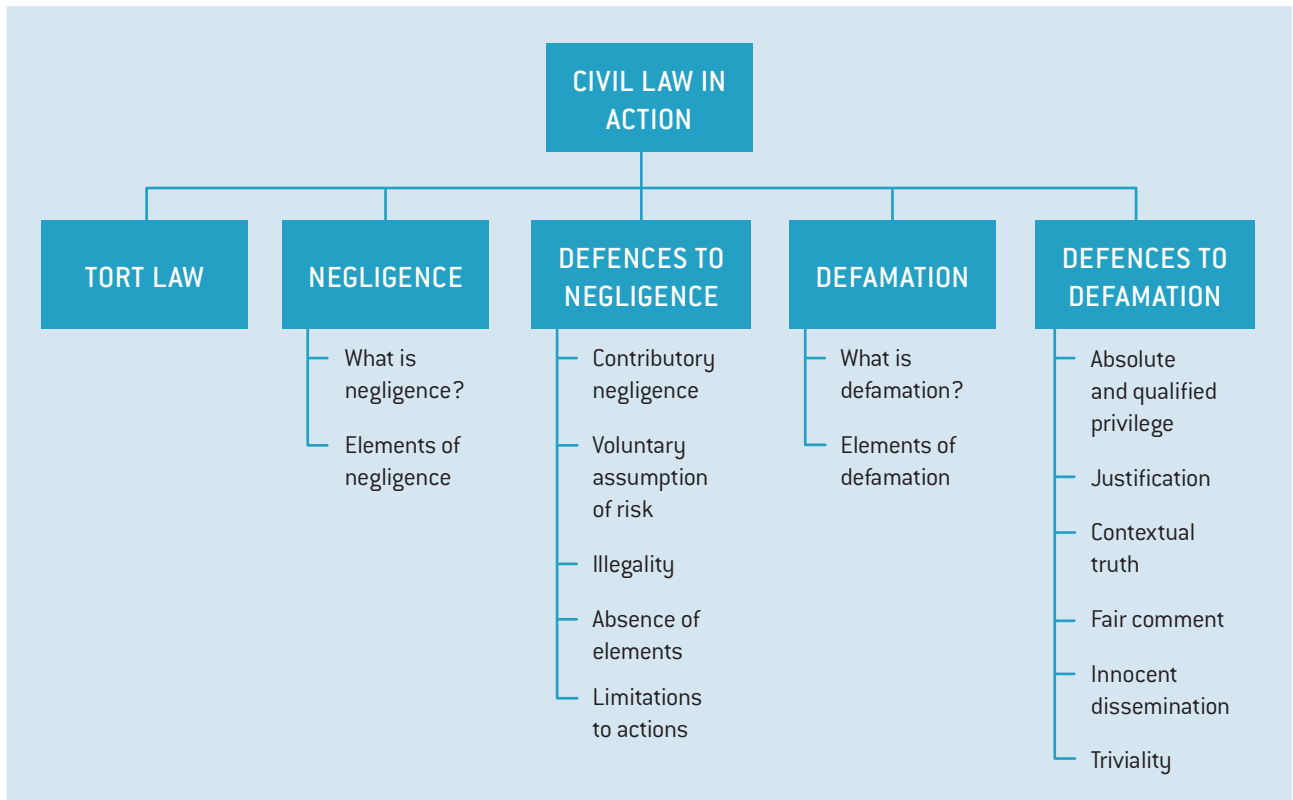
On completion of this unit the student should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > two areas of civil law and for each area of law:
 - the rights protected by the law
 - the elements required to establish liability
 - the limitations of actions
 - possible defences
- the role of statute law and common law in developing the elements and defences
- the impact of the breach on the parties

KEY SKILLS

- > define and use key legal terminology
- > research and analyse relevant information about civil law
- > synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law
- > apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to two actual and/or hypothetical scenarios



KEY TERMS

defamation	A written or oral statement that injures a person's good reputation
duty of care	A moral or legal obligation to ensure the safety or wellbeing of others
negligence	A tort imposing a duty to exercise reasonable care to ensure a person's actions do not adversely affect others
neighbour	Someone who would be closely and directly affected by another person's act/s or omission/s
<i>prima facie</i> case	A case that, on first impressions, has a possibility of being successful
reasonable care	The standard of care owed by a person who has a duty to take care
reasonable person	A hypothetical person who acts with average care, skill and judgment, and is used as a comparison when determining various elements in tort law
reckless	Acting or failing to act in a manner where a person can foresee some harmful consequence but carries on without regard for that consequence

Tort law covers many categories of civil wrongs.

TORT LAW

The word 'tort' comes from a French word meaning 'wrong'. Tort law covers a large number of civil wrongs or wrongful acts.

HAVE YOU...	YES / NO / UNSURE
Heard of the 'snail in the bottle' case?	
Eaten a meal at a restaurant only to suffer food poisoning?	
Ever written something untrue on social media?	
Injured someone when playing sport?	
Read an article that you thought made someone look bad?	
Altered an image and then posted it on Instagram?	

If you answered 'yes' to any of the questions in the table, then you have encountered tort law. Tort law is found in both common law and statute law. There are many broad categories of tort law. Some of these involve the rights of a person to personal safety and integrity; these include the torts of trespass to the person (such as assault and false imprisonment) and breaching a duty of care or failing to exercise a degree of care (negligence). Other torts involve the rights to possession and ownership of land (such as trespass to land) and some protect personal reputation (defamation).

Each tort has its own legal requirements, known as elements, that must be proven in order for a plaintiff to be successful in their claim. Each tort also has its own related defences and remedies. We will focus on two different areas of tort law, negligence and defamation, in this chapter.

NEGLIGENCE

WHAT IS NEGLIGENCE?

Negligence occurs when a person behaves in a careless or **reckless** manner that results in injury to another. The law of negligence specifically protects a person's right to live free from harm, preserving their right to personal safety and integrity. It further imposes a duty on people to be concerned for the interests of others, a duty or obligation only found in the law of negligence.

Perhaps the most famous case of negligence is the case of *Donoghue v Stevenson* [1932] AC 56, sometimes referred to as 'the snail in the bottle' case (see next page).

A significant precedent was established in this case. The rule created in *Donoghue v Stevenson* has been used as the basis for a great variety of rights of action under the tort of negligence. A duty to take reasonable care is now placed on everyone, not just manufacturers, under certain circumstances. For example, road users have a duty of care to others who may be affected by their actions. In recent times, the tort of negligence has been extended to include those professionals who give information and advice, such as doctors and lawyers.

NEGLIGENCE: a tort imposing a duty to exercise reasonable care to ensure a person's actions do not adversely affect others

RECKLESS: acting or failing to act in a manner where a person can foresee some harmful consequence but carries on without regard for that consequence

Negligence is a civil wrong in which a person's careless or reckless behaviour results in another person being injured.

THE SNAIL IN A BOTTLE

CASE STUDY **DONOGHUE V STEVENSON [1932] AC 56**

One August day in 1928, Mrs Donoghue (the plaintiff) set out to meet her friend at a local café. Her friend ordered a ginger beer float for her. The ginger beer was served in an opaque (unable to be seen through) bottle. After drinking some of the ginger beer directly from the bottle, the plaintiff poured the remaining contents of the bottle into her glass. She discovered what she took to be a decomposed snail in the ginger beer. After seeing this, she became ill, suffering from gastroenteritis. Her illness meant she was unable to work for some time.



While seeing her lawyer in relation to another matter, Donoghue mentioned her experience and was advised that it might be possible to sue the manufacturer, even though neither she nor the manufacturer was party to the original contract involving the purchase of the ginger beer. (The original parties to the contract of sale were the person who bought it, Donoghue's friend, and the shopkeeper who sold it.) Ms Donoghue therefore brought an action against the beverage manufacturer (Mr Stevenson).

Because of the legal significance of the issue, the British House of Lords (the highest court of appeal in England) was asked to determine whether a civil right of action existed in this case. In the leading judgment, Lord Atkin established that such a right of action did exist and stated that the rule should be applied as follows:

A manufacturer of products, which he sells in such a form as to show he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that absence of **reasonable care** in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty of care to the consumer to take reasonable care.

In Lord Atkin's view, this rule followed naturally from the basic principle that 'in law, you must take reasonable care to avoid acts or omissions that you could reasonably foresee would be likely to injure your neighbour'. This is known as the 'neighbour principle'.

REASONABLE CARE: the standard of care owed by a person who has a duty to take care

ELEMENTS OF NEGLIGENCE

For a plaintiff to succeed in a negligence action, the following elements must be proven by the plaintiff:

- The plaintiff was a 'neighbour' of the defendant and was thus owed a duty of care by the defendant.
- The defendant was careless and breached that duty of care.
- The defendant's carelessness caused the plaintiff damage or injury.

Element 1: Duty of care

As a result of *Donoghue v Stevenson* and subsequent cases, several generalisations can be made about how the courts will decide who is owed a **duty of care**.

When trying to determine whether a person owes a duty of care to another, we must ask whether the two parties involved were 'neighbours.' A person's **neighbour** is someone

The plaintiff in a negligence case must prove the defendant had a duty of care.

DUTY OF CARE: a moral or legal obligation to ensure the safety or wellbeing of others

NEIGHBOUR: someone who would be closely and directly affected by another person's act/s or omission/s

who would be closely and directly affected by that person's act/s or omission/s. Therefore, a person must take reasonable care to avoid acts and omissions that can reasonably be foreseen as likely to injure their neighbours.

In most cases, it is easy to determine whether a duty of care is owed as there are many well-established relationships, recognised by the law, that automatically create a 'neighbour relationship'. For example, a doctor always owes a duty of care to their patients and a driver of a motor vehicle always owes a duty of care to other road users, be they other drivers, passengers, cyclists or pedestrians.

Other times, it is not so clear who owes and is owed a duty of care. If the case is not clear, the courts will need to look at the facts and determine whether there is a neighbour relationship. In Victoria, the *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic) has helped clarify the question for the courts. It has extended the law of negligence while confirming what was said in *Donoghue v Stevenson*. The Act states that a person owes a duty of care if these circumstances exist:

- the risk was foreseeable
- the risk was significant or not insignificant
- in the circumstances, a **reasonable person** in the same position would have taken precautions to eliminate any risk of harm.

This means that a plaintiff does not have to prove that the defendant actually knew that their act would lead to the exact injury that occurred. The plaintiff must only prove that it was reasonable for the defendant to expect some form of injury to occur because of their act/s or omission/s.

Element 2: Breach of duty

Once a duty of care has been established, the plaintiff must then prove that the defendant breached that duty of care. A duty of care will have been breached if a defendant fails to act as a reasonable person would have in the same situation; that is, the person has not met their standard of care.

Again, legislation has stepped in to clarify when a duty of care has been breached. Section 48 of the *Wrongs Act 1958* (Vic) states:



- (1) A person is not negligent in failing 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 to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

So, what does this mean? Essentially, the Act requires the court to determine three things:

1. Was the risk of harm foreseeable?
2. Was the risk 'not insignificant'?
3. If it was not insignificant, would a reasonable person have taken precautions to avoid the risk?

REASONABLE PERSON: a hypothetical person who acts with average care, skill and judgment, and is used as a comparison when determining various elements in tort law

The plaintiff in a negligence case must prove the defendant breached their duty of care in some way.

ROLLER-SKATING INJURY

CASE STUDY



In a case in New South Wales, the New South Wales Court of Appeal held that the defendants were liable for injury to a girl who had roller-skated on their trampoline.

The plaintiff, a seven-year-old girl, had been visiting with the defendants' daughter. The seven-year-old decided to go on the trampoline and was injured. The girl's parents sued her friend's parents for failing to supervise the girls' use of the trampoline. The owners of the trampoline argued they needn't have supervised the girls as they could not have foreseen that the plaintiff would roller-skate on their trampoline (that is, the risk of injury was not reasonably foreseeable).

The Court held that the defendants were liable as, although the act of roller-skating on the trampoline may not have been reasonably foreseeable, it was reasonably foreseeable that if the girls were not supervised on the trampoline, a risk of injury existed. In this situation, a reasonable person would have taken action to prevent a risk of injury by either supervising the girls or turning the trampoline over so that it could not be used.

Foreseeability of harm

A defendant does not need to foresee the exact nature of the harm suffered by the plaintiff. It is enough if the defendant had foreseen, or ought to have foreseen, that there was a risk that injury may occur.

Insignificant risk

The risk of injury was held to be 'not insignificant'. This is a test that will be applied to each case based on its facts, but the risk of injury does not have to be 'significant' (a rather high risk) but it should be more than 'far-fetched and fanciful' (a very low risk).

Response to the risk

If a plaintiff has proved that the risk was foreseeable and not insignificant, they must also prove that a reasonable person, in the same situation, would have taken precautions that would have avoided the risk and thus avoided injury to the plaintiff. Just like the risk of injury, whether or not a person should have taken steps to avoid the risk will be up to the court and based on the facts of each individual case. However, the *Wrongs Act* has set out some guidelines for the courts to consider:



- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst 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;
 - (d) the social utility of the activity that creates the risk of harm.

The courts have developed some basic principles in relation to this matter:

- The greater the likelihood of injury, the greater the care that should be taken to avoid it.

- The easier the task of avoiding the injury, the more reasonable it is to expect that measures to avoid injury be taken.
- If the probability of injury is very small, it may be justifiable for a defendant to have failed to take precautions to avoid the risk.

Element 3: Damage or injury caused

For the plaintiff to be successful in their negligence claim, they must also prove that they suffered damage or injury as a result of the defendant's careless behaviour and not as the result of some other factor or incident.

The plaintiff in a negligence case must prove that they suffered injury due to the duty of care being breached.

If you look back to the discussion of causation in Chapter 7, you will remember that in cases of negligence, the 'but for' test is often applied to determine if the defendant caused the plaintiff's harm.

The 'but for' test

The 'but for' test requires the court to ask whether, on the balance of probabilities, the plaintiff would still have suffered the damage/harm if the defendant had not acted negligently. If the court decides that the plaintiff would have suffered the harm even if the defendant hadn't had acted, the defendant will not be liable for the plaintiff's injury.

However, sometimes this test finds a person negligent, when there may have been more than one cause of the harm. Thus, the courts have had to develop different tests that can be applied in situations where the 'but for' test is inconclusive or brings about a result that goes against society's values. For example, where there may be more than one cause of injury due to an event before or after the defendant's actions, the court may apply the 'common sense and experience' test, where the judge/s can take into account common sense and policy considerations.

Under legislation, the courts must apply the 'necessary condition' test. This requires the courts to answer whether the defendant's breach of duty was a necessary condition of the plaintiff's harm. This test can be answered by using the 'but for' test as a guide. The legislative test generally rules out the use of the 'common sense and experience' test. However, section 51 of the *Wrongs Act* does allow the court to decide if a defendant should be held responsible for the plaintiff's harm if the 'necessary condition' test is inconclusive.

Types of damage

In order for a plaintiff to successfully sue, not only must their injury be caused by the defendant, it must also be a type of injury or loss that is recognised by the law. If it is not recognised by the law, the plaintiff will be unsuccessful in proving the last element and thus unsuccessful in their claim.

Recognised damage

The common law recognises the following kinds of damage:

- property damage
- personal injury (including psychiatric injury)
- economic loss.

Under legislation, the term 'harm' is used instead of damage as the term 'damages' is used to refer to monetary compensation and the need to avoid confusion is necessary. Under the *Wrongs Act*, 'harm' includes death, injury, damage to property, economic loss or 'harm of any kind'. Injury includes pre-natal injury, psychological or psychiatric injury, disease and aggravation, acceleration or recurrence of an injury or disease.



Unrecognised damage

The recognised categories of damage are quite wide and will cover most forms of loss or harm to a plaintiff. There are, however, a number of losses that will not be recognised by the law. These include:

- loss associated with illegal activity (see Chapter 7 for more information)
- loss that cannot be quantified (this is usually because the loss is too vague and no monetary value can be calculated)
- wrongful life (see Chapter 7)
- grief, general anxiety or emotional distress that does not manifest as a psychiatric condition
- loss of chance or opportunity.

Therefore, it is important for the plaintiff to seek legal advice before making a claim, as the legal practitioner should be able to advise if they have a recognisable form of damage. If the plaintiff does not seek such advice, they may initiate a costly claim that will ultimately be unsuccessful.

Remoteness of damage and vulnerable plaintiffs

Even though a plaintiff may prove that the defendant caused their injury/loss, the defendant may still be deemed not liable for the harm, due to the harm that was suffered being too remote a consequence from the defendant's action. The injury/loss must be a reasonably foreseeable effect of the defendant's conduct. The outcome does not have to be exact: it doesn't have to be reasonably foreseeable that a person might break their arm from the conduct, it just matters that physical injury may occur from the conduct.

Further, a defendant must take their victim as they find them. This means that a defendant will be held liable for any harm to a plaintiff, even if the harm was greater than expected because the plaintiff was unusually vulnerable. This is known as the 'egg-shell skull' rule.

CONCLUSION

If the plaintiff can meet their burden of proof and on the balance of probabilities (the standard of proof), prove all three elements of negligence, the defendant will be found liable for the plaintiff's harm and the plaintiff will be awarded a remedy (see Chapter 12).



APPLY YOUR UNDERSTANDING

ELEMENTS OF NEGLIGENCE

1. Create a flow chart that describes each of the three elements of the tort of negligence. For each element, explain what the plaintiff must demonstrate to successfully meet their burden and standard of proof. Discuss both common law and statutory law requirements, where relevant.
2. For each of the following cases discuss whether, in your opinion, the plaintiff would be successful in suing for negligence. Ensure that you refer to each of the three elements of negligence and consider the type of damage suffered, and whether it is recognised by the law or too remote.

CASE A

A pregnant woman, Mrs Bourhill, stepped off a bus and was removing her shopping from the driver's platform when a speeding motorcyclist passed on the other side of the bus and collided with a car at

an intersection about 50 metres ahead of the bus. The motorcyclist died. Mrs Bourhill said she had heard the noise of the collision and seen the body and blood on the road. As a result of the shock, she said she was 'a pack of nerves' and had suffered a wrenched back. About a month later she delivered a stillborn baby. [*Bourhill v Young* [1943] AC 92.]

CASE B

A water-ski club built a jetty at a remote and relatively undeveloped lake. The local council had dredged a channel nearby to allow boats to travel more easily. A council employee erected signs near the channel stating 'Deep water'. The plaintiff was inexperienced at water-skiing. He fell over while skiing, hit his head and became a quadriplegic. The plaintiff sued the club and the council, arguing that he was misled by the signs into believing the entire lake was deep, not just the area near the channel. He stated that if he had known the lake was generally shallow, he wouldn't have skied there. [*Wyong Shire Council v Shirt* (1980) 146 CLR 40.]

CASE C

A teenage boy was riding his bike along a bike path through a park. On an oval adjacent to the park, the defendant was exercising his pit bull terrier. The dog had been let off the lead so it could run around the oval. When the dog saw the boy, it charged towards him. On seeing the dog, the boy got off his bike and went to pat the dog. The dog bit the boy on the arm and hung on, not releasing its grip until the owner arrived. The wound required stitches and the boy continues to suffer pain when he raises his arm above shoulder height.

DEFENCES TO NEGLIGENCE

PRIMA FACIE CASE: a case that, on first impressions, has a possibility of being successful

Once a plaintiff has presented a ***prima facie* case** of negligence—that is, on the face of all evidence presented by the plaintiff, it appears that the defendant was negligent—the defendant is then able to raise any common law or statutory defences that may either defeat or reduce the plaintiff's claim. There are many defences available to a defendant, and several will be discussed below.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a defence claim that the plaintiff contributed to their own injury by not taking the appropriate standard of care.

The defendant may claim that the plaintiff failed to take the standard of care a person should to ensure their own safety and thus contributed to their loss/harm. This defence is known as contributory negligence. The plaintiff does not have to have contributed to the cause of the accident/incident, or owe the defendant a duty of care. The court is only looking to determine whether the plaintiff acted in a manner that led to their injury or loss. Under section 26 (1)(b) of the *Wrongs Act*, if a plaintiff has contributed to their injury or harm 'the damages recoverable in respect of the wrong must be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'.

When determining whether a plaintiff is guilty of contributory negligence, again the *Wrongs Act* has supplanted the common law. It states that the court must decide what a reasonable person in the same situation would have done, based on what that person knew or ought to have known (section 62). This is a higher standard than the common law required, as the common law determined a person had a lower standard of care owing to themselves than to others. This legislative standard is equivalent to the standard of care owed by defendants to plaintiffs.

Where a plaintiff is intoxicated, there is a presumption of contributory negligence. Unless the plaintiff can rebut this presumption, they will have their damages reduced automatically.

Under the common law, it is not possible to apportion 100 per cent of the blame on the plaintiff. This has been altered by statute. Under section 63 of the *Wrongs Act*, a court may determine that the plaintiff is solely responsible (where it is just and equitable to do so) and thus the plaintiff's claim will be defeated.

VOLUNTARY ASSUMPTION OF RISK

Under the common law, there can be no successful claim of negligence where a person willingly consents to the risk that caused the injury and fully appreciates the dangers involved in the action. As you can imagine, this defence is very hard to prove, as the defendant must prove something that is subjective. Thus, legislation has stepped in and made the defence a little easier.

If the plaintiff willingly consented to and appreciated the risk, their claim cannot be successful.

Under the *Wrongs Act*, a plaintiff is deemed to have been aware of and assumed the risk if the risk of injury was 'obvious' (section 54). What does 'obvious' mean? Under section 53, a risk is 'obvious' if it is one that 'in the circumstances, would have been obvious to a reasonable person in the position of that person'. Even if a risk was unlikely to occur or not able to be physically observed, it may still be obvious. Under the legislation, it is up to the plaintiff to prove that the risk was not obvious.

ILLEGALITY

Under the common law, where both the plaintiff and defendant are involved in illegal activity and the plaintiff is injured by the defendant's negligent act, the defendant may escape liability. This is because either the defendant did not owe the plaintiff a duty of care in this situation, or because both were undertaking an illegal activity that denies claims for negligence.

Under Victorian statute law, illegality does not immediately negate a plaintiff's claim; however, the court must consider the illegality when determining whether a breach of duty has occurred (section 14G of the *Wrongs Act*).



ABSENCE OF ELEMENTS

While not a defence per se, the defendant may also try to demonstrate that one or more of the elements has not been proven by the plaintiff, on the balance of probabilities, to exist.

- *No duty of care was owed.* A defendant may claim that there was no 'neighbour relationship' between themselves and the plaintiff because it was not reasonable to foresee that their actions would cause the loss or damage suffered.
- *The duty of care was not breached.* A duty of care is not breached if the defendant acted as any reasonable person would and the injury was the result of an accident, or could not reasonably have been stopped. For example, at a cricket match a ball may be hit into the spectator area and possibly injure someone; it may not be feasible to fence the entire ground to avoid such a possibility.
- *No damage occurred or the injury was caused by other means.* The defendant claims that although they may have breached their duty of care, the plaintiff suffered no damage or the damage was not of a type recognised by the law. Alternatively, the defendant may claim that the damage or injury suffered by the plaintiff was not the result of the breach.

LIMITATIONS TO ACTIONS

Parliament has passed laws that limit how the tort of negligence applies to some situations.

In Chapter 7, we discussed some general limitations to actions in the civil law. These apply to the tort of negligence just as they do to any other tort. However, some specific limitations have been developed for the tort of negligence due to concerns in recent years about the rising costs of public liability insurance. The *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic) limits the rights of individuals making a claim under negligence. These are some of the limitations:

- A court will take into consideration if a person was voluntarily intoxicated, under the influence of drugs, or taking part in an illegal activity at the time of the injury. If these factors exist, the court may consider that the plaintiff contributed to the injury and the plaintiff's remedy may be reduced.
- An apology may not necessarily be an admission of liability. For example, if a doctor makes an apology to the parents after the death of a child while in hospital, the apology cannot be taken as acknowledgment of wrongdoing.
- A good Samaritan is not liable for anything they do or do not do after an accident or in an emergency, even if the emergency or accident was caused by the good Samaritan.
- Volunteers who provide services to the community are protected from civil liability arising out of these actions. Instead, liability falls to the community organisation, like vicarious liability (see Chapter 7). Volunteers under the Act do not include volunteers of the Country Fire Authority or a voluntary Emergency Services member.
- Businesses donating leftover food to charities cannot be sued for injuries caused by the consumption of the food donated, provided the food was safe to eat when it left their possession.
- A professional will not be negligent for causing injury if they acted in a way that, at the time the service was provided, was widely accepted as competent professional practice in Australia.
- Damages for pure mental harm can only be recovered if the plaintiff sees, at the scene, the victim being killed, injured or put in danger, or if the plaintiff is or was in a close relationship with the victim.
- There must be a minimum loss of 5 per cent for non-economic loss and 10 per cent for psychiatric loss. The maximum amount that can be claimed for non-economic loss is \$577 050. This amount was fixed in 2015 and has not been amended since.



APPLY YOUR UNDERSTANDING

DEFENCES TO NEGLIGENCE

1. Explain how the law of negligence has been altered by statute law to ensure that the law is fair to both the plaintiff and the defendant. In your answer, refer to the defences to negligence as well as the recent changes to the law.
2. Explain the defences available to a defendant under the law of negligence. Outline the effect of the defence; that is, state whether the plaintiff's case will be deemed unsuccessful or not if the defendant proves the defence exists.
3. 'A plaintiff can be deemed to have contributed 100 per cent to their injury.' Do you agree with this statement? Explain your answer with reference to defences and limitations of actions.

CAUTION: WET FLOOR**CASE STUDY** **BRISBANE MUM WINS \$650 000 PAYOUT AFTER SLIPPING ON HER EX-PARTNER'S FRONT STEP****Lisa Yallamas**

A Brisbane mother, whose arm went through the glass of her ex-partner's front door when she slipped on a wet step eight years ago, has won a \$650 000 payout.

Kayleen Gayle Chandler sued the father of her baby, Clive Francis Silwood, for negligence.

Supreme Court Justice Catherine Holmes found last Wednesday that Mr Silwood should have warned Ms Chandler that the step was wet, or at least turned on an outside light for her.

As the occupier of the property, Mr Silwood owed a duty to Ms Chandler to take reasonable precautions to prevent injury as the accident was foreseeable, Justice Holmes found.

On the day of the accident, September 9, 2008, Mr Silwood arrived home from work and hosed off bat droppings on the front wall of his home about 3pm, next to the front door.

At around 8.30 pm, Ms Chandler arrived to drop off their baby daughter.

'Ms Chandler's evidence was that from about 4pm she had drunk three 150 millilitre glasses containing an even mix of red wine and lemonade, with the aim of drying up her breast milk,' the justice said. Mr Silwood claimed she had tripped due to intoxication, rather than slipped on a wet surface.

'It would have been apparent to Mr Silwood, too, had he turned his mind to it, that the steps would remain wet for some time and could be hazardous in that state,' Justice Holmes found.

'A reasonable person in his position, in my view, would have made sure the stairs were dry or at least warned Ms Chandler in their telephone conversation that they might be wet and should be taken with care, and would certainly have made sure that the light was on.'

Source: *Brisbane Times*,
30 April 2016

APPLY YOUR UNDERSTANDING**CASE STUDY—CAUTION: WET FLOOR**

1. Identify the plaintiff in this case.
2. Identify the defendant in this case.
3. Briefly outline the facts of this case.
4. You are representing the plaintiff in this case. Prepare an argument that the tort of negligence applies to this situation.
5. You are representing the defendant in this case. Present an argument that the tort of negligence does not apply to this situation. Refer to relevant defences in your answer.
6. Outline the court's decision. What reason does the judge give for this decision?
7. What impact did the defendant's conduct have on the plaintiff? Remember to think beyond the actual harm.

DEFAMATION

WHAT IS DEFAMATION?

DEFAMATION: a written or oral statement that injures a person's good reputation

Defamation is a civil wrong in which a person spreads statements that damage another person's reputation.

Defamation is the dissemination of a statement or other public material that lowers the reputation or standing of the plaintiff in the eyes of the community. The tort of defamation protects our right to a good reputation.

The law of defamation is interesting in that it illustrates a conflict between two rights of individuals. On the one hand, we all have the right to freedom of speech, but conversely, we all have the right to enjoy a good reputation. The law thus imposes a limit on our freedom of speech. This right to a good reputation has long been recognised in our society, going back to the 10th and 11th centuries, where defamation was not only a tort but a crime with laws and remedies differing depending on local laws and traditions. Today, the law on defamation can be found in common law and the *Defamation Act 2005* (Vic).

ELEMENTS OF DEFAMATION

In order for a plaintiff to successfully prove a case of defamation, they must show that all of the following factors exist:

- The statement was defamatory.
- The defamatory statement refers to the plaintiff.
- The defendant communicated the defamatory statement to a third person.

Element 1: Defamatory statement

A defamatory statement is an untrue statement that lowers an individual's reputation in the eyes of right-thinking people.

A plaintiff is defamed if the publication causes a reasonable person to think less of the plaintiff. This requires that there is a defamatory statement; a statement that is untrue. It is a statement that lowers the reputation of an individual in the eyes of the community. To say, for example, that another person is 'a crook' or can't be trusted, when that is not true, is defamatory. The defamation is the damage to the person's reputation. It may injure the person's reputation by exposing them to hatred, contempt or ridicule, or cause them to be shunned or ignored. It is not necessary to show that the defendant intended to damage the plaintiff's reputation, it is merely enough to show that it did harm their reputation. However, if a plaintiff suffers only from a loss of pride or has their feelings hurt, then this is not a defamatory statement.

Element 2: The statement is about the plaintiff

A statement will be considered defamatory if others can identify the person about whom the statement is made.

The plaintiff, once they have established that a defamatory statement has been made, must prove that the statement is about them. This is a question of fact that will be determined by either a jury or a judge. The court will ask whether a reasonable person, having knowledge of the circumstances, would link the statement to the plaintiff. This means that a defamatory statement does not have to name the plaintiff. The statement will still be considered defamatory if people could reasonably conclude that the statement is about the plaintiff.

For instance, if a news article reads 'The third runner-up in the 2012 Miss Galaxy competition has a history of drug and alcohol abuse', but does not specifically name the woman, it may still be considered defamatory. In this example, it would be very easy for people to discover the identity of the woman using the internet or other means, and thus it can be deemed to have referred to the plaintiff.

Element 3: The statement been communicated to a third person

For a statement to be considered defamatory it must be communicated to a third person. Communication may include publications, such as articles in newspapers or magazines, or broadcasts on television and the radio. Scenes in plays or movies, and letters, signs and postcards may also be considered forms of communication for a defamation claim. The important factor is that the statement is published to a third party.

For a statement to be defamatory it must be communicated to a third person.

Without a third party, there can be no defamation as there will be no injury to the plaintiff's reputation. For instance, A says to B, 'You are a crook'. This may not be true but it is not defamation as the conversation is only heard by the two parties. But if A says to C, 'B is a crook' and the statement is not true, it may be considered defamatory because it has been communicated, or published, to another person.

Publication can occur more than once; for example, if a statement is made on a television program and that program or segment is repeated on a later date, then the statement has been republished and a cause of action arises for each publication. This means that the person who republishes the statement can also be sued by the plaintiff.

CONCLUSION

If the plaintiff can meet their burden of proof and, on the balance of probabilities (the standard of proof), prove all three elements of defamation, the defendant will be found liable for the plaintiff's loss of reputation and the plaintiff will be awarded a remedy (see Chapter 12).

APPLY YOUR UNDERSTANDING

ELEMENTS OF DEFAMATION

1. 'The tort of defamation ensures that there is a balance between people's rights. This ensures that the law is fair and just.' Do you agree with this statement? Justify your response with reference to the rights protected by defamation and the principles of justice (see Chapter 2 for extra information).
2. For each of the following cases, discuss whether the plaintiff would be successful in suing for defamation. In your answer, you should refer to each of the three elements of defamation.

CASE A

A television critic writes the following review of a new Australian sketch comedy show. It is printed in *The Age* and appears on their website; it is soon shared by others on Facebook and Twitter. 'Before watching this show I believed it to have a lot of potential. But lead actor Andre's abysmal performance will ensure the show is not aired beyond the first episode. His lack of talent leaves you unconvinced, and Andre has ensured that he and his cast mates will be unemployed for some time to come.' Andre is concerned that this review will cause his show to be cancelled before it is given enough time to become popular.

CASE B

Lachlan and Jonno are students in the same class. For their last test, Lachlan received the top mark. Suspecting that Lachlan has cheated, Jonno slips Lachlan a note in class that reads: 'You're a real scumbag and cheat. You're such a moron, there's no way you could have got that mark if you hadn't been looking at my paper.'

CASE C

Niamh was upset with and jealous of an employee of another firm, and in anger sent an email message to a friend at work, saying: 'I am sure that Olivia at The Bacchus Company is not honest. She must be stealing from her employer to afford all those new clothes and that overseas trip last year. She doesn't earn that much!' This message was inadvertently sent to the accounts department in The Bacchus Company and given to the manager.

CASE D

Alex had been searching for a new home. He was shown a house by a real estate agent, Mackinley, and he fell in love with it. Before signing the contract, he was assured by Mackinley that there were no structural problems. After signing the contract and paying the deposit, he discovered termites in the house's floorboards. Mackinley refused to refund his deposit. Alex was extremely angry and took out his anger on Mackinley's shop front. He painted a sign across her window stating: 'Mackinley is a con artist. She will do anything to get a sale. Do not trust her.'

DEFENCES TO DEFAMATION

As stated above, the law of defamation strikes a balance between a person's freedom of expression and another's right to protect their reputation. The defences to the tort of defamation assist in achieving this balance by allowing the publication of defamatory material when reasonable. If a defendant cannot prove that a defence exists, the plaintiff will be entitled to a remedy. This usually takes the form of monetary compensation but may also include an injunction to prevent publication or republication (see Chapter 12 for more on remedies). The defences to defamation exist at common law while additional defences are also set out in the *Defamation Act 2005* (Vic). We will look at some below.

ABSOLUTE PRIVILEGE

There are some special circumstances in which people are free to say what they please about others. These are referred to as privileged circumstances. For instance, under the *Defamation Act*, statements made in Parliament by members of parliament are considered to be privileged. This allows parliamentarians to speak freely during parliamentary sittings. It means that parliamentarians can discuss the actions and activities of others without the fear of legal action. It is believed that the interests of the public are best served by allowing parliament to be an open and free forum for views and ideas. The privilege does not extend outside of parliamentary proceedings. This means, should a politician repeat something that would normally be defamation outside of parliament, their absolute privilege does not protect them. This is also the case for statements made during court proceedings.

There are other circumstances that enjoy the status of absolute privilege under common law. These are statements made between husband and wife, and those made between lawyer and client.

QUALIFIED PRIVILEGE

In some circumstances, privilege is qualified or limited. To claim a qualified privilege, the defendant must prove that the following circumstances apply:

- the person given the information has an interest in the information
- the matter is published in the course of giving the recipient information on that subject

If a person makes a statement in a situation of privilege, they cannot be sued for defamation.

- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

This qualified privilege allows people to speak freely about matters that concern them. Examples include comments made between a teacher and parents, statements made to the police, and employment references. The motives behind these statements are important if the statements are to enjoy qualified privilege. They must be made fairly and without malice.

The *Defamation Act* sets out criteria for a court to determine whether there is a qualified privilege. These are some of those criteria:

- if the statement is of public interest
- if the statement relates to the way the plaintiff performs their public duties
- the seriousness of any defamatory statement published
- whether it was in the public interest for the material to be published quickly
- the nature of the business environment in which the defendant operates
- the sources of the information in the published matter
- the integrity of those sources
- whether a reasonable attempt was made by the defendant to obtain and publish a response from the plaintiff
- any other steps taken to verify the information in the matter published
- any other circumstances that the court considers relevant.

JUSTIFICATION

A statement will not be considered defamatory if there was a good reason for publishing it. The most obvious defence to an action in defamation is to justify the defamatory statement by proving it is true. The plaintiff has no burden of proof—they do not have to prove it was not true. The defendant must prove that the statement is true.

Under common law, in order for justification to succeed as a defence, the defendant must show that the material complained about was true in substance and effect. That means that not only was the meaning true and accurate, but so was any inference that may be drawn from the statement. Under legislation, it is enough for the defendant to prove that the material was ‘substantially true’. Under section 4 of the *Defamation Act*, this means ‘true in substance or not materially different from the truth’. Truth is a total defence and if proven, the plaintiff’s case will fail.

If a statement can be justified, generally by proving that it is true, then it cannot be considered defamatory.

CONTEXTUAL TRUTH

Under the *Defamation Act*, it is possible for a publication to contain some defamatory statements as part of a larger article. In this situation, the defendant may claim contextual truth. In other words, although some untrue statements have been published, these statements are part of an imputation (implied meaning) about the plaintiff that is substantially true.

For instance, a journalist writes: ‘Convicted murderer Edward Kelly appeared in court yesterday, charged with importing drugs’. Edward Kelly has been convicted of murder—that is a true statement. But the journalist has made an error and, in fact, Edward Kelly was charged in this instance with possession of drugs. In the context of the other true statements, does the untrue statement amount to a defamation? The defendant would claim that the defamatory statements do no further harm in the context of the truthful statements.

If an untrue statement is made in the context of an accusation that is substantially true, it may not be considered a defamation.

MEAGRE OFFERING: *DERING V URIS* (1964) 2 WLR 1298

Novelist Leon Uris and publisher Bantam were sued over his novel *Exodus*, published in 1964. Dr Wadislaw Dering, a former concentration camp inmate, claimed that he had been defamed. He said he had been portrayed as having carried out medical experiments on people with callousness and brutality at the notorious concentration camp Auschwitz. The court ruled that although the callousness of Dr Dering might have been exaggerated, he had betrayed his duty to refuse to participate in medical experiments that were inherently criminal, irrespective of the way that they were carried out. The court awarded him damages of ‘the smallest coin in the realm’—a halfpenny.

FAIR COMMENT/HONEST OPINION

Under the common law, a defence of ‘fair comment’ exists that allows the publication of an opinion that is held honestly. In most cases, reviewers and commentators are protected from defamation actions because of this defence. Under legislation, the defence of ‘honest opinion’ exists, which is essentially the same defence. Under section 31(1) of the *Defamation Act* a statement will be considered an honest opinion if the defendant proves that:

- a. the matter was an expression of opinion of the defendant rather than a statement of fact
- b. the opinion related to a matter of public interest
- c. the opinion is based on proper material.

The term ‘proper material’ means material that is substantially true. An opinion can be extremely critical as long as it is honestly held by the author; if the opinion is not honestly held by the defendant at the time of publication, then the defence fails.

Reviewers and commentators may claim that a statement is an honest opinion.

DEFENCE OF INNOCENT DISSEMINATION

Sometimes the defendant may have published a defamatory statement without realising that they were distributing the information. In these cases, it may be possible to claim that the dissemination of the statement was innocent. The defendant would need to prove the following:

- They published the statement merely as a subordinate distributor for someone else.
- They did not know, and could not have reasonably known, that the statement was defamatory.
- Their lack of knowledge was not due to any negligence on their part—for example, they did not have editorial control before it was published.

Subordinate distributors include booksellers, newsagents and librarians. Distributors may also include live television broadcasts and communication service providers.

Under both the common law and the *Defamation Act*, the author or ‘originator’ of the material cannot claim this defence.

It may not be considered a defamation if the defendant published the defamatory statement without knowing that they were distributing the statement.

DEFENCE OF TRIVIALITY

Triviality is a defence under legislation that, if proven, negates the plaintiff’s claim. The defendant has to prove that, in the circumstances, the plaintiff was unlikely to sustain any harm by the publication of the defamation. The court will look at the nature of the defamatory material, how it was disseminated to the public and where it was published to see if the harm can be deemed trivial.

The defendant may claim that the defamatory statement has not caused any harm to the plaintiff.

THE DEFAMATION ACT: A MORE RATIONAL APPROACH

The Defamation Act 2005 (Vic) introduced several changes to the way we resolve defamation cases. This Act was part of a nationwide approach to defamation laws that tried to avoid plaintiffs ‘shopping around’ for the jurisdiction that would offer them the best result. Under the legislation, the following has been included, adding to the common law (the common law has been protected by the legislation and continues to exist alongside the Act).

1. A plaintiff can formally notify the defendant of concerns about a defamatory statement. The defendant can then offer to make a correction or an apology and pay expenses to settle the complaint. If the offer is accepted, then the matter is settled. If a reasonable offer is rejected, the defendant can use this as a defence. Remember though: an apology is not an admission of fault or liability.
2. If the case goes to a jury trial, the jury is used to decide two issues. First, the jury decides whether the publication complained about is defamatory. Second, if the publication is defamatory, the jury decides whether any defence raised has been established. It is the role of the judge to determine the amount of damages if the action is successful.
3. The damages awarded must be rational and appropriate to the harm done. The Act also sets a maximum amount that can be awarded for non-economic harm. This figure is adjusted annually. No award can be made for exemplary or punitive damage (see Chapter 12 for more information about types of damages).

A jury cannot determine the level of damages in a defamation case.

CELEBRITY DEFAMATION

CASE STUDY

REBEL WILSON WINS DEFAMATION CASE AGAINST ‘BULLY’ MAGAZINE PUBLISHER BAUER MEDIA

Emma Younger

Rebel Wilson has won her defamation case against magazine publisher Bauer Media over a series of articles the Hollywood actress claimed damaged her career by depicting her as a serial liar.

In an at-times bizarre Victorian Supreme Court trial, the 37-year-old Australian sued over eight articles which appeared in *Woman’s Day*, *Women’s Weekly*, *OK Magazine* and *New Weekly* in 2015.

The articles said Wilson had publicly lied about her age, real name and upbringing, and alleged she had added a ‘touch of Hollywood’ to her backstory.

She returned to Melbourne from Los Angeles to give evidence at the three-week trial in which she made jokes, rapped an Academy Award acceptance speech she claims to have hallucinated years earlier, and broke down in tears several times.

Outside the court, Wilson said it had been a long, hard fight but she felt she had to take a stand.

‘I had to stand up to a bully, a huge media organisation, Bauer Media Group, who maliciously took me down in 2015 with a series of grubby and completely false articles,’ she said.

‘Far too often I feel the tabloid magazines and the journalists who work for them don’t abide by professional ethics. Far too often I feel their conduct can only be described as disgusting and disgraceful.

‘I’m glad, very glad, that the jury has agreed with me and by their unanimous overwhelming verdict they have sent a very, very clear message.’

Continued

CASE STUDY



Rebel Wilson

Source: ABC News,
15 June 2017

Justice John Dixon is now tasked with assessing the amount of damages to award the actress. In a statement, Bauer Media said it would consider its options following the verdict. The company said it had no further comment at this time.

The actress told the trial the articles were a 'malicious, deliberate take-down' published to coincide with the release of her biggest movie role to date and designed to sell as many copies as possible.

She alleged they resulted in her being sacked from DreamWorks animated feature films *Trolls* and *Kung Fu Panda 3* for being 'too divisive', and she subsequently had to beg to work for free.

'After month after month, that all of a sudden doors that used to be open were shut and I basically had to beg to get back in the door ... it became apparent that ... [the articles] did a tremendous amount of damage,' she told the jury.

But Bauer Media denied the articles had damaged Wilson's reputation and argued that, in any case, they were based in fact.

One of the magazine's former journalists, Shari Nementzik, denied doing a 'hatchet job' on the actress's reputation. Nementzik told the court she did not think her source was 'completely unreliable', and denied publishing information she knew was false.

She also denied breaching the code of ethics by leaving out relevant facts and not giving Wilson an opportunity to respond.

APPLY YOUR UNDERSTANDING

CASE STUDY—CELEBRITY DEFAMATION

Read the case study 'Celebrity defamation' above, then complete the following tasks.

1. Explain the law of defamation. In your answer, refer to the three elements that must be proven by a plaintiff.
2. Briefly describe the defamation case against Bauer Media. make sure you include the elements that need to be proven in your response.
3. Explain the defences Bauer Media and Shari Nementzik used in this case.
4. Do you think that Bauer Media's defences were appropriate? Explain your opinion by referring to the facts of the case and the *Defamation Act*.

LIMITATIONS OF ACTIONS

Just as with negligence, there are a number of limitations that exist under the law of defamation, distinct from the general limitations of actions discussed in Chapter 7.

WHO CANNOT SUE FOR DEFAMATION?

Any living person may sue for defamation. However, in all states except Tasmania, an action in defamation cannot be brought if the person defamed is deceased. Further, if the person who is alleged to have made the defamatory statement is deceased, their estate cannot be sued.

Companies cannot sue for defamation unless they are a not-for-profit organisation or employ fewer than 10 people.

Statements made about a large group of people are not defamatory. The statement must be made about an individual or small group of people. For example, it is not defamatory to say that all lawyers or doctors are 'crooks', as no particular person is identified.

There are limits on who can sue for defamation.

TIME LIMITS

Under all Australian jurisdictions, a case must be brought within one year of the date of publication. However, it is possible to gain an extension of up to three years.

IMPACT OF NEGLIGENCE AND DEFAMATION ON THE PLAINTIFF

The plaintiff is suing the defendant because of the impact of the damage or harm caused by the defendant. In the case of defamation, the harm to a person's reputation may be such that they lose their job or can no longer socialise in the circles they once did, due to the negative implications of the defamatory statement made. In terms of negligence, the damage or harm caused by the defendant may be such that a person can no longer carry on their life as they had before the defendant's conduct. A person may have been rendered paralysed, or so psychologically damaged that they are unable to function in society. Many people are unable to work for extended periods of time, or are never able to work again.

For example, in a recent workplace negligence case, *Mathews v Winslow Constructors (Vic) Pty Ltd [2015] VSC 728*, a woman, Mathews, was so severely bullied by her co-workers that she was unlikely to ever work again due to many psychological conditions that resulted from her employer's and co-workers' behaviour. The woman was only 35 years of age when her injuries forced her to stop working. The retirement age in Australia at present is 65 years. Thus, Mathews was unlikely to work for 30 years. Not only would this mean a loss of income, but potentially a loss of independence and feeling of self-worth and accomplishment—both of which are important (but not calculable) benefits of working. This is only one example of the impact a defendant's actions can have on a plaintiff. Injuries such as psychological conditions can be sued for, but there are other impacts that cannot be dealt with by the courts.

When taking a case to court, the plaintiff will have to face the person they are alleging has caused them harm. This may be extra taxing on the plaintiff, and no remedy can be awarded by the court for this impact. There is also the time taken to attend solicitors' appointments, doctors' appointments (if there are physical or psychological injuries being claimed) and then the court case. While a plaintiff may recover some of the fees associated with the case if they are successful, no award of compensation will fully cover the costs. If costs are awarded against a defendant, the defendant is only liable to pay the amount proscribed by the relevant legislation. These costs are generally not the true costs charged by lawyers, so the plaintiff will usually remain out-of-pocket. These are all considerations a person must make before deciding to pursue a claim in the courts.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Negligence

- The law of negligence protects a person's right to personal safety and integrity.
- Significant precedent for the development of negligence was established in *Donoghue v Stevenson 1932* (known as the 'snail in the bottle' case).
- For a plaintiff to succeed in a negligence case, certain elements must be proven:
 - > That a duty of care was owed.
 - Whether the two parties involved were 'neighbours'
 - > That there was a breach of duty of care.
 - Whether the risk was foreseeable

- Whether the risk was significant or insignificant
- Whether a reasonable person in the same position would have taken precautions to eliminate any risk
- > That the plaintiff suffered damage or injury as a result of the defendant's behaviour.
 - The 'necessary condition' test checks whether the defendant's breach of duty was a necessary condition of the plaintiff's harm using the 'but for' test as a guide.
 - The 'but for' test checks on the balance of probabilities that the plaintiff would still have suffered harm if the defendant had not acted negligently.
- > That a type of injury or loss is recognised by the law.
 - Recognised damage may include property damage, personal injury (including mental health) or economic loss.
 - Unrecognised damage includes loss associated with illegal activity, loss that cannot be quantified, wrongful life, emotional distress not manifesting as a psychiatric condition, or loss of opportunity.
 - A defendant may not be liable for harm due to the harm suffered being too remote from the defendant's actions.
 - A victim is 'taken as found', and a defendant liable for any harm, even if the harm was greater than expected due to the plaintiff being unusually vulnerable.

Defences to negligence

- The defendant may draw upon common law and legislation to defeat or reduce the plaintiff's case.
 - > Contributory negligence is a defence where the defendant claims the plaintiff failed to take a standard of care to ensure their own safety.
 - > Voluntary assumption of risk is a defence where the plaintiff had consented to the risk that caused the harm.
 - > Illegality means both the plaintiff and defendant were involved in illegal activity and no duty of care was owed.
 - > Absence of elements is where the defendant must demonstrate that one or more of the elements of negligence has not been proven by the plaintiff.
- There are some specific limitations developed for the tort of negligence under the *Wrongs Act* (for example, whether a person was voluntarily intoxicated, an apology not necessarily being an admission of liability, or a professional not being negligent if they acted in a manner widely accepted as competently professional).

Defamation

- The tort of defamation protects the right to a good reputation.
- Defamation is a statement or other public material that infringes the reputation or standing of the plaintiff in the eyes of the community.
- Elements of defamation include:
 - > A defamatory statement (causing a reasonable person to think less of the plaintiff)
 - > A reference to the plaintiff (the statement must be proven to be about the plaintiff)
 - > Communication of the statement to a third party (which may include publication in some form of media or even a play or sign).
- Defences to defamation may include:
 - > Absolute privilege (where there are circumstances where people are free to say what they please about others, such as statements made in parliament).
 - > Qualified privilege (or limited privilege, where the defendant's making of the statement is seen as reasonable in the circumstances).

- > Justification (a statement is not considered defamatory if there was a good reason for publishing it).
- > Contextual truth (some untrue statements may be part of a larger statement that is substantially true).
- > Fair comment (allowing the publication of an opinion held honestly).
- > Innocent dissemination (where the statement is made without realising that it was being distributed).
- > Triviality (where the defendant proves that the plaintiff was unlikely to sustain harm by the defamatory statement).
- Similar to negligence, there is a limitation of actions for defamation.
 - > There is a limitation on who can sue for defamation:
 - While a living person may take up a civil case for defamation, typically a deceased person cannot.
 - Not-for-profit organisation or companies who employ fewer than 10 people may sue for defamation, but not companies in general.
 - A statement is only considered defamatory if it is about an individual or a small group, not large groups of people.
 - > There is a time limit from when a defamatory statement is made to when a case can be brought to courts (typically one year, though extensions of up to three years are possible).
- The plaintiff must prove the impacts of negligence and defamation on their reputation through:
 - > Monetary impacts (such as loss of job or income)
 - > Non-monetary impacts (such as an impact on socialising as they once did).

CHECK YOUR UNDERSTANDING

1. Define 'negligence'.
2. Outline the rights protected by negligence.
3. Explain the legal principles developed in the case of *Donoghue v Stevenson* that form the basis of the tort of negligence.
4. Describe the main elements of negligence. Refer to legislation and common law where relevant.
5. Describe the main defences to a claim of negligence. Refer to legislation and common law where relevant.
6. Explain how the amendments made by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic) placed limitations on actions of negligence.
7. Outline the rights that are protected by defamation.
8. Describe the main elements of defamation. Refer to legislation and common law where relevant.
9. Describe the main defences to a claim of defamation. Refer to legislation and common law where relevant.
10. Suggest why in some situations people can make statements under privilege that would otherwise be considered defamatory.
11. Explain why uniform legislation was introduced concerning defamation in Australia.
12. Describe the limitations placed on the categories of people who can sue and be sued under defamation laws.
13. What time limitations exist for a defamation case?

APPLY YOUR UNDERSTANDING

NEGLIGENCE AND DEFAMATION

1. 'The laws of negligence and defamation have evolved over the decades to provide key protections of plaintiffs' rights and to ensure harm caused by one person to another is limited and compensated.' To what extent do you agree with this statement? Use evidence from what you have learnt in this chapter to support your contention. Your answer should be between 1.5 and 2 pages in length and refer to both common law (including key cases) and legislation.
2. Read the hypothetical cases below, then complete the tasks that follow.

CASE A

Hailey and Eden work at the fast food outlet Yummy Foods. Eden tells the manager that Hailey has Hepatitis C. The manager tells Hailey that she is fired because he doesn't want her working with food. Hailey doesn't have Hepatitis C; she can no longer afford her rent and is finding it hard to get a new job as she cannot get a good reference from the manager.

CASE B

A sports commentator, discussing the selection of swimmers for the Commonwealth Games on his television show, states that one swimmer should not have been picked to represent their country. He states that 'Sharkie doesn't deserve a place. He's a drug cheat who just hasn't been caught yet.'

CASE C

A VCE student writes in an essay that there are major problems with the legal system. She writes: 'All police are corrupt, lawyers are nothing more than hired guns selling themselves to the highest bidder and judges are so old they must be senile'.

CASE D

Ryan, a university student, wrote a review of a movie on his Twitter feed. His review stated that the film 'was the worst movie ever made and sullies the good names of the actors who appear in it'.

For each case:

- a. Does the tort of defamation apply? In your answer, outline each element and refer to specific evidence from each case to support your conclusion.
 - b. Are there any defences? Outline any defences that might be claimed by the defendant and suggest whether you believe they would be successful.
3. The defence of triviality negates a plaintiff's claim for defamation. Do you believe that a court should have the right to decide if a plaintiff's harm is trivial, or should the fact that a plaintiff has suffered any form of harm be enough for a case to be successful? Discuss your point of view, using examples to support your case.
 4. Conduct research on the internet to find out about the *Grant v Australian Knitting Mill* case. As a class, read through the judgment and then create a Venn diagram or similar to show how this case is similar to and different from *Donoghue v Stevenson*. In a short paragraph, explain how the *Grant* case confirmed and built on the principles outlined in *Donoghue v Stevenson*.
 5. Evaluate the impacts of negligence and defamation on a plaintiff. *Hint: remember, 'evaluate' requires you to look at both positives and negatives (or strengths and weaknesses) of an issue and then conclude whether, overall, there are more positives or negatives.*

An 'evaluate' question in an assessment or examination will usually be worth between 8 and 10 marks. As such, you should aim to write about 1.5 pages and make approximately 3 or 4 points for each side of your argument (that is, a total of 6 to 8 points per answer). Don't forget to include a small introduction and conclusion and make a statement about your view if you want to aim for full marks.

CASE FILE—NEGLIGENCE IN AUSTRALIA

ASSESSMENT

Tort law establishes a right for individuals to take action to recover a loss due to the actions of another. This is consistent with community standards and expectations; it forms the basis of a 'fair go'. But the law also sets a standard for others. It may have seemed frivolous in 1932 to sue a manufacturer after swallowing a snail in ginger beer, but today this case sets the standard of care required in our community.

The following cases highlight the important of the law of torts in society. Read through the cases and answer the questions that follow.

BIRTH COMPLICATIONS

A 12-year-old boy took action against his mother's obstetrician, and the Peninsula Private Hospital in Frankston, after he was born with cerebral palsy. He is unable to walk, needs 24-hour care and is unlikely to live beyond the age of 30. The boy sought millions of dollars in compensation, alleging that the midwives, doctors and the hospital administered too much of a drug to induce labour in his mother. The doctor and hospital agreed to settle the matter out of court.

SLIPPED ON A CHIP

A woman, Ms Strong, successfully sued supermarket giant Woolworths after suffering severe spinal injuries outside one of their Big W stores. The disabled Ms Strong fell after one of her crutches slipped on a hot chip, which was on the ground being occupied by an outside stall set up by Big W. It was determined that the store did not have an adequate inspection and cleaning regime in place, which would have seen Ms Strong's injury avoided. The woman was awarded \$580 299.12 in compensation in NSW District Court. Woolworths appealed to the Court of Appeal and was successful. The case was then taken to the High Court, where Ms Strong's appeal was upheld. (*Strong v Woolworths Ltd* [2012] HCA 5 [7 March 2012])

NO BULL

A council gardener is suing his employer and a party rental company for almost half a million dollars after being thrown from a mechanical bull at a Christmas party.

Gregory Peter Beazley, 45, lodged a statement of claim in the Southport District Court against Gold Coast City Council and Jolly Jumps Rentals last Monday for \$477 071.42 after allegedly injuring his back when the bull ride operator started it bucking as Mr Beazley was trying to get off.

To make matters worse, Mr Beazley alleges the Jolly Jumps Rentals staff member was 'consuming alcohol' while running the ride.

It [the claim] states Mr Beazley is employed as a gardener with the council and an online LinkedIn profile for 'Greg Beazley' says he has worked as a horticulturalist since 1989.

Court documents state that Mr Beazley rode the mechanical bull for about 30 seconds before the ride was stopped.

'The plaintiff then commenced getting off the mechanical bull and was halfway off the machine when the operator again commenced the ride,' the claim states.

'The machine operator turned the mechanical bull on to a much higher speed than on the plaintiff's first ride.'



ASSESSMENT

Source: Gold Coast
Bulletin, 16 January 2017

The claim states Mr Beazley had not mounted and gripped on to the bucking bull safely when the ride was restarted and was 'flung from the mechanical bull at speed in a sideways direction'.

Mr Beazley suffered an acute compression fracture to his spine on the T10 vertebra as a result of the incident.

He was required to have surgery and had an extended period of hospitalisation, the claim states.

It said Mr Beazley is now unable to perform heavier manual tasks, which has affected his ability to perform his duties as a gardener.

Mr Beazley claims the council was negligent in failing to identify the risks and dangers associated with 'the use of the mechanical bull at its Christmas party'.

The claim also states the council was negligent in providing alcohol to its employees 'while those employees were using the various rides ...'

Mr Beazley alleges Jolly Jumps Rentals was negligent by failing to operate the mechanical bull safely, operating it at 'excessive speed' and 'while consuming alcohol'.

Of the \$477 071.42, Mr Beazley is claiming \$187 195.71 in damages from council for negligence and breach of contract and a further \$289 875.71 from Jolly Jumps Rentals for its alleged negligence in operating the ride. He is also asking for interest and costs.



CASE STUDY—NEGLIGENCE IN AUSTRALIA

1. Consider each of the three cases referred to in the case file 'Negligence in Australia'. For each case:
 - a. explain how the principles of negligence apply
 - b. suggest one defence that you would have presented to the court if you had been a lawyer for the defendant.
2. What do you consider to be the standard of care required by a party host? Does your view change when it is a work party?
3. What types of injuries or damage would you consider to be foreseeable at a party?
4. How has the right to sue for negligence been limited in Victoria? Suggest reasons for these limitations.
5. How does civil law, and the law of negligence, reflect the values of the community? Do you believe any further changes are needed?

SANCTIONS, REMEDIES AND RIGHTS

Criminal law and civil law aim to protect the rights of individuals. When rights are infringed, a case or dispute may arise which needs to be determined or resolved, and sanctions or remedies may be imposed. This unit focuses on the enforcement of criminal law and civil law, the methods and institutions that may be used to determine a criminal case or resolve a civil dispute, and the purposes and types of sanctions and remedies and their effectiveness.

Students undertake a detailed investigation of two criminal cases and two civil cases from the past four years to form a judgment about the ability of sanctions and remedies to achieve the principles of justice. Students develop their understanding of the way rights are protected in Australia and in another country, and possible reforms to the protection of rights. They examine a significant case in relation to the protection of rights in Australia.



