exam café

Legal Studies Preliminary

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Third Edition

ALWAYS LEARNING

PEARSON

Legal Studies Preliminary

Third Edition

Author Dedications

To Julian Francis Hayes, my grandson
Michael Hayes

To Chol from the Sudan. May you have a fulfilling life in your new home
Nerida Thiering

For my family, Rose, Gavin and Edmund
Bruce Derwent

For Zoe and Phoebe and their wonderful mother Sarah
David Hamper

In memory of my mother, Frances, a lifelong advocate of social justice
John Boesenberg

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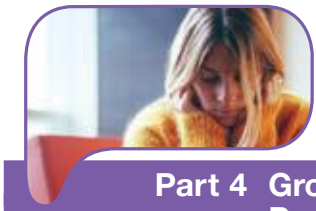
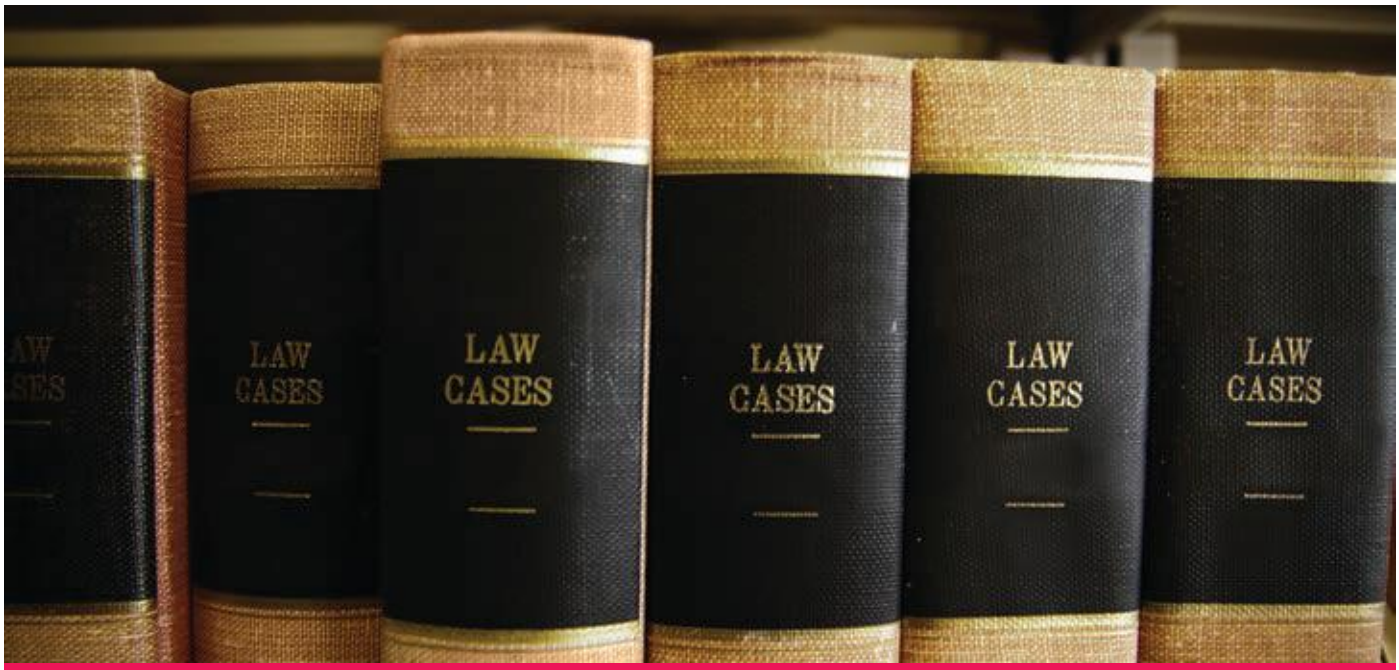
Contents

The following chapters can be found on Pearson Places





Glossary of directive terms

Account: Account for: state reasons for, report on. Give an account of: narrate a series of events or transactions

Analyse: Identify components and the relationship between them; draw out and relate implications

Apply: Use, utilise, employ in a particular situation

Appreciate: Make a judgement about the value of

Assess: Make a judgement of value, quality, outcomes, results or size

Calculate: Ascertain/determine from given facts, figures or information

Clarify: Make clear or plain

Classify: Arrange or include in classes/categories

Compare: Show how things are similar or different

Construct: Make; build; put together items or arguments

Contrast: Show how things are different or opposite

Critically (analyses/evaluate): Add a degree or level of accuracy depth, knowledge and understanding, logic, questioning, reflection and quality to (analysis/evaluation)

Deduce: Draw conclusions

Define: State meaning and identify essential qualities

Demonstrate: Show by example

Describe: Provide characteristics and features

Discuss: Identify issues and provide points for and/or against

Distinguish: Recognise or note/indicate as being distinct or different from; to note differences between

Evaluate: Make a judgement based on criteria; determine the value of

Examine: Inquire into

Explain: Relate cause and effect; make the relationships between things evident; provide why and/or how

Extract: Choose relevant and/or appropriate details

Extrapolate: Infer from what is known

Identify: Recognise and name

Interpret: Draw meaning from

Investigate: Plan, inquire into and draw conclusions about

Justify: Support an argument or conclusion

Outline: Sketch in general terms; indicate the main features of

Predict: Suggest what may happen based on available information

Propose: Put forward (for example a point of view, idea, argument, suggestion) for consideration or action

Recall: Present remembered ideas, facts or experiences

Recommend: Provide reasons in favour

Recount: Retell a series of events

Summarise: Express, concisely, the relevant details

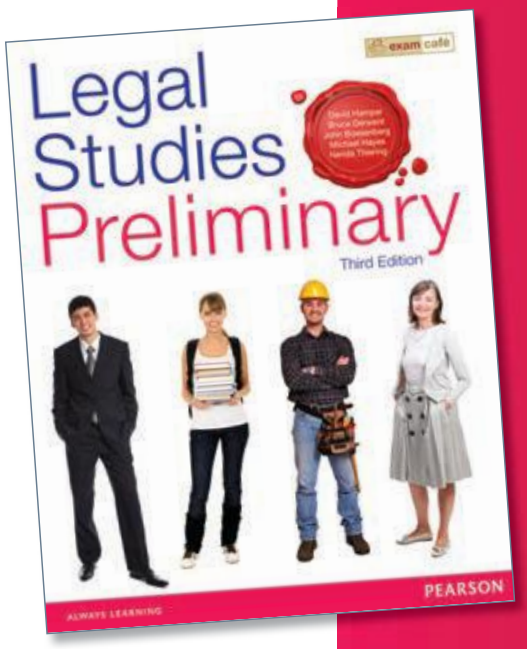
Synthesise: Putting together various elements to make a whole

Legal Studies Preliminary

Legal Studies Preliminary Third Edition is the first of a two-book series developed for the revised NSW Legal Studies syllabus (2010 implementation). This new edition has been thoroughly rewritten and updated.

Student Book

This student-friendly book has been designed to engage and motivate students. It provides a framework that will help students to develop a deep understanding and knowledge about the relevant areas of law studied.



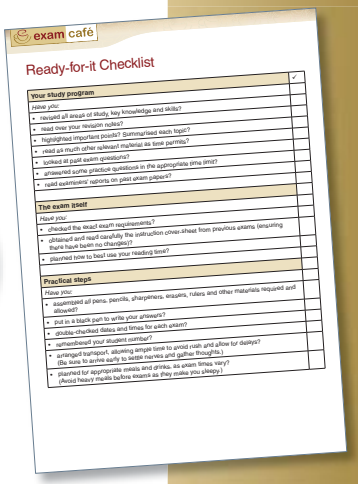
Key features

- Rich and up-to-date material and numerous case references add interest and relevance to the content.
- Chapter opening pages provide a list of relevant outcomes and summaries of case law and legislation.
- Points to Ponder help students to consider a range of issues more deeply and act as a source of class discussion.
- Law in Action and Review boxes allow students to demonstrate their understanding of chapter content, as well as linking to contemporary events. Associated activities provide consolidation and extension opportunities.
- Chapter summaries and a range of HSC exam-style multiple-choice and short-answer questions offer opportunities for review.

Exam Café CD

The *Legal Studies Preliminary* Exam Café CD contains a PDF of the printed book. The CD also includes:

- Daily study planner
- Ready-for-it check list
- Glossary terms
- Preparing for exams
- Handling exam questions.



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The **Legal Studies Preliminary Third Edition** page includes:

- Teacher Lounge—one location for teacher support material
- Exam Café Online—the online destination for senior students to practise, revise and study for exams. Available online are:
  - Practise exams with sample answers
  - Examiners' tips
  - Daily study planner
  - Preparing for exams
  - Handling exam questions
  - Ready-for-it checklist.
- Chapters 20–33 are also available in the Teacher lounge at Pearson Places.

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Succeeding in Legal Studies

The law is always changing and updating as society changes, and people's views and values modify. It is very important that you, as a student of the law, always try to ensure that you are aware of the changes taking place, the debates being held about areas of the law and the pressures being placed on the law by various groups who may want to change the law or indeed stop changes being made.

For example, in recent years there has been much debate about same-sex marriages, euthanasia, the extent to which anti-terror laws affect fundamental human rights and the legality of conflict. All these debates are complex and represent changing values in our society.

Researching the law

Many of your assessment tasks at school are likely to require you to conduct research into the law. There are many useful sources of information on the law. These include traditional sources of information such as books, legal journals and newspapers. The Internet is also an excellent source of information.

Regardless of the sources you use, it important to look for information that is accurate and up to date. A book on international affairs written in 1998 it is not going to be very informative about the issues of today? Think about all the changes that have taken place and events that have occurred in international affairs since then: September 11, the 'War on Terror', the Bali bombings etc.

Newspapers are a great source of contemporary information about the law. They also give you a good idea of the debates and controversies that surround different areas of the law. Most newspapers have websites and many libraries also have access to digital databases of past newspapers. These are excellent sources of information.

Using the Internet

The Internet provides a wealth of information about the law. However, it can also be a very unreliable source of information. For this reason it is important to consider the following:

- *The authority of the site*. You need to establish whether the site was written by someone with a legitimate knowledge or expertise in the subject.
  - Does the author of the site give their name, qualifications and contact details?
  - Is the site from a reputable source? For example, a site from a university, government etc. is likely to be more reliable than a blog site.
- *The purpose of the site*. This relates to why the site was actually made. It is important to consider whether the site actually matches what you need and whether it can be trusted for its accuracy. Some things to consider include:
  - What type of site is it? All sites come with a domain name, which gives you an indication of who wrote the site and its purpose, for example commercial sites (.com), educational sites (.edu), government sites (.gov), military sites (.mil), non-governmental and inter-governmental organisations (.org). Therefore looking at the domain name will help you decide on the purpose of the site—for example, a .com site is one designed to sell you something.
- *The content of the site.* This relates to how accurate the information on the site is and the bias of the site. Remember, anyone can post information on the Internet and usually no one checks that it is accurate before it appears on a site. That great website you found on the United Nations might in fact be written by a 13-year-old student from New York and be totally made up! The best way to assess the content of a site is to consider:
  - How accurate the information is. You can check the accuracy of statistics, for example, by looking at specialised statistical sites (such as the Australian Bureau of the Statistics).
  - What is opinion and what is fact? Does the author of the site clearly state where the information has come from? If not, they are expressing their opinion, and the site is therefore less reliable.
  - Is there is a bias in what the author of the site is writing? Remember that there will always be some bias—this does not make a site useless but it is important to consider what the bias is and the extent to which it affects the content. For example, a site from a victims' rights group will be biased against improving prison conditions, while a site from a prisoners' rights group will be biased in the other direction.
  - Is the site up to date? Even sites that are from reliable sources, such as universities and governments, can become out of date. Remember, the law is constantly changing, so it is important to check that the site is up to date.
  - Is the site easy to use? We have all looked at sites that look great and then are almost impossible to navigate.

Exam tips

- Read the exam instructions carefully.
- Make sure you manage your time effectively.

Getting ready for the exam

As with all your other subjects you will need to sit examinations in Legal Studies. Preparing yourself for these exams is essential if you want to succeed. Obviously your textbook is a great source of information, but many people use this book so it is important that you make revision notes based on other sources, such as your class notes, handouts provided by your teacher, the research you have done for assignments etc.

There is no 'right way to study'. Every person learns differently. However, revision notes are an important part of effective study for this course. Bear the following in mind when making your notes:

- The questions you will be asked will be based on the Board of Studies syllabus. For this reason it is useful to make your notes under the same headings as the syllabus uses. In this textbook we have used the same headings as in the syllabus.
- Your notes need be well organised. There is no right way to make notes, but it is important that your notes are clear and make sense to you. Consider the following:
  - Space your notes out by using wide margins and a large font; this makes them easier to read.
  - Use boxes, different colours, fonts etc. to highlight key points or examples. For example, you may find it useful to put case law in a different colour to help you remember the information.
- The goal of revision notes is to help you to process information in your brain, not to rewrite everything that is in the textbook and your class notes. How do you make this happen?
  - Read through the text and class notes and select the information that you think is important. A highlighter may be useful for this.
  - Rewrite these points in your own words. This is important, as it forces your brain to process the information rather than simply read it.
  - Highlight key words in your study notes to focus your memory on them.

More exam tips

- Don't write more than you need to. If the question is worth only 2 marks then you can only get 2 marks. It is a waste of time to write a full page on this question!
- Make sure you are answering the question. Read it carefully and highlight the key words if you need to.
- Make sure you know the Board of Studies directive terms (see p. ix; for example, a question that asks you to outline is very different from one that asks you evaluate).

Doing the exam

In Legal Studies examinations you will often need to answer:

- multiple-choice questions
- short-answer questions
- stimulus-based responses; and
- extended-response questions.

It is important that you familiarise yourself with these types of questions as they will also be common ways in which you will be tested at school during assessment tasks.

Multiple-choice questions

Multiple-choice questions are used to test your specific content knowledge. When examiners write multiple-choice questions they usually write two options that are clearly wrong, one that is close to being correct and of course one that is the correct answer.

A common mistake is to misread the question and therefore select the wrong answer. Examiners are aware of this and will often provide an answer that would be correct for the misread question. Therefore:

- Read the question carefully. Do not skim-read it.
- Read each option and eliminate those that are clearly wrong.
- Never leave a question out. Even if you have to guess, you have a one in four chance of getting it right!
- Do not spend more than about one minute on each question.

Short-answer questions

Short-answer questions are used to test your knowledge as well as your ability to analyse information. In Legal Studies exams most short-answer questions are worth between 2 and 8 marks.

When answering short-answer questions many students write far too much and while they get full marks, they waste a lot of time. Look at how much the question is worth and write the appropriate amount. In this section of the exam lines are often provided for you to write on. This acts as a guide. As a general rule examiners provide two lines per mark.

Stimulus-based responses

In many Legal Studies tasks you will be provided with stimulus material. This means that the examiners provide you with some information, such as a legal scenario or newspaper report, and then ask you a series of questions in relation to the stimulus and your own knowledge.

When answering these questions it is important to do exactly as the question asks. For example, the question may ask you to refer to the source and your own knowledge. This means that you should include information from the source provided and additional

information that you have gained from your studies. When asked to refer to the stimulus it is important that you do this. As with the short-answer questions, it is important that you look to see the value of the question so as to write an appropriate amount.

Extended-response questions

Extended responses, sometimes called essays, are an important method of assessment in Legal Studies. Extended responses are designed to allow you to show the examiner your detailed knowledge and understanding of a topic.

A good extended response is structured and logical and conforms to the following format:

1 *Introduction*. This has two functions. The first is to outline your thesis; this is your point of view on the topic. The second is to outline the main arguments you intend to make. These arguments are the evidence that proves that your thesis is a correct and valid point of view.

2 *The body*. The body is a series of arguments made in support of your thesis. Each paragraph presents a new point and should begin with a topic sentence—that is, a sentence that acts as a simple introduction to the paragraph. For example, if the paragraph is to be about the role of the District Court, the topic sentence may read something like 'The District Court has roles in both criminal and civil law matters'.

3 *The conclusion*. This is designed to tie together the main arguments of your extended response. Do not simply rewrite your introduction; instead, you should focus the reader's attention on your main points, which proved that your thesis was correct. Remember that the first thing the marker does after reading your conclusion is to assign a mark to your extended response, so it is important that you remind them of your most forceful arguments.

Good extended responses will be objective rather than subjective; this means that they rely on fact rather than opinion. To stay objective in your writing:

- Include factual examples to support your generalisations, for example refer to specific cases, media reports, etc.
- Write in the third person rather than the first person. For example instead of writing 'I think that human rights are being abused by these laws', write 'Human rights are being abused by these laws because they breach international law …'.

In Legal Studies examiners expect to see you citing case law and legislation. They also like to see that you have a knowledge of contemporary legal issues. Therefore it is important that you incorporate these things into your extended responses.

Researching case law

In order to research legal cases—including the most recent cases—use the following website: www.austlii.edu.au.

This site contains details of cases from all the superior courts of Australia, both state and federal, as well as many tribunal cases.

What to do

Once at the site, select the appropriate jurisdiction, e.g. the Commonwealth or New South Wales.

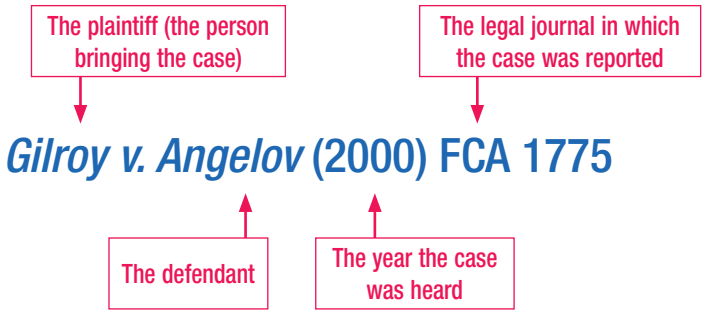
Once you have selected the appropriate jurisdiction, select the level of court you want to find cases from, e.g. the Federal Court or the New South Wales District Court.

Once you have selected the court, use one of the various search methods to find appropriate cases, such as the name of the case, or the type of case (e.g. armed robbery).

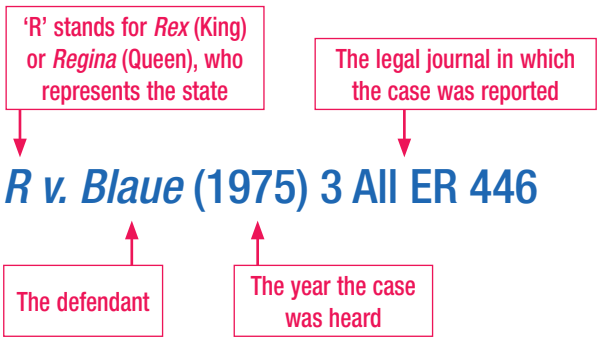
Understanding case citations

In this book, we have followed the convention of using square brackets when there is no volume number in the journal citation and the year is the key reference point.

Civil cases



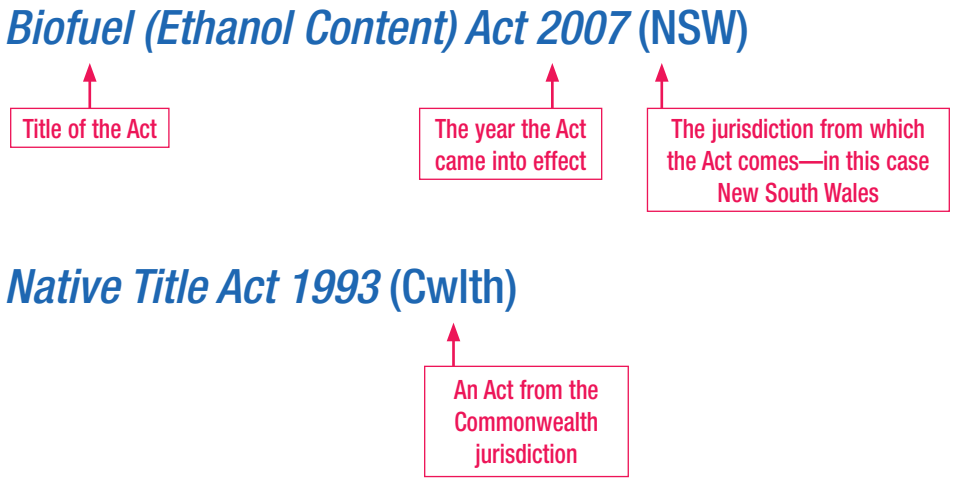
Criminal cases



In appeal cases the defendant's name will appear first. If the matter was heard in the High Court, the state will be referred to as 'The Queen', for example:

Dietrich v. The Queen (1992) 177 CLR 292; 109 ALR 385

Understanding legislation citations



Course Outcomes

Objectives	Preliminary course outcomes
A student develops knowledge and understanding about: **1. the nature and institutions of domestic and international law**	**A student:** **P1** identifies and applies legal concepts and terminology **P2** describes the key features of Australian and international law
2. the operation of Australian and international legal systems and the significance of the rule of law	**P3** describes the operation of domestic and international legal systems **P4** discusses the effectiveness of the legal system in addressing issues
3. the interrelationship between law, justice and society and the changing nature of the law.	**P5** describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change **P6** explains the nature of the interrelationship between the legal system and society **P7** evaluates the effectiveness of the law in achieving justice
A student develops skills in: **4. investigating, analysing and communicating relevant legal information and issues.**	**P8** locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents **P9** communicates legal information using well-structured responses **P10** accounts for differing perspectives and interpretations of legal information and issues

Note that these Outcomes are applicable to all topics. Some may be more relevant to a particular topic than others. Outcomes may be examined.

Summary of legislation

Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cwlth)

Aboriginal Land Act 1991 (Qld)

Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)

Aboriginal Land Rights Act 1983 (NSW)

Aboriginal Lands Trust Act 1966 (SA)

Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld)

Act of Settlement 1701 (UK)

Administrative Appeals Tribunal Act 1975 (Cwlth)

Administrative Decisions (Effect of International Instruments) Act 1995 (SA)

Administrative Decisions (Effect of International Instruments) Act Repeal Bill 2007 (SA)

Administrative Decisions (Effect of International Instruments) Bill 1999 (Cwlth)

Administrative Decisions (Judicial Review) Act 1977 (Cwlth)

Administrative Decisions Tribunal Act 1997 (NSW)

Adoption Act 2000 (NSW)

Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cwlth)

Age Discrimination Act 2004 (Cwlth)

Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW)

Anti-Discrimination Act 1977 (NSW)

Anti-Discrimination Amendment (Breastfeeding) Act 2007 (NSW)

Anti-Discrimination Amendment (Carers' Responsibilities) Act 2000 (NSW)

Associations Incorporation Act 1984 (NSW)

Australia (Request and Consent) Act 1985 (Cwlth)

Australia Act 1986 (Cwlth)

Australia Act 1986 (UK)

Australian Citizenship Act 1948 (Cwlth)

Australian Citizenship Act 2007 (Cwlth)

Australian Law Reform Commission Act 1996 (Cwlth)

Australian Sports Commission Act 1989 (Cwlth)

Australian Sports Drug Agency Act 1990 (Cwlth)

Biofuel (Ethanol Content) Act 2007 (NSW)

Border Protection (Validation and Enforcement Powers) Act 2001 (Cwlth)

Boxing and Wrestling Control Act 1986 (NSW)

Broadcasting Services Amendment (Online Services) Act 1999 (Cwlth)

Child Support (Assessment) Act 1989 (Cwlth)

Children (Equality of Status) Act 1976 (NSW)

Children (Protection and Parental Responsibility) Act 1997 (NSW)

Children and Young Persons (Care and Protection) Act 1998 (NSW)

Chinese Immigration Regulation Act 1861 (NSW)

Civil Liability Act 2002 (NSW)

Civil Liability Act 2003 (Qld)

Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW)

Colonial Laws Validity Act 1865 (Imp)

Commission For Children and Young People Act 1998 (NSW)

Commonwealth Electoral Act 1918 (Cwlth)

Commonwealth Euthanasia Laws Act 1996 (Cwlth)

Commonwealth of Australia Constitution Act 1900 (UK)

Communist Party Dissolution Act 1950 (Cwlth)

Community Justice Centres Act 1983 (NSW)

Constitution Act 1902 (NSW)

Constitution of the Commonwealth of Australia

Copyright Act 1968 (Cwlth)

Corporations Act 2001 (Cwlth)

Crimes (Apprehended Violence) Amendment Act 1989 (NSW)

Crimes (Domestic Violence) Amendment Act 1982 (NSW)

Crimes (Domestic Violence) Amendment Act 1983 (NSW)

Crimes (Forensic Procedures) Act 2000 (NSW)

Crimes (Forensic Procedures) Amendment Act 2008 (NSW)

Crimes (Girls' Protection) Act 1910 (NSW)

Crimes (Homicide) Amendment Act 1981 (NSW)

Crimes (Personal and Family Violence) Amendment Act 1987 (NSW)

Crimes (Sexual Assault) Amendment Act 1981 (NSW)

Crimes Act 1900 (NSW)

Crimes Act 1914 (Cwlth)

Crimes Amendment (Consent–Sexual Assault Offences) Act 2007 (NSW)

Criminal Appeal Act 1912 (NSW)

Criminal Code Act 1995 (Cwlth)

Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003 (NSW)

De Facto Relationships Act 1984 (NSW)

Disability Discrimination Act 1992 (Cwlth)

Disability Services Act 1986 (Cwlth)

Disability Services Act 1993 (NSW)

Dog Act 1970 (Vic)

Education Act 1990 (NSW)

Evidence (Children) Act 1997 (NSW)

Fair Trading Act 1987 (NSW)

Fair Work Act 2009 (Cwlth)

Family Law Act 1975 (Cwlth)

Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cwlth)

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cwlth)

Family Law Amendment Act 2000 (Cwlth)

Family Law Legislation (Superannuation) Amendment Act 2001 (Cwlth)

Family Law Reform Act 1995 (Cwlth)

Family Provision Act 1982 (NSW)

Firearms Legislation (Amendment) Act 1992 (NSW)

Fitness Services (Pre-Paid Fees) Act 2000 (NSW)

Freedom of Information Act 1982 (Cwlth)

Freedom of Information Act 1989 (NSW)

Gene Technology Act 2000 (Cwlth)

Guardianship Act 1987 (NSW)

Guardianship of Infants Act 1934 (NSW) (now repealed)

Heritage Protection Act 1984 (Cwlth)

Human Rights (Sexual Conduct) Act 1994 (Cwlth)

Human Rights and Equal Opportunity Commission Act 1986 (Cwlth)

Immigration (Guardianship of Children) Act 1946 (Cwlth)

Immigration Restriction Act 1901 (Cwlth)

Independent Commission Against Corruption Act 1988 (NSW)

Industrial Arbitration (Female Rates) Amendment Act 1959 (NSW)

Institute Of Sport Act 1995 (NSW)

James Hardie (Civil Liability) Act 2005 (NSW)

Judicature Act 1873 (UK)

Jury Act 1977 (NSW)

Jury Amendment Act 2007 (NSW)

Justice and Other Legislation Amendment Act 2003 (Qld)

Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cwlth)

Law Reform Commission Act 1967 (NSW)

Local Government Act 1993 (NSW)

Magna Carta 1215

Marriage Act 1961 (Cwlth)

Married Persons (Equality of Status) Act 1996 (NSW)

Married Persons (Property and Torts) Act 1901 (NSW)

Married Women's Property Act 1893 (NSW)

Mental Health (Criminal Procedures) Act 1990 (NSW) (now renamed as the Mental Health (Forensic Provisions) Act 1990)

Mental Health (Forensic Provisions) Act 1990 (NSW)

Mental Health Act 2007 (NSW)

Migration Act 1958 (Cwlth)

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cwlth)

Migration Regulations 1994 (Cwlth)

Minors (Property and Contracts) Act 1970 (NSW)

Motor Vehicle Sports (Public Safety) Act 1985 (NSW)

Native Title Act 1993 (Cwlth)

Native Title Amendment (Technical Amendments) Act 2007 (Cwlth)

Native Title Amendment Act 1998 (Cwlth)

Native Title Amendment Act 2007 (Cwlth)

Newcastle International Sports Centre Act 1967 (NSW) (now repealed)

Northern Territory Aborigines Act 1910 (NT) (passed by the South Australian parliament)

Northern Territory National Emergency Response Act 2007 (Cwlth)

Olympic Insignia Protection Act 1987 (Cwlth)

Ombudsman Act 1976 (Cwlth)

Parliamentary Committees Enabling Act 1996 No 143 (NSW)

Pitjantjatjara Land Rights Act 1981 (SA)

Privacy Act 1988 (Cwlth)

Privacy and Personal Information Protection Act 1998 (NSW)

Privy Council (Appeals from the High Court) Act 1975 (Cwlth)

Privy Council (Limitation of Appeals) Act 1968 (Cwlth)

Prohibition of Human Cloning for Reproduction Act 2002 (Cwlth)

Property (Relationships) Legislation Amendment Act 1999 (NSW)

Protected Estates Act 1983 (NSW)

Provisions of Oxford 1258

Public Instruction Act 1880 (NSW)

Queensland Coast Islands Declaratory Act 1985 (Qld)

Racial Discrimination Act 1975 (Cwlth)

Racial Hatred Act 1995 (Cwlth)

Registration of Births, Deaths and Marriages Act 1973 (NSW)

Research Involving Human Embryos Act 2002 (Cwlth)

Residential Tenancies Act 1987 (NSW)

Rights of the Terminally Ill Act 1995 (NT)

Road Transport (General) Act 1999 (NSW)

Road Transport (Safety and Traffic Management) Act 1999 (NSW)

Road Transport Legislation Amendment (Car Hoons) Act 2008 (NSW)

Royal Commissions Act 1902 (Cwlth)

Sale of Goods Act 1923 (NSW)

Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (Cwlth)

Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Act 2008 (Cwlth)

Sex Discrimination Act 1984 (Cwlth)

Sex Discrimination Amendment (Pregnancy and Work) Act 2003 (Cwlth)

Social Security Act 1991 (Cwlth)

Sporting Injuries Insurance Act 1978 (NSW)

Sporting Venues (Pitch Invasions) Act 2003 (NSW)

Sporting Venues Management Act 2002 (NSW) (now repealed)

Status of Children Act 1996 (NSW)

Statute Law (Miscellaneous Provisions) Act (No 2) (NSW)

Succession Act 2006 (NSW)

Summary Offences Act 1970 (NSW) (now repealed)

Summary Offences Act 1988 (NSW)

Superannuation Guarantee Charge Act 1992 (Cwlth)

Testator's Family Maintenance and Guardianship of Infants Act 1916 No 41 (NSW)

Torres Strait Islander Act 1991 (Qld)

Trade Practices Act 1974 (Cwlth)

Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 (NSW)

Vagrancy Act 1902 (NSW) (now repealed)

Veterans Entitlement Act 1986 (Cwlth)

Veterans' Entitlement Act 1986 (Cwlth)

Wills, Probate and Administration Act 1898 (NSW)

Women's Legal Status Act 1918 (NSW)

Workplace Relations Act 1996 (Cwlth)

Workplace Relations Amendment (Work Choices) Act 2005 (Cwlth)

Workplace Surveillance Act 2005 (NSW)

Workplace Video Surveillance Act 1998 (NSW)

Young Offenders Act 1997 (NSW)

Summary of international law

Antarctic Treaty (1959)

ANZUS Treaty (1952)

Charter of the United Nations (1945)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)

Convention for the Protection of the World Cultural and Natural Heritage (1972)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

Convention on the Rights of the Child 1989 (CROC)

Convention on the Elimination of All Forms of Racial Discrimination (1969)

Convention on the Prevention and Punishment of the Crime of Genocide (1951)

Convention on the Rights of Persons with Disabilities (2008)

Declaration of Human Rights (1948)

Declaration on the Rights of Indigenous Peoples (2007)

Draft Universal Declaration on the Rights of Indigenous Peoples (1989)

Geneva Conventions (1864, 1906, 1929, 1949; all revised 1949)

International Convention on the Elimination of All Forms of Racial Discrimination (1969)

International Covenant on Civil and Political Rights (1976)

International Covenant on Economic, Social and Cultural Rights (1966)

International Labour Organization Convention on Discrimination (Employment and Occupation) [1958]

Partial Test Ban Treaty (1963)

Protocol Relating to the Status of Refugees (the Refugees' Convention) (1967)

Rome Statute (2002)

Statute of the International Court of Justice (1945)

UN Convention on the Rights of the Child (CROC), (1989)

United Kingdom/Ireland Continental Shelf Boundary Agreement (1988)

United Nations Convention on Disability Rights (2009)

United Nations Convention Relating to the Status of Refugees (1951)

United Nations Declaration of the Rights of Disabled Persons (1975)

United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)

United Nations' Universal Declaration of Human Rights (1948)

Other international documents

The Olympic Charter

Special Commission of Inquiry 2004 (into the Medical Research and Compensation Foundation established by James Hardie Industries)

Australian Law Reform Commission reports

'Children and Young People', *Reform*, Issue 92, Winter 2008

Seen and Heard: Priority for Children in the Legal Process (ALRC 84, 1997)

Fighting Words: A Review of Sedition Laws in Australia (ALRC 104, 2006)

Summary of case law

Aboriginal Land Rights Act 1983 (NSW)

Angela Raguz v. Rebecca Sullivan & ors [2000] NSWCA 240

Anglo-Norwegian Fisheries case (1951) ICJ Rep. 116; (1951) 18 ILR 86

Anti-Discrimination Act 1977 (NSW)

ASIC v. James Hardie Industries NV & Ors (2007–2009) (Supreme Court of New South Wales)

Australasian Performing Rights Association Ltd v. Telstra Corporation Ltd [1995] 31 IPR 289

Australia v. France, New Zealand v. France (1974) ICJ Rep. 253, 57 ILR 398 (the Nuclear Tests case)

Australian Boot Trade Employees Federation v. Whybrow & Co (1910) 11 CLR 311

Australian Communist Party v. Commonwealth of Australia (1951) 83 CLR 1

Australian Football League v. Carlton Football Club Ltd [1998] 2 VR 546 (the *Williams* case)

Australian Racing Drivers Club Ltd v. Metcalf (1961) 106 CLR 177; [1961] HCA 80

Australian Safeway Stores v. Zaluzna (1987) 162 CLR 479

Australian Workers' Union v. EA Abbey & Ors (1944) 53 CAR 212

Bartho v. R (1978) 19 ALR 418

Behrooz v. Secretary, Dept of Immigration, Multicultural and Indigenous Affairs [2004] HCA 36

Bolton v. Stone [1951] 1 All ER 1078 (House of Lords)

Bosnia–Herzegovina v. Federal Republic of Yugoslavia [Serbia and Montenegro] (the Genocide in Bosnia case), 1993 ICJ

Bryant v. Queensland Newspapers [1997] Unreported HREOC decision, 15 May 1997

Buckley v. Tutty (1971) 125 CLR 353

Cattanach v. Melchior [2003] HCA 38

Cesan v. The Queen; Mas Rivadavia v. The Queen [2008] HCA 52

Chappell v. Mirror Newspapers Ltd (1984) ATR 80-691

Commercial Bank of Australia v. Amadio (1983) 151 CLR 447

Commonwealth of Australia v. State of Tasmania & Ors (1983) 46 ALR 625; 136 CLR 1 (the Tasmanian Dam case)

Computer Edge Pty Ltd v. Apple Computer Inc. (1986) 161 CLR 171

Curro v. Beyond Productions Pty Ltd [1993] 30 NSWLR 337

Democratic Republic of the Congo v. Rwanda (2002) (the Armed Activities on the Territory of the Congo case) ICJ Reports 2006

Dent and Daryl Wight as an Australian Electoral Officer [2007] AATA 1985

Dietrich v. The Queen (1992) 109 ALR 385; 177 CLR 292

Donoghue v. Stevenson [1932] AC 562 (House of Lords)

Equal Pay Case (1969) 127 CAR 1142 (the *Equal Pay* case)

Ettinghausen v. ACP [1991] 23 NSWLR 443

Eveready Australia Pty Ltd v. Gillette Australia Pty Ltd [1999] FCA 1824

Ex parte H. V. McKay (1907) 2 CAR 1 (the *Harvester* case)

Fejo v. Northern Territory (1998) 195 CLR 96

Foca Rape Camps case [2000] ICTY

Foscolos v. Footscray Youth Club [2002] VSC 148 (6 May 2002)

G v. H (1994) 181 CLR 387

Gan v. Anderson & anor [2008] NSWLEC 1257 (24 June 2008)

Gerhardy v. Brown (1985) 159 CLR 70

Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 1 All ER 533; 3 All ER 402

Gilroy v. Angelov [2000] FCA 1775

Hall & Ors v. A. Sheiban Pty Ltd & Ors [1989] EOC 92-250

Hall v. New South Wales Trotting Club (1977) 1 NSWLR 378

Hawthorn Football Club Ltd v. Harding [1988] VR 49

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd [1964] AC 465

ICAC inquiry into Ms XL and Mr QP 2009

Jex-Blake v. Senatus of the University of Edinburgh (1893) 11 MacPh. 784

Kerryn Haar v. Maldon Nominees Pty Ltd (trading as McDonald's) & Ors [2000] FMCA 5

Koowarta v. Bjelke-Petersen (1982) 153 CLR 168

L Shaddock & Partners Pty Ltd v. Parramatta City Council (1981) 150 CLR 225

Lardil Peoples v. State of Queensland [2004] FCA 298

Leves v. Haines [1986] EOC 92-167

Lumley v. Wagner (1852) 42 ER 687

Lynch v. Lynch [1991] 25 NSWLR 411

Mabo v. Queensland (No. 1) (1988) 166 CLR 186

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

Mary Yarmir v. Northern Territory [1998] FCA 771

Members of the Yorta Yorta Aboriginal Community v. Victoria [1998] FCA 1606; [2002] HCA 58

Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141 (the Gove Land Rights case)

Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh (1994–1995) 183 CLR 273

Municipal, Administrative, Clerical and Services Union v. Ansett Australia [2000] FCA 441

Murphyores Inc. Pty Ltd & Ors v. The Commonwealth of Australia & Ors (1976) 136 CLR 1

New South Wales v. Commonwealth [2006] HCA 52; 81 ALJR 34; (2006) 231 ALR 1

Newman v. R (2007) 173 A Crim R 1

News Limited & Ors v. Australian Rugby Football League & Ors (1996) 64 FCR 410; 139 ALR 193

News Limited v. South Sydney District Rugby League Football Club Limited [2003] HCA 45

Northern Territory National Emergency Response Act 2007 (Cwlth)

Onus v. Alcoa of Australia Ltd (1981) 149 CLR 27

Osland v. R [1998] HCA 75; (1998) 197 CLR 316

P v. P (1994) 181 CLR 583

Pavitt v. Regina [2007] NSWCCA 88

People of the State of New York v. Joseph Castro [County of Bronx: Criminal Term Pt. 28, Indictment No. 1508 of 1987] (1989)

Perre v. Apand Pty Ltd [1999] HCA 36

R v. Blaue (1975) 3 All ER 446

R v. D. J. Johns (1992), unreported, SCSA

R v. Ferguson; ex parte A-G (Qld) [2008] QCA 227 *R v. Ferguson* Qld 2008; rescheduled for 2009

R v. Fernando & Anor [1999] NSWCCA 66

R v. Hickey (1992) 16 Crim. LJ 271

R v. Justins (2008) NSW Sup. Ct.

R v. Kinloch [2004] NSWSC 998

R v. Kottinen (SA Supreme Court) [Unreported]

R v. LMW [1999] NSWSC 1128 (the Corey Davis case)

R v. Lucas (1992) 55 A Crim R 361; [1992] 2 VR 109

R v. M'Naghten (1843) 8 ER 718 10; Cl & F 200, 210 (M'Naghten's case) (House of Lords)

R v. Mailes [2001] NSWCCA 155; 53 NSWLR 251

R v. Murrell (1836) 1 Legge 72

R v. Peterson [1984] WAR 329

R v. Porter (1933) 55 CLR 182

R v. Runjanjic and Kontinnen (1991) 56 SASR 114

R v. Shannon (1991) 57 SASR 15

R v. Skaf [2004] NSWCCA 37

R v. Wood [2008] NSWSC 1273

R v. Young [1995] QB 324

re Marion (1992) 175 CLR 218

re Pinochet [1999] UKHL 1

Romeo v. Conservation Commission of the Northern Territory (1998) 192 CLR 431

Rootes v. Shelton (1967) 116 CLR 383

Rural Workers Union and the South Australian United Labourers' Union v. Mildura Branch Australian Dried Fruits Association (1912) 6 CAR

Scott and Bernadette Finney on behalf of Scarlett Finney v. The Hills Grammar School [2000] EOC 93–087

Secretary Department of Social Security v. Agnew [2000] FCA 59

South Sydney District Rugby League Football Club Ltd v. News Limited [2001] FCA 862

Stapleton v. The Queen (1952) 86 CLR 358 (High Court of Australia)

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

State of New Jersey v. Kelly (1984) (USA)

Stoker v. Kellogg Pty Ltd [1984] EOC 92-021

SW v. Forests NSW [2006] NSWADT 74

Swain v. Waverley Municipal Council [2005] HCA 4

Taylor & Ors v. Moorabbin Saints Junior Football League & Football Victoria [2004] VCAT 158

The King v. Davey & Ors; Ex parte Freer (1936) 56 CLR 381

Toonen v. Australia (1994) 1 PLPR 50 (matter heard by UN Human Rights Committee)

Toonen v. Australia UNHRC (Views on Communication, No 488/1992, adopted 1994)

Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd [2005] FCA 1242

Wagga Wagga Aboriginal Action Group v. Eldridge (1995) EOC 92–701

Walker v. New South Wales (1994) 182 CLR 45

Ward & Ors v. State of Western Australia & Ors [1998] 1478 FCA; (1998) 159 ALR 483

Warner Bros Pictures Inc. v. Nelson [1937] 1 KB 209

Watson v. Haines [1987] Aust. Torts Reps 80-094; NSWSC

Wik Peoples v. The State of Queensland & Ors (1996) 187 CLR 1

Woods v. Multi-Sport Holdings Pty Ltd [2002] HCA 9

Wyong Shire Council v. Shirt (1980) 146 CLR 40

X v. Commonwealth (1999) 200 CLR 177

X v. The Commonwealth [1999] HCA 63

Yarmirr v. Northern Territory (No. 2) (1998) 82 FCR 533

The legal system

PART 1

Percentage of course time: 40%

PRINCIPAL FOCUS

Students develop an understanding of the nature and function of law through the examination of the law-making process and institutions.

Themes and challenges incorporated throughout this topic:

- The need for law in the operation of society
- The importance of the rule of law for society
- The relationship between different legal institutions and jurisdictions
- The development of law as a reflection of society
- The influences in the Australian legal system

FOCUS OUTCOMES

P1 identifies and applies legal concepts and terminology
P2 describes the key features of Australian and international law
P3 describes the operation of domestic and international legal systems
P4 discusses the effectiveness of the legal system in addressing issues
P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change
P6 explains the nature of the interrelationships between the legal system and society
P7 evaluates the effectiveness of the law in achieving justice
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents
P9 communicates legal information using well-structured responses
P10 accounts for differing perspectives and interpretations of legal information and issues

CHAPTER 1

Basic legal concepts

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

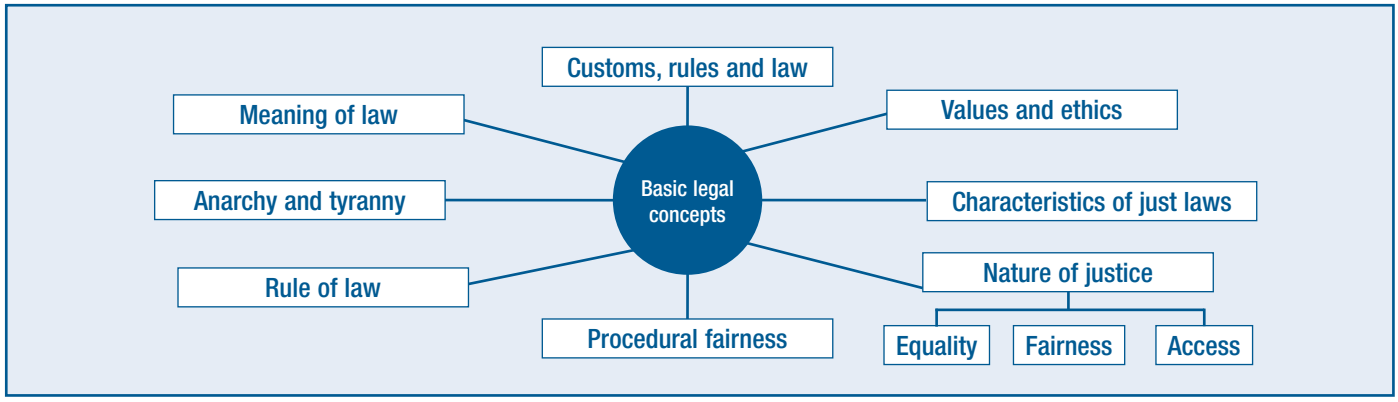
P6 explains the nature of the interrelationships between the legal system and society

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

In this chapter students will develop their understanding of the key terms and concepts associated with the law. The meaning of law, justice and procedural fairness is examined. In addition, the importance of the rule of law and the impacts of anarchy and tyranny are discussed.



SUMMARY OF CASE LAW

Dietrich v. The Queen (1992) 109 ALR 385
re Pinochet [1999] UKHL 1

SUMMARY OF LEGISLATION

Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cwlth)

1.1 The law, customs and rules

Meaning of law

A law is a special type of rule that has been made by a person or institution that has the authority to make laws. This is referred to as '**sovereign power**'. In democratic countries, such as Australia, Britain and the United States, the sovereign power is Parliament. Society elects Members of Parliament to make laws on their behalf. Laws made by Parliament are known as statute laws (this is discussed in greater detail in Chapter 3).

Australia has a type of legal system known as 'common law'. This system allows for laws to also be made by judges when there is a lack of statute law (this is discussed in greater detail in Chapter 2). Parliament can also give the authority to make laws to other bodies; laws made by these bodies are known as 'delegated legislation'.

The most important feature of law is that it is universal. This means that the law applies constantly and consistently. In other words, the law is always in effect; for example, the law states that at a stop sign a car must come to a full stop. This law applies even if there are no other cars around. Individuals do not have the authority to decide if they need to comply with the law; instead, society expects them to stop at the sign every time regardless of the circumstances.

The law also applies to everyone. This is one of the most important aspects of the law. Regardless of a person's position, wealth or power, they must comply with the law. For example, in 2008 the Prime Minister of Thailand was charged with fraud and faced conviction. Even though he was the Prime Minister he was still not above the law – this is known as the rule of law (this is discussed in greater detail on page 10).

Laws are strictly enforced by society and those who breach laws often face sanctions, such as fines, community service orders or, in the most serious cases, imprisonment. Laws are enforced by the police and the courts, who are acting on behalf of society.

Laws are strictly enforced by society.

SOVEREIGN POWER **A person or institution that has the authority to make laws.**

Customs

Customs can be defined as the ways of behaving that have been established through longstanding traditions. When the behaviour of many people becomes so common that members of society expect this behaviour all the time, a custom has developed. Customs can also develop that forbid certain types of behaviour.

Customs are not written down. Instead, they tend to be passed down from generation to generation. Parents, education systems and the media all help to ensure that customs are passed on to children. In this sense customs are enforced by social pressures rather than through some form of legal process. When a member of society fails to abide by the customs established and expected by society they will face ridicule and/or exclusion.

Rules are often displayed as images and often are enforced through the use of penalties, such as fines.

Rules and laws

Rules are established to ensure the smooth operation of society. Laws are universal: they apply all the time and to everyone. They emanate from the state and are enforced by the state. Rules, however, apply only to certain people at certain times. For example, think of the rules at your school. These apply to you only when you are enrolled at this school and when you are actually at school. Assume you have a school rule that states you must wear black socks. You must wear black socks only when you are at school; at home you can wear blue or red socks or any colour you like.

Rules are recorded either in written form or through the use of symbols, such as a 'no smoking' symbol. When a rule is recorded there is less opportunity for people to argue or seek to avoid complying with it. This means that rules are more enforceable than customs. Penalties such as fines are often used to ensure that people comply with rules.

REVIEW

1 Outline the meaning of sovereign power.
2 Explain the principle of the law being universal.
3 What is a custom?
4 Describe how customs are enforced.
5 Define the meaning of a rule.

LAW IN ACTION

1 Write your own definition of law. Compare your definition with a partner, discuss the definitions and agree on a new definition. Share your agreed definition with the rest of the class.
2 Copy the following table into your notebook and complete it.

	Definition	How are they created?	How are they enforced?
Law			
Custom			
Rule			

1.2 Values and ethics

The values societies hold are a reflection of the things that are considered important. These values are often reflected in the law. For example, our society values the concept of private property and for this reason there are many laws designed to protect property. In this sense we can say that the law is a reflection of the values held by the society that makes it.

Ethics are defined as those things that a society considers to be right and wrong. When we act ethically we are acting in the right way. For example, if we find a wallet in the park with $200 in it and take the wallet to the police station, we are acting ethically.

However, the values and ethics of society are not constant. Thus in order for the law to be effective it must be adaptable. There are many examples of the way changes in values and ethics have been reflected in changing laws.

- The values held in Australian society about the role of women have changed greatly. As little as thirty years ago there was a strong expectation that, once women married, they would cease working and have children. In the early 20th century, the law required female teachers to tender their resignation once they married. Society, of course, no longer holds these values and consequently we now have laws protecting the rights of women from the kind of discrimination that was once entrenched in law, such as the *Anti-Discrimination Act 1977* (NSW) and the *Sex Discrimination Act 1984* (Cwlth).
- The use of the death penalty (known as capital punishment) was permitted in Australia until well into the second half of the 20th century. Executions remain quite common in many countries, including the United States, China, and most of South-East Asia and the Middle East. However, the values of Australian and most European societies have changed on this issue and it is no longer permitted to execute people in these countries.

Instead of being illegal as it once was, homosexuality is now an accepted part of Australian culture, reflecting the changing values of society.

Point to ponder

The last person executed in Australia was Ronald Ryan. He was convicted of shooting a prision guard during an attempted escape from custody. Although Ryan and others strongly protested his innocence, he was hanged in Victoria in 1967. Research since then has suggested that the guard died from bullets fired at Ryan by the police, and that Ryan was innocent of the crime for which he was hanged.

- For most of the 20th century it was illegal to engage in homosexual sex in Australia. It was possible for individuals to be fined or even imprisoned for having homosexual intercourse. This was a reflection of strongly held values that homosexuality was wrong and dangerous. Society now has a far more accepting view towards homosexuality and ongoing reforms to anti-discrimination, family, taxation, welfare and employment laws are gradually breaking down the discrimination faced by people in same-sex relationships.

Not everyone in society will hold the same values. As a general rule, values will begin to influence the legal system once a significant proportion of the society holds a particular view. There are many issues in Australia about which opinions are strongly divided and this makes law reform very challenging. Examples of this include laws concerning euthanasia and the decriminalisation of certain drugs, especially cannabis.

REVIEW

1 Define the term 'value'.
2 What are ethics?
3 Explain how the law is influenced by values.

LAW IN ACTION

1 Using the Internet and other sources, conduct research into a controversial area of law reform, such as euthanasia. Prepare a report outlining the current laws in regards to the issue and present the arguments for and against reform of the laws.
2 As a class, discuss whether judges and politicians who are responsible for making and interpreting laws are the best people to decide whether the law accurately reflects the values and ethics of society.

1.3 Just laws and the nature of justice

The characteristics of just laws

In order to be valid a law must be just. A just law has several features to it, including:

1 It is equal. A just law is one that treats every person the same. Applying the law equally, however, does not mean that the outcome of the law will necessarily be equal. For example, John is a pensioner living on $180 a week and Sarah is an executive who earns $2200 a week. Both Sarah and John are fined $180 for speeding. The fine is the same but the penalty has a far greater impact on John than on Sarah.

2 It is based on widely held values. As discussed previously, laws should be based on the values and ethics held by most of society.

3 It is utilitarian. **Utilitarianism** is the philosophy of ensuring an action achieves the greatest good for the greatest number of people. Thus, laws need to be made for the benefit of society as a whole, even though it may mean some individuals will be disadvantaged by the law.

UTILITARIANISM **Achieving the greatest good for the greatest number.**

4 It aims to redress inequalities. This is a more contemporary notion and means that laws should ensure that systemic inequality is avoided. This means that law should not create inequality or injustice. For example, a law that stated that women should be paid less than men for the same job would be considered unjust.

5 It must minimise delay. A just law will be one that aims to resolve disputes as soon as is practicable. This is one of the major criticisms of many laws in Australia, especially civil laws. For example, individuals may wait for years for legal matters to be dealt with by the courts.

6 It must not be retrospective. The law must be made for the future. Retrospective laws are backward-looking; they change the legal status of something in the past and this is unfair. For example, it may be legal to do something on Monday, but if on Wednesday the law is changed retrospectively, the legal action carried out on Monday may now be illegal and may be penalised, even though the law changed after the action.

7 The law must be known. Laws must be known before they can be enforced. In Australia, state and federal governments use publications known as Government Gazettes to alert people of changes in the law. Changes to laws are also advertised through the media, especially those laws that affect many people, such as traffic laws. This is sometimes called 'the law being discoverable'.

The nature of justice

Justice is a combination of equality, fairness and access. In many societies justice is symbolised by 'Lady Justice'. The blindfold ensures that she acts impartially instead of being influenced by factors unimportant to the case. The scales represent the need to weigh up the evidence, while the sword is used to enforce her decisions.

Lady Justice is a symbol for the nature of justice.

Equality

Justice requires laws that do not discriminate and that are applied equally to all people. The enforcement of the law must also be equal.

Fairness

Fairness is another feature of justice. Key factors associated with fairness include ensuring the law does not have a particularly harsh effect on an individual. The right to appeal a decision is also a very important aspect of fairness. Fairness and equality are not necessarily mutual. Many ethicists and lawyers would argue that in a bid to create equality the concept of fairness has been lost.

Access

Individuals must have the ability to access the law in order for justice to be achieved. They should have access to legal information and assistance and be able to understand the law. In recent times there have been moves towards making legal documents, such as contracts, easier to understand by using plain English. Access includes physical access – that is, where the courts and legal aid offices are located.

Log on to the Pearson Places website and follow the links to find more information on Legal Aid.

Web Destination

ACCESSING THE AUSTRALIAN LEGAL SYSTEM: IS JUSTICE SERVED?

The ability to access the legal system is one of the key aspects of justice. However, it is often argued that many Australians have poor access to the legal system. For example, any person charged with a criminal offence is allowed to have a lawyer. However, individuals are expected to pay for their own legal representation.

Therefore, this right is only available to those who can afford to pay for their own lawyer. Government-funded legal representation is available to some through Legal Aid, but access to this service is subject to strict criteria, which means that many people are forced to represent themselves in court. People who represent themselves but have no legal training will have a limited understanding of the law and are unlikely to receive a fair trial, thus reducing their access to justice.

In the case *Dietrich v. The Queen* (1992) 109 ALR 385, Dietrich appealed his conviction on drug charges to the High Court. The basis of Dietrich's appeal was that he was forced to represent himself after failing to meet the criteria for Legal Aid representation and that consequently he did not get a fair trial. The High Court agreed that everyone is entitled to a fair trial but there is no automatic right to a lawyer.

In civil law matters, the issue of access is even more of a problem in Australia. Legal Aid rarely provides assistance in civil law issues. For example, an individual may be attempting to seek redress from a multinational company who can afford a team of barristers. The chance for justice here is very low.

REVIEW

1. Outline the characteristics of a just law.
2. Explain how the law does not always allow for equal outcomes.
3. What is a retrospective law?
4. Explain why a retrospective law is unfair.
5. Explain the meaning of utilitarianism.
6. Describe the meaning of fairness.
7. Explain why access is such an important part of justice.

LAW IN ACTION

1. With a partner, brainstorm the meaning of justice. Write a definition and share it with the class.
2. Write a report on the way access affects the provision of justice in Australia.
3. Should Australians have an automatic right to a lawyer? Justify your answer.

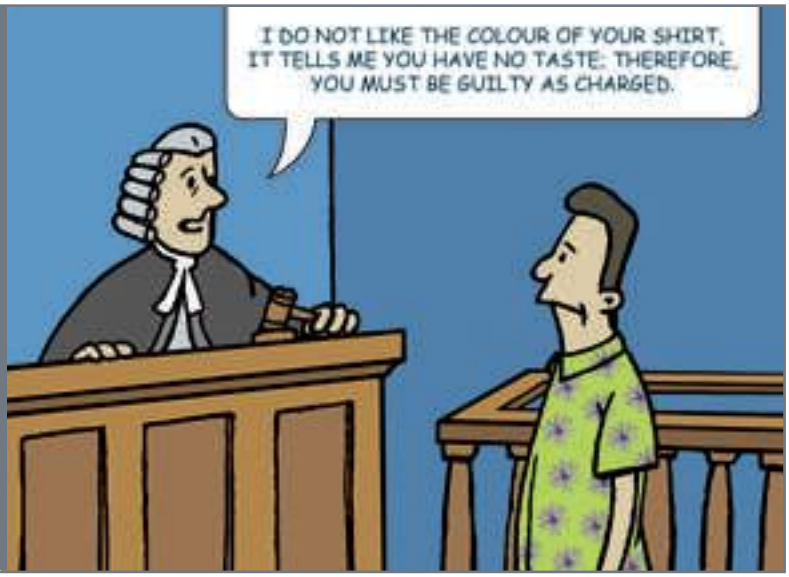
1.4 Procedural fairness and the rule of law

Procedural fairness: the principles of natural justice

Procedural fairness is often referred to as 'natural justice'. The overriding principle of procedural fairness is the concept of fair treatment before the law. The doctrine of natural justice includes:

- the right of a person to participate in legal proceedings in which they have an interest. For example, if a person was charged with a crime but denied the right to attend the trial, we would say this was unfair.
- the right of a person accused of wrongdoing (the **defendant**) to know the accusation made against them. This is essential as it allows the defendant to prepare their defence and gather their own evidence.
- the right of the defendant to have a hearing, during which they are able to present evidence.
- the right to have a matter heard before a court that is free from bias. It is for this reason that judges and juries are required to put aside their personal views about a matter and use only the evidence presented to them to make a decision.

DEFENDANT A person accused of some kind of legal wrongdoing.



Natural justice states that those responsible for making legal decisions must do so without bias and use only the evidence presented to them.

CASE LAW *re Pinochet* [1999] UKHL 1

This case was heard in the House of Lords, the highest court in Britain. It revolved around the concept of natural justice. In an earlier case, General Augusto Pinochet, the former military dictator of Chile who was living in Britain, was ordered to be extradited (to be returned to another jurisdiction) to face numerous charges relating to his rule.

Pinochet appealed this ruling to the House of Lords on the basis that the judge in the case – Lord Hoffman – had been a director of Amnesty International. This organisation had been involved in previous cases against Pinochet that accused him of crimes against humanity.

The House of Lords agreed that Lord Hoffman's close association with Amnesty International created at least a perception of bias and therefore a new trial was ordered with a different Lord hearing the case.

- the right to test the evidence presented in a case. This is often called 'cross-examination' and means that each side is able to question the witnesses who give evidence for the opposing side, in a bid to cast doubt on the evidence of the witness.
- the right of the accused to not have previous criminal convictions or accusations to be brought up during the trial. This ensures that only the evidence relating to the current case is used to make a decision.

STALIN'S SHOW TRIALS

Joseph Stalin ruled the Soviet Union (now the country of Russia) from 1928 until his death in 1953. History's record shows that Stalin was one of the world's worst tyrants. In order to maintain his immense power he oversaw the murder of millions of his countrymen. The entire country lived in constant fear of Stalin's actions.

One of Stalin's favoured methods of terror was the use of show trials. These were designed to create a sense of justice while at the same time sending a powerful message of fear to the Russian people. A typical show trial saw a high-profile Russian, such as a general or political leader, charged with a crime that they had not committed. They would then be tortured until they admitted to the crime, at which point they would be brought before a court. The hapless victim would confess to the crime and a sentence (usually death) would be issued. The accused would be marched to a courtyard off the courtroom and shot. The whole process might take less than a week.

During these show trials the accused were given no legal representation; in some cases they were not even informed of the actual charges brought against them. The accused were not allowed to present any evidence in their defence and they were not permitted to challenge the evidence given by the prosecution. The only role they could play in the case was to plead guilty.

Often the show trials would be broadcast throughout Russia so that Stalin could justify his actions by claiming there were plotters attempting to overthrow the government. These broadcasts were also used to spread fear and discourage any dissent from the people.

Point to ponder

Stalin's real name was Vissarion Iavanovich Djuasgvii. He took the name 'Stalin', which means 'man of steel', after the Russian Revolution in 1917.

The rule of law

The rule of law is a key principle in the legal systems of democratic societies; it means that the use of arbitrary power is eliminated. Arbitrary power is the unrestrained use of power – that is, making decisions without any reference to the law. (This is discussed in greater detail in *Legal Studies HSC*.)

Unrestrained use of power is common in many dictatorships, where rulers can make any decision they wish. However, in modern democracies, constitutions outline the powers of governments and they must act within these powers. In Australia, for example, if the government attempts to pass a law that is beyond its powers the Governor-General and the High Court of Australia are empowered to intervene. (This is known as the separation of powers and is discussed in greater detail in Chapter 4.)

The other element crucial to the rule of law is the notion that the law must be known and that the application of the law will be certain. This basically means that, once a law is made, people are made aware of it so that they can comply with it. Members of society need to also know that the law will be applied equally and fairly, meaning that no individual, no matter how powerful, will be exempt from the law.

Key features of a legal system that complies with the rule of law include:

- an independent **judiciary**. The courts should not be influenced by the Parliament. It is for this reason that it is very difficult for a judge to be dismissed by the Parliament

JUDICIARY **The courts and the judges that sit in them.**

- controls placed on enforcement agencies, such as the police, to ensure that they do not abuse power
- the accused should not be forced to incriminate themselves
- the legal defence for the accused must be free to operate without interference from the prosecution
- the accused must be informed of the allegations made against them
- criminal laws must never be retrospective
- governments are bound by a constitution
- human rights, particularly those relating to **freedom of association**, speech and religion, are protected.

FREEDOM OF ASSOCIATION
The right to form or join a political organisation.

REVIEW

1 Describe the key features of natural justice.
2 Explain why the defendant must know exactly what wrongdoing they are accused of.
3 Outline the concept of cross-examination.
4 Describe the meaning of arbitrary power.
5 Explain the role of the constitutional documents in maintaining the rule of law.
6 Why is it essential that the law is known?

LAW IN ACTION

1 Hold a class debate on the topic 'natural justice makes it too hard to convict the guilty and this is not good for society'.
2 Review the case *re Pinochet* [1999] and complete the following activities.
   a Explain why a new judge was needed in this case.
   b Analyse how this case demonstrated the concept of natural justice.
3 Read the information on Stalin's show trials and complete the following activities:
   a Outline the nature of the show trials.
   b Explain why these show trials failed to provide natural justice.
4 Write your own definition of the term 'rule of law'.
5 In recent years there have been media reports of judges acting inappropriately, including one judge who was accused of falling asleep during trials. These reports led to calls for reforms that would make it easier for judges to be dismissed. What are the advantages and disadvantages of making such reforms? Consider the implications of such changes for the rule of law.

1.5 Anarchy and tyranny

When a society is left without an effective legal system, anarchy can emerge. Such a situation is common after times of war or natural disaster when governments, courts and law enforcement agencies cannot operate effectively. For example, in 2005 Hurricane Katrina devastated the city of New Orleans in the United States. In the days following the hurricane, law and order broke down in the city, leading to widespread looting and other crimes.

Most people will obey laws because they value them and consider it be ethical and moral to obey the laws of their society. However, some people obey the law because they fear the consequences of not obeying the law. The fear of being sent to prison, for example, may act as a deterrent to people considering importing drugs.

Point to ponder

Pirates released the massive oil tanker *Sirius Star* in January 2009, after its owners paid a US$4 million ransom, which was dropped by parachute onto the deck.

When no one is there to enforce the law, such as in New Orleans, then this fear is removed and a state of anarchy can emerge.

In some respects tyranny is the extreme opposite to anarchy. It occurs when there is no check on the power of lawmakers and enforcers. Constitutions, if they exist, are disregarded and consequently there is no rule of law. In countries where there is no democratically elected government, power is taken rather than given by the people. For example, in Myanmar (Burma) power is held by military leaders known as a 'junta' – a group of army generals who ruthlessly crush any resistance to their rule.

ANARCHY IN SOMALIA

Somalia is located on the eastern coast of Africa in a region known as the 'Horn of Africa'. Many years of civil war and religious fighting have left the country in a state of anarchy. The United Nations maintained a peacekeeping force (including Australian troops) from 1992 to 1995, but this proved unsuccessful. An invasion by Ethiopia at the turn of the 21st century also failed to bring about stability. The government has been unable to establish any control outside of the capital, Mogadishu.

More than one million people have been forced from their homes due to war and civil unrest. The infant mortality rate (the measure of children dying before the age of 5) is 145 per 1000 children and around half the population live on less than US$1 per day. The government is powerless to act and people are largely left to fend for themselves.

In recent years Somalia has gained an international reputation for piracy. The waters off the Somali coast are among the busiest in the world, with hundreds of ships carrying millions of tonnes of cargo passing the area every week. By November 2008 more than twelve large ships had been attacked, including a supertanker, the *Sirius Star*, which held more than 2 million barrels of oil from Saudi Arabia. Pirates are free to operate in Somalia because there is no effective law enforcement to stop them.

Effective government has collapsed in the east African nation of Somalia.

Anarchy in Somalia has made it a haven for modern-day pirates.

Countries where tyranny exists are often referred to as 'police states'. This term describes the fact that law enforcers act arbitrarily and without fear of consequence. The rule of law is therefore absent. There is no distinction between lawmakers, law enforcers and the courts; they are all essentially the same organisation and therefore justice is impossible. The rule of law is not applied. This is seen in the way Stalin used the legal system against his enemies in a series of show trials (see page 10 for more details).

REVIEW

1 Outline the meaning of the term 'anarchy'.
2 Under what circumstances can anarchy develop?
3 Explain the importance of deterrent in stopping anarchy.
4 Describe the meaning of tyranny.
5 Outline the nature of a police state.

LAW IN ACTION

1 Review the information on anarchy in Somalia and complete the following activities.
   a Outline the situation of the Somali government.
   b Explain why pirates have been able to operate freely in Somali waters.
2 Using the Internet and other resources, conduct research into a tyrant. Possible examples include Adolf Hitler, Benito Mussolini, Robert Mugabe, Idi Amin or Joseph Stalin. Outline the nature of their rule including how they came to power and the impact of these rulers on the lives of individual citizens.

CHAPTER SUMMARY

Laws are special types of rules made by a person or institution that has the sovereign power to make laws. Laws are universal, meaning that they apply to all people all of the time. In Australia both the Parliament and the courts have such sovereign powers. Laws that are made by Parliament are known as statute laws, while the term 'common law' describes those laws made by judges.

Customs can be defined as the ways of behaving that have been established through long-standing traditions. Customs are usually enforced through social pressure, although some customs will be considered so important that they will be made into laws and can be strictly enforced. Rules are established to ensure the smooth operation of society, and apply only to certain people at certain times.

Laws reflect the values held by the society that makes them. Values reflect those things that society considers important. Ethics – what is considered right and wrong – also influence the nature of the law.

For a law to be accepted it must be just. Just laws will be equal in the way they apply. They will also be based on widely held values, aim to reduce inequalities and be widely known.

The key features of justice include equality, fairness and access. There has been some criticism of the extent to which people have good access to Australia's legal system. The cost of legal representation and the fact that in Australia there is no automatic right to a lawyer are said to reduce access to the legal system and thus affect the provision of justice.

The rule of law refers to the notion that there are checks on the power of lawmakers and law enforcers. It means that everyone, regardless of their position, wealth or power, must comply with the law. Where the rule of law is absent, anarchy may form; that is, where there is no effective government to enforce the law.

MULTIPLE-CHOICE QUESTIONS

1 Laws are universal. What does this mean?

- **A** They are created by God.
- **B** They apply constantly and consistently.
- **C** They are made by Parliaments on behalf of the people.
- **D** They apply to the citizens of a country but the rulers are exempt.

2 What are customs?

- **A** Regulations about trade
- **B** Behaviours based around religious beliefs
- **C** Laws relating to the way governments must rule
- **D** Behaviours based around long-standing traditions

3 Which of the following best describes the meaning of ethics?

- **A** Expectations of good behaviour
- **B** Society's beliefs about what is right or wrong
- **C** The rules that judges are expected to follow in making decisions
- **D** The way laws are influenced by the changing values of a society

4 What are the features of justice?

- **A** Equality, fairness and access
- **B** Fairness, morality and equality
- **C** Fairness, procedural fairness and ethics
- **D** Access, minimal delay and retrospective laws

5 Alex is arrested for drug trafficking but he was never informed of the actual crime with which he was charged. What legal principle has not been meet in this instance?

- **A** Anarchy
- **B** Legal bias
- **C** Rule of law
- **D** Natural justice

SHORT-ANSWER QUESTIONS

1 Outline the features of natural justice.

2 Outline the consequences of anarchy.

3 Define the meaning of anarchy.

4 Describe, using examples, how the law is influenced by the values held by society.

5 Differentiate between a rule and a law.

6 Explain under what circumstances a law would be considered to be just.

7 Analyse the importance of laws being a reflection of the values and ethics of the society for which they are made.

8 Assess the importance of the rule of law in the effective functioning of society.

CHAPTER 2

Sources of contemporary Australian law: Common law

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

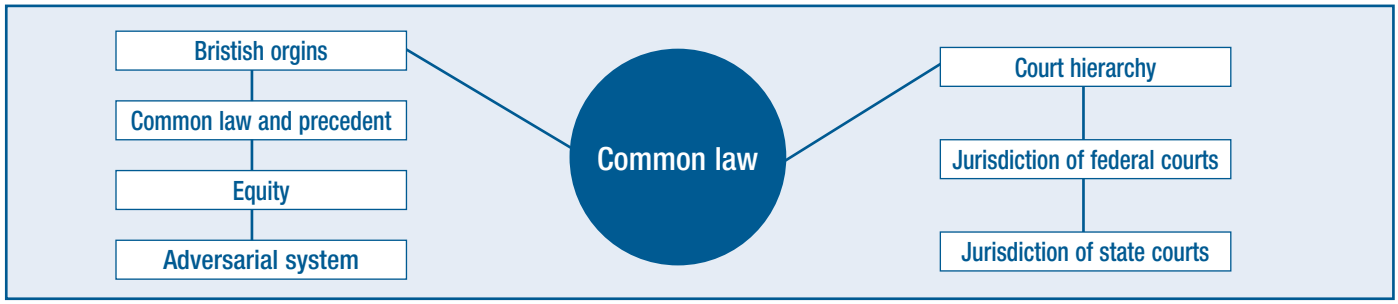
P4 describes the operation of domestic and international legal systems

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines the key features of common law, including its British origins. The legal concepts of equity, precedent and the adversarial system are also examined in detail. The federal and New South Wales court hierarchies are also discussed.



SUMMARY OF CASE LAW

Curro v. Beyond Productions Pty Ltd [1993] 30 NSWLR 337
Hawthorn Football Club Ltd v. Harding [1988] VR 49
Lumley v. Wagner (1852) 42 ER 687
Warner Bros Pictures Inc. v. Nelson [1937] 1 KB 209

SUMMARY OF LEGISLATION

Family Law Act 1975 (Cwlth)
Judicature Act 1873 (UK)
Provisions of Oxford 1258

2.1 The British origins of common law

The common-law system first developed in England and is therefore often referred to as 'English common law'. Upon colonisation by the British, Australia adopted a common-law legal system. Other countries using this system include Great Britain, Canada, New Zealand and the United States of America.

Common law can be best described as a collection of legal principles and rules that is derived from the decisions of judges in higher courts. However, the term 'common law' – or 'judge-made law' – is also used to differentiate between law that is developed by judges and law that is imposed by parliaments. It is this second usage that is most commonly associated with common law.

Judges are required to obey **statute law**; that is, law developed by parliament. However, when no relevant statute law exists a judge will turn to common-law principles to resolve the dispute. A judge may also use common law in order to interpret statute law. If both common and statute law exists, then the statute law must always be followed.

STATUTE LAW **The body of law made by parliaments.**

Common law is the term used to describe laws that are made by judges rather than parliaments.

HISTORICAL DEVELOPMENT OF COMMON LAW

Common law developed after the Norman invasion of England in the 11th century. In order to consolidate his position in the newly conquered country, William the Conqueror sent judges around the country. They were given three main tasks by the king:

1. to administer a uniform set of laws throughout the country
2. to report to the king any threats to the throne
3. to assess the wealth of the country in order to determine what taxes could be levied.

By the end of the 12th century the practice of sending royal justices throughout the country 'on circuits' was well established. These royal justices ensured that their rulings were similar, thus developing the concept of precedent. As a consequence, a set of quite uniform laws developed throughout the country.

In 1258 the Provisions of Oxford – a form of constitutional control on the king – were drawn up. One effect of this was to greatly reduce the flexibility of common law. In essence, it required a case to fit into a precedent that had already been set, which made it very difficult for a person to bring a case that was new.

Equity

The inflexibility introduced into the common law by the Provisions of Oxford led many people to turn to the King to have their disputes heard. They believed that justice could only be achieved through the King, who was the 'guardian' of justice and had discretionary power to overrule any decision made by the courts. This became an effective way for people to bring cases for which there was no precedent. The King decided on cases using the concept of equity (or fairness) and his conscience. In essence, the King's decision was based not on the dictates of precedent but instead on achieving the fairest outcome.

The Office of the Chancellor had grown in power and prestige during the reign of Henry II (1154–1189). The Chancellor played many roles: he was the King's secretary, the royal Chaplain and – importantly – the 'keeper of the King's conscience'. The King was thus able to delegate to the Chancellor the role of hearing and deciding on the growing number of disputes that came to the King for resolution.

By the 14th century, the Courts of Chancery had been established to administer a new set of laws: the laws of equity. These courts provided a far wider range of legal remedies than the common-law courts; for example, the main remedy in common law is to order monetary compensation, while, equity law provides for other remedies, such as **injunctions** and **specific performances**, which are more in keeping with the concept of fairness. Over time, two types of judge-made law developed: common law and equity.

INJUNCTION A court order that requires a person not to do something; for example, not to print a particular story in a newspaper.

SPECIFIC PERFORMANCE A court order that requires a person to fulfil an obligation they undertook as part of a contract.

The principles of equity were laid down in the 12th century, during the reign of King Henry II of England.

The main principles of equity law are:

- to modify a remedy in common law that is deficient, or to create a new remedy
- to develop remedies for wrongs that the common law does not recognise.

In order to obtain an equitable remedy the person seeking the remedy must not have breached any laws in order to obtain it. Equity law is intended to assist the diligent and not those who act in a lazy or tardy way.

For several hundred years England had two parallel legal systems: common law and equity. It became clear that the two systems were often in conflict with each other, sometimes providing alternative decisions in the same dispute. In 1620, King James I attempted to overcome this problem by announcing that where a conflict arose the equity decision would prevail.

Finally, the two legal systems were combined under the *Judicature Act 1873*, which created the Supreme Court of Judicature. Under this Act, courts were instructed to take into account the principles of equity. Therefore the principles of equity are now considered part of the common-law system.

A comparison of the features of common law and equity

Common law	Equity
A complete legal system	A series of isolated principles
Common-law rights are extended to all people	Rights of equity are valid only to those people specified by the court
Common-law remedies are enforceable at any time (within the statutory limitations)	Equitable remedies must be applied for promptly
Common law is non-discretionary and must follow precedent	Equity is discretionary

Point to ponder

In a legal sense when discretion can be used it means that the person making a decision is not bound to follow a certain action.

CASE LAW *Lumley v. Wagner* (1852) 42 ER 687

Wagner, an opera singer, had been contracted to sing at a theatre by the promoter, Lumley. A clause within Wagner's contract stated that she could not sing anywhere else during the period of the contract unless she had the written agreement of Lumley. Wagner broke this part of the agreement and Lumley sought an injunction to stop her singing elsewhere.

The English Court of Appeal held that an injunction should be granted. The Lord Chancellor stated 'I have not the means of compelling her to sing, but I [can] compel her to abstain from the commission of an act which she has bound herself not to do'.

Since this case there have been many other similar injunctions granted. For example, in 1937 Bette Davis was forced to stop working for a rival film company as she was in breach of her contract (*Warner Bros Pictures v. Nelson* [1937] 1 KB 209). In another case, a player for the Hawthorn football club was restrained from playing with another club (*Hawthorn Football Club Ltd v. Harding* [1988] VR 49) and in 1993 a television presenter was stopped from appearing in a program on a rival station (*Curro v. Beyond Productions Pty Ltd* [1993] 30 NSWLR 337).

REVIEW

1. Describe the two main meanings of the term 'common law'.
2. Explain under what circumstances a judge can turn to common-law principles when deciding a case.
3. What was the impact of the Provisions of Oxford (1258) on common law?
4. Explain why the concept of equity developed.
5. How did the King make his decisions when using the principles of equity?

LAW IN ACTION

1. Create a timeline outlining the development of common law and equity.
2. Write an extended response explaining the differences between common law and equity.
3. Examine the case *Lumley v. Wagner* and complete the following activities:
   - **a** Explain why Lumley sought an injunction against Wagner.
   - **b** Why did the court grant the injunction?
   - **c** Analyse the facts of this case and explain how the court in reaching its decision has used the concept of equity.

PRECEDENT A judgment made by a court that establishes a point of law.

2.2 The system of precedent

One of the main features of the common-law system is the doctrine of **precedent**. A precedent can be defined as 'a judgment made by a court that establishes a point of law'. Until the development of parliaments and statutory law, precedent was the primary source of law relied on by judges.

A judge who follows precedent is attempting to resolve a legal issue in a certain way because a similar issue was resolved in this way in the past. This legal process of following precedent is known as *stare decisis*, or literally, 'to stand by a decision'.

The aim of the doctrine of precedent is to ensure that people will be treated equally and fairly in their dealings with the legal system. Precedent gives everyone the assurance that certain rules and procedures exist that make it possible to predict, with some certainty, the likely outcome of a dispute. Therefore the doctrine limits the power of the judge to make new rulings when a decision about a similar case has already been made. In this sense the discretion of the judges, a key feature of equity, is limited.

HISTORICAL DEVELOPMENT OF PRECEDENT

Like equity, the doctrine of precedent developed from the circuit courts. The judges of these courts would travel from town to town and hear any matter that had arisen since the court last sat; this could be as long as a year. One of the potential problems with this system was that judges could develop their own laws. Judges were often required to fill in gaps in the common law as new cases developed, which left open the chance that each group of judges could develop a different set of laws for the same situation.

To overcome these problems, circuit court judges would regularly return to the central courts to compare their decisions. From the pool of decisions that had been made by the judges, the most appropriate were selected and these become known as precedent decisions. These precedents were then used by all the judges when they returned to their circuits.

Making precedent

There are two main ways that precedent is developed:

1. Precedent is created when a judge arrives at a decision in a case when there is no existing common or statute law. In these cases the judge must rely on common sense and the principles of law for guidance in making the decision. Many of the laws relating to murder have been created in this manner – for example, the defences of provocation and self-defence. The cases in which these defences were first used then set a precedent that subsequent courts could follow in similar cases.
2. Precedent can also be created by the way judges interpret legislation. While parliament is responsible for the creation of legislation, courts still need to interpret the law, or to determine the meaning of certain words. For example, in Victoria a person can only be found guilty of burglary if they enter a 'building'. The legislation does not define what a building is, leaving it up to the courts to decide.

Rules of precedent

Binding precedent

Where binding precedent occurs, a court must follow the precedent already set, whether it believes the decision is correct or not. For example, in 2001 Judge Latham of the New South Wales District Court handed down a controversial sentence in a sexual assault case. The Judge was bound by precedent to impose a sentence that was considered lenient by some in the media. The rules of precedent, however, ensured that the sentence the judge gave was in keeping with sentences handed down by judges in similar cases.

In New South Wales, a precedent is binding when it has been set by a higher court. For example, the New South Wales District Court must follow the rulings of the New South Wales Supreme Court. The judge is only bound by the ***ratio decidendi*** – the reason for the decision – of the higher court. Other statements made by the Supreme Court judge, known as ***obiter dicta***, may be taken into account but do not create a precedent.

Precedent only applies if the case is sufficiently similar to the one that set the precedent. A precedent set by another court in another jurisdiction would not be binding. For example, a precedent set by the Victorian Supreme Court would not apply in New South Wales.

RATIO DECIDENDI A statement by the judge about the reason for their decision. It creates a precedent that lower courts must follow.

OBITER DICTA Other statements made by judges, such as their personal opinions. These create no immediate precedent, but can be used much later to justify a precedent.

Persuasive precedent

Persuasive precedent may influence a decision, but a court is not bound to follow it. Examples of this type of precedent include judicial statements made by a judge, or decisions made by courts in other jurisdictions. For example, a decision made by the House of Lords in Britain may be quoted in a case in New South Wales, but it is not binding.

How persuasive a precedent is will depend on two main factors:

- the judge. A court is more likely to take into account a precedent set by eminent and influential judge
- the court. The higher the court, the more persuasive the precedent will be.

The operation of the doctrine of precedent in Australia

Court	Binding precedent	Persuasive precedent
High Court	All state and federal courts	High Court and courts in some other countries
Full Court of Federal Court	Single judge of Federal Court and Full Court of Federal Court	High Court and courts in other hierarchies
Single judge of Federal Court	Single judge of Federal Court	Courts in other hierarchies
Courts of Appeal (NSW, Vic., Qld), Full Bench and Full Court of Supreme Court	Single judge of Supreme Court, District Court (County Court in Vic.) and Magistrate's Court in same jurisdiction	High Court and courts in other hierarchies
State Supreme Courts	District Court (County Court in Vic.) and Local Court in same jurisdiction	High Court and courts in other hierarchies
Privy Council (UK)	None in Australia	All Australian courts
House of Lords (UK)	None in Australia	All Australian courts

AVOIDING THE USE OF PRECEDENT

A judge is entitled to avoid the use of precedent in some circumstances, especially where the use of precedent may result in an unjust legal outcome. Judges can avoid precedent by:

- *distinguishing the case*. A judge may decide that the facts of a current case are sufficiently different to a previous case that precedent does not have to be followed.
- *reversing a judgment*. When a matter is appealed to a higher court, there is a possibility that the appeal will be upheld. This means that the decision, and therefore the precedent set by the lower court, will be reversed.
- *overruling a decision*. This is similar to reversing a decision, but involves two separate cases. For example, a person is found guilty of an offence in a lower court. Another person is then tried for a similar offence with similar facts in a higher court. If the higher court decides the ruling of the lower court was wrong, it may overturn the decision and therefore the lower court's precedent.
- *disapproving a decision*. A case from another court system may be referred to a judge for consideration. The judge, however, may simply refuse to consider the case because it comes from another jurisdiction.

REVIEW

1 Explain what a judge does when following precedent.
2 Outline the aims of the doctrine of precedent.
3 How was the concept of precedent developed?
4 Describe the two forms of making precedent.
5 Explain the difference between binding and persuasive precedent.

LAW IN ACTION

1 In small groups, develop a list of advantages and disadvantages of using the doctrine of precedent in the judicial system. Share your list with the class.
2 In which of the following circumstances would binding precedent, persuasive precedent or no precedent apply? Explain your answer for each.
   - **a** A case in the New South Wales Supreme Court where a case heard in the Western Australian Supreme Court is raised
   - **b** A case in the Victorian District Court where a case heard in the High Court is raised
   - **c** A case in the New South Wales District Court where a case in the Local Court is raised
   - **d** A case in the High Court where a case from the Supreme Court of the United States is raised

2.3 The adversary system

CROSS-EXAMINATION When a lawyer for one party in a case asks questions of a witness called by the opposing party.

As we know, the Australian legal system has been heavily influenced by English law. One of the main characteristics of English law is its use of the adversary system. This means that in each case there are two opposing sides who argue their case before a court, which is presided over by a neutral third party.

As long as they abide by the rules of evidence, each side has control over what evidence it introduces to the court and over the witnesses it may call to support its case. The opposing side then tests the evidence by asking questions of witnesses (**cross-examination**) and by introducing other witnesses and evidence to counter

the other side's evidence. At the conclusion of the case, the presider (judge or magistrate) or a jury will decide which version of events they believe; one side will win and the other will lose. Neither the presider nor the jury has any role in testing the evidence; for example, a judge cannot cross-examine a witness.

There are many criticisms of the adversary system. Some people argue that it creates a legal system where the case is won by the best and most persuasive argument rather than on the evidence. On the other hand, the system allows the rigorous testing of evidence by both sides. In recent years there have been moves to reduce the adversarial nature of some cases; for example, the greater use of **mediation** in family law matters is designed to reduce time, costs and animosity between parties in dispute. In criminal law, there have been changes to the way that some witnesses, such as children and victims of sexual assault, are cross-examined to reduce the trauma of the trial process.

MEDIATION **Where two parties in dispute meet to discuss their concerns through mutual negotiation.**

Key features of the adversary system

REVIEW

1 Describe the key features of the adversarial system.
2 Explain the process of cross-examination.
3 Why is cross-examination such an important part of the adversarial system?

LAW IN ACTION

1 Write a newspaper editorial on the topic of the adversary system. Your editorial should be either in support of or against the continued use of the system in Australia.
2 In small groups, brainstorm a list of the advantages and disadvantages of allowing the cross-examination of witnesses in a trial.

2.4 The court hierarchy

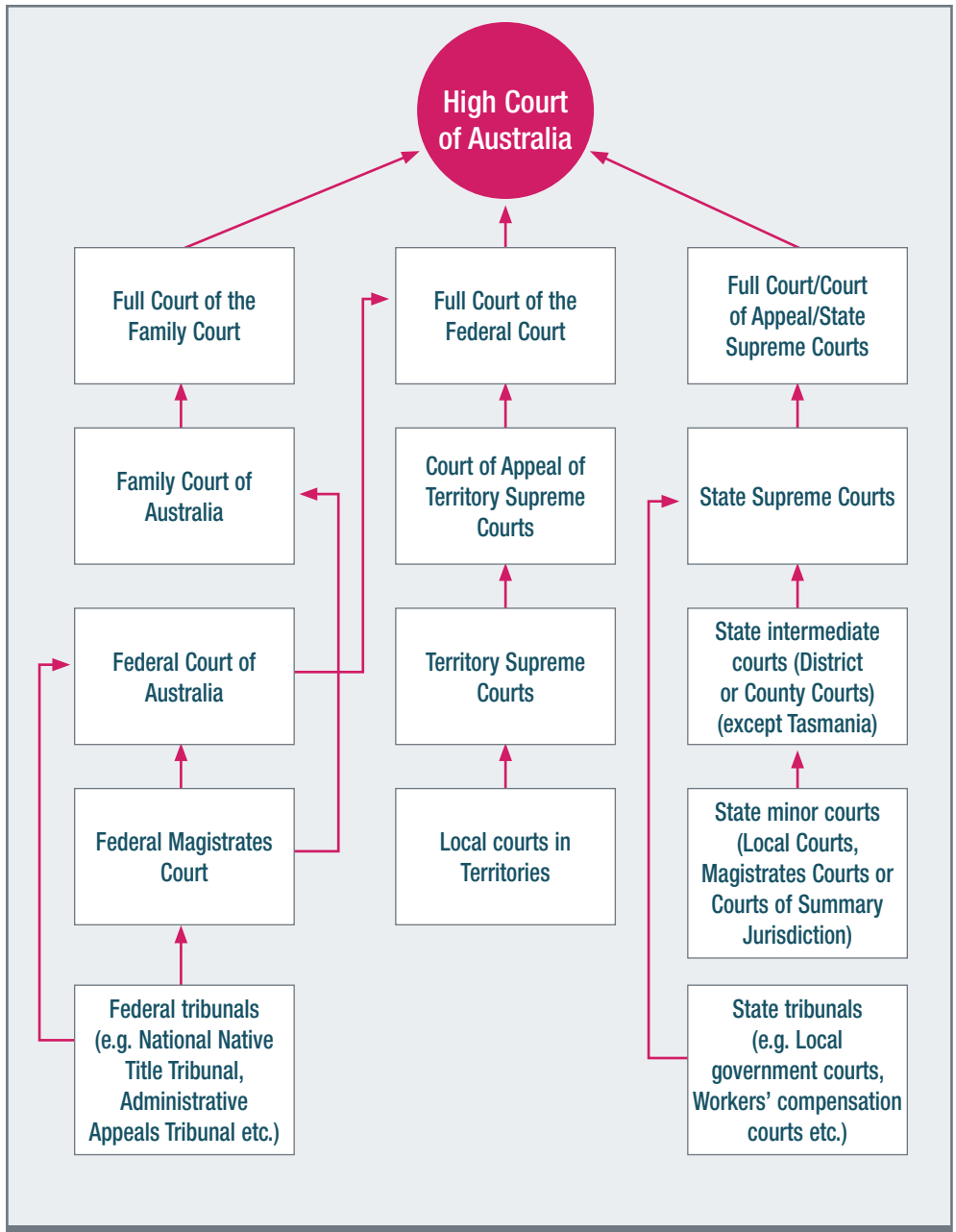
JURISDICTION The area over which certain laws and powers lie.

ORIGINAL JURISDICTION The power of a court to hear a case for the first time.

APPELLATE JURISDICTION The power of a court to hear a matter on appeal from a lower court.

Australia is a federation and as a result there are two levels of law that apply: state and federal law. (This is discussed in greater detail in Chapter 4.) The Australian Constitution grants certain legal powers to the Commonwealth (federal) Government and others to the state and territory governments. Consequently there are separate state and federal **jurisdictions**, each having its own court structure.

All courts have an **original jurisdiction**; that is, the power to hear certain cases for the first time. For example, the High Court has original jurisdiction to hear matters relating to the Constitution. In addition to the original jurisdiction, many courts also have an **appellate jurisdiction**. This means that the court has the right to hear cases that were originally dealt with by a lower court but which have been subject to an appeal.



The structure of state and federal courts

UNDERSTANDING KEY LEGAL TERMINOLOGY USED IN THE COURTS

- Criminal matter: Where a person is accused of breaking a law created by parliament
- Civil matter: A legal dispute between two or more parties
- Summary offence: A less serious criminal matter, such as drink driving
- Indictable offence: A serious criminal matter, such as armed robbery or murder
- *Prima facie* case: A situation where the evidence suggests that a jury would be likely to convict the defendant

The state court hierarchy

New South Wales, like all the other states, has a hierarchical court structure. This means that courts are 'ranked'. The position of the court within the hierarchy indicates the type of case that will be dealt with by the court. There are three main tiers within the hierarchy; inferior, intermediate and superior courts.

Log on to the Pearson Places website and follow the links to find more information on the Courts of New South Wales.

Inferior courts

The Local Court

Sometime referred to as the Magistrates Court, this is the lowest court in the hierarchy. The aim of this court is to settle disputes at a local level, cheaply and quickly. There is less emphasis on formality in this court although the basic procedures are retained. The Local Court has two jurisdictions in which it hears matters:

1 Criminal jurisdiction. There are two areas of criminal law over which the Local Court has jurisdiction:
   - All summary offences. These are less serious crimes, such as drink driving and shoplifting. The magistrate deals with these matters determining guilt and issuing punishment.
   - Committal proceedings. These are preliminary hearings for more serious offences, known as indictable offences. The aim of the committal is for the police to demonstrate that have a *prima facie* ('on the face of it') case – that there is sufficient evidence that a jury would likely convict this person. If the magistrate considers there is sufficient evidence then the case will be scheduled for a trial in a higher court to test the evidence.

2 Civil jurisdiction. The Local Court hears only relatively minor civil matters, such as debt claims. Matters involving up to $60 000 will be heard in the court.

Point to ponder

About 98 per cent of all criminal and civil matters are finalised in the Local Court.

Coroner's Court

The role of the Coroner's Court is to investigate unexplained deaths and fires. Like the Local Court, the Coroner's Court can commit a defendant to trial in a higher court if there is a *prima facie* case.

Children's Court

This court deals with any summary or indictable matter involving persons under the age of 18 at the time of the offence, or less than 21 when charged with a crime they committed when less than 18. The only exception to this is the charge of murder, where the Children's Court conducts a committal proceeding and the trial is held in the Supreme Court.

Point to ponder

The New South Wales Consumer, Trader and Tenancy Tribunal (CTTT) also deals with small civil matters, involving amounts of no more than $25 000.

Land and Environment Court

This court deals with matters involving environmental planning and land compensation. It also deals with appeals in relation to local council decisions. One of the main areas of its work involves hearing matters where individuals or businesses have been charged with environmental offences, such as illegal pollution.

Intermediate courts

The District Court

The District Court deals with more serious matters and is presided over by a judge, who is referred to as 'your honour'.

