

INVESTIGATING  
**LEGAL STUDIES**  
FOR QUEENSLAND

Second Edition



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# Introduction

Welcome to the Second Edition of *Investigating Legal Studies for Queensland*, written to the new *Legal Studies 2019 General Senior Syllabus*.

Laws influence everything we do so it is important for us, as citizens, to understand the laws that exist within our society and how they affect us. Legal Studies provides students with the opportunity to understand our legal system as well as comprehend many important legal and social topics. It is important for students to value their democratic and human rights as this allows them to make a meaningful contribution to our society. *Investigating Legal Studies for Queensland Second Edition* uses current issues that stem from local, national and international sources that will allow students to reflect on legal implications from both the past and the present as well as into the future.

Covering the *Legal Studies 2019 General Senior Syllabus* in one book allows flexibility in the development of work programs for Years 11 and 12 in all schools and provides better support for composite classes because all the topics can be found in the one textbook.

Clearly distinguishable by means of coloured tabs, each of the four units (Beyond reasonable doubt, Balance of probabilities, Law and governance, and Human Rights in legal contexts) follows the same structure. Starting with unit and chapter openers to contextualise the content to be covered, then enhancing the content through case studies, news articles, extracts from relevant laws, and photos; offering ample opportunities for revising new content and inquiry through a range of activities and concluding the chapter and unit with a range of assessment techniques (short-response, extended-response and response-to-stimulus).

While 'Review' activities support students to check their understanding of the new materials they have been introduced to, 'Research' activities, 'Sidebar' and 'Check this out' offer students opportunities to delve deeper into and reflect on issues relating to the relevant chapter topic. Each question is marked with the relevant cognitive verb – Comprehend (C), Select (S), Analyse (A), Evaluate (E), and Create (Cr) – to guide students through the required range of cognitive processes they need to use to meet the syllabus objectives.



# About the authors



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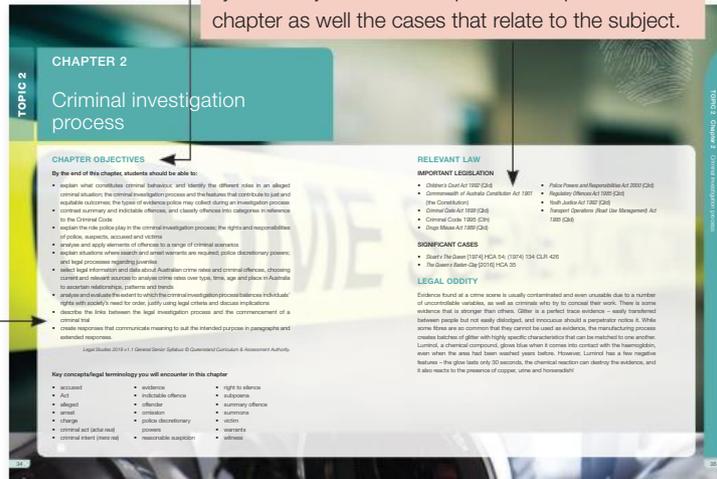
**DON SMITH:** To the students whose engagement in learning makes teaching worthwhile.

# How to use this book

Each chapter opener provides an overview of the syllabus objectives for the particular topic and chapter as well as the cases that relate to the subject.

Navigate through the book by following the topic and chapter information in the tab that changes colour with each unit.

This list can be used as a quick revision aid – definitions appear throughout the chapter as well as in the glossary at the back.



Key terms and other relevant words are defined where they first appear in the text.

Research activities are designed to extend your knowledge by researching relevant cases, issues or bodies using source material. The code in brackets refer to the cognitive verbs in the five syllabus objectives: Comprehend (C), Select (S), Analyse (A), Evaluate (E), and Create (Cr).

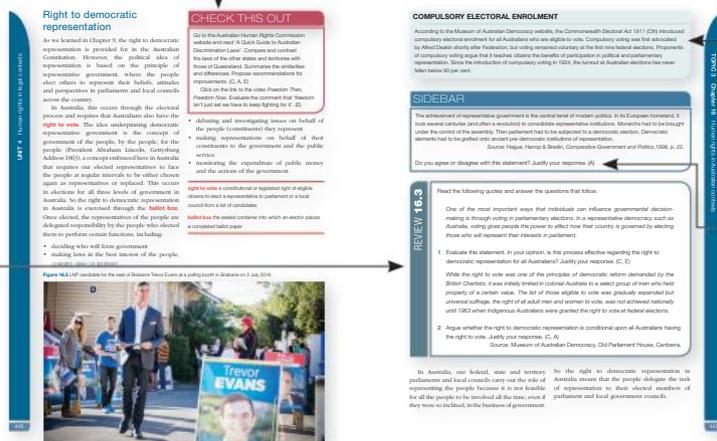
Check this out boxes give suggestions for further content available online.

Review activities comprise comprehension and focus questions about the preceding text. The code in brackets refer to the cognitive verbs in the five syllabus objectives: Comprehend (C), Select (S), Analyse (A), Evaluate (E), and Create (Cr).



Each Chapter Review provides a summary of the key points.

Three sets of activities help you review the chapter content and identify areas where you need further assistance.



Information that the authors want to highlight appear in breakout boxes.

Sidebars are legal fact boxes followed by a discussion question.

# Beyond reasonable doubt

## **Focus: Can the Australian legal system effectively safeguard individuals' right to freedom from interference with society's need for order?**

In Unit 1, students are introduced to the Australian legal system, the sources of law and the roles of parliament and the courts. The unit focuses on legal principles, and criteria, for example just and equitable outcomes. Students will consider how criminal law attempts to safeguard individuals' right to freedom from interference with society's need for order. Students examine the consequences of alleged criminal behaviour in terms of trial processes, punishments and sentences.

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## UNIT OBJECTIVES

**By the end of this unit, students should be able to:**

- comprehend legal concepts, principles and processes of the Australian and Queensland legal systems, with a focus on the criminal law
- select legal information from sources relevant to the Australian and/or Queensland criminal justice systems
- analyse legal issues involving the Australian and/or Queensland criminal justice systems
- evaluate legal situations relevant to the Australian and/or Queensland criminal justice systems
- create responses that communicate meaning to suit the intended purpose.

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## CHAPTERS/TOPICS IN THIS UNIT

- Chapter 1: Legal foundations
- Chapter 2: Criminal investigation process
- Chapter 3: Criminal trial process
- Chapter 4: Punishment and sentencing

## CHAPTER 1

## Legal foundations

## CHAPTER OBJECTIVES

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

- describe the concept of the rule of law; sources of law in the Australian legal system; separation of powers doctrine in the Australian legal system; difference between onus of proof and standard of proof; court hierarchy in Australia; and the difference between adversarial and inquisitorial systems of criminal justice
- explain the purpose of laws within society; the difference between a rule and a law; the concepts of just and equitable outcomes as a foundation principle of criminal law in Australia; characteristics of an effective law; the process of statutory law-making; the role of states, territories and the Australian Government; the process of statutory interpretation and the role of courts; and the legal criteria for decisions
- analyse a range of criminal legal issues to determine the nature and scope of the issue and then examine different viewpoints
- analyse the role of customary law in Australia's legal system to determine the nature and scope of the issues involved, then examine different viewpoints
- describe the links between the legal foundations to the criminal justice system as a general overview
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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## Key concepts/legal terminology you will encounter in this chapter

- |                      |                        |                        |
|----------------------|------------------------|------------------------|
| • adversarial system | • criminal law         | • referendum           |
| • bicameral          | • customary law        | • residual powers      |
| • civil law          | • democracy            | • rule of law          |
| • code               | • equitable outcomes   | • separation of powers |
| • common law         | • exclusive powers     | • stakeholder          |
| • concurrent powers  | • inquisitorial system | • standard of proof    |
| • constitution       | • jurisdiction         | • statute law          |
| • court hierarchy    | • justice              | • the state            |
| • crime              | • onus of proof        | • unicameral           |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Acts Interpretation Act 1954* (Qld)
- the Charter of the United Nations 1945
- *Commonwealth of Australia Constitution Act 1901* (the Constitution)
- *Criminal Code Act 1899* (Qld)
- *Criminal Code 1995* (Cth)
- *Magistrates Court Act 1921* (Qld)
- the Magna Carta (the Great Charter) 1215

### SIGNIFICANT CASES

- *R v Minor* (1992) 59 A Crim R 227
- *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012)

## LEGAL ODDITY

Australia's first police force was made up entirely of convicts! The Marines of the Royal Navy were put in charge of law enforcement after the First Fleet arrived in New South Wales in January 1788. They operated according to the rules set by Governor Arthur Phillip. As crime began to rise steadily throughout the colony, it was soon decided that the settlement needed a police force of its own. Governor Phillip created the Night Watch, made up of 12 of the best-behaved convicts.

# 1.1 Rules and laws in society

Law is a part of daily life. It establishes rights and responsibilities to regulate how individuals and groups conduct themselves in society by establishing legal requirements or restrictions on behaviour. There are many different legal and non-legal rules and regulations to abide by, so citizens

need to understand where rules and laws originate, their importance, and the impacts on society of their rights and responsibilities.

Living in a democratic country such as Australia, individuals need to understand their role in electing the government that determines the rules and laws

**Figure 1.1** Legal and non-legal rules regulate how individuals and groups behave.



that govern a society and the importance of **democracy**. They must not take for granted their right to vote when they turn 18 but rather take seriously their major role in the democratic process, to vote for a member of parliament who will best serve their interests. Informed citizens understand the world in which they live, respect and reflect on laws and seek change to benefit society.

---

**democracy** government by the people, directly or indirectly, through a system of representation, usually involving periodically held free elections

---

## Rules and laws

Parents, guardians, schools, sporting clubs and associations make decisions about safety and needs every day. These decisions, called **rules**, can range from very basic to very formal. Rules made by governments to ensure that our society functions properly are referred to as **laws**. Laws cover almost every aspect of our lives. There are laws that regulate how we use our roads, how we buy and sell goods, what we can and cannot have in our backyards and how we resolve conflict, as well as laws that ensure our individual rights are protected. When considering laws and the legal issues that arise from the regulation of behaviour in society, analysing the **nature** and **scope** of the issues can help us to understand the impact of

the regulations and the need for rules and laws to safeguard the rights of individuals and society's need for order. These rules and laws are designed to regulate the behaviours of and interactions between members of society and the **state**, and are categorised into either civil law or criminal law.

In modern Australian society, when an individual or group breaks the law through an act or omission against the community at large, the action is referred to as a **crime**, and is punishable by the state. Criminal law attempts to balance the rights of individuals to freedom from interference with person or property, and society's need for order. We expect that if someone violates our rights in some way through a criminal act, the perpetrator will be punished.

---

**rules** the decisions your parents, guardians and school make about your safety and needs

**laws** rules that are made by government to ensure that our society functions properly

**nature** (of a legal issue) the essence and elements of the legal issue being considered

**scope** (of a legal issue) the extent of the components of the legal issue

**state** a term used to refer to the government and the people it governs

**crime** an act or omission punishable by the state

---

### REVIEW 1.1

- 1 Classify the following as rules or laws:
  - a not wearing a school uniform
  - b wearing a helmet when riding a bike
  - c speeding
  - d punching someone in the face
  - e lining up in the tuckshop
  - f not starting a race until a gun is fired
  - g going to school. (C)
- 2 List as many rules and laws as you can that may have affected your life in the last couple of days. Discuss the function of each of the laws identified. (C)
- 3 Describe the differences between civil and criminal laws. (C)
- 4 Explain, in your own words, what the concept 'nature and scope' means when referring to legal issues or crimes. (C)
- 5 Create a one-paragraph response that explains the function of law and why both rules and laws are necessary in a society. (C, Cr)

## The purpose of laws

Regardless of their age, race, sex, cultural or religious background, most people believe that there are certain ways in which people should behave and treat others. Laws are a formalised version of these beliefs, enacted to regulate, protect and balance the rights and responsibilities of citizens in a society. In Australia, the law aims to reflect the moral, ethical, political, economic, social and cultural influences of the society as a whole.

At times, moral and ethical standards seem to be at odds with modern-day society and with some minority groups within society; however, these laws aim to guide citizens on how to behave, to offer protection, maintain order and ensure justice. As

such, the law must constantly change to reflect the values of the people who created the law and those who live in this country. As societal views change over time, so too does the law in recognition of the changes that have occurred in people's beliefs and values. External factors, such as advances in technology and national emergencies, have also brought about changes.

### CHECK THIS OUT

Search for the 'I Side With' website using your preferred search engine and look at the current polls. Discuss the contemporary legal issues being polled and the responses to each issue.



#### Social

As our society discusses and questions certain topical issues through the many different avenues available to it, especially through the media and social channels, pressure is put on governments to act to ensure that our laws reflect the current needs of citizens.



#### Moral

We all make decisions about what we believe is right or wrong. A number of different factors mould our moral beliefs, such as our parents, religious beliefs, cultural heritage, education and peers. These and many other factors can have some influence on our moral make-up. The right-to-life debate is an issue that continually rises to the surface, as do the debates about capital punishment, euthanasia and embryonic stem cell research. How the law deals with such complex issues is important, particularly regarding the moral and religious influences that are evident in areas such as criminal law and family law.



#### Economic

The passing of some laws can either be a response to economic circumstances or have some form of economic impact on our society. These may include lobby groups such as large multinationals – for example Shell, Apple, Microsoft or Coca-Cola. Economic influences can take other forms as well. Our law-makers can be influenced by economic market factors such as inflation, interest rates and the stock market.



#### Political

At local, state and federal levels of government, the governing party of the day does influence the types of laws passed. Different lobby groups (e.g. peak bodies that represent certain industries or business) place external pressures on the governing party to try to persuade the government to amend or make new laws on certain topics that will provide the best outcomes for the bodies they represent.



#### Cultural

Since Australia has adopted a traditional British system of law (the Westminster system), this has had a strong influence on our society, especially our parliamentary and legal system. To ensure that fairness exists between different cultural groups in Australia, certain pieces of legislation have been passed. These include the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).

Figure 1.2 Influences on the law drive change to reflect the views and values of society.

## RESEARCH 1.1

- 1 Choose one contemporary legal issue (see Check this out on the previous page) to conduct further research and answer the following questions:
  - a Is the issue considered legally and morally acceptable in today's society?
  - b What are the viewpoints of three opposing stakeholders? How does the law meet the needs of all these **stakeholders**?
  - c Do the laws on the issue safeguard individuals' right to freedom while balancing society's need for order?
  - d Have any changes to the laws been made to meet the changing needs of society? (S, A, E)
- 2 Create an extended response to communicate the nature and scope of the legal issue you have researched in the form of one of the following:
  - a a short presentation using digital technology
  - b one-page letter to one of the stakeholders you discussed above
  - c an oral presentation for an online podcast or radio segment. (Cr, C, E)

## RESEARCH 1.2

- 1 Find three articles in the media that evidence the influences of law and the amendment to law on a contemporary legal issue. (S)
- 2 Research and identify what pressure groups influenced the changes to the law. (S, A)
- 3 Explain why it is important that pressure groups exist within our democracy. (C)
- 4 Create a short multimodal response using visual evidence to explain what influences drove one of the changes identified in question 2. Explain what amendments were made in response to the influences identified. (Cr, C)

## Customary law

Customary law consists of principles and procedures that have developed into rules and laws through general usage according to the customs of a people, nation-state or group of nation-states. Customs arise to deal with problems in the most harmonious way. These customary laws represent accepted practice that operates within a recognised place or community to regulate human behaviour and mandate specific sanctions for non-compliance.

Three areas in which customary law has had an impact on the Australian legal system are:

- Aboriginal and Torres Strait Islander customary law
- English customary law
- international customary law.

Originally, customary law was not written down but simply developed through practice and common agreement. Customary law may have existed and been practised for hundreds or even thousands of

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**stakeholder** person, group or organisation that is affected by, can affect or is concerned with an issue

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years without having been written down. In many societies, most customary law is never written down – as is the case with Aboriginal society – while in other societies customary law is eventually transferred into written law in complex and formal legal systems.

During the Middle Ages, much of English law was customary law; however, this body of law developed into a common law system that spread to other countries, such as Australia, the United States, Canada, New Zealand and India, to name just a few.

The Australian Law Reform Commission (ALRC Report 31) shows that customary law issues tend to be argued in the more serious cases – for example, aggravated assaults and homicides – and to a much lesser extent in the case of minor property and public order offences.

In a criminal case, *R v Minor* (1992) 59 A Crim R 227, in which the accused pleaded guilty to two manslaughter charges, the trial judge sought to take into account that the accused would receive a form of ‘payback’, which involved being speared in the leg, as a consideration for early release from prison.

## CASE STUDY 1.1

### *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012)

#### Facts

In December 2012, Edwin Djambuy and his wife Sheraldine Yakayaka pleaded guilty in the Northern Territory Supreme Court before Riley CJ to having unlawfully supplied a commercial quantity of cannabis to people living in the Millingimbi community.

#### Issues

The defendants had pleaded guilty, so the only issues were those relating to sentencing, including whether the court could adopt customary law (Yolngu law) or a combination of Northern Territory and customary law. Specifically, the question was whether section 16AA of the *Crimes Act 1914* (Cth) prevented the judge from imposing what was argued to be a lesser sentence by applying Yolngu law.

#### Law

*Sentencing Act* (NT)

*Crimes Act 1914* (Cth), s 16AA

**Matters to which court to have regard when passing sentence etc.—Northern Territory offences**

- 1 In determining the sentence to be passed, or the order to be made, in relation to any

person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

- a excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- b aggravating the seriousness of the criminal behaviour to which the offence relates.

#### Arguments

The prosecution argued that section 16AA of the *Crimes Act 1914* (Cth) applied to prevent the court from imposing a ‘punishment that leads to the rehabilitation that may include ostracisation from the community and being sequestered in a place where the community or the elders have deemed it appropriate for them to serve out their time as community punishment ... would offend the rule ... in lessening the seriousness of the criminal behaviour’.

The defence argued that the court should accept a role for Yolngu law as part of the punishment. The defence called a senior lawman to give evidence and to outline what conditions Yolngu law would impose. The court was told that the application of Yolngu law

would involve a punishment of being banished to an isolated ‘prison’ under the supervision of elders.

The specific issue was who should supervise the proposed suspended sentences.

## Decisions

The judge decided that imposing a punishment incorporating Yolngu law ‘doesn’t lessen the seriousness of the criminal behaviour, it provides a consequence of the behaviour, which doesn’t make it less serious but shows that they are being dealt with or they have consequences’.

The judge indicated that he regarded Mr Djambuy as being more culpable, and that he would have sentenced him to imprisonment for 16 months, but taking into account his guilty plea, he sentenced him to 12 months’ imprisonment to be suspended after 28 days. In respect of Ms Yakayaka, the judge indicated that he would have sentenced her to

12 months’ imprisonment but for her guilty plea. She was sentenced to eight months’ imprisonment, to be suspended immediately. Mr Djambuy’s suspended sentence was to be supervised under Yolngu law after he was released from prison in 28 days.

## Reasons

Mr Djambuy’s suspended sentence was not to be supervised by NT Corrections as would normally have been the case; instead, the judge accepted the submission that the offenders would be punished and supervised under Yolngu law. The judge said that supervision by NT Corrections was not ‘necessary or indeed appropriate’, and added, ‘I am told that he will be under strict supervision (under Yolngu law) within the community by community members for a significant period and that would seem to me to be an adequate response to any need for supervision in his circumstances.’