LAW ENFORCEMENT

UNIT 2 – AREA OF STUDY 1: Sanctions

When ones' rights are infringed, a number of law enforcement bodies may become involved in order to resolve a criminal case or civil dispute.

OUTCOME

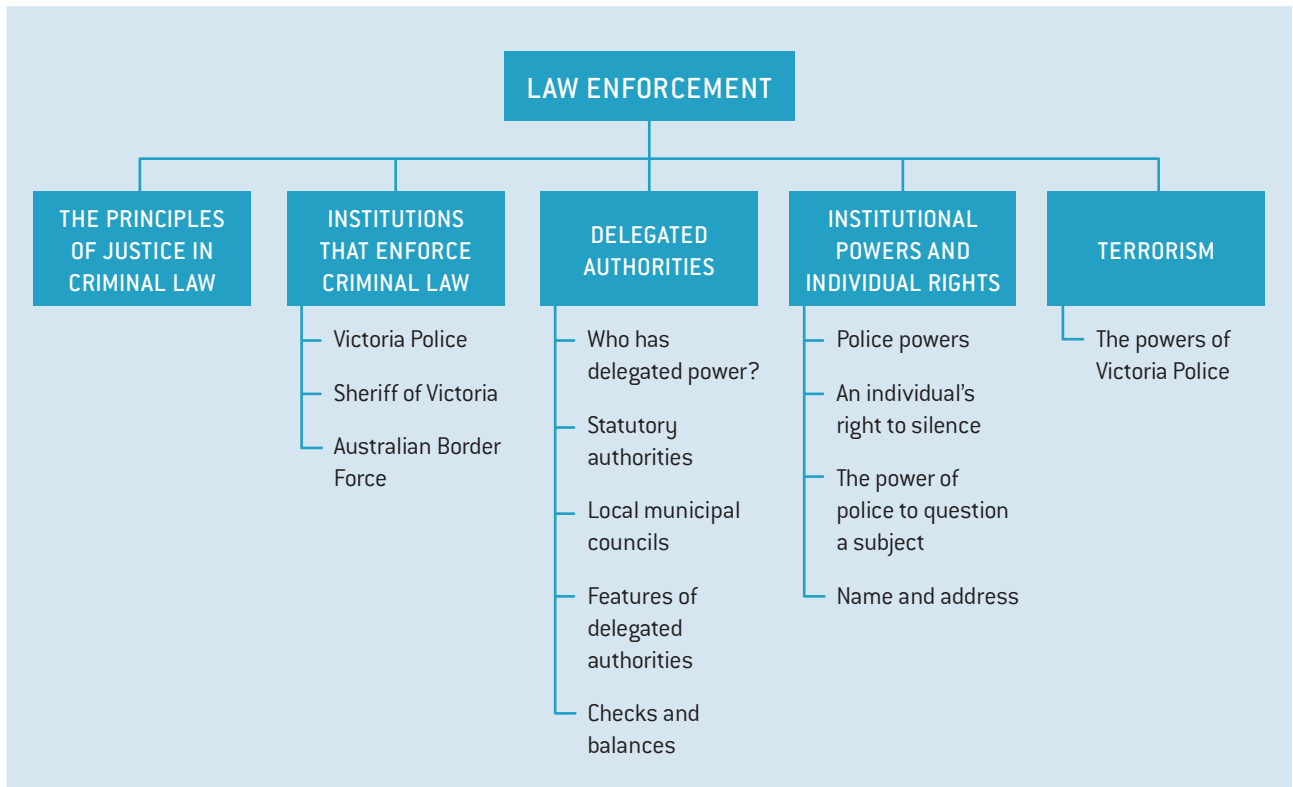
On completion of this chapter the student should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > the principles of justice: fairness, equality and access
- > institutions that enforce criminal law, such as the police and delegated bodies
- > the balance between institutional powers and individual rights
- > two recent criminal cases and for each case:
 - an overview of the charges and the central facts of the case
 - courts that may be or were involved
 - sanctions that could be or were imposed and their appropriateness
 - factors that may be or were taken into consideration in sentencing
 - possible avenues of appeal
 - the extent to which the principles of justice could be or were achieved

KEY SKILLS

- > define and use legal terminology
- > describe the institutions that enforce criminal law
- > discuss the principles of justice in relation to the enforcement of criminal law and sanctions
- > research, analyse and apply information in relation to criminal law and two recent criminal cases
- > analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases



KEY TERMS

bail	The practice of allowing an accused person to be released from custody (sometimes with conditions) between the date of being charged and the court hearing
caution	A warning to suspects of their rights before the suspect is questioned
control order	A court order preventing association or regulating the use of the internet or a mobile phone; it can last for 12 months and have conditions attached
delegated authorities	Bodies that are subordinate to parliament and can make and enforce the law
delegated legislation	Laws made by bodies or authorities that are subordinate to parliament
forensic procedure	A procedure whose result will tend to confirm or disprove the suspect's involvement in an indictable offence
incriminate	Provide evidence of involvement in a crime
local council	Democratically elected body that represents a local area and can make local laws
police caution	A warning for an offence not involving a conviction or court appearance
preventative detention order	A court order that allows police to arrest, search or seize items or evidence associated with a terrorist act
Protective Services Officers	Uniformed and armed security and transit officers with the power to arrest, search and apprehend
right to silence	No person can be compelled to testify against themselves or to answer police questioning, except for providing their name and address
statutory authority	An independent government body that has the power to make rules or regulations
summons	An order to appear in court to defend one's charges
terrorism	An act or threat intended to advance a political, ideological or religious cause by coercion or intimidation
warrant	A court order that gives police permission to carry out their duties, such as making an arrest or searching property

Justice means providing a fair hearing as well as due process before, during and after the trial, and is based in fairness, equality and access.

THE PRINCIPLES OF JUSTICE IN CRIMINAL LAW

We know from Chapter 2 that justice can mean different things to different people.

Whatever your definition of justice, our society aims to allow all individuals to achieve the three basic principles of fairness, equality and access.

The principles of justice in criminal law are primarily focused on processes, procedures and making sure that our legal system provides a fair hearing, as well as due process before, during and after the trial. The principle of *fairness* ensures that all are treated impartially without fear or favour. *Equality* provides the safeguard that all are treated in the same way with the same status, rights, and opportunities. *Access* means that there are a range of methods and institutions to ensure all have the means or opportunity to attain dispute settlement.

HAVE YOU...	YES / NO / UNSURE
Ever received a letter requesting that you give evidence in court?	
Seen a police presence during a rally or protest?	
Used ink to make a copy of your fingerprints?	
Been asked for your name and address by police?	
Considered whether a terrorist act could happen where you live?	
Seen a car with its wheels clamped?	
Returned from overseas travel and had your luggage searched at the airport?	
Read any of the specific laws to your local council?	
Applied for a learner's permit through VicRoads?	

9.1 The principles of justice through the criminal justice process

	FAIRNESS	EQUALITY	ACCESS
PRE-TRIAL	Legal rights and protections such as the right to silence or legal representation, open and public hearings, presumption of innocence and the burden and standard of proof	Natural justice and equal opportunity for the victim and the accused, police investigations counter-balanced with individual rights and protections, criminal processes such as bail or remand, committal procedures and direction hearings	Access to a number of complaints bodies such as the Office of Police Investigation, the Ombudsman, government departments and municipal councils
TRIAL	Legal rights and protections such as the right to trial by jury and an independent arbitrator	Criminal processes such as the opportunity to cross-examine and challenge evidence	Access to a range of courts such as the Drug or Koori courts, as well as the Neighbourhood Justice Centre Court
POST-TRIAL	Legal rights and protections, such as the right to rehabilitation or appeal	The use of sentencing hearings to ascertain culpability	Access to a range of rehabilitation programs such as alcohol and other drug treatment programs, family violence or mental health programs, or a range of education, skills and training programs

INSTITUTIONS THAT ENFORCE CRIMINAL LAW

There are a number of institutions or bodies that enforce criminal law. Areas of criminal law include a range of crimes against the community, persons, property, public order, security and justice. These crimes can be investigated by agencies or bodies at the local, state and federal level. The same also exists for bodies that can punish and enforce these laws.

	LOCAL	STATE	FEDERAL
POLICING AND ENFORCEMENT	By-laws officer Government department officials	Victoria Police Sheriff's Department Department of Corrections (including prisons)	Federal Police Border Force
COURTS	Depending on the offence, most matters will be heard in the Magistrates' Court	Children's, Coroners, Magistrates', County and Supreme courts	Federal Circuit Court of Australia and Federal Court

9.2 Institutions that enforce criminal law

VICTORIA POLICE

Victoria Police was established on 3 January 1853. Back then it consisted of 875 policemen, protecting a population of 168 000. Victoria Police now serves over 6 million people in the state, monitors 23 000 kilometres of roads and receives over 900 000 calls for assistance each year. Victoria Police employs more than 17 670 staff, including police, public servants, forensic officers, Protective Services Officers and Police Custody Officers in 331 police stations. Its services are available to the community 24 hours a day, seven days a week and costs the community just over \$2.5 billion per year.

Victoria Police operates under the *Victoria Police Act 2013* (Vic), which substantially repealed the *Police Regulation Act 1958* (Vic) in order to modernise the law relating to the police. The Chief Commissioner of Victoria Police reports directly to the Minister for Police. However, the Chief Commissioner also works closely with several other ministers, such as the Ministers for Prevention of Family Violence, Emergency Services, Roads and Road Safety, the Attorney-General, the Premier and the Treasurer.

Some 159 Victoria Police officers have lost their lives in the line of duty.

The role of Victoria Police is to serve the Victorian community and uphold the law so as to promote a safe, secure and orderly society.

VICTORIA POLICE PERSONNEL	NUMBERS
Police	13 188
Police recruits	109
Protective Services Officers (PSOs) (security and transit)	1308
PSOs in training	44
Reservists	2
Police Custody Officers	214
Victorian public servants	2804

9.3 Victoria Police personnel numbers, as of June 2016

CODE OF ETHICS



I uphold the right in my role within the Victoria Police Force by acting impartially, with integrity and by providing service excellence to everyone.

The role of the police in enforcing the law

The police force is directly responsible for maintaining law and order in the community. Their role is to serve the community and uphold the law so as to ensure social cohesion—in other words, to promote a safe, secure and orderly society. The police do not make laws; they assist in enforcing them. A police officer does not have the power to send someone to prison. The courts decide the innocence or guilt of a person charged with an offence after hearing the evidence of both parties: the prosecution and the accused.

In Victoria, the general functions of police are set out in section 9 of the *Victoria Police Act 2013* (Vic). These functions include:

- a. preserving the peace
- b. protecting life and property
- c. preventing the commission of offences
- d. detecting and apprehending offenders
- e. helping those in need of assistance.

Preserving the peace

Victoria Police's purpose is to serve the community and uphold the law so that members of the community can undertake their normal lives confidently, safely and without fear of crime. Examples of this occur in demonstrations, where police preserve the peace by directing protesters' movements in order to limit the impact on the community. In neighbourhood disputes, police often assist in regulating parties that play loud music and become rowdy. These activities allow for peaceful conduct.



Protecting life and property

Victoria Police has a number of departments related to the protection of life and property. The Air Wing, Water Police, Rescue Squad and Missing Persons Squad all have specialised training, not only to enforce the law but to protect and preserve life and safety.

Victoria Police produce a number of fact sheets in a range of languages designed to deter crime and keep the community safe. Fact sheets exist on a range of topics, from preventing theft of and from motor vehicles to preventing burglaries while at home or away on holiday. They also provide a range of strategies to protect personal safety at home or when out at night.

Preventing the commission of offences

Police officers carry out their duty of preventing the commission of a crime in three main ways:

- prevention of crime (for example, by patrolling places where crime is likely to occur), or by being a visible presence, such as having Protective Services Officers at train stations.

- deterring people from committing crimes (for example, by trying to make sure that crime doesn't pay—that criminals are caught and, if found guilty, are punished by the courts). This can involve setting up taskforces to investigate specific or targeted crimes such as violent aggravated burglaries (home invasions) or carjacking.
- educating people (for example, by providing advice to people on how to protect themselves and their property through fact sheets). The police prevent crime by working with groups such as Neighbourhood Watch. The Kids' Site on the Victoria Police homepage provides primary school students with information about how to stay safe.

Detecting and apprehending offenders

Police officers carry out their duty of detection and apprehension of offenders in a number of ways:

- Most of the resources of Victoria Police are used to detect and investigate crime. Sometimes offenders are caught in the act, such as when drivers are caught speeding or are breathalysed and found to be over the legal blood alcohol limit. Police officers are often called to the scene of a crime by the victim or by the person who discovers the crime.
- When a crime has been reported, the police carry out an investigation, which may entail interviewing witnesses and victims, investigating and searching the scene where the crime took place, and carrying out forensic tests.
- Once a person is suspected of committing a crime, how it is prosecuted—in other words, the procedure followed—will depend on the type of offence committed.
 - > For minor offences, the police may use their discretion to give the person a **police caution**. This option is used for first-time juveniles and certain offenders caught stealing from shops.
 - > In various traffic offences, the police may impose an on-the-spot infringement notice. This means that the offender has the option to pay a fine or have the matter heard in court.
 - > In most criminal offences, the police, after completing the necessary investigations, can deal with the offence by bringing an action against the offender in a court. Once a person is charged with a crime, the police are responsible for much of the paperwork involved and attend court to give evidence.



POLICE CAUTION: a warning for an offence not involving a conviction or court appearance

Helping those in need of assistance

In many cases a police officer's job goes beyond law enforcement. The police will assist in emergencies (for example, saving a drowning swimmer), at accidents (for example, rescuing trapped miners in a shaft) and at fires, floods and other disasters. They can assist in the orderly entry and exit at major sporting events. Victoria Police have also embraced strategies to ensure that victims and those in need of assistance are treated with dignity, courtesy and respect, and provided with appropriate information and support in a timely manner.

Protective Services Officers

Protective Services Officers (PSOs) are a group of uniformed and armed officers who have been given a broad range of powers to apprehend, arrest, search and fine people. PSOs work in designated places such as train stations, courts and government buildings.

PROTECTIVE SERVICE OFFICERS: uniformed and armed security and transit officers with the powers to arrest, search and apprehend



PSOs have the following powers:

- to arrest suspects and to be able to use reasonable force when doing their job
- to ask for a name, age and address if they believe a minor has been drinking, and to confiscate their alcohol
- to search persons, bags and vehicles for weapons or spray-paint cans
- to direct a person to move on from a location
- to fine individuals for a range of offences.

The main difference between a PSO and a police officer is basically where they work—PSOs work only in a designated area. For example, a PSO could not investigate the crime of burglary at a residential address. They could, however, investigate a break and enter at a railway station.



SHERIFF'S OFFICE VICTORIA

Sheriff's Office Victoria operates under the Department of Justice & Regulation. The Sheriff is an officer of the Supreme Court and delegates his powers and functions to Sheriff's officers.

Sheriff's officers enforce warrants and orders issued by Victorian courts for both criminal (arising from unpaid fines) and civil (arising from orders made following civil disputes) matters. Sheriff's officers use a variety of means to locate people named on warrants. Once they have tracked down a defendant they demand payment of outstanding debt.

If the defendant does not pay, or take any action to resolve their outstanding matters, Sheriff's officers are authorised to exercise a range of enforcement powers, including:

- **Wheel clamping** - Sheriff's officers are able to clamp a vehicle anywhere, anytime, with prior notice

The Sheriff, an officer of the Supreme Court, is responsible for enforcing court orders and warrants.

- **Non-renewal of vehicle registration** – VicRoads can be directed to prevent the renewal of vehicle registration. This can also impact the selling of any vehicle.
- **Seizure and sale of assets** – the Sheriff's Office Victoria can seize and sell assets to pay the debt.
- **Arrest** – If a person fails to pay the debt, they can be arrested and face the possibility of imprisonment as a sanction of last resort.

As of 31 December 2017, there will be significant changes to Victoria's infringement system and Sheriff's Office Victoria when the Fines Reform Act 2014 (Vic) commences.

What happens when the Sheriff contacts a defendant?

A **warrant** is issued by the courts to the Sheriff of Victoria. A warrant gives the Sheriff authority to act against a person who has not complied with a court order.

If a warrant has been issued against a defendant, they may be contacted by a Sheriff's officer:

- at home or work
- during a road block operation with Victoria Police, and
- during an automatic number plate recognition technology operation.

The Sheriff's officer will initially discuss the defendant's payment options in relation to their outstanding warrants. If the defendant does not pay, a Sheriff's officer will serve the defendant with a Seven Day Notice and may apply a wheel clamp to their vehicle. A Seven Day Notice is a last chance warning. It details the defendant's rights and obligations and gives 7 days to take action and settle any fines.

Sheriff activities

Sheriff's officers also stage targeted operations (such as roadblocks) to identify people with outstanding warrants. These operations regularly result in the identification of a large number of defendants.

Roadblock operations

Roadblock operations can include multi-agency participation involving VicRoads, Victoria Police and the Victorian Taxi Directorate. During these operations, Sheriff's officers canvass a large number of vehicles, and in doing so identify those that are connected to outstanding warrants.

Automatic Number Plate Recognition technology

Sheriff's officers use Automatic Number Plate Recognition (ANPR) technology to identify vehicles registered to owners who have outstanding warrants. These cameras take images of number plates and compare these against a list of vehicles with outstanding warrants. If there is a match, the software notifies the Sheriff's officer and records the time, date, location and number plate.

AUSTRALIAN BORDER FORCE

Australian Border Force was established in 2015 with the mission to protect Australia's border and manage the movement of people and goods. This Commonwealth department integrated both the Australian Customs and Border Protection Service and the Department of Immigration and Border Protection. Australian Border Force has the power to enforce customs, immigration and border protection.

WARRANT: a court order that gives police permission to carry out their duties, such as making an arrest or searching property

Australian Border Force is a Commonwealth department charged with protecting Australia's borders and managing movement across them.



Dozens caught in Sheriff clampdown

Rob McLennon

A blitz at Mount Duneed has uncovered more than 40 fine evaders with close to 250 outstanding warrants between them. Police and Sheriff's officers yesterday wheeled out their number plate recognition equipment

on Torquay Road. 42 drivers with \$150 000 in outstanding fines were caught during the joint operation. Victorian Sheriff Brendan Facey says three drivers had their wheels clamped.

Source: Bay 92.3 News
Online, 7 December 2016



The Australian Border Force brought together all existing operational border, investigations, compliance, detention (facilities and centres) and enforcement functions. Policy, regulatory and corporate support for the Australian Border Force are delivered by the Department. Significant service and enforcement functions performed by the Australian Border Force include:

- facilitating the lawful passage of people and goods
- investigations, compliance and enforcement in relation to illicit goods and immigration malpractice; onshore detention, removals and support to regional processing arrangements.

Officers in the Australian Border Force are operationally focused, uniformed and part of a disciplined enforcement body undertaking functions across our operating environment—patrolling our air and seaports, remote locations, mail and cargo centres and Australia's extended maritime jurisdiction.

Australian Border Force comprises two groups:

- The Operations Group has responsibility for all operational activity relating to the management of travellers, goods and cargo throughout the border continuum.
- The Support Group has responsibility for providing planning, support and specialist services to ensure operational continuity across the border continuum and the operational management responsibility for detention services management, including health, detention estate management, and regional processing and settlement.

Source: www.border.gov.au



Detector Dog Program— Working with dogs to help protect Australia

The Australian Border Force Detector Dog Program plays a significant role in helping to protect Australia's borders from the importation of prohibited and restricted goods. Detector dogs are deployed for their unobtrusive and non-discriminatory broad screening detection capability. Their strength is their ability to screen large volumes of people and goods quickly and efficiently. They provide an excellent complementary detection capability alongside technologies such as x-ray and trace particle detection.

Detector dog teams are trained to search in a range of challenging border environments. They are routinely tasked to search luggage, parcels, mail, air and sea cargo, cargo containers, vessels, vehicles, aircraft, structures and people.

Australian Border Force detector dogs also provide operational support to the Australian Federal Police, state and territory police and other government law enforcement agencies.

Program training is very technical and challenging, particularly given that novice handlers are trained alongside novice dogs. In total, each detector dog team undergoes a minimum of seven months training before



they graduate. Detector Dog Program training focuses on developing independent search and decision making behaviour in all trained dogs. Each dog and handler is taught the proper search sequence when searching freight, mail, luggage, vehicles, vessels, aircraft, premises and people. Detector dogs are trained to detect the following substances/articles:

- narcotics
- firearms
- explosives
- currency
- tobacco.

Source: www.border.gov.au

DELEGATED AUTHORITIES

Parliament does not have the time, expertise or local knowledge to make and enforce all the laws needed in the community. To overcome this problem, parliament delegates the power to make laws to a variety of **delegated authorities** or subordinate bodies. Parliament will do this by passing an Act (known as an enabling or parent Act). The enabling Act gives another body the power to make rules and regulations, which are known as **delegated legislation**. Although parliament delegates the authority to make rules, it has the power to check the rules being made: if necessary, parliament can override delegated legislation.

WHO HAS DELEGATED POWER?

Both the Commonwealth and Victorian Parliaments are able to delegate law-making powers to the following authorities:

- the Federal or state Executive Council
- federal or state government departments

DELEGATED AUTHORITIES: bodies that are subordinate to parliament and can make and enforce the law

DELEGATED LEGISLATION: laws made by bodies or authorities that are subordinate to parliament

- federal or state statutory authorities.
- local municipal authorities or councils.

Executive Council

The **Executive Council** is made up of the Governor-General (federal) or the Governor (state) and two to five ministers. The Council meets regularly and gives approval to make regulations on the recommendation of ministers. The Victorian Executive Council meets weekly.

Youth Justice Centre at Barwon Prison

As a result of an increase in youth crime, and the issues of unruly behaviour by some youth offenders in detention facilities, the Victorian Government established a Youth Justice Centre at Barwon Prison. Approval by the Executive Council gave the Minister in charge the power to move youth offenders directly from Parkville Youth Detention to Barwon Prison, without having to go through Parliament.

Children, Youth and Families Act 2005

ESTABLISHMENT OF A REMAND CENTRE

Order in Council

The Administrator, as the Governor's deputy, with the advice of the Executive Council under section 478(a) of the **Children, Youth and Families Act 2005** establishes as a remand centre a specified area at Her Majesty's Prison Barwon, 1140 Bacchus Marsh Road, Anakie, shown hatched in the attached plan of survey.

This Order comes into effect on the date it is published in the Victoria Government Gazette.

Dated 29 December 2016

Responsible Minister:
JENNY MIKAKOS MP
Minister for Families and Children

ANDREW ROBINSON
Clerk of the Executive Council

Order in Council

Government departments

Government departments are responsible for the administration of particular areas of government policy. Each department is staffed by public servants and is normally headed by a department secretary who is responsible to the Minister. The parliament sets out the general policy. The department is responsible for the day-to-day administration of the policy. To put these policies into practice, government departments need to make rules and regulations.

Federal government departments include the Australian Border Force and the Australian Taxation Office. State government departments include the Department of Justice and the Department of Health.

Border Watch

Border Watch is an example of how a government department obtains information from the community. Protecting and enforcing Australia's borders is a major priority for the federal government.



Border Watch is a programme operated by the Australian Border Force that enables the community and industry to report suspicious behavior relating to border protection. Community and industry play an important role in supporting the work of the department by being the eyes and ears on the ground, helping to protect Australia from illicit and dangerous goods and exploitation. The information provided could be the missing piece of the puzzle the department needs to prevent illegal activity at Australia's border.

Have you seen something suspicious?

If you have seen something suspicious, your information could be the key piece of the puzzle that helps the Australian Border Force detect and seize dangerous drugs or prohibited imports such as illegal firearms. By reporting suspicious activities, you actively help protect Australia's border.

You can make a report to Border Watch using an online form. You can choose to remain anonymous. If you are unable to submit an online form, you can contact us on the 1800 number.

WHAT TO REPORT

The Australian Border Force are interested in information about:

- importation of illicit drugs and precursor chemicals
- people smuggling
- terrorism
- illegal and dangerous weapons
- performance and image enhancing drugs [steroids]

- illegal import or export of currency
- illegal import and export of fauna
- illegal pornography and child abuse images
- counterfeit goods.

WHAT TO LOOK OUT FOR

SUSPICIOUS BEHAVIOUR

The person is:

- overly nervous, evasive or refusing reasonable assistance
- attempting to conceal their identity
- preferring to settle accounts early
- enquiring about Australian Border Force, police or other law enforcement agencies' activities.

SUSPICIOUS ACTIVITY

The person is:

- interested in specific or unusual locations
- insisting on paying in cash only
- making unusual purchases
- carrying unusual equipment or hardware.

SUSPICIOUS GOODS

The goods are:

- misdescribed, misspelt or have incorrect information on them
- labelled in an obscure manner
- damaged, modified or tampered with
- too heavy or too light for the given goods description, or
- emitting an unusual odour.

Source: www.border.gov.au

STATUTORY AUTHORITIES

A **statutory authority** is a body that has been established by an Act of Parliament. Statutory authorities may be businesses that are independent (but government owned and controlled) regulatory bodies. Australia Post is a federal statutory authority; it performs an essential public service but is structured as a business. VicRoads is a state statutory authority; it sets regulations governing licencing and registrations of vehicles. Other examples of statutory authorities are the Victorian Sheriff's Office, Victorian Law Reform Commission and WorkSafe Victoria. Statutory authorities are delegated the power to make rules.

Victorian Sheriff's Office

The Sheriff's Office is an example of the impact of a statutory authority and the powers it is given by legislation to carry out its function. Section 1 of the *Sheriff Act 2009* (Vic) outlines the legal basis for the Sheriff, the deputy Sheriff and Sheriff's officers,

STATUTORY AUTHORITY: an independent government body that has the power to make rules or regulations

along with their functions, powers and duties. The Act uses the term ‘instrument of delegation’, meaning that it has been set up as a statutory authority under the power of the Department of Justice.



SHERIFF ACT 2009 (VIC)

Section 15 – General power to arrest persons

The Sheriff may arrest—

- (a) a person named or described in a criminal warrant that authorises that person’s arrest;
- (b) a person as provided by the relevant court and enforcement legislation.

Section 18 – Power to enter and search premises in order to arrest person

- (1) This section applies if the Sheriff suspects that a person named or described in a criminal warrant that authorises the arrest of that person is at particular premises.
- (2) In the execution of a warrant that authorises the arrest of the person, the Sheriff may, in accordance with the relevant court and enforcement legislation—
 - (a) Break and enter the premises at which the person is suspected to be for the purpose of searching for that person; and
 - (b) after entering those premises, search for that person in the premises for the purpose of arresting the person.

Section 47 – Offence to resist Sheriff, deputy Sheriff, Sheriff’s officer or justice employee

A person must not resist the Sheriff, the deputy Sheriff, a Sheriff’s officer or an appropriately trained justice employee in the execution of a warrant or other process.

Penalty: 6 months’ imprisonment.

LOCAL MUNICIPAL COUNCILS

In Victoria, the *Local Government Act 1958* sets out the powers and functions of a **local council** and municipality. Local governments are elected representatives of a local area.

They have the power to make local laws that regulate affairs within their own areas.

These laws cover issues relating to garbage disposal, swimming pools, libraries, parks and recreation facilities, health and preschool centres, car parking and street cleaning, building construction, the registration and control of domestic pets and more. Activities such as the use of skateboards or skate parks can also be regulated by local councils.



CONSUMPTION OF LIQUOR LOCAL LAW (2012)

Purpose of the Local Law

The purpose of the Local Law is to:

- regulate and control the consumption of alcohol in designated areas, and prohibit the possession of alcohol in other areas, within the Municipal District;
- protect against behaviour which causes detriment to the amenity and environment of the Municipal District;
- protect the community interest;

LOCAL COUNCIL: democratically elected body that represents a local area and can make local laws

- provide for the enforcement of this Local Law, including issue of infringement notices, noting that enforcement of this Local Law would usually be the role of members of Victoria Police;
- provide generally for the administration of Council's powers and functions;
- lead and educate the public as to what is, and what is not, appropriate behaviour;
- provide generally for the peace, order and good government of the Municipal District.

General Purport of the Local Law

The Local Law will achieve its objectives by a number of measures including:

- prohibiting the consumption of liquor or the possession and control of liquor other than in a sealed container in specified locations (described by reference to maps in the Local Law), on a road or Council land (including while in a vehicle);
- prohibiting the consumption of liquor or the possession and control of liquor other than in a sealed container in specified locations (described by reference to maps in the Local Law), on a road or Council land (including while in a vehicle) between certain nominated hours;
- applying specific controls to the consumption and the possession of liquor on Council land or a road for the New Year and Australia Day periods;
- identifying exemptions from the prohibitions, such as in licensed premises, participation in a function or an activity for which the Council has given a written exemption or a permit has been granted by the Council, or camping sites on the foreshore provided the occupants possess a current permit; and
- providing for the administration and enforcement of the Local Law through a permit system and creating offences for contravention of certain provisions in the Local Law.

Enforcement of local law

- An authorised officer may impound and dispose of any Liquor which is in the possession or control of a person, contrary to this law.
- Consumption or possession of Liquor during the New Year's Eve, Australia Day period or in a designated area between 8.00pm to 8.00am is contrary to the Local Law and carries the consequence of 1 Penalty Unit for the first offence and 2 penalty units for the second offence.
- Failing to give name and address to an Authorised Officer carried the consequence of 10 Penalty Units.

A copy of the Local Law may be inspected at any of the Shire's Customer Service Offices during office hours or the Shire's website at www.mornpen.vic.gov.au.

Source: www.boondara.vic.gov.au

APPLY YOUR UNDERSTANDING

STRUCTURED QUESTIONS—CONSUMPTION OF LIQUOR LOCAL LAW

The Mornington Peninsula is a popular holiday destination and uses the *Consumption of Liquor Local Law* to regulate alcohol consumption. Read through this law, then answer the following questions.

1. Summarise the purpose of this local law.
2. What community value does this local law represent?
3. Why might the Mornington Peninsula Shire state a number of measures in this local law?
4. Find out how much 1 penalty unit is worth and explain the effectiveness of enforcing this local law through penalty units.
5. To what extent is a law such as this aimed at regulating alcohol consumption on public holidays such as New Year's Day and Australia Day? In your response, speculate on the reasons why the local council allows the consumption of alcohol with a few exemptions.

FEATURES OF DELEGATED AUTHORITIES

Advantages of delegated authorities

There are several key benefits or strengths of delegated authorities:

Delegated legislation means that laws can be made quickly and within specific areas, and can ease the workload on parliament.

- It is more efficient for bodies with expertise in a particular area to make some rules and regulations (such as VicRoads and the rules about licencing). It also allows for greater community participation in law-making (such as Border Watch).
- It eases the workload of Parliament. Parliament does not have time to fully debate each rule or regulation needed in our community.
- Changes can be implemented quickly. Delegated bodies deal with specified areas on a daily basis and may be more responsive to the changing needs of the community (such as local councils).
- It recognises that different geographic areas have special and particular requirements (for example, the Shire Council of Mornington will have different needs to the City of Darebin).

Disadvantages of delegated authorities

There are several main problems or weaknesses with delegated authorities:

- Other than local councils, people who make delegated legislation have not been elected, so delegated authorities are often seen as undemocratic.
- It is difficult to know who is making these laws and when these laws have been changed.
- There may be more than one body making delegated legislation about a particular area or issue, which can lead to fragmentation and confusion. For example, local laws relating to the regulation of tree conservation can differ between different councils.
- Although Parliament gives these bodies the power to make laws, it does not have the time to exercise control over all rules and regulations made. Some bodies do not have to consult with the public before making rules. There may be limited opportunity for public input or scrutiny.

CHECKS AND BALANCES ON DELEGATED LEGISLATION

Parliament does have established checks on the use of delegated authorities. Controls placed by Parliament on the use of delegated legislation include:

- *Regulatory impact statements.* This means that before a regulation is made, a report on the economic and social costs and benefits of the regulation must be prepared. This may include community consultation.
- *Tabling in parliament.* All regulations must be tabled within a specified period of time. All members of parliament receive a copy of every regulation.
- *Ministerial responsibility.* The minister responsible for the particular area can be asked questions in parliament about the use of delegated power.



Barwon Prison

- *Scrutiny committees.* Parliamentary committees are responsible for checking regulations with the use of independent legal advice from parliamentary counsels (government lawyers).
- *Regulations are printed in the Government Gazette.* In theory, this allows an opportunity for those affected by the regulation to make a comment, such as the 'Orders in Council' on establishing a Youth Justice Centre at Barwon Prison.

- *Sunset clause.* All regulations are revoked (ended) after 10 years. Local councils are elected bodies and councillors face their communities for election every four years. This means that they must update their regulations so they maintain currency with community attitudes and values.

Further checks and balances in Victoria include:

- *The ombudsman.* This is an independent public servant who investigates complaints about administrative decisions taken by government departments, statutory authorities and local councils. (Other areas, such as telecommunications or banking, also have an ombudsman who investigates complaints related to that particular field.)
- *Court challenges.* Delegated legislation can be challenged in the Supreme Court as it may be *ultra vires*: that is, beyond the power of the body that made the delegated legislation. The court can provide an independent ruling on the nature of this dispute.
- *Adverse media publicity.* When a rule or regulation affects an individual or community, sometimes the media publicity shed on the subject creates changes to these laws (such as the implementation of Skyrail, which impacted on local communities in some south-east suburbs of Melbourne).

APPLY YOUR KNOWLEDGE

STRUCTURED ASSIGNMENT—YOUR LOCAL COUNCIL

Find out more about the work of your local shire or council. Find its website and highlight examples of the different types of laws that it has made in your local area. As part of your work you may also wish to refer to articles produced by your local newspaper.

Prepare a poster that includes the following:

- a map showing the geographic area covered by your local council or shire
- an explanation of how the local council or shire is elected
- a list of local councillors and a brief profile statement for each
- at least three laws made by the local council or shire and for each include these points:
 - > a brief explanation of the law and the penalties involved
 - > suggested reasons that the law may be needed in your area
 - > suggested reasons that the law is made by a local council rather than Parliament.

Local government listings can be found at www.vic.gov.au/government-economy/local-councils.html



THE BALANCE BETWEEN INSTITUTIONAL POWERS AND INDIVIDUAL RIGHTS

POLICE POWERS

When dealing with the police, it is important to remember that all people have rights and responsibilities. The freedom of the individual is an important principle in our society. At the same time, the police need the power to prevent and investigate crime. Laws that set out the powers of the police attempt to balance the need for police to prevent and investigate crimes while preserving the civil rights of individuals. Table 9.4 lists a summary of the powers of the police and the rights of individuals during criminal investigations.

The police have significant powers to enforce the law, but individuals have rights too, which must be respected.

9.4 Police powers and the rights of individuals

POLICE POWERS	RIGHTS OF INDIVIDUALS
Questioning	Presumption of innocence
Demanding name and address	Right to silence
Searches in a public or designated area or on private property	Right to be cautioned by the police
Fingerprinting	Right to be informed of the charge
Forensic procedures such as photos, ID parades, finger scan and body samples	Request police officer's name, rank, identification number and station
Arrest with or without a warrant	Right to communicate with a lawyer or friend
Seize and impound vehicles under hoon laws	Right to refuse an ID parade
Issue barring orders	Right to an interpreter
Issue 'move-on' directions	Right to see and read any written statements recorded during the police interview, as well as obtain a copy
Issue an 'on-the-spot fine'	Right to refuse to accompany a police officer to the police station, unless under arrest
Summons	Right to refuse to provide evidence (such as voice prints, photos and blood samples) unless under arrest or by court order

Benjamin Franklin stated in 1785 that it is better to let the guilty go free than to punish the innocent. Our legal system and lawmakers make every effort to balance the institutional powers provided to the police and law enforcement agencies with the right of individuals to be protected from going to jail unfairly. Police will often argue that the community's need to be protected from increased criminal activity cannot be met unless they are given more power. Civil liberties groups and lawyers argue that police already have sufficient power, and that any increase in these powers would seriously erode or limit the liberties of individuals.

The issue of talking with the police provides an example of how our lawmakers balance the needs of the police to investigate and the rights of the individual.

AN INDIVIDUAL'S RIGHT TO SILENCE

A person is presumed innocent until proven guilty and cannot be made to provide information or evidence that could **incriminate** them. This right is recognised in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 25(1) states that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. No person can be compelled to testify against themselves or to confess to guilt. Other than giving their name and address, a person does not have to answer any questions put to them by the police, even if they are under arrest. The accused does not have to say a thing, as it is up to the police to prove the allegations. The law is designed to protect individuals.

In some situations, where police are investigating a matter of organised crime, the **right to silence** can be revoked by approval from the Supreme Court. An organised crime offence is defined as one that is an indictable offence in Victoria where certain conditions exist:

Individuals have a right to silence and cannot be forced to confess or to testify against themselves.

INCRIMINATE: provide evidence of involvement in a crime

RIGHT TO SILENCE: no person can be compelled to testify against themselves or to answer police questioning, except for providing their name and address

- two or more offenders are involved
- substantial planning and organisation is involved
- systematic and continuing criminal activity is apparent
- the purpose is obtaining profit, gain, power and influence.

In these circumstances there are some limitations on a person's right to silence. During the investigation, a suspect is not excused from answering questions or giving information on the grounds that they may incriminate themselves.



THE POWER OF POLICE TO QUESTION A SUSPECT

Police are entitled to ask questions as part of the investigative process. As a community, we expect the police to question suspects, witnesses and members of the community in order to solve a crime. Police are able to question a suspect for a 'reasonable time' before the suspect is released unconditionally, or on **bail**, or brought before the Magistrates' Court. If police have reason to believe that the suspect has or is about to commit a crime then, before they ask questions, they must give the person a caution about their rights.

BAIL: the practice of allowing an accused person to be released from custody (sometimes with conditions) between the date of being charged and the court hearing

CAUTION

If the defendant was caught in the act of committing a crime, the police would need to inform the defendant of the crime. If a defendant (Labrini) was charged with shop-stealing (theft), the police may use the following **caution**:

'Labrini, you are under arrest for theft. You are not obliged to say or do anything but anything you say or do may be used in evidence against you.'

The police will ask if Labrini understands what has occurred. They will also inform Labrini of her right to communicate with a friend or a relative to inform them of her whereabouts, and the right to communicate with a lawyer.

However, if the police wish to interview the defendant as part of their investigations for theft, the following caution may apply:

'I must inform you, Labrini, that you do not have to say or do anything but anything you say or do may be given in evidence. Do you understand that?' (Labrini must reply.)

'I must also inform you of the following rights.

You may communicate with or attempt to communicate with a friend or a relative to inform that person of your whereabouts.

You may communicate with or attempt to communicate with a legal practitioner.'

CAUTION: a warning to suspects of their rights before the suspect is questioned

Police have the power to question suspects and record their responses, so long as rules are followed.

If a person has been charged with an indictable offence, the police must record the caution and the response at the beginning of the police interview, usually on tape or video. This is not the case for a summary offence, as the police can write down the questions they ask and the defendant's responses. This information can then be used as evidence in court against the defendant. This protects both the police and the defendant. The defendant may ask for a copy of the recording. If the defendant does not understand English very well, they can request a qualified interpreter to assist them, at the expense of the police department.

If the police question a young person about their activities, they usually ask the person to accompany them to the police station. The young person does not have to go with them unless arrested. If that happens, the person must be told the offence with which they are charged. At the police station, a young person does not have to answer any questions, except for providing their name and address.



No person under the age of 18 years taken into custody should be questioned without a parent, guardian or independent person present, and the person is entitled to a copy of the taped record of interview. It is suggested that young people in this position should also obtain legal advice.

Young people have the right to make a phone call from the police station to a lawyer or friend. When questioned by the police, a young person who has been charged or detained has these rights:

- to communicate privately with a parent, guardian or independent person
- to call or attempt to communicate with a lawyer
- to have an interpreter, if one is needed
- to have been cautioned.

NAME AND ADDRESS

The powers of the police

Section 456AA of the *Crimes Act 1958* (Vic) provides police with the power to demand a person's name and address if they believe, on reasonable grounds, that any of the following situations occur:

- the person has committed or is about to commit an offence
- the person may be able to assist them in the investigation of an indictable offence
- the person is driving, and must produce their licence (this includes a car, boat or motor bike)
- the person is on public transport.

It is a criminal offence if a person refuses to provide their name or address or provides a false name and address to police, with a maximum of 5 penalty units.

An individual's rights

A person who is asked to give their name and address can request the police officer to give in writing their name, rank and place of duty.

A person may feel it necessary to cooperate with police, if they are questioned further. However, other than their name and address, the person does not have to answer any other questions. They can also request to speak to a lawyer if the questioning continues.

It is also a criminal offence for a police officer to refuse to provide their name, rank and place of duty, with a maximum of 5 penalty units.

Police have the power to demand a person's name and address if they believe they are involved in an offence.

Individuals must provide their name and address to the police if ordered, but they do not have to answer any further questions, and may request identifying details from police officers.

APPLY YOUR UNDERSTANDING

THE BALANCE BETWEEN INSTITUTIONAL POWERS AND INDIVIDUAL RIGHTS

1. Define the term ‘institutional power’.
2. Write a paragraph to explain the right to silence.
3. Describe the conditions required to revoke the right to silence. Discuss if you believe this is fair.
4. A person can be held in custody for only a ‘reasonable time’. Research the factors that determine what is reasonable in the *Crimes Act 1958* (Vic).
5. If police believe or have reason to believe that the suspect has or is about to commit a crime, then before they ask questions they must give the person a ‘caution’ about their rights. Discuss the importance of this caution for police questioning.
6. Evaluate the right to silence by discussing three arguments for and three against this right.
7. Provide examples of the ways young people are treated differently from adults in criminal law. Why are children and teenagers treated differently?
8. Using a ‘T’ table, compare the power of police to demand a person’s name and address with the rights of the individual. Ask your teacher to explain how ‘T’ tables work, if you’re unsure.

Going further

9. Prepare a poster or a booklet for young people on their rights when dealing with the police. Where appropriate, use information as well as pictures, images or photos to illustrate the following police powers:
 - > searches
 - > fingerprints
 - > forensic procedures
 - > arrest
 - > seize and impound vehicles under hoon laws
 - > other police powers.

TERRORISM

The ultimate jurisdictional responsibility of **terrorism** falls within the Commonwealth Government’s power. However, both the Victorian and Commonwealth Governments have made complementary legislation covering this area, as the crime of terrorism may cross a number of boundaries. The Commonwealth has laws against terrorism as part of the *Criminal Code Act 1995* (Cth) (Parts 5.3 and 5.5), and Victoria has the *Terrorism (Community Protect) Act 2003* (Vic) to cover those areas in Victoria.

When we hear the word ‘terrorism’, we generally think of a person or a group of people using (or threatening to use) violence against others to achieve their own political or religious advantage. In recent years, that violence often involves guns, bombs or other weapons designed to kill or hurt a number of people at one time.

TERRORISM: an act or threat intended to advance a political, ideological or religious cause by coercion or intimidation

The Commonwealth Government has ultimate responsibility over responses to terrorism, but Victoria has its own laws and powers that apply to terrorism offences.

Source: *Criminal Code Act 1995* (Cth)

A terrorist act is defined under Australian law as:

an act or threat, intended to advance a political, ideological or religious cause by coercing or intimidating an Australian or foreign government or the public. This action must cause serious harm to people or property, create a serious risk to the health and safety to the public, or seriously disrupt trade, critical infrastructure or electronic systems.

The Australian Government has a system to indicate the national terrorism threat level. Currently it is at probable:

not expected (green)
possible (blue)
probable (yellow)
expected (orange)
certain (red)

THE POWERS OF VICTORIA POLICE UNDER TERRORISM LAWS

Stop, search and seizure powers

In Victoria, the police can ask a court to let them do things to stop a terrorist act. The police can:

- demand your identification
- stop and search you, your car or house
- direct you to leave somewhere or stay somewhere
- take anything connected with a terrorist act.

Victoria police have search and seizure powers pertaining to terrorism investigations, and can ask courts to issue control orders or preventive detention orders on suspects.

The police can search your home without your knowledge if they reasonably suspect that a terrorist act will be or has been committed. The police must apply to the Supreme Court for a warrant to carry out the search. The court has to be convinced that terrorism is involved and that the activity is not simply a protest or industrial action. The police must report back to the court within seven days of the search.

Control orders

The police can ask a Commonwealth court for a **control order** if they think you are training with a listed terrorist organisation, or that the order will stop a terrorist act from happening.

- Control orders can stop you from seeing certain people and doing certain things, like leaving Australia or going to a political meeting.
- The order can say you have to wear a tracking device and are not allowed to use the internet or a mobile phone. You may have to:
 - > regularly report to someone, such as the police
 - > be photographed and fingerprinted
 - > have counselling.

The order can last for up to 12 months. The accused may contact a lawyer to get a copy of the order.

A control order cannot be made against someone under 16. If they are aged 16 to 18, a control order can only apply for up to three months.

CONTROL ORDER: a court order preventing association or regulating the use of the internet or a mobile phone; it can last for 12 months and have conditions attached

Preventative detention order

The police can ask for a **preventative detention order** if they think you are involved in a terrorist act. They can also ask for this order if they think you have something connected with a terrorist act. In both cases, they must believe that the order will stop the terrorist act from happening or will help them get evidence of the act.

There are two types of preventative detention orders:

- interim preventative detention order—this means that you can be held by the police for 48 hours
- continued preventative detention order—this means you can be held for up to 14 days.

A preventative detention order means the police can:

- take you into custody
- search you if they reasonably suspect you are carrying a 'seizable' item or evidence of a terrorist act (e.g. a gun). The police can take anything they find
- ask for the name and address of any person who can give them information that will allow them to detain you
- search any place at any time if they reasonably believe you are there
- use reasonable force to take you into custody.

Right to tell someone what is happening to you

An accused can contact someone at least once. This could be a family member, someone they live with, an employer, employee or business partner. They can tell them that they are under a detention order and cannot be contacted. They can also contact a lawyer. The meeting with the lawyer will be monitored and they must speak in English or use an interpreter.

PREVENTATIVE DETENTION ORDER: a court order that allows police to arrest, search or seize items or evidence associated with a terrorist act

Source: Victoria Legal Aid, Creative Commons Attribution 4.0 licence

TERRORISM OFFENCES: *THE QUEEN V MHK*

CASE STUDY

The following is a summary of an actual terrorism case, reported in the Supreme Court of Victoria as *The Queen v MHK* [2016] VSC 742. As MHK was a minor at the time of the offence, in order to protect his reputation, initials were used.

AN OVERVIEW OF THE CASE

MHK was charged with three counts under the Commonwealth Criminal Code, section 101.6(1), and pleaded guilty to:

- acting in preparation for a terrorist act
- constructing an improvised explosive device
- intending to carry out a terrorist attack by planning to build a bomb and detonate it in a populated area to cause death and injury.

At the time of the offence, MHK was a 17-year-old. He lived with his family in Melbourne, where they had emigrated from Syria. He attended high school and was suffering from emotional difficulties and anxiety. MHK was deeply involved in the Islamic religion, and that led him to absorbing Islamic State (IS) propaganda.

MHK stated that he wanted to travel to Syria and join the fighting there, but this needed parental approval, which he knew was not possible. So, with the assistance of a 20-year-old UK jihadist, MHK planned to launch a terrorist attack in Melbourne by detonating a bomb in the central business district, on a train or at a police station.

Continued



CASE STUDY

TERRORISM OFFENCES: *THE QUEEN V MHK*

MHK was in contact with the UK jihadist through Facebook and Surespot. The jihadist assisted MHK to construct explosive devices by sending him electronic links to access bomb-making manuals. Prior to being arrested, MHK deleted his Facebook account in preparation for the detonation. At the time, Victoria Police engaged the services of the Federal Bureau of Investigation (FBI), which suggested that the bombs MHK was suspected of making were similar to those used in the Boston Marathon bombing. When MHK was arrested, the bombs were not fully completed.

Initially, MHK did not contribute to the investigation. However, later in the investigation (after spending time in prison), he became far more cooperative.

COURTS THAT WERE INVOLVED

Initially, as MHK was 17 years old at the time of the offence (April and May 2015), the case came under the jurisdiction of the Children's Court of Victoria. However, the Commonwealth Director of Public Prosecutions (DPP) successfully applied to have it uplifted to the County Court in May 2016.

SANCTIONS THAT WERE OR COULD BE IMPOSED

The maximum penalty for these offences are either life imprisonment or a possible fine of the equivalent of \$360 000. However, Justice Lasry issued MHK with a sentence of 7 years, with a fixed period of 5 years and 3 months before being eligible for release on parole.

- The 579 days MHK served in remand prior to sentencing were recorded as time already served under this sentence.
- Had MHK not pleaded guilty to the charge, a sentence of 11 years' imprisonment with a minimum of 8 years and 3 months before being eligible to apply for parole would have been applied.
- Justice Lasry also made the following recommendations as part of his sentence:
 - > That MHK not be incarcerated with any other person serving a prison term for a similar offence with extreme and violent Islamic views
 - > That where possible, MHK serve his sentence in a Youth Justice Centre
 - > That MHK continue rehabilitation with family support.

FACTORS THAT WERE TAKEN INTO CONSIDERATION IN SENTENCING

When sentencing MHK, there were many factors Justice Lasry took into account when considering the discount for a plea of guilty:

1. An early and genuine plea of guilty. Although MHK accepted responsibility, there was evidence that he was not fully remorseful.
2. Character evidence, age and lack of any criminal record.
3. With a guilty plea, it was unusual to give evidence, which allowed cross-examination by the Commonwealth DPP. This means that MHK did not have to testify in court, since he admitted his guilt. He chose to undergo cross-examination as a show of remorse, and this was taken favourably into consideration.
4. MHK avoided the need for a trial, saving the community the expense of a trial and the ordeal of witnesses from giving evidence.
5. MHK showed cooperation with law enforcement agencies, although initially there were shortcomings.

The main aim of the sentence was the need for deterrence, both on MHK and others. The court also expressed denunciation of the crime and expressed the community's outrage at this behaviour. Both of these aims outweigh the consideration of youth and rehabilitation.

POSSIBLE AVENUES OF APPEAL

MHK could appeal to the Court of Appeal on either a point of law (if the judge made an error in the trial) or a point of fact (if MHK felt that the sentence was too severe or the Commonwealth DPP felt the sentence was not harsh enough). The DPP subsequently appealed the length of this sentence, which was raised to 11 years' imprisonment with a non-parole period of 8 years and 3 months.

THE EXTENT TO WHICH THE PRINCIPLES OF JUSTICE ARE OR COULD BE ACHIEVED

The following principles of justice were achieved in the sentencing of MHK:

- *Fairness*: Justice Lasry showed fairness by balancing the need to protect the community with MHK's need for rehabilitation. Justice Lasry took a number of factors into considerations when sentencing MHK to a sanction of 7 years, such as an early plea of guilt that avoided the need for a trial, the age and character of MHK, his cooperation with the police and the community's outrage at this crime.
- *Equality*: MHK employed Robert Richter QC to present his case. They presented his version of what occurred and the reasons to the Court. The Court also took into consideration a number of reports and character evidence when sentencing MHK. The sentencing hearing provided both parties with the opportunity to ascertain culpability.
- *Access*: Although MHK was sentenced to 7 years' imprisonment, Justice Lasry recommended that he continue his rehabilitation with family support. It was also recommended that MHK not be incarcerated with prisoners serving for a similar offence with extreme and violent Islamic views, and that (where possible) he serve his sentence in a Youth Justice Centre.
- *Rights*: Although the maximum penalty for this crime was 25 years, MHK may have been lucky not to receive a more serious sentence. MHK also exercised a number of rights during his trial, such as the right to testify and to have his defence counsel present his version of the events to the court.

CASE STUDY

APPLY YOUR UNDERSTANDING

CASE STUDY—THE QUEEN V MHK

1. Define the term 'terrorism' and identify the laws that cover terrorism offences.
2. Find out what each national terrorism threat level means.
3. Outline the role of Victoria Police under terrorism laws. In your answer, make sure you cover:
 - a. Stop, search and seizure powers
 - b. Control orders
 - c. Preventative detention order
 - d. The right to tell someone what is happening to you.
4. Read through the case study *The Queen v MHK* and complete the following questions:
 - a. Identify the offences that MHK was charged with.
 - b. Reading through the facts of the case, speculate on why MHK committed these offences.
 - c. Why do you think the Commonwealth DPP applied to have the case uplifted to the County Court, instead of it being heard in the Children's Court?
 - d. Do you think the sanction imposed by Justice Lasry was a fair one?
 - e. Briefly summarise the factors taken into account before sentencing. Which of these factors do you think Justice Lasry gave greater weight when imposing the sanction?
 - f. To what extent do you agree with Justice Lasry's sentence of MHK? Use the principles of justice to explain your view.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

The principles of justice in criminal law

- In criminal law, the principles of justice apply to processes, procedures and the expectation that an individual will receive a fair hearing as well as due process before, during and after the trial.
 - > Fairness ensures that all are treated impartially.
 - > Equality ensures that all are treated in the same way.
 - > Access ensures that all have means or opportunity to settle disputes.

Institutions that enforce criminal law

- Institutions that can investigate and enforce criminal law exist at the local, state and federal levels of government.
- Victoria Police includes frontline police officers, public servants, forensic officers, Protective Services Officers and Police Custody Officers, with services available to the community 24 hours a day, seven days a week.
- The role of the police is to serve the community and uphold the law so as to promote a safe, secure and orderly society. It does this through:
 - > preserving the peace within Victoria
 - > protecting life and property
 - > preventing the commission of crime and offences
 - > detecting and apprehending offenders and wrongdoers
 - > assisting those in need of assistance.
- Protective Services Officers are uniformed and armed officers who have the power to apprehend, arrest, search and fine people at train stations, courts and government buildings.
- The Sheriff is responsible for enforcing court orders and warrants.
- A Sheriff's officer has the power to track down a defendant and use a range of enforcement strategies such as wheel clamping, non-renewal of vehicle registration, vehicle registration or driver licence suspension, seizure and sale of assets and arrest.
- The Sheriff is able to use targeted operations, such as roadblocks and Automatic Number Plate Recognition technology, to identify people with outstanding warrants.
- Australian Border Force facilitates the legal passage of people and goods, investigates and enforces laws in relation to illicit goods and immigration abuse and onshore and offshore detention.

Delegated authorities

- Parliament delegates power to delegated authorities or subordinate bodies via an enabling or parent Act.
- The Commonwealth and Victorian parliaments delegate law-making powers to the Executive Council, government departments, statutory authorities and local councils within states.
- The Executive Council is made up of the Governor-General or the Governor and several Ministers and makes regulations.
- Government departments are responsible for the day-to-day administration rules and regulations on a variety of portfolios.
- Statutory authorities are independent, government-controlled regulatory bodies that can make rules in a specific area.

- Local councils are democratically elected to represent a local area and can make local laws.
- Delegated authorities have expertise, provide for community participation, reduce the parliamentary workload, can make changes quickly and recognise different geographic requirements.
- Delegated authorities, however, can be seen as undemocratic, difficult to understand, with limited opportunity for public input or scrutiny.
- There are many checks and balances on delegated authorities such as regulatory impact statements, tabling in Parliament, ministerial responsibility, scrutiny committees, sunset clauses, the ombudsman, court challenges and adverse media publicity.

Institutional powers and individual rights

- The law attempts to balance the powers of the police to prevent and investigate crimes with the civil rights of the individual.
- The right to silence provides all individuals with the authority to say nothing to police except for their name and address. Police have the power to question an individual as part of an investigation.
- Police must caution an individual if that person is suspected of a crime and questioned in relation to that crime. This caution must be recorded.
- A young person under the age of 18 years old cannot be questioned without an adult present.
- Police have the power to demand a person's name and address if they believe on reasonable grounds that the person has committed an offence, or to assist with an investigation, or if they are driving a vehicle or on public transport. A person who is asked to give their name and address can request in writing the police officer's name, rank and place of duty. They can also request to speak to a lawyer.

Terrorism

- Although the crime of terrorism is a Commonwealth power, Victoria Police also assist in promoting a safe, secure and orderly society.
- Terrorism is an act or threat intended to advance a political, ideological or religious cause by coercion or intimidation.
- Australia has a 5-level threat system for terrorism.
- Victoria Police has a number of controls under terrorism laws such as the power to stop, search and seizure powers, control orders and preventative detention orders.
- A person accused of terrorism has the right to contact a family member, an employer, employee, business partner or someone they live with.

CHECK YOUR UNDERSTANDING

1. Using pre-trial, trial and post-trial examples, explain the principles of justice in criminal law, including fairness, equality and access.
2. In pairs, draw up a table similar to the one below and brainstorm institutions (or bodies) that enforce criminal law.

LOCAL	STATE	FEDERAL

3. Victoria's population is just over 6 million people and it has more than 13 000 police officers. Work out the ratio for one police officer per population. Do you think this is enough? Discuss your reasons.

4. Why do you think the Chief Commissioner of Victoria Police reports directly to the Minister for Police?
5. In pairs, draw up a table similar to the one below and title it 'The role of the police in enforcing the law'. Think about the different jobs that you observe the police doing in your community and that are reported in the media. Provide a description of the role of police and examples of how the police perform each of their roles in the table.

ROLE OF POLICE	PRESERVE	PROTECT	PREVENT	DETECT	HELP
BRIEFLY DESCRIBE THE ROLE					
PROVIDE CURRENT EXAMPLE					

6. Describe the powers of Protective Services Officers (PSOs).
7. Explain your rights and responsibilities when a police officer:
 - a. asks for your name and address
 - b. asks you questions.
8. In relation to police powers, to what extent do you believe that 'it is better 100 guilty people should go free than that one innocent person should go to jail'? In your response, provide the purpose of this statement as well as examples of police powers.
9. Create a flowchart, chart, map, graph organiser or mind-map that outlines the balance between institutional powers and individual rights when talking to the police.
10. Critically examine the right to silence by discussing both its strengths and drawbacks.
11. Find a media article on a terrorism case and create a report containing the following information:
 - a. an overview of the charges and the facts of the case
 - b. courts that may be or were involved
 - c. sanctions that were or could be imposed and their appropriateness
 - d. factors that may be or were taken into consideration in sentencing
 - e. possible avenues of appeal
 - f. the extent to which the principles of justice are or could be achieved.
12. Summarise the role of both the Sheriff's Office and Australian Border Force, using the following table:

	SHERIFF	AUSTRALIAN BORDER FORCE
BRIEFLY DESCRIBE THE ROLE		
POWERS AND DUTIES		
RESEARCH CURRENT EXAMPLES		

13. Describe the term 'enabling or parent Act'. In your answer, identify its importance.
14. Using a series of photos or objects, present an investigation on the various delegated authorities and the rules and regulations they make.
15. Assess the importance of delegated authorities in enforcing laws in Victoria. In your response, describe the ways these bodies are scrutinised.

APPLY YOUR KNOWLEDGE

CLASS SURVEY AND DISCUSSION—POLICE GUIDELINES: WHEN TO FRISK?

Read through the following information on the police power to frisk.

Police have the power to frisk a person in these circumstances:

- there are reasonable grounds to believe a person is concealing drugs or weapons
- a warrant has been issued by a magistrate
- a person has been arrested and the prisoner may be concealing evidence or implements to cause injury or further an escape
- a suspect grants specific permission.

All searches must be recorded in the Patrol Duty Register and all persons searched must be informed of the reasons for the search. It should be done by a police officer who is of the same sex as the person being searched. A police officer can also ask you to empty your pockets or bag.