- Criminal jurisdiction. The District Court deals with the majority of indictable offences, such as robbery and assault. Cases are heard before a judge, whose role is to decide on questions of law, and a jury which, in nearly all cases, consists of 12 randomly selected citizens whose role is to determine guilt. If the defendant is found guilty, the judge is responsible for sentencing.
- Civil jurisdiction. The District Court hears civil matters involving amounts between $60 000 and $750 000 (matters concerning greater amounts may be heard if all parties agree) and any matter involving compensation for motor vehicle accidents. In most cases a judge determines the case alone, although a jury consisting of four or six people may be used.
- Appellate jurisdiction. The District Court can hear appeals from the inferior courts. A case may be appealed because the penalty imposed was inappropriate, an error in law may have been made by the magistrate or new evidence has come to light.

Superior courts

The Supreme Court

The New South Wales Supreme Court is the highest court in the state hierarchy. In general terms, it hears the most serious cases and those that involve difficult points of law. The Supreme Court of each state is a **Court of Record**. This means that its decisions create precedent, and therefore this court is important in the establishment of common law.

- Criminal jurisdiction. This court hears the most serious indictable offences, such as murder, serious sexual assault and kidnapping. All cases are heard before a judge and jury, who have the same role as in the District Court.
- Civil jurisdiction. There is no upper limit on civil matters in the Supreme Court, although the minimum is $750 000. As in the District Court, most civil matters are dealt with by a judge alone, although juries of four, six or ten may be used in some cases.
- Appellate jurisdiction. In New South Wales, a special division of the court (known as the Court of Appeal) hears appeals to the Supreme Court. The right to appeal is not automatic and applicants must demonstrate that they have a good reason to appeal. This is known as 'seeking leave to appeal'.

COURT OF RECORD **A court whose decisions can establish a precedent.**

Log on to the Pearson Places website and follow the links to find more information about the courts of New South Wales: the Local Court, the District Court, the Supreme Court, the Coroner's Court, the Children's Court and the Land and Environment Court.

The Supreme Court of New South Wales is at the top of the court hierarchy in New South Wales.

Federal courts

In addition to the various courts of each state, the Commonwealth has its own hierarchy of courts that deal with matters of federal law.

The Federal Magistrates Service

The Federal Magistrate has jurisdiction in areas of family law and also parts of bankruptcy and trade practices law. The service also hears appeals from Commonwealth tribunals, such as the Human Rights Commission.

The Family Court of Australia

The Family Court was established in 1976 as a part of the sweeping changes to family law that were introduced by the *Family Law Act 1975* (Cwlth). It is a special court that deals with matters of family law, in particular divorce, custody of children, maintenance and the division of property. Most matters are dealt with by a single judge, although the Full Bench of the Family Court deals with appeals.

The Federal Court of Australia

Also established in 1976, the Federal Court, like the state's Supreme Court, is a Court of Record. Its jurisdiction is broad and includes matters such as trade practices, industrial relations, intellectual property (copyright), taxation and immigration. Most matters are dealt with by a single judge, but appeals are heard by the Full Court of the Federal Court, comprising three judges. Appeals can come from the decisions of a single judge of the Federal Court, single judges of the state's Supreme Court and appeals from state Supreme Courts that exercise federal jurisdictions.

The High Court of Australia

The main role of the High Court of Australia is to deal with matters involving the Constitution (this is discussed in greater detail in Chapter 4). When dealing with a matter for the first time, the case is heard by a single judge, except where the Constitution is involved, when five judges hear the case. The court is a Court of Record and consists of a Chief Justice and six other justices.

Log on to the Pearson Places website and follow the links to find more information about the federal courts: the Federal Magistrates Service, the Family Court of Australia, the Federal Court of Australia and the High Court of Australia.

REVIEW

1. Differentiate between a court's original jurisdiction and its appellate jurisdiction.
2. Explain the jurisdiction of the Local Court.
3. What is the role of the Coroner's Court and the Children's Court?
4. Describe the jurisdiction of the Supreme Court and District Court of New South Wales.
5. Under what circumstances can an appeal be made to a higher court?
6. Describe the jurisdiction of the Federal Court of Australia.
7. Explain the function of the High Court of Australia.

LAW IN ACTION

1. Start a media file by collecting newspaper clippings about cases heard the various courts. Categorise the cases by the courts in which they are heard.
2. Working with a partner, decide which court would hear the following cases:
   - **a** A 16-year-old girl charged with stealing a car
   - **b** A company accused of using a rival company's design for a new computer product
   - **c** A builder accused of disposing of building rubble in a national park
   - **d** A 32-year-old man accused of importing two kilograms of an illegal drug
   - **e** A father seeking the custody of his daughter after a divorce
   - **f** A mysterious fire in which a person was killed
3. Before an appeal can be made to the High Court, the person seeking the appeal must first apply. Do you think this should be the case or should everyone have the right of appeal? Explain your response.

CHAPTER SUMMARY

The Australian legal system is based upon common law – a type of legal system that first developed in England after the Norman conquest in the 11th century. Where common law could not bring justice, the king applied the principle of equity – a concept that was intended to create fair outcomes. For several centuries common law and equity ran as parallel legal systems in England. Finally, with the passage of the *Judicature Act 1873*, equity ceased to operate as a separate system and its principles were incorporated into the common law.

The common-law system allows judges to make laws, known as common law, when they are presented with a situation in which no appropriate statute law exists. (A statute is a law made by Parliament.) When a statute is passed that fills this gap, the common law ceases to exist.

Another key feature of common law is the use of the adversary system, which dictates how evidence is presented in a legal case. During a trial, each side presents evidence in support of its own case. The other side then has the opportunity to test this evidence and to introduce new evidence that contradicts it. Witnesses are called to give evidence and the other side has the right to cross-examine the witnesses in a bid to discredit their evidence.

One of the main features of the common-law system is the doctrine of precedent. A precedent can be defined as 'a judgment made by a court that establishes a point of law'. Until the development of parliaments, precedent was the primary source of law for judges to use.

There are two main types of precedent:

- Binding precedent. This type of precedent is set by a higher court and must be followed by lower courts. Failure to follow the precedent will result in an error in law.
- Persuasive precedent. This is precedent that a judge may wish to follow but is not required to. Examples include precedents set in different jurisdictions and by lower courts.

The Australian common-law system is administered by a court hierarchy that distinguishes the roles of the courts based on the types of cases heard in the court. At the broadest level, courts are divided into those with a federal jurisdiction and those with whose jurisdiction is at a state level.

The Local Court is the main inferior court in New South Wales and deals primarily with summary offences. These are minor offences and are heard in front of a magistrate only. The Local Court also conducts committal hearings for indictable (more serious) offences. These hearings test the evidence of the prosecution to decide whether a case should be sent to trial.

The District Court is the intermediate court and deals with most indictable offences. Trials here are presided over by a judge and each case is determined by a jury of 12 randomly selected people. More serious indictable offences and very large civil-law matters involving amounts over $750 000 are heard in the Supreme Court.

At a federal level, the Federal Court deals with most federal law matters. The High Court of Australia deals with constitutional law matters as well as being the final court of appeal for Australia. The High Court hears appeals from the Federal Court and the state Supreme courts.

MULTIPLE-CHOICE QUESTIONS

1 Which of the following statements best describes common law?

- **A** Laws made by parliament that apply to all people
- **B** Laws that are created by a vote of all people
- **C** Laws that are made by judges when no parliamentary laws apply
- **D** Laws that are applied to common problems faced by most people in society

2 What is a binding precedent?

- **A** A precedent set by parliament
- **B** A precedent that is made using the principles of equity
- **C** A precedent set by a higher court that must be followed by lower courts
- **D** A precedent that is only used in criminal law matters and does not apply to other types of law

3 What is a court of record?

- **A** A court whose decisions set precedent
- **B** A court that hears appeals from lower courts
- **C** A court where members of the public are allowed to attend
- **D** A court where proceedings are shown on television

4 The State of Victoria believes that the Commonwealth Government has taken away some of the powers granted by the Constitution. Which court should Victoria have this matter heard in?

- **A** The state's Court
- **B** The Constitutional Court
- **C** The High Court of Australia
- **D** The Supreme Court of Australia

5 In the case *Lumley v. Wagner* (1852) Lumley was granted an injunction. What is an injunction?

- **A** An order to pay an amount of money
- **B** An order to stop the performance of a certain act
- **C** An order to change a contract between two parties
- **D** An order to have a dispute settled by a trial with a jury

SHORT-ANSWER QUESTIONS

1 List the main federal courts.

2 Define the legal concept of common law.

3 Describe the historical development of equity.

4 Compare and contrast the features of common law and equity.

5 Explain the different types of precedent.

6 Explain the differences between the local and district courts.

7 Analyse the key features of the adversary system.

8 Assess the validity of this statement: 'There are too many courts in Australia.'

CHAPTER 3

Sources of contemporary Australian law: Statute law

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

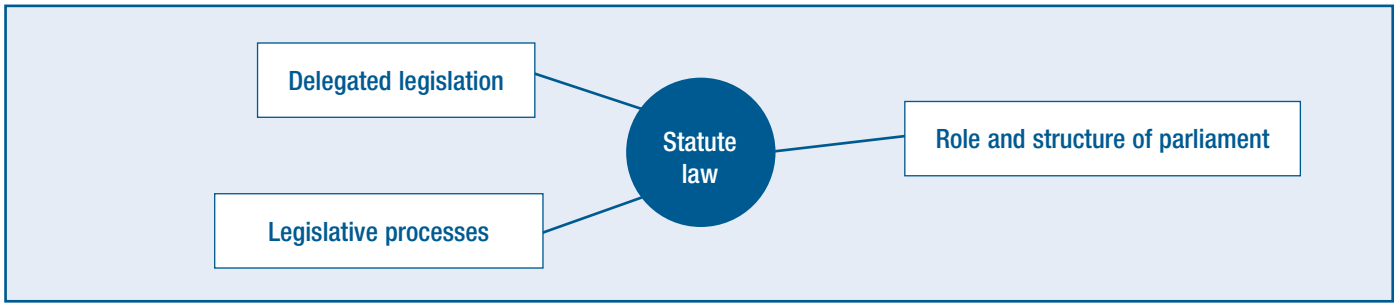
P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses



PRINCIPAL FOCUS

This chapter examines the nature of statute law. Particular attention is paid to the role of parliament in the development of statute law. The role of delegated legislation and the way that it is made is also examined.

SUMMARY OF LEGISLATION

Biofuel (Ethanol Content) Act 2007 (NSW)
Constitution of the Commonwealth of Australia
Corporations Act 2001 (Cwlth)
Local Government Act 1993 (NSW)
Parliamentary Committees Enabling Act 1996 No 143 (NSW)
The *Australia Acts 1986* (Cwlth and UK)

3.1 The role and structure of parliament

Australia is a parliamentary democracy. This means that the people of Australia elect representatives who in turn make decisions and pass laws in the name of the people. If those elected by the people no longer satisfy the wishes of the majority of citizens then the people will have the opportunity to vote them out of office at the next election.

The key role of parliament is to pass laws. Any law passed by the parliament is called a statute. As discussed in the previous chapter, Australia also uses judge-made laws, or 'common law'. Statute law is considered to be superior to common law. Legislation has the power to alter common law and, in cases where common law and statute law conflict, the statute has precedence. However, there are a few exceptions to this rule. For example, in employment law, if an award agreement created under an Act is not as favourable to an employee as a relevant contract created by common law, then the common-law contract will prevail.

Statute law is the body of law created by parliaments.

BICAMERAL PARLIAMENT A parliament with two houses.

Parliamentary structure

With the exception of Queensland, all state parliaments and the Commonwealth Parliament in Australia are **bicameral**, meaning that they have two houses: an upper and a lower house. Queensland is a unicameral parliament, having only a lower house.

At the federal level the two houses are the Senate (the Upper House) and the House of Representatives (the Lower House). Above the two houses is the position of Governor-General. The parliament is elected for a maximum period of three years. However, the government has the right to seek an election at any time before the three-year term expires.

The House of Representatives

Despite being known as the Lower House, the House of Representatives is in fact the more powerful house. It is sometimes referred to as the House of Government, as the political party that holds the majority in this House forms the government, and its leader becomes the Prime Minister.

The House of Representatives has 150 members, with each member representing an electorate. Each electorate holds approximately 80 000 voters, so some electorates in the large cities cover a very small area: just a few square kilometres. Other electorates, however, are enormous; those in remote Australia cover thousands of square kilometres. Members here often use aircraft to visit their constituents. Members of the House of Representatives are elected for a maximum term of three years.

Traditionally, the members of the House of Representatives have been drawn from the three main political parties: the Australian Labor Party, the Liberal Party of Australia and the National Party of Australia. The Liberal and National parties have for many years been in coalition, meaning they tend to vote as one group on most issues. The coalition was also formed so that the two parties could create a majority to form government. One interesting trend in recent years has been the growth in the number of seats won by independents (politicians who are not members of any particular party) in the House of Representatives.

The key role of the House of Representatives is to make new laws and amend existing ones. When a new piece of legislation is first introduced into the House, it is known as a Bill; if it is passed – that is, enacted into law – it becomes an Act of Parliament. Most new legislation is introduced in the House of Representatives.

Log on to the Pearson Places website and follow the links to find more about the House of Representatives.

Point to ponder

The electorate of Kalgoorlie in Western Australia is the largest electorate in the world. It covers almost 2.3 million square kilometres!

The Senate

The Senate is otherwise known as the States House, because its role is to represent each of the six states and the two territories. Each state is represented by 12 senators and each territory by two senators. Senators represent their entire state, not just one electorate; this means that minor parties (those with fewer votes) have a greater chance of being successfully elected to the Senate rather than to the House of Representatives.

Each senator is elected for six years, which is twice as long as members of the House of Representatives. A system of rotation means that half of the Senate retires every three years; retiring senators may then seek re-election for another six years. The exception to this is senators who represent the Australian Capital Territory and the Northern Territory; they serve three-year terms. If a senator leaves the parliament before the end of their term – for example, they retire due to illness or die – the state parliament from the state represented by the senator selects a new senator to take their place. Although, not legally required, convention states that the new senator will be selected from the same political party as the one who has left.

The Senate plays a very important role in reviewing legislation that is proposed by the House of Representatives. It is common for the political party in government to be in a minority in the Senate. This means that their power in the House of Representatives is balanced by the Opposition's power in the Senate.

The Senate has equal law-making powers to the House of Representatives, except that it is not allowed to introduce or amend 'Money Bills' – laws that introduce new taxes or deal with the normal expenditure of government. The Senate can, however, request that the House of Representatives make changes to these Bills before passing them.

Log on to the Pearson Places website and follow the links to find more about the Senate.

DOUBLE DISSOLUTION

The Australian Constitution has provisions within it for resolving deadlocks that might arise between the Senate and the House of Representatives. On the rare occasion that the Senate fails to pass the same legislation from the House of Representatives twice, the Constitution grants a special power to the Governor-General to dissolve both the House of Representatives and the Senate and call a new election. This is referred to as a 'double dissolution'.

THE PRESIDING OFFICERS OF EACH HOUSE

The Speaker of the House is responsible for the administration of the House of Representatives and presides over debates in the House. The Speaker is assisted by a Deputy Speaker and Second Deputy Speaker. The Speaker is a member of the House and represents an electorate. At the start of each new parliament, immediately following an election, the Speaker will be elected by the members of the House of Representatives.

The President of the Senate has a similar role to the Speaker. The President is also a senator representing one of the states or territories and is also elected by the members of the Senate.

The Governor-General

The Governor-General is the representative of the Queen in Australia. The role of the Governor-General was created by the Constitution of the Commonwealth of Australia. The Governor-General is appointed by the Queen on the advice of the Prime Minister. In theory, the Governor-General's appointment has no set time limit; however, in practice appointments usually last for about five years.

Although the Governor-General acts as the Queen's representative, the role of the monarch in the legislative and parliamentary process has been greatly diminished since the passing of the *Australia Acts 1986* (Cwlth and UK). In practice, the sole remaining function of the Queen is to appoint the Governor-General.

The Governor-General is a member of the **Federal Executive Council**, which also includes the Prime Minister and the Cabinet Ministers; these are the senior ministers of the government. In most cases, the Governor-General follows the advice of the Prime Minister and Cabinet. There are, however four key areas where the Governor-General may exercise power contrary to this advice. These are known as the Reserve Powers and include:

1. the power to appoint the Prime Minister where an election has resulted in a hung parliament (A hung parliament occurs when no political power has a clear majority.)
2. the power to dismiss a Prime Minister who has lost the confidence of the parliament. This has happened only once: in 1975, with the dismissal of Prime Minister Whitlam. (This is discussed in greater detail in Chapter 4.)
3. the power to dismiss a Prime Minister who has acted unlawfully
4. the power to dissolve the House of Representatives at the request of the Prime Minister; this results in an election being called.

One of the most important roles of the Governor-General is to ensure that the **Federal Executive Council** always acts lawfully; that is, within the powers set out in the Constitution. In this sense the Governor-General is the protector of the Constitution.

FEDERAL EXECUTIVE COUNCIL A body comprising the Governor-General and Ministers of the Commonwealth of Australia. (At the state level, the Executive Council consists of the state Governor and state Ministers.)

All legislation that is passed by the House of Representatives and the Senate must then go to the Governor-General for approval. This is known as the 'Royal Assent'. Once the assent has been given and the Bill is published in the *Government Gazette* (similar to a newsletter of new laws), it becomes law. It is very rare for a Governor-General to refuse to assent. One reason for not giving assent might be that the Bill was unconstitutional.

Australia's first female Governor-General, Quentin Bryce, was sworn in to the role in September 2008.

Point to ponder

In addition to the legislative role, the Governor-General is also the Commander-in-Chief of the Australian Defence Force (ADF).

Log on to the Pearson Places website and follow the links to find more about the New South Wales Parliament.

PP Web Destination

THE PARLIAMENTARY STRUCTURE OF NEW SOUTH WALES

New South Wales uses an almost identical parliamentary structure to the Commonwealth Parliament. As in the federal system, there is both an upper and a lower House and a representative of the Queen whose role is to accept or refuse legislation. Some of the differences between the two parliaments are:

1 The Lower House is referred to as the Legislative Assembly.
2 The Upper House is referred to as the Legislative Council.
3 A Governor represents the Queen.
4 Parliament in New South Wales has a fixed term of four years.

REVIEW

1 Define the term 'statute law'.
2 Describe the role of parliament.
3 What is a 'bicameral parliament'?
4 Outline the role of the House of Representatives.
5 Describe the function of the Senate.
6 Explain the role played by the Governor-General.
7 What is the Federal Executive Council?

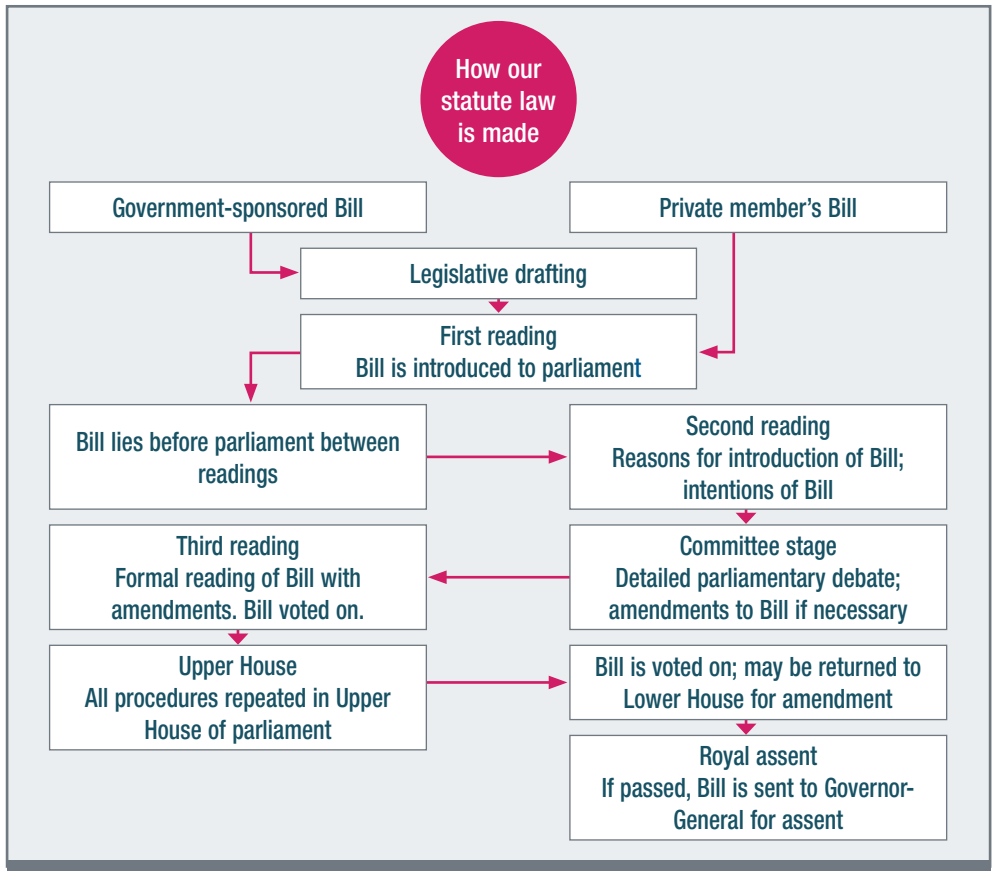
LAW IN ACTION

1 Write a short report explaining the differences between the Senate and the House of Representatives.
2 Hold a class debate on the topic 'the Governor-General should not be permitted to dismiss a democratically elected government'.
3 Compare the structure of the New South Wales and federal parliaments.

3.2 The legislative process

Any parliament has the power to make statute law. Therefore state, territory and federal governments have the right to make legislation. The Constitution determines the areas in which each level of government has the power to make laws. When statute law is made, the parliament that makes it and the year it was made will become part of the name of the Act. For example, the law relating to the use of ethanol in petrol in New South Wales is contained in the *Biofuel (Ethanol Content) Act 2007* (NSW). Similarly, the *Corporations Act 2001* (Cwlth) is a federal statute governing the conduct of companies that are incorporated.

The mechanism for passing laws in the New South Wales and the federal parliaments (and the other states with bicameral parliaments) is the same and is summarised in the chart below.



Mechanism for passing laws in a bicameral parliament

The initial formation of the Bill

Any Member of Parliament has the right to introduce a **Bill** (this is referred to as a Private Member's Bill). However, the more common method is for the government to sponsor a Bill. In this case a Minister is appointed to develop the Bill. For example, the Health Minister will deal with a Bill about hospitals. The actual writing of the Bill, known as legislative drafting, is usually carried out by especially trained advisors.

BILL A piece of proposed legislation.

The first reading

The Minister or the private member responsible for the Bill will introduce it to the parliament in the House in which they sit; for example, a senator will introduce it first to the Senate whereas a representative will first introduce it the House of Representatives. At the first reading the minister or private member reads the title and distributes copies of the Bill for members to read before they are asked to vote on it.

The second reading

During the second reading the parliament debates the Bill, with members given an opportunity to express their opinions about it.

During the second reading a proposed Bill is debated in both houses.

Committee stage

During the committee stage each individual clause of the Bill is debated, although in most cases members only wish to speak about certain controversial clauses. It is at this stage that members can propose amendments to the Bill.

The third reading

It is during the third reading that the House is asked to vote on the Bill. If the vote is successful then the Bill will be passed onto the Upper House for its approval.

The Upper House

In the Upper House the entire process is repeated, with one exception: if the Bill was first introduced in the Senate then the first reading is not repeated. If the Upper House does not pass the Bill it is returned to the Lower House for amendment, or it may simply be rejected outright.

Assent

If the Upper House passes the Bill then it is sent to the Governor-General (in the case of the Commonwealth Parliament) or the Governor (in the case of state parliaments) for approval. This is referred to as the 'Royal Assent'. Once the assent has been given, the Bill will become law. It is now referred to as an Act of Parliament, and is effective from the date specified in the Act.

THE ROLE OF THE COURTS IN INTERPRETING STATUTE LAW

One of the key functions of the courts is to interpret the laws that are made by parliaments. This interpretation requires a judge to determine the meaning of particular words and phrases that are ambiguous.

Sometimes judges will 'reinterpret' laws with which they strongly disagree.

However, if the courts interpret the legislation in a way that the parliament did not intend, then the parliament has the final say. It is able to amend the law, to make it clearer and remove the need for the court to interpret the law.

REVIEW

1. What is a Bill?
2. Describe the purpose of the first reading of a Bill.
3. Explain the purpose of the Senate in passing legislation.
4. What is assent?
5. Explain the role of the courts in interpreting statute law.

LAW IN ACTION

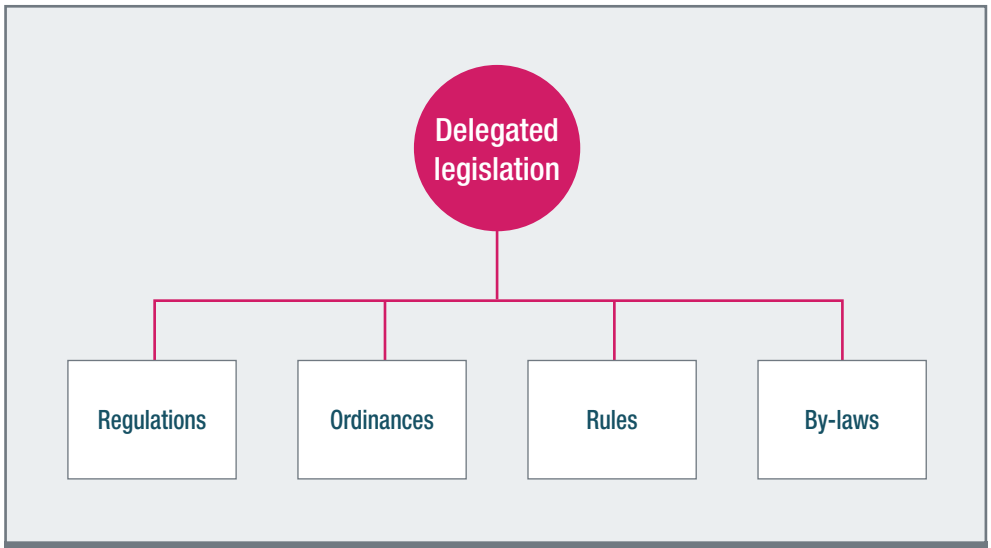
Conduct a class role-play creating a new law. As a class, brainstorm some class or school rules that you think need to be made or amended, and then select one for a proposed Bill. Divide the class into four sections – one for the government and opposition in each house – and refer to the chart on page 36 to revise the procedures to follow.

3.3 Delegated legislation

DELEGATED LEGISLATION
Legislation made by non-parliamentary bodies, such as councils.

Delegated legislation is legislation that is made by bodies subordinate to the parliament. These bodies can include government departments and local councils, and they are authorised to make legislation by an Act of Parliament. This authorisation is referred to as an 'enabling Act'. These Acts define what the bodies can make laws about and how far their authority extends. For example, the *Parliamentary Committees Enabling Act 1996 No 143* (NSW) lists the powers and rights of the various committees of the Parliament of New South Wales.

Once delegated legislation has been developed, either house has the power to disallow the legislation. If no such action is taken within 15 days of the legislation being presented to parliament, then the legislation becomes law. The principles of the Constitution apply to all matters of delegated legislation. For example, if the New South Wales Parliament has no constitutional power to make laws on a particular matter, it cannot delegate to another body to make the law.



Types of delegated legislation

The four main types of delegated legislation include:

1 **regulations**: delegated legislation made by the Governor-General, state Governors or members of the Executive Council
2 **ordinances**: laws made for territories of Australia, such as the Australian Antarctic Territory, usually by the body governing the territory
3 **rules**: delegated legislation made for government departments, usually by the departments
4 **by-laws**: laws made in accordance with the *Local Government Act 1993* (NSW). This Act allows local councils to make laws that apply within the boundaries of the local government area.

The advantages and disadvantages of delegated legislation

Advantages	Disadvantages
• The people making the legislation tend to be experts in the area to which the legislation applies; for example, pollution experts from the Environmental Protection Authority may draft pollution legislation • Delegating some of the 'less important' legislation frees up parliamentary time • Delegated legislation is far easier to amend and is therefore more flexible	• Delegating law-making duties to non-elected bodies may be considered undemocratic • There is often insufficient time and expertise among members of parliament to properly check the delegated legislation • There is usually very little publicity about delegated legislation, making it hard for people to voice their views about it before it becomes law • With many different bodies making delegated legislation it can be hard to ensure consistency

REVIEW

1 Write a definition for 'delegated legislation'.
2 Explain the process that must be taken in order to create delegated legislation.
3 Describe the differences between regulations and ordinances.
4 What is a by-law?

LAW IN ACTION

1 Prepare a short information brochure on delegated legislation. In your brochure explain what it is and how it is made, and define the purpose of delegated legislation.
2 Write an argument either in support of or opposing the use of delegated legislation.

Local councils can pass delegated legislation that affects a specified area only, such as this by-law prohibiting alcohol on Bondi Beach.

CHAPTER SUMMARY

The Australian Parliament is democratically elected. This means that the people elect representatives to make laws and decisions on their behalf. The key role of the parliament is to make laws (this type of law is called 'statute law'). Statute law can therefore be defined simply as law made by parliament. It is superior to the judge-made common law. Parliaments can pass a law to alter or suspend common law.

The federal parliament and the state parliaments (with the exception of Queensland) are bicameral. This means that they have both an Upper and a Lower House. The Upper House in the federal parliament is the Senate. It is sometimes referred to as the States House as it is designed to represent the interests of the states. Each state is represented by 12 senators and the territories have two representatives each. The Lower House is the House of Representatives. Each member represents an electorate of approximately 80 000 voters.

Most proposed legislation (known as a Bill) begins in the House of the Representatives, although Bills can also be introduced in the Senate. A Bill must be passed by both houses in order to become law. The first stage of this process is known as the 'first reading'; it is where the Bill is introduced. During the second reading, the Bill is debated and members have the opportunity to express their opinions on the Bill. During the committee stage the individual clauses of the Bill are examined in close detail. During the third reading the members are asked to vote on the Bill.

Once passed by the House of Representatives, the Bill is sent to the Senate for its approval. The Senate has the right to make amendments to the Bill, which will then be returned to the House to be voted on again. A double dissolution (when the entire parliament is forced to go to an election) may result from the same legislation being refused by the Senate after two attempts.

Once legislation has been passed by both houses, it is sent to the Governor-General for approval. The Governor-General examines the legislation in terms of whether the parliament has the constitutional right to pass such legislation. Once approved, the Bill is said to have received the Royal Assent and it will then be published in the *Government Gazette*, a type of newsletter. Once published, the Bill is called an Act of Parliament and becomes law.

Parliaments have the right to pass on their rights to pass legislation to another group, such as a government department or a local council. This is known as delegated legislation. Before another body can be delegated the right to make legislation the parliament must first pass an Enabling Act. This is a special Act that outlines the extent of the legislative powers to be granted to the subordinate body.

MULTIPLE-CHOICE QUESTIONS

1 What type of parliamentary structure does New South Wales have?

- **A** A guided system
- **B** A statutory system
- **C** A senatorial system
- **D** A bicameral system

2 Which of the following best describes role of the Senate?

- **A** To represent the interests of the states and territories
- **B** To advise the Governor-General on matters of constitutional law
- **C** To represent the interests of the electorate represented by the senator
- **D** To introduce new legislation that is needed in order to update old laws

3 How is the Governor-General appointed in Australia?

- **A** By a vote of all Australians
- **B** By a vote of the federal parliament
- **C** By the Queen, following advice from the Prime Minister
- **D** The outgoing Governor-General nominates a successor to the post.

4 A local council is given the right to issue parking tickets by the Parliament of New South Wales. What type of legislation is this?

- **A** Common state law
- **B** Local enabling acts
- **C** Delegated legislation
- **D** Parliamentary executive law

5 The House of Representatives passes a Bill, which the Senate refuses to accept. The House of Representatives returns it the Senate without amendment, but again it fails to pass. Which of the following actions can now be taken?

- **A** The parliament can be dissolved and an election held to elect a new parliament.
- **B** The Senate can now make whatever changes it wants to the BIll and send it to the Governor-General.
- **C** The House of Representatives can override the Senate and the Bill will go straight to the Governor-General.
- **D** The Senate can appeal to the Queen and she can accept or reject the Senate's recommendation before passing the law.

SHORT-ANSWER QUESTIONS

1. Define the term ‘statute law’.
2. Outline the roles of the House of Representatives.
3. Describe the role of the Governor-General in making statute law.
4. Describe the steps involved in the creation of statute law.
5. Explain the concept of delegated legislation.
6. Compare the features of common law and statute law.
7. Analyse the advantages and disadvantages of statutory law over common law.
8. Analyse the role of the Governor-General in protecting the Constitution.
9. Assess the advantages and disadvantages of Australia having two houses of parliament.

CHAPTER 4

Sources of contemporary Australian law: Constitutional law

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

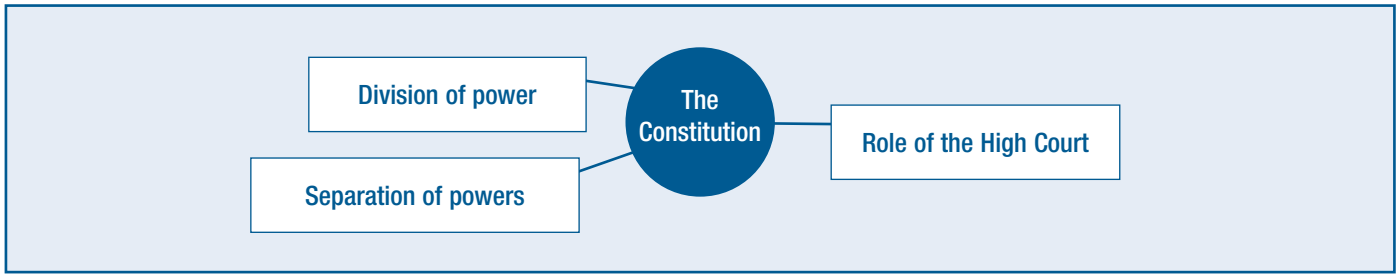
P3 describes the operation of domestic and international legal systems

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines the development and role of the Australian Constitution. In particular, the nature of the Constitution in separating powers between the three branches of government and in dividing power between the state and federal governments is examined. The role of the High Court of Australia in the operation of the Constitution is also discussed.



SUMMARY OF CASE LAW

Australian Boot Trade Employees Federation v. Whybrow & Co (1910) 11 CLR 311
Australian Communist Party v. Commonwealth of Australia (1951) 83 CLR 1
Commonwealth v. Tasmania (1983) 136 CLR 1 (the Tasmanian Dam case)
Murphyores Inc. Pty Ltd and Others v. The Commonwealth of Australia and Others (1976) 136 CLR 1
New South Wales v. Commonwealth [2006] HCA 52; 81 ALJR 34; 231 ALR 1

SUMMARY OF LEGISLATION

Act of Settlement 1701 (UK)
Australia (Request and Consent) Act 1985 (Cwlth)
Australia Act 1986 (Cwlth)
Colonial Laws Validity Act 1865 (Imp)
Commonwealth of Australia Constitution Act 1900 (UK)
Communist Party Dissolution Act 1950 (Cwlth)
Constitution Act 1902 (NSW)
Fair Work Act 2009 (Cwlth)
Magna Carta 1215
Privy Council (Appeals from the High Court) Act 1975 (Cwlth)
Privy Council (Limitation of Appeals) Act 1968 (Cwlth)
Workplace Relations Act 1996 (Cwlth)
Workplace Relations Amendment (Work Choices) Act 2005 (Cwlth)

SUMMARY OF INTERNATIONAL LAW

Convention for the Protection of the World Cultural and Natural Heritage (1972)

4.1 An introduction to Constitutional law

A constitution can be defined as a document that outlines the rules for the governing body of a nation. In other words, it is the rules that control the power, authority and operation of a parliament. In Australia, the Australian Constitution governs the Parliament of the Commonwealth of Australia, while each of the six states also has its own Constitution.

The two constitutions that affect citizens of New South Wales are:

1. the Australian Constitution: this was created by the *Commonwealth of Australia Constitution Act 1900* (UK). The British Parliament passed this Act when the six colonies that made up Australia decided to federate into a single nation. It came into effect on January 1 1901 – the official date of federation.
2. the Constitution of New South Wales: this was created by the *Constitution Act 1902* (NSW).

The main role of the Australian Constitution is to determine what powers can be exercised by the Commonwealth Government and what powers remain with the state governments. This is known as the division of power and is discussed in greater depth in Section 4.2.

PARLIAMENTARY SOVEREIGNTY **The right of the parliament to rule without interference.**

HISTORICAL DEVELOPMENT OF ENGLISH CONSTITUTIONAL LAW

In parliamentary democracies such as Australia, constitutions are almost taken for granted. However, they are enormously important in the maintenance of democracy and the rule of law. The first constitutional document was developed in 1215 in England and was known as the Magna Carta. It was the first attempt to restrain the authority of the monarchy.

The Magna Carta was forced onto the unwilling King John by the powerful nobility. John's reign had been plagued by a series of unsuccessful wars and bitter feuds with other powers, including the Pope, who at one point ex-communicated John. He was, therefore, in a weak position and the nobility seized their opportunity. The document itself is mostly about increasing the power of the nobility at the expense of the King, but in some fundamental clauses the notions of **parliamentary sovereignty** are outlined as well as some references to the rights of individuals.

After the establishment of the Magna Carta, the status of parliament continued to rise. In the 15th century, King Henry V conceded that the parliament had the right to make legislation and established that legislation should be approved by the House of Commons – the parliament made up of common men (that is, men not of noble birth).

King John was given no real choice but to sign the Magna Carta.

The position of parliament was further enhanced when, in 1689, the English Bill of Rights was passed. The Bill required the King to call parliament together regularly, and took away the King's right to block legislation made in the parliament. Therefore in England the position of the parliament, its role and stature in society were enshrined in law by the end of the 17th century.

The other main aspect of constitutional law is the position of the judiciary. Throughout the history of Britain, judges had been dismissed by the King whenever they ruled against his wishes.

This meant that there was no real independence of the judiciary. This problem was overcome with the passing of the *Act of Settlement 1701* (UK), which guaranteed that judges would remain in office *quamdiu se bene gesserint* – during good behaviour.

Thus by 1701 Britain had developed a series of constitutional laws that ensured that each area of government had assigned roles and authorities.

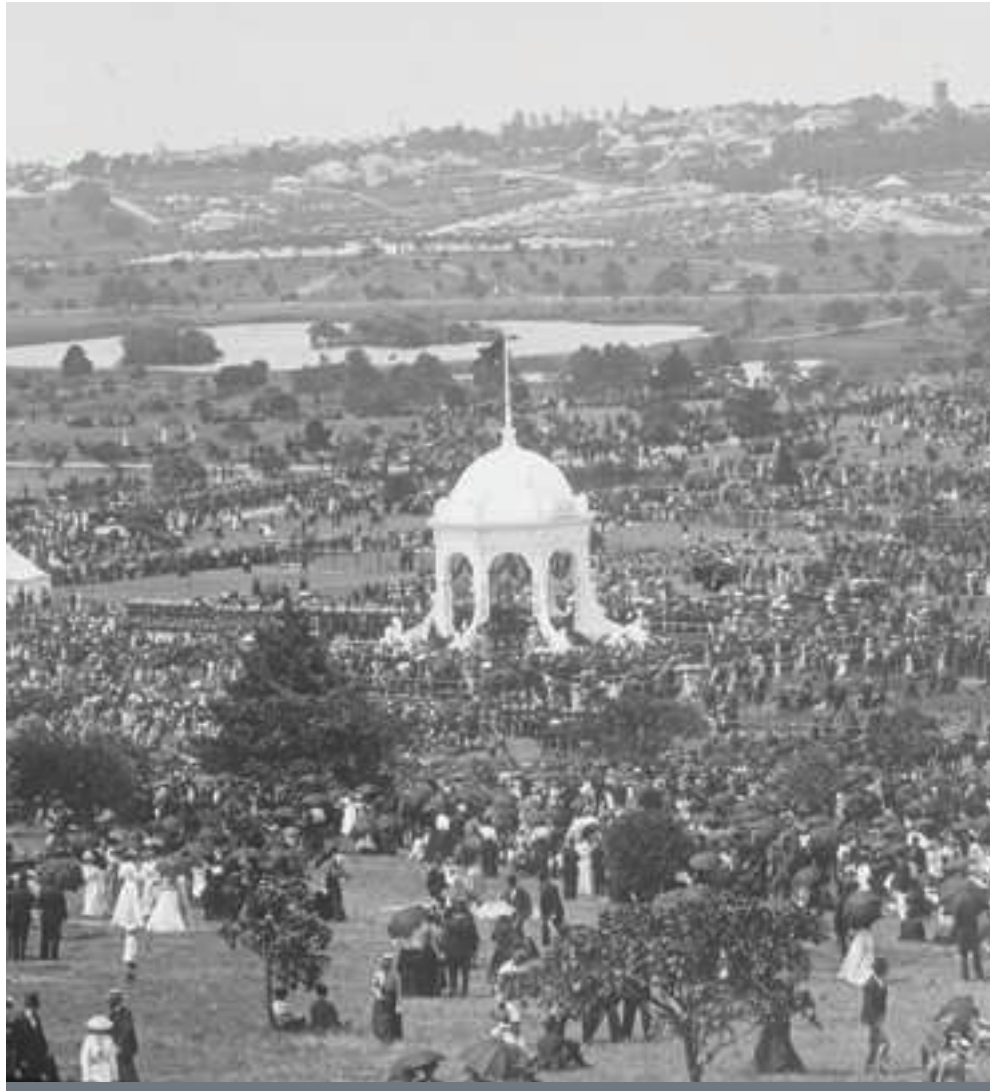
While there was no single constitution, there existed a wide variety of laws that served the same purpose. The principles outlined in the various constitutional documents developed over hundreds of years in England can be seen in most modern constitutions, including the Australian Constitution.

The establishment of the Australian Constitution

The Australian Constitution was created by an Act of the British Parliament: the *Commonwealth of Australia Constitution Act 1900* (UK). The agreement of the British Parliament was necessary for the establishment of the Australian Constitution because, prior to this, Australia had been a collection of self-governing colonies under the ultimate authority of Britain.

The Australian Constitution can be described as the fundamental law of Australia. All Australians, including the Commonwealth and state parliaments, are bound by the Constitution. This means that all government decisions, including statute law, must comply with the conditions established by the Constitution.

Before the Australian Constitution came into effect and the Australian nation was created, the people of the six colonies (New South Wales, Victoria, Tasmania, South Australia, Western Australia and Queensland) had to agree to the conditions of federation. This was done through a series of votes, called plebiscites, where the people were asked if they agreed to the plan. Once this was achieved, the Australian Commonwealth was established on 1 January 1901. On this date the *Commonwealth of Australia Constitution Act 1900* (UK) came into effect.



Federation celebration in Sydney's Centennial Park, 1 January 1901

The Constitution established a federal parliamentary system of government. Under this system of government, powers are distributed between a central (or federal) government and regional (or state) governments. This type of system is relatively rare, and found in only 13 other countries in the world: Canada, the United States of America, Mexico, Venezuela, Brazil, Germany, Switzerland, Austria, the United Arab Emirates, Malaysia, Pakistan and India.

This federal structure, in which the state parliaments held on to significant power, reflected the fact that the various colonial governments had to agree to the establishment of the Commonwealth. There was considerable reluctance on the part of many colonial politicians to decrease their powers by handing over authority to a new federal government.

These concerns were one of the main reasons for the establishment of the Senate. As was discussed in Chapter 3, one of the main roles of the Senate was to enshrine states' rights, and for this reason it was often referred to as the States House. The structure of the Senate, with each state having 12 senators, regardless of population, was a bid to allay fears from the states with smaller populations, especially Western Australia, that the large eastern states would dominate the Commonwealth Parliament.

The large star directly under the Union Jack on the Australian flag is known as the Commonwealth Star. Its seven points represent the six states and the combined territories of the Commonwealth.

REVIEW

1 Define the legal term 'constitution'.
2 Describe the main role of the Australian Constitution.
3 Explain why the Magna Carta is considered such an important legal document.
4 What is a federal parliamentary system?

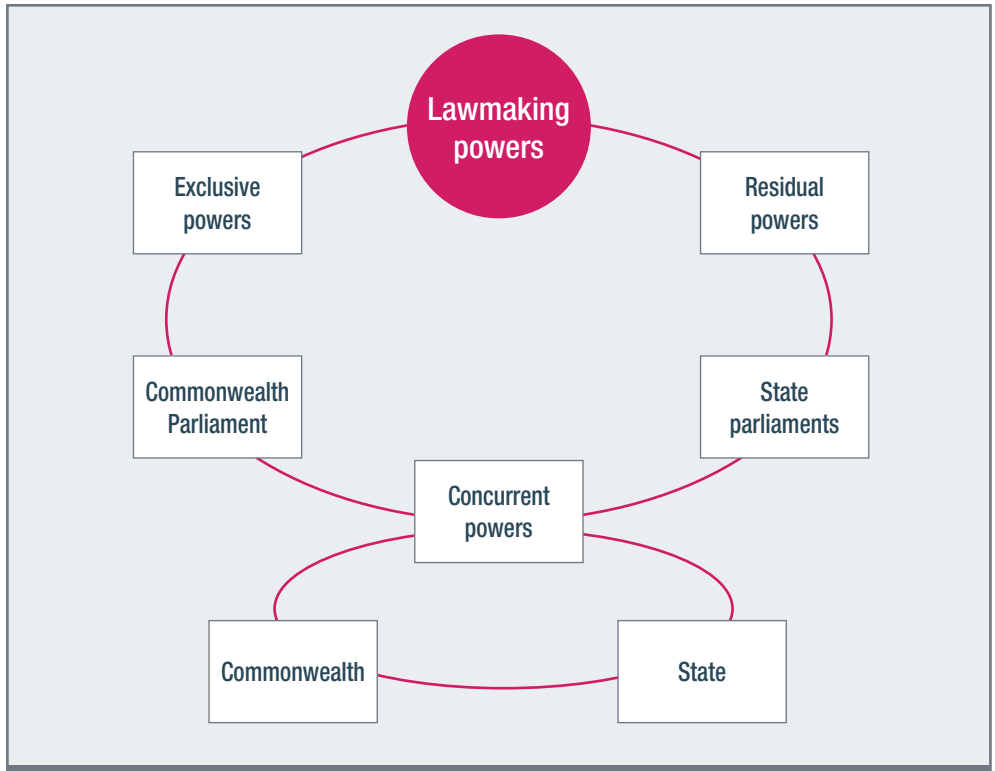
LAW IN ACTION

1 Write a short explanation of the historical development of constitutional law.
2 Before Australia federated, many members of colonial parliaments expressed considerable reluctance to federate. Why do you think this reluctance existed? Explain how the Constitutional structure of the Commonwealth attempted to reduce these fears.

4.2 The constitutional division of power

One of the most important aspects of the Constitution is its role in dividing power between the states and the Commonwealth parliaments. Prior to federation, each of the six colonies had their own constitutions and systems of government. Sections 106 and 107 of the Australian Constitution guarantee the ongoing existence of each of the states and their constitutions.

The constitutions of each state provide state parliaments with the powers to make laws on any matter that affects the state. The Australian Constitution does not really restrict these rights, with a few exceptions (see below). In fact, as a result of the Constitution, state parliaments have law-making powers on a far wider range of issues than the federal parliament.



The division of power

Exclusive powers

Exclusive powers are those powers that are granted only to the Commonwealth Parliament. These powers fall into three main categories: trade, foreign relations and defence. Section 90 of the Constitution grants exclusive powers to the Commonwealth in the area of customs. This is an important power as it gives the Commonwealth power over immigration and international trade.

Section 51 also makes reference to the power of the Commonwealth to make laws in relation to trade. This section of the Constitution was used in 1976 to block sand mining on Fraser Island in the famous case *Murphyores Inc. Pty Ltd and Others v. The Commonwealth of Australia and Others* (1976) 136 CLR 1. Murphyores was blocked from mining on the island by the Commonwealth Government, which used its constitutional powers over trade.

Section 51(vi) makes reference to the defence of Australia. Under this section the Commonwealth has the responsibility for 'the naval and military defence of the Commonwealth'. This role is reinforced by section 114, which forbids states from forming their own defence force:

> 'A state shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force…'
>
> Section 114 of the Australian Constitution

Perhaps one of the most significant aspects of the Commonwealth's powers lies under the broad category of 'external powers'. Section 51 is the most commonly quoted section on this issue. Section 51(xxix) makes reference to 'External Affairs' and this has been interpreted quite broadly by the High Court. The external affairs power has been significant and continues to grow in importance over time. It is through these powers that the Commonwealth is able to sign international agreements such as treaties. These international agreements then take precedence over the powers of the states.

CASE LAW *Commonwealth v. Tasmania* (1983) 136 CLR 1 (the Tasmanian Dam case)

The Commonwealth blocked Tasmania from constructing a hydroelectric dam in the World Heritage-listed Gordon River. The Tasmanian government claimed that it was unconstitutional for the Commonwealth to block the dam, because power generation was an area of state responsibility. It also argued that the Commonwealth had no powers over environmental protection.

During the case the Commonwealth argued that it did have the power to block construction because Australia was a signatory to the Convention for the Protection of the World Cultural and Natural Heritage (1972). It argued that because this international agreement stipulated that there should be no construction, such as dams, in a World Heritage area, it was required to stop construction under international law. The High Court agreed and the dam was never built.

Residual powers

Residual powers are those powers that the states retained after federation. These powers are outlined in the constitutions of the various states, which confer authority in the area of health, transport, education and, importantly, law and order. It is for this reason that there is so much diversity between the states on various issues such as criminal law, traffic regulations and educational policy.

Concurrent powers

Concurrent powers are those that are shared between the Commonwealth and the state governments. There are many areas of government where both levels have authority. For example, in relation to health care, the state governments have the responsibility of running hospitals, ambulance services and so on, but the Commonwealth is responsible for raising health care funding through the running of the Medicare system.

Where state and federal laws conflict, the Constitution is clear that laws made within the limits of the constitution by the Commonwealth have precedence:

> 'When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'
>
> Section 109 of the Australian Constitution

CASE LAW *New South Wales v. Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1

In 2005 the Coalition government of John Howard introduced radical changes to Australia's industrial relations laws. The new Act, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cwlth), was generally referred to as 'WorkChoices'. Industrial relations have generally been controlled by the states, but the federal government argued that the Constitution granted it power to act and these powers were superior to those of the states.

The new Act amended the existing *Workplace Relations Act 1996* (Cwlth) and introduced a range of changes that were criticised by the Labor Party and trade unions (this is discussed in greater detail in *Legal Studies HSC* 3rd Edition). The Labor Government of New South Wales joined with most of the other Labor-governed states in a High Court challenge against the WorkChoices law.

The WorkChoices legislation relied on using section 51(xx) of the Constitution (the corporations power) and section 51(xxxv) (powers relating to conciliation and arbitration). The New South Wales Government argued that section 51 could only be used in relation to the external relations of corporations, not in regards to their industrial relations. In a 5–2 ruling, the High Court held that the Constitution did not stop the Commonwealth from using its powers to make industrial relations laws.

In 2008 the new Labor Government of Kevin Rudd introduced legislation that revoked many of the industrial relations changes introduced by WorkChoices.

The new legislation, the *Fair Work Act 2009*, came into force on 1 July 2009.

CHANGING THE CONSTITUTION

Constitutional change is a difficult process that requires a specific vote by the people, known as a referendum. The process for undertaking a referendum is outlined in section 128 of the Constitution. Under this section, referenda require a majority of votes to succeed; in addition, there must be a majority in at least four of the six states. A referendum that, if passed, would reduce the power of any state or territory in the Commonwealth must also have a majority in that state.

Before a matter can go to a referendum, the Commonwealth Parliament must pass the Bill that contains the proposed change. Once the parliament has given its approval, the referendum will be put to the people in the form of a question to which they must answer 'yes' or 'no'.

Australians have been reluctant to change the Constitution; most referenda have failed. The most successful referendum was held in 1967. Voters were asked whether they supported Aboriginal people being included in the national census (until then, section 127 of the Constitution specifically excluded them) and whether the Commonwealth government should be able to make laws on the behalf of Aboriginal people (until then it was a state government responsibility). More than 90 per cent of Australians voted 'yes' in the referendum. Section 127 was repealed, and section 51(xxiv) of the Constitution, which until 1967 had conferred the power to make laws with regard to:

> '… the people of any race, other than the Aboriginal race in any state, for whom it is deemed necessary to make special laws'

was amended to strike out the words 'other than the Aboriginal race in any state'.

The 1967 referendum that changed the Constitution to allow the federal government to make laws in relation to indigenous Australians was the most successful, with more than 90 per cent of voters agreeing to the change.

Point to ponder

An amendment to the Constitution is shown by striking out a deleted section or inserting a new section in bold.

REVIEW

1 Explain the concept of the division of power.
2 What are 'exclusive powers'?
3 Explain the importance of Section 51 of the Constitution.
4 Outline the nature of residual powers.
5 What are 'concurrent powers'?
6 Explain what happens when both the state and federal governments have powers in the same areas.
7 Describe the process for changing the Australian Constitution.

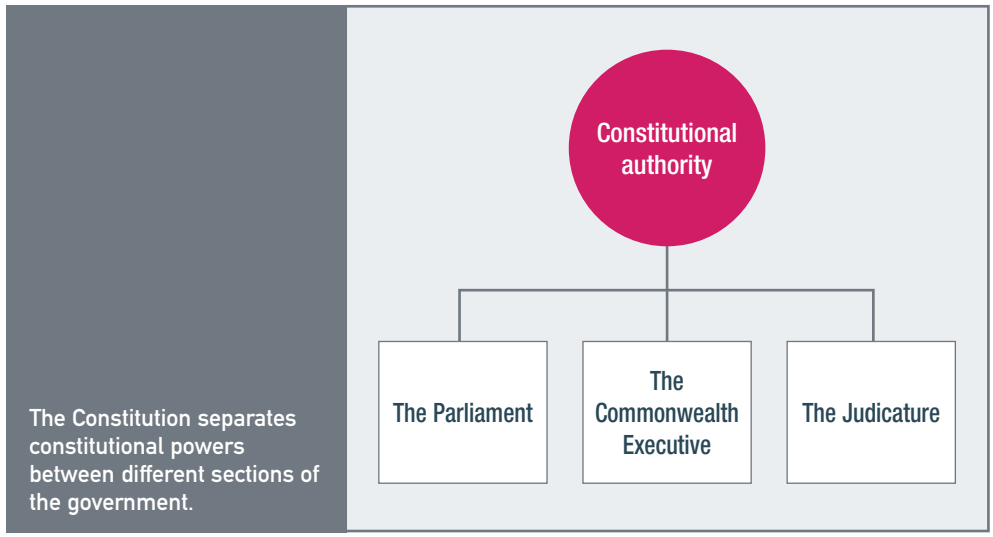
LAW IN ACTION

1 Why do you think so much of the Australian Constitution deals with the division of power?
2 Examine the case *Commonwealth v. Tasmania* (1983) and complete the following activities:
   a Explain why Tasmania believed the Commonwealth had no rights in this matter.
   b Outline the argument of the Commonwealth and the High Court's ruling.
3 Examine the case *New South Wales v. Commonwealth* [2006] and complete the following activities:
   a Briefly outline the facts of this case.
   b Outline the arguments presented by New South Wales.
   c Explain the ruling of the High Court.
4 Over the years, some people have called for the Commonwealth to take greater control of areas such as health, education and law and order, which are currently governed by the states. As a class, brainstorm some of the advantages and disadvantages of such an action.
5 With a partner, discuss the advantages and disadvantages of the current system used for changing the Constitution.
6 Write an argument either in support or against the current constitutional system.

4.3 The separation of powers

In addition to dividing power between the Commonwealth and the states, the Constitution also ensures that no one group within the government can dominate. This is known as the 'separation of powers'. The Constitution divides Commonwealth powers between three separate bodies:

1 The parliament, whose powers are outlined in Chapter 1 of the Constitution, in particular section 51.
2 The Commonwealth Executive, which is officially referred to as the Federal Executive Council. Its members include the Governor-General, the Prime Minister and the members of the Cabinet (senior government ministers). The powers of the executive are contained in Chapter 2 of the Constitution.
3 The judicature or courts. The Constitution established a federal Supreme Court (referred to as the High Court of Australia) (section 71) and also granted federal parliament the right to create other federal courts (section 71). Under the Constitution, High Court judges cannot be removed from their position without the approval of the Governor-General and both houses of parliament.



The Constitution separates constitutional powers between different sections of the government.

The aim of the separation of powers is to ensure that authority is evenly distributed between these three groups. By doing this, each acts as a check on the others, to ensure that there are no abuses of power and that constitutional authority is not exceeded. The following case demonstrates the separation of powers.

CASE LAW *Australian Communist Party v. Commonwealth of Australia* (1951) 83 CLR 1

During the spring session of federal parliament in 1950, the Liberal Prime Minister Robert Menzies introduced legislation that would outlaw the Communist Party and allow the Commonwealth to seize all its assets. Under the Bill, any person charged with being a member of the Communist Party would be required to prove their innocence rather than the prosecution being required to prove their guilt.

Initially the Labor Party blocked the Bill in the Senate but after internal debate the Bill was passed and became the *Communist Party Dissolution Act 1950* (Cwlth). In the preamble to the Act it was claimed that the Communist Party was a revolutionary party whose members were attempting to destabilise the democratically elected government through strikes and boycotts.

The Communist Party, with the support of several trade unions, took the Commonwealth to the High Court, arguing that the Commonwealth did not have the constitutional right to ban a political party. The Commonwealth argued that it did have the power as it lay within their defence powers.

Six out the seven High Court judges held that the Commonwealth had no constitutional right to ban the party. They stated that, while the Commonwealth had considerable defence powers, there was no justification to use those powers in relation to the Australian Communist Party.

Chief Justice Latham was the dissenting judge. He argued that it was the role of the parliament to make defence policy, not the courts. He stated that 'whether they are right or wrong, is a political matter upon which the electors, and not any court, can pass judgement'. He also went on to point out that the Commonwealth had powers to make laws to stop subversion and other acts of treason.

In September 1951 Menzies attempted to gain the power to ban the Communists through a referendum but was unsuccessful by a very small margin.

REVIEW

1 Write a definition for the 'separation of powers'.
2 Who makes up the Federal Executive Council?
3 Outline the role of the Council.

LAW IN ACTION

1 Write a short report explaining the importance of the separation of powers.
2 Review the case *Australian Communist Party v. Commonwealth of Australia* (1951) and complete the following activities:
   - **a** Briefly outline the law proposed by the Menzies government.
   - **b** On what grounds did the Communist Party take the matter before the High Court?
   - **c** Explain the finding of the majority of the High Court.
   - **d** Describe the ruling of the Chief Justice.
   - **e** Explain how this case demonstrates the role of the separation of powers.

4.4 The role of the High Court

The High Court of Australia is the highest court in Australia. It was established in 1901 under section 71 of the Constitution. The court has three main aims:

1 to protect the Constitution by ensuring that governments act within their constitutional powers
2 to exercise its original jurisdiction (this refers to cases that are first heard in the High Court). These cases include 'constitutional challenges'; that is, where the actions of the Commonwealth are being challenged as unconstitutional, such as the Tasmanian Dam case (*Commonwealth v. Tasmania* (1983) 136 CLR 1)
3 to act as the final Court of Appeal within the Australian legal system. The High Court can hear an appeal from any of the state Supreme Courts or from the Federal Court.

Point to ponder

High Court judges are required to resign from office once they reach the age of 70.

One of the main roles of the High Court is to protect the Constitution.

THE PRIVY COUNCIL

The Privy Council is the highest court of appeal in Britain and, until 1986, Australians had the right to appeal matters from Australian courts to the Council. As such, the High Court was not in fact that most superior court in Australia, meaning that a court in Britain had the power to overturn legal decisions made by Australian courts.

A series of acts passed in the 1960s and 1970s reduced this right. The *Privy Council (Limitation of Appeals) Act 1968* (Cwlth) removed the right of appeal to the Council from the High Court in any matter involving federal law. The *Privy Council (Appeals from the High Court) Act 1975* (Cwlth) removed the right to appeal any matter from the High Court to the Council; however, it was still possible to appeal to the Privy Council from a state Supreme Court.

In 1986 the *Australia Act 1986* (Cwlth) and the *Australia (Request and Consent) Act 1986* (Cwlth) were passed. As a result, the *Colonial Laws Validity Act 1865* (Imp) was repealed. Until this time, any state law that was inconsistent with English law was considered invalid. The passage of these Acts meant that the right to appeal to the Privy Council from state Supreme Courts was removed. As a consequence, the High Court of Australia became the highest court in Australia, being the final court of appeal for all matters, importantly including matters relating to the Constitution.

Point to ponder

When an Act is repealed it is removed from the statutes, ceasing to be a valid law.

One important role of the High Court is interpreting the Constitution. Like all other Acts of Parliament, the Constitution is not always clear and the courts must interpret and define certain words and phrases. The Court ensures that parliament, the courts and government departments do not exceed their constitutional authority; for example, in the case *Murphyores Inc. Pty Ltd & Ors v. The Commonwealth of Australia & Ors* (1976) 136 CLR 1, where the High Court was required to decide whether the Commonwealth had powers in this matter.

CASE LAW *Australian Boot Trade Employees Federation v. Whybrow & Co* (1910) 11 CLR 311

In 1904 the Commonwealth Government established the Commonwealth Arbitration Court to hear industrial disputes. Its main role was to settle industrial disputes that extended across state boundaries. The court also made and enforced industrial awards, registered industrial organisations such as unions, and made common rules – that is, rules that apply across a whole industry.

During a dispute between the Australian Boot Trade Employees Federation and Whybrow and Co, the Commonwealth Arbitration Court made an award that it stated was to apply to all employees in the boot trade throughout Australia.

However the federation took the matter to the High Court, claiming that the Arbitration Court did not have the authority to make such as ruling. The High Court held that the Arbitration Court could only exercise those powers that had been granted by the Commonwealth. While the Commonwealth had granted the powers in question to the court, the Commonwealth itself had no constitutional right to do so. Therefore the High Court ruled that the Arbitration Court had no authority to make common rules or common awards.

REVIEW

1. Describe the role of the High Court in regard to the Constitution.
2. What are the other roles of the High Court?
3. What is the Privy Council?
4. Explain the role that the Privy Council had in the Australian legal system.
5. Outline the process that transferred power from the Privy Council to Australian courts.

LAW IN ACTION

Refer to the case *Australian Boot Trade Employees Federation v. Whybrow & Co* (1910) and complete the following activities:

a What action did the Arbitration Court take that was considered outside its authority?

b Explain why the High Court ruled that the action was unconstitutional.

CHAPTER SUMMARY

A constitution is a document that outlines the rules for the governing body of a nation. The Australian Constitution governs the Parliament of the Commonwealth of Australia; in addition, each of the six states has its own constitution. The first constitutional document was developed in 1215 in England. Known as the Magna Carta, it was the first attempt to restrain the authority of the monarchy. After the establishment of the Magna Carta the influence of parliament continued to rise.

The Australian Constitution was created by the *Commonwealth of Australia Constitution Act 1900* (UK). The Constitution can be described as the fundamental law of Australia. All Australians, including the Commonwealth and state parliaments, are bound by the Constitution. This means that all government decisions, including statute law, must comply with the conditions established by the Constitution.

One of the most important aspects of the Constitution is its role in dividing power between the states and the Commonwealth parliaments. Those powers that are granted to Commonwealth are known as 'exclusive powers'. The main exclusive powers relate to 'external powers'; that is, the powers that allow the federal government to deal with matters between Australia and other countries. Other important exclusive powers relate to defence and customs.

Powers that remain with each of the state governments are known as residual powers. These powers include powers over education, health and law and order. Concurrent powers are those that are shared between both the state and federal governments. Where conflict arises between these concurrent powers, the federal government's powers are considered greater.

In addition to dividing power between the Commonwealth and the states, the Constitution also ensures that no one group within the government can dominate. This is known as the separation of powers. Three bodies have power distributed between them: the Parliament, the Executive and the Judiciary.

The High Court of Australia is the highest court in Australia. The Court has three main functions:

1. to protect the Constitution by ensuring that governments act within their constitutional powers
2. to exercise the court's original jurisdiction (where cases are first heard); in the High Court, this means constitutional cases, (known as 'constitutional challenges')
3. to act as the final court of appeal in the court hierarchy.

MULTIPLE-CHOICE QUESTIONS

1 Which of the following best describes the role of a Constitution?
- **A** A document outlining the rights of citizens
- **B** A document outlining the rules by which the government must act
- **C** A document containing the full list of all statute laws that exist within the country
- **D** A document that grants the power to the government to enter into international laws

2 What are exclusive powers?
- **A** Powers given to the states
- **B** Powers that are held by the federal government
- **C** Powers provided to the Governor-General
- **D** Powers that are given to the Federal Executive Council

3 What happens when the powers of the states and federal government conflict?
- **A** The powers of the federal government take precedent.
- **B** The issue is referred to the Governor-General to make a decision.
- **C** The High Court automatically decides which government has powers.
- **D** A referendum will be held in the state affected, asking the voters to decide which government's power should be used.

4 What is the purpose of the separation of powers?
- **A** To ensure voters can change the Constitution
- **B** To ensure that the rights of the states are maintained
- **C** To ensure that no branch of the government becomes too powerful
- **D** To ensure that people have the right of appeal from the state courts to the High Court

5 What is the original jurisdiction of the High Court of Australia?
- **A** Constitutional challenges
- **B** Dealing with cases involving treason
- **C** Dealing with the most serious criminal matters
- **D** Hearing appeals from the state Supreme Courts and the Federal Court

SHORT-ANSWER QUESTIONS

1 List the three branches of the federal government between which the Constitution separates power.

2 Outline the purpose of a constitution.

3 Describe the concept of the division of power.

4 Explain the importance of the separation of powers.

5 Explain how the Australian Constitution can be changed.

6 Analyse the role of the Governor-General in constitutional matters in Australia.

7 Assess the importance of the High Court in constitutional law in Australia.

CHAPTER 5

Aboriginal and Torres Strait Islander peoples' customary law

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P4 discusses the effectiveness of the legal system in addressing issues

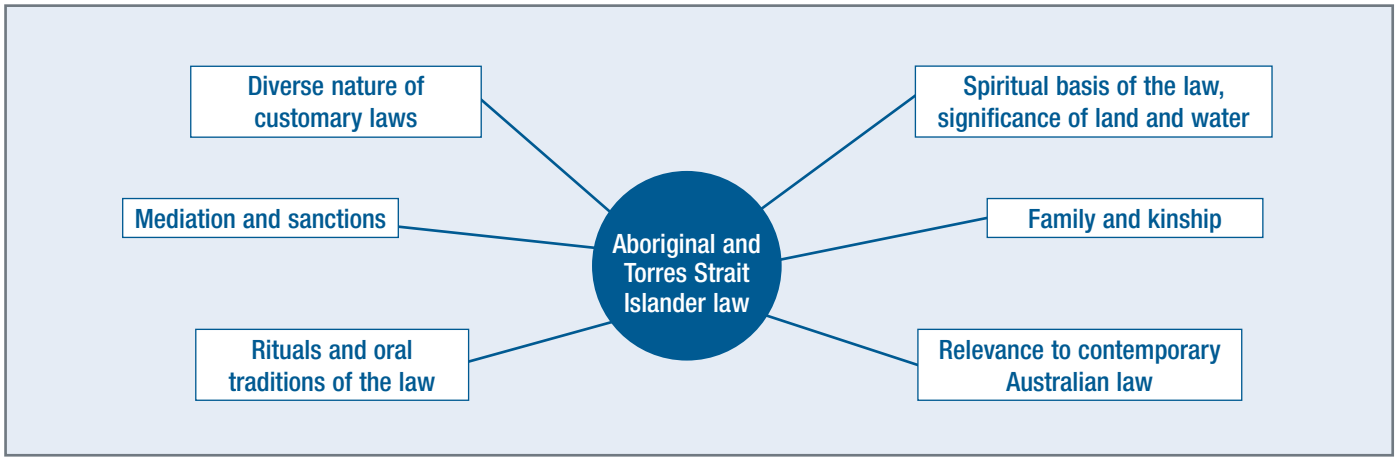
P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

P6 explains the nature of the interrelationship between the legal system and society

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

P10 accounts for differing perspectives and interpretations of legal information and issues



PRINCIPAL FOCUS

This chapter examines the key features of Aboriginal and Torres Strait Islander law. The diverse nature of the laws and the significance of land and water are discussed.

SUMMARY OF CASE LAW

Lardil Peoples v. State of Queensland [2004] FCA 298
Mary Yarmir v. Northern Territory [1998] 771 FCA
Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141
R v. Shannon (1991) 57 SASR 15
Ward & Ors v. State of Western Australia & Ors [1998] 1478 FCA

SUMMARY OF LEGISLATION

Native Title Act 1993 (Cwlth)

5.1 Diverse nature of customary law

KINSHIP The relationship between individuals and their extended family or clan and the bonds of loyalty that tie the group together.

Aboriginal people are thought to have arrived in Australia somewhere between 60 000 and 80 000 years ago. Over the thousands of years that they have occupied the continent, a complex customary legal system developed. This system was one based on oral traditions and was strongly linked to the notion of **kinship**.

Prior to the invasion of Australia by Europeans in 1788, Aboriginal people lived a traditional hunter–gatherer existence, in which tribal groups moved around their territories in search of food and water. The seasons, the harshness of the environment and the size and composition of the group determined the size of the territory and how far each group moved.

DEFINING ABORIGINAL AND TORRES STRAIT ISLANDER CUSTOMARY LAW

There is no set definition for the concept of customary law. This is partly because of the diverse nature of Aboriginal and Torres Strait Islander peoples' legal systems, and the fact that many of the laws are secret and known only to members of the tribe to which they apply.

In the case *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141, it was argued that customary law must be defined in order for it to be valid. Justice Blackburn did not agree that this was the case but nonetheless produced the following definition of customary law:

'a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people'.

It is important to note that there is no single Aboriginal nation (see below). There are approximately 500 known Aboriginal and Torres Strait Islander nations. Within each of these nations there existed a number of clans. Each of these clans had its own territory, traditions and rituals and, importantly, developed its own laws. Consequently there are now thousands of variations of Aboriginal and Torres Strait Islander peoples' customary law.

This map shows the great number of Aboriginal nations in New South Wales.

Therefore it is impossible to talk of Aboriginal and Torres Strait Islander peoples' customary law as a single entity. Instead, we can only look at those aspects of the law that are similar and common to all groups; for example, the importance of the Dreamtime to the establishment of the law and the role of the land and spirituality in Aboriginal and Torres Strait Islander customary law.

THE DREAMTIME

The Dreamtime is the basis of Aboriginal spirituality and has been passed down by word of mouth from generation to generation for thousands of years through the use of song, dance and story.

The importance of the Dreamtime lies in the way it tells how the spirits made and maintained the land and how they laid down the law. As in most indigenous societies, Aboriginal and Torres Strait Islander peoples make no distinction between daily life and the law. Morality, religion and norms of social behaviour are all considered part of the law. Therefore, references to the structure of society, the rituals required to maintain daily life and the behavioural standards expected of the people that are found in the Dreamtime are in fact references to customary law.

There is no single type of customary law. Instead, the 500 or so separate Indigenous Australian nations that can be identified in Australia each developed their own unique laws. However, all of these laws do share common aspects. Most importantly, all have a spiritual base and are inescapably linked to the land.

REVIEW

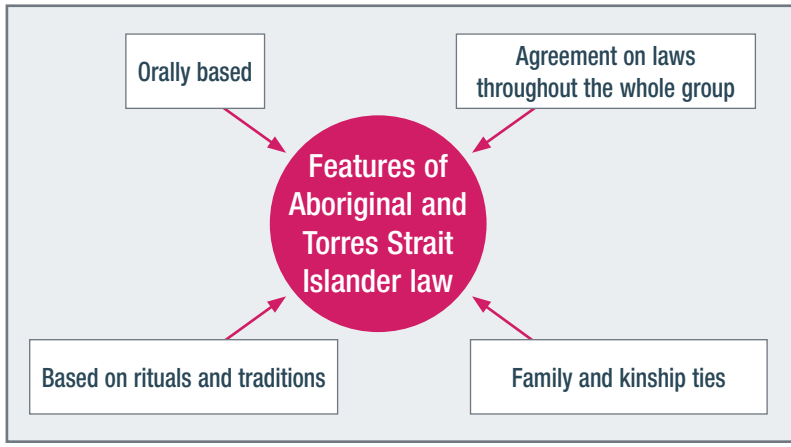
1. Outline the lifestyle of Indigenous Australians prior to the European invasion.
2. Describe the importance of the Dreamtime in Aboriginal and Torres Strait Islander peoples' customary law.
3. Why is it impossible to discuss a single type of Aboriginal and Torres Strait Islander peoples' customary law?

LAW IN ACTION

Taking the perspective of a 19th-century European explorer who has come across an Aboriginal clan, prepare a report for your superiors on the nature of their law.

5.2 The spiritual basis of Aboriginal and Torres Strait Islander peoples' customary law

Aboriginal and Torres Strait Islander peoples did not develop the type of industrial society that existed in Europe. European societies measured the value of nature and the land by the resources they provided or that could be exploited. The Aboriginal and Torres Strait Islander tradition views the land and nature as having great spiritual importance and this is reflected in customary law. The key features of Aboriginal and Torres Strait Islander customary law are summarised below.



Key features of Aboriginal and Torres Strait Islander peoples' customary law

Point to ponder

A key feature of Aboriginal and Torres Strait Islander law is the concept of shared ownership of the land and resources. This concept is in stark contrast to European law, which is devoted to the principle of private ownership.

Significance of land and water

One of the key differences between Aboriginal and Torres Strait Islander customary law and the European legal tradition lies in the area of land ownership. One of the main principles of European law is the right to possess and own property and, in particular, land. In Aboriginal and Torres Strait Islander peoples' customary law, land is sacred and is collectively owned. All members of the group lived together, with no concept of individually owned plots of land. Instead, people saw their role as custodians of the land for future members of the group.

The land is central to all Aboriginal and Torres Strait Islander cultures and forms the basis of their religious beliefs and their law. The land itself was and continues to be considered sacred by Aboriginal and Torres Strait Islander people. Bodies of water were also thought to hold special significance.

Indigenous Australians have a very close link to their traditional lands and the landform features contained in them, many of which they consider to be sacred.

THE DOCTRINE OF *TERRA NULLIUS*

Upon the arrival of the British in the 18th century the Australian continent it was declared terra nullius. This dubious legal concept, meaning 'empty land', was used to justify the occupation of the continent. This in effect took away any rights Aboriginal and Torres Strait Islanders had over their traditional lands, including access to sacred sites and hunting rights.

In recent years there has been growing recognition throughout the world of the rights of indigenous peoples to their traditional lands. In landmark decisions in Canada, indigenous people have been granted their own homeland, while in Scandinavian countries the Saami people have received recognition of some hunting rights. In Australia the development of **native title** has seen a growing number of Indigenous communities regain at least some access to their land (this is examined in greater detail in Chapter 9). This is in recognition of the religious and cultural significance of the land to the Aboriginal and Torres Strait Islander societies. The *Native Title Act 1993* (Cwlth) enshrines this recognition in law.

NATIVE TITLE A type of legal ownership that recognises the land rights of traditional landowners.

The two following contemporary cases demonstrate the growing recognition of the importance of land and water to Indigenous Australians. In both cases, traditional landowners were able to show that they had maintained important spiritual and cultural links to traditional lands and waters.

CASE LAW *Ward & Ors v. State of Western Australia & Ors* [1998] 1478 FCA

Ben Ward, a member of the Miriuwung–Gajerrong people of Western Australia, made a native title claim over 7653 square kilometres of Western Australia and the Northern Territory on behalf of his people. The land claimed was rich in mineral deposits and large areas were subject to pastoral leases: leases granted to pastoralists conferring the right to use **Crown land** for pastoral purposes for a set period of time, usually 99 years.

CROWN LAND Land owned by the government.

Justice Lee of the Federal Court held that Ward had successfully shown that he and his people did have rights over large areas of the land claimed. These native title rights included the right to:

- control access to the land by any third parties
- control the 'use and enjoyment' of the land, including the resources contained in it. This included the right to receive a portion of any resources taken from the land.

The court also held that native title did not exist on any land used for government purposes, such as roads and power lines. This is known as 'extinguishment' of native title.

In order to prove that there was native title over the land, Ward was required to demonstrate that his clan had maintained a physical connection with the land since European settlement had begun. This connection must also include the fact that the land was of cultural or religious significance to the people.

CASE LAW *Lardil Peoples v. State of Queensland* [2004] FCA 298

This important native title case demonstrated the importance of both the land and bodies of water to Indigenous Australians. In this case the Federal Court recognised that native title existed over parts of the sea surrounding the Wellesley Islands in the Gulf of Carpentaria in far north Queensland.

The rights granted to the traditional owners – the Lardil, Yangkaal, Kaiadilt and Gangalidda peoples – included fishing and hunting rights. In making its decision, the Federal Court held that the traditional land owners were able to show an important cultural and spiritual link, not just to the land but also to the bodies of water in question; hence their decision to include them in the native title grant.

The Court used the famous Crocker Island case (*Mary Yarmir v. Northern Territory* [1998] 771 FCA) as the basis for their decision. The Crocker Island case was the first time that water bodies were recognised as being subject to native title.

REVIEW

1. Describe the differences between customary and European-based laws in relation to private ownership.
2. Outline the doctrine of *terra nullius*.
3. Explain how *terra nullius* was used to take traditional lands from Indigenous cultures.

LAW IN ACTION

1. Examine the case *Ward & Ors v. State of Western Australia & Ors*. What was Ward claiming? Before the court would grant his application for native title, what was Ward required to show?
2. Explain how this case demonstrates the significance of land to traditional owners.
3. Refer to the case *Lardil Peoples v. State of Queensland*. Explain why the Federal Court decided to grant native title to areas of both land and sea.

5.3 Family and kinship

Kinship is a reference to family relationships and extended family ties. Kinship is an essential feature of Indigenous Australian societies and communities. Traditional ways of living have been characterised by extended family networks living in close communities. This feature of such societies is significant when making laws and enforcing them. The inclusion of family and social relationships into an understanding and application of the law helps non-Indigenous Australians to understand the centrality of communities to Aboriginal and Torres Strait Islander peoples.

5.4 Ritual and oral traditions of Aboriginal and Torres Strait Islander societies

RITUAL A regular and stereotyped behaviour.

ORAL LAW A legal system in which laws are not written down, but passed from generation to generation by word of mouth.

Before the arrival of Europeans in Australia, there were several thousand Aboriginal and Torres Strait Islander clans, each having developed its own culture, traditions and laws. Often the difference between the various groups was very small.

The **rituals** that each clan practiced came from their various interpretations of the Dreamtime. These rituals were found in all areas of life, including religion and customary law. In a similar way to European law, therefore, Aboriginal and Torres Strait Islander customary law has a strong ritual element. For example, it was common for tribal elders to paint their faces in red ochre before passing judgment. Europeans often found such rituals unusual but many Indigenous Australians are likely to find European legal rituals, such as the wearing of robes and wigs, similarly unusual.

One of the main features of Aboriginal and Torres Strait Islander customary law is that it is **oral law**. This means that the law is not written down but is instead transmitted by word of mouth. Each generation must remember the laws and then pass them on to the following generation. Songs, dance and stories were used to help members of the clan remember the various laws that applied to their group.

Songs, dance and stories were used by Aboriginal and Torres Strait Islander people to pass on their oral laws.

One of the main problems associated with oral law is the danger that it can be forgotten or misinterpreted. As one generation passes on the law to another, it is easy for it to be unwittingly modified. To overcome this problem, Aboriginal people would simply ignore a law that had changed to the point that it was now unjust. This is one of the main advantages of oral law: its flexibility. As a society adapts, so can the law. In European-based legal systems, changing the law involves a long and usually time-consuming process; as a consequence, the legal system can become out of step with the expectations of society.

The lack of written law was one of the main reasons Europeans assumed that Aboriginal and Torres Strait Islander people had no legal structure. This assumption led to the British declaration of ***terra nullius*** during the initial invasion of the Australian continent.

TERRA NULLIUS 'Empty land' was the basis for the British occupation of Australia. It was assumed that as there was no clear legal or political structure (in the view of the British) among Aboriginal people, the land could be occupied without any reference to the indigenous population.

REVIEW

1 Write your own definition for the terms 'ritual' and 'tradition'.
2 What is an oral law?
3 Describe the methods used by Indigenous Australians to recall their laws and customs.

LAW IN ACTION

1 Create a table of the advantages and disadvantages of oral laws and written laws.
2 Write an argument in support of the view that oral laws are just as valid as written laws.

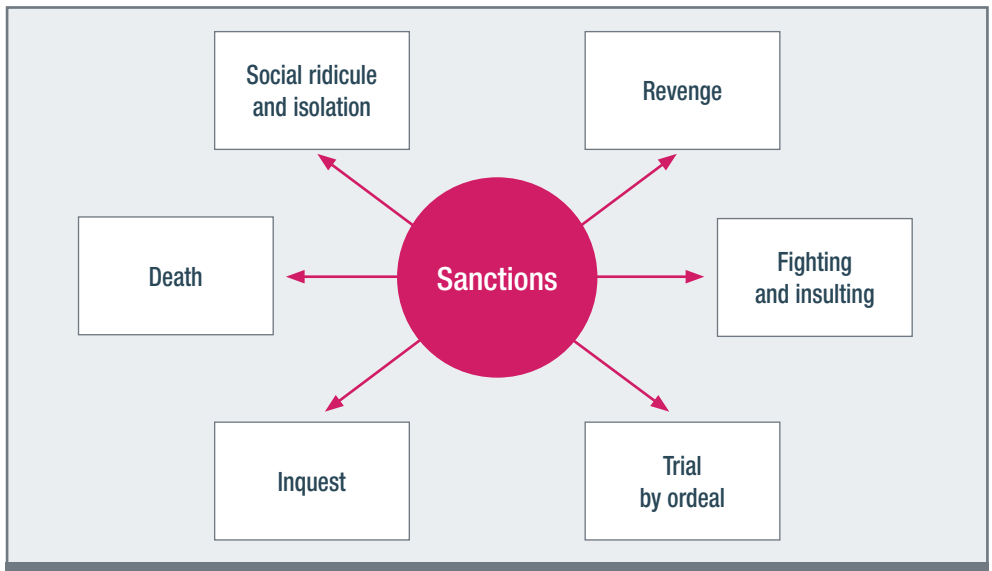
5.5 Mediation and sanctions within Aboriginal and Torres Strait Islander peoples' customary law

We have already discussed the strong kinship links that bind Aboriginal and Torres Strait Islander societies. Unlike many European families where the traditional family is nuclear – mother, father and children – Aboriginal and Torres Strait Islander families extend to encompass uncles, aunts, grandparents and cousins. The kinship ties that each person has to all these relatives overrides almost all other duties and responsibilities.

As a consequence of the strong bonds between family members and, ultimately, the clan, mediation has been the favoured method of dispute resolution. Mediation involves all parties involved in a dispute talking through their issues and trying to resolve their problems through negotiation. Rather than handing out punishment to a person who broke tribal laws or customs, Indigenous legal tradition holds that it is better to have family member talk to the individual and attempt to resolve the problem by discussion.

Where a dispute could not be resolved through mediation, conciliation would be used. In this method of dispute resolution, the elders of the tribe would meet with the people in the conflict and attempt to assist them to reach a resolution through discussion and dialogue.

For most offences against tribal law, mediation and conciliation were adopted. However, for very serious offences, punishments were applied. For example, a member of the clan who breached religious laws, such as disobeying rules about sacred sites, could be punished by death. The figure below summarises the types of sanctions found in Aboriginal and Torres Strait Islander customary law.



Sanctions found in Aboriginal and Torres Strait Islander customary law

Revenge

Revenge was often used when a person had committed murder. The family of the victim was given the right to take their revenge on the perpetrator of the crime. Revenge was more about retribution than punishment and could often lead to long-lasting feuds within or between clans.

In some cases the revenge would be taken on the perpetrator's family or clan. Consequently, relatively minor incidents could result in tribal war. In one mythical case a man accidentally ate another's pet dingo. The retribution that followed inflicted great violence to the man's clan and resulted in several deaths.

Trial by ordeal

Trial by ordeal is something often associated with medieval Europe, but it was also common in many Aboriginal and Torres Strait Islander societies, particularly in Arnhem Land in the Northern Territory where it was called 'magarada'. The 'trial' was held some time after the offence has occurred in order to give time for tempers to cool.

The ordeal usually consisted of the accused, and commonly their relatives, running past the victim and their relatives, who would throw spears. The spears had the blades removed in order to stop any serious injuries. The accused was permitted to dodge the spears but could not throw them back, nor reply to any of the verbal abuse being directed at them.

The accused and their relatives were then required to run past the victims again, but this time the blades were left in. Finally the accused would dance from one side of the victim's group to the other. If the accused was speared in the thigh then the matter was at an end; the accused was forgiven and everyone joined in dancing. If the accused was not speared then this meant that they were not yet forgiven and a further ordeal would be necessary.

Inquest

It was common for Aboriginal and Torres Strait Islander societies to hold an inquest after a person had been murdered. At the inquest the tribal doctor would attempt to determine the cause of death and also who had caused the death. One common procedure required a relative of the victim to sleep with the head resting on the stomach of the corpse. During the sleep the relative would then dream of the murderer.

Another method adopted by Aboriginal clans in the Port Stephens area involved two people holding the corpse while a third beat it with a stick while naming suspects. If the body shook when a person was named then this indicated the named person's guilt. While each clan developed their own inquest procedures, almost all of them involved elements of magic and supernatural power.

Fighting, insulting, social ridicule and isolation

Fighting was another common way to punish suspected murders. However, one of the problems with this type of punishment was that if the accused was a good fighter, the combat often led to others being injured and the accused suffering no injury at all.

Insults and social ridicule were also common. Aboriginal and Torres Strait Islander societies were close-knit communities where social interaction with the clan was considered very important. Therefore having the whole clan ignore a person was a very effective punishment.

REVIEW

1. Write your own definition for the term 'mediation'.
2. Outline the role of families and clan members in dispensing customary law.
3. Describe the difference between mediation and conciliation.
4. Outline the concept of trial by ordeal.
5. What is an inquest in traditional customary law?

LAW IN ACTION

1. Use a graphic organiser such as a mind map to summarise the features of the main types of sanctions and punishments used in Aboriginal and Torres Strait Islander customary law.
2. Write a report explaining the key differences between sanctions and punishments in contemporary Australian law and customary law.

5.6 Relevance of Aboriginal and Torres Strait Islander peoples' customary law to contemporary Australian law

There are very great differences between the modern Australian legal system based on English common law and Indigenous customary laws. However, features of customary law are beginning to play a far greater role in modern Australian law.

The concept of mediation, which is a key feature of customary law for Indigenous Australians, is now used in a number of areas of law in Australia, including family law, industrial relations and, increasingly, in criminal law, especially where young offenders are involved. In 2000 the New South Wales Law Reform Commission produced a report on sentencing for Aboriginal offenders. It noted that judges should take into consideration that Indigenous Australians often face tribal punishments and judges should take this into consideration when sentencing.

Circle sentencing

There are a number of areas in the criminal justice system that are inclusive of Indigenous Australian perspectives. Over time the law is doing better at reflecting the needs of Aboriginal and Torres Strait Islander peoples in applying criminal justice. Specifically, **circle sentencing** – a process by which community leaders and a magistrate together decide on a punishment for offenders – is increasingly used. There are also Aboriginal Community Justice Groups, which work with local peoples in order to ensure the criminal justice system is more inclusive of Indigenous Australian perspectives. In addition, a system of Aboriginal Community Patrols is used in many rural and remote communities in New South Wales. These patrols help to reduce the incidence of public order offences and minor crimes that occur at night. In these ways it can be seen that alternative perspectives are influencing and shaping the legal system.

CIRCLE SENTENCING

A process by which sentencing is taken to the local community. It is characterised by the magistrate and community members sitting in a circle. Here they discuss the matter and impose and a sentence that is appropriate to the offence and which has community support.

Concepts such as mediation, a key feature of customary law, are now beginning to be used in contemporary Australian law.

The recognition of customary law in Australia has been highly contentious and has created considerable debate. A 1986 Australian Law Reform Commission report, *The Recognition of Aboriginal Customary Law*, was the first time the concept was really considered. This important report stated that customary law should be recognised where appropriate but that a separate legal system should not be established for Indigenous Australians, as this would undermine the entire legal system.

CASE LAW *R v. Shannon* (1991) 57 SASR 15

Increasingly, traditional beliefs are also being considered by the courts. In this case the defendant, Shannon, lit a number of fires in the belief that this would frighten off evil spirits. Soon afterwards his father threatened Shannon that he would suffer ill fortune at the hands of tribal kadaitja men. This threat tends to strike fear and panic into tribal members and caused Shannon to fear for his life. When police attempted to restrain Shannon he assaulted them.

On appeal, Justice Zelling found that the threat of kadaitja men was so significant that it would have caused Shannon to suffer an immediate superstitious panic and that the original trial judge should have taken this into account when sentencing Shannon for the assault.

REVIEW

Explain how Aboriginal and Torres Strait Islander customary laws are influencing contemporary Australian law.

LAW IN ACTION

1. With a partner, brainstorm some of the advantages and disadvantages of greater recognition of customary law in Australia. Share your ideas with the class.
2. Hold a class debate on the topic: 'Customary law should be recognised in Australia through a separate legal system'.

CHAPTER SUMMARY

Between 60 000 and 80 000 years ago, Australia's Indigenous people are thought to have arrived on the continent. Over the successive centuries a complex customary legal system developed. Each individual clan developed their own legal principles, but fundamental to all systems is the fact that laws are orally based and that kinship and customary religion are central to the legal systems.

The Aboriginal and Torres Strait Islander peoples' tradition sees the land and nature as having great spiritual importance and this is reflected in the customary law that developed. A key difference between Aboriginal and Torres Strait Islander peoples' customary law and the European legal system concerns the ownership of property. While much European law has been created to protect the rights of individuals to own and control property, in Aboriginal and Torres Strait Islander peoples' customary law, property is jointly owned by all. This has often led to conflict, particularly in the years following the European invasion.

One of the main features of Aboriginal and Torres Strait Islander peoples' customary law is that it is oral law. This means that the law is not written down but is instead based on word of mouth. Each generation must remember the laws and then pass them on to the following generation. Songs, dance and stories were used to help members of the clan remember the various laws that applied to their group. The lack of written law was one of the main reasons Europeans assumed that Aboriginal and Torres Strait Islander peoples had no legal structure. This assumption led to the British declaration that Australia was *terra nullius* during the initial invasion of the Australian continent.

This dubious legal doctrine, which meant 'empty land', was used to justify the occupation of the continent. This in effect took away any rights Aboriginal and Torres Strait Islanders peoples had over their traditional lands, including access to sacred sites and hunting rights. In recent years there has been growing recognition throughout the world of the rights of indigenous peoples to their traditional lands.

As a consequence of the strong bonds between family members and, ultimately, the clan, mediation became the favoured method of dispute resolution. Mediation involves all parties in a dispute talking through their issues and trying to resolve their problems through negotiation. Where a dispute could not be resolved through mediation, conciliation would be used. The elders of the tribe would meet with the people in the conflict and help them to reach a resolution through discussion and dialogue.

There are very great differences between the modern Australian legal system based on English common law and Indigenous customary law. However, features of customary law are beginning to play a far greater role in modern Australian law. Examples of this influence can be seen in the growing use of mediation in many areas of Australian law. There is also a growing recognition of customary law and the role it plays alongside the common-law system.

MULTIPLE-CHOICE QUESTIONS

1 Which of the following best describes Aboriginal and Torres Strait Islander customary law?
   - **A** Tribal law is uniform across all of Australia.
   - **B** It is based upon the principles of common law.
   - **C** It is oral law and contains a strong spiritual component.
   - **D** The ownership of property is central to customary law.

2 Which statement best describes the concept of a ritual?
   - **A** A religious event
   - **B** A regular behaviour
   - **C** A belief about a certain legal principle
   - **D** A dance or song used to remember a type of law

3 In customary law, how are disputes most commonly settled?
   - **A** Mediation
   - **B** Fighting and insults
   - **C** A hearing before a tribal elder
   - **D** Asking the advice of the gods through a tribal elder

4 In customary law, what is an inquest used for?
   - **A** To decide whether a traditional customary law should be changed
   - **B** To end a tribal war between different clans
   - **C** To decide on what punishment a person should receive
   - **D** To determine who murdered a person

5 What does the legal doctrine of *terra nullius* mean?
   - **A** Empty land
   - **B** A place with no law
   - **C** A society that has complex legal systems
   - **D** The right to decide whether a person is guilty of an offence

SHORT-ANSWER QUESTIONS

1 List the key features of Aboriginal and Torres Strait Islander peoples' customary law.

2 Describe the Dreamtime and outline its significance to Aboriginal and Torres Strait Islander peoples' customary law.

3 Describe how Aboriginal and Torres Strait Islander peoples' customary law is recorded and transferred to each generation.