## RESEARCH 1.3

- 1 Use Case Study 1.1 and your own research to analyse the role of customary law in Australia by identifying the essential elements, features and components of customary law. (A, C)
- 2 Create a list of the stakeholders, their perspectives and the legal issues that may arise from the use of customary laws in criminal law matters. (C)
- 3 Create a series of short responses (50–150 words each) to communicate the nature and scope of the drug offence of supply in Queensland. You will need to research to find the necessary information:
  - definition of supply
  - nature of supply
  - scope of supply
  - stakeholders affected by supply
  - customary law and supply. (Cr, C)
- 4 Create a one-paragraph response to evaluate the role of customary law in Australia’s legal system to deal with drug offences. (Cr, E)

## 1.2 The rule of law

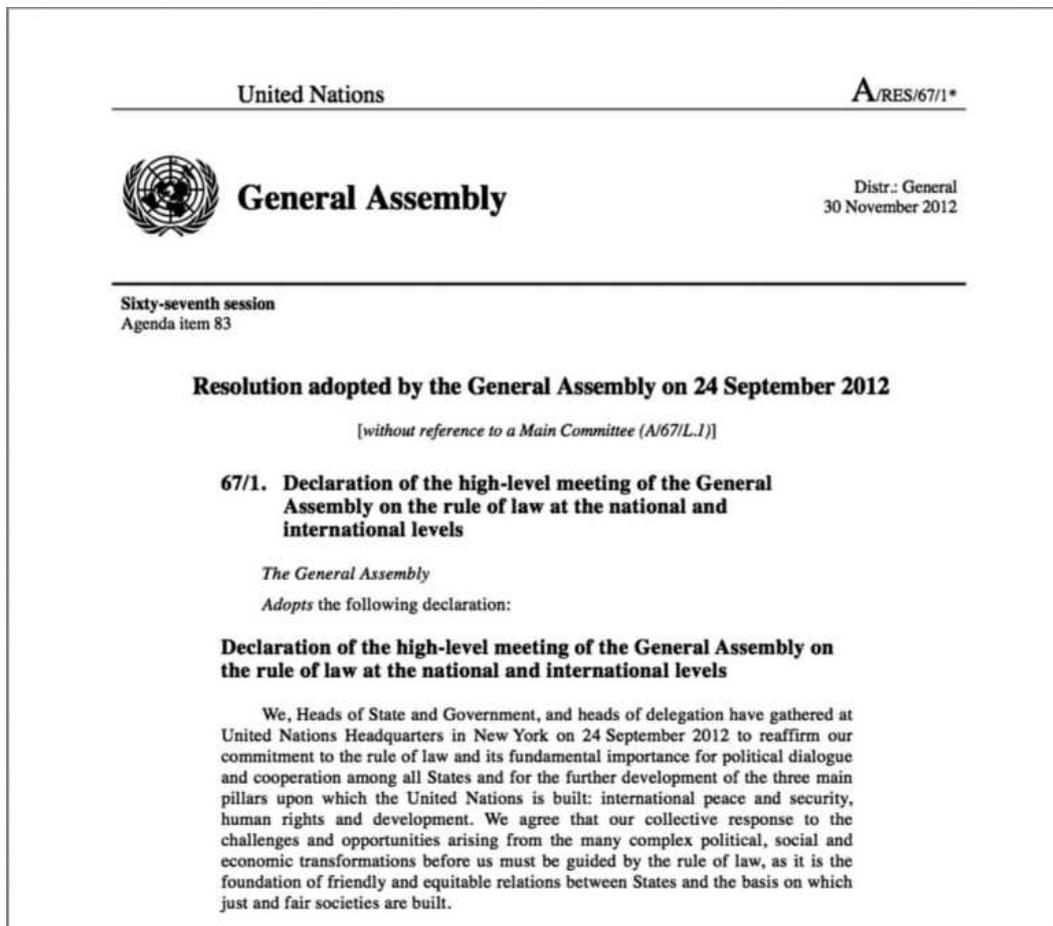
The **rule of law** is the underlying principle that all people and institutions are equally subject to and accountable to the law. Democratic societies, including Australia, adhere to this principle to ensure governments exercise the appropriate authority and that they themselves abide by the law. As a result, no individual or group is beyond the law, no one can be convicted of a crime without a proper trial using established and valid laws and the law must be fairly applied and enforced to all. The rule of law is fundamental to the democratic principles of a fair society and to ensuring just and equitable outcomes for all.

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**rule of law** the principle that all people are subject to the law and equal before the law

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The concept of the rule of law was first embedded within the Charter of the United Nations, signed in 1945 before the United Nations was formally established, to outline the purpose and principle of governance. It was then reaffirmed and given a central place in the Universal Declaration of Human Rights, signed in 1948. On 24 September 2012, all Member States, non-governmental organisations and civil society represented at the highest level attended a high-level meeting to commit to strengthening the rule of law. With the consensus of a declaration, Member States confirmed their commitment to the rule of law and expanded on the efforts required to maintain different aspects of the rule of law.



**Figure 1.3** 'the rule of law applies to all States equally ... all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.'

Source: United Nations.

The UN Secretary General describes the rule of law as

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

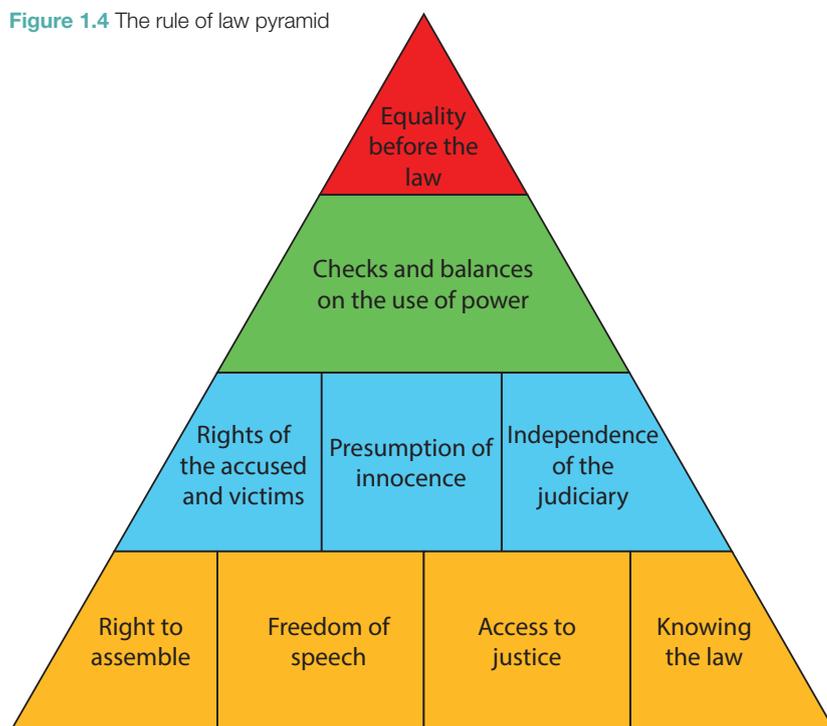
For the rule of law to operate effectively within our society, a number of key aspects must be evident:

- Laws must be *clear*.
- Laws must be *accepted* by all citizens.
- Laws must be *known*.
- Laws must be seen to be *applied fairly*.

## REVIEW 1.2

- 1 Discuss whether all principles in the rule of law pyramid are of equal importance to ensure that the law is fairly applied and enforced. (A)
- 2 Create a one-paragraph response to communicate the concept of the rule of law. (Cr, C)
- 3 Create a one-page infographic to communicate the key aspects of the rule of law. (Cr, C)

Figure 1.4 The rule of law pyramid



Source: © The Rule of Law Institute of Australia.



## 1.3 Powers in the Australian legal system

The development of our legal and parliamentary system has a long history. We inherited most of our existing laws from the English Westminster system.

In 1215, the Magna Carta was the first document forced onto a king of England by a group of his subjects, the feudal barons, in an attempt to limit his powers by law and protect their privileges. The document contained promises – for example, that no new taxes would be introduced and that the king was required to consult with the noblemen. This was a significant move and the first step in limiting the power of the monarchy.

Two other significant documents were passed between 1679 and 1688. The *Habeas Corpus Act 1679* ensured that any person who was detained was entitled to a trial. Then the British Bill of Rights was introduced, which placed further restrictions on the monarchy. The Bill of Rights 1689, 1 Wm & M 2, c 2, ensured that the monarchy could not pass any laws without the approval of parliament.

The Magna Carta, *Habeas Corpus Act* and Bill of Rights provided the foundation to establish the principles that everyone is subject to the law, guaranteeing the rights of individuals, the right to justice and the right to a fair trial, ensuring that imprisonment should not occur without due legal process. This could be seen as a foundation of accountability, of popular democracy and even of the importance of engaged citizens. To ensure that this accountability is upheld within the Australian legal system, authority is divided across the arms and levels of government.

### Arms of government

The **separation of powers doctrine** divides or separates the power of governing Australia into three parts. These three parts are found in Chapters I, II and III of the Australian Constitution and ensure that no individual body or person has complete control. It clearly outlines the powers afforded to the three levels of government: federal, state and local.

**separation of powers doctrine** requires that all three arms be separated to ensure that no individual body or person has complete control; the distinct roles of the executive, the judiciary and the legislature are strictly maintained

### REVIEW 1.3

- 1 Discuss why it is important that judges and magistrates remain separated from the other two arms of government. (C)
- 2 Create a one-paragraph response to explain the role of the separation of powers doctrine in the Australian legal system. (Cr. C)

While there is a slight overlap between the legislative and executive arms within Australian governments, members of the judiciary are not part of the other two branches of government, and the independence of the judiciary ensures that the courts remain impartial and thus protect the rights of all citizens. The separation of powers is discussed in more detail in Chapter 9.

### Levels of government

In Australia, authority is shared between three levels of government – federal, state and local. In 1901, the Australian Constitution established a federal system of government within the country, thereby giving certain powers to the Commonwealth and the states.

Sections 51 and 52 of the Australian Constitution list the powers under which the Commonwealth can make laws. The powers available to the states apply to almost any area not specifically given to the Commonwealth.

**Figure 1.5** Themis, an Ancient Greek Titaness, is the personification of order, law, fairness and justice. Her symbol is the scales of justice and her image is often associated with the law. This statue sits outside the Law courts in Brisbane.



## History of Australian law

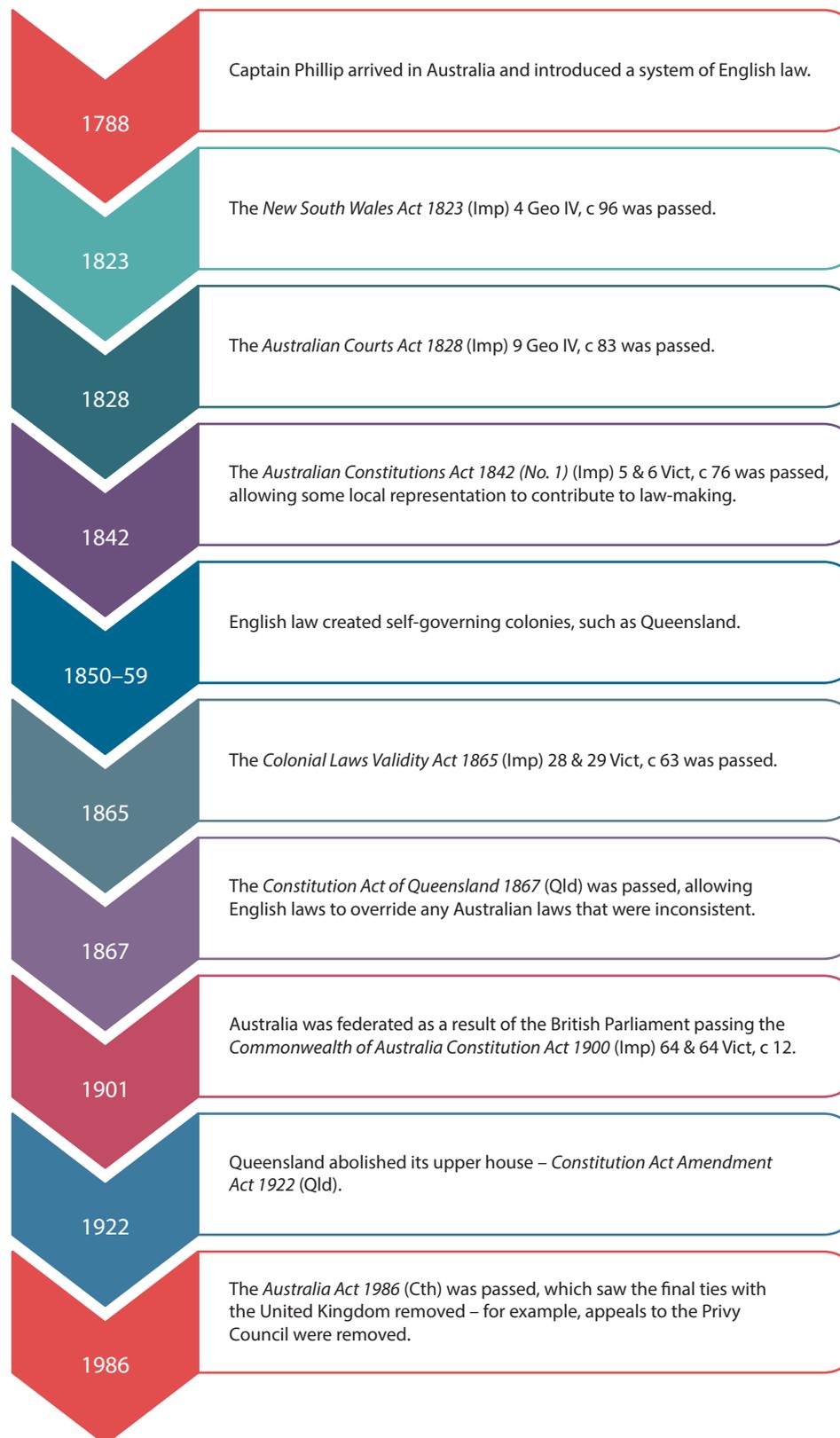


Figure 1.6 A number of historical dates concerning the development of our laws since white settlement in Australia

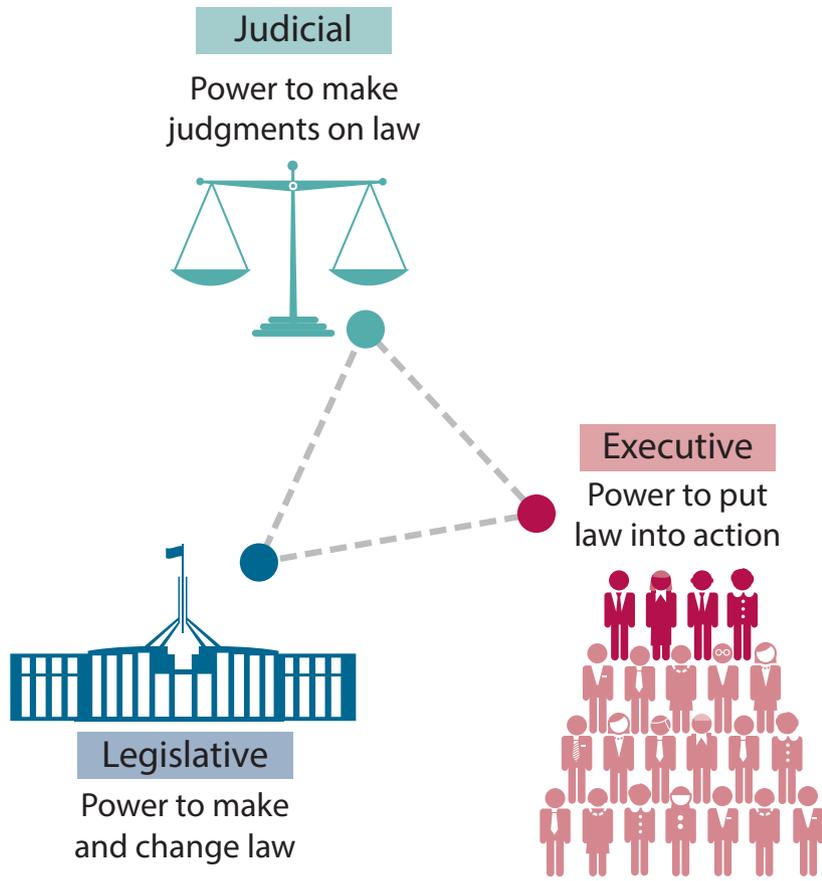


Figure 1.7 Separation of powers

Each state has its own government and makes laws in relation to areas over which it has control. Local councils are given power by way of the states passing Acts of parliament in each state that delegate certain authority to local councils. The state parliaments can pass laws on a wider range of areas than the Commonwealth Parliament, but it could be debated that the Commonwealth has greater power.

Section 109 of the Australian Constitution states that if there are inconsistent laws between the Commonwealth and a state, the Commonwealth will override the state. Section 96 also allows the Commonwealth to make grants of money to the states for any reason, although conditions can be imposed on how the money can be spent. In this way, the Commonwealth can have an influence in areas where they have no direct power under the Australian Constitution.

The powers given to the federal government are known as **exclusive powers**. The remaining powers taken over by the states are referred to as **residual powers**. In some instances, both the states and the federal government have the right to pass laws pertaining to certain areas, such as the environment. These powers are referred to as **concurrent powers**.

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**exclusive powers** the powers given to the federal government by the Constitution, such as defence, immigration, customs and excise duties

**residual powers** the legislative powers not covered by section 51 of the Constitution, which remain with the states

**concurrent powers** powers under the Constitution that may be exercised by both the Commonwealth and the states

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**Figure 1.8** The Queensland Government is given residual powers to govern areas such as education, health and transport. Its new offices are located at 1 William Street, Brisbane.

**Table 1.1** The three levels of government in Australia

Level of government	Role
Federal	The federal government makes laws that relate to issues relevant to the entire country, as stated in the Australian Constitution. Examples include taxation, postal service, defence forces, quarantine, bankruptcy and airports.
State	The states can pass laws on any areas not listed in the Australian Constitution. Examples include education, hospitals, law courts, police, emergency services and railways. There are some overlapping areas that both the states and the federal level of government share – for example, national highways.
Local	The responsibility of local government is to pass laws and regulations that apply to the local area. Examples include town planning, local roads, public libraries, and rubbish and sewage disposal.

## RESEARCH 1.4

- 1 Research and identify the name of the local, state and federal electorates in which you live. (S, C)
- 2 Create a list of the legislative powers that relate to each of these electorates. (C)
- 3 Discuss whether these powers are appropriately distributed and whether the areas in which each level of government legislates are suitable to the needs of society. (E)
- 4 Create a one-paragraph response to explain, using examples, the difference between exclusive, residual and concurrent powers. (Cr, C)

## 1.4 Sources of law

This section explains the origins of law and where the laws that govern a country are derived from. In Australia, the two main sources of law are **statute law** and **common law**. Laws that are made by parliament and written into acts of parliament are referred to as statute law or **codes**.

**Table 1.2** Sources of law

Source	Type of law
Statute law	Written legislation made by parliament in the form of statutes or codes
Common law	Decisions made by judges about issues that arise in court

---

**statute law** the most common form of law within our society. It is a law passed by parliament that can cover any topic and it takes precedence over common law.

**common law** the body of laws made through decisions of the courts – as distinct from statute law; also referred to as judge-made law

**code** a written form of the laws of a society; may also indicate appropriate sanctions for a breach of the code

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### CRIMINAL LAW AMENDMENT BILL 1993

#### EXPLANATORY NOTES

##### OUTLINE

##### Objective of the Legislation

The objective of the Bill is to provide for a new indictable offence of stalking to be inserted into the Queensland *Criminal Code*. The Bill provides for a two level offence; straightforward stalking which will attract a maximum sentence of three years imprisonment and aggravated stalking which will attract a maximum sentence of five years imprisonment. The Bill also provides for a maximum sentence of 18 months imprisonment for straightforward stalking if the offence is dealt with summarily in the Magistrates Court. Because of the more serious nature of the aggravated form of the offence, it is not an objective of the Bill to provide that aggravated stalking may be dealt with summarily.

##### Reasons for the Bill

As part of the Review of the Queensland *Criminal Code*, many submissions were received from community and women's interest groups contending that the criminal law of Queensland did not adequately provide protection for a person who had been followed, placed under surveillance, contacted, or been sent offensive items in circumstances where that person felt harassed, intimidated or threatened.

Although the *Criminal Code* contains a small number of sections which extend criminal liability to an offender who does not undertake actual violence, but causes fear to another or others in narrow and specific circumstances, the *Criminal Code* does not generally provide for criminal liability in cases where a person has been subjected to behaviour which might reasonably cause an expectation of potential violence.

**Figure 1.9** Queensland was the first state to introduce stalking laws into Australia.

Common law or judge-made law, also referred to as precedent, is based on judges making decisions about issues that arise in court. The **doctrine of precedent** is discussed in Chapter 10. It is an important principle, used by our courts because it ensures that consistent decisions are made and society sees that the law has been applied fairly. In criminal law, common law is relevant as a source of law when a situation arises where law has not been codified through statute or parliamentary law.

In 1993, Queensland became the first Australian jurisdiction to enact legislation to prohibit stalking in response to criminal activity not codified in statutory legislation. Amendments to the Queensland Criminal Code in 1999 made significant changes to the stalking offence and directly addressed cyberstalking for the first time – again, a response to criminal activity not previously legislated. Criminal laws such as these must change continually as evolving crimes, technologies and issues arise in court.

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**doctrine of precedent** a principle of common law that requires judges to follow the rulings of judges in higher courts on previous cases where the issues and facts were similar

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## Statute law

### *The Australian Constitution Act 1901 (The Constitution)*

Prior to the introduction of the Australian Constitution, Australia was made up of a number of separate British colonies – no federal government existed. The Australian Constitution was drafted by forming an agreement with the former British self-governing colonies of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, which agreed to come together and form one nation. They would keep the systems of government that they had developed as separate colonies, but also have a federal government that was responsible for matters concerning the whole nation.

When the Australian Constitution came into force on 1 January 1901, the existing colonies in Australia collectively became states of the Commonwealth of Australia and a new federal parliament was established. The Australian Constitution is made up

of 128 sections, which set out the basic principles and aspects of government in Australia, including the structure and powers of the federal, state and local governments, and the establishment of the High Court. Section 128 of the Australian Constitution outlines how a change to the Constitution requires the approval of a majority of voters nationwide, and a majority of voters in at least four states. This vote is referred to as a **referendum**.