A person under the age of 18 years can only be searched in the presence of a parent or guardian.

Survey the class or your peers and present evidence on the following as part of a class discussion:

- How many people do you know who have been frisked? What was the reason provided by police?
- Do your class members or peers believe police should have the power to frisk? What reasons did they give for or against this power?
- Describe the conclusions of the survey undertaken by your class.

APPLY YOUR KNOWLEDGE

POSTER/REPORT—CRIME INVESTIGATION

As a class, undertake further research into the use of forensic science in the investigation of criminal offences. Find out more about one of the following areas of forensic science and how it is used in the investigation of a crime:

- forensic anthropology
- forensic photography
- forensic entomology
- forensic ballistics
- forensic DNA
- forensic serology
- forensic psychiatry
- computer forensics.



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www.vifm.org



Divide the class into eight groups and present a report or poster outlining your research.

APPLY YOUR KNOWLEDGE

CLASS DEBATE—POLICE POWERS

Run a class debate on one of the following topics, or create your own topic on police powers.

- ‘The right to silence should be abolished.’
- ‘Police should have greater powers to arrest and detain suspects.’
- ‘A reasonable period of time should be set at 12 hours.’

Identify three speakers for and three speakers against. Provide time in class to research the topic. Allocate three adjudicators and use the criteria below to judge the winner of the debate.

TOPIC						
CRITERIA	SPEAKERS FOR			SPEAKERS AGAINST		
	1	2	3	1	2	3
SPEAKS CLEARLY AND SOUNDS CONVINCING						
PRESENTS REASONED ARGUMENT						
IS ABLE TO ARGUE EFFECTIVELY						
DISPLAYS THOUGHT ABOUT THE TOPIC						
USES APPROPRIATE BODY LANGUAGE						
WORKS AS AN EFFECTIVE MEMBER OF A TEAM						



THE PRINCIPLES OF JUSTICE

ASSESSMENT



Choose to complete either a case study/annotated report **or** an essay.

CASE STUDY AND ANNOTATED REPORT

Either find a media article or go to the Australasian Legal Information Institute (AustLII) website and find a recent criminal case that takes your interest.

Write a detailed report covering the following:

1. an overview of the charges and the facts of the case
2. courts that may be or were involved
3. sanctions that were or could be imposed and their appropriateness
4. factors that may be or were taken into consideration in sentencing
5. possible avenues of appeal
6. the extent to which the principles of justice are or could be achieved.

This task should take 2 to 3 lessons to complete and should be approximately 800 to 1000 words in length.

ESSAY—BALANCING INSTITUTIONAL POWERS AND INDIVIDUAL RIGHTS

Complete an essay on one of the following topics.

1. 'Institutions such as the Victoria Police or Australian Border Force need more power to investigate a crime. Individual rights such as the right to silence or communication give an accused an unfair advantage.' To what extent do you think that this statement is true?
2. 'The rights of the institutions such as police to investigate a criminal offence must be carefully balanced against the rights of the individual.' Do you think police have too much power? Justify your view.
3. 'The presumption of innocence makes it too difficult for our police to do their work effectively, especially with terrorism cases. Reversing the presumption and making the accused guilty until proven innocent will make society a safer place'. Discuss.

What to include in your essay?

- Your essay should use the conventions of an introduction, main body and conclusion.
- Your introduction should take a position or state your opinion, for example 'to what extent do you agree, disagree or partially agree/disagree' and provide a basic outline to your response.
- The main body should be structured in paragraphs. Start every new idea in a new paragraph, and avoid writing in point form. Paragraphs provide a sense of order and development to your response. Make sure you include the extent to which the principles of justice are or could be achieved.
- Your conclusion should summarise your main arguments and respond to the question.

This task should take 2 to 3 lessons to complete and should be approximately 800 to 1000 words in length.

www.austlii.edu.au





COURTS AND SENTENCING APPROACHES

UNIT 2 – AREA OF STUDY 1: Sanctions

Criminal courts in Australia are arranged in a hierarchy, with each hearing specific types of civil or criminal cases and operating within a prescribed jurisdiction. In this chapter, students will explore the role of criminal courts and the role of the jury in determining the guilt of the accused. Students will also undertake a study of the Victorian hierarchy as well as alternative approaches to sentencing, including the use of the Drug Court, the Koori Court and diversion programs.

OUTCOME

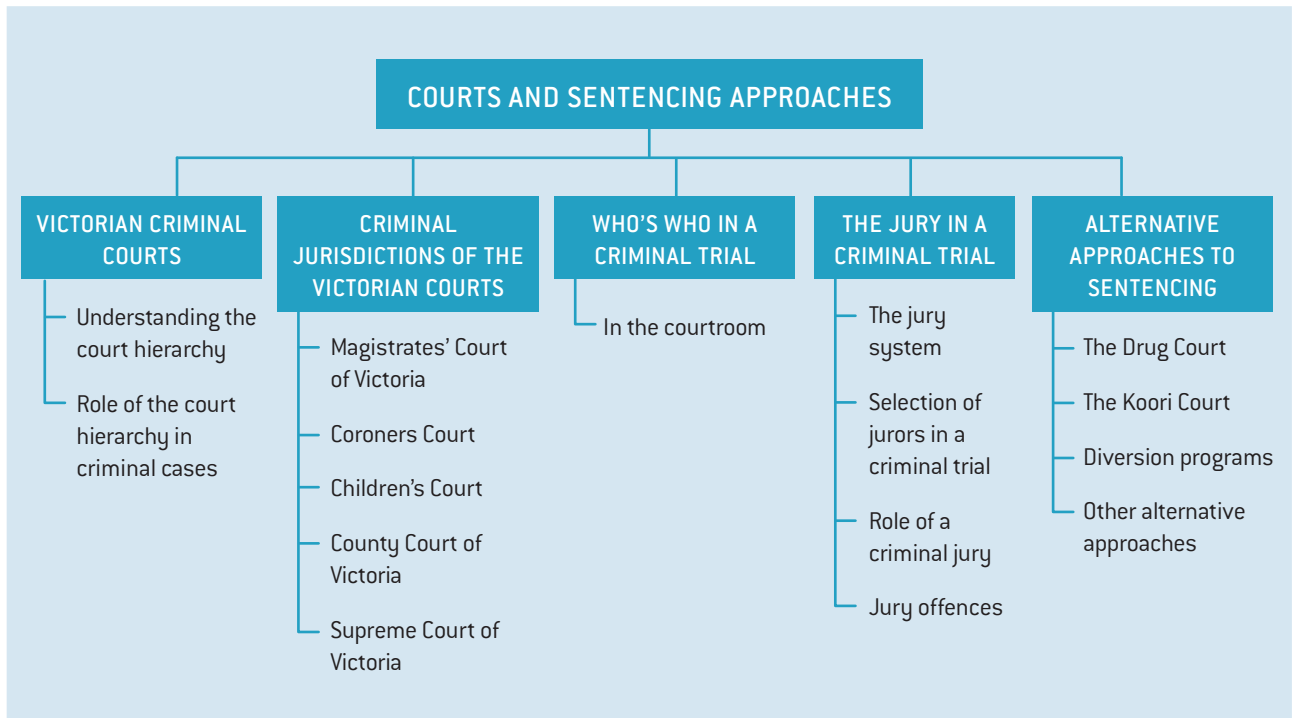
On completion of this chapter, students should be able to explain key concepts in the determination of a criminal case. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > an overview of the role and criminal jurisdictions of the Victorian courts
- > the role of the jury in a criminal trial
- > alternative approaches to sentencing, such as the use of the Drug Court, the Koori Court and diversion programs
- > two recent criminal cases and for each case:
 - an overview of the charges and the central facts of the case
 - courts that may be or were involved
 - sanctions that could be or were imposed and their appropriateness
 - factors that may be or were taken into consideration in sentencing
 - possible avenues of appeal
 - the extent to which the principles of justice could be or were achieved

KEY SKILLS

- > define and use legal terminology
- > explain the role of the Victorian courts and juries in criminal cases
- > research, analyse and apply information in relation to criminal law and two recent criminal cases
- > analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases



KEY TERMS

appellate jurisdiction	The power of a court to hear and determine an appeal
barristers	Lawyers who usually present a case in higher courts
committal hearing	A hearing conducted in the Magistrates' Court to determine whether there is enough evidence to justify a conviction by a jury in a higher court
coroner	A magistrate who has the power to investigate reportable deaths and fires
directions hearings	A hearing to determine any issues or interpretation of the law before the trial starts and the jury is empanelled
empanel	The process of selecting a jury in the court room
hand-up brief	Process that provides for a committal to be conducted based on documented evidence
judge	The adjudicator in higher courts
jury	A panel of citizens selected to listen to a case and to reach a verdict based on the evidence presented
magistrate	A legal practitioner who is an adjudicator in the Magistrates' Court, Children's Court, Coroners Court and related divisions and lists
<i>nolle prosequi</i>	A notice that the DPP does not intend to continue with the prosecution due to insufficient evidence
original jurisdiction	The authority or legal power of a court to hear a case in the first instance
<i>prima facie</i>	On face value, is there enough evidence to support a conviction in a higher court?
recidivism	The tendency of a convicted criminal to re-offend
sentence	A judgment by a court specifying a punishment for a crime
solicitors	Lawyers involved in the administration and processing of legal matters; they may present cases in the Magistrates' Court
therapeutic justice	A focus on services and programs to rehabilitate offenders while maintaining the protection of the community

Australian courts are arranged in a hierarchy. Higher courts have greater powers, including the power to hear some appeals.

VICTORIAN CRIMINAL COURTS

UNDERSTANDING THE COURT HIERARCHY

In Australia, courts are arranged in a hierarchy. This means that they are organised in order from lowest to highest. Each court in the hierarchical structure operates within prescribed limits. In other words, each court can hear certain types of civil or criminal cases. The prescribed limits of a court's power are referred to as its jurisdiction or legal authority.

The legal authority or power of courts can be divided into either original or appellate jurisdiction. **Original jurisdiction** is where cases are heard for the first time. For example, if a person has been charged with a traffic offence, the Magistrates' Court will hear the case in the first instance. **Appellate jurisdiction** is where a case is heard on appeal, or a second time. For example, if the accused is not happy with the outcome of their traffic offence, they have the right to appeal the case and have it heard in the County Court. Cases can also be transferred between the Children's, County and Supreme courts depending on the seriousness of the case or the courts' workload.

ORIGINAL JURISDICTION: the authority or legal power of a court to hear a case in the first instance

APPELLATE JURISDICTION: the power of a court to hear and determine an appeal

HAVE YOU...	YES / NO / UNSURE
Studied the difference between a solicitor and a barrister?	
Had a family member called up for jury duty?	
Seen a judge or lawyer dressed up to attend court?	
Heard that for a jury member to discuss a case with anyone other than other jurors is a criminal offence?	
Known a teenage law-breaker who avoided juvenile detention through a diversion program?	
Met someone who worked in court services, such as a mental health liaison or court advice and support officer?	

The Victorian court system also reflects the structure of federalism within in Australia. In other words, there are state and federal courts. The diagram on the page opposite provides a visual representation of state and federal courts and where they sit in the hierarchy. They are organised in order from lowest to highest, and the High Court is the final court of appeal from both state and federal matters.

This allows us to understand why we have summary and indictable offences. A summary offence is a minor offence that is heard in the Magistrates' Court, or in one of its specialist jurisdictions or the Children's Court. An indictable offence is heard before a judge and jury and is of a serious nature. The County or Supreme Court deal with these sort of cases.

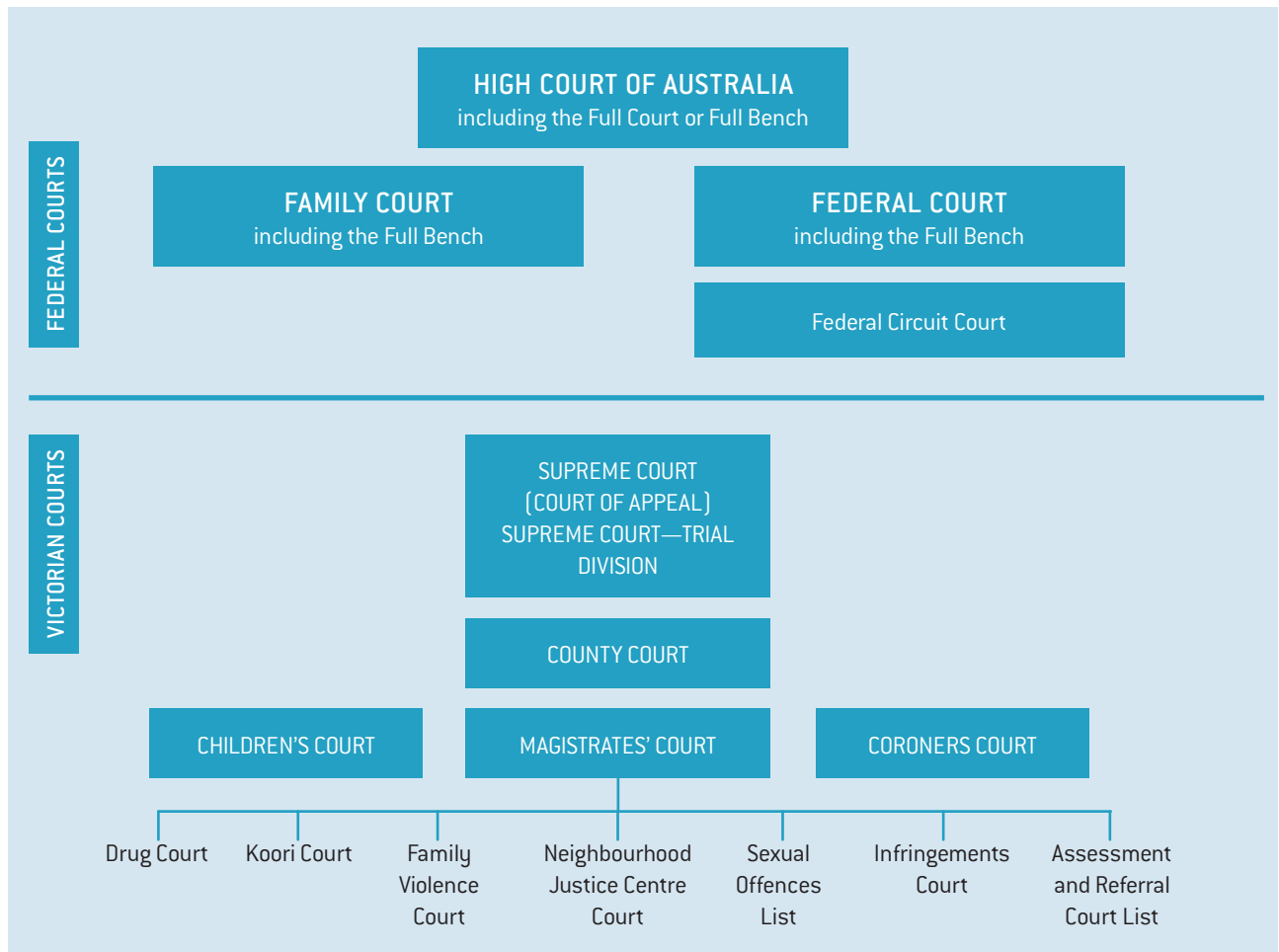
The court hierarchy allows criminal cases to be tried in the most appropriate circumstances, for appeals to be made and for costs to be controlled.

ROLE OF THE COURT HIERARCHY IN CRIMINAL CASES

The primary role of our courts in criminal cases is to enforce the law, settle disputes and reflect views about conduct that the community regards as unacceptable. Courts that deal with criminal cases provide a way of resolving these matters in a peaceful way, ensuring that the principles of justice including fairness, equality and access are adhered to.

When a case is heard before a criminal court and an accused is found guilty of a crime, it is up to the court to ensure that the offender is punished fairly. If necessary, they may

remove the wrongdoer from society for the protection of the community by detaining them in gaol. Courts may also consider deterring others from this sort of offending and impose community's retribution with a severe punishment. In some cases, the court may decide that the offender is a candidate for rehabilitation and impose a sentence that allows for the prospect of change. In doing this, criminal courts perform a balancing act by protecting the community while also protecting the rights of the individual.



Precedent

Criminal courts will primarily settle cases within their jurisdiction. While these courts do not set out to create a law or change an existing law, new laws can result from decisions made by judges in order to resolve a particular dispute. This area of law is referred to as case law, judge-made law or common law. Common law develops through the operation of what is known as the doctrine of precedent. A precedent relies heavily on the existence of a hierarchy and is a legal principle developed by a superior court, such as the Supreme Court or Court of Appeal. This legal principle then becomes binding and is followed by lower courts.

Appeals

Criminal courts have appellate jurisdiction. One of the principles of justice is fairness, which ensures that all are treated impartially without fear or favour. In order for this to occur, an accused has the right to appeal. They may be able to have their decision reviewed on appeal by a higher court; this promotes fairness through safeguarding against unjust decisions.

Specialisation

Courts deal with a specific range of criminal cases, and this allows judges and magistrates to gain great skill, experience and expertise in the particular matters they hear. Court processes are also streamlined to provide for specialised legal personnel and legal procedures. This promotes consistency in decision-making. For example, the Magistrates' Court has a range of specialist courts and lists that allow for a greater understanding of specific matters.

Administrative convenience

Linked to specialisation, it is more efficient to have cases of a similar nature being heard by a particular court. The hierarchy reduces the likelihood of delays by providing a means of allocating cases according to their seriousness and complexity. For example, it makes sense to have more personnel and courts at the magistrate level because the majority of criminal cases (approximately 90 per cent) are heard here.

Trials in criminal matters are very costly and time-consuming. A court hierarchy enables minor matters to be dealt with relatively quickly and inexpensively. Trying a case in the Magistrates' Court (or one of its specialist courts) is much cheaper than a case in the County Court or Supreme Court, where it will cost thousands of dollars and possibly take years before the case is finally determined. A local Magistrates' Court may resolve more cases in one day than the County Court or Supreme Court could hear in weeks or even months.

CRIMINAL JURISDICTIONS OF THE VICTORIAN COURTS

Victoria's system includes the Magistrates' Court, the County Court and the Supreme Court. It also includes specialised courts, such as the Children's Court and the Coroners Court.

MAGISTRATES' COURT OF VICTORIA

The Magistrates' Court is the lowest court in the hierarchy. All criminal cases come before the Magistrates' Court in the first instance. Although it has the most limited jurisdiction, it hears approximately 90 per cent of cases in Victoria.

The Magistrates' Court workload for the financial year ending 2015 was as follows:

- criminal cases—275 552
- committal proceedings—2839
- intervention order applications finalised (including interim orders)—72 625
- criminal listings—766 091.

The Magistrates' Court jurisdiction covers the following types of cases:

- summary offences
- indictable offences heard summarily
- committal proceedings
- warrants and bail applications
- special courts or lists.



MAGISTRATES' COURT:
www.magistratescourt.vic.gov.au

The Magistrates' Court is the lowest court in the hierarchy, and also the busiest; all criminal cases come before it in the first instance.

TOP 10 CRIMINAL CHARGES 2014–15

1. Drive vehicle unregistered in toll zone (CityLink)
2. Theft
3. Drive while disqualified, suspended or cancelled
4. Contravene Family Violence intervention order
5. Drive vehicle unregistered in toll zone (EastLink)
6. Unlawful assault
7. Possession/attempted possession of a drug of dependence
8. Exceed speed limit
9. Obtain property by deception
10. Fail to answer bail

Source: *Magistrates' Court, Annual Report 2014–2015*



Melbourne
Magistrates' Court

Summary offences

Summary offences are generally of a less serious nature and these offences are heard and determined by a **magistrate**. There is no jury in the Magistrates' Court because there is no right to a trial by jury for summary offences. These offences include being drunk and disorderly, traffic offences (such as driving with a blood alcohol concentration in excess of 0.05), using obscene language in public, and minor drug cases.

MAGISTRATE: a legal practitioner who is an adjudicator in the Magistrates' Court, Children's Court, Coroners Court and related Divisions and Lists

Indictable offences heard summarily

Indictable offences are more serious and are heard by a **judge** and jury in a higher court. Some indictable offences can be tried summarily. This means that an accused may elect to have some indictable offences heard in the Magistrates' Court in the same way as a summary offence. The Magistrates' Court can only hear these criminal cases with the consent of the prosecution and the accused.

JUDGE: the adjudicator in higher courts

For example, theft (which includes all shop-stealing offences) is an indictable offence. A person accused of shop-stealing will be charged with theft and can be tried by a judge and jury in the County Court. However, the cost of proceeding with the case may be much greater

than the value of the goods stolen. To overcome this problem, the Magistrates' Court has been given the power to hear some indictable offences as summary trials. The magistrate in this case must be satisfied beyond reasonable doubt before finding the accused guilty of the offence.

There are a number of advantages of having an indictable offence heard summarily for both the accused and the legal system. Cases are more likely to be heard faster, cheaper and more informally in the Magistrates' Court than in the County Court. The Magistrates' Court is also limited in the outcomes it can issue as opposed to a higher court.

Indictable offences that can be heard summarily include offences listed in Schedule 2 of the *Criminal Procedure Act 2009* (Vic). These include common law fraud offences, affray, recklessly causing serious injury, obtaining property or financial advantage by deception, robbery and burglary, incitement, secret commissions, dealing with proceeds of crime and drug trafficking. The court's jurisdictional limit is \$100 000 for indictable offences involving theft, destruction or damage to property.

Committal hearing

Before an indictable offence can proceed to a higher court, a **committal hearing** is conducted in the Magistrates' Court to:

- determine if there is evidence of sufficient weight to support a conviction for the offence charged; this is known as a *prima facie* case
- enable the accused to hear the evidence and cross-examine contentious issues
- empower the accused to put forward a defence or to enter an early plea of guilty.

Committal mention

A committal mention date will be set to establish the first date for the hearing of the committal proceedings. The purpose of this is to determine whether the defendant is going to plead guilty or contest the committal. If the defendant enters a plea of 'guilty' at the committal mention, a date will be set for sentencing in the higher court. If the committal is contested, the magistrate will do two things:

- determine the number of witnesses and the likely length of the committal proceeding
- set a date for a full committal hearing.

There are two types of procedure that can be followed—the 'hand-up brief' or the traditional committal hearing.

Committal process—Hand-up brief

In most cases a committal procedure known as a **hand-up brief** will be used. This procedure is usually adopted in cases where children are involved, or a person with mental illness or intellectual disability or in cases of a sexual nature. This method of committal allows most of the evidence to be presented as written statements. If the defendant wishes to question the evidence given in any of the statements, they may request that a witness appear in court to answer questions. This saves court time, as the defendant is in a position to make informed decisions about a possible plea or their intention to contest the committal.

Committal process—Committal hearing

At the full committal hearing, the role of the court is not to determine whether the defendant is guilty or innocent but whether there is sufficient evidence to support a conviction in a higher court. The committal hearing is therefore not a trial.

At the committal proceeding the defendant will be asked to enter a plea. The defendant also has the option to enter no plea, and the onus is on the prosecution to prove the case.

COMMITTAL HEARING: a hearing conducted in the Magistrates' Court to determine whether there is enough evidence to justify a conviction by a jury in a higher court

HAND-UP BRIEF: the process that provides for a committal to be conducted based on documented evidence

The defendant does not have to present a defence during the committal; this may be reserved for the trial. The Director of Public Prosecutions (DPP) presents the information and evidence given in a committal proceeding in written statements known as depositions. The DPP will review the case and decide to proceed with the prosecution in a higher court or issue a notice of *nolle prosequi*, which means the DPP does not intend to continue with the prosecution.

NOLLE PROSEQUI: a notice that the DPP does not intend to continue with the prosecution due to insufficient evidence

Other pre-trial procedures

There are a number of procedures that may take place between the time of committal and the trial of a defendant for an indictable offence. These procedures have been designed to reduce delays in bringing cases to court and include the directions hearing, the summary of prosecution opening and the defence response.

Directions hearings

The judge may hold a **directions hearing**. As part of this hearing the prosecution and the defence must file a statement of their case. The purpose of this hearing is to determine any issues or interpretations of the law before a jury is empanelled. Other matters (such as the number of witnesses, the use of experts and questions of law) are discussed to determine the approximate length of the trial. This means that the trial can proceed as one continuous hearing after the jury is empanelled.

DIRECTIONS HEARING: a hearing to determine any issues or interpretation of the law before the trial starts and the jury is empanelled

Opening statements

The prosecution will give the defendant a summary of the prosecution's opening statement and a copy of any pre-trial admissions. This will include a summary of any Acts, facts, matters and circumstances that the prosecution will rely on to obtain a guilty finding. The accused will give the prosecution a summary of their response to the opening statement and indicate what evidence is agreed and admitted, as well as a statement of what evidence is to be contested.

APPLY YOUR UNDERSTANDING

THE IMPORTANCE OF A COMMITTAL HEARING

1. Define the term *prima facie*.
2. Describe the main purpose of the committal mention.
3. Compare and contrast the similarities and differences between a hand-up brief and a committal hearing.
4. Explain the role of the Director of Public Prosecutions (DPP) during a committal.
5. Speculate on the reasons why the DPP may issue a notice of *nolle prosequi*.
6. Discuss the importance of the directions hearing and opening statement prior to the trial.
7. Evaluate the use of committals by discussing two arguments for and two against this procedure.

Bail and warrant applications

Bail is the release from custody of a person charged with an offence. The person charged with the offence gives an undertaking to appear in court at a later date. Bail will generally be granted and is only refused if there is an unacceptable risk that the accused will not appear in court, will commit an offence while on bail, will endanger the safety or welfare of the public or will interfere with a witness or obstruct justice.

SURETY: a person responsible for ensuring that an alleged offender attends court at a specified time

Sometimes a **surety** is asked for. A surety is someone who promises to make sure that the alleged offender attends court at the specified time. The promise of either the accused or the surety may be supported by the deposit of required money (at the police station or court) and evidence of the availability of the required money (such as evidence of a sufficient savings account balance from the bank). If the person charged does not appear in court, then the money will be lost.

The seriousness of the offence will also be taken into consideration in deciding bail applications. In certain circumstances, bail will be refused unless the person charged can show why they should be granted bail. These circumstances include murder, treason and serious drug offences. If a person cannot satisfy the conditions of bail, they will be remanded in custody.

A magistrate is able to issue a warrant, which is a court order providing police with the legal authority to arrest or search a suspect or to seize property. A warrant is usually issued by a magistrate when a suspect does not turn up for their court appearance or does not return property that was taken, or when police need to search property due to a reasonable suspicion of illegal activity.

10.1 Bail and warrant statistics 2014–15

Applications for bail	29 074
Applications for bail variation	10 648
Application for revocation of bail	4252
	43 974

Warrants to arrest issued by the Magistrates' Court	53 085
Individual infringement warrant initiations for fine enforcement	310 570
	363 655

Specialist courts and lists of the Magistrates' Court

The Magistrates' Court includes a number of specialist jurisdictions or courts. These courts are designed to deal with specific issues. They are generally less formal and more flexible, and focus on solutions to specific problems.

10.2 Specialist courts and lists in the Magistrates' Court

JUSTICE CENTRES	Justice Centres operate as community centres and multi-jurisdictional courts, dealing with some Magistrates' Court, Children's Court, VCAT and Victims of Crime Assistance Tribunal (VCAT) matters. The Justice Centre is able to offer a range of services such as mediation, legal advice, employment and housing support, counselling and mental health support.
DRUG COURT	The Drug Court sentences and supervises the treatment of offenders who have committed an offence under the influence of drugs or alcohol or to support a drug or alcohol habit. An offender in the Drug Court will be sentenced to a two-year Drug Treatment Order. See 'The Drug Court' on page 245.
INFRINGEMENTS COURT	The Infringements Court deals with the processing and enforcement of infringement notices and penalties, such as parking fines. The role of this court is to reduce the workload of the Magistrates' Court to resolve the issue of unpaid fines. An accused still has the right to challenge their fine in court.

KOORI COURT	The Koori Court sentences Aboriginal offenders who have pleaded guilty. It provides an informal atmosphere and allows the Aboriginal community to participate in the court process. An Aboriginal Elder or Respected Person, an Aboriginal justice worker, Aboriginal defendants and their families assist the magistrate to determine an appropriate sanction. See 'The Koori Court' on page 248.
SEXUAL OFFENCES LIST	Special processes are used for the hearing of all cases relating to a charge for a sexual offence. This recognises the distinctive nature of these matters, including the difficulties faced by victims.
FAMILY VIOLENCE COURT DIVISION	The Family Violence Court hears matters relating to domestic violence and aims to make the process of applying for an intervention order easier. Support services ensure safety and provide assistance. The court focuses on making those who use violence against family member answerable for their actions.
ASSESSMENT AND REFERRAL COURT LIST (ARC)	ARC operates out of the Magistrates' Court for offenders undergoing criminal proceedings and suffering from a mental health issue, such as a mental illness or an intellectual disability. ARC is able to offer a range of services to the accused such as psychological assessment, referral to welfare, health, mental health, disability, housing services and/or drug and alcohol treatment.



Members of the Coroners Court

CORONERS COURT

The *Coroners Act 2008* (Vic) established the Coroners Court as the first Victorian court to be identified as an inquisitorial court. This means that a coroner has independent powers to investigate deaths without the coronial investigation becoming too adversarial.

The **coroner** (who is a magistrate) has the power to investigate reportable deaths, reviewable deaths and fires.

Reportable deaths include cases where the following circumstances have happened:

- a person dies suddenly
- homicide is suspected
- the person who died was being held in care—for example, as a ward of the state or as a detained prisoner
- the identity of the deceased is unknown
- the death occurred under a medical procedure, such as under anaesthetic.

During the reporting period July 2015–June 2016, there were 6366 notifications made to the coroner.

CORONER: a magistrate who has the power to investigate reportable deaths, reviewable deaths and fires

The Coroners Court is an inquisitorial court that investigates reportable deaths and fires.

A reviewable death is where there has been a second or subsequent death of a child in a family. Doctors and police officers must report the reviewable deaths to the State Coroner. Reporting is mandatory and must be done regardless of the circumstances surrounding the death.

The coroner also has the authority to advise government, to make recommendations on how such deaths or fires can be avoided in the future and to inform the community of the court's findings.

The Children's Court hears criminal charges against offenders who are under the age of 18.

CHILDREN'S COURT

The Children's Court hears criminal charges against children, defined as anyone under the age of 18 at the time of the offence and who is under the age of 19 at the time the case is heard. During the reporting period July 2014–June 2015, there were 3523 offenders found guilty and 155 offenders ordered to be detained.

The Children's Court is divided into two divisions, as well as the Children's Koori Court.

Criminal Division

Almost a third of the Court's time is devoted to dealing with criminal cases. The Children's Court has the power to hear most cases concerning children (between the ages of 10 and 18 years old) charged with criminal offences, except for homicide. The cases the Children's Court hears fall into these categories:

- all summary offences
- all indictable offences except the most serious, such as murder, manslaughter and offences causing death
- committal hearings
- bail applications.

Family Division

The Children's Court also has the power to hear cases concerning young people under the age of 17 years who are considered to be in need of care and protection. More than a third of its time is devoted to dealing with child protection.

A young person will be considered to be in need of care and protection if they are abandoned or ill-treated, or if their parents do not exercise sufficient control. Alternatively, the Children's Court may hear cases in which irreconcilable differences between the parent and the child are likely to result in a serious disruption to the young person's care.

Children's Koori Court

The Children's Koori Court was set up with similar powers to the Criminal Division of the Children's Court. It also hears criminal matters involving Aboriginal or Torres Strait Islander children between the ages of 10 and 18. The Court exercises its jurisdiction in an informal environment to make



Children's Court of
Victoria

these proceedings comprehensible to the offender, their family and any member of the Aboriginal community. The courtroom is structured around an oval table at which all parties involved in the case sit. The parties include the magistrate with two elders, the prosecutor, a youth justice worker, the defence lawyer, the defendant and family members and any other participants such as a drug and alcohol worker, or mental health worker.

COUNTY COURT OF VICTORIA

The County Court has original and appellate jurisdictions to hear criminal cases.

Criminal jurisdiction

The County Court hears all but the most serious criminal offences, such as murder, treason or murder-related offences. In practice, it hears the majority of serious criminal cases, such as major burglaries and drug offences, sexual assault, culpable driving, arson and armed robbery. When the accused pleads not guilty, the case will be heard by a judge and a jury of 12 people drawn from the community.

Appeals

The County Court can hear appeals against conviction and sentence from the Magistrates' Court in criminal matters. It can also hear appeals by the DPP against the leniency of a sentence. An accused is also able to appeal from the criminal and family divisions of the Children's Court.

County Koori Court

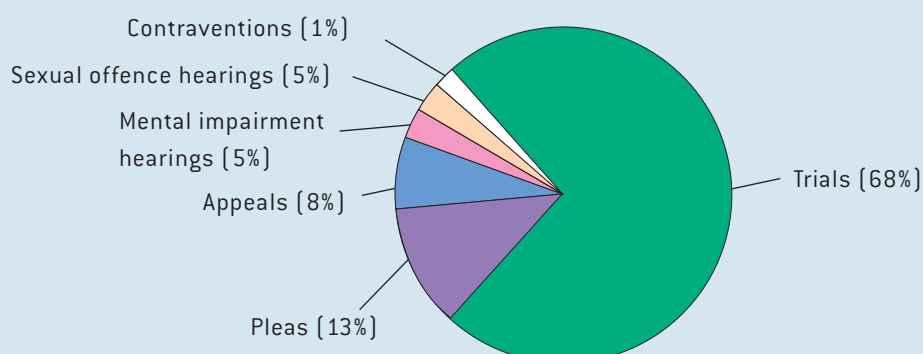
The County Koori Court was established in 2008 to operate in a higher jurisdiction than the Magistrates' Court. The Court provides an alternative sentencing process for Aboriginal and Indigenous offenders. It only deals with offenders who plead guilty. It does not deal with sexual offence cases. During the sentencing process, the court ensures effective participation of the Aboriginal community through the role played by Aboriginal Elders or Respected Persons and others such as the Koori Court Officer.

The County Court hears all but the most serious criminal cases, as well as appeals from the Magistrates' Court.



County Court of Victoria

AVERAGE WORKLOAD OF A COUNTY COURT JUDGE



Source: statistics from County Court 2014–15 annual report, page 17

SUPREME COURT OF VICTORIA

The Supreme Court is the highest court in the Victorian hierarchy, and is divided into two divisions: a trial division and a Court of Appeal.

Criminal jurisdiction

The trial division of the Supreme Court deals with the most serious criminal cases, such as murder and treason including applications for bail for these offences. Where an accused pleads not guilty, the case is heard before a justice and a jury of 12 people drawn from the community. The Supreme Court can also hear matters of public significance such as judicial reviews. The criminal trial division splits its workload almost equally between criminal trials and plea hearings.

Appellate jurisdiction

The Court of Appeal has the power to hear and determine appeals from the County Court and the trial division of the Supreme Court. Appeals on points of law from the Magistrates' Court are heard by a single judge of the Supreme Court. Usually three justices will hear an appeal, although five may sit when the matter is very important.

WHO'S WHO IN A CRIMINAL TRIAL

There are a number of people who play an important role in the workings of the court in a criminal case.

10.3 Roles within the courtroom

JUDGE/JUSTICE	The person who oversees a trial in higher courts is known as a judge or justice. A judge sits in the County Court. In other courts, the judge is referred to as a justice. The judge is referred to as 'Your Honour'. Their role is to make sure both parties obey the rules of court procedure. They are also there to protect the rights of the accused person and the witnesses. In higher courts, a jury is used in cases where the accused pleads not guilty. The judge sums up the evidence and explains the law to the jury before they retire to deliver their verdict. In a criminal trial, it is the judge who determines the appropriate sanction if the jury finds an accused person guilty.
TIPSTAFF	The tipstaff is responsible for maintaining order in the courtroom, including calling and swearing in of witnesses and attending to the jury.
CROWN PROSECUTOR	Crown Prosecutors are barristers who put the case against the accused person/s on behalf of the Crown (or state). The Crown Prosecutor sits closest to the jury and it is their role to present the case beyond reasonable doubt that the accused person committed the crime.
MAGISTRATE	A magistrate performs a similar role to a judge/justice in the Magistrates' Court. Juries are not used in the Magistrates' Court. The magistrate will oversee the conduct of a hearing and, where a defendant pleads not guilty, determine the verdict. The magistrate is also responsible for deciding an appropriate sanction where a defendant is convicted. As the Magistrates' Court is not as formal as the higher courts, magistrates do not wear robes and wigs. Magistrates are referred to as 'Your Honour'. They must also determine the guilt or innocence of the accused from the case presented by the prosecution also beyond reasonable doubt.

JUDGE'S ASSOCIATE	The judge's associate sits in front of (and below) the judge and works as their personal assistant and research officer. They are chosen and appointed by each individual judge. A judge's associate will work closely with one particular judge and undertakes much of their administrative work. They perform certain functions in the court, such as announcing the charge/s against the accused. In court, they wear a black robe.
DEFENCE BARRISTER	The defence barrister represents the person accused of the crime. The defence barrister calls witnesses who may have knowledge of the event, including the accused, though an accused person does not have to give evidence. The defence barrister will always be positioned at the Bar Table nearest the witness box.
INSTRUCTORS/ SOLICITORS	Both barristers will have instructors or solicitors sitting opposite them in court at the Bar Table. They assist the barristers and are familiar with the case, as they have probably done a lot of the preparatory work before the case comes to court.
WITNESSES	A witness can be anyone who has knowledge of the event, or has a specialist or 'expert' knowledge that may shed light on the case. Regardless of whether witnesses are called by the prosecution or the defence, they are likely to be asked questions by both sides. This process involves calling evidence-in-chief, then cross-examination and possibly re-examination.
JURY	The jury consists of people chosen at random from those on the electoral roll. Twelve jurors are selected for criminal trials. It is possible for 15 jurors to be empanelled in special cases (for example, very long trials). The jury is essentially a fact-finding body and they must perform these tasks: • listen to all the evidence presented by both sides • consider this evidence • reach a decision based on the evidence. If they find the accused guilty they must do so 'beyond reasonable doubt'. In all cases other than murder, treason and serious drug offences, their decision (of either guilty or not guilty) can be a majority (11 out of 12). Juries are used in hearing criminal cases where the accused pleads not guilty in a County or Supreme Court. Juries are not used in the Magistrates' Court.
COURT NETWORKERS	A court networker can support people attending court for any reason. They are not employed by the court but are volunteers from Court Network, a community agency that supports people going to court. You may not see networkers in all courts.

LEGAL PROFESSIONALS

Lawyers

Lawyers may work as either **solicitors** or **barristers**. To become a lawyer, you need a law degree. You also need to undertake practical legal training. This training can be completed in one of two ways:

- 12-month supervised traineeship (previously called 'Articles of Clerkship')
- a practical legal training course and 90 hours of workplace experience.

After completing this training, you make an application to be admitted to the Supreme Court of Victoria as an Australian lawyer.

SOLICITORS: lawyers involved in the administration and processing of legal matters; they may present cases in the Magistrates' Court

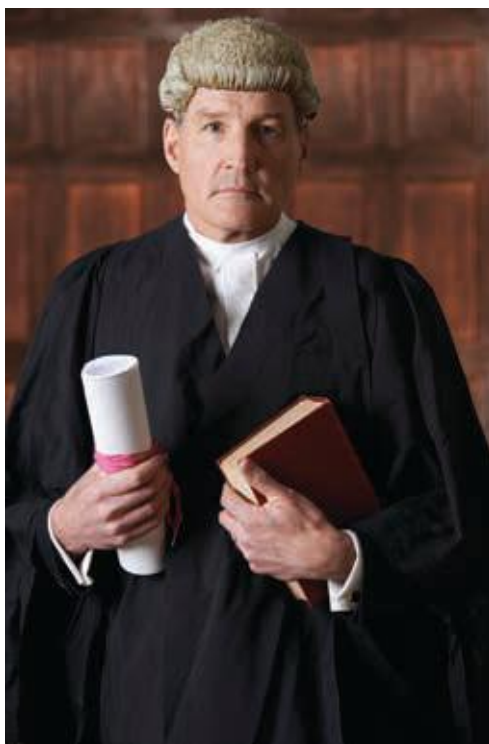
BARRISTERS: lawyers who usually present cases in higher courts

Barristers

Barristers present cases in court for the prosecution or the defence. They can also provide advice about the possible legal outcome of proposed cases. Barristers are usually briefed or contacted by solicitors.

Once in court, the client is entirely in the barrister's hands. The barrister is required to have a sound knowledge of the rules of evidence and procedure and will be required to 'lead' evidence and also to cross-examine witnesses called by the other side. Barristers also make submissions on points of law during the course of a trial.

After at least 10 years, successful barristers may apply to be appointed to the rank of Senior Counsel.



Solicitors

After being admitted to practice, the majority of lawyers work as solicitors. A solicitor is usually the first point of contact for a person seeking legal advice and assistance. For example, solicitors will provide advice to people who are in trouble with the police and facing criminal charges.

In such situations, a solicitor will advise the client about their rights and the best course of action for the client to take. A solicitor may appear for a client in the Magistrates' Court. Solicitors will also draft legal documents, such as wills, for clients.

APPLY YOUR UNDERSTANDING

INVESTIGATION—WHO'S WHO IN THE COURTROOM

1. Sketch an image of a court room in your workbook, and identify and explain the role of each participant in a criminal case.
2. Draw up a table similar to the one below. List the different career opportunities for a person interested in working in the legal system. Complete the table, providing more information about the duties involved in each career and the qualifications needed.



CAREER	DUTIES	QUALIFICATIONS
Parliamentary counsel		
Policy advisor		

CAREER	DUTIES	QUALIFICATIONS
Court registrar or bench clerk		
Police officer		
Community corrections officer		
Prison officer		
Legal secretary		
Law clerk		
Hansard reporter		
Journalist		
Insurance claims officer		
Criminologist		
Industrial relations officer		
Other...		

3. Select one career from the above list that you may be interested in and prepare a poster, information booklet or report to provide the following information on that career:
- What are the main duties performed?
 - What personal attributes are required to do this job?
 - What are the employment opportunities or job prospects?
 - What educational qualifications are required?
 - Find out about one course or training program related to the selected career. Describe the course or training program.
 - Where can additional information about the selected career be located?

These websites may assist you in your research:
www.jobsearch.gov.au,
www.graduatemcareers.com.au and www.myfuture.edu.au



THE JURY IN A CRIMINAL TRIAL

THE JURY SYSTEM

The concept of a **jury** is based on the idea that all individuals in the community are responsible for the administration of justice. This dates back to the early English idea of trial by peers (or equals). It means that every person has the right to be tried in accordance with the values held by ordinary members of the community. Therefore, the aim of the process used to select potential jurors is to provide a jury representing a cross-section of the community.

The most compelling argument in support of the jury system was made by Justice Deane in the High Court case of *Kingswell v the Queen* [1985] HCA 72. Justice Deane said:

Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of

JURY: a panel of citizens selected to listen to a case and to reach a verdict based on the evidence presented

The jury system ensures that offenders are tried in accordance with community values.

the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.

SELECTION OF JURORS FOR A CRIMINAL TRIAL

Anyone registered on the electoral roll may be eligible for jury service, although some may be excused, disqualified or considered ineligible.

Any person whose name appears on the electoral roll may be eligible for jury service. This means that to be on a jury a person must be an Australian citizen, over the age of 18 and eligible to vote. The names of potential jurors are selected at random from the roll. A questionnaire, which must be answered and returned within seven days, is then sent to each potential juror. Based on the answers to the questionnaire, potential jurors may be ineligible, disqualified, deemed unfit, defer jury service or be excused permanently for good reason.



The jury box in a court room, where jurors sit during a trial

Ineligible

People who are ineligible for jury service are those who:

- work in the legal system (such as police officers, judges and lawyers)
- have a physical disability that prevents them from performing the duties of a juror, such as deafness, blindness or intellectual capacity
- are unable to communicate in or understand English.

Disqualified

People disqualified from jury service are those:

- who have been convicted of treason or an indictable offence and sentenced to a term of imprisonment of three years or more
- who have been sentenced to more than three months in prison in the past 10 years
- who have been sentenced on an intensive correctional order or suspended sentence within the past five years.

Excused from jury service

People can be excused from jury service, or seek deferment to a more convenient time, if they have a 'good reason'. These are some of the reasons people may be excused:

- illness, poor health or advanced age
- living more than 50 kilometres from Melbourne or more than 60 kilometres from a country court
- jury service would cause substantial financial or other hardship to the person

- where a potential juror knows any of the accused or the victims, or has personal knowledge of some aspects of the alleged crime (for instance, lives in the specific area where the offence was committed).

Empanelling a criminal jury

The County or Supreme courts will **empanel** a jury of 12 in criminal cases when the accused pleads not guilty. In forming a jury, both parties are entitled to challenge potential members. These challenges may be peremptory challenges—in which no cause or reason needs to be given—or challenges for cause, such as a jury member being unqualified for service or being deemed to be not impartial. When there is one accused, each side has six peremptory challenges; with two accused they have five; and with three or more accused they have four challenges. In cases that are expected to be lengthy, up to 15 jurors may be empanelled, but only 12 will be balloted to make the final decision. Jurors have the choice of being empanelled either by name or by number, and by occupation. The current rates of payment for jurors in Victoria is \$40 per day for the first six days and \$80 thereafter.

EMPANEL: the process of selecting a jury in the court room

ROLE OF A CRIMINAL JURY

Decide the guilt or innocence of the accused

The main role of a criminal jury is to remain impartial, listen to the evidence and decide whether the accused is guilty 'beyond reasonable doubt'. The jury must put any prejudice or bias aside, stay focused and listen carefully to all the evidence. They consider only the facts of the case when forming an opinion as to whether the accused is guilty or not guilty. Juries are first asked to attempt to come to a *unanimous verdict* (12/12 jurors), but are permitted to reach a *majority verdict* (11/12 jurors) in all criminal matters, except murder, Commonwealth offences and certain drug offences, which must be a unanimous verdict. It is the judge's responsibility to interpret the law and to determine the sanction if the accused is found guilty by a jury.

The role of a criminal jury is to decide guilt or innocence, provide unbiased decisions, ensure community involvement in the legal system, share decision-making and ensure that cases adhere to the principles of justice.

Provide an impartial and unbiased decision-making body

Criminal jurors are randomly selected from the community. The fate of an accused is in the hands of ordinary people who represent a cross-section of community attitudes and values. Jurors come to the court with open, unbiased minds. This helps to ensure that the principles of justice including fairness, equality and access are achieved. Juries do not have any connection with the accused or the crime that the accused is charged with, and therefore they can be impartial.

Ensure community involvement

The use of jurors also means that the community is actively involved in the legal system irrespective of financial circumstances, gender or race. This increases the acceptance of court decisions and ensures that the legal system reflects the values of the community when dealing with criminal cases.

Share decision-making

The responsibility for decision-making is shared across the 12 jurors in criminal cases. As a majority of jurors must come to the same decision, there is much less chance of an incorrect or wrong decision. A judge may accept a majority verdict if, after six hours,

the jury cannot reach a unanimous decision. More time may be permitted if the judge believes that a decision may be achieved.

If the judge is satisfied that a jury cannot reach a decision, the jury may be discharged. When a jury is discharged because it cannot reach a decision, it is called a hung jury, and the case must be reheard before another jury. While this can be costly and stressful for the accused, the victim and their families, our system tries to ensure that the correct decision is reached.

Ensure that proceedings abide by the principles of justice

The use of a jury means that the community can see our justice system at work. This acts as a safeguard to the accused, as the public can see if our courts are operating fairly. The presence of a jury also means that lawyers explain the law and any other complex matters in a way that everyone can understand. In theory, this means that both the jury and the accused can understand what is happening in the courtroom, which allows for greater access. This also educates the public about legal procedures. The use of the jury ensures that proceedings can be understood by the average person, providing equality for all.

Jurors are bound by several laws, and may be charged with criminal offences if they break them.

JURY OFFENCES

It is an offence to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by jurors in the course of their deliberations. This means that research on juries is restricted to general questions in questionnaires or simulation studies. No-one is allowed to interview jurors about how and why they reached their verdict in any particular case. There are a number of other offences related to the jury system.

- **Attendance is compulsory.** If someone is summoned to attend jury service and fails to attend, they can be fined and summoned to attend jury service at a later date.
- **All jury deliberations are secret.** Jurors are only allowed to discuss a case with other jurors. There are strict limits on what can be discussed even when the case has concluded.
- **Juror inquiries are illegal.** A juror must not undertake an inquiry about trial matters except in their duties as a juror. Making an inquiry includes consulting with another person or conducting research by any means, such as using the internet to search a database for information, viewing or inspecting a place or object that is relevant to the trial, conducting an experiment or asking another person to make an inquiry. The fine for a breach is up to \$15 000.
- **Employers must release permanent or casual workers for jury duty.** The *Juries Act 2000* (Vic) protects people called for jury duty. A juror cannot be made to take holiday or sick leave during this time. The trial judge may ask the Juries Commissioner to speak to the employer. An employer who threatens or terminates the employment of a juror faces a fine of up to \$12 000 or jail for up to one year.

APPLY YOUR UNDERSTANDING

HYPOTHETICAL—JURY SELECTION

You are representing the defendant as a defence counsel. Your case is of a young, unemployed person who has been charged with the murder of an elderly victim. It is alleged that the accused assaulted the victim with the intention of stealing money. The victim fell during the assault and struck their head on the footpath. The victim died as a result of the injuries.

1. Using what you know about a criminal jury, explain its role in relation to the case above.
2. Summarise Justice Deane's argument for the use of juries in criminal cases. To what extent do you agree with his point of view?
3. Outline the process that would be used for the selection of the jury.
4. The following people have applied to the judge to be excused from jury service. Do you think that they should be excused? State your reasons.
 - a. a mother of three secondary-aged schoolchildren
 - b. a VCE teacher supervising a Units 1 and 2 subject such as Legal Studies
 - c. a pregnant woman in her third trimester
 - d. a retired man who has planned a holiday
 - e. a casual worker who is concerned that she will lose her job.
5. Would you advise your client to challenge any of the following possible jurors? Suggest reasons for your decision.
 - a. a young man with dreadlocks and a 'free the refugees' badge
 - b. two men in their mid-20s wearing suits and ties
 - c. an elderly woman wearing a hearing aid and using a walking stick
 - d. a young woman carrying a copy of the *Big Issue* magazine
 - e. an unemployed young woman fidgeting nervously as she waits
 - f. a heavily tattooed man in his mid-20s
 - g. a middle-aged woman wearing a tracksuit and reading a women's magazine
 - h. a middle-aged man who is Minister of the Health Department
 - i. a young man who went to primary school with the accused
 - j. a middle-aged man of Asian appearance
 - k. a middle-aged woman wearing a head scarf that suggests she may be a Muslim
 - l. a man with a long beard, wearing shorts, socks and sandals.
6. Outline the difficulties faced by a jury in performing their duties in the above case. What reforms could be suggested to increase the value of the jury? How effective would it make criminal trials if these reforms were in place?

Going further

7. Do research on the jury system and complete one of the following extended-response topics.
 - a. 'The right to a trial by a jury is one of the cornerstones of criminal justice in Victoria. Jurors bring real-world, practical experience to criminal trials when they are asked to decide whether or not an accused is guilty beyond reasonable doubt.' Discuss this statement. Critically analyse the other advantages of using a jury in criminal cases.
 - b. The right to trial by jury is often described as a fundamental right. To what extent do you believe that trial by jury is a fundamental right? Use evidence to support your beliefs.
 - c. To what extent is the jury a representative and democratic body? In your answer critically analyse two factors that limit the effective operation of the jury system in a criminal case.

With prison populations rising, along with costs, alternative approaches to sentencing offenders need to be explored.



You can download the Ombudsman's report from here:
www.ombudsman.vic.gov.au

RECIDIVISM: the tendency of a convicted criminal to re-offend

ALTERNATIVE APPROACHES TO SENTENCING

The 'tough on crime' approach taken by our politicians has led to an increase in the prison population. This has come about mainly because of a number of high-profile cases and crime issues reported in the media. In the past few years, Parliament has introduced a number of reforms to sentencing, bail and parole. These have resulted in an increase in Victoria's prison population and an increase in the corrections budget.

A report undertaken by the Victorian Ombudsman, 'Investigation into the rehabilitation and reintegration of prisoners in Victoria, 2015' showed that the cost of the prison system continues to rise. Since 2011, the budget for correctional services in Victoria has risen by 31 per cent to \$1.04 billion. The average prisoner now costs the Victorian taxpayer around \$270 a day, or \$295 168 over their average sentence of three years' imprisonment. Over 99 per cent of prisoners in Victoria will be released, so imprisonment is only a temporary solution. Of the 6386 people held in Victoria's prisons in March 2015, only 14 people were being held indefinitely, never to be released. The **recidivism** rate is at a high of 44.1 per cent. If inadequate effort is made to rehabilitate and reintegrate people as they are released, former prisoners and the community are left vulnerable to recidivist behaviour. The Victorian Ombudsman projects the prison population to reach 8300 in June 2019.

The Ombudsman's report shows that the more support a prisoner has on their release into the community, the better their chances of staying out of prison. For example, Victoria's only dedicated facility for helping prisoners transition back into the community, the Judy Lazarus Transition Centre, has shown a much lower re-offending rate than the prison population as a whole. The recidivism rate for prisoners leaving the Centre is 10.4 per cent, compared to 44.1 per cent for the overall prison population.

Just under half of all prisoners in Victoria have at least two measures of serious disadvantage. At the time they entered the prison system, 35 per cent of prisoners were homeless, more than 50 per cent were unemployed and more than 85 per cent did not complete high school.

The average male prisoner



- 35.5 years old
- born in Australia
- did not complete high school
- a history of alcohol and drug abuse
- single and unemployed at the time he entered the prison system
- sentence of three years in a medium security prison
- more likely than not to have been imprisoned previously

The average female prisoner



- 36 years old
- born in Australia
- single or in a de facto relationship
- likely to be a mother/primary care giver
- unemployed, home duties or on a pension before prison
- has a higher level of education than her male counterpart but still failed to complete high school
- sentence of less than two years
- likely to be in prison for the first time

Average Victorian prisoners

Prisoners often face a ‘catch-22’ situation where they are unable to get parole without having housing to go to on release, but cannot secure housing without having a parole date. Prisoners are 12 times more likely to die in the first four weeks after their release. Some prisoners have been provided with camping swags on release because there was no other housing option.

THE DRUG COURT

Alternative approaches to sentencing are needed for those suffering a drug addiction or alcohol dependency. The Ombudsman has reported that over 75 per cent of male prisoners and 83 per cent of female prisoners have reported illicit drug use before entering prison, and it is well recognised as a significant challenge to rehabilitation and prisoner management.

The Drug Court operates out of Dandenong and represents a major shift in the way courts deal with drug offenders. Protection of the community is the primary focus; however, it does this by seeking to provide services to rehabilitate offenders from drug or alcohol dependency. This approach is known as **therapeutic justice** and is a major shift from the mainstream management of offenders.

The Drug Court provides alternative sentencing options for drug offenders, seeking to protect the community while also helping rehabilitate offenders.

Sentencing options—Drug treatment order (DTO)

Section 18 of the *Sentencing Act 1991* (Vic) allows a Drug Court Magistrate to sentence an offender to a two-year drug treatment order (DTO), consisting of two parts:

- Custodial: The magistrate will sentence the offender to a custodial period that is served in the community while they undergo the DTO.
- Supervision and treatment: Involves conditions being imposed to address the offender’s drug and alcohol dependency. These include regular drug testing, attending meetings with a case manager and clinical advisor, drug and alcohol counselling and regular attendances before the Drug Court Magistrate.

The custodial part of the order is put aside while the accused undertakes the supervision and treatment program while remaining in the community. If the accused does not abide by the condition of the order, they can be placed in jail.

THERAPEUTIC JUSTICE: a focus on services and programs to rehabilitate offenders while maintaining the protection of the community

Eligibility criteria

In order to be considered eligible for a DTO, the following criteria must be met:

- the accused must plead guilty to all offences referred to the Drug Court
- the accused’s usual place of residence must be within a postcode area serviced by the Drug Court
- there must be a link between the accused’s offending and their drug or alcohol dependence
- the offence must be within the jurisdiction of the Court and punishable upon conviction by imprisonment
- the offence must not be a sexual offence or involve the infliction of actual bodily harm.

Requirements

Participants are expected to comply with a number of conditions, including:

- frequent urine drug testing and possible breath testing
- regular attendance at Court Review Hearings
- alcohol and drug counselling
- frequent attendance at case management and clinical advisor appointments
- any other conditions set by the Drug Court to assist them in overcoming their drug or alcohol dependence.

Benefits

Benefits for Drug Court participants include:

- assistance to break the cycle of offending
- abstinence from substance use
- improved health and wellbeing
- improved employment and training prospects
- connection to local community
- reduced risk of relapse
- greater self-esteem.



Defendant testifying in Drug Court.

Benefits to the community include:

- cost savings surrounding reduced time in custody
- lower rates of recidivism
- fewer victims of crime
- greater sense of personal and community safety
- lower drug and alcohol related health costs
- less welfare dependency and associated costs.

A recent evaluation by KPMG of the Drug Court found that successful completion of the program reduced the rate of recidivism by over a third and also lowered the seriousness of re-offending behaviour. KPMG estimated the cost at \$26 000 per participant for two years, compared with two years'

imprisonment at an average cost of \$197 000 per prisoner. They calculated a \$1.2 million in saving on prison expenditure as a result of the program completed by 61 offenders.



CASE STUDY

AN EXPERIENCE OF THE DRUG COURT

John has a minimal criminal history, initially appearing in the Magistrates' Court at the age of 29 for theft charges with no conviction recorded. Fifteen years later, at the age of 46, John again re-entered the criminal justice system after committing numerous burglaries and thefts with his partner.

John stated that he and his partner (and co-offender) were initially using ice on a social basis, but after the death of John's daughter, this use had escalated from half a gram once every three weeks to half a gram on a daily basis, dependent on finances. He states the lack of money was the main catalyst for their offending to enable them to continue to purchase drugs and keep up with their private rental accommodation.

The Drug Court team assessed John as a person who would benefit significantly from the therapeutic interventions of a DTO and he was sentenced to a term of imprisonment with a DTO component in late 2013.

A DTO consists of three phases ranging in intensiveness. If an individual demonstrates a range of specified behaviours, the Drug Court Magistrate can respond by promoting them through the phases. Likewise, should there be a deterioration, the Drug Court Magistrate can elect to demote the person and increase the support and intensiveness of intervention.

Initially motivated to address his substance abuse, John attended supervision, testing, counselling, Court and Treatment Planning sessions on a regular basis. His promotion to Phase 2 in mid-2014 indicated his determination to become drug-free.

**CASE
STUDY**

John was unable to maintain this progress and lapsed back into ice use, citing negative peer associations as his major risk factors. He was subsequently demoted to Phase 1 in late 2014 to benefit from the more intensive and weekly support provided in this phase.

In early 2015, John was able to reverse this decline in his commitment and started to take advantage of the assistance of the Drug Court team. His drug-free status resulted in him progressing to Phase 2, then Phase 3 soon after.