4 Select two sanctions and punishments used in Aboriginal and Torres Strait Islander peoples' customary law and describe them.

5 Compare the role of family members of victims in Aboriginal and Torres Strait Islander peoples' customary law to their role in the contemporary Australian legal system.

6 Analyse the key differences between customary and common law.

7 Using case law, write a report on the significance of land and water to Indigenous Australians.

8 Assess the validity of the claim used by Europeans that there was no legal system in Australia prior to their arrival.

CHAPTER 6

International law

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

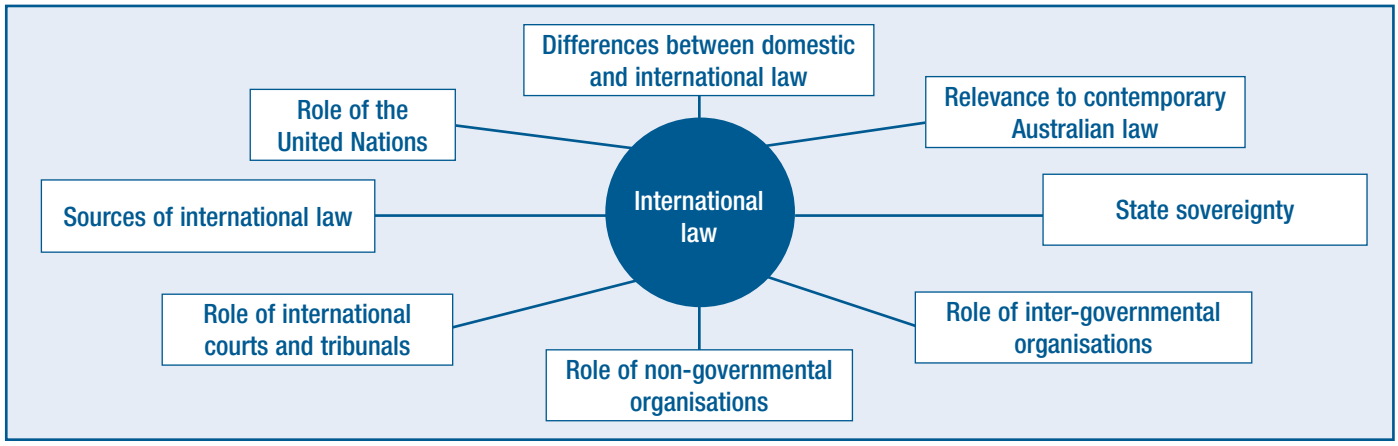
P6 explains the nature of the interrelationships between the legal system and society

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines the key features of international law. The sources of international law and the main differences between international and domestic law are discussed in detail. The role of the United Nations, various international courts and tribunals and non-governmental organisations in maintaining and creating international law are also examined.



SUMMARY OF CASE LAW

Anglo-Norwegian Fisheries case (1951) ICJ Rep. 116; (1951) 18 ILR 86
Australia v. France, New Zealand v. France (1974) ICJ Rep. 253, 57 ILR 398
Bosnia–Herzegovina v. Federal Republic of Yugoslavia [Serbia and Montenegro] (1993) ICJ
Democratic Republic of the Congo v. Rwanda (2002) ICJ Reports 2006
Foca Rape Camps case [2000] ICTY

SUMMARY OF INTERNATIONAL LAW

Antarctic Treaty (1959)
Charter of the United Nations (1945)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)
Convention on the Prevention and Punishment of the Crime of Genocide (1951)
Geneva Conventions (1864, 1906, 1929, 1949; all revised 1949)
International Covenant on Civil and Political Rights (1976)
Partial Test Ban Treaty (1963)
Rome Statute (2002)
Statute of the International Court of Justice (1945)
United Kingdom/Ireland Continental Shelf Boundary Agreement (1988)

6.1 Differences between domestic and international law

International law is the body of law that governs the relationship between nations. Without international law, nations would be unable to participate in trade and commerce and there would be a greater likelihood of conflict between nations. While the main focus of international law is the regulation of behaviour between nations, there are also international laws that apply to individuals engaged in international transactions.

International law is very different from domestic law; that is, the law that applies within each country. In the case of Australia, these differences are summarised in the table below.

Differences between Australian domestic law and international law

	International law	Australian domestic law
Application	Applies only to those nations that agree to be bound by the law	Is universal, meaning it applies to all
Enforcement	Complex legal tribunals exist but countries are permitted to exempt themselves from cases	Law enforcement agencies exist, such as the police, to enforce the law
Creation	Made through negotiations between nations	Made by parliament or the rulings of judges

As the table above demonstrates, the key differences between domestic laws and international laws relate to their application. In Australia, domestic law laws are made for all people and must therefore be followed by all. This is one of the cornerstones of our legal system: that no-one is above the law. However, in international law the legal principle of 'state sovereignty' applies. This principle, discussed in detail in the next section, allows nations to decide the laws by which they will agree to be bound.

International law is made in a very different manner to domestic law. International laws are made through negotiations between countries; this process is often complex and it can take many years to create a new law. When a new international law is proposed, each nation must decide whether they wish to participate. If a country agrees with the law, a representative of that nation will sign the agreement. However, the law must then be ratified. The process of **ratification** requires the national government to enact a domestic law accepting the terms and conditions of the international law. Only then is the nation obliged to follow it. Once this has occurred, the country is said to be a party to the international law.

RATIFICATION OF INTERNATIONAL LAWS **Before a country is bound by an international law it must ratify the law. This means passing a domestic law accepting the terms and conditions of the international law.**

REVIEW

1 Define the term 'international law'.
2 Explain the process involved in making international law.
3 Outline the process of ratification.

LAW IN ACTION

Write a report outlining the key differences between international and domestic law.

6.2 State sovereignty

The notion of state sovereignty is at the centre of all international law. It emerged at the same time as that of the 'nation state' – that all nations are fundamentally equal and that each nation's rulers have the right to make decisions on behalf of the nation. State sovereignty thus presents a dilemma for international law.

By definition, a law requires that it be enforced by some overriding authority. Within a state, that authority is the government, but there is, however, no world government to enforce international law. The United Nations is not a world government, merely an organisation made up of independent sovereign states, and has no authority of its own.

State sovereignty means that nations have the right to refuse to participate in international laws. Nations can even refuse to participate in hearings of international courts and tribunals, and this is the fundamental weakness of all international law.

Nations who wish to disregard the interests of the global community and follow their own agenda can do so without fear of consequence, knowing that they will not be held accountable. There are countless examples of this:

- the operation of pirates in the national waters of Somalia, who have attacked many ships; this is discussed in greater detail in Chapter 1.
- the treatment of civilians in Tibet by the Chinese military
- the torture and imprisonment of democracy protesters in Myanmar (Burma)
- the execution of juveniles in the United States.

In each case, these actions were outlawed by an international treaty. However, treaties only apply to those nations that ratify them; those that do not cannot be held accountable. Each of the nations cited above argued that the United Nations would be interfering with domestic policies if it were to intervene. Furthermore, intervention would amount to a breach of that nation's sovereign rights.

CASE LAW *Democratic Republic of the Congo v. Rwanda* (2002) (the Armed Activities on the Territory of the Congo case) ICJ Rep. 2006

In this case the International Court of Justice (ICJ) commenced hearing evidence in 2002 and finally made a ruling in February 2006. The case revolved around allegations made by the Democratic Republic of Congo (DRC) that its neighbour Rwanda had been launching armed attacks across the border and that this was in breach of many international laws.

This case demonstrates the way that state sovereignty can reduce the effectiveness of international law. The court found that it was unable to make a ruling in this case because it did not have the power to enforce international laws against Rwanda.

For example, the DRC stated in its submission to the ICJ that Rwanda had broken the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but Rwanda had never been a party to (signed and ratified) the agreement and so it could not be used in this case.

The DRC also cited the Convention on the Prevention and Punishment of the Crime of Genocide (Art. IX). While both the DRC and Rwanda were parties to this agreement, Rwanda had entered a reservation (a type of exclusion) that prevented the ICJ from hearing disputes involving it in relation to this Convention. Again this meant that the ICJ was powerless to enforce this law.

State sovereignty meant that the International Court of Justice was powerless to rule in a case brought by the Democratic Republic of Congo against Rwanda's armed attacks across the border.

REVIEW

1 Define the term 'state sovereignty'.
2 Explain how state sovereignty affects the operation of international law.

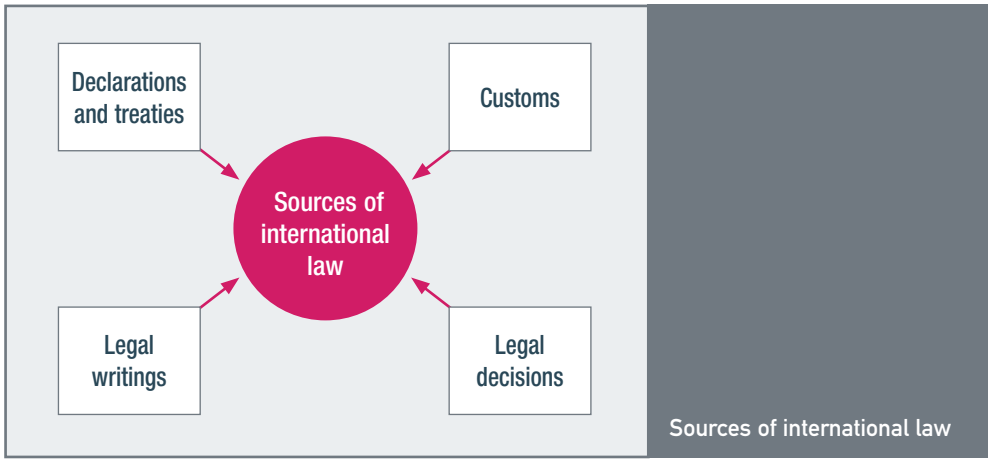
LAW IN ACTION

Examine the case *Democratic Republic of the Congo v. Rwanda* (2002) and complete the following activities:

a Outline the accusations made by the Democratic Republic of Congo.
b Explain how state sovereignty affected this case.

6.3 Sources of international law

International law is created in several ways as summarised below.



Treaties and other international agreements

Treaties are often referred to as conventions, protocols, covenants or **declarations**. Although each of these international instruments is technically different they have, in practice, come to have the same meaning. A treaty is best described as an agreement between nations that is entered into voluntarily. Nations who sign a treaty are said to have become 'parties to the agreement' and as such agree to be bound by the conditions and rules established in the agreement.

Treaties are therefore a little like a contract in that, by agreeing to participate in the treaty, the nation is creating a binding obligation for themselves. In return the signatory nation receives some kind of benefit. For example, one of the most significant treaties is the Geneva Convention relates to the regulation of war. Article 3 of the 1949 Convention (see overleaf) states that wounded and sick members of the armed forces shall be treated properly. Australia has signed this agreement and therefore agrees to accept the responsibility of treating enemy troops within the conditions outlined in the agreement. By agreeing to participate, Australia is obliged under international law to accept this responsibility, but it is also guaranteed by other signatory nations that, should we ever go to war with them, they would treat our troops properly.

DECLARATION **A non-binding agreement between nations.**

GENEVA CONVENTION 1, 1949: WOUNDED AND SICK ARTICLE 3

1 Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

b taking hostages

One of the key clauses of the Geneva Convention relates to the treatment of wounded and sick in war.

c outrages upon personal dignity, in particular humiliating and degrading treatment

d the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised people.

Point to ponder

The first Geneva Convention was originally drafted in 1864. The second and third conventions were adopted in 1907 and 1929; all three were revised at various times, most recently in 1949 when a fourth convention relating to the treatment of prisoners of war was also adopted. Further amendments were added in 1977 and 2005.

Types of treaties

There are two main types of treaties:

1 Bilateral treaties: these are treaties between two nations – for example, the United Kingdom/Ireland Continental Shelf Boundary Agreement 1988. This agreement between Britain and Ireland defines the sea boundary between these two nations.

2 Multilateral treaties: these are treaties between more than two nations – for example, the Antarctic Treaty (1959). This treaty is between several nations that have an interest in Antarctica.

Making treaties

There is no prescribed way to make a treaty, although most treaties are made using the following method.

1 Negotiation: the various nations that have an interest in the treaty discuss the clauses and conditions that the treaty will contain.

2 Consent to be bound: the participating nations agree that they will be bound by the conditions of the treaty. This commitment is demonstrated by signing the agreement.

3 Ratification: this is considered the most important step. It involves the signatory nation passing domestic law to accept the treaty. In a parliamentary democracy such as Australia, the federal parliament would pass a Bill accepting the treaty.

4 Reservation: this allows nations to withdraw from a treaty or a part of it. For example, when the United States signed the Convention on the Prevention and Punishment of the Crime of Genocide, it took a reservation that an American citizen could only be tried for genocide if the American government first granted approval.

Customs

An international custom is a rule that has been established because it has a long tradition and has been followed by many nations. Until the late 19th century almost all international law was customary law. However, customary law is considered too slow to effectively create international laws in a rapidly changing world. Furthermore, there are so many independent nations today that it is hard to find practices that are common to most nations. Treaty law therefore became a far more common means of establishing international laws.

Despite the growth of treaty law, a considerable amount of international law has its foundations in international customary law. For example, the 'Law of the Sea' and 'air law', which govern the use of international waters and airspace, are largely based on customary law. Many international customs still remain today; for example, a sea captain is expected, although technically not legally required, to stop and give assistance to another vessel in distress.

Legal decisions

The International Court of Justice (ICJ) deals with most disputes involving international law. The court, a part of the United Nations structure, has the power to make rulings in relations to treaties that nominate the court as the dispute resolution mechanism.

Under Article 38(1) of the Statute of the International Court of Justice, the international agreement under which the ICJ was formed, legal decisions are considered a subsidiary means of international law making. However, the rulings of the court, while not necessarily setting precedent, are becoming an important source of international law. This is because the ICJ has a tendency to go back and look at past cases before making rulings and there have been several cases where treaty law has been developed or amended as a result of the ICJ's rulings. For example, in the Anglo-Norwegian Fisheries case (1951) ICJ Rep 116; (1951) 18 ILR 86, the ICJ made a ruling that developed a baseline from which territorial seas could be measured. This baseline was then adopted in later treaties.

Apart from the ICJ, there are a variety of other specialised international courts and tribunals. Sometimes these too can establish aspects of international law. Cases involving war crimes are heard in **ad hoc war crimes tribunals**.

In 2000, at a sitting of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague in the Netherlands, it was agreed that rape and other forms of sexual assault may qualify as crimes against humanity. This means that a person who rapes another in war would be considered a war criminal and could be charged with this offence under international law. During the case, which became known as the Foca Rape Camps case, three Serbian soldiers were sentenced to prison terms ranging from 12 to 28 years.

Point to ponder

The ANZUS Treaty is a defence treaty signed between Australia, New Zealand and the United States. Since New Zealand refused access to its ports by American nuclear-armed or -propelled warships in 1985, the United States has refused to honour its treaty obligations to New Zealand.

Log on to the Pearson Places website and follow the links to learn more about the ICJ and look up current and past cases.

AD HOC TRIBUNALS

Temporary tribunals set up for a specific purpose. Once this is completed they are disbanded.

Legal writings

NATURAL LAW **Laws said to have been derived from God. They were considered more important than the laws made by monarchs or courts.**

Throughout history, the writings of philosophers and legal academics have been very important in influencing the direction of law making. Legal writings were particularly important from the 16th to the 18th centuries. During this period the concepts of **natural law** – which held that law came from God and was above the authority of the state – were dominant. Therefore, theologians and philosophers played a very important role in the development of law, including international law. In fact, throughout this period philosophical writers such as Vattel, Gentilis and Bynkershoek were considered more important in the formation of international law than judicial decisions or the practices of nations.

By the 19th century the dominance of natural law began to decline and **positive laws** gradually took over. Positivists placed a greater emphasis on the role of the state in making law, and treaties and customs began to dominate international law rather than legal writings.

POSITIVE LAW **Laws that are generated by parliaments, monarchs and courts.**

While the role of legal writers in the formulation of international law declined considerably throughout the 20th century, this is not to say that they have no role at all. Legal writings are important in focussing attention on defects in international law, leading to the rectification of these faults. Writings also stimulate discussion and debate about the nature of international law. Interestingly, when international lawyers offer advice to their governments or present arguments to international courts and tribunals, they often make references to legal writings.

REVIEW

1. What is a treaty?
2. Outline the difference between a treaty and a declaration.
3. Explain why countries sign up to international laws.
4. Differentiate between bilateral and multi-lateral treaties.
5. Outline the methods for making international laws.
6. Explain what an international custom is.
7. Describe the role of legal writings in creating international laws.
8. Explain the difference between positive and natural laws.

LAW IN ACTION

1. Refer to the extract from the Geneva Convention 1 on page 74. Outline the obligations this convention places on countries.
2. Working with a partner, use the library and the Internet to identify two treaties to which Australia is a party. Identify the treaty and explain what this treaty requires Australia to do.
3. Some people, including the former President of the United States, George W. Bush, have argued that when nations sign international agreements, national independence is diminished. For this reason it is argued that signing too many agreements should be avoided. Do you agree with this argument? Explain your answer.

6.4 Organisations involved in international law

Log on to the Pearson Places website to find a full copy of the United Nations Charter.

Web Destination

The United Nations

At the conclusion of World War II the United Nations (UN) was formed, with the principal aim of establishing and maintaining world peace. The Charter of the United Nations, completed in 1945, outlines the principles, rules and ideals to which member nations of the United Nations commit themselves.

The UN has 192 members and has its headquarters in New York. When it was first established, the UN saw itself as providing a forum for nations in dispute with each other, but would not intervene in any matter that was domestic. This has attracted much criticism, as **civil war** is one of the most common types of conflict and one of the most devastating to civilians.

CIVIL WAR **A war between groups within the same nation.**

The United Nations, whose headquarters are located in New York, has 192 member countries.

In more recent times the United Nations has deployed peacekeeping forces to various places where internal conflicts have developed. Recent examples have included Sudan, Somalia, Rwanda and the Balkan region of Europe. While these deployments have demonstrated a commitment by the UN to the promotion of peace, they too have been criticised as being ineffective. For example, when peacekeepers were sent to Bosnia they were not permitted to use force to promote peace but only in self-defence. Therefore they were powerless to stop civilians from being shot at unless they themselves were being targeted.

While the United Nations does attract a great deal of criticism it remains a powerful force in the promotion of world peace and international law. Through it vast array of organisations, most of which Australia is a member, it encourages human rights, has reduced disease and hunger on a global scale and has established the legal framework for the prosecution of international criminals.

Point to ponder

Montenegro is the newest country to join the UN, joining in June 2006.

KEY UN BODIES

The General Assembly

The General Assembly is the main forum of the United Nations. It meets from September to December every year in the UN headquarters in New York. All member nations sit in the General Assembly and its primary role is to pass resolutions in relation to the operations of the UN. The Assembly also passes resolutions relating to conflicts between nations and has the power to create new United Nations bodies. For example, in 1993 a High Commission for Refugees was appointed by the General Assembly. Its role is to ensure that the rights of all refugees are maintained throughout the world.

The Security Council

The United Nations Charter (Article 24) assigned the primary responsibility for maintaining peace to the Security Council. The council consists of five permanent members: Great Britain, the United States of America, Russia, China and France. In addition, there are 10 non-permanent members who serve for two years each. The five permanent members each have the **power of veto** over any decision taken by the council. This means that one of the permanent members can block a proposal even if all the others agree to it.

POWER OF VETO The right to reject any proposal.

Article 39 of the UN Charter allows the Security Council to instigate military action if it feels there is a 'threat to the peace, breach of the peace, or an act of aggression'.

In 1950 the United Nations activated Article 39 for the first time, after the invasion of South Korea by North Koreans. The Security Council called on all member states to provide military assistance to South Korea. The troops were in theory under a unified United Nations command, although in reality the force was commanded by the United States, as they had provided the bulk of the troops.

More recently, the Security Council passed resolutions in relation to the Iraqi invasion of Kuwait in 1990. The Council called on member nations to provide military assistance to Kuwait; 29 member nations complied, while others provided a range of non-military assistance.

Courts and tribunals

The International Court of Justice

The International Court of Justice (ICJ) is the main judicial organisation of the United Nations. The court consists of 15 judges, each representing a different geographic region. The court has two main functions:

1 to decide on disputes brought before it by member nations

2 to offer legal advice on matters of international law when requested by a member nation.

The ICJ is a court for nations only. An individual, corporation or other organisation cannot bring a matter before the court, although nations are authorised to bring a case before the court on behalf of a citizen.

Jurisdiction of the ICJ

All member nations of the United Nation are entitled to take matters before the ICJ. However, before the ICJ will hear a case the nations involved must recognise the right of the court to settle this dispute. This will occur in one of three ways:

1 a special agreement: when agreement is given in relation to a specific dispute

2 a clause in a treaty: there are more than 300 international treaties that nominate the ICJ to resolve disputes between the signatories of the treaty. In this circumstance, by signing the treaty a nation agrees to accept the jurisdiction of the ICJ in disputes relating to the treaty

3 a unilateral declaration: some nations have agreed to accept the **jurisdiction** of the ICJ in all matters. This jurisdiction applies to disputes where both parties have made the unilateral declaration. These declarations may be time-limited and may also contain exception clauses. At present, 63 nations have made declarations.

COURT JURISDICTION The authority of a court to decide on a particular matter.

This situation significantly reduces the effectiveness of the ICJ in resolving international law disputes. A country can simply refuse to participate in the case and even when they do agree to accept the right of the ICJ to hear a case there is little the court can do to enforce its rulings.

CASE LAW *Australia v. France, New Zealand v. France* (1974) ICJ Rep. 253, 57 ILR 398 (the Nuclear Tests case)

During the 1970s France conducted a series of nuclear tests on tiny Mururoa Atoll in the South Pacific Ocean. The tests were atmospheric, meaning the nuclear bomb was dropped from an aircraft and detonated before hitting the ground.

After approaches to the French government to stop the testing due to fears that nuclear fallout could contaminate Australian and New Zealand territories were unsuccessful, a case was launched in the ICJ. The basis of case was that atmospheric nuclear testing was prohibited under the Nuclear Test Ban Treaty 1963, to which France, Australia and New Zealand were signatories.

However, before the proceedings could begin France refused to accept the authority of the ICJ to hear the case. This in effect meant that even though the case went ahead and the court ruled against France there was nothing the court to do to enforce the ruling.

Despite having problems like those seen in the Nuclear Test case, the ICJ plays a very important role in resolving disputes before they escalate into serious international incidents and perhaps even war. The ICJ can also help protect global environments through its rulings on international environmental law and can also help protect international human rights.

CASE LAW *Bosnia–Herzegovina v. Federal Republic of Yugoslavia* [Serbia and Montenegro] (the Genocide in Bosnia case), (1993) ICJ

This case was brought before the ICJ by Bosnia–Herzegovina, which claimed that the Republic of Yugoslavia had engaged in acts of **genocide** and unlawful armed attacks during the Balkan wars of the 1990s. Yugoslavia was a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide, and so the ICJ agreed to hear the case.

The case was a very complex one and involved a great deal of legal argument. Bosnia claimed that any delay could result in even more acts of genocide and harm to its people. The court recognised its important role in the protection of the rights of individuals and therefore issued an interim order before the case was finished.

The order required that Yugoslavia take all measures to prevent genocide and in particular to ensure that all troops under its command acted in accordance with international law.

GENOCIDE **The intentional extermination, or attempted extermination, of an ethnic group or nationality.**

War crimes tribunals

War crimes tribunals are special international courts established on an *ad hoc* (when needed) basis to try individuals accused of war crimes and crimes against humanity. These tribunals play a very important role in ensuring that individuals involved in conflict conduct themselves in within the rules of war. A number of tribunals are currently sitting, including the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY).

The first ever trial of war criminals took place at Nuremberg in Germany, where the Allies convicted war criminals of Nazi Germany.

Log on to the Pearson Places website and follow the links to find more about the International Criminal Court (ICC).

PP Web Destination

International Criminal Court

The International Criminal Court (ICC) was created by a special treaty called the Rome Statute, which entered into force in 2002. At present, 108 countries are parties to the Statute and are therefore bound by the rulings of the Court.

The ICC is a permanent court and deals with the cases against individuals who have been accused of the most serious of international crimes, such as genocide, crimes against humanity and serious war crimes. The ICC will not hear a case that is currently being investigated by another body, such as a national court, unless the investigation is not genuine or is unfair.

The ICC is currently hearing cases involving individuals accused of committing crimes against humanity in the Darfur region of Sudan.

Role of intergovernmental organisations

Intergovernmental organisations (IGOs) are organisations that represent the governments of member nations. The United Nations is the most significant intergovernmental organisation. However, there are many other organisations, many of which are regionally based, such as the European Union (EU).

These organisations have their own international laws and regulations. Some organisations also have their own tribunals and use sanctions against members who fail to abide by these laws. For example, the African Union, an organisation made up of countries throughout Africa, suspended the membership of Guinea in December 2008 after the overthrow of the government by a group of soldiers.

Log on to the Pearson Places website and follow the links to find more information on the African Union (AU).

PP Web Destination

Role of non-governmental organisations

Throughout the 20th century, non-governmental organisations (NGOs) representing a variety of special-interest groups grew in prominence. These organisations are not recognised under international law and therefore have no direct legal role; for example, an NGO cannot bring a matter before the ICJ.

However, NGOs play a significant role in applying political pressure to nations to abide by international laws. For example, environmental groups worldwide have used the media to apply public pressure to governments, encouraging them to participate in international environmental law.

Several thousand people took part in this protest march against the war in Iraq.

Point to ponder

The International Committee of the Red Cross and Red Crescent (ICRC) is a special NGO that has legal authority under international law. The ICRC administers the Geneva Conventions and Protocols.

REVIEW

1 Outline the main roles of the United Nations.
2 Describe the function of the UN General Assembly.
3 What is the role of UN Security Council?
4 Describe the functions of the International Court of Justice.
5 Describe the three circumstances that lead to the International Court of Justice agreeing to hear a case.
6 Describe the purpose of war crime tribunals.
7 What is the role of the International Criminal Court?
8 Explain how intergovernmental organisations affect the operation of international law.
9 Define the term 'non-governmental organisation'.
10 How do non-governmental organisations affect international law?

PP Web Destination

LAW IN ACTION

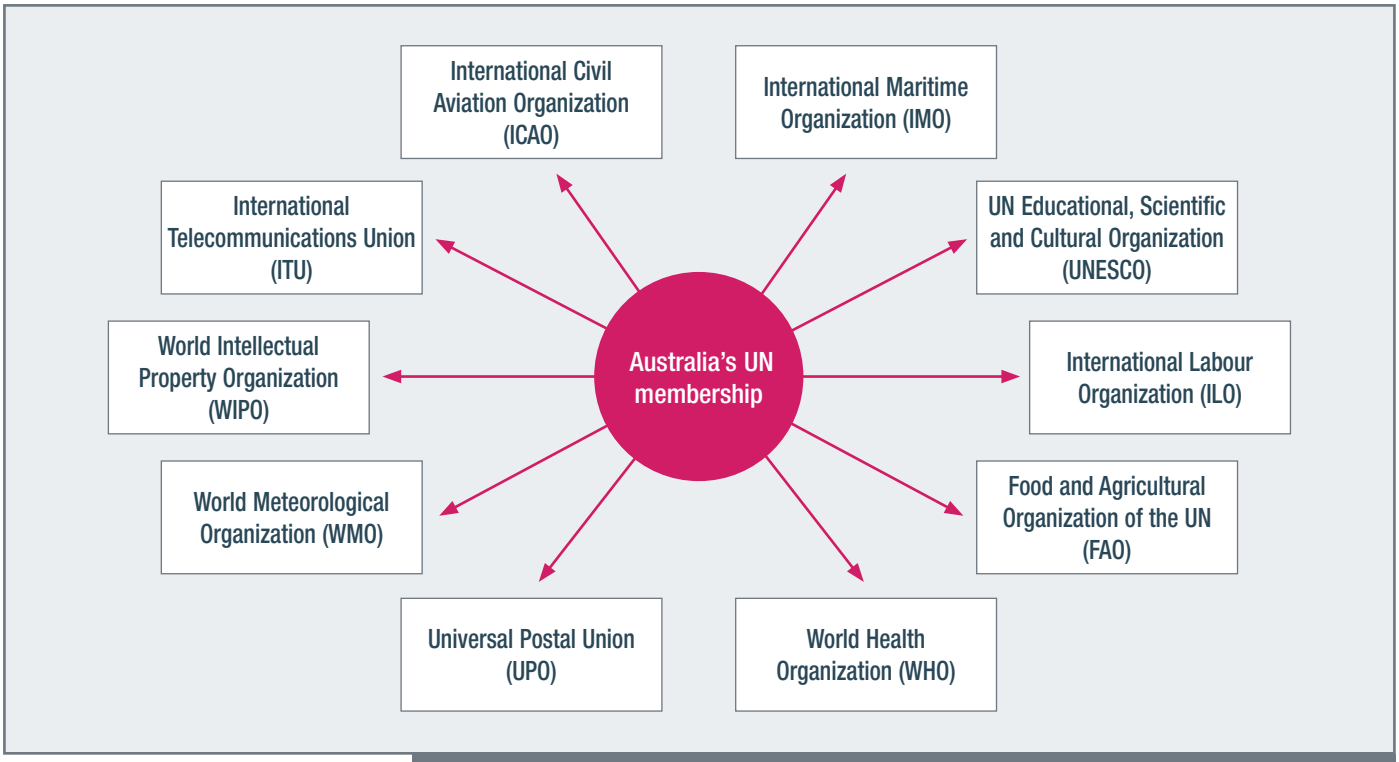
1 Log on to the Pearson Places website and follow the links to the United Nations website. Prepare a report on the various functions undertaken by the organisation. In particular, describe its role in the promotion of world peace and the protection of human rights.
2 Write an argument in support of or against the fact that only countries can use the International Court of Justice to resolve disputes.
3 Refer to the case *Australia v. France, New Zealand v. France* (1974) and complete the following activities:
   a Under what grounds did Australia and New Zealand launch this case against France?
   b Explain why the ruling left the matter unresolved, even though the court ruled against France.
   c As a class, discuss what this case tells us about the effectiveness of the ICJ in enforcing international law.

continued…

4 Refer to the case *Bosnia–Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro)* and complete the following activities:
- **a** Explain the nature of the claim brought by Bosnia–Herzegovina.
- **b** Outline the ruling of the court.
- **c** What conclusions can be drawn from this case about the way the ICJ views its role in relation to human rights?

6.5 Relevance of international law to contemporary Australian law

Australia plays a very active role in international law. It was one of the founding members of the United Nations and has been involved in the organisation ever since.



Australia is member of a wide variety of UN organisations.

Australia has also been active in UN peacekeeping activities. In recent years, forces from Australia have contributed to peacekeeping operations in Cyprus, East Timor, Bougainville, Cambodia and Somalia.

International law plays an important part in Australian domestic law as well. The Tasmanian Dam case (see page 49 for more information) is an example of the way that international laws affect legal decisions in Australia. In this case, the fact that the Franklin and Gordon rivers were World Heritage areas and thus protected by international law meant that the Tasmanian Government could be prevented from constructing dams in this important environment.

RECOGNITION OF SAME-SEX RELATIONSHIPS

In January 2009 the Commonwealth Government announced changes to laws relating to pensions given to the partners of war veterans who had died, known as war widow/widower pensions.

Edward Young had been in a same-sex relationship with Larry Cairns, a World War II veteran, for 38 years before Mr Cairns died. Upon his death, Mr Young applied for a war widower's pension but was refused on the grounds that same-sex partners were not eligible for the pension.

After several unsuccessful appeals to the government, Mr Young appealed to the United Nations High Commissioner for Human Rights. In 2003 the UN found that the lack of recognition of same-sex relationships amounted to a breach of the International Covenant on Civil and Political Rights, of which Australia is a signatory. The UN continued to apply pressure to the government in relation to Mr Young's claim. Eventually, the laws were changed in line with the Covenant and Mr Young received the pension from mid-2009 onwards.

REVIEW

1 Outline some of the ways in which Australia has been affected by international law.
2 Explain how international law affected the outcome of the Tasmanian Dam case.

LAW IN ACTION

1 Research one of the UN organisations to which Australia belongs. Make a short presentation to the class on the role of the organisation and how it affects Australia.
2 Working in small groups, conduct research into recent UN peacekeeping operations in which Australia has been involved. Each group should research a different operation, outlining the location, time frame, involvement and operation of the mission, and also describe the reasons why the mission was required.
3 Refer to the box above on recognition of same-sex relationships and explain how international law was used in this case.

CHAPTER SUMMARY

International law is the body of law that governs relationships between nations. International law is very different from domestic law (the law that applies within a country). A key difference is the way that laws are made. International laws are made by negotiation between individual countries.

Another difference relates to enforcement – in international law, special courts or tribunals enforce the law, but countries can exempt themselves from participation in cases. While domestic laws are universal – meaning that the laws apply to all – in international law the laws only apply to those nations that agree to be bound.

The notion of state sovereignty is at the centre of all international law. It emerged at the same time as that of the 'nation state' – that all nations are fundamentally equal and that each nation's rulers have the right to make decisions on behalf of the nation.

State sovereignty presents a major problem for international law as it allows nations the right to refuse to participate in it. Thus the scope and effectiveness of international law is greatly reduced.

Treaties are the most common method by which international law is made. A treaty is a voluntary agreement made between nations. Once a nation signs the agreement it is said to be a party to the agreement and therefore agrees to be bound by the conditions and rules of the treaty. Before the treaty takes effect for the signatory nation, however, it must first be ratified. This means that the national parliament passes a domestic law agreeing to be bound by the terms and conditions of the treaty.

While treaties are voluntary, many countries participate in them because they wish to demonstrate their commitment to a principle, such as being against discrimination, or because they will gain some benefit from the treaty, such as favourable trade relations.

Some international laws are created by international customs: long-standing traditions that the majority of nations have followed. The decisions of international courts do not create precedent but they sometimes prompt the formation of international law.

The United Nations (UN), which has 192 member nations, is the principal international organisation. Only countries can join the UN, which has numerous bodies that have their own treaties and regulations. The key aim of the UN is the promotion of peace between nations in order to protect the rights of individuals. The UN Security Council is a significant UN body that aims to create peace. It has the power to create peacekeeping missions and is also entitled to request military action in order to enforce peace.

The principle international court is the International Court of Justice (ICJ). Only nations are entitled to refer a matter to the ICJ. Most countries that participate in a treaty nominate the ICJ as the means for resolving disputes between parties to the treaty. However, the concept of state sovereignty means that countries may refuse to recognise the right of the ICJ to decide on a legal matter.

MULTIPLE-CHOICE QUESTIONS

1 Which of the following statements best describes international law?

- **A** It is universal and applies to all nations.
- **B** It is enforced by special peace-keeping forces of the United Nations.
- **C** It is voluntary and is created through negotiations between countries.
- **D** International laws only take effect once at least 50 per cent of the world's countries vote to accept the law.

2 What is state sovereignty?

- **A** The right of countries to make their own decisions
- **B** The right of individuals to have a say in who will rule them
- **C** The rights granted to each state under the Australian Constitution
- **D** The right of the United Nations to force countries to comply with international laws

3 What is a treaty?

- **A** A non-binding agreement made between nations
- **B** A document outlining the rules of behaviour that governments must follow
- **C** A document signed by nations agreeing to be bound by certain rules of behaviour
- **D** An agreement made between governments and non-governmental organisations

4 Australia negotiates a treaty with Indonesia on a certain aspect of trade. What type of treaty is this?

- **A** A bilateral treaty
- **B** A sovereign treaty
- **C** A declarative treaty
- **D** An intergovernmental treaty

5 A nation ratifies a treaty. What does this involve?

- **A** The leader of the country signing the agreement
- **B** The people voting in a referendum to accept the agreement
- **C** The nation indicating to the United Nations that it no longer wishes to be bound by the treaty
- **D** The national parliament of a signatory nation passing a domestic law accepting the conditions of the treaty

6 What is an international custom?

- **A** An international rule established through a long-standing tradition
- **B** Rules governing the movement and trade of goods between countries
- **C** An international rule made through a vote of the General Assembly of the United Nations
- **D** Rules made through the legal decisions of international courts, such as the International Court of Justice

7 Which of the following statements best describes the meaning of 'positive law'?

- **A** Laws that aim to achieve fair outcomes
- **B** Laws made by parliaments, monarchs and courts
- **C** International laws that are created to reward the good behaviour of countries
- **D** Laws that are created to maintain good order between countries during times of war

8 When does the International Court of Justice (ICJ) have jurisdiction to hear a legal matter?

- **A** When the crime of genocide has been committed
- **B** When the United Nations Security Council refers a matter to it
- **C** When at least one country in the dispute asks the Court to decide on the matter
- **D** When a treaty nominates the Court as the decision maker in a dispute about the treaty

9 An army general is accused of murdering hundreds of unarmed enemy civilians and injured soldiers. The general is charged with crimes against humanity. In which court are they most likely to be tried?

- **A** International Criminal Court
- **B** International Court of Justice
- **C** The UN Security Council Tribunal
- **D** The Tribunal of the Geneva Convention

10 What method is most commonly used by non-governmental organisations to influence international law?

- **A** Becoming signatories to international agreements
- **B** To refer matters to international courts and tribunals
- **C** Applying pressure to individual governments through media and protest campaigns
- **D** Creating their own treaties and agreements and encouraging countries to sign and be bound by the agreement

SHORT-ANSWER QUESTIONS

1 Outline the way that international law is generally made.

2 Outline the jurisdiction of the International Court of Justice.

3 Define the term 'treaty'.

4 Describe the nature of intergovernmental organisations.

5 Describe the role of non-governmental organisations in the operation of international law.

6 Compare the features of international and domestic law.

7 Explain the purpose of the International Court of Justice.

8 Analyse the role of the United Nations in the operation of international law.

9 Analyse the relevance of international law to Australia.

10 Assess the impact of state sovereignty on the effective operation of international law.

Classification of law

CHAPTER 7

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

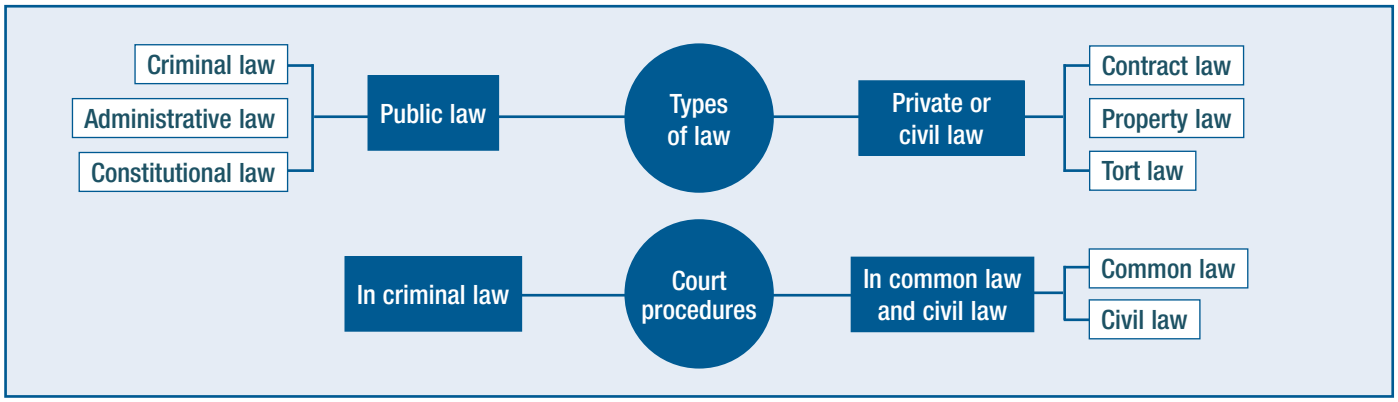
P6 explains the nature of the interrelationships between the legal system and society

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

The focus of this chapter relates to the different types of laws that exist in the Australian legal system. The procedures used in criminal and civil courts along with the legal personnel involved in this are also examined.



SUMMARY OF CASE LAW

Bartho v. R (1978) 19 ALR 418
Commercial Bank of Australia v. Amadio (1983) 151 CLR 447
Donoghue v. Stevenson [1932] AC 562 (House of Lords)
Eveready Australia Pty Ltd v. Gillette Australia Pty Ltd [1999] FCA 1824
Gan v. Anderson & anor [2008] NSWLEC 1257 (24 June 2008)
New South Wales v. Commonwealth [2006] HCA 52; 81 ALJR 34; 231 ALR 1
R v. Blaue (1975) 3 All ER 446
R v. Peterson [1984] WAR 329

SUMMARY OF LEGISLATION

Education Act 1990 (NSW)
Fair Trading Act 1987 (NSW)
Trade Practices Act 1974 (Cwlth)

7.1 Public law

The Australian legal system is a complex one with a huge number of laws. These laws can be classified into either public or private laws. Public laws – referred to as social norms – are those laws that set the general standards of behaviour expected by a society. Public laws include:

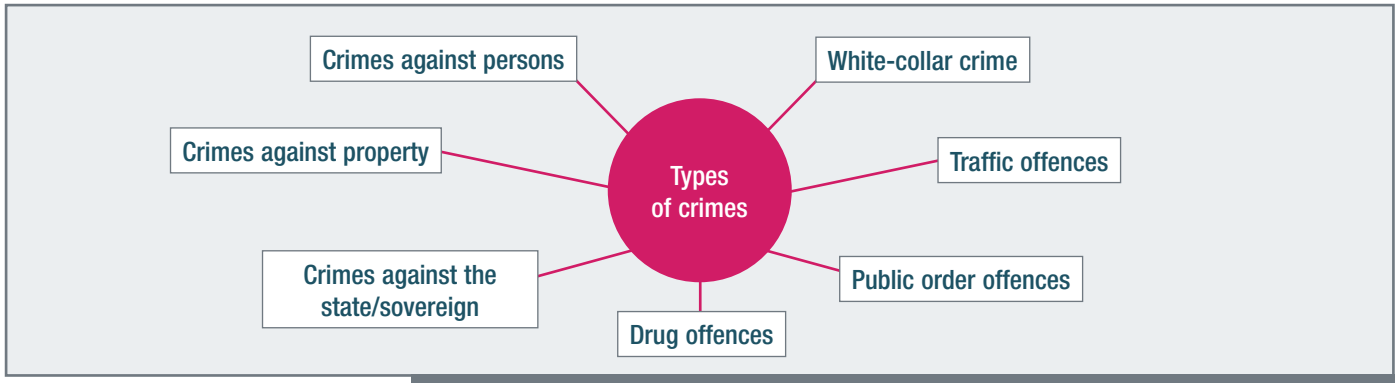
- criminal law
- administrative law
- constitutional law.

Criminal law

Criminal laws are usually established by statute, although in some cases criminal laws can be made through common law. For example, the crime of rape was originally established as a crime through the decision of judges. Eventually statute laws were made creating the offence of sexual assault, replacing the old crime of rape.

Criminal law is considered public law because when a person breaks a criminal law they are said to be harming all members of society. Consequently the victim in a criminal case is all of society; hence, the case is brought by the police and prosecution on behalf of society. This can be seen in the way that criminal law cases are cited; for example, *R v. Peterson* [1984] WAR 329. The accused in this case was Peterson but instead of the victim's name being used in the citation 'R', meaning Regina (or Queen) is used. As the Queen is the head of state she represents all people.

There are seven broad classifications of criminal laws as summarised in the figure below.



The seven broad classifications of criminal laws

- Crimes against persons. These crimes involve the injury or threat of injury to another person, such as homicide (the intentional killing of another person) and assault (the crime of causing or threatening to cause an injury to another person).
- Crimes against property. These crimes involve the theft of or damage to another person's property. Much of the criminal law in Australia relates to this type of crime. Examples include larceny (removing another person's property without their consent) and robbery (the use or threatened use of violence in order to take another person's property).

BREAK AND ENTER
A crime against property that involves illegally entering a building in order to commit an offence.

- Crimes against the state or sovereign. These laws are often thought of as being from medieval times, but they are still used today. They involve crimes that damage the country and its people. There are two main types: sedition (the crime of encouraging a hatred of the country) and the more serious offence of treason (the crime of actively trying to bring about the collapse of the country or assisting the enemies of the country).
- Public order offences. These crimes disrupt the activities of a society. They are minor offences such as being drunk in a public place or swearing in a public place.
- Traffic offences. These are the most common offences committed in society. Most offences, such as speeding, are dealt with by on-the-spot fines. More serious traffic offences, such as drink driving, require a court hearing.

Crimes against public order are the most common criminal law matters.

- White-collar crimes. This covers a wide variety of crimes that are usually committed by professional people; hence their name. Tax evasion, fraud and computer hacking are all examples of this type of crime.
- Drug offences. These are offences against the state and include the importation, manufacture, possession, trafficking, distribution, supply and use of prohibited narcotics. Some drug offences are Commonwealth crimes (such as importation) and other are state offences (manufacture and distribution).

Administrative law

Administrative laws are those that relate to the operation of the government and its various departments. Whenever a government department or agency is created, it is done through the passing of a law establishing the department; for example, the powers and responsibilities of the New South Wales Board of Studies are outlined in the *Education Act 1990* (NSW) as reformed. In addition to creating the government body, the Act also outlines the powers the body may exercise. This is referred to as its 'administrative powers'.

Point to ponder

The Administrative Decisions Tribunal is a special tribunal that deals with matters of administrative law for Commonwealth government departments and agencies.

Constitutional law

A constitution is a legal document outlining the powers and operation of the government. In a democratic society, such as Australia, governments and its members must abide by the rules established in the constitution or they will be dismissed from office.

While the constitution in some countries deals extensively with the rights of individual citizens, the Australian Constitution mostly deals with division of power between the federal and state and territory governments and the separation of power between the parliament, the High Court and the Commonwealth Executive Council (this is discussed in greater detail in Chapter 4).

As discussed in Chapter 2 (see page 27) the High Court of Australia deals with all matters relating to constitutional law in Australia. The Court hears cases where it is thought the government has exceeded its rights as outlined in the Constitution. For example in the case *New South Wales v. Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (2006), the New South Wales Government alleged that the Commonwealth did not have the legal right to make certain laws affecting industrial relations. Instead, it argued, the Constitution gave such rights to the states. In this case (discussed in greater detail on page 50) the High Court ruled that in fact the Constitution did give the Commonwealth the power to make the laws.

The High Court of Australia deals with matters with constitutional law.

REVIEW

1. List the main types of public law.
2. Describe the nature of criminal law.
3. Explain why criminal law can be considered public law.
4. What is a crime against a person?
5. Outline the nature of public order offences.
6. Describe administrative law.
7. What is constitutional law?

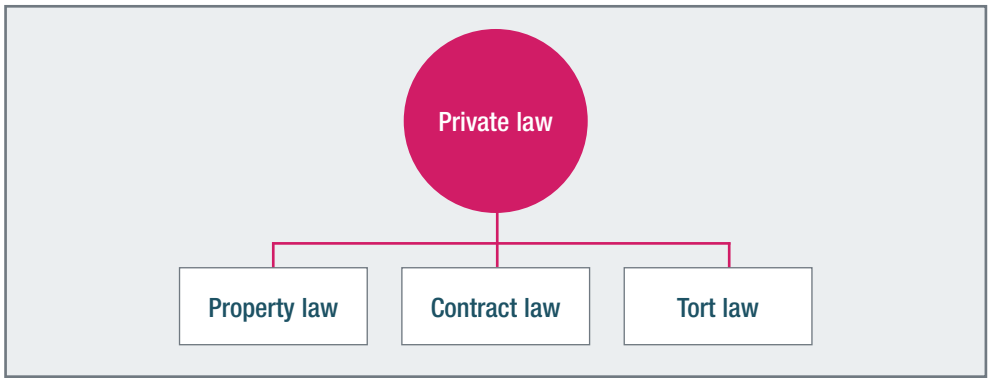
LAW IN ACTION

1. Write a report outlining the main features of public law.
2. In criminal law all of society is considered to be the victim. Some have argued that this principle reduces the rights of the victims of crime. Should individual victims have a greater role in criminal law? Justify your answer.

7.2 Private or civil law

Private law is often referred to as civil law and deals with the legal relations between individuals and organisations. The key difference between criminal and civil law is the role of the individual. In a criminal matter it is society that is said to have been wronged and hence society brings the case. Under civil law, however, it is a matter between individuals. The person who brings the action is known as the **plaintiff**, while the person against whom the action is brought is known as the **defendant**. This is seen in the way cases are cited; for example, in the case *Eveready Australia Pty Ltd v. Gillette Australia Pty Ltd* [1999] FCA 1824, Eveready (the plaintiff) brought a case against Gillette (the defendant) after the company advertised wrongly that its batteries lasted four times longer than other brands.

There are three main areas of civil or private law, as summarised below.



PLAINTIFF **The person who brings a case in a civil law matter.**

DEFENDANT **The person who is accused of committing a wrong in a civil law matter.**

Contract law

A **contract** is a legally binding agreement between two or more parties. Many civil law matters deal with contracts where one party believes that the other party has failed to fulfil the requirements of the contract.

Contract law stipulates that in order for a contract to be valid and therefore enforceable there must be:

- an 'invitation to treat'. For instance, a shop that advertises a shirt for $45 is inviting interested people to come in and buy it
- an offer. In this example, an offer takes place when a person takes the shirt to the counter and offers to buy it
- consideration. Under contract law, both parties in a contract must benefit from it. In this example, the consideration on the part of the buyer is the money tendered for the shirt, while the shirt itself is consideration on the part of the vendor. If one party fails to benefit from the contract it will not be valid
- acceptance. When the shop assistant accepts the money, a contract comes into existence. When the shirt is handed over in exchange, the contract is complete.

Another feature of contract law is that it requires parties who enter into a contract to do so in 'good faith'. This essentially means that the parties will act fairly and not try and deceive the other party. When either party fails to act fairly it is called '**unconscionable conduct**'. Many contract law cases, such as the one following, come about because of this issue.

CONTRACT **A legally binding agreement between two or more parties.**

UNCONSCIONABLE CONDUCT **When a party in a contract acts unfairly it is said to be engaging in 'unconscionable conduct'.**

The law requires people who enter into contracts to act in good faith.

CASE LAW *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447

Mr and Mrs Amadio's son convinced them to become guarantors for a business loan he was seeking from the Commercial Bank of Australia. A guarantor is someone who agrees to pay the debts owed by another person if they fail to pay. The bank agreed that Mr and Mrs Amadio could become guarantors and issued the loan.

Mr and Mrs Amadio were elderly and had a very poor comprehension of English and the bank failed to properly explain the consequences of becoming a guarantor for their son's loan. The bank did not advise Mr and Mrs Amadio to seek legal advice, nor did it inform them that their son was in a very weak financial situation.

When the business failed the bank demanded that Mr and Mrs Amadio pay for their son's loan. On appeal to the High Court, it was found that the Commercial Bank had acted unconscionably by not providing full and accurate information and by taking advantage of the couple's poor English. Consequently the contract was found to be void and the Mr and Mrs Amadio were released from paying the debt.

Property law

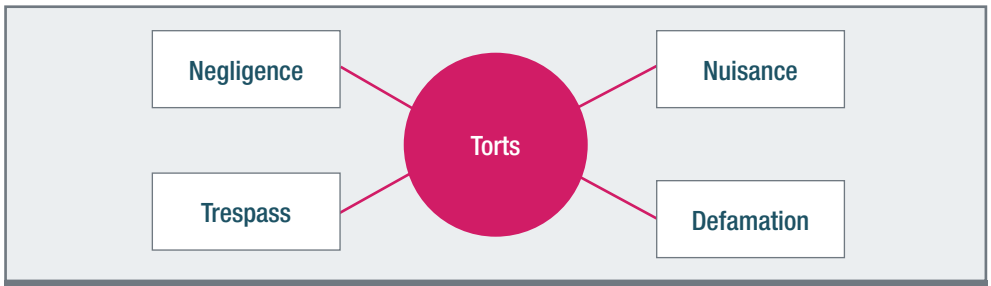
Anything that can be bought or sold is considered **property**. There are numerous laws governing the way that property transactions are to take place. For example, the *Trade Practices Act 1974* (Cwlth) and the *Fair Trading Act 1987* (NSW) are examples of statutes that ensure that businesses act appropriately when selling property. Insurance is a key aspect of property law.

PROPERTY **Anything that can be bought and sold.**

TORT **A civil wrong.**

Tort law

The law of **torts** is a complex area of law that involves civil wrongs. Torts are not criminal matters but involve the actions of one person inconveniencing another person, or breaching their rights. Torts are divided into four key areas, as shown below.



Torts are divided into four key areas.

Negligence

Negligence is a very common tort and revolves around the concept of 'duty of care'. This legal concept states that every person and organisation has the responsibility to ensure that their actions do not cause harm to others or their property. The concept of duty of care was established through common law in the famous case *Donoghue v. Stevenson*.

COMMUNITY JUSTICE CENTRES (CJCs) **Legal bodies that help people resolve minor disputes using mediation and, if need be, arbitration.**

CASE LAW *Donoghue v. Stevenson* [1932] AC 562 (House of Lords)

Mrs Donoghue visited a cafe with her friend, who ordered and paid for a bottle of ginger beer. The owner poured some of the ginger beer into a glass. Mrs Donoghue drank some of the contents, but when she poured out the remainder of the ginger beer, a decomposed snail fell out of the bottle into the glass. Mrs Donoghue suffered severe stomach pains, gastroenteritis and shock and, as a result, launched a legal action against Mr Stevenson, the maker of the ginger beer.

Initially the case was dismissed. It was argued that Mrs Donoghue had not purchased the drink and therefore there was no contractual relationship between her and the café owner, or with the manufacturer of the drink. Eventually the case was appealed all the way to the House of Lords, the highest court in Britain.

In his ruling, Lord Atkin found that individuals must have some remedy against a manufacturer who produces a product that is not at the appropriate standard. The manufacturer had argued that there was no contract between themselves and Mrs Donoghue as they sold the product to the café, and the café had sold it not to Mrs Donoghue but to her friend. However, Lord Atkin ruled that there was an implied contract between the manufacturer and Mrs Donoghue and that it was not unreasonable for Mrs Donoghue to believe the drink to be safe to consume. Thus the maker was deemed to have a duty of care to produce a product that was safe to drink.

Nuisance

Nuisance involves one person interfering with another person's rights. For example, if a neighbour constantly plays very loud music late at night they may cause a nuisance to another person. Many of the cases that are heard in **community justice centres** involve this tort.

CASE LAW *Gan v. Anderson & Anor* [2008] NSWLEC 1257 (24 June 2008)

Mr and Mrs Gan are neighbours to Mr Anderson and Ms Field. The sewer pipe from the Gan's property passed through the property of Anderson and Field to the main sewer line. On several occasions roots from a large tree growing in Anderson's and Field's property blocked the Gan's sewer line, resulting in expensive plumbing bills.

Mr and Mrs Gan asked the Land and Environment Court to order that the tree be removed and that they receive compensation for the plumbing costs. Anderson and Field contended that the plumbing problems were caused by trees growing on the Gan property and other changes made by them. The court found in favour of the Mr and Mrs Gan but noted that they should have taken action earlier; the problem had existed for ten years and the delay made the problem worse.

Defamation

Defamation involves damaging another person's reputation. When misleading information about a person is published or broadcast and this information damages the person's reputation, defamation is said to have occurred. Information contained on websites is also subject to defamation laws. For example, if a person makes a statement on a social networking website that damages a person's reputation, the damaged person may take action against the author of the statement. It may be possible to also take action against the website's creator.

It is important to note that if the information about the person is accurate then defamation has not occurred. This is the most common defence to this tort. For example, if a newspaper publishes an article reporting on the conviction of a person charged with murder then no defamation has occurred; the person really is a murderer. However, if the person was not convicted then using this term could result in defamation.

Trespass

Trespass typically takes place when a person interferes with the property of another person. There is also the tort of trespass against the person, but in most cases criminal laws, such as assault, would apply. Unlawful imprisionment is an example of trespass against the person.

REVIEW

1 Differentiate between private and public law.
2 Define the term 'plaintiff'.
3 What is a contract?
4 Describe the nature of property law.
5 Define 'tort law'.
6 What is negligence?
7 Explain what defamation is.

LAW IN ACTION

1 Take on the role of a solicitor for a consumer protection body. You have been asked to produce a digital presentation to give at upcoming seminar on the features of contracts and the way the law protects individuals in contract law.
2 Review the case *Commercial Bank of Australia v. Amadio* (1983) and complete the following activities:
   a Outline the key features of the case.
   b Explain why the court ruled in favour of Mr and Mrs Amadio.
3 Refer to the case *Donoghue v. Stevenson* [1932] and complete the following activities:
   a Outline what happened to Mrs Donoghue that prompted this case.
   b Describe the defence brought by Stevenson, the manufacturer of the ginger beer.
   c Explain the findings of Lord Atkin of the House of Lords.
4 Examine the case *Gan v. Anderson & anor* [2008] and explain how the tort of nuisance was applied in this matter.

7.3 Criminal and civil court procedures

Personnel involved in court procedures

Judges and magistrates

Judges and magistrates preside over the courts. They are legally qualified professionals, usually with considerable experience in the law. Most judges and magistrates once served as barristers, as experience in courtroom argument is important. It is rare but not unheard of for legal academics to be appointed as judges or magistrates.

Judges sit in intermediate and superior courts and their role is to adjudicate in cases. ('Adjudicate' means to decide on points of law and issue instructions to the jury.) The judge is also required to issue sentences and rulings. In some civil law matters they may sit without a jury, so in these cases they will have also determine the case.

A magistrate sits in the inferior courts and their role is to determine cases; that is, to reach a verdict. In addition, the magistrate must also issue rulings and sentences.

Barristers

Barristers almost always receive their work through a solicitor. The solicitor approaches a barrister on behalf of a client, and the barrister then represents the client in court. Most barristers specialise in one particular area of the law—for example, criminal law—which allows them to develop considerable expertise in that area.

The barrister has two main functions:

- to provide legal advice, known as an 'opinion', on the legal facts presented to them. This advice usually includes some indication of the likely outcome, which allows the client to decide what course of action is best for them
- to present their client's case in the court (if the barrister has been briefed by a solicitor).

One of the roles of the barrister is to present their client's case in the court.

Solicitors

A solicitor is usually the first person that someone who is seeking legal advice will approach. While solicitors may appear in court, in most cases the majority of their work is non-litigious; that is, it involves no court appearances. The main duties of solicitors include the preparation of wills, family law issues, conveyancing (handling the sale and purchase of real estate) and the drawing up of legal documents, such as contracts. The main role of a solicitor in a legal case is to prepare the case (known as a 'brief') for a barrister.

Court procedures in criminal law proceedings

Log on to the Pearson Places website and follow the links to find more information on the Office of the Director of Public Prosecutions.

The two parties in a criminal matter are referred to as the prosecution and the defendant. The prosecution represents the community and in trials is referred to as the Crown. In most criminal trials the Office of the Director of Public Prosecutions (ODPP) conducts the prosecution. When a criminal matter is heard in the Local Court, the prosecution is usually conducted by a specially trained police officer known as a Police Prosecutor. The defendant is the accused person; in most trials they will be represented by their barrister, although some people may chose to represent themselves.

Criminal trials are heard before a jury of 12 people. These people are selected at random using the jury register. The role of the jury is to determine the case; that is, to consider whether there is sufficient evidence to convict the accused. The judge's role is to advise the jury and to deal with any questions of law. The jury must be convinced beyond reasonable doubt that the accused is guilty in order to find them guilty.

CASE LAW *Bartho v. R* (1978) 19 ALR 418

Bartho was charged and convicted of causing grievous bodily harm with the intent to commit murder. Two other men were also charged with the same offence. While giving evidence at the trial, Bartho admitted that he had intended to cause grievous bodily harm but had no intention of committing murder.

Bartho appealed to the Court of Criminal Appeal and, ultimately, applied to the High Court for leave to mount an appeal. His legal argument was based upon the comments of the trial judge to the jury. During the trial the jury had been informed that they had to be satisfied that the prosecution had proved the guilt of the accused beyond any reasonable doubt. However, at the conclusion of the trial the judge had said to the jury:

'Since this is a criminal trial and since the accused has pleaded not guilty you are the body that has to determine whether they are guilty or innocent.'

Bartho argued that the judge's comments implied that the accused must be innocent in order for the jury to acquit them. Instead there need only be doubt that the accused committed to crime for an acquittal to occur.

In a majority ruling the High Court found that it was unlikely that the jury would have been misled by the judge's statement, given the fact that the jury had been reminded of their role throughout the trial. Consequently leave to appeal was refused.

During the trial the prosecution must only deal with the charges relating to this case. Any previous convictions and accusations about the accused cannot be mentioned to the jury. This is based on the principle that the jury must only deal with the evidence presented to them in relation to the case and should not be influenced by other factors.

In a criminal trial the role of the jury is to determine the case.

If the jury finds the accused guilty then the judge will order a sentencing hearing. This is a special hearing during which the judge will determine the sentence to be given. At this hearing the role of the prosecution is to convince the judge to issue a more significant sentence. In order to do this the prosecution will discuss any previous convictions the person has had and may use **victim impact statements** to convince the judge of the seriousness of the offence. In its turn, the defence will try to convince the judge that a lighter sentence is warranted. In order to do this they may introduce mitigating circumstances, such as the childhood of the convicted person.

Standard and burden of proof in criminal matters

In a criminal case the **standard of proof** is beyond reasonable doubt. This means that the jury must be convinced without doubt that the accused is guilty of the crime of which they are accused. The **burden of proof** always lies with the prosecution; therefore in theory the defence can say nothing and still be found 'not guilty' if the prosecution's evidence is unconvincing.

VICTIM IMPACT STATEMENT
A statement given to a judge during sentencing about the impact of a crime upon the victim.

STANDARD OF PROOF This refers to the level of proof that is required to win a case.

BURDEN OF PROOF This refers to which side must prove the case.

PROVING GUILT IN A CRIMINAL CASE

To find a person guilty of a criminal act the prosecution must first demonstrate three important legal concepts:

1 *Mens rea.* Meaning the 'guilty mind', this concept refers to the intention of the accused to commit a crime. In traffic offences the prosecution does not have to demonstrate *mens rea* (this is known as strict liability) but in all other matters they must.

2 *Actus reus.* This means the 'criminal act' and refers to the fact the accused must have actually committed an offence.

3 Causation. This means that the prosecution must show that there is a link between the act and the crime.

CASE LAW *R v. Blaue* (1975) 3 All ER 446

This case demonstrates the importance of causation. Blaue had been charged with manslaughter after he stabbed a woman who refused to have sex with him. The stabbed woman was taken to hospital where it was deemed an operation was required.

However, the woman refused the operation as it would necessitate a blood transfusion and, as a Jehovah's Witness, this was against her religion. As a result she died and Blaue was charged with manslaughter.

Blaue was convicted but appealed that the woman died because of her refusal to give consent to the operation, not because of his actions. The Appeal Court ruled that Blaue's action was a major contributor to the women's death and therefore there was causation between Blaue's actions and the death of the woman.

Court procedures in civil law proceedings

Civil law proceedings involve disputes between two parties that do not involve criminal matters. Common civil matters include breaches of contract and property disputes.

The proceedings begin when the **plaintiff** (the person bringing the action) issues a Statement of Claim. This is a legal document that identifies the parties to the dispute and outlines the circumstances of the dispute. Once the statement of claim has been issued the other party, known as the **defendant**, replies by issuing a Statement of Defence. This process allows for information to be shared between the two parties and many disputes are resolved through this process.

If the matter is still not resolved at this stage then it will go to trial. At the trial each side has the right to introduce evidence and call witnesses in accordance with the rules of evidence. This allows for cross-examination by the opposing sides.

At the conclusion of the presentation of evidence the judge (or in some cases, the jury) is required to make a ruling based on the evidence that has been presented by both sides. If the decision is in favour of the plaintiff, the judge will then indicate what relief (compensation) will be made to the plaintiff. This relief is usually in the form of damages (cash payment) or injunctions (special court orders).

PLAINTIFF **The person who brings a case in a civil law matter.**

DEFENDANT **The person who is accused of committing a wrong in a civil law matter.**

Standard and burden of proof in civil matters

In civil matters the standard of proof is determined on the **balance of probability**: based on the evidence presented, who is more likely to be telling the truth? The burden of proof in any civil matter lies with the plaintiff.

BALANCE OF PROBABILITY **The standard of proof required in civil matters. It is based on who is more likely to be telling the truth.**

In civil matters the plaintiff must prove the case.

REVIEW

1 Describe the role of the judge in a trial.
2 Outline the role of the magistrate.
3 Differentiate between the functions of barristers and solicitors.
4 Outline the role of the Office of the Director of Public Prosecutions.
5 What is a jury?
6 What is a sentencing hearing?
7 Describe the role of the prosecution and defence in a sentencing hearing.
8 Outline the three things that the prosecution must prove before gaining a criminal conviction.
9 What is a statement of claim?

LAW IN ACTION

1 Examine the case *Bartho v. R* (1978) and complete the following activities:
   - **a** Outline the charge brought against Bartho.
   - **b** Describe the grounds on which Bartho appealed the court's decision.
   - **c** Outline the Appeal Court's findings.
   - **d** Do you agree with this finding? Justify your response.
2 As a class, discuss whether the prosecution should have the right to inform the jury of the accused's previous criminal record.
3 Log on to the Pearson Places website and follow the links to the New South Wales Sheriff's site. Go to the information on jury service. Outline the main responsibilities of the juror.

4 Review the case *R v. Blaue* (1975) and complete the following activities:
   - **a** Describe the concept of causation.
   - **b** Explain how Blaue attempted to use the principle of causation in this case.
   - **c** Was the jury correct in finding Blaue guilty of manslaughter? Justify your answer.
5 Write a report differentiating between the standard and burden of proof in criminal and civil matters.

7.4 Common and civil law systems

Common-law systems

As was discussed previously, Australia's legal system is often referred to as a common-law system. This system, which first developed in England and is therefore sometimes called English common law, is still used in several former British colonies and in Britain itself.

The key feature of the common-law system is the ability of judges to make laws. This right is limited to where a gap is found in the statute law. It is important to remember that in cases where both common and statute law exist the statute law must always be used. Chapter 2 has a detailed discussion on common law.

Civil law systems

As discussed earlier in this chapter, civil law refers to legal matters between two or more parties. However, the term 'civil law' has an alternative meaning. It also describes the system of law that developed Ancient Rome. To avoid confusion it is usually referred to as 'the civil law system'.

Laws in this legal system are almost entirely derived from statute law. In the time of Ancient Rome, most laws were directly made by the Roman Emperor. As the Romans conquered Europe they took with them their legal system. Consequently much of Europe, including France and Germany, still uses the civil law system. It is also used in Latin America, most of Africa and Japan.

Civil law first developed in ancient Rome.

The main difference between the two systems is the role of the courts. Under a civil law system there is no room for the development of judge-made law. Judges are also required to carry out investigations—that is, to gather evidence. This is known as an 'inquisitorial' system. Under a common-law system (as used in Australia), judges can make law; they do not seek evidence but rather make their decisions based on the evidence presented to them by both sides. This is known as an 'adversarial' system.

REVIEW

1 Outline the key features of the common-law system.
2 Explain the two meanings of 'civil law'.
3 Describe the main features of the civil law system.

LAW IN ACTION

1 Working in small groups, analyse the advantages and disadvantages of the civil law and common-law systems. Create a list from your discussions.
2 Write an extended response on whether Australia should adopt the civil law system over common law.

CHAPTER SUMMARY

Public laws are those laws that set the general standards of behaviour expected by a society; these are known as 'social norms'. There are three broad categories of public law: criminal, administrative and constitutional law.

Criminal law is considered public law because, when a person breaks a criminal law, they are said to be harming all members of society. Consequently the victim in a criminal case is all of society; hence, the case is brought by the police and prosecution on behalf of society.

Administrative laws are those that relate to the operation of the government and its various departments. A constitution is a legal document that outlines the powers and operations of the government. A body of law exists based upon the interpretation of constitutional documents.

Private law is often referred to as civil law and deals with the legal relations between individuals and organisations. The key difference between criminal and civil law is the role of the individual. There are three main types of civil law: contract law, property law and torts.

A contract is a legally binding agreement between two or more parties. Many civil law matters deal with contracts where one party believes that the other party has failed to fulfil the requirements of the contract. Property law governs the trade in anything that is considered property, and can be bought or sold. There are numerous laws governing the way that property transactions are to take place.

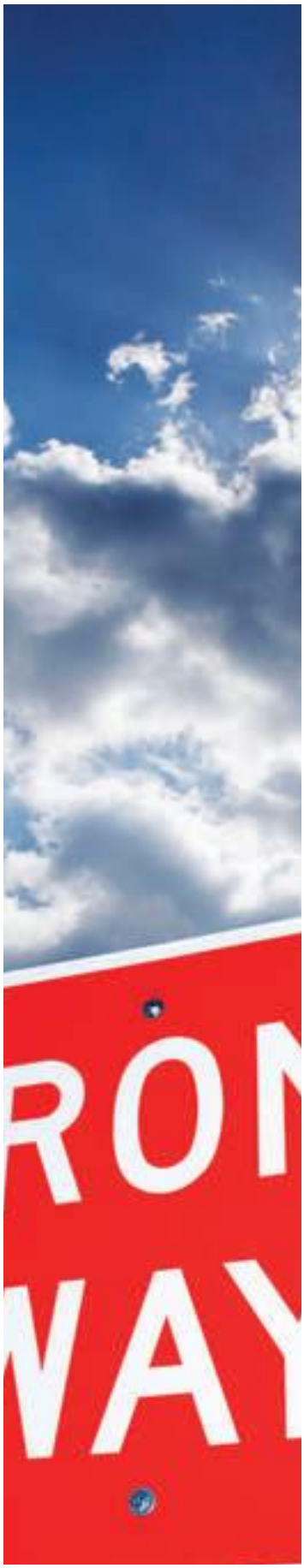
Torts are civil wrongs. They are divided into four main areas: the tort of negligence (based upon the concept of the duty of care, meaning that every person has the responsibility to ensure their actions do not affect others); the tort of nuisance (when one person interferes with another person's rights); the tort of defamation (when misleading information about a person is published or broadcast and this information damages the person's reputation); and the tort of trespass (when a person interferes with the property of another person).

Judges sit in intermediate and superior courts and their role is to adjudicate in cases. This involves them deciding on points of law and issuing instructions to the jury. The judge is also required to issue sentences and rulings. The role of the barrister is to represent the client in the court. A solicitor is usually the first person that someone seeking legal advice will approach.

In a criminal trial the prosecution attempts to convince the jury of the accused person's guilt, whereas the role of the defence is to demonstrate that the evidence presented by the prosecution is inaccurate and to present alternative evidence. In criminal cases the prosecution must prove the accused person's guilt beyond reasonable doubt.

In civil cases the plaintiff makes the accusation, while the defendant responds to the accusations. In civil cases the plaintiff must prove their case on the balance of probability.

The civil law system refers to a type of legal system that developed in Roman times. The civil law system is very different from the common-law system. In a civil law system it is the judge who investigates the case and the defence has the responsibility of proving the accused person did not commit an offence.



MULTIPLE-CHOICE QUESTIONS

1 Which of the following are examples of public law?

- **A** Contract, tort and delegated law
- **B** Administrative, tort and negligence law
- **C** Criminal, contract and constitutional law
- **D** Constitutional, administrative and criminal law

2 Joshua is accused of encouraging people to overthrow the government in a violent revolution. This is an example of what type of crime?

- **A** Assault
- **B** Treason
- **C** Sedition
- **D** Manslaughter

3 Phoebe is involved in a civil law matter as the plaintiff. What is the meaning of the term 'plaintiff'?

- **A** The person making the accusation
- **B** The assistant to the judge in a civil law matter
- **C** The person about which the accusation is made
- **D** The legal representative of the person being accused

4 What type of law outlines the powers and responsibilities of government departments?

- **A** Civil law
- **B** Departmental law
- **C** Governmental law
- **D** Administrative law

5 What is a tort?

- **A** A civil wrong
- **B** A special type of contract
- **C** A crime against property
- **D** A rule that government departments must follow

6 What is the main role of a barrister?

- **A** To represent a client in court
- **B** To offer advice in minor criminal matters
- **C** To represent clients who have appealed cases
- **D** To offer advice to judges and juries on complex areas of law

7 Which of the following statements best describes the role of the jury in a criminal trial?

- **A** To decide whether the accused is guilty or not guilty
- **B** To decide whether the accused is guilty and pass sentence
- **C** To decide if the evidence presented shows the accused is guilty
- **D** To advise the judge on whether they think the accused is guilty and assist them to pass an appropriate sentence

8 In a civil case, what standard of proof must be obtained?

A Beyond reasonable doubt

B On the balance of probability

C Beyond all reasonable precedent

D Beyond the doubt of the majority

9 What is the meaning of *actus reus*?

A Committing a criminal act

B Knowingly breaking the law

C Planning to commit a criminal act

D Establishing that there is a link between the an act and the crime

10 Zoe belongs to an environmental organisation. She believes that the federal government does not have the power to authorise a new development that may damage a nearby wetland. What type of law should Zoe use?

A Civil law

B Administrative law

C Constitutional law

D Environmental law

SHORT-ANSWER QUESTIONS

1 List the main types of criminal law.

2 Outline the role of solicitors in legal matters.

3 Define the term 'public law'.

4 Describe the key features of administrative law.

5 Describe the three legal concepts that must be proven in a criminal trial in order to obtain a successful prosecution.

6 Compare public and private law.

7 Explain the main procedures used in a civil law case.

8 Analyse the differences between the common-law and civil law systems.

CHAPTER 8

Law reform

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

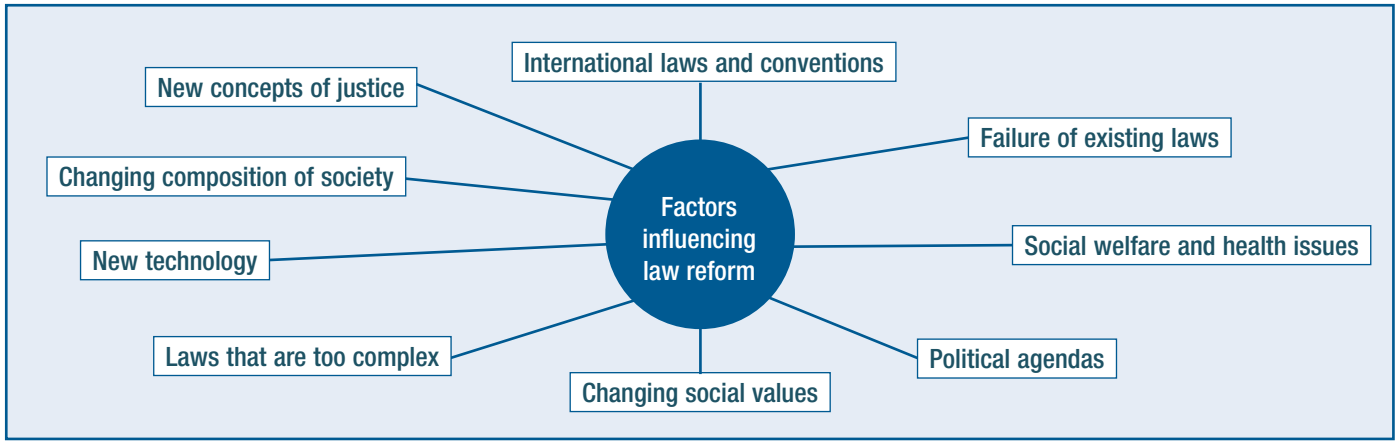
P6 explains the nature of the interrelationship between the legal system and society

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter assists students to develop an understanding of the nature and functions of law through the examination of the law-making processes and institutions. Key aspects of the chapter include the need for law and the relationships between different legal institutions and jurisdictions.



SUMMARY OF CASE LAW

Cattanach v. Melchior [2003] HCA 38
R v. Fernando & Anor [1999] NSWCCA 66
State Government Insurance Commission v. Trigwell (1979) 142 CLR 617
Toonen v. Australia UN Human Rights Committee (Views on Communication, No 488/1992, adopted 1994)

SUMMARY OF LEGISLATION

Australian Law Reform Commission Act 1996 (Cwlth)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Civil Liability Act 2002 (NSW)
Crimes (Forensic Procedures) Amendment Act 2008 (NSW)
Crimes Amendment (Consent–Sexual Assault Offences) Act 2007 (NSW)
Family Law Reform Act 1995 (Cwlth)
Justice and Other Legislation Amendment Act 2003 (Qld)
Law Reform Commission Act 1967 (NSW)
Summary Offences Act 1988 (NSW)
Vagrancy Act 1902 (NSW) (now repealed)

SUMMARY OF INTERNATIONAL LAW

UN Convention on the Rights of the Child (CROC) (1989)
International Covenant on Civil and Political Rights (1966)

AUSTRALIAN LAW REFORM COMMISSION REPORTS

'Children and Young People', *Reform*, Issue 92, Winter 2008
Seen and Heard: Priority for Children in the Legal Process (ALRC 84, 1997)
Fighting Words: A Review of Sedition Laws in Australia (ALRC 104, 2006)

8.1 Conditions that give rise to the need for law reform

The law reflects our social values. As our value systems change over time, so must the law, to meet the needs of our society. Law reform is the process that reviews our existing laws and recommends or introduces changes to them, usually with the aim of improving justice or efficiency. It is the responsibility of the state and Commonwealth parliaments to introduce legislative reforms they believe are desirable. If law reform did not take place, laws would lose relevance over time and could create, rather than remove, injustice. This would result in a widespread loss of support for the legal system and, without public support, the legal system could not function effectively.

Failure of existing laws

Laws can become obsolete or unnecessary over time. It is most unlikely that many of the laws in use one hundred years ago could still operate effectively today.

Obsolete or irrelevant laws can be left in place but simply not enforced. This argument was used by the Tasmanian Government in *Toonen v. Australia* UNHRC (Views on Communication, No 488/1992, adopted 1994). In this case, a homosexual man complained about a state law that criminalised homosexual relationships. The government's response was that the law was not being enforced, so there was no problem.

However, as Toonen pointed out, the law could be enforced at any time. The simplest response in such a situation is to repeal (remove) that particular law. A law can also be amended to remove obsolete sections and the courts can be called on to interpret poorly worded or ambiguous legislation. For example, a law that requires domesticated animals to be held on a leash in public will require a court to decide what animals are 'domesticated'.

Changes to obsolete laws have been made in relation to some summary offences, including vagrancy. Under the *Vagrancy Act 1902* (NSW), persons who slept on park benches at night and who had 'no visible means of support' could be detained overnight in police cells. This was regarded as harsh treatment by most members of the public and the offence was removed by repealing the Act and replacing it with a section of the *Summary Offences Act 1970* (NSW) (now repealed and eventually replaced by the *Summary Offences Act 1988* (NSW). There was an unfortunate unexpected consequence to this action. Many homeless people who were then left to sleep in parks and in the open died of exposure to the elements. Death rates went up, particularly in winter.

Point to ponder

If a criminal law is not being implemented, does it matter that it still exists on the statute books?

People who sleep overnight on the streets can easily die from exposure, particularly during winter.

Fortunately, steps were then taken to ensure that vagrants were fed and housed whenever possible. However, this highlights the need for law reform that is carefully thought through and is not just a 'knee-jerk' reaction to a problem.

International laws and conventions

International agreements exist to promote certain ideals between countries. However, the existence of these agreements does not guarantee that their principles will be applied in each country. In Australia, The Commonwealth Parliament must pass legislation incorporating the elements of an international agreement to give it legal force.

The UN Convention on the Rights of the Child (CROC), a widely supported international agreement, was partially adopted into the *Family Law Reform Act 1995*. This ensured greater rights and more protection for children in our society. An inquiry was initiated by the Australian Law Reform Commission in 2008, titled 'Children and Young People' (*Reform*, Issue 92, Winter 2008) and one of its areas of research was to see how effectively Australia is meeting its obligations to children under international law.

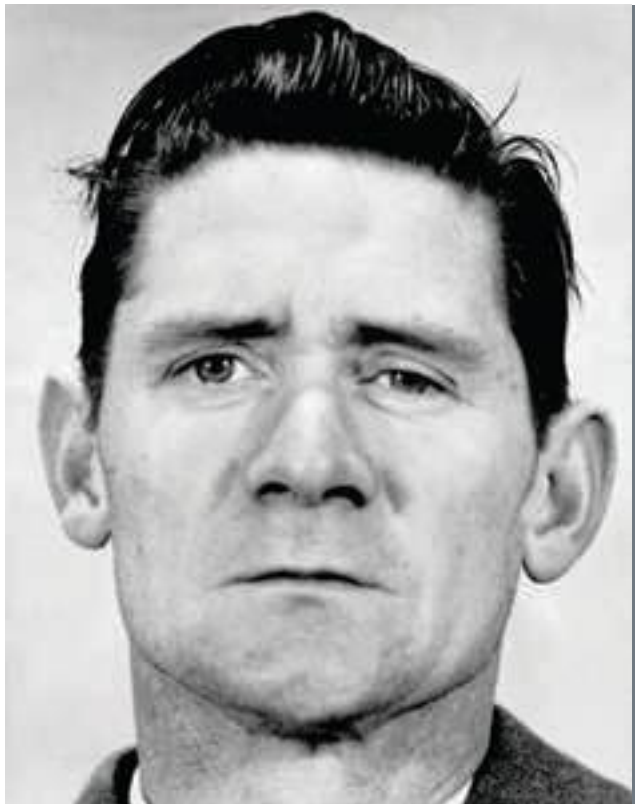
As the body of international law increases over time, countries such as Australia will need to consider reforming more of their laws to meet their international obligations.

New concepts of justice

Society evolves over time and its views on justice alter for a variety of reasons. As a society becomes more multicultural it will absorb certain values from these other cultures. The increased emphasis on social justice and human rights will also be a force for change; for example, the death penalty has been removed from our law (the last man hanged in Australia was Ronald Ryan in 1967).

Point to ponder

Executing people is often referred to as 'capital punishment'.



Ronald Ryan was the last person to be executed in Australia. He was hanged in Victoria in 1967 for killing a prison guard while escaping custody. However, it is now uncertain whether he did commit the offence.

Physical punishment in any form has largely lost favour. Parents who hit their children in public are now more likely to be stared at by passers-by, or reported to the Department of Community Services for ill-treating their children. The cane has been removed from schools. In January 2009 there were calls to make smacking of children by parents illegal. These developments are reflections of changing social values. They tell us how justice is perceived and how the legal system can help to provide it to society.

Point to ponder

Physical punishment is often referred to as 'corporal punishment'.

Changing composition of society

Australia's population has increased by more than three times since the end of World War II. Much of this growth has been as a result of immigration. The number of different cultures and religions reflected in Australian society has grown significantly.

Marriage is being deferred or is not considered necessary by many young couples. Families are also having fewer children. The global financial crisis of 2008-10 resulted in increased unemployment and calls for legislative reform of the banking sector. White-collar crime had flourished in the economic boom over the previous few years and it culminated in massive disruption to almost all economies. Crime rates tend to increase with increased poverty and unemployment. All these factors will influence the focus on law reform.

Point to ponder

White-collar crimes are crimes relating to fraud, computer hacking etc. They are often committed by professionals.

New technology

Advances in technology require continual review of existing laws (this is discussed in greater detail in Chapter 13). For example, the growth in the use of chat rooms and cyber-bullying using computers raises many new issues concerning acceptable conduct on the net, privacy issues and the problems associated with enforcing laws relating to use of the internet.

Changing technology such as DNA sampling has major implications for law reform.

The *Crimes (Forensic Procedures) Act 2000* (Cwlth) was introduced to allow police to take DNA swabs, hair and tissue samples from suspects. This legislation overcame problems of suspects refusing to provide samples for testing. In *R v. Fernando & Anor* [1999] NSWCCA 66, two suspects in a sexual assault case had refused to provide blood samples to police. They argued that giving a blood sample would constitute an assault. The law had to respond to challenges like this or police

investigations would be severely hampered. The Act put an end to uncertainties associated with police rights to take body samples.

However, the reform process is not static and an amending Act – (the *Crimes (Forensic Procedures) Amendment Act* (2008) – amended Section 93 of the Act, clarifying the circumstances in which DNA profiles on the DNA database can be matched against each other. A further change to Section 97 has given the Attorney-General the ability to sign more complex agreements concerning DNA matching and sharing with other jurisdictions.

Despite some progress, Justice Kirby, the recently retired High Court Justice, has warned that Australia is falling behind in dealing with legal and ethical problems raised by quantum advances in genetic science. Progress in genetic studies now allows parents to know if their unborn babies are carrying a genetic defect. A decision then needs to be made whether a pregnancy should continue or be terminated. This has been an area where the courts have not wanted to interfere with the rights of parents. However, at some point they may be forced to make a ruling; for example, where doctors and parents disagree on a course of action.

The changing use of technology is also an issue. Laws made in the past often called for motor vehicles to give way to livestock, even on major roads. On Norfolk Island, an Australian territory, motor vehicles must still give way to cows on the island's roads.

Point to ponder

Should the High Court intervene in moral issues or leave them to families to decide?

Changing social values and morality

Society has become more conscious of the need to prevent discrimination against minority groups. Legislation that disadvantaged certain groups has largely been removed, and anti-discrimination laws have been introduced. Society has become more tolerant of people caught with very small quantities of recreational drugs and this is reflected in legislative changes to existing laws.

REVIEW

1. Provide your own definition of 'law reform'.
2. What would happen if the process of law reform stopped for any prolonged period of time?
3. Outline the factors that create a need for law reform. Suggest other factors that create a need for law reform apart from those provided.
4. Explain why simply not enforcing a law that society no longer supports is not an adequate way of dealing with changing social values.
5. Describe how international law influences the process of law reform in Australia.
6. Provide an example of a situation where society's perceptions of justice have altered over time.
7. How might the changing composition of society influence law reform in Australia?
8. Explain how advances in technology introduce a need for law reform.

LAW IN ACTION

1. Working with a partner, discuss the following statement in a proposed law: 'Fines will apply for throwing litter in park'. Brainstorm the problems that would arise from the wording of this statement.
2. Write an extended response on the following topic: 'Laws cannot remain static; they require constant reform'.

8.2 Agencies of reform

Law reform can be brought about in several ways. For example, parliament may initiate a change to the law where it sees a need; and parliamentary committees are also set up to investigate issues such as road safety. However, a major formal means of investigating the law and recommending changes is through the operation of Commonwealth and state law reform commissions.

The Australian Law Reform Commission

The Australian Law Reform Commission (ALRC) was established in 1975 as a permanent, full-time body to provide advice on areas of law reform to the Australian government. The Law Reform Commission of New South Wales had been established earlier in 1967. The ALRC is governed by the *Australian Law Reform Commission Act 1996* (Cwlth), which states that its role is to:

- simplify and modernise the law
- harmonise and complement state and territory laws
- systematically develop and reform law
- improve access to justice
- remove obsolete or unnecessary laws
- eliminate defects and anachronisms in the law, and
- consolidate, codify (put into legislation) and revise the common law.

The ALRC is an independent reviewer of the law. The federal Attorney-General does direct the ALRC to the extent that he informs them of an area of the law that needs to be reviewed. However, once the ALRC has started to conduct its inquiry it is free from government influence and direction.

Ultimately, the ALRC will report back to the Attorney-General with its findings, which will be considered by parliament. It is parliament's role to decide whether the House will follow the ALRC's recommendations in whole, in part, or possibly not at all.

In making its proposals and recommendations, the ALRC is required to ensure that it does not unduly interfere with any individual's rights and liberties. The Commission is also expected to comply with the provisions in the International Covenant on Civil and Political Rights. Further, the ALRC must have regard to Australia's other international obligations and how its recommendations will impact on people's access to justice.

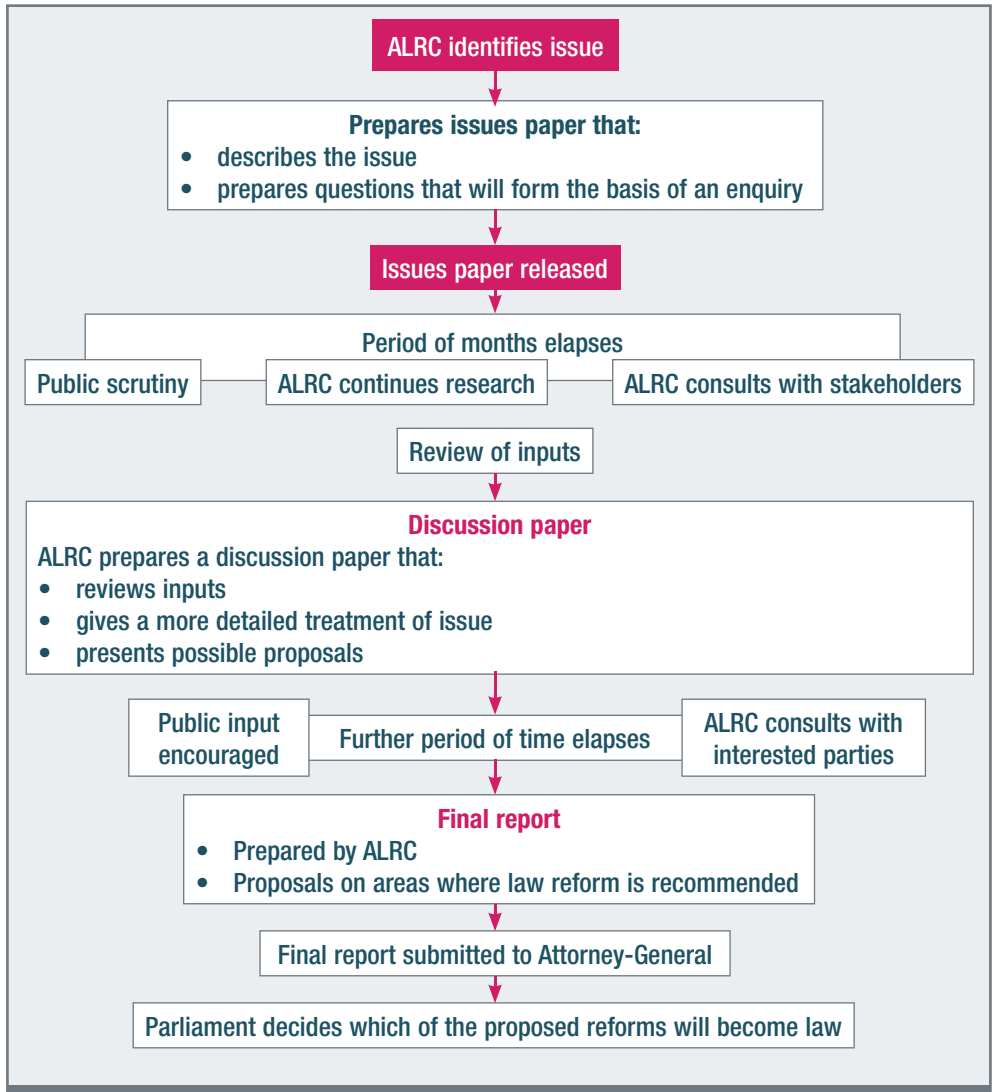
The reform process and the Australian Law Reform Commission

An inquiry starts when the Attorney-General provides the ALRC with 'terms of reference': the matters to be considered by the inquiry, some specific issues to be addressed and a date by which the inquiry must be completed. The ALRC is not free to consider making inquiries into areas of its own choice. It can act only on the instructions of the Attorney-General. It may suggest to the government that a certain area of inquiry should be conducted but their request may be ignored or taken up by the government.

The procedures followed by the ALRC are specifically designed to maximise community input and feedback (see overleaf). Usually, two major consultative documents are published during the course of the inquiry: an issues paper (sometimes referred to as a background paper) and a discussion paper. Ultimately, a final report will be prepared and presented to the Attorney-General. All papers are

Log on to the Pearson Places website and follow the links to find more information about the work of the Australian Law Reform Commission.

made available to the public and areas of inquiry are advertised and call for public submissions.



The process of reform followed by the ALRC

The issues paper seeks to identify what the ALRC regards as the issues that should be reviewed. It presents a series of questions that address many of the issues that form the basis of the inquiry.

After the release of the issues paper there is usually a period of months during which the public may make submissions. The ALRC continues with its own research on the topic and consults with key stakeholders.

The inputs of the public and stakeholders, and the results of the ALRC's own research are all reviewed and a discussion paper is published. It will contain a more detailed treatment of the issues and the ALRC's thoughts on possible proposals.

A period follows where further submissions are encouraged. The ALRC consults with interested parties about the proposals before completing its final report.

The final report is submitted to the Attorney-General's department. It will contain proposals on areas where law reform is recommended. It is then up to the parliament to decide what actual reforms will be drafted into proposed legislation.

The process followed by the ALRC in tackling reform issues allows for considerable community input. This enables a wide canvassing of opinion and

many different groups may choose to become involved in the process. It also helps to identify points that need to be clarified so that any legislative response is less likely to have omitted or misunderstood important issues.

The process followed by the ALRC in tackling reform issues allows for considerable community input. This enables a wide canvassing of opinion and many different groups may choose to become involved in the process. It also helps to identify points that need to be clarified so that any legislative response is less likely to have omitted or misunderstood important issues.