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**referendum** a vote on a direct question or proposal presented to all members of a country or electorate for their approval or rejection. Any change to the Constitution requires a referendum and the approval of a majority of voters nationwide.

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### *The Commonwealth Criminal Code Act 1995*

The Commonwealth Criminal Code outlines the major offences against the Commonwealth. The Code does not provide a comprehensive statement of federal offences that are covered in other federal legislation, but rather covers matters regarding the security of the Commonwealth, administration of the government, offences against humanity, dangers to the community and national infrastructure.

### *The Queensland Criminal Code Act 1899*

In Queensland, the majority of criminal laws have been codified in the *Criminal Code Act 1899*. The Criminal Code contains procedural rules and practices, and covers a range of offences, including offences against the person, offences against property and other offences including public order and traffic offences. There are also other Acts of parliament that deal with more specific types of criminal offences, such as drug offences. Sir Samuel Walker Griffith drafted the Queensland Criminal Code during his appointment as Chief Justice of Queensland and, although it has been amended from time to time, much of the Code continues to apply in its original form.

## Statutory law-making

The words ‘parliament’ and ‘government’ are often used interchangeably, but they actually have different meanings. Parliament refers to all the elected members, regardless of the political parties. Government, on the other hand, refers

to the political party that wins the election and has the majority of members in parliament; that party will govern the state or the country.

The most important function of parliament is to pass laws that are necessary for society to function properly. Both state and federal parliaments make or amend laws regularly.

**Table 1.3** A comparison of the Commonwealth Parliament and the Queensland Parliament

Functions of parliament	
There are four main functions of parliament:	
<ol style="list-style-type: none"> <li><b>To make or change laws.</b> The main function of parliament is to pass laws that are necessary for society to function properly. Both state and federal parliaments make or amend laws regularly.</li> <li><b>To represent voters.</b> Every Australian citizen aged 18 years and over has the right and legal responsibility to vote.</li> <li><b>To scrutinise the government.</b> Parliament plays an important role in scrutinising decisions made by the government. The most fundamental manner in which the government is questioned occurs during question time in parliament. Another method involves the formation of parliamentary committees to investigate and report on a particular matter.</li> <li><b>To form government.</b> The elected party that forms the government then elects the Prime Minister (federal parliament) or the Premier (state parliament), who in turn selects the ministers who will be responsible for certain departments.</li> </ol>	
Commonwealth Parliament	Queensland Parliament
The Commonwealth Parliament is the national law-making body. It has the authority to make laws that affect the country as a whole.	The Queensland Parliament is the law-making body that can pass laws in relation to matters that specifically relate to the state.
<b>Governor-General</b> The Queen’s representative performs ceremonial functions on behalf of the Queen and functions listed in the Australian Constitution. Must sign all Bills passed by parliament and give Royal Assent to legislation. After receiving a nomination from the Prime Minister, the Queen appoints the Governor-General.	<b>Governor</b> The Queen’s representative and acts on the advice of the government. Must sign all Bills passed by parliament before they become law. Gives Royal Assent to legislation.
<b>Prime Minister</b> The Prime Minister is the head of the government elected from within the governing party. The Prime Minister is seen as the most important political figure in the Australian Government.	<b>Premier</b> The Premier is the elected leader of the governing political party that holds the majority of seats in the Legislative Assembly.
Two houses of parliament (bicameral) <ul style="list-style-type: none"> <li>Lower house – House of Representatives. Has 150 members, each representing a different electorate. Each member is elected for a term of up to three years. The political party with the majority in this house forms the government.</li> <li>Upper house – Senate. The Senate consists of 76 senators: 12 senators per state and two each for the ACT and Northern Territory. State senators are elected for a period of six years, half the Senate at a time, and territory senators for a three-year period.</li> </ul>	One house of parliament (unicameral) <ul style="list-style-type: none"> <li>Lower house – Legislative Assembly. Contains all the members of parliament. The Legislative Assembly has 89 members, each representing a different electorate.</li> <li>Upper house – abolished in 1922 (Legislative Council)</li> </ul>
<b>Ministers</b> The governing party chooses the ministers. They can be appointed from either house. The prime minister then allocates portfolios to the ministers who have the responsibility and accountability for their respective department. Senior government ministers form the federal Cabinet.	<b>Ministers</b> Ministers are selected by the Premier and have similar duties to those of ministers in the federal system. Ministers are responsible for the development of legislation. Ministers belong to the state Cabinet.

- 1 Using your general knowledge or research, identify the following:
  - a the Prime Minister of Australia
  - b the Premier of Queensland
  - c the Queen's representatives at both the federal and state levels
  - d the leader of the opposition in the federal parliament and in Queensland
  - e the elected members in your local, state and federal electorates. (S, C)
- 2 Explain why it is beneficial for members of a community to know who represents them in government. (C)
- 3 Australia has eight other territories in addition to the Australian Capital Territory and Northern Territory. Research and identify these and explain how the law is applied in these territories. What role does each of the territories play in statutory law-making? (S, C)

When drafting new or amended statute law, parliaments must consider common law issues, influences on the law and many other factors from international treaties or conventions. Elected members of parliament are responsible for representing the people by considering how Bills and decisions of parliament will affect people in their electorate or state/territory.

## Drafting new laws

A proposal for a new law or an amendment to an existing law is called a **Bill**. The minister who is responsible for its preparation usually introduces a Bill. The government introduces most of the laws, but any member of parliament can introduce a Bill. A Bill that is introduced by a member of parliament who is not a minister (that is, a backbencher) is called a Private Member's Bill.

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**Bill** a drafted law that has not yet passed through parliament or received Royal Assent

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### SIDE BAR

A private member, or any of parliament who is not a member of Cabinet can propose a Private Member's Bill. Research the Private Members' Bills recently submitted to parliament and discuss why many Private Members' Bills do not get passed.

The process of a Bill passing through federal parliament, with its two houses (except in Queensland), is slightly more complex. For the Bill to become an Act of Parliament, it needs to be agreed upon by both houses. The first reading through to the third reading occur both in the House of Representatives and the Senate. Once agreement has been established in both houses, the Bill can then be presented to the Governor-General for Royal Assent.



**Figure 1.10** Laws must be known, understood, adaptable, consistent and enforceable to be considered effective.

When a certain piece of legislation becomes out of date, meaning it is no longer relevant to our current society, parliament can repeal (do away with) the Act. Sometimes situations may

arise that may require our law-makers to amend certain pieces of legislation that, on the whole, are still applicable but require some form of alteration.

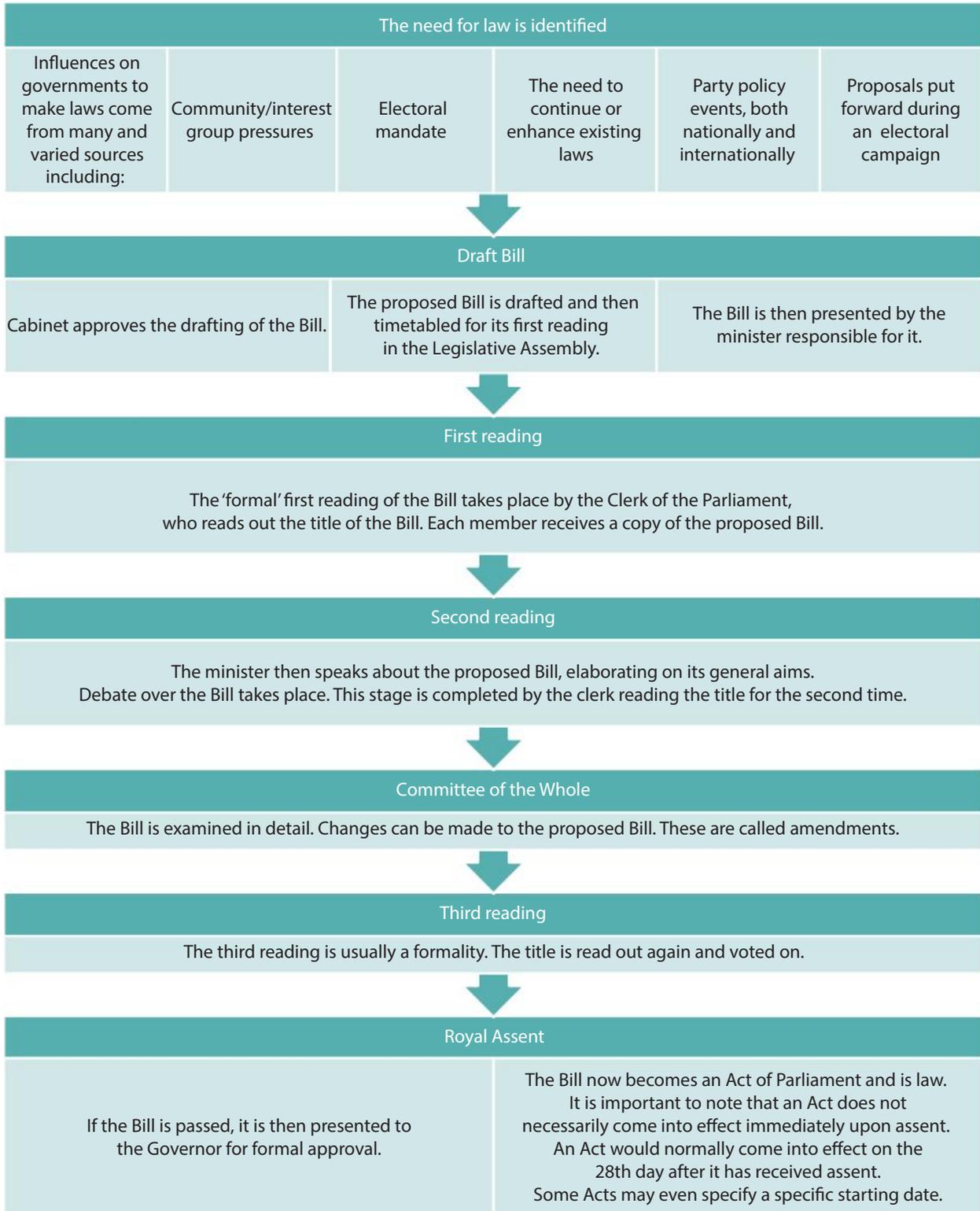


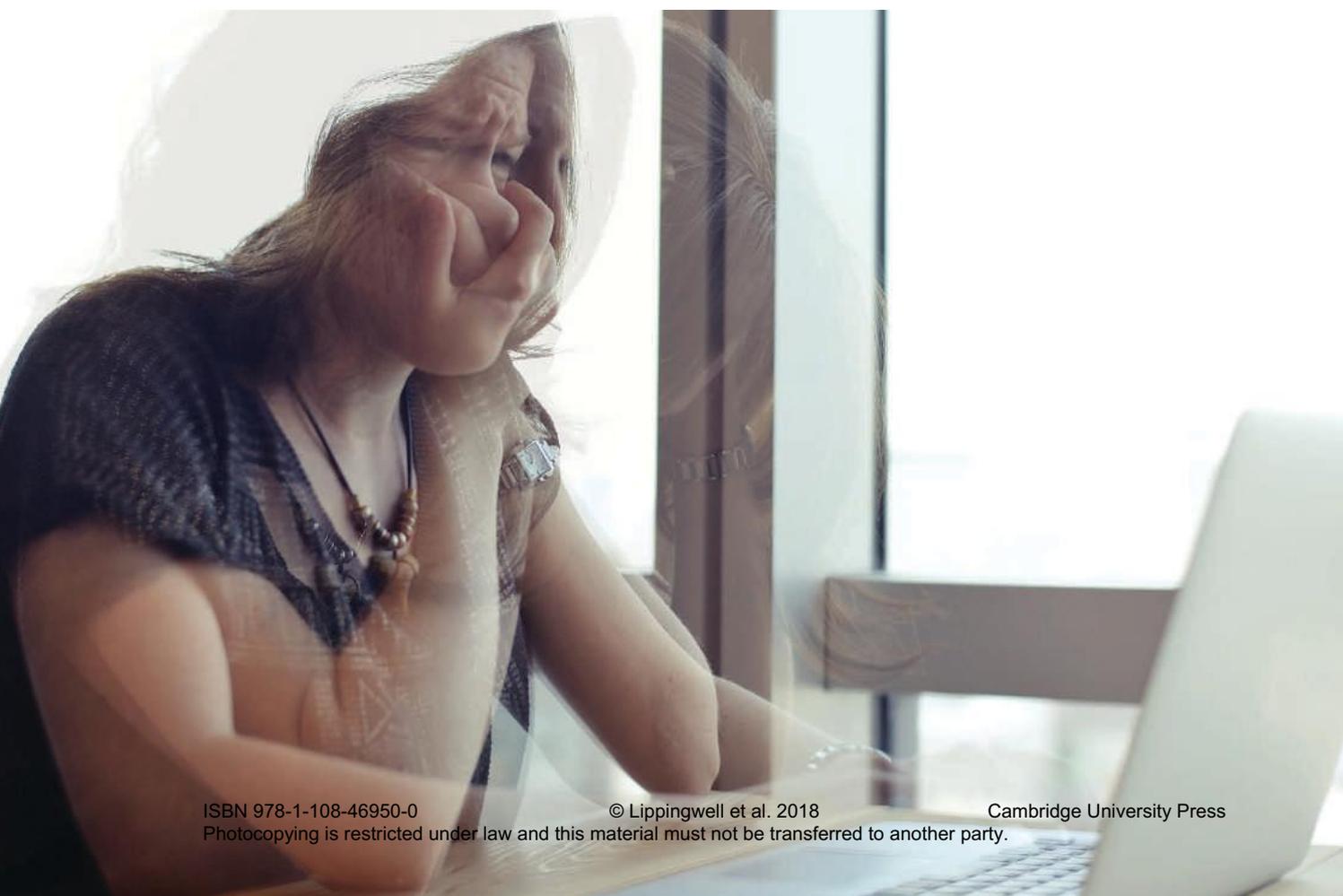
Figure 1.11 Making a Queensland Act of Parliament

## Characteristics of effective law

To meet the rule of law objectives and ensure that all people and institutions are equally subject to and accountable to the law, new laws or amendments must be evaluated before enactment to ensure they are effective laws. To be considered effective, the law must have the following characteristics:

- **The law must be known and understood.** In order for the public to be well informed about all laws, they must be written clearly so they are understood easily. If laws are too complicated or contain ambiguity, then uncertainty and confusion may follow. For a law to be enforceable, the public must know about it. If people do not know about the new law, they will not be able to follow it.
  - **The law must be able to adapt to change.** The law must be flexible enough to be changed
- in order to keep up with the changes in society – for example, laws must be able to keep up with advances in technology. If a law is not in line with community values, then people may be inclined to disregard the law.
- **The law must be stable and consistent.** While laws need to change with the times, it is important that there is not too much change all at once, which can lead to confusion. If the law were changing constantly, no one would be certain what the law was and there would be chaos. It also needs to be seen to be applied fairly to all.
  - **The law must be enforceable.** If the law is broken, there needs to be a reasonably high likelihood that person responsible for breaking the law will be caught and punished. An effective law must be enforceable – that is, if people break the law, they must be able to be caught and brought to justice.

**Figure 1.12** Several states are quickly looking to create laws specifically targeting the non-consensual or illegal posting of intimate images, often referred to as ‘revenge porn,’ which can be considered abuse or sexual assault. These new laws demonstrate the adaptability of law regarding ever-evolving technologies and social medias. However, Queensland is yet to implement new, specific laws on this issue.



## 1.5 Legal outcomes

In the criminal justice system, the investigative process, the trial process and the role of the courts in punishment and sentencing aim to ensure **just** and **equitable** outcomes for all stakeholders. This means that the legal outcomes are considered even, impartial, fair and proper in the circumstances, balancing the rights and freedoms of individuals and society. The independence of the judiciary ensures that the courts remain impartial and protect all citizens' rights.

To ensure these just and equitable outcomes for all citizens, it is the role of judges and magistrates to interpret statute. To do this consistently and to resolve questions of interpretation, in Queensland judicial officers refer to the *Acts Interpretation Act 1954* (Qld). This process, called **statutory interpretation**, is used by judges and magistrates in court to interpret and apply the legislation, deciding how a particular law will apply to a particular case.

---

**just** legally right, conforming to that which is lawful or fair and proper in the (or all) circumstances

**equitable** even and impartial; balance between the rule of law and the rights and freedoms of individuals and society; impartial and fair outcome or result where the statute law is silent

**statutory interpretation** the process used by judges and magistrates in court to interpret and apply the legislation

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When laws are drafted, important factors need to be considered. The drafter of a new law needs to consider not only the intent of the Act, but also the actual wording of the document to ensure that the future possibilities that may arise will be covered by the new legislation. This can sometimes cause problems where meanings of certain words are ambiguous or unclear, making the interpretation of the new law difficult for the courts.



**Figure 1.13** Judges must ensure their statutory interpretation is just and equitable.

**Juvenile Justice Act 1992**

Reprinted as in force on 1 January 2013

**Reprint No. 10D**  
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15  
Juvenile Justice Act 1992

**Juvenile Justice Act 1992**  
 (as amended by all amendments that commenced on or before 1 January 2013)

**An Act to provide comprehensively for the laws concerning children who commit, or who are alleged to have committed, offences and for related purposes**

**Part 1 Preliminary**

**1 Short title**  
 This Act may be cited as the *Youth Justice Act 1992*.

**2 Objectives of Act**  
 The principal objectives of this Act are—

- (a) to establish the basis for the administration of juvenile justice; and
- (b) to establish a code for dealing with children who have, or are alleged to have, committed offences; and

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216  
*Juvenile Justice Act 1992*

**Schedule 4 Dictionary** section 4

*adult* means a person who is not a child

*approved* form see s 306.

*approved* provider, for part 7, division 3, see s 171.

*arrest* includes apprehension and taking into custody.

*arrest offence* means—

- (a) an offence of a type for which the offender may be arrested without a warrant; or
- (b) an offence committed in circumstances where the offender may be arrested without warrant.

*attend*, for part 7, division 3, see s 167.

Figure 1.14 Parts of an Act

## READING THE LEGISLATION

When an Act is drafted, it is divided into parts, which assists you to quickly find what you are looking for. Often, a definitions section is included at the beginning of the Act, or a dictionary section is included in a schedule at the end of the Act.

To apply statutory interpretation fairly, a number of rules are used to aid understanding of the intent of an Act, to help the judiciary to interpret the meaning of the law. Some of these rules are stated in the *Acts Interpretation Act 1954* (Qld), including:

- **literal rule** – meaning that the actual words used are given their ordinary meaning

- **purposive rule** – asks the reader to look at the intention of parliament; this can be achieved by reading through speeches from parliamentary debates to help provide interpretation of meanings or the intent of the Act
- **specific rules** – refers to reading a particular section in the context of the entire Act to understand the Act's intention.

## The criminal justice system

In Australia, the criminal justice system is based on the adversarial system of law. The **adversarial system** is about contest. This requires the involvement of two parties who argue their differing versions of the facts and the related law before the court. There are two main elements of the adversarial system:

- **Two parties who present their cases.** Each side decides what points are in issue, which arguments to rely upon and what evidence should be presented. This freedom to decide how the

trial will proceed is limited only by the rules of evidence and rules of procedure, including court rules about case-flow management.

- **An independent and impartial judge (or magistrate).** This person presides over the proceedings and decides questions of law and, where there is no jury, questions of fact.

---

**adversarial system** a system of law in which each side presents evidence in order to prove their case

---

### Adversarial system

The trial consists of a contest between two parties in dispute. Each side puts forward its own version of the facts and tests the opposing side's version of the facts.

#### Judge's role:

- essentially an umpire
- to ensure that the rules are followed
- decides what evidence is allowed
- decides issues of law
- decides the verdict when no jury is present

#### Jury's role:

- to listen to the evidence presented by opposing sides and make decisions on guilt (criminal matter) or which party's version of events is more likely to be true (civil matters)

### Inquisitorial system

The trial is presided over by a judge whose job is to question the accused, gather the evidence and then decide the truth.

#### Judge's role:

- has active role in seeking out evidence
- applies the law and the facts of the case
- decides the verdict

No jury

Figure 1.15 The contrast between the adversarial and inquisitorial systems

In an **inquisitorial system**, the judge plays more of a role in the investigations into the events that have taken place. An inquisitorial system is where the court or a part of the court is actively involved in determining the facts of the case, as opposed to an adversarial system where the role of the court is solely that of an unbiased umpire between parties. Inquisitorial systems are used in most countries in Western Europe and Latin America, and in some areas of Australian law, such as in Coroners Courts or Royal Commissions.

## The standard of proof

The criminal justice system is founded on the principle that a person is innocent until proven guilty.

When it comes to proving criminal guilt, the **onus or burden of proof** rests with (falls on) the prosecution. This means the prosecutor must prove in court that the accused did in fact commit the crime. The **standard of proof** the prosecution is required to meet to establish the guilt of an accused person in a criminal matter is **beyond reasonable doubt**.