John's determination to achieve both his personal goals and those of the DTO resulted in him putting in place strategies to address both his physical needs and stabilise his depression through prescribed medication. He re-established friendships with people he used to know prior to his criminal lifestyle, gained permanent housing through the Drug Court Homelessness Assistance Program run by local housing service WAYSS and became fully employed. Further, he did not re-offend during the period of his DTO, demonstrating an increased insight into the ramifications of offending and a strong desire to embrace a positive crime-free lifestyle.

John had significant grief and loss issues prior to being placed on the Order. Prior to graduating from the DTO, he set himself further goals in an effort to extend his capabilities. He advised his case manager that he intended to sponsor a seven-year-old African child, as this would be a concrete way he could 'give something back to the community'. He also summarised his achievements on the DTO by stating he had 'beaten' his addiction by looking at it 'straight in the face' and that regaining his self-pride was his biggest achievement.

APPLY YOUR UNDERSTANDING

THE DRUG COURT

1. Describe what is meant by the term 'therapeutic justice'.
2. Explain the two parts of a DTO. Discuss the impact of each part on the offender.
3. Summarise the criteria for an offender to be eligible for a DTO. Once on the program, do you believe the requirements are difficult to attain?
4. Evaluate the benefits of this program.
5. To what extent do you believe the following statement is correct?
 'The tough on crime approach for drug offenders serves the community well but not the individual.'
 In your response, consider the cost of imprisonment and protection of the community.
6. Read through the case study and complete the following questions:
 - a. Provide a snapshot as to who John is and what his crimes were. Read through the case study and take an educated guess why John was involved in drugs.
 - b. Apply the eligibility criteria to John and describe the various phases he had to undertake.
 - c. Describe John's success in the program and cite (state) the reasons for his success or lack of.
 - d. Identify the impact of the 'Drug Court Homelessness Assistance Program'.
 - e. Outline the importance of a case manager throughout this program.
 - f. To what extent do you agree that John's rehabilitation was his own doing and not that of the Drug Court? Explain your view.

The Koori Court aims to create sentencing orders that are more culturally appropriate to Koori offenders, thereby reducing the rate of re-offending.

THE KOORI COURT

The Koori Court operates three jurisdictions in Victoria. The Koori Court began as a division of the Magistrates' Court, then expanded to the Children's Koori Court and the County Koori Court.

The need for a Koori Court arose from the over-representation of Aboriginal and Torres Strait Islander people across all levels of the criminal justice system. In 2001, when the Magistrates' Koori Court Pilot commenced, it was estimated that Koori people were 12

times more likely to be imprisoned than other Victorians. The Koori Court offers an alternative approach to sentencing by enhancing the ability of the Court to understand the underlying issues that lead to a person's offending behaviours.

The Koori Court is an informal court with the magistrate or judge sitting with all the participants at a large table, not at the bench as in a traditional court. The accused sits with their family at the table. Matters are discussed in plain English rather than using technical legal language. The adjacent diagram provides a snapshot of how the court is structured in comparison to a traditional court.

This diagram explains where everyone will sit in the Koori Court:

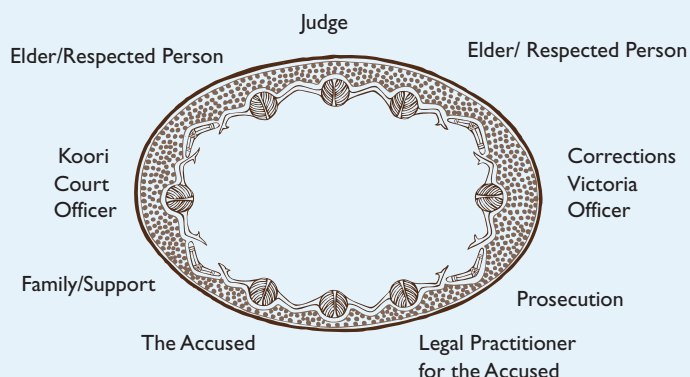


Figure 10.4 Where everyone sits in the Koori Court

Eligibility criteria

The eligibility criteria is that the Koori accused must:

- plead guilty to an offence
- live within, or have offended within, the boundary area of a Koori Court
- elect to go to the Koori Court and be willing to join in the Koori Court process.

Process requirements

The Koori Courts are open and accessible to the public. All hearings are conducted in a specially designated courtroom with as little formality as possible, including the requirement to speak in plain English. The judicial officer acknowledges Country and explains that the court respects Aboriginal people and culture and that the room has been smoked.

Prior to a formal judgment by a magistrate or judge, hearings occur like this:

- All participants sit around a table.
- All the participants are introduced and the judicial officer explains the Elders' role.
- The case is presented to the Court and all participants have a chance to discuss the offending behaviour.
 - > The Koori offender is expected to be involved in the 'sentencing conversation' and has the opportunity to talk about their past, why they did things, and what they can do about it.
 - > The accused's family and community members can also contribute to the discussion.
 - > The Koori Court Officer can talk about the availability of local services and programs appropriate to the accused.
 - > The Koori Elders and Respected Persons will provide the Court with advice relating to cultural matters.

At the end of these proceedings, depending on the complexity of the charge/s, sentencing can take place immediately or some time later. The Country Koori Court follows formal sentencing practices, with the judge sitting alone at the bench to deliver the sentence of the court. This reinforces to the accused that the judge is the ultimate decision-maker.

Sentencing options

The Koori Court retains the same sentencing options as a traditional court, including the power to send the accused to prison. However, the primary goal of the Koori Court is to create sentencing orders that are more culturally appropriate to Koori offenders, thereby reducing the rate of re-offending. See the County Koori Court case study of *DPP v McDevitt*.

Benefits

Benefits for Koori Court participants include:

- culturally inclusive assistance to break the cycle of offending
- assistance from Koori Court officers and local services, such as employment and training
- greater ownership and participation of an accused in their rehabilitation
- an opportunity to speak and be a part of the sentencing process
- involvement and support of family
- connection to the local Indigenous community.

Benefits to the community include:

- involvement of Elders and Respected Persons
- lower rates of recidivism and over-representation in prison of Indigenous people
- Aboriginal participation in the sentencing process
- promotes awareness about acceptable community standards of behaviour
- greater sense of personal and community safety
- lower drug- and alcohol-related health costs
- less welfare dependency and associated costs.

We know that sending people to prison is very costly, with little opportunity for rehabilitation. The Koori Courts also assist in reducing the levels of recidivism amongst Koori defendants. This also impacts the levels of over-representation of Indigenous offenders in the prison community. Overall, the Koori Court has increased the level of Koori community participation in the administration of law, thus providing a more therapeutic approach to justice.



Opening of the County Koori Court in Mildura.

COUNTY KOORI COURT—*DPP V MCDEVITT*

CASE STUDY



The following case study is a summary of a sentencing for a case of theft, culpable driving causing death and unlicensed driving reported in the County Court of Victoria. The case citation is *DPP v McDevitt* [2016] VCC 1668. Allan McDevitt is an Indigenous offender and his pre-sentencing hearing took place in the County Koori Court one month prior to his sentencing.

AN OVERVIEW OF THE CHARGES AND THE FACTS OF THE CASE

Allan McDevitt, 31 years old and of Koori heritage, pleaded guilty to one charge of theft, one charge of culpable driving causing death and one summary charge of unlicensed driving. McDevitt



CASE STUDY

stole a motor vehicle and was an unlicensed driver. He drove the vehicle while under the influence of alcohol with a BAC reading of 0.109. He was incapable of having proper control of the vehicle and was estimated speeding at 95 kilometres per hour and driving erratically. Being on the wrong side of the road, he caused the death of Ms CG, an elderly woman.

COURTS THAT WERE INVOLVED

A number of courts were involved in this case:

- Sentencing conversation in the Koori Court before Elders (the pre-sentencing hearing)
- Sentencing hearing in the County Court
- Numerous attendances in the Magistrates' Koori Court between 2009 and 2015.

SANCTIONS THAT WERE IMPOSED AND THEIR APPROPRIATENESS

The maximum penalties for these offences were 20 years' imprisonment for culpable driving causing death, 10 years' imprisonment for theft and 3 months' imprisonment (or a fine of not more than 25 penalty units) for unlicensed driving. However, Judge Grant sentenced McDevitt to an imprisonment term of 7 years and 9 months (with a fixed period of 5 years and 3 months before being eligible for release on parole). In addition:

- the 473 days served in remand prior to sentencing were recorded as time already served under this sentence
- on the charge of culpable driving, McDevitt was convicted and sentenced to 7 years and 6 months' imprisonment
- all licences were cancelled and McDevitt was disqualified from driving for 6 years
- for the charge of car theft, McDevitt received 15 months' imprisonment
- for the charge of unlicensed driving, McDevitt received one month imprisonment
- three months of the sentence for the car theft was to be served cumulatively upon the sentence for culpable driving
- had McDevitt not pleaded guilty to the charges, a sentence of 10-and-a-half years (with a minimum term of 8 years' imprisonment before being eligible to apply for parole) would have been imposed.

FACTORS CONSIDERED IN SENTENCING

Judge Grant considered specific and general deterrence as a consideration. Principles of denunciation, just punishment and protection of the community were also highly relevant in sentencing. He took into consideration the following factors (note: the term 'credit' means that it was seen as a favourable factor, whereas 'debit' meant that it was an unfavourable factor).

Prior convictions (debit):

- 2004: drink driving and careless driving charge, with a 12-month adjournment
- 2007: careless driving charge where a pedestrian was killed—fined \$1200
- 2009: failed to give name and address—suspended jail sentence and licence disqualified for four years
- 2012: driving while disqualified—convicted and fined, and attended alcohol and drug counselling
- Magistrates' Koori Court: many appearances between September 2009 and January 2015 for dishonesty offences and violence offences—community corrections orders with conditions that were aimed at addressing the drug and alcohol problems and the mental health issues.

Background circumstances (credit):

- Difficult background and schooling—ostracised because of very dark skin
- Was lonely and unhappy at school and finished Year 11 at Northland Secondary College
- At the time of the offence, McDevitt was unemployed and on a NewStart Allowance
- McDevitt had a long-standing problem with alcohol and drug abuse. He also suffered from post-traumatic stress disorder and severe depression as a result of the 2007 incident.

CASE STUDY

Culpability (debit):

- Increased weight was given to a long history of abusing alcohol, which was a trigger for this offending
- Due to suffering from a mental illness, only a modest reduction was taken into consideration.

Early plea of guilt (credit):

- The early plea of guilty saved the victims from the trauma of giving evidence and also saved the community the cost and expense associated with a criminal trial
- The plea indicated remorse.

Koori Court Processes (credit):

- The accused participated in Koori Court sentencing conversation, before Elders from the Koori community, which is a difficult and challenging experience.

Prospects of rehabilitation (debit):

- The judge was extremely guarded about McDevitt's prospects for rehabilitation.

Many prior convictions (credit):

- Judge Grant gave consideration to the fact that this represented McDevitt's first lengthy period of imprisonment.

POSSIBLE AVENUES OF APPEAL

McDevitt was sentenced in the County Court. He could appeal within the designated time limit to the Supreme Court of Appeal if he felt that the sentence was too severe. Similarly, the DPP could appeal if it felt the sentence was not harsh enough.

THE EXTENT TO WHICH THE PRINCIPLES OF JUSTICE ARE ACHIEVED

The following principles of justice were achieved in the sentencing of McDevitt:

Fairness

Judge Grant showed fairness by considering the specific and general deterrence of others who offend with these types of crimes. He also felt that denunciation, just punishment and protection of the community were paramount in his sentencing. Due to McDevitt's previous history, Judge Grant was extremely guarded about prospects for rehabilitation.

He also considered carefully the following factors in determining McDevitt's 7 years and 9 months sentence: the early plea of guilt and thus avoiding the need for trial, McDevitt's prior convictions and his background. Judge Grant also considered McDevitt's moral culpability and low prospects of rehabilitation. McDevitt's participation in the Koori Court sentencing conversation process was seen as an advantage.

Equality

In order that McDevitt be treated equally in the court, he sought legal assistance from the Victorian Aboriginal Legal Service, which briefed a barrister (M Stanton) to present his case. The judge also took into consideration a number of reports and character evidence when sentencing McDevitt.

The Koori Court sentencing conversation gave all parties the opportunity to ascertain culpability and provide an opinion as to the offending. It also gave the judge an opportunity to assess McDevitt's remorse for his offending. The judge made mention of the impact of the crime and the devastating effect it had on the victim's family. The victim's partner and daughter provided victim impact statements that describe their grief, distress and suffering.

Access

The judge made mention of McDevitt's low rehabilitation prospects. However, he did say that if McDevitt sought treatment for his mental health and substance abuse issues, his prospects of rehabilitation would be enhanced.

APPLY YOUR UNDERSTANDING

THE KOORI COURT

1. Explain the reasons for the introduction of the various Koori Courts.
2. Outline the process used in the Koori Court to assist Indigenous offenders.
3. Evaluate the benefits of the Koori Court for the individual and the community.
4. Read through the case study and complete the following questions:
 - a. Identify the offences that McDevitt was charged with.
 - b. McDevitt served 473 days in remand prior to sentencing. How many months is this, and do you think it is fair he spent so long in prison prior to his trial?
 - c. What if McDevitt challenged these offences and was found to be not guilty? Would that be fair? Explain your view.
 - d. Reading through the case study, speculate on why McDevitt committed these offences.
 - e. Provide reasons why you think the sentencing conversation in the County Koori Court before Elders would have been difficult and challenging.
 - f. Do you think the sanction imposed by Judge Grant was a fair one?
 - g. Briefly summarise the factors taken into account before sentencing. Which of these factors do you think Judge Grant gave greater weight to when imposing the sanction?
 - h. To what extent do you agree with Judge Grant's sentencing of McDevitt? Refer to the maximum penalties for these offences and the principles of justice to explain your answer.

DIVERSION PROGRAMS

The Criminal Justice Diversion Program aims to give offenders the chance to avoid a criminal record by undertaking tasks and conditions that benefit the community.

The Criminal Justice Diversion Program (CJDP) provides mainly first-time offenders with an alternative to avoid a criminal record by undertaking conditions that benefit the offender, victim and community. The CJDP is governed by section 59 of the *Criminal Procedure Act 2009* and encourages victim involvement.

Eligibility criteria

The matter must meet the following criteria before a Diversion can be recommended:

- the matter is a summary offence
- the offence is not subject to a minimum or fixed sentence or penalty (except demerit points)
- the accused acknowledges responsibility for the offence
- the prosecution consents to the Diversion.

Requirements

Anyone can apply for Diversion throughout the court process. However, Diversion cannot commence without the consent of the prosecution.

Victims

Where a charge involves a victim, the court seeks the victim's view of the matter. This may include whether the victim agrees with the course of action, the amount of compensation sought for damage to property and how the crime has affected the victim.

Victims are not obliged to respond to the court's contact. However, the victim is entitled to express their view by way of letter or in person on the day of hearing. If requested, the court will notify victims of the outcome of the hearing.

Interview

Prior to any appearance before a magistrate or judicial registrar, the diversion coordinator interviews the accused to identify the major issues in the case so they can advise the magistrate or judicial registrar of appropriate services for the accused. This interview assists the presiding magistrate or judicial registrar and reduces the required amount of court time.

In court

A Diversion hearing is conducted in open court before a magistrate or judicial registrar. The magistrate or judicial registrar assesses the suitability of the accused and a plan is developed.

The existence of prior convictions does not disqualify an accused from the program, but the court will consider this when deciding if the Diversion Program is appropriate.

Sentencing options

The Magistrates' Court offers a variety of services and programs to members of the public to improve its responsiveness to the community when they attend court. In addition, the support services aim to assist those accused who may present with issues of disadvantage such as disability, substance abuse or mental illness. The following sanctions are alternatives used instead of imprisonment:

- undertake voluntary work with various community organisations
- undertake to donate to charities and local community projects
- undertake to pay restitution to victims
- apologise to the victim in a letter or in person
- attend counselling and/or treatment
- attend a defensive driving course and/or Road Trauma Awareness seminar
- comply with any other condition the magistrate or judicial registrar deems appropriate.

Benefits

Benefits for CJDP participants include:

- offenders avoid having a criminal record
- reduction of re-offending
- offender takes responsibility by making an apology to the victim
- offender receives assistance such as counselling or treatment as part of their rehabilitation.

Benefits to the community include:

- efficient use of court resources
- complements current courts case processes
- lower rates of recidivism
- assistance towards local community projects such as voluntary work and donations
- ensures accountability of the accused due to court monitoring and increases community safety.

The success rate of CJDP from re-offending is quite high—over 90 per cent. Police have noticed a reduction in crime as a result of diversions and referrals.

Some of the offences used as part of the Diversion program include careless driving, indecent language, offensive behaviour, consuming or supplying liquor on unlicensed premises, failure to leave licensed premises when requested, shop theft of goods worth up to \$600 and wilful damage to property of up to \$500. All these crimes are low level summary offences.



Rob Hulls working with young offenders to remove graffiti.

OTHER ALTERNATIVE APPROACHES

Courts understand that sentencing is a balancing act between protecting the community, providing justice to victims and the rehabilitation of offenders. Recent increases in Victoria's prison population has placed a strain on access to rehabilitation programs within these prisons. Courts also understand that the more support an offender has in the community, the better their chances of staying out of prison and rehabilitating themselves. Sending someone to prison is an expensive exercise, whereas placing them on a supervised corrections order is at a fraction of the cost.

Specialist courts and support services give the legal system more options for protecting the community while also rehabilitating offenders.

Our legal system has responded to this by establishing a range of specialist courts with services to deal with criminal offending such as Justice Centres, the Drug Court, the Infringements Court, Koori Court, Sexual Offences List, Family Violence Court Division and the Assessment and Referral Court (ARC) List.

Police officers are the frontline of dealing with offenders. Currently they have discretionary powers to issue informal or formal warnings and cautions rather than arrest offenders. They can recommend a number of diversion programs in operation for first time and low level offenders. The Illicit Drugs Diversion or the Cannabis Cautionary Program are examples of interventions for those with drug-related problems.

The courts also offer a range of support services for an offender. These services assist an accused undergoing a criminal matter who is experiencing issues such as disability, substance abuse, cognitive impairment or mental illness. The services address the issues that led to the offending or anti-social behaviour and thus reduce crime and improve outcomes for the accused, as well as the community.



Victorian budget: statewide push to divert youth from a life of crime

Farrah Tomazin

Early intervention program encourages teen offenders to take responsibility for their crimes and supports them in the community. Teenage lawbreakers will get more chances to avoid jail as part of a statewide plan to divert young people from a life of crime. As Victoria's crime rate continues to rise—partly on the back of youth offences—the state budget will pump millions of dollars into early intervention, aiming to get young people back on track rather sentence them to juvenile detention.

Under the plan, \$5.6 million will be spent on a new diversion program in the Children's Court, allowing young people to avoid a criminal conviction and get the support they need, if they accept responsibility for their behaviour.



Four new full-time youth justice workers will also be employed to support offenders, and a further \$1 million over two years will be spent expanding the Youth Justice Bail Supervision program, which helps to safely manage young people on bail in the community.

The notion of a statewide, government-backed diversion program builds on a pilot scheme run

by the Jesuit Social Services. Figures suggest that in the pilot program's first quarter, 35 out of 38 young people who completed the program had their matters successfully dismissed.

Children's Minister, Jenny Mikakos, stated that, 'No one wants to see one mistake define a young person's entire life. Avoiding further progression into the criminal justice system is in the best interests of the young person and the community'.

Under the new scheme, young people will be encouraged to understand the underlying causes of their behaviour and will receive tailored support. But if a person does not satisfy the diversion requirements their matter will return to court and they will be sentenced if found guilty.

Youth advocates have welcomed the move. Victoria has traditionally had a strong record when it comes to rehabilitating people in the juvenile justice system.

'Diversion isn't a soft option—it actually involves young people taking responsibility for their behaviour and taking that next step,' Youthlaw advocacy officer Tiffany Overall said.

'Unless you tackle the root causes you're not going to ultimately stop the offending, so it's a good thing—not just for the young person but also the community generally.'

The latest official figures show that Victoria's crime rate rose 8.1 per cent in the 12 months to December last year, partly on the back of a rising tide of youth offences, family violence, and drugs.

Source: *The Age*, 23 April 2016

COMMUNITY CORRECTIONAL SERVICES, COURT SERVICES UNIT

Community Corrections provide a range of supervision options for offenders tailored to address offending behaviour and reduce the risk of re-offending. This unit works closely with the courts to ensure offenders are sentenced or admitted to a community corrections order. They can undertake on-the-spot assessment and pre-sentence reports for judicial monitoring. Those who breach their orders are also prosecuted.

COURT ADVICE AND SUPPORT OFFICER

This service provides advice to judicial officers, court staff and lawyers regarding a range of options available from government and community agencies. Support and treatment services include medical, mental health, housing, CentreLink, immigration, counselling and aged care. Used by applicants and respondents in the Family Violence Division.

COURT INTEGRATED SERVICES PROGRAM

An important service that assesses and refers the treatment of offenders. It links offenders to support services such as drug and alcohol treatment, crisis accommodation, disability, mental health and acquired brain injury services.

CREDIT/BAIL SUPPORT PROGRAM

Bail is a fundamental right as an accused has the presumption of innocence. The CREDIT/Bail Support Program increases the likelihood of an accused being granted bail. The program links the accused to services such as accommodation, access to drug treatment and other support services. This provides for successful completion of bail.

ENFORCEMENT REVIEW PROGRAM

Offenders who present with special circumstances relating to outstanding fines are able to access court outcomes that reflect their circumstances of the offending. These offenders present with mental illness or neurological disorders.

10.5 Court services

KOORI FAMILY VIOLENCE AND VICTIM'S SUPPORT PROGRAM	This program assists victims of family violence with services that are more culturally appropriate within the court to matters involving Koori people.
KOORI COMMUNITY ENGAGEMENT OFFICER	Engagement officers assist Koori people before the courts by providing them with advice and access to culturally appropriate and sensitive services.
KOORI LIAISON OFFICER PROGRAM	Addresses the over-representation of Koori people in the Victorian justice system by working with Koori defendants when they enter the court system. The service is aimed at making the most of rehabilitation interventions through culturally appropriate and sensitive involvement.
MENTAL HEALTH COURT LIAISON SERVICE	This service provides court-based assessment and advice aimed at offenders with a mental illness, diverting them from the courts into appropriate mental health treatment services.
YOUTH JUSTICE COURT ADVICE SERVICE	This service is aimed at diverting from the courts young offenders aged between 18 and 20 years who are to appear before the Magistrates', County and Supreme courts in relation to criminal matters.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Victorian criminal courts

- A court hierarchy is organised in order from lowest to highest. Each court has its own jurisdiction or power. This jurisdiction is divided into original (cases are heard for the first time) and appellate (cases heard a second time). Courts also have the power to hear summary (minor) matters and indictable or serious matters.
- A court's primary role is to enforce the law and settle disputes. In determining the sentence, courts can consider just punishment, protection of the community, denunciation, retribution or rehabilitation.
- Courts can create a precedent or a set of principles that are used in later cases.
- The right to appeal exists in most criminal cases whereby an accused can have a court provide a second opinion.
- Courts specialise in some areas, providing judges and magistrates with skills, experience and expertise in particular matters.
- A court hierarchy enables minor matters to be dealt with relatively quickly, thus saving time and money and making it organisationally convenient for the legal system.

Criminal jurisdictions of the Victorian courts

- The criminal jurisdiction of the Magistrates' Court includes:
 - > summary or minor offences such as being drunk and disorderly
 - > indictable offences heard summarily such as shop-stealing offences
 - > committal proceedings, including mentions, hand-up brief or a hearing
 - > warrants and bail applications.
- The Magistrates' Court includes a number of specialist jurisdictions. These can be known as courts, divisions or lists. These include Justice Centres, the Drug Court, Infringement Court, Koori Court, Sexual Offences List, Family Violence Court Division and ARC List.

- The Coroners Court is an independent body that investigates reportable deaths, reviewable deaths and fires.
- The Children's Court generally has the power to deal with cases relating to a child under the age of 18. Its jurisdiction is divided into three areas:
 - > Criminal Division—all criminal matters except homicide
 - > Family Division—care and protection orders
 - > Children's Koori Court—similar to criminal division, dealing with Indigenous offenders.
- The County Court hears all serious criminal offences except murder, treason or homicide-related offences. It can hear appeals from the Magistrates' Court. The County Koori Court is a sentencing court and deals only with Indigenous offenders who plead guilty.
- The Supreme Court is the highest trial court and hears the most serious criminal offences such as murder, treason or homicide-related offences. It has a range of appeal options from the Magistrates' Court and County Court.

The jury in a criminal trial

- The jury represents a cross-section of the community, and applies the values held by ordinary members of society to criminal cases.
- Jurors are selected via a questionnaire. Depending on their answers some potential jurors may be ineligible, disqualified, defer jury service or be excused permanently for good reason.
- The empanelling process provides the accused with the right to challenge jurors either for no reason (six) or for cause (unlimited). Jurors can be empanelled either by name or by number.
- The role of a criminal jury is to remain impartial and decide the guilt of the accused beyond reasonable doubt. Their decision must be either a majority or unanimous one, depending on the crime.
- Criminal jurors are randomly selected and are an impartial fact-finding body.
- Juries bring community values when dealing with criminal cases.
- Juries act as a safeguard for the principles of justice.
- There are four offences related to the jury system. They are: not complying with compulsory attendance; revealing deliberations; making illegal inquiries; and employers not releasing permanent or casual workers for jury duty.

Alternative approaches to sentencing

- Alternative approaches to sentencing are needed as prisons are costly and offer little in terms of rehabilitation. Very few prisoners have completed high school and under half of all prisoners in Victoria have at least two measures of serious disadvantage.
- The Drug Court operates out of Dandenong and assists offenders suffering a drug addiction or alcohol dependency. The accused must plead guilty and qualify for a DTO. This order has two parts, custodial and supervision and treatment. There are many benefits of the Drug Court to the community and the accused.
- The Koori Court is an alternative to sentencing, enhancing the court's ability to address the underlying issues that lead to a person's offending. The accused must plead guilty and is expected to participate in the sentencing. It is run as an informal court with the magistrate or judge sitting with all the participants at a large table. Koori Elders and Respected Persons assist the judicial officer in understanding the offending. There are many benefits to the community and the accused as a result of the work undertaken in the Koori Court.
- The Criminal Justice Diversion Program provides first-time offenders with an alternative that avoids a criminal record by undertaking conditions that benefit the offender, the victim and

the community. The magistrate may issue the following sanctions instead of imprisonment: voluntary work, donations, restitution orders, apology to the victim, counselling and/or treatment, defensive driving course and/or a Road Trauma Awareness seminar. Diversion programs have worked successfully and benefit both the community and the accused.

- Our legal system and courts have responded to the challenges of offenders with special needs by establishing a range of specialist courts and court services.

CHECK YOUR UNDERSTANDING

1. Define the term 'jurisdiction'. What is the difference between original and appellate jurisdiction?
2. Courts are arranged in a hierarchy; that is, in order from lowest to highest courts. Explain the reasons for a court hierarchy. Illustrate with the use of an example.
3. Outline the criminal and appellate jurisdiction of the following courts:
 - a. Magistrates' Court
 - b. County Court
 - c. Supreme Court, including the Court of Appeal.
4. In the past 10 years, the Magistrates' Court has expanded its use of specialist courts and lists. To what extent do these lists and courts assist in providing effective justice to the community? In your discussion, mention the various lists and divisions of the Magistrates' Court.
5. Explain the difference between a reportable and reviewable death by the Coroner.
6. Describe the jurisdiction of the Children's Court. Why do we need a special court to hear cases where a young person is charged with an offence?
7. What is a mention hearing? Why are mention hearings used?
8. What is the purpose of a committal hearing?
9. How does the hand-up brief process differ from a committal hearing?
10. Distinguish between the roles of the following people:
 - > a barrister and a solicitor
 - > a judge and a magistrate
 - > a prosecutor and a defence barrister.
11. What is a jury? When will a jury be used in a criminal case?
12. How does the Juries Commissioner determine who is eligible for jury service? Describe the eligibility criteria.
13. Suggest why some people may not be allowed or may refuse to do jury service.
14. Draw up a table similar to the one below. In one column, list three advantages of the jury system. In the other column, list the corresponding disadvantages.

JURY SYSTEM	
ADVANTAGES	DISADVANTAGES

15. Describe the offences to jury service. To what extent do you believe the sanctions are adequate?
16. Discuss the pros and cons of a Diversion Program, whereby criminals go into the army for six months.

17. Draw up a table similar to the one below. Create a summary comparing the alternative approaches to sentencing.

	THE DRUG COURT	THE KOORI COURT	CRIMINAL JUSTICE DIVERSION PROGRAM
Brief description			
Who is eligible?			
Process			
Sanctions available			
Benefits			
Speculate on the possible negatives of this approach			

APPLY YOUR KNOWLEDGE

COURT HIERARCHY

Complete the following table on court hierarchy in your notes.

CASE STUDIES	WHICH COURT WOULD HEAR THE CASE?	WOULD A JURY BE USED? 'YES', 'NO' OR 'UNSURE'	WHICH COURT WOULD HEAR THE APPEAL?
Tash is 15 years old and has been charged with theft of an iPad.			
Victor—a 35-year-old, unemployed accountant—is charged with theft of property valued at \$16 000 from L-Mart stores.			
Emily, a 25-year-old, refuses a 'direction to move on' by a police officer in a public place.			

CASE STUDIES	WHICH COURT WOULD HEAR THE CASE?	WOULD A JURY BE USED? 'YES', 'NO' OR 'UNSURE'	WHICH COURT WOULD HEAR THE APPEAL?
Kiah, a 14-year-old girl, wishes to apply for an irreconcilable differences (split from her family) order.			
Zoe is charged with culpable driving, causing the death of Victoria.			
Stephanie is charged with the murder of Lauren. Stephanie claims it was an accident.			
Alanah, an Aboriginal woman, pleaded guilty to burglary.			
Chloe is appealing against a conviction for burglary in the County Court. The basis of Chloe's appeal is that the judge misdirected the jury.			
Habiba is convicted of a criminal offence in the Magistrates' Court and is sentenced to six months' imprisonment. She wishes to appeal against the severity of the sentence.			
Luke is 16 years old, and has been charged with murder.			
Michael is 18 years old, and was caught stealing Pokémon cards from Target. It was his first offence.			
Isabella, 23, has been convicted of terrorism in Victoria.			
Ross, a 55-year-old drug addict, has been charged with being drunk and disorderly in a public place.			

APPLY YOUR KNOWLEDGE

WORD FIND—THE OPERATION OF THE JURY SYSTEM

Use the words listed below to complete the following passage.

random	eligible	jury panel	summons	electoral	ineligible
vote	excused	questionnaire	jury pool	disqualified	jury lists

Anybody over the age of 18 years who is enrolled to _____ can be called for jury service. The Juries Commissioner prepares _____. The Juries Commissioner will notify the _____ officer of the number of jurors that are likely to be needed in an area for the following 12 months. Names of potential jurors are selected at _____ from the electoral roll. Each person selected is sent a _____ to determine if they are _____ to complete jury service.

Some people, such as judges and police officers, will be considered to be _____ for jury service. Others may be considered _____ as they are either currently serving, or have recently served, a sentence for a criminal offence. Some jurors may request to be _____ for a good reason such as illness or care of children. Jurors who are not excused, ineligible or disqualified are sent a _____ to attend court and form a _____. Potential jurors for individual trials are selected from the jury pool. When a jury is sworn in for a particular trial they form the _____.

APPLY YOUR KNOWLEDGE

E-LEARNING INVESTIGATION—CORONERS COURT

Using the Coroners Court website, and referring to the tabs listed below, outline the role and jurisdiction of this court.

CORONERS COURT:
www.coronerscourt.vic.
gov.au



Family Information
Examinations and Autopsies
In the Courtroom
Coronial Investigation Process
Coroners' Written Findings
Orders and Rulings

Publications
Forms
Translations Brochures
Practice Directions
Legislation
FAQs
Virtual Tour

- Which of the following cases would be heard by a Coroners Court?
 - A local council cut down a tree that crushed a passing motorist to death when it fell. It has been suggested that the death resulted from the negligence of two of the council's employees.
 - A pedestrian is killed in a traffic accident. The coroner expresses concern that the bull bar attached to the front of the car may have contributed to the injuries suffered by the pedestrian.
 - An elderly man dies in his home. The body is not discovered for 10 days.

- d. A fire destroys an old weatherboard home.
 - e. A fire destroys a factory. As a result, all the equipment in the factory is destroyed.
 - f. A 17-year-old boy drowns in a boating accident. The driver of the boat is found to have a blood alcohol level in excess of 0.05.
2. How do the cases in the previous question illustrate the role of the Coroners Court in our court hierarchy?

APPLY YOUR KNOWLEDGE

GROUP ACTIVITY—COURT HIERARCHY PRESENTATION

Find out more about one of the courts in Australia's court hierarchy and prepare a class presentation. Working in groups, conduct a search of a court website and prepare a PowerPoint presentation and a set of speaker notes, as outlined in the following activities.

1. Working in groups, use the internet to find out more about one of the following courts:
 - > Magistrates' Court
 - > Children's Court
 - > County Court
 - > Supreme Court.
 - a. There are some differences between the layout and content of the website for each court. Work through the website for the court that you have selected. Locate information on the:
 - history of the court
 - jurisdiction of the court
 - judges, magistrates and other people working in the court
 - court procedures.
 - b. What other information can be found on the website?
 - c. How easy or difficult is the website to use? Explain your response.
2. Prepare a PowerPoint presentation and a class talk on one of the courts. You should include the following details:
 - > background information on the court
 - > the jurisdiction of the court (such as the number and types of cases heard in this court)
 - > key court personnel
 - > other features, such as special services, court processes and procedures, access to information about cases and information on the jury system.

Your presentation should consist of the following:

- > slides to be used with your class talk, with each slide containing a summary of main points that you will discuss in your talk
- > at least two illustrations, pictures, maps or diagrams—remember that graphics should relate to the topic and must be relevant
- > a set of notes—use the notes page for each slide to provide a more detailed explanation of each point. Print a copy of your notes to hand in at the completion of your class talk.

MAGISTRATES' COURT:
www.magistratescourt.vic.gov.au

CHILDREN'S COURT:
www.childrencourt.vic.gov.au

COUNTY COURT: www.countycourt.vic.gov.au

SUPREME COURT: www.supremecourt.vic.gov.au



APPLY YOUR KNOWLEDGE

COURT REPORT—COURT VISIT

Arrange a visit to your local Magistrates' Court and observe criminal cases being heard there. To complete this task, you will need to take notes on your observations during your visit and complete a written task after your visit. You may need to make a copy of the observation tasks beforehand so that you can take notes during the visit.

1. **Prediction tasks:** Think about your visit prior to attending the Magistrates' Court
 - a. What are you likely to see or observe at the Magistrates' Court?
 - b. How are you likely to feel in this environment? Consider cases, dress, types of employment, location, physical features, architecture, design or layout.
2. **Observation tasks:** Take notes of your observations at the Magistrates' Court.
 - a. Draw a floor plan of the Magistrates' Court and include labels for the following participants:
 - > magistrate
 - > bench clerk
 - > media
 - > defence
 - > prosecution
 - > witness
 - > defendant.
 - b. Briefly describe the function of each person above.
 - c. Draw up a table similar to the one below. Complete the table for each case that you observe.

GENDER OF DEFENDANT	ESTIMATED AGE OF DEFENDANT	OFFENCE	WAS THE DEFENDANT REPRESENTED [YES/NO]?	BRIEF EXPLANATION OF THE FACTS OF THE CASE	WAS THE DEFENDANT CONVICTED?	IF SO, WHAT SANCTION WAS GIVEN?

- d. Comment on your impressions of the courtroom; include the following points:
 - > the courtroom atmosphere—was it formal or informal?
 - > the physical facilities—consider heating, cooling, lighting, seating and acoustics
 - > the proceedings—such as the number of cases heard and the speed at which they were heard
 - > whether the process appeared to be efficient. Did it appear to be fair?

3. **Evaluation task:** Prepare a report of your visit to court. Your report should address the following questions and tasks.
- What is the function of the Magistrates' Court?
 - Present a floor plan of the court. On your floor plan, label each of the key officials and describe their role.
 - Explain the types of cases that are heard in the Magistrates' Court. Use some of the cases you have observed as examples.
 - Thinking about the cases you have observed, answer the following.
 - > How many male defendants were there?
 - > How many female defendants were there?
 - > Was there a difference between the types of offences committed by male offenders and female offenders? Explain.
 - > What was the average age of the defendants?
 - > Were most defendants represented by a lawyer? Do you think that it made a difference if the defendant had a legal representative? Explain.
 - > What was the most common sanction given by the magistrate?
 - > How did the magistrate decide on a sentence or fine?
 - > Explain how a person may appeal a decision made by the Magistrates' Court.
 - From your observations, did you notice any procedures that ensured the principles of justice were adhered to, including fairness, equality and access?



APPLY YOUR KNOWLEDGE

CLASS DISCUSSION—DO JUDGES AND JURIES ALWAYS GET IT RIGHT?

The legal system and the principles of justice

Read the following case study and answer the questions that follow.

On a Saturday night, a car veered into a group of teenagers as they left a 16th birthday party. Six of the teenagers were killed. Jimima Willis, aged 36, was charged with a number of driving offences and appeared before the Victorian Supreme Court.

After deliberating for three days, the jury of six men and six women found her not guilty of six counts of culpable driving, which carried a potential jail term of up to 20 years. She was found not guilty of four counts of driving negligently. But she was found guilty of 10 counts of dangerous driving. Dangerous driving carries a maximum penalty of five years.

Willis, who had been in custody since her arrest, was also found not guilty of two counts of reckless conduct endangering serious injury, one count of failing to stop after an accident and another of failing to render assistance after an accident. Willis pleaded not guilty to the charges.

The families of the victims were very upset by the verdict. A friend of the family read a statement on behalf of the victims' families. He said that the victims' families were saddened, and shocked and that the defence had been very clever in convincing the jury that the driver had not committed a serious crime.

The court was told that Willis had her four-year-old son on her lap in the car and was speeding when she lost control on a bend and crashed into the teenagers. The Crown Prosecutor told the court that Willis drove in a shocking manner, failing to see the bend until it was too late because she was not concentrating. The defence barrister urged the jurors to apply their intellect, not emotion. He told the jury that the driver was not a serious criminal. Outside the court, the defence barrister told the waiting media that the jury system always got it right. Willis was consequently jailed for 10 years. The justice in the case set a non-parole period of seven years.

Using the facts above, complete a report that contains the following information. Discuss the issues with your class:

1. Provide an overview of the charges and the facts of the case.
2. Identify the court that may be or was involved.
3. Describe the sanction/s that were or could be imposed and their appropriateness.
4. Explain the possible factors that may be or were taken into consideration in sentencing.
5. Was the sentence issued by the justice appropriate for the crime? Discuss.
6. What possible avenues of appeal were there?
7. To what extent were the principles of justice achieved in this case? In your discussion make sure you include fairness, equality and access.
8. Discuss the defence counsel's view that juries always get things right. Defend the position that the jury got it right in this case.



ASSESSMENT

INVESTIGATION—ALTERNATIVE APPROACHES TO SENTENCING

On completion of this activity, you should be able to explain the effectiveness of sentencing and the alternative approaches used by our legal system and discuss the extent to which these approaches ensure the principles of justice to an actual case.

WHAT TO INCLUDE IN YOUR INVESTIGATION

Step 1— Choose one specialist court and research what kind of cases it covers.

Choose a specialist court from:

- Neighbourhood Justice Centre Court
- Infringements Court
- Sexual Offences List
- Family Violence Court Division
- Assessment and Referral Court List
- Other—discuss this with your teacher.

Research and report on this specialist court, using the following headings:

- Introduction—A description of the purpose of the specialist court.
- Eligibility criteria—What sort of cases does it deal with?
- Requirements—How are cases dealt with?
- Sentencing options—What sanctions or alternative punishments are used?
- Benefits—Identify the benefits of this courts and include the extent to which the principles of justice are or could be achieved.

Step 2— Choose one specialist court service and research what kind of cases it covers.

Choose a specialist court service:

- Community Correctional Services, Court Services Unit
- Court Advice and Support Officer
- Court Integrated Services Program
- CREDIT/Bail Support Program
- Enforcement Review Program
- Koori Family Violence and Victim's Support Program
- Koori Community Engagement Officer
- Koori Liaison Officer Program
- Mental Health Court Liaison Service
- Youth Justice Court Advice Service
- Other—discuss this with your teacher.



ASSESSMENT

Research this specialist court service using the following headings:

- Description of the purpose of the specialist court service.
- Who administers the service?
- Explain the services offered.
- Benefits—Identify the benefits of this specialist court service and include the extent to which the principles of justice are or could be achieved.

Step 3— Find a case from *either* your specialist court *or* specialist court service and write a report covering the following:

1. An overview of the criminal matters and the facts of the case.
2. The court/s that may be or were involved.
3. The sanctions or alternatives that were or could be imposed and their appropriateness.
4. Factors that may be or were taken into consideration in sentencing or with the use of alternative sanctions.
5. The possible avenues of appeal.
6. The extent to which the principles of justice are or could be achieved by this specialist court or specialist court service.

This task should take 2 to 3 lessons to complete and should be approximately 900 to 1200 words in length.



THE SENTENCING PROCESS

UNIT 2 – AREA OF STUDY 1: Sanctions

When an offender pleads guilty or is found guilty by the court, sanctions will be imposed upon them in a court where a judicial officer (such as a magistrate or judge) is present. In this chapter, students will undertake a study of sentencing practices in Victoria and in one other jurisdiction.

OUTCOME

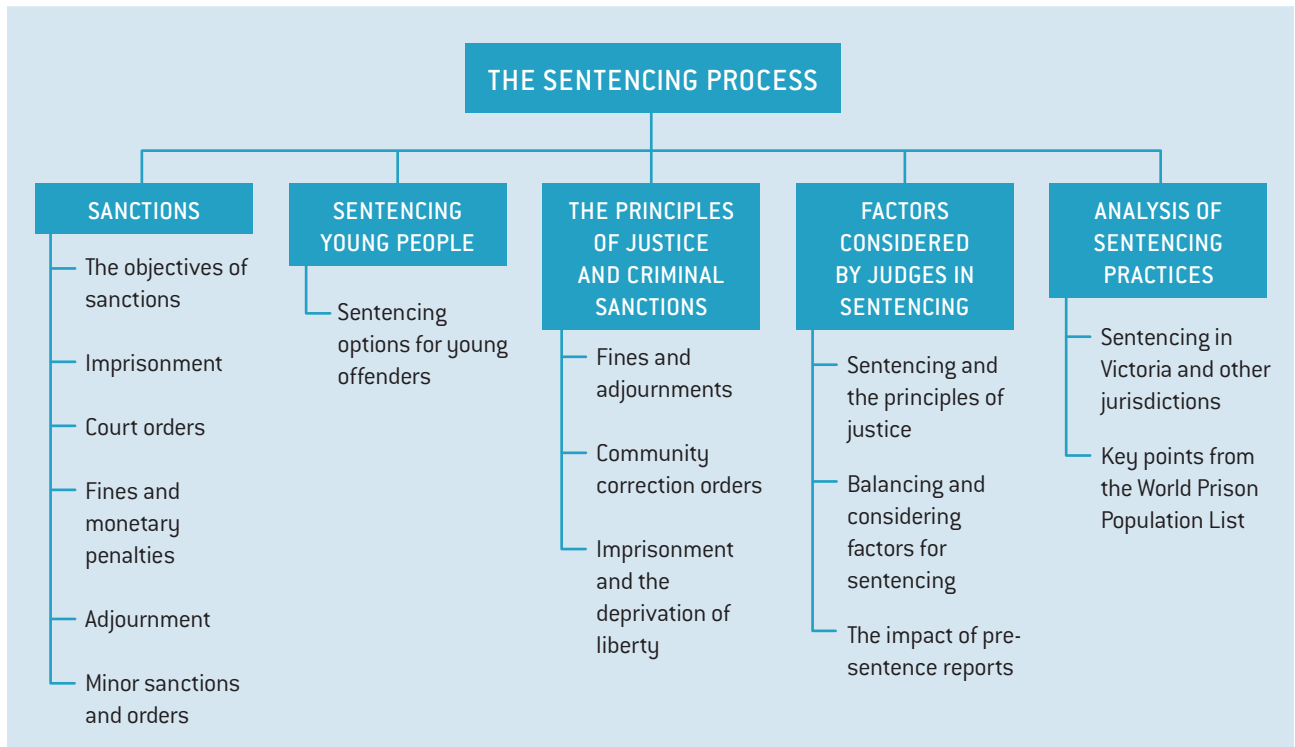
On completion of this unit the student should be able to explain key concepts in the determination of a criminal case, and discuss the principles of justice in relation to the determination of criminal cases, sanctions and sentencing approaches. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
- > types of sanctions such as fines, community correction orders and imprisonment
- > factors considered by judges in sentencing
- > aspects of sentencing practices in Victoria and in one other jurisdiction

KEY SKILLS

- > define and use legal terminology
- > discuss the principles of justice in relation to the enforcement of criminal law and sanctions
- > research, analyse and apply information in relation to criminal law and two recent criminal cases
- > analyse the extent to which the principles of justice could be or were achieved in two recent criminal cases.



KEY TERMS

adjournment	An undertaking of good behaviour
community correction order	A court order that allows a judge to use a range of rehabilitation conditions and deferred sentencing options
denouncement	Expression of disapproval
dismissal	Where the charge is proven, but no conviction is recorded
imprisonment	A sentence requiring the offender to serve time in prison
indefinite sentence	A judgment that the offender is never to be released from prison
judicial officer	An independent and impartial officer of the courts who can sentence an offender
parity	Providing a similar sentence for the offence as is normal
parole	Early release of a prisoner to serve the remainder of their sentence in the community, with conditions
parsimony	To balance the punishment with the crime
probation	A 12-month Children's Court order
proportionality	To place quantity and value on balancing the sanction
restitution	A court order for the return of stolen goods to the rightful owner
sanction	A penalty imposed by a court for a criminal offence
sentence	A judgment by a court specifying a punishment for a crime
totality	Ensuring that multiple sentences provide an overall punishment that is fair and just
treatment order	A court order stipulating treatment conditions in order to avoid imprisonment
young offender	A person under the age of 21 at the time of sentencing

THE PURPOSES OF SANCTIONS

JUDICIAL OFFICER: an independent and impartial officer of the courts who can sentence an offender

Judicial officers sentence offenders who are found guilty. They consider many factors when determining the appropriate sanction in each case.

Sentencing is done in courts or where a **judicial officer** is present. A magistrate, a judge or justice are all seen as judicial officers of the courts. The role of a judicial officer is to remain independent and impartial and ensure the principles of justice including fairness, equality and access apply to both parties. A judicial officer has a number of responsibilities. These are to:

- oversee the conduct of the trial by administering the rules of evidence and procedure
- listen to all the evidence presented in the criminal matter
- determine the admissibility or inadmissibility of evidence
- oversee the selection and empanelling of the jury
- ensure natural justice and equal opportunity
- decide on questions of law
- decide on questions of fact when there is no jury, such as in the Magistrates' Court
- ensure the prosecution satisfies the burden and standard of proof
- determine the appropriate sanction when guilt is decided, either by a jury or by a magistrate.

HAVE YOU...	YES / NO / UNSURE
Considered what the difference in sentencing would be between manslaughter or murder?	
Heard of a criminal serving a prison sentence being released on parole?	
Known the whereabouts of the closest prison to where you live?	
Known a family member to have paid an on-the-spot fine for speeding?	
Heard that a child under the age of 10 cannot be charged with a crime?	
Read how many prisoners there are in Victoria in total, or in all of Australia?	
Discovered when the death sentence was last used in Australia?	

SENTENCE: a judgment by a court, specifying a punishment for a crime

An offender will receive a **sentence** from a judicial officer when entering a plea of guilty or when they are found guilty by the court. A court must be satisfied that this is done beyond reasonable doubt. In most instances, sentencing will take place in an open court and members of the public can observe the sentencing decision.

A judicial officer's task is to weigh up and take into account all the relevant circumstances and factors (such as pre-sentencing reports, victim impact statements and the offender's previous convictions) when determining the appropriate **sanction**. As we have seen from Chapter 2, most courts around Australia have an image of 'Lady Justice' as a symbol of their work. The blindfold represents impartiality, the scales represent balance and equal opportunity. The sword represents the courts' authority and a judicial officer's ability to sentence.

Sentencing derives its authority from two main sources in Victoria:

- **The Victorian Parliament and legislation**

Laws relating to offences and their maximum penalties are found in Acts such as the *Crimes Act 1958* (Vic) or the *Summary Offences Act 1966* (Vic). Other laws list

SANCTION: a penalty imposed by a court for a criminal offence

the available sanctions and the factors courts must apply when sentencing, such as the *Sentencing Act 1991* (Vic) or the *Children, Youth and Families Act 2005* (Vic).

- **Common law**

Common law has been developed by the courts over time. Courts develop legal principles known as precedent, which include past sentencing decisions that can be relevant to a current or future case. The court may also consider how legislation should be applied or interpreted. Precedent is usually made in cases on appeal. For example, in *R v Verdins 2007* 16 VR 269, the Court of Appeal reviewed a case from the County Court and decided a number of qualifying factors in considering mental impairment in sentencing.

A number of principles have been developed by parliament and common law to assist judicial officers when determining an appropriate sanction. They include:

- the punishment should fit the crime—this is the principle of **parsimony**
- the punishment should be equivalent to the magnitude of the criminal behaviour—this is the principle of **proportionality**
- the punishment imposed should be similar to offences committed by offenders in similar circumstances—this is the principle of **parity**
- a punishment must be fair and suitable where an offender is to serve more than one sentence—this is the principle of **totality**.

PARSIMONY: to balance the punishment with the crime

PROPORTIONALITY: to place quantity and value on balancing the sanction

PARITY: providing a similar sentence for the offence as is normal

TOTALITY: ensuring that multiple sentences provide an overall punishment that is fair and just

THE OBJECTIVES OF SANCTIONS

Under section 5 of the *Sentencing Act 1991* (Vic), a court will consider a number of objectives of sanctions to determine an appropriate sentence. No single objective is meant to be an overriding purpose for sentencing. Judicial officers will examine all the features of the case and decide which purpose or combination of purposes should apply.

- **just punishment**—to punish the offender for the harm caused. The principle of fairness is used here to impose a sentence that considers all factors so that parsimony is adhered to.
- **deterrence**—to stop or deter the wrongdoer (specific deterrence) from offending again or to make an example of the offender to deter others in the community (general deterrence) from committing similar offences (or both).
- **rehabilitation** or reform—to help the offender to learn the error of their ways and so not re-offend. Access to a range of education programs in prison should bring about changes in an offender's behaviour.
- **denouncement**—to make clear society's disapproval of the conduct. This is where a judicial officer will publicly condemn the offender's action and exact revenge (retribution) on behalf of the victim as payback for a wrong committed.
- **protection**—to ensure the safety of the community from the actions of the offender. If a sanction is imposed as a result of protection, then a term of imprisonment is usually the result.

Sanctions aim to meet one or more objectives: punishment, deterrence, rehabilitation, denouncement or protection.

DENOUNCEMENT: the expression of disapproval

The court tries to balance these objectives when deciding on a penalty. In some cases, the need to punish the offender and protect the community may outweigh other objectives. In cases such as this, a term of **imprisonment** is the most likely outcome.

The *Sentencing Act* sets out the guidelines and penalties available in Victorian courts. Here is an extract.

IMPRISONMENT: a sentence requiring the offender to serve time in prison



SENTENCING ACT 1991 ACT NO 49/1991

PART 2: GOVERNING PRINCIPLES

SECTION 6

Factors to be considered in determining offender's character.

In determining the character of an offender a court may consider (among other things)—

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and
- (b) the general reputation of the offender; and
- (c) any significant contributions made by the offender to the community.

APPLY YOUR UNDERSTANDING

THE PURPOSES OF SANCTIONS

Read through the general facts of the cases below and identify the purpose/s of sentencing. Justify your reasons why the particular sanction was issued by the judicial officer.

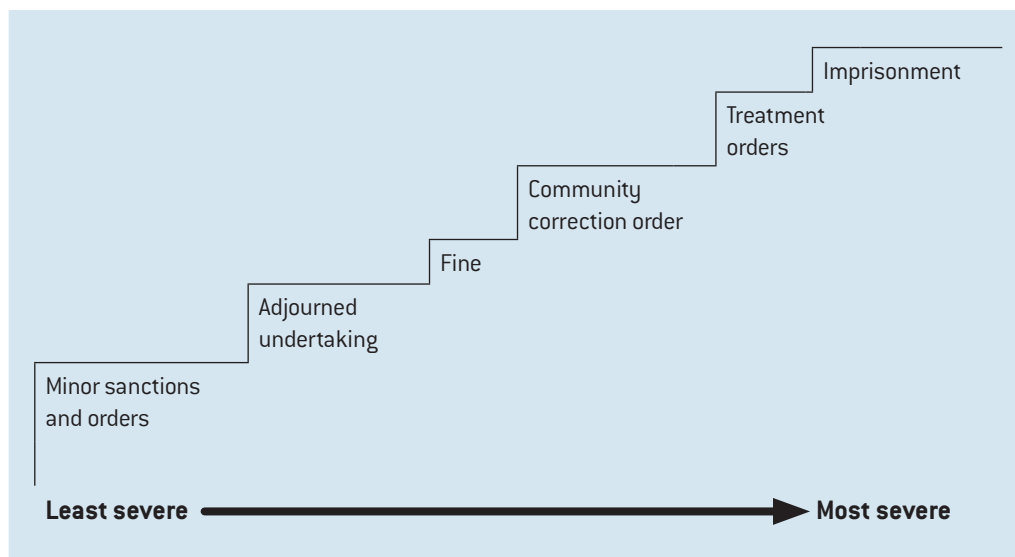
CASE STUDIES	IDENTIFY AND JUSTIFY THE PURPOSE OF THE SENTENCE
1. Dimitra was fined 2 penalty units without conviction for eating a chocolate bar without paying for it. This was her first offence.	
2. Zara, a 16-year-old girl, was convicted of walking across the road without using the pedestrian crossing nearby. She was issued with an official police caution as this was her second offence.	
3. Michael was convicted of dropping litter from a vehicle. As this was his third offence, he was fined 5 penalty units.	
4. Silvio was convicted of indecent exposure in public. He was placed on a community correction order.	
5. Farah was found guilty of using her mobile phone while driving. This was her second offence. She was fined 3 penalty units.	
6. Stefan, who is 12 years old, has been charged with manslaughter and has been placed in youth detention for 15 years.	
7. Lila, a 25-year-old unemployed woman, was found guilty of placing graffiti on public equipment. She was placed in a diversion program as this was her first offence.	
8. Yousef was found guilty of aggregated burglary. He had a number of prior convictions and the judge sentenced him to 8 years' imprisonment.	
9. Mia-ling, a 19-year-old student, was found guilty of importing illicit drugs. She was sentenced to 3 years' imprisonment as this was her first offence. At the end of her prison term, she will be deported to her country of birth.	
10. Jock was found guilty of cyber-bullying by using Snapchat to send a derogatory message. He was sentenced to a CCO and had to undertake 500 hours of voluntary work.	

TYPES OF SANCTIONS

Sentencing occurs at the end of the hearing if a person pleads guilty or is found guilty. Courts are generally open to the public to view or witness these proceedings. A judicial officer's sentencing comments are made to the accused and can be found on the Australasian Legal Information Institute (AustLII) website or a higher court's website. They make for interesting reading, especially cases reported in the media or high-profile cases.

Judicial officers have a range of sentencing options that may be used by the courts to achieve the purposes or objectives set out in the *Sentencing Act 1991* (Vic). It is up to the judicial officer to determine the most appropriate outcome. Judges and magistrates have the discretion to impose a sentence less than the maximum penalty. Maximum penalties are determined by parliament, and the most serious offences can be found in the *Crimes Act 1958* (Vic). Some offences are set out in other legislation, such as the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (drug offences) and the *Road Safety Act 1986* (Vic) (driving offences).

www.austlii.edu.au



Hierarchy of sentencing for adults in Victoria

IMPRISONMENT

Imprisonment is seen as the most severe punishment available to courts and as such it is used as a last resort. It is used for the most serious crimes and for habitual reoffenders. Imprisonment is the deprivation of a person's liberty and removes the offender from the community.

There are many different types of prisons. There are special prisons for juvenile offenders, known as youth training centres. Prisons for adult offenders include prison farms, low-security prisons and maximum-security prisons.

Judicial officers can impose different lengths of imprisonment for specific offences. The times of imprisonment (or terms) for specific offences are set out in various Acts. These terms vary from one day to many years. Courts use the principle of totality where an offender is to serve more than one sentence so that the punishment is fair and suitable.

Imprisonment is seen as the most severe sanction that can be applied for offenders.

11.1 Sentence levels

SENTENCE LEVEL	MAXIMUM PRISON TERM	EXAMPLES OF CRIMES
1	Life	Murder Trafficking drugs (large commercial quantity)
2	25 years	Rape Aggravated burglary
3	20 years	Manslaughter Culpable driving causing death
4	15 years	Recklessly causing serious injury Arson
5	10 years	Threats to kill Theft
6	5 years	Recklessly causing injury Possession of a drug (trafficable quantity)
7	2 years	Going equipped to steal
8	1 year	Cultivation of a narcotic plant (personal) Possession of a drug of dependence

Concurrent sentences

When a person is imprisoned for a number of offences, the person may be directed to serve these terms concurrently (at the same time). Concurrent sentences cannot be set for serious sexual or violent offences and, in some cases, may not be set for default on payment of fines. The court must also consider the time the person has already spent in custody in deciding the sentence.

For example, Patrick has been found guilty for the offence of burglary with a 6-month term of imprisonment, and 3 months for another offence of going equipped to steal. A judicial officer may decide to have these offences served concurrently, therefore Patrick served a total of 6 months for both offences.

Cumulative sentences

In some instances, the court will order that a person who has been convicted of a number of offences serve terms of imprisonment cumulatively (or one after the other). Cumulative sentences will be set for serious sexual or violent offences. Cumulative sentences are also set for these other offences:

- not paying a fine
- prisoners committing prison offences or an escape
- offences committed while released under parole
- offences committed while released on bail.

For example, Patrick has been issued with 6 months' imprisonment for the first offence and 3 months for another offence. A judicial officer may decide to have these offences served cumulatively, therefore Patrick served a total of 9 months.

Indefinite sentences

Indefinite sentences can be imposed for serious violent or sexual offenders if the court is satisfied that the offender is a serious danger to the community. Such sentences may be reviewed by a court. The provisions relating to indefinite sentencing were made through the *Sentencing (Amendment) Act 1993* (Vic). At the time of publishing this textbook, only 14 Victorian offenders have ever been issued with an indefinite penalty.

INDEFINITE SENTENCE: a judgment that the offender is never to be released from prison



SENTENCING ACT 1991 - SECT 18B

When court may impose indefinite sentence in respect of serious offence

- (1) A court may only impose an indefinite sentence on an offender in respect of a serious offence if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community because of—
 - (a) his or her character, past history, age, health or mental condition; and
 - (b) the nature and gravity of the serious offence; and
 - (c) any special circumstances.
- (2) In determining whether the offender is a serious danger to the community, the court must have regard to—
 - (a) whether the nature of the serious offence is exceptional;
 - (b) anything relevant to this issue contained in the certified transcript of any proceeding against the offender in relation to a serious offence;
 - (c) any medical, psychiatric or other relevant report received by it;
 - (d) the risk of serious danger to members of the community if an indefinite sentence were not imposed;
 - (e) the need to protect members of the community from the risk referred to in paragraph (d)—
 and may have regard to anything else that it thinks fit.
- (3) The prosecution has the onus of proving that an offender is a serious danger to the community.