The ALRC has, in recent years, inquired into areas such as the treatment of children and young people in the legal process. A recent report 'Children and Young People' (*Reform*, Issue 92, Winter 2008) can be contrasted with another investigation completed in 1997, titled 'Seen and Heard: Priority for Children in the Legal Process', which was jointly prepared by the ALRC and the Human Rights and Equal Opportunity Commission (now called the Human Rights Commission). At the time, the report also reflected how effectively Australia had met its international obligations under the UN Convention on Rights of the Child. A comparison of the reports shows developments in areas such as juvenile justice, life opportunities for Indigenous children, the sexualisation of children in the media and children's rights under family law.

These areas receive widespread media coverage and strong interest from the public. It is desirable that there is vigorous public debate and that a wide cross-section of the public is engaged in the discussions; otherwise there will be only a few groups with vested interests in the issue taking part in proceedings and their opinions may not be representative of the wider society.

Law reform involves a consideration of existing laws both within Australia and overseas. Apart from reviewing legislation and case law, the ALRC also draws on academic research and the knowledge of experts in that particular field.

Importantly, the ALRC does not merely state a particular view in its final report. It outlines a range of competing arguments that it has identified and provides reasons for its preferred approach. The transparency of this approach means that competing views can be presented to the government so they are able to consider options and are aware that the law reform contemplated may meet with resistance from some sections of society.

SEDITION Occurs when people speak out encouraging others to attack the government.

TREASON Actively supporting the enemies of your government.

REFORM OF SEDITION LAWS

The ALRC recently made 27 recommendations for reform of the law of sedition in its report *'Fighting Words: A Review of Sedition Laws in Australia'*. The federal government has accepted 25 of these unconditionally and two of them in principle. The necessary changes to the law are currently being drafted. The Commission contends that a definite line should be drawn between free speech and conduct calculated to encourage violence in the community. However, one of the recommendations is to remove the term **'sedition'** from federal statutes, as the term creates heated debate in the community. The crime of **treason** and assisting the enemy is to be amended, perhaps following on from the case mounted against Dr Mohamed Haneef. (You can read more about the circumstances of Dr Haneef's arrest on page 183 of Chapter 12.) New assistance must be 'material', such as providing arms, funds or strategic information.

Sedition occurs when people try to encourage others to overthrow the government.

Law Reform Commission of New South Wales

The Law Reform Commission of New South Wales (NSWLRC) conducts reviews of, and recommends changes to, the laws that operate within that state. Their investigations follow a similar format to that employed by the ALRC. The Attorney-General of New South Wales writes to the Commission asking it to inquire into and report on the need for reform in a particular area of the law.

Once the area of inquiry has been decided, the Commission generally implements the following steps:

- It appoints commissioners to investigate the referral.
- It identifies the issues and seeks community input. Some preliminary research is conducted and the nature of the inquiry is publicised in the media. Defects in the current law are noted and laws from overseas and other states of Australia are examined to see if they have overcome the defects found in the relevant New South Wales law.
- Consultation papers and/or a research report are released for public comment. They explain all the issues and suggestions for reform.
- Submissions to the Commission are received and analysed. These are usually in writing but can be oral; for example, by making a phone call or speaking at a public hearing.
- As well as calling for submissions, the Commission involves itself in widespread public consultation. This occurs through public meetings, phone-ins, public opinion surveys and meetings for special groups; for example, where people with intellectual disabilities can express in their own words their experiences with the criminal justice system and ideas for change.
- The Commission then undertakes further research and analysis of the issues and considers all submissions.
- Finally, the Commission will release its report with recommendations for reform. It will include dissenting recommendations and reasons.

CRIMINAL LAW REFORM

In recent years the NSWLRC has been investigating a number of important law reform issues, including:

Criminal justice issues

There are nine criminal jurisdictions in Australia. This naturally creates problems with gaining a uniform or consistent approach to criminal law across the states and territories. Attempts are being made to introduce a uniform criminal code to operate throughout Australia. This should, if it occurs, be a major achievement.

When Martin Bryant shot dead 34 people at Port Arthur in Tasmania, the federal government wanted to tighten the existing gun laws. This could only be achieved by gaining the support of each state, as gun laws were an area of state responsibility. A uniform criminal code would remove problems of this type. It is also harder to gain community support for laws against crime if different penalties are applied from state to state.

Jury directions

Directions to the jury are mainly oral instructions given by the judge in a case to assist them in reaching their verdict. The judge must advise the jury on the relevant law, and explain what the prosecution must have proven to secure a conviction, for instance, in a murder trial. These directions are often thought to be too long or complex and framed in obscure legal terminology. The Commission is attempting to establish whether there is a more effective way that judges can advise juries.

Each state and territory has its own criminal justice system and laws, which complicates the criminal justice process in Australia.

Parliamentary committees

Every parliament has several committees operating to investigate matters of concern to it and the wider community. These committees then suggest changes that should be made to the law. For example, a road safety committee would make recommendations concerning speed limits, seat belt requirements and restrictions on 'P plate' licences.

An advantage of these committees is the inclusion of members of parliament from all major political parties. A report that has support from all sides of politics is more likely to gain a favourable reception in parliament.

A Minister can also appoint a committee of experts to investigate a matter and make suggestions on how the law in that area should be reformed. These committees use many of the techniques of a law reform commission to consult with the community on what areas should be covered by the law.

Royal commissions

A Royal Commission may be set up by the government to investigate a specific area of the law. It is usually named after the retired judge or legal expert selected to head the inquiry; for example, the Wood Royal Commission.

This Commission was set up in 1994 to investigate police corruption in New South Wales and ran until 1997. During the investigation of corruption at various levels of the police force and even the judiciary, disturbing evidence of child pornography emerged. There was also evidence that known paedophiles were bribing police officers to avoid conviction. The findings of the Royal Commission certainly played a key role in the development of child protection laws such as the *Children and Young Persons (Care and Protection) Act 1998* (NSW); it is still influencing the direction of child protection laws today. Similarly, in the Lindy Chamberlain case, appeals to the Federal Court and High Court failed. It was not until a Royal Commission was held into her wrongful murder conviction for killing her daughter Azaria that Lindy Chamberlain was released.

Log on to the Pearson Places website and follow the links to find more information about Lindy Chamberlain.

Permanent advisory bodies

There are a number of bodies established by governments to monitor the operations of, and propose reforms to, the law in a particular area. At federal level these include the Australian Institute of Criminology and the Family Law Council.

In New South Wales there are three permanent advisory bodies: the Bureau of Crime Statistics and Research, the Anti-Discrimination Board and the Youth Advisory Council. As an example, the Bureau of Crime Statistics and Research monitors the number of people in gaol to see if there are any trends. Its findings are then publicised; for instance, the Bureau has identified that the number of people in gaol in New South Wales has increased significantly over the past decade. This may be an issue the government needs to examine in more detail. The Bureau also produced statistics showing that when persons convicted of break-and-enter offences received gaol sentences or longer gaol sentences, the number of break-and-enter offences recorded fell. People in favour of gaol sentences for offenders could use this research to press their claims on the government.

Point to ponder

Professional associations such as the Law Society make suggestions to the government on areas of the law that need reform.

The media

The media is an informal means by which the need for law reform can be emphasised and promoted. The media has a strong capacity to influence public opinion and to shape a community's understanding about particular issues. Lobby groups seeking reform will often highlight and bring attention to particular issues through the media.

Log on to the Pearson Places website and follow the links to find more about the Bureau of Crime Statistics and Research and their research into criminal activity in New South Wales.

PP Web Destination

Non-government organisations

Like the media, non-government organisations (NGOs) have a major role to play with respect to law reform. These organisations use the media to raise awareness about specific law reform issues. When social attitudes and values change, NGOs can lobby for change by focusing on specific issues, particularly those affecting minority groups.

REVIEW

1. List some of the key agencies of law reform.
2. Describe the role of the Australian Law Reform Commission.
3. The Australian Law Reform Commission prides itself on community consultation in the review process. Explain how community views are included in the ALRC's reviews of current law.
4. Outline the merits of putting competing arguments into the ALRC's final report.
5. Outline how the Law Reform Commission of New South Wales conducts an inquiry.
6. Explain how having nine separate criminal jurisdictions in Australia creates problems for law reform.
7. Identify an advantage of having parliamentary committees to review the law and recommend changes.
8. Explain how bodies like the Bureau of Crime Statistics and Research contribute to the quality of debate over law reform

LAW IN ACTION

1. You have been appointed by the Australian Law Reform Commission to produce an information booklet about the Commission. You need to make a booklet that contains information about the role of the Commission and the way it operates.
2. Using the Internet and other resources, conduct research into the role played by Royal Commissions in the law reform process. Discuss the desirability of having a Royal Commission to investigate aspects of the legal system.
3. As a class, examine your school rules. Brainstorm a list of reforms that you think need to be made to the rules. Working in small groups, develop a proposal for changing one of the rules, include a justification showing why the rule needs reform.

8.3 Mechanisms of reform

The courts

Courts engage in the process of developing and reforming the law by adapting to changing circumstances. As new cases reach the courts with differing sets of facts, judges exercise some discretion in their judgments. In making a ruling on a case and explaining the reasons for their decision, judges may be adding to and reforming the law. Established legal doctrines are modified to accommodate changing social values. These changes often arise out of the appeal process. However, courts can only do this in a piecemeal way because their primary function is to adjudicate personal disputes. They are not able to choose an area of law they would like to research and discuss it with a view to reforming the law.

However, Sir Anthony Mason, former Chief Justice of the High Court of Australia, said in 1979:

> 'The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.'
>
> *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617 at 633

Critics of law-making by courts say judges go too far in some judgments and engage in '**judicial activism**'. This implies that they go too far in their use of discretion, supposedly trying to bring about social reform. In doing so, they do not apply statute law appropriately.

This is regarded by some as unfair criticism. Those who think judges go too far in some of their judgments usually argue that judges are usurping or overthrowing the power of the legislature. As parliament is elected, they contend that statute law is superior.

JUDICIAL ACTIVISM **The belief held by some that judges allow their personal opinions and political beliefs to influence their judgments, even to the point of overriding precedent or misinterpreting the Constitution.**

The courts are therefore a mechanism of law reform, but this should be kept in perspective as it is not its major role.

Some judges have been criticised, often unfairly, for allowing their personal views and beliefs to influence their decisions.

CASE LAW *Cattanach v. Melchior* [2003] HCA 38

In the case of *Cattanach v. Melchior*, Stephen Cattanach, an obstrician and gynaecologist, had an action in tort brought against him by Kerry Anne and Craig Melchior, parents of a child born despite an earlier operation to sterilise the mother. The judgments of the minority judges supposedly reflected personal beliefs on morality. This was attacked as judicial activism.

The case also prompted legislative reform, as the Queensland parliament responded to the case by passing the *Justice and Other Legislation Amendment Act 2003*. Section 41 of that Act inserted new sections 49A and 49b into the *Civil Liability Act 2003*.

These sections prevent a court from awarding damages for financial loss involved in rearing a healthy child. Section 71 of the *Civil Liability Act 2002* (NSW) has similar effect.

Parliament

The federal parliament is the supreme law-making body in Australia. State parliaments are also responsible for law making and reform of the law. However, should federal and state laws clash, federal law prevails to the extent of any inconsistency under s.109 of the Commonwealth Constitution. Statutory law will override common law.

Parliament often responds to community concerns to introduce new laws and amend legislation that has lost relevance to current social values.

Parliament may also decide that the law in a certain area should be codified. For example, following an incident where two young persons travelled in the boot of a friend's car and were killed in an accident, the New South Wales government quickly passed legislation making it illegal for passengers to travel in the boot of a car. This may simply have been an area of road law that had not previously been considered but the accident raised a key safety issue that parliament responded to in urgent fashion.

Special interest groups (sometimes referred to as vested interest groups) may pressure the government to make changes to the law. Often this is done because the group believes it has identified a weakness in the law or an area of injustice. The courts also play a significant role in reforming the law. A judge may make a ruling that is a departure from existing law and bring about law reform in this way.

STATUTE LAW REPLACING COMMON LAW: THE ISSUE OF CONSENT IN SEXUAL ASSAULT CASES

After considerable public consultation and debate, the state government introduced the *Crimes Amendment (Consent–Sexual Assault Offences) Act 2007*. This legislation has now been consolidated into the foundational Act: the *Crimes Act 1900* (NSW).

Prior to its introduction, some men were being acquitted of sexual assault charges because they argued, quite mistakenly, that the female concerned had given consent. There was some uncertainty as to what constituted 'consent' and juries were sometimes confused about the issue.

Consent had been based on the common law, where judges based their decisions on previous court cases.

The object of the new legislation is as follows:

a to define 'consent' for the purposes of sexual assault offences as free and voluntary agreement to sexual intercourse, and

b to include in cases where consent to sexual intercourse is or may be negated; incapacity to consent, intoxication, persons who are asleep or unconscious, unlawful detention, intimidatory or coercive conduct and abuse of a position of authority or trust, and

c to provide that a person commits sexual assault if the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

Crimes Amendment (Consent–Sexual Assault Offences) Bill 2007 Explanatory notes

This is a tightening of the law, and removes the uncertainty that sometimes arose in common-law cases that dealt with consent. In effect, the defendant now must show in clear terms that consent was obtained.

Intergovernmental organisations

Intergovernmental organisations (IGOs) are organisations that have **sovereign states** (individual countries) as members. The 'member states' have certain common goals; for instance, an international body they might be keen to promote peaceful co-existence and stable government. Examples of international organisations include the United Nations, the European Union and the World Trade Organization.

Intergovernmental organisations have become increasingly important, both in facilitating conflict resolution between countries and also in dealing with major conflicts within countries. They are able to:

- encourage cooperation between countries or 'states'
- provide a forum for countries to air a dispute
- support members by being information providers; in particular, this may benefit reform processes in countries suffering from internal division and corruption
- promote the long-term benefits of cooperation and encourage states to look past short-term causes of conflict
- exhibit impartiality (an unbiased approach), which enhances their credibility in conflict resolution.

SOVEREIGN STATES These are countries that are independent and have their own political and legal identity.

THE WORLD TRADE ORGANIZATION

The World Trade Organization (WTO) promotes the free movement of goods and services between countries, otherwise known as free trade. Member countries are encouraged to promote international trade and to remove or reduce obstacles to trade. Australia has reduced its tariffs (taxes on imports) to make it cheaper for goods from overseas to enter the country. Australia would expect other countries to also cut their taxes on imports so that her exporters benefit.

Member countries are all required to comply with the rules of the WTO. If all member countries support the WTO and promote trade, all will benefit from economic growth. These organisations are based on mutual cooperation. A problem can occur if one country bans goods from another. Australia has banned certain food products such as chicken and salmon to prevent disease entering the country. However, if other countries are suspicious of Australia's motives, perhaps believing that the ban is intended to protect Australian producers, they can complain to the WTO, which enforces bans on countries who do not meet their obligations.

UNITED NATIONS

The United Nations (UN) was established in 1945. It promotes world peace and the recognition of human rights. The UN is the most prominent intergovernmental organisation. It plays a major role in resolving international conflict and in more recent times has played a major role in settling disputes within countries.

Throughout its history, the UN has typically tried to place peacekeeping forces between warring factions. In countries engaged in civil war, the UN has tried to put cease-fires into operation and then monitor the peace; for example, in Sierra Leone, Kosovo and Ethiopia–Eritrea. In certain much-publicised situations it has been rather unsuccessful, including in Rwanda and the Sudan.

Once 'peace-building missions' have some success, it is important for these countries to establish stable governments, conduct free elections, remove corrupt practices and promote the rule of law. The United Nations' attempts to promote peace and encourage reform are restricted by:

- a lack of genuine commitment and consensus among UN members
- an identity crisis for the UN
- a perceived crisis of confidence after setbacks in many countries
- the pace of globalisation and the recent world financial crisis
- a financial crisis of its own, as the UN has experienced continual short-falls in its budgets.

With 192 member states, the United Nations is the most prominent intergovernmental organisation.

Despite these problems, the United Nations has been able to encourage international support for treaties and conventions that promote human rights. The International Covenant on Civil and Political Rights has won widespread support, with most UN member countries being signatories. As more countries agree to ratify these conventions, they will also look to reform their own laws, remove discriminatory sections of Acts and better protect the human rights of their people.

REVIEW

1 Outline how the courts can make law or reform existing law.
2 Explain the term 'judicial activism'. Why is it criticised?
3 Identify factors that may influence parliament to modify existing laws.
4 In what ways will the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) help victims of sexual assault?
5 Outline how the operation of intergovernmental organisations can assist countries to resolve their disputes.
6 Discuss the role of the United Nations in resolving international disputes. What problems confront its operation in the 21st century?
7 As more countries ratify and want to show support for international agreements, how will this accelerate the process of law reform?

LAW IN ACTION

1 Read the quote of Sir Anthony Mason on page 115. Does the role played by Sir Anthony as former Chief Justice of the High Court add weight to his views? Justify your answer.
2 Review the case *Cattenach v. Melchior* [2003] on page 116 and complete the following activities:
   a Outline the ethical issues raised by this case.
   b Analyse the response of the Queensland government's decision to this case.
3 Should nations be forced to comply with the decisions and directives of the UN? What dilemmas would such a requirement create?

CHAPTER SUMMARY

Law reform is the process that examines our existing laws and recommends or introduces changes to the law. It is a vital step in keeping the law relevant to current society and trying to achieve justice for individual citizens and society.

Conditions that give rise to the need for law reform include the failure of existing laws to meet society's needs. This was shown recently by calls for new legislation to ban corporal punishment.

International laws and conventions impose an obligation on Australia to meet its obligations under those agreements through the introduction of new legislation.

New concepts of justice – for example, the removal of the death penalty – require legislative change. New technology, changing social values and morality, social welfare and medical issues also give rise to the need for law reform.

There are several key agencies for law reform in Australia and New South Wales.

The Australian Law Reform Commission inquires into areas of the law that the federal Attorney-General has requested. The impetus for reform may have come from the government itself, the public, media pressure or vested interest groups.

The Law Reform Commission of New South Wales operates in similar fashion to the ALRC but inquires into current laws in New South Wales. Parliamentary committees investigate areas of the law that may have been proven deficient or become outdated. Road safety laws, for example, are continually being re-examined.

Royal Commissions investigate important public issues such as the Wood Royal Commission into the New South Wales police force. There are also permanent advisory bodies, independent authorities such as the Independent Commission Against Corruption, and professional associations, such as the Law Society and the Barristers Admission Board, which all play a role in the law reform process.

Mechanisms of reform are crucial, as they ensure that much-needed law reform actually takes place. The courts adapt the law to changing sets of circumstances and rule on issues that are not always clear in legislation.

State and federal parliaments implement most law reform by introducing new laws or modifying existing laws to achieve justice and greater relevance in the law.

Intergovernmental organisations promote the adoption of international agreements and the human rights they seek to protect. They also foster greater cooperation between countries for mutual benefit.

MULTIPLE-CHOICE QUESTIONS

1 A law allowing teachers to use the cane to correct students would probably be regarded as what?

- **A** Widely socially accepted
- **B** Obsolete or outdated
- **C** Legally enforceable in certain situations
- **D** Sex discrimination

2 The *Crimes (Forensic Procedures) Amendment Act* allows which of the following to occur?

- **A** Coroners to examine criminal blood samples
- **B** Criminal suspects to refuse to give body samples
- **C** Genetic information of persons to be stored
- **D** Police to take body samples

3 The Australian Law Reform Commission (ALRC) is able to do which of the following?

- **A** Recommend changes to federal laws
- **B** Recommend changes to state laws
- **C** Modify laws to ensure law reform takes place
- **D** Investigate laws it believes need reforming

4 As part of the review process, what does the Australian Law Reform Commission ensure?

- **A** Everyone agrees with its recommendations.
- **B** All recommendations have full parliamentary support.
- **C** Competing arguments are included in its final report.
- **D** The public can only make written submissions.

5 Which of the following are parliamentary committees required to do?

- **A** Only include members from the government party
- **B** Ensure minority political parties are ignored
- **C** Invite members of the public to join the committee
- **D** Include members from the major political parties

6 For what purpose are Royal Commissions established?

- **A** To investigate a specific area of the law
- **B** As an open forum for public complaints
- **C** To ensure law reform recommendations are adopted
- **D** As a way of monitoring government activities

7 Which of the following is an example of a permanent advisory body?

- **A** Royal Commission
- **B** Bureau of Crime Statistics
- **C** Special inquiries set up by parliament
- **D** State parliament

8 In what ways are courts a mechanism of reform?

- **A** Courts can change laws made by parliament.
- **B** Community groups can bring concerns to the court.
- **C** Courts can adapt to changing circumstances.
- **D** Politicians can instruct judges on the correct judgment to make in a case.

9 Which of the following is the most important area of involvement for intergovernmental organisations?

- **A** Enforcing United Nations demands on countries
- **B** Supplying armed forces to combat civil wars throughout the world
- **C** Discussing cultural heritage issues at the United Nations
- **D** Conflict resolution between countries and within countries

10 Which of the following is a major problem facing the United Nations in the 21st century?

- **A** The abundance of resources at its disposal to help the poor
- **B** The lack of consensus and cooperation between members of the United Nations
- **C** The phenomenal growth of Asian economies
- **D** A huge decline in membership of the United Nations

SHORT-ANSWER QUESTIONS

1 Identify the agents of law reform.

2 Describe the operation of intergovernmental organisations.

3 What areas of law have the Australian and New South Wales law reform commissions investigated in recent years?

4 Discuss the reasons for the introduction of the *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007*.

5 Analyse the need for law reform.

6 Evaluate the criticism of judges who allow personal values to influence their decisions.

Native title

CHAPTER 9

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

P6 explains the nature of the interrelationship between the legal system and society

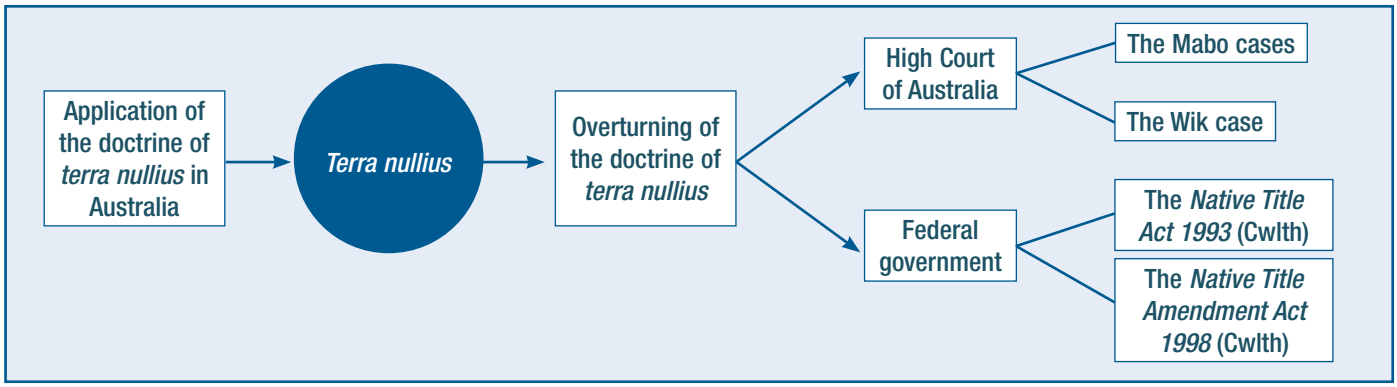
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

P10 accounts for differing perspectives and interpretations of legal information and issues

PRINCIPAL FOCUS

In this chapter students examine the nature and functions of law through an examination of the complex and contested law-making processes and the Commonwealth and state institutions that finally recognised, implemented and modified Indigenous land rights and native title.



SUMMARY OF CASE LAW

Fejo v. Northern Territory (1998) 195 CLR 96
Mabo v. Queensland (No. 1) (1988) 166 CLR 186
Mabo v. Queensland (No. 2) (1992) 175 CLR 1
Members of the Yorta Yorta Aboriginal Community v. Victoria [1998] FCA 1606
Members of the Yorta Yorta Aboriginal Community v. Victoria [2002] HCA 58
Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141
Ward v. Western Australia (1998) 159 ALR 483
Wik Peoples v. Queensland & Ors (1996) 187 CLR 1
Yarmirr v. Northern Territory (No. 2) (1998) 82 FCR 533

SUMMARY OF LEGISLATION

Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cwlth)
Aboriginal Land Act 1991 (Qld)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)
Aboriginal Land Rights Act 1983 (NSW)
Aboriginal Lands Trust Act 1966 (SA)
Heritage Protection Act 1984 (Cwlth)
Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cwlth)
Native Title Act 1993 (Cwlth)
Native Title Amendment (Technical Amendments) Act 2007 (Cwlth)
Native Title Amendment Act 1998 (Cwlth)
Native Title Amendment Act 2007 (Cwlth)
Pitjantjatjara Land Rights Act 1981 (SA)
Queensland Coast Islands Declaratory Act 1985 (Qld)
Racial Discrimination Act 1975 (Cwlth)
Torres Strait Islander Act 1991 (Qld)

9.1 Law reform in action

Law reforms become real when the law changes to better reflect the needs of a changing, and increasingly diverse, society. Law reform processes affect many areas of the law. As you have already seen, numerous bodies are involved in law reform processes. Principal among them are law reform commissions and parliaments.

In Australia there are several significant areas of law reform. These include:

- reform and development in the area of native title and the law as it affects Indigenous Australians. Much of the reform in the area is informed by developments in the international arena of law and politics
- reform and development in the area of sport, which has gone from being amateur in nature to becoming highly organised and professional
- reform and development in the areas of youth and young people. Principally, reforms have been inclusive of the rights of minors with respect to family law, protection from family violence, rights with respect to criminal justice and rights as they affect independence (such as driving, contracting and paid employment)
- reform in the area of animal welfare and animal rights. This is broadly classified in the areas of conservation and environmental law
- reform in the role of the state with respect to drug laws. Several Australian jurisdictions have decriminalised the use of cannabis and there is ongoing debate concerning the use of drugs in the management of illness, such as terminal cancers.

In this section we examine two areas of law reform that are of crucial importance and of widespread interest. The first relates to Indigenous Australians and the issues around native title rights and self-determination. The second is about the law as it relates to sport, sportsmen and sportswomen and the professionalisation of sporting codes.

Students are encouraged to develop an interest in how the law changes and adapts to the changes in society through the law reform processes.

9.2 *Terra nullius*

What is *terra nullius*?

Terra nullius is a legal term meaning 'land of no-one'. This concept first appeared in English law in the 17th century and was based on the notion that English law was applied whenever a 'new land' was discovered. The British decreed that lands where the inhabitants had not created an organised system of government with recognised law (according the standards of European law) was to be declared *terra nullius*. This meant that the British could take possession of the land and impose their own legal system.

THE 'LEGAL' BASIS FOR *TERRA NULLIUS*

In the 18th century, as the European powers continued expanding their empires, international law recognised three ways of acquiring sovereignty over land:

- by conquest – that is, by fighting for new territory (land) and winning
- by cession – that is, the surrender of territory by the inhabitants of the territory to newcomers
- by occupation of *terra nullius*.

The term '*terra nullius*' literally means 'the land of no-one'. However, English law at the time also considered as *terra nullius* those territories that were inhabited but whose indigenous inhabitants had a social organisation so primitive (in their view) that there was no obvious system of local law (that is, no system recognisable by the English). These lands were considered uninhabited.

European invasion of the Australian continent

The British first claimed Australia in 1770 when Captain James Cook landed on the shore of eastern Australia, at Botany Bay. He was told by his superiors in London not to take possession of the land if it was inhabited. He and his scientist-on-board, Joseph Banks, surveyed the terrain and then sailed for weeks northward along the eastern coast. They observed that the 'natives' were 'primitive'; they were scattered into small groups, seemed to have no idea of agriculture, property rights in land or any interest in trade, and were not warlike.

Stuart Banner, a legal historian, wrote of the way Cook's report was taken and interpreted:

> 'These were attractive characteristics for a potential colony — so attractive, and in some respects…so misleading, that one may suspect some wishful thinking on the part of Cook, Banks, and the various audiences for their reports. James Matra, who proposed placing a colony there in 1783, argued that among Australia's advantages was that it was "peopled by only a few black inhabitants, who, in the rudest state of society, knew no other arts than such as were necessary to their mere animal existence". A pamphlet of the mid-1780s urging colonisation emphasised that the continent was "the solitary haunt of a few miserable Savages, destitute of clothing". Unlike most parts of the world, Britons could believe, Australia really was *terra nullius*.'
>
> Stuart Banner, 'Why *Terra Nullius*? Anthropology and Property Law in Early Australia', *Law and History Review*, Vol. 23, No. 1, Spring 2005, p. 21

The arrival of the first fleet in 1788 under the command of Captain Arthur Philip saw Australia formally colonised by the British. The British regarded Australia as an uninhabited land under the doctrine of *terra nullius*. The sacred relationship of the Indigenous Australians to their land was overwritten by British military and legal power. As a result, it was regarded as a 'settled colony'. Upon 'settlement' by the colonists, Australia automatically 'received' all laws of England. In other words, English law became Australia's law. This is known as the **doctrine of reception**.

DOCTRINE OF RECEPTION
The legal doctrine that once a 'new land' was settled by the British, the laws of Britain applied.

When the First Fleet arrived in Australia in 1788, the British did not recognise the complex legal and social systems of Aboriginal inhabitants.

The declaration of Australia as *terra nullius* had a profound effect on Aboriginal and Torres Strait Islander peoples. In some other territories of the British Empire, the rights of indigenous peoples to own their land were recognised by agreements such as treaties; for example, the Treaty of Waitangi, signed with the Maori of New Zealand. Indigenous Australians, however, were not seen as having a political culture or system of law. Indigenous Australian customary law was not recognised. One of the results of applying the doctrine of *terra nullius* was that the only legally recognised scheme of land ownership was that recognised by English common law: that all land ultimately belonged to the Crown (government). This had serious consequences for Indigenous Australian groups, as it meant that their concept of land ownership – that they were the traditional owners and guardians of the land who were to use, preserve and celebrate the land for future generations – ceased to exist in the eyes of the 'law'. Thus, they lost all rights to their lands.

THE BRITISH DIVISION OF THE LAND

In the newly-colonised territories in Australia, the British introduced three distinct ways of possessing land titles under common law:

1. Freehold: land granted or sold by the representatives of the British Crown in the colonies to individuals who, in turn, could sell or lease it to other people in the colonies
2. Leasehold: land rented by the leaseholder from the colonial authorities for an agreed length of time
3. Pastoral lease: this specific land title was later introduced, for a set time period, to give the leaseholder land for grazing and associated pastoral activities, as well as to allow Indigenous peoples their rightful and customary access to their traditional lands.

Some portions of Crown land, known as reserve lands, were made available to Indigenous peoples. However, the titles of this land were never granted or offered for sale to the Aboriginal people who lived on these reserves.

Much of Australia's agricultural land became pastoral leases following the permanent settlement of the British, and has remained so since.

REVIEW

1 What is '*terra nullius*'?
2 Outline the legal basis for the British declaration of *terra nullius*.
3 Explain the consequences for Indigenous Australians of the application of *terra nullius*.
4 Explain why the British believed they had the right to declare Australia to be *terra nullius*.

LAW IN ACTION

1 Imagine if a group of people arrived at your house and said they owned it. What would you do about it? What legal protections do you have to stop this happening?
2 Read the extract from Stuart Banner's text on page 125.
   a Explain the attitudes that existed at the time of the European invasion.
   b Why do you think the British were so keen to declare Australia terra nullius?

9.3 The role of the High Court of Australia and the Parliament of Australia

Overturning the doctrine of *terra nullius*

In 1967 the most successful referendum ever held in Australia took place. In the referendum more than 90 per cent of Australian voters chose to count Aboriginal and Torres Strait Islander people as members of the Australian nation, and to enable the Commonwealth government to legislate on their behalf. Although this referendum did not give Indigenous Australians any additional legal or non-legal rights, it did focus the nation's political, social and emotional attention on the plight of Aboriginal peoples. Encouraged by this unprecedented electoral outcome, Aboriginal people began to gain confidence in their pursuit of more reforms, including land rights.

CASE LAW *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 (the Gove Land Rights case)

This case was the first in which an Aboriginal community had sought to have its land rights recognised by the courts. In 1963 the Yolngu people petitioned the Australian Parliament with a bark painting. As the traditional owners, they opposed the establishment of a bauxite mine on their land. The Australian Parliament did not respond effectively, so the Yolngu people took their arguments to the courts.

The argument put to the Court was that common law required that the rights of Indigenous communities to their land must be respected if these rights were capable of recognition (were made by a legitimate authority). It was argued that these rights could only be taken away if they were terminated validly. This would require the consent of the Indigenous communities as well as legislation.

Justice Blackburn rejected the argument. He found that Australia had been settled by the British and that therefore the doctrine of reception applied.

Despite the setback to Aboriginal land rights that this case created, it was nonetheless an important step. Blackburn observed, in response to the thorough research presented by the plaintiff's lawyer, A. E. Woodward, that the Yolngu people had a complex social and legal system, 'a government of laws, not of men', which commanded respect and careful attention. Indeed, his concluding, bald assertion that the 'question (in this case) is not one of fact but of law', revealed the overriding and stark power of the **legal fiction** of *terra nullius*.

LEGAL FICTION **An invented assertion or assumption, not based on any closely-examined evidence, used by the courts to construct and justify their judgments.**

At this moment, however, the courts were shown to have frustrated the Aboriginal land rights cause. It was in the federal parliament that the next advance was to be taken. In 1973 A. E. Woodward, the lawyer from the Gove Land Rights case, was appointed by the Whitlam Government to head an inquiry into Aboriginal land rights. The results of this inquiry would eventually lead to the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth).

The Queensland government of Joh Bjelke-Petersen, the National Party leader, opposed this federal legislation. The state did not want to give remote Queensland Aboriginal communities possession of their reserves and the right to self-government. The federal government responded to this negativity with the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cwlth). The most frustrating issue in this Commonwealth–state dispute had been the state law that stopped Queensland Aborigines from entering or leaving their reserves without the permission of the state's welfare authorities. These prohibitive measures were considered necessary to stop alcohol coming into the reserves.

These restrictions on movement were seen by one Torres Strait Islander, Eddie Mabo, as an infringement of his basic human rights. In 1982, together with Father David Passi and James Rice, Mabo began an action in the High Court of Australia, which would eventually overturn the doctrine of *terra nullius*.

In the meantime, a series of state and Commonwealth laws had been enacted that would profoundly alter the legal and political landscape of Australia. The possibilities for future land rights reform had significantly improved.

Eddie Mabo would eventually launch the first successful land rights case in Australia in 1992.

Other key pieces of legislation affecting land rights before the *Mabo* cases

LEGISLATION	EFFECT
Aboriginal Lands Trust Act 1966 (SA)	• Established the Aboriginal Lands Trust in South Australia
Aboriginal Land Rights (Northern Territory) Act 1976 (Cwlth)	• Provided for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aborigines • Also established Aboriginal Land Council and Aboriginal Land Trusts
Pitjantjatjara Land Rights Act 1981 (SA)	• Under this legislation, 100000 square kilometres of South Australian territory were transferred to the Pitjantjatjara people
Aboriginal Land Rights Act 1983 (NSW)	• Recognised Aboriginal land rights and recognised that past government decisions had reduced the amount of Aboriginal land without compensation • Established Aboriginal Land Councils (ALC) in New South Wales • Provided for the vesting in the Land Councils of Aboriginal lands previously held by the government's land trusts • Also provided mechanisms for ALC members to have access to non-Aboriginal land for the purpose of fishing, hunting or gathering
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cwlth)	• Made provisions for the preservation and protection of areas and objects in Australia and in Australian waters that have particular traditional significance to Indigenous Australians
Aboriginal Land Act 1991 (Qld) and *Torres Strait Islander Act 1991* (Qld)	• Under these Acts, land in Queensland that was occupied by Indigenous Australians was transferred to them under a new form of inalienable freehold title • Those Indigenous people granted this title hold the land as trustees for 'the benefit of Aboriginal people and their ancestors and descendants'

Eddy Mabo's traditional lands were islands in the Torres Strait.

REVIEW

1 Explain the impact of the 1967 referendum on attitudes towards Indigenous Australians.
2 Explain why *terra nullius* can be referred to as a legal fiction.
3 Outline the consequences of the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cwlth).
4 Describe the reaction of the Queensland Government to this Act.

LAW IN ACTION

Review the case *Milirrpum v. Nabalco Pty Ltd* and complete the following activities:

a Why is this case so important in Australian legal history?
b Outline the arguments put forward by the traditional land owners.
c Analyse the court's ruling.

9.4 Major native title decisions

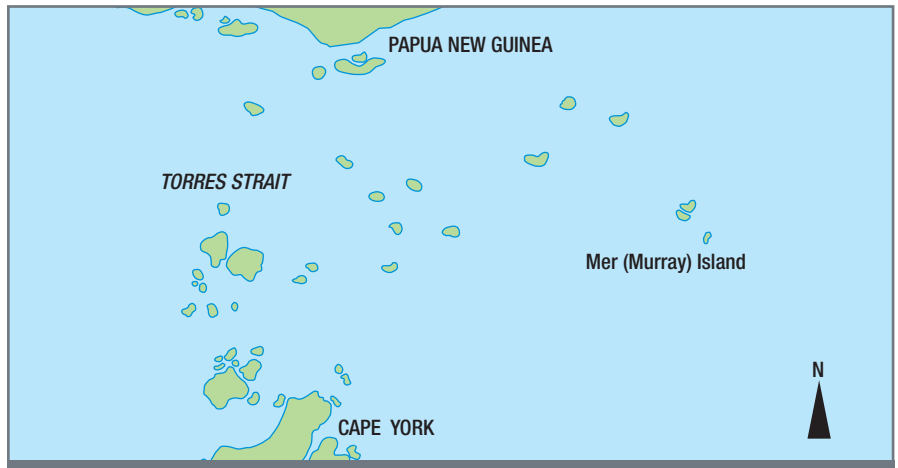
The *Mabo* cases

CASE LAW *Mabo v. Queensland* (No. 1) (1988) 166 CLR 186 (the Mabo case)

This case concerned three Murray Islands, comprising of Mer, Dauer and Waier, in the Torres Strait. Their total land area is about nine square kilometres. The occupants of the islands are known as the Meriam people. The islands were settled for some generations before early European contact. In 1879, the Queensland Governor proclaimed that the Murray Islands were annexed to Queensland (in other words, became part of Queensland) and came under Queensland law.

In 1882, a Queensland official, Captain Pennefather, reported that:

- the Murray Islands were divided into small properties handed down from father to son, from generation to generation
- that the inhabitants were 'very tenacious' of their land ownership
- that they refused to sell their land at any price
- that they cultivated gardens and built good houses
- that they were a powerful, intelligent race.



Murray Island is located in the Torres Strait between Cape York and Papua New Guinea.

In 1982, three Murray Islanders—Eddie Mabo, David Passi and James Rice (the plaintiffs)—brought an action in the High Court of Australia against the State of Queensland (the defendant). They claimed that Queensland's sovereignty over the Murray Islands was subject to the land rights of the Murray Islanders based on local custom and traditional title. Essentially, the Murray Islanders asked the Court to declare:

- that the Meriam people were entitled to the Murray Islands
  - as owners
  - as possessors
  - as occupiers, or
  - as persons entitled to use and enjoy the Islands, and
- that the State of Queensland had no power to extinguish the Meriam people's title.

In 1985, the Queensland Government under Premier Bjelke-Petersen enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld). Section 3 of the Act provided that on annexation by the Crown in 1879, various islands near the coast of Queensland became part of Queensland and came under its law. All land therefore became 'owned' by the Crown, free of all other rights, interests and claims (in the same way all lands were considered as belonging to the Crown when the British arrived in 1788, as noted above). By passing this law, the Queensland Government hoped to stop any potential claims for land rights by Torres Strait Islanders.

Mabo and others claimed that:

- a system of native title existed on the Torres Strait island of Mer, and
- native titles are recognised in Australia under common law.

While the Queensland Government argued that:

- native titles were not part of Australian law; and, in the alternative,
- the 1985 Act retrospectively extinguished any native titles (in other words, applied 'back in time' to override any claims to native titles which might have existed before the Act was passed).

In this first decision, the High Court did not address the issue of whether native title existed in Australia. The High Court found that the Queensland Act was trying to limit the land rights of the Torres Strait Islanders, simply because of their race. The Act would have meant that the land rights of Torres Strait Islanders would have been different to other groups with land rights in Queensland. Therefore, the High Court held that the 1985 Queensland Act was invalid because of section 10 of the *Racial Discrimination Act 1975* (Cwlth). This section provided that no law could limit the rights of a particular group on the ground of race if that law did not equally apply to groups of other races.

The High Court then referred the matter back to the Queensland Supreme Court for a determination of the facts of the case, before going on to consider the issue of native title in *Mabo v. Queensland* (No. 2).

CASE LAW *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1

To gather evidence in the case, Justice Moynihan of the Queensland Supreme Court visited the Murray Islands to investigate the features of life in the Murray Islands at the time of first European contact. Justice Moynihan determined that the facts were as follows:

- At the time of European contact, the Murray Islanders had a complex and intricate social structure, although it was impossible to identify precise systems or rules regarding title, inheritance or alienation of land.
- Gardening was crucially important to the Islanders prior to and at the time of European contact.
- There was no concept of public or general community ownership of land, and all village and garden land was divided into plots owned either by individuals or family groups.
- Meriam society was regulated more by custom than by law.
- While there was a general expectation that land would be passed down from father to son, the ultimate factor in determining the control and disposition of land appeared simply to be what was acceptable in terms of social harmony.
- The Meriam people retained a strong sense of identity with the islands, and an affiliation with the society and culture of earlier times; they still had 'strong' and 'enduring' links to their land.

The main issue was whether the annexation of the Murray Islands by Queensland in 1879 had the effect of vesting in the Crown absolute ownership of all land in the Murray Islands, thereby extinguishing native title.

The case required the High Court to consider the legal status of the declaration of *terra nullius*. If Australia was truly *terra nullius* at the time of settlement, then English laws applied and the islanders had no case. However, if the court held that the English had invaded Australia then the laws of the original inhabitants would be recognised.

In a majority ruling of six to one, the High Court ruled that the Murray Islanders had native title rights, including the right to:

- possession of the islands
- occupation of the islands
- enjoyment and use of traditional lands.

The court's decision was based on two key points:

1 The declaration of *terra nullius* was not valid and therefore native title could exist.

2 Native title existed wherever Indigenous people had occupied the land prior to European settlement, providing the government had not transferred the land's ownership.

The court also established several guidelines for dealing with similar claims for native title, including that the federal government could take back native title rights on the condition the tradition owners received fair compensation. State parliaments had similar rights and conditions, so long as they complied with federal law.

On the issue of *terra nullius*, the High Court said:

The *terra nullius* doctrine is not part of Australian law. The historical facts do not fit the 'absence of law' or 'barbarian' theory, which underpinned the reception of English law into Australia. Thus, the notion that Australia was *terra nullius* was dismissed by the High Court in *Mabo*.

On the issue of common-law recognition of native titles, the High Court stated that:

- The recognition and protection of native title interests extended to traditional interests to use or enjoy land.
- The interest would normally belong to a community or group, but it could belong to an individual.
- The interest could relate to lands that were cultivated, or lands left uncultivated but which, under the law or custom observed in the territory, were traditional homelands or hunting grounds.

What the common law required was that the group (or individual—but this would be extremely rare) claiming native title interests:

- must have maintained their traditional identity and system of culture and customs (although the customs could change over time)
- must have maintained a substantial connection with the land (this connection could be physical, spiritual or cultural)
- had interests that, under customary law, entitled the group to occupy and use the particular land claimed.

The High Court also held that Indigenous Australians continued to hold native title so long as they have maintained their traditional links with the land or until the government takes lawful action to extinguish their native title. The court, however, denied that Indigenous Australians had the right to claim compensation.

Point to ponder

The Meriam people who inhabited the Murray Islands had a complex system of land ownership. This system continued to operate in a limited way after the European occupation of the islands and into the 20th century.

The *Native Title Act 1993* (Cwlth)

Following *Mabo v. Queensland* (No. 2), the Commonwealth Government passed the *Native Title Act 1993* (Cwlth), which recognised native title. Native title is defined in section 61 of the Act as the rights and interests of Aborigines and Torres Strait Islanders observed under traditional custom and recognised by the common law of Australia. The rights and interests include hunting, gathering or fishing. The Act allows Indigenous Australians to claim land where they can prove that they have maintained their traditional links with it. Native titleholders can negotiate directly with mining companies who hold mining rights.

NATIVE TITLE

When a person owns property they are said to have title over it. 'Native title' is the collection of individual or group rights and interests held by Indigenous people in relation to land and water. People seeking to have native title affirmed must show that:

- the Indigenous population have observed their traditional customs and laws
- the Indigenous population have a connection to the land or water through these laws and customs
- these rights and interests are recognised under Australian common law.

Where can native title be claimed?

When making the *Mabo* decision, the High Court did not state which specific parts of Australia would be subject to native title. However, the court did suggest some general places that may be subject to native title, including:

- state forests
- national parks and public reserves
- Crown land that is currently vacant
- beaches
- land held by government agencies
- land owned by government but held in trust for Indigenous Australians, such as Aboriginal reserves.

CASE LAW *The Wik Peoples v. The State of Queensland & Ors* (1996) 141 ALR 129 (the Wik case)

The Wik and the Thayorre people launched a case against the Queensland Government in the Federal Court, claiming native title rights to their traditional lands that were now subject to pastoral leases. The Federal Court ruled that once a lease had been granted on Crown land, then native title rights were extinguished (made non-existent).

The matter was appealed to the High Court, where in a majority of four judges to three the court ruled that pastoral leases do not automatically extinguish native title, and that the Wik and Thayorre people should be allowed the continue with their claim.

The court found that pastoral leases and native title could co-exist at the same time on the same piece of land. For example, a pastoralist could continue to graze cattle on the land and Indigenous people could continue to have access to the land for traditional ceremonies. However, the court made the provision that where the two types of land tenure came into conflict, the lease would prevail.

While the Wik decision did not automatically grant native title over Crown land occupied through a lease, it created great concern amongst pastoralists, farmers and mining companies. They feared that they could be forced into slow and complex negotiations with Indigenous people over access to and use of the land.

The *Native Title Amendment Act 1998* (Cwlth)

The election of the more conservative Howard government in 1996 marked a change in policy, known as the 'ten-point plan'. It was time, argued Howard, to stop the 'pendulum' swinging in favour of Indigenous Australians. He aimed to reduce the scope and nature of native title rights and introduce 'bucketloads of extinguishment' to give all Australians certainty against the over-hyped, ungrounded fear that they would lose their own entitlement to land under this new, post-Mabo legislation.

The 'ten-point plan' would enable pastoral and mining companies to extinguish native title on the lands they had leased. Miners did not have to negotiate with the traditional owners if the prospectors themselves considered that there would be little impact on the local environment as a result of their exploration and exploitation. New methods of primary production on the part of pastoralists meant that native title would be invalidated. Native title claims could not stand in the way of progress and development.

The first version of the ten-point plan was rejected by the Senate. In 1998, a revised version of the plan was passed and the Native Title Act was amended to reflect the changes. The Act itself created considerable controversy and saw one of the longest parliamentary debates in Australian political history before the Senate agreed to pass it. Among the provisions of the Act are:

- native title extinguishment. The Act extinguished native title over any land that was considered privately owned prior to 1 January 1994. In addition, the Act extinguished native title over pastoral leases issued before 1 January 1994 where the government appeared to have granted exclusive possession to the leaseholder
- the rights of pastoral leaseholders. Where the native title exists alongside a pastoral lease, the pastoralist cannot be stopped from using the land for primary production, including 'farm stay' accommodation
- the 'native title' test. The Act imposed tougher tests for determining if native title could be claimed. Under the Act at least one person in the claimant group must prove a continuous link with the traditional lands. This could include someone who was forcibly removed (or the child of such a person).

REVIEW

1 Describe the main characteristics of native title.
2 Outline the key features of the *Native Title Act 1993* (Cwlth).
3 What was the 'ten-point plan' of the Howard Government?
4 Describe the key features of the *Native Title Amendment Act 1998* (Cwlth).

LAW IN ACTION

1 Review the two *Mabo* cases and complete the following activities:
   - **a** Outline the key facts of the 1988 case.
   - **b** Describe the ruling of the Court in the 1988 case.
   - **c** What were the main issues in the 1992 case?
   - **d** Explain the High Court's ruling.
   - **e** As a class, discuss why the *Mabo* case is considered to be one of the most important in Australia's legal history.
2 Examine the *Wik* case and complete the following activities:
   - **a** Outline the grounds for the native title claim launched by the Wik and Thayorre peoples.
   - **b** Explain the ruling the High Court came to in the *Wik* case.
   - **c** Outline the concerns expressed by pastoralists with the *Wik* ruling.
3 Break into groups, with one group taking the perspective of an Aboriginal community and the other the perspective of a group of pastoralists. The pastoralists occupy land through a pastoral lease and the Aboriginal community has just been granted native title over the same land. Negotiate an arrangement that will allow both groups to use the land.

9.5 The effectiveness of the native title reform process

The *Native Title Amendment Act 1998* (Cwlth): an obstacle to justice?

Any analysis and evaluation of the Howard Government's changes to native title, with respect to achieving justice in native title outcomes, must take into account the diversity of opinion within Australian society and the dynamic nature of Australian law, government and democracy. One case that highlights this complexity is the claim by the Yorta Yorta people of northern Victoria and southern New South Wales, which was first presented before the Federal Court of Australia.

The Yorta Yorta community claimed land and waters in Victoria and New South Wales.

CASE LAW *Members of the Yorta Yorta Aboriginal Community v. Victoria* [2002] HCA 58 (12 December 2002)

The Yorta Yorta Aboriginal community applied to the Federal Court, claiming native title to an area of land and waters in northern Victoria and southern New South Wales. The Federal Court dismissed the claim on the grounds that 'the facts showed that the Yorta Yorta people had ceased to occupy their traditional land in accordance with their traditional laws and customs before the end of the 19th century' and Justice Olney added that 'the tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs'.

On appeal, the Full Court of the Federal Court upheld Justice Olney's decision. The Yorta Yorta people therefore appealed to the High Court of Australia.

The High Court held that, in order to prove native title, the claimants must prove that there has been 'an acknowledgement and observance of laws and customs on a substantially uninterrupted basis since sovereignty'. In addition, the Court awarded costs against the Yorta Yorta people.

As a result, any Indigenous group that has been displaced from their land by European settlers has lost the ability to claim native title and may be wary of instigating further proceedings, knowing that appearing before the Australian judicial system costs a great deal of money.

In Adelaide, two years after the Yorta Yorta claimants had lost their appeal, the Australian Institute of Aboriginal and Torres Straits Islander Studies (AIATSIS) organised a conference on native title. At the final session, Mr. Henry Atkinson, a Yorta Yorta elder, spoke before a gathering of 450 people, who over the three days had heard presentations from traditional owners, judges, anthropologists, historians and government ministers.

HENRY ATKINSON, A YORTA YORTA ELDER, STANDS AGAINST THE 'TIDES OF HISTORY'

Henry Atkinson

Henry Atkinson, speaking at the Australian Institute of Aboriginal and Torres Straits Islander Studies (AIATSIS) native title conference, reminded his audience of Justice Olney's stark and provocative words justifying his decision in the Yorta Yorta case; that the Yorta Yorta people's ties with country had been 'washed away by the tides of history'. This had a devastating effect on the elders; 'people of a good age who had struggled for so many years and then to not even be recognised as people in their own land,' Atkinson said.

Atkinson went on to say of the comment, 'It was history being revisited, a repeat of days gone by and shows that for all of our years of struggle, we are still classified as not 'being'.'

Mr Atkinson said Indigenous people thinking of entering the native title process needed a very strong base of support. 'The joy of winning such a claim would be great but if the claim was rejected, your people will need this support; for it will affect so many, not only the elders but the younger generation.'

Through the creation of a corporation working under the Yorta Yorta umbrella, the effort for recognition continued after the Federal Court's decision and the subsequent unsuccessful High Court challenge. As a result, the Yorta Yorta came to an agreement in June 2004 with the Victorian Government about the management of the Barmah Forest, which covers 7000 square kilometres of red-gum forest and waterways. It recognises the Yorta Yorta as the traditional owners of country, includes Yorta Yorta people in its management and involves training and skills development for Yorta Yorta youth.

Conference coordinator and manager of the Native Title Research Unit at AIATSIS, Dr Lisa Strelein, said the Yorta Yorta experience had shown that the native title process was an important one, symbolically as well as functionally.

'Native title will continue to play a central role in political settlement because, for better or worse, it now provides a framework within which non-Aboriginal and Torres Strait Islander people conceive of Aboriginal and Torres Strait Islander rights, and it provides the bulwark against which Aboriginal and Torres Strait Islander peoples can build their claims for greater recognition,' she said.

Source: Talking Native Title, *Issue 12, September 2004, p. 4*

The Native Title Tribunal and the *Native Title Amendment Act 1998*: 'for better or worse'

The 2004 decision by the Bracks Government in Victoria to enter into a cooperative agreement with the Yorta Yorta is an example of the agreements made between government and an Indigenous community, seeking a just outcome. These agreements have laboured under frustrating bureaucratic rules and regulations – the multitude of articles and clauses of the *Native Title Amendment Act 1998*.

However, they have nevertheless been carefully and painstakingly negotiated through the legal minefield of this Act's restrictions and requirements by the patient agency of the Native Title Tribunal. The Tribunal had been set up, as a result of the *Native Title Act 1993*, to act as an independent body to help negotiate native title agreements. However, this body has been lumbered with an avalanche of applications and must navigate its way through the obstacles set up by the *Native Title Amendment Act 1998*. The task before the tribunal is vast and native title agreements are reached despite the legislative difficulties shored up against them.

Statistics showing the vast and complex volume of work the Native Title Tribunal must negotiate

Determinations of native title	as at 31 Aug 2006	as at 26 Feb 2007	as at 15 Nov 2007	as at 19 Nov 2008
Total number of registered determinations of native title in Australia	88	95	107	114
Determinations that native title exists in the entire or part of the determination area	61	64	72	81
Determinations that native title does not exist	27	31	35	33
Consent determinations	53	55	62	69
Litigated determinations	19	20	21	21
Unopposed determinations	16	20	24	24
Indigenous land use agreements (ILUAs)	**as at 31 Aug 2006**	**as at 26 Feb 2007**	**as at 15 Nov 2007**	**as at 19 Nov 2008**
Total number of registered ILUAs in Australia	251	268	305	352
Determinations of native title	**as at 31 Aug 2006**	**as at 26 Feb 2007**	**as at 15 Nov 2007**	**as at 19 Nov 2008**
Claimant applications	550	546	525	481
Compensation applications	12	11	11	10
Non-claimant applications	38	38	36	29
Total applications	600	595	572	520

Source: *Talking Native Title*, Native Title Tribunal quarterlies, September 2006–December 2008

Removing an 'obstacle' to native title: beyond the *Native Title Amendment Act 1998*

In the last year of the Howard Government, two pieces of legislation were passed: the *Native Title Amendment Act 2007* and the *Native Title Amendment (Technical Amendments) Act 2007*. These Acts were designed to improve the effectiveness of the groups representing Indigenous communities who made a claim; to make the process of consultation, dialogue and negotiation with state and territory governments more open and transparent; to accelerate this process; and to financially assist those involved as they navigate the complex legal obstacles of the Acts.

The Rudd Government has continued this reform process. In 2009 it announced significant changes to the Native Title Amendment Act. The federal Minister for Indigenous Affairs, Jenny Macklin, recently demonstrated a growing commitment within the government to further native title law reform when she stated:

> 'Native title is a right that must be used as a tool to bring about positive change, for social purposes, for cultural purposes and for economic purposes. It must be used as part of our armoury to close the gap between Indigenous and non-Indigenous Australia. Mabo would have expected no less.'
>
> Jenny Macklin, The 3rd Annual Negotiating Native Title Forum, 19–20 February, 2009

REVIEW

1 Outline some of the recent changes introduced to native title law in Australia.
2 Using examples and statistics, describe the complexity of native title issues in Australia.

LAW IN ACTION

1 Examine the *Yorta Yorta* case on page 135 and complete the following activities.
   - **a** Outline the claim of the Yorta Yorta people.
   - **b** What was the ruling of Justice Olney?
   - **c** Outline the ruling of the High Court when it heard the appeal of the Yorta Yorta people.
   - **d** Analyse the consequences of this case.
2 Write an extended response assessing the effectiveness of native title law reform.
3 Read the response of Henry Atkinson to the Yorta Yorta decision. Explain the views expressed by Atkinson.
4 In 2009, Aboriginal leader and legal academic Mick Dodson was named Australian of the Year. Use the Internet and other resources to research the work of Dodson in promoting Indigenous rights in Australia. Present your research in a report format.

CHAPTER SUMMARY

When the British invaded the Australian continent they viewed the Indigenous people as being primitive. The British used this belief to assert that the land was '*terra nullius*', that it 'belonged to no-one'. As a result, they applied the doctrine of reception, which declared that, once the British had settled the land, only their law existed and applied.

The British divided the possession of land in Australia into three types of land title under common law: freehold, leasehold and pastoral lease. Indigenous Australians, most of whom were removed from their homelands, were never granted or sold any title to their land. This situation lasted for most of the 20th century.

Eddie Mabo set out to challenge the legal fiction of *terra nullius*. He and his people presented their arguments in two cases – *Mabo v. Queensland* (No. 1) (1988) and *Mabo v. Queensland* (No. 2) (1992) – before the High Court of Australia. They were successful. The doctrine of *terra nullius* was overturned and the existence of native title was recognised.

The *Native Title Act 1993* (Cwlth) recognised native title and allowed Indigenous Australians to claim land where they can prove that they have maintained their traditional links with it. Native titleholders can negotiate directly with mining companies that hold mining rights. In 1996, the High Court held in *Wik Peoples v. Queensland* that pastoral leases did not extinguish native title. Both pastoral leases and native title could coexist.

The *Wik* decision created an uncertainty among some groups in Australia and new laws to reduce the scope and nature of native title rights were introduced. The federal government's *Native Title Amendment Act 1998* (Cwlth) placed many technical obstacles in front of Indigenous Australians, making it harder to prove their claim to their land. The Yorta Yorta people's claims in *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002) were dismissed by Justice Olney's stark and provocative pronouncement that any proof of their ties to their land had been 'washed away by the tides of history'.

Despite these obstacles, determined Indigenous groups persisted in pressing their land rights claims before the Native Title Tribunal. This independent body had been set up as a result of the *Native Title Act 1993* (Cwlth). They were heartened by international pressure also critical of the federal government's new legislation.

More recently a number of changes have been introduced to allow for greater recognition of native title rights. Indigenous Land Use Agreements are now also being used to allow Indigenous people greater access to their traditional lands.

MULTIPLE-CHOICE QUESTIONS

1 What is the meaning of '*terra nullius*'?

- **A** 'Afraid of the land'
- **B** 'Land belonging to no-one'
- **C** 'Land that does not exist'
- **D** 'Land for nothing'

2 Which of the following statements best describes customary law?

- **A** It is made up of Indigenous customs, beliefs and cultures developed over thousands of years.
- **B** It is based on the doctrine of precedence.
- **C** It is part of all common law of Australia.
- **D** It is recognised by the High Court of Australia as co-existing with the body of criminal laws in Australia today.

3 What is a pastoral lease?

- **A** Land owned by farmers
- **B** Farming land that is subject to native title
- **C** Crown land that is rented by farmers
- **D** Land that any farmer can use to graze their stock on

4 Which of the following statements best describes the concept of native title?

- **A** Land that has been declared *terra nullius*
- **B** Any land that Indigenous people have a close spiritual connection to
- **C** Land that was once privately owned but which has now been given to Indigenous people against the wishes of the private landowners
- **D** Land that Indigenous Australians can show they have had an uninterrupted connection to and are able to gain some control over

5 Why was the *Mabo* case so important to Australia's legal system?

- **A** The case established the concept of *terra nullius*.
- **B** The High Court ruled that the declaration of *terra nullius* was invalid.
- **C** The High Court granted Indigenous Australians rights over all their traditional lands.
- **D** The High Court ruled that Indigenous Australians had the right to self-determination, meaning they could decide on how their traditional land could be used.

SHORT-ANSWER QUESTIONS

1 Outline the roles of the High Court and parliaments in the process of making a claim for native title.

2 Outline the effect of the doctrine of *terra nullius* on native title.

3 Describe the importance of the Gove Island land rights case.

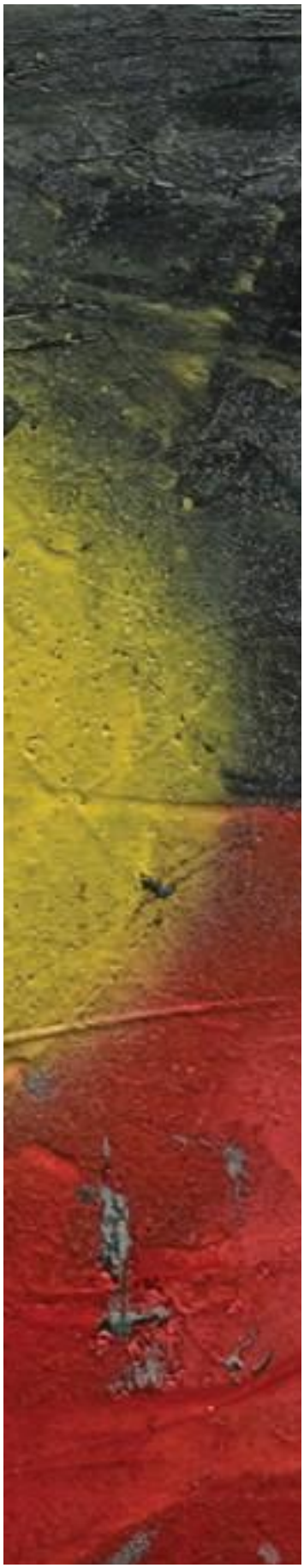
4 Describe the three types of land ownership under British law.

5 Explain the effect of the *Wik* decision on land rights in Australia.

6 Analyse the key features of native title.

7 Analyse the ways in which native title legislation has supported or undermined case law.

8 Assess the effectiveness of the law reform process in granting native title.



CHAPTER 10

A contemporary law reform issue: Sport and the law

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

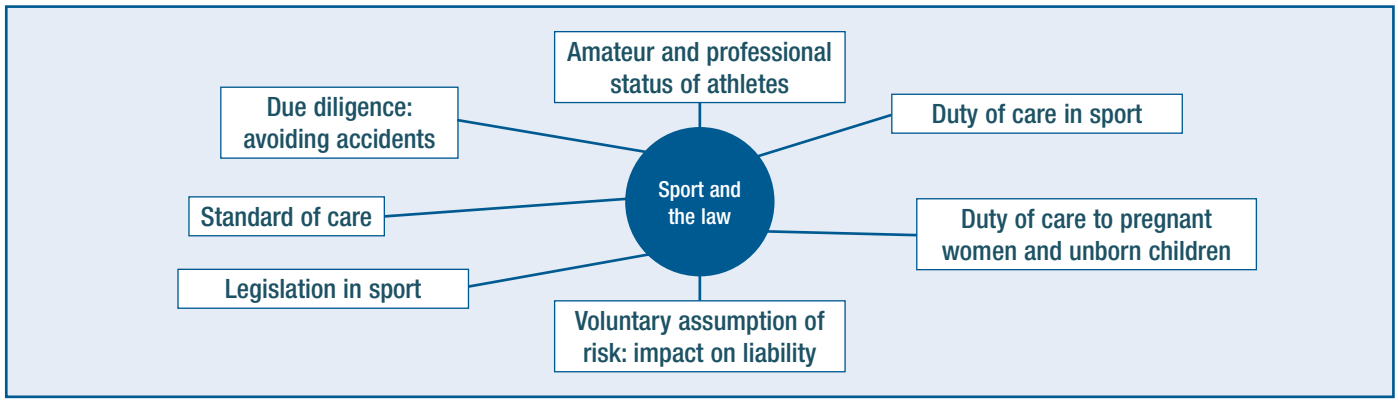
P7 evaluate the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

In this chapter, students investigate the nature and functions of law relating to sport, through the examination of the law-making processes and institutions.



SUMMARY OF CASE LAW

Angela Raguz v. Rebecca Sullivan & Ors [2000] NSWCA 240
AFL v. Carlton Football Club [1998] 2 VR 546
Australian Racing Drivers Club v. Metcalf (1961) 106 CLR 177; [1961] HCA 80
Bolton v. Stone [1951] 1 All ER 1078
Buckley v. Tutty (1971) 125 CLR 353
Chappell v. Mirror Newspapers Ltd (1984) ATR 80-691
Ettinghausen v. ACP [1991] 23 NSWLR 443
Foscolos v. Footscray Youth Club [2002] VSC 148 (6 May 2002)
Hall v. NSW Trotting Club (1977) 1 NSWLR 378
Lynch v. Lynch [1991] 25 NSWLR 411
News Ltd v. Australian Rugby Football League (1996) 64 FCR 410; 139 ALR 193
News Ltd v. South Sydney District Rugby League Football Club Ltd [2003] HCA 45
Rootes v. Shelton (1967) 116 CLR 383
South Sydney District Rugby League Football Club Ltd v. News Ltd [2001] FCA 862
Taylor & Ors v. Moorabbin Saints Junior Football League and Football Victoria Ltd [2004] VCAT 158
Watson v. Haines [1987] Aust. Torts Reps 80-094; NSWSC
Woods v. Multi-Sport Holdings Pty Ltd [2002] HCA 9
Wyong Shire Council v. Shirt (1980) 146 CLR 40

SUMMARY OF LEGISLATION

Anti-Discrimination Act 1977 (NSW)
Boxing and Wrestling Control Act 1986 (NSW)
Disability Discrimination Act 1992 (Cwlth)
Disability Services Act 1993 (NSW)
Fair Trading Act 1987 (NSW)
Fitness Services (Pre-Paid Fees) Act 2000 (NSW)
Racial Discrimination Act 1975 (Cwlth)
Sex Discrimination Act 1984 (Cwlth)
Trade Practices Act 1974 (Cwlth)

SUMMARY OF INTERNATIONAL LAW

The Olympic Charter

10.1 The role of sport in society

Sport is an activity that most people engage in from a very early age. Many young children first play sporting games in their back yard with their siblings or parents. In their early years at school, students participate in running races and team sports, but with little emphasis on the competitive side of sport. As they get older, children are encouraged to exercise daily, to develop their physical coordination and to play a variety of sports. At first, these sports, primarily ball games, are designed to improve skill levels and teamwork. Students gradually become familiar with the rules that govern each game and enjoy the interaction with other players of about their own age. In this way, sport can develop self-esteem and teamwork.

The competitive nature of most sport can add to its attraction for some, while others are discouraged by the sense of rivalry. Sport can present a challenge at an individual level, as with athletics or swimming, or be team based, as with netball or football.

The vast majority of people play sport for enjoyment and to improve fitness. It is a social event and, if competitive, will involve clubs and other groups to establish and enforce the rules of the game. There are often fees to be paid to a club or organisation to play a particular sport. This leads to a greater need for codes of conduct to govern all sports. Persons who breach the rules of a game or who fail to meet the requirements of the code of conduct may face a disciplinary hearing before officials of the sporting body that runs that activity.

Sport has become more organised, with vast numbers of participants and spectators. Regulation of sport has also grown, recognising the risks of injury and the legal relationship that exists between players, their clubs and officials. The public has become more aware of the risk of injury to sportspersons and the legal issues involved in playing sport.

The growing commercialisation of sport has meant that elite athletes in many sports are very highly paid for their efforts. Sport has become big business, with professional promoters, coaches and managers. Television ratings confirm that top sporting events have higher ratings than any other telecast programs.

Whole nations tend to support certain sports and the Olympic Games provide an expression of national pride for each country's sporting heroes. International competitions are now a feature of most sports.

The status of sport in society has grown but this has resulted in complex legal issues that are difficult to resolve. For example:

- How much power should governing sports bodies be able to exercise?
- How are the personal rights of individual sportspersons to be protected?
- To what extent should participants in a sport have to accept the risks associated with playing that sport?
- How valid are sporting contracts that tie players to clubs and do not allow them to move on freely to other clubs?
- What role should the law play in regulating all sports?
- How are international sporting competitions to be regulated?

Status under the law

Sport is often played for sheer pleasure and the joy of competition. Persons who play sport without receiving payment are classified as amateurs. They train and compete in their own time, usually before or after work and on weekends.

There have always been sports purists who believe that sport should be conducted for the enjoyment it provides and not for financial gain. They would

argue that engaging in sport can teach self-discipline, teamwork and a spirit of cooperation. It can foster a healthy degree of competitiveness between individuals and teams. School sport is played on this basis. The Olympics in the past always tried to foster endeavour and competition based on amateur sporting traditions. However, even the Olympics now have professional athletes competing and many countries offer incentive payments to successful members of their Olympics team.

Amateur competition is often championed as being nobler than competition where money is a major component. Over the last 50 years in Australia, many sports have gradually shifted from their amateur status to a professional basis.

Professional sports are those in which athletes receive payment for their performance. As a result there is greater emphasis on performance and winning to justify the payments being made to them. The athletes usually train full-time and devote all their mental and physical efforts to their sport. Professional sports have grown in number and the payments made have grown considerably in recent decades. However, professional sport has only recently been available to women. It is only in the recent past that women have gained similar prize money in major tennis tournaments; in most sports they still receive smaller payments than men.

THE EMERGENCE OF PROFESSIONAL SPORT

Australia experienced a golden age of tennis in the 1950s and 1960s. Many outstanding champions played the game while it still had amateur status. Hoad, Rosewall, Sedgman, Hopman and Bromwich all enjoyed international success and were all household names. Perhaps the greatest of them all was Rod Laver. He won the Grand Slam, or 'Big Four' tournaments as an amateur in 1962; and the Australian, French, Wimbledon and US singles titles.

Soon after, professional tennis started and many players took up the opportunity to be paid for playing tennis. They had families to support and many were planning for life after their sporting careers ended. Rod Laver was one of them. In consequence he was banned from playing the major tennis tournaments, as they were still confined to amateur players. Playing for money at that time was regarded as going against the spirit of the game.

Many years later, the traditional tennis clubs realised that professional tennis was here to stay and allowed the professional players to again compete in the major championships. Rod Laver then won a second Grand Slam (in 1969) but this time as a professional player. This is a feat unequalled by any other tennis player in the world. Rod won 11 Grand Slam singles titles and was Wimbledon Champion four times. If Laver had not spent years banned from the major tournaments, he may have won more Grand Slams and many more major titles. The main stadium and centre court of Melbourne Park, where the Australian Open tennis tournament is played, is named in his honour: the Rod Laver Arena.

Rod Laver, one of Australia's greatest tennis players, was also one of the first professional tennis players.

The governing sporting bodies decide the rules that govern their sport and how players are to be classified as amateurs or professionals. Some blurring of the distinction between the two is inevitable, as some amateurs receive travel and training payments. Several countries reward successful athletes at the Olympics with large payments that go into trust funds. These funds provide for the athletes' future needs and are not classified as income, which allows them to maintain their amateur status.

The advantages and disadvantages of professional sport

Advantages	Disadvantages
Professional sportspersons are paid an income for their efforts like any other employee or contracted worker	Payment for sporting involvement takes away from the spirit of enjoyment of simply playing a sport for the fun of it
Professional sportspersons through their efforts raise the standards of sporting competitions and this results in better training programs being developed. Medical care is provided to protect massive investments in key players	The intensity of professional sport results in more injuries and an early end to many sporting careers. Players who do not quite make it to the top and sustain major injuries are often left to struggle financially
Professional sport will only exist while sponsors and the public are prepared to inject funds into sport; patrons must therefore think it worthwhile for many sports to pay large amounts to gifted athletes	Only a small percentage of athletes in any sport receive large salary packages and endorsements. Most players receive modest amounts, given the time they put into chasing sporting success

REVIEW

1. Outline the role of sport in society.
2. Describe the impact of the growing commercialisation of sport.
3. What is the legal status of sport?
4. Outline the differences between amateur and professional sports.
5. Why did many amateur players switch to professional tennis when it was introduced?

LAW IN ACTION

1. Should sport in school be compulsory for all students? Justify your response. What issues might such a policy create?
2. Working in small groups, discuss who should pay for an injury that an athlete sustains when playing a team sport. Share your ideas with the class.
3. Hold a class debate on the topic 'professionalism is good for sport'.

10.2 Sport and risk

Participants in certain sports are more likely to receive a sports-related injury. Body contact sports and sports that involve travelling at high speeds will have higher injury rates than other sports. A boxer who enters a ring to fight an opponent may gain any number of injuries while the fight is being conducted. A fractured cheekbone, broken jaw or rib injuries are typical of injuries sustained in a boxing match. However, every person who consciously agrees to enter a boxing ring is accepting that there is a greater risk of being hurt in that activity compared to other sports. This is referred to as the 'voluntary assumption of risk', and it means that a boxer accepts that there is a reasonable chance he could be physically injured in

a boxing competition. That does not mean that a boxer accepts that any injuries gained in the ring are his or her own responsibility.

There are several issues that must be considered if a boxer gets hurt in the ring. These include the following:

- the degree of training that the boxer may have had before entering the ring. An experienced boxer will have had plenty of experience in the ring and should have complied with any requirements imposed by the boxing authority. An inexperienced boxer would need to have had a medical check-up to establish their fitness and to verify that they have received appropriate training
- the voluntary assumption of risk. This only applies to injuries sustained in accordance with the rules of a sport. A boxer who bites off an opponent's ear in the ring is acting outside the rules. The result would be a disqualification of the offender and an assault charge.

Many sports such as skydiving, snow skiing and deep-sea diving present a greater risk of injury for those who love to participate in these activities. Persons who engage in 'extreme sports' take an enormous risk of being injured. As a result, they must accept more responsibility for their own actions. Health and life insurance companies will also charge higher premiums or fees to persons who participate in sporting activities with a greater risk of injury. In some cases, activities may be so dangerous that insurance cover may not be available to participants.

Duty of care in sport

Despite the fact that participants in sporting activities accept some risk in playing sport, there are legal responsibilities that apply to administrators, coaches and other sporting officials.

A person or an organisation will, in certain circumstances, owe a '**duty of care**' to another person or organisation to take reasonable care to prevent them being harmed. Whether a duty of care exists will depend on the relationship between those concerned.

DUTY OF CARE **Every person owes a duty of care to others. This means that they must ensure their actions do not cause harm to others or to their property.**

In sport, those who may have a duty of care include people who assume a responsibility (for instance, by agreeing to coach an athlete or referee a game), or those who have relevant skills or expertise (for instance, a sports administrator).

A coach of a team owes a duty of care to the players. Some accidents will occur on any sports field, but the risk of injury can be minimised. A lot of time, for example, is devoted to teaching young rugby union players how to scrummage so there is less chance of a scrum collapsing awkwardly and causing neck or spinal injuries.

Young rugby players are shown exercises to build up the strength of their neck and shoulder muscles to further reduce the risk of injury on the playing field. In a similar fashion, a referee must not tolerate illegal conduct on the sports field that could cause harm. If such conduct was not corrected on the field, then the referee and the administrators of that sport would be exposing themselves to the very real prospect of legal action.

CASE LAW *Woods v. Multi-Sport Holdings Pty Ltd* [2002] HCA 9

In March 1996 Woods was batting in an indoor cricket game at a facility owned and operated by Multi-Sport Holdings Pty Ltd. Multi-Sport organised the game and provided sporting equipment for the players, but this did not include helmets. Woods hit a ball, which flew off his bat and struck him in the eye, causing a total loss of sight in that eye. Woods sought compensation from Multi-Sport Holdings, arguing that the owner of the venue owed him a duty of care, which they failed to meet to the required standard. After six years of court battles right up to the High Court, the matter was finally decided. The High Court decided 3:2 that Multi-Sport Holdings was not negligent for not supplying helmets and not warning players of the risk of injury.

Five separate judgments were delivered by the judges and so there was no clear explanation of what conduct would constitute a breach of duty of care by a sporting group such as Multi-Sport. It will still be left to judges to decide, on a case-by-case basis, whether sporting injuries were the result of a breach of duty of care.

Duty of care to pregnant athletes

Sporting organisations and administrators may owe a duty of care to pregnant athletes to advise them that there are possible risks involved in participating in a sport while pregnant, and to advise them that they should obtain medical advice about whether to participate and for how long. Steps should be taken to ensure that all female players registering for a sport are given a clear statement indicating the need to seek medical advice about their continued involvement in the sport during any pregnancy. The information should also be prominently displayed so that all competitors will see it.

Sporting organisations and their officials should not provide advice to pregnant participants on the health risks of participating. Doing so could put both staff and organisations at risk of being found liable and sued for negligence.

Sports administrators' duty of care to pregnant athletes does not require them to place restrictions on the athletes' participation in a particular sport from a specific stage of the pregnancy. Such a ban could be seen as discriminatory.

Sporting organisations owe a duty of care to all athletes.

There are no special guidelines on how to treat pregnant competitors, though many people feel uncomfortable about competing in a sport against a pregnant opponent. All players are owed a duty of care. Reasonable care must be taken not to cause harm to other participants. Any player who harms another by going outside the rules of the game may be liable in tort and held legally responsible for medical expenses and compensation.

Pregnant athletes owe a duty of care to their unborn children to take reasonable care to avoid foreseeable risks of injury. They can usually meet that duty by obtaining advice from appropriately qualified medical practitioners as to the risks involved in participating in a particular sport while pregnant, and following that advice.

CASE LAW *Lynch v. Lynch* [1991] 25 NSWLR 411

In this case, a child successfully sued her mother for prenatal injury, claiming that her mother's actions were negligent. In this case, the claim concerned a car accident. The court found that the mother owed a duty of care to her unborn child, and that this duty could be breached by prenatal neglect or carelessness that causes injury. This means that, legally, a pregnant woman may be held personally responsible for careless or negligent acts that harm the health of her unborn child.

A problem arises for sports administrators if they are aware, or should have been aware, that a pregnant sportswoman either has not obtained appropriate medical advice, or has chosen to keep playing sport despite advice that it is unwise. It is not up to the pregnant player alone to decide that she will accept any risks associated with her continued involvement in sport while expecting a baby.

It has been suggested that one way sporting groups may contain their legal liability for injury is by banning the participation of pregnant women, because the cost of an anti-discrimination action that might result will probably be less than the cost of a negligence claim made by a pregnant woman who continued to play and was injured. This is a rather cynical view that does not allow for the rights of the woman concerned.

Standard of care

The standard of care required in sport is based on what a reasonable person would have done in similar circumstances. It will vary with the role being performed by the person involved. For example, the duty of care owed by someone in an official capacity, such as a coach, would be based on what a reasonable coach would do in similar circumstances. The test is objective rather than subjective. A coach may feel they have done nothing wrong by telling players to deliberately foul or interfere with opposition players in a netball or basketball game even if it may cause an injury. Courts of law would look at it from the point of view of a reasonable coach in similar circumstances, so the personal opinion of the offending coach would be disregarded. The standard of care to be shown by a coach would also be greater for younger or disabled players.

Industry standards and organisation documents such as codes of practice and behaviour may all be used to determine the standard of care required.

CASE LAW *Bolton v. Stone* [1951] 1 All ER 1078 (House of Lords)

Bolton v. Stone was a classic negligence (tort) case. It involved Miss Bessie Stone, who was struck by a cricket ball as she passed a ground in Manchester, England. The ball had been hit about 70 yards and cleared a fence around the ground. The plaintiff sued the Cheetham Cricket Club Committee for negligence.

The court decided that though the accident was foreseeable, the likelihood of damages were so slight that 'a reasonable man would not have felt called upon to either abandon the game or increase the height of the existing fence'. The standard of care to be applied is that of an ordinary careful person who does not take precautions against every foreseeable risk.

Due diligence

To limit liability, directors and officers of a sporting organisation need to demonstrate that they took all reasonable steps to prevent a reasonably foreseeable risk of injury occurring. The concept of due diligence comes from corporations law. It essentially means that a director or officer of a sporting group should:

- act in good faith and for a proper purpose
- not have a material interest; that is, not stand to gain financially from any decision they make in relation to that sport
- reasonably inform themselves, and
- consider their decisions in the best interests of the sporting body.

Legislation in sport

Though sport is an area that should not be over-regulated, there are areas where legislation is required to promote sport and protect its ideals. There is also a need to protect all participants from the unscrupulous or negligent acts of others.

Legislation such as the *Australian Sports Commission Act 1989* (Cwlth) exists to promote sport in Australia and encourage increased participation and improved performance in sport. The Commission operates under the name Australian Institute of Sport (AIS) when performing certain roles. The AIS is required, among other things, to

> 'develop and implement programs for the recognition and development of:
> (i) persons who excel, or who have the potential to excel in sport
> (ii) persons who have achieved, or who have the potential to achieve, standards of excellence as sports coaches, umpires, referees or officials essential to the conduct of sport;
> (iii) initiate, encourage and facilitate research and development in relation to sport; and
> (iv) to undertake research and development related to sports science and sports medicine.'

The Australian Institute of Sport is able to take promising young athletes and provide them with first-class coaching and training facilities. These athletes may then compete at future Olympic Games and help maintain Australia's superb international sporting record.

There are some instances of conduct at sporting events that is not positive for the image of Australian sport. Legislation exists to curtail some of these activities.

Streaking at a public sporting venue will result in large fines for offenders. The fine is $5000 at the Etihad Stadium in Docklands, $7000 at the Melbourne Cricket Ground and $10 000 at the Sydney Cricket Ground. Under the *Sporting Venues (Pitch Invasions) Act 2003* (NSW) a person who is removed from a designated sporting venue for a contravention of Section 4 is banned for 12 months from re-entering the venue (the ban starting from when the person was removed from the venue).

Log on to the Pearson Places website and follow the links to find more information about the Australian Institute of Sport (AIS).

Legislation exists prohibiting streaking at all major sporting venues in Australia.

BOXING INDUSTRY REGULATION

Boxing and kickboxing are the largest professional combat sports in New South Wales and the industry is regulated under the *Boxing and Wrestling Control Act 1986* (NSW). The Act provides for the establishment of the Boxing Authority of New South Wales to control and regulate the conduct of professional boxing events in New South Wales.

As professional boxing is an inherently dangerous sport it needs to be carefully regulated and closely monitored. The Boxing Authority is responsible for the conduct of boxing contests in New South Wales.

The Act also controls wrestling, amateur boxing and kick-boxing through a permit system administered by NSW Sport and Recreation under Ministerial delegation.

An area of some dispute in recent years has been that women in New South Wales are banned from the sport of boxing under the Act, but boys can fight from as young as 14 years.

REVIEW

1 Explain the concept of voluntary assumption of risk.
2 Under what circumstances does the voluntary assumption of risk cease in sport?
3 What is an extreme sport?
4 Define the term 'duty of care'.
5 Describe the impact of the duty of care on sport.
6 Describe the duty of care that is owed to pregnant athletes.
7 Explain the duty of care owed by pregnant athletes to their unborn children.
8 Outline the nature of 'standard of care' as it relates to sport.
9 What is 'due diligence'?
10 Outline the purpose of the *Australian Sports Commission Act 1989* (Cwlth).
11 Explain how the boxing industry is regulated.

LAW IN ACTION

1 Working with a partner, brainstorm a list of sports that would be considered dangerous. Select one of these sports and consider what reasonable steps a sporting organisation could take to reduce the risks associated with this sport.
2 Consider each of the following scenarios and explain the risk associated with each:
   - **a** Playing on a very hot day
   - **b** Playing sport at night with very poor lighting
   - **c** Playing on a sports field with an uneven and very hard surface
3 Examine the case *Woods v. Multi-Sport Holdings Pty Ltd* [2002] and complete the following activities:
   - **a** Outline the facts of the case.
   - **b** Describe the finding of the court.
   - **c** Do you agree with the finding? Explain your answer.
4 Examine the case *Lynch v. Lynch* [1991] and explain the implications of this case on sport.
5 Review the case *Bolton v. Stone* [1951] and complete the following activities:
   - **a** Outline the facts of this case.
   - **b** Do you believe the plaintiff had a good case? Explain why.
   - **c** Explain the ruling of the court.
6 Write an argument either in support of or against the notion that athletes need to take total responsibility for any injuries they sustain while playing sport.

10.3 Mechanisms for achieving justice

Sport has traditionally been based on notions of fairness and friendly competition. Reference is often made to 'meeting on a level playing field'. However, conflict can occur in sport and mechanisms to achieve justice are required for participants, officials and administrators. As with other areas of the law there should also be avenues of appeal if players are held accountable for their conduct on and off the playing field.

Natural justice

Players who have broken club or competition rules need to be dealt with appropriately. To ensure that legal matters do not arise, a person identified as having broken the rules must be treated fairly. To do this, the principles of natural justice need to be applied. These principles in a sporting context include:

- the right of any player to know the details of the rules they are supposed to have broken and to be given time to consider any allegations made against them
- the right to put forward a defence and to be heard
- the right for the matter to be heard before an independent and impartial judge or panel of judges.

A player who has been suspended or fined for any reason without being given a chance to put their side of the story has been denied natural justice. For example, an athlete who has been charged with using performance-enhancing drugs must be

given an opportunity to explain that perhaps they were on medication prescribed by their doctor. The explanation may not change the outcome of a disciplinary hearing, but the opportunity for the athlete to plead their case must be provided. If legal redress is sought, the decision may be overturned in court if the player was denied natural justice and the player may receive financial compensation.

CASE LAW *Hall v. New South Wales Trotting Club* (1977) 1 NSWLR 378

A trotting trainer, Percy Hall, was accused of misconduct by the New South Wales Trotting Club and suspended for three months. Though Hall was present at the disciplinary hearing he was not offered the opportunity to make any representations on the question of penalty. The Supreme Court held that a sporting tribunal has a duty to hear the accused on all parts of the case. Hall was able to address the tribunal on his guilt or innocence but was not consulted in relation to the penalty. As the penalty was severe, Hall should have been able to make representations to the tribunal about it. The finding of guilt still applied as Hall had a chance to speak on that issue but the penalty imposed was ruled invalid.

Restraint of trade

Athletes who play professional sport sign contracts that set out the terms of the agreement they have with their club or the body that runs the sporting activity. The contract will contain details of what the athlete must do in terms of performance and the amounts they will be paid for their services. It is, in effect, a contract of employment. Contracts may contain special conditions that are not always found to be legal if challenged in the courts.

An issue for many players in sports such as rugby league, rugby union, Australian Rules football and soccer is 'restraint of trade'. Once a player commits to playing for one club, restrictions are often placed on his or her ability to leave that club and play for another club – or even in another country. Sporting contracts often contain a clause outlining whether a player can leave the club and on what terms. Ultimately no player can be forced to play for a team, even if contracted to them. However, if they choose not to play for that team, they will forfeit their match payments and may be prevented from playing for any other club in that competition. A review of cases dealing with contractual issues will show how much the law impacts on professional and, to a lesser extent, amateur sport.

CASE LAW *Buckley v. Tutty* (1971) 125 CLR 353

This is one of the earliest cases in New South Wales that deals with restraint of trade in sport.

Tutty was a professional rugby league player with the Balmain club in Sydney. Both the New South Wales Rugby League and his club were unincorporated (they were not companies) so that the *Trade Practices Act 1974* (Cwlth) did not apply. The league rules:

a stated that players were required to be registered before they could play

b contained provisions relating to the transfer of players between clubs, and

c prevented a player from playing for another club without the permission of his own club.

Tutty claimed the rules were an unreasonable restraint of trade, arguing that they interfered with his ability to gain employment and earn an appropriate amount for his skills.

The High Court ruled in Tutty's favour. They stated that the rules imposed on rugby league players were in restraint of trade. The rules were preventing professional athletes from making the most of their skills and prevented a member of one club playing for another without approval, even if the contract with their original club had expired. Clubs were trying to stop their players from leaving and to prevent other clubs from acquiring their services by offering more money.

SONNY BILL WILLIAMS AND THE RESTRAINT ON TRADE

As discussed in *Buckley v. Tutty* (1971) 125 CLR 353, players often want to leave one sporting club and join another. In Tutty's case his contract had expired but his club was still unwilling to let him leave. Sonny Bill Williams, a player with the Canterbury Rugby League Club, was contracted to play for Canterbury until 2012.

He left in the middle of the 2008 playing season, virtually without warning, to play rugby union in France. It was rumoured that he would be paid a lot more in France than he was being paid in Australia. Rugby league officials in Australia threatened Williams with a lifetime ban if he played in France, so that he could never play rugby league in Australia again. A subpoena (court order) was issued in the Supreme Court of New South Wales in an attempt to force Williams to appear in court relating to his breach of contract. An injunction was also sought to prevent Williams playing for any other club.

An interesting aspect of this case is jurisdictional; that is, New South Wales courts deal only with legal issues in New South Wales. They are not able to instruct French authorities that Williams is not allowed to play sport in France. Their jurisdiction only covers the State of New South Wales.

Australian sporting authorities can ask French sporting authorities to respect their ban on Williams. If French sporting groups choose to refuse such a request, then New South Wales or even Australian teams may refuse to play against French rugby league teams or possibly even in the Rugby Union World Cup. The situation could have caused a lot of damage to international sporting relations, with officials in New South Wales branding it international piracy.

The case was resolved when Sonny Bill Williams bought out his contract with Canterbury Bankstown. He is now free to play in France and his old club has been compensated for his loss.

Professional footballer Sonny Bill Williams created controversy in 2008 when he left his Sydney team, the Canterbury Bulldogs, in mid-season to play rugby in France.

Negligence

Negligence occurs when a person is harmed unintentionally by another due to carelessness (this was discussed in greater detail in Chapter 7). For example, failure to check indoor or outdoor facilities to see if they are slippery or unsafe could constitute negligence. It is the failure to use reasonable care in a given situation. Negligence could extend to not fencing off a playing field so that spectators are injured by players or equipment.

In order for a negligence claim (a tort) to be successful, four elements need to be established to the court's satisfaction:

- a duty of care being owed to the injured person
- a breach of that duty of care occurred
- an injury or 'damages' occurred, and
- a causal connection existed between the breach of duty of care and the resulting injury.

LEAGUE STAR AWARDED $97 000

A landmark case in New South Wales involved Jarrod McCracken, a rugby league footballer. He was the victim of a spear tackle where opponents lift a player into the air and propel him into the ground head-first. The illegal tackle occurred in a game between the Wests Tigers and Melbourne Storm teams.

McCracken suffered neck and spinal injuries and some of the damage is permanent. He sued Melbourne Storm and two of its players, Stephen Kearney and Marcus Bai. Justice Robert Hulme commented that 'they (the injuries) also prevented him from continuing in a career for which he had a passion'.

The case was settled in November 2006 though the incident occurred years earlier. McCracken had sought $750 000 in damages, the maximum claim allowed in the District Court of New South Wales. The final amount awarded as damages was $97 000.

McCracken is currently a property developer with $15 million in assets. The case was a landmark one as, prior to this case, players were unwilling to take legal action for breaches of rules of the game that amounted to assault or even more serious offences.

International law

Professional sportspersons aim to compete at the highest levels. International competition allows for very high standards of competition and for the selection of world champions in individual sports.

Major issues of concern for international sport are the use of performance-enhancing drugs and conduct to the detriment of sport's image in the eyes of the public.

When athletes are banned from international competition by disciplinary tribunals they will often lodge an appeal with the Court of Arbitration for Sport (CAS). It is an international arbitration body set up by the International Olympic Committee (IOC) in 1984 to settle disputes relating to sport. Its headquarters are in Lausanne, Switzerland.

There are also additional courts in New York and Sydney. It was originally set up to deal with disputes that occur in Olympic events but it has broadened the scope of areas it will investigate. The CAS draws its power from rule 61 of the Olympic Charter, which states:

> 'Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.'

A dispute is usually only submitted to the CAS if there is an arbitration agreement between the parties that specifies CAS involvement in disputes. Disputes in major sports such as English Football are often referred to the CAS if it is a matter that comes under their jurisdiction.

Log on to the Pearson Places website and follow the links to find more information about the Court of Arbitration for Sport.

THE COURT OF ARBITRATION FOR SPORT

Riccardo Ricco, an Italian cyclist, filed an appeal with the Court of Arbitration for Sport in November 2008 against the decision of the Anti-Doping Tribunal of the National Olympic Committee of Italy. The tribunal had imposed a two-year ban on Ricco following a positive test for EPO (erythropoietin, a hormone that increases the production of red blood cells) during the Tour de France. The cyclist was seeking a reduction in the length of his suspension based on his cooperation with officials investigating the use of performance-enhancing drugs by cyclists.

Professional cyclists participating in the Tour de France have referred cases to the Court of Arbitration for Sport after being banned for taking performance-enhancing drugs.

REVIEW

1 Explain the notion of 'natural justice' as it applies to sport.
2 Describe situations in which athletes are denied natural justice.
3 What is 'restraint of trade'?
4 Explain how the restraint of trade affects sport.
5 What is 'negligence'?
6 Outline the elements that need to be proven in order for a negligence case to be successful.
7 Describe the major international law issues of concern in relation to sport.
8 Outline the role of the Court of Arbitration for Sport.