This is the standard of which the magistrate or **jury** must be satisfied before they can make a finding of guilt. This term has not been given a satisfactory meaning by the common law; it is up to the tribunal of fact (that is, the judge/magistrate or jury) to determine what 'beyond reasonable doubt' actually means. The defence does not have to prove anything at the trial as the onus of proof in a criminal matter lies with the prosecution.

**Figure 1.16** The strength and clarity of evidence provided by the prosecution or defence greatly contributes towards the standard of proof.



Criminal law and civil law have a number of differences that it is important to recognise. A civil action generally involves a plaintiff/applicant and a defendant/respondent settling their dispute through the court system. A criminal case, on the other hand, is when the government, on behalf of society (through bodies such as the police, public prosecutors and police prosecutors), brings charges against an individual for a wrong they allegedly have committed against another member of society.

In a civil case, the standard of proof is on the **balance of probabilities**. Criminal cases work on the standard beyond a reasonable doubt. Other differences include the size of the jury – a civil jury has four to six people while a criminal jury comprises 12 people in the Queensland courts.

**inquisitorial system** a method of legal practice in which the judge endeavours to discover facts while simultaneously representing the interests of the state in a trial

**onus or burden of proof** the responsibility of proving a disputed charge or allegation; lies with the person making the allegation

**standard of proof** (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond a reasonable doubt. (2) In a civil proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

**beyond reasonable doubt** there needs to be no other alternative or any doubt in the mind of the jury that the accused committed the offences with which they are charged

**jury** body of people sworn to judge and give a verdict on a given court matter; will consist of 12 people for a criminal trial

**balance of probabilities** the standard of proof in civil cases that the more likely or probable version of the truth should succeed

### REVIEW 1.4

Create one-paragraph responses to explain:

- 1 the difference between adversarial and inquisitorial systems
- 2 the difference between onus of proof and standard of proof. (C, Cr)

## RESEARCH 1.6

- 1 Research and find a case that provides an example of a crime where, without the presumption of innocence, just and equitable outcomes could not be achieved. Share your findings in a short three- to five-minute multimodal presentation. (C, A, Cr)
- 2 The 'presumption of innocence' is a cornerstone of our justice system. Research this statement. Discuss your findings. (C, A)

## The court system

The courts have two very important roles to play in the Australian legal system. First, courts are used as a place to resolve disputes. Disputes can range from an argument between neighbours to seeking compensation from someone who has smashed into your car. The role of the courts is also to

determine whether or not someone has broken the law and to uphold the laws that apply to society. In criminal law, when a crime is committed and formal charges have been laid, it is the role of the courts to ensure a hearing takes place in the appropriate court. These two different areas are referred to as the court's **jurisdiction**.

**jurisdiction** the power or authority of a court to hear and try a case, including the geographic area in which a court has power or the types of cases it has the power to hear

The jurisdiction is the authority the court has to hear, and to pass judgment on, certain types of cases. Many courts have both a *civil jurisdiction* (the authority to hear a civil case) and a *criminal jurisdiction* (the authority to hear a criminal case). Most courts have been given their power by way of an Act of Parliament. For example, the Magistrates Court in Queensland was established by the *Magistrates Court Act 1921* (Qld) and the *Justices Act 1886* (Qld).

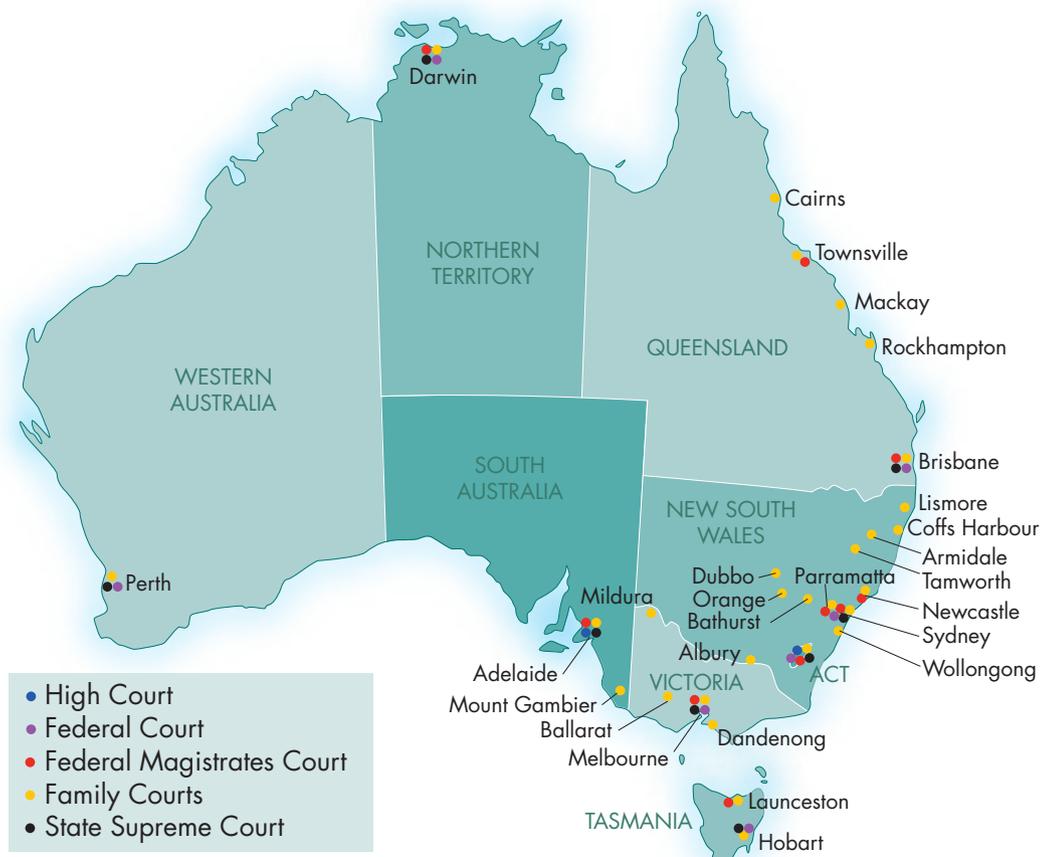
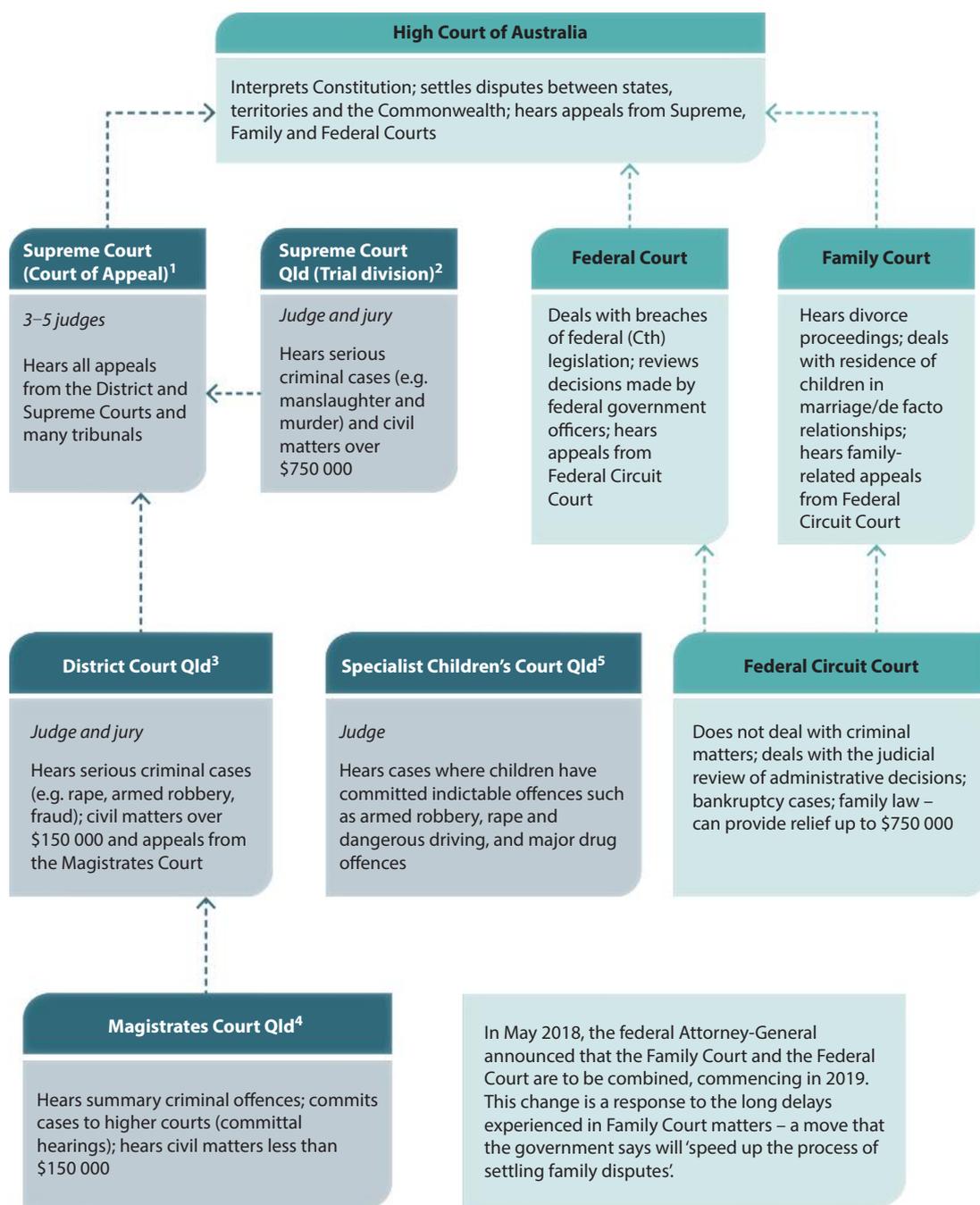


Figure 1.17 Each state and territory court has jurisdiction over certain matters.



**Figure 1.18** Hierarchy of the courts of Australia. This represents the current court structure as of 2018. Refer to the following page for further detail matching the superscripted numbers in this Figure.

## High Court of Australia

The High Court of Australia has two main roles. It hears cases on constitutional matters and it also operates as an appellate (appeals) court.

As the name suggests, the High Court of Australia is the highest decision-making court in the country. The High Court sits permanently in Canberra, but

it also sits in the state capital cities to hear some cases. Every court is bound by the decisions of this court. The High Court has the jurisdiction to hear issues relating to the Australian Constitution and disputes that involve the Commonwealth. It also has the authority to hear appeals not only from the federal court system, but from state and territory courts.

Appeals are not automatically heard by the High Court. Whether or not the issue is of public importance or in the interests of justice needs to be considered before the High Court will allow leave to appeal. The High Court of Australia is discussed in further detail in Chapter 10.

## Queensland court system hierarchy

**Refer to Figure 1.18 on the previous page for the related Court in the hierarchy matching the superscripted numbers.**

<sup>1</sup>The Court of Appeal, Appellate jurisdiction, consists of either three or five judges who hear appeals from the District or Supreme Courts. The Court of Appeal can hear appeals from or review decisions of a lower court from both criminal and civil cases. This includes an appeal against a sentence in criminal matters.

<sup>2</sup>The Supreme Court is the highest court within the Queensland court hierarchy. It is made up of two parts: the appellate jurisdiction (the Court of Appeal) and the trial jurisdiction. Matters are heard before a judge and jury.

Supreme Court, Original jurisdiction:

- **Criminal jurisdiction** – The Supreme Court has the jurisdiction to hear indictable offences which usually carry penalties greater than 14 years' imprisonment. Examples: murder, manslaughter.
- **Civil jurisdiction** – Civil cases in the Supreme Court relate to matters involving disputes of more than \$750 000. There is no maximum limit.

<sup>3</sup>The District Court, original and appellate jurisdiction, has the authority to hear appeal cases from the Magistrates Court.

- **Criminal jurisdiction** – The District Court has the jurisdiction to hear criminal matters which carry a maximum penalty of less than 14 years' imprisonment. The type of offences are usually

indictable offences, such as burglary and rape. Criminal matters are heard before a judge or a judge and a jury.

- **Civil jurisdiction** – Civil cases in the District Court relate to matters involving disputes between \$150 000 and \$750 000. Civil cases are normally heard by a judge, but there is the option of a jury trial.

<sup>4</sup>The Magistrates Court, original jurisdiction, is the lowest court in the state court hierarchy. The Magistrates Court has both criminal and civil jurisdictions, but also has responsibility for domestic violence matters. Usually a single magistrate presides over the court. There is no jury in a Magistrates Court, with the presiding magistrate being the one who makes all the decisions.

- **Criminal jurisdiction** – All criminal matters must first be heard in the Magistrates Court. The Magistrates Court has the authority to hear and determine minor criminal offences, such as simple and regulatory offences. Examples of these offences include drink driving offences and shoplifting. All other serious criminal offences are heard for the first time in 'committal hearings' – the magistrate needs to determine whether or not there is sufficient evidence for the person to stand trial in either the District Court or Supreme Court.
- **Civil jurisdiction** – The Magistrates Court hears civil disputes involving up to \$150 000.

<sup>5</sup>The Specialist Children's Court is presided over by a judge at District Court level. Offences such as murder, attempted murder, treason and major drug offences are dealt with by the Supreme Court – regardless of whether the defendant is a child or an adult.

Specialist Children's Court hearing criminal and civil matters: The Children's Court at this level is presided over by a magistrate. It has the power to hear criminal matters against children. The most common civil matters heard relate to child protection.

Identify the appropriate court in which each of the following matters will be heard:

- 1 an indictable offence, other than a very serious offence committed by a minor
- 2 a serious drug-related offence in which the offender has pleaded guilty and seeks rehabilitation
- 3 murder
- 4 rape
- 5 stealing an iTunes card from a supermarket
- 6 a dispute over work not completed amounting to \$32 000
- 7 a dispute between the state government and the Commonwealth
- 8 an appeal from the District Court
- 9 manslaughter
- 10 drink driving
- 11 a person taking legal action over a car accident in which damages to the car amounted to \$15 000
- 12 a native title claim
- 13 divorce
- 14 an offender who has been caught driving without a licence. (C)

## Changes to Australian court structure

### Sweeping changes to family court announced as broader review of strained system continues

By Matthew Doran

Updated 30 May 2018

The Family Court and Federal Circuit Court will be combined as part of sweeping changes to the financially and emotionally crippling family law system, in an announcement by the Attorney-General Christian Porter today.

#### Key points:

- The changes will come into effect from the start of 2019
- Current delays in the family law system means most cases take about a year and a half to reach trial, Mr Porter says
- At the moment nearly 1200 families' cases are transferred between the two courts each year

The decision comes before a broader review, which looks into the painstakingly slow way in which the nation's strained family law system operates, delivers its findings next year.

The changes will come into effect from the beginning of 2019, in what the Federal Government is arguing will speed up the process of settling family disputes.

'We have two parallel courts, different rules, forms, procedures, individuals who are in the system get bounced around like Family Law footballs from one court to the other – terrible outcomes for them,' Mr Porter told the ABC's AM program.

'They wait too long and that just makes life worse in these very difficult circumstances.'

The Family Court currently hears family law cases involving complex financial arrangements, trusts, serious parenting arguments, allegations of child abuse in custody arrangements and protracted family disputes.

The Federal Circuit Court deals with the rest.

Appeals from the newly formed court, to be known as the Federal Circuit and Family Court of Australia (FCFCA), would also be heard by the Federal Court under the new arrangements.

#### Nearly a year-and-a-half wait to reach trial

Some 22000 cases are filed across the two courts each year, and Mr Porter said delays in the family law system meant most cases were taking almost a year and a half just to reach trial.

He argued the merger was warranted given there is already significant crossover in jurisdiction and procedures of the two courts, and could result in an extra 8000 cases being resolved each year.

‘Everyone that you talked to who understands the court system, but particularly the tens of thousands of Australians who use it, know that the system at the moment does not work at all well,’ Mr Porter said.

‘Twenty-two thousand matters are listed for final order in these courts every year, representing tens of thousands of Australians, and our priority is to get better outcomes for those Australians.’

### Funding pressure, delays in appointing judges

It is unclear whether the changes will satisfy critics of the way the family law system, who argue funding pressures and delays in appointing judges to the bench are key reasons why the system is inefficient and struggling to cope with case loads.

Last year, the former Chief Justice of the Family Court demanded more funding.

The former attorney-general, George Brandis, announced a ‘long overdue’ review of the family law system in September – the first since the dedicated court was established in the late 1970s.

The Australian Law Reform Commission is due to report back to the Government by March 2019.

Mr Porter defended making the announcement before those findings were delivered.

‘It was a matter of such obviousness that the present structure was not working and was causing inefficiencies and duplications and delays that we considered that we could make the structural change,’ he said.

Shadow attorney-general Mark Dreyfus cast doubt on the merit of the merger.

‘We’ve got concerns about the near-complete lack of consultation that’s occurred here,’ Mr Dreyfus told ABC Radio Melbourne.

‘It appears that judges were not consulted, that family groups and the sector weren’t consulted, family lawyers were not consulted.

‘And the Government has decided that this is somehow the result of inefficiencies in the court system.’

The current Chief Justice, John Pascoe, was appointed to the role last year after being the head of the Federal Circuit Court.

But he will be forced to retire by the end of the year, as he hits the statutory retirement age for judges.

One Nation leader Pauline Hanson has campaigned for changes to the family law system, including calling for the abolition of the Family Court altogether.

## REVIEW 1.6

- 1 Explain why the Family and Federal Circuit Courts are being amalgamated. (C, S)
- 2 Create a table to analyse the perspectives and potential benefits for five different stakeholders identified in the previous article. (Cr, A)
- 3 Discuss the concerns and impacts on the wider community raised in the article. (A, E)
- 4 Make a decision on whether you agree or disagree with the government’s decision to merge the two courts. (E)
- 5 Create paragraph responses to communicate your decision. (Cr)

## REVIEW 1.7

Go to the Attorney-General’s Department Media releases to read Fact Sheets 1 and 2 about the introduction of the new Federal Circuit and Family Court of Australia (FCFCA) and then answer the following questions:

- 1 How many applications were made to the two courts in 2016–17? (C)
- 2 How many additional family law matters does the Attorney-General’s Department predict can be finalised every year following the restructure? (C)
- 3 Explain the role of the new Family Law Appeal Division (FLAD). (C, S)
- 4 Analyse the impact of the issues and inefficiencies raised in the media release. (S, A)
- 5 Discuss how the influences of the law (social, economic, political, cultural and moral) could have contributed to this restructure. (A, E)

# Chapter review

## Chapter summary

- Laws cover almost every aspect of our lives, and can be categorised into criminal or civil law.
- There are a number of influences on our laws: social, cultural, moral, political and economic.
- The rule of law ensures that all are equal before the law and that laws must be clear, accepted, known and seen to be applied fairly.
- Australia operates with an adversarial system of criminal justice.
- Queensland has a unicameral parliament and passes new laws through only one house while the Commonwealth Parliament is a bicameral system, so laws must pass through both houses.
- Customary law is an important consideration when looking at our legal system.
- In criminal law, the onus of proof lies with the prosecution to prove the accused is guilty. The standard of proof must be beyond reasonable doubt.
- Each court sits within a hierarchy and has a jurisdiction governing what cases are heard in which courts.
- An effective law is one that is known, accepted, adaptable, able to be enforced, and that carries specific penalties or punishment that apply to all.