Parole

A person serving a prison sentence could—depending on the nature of the crime, the length of the sentence, and the behaviour of the prisoner—be released earlier than the full term of the sentence, through a process known as **parole**.

The court, at the time of sentencing, will set a non-parole period. A non-parole period must be set for all terms of imprisonment greater than two years. A court may also set a non-parole period if the term of imprisonment is between 12 and 24 months. A prisoner cannot be released earlier than the non-parole period prescribed by the court.

For example, if Patrick has been sentenced to 6 years' imprisonment for a number of offences, then a judicial officer may decide to set the non-parole period at 4 years before Patrick is eligible for parole or early release.

If a person is released on parole, it is generally with a number of conditions, such as reporting to parole officers and/or following directions or curfews about where to live.

PAROLE: early release of a prisoner to serve the remainder of their sentence in the community, with conditions

Sex offender registration

Convictions for serious sexual offences receive a term of imprisonment. These offenders are automatically registered as sex offenders. For other sexual offences, a judicial officer can decide whether or not to register an offender. Under the *Sex Offenders Registration Act 2004* (Vic), an offender is obliged to inform police of changes to their personal details, such as living arrangements, travel plans or change of name.

CASE STUDY

PRISON STATISTICS



DEPARTMENT OF
CORRECTIONS:
www.corrections.vic.gov.au

The Department of Corrections provides updated data on prisoners and offenders on the corrections website.

The following statistics were all calculated or measured up to the end of June 2016.

NUMBER OF PRISONERS IN VICTORIA

There were 6520 prisoners in the Victorian prison system. This represented an increase of 70 per cent on prison numbers in the 10 years since June 2006.

MONTHLY PRISONER AND OFFENDER STATISTICS

The Department of Corrections tracks the numbers of prisoners on a monthly basis. As of 30 June 2016, there were 6092 male prisoners and 428 female prisoners. Of these, 531 were Aboriginal and Torres Strait Islanders. There were 755 prisoners aged less than 25 years. A total of 1883 prisoners were unsentenced.

VICTORIAN IMPRISONMENT RATE

The Victorian imprisonment rate in June 2016 was 138.8 prisoners per 100 000 of the adult population.

COMMUNITY CORRECTIONS ORDERS IN VICTORIA

There were 14 209 offenders on Community Corrections orders in March 2017.

RE-OFFENCE RATE

More than 42 per cent of the prisoners who were released in 2012–14 had returned to prison under sentence by June 2016, two years later. Of the offenders who were discharged from Community Corrections orders only, 21 per cent or more had returned with a new community correctional sanction within those two years.

COSTS

The Council of Australian Governments reports that net operating expenditure per prisoner per day in Victoria in 2015–16 was \$289.83, while net operating expenditure per Community Corrections offender per day in 2015–16 was \$25.60.

Source: Corrections
Victoria; Australian
Bureau of Statistics

A two-person cell in
Barwon Prison



CASE STUDY

PRISON (DATE ESTABLISHED)	FUNCTION	OPERATIONAL CAPACITY AS OF DEC 2016	PRISONERS AS OF JUNE 2016
BARWON PRISON (1990)	A maximum-security male prison with two high-security units, a 35-bed management unit and two protection units; accommodation is predominantly single cells	435	426
BEECHWORTH CORRECTIONAL CENTRE (2005)	A minimum-security male prison focusing on providing education, treatment programs and pre-release services to assist prisoners in reintegrating into the community after release	210	184
DAME PHYLLIS FROST CENTRE (1996)	A maximum-security female prison providing specialist accommodation for remand, sentenced and protection prisoners	419	375
DHURRINGILE PRISON (1965)	A minimum-security male prison emphasising pre-release programs and farming activities	328	242
FULHAM CORRECTIONAL CENTRE (1997)	A medium-security male prison incorporating a protection, drug treatment and young adult unit—privately owned	893	786
HOPKINS CORRECTIONAL CENTRE (1967)	A medium-protection male prison, housing a high proportion of sex offenders	748	695
JUDY LAZARUS TRANSITION CENTRE (2007)	A minimum-security male unit providing transitional and reintegration programs, such as accommodation, employment, life skills and family assimilation	25	22
LANGI KAL KAL PRISON (1950; 1993)	A minimum-security male prison with a large working farm	428	377
LODDON PRISON (1990)	A medium-security male prison emphasising release preparation, drug-free lifestyles and support for intellectually disabled prisoners: includes the Middleton unit, a restricted minimum-security unit	470	689
MARNGONEET CORRECTIONAL CENTRE (2006)	A medium-security male prison providing a range of intensive treatment and offender management programs, such as sex offender, drug and alcohol, and violent offender treatment programs and vocational services; includes the Karreenga protections unit that can house up to 300 prisoners	559	552

CASE STUDY

PRISON (DATE ESTABLISHED)	FUNCTION	OPERATIONAL CAPACITY AS OF DEC 2016	PRISONERS AS OF JUNE 2016
MELBOURNE ASSESSMENT PRISON (1989)	A maximum-security reception prison for male prisoners, including those on remand, those awaiting classification and those needing medical or psychiatric treatment	305	284
METROPOLITAN REMAND CENTRE (2006)	A maximum-security prison for unsentenced prisoners who have been remanded into custody	853	769
PORT PHILLIP PRISON (1997)	A maximum-security prison providing remand, sentenced, mainstream, protection and specialist accommodation—privately owned	1084	1067
TARRENGOWER PRISON (1987)	A minimum-security female prison, emphasising release preparation and community integration	72	52
RAVENHALL PRISON PROJECT (2017)	A medium-security prison next to the Dame Phyllis Frost Centre and Metropolitan Remand Centre. Able to be expanded to 1300 beds; the expected completion date is in 2017—privately owned	1300	Not yet in operation
CURRENT OPERATING CAPACITY AND PRISONERS		6829	6520

APPLY YOUR UNDERSTANDING

CASE STUDY—PRISON STATISTICS

Using the information in the case study 'Prison statistics', complete the following activities:

1. What is the current occupancy level of Victorian prisons? (Divide the total number of prisoners by the operating capacity.)
2. What is the percentage of increase in the prison rate over 10 years?
3. If each prisoner costs about \$100 000 a year to imprison, work out how much the government has spent until now. To what extent is this an effective use of taxpayer money?
4. Discuss the reasons why CCOs are a more effective sanction than imprisonment. In your answer compare the costs of prison detention with those for a Community Corrections Order.
5. What is meant by the term 'unsentenced prisoners'?
6. State the percentage of Aboriginal and Torres Strait Islanders and those aged less than 25 years. To what extent are these groups over-represented?
7. Read the descriptions of the 14 currently operating Victorian prisons.

- Differentiate which prisons are maximum-, medium- and minimum-security prisons. Identify the numbers in each of these prisons in terms of percentages.
- Which prisons are set up to assist the reintegration of prisoners into the community?
- How many private prisons are there? What percentage of prisoners do they house?
- Identify the longest running prison in Victoria. Why do you think it has two dates?

Prisoner statistics are available at www.abs.gov.au and www.corrections.vic.gov.au



COURT ORDERS

Court secure treatment order

Under a court secure **treatment order**, an offender with a serious mental illness is compulsorily detained and treated at a secure mental health facility instead of being detained in a prison. This order is imposed on offenders whose mental illness requires treatment to prevent serious deterioration in their health, or to prevent serious harm that their illness may pose to themselves or to others.

This type of order can only be made where the court would otherwise have imposed a sentence of imprisonment. The order cannot be for a period longer than the term of imprisonment that would otherwise have been imposed. The court must be satisfied that there is no less restrictive sentence available (for example, a community correction order) that would ensure the offender receives the required treatment. A non-parole period must be set for a court secure treatment order as if the order were a term of imprisonment.

TREATMENT ORDER: a court order stipulating treatment conditions in order to avoid imprisonment

Court orders, such as secure treatment orders, drug treatment orders and community correction orders, are considered lighter sanctions than imprisonment.

Drug treatment order (DTO)

A drug treatment order (DTO) falls below imprisonment in the sentencing hierarchy. Technically a custodial sentence, a DTO is a prison sentence that is suspended (held back) so that offenders can have treatment in the community for their addiction.

Only the Drug Court, a specialised part of the Magistrates' Court (see page 245), can make DTOs. People are eligible for a DTO if they are dependent on alcohol or other drugs and that dependency contributed to their offending. DTOs are not available for offenders convicted of sexual or violent offences leading to actual bodily harm.

A DTO has two parts:

- The custodial part consists of a sentence of imprisonment imposed for up to two years. This is not served by the offender unless it is activated by the Drug Court.
- The treatment and supervision part consists of core conditions imposed for up to two years. This part includes conditions such as participation in treatment programs, reporting to and receiving visits from court or corrections staff, and attending the Drug Court.

A range of consequences and rewards encourage offenders to complete their DTO successfully. Offenders who breach the conditions of their DTO (for example, by resuming drug use, re-offending or failing to attend treatment) may have longer or additional conditions imposed, or they may be imprisoned. Offenders who successfully comply with the conditions and demonstrate progress towards the treatment objectives of their DTO may be rewarded (for example through reduced supervision or early completion of the DTO).

COMMUNITY CORRECTION ORDER:
a court order that allows a judge
to use a range of rehabilitation
conditions and deferred
sentencing options

Community correction order (CCO)

A community correction order (CCO) is a flexible sanction that can have different conditions applied based on the circumstances of the offence, the offender's needs and situation, and the direction of the court. Courts can select from a flexible range of conditions to impose on the offender as part of a CCO. These conditions may include things such as undertaking rehabilitation or unpaid community work, or restrictions on the offender's whereabouts. Breaching a condition of a CCO is an additional offence.

In the Magistrates' Court, the maximum term of a CCO is two years. In the higher courts, the maximum term can last as long as the maximum term of imprisonment for the offence, although judicial officers need to consider the risks associated with lengthy conditional orders. The court may combine a CCO with other sentencing options such as imprisonment or a fine.

Every CCO contains a number of standard conditions under the Act, such as:

- not committing another offence punishable by imprisonment
- notifying Corrections Victoria of any change of address or employment
- not leaving Victoria without permission
- reporting to a community corrections centre.

The court may supplement any of the above statutory conditions with any additional conditions it thinks fit. The Act specifies three matters the court must consider when attaching conditions: the principle of proportionality, the purposes for which a sentence may be imposed and the purposes of the CCO. Other conditions include:

- unpaid community work
- treatment and rehabilitation
- supervision
- non-association
- residence restriction or exclusion
- place or area exclusion
- curfew
- alcohol exclusion
- electronic monitoring
- judicial monitoring.

Pre-sentence reports and submissions from parties may help identify available rehabilitation programs and the capacity of Corrections Victoria to supervise an offender.



SENTENCING ACT 1991 - SECT 48I

Curfew condition

(1) A court which is making a community correction order may attach a condition to the order, directing that the offender must remain at the place specified in the order between specified hours of each day for the period specified in the order.

Example

An example of a direction that may be made under a condition attached under subsection (1) is a direction that the offender must remain at home between 9pm and 6am each day.

- (2) When attaching a curfew condition the court may—
- (a) have regard to the risk the condition poses to the safety of any person, including a child, who is likely to reside with the offender under the order;
 - (b) have regard to any effect the attaching of the condition may have on any employment of the offender.
- (3) The offender must remain at a place specified by the court under a curfew condition for—
- (a) not less than 2 hours of each day; and
 - (b) not more than 12 hours of each day—
- for the period specified in the order which must not be more than 6 months.

FINES AND MONETARY PENALTIES

A monetary penalty is a sum of money to be paid by the convicted offender, and includes fines and costs. Fines are set in penalty units. At the time of writing, each penalty unit is equal to just over \$155.00. This is indexed each year. To determine an appropriate fine for an offence, the court will consider a number of factors:

- the number of penalty units set for a particular offence
- the method of payment (such as by instalment orders) and the time allowed to pay
- the financial circumstances of the offender
- the burden the fine will impose.

A fine is a common punishment for people convicted of summary offences in the Magistrates' Court. If a fine is not paid (an offence known as fine default) one month after an order has been made, the court may issue a warrant to arrest the person. The court may order one of the following actions when an offender fails to pay a fine:

- an extension of the time in which to pay or an instalment plan for payment
- the adjournment of the case for six months
- the issue of a penalty enforcement warrant to seize property to pay for the fine
- a term of imprisonment (although this is seen as the last resort).

In some cases, the payment of fines can be linked to renewal of a driver licence and car registration. This means that any renewal notice sent by VicRoads will indicate that a person will need to pay their fines, or enter into an instalment plan to pay, before the licence or registration can be renewed.

In some countries, fines are linked to an offender's income. In Finland, a millionaire who exceeded a 40 kilometres speed limit was fined the equivalent of AU\$277 000.

ADJOURNMENT

For summary offences, the magistrate can release a person with a conviction recorded on an undertaking to be of good behaviour for a period of up to five years. A person can also receive an **adjournment** (sometimes referred to as a bond) without conviction. This means that, at the end of the time set by the court, no conviction will be recorded if the person has been of good behaviour. The court may sometimes include a monetary penalty in the undertaking (for example, a \$200 donation to charity).

An adjournment (with or without an undertaking) requires a person to be of good behaviour and not to re-offend within a time set by the court. If the offender is not of good behaviour for the time set, the offender may be punished for breaking the undertaking; in most cases a conviction will be imposed for the original offence as well.

Fines, calculated in 'penalty units', are the most common form of sanctions applied to offenders.



ADJOURNMENT: an undertaking of good behaviour

A magistrate may issue an adjournment or bond period on a summary offence; if the offender continues to be of good behaviour during that period, no conviction is recorded.

A person convicted in a higher court may also be released on an undertaking (with or without a monetary penalty and other conditions) to be of good behaviour. If the undertaking is broken, the offender may be resentenced for the original offence.

A magistrate or a County Court judge may defer sentencing for up to 12 months for offenders of any age. Deferral of sentencing gives an offender the opportunity to participate in programs designed to deal with the causes of their offending behaviour. The court can then consider such efforts at rehabilitation when sentencing.

WHAT IS AN ON-THE-SPOT FINE?

Many government bodies are authorised to issue on-the-spot fines. These fines include infringement notices and penalty notices. On-the-spot fines can be issued for offences such as parking infringements, speeding, drink-driving or littering. If a person pays the penalty, the matter comes to an end. No conviction is recorded unless it is a licence loss infringement notice.

When a person fails to pay a fine within the time allowed on the notice, a reminder notice called a courtesy letter is sent. After a courtesy letter is sent, a person has 28 days to pay the penalty. A small administrative fee is also charged.

If a person intends to challenge the fine, they need to give notice that they do not want the matter dealt with under the Infringements Court system. The infringement notice is automatically cancelled and a charge and summons are issued to prosecute the offender in the Magistrates' Court.

If a person does not pay the fine (or does not lodge any objection to the courtesy letter), the Infringements Court will issue an enforcement order (and costs). The Infringements Court is part of the Magistrates' Court of Victoria. It administers court orders about the payment of fines. If the enforcement order is not paid, the Infringements Court can issue a warrant to recover the debt.

The legal system takes a more flexible approach when chasing unpaid fines by young people under the age of 18. The Children and Young Persons Infringement Notice System (CAYPINS) is a method of enforcing these infringement notices in the Children's Court when the fine is not paid in the first instance.

In order to reduce the number of minor offences being tried in our courts, the infringement system was expanded to include more minor summary offences. These are the additional offences:

- consuming alcohol on unlicensed premises
- failure by a person who is drunk, violent or quarrelsome to leave licensed premises when requested
- careless driving
- jaywalking
- placing an obstruction on the road
- discharging a missile
- wilful damage
- indecent or obscene language
- some public drunkenness offences such as a barring order
- offensive behaviour or move on orders.

MINOR SANCTIONS AND ORDERS

Some of the other punishments that a court may impose on offenders for certain offences include the following:

- A court can find an offender guilty of an offence but not record a conviction. The offender is **dismissed** without any other punishment.
- A court can find an offender guilty of an offence and record a conviction but then discharge the offender without imposing any sentence.
- For first-time adult and young offenders, the Criminal Justice Diversion Program operates at the Magistrates' Court. They are given the opportunity to stay out of the court system by agreeing to take part in a court-directed program. For example, offenders facing minor driving charges could be ordered to attend a driver safety course instead of receiving a bond or fine. Other offenders might be required to compensate their victim and send a letter of apology. If the offender successfully completes the program, they do not have a criminal record.
- The seizure or confiscation of certain items (such as firearms) and the destruction of certain items (such as pornographic material and illegal drugs) can be made by a court order. Courts can also seize the proceeds of crime or any property belonging to the offender.
- An order to pay into the poor box—a magistrate may suggest that an offender pay a certain sum into the court poor box. This practice has been in operation in Victoria since early last century, although it has no legislative authority and so payment cannot be enforced.
- Magistrates have the power to order an offender to pay monetary compensation to another person for the loss, destruction or damage resulting from the offender's criminal action. **Restitution** orders can be made for the return of stolen goods to the rightful owner. Under the *Crimes (Confiscation of Profits) Act 1986* (Vic), any money or property acquired as a result of a criminal action may be forfeited. This applies to drug offences. The court can order that compensation be paid to the victim or that goods or money be returned to the victim.
- A magistrate may cancel, suspend or disqualify a driver's licence. Drivers who are involved in 'serious motor vehicle offences' now face a mandatory automatic disqualification of their licence. In addition to drivers with Victorian licences, drivers who have licences that have been issued interstate and holders of learner's permits may also have their licences or permits cancelled. A court can require an alcohol interlock device to be fitted to a vehicle if a driver has been convicted for driving under the influence of a drug or alcohol.

DISMISSAL: where the charge is proven, but no conviction is recorded

Courts may impose a variety of minor sanctions for certain offences, such as court-directed programs, confiscation of items, financial compensation, disqualification of a driving licence and more.

RESTITUTION: a court order for the return of stolen goods to the rightful owner

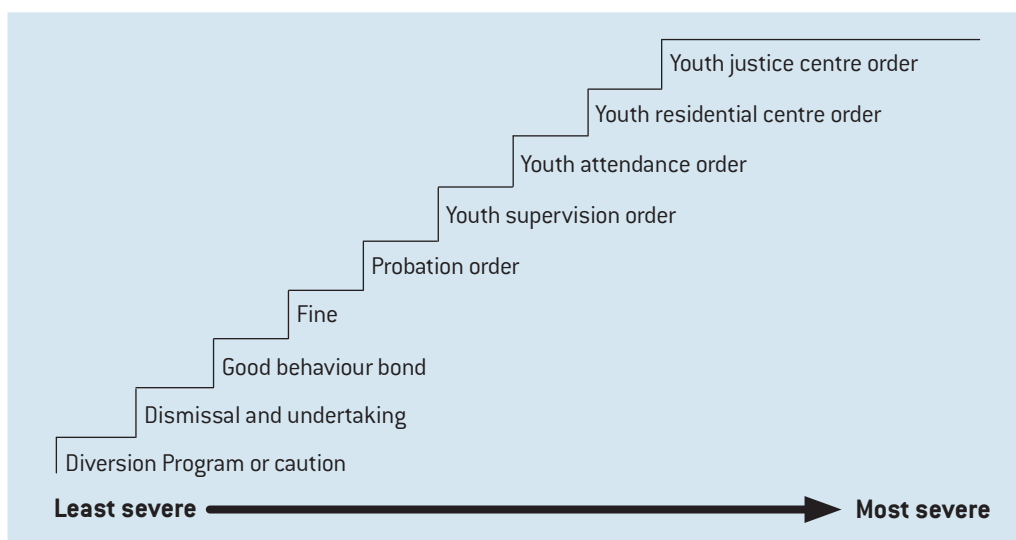
SENTENCING YOUNG PEOPLE

We know from Chapter 4 that the age of criminal responsibility starts at 10 years old, so a child under 10 cannot be charged with a crime. Between the ages of 10 and 14, the prosecution must prove that the young person knew the difference between right and wrong, and they were able to form criminal intent. The *Children, Youth and Families Act 2005* defines a child as someone aged 10 to 17 at the time of the alleged offence and aged under 19 when Children's Court proceedings begin. The *Sentencing Act 1991* defines a **young offender** as someone aged under 21 at the time of sentencing. The Children's Court hears most matters relating to criminal matters except for murder, manslaughter, arson causing death, or culpable driving causing death. These matters are heard in the County or Supreme Court.

Children under 10 cannot be charged with a crime; children (10 to 17 years) may be charged in the Children's Court.

YOUNG OFFENDER: a person under the age of 21 at the time of sentencing

SENTENCING OPTIONS FOR YOUNG OFFENDERS



Hierarchy of sentencing for children in Victoria

A number of sanctions can be applied to young offenders, including detention or residential centre orders, supervision orders, probation, fines, bonds, undertakings and diversion programs.

Youth justice centre order

A youth justice centre order is similar to imprisonment for adults and is the most severe sanction that may be imposed. It involves a period of detention in a youth justice centre. A court can issue an order to an offender between 15 and 20 with a maximum period of two years for a single offence or three years where the young person is convicted of more than one offence. It is expected that the offender will participate in education and rehabilitation programs.

Youth residential centre order

A youth residential centre order is a sentence of 'last resort' for children aged under 15 at the time of sentencing. It is similar to a youth justice centre order, but the maximum period of detention in a youth residential centre is one year for a single offence or two years where the child is convicted of more than one offence. It is expected that the offender will participate in education and rehabilitation programs.

Youth attendance order

A youth attendance order is an intensive community-based supervisory order. It is an alternative to detention for children aged 15 years or over. The maximum period of supervision is 12 months. Some of the requirements of this order could be the number of attendance hours (maximum of 10 hours per week), dates and times of attendance and the program content.

While on this order, a child must not re-offend and must attend education and other program activities, which may include counselling. If the child breaches the youth attendance order, then it can be revoked, leading to detention in a youth justice centre.

Youth supervision order

A youth supervision order, is subject to a higher level of supervision than a probation order. It requires a child to undertake supervised community work. The maximum period of the order is generally 12 months. If the child breaches the supervision order, then it can be revoked, leading to another sentence.

Probation order

A probation order is the least intensive supervisory order, with a duration of 12 months. The child must abide by conditions of the probation, such as not re-offending, reporting

to relevant personnel and obeying any instructions of a youth justice worker. If the child breaches the probation order, it can be revoked, leading to another sentence.

Fines

Similar to fines for adults, a court can impose a monetary penalty on a child. The maximum amount of a fine is described in penalty units. If the offender is under 15 years of age, the maximum fine is one penalty unit for one offence and two penalty units for multiple offences.

Good behaviour bond

A court may suspend proceedings against a child without a conviction under a good behaviour bond. A good behaviour bond generally lasts for 12 months. The child must be of good behaviour, pay a bond and comply with any conditions set by the court. If the child complies with the conditions for the period of the bond, the court will dismiss the charge and return the bond without recording a conviction. However, if the conditions of the bond are breached, the court may keep the bond and impose no further penalty, or hold another hearing and impose a different sentence.

Dismissal and undertaking

With a dismissal, where a charge is proved, a court may make an order clearing the charge without recording a conviction. With an undertaking, a child is released on the condition that they undertake, or refrain from doing, particular acts for a period not exceeding six months. The child must agree to the undertaking and no conviction is recorded. An undertaking could be either a non-accountable or accountable undertaking.

With a non-accountable undertaking, the court will not take any further action, if breached. Whereas with an accountable undertaking, if a breached the court can revoke the order dismissing the charge and impose a fine of not more than one penalty unit.

Diversion program

The purpose of a Diversion Program is to provide first-time offenders with an alternative to sentencing in order to avoid a criminal record by undertaking conditions that benefit the offender, victim and community. There are a number of conditions that must be satisfied before an accused is eligible for a Diversion Program. Diversion Programs are covered in length in Chapter 10 on page 252.

THE PRINCIPLES OF JUSTICE AND CRIMINAL SANCTIONS

The principles of justice (fairness, equality and access) mean different things to different people depending on their perspective. For example, with the commission of a crime, justice has a number of perspectives:

- for the accused person, justice means a fair hearing and sentence (fairness), the right to present their case (equality) and a range of programs for rehabilitation (access).
- for the victim, justice is for the accused to be punished for their crime (fairness), to be given the opportunity to speak at the trial (equality) and to be provided with assistance such as counselling (access).
- for the community, justice could mean a harsh punishment focused on retribution and deterrence (fairness), that the accused be given legal representation (equality) and have the opportunity to due process (access).
- for the legal system, justice means the impartial application of the rule of law (fairness), without fear or favour (equality) and the ability to use a variety of sanctions (access).

Sanctions are intended to promote the principles of justice, but it can be difficult to assess their impact given that justice means different things to different people.

As you can see from the above, how effective a sanction is depends on a person's perspective. We know that justice can mean different things to different people, so judging the effectiveness of the enforcement of criminal law and sanctions is not straightforward. The ultimate effect of a sanction imposed on an individual will vary depending on that person's particular circumstances.

FINES AND ADJOURNMENTS

Minor sanctions such as fines are generally seen as fair deterrents for first-time offenders.

For many first offenders, it is appropriate for a court to issue a minor sanction as a way for our legal system to demonstrate fairness. In most cases, a fine or adjournment will be sufficient to deter them from re-offending. Breaching the terms of the undertaking would mean another court visit.

The effectiveness of a fine as a deterrent will depend on the attitude of the offender, their ability to pay and their financial resources. For example, a person who is financially 'well off' can pay a fine more easily than a person who is unemployed. However, our legal system uses a number of ways to enforce the payment of outstanding on-the-spot fines, as seen earlier in this chapter, as well as the powers of the Sheriff explained in Chapter 9.

COMMUNITY CORRECTION ORDERS

CCOs allow offenders to gain access to rehabilitation programs and other services.

The aim of a CCO is to target a range of rehabilitation programs applied to the circumstances of the offender, their needs and situation and the direction of the court. Courts can impose a flexible range of conditions on the offender as part of a CCO. These conditions carry with them some degree of deprivation of liberty and are, therefore, likely to deter some offenders from reoffending.

CCOs allow the offender to gain access (a principle of justice) to services such as drug and alcohol treatment and rehabilitation programs. These programs provide for fairness, another principle of justice, which is an opportunity to meet the needs of the offender in order to reform or rehabilitate them. In addition, compared to imprisonment, the cost of such orders to the community is relatively low for each offender. The success of these orders is also related to the degree of supervision and assistance offered and the willingness of the offender to reform.

However, CCOs may be seen as a 'soft option' in comparison to imprisonment. A victim of a crime may feel that it is unfair to issue a CCO for a burglary, as their peace of mind and feeling of security has been shattered.

IMPRISONMENT AND THE DEPRIVATION OF LIBERTY

A jail sentence is the most severe form of punishment. Many people in the community view prisons as places for punishment, for exacting retribution on behalf of society. Imprisonment is also seen as a means of achieving deterrence. It is generally imposed on those people found guilty of the most serious offences. But statistical reviews of the prison population indicate that a range of factors has an impact on the likelihood of a person ending up in jail.

Imprisonment is the most severe form of sanction. While it punishes offenders, it may also have excessive negative impact on their future lives, as well as on society as a whole.

There are also social costs of imprisonment. Prison can brutalise inmates who live in fear for their personal safety. Those critical of the prison system suggest that it does not provide an environment in which new skills can be learnt—rather, it isolates the inmates. It is sometimes claimed that the environment of maximum-security prisons dehumanises the inmates and provides opportunities for them to learn more effective ways of committing further crimes. On leaving jail, prisoners may have few social or work skills, and little money.

The effect of imprisonment on different groups in our society also needs to be considered. The Human Rights and Equal Opportunity Commission has commented on the rights of the mentally ill and some of the horrifying conditions they deal with when in prison. It is reported that some mentally ill people were denied medical treatment because no one could deal with their illness. There is also concern in the community that those with mental illness cannot always access adequate care and, as a result, may commit criminal offences, and are consequently sent to prison in very inappropriate circumstances. The Victorian Association for the Care and Resettlement of Offenders (VACRO) provides support for prisoners on their release from custody. Case workers help offenders with accommodation, employment, counselling, any treatment they may need, such as for drug addiction, and ordinary day-to-day functions, such as banking and shopping.

Aboriginal Australians face special problems when incarcerated. The high rate of imprisonment of Aboriginal Australians and deaths in custody are issues of concern for the community. On average, Aboriginal people are 15 times more likely to go to prison than non-Aboriginals. The introduction of the Koori Court seeks to deal with these issues.

PROFILE OF A PRISONER

Statistics indicate that the under-educated and unemployed dominate Victoria's adult prison population. A 2015 snapshot of the prison population reveals that only 14 per cent of male inmates have completed secondary education. As we saw in the 'Prison Statistics' case study (page 276), men make up 93 per cent of the prison population with the average age being 35.5 years. Women make up 7 per cent of the prison population with an average age of 36 years. Unemployment, alcohol and drug abuse are major issues, as is recidivism (repeat offending), with about 40 per cent of the prison population being repeat offenders.

Economic and educational disadvantage are clearly factors that need to be tackled to stop people from re-offending. Recent ABS statistics showed that the median prison term in Victoria for all prisoners in 2016 was 2.7 years. The estimated cost of keeping a prisoner in a prison, as we've seen, is about \$105 000 per annum or \$290 a day.

THE LAW IN ACTION—HISTORICAL CONVICTIONS FOR HOMOSEXUAL ACTIVITY

Victoria has introduced a scheme to expunge (delete) the historical convictions for homosexual activity that would not be a criminal offence today. Changes to the *Sentencing Act 1991* were made on 1 September 2015 and recognise that homosexual activity between consenting adults should never have been a crime. A person with an expunged conviction:

- may legally claim not to have been convicted or found guilty of that offence
- is not required to disclose that conviction or finding of guilt for any purpose
- cannot be denied a job or position due to that conviction or finding of guilt.

Under the scheme, an individual (or the appropriate representative of a deceased person) can make a confidential application to the Secretary of the Department of Justice and Regulation to have their conviction or finding of guilt for an historical homosexual offence expunged. This application can be made free of charge.

If a conviction or finding of guilt is expunged, police, prosecution and court records will either be marked to show that the conviction is expunged or electronic records may be amended or deleted.

There is no list of offences covered by the scheme. Offences may include the type of criminal offences that were used to punish consensual homosexual sex between adults in the past, gross indecency with a male and loitering for homosexual purposes. Other sexual and public morality offences may be eligible for consideration under the scheme, if it can be established that the individual was only charged or prosecuted due to the homosexual nature of the activity and that this would not be an offence in Victoria today.

Sometimes a person may have pleaded guilty or been found guilty of an historical homosexual offence but the court put the accused on a 'bond to be of good behaviour' rather than 'recording a conviction'. A finding of guilt may still be listed on a criminal record check and so the scheme covers convictions and 'findings of guilt'.

Discrimination on the basis of an expunged homosexual conviction is prohibited under the *Equal Opportunity Act 2010*.



SENTENCING ACT 1991 - SECT 105S

No entitlement to compensation

(1) A person who has an expunged conviction is not entitled to compensation of any kind, on account of that conviction becoming an expunged conviction, in respect of the fact that the person—

- (a) was charged with, or prosecuted for, the offence; or
- (b) was convicted of, or sentenced for, the offence; or
- (c) served a sentence for the offence; or
- (d) was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of being convicted of, or sentenced for, the offence; or
- (e) incurred any loss, or suffered any consequence ... as a result of any circumstance referred to in paragraph (a), (b) or (c); or
- (f) has an expunged conviction.

(2) Nothing in subsection (1) prevents a person being entitled to compensation in respect of anything that occurred while the person was serving a sentence.

Example

The person is injured while serving a sentence in prison.

APPLY YOUR UNDERSTANDING

THE PRINCIPLES OF JUSTICE AND CRIMINAL SANCTIONS

1. Evaluate the effectiveness of fines, CCOs and imprisonment. In your evaluation explain two advantages and two disadvantage of each of these sanctions.
2. Read the information on historical convictions for homosexual activity and complete the following:
 - a. Speculate on the reasons why this law was enacted by Parliament.
 - b. Why has the law made it illegal to discriminate on the grounds of an expunged homosexual conviction?
 - c. Explain why you think many people would have pleaded guilty to a crime of homosexual activity, instead of fighting the case in courts.

- d. To what extent does this change in the law demonstrate the principles of justice? In your answer explain how fairness, equality and access are achieved.
 - e. A person who has an expunged conviction is not entitled to compensation of any kind. Discuss the reasons why this section was introduced.
3. With a partner, describe the profile of a prisoner. What conclusions does this tell us about our society, if any?
 4. Find a media article on a recent criminal case and prepare a report that includes the following:
 - a. Provide an overview of the charges and the facts of the case.
 - b. Identify the court/s that may be or were involved.
 - c. Discuss the sanction/s that were or could be imposed and their appropriateness to the case.
 - d. Explain or hypothesise on the factors that may be or were taken into consideration in sentencing.
 - e. State the possible avenues of appeal.
 - f. Discuss the extent to which the principles of justice were or could have been achieved. In your discussion explain how fairness, equality and access was achieved.

Going further

5. Working in a pair or a group, collect five news reports of different types of crimes. Write a brief factual summary of each case, but do not state what sentence was passed. Use these five cases to create a survey of public opinions on sentencing. For each summary, ask the following questions. You should survey people of a variety of ages, and both men and women.
 1. What sentence would you give the offender?
 - a. An adjournment
 - b. A fine
 - c. A CCO
 - d. A treatment order
 - e. Imprisonment (up to 10 years; 11–15 years; 16–20 years; 21–25 years; 26–30 years; indefinite; life).
 2. In arriving at your sentence, which did you consider to be the most important factor?
 - a. Punishing the offender
 - b. Deterring the offender
 - c. Rehabilitating the offender
 - d. Denouncing the conduct
 - e. Protecting the community.

You should note whether the respondent is:

- a. male
- b. female.

You should also note which of the following age groups the respondent belongs to:

- a. under 20 years
- b. 20–29 years
- c. 30–39 years
- d. 40–49 years
- e. 50–59 years
- f. over 60 years.

When you have collated the results, create graphs to display the information visually. Prepare a brief written statement about each graph.

Judges and magistrates consider the principles of justice—fairness, equality and access—when sentencing, not just for the offender but also for the victim and the community.

FACTORS CONSIDERED BY JUDGES IN SENTENCING

SENTENCING AND THE PRINCIPLES OF JUSTICE

Section 5 of the *Sentencing Act 1991* (Vic) outlines five objectives of sentencing. They are just punishment, deterrence, rehabilitation, denouncement, and protection. Judicial officers must aim to achieve at least one of these objectives when sentencing.

So, a sentence that achieves justice is one that achieves one or more of these objectives, is consistent with sentencing guidelines, and takes into consideration who is being sentenced and for which offence.

We know that justice means different things for different groups; therefore, a good sentence for a young offender may be a CCO with conditions aimed at the young person's rehabilitation. For a violent offender with a history of assault, a just sentence may be imprisonment, in order to protect the community.

The right of an offender to a fair trial and the independence of our courts are fundamental to the principles of justice. The government cannot interfere with the outcome of a trial. But the law must also take into account the values and expectations of the community. If the legal system fails to reflect the community's values, there is a danger that the community will no longer respect the law.

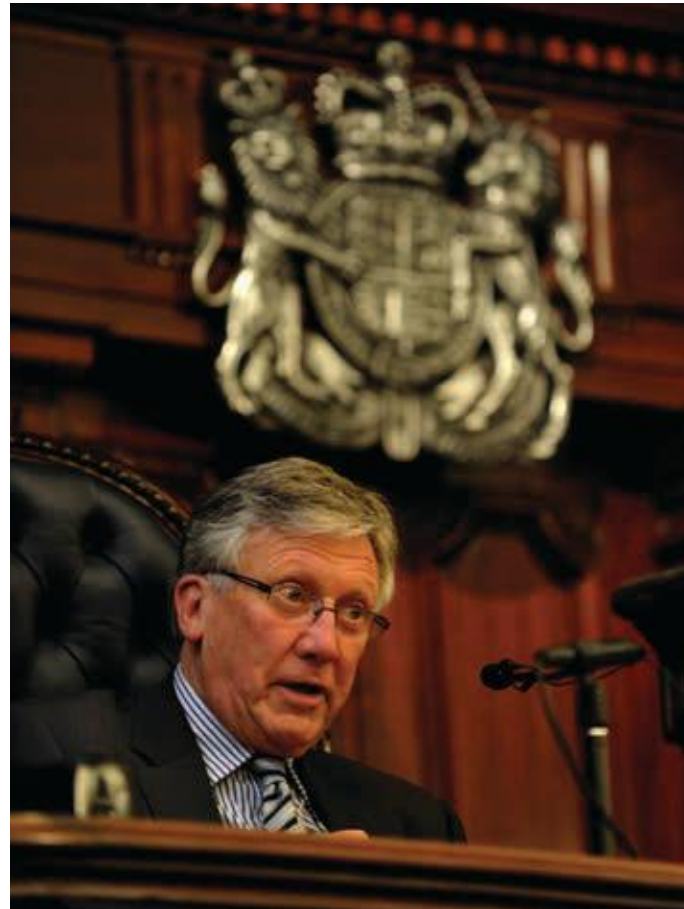
BALANCING AND CONSIDERING FACTORS FOR SENTENCING

The *Sentencing Act* and decisions of the Court of Appeal guide judges and magistrates. In sentencing an offender, a judicial officer must consider many factors such as:

- The maximum penalty for the offence
 - > A judicial officer must give regard to the maximum penalty for the offence in terms of imprisonment or fine amount.
- The type of crime and the degree of criminality
 - > A judicial officer needs to take into account the number of offences and their seriousness. They also take into consideration those crimes that were planned or premeditated as opposed to those that were on the spur of the moment, or as a result of mental impairment.
- A plea of guilt
 - > Especially when made early in the proceedings, this plea is considered important as it saves the time of the courts and valuable community resources. It may be more kind to the family of the victim, and so is regarded as a reason for a lesser penalty as it saves the trauma or stress of a trial.
- The victim's circumstances, including injury, loss or damage to the victim
 - > The effect of the crime on the victim is a factor in sentencing. Issues such as age and capacity of the victim may be taken into consideration when determining the severity of the sentence. Victims are entitled to make an impact statement to the courts and a judicial officer needs to consider the impact, or degree of injury or loss to the victim.
- Mitigating circumstances
 - > Factors such as remorse, cooperation with the police or prosecution, or restitution to the victim are used to lessen the penalty.

Factors that affect sentencing include maximum and minimum penalties, the type of crime, guilty pleas and the circumstances of both offender and victim.

- Aggravating circumstances
 - > A crime that is premeditated or planned can worsen a sentence or penalty. Factors such as use of a weapon, a breach of trust or where a gang outnumbers a victim all play a part in increasing the penalty.
- The offender's character
 - > When sentencing, the court also takes into account a range of factors pertaining to the offender's character, such as whether the offence was motivated by hatred, there was a previous criminal record, the age and likelihood of rehabilitation, the offender's cultural background (such as religious beliefs) and physical or mental capacity.
- The offender's family
 - > A judicial officer may take into consideration the impact of the penalty on the offender's family, such as whether the offender is the sole provider for their family or the only person able to look after their dependants. This may cause exceptional hardship if they are sent to prison.
- Mandatory minimum sentencing
 - > The introduction of mandatory minimum sentences removes the discretion of the courts to consider each case individually. Courts may not be able to determine penalties that take into account the specific circumstances of the offender. A judicial officer cannot take into account the remorse of the offender and the impact on the victim. For example, the one-punch law carries a minimum non-parole period of 10 years.



Judge Philip Cummins addressing the Victorian Supreme Court.

THE IMPACT OF PRE-SENTENCE REPORTS

In order for sentencing to be effective and for the court to tailor the appropriate punishment or conditions, it must have accurate information on the circumstances of the offence, the offender's needs and situation, and the direction of the court. The *Sentencing Act 1991* (Vic) identifies what can be covered by a pre-sentence report, such as:

- any alcohol, drug and any other substance history disclosed by the offender
- the ability of the offender to pay a bond
- any other services—from which the offender may benefit—that deal with the risk of recidivism
- the relevance and appropriateness of any proposed condition
- the capacity of the offender to perform unpaid community work
- the recommended duration of any intensive compliance period of a CCO
- the appropriateness of confirming an existing order that applies to the offender.

The Act also gives courts the ability to order that a pre-sentence report be distributed to a person other than the prosecutor, a legal practitioner representing the offender and the offender. A pre-sentence report is also used for youth justice centre orders and youth residential centre orders.

Pre-sentence reports describe the offender's circumstances and the possible appropriateness of different conditions and sanctions.

THE DEGREE OF CULPABILITY OR CRIMINALITY

Culpability is the extent to which people are held accountable for the offences they have committed. Culpability means how much blame people have for what happened and the harm offences cause. More culpable offenders tend to get more severe sentences.

In assessing an offender's culpability, judges and magistrates consider the offender's intention, awareness, and motivation in committing the offence. For example, the judge or the magistrate considers factors such as whether an offence is:

- committed by someone in complete control of their own actions
- committed with the offender's knowledge of its consequences (or likely consequences) or only in negligent disregard of the consequences
- provoked or unprovoked
- planned or opportunistic (spontaneous)
- carried out while the offender is in possession of an offensive weapon
- incited, encouraged or paid for by another person
- motivated by hatred for the victim based on the victim's gender, race or other personal characteristic.

Culpability is also relevant for police. Before deciding the type of offence to be charged, the police may consider whether there is evidence that the offence is committed:

- **Intentionally**—with the intention to cause a particular outcome, not just the intention to do the act that caused the outcome.
- **Recklessly**—with foresight of the consequences (or likely consequences) but with indifference to whether or not the consequences come about.
- **Negligently**—with a great falling short of the standard of care that a reasonable person would exercise in the circumstances. This involves such a high risk of serious bodily injury occurring that an act or omission warrants punishment under criminal law.
- **Dangerously**—in a manner dangerous to the public having regard to all the circumstances.

An example of how culpability affects offence selection is the difference between the offences of murder and manslaughter:

- If there is evidence that a defendant killed someone by stabbing with the intention to kill the person, this would support a charge of murder.
- If there is evidence that a defendant killed someone by stabbing while not caring that this would likely kill the person (but the defendant does not actually intend the person to die), this would support a charge of manslaughter.

ANALYSIS OF SENTENCING PRACTICES

SENTENCING PRACTICES IN VICTORIA AND OTHER JURISDICTIONS

Information about sentencing in Victoria can be obtained from the Sentencing Advisory Council, which was established in 2004. This is an independent statutory body, which reports on Victoria's sentencing laws and practices. The Australian Bureau of Statistics (ABS) also compiles prisoner numbers on a regular basis from around Australia.

Table 11.4 provides a snapshot (as of 2016) of sentencing practices in relation to imprisonment. For example, in Australia, of the 2381 sentenced prisoners for an offence of homicide, 7 out of 10 (71 per cent or 1698 prisoners) had an offence of murder.

	VICTORIA	NSW	AUSTRALIA
POPULATION	6 million	7.5 million	24 million
PRISON POPULATION	6522	12 629	38 845
IMPRISONMENT RATE PER 100 000 PEOPLE	138	210	207
PRISONERS PREVIOUSLY IMPRISONED	48.8%	51.6%	56%
MALE PRISONERS	93.4%	92.6%	98%
FEMALE PRISONERS	6.6%	7.4%	8%
MOST COMMON OFFENCES—TOP 3	1. Acts intended to cause injury 2. Illicit drug offences 3. Sexual assault	1. Acts intended to cause injury 2. Illicit drug offences 3. Sexual assault	1. Acts intended to cause injury 2. Illicit drug offences 3. Sexual assault
MEDIAN AGE OF ADULT PRISONERS	35.7 years	34.5 years	36.3 years
UNSENTENCED PRISONERS	28.8%	32.9%	31.2%
OVERSEAS-BORN PRISONERS	1674 (26%)	2936 (23%)	8283 (21%)
COUNTRY OF BIRTH—TOP 3	1. Vietnam 2. New Zealand 3. United Kingdom	1. New Zealand 2. Vietnam 3. China	1. New Zealand 2. Vietnam 3. United Kingdom
ABORIGINAL AND TORRES STRAIT ISLANDER POPULATION	8.2%	24%	27.3%
	Note: total Aboriginal and Torres Strait Islander population aged 18 years and over in 2015 was approximately 2%		
MEDIAN TERM OF IMPRISONMENT FOR HOMICIDE	20.5 years	18 years	17 years
MEDIUM YEARS OF IMPRISONMENT FOR ALL OFFENCES	3 years	3.5 years	3 years
MEDIAN TIME SPENT ON REMAND	2.1 months	3.7 months	2.7 months
PRISON FACILITIES	14	48	116
COMMUNITY CORRECTIONS ORDERS OR EQUIVALENT	14 231 (21%)	18 433 (28%)	66 793
CCO RATE PER 100 000 POPULATION	301.4	307.7	357.9
SENTENCED PROBATION	25%	24%	56%
PAROLE	7%	37%	20%
COMMUNITY SERVICE ORDERS	16%	37%	15%

11.2 Australia's prison population, December 2016

Source: 'Prisoners in Australia', Australian Bureau of Statistics, 2016

KEY POINTS FROM THE WORLD PRISON POPULATION LIST

- More than 10.35 million people are held in penal institutions throughout the world, mostly as pre-trial detainees/remand prisoners or as sentenced prisoners. More than half of these are in the United States, China, Russia and Brazil.
- The Seychelles has the highest prison population rate in the world, 799 per 100 000 of the national population, followed by United States (698), St. Kitts and Nevis (607), Turkmenistan (583), US Virgin Islands (542) and Cuba (510).
- The world prison population rate, based on United Nations estimates of national population levels, is 144 per 100 000.
- Prison population rates vary considerably between different regions of the world, and between different parts of the same continent. For example:
 - > in Africa, the median rate for western African countries is 52, whereas for southern African countries it is 188
 - > in the Americas, the median rate for south American countries is 242, whereas for Caribbean countries it is 347
 - > in Asia, the median rate for south-central Asian countries (mainly the Indian sub-continent) is 74, whereas for eastern Asian countries it is 166
 - > in Europe, the median rate for western European countries is 84, whereas for the countries spanning Europe and Asia (such as Russia and Turkey) it is 236
 - > in Oceania (including Australia and New Zealand), the median rate is 155.

Source: *World Prison Population List* (9th edition), International Centre for Prison Studies (ICPS), University of Essex

11.3 A snapshot of prison populations in Australia and selected countries

COUNTRY	AUSTRALIA	UNITED STATES	UNITED KINGDOM	VIETNAM	NEW ZEALAND
RANKING BASED ON WORLD PRISON POPULATIONS*	47	1	17	13	96
PRISON POPULATION TOTAL	39 152	2 217 947	84 857	136 245	9798
PRISON POPULATION RATE PER 100 000	162	693	145	146	208
TOTAL POPULATION (MILLION)	24	320.1	58.6	93.39	4.43
REMAND PRISONERS AS PERCENTAGE OF PRISON POPULATION	31.2%	21.1%	10.96%	17.6%	27.2%
FEMALE PRISONERS AS PERCENTAGE OF PRISON POPULATION	8%	9.7%	4.6%	12.1%	6.8%
JUVENILE PRISONERS AS PERCENTAGE OF PRISON POPULATION	0.1%	0.3%	0.7%	N.A.	0.6%
FOREIGN-BORN PRISONERS AS PERCENTAGE OF PRISON POPULATION	18.7%	5.5%	11.9%	0.2%	2.3%
NUMBER OF JAILS OR INSTITUTIONS	111	4575	123	53	18
PRISON OCCUPANCY LEVEL	96%	102.7%	112.7%	NA	106.1%

Source: *World Prison Brief*, International Centre for Prison Studies, University of Essex, October 2015

*Based on comparison of number of prisoners in surveyed countries; country with highest number of prisoners is ranked 1

APPLY YOUR UNDERSTANDING

SENTENCING PRACTICES IN VICTORIA AND OTHER JURISDICTIONS

Using the information above, complete the following activities.

Part 1—Australia's prison population

1. More than 50 per cent of Australia's prison population comes from just two states. Why?
2. More than half the number of prisoners have been previously imprisoned. Discuss five reasons why this is the case.
3. What is the percentage of prisoners born overseas in Australian jails? Discuss why the top three countries are likely to be at the top of this list.
4. If Aboriginal and Torres Strait Islanders make up approximately 2 per cent of the population aged 18 years and over, why are they so overly represented in the prison system?
5. Define the term 'unsentenced prisoners'.
6. Compare the effectiveness of imprisonment versus CCOs. Include an explanation of the similarities and differences.

Part 2— Other countries' prison populations

7. Which country has the highest percentage of remand prisoners? Can you offer any reasons for this? If an accused has the presumption of innocence, to what extent does this demonstrate the principles of justice such as fairness, equality and access?
8. The United States is ranked number 1 in the world as the country with the highest number of prisoners. Speculate what this ranking suggests about the US legal system.
9. What do you think is the main difference between Australia and the United Kingdom in relation to remand prisoners? Give reasons for your view.
10. The percentage of female prisoners in Vietnam is very high. Can you offer any reasons for this?
11. Do you think it is acceptable that some countries overfill their prisons? What does this figure tell us about criminal justice policies in these countries?
12. Compare and contrast Australia's prison population with that of Victoria (see page 276). Can you suggest any reasons for any differences?
13. Read through the international comparison. Describe the statistics that stand out. Can you offer any reason for these figures?
14. The top three countries of birth of prisoners in Australia are New Zealand, Vietnam and the United Kingdom. Analyse the prison results in these countries and compare them to Australia.

Going further

15. Update your research. Go to the International Centre for Prison Studies website, which provides information about prison systems throughout the world. It provides information on prison populations, prison overcrowding, imprisonment rates per 100 000 people, and imprisonment rates for women and juveniles. Choose three other countries (other than those featured in table 11.4) and compare the prison populations of those countries.
16. Prepare a poster comparing and contrasting Australia's prison population with that of the other countries shown. Include an explanation of the similarities and differences.

WORLD PRISON BRIEF
ONLINE: www.prison-studies.org/info/worldbrief



CASE STUDY

CAPITAL PUNISHMENT

Ronald Ryan (left), the last man to be executed in Victoria.

11.4 Reported executions in 2016

Source: Amnesty International Global Report, Death Sentences and Executions, 2016

THE DEATH PENALTY

Capital punishment is the penalty of death. For many years, this was used as the ultimate punishment for those found guilty of murder. The last person to be hanged in Victoria was Ronald Ryan in 1967. Capital punishment was abolished in Victoria in 1975. Calls for its reinstatement come periodically from different sectors of the community, often in response to a very serious and horrific crime.

In 1990, the United States banned the execution of juveniles under the age of 16 years. In 2005, this ban was extended to young people under the age of 18 years.

Each year Amnesty International releases its report on death sentences and executions. 2016, at least 1032 people were executed. Of all executions recorded in 2016, 87 per cent were carried out in just four countries: Iran, Saudi Arabia, Iraq and Pakistan. Amnesty International believes that China remains the world’s top executioner, based on ongoing monitoring of the criminal justice system which shows that executions remain in the thousands annually.

Although Australian states no longer issue the death penalty, a number of Australians are subject to the death penalty in other countries.



COUNTRY	NUMBER OF EXECUTIONS
China	1000+
Iran	567+
Saudi Arabia	154+
Iraq	88+
Pakistan	87+
Egypt	44+
United States	20+
Somalia	14
Bangladesh	10
Malaysia	9
Afghanistan	6

Where + appears after a figure, it means that Amnesty International believes there were more than the recorded number of executions in that country in 2016.

AUSTRALIANS ON DEATH ROW

The following Australians were executed in recent years:

- Andrew Chan—firing squad on 29 April 2015 in Indonesia
- Myuran Sukumaran—firing squad on 29 April 2015 in Indonesia
- Van Tuong Nguyen—hanged on 2 December 2005 in Singapore

As of June 2017, the following Australians were facing the death penalty overseas because they have been convicted of, or charged with, offences that attract a death sentence:

- Pham Trung Dung—convicted and sentenced to death in 2014 in Vietnam for heroin trafficking
- Henry Chhin—convicted and sentenced to death (suspended) in 2005 in China for amphetamine trafficking
- Ibrahim Jalloh—convicted and sentenced to death (suspended for two years, can be commuted to a life sentence with good behaviour in prison) in April 2015 in China for methamphetamine trafficking

A number of other Australian citizens in foreign prisons, such as Schapelle Corby, have had their death sentences commuted to lesser sentences, or have managed to have their convictions overturned.

THE DEATH PENALTY IN THE UNITED STATES

- The United States is one of only two countries (the other being Japan) in the G8 (the world's eight wealthiest countries) to have carried out executions in 2016.
- Since the US Supreme Court reinstated the death penalty in 1976, the total number of executions in the United States is 1456 (with Texas having the largest number at 542).
- The total number of inmates on death row is 2905.
- Since 1973, throughout the United States, 150 people have been released from death row due to evidence of their wrongful conviction. In this same time period, more than 1000 people have been executed.



- 56 women are on death row, with 16 women executed since 1976.
- In Texas, a death penalty case costs an average of US\$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.
- Since the US Supreme Court reinstated the death penalty in 1976, 80 per cent of all executions have taken place in the southern US states.
- Almost all death row inmates could not afford their own attorney at trial. Court-appointed attorneys often lack the experience necessary for capital trials and are overworked and underpaid.
- Prosecutors seek the death penalty far more frequently when the victim of a homicide is white than when the victim is African-American or of another ethnic/racial origin.
- African-American defendants receive the death penalty at three times the rate of white defendants in cases where the victims are white.
- One common theme running through the histories of many of those facing execution was the presence of severe mental illness. The US Supreme Court has banned the execution of those with intellectual disabilities and those with no rational understanding of their punishment (insanity).

CASE STUDY



San Quentin State
Prison, California

Source: 'Facts about the
Death Penalty, Death
Penalty Information
Center, December 2016

APPLY YOUR KNOWLEDGE

CASE STUDY—CAPITAL PUNISHMENT

Undertake research into issues relating to capital punishment and complete the following questions and tasks.

1. When was the death penalty abolished in Victoria? Why do you think the Commonwealth Government abolished the death penalty? Clue: What does the Universal Declaration of Human Rights say about the death penalty?
2. Survey your classmates. How many believe the death penalty should be reinstated? If you have the opportunity, ask your relatives. Do their views differ from your peers?
3. There are several Australians on death row in countries around the world. Summarise the information from page 296, and speculate on the reasons many of these Australians have been sentenced to death.
4. Look at Table 11.5. What do these statistics tell you?
5. Evaluate three arguments put forward in favour of the death penalty. Investigate and examine the effectiveness of the death penalty as a deterrence.
6. Discuss how race plays an important part in the death penalty in the United States. How many people have been released from death row due to evidence proving their innocence?
7. Write a paragraph paraphrasing the information in this case study.
8. Discuss the extent to which the principles of justice are achieved by the use of the death penalty. In your discussion, explain how fairness, equality and access are or are not achieved.

Going further—Update your statistics

9. Look at the Amnesty International or Death Penalty Information Center website and update the statistics in Table 11.5.
 - Describe how many countries carried out executions in the current or previous year.
 - How has this number changed from the information in this textbook?
 - Explain how many countries abolished the death penalty in the current or previous year.
 - Investigate and briefly outline why Amnesty International opposes the death penalty.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

The purposes of sanctions

- A judicial officer is a magistrate, a judge or justice. Their role is to remain independent and impartial and ensure the principles of justice, including fairness, equality and access, apply to both parties. They oversee the conduct of a trial by administering the rules of evidence and procedure and sentence the accused when they are found guilty or plead guilty.
- A judicial officer's task is to weigh up all the relevant circumstances and factors when determining the appropriate sanction, punishment or outcome.
- Sentencing law comes from two main sources: the Victorian Parliament (or legislation) and common law (or judge-made law).
- A judicial officer must consider the principles of parsimony, proportionality, parity and totality when determining a fair sentence.
- The *Sentencing Act 1991* (Vic) outlines five main objectives of sanctions. They are just punishment, deterrence, rehabilitation, denunciation and community protection. All

sanctions fulfil the purpose of sanctioning in different ways. There is no one criterion that can be used to judge the effectiveness of sanctions.

Types of sanctions

- Judicial officers are able to use a hierarchy of sanctions when sentencing for adults in Victoria.
- Imprisonment is the deprivation of a person's liberty. Considered the sentence of 'last resort', imprisonment removes the offender from the community. There are different levels of imprisonment and some offences can be served cumulatively or concurrently (see page 274). Imprisonment can also be indefinite for serious offenders who will never be released. Parole is a way of releasing an individual into society with conditions so they can be monitored.
- A number of treatment orders can be issued by a judicial officer. A court secure treatment order is issued against an offender with a serious mental illness, who is compulsorily detained and treated at a secure mental health facility instead of being detained in a prison.
- A drug treatment order (DTO) is a prison sentence that is suspended so that offenders can have treatment in the community for their drug or alcohol addiction.
- A community correction order (CCO) can have a range of conditions applied against the offender such as unpaid community work, treatment and rehabilitation, non-association, curfew, electronic monitoring and judicial monitoring.
- A monetary penalty or fine is used for summary offences. Fines are described in penalty units.
- An adjournment is an undertaking or a promise to be of good behaviour. It can be with or without a fine and other conditions.
- Other minor punishments include dismissal, discharge, Diversion Programs, seizure or confiscation, restitution, suspension of a driver licence or the use of an alcohol interlock.
- There is a hierarchy of sanctions for children in Victoria such as youth justice centre orders, youth residential centre orders, youth attendance orders, youth supervision orders, probation, fines, good behaviour bonds, Diversion Programs or cautions.



Factors considered in sentencing

- The principles of justice, including fairness, equality and access, mean different things to different people in relation to sentencing. There are many perspectives in sentencing such as the accused, the victim, the community and the legal system. These perspectives apply to fines, CCOs and imprisonment.
- The law was changed to delete the historical convictions for homosexual activity that would not be a criminal offence today. This provides fairness and equality to all.
- A judicial officer must consider a number of factors when considering their sentence. These are the maximum penalty, the degree of criminality, guilty plea, the victim and the defendant, mitigation or aggravation and mandatory minimum sentences.

CHECK YOUR UNDERSTANDING

1. Outline the role of a magistrate or judge in a criminal case.
2. Define the term 'sanction' and state three other synonyms for this term.
3. Explain the relationship of the two main sources of sentencing law in Victoria.

4. Describe the objectives of the *Sentencing Act 1991* (Vic).
5. What factors does a judge take into account when determining an appropriate sentence? To what extent do you think that the views of the victim should be considered? In your opinion, what are the most important considerations? Discuss.
6. Differentiate between concurrent and cumulative sentencing. Describe when they are used.
7. Working in pairs, copy and complete the following table. Explain the following criminal sanctions and evaluate their effectiveness, looking at both their advantages and disadvantages.