LAW IN ACTION

1 Review the case *Hall v. New South Wales Trotting Club Ltd* (1977) 1 NSWLR 378 and complete the following activities:
   a Outline the facts of this case.
   b Describe the ruling of the Supreme Court.
   c Do you agree with the ruling? Explain your response.
2 Examine the case *Buckley v. Tutty* (1971) 125 CLR 353 and complete the following activities:
   a Explain why the Trade Practices Act did not apply to sporting clubs.
   b Describe how the league rules constituted a restraint on trade.
   c What was the ruling of the High Court? Do you agree with the ruling?
3 Read the information on Sonny Bill Williams and complete the following activities:
   a Explain why Sonny Bill Williams created so much controversy.
   b What were the jurisdictional issues raised by this case?

10.4 Responsiveness of the legal system

The law and law courts are generally reluctant to get involved in the private matters of any individual. This extends to their sporting activities and their relationships with sporting clubs. Parliament will legislate to protect players' safety but will not direct clubs to all follow the same rules or mandate how clubs should run their affairs. There is still 'freedom to contract' in Australian sport.

The governing body of a sport still controls the behaviour of persons engaged in its sport through various rules, codes and regulations to manage the way the sport is played and to protect the integrity of the sport. The rules will usually deal with issues such as violence, racial vilification, performance-enhancing drugs and conduct at public venues. There is usually a general provision in the code of conduct requiring players not to bring the game or sport into disrepute. Many clubs will also insist that their players spend a certain number of hours visiting hospitals, schools and training sessions for junior players.

There are circumstances where the legal system has to be involved and this often occurs when a player's conduct affects the public image of their sport. A player will often feel harshly treated for what they regard as a minor breach of a code of conduct. Judicial review is usually available to such a player, though the courts remain reluctant to intervene in internal disputes within a club or sporting body. The chance of a successful appeal to the courts against a sporting body's disciplinary findings are slim. The disciplinary ruling would have to be 'so aberrant that it cannot be classed as rational' according to Judge Tadgell in *Australian Football League v. Carlton Football Club Ltd* [1998] 2 VR 546 (the *Williams* case). This means that unless a disciplinary finding is without any logical basis an appeal against it will not succeed. A court will not generally review the merit of a tribunal decision. There must be a mistake at law for an appeal to the courts or no evidence at all of improper conduct. Under those circumstances, an appeal such as that lodged by Nick D'Arcy in the case below has very little chance of success.

ATHLETES' BEHAVIOUR AND THE LAW

NICK D'ARCY'S EXPULSION FROM THE BEIJING OLYMPICS TEAM

All players who represent their country at a particular sport are expected to follow certain codes of conduct to make sure they don't 'bring the game into disrepute'. This involves conduct at sporting venues and at public gatherings and, to some extent, it even includes behaviour in a private setting. An athlete on an Apprehended Domestic Violence Order (ADVO) for example, may not be selected to represent their country.

In Nick D'Arcy's case, he had been selected as a member of the swimming team to represent Australia at the Beijing Olympics. Selection for an Olympics team is based on performance and D'Arcy had qualified on his swimming performances in the butterfly event.

Following a social gathering in Sydney, police had charged D'Arcy with assault and grievous bodily harm. Police alleged he had consumed at least 16 alcoholic drinks prior to the assault. The charges were later reduced to just one of recklessly inflicting grievous bodily harm. D'Arcy had struck another swimmer, Simon Cowley, who suffered a broken jaw, broken nose, fractured eye socket, crushed cheekbone and fractured palate. The matter attracted considerable media attention and, though the charges had yet to be heard, Nick D'Arcy was dropped from the Australian Olympics team. It was decided that he had breached the conduct guidelines given to Olympic representatives.

The case certainly illustrates the consequences of an athlete bringing their sport into disrepute. As an athlete trains for about four years to reach Olympic level, the expulsion meant D'Arcy could not compete at the Olympics for eight years.

D'Arcy appealed his expulsion to the Court of Arbitration for Sport but was unsuccessful.

JOBIE DAJKA'S FALL FROM GRACE

Jobie Dajka was a former world champion in the sport of track cycling.

He had been sacked from the Athens Olympics cycling team after admitting he lied to an inquiry into drug use in the sport. After this Dajka's cycling career fell apart and in July 2005 he was banned for three years for assaulting Martin Barras, the head coach of the Australian track cycling team. He had also been charged with drink driving, had his driver's licence cancelled and breached bail conditions in August 2006. This led to criticism of Cycling Australia and Barras as coach for neglecting athletes who experience personal problems.

This case confirms the strong stance taken by Olympics officials with athletes who bring their sport into disrepute, but it has a tragic aftermath: unable to surmount the problems that lead to his dismissal, Jobie Dajka took his own life in April 2009.

ANDREW SYMONDS' CRICKET FUTURE JEOPARDISED

Andrew Symonds was regarded as an exceptional cricket talent. After missing a training session he was dropped from playing for the Australian test side. Then, after making comments on a radio program against a New Zealand cricketer, it was decided by Cricket Australia that he had made a 'detrimental public comment' and that he could not be selected for the 2009 cricket tour of South Africa. Symonds was advised that he needed further rehabilitation and counselling. He was fined $4000 for the comments he made on air.

In 2009 Symonds' contract with Cricket Australia was terminated after he broke the key conditions of this contract not to drink in public while on tour to England. He was sent home and may not play for Australia again.

The behaviour of international cricketer Andrew Symonds saw him expelled from the Australian team in 2009.

BEN COUSINS' ON AGAIN-OFF AGAIN CAREER

Ben Cousins is a high profile Australian Rules football player. He spent most of his career playing for the West Coast Eagles in the AFL competition. During his 11 years with the West Coast Eagles, he won several of the league's highest individual awards, including a Brownlow medal and a premiership medallion. He was selected six times in the All-Australian team, was club champion for four seasons and captain for five seasons.

His football career seemed over when details of his off-field antics received massive media coverage. Reports of drug taking, associating with known criminals and traffic offences put him on a collision course with the Eagles club. In October 2007 his contract was terminated and the AFL Commission then banned him from playing Australian Rules for 12 months for 'bringing the game into disrepute'.

Cousins was cleared to return to football in 2009 but most clubs were reluctant to offer him a contract. He was finally drafted by the Richmond Football Club in Melbourne. Cousins' performance will be closely monitored to ensure he remains drug free and avoids attracting unfavourable publicity. Richmond Football Club has a moral and legal responsibility to help Ben Cousins in his rehabilitation.

FEMALE CLOTHING CAUSES PROBLEMS AT THE TENNIS

Women are not often accused of bringing a sport into disrepute. They are less likely to swear and behave in a violent fashion. The main complaint lodged against their conduct seems to be for breaching dress codes. It was reported that at the Australian Open Tennis titles played in Melbourne in 2009 that the tennis referees would double as fashion police to stamp out the wearing of skimpy outfits.

Open officials had threatened fines of up to $2000 for any player caught flouting its strict dress code. This followed complaints against French player Alizé Cornet who wore a short skirt and revealing, see-through top during a doubles match at the Hopman Cup tournament in Perth a week before the Melbourne tournament.

Organisers have a right to set the rules for their tournaments and this includes dress codes. Interestingly, tennis tournament organisers in Australia and elsewhere used to insist that all competitors wear all-white clothing or be banned from competing. Wimbledon still requires white.

Fairness to all participants and competitors

Legislation exists to protect persons from discrimination in all areas of life, and this certainly includes sport. The *Anti-Discrimination Act 1977* (NSW), the *Racial Discrimination Act 1975* (Cwlth), the *Sex Discrimination Act 1984* (Cwlth) and the *Disability Discrimination Act 1992* (Cwlth) all prohibit discrimination against minority groups. In recent years, Indigenous sportsmen have endured racist comments and vilification on and off sports fields in several Australian states. Officials must suspend players who use racial taunts and abusive spectators are ejected from sporting venues. Some clubs permanently ban repeat offenders who use abusive language or assault other persons at the game.

Female participation in male-dominated sports

An issue that has not been completely resolved in legal terms is female participation in traditional male sports. Though females have their own cricket, football, rugby union, rugby league and touch football competitions, the problem occurs when they want to play in the same team as male players.

There are two sides to this issue:

- Women should not be discriminated against in sport. Discrimination occurs when a person is treated less favourably than other persons. For example, if a woman wishes to play in a billiards or snooker team and she deserves her place on ability, then she should be in the team. If the organisers of a tournament were to argue that there are no women's toilets at the competition venue, that would not be an acceptable reason for banning female participation. The organisers would have to make arrangements to circumvent or get around this problem. Failure to do so would be discrimination. For example, the *Sex Discrimination Act 1984* (Cwlth) makes it unlawful for an educational authority to discriminate against a pupil on the basis of sex. This particularly applies to sports played up to the age of 12 years.
- Women are more likely to suffer injuries in body contact sports against males. Sex discrimination legislation does not make it unlawful to exclude a person of a particular sex from competing in a competitive sporting activity where the strength, stamina or physique of competitors is relevant.

Sports that have traditionally been seen as male sports, such as football, are becoming increasingly popular among women.

CASE LAW *Taylor & Ors v. Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158

In this Victorian case, young girls aged 14 and 15 years challenged a ban on girls playing football alongside boys of the same age. Under state law, participants over the age of 12 can be excluded from sports where the strength, stamina or physique of competitors is an issue.

The judge decided that strength, stamina and physique were not greatly different in girls and boys up to the age of 14 years. However, the judge accepted that in the group under 15 years of age there was sufficient disparity between girls' and boys' strength and stamina to justify a ban on girls joining boys teams in that age group.

In sport, the courts may not only be called on to rule on female participation in male activities, they may have to rule on the participation of boys in sports that are not suited to their physiques. A young boy, even if skilful, may be advised against playing in a higher age group in a body contact sport if the risk of injury is greater.

CASE LAW *Watson v. Haines* [1987] Aust. Torts Reps 80-094; NSWSC

Stephen Watson, aged 15 years, played hooker for his school's first grade rugby union team. A scrum collapsed during a match, fracturing his cervical spine leaving him a quadriplegic. Watson sued the Education Department for failing to give him (the plaintiff) appropriate neck-strengthening exercises. His claim also maintained he should not have been played at hooker given his physical size. The court accepted that he had a long, thin neck unsuitable for the pressure of a scrum.

Evidence showed that neck and spinal injuries were not uncommon in rugby games. In 1980, seven injuries involving damage to the spinal cord that resulted in paralysis were reported. In fact, the Director of the Spinal Unit at Royal North Shore Hospital prepared a kit titled 'Don't Stick Your Neck Out' which included a poster and audiovisual presentation.

In 1981, the New South Wales Minister for Education directed his staff to distribute the kit to schools. However, it was not given priority and even if it made its way into schools it did not come to the attention of most teachers, including the teachers coaching rugby at the plaintiff's school.

DRUGS IN SPORT

Professional athletes are training harder and more often than ever before as they try to meet their sporting commitments to their clubs and sponsors. The demands being made on their bodies increases the likelihood of injuries. Even muscle strains may rule a person out of competitive sports for several weeks. Some injuries will take much longer to heal. The frequency of career-ending injuries is increasing. Many elite athletes, particularly in team sports, find that the demands of full-time competitive sport and the rigours of training are shortening their careers. Players find that once they reach their thirties the number of injuries they suffer increases and it takes more time for their bodies to recover peak fitness. Most sporting clubs now have very large squads of players to choose from, so if an injury occurs to one player there are several possible replacement players who could take their place. A player who gives up a place in their club's first team due to injury may find it difficult to break back into the top team.

Fortunately, many clubs recognise these problems and have teams of doctors, dietary and exercise experts to help their players cope with the demands of professional sport. However, the pressure on players to perform at peak fitness and to recover from injuries as quickly as possible encourages some to take steroids, THG (tetrahydrogestrinone, a banned steroid hormone) or other hormone treatments. Even dietary supplements are questionable. A significant percentage of supplements tested by the IOC contain enough steroids or hormones for an athlete to fail a doping test.

There are also many performance-enhancing drugs that an athlete may consider. For example, the desire to run the 100 metres just one tenth of a second faster and thus be recognised as an elite athlete may be the reason why some athletes take such drugs and run the risk of detection. In the past, many athletes were taking performance-enhancing drugs in the off-season or while training and tapering off their use of the drugs in the lead-up to a major competitive event. As drug testing was far more likely close to the day of competition,

these 'drug cheats' hoped to escape detection. As doping tests have become more sophisticated and are held more often, it has become far harder for offenders to avoid detection. This partially explains why some athletes refuse to give urine or blood samples when randomly asked to do a drug test. This can raise privacy issues if an athlete can be asked at any time to undertake a drugs test and this problem is still to be adequately resolved by many sporting bodies.

A problem for young, highly paid, professional athletes is recreational drug use. This coupled with heavy consumption of alcohol leads to disciplinary issues with their coaches, clubs and other sporting administrators. Given their duty of care to players, many clubs introduce rehabilitation programs to help young players deal with drinking or drug-taking problems.

The Australian Sports Drug Agency (ASDA) was established under the *Australian Sports Drug Agency Act 1990* (Cwlth) to collect samples from athletes and arrange testing. Most tests are now conducted outside actual competition days. Australia's drug-testing procedures are in accordance with the World Anti-Doping Agency's (WADA) Code.

The WADA Code's prohibitions include 'the presence of a prohibited substance or its markers in an athlete's bodily specimen'. 'Intent' to take the drug does not have to be established; a cold cure could inadvertently breach the Code. The use or attempted use of a prohibited substance and refusal to comply with a request to supply a sample, including evading dope test officials, are all violations of the Code.

DRUGS AT THE OLYMPICS

Sporting competitions have become the focus of attention for the detection of illegal drug use. There have been many high-profile athletes who have taken drugs in the lead-up to the Olympic Games. The IOC, as organisers of the Olympic Games, have tried to increase the sophistication of drug-testing procedures and the frequency of random drug tests.

Italian fencer Andrea Baldini was one of 37 athletes to be disqualified immediately before or during the 2008 Beijing Olympics after failing a drug test. At the 2008 Olympics in Beijing, China, the crackdown on illegal drug use intensified as athletes were randomly tested and with greater frequency than ever before. In the lead-up to the Olympics at least 37 athletes were disqualified for testing positive to drugs.

Prior to the Athens Olympics there were 19 athletes who failed random drug tests. Media coverage focused on athletes such as Katerina Thanou, who tried to keep moving around Greece to avoid being tested for drugs. She was banned for two years from athletics competitions.

US Olympic athlete Marian Jones admitted to having taken performance-enhancing drugs years after winning multiple gold medals at the 2000 Sydney Olympics.

Another recent case involved Marion Jones, a multiple gold medal-winner at the Sydney Olympics in 2000. For years, she denied taking drugs but eventually had to admit that she took steroids (THG) when preparing for the Olympics.

Athletes wanting to appeal their disqualification or suspension will take their appeals to the Court of Arbitration.

Fees and charges charged by clubs

Gyms and fitness clubs have grown in popularity as people try to exercise more regularly and in a carefully regimented manner. The conduct of some fitness clubs has been brought into question, however, for overcharging, charging large sign-on fees and pressuring fitness enthusiasts into signing long-term contracts. Clubs may go into liquidation and those members who have paid fees in advance may find they have little chance of having the money returned to them.

Under the *Fitness Services (Pre-Paid Fees) Act 2000* (NSW) there are special conditions attached to fitness contracts to protect club members from the unscrupulous conduct of some gym proprietors. Section 8, for example, deals with the prepayment of fees for periods of more than 12 months. It states:

> '(1) A supplier who agrees to provide any fitness service under a fitness service agreement must not seek or accept a pre-paid fee for the provision of the service for a period that exceeds 12 months. Maximum penalty: 1000 penalty units (a penalty unit changes with time but is currently $110).'

The *Fitness Services (Pre-Paid Fees) Act 2000* (NSW) places special conditions on fitness clubs and gyms to protect members.

The New South Wales Office of Fair Trading (OFT) monitors complaints and advises consumers to check the details very carefully before signing any contracts. Fitness centres should be members of their peak body, Fitness Australia, as these gyms operate under a voluntary code of practice. This provides greater security and the code of practice calls for gyms to provide a 'cooling-off period' to their clients. The code also provides for early termination of the contract in case of serious illness.

Consumers should always ask the following questions when joining a gym:

- Are there sign-on or termination fees? How much are monthly membership fees?
- What happens if a member wishes to cancel, transfer or suspend membership?
- If paying by direct debit, how regularly are amounts deducted, are there special fees and how is direct debit terminated? Banks charge extra fees if there are insufficient funds in an account to pay monthly premiums.

Log on to the Pearson Places website and follow the links to find more about the NSW Office of Fair Trading.

Fitness clubs and gyms around Australia are likely to come under increasing pressure from consumers who are fed up with strict membership conditions. The use of unconscionable sign-on tactics has angered many and has led the federal government, which has been keen to see reform in the industry, to design new policies to prevent unfair contracts. The New South Wales Office of Fair Trading receives an average of one complaint a day about unfair gym contracts, problems with ending memberships and obtaining refunds.

A new company that has recently entered the gym market has taken a different approach. It proposes to have no contract memberships. Members will pay a single amount per month (about $90) to use gym facilities. This could lead to intensified competition in the industry and a fairer system for consumers. Until now, the industry has been notorious for forcing customers to sign long-term contracts with onerous cancellation fees and conditions.

REVIEW

1 Explain the circumstances under which the law will intervene in sport.
2 Outline the issues associated with female participation in male-dominated sports.
3 Explain why drug-taking in sport is such a problem.
4 Describe the response of sporting authorities to the greater use of drugs in sport.
5 What is the role of the Australian Sports Drug Agency?
6 Outline the impact of drug-taking on the Olympic Games.
7 Describe the protections put in place to ensure that the rights of the users of gyms are protected.

LAW IN ACTION

1 Write a report summarising examples of athletes whose behaviour has resulted in serious consequences.
2 It is fair that famous athletes are expected to maintain higher standards of behaviour than many other members of society?
3 Examine the case *Taylor & Ors v. Moorabbin Saints Junior Football League and Football Victoria Ltd* [2004] VCAT 158 and complete the following questions:
   a Outline the facts of the case.
   b What was the ruling of the judge?
   c Do you agree with this ruling? Explain your answer.
4 Review the case *Watson v. Haines* [1987] Aust. Torts Reps 80-094 and complete the following activities:
   a What happened to Stephen Watson?
   b Describe the basis of Watson's case.
   c Outline the outcome of this case.
5 Is it fair that elite athletes can be randomly tested for drugs in the off season, with inspectors coming to their houses and places of work to conduct the tests? Justify your answer.
6 A famous case relating to privacy was *Ettinghausen v. ACP* (1991) 23 NSWLR 443. After a rugby league match, Andrew Ettinghausen, a high-profile player for Cronulla, state and national teams, was photographed taking a shower. He did not realise that his nude photo would appear in HQ magazine showing his genitalia. This caused Ettinghausen considerable embarrassment. He sued Kerry Packer's publishing house, Australian Consolidated Press (ACP), and was awarded $100 000 in compensation. Discuss the right of a professional player to privacy when not participating in competitive sport.

CHAPTER SUMMARY

Sport is an activity that most people engage in from an early age. The competitive nature of sport can add to its attraction for some, while others are discouraged by the sense of rivalry.

Sport is often played for sheer pleasure and the joy of competition. Persons who play sport without receiving payment are classified as amateurs. They train and compete in their own time, usually before or after work and on weekends.

Professional sports are those in which athletes receive payment for their performance. They usually train full-time and devote their mental and physical efforts to their sport. Professional sports have improved the standards of sporting competitions, though critics argue that professionalism has taken away some of the spirit and camaraderie that exists in amateur sports.

Participants in certain sports are more likely to receive a sports-related injury. Persons who enter a boxing ring, for example, voluntarily accept part of the risk that they could be injured. Administrative bodies, clubs, coaches and officials may all owe a duty of care to players and even spectators attending their sporting events. Players also owe a duty of care to each other.

In *Woods v. Multi-Sport Holdings Pty Ltd* [2002] the High Court showed that there are limits to how far the duty of care extends in relation to sporting organisers. A player had been injured while batting in an indoor cricket game but the court held it was not up to the indoor cricket centre to supply helmets.

An issue that arises in negligence cases is foreseeability. Could an accident have been avoided if more care had been taken in a given situation? Would a reasonable person have realised the possibility of harm occurring in a game, for example, if the rules were not followed properly?

Legislation exists to promote sport such as the *Australian Sports Commission Act 1989* (Cwlth) and to protect persons playing in, or even spectating at, sports events. There is even a law against streaking at public sports venues.

An athlete who is denied the opportunity to defend themselves against a charge of misconduct can effectively argue that they have been denied natural justice.

Athletes often sign contracts to play for a certain club in a sporting competition. However, problems occur when contracts are used to stop players leaving a club or trying to join another club. If a player is unfairly restricted in their ability to earn an income this is referred to as 'restraint of trade'.

Negligence is the most common tort. If a player acts outside the rules of a game and injures another player in the process they may well be guilty of negligence.

The international Court of Arbitration for Sport (CAS) hears disputes that involve Olympic and other sporting events. An international player who is suspended from playing their chosen sport will usually appeal to the CAS.

Australian courts are reluctant to challenge the findings of disciplinary bodies established by sporting organisations. Players who misbehave on and off the field are often accused of 'bringing the game into disrepute'. The line between a player's private life and what is in the public domain at times becomes quite unclear.

Sport always throws up issues of discrimination and unfair treatment. A current issue relates to female participation in male-dominated contact sports. Denying women the right to play in such situations may be viewed as discrimination, but may also protect women from severe physical injuries.

MULTIPLE-CHOICE QUESTIONS

1 How are amateur participants in sport different to professional athletes?
- **A** They enjoy playing their sport.
- **B** They are never reimbursed for travelling expenses.
- **C** Amateurs do not receive match payments.
- **D** Sporting regulations do not apply to amateur players.

2 What is the 'voluntary assumption of risk' in sport?
- **A** All athletes must accept full responsibility for their behaviour when playing sport.
- **B** Participants accept that there is a greater risk of being hurt in their sport than in other activities.
- **C** Athletes cannot expect medical insurance to cover injuries in sport.
- **D** Administrators accept responsibility for any injuries to athletes in a sport.

3 What happens if a player is injured by an opponent who has breached the rules of the game?
- **A** This situation is still covered by the voluntary assumption of risk.
- **B** The offending player can only be penalised or suspended for their actions.
- **C** The referee or umpire decides if any action should be taken against the offending player.
- **D** The offending player is legally liable to pay compensation to the injured player.

4 Who owes a duty of care in a sporting match?
- **A** Officials and organisers of the sport
- **B** Referees and coaches of the players
- **C** All players, officials, coaches and referees
- **D** Officials, coaches, and referees

5 Who decides when a pregnant woman athlete should cease playing sport before the birth of her baby?
- **A** The expectant mother in consultation with her doctor
- **B** The club or sporting body in the best interests of the woman
- **C** The woman's club in consultation with her doctor
- **D** Other clubs, who can refuse to play her so the pregnant woman must cease playing that sport

6 If a player is suspended in a local competition for three matches without any explanation, what legal rights have been breached?
- **A** The rule of law
- **B** Natural justice
- **C** The standard of care
- **D** International sports law

7 What legal principle was involved in *Buckley v. Tutty* (1971) 125 CLR 353?
- **A** A club's right to enforce a contract
- **B** A player's right to demand a new contract
- **C** Conduct bringing the game of rugby league into disrepute
- **D** Restraint of trade

8 Which of the following would be conduct bringing a game into disrepute?
- **A** A player being penalised for a breach of the rules
- **B** A player having regular appearances on a radio show
- **C** A player being divorced by his wife
- **D** A player abusing spectators

9 When would a court overturn the decision of a sporting tribunal or disciplinary body?

- **A** When the public complain about the sporting body's actions
- **B** When the court disagrees with the logic of the decision
- **C** When there is an error of law
- **D** If a player appeals the sporting body's decision

10 Statute law best protects or provides justice for athletes through which of the following?

- **A** Through anti-discrimination legislation
- **B** By challenging the rules of sporting clubs
- **C** By imposing harsh penalties on athletes who break the rules of their sport
- **D** Through court inquiries into appeals against suspensions and fines

SHORT-ANSWER QUESTIONS

1 Identify the key elements of a negligence action for a sporting injury.

2 Outline how restraint of trade can operate in relation to sporting contracts.

3 Describe how the voluntary assumption of risk can reduce the liability of sports organisers.

4 Explain the key differences between amateur and professional sports.

5 Explain why a restraint of trade clause in a contract may be overruled in the courts.

6 Critically analyse the importance of foreseeability of harm in relation to the organisation of sport.

7 Justify actions by clubs to control the behaviour of their players on and off the playing field.

8 Compare the rights of sportsmen and women to those of society at large in relation to random drug testing at any time of the day and throughout the year.

The individual and the law

PART 2

Percentage of course time: 30%

PRINCIPAL FOCUS

Students investigate the way in which the law impacts on individuals by referring to legal and non-legal institutions, laws and media reports that relate to each of the areas covered.

Themes and challenges incorporated throughout this topic:

- The relationship between justice, law and society
- The relationship between rights and responsibilities
- The balancing of the rights of individuals with the needs of the state
- The role of the law in regulating technology
- The effectiveness of legal mechanisms for achieving justice for individuals and society

FOCUS OUTCOMES

P1 identifies and applies legal concepts and terminology
P4 discusses the effectiveness of the legal system in addressing issues
P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change
P6 explains the nature of the interrelationships between the legal system and society
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents
P9 communicates legal information using well-structured responses
P10 accounts for differing perspectives and interpretations of legal information and issues

Your rights and responsibilities

CHAPTER 11

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P4 discusses the effectiveness of the legal system in addressing issues

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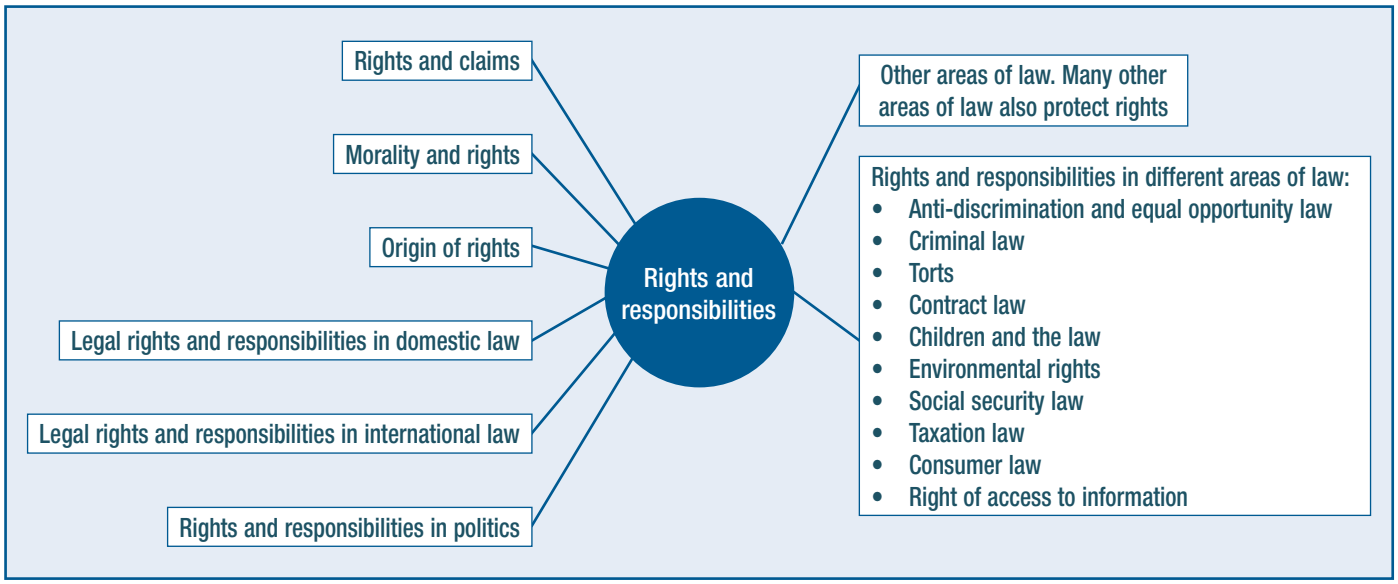
P9 communicates legal information using well-structured responses

P10 accounts for differing perspectives and interpretations of legal information and issues

PRINCIPAL FOCUS

In this chapter students will examine the rights of individuals. The responsibilities that all members of society have and the relationships between these rights and responsibilities are investigated.



SUMMARY OF CASE LAW

Dietrich v. The Queen (1992) 177 CLR 292
Pavitt v. Regina [2007] NSWCCA 88

SUMMARY OF LEGISLATION

Anti-Discrimination Act 1977 (NSW)
Fair Trading Act 1987 (NSW)
Sale of Goods Act 1923 (NSW)
Trade Practices Act 1974 (Cwlth)

SUMMARY OF INTERNATIONAL CONVENTIONS

International Covenant on Civil and Political Rights (1976)
International Covenant on Economic, Social and Cultural Rights (1976)
UN Declaration of Human Rights (1948)

11.1 The nature of individual rights

Human rights may be described as essential to being a human being; for instance, the right to life, the right not to be held as a slave and the right to freedom of religious belief. Of course different people may argue which rights are essential to being human. The focus in this chapter is on what constitutes a 'right' and what rights are protected in major areas of the law.

Rights are what we are entitled to.

What is a right?

RIGHT A right is something to which you are entitled, which no-one can take from you except through law.

You would imagine this to be a simple question but there is debate about just what constitutes a '**right**'. Probably the simplest answer is to say that it is something to which you are entitled and that someone cannot take away from you. That sounds simple enough. For instance we have the right to leave our homes and go onto the footpath and visit the local shops. There are people who do not have this right. Persons sentenced to imprisonment because they have committed crimes are the obvious examples. Perhaps a better definition is that a right is the freedom to act or refrain from an act, which cannot be taken away from a person except with the authority of law. This really is only the beginning of a discussion of what a 'right' is.

Rights and equality

EQUALITY IN LAW Where persons are treated as though they are the same.

The concepts of **equality** and rights are closely related. Individual rights are strengthened when the legal system provides for ways of increasing equality between citizens. For instance, anti-discrimination laws aim at preventing discrimination based on irrelevant characteristics.

What is the difference between a right and a claim?

It can be argued that a right is something that a person is legally entitled to do or have. It could also be argued that a right is something a person has, even if it has not been recognised by law. This is commonly the position with respect to debates over human rights.

However, where the right is not determined, individuals may make a **claim**. For instance, there may be a dispute between individuals in which each claims to be the owner of a property. They may negotiate to decide who will take the property, or a court may decide finally who has the right to the property.

CLAIM **An assertion that is made to establish a right. It may be disputed.**

Where do our ideas about rights come from?

Many of our human rights have a religious basis; for example, rights were seen among many Christians as coming from God. The religious book of Christianity, the Bible, states that Jesus Christ said: 'Do unto others as you would have them do unto you'. This statement in itself indicates that there are significant limits on how we should treat others when we are more powerful than them.

Buddhism developed in India, a country where the society was and, to some extent, continues to be divided into strict social classes called 'castes'. Buddha rejected these hierarchical social structures, criticising the caste system. Buddhists, like Christians, believe all people were created equal. The holy book of the Islamic faith, the Koran, also makes reference to many rights that are now commonly thought of as human rights.

Many rights have a religious basis.

People have also argued for rights from a non-religious perspective. For instance the 19th-century liberal philosopher John Stuart Mill said that a person should be allowed to do anything provided it did not harm another person.

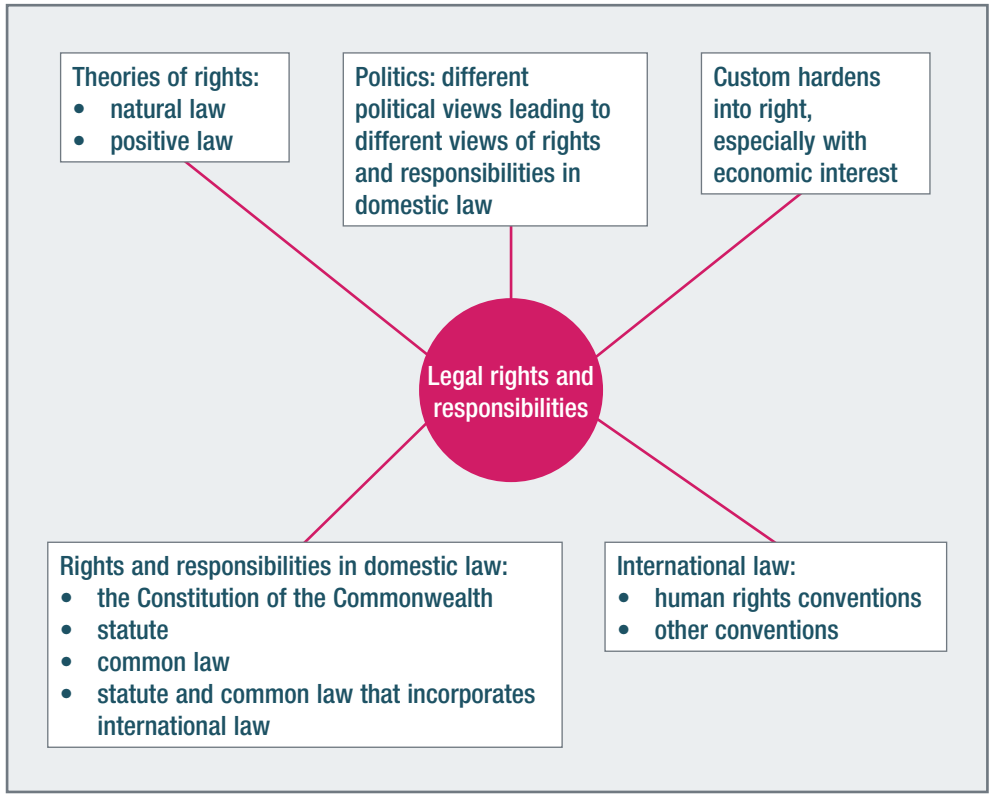
REVIEW

1 Define the term 'right'.
2 What is a human right?
3 Explain the relationship between rights and equality.
4 Differentiate between a right and a claim.
5 Outline the sources of many of our rights.

LAW IN ACTION

1 What rights and responsibilities do you have? Which are social, which are cultural and which are religious in origin?
2 Interview another student in the class about their answers to the above question. Where do you agree and where do you disagree? Discuss the results. Do you agree with each other? Why, or why not? Can you reach agreement? If not, why not?
3 Using the Internet and other sources, conduct research into a major religion, such as Judaism, Hinduism, Christianity, Islam or Buddhism. Explain the basic principles relating to rights that the religion adopts.

11.2 Types of rights



POSITIVISM The view that rights can only be granted by lawful authority.

Legal rights

In legal theory, there exist two basic concepts that are very relevant to the issue of rights:

- **Natural law** theorists says that we are entitled to rights because God, or some kind of higher authority, has given us these rights. No law passed by parliament or other authority can overturn such a law.
- **Positivists** argue that the natural lawyers are wrong and that the only rights that exist are those that are granted by lawful authority; for example, government or parliament.

NATURAL LAW **The view that there is a higher law than that of kings and parliaments. It may come from God or from other basic principles.**

HISTORICAL DEVELOPMENT OF LEGAL RIGHTS

Throughout history, a number of very important legal documents have laid a strong foundation on which contemporary human rights have been based.

The Magna Carta (1215)

The first clear statement of rights in English law comes from one of the most famous legal documents ever created: the Magna Carta. It was the result of a struggle between the King and his leading nobles. The document really was designed to protect the interests of the wealthy and powerful but it is the first time in English law that some limits were formally placed on the power of the king. The most important rights stated were:

- the right to a fair trial, including judgment by your peers (the jury)
- the right to be taxed only on the decision of parliament.

The English Bill of Rights (1688)

Although later developments indirectly impacted on the rights of the citizen, these also tended to be made in the interests of the elite of society. The Bill of Rights in 1688 provided for the following:

- Only parliament had the right to raise taxes.

Written in 1215, the Magna Carta is an example of one of the first attempts to limit the power of a king.

- Freedom of speech was absolute for members of parliament inside the parliamentary chamber.
- Only parliament had the right to raise an army.

The Bill of Rights then shifted power to the parliament rather than establishing individual rights.

The Declaration of Independence of the United States of America (1776)

The invention of the printing press, which allowed a massive increase in the sharing of knowledge and the growth of a middle class in Europe, led to a challenge to traditional ways of thinking and, in particular, to the power of the Church. By the 18th century rights-based thinking and writing had grown and influenced the revolutions in France and the United States. The focus on individual rights may be referred to as a form of liberalism.

Thomas Jefferson, in the enormously powerful and influential Declaration of Independence of the United States of America, wrote:

> 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness…'

In the same document he went on to state that it was the role of government to secure these rights and any government that did not do so could be overthrown.

After the United States was founded, a Bill of Rights was amended to the Constitution setting out the basic rights of the citizen including such rights as freedom of the press, speech, assembly and religious belief.

Some legal rights are contained in the Australian Constitution, such as the right of freedom of religion; however, few rights are specifically mentioned in the Constitution. Most of the rights Australians enjoy are found in Acts of Parliament, such as the *Anti-Discrimination Act 1977* (NSW), which asserts that people must not be discriminated against on the basis of race in accommodation, supply or services or employment.

Point to ponder

Ironically, many of the founding fathers of United States democracy were slave-owners, including Thomas Jefferson and George Washington.

ANTI-DISCRIMINATION AND EQUAL OPPORTUNITY LAW

A range of legislation attempts to establish rights for individuals against discrimination. In New South Wales the *Anti-Discrimination Act* forbids discrimination on the basis of:

- race
- sex, including sexual harassment
- homosexuality
- transgender
- marital or domestic status (e.g. whether married, divorced, in a de facto relationship, widowed)
- disability
- responsibilities as a carer
- age
- HIV/AIDS.

The areas where discrimination is forbidden are in the supply of goods and services, employment and accommodation. Vilification on the grounds of race, homosexuality or HIV/AIDS is also forbidden.

Commonwealth law also forbids discrimination in many of these areas. Citizens' rights are protected by this legislation and citizens also have a responsibility not to behave in a manner that is discriminatory.

Commonwealth equal employment opportunity legislation exists, but it only protects women and not others who may suffer from discrimination, particularly discrimination on the basis of race. For example, the Race Discrimination Commissioner, Tom Calma, said in 2008 there was not enough monitoring of cyber-racism. This springs from the revelation that many social networking sites are used by racists. Mr Calma has said that the legal sanctions for serious racial vilification on the Internet are limited. The biggest difficulty is that it is very difficult to locate and identify the offenders.

Point to ponder

A high proportion of complaints to the Anti-Discrimination Board are from women complaining that they have been discriminated against on the basis of pregnancy.

Log on to the Pearson Places website and follow the links to find more information about the New South Wales Anti-Discrimination Board.

Web Destination

The criminal law provides a number of protections of the rights or citizens and the rights of accused persons. A citizen is ordinarily entitled to go about their business without interference from the police. However, when a person is arrested they have three fundamental rights:

- the right to be treated as innocent until proven guilty
- the right to silence. In fact, no person should ever answer questions without legal advice, except to state their name and address. Anything that you say or confess in writing may be used in evidence against you
- the right to have a lawyer present when questioned.

CASE LAW *Pavitt v. Regina* [2007] NSWCCA 88

The prosecution case against Pavitt was that he had sexually assaulted the victim when the victim was between 12 and 16. Pavitt was six years older than the victim. The police obtained a warrant to listen to a telephone conversation between Pavitt and the victim. Pavitt was a suspect at that stage but the police had decided not to arrest him. He had not refused to be interviewed by police.

At his trial there were objections to admitting the taped conversation as evidence. Pavitt was convicted and appealed that the taped conversation should not have been admitted as evidence.

The Court of Criminal Appeal held that Pavitt's admission was made voluntarily and was not the equivalent of an interrogation. It was a 'natural conversation occurring between peers rather than the sort of formalistic conversation which might be expected in a police interrogation'. He could have withdrawn from the conversation at any time. The right to silence would only have been breached if the evidence was obtained by an agent of the state, such as a police officer. That was not the case here.

Justice Adams disagreed with the majority and claimed that the victim was an agent of the police in the conversation and that the police exploited the relationship between the accused and the victim in a way that made him far more likely to talk and make admissions. Also the admissions were ambiguous and only vaguely related to the charges.

Other rights are protected by the common law. However, the protection of rights through common law is not always considered to be particularly stable. Rights established through common law can be subsequently overturned if a statute law is passed that overrides them. Probably the most important right established by common law is the right to a fair trial.

CASE LAW *Dietrich v. The Queen* (1992) 177 CLR 285

Dietrich was charged with drug offences. He applied for legal representation but the Legal Aid Commission would only agree to provide him with representation if he pleaded guilty.

The trial proceeded with Dietrich representing himself.

He made many remarks indicating that he strongly objected to being tried without legal representation, such as 'I cannot appear for myself', 'I'm not legally minded', 'I don't understand the system', 'I've got no idea', 'I'm not emotionally or mentally fit to conduct my own trial'. There were a number of exchanges with the judge, including the following:

> 'HIS HONOUR: I want you to understand this, Mr Dietrich – if you will listen to me – that I have not power to give you legal representation.
>
> DIETRICH: You have a power to adjourn the matter, sir.
>
> HIS HONOUR: I don't propose to adjourn the matter. The matter is an alleged offence, which occurred the year before last, and it is desirable that the matter proceed to trial.
>
> DIETRICH: Desired by whose side?
>
> HIS HONOUR: Desirable to the community.
>
> DIETRICH: The community has got no interest in it. If the community is aware that they are putting people in front of court without representation, the community would be aghast.'

Dietrich, not surprisingly, was convicted. He appealed to the Court of Criminal Appeal and this appeal was dismissed. He then appealed to the High Court, arguing that the Court of Criminal Appeal was in error in holding that he did not have a right to be provided with defence counsel at public expense and that because he was unrepresented there was a miscarriage of justice.

The High Court upheld the appeal. Mason CJ and McHugh J summed up, saying that if a poor person is charged with a serious offence and through no fault of their own cannot obtain legal representation, then:

> '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 the appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.'

Note that the court made it clear that a person was not entitled to have the state provide them with free legal advice or representation. However, the trial of a person who did not have the means to obtain representation and so represented themselves would be an unfair trial.

International law is another important source of legal rights. A large number of human rights treaties have been created in the years following World War II. These treaties provide rights such as the right to life, the rights against arbitrary arrest and detention, the right to marry and found a family, equality before the law, rights against enslavement, torture, against discrimination etc. (this is discussed in greater detail in *Legal Studies HSC* 3rd Edition).

Some of the important international human rights documents include:

- UN Declaration of Human Rights
- International Covenant on Civil and Political Rights
- Covenant on Economic, Social and Cultural Rights.

INTERNATIONAL LAW **Law that comes from international custom, treaties or conventions and the decisions of international courts and experts in international law.**

Log on to the Pearson Places website and follow the links to access full copies of these documents from the United Nations.

POLITICS AND RIGHTS

The philosopher John Rawls wrote *A Theory of Justice* in 1971. Rawls' theory was basically that inequality in the economic benefits and jobs that people have within the society are only justified if they benefit the least advantaged in society.

In 1974 Robert Nozick wrote a book called *Anarchy, State, and Utopia.* In it he argued that we have the right to life, liberty and legally acquired property and the state had no right to take that from us. Its role was principally to protect the citizen from violence and to enforce contracts. The kind of state that Nozick's book envisaged was a minimal state where social security would probably not exist and any regulation would be an absolute minimum.

Rawls' principles seem to suggest a traditionally left-wing liberal political view and Nozick's principles a very right-wing or conservative position. Both views are stated in absolute terms and cannot be reconciled. Clearly the kind of rights someone would have in the type of state suggested by Nozick would be very different to those in a state under the principles suggested by Rawls.

1 Rawls, J., 1971, *A Theory of Justice*, Harvard University Press, 525 pp.

2 Nozick, R., 1974, *Anarchy, State, and Utopia*, Basic Books, 367 pp.

Economic, social and cultural rights

The International Covenant on Economic, Social and Cultural Rights came into effect in 1976. The overriding principle of this agreement is to ensure that humans are provided with everything they need in order to live with dignity. Key rights established by this document include:

- the right to receive equal pay for equal work
- the right to work and to freely choose the work
- the right to form and join trade unions and the right to strike
- the right to receive social security when needed
- the right to special assistance if required, especially for families, women and children
- the right to an adequate standard of living
- the right to health care
- the right to education
- the right to enjoy a cultural life
- the right to scientific freedom.

Civil and political rights

POLITICS The practice of government.

The main function of civil and **political** rights is to protect people from the actions of oppressive governments. The main piece of international law in this area is the Covenant on Civil and Political Rights, which was adopted in 1976. Key rights protected by the Covenant include:

- the right to life
- the right to freedom of expression
- the right to participate in public life
- the right to equality before the law.

One of the most significant features of the Covenant was that it established the International Human Rights Committee. Individuals can refer human rights abuses to this Committee if they believe that the actions of their government abuse their human rights.

Environmental rights

Awareness of environmental issues has increased significantly in recent decades. The key goal of environmental law is the protection of the environment for future generations. This concept is known as intergenerational equity. Environmental rights are therefore based upon the notion that each person has the right to access the resources of the environment now and in the future. For example, we all have the right to enjoy clean air and water.

Environmental rights are very difficult to maintain because of the global nature of many environmental issues. For example, one country's air pollution may be carried thousands of kilometres by air currents, ultimately damaging the environment in other countries.

Environmental rights are based on the concept of protecting the environment for future generations.

Consumer rights

Until the early 20th century the consumer had few rights against the seller of goods. The legal principle was *caveat emptor* (let the buyer beware). The *Sale of Goods Act 1923* (NSW) set out general requirements that goods must be of merchantable quality and fit for their purpose. This Act was designed to protect the interests in business as well as consumers.

The growth of the consumer movement from the 1960s led to specific laws designed to protect ordinary consumers. Since that time there has been a growth of **consumer laws** designed to give rights to consumers against sellers and importers when goods are not suitable or are defective, and to prevent misleading conduct. The main pieces of legislation are the *Trade Practices Act 1974* (Cwlth) and the *Fair Trading Act 1987* (NSW).

There also exist laws to protect consumers in relation to services, and specific legislation that deals with potential problems in the sale and service of motor vehicles.

CONSUMER LAWS **Those laws that protect consumers against improper conduct by sellers, manufacturers and importers.**

A wide range of remedies are available to consumers whose rights have been breached, including damages, injunctions, orders varying the terms of contracts, orders for refunds of money and 'any other orders' that the court sees fit.

REVIEW

1 Differentiate between 'natural' and 'positive' law.
2 Explain why the Magna Carta is considered so important.
3 What rights were established by the English Bill of Rights?
4 Outline the rights established by the American Declaration of Independence.
5 Describe the rights contained within the criminal law.
6 How does politics affect rights?
7 What is the main principle of the International Covenant on Economic, Social and Cultural Rights?
8 Outline the main civil and political rights.
9 Describe the role of the International Human Rights Committee.
10 Explain the concept of intergenerational equity in regards to environmental law.
11 Outline the main rights of consumers in Australia.

LAW IN ACTION

1 Prior to World War II, the majority of legal writers and theorists in Germany were likely to support positivist views about the law. After the war this view began to change. Why do you think this was the case?
2 Analyze the way rights are protected under statute, common and international law.
3 Review the case *Pavitt v. Regina* on page 170 and complete the following activities:
   a Outline the case against Pavitt.
   b On what grounds did Pavitt appeal the decision?
   c Explain the ruling of the appeal court, including the minority decision of Justice Adams.
   d Do you agree with the majority or minority ruling? Explain your response.
4 Examine the case *Dietrich v. The Queen* on page 171 and complete the following activities:
   a Explain the basis of Dietrich's appeal.
   b What was the ruling of the High Court in the appeal?
   c Do you agree with this ruling? Justify your response.
5 Many international agreements refer to the right of individuals to live with dignity. Working in small groups, discuss what rights would be essential for humans to live with dignity. Do all humans enjoy these rights? Share your thoughts with the rest of the class.

11.3 Responsibilities

Citizens have social, moral and ethical responsibilities. Those who maintain religious beliefs will also have religious responsibilities. All these responsibilities are often interrelated and difficult to separate.

Social, cultural and moral responsibilities

Social, cultural and moral responsibilities are responsibilities that are not enforceable by the law. They tend to be interrelated. Typical responsibilities of this kind include:

- the responsibility to look after aged parents

- the responsibility to give reasonable attention to your studies
- the responsibility to recycle waste which can be recycled
- the responsibility to help support poor citizens through giving to charity.

Social responsibilities may be defined as responsibilities that leaders of public opinion regard as appropriate. These views will be based on moral views or on political views.

The responsibility to recycle is an example of a social responsibility.

Religious leaders frequently comment on the responsibilities of their communities and on the community in general. These leaders may be from within the Australian community or from outside. For instance, Popes have frequently criticised easy access to divorce and focused attention on the 'sanctity' of marriage. Such arguments are based on certain moral beliefs and thus form moral responsibilities. It is important to remember that morals are also private matters and each person will have their own moral standards.

Responsibilities may also be determined within particular cultures and may be related to what are determined to be religious responsibilities by religious leaders. For instance, in some parts of Africa the circumcision of girls is practiced. Although this is sometimes claimed to be an 'Islamic practice', many Islamic leaders have condemned the practice as against Islam.

Legal responsibilities

Responsibilities may be imposed by the common law or by statute. In some cases the law enforces responsibilities of a cultural, social or moral character. Fundamental examples of common-law responsibilities are:

- the duty of care established by the case *Donoghue v. Stevenson* [1932] AC 562 (House of Lords) (see page 93)
- the responsibility not to cause a nuisance to your neighbour; this is covered by tort law (see pages 92–4)
- the responsibility to refrain from acts of violence against the person or property of others
- the responsibility to carry out the terms of a contract to which you have agreed.

Statutory responsibilities

Responsibilities may be established under statute law. These are many in number and exist under a large number of statutes. For example:

- the responsibility to pay tax
- the responsibility of employers to pay an additional percentage of salary for employees' superannuation
- the responsibility not to use a person's copyright material without their permission
- the responsibility of parents to care for their children
- the responsibility of parents to support each other
- the responsibility of all citizens not to discriminate against each other in areas outlined in different laws
- the responsibility to refrain from defaming your fellow citizens.

Rights and responsibilities

In most (if not all) cases, rights have corresponding duties or responsibilities attached. It is wrong to talk and act as though one only has rights and no responsibilities. This can be seen in the examples given above from many parts of the law. For example, individuals who require it have the right to receive social security, but this is only possible if others abide by their responsibility to pay taxes.

Arguably some rights are so essential to our humanity that even if we fail to live up to the corresponding responsibility we should continue to retain them. Perhaps the most extreme and contentious example of this proposition is the right to life, established in international instruments and the end of the death penalty in Australia. Other rights that arguably fall into this category are:

- the right to shelter
- the right to food
- the right to education
- the right to family
- the right to a free press (freedom of speech)
- the right of assembly (the right to form or join political organisations)
- the right to freedom of conscience, which includes freedom of religious belief
- the right to freedom from discrimination
- the right not to be arrested arbitrarily (without legitimate charge), and
- the right to a fair trial.

REVIEW

1 What is a social responsibility?
2 Explain the link between moral responsibilities and religion.
3 Differentiate between statutory and common-law responsibilities.
4 Explain the relationship between rights and responsibilities.

LAW IN ACTION

1 Working with a partner, discuss whether it is possible to have rights without responsibilities. Share your thoughts with the class.
2 Create a list of the rights that you have as a student at your school. What responsibilities do you have? Explain what happens to the collective rights of students at your school when some individuals do not follow their responsibilities.

CHAPTER SUMMARY

A right is the freedom to act or refrain from an act, which cannot be taken away from a person except with the authority of law. The equal treatment of all is an important principle in protecting rights. Difficult moral questions lead to debate about what a person's rights should be. If they are in dispute, the courts will finally determine what these rights are. Despite many international agreements relating to rights, a right may not be protected under domestic law even if recognised under international law – but it still is a right.

Natural rights, lawyers say, are rights from God – or what a reasonable person would regard as a right. Positivist lawyers, however, say a right is only a right if made by the law, such as laws made by parliament.

Rights in Australian domestic law are protected by the Constitution, statute and common law. Legal rights are protected by international law but this protection is only effective with the cooperation of the domestic government. For example, anti-discrimination laws provide for protection of individual rights over a wide range of areas of the law.

The criminal law provides substantial protections for the rights of citizens, from arrest to appeal. Social and cultural rights are those that relate to the right to live with dignity. Civil and political rights aim to protect citizens from oppressive governments. Environmental law acts to protect rights and enforce responsibilities from the local to the global level. Consumer laws provide for the rights for consumers against sellers and importers, who were better able in the past to evade their responsibilities to consumers.

Most rights bring responsibilities with them and these things are interrelated. Without people abiding by their responsibilities it is often very difficult for rights to be maintained.

MULTIPLE-CHOICE QUESTIONS

1 Where do rights come from?
   - **A** Social and cultural views
   - **B** Our view of what is right
   - **C** Political debate
   - **D** The law

2 Which of the following protect rights in Australia?
   - **A** The Bill of Rights
   - **B** The Constitution and international law
   - **C** Statutes, common law and to a limited extent the Constitution
   - **D** International law along with common law and statute law

3 Where does anti-discrimination law protect a citizen's rights?
   - **A** The supply of goods and services or accommodation and in employment
   - **B** In all areas of religious worship
   - **C** In equal employment opportunity
   - **D** The supply of goods, services, accommodation, in employment and against vilification.

4 Why does politics affect rights?
   - **A** Politicians are interested in their own rights.
   - **B** Politics influences who gets what benefits in society.
   - **C** Politics has developed the idea of keeping taxes low.
   - **D** Politicians try to buy votes by giving benefits to their supporters.

5 Which of the following is a common-law right in criminal law?
   - **A** The right to a fair trial
   - **B** The right to legal representation
   - **C** The right to be legally innocent if successful at a trial
   - **D** The right to continual access to a lawyer while in prison

SHORT-ANSWER QUESTIONS

1 Identify the sources of protection for legal rights in Australia.
2 Define the term 'right'.
3 Outline two rights and responsibilities of citizens.
4 Distinguish between 'rights' and 'claims'.
5 Describe the protections for rights in international law and the limitations of these protections.
6 Explain how rights are protected in the criminal justice system.
7 Analyse the extent to which rights are protect in the Australian legal system.
8 Analyse the relationship between rights and responsibilities.
9 Assess the effectiveness of international and domestic laws in protecting the rights of people.

CHAPTER 12

Enforcing rights

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

P6 explains the nature of the interrelationship between the legal system and society

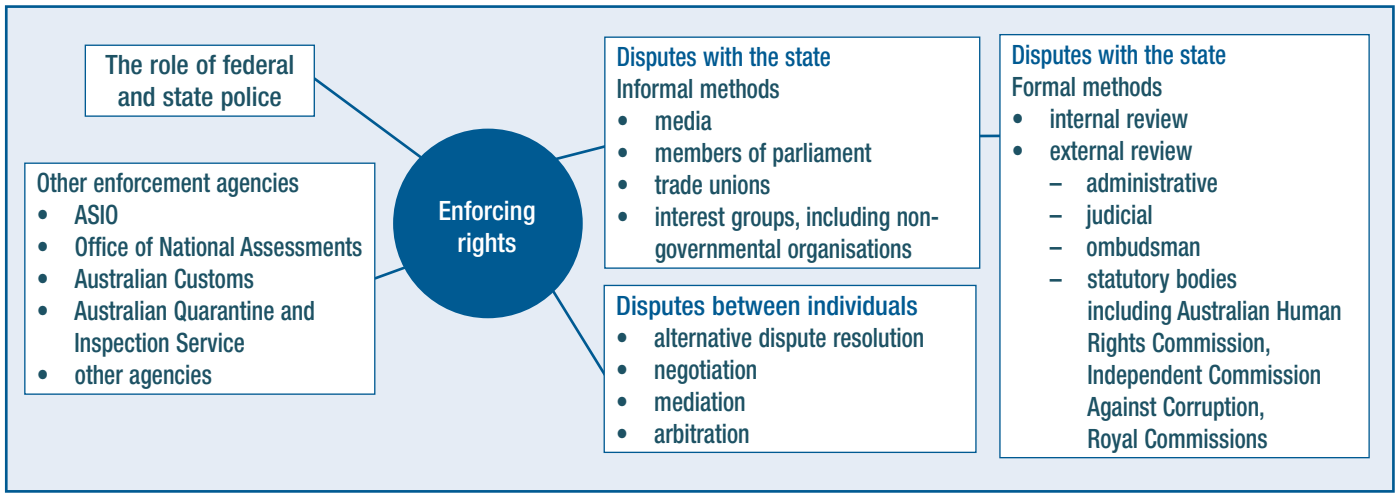
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

P10 accounts for differing perspectives and interpretations of legal information and issues

PRINCIPAL FOCUS

In this chapter, students investigate both state and federal law enforcement agencies. Methods for resolving disputes between individuals and disputes with the state are also examined.



SUMMARY OF CASE LAW

Dent and Daryl Wight as an Australian Electoral Officer [2007] AATA 1985

Onus v. Alcoa of Australia Ltd (1981) 149 CLR 27

SUMMARY OF LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cwlth)

Administrative Decisions (Judicial Review) Act 1977 (Cwlth)

Administrative Decisions Tribunal Act 1997 (NSW)

Age Discrimination Act 2004 (Cwlth)

Community Justice Centres Act 1983 (NSW)

Crimes Act 1900 (NSW)

Crimes Act 1914 (Cwlth)

Criminal Code Act 1995 (Cwlth)

Disability Discrimination Act 1992 (Cwlth)

Freedom of Information Act 1989 (NSW)

Human Rights and Equal Opportunity Commission Act 1986 (Cwlth)

Independent Commission Against Corruption Act 1988 (NSW)

Ombudsman Act 1976 (Cwlth)

Racial Discrimination Act 1975 (Cwlth)

Residential Tenancies Act 1987 (NSW)

Road Transport (General) Act 1999 (NSW)

Royal Commissions Act 1902 (Cwlth)

Sex Discrimination Act 1984 (Cwlth)

Sex Discrimination Amendment (Pregnancy and Work) Act 2003 (Cwlth)

12.1 Role of the federal and state police and other law enforcement agencies

New South Wales Police Force

The principal roles of the police are to prevent crime, investigate crime and arrest and prosecute offenders. They chiefly enforce the *Crimes Act 1900* (NSW) and the *Road Transport (General) Act 1999* (NSW). The New South Wales Police Force has jurisdiction only within New South Wales. They only have powers within the boundaries of the state and they must seek the assistance of other police services for crimes that extend across state borders.

Police have significant powers. They may question anyone when investigating a crime. Generally a person is not required to answer but they should give their name and address. In motor traffic cases, a person is required to give the name and address of the driver of a car if there has been an accident or the driver is guilty of a traffic offence.

If the police ask the driver for their licence they must show it. If police ask someone to carry out a breath test they must do so. Police cannot normally enter into premises or search unless a crime scene is established, the police have a warrant or if they suspect a crime is being conducted on the premises at the time.

Police and Customs officers holding 250 kg of cocaine destined for Sydney streets, which was intercepted by the multi-agency Joint Asian Crime Group.

Australian Federal Police

The Australian Federal Police (AFP) was formed in 1979, initially to deal with the threat of terrorism and smuggling. The Federal Police collaborate with overseas and domestic policing organisations to fight trans-border crime – that is, crimes that extend across borders. The main areas of their operations include counter-terrorism, major fraud and smuggling operations, especially drug trafficking

Log on to the Pearson Places website and follow the links to find out more about the Australian Federal Police.

and people smuggling. Increasingly electronic crime, especially Internet fraud, is becoming an important part of their work.

The Federal Police also provide police for United Nations and other international peacekeeping operations. For example, Federal Police are currently serving as part of UN peacekeeping forces in Cyprus and East Timor and regional peacekeeping operations in the Solomon Islands.

Australian Customs and Border Protection Service

Australian Customs controls the security of Australian borders. It works with the Australian Federal Police, Australian Quarantine and Inspection Service, the Immigration Department and the Australian Defence Force to detect unlawful movement of goods across Australia's borders.

The Service also has a responsibility for ensuring that those people entering Australia do so lawfully. Its priorities are to protect Australians against importation of drugs, illegal firearms and other dangerous goods. It inspects ships, planes, cargo, postal items and travellers.

The Australian Customs Service has the responsibility for protecting Australia's borders. A major role is inspecting cargo that arrives in Australia to ensure illegal items such as drugs are not being brought into the country.

Australian Quarantine and Inspection Service

Being an island, Australia has a level of immunity from many diseases and pests that harm commercial crops and native environments. The advent of global trade and tourism has meant that it is now much easier for such hazards to reach Australia and cause considerable damage.

It is the role of the Australian Quarantine and Inspection Service (AQIS) to protect Australian borders from the importation of biologically hazardous material such as plants and animals that may in any way be harmful to the environment. AQIS officers are found at all international airports, where they inspect baggage; they also inspect cargo from ships and aircraft as well as postal items.

Australian Security Intelligence Organisation

The Australian Security Intelligence Organisation (ASIO) is Australia's national security service. Its main role is to warn the government about security threats from politically motivated violence and from persons who promote violence in different communities within Australia.

According to ASIO's 2007–08 'Year in Review', there is a tiny minority of Australians who hold extreme views and support violence, and others who travel overseas for violent action. Terrorism remains a significant threat from Al Qaeda and similar organisations.

Log on to the Pearson Places website and follow the links to find more information about ASIO.

AUSTRALIA'S SPOOKS – OUR SECURITY AGENCIES

Apart from ASIO, which deals with threats to security from within Australia, there is a range of other intelligence organisations that deal with national security threats from overseas. The Australian Secret Intelligence Service (ASIS) and the Defence Intelligence Organisation (DIO), both of which are very secretive, protect Australia from foreign espionage.

The Office of National Assessments (ONA) reports directly to the Prime Minister. It is responsible for assessing intelligence from all sources including collecting and assessing intelligence from other countries. Australia has intelligence-sharing arrangements with other countries with which we have close military alliances, such as the United States.

THE CASE OF DR MOHAMED HANEEF

Justice Clarke's report into the charging, release and deportation of Dr Mohamed Haneef was released at the end of 2008. Dr Haneef was alleged to have been involved in a botched terrorist attack at Glasgow airport, in Scotland. The evidence the police used included the fact that one of the terrorists who attempted to bomb Glasgow Airport was a cousin of Dr Haneef and that a SIM card originally bought by him had been given to this cousin. The AFP also alleged that the SIM card was found in the vehicle used in the attack, but this was proven to be false.

Dr Haneef had also bought a one-way ticket to visit his wife in India. However, the police did not give regard to the cooperative behaviour and convincing answers given by Dr Haneef, the unlikelihood of his giving a SIM card in his own name for a terrorist purpose and the fact that he was going home to join his wife and newborn baby.

The central problem appears to have been a loss of perspective and excessive zeal by officers of the Australian Federal Police, which led to them urging the federal prosecutor to prosecute. The prosecutor spoke of 'unspoken but considerable pressure' being applied by AFP officers. Bail was granted to Dr Haneef and the Immigration Minister immediately revoked his visa and put him into an immigration detention centre.

The original charge was reduced to 'recklessly providing help to terrorists' but even this was dismissed by the magistrate. Nevertheless the Immigration Minister kept to his original decision.

The other investigating agency, ASIO, was convinced that Dr Haneef was not involved in the plot in the United Kingdom and within 48 hours of his arrest had advised all key federal agencies and federal minister that this was the case.

Former terrorist suspect Dr Mohamed Haneef disembarks from his Thai Airways flight.

REVIEW

1 Outline the main functions of the New South Wales Police Force.
2 When can the police search premises?
3 Describe the role of the Australian Federal Police.
4 Which government agency is charged with stopping diseases and pests entering Australia?
5 List the main security agencies and outline the role of each.

LAW IN ACTION

1 Select one law enforcement agency operating in Australia. Prepare a presentation for your class on the agency. In your presentation, include:
   - an outline of the role of the agency
   - the legislation it has responsibility for enforcing
   - a short history of the organisation
   - the operation of the organisation
   - an explanation of why the work of this agency is important.
2 Read the information on the case of Dr Mohamed Haneef and complete the following activities:
   a Outline the case against Dr Haneef.
   b Describe the problems with the case against Dr Haneef.
   c Should the rights of individuals come second to national security concerns when the lives of thousands might be at stake? Justify your answer.

12.2 Disputes between individuals

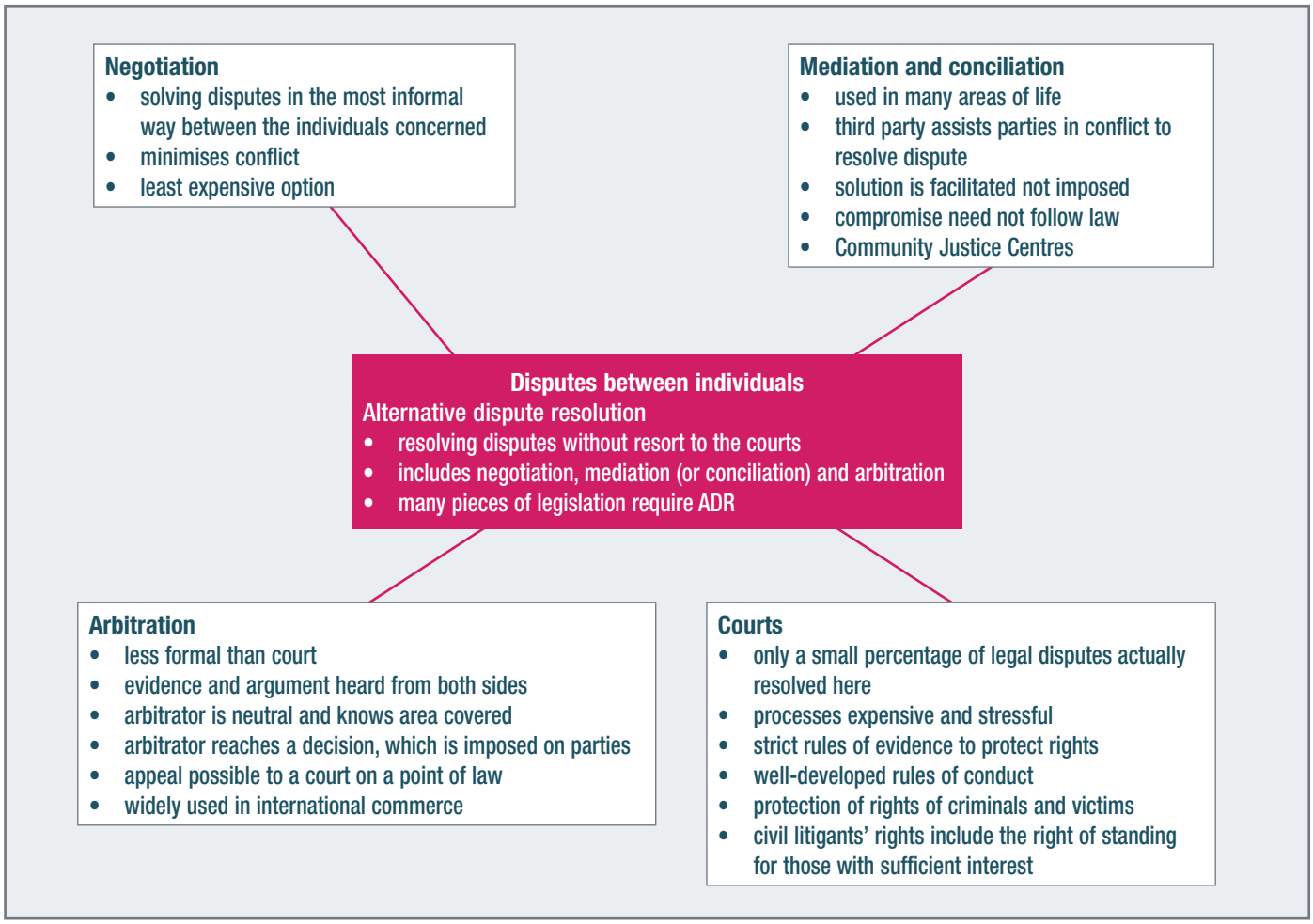
Disputes between individuals may be dealt with informally through negotiation and alternative dispute resolution, or more formally through the internal processes of government departments, tribunals or the courts.

Alternative dispute resolution

Alternative dispute resolution (ADR) refers to ways of resolving disputes without resort to the courts. It includes negotiation, mediation (or conciliation) and arbitration. Many pieces of legislation now require alternative dispute resolution to be attempted before matters may be heard in court.

Negotiation

As far as possible all disputes should be settled through negotiation. Negotiation refers to the simple process of speaking to the person with whom you have a problem and attempting to resolve it. The idea behind negotiation is that most disputes should be able to be resolved by goodwill and give-and-take by the parties directly concerned. The benefits of negotiating a legal problem are that it is the least expensive option and is likely to leave the parties feeling personally more satisfied.



Mediation and conciliation

Mediation and conciliation are very similar processes that are used in a wide range of areas. In general, mediation involves two parties attempting to resolve a dispute between them with a third party. The third party is the mediator, whose role is to help the disputing parties to discuss and hopefully resolve the issues between them. Mediation may be voluntary or it may be directed as part of a pre-court hearing. No family law disputes can be taken to court unless the parties first accept mediation through the Family Relationships Centres.

The mediator helps the parties to identify issues and assist them to arrive at a settlement that they both find satisfactory. Community Justice Centres of New South Wales trains and employs mediators. The Law Society of New South Wales can also provide mediation services. A wide range of legal issues can be resolved through mediation, including family law issues, disputes over wills, the recovery of smaller debts, contract disputes and workplace issues.

Log on to the Pearson Places website and follow the links to find more information about the work of Community Justice Centres.

Mediators help people in dispute to resolve issues between them.

All negotiations during the mediation are confidential and non-binding; that is, decisions cannot be enforced. Mediation will only work well if the parties work in good faith and are willing to compromise in much the same way as negotiation.

The compromise, which is written down, does not need to follow legal precedent or community standards. In this way the principles of fairness rather than equality tend to be used to resolve the dispute.

A settlement reached as the result of a pre-court hearing may be written down by the parties and signed by each side. Ninety per cent of cases are resolved without recourse to the courts and early settlement reduces legal costs. The costs to the parties' businesses are also reduced, as they can focus on those businesses without taking time off to attend court. The stress of appearing in court and giving evidence is also eliminated.

Even if a dispute is not resolved through mediation the fact that the parties have discussed the issues may help to resolve the dispute in court more quickly and cheaply. In this way mediation is a highly effective method of dispute resolution.

Log on to the Pearson Places website and follow the links to the Australian Mediation Association (AMA), which provides a wide range of information about mediation.

Web Destination

Arbitration

Arbitration is a more formal process than mediation. It is usually a private process that is less formal than court. This also means that the process tends to be considerably cheaper and more efficient than the courts. The arbitrator will hear evidence and argument produced by both sides and then will impose a decision on the parties. Arbitration is still commonly employed in many workplace disputes. Arbitration is also widely used in international disputes, particularly in trade disputes.

The arbitrator is neutral and knowledgeable in the area for dispute. Under a commercial agreement, the arbitrator will be nominated by both parties, who pay the arbitrator's fee and agreed expenses.

Courts

In practice only a small percentage of legal disputes are resolved in courts. This is no wonder, as court processes are stressful and expensive. The courts exist as a hierarchy, but specialised courts have been developed particularly since the 1970s (this was discussed in greater detail in Chapter 2).

Strict rules of evidence apply to ensure that evidence that is unfair is not admitted in court. Evidence must be relevant and not be unduly prejudicial. For instance, in a criminal trial the defendant's past convictions cannot be raised as evidence that they have committed the offence for which they are charged. This is because a jury may think that because a person committed the same offence several times before that they are guilty of committing the new offence. When a defendant is brought before the court to be charged they have the right to seek bail.

As discussed in Chapter 11, in criminal matters the defendant's rights are protected through the right to a fair trial and the right to appeal on questions of law. Appeals may be successful in the event of an unfair trial, miscarriage of justice or misdirection of the jury by the judge. An appeal may also be made on the grounds of severity of sentence. The appellant (the person making the appeal) must convince the appeal court that the verdict was unreasonable and could not be supported on the evidence, or that the decision was wrong on a question of law, or that there was a miscarriage of justice.

Victims of crime have the right to compensation and to write their own victim impact statement to be read out in court. The court can consider the statement any time after conviction. It is the prosecutor who decides whether or not it is to be presented, unless the principal victim has died; in this case a victim impact statement written by a member of the family must be examined by the court. The court is not required to take the victim impact statement into account in deciding on sentence unless it decides that it is appropriate to do this.

In civil proceedings there is the rule of 'legal standing'. The rules of standing only allow those who have an interest in property or have suffered economic loss to sue. The one exception is where a statute gives a person an explicit right to sue; however, a mere emotional or intellectual concern is not sufficient. More recently wider interests have been protected, such as in the case *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27.

CASE LAW *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27

When Alcoa planned to build a bauxite (the key ingredient of aluminum) smelter, local Aboriginal people tried to stop the building from interfering with Aboriginal relics. The High Court finally held that Aboriginal people had standing because of their cultural and traditional links with the area concerned. However, the High Court doubted that this interest would be sufficient to stop the smelter going ahead.

Nevertheless, the High Court also held that too much may be made of the standing rule and that where the case had enough merit the court may hear the case and decide on whether there was a right to present the case later.

In this case Justice Murphy said that 'restrictive rules of standing deny access to justice'.

Gibbs CJ explained the traditional view of standing, saying:

> '… it may be thought that in a community which professes to live by the rule of law the courts should be open to anyone who genuinely seeks to prevent the law being ignored or violated. On the other hand if standing is accorded to any citizen to sue to prevent breaches of the law by another… not only will the process of the law be abused by busybodies and cranks and persons accentuated by malice, but also that persons or groups who feel strongly enough about an issue will be prepared to put some other citizens, with whom they had no relationship, and whose actions have not affected them except causing them intellectual or emotional concern, to very great cost and inconvenience in defending the legality of his actions… Ideal rules of standing would not fail to take into account… that the courts should decide only a real controversy between parties each of whom has a direct stake in the outcome of the proceedings. The principle… settled by the courts does attempt a reconciliation of these considerations…'

REVIEW

1 Outline the benefits of using negotiation to resolve disputes.
2 Explain the process of mediation.
3 What is the role of the mediator in mediation?
4 Describe the process of arbitration.
5 Outline the processes involved in using the courts to resolve disputes.
6 What is a victim impact statement?
7 Explain the meaning of 'standing'.

LAW IN ACTION

1 Taking on the role of a legal advisor, prepare a short information brochure on the various methods available for resolving disputes.
2 Sarah is in dispute with her neighbour Min over a fence. Which dispute resolution method should Sarah and Min first use to resolve this dispute? Explain your choice.
3 Review the case *Onus v. Alcoa of Australia Ltd* (1981) and complete the following activities:
   a Outline the facts of the case.
   b Why did the High Court put aside the rules of standing?
   c As a class consider the rules of standing. Should these rules be changed? Explain your answer.
4 The law has allowed a limited right of 'self-help'; that is, to take action to protect your rights even though it may interfere with someone else's rights—or they may feel that this is happening. For example, you may cut branches from a tree growing in your neighbour's property if they are intruding over the fence into yours; and you may put the cuttings back onto that property. What limits should there be to the right of self-help?

12.3 Disputes with the state

Informal methods

Many minor concerns with the decisions of government departments can be resolved through negotiation, in the same way as private problems. Often the cause of such minor disputes is an inadvertent error by a person in a government department. More serious problems may need to be dealt with in other ways. The main informal methods include:

The media

The media are always on the look-out for a good story and pressure from the media has often brought critical pressure to bear even on the highest levels of government. The Haneef case is an example of this, although Dr Haneef sought to clear his name through the courts. The high level of media coverage of his case contributed to the government's decision to set up the Clarke Inquiry. The results of this inquiry were headline news in most major newspapers.

The media may enhance our rights but also have the potential to infringe on our rights.

STOPPING GUNNS

Gunns, one of Tasmania's biggest companies, announced plans to build a massive paper mill in the north of Tasmania on the coast of Bass Strait. The former Environment Minister Malcolm Turnbull gave permission for the mill to be built.

Local residents opposed the mill from the very start, fearing its impact on the local environment. Protesters began a campaign in the media against the mill. One opponent even took out large advertisements criticising the decision to allow the mill in the newspapers in the Eastern Suburbs of Sydney, where Malcolm Turnbull was seeking re-election.

Members of Parliament

Members of Parliament (MPs) can assist their constituents in conflicts with government departments. If the issue is significant enough it can be raised in the meetings of the party in the parliament. If the member is a member of the governing party this could lead to the issue being taken up by the government.

Opposition members may be able to embarrass the government by asking difficult questions on issues raised by the general public in parliament. Since the media follow proceedings, this can lead to media scrutiny of the issue.

CRITICISING HOSPITALS IN NEW SOUTH WALES

In New South Wales, issues relating to long hospital waiting lists and the standard of health care offered by public hospitals are constantly being raised by the Opposition. These criticisms focus on the management of the hospitals and the health system by the Minister and, more generally, by the government.

Vancomycin-resistant enterococcus (VRE) was found in 13 patients in Royal North Shore Hospital. Enterococci are usually harmless bacteria that live in most people's intestines. However, VRE is a 'superbug'. The only effective treatment for VRE is a recently discovered antibiotic called linezolid. It is feared that vancomycin resistance from VRE may be transferred to another superbug also present in hospitals: methicillin-resistant *Staphylococcus aureus* (MRSA). The resultant strain of MRSA would be resistant to almost all of the antibiotics currently available.

Patients who already have weak immune systems are most at risk from VRE, which is on the increase.

Families of infected patients and hospital workers raised their concerns with the Opposition and the media. The Opposition also uses the media as a way to spread their arguments against the government's policies and management.

THE OPPOSITION CALLS FOR CHANGES TO SENTENCING

In January 2009 the Opposition spokesman on justice, Greg Smith, was reported as saying that hard-line sentencing policies on prisoners have failed and that greater attention is needed on rehabilitation. The evidence for this is that half of the prisoners who are released will re-offend. What has happened over a long period of time is that both government and Opposition – particularly at election time – have attempted to outbid each other by showing they are tough on crime. Mr Smith suggested that while it was necessary to give more recognition to the harm done to victims of homicide, the gaols were full of individuals from deprived backgrounds with learning difficulties, drug addictions or mental health problems.

The Attorney-General, Mr Hatzistergos, responded by denying that the government was locked in such a bidding war. He countered that the Opposition had previously proposed mandatory sentencing and grid sentencing, which had used a 'formulaic' approach to sentencing. He also defended the government's efforts in preventing re-offending.

Trade unions

Trade unions work to protect the rights of workers and bargain on their behalf with employers, which protects their rights to a fair wage and fair conditions. The law protects the rights of workers to join a trade union or remain outside the trade union. Under both state and federal law, unions automatically have standing to represent workers in industrial relation tribunals.

Under federal and state law it is an offence to dismiss a worker because they are a member of a trade union or, conversely, because they are not a member of a trade union. Unions help to protect the rights of workers in areas of underpayment of wages, unfair dismissal, harassment and workplace bullying, workplace health and safety; and they generally provide advice to workers about their rights. Unions also play a wider role, lobbying governments on a range of industrial and social issues such as maternity leave. In return for the benefits of membership, union members have the responsibility to pay their membership fees and obey the rules of the trade unions.

Trade unions represent the interests of workers.

THE 'YOUR RIGHTS AT WORK' CAMPAIGN

In 2005 the Howard Government introduced an amendment to the *Workplace Relations Act 1996* known as 'WorkChoices'. This policy introduced a number of amendments to the Act that were designed to move workers away from awards and collective agreements towards individual agreements known as Australian Workplace Agreements (AWAs).

Increasing evidence indicated that workers bargaining as individuals—in particular, less skilled workers—were achieving lower levels of wages and conditions. Workers effectively lost the right to bargain collectively, as the employer could insist on an AWA as a condition of employment. There were many other areas of the legislation that were criticised by many commentators as favouring employers in bargaining and employment. One other area that was widely criticised was the end of the right to sue for unfair dismissal in workplaces where fewer than 100 workers were employed and restrictions on unfair dismissal laws for employees in larger enterprises.

The Australian Council of Trade Unions (ACTU), the body representing all unions, and individual trade unions commenced a campaign called 'Your Rights at Work', which included advertisements on TV, radio and in the newspaper. The campaign was highly successful and contributed to the fall of the government in late 2007. The Australian Labor Party (ALP) also opposed WorkChoices and campaigned for its abolition at the 2007 election.

The new Commonwealth Government elected in 2007 worked to introduce:

- the right to collective bargaining
- fuller protection from unfair dismissal
- the right to union representation
- a strong industrial umpire (Fair Work Australia).

Interest groups including non-government organisations

Non-government organisations (NGOs) are organisations that have no affiliation with the government. Instead they rely on the support of the individuals and other organisations.

Log on to the Pearson Places website and follow the links to find out more about the Australian Council of Trade Unions (ACTU).

HUMAN RIGHTS INTEREST GROUPS

New South Wales Council for Civil Liberties

The New South Wales Council for Civil Liberties (NSWCCL) aims to bring about equal rights for all people, as long as these rights do not infringe on the rights of other people. It is opposed to the abuse of power by the state against its people.

The NSWCCL attempts to influence public debate and government policy on a range of human rights issues. It lobbies for parliament to amend law and alter policy, where there is a lack of respect for human rights.

The NSWCCL accepts individual complaints and provides volunteers who assist members of the public to resolve civil liberties problems. The Council also:

- makes submissions to governments on civil rights issues
- conducts court cases defending people whose civil rights are infringed
- engages in debate and speaks to the media on civil rights issues
- produces publications that promote human rights issues.

Australian Council of Social Service

The Australian Council of Social Service (ACOSS) is the peak council of the community service and welfare sector groups. It provides a voice for people who are affected by poverty and inequality. According to its website, it seeks an Australia that is 'fair, inclusive and sustainable', and aims at promoting policies in government, business and elsewhere so that all Australians can 'participate in and benefit from social and economic life'. It supports organisations that provide assistance to vulnerable Australians, such as the Salvation Army, Anglicare, Catholic Welfare and the Smith Family.

Electronic Frontiers Australia

Electronic Frontiers Australia (EFT) lobbies for online freedom and rights. Their website states that EFT's major objectives are 'to protect and promote the civil liberties of users and operators of computer-based communications systems such as the Internet, to advocate the amendment of laws and regulations in Australia and elsewhere (both current and proposed) which restrict free speech and to educate the community at large about the social, political and civil liberties issues involved in the use of computer-based communications systems.' The organisation is interested in the

liability of ISP providers, government telecommunications policies and issues of censorship and claims to have influenced government decisions in these areas.

Electronic Frontiers Australia has presented oral evidence to parliamentary committees and attended meetings with members of parliament and their political staff to assist them in understanding issues of Internet freedom. It claims to be independent of government and business.

National Women's Justice Coalition

The National Women's Justice Coalition (NWJC) is a coalition that aims to increase the equality of Australian women in the legal system. It arose in part out of the Australian Law Reform Commission's report, *Equality Before the Law*, which referred to the 'failure of justice for women in Australia'. Organisations that form the National Women's Justice Coalition include Women's Legal Services, Women's Electoral Lobby (Australia) and the Coalition of Participating Organisations of Women (CAPOW). The NWJC works at a national level to promote understanding of issues relating to women's inequality, coordinates and lobbies on women's justice issues and helps facilitate the work of relevant groups and individuals.

Log on to the Pearson Places website and follow the links to find more information about the National Women's Justice Coalition, the New South Wales Council for Civil Liberties, the Australian Council of Social Service and Electronic Frontiers Australia.

ENVIRONMENTAL INTEREST GROUPS

Australian Conservation Foundation

The Australian Conservation Foundation (ACF) works to achieve a sustainable environment for all Australians. It attempts to work with the community, business and government to preserve and improve the environment.

Greenpeace Australia Pacific

Greenpeace advocates non-violent direct action in order to highlight environmental problems and force solutions to those problems. It's aim is to raise awareness with respect to global environmental and peace issues. Greenpeace attempts to maintain independence by not accepting money from political parties or corporations.

Log on to the Pearson Places website and follow the links to find more information about the Australian Conservation Foundation and Greenpeace.

BUSINESS AND ECONOMIC INTEREST GROUPS

Business Council of Australia

On its website, the Business Council of Australia (BCA) claims that it wants to make Australia the best place in the world to 'live, learn, work and do business'. It supports sustainable development and an 'effective emissions trading scheme'. It supports improved levels of health, education and training and the fullest possible participation in the workforce. It advocates engagement with Indigenous communities and business. Although many of these general aims would be beneficial for all Australians, the BCA is particularly focused on improving economic efficiency and conditions for doing business.

Australian Chamber of Commerce and Industry

The Australian Chamber of Commerce and Industry (ACCI) describes itself as the peak council of business associations. It represents the concerns and interests of business to the government and to the community. It acts as an advocate for business interests to government. It carries out research and policy development on issues of interest to business.

National Farmers' Federation

The National Farmers' Federation (NFF) is the peak body representing farmers in Australia. It is an important lobbying and advocacy group. It represents the interests of farmers and is interested in raising awareness of issues affecting agriculture.

The NFF is concerned about environmental issues and developed Landcare in association with the Australian Conservation Foundation. Farmers provide millions of dollars towards a sustainable future by planting trees. Their website states:

'One of the most significant achievements in natural resource management came in 2003, when the NFF successfully lobbied the Australian and State Governments for an Intergovernmental Agreement for a National Water Initiative, the aim being to provide environmental sustainability and long-term resource security for farmers, the environment and all Australians.'

Log on to the Pearson Places website and follow the links to find more information about the Business Council of Australia, Australian Chamber of Commerce and Industry, and the National Farmers' Federation.

Web Destination

CONSUMER-BASED INTEREST GROUPS

Tenants NSW

Tenants NSW is the peak non-government organisation for tenants in New South Wales and represents the interests of all tenants including private rental, public housing and social housing tenants; and boarders, lodgers and residential park residents.

Tenants NSW publishes the *Tenants' Rights Manual* and produces fact sheets for tenants.

Since 1979 the organisation has called for policy reform in the interests of tenants. It provides tenancy advice and advocacy services, including special services for Aboriginal tenants. Although Tenants NSW is a not-for-profit organisation, funding for these services is provided by the New South Wales Department of Fair Trading.

Boarders and lodgers have more limited rights than tenants, who are protected under the *Residential Tenancies Act 1987* (NSW). Tenants NSW has expressed concern that these renters have no effective legal rights. Their rent can be increased without notice, they cannot force repairs to be carried out and they can be evicted without notice.

Log on to the Pearson Places website and follow the links to find more information about Tenants NSW.

Web Destination

REVIEW

1 Use examples to explain the role of the media in resolving disputes.
2 Describe the way that members of parliament can be useful in resolving disputes with the state.
3 Outline the role of trade unions.
4 What is a non-government organisation?
5 Describe the role of some of the main human rights special-interest groups.
6 Outline the role of the Business Council of Australia.
7 Describe the role of Tenants NSW.

LAW IN ACTION

1 Read the information on New South Wales hospitals on page 189 and on sentencing laws on page 190, and then complete the following activities:
   a Describe the role of politicians in enforcing rights in these examples.
   b Explain the importance of the interaction between members of parliament and the media in these cases.

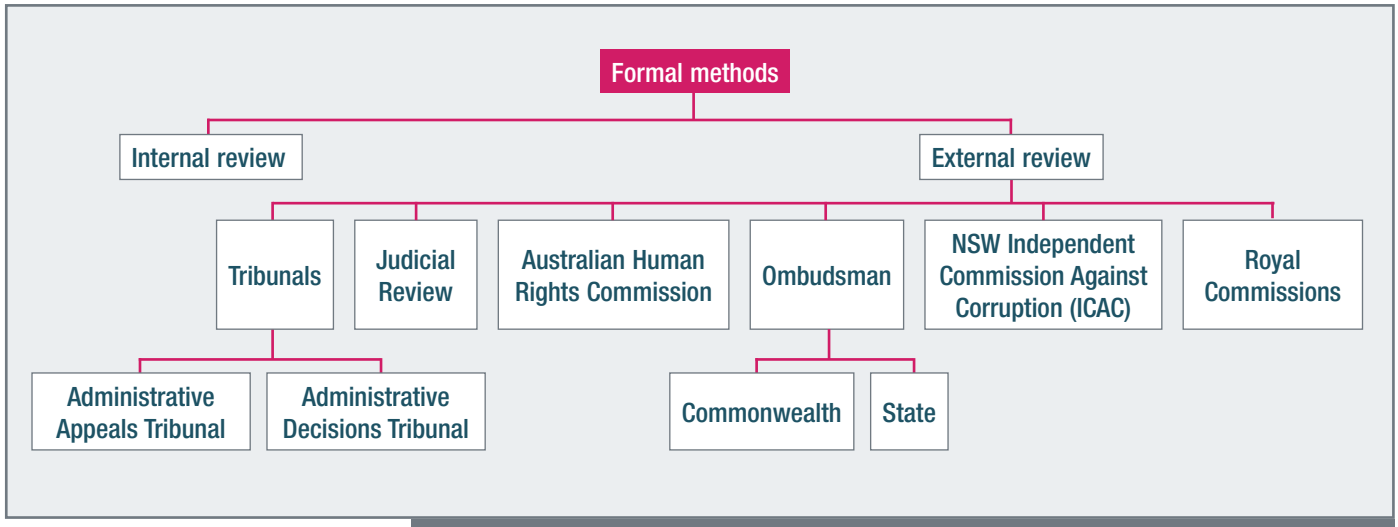
continued…

2 Describe the role of trade unions in bringing about legislative changes to Australia's workplace relations laws.

3 Examine the list of special interest groups on page 191–3 and decide which interest group would represent the interests of the following people:

- **a** Sally rents her home.
- **b** Phoebe is a young woman who wishes to become a lawyer.
- **c** Costa is an advocate for free speech.
- **d** Paul is suffering from severe poverty.
- **e** Conrad owns a sheep farm.
- **f** Vincent runs an Internet service provider.
- **g** Hasaan is concerned about logging in a forest near to his town.
- **h** Zoe is a manager of a large mining company.

12.4 Formal methods of dispute resolution



Formal methods of dispute resolution

Formal means of dispute resolution include all of the mechanisms established by the Commonwealth and state governments to resolve problems arising from the actions of government departments and agencies.

Internal review

In some cases it is possible for a person who is affected by the decision of a government department to apply for an internal review of the decision; that is, the department will have in place a process for reviewing the decision within the department itself.

In New South Wales the following process applies: If a person applies for a review of a decision they must write to the **administrator** who made the original decision asking for reasons for the decision. As soon as practicable – but no later than 28 days after making the decision – the administrator must give reasons in writing for the decision that was made, setting out the evidence on which the it was based and the administrator's understanding of the law that applied in that case. The administrator must also explain the reasoning processes that led them to make the decision. These requirements are all set out in section 49 of the *Administrative Decisions Tribunal Act 1997* (NSW).

As far as practicable, the decision must be reviewed 'afresh' by someone not substantially involved in making the original decision, but who is an employee of the same administrator or someone employed in the same agency as the administrator. Otherwise a suitably qualified person may carry out the review.

Reasons must be given to affirm, vary or set aside the original decision. If the officer deems it necessary, a new decision can be made. A document entitled 'Reasons for Decision' sets out the guidelines for making these decisions. It is available over the Internet from the Premier's Department, but a password is required to obtain it.

The notice of the review should set out the right to have the decision further reviewed by the Administrative Decisions Tribunal. The legislation applies to New South Wales government departments, agencies and state-owned corporations. Commonwealth legislation has similar requirements to the state legislation.

Commonwealth and state legislation provides exceptions to the right of review. For instance, decisions relating to personnel management in the public service cannot be reviewed in New South Wales. The federal Attorney-General may issue a certificate stating that certain matters cannot be disclosed in order to protect the public interest; for example:

- Disclosure could harm international relations, defence or national security.
- Disclosure would reveal the deliberations and decisions of the cabinet.
- The information would be privileged in judicial proceedings.

ADMINISTRATOR **The person or body that made the original decision.**

External review

A variety of reviews of the action of government departments and agencies exist which are made outside those agencies. These include courts, tribunals, Ombudsmen and statutory bodies established to protect citizens' individual or group rights.

ADMINISTRATIVE REVIEWS

The Administrative Appeals Tribunal

The Administrative Appeals Tribunal hears appeals against decisions of federal government departments and agencies on their merits. If a decision of an agency can be heard by the Tribunal, the agency must inform the person that they have this right. The jurisdiction of the Tribunal changes constantly and is set out in its annual reports.

If a person has been affected by a decision of a government body that is reviewable, the body must give reasons for the decision if an affected person asks for them. A request for a review must be made in writing. If the parties agree, alternative methods of dispute resolution such as mediation are usually used to resolve the problem.