## Short-response questions

- 1 Provide explanations in sentences and short paragraphs to show your comprehension of the following legal concepts, principles and processes:
  - a the difference between rules and laws
  - b the difference between 'unicameral' and 'bicameral'
  - c the term 'Private Member's Bill'
  - d the concept of the rule of law
  - e the process of statutory law-making
  - f the different purposes of criminal and civil laws. (C)
- 2 Describe how our laws can be affected by different influences. (C)
- 3 Describe some elements of the use of customary law within our legal system. (C)
- 4 Describe the functions of parliament. (C)
- 5 List four differences that exist between parliaments and courts. (C)
- 6 Create a mind map to brainstorm all the possible stakeholders who may be impacted in relation to criminal law. Look at the example below for inspiration. (A)



## Extended-response questions

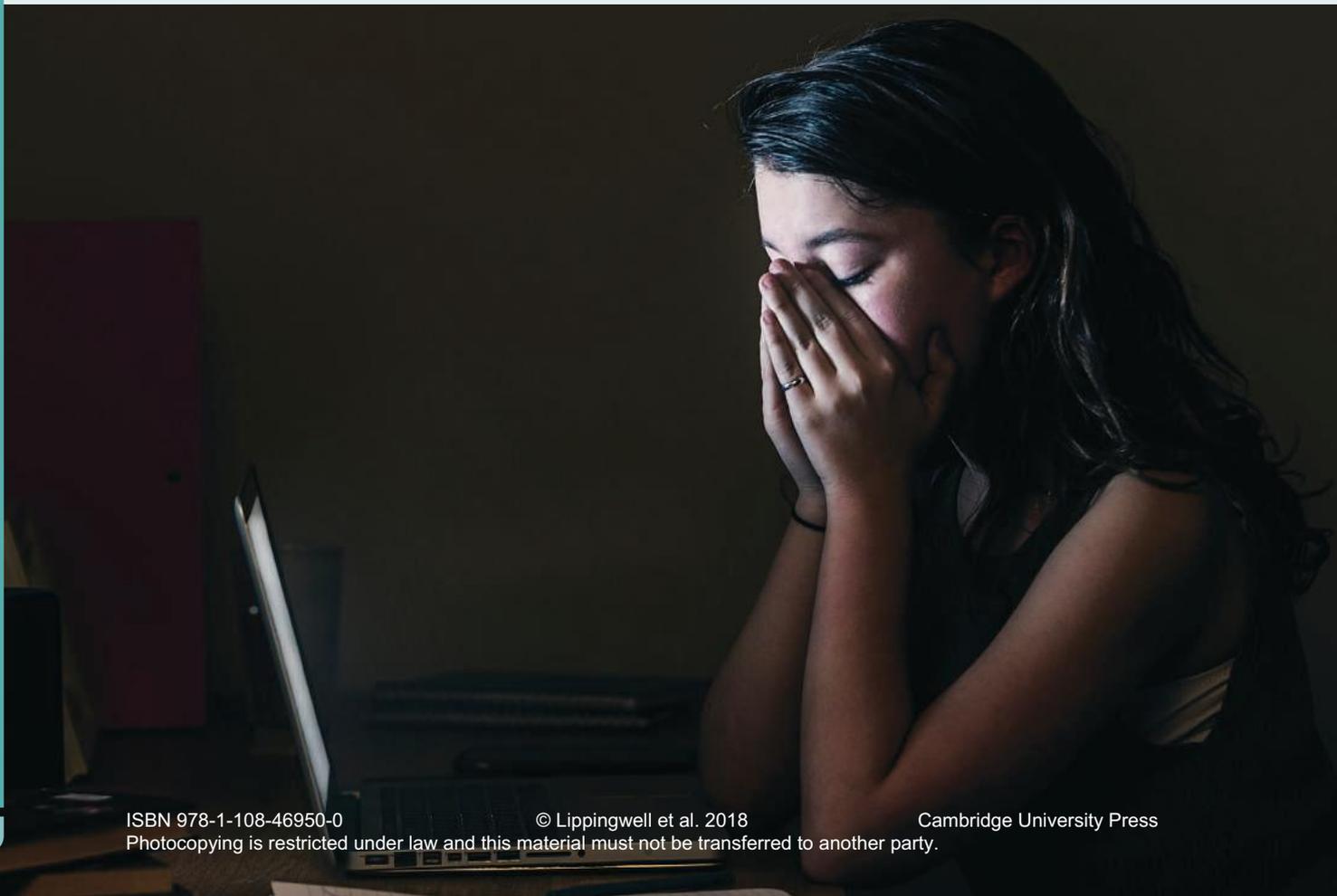
- 1 Create a paragraph response of 200–400 words to explain how and why the powers of government are separated. (C, Cr)
- 2 Create a short essay response of 600–800 words to evaluate whether or not the Constitution of Australia, written in 1901, is still relevant today. In your answer, each body paragraph should address one of the following points:
  - the role of the Constitution and its place in our legal system
  - the role of the High Court in interpreting the Constitution
  - evaluation and recommendation of whether or not the powers given to the states should be taken away and handed over to the federal government. (E, Cr)

## Response-to-stimulus questions

- 1 Find three media articles that relate to cyberbullying. (S)
- 2 Complete a table like the example provided to analyse the stakeholders affected by cyberbullying (e.g. victim, victim's family, victim's place of work/school, the government, society). The first line has been completed for you.

Stakeholder	Impact
Victim	Emotional, physical and psychological stress and related health problems Sick leave
Victim's family, etc.	

- a Why do you think the government has found it so hard to police cyberbullying?
- b Do you think the government should draft laws to stop cyberbullying? What should be included in the draft Bill? (A, C, E, Cr)



- 3 Read the article then complete the activities that follow.
  - a Research and identify the section in the Criminal Code under which the charges in the article fall.
  - b Research and explain the meaning of overt crimes and why graffiti is considered an overt crime.
  - c Interview three stakeholders regarding their viewpoints on graffiti. Compare and analyse the different perspectives on graffiti as a crime.
  - d Create an extended response of 400–600 words to communicate the nature and scope of graffiti in Queensland and the legal issues that may arise from the use of wilful damage laws in regard to graffiti. (C, S, A, Cr)

## Wilful damage (graffiti) charges, Brisbane City

QPS Media on Feb 12, 2016 @ 9.29 am

Officers from the Taskforce Against Graffiti (TAG) have charged three men with a total of 1892 offences following investigations into a number of graffiti offences committed throughout Brisbane and surrounds.

It will be alleged that the offences date as far back as 2009.

A 26-year-old man from Carina Heights was charged with 811 offences and is due to appear in the Brisbane Magistrates Court on 30 March 2016.

A 24-year-old man from Zillmere was charged with 826 offences and is due to appear in the Brisbane Magistrates Court on 15 February 2016.

A 30-year-old man from Albion was charged with 255 offences and is due to appear in the Brisbane Magistrates Court on 3 March 2016.

Taskforce Against Graffiti (TAG) commenced in October 2008, and is a joint initiative between the Queensland Police Service and the Brisbane City Council (BCC) to address the issue of graffiti in and around the Brisbane area.

The Taskforce consists of experienced investigators and intelligence officers from the QPS and BCC who work collaboratively to identify, locate and arrest graffiti offenders.

Detective Inspector Glen Farmer, City Valley Crime Group, said TAG has been extremely effective in reducing and preventing graffiti across Brisbane.

‘The success of TAG can be attributed to the strong partnership between the QPS and BCC. This collaborative approach of sharing of information has allowed police to target graffiti offences more effectively.

‘Graffiti is a highly visible crime and one that will not be tolerated. The willingness of the community to work with police by providing information on offences has also greatly contributed to the success of TAG.

‘Members of the public can report any incident of vandalism or graffiti anonymously to Crime Stoppers on 1800 333 000,’ Detective Inspector Farmer said.

Police would like to remind the public that graffiti vandals will be charged with wilful damage, and those convicted could face up to five years’ imprisonment.

Figure 1.19 Some crimes, such as wilful damage and graffiti, are considered to be overt.



## CHAPTER 2

# Criminal investigation process

### CHAPTER OBJECTIVES

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

- explain what constitutes criminal behaviour, and identify the different roles in an alleged criminal situation; the criminal investigation process and the features that contribute to just and equitable outcomes; the types of evidence police may collect during an investigation process
- contrast summary and indictable offences, and classify offences into categories in reference to the Criminal Code
- explain the role police play in the criminal investigation process; the rights and responsibilities of police, suspects, accused and victims
- analyse and apply elements of offences to a range of criminal scenarios
- explain situations where search and arrest warrants are required; police discretionary powers; and legal processes regarding juveniles
- select legal information and data about Australian crime rates and criminal offences, choosing current and relevant sources to analyse crime rates over type, time, age and place in Australia to ascertain relationships, patterns and trends
- analyse and evaluate the extent to which the criminal investigation process balances individuals' rights with society's need for order, justify using legal criteria and discuss implications
- describe the links between the legal investigation process and the commencement of a criminal trial
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

### Key concepts/legal terminology you will encounter in this chapter

- |                                       |                               |                    |
|---------------------------------------|-------------------------------|--------------------|
| • accused                             | • evidence                    | • right to silence |
| • Act                                 | • indictable offence          | • subpoena         |
| • alleged                             | • offender                    | • summary offence  |
| • arrest                              | • omission                    | • summons          |
| • charge                              | • police discretionary powers | • victim           |
| • criminal act ( <i>actus reus</i> )  | • reasonable suspicion        | • warrants         |
| • criminal intent ( <i>mens rea</i> ) |                               | • witness          |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Children's Court Act 1992* (Qld)
- *Commonwealth of Australia Constitution Act 1901* (the Constitution)
- *Criminal Code Act 1899* (Qld)
- Criminal Code 1995 (Cth)
- *Drugs Misuse Act 1989* (Qld)
- *Police Powers and Responsibilities Act 2000* (Qld)
- *Regulatory Offences Act 1985* (Qld)
- *Youth Justice Act 1992* (Qld)
- *Transport Operations (Road Use Management) Act 1995* (Qld)

### SIGNIFICANT CASES

- *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426
- *The Queen v Baden-Clay* [2016] HCA 35

## LEGAL ODDITY

Evidence found at a crime scene is usually contaminated and even unusable due to a number of uncontrollable variables, as well as criminals who try to conceal their work. There is some evidence that is stronger than others. Glitter is a perfect trace evidence – easily transferred between people but not easily dislodged, and innocuous should a perpetrator notice it. While some fibres are so common that they cannot be used as evidence, the manufacturing process creates batches of glitter with highly specific characteristics that can be matched to one another. Luminol, a chemical compound, glows blue when it comes into contact with the haemoglobin, even when the area had been washed years before. However, Luminol has a few negative features – the glow lasts only 30 seconds, the chemical reaction can destroy the evidence, and it also reacts to the presence of copper, urine and horseradish!

## 2.1 Enforcing criminal law

In criminal law, an **alleged criminal situation** is where an unproven accusation of a crime is reported – for example, a break and enter may have been reported to police but it is currently unproven, and no charges have yet been laid. When a crime is reported, police are provided with an account of the details of the alleged event so they can investigate and pursue the matter. The aim of investigating crimes and proceeding with prosecution is to protect the community and to ensure just and equitable outcomes for all stakeholders.

Within an alleged criminal situation, a number of stakeholder roles may be investigated, and several people may be interviewed and required to present **evidence** important to the criminal investigation and court proceedings. They include:

- **the victim** – a person who has suffered a loss (physical, emotional or economic) due to the actions or omissions of another
- **the accused** – a person who is charged and on trial for a crime but who has not yet been found guilty
- **a suspect** – a person who is thought to have committed a crime and is being investigated
- **a witness** – a person who has seen or heard information relevant to an alleged crime
- **the offender** – a person who has broken the law.

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**alleged criminal situation** where an unproven accusation of a crime is reported to the police for investigation

**evidence** facts or information indicating whether a belief or proposition is true or valid

---

In Queensland, the responsibility for investigating reports of alleged crimes and enforcing criminal law lies with the Queensland Police Service. The police are part of the executive arm of government and are given special powers separate from the

**Figure 2.1** The Queensland Police Service investigates alleged criminal situations and enforces criminal laws within the state.



Follow the link <http://cambridge.edu.au/redirect/8161> and go to roughly the 1:16 minute mark. Listen to the monologue from Officer Jim, played by John C. Reilly. Answer the questions below.

- 1 Discuss the relevance of the monologue. Explain what Officer Jim means regarding police discretionary powers and what crimes you think he is referring to as forgivable. (E)
- 2 Explain the difference between a suspect and the accused in an alleged criminal situation. (C)
- 3 Explain how police discretionary powers apply to alleged criminal situations. (C)
- 4 Create a table to analyse the advantages and disadvantages of police discretionary powers in Queensland. (Cr, A)
- 5 Create one-paragraph responses to the following:
  - a Evaluate the impact police discretionary powers may have on the just and equitable outcomes for those suspected or accused of criminal behaviour and the victim.
  - b Make a decision about whether the use of such powers is appropriate in enforcing criminal law. (Cr, E)

legislative and judicial powers. These powers are given to police officers to carry out the criminal investigation process outlined in the *Police Powers and Responsibilities Act 2000* (Qld).

Despite these specific legislated powers, every day police must make choices and decisions about what crimes to investigate, what should be reported or not, what processes to implement and what charges to lay. This decision-making power, known as **police discretionary powers**, affords the power to police to decide what seems to be the most appropriate course of action within a

set of circumstances. This may include decisions regarding what areas to patrol, what crimes to target, what reports to investigate, what offences to pursue, implementing the criminal investigation process and which behaviours for which to file charges, or which crimes or situations warrant the issue of a warning.

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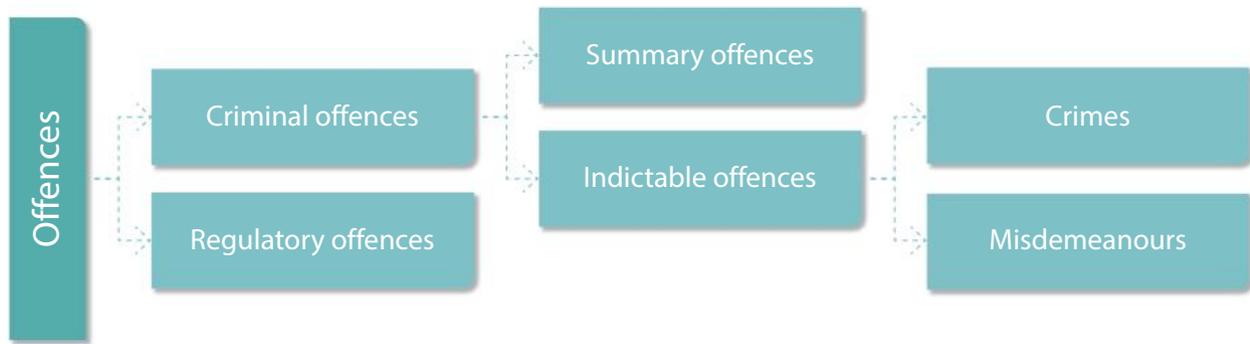
**police discretionary powers** the power afforded to police to make decisions based upon what seems to be the most appropriate action in the circumstances

---

### 3 Division of offences

- (1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.
- (2) Criminal offences comprise crimes, misdemeanours and simple offences.
- (3) Crimes and misdemeanours are indictable offences; that is to say, the offenders cannot, unless otherwise expressly stated, be prosecuted or convicted except upon indictment.
- (4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.
- (5) An offence not otherwise designated is a simple offence.

**Figure 2.2** The *Criminal Code Act 1899* (Qld) divides crimes into criminal and regulatory offences.



**Figure 2.3** The *Criminal Code Act 1899* (Qld) further divides criminal offences into summary (simple) and indictable offences.

## Criminal behaviour

In order to balance individuals' rights with society's need for order and to uphold society's beliefs about what is considered morally right or wrong and what is considered socially acceptable or unacceptable, regulations have been **prescribed** in certain Queensland laws. These laws outline the acts or **omissions** that have been prohibited by statute law and are punishable by the state. Under the *Criminal Code Act 1899* (Qld), crimes are defined and categorised as **offences**.

**prescribed** in this context, something that is laid down in legislation – contained in Acts and regulations

**omission** a failure to act resulting in a breach of duty or damage

**offence** an act that breaks the law

The Criminal Code divides offences into criminal offences and **regulatory offences**. Regulatory offences are set out in the *Regulatory Offences Act 1985* (Qld) and must be finalised in the Magistrates Court. All regulatory offences carry fines as their maximum penalty. For example, stealing something valued at \$150 or less from a shop or leaving a restaurant without paying the bill of less than \$150 is a regulatory offence. Criminal offences are predominantly covered in the *Queensland Criminal Code Act 1899* and can be divided further into **summary offences** and **indictable offences**.

**regulatory offence** act that is prohibited by legislation and carries a fine as its maximum penalty

**summary offence** simple or less serious criminal offence heard by a magistrate

**indictable offence** more serious criminal offence that requires a committal hearing and trial

Summary offences, also known as simple offences, are matters that are tried by a magistrate; they are usually less serious offences, such as traffic offences and minor crimes. If you are charged with a summary offence, you do not have the right to have a trial by jury. Indictable offences are more serious crimes and misdemeanours, which require a trial by judge and jury. Indictable offences include murder, rape, robbery, serious assault, and break and enter.

The physical performance of the **criminal act** is known as **actus reus**; this is the action taken or omitted by a person. Examples of such acts include hitting another person (assault), stabbing a person to death (murder) and hacking into a computer system (computer hacking). Along with the physical performance is the mental element – a person's awareness of the fact that their conduct is criminal: this is the **criminal intent (mens rea)**.

**criminal act (actus reus)** the physical performance of a crime (guilty act)

**criminal intent (mens rea)** a person's mental state and awareness of the fact that their conduct is criminal

## RESEARCH 2.1

- 1 Research and explain an example of an omission that was once considered to be a crime. (S, C)
- 2 Research and explain, using an example, a so-called 'victimless crime'. (S, C)
- 3 Research and discuss the division of offences and why the classification of regulatory and criminal offences is used in Queensland. Why are criminal offences then classified further? (S, A, E)

Those charged with an indictable offence who choose to plead 'not guilty' are entitled to the right to presumption of innocence and a fair trial. To prove that the accused has committed the crimes with which they are charged, the **prosecution** will need to show, in court through evidence, that the person physically committed the act beyond reasonable doubt, and in some crimes they must also show the intent of the offender to commit the act. Forensics, evidence and witness testimony are all vital parts of the investigation process. It is through these methods of investigation and evidence collection that an accused can be linked to the scene of the crime and the criminal act.

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**prosecution** the party who presents and argues the case on behalf of the Crown against the accused

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## REVIEW 2.2

- 1 Using examples, create a one-paragraph response to explain the difference between summary and indictable offences. (C, Cr)
- 2 Consider each of the scenarios below to identify whether a criminal act (*actus reus*) and/or criminal intent (*mens rea*) is present.
  - a Timothy was charged with assault after he lost his temper at the cinema. He felt the candy bar prices were too high. He pushed a display shelf over, hitting a child standing near the counter and cutting his forehead open. The boy required six stitches at the hospital.
  - b Jessica is at work but has decided she needs to go home because she's not feeling well. She starts driving but is having a hard time focusing on the road. Jessica falls asleep at the wheel and hits a tree. Luckily, no one is seriously hurt. She is charged with dangerous driving.
  - c Samantha is 18 and babysits the children of a local family. She picks them up from school and drives them to their afternoon activities. One afternoon, she decided to watch the children's soccer game. Samantha is also responsible for the family dog when she is babysitting, but decided on this occasion that she didn't want to have to look after it at the game. She decided to leave the dog in the car for a few hours, even though it was 35°C outside. Before the end of the game, someone walked by, noticed the distressed dog and called the RSPCA. Charges are yet to be laid.
  - d Shaun has been bullied at school for an extended period of time and has decided he needs to take matters into his own hands to stop the bullying. He pays some older boys from a local sporting club to 'rough' the bullies up a little. Things get out of hand and one of the bullies falls on the cement, fracturing his skull. He is in an induced coma and is not expected to recover. (A)

## 2.2 Types of offences

All crimes, whether summary or indictable, can be classified into a type of offence, including offences against the person, offences against property and other offences. Those classified as other offences are generally offences detected by the police rather than being reported by the public – for example, public order offences, motor vehicle offences and drug offences. In Queensland, the Criminal Code 1899 (Qld), along with other Acts of Parliament such as

the *Drugs Misuse Act 1986* (Qld) and the *Transport Operations (Road Use Management) Act 1995* (Qld), defines what actions are considered to be criminal.

### CHECK THIS OUT

Use the Crime Map website to look at the crime statistics in your region.

### RESEARCH 2.2

- 1 Discuss your findings from Crime Map, considering the following:
  - a What crimes appear to be most prevalent? Why?
  - b What is the comparison of crime rates for summary and indictable offences?
  - c Which crimes are most likely to be subject to police discretionary powers? (S, A)
- 2 Compare the statistics of your region with those for another region. Discuss the differences. (E)
- 3 Create a one-paragraph response to explain why these data are publicly available and what benefits publishing such data might have for society. (Cr, C)

**Infringement Notice**  
State Penalties Enforcement Act 1999

Queensland Government

Issue Date: 27/07/2015  
**Infringement Notice Number: Q 300000170 8**  
 Customer Reference Number: 99999999  
 AMOUNT DUE: \$341.00  
 DUE DATE: 24/08/2015  
 Service Method: POST

Q3000001708.20150727091551 00001/00001  
**SAMMY SAMPLE**  
 1 SAMPLE ST  
 SAMPLE QLD 4000

Offence Details			
Offence:	Fail to stop at red light	Vehicle Registration:	SAMPLE
Location:	100 SAMPLE ST SAMPLE QLD 4000	Vehicle Description:	SAMPLE
Offence Date:	27/07/2015	Vehicle Colour:	Black
Offence Time:	9:14 AM	Alleged Speed Travelled:	70 km/h
Driver Licence Number:		Speed Limit:	60 km/h
Licence State:		Demerit Points:	3
For further information on demerit points go to <a href="http://www.qld.gov.au">www.qld.gov.au</a>			

Officer's Signature: \_\_\_\_\_ Officer's Number: \_\_\_\_\_ Station: \_\_\_\_\_

**Figure 2.4** Strict liability means only the criminal act, not criminal intent, is required to be proven for some summary offences – for example, speeding tickets.

Source: Queensland Government.