SANCTION	DESCRIPTION	ADVANTAGES	DISADVANTAGES
Imprisonment			
Drug treatment order			
Community correction order			
Fine			
Adjournment			
Other sanctions			

8. Research and find out how many offenders have had an indefinite sentence in Victoria. Explain what a court must consider when issuing an indefinite sentence.
9. Explain the value of parole.
10. Find an article on one of Victoria's prisons and summarise the main points for a class discussion.
11. Explain the impact of judicial monitoring of an offender as a condition of a CCO.
12. Fines are set in penalty units and they are indexed each year. What is the current value of a penalty unit?
13. In some countries, such as Finland, fines are linked to an offender's income. To what extent is this a more effective method of preventing offenders from breaking the law?
14. How does the legal system enforce fines as an effective punishment?
15. Create a graphic organiser of a hierarchy in your workbook and summarise the sanctions for young people. To what extent are these sanctions a softer option than punishments available to adults?
16. Aboriginal people are 15 times more likely to go to prison than non-Aboriginal people. Speculate on the reasons for this.
17. Discuss the importance of pre-sentencing reports. To what extent do they have an impact on a judge when sentencing an offender?
18. Select three sanctions that may be imposed on an offender. For each sanction you have selected, discuss how it achieves two or more of the purposes set out in the *Sentencing Act*.
19. Culpability is the extent to which people are held accountable for the offences they have committed. More culpable offenders tend to get more severe sentences. Explain how a judge determines this culpability or criminality.
20. A magistrate or a County Court judge may defer sentencing for up to 12 months for offenders of any age. Discuss why this is so.
21. Evaluate the importance of licence suspensions and alcohol interlocks as a sanction available to courts.

APPLY YOUR UNDERSTANDING

HYPOTHETICALS—A JUST SANCTION

Read through the general facts of the situations below and use your knowledge of criminal sanctions to determine an appropriate punishment for each of the offenders. Try to be as specific as you can about the punishment (for example, 15 years' imprisonment, or a CCO containing 20 hours of unpaid community work). Having allotted a sanction, justify your reasons, referring to the facts.

CASE STUDY	SANCTION	JUSTIFY YOUR REASONS
George, 23, is convicted of selling marijuana to minors at the local school (third offence).		
Allison, 17, is charged with the murder of Jimima. Allison claims she was acting in self-defence, but was found guilty.		
Vicki, an Aboriginal woman, challenged the prosecution's case of burglary but was found guilty in the County Court.		
Tassos, 45, was found guilty of stealing mag wheels from a car in a hotel car park (third offence).		
Gamilah was found guilty of killing her husband, who consistently abused and beat her (first offence).		
Paryce was found guilty of parking her car in a disabled zone. She refuses to pay her outstanding fines from previous offences of the same nature (10 in all).		
Damianos has been convicted of terrorism-related offences. He wanted to bomb Parliament.		
Ali, a financial officer, was found guilty of stealing \$200 000 from a pensioners' group that had invested in his firm (first offence).		

APPLY YOUR UNDERSTANDING

ANALYSIS—THE IMPACT OF CCOs

Read the following information on one of the conditions of a CCO, then answer the questions that follow.

RESIDENCE, PLACE CONDITIONS AND CURFEWS

A community correction order may provide conditions that affect the liberty of the accused in relation to their movement.

First, the court may require the accused to either reside at a particular place or not reside at a particular place.

Second, the court may specify a particular place that the accused must not enter or remain in.

Third, the court may impose an 'alcohol exclusion condition'. Subject to any exceptions specified by the court, this condition restricts an offender in the following ways:

- the offender must not enter or remain in any licensed premises characterised as nightclubs, bars, restaurants, cafes, reception centres or function centres
- the offender must not enter or remain in the location of a major event
- the offender must not enter or remain in a bar area of any licensed premises not otherwise covered by the first two bullet points
- the offender must not consume liquor in any licensed premises not covered by the first two bullet points.

This condition may be imposed to address the role of alcohol in the offending behaviour. The court may set this condition to apply either at all times, or only at particular hours of the day.

Finally, a court can impose a curfew condition, requiring the offender to remain at a specified place between specified hours of each day. The court may not specify a period of less than two hours or more than 12 hours each day. In addition, the court must set the length that the curfew condition applies for and this may not exceed six months.

1. Discuss why a court may state (make an order) to an accused that they will not be able to not enter or remain in a specific area.
2. In your own words describe what is meant by an 'alcohol exclusion condition'.
3. How effective do you think a curfew is?
4. To what extent do you think that a 'residence, place or curfew' condition would be easy to enforce? Explain.
5. How does a 'residence, place or curfew condition' demonstrate the principles of justice?



INVESTIGATION—PRISON PROFILES

ASSESSMENT

On completion of this activity you should be able to explain key concepts in the determination of a criminal case, and discuss the effectiveness of sanctions and the criminal justice system in relation to an actual case.

Investigation

Step 1—There are 14 prisons currently operating in Victoria. As a class, pair up and divide the list of Victorian prisons. Each pair is to conduct research on one prison and create a profile that includes the following information about the prison:

CHOOSE A PRISON	RESEARCH THE PRISON AND CREATE A PROFILE COVERING:
• Barwon Prison • Beechworth Correctional Centre • Dame Phyllis Frost Centre • Dhurringile Prison • Fulham Correctional Centre • Hopkins Correctional Centre • Judy Lazarus Transition Centre • Langi Kal Kal Prison • Loddon Prison • Marngoneet Correctional Centre • Melbourne Assessment Prison • Metropolitan Remand Centre • Port Phillip Prison • Tarrengower Prison	• its purpose • its operator • the type of accommodation it provides • its history • other relevant details such as dress standards, visit conditions, property and money • an image of the prison.

Step 2—Find a recent criminal case in which the accused was sent to this prison and write a report covering the following:

1. An overview of the criminal matter and the facts of the case.
2. The court/s that may be or were involved.
3. The sanctions that were or could be imposed and their appropriateness.
4. The factors that may be or were taken into consideration in sentencing.
5. The possible avenues of appeal.
6. The extent to which the principles of justice are or could be achieved by the offender being at this prison. In your answer explain the rehabilitation programs and likelihood of parole.

This task should take two lessons to complete and should be approximately 900 to 1200 words in length.



RESOLVING CIVIL DISPUTES

UNIT 2 – AREA OF STUDY 2: Remedies

In this chapter, we look at the institutions and methods available to a person to resolve a civil dispute. We will also examine the role and civil jurisdiction of the courts in the court hierarchy, the role of a jury in a civil case and the remedies that may be awarded to a successful plaintiff. You will then put your knowledge into practice by examining two recent civil cases and decide whether the principles of justice are achieved in the cases and the legal system in general.

OUTCOME

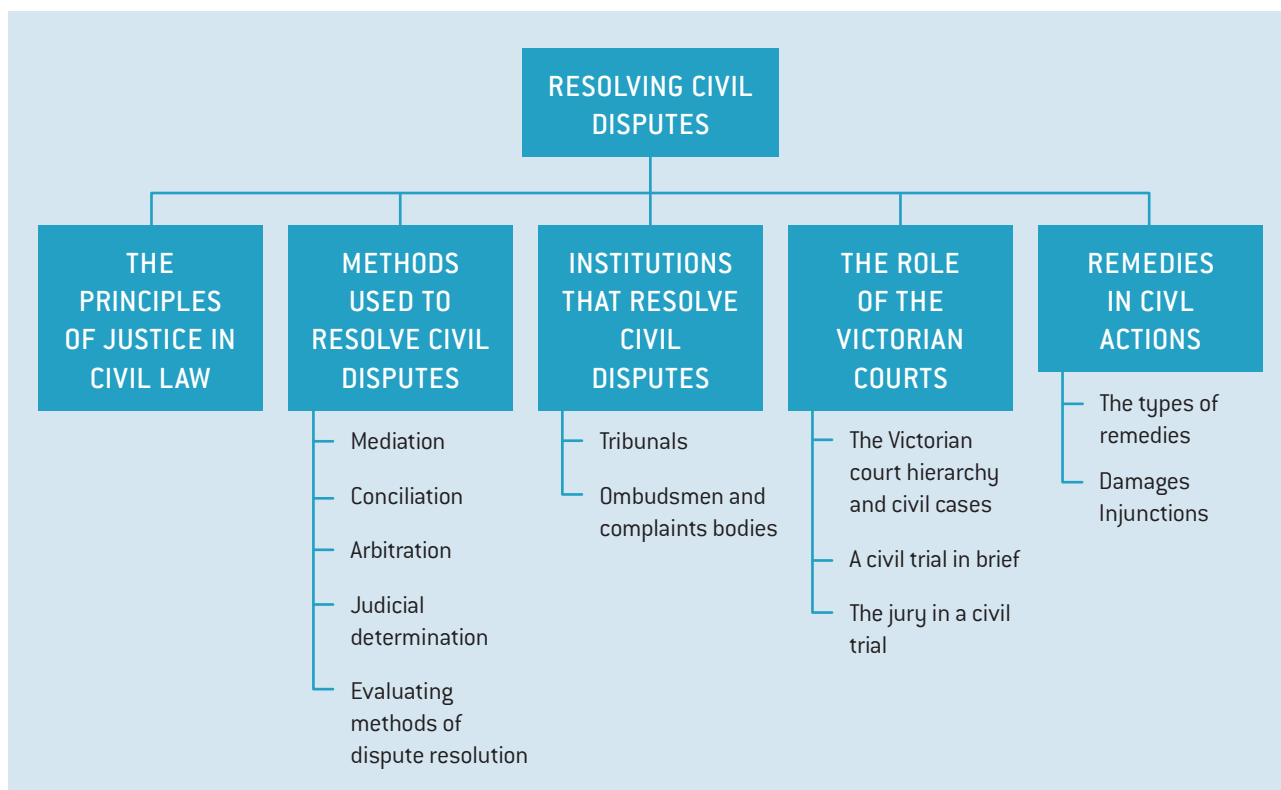
On completion of this unit the student should be able to explain key concepts in the resolution of a civil dispute, and discuss the principles of justice in relation to the resolution of civil disputes and remedies. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > the principles of justice—fairness, equality and access
- > methods used to resolve a civil dispute such as mediation, conciliation and arbitration
- > institutions that resolve civil disputes, such as tribunals, ombudsmen and complaints bodies
- > an overview of the role and civil jurisdictions of the Victorian courts
- > the role of the jury in a civil trial
- > the purposes of remedies
- > types of remedies, such as damages and injunctions
- > two recent civil cases and for each case:
 - an overview of the claim and the central facts of the case
 - dispute resolution bodies that may be or were involved
 - methods of dispute resolution and their appropriateness
 - remedies that could be or were awarded and their appropriateness
 - possible avenues of appeal
 - the extent to which the principles of justice were or could be achieved

KEY SKILLS

- > define and use legal terminology
- > research, analyse and apply information in relation to civil law and two recent civil cases
- > describe the institutions that resolve civil disputes
- > explain the role of the Victorian courts and juries in civil cases
- > discuss the principles of justice in relation to the resolution of civil disputes and remedies
- > discuss the ability of remedies to achieve their purposes
- > analyse the extent to which the principles of justice were or could be achieved in two recent civil cases



KEY TERMS

arbitration	A dispute resolution method where both parties present their case before an independent arbitrator who will make a final and binding decision
conciliation	An informal dispute resolution method where the two parties discuss the issues before a conciliator who will assist the parties to reach an agreement
damages	A civil remedy providing monetary compensation
injunction	A court order requiring that a party take an action or refrain from taking an action
judicial determination	A hearing or trial held before a judicial officer in order to settle a dispute between two or more parties
mediation	A dispute resolution method where a mediator assists parties to exchange information, ideas and possible alternatives
ombudsman	An official with the power to investigate complaints of individuals against a company or organisation, such as the government
remedies	The means by which the court restores a successful plaintiff to their original position
tribunal	An institution with authority to hear and adjudicate on a claim or dispute
Victorian Civil and Administrative Tribunal (VCAT)	Tribunal set up to resolve minor cases in specific areas in a less expensive manner than going to court
void	Having no legal effect, not legally enforceable

INTRODUCTION

Once a plaintiff determines that they have a case, they must decide how to proceed and resolve the dispute. Depending on the type of dispute, there are a number of options available to a person, each with their own pros and cons.

HAVE YOU...	YES / NO / UNSURE
Ever had an issue with a company and not known who to go to?	
Heard of the Victorian Civil and Administrative Tribunal (VCAT)?	
Wondered if court is the only option available to a person with a case?	
Thought about what it would mean to be on a jury in a civil case?	
Heard the words 'dispute resolution methods', but not really understood what this means?	

In this chapter, we will discuss the institutions that help resolve disputes and look at the ways these institutions resolve disputes. We will then discuss the remedies available in civil cases, as this is ultimately what the plaintiff is seeking when trying to settle the dispute. As you work through the chapter, always keep in mind the principles of equality, fairness and access, and decide for yourself whether the institutions, methods and remedies are able to ensure these principles are met.

THE PRINCIPLES OF JUSTICE IN CIVIL LAW

The principles of justice—fairness, equality and access—apply to civil law just as they do to criminal law.

As you will recall, the principles of justice (fairness, equality and access) have many different meanings depending on the person and the situation that person is in. A victim of a crime may have a different sense of what justice means to a person who is merely hearing about a crime on television. The same could be said for a person who has suffered as part of a civil wrong. If you have been injured or your property has been damaged because of someone’s negligence, you will have a keen sense of what is fair in your case. You will also know the difficulties that you may face when trying to access dispute resolution methods or institutions. A person who has not been involved with civil law will not have the same understanding or perception of these issues. However, it is important that our legal system is fair, equitable and accessible to all so that if a person should require the law to assist them, they have the best possible experience.

You have already seen the table below in relation to criminal law; now look at it from the perspective of civil law. Ask yourself, how just is our civil law? We will return to this question later in the chapter.

PRINCIPLES OF JUSTICE		
FAIRNESS	EQUALITY	ACCESS
Fairness relates to the processes, procedures and principles in our legal system that ensure all are treated fairly without fear or favour, such as: • procedural fairness of rules of evidence and procedure • legal rights and protections • the adversary system • acknowledgement by courts of individual needs • the doctrine of precedent	Equality relates to the processes, procedures and principles in our legal system that ensure all are treated equally or alike with the same status, rights and opportunities, such as: • natural justice and equal opportunity • independent judge and jury • rules of evidence and procedure in civil and criminal cases • anti-discrimination laws	Access relates to the establishment of a range of methods and institutions used to ensure all have the means or opportunity to attain dispute settlement, such as: • a variety of dispute resolution methods • complaints bodies • VCAT • the use of judicial determination • specialist courts and lists • Legal Aid and pro bono schemes • court services and diversion programs • rehabilitation programs • education, skills and training • Indigenous education and training

METHODS USED TO RESOLVE CIVIL DISPUTES

Many options are available to a person whose rights have been infringed under the civil law. They do not have to pursue a matter through the courts. In fact, even if they do decide to take their action to court, they may still be required by the courts to use other dispute resolution methods during the pre-trial stage. Many agencies have been established to enable legal problems to be resolved. It is important to realise that the great bulk of disputes that take place in our community do not ever reach a court of law. People may also take action for themselves to solve their legal problems, or decide not to pursue the matter.

There are a range of methods of dispute resolution that people can use to resolve a dispute. These include **mediation**, **conciliation**, **arbitration** and **judicial determination**. Generally, the parties are given the opportunity to find their own solution to a dispute rather than a decision being imposed on them by a court. Courts use judicial determination as a last resort. All of these methods, except judicial determination, require the parties to a dispute to be willing to participate.

MEDIATION

Mediation aims to assist parties to a dispute to reach a mutually acceptable resolution. The mediation is conducted by an impartial third party, called a mediator. A mediator is a specially trained person. In the mediation process, a mediator takes a neutral role—they do not express an opinion in support of either party. The mediator assists the parties to exchange information, ideas and possible alternatives to resolve the dispute. They assist to clarify the issues and encourage the parties to work together to reach an agreement. Their role is to ensure that the proceedings are fair and equal. Although there are variations in how different organisations conduct mediation, the common feature is that parties talk face to face. One important feature of the mediation process is that other than any agreement reached, it is confidential.

It is not the mediator's role to give advice or make suggestions; this is the role of the two parties. The mediator will assist the parties by explaining options and ensuring that

The methods used to resolve disputes are mediation, conciliation, arbitration and judicial determination.

MEDIATION: a dispute resolution method where a mediator assists parties to exchange information, ideas and possible alternatives

CONCILIATION: an informal dispute resolution method where the two parties discuss the issues before a conciliator who will assist the parties to reach an agreement

ARBITRATION: a dispute resolution method where both parties present their case before an independent arbitrator who will make a final and binding decision

JUDICIAL DETERMINATION: a hearing or trial held before a judicial officer in order to settle a dispute between two or more parties

In mediation, a neutral mediator works with the parties to help them create and implement possible solutions to the issue.

any agreement is recorded appropriately. Importantly, the parties to the dispute make the final decision as to how the dispute will be resolved. The mediator has no input into the decision, which is not legally enforceable.



Many courts require parties to attend mediation before the case proceeds to a trial. For example, a Mediation Pilot Program is being operated in a number of Magistrates' Courts across Victoria. This program requires litigants to attend compulsory mediation for all civil disputes where the amount claimed is below the set limit (\$40 000). If a party fails to attend mediation, the Court can order that the claim be dismissed or the notice of defence be struck out, depending on the defaulting party. The County and Supreme courts may also require the parties to attend mediation at any stage, sometimes without the parties'

consent. Mediation is used by the courts to attempt to ensure a speedy and cheap resolution of cases and to encourage the continued relationship of the parties.

CONCILIATION

Conciliation involves an independent third party who attempts to resolve a dispute by talking about the issues with the parties and suggesting ways to resolve the dispute. The conciliator is usually an expert in the area related to the dispute and is thus actively involved in the discussion. However, just like in mediation, the parties make the final decision about how the dispute is resolved. The conciliator cannot force the parties to reach an agreement. Any decision made is not legally enforceable against the parties.

Conciliation is often used in consumer claims and cases involving discrimination at the Victorian Equal Opportunity and Human Rights Commission.

In conciliation, a neutral expert suggests possible solutions to the issue, but the parties involved must decide which (if any) to pursue.

CONCILIATION AND CONSUMER AFFAIRS VICTORIA

When a complaint is lodged with Consumer Affairs Victoria (CAV), its policy is to settle disputes through the use of conciliation. Conciliation is used in disputes between traders and purchasers, and landlords and tenants. CAV is unable to force traders to attend conciliation, so the process depends entirely on the cooperation of the trader.

CAV often undertakes conciliation over the phone. The conciliator will provide advice on the parties' rights and responsibilities as well as suggesting an outcome.

Before undertaking conciliation, CAV will consider the following questions:

- Does the matter fall under CAV's jurisdiction?
- Is the matter likely to be settled?
- Can the matter be dealt with in accordance with other legislation or other action?

Conciliation is conducted free of charge and provides a cheap and quick method of resolving disputes.



ARBITRATION

Arbitration involves an independent third person, known as an arbitrator, hearing the issues and making a decision about how the dispute can be resolved. The arbitrator resolves the dispute by making an award or decision in favour of one of the parties. Decisions made in arbitration are always legally binding on the parties. Arbitration is compulsory for civil claims under \$10 000 in the Magistrates' Court, and these claims are usually heard before a magistrate.

Dispute resolution using arbitration is more formal than dispute resolution using mediation and conciliation, with hearings conducted in the style of a court hearing. But the rules of evidence and procedure are much more relaxed than for a trial.

In arbitration, a neutral expert examines the issue during semi-formal hearings and decides on how it will be resolved.

JUDICIAL DETERMINATION

Judicial determination is a formal method of resolving disputes using a judicial officer, such as a magistrate or judge. It is used as a last resort to resolve civil disputes, when all other methods have failed. A judge or magistrate will listen to the evidence and analyse and apply the law. This decision is binding and enforceable by the court.

Judicial determination is when a civil dispute is taken to an appropriate court for a judge or magistrate to resolve.

EVALUATING METHODS OF DISPUTE RESOLUTION

There are many advantages to using a method of dispute resolution that does not involve going to court, such as it being quick and relatively inexpensive. There are many disadvantages to these methods too, thus making a decision about which method to use confusing. The decision may even ultimately affect the success of a person's case. Table 12.1 outlines a number of advantages and disadvantages of each method.

METHOD	ADVANTAGES	DISADVANTAGES
Mediation	- Cheap: no trial costs, legal representation is not required, low fees - Quick: takes only days or weeks to resolve - Win-win solution: both sides come up with the solution so both parties should feel satisfied with the outcome - Informal atmosphere: less intimidating, encourages compromise.	- Decision is not binding and cannot be enforced by the courts - A solution may not be produced: mediation is not compulsory - Imbalance of power may be possible: informal atmosphere may allow a stronger party to take advantage of a weaker party.
Conciliation	- Informal: allows both sides to have their say and encourages cooperation - Conciliator is an expert: can assist parties to make the right decision - Cooperative environment: encourages a continuing relationship between the parties.	- Lack of finality is possible: if parties can't agree, the conciliator cannot impose a resolution - Decision is not binding: decision reached is not legally binding unless incorporated into a court or tribunal order - Relies on goodwill: voluntary process where either party can withdraw at any time.

12.1 Advantages and disadvantages of methods of dispute resolution

METHOD	ADVANTAGES	DISADVANTAGES
Arbitration	• Binding decision: arbitrator has the power to make an order that is final and enforceable in the courts • Speed: usually faster than a court case and offers great privacy • Expertise: arbitrator is an expert in the process of resolving disputes • Types of remedies greater than courts: can get an apology or explanation, which you cannot in court • Formal process: suits serious disputes or where there is an imbalance of power between the parties • Limited costs: costs are lower than the courts and are recoverable.	• Expensive: legal representation is an option that can add to the costs of resolution • Limited appeals: avenues are not extensive and generally not successful • Lengthy: may be just as lengthy as a court case • Win/lose scenario: a decision is made in favour of one party, thus satisfaction can be limited.
Judicial determination	• Binding decision: enforceable in the courts • Equal treatment: parties are protected by the strict rules of evidence and procedure; judge must remain impartial • Appeals possible: dissatisfied parties can have the case reheard in a higher court, if there are grounds.	• Expensive: court cases are time-consuming, expensive and require assistance from legal representation • Extensive delays: can take many months or years before a case comes to hearing and then may take months to resolve • Win/lose scenario: only one party can win and this can lead to added animosity between parties • Formality: courtroom proceedings may be intimidating.

APPLY YOUR UNDERSTANDING

DISPUTE RESOLUTION

1. Describe the methods of dispute resolution.
2. Compare the four methods of dispute resolution.
3. In which situations may these methods be required?
4. Evaluate the methods of dispute resolution.
5. Mediation, conciliation and arbitration are important methods for resolving disputes in the community. But for many people they are a new and often daunting experience. Conduct some further research into **one** of the methods (mediation, conciliation or arbitration) and create a brochure that could be provided to people who are considering using one of these methods to resolve their dispute. Make sure your brochure includes the following points:
 - > an explanation of what the method is
 - > an outline of the role of the independent third party
 - > examples of when the method can be used
 - > the advantages of using that method over judicial determination as a dispute resolution option.

INSTITUTIONS THAT RESOLVE CIVIL DISPUTES

When a person's rights have been infringed, they can decide whether or not to take the matter further against the person/persons they allege have infringed their rights. If they decide to take further action, the aggrieved person must take their dispute to an appropriate body. This may be a court, but it may be one of the many regulatory bodies or institutions that specialise in dealing with certain disputes. For example, a person who has an issue with their telephone company may take their complaint to the Telecommunications Industry Ombudsman rather than the court. We will discuss a number of these institutions in this section.

TRIBUNALS

Often, people do not have the money to take a case to court, or do not want to wait for a case to be heard before a court (this can often be months to years), and they seek to have their case heard by a **tribunal**. There are many tribunals in Victoria, including the Victims of Crime Assistance Tribunal (VOCAT), the Mental Health Tribunal and the **Victorian Civil and Administrative Tribunal (VCAT)**. Not all cases are suited to a tribunal; however, most civil matters can be dealt with by VCAT.

Victorian Civil and Administrative Tribunal (VCAT)

VCAT provides an inexpensive and informal means to resolve civil and administrative disputes in Victoria. VCAT hears over 85 000 cases each year, in a timely and cost-effective manner.

VCAT is generally less formal than a court, with disputants not requiring legal representation or advice in most cases. The Tribunal is divided into four Divisions: administrative, civil, human rights and residential tenancies. Each Division is further divided into Lists, which hear specific types of cases.

TRIBUNAL: an institution with authority to hear and adjudicate on a claim or dispute

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT): a tribunal set up to resolve cases in specific areas in a less expensive manner than going to court

DIVISION	TYPES OF CASES HEARD	LISTS
<i>Administrative Division</i>	Administrative matters such as: - professional conduct inquiries - applications to review decisions of government and other bodies	- Legal Practice - Planning and Environment - Review and Regulation
<i>Civil Division</i>	Civil matters such as: - consumer matters - domestic building - sale and ownership of property	- Civil Claims - Building and Property - Owners Corporations
<i>Human Rights Division</i>	Deals with matters such as: - equal opportunity - guardianship - racial vilification - health and privacy	- Guardianship, including Powers of Attorney - Human Rights
<i>Residential Tenancies Division</i>	Matters involving: - residential tenants and landlords - residents and caravan park owners - residents and rooming house owners - site tenants and site owners	Residential Tenancies

12.2 VCAT Divisions and Lists

Tribunals such as VCAT are not courts, but they have the authority to hear appropriate civil disputes and make binding decisions on how to resolve them.

Civil Division: Civil Claims List

A person can make a claim to the Civil Division's Civil Claims List if they have a dispute that has arisen following the purchase of goods or services for any amount. The dispute can be between any combination of persons, businesses or companies. A claim must be made to VCAT within six years of the dispute arising. If you wish to be represented by a lawyer or other representative, permission must be sought from VCAT. Usually a lawyer is not permitted if your claim is for less than \$10 000.

OMBUDSMEN AND COMPLAINTS BODIES

Often, people only wish to make a complaint about the service they have received, or do not want to take the matter to a hearing before a tribunal or court. In this situation, they may seek assistance from an **ombudsman** or complaints body.

Ombudsmen

An ombudsman will investigate a complaint made by an individual against an organisation or company. Each ombudsman has responsibility for a specific industry, organisation or company. In Victoria, for example, there is the Energy and Water Ombudsman to deal with disputes between customers and their electricity, gas or water supplier. On a greater scale, the Victorian Ombudsman investigates complaints made about Victorian government departments, statutory authorities and local councils. Some ombudsmen deal with disputes for an entire industry across the country. One such ombudsman is the Telecommunications Industry Ombudsman.

Telecommunications Industry Ombudsman

The Telecommunications Industry Ombudsman (TIO) investigates disputes between residential and small business customers and their telephone and/or internet provider. The service is free and can make a resolution that is binding on the telecommunications company in complaints that are worth \$50 000 or less.

Before making a complaint to the TIO, the customer should first attempt to settle the dispute with their provider. If the dispute remains unresolved, the customer may lodge a complaint online with the TIO. The complaint should have arisen within the past two years and be related to issues such as faulty equipment, contracts or billing mistakes. TIO does not deal with issues such as the rates charged by a provider or website domain names. If a provider is seen to have failed in their obligations to the consumer, they may be asked to provide a refund or some other monetary payment to the complainant.

Complaints bodies

Like ombudsmen, complaints bodies deal with disputes between individuals, groups and organisations. Complaints and resolution bodies include the Accident Compensation Conciliation Service, which helps resolve workers compensation disputes, and Consumer Affairs Victoria.

Consumer Affairs Victoria

Consumer Affairs Victoria (CAV) is the Victorian consumer regulator, a government body created to protect consumer rights and assist with settling disputes.

CAV can assist a consumer in these ways:

- offering advice and information to both traders and consumers about problems so that

OMBUDSMAN: an official with the power to investigate complaints of individuals against a company or organisation, such as the government

Ombudsmen and complaints bodies investigate appropriate complaints and assist in settling disputes.

they can make informed judgments and choices

- providing conciliation services to help parties sort out their difficulties
- providing advocacy, law enforcement and product safety services.

CAV encourages consumers to seek a resolution to their dispute before contacting them. CAV will only become involved if they believe the problem is suitable for conciliation. However, this is a voluntary process and CAV cannot force the business to attend. If CAV cannot settle the dispute through conciliation, it may be able to assist a consumer by identifying who to next take the dispute to. This may be VCAT or a court.



When Consumer Affairs gets involved

We accept complaints when:

- the problem is about a business or landlord/property manager (we do not accept complaints about consumers or tenants)
- you have made a reasonable attempt to resolve the problem with the business or landlord/property manager
- legislation or contractual rights appear to have been breached
- the problem has a reasonable chance of being resolved
- you have paid by credit card and a chargeback has failed to resolve the problem
- the courts or a tribunal have not already ruled on the matter, or there is no case pending.

Source: Consumer Affairs Victoria

APPLY YOUR UNDERSTANDING

ANNOTATED VISUAL DISPLAY

Create a poster or other form of visual display that explains the institutions (other than courts) that may assist in resolving disputes. Ensure that your display covers tribunals, ombudsmen and complaints bodies as well as explaining the types of disputes they help resolve and where people can find further information.

THE ROLE OF THE VICTORIAN COURTS

When most people think about resolving a dispute, be it in criminal or civil law, they think about taking the issue to the courts. The courts resolve thousands of civil cases each year and use many methods of dispute resolution to do so. In fact, the courts will use all of the dispute resolution methods discussed earlier in this chapter in an attempt to resolve a case.

In a civil court case, the person bringing the action is called the plaintiff and the person against whom the action is brought is called the defendant. A person or business entity,

The role of a court in civil cases is to interpret the law and apply it to the dispute at hand in order to reach a resolution.

such as a company, can bring an action. Generally, the parties to a civil legal action are known as litigants.

The role of a court in civil cases is to interpret the law and apply the law to the case at hand. The person in the court who will interpret the law will be the judge presiding over the case. They will answer any questions of law and instruct a jury (if used) how to apply the law to the case. If no jury is used (more on this later in the chapter), the judge will also apply the law to the case. The judge or jury will then apply the law to the facts presented to the court and determine, on the balance of probabilities, whether the defendant is liable or not liable for the plaintiff's injury/loss. If the defendant is found liable, it will be up to the judge, not the jury, to determine the remedy that will be awarded to the plaintiff.

THE VICTORIAN COURT HIERARCHY AND CIVIL CASES

As you already know from Chapter 3, courts in Australia and Victoria are arranged in a hierarchical structure. This means that they are arranged in order from lowest to highest. Each court in the hierarchy operates within prescribed limits. In other words, each court can only hear certain types of civil cases. The prescribed limits of a court's power are referred to as its jurisdiction. Some of these courts also have the power to hear appeals from lower courts.

12.3 Civil jurisdiction: Victorian court hierarchy

COURT	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
Magistrates' Court	Claims up to \$100 000 Claims up to \$10 000 heard by arbitration	No jurisdiction
County Court	Unlimited: applicants can choose to have their case heard in the County Court or Supreme Court Jury of six is optional	No jurisdiction
Supreme Court	Unlimited: applicants can choose to have their case heard in the County Court or Supreme Court Jury of six is optional	Appeals on a point of law from Magistrates' Court and the VCAT
Court of Appeal	No jurisdiction	Appeal from the County Court or Supreme Court on a point of law, question of fact or amount of damages
High Court	Claims arising from a treaty Claims where the Commonwealth is a party	No jurisdiction
Full Court of the High Court	Special leave claims	Appeals from state and territory Supreme courts, the Federal Court, Federal Circuit Court and the Family Court
Full Bench of the High Court	Cases concerning interpretation of the Constitution	Cases concerning a previous High Court decision or cases deemed to be of major importance

Magistrates' Court of Victoria

The Magistrates' Court hears civil cases up to \$100 000. The Magistrates' Court will use arbitration to resolve disputes up to \$10 000. If all parties agree, claims for higher amounts may be heard. The civil cases heard by the Magistrates' Court include personal injury cases, motor vehicle accident claims and contractual matters. The Magistrates' Court also hears matters relating to family law and WorkCover claims (workers compensation).

County Court of Victoria

The County Court can hear civil cases for unlimited amounts. The County Court has no civil appellate jurisdiction. Litigants (or sometimes the Court) can choose to have their case heard in the County Court or the Supreme Court.

The County Court has a number of Divisions, which are then divided into Lists, that hear the civil matters within the Court's jurisdiction. For example, the Court's Commercial Division hears nearly 50 per cent of the Court's civil cases. The aim of this Division is to provide fast, cost-effective resolution of commercial disputes. It does this by reducing the number of pre-trial stages and ensuring that trial dates are set within six months of the first mention. Over 2600 cases are started in this Division each year. The Division is divided into four Lists, with a judge placed in charge of each. The Divisions not only ensure cases are heard quickly, but provide expertise for each case so that it is resolved appropriately and fairly.

Supreme Court of Victoria

The Supreme Court is the highest court in the Victorian hierarchy. It has two Divisions: a Trial Division and a Court of Appeal. It too has unlimited jurisdiction in civil claims. It usually hears the most serious matters or those with significant areas of law to be determined. While it is primarily up to the plaintiff to decide whether to initiate a case in the County or Supreme Court, the Supreme Court can refer a case down to the County Court if it does not have the resources to hear it, while the County Court can refer a case to the Supreme Court if it feels the case is better dealt with by the superior court.

A single judge in the Supreme Court hears appeals from the Magistrates' Court on a question of law in a civil case. The Court of Appeal hears appeals in civil matters from the County Court and from a single judge of the Supreme Court. Appeals generally involve a question of law or disagreements over the amount of **damages** awarded. Appeals from the Court of Appeal are heard by the High Court.

DAMAGES: a civil remedy that provides monetary compensation

High Court of Australia

The High Court was created by the Australian Constitution and has the power to hear cases throughout Australia. The High Court will hear cases concerning the Constitution, or matters that ask the Court to alter a past decision. In these types of cases, usually all seven justices will sit and rule on the case. In other cases, such as appeals from the Victorian Supreme Court (Court of Appeal), a bench of no less than two justices will hear and determine the case. The Court may be asked to hear cases and appeals ranging from contract law to family law, personal injury to insurance. Basically, the court can hear any type of civil law.

There is no automatic right to appeal to the High Court. The party wishing to bring their case before the High Court must persuade the Court in a preliminary hearing that their case is of the type that requires the Court's expertise.

The High Court is the final court of appeal. If a person is unhappy with the decision of the High Court, they have no further recourse. All decisions made by the Court are binding on all other courts within in Australia.

The High Court of Australia



APPLY YOUR UNDERSTANDING

WHICH COURT?

1. Draw a table similar to the one below. Describe the civil cases that may be heard by each court.

COURT	ORIGINAL JURISDICTION	APPELLATE JURISDICTION
High Court		
Supreme Court		
Court of Appeal		
County Court		
Magistrates' Court		

Read the cases below, then complete the tasks that follow.

CASE A

Jasmine has suffered damage to her property due to Nathan's negligent building works. She is suing Nathan for negligence in the amount of \$500 000.

CASE B

Olga has lived in her home for more than 20 years. Recently, a young couple has moved in next door and play loud music until 3.00 am. Olga cannot sleep and has been unable to work. She is suing her neighbours under the tort of private nuisance for \$20 000.

CASE C

Suzannah was sued by Anh in the County Court. Anh was successful but Suzannah feels that she has been asked to pay an amount of damages that far exceeds the injury that Anh suffered. She wishes to appeal the amount of damages awarded to Anh.

CASE D

Shane was attacked by Igor at a birthday party. Igor was charged by the police, but Shane is seeking payment of the medical bills he incurred due to a broken wrist. He is seeking \$250 000 in damages from Igor.

CASE E

Hannah is not happy with the outcome of her case in the Supreme Court (Court of Appeal). She wishes to appeal further.

- a. Determine which court each case would be heard in. Justify your choice.
- b. State whether the case falls under the court's original or appellate jurisdiction.

A CIVIL TRIAL IN BRIEF

As you will recall from Chapter 7, in a civil matter, the burden of proving the facts of the case is on the plaintiff. The standard of proof is on the balance of probabilities. This means that the judge or jury must be satisfied that the plaintiff has proven its case to be more likely or probable than the defendant's version of the facts.

In court, each party (usually represented by legal representatives) is responsible for presenting its case to the court. They will present evidence to either substantiate or refute the claim that forms the basis of the case.

The result of the case will be a verdict for either the plaintiff or the defendant. If the case is decided for the plaintiff, they will be awarded a judgment against the defendant, which entitles them to some form of remedy and (usually) costs. If the judgment is for the defendant, this means that the plaintiff has failed to prove their case and so receives no remedy.

In a civil case, the plaintiff needs to prove their case on the balance of probabilities.

Each party prepares and presents their case. This includes the examination of witnesses and submissions on points of law.



Artist's depiction of a civil trial

The parties can elect to have a **jury** of six in civil cases heard in the County Court or the Supreme Court.

THE JURY IN A CIVIL TRIAL

In the Magistrates' Court, a magistrate will hear the case. No jury is used in the Magistrates' Court. In the County or Supreme courts, the case will be heard by either a judge alone or a judge and jury. The parties to a civil action decide whether or not to use a jury in the County or the Supreme courts. If a jury is used it will usually consist of six people, though eight can be empanelled at the direction of the court. These additional jurors are usually empanelled when a trial is predicted to be lengthy (more than three weeks). Jurors will generally only leave a case before deliberation due to illness (either to themselves or someone under their care), so the additional jurors ensure that there will be enough jurors available for the deliberation process.

Before a jury is empanelled, each side has the opportunity to challenge the inclusion of community members in the jury. The community members who are challenged are not required to sit on the jury in that particular case. Each side has an unlimited number of challenges for cause, which means for a good reason. Each side also has up to three peremptory challenges—that is, a challenge without giving a reason.

The role of the jury in a civil trial

The jury's task is to hear evidence and to make its decision on the balance of probabilities. The jury must listen carefully to all the evidence presented by both parties and decide on whether the plaintiff's version of the facts is the more likely version of the case. They do not have to decide questions of how the law applies or which law/s apply; it is the judge's responsibility to interpret the law, as they are the experts. If there isn't a jury, the judge will decide both the facts and the law.

The jury must try to reach a unanimous decision where all jurors agree with the verdict. If, after at least three hours of deliberation, a unanimous verdict cannot be reached, the court may accept a majority verdict—that is, five out of six jurors agreeing with the verdict. If the court does not believe that the jurors have deliberated for an appropriate amount of time (having regard to the complexity and nature of the trial), they may ask the jurors to deliberate longer before accepting a majority verdict. If, after at least six hours of deliberation, the jurors cannot reach a majority verdict, the judge may discharge the jury and the trial will need to begin again, with a new jury.

If the jury finds for the plaintiff and that the defendant is liable for the damage or loss suffered, in most cases the jury will also be asked to determine the level of damages awarded to the plaintiff. In defamation cases this is not the role of the jury; it is up to the judge to determine the level of damages.

REMEDIES IN CIVIL ACTIONS

One of the most significant distinctions between criminal and civil law relates to the outcome of each case. When a criminal trial results in a conviction, society expects that some form of punishment will be applied to the criminal. Punishment of the offender is usually not of direct benefit to the victims of the crime. In civil actions, the plaintiff is seeking a remedy that will generally be of direct personal benefit.

The general purpose of civil remedies is to restore the plaintiff to the position they were in prior to the civil wrong occurring. This may be easily met where the plaintiff has suffered damage to property or a loss of income; however, it is not so easily met where the plaintiff has suffered physical harm, such as the loss of a limb.

Each type of remedy has its own purpose, above that of the general purpose of civil remedies. We will discuss each of these as we look more closely at the types of remedies available.

THE TYPES OF REMEDIES

Remedies may take various forms, including those discussed below. This is not an exhaustive list of civil remedies. However, those not mentioned are generally used in cases of a more technical nature.

Damages

The remedy most often sought in civil actions is **damages**. Damages is monetary compensation paid for some loss suffered, such as the loss of a leg, the cost of a broken contract or damage to a person's reputation. The law distinguishes between the particular types of damages that may be sought. These are described in Table 12.4.

DAMAGES: a civil remedy that provides monetary compensation

SPECIAL	These are damages that can be accurately assessed. In the case of an action for negligence when a person has suffered physical injury, certain expenses can be calculated directly. For example, doctors' bills, pharmaceutical costs and hospital charges can be accurately calculated.
GENERAL	These are amounts of compensation that cannot be accurately assessed. The judge and jury are required to estimate the monetary value of the suffering. For example, the court may be asked to place a dollar value under a general heading of 'loss of enjoyment of life'.
NOMINAL	This is a small sum of money awarded in situations where a plaintiff's rights have been infringed but they may not have suffered significant injury or loss.
EXEMPLARY	These are awarded when the court may intend to make an example of the defendant to the rest of the community by ordering them to pay a large amount of money.
CONTEMPTUOUS	This is awarded in cases when the plaintiff may have a valid claim and could even be successful in exercising their rights, but the court is not particularly sympathetic. Therefore, the plaintiff may win technically but be awarded an amount that almost makes a mockery of the case at the same time.

12.4 Types of damages

Damages are monetary compensation paid to the plaintiff for their loss.

The purposes of damages

The main purpose of damages is to return the plaintiff to their pre-tort position. This purpose is met through general and specific damages. The other forms of damages meet other purposes. For example, the purpose of nominal damages can be seen to be the aim of making a point. These may be awarded where the defendant has been shown to have committed a tort, but the plaintiff has not suffered any actual damage that can be calculated under general or specific damages. Further, in the case of exemplary damages, the court is awarding this type of damages with the aim to punish the defendant or to deter others from acting in the same way. This is the only remedy that seeks to punish the defendant. Finally, contemptuous damages have the purpose of showing disapproval for the plaintiff's claim. This type of award may be made if the court believes the plaintiff's claim is frivolous, vexatious or vindictive.

Injunction

An **injunction** is a court order for the defendant to undertake, or to refrain from undertaking, particular behaviour. An injunction may be an appropriate remedy in a defamation case. The court could order that a newspaper cease publishing damaging statements until there has been an opportunity to test the accuracy of those defamatory statements. Other torts where injunctions can be sought are nuisance and trespass.

INJUNCTION: a court order requiring that a party take an action or refrain from taking an action

Injunctions are court orders that force a defendant to take an action, or prevent them from taking an action, depending on the case.

There are two types of injunctions: restrictive or mandatory. A restrictive injunction orders the defendant to stop or refrain from doing something (such as pulling down a building), while a mandatory injunction orders the defendant to perform a particular act, such as following through with a contract they have breached.

Further, an injunction can be ordered at two points in time—either prior to the final determination of a case (interlocutory) or as the final remedy in a case (perpetual). An interlocutory injunction is issued by a court for the duration of a hearing. A perpetual injunction is a permanent injunction issued as the remedy at the end of a hearing.

The purposes of injunctions

The main purpose of an injunction is to rectify a situation that has been caused by a defendant. This is particularly the case with a perpetual injunction. The purpose of an interlocutory injunction, however, is to maintain the status quo between the parties during the hearing. It is usually issued where there is a serious question that needs to be answered during trial. This helps decrease any further potential of loss or harm occurring to the plaintiff before a trial can be held and a permanent injunction is put in place.

APPLY YOUR UNDERSTANDING

CIVIL TRIALS AND REMEDIES

1. What is the role of the judge and jury in a civil case?
2. When may a majority verdict be reached in a civil case?
3. What remedies are available to an individual who believes that their civil rights have been violated?
4. What is the main purpose of all civil remedies?
5. Differentiate between specific and general damages.
6. Explain the purposes of the different types of damages.
7. What types of injunctions exist and when are they available?
8. Discuss the extent to which the remedies of damages and injunctions achieve the principles of justice. In your answer, explain how fairness, equality and access are and are not met by the remedies.

APPLY YOUR UNDERSTANDING

ANALYSIS—TWO RECENT CASE STUDIES

Find two media articles about two recent civil cases (the cases should be from within the past four years). Prepare a report that includes the following for each case:

- a. Provide an overview of the claim and the central facts of the case.
- b. Identify the dispute resolution bodies that may be or were involved.
- c. Discuss the methods of dispute resolution that were or could be involved and their appropriateness to the case.
- d. Explain or hypothesise the remedies that may be or were awarded in the case and their appropriateness to the case.
- e. State the possible avenues of appeal.
- f. Discuss the extent to which the principles of justice were or could have been achieved in the case. In your discussion explain how fairness, equality and access were achieved.

COURT RESOLUTION OF A CIVIL DISPUTE

CASE STUDY

SHOPPER SANGEETA GURU AWARDED \$90 000 DAMAGES AFTER SLIPPING ON GRAPE IN COLES

Stephanie Gardiner

Sangeeta Guru was walking in the fruit and vegetable section of a Coles supermarket in Sydney west when she slipped on a grape, fell on the floor and hit her leg on a trolley.

Ms Guru was on Wednesday awarded \$90 130 in damages, after a NSW District Court judge found that Coles was negligent, and failed to address the risk of harm posed by errant grapes on the floor.

The court heard Ms Guru, a 40-year-old beautician, was shopping in the store in Cambridge Gardens, near Penrith, on October 19, 2012, when she fell, injuring her knees, and jarring her back.

While on the floor, Ms Guru looked at the bottom of her thongs and found some squashed grape, and more of the fruit on the floor nearby.

An employee came to her aid and told Ms Guru she had been on her tea break and hadn't had time to clean up, the court heard.

'I am always out on the floor and constantly checking the grape display as I know how often they are dropped by customers,' the employee told the court.

Ms Guru continues to suffer pain from soft tissue injuries, exacerbated by sitting or walking for a long time.

'She has become an unhappy person. Her sleep is also impaired,' Judge Leonard Levy said in his judgment.

Coles unsuccessfully argued there was 'contributory negligence' on Ms Guru's part, saying she should have been looking where she was going.

Judge Levy noted Ms Guru admitted she wasn't looking at the floor as she walked, but that was not a reasonable expectation in a supermarket.

'The plaintiff was looking around her for items to purchase. Her surroundings were a supermarket where goods were attractively displayed to induce customers to select particular items for purchase.'

Ms Guru had claimed more than \$1 million in damages for economic loss, domestic assistance and out-of-pocket expenses.

But Judge Levy found she was not entitled to damages for past economic loss, loss of superannuation, nor for domestic assistance.

Source: *Sydney Morning Herald*, 14 December 2016

APPLY YOUR UNDERSTANDING

CASE STUDY—COURT RESOLUTION OF A CIVIL CASE

Read the case study 'Court resolution of a civil dispute' and answer the following questions.

1. Briefly explain the facts of the case.
2. Which method of dispute resolution did the plaintiff use?
3. Which other dispute resolution methods could the plaintiff have used? Explain which you think would have been the most appropriate and why.
4. Explain the remedy that was awarded in this case. Is this the most appropriate remedy for this case? Justify your answer with reference to the purpose of remedies in general, and the purpose/s of the remedy awarded.

5. If the plaintiff is unhappy with the outcome of her case, what avenues of appeal are available to her?
6. Evaluate the extent to which the principles of justice were achieved in this case. In your answer, remember to refer to fairness, equality and access and to show both sides of an argument, that is, the extent to which the principles were achieved and the extent to which they weren't. Refer to specific elements of the case study in your answer.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Methods used to resolve civil disputes

- The methods used to resolve disputes are mediation, conciliation, arbitration and judicial determination.
 - > In mediation, a neutral party (a mediator) works with the parties to help them create and implement possible solutions. They cannot take sides or suggest actions.
 - > In conciliation, a neutral party (a conciliator) suggests possible solutions to the issue, but the parties involved must decide which, if any, to pursue.
 - > In arbitration, an expert neutral party (an arbiter) examines the issue during hearings and makes a legally binding decision on how it will be resolved.
 - > The most formal resolution method is judicial determination, when the dispute is taken to an appropriate court for a judge or magistrate to resolve.

Institutions that resolve civil disputes

- A number of institutions exist to resolve or assist in resolving civil disputes rather than take them to court. They include:
 - > Tribunals, such as VCAT, that have the authority to hear and make binding adjudications on claims.
 - > Ombudsmen, such as the Telecommunications Industry Ombudsman, that investigate complaints made against organisations/groups in specific industries or governments.
 - > Complaints bodies, such as Consumer Affairs Victoria, that investigate complaints made about the actions or practices of appropriate groups or organisations.

The role of the Victorian courts

- The Magistrates' Court hears civil cases worth up to \$100 000, and will use arbitration to resolve disputes worth up to \$10 000. It cannot hear appeals.
- The County Court hears civil cases worth an unlimited amount, with optional involvement of a jury. It cannot hear appeals.
- The Supreme Court of Victoria's Trial Division hears civil cases worth an unlimited amount, with optional involvement of a jury.
- The Supreme Court of Victoria's Court of Appeals hears appeals from the County Court or Supreme Court. It only considers appeals on points of law, questions of fact or amount of damages.
- The High Court of Australia only hears civil claims that involve international treaties or the Commonwealth as a party. The Court can hear appeals, but only for exceptional or significant cases.

The jury in a civil trial

- Juries can be appointed for civil cases in the County Court or Supreme Court, if the parties think it is necessary.

- Civil juries usually consist of six people, or occasionally eight, rather than the 12 in a criminal jury.
- The jury's task is to hear evidence and to make its decision 'on the balance of probabilities', that is whether the plaintiff's case is more or less likely to be true than the defendant's case.
- Civil juries should attempt to reach a unanimous verdict, but a majority verdict can be accepted.

Remedies in civil actions

- Remedies are the means by which the court attempts to restore a successful plaintiff to their original position (which is not always possible).
- Multiple types of remedies are available to courts. The most common are:
 - > Damages, or monetary compensation paid to the plaintiff for their loss. They can be specific, general, nominal, exemplary or contemptuous.
 - > Injunctions, or court orders that require a party to take an action or to restrain from taking an action. These can be mandatory, restrictive, interlocutory or permanent.

CHECK YOUR UNDERSTANDING

1. Outline the methods of dispute resolution available to parties involved in a civil dispute.
2. Distinguish between conciliation and arbitration.
3. Evaluate mediation as a method of dispute resolution.
4. Explain the role of tribunals such as VCAT.
5. Explain the role of ombudsmen and complaints bodies in dealing with civil matters.
6. Outline the role of the courts in civil cases.
7. Describe the original civil jurisdiction of the County Court.
8. Describe the avenues of appeal available from the Supreme Court.
9. Describe the composition of a jury in a civil trial.
10. Explain the role of a jury in a civil trial.
11. Outline the purpose of civil remedies.
12. Differentiate between the types of damages.
13. Explain the different forms of injunctions.
14. Evaluate the extent to which civil remedies meet their purposes.

APPLY YOUR UNDERSTANDING

EXTENDED RESPONSE—METHODS OF DISPUTE RESOLUTION

1. Choose one of the tasks below and write an extended response. Your answer should be between 250 and 350 words in length. Remember that the 'discuss' task word requires you to show two sides to an argument.
 - a. 'Mediation is informal and the process is controlled by the parties.' Discuss this statement, indicating the advantages of resolution processes such as mediation.

- b. 'Methods of dispute resolution that do not involve the courts are not viable options unless all parties to a dispute are willing to participate.' Discuss this statement.
- c. 'The various methods of dispute resolution available in the community ensure that the principles of justice are effectively met.' Discuss the extent to which you agree with this statement.

APPLY YOUR UNDERSTANDING

MEDIA FILE—CIVIL ACTION

Collect three to five articles that illustrate the ways in which civil disputes within the community are resolved. These cases should discuss a range of dispute resolution institutions and may involve proposed civil action, civil actions currently before the courts or cases where a remedy has been awarded.

Each article should discuss a case concerning Australian law. For each article, prepare a report that has these features:

- the date and source of the article
- an explanation of the relevant area of civil law (you might need to refer back to Chapter 7 to refresh your memory)
- the dispute resolution institution being used or to be used
- the dispute resolution method used or to be used
- suggests other methods and institutions of dispute resolution that may have been used.

APPLY YOUR UNDERSTANDING

RESEARCH—VCAT

Go to the Victorian Civil and Administrative Tribunal (VCAT) website, then complete the following tasks.

VCAT: www.vcat.vic.gov.au



1. When was VCAT introduced?
2. What types of disputes does VCAT resolve?
3. Find the link for 'Fees'.
 - a. How much does it cost to make an application?
 - b. How does this compare with court costs?
 - c. Is the difference in cost an advantage or disadvantage of tribunals? Explain.
4. What Divisions are there in VCAT?
5. What are the 'Lists'?
6. Who is the president of VCAT?
7. Who are the vice-presidents of VCAT?
8. What does a member do?
9. A consumer has a complaint about a trader. Draw a diagram, a series of pictures or a flow chart, or prepare a PowerPoint presentation that illustrates, in summary form, the steps that the consumer would go through to have the complaint remedied. Include the steps in the VCAT Civil Claims List.

CLASSROOM PRESENTATION—INSTITUTIONS OF DISPUTE RESOLUTION

ASSESSMENT

1. As a class, divide up into pairs or groups, each of which chooses a different institution of dispute resolution. The institutions should cover a range of tribunals, complaints bodies, ombudsmen and courts available to civil claimants in Victoria.
2. In your pair or group, conduct research into your assigned institution. Your research should cover the following:
 - a. the role of the institution in resolving civil disputes
 - b. the types of disputes dealt with by the body
 - c. the methods of dispute resolution employed by the body
 - d. the fees associated with a claim
 - e. the location/s of the body
 - f. remedies available for a successful claim through the body
 - g. any avenues of appeal available
 - h. one or two recent decisions made by the institution.
3. In your pair/group, write a brief response that evaluates the extent to which the principles of justice are met by your institution. Refer to the research you have conducted when answering this question.
4. Once you have gathered your information and written your answer to task 3, create a presentation based on your findings. You might like to create a series of slides, a video or some other form of visual medium.
5. Present your information to the class—be prepared to answer any questions.



13

RIGHTS IN AUSTRALIA

UNIT 2 – AREA OF STUDY 3: Rights

Have you ever felt like something wasn't fair, or perhaps that your rights have been violated? In this chapter students will discover how individuals and groups of individuals who have suffered an abuse of their rights can seek redress in the court system and, in the process, shape the face of the Australian legal system.

OUTCOME

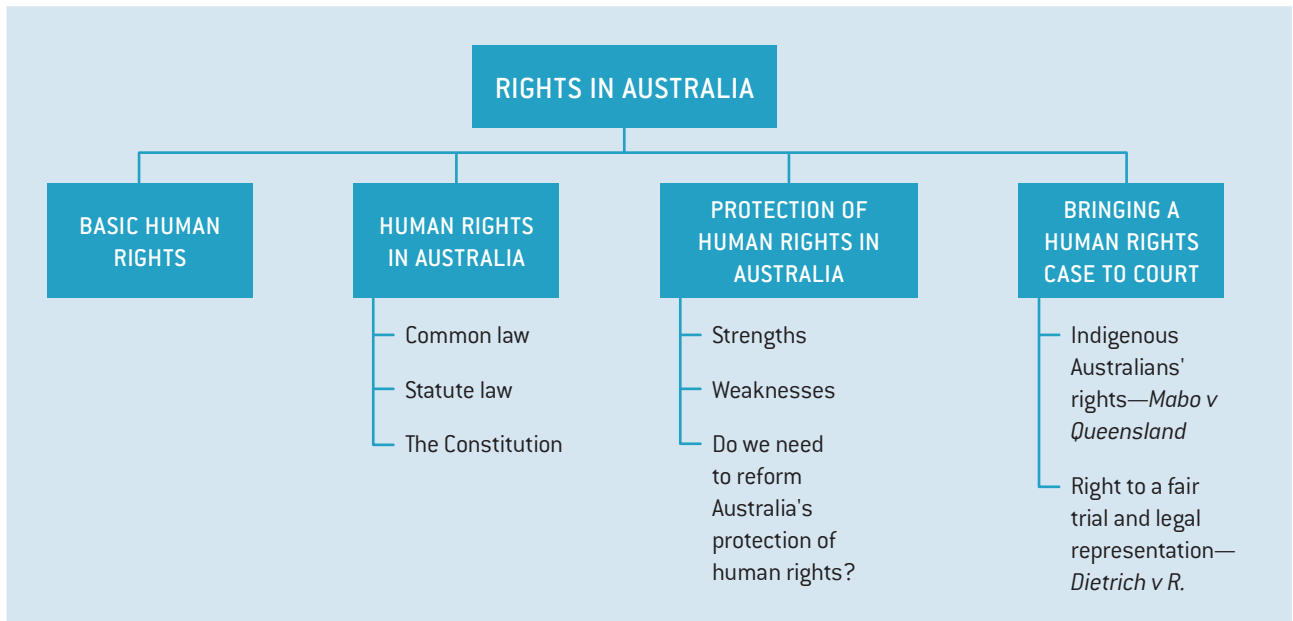
On completion of this unit the student should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > an overview of the ways in which rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law
- > possible reforms to the protection of rights in Australia
- > one case that has had an impact on the protection of rights in Australia:
 - the role of the individual in taking a case to court
 - the facts and issues central to the case, including the rights in question
 - the laws that applied to the case
 - the outcome of the case and its impact on the rights of individuals and on the legal system
 - possible conflicting attitudes in relation to the case

KEY SKILLS

- > define and use legal terminology
- > discuss possible reforms to the protection of rights in Australia
- > evaluate the ways in which rights are protected in Australia
- > describe the role of individuals in bringing about changes in protections of rights through cases
- > analyse the impact of a case on the rights of individuals and on the legal system



KEY TERMS

Bill of Rights	A formal declaration of the rights of citizens in a country or state
express rights	Rights stated specifically in the Commonwealth Constitution
human rights	The basic rights and freedoms to which all humans are entitled
implied rights	Rights found in the interpretation of the Commonwealth Constitution
native title	The recognition by the law of Indigenous rights to use and possess land
representative government	A government that is answerable to the people at elections
responsible government	a government where members are held accountable for their actions to the parliament and parliament is accountable to the voters
separation of powers	The division of the functions of government among three independent bodies to provide a system of checks and balances on each body's power
<i>terra nullius</i>	A Latin expression meaning 'land belonging to no-one'
test case	A case brought before the courts where no precedent has been established
structural protections	Rights indirectly protected due to the structure and wording of the Commonwealth Constitution
vilification	Abusive or derogative speech and writing

BASIC HUMAN RIGHTS

HUMAN RIGHTS: the basic rights and freedoms to which all humans are entitled

Human rights can be defined as those basic rights and freedoms to which all humans are entitled. These rights include the rights to life and liberty, freedom of thought and expression, and equality before the law.

HAVE YOU...	YES / NO / UNSURE
Ever travelled interstate or overseas for a holiday and come back to Victoria easily and safely?	
Worked for an employer and not been paid?	
Participated in a demonstration?	
Joined a trade union or club?	
Heard of a person who was forced to marry someone against their wishes?	
Read about a criminal sentenced to death?	
Ever participated in a debate or argued with someone who didn't agree with you?	
Had someone tell you that you can't follow your religion?	
Attended a court case to observe someone else's trial?	

The above situations all refer to one of the many human rights all humans are entitled to each day. Governments, business and other individuals should not infringe your human rights. If they do, there are remedies available to individuals to seek redress (amends).