The hearings are fairly formal, and lawyers or other trained advocates may appear. However, in some areas of law this does not occur – for instance, with social security cases. Evidence is heard and written argument is accepted but the Tribunal is not bound by the rules of evidence and is able to inform itself in whatever way it considers best.

The Tribunal has significant power to request government documents or require persons to answer questions. It can even do this in some circumstances when the Attorney-General has decided that a person cannot receive information because it is a threat to security, national defence

or part of the deliberations of the cabinet. In this last case it may only inform itself and cannot divulge cabinet deliberations to anyone else.

The Tribunal will normally hear matters in public but it may close proceedings at its discretion. The Tribunal may affirm the decision under review, vary the decision or set the decision aside and make a new decision itself, or give advice to the decision maker on making a new decision. Only questions of law may be appealed to the Federal Court or Federal Magistrates Court.

Administrative Decisions Tribunal

The Administrative Decisions Tribunal (ADT) of New South Wales can review the decisions of officers of government departments if legislation permits. The ADT makes decisions in discrimination cases, professional discipline cases and tenancy cases. In also makes decisions other areas, but not until an internal review has taken place. These areas are:

- licensing of security guards, tow truck drivers and gun licenses
- freedom-of-information applications
- some state taxation decisions e.g. stamp duty and land tax
- decisions about adoption
- decisions about community and disability services.

The tribunal is required to give reasons for its decisions. Legislation determines who has the right to seek a review; for example, under the *Freedom of Information Act 1989* (NSW) only a person 'aggrieved' by a decision is entitled to seek review.

Many applicants before the tribunal are not represented by a lawyer, but government agencies are. The tribunal reviews decisions on their merits, making use of any relevant material brought to its attention. The type of decision made is similar to those of the federal Administrative Appeals Tribunal: affirm, vary, return the matter for the original decision maker to reconsider taking into account the ruling of the Tribunal, or substitute its own decision for that of the original decision maker.

CASE LAW *Dent and Daryl Wight as an Australian Electoral Officer* [2007] AATA 1985 (23 November 2007)

A man born with the name Albert Langer tried to enrol as a voter under the name Arthur Dent, the same name as a character in the novel *Hitchhikers' Guide to the Galaxy*. Mr Wight, an Australian Electoral Officer, refused to enrol him under that name. Mr Dent (or Langer) appealed to the Administrative Appeals Tribunal, which decided that he could be enrolled, but under the name he was born with; that is, Albert Langer.

Judicial review

A judicial review of an administrative action may be taken before a court. In this case the court will:

- order that a decision be set aside
- order that proceedings be halted
- direct an administrative officer to take some action.

A judicial review examines the way in which a decision maker reached their decision to determine whether:

- procedural fairness or 'natural justice' has occurred. Did the person concerned have the right to participate in proceedings? Were they given a right to give evidence? Was the judge free from bias?
- factors were taken into account under the relevant legislation
- the administrator's decision was ***ultra vires*** – that is, it was made outside the authority granted by the legislation. Sometimes the breach is technical and can be ignored, so the original decision stands
- the decision was unreasonable – that is, no reasonable decision maker could reach the same decision.

ULTRA VIRES A Latin term meaning 'beyond the power'.

Unlike tribunals, courts do not determine cases on their merits but simply decide if a decision was made within the principles of natural justice or procedural fairness, and within the factors and powers of the relevant legislation.

Judicial review usually takes place in the Federal Court or state Supreme Court, though in some circumstances they may take place in the Land and Environment Court. It is a much more expensive procedure than seeking the decision of a tribunal.

The courts have a wide range of remedies available to them:

- declaration: for example, that a decision was unlawful
- injunction: an order that a particular action be taken or not taken
- *mandamus*: an order requiring an official or public body to take action it failed to take
- prohibition: an order to a lower court to cease proceedings
- *certiorari*: an order to quash the decision of the decision maker because jurisdiction was improperly exercised or the process lacked procedural fairness.

Log on to the Pearson Places website and follow the links to find copies of Ombudsman's reports.

Commonwealth Ombudsman

The term 'Ombudsman' is from Swedish. It is not gender-specific and refers to either male or female incumbents. The first Ombudsman was appointed in Sweden in 1809, to help citizens complain about government actions through a body that was independent of the government. The Commonwealth Ombudsman's office investigates complaints made by citizens about federal government departments and agencies. Citizens who feel that they have been treated unfairly by a government agency can complain to the Ombudsman. Complaints can be made in writing, by phone or in person.

There are specific roles for the Ombudsman:

- The Defence Force Ombudsman investigates complaints by members of the Australian Defence Force.
- The Immigration Ombudsman investigates actions taken by government departments in relation to immigration; this includes investigating complaints from detention centres.
- The Taxation Ombudsman investigates complaints about actions taken by the Australian Taxation Office.
- The Postal Industry Ombudsman investigates complaints against private mail services.
- The Law Enforcement Ombudsman investigates the conduct and practice of the federal police.

Most complaints are resolved by the Ombudsman without a formal report. If necessary an investigation may be carried out, with a report containing recommendations where the Ombudsman had a view that the actions of the administrator were unreasonable, unjust, oppressive, improperly discriminatory, unsupported by the facts or not properly explained by the government agency. The Ombudsman may also comment on legislation that was unreasonable, unjust, oppressive or improperly discriminatory.

A report is given to the relevant Minister and agency. If the Ombudsman's recommendations are not accepted, the report may be given to the Prime Minister.

OMBUDSMAN DEALS WITH CHILD SUPPORT FRAUD COMPLAINTS

A report into dealing with customer fraud was recently released by the Commonwealth Ombudsman. Complaints had been made to the Ombudsman's Office that the Child Support Scheme did not take investigating and prosecuting customer fraud seriously enough. It did not regard this as an efficient use of its resources.

One complaint was from a mother who complained that her husband altered his pay slips, used as proof of income. She complained that these pay slips were used to determine the amount of child support he had to pay, but there was no meaningful investigation of her complaint. She had to take expensive legal action to get appropriate child support. The Ombudsman pointed out that the Child Support Scheme was required by Commonwealth Government Guidelines to have a comprehensive control plan to detect, investigate and prevent fraud.

The Ombudsman recommended that the Child Support Sheme:

- review its Fraud Control Plan to adequately manage the risks of customer fraud
- develop new procedures to implement the plan
- establish new procedures for responding to fraud allegations
- educate staff regarding their role in recommending cases for prosecution by the DPP
- provide guidance on authenticating documents and when it is necessary to investigate conflicting evidence from parents.

The Ombudsman noted that the Child Support Scheme had responded positively to the report and had advised the Ombudsman that it developed new arrangements to investigate and prosecute customer fraud. It had also increased the attention to given to investigation and, where necessary, prosecution on these matters.

New South Wales Ombudsman

The New South Wales Ombudsman, like its federal counterpart, is independent of the government of the day. Its role is to help ensure that government departments are aware of their responsibilities to the public, and that they act reasonably and comply with the law when carrying out their duties. The Ombudsman encourages and helps agencies to develop their complaint mechanisms, as responding to complaints and to the feedback received are the best means of improving the way the work of departments and agencies is done.

The New South Wales Ombudsman has the power to investigate conduct that is:

- illegal
- unreasonable
- unjust or oppressive
- improperly discriminatory
- based on improper or irrelevant grounds
- based on a mistake of law or fact
- otherwise wrong.

Complaints can be made to the Ombudsman regarding matters from the following:

- local government; for instance, not complying with the law or not enforcing the conditions of a consent to develop land
- the police; for instance, abusive behaviour or harassment, failure to take action in cases of domestic violence, bias or excessive use of force
- community services; where there is a failure to provide a service or concern about the way in which a service is managed
- child protection; including sexual assault, mistreatment or neglect of a child and psychological harm to the child

- correctional centres; in this case, the website suggests the complaint should be made within the prison first. Only serious complaints should be made
- freedom of information; for instance, when the outcome of an internal review or freedom-of-information request is not satisfactory
- protected disclosures (otherwise known as whistle-blowing); for instance, by a public official about serious maladministration, corrupt conduct or serious waste of public money.

Statutory bodies

A number of bodies have been created by statute to deal with reviews of government bodies. Some of these agencies include:

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) was formerly known as the Human Rights and Equal Opportunity Commission. The AHRC is responsible for administering the following federal human rights laws:

- *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth)
- *Racial Discrimination Act 1975* (Cwlth). This Act covers racial discrimination in employment, accommodation, provision of goods and services, access to public places and with advertising. There are also criminal provisions dealing with **racial vilification**. An act of vilification has to be public; for instance, in a public speech, statement on radio, in the newspaper, in a book, on a website, graffiti etc.
- *Sex Discrimination Act 1984* (Cwlth). This Act prohibits discrimination on the basis of sex and related characteristics, such as pregnancy.
- *Disability Discrimination Act 1992* (Cwlth). This Act prohibits discrimination on the grounds of disability, including future disability or perceived disability; for example, because a person has AIDS or appears not to be capable of carrying out some activity. It includes people who have a connection with the disabled person, such as the carers and parents of disabled people. Harassment of disabled persons in employment (for instance, making them the target of humiliating jokes) is prohibited. The Act applies to employment, provision of goods and services, education and facilities.
- *Age Discrimination Act 2004* (Cwlth). Discrimination on the basis of age is generally prohibited, although the law permits discrimination based on junior wages. The AHRC's work in this area is particularly focused on barriers to employment for younger and older workers.

Each of these Acts set out the functions and powers of the Commission, which include:

- investigating and conciliating complaints of discrimination
- holding inquiries into human rights issues of national importance and making recommendations to address problems of discrimination and human rights
- developing educational resources on human rights for schools, the community and workplaces
- providing advice to government to develop legislation, policies and programs consistent with international and domestic law
- assisting the courts by giving legal advice on human rights issues and discrimination issues
- carrying out research into human rights and discrimination issues.

RACIAL VILIFICATION **Any act that could bring a person or group into hatred, serious contempt or severe ridicule.**

RACIST GROUPS USE SOCIAL NETWORKING SITES

Numerous racist groups are using social networking sites to spread their racist views and making threats, in particular towards Muslim users. One Sydney user, Alex Gollan, has created a Facebook group called Australians Against Racism and Discrimination, and has been threatened with violence.

Some users stalked him for a period of months and published his personal details, including his address and phone number. It took a long time for this material to be removed by the Internet service provider.

Tom Calma, the Race Discrimination Commissioner, complained that legal sanctions against this kind of Internet stalking are limited, particularly because it is difficult to identify the perpetrators. Mr Calma pointed out that there needed to be criminal sanctions for serious racial vilification.

The New South Wales Independent Commission Against Corruption

The Independent Commission Against Corruption (ICAC) was established in 1988. According to its website, its aims are to 'protect the public interest, prevent breaches of public trust and guide the conduct of public officials'.

The Commission's role is to investigate and prevent corruption by public authorities and public servants, and to educate public officials and the community generally about the detrimental effects of corruption on administration and on the community.

The ICAC is a public authority completely independent of the government. It is directly accountable to the New South Wales Parliament.

ICAC INVESTIGATES SELECTIVE SCHOOL CORRUPTION

A Sydney father was accused of trying to get his son into a selective school by bribing his teacher. Although there is a selective schools test, a component for entry to selective school also includes school assessment in which the teacher participates.

The father described film character Forrest Gump's mother as a 'hero' when she slept with a teacher to get her son into a school.

He had written to the boy's teacher twice to get her to assist him to get into selective school. The first letter had $2000 in it, the second $500. The second letter asked for 'favourable assessment in school assessment and report'.

The teacher reported that she felt under pressure from parents who were desperate for their children to enter selective school. Another parent had asked her to inflate her child's mark in the hope that the child would get into a 'better' selective school.

The teacher immediately reported the matter to the principal after discovering the money in the notes. The matter was referred to ICAC for investigation.

Source: Patty, Anna 'Cash lands pushy parents before ICAC', *Sydney Morning Herald*, 10 December 2008

TUTORING COMPANIES INVESTIGATED

The Independent Commission Against Corruption investigated allegations that a private tutoring company had given students 'improper assistance' for work that they subsequently submitted to the Board of Studies as part of their HSC assessment. The assistance included changing words, rewriting paragraphs, providing drafts for consideration, editing and adjusting story lines.

The ICAC's investigation focused on the services offered and on the policies, procedures and practices of the government offices concerned. The Commission made 20 anti-corruption prevention recommendations to the New South Wales Board of Studies, the New South Wales Department of Education and Training and the Minister for Education. There was no finding of corrupt conduct made in the report. The report did point out that corrupt conduct can include conduct by a person that adversely affects or could adversely affect the functions of the public official.

There are a number of conduct categories in the Act. They are normally criminal acts. The relevant one here is fraud. The conduct of the tutors and their students would have been corrupt if it had adversely affected the assessment of the student's work, and if the conduct also amounted to a fraud.

The Commission did not find evidence that the material for marking adversely affected the assessment, but it was enough that it could have affected the assessment by adversely affecting 'official functions'. However, there was insufficient evidence on which to base a prosecution.

The Commission did find that there were areas of practice and procedure that were 'conducive to corrupt conduct'. The Board of Studies itself in 2005 commissioned an independent review of its policies, rules and procedures. Its *Assessment, Certification and Examination Manual* has a more extensive definition and discussion of malpractice and further brochures were prepared to inform students, parents and teachers with additional advice with respect to submitted works.

Royal commissions

The *Royal Commissions Act 1902* (Cwlth) allows the Commonwealth to establish inquiries into any matter of public importance. Two relatively recent Royal Commissions were the Food For Oil Inquiry and the Royal Commission into the Building and Construction Industry. Royal Commissioners may be given significant powers; even the Prime Minister and federal government ministers were required to give evidence at the Food for Oil inquiry. There is no Commonwealth equivalent of the Independent Commission Against Corruption and a specific Royal Commission would need to be set up to deal with serious corruption issues. Recent Royal Commissions include:

- the Food for Oil Inquiry. Commissioner Cole conducted this inquiry in 2005 into the conduct of private companies after the UN issued a request for governments to take steps to prevent companies providing food for oil from the Iraqi regime of Saddam Hussein, which was under UN sanctions with strict controls on what the regime could trade. Commissioner Cole requested revised letters patent, which he was given, and presented his report in 2006. The Commissioner found that the Australian Wheat Board was involved in improper dealings in trading with the regime of Saddam Hussein.
- the Royal Commission into the Building and Construction Industry. The Commissioner concluded that there should be an end to pattern bargaining in the industry. The Commission found collusion between large employers and unions against small contractors. There was much criticism that this Royal Commission was politically motivated and justified a number of anti-union measures. For instance, it did not address serious occupational health and safety issues and the widespread use of illegal immigrants.

REVIEW

1 Describe the process of internal review in New South Wales.
2 What is the role of the administrator?
3 Explain the role of the Administrative Appeals Tribunal.
4 What are the functions of the Administrative Decisions Tribunal?
5 What is a judicial review?
6 Outline the role of the Ombudsman.
7 How can the Ombudsman ensure that there is a response to any investigation?
8 Outline the legislation that the Australian Human Rights Commission oversees.
9 Describe the role of the New South Wales Independent Commission Against Corruption.
10 Describe the powers of a Royal Commission.

LAW IN ACTION

1 Read the information about the Ombudsman's investigation into child support on page 198 and complete the following activities:
   a Outline some of the complaints brought before the Ombudsman.
   b Describe the main recommendations of the Ombudsman.
   c Do you agree with these recommendations? Explain your response.
2 Use specific examples to write a report on how government agencies can assist people in enforcing their rights.
3 Read the information about the investigations conducted by ICAC into tutoring companies and complete the following activities:
   a Outline the allegations made against the tutoring company.
   b What was the outcome of the ICAC investigation?
4 Use the Internet to conduct research into the New South Wales Anti-Discrimination Board. What are its functions? Describe how it carries out its work.

CHAPTER SUMMARY

The New South Wales police prevent crime, investigate crime and arrest and prosecute offenders, chiefly under the *Crimes Act 1900* and the *Road Transport (General) Act 1999*. The Australian Federal Police fight international and transnational crime, particularly terrorism, drug trafficking, Internet crime and fraud.

The Australian Customs and Border Protection Service prevents unlawful entry of goods into Australia, while the Australian Quarantine Inspection Service (AQIS) prevents the entry of potentially damaging biological material. There are also a number of secret intelligence services, such as ASIO and the Office of National Assessments, which deal with anti-terrorism and counter espionage.

Alternative dispute resolution is a cheaper and easier way of resolving disputes than going through the courts. Initially it involves negotiation or, when this does not work, mediation. This is a process where an independent third party assists disputing parties to reach a settlement of their differences. Arbitration involves a neutral party reaching a decision by which the disputing parties must abide. In commercial contracts, the arbitrator is usually nominated by the parties in advance.

In practice, only a small proportion of civil disputes are resolved in the courts. During the court case the defendant's right to a fair trial is protected by rules of evidence and procedure and rights of appeal. Victims have rights to compensation and to make a statement of the impact of the offence on them, which the court may take into account if it regards this as appropriate. Rules of standing ensure that state resources are not wasted.

The media protects rights by bringing abuses of rights to the attention of the public and politicians. Members of parliament may make representations to government on behalf of citizens and raise issues in parliament or in the media. Trade unions protect members' rights by giving advice and representing workers to employers.

A wide range of non-government organisations, such as the New South Wales Council of Civil Liberties (NSWCCL), exist to provide information to government and to lobby on citizens' rights issues.

Internal review in government departments is a resource-efficient and relatively speedy means of improving decision making in respect to individuals. Tribunals deal with complaints about administrative actions in a relatively informal and cost-effective manner.

Judicial review provides for review of administrative decisions where tribunals have made errors of law. The Ombudsman provides a relatively simple means for citizens to assert their rights.

The Australian Human Rights Commission investigates, conciliates complaints of discrimination, holds inquiries and educates citizens about rights. The Independent Commission Against Corruption (ICAC) investigates and prevents corruption by public officials.

Royal Commissions may be given wide powers to investigate and report to government on issues of abuse of power, waste of public funds and corruption.

MULTIPLE-CHOICE QUESTIONS

1 When can the police demand to know your identity?

- **A** If they have a warrant
- **B** Any time that they ask for it
- **C** If they suspect you of a crime
- **D** In a motor traffic accident if they ask for your drivers licence

2 Which of the following organisations is responsible for providing assessments of security risks to the Prime Minister?

- **A** Australian Customs
- **B** Australian Federal Police
- **C** Office of National Assessments
- **D** Australian Intelligence and Security Organisation

3 Which of the following forms of informal dispute resolution involves an independent expert reaching a decision, which the parties must act on?

- **A** Negotiation
- **B** Arbitration
- **C** Conciliation
- **D** Mediation

4 Which of the following is NOT a ground of appeal?

- **A** Unfair trial
- **B** Severity of sentence
- **C** Miscarriage of justice
- **D** Dissatisfaction with trial decision

5 Aku has a very bad experience with a federal government department. An internal review does not resolve Aku's concern. Which agency should Aku refer the matter to?

- **A** Commonwealth Ombudsman
- **B** The Council for Civil Liberties
- **C** The Commonwealth Complaints Tribunal
- **D** The Australian Human Rights Commission

6 Which government agency has responsibility for ensuring illegal goods do not enter Australia?

- **A** Australian Federal Police
- **B** The Office of National Assessments
- **C** Australian Consumer Protection Agency
- **D** Australian Customs and Border Protection Service

7 A New South Wales government employee is accused of accepting bribes. Which agency is responsible for investigating this allegation?

- **A** The NSW Ombudsman
- **B** The Independent Commission Against Corruption
- **C** The Administrative Decisions Tribunal
- **D** The Australian Federal Police

8 Which of the following statements best describes the main role of trade unions?

A Advocate for the rights of workers

B Advise businesses on industrial relation issues

C Mediate disputes between workers and their employers

D Provide training to workers and employers on safety in the workplace

9 Which federal government agency has the responsibility for investigating threats to national security within Australia?

A Office of National Assessments

B Defence Intelligence Organisation

C The Australian Secret Intelligence Organisation

D The Australian Security Intelligence Organisation

10 Which body has responsibility for enforcing the *Sex Discrimination Act 1984* (Cwlth)?

A The Human Rights Commission

B The Administrative Decisions Tribunal

C The Australian Council of Trade Unions

D The Australian Discrimination Commission

SHORT-ANSWER QUESTIONS

1 Define 'enforcement of rights'.

2 Outline the role of law enforcement agencies.

3 Outline the informal means for enforcing rights in Australia.

4 Describe the role of the media in enforcing rights.

5 Describe the role of the Commonwealth Ombudsman.

6 Explain the processes of negotiation, mediation and arbitration.

7 Compare disputes between individuals and those between the individual and the state.

8 Distinguish between formal and informal methods of enforcing rights and resolving disputes.

9 Assess the effectiveness of methods of resolving disputes between individuals.

10 Evaluate the ways in which Australian citizens can enforce their rights.

CHAPTER 13

The individual and technology

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

P6 explains the nature of the interrelationship between the legal system and society

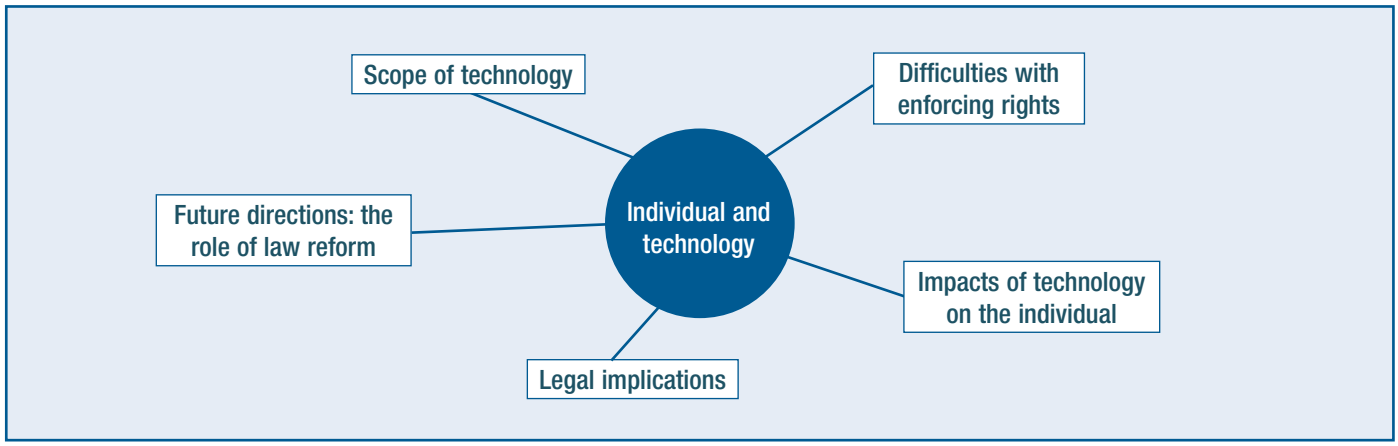
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

P10 accounts for differing perspectives and interpretations of legal information and issues

PRINCIPAL FOCUS

In this chapter, students learn about the way that technology has affected the legal system. The need for law reform and the difficulties that technology poses for enforcing the rights of individuals are also examined.



SUMMARY OF CASE LAW

Australasian Performing Rights Association Ltd v. Telstra Corporation Ltd [1995] 31 IPR 289
Computer Edge Pty Ltd v. Apple Computer Inc. (1986) 161 CLR 171
G v. H (1994) 181 CLR 387
Municipal, Administrative, Clerical and Services Union v. Ansett Australia [2000] FCA 441
People of the State of New York v. Joseph Castro [County of Bronx: Criminal Term Pt. 28, Indictment No. 1508 of 1987] (1989)
R v. Lucas (1992) 55 A Crim R 361; [1992] 2 VR 109
SW v. Forests NSW [2006] NSWADT 74
Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd [2005] FCA 1242
X v. Commonwealth (1999) 200 CLR 177

SUMMARY OF LEGISLATION

Broadcasting Services Amendment (Online Services) Act 1999 (Cwlth)
Copyright Act 1968 (Cwlth)
Gene Technology Act 2000 (Cwlth)
Prohibition of Human Cloning for Reproduction Act 2002 (Cwlth)
Research Involving Human Embryos Act 2002 (Cwlth)
Workplace Surveillance Act 2005 (NSW)
Workplace Video Surveillance Act 1998 (NSW)

13.1 The scope of technology

The rate of technological change in the last three decades has been remarkable. Mobile phones, digital cameras, the Internet and email were not available 25 years ago and music CDs were still 'new' technology. An understanding of human DNA and the use of gene technology for medical procedures was the stuff of science fiction. Yet all of these things are now commonplace and their use is widespread throughout the community.

The Internet

The Internet has transformed the way that individuals access information, buy goods and services and interact with each other. People are now far more empowered as a result of the Internet. They can easily access a vast array of information about products, companies and even government agencies, allowing them to make more informed decisions. For example, researching our rights as a consumer is now as easy as completing a few simple Internet searches.

However, the Internet by its nature is unregulated and this has created new opportunities for criminals and those who seek to do wrong. Billions of dollars of trade takes place every day via the Internet. Fraudsters use spam email to prey on the vulnerable and ill-informed.

The Internet has transformed society and also poses issues for the legal system.

International boundaries are to a great extent meaningless when it comes to the Internet. A criminal can use the Internet to engage in fraud in France just as easily as they can in New Zealand. Policing Internet crimes has become increasingly complex, requiring enhanced international cooperation. One area where cooperation has had some success is child pornography. Paedophiles have been using secure sites to distribute pornographic images of children, but they have been very hard to track as they are often spread across the world. However, in recent years increased cooperation between police forces around the world has broken many of these paedophile rings, leading to successful convictions.

The Internet has also allowed the proliferation of other forms of file sharing. People can share digital files, either in an open system where anyone can access them, or in a restricted way that allows access only to certain people. They can use blogs to keep their friends informed of their travels and adventures, families can stay in touch around the world and so on.

However, this technology also poses risks to copyright laws. When a person makes a product it is subject to copyright; this means that another person cannot copy it without the original producer's permission. The book you are now reading, the words in it, the graphics and even its design are subject to copyright. If you look in the front you will find the copyright owners; if you were to copy parts of this book and sell it, or used it without permission in another book you happened to be writing, you would be breaking copyright laws. In effect, you would be stealing. Some file-sharing technology allows people to copy files without permission or without paying for them and this poses serious problems for copyright laws. For example, some Internet sites have allowed people to share music files so that, instead of buying a CD or downloading and paying for a song, individuals 'share' music for free. This sounds great but it denies artists, record companies and distributors their copyright sales and ultimately that means the whole industry could collapse.

Web 2.0 technologies, which allow individuals to produce and broadcast their own media, have transformed the way society perceives information and entertainment. These technologies also pose questions of privacy; for example, who controls the content and comments made on a social networking sites to ensure that they do not **defame** an individual?

DEFAMATION A tort that relates to broadcasting unsubstantiated comments and information about another person that damages their reputation.

3G AND 4G MOBILE TECHNOLOGY

Phone companies around the world are beginning to move into 3G (3rd generation) and 4G mobile technologies. This technology allows for far greater data-handling rates to and from mobile devices, typically mobile phones. With this technology, mobile phones are able to have video streaming, video conference calls, web-browsing and email functions.

This new technology brings with it many advantages and possibilities. However, it also creates greater opportunities for criminal activities. Devices with new technologies, particularly the more advanced 4G, have become high-value targets for thieves. While mobile phones have always been stolen, 3G and 4G phones are effectively mini computers and if stolen may open access to credit card details and other personal information belonging to the owner.

Italy and Japan have announced that they may use this technology in elections so people can more easily vote. This has substantial benefits in terms of convenience but, if used incorrectly, creates some serious opportunities for election fraud. Another type of fraud that is being reported in some European countries is the targeting of 3G phones with computer viruses that infect the user's phone, making calls to high-rate numbers without the owner's knowledge and resulting in enormous phone bills.

Recording technologies

Modern recording technologies allow individuals to take and store photographs and video footage; these can then be shared with potentially millions of people via file-sharing sites on the Internet. Used appropriately, these technologies are convenient and simple to use. However, if used inappropriately they pose risks to privacy and copyright.

Most modern mobile phones are equipped with a digital camera. These small and easy-to-use cameras are convenient but they are also easy to conceal, and this has raised concerns about their inappropriate use. For example, police and beach inspectors have found that a small proportion of people have used such devices to record, store and transmit images of people at the beach and in some cases even in

changing rooms. This raises serious issues about privacy and, of course, in some cases constitutes illegal activity.

Most mobile phones contain inbuilt cameras. If used inappropriately, these small recording devices can pose a risk to privacy.

Surveillance technology

Often referred to as 'big brother' technology, surveillance technology has expanded considerably in recent years. It includes the use of closed circuit television (CCTV) cameras that record video footage, Internet usage tracking and even the use of **GPS systems** to track the whereabouts of individuals.

The use of CCTV is very widespread. In the past, high-value assets such as banks may had had a camera installed, but now they are used in most shops, often in schools and even on public streets. A recent survey of British cities found that in London alone there were several thousand CCTV cameras installed taking constant video footage of all major streets.

GLOBAL POSITIONING SYSTEM (GPS) **A satellite-based system that identifies geographical locations.**

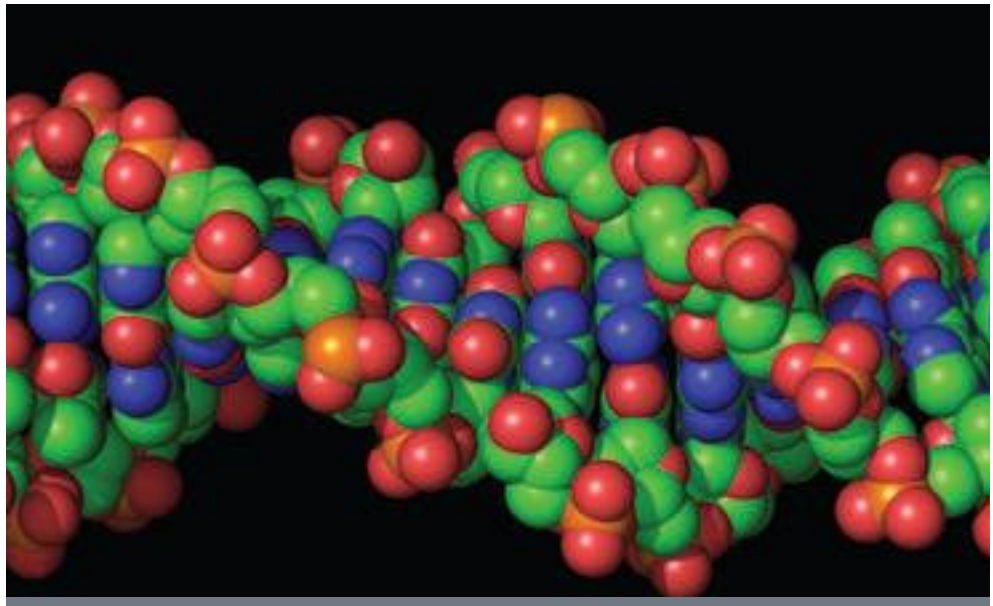
DNA and gene technology

With the exception of identical twins, every human being has DNA (deoxyribonucleic acid) that is unique; it contains the genetic program for that individual. DNA is found in every cell in the body. When, for example, a flake of skin is shed, it contains cells that in turn contain DNA. This DNA can be extracted to give a genetic 'fingerprint' for an individual.

DNA technology is now used extensively in a whole variety of areas. In a criminal investigation, DNA evidence collected at the crime scene can lead to a conviction. The technology has also been used to re-examine past cases, sometimes leading to the release of people who had been found guilty of crimes that they had not committed. In the United States, this has included several people who were awaiting execution, and who have now been released.

One of the first cases to ever use DNA technology took place in the United Kingdom in 1987. A 17-year-old boy was accused of the sexual assault and murder of two girls. The boy lived near Alec Jeffreys, the scientist who developed the technology of DNA fingerprinting. Jeffreys' methods of testing showed that, while

the two girls had been murdered by the same person, the DNA evidence did not match the accused boy.



Our knowledge of genes and DNA technology is considerable.

Gene technology is also revolutionising medicine and this has raised considerable legal, ethical and moral debate; in particular, over the use of human embryos to grow human stem cells by which a range of diseases can be treated. This technology raises questions about the status of embryos. The cause of even greater debate is the idea of human cloning, where a human could have body parts or even a whole new body made in their exact genetic image. The technology does not yet exist, although many scientists believe it is not far away. Several other species have already been successfully cloned, including – most famously – 'Dolly the sheep'.

Point to ponder

Dolly the sheep was cloned by scientists at the Roslin Institute in Edinburgh Scotland in 1996. She lived until 2003.

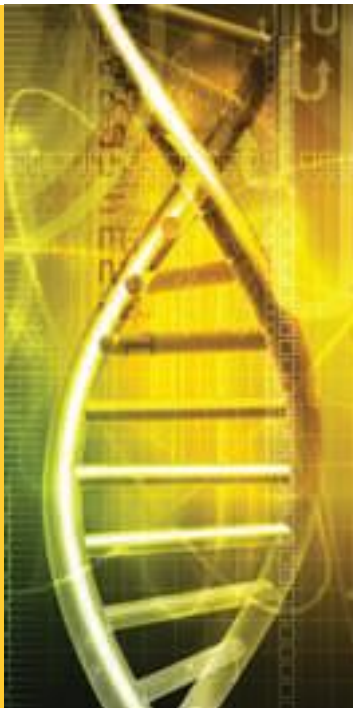
Dolly the sheep was made through cloning technology in 1996. The possibility of human cloning raises many ethical and legal issues.

REVIEW

1 Explain how the Internet can be used in criminal activities.
2 Outline the international law issues created by the Internet.
3 What is 'copyright'?
4 Describe the potential criminal activities that may arise with 3G and 4G mobile technology.
5 Describe the impact of the Internet on copyright.
6 Outline the legal issues raised by surveillance technology.
7 Explain what DNA is and how it can be used in criminal matters.
8 Describe the issues raised by gene technology.

LAW IN ACTION

1 Take on the role of an Internet expert. Prepare a short guide to Internet users about some of the issues and dangers they should consider.
2 Working in small groups, consider the advantages and disadvantages of making greater use of CCTV in public spaces, such as parks and footpaths.
3 Use the Internet and library resources to conduct research into DNA fingerprinting technology. Prepare a short report on the processes involved and explain how it is used by law enforcement agencies in criminal matters.



13.2 Impacts of technology on the individual

The effect of technology on privacy

Technology has improved many aspects of life. However, sometimes it comes with a downside and privacy is often a victim of these advances. For example, the enormous Internet company Google developed *Google Earth* some years ago. This technology allows users to view aerial photographs and, more recently, ground-level photographs of vast areas of the Earth. This has raised some privacy concerns; for example, some have said that criminals can use the system to 'look behind' walls and plan their crimes; equally, images of individuals who happened to be 'caught' in the shot as it was taken are there for the whole world to see.

Perceptions of crime and improved surveillance technology have seen a dramatic increase in recent years of CCTV surveillance. Many public places, such as shopping malls, busy streets and public transport, are all now monitored by CCTV, but this poses a number of issues.

Surveillance cameras are increasingly being used to monitor public places, raising concerns about the privacy of individuals.

On one hand, this technology has helped the police to solve crimes, and a strong argument can be made that it acts a deterrent to crime. However, privacy advocates have expressed concerns that CCTV technology reduces an individual's right to privacy. For example, in 2009 government bus drivers in Sydney threatened industrial action over the use of CCTV on buses. Each bus is fitted with several cameras that are designed to deter misbehaviour on the bus. However, one camera is situated so that it points directly at the driver and records only them. The drivers complained that this camera was being used to 'check up' on them. They were afraid of being dismissed for taking too long on toilet breaks or for very minor matters.

In response to public concerns about the use of CCTV technology, the New South Wales Government developed the NSW Government Policy Statement and Guidelines for the Establishment and Implementation of Closed Circuit Television (CCTV) in Public Places. These guidelines were developed to help government agencies, local councils and businesses use CCTV ethically and appropriately. The guidelines are as follows:

- Recording of images should be lawful and fair.
- The purpose of CCTV should be widely known.
- The images and information obtained from CCTV should only be used for the purpose for which it was recorded. For example, if a company installs CCTV to stop theft it should not be used to check that employees are wearing the correct uniform.
- People should be made aware that they are being recorded by CCTV. Notices indicating that CCTV is being used in the area should always be displayed.

CASE LAW *SW v. Forests NSW* [2006] NSWADT 74

This case was heard by the New South Wales Administrative Decisions Tribunal (NSWADT). 'SW' was an expert in rainforest vegetation and had been invited by Forests NSW to make a presentation at a conference in a Victorian town. Forests NSW provided accommodation for 'SW' in the town, in a house along with others.

One morning while waiting for the bathroom 'SW' was sitting smoking a cigarette in her pyjamas on the veranda of the house. An officer for Forests NSW took a photograph of her without asking for consent. At a subsequent conference, a CD containing photographs (including those of 'SW' in her pyjamas, smoking) were distributed to those attending. 'SW' stated that she had agreed to have photos of herself doing her professional work taken and published, but she felt these photos were a significant breach of her privacy.

An internal review by Forests NSW found that 'SW' had been wronged and an apology was issued on behalf of the officer who had taken and published the photographs. All the CDs were recovered and destroyed. However, the photographs remained on a computer of a Forests NSW officer and 'SW' felt that an external review of Forests NSW was necessary; hence, she launched the NSWADT case.

On hearing the evidence, the NSWADT agreed with 'SW' that her right to privacy had been breached. Forests NSW was ordered to give an unreserved apology from the organisation, not just on behalf of the officer, and to remove the photographs from the officer's computer. Finally, Forests NSW was ordered to review its privacy policies.

Internet use and the exchange of personal information on it exposes another interesting area in which privacy can be infringed. The extent to which Internet service providers and other Internet-based companies can track information about their users is beginning to attract the attention of law makers. Of particular concern is the widespread use of Internet 'cookies'.

INTERNET COOKIES

An Internet cookie is a small text file that is sent from a website's server to the computer of a person viewing the website. In most cases the cookie contains a special code that acts as a unique identifier for that visitor's computer. The code allows the server to detect every time that computer logs on to that site or other sites for which the server is responsible.

Cookies are mostly used to create an information database about the habits of Internet users, thus allowing for customised advertising to be directed to the user. Most Internet browsers are configured in such a way that they automatically allow cookies to be downloaded without notifying the user.

Cookies impact on the privacy of individuals; for example, if a user was to enter personal information onto a website (such as a free email service or a free weather update service) then cookies may allow that person's name, email address or perhaps even their actual address and their Internet activities to be matched.

Impacts of gene and DNA technology

Gene technology raises a number of important issues for individuals; in particular, the potential for a new form of discrimination: that of gene discrimination. This can occur when an individual's genetic information is used in a discriminatory manner; for example, to determine access to health or life insurance. The use of this technology in employment also creates the potential for discrimination. There are also serious privacy issues raised by the technology.

GENETIC TESTING IN THE WORKPLACE

Many employers now conduct a range of tests on job applicants as part of their recruitment process. These tests typically include standard medical fitness checks and psychological tests to assess a person's suitability for the physical and mental demands of a particular job.

The legality of such tests has been tested in the courts. In cases where it has been found that the test is used to determine a physical or mental trait essential for the position, testing is allowed. For example, in the case *X v. Commonwealth* (1999) 200 CLR 177, the High Court ruled that a soldier who was tested for AIDS and found to be positive could be legitimately dismissed from the Australian Army because it was essential that the soldier could 'bleed safely'. However, genetic testing is different. It is used to show that someone has a greater chance of contracting a disease or condition rather than actually having it.

At present the use of genetic testing of employees by employers in Australia is not widespread. However, as technology in this area expands and testing becomes simpler and more accurate, the possibility of wider use is very real.

This raises significant ethical as well as legal questions to do with discrimination. This is particularly the case where testing may be done to determine a person's predisposition to a particular disorder, and this may be used to deny a person a position. For example, a genetic test may indicate a person has a greater chance of developing a mental illness, so an employer may decide not to offer this person a promotional position because of concerns about the impact of such an illness on the person's performance (should they go onto develop the illness).

At present, anti-discrimination and occupational health and safety legislation regulates the use of medical and psychological testing of employees. However, there is no specific legislation that regulates the use of genetic testing and the subsequent workplace discrimination that may result. This is an important area of law reform for the future.

Genetic technology also raises important ethical questions. If an individual in the future is forced to submit to genetic testing to gain life insurance, for example, do they have the right to 'not know'? This is the notion that an individual may not wish to know that they have a greater chance of contracting a certain illness. This is particularly important for illnesses that have no known treatment or cure. In such a case, an individual may be denied life insurance on the grounds that they have a

higher than average likelihood of suffering a type of illness because of their genetic makeup. It does not mean they will contract the disease, just that they are more likely to; but the psychological harm done by this knowledge may be profound.

A 'GENETIC UNDERCLASS'

In the science fiction film *Gattaca*, all members of society undergo genetic testing to determine their suitability for different jobs. People deemed to have a predisposition to genetic diseases are denied employment in more highly valued jobs and instead do less-valued jobs.

Many civil libertarians and ethicists fear that the situation portrayed in this work of fiction could one day become reality. Genetic testing could result in people who have not yet developed (and who may never develop) illnesses being denied employment, insurance and other rights. Thus a new social underclass of poor, social welfare-dependent individuals may develop.

This potential use for genetic testing has led to calls for new legislation and the reform of existing legislation to either regulate or outlaw such testing.

Point to ponder

The classic science fiction film *Gattaca*, made in 1997, deals with gene discrimination. Could it be predicting our future?

The acceptance of DNA technology as reliable evidence by the court system has raised some interesting issues in relation to the right to refuse to submit to a DNA test. For example, in family law DNA testing is now widely used to determine matters of paternity (the identity of the biological father of a child).

CASE LAW *G v. H* (1994) 181 CLR 387

In this family law case, 'G' was disputing the fact that he was the father of child for which 'H' was seeking support. 'G' was asked to submit to a DNA test that would establish whether he was the biological father of the child. 'G' refused and the court ruled that he was the father.

On appeal to the High Court, the court ruled that in a case where the person whom the evidence identifies as being most likely to have fathered the child refuses to submit to a DNA test, then an inference that they are the father can be made. The Court argued that because DNA testing is very reliable it is just and fair to take the view that if a person refuses to take the test, it is likely that he is the father.

Similarly, the use of DNA technology in criminal cases has raised some concerns. The most that DNA testing can generally show is that an individual was at the scene of the crime. Some lawyers have become increasingly concerned that juries are being influenced by the 'power' of DNA evidence at the expense of other evidence. While the case *G v. H* (1994) 181 CLR 387 is a family law matter, several lawyers have pointed to the potential for similar issues to arise in criminal law matters. For example, will an expectation arise that the accused in a criminal matter must prove they were *not* at the scene of a crime by submitting to a DNA test? If so, how would this expectation sit with the long-held legal principles of the right to silence and the presumption of innocence?

REVIEW

1. Describe the issues associated with the use of CCTV.
2. Outline the key features of the CCTV guidelines developed by the New South Wales Government.
3. What is an Internet 'cookie'?
4. Explain how Internet cookies could be seen as an invasion of privacy.
5. Outline the potential impacts of gene technology on individuals.
6. Explain the term 'genetic underclass'.

LAW IN ACTION

1 Write an extended response analysing the impact of technology on privacy. Be sure to include specific examples in support of your arguments.
2 Review the case *SW v. Forests NSW* [2006] NSWADT 74 on page 212 and complete the following activities:
   a Outline the facts of the case.
   b Describe the concerns held by 'SW'.
   c Explain the ruling of the Administrative Decisions Tribunal.
   d Do you agree with this ruling? Justify your response.
3 Should the operators of a website be forced to alert users that the site installs an Internet cookie onto their computer? Justify your response.
4 The law allows for employers to conduct medical and psychological tests on employees. Is it reasonable therefore for employers to use genetic testing? In your response, consider:
   a the accuracy of genetic testing
   b the purpose of the testing
   c what the testing shows.
5 As a class, discuss whether an individual's right not to know whether they have a genetic predisposition to an illness is greater than the right of an insurance company to use such testing as a part of their decision making in whether to grant a person insurance.
6 Review the case *G v. H* (1994) 181 CLR 387 and then complete the following activities:
   a Outline the facts of this case.
   b Explain the impact of this case on important legal principles.

13.3 Legal implications

Technological change has numerous legal implications. Most importantly, advances in technology often require new laws to be created. However, the speed of technological change is such that new legislation usually lags behind. Consequently, **common law** – laws created through the decisions of judges – is often the first to respond. As shown in the case below, existing laws can sometimes be applied to a different situation that has been created by new technology. In this case, existing industrial relations laws were used to deal with a situation that was emerging due to the growth of new technologies. Eventually **statute law** will be amended or new laws created to deal with the technological changes.

The Internet and the greater use of electronic communication is just one technological advance that has resulted in a considerable legislative response. For example the *Broadcasting Services Amendment (Online Services) Act 1999* (Cwlth) was created to give the Australian Broadcasting Authority powers to force Australian-based Internet service providers to regulate controlled materials such as pornography.

COMMON LAW **The body of law created by judges.**

STATUTE LAW **The body of law created by parliaments.**

CASE LAW *Municipal, Administrative, Clerical and Services Union v. Ansett Australia* [2000] FCA 441

In 1998 a manager at Ansett Australia was dismissed after using the company's email system to distribute union information about upcoming wage negotiations. During the negotiations Ansett had agreed that information about the negotiations would be distributed to employees via email.

The Union took the company before the Federal Court on behalf of the employee arguing that she had been wrongfully dismissed. Ansett argued that she was dismissed because of her wrongful use of the company's email system in breach of company policy.

The Court found that the company had unfairly dismissed the employee. It found that the real reason for her dismissal was her union activism rather than the alleged misuse of the email system.

Point to ponder

Tracking surveillance technology uses an electronic device to monitor geographical locations and movements.

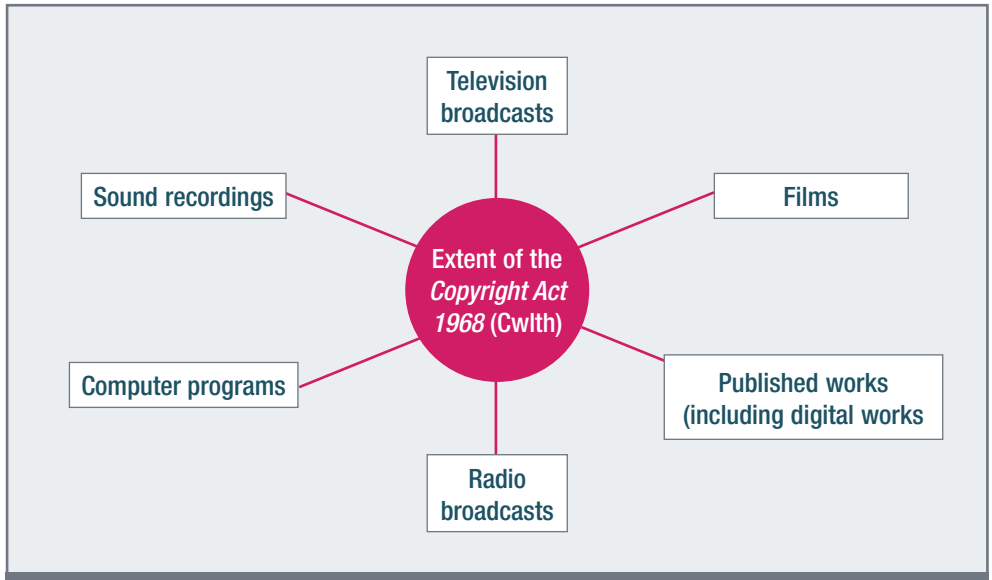
The *Workplace Surveillance Act 2005* (NSW)

In recent years there have been growing concerns about the potential for employers to use surveillance technology to infringe the rights of their employees. The *Workplace Surveillance Act 2005* (NSW) requires employers to protect the right to privacy of their employees. This Act replaced the *Workplace Video Surveillance Act 1998* (NSW), which had only referred to camera surveillance. This gives an indication of the advances in surveillance technology over only a few years. Important requirements of the Act include:

- Employers are prohibited from using surveillance of their employees except where the employees have been given prior notice. This applies to camera surveillance, surveillance of computer use (including downloads and uploads) and tracking surveillance technology.
- The prohibition on surveillance extends beyond the workplace to any place where an employee is working.
- Surveillance of change rooms, toilets and showers in a workplace is forbidden, regardless of whether prior notice has been given.
- There are restrictions and regulations on employers from blocking emails and Internet access of employees. The Act specifically ensures that employers cannot block access to content relating to industrial matters. For example, an employer cannot stop an employee receiving or sending emails relating to trade union matters.

Copyright legislation

Copyright is the right of a creator to ensure that their original work is not copied by others without their permission. The figure below summarises the range of things covered by the *Copyright Act 1968* (Cwlth).



Extent of the *Copyright Act 1968* (Cwlth)

Technology has had a significant impact on copyright laws in Australia. For example, when the Copyright Act was developed, the Internet did not even exist. However, through the development of case law and amendments to the Act, the law has gradually evolved to cover a wider range of materials. Technology has also made it more challenging for individuals and organisations to protect their copyright. For example, music file-sharing sites and the ability to use small recording devices to make pirate copies of films and music both present challenges to copyright protection. However, the law has responded to these challenges and gradually, through both case law and statute law, copyright is being re-established. For example, in *Australian Performing Rights Association Ltd v. Telstra Corporation Ltd* [1995] 31 IPR 289, Telstra was ordered to pay the Association for the use of music recordings it was using when Telstra customers were placed on hold.

The following cases demonstrate the way that copyright law is now being used for many ideas, products and materials that were not even thought of when the Act was originally written.

CASE LAW *Computer Edge Pty Ltd v. Apple Computer Inc.* (1986) 161 CLR 171

This case took place when computer technology was still at an early stage of development. The case was one of the first in Australia to deal with copyright and computer technology. Computer Edge had imported a computer to compete with a top-selling computer that Apple was selling in Australia: the Apple II. Apple Computer Inc. argued that copies of their programs were being used in the computer chips of the imported product, and that this breached their copyright.

The Court ruled that the codes in the chips were not subject to copyright as they were electrical impulses. However, the written codes that were used to make the chips did constitute a literary work and were therefore covered by copyright. Thus Apple was successful.

CASE LAW *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* [2005] FCA 1242

This case that was heard in the Federal Court related to the Kazaa Internet sharing site. This site, owned and operated by Sharman License Holdings, was available worldwide and allowed users to share materials, mostly copyright-protected music files.

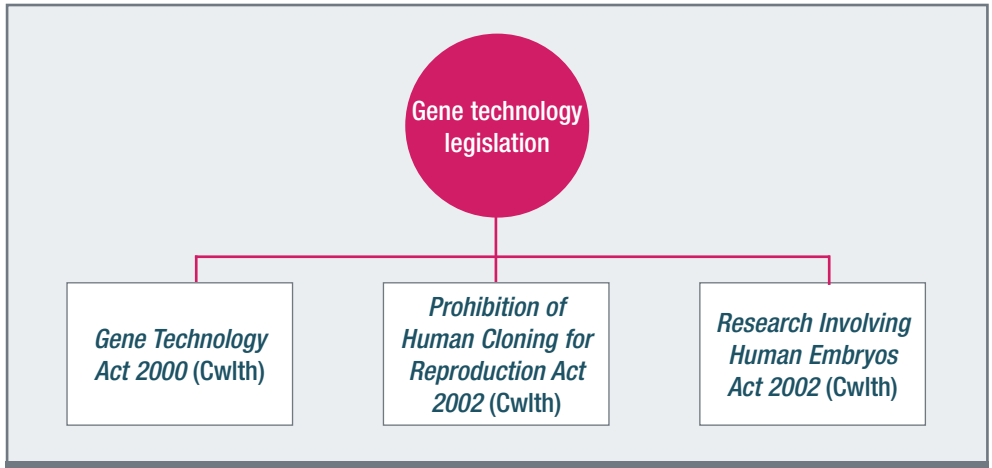
Thirty parties joined in this case against Sharman, led by Universal Music. They claimed that the Kazaa site breached their copyright rights by allowing people to download music, movies and other files without paying for them. Kazaa claimed their site did not authorise individual users to breach copyright laws.

The plaintiffs (Universal Music) argued that Kazaa was aware that many people were using the site to share files in disregard of copyright and no action was taken by Kazaa to stop them.

The court found that the Kazaa site was in breach of the *Copyright Act 1968* (Cwlth). An immediate injunction was granted ordering the site to be suspended until Kazaa took actions to ensure that file-sharing would not include files that were subject to copyright.

Legislation relating to gene and DNA technology

The ethical and legal debates relating to gene technology that were discussed earlier have resulted in a considerable legislative response.



Commonwealth legislation responding to gene technology

The *Gene Technology Act 2000* (Cwlth)

The *Gene Technology Act 2000* (Cwlth) was established to ensure that individuals or organisations that use gene technology are appropriately licensed. It makes it a criminal offence to create or trade genetically modified organisms without a licence. Licences are issued by the Gene Technology Regulator.

Prohibition of human cloning

The *Prohibition of Human Cloning for Reproduction Act 2002* (Cwlth) was established following considerable ethical debate about the use of human embryos in certain medical procedures. The intent of the Act is to criminalise any activity that seeks to create human embryos for the purpose of cloning. The Act makes a range of medical procedures and technologies illegal, with penalties of up to 15 years' imprisonment, including:

- placing the embryo of a cloned human in the body of a human or animal
- importing or exporting a human clone
- making a human embryo through fertilising a human egg with human sperm outside the body of a woman, unless the person's intention is to achieve a pregnancy (this ensures that *in vitro* fertility treatment (IVF) remains legal)
- creating an embryo from the genetic material of more than two people
- growing a human embryo outside of the body of a woman for more than 14 days
- altering the genetic program of a embryo, where such an alteration would be passed on to descendants of the embryo
- engaging in commercial trade of human embryos, sperm or eggs.

Research involving the *Human Embryos Act 2002* (Cwlth)

This Act was created in response to concerns about the potential to grow human embryos for the purpose of conducting genetic experiments on them or for training purposes. In addition, the Act also deals with the use of excess embryos and eggs that are created during reproductive treatments such as IVF. The Embryo Research Licensing Committee was created by the Act to licence individuals and organisations that conduct research in this area. It provides for significant criminal penalties, including imprisonment, for breaches of the Act.

In response to the growth in genetic technology the Commonwealth has passed numerous statutes to regulate the technology.

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LEGAL ISSUES ARISING OUT OF DNA EVIDENCE

As discussed earlier, DNA evidence in now commonly used in many areas of the law. When DNA evidence is used in criminal matters, where a person's freedom is at risk, some important legal questions have been raised. Of particular concern is the notion that juries see DNA evidence as irrefutable (that is, definite). This has raised some concerns amongst lawyers about the power of this evidence to unfairly influence a jury.

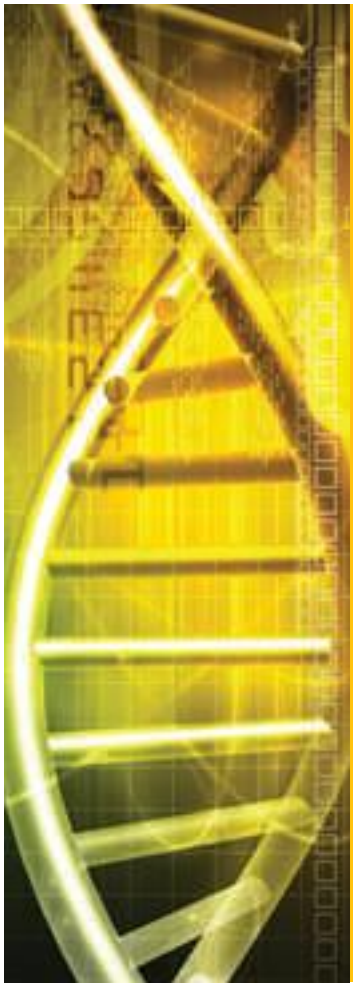
It is impossible to tamper with an individual's DNA. For example, criminals cannot alter or disguise their own DNA. However, the way DNA is collected at a crime scene and the procedures put in place during the testing of samples for DNA are not foolproof. Evidence can, for example, become contaminated with the DNA of another person. In one well-known case from the United States (*People of the State of New York v. Joseph Castro* (County of Bronx: Criminal Term Pt. 28, Indictment No. 1508 of 1987), 1989), in which a mother and child were stabbed to death, there appeared to be significant DNA evidence against the accused. However, after considerable evidence from leading scientists the judge dismissed the evidence, as the laboratory where the DNA tests were conducted had not followed correct procedures for ensuring the samples were free from contamination.

Issues also arise when cutting-edge technology is used in cases. This was demonstrated by a case from the early 1990s heard in the Victorian Supreme Court: *R v. Lucas* (1992) 55 A Crim R 361; [1992] 2 VR 109. In the case the prosecution relied on new techniques to test DNA from blood smears that were taken from the walls of a garage where a murder had taken place. There was considerable debate amongst scientists about the technique and there were concerns that the jury would not have the expertise to understand the arguments. Justice Hampel, who was presiding

over the case, ruled that where there is dispute within the scientific community, evidence developed from the disputed techniques should not be used in cases. This principle still applies now.

It must also be remembered that DNA in itself does not show that a person committed a crime; instead, it places them at the place where a crime was committed. In sexual assault cases, DNA evidence is very commonly used as prosecution evidence. Some defence lawyers have expressed concerns that this evidence is presented in such a way that it demonstrates that sexual assault has taken place. However, they argue it only demonstrates that the accused had sex with the person.

Sex is in itself, of course, not a crime; it only becomes a crime when the sex is not consensual. There is no way for DNA evidence to demonstrate whether consent was or was not given, and hence other evidence must also be used by the prosecution to show this.



REVIEW

1. Explain why the law is always responding to technological change.
2. What is the purpose of the *Workplace Surveillance Act 2005* (NSW)?
3. Outline the restrictions placed on employers and their use of surveillance by the Workplace Surveillance Act.
4. Describe the extent of copyright legislation in Australia.
5. Why was the case *Computer Edge Pty Ltd v. Apple Computer Inc.* (1986) 161 CLR 171 so important to copyright laws in Australia?
6. Outline the main features of legislation relating to gene technology.

LAW IN ACTION

1. Review the case *Municipal, Administrative, Clerical and Services Union v. Ansett Australia* [2000] FCA 441 and complete the following activities:
   - **a** Outline the reasons for the dismissal of the employee.
   - **b** Explain the ruling of the Court.
2. Examine the case *Universal Music Australia Pty Ltd v. Sharman License Holdings* [2005] FCA 1242 and complete the following activities:
   - **a** Outline the facts of this case.
   - **b** What was the ruling of the Federal Court?
   - **c** Explain why the Court came to this ruling.
3. Working in small groups, review the legislation relating to gene technology that is outlined on page 218. Is this legislation appropriate? Should other things be added or taken out of the legislation? Justify your response.
4. Summarise the key issues associated with the use of DNA evidence. You may wish to use a graphic organiser, such as a mind map, to do this.
5. Analyse the advantages and disadvantages of the use of DNA evidence in court cases.

13.4 Difficulties with enforcing rights and future directions

Technology has transformed society. It has helped to improve living standards and health outcomes and has expanded human understanding. However, technology has created challenges for individuals and organisations in terms of enforcing their rights. Some of the issues are described below.

Enforcing intellectual property rights

When a person or organisation creates something new, such as a new design for a car, a song, a movie script or a textbook, they own the words, drawing or musical score. This ownership is known as 'intellectual property' and is protected by copyright legislation. When someone else wishes to use all or part of something that is the intellectual property of another, they must ask permission and usually pay a fee. As demonstrated by some of the cases discussed earlier in this chapter, technology is making it increasingly easy to steal the intellectual property of others. For example, file-sharing sites have made it very difficult for musicians and recording companies to protect their intellectual property rights.

Enforcing the right to privacy

As we have seen throughout this chapter, technology has a considerable impact on the ability of individuals to protect their privacy. Digital databases have the potential to store vast amounts of personal data. Recording technologies, such as CCTV, also mean that privacy can be invaded.

Equality of access

While technology has greatly improved life outcomes for many people, it has created some interesting questions relating to access. For example, many modern medical treatments can cost vast sums of money. The question is: should everyone in society have the right to these technologies, or only those that can afford it?

Modern medical technology, such as this MRI machine, is very expensive. Should everyone have the right to use this technology, or only those who can afford it?

Furthermore, is it fair that some will have better access to technology than others? For example, Australians who live in the capital cities currently have far greater access to broadband and the latest G4 (4th generation) mobile phone technologies than those Australians living in regional areas.

The role of law reform

The speed with which technology is advancing is a constant problem for the law. It is practically impossible to predict technological advances and their implications. Hence the law is always reactive – that is, dealing with the changes after they have happened. For this reason there is often a lag between the emergence of new technologies and the development of laws to regulate and control their use. The long delay in developing a legal response to the emergence of file-sharing sites on the Internet is just one such example.

In Australia the existence of common law has helped to reduce the impact of this delay in legislative change. As a result of common law, a judge has the power to examine a case and, if needed, create a law that will bring about a just outcome. This principle has been applied to several of the cases discussed earlier in this chapter. While common law creates this flexibility, it lacks the certainty and clarity that comes with statute law. Hence there will always be a need to reform statutory law so that it keeps up with technological change.

All legal jurisdictions in Australia have agencies for law reform. In New South Wales this is the New South Wales Law Reform Commission and at a federal level it is the Australian Law Reform Commission. These agencies play a very important role in assisting parliaments to amend the law to deal with technological changes. The role of these agencies is to conduct research into specific areas of the law and then to advise parliament on possible amendments that should be made.

For example, in 2005 the Australian Law Reform Commission along with the Australian Health Ethics Committee released a special report on genetic privacy and discrimination: *Essentially Yours: The Protection of Human Genetic Information in Australia*. Many of the recommendations of this report have since been incorporated into law and policy.

One of the 144 recommendations was that the government should establish a special committee to deal with human genetic technology. The Human Genetics Commission of Australia (HGCA) has since been established. The HGCA regulates the way that genetic information is obtained, stored and used in areas such as employment, insurance and medicine. Many of the recommendations from this report have since been adopted by countries around the world.

SOCIAL STANDARDS

Effective laws are those that reflect the society for which the laws are made. The standards of societies are not fixed; they constantly change and evolve. One of the key functions of law reform, therefore, is to ensure that the law reflects the expectations and standards of society at a given point in time.

Law reform is relatively simple where there is a clear indication from society about the standards they expect. However, in many issues, particularly those involving medical technologies, there is often no consensus within society.

For example, there has been considerable debate about the use of gene technology. On one side of the debate are those who argue that such technologies are dangerous and, in the wrong hands, may result in human cloning. Some see the technology as immoral. These arguments are often based around strongly held religious beliefs that these technologies interfere with the wishes of God. The contrary view is that gene technologies have the power to transform the lives of people who suffer from debilitating illnesses. For example, Michael J Fox, Hollywood movie actor and a sufferer from Parkinson's disease, has been a vocal advocate for law reform to allow greater use of gene technology. Such diverse and passionately held views have made law reform in this area very challenging and complex.

PRIVACY LAW REFORM NEEDED

Another recent report from the Australian Law Reform Commission dealt with the impact of technology on privacy. Released in 2008, the report is titled *For Your Information: Australian Law and Practice*. The findings of the report demonstrate the influence that technological change can have on the law.

The report called for major reform of the *Privacy Act 1968* (Cwlth), even though at the time it was only 40 years old. The President of the ALRC noted at the release of the report that at the time the Privacy Act was introduced, supercomputers, the Internet, mobile phones, digital cameras, social networking sites and many other technologies did not exist.

The Australian Law Reform Commission has found that advances in technology, such as the ability to store and transfer vast amounts of personal data, require reform of the Privacy Act.

Technology has meant that the world is metaphorically a much smaller place. This has brought great advantages in terms of trade and economic development. However, it has also meant that criminal activities have become increasingly internationalised and this will require reform of international law and cooperation between nations in the future.

For example, a crime gang operating in Nigeria can use the Internet to target victims of their frauds anywhere in the world where a person has Internet access. Dealing with such international crime (sometimes referred to as trans-boundary crime) is extremely difficult. Assume that a person in New South Wales is targeted by one of these gangs. They may go to the New South Wales Police for help but the police have no jurisdiction in Nigeria. Consequently one very important area of law reform in the future is greater international cooperation between police forces. This is partly achieved through **Interpol**, an international agency that assists in dealing with crimes that extend across international borders (see page 224 for more detail).

INTERPOL The official name of the International Criminal Police Organization.

The potential for greater cooperation between police forces worldwide has been seen in the way that police forces around the world have combined forces to deal with child pornography on the Internet. Groups of paedophiles have used the Internet to exchange child pornography. This terrible crime has been very hard to track as these paedophile rings can include individuals in many countries.

One of the most famous cases revolved around a group of paedophiles known as the Wonderland Club. The group had members in United States, Germany, Australia and Great Britain. More than fifteen separate police forces combined their investigations and simultaneously each force raided the houses of paedophiles within their jurisdictions. As a result of this cooperation dozens of paedophiles were convicted for their crimes.

INTERPOL

Interpol is the largest international police organisation in the world. Created in 1923, it has 187 member countries. Its main function is to facilitate cooperation between police forces.

Interpol plays a crucial role in limiting international crime, which has become even more important as technology has created more opportunities for international crime. It does this work through:

- hosting a global police communications network that allows police to contact colleagues in other countries about criminal matters. This is especially useful when a criminal flees one country to another
- hosting a global criminal database that police forces around the world can access in order to gain intelligence about criminal activities
- providing training and support services to police forces around the world.

In November 2008 Thai police succeeded in convicting Christopher Neil, a Canadian, who had been suspected of sexually assaulting children and posting photographs of the assaults on the Internet. Neil was arrested by the Thai police after Interpol had posted information about his activities through their global communication network just 11 days previously. Neil had used sophisticated computer software to distort his face on the images of the assaults he had recorded and posted on child pornography sites. German police had accessed these sites and the images were sent to computer experts who were able to break the distortion to reveal Neil's face, which was then posted on the network.

Interpol is devoting considerable effort to technology crimes. For example, since 2000 Interpol has hosted a database to keep track of international credit card fraud. This database is now an essential tool in dealing with credit card fraud, where criminals may be operating in countries on the other side of the world from their victims.

Another important role of Interpol is to provide advice and assistance in order to facilitate law reform. The organisation hosts numerous conferences and produces reports to help agencies deal with the changing nature of crime and other legal issues. For example, in 2008 a large international conference was held in Canada on the issue of intellectual property crimes and how to better deal with them.

REVIEW

1 Outline the issues technology creates for enforcing intellectual property rights.
2 Explain how technology may impact on equal access rights.
3 Describe the complexities that technology creates for law reform.
4 What is the role of law reform agencies?
5 Outline the main areas for law reform in the area of privacy law.
6 What is Interpol?
7 Outline how Interpol helps to deal with crime that stretches across international borders.

LAW IN ACTION

1 Use specific examples to describe the role of Australian law reform agencies in reforming laws relating to technology.
2 'Social expectations around technology and the law make law reform in this area challenging.' Assess the validity of this statement.

CHAPTER SUMMARY

The rate of technological change in the last three decades years has been remarkable. Mobile phones, digital cameras the Internet, and email were not available 25 years ago, and music CDs were still 'new' technology. These changes have transformed our society but have also created a number of important issues for the legal system.

The Internet by its nature is unregulated and this has created new opportunities for criminals and those seeking to do wrong. This is further complicated by the fact that international boundaries are to a great extent meaningless when it comes to the Internet. The Internet has also allowed a proliferation of other forms of file sharing. People can share digital files either in an open system, where anyone can access them, or in a restricted way that allows access only to certain people. However, this technology also poses risks to copyright. When a person makes a product it is subject to copyright; that is, another person cannot copy it without permission from the original producer.

Often referred to as 'big brother' technology, surveillance technology has expanded considerably in recent years. Used incorrectly, surveillance technology poses a risk to the right of individuals to privacy.

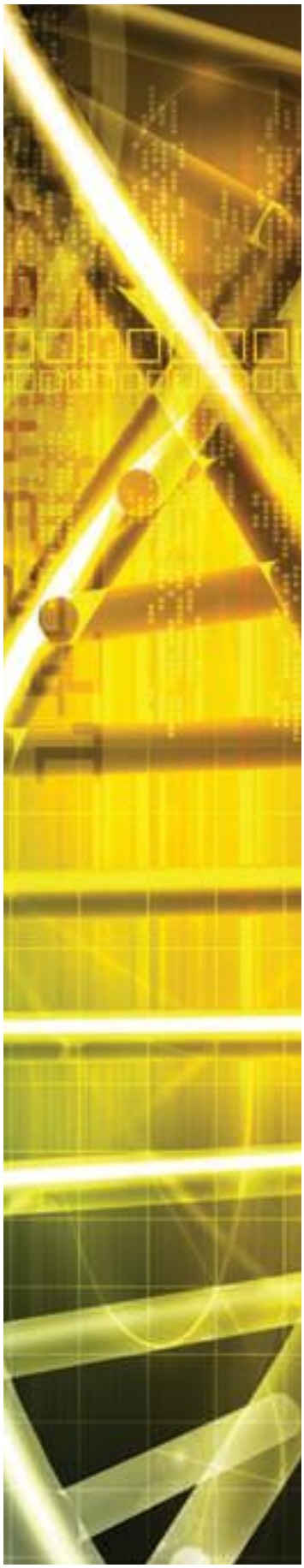
With the exception of identical twins, the DNA (deoxyribonucleic acid of every human being is unique; it contains the genetic program for that individual. This DNA can be extracted to give a genetic 'fingerprint' for an individual. Gene technology is also revolutionising medicine and this has raised considerable legal, ethical and moral debate; in particular, over the use of human embryos to grow human stem cells by which a range of diseases can be treated.

At present the use of genetic testing of employees by employers in Australia is not widespread. However, as technology in this area expands and testing becomes simpler and more accurate, the possibility of wider use is very real. The use of such tests raises significant ethical as well as legal questions around discrimination.

DNA technology is also widely used in criminal cases and this has raised some concerns. The most that DNA testing can generally show is that an individual was at the scene of the crime. Some lawyers have become increasingly concerned that juries are being influenced by the 'power' of DNA evidence at the expense of other evidence.

The speed of technological change is such that the law is usually slow in responding to changes. For example, when the *Copyright Act 1968* (Cwlth) was developed, the Internet did not even exist; but gradually through case law and amendments to the Act, it has evolved to cover a wider range of materials. Initially common law may fill the void until statute law can be created.

Key issues that need to be considered in reforming the law in regards to technology include: the right to individual privacy, the need to protect intellectual property rights and the issues of equal access.



MULTIPLE-CHOICE QUESTIONS

1 What is an Internet 'cookie'?

- **A** A way to share files between Internet users
- **B** A small file that tracks the way users make use of a website
- **C** A computer file that blocks a user's access to a particular site
- **D** A special program that protects computer systems from hacking

2 Alex enjoys using Internet chat rooms. After arguing with his neighbour over loud music, Alex places information on a chat room in which he states his neighbour is a criminal who is dealing in drugs and abuses members of his family. None of what Alex has written is true. What consequences might Alex face?

- **A** He may be sued for breaking the *Privacy Act 1988* (Cwlth).
- **B** Nothing; there are no laws relating to the Internet.
- **C** His neighbour may take legal action against Alex for defamation.
- **D** His neighbour may call the police and Alex could be charged with a criminal offence.

3 A television station uses footage of a car crash that was recorded from the news bulletin of a rival station without permission. Which Act of Parliament prohibits this?

- **A** The Privacy Act
- **B** The Copyright Act
- **C** The Intellectual Property Act
- **D** The Broadcasting Act

4 Which of the following statements best describes the use of genetic testing in the workplace?

- **A** It is now widely used by employers.
- **B** It may breach anti-discrimination legislation.
- **C** It is banned by special legislation that outlaws its use.
- **D** It is allowed if an employer shares the information with their employee.

5 What is a 'genetic underclass'?

- **A** A type of DNA testing that is used in criminal cases
- **B** People who have been created by genetic manipulation
- **C** People who face disadvantage because of their predisposition to a genetic illness
- **D** Scientists who break the law by continuing to do research into human cloning

6 Jack is accused of stealing jewellery from a store. Police use DNA technology at the crime scene and find a strand of hair that they match to Jack. How should a jury interpret this evidence?

- **A** Jack committed the crime.
- **B** Jack was in the store at some point in the past.
- **C** They should disregard it as DNA evidence is very unreliable.
- **D** They should consult with another expert to double-check the laboratory results.

7 Under what conditions does the *Workplace Surveillance Act 2005* (NSW) allow employers to use surveillance on their employees?

- **A** When they have advised their employees
- **B** When they have gained permission from the police
- **C** When they suspect that their employees are stealing from them
- **D** When their employees are involved in handling large sums of cash

8 What is the role of the Gene Technology Regulator?

- **A** To prosecute scientists who are developing human cloning technology
- **B** To promote genetic research within the Australian scientific community
- **C** To advise the government on reforms that may be needed to the law as a result of gene technology
- **D** To licence individuals and organisations that create and trade in genetically modified organisms

9 Sarah is a well-known pop singer who has recently released a new single. A website offers her single free of charge to their users without Sarah's knowledge. Which of Sarah's rights have been damaged by the actions of the website operators?

- **A** Privacy rights
- **B** Intellectual property rights
- **C** Defamation rights
- **D** Common-law rights

10 What is the role of the Australian Law Reform Commission?

- **A** To hear appeals from federal courts
- **B** To prepare cases against those accused of misusing gene technology
- **C** To research areas of law and advise the federal parliament on areas of the law that may need changing
- **D** To survey the public about their views in relation to cases that have caused considerable controversy

SHORT-ANSWER QUESTIONS

1 Outline the major technological advances that pose issues for the law.

2 Define 'intellectual property rights'.

3 Describe how the law has responded to the emergence of surveillance technology.

4 Describe the legal issues posed by gene technology.

5 Explain how technology can undermine the right to privacy.

6 Explain the need for law reform in regards to technology.

7 Analyse the impact of DNA technology on criminal law.

8 Analyse the effect of technology on copyright.

9 Assess the effectiveness of the law in responding to the changes brought about by technology.

10 Assess the extent to which technology impacts on the individual and their rights.

Law in practice

PART 3

Percentage of course time: 30%

PRINCIPAL FOCUS

Students investigate topics that examine how the law operates in practice.

Themes and challenges incorporated throughout this topic:

- The relationship between justice, law and society
- The the development and reform of law as a reflection of society
- The importance of the rule of law
- The responsiveness of the legal system in dealing with issues
- The effectiveness of legal mechanisms for achieving justice for individuals and society

FOCUS OUTCOMES

P1 identifies and applies legal concepts and terminology
P2 describes the key features of Australian and international law
P3 describes the operation of domestic and international legal systems
P4 discusses the effectiveness of the legal system in addressing issues
P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change
P7 evaluates the effectiveness of the law in achieving justice
P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents
P9 communicates legal information using well-structured responses

CHAPTER 14

Women: Status under the law and key issues

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

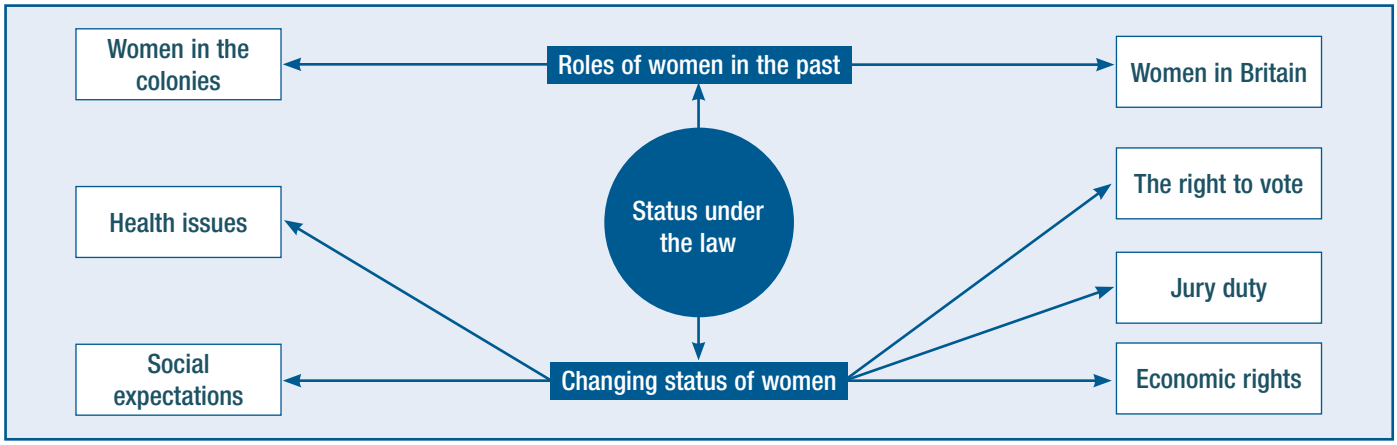
P7 evaluates the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

Students investigate the status of women and key legal issues affecting women.



SUMMARY OF CASE LAW

Ex parte H. V. McKay (1907) 2 CAR 1 (the *Harvester* case)
Jex-Blake v. Senatus of the University of Edinburgh (1893) 11 MacPh. 784
R v. D. J. Johns (1992), unreported, SCSA
Rural Workers Union and the South Australian United Labourers' Union v. Mildura Branch Australian Dried Fruits Association (1912) 6 CAR

SUMMARY OF LEGISLATION

De Facto Relationships Act 1984 (NSW)
Jury Act 1977 (NSW)
Married Persons (Property and Torts) Act 1901 (NSW)
Married Persons (Equality of Status) Act 1996 (NSW)
Married Women's Property Act 1893 (NSW)
Property (Relationships) Legislation Amendment Act 1999 (NSW)
Women's Legal Status Act 1918 (NSW)

14.1 Status of women under the law

Australian law has reflected the status of women in Anglo-Celtic culture. Today there are women in Australia from widely diverse cultural backgrounds and the law has a role in ensuring the safety, freedom, security and equality of opportunity for them all. As the status of women varies from culture to culture and changes over time, the law has had to adapt and evolve in order to fulfil its role.

Women in Australia today reflect diverse cultural backgrounds.

Status of women under British law

Modern Australian law began its existence as British law, applying to 18th- and 19th-century women in their traditional roles. The social and political values of 19th-century Britain and Australia generally did not provide an opportunity for women to be active in public life, to have a career, to own property, to make economic decisions for themselves or to exert any substantial control over decision making in their lives. Many women did not actively seek to change this situation, because they believed, or at least accepted, the social values of their time.

The primary role of a woman in the 18th and 19th centuries was that of domestic carer. She provided services such as child-rearing and housekeeping, and support for her husband or father, who was considered the sole breadwinner and head of the household, and other males such as adult sons who may also have contributed.

Women were seen as property

Women were seen as the property of a male patriarchal figure. Single women were bound to the wishes of their fathers and, sometimes, their brothers. Marriage changed this slightly in that the woman became the property of the husband, rather than the father.

The husband had legal rights of sexual consortium and a wife was expected to be available to meet all the demands of her husband, even if they were against her will.

Although laws regarding consortium have changed to a great extent, recent cases show that the values of some sections of our society remain unchanged.

CASE LAW *R v. D. J. Johns* (1992), unreported, SCSA

Mrs Johns alleged that in April 1990 her husband forced her to have sexual intercourse with him. Mr Johns was alleged to have used violence to make his wife consent to his request. Mrs Johns claimed that she tried to push her husband off her on several occasions and also that she was fearful of what he might do to her because he had been drinking.

The Court needed to consider whether Mrs Johns had consented to having sexual intercourse with her husband. If so, they needed to decide what elements are necessary to prove such consent did exist.

In summing up the case for the jury, Justice Bollen made the following statements:

'There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing the mind, and consenting.'

The jury in the case found the husband not guilty of sexual assault. However, on appeal the 'not guilty' verdict was overturned.

It is interesting to note that although Justice Bollen's comments about 'rougher than usual handling' have been taken out of context, they indicate to some extent the views held by some members of the judiciary. Many social commentators believe that Justice Bollen's comments reflect a **patriarchal** belief about women in marriages, a view that still perceives women to be the property of their husbands.

PATRIARCHAL SOCIETY **One where men and their views dominate.**

Women were not allowed to own property

Upon marriage, a woman gave up most of her rights and possessions to her husband, as married women were not allowed to own property. The husband became the overseer of his wife's affairs and property. Even upon betrothal or engagement, the future husband could control the property of or any gifts made to his future wife. Upon the death of her spouse, a wife could lose all of her property unless the husband had willed it to her prior to his death. There was no legal obligation for a husband to provide for the maintenance and support of his wife.

Women were denied access to public life

A married woman was seen as one entity (***unito caro***, or 'one flesh') with her husband. Women were not recognised as individuals. Since women were not considered to be 'persons', by legal definition they were not entitled to vote. A woman's husband would act as her agent through the voting rights that he had.

During the 1800s some women sought to gain higher education, entrance to professions and appointment to public office. In the same way in which women were denied the right to vote, because they were not considered to be persons, access was denied to them or made very difficult in these other fields. For example, in the 1860s Sophia Jex-Blake wanted to study and practise medicine. Her enrolment into the University of Edinburgh was accepted on several conditions, including that she and other women would study in separate classes from the men. Jex-Blake passed all of her classes, but some professors refused to teach women in some of the subjects. Consequently, Jex-Blake and the other women were unable to complete their degrees, which meant that they were unable to practise medicine.

Jex-Blake and the other women initiated action against the university (*Jex-Blake v. Senatus of the University of Edinburgh* (1893) 11 MacPh. 784), asking it to provide the necessary subjects for their degrees. In reply, the university stated that its charter referred to 'students or persons' and it had interpreted this over time

UNITO CARO **Meaning 'one flesh', this was a legal concept that meant that a woman ceased to be an individual once married.**

to mean male persons. In effect, it was saying that women were not persons. The women's challenge was unsuccessful, and women continued to be excluded from tertiary studies.

Women in Australia and the law

When the First Fleet arrived at Sydney Cove on 26 January 1788, 191 female convicts set foot on Australian soil. The convict women ranged in ages from 13 to 82, with the majority being in their twenties. Most of the women had been servants, milliners, dairymaids and dressmakers who had been transported for various crimes such as petty theft, robbery and receiving, and vagrancy. These were lesser crimes than those of their male counterparts. There is evidence to suggest that women were convicted of lesser offences and transported to prepare for the establishment of the colony.

The first European women in Australia arrived as convicts.

Once released, these women provided female partners for the released male convicts. Women convicts were assigned as servants to free settlers. Some were treated well, others suffered greatly at the hands of their masters.

Any convict women who could not be assigned due to age, sickness, pregnancy or a lack of skills were sent to the 'female factories' at Parramatta, outside Hobart Town and in Launceston. These institutions were prisons and the women were given sewing and laundry to do – hard labour for them and a source of revenue for the government.

Marriage was an advantage to convict women because they were automatically assigned to their husbands. However, the women were in a tenuous position as their husbands could have their wives recommitted to the female factories.

Some convict women were successful and one such example is Mary Reibey (1777–1855) who became a very wealthy businesswoman. She married an Irish merchant after she had been in New South Wales for a couple of years. Together they built up a big business as traders and landowners. After his death, she took over the running of the fleet of ships, warehouses and farms.

As convicts in the newly settled colony of New South Wales, women had fewer rights than male convicts. Although there were no strict legal provisions that directly excluded women from being granted land, Governor Macquarie refused to do so. When Miss Eliza Walsh applied for a grant of land from the Crown in 1821, she was told that she was unable to be granted land because it was contrary to the regulations. Upon further petitioning by Miss Walsh, she discovered that all persons with adequate capital were eligible to be granted land. This included women. It was, in fact, the decision of Governor Macquarie that denied women access to land grants. The belief in the colony was that women were generally dependent on a male figure, whether their father or husband, and would not be able to run a farm on their own.

As well as convict women, a small number of women came to the colony as free settlers. Life was hard for women in early Australia. A woman had to be wife and mother in times when inadequate medical knowledge about difficulties in childbirth, infant diseases, nutrition and good health practices meant that many children did not reach adulthood. Early colonial women cooked on open fireplaces, gathered wood as fuel, washed clothing in the nearest stream, helped their husbands in the fields and lived very isolated lives.

If a woman's husband died or deserted her she was often left in desperate circumstances, as a husband's property did not automatically go to his wife. Finding work was difficult for women. They were often discriminated against and worked in extremely poor conditions, with limited opportunities and unequal pay.

Colonial women's work, besides the unpaid essential labour of child rearing, cooking and housework, was also often connected with using their domestic and business skills in occupations such as shopkeeping or running inns and boarding houses. Some women worked as dressmakers, milliners, cooks, school mistresses, nurses and laundresses. Many women also worked as prostitutes.

Working women generally came from working-class backgrounds. Young, single, working-class women went into domestic service where they lived hard, restricted lives at the mercy of their mistresses. Single lower-middle-class women worked as governesses. They were paid very little and worked long hours. Middle-class women managed large households, servants, bookkeeping and even entire farming properties. Women of higher social class were not permitted to work and had even fewer rights than their working-class counterparts. It was even more difficult for these women to express their views if these were contrary to those of their husbands. Support of the husband's views was paramount. Independence did not exist for many of these women.

While women in Australia were denied many of the rights of men, Australian women enjoyed better rights sooner than women in many other countries. Australian women gained the right to vote in 1902, but Indigenous women were denied this right until 1962. Like Sophia Jex-Blake, Australian Ada Evans sought to gain a university degree. She completed a degree in law in 1902 but it was not until the passing of the *Women's Legal Status Act 1918* (NSW) that women were allowed to practise law. Today women enrolled in universities now outnumber men and more than 40 per cent of university lecturers are women.

In the years following World War II, Australian women entered the workforce in ever-greater numbers. However, women continued to earn considerably less than men for doing the same work until 1972, when the Fair Pay case was heard (this is discussed in greater detail later in the chapter).

REVIEW

1 Describe the traditional roles of women in our society.
2 Explain the impact of marriage on the rights of women in the past.
3 What is meant by *unito caro*?
4 Explain what the implications of *unito caro* were in regards to women and their property.

LAW IN ACTION

1 Historically, to what extent were women treated as second-class citizens?
2 Has society changed in the way it treats women? Explain your answer.
3 Take on the role of a person living in 1823 and consider the following scenario. Then complete the activities that follow.

Jane is the only child of a wealthy landowner. She is fast approaching 21 years of age and her parents are concerned that if she does not marry soon, she will be too old and miss her opportunity.

They arrange for her marriage to Henry, who is the son of the local baker. He is poor and sees this as his opportunity to acquire wealth quickly.

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a Why does Henry see this marriage as an opportunity for financial gain?
b How will Jane be affected by the marriage?

4 Review the case *R v. D. J. Johns* (1992) and complete the following activities:
a What information did the judge use to make his decision?
b How would the ruling in this case compare with a ruling that may have been made 200 years ago when women were considered to be the property of men?

14.2 Issues arising from the changing status of women

Point to ponder

The famous novelist, Charles Dickens, wrote vividly about the terrible conditions faced by workers in 19th-century English factories.

Many social changes have occurred over time that have allowed women to gain the same rights that men have had for many years. The Industrial Revolution in the late 18th and early 19th centuries changed the work patterns of the past. Cottage-based production could not compete with the factories, so workers had to abandon their cottage industries and work outside the home. Working-class women began working in the dangerous and dirty factories of England for small supplementary incomes. Working outside the home helped women to become aware of their unequal treatment. 'Equality consciousness' (the belief that women should be treated in a manner similar to men) began to attract many followers throughout Europe, reflecting a change in the social attitudes to women in their public and private lives.

Over the last 200 years women have won many of the rights that men have enjoyed for so long. Today many of the values and legal rules that bound women to domesticity have disappeared. The legal system has changed many of the inequities that denied women rights equal to those of men. Women now have increased educational and occupational access, they have gained a higher profile in public life and they are able to act in commercial matters.

The right to vote

SUFFRAGE The right to vote.

'**Suffrage**' means the right to vote. In Britain, in the first two decades of this century, Emmeline Pankhurst and her two daughters led a political campaign called the 'suffragette movement', which aimed to gain the right to vote for women. They lobbied parliament, disrupted government meetings, undertook hunger strikes, and organised rallies and public meetings to gain support for their cause. At the time this was radical behaviour, yet they drew a large following and increasing public support. In 1918 women over 28 years were granted the right to vote in the United Kingdom. In 1928 this was extended to all women over 21 years, in line with the rights that their male counterparts enjoyed.

In Australia the suffragettes were ahead of their British sisters. The right to vote was first granted to women in South Australia in 1894. By 1902 all non-Indigenous Australian women had been granted the right to vote in Commonwealth elections and by 1908 non-Indigenous women in all states had the right to vote in state elections. Some social commentators of the time perceived that women were granted the right to vote, not because there was a belief that they were equal as people, but rather because they could help win elections for public figures. Nonetheless, women achieved a milestone in gaining the right to vote, and hence gained some voice in public matters.

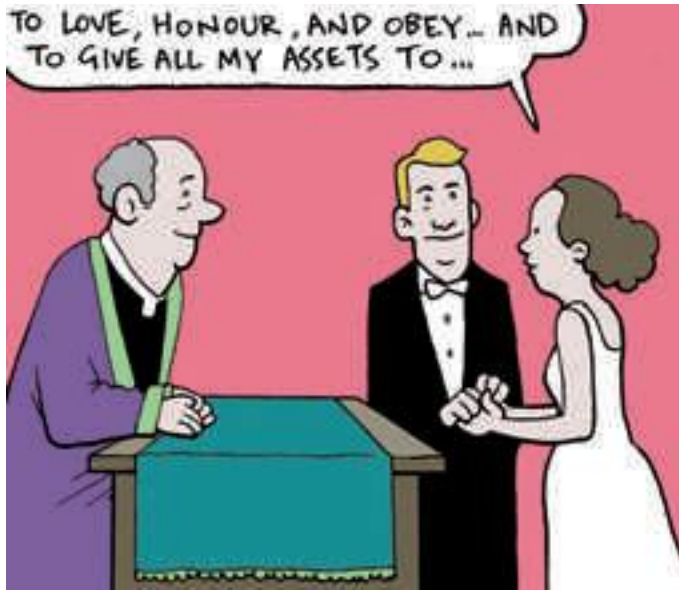
Australian suffragettes won the right to vote in federal elections in 1902 and in all state elections by 1908.

Jury duty

As women were not considered persons in a legal sense, and could not own property until the turn of the century, they were not permitted to sit on juries. It was not until 1947 that women in New South Wales were legally able to sit on juries. This legal entitlement did not confer obligation, rather an available legal option if women so wished. They were not included on jury rolls until 1968, and it was not until the passing of the *Jury Act 1977* (NSW) that women were required to be available for jury duty – as men had always been.

Economic rights

Women's economic rights depended greatly on whether they were married or unmarried, and their social status. If a woman was married, her position was subservient to that of her husband. The husband provided the income and shelter for his wife and family. Upon marriage a woman could not retain control over any property she had prior to the marriage. Indeed, under common law a man and his wife were *unito caro*, 'one entity'. The wife's livelihood, property and indeed legal existence merged into that of her husband. A woman could not enter into a contract without her husband's signed authority. Marriage was therefore socially and economically important to a woman.



Previous laws meant that once a woman married all financial control was given over to the husband.

Unmarried women of high social status could not earn an income, as working for a living was only available to women of the lower classes. Unmarried women therefore relied on the support of relatives and were seen as recipients of charity rather than fulfilling any useful purpose.

In New South Wales, the right to enter into contracts was granted by the *Married Women's Property Act 1893*, and the right to sue and be sued was granted under the *Married Persons (Property and Torts) Act 1901*. (This Act has now been absorbed into as the *Married Persons (Equality of Status) Act 1996* (NSW).) This gave married women considerable rights in relation to property and separate income. Before these Acts, the ownership of any property that a woman owned would transfer upon marriage to her husband, who would then exercise control over it. A woman could have dealings in property or any related income only through her husband.

Today, any individual with the financial means can obtain property. A couple buying a home will usually do so together, sharing the ownership of the property.

PROPERTY (RELATIONSHIPS) LEGISLATION AMENDMENT ACT 1999 (NSW)

The *Property (Relationships) Legislation Amendment Act 1999* (NSW) amended the *De Facto Relationships Act 1984* (NSW). This Act endeavours to 'make provision with respect to the rights and obligations of persons in certain domestic relationships'. It applies to people who had previously not been protected financially under the law. The Act covers property and inheritance rights for couples of the same sex so that their rights are comparable with other heterosexual couples. Same-sex couples living in a de facto relationship for two years now have access to the District Court of New South Wales for the purpose of property proceedings and seeking financial maintenance. Issues such as probate rights when one of the same-sex partners dies intestate are covered.

Previously, same-sex couples had rights in respect to the common law in the Supreme Court of New South Wales. The Act attempts to make such litigation easier to achieve as matters should now be simplified.

Other domestic relationships can be regarded as coming within the scope of the Act. A relationship between child and parent living together for domestic support and care can be classed as a family relationship. Even unpaid domestic and personal carers and siblings who live together can now make relationship claims.