## UNDERSTANDING THE ELEMENTS OF AN OFFENCE

Every offence has certain elements that must be established by the prosecution before a person can be found guilty of that offence. These elements are outlined in the *Criminal Code Act 1899* (Qld). Consider the following:

'Stealing' is defined in the Criminal Code 1899 (Qld), s 391(1) as:

A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

Considering just the first part, the elements of 'stealing' are:

- taking something capable of being stolen
- with fraudulent intent.

How do we know what each of these elements means? The Criminal Code 1899 (Qld) assists us: 'Things capable of being stolen' are described in section 390 and include (from the Criminal Code 1899 (Qld) and cases):

- any inanimate thing which is movable or capable of being made movable
- a tame animal (except pigeons)
- oysters in an oyster bed.

'With fraudulent intent' is described in s 391(2) and includes:

- an intent to permanently deprive the owner of the thing
- an intent to deal with it in such a manner that it cannot be returned in its original condition.

These Acts clearly identify the crime as either a summary or indictable offence. They also set out the **elements of an offence** which allow the courts to determine whether the offence is one of **strict liability** or there is a full or partial **defence** to the crime available. The criminal law in Queensland also prescribes the **punishment** for criminal offences when an offender is found guilty.

Strict liability does not require the prosecution to show that criminal intent was present or that the accused had any criminal intent to commit the crime. For example, speeding offences do not require the police or prosecution to prove that the offender intended to speed. Instead, strict liability for these minor offences puts a greater onus on society to comply with the laws, lowers the level of proof required for criminal conviction and assists the criminal justice system to cope with the volume of minor offences.

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**elements of an offence** the facts of an offence that must be proven to find the offender guilty

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**strict liability** offences where only the criminal action (*actus reus*) needs to be proved

**defence** the claims of the defendant in opposition to complaints against them; the party who presents and argues the case on behalf of the accused or the defendant

**punishment** financial loss, confinement or another penalty imposed for wrongdoing

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## Offences against the person

Offences against the person are those offences that directly affect a person's physical and emotional health. These effects can be very significant for the victim and the victim's family, depending on the nature of the crime. There are a number of offences outlined in the *Criminal Code Act 1899* (Qld), and details of some of the offences against the person are provided in Table 2.1 over the page. The principles of penalties and sentencing for these offences are discussed in Chapter 4.

**Table 2.1** Offences against the person reported in the 2015–16 and 2016–17 financial years

Offence	Number reported			Number reported per 100 000 persons*		
	2015–16	2016–17	Percentage change	2015–16	2016–17	Percentage change
<b>Homicide (murder)</b>	<b>48</b>	<b>38</b>	<b>-21</b>	<b>1</b>	<b>1</b>	<b>-22</b>
<b>Other homicide</b>	<b>83</b>	<b>96</b>	<b>16</b>	<b>2</b>	<b>2</b>	<b>14</b>
Attempted murder	49	75	53	1	2	51
Conspiracy to murder	1	0	-100	0	0	-100
Manslaughter (excl. by driving & striking)	5	4	-20	0	0	-21
Manslaughter – unlawful striking cause death	3	5	67	0	0	65
Driving causing death	25	12	-52	1	0	-53
<b>Assault</b>	<b>19 956</b>	<b>22 369</b>	<b>12</b>	<b>412</b>	<b>457</b>	<b>11</b>
Grievous assault	904	894	-1	19	18	-2
Serious assault	9 341	10 838	16	193	221	15
Serious assault (other)	2 928	3 275	12	61	67	10
Common assault	6 783	7 362	9	140	150	7
<b>Sexual offences</b>	<b>6 520</b>	<b>5 860</b>	<b>-10</b>	<b>135</b>	<b>120</b>	<b>-11</b>
Rape and attempted rape	1 717	1 870	9	35	38	8
Other sexual offences	4 803	3 990	-17	99	81	-18
<b>Robbery</b>	<b>1 367</b>	<b>1 750</b>	<b>28</b>	<b>28</b>	<b>36</b>	<b>26</b>
Armed robbery	709	891	26	15	18	24
Unarmed robbery	658	859	31	14	18	29
<b>Other offences against the person</b>	<b>3 216</b>	<b>4 236</b>	<b>32</b>	<b>66</b>	<b>86</b>	<b>30</b>
Kidnapping & abduction, etc.	295	333	13	6	7	12
Extortion	64	82	28	1	2	27
Stalking	612	639	4	13	13	3
Life endangering acts	2 245	3 182	42	46	65	40
<b>Offences against the person</b>	<b>31 190</b>	<b>34 349</b>	<b>10</b>	<b>645</b>	<b>701</b>	<b>9</b>

Source: Queensland Police Service.

\* Although offences per 100 000 persons have been rounded to the nearest whole number, the actual rate was used to calculate the percentage change between the two periods. Therefore, although the change values are correct, they may not appear so, particularly in smaller volume offence categories.

## CHECK THIS OUT

Read the Statistical Review of Offences Against the Person in Queensland on the Queensland Police Service website and discuss the patterns and trends identified and analysed in the report.

## REVIEW 2.3

Consider the elements of the offence of stealing and make a decision about whether each of the scenarios satisfies all elements and would be considered to be the crime of stealing.

- 1 The person in front of you drops \$20. You pick it up and pocket it.
- 2 You borrowed a stranger's phone to make an emergency call and, during the commotion, forgot to give it back.
- 3 You took some flowers from your neighbour's yard to give to your mother.
- 4 You see an un-labelled computer left on the back seat of the bus. You take it.
- 5 A friend owes you \$50 and has taken too long to pay you back so you take her new running shoes from her locker instead of the payment. You tell her after you have already taken them what you have decided. (E)

## RESEARCH 2.3

- 1 Go to the Queensland Police Service website and select the current data about offences against the person. Compare these figures with data from previous years and consider the patterns and trends over time and the types of offences against the person. (S, C, A)
- 2 Go to the Australian Bureau of Statistics website and compare this data with the reported offences against the person in other states. What impact does place have on the data? (S, C, A)
- 3 Discuss what the data show about the relationships, patterns and trends of crimes against the person in Australia. (E)

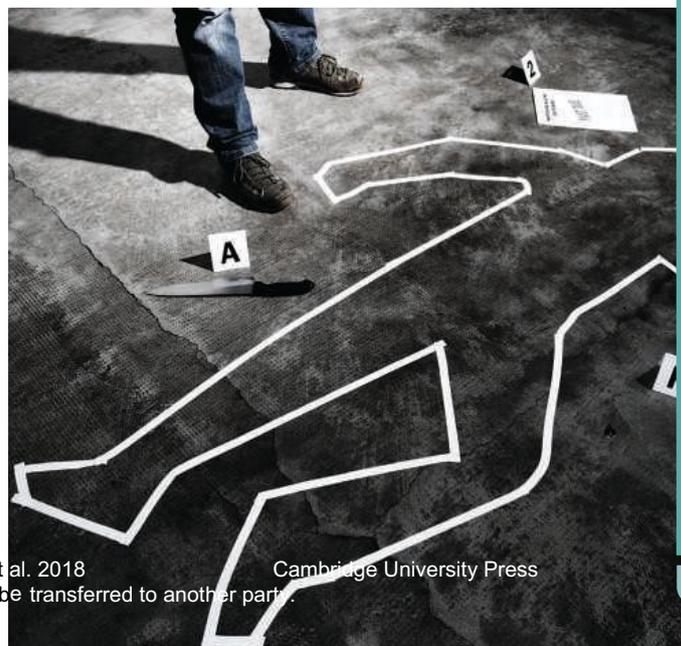
## Murder

- **Elements:** kills another person unlawfully.
- **Mandatory sentence:** life imprisonment.

According to section 300 of the Criminal Code 1899 (Qld), any person who unlawfully kills another is guilty of either murder or manslaughter. Murder is the more serious of the two offences, as it usually requires intent to kill another person (s 302). Another circumstance in which a person who kills another is guilty of murder is when the person who killed was committing a criminal act when the death occurred, whether or not that person intended to kill. An example of this may be if a person was robbing a bank and they fired a warning shot that killed a passer-by. This person will be charged with murder as they were committing an illegal act when the death was caused. A person can also be charged with murder, according to section 302, if they intended to cause grievous bodily harm to another and that person later dies. Furthermore,

as *Stuart v The Queen* illustrates, a person also can be convicted of murder (or any offence) if they 'counsel or procure' another person to commit the offence or if persons 'form a common intention to prosecute an unlawful purpose'.

**Figure 2.5** Any person who unlawfully kills another is guilty of either murder or manslaughter.



## CASE STUDY 2.1

### *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426

#### Facts

The Whiskey Au Go Go nightclub in Brisbane was firebombed on 8 March 1973. Fifteen people died in the incident. John Andrew Stuart and James Finch were arrested two days later and charged with the murder of Jennifer Davie (one of the deceased). Police alleged that Stuart was the instigator of the offence and that Finch had lit the firebomb. There were also allegations of links between Stuart and a Sydney-based crime syndicate, and a suggestion that extortion was a motive.

Stuart and Finch were found guilty of murder and sentenced to life imprisonment. They appealed to the Queensland Court of Appeal. Their appeal was dismissed, and the verdict was upheld (*R v Stuart and Finch* [1974] Qld R 297). Stuart further appealed to the High Court. In his judgment, McTiernan ACJ set out the facts as follows:

The two accused were tried together and each pleaded 'not guilty'. The circumstances of the case shortly stated are: Finch and the applicant planned to extort money from the owners of nightclubs in Brisbane by means of what is described in the evidence as a 'protection racket'. The scheme required Finch to light a fire in the building in which one of the clubs called the 'Whisky Au Go Go' Night Club carried on, at a time when its customers were enjoying its facilities. The object of lighting the fire was to convince proprietors of similar places of the necessity to hand over money to Finch and Stuart and their associates to get protection against such criminal interference. At 2.08 am on 8 March 1973, Finch lit the fire which killed Miss Davie and other persons who, like her, were customers of the 'Whisky Au Go Go' Night Club. It appeared from the evidence given at the trial that Stuart had arranged an alibi for use in the event of his being charged with an offence. (Para 3)

#### Issues

The trial was controversial. Stuart dismissed his counsel and swallowed pieces of wire during the trial, which required surgery in Royal Brisbane Hospital. Thus he was not present in court for some of his trial. Section 617 of the Criminal Code 1899 (Qld) gives the trial judge discretion to allow a trial to proceed in the absence of the accused. This discretion was exercised and the verdict was upheld on appeal. The major points at issue in Stuart's High Court appeal related to sections 7 and 8 of the Criminal Code 1899 (Qld) to do with parties to offences and offences committed in prosecution of a common purpose.

#### Law

Section 7(d) of the Criminal Code 1899 (Qld) provides that 'any person who counsels or procures any other person to commit the offence' is guilty of the offence. Section 8 provides that 'when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence'.

#### Arguments

The points that were in contention relating to these two sections were summed up by the trial judge (and adopted by the High Court).

#### Decision

The High Court refused Stuart leave to appeal.

#### Reasons

The High Court adopted the instruction and reasoning of the trial judge in the interpretation of the Criminal Code 1899 (Qld) and commented very favourably on the work of the trial judge.



**Figure 2.6** The fire at the Whisky Au Go Go Night Club in Brisbane  
 Source: *Courier-Mail*.

## SIDEBAR

Look up the definition of 'killing' in section 293 of the Criminal Code 1899 (Qld) and then consider why this definition would be listed, and not just murder.

## Manslaughter

- **Elements:** killed another person unlawfully; circumstances of the case do not constitute murder.
- **Maximum penalty:** life imprisonment.

Manslaughter is defined in section 303 of the Criminal Code 1899 (Qld), which states that, regarding any unlawful killing of another person where that person's actions do not constitute murder, they will be guilty of manslaughter. Circumstances in which a person can be found guilty of manslaughter include causing the death of another by wrongful act and manslaughter by criminal negligence – that is, by failing to act as a reasonable person and causing the death of another person. Partial defences, as discussed in Chapter 3, can reduce a murder charge to manslaughter.

The major difference between murder and manslaughter is the underlying intention. If manslaughter is to prevail as the offence, it will need to be established that the accused had no intention of causing death. If the intention of the accused is to cause the death of another, the only charge that can be brought against them is murder.

## Assault

**Assault** is defined in section 245 of the Criminal Code 1899 (Qld) as:

A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an 'assault'.

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**assault** the unlawful, intentional threat of force or infliction of injury on another person

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Assault can further be categorised into common assault, assault occasioning bodily harm, serious assault and grievous bodily harm.

- **Common assault** is the least serious offence. It is outlined in section 335 of the Criminal Code 1899 (Qld). This offence can simply include threats of violence where no actual harm was inflicted, or instances where violence was inflicted upon the victim but where very little, if any, damage was sustained by them.



**Figure 2.7** Assaults can range from minor assaults that cause minor damage such as a bruise, to assaults that cause serious damage such as broken bones and internal bleeding.

- **Assault occasioning bodily harm** is the infliction of actual personal violence that causes actual bodily harm to the victim. Assault occasioning bodily harm is a crime in Queensland according to section 339 of the Criminal Code 1899 (Qld). To prove that this offence occurred, the prosecution would have to show evidence of actual harm that was suffered by the victim of the crime.
- **Serious assault** is the threat or infliction of actual personal violence, where the victim of the assault is a police officer; a person over the age of 60 years; a person who relies on a wheelchair, guide dog or any other remedial device; or a prisoner assaulting a working correctional services officer. Serious assault is a crime according to section 340 of the Criminal Code 1899 (Qld). It is clear that law-makers felt the need to include such an offence in the Act to protect people who work in dangerous professions, such as police officers and corrections officers, as well as people who would struggle to protect themselves due to age or physical impairment. Serious assault does not mean that the injury inflicted needs to be very serious, as the main factor that distinguishes this offence from the other two types of assault is the status of the victim involved.

- **Grievous bodily harm** means inflicting an injury upon another person of a very serious nature and carries a maximum penalty of 14 years' imprisonment. Section 320 of the Criminal Code 1899 (Qld) makes grievous bodily harm a criminal offence. Physical assaults that cause serious and potentially fatal force to the victim are known as assaults causing grievous bodily harm. These are the most serious forms of assault, and can often lead to the victim being permanently injured in some manner.

In section 1 of the Criminal Code 1899 (Qld), grievous bodily harm is defined as:

- the loss of a distinct part or an organ of the body, or
- serious disfigurement, or
- any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health, whether or not treatment is or could have been available.

**Figure 2.8** Grievous bodily harm is defined in section 320 of the Criminal Code 1899 (Qld).

## REVIEW 2.4

- 1 Create a table to contrast each of the types of assault explained in this section. Explain why each of the different definitions of assault is important for protecting the rights of individuals. (Cr, A, C)
- 2 Discuss the descriptions of victims in serious assault. Do you agree or disagree that the classification of the victim increases the seriousness of the offence? (C, E)
- 3 Using the definitions from the Criminal Code 1899 (Qld), explain the difference between murder and manslaughter. (C)



**Figure 2.9** Stalking is an offence according to section 359B of the Criminal Code 1899 (Qld).

## Stalking

- **Elements:** an act intentionally directed at the stalked person; it can include following, watching or approaching the person, contacting the person in any way, giving offensive material to the person, **loitering** near the person's home or place of work, and threatening to use or actually using violence against the person.
- **Maximum penalty:** seven years' imprisonment.

Stalking is an offence according to section 359B of the Criminal Code 1899 (Qld). The conduct may be engaged in on one occasion if it is protracted, or otherwise on more than one occasion. The elements of this offence make it clear that stalking is not simply following a person around, but can include any number of actions, all of which can be very frightening and intimidating for the victim.

**loiter** linger idly by; to move slowly about

## Rape

- **Elements:** having **carnal knowledge** of a person without consent or permission. The element of carnal knowledge is 'complete upon penetration' according to section 6 of the Criminal Code 1899 (Qld).
- **Maximum penalty:** life imprisonment.

Rape is a crime according to section 349 of the Criminal Code 1899 (Qld). The elements of the

crime that are outlined in the Code show that it is not just carnal knowledge without consent that can lead to a rape conviction. Virtually any sexual act performed without consent that has been freely and voluntarily given can be considered rape. The person giving the consent must also have the **cognitive capacity** to give the consent.

**carnal knowledge** the act of engaging in sexual intercourse

**cognitive capacity** capable of understanding the nature and effect of decisions about the matter and freely and voluntarily able to make decisions about the matter and communicate decisions in the same way

## CHECK THIS OUT

Go to the Lawstuff website and consider the information relating to criminal liability and young people with regard to sexual offences.

## Sexual assault

- **Elements:** unlawful and indecent assault of another person without their consent.
- **Maximum penalty:** between 10 years' and life imprisonment (depending on the seriousness of the offence).

Sexual assault is defined in section 352 of the Criminal Code 1899 (Qld). Such acts include indecently

exposing oneself or indecently touching another person. The offence is viewed as more serious when:

- ‘the offender brings into contact any part of the genitalia or the anus of a person with any part of the mouth of a person’ (Criminal Code 1899 (Qld), s 352(2))
- ‘the offender immediately before, during, or immediately after the offence is or pretends to be armed with a dangerous or offensive weapon, or is in company with any other person’ (Criminal Code 1899 (Qld), s 3(a)).

Indecent assaults are defined in section 352(3)(b) as including assaults involving the assaulted person being forced to penetrate the offender’s vagina, vulva or anus to any extent with a thing or a part of the person’s body that is not a penis. Gross indecent assault includes the person being assaulted by having their vulva, vagina or anus penetrated by a thing or part of the body that is not a penis (Criminal Code 1899 (Qld), s 352(3)(c)).

### *Carnal knowledge of a child*

- **Elements:** having or attempting to have carnal knowledge of a child under the age of 16 years.
- **Maximum penalty:** life imprisonment (child under the age of 12 years) or 14 years’ imprisonment (child between 12 and 16 years).

Carnal knowledge of a child under 16 years of age is a crime according to section 215 of the Criminal Code 1899 (Qld). This is an offence, as the law considers a person under the age of 16 to be incapable of giving informed consent to such an act, due to immature age.

### *Indecent treatment of a child under 16*

- **Elements:** unlawfully and indecently dealing with a child under the age of 16 years or wilfully exposing a child under 16 years to an indecent act, film or other indecent matter.
- **Maximum penalty:** 14–20 years’ imprisonment, depending on the age of the child and the relationship between offender and child. Indecent treatment of a child under 16 is an offence under section 210 of the Criminal Code 1899 (Qld).

## RESEARCH 2.4

- 1 Using the Criminal Code 1899 (Qld), research and explain the elements and maximum penalty for the following offences against the person:
  - a incest (s 222)
  - b unlawful wounding (s 323). (S, C)
- 2 Research and compare the definition of an offence against the person in Queensland to that in another jurisdiction. (S, A)
- 3 Create a one-paragraph response to discuss why the elements of a crime may differ from state to state. What legal issues might this cause? (E, Cr)

## Offences against property

Offences against property are those offences that include the removal or destruction of another person’s property. There are a number of offences outlined in the *Criminal Code Act 1899* (Qld). Details of some of the offences against property are included in Table 2.2.

### *Stealing*

- **Elements:** fraudulently (dishonestly) taking the property (that is movable or capable of being made movable) of another with an intent to permanently deprive the owner of the thing.
- **Maximum penalty:** five years’ imprisonment.

Stealing is an offence in Queensland according to Chapter 36 of the Criminal Code 1899 (Qld), in particular sections 390, 391 and 398. Stealing is discussed in more detail earlier in the chapter.

## CHECK THIS OUT

Other things are capable of being stolen, but what about wild animals? See section 390 of the Criminal Code 1899 (Qld).

**Table 2.2** Offences against property reported in the 2015–16 and 2016–17 financial years

Offence	Number reported			Number reported per 100 000 persons*		
	2015–16	2016–17	Percentage change	2015–16	2016–17	Percentage change
<b>Unlawful entry</b>	<b>32 502</b>	<b>36 821</b>	<b>13</b>	<b>672</b>	<b>752</b>	<b>12</b>
Unlawful entry with intent – dwelling**	19 892	23 490	18	411	480	17
Unlawful entry without violence – dwelling	19 293	22 786	18	399	465	17
Unlawful entry with violence – dwelling	599	704	18	12	14	16
Unlawful entry with intent – shop	1 542	1 817	18	32	37	16
Unlawful entry with intent – other	11 068	11 514	4	229	235	3
<b>Arson</b>	<b>1 140</b>	<b>1 206</b>	<b>6</b>	<b>24</b>	<b>25</b>	<b>4</b>
<b>Other property damage</b>	<b>33 499</b>	<b>36 731</b>	<b>10</b>	<b>692</b>	<b>750</b>	<b>8</b>
<b>Unlawful use of motor vehicle*</b>	<b>9 948</b>	<b>12 013</b>	<b>21</b>	<b>206</b>	<b>245</b>	<b>19</b>
<b>Other theft (excl. unlawful entry)</b>	<b>1 022 65</b>	<b>1 108 88</b>	<b>8</b>	<b>2 114</b>	<b>2 264</b>	<b>7</b>
Stealing from dwellings	8 463	8 655	2	175	177	1
Shop stealing	19 983	21 322	7	413	435	5
Vehicle (steal from/enter with intent)	25 149	27 328	9	520	558	7
Other stealing	48 670	53 583	10	1 006	1 094	9
<b>Fraud</b>	<b>23 421</b>	<b>27 258</b>	<b>16</b>	<b>484</b>	<b>557</b>	<b>15</b>
Fraud by computer	307	454	48	6	9	46
Fraud by cheque	211	229	9	4	5	7
Fraud by credit card	11 136	13 203	19	230	270	17
Identity fraud	1 000	1 179	18	21	24	16
Other fraud	10 767	12 193	13	223	249	12
<b>Handling stolen goods</b>	<b>5 523</b>	<b>5 556</b>	<b>1</b>	<b>114</b>	<b>113</b>	<b>-1</b>
Possess property suspected stolen	2 345	2 398	2	48	49	1
Receiving stolen property	475	448	-6	10	9	-7
Possess etc. tainted property	2 643	2 651	0	55	54	-1
Other handling stolen goods	60	59	-2	1	1	-3
<b>Offences against property</b>	<b>2 082 98</b>	<b>2 304 73</b>	<b>11</b>	<b>4 306</b>	<b>4 706</b>	<b>9</b>

Source: Queensland Police Service.