APPLY YOUR UNDERSTANDING

RESEARCH—PROTECTION OF HUMAN RIGHTS

Using the internet, find a copy of the United Nations Universal Declaration of Human Rights. For each of the situations in the table above, determine which human right is being protected or infringed. For each situation, explain why you believe the right is being protected or infringed.

HUMAN RIGHTS IN AUSTRALIA

Australia, unlike most liberal democratic nations in the world, does not have a single document, or **Bill of Rights**, protecting the human rights of its citizens. Rather, we must look at several documents to determine how our rights are protected. Our rights may be protected through the Commonwealth Constitution, state and federal statute or the common law.

COMMON LAW

As discussed in Chapter 2, common law is law that is made by the courts. Judges are permitted to create a law that provides protection of our rights when determining a case that comes before them. In the absence of a statutory Bill of Rights, a number of our rights have been protected by judges. Judges also interpret Acts of Parliament to ensure they do not infringe or impede the rights we have.

When parliament makes laws and courts are interpreting statutes, these bodies follow the common law principle that legislation does not intend to infringe our fundamental rights and freedoms unless there is an express intention by parliament to do so and the

BILL OF RIGHTS: a formal declaration of the rights of citizens in a country or state

Human rights in Australia may be protected by the common law, by statute law or by the Constitution.

infringement is reasonable. This has meant that the common law provides Australians with a strong protection of human rights. Two will be discussed below.

Freedom of movement

Freedom of movement is one right that is protected by the common law. This right allows Australians to leave the country as and when they wish, and to be able to return freely when they wish. However, this right is not without some restrictions. A person may be entitled to leave Australia but they may not have the right to enter any other country of their choosing. Further, a person may have their freedom of movement restricted if they are charged with a crime and there is concern that they might flee the country to escape punishment.



Right to not self-incriminate

The courts have determined that we have many rights when charged with a crime and facing prosecution. One such right is the right to not incriminate oneself. The High Court has stated that a person does not have to answer any question, or produce any document, that may cause them to be convicted of a crime. This right extends to people who are suspected of committing a crime or people being questioned in civil proceedings. This right also includes the right to silence; that is, individuals cannot be made to testify against themselves, whether or not it would incriminate them. Just like with freedom of movement, there are exceptions to this common law right. A person cannot refuse to give evidence that is not delivered via testimony (that is, evidence that is given orally in question and answer form). A person cannot refuse to provide evidence such as fingerprints or DNA evidence.

STATUTE LAW

Other rights are protected by statute law; that is, laws made by parliament. The principles set out in international treaties (more on this topic in Chapter 14) are often reflected in laws that have been passed at both federal and state levels.

Commonwealth laws

Commonwealth legislation protects people from discrimination on a range of grounds and from many other abuses of their human rights. Such Commonwealth laws include the following:

- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Australian Human Rights Commission Act 1986*
- *Privacy Act 1988*
- *Disability Discrimination Act 1992*
- *Age Discrimination Act 2004.*

Racial Discrimination Act 1975 (Cth)

The *Racial Discrimination Act 1975 (Cth)* provides that it is illegal for a person to exclude, distinguish, restrict or give preference to someone based on race, colour of their skin, descent or national or ethnic minority. This law therefore provides rights to all people to be given employment, benefits, housing and the provision of goods and services. Again, there are exemptions to these rights.



For example, a person has the right to make a comment or write an article that fairly and accurately reports on any event or matter of public interest. This exemption tries to provide a balance between a person's freedom of speech and the right to not be racially vilified.

Victorian laws

There are also state laws that protect the rights of individuals, such as the *Victorian Equal Opportunity Act 2010* and *Charter of Human Rights and Responsibilities Act 2006*. These laws apply to residents of Victoria only and supplement the common law and federal statutory rights all Australians have.

Victorian Equal Opportunity Act 2010 (Vic)

The *Victorian Equal Opportunity Act 2010* (Vic) was enacted to try to eliminate discrimination, sexual harassment and **vilification**. Under this Act, a person cannot be discriminated against based on age, the fact they are breastfeeding, their gender identification, marital status or disability, just to name a few.

A person may be directly or indirectly discriminated against. Examples of both forms of discrimination are found in the Act. Direct discrimination occurs when a person treats someone unfavourably due to an attribute. Section 8 illustrates examples of direct discrimination, such as: 'An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills.' This is a case of discrimination based on a person's age.

Section 9, on the other hand, provides illustrations of indirect discrimination. Indirect discrimination occurs where a person imposes, or wishes to impose, a requirement that will, or will likely, disadvantage a person and that requirement is unreasonable. For instance, 'An advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of his or her race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.'

Just like with the Commonwealth Acts, there are permitted forms of discrimination. It is not unlawful to discriminate based on age when dealing with pensions, while it is not unreasonable for an employer to set minimum requirements in terms of qualifications if it is necessary to perform a job.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

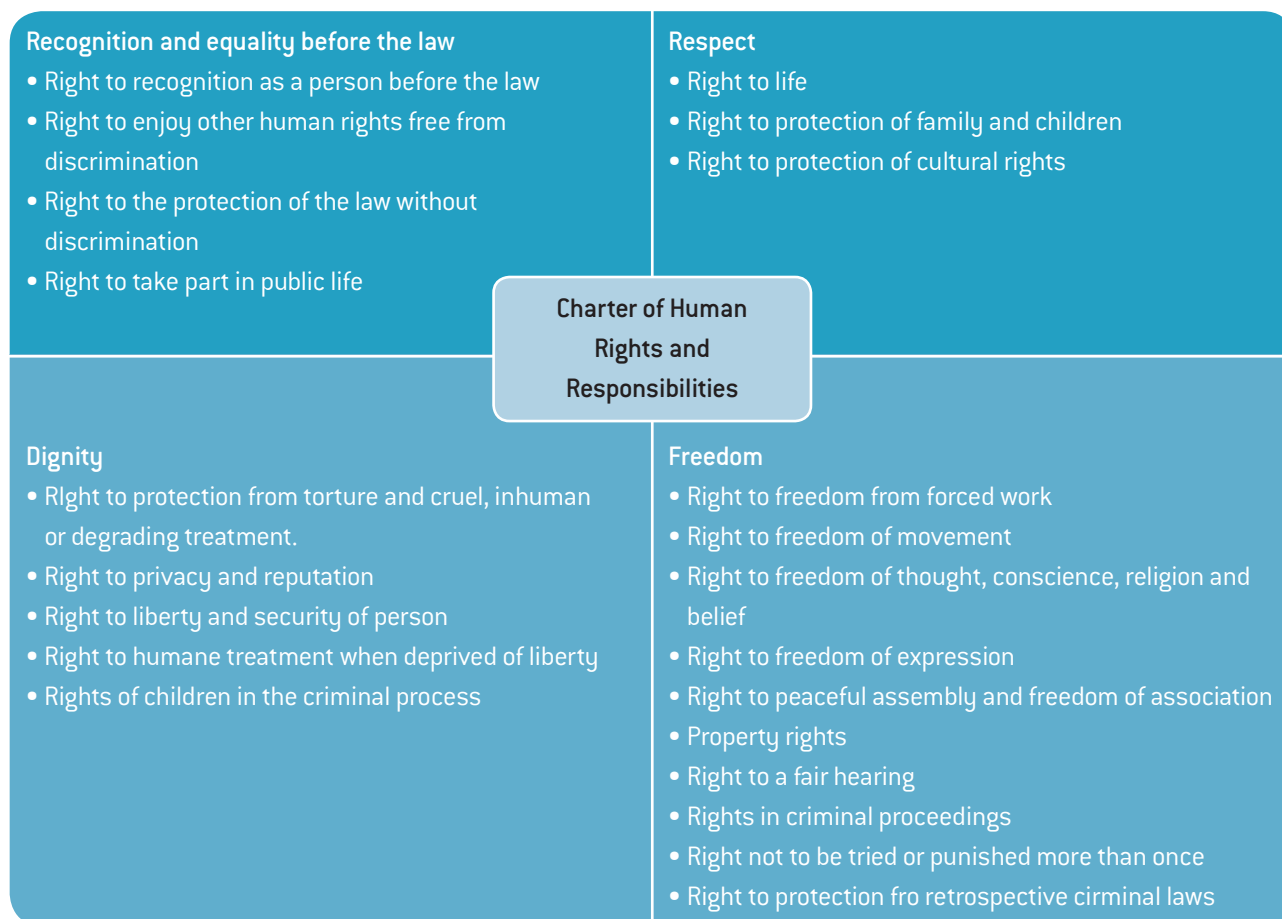
On 25 July 2006, the Victorian Parliament passed the *Charter of Human Rights and Responsibilities Act*. Victoria was the first Australian state to adopt a Charter of Human Rights (the Australian Capital Territory was the first Australian jurisdiction to pass a form of a Bill of Rights in 2004). The Charter sets out the rights, freedoms and responsibilities of all Victorians. It focuses on protecting twenty fundamental civil and political rights by recognising four basic principles: freedom, respect, equality and dignity.

How does the Charter work?

The Charter imposes specific responsibilities on the Victorian Government, local councils, public servants, Victoria Police and other public authorities to not knowingly breach these human rights when making policies or laws, or when delivering services. Laws and decisions may limit these human rights, but these limitations must be necessary and reasonable, and it must be clear why this decision was made.

VILIFICATION: abusive or derogative speech and writing

Victoria's Charter of Human Rights and Responsibilities is similar to a Bill of Rights for the state.



Government departments and public bodies

Government departments and public bodies must observe these rights when they create laws, set policies and provide services. Government, public servants, local councils, Victoria Police and others must act in a way that is consistent with the human rights protected under the Charter.

Victorian Parliament

All proposed laws are checked against the Charter. The Parliament must take into consideration human rights when making decisions about proposed laws. When a Bill is introduced into Parliament, a Statement of Compatibility is prepared by the Scrutiny of Acts and Regulations Committee. The Statement of Compatibility informs Parliament if the Bill is consistent with the standards set by the Charter. If a law does not meet human rights standards, then the government is expected to provide an explanation. (A Human Rights Certificate is prepared for all proposed regulations.)

Parliament can pass a law that limits the rights in the Charter. Limitations may be placed on a human right where it 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'. If Parliament passes a law that overrides human rights, there must be an express declaration of that intention in an Act.

The courts

Courts and tribunals are required to consider human rights when interpreting legislation. The Supreme Court can issue a Declaration of Incompatibility. This means

that the government must reconsider the legislation. The responsible minister must respond in Parliament to a declaration made by the Supreme Court. The Supreme Court does not have the power to declare the legislation invalid. Parliament has the final say.

An individual cannot take a legal action for a breach of the Charter but they can raise a human rights argument in the context of a case being heard by a court or tribunal.

THE CONSTITUTION

The Commonwealth Constitution provides some limited protection of human rights.

Express rights

Some rights in the Constitution are clearly stated. These rights may be referred to as explicit or **express rights**. There are five express rights in the Constitution:

1. The right to freedom of religion (section 116): the Commonwealth Parliament cannot enact a law that creates a religion, forces people to observe a particular religion or to not observe a certain religion, nor can they make religion a qualification for the holding of any public office. This right applies to the Commonwealth government only.
2. The right to freedom of interstate trade and commerce (section 92): the Commonwealth cannot impose any taxes or customs on trade and business between states. This means that a law cannot be made charging, for example, a 15 per cent tax to bring bananas from Queensland into Victoria. This protects the rights of people to conduct business freely.
3. The right to freedom from discrimination on the basis of a person's state of residence (section 117): this prevents the creation of a law that discriminates against someone based on the state they live in. For example, an association cannot make it a requirement of membership that a person resides in a particular state. This section applies to bodies in both the Commonwealth and the States.
4. That the Commonwealth must provide 'just terms' when acquiring property (section 51 (xxxi)): If the Commonwealth wishes to acquire property it must firstly have the power to take the property for a legislative purpose and it must then pay the owner of the property compensation that is fair or have established a procedure to determine what is fair compensation. This section only applies to the Commonwealth Parliament.
5. The right to a jury trial for indictable Commonwealth offences (section 80): This section states that 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury, ...' Thus, this section ensures that any person who is charged with an indictable offence under Commonwealth law is required to be tried by a jury of their peers. This section only applies to offences under Commonwealth law that are indictable offences. It does not protect Commonwealth summary offences or offences committed under state laws.

Implied rights

Some rights are said to exist because the High Court has interpreted that they exist in the Constitution. These are called **implied rights**. For example, the High Court has decided that the right to freedom of political communication is implied in our Constitution.

EXPRESS RIGHTS: rights stated specifically in the Commonwealth Constitution

Five express rights are specifically stated in the Commonwealth Constitution.

IMPLIED RIGHTS: rights found in the interpretation of the Commonwealth Constitution

In two cases, *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, the High Court determined that all Australians have a common law right to freedom of speech in relation to communication about government and political matters. This right needs to be protected to ensure that our system of representative government functions properly; that is, it ensures our parliament is 'chosen by the people' (more on this below). It is important to note that this right places a limit on the Commonwealth Parliament's ability to limit a person's right to political communication rather than giving a right to individuals. For example, parliament can create a law so long as it does not unreasonably regulate political speech. However, parliament can create a law that 'reasonably' limits political speech.

Structural protections

Other rights are indirectly protected by mechanisms contained in the structure and text of the Constitution; these are referred to as **structural protections**. These structural protections indirectly protect our basic democratic and human rights by preventing the abuse of parliamentary power.

Three main structural protections operate under the Constitution:

- responsible government
- representative government (found in sections 7 and 24)
- the separation of powers.

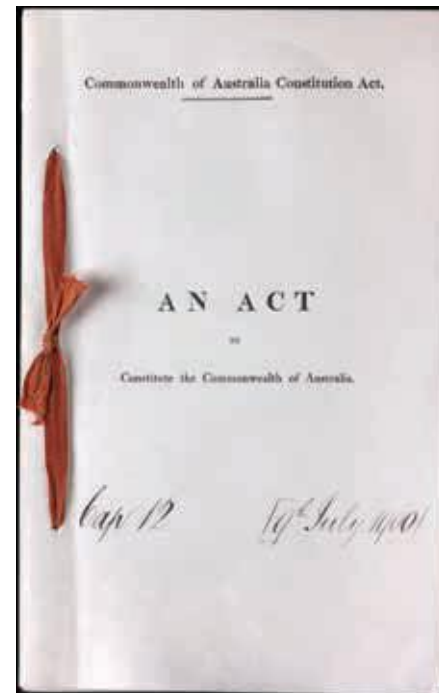
Responsible government refers to a government where members are held accountable for their actions to the parliament and parliament is accountable to the voters. A responsible government indirectly protects our right to be governed by a government that has the confidence and support of the Lower House of Parliament (the House of Representatives) and thus protects against any possible abuse of power.

Representative government also protects citizens from any possible abuse of power by making the government answerable to the people at elections. A representative government is a government whose members are elected by the people to represent their views and values.

The **separation of powers** is an important principle upon which a parliamentary system is based. The separation of powers divides the functions of government among three independent bodies (the Legislative, Executive and Judiciary) to provide a system of checks and balances on each power to ensure that power is not concentrated in one set of hands.

Under the separation of powers, the power to make laws is given to the *legislative* branch (the Commonwealth Parliament) while the power to administer those laws is given to the *executive* branch (the Crown and Executive Council). Finally, the power to enforce the law and settle disputes is given to the *judiciary* (the High Court). In this way, the body that makes the law is not the same body that creates the mechanism to implement the laws and cannot decide if a person has breached the laws. This ensures that the law is created and applied in a fair and consistent manner.

These rights can be enforced by the High Court. If a case is brought before the High Court and the High Court decides that a law infringes a right either stated or implied in the Constitution, the High Court can declare the law to be unconstitutional.



The original document of the Australian Constitution

STRUCTURAL PROTECTIONS: rights indirectly protected due to the structure and wording of the Commonwealth Constitution

RESPONSIBLE GOVERNMENT: a government where members are held accountable for their actions to the parliament and parliament is accountable to the voters

REPRESENTATIVE GOVERNMENT: a government that is answerable to the people at elections

SEPARATION OF POWERS: the division of the functions of government among three independent bodies to provide a system of checks and balances on each bodies' power

Many human rights in Australia emerge indirectly from the structural protections within the Constitution.

APPLY YOUR UNDERSTANDING

HUMAN RIGHTS IN AUSTRALIA

1. Define human rights.
2. List the ways in which human rights are protected in Australia.
3. Describe how the common law protects a person's human rights.
4. How does statute law protect human rights in both the Commonwealth and Victorian jurisdictions? Use examples of statutes to help your explanation.
5. Compare express rights and implied rights.
6. Explain how the structures found in the Constitution help protect human rights.

PROTECTION OF HUMAN RIGHTS IN AUSTRALIA

There are a number of strengths and weaknesses in the manner in which human rights are protected in Australia.

STRENGTHS

Protections in the Constitution are difficult to change

Express rights are entrenched in the Constitution. The only way to alter or remove these rights is through a successful referendum. A referendum is a complicated process outlined in section 128 of the Constitution and proposed changes have rarely been successful. In fact, out of the 44 referendums put to the people since 1901, only eight have been successful. Of those eight, none have removed the rights provided.

Rights can be interpreted into the Constitution

The High Court has interpreted the Constitution to include the implied right to freedom of communication on public affairs and political matters. This has allowed the Constitution to remain up to date with society's changing values and needs. The High Court can interpret new rights in the future should a suitable case come before it. Further, the High Court has also determined that the structures of the Constitution help protect rights. Although they are indirect protections, they are important safeguards against the abuse of power by government.

Statutory protections can be easily changed or implemented

By allowing the parliaments to create laws that protect rights, legislators can alter protections if values or needs change. It also means that new rights can be protected if a situation arises that has not previously been considered. Statutes protect rights that are not found in the Constitution; for example, the *Racial Discrimination Act 1975* provides far-reaching protections for people, unlike the limited rights protected in the Constitution.

Common law allows for timely application and alteration of human rights

Just as parliament can create or alter human rights through statutes, the courts can also create new rights or stop the infringement of a person's rights when a case is brought before them. The courts can interpret legislation and/or the Constitution in a timely manner to ensure that injustices are avoided. Any legislation that is deemed to violate human rights will be invalid to the extent of the violation.

The strength of Australia's approach to protecting human rights is that our express rights are protected, while other rights can be flexibly updated and protections implemented through common law, statute law and Constitutional interpretation.

WEAKNESSES

Rights in the Constitution are difficult to change

Due to the requirement of a referendum, it is extremely difficult to alter the Constitution and create new rights. This means that when technology changes, or people's views and values change, it is not easy to include new rights that are expressed in the Constitution. It also means that it is difficult to change or remove a right if it is no longer considered necessary.

Constitutional rights are limited

The Constitution only provides Australians with five express rights and one implied right. These rights are mainly civil and political rights and do not protect rights in relation to areas such as dignity and respect. The Constitution provides stable and strong protection, so the fact that the number of rights directly protected are limited means that governments and other bodies may be able to neglect other basic rights. Further, many of the rights within the Constitution are limited in nature. For example, the right to trial by jury only applies to Commonwealth indictable offences. There is no such right for other criminal acts or civil proceedings.

Common law protection requires a case to be brought to court

In order for the courts to create common law to protect human rights, a case must come before them. This is often a costly and time-consuming process that may stop someone pursuing their claim and a right not being protected or created. Further, only superior courts of record can create common law. This adds to the cost and time of a case, creating greater barriers to the creation and protection of human rights.

Statutes can be easily changed

It is easy for parliaments to remove or alter current laws that protect human rights. While this means new rights can be created easily, it also means that laws can remove or reduce the current protections provided. As parliament is the supreme law-making body, there are few barriers to its ability to remove human rights protections.

The weakness of Australia's approach to protecting human rights is that only a small number of rights are clearly defined by the Constitution, and laws could be easily made or changed to remove the protection of our other rights.

APPLY YOUR UNDERSTANDING

ASSESSMENT-STYLE QUESTION

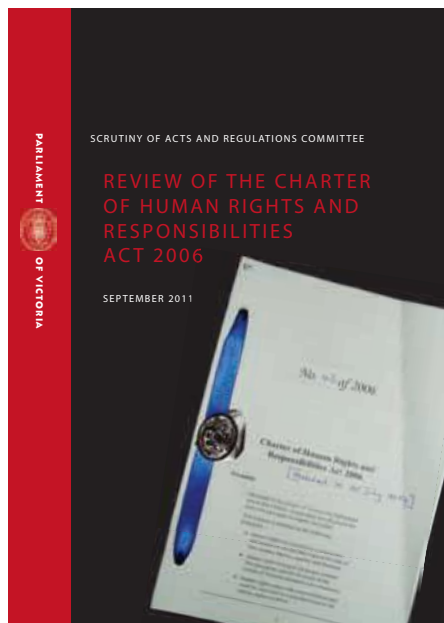
Answer the following assessment-style question:

'Evaluate the strengths of Australia's human rights protection.' (8 marks)

Remember: when you answer an evaluation question, you are being asked to look at the strengths and weakness of a topic to come to a conclusion about its overall effectiveness. Here, the question asks you to 'evaluate the strengths'; this means that you must start your paragraph with an explanation of one strength and then counter that strength with a corresponding weakness. You would then repeat the same structure three more times in order to maximise your chance of receiving full marks. The answer should be between two-thirds to a page in length.

DO WE NEED TO REFORM AUSTRALIA'S PROTECTION OF HUMAN RIGHTS?

As discussed above, there are strengths to the system of rights protection in Australia; however, there are also weaknesses. This has prompted some people in the community to argue that we need to reform our approach and perhaps include a Bill of Rights into our law to protect human rights further.



A review of the Victorian Charter of Human Rights and Responsibilities

15.1 Reasons for and against a Bill of Rights for Australia

A Bill of Rights is a statement of certain rights that citizens or residents (or both) of a free and democratic society have (or ought to have) under the laws of that society.

The Australian Constitution does not include a Bill of Rights. There have been a number of attempts to amend the Constitution to include a statement of rights. In 1973 and 1983, there were two major attempts in the Commonwealth Parliament to introduce a general Bill of Rights. In both cases the legislation lapsed. The ACT Legislative Assembly passed Australia's first Bill of Rights: the *Human Rights Act* in 2004. This Act included fundamental rights, such as freedom of expression, religion and movement.

In 2006 Victoria introduced the *Charter of Human Rights and Responsibilities*. In the same year, the Tasmanian Government said it would examine options to protect human rights, including legislating a Human Rights Act; it is still determining the approach it wishes to take.

Australia is one of the few Western democratic nations that does not have a Bill of Rights. Other English-speaking countries with similar political and legal systems do. These countries include New Zealand, South Africa, the United States, Great Britain and Canada. We will look at the approach that one of these countries takes in Chapter 14.

THE ARGUMENTS AGAINST A BILL OF RIGHTS

It would undermine the principle that parliament has the ultimate law-making power.

It would transfer power from elected parliaments to courts who would attain the power to interpret the Bill of Rights and its application.

Difficult questions would be squeezed into artificially limited categories contained in a Bill of Rights.

A Bill of Rights could impact on sensitive, social and regional issues. Not all members of all areas of society would be happy with what is included or left out.

With the speed of change in society, a Bill of Rights would soon be out of date. It would be difficult to change, particularly if it was included into the Constitution.

A Bill of Rights does not provide a guarantee against intrusions into fundamental rights. The best protection is building a society that respects diversity of opinion and lifestyle, and protects minorities so that intrusions do not occur.

Courts already protect basic rights through the common law, e.g. *Mabo*. This process is relatively cheap and can quickly create a new right should we need it. Enacting specific laws will be less effective than the protection offered by the courts.

THE ARGUMENTS FOR A BILL OF RIGHTS

Australian law offers inadequate protection of fundamental freedoms. Our Constitution recognises only five express rights and one implied right.

A Bill of Rights would give recognition to certain universal rights. The number of rights included could be as many or as few as society believes necessary.

It would bring Australia into line with the rest of the democratic world and meet Australia's international obligations.

It would enhance Australian democracy by protecting the rights of minorities.

A constitutional statement of rights is needed to prevent parliament from making laws that infringe our basic rights.

It would give courts the power to protect the basic rights of all people and the power to determine difficult questions that parliament currently puts into the 'too-hard basket'.

Some values of Australian society need to be above party political debate.

A Bill of Rights would educate citizens about the fundamental rights of all Australians.

APPLY YOUR UNDERSTANDING

EXTENDED-RESPONSE QUESTION

Complete the following extended response question. This task should take 2 to 3 lessons to complete and should be approximately 800 to 1000 words in length.

‘Australia’s Constitution should be amended to include a Bill of Rights.’

Discuss the above statement and indicate the extent to which you agree with it, giving reasons for your answer. Include in your response an explanation of the arguments surrounding the issue of human rights protection and reform in Australia.

Refer back to Chapter 4 for a reminder on how to structure an extended response answer.

BRINGING A HUMAN RIGHTS CASE TO COURT

As our system of rights protection is largely based on legislation and common law, when an individual has one of their rights infringed they often need to seek redress through the court system. There are instances when people are unsure whether their case involves a rights violation or whether their case will be successful because there is no precedent. Cases brought before the courts in either situation are known as ‘test cases’.

A **test case** is a case that seeks to clarify or establish the legal rights and duties of a group or individual under common or statute law. A test case may also be launched to challenge a pre-existing interpretation of those rights.

Running a test case is not done every day. It is a risky endeavour and therefore not a common occurrence. Test cases are expensive and have no guarantee of success, but their benefit is that they may allow a disadvantaged individual or group to attain redress as well as make a lasting impression on the legal system of Australia.

A test case cannot be brought concerning any issue. The issue at hand must be ‘justiciable’; that is, there must be a real legal or rights dispute within the case. Applicants who fail to recognise this may find their case is dismissed and they will be left with not only paying their own legal fees, but also those of the defendant.

There have been a number of test cases since the early 1990s that have dealt with rights in Australia. These cases include:

- *R v L* (1991) 174 CLR 379
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1
- *Dietrich v R* (1996) 177 CLR 292
- *McBain v Victoria* (2000) FCA 1009
- *Roach v Electoral Commissioner* (2007) HCA 43.

Each test case was initiated by individuals or groups who felt that they had suffered an abuse of their rights. Their belief in the ability of the legal system to bring relief to their suffering and their strength in bringing a novel case to court have helped to ensure that the Australian legal system recognises our basic rights. Two cases are discussed below; ensure that you investigate at least one of these in detail.

TEST CASE: a case brought before the courts where no precedent has been established

In order for a precedent to be established that lets governments address human rights issues, a test case must first be brought to the courts.

INDIGENOUS AUSTRALIANS' RIGHTS—*MABO V QUEENSLAND (NO. 2)*

In 1988, a report of the United Nations Working Group on Indigenous Populations stated that Aboriginal people in Australia were living in 'poverty, misery and extreme frustration'. According to the report, 'Australia stands in violation of her international human rights obligations relating to non-discrimination and unequal treatment in general'. In 1991, the Royal Commission into Aboriginal Deaths in Custody presented the position of Indigenous peoples in Australia as 'deliberate and systematic disempowerment ... starting with dispossession from their land and proceeding to almost every aspect of their life'.

The Mabo case determined that the Merriam people of the Murray Islands were entitled to their lands; it led to the doctrine of *terra nullius* being overturned and the concept of native title being recognised as existing in Australia.

MABO V QUEENSLAND (NO. 2) (1992) 175 CLR 1

The case of *Mabo v Queensland (No. 2)* asked the High Court to consider whether the Merriam people of the Murray Islands were entitled to hold native title over their land. This concept had not been tested before as the doctrine of ***terra nullius*** was seen to apply to all land in Australia. Eddie Mabo and his relatives were not content with this and took their case to the High Court. The following was the result of their test case.

- The doctrine of *terra nullius* was overturned.
- The concept of native title was recognised as existing in Australia.
- The Merriam people were granted native title to the Murray Islands.

The decision was welcomed by many Australians, not just Indigenous Australians. But some people saw the decision as doing little to right the wrongs inflicted upon Indigenous peoples since British settlement.

TERRA NULLIUS: a Latin expression meaning 'land belonging to no-one'

The role of Eddie Mabo

Eddie Koiki Mabo was born in 1936 on the island of Mer (also known as Murray Island) in the Torres Strait. Raised by his uncle following his mother's death during child birth, Mabo was taught about his family's lands from an early age.

Moving to Townsville in Queensland at the age of 23, Eddie Mabo became an activist for Indigenous rights, playing a role in fighting for change during the 1967 Referendum, while helping to found the Townsville Aboriginal and Islander Health Service.

Mabo became aware of his lack of ownership of his land on Mer Island in the early 1970s. Two major moments helped change his focus towards fighting for ownership of his land. The first incident occurred in 1972, when Eddie Mabo, his wife and children planned to return to Mer to visit Mabo's father, who was quite ill. The Mabo family asked the Queensland Government for permission to travel to Mer (at the time, government permission was required to travel to the Island). The government stated the Mabo was a non-Islander because he had been off the Island for too long. The Mabos did not make it to Mer and six weeks later received a telegram informing them that Mabo's father had died. According to Mabo's daughter, Gail Mabo, 'My father never forgave the government authorities for this injustice. It fuelled his determination for recognition and equality in society. This began his ten-year battle for justice and political status.'

The second incident came two years later in 1974, when Eddie Mabo was working as a gardener at James Cook University. He was told by university historians that Mer Island was Crown land and not land owned by his family. Eddie Mabo was shocked and exclaimed that the land was not the government's but 'ours'. However, it was not until 1981 that Eddie Mabo began speaking out about Indigenous land rights.

In 1981, Eddie Mabo gave a speech at James Cook University that explained the ideas of traditional land ownership and inheritance that the Mer Islanders followed. A lawyer present at the speech approached Mabo and suggested there may be a test case in which Eddie Mabo could claim ownership through the courts. Solicitor Greg McIntyre agreed to represent Mabo. McIntyre then recruited barristers Ron Castan and Bryan Keon-Cohen to assist. Both Mabo and McIntyre successfully applied to the Australian Institute of Aboriginal and Torres Strait Islander Studies for research grants that enabled them to conduct the necessary research for their case.

Eddie Mabo, along with four other Mer Islanders (Reverend David Passi, Celuia Mapoo Salee, Sam Passi and James Rice), began their claim in the High Court of Australia on 20 May 1982. As Mabo was the first named plaintiff, the case became known as the '*Mabo case*'.



Eddie Mabo

The rights issues

When the British first settled Australia in 1788, they said that the country was *terra nullius*, a land regarded as empty and belonging to no-one. Despite the Indigenous peoples having called Australia home for over 40 000 years, they were seen as being nomadic and their society and laws were not recognised by the British people. Therefore, the Indigenous peoples were seen as being unable to own the land and, according to the doctrine of *terra nullius*, the British Government claimed title to, or ownership of, the land and could do with it as they wished.

The concept that the Indigenous peoples of Australia owned land was not recognised in Australia until 1992, when the High Court recognised a concept called **native title**. Native title is the recognition by the law that some Indigenous peoples have rights and an interest in areas of land due to cultural and traditional values and customs. This was a landmark decision, established in the case of *Mabo v Queensland (No. 2) (1992)*, a test case brought before the courts by Eddie Mabo.

NATIVE TITLE: the recognition by the law of Indigenous rights to use and possess land

The facts

The *Mabo* case was brought to the High Court by a group of people from the Murray Islands. The Murray Islands are situated in Torres Strait, near Papua New Guinea. The group, including Eddie Mabo, claimed that the Merriam people held native title over the group of islands that they call Mer.

Europeans settled Australia in 1788. The Murray Islands were not annexed as part of Queensland until 1879. Europeans never settled these islands and the Murray Islanders have

maintained their ties with the land to this day. Unlike most Indigenous peoples, their law allowed them to own land individually. The land was divided into recognisable areas, each with an owner. Eddie Mabo claimed that the Merriam peoples' traditional right to own land had not been extinguished by the Queensland government. He asked the High Court to recognise that they were the owners of the land and that, subject to sovereignty of the Crown, the plaintiffs had the right to use and enjoy the land according to their traditions and customs.

The outcome

The landmark decision was handed down on 3 June 1992 with a 6:1 majority. The High Court overturned the doctrine of *terra nullius*, deciding that the Murray Islanders were entitled to exclusive possession, use and enjoyment of their lands and recognising that native title could exist under Australian common law.



Eddie Mabo and representatives of Aboriginal & Torres Strait Islanders at Collingwood Town Hall

The High Court held that the Torres Strait Islanders occupying the land in question owned it under a form of native title.

The High Court ensured that the outcome of this case did not apply solely to the plaintiffs' land. The decision also applied to land on the mainland of Australia, provided the Indigenous people could prove their right to the land.

Native title

Native title can only be held by Indigenous inhabitants and their descendants. One important component of the Mabo decision was that for native title to exist, there must be a continuous link between the current inhabitants of the land and their pre-settlement ancestors. Even if some laws and customs have changed over time, the title remains, provided that the general nature of the connection between the people and the land remains. This link was an important element for future claims. It was the first time that this type of title was applied in Australia.

The majority held that, at common law, land rights were as follows:

- The Crown's sovereignty to land in Australia could not be challenged in any court.
- Native title survived the Crown's sovereignty and coexisted with it. The rights given under native title could not be affected by the Crown's sovereignty, except in certain situations when native title was extinguished.
- Native title cannot coexist with certain grants made by the Crown, such as a grant of freehold.
- Native title is extinguished on land that has been appropriated by the Crown and used as roads, railways, post offices and so on, and thus precludes the enjoyment of native title. Where land has been set aside but allows for the concurrent enjoyment of native title, native title has not been extinguished. This occurs in areas such as national parks.
- Native title is extinguished when the Indigenous people no longer follow their native culture and traditions, lose connection with their land or the last member of their group or clan dies.
- The Indigenous peoples can voluntarily give up their native title rights.

Establishing native title

What do Indigenous people (other than the Murray Islanders) need to do to establish native title in common law? Any person making a claim must show the following:

- They are part of an Indigenous Australian group that has held traditional rights since before 1788
- Their group has continued to occupy the land or maintained their traditional links with it since 1788
- Native title has not been extinguished in some other way; for example, by the Crown giving the title to the land to someone else.

The impact of the *Mabo* case

The *Mabo* case established a new form of right to land for the Indigenous peoples of Australia under the common law. The concept of native title did not exist in Australia prior to this case. This is an example of the courts creating new rights where they had not existed previously.

In 1993, the Commonwealth Parliament passed legislation seeking to clarify the matter and enshrine the *Mabo* decision in statute law. This is known as codification, and ensures that the decision cannot be overturned by courts at a later date due to the supremacy of parliament's law-making. The *Native Title Act 1993* (Cth) upheld native title, tried to safeguard existing freehold and leasehold titles, and allowed for compensation to be paid where native title had been extinguished.

The *Native Title Act* established the National Native Title Tribunal to determine land rights claims. The Registers of Native Title Claims are open for inspection. They record all claims for native title made under the Act for areas of land and water throughout Australia, and all determinations of native title made by common law, the tribunal or by any other source.



National
Native Title
Tribunal

In December 1996, the High Court made another historic ruling on the land rights of Indigenous peoples: *The Wik Peoples v State of Queensland*; *The Thayorre People v State of Queensland* (1996) 187 CLR 1. The High Court decision, in an appeal by the Wik and Thayorre peoples of Cape York, found that pastoral leases could coexist with native title.

Indigenous people can claim native title rights (such as the right to hunt, fish and camp) on pastoral leases, but these rights do not override the rights given to a person who holds a lease. As a result of this decision, native title holders and pastoralists must resolve disputes about land use in a way that recognises the rights of both traditional owners and leaseholders. Questions about how to resolve possible conflicts between the rights of the two groups and questions of compensation are resolved by the Federal Court.

In 1998, the *Native Title Act* was amended. These changes confirmed the rights of those with pastoral leases and established a process to negotiate Indigenous land use agreements where pastoral rights and native title conflict.

Since the *Mabo* case and the implementation of the native title legislation, a large number of cases have been brought to the courts for determination. Between 1 January 1994 and 31 December 2011, 76 per cent of all claims had been dealt with. That is, 1488 claims had been determined, dismissed or dealt with in some other manner.

All claims since January 1994 have determined that native title exists either exclusively or non-exclusively in 239 6065 square kilometres of Australia's land and over 76 645 square kilometres of sea. Also, as of 16 December 2016, 368 determinations of native title have been registered under the *Native Title Act 1993* (Cth); 305 of those claims were deemed to exist (in whole or part), while 63 were deemed not to exist. And also, as at December 2016, 319 claims were still to be determined, with each claim taking, on average, six years and three months to finalise from filing.

WHERE DOES NATIVE TITLE EXIST?

Native title may exist in areas such as:

- some types of pastoral leases
- some land held for Aboriginal communities
- vacant Crown land
- some national parks, forests and public reserves
- beaches, oceans, seas, reefs, lakes, rivers, creeks, swamps and other waters that are not privately owned. Public rights of access to these areas are not affected by native title.

Conflicting attitudes

The decision in *Mabo* divided the nation. Some people thought it left the majority of Indigenous peoples with nothing, as it granted rights only to a small number of Indigenous peoples, as the majority lived on land not covered by the decision. Peoples whose land had been taken and used by the Crown were unable to obtain native title rights to their traditional lands. The nation had been built on these lands and it now could not be removed.

Further, native title was not automatically given to the Indigenous groups. Those who feel they have a right to native title on their land have to initiate a claim in court to prove the existence of their right. For many, this would not be possible due to limited funds and a lack of understanding of the legal system. Claims take many years; in some cases, it has taken over 12 years to have a claim determined.

However, many felt the decision was long overdue and that justice had finally been delivered to Indigenous Australians. It was a basis upon which discrimination against Aboriginal and Torres Strait Islanders could start to be removed. Reconciliation and perhaps formal recognition in the Australian Constitution is the next step in the process. *Terra nullius* was finally seen as a fiction, giving justice to the Indigenous peoples.

APPLY YOUR UNDERSTANDING

THE *MABO* CASE

1. What is a test case? How was *Mabo* a test case?
2. What is *terra nullius* and how did it apply in Australia prior to 1992?
3. What is native title? How was the right to native title established by the *Mabo* case?
4. According to the *Mabo* case, what do you need to prove in order to claim native title?
5. How did the High Court decision in the *Wik* case add to our understanding of the principles of native title set out in the *Mabo* case?
6. What was the effect of the amendment of the *Native Title Act* in 1998?
7. Outline the conflicting views towards the *Mabo* decision.

RIGHT TO A FAIR TRIAL AND LEGAL REPRESENTATION—*DIETRICH v R*

Many people believe that Australian citizens are entitled to a fair trial if they are arrested and charged with a criminal offence. Others believe that, should a person be unable to pay for legal representation, the government should pay for counsel. Is this the case? The High Court case of *Dietrich v R* (1996) 177 CLR 292 settled this issue.

The *Dietrich* case established that all Australians have a right to not have an unfair trial.

DIETRICH v R (1996) 177 CLR 292

The case of *Dietrich v R* asked the High Court to consider these issues:

- whether Australians had the right to a fair trial
- whether an accused person has a right to publicly funded legal representation.

Olaf Dietrich was accused of several drug-related offences. He was unable to afford legal representation and was made to go to trial without legal counsel to represent him. He felt this went against his rights and appealed his case to the High Court of Australia.

The following was the result of his test case:

- Australians have the right to not have an unfair trial.
- There is no right to have counsel provided at public expense.
- Failing to adjourn or stay a case when a person is unrepresented may lead to an unfair trial.

The rights issues

Olaf Dietrich was arrested on a number of drug charges. He was unable to afford legal representation. He argued his case all the way to the High Court of Australia as he believed that his rights were infringed by the County Court. He argued that he had a right to a fair trial and a right to have counsel provided at the expense of the public if he was unable to afford such representation. But were these rights afforded to an accused under Australian law?

The facts

On 17 December 1986, Dietrich flew into Melbourne Airport from Thailand. He was arrested by the Australian Federal Police for importing at least 70 grams of heroin concealed in condoms that he had swallowed. Dietrich was tried in the Victorian County Court on three counts, one of which was importing into Australia not less than a traffickable quantity of heroin. His trial lasted for approximately 40 days, during which time Dietrich was forced to represent himself, having exhausted all attempts at attaining legal representation.

Dietrich had applied to the Legal Aid Commission of Victoria, who rejected his claim on the grounds that he was not willing to plead guilty to the charges. Dietrich was opposed to changing his plea from not guilty. He also applied to the Supreme Court of Victoria for assistance, but his application was denied as he had failed to make an application within the requisite time. There were no other options available to Dietrich.

Throughout his trial, Dietrich continually voiced his objections to being tried without legal representation. The County Court trial judge followed previous practice and forced Dietrich to go to trial without representation.

Dietrich was acquitted on two of his charges but he was found guilty on the importation charge. He sought to appeal to the Supreme Court but was denied; he thus took his case to the High Court.

Dietrich argued that an indigent (poor person) accused who wished to be represented was entitled to have counsel provided at public expense, when being tried on any indictable offence that may result in their imprisonment. He argued that without representation, the accused would not be afforded a fair trial. He further argued that a court has the duty to ensure a fair trial and therefore a judge has the discretion to adjourn a trial of an unrepresented accused until representation can be found.

The outcome

The majority of the High Court held that a fundamental element of the criminal justice system is the right to not be tried unfairly. The practice of forcing an indigent accused to face trial without legal representation should thus cease immediately. This practice abused the right of the accused to not be tried unfairly.

Therefore, Australia recognises the right to not receive an unfair trial and, depending on the circumstances, if an accused remains unrepresented, this could mean that the accused did not or could not receive a fair trial. But there is no right in Australian law for an indigent accused to be provided counsel at public expense.

In Dietrich's case, it was found that the trial judge erred in not adjourning the case to enable Dietrich to attempt to attain representation. The trial judge therefore ensured that Dietrich's trial was not fair.

Dietrich was given leave to appeal and to have his case reheard in Victoria. Due to the fact that he had already served his full sentence, the re-trial never proceeded and he was set free.

THE 'DIETRICH PRINCIPLE'

In the *Dietrich* case, Chief Justice Mason and Justice McHugh reached the following decision:

In view of the differences in the reasoning of the members of the Court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

The impact of the *Dietrich* case

The decision handed down by the High Court majority in this case was seen as a significant departure from previous practices in the Australian legal system but the court was not prepared to create a new constitutional right, which meant that it was up to individual states to alter their practices.

After the decision, the ‘Dietrich principle’ was applied in all Australian District and Supreme courts.

In 1993, the Victorian Parliament enacted legislation amending the *Crimes Act 1958*. These amendments gave the Victorian courts power to direct Legal Aid Victoria to provide legal assistance to an indigent accused if the court was satisfied that failing to do so would lead to an unfair trial.

Other states around Australia have also altered their practices after this decision. For example, in Western Australia, the state government will make funds available to an accused who has successfully made a ‘Dietrich application’.

Conflicting attitudes

For many, the decision outlined in *Dietrich* was seen as a gain for indigent accused people, the decision recognising the significance of an accused having legal representation. Many saw the decision as recognising Australia’s human rights responsibilities under such UN conventions as the International Covenant on Civil and Political Rights.

Others, however, were not so approving of the decision. Concerns were raised as to the effect that this might have on available funds to legal aid bodies in general. Would the decision mean that funds would be diverted to criminal matters at the expense of family law and civil law matters? Some were concerned that the legal system would become clogged with defendants pleading not guilty rather than guilty, as was the previous requirement for receiving legal aid.

There were also concerns that the principle would lead to lengthy or permanent stays in the trials of many people charged with serious crimes. These adjournments or stays of proceedings could mean that criminals are released on bail indefinitely, thus undermining the community’s confidence in the legal system and placing pressure on victims and their families.

APPLY YOUR UNDERSTANDING

THE DIETRICH CASE

1. On what basis was Dietrich appealing to the High Court?
2. According to the decision in the *Dietrich* case, what rights did the Australian legal system afford an accused person?
3. How did the High Court decision affect Dietrich?
4. What was the impact of this case on the Australian legal system?
5. Outline the conflicting views towards the *Dietrich* decision.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

Human rights in Australia

- Basic human rights include the rights to life and liberty, freedom of thought and expression, and equality before the law.
- Australia does not have a single document, or Bill of Rights, protecting human rights of its citizens, but instead it has several documents that protect our rights.

Protection of human rights in Australia

- Human rights in Australia are protected by:
 - > Common law (made by the courts) or judges who interpret Acts of Parliament to ensure they do not infringe or impede human rights.
 - Freedom of movement is protected by common law, allowing Australians to leave and return to Australia when they wish (though with some restriction).
 - The right to not self-incriminate is protected by common law, giving a person the right of not having to answer any question or produce a document that may cause them to be convicted of a crime.
 - > Statute law (made by parliament), often with principles from international treaties reflected in laws.
 - Commonwealth legislation may protect people from discrimination, such as:
 - > *Racial Discrimination Act 1975* proves it is illegal to exclude, distinguish, restrict or give preference to someone based on race, colour of skin, descent or national or ethnic minority.
 - Victorian legislation applies only to residents of that state. Examples include:
 - > *Victorian Equal Opportunity Act 2010* (Vic), which was to eliminate sexual harassment and vilification.
 - > *Charter of Human Rights and Responsibilities 2006* (Vic), which sets out fundamental civil and political rights to freedom, respect, equality and dignity.
 - > The Commonwealth Constitution provides some limited protection of human rights.
 - Express rights, which are explicitly stated, such as:
 - > the right to freedom of religion (section 116)
 - > the right to freedom of interstate trade and commerce (section 92)
 - > the right to freedom from discrimination on the basis of a person's state of residence (section 117)
 - > that the Commonwealth must provide 'just terms' when acquiring property (section 51 (xxxi))
 - > the right to a jury trial for indictable Commonwealth offences (section 80).
 - Implied rights, due to interpretations by the courts, such as:
 - > the right to freedom of political communication.
 - Structural protections, protecting basic democratic and human rights, given indirectly due to the structure and text of the Constitution, such as:
 - > responsible government (where government and parliament is held accountable to the voters)
 - > representative government (making the government answerable to the people at elections)

- > separation of powers (to prevent abuse of power by dividing the functions of government between legislative, executive and judiciary bodies).
- There are strengths and weaknesses in how human rights are protected in Australia:
 - > Strengths include:
 - That express rights are difficult to change
 - That rights can be interpreted into the Constitution so that they stay up to date with changing values and needs
 - That protections can be changed or implemented if a situation arises that has not previously been considered
 - That the courts may create or alter human rights in a timely manner to avoid injustices.
 - > Weaknesses include:
 - That express rights are difficult to change, due to the requirements of a referendum
 - Protection of rights may be limited with regards to dignity and respect
 - That before the courts can generate common law to protect rights, a case must be brought before them
 - That it is easy for parliaments to remove or alter laws that protect human rights.
- It has been proposed that a Bill of Rights needs to be included into our law to address weaknesses in how human rights are protected in Australia.

Bringing a human rights case to court

- A test case seeks to establish the legal rights and duties of a group or individual under common or statute law, and is needed to challenge pre-existing interpretations of rights.
 - > Two important test cases in Australia include:
 - *Mabo v Queensland (No. 2) (1992)*, which determined whether the Merriam people of the Murray Islands were entitled to hold native title over their land.
 - > This case led to the doctrine of *terra nullius* being overturned, the concept of native title recognised as existing in Australian and the Merriam people being granted native title to the Murray Islands.
 - *Dietrich v R (1996)*, which determined whether a person unable to pay for legal representation should have counsel paid for by the government.
 - > This case led to the ruling that Australians have the right to not have an unfair trial, that there is no right to have counsel provided at public expense, and that failing to adjourn or stay a case when a person is unrepresented may lead to an unfair trial.

CHECK YOUR UNDERSTANDING

1. Define human rights. Include examples of basic human rights in your answer.
2. Explain how the common law protects human rights in Australia.
3. Discuss the types of rights protection afforded by statutes made by the Commonwealth Parliament.
4. Explain how laws made by the Victorian Parliament help to protect rights.
5. Outline the rights protected by the Victorian Charter of Human Rights.

6. Using a concept map or similar, explain how human rights are protected in the Constitution. Ensure that you include the three types of protections in your answer. Examples of the rights protected should be used.
7. Outline the strengths of human rights protection in Australia.
8. Outline the weaknesses of human rights protection in Australia.
9. Define the term 'Bill of Rights'. Why should Australia have a Bill of Rights?
10. Explain what a test case is and how it can be used by individuals to achieve change in the law.
11. Explain how the High Court of Australia increased the rights of Indigenous Australians through the *Mabo* case.
12. Discuss the impact of the *Dietrich* case on the rights of accused persons in Australia.
13. Evaluate the protection of human rights in Australia. In your opinion, do Australians have all the important rights protected?

APPLY YOUR UNDERSTANDING

HUMAN RIGHTS CASES IN AUSTRALIA

1. 'On 3 June 1992, the High Court decided the lands on the island of Australia were not unoccupied in 1788. Some people say that on this day the Australian legal system 'came of age'.' Explain the significance of this statement in relation to the *Mabo v Queensland (No. 2)* decision.
2. Undertake research to find out more details about the provisions of the *Native Title Act 1993* (Cth). How has the amendment of the *Native Title Act* affected Indigenous land rights? Present a summary of the main provisions in a PowerPoint presentation or similar.
3. Why do you think the decision in *Mabo* and the passing of the *Native Title Act 1993* (Cth) caused uncertainty and confusion in the Australian community?
4. There was a great deal of concern following the *Dietrich* decision that legal aid providers would be stretched too thin and not be able to provide useful assistance to accused persons. Undertake research into the provision of legal aid in Victoria.
 - How does a person apply for legal aid?
 - Are there any barriers or hurdles that must be climbed before a person is granted aid?
 - How many applications are successful/unsuccessful each year?
 - Do you believe that *Dietrich* has had any impact on the provision of legal aid in Victoria?

Write a 1.5–2-page report based on your findings. You may like to write your report like a news article or a blog post.

CLASS DEBATE

ASSESSMENT

The legal system aims to ensure justice, equality and fairness. As a class, prepare and present a debate on the ability of Australia's legal system to provide justice, equality and fairness when protecting human rights. Refer to Chapter 2 to remind yourself about these concepts before commencing your research.

Your class may wish to debate this topic in general, or you may wish to focus on one of the topics below:

1. 'Recognition of native title is one of the biggest steps forward for the human rights of Aboriginal and Torres Strait Islander people. In getting rid of the doctrine of *terra nullius* the High Court ensured that the Australian legal system was one step closer to ensuring justice, equality and fairness for all.'
2. 'The limited protection of human rights in Australia means that her citizens do not experience justice, equality or fairness. It is time that a Bill of Rights protecting wide-ranging human rights is introduced into Australia's Constitution.'

HOW TO BEGIN ORGANISING YOUR DEBATE

1. Once you have chosen/been assigned your side, write down all of your thoughts on the issue. You might like to consider things such as:
 - a. What human rights are protected in Australia and what ones aren't
 - b. What the terms 'access', 'equality' and 'fairness' mean and how they relate to your topic
 - c. If you are doing topic 1, how the *Mabo* case meets access, equality and fairness or how it doesn't (depending on your side)
 - d. If you are doing topic 2, what a Bill of Rights is and how it might help protect or not protect human rights in Australia.
2. Once you have all your thoughts on paper, begin to construct a coherent, logical argument that supports your position. Make sure to include at least five arguments/examples to help support your point of view. This might be case examples or examples from the news. Try to write an argumentative speech that you can present as your section of the debate.
3. Once each person has written their argument, choose who will speak first for both the affirmative and negative views.
4. Present both sides of the debate and then vote on which side presented the most convincing argument.



INTERNATIONAL RIGHTS

UNIT 2 – AREA OF STUDY 3: Rights

International declarations and treaties that form part of international law can influence the protection of rights in Australia.

OUTCOME

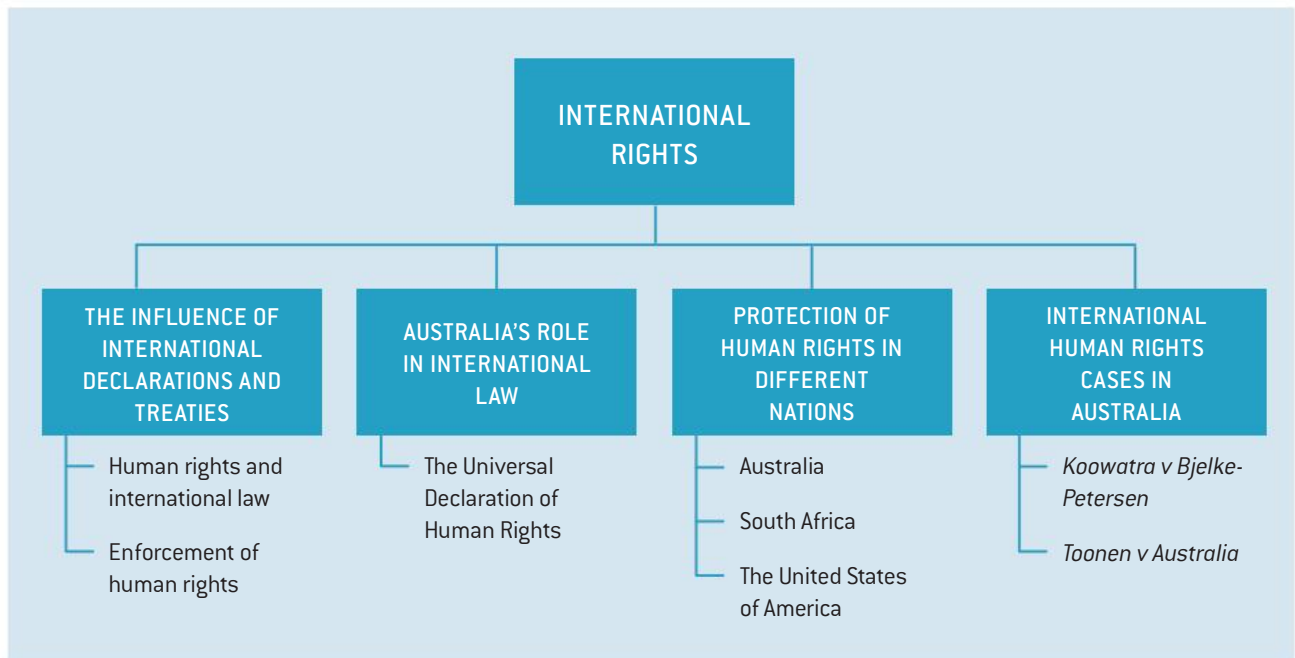
On completion of this chapter, the student should be able to evaluate the ways in which rights are protected in Australia, compare this approach with that adopted by another country and discuss the impact of an Australian case on the rights of individuals and the legal system. To achieve this outcome the student will draw on the following key knowledge and key skills:

KEY KNOWLEDGE

- > the influence of international declarations and treaties on the protection of rights in Australia
- > the approach adopted by one other country in protecting rights
- > one Australian case that has had an impact on the protection of rights in Australia, including:
 - the role of the individual in taking a case to court
 - the facts and issues central to the case, including the rights in question
 - the laws that applied to the case
 - the outcome of the case and its impact on the rights of individuals and on the legal system
 - possible conflicting attitudes in relation to the case

KEY SKILLS

- > define and use legal terminology
- > compare Australia's approach to the protection of rights with the approach of another country
- > evaluate the ways in which rights are protected in Australia
- > discuss possible reforms to the protection of rights in Australia
- > describe the role of individuals in bringing about changes in protection of rights through cases
- > analyse the impact of a case on the rights of individuals and on the legal system
- > research and analyse relevant information about the protection of rights
- > apply legal principles to actual cases



KEY TERMS

declaration	A United Nations (UN) announcement on a particular topic
external affairs power	The power given to the Commonwealth Government to deal with issues that affect Australia and its relationship with international countries and organisations
referendum	A formal yes or no vote to change, by either adding to or deleting from, the wording of the Commonwealth Constitution
treaty	A written document that legally binds states governed by international law
United Nations (UN)	A world body that deals with human rights and international law

THE INFLUENCE OF INTERNATIONAL DECLARATIONS AND TREATIES

UNITED NATIONS (UN): a world body that deals with human rights and international law

DECLARATION: a UN announcement on a particular topic

TREATY: a written document that legally binds states governed by international law

International treaties impact Australian laws and the rights we have as citizens.

Shortly after its formation in 1945, the **United Nations (UN)** made an international **declaration** that all peoples and all nations should have basic human rights, with the fundamental elements being the rights to life and liberty, to be free of slavery and torture, to freedom of thought, expression and religion, and equality before the law. While Australia is held to these rights, they are not necessarily part of law in Australia.

To understand international declarations and treaties and the impact on the protection of rights in Australia, we need to appreciate that declarations and treaties form part of international law. These laws form a system of rules and values concerning the relationships between governments (states) and international organisations such as the UN. Since 1970 Australia has enacted (entered into force) 1275 Treaties. A **treaty** is a written document that legally binds states governed by international law. Treaties can also be called instruments or protocols.

HAVE YOU...	YES / NO / UNSURE
Read about an Australian citizen who was sentenced to death overseas?	
Been approached by someone looking for donations to Amnesty International?	
Heard of the UN commenting on the conditions of asylum seekers to Australia?	
Heard of a country where slavery or torture is still used to this very day?	
Realised that Australia is one of the only English-speaking countries in the world without a comprehensive Bill of Rights?	
Been aware that you have the right to recreational activities and free education?	
Wondered why same-sex marriage is legal in countries such as Ireland, the Netherlands and New Zealand, but not in Australia?	

A declaration is slightly different from a treaty (such as the Declaration on the Rights of the Child) as it is not intended to be binding. Declarations are an announcement on a particular topic. Sometime in the future, they may become a treaty and adopted by the UN General Assembly (such as the Convention on the Rights of the Child). Declarations and treaties are not applicable in Australia unless they have been enacted in law through Commonwealth legislation.

HUMAN RIGHTS AND INTERNATIONAL LAW

The UN is a world body with 192 members representing countries from all over the world. It was formed after World War II. The UN is a body called on to have a global view of issues, to consider matters that extend beyond national boundaries and to broker world peace. In times of hostility or international difficulty, UN troops can be called on to quell conflict, assist innocent civilians and try to work with dissident factions to resolve disputes.

The UN has set up a number of bodies to protect and report on human rights. These are three of the most important ones:

- the Human Rights Council
- the Human Rights Committee
- the International Court of Justice.

Human Rights Council

The UN Human Rights Council is made up of 47 state members who are responsible for promoting and protecting human rights around the world. Its main role is to report on human rights violations and make recommendations on addressing those violations.

Human Rights Committee

The UN Human Rights Committee is the supervisory body for the International Covenant on Civil and Political Rights (ICCPR). The Committee has these responsibilities:

- to receive and consider reports from the countries bound by the covenant on the progress made in the enjoyment of these rights
- to consider complaints on any violation of the rights lodged by a country
- to consider complaints lodged by individuals.

The International Covenant on Civil and Political Rights (ICCPR) includes an extensive list of human rights.

International Court of Justice

The International Court of Justice is located at the Peace Palace in The Hague (Netherlands). It began work in 1946. Two of its most significant roles are:

- to settle the legal disputes submitted to it by countries
- to give advisory opinions on legal questions referred to it by duly authorised international organs and agencies.

The court decides cases concerning disputes about matters such as frontiers and boundaries, diplomatic relations, hostage taking, the right of asylum, nationality, guardianship and economic rights.

Other bodies monitoring human rights

There are also a number of non-government organisations that monitor and report on human rights worldwide. A selection of these is listed in Table 14.1.