The claimants must satisfy certain criteria:

- The relationship has to be in existence for not less than two years or there has to be a child of the relationship.
- The person making the claim needs to have made a substantial contribution without receiving compensation.
- Proceedings must be commenced before the expiration of two years after the end of the domestic relationship, or leave must be sought.
- The claim has to be connected with New South Wales.

The Act allows for domestic relationship agreements and termination agreements to be entered into by two persons who are not married. The Act examines the effect of death of a party in such a domestic relationship. The Act further covers domestic violence and harassment by allowing for the granting of injunctions.

A vital aspect of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) is the legal protection it affords women and their children, regardless of marital status. Both women and children were once punished and ostracised if the mother was unmarried when the child was born. Today marital status is irrelevant and all women and all children are protected equally.

Women's paid work

As a result of industrialisation women's paid work changed. Women's work, however, was downgraded and kept separate from men's. Women's work was classed as only temporary, and they were paid much less for their efforts. A woman's true vocation was considered to be that of wife and mother. Such social stereotyping gave males apprenticeships, entry to trade guilds and better wages than women.

CASE LAW ***Ex parte HV McKay*** (the *Harvester* case) 2 CAR 1 (1907)

This case, which has become known as 'the *Harvester* case', is famous because in handing down his judgment Justice Higgins developed the concept of a basic wage, based on what was considered sufficient for a man to keep a wife and three children housed and fed.

The case itself centred around the validity of federal industrial laws that were designed to ensure that workers received fair and reasonable wages. The owner of the Harvester Company, Hugh Victor McKay, argued that his company should receive compensation from the government as his workers were already fairly paid.

Justice Higgins decided to establish what was to be considered a fair wage. This judgment only examined the wages of men and disregarded the fact that in some instances women were responsible for the financial maintenance of a family. At the same time the female wage was fixed at a maximum of 54 per cent of the male wage. In fact, women were left without a basic wage until 1950. Some women did earn an income through writing, but they were few in number and the income was meagre.

Another important case in regards to fair pay was the 'fruit pickers' case' – *Rural Workers Union and the South Australian United Labourers' Union v. Mildura Branch Australian Dried Fruits Association* (1912) 6 CAR 6. This case, also heard by Justice Higgins, established the difference between male and female wages. The needs of a woman worker were judged to be those of a single woman, while a man's wages (whether married or not) were set according to the married male basic wage. Women working in what were deemed 'female' occupations received lower minimum rates than those in 'male' occupations (such as fruit pickers).

Today women, on average, still earn less than their male counterparts. In 2008, according to the Australian Bureau of Statistics, women in full-time employment were earning on average $1004 a week compared to full-time male average weekly earning of $1190. This represents a ratio of 84.4 per cent.

The Australian Bureau of Statistics' Survey of Employment Arrangements, Retirement and Superannuation found in 2008 that 'employed women are more likely than men to be working without paid leave entitlement and are more likely to be working without superannuation coverage. According to census data, by 2006 the labour force participation rate among women aged 15 years and over was 58 per cent, and yet despite changing attitudes, women's work today is still underpaid and undervalued. There is an 'imbalance of superannuation payments of men and women and [a] lack of women in executive positions. Both are reasons for concern.'

At present women expect to be granted equal pay for equal work, to have equal promotion opportunities and to be assisted financially as they stop work to give birth and to raise children.

Social expectations

Attitudes about what roles women should fulfil in society change over time. The advertisement below from 1947 illustrates the expectations placed on women at this time. The change in social expectation for women from then to now is remarkable.

An advertisement for popular cookware from 1947

A 21st-century woman is likely to look upon such an expectation as quaint, condescending and out of touch with reality. In Australia today women expect to be treated as equal to men and to have equal opportunities to be educated, to participate in society and to have a satisfying and fairly-paid career. The law has evolved to match these expectations and to promote and support them.

Health issues

Women have become active in promoting health issues, both those that apply specifically to women and those that apply to all people. This includes supporting the development of preventative measures in the form of public health education and vaccines. The issue of teenage binge drinking and, in particular, female binge drinking has been a recent target of the federal government, as result of information coming from the 2007 National Drug Strategy Household Survey, which highlighted a disturbing pattern of alcohol consumption by Australian teenage girls.

The survey found that:

- girls aged between 12 and 15 years were three times as likely as teenage boys the same age to consume alcohol at least once a week
- almost twice as many girls aged 14–19 as boys were consuming alcohol at a level that had a high risk of long-term harm
- teenage girls were more likely than their male counterparts to have tried marijuana, amphetamines and cocaine.

The federal government's response to this survey will be examined in Chapter 15.

REVIEW

1 What is meant by 'suffrage'?
2 Explain why it was important for women to gain suffrage.
3 List the different rights that women have gained in the past 150 years.
4 What changes have occurred in 'women's work'?
5 Name the types of industries and occupations in which women have usually worked.
6 Describe the differences between male and female employment in the past.

LAW IN ACTION

1 Write an extended response analysing the changes in the position of women over the last 150 years.
2 Prepare a table showing the effectiveness and ineffectiveness of the law in addressing the issues faced by women over the past 150 years.
3 Working in small groups, discuss how group members perceive the roles of women and men today. How are these views similar and/or different to those that existed in the 1950s?
4 Conduct an interview with an older person, such as a grandparent, about the changes in regards to the status of women they have witnessed in their lifetime. Prepare a short presentation to give to the rest of the class about your findings.

CHAPTER SUMMARY

It was British law that was first used as a basis for Australian law. British law reflected the traditional roles of women in British society and reinforced the lack of status and power that women experienced in relationships with family members and employers.

Women were regarded as the property of a male, whether father, husband or brother. A woman was not given the legal opportunity to be financially independent. Women were not allowed to own property, nor could they participate in public life.

The fact that women were denied a public life meant they were largely hidden both from representation and public discourse. This is clearly seen through the life of Sophia Jex-Blake, a very high-achieving female student who faced significant discrimination. She sought to enter the field of medicine in England but could not complete her studies on account of a refusal by academics. This experience of women in England was largely mirrored here in Australia. Many women had very demeaning roles and those who sought to enter into areas considered at the time 'non-traditional' faced significant discrimination. This is exemplified by the experiences of Eliza Walsh and Ada Evans, among many others.

Women in the early colony of New South Wales either came as convicts or free settlers. In both cases they lacked the legal capacity to be independent.

Since the 18th and 19th centuries, attitudes of men towards women, and of women towards themselves, have changed. This has resulted in women demanding an alteration to traditional gender roles. A consequence has been the gradual empowerment of women in the form of suffrage, jury duty, economic rights, education, social expectations and health.

MULTIPLE-CHOICE QUESTIONS

1 A married woman was seen as one entity, 'one flesh' with her husband. What is the legal term for this?

- **A** Patriarchal belief
- **B** *Unito caro*
- **C** Sexual consortium
- **D** Reality

2 Which of the following statements best describes the primary role of a woman in the 18th and 19th centuries?

- **A** Active participant in public life
- **B** Career woman
- **C** Domestic carer
- **D** Equal partner to her husband

3 What was the means by which the right to enter into a contract was granted to women in New South Wales?

- **A** The *Married Persons (Property and Torts) Act 1901* (NSW)
- **B** The Judiciary of New South Wales
- **C** The *Married Women's Property Act 1893* (NSW)
- **D** The Harvester Award 1907

4 What does 'suffrage' mean?

- **A** The right to vote
- **B** The right to marry
- **C** The right to be educated
- **D** The right to own property

5 Which of the following statements best describes the situation for women in the Australian workforce in 2008?

- **A** Women outnumbered men in the workforce.
- **B** Women have no legal protection for their rights.
- **C** Women cannot join trade unions.
- **D** Women earn less on average than the average male income.

SHORT-ANSWER QUESTIONS

1 Outline the status of women in Australia in the early years of European settlement.

2 Outline specific areas of disadvantage that women still face.

3 Describe the changes that have taken place regarding women's property rights.

4 Describe the changing economic rights of women.

5 Explain, using specific examples, how the decisions of judges have influenced the status of women.

6 Explain the impact of marriage on the status of a woman in the past.

7 Analyse the impact of changing social expectations on women.

8 Assess the effectiveness of the legal system in achieving equality for women within society.

CHAPTER 15

Women: Legal and non-legal responses

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

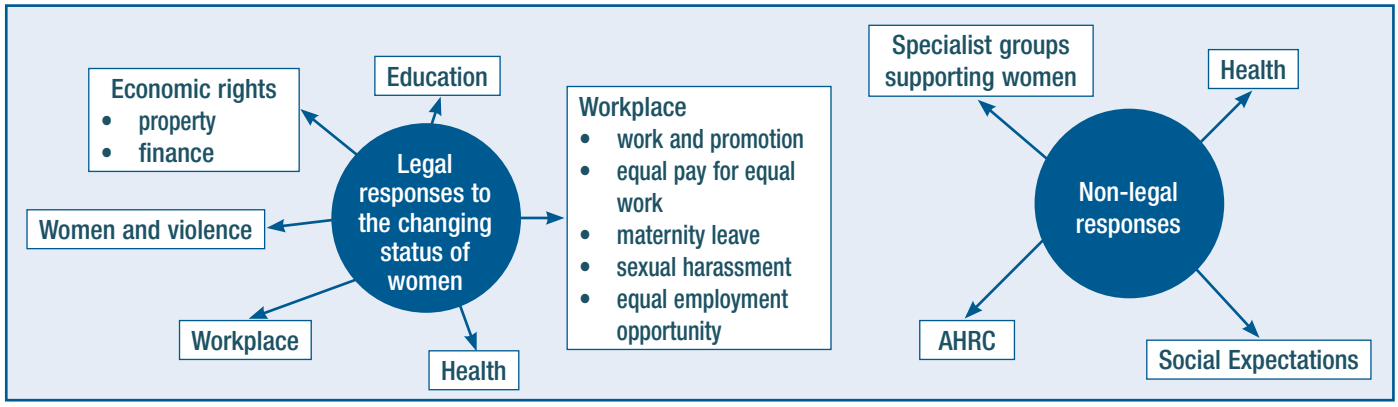
P7 evaluates the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines the legal and non-legal means adopted to address disadvantage encountered by women in the community.



SUMMARY OF CASE LAW

Equal Pay Case (1969) 127 CAR 1142
Hall & Ors v. A. Sheiban Pty Ltd & Ors [1989] EOC 92-250
Leves v. Haines [1986] EOC 92-167
Osland v. R [1998] HCA 75; (1998) 197 CLR 316
R v. Hickey (1992) 16 Crim. LJ 271
R v. Runjanjic and Kontinnen (1991) 56 SASR 114
State of New Jersey v. Kelly (1984) (USA)

SUMMARY OF LEGISLATION

Affirmative Action (Equal Opportunity for Women) Act 1986 (Cwlth)
Anti-Discrimination Act 1977 (NSW)
Crimes Act 1900 (NSW) and all amendments consolidated
Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003 (NSW)
De Facto Relationships Act 1984 (NSW)
Fair Work Act 2009 (Cwlth)
Family Law Act 1975 (Cwlth)
Family Law Reform Act 1995 (Cwlth)
Firearms Legislation (Amendment) Act 1992 (NSW)
Human Rights and Equal Opportunity Commission Act 1986 (Cwlth)
Industrial Arbitration (Female Rates) Amendment Act 1959 (NSW)
Married Persons (Property and Torts) Act 1901 (NSW)
Married Women's Property Act 1893 (NSW)
Public Instruction Act 1880 (NSW)
Sex Discrimination Act 1984 (Cwlth)
Women's Legal Status Act 1918 (NSW)
Workplace Relations Act 1996 (Cwlth)

SUMMARY OF INTERNATIONAL LAW

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)
International Labour Organization Convention on Discrimination (Employment and Occupation) (1973)

15.1 Legal responses to the changing status of women

Education

Girls have always been treated differently from boys. In the past, girls were expected to help their mother around the house while boys did the 'important' jobs, working with their father. When old enough, girls were expected to marry and start a family. Some fathers even told their daughters who to marry.

These attitudes helped influence the type of education boys and girls received. Under the provisions of the *Public Instruction Act 1880* (NSW), all children between the ages of 6 and 14 were required to attend school for a period of no less than 70 days every half-year. They were taught reading, writing and arithmetic. However, boys and girls were segregated into different classrooms and the first high schools were for either girls or boys, not both together. Even the subjects taught in these schools were different. Boys did subjects that would get them a good job. Girls did subjects that would help them become good mothers and housekeepers. Domestic science was mandatory, as it taught girls the latest ideas about cooking, cleaning, washing and child rearing. This continued until the late 1950s and early 1960s.

During the 1980s the New South Wales Government addressed the limited choice of subjects available to girls by encouraging girls to select subjects that previously had been very much male dominated, particularly the sciences. There was also an emphasis placed on changing ingrained attitudes and girls were encouraged to pursue career paths previously monopolised by male students.

The case of *Leves v. Haines* [1986] EOC 92-167 (below) shows how the Equal Opportunity Tribunal dealt with one example of inequality of access to education for girls.

Point to ponder

From the beginning of the government school system in 1848 until 1880 school attendance was not compulsory in New South Wales.

CASE LAW *Leves v. Haines* [1986] EOC 92-167

In 1986 Melinda and Rhys Leves were both in year 10 at single-sex schools. At Melinda's school the girls were offered a variety of subjects as electives that were different from those offered at her brother's school. Melinda was able to choose from subjects such as home economics, domestic science, and textiles and design.

In contrast, Rhys's school offered a range of subjects of a more technical nature, such as industrial arts, technical drawing and techniques. Also, it appeared that the boys' school offered its students greater access to computers. Melinda felt that she and fellow students were being denied access to technical 'hands on' subjects that were available to her brother at his school, and that because of this they suffered discrimination based on their gender. Further, this lack of access to technical subjects meant that she and her peers would be at a disadvantage in the workplace in comparison with their male counterparts, who had taken technical subjects during their schooling. Melinda took her complaint to the Equal Opportunity Tribunal.

The Tribunal had to decide whether Melinda was being denied access to technical subjects based on her gender. If she was denied access to certain subjects, did she suffer detriment as a result of this? Could this detriment have consequences for her in the workplace and in tertiary studies?

In hearing the matter the Tribunal was presented with evidence suggesting that access to technical subjects improved a student's spatial and visual abilities. Also, the Tribunal determined that Melinda would actually be in a less favourable position after she left school compared with those persons who had had access to technical and computer experience. Finally, the fact that she was a female played a role in determining the nature of subjects available to her. The Tribunal ruled in favour of Melinda's complaint. The Education Department appealed the decision, but the Tribunal's decision was upheld.

As in Britain, Australian women found it difficult to enter courses at university, particularly in relation to medicine. The University of Melbourne first admitted women on the same terms as men in 1876. Sydney University first admitted women

in 1882. However, the obstacles placed in the way of Ada Evans, who enrolled in the law school at Sydney University in 1899, show that achieving the qualifications necessary to follow a profession did not necessarily ensure the right to practise. When Ms Evans sought first to register as a student-at-law with the Supreme Court of New South Wales, and then, after she had completed her degree, to apply for admission to the New South Wales Bar, she was denied because, as a woman, she was not a 'person'. At the time, common law required that in order to confer special rights and privileges on women, legislation was necessary. It was not until the *Women's Legal Status Act 1918* (NSW) was passed that Ada was finally admitted to the Bar in 1921. Ada Evans died in 1947, never having practised law. Too many years had passed since her graduation in 1902 – she had lost her confidence and perhaps knowledge and enthusiasm.

A good education is, for many, the key to a successful career. Many believe that without it a person will have little or no chance of success. Traditionally, women received only a very basic education where they were taught to read and write, and to acquire a few domestically useful skills. Today, females and males are supposed to have equality of access to education and training. In schools, changes to curriculum promote the participation of female students in courses that would have been considered 'male' courses 20 years ago. During the 1980s the government in New South Wales set up many educational programs promoting girls' education. In fact, it is now considered to be discriminatory for schools not to offer a wide range of cross-gender subjects.

In terms of tertiary education, access is determined primarily on achieving a satisfactory university admission score. While no overt barriers exist, the attitudes of some parts of society still undermine equality for women. However, due to changing attitudes towards and expectations of women and their potential, participation of women in tertiary education has increased strikingly in recent years.

SEX DEGREES OF SEPARATION: MEN'S UNI DILEMMA

by Matthew Thompson

Australian women have streaked ahead of men in gaining university qualifications, says a new international survey. Nearly 40 per cent of Australian women aged between 25 and 34 have degrees, compared with less than 30 per cent of men, the findings by the Organisation for Economic Co-operation and Development reveal.

While both men and women are now more likely than ever to have degrees or higher qualifications, the steep rise in women's achievements is striking. Between 1991 and 2001, the number of men aged 25 to 34 with a university education grew from 22 per cent to 29 per cent. For women, it leapt from 24 per cent to 38 per cent, says ***Education at a Glance***, the study published in a 446-page OECD report.

Alicia Albury, 33, holds degrees in arts and law from the University of New South Wales and a masters in law management from the Australian Graduate School of Management. A solicitor with a city law firm, Ms Albury says that when she was a schoolgirl she never questioned gaining a higher education.

'It was like thinking that I would drive a car. I didn't think twice about it.'

Yet women's advance is part and parcel of the 'feminisation of education' and the increasing alienation of men, says a leading men's researcher. 'The unis' pamphlets and brochures and websites have women all over them – often with just a token man,' said Peter West, head of the University of Western Sydney's research group on men and families. Dr West, author of *What is the Matter with Boys*, says that from primary school to university, education has become 'so feminised that people don't even see it any more'.

And when it got tough, women sought help. 'I told a young woman once that she was likely to fail, and the next thing was she was out in the hall crying with three or four people seeing if she was all right and offering to help her.

When a guy has got a problem, he tends to say "Stick it up your a***", and walks out.'

In the early and mid-1990s, men stayed within one or two percentage points of women in tertiary education. But later, women left men behind, the OECD figures show.

The figures are supported by enrolment patterns at the University of NSW. In 1991, women comprised 47 per cent of law enrolments, but by 2001 made up 58 per cent, and last year 60 per cent. In medicine, female enrolments have grown from 39 per cent in 1991 to 50 per cent last year.

Yet the OECD figures are misleading, according to the feminist Eva Cox, who says women are all too often doing degrees that put them in low-paid jobs. 'Much of the growth has been in child care and nursing – but even if you look at how there's now more women doing law degrees, instead of running the [law] firms, they tend to join the public service,' said Dr Cox, who teaches social inquiry at the University of Technology, Sydney.

The director of resource analysis at the Australian Vice-Chancellors Committee, John Chan, said that more women were going to university to start with. 'There's no deliberate policy to discriminate.'

Source: *Sydney Morning Herald*, 23 September 2003

GRADUATION STORM

Percentage of 25–34-year-olds that have attained tertiary education, by gender

	1991	1995	2001
Australia			
Males	22	24	29
Females	24	25	38
M & F	23	25	34
New Zealand			
Males	21	23	26
Females	25	26	31
M & F	23	24	29
United Kingdom			
Males	19	24	30
Females	18	22	29
M & F	19	23	29
United States			
Males	29	33	36
Females	31	35	42
M & F	30	34	39

Source: OECD

Workplace

Women today expect to be able to join the workforce. Certain problems arise that specifically affect women who may be juggling alternate roles as mother or carer with a job. Women have come to expect equal pay for equal work, to be treated the same as any male employee and to be given equal opportunity for promotion. The legal response to these issues has been careful and laws continue to be amended as unfairness in practice as opposed to fairness in theory become obvious. Some of the key issues still facing women in the workplace are described overleaf.

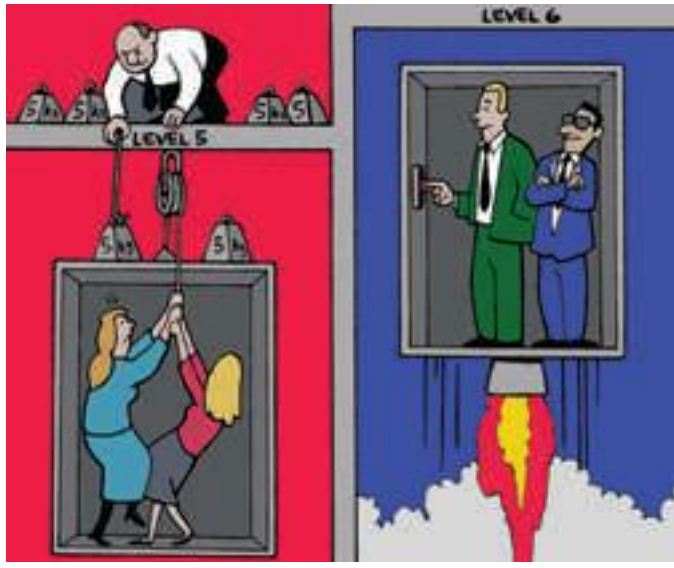
Work and promotion

Today women make up 47 per cent of the workforce. Despite the increasing levels of female participation in the workforce in Australia, the number of women promoted to higher positions where they would be able to change policy and hold positions of authority and influence is low.

Studies have shown that women hold few positions as partners in law firms and accounting firms, even though there is an increasing number of women working in these areas. Even in industries dominated by women, men often hold a disproportionate number of the promotional positions; on average, only 12 per cent of women are in such positions.

Many women complain about lack of access to promotional positions, claiming that circumstances often favour male candidates. Others believe that women do not choose to pursue promotional positions in the assertive way that men do. Women may be less likely to be as committed to their careers as men, particularly women with children, who may have different priorities.

It is said that an invisible structural barrier exists, referred to as the 'glass ceiling', which prevents women from moving past certain levels in occupations. The glass ceiling is caused by the attitudes of people in the workplace. Women are concentrated in lower-grade work with limited opportunities for training and advancement. Terms such as the glass ceiling, the 'sticky floor syndrome' and 'pink ghettos' are used to describe areas of the workplace where promotion for women is difficult to achieve.



Women still face problems in obtaining promotion to more senior positions. This is often referred to as the 'glass ceiling'.

Factors that contribute to such barriers to equality include male prejudice, male-dominated work practices and the unwillingness of organisations to take account of women's career paths.

Recommendations for change aimed at producing concrete improvements for women affected by sticky floors and glass ceilings include the introduction of career and gender awareness programs, the introduction of development plans for managerial and non-managerial women employees, the provision of appropriate training, and an examination of 'lateral' as well as conventional 'vertical' career paths.

The progression of women in the workforce from one position to the next is often prevented or disrupted. Some of the reasons that may account for the difficulty women have in being promoted are outlined below:

- Women may have interrupted careers (pregnancy and child rearing).
- Women may take time off work to look after their families.
- Employers are reluctant to train women, as they believe that they will leave the workforce to have children.
- Like some men, some women do not want promotional positions.
- Some employers with traditional views believe that women do not deal with demanding situations as well as men.
- Some clients prefer to deal with men.
- Women often have a preference for flexible hours and proximity to home to cater for children's needs.
- Often, it is men who do the interviewing.
- A woman who has an assertive, autocratic management style is seen as 'bossy' whereas this quality is seen as positive in a male.
- Sexist attitudes are still prevalent in many occupations, particularly in male-dominated fields.

If education were the only criterion, more than a third of administrative, executive and managerial positions would be held by women. In fact, they hold no more that approximately 12 per cent of the highly paid, high-status positions. Such figures generate concern for the increasing numbers of young women going on to university and graduating with high qualifications and high hopes. These young women may find employment, but promotion may evade them.

Extensive legislation has been enacted over the past 30 years endeavouring to redress the imbalance of power, opportunity and pay that has been common in the workforce. It is unlawful to prevent a person getting a job or gaining promotion solely on the grounds of their gender. An applicant who can prove that this has happened is protected by the *Anti-Discrimination Act 1977* (NSW) and the *Sex Discrimination Act 1984* (Cwlth). The aim of this legislation is to set a standard of behaviour so that no employer would consider denying someone a position because that person is male or female.

Equal pay for equal work

In the past, pay rates were seen not as a civil rights issue but as an industrial matter. The union movement has tended to address this issue in the industrial system. Traditionally, however, unions were reluctant to include women in the workforce as it was thought that this would reduce conditions and pay for male members. It was believed that women should be paid less, even if they performed the same work as men.

The *Industrial Arbitration (Female Rates) Amendment Act 1959* (NSW) applied the principle of equal pay for males and females who perform work of the same or similar nature. The legislation did not, however, apply to work usually performed by women.

In 1959 all New South Wales teachers were granted equal pay, quite a significant achievement for women teachers. The fight for equal pay for women began in earnest in the 1960s. In 1969 the Conciliation and Arbitration Commission heard the first Equal Pay **Test Case** – the *Equal Pay Case* (1969) 127 CAR 1142 – which established the basic principle that work of equal value should earn equal wages, as long as the work was not mainly performed by women. Obviously this meant that most women missed out on equal pay, as at the time most women worked in 'female' jobs. It was not until a second Equal Pay Test Case in 1972 that the Commission granted equal pay for equal work without the previous restrictions.

TEST CASE **A case that is brought for the purpose of establishing a legal principle or setting a precedent.**

The Equal Pay test case in 1969 established the basic principle that work of equal value should attract equal wages regardless of the worker's gender.

However, problems still existed, as it could be difficult for a judge or commission to agree what work was of 'equal' value. Also during times of wage restraint or recession it could be very hard to use these policies. Some factors that help to explain the differences in pay received by males and females are as follows:

- Males hold jobs that require greater degrees of training and are paid more in accordance with this.
- Females tend to work less overtime (either because of family commitments or because the jobs they have present few possibilities for overtime).
- Males tend to have uninterrupted careers, while women tend to leave and re-enter the workforce because of children.
- Males often work in industries in which over-award payments exist as part of the normal wage structure.
- Occupations dominated by professional males tend to be more lucrative in terms of fringe benefits.

Maternity leave

Maternity leave is an agreement whereby a woman can leave work to have a baby and to care for it after birth and be guaranteed that her job will be waiting for her upon her return to work. It is a necessary development in the process of enabling women to have babies as well as continuing a career. Without it a woman had to leave the workforce when pregnant and consequently was without her own income. There was also no guarantee of a job if she wished to return to work.

The second issue about maternity leave is whether or not the woman is paid while absent from work. Sections 67–85 of the *Fair Work Act 2009* (Cwlth) provide for unpaid **parental leave** only. In the public sector, women in most jobs are given between 12 and 14 weeks of paid maternity leave. In 2007 the Australian Bureau of Statistics reported that 45 per cent of female employees said they had access to some paid maternity leave and that, in 2005, 34 per cent of women used maternity leave just before the birth of their baby. In 2009, the federal government announced plans for the introduction of limited paid maternity leave.

PARENTAL LEAVE **The term used in the *Fair Work Act 2009* (Cwlth) as a substitute for 'maternity leave' because it includes time off for both parents to care for a baby.**

There is much room for improvement in the level of protection afforded to parents while they care for babies and young children. The Productivity Commission recently drafted a report entitled 'Paid parental leave: support for parents with newborn children'. The details of this report prompted the 2009 announcement.

Sexual harassment

Sexual harassment refers to any unwanted or unsolicited sexual advances or conduct in the workplace. It may take the form of unwelcome touching, making crude jokes and sexual comments, displaying pictures of naked persons, suggestive behaviour, sexual staring or leering, and making unwanted sexual propositions. Apart from the obvious forms, sexual harassment can also include making demeaning or insulting comments about gender; for example, 'You are only a woman, we can understand that you can't handle the pressure.'

The general pattern of harassment shows that it is often people in positions of power who sexually harass fellow workers. Women in the workplace often do not complain about incidents of sexual harassment because they fear losing their jobs or they feel that the behaviour is so subtle that it would be hard to identify as sexual harassment. Women also fear being blackmailed or being threatened.

The two pieces of legislation that regulate sexual harassment in the workplace are the *Sex Discrimination Act 1984* (Cwlth) and the *Anti-Discrimination Act 1977* (NSW). Both of these make it unlawful to harass any person in the workplace on the grounds of their gender or sex or in a sexual manner. Although individuals must be accountable for their own actions, it is the responsibility of employers to ensure that sexual harassment does not occur in the workplace. For example, if an employee pins up posters of naked people in a workplace, the employer is responsible for ensuring that they are taken down.

CASE LAW *Hall & Ors v. A. Sheiban Pty Ltd & Ors* [1989] EOC 92-250

In 1985 Dr Sheiban interviewed and employed Ms Reid, Ms Oliver and Ms Hall as receptionists for his medical practice. Each of these women alleged that they experienced sexual harassment while being interviewed and during their employment with the doctor.

The women claimed that during their interviews Dr Sheiban asked them personal questions related to their marital status and their sexual relations with their respective partners, and whether they were pregnant and intended to marry. Because the women were in need of employment, they answered most of the questions.

The sexual harassment continued after the interviews and took the form of comments about physical appearance, attempts to kiss the women, questions of a very personal nature and the unzipping of two of the women's uniforms to expose some cleavage. On all occasions these actions were unwanted or rejected by the women. Ms Hall finally left her job after Dr Sheiban used an element of force in trying to kiss her. A short while after this Ms Reid and Ms Oliver were dismissed from their jobs because their employer claimed that they were unsuitable employees.

The matter was reviewed the Human Rights and Equal Opportunity Commission (HREOC) – since renamed the Australian Human Rights Commission (AHRC). The Commission needed to consider first, whether the questions and gestures of Dr Sheiban, both at the interviews and during the employment period, constitute sexual harassment for Ms Reid, Ms Hall and Ms Oliver; and second, if it was harassment, whether the women were entitled to compensation.

The Commission decided that the women had suffered sexual harassment in their jobs, but not at the interview stage and compensation was denied to the women.

The women appealed the decision and the matter was then heard by the Federal Court. The judges of the Federal Court rejected the decision of the HREOC in two ways. First, they disagreed with the original decision that the women were not sexually harassed at the interviews and held that the behaviour of Dr Sheiban at the interviews did constitute sexual harassment. Second, they decided that the women were entitled to some form of compensation for the sexual harassment they suffered.

Equal employment opportunity

Discrimination that relates specifically to gender and marital status in employment and occupations is dealt with by the *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth).

This Act aims to promote the principle of equal employment opportunity (EEO) for all people. These policies are an attempt to eradicate barriers against certain groups, such as women, in the workplace. All public sector employers must develop and implement EEO principles in their workplaces. As part of their EEO plans, many organisations include affirmative action policies.

AFFIRMATIVE ACTION

Affirmative action refers to the principle of removing discrimination and promoting equal opportunity for women in the workplace. In attempting to provide women with equal access to promotional positions and employment, and generally to reduce discrimination, the *Affirmative Action (Equal Opportunity for Women) Act 1986* (Cwlth) was created.

The main features of this Act are:

- the promotion of equal opportunity for all women in employment
- the improvement of access for women to promotional positions, training and education
- the development of affirmative action strategies to eliminate forms of sex-based discrimination in the workplace
- the development and implementation of affirmative action programs in all public sector organisations, statutory authorities and workplaces with 100 or more employees
- the development of a system whereby these organisations must report annually to the Affirmative Action Agency concerning their practices.

The affirmative action program has the following eight steps, which the management of the employing body must follow. They must:

1. issue a statement to all employees notifying them that an affirmative action program is in place and operating
2. appoint an affirmative action officer in the workplace to oversee the implementation of the program
3. consult with trade unions with regard to the program
4. consult with all employees in the workplace about the program
5. collect and record statistics about the employer's employment practices
6. examine workplace practices to detect discrimination against women and any lack of equality
7. set goals for the program
8. monitor and evaluate the implementation of the program.

Employers are required to prepare and submit a report to the Director of Affirmative Action. Failure to do this results in the employer being 'named' in parliament. This has proved to be a minor sanction for many employers, who are failing to compile their reports.

Arguments for and against affirmative action

For	Against
• In most companies and businesses, males are heavily concentrated in management positions while women are in ancillary positions • Affirmative action will accelerate the move towards equality in such a situation • The whole structure of the workplace is biased towards men. Men developed the rules of the workplace, which is to their advantage; for example, until recently maternity leave was unavailable • Affirmative action could provide role models for younger women	• Women gain employment or promotion over their male counterparts simply because of their gender • Women's real achievements may be belittled • A woman who is appointed to a position may be considered to have 'got there' only through affirmative action • Sanctions for employers who do not comply with affirmative action legislation are inadequate

KEY ANTI-DISCRIMINATION LEGISLATION

Sex Discrimination Act 1984 (Cwlth)

The *Sex Discrimination Act 1984* is a federal law that upholds Australia's obligations to international law. This Act relates directly to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, and the International Labour Organization's Convention on Discrimination (Employment and Occupation) 1973. The key areas that this covers are discrimination:

- based on gender
- based on marital status
- based on pregnancy
- that denies access to educational services, accommodation, goods and services, the disposal of land and membership of registered clubs.

Any unlawful conduct that results in a complaint from the areas listed above is dealt with under the Sex Discrimination Act, as long as it falls under Commonwealth jurisdiction. Matters that fall within state jurisdiction are dealt with by state laws (see below).

Anti-Discrimination Act 1977 (NSW)

The most significant state law that acts to protect women against discrimination is the *Anti-Discrimination Act 1977* (NSW). This legislation prevents discrimination based on sex, race, marital status, homosexuality and age. Specifically, this Act states that any characteristics that pertain generally to persons of a particular sex or which can be generally attributed to a particular gender cannot be used to discriminate against an individual.

Complaints received by the Anti-Discrimination Board (2007–08)

Grounds for complaint	Number of complaints
Sex	242
Race	211
Disability	239
Other	64
Victimisation	137
Age	71
Homosexuality	31
Transgender	13
Marital status	18
Racial vilification	16
Homosexual vilification	7
Carers' responsibilities	46
Not specified	35
Total number of complaints	1144

Source: Anti-Discrimination Board (2007–08)

Anti-Discrimination Board

In 2007–08 the Anti-Discrimination Board received 1144 complaints. Approximately 21 per cent of the complaints related to discrimination based on sex.

It is clear from the information shown in the table below that various grounds for complaints apply to the treatment of women. Apart from discrimination based on sex, discrimination based on marital status is also relevant.

Health

Protection of women's health and safety is an issue of individual responsibility, supported by the government. Both federal and state governments support women through legislation, through funding for vaccines, medical care and refuges, and through policy and education campaigns. In 2008 the federal government responded to the findings of the National Drug Strategy Household Survey by almost doubling the tax on pre-mixed alcoholic drinks from $39 per litre to $67 per litre. These drinks are known as 'alcopops' or 'ready-to-drink products' (RTDs). The survey had found that teenage girls, in particular, are introduced to alcohol through RTDs. They tend to be significant consumers of these drinks and, along with young men, to engage in dangerous levels of binge drinking. The increase in tax will push the price of RTDs up by between 30 cents and $1.30 per bottle. It is expected that the federal government will raise more than $2 billion in additional

revenue from the new tax. The government, however, has argued that the tax is in response to a spike in binge drinking identified in the survey, and only affects RTDs.

The purpose of this action was to protect young people, especially young women, from the damaging effects of alcohol and is seen by the government as a preventative health measure.

Women and violence

Many changes have been instituted in an attempt to protect women from violence in the home environment. These changes include:

- the prohibition of rape in marriage in New South Wales since 1981
- the creation of anti-stalking laws
- making it easier for the victim and the police to obtain apprehended violence orders (AVOs); AVOs are given on the balance of probability, making them much easier to obtain
- the provision of greater support by the police and welfare agencies to victims of domestic violence
- the seizure of guns from a person named in an AVO
- greater powers for magistrates to make an AVO when it might conflict with existing access or contact orders.

Point to ponder

Until 1981 in New South Wales a husband could not be charged with the sexual assault of his wife.

These initiatives have been very positive and have increased the protection given to women in violent domestic relationships. However, the legal system is still criticised because it fails to prevent domestic violence from occurring, and the changes that it does put in place are often 'knee-jerk' reactions to public outcry.

Domestic violence is still a serious problem in Australian society. Traditionally, most of the victims of abuse have been women and children. Even though there has been much legislative support for reducing violence towards women, the threat of violence towards women is still high, greater in their own homes than elsewhere.

The following list explains why violence against women exists in modern Australian society:

- In the past the legal status of women was linked to the husband. Husbands controlled their wives in all aspects of life. A husband could legally have sexual intercourse with his wife without her consent.
- Women, historically, had little political influence. Due to women's legal insignificance, their rights and interests were often overlooked and domestic violence was treated lightly. In fact there was quite a social stigma attached to women associated with domestic violence and little was said or uncovered. A change in societal attitude was very much needed. Education programs and awareness programs were needed to address society's ignorance and avoidance of the problem.
- Police reluctance to intervene has always been a major problem and one that has only recently been addressed. Police have viewed domestic violence as a private matter between partners involved in a domestic relationship. Some police officers, particularly male, have even felt that the offence often was warranted or deserved. Therefore police were reluctant to lay charges and so domestic violence was indirectly sanctioned.
- This attitude has been further espoused by the gender bias evident in the judiciary, which has perhaps contributed to the low levels of reporting. This bias reinforces the need for greater community involvement in judicial appointments.

A greater number of women in senior positions is needed in the legal system and in parliament. Further, there is an obvious need to educate the judiciary and the legal profession in gender awareness and gender bias.

- Financial pressure increases stress in marriage and relationships, and this can result in frustration, which often resulted in the use of violence.
- Social conditioning of men reinforces the masculine qualities of dominance and aggressiveness. Society often accepts such acts of aggression by males as natural. Biological reasons have also been suggested; for example, that some men may find release from tension caused by unachievable goals or stress in physical action, which may even include acts of violence towards those closest to them. These men attempt to regain control of their lives by controlling vulnerable individuals, such as their wives and children.

Summary of landmark cases dealing with violence against women

Case	Outcomes
State of New Jersey v. Kelly (1984) (USA)	• Defined battered women's syndrome as a range of symptoms: 'sustained psychological and physical trauma compounded by aggravating social and economic factors' • The syndrome is not a defence in itself but may assist an accused woman who says she acted in self defence by enabling the jury to perceive her actions as reasonable, for the woman felt she was experiencing a life-threatening attack
R v. Runjanjic and Kontinnen (1991) 56 SASR 114	• First Australian case where it was ruled the evidence of battered women's syndrome is admissible • Used to support defences of duress, self defence, provocation and diminished responsibility • Raised to mitigate (reduce) a sentence when the person is found guilty of murder • Used by Department of Public Prosecutions in decisions not to bring a charge against the accused
R v. Hickey (1992) 16 Crim. LJ 271	• First New South Wales case to recognise battered women's syndrome • Hickey had taken out AVOs and was separated from her partner • When Hickey took her children to visit her partner, he became violent. Hickey then stabbed him in the chest • Hickey was acquitted after it was decided that she had acted in self-defence, as she had reason to believe the incident was life-threatening
Osland v. R [1998] HCA 75; (1998) 197 CLR 316	• First High Court decision regarding battered women's syndrome • Osland and her son were abused and tried to leave but could not obtain a bank loan without a male signature • A report was made to the police, but no action was taken to help her • After a particularly horrific incident of abuse, Osland and her son drugged the husband and dug a grave, and the son killed the husband while Osland was present • The son was acquitted on self-defence, but Osland was found guilty of murder

Legislation used to deal with violence against women

Legislation	Effect
Crimes Act 1900 (NSW)	Criminal charges apply
Crimes (Girls' Protection) Act 1910 (NSW)	Raised the age of sexual consent to 16
Crimes (Sexual Assault) Amendment Act 1981 (NSW)	Made intramarital rape a crime; Abolishes immunity for offenders
Crimes (Homicide) Amendment Act 1981 (NSW)	Allows for lesser penalties to apply to women who kill their violent husbands
Crimes (Domestic Violence) Amendment Act 1982 (NSW)	Introduced apprehended domestic violence orders (ADVOs) for the first time
Crimes (Domestic Violence) Amendment Act 1983 (NSW)	Extended application of ADVOs to cover fear of harassment or molestation, rather than physical violence
De Facto Relationships Act 1984 (NSW)	Allows *de facto* couples to apply for a *de facto* relationship injunction, although ADVOs are cheaper and easier
Crimes (Personal and Family Violence) Amendment Act 1987 (NSW)	Made ADVOs available to anyone who shares or has shared a common residence or intimate relationship or is related to an offender
Crimes (Apprehended Violence) Amendment Act 1989 (NSW)	Amended legislation to allow anyone who fears violence to apply for an order; ADVOs renamed AVOs
Firearms Legislation (Amendment) Act 1992 (NSW)	Requires police to inquire about and confiscate firearms in domestic violence situations
Crimes (Domestic Violence) Amendment Act 1993 (NSW)	Made further amendments to AVOs, such as: • police able to apply for interim AVOs over the telephone after normal working hours without notifying the offender • anyone of 16 years of age and above is able to lodge a complaint • intimidation made a separate offence
Family Law Reform Act 1995 (Cwlth)	Gave greater recognition to the effects of domestic violence and the effects on children exposed to it
Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003 (NSW)	Forbids those accused of a sexual assault and who choose to represent themselves from cross-examining the victim; thereby protects the victim from a confrontation with the accused

Marriage

The traditional roles of women in society were determined by their marital and social status. In many ways the law did not protect the rights of women. Women were seen as homemakers and child carers, with little activity or influence in public matters. Few women had any roles that were independent of men and family life (see Chapter 14).

Husbands had a legal right to 'consortium' until finally an amendment to the *Crimes Act 1900* (NSW) abolished immunity for rape within marriage. The *Crimes (Sexual Assault) Amendment Act 1981* (NSW) addressed the increasing recognition that many females were still in positions where they were being intimidated by

men, particularly within the home. Further, the *Crimes (Homicide) Amendment Act 1981* (NSW) was introduced, which allowed for lesser penalties to be given to battered wives who had killed their violent husbands. For centuries, common law had permitted a husband to apply 'domestic chastisement' or 'correction' to his wife, in the same way he was permitted to chastise his children or apprentices under his control. However, he was never permitted at law to use 'violence'. The boundary between 'reasonable' chastisement and violence appears not to have been defined, and the prohibition against violence seemed to have been largely unenforced. Changing social attitudes and law reform have long since brought this state of affairs to an end.

Economic rights

Property

Traditionally a man gained full control of his wife's property upon marriage (see Chapter 14). Legislation has now been enacted to address this inequality. As a result of the *Married Women's Property Act 1893* (NSW) a woman could own property in her own right and enter into contracts. The *Married Persons (Property and Torts) Act 1901* (NSW) gave women the right to sue and be sued.

The equitable distribution of property was further enhanced by the *Family Law Act 1975* (Cwlth), which allowed for the non-financial contribution of women to be taken into consideration in property settlement upon dissolution of a marriage. This Act also reinforced the maintenance of dependents on dissolution of a marriage.

Not only has there been a great deal of legislative reform in the area of property, the courts have also endeavoured to determine a fair and reasonable distribution through orders that have been made.

Finance

Linked to property ownership and acquisition is the need for women to be treated equally when obtaining finance to purchase any property. Some banking institutions still continue to discriminate against women borrowers, even though this has been illegal in New South Wales since 1977. The problem lies in the fact that credit assessment was often based on particular occupations being favoured above others. Some of these occupations, such as accounting and engineering, have tended to be male dominated and so males were given preference for loans compared to occupations such as nursing and clerical duties, which are still dominated by women.

A further example of discrimination against women that has occurred in lending institutions is when women's income is assessed as a secondary income for housing loans. Lending institutions have held the belief that women would not be able to continue repayments as they may have children, thereby interrupting their time in the workforce and reducing their income. In 1990 the Anti-Discrimination Board issued guidelines for lending institutions. Lenders were requested to not ask women about their child-bearing intentions and to inform all their employees about anti-discrimination laws.

Lending institutions are now required to take into account women's earnings from part-time jobs when assessing loan applications. Credit now must be offered to husbands and wives equally.

REVIEW

1 What did the *Public Instruction Act 1880* (NSW) require children to do?
2 Explain the ways that girls have traditionally been treated differently to boys in schools.
3 Under what circumstances do women receive equal pay to men?
4 Explain what is meant by the term 'glass ceiling'.
5 Define the term 'sexual harassment'.
6 Outline the features of affirmative action.
7 Describe the key features of anti-discrimination laws in Australia and NSW.
8 Outline the government's strategy in relation to binge drinking by young women.
9 Describe the legal changes that have taken place to create more protection for women from domestic violence.
10 Explain why domestic violence remains a problem for Australian women.
11 Describe the legislative changes that have improved the status of women after marriage.

LAW IN ACTION

1 'Deepak attends an all-boys school where he studies auto-mechanics. Female students at the neighbouring girls' school often share classes with Deepak's school because it is an efficient way to share resources. Mira, from the girls' school, applies to do the auto-mechanics course and is told that she will be given a place only after the boys have made their choices. The class has spare places in it, but Mira is not offered a place.'
   a Working in small groups, discuss whether Mira has been a victim of discrimination because of her gender. Explain your response.
   b What avenues does Mira have open to her to seek redress?
2 Review the case *Leves v. Haines* [1986] EOC 92-167 on page 243 and complete the following activities:
   a Outline the facts of the case.
   b Describe the ruling of the Equal Opportunity Tribunal.
   c Do you agree with this ruling? Explain your answer.
3 Write a report describing the main issues facing women in the workplace.
4 Read the article 'Sex degrees of separation: men's uni dilemma' on page 244 and complete the following activities:
   a Outline the changes that have taken place in women's attendance at university.
   b Explain the impact of more women enrolling at university on men.
   c Outline the concerns raised about using the OECD figures.
5 Review the case *Hall & Ors v. A. Sheiban Pty Ltd & Ors* [1989] EOC 92-250 on page 249 and complete the following activities:
   a Outline the allegations made against Dr Sheiban.
   b What were the issues the Equal Opportunity Commission had to decide on?
   c Explain the ruling of the Commission and the subsequent ruling of the Federal Court.
6 Use the information on domestic violence contained on the New South Wales Attorney-General's website to prepare a report on the current status of governmental and legal responses to domestic violence.
7 Write a short report analysing the impact of significant legal cases on the way society views domestic violence.

15.2 Non-legal responses

Health responses

Women's health has been the target of federal government funding and education campaigns. Breast cancer screening for women over 50 years is free and is done to detect breast cancer in its early stages when it can be successfully treated. Pap smears are encouraged for all women and their costs are covered by Medicare. Gardasil is a vaccine used to provide immunity against two strains of the Human Papilloma Virus, which causes cervical cancer. This vaccine is free to female students in Year 8. Each of these preventative health measures is government funded and backed up by advertisements to educate women on the value of having medical check ups and receiving vaccinations.

Women's safety has been fostered by a public education campaign that ran at cinemas, on television, in magazines and on billboards until December 2007. This campaign was sponsored by the federal government and was called 'Violence against women: Australia says No'. The work of this campaign continues today through the Office for Women, which provides counsellors for victims and for men who harm women as well as training material on domestic violence to educate the public. In New South Wales there is a Violence Prevention Coordinating Unit to coordinate government policy on the prevention of domestic violence.

Log on to the Pearson Places website and follow the links the ABC's website. It has links to sites that specialise in women's health issues. Women are able to source medical advice, the latest research findings on health and learn about alternative approaches to health.

Social expectations

Time and greater awareness have resulted in expectations of gender equality in Australian society. This expectation is reflected in government policies and services. In New South Wales the government provides health services for women's general health, mental health, family planning and reproductive health. It provides income and financial advice, and legal assistance in the form of the Women's Legal Resource Centre and Law Access New South Wales. There are support services for employment advice, rural and regional areas, and a Women's Counselling Service.

Women who have taken on a prominent role in Australian society have helped to bring about a change in social expectations over time. In 1933 Nancy Bird Walton became the first female pilot in Australia with a licence to carry passengers. She became a role model for women in aviation and changed social expectations. Julia Gillard and Julie Bishop have been appointed to high-ranking positions in the federal government and Opposition. Quentin Bryce is Australia's Governor-General. Marie Bashir is the Governor of New South Wales. Sharan Burrow is the leader of the ACTU. Heather Ridout is the head of the Australian Industry Group. Gail Kelly is the CEO of Westpac, one of the top jobs in corporate Australia.

Log on to the Pearson Places website and follow the links to the NSW Womens' Refuge Movement, which helps victims of domestic violence. Their website contains information and links to support for victims.

Julia Gillard made history by becoming Australia's first female Deputy Prime Minister in 2007.

Julia Gillard made history in December 2007 by becoming Australia's first female Acting Prime Minister. To mark the occasion she said: 'this is evidence that women can aspire to do anything they want. The important thing is for Australian girls growing up in this society. I think if there's one girl who looks at the TV screen over the next few days and says "Gee, I might like to do that in the future", well that's a good thing.'

Role models have a profound effect on setting standards for younger generations. In this way more and more women will fulfill their potential, in contrast to their female ancestors. Each December the media analyses the HSC results in New South Wales and emphasises the success of female candidates and their potential to contribute to Australian society. Media attention leads to public discussion, which increases awareness of women's issues.

Specialist groups supporting women

Sometimes called 'lobby groups', many specialist groups exist to promote the cause of women's equality. Lobby groups are professional public pressure groups that support a campaign or argument. Such groups may 'lobby' or pressure governments to modify the law to the group's satisfaction.

Women have always been a strong element within lobby groups, partly because many of the issues that provoke debate in today's society concern important aspects of women's lives; for example, the environment, abortion, employment, equality, children, domestic violence and the home.

Lobby groups use a variety of methods to gain media exposure or bargaining power with governments. Some use political or media connections in an attempt to sway debate; for example, refusing to buy products not made in Australia or goods that are not environmentally friendly.

Log on to the Pearson Places website and follow the links to find more information about the Commonwealth Office for Women and the NSW Office for Women's Policy.

KEY ORGANISATIONS SUPPORTING WOMEN

WOMEN'S ELECTORAL LOBBY

The Women's Electoral Lobby (WEL) in Australia is a national independent political organisation dedicated to creating a society where women's participation and potential are unrestricted, acknowledged and respected and where women and men share equally in society's responsibilities and rewards.

This national lobby organisation was founded in 1972 as a women's political lobby. WEL lobbies politicians, unions and employers. It educates many people about women's issues and seeks to change social attitudes and practices that discriminate against women.

Members of WEL come from across the political spectrum, covering a wide age range.

THE OFFICE FOR WOMEN

The Office for Women is a federal government initiative. It works to bring women's issues to the attention of Australian society and internationally in the priority areas of

- reducing violence against women
- women's equal place in society
- economic independence.

The Office also plays an important role in advising and informing the Minister for the Status of Women on significant issues facing women.

In New South Wales the Department of Premier and Cabinet has an Office for Women's Policy. This office 'provides leadership in promoting outcomes for women in New South Wales through policy development and working with other agencies.'

THE AUSTRALIAN HUMAN RIGHTS COMMISSION

The role of the Australian Human Rights Comission (AHRC) includes reviewing laws, conducting research, preparing policy advice and running community education programs on all issues of human rights. It sees 'equality between men and women [as] a principle that lies at the heart of a fair and productive society'.

Disadvantage to women has been addressed through legislation in the areas of education, workplace, health, marriage and economic rights. Legislation is a powerful means of setting standards of behaviour. Alternative methods of assisting women have been specialist groups advising and lobbying governments to introduce policies and education campaigns. More subtle changes occur as a society changes its attitude to women. Opportunities arise as a result of new social expectations that support and encourage women to achieve their potential.

REVIEW

1 How has the federal government attempted to educate the public about domestic violence?
2 What special women's services does the New South Wales Government offer?
3 Identify a lobby group focused on woman's issues and describe the cause it supports.

LAW IN ACTION

1 Conduct a class debate on the topic: 'Women have not made real progress in the workplace in the past 100 years.'
2 To what extent does gender bias exist in the culture, processes and practices of the legal system?
3 Log on to the Pearson Places website and follow the links to the Commonwealth Office for Women. Outline the aim of the Office and the issues it addresses in its quest to advance justice for women.
4 Log on to the Pearson Places website and follow the links to the Office for Women's Policy. Identify the current New South Wales Minister for Women and define the purpose of the Office.

Web Destination

CHAPTER SUMMARY

Traditionally girls were limited to a life of running a household. The education offered to girls prepared them only for this expected career. Over time, social expectations changed and females wanted the same education as that given to males. Legislation and case law began to reflect these new attitudes, and now it is an offence if a girl is denied equality of access in education and training.

The workplace has seen many changes in attitudes to women and opportunities for women in the type of job they have and how they are treated at work. Women make up nearly half of the workforce and yet most of the powerful and influential positions are held by men. A 'glass ceiling' certainly exists, hindering a woman's progress through the ranks in institutions. The rights of women in the workplace are covered by extensive legislation and there has been much development in equality of opportunity. There is now equal pay for equal work and maternity leave. Sexual harassment is an offence. Affirmative action has been a policy of the federal government since 1986 and it endeavours to redress the balance between opportunities offered to men and women at work. In New South Wales the Anti-Discrimination Board received 1144 complaints of discrimination in 2007–08.

One way that the federal government aims to protect women's health is by raising the tax on 'alcopops' in an attempt to discourage young women from drinking to excess. It also funds vaccines and medical check-ups to keep women healthy.

Domestic violence prevention is the focus of case law, legislation and education campaigns. Specialist groups exist to protect women who are victims of domestic violence.

The status of women in a marriage has changed over the past 200 years. Today women are protected by law from physical harm. Women can own their own property before, during and after a marriage.

Changes in social expectations have been a major factor in the gaining of power and influence by women. Each success leads to other women being inspired to strive towards further achievements. Over time both men and women have come to believe in social equality.

MULTIPLE-CHOICE QUESTIONS

1 In what year did Ada Evans graduate in Law from Sydney University?

A 1902

B 1907

C 1921

D 1947

2 Sexual harassment refers to unwanted sexual advances or conduct in the workplace. What type of behaviour can be characterised as sexual harassment?

A Unwelcome touching

B Making crude jokes

C Making unwanted sexual propositions

D All of the above

3 In which year did all non-Indigenous Australian women gain the right to vote in federal elections?

A 1918

B 1894

C 1928

D 1902

4 What is the 'glass ceiling'?

A The difference in wages between men and women

B The types of work available to women

C The level above which promotion is not available to women

D The number of women permitted in an organisation

5 In 1969, what did the Equal Pay case establish?

A All equal work should earn equal wages.

B It is too difficult to determine when work is equal.

C Men should earn one wage and women another.

D Equal work should earn equal wages, unless that work is normally performed by women.

SHORT-ANSWER QUESTIONS

1 Outline at least three reasons why women often have difficulty gaining promotion in the workplace.

2 Outline the concept of the 'glass ceiling'.

3 Describe the main anti-discrimination legislation that protects the rights of women.

4 Describe the process of affirmative action in relation to women.

5 Explain the impact of domestic violence on women.

6 Explain the educational disadvantages faced by women in the past.

7 Analyse the changing expectations of Australian society towards women.

8 Assess the effectiveness of laws to stop discrimination against women in the workplace.

CHAPTER 16

Women: Effectiveness of the responses

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

P7 evaluates the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines the effectiveness of legal and non-legal means adopted to address disadvantage encountered by women in the community.

SUMMARY OF CASE LAW

R v. Kottinen (SA Supreme Court) [Unreported]

SUMMARY OF LEGISLATION

Affirmative Action (Equal Opportunity for Women) Act 1986 (Cwlth)
Anti-Discrimination Act 1977 (NSW)
Anti-Discrimination Amendment (Breastfeeding) Act 2007 (NSW)
Anti-Discrimination Amendment (Carers' Responsibilities) Act 2000 (NSW)
Crimes (Girls' Protection) Act 1910 (NSW)
De Facto Relationships Act 1984 (NSW)
Family Law Act 1975 (Cwlth)
Fair Work Act 2009 (Cwlth)
Family Law Amendment Act 2000 (Cwlth)
Family Law Legislation (Superannuation) Amendment Act 2001 (Cwlth)
Family Law Reform Act 1995 (Cwlth)
Guardianship of Infants Act 1934 (NSW) (now repealed)
Jury Act 1977 (NSW)
Married Persons (Property and Torts) Act 1901 (NSW)
Married Women's Property Act 1893 (NSW)
Property (Relationships) Legislation Amendment Act 1999 (NSW)
Sex Discrimination Act 1984 (Cwlth)
Testator's Family Maintenance and Guardianship of Infants Act 1916 No 41 (NSW)
Women's Legal Status Act 1918 (NSW)
Workplace Relations Act 1996 (Cwlth)

16.1 Effectiveness of legal responses

The status of women has changed over the past 200 years. These changes are due to a shift in social expectations about the role of women in the wider community, beyond the confines of a family home. Women gaining an education and subsequently taking on careers has led to women having a new view of their own potential and men seeing women as colleagues or leaders in the workplace.

Once social expectations change, the law will respond in order to protect and reflect those changes. Hence there have been numerous legal responses to the changing status of women. Similarly, non-government bodies will support members of society who need protecting. Below is a table outlining significant events in the history of women.

Significant events in the history of women

18th century	Women had few rights in relation to work outside the home, property ownership, voting, access to education, their bodies and participation in public life
1857	Divorce becomes legally available in England, but women's access to it is still limited
1867	The first female students are allowed to enter university in Australia
1893	Women are allowed to own property and enter into contracts under the *Married Women's Property Act 1893* (NSW)
1894	The first non-Indigenous women in Australia are granted the right to vote in South Australia
1901	The right to sue and be sued is granted under the *Married Persons (Property and Torts) Act 1901* (NSW)
1902	Women are granted the right to vote in New South Wales state elections and in Commonwealth elections
1916	The *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) gives women custody over their children, but only after the children's father has died
1918	The *Women's Legal Status Act 1918* (NSW) is passed, allowing women to enter professions without being disqualified because of their gender
1920	Edith Cowan becomes the first woman to be elected to a state parliament (in Western Australia)
1921	Ada Evans is the first woman to be admitted to the Bar
1934	The *Guardianship of Infants Act 1934* (NSW) allows either parent to claim custody of their children
1943	Dame Enid Lyons is the first woman to be elected to the federal parliament
1947	Women are allowed to participate in jury duty (not compulsory)
1962	Aboriginal women and men are granted the right to vote
1972	Women are granted equal pay for work of equal value because of a decision by the Australian Conciliation and Arbitration Commission in the Equal Pay Test Case
1975	The *Family Law Act 1975* (Cwlth) recognises non-financial contributions to property within a marriage and allows the granting of 'no fault' divorces

1977	Women in New South Wales are legally compelled to be part of the jury system by the introduction of the *Jury Act 1977* (NSW)
1977	The *Anti-Discrimination Act 1977* (NSW) makes it unlawful to discriminate on various grounds – gender and marital status being of particular relevance to women
1984	The *De Facto Relationships Act 1984* (NSW) provides legal protection for couples living in de facto relationships
1984	The *Sex Discrimination Act 1984* (Cwlth) outlaws discrimination based on gender
1986	The *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cwlth) seeks to remove barriers to women being promoted in the workplace
1995	The *Family Law Reform Act 1995* (Cwlth) emphasises the duties and responsibilities of parents rather than their rights in relation to a child
1999	The *Property (Relationships) Legislation Amendment Act 1999* (NSW) addresses property and inheritance rights for same-sex couples
2001	The *Family Law Amendment Act 2000* (Cwlth) introduces a three-stage 'parental compliance regime' and establishes consequences for failing to comply with orders and other parental obligations as determined by the *Family Law Reform* Act *1995* (Cwlth)
2002	The *Family Law Legislation Amendment (Superannuation) Act 2001* (Cwlth) allows superannuation to be included in the calculation of assets during divorce
2007	The New South Wales government amends the *Anti-Discrimination Act 1997* (NSW) to ensure that no woman can be discriminated against on the grounds that she is breastfeeding
2007	Julia Gillard becomes the first female deputy Prime Minister of Australia and makes further political history as Acting Prime Minister
2008	Quentin Bryce is appointed as Australia's first female Governor-General

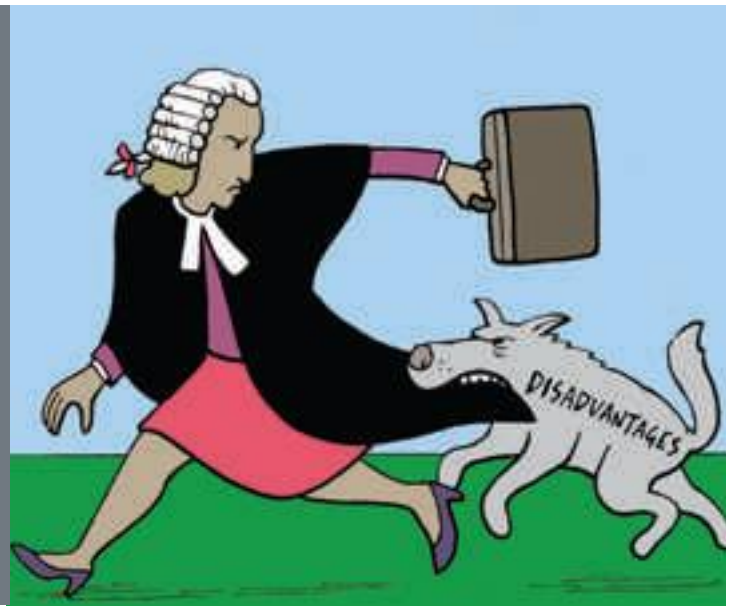
Dame Enid Lyons was the first woman elected to federal parliament in 1943.

The table on pages 263–4 is an indication of a successful response to the disadvantage encountered by women. Much progress has been made in redressing the imbalance of rights and opportunities between men and women. There remain however, areas where improvements can be made.

Gender bias

There is an inherent gender bias within the legal system, which decreases its effectiveness when dealing with issues related to women. 'Gender bias' refers to the belief that there exists unwritten language in law that favours males over females. It suggests that the law has been created by males and to a large degree excludes women and their experiences. In doing so, the legal system does not adequately deal with the needs of women because it does not understand them.

The judiciary has been predominantly male and so a male perspective influences judgments, but a slow change is occurring. Virginia Bell was appointed as a justice of the High Court of Australia in 2009. In a speech of welcome to the new appointee, Anna Katzmann SC, speaking on behalf of all barristers in New South Wales, said: 'Until recently there was only one woman on the High Court bench. Now there are three. The surge appears to be working'.



More women are entering the legal profession but they still face considerable disadvantage.

Health and violence issues

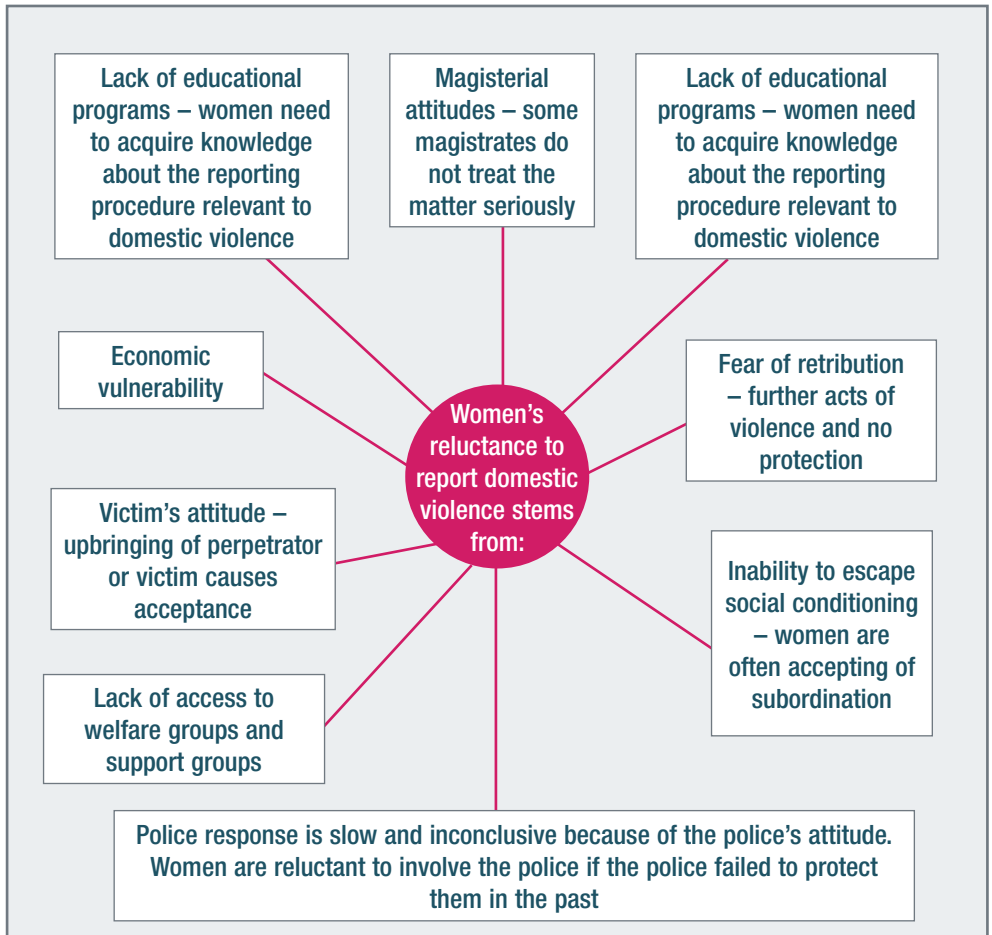
The increase in excise tax on so-called 'alcopops' by the federal government (see Chapter 14) in an attempt to curb excessive drinking of alcohol by teenagers, particularly girls, has been both criticised and supported. The Anti-Drug Foundation has issued statements in support of the policy, believing that it will help reduce the number of younger women drinking to excess.

In examining the effectiveness of the legal response to violence against women, it is necessary to look at why women are often reluctant to report domestic violence. The figure overleaf summarises the reasons the police are not being called as the first step towards protection of the victim, punishment of the offender and prevention of further instances of violence.

WOMEN'S RELUCTANCE TO REPORT DOMESTIC VIOLENCE

A number of important factors affect the willingness of some victims of domestic violence to report their abuse to the police. These factors include:

- economic vulnerability. Some women fear the financial consequences of leaving their violent partners
- response of the courts. There are concerns that some magistrates do not take domestic violence seriously. Apprehended violence orders, which are often granted by the courts, are not always well enforced. These issues are less problematic than in the past but still remain
- fear of retribution. There have been cases of women being severely assaulted and in some cases even murdered by their violent partners after they have reported assaults to the police
- inability to escape social conditioning. For some women the violence of their partners is so extreme and long-lasting that an acceptance of the violence sets in and the violent behaviour comes to be seen as normal by the victims
- police responses. Previously, domestic violence had been seen as private and personal. Police were reluctant to take action and often refused to respond at all. Fortunately police now have far better training and this is gradually helping to reduce these attitudes – but issues do persist
- lack of knowledge. Often victims of domestic violence do not have a good understanding of their rights and this limits their ability to respond. This is particularly a problem for some migrant women whose understanding of English is limited.



There are reasons why women may not report domestic violence.

Social attitudes towards domestic violence have slowly changed. The changes have taken place mostly due to the introduction of education policies and the formation of support groups. Victims of domestic violence can also seek help by requesting housing, money and counselling. Significant changes to legislation have reinforced the view that domestic violence or, in fact, any violence against women is no longer acceptable and will not be tolerated by the legal system.

Today the court system and law enforcement agencies are more aware and sensitive towards the issue of domestic violence. Both the courts and law enforcement agencies are more responsive to taking action. The courts' recognition of the 'battered women's syndrome' (see below) as a defence is a positive step towards helping victims of domestic violence.

Effectiveness of the legal system in dealing with domestic violence

Criteria for assessing effectiveness	Success of legal system
Does it correct inequality?	New laws give victims of violence greater powers to seek an AVO. They have only to establish that violence has occurred or that they are fearful that it will on the balance of probability
Is it accessible to all?	• The legal system is accessible only to those who know how to use it, although facilities do exist for non-English speakers • Sometimes fear prevents victims from using the protection available
How much does it cost?	Generally the cost of seeking an AVO is not as prohibitive as other legal actions
How quick is it?	An AVO can usually be obtained very quickly
Does it prevent the problem occurring in the future?	• Police and AVOs cannot automatically prevent domestic violence from occurring • AVOs are only given after the damage has been done • AVOs are also difficult to enforce and prove to be quite ineffective in many instances

Women who are victims of domestic violence may become the victims of spousal murder. Alternatively, continual long periods of domestic violence may lead women to acts of retaliation such as killing their partners. Often these women will suffer from battered women's syndrome. This syndrome leads women to kill their abusive partners while they are asleep or at a time when they are unable to hurt them in return. Such killings, therefore, are not regarded as self-defence, so it is difficult for these women to defend themselves against murder or manslaughter charges.

Recently the courts have accepted evidence of domestic violence and sentences can be mitigated for such situations. In South Australia, in the case *R v. Kottinen* (SA Supreme Court) [Unreported], the Court recognised battered women's syndrome constituted provocation and could therefore be used as a defence to a charge of murder. Reforms have been introduced by the legal system and welfare agencies to assist victims of domestic violence, but further reform is needed as domestic violence and violence against women is still occurring.

More legal reform is needed to protect the rights of women caught in violent situations. Police and courts need stricter and more flexible powers to apprehend and punish the perpetrators. Social responses to domestic violence also need to be further addressed and certainly more resources need to be directed towards helping victims with housing, finance and counselling.

Workplace

Conditions at work for women have improved as a result of legislation covering wages and discrimination.

The *Anti-Discrimination Amendment (Breastfeeding) Act 2007* (NSW) modified the Anti-Discrimination Act to include breastfeeding as a work-related issue. This is a positive development in conditions for women. Women have moved out from the home and into careers but, once they have children, many become caught between the two. It took social and legal upheaval to move women out of the home and to enable them to participate in the workforce. However, how does a woman juggle the competing demands of career and a baby or a young child? It is a difficult situation. Earlier solutions were to have the woman leave the workforce once they became pregnant and thus to clearly delineate roles: either at home or at work. The passing of time has resulted in changed expectations. Women are no longer compelled to choose one or the other; instead, they are attempting to do both.

Amending the Act makes it possible for a woman to take her newborn baby to work or to have someone bring the baby to her for breastfeeding. The mother's milk supply alters according to contact with the baby because the mother's hormones react to the baby's needs by changing the amount of milk produced. The relationship between mother and baby deserves respect. Equality for men and women has come far enough in modern Australia for people to put time and effort into considering how respect for the mother/child bond and keeping the mother in the workforce might be possible. The changes made to the Anti-Discrimination Act with regard to breastfeeding are one step in the search for solutions to this dilemma. The law has come down on the side of protecting breastfeeding women against others who believe that breastfeeding is for the privacy of a home only. This represents an important shift in attitude; one where women are seen as whole beings rather than simply a body.

Further changes have been made in the workplace, led by the trade unions, which enable a mother to continue working. These include allowing part-time work and job-share arrangements, whereby two people work a single full-time load and divide it up between them. Both types of flexible arrangements particularly suit women who wish to work and also have time to be with their children.

On the issue of equal pay for equal work, there has been progress. According to the Australian Bureau of Statistics, full-time adult total earnings rose by 4.4 per cent for males and 5.2 per cent for females in the twelve months to February 2008. Despite this, equal pay for men and women is still not the norm. It is common that men and women do not participate in the workforce in the same way. The laws protect women if they work as a man does. If however, anyone wishes to be flexible and take time away from full-time work to be with a child, then the system does not adequately protect them.

For example, long-service leave is calculated on a percentage of the wage earned over the past five years. It enables a person to leave work for a time and still be paid a wage and is a reward for long service. In theory it is an achievement fought hard for by trade unions. However, if a person changed from full-time to part-time work in order to accommodate a young family and subsequently applied for long-service leave, their leave payments would be calculated on the part-time wage earned immediately prior to their leave and not on the full-time wage earned over many years before that. As a result, anyone who altered their pattern of work to suit their family would lose or have reduced long-service leave payments to which others are entitled.

Similarly, superannuation benefits are calculated on wages earned. It sounds fair in theory but, as with long-service leave, if an employee changes from full-time to part-time work or takes leave to bring up children, then their wages will fall and so too will their superannuation. By linking long-service leave and superannuation to

wages earned in the immediate past, the long-term work history of an employee is lost. In practice, therefore, a woman who changes her work arrangements to cater for the needs of her family will suffer financially and this loss will impact directly on her children. It is a particularly difficult situation if the woman has no partner to support her and the children.

Today women's work is still underpaid and undervalued. Where a woman works in an historically male-dominated job the pay is higher than in a traditionally female area such as childcare, health, care of dependants, education, clerical or retail. The reality is that when a woman enters a job that is seen as being traditionally female, her ability to earn a high income is reduced.

The passage of the *Fair Work Act 2009* (Cwlth) incorporates changes to the way Australians think about the place of men and women in the workforce. Among the objectives of Fair Work Australia (the organisation that, under the Act, replaced the Australian Industrial Relations Commission) are initiatives aimed at redressing the gender pay gap by having the work women do properly valued and remunerated. This can be done by modernising the pay and classification structures in awards and agreements. The equal remuneration provisions under its predecessor, the *Workplace Relations Act 1996*, were inadequate in redressing the problem of undervaluation of work.

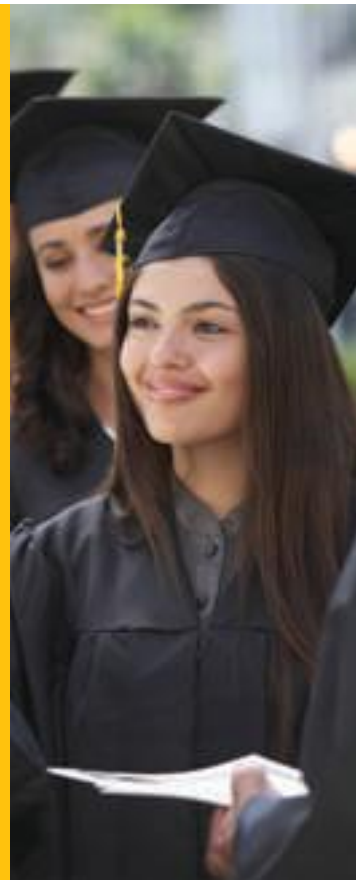
REVIEW

1 Explain why the status of women has changed in the last 100 years.
2 What is 'gender bias'?
3 Describe the impact of male gender bias on the legal system.
4 Outline some of the reasons why women can be reluctant to report domestic violence.
5 What is 'battered women's syndrome'?
6 Explain the changes to the legal system as a result of better awareness of battered women's syndrome.
7 Outline some of the legislative changes that have reduced disadvantages for women in the workplace.
8 Describe the disadvantages women still face in the workplace.

LAW IN ACTION

1 Assess the extent to which legislation has reduced the disadvantages faced by women.
2 Use the Internet and other sources to conduct research into domestic violence. A good place to start would be to log on to the Pearson Places website and follow the links to the New South Wales Bureau of Crime Statistics and Research (BOCSAR). Prepare a short report on the extent of domestic violence and on the policies in place to deal with it.

3 Take on the role of a workplace consultant. You have been asked to develop a report for the management team of a large business outlining how they can reduce the disadvantages faced by their female employees. Working in small groups, brainstorm a list of strategies a company could implement to improve working conditions for women.



16.2 Effectiveness of non-legal responses

Non-legal responses include government initiatives, specialist groups and changing social expectations, all of which combine to improve the status of women.

In New South Wales the government provides community services for women in the form of centres offering advice and assistance; for example, Jobsearch, Family Planning, Women's Legal Resource Centre, Victims' Support Line and a Women's Counselling Service. The New South Wales Office for Women's Policy has recently expanded its responsibility to a new Violence Prevention Council Unit. This unit leads and coordinates government policy in relation to the prevention of domestic and family violence.

The federal Sex Discrimination Commissioner, Elizabeth Broderick, launched a Plan of Action Towards Gender Equality in July 2008 after she had undertaken a national listening tour. The Commissioner will focus on women and leadership; balancing paid work and family responsibilities; sexual harassment in Australia; the gender gap in retirement savings; and laws to address sex discrimination and promote gender equality. Progress towards equality for women is evident simply in the fact that the position of Sex Discrimination Commissioner exists, which makes the Plan of Action focusing on gender equality possible.

Social expectations are an extremely effective means of setting new standards of behaviour. In 2009 the French Minister for Justice Rachida Dati gave birth by caesarian section and five days later returned to work. This led to heated debate in the international media, including in Australia. Opposing points of view ranged from believing it was a private matter to criticism that she had put her career ahead of the child's and her own physical and emotional wellbeing. It was also felt that Ms Dati had undermined the feminist cause, letting down all women in the workforce, because she did not take advantage of the maternity leave available to her by law and therefore employers might expect other women to forgo their entitlements.

The French Justice Minister, Rachida Dati, created controversy in 2009 when she returned to work five days after giving birth.

The Australian Prime Minister's wife, Therese Rein, is financially independent and heads a large and successful job placement company, Igneus. She acts as a role model to other women.

Julia Gillard's position in the federal government is another example. Today there are historically unprecedented numbers of women in the ministry, indicating that legislation and education have successfully paved the way for women in politics. For Ms Gillard, the path to success has not always been smooth. She has suffered repeated personal attacks throughout her political career. A photo of her spotless kitchen published in a magazine sparked criticism that a childless, unmarried woman with an empty fruit bowl could not possibly understand the lifestyle of many other Australians. In 2007 Bill Heffernan, a Liberal senator, dismissed Ms Gillard as having no political potential because she was ' deliberately barren', meaning that she had chosen not to have children. That there was a public outcry against this view indicates how social attitudes have changed in favour of women.

Further strides are made towards gender equality whenever women achieve positions of power and influence. Gail Kelly, while CEO of St George Bank, created family-friendly policies, expanded maternity leave, introduced grandparents' leave and allowed employees to 'buy' extra leave. Once these changes are made in an institution, they permanently alter the work environment so that women can flourish.

The glass ceiling still operates to hinder progress of women through the hierarchy of power. Australia lags behind other developed countries when it comes to the percentage of women in senior management positions, which has significant influence over Australia's business direction, economy, public policy and the community generally.

It is, however, clear from the above examples that social expectations are changing and successful women serve as role models who inspire others.

In 2009 the federal government announced the introduction of 18 weeks' paid maternity leave, based on the minimum adult wage. The new National Employment Standards, effective from 1 January 2010, established basic employment conditions for all Australians and will increase the period of unpaid parental leave from 52 weeks to 104 weeks per couple.

REVIEW

1 What focus has the Sex Discrimination Commissioner, Elizabeth Broderick, taken in her Plan of Action Toward Gender Equality?
2 Explain the varying reactions to Rachida Dati's return to work five days after giving birth.
3 What has been the substance of attacks made on Julia Gillard?
4 Gail Kelly created family-friendly policies while CEO of St George Bank. Give examples of these policies.

LAW IN ACTION

Web Destination

1 Find out what the term 'indirect discrimination' means. Log on to the Pearson Places website and follow the links to Lawlink to assist your research.
2 A defender of Julia Gillard against personal attacks in the media said 'Julia Gillard got into trouble for having a tidy kitchen; she would have got into trouble for having an untidy kitchen. People still make comments on her hairdo and on her personal relationship. We are not very good at treating women as though they are people in that neutral sense' (ABC Radio, PM program, 10 December 2007). Compare how men and women are treated in the media.
3 Evaluate the effectiveness of the government's actions in promoting change and equality for women.

CHAPTER SUMMARY

Much progress has been made over the past 200 years in improving the status of women. Laws have empowered women to vote, sit on juries, enter professions, and sue and be sued as individual persons.

Government departments ensure women are protected by the creation of services especially to meet their needs.

A good education is the key to a successful career. Participation of girls in high school and tertiary education has been a powerful factor in helping girls to prepare for careers and further their intellectual development. It has led to women having the means to assert themselves in society and to stand alongside men as their equals. This new status has led to success by individual women in a wide variety of professions and these women act as role models for all women.

The 'glass ceiling' still exists in many institutions, preventing women from being promoted on merit. Women are often overlooked in favour of men. Even though increasing numbers of young women are graduating from university with high qualifications, there are still many factors that limit these women's promotional prospects in the workforce. Women are still segregated into 'female' industries and occupations that focus on the provision of services.

The effectiveness of law, in terms of the way it deals with specific issues, can be measured by the following criteria: the time it takes, its cost, its accessibility, whether it prevents the problem and its ability to deal with issues of equality.

MULTIPLE-CHOICE QUESTIONS

1 Which of the following remedies might overcome invisible structural barriers that prevent women making progress in the workforce?
   - **A** Providing only full-time work for all employees
   - **B** Educating workers to make them aware of gender issues
   - **C** Forcing employers to be kind to women
   - **D** Making the structural barriers visible

2 Which state in Australia was the first to grant non-Indigenous women the right to vote?
   - **A** New South Wales
   - **B** Queensland
   - **C** Tasmania
   - **D** South Australia

3 After 1916, in what circumstances were women allowed to have legal custody of their children?
   - **A** As soon as the child was born
   - **B** Only when the child's father died
   - **C** Whenever the woman wanted custody
   - **D** When her husband decided to share custody

4 Which of the following best describes the meaning of the term 'gender bias'?
   - **A** One gender is attracted to the other gender.
   - **B** One gender will outlive the other gender.
   - **C** One gender is superior to the other gender.
   - **D** One gender is favoured over the other gender.

5 Which of the following is a contributing factor to inequality in the workforce?
   - **A** The federal government's lack of interest in gender equality
   - **B** The social belief that women should not be in the workforce
   - **C** An inflexibility in the structure of organisations
   - **D** Lack of specialist groups focused on promoting women's issues

SHORT-ANSWER QUESTIONS

1 Outline the major health and violence issues facing women.

2 Describe the role of one government body that focuses on the women's issues.

3 Describe how legislation is reducing the disadvantages faced by women in the workplace.

4 Explain how successful women influence other women.

5 Explain the meaning and effect of 'gender bias'.

6 Analyse the way that changes in society's expectations have affected the status of women in Australia.

7 Analyse the changing perceptions towards domestic violence in Australian society.

8 Assess the effectiveness of legislation in reducing the disadvantages faced by women.

CHAPTER 17

Youth, the aged and people of differing sexual identity: Status under the law and issues

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

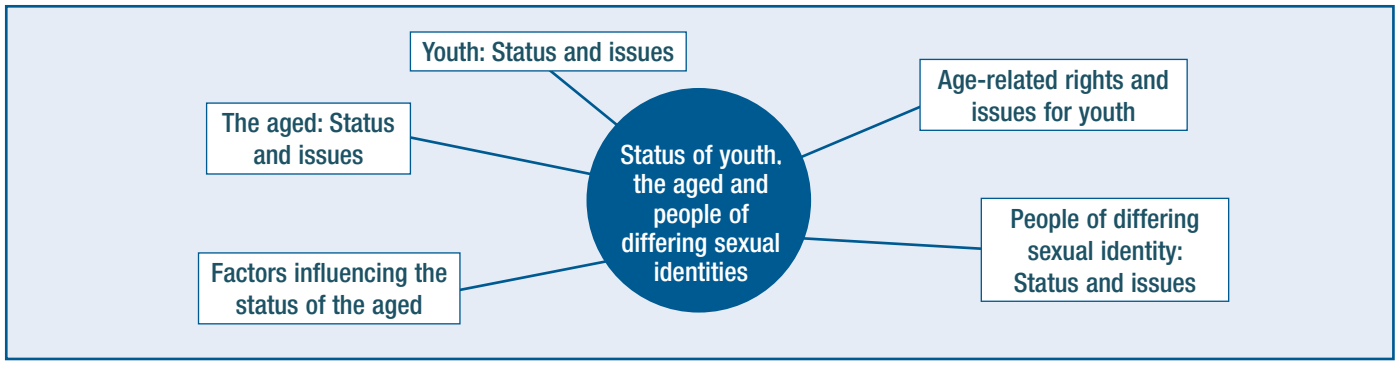
P7 evaluates the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

In this chapter students examine legal issues that affect youth, the aged and people of differing sexual identity.



SUMMARY OF CASE LAW

Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 1 All ER 533; 3 All ER 402
R v. LMW [1999] NSWSC 1128

SUMMARY OF LEGISLATION

Adoption Act 2000 (NSW)
Age Discrimination Act 2004 (Cwlth)
Anti-Discrimination Act 1977 (NSW)
Child Support (Assessment) Act 1989 (Cwlth)
Children (Protection and Parental Responsibility) Act 1997 (NSW)
Education Act 1990 (NSW)
Fair Work Act 2009 (Cwlth)
Family Law Act 1975 (Cwlth)
Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cwlth)
Family Law Reform Act 1995 (Cwlth)
Family Provision Act 1982 (NSW)
Human Rights (Sexual Conduct) Act 1994 (Cwlth)
Marriage Act 1961 (Cwlth)
Minors (Property and Contracts) Act 1970 (NSW)
Property (Relationships) Legislation Amendment Act 1999 (NSW)
Sucession Act 2006 (NSW)

SUMMARY OF INTERNATIONAL LAW

Convention on the Elimination of Discrimination Against Women (CEDAW)
Convention on Rights of the Child (1989)
International Covenant on Civil and Political Rights (1966)
Universal Declaration of Human Rights (1948)

Introduction

Several groups within our society struggle for legal recognition and justice. They experience particular disadvantages that, if they are to share in the same rights and privileges enjoyed by other members of our society, require both a legal and a non-legal response. Included among these are:

- Aborigines and Torres Strait Islander peoples
- people who have a mental illness or intellectual or physical disability
- migrants
- people who are socio-economically disadvantaged
- women.

Every person is entitled to certain basic human rights; those of the groups listed above have all been addressed by other chapters in this book. However, there are other people protected by human rights legislation who are also deserving of attention and support. These include the young, the aged and people who live in same-sex relationships or who are transsexual. All suffer from disadvantages that can only be overcome with help from society and the legal system. This chapter explores issues relating to all three groups but, to enable students to more readily identify with the material, there is a greater emphasis on the young.

From birth everyone is entitled to certain fundamental and inalienable rights and entitlements that should never be taken away from them, such as the right to racial equality and to be free from discrimination. These rights need to be established at law and protected at an international and domestic level.

Disadvantaged members of society are among those whose rights are most likely to need protection. In Australia, older people can be made to feel that they are no longer productive members of society and that they are a burden on their children. The young have historically been denied certain rights until they attain adulthood. Same-sex couples have experienced significant prejudice and discrimination right up to the present time.

These groups have all suffered because they are relatively powerless and are capable of being exploited. Having little political, social or economic influence, they have been unable to participate in making important decisions that affect them. Their rights must be protected by the law and acknowledged by others. There is also a need for increased social awareness of the problems that confront them.

17.1 Youth: Status under the law and issues

Historically, in Australia and elsewhere, children of all ages have had almost no say in the key decisions affecting their lives. Parents and other adults have had the responsibility of making decisions for the young. Though parents could usually be expected to take care of their children, this was not always the case. Methods of discipline, for example, could vary from moderate to severe. Until quite recently, some parents believed they owned their children and, as a result, they could treat them however they pleased. In consequence, when family law contained in the *Family Law Act 1975* (Cwlth) was amended by the passing of the *Family Law Reform Act 1995* (Cwlth), references to parental rights with regard to children as 'custody' were removed and replaced by the term 'residency order'. The aim was

to emphasise that parents do not own their children, and cannot therefore regard them as 'property' in divorce proceedings.

Children are among the most vulnerable people in society. Consequently, laws are required to safeguard their rights.

In recent years, there has been increased awareness and legal recognition of the rights of children and young persons. However, areas of discrimination, abuse, denial of rights and neglect still occur. As children and young persons are regarded as vulnerable, it is society's overall responsibility to protect and safeguard the rights of the young.

Young people are now more financially independent than ever.

The social status of children

The social status of children in Australia has changed significantly, especially in the latter part of the 20th and early part of the 21st century. Factors contributing to the change are listed below.

Legal recognition

Legal recognition as an adult now occurs at 18 instead of 21 years of age. Eighteen is also the age recommended by the United Nations for recognition as an adult. Social pressure has helped bring about this change. For example, in the past, young men could join or be conscripted into the Army but did not have the right to vote. This resulted in community support for legal recognition of 18-year-olds as adults.

Financial independence

Young people have achieved greater financial independence. Teenagers, in particular, have become very significant spenders in the economy. Part-time jobs have given young people much higher disposable incomes than were available previously, and businesses have responded to this by targeting the young in their advertising and promotion of services.

Educational standards

Improved educational standards have contributed significantly to the skills of the young. The fact that more students stay on to complete their Higher School Certificate and go on to tertiary studies has had a considerable impact.

Increased awareness

Advances in technology have increased young people's awareness of the world; they are well informed on a range of national and international issues. Their use of computers can be intimidating for their parents. The 'knowledge explosion' benefits the young as they are best placed to take advantage of it.

International pressures

International attention has been directed to many issues concerning the young: child slavery and prostitution, sex abuse, war atrocities, education and health needs. This has led to calls for international and domestic initiatives to create safer environments for children.

Employment

Young people have not been in the workforce for very long and also face varying forms of employment discrimination. They are inexperienced and generally unsure of their rights; and are often just grateful to have some income and the independence it grants from their parents. They are therefore less likely to know or understand their rights as employees, leading to a greater likelihood that they will tolerate abusive or discriminatory conduct by their employers.

Age restrictions on children

Parental control over or responsibility for their children does not continue without alteration from birth until they attain the age of 18. Most people like to make 18 years the convenient cut-off point between childhood and adulthood. However, as children grow older (especially as they enter their teens) the law recognises their increasing ability to make decisions on their own and be responsible for those decisions. The table overleaf defines what young people can do at different ages.

Age-related rights and issues for youth

Eighteen years	When a person reaches the age of 18 they legally become adults and can: • vote in state and federal elections. This is mandatory (compulsory) in Australia • freely enter contracts. However, a limited range of contracts—such as an employment contract—can be entered into before the age of 18 if they are for the young person's benefit. The *Minors (Property and Contracts) Act 1970* (NSW) provides a comprehensive scheme for infants' contracts • decide for themselves whether to consume alcohol, buy cigarettes or get a tattoo • marry. Permission can be sought at an earlier age (16 or 17 years) in 'exceptional and unusual' circumstances • make out their own will. This can be done earlier if the young person is planning to marry, or has special permission from the court.
Seventeen years	At the age of 17 a young person can gain a provisional driver's licence in New South Wales.
Sixteen years	At age 16 a young person can: • legally engage in heterosexual or homosexual sex • apply for a driver's permit • become a blood donor (with parental consent) • apply for an Apprehended Violence Order on their own behalf • leave home. No law states explicitly when a person can leave home, but generally a young person can leave at 16 if they have a safe place to go and are capable of supporting themselves financially.
Fifteen years	At age 15 a young person may: • leave school and enter full-time employment • watch MA 15+ rated films • plead guilty to a minor offence without having it appear on their record. This also applies if they are younger than 15.
Ten to fourteen years	In general, children under the age of 14 are presumed to be incapable of criminal acts. The courts may decide that a young person ten to 14 years old can be held liable for a serious criminal offence, but this is most unlikely. The legal principle of *doli capax* must first be proven: that the child was 'capable of deceit, mischief, having knowledge of right and wrong'. There has not been a conviction for murder in New South Wales where the offender was under 14 years of age. In the Corey Davis case (*R v. LMW* [1999] NSWSC 1128) a young boy, Corey Davis, was pushed into the Georges River by another boy who knew he couldn't swim. Corey drowned, and the DPP responded to public pressure by charging the boy (LMW) who had pushed him with causing his death. However, in a closed Supreme Court hearing the accused was acquitted.
Less than ten years	Children under ten years of age are thought to be *doli incapax*; that is, unable to form the criminal intent necessary to be held responsible for serious criminal offences.

Point to ponder

Children under 14 years of age are generally thought to be *doli incapax*; that is, unable to form criminal intent. However, a child aged ten to 14 may be proven to be *doli capax* (capable of deceit, mischief, having knowledge of right and wrong); that is, able to form criminal intent.

Other age-related issues

There are exceptions to the generalisations listed in the table above; for example, under certain circumstances a child may leave school before the age of 15.

- The *Education Act 1990* (NSW) requires all children to attend school between the ages of six and 15 years, although this is under revision.
- Parents may discipline children under their care, provided it is 'reasonable' and 'appropriate' to the child's age. **Corporal punishment** for children at school (most notoriously the cane) has been banned in all New South Wales schools, although some religion-based schools still argue for the right to use corporal punishment.
- Persons under 16 years of age who plead guilty or are found guilty of a criminal offence will have no conviction recorded unless it was a serious offence. If a conviction is recorded against a young person in the Children's Court it is removed after three years.
- The *Adoption Act 2000* (NSW) specifies that adoptions must take children's wishes into account. Section 9 defines procedures for ensuring that a child is able to participate in any decision made about its future.
- Generally speaking, a mature teenager has the right to seek medical treatment and decide lifestyle issues, including the use of contraception. (This is termed the 'Gillick competency', as it was established by the English case *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 1 All ER 533; 3 All ER 402. In this case Mrs Gillick tried to prevent the Area Health Authority giving contraceptive or abortion advice to her daughters. The House of Lords determined that the mother had no right to stop her daughters seeking contraceptive advice.
- Police can take out an AVO (Apprehended Violence Order) on behalf of children.
- Persons under 18 years of age must have an adult support person present when being interviewed by police; otherwise, any statements made are inadmissible in court.
- The *Children (Protection and Parental Responsibility) Act 1997* (NSW) allows police to safely escort a young person from a public place if they reasonably believe the young person is under 16 years of age, is not being supervised by a responsible adult and is in danger of being abused or injured, or is about to break the law. Police can then take the young person home, or to a relative or an 'approved person'. However, section 28G of the *Summary Offences Act 1988* (NSW) states that this law only applies in areas where the local council has made an application to the Attorney-General.
- If a parent dies **intestate** – that is, without leaving a will – a child has rights under the rules of intestacy to claim a financial benefit. These rules may be found in the *Succession Act 2006* (NSW).
- A real estate agent should not refuse a young person accommodation because they are under 18 years of age. This would be age discrimination and against the law. A young person who signs a residential tenancy agreement will generally be bound by it under the general rules of contract. It is illegal for a landlord to ask for a guarantor for young people renting a property.