\* Although offences per 100 000 persons have been rounded to the nearest whole number, the actual rate was used to calculate the percentage change between the two periods. Therefore, although the change values are correct, they may not appear so, particularly in smaller volume offence categories.

\*\* Community by-law offences cannot be separated into offences with and without violence. As such, sub-categories may not add to the total.

# This category includes attempted offences.

## RESEARCH 2.5

- 1 Go to the Queensland Police Service website and select the current data about offences against property. Compare these figures with previous years' data and consider the patterns and trends over time and the types of offences. (S, A)
- 2 Go to the Australian Bureau of Statistics website and compare these data with the reported offences against property in other states. What impact does place have on the data? (S, E)
- 3 Discuss what the data show about the relationships, patterns and trends of crimes against property in Australia. (E)

## Robbery

- **Elements:** stealing something when, directly before, during or directly after the stealing, using or threatening to use actual violence in order to obtain the stolen thing or to overcome resistance to it being stolen.
- **Maximum penalty:** 14 years' imprisonment, which increases to life if (a) a dangerous weapon is used, or (b) more than one person is involved, or (c) violence is actually used.

Robbery is a crime according to section 409 of the Criminal Code 1899 (Qld). The maximum penalty for robbery is more severe than it is for stealing, as violence has been threatened or has actually occurred in the crime of robbery. Armed robbery is simply where the violence is threatened through the use of a weapon.

**Figure 2.10** Armed robbery is where violence is threatened through the use of a weapon.



## Other offences

**Table 2.3** Other offences as reported in the 2015–16 and 2016–17 financial years

Offence	Number reported			Number reported per 100 000 persons*		
	2015–16	2016–17	Percentage change	2015–16	2016–17	Percentage change
<b>Drug offences</b>	<b>88 660</b>	<b>84 259</b>	<b>–5</b>	<b>1 833</b>	<b>1 720</b>	<b>–6</b>
Trafficking drugs	717	612	–15	15	12	–16
Possess drugs	38 447	36 249	–6	795	740	–7
Produce drugs	2 027	1 730	–15	42	35	–16
Sell supply drugs	5 929	6 940	17	123	142	16
Other drug offences	41 540	38 728	–7	859	791	–8
<b>Prostitution offences</b>	<b>61</b>	<b>96</b>	<b>57</b>	<b>1</b>	<b>2</b>	<b>55</b>
Found in places used for purpose of	13	2	–85	0	0	–85
Have interest in premises used for	2	6	200	0	0	196
Knowingly participate in provision	19	43	126	0	1	124
Public soliciting	8	3	–63	0	0	–63
Procuring prostitution	3	1	–67	0	0	–67
Permit minor to be at a place used	0	0	0	0	0	0
Advertising prostitution	4	22	450	0	0	443
Other prostitution offences	12	19	58	0	0	56
<b>Liquor (excl. drunkenness)</b>	<b>5 643</b>	<b>4 776</b>	<b>–15</b>	<b>117</b>	<b>98</b>	<b>–16</b>
<b>Gaming, racing &amp; betting offences</b>	<b>0</b>	<b>3</b>	<b>100</b>	<b>0</b>	<b>0</b>	<b>100</b>
<b>Breach domestic violence protection order</b>	<b>23 176</b>	<b>25 678</b>	<b>11</b>	<b>479</b>	<b>524</b>	<b>9</b>
<b>Trespassing and vagrancy</b>	<b>5 927</b>	<b>5 949</b>	<b>0</b>	<b>123</b>	<b>121</b>	<b>–1</b>
<b>Weapons Act offences</b>	<b>6 721</b>	<b>6 722</b>	<b>0</b>	<b>139</b>	<b>137</b>	<b>–1</b>
Unlawful possn conc. firearm	166	158	–5	3	3	–6
Unlawful possn firearm – other	790	811	3	16	17	1
Bomb possession and/or use of	14	26	86	0	1	83
Possn and/or use other weapons; restricted items	2 182	2 028	–7	45	41	–8
Weapons Act offences – other	3 569	3 699	4	74	76	2
<b>Good order offences</b>	<b>61 769</b>	<b>59 490</b>	<b>–4</b>	<b>1 277</b>	<b>1 215</b>	<b>–5</b>
Disobey move on direction	963	828	–14	20	17	–15
Resist, incite, hinder, obstruct	27 847	27 035	–3	576	552	–4
Fare evasion	5 567	6 023	8	115	123	7
Public nuisance	27 392	25 604	–7	566	523	–8
<b>Stock-related offences</b>	<b>544</b>	<b>255</b>	<b>–59</b>	<b>11</b>	<b>5</b>	<b>–59</b>
<b>Traffic and related offences</b>	<b>44 663</b>	<b>42 043</b>	<b>–6</b>	<b>923</b>	<b>858</b>	<b>–7</b>

Table 2.3 (Continued)

Offence	Number reported			Number reported per 100 000 persons*		
	2015–16	2016–17	Percentage change	2015–16	2016–17	Percentage change
Dangerous operation of a vehicle	1 930	2 070	7	40	42	6
Drink driving	29 934	28 488	–5	619	582	–6
Disqualified driving	12 768	11 464	–10	264	234	–11
Interfere with mechanism of M/V	31	21	–32	1	0	–33
<b>Miscellaneous offences</b>	<b>5 631</b>	<b>4 269</b>	<b>–24</b>	<b>116</b>	<b>87</b>	<b>–25</b>
<b>Other offences</b>	<b>2 427 95</b>	<b>2 335 10</b>	<b>–4</b>	<b>5 019</b>	<b>4 768</b>	<b>–5</b>

Source: Queensland Police Service.

\* Although offences per 100 000 persons have been rounded to the nearest whole number, the actual rate was used to calculate the percentage change between the two periods. Therefore, although the change values are correct, they may not appear so, particularly in smaller volume offence categories.

## Burglary

- **Elements:** entering a dwelling with intent to commit an indictable offence.
- **Maximum penalty:** 14 years' imprisonment, which increases to life imprisonment if there is more than one offender, or if the offence is committed at night, or if threatened or actual violence is used, or if the offender pretends to be

or is actually armed with a dangerous weapon, or if any property is damaged.

**Burglary** is sometimes referred to as 'break and enter' and is a crime under section 419 of the Criminal Code 1899 (Qld).

**burglary** the act of entering a building or other premises with the intent to commit a felony

### RESEARCH 2.6

Using the Criminal Code 1899 (Qld), research and explain the elements and maximum penalty for the following offences against property:

- 1 wilful damage to property (s 469)
- 2 arson (s 461)
- 3 receiving (s 433). (S, C)

### REVIEW 2.5

- 1 Describe how robbery is different from stealing. (C)
- 2 Explain the circumstances that would make an offender who is guilty of burglary liable for a life sentence. (C)
- 3 Evaluate the elements of the crime of receiving. Make a decision about whether or not you think receiving is a crime. Consider whether those who receive unknowingly should be subject to the same penalties as those who are aware the goods are stolen. (E)

### RESEARCH 2.7

- 1 Go to the Queensland Police Service website and select the current data about drug, traffic or public order offences. Compare these figures with previous years' data and consider the patterns and trends over time and the types of offences. (S, A)
- 2 Go to the Australian Bureau of Statistics website and compare these data with the reported drug, traffic or public order offences in other states. What impact does place have on the data? (S, E)
- 3 Discuss what the data show about the relationships, patterns and trends of drug, traffic or public order offences in Australia. (E)

## Public order offences

Public order offences are those behaviours in a public place that affect or are likely to have an effect on other people. This effect could be through harm, endangerment, embarrassment, disruption or annoyance. Queensland police officers have a responsibility to uphold the public 'peace', which means they must stop offences that disrupt public order.

In Queensland, most public order offences are covered by the *Summary Offences Act 2005* (Qld). This Act makes the following activities illegal:

- unlawfully entering farming land and the like
- persons unlawfully gathering in or on a building or structure
- unlawful driving of a motorbike on public land
- trespass
- being drunk in a public place
- wilful exposure
- begging in a public place
- public nuisance
- unregulated high-risk activities
- possession of an implement in relation to particular offences
- unlawful possession of suspected stolen property
- possession of a graffiti instrument
- unlawful use of vehicles
- piercing particular body parts of a minor
- tattooing of a minor
- preventing public meetings
- false advertisements/notices about births, deaths, marriages or employment
- imposition
- sale of potentially harmful things
- throwing things at a sporting event.

### CHECK THIS OUT

Visit the Australian Legal Information Institute website for a full explanation of the offences listed above. These actions are called 'public order offences' because if they are illegal, then public order within the community is maintained.

## Anti-social behaviour targeted across CBD

Chris McMahon, *Townsville Bulletin*, 28 February 2017

A police operation targeting anti-social behaviour in Townsville's CBD began yesterday amid complaints from business owners about a growing number of itinerants.

Operation Summer Charlie involves more police and increased patrols and will target the anti-social behaviour of people hanging around Flinders St, Dean Park and Perfume Gardens.

It comes after outraged inner-city traders have voiced their concerns about customers being scared away, with people intimidated when asked for money and public urination and fighting derailing their business.

Townsville Police Station officer-in-charge Senior Sergeant Graeme Paine said the operation would hopefully address the concerns of the business owners in the CBD.

'The basis of the operation is designed to give us an expanded presence within the Townsville CBD. The operation will consist of a number of police resources across a variety of areas,' he said.

'We won't tolerate any public order offences, we will take whatever action is appropriate to address any public order issues we do identify.'

Sen-Sgt Paine said an increased police presence was the best way to stamp out anti-social behaviour.

'The majority of it is basic public order issues, consumption of liquor, use of obscene language and elements of poor behaviour, it could be urinating, fighting,' he said.

'We want to have a consistent presence right throughout the day ... we will target our resources

around when the peak offence times and the peak issues that have been identified in regards to people hanging around.’

Sen-Sgt Paine said there had not been an increase in assaults or calls for service in the area, but police did identify a need to address the itinerant issue.

‘The issues often arise when other people come and hang out with that group (of itinerants) ... that’s what people see and in some circumstances, can be concerning and that’s where we get the reports from. It is only a small group and I think it just ebbs and flows with people that come in and associate with that group.

‘It’s about us trying to work out why they’re here, if they need to be here, if there’s any reason why they

shouldn’t be here and then address the offences that occur and then look at any of the causal factors behind it.’

Police Minister Mark Ryan said he had been briefed about the issue by the Police Commissioner and would be working with other ministers to come up with a solution.

‘The Police Commissioner has provided myself and my office with a full brief in relation to community concern of itinerants in Townsville’s CBD,’ he said.

‘I have been in discussions with other relevant Ministers in relation to this issue and I will continue to work closely with my colleagues in order to look at all possible solutions.’

## REVIEW 2.6

Read the article about anti-social behaviour and answer the following questions.

- 1 Identify the public order offences committed in the article. (C, S)
- 2 Evaluate whether public order offences appropriately balance individuals’ rights and society’s need for order. (E)
- 3 Create a one-paragraph response to explain why public order offences are mostly summary offences and not regulatory offences. (C, Cr)

Section 328A of the Criminal Code 1899 (Qld) states that the dangerous operation of a motor vehicle is a criminal offence. Some examples of what courts have said, which are indicators regarding particular circumstances, are referred to in section 328A(5).

The word ‘dangerous’ is not defined in the Code, so it is up to the court to consider all the relevant circumstances of the incident in order to decide whether a person was actually driving dangerously. The penalty for this offence depends on the circumstances behind the dangerous driving, along with the outcomes of any accident that may occur.

### Drink driving

- **Elements:** driving while under the influence of an intoxicating substance.
- **Maximum penalty:** the penalties likely to be imposed for an offence of drink driving depend partly on whether the offence is classified as major or minor.

Drink driving offences in Queensland are covered under the *Transport Operations (Road Use Management) Act 1995* (Qld). Drink driving is a very serious offence. The law in Queensland allows police officers to conduct random roadside breath tests to catch drink drivers. If a person refuses to give a breath sample to police, they are presumed to be guilty of the most serious drink driving offence.

Certain drivers are required to have a blood or breath alcohol concentration (BAC) of 0 per cent when operating a vehicle. These include learner

## Traffic and related offences

Traffic and related offences include those offences that occur when driving a car or other vehicle. These offences range from driving unlicensed to speeding and even dangerous driving causing death. Penalties can range from receiving a fine and incurring demerit points to a probation order or imprisonment. This depends on the type of offence, the circumstances and the traffic history of the offender.

### Dangerous operation of a vehicle

- **Elements:** dangerous operation of a motor vehicle.
- **Maximum penalty:** depends on outcome of act – see Table 2.4 for details.

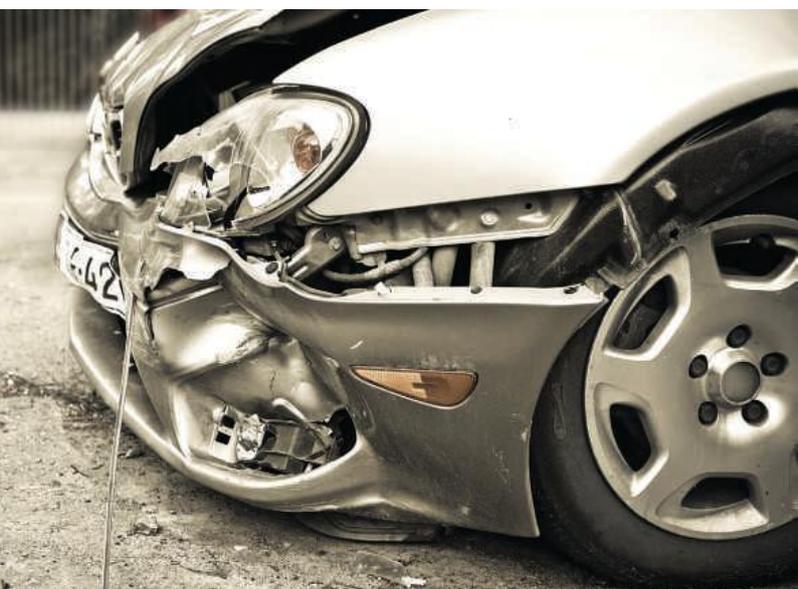
**Table 2.4** Dangerous operation of a vehicle offences and corresponding maximum penalties

Offence and element present	Maximum penalty
Dangerous operation of a vehicle	Three years' imprisonment
Dangerous operation of a vehicle causing death or grievous bodily harm	Ten years' imprisonment
Dangerous operation of a vehicle while intoxicated	Five years' imprisonment
Dangerous operation of a vehicle while intoxicated causing death or grievous bodily harm	Fourteen years' imprisonment
Dangerous operation of a vehicle while intoxicated (high alcohol limit according to the <i>Transport Operation (Road Use Management) Act 1995</i> (Qld))	Fourteen years' imprisonment

drivers, drivers on a provisional licence who are under the age of 25, commercial truck drivers, bus drivers, taxi drivers and drivers of vehicles carrying dangerous goods. All other drivers in Queensland must have a BAC of less than 0.05. This means that the driver has less than 0.05 milligrams of alcohol per 100 millilitres of blood.

Drivers who are convicted of three drink driving offences within a five-year period face a mandatory term of imprisonment; the magistrate in such cases cannot exercise any discretion over this punishment.

**Figure 2.11** Drink driving is a serious offence.



## Minor offences

Minor offences include all offences involving a blood alcohol content reading above the relevant limit but less than 0.15 per cent. First offences generally attract licence disqualification periods from one month to 12 months, and fines can range anywhere from a few hundred dollars up to \$2000. The magistrate can still impose prison sentences, but such a penalty is generally reserved for repeat offenders.

## Major offences

Penalties for major offences are likely to include fines from about \$1000 up to \$3000 and involve a minimum licence disqualification period of six months. It is also possible for the magistrate to order a period of imprisonment; however, such a penalty is not common for first-time offenders. There are three forms of major offences:

- blood alcohol content is equal to or greater than 0.15 per cent (in which case you are said to be 'under the influence')
- driving under the influence of some other intoxicating substance, such as an illicit drug
- failure to provide a breath or blood specimen as lawfully required.

## Drug offences

The law in Queensland that deals with drug offences is the *Drugs Misuse Act 1986* (Qld). Each dangerous drug that is illegally used has a different impact on the body and on society as a whole. For this reason, it is necessary to categorise drugs into different groups so that the penalties for drug offences can be proportionate to the seriousness of the drug in question. Under Queensland law, dangerous drugs are broken into two different categories: 'Schedule 1' and 'Schedule 2'.

Schedule 1 drugs are considered to be 'harder' or more dangerous substances and are listed under steroid and non-steroid drugs. They carry much harsher penalties than those on the Schedule 2 list.

## Schedule 1 drugs include:

- heroin
- lysergide (LSD)
- cocaine
- phencyclidine
- methamphetamine (ICE)

## Schedule 2 drugs include:

- cannabis
- morphine
- pethidine
- amphetamines
- opium
- gamma hydroxybutyric acid (fantasy/GHB)

**Figure 2.12** Examples of some of the drugs listed in Schedules 1 and 2 of the *Drugs Misuse Act 1986* (Qld)

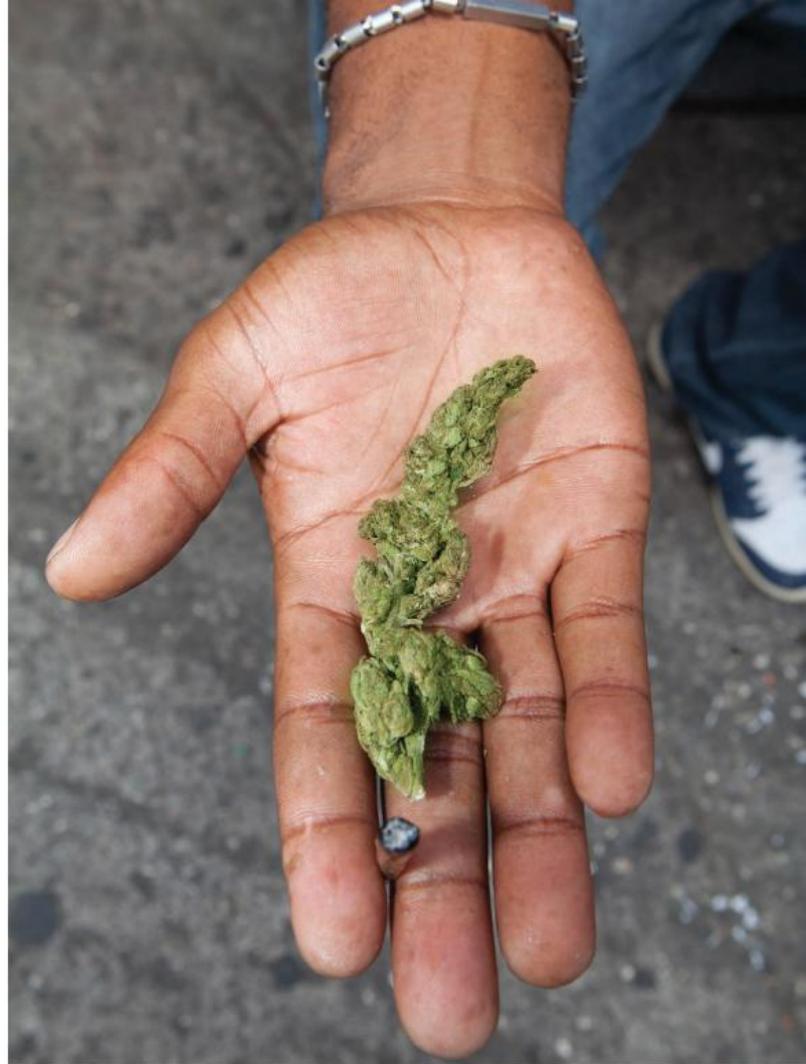
The category of the drug is combined with the amount of the drug the offender possesses, produces, supplies or traffics to produce a maximum penalty to be applied for the offence committed. The most serious penalties apply when offenders have large amounts of Schedule 1 drugs. Penalties are also more severe for offenders who supply drugs to children.