The Peace Palace in The Hague

Amnesty International	www.amnesty.org
Anti-Slavery International	www.antislavery.org
Avocats Sans Frontières	www.asf.be
Asian Human Rights Commission	www.humanrights.asia
The Carter Center	www.cartercenter.org
Food First Information and Action Network International	www.wocan.org
Forum 18	www.forum18.org
Global Rights	www.globalrights.org
Human Rights Watch	www.hrw.org

14.1 Human rights organisations

THE HUMAN RIGHTS COMMITTEE IN ACTION

The Human Rights Committee has heard a number of complaints against Australia. In some of these cases, the Committee found that the Australian Government violated human rights.

In 1994, the Human Rights Committee made a landmark decision (in *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 [1994]) that Tasmania's anti-homosexual laws contravened the ICCPR. The Committee suggested these laws be repealed. A Tasmanian man, Nicholas Toonen, took the case to the Committee. The decision by the Committee recognised, for the first time, 'sexual orientation' as being covered by the ICCPR. This decision caused controversy in Australia. In December 1994, the Federal Government passed the *Human Rights (Sexual Conduct) Act 1994* (Cth) to override the Tasmanian laws and recognise the rights protected in the ICCPR. Despite the action of the Federal Government, the Tasmanian Parliament refused to alter the law until 1997. In April 1997, the Tasmanian Parliament repealed the provision of the Criminal Code that made homosexual conduct a criminal offence. This case is covered in greater detail in this chapter on page 368.

The issue of discrimination was again considered in *Mr Edward Young v Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 [2003]. This case concerned Mr Young, who had been in a relationship with his male partner for 38 years. When Mr Young applied for a war veteran's dependant pension, the Department of Veteran Affairs refused to consider his application. The relevant law stated that to be a 'member of a couple' the persons in the couple must be 'of the opposite sex'. The Committee found that Australia had denied Mr Young his right to equality before the law and equal treatment by the law.



Meeting of the UN
Human Rights Council

ENFORCEMENT OF HUMAN RIGHTS

Countries that are members of the United Nations have an obligation to protect the rights set out in the Universal Declaration of Human Rights. In a field like human rights, Australia upholds international rules and values because our government recognises the need to protect human rights.

There are a number of processes that the United Nations uses to protect human rights. Its main focus is to help countries negotiate treaties and settle disputes peacefully. It also attempts to enforce agreements if they are broken or violated.

Parties or governments can arrange for the UN to supply a third party, known as a mediator or conciliator, to make a binding decision. These parties provide the same function as a mediator or conciliator in a civil dispute (see Chapter 12).

The International Court of Justice, or World Court, can determine a dispute between parties, which binds them to the outcome. It also has the Court of Arbitration, which provides an independent arbitrator who can make a binding determination.

While the UN provides many important enforcement processes for international human rights treaties, there are some significant limitations on its powers and functions.

- Sometimes the processes established by the United Nations can take a long time. Parties to a dispute may prefer to negotiate the issues without the use of the UN's services.
- Some countries are not signatories to human rights treaties. If an individual lives in a country that has not signed a human rights treaty, it is more difficult to enforce these rights.
- The processes for the enforcement of human rights do not apply to all treaties. In some cases, a nation may agree to a treaty but not to the processes established to enforce it.
- Countries may be reluctant to report their own human rights violations. In this respect, the role of international organisations that monitor and report human rights violations is very important.
- In some instances, individuals can only take complaints to the United Nations after they have tried to enforce their rights through the courts in their own country. See the information on the Human Rights Committee in action on page 354.
- There can be significant variations in how different cultures interpret human rights. Some cultures may not place a priority on the protection of the human rights of particular groups within their community. For instance, some cultures may not recognise the equality of women or the importance of the rights of indigenous minorities.

APPLY YOUR UNDERSTANDING

THE UNITED NATIONS AND HUMAN RIGHTS

1. Explain the role of the UN Human Rights Council and the International Court of Justice.
2. Outline the role of the UN Human Rights Committee and briefly describe a case taken by an Australian to this Committee.
3. Describe the ways an individual or government can enforce a human right. Discuss the effectiveness of this enforcement.

Going further

4. Collect information that illustrates the activities of the UN and the role that it plays in international affairs. The information you collect may come from television, radio or press reports, or the internet. Use this information to prepare an annotated visual display. Your annotated visual display should include these features:
 - > a map of the world identifying the location of each example discussed
 - > a brief explanation of the issues in each example
 - > an explanation of the role of the UN in relation to each issue.
5. Prepare a brief report that critically assesses the role of the UN. Your report should include these points:
 - > an overview of the role of the UN
 - > a discussion of the values reflected in the Universal Declaration of Human Rights
 - > an assessment of the effectiveness of the UN in protecting human rights.

AUSTRALIA'S ROLE IN INTERNATIONAL LAW

Section 51 of the Constitution gives the Australian Parliament the authority to make laws that pertain to international declarations and treaties.

The *Commonwealth of Australia Constitution Act 1900* (UK) came into operation on 1 January 1901, when Australia became a federated nation. So that the six colonies could form a federation, a constitution was needed. A constitution is a rule book that states the guidelines or principles on how government will operate at the state and Commonwealth level.

The Constitution established the law-making powers of each of these parliaments, known as the division of power—the central, or Commonwealth, government would look after issues of national interest, while the six smaller state governments would deal with and administer important state issues.

In section 51 of the Constitution, under the exclusive powers of the Commonwealth, it states that Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to 'external affairs' (subsection xxix). The **external affairs power** provides the Commonwealth with the power to make laws:

- on treaties and other international obligations, such as signing and ratifying the ICCPR
- on matters physically external to Australia, such as sending troops to war or criminalising sexual conduct of Australian citizens with minors overseas
- on Australia's relationship with other countries, such as trade agreements that change or override domestic law to deal with international agreements, such as enforcing aspects of the Universal Declaration of Human Rights.

Through the external affairs power, the Commonwealth government has the authority to become a signatory to many international declarations and treaties. Becoming a signatory is not enough to protect the rights of Australians. It is not until the Commonwealth government ratifies and enacts this treaty into law that it has effect. Table 14.2 provides some examples.

EXTERNAL AFFAIRS POWER: the power given to the Commonwealth Government to deal with issues that affect Australia and its relationship with international countries and organisations

14.2 Impact of treaties on Australian law legislation

INTERNATIONAL TREATY OR AGREEMENT	IMPACT	RESULTING AUSTRALIAN LEGISLATION
International Covenant on Civil and Political Rights	<i>Dietrich v the Queen</i> [1992] HCA 57 <i>Toonen v Australia</i> , Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 [1994] <i>Mr Edward Young v Australia</i> , Communication No. 941/2000, U.N. Doc. CPR/C/78/D/941/2000 [2003]	<i>Human Rights (Sexual Conduct) Act 1994</i> [Cth] Also established the Human Rights and Equal Opportunity Commission in 1986
International Convention on the Elimination of All Forms of Racial Discrimination	<i>Mabo v Queensland</i> (No. 2) [1992] 175 CLR 1 <i>Koowarta v Bjelke-Petersen</i> [1982] HCA 27–153 CLR 168 <i>Eatock v Bolt</i> [2011] FCA 1103	<i>Racial Discrimination Act 1975</i> [Cth]
Convention for the Protection of the World Cultural and Natural Heritage	<i>Commonwealth v Tasmania</i> [1983] HCA 21; 158 CLR 1; 57 ALJR 450; 46 ALR 625	<i>World Heritage Properties Conservation Act 1983</i> [Cth]
Convention on the Elimination of All Forms of Discrimination Against Women	<i>McBain v State of Victoria</i> [2000] FCA 1009; 99 FCR 116; 177 ALR 320; [2000] EOC 93–102 <i>Hickie v Hunt and Hunt</i> [1998] EOC 92–910	<i>Sex Discrimination Act 1984</i> [Cth]

INTERNATIONAL TREATY OR AGREEMENT	IMPACT	RESULTING AUSTRALIAN LEGISLATION
Declarations of the Rights for Disabled Persons	<i>Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games</i> [2000] HREOC No. H 99/115 <i>Scott v Telstra</i> (1995) <i>King v Jetstar Airways Pty Limited</i> [2012] FCAFC 115	<i>Disability Discrimination Act 1992</i> [Cth]
International Covenant on Economic, Social and Cultural Rights	<i>Hopper v Virgin Blue Airlines Pty Ltd</i> [2006 QADT 9]	<i>Age Discrimination Act 2004</i> [Cth]
The Refugee Convention enforced by the United Nations High Commissioner for Refugees (UNHCR)	<i>A v Australia</i> , CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997 <i>D and E, and their two children v Australia</i> , CCPR/C/87/D/1050/2002, UN Human Rights Committee (HRC), 9 August 2006 <i>Ruddock v Vadarlis</i> [2001] FCA 1329 <i>Al-Kateb v Godwin</i> [2004] HCA 37 219 CLR 562; 78 ALJR 1099; 208 ALR 124 <i>Nasir v Australia</i> CCPR/C/116/D/2229/2012	<i>Migration Act 1958</i> [Cth] See Operation Sovereign Borders (in Chapter 9, <i>Law Enforcement</i>).

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UN promotes universal respect and observance of human rights. The Universal Declaration of Human Rights was approved in 1948. The declaration sets out the basic human rights for all peoples and all nations. The Universal Declaration of Human Rights sets out the basic human rights of all people.

In a speech delivered by the Honourable Justice Michael Kirby on ‘The Growing Impact of International Law on Australian Constitutional Values’ at the University of Tasmania in 2008, he stated:

They are rules to inform our conduct as human beings, citizens and professionals. Judges, including Australian judges, do not leave these principles outside the courtroom when they perform their professional duties. The principles are not, as such, part of our Australian domestic law. They have not, as such, been enacted by an Australian Parliament. But they are an undoubted part of the reality of the world which judges and other citizens live in. They inform our perceptions of that world. Increasingly, they influence our perceptions of legal problems, legal values and of the solutions that conform to those values.

Australia is a signatory to the Universal Declaration of Human Rights, which sets out the basic human rights of all people.



Justice Michael Kirby

The Universal Declaration covers 30 articles or sections related to human rights. These include the rights to life and liberty, to be free from slavery and torture, to be equal before the law, and to freedom of thought, conscience and religion.



UN: www.un.org



FROM THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3: Everyone has the right to life, liberty and security of person.

Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) give legal force to these rights.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR includes an extensive list of rights, including:

- the right to life
- the right to freedom from torture and inhuman treatment
- the right to freedom from slavery and forced labour
- the right to liberty and security
- the right of detained persons to be treated with humanity
- the right to privacy
- the right to freedom of thought, conscience and religion
- prohibition of propaganda for war and of incitement to national, racial or religious hatred
- the rights of the child
- the right to equality before the law
- the rights of minorities.

Since 1980, Australian governments have been bound to promote and observe these rights. Although Australia is a signatory to the covenant, the covenant is not part of the law in Australia, unless the treaty has been specifically enacted into Australian law through legislation. For instance, many of the provisions contained in the Convention on the Rights of People with Disabilities are mirrored in Australian law through the *Disability Discrimination Act 1992* (Cth).

APPLY YOUR UNDERSTANDING

AUSTRALIA'S ROLE IN INTERNATIONAL LAW

1. What was the purpose of the *Commonwealth of Australia Constitution Act 1900* (UK)?
2. Define the term 'division of power'.
3. Describe the impact of the external affairs power.
4. List the treaties Australia has signed, ratified and enacted into law.
5. What is the Universal Declaration of Human Rights?
6. Describe the connection between the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Going further

www.un.org/en/index.html



Visit the UN website to answer the following questions.

7. What are the main aims of the UN?
8. Prepare a time line tracing the development of the UN from the League of Nations to current times.
9. Briefly describe the basic organisational structure of the UN.
10. What do you think have been the two most important historical events to influence the work of the UN?
11. Find out more about the work of an organisation that monitors and reports on human rights issues. Prepare a booklet explaining the work of the organisation. Your booklet should include some examples of cases dealt with by the organisation, how to join and how individuals or groups can support its work.

PROTECTION OF HUMAN RIGHTS IN DIFFERENT NATIONS

AUSTRALIA

Rights in Australia have been viewed as a matter of fundamental importance, reflecting the democratic nature of our society. Therefore, there is a strong tradition of upholding and protecting rights in this country. Interestingly, Australia is one of the only English-speaking countries in the world that does not have a comprehensive Bill of Rights. (See Chapter 13 for a discussion on how rights are protected in Australia and whether or not a Bill of Rights should be introduced.) Australia protects human rights in four basic ways:

- through the Commonwealth Constitution (via structural, express and implied rights)
- through common law (such as the *Mabo* and *Dietrich* cases)
- through statute law (the *Racial Discrimination Act 1975* (Cth) and the *Equal Opportunity Act 2010* (Vic))
- through international treaties (such as the ICCPR, which led to Australia establishing the Human Rights and Equal Opportunity Commission in 1986).

Australia does not have a Bill of Rights, but our human rights are protected through the Constitution, common law, statute law and adherence to international treaties.

The Commonwealth Constitution

The Constitution protects rights in three ways:

1. Structural protections: These are organisational mechanisms by the way our Constitution sets up government and the relationships between the Commonwealth and states.
 - a. *Separation of powers*: The three arms of government—the Executive, the Legislature and the Judiciary—are meant to be independent of each other.
 - b. *High Court and the judiciary*: The High Court is able to deal with disputes that arise from an individual, a state or a Commonwealth challenge regarding expressed rights or international treaties.
 - c. *Representative government*: Governments are answerable to the people at elections, ensuring that politicians represent the views and needs of those who elect them.
 - d. *Responsible government*: Government is responsible and accountable to the Parliament through debate, question time and committees.
 - e. *Bicameral parliament*: Laws must pass through both Houses of Parliament, with the Upper House acting as a house of review.
 - f. *Referendum process*: Any physical change to the Constitution must have the approval of the Australian people in a ‘yes or no’ vote.



The right to freedom of religion is an express right in Australia.

2. Express rights: These are rights that are explicit in the Constitution and are clearly stated in various sections.
 - a. *The right to freedom of religion (section 116)*: Parliament cannot make a law that creates a religion, forces people to observe or to not observe a religion, nor can they make religion a qualification for holding any public office.
 - b. *The right to freedom of interstate trade and commerce (section 92)*: The Commonwealth cannot impose any taxes or customs on trade and business between states, which protects the rights of people to conduct business freely.
 - c. *The right to freedom from discrimination on the basis of a person's state of residence (section 117)*: This prevents laws that discriminate against someone based on the state they live in.
 - d. *The Commonwealth must provide 'just terms' when acquiring property (section 51 (xxxi))*: If the Commonwealth wishes to acquire property, it must have the power to take the property for a legislative purpose and it must pay the owner of the property fair compensation.

- e. *The right to a jury trial for indictable Commonwealth offences (section 80)*: This section ensures that any person who is charged with an indictable offence under Commonwealth law is required to be tried by a jury of their peers.
3. Implied rights: These rights are not expressly stated in the Constitution, but are assumed through High Court interpretation.
 - a. *Freedom of political speech*: Through *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 1; 66 ALJR 214; 104 ALR 389, the High Court determined that all Australians have a common law right to freedom of speech in relation to communication about government and political matters.

Common law

The High Court can protect rights and acts as the 'guardian' of the Constitution, and ensures that state and Commonwealth parliaments act within their limits. Two examples of this occurred in the following cases, which are covered in detailed in Chapter 13:

1. The *Mabo* case (1992), which abolished the concept of *terra nullius* and established the previously unrecognised area of native title.
2. The *Dietrich* case (1996) entrenched the right to legal representation for a defendant appearing before a court charged with a criminal offence.

Statute law

Legislation made by the Commonwealth or states to protect rights. Laws made by parliament may be to enact an international treaty or a common law decision.

1. *Commonwealth legislation* protects people from discrimination on a range of grounds, such as the *Racial Discrimination Act 1975*.
2. *Victorian legislation* protects the rights of individuals, such as the *Equal Opportunity Act 2010* (Vic) and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

International treaties

Australia is a signatory to many treaties and covenants. These treaties do not become law until the government legislates or enacts the international principles into domestic legislation.

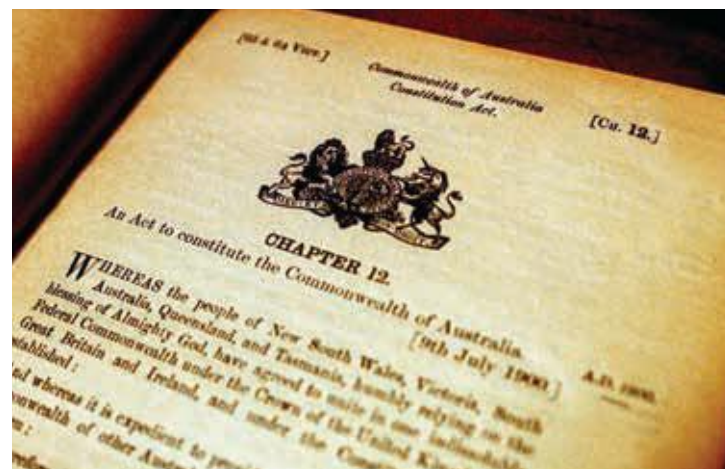
The principles of the ICCPR are found in the *Human Rights (Sexual Conduct) Act 1994* (Cth) and the International Convention on the Elimination of All Forms of Racial Discrimination has been enacted in the *Racial Discrimination Act 1975* (Cth).

Protection of rights

The Commonwealth and state parliaments must act within the constitutional powers otherwise laws may be struck down by the High Court. The division of power determines who looks after issues of national and state interest. The four ways above provide a strong framework of protecting rights through the Constitution, common law, statute law and international treaty.

Implied rights

Currently, there is only one implied right assumed or interpreted by the High Court in the Constitution, and this was established in the case of *Australian Capital Television Pty Ltd v The Commonwealth* in 1992. The existence and scope of this implied right is limited to the freedom of political speech in order to ensure the democratic principle of informed debate so that voting is effective.



The Australian Constitution

Entrenched rights

The Commonwealth Constitution explicitly states a number of ways of protecting rights. These are done through structural mechanisms, express and implied rights. Although these protections are not comprehensive they can only be removed through a referendum to amend the Constitution. The other ways of common law, statute law and international treaty are not entrenched as they can be changed via the parliament.

Changing rights

Generally structural, expressed and implied rights are entrenched in the Constitution and cannot be removed except by **referendum**. A referendum is a compulsory 'Yes' or 'No' vote used to change the physical wording of the Constitution by adding or deleting words, phrases or paragraphs, thereby changing the nature of the Constitution.

In order for this to occur, a Constitution Alteration Bill is drawn up and passed by both Houses of Parliament. The 'Yes' or 'No' vote is put to eligible voters within two to six months of passing through parliament. Success requires a double majority: that is, a majority of all voters across Australia must vote yes *and* an absolute majority of states (at least four out of six states) must vote yes. If successful, the Alteration Bill receives Royal Assent, which allows the wording of the Constitution to be changed.

REFERENDUM: a formal yes or no vote to change, by either adding to or deleting from, the wording of the Commonwealth Constitution

Malcolm Turnbull campaigning in the 1999 referendum on Australia becoming a republic.



Enforcing rights

Constitution, common law, statute law and international treaties are fully enforceable by the High Court, which can invalidate legislation that infringes those rights. These rights are subject to interpretation by the High Court. Parliament is able to introduce legislation that removes or abrogates rights unless they are expressly stated. If the High Court declares legislation unconstitutional, Parliament's options are to alter the legislation so that the unconstitutional provisions are altered, or to amend the Constitution (subject to section 128).

SOUTH AFRICA

Protection of rights

Prior to 1996, South Africa had experienced a brutal system of apartheid government. The introduction of a new Constitution allowed South Africa to become a democratic society and enshrine a Bill of Rights. This meant that the executive, the legislature and the judiciary were required to uphold the values of human dignity, equality and freedom.

Implied rights

When interpreting and developing legislation and common law, every court and tribunal must promote and interpret legislation in accordance to the Bill of Rights. The Bill of Rights binds all branches and organs of government. This means that courts are required to develop common law in accordance with the Bill of Rights that promote the spirit and purpose of this Bill. All government actions must use the Bill of Rights as a guide when making decisions. The Bill of Rights is unlike any ordinary piece of legislation. The language used in many of the sections is broad, which means the rights need careful interpretation by the judges who apply this document.

Entrenched rights

The Bill of Rights is comprehensive when it comes to a list of rights and protections. These include human rights relating to equality, human dignity, life, freedom and security of the person, slavery, servitude and forced labour, privacy, freedom of religion, belief and opinion, just to name a few. This extensive list of rights is noted under headings such as social, economic and cultural rights.

Changing rights

These entrenched rights can only be changed through a constitutional amendment. It cannot be changed by a simple parliamentary majority. This amendment requires the approval of a two-thirds majority (67 per cent of the members of parliament) in the National Assembly, and least two-thirds (6 out of the 9) of the National Council of Provinces (state parliaments), must vote for it.

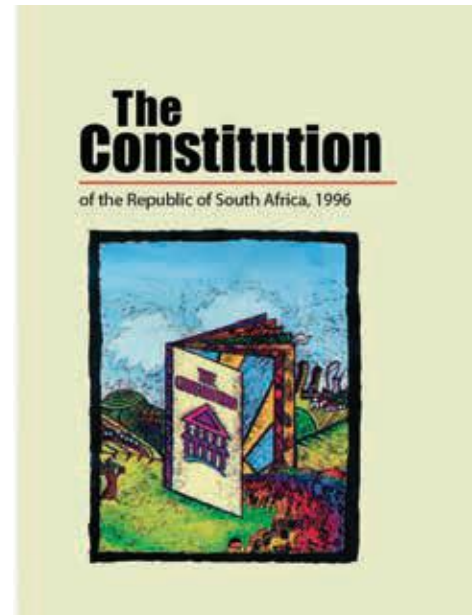
Enforcing rights

Rights are fully enforceable under the South African Bill of Rights. Any legislation that violates the expressed rights of South Africa can be declared unconstitutional and therefore be declared invalid. Any individual or group has the right to take action if they believe a right has been infringed. This clause allows people to act for themselves. When a right is interpreted by the courts, it must be done carefully as the language used in many sections of the Bill of Rights is

SOUTH AFRICA'S BILL OF RIGHTS: www.gov.za/documents/constitution/chapter-2-bill-rights



South Africa implemented a new Constitution in 1996, along with a Bill of Rights that sets out all rights and protections of its citizens.



The South African Constitution

The South African Constitutional Court





US Bill of Rights

Implied rights

The United States Supreme Court has recognised a number of implied rights. These are the right to travel, the right to marry and have children, the right to association, the right to study a foreign language, the right to educate one's children, and the right to privacy.

Entrenched rights

The US Bill of Rights contains an extensive list of rights and can only be removed through article 5 of the US Constitution. The following rights exist:

- Amendment 1 Freedoms, Petitions, Assembly
- Amendment 2 Right to bear arms
- Amendment 3 Quartering of soldiers
- Amendment 4 Search and arrest
- Amendment 5 Rights in criminal cases
- Amendment 6 Right to a fair trial
- Amendment 7 Rights in civil cases
- Amendment 8 Bail, fines, punishment
- Amendment 9 Rights retained by the People
- Amendment 10 States' rights.

Changing rights

Article 5 of the US Constitution allows for amending the Bill of Rights. In order for this to occur, the US Congress must approve the change by a two-thirds vote, as well as have approval from the state legislatures meeting the three-quarters voting condition. Using this process, just over 27 amendments have been made, such as abolishing slavery and the right not to be denied the right to vote based on race, colour, or previous condition of servitude.

Enforcing rights

US citizens are able to use these rights to protect them against the abuse of criminal law processes. However, they are able to bring a civil claim against the government for damages or compensation if their rights have been infringed. The US Supreme Court is the ultimate court that can make this ruling; however, a number of federal courts can also declare this type of legislation invalid.



THE US BILL OF RIGHTS:
www.archives.gov/founding-docs/bill-of-rights-transcript



The United States
 Supreme Court

INTERNATIONAL HUMAN RIGHTS CASES IN AUSTRALIA

The Commonwealth Government is given the exclusive powers to make laws on matters with respect to ‘external affairs’. Section 51, subsection 29, of the Commonwealth Constitution provides the government with the power to make laws on treaties and other international obligations, on matters physically external to Australia, our relationship with other countries and the ability change or override domestic law to deal with international agreements. It is not until the Commonwealth Government ratifies and enacts this treaty in to law that it has effect.

KOOWARTA V BJELKE-PETERSEN

An example of a case that has impacted on the protection of rights in Australia occurred when the Australian Government enacted the *Racial Discrimination Act 1975* (Cth) as part of its obligation to abide by the principles of the International Convention on the Elimination of All Forms of Racial Discrimination. The case of *Koowarta v Bjelke-Petersen 1982* tested the validity of the Racial Discrimination Act. The High Court had the jurisdiction to hear the *Koowarta* case in the first instance as it was a constitutional matter.

The role of the individual in launching a test case

The plaintiff, John Koowarta, was an Indigenous Australian and a member of the Wik people (the traditional inhabitants of the Aurukun region of Cape York Peninsula in far north Queensland). Mr Koowarta was a stockman, as were many of his peers. In 1974, they attempted to purchase the Archer River cattle station. Because the station covered a large amount of the traditional Wik lands, Koowarta was able to draw on funds from the Aboriginal Land Fund Commission to make an offer to the American owners.

By February 1976, Koowarta had negotiated an agreement for the Commission to purchase the pastoral lease from the owners—but the Queensland Government, at the direction of then-Premier Joh Bjelke-Petersen, blocked the sale. He was opposed to Indigenous peoples or groups acquiring large areas of land, and the Queensland Minister of Lands intervened at the premier’s bidding to turn down the sale.

John Koowarta made a complaint to the Human Rights and Equal Opportunity Commission, a Commonwealth Government body, on the basis that that blocking the sale was an act of discrimination. The Commission upheld his complaint, but the Queensland Government appealed to the Supreme Court of Queensland. The Queensland Government then brought a separate action against the Government of Australia, arguing that the *Racial Discrimination Act* was not a valid piece of legislation and could not be enforced. The case moved to the High Court for further debate.

The Koowarta Case confirmed that the Commonwealth Parliament had the power to make laws on matters of international concern and treaty obligations.

The facts and issues central to the case

John Koowarta’s initial complaint to the Human Rights and Equal Opportunity Commission argued that the Queensland Government’s policy of blocking Indigenous peoples purchase of land was discriminatory under sections 9 and 12 of the *Racial Discrimination Act 1975* (Cth).

- Section 9 makes it unlawful for any person to make a distinction, based on race, that interferes with another person’s human rights.
- Section 12 makes it unlawful for any person to refuse to sell land to another person, or prevent them from occupying the land, based on their race.

The Queensland Government's response was to argue that the *Racial Discrimination Act* was not a valid piece of legislation, and that the Commonwealth Government had no power to make it (let alone enforce it).

Section 51 of the Commonwealth Constitution defines the powers of the Australian Government, and subsection xxvi of that section allows parliament to make laws for 'the people of any race, for whom it is deemed necessary to make special laws'. Bjelke-Petersen and his government argued that subsection xxvi did not apply to the *Racial Discrimination Act*, as it prohibited discrimination against people of all races.



Former Queensland Premier
Joh Bjelke-Petersen

The Commonwealth Government argued that the 'external affairs' (subsection xxix) power in section 51 gave the Commonwealth the power to make laws in relation treaties and other international obligations, and this could change or override domestic law to deal with international agreements.

The laws that applied to the case

The Commonwealth, intervening for John Koowarta, believing that the *Racial Discrimination Act 1975* (Cth) had power under section 51(xxix) of the Constitution, the 'external affairs' power, because it gave domestic effect to Australia's international obligations and therefore the Act, including the relevant sections 9 and 12, were valid.



Section 9(1) prohibits what is generally known as 'direct' racial discrimination:

- (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Outcome of the case, impact on the legal system and on the rights of individuals

The High Court decision was split 4:3, finding the *Racial Discrimination Act 1975* (Cth) was valid. The Court found that the notion of 'external affairs' included not only matters physically external to Australia, but also international obligations that had a primarily domestic impact.

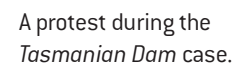
The concern of the minority was that a broad interpretation of external affairs empowers the executive to determine the scope of Commonwealth power by entering treaties.

The Act was found to be a valid use of the external affairs power because, as a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (1969), Australia had committed to 'suppress all forms of racial discrimination'.

Justice Stephen developed a test to identify the correct usage of the Constitution's external affairs power: 'the implementation of a treaty is a valid use of the power when the subject matter is of "international concern"'. This broader interpretation of the external

This approach was confirmed in *Commonwealth v Tasmania* 1983 (*Tasmanian Dam case*).

As for John Koowarta, he took his case back to the Supreme Court of Queensland to appeal against the blocking of the Archer River station purchase. In 1988, that Court ruled in Koowarta's favour to allow the purchase—but before the sale could go through, Premier Bjelke-Petersen declared the property a national park, the Archer Bend National Park. (It has since been renamed Oyala Thumotang National Park.) As a national park, the region became owned by the state government and could not be sold to the Wik people. General opinion at the time (and to this day) was that Joe Bjelke-Petersen made the declaration out of spite, in order to stop John Koowarta and his people from enjoying their court victory.



The *Tasmanian Dam* case confirmed the approach taken by the majority of judges relating to a subject of international concern. The impact of this has led to the Commonwealth becoming a signatory to many international agreements and thus overriding the states. The external affairs power gave the Commonwealth the power to make laws that fulfil Australia's obligations under international treaties. In order for this power to be enforceable, three things must occur:

- ISBN 978 1 4202 3842 6

14.3 Arguments for and against the *Koowarta* judgment

ARGUMENTS FOR THE JUDGMENT	ARGUMENTS AGAINST THE JUDGMENT
The Constitution in section 51—External Affairs (xxix)—gives the Commonwealth the power to sign international agreements. Therefore, anti-discrimination laws are of international concern. As the Commonwealth ratified the Convention, it meant it could introduce federal legislation that would apply to all, including the states.	The Queensland Government argued that anti-discrimination laws are a state residual power and the Commonwealth had no rights in this area.
A broader interpretation of the external affairs power has encroached on state residual powers. This benefits the Commonwealth.	This broader interpretation has taken legislative powers away from the states without negotiation.
The decision of the <i>Koowarta</i> case and then the <i>Tasmanian Dam</i> case reaffirmed the Commonwealth's ability to enter into treaties and agreements on a range of matters not in the jurisdiction of the Commonwealth according to the Constitution, such as the environment, human rights and industrial relations.	The states believe that the Commonwealth external affairs power can be unlimited, as anything could be a matter of international concern, such as education and health which are state responsibilities. It is unlimited as it can apply in all areas, providing the Commonwealth signs a treaty and enacts it in Australia.

The Toonen Case confirmed that the Commonwealth Parliament had the power to override state laws if they were incompatible with Australia's international treaty obligations.

TOONEN V AUSTRALIA

The role of the individual in launching a test case

Nicholas Toonen, a gay man living in Tasmania, brought a legal case in 1993 to the UNHRC. He challenged sections 122(a), 122(c) and 123 of the Tasmanian Criminal Code. These provisions criminalised all forms of consensual sexual contact between adult men. Toonen argued that by retaining these provisions, even if they were not enforced, the Tasmanian Government fuelled discrimination, harassment and violence against gay and lesbian Tasmanians.

The facts and issues central to the case

At the time Toonen made his complaint, Tasmania was the only Australian state or territory to still criminalise gay or lesbian sexual contact, although the Tasmanian police had not charged anyone under sections 122 or 123 in several years. However, Toonen argued that as a gay man, activist and HIV/AIDS health worker in a long-term relationship, the continued existence of these provisions threatened his private life and liberty, as they could be enforced at any time. Moreover, he argued that the provisions 'created the conditions for discrimination in employment, constant stigmatisation, vilification, threats of physical violence and the violation of basic democratic rights'.

The laws that applied to the case

Toonen alleged that sections 122 (a), 122 (c) and 123 of the Tasmanian Criminal Code violated the ICCPR because:

- they did not distinguish between private and public sexual activity, so that enforcing the laws allowed police to violate citizens' right to privacy (entering homes on suspicion that unlawful sexual activity was occurring)

- b. they discriminated between individuals in the exercise of their right to privacy, as heterosexual persons were not targeted or impacted by these provisions
- c. the Code did not outlaw any form of private sexual activity between consenting homosexual women, meaning that homosexual men in Tasmania did not enjoy equality under the law.

Outcome of the case, impact on the legal system and on the rights of individuals

The UNHRC found that private, consensual sexual activity should be covered by the concept of 'privacy', and that the existence of the Tasmanian laws, even if they were not currently being enforced, did continuously and directly interfere with Toonen's privacy.

The Committee therefore ruled that the Tasmanian laws arbitrarily interfered with Toonen's right under article 17 of the ICCPR, and that the appropriate remedy would be the repeal of sections 122 (a), 122 (c) and 123 of the Tasmanian Criminal Code.

The Tasmanian Parliament refused to repeal the laws, so the Commonwealth Government passed the *Human Rights (Sexual Conduct) Act 1994*. Section 4 of the Act legalised sexual activity between consenting adults throughout Australia, and prohibited the making of state or federal laws that would interfere with the private sexual conduct of consenting adults.

Possible conflicting attitudes in relation to the case

In refusing to repeal sections 122 and 123 of the Code, the Tasmanian Government argued that the laws were justified on both moral and health grounds, as they were part of an effort to address the spread of HIV/AIDS.

In their response to the UNHRC, the Commonwealth Government rejected these claims, stating that laws against homosexuality had been repealed in all other states and territories and that Tasmania's laws could not be justified as exceptions. They also agreed that Toonen's right to privacy was violated by Tasmania's laws even if they were not being enforced, since the risk of prosecution or investigation remained while the laws remained part of the Criminal Code.

The Commonwealth Government responded to the result of the Toonen and Croome cases related to treaties and matters of international concern by introducing the *Human Rights (Sexual Conduct) Act 1994* (Cth), which effectively overrode the relevant section of Tasmania's Criminal Code.

The Tasmanian Government knew from the *Franklin Dam* case that:

- the Commonwealth had signed an international treaty, the International Covenant on Civil and Political Rights
- this was an issue of human rights and of international concern
- it was likely the High Court would interpret the Commonwealth Constitution in favour of the Commonwealth again, at the expense of what the state viewed as their residual rights.

As a result, the Tasmania Government amended its own legislation, rather than lose another High Court challenge.



Nicholas Toonen

14.4 Arguments for and against the *Toonen* judgment

ARGUMENTS FOR THE JUDGMENT	ARGUMENTS AGAINST THE JUDGMENT
The judgment by the Human Rights Committee has wide ramifications as it carried significant moral and persuasive authority in other cases which were similar, not only in Australia, but around the world.	The Human Rights Committee, an outside organisation without any authority in Australia, should not have any right or power to comment on laws made in Australia, let alone in the states of Australia.
There was considerable pressure placed on the Australian Parliament to quickly create legislation to override state residual powers and laws that discriminated against citizens.	The state of Tasmania may have felt that the Commonwealth has no legal authority to make laws that had overridden its Criminal Code.
In 1997, activist Rodney Croome appealed to the High Court of Australia, arguing that Tasmania's laws were inconsistent with the <i>Human Rights (Sexual Conduct) Act 1994</i> . The Tasmanian Government attempted to have the matter struck out, but failed, and was forced to repeal sections 122 (a), 122(c) and 123 of its Criminal Code.	The outcome in <i>Croome</i> case saw the use of the external affairs power expanded into Tasmania's laws regarding the Criminal Code and homosexuality. The Constitutional founders did not envisage this as a consequence of state and federal relations in section 51.

APPLY YOUR UNDERSTANDING

CASE STUDY ANALYSIS—THE PROTECTION OF RIGHTS IN AUSTRALIA

1. Define the term 'universal right'. Apply this definition to the *Koowarta* and *Toonan* cases.
2. Explain the importance and impact of the international treaties in both the *Koowarta* and *Toonan* cases.
3. Discuss the outcomes of the *Koowarta* and *Toonen* cases.
4. Explain the role of the UN Human Rights Committee and the High Court in dealing with the *Koowarta* and *Toonen* cases.
5. There are many conflicting attitudes when a case is taken to court. Suggest reasons why the losing parties in the *Koowarta* and *Toonen* cases decided to challenge the Commonwealth Government.
6. Discuss and explore the difficulties that John Koowarta and Nicholas Toonan would have faced as a result of taking a case to court on ground of discrimination.



CHAPTER SUMMARY

Do your notes cover all of the following dot points?

The influence of international declarations and treaties

- Australia has signed and enacted many treaties and declarations giving force to international law.
- The United Nations (UN) is a world body that has set up many bodies to protect and report on human rights, such as the Human Rights Council, the Human Rights Committee and the International Court of Justice.
- The enforcement of human rights is limited because not all countries are signatories to human rights agreements or may not support the enforcement processes. The processes for enforcing human rights may also take a long time.

Australia's role in international law

- The Australian Government is given the power to deal with treaties via the external affairs power in the Commonwealth Constitution.
- The Commonwealth Government has ratified and enacts many treaties into law that impacts all Australians, such as the ICCPR leading to the *Human Rights (Sexual Conduct) Act 1994* (Cth).
- The Universal Declaration of Human Rights sets out the basic human rights for all peoples and all nations and covers 30 articles or sections.
- The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) give legal force to the Universal Declaration of Human Rights.

Protection of human rights in different nations

- The protection of human rights in Australia occurs in four ways: through the Commonwealth Constitution, common law, statute law and international treaties.
- The Constitution protects rights in three ways:
 - > Structural protections, such as the separation of powers, the High Court, representative and responsible government, bicameral parliament and the referendum process
 - > Express rights, such as the right to freedom of religion, interstate trade and commerce, discrimination on the basis of a person's state of residence, provide 'just terms' when acquiring property and the right to a jury trial for indictable Commonwealth offences
 - > Implied rights, such as freedom of political speech.
- Common law is developed by the High Court; it protects rights and acts as the 'guardian' of the Constitution. Statute law (legislation) is the main way in which our rights are protected, including through creating laws that enforce international human rights treaties.
- The approach adopted in South Africa and the United States in protecting rights:
 - > Both countries protect rights by a Constitutional Bill of Rights
 - > Both countries are able to imply rights, although South Africa's courts are also asked to consider the spirit of the Bill of Rights
 - > Both countries protect an extensive list of rights and freedoms
 - > Both countries provide a mechanism to alter their Bill of Rights
 - > Both countries have a superior court that acts as guardian of their Bill of Rights.

International human rights cases in Australia

- John Koowarta challenged the Queensland Government, which blocked him from purchasing land on behalf of the Wik people. The High Court found in favour of Koowarta and stated that the implementation of a treaty is a valid use of the power when the subject matter is of 'international concern'.
- Nicholas Toonen challenged two provisions of the Tasmanian Criminal Code, which criminalised all forms of sexual contact between consenting adult men in private. The UN Human Rights Committee found that Toonen was a victim of discrimination according to his homosexuality.

CHECK YOUR UNDERSTANDING

1. Describe the main difference between a treaty and a declaration. Use an example to illustrate this difference.
2. Choose a non-government organisation that monitors human rights from Table 14.1 and provide a brief snapshot of how it observes human rights.
3. Define the terms 'Federation', 'Constitution' and 'division of powers'.
4. Explain how the external affairs power protects human rights in Australia.
5. Read through and summarise the comments made by the Honourable Justice Michael Kirby on the Universal Declaration of Human Rights (page 357).
6. Choose an 'article' from the Universal Declaration of Human Rights and illustrate how that article is protected by Australian law.
7. Using a graphic organiser such as a mind map, illustrate the ways human rights are protected in Australia.
8. Copy the following table into your notebook and outline the approach adopted in Australia in protecting rights with that of South Africa and the United States.

	AUSTRALIA	SOUTH AFRICA	UNITED STATES
How are rights protected?			
How are rights implied?			
How are rights entrenched?			
How are rights changed?			
How are rights enforced?			

9. Evaluate the approach adopted in Australia in protecting rights. In your answer, outline two strengths and two corresponding weaknesses.
10. Evaluate the approach adopted in either South Africa or the United States in protecting rights. In your answer, outline two strengths and two corresponding weaknesses.
11. Compare and contrast the effectiveness of the approach adopted in protecting rights in Australia with that of either South Africa or the United States. How are they similar or different?
12. Outline the rights protected by the Victorian Charter of Human Rights.
13. Explain the role and impact of the High Court of Australia in dealing with the *Koowarta* case.
14. Discuss the impact of the Human Rights Committee via the *Toonan* case on Australian law.
15. Illustrate and apply the principles of justice in the human rights cases, including fairness, equality and access.
16. To what extent does international law have an impact on Australian law? In your answer, provide examples of cases that have changed Australian law.

APPLY YOUR KNOWLEDGE

BRAINSTORM—HUMAN RIGHTS

In pairs, copy the following table into your notes. Your table will need to have 26 lines, one line for each letter of the alphabet. Complete the following list of rights and freedoms from A to Z that all Australians have. Be creative and complete as many as you can.

A	
↓	
X	e.g. the right to cross eXamination in a trial
↓	
Z	

APPLY YOUR KNOWLEDGE

INVESTIGATION—CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS

Using a digital copy of the Australian Constitution, complete the following questions.

1. What is a Constitution?
2. What is a federation and why is a Constitution important in a federation?
3. How many parts is our Constitution divided into?
4. State how many sections are in the Constitution.
5. Sections 7 and 24 state that Senators and Members of the House of Representatives must be directly chosen by the people of the state/Commonwealth. What do you think this means?
6. Describe what the legislative power in Part I is meant to look like. This is also known as what other term?
7. How many subsections are in section 51? Identify which of these powers are shared, and which are Commonwealth. Clue: the title in these powers should assist you.
8. Why is section 127 struck out; in other words, why does it have lines through it?
9. Outline the jurisdiction of the High Court and the judiciary from sections 75 and 76.
10. Summarise the expressed rights found in sections 51(xxxi), 80, 92, 116 and 117.
11. Jeff is charged with a criminal offence under the *Victorian Crimes Act*. Will section 80 of the Constitution guarantee a jury at his trial? Why or why not?

THE AUSTRALIAN
CONSTITUTION: [www.peo.gov.
au/learning/fact-sheets/
australian-constitution.html](http://www.peo.gov.au/learning/fact-sheets/australian-constitution.html)



APPLY YOUR KNOWLEDGE

CLASS SURVEY AND DISCUSSION—THE IMPORTANCE OF INTERNATIONAL LAW AND HUMAN RIGHTS

Examples of international law and human rights exist in all parts of our lives. As a class, complete the following questions on rights and then individually write a brief paragraph about rights.

- Other than South Africa or the United States, identify a country that has a Bill of Rights.
- Identify a restriction on the law-making power of the Victorian Government.
- Identify a restriction on the law-making power of the Federal Government.
- Name a film about rights.
- Name a book about rights.
- Name a famous person who has fought for rights.
- Name a right that your parents have that you do not have.
- Name an Australian case that illustrates a rights issue.
- Identify one way of changing the Australian Constitution.
- Name a universal right that all people have.
- Give an example of a power given to the states.
- Identify an issue of rights that is controversial.
- Identify a right that the government should make a law about.

APPLY YOUR KNOWLEDGE

EXTENDED RESPONSE—THE APPROACH ADOPTED IN AUSTRALIA AND ONE OTHER COUNTRY IN PROTECTING RIGHTS

Complete the following extended response question on the approach adopted in Australia and one other country in protecting rights. Your answer should be at least 200 words in length.

‘There have been very few human rights abuses in Australia; therefore, there is no need for an extensive list Bill of Rights.’

To what extent do you agree? In your answer, compare and contrast the protection of rights between Australia and one other country, highlighting two similarities and two differences.

APPLY YOUR KNOWLEDGE

E-LEARNING INVESTIGATION—AUSTRALIAN HUMAN RIGHTS COMMISSION

The Australian Human Rights Commission was set up to investigate and resolve issues of discrimination or breaches of human rights. The Commission has a role to develop education programs and resources for the community. It is able to provide independent legal advice to assist courts in cases that involve human rights issues. As part of its work, the Commission is able to make recommendations to Parliament to develop the law consistent with existing national laws and international human rights agreements.

Visit the AHRC website to answer the following questions.

1. Go to the section titled 'Top Projects'. Choose and click on an area of investigation that interests you and briefly describe the work that the Commission is undertaking.
2. Go to the section titled 'About' and click on the link titled 'What are human rights?' Choose one of the following human rights treaties that the Australian Government has agreed to uphold:
 - ICCPR
 - ICESCR
 - Convention on the Elimination of All Forms of Racial Discrimination
 - Convention on the Elimination of All Forms of Discrimination against Women
 - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
 - Convention on the Rights of the Child
 - Convention on the Rights of Persons with Disabilities.
3. Answer the following:
 - a. When was this agreement adopted or ratified by the UN?
 - b. Briefly describe what this treaty covers.
 - c. List five examples of articles or rights that are covered by this treaty.
 - d. Justify your reasons for choosing the five examples above. What makes these examples important?
4. Go to the section titled 'Education' and click on the link titled 'Human Rights Explained fact sheets'. Scroll to the bottom of the page and find 'Case Studies: Complaints including Australia'. Read through the descriptions of the cases listed and choose one that interests you, and answer the following questions:
 - a. What is the role of the individual in launching a test case?
 - b. What are the facts and issues central to the case (including the right/s in question)?
 - c. What laws apply to the case?
 - d. What was the outcome of the case? What was the impact on the legal system and the rights of individuals following this case?
 - e. What are the possible conflicting attitudes in relation to this case?

AUSTRALIAN HUMAN
RIGHTS COMMISSION:
www.humanrights.gov.au



**Australian
Human Rights
Commission**



ASSESSMENT

INVESTIGATION—THE PROTECTION OF RIGHTS IN AUSTRALIA

On completion of this activity, you should be able to demonstrate your understanding of the way rights are protected by examining a significant case that impacted on the protection of rights in Australia.

WHAT TO INCLUDE IN YOUR INVESTIGATION

Referring back to Table 14.2 on page 356, choose a case that takes your interest. Make sure you discuss this with your teacher as you do not want to study the same case as every other member of your class.

Your investigation should include the following topics:

- The role of the individual in launching a test case.
- The facts and issues central to the case, including the right/s in question.
- The laws that applied to the case.
- The outcome of the case and its impact on the legal system and the rights of individuals.
- Possible conflicting attitudes in relation to the case.
- The extent to which the principles of justice are or could be achieved by the outcome of this case.

The presentation of this task should take place before the class. You may choose to do this as structured questions, case study analyses, role play or debate.

This task should take 3 to 4 lessons to complete and should be approximately 1000 to 1200 words in length.

ACCESS To ensure all have the means or opportunity to attain dispute settlement

ACCESSORY A person who is not present at the time of the crime but assists (either before or after)

ACCIDENT An action beyond a person's control

ACTS Laws passed by parliament, also known as legislation or statutes

ACTUS REUS A wrongful act; the physical act constituting a crime

ADJOURNMENT An undertaking of good behaviour

AGGRAVATED BURGLARY Burglary committed with the presence or use of an offensive weapon

ALIBI Evidence that shows a defendant was somewhere else at the time of the crime

APPEAL when a case is heard for a second time in a higher court in order to review the lower court's decision

APPELLATE JURISDICTION The power of a court to hear and determine an appeal

ARBITRATION A dispute resolution method where both parties present their case before an independent arbitrator who will make a final and binding decision

ARSON Deliberately destroying property by fire

ASSAULT An action that places another individual in fear of violence

AUTOMATISM A defence where the actions of the defendant were involuntary and beyond their control

BAIL The practice of allowing an accused person to be released from custody (sometimes with conditions) between the date of being charged and the court hearing

BARRISTERS Lawyers who usually present cases in higher courts

BATTERED SPOUSE SYNDROME 'The learned helplessness' of some victims of domestic violence

BICAMERAL A parliament consisting of two houses and the Crown

BILL OF RIGHTS A formal declaration of the rights of citizens in a country or state

BREACH A violation of law, promise or obligation

BURDEN OF PROOF A duty to prove what is suspected, which rests with the party making the allegation or assertion

BURGLARY Entering premises with the intent either to steal or to commit assault/property damage

CARJACKING Intentionally using fear of force to steal a car

CAUSATION A connection between a defendant's action/s and the plaintiff's loss/es

CAUTION A warning to suspects of their rights before the suspect is questioned

CIVIL LAWS Laws regulating the behaviour of private individuals

COMMITTAL HEARING A hearing conducted in the Magistrates' Court to determine whether there is enough evidence to justify a conviction by a jury in a higher court

COMMON LAW Laws developed by the courts through the application of precedent

COMMUNITY CORRECTION ORDER A court order that allows a judge to use a range of rehabilitation conditions and deferred sentencing options

CONCILIATION An informal dispute resolution method where the two parties discuss the issues before a conciliator who will assist the parties to reach an agreement

CONCURRENT POWERS Law-making powers listed in the Constitution that are shared by both the state and Commonwealth parliaments

CONSENT Informed legal permission

CONSTITUTION A document that sets out the structure and powers of a parliament

CONTRACT A legally binding agreement

CONTROL ORDER A court order preventing association or regulating the use of the internet or a mobile phone; it can last for 12 months and have conditions attached

CORONER A magistrate who has the power to investigate reportable deaths, reviewable deaths and fires

CRIME An act or omission that is seen as illegal and is punishable by a court

CRIMINAL LAWS Laws dealing with behaviour considered harmful to society as a whole

CROWN The authority of the Queen in parliament and the legal system

CULPABLE DRIVING Causing the death of another while driving a car

DAMAGES A civil remedy providing monetary compensation

DECEPTION A dishonest act or omission

DECLARATION A UN announcement on a particular topic

DEFAMATION A written or oral statement that injures a person's good reputation

DEFENDANT The person against whom a civil action is brought in the courts

DELEGATED AUTHORITIES Bodies that are subordinate to parliament and can make and enforce the law

DELEGATED LEGISLATION Laws made by bodies or authorities that are subordinate to parliament

DENOUNCEMENT The expression of disapproval

DETERRENCE Imposition of a sanction to discourage others from taking a similar action

DIRECTIONS HEARING A hearing to determine any issues or interpretation of the law before the trial starts and the jury is empanelled

DISMISSAL Where the charge is proven, but no conviction is recorded

DIVISION OF POWER The way that law-making power is shared between the Commonwealth and state parliaments

DOLI INCAPAX Lacking the capacity to be guilty of an offence; for example, children

DURESS Threats, violence or other action used to coerce someone into doing something against their will

DUTY OF CARE A moral or legal obligation to ensure the safety or wellbeing of others

EMPANEL The process of selecting a jury in the court room

EQUALITY To be treated alike with the same status, rights and opportunities

EXCLUSIVE POWERS Law-making powers listed in the Constitution that belong only to the Commonwealth Parliament

EXPRESS RIGHTS Rights stated specifically in the Commonwealth Constitution

EXTERNAL AFFAIRS POWER The power given to the Commonwealth Government to deal with issues that affect Australia and its relationship with international countries and organisations

FAIRNESS To treat without fear or favour

FEDERATION The joining together of states to form one nation with a common purpose

HAND-UP BRIEF The process that provides for a committal to be conducted based on documented evidence

HIERARCHY the ranking of a number of bodies according to their status and authority

HOMICIDE The killing of a human being

HOUSE OF REPRESENTATIVES The Lower House of the Commonwealth Parliament

HUMAN RIGHTS The basic rights and freedoms to which all humans are entitled

IMPLIED RIGHTS Rights found in the interpretation of the Commonwealth Constitution

IMPRISONMENT A sentence requiring the offender to serve time in prison

INCRIMINATE Provide evidence of involvement in a crime

INDICTABLE OFFENCE A serious criminal offence, heard before a judge and jury in the County Court or the Supreme Court

INDICTABLE OFFENCE HEARD SUMMARILY An indictable offence heard before a magistrate

INFANTICIDE Where a mother kills her own child [who is under the age of 24 months]

INJUNCTION A court order requiring that a party take an action or refrain from taking an action

JUDGE The adjudicator in higher courts

JUDICIAL DETERMINATION A hearing or trial held before a judicial officer in order to settle a dispute between two or more parties

JUDICIAL OFFICER An independent and impartial officer of the courts who can sentence an offender

JURISDICTION The power of a court to hear and determine a case

JURY A panel of citizens selected to listen to a case and to reach a verdict based on the evidence presented

JUSTICE A universal feature whereby each person is entitled to their rights and bound by their responsibilities

LAWS Legal rules created and enforced by institutions within the legal system

LEGAL RULES Laws created by institutions within the legal system and enforced by the legal system

LEGAL SYSTEM The processes and procedures to create, interpret and enforce the law

LEGISLATIVE ASSEMBLY The Lower House of the Victorian Parliament

LEGISLATIVE COUNCIL The Upper House of the Victorian Parliament

LEGISLATIVE PROCESS The process used by parliament to make laws

LOCAL COUNCIL Democratically elected body that represents a local area and can make local laws

MAGISTRATE A legal practitioner who is an adjudicator in the Magistrates' Court, Children's Court, Coroners Court and related divisions and lists

MALICE AFORETHOUGHT An intention to do wrong and commit murder

MANSLAUGHTER An unlawful homicide that is not considered to be murder because there was no intention to kill or there were other special circumstances

MEDIATION A dispute resolution method where a mediator assists parties to exchange information, ideas and possible alternatives

MENS REA A guilty mind or the state of mind required to commit a wrongful act

MENTAL IMPAIRMENT State in which a person is not mentally able to recognise either the nature and quality of their actions or that the conduct was wrong

MURDER The unlawful killing of any reasonable creature in being with malice aforethought either expressed or implied

NATIVE TITLE The recognition by the law of Indigenous rights to use and possess land

NEGLIGENCE A tort imposing a duty to exercise reasonable care to ensure a person's actions do not adversely affect others

NEIGHBOUR Someone who would be closely and directly affected by another person's act/s or omission/s

NOLLE PROSEQUI A notice that the DDP does not intend to continue with the prosecution due to insufficient evidence

NORMS Social expectations within social groups

NUISANCE Interference with the enjoyment of either public or private property

OMBUDSMAN An official with the power to investigate complaints of individuals against a company or organisation, such as the government

ORIGINAL JURISDICTION The authority or legal power of a court to hear a case in the first instance

PARITY Providing a similar sentence for the offence as is normal

PARLIAMENTARY SOVEREIGNTY The ultimate law-making body that can make, change or repeal legislation as well as override common law

PAROLE Early release of a prisoner to serve the remainder of their sentence in the community, with conditions

PARSIMONY To balance the punishment with the crime

PLAINTIFF A person who brings a civil action to court

POLICE CAUTION A warning for an offence not involving a conviction or court appearance

PRECEDENT A legal principle developed by the courts

PRESUMPTION OF INNOCENCE The principle that every person is considered to be innocent until proven guilty

PREVENTATIVE DETENTION ORDER A court order that allows police to arrest, search or seize items or evidence associated with a terrorist act

PRIMA FACIE CASE A case that, on first impressions, has a possibility of being successful

PRINCIPAL OFFENDER A person who participates in the commission of a crime

PROPERTY Items that are of a tangible nature

PROPORTIONALITY To place quantity and value on balancing the sanction

PROTECTIVE SERVICE OFFICERS Uniformed and armed security and transit officers with the powers to arrest, search and apprehend

PUNISHMENT A penalty or sanction imposed on a wrongdoer

REASONABLE CARE The standard of care owed by a person who has a duty to take care

REASONABLE PERSON A hypothetical person who acts with average care, skill and judgment, and is used as a comparison when determining various elements in tort law

RECIDIVISM The tendency of a convicted criminal to re-offend

RECKLESS Acting or failing to act in a manner where a person can foresee some harmful consequence but carries on without regard for that consequence

REFERENDUM A formal yes or no vote to change, by either adding to or deleting from, the wording of the Commonwealth Constitution

REHABILITATION Improvement through programs that focus on bringing about changes in an offender's behaviour

REMEDY The means by which the court restores a successful plaintiff to their original position

REPRESENTATIVE GOVERNMENT A government that is answerable to the people at elections

RESIDUAL POWERS Law-making powers not listed in the Constitution that belong to the state parliaments

RESPONSIBLE GOVERNMENT a government where members are held accountable for their actions to the parliament and parliament is accountable to the voters

RESTITUTION A court order for the return of stolen goods to the rightful owner

RETRIBUTION An act done as revenge or to pay back for a wrong committed

RIGHT TO SILENCE No person can be compelled to testify against themselves or to answer police questioning, except for providing their name and address

SANCTION A penalty imposed by a court for a criminal offence

SELF-DEFENCE The use of necessary and reasonable force to protect oneself or another

SENATE The Upper House of the Commonwealth Parliament

SENTENCE A judgment by a court, specifying a punishment for a crime

SEPARATION OF POWERS The division of the functions of government among three independent bodies to provide a system of checks and balances on each bodies' power

SOCIAL COHESION The ability of a community to live together in peace and with order and harmony by recognising that all people have rights and responsibilities

SOLICITORS Lawyers involved in the administration and processing of legal matters; they may present cases in the Magistrates' Court

SPECIFIC POWERS Law-making powers listed in the sections of the Commonwealth Constitution

STANDARD OF PROOF The standard against which cases are measured

STATUTORY AUTHORITY An independent government body that has the power to make rules or regulations

STATUTORY INTERPRETATION The process of a court interpreting and applying legislation to a case before it

STRICT LIABILITY Offences in which no wrongful intent needs to be established

STRUCTURAL PROTECTIONS Rights indirectly protected due to the structure and wording of the Commonwealth Constitution

SUDDEN OR EXTRAORDINARY EMERGENCY An emergency that involves a risk of death or serious injury

SUMMARY OFFENCE An offence of a less serious nature, such as a minor traffic offence; heard in the Magistrates' Court

SURETY A person responsible for ensuring that an alleged offender attends court at a specified time

TERRA NULLIUS A Latin expression meaning 'land belonging to no-one'

TERRORISM An act or threat intended to advance a political, ideological or religious cause by coercion or intimidation

TEST CASE A case brought before the courts where no precedent has been established

THEFT Dishonestly taking the goods of another person with the intention of depriving them of the use of those goods

THERAPEUTIC JUSTICE A focus on services and programs to rehabilitate offenders while maintaining the protection of the community

TORT A civil wrong

TORT LAW A broad area of law made up of a number of separate wrongs that aim to protect individual interests

TORTEASOR The wrongdoer or person who has committed the tort

TOTALITY Ensuring that multiple sentences provide an overall punishment that is fair and just

TREATMENT ORDER A court order stipulating treatment conditions in order to avoid imprisonment

TREATY A written document that legally binds states governed by international law

TRESPASS Direct and intentional interference with a person or their goods or land

TRIBUNAL An institution with authority to hear and adjudicate on a claim or dispute

UNITED NATIONS (UN) A world body that deals with human rights and international law

VALUES The importance of social, moral, political, economic, technological and environmental standards

VICARIOUS LIABILITY When a person is held responsible for the actions of another person, whether or not they were personally involved or at fault

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT) A tribunal set up to resolve cases in specific areas in a less expensive manner than going to court

VILIFICATION Abusive or derogative speech and writing

WARRANT A court order that gives police permission to carry out their duties, such as making an arrest or searching property

YOUNG OFFENDER A person under the age of 21 at the time of sentencing

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