CORPORAL PUNISHMENT **The inflicting of pain as a form of punishment.**

INTESTATE **When someone dies without leaving a will they are referred to as dying 'intestate'.**

REVIEW

1 Describe the impact of technology on the legal status of young people.
2 Outline the legal rights given to a person once they attain 18 years of age.
3 Account for the fact that young persons under the age of 14 years are usually not prosecuted for serious offences such as murder and manslaughter.
4 Suggest reasons why some of the age restrictions imposed on young people should be removed or varied.
5 What is meant by the term 'rules of intestacy'?

LAW IN ACTION

1 Use the Internet and the library to find out at what age a young person in New South Wales may:
   a get their body pierced
   b apply for an international driver's licence
   c deliver newspapers.
2 Conduct a class debate on the topic: 'Sixteen is the new eighteen.'
3 Working in small groups, take on the role of a young persons' advisory committee to the New South Wales Premier. Compile a list of recommendations you would make to the premier about aspects of the law in relation to young people that need reform. Explain your choices. Present your ideas to the class.
4 Read the following scenario and then complete the activities following.

Jeremy and George, both aged 15, have been sitting talking outside some shops in a small country town at about 9 p.m. They decide to cross the road and Jeremy stumbles and falls. Constable Lee calls out to them to stop. He accuses the boys of drinking alcohol and hanging around the town to steal from parked cars. The constable says he is going to go to the boys' homes and talk to their parents.

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   a Does Constable Lee have the right to take the boys home?
   b If the boys have been drinking, have they done anything wrong? Explain why.
   c With a partner, discuss whether you think the boys would be treated differently if they were over 18 years of age. Contrast the view of society to that of the individuals involved in this case. Share your thoughts with the class.

17.2 The aged: Status under the law and issues

There is no age at which a person automatically becomes classified as 'old' or 'aged'. The choice of 65 as a retirement age for men was originally made quite **arbitrarily** and was then followed as a matter of custom. It is not law. The retirement age for Social Security purposes in Australia is 65 for men; women currently retire at a younger age but this is gradually being increased. By the year 2014 women will also retire at 65. Starting in 2017, the retirement age for both men and women will increase by a few months each year until it reaches 67 years in 2023. No one should be forced to retire if they can still carry out the requirements of their job. Anyone forced to retire simply on the basis of their age can reasonably complain they are a victim of discrimination.

ARBITRARILY **Based on one's personal view or personal choice.**

It would appear that when a person becomes 'mature', 'aged', a 'veteran' or a 'senior' depends very much on cultural and social attitudes. Senior citizens' organisations in New South Wales usually encourage anyone over 50 years of age to become a member. In the sporting arena (for example, tennis) competitions are often classified as veterans' events for those over 40 years of age. At the age of 85, people who wish to continue driving must undergo an annual test with the Roads and Traffic Authority. Those who pass may continue driving with a full licence, or they may be granted a special licence that allows them to drive within five kilometres of their home. Those who are unable to pass the test must hand in their driver's licence.

As people age and stop working, they may find that their status in the community alters. Whether this change is positive or negative will probably be determined by the factors listed in the following table. Some of these factors could have a positive or negative effect, depending upon prevailing social attitudes.

As people grow older their status in society changes.

Factors affecting the status of aged persons

Factors aiding status of aged persons	Factors restricting status of aged persons
• It is recognised that the aged have contributed to society over their working lives and are entitled to retirement • Most people have fond memories of persons who have had a significant impact on their life: parents, grandparents, relatives or friends • Some families still have grandparents living with them as part of an extended family of children, parents and grandparents • The aged are often respected for their experience and wisdom, especially in certain ethnic cultures • Many aged persons in the future will have financial independence through superannuation, especially if they have been contributing to superannuation since they started employment • There is an awareness in all of us that we will grow old and would like to be well treated	• Some people have a poor opinion of anyone who receives social security payments, including pensioners • The loss of a partner can lead to an aged person feeling alone and isolated from the rest of the community. Loss of employment also harms self-esteem • Much of Australian society does not demonstrate respect for the aged • Currently, many older people have very limited superannuation entitlements and incomes and are dependent on government, charities and community groups for support • An ageing population may reduce the availability of resources for individuals. Benefits of all types (such as pharmaceutical benefits) may have to be reduced

REVIEW

1 What factors may determine when a person is 'aged'?
2 Analyse the factors affecting the status of the aged in our community.
3 Which factors are most influential in forming social attitudes towards the elderly?
4 Explain how financial factors can contribute to social attitudes towards the elderly.

LAW IN ACTION

1 At what age would you consider someone to be elderly? Outline the things that make you consider why this age would make someone elderly.
2 As the numbers of aged people grow, their political power will increase. What effect is this likely to have on these issues?
3 Working in small groups, consider how elderly people are portrayed in the media. Do you think that this portrayal is a true reflection of elderly people in Australia?

17.3 People with differing sexual identity: Status under the law and issues

Homosexual men and women have had to wait until recent years to enjoy a similar status to heterosexual members of society. Though there have been efforts made at the international level to protect the rights of homosexuals, individual countries have often been slow to introduce domestic legislation that reflects the various international agreements.

The Preamble to the Universal Declaration of Human Rights (UDHR) refers to the 'inherent dignity' and the 'equal and inalienable rights' of all human beings. Though it does not specifically refer to homosexuality, its intent was clearly to allocate to all individuals the same fundamental human rights. The International Covenant on Civil and Political Rights (1966) calls on all countries to respect and ensure the rights of all their people 'without distinction of any kind'. Again, this indicates that there should be no discrimination against people of any sexual identity.

Point to ponder

The current definition of marriage contains four basic elements: it is voluntary, it exists between a man and a woman, it is exclusive, and it is entered into for life.

In Australia, homosexuality is an issue that previous generations have not wanted to acknowledge. The legal definition of marriage in Australia, both in statute – the *Marriage Act 1961* (Cwlth) and the *Family Law Act 1975* (Cwlth) – and in the original British common law, is 'the voluntary union of a man and a woman to the exclusion of all others and for life'. This definition simply does not allow for a homosexual union to be recognised as a marriage in Australia. This created enormous problems for homosexual couples over issues such as the right to inherit a partner's estate.

The introduction of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) overcame some of these problems, but homosexual people still face problems gaining full recognition of their relationship. In 2006 the ACT Government announced legislation to allow homosexual civil unions, which would grant same-sex couples the same legal status as married couples. The federal government blocked this legislation, arguing that it conflicted with the *Marriage Act 1961* and was therefore invalid.

Recent legislative changes have gradually reduced the legal difficulties faced by same-sex couples.

Females have always had the right to engage in heterosexual or homosexual activity from the age of 16. However, until very recently males were only permitted to engage in homosexual sex from the age of 18. Section 78K of the *Crimes Act 1900* (NSW) specifically stated that:

> 'A male person who has homosexual intercourse with a male person of, or above the age of ten years, and under the age of eighteen years shall be liable to penal servitude for life.'

In 2003, after considerable community and political debate, the age of consent for same-sex male couples was reduced to 16 years of age in line with heterosexual and lesbian couples.

Recent media attention has been directed to issues such as in vitro fertilisation, surrogacy and adoption. Section 19 of the *Adoption Act 1965* (NSW) prohibited homosexual couples from adopting children. The Act defined the 'persons in whose favour adoption orders may be made' as a husband and wife, or a man and a woman living together as husband and wife on a ***bona fide*** domestic basis although not married. Provision was made for an adoption order in favour of one person, but no allowance was made for a gay couple to adopt a child.

BONA FIDE **A legal term meaning that something is genuine.**

The *Adoption Act 2000* (NSW) has changed the focus of adoption so that it is oriented much more towards the needs of the children. Section 7 emphasises that the adoption must proceed on the basis that the best interests of the child are paramount. The child's wishes are to be considered (section 8), as adoption is 'to be regarded as a service for the child, not for adults wishing to acquire the care of the child'.

In other areas there has been strong legislative support for homosexuals and **transsexuals**. A now-famous case was launched in 2006 by a US prisoner, Robert Kosilek, who launched a court action against the prison authorities for refusing to pay for a sex-change operation. Kosilek, who was convicted of killing his wife, had been diagnosed with gender identity disorder and received hormone treatment and other treatments due to the disorder. However, the prison authorities argued that it would be dangerous to allow Kosilek to have a sex change as he would not be transferred to a female prison. Three years on, the case has yet to be decided.

TRANSSEXUAL **A person who completely identifies with the opposite sex.**

COMMONWEALTH POWERS IN RELATION TO SAME-SEX COUPLES

Commonwealth powers do not extend to many areas relating to sexual identity. Section 51 of the Australian Constitution gives the Commonwealth Government the power to make laws relating to marriage, divorce and children, but not to same-sex relationships.

The *Fair Work Act 2009* (Cwlth) does provide some protection in relation to employment but this is limited. The *Human Rights (Sexual Conduct) Act 1994* (Cwlth) also provides that sexual conduct between consenting adults should be free of arbitrary interference from other persons. This provides a same-sex couple some degree of privacy in their personal life.

REVIEW

1 Outline the role of international law in protecting the rights of people who are homosexual.
2 Describe the legal challenges faced by homosexual couples relating to financial matters.
3 What are the legal issues around adoption as it relates to homosexual people?
4 Explain how homosexual rights are protected by state and federal legislation.

LAW IN ACTION

1 Read the hypothetical legal scenario below and answer the questions that follow.

Bill faced a lot of problems that made life more difficult. He had lived all his life in a small country town as an only child. At the age of 14 he had decided that he was gay. His parents probably suspected how Bill felt but they would not talk about it. Bill's dad was a successful businessman and local councillor and avoided what he saw as an unpleasant issue. The slightest reference to homosexuality, even on the television, would send him into an abusive rage. His mum was much gentler by nature but she would keep picking out girls that she thought Bill should ask out. Things stayed like this for the next two or three years.

When finally Bill decided to go to the Mardi Gras in King's Cross it was too much for his dad, who virtually disowned him. His mum could not do much to help without having huge fights with his dad.

School was no better. Most students were quite accepting of Bill's sexual identity. However, a few thought Bill was just trying to make a statement to draw attention to himself and made what they thought were funny comments in front of him. Some of the older members of staff were not comfortable with Bill's open expression of his sexuality. He began to feel picked on for being a bit different. Comments made by people, especially those who did not know him very well, became increasingly hurtful.

Eventually, Bill felt that he should move to Sydney, perhaps somewhere near Paddington where he hoped people would be more accepting of who he was. Unfortunately, this meant leaving school early and having minimal contact with his parents. Bill could not see how anti-discrimination law could do much to make his life easier. It would be difficult to gain a job in town because of some people's prejudices. He knew he could expect no help from his dad, who had told him anything society did to give gays greater recognition would only encourage more people to say they were gay. His dad felt this would make for an even greater social problem.

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a What attitudes towards homosexuality are displayed by Bill's father? Are these views widely held in the community?
b Which instances in the story are probably illegal under anti-discrimination law?
c Explain why it would be difficult for Bill to take effective legal action to stop people making unkind or hurtful comments.
d Evaluate the effectiveness of legislation in protecting the rights of people like Bill.

2 The High Court in *Gerhardy v. Brown* (1983) 159 CLR 70 stated that human rights are 'fundamental rights inherent in every individual on the basis of humanity'. This confirmed in Australian common law the provisions in the Declaration of Human Rights and other human rights documents.

a How can society create an environment where people have a better understanding and acceptance of different sexual identities?

b When the High Court makes a statement like this, is it merely reflecting social values, or attempting to influence public opinion?

3 Prior to the introduction of the *Property (Relationships) Legislation Amendment Act 1999* (NSW), same-sex couples had considerably fewer rights than they do today. Analyse the following comment (made prior to the Act) from former Chief Justice Nicholson of the Family Law Court. Could a similar observation be made today?

'[The] state of the law smacks of society punishing otherwise law-abiding members for a sexual orientation that is, in and of itself, lawful. And to what gain? Legal denial and intolerance achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a country which supposedly supports tolerance for peaceful differences among its members.'

Source: A. Nicholson, 1997, 'The Changing Concept of Family: The sign of recognition and protection', *Australian Gay and Lesbian Law Journal*, vol. 6, p. 13.

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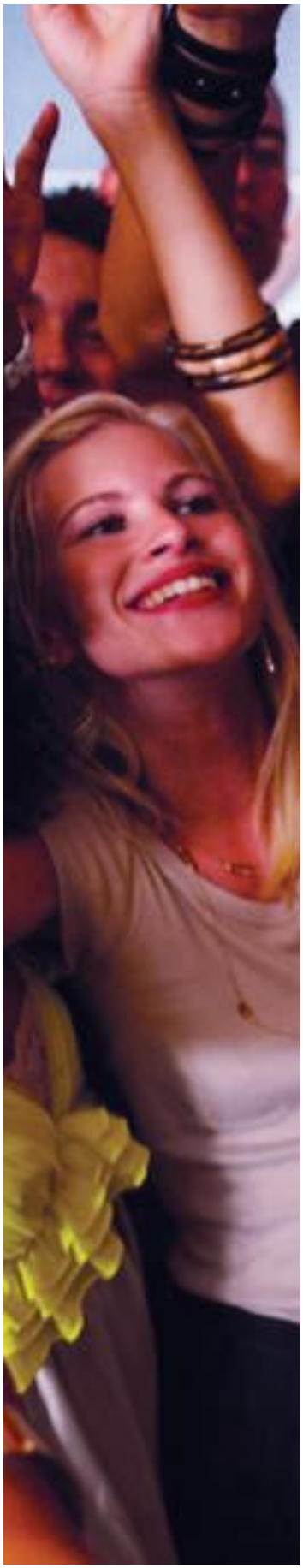
a Suggest possible reasons why the Chief Justice made such comments in 1997.

b Would it be correct to make such comments today? Justify your response.



CHAPTER SUMMARY

There are several disadvantaged groups within society. The young, aged and people of differing sexual identity are three groups that lack economic, social and political power.

Young people have traditionally not been involved in the decisions that govern their lives. Parents have essentially been the decision makers within a legal framework designed to protect children. Some rights are gained by children when they attain certain ages. Fourteen is an important age, as a child has often matured enough by then to make lifestyle choices, such as choice of doctor. It is also the age at which a young person is usually able to form criminal intent and can be held fully responsible for crimes they commit. Children's rights increase with age until, at 18, they are no longer defined as children and can vote, marry and enter contracts in their own right.

However, there has been growing recognition of the rights of the young and this has been coupled with growing responsibilities of parents. The influence of the Convention on Rights of the Child cannot be underestimated in this process.

People do not become 'aged' at any particular point in time. It has been a social convention for men to retire at 65 years and women at 60 years, but that has changed. If a person can still perform the duties expected of their employment position, then there is no reason why they should have to retire. It is an offence to discriminate on the basis of age.

The aged face special issues as their status in society suffers, to some extent, when they retire. They can be victims of discrimination and neglect. There is a need for more legal protection of their rights. Social change is required and younger age groups need to be educated to value the aged members of society.

Homosexuality was an issue that society avoided discussing in the past. A turning point came in 1999 when the *Property (Relationships) Act 1984* (NSW) was amended to grant legal status to same-sex couples.

Federal laws needed to be reformed to remove discrimination, and the next chapter will detail some of these changes. However, despite giant leaps forward in legal status, same-sex couples still face prejudice from sections of the community. All three groups – youth, the aged and people of differing sexual identity – have suffered disadvantage. Their legal status has been improved by statute, common law and increased public education and awareness.

MULTIPLE-CHOICE QUESTIONS

1 At what age does legal recognition as an adult occur?

- **A** 14 years
- **B** 16 years
- **C** 18 years
- **D** 21 years

2 At what age can young persons leave home?

- **A** They can leave at any age with parental permission and as long as someone is paying the rent.
- **B** There is no set age, though at 16 years a young person can be working and be in a sexual relationship.
- **C** At 18 years, young persons are fully independent of their parents and can make their own lifestyle choices.
- **D** At 15 years, young persons can leave home, as they do not have to attend school.

3 The term '*doli incapax*' refers to which of the following?

- **A** The age at which a young person can make lifestyle choices
- **B** Children under 10 years of age never being held responsible for their actions
- **C** Children under 14 years of age not being able to form criminal intent
- **D** The age of consent for both females and males

4 Which Act of Parliament allows a child to challenge the amount left to them in a will for their future education by a parent?

- **A** The *Family Provision Act 1982* (NSW)
- **B** The *Family Law Act 1975* (Cwlth)
- **C** The *Anti-Discrimination Act 1977* (NSW)
- **D** The *Child Support (Assessment) Act 1989* (Cwlth)

5 At what age must older drivers have their driver's licence reviewed annually?

- **A** 60 years
- **B** 65 years
- **C** 75 years
- **D** 85 years

6 Shirley is 65 and has been told by her employer that she must retire. Which of the following statements best describes Shirley's rights in regards to this?

- **A** She must accept that age 65 is retirement age.
- **B** She may claim age discrimination against her employer.
- **C** She can still look for another position so no discrimination exists.
- **D** She must now live solely on her superannuation benefits and will not be eligible for the aged pension.

7 What inheritance and property rights do same-sex couples legally possess?

- **A** They have none, as they are not allowed to marry in Australia.
- **B** They have basically the same rights as heterosexual couples.
- **C** Property rights only apply if a will has been made.
- **D** If they separate they have no property claims on each other.

8 Which major international agreement requires countries to protect the rights of its citizens 'without distinction of any kind'?

- **A** the Australian Constitution
- **B** the Declaration of Human Rights
- **C** the Convention on Rights of the Child
- **D** the International Covenant on Civil and Political Rights

9 Which of the following statements best describes the criminal accountability of children under 10 years of age?

- **A** They have no accountability.
- **B** They are treated like any other offender.
- **C** They can be charged if they commit an 'adult' crime.
- **D** They can be charged if the Supreme Court approves the charge.

10 Same-sex couples gained property and inheritance rights the equal of heterosexual *de facto* couples in what year?

- **A** 1975
- **B** 1999
- **C** 2000
- **D** 2006

SHORT-ANSWER QUESTIONS

1 Outline arguments for and against same-sex marriages in Australia.

2 Describe why the *Children (Protection and Parental Responsibility) Act 1997* (NSW) was introduced.

3 Describe the legal issues faced by the aged.

4 Explain why turning 18 years of age is important in the eyes of the law.

5 Analyse the statement: 'It's difficult to legislate away prejudice.'

6 Account for the discrimination encountered by the young, the aged and the people of differing sexual identity.

7 Assess the effectiveness of changes to the law in reducing the discrimination faced by young people.

CHAPTER 18

Youth, the aged and people of differing sexual identity: Legal and non-legal responses

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

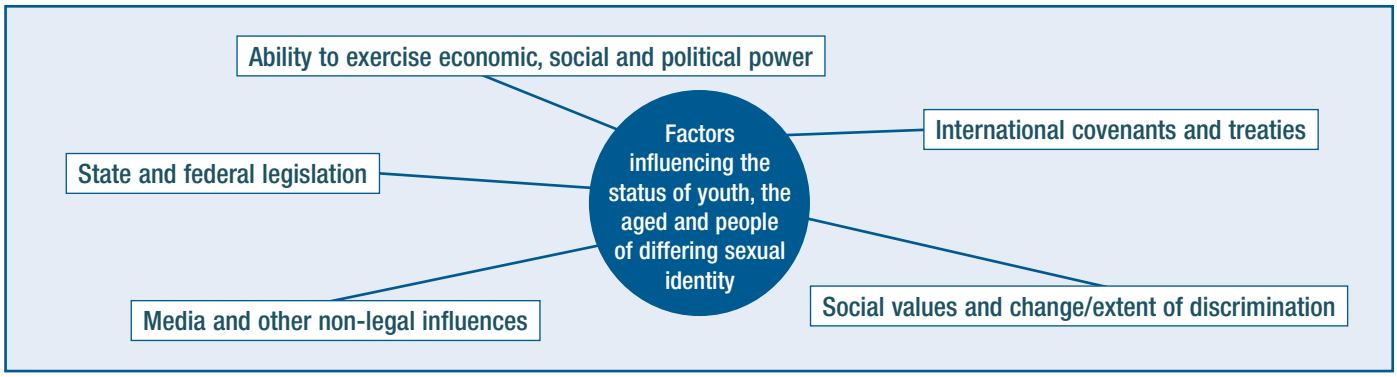
P7 evaluates the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines how the law and non-legal aspects of society have responded to the issues facing youth, the aged and people of differing sexual identity.



SUMMARY OF CASE LAW

Toonen v. Australia (1994) 1 PLPR 50

SUMMARY OF LEGISLATION

Adoption Act 2000 (NSW)
Age Discrimination Act 2004 (Cwlth)
Anti-Discrimination Act 1977 (NSW)
Australian Citizenship Act 1948 (Cwlth)
Child Support Assessment Act 1989 (Cwlth)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Children (Protection and Parental Responsibility) Act 1997 (NSW)
Education Act 1990 (NSW)
Evidence (Children) Act 1997 (NSW)
Fair Work Act 2009 (Cwlth)
Family Law Act 1975 (Cwlth)
Family Law Reform Act 1995 (Cwlth)
Human Rights and Equal Opportunity Commission Act 1986 (Cwlth)
Privacy and Personal Information Protection Act 1998 (NSW)
Property (Relationships) Legislation Amendment Act 1999 (NSW)
Road Transport Legislation Amendment (Car Hoons) Act 2008 (NSW)
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cwlth)
Sex Discrimination Act 1984 (Cwlth)
Status of Children Act 1996 (NSW)
Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 (NSW)
Sucession Act 2006 (NSW)

SUMMARY OF INTERNATIONAL LAW

Convention on the Elimination of Discrimination Against Women (CEDAW)
Convention on Rights of the Child (1989)
International Covenant on Civil and Political Rights (1966)
Universal Declaration of Human Rights (1948)
International Covenant on Economic, Social and Cultural Rights (1966)

18.1 Discrimination against youth, the aged and people of different sexual identity

Youth, the aged and people of different sexual identity all have to deal with various forms of discrimination. They have in common a lack of recognition, and limited economic, social and political power. At times they will all suffer some disadvantage because of this.

Direct discrimination

DIRECT DISCRIMINATION
When a person bases a decision on a stereotyped opinion of another individual.

Direct discrimination occurs when a decision is made or an action is taken based on a stereotyped view of a person, or the group they belong to. A person who makes a decision that is discriminating does not evaluate the worth or merits of the individual or group concerned, but presumes that they have certain characteristics because they are members of a much larger group.

Direct discrimination is based on ignorance and opinions rather than on facts or evidence. The following scenarios demonstrate this.

- An employer finds out that an employee is a lesbian, and decides that she should never be promoted as she would not be able to command the respect of her staff. The employer had not seen this as an issue before the woman's sexual preference became known. The decision is based on a prejudiced view that the woman will not be liked or respected by fellow employees simply because she is a lesbian. If a promotion position should fall vacant, and the woman concerned is the best qualified but is not offered the position, this would be direct discrimination on the basis of homosexuality.
- A manager dislikes having younger workers in his section of a retail store because he regards them as lazy and unreliable, and expects they will only stay with the business for a short time. If the manager blocks young employees from working in his section because of his assumption that all young people have poor work ethics and no loyalty to the business, he will be engaging in direct discrimination on the basis of age.

Direct discrimination is based upon stereotypes.

The negative stereotyping that leads to discrimination has built up in the community over many years (sometimes over many generations). It will probably take both a change in community attitudes and legislation such as the *Anti-Discrimination Act 1977* (NSW) to bring about genuine equality for all groups in the community.

Indirect discrimination

In some cases there is an appearance that people are being treating equally, when in fact they are not. If treating all people in the same way results in one group being disadvantaged, then indirect discrimination may occur. For example, a shopping centre that provides a car park must ensure that there are disabled car spaces so that a person with a disability can access the centre.

This type of discrimination is less obvious than direct discrimination. Until the community's consciousness is raised about a form of indirect discrimination, many people and organisations will be unaware that their actions and policies are discriminating against others. For example, in the past everyone joining the police force was expected to be reasonably young, preferably male and above a certain height. This was generally thought of as quite reasonable. It has taken many years for society to recognise that such treatment is unfair and constitutes indirect discrimination. If a person who does not meet the age, gender and height restrictions can do the job as well as another person who does, it is unfair to deny them the opportunity.

It is not always acceptable to treat everyone the same. If, for example, older employees are required to have the same level of fitness as 18-year-olds in a job where peak fitness is not necessary for the normal performance of work-related activities, this would amount to indirect discrimination.

LEGISLATIVE RESPONSES TO INDIRECT DISCRIMINATION

In more recent years there has been an increase in public awareness of indirect discrimination and, with it, an increase in legislation. For example, if an employer, club or educational institution:

- has a rule, requirement or policy that applies to everyone, and
- it results in a particular group being disadvantaged in comparison to another group, then
- the employer, club or educational institution must show that the rule, requirement or policy is reasonable in all circumstances.

If they are unable to do this, they are breaking the law.

REVIEW

1 Describe what is meant by 'direct discrimination'.
2 What attitudes result in direct discrimination?
3 Outline the causes of indirect discrimination.

LAW IN ACTION

1 Use examples to write a short report differentiating between direct and indirect discrimination.
2 Working with a partner, review the following scenarios and decide whether each is an example of direct or indirect discrimination. Justify your decision.
   a A same-sex couple is denied a rental property because the landlord believes they will be bad tenants.

continued...

b A company has a policy that requires all new employees to have a minimum of five years' work experience regardless of the position for which they apply.

c An airline refuses to employ men as cabin crew, as they are less polite and attractive than female crew.

d A sporting club refuses to allow a girl to play in their football team because she may get hurt.

e An employer requires all their workers be able to attend meetings outside normal working hours. They use this policy to deny employment to a working mother.

18.2 International recognition of the rights of youth, aged and people of differing sexual identity

INALIENABLE HUMAN RIGHTS Fundamental entitlements that all persons receive from birth, which should never be taken away from them.

Various international agreements acknowledge that all human beings have certain **inalienable human rights**. This acknowledgment acts in part as an empowering mechanism or device, encouraging minority groups and even individuals to see that they are recognised as human beings and the equals of all others. People can take comfort in this recognition that everyone is entitled to share in fundamental human rights and privileges.

International agreements are also there to serve as protective mechanisms for peoples of all nations. This protection is available to everyone, including the young, the aged and those persons of differing sexual identities.

An international court – the International Criminal Court (ICC) – was established in June 2002, after years of discussion between member states of the United Nations. This court prosecutes individuals for war crimes, crimes against humanity and the crime of **genocide** (all of which involve the abuse of human rights) and ensures that criminals are brought to justice more effectively than has been the case in the past. (The ICC is discussed in greater detail in Chapter 4.) The laws under which persons accused of human rights violations will be brought to trial are contained in the various international human rights documents.

GENOCIDE The deliberate extermination or attempted extermination of a racial group.

International recognition of the rights of youth

The rights of the young are a major international issue, particularly when young people are still forced into slavery or prostitution, or are forcibly drafted into armies from an early age. The death penalty can still be applied to children who commit serious crimes in some countries, including the United States, and issues such as female circumcision continue to be debated at an international level.

One major way of trying to ensure that all children receive fundamental rights, such as the right to live in safety and to have access to education and health services, is through the acceptance of international agreements promoting the welfare and wellbeing of children.

Human rights gained international recognition and acceptance in 1948 when the founding members of the United Nations General Assembly unanimously adopted the Universal Declaration of Human Rights (UDHR). The Declaration established a detailed outline of human rights standards that should be followed by all countries. It is not legally binding but many of its principles have been ratified

(enacted into domestic law) by the signatory nations. The fundamental human rights contained in the Declaration are examined in greater detail in *Legal Studies HSC* (3rd edition). Those that relate to families and particularly children include:

- Article 3, which provides that 'everyone has a right to life, liberty and security of person'
- Article 25(1), which states, in part, that 'everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care'
- Article 25(2), which asserts that children are entitled to special care and assistance, irrespective of whether they were born in or out of wedlock
- Article 26, which provides that 'everyone has the right to education'.

Log on to the Pearson Places website and follow the links to find a full copy of the CROC at the United Nations' website.

Web Destination

CONVENTION ON THE RIGHTS OF THE CHILD

The rights of children came even more directly into the spotlight in 1989 with the adoption by the United Nations of the Convention on the Rights of the Child (CROC). This marked a significant turning point in the way legal systems regarded children. CROC introduced the requirement for nation states to take 'the best interests of the child' as the primary consideration in administrative decision making.

All but two UN member nations are signatories to the CROC. The United States is not; it reserves the right to execute minors, which is forbidden by the CROC. Somalia is the other non-signatory. While the remaining countries are all signatories there are major problems with forcing nations to comply with their duties under the agreement and the human rights of millions of children throughout the world continue to be abused.

Article 3 of CROC is perhaps the most significant. It lays out the requirements of governments in relation to the human rights of children. Governments must ensure the rights of:

> 'each child within its jurisdiction without discrimination of any kind irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status.'

The Convention on the Rights of the Child is the only human rights document specifically designed to protect the rights of children.

The CROC also places an extra duty on nations to protect rights specific to childhood, including:

- the right to be given a birth name
- the right to an education
- the right to enjoy leisure
- freedom from all forms of discrimination and torture
- protection from work that endangers a child's health
- protection from drug abuse, unauthorised arrest and cruel punishment
- the right to express their views and be heard.

The rights outlined in the Convention on the Rights of the Child only have legal force if drafted into domestic legislation. There is also a moral obligation on the Australian or any other signatory government to comply with the terms of the Convention.

In Australia, the Convention influenced the *Family Law Reform Act 1995* (Cwlth) by increasing the rights of children and the responsibilities of parents. In all Family Court proceedings involving children, the 'best interests of

the child' must be considered in decision making. The welfare of the child is also regarded as 'paramount'. Children are increasingly able to express their own views over such issues as where they live and how contact can be maintained with both parents. The older the child, the more likely it is that they will express their own views. The Family Court will even provide children with their own solicitor in divorce matters. Under the *Family Law (Shared Parental Responsibility) Amendment Act 2006* (Cwlth) there is also renewed emphasis on joint decision making or 'shared parenting' to allow each parent to play a role in the development of their children.

Point to ponder

The Convention on the Rights of the Child was ratified by Australia in 1990.

PARAMOUNT **When something is 'paramount', this means that it is of great importance and should be given priority over other issues.**

International support for the rights of the aged and people of differing sexual identity

The Universal Declaration of Human Rights makes explicit reference to the protection of the rights of the aged. A number of other international agreements also make reference to the protection of the rights of the aged, including in the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

A significant body of international law makes specific reference to the rights of the aged.

Reference to people with differing sexual identities is more limited in most international agreements, but it is implied in many documents. In several countries around the world homosexual sex remains a crime and thus there is reluctance in many nations to formalise the specific rights of those with differing sexual identities. For example, in 2005 two men were executed in Iran for the crime of engaging in homosexual activity.

Since 1992, Australian citizens have been able to lodge individual complaints with the United Nations Human Rights Committee under the First Optional Protocol, for breaches of the International Covenant on Civil and Political Rights (ICCPR). The case below demonstrates how this Protocol was used to protect and enhance the rights of people with a differing sexual identity. It is, however, worth noting that Australia is the only major democracy not to have adopted the provisions of the ICCPR into domestic law.

CASE LAW *Toonen v. Australia* (1994) 1 PLPR 50 (matter heard by the United Nations Human Rights Committee)

This was the first complaint made by an Australian to the United Nations Human Rights Committee; it dealt with discriminatory anti-homosexual legislation in Tasmania.

Tasmania was the last of the states of Australia in which homosexual relations between consenting adults were illegal. The federal and other state governments and various lobby groups had called for legislative reform, but without success. Eventually, Nicholas Toonen complained to the United Nations Human Rights Committee that Tasmania's prohibition of male homosexuality directly violated an individual's right to privacy under Article 17 of the ICCPR.

The Human Rights Committee found in favour of Mr. Toonen. However, there was still some reluctance to bring about legislative reform in Tasmania. The Australian government therefore decided to intervene, using its power under section 109 of the Constitution to legislate and override Tasmanian law. In this way, Australia's obligations under the ICCPR could be met.

The legislation introduced by the federal government was the *Human Rights (Sexual Conduct) Act 1994* (Cwlth). Its aim was to override any anti-homosexual legislation by declaring it an arbitrary interference in the right of individuals to privacy.

However, before the constitutional validity of the law was tested (to determine whether the federal government had the power under the Constitution to make such a law) the Tasmanian Parliament amended its own law and repealed the offending provision.

The case illustrates that although it may be uncommon for individuals to bring about actions in this way, it is an effective mechanism for protecting human rights. It also indicates that if minority or disadvantaged groups are unable to muster enough support to bring about reform domestically, they may – if Australia has signed a relevant optional protocol – succeed at an international level.

Point to ponder

Section 109 of the Australian Constitution states that if federal and state laws contradict each other, federal law will prevail to the extent of any inconsistency.

REVIEW

1. What are 'inalienable human rights'?
2. Outline some of the human rights issues facing youth.
3. Explain how the Universal Declaration of Human Rights protects the rights of children.
4. Describe the importance of the Convention on the Rights of the Child.
5. Explain why some countries are reluctant to specifically protect the rights of people with differing sexual identities.

LAW IN ACTION

1. Examine the list of specific rights of children that are contained within the Convention on the Rights of the Child (see page 293). Working in small groups, evaluate this list and consider what other rights should be added. Justify your additions.
2. Do children need their own international law specifically protecting their rights? Explain your response.
3. Refer to the *Toonen* case above and complete the following activities:
   - **a** Outline the nature of Toonen's complaint.
   - **b** Explain the ruling of the United Nations Human Rights Committee.
   - **c** Describe the legislative responses of both the Commonwealth and Tasmanian parliaments in relation to the Committee's findings.

18.3 Domestic recognition of the rights of youth, the aged and people of differing sexual identity

Domestic laws are those that are created and apply within a particular legal jurisdiction. In Australia, such laws are either made by the federal, state or territory governments or, in case of common law, the courts of these jurisdictions.

Domestic support for the rights of youth

The rights of youth are covered by both Commonwealth and state legislation. The table below provides a summary of the Commonwealth and New South Wales legislation that protects the rights of children and young people. Under Section 51 of the Australian Constitution, the Commonwealth government can make laws with respect to children (along with marriage and divorce). An example of this is the *Child Support Assessment Act 1989* (Cwlth).

Key Commonwealth legislation affecting the rights of children

Title of Act	Area covered by the Act
Australian Citizenship Act 1948 (Cwlth)	A child born in Australia gains Australian citizenship (though their parents may not)
Family Law Act 1975 (Cwlth)	Parental responsibilities to children are outlined under the Act
Family Law Reform Act 1995 (Cwlth)	The Family Law Act has been continually amended but the 1995 changes were particularly important to children
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cwlth)	The Act aims to remove areas of discrimination against same-sex couples and their children

Key New South Wales legislation affecting the rights of children

Title of Act	Area covered by the Act
Registration of Births, Deaths and Marriages Act 1973 (NSW)	All births must be registered
Status of Children Act 1996 (NSW). This re-enacted the *Children (Equality of Status) Act 1976* (NSW)	Provides equal legal status to all children whether children of a marriage, adopted or ex-nuptial. Allows parentage of a child to be established via DNA testing
Family Provision Act 1982 (NSW). Now inserted into the *Succesion Act 2006* (NSW).	Allows any family member (e.g. a child) to challenge a will if they were not adequately provided for by a parent
Education Act 1990 (NSW)	Everyone has a right to education but children generally must attend school until they are 15 years old
Evidence (Children) Act 1997 (NSW)	Outlines how children may give evidence in criminal proceedings

Children (Protection and Parental Responsibility) Act 1997 (NSW)	Allows police to escort children home if found on the streets or other public places late at night
Young Offenders Act 1997 (NSW)	Encourages use of cautions, warnings and youth justice conferences as alternatives to court proceedings
Child Protection (Prohibited Employment) Act 1998 (NSW) now repealed	Allows for screening of applicants seeking work in child-related industries. Applicants with criminal records for certain serious criminal offences prevented from working near children Names the New South Wales Commission for Children and Young People as the key administrative agency.
Ombudsman Amendment (Child Protection and Community Services) Act 1998 (NSW) Now inserted into the *Ombudsman Act 1974* (NSW)	Legislation designed to protect children from abuse. The key agency responsible for implementation is the New South Wales Ombudsman
Children and Young Persons (Care and Protection) Act 1998 (NSW)	This Act sets out the role of the Department of Community Services (DOCS) in child protection. DOCS provides or arranges services to children, young people and parents when a request for assistance is received; receives and assesses reports of child abuse and neglect; and acts to maintain the safety of children and young people
Commission For Children and Young People Act 1998 (NSW)	This Act established the New South Wales Commission for Children and Young People as the key administrative agency The Act mandates the screening by an approved screening agency of preferred applicants for certain child-related employment The Act charges the Commission with the provision of services to assist and protect the young
Adoption Act 2000 (NSW)	Details the rules governing adoption and how an adopted child can access information about their natural parents
Succession Act 2006 (NSW)	Details the rules around wills, probate and family provisions

The legal system can be **reactive** and respond to changes in the behaviour of youth in a manner designed to protect the young from their own excesses. For example it was not until incidences of street racing continually occurred that the government decided to raise the penalties.

The *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW) introduced new measures and increased penalties for persons who engage in illegal street racing and 'car hoon' activity. The maximum court-imposed fine for a burnout offence is $1100. Anyone committing an aggravated burnout or street racing offence is liable to a penalty of $3300 and, if they re-offend, a further $3300 fine and/or nine months' imprisonment. A 12-month automatic period of disqualification will also apply to the driver following conviction for these offences.

The New South Wales police have the power to confiscate the car of a driver who commits a street racing or aggravated burnout offence. They may also have a vehicle clamped or impounded. A second offence may see the car taken away from

REACTIVE **Responding to a set of circumstances that already exist; that is, reacting to change rather than introducing change.**

its owner and sold or used by the RTA for crash testing. Interestingly, in 2008 police impounded 3000 cars, mainly for speeding and street racing offences. Apart from young drivers, police identified a large group of 'mid-life crisis car hoons'. Despite this fact, most convictions and indeed the great bulk of media coverage on this issue has related to young drivers.

VIOLENCE AGAINST YOUNG PERSONS

Young persons are often exposed to violence in the home. An estimated one in ten children live in homes where a male adult has assaulted them or their siblings for reasons other than bad behaviour; loss of temper and the influence of alcohol being major causes for these assaults. The Australian Bureau of Criminology reported in 2001 that at least one-quarter of young people living in Australia had witnessed domestic violence against their mother or female carer.

The likelihood of having been assaulted, or having witnessed brutality in the home is much higher for indigenous Australians and for young persons from lower socio-economic backgrounds.

The Australian Institute of Criminology in its 2008 report 'Australian Crime Facts and Figures 2007' noted that both males and females in the age group 15–24 years had the highest rates of being victims of assault. Persons of this age are more likely to try and defend their mother from abuse and are more likely to stand up to a violent parent. The highest rates of sexual assault were recorded for females in the 10–14 years range.

Such statistics clearly indicate that, despite considerable domestic and international law in relation to the rights of young people, serious issues remain.

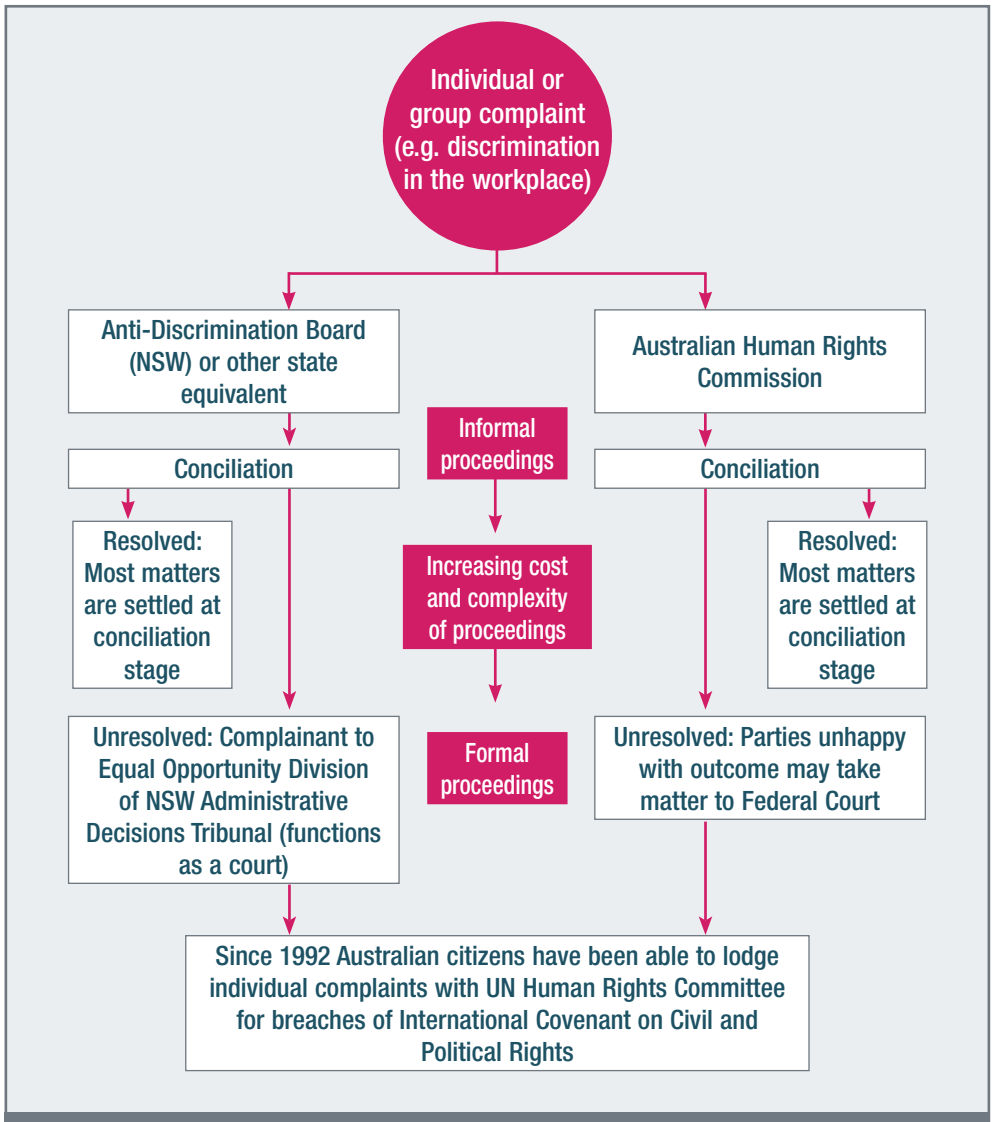
Domestic support for the rights of the aged and people of differing sexual identity

Anti-discrimination law provides legal support for persons treated unfairly because of some characteristic such as age or sexual preference. It allows people who feel they have suffered unfair treatment in comparison to others to air their grievances, be listened to and taken seriously. Usually, an attempt will be made to bring the parties together and settle the matter through conciliation. Bodies such as the Human Rights Commission (though under statute still known as the Human Rights and Equal Opportunity Commission or HREOC) or the Anti-Discrimination Board arrange the conciliation process.

For an individual this can be an overwhelming experience. For example, an older person alleging they were ridiculed and abused at work may lodge a complaint with the Anti-Discrimination Board to assert their rights. However, the process of complaint and conciliation is stressful even when the outcome is favourable, and the complainant may well feel unable to return to work.

However, older people taking action as a group can support each other and may achieve some lasting policy reforms in their workplace so that older people receive fairer treatment. For example, a group of older workers may be able to restrain their employer from gradually phasing them out of responsible or promotional positions, conduct that is clearly discriminatory. In this process, the work culture may become much healthier, making the effort of lodging a complaint more worthwhile.

The Human Rights Commission only provides a conciliation service, and therefore complaints that are not resolved by conciliation could then proceed to the Federal Court and a lengthier, more costly court case.



The process for making an anti-discrimination complaint

The rights of the aged are protected in all anti-discrimination legislation. However, the *Age Discrimination Act 2004* (Cwlth) provides specifically for the protection of this group in our society.

AGE DISCRIMINATION ACT 2004 (CWLTH)

Section 3 of the Act sets out the objects of this legislation.

The objects of this Act are:

(a) to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information; and

(b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and

(c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances; and

(d) to promote recognition and acceptance within the community of the principle that people of all ages have the same fundamental rights; and

(e) to respond to demographic change by:

(i) removing barriers to older people participating in society, particularly in the workforce; and

(ii) changing negative stereotypes about older people.

Log on to the Pearson Places website and follow the links to the Commonwealth Attorney-General's website for a detailed list of amended legislation regarding same-sex relationships.

Despite a significant legislative response, such as the introduction of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) there was still a very large number of federal statutes that discriminated against same-sex couples. Ongoing pressure for reform saw the introduction of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cwlth). It has removed many of the remaining areas of discrimination against same-sex couples and their children.

There is also a growing amount of legislation designed to protect the rights of transgender individuals. For example, the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) made it unlawful to discriminate against or vilify someone on the grounds of transgender status, or because they were thought to have transgender status. Essentially, the protective provisions are similar to those for homosexuals, but section 38B outlaws treating a transgender person as a member of their former sex or requiring them to comply with a condition with which a substantially higher proportion of members of their former sex could comply.

KEY COMMONWEALTH AND NEW SOUTH WALES ANTI-DISCRIMINATION LEGISLATION RELATED TO DIFFERING SEXUAL IDENTITIES

- *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth). This Act prohibits breaches of human rights by the Commonwealth, and discrimination in employment on specific grounds, including (for our purposes) age and sexual preference.
- *Sex Discrimination Act 1984* (Cwlth). This Act deals with discrimination based on sex and issues relating to sexual harassment.
- *Fair Work Act 2009* (Cwlth). This Act deals with discrimination in the workplace based on various grounds, including age and sexual preference.
- *Anti-Discrimination Act 1977* (NSW). This Act is the centerpiece of anti-discrimination legislation in New South Wales. It covers a very wide range of areas where discrimination may occur, including marital status, gender, HIV/AIDS vilification, homosexuality, homosexual vilification, transgender, transgender vilification, age, compulsory retirement and sexual harassment.
- *Privacy and Personal Information Protection Act 1998* (NSW). This Act protects a person's right to privacy with regard to issues (such as sexual identity) that should be of no concern to others.

REVIEW

1 What is a domestic law?
2 Outline some of the key legislation that protects the rights of youth.
3 Explain what is meant by 'reactive laws'.
4 Outline the issues facing youth in regards to violence.
5 Describe the key domestic laws that support the right of the aged.
6 How are the rights of transgender individuals protected?

LAW IN ACTION

1 Working in small groups, discuss whether enough is being done to protect the rights of youth in Australia and around the world. Support your views with examples.
2 Select one piece of legislation that exists to protect the rights of youth, the aged or people with differing sexual identities. Use the Internet to conduct research into this Act and develop a short presentation to give to the class. In your presentation:
   - Identify the key features of the Act.
   - Demonstrate how it protects rights.
   - Assess the effectiveness of the Act in protecting these rights.

18.4 Non-legal responses to the issues affecting youth, the aged and people of differing sexual identity

Non-legal responses to issues affecting youth

Children and young people enjoy considerable proactive community support. They are able to join a vast number of sporting and cultural clubs and other community groups. Most churches have their own youth group and the major political parties all encourage the participation of young people in political processes. Though most of these groups are not pushing for legislative reform, they are allowing children and young people necessary outlets for their views and a chance to gain greater recognition of their skills and abilities.

Online social networking sites provide young persons with a means of sharing ideas and gaining information from other persons in their age group.

Greater access to information and social networking through the Internet provides additional opportunities for young people to better know their rights.

There is considerable support for the young from the wider community, as shown in the calls to remove corporal punishment.

COMMUNITY CALLS FOR SMACKING TO BE OUTLAWED

About a third of child homicides are caused by 'fatal child abuse' linked to the use of corporal punishment by parents and carers. Between 1991 and 2005 there were 165 child homicides committed in New South Wales. In 59 of those cases, deaths resulted from the use of physical punishments. Young fathers and step-fathers were the main offenders.

There is widespread community concern for the welfare of children, especially with the high number of abuse cases that continue to be reported. Physical punishment quickly escalates from a gentle correction to something far more violent. This happens when parents or carers lose their temper. The result is often repeated smacking, resulting in heavy bruising. A child may also be thrown, shaken, given cigarette burns or hit with any instrument that comes to hand. Violent parents will also affect their children so that when they grow up they may believe 'a good smack never hurt anyone'. In this way, a cycle of violence is created. An adult needs to remember just how much bigger they are than an infant or young child and how much physical damage they can cause.

Countries have been slow to remove or reduce the amount of corporal punishment that a parent is allowed to administer. There has been a belief that parents know what is best for their child and that laws are not required to govern domestic situations. There are also problems with enforcing a law that bans corporal punishment. No doubt, others have thought that the removal of smacking and other forms of correction will lead to a generation of ill-disciplined young people.

Countries such as Sweden banned smacking as a punishment 30 years ago and, in the 15 years after the ban's introduction, there has not been a single death through child abuse.

Unfortunately, in a further 27 cases of child homicide the offenders were suffering some form of mental illness. Five cases were caused by parents administering methadone to their children.

The use of the media to promote the rights of children and protect them from abuse has been a powerful agent for change. Media coverage of a paedophile being released from prison and going to live in the suburbs near schools or playing fields is guaranteed to produce a strong emotional response from the general public. It also raises the moral dilemma: whose need is greatest: the public who want to protect children, or an individual who has completed his sentence and is entitled to privacy (and non-disclosure of his address)?

Denis Ferguson

DENIS FERGUSON DENIED LEAVE TO APPEAL TO HIGH COURT

Lawyers for accused child molester Dennis Raymond Ferguson have been denied leave to appeal to the High Court.

His legal team was appealing against a decision that he face trial for allegedly sexually assaulting a five-year-old girl.

The 61-year-old's lawyers last August lodged an application for leave to appeal to the High Court.

A panel of two High Court judges, Justices Kenneth Hayne and Virginia Bell, via videolink from Canberra on Friday denied leave to appeal.

Justice Hayne said the appeal would have had insufficient prospects of success.

Ferguson is awaiting trial on one count of indecent treatment of a child under 16 years after Queensland's Court of Appeal overturned a Brisbane District Court judge's ruling in early 2008 that he could not receive a fair trial.

State Attorney-General Kerry Shine on Friday said in a statement he had always maintained an accused person could get a fair trial in Queensland.

'A jury, properly directed by a judge, is capable of coming to a fair decision based solely on the evidence before them,' Mr Shine said.

'Queensland juries have a great deal of commonsense and maturity.

'I have every confidence in the jury system and the criminal justice system in Queensland.'

Source: AAP, *The Australian*, 13 February 2009

Non-legal mechanisms for protecting and supporting the aged and people of differing sexual identity

The removal of discrimination and other obstacles to the equality of disadvantaged groups is as much a social issue as it is a legislative one. Legislative responses alone will not bring about the changes in attitude and community values required for an accepting and tolerant society based on recognition of equality for all Australian citizens.

The 'aged' are a group with a clear understanding of their lack of economic power. However, their combined voting power gives them considerable political influence, which is increasing as Australia's population continues to age. They also enjoy widespread community support.

As Australia's population continues to age, the elderly have a greater political voice.

Establishing the rights of people with differing sexual identities in the community has taken longer than for the aged. This is because a starting point had to be provided by anti-discrimination legislation to protect them from widespread discrimination and prejudice. The right to free speech or expression is desirable, but it must be guaranteed at law.

Events such as the Gay and Lesbian Mardi Gras in Sydney have elevated homosexual issues in the public eye. Critics have suggested that the sharp political edge that originally characterised these events has been lost. However, the community is now less reactive towards homosexuality, and more receptive and accepting of the views of the homosexual community. Certainly, the level of opposition from many sections of society to events such as the Mardi Gras has waned in recent years.

Lobby groups

These groups actively encourage support from the community for the groups they are promoting. They share common goals and ideals and work towards the attainment of those goals. For example, around the time the federal government announces its annual Budget, various lobby groups compete for the opportunity to express their views and compete for media coverage in the hope of gaining community – and therefore political – support. There are very effective lobby groups working to promote the interests of both the aged and people of differing sexual identities. For example, the Superannuants Association represents the views of retirees, while the Gay and Lesbian Counselling Service provides support and assistance to people of differing sexual identities.

Education

The role of education is particularly important. Expressions of prejudice and discrimination often arise from views that have been held by some members of the community for a long time, sometimes generations. Legislative prohibitions often force those views 'underground', but they may continue to exist and may resurface at some time in the future.

To effectively remove prejudice, educational programs must follow legislation. Bodies such as the Anti-Discrimination Board, the Human Rights Commission and the courts take their educative role very seriously. For example, representatives of the Anti-Discrimination Board can raise the profile of protective legislation and explain its key features during their visits to various workplaces. They can also explain how the complaints mechanism associated with the legislation operates.

The media

The media in all forms plays a major role in presenting the news of the day and forming public opinion. For example, graphic TV coverage of the Vietnam war shown in the United States and Australia in the late 1960s and early 1970s eventually turned public opinion away from supporting the government's role in the conflict. Media reporting of certain events continues to have a definite impact on how the public view major issues.

The media can also focus on positive issues such as health care for the aged, or the achievements of young children. It can also help to lessen fear and public misconceptions about people of differing sexual identities by showing them going about their day-to-day activities just like everyone else.

The media can give positive impressions of groups such as the elderly.

REVIEW

1 Explain the link between the use of corporal punishment and fatal child abuse.
2 Outline any evidence to suggest that a ban on smacking could reduce child mortality rates.
3 How does hitting create a cycle of violence?
4 What is a lobby group?
5 Why is education such an important factor in protecting the rights of the aged and those with differing sexual identities?
6 Outline the role of the media in influencing society's views towards the aged.

LAW IN ACTION

1 As a class, discuss the proposition that some people should not be allowed to raise children. What are the problems a view like this can create for society and the legal system?
2 Select newspaper articles that convey strong messages about the three groups being studied. For each article, explain:
   - **a** the issue dealt with in the article
   - **b** the approach or stance taken by the journalist to the issue (supportive or critical)
   - **c** any implications for legal reform or community values.
3 Read the article on Denis Ferguson and complete the following activities:
   - **a** What offence was Ferguson alleged to have committed?
   - **b** Explain what is meant by 'seeking leave to appeal to the High Court'.
   - **c** Suggest reasons why a judge might decide that an accused person is not able to receive a fair trial in front of an unbiased jury.
   - **d** The Queensland Attorney-General was certain that a fair trial could be held in Queensland. Consider the need to maintain public confidence in such a situation. What would happen if the courts decided that a known paedophile could not receive a fair trial?
   - **e** The media highlighted the fact that a paedophile had been released and was moving about in the general community. Research some of the media articles on the Dennis Ferguson case to assess the fairness of the media's coverage.
4 List the lobby groups that promote the rights of the aged. In small groups, select one lobby group and find out more about how it operates to draw public and media attention to issues of concern. Make an oral presentation of your findings to the class.
5 The media coverage of alleged paedophiles, persons who commit serious sex offences and murderers is often quite emotional and not always factual. What problems does this present for the legal system in providing justice for all members of society? Consider whether all members of society deserve the same rights. Should the rule of law always apply?

CHAPTER SUMMARY

In Australia youth, the aged and people of differing sexual identity all suffer from discrimination.

Direct discrimination occurs when a decision is made or an action is taken based on a stereotyped view of a person, or the group they belong to. Because of this tendency to judge people without knowing them, some groups experience unfair treatment in employment and socially, and are denied opportunities that are freely available to others. Direct discrimination can be legislated against; for example, the *Anti-Discrimination Act 1977* (NSW) can greatly reduce the occurrence of open discrimination.

Unfortunately, indirect discrimination is more difficult to identify and act against. Sometimes it may appear that people are being treating equally when in fact they are not. If treating all people in the same way results in one group being disadvantaged, then indirect discrimination may occur. For example, a shopping centre car park must include car spaces dedicated to disabled people.

International agreements can play a major role in advancing the rights of children. Fundamental rights such as freedom from slavery are more likely to be achieved if global recognition is given to the problem. The Convention on the Rights of the Child has gained enormous international support and has led to increased child protection legislation in most countries.

The Declaration of Human Rights makes specific reference to the rights of the aged. Australia's ageing population also has more economic and political power than the young and can influence the policies adopted by political parties.

Every Australian has the right to take a human rights grievance to the United Nations Human Rights Committee. *Toonen v. Australia* (1994) 1 PLPR 50 dealt with the rights of homosexuals not to suffer discrimination. Eventually, the offending legislation was removed.

There has been a marked increase in legislation to protect the rights of the young at both state and federal level, especially child protection legislation and family law. The phrase 'in the best interests of the child' forms the cornerstone of divorce law and determines what happens to the children after a relationship has broken down.

However, young people have felt their rights have been curbed. The *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW) is an attempt to discourage silly behaviour on the roads by young people.

The *Age Discrimination Act 2004* (Cwlth) removed discrimination against the aged and raised their profile as valued members of the community.

Though legislative reform had removed major areas of discrimination against same-sex couples there were existing laws where discrimination still occurred. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cwlth) has removed almost all instances of discrimination against same-sex couples in federal law.

There are many non-legal means of bringing about change in society. The media can focus on issues of public concern, put legal matters under the microscope and intensify public scrutiny of undesirable legislation.

Education can play a major role in raising community awareness of issues such as child abuse, neglect of the aged and discrimination against homosexuals. Education can bring about changes in attitude that legislation is unable to achieve.

A combination of legal and non-legal responses are required if justice is to be made available to all members of society.

MULTIPLE-CHOICE QUESTIONS

1 If a restaurant owner decides not to employ a waitress because she shares a domestic relationship with another woman, then it is an example of what?

- **A** It is indirect discrimination
- **B** It is direct discrimination
- **C** Shopkeepers are allowed to hire and fire as they please
- **D** The waitress has no legal protection

2 Which of the following is indirect discrimination?

- **A** A doctor refuses to treat all homosexual patients.
- **B** An employer refuses to hire women.
- **C** Teachers give out rewards to everyone in class.
- **D** The Ace Security Company only hires persons of height 180 cm or more.

3 Which of the following was the first major human rights document produced by the United Nations?

- **A** Declaration of Human Rights
- **B** Convention on the Rights of the Child
- **C** International Convention on Civil and Political Rights
- **D** Convention for the Elimination of all Discrimination Against Women

4 Which of the following is a right granted to children by the Convention on Rights of the Child?

- **A** The right to vote in all domestic elections
- **B** The right not to be arrested
- **C** Free contraceptives and the right to free medical advice
- **D** Protection from work that endangers health

5 What is a notable feature of the *Young Offenders Act 1997* (NSW)?

- **A** Harsher penalties for young offenders
- **B** Mediation of all criminal charges
- **C** The use of cautions and warnings
- **D** Voluntary acceptance of corporal punishment

6 Which of the following age groups is most likely to be victims of assault?

- **A** 8–14 years
- **B** 15–24 years
- **C** 55–64 years
- **D** 65–74 years

7 Which of the following forms of corporal punishment is legal in New South Wales?

- **A** Use of the cane
- **B** Use of a ruler or strap
- **C** A cupped hand
- **D** Withdrawing privileges

8 In which of the following situations has someone broken the law?

- **A** If a student brings a knife to school
- **B** When a policeman carries a gun on duty
- **C** When a chef has a set of sharp carving knives
- **D** If an antique dealer sells a model firearm

9 The case *Toonen v. Australia* dealt with which of the following issues?

- **A** A complaint by Aborigines of racial discrimination in Queensland
- **B** An illegal immigrant claiming they were imprisoned for four years
- **C** Women complaining about domestic violence
- **D** Homosexual acts being outlawed in Tasmania

10 Which of the following statements describes the role of lobby groups?

- **A** Drafting legislation for the government
- **B** Refusing to pay income taxes
- **C** Encouraging people to revolt against the government
- **D** Talking to politicians about their concerns

SHORT-ANSWER QUESTIONS

1 Outline the characteristics of direct and indirect discrimination.

2 Outline the functions of the International Criminal Court.

3 List at least three international human rights agreements.

4 How are the rights of children and youth protected by international law?

5 In what ways is the case of *Toonen v. Australia* evidence that Australia has a free and open society?

6 Explain at least two issues facing young people that require a legislative response.

7 Discuss the proposition that social change is just as important as legislative reform to protect the rights of youth, the aged and people of differing sexual identity

8 Analyse the role of law reform in assisting disadvantaged groups in society.

9 Assess the extent to which the law reflects moral and ethical standards in relation to youth, the aged and people of differing sexual identities.

CHAPTER 19

Youth, the aged and people of differing sexual identity: Effectiveness of the responses

CHAPTER OUTCOMES

P1 identifies and applies legal concepts and terminology

P2 describes the key features of Australian and international law

P3 describes the operation of domestic and international legal systems

P4 discusses the effectiveness of the legal system in addressing issues

P5 describes the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change

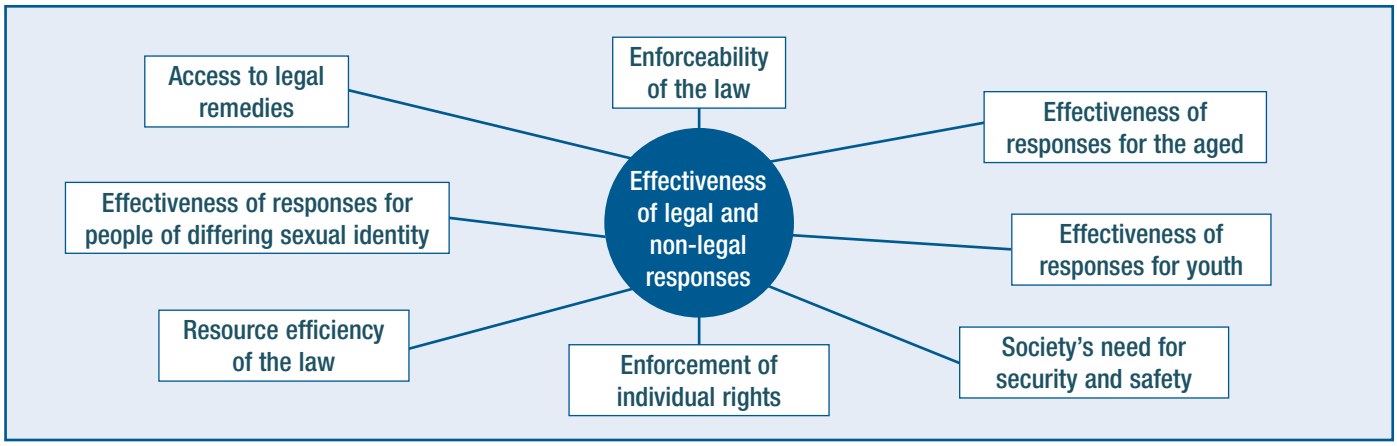
P7 evaluates the effectiveness of the law in achieving justice

P8 locates, selects and organises legal information from a variety of sources including legislation, cases, media, international instruments and documents

P9 communicates legal information using well-structured responses

PRINCIPAL FOCUS

This chapter examines how successful the legal and non-legal responses have been in addressing the issues facing youth, the aged and people of differing sexual identity.



SUMMARY OF CASE LAW

Cesan v. The Queen; Mas Rivadavia v. The Queen [2008] HCA 52
Gilroy v. Angelov [2000] FCA 1775
R v. Skaf [2004] NSWCCA 37

SUMMARY OF LEGISLATION

Commonwealth Euthanasia Laws Act 1996 (Cwlth)
Crimes Act 1900 (NSW)
Crimes Amendment (Consent–Sexual Assault Offences) Act 2007 (NSW)
Criminal Appeal Act 1912 (NSW)
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cwlth)
Family Provision Act 1982 (NSW)
Jury Amendment Act 2007 (NSW)
Property (Relationships) Legislation Amendment Act 1999 (NSW)
Rights of the Terminally Ill Act 1995 (NT)
Road Transport (Safety and Traffic Management) Act 1999 (NSW)
Road Transport Legislation Amendment (Car Hoons) Act 2008 (NSW)
Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Act 2008 (Cwlth)
Young Offenders Act 1997 (NSW)

SUMMARY OF INTERNATIONAL LAW

International Covenant on Civil and Political Rights (1966)

19.1 Assessing the effectiveness of legal and non-legal responses

Legal and non-legal responses may be used to overcome the disadvantages faced by youth, the aged and people of differing sexual identities. The effectiveness of these responses may be gauged from several different perspectives.

Each individual will measure the response by their own set of values to determine if justice was attained. For example, a parent with strict ideas on discipline will want to see strong penalties applied to young offenders. A parent with moderate views on discipline may see guidance and counselling of young offenders as more likely to produce desired outcomes. Society as a whole may decide for a course somewhere between these two extremes. Society's main concern will be for the safety and well being of the community as a whole.

Legal responses or attempts to protect the rights of a disadvantaged group may be judged on the outcomes they produce. If anti-discrimination laws significantly reduced the occurrence of discrimination or ultimately remove prejudice in society they would be regarded as an overwhelming success. A law that achieves no benefit should be removed or reformed to achieve a net positive outcome for society.

Access

A major concern for disadvantaged groups is access to the law. An aged person, for example, may not physically be able to attend court or go looking for a solicitor. They may be ignorant or ill-informed of their rights. They may not have the financial capacity to institute legal proceedings and may live in an isolated country town. Youth and people of differing sexual identity face similar problems in gaining access to the law. In terms of providing just outcomes, these are important issues for the law to address.

An inability to understand the law is a major barrier to accessing the legal system.

Non-legal responses can sometimes assist as community groups may provide advice and support at no cost to people. They may provide transport and develop networks of professional advisors who will work *pro bono* (without charging for their services).

The expression 'justice delayed is justice denied' applies to many court cases or legal claims that take several years to be settled. If a young girl is sexually assaulted and legal proceedings extend over many years it must be emotionally draining for the victim. There are situations where young women refuse to give evidence again in such cases. Fortunately, this issue is being addressed through law reform. (This is discussed in greater detail in *Legal Studies HSC* 3rd edition.) In brief, the law has been reformed so that a victim of sexual assault should only need to testify to the court at the initial trial. If appeals or mistrials occur, the victim is not required to keep making appearances in court.

Enforceability

Legislation to overcome discrimination must be enforced if social attitudes are to change. Individuals need to know that if they experience discrimination at school, in employment or socially there is a legal remedy available. Employers know they are vicariously liable for the actions of their employees. This has led to a change in the culture in many workplaces. In this way legal changes have had non-legal outcomes, as codes of conduct in many work environments have changed. Society has moved from tolerating degrees of child abuse, ageism and overt discrimination against homosexuals to setting new standards of appropriate behaviour. Young people growing up now are far less likely to experience discrimination in the future due to the effectiveness of legislative reform in recent decades.

CASE LAW *Gilroy v. Angelov* [2000] FCA 1775

This case dealt with sexual harassment of a female employee by a male co-worker. The company employing both people was aware that the harassment was taking place but had not made any real effort to ensure the harassment stopped.

Ms. Angelov lodged a complaint against her employer, claiming that it was responsible for the actions of its employees under the notion of vicarious liability. The company was required to compensate Ms Angelov for the distress she had suffered.

Society seeks security and safety for its citizens. Anti-discrimination law and its active enforcement has clearly increased social awareness and responsiveness to the harm that results from discriminatory behaviour.

Resource efficiency

The provision of justice comes at considerable cost in terms of financial and human resources. Fortunately, anti-discrimination and related laws to promote and protect the rights of disadvantaged groups do not impose too large a burden on the legal system or the community. The emphasis on mediation of disputes through bodies like the Anti-Discrimination Board helps to ensure practical, low-cost outcomes to many instances where harassment, discrimination or **vilification** have occurred.

VILIFICATION **The incitement of hatred towards, serious contempt for or severe ridicule of a person.**

Bodies such as the Anti-Discrimination Board help produce practical, low-cost and effective legal outcomes in discrimination matters.

The amendment of outdated legislation that is itself discriminatory can, without major cost, produce favourable outcomes. For example, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cwlth) and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Act 2008* (Cwlth) help to provide just outcomes for same-sex couples and, in the process, remove discrimination without any real financial cost to the community.

Law reform can also raise community awareness to injustices of the past. An informed community is more likely to promote the ideals contained in legislation. Clubs are more likely to extend membership to men and women, heterosexuals and homosexuals and youth where appropriate. Education now targets the young and old to complete additional courses. The police are encouraged to be mindful of not targeting certain groups for public order offences.

Enforcement of rights

The legal system in enforcing laws must be careful not to infringe personal rights. For example, if the police interview a young person who has been arrested on a criminal charge without making arrangements for a parent or carer to be present, any evidence gained is inadmissible in court. The rights of the individual must be safeguarded if public confidence in the legal system is to be maintained.

CASE LAW *Cesan v. The Queen; Mas Rivadavia v. The Queen* [2008] HCA 52

In this appeal case, the defendants had appealed a conviction for importing ecstasy into Australia. Their appeal was based on their assertion that the trial judge was asleep for periods during the trial and a 'miscarriage of justice' had resulted under section 6(1) of the *Criminal Appeal Act 1912* (NSW). The High Court had to decide whether the conduct of the judge would have in some way influenced the jury's ability to determine a fair outcome in the case. The appeal was allowed, resulting in the need for a new trial to ensure the rights of the accused were not adversely affected. The case gave an interesting insight into the notion of 'miscarriage of justice'.

Point to ponder

A miscarriage of justice occurs when due legal process breaks down, prejudicing an accused person's right to a fair trial.

Society's needs for security

Justice requires the protection of individual rights. However, at times, individual freedoms clash with the 'common good', or the interests of society. For example, young people may look to express and extend their rights, but some in society may feel threatened by youth and the way they express their legal rights. Young people are generally keen to gain a driver's licence and to express their new status as a driver out on the roads. Their confidence and tendency to speed worries many older drivers. This results in a lot of social pressure to limit the rights of 'P' plate drivers.

REVIEW

1. In what ways is the effectiveness of the law a subjective or personal viewpoint?
2. Explain the importance of access to the law.
3. Explain why the enforceability of the law is so important.
4. Outline the reasons why anti-discrimination laws must be enforced.
5. Why is it important for the legal system to be resource-efficient?

LAW IN ACTION

Review the case *Cesan v. The Queen; Mas Rivadavia v. The Queen* [2008] HCA 52 and complete the following activities:

a Outline the reasons this case was appealed.

b Describe the ruling of the High Court.

c Explain what this case indicates about the need for society to have 'faith' in the effectiveness of the legal system.

19.2 Effectiveness of legal and non-legal responses in relation to youth

During the Wood Royal Commission into the operation of the New South Wales police force in the 1990s, evidence of child abuse of various kinds was revealed. This resulted in new and amended legislation being introduced into parliament to improve child safety. In trying to ensure the legislation was effective in protecting children, the legislators placed enormous pressure on law enforcers, government agencies, schools, police and doctors.

Department of Community Services

The role of the Department of Community Services (DoCS) in child protection is set out in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). It works with parents and care-givers along with the police, schools and other agencies to protect the rights of children.

The Department of Community Services is responsible for ensuring the rights of children are maintained.

The increased emphasis on the wellbeing of children in recent years has seen DoCS' workload increase significantly. However, the Department's resources have always been limited and therefore incoming reports of children being mistreated had to be prioritised. This meant that the most serious allegations were dealt with first. Other cases, some of which were also issues of concern, could not be dealt with as quickly.

Factors limiting the effectiveness of DoCS include:

- burn-out of staff. Staff are given a large number of cases to manage, each of which is a particular young person or family situation. The workload is great and the emotional drain of trying to help lots of troubled young people often means that staff are unable to stay in the job for long
- issues that are difficult to resolve. Staff must sometimes decide whether to remove a neglected infant from its family environment or leave it with its family. If a child is removed, DoCS is sometimes accused of cruelty. On the other hand, if a child is not removed and later dies for some reason, DoCS may again face considerable criticism. For example, young children are not removed from parents just because they are drug addicts. Yet, young children die from neglect (not being fed) and from being given methadone by drug-dependent parents. The problem is made to appear worse if DoCS has homes under supervision but children still die. The impact on staff morale is enormous
- limited resources. The Department is always struggling with limited resources, which makes it difficult to attain the goals prescribed in the Act.

In late 2008, some relief for DoCS occurred in relation to mandatory (compulsory) reporting of incidents relating to child protection. Up till then, all possible incidents of child abuse or children 'at risk' had to be reported to DoCS. Almost 303 000 calls were made to the DoCS help line in 2007–08, compared to 159 643 in 2001–02. Due to the sheer volume of reports only 13 per cent of reports were followed up with a home visit.

This meant every unexplained bruise on a child noticed by a doctor or teacher, for example, had to be reported to DoCS. The workload this created overwhelmed DoCS resources. Many of the reports were clearly unnecessary. The suspicion of a child being 'at risk' now needs to be 'significant' for it to be reported to DoCS.

THE IMAGE OF THE DEPARTMENT OF COMMUNITY SERVICES IN THE MEDIA

The Department of Community Services is the human face of child protection. As an agency that works with parents, children, police, schools, health care workers and the community there are high expectations of how effectively DoCS can protect young people. The media often dwells on the more negative aspects of DoCS' role. If a young child dies of neglect or abuse, DoCS will be criticised for failing to adequately protect the child.

An example is a headline in a Sydney newspaper titled 'Girl starved in bed'. In this case a seven-year-old autistic child, Shellay Ward, was found dead in her bed. She weighed just nine kilograms. The NSW Department of Community Services confirmed it had been in contact with family over the years, yet Shellay appeared to have gone unnoticed. She had died of starvation and dehydration. Two other children in the family were taken into care. The girl was one of 115 children to have died in New South Wales in that year while under the watch of DoCS.

The problem for DoCS is that children are usually best left in the care of parents, but sometimes this goes tragically wrong. It is these tragedies and not the thousands of successful cases that receive the most media attention.

Young offenders and the criminal law

The legal system is not generally harsh in its treatment of young offenders – that is, those under 18 years. The *Young Offenders Act 1997* (NSW) is based on a system of warnings and cautions in preference to court appearances. Under Section 10 of the *Crimes Act 1900* (NSW) a first offender before the court can ask that no conviction be recorded. This is particularly important for young people, as most employers use standard employment forms that ask if a job applicant has a criminal record. An applicant who lies about a criminal record can be instantly dismissed. Any student wishing to study Law at university, hoping to then have a career in Law, must not have a criminal record. Authorities are aware of the importance to young people of not having a criminal record and try to use alternatives to court proceedings, particularly for minor breaches of the law.

Society wants violent or career criminals punished but has a more compassionate view to young offenders. The following case reflects prevailing social values.

Point to ponder

In accordance with Section 10 of the *Crimes Act 1900* (NSW), a young person who commits even a relatively minor offence can be given a criminal record.

MANSLAUGHTER CHARGE OVER SPEED BOAT DEATH OF YOUNG GIRL DROPPED

In December, 2008 an 18-year-old girl was thrown from a speed boat that collided with a tree protruding out of the water on Lake Eildon in Victoria and died. The accident happened at about 1:30 a.m. The driver of the boat was a 16-year-old boy.

Police believe speed may have been involved in the accident. After preliminary investigations, the boy was charged with manslaughter. However, the charge, which was to be heard before the Children's Court, was later dropped.

Point to ponder

Between April 2007 and November 2008, 52 000 'P' platers lost their licence for a range of driving offences.

Driving-related offences dominate the relationship between the police and youth. The image of young drivers has been tarnished by the actions of some reckless drivers and this has resulted in a perception that all young drivers are dangerous and engage in high-risk activities. Such perceptions are often fuelled by media reports.

STREET RACING AND BURNOUT OFFENCES

The legal system has reacted strongly to the ongoing problem of illegal street racing and related offences. In 2007, Alan and Judith Howle, a couple in their 70s, were rammed and killed by two cars racing on the Great Western Highway at St. Marys in Sydney. The public demanded action and the media responded with an ongoing campaign. Police confiscated about 200 cars in that year and see it as the most effective way of stopping illegal street racing.

In dealing with another case of street racing by two 17-year-olds that occurred in the same week, magistrate Anthony Spence called for the law to be toughened on offenders. The public also

The law has responded to street racing with increased penalties.

expected that the law would be reformed. The *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW) clearly was the legal response to the increasing occurrence of this offence. The *Road Transport (Safety and Traffic Management) Act 1999* (NSW) had previously banned street racing and burnout offences under sections 40 and 41, but the amendment allowed for tougher penalties.

The effectiveness of the legislative changes will only be gauged over time. However, evidence suggests that taking away drivers' licences for excessive speeding and non-payment of fines is effective. The police view is that the confiscation of young drivers' cars, to which they devote vast amounts of time, energy and money, may well stop or deter street racing. The protection of society has demanded that some individuals be punished for their behaviour on the roads.

Many years ago drivers who had not paid outstanding fines would appear in court and could be forced to pay an additional penalty. They also had the option of spending time in prison rather than paying their fines. Youth were particularly affected by such policies. In one case, Jamie Partlic opted to spend time in prison rather than pay his fines. He was placed in the remand part of the prison and was savagely beaten by another inmate. He became a quadriplegic. As a result of that case, the option of spending time in prison instead of paying fines has been withdrawn. It is now widely accepted that if people do not pay their fines, confiscating their driver's licence is the most effective means of dealing with the problem.

Concern is often expressed about how many young people use fake or borrowed identification to enter premises that serve alcohol. At present, a large fine is imposed on offenders and persons who lend their identification details to their friends can also be penalised.

As of 2009, police have been passing on offenders' details to the Roads and Traffic Authority. Most offenders are on their 'P' plates and an extra six months will automatically be added to the time they must remain on their 'P's. This takes the minimum time spent on 'P' plates for offenders to three-and-a-half years.

Police are concerned that many parents pay any fines imposed on their children and so young people are not treating the fines as seriously as they should.

The issue of consent in sexual relations

Young people are often victims of domestic violence. They are also victims, and in some cases, perpetrators of assault. Sexual assault is a particularly serious issue for young women. Only a very small percentage of offenders are finally held accountable for their actions and given prison sentences. The Bilal Skaf case (*R v. Skaf* [2004] NSWCCA 37) received massive publicity, as Skaf was originally sentenced to 55 years for his role in multiple sexual assaults (aggravated sexual assault in company or 'gang rape').

A major issue for the courts and juries has been the issue of consent. An amendment to the *Crimes Act 1900* (NSW) – the *Crimes Amendment (Consent–Sexual Assault Offences) Act 2007* (NSW) – has significantly tightened the law, making it harder for offenders to argue that they thought they had consent. Any duress will negate consent. This change to the law will make it easier for juries to understand exactly what 'consent' is and not have as many offenders avoiding conviction due to uncertainty over whether consent was given in a sexual assault case.

REVIEW

1 Account for changes to child protection laws that followed the Wood Royal Commission.
2 Outline the difficulties faced by DOCS in trying to safeguard children from abuse.
3 Describe the recent changes that will reduce the workload of DOCS.
4 What allowances are made in the criminal law for young offenders?
5 Explain why the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) was amended.
6 Outline the dangers involved in street racing.
7 How has the legal system responded to the growing use of identification fraud?
8 Outline the issues facing youth in regard to sexual consent.

LAW IN ACTION

1 The Department of Community Services emphasises that caring for children is a responsibility to be shared by agencies, families and communities working in partnership. Assess whether this happens in practice.
2 Review the text 'Manslaughter charge over speed boat death of young girl dropped' on page 315, and complete the following activities:
   a Suggest reasons why the police originally decided to charge the boy with manslaughter.
   b How significant would the boy's age be in this case?
   c Would justice be served by placing the young boy in a juvenile detention centre?
   d 'The law reflects social values.' Assess how society may view the outcome in this case.
3 Working in small groups, discuss whether parents should be forced to pay the traffic fines of their children.

19.3 Effectiveness of legal and non-legal responses in relation to the aged and people of differing sexual identity

State and federal governments have become increasingly aware of the needs of the older members of society. Legislation in recent years has dealt with areas such as aged care and retirement accommodation. The *Age Discrimination Act 2004* (Cwlth) has achieved many of its objectives, as outlined in the previous chapter.

The aged are increasing in number. Australia's 'baby boomers' are now approaching retirement age. This will increase the political power of that age group to bring about legislative and social reform. In the future, more retirees will have superannuation when they retire, providing them with more spending power. Superannuation is a form of compulsory saving. Employers are required to pay an amount at least equivalent to 9 per cent of their employees' salary into a fund for their employees to access upon retirement. These savings should result in favourable non-legal outcomes, as aged-care services will expand to meet the growing market. Community groups that serve as places where the aged can meet and socialise, discussing issues of mutual importance, should help promote the wellbeing of the aged.

BABY BOOMER The generation born between 1946 and 1964.

Australia's population is aging and this presents a range of legal and non-legal issues for Australia.

Euthanasia

One area that could be regarded as a key human rights issue for the aged is **euthanasia**. Though people can fall seriously ill at any stage of their life, it is most often the aged who have to deal with life-threatening conditions such as cancer, and a marked deterioration in the quality of their lives.

Some aged persons would prefer to have the right to terminate their own life rather than live in pain. However, at present, euthanasia is illegal in Australia. Recent experience in Australia might suggest that there is little likelihood of any change to the law. Euthanasia creates considerable debate in society; a debate that is influenced by personal morality and religious beliefs.

In 1995, the Northern Territory had passed a law (the *Rights of the Terminally Ill Act 1995*) to allow euthanasia to take place. Under this Act, seriously ill persons were able to have assistance to take their own lives in certain circumstances. However, the Commonwealth government introduced its own legislation (the *Commonwealth Euthanasia Laws Act 1996*), which overrode the Northern Territory Act and ensured that euthanasia remains illegal in every state and territory in Australia.

Society's values would need to change before any further attempts are made to legalise euthanasia. International law may also need to change, as the International Covenant on Civil and Political Rights that Australia supports provides for a right to life for all persons.

EUTHANASIA **The assisted, voluntary ending of the life of a person who is suffering great pain and discomfort from an incurable disease, such as some forms of cancer.**

The euthanasia debate

Arguments for euthanasia	Arguments against euthanasia
• Each person has a right to control their own life and euthanasia should be a matter of personal choice • Many people experience a lot of pain with a terminal illness and when death seems inevitable they should be spared from this suffering • Families may go through a lot of anguish watching a loved one in pain and slowly dying. This process could continue for some years • Prolonging life past a certain point could be regarded as a very cruel and morally wrong act. Keeping a person alive but in a vegetative state is not affording them any quality of life • An ageing population will add considerably to the nation's health costs. There must be a limit to the resources that can be provided for treatment of the terminally ill • It is suggested that some doctors currently assist patients to die by increasing or stopping medication. Making euthanasia legal would remove some pressure or responsibility from doctors who treat the terminally ill. Further, it would save people who assist a person to end their life from facing criminal charges	• Human life is sacred and no-one has the right to take anyone's life, including their own • Some people suffering from a serious, life-threatening illness may actually recover, or a cure could be developed before they die • The person who is seriously ill may change their mind. For example, for a period of time they may feel like dying and then, if the pain is better managed, they may decide they wish to live • Who is to decide when a person's life is to end? Their doctor, a family member or just the individual concerned? Many problems could emerge in trying to decide this issue • A person who is ill may feel pressured to 'do the right thing' to ease the burden on family or the health system • If euthanasia is only legalised in one or two states or territories there will be a rush of people from states where euthanasia is illegal to jurisdictions where it is allowed. The perceived inconsistency in the law between the states would also undermine public confidence in the legal system

Same-sex relationships and law reform

There has been considerable progress in granting rights to people with differing sexual identities. They gained property and inheritance rights in line with other *de facto* couples with the passing of the *Property (Relationships) Legislation Amendment Act 1999* (NSW). Prior to the Act, if a partner in a homosexual relationship died intestate, it was difficult for the surviving partner to inherit the estate. They had to rely on the *Family Provision Act 1982* (NSW) and hope to convince the court that they were a 'dependant' of the deceased.

Now that the new Act is in force, surviving partners may inherit their partner's estate without the complication of a court case. However, this Act only protects the rights of those living in New South Wales; thus there is an inconsistency in the level of protection throughout Australia.

Recent amendments introduced to many pieces of legislation by the Commonwealth government have removed many remaining areas of discrimination. These changes to the law are effective as they are far more than cosmetic; they are real attempts to promote equality of rights.

The main area where equality has not been achieved is in relation to marriage. The definition of marriage includes reference to the union of a man and a woman. The federal government has refused to consider changing this definition and struck out the ACT's attempt to bring in an Act to legalise civil unions, which was an attempt to give same-sex unions status roughly equivalent to marriage.

Again, it will probably require non-legal initiatives through changed social values and social pressure to bring about a change to existing marriage law.

REVIEW

1 Outline the changes taking place in Australia's population.
2 What is a 'baby boomer'?
3 Explain how superannuation will affect the aged in the future.
4 Describe how the law has responded to an aging population.
5 Define 'euthanasia'.
6 Outline the legislative responses to the issue of euthanasia.
7 Describe the changes to the laws that have taken place in relation to people with differing sexual identities.
8 What is the legal definition of 'marriage'?

LAW IN ACTION

1 As a class, discuss the consequences for Australian society of an ageing population.
2 Consider the question of whether the government has the right to deny an adult the right to use euthanasia to end their lives when suffering a terminal illness. Present your thoughts to the class.
3 Conduct research into same-sex marriages around the world. Which countries allow such marriages?

CHAPTER SUMMARY

Youth, the aged and people of differing sexual identity are all disadvantaged groups in our society. Legal and non-legal approaches have been adopted to improve their status and the opportunities available to them. The removal of all forms of discrimination has been an important part of that process.

However, the question must always be asked 'how successful have these initiatives been in assisting these disadvantaged groups'? The 'effectiveness' of legal and non-legal responses to the issues faced by these groups tends to be determined subjectively by most people. There are aspects of effectiveness that can be examined to see if there is more justice as a consequence of new laws and changed social values.

Access is an important justice-related issue. Do these groups have appropriate information about how the legal system operates and how to lodge a complaint if their rights are violated? The financial cost of taking matters to court is significant. Appeals will cost more and drag out legal processes. The end result can be that 'justice delayed is justice denied'.

Any additions to anti-discrimination law must be enforceable and promote changes within the community itself. The support of community groups to bring about social acceptance and tolerance of different groups is necessary, because laws alone will not bring about changes in behaviour. The legal system and community groups have to make use of limited resources and strive to be resource-efficient.

Another important issue is the protection of individual rights. The legal system cannot be so keen to bring about change or to protect the community that it sacrifices the rights of the individual. A miscarriage of justice, as shown in *Cesan v. The Queen; Mas Rivadavia v. The Queen* [2008] HCA 52, cannot be tolerated or it will threaten the rule of law and public confidence in the system.

Child protection has been greatly improved through legal and social forces combining to provide safer environments for children and young people. Youth have gained more rights and more of a say in decisions that affect them. Perhaps in their haste to enjoy the privileges of growing older, some youth have engaged in behaviour that is a threat to society. Speeding, street racing, burnouts and the use of fake identification to enter licensed venues or to purchase alcohol have prompted legal and social responses to deal with these problems. There is little doubt that, when legislation is titled the *Road Transport Legislation Amendment (Car Hoons) Act 2008*, it is sending a clear message to the community. Certain behaviours will not be tolerated.

Though the emphasis is on youth, the aged have achieved major success in removing discrimination with the *Age Discrimination Act 2004* (Cwlth). More issues, such as euthanasia, will keep emerging but society will decide if and when it becomes necessary to introduce new laws to deal with this.

Same-sex couples have for a long time been victims of discrimination. Social attitudes have changed and have been reflected in changes to legislation to significantly increase the rights of same-sex couples.

MULTIPLE-CHOICE QUESTIONS

1 In practical terms, what does 'justice delayed is justice denied' mean?

- **A** Juries should reach quick verdicts rather than deliberate for too long.
- **B** Judges who delay sentencing give lesser penalties.
- **C** Court processes can take years to complete and are emotionally draining.
- **D** Police should punish offenders rather than taking matters to court.

2 An employer who does nothing to stop some employees victimising older staff is guilty of which offence?

- **A** Vicariously liable for discrimination
- **B** Causing hardship
- **C** Breaches of occupational health and safety
- **D** Creating unemployment

3 In the High Court appeal *Cesan v. The Queen*, what was the key issue?

- **A** Whether drug importers have a right to appeal
- **B** Jury conduct, as many were not paying attention to the judge
- **C** Judges are overworked and under enormous pressure in court
- **D** The miscarriage of justice

4 What determines most people's perceptions of justice?

- **A** What they read in law books
- **B** Their own experiences and values
- **C** An objective review of the facts in a case
- **D** What other people tell them

5 What effect has the *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW) had on traffic laws?

- **A** Street racing is banned.
- **B** The police are now permitted to stop and search cars.
- **C** Tougher penalties have been introduced, such as confiscating cars belonging to those convicted of street racing.
- **D** People who don't pay speeding tickets will now be sent to prison.

6 Why is Section 10 of the *Crimes Act 1900* (NSW) important?

- **A** It allows young offenders a second chance.
- **B** It ensures prison sentences for certain offences.
- **C** It discriminates in favour of children.
- **D** It lists all the major crimes.

7 The *Age Discrimination Act 2004* (Cwlth) deals with which of these issues?

- **A** The availability of superannuation for aged employees
- **B** Ensuring young children are not forced into employment
- **C** Ensuring older employees retire at 65 years of age
- **D** Removing discrimination against older persons

8 Which of the following statements matches the current legal position on euthanasia?

A Euthanasia should be a matter of choice.

B Euthanasia is illegal in all Australian states.

C Doctors decide whether euthanasia is justified.

D Euthanasia has always been legal if the patient agrees.

9 Same-sex partners are not able to do which of the following?

A Inherit property from their partner

B Marry

C Have family cover for health insurance

D Arrange for a surrogate mother

10 In what ways are the problems of disadvantaged groups moral and ethical issues?

A Laws should be very clear and easy to follow.

B It is too difficult to make laws on discrimination.

C People's value systems are involved.

D Minority groups are always unhappy.

SHORT-ANSWER QUESTIONS

1 What factors should be considered when deciding whether a law is effective?

2 Provide examples of issues of concern for youth, the aged and people of differing sexual identities that indicate doubts over the effectiveness of the law.

3 Describe the importance of access when assessing the effectiveness of the legal system.

4 Explain the issues facing the aged in regard to the law.

5 Analyse the legal issues faced by youth.

6 Assess the effectiveness of the law in dealing with the legal issues involving youth.

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INDEX

A

B

C

INDEX

D

E

F

G

INDEX

INDEX

INDEX

ANSWERS TO MULTIPLE-CHOICE QUESTIONS

CHAPTER 1

1 B
2 D
3 B
4 A
5 D

CHAPTER 2

1 C
2 C
3 A
4 C
5 B

CHAPTER 3

1 D
2 A
3 C
4 C
5 A

CHAPTER 4

1 B
2 B
3 A
4 C
5 A

CHAPTER 5

1 C
2 B
3 A
4 D
5 A

CHAPTER 6

1 C
2 A
3 C
4 A
5 D
6 A
7 B
8 D
9 A
10 C

CHAPTER 7

1 D
2 B
3 A
4 D
5 A
6 A
7 C
8 B
9 A
10 C

CHAPTER 8

1 B
2 D
3 A
4 C
5 D
6 A
7 B
8 C
9 D
10 B

CHAPTER 9

1 B
2 A
3 C
4 D
5 B

CHAPTER 10

1 C
2 B
3 D
4 C
5 A
6 B
7 D
8 D
9 C
10 A

CHAPTER 11

1 D
2 C
3 D
4 B
5 A

CHAPTER 12

1 D
2 C
3 B
4 D
5 A
6 D
7 B
8 A
9 C
10 A

CHAPTER 13

1 B
2 C
3 B
4 B
5 C
6 B
7 A
8 D
9 B
10 C

CHAPTER 14

1 B
2 C
3 C
4 A
5 D

CHAPTER 15

1 A
2 C
3 D
4 C
5 D

CHAPTER 16

1 B
2 D
3 B
4 D
5 C

CHAPTER 17

1 C
2 B
3 C
4 A
5 D
6 B
7 B
8 D
9 A
10 B

CHAPTER 18

1 B
2 D
3 A
4 D
5 C
6 B
7 C
8 A
9 D
10 D

CHAPTER 19

1 C
2 A
3 D
4 B
5 C
6 A
7 D
8 B
9 B
10 C