## Possession

- **Elements:** having actual physical control of a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment.

Section 9 of the *Drugs Misuse Act 1986* (Qld) states that any person who unlawfully has **possession** of a dangerous drug is guilty of a crime. Depending on the schedule of the drug under the *Drugs Misuse Regulation 1987* (Qld) and the quantity of the drug, a person found guilty of possession can face a maximum penalty of 25 years' imprisonment. This maximum penalty will only apply if the offender is found with a large quantity of Schedule 1 drugs.

**possession** for a person to be in possession of a drug, they generally have to be aware of its existence and be exercising control over it. The person must also know that the substance is a drug, or have reason to suspect that it is a drug.



**Figure 2.13** The *Drugs Misuse Act 1986* (Qld) outlines the offences of supply, producing, trafficking and possession.

## Producing

- **Elements:** to offer, prepare to or actually prepare, manufacture, cultivate, package or produce a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment.

Section 8 of the *Drugs Misuse Act 1986* (Qld) states that any person who unlawfully produces a dangerous drug is guilty of a crime. Depending on the quantity of the drug and its schedule under the *Drugs Misuse Regulation 1987* (Qld), a person guilty of possession may face a maximum penalty of 25 years' imprisonment.

## Supplying

- **Elements:** to supply means to offer, prepare to or actually give, distribute, sell, administer, transport or supply a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment (for aggravated supply).

According to section 6 of the *Drugs Misuse Act 1986* (Qld), a person who unlawfully supplies a dangerous drug to another, whether or not such other person is in Queensland, is guilty of a crime. A person found guilty of supplying a Schedule 1 drug faces a maximum penalty of 20 years' imprisonment, and a person found guilty of supplying a Schedule 2 drug can face a maximum penalty of 15 years' imprisonment. Different punishments apply for what is known as 'aggravated supply'. Aggravated supply includes an adult supplying to a minor, a person with an intellectual impairment, a person in an educational institution, a person within a correctional facility or a person who is unaware of what they are being supplied. The maximum penalty for the aggravated supply of a Schedule 1 drug is 25 years' imprisonment, and the maximum penalty for the aggravated supply of a Schedule 2 drug is 20 years' imprisonment.

## Trafficking

- **Elements:** carrying on the business of unlawfully trafficking a dangerous drug.
- **Maximum penalty:** 25 years' imprisonment.

According to section 5 of the *Drugs Misuse Act 1986* (Qld), a person who carries on the business of unlawfully trafficking in a dangerous drug is guilty of a crime. **Trafficking** is not defined in the Act, however. Usually, courts consider trafficking to mean running a business that sells drugs commercially. A person found guilty of this offence can face a maximum penalty of 25 years' imprisonment for trafficking a Schedule 1 drug, and 20 years' imprisonment for trafficking a Schedule 2 drug.

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**trafficking** typically, selling drugs; however, 'trafficking' is of wider import, meaning 'knowingly engaging in the movement of drugs from source to ultimate user'

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**Figure 2.14** A significant amount of narcotics would usually indicate the desire of the offender to sell the drugs for profit.



## 2.3 Rights and responsibilities in criminal situations

During a criminal situation, the investigation process and the trial proceedings, a number of stakeholders are involved. The rights and responsibilities of each of these stakeholders ensure that due process is followed and just and equitable outcomes are sought for all those involved. Whether they are suspects, police, alleged criminals, accused criminals, witnesses to a crime or victims of crime, the role each stakeholder plays in the criminal investigation process is important to ensuring efficient and effective enforcement of criminal law.

### The right to silence

When a person is suspected of committing an offence, they must provide the police officer who is arresting them with their name so they can be identified. They are also required to provide their address if asked. This power is provided to the police in section 40 of the *Police Powers and Responsibilities Act 2000* (Qld). Apart from this, a person is not required by law to answer any other

questions police officers ask them, as they may be incriminating themselves by doing so. Many people will refuse to answer questions until they have a lawyer present, which they are legally entitled to do. This right is outlined in section 418 of the *Police Powers and Responsibilities Act 2000* (Qld) – every person who is arrested must be given the opportunity to contact a lawyer or a friend. Therefore, apart from providing their identity to police officers, citizens do have the right to remain silent.

However, the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*), provides that national security and counter-terrorism come under a different system, whereby the right to silence does not apply. The Australian Government can legally detain a suspect for questioning for up to seven days in secret, with no right to silence and no access to a lawyer if they consider it is for the purpose of gathering information about a terrorist offence. They may not even be a suspect. This means that journalists, priests – even you – can be detained under these powers.

**Figure 2.15** Police may detain a suspect for questioning relating to an indictable offence for a reasonable period of time.



The powers given to the Australian Security Intelligence Organisation (ASIO) were enacted under sections 34D–34H of the *ASIO Act* in response to the Bali bombings in 2002. Although these powers clearly undermine the fundamental underpinnings of our democratic society and the rule of law – such as the right to silence; the right to an attorney; the right to a fair trial; freedom from arbitrary detention, torture or cruel, inhuman or degrading treatment or punishment; and the right to liberty – they were considered necessary in a time of public emergency to prevent terrorist attacks. Since these powers were established, they have only been used once.

## SIDEBAR

Research the coercive questioning powers of ASIO. Discuss the circumstances in which this power may be used and why the right to silence does not apply to citizens when they are being questioned by ASIO in such circumstances. Do you agree that these powers are necessary for the protection of society?

## Rights and responsibilities during searches

Section 624 of the *Police Powers and Responsibilities Act 2000* (Qld) sets out the general provisions that apply to searches of persons by police officers. Usually, the police officer conducting the search must be of the same sex as the person being searched. If there is no police officer of the same sex available, then the police officer may direct another person of the same sex (for example, a doctor) to conduct the search. The police officer must ensure that the search is carried out in a manner that respects the dignity of the person. They must also ensure that the search causes minimal embarrassment. A search in public must be restricted to a ‘pat-down’ search of the outer clothing. Any more thorough search must be conducted out of public view.

‘Out of public view’ can mean at a police station if there is one nearby, or in a private room in some other establishment.

It may be necessary under some circumstances to complete an immediate, thorough search of an individual. If this is necessary, a police officer of the opposite sex to the person being searched may conduct the search if there is no one else available. Such a search may also be more thorough than a pat-down search in public view. An example of when an immediate search is necessary is when the police officer has a **reasonable suspicion** that the person to be searched may have a bomb strapped to their body or has a concealed firearm or knife.

**reasonable suspicion** facts that would cause a reasonably minded person to conclude something – this may be an incorrect suspicion, but it must be a reasonable one

**Figure 2.16** Examples of when police officers may search a suspect without a warrant include, but are not limited to, the officers having a reasonable suspicion that the person is concealing a weapon, carrying a bomb or has a dangerous drug in their possession.



## Search warrants

Usually, police officers will need a warrant to be able to search a place. The warrant will state the place that is to be searched and the item for which the police are searching, and will also state the reason for the search. The police are also given a timeframe in the warrant stating by when the search must be conducted. Sometimes it is necessary for the police to conduct a search without a warrant. The *Police Powers and Responsibilities Act 2000* (Qld) sets out certain circumstances under which such a search may be necessary, such as the search of a car, public place or private property. Other situations that may allow a search without a warrant include where police reasonably believe a person may harm themselves or others, or when they reasonably suspect there are unlawful weapons, drugs or stolen property on the premises.

## Rights and responsibilities during arrest

When a person is arrested, the police officer's responsibility, as soon as is reasonably practicable, is to tell the arrested person the nature of the

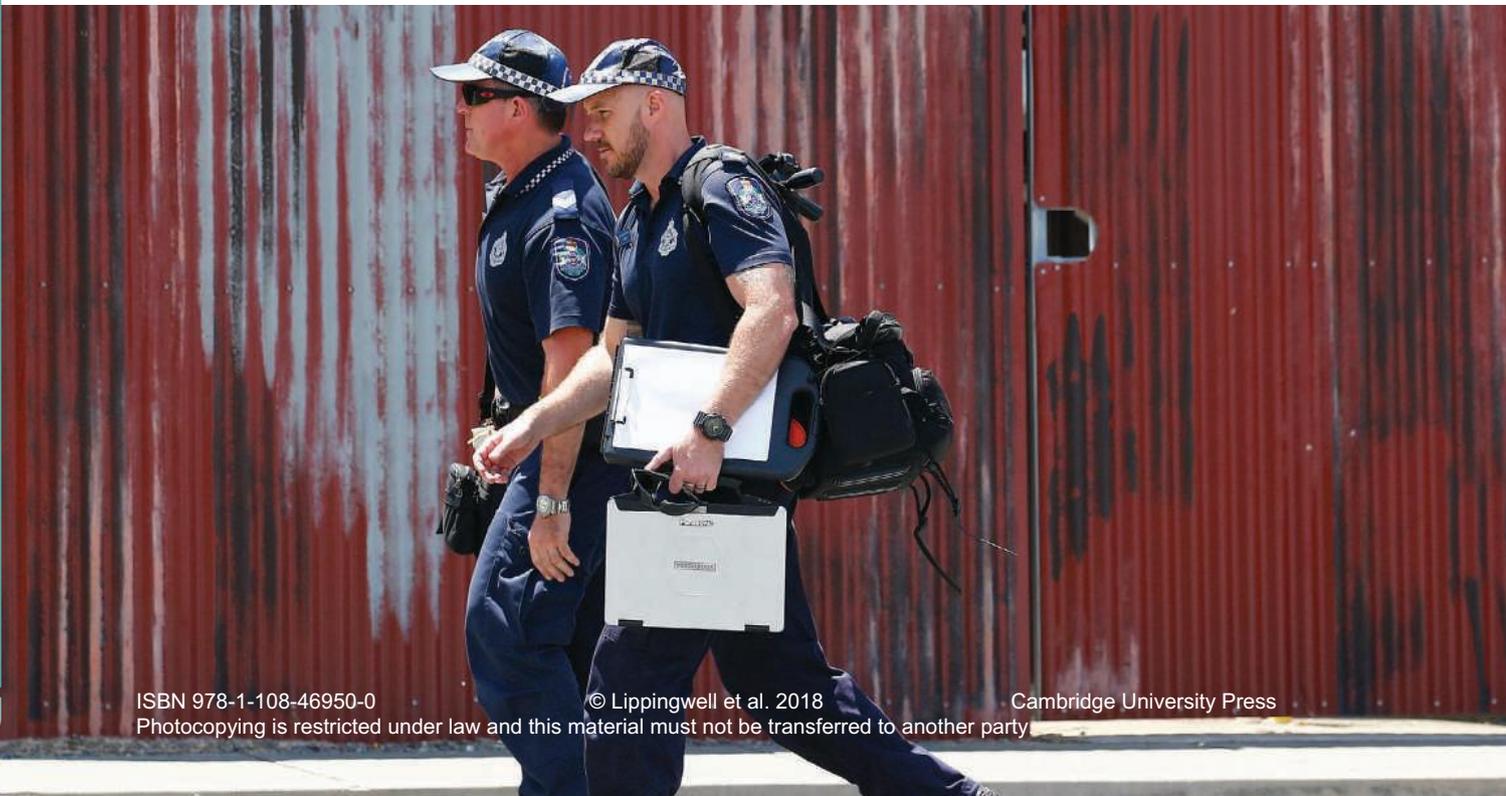
offence for which they have been arrested. A police officer must give the arrested person the name, rank and station of the arresting officer, in writing, before they are released from police custody (if they are released from custody): see section 391 of the *Police Powers and Responsibilities Act 2000* (Qld).

## Arrest warrants

A police officer can apply for a warrant (a court document that directs a law enforcement officer to arrest a person and bring them to court) for a person's arrest. A judge, magistrate or justice of the peace (JP) may issue a warrant if they reasonably believe that the person for whom the warrant will be issued has committed an offence. Section 372 of the *Police Powers and Responsibilities Act 2000* (Qld) requires that such a warrant contains the rank, registered number and station of the officer applying for the warrant, as well as the offence the person is alleged to have committed.

Police can arrest an adult without a warrant if the police officer reasonably suspects the person has committed or is committing an offence and one of the prescribed circumstances exists. Section 365 of the *Police Powers and Responsibilities Act 2000* (Qld) gives police this power.

**Figure 2.17** The rights and responsibilities of police during the criminal investigation process are outlined in the *Police Powers and Responsibilities Act 2000* (Qld).



## Detention

Section 403 of the *Police Powers and Responsibilities Act 2000* (Qld) states that police may detain a suspect for questioning relating to an indictable offence for a reasonable period of time.

Generally, a person cannot be detained for more than eight hours. However, this time period may be extended by a magistrate if the offence is a very serious one or if more than one offence has been committed and the police require more time to interview the suspect.

### REVIEW 2.7

- 1 Describe the purpose of the *Police Powers and Responsibilities Act 2000* (Qld). (C)
- 2 Explain why you think the law requires a police officer to provide the arrested person with information about themselves. (C)
- 3 Explain why warrants are required during the criminal investigation process. What protections does the need for warrants provide? (C)
- 4 Explain the situations in which police can search or arrest a person without a warrant. (C)

## 2.4 Evidence

During the criminal investigation process, in order to establish that a crime has taken place, the prosecution will need to prove in court through evidence that the accused person physically committed the act beyond reasonable doubt. Forensics, the collection of evidence and witness testimony are all vital parts of the process. It is through these methods of investigation that an accused can be linked to the scene of the crime and the criminal act.

This evidence may be collected directly from the crime scene or throughout the investigation

**Figure 2.18** Evidence is collected and used by the prosecution to prove the accused committed the offence beyond reasonable doubt.



process. Section 196 of the *Police Powers and Responsibilities Act 2000* (Qld) gives police the right to seize property that they reasonably suspect is evidence of the commission of an offence. The police must have lawful reason to be at the location where the evidence is located.

A witness may be ordered legally to appear in court to present their direct or circumstantial evidence, particularly as a witness for the prosecution. This legal order is called a **summons** if the witness is called to give evidence in a Magistrates Court, or a **subpoena** if the evidence is to be presented by the witness in a District or Supreme Court.

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**summons** an official document that requires a person to give evidence in the Magistrates Court

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**subpoena** an official document that requires a person to give evidence in the District or Supreme Court

---

The evidence that is collected by police during their investigation and presented in court can be classified as direct or as circumstantial.

- **Direct evidence** is evidence that tends to prove a fact directly – for example, when the witness testifies about something which that witness personally saw or heard.

- **Circumstantial evidence** is evidence of circumstances or indirect evidence that can be relied upon not as proving a fact directly, but instead pointing to its existence. It requires that an inference be made about the likelihood of the scenarios being presented.

Both direct and circumstantial evidence must be considered by the jury. For the jury to come to

a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances. The rules of evidence will be explored in Chapter 3.

## CASE STUDY 2.2

### *The Queen v Baden-Clay* [2016] HCA 35



**Figure 2.19** Gerard Baden-Clay was committed to stand trial and was found guilty of the murder of his wife Allison. A memorial service for Allison is pictured here.

#### Facts

Gerard Baden-Clay was arrested in June 2012 and charged with murdering his wife Allison and interfering with a corpse. He had earlier reported her missing; later, her body was found. There was much publicity surrounding the case, as Mrs Baden-Clay was well known in the area where they lived. The publicity also included discussion of business, personal and insurance matters. Baden-Clay was committed to stand trial and was found guilty. On 15 July 2014, following a trial in the Supreme Court of Queensland before Byrne SJA and a jury, Gerard Baden-Clay was found guilty of the murder of his wife, Allison Baden-Clay.

#### Issues

No direct evidence was presented to the jury that convicted Gerard Baden-Clay of murdering his wife, but the prosecution's circumstantial case was strong enough to convince the jury that Baden-Clay was guilty beyond reasonable doubt.

#### Law

Baden-Clay was convicted of the murder of his wife according to the definition of murder in the Criminal Code 1899 (Qld). Baden-Clay appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland on the ground that the jury's verdict was unreasonable. The Court of Appeal (Holmes CJ, Fraser and Gotterson JJA) allowed the appeal on that ground, set aside the respondent's conviction on the charge of murder and substituted a verdict of manslaughter.

#### Arguments

On further appeal to the High Court, the Crown contended that it was open to the jury, having regard to all the evidence, to be satisfied beyond reasonable doubt that the respondent killed his wife with intent to kill her or to cause her grievous bodily harm. That contention should be accepted.

#### Decision

The original conviction of murder was reinstated.

#### Reasons

The High Court said the Court of Appeal had 'erred in concluding that the jury's verdict of guilty of murder was unreasonable on the basis that the prosecution had failed to exclude the hypothesis that Gerard Baden-Clay unintentionally killed his wife'.

## DNA evidence



**Figure 2.20** DNA evidence can be collected from blood, hair, skin cells and other bodily substances.

### Collecting DNA

Police can collect DNA samples with consent, by court order or with the permission of a senior police officer. A DNA sample may be taken by an authorised police officer, a doctor or a nurse using a mouth swab or by collecting hair.

Generally, DNA samples and results are destroyed if the arrest does not proceed to charges being laid or a court finds the accused not guilty. DNA samples will not be destroyed if the accused

is investigated or charged with another serious offence, or is unfit for trial due to mental illness; instead they are stored.

### DNA databases

The National Criminal Investigation DNA Database (NCIDD) which is managed by the Australian Criminal Intelligence Commission, has been operational nationally since April 2001 and since then more than 837 000 DNA profiles have been uploaded.

The NCIDD contains DNA profiles from samples collected by Australian police from crime scenes, convicted offenders, suspects, items belonging to missing persons and unknown deceased persons.

Under the *Police Powers and Responsibilities Act 2000* (Qld), if a suspect is found guilty or has been convicted of an indictable offence, their DNA will remain on the database. If they are found not guilty, or if the police decide not to proceed with the case, the DNA will be destroyed after 12 months, but this is only if the person does not consent to the sample being taken, or gives consent but limits what the police can use the DNA for.

If the sample was provided with consent as an 'unlimited' sample, it will be analysed and remain on the NCIDD.

### RESEARCH 2.8

- 1 Research the collection and storage of telecommunications or technology metadata evidence in Queensland, then answer the following questions:
  - a Explain what metadata is and why this is collected.
  - b What relevance does metadata have to the evidence collected?
  - c What are the implications of collecting metadata? (S, C)
- 2 Create a one-paragraph response to justify the use of metadata in evidence collection and storage. (Cr, E)

## 2.5 Juveniles and criminal law

Children are not treated in the same way as adults by the criminal justice system. The *Youth Justice Act 1992* (Qld) and the *Children's Court Act 1992* (Qld) are the two main laws that deal with juvenile offenders in Queensland. Prior to February 2018, a person 17 years of age or older was treated as an adult in Queensland; however, on 3 November 2016, the Queensland Parliament passed the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* to bring 17-year-olds into Queensland's youth justice system. This brings Queensland into line with Australia's other states and the United Nations Conventions on the Rights of the Child.

### SIDEBAR

Discuss why 17-year-old offenders would once have been considered adults in the criminal justice system in Queensland. What impact will the change of this age have on the criminal justice system in Queensland?

The courts deal with child offenders differently from adults, as they are considered to be more vulnerable. Schedule 1 of the *Youth Justice Act 1992* (Qld) states that children should only be detained as a last resort, and that if they do have to be detained, they should only be held in a facility that is suitable for children. Sentencing options, which are discussed in more detail in Chapter 4, are also different for children. This is because the courts, wherever possible and in accordance with the principles of the *Youth Justice Act 1992* (Qld), try to ensure that children are not detained in custody unless they have an extensive criminal history or have committed a very serious or very violent offence. It is believed by many that if children are not exposed to the harsher side of the criminal justice system, such as detention centres, then they are less likely to enter into a cycle of reoffending.

Matters involving children are most often heard by the Children's Court, in which a magistrate hears and decides the case. The Children's Court is

closed, which means that the general public cannot enter and view the proceedings. However, as with adults, very serious offences such as murder must be heard in the Supreme Court, which is an open court. Juvenile offenders are generally protected from publicity and cannot be named in the media; this is to protect their reputation and so they are less likely to see themselves as criminal heroes. However, section 234 of the *Youth Justice Act 1992* (Qld) sets out circumstances in which a court may allow the publication of identifying information of juvenile offenders who have committed a very serious offence. The theory behind this provision, often referred to as 'naming and shaming', is that it may act in the interests of justice and be a deterrent to potential juvenile offenders, and that the public may be informed.

There are separate Queensland laws dealing with juvenile offenders – namely, the *Youth Justice Act 1992* (Qld) and the *Children's Court Act 1992* (Qld) – and some different sentencing options for children. There are also different police procedures for dealing with children – that is, those who have not turned 18 years of age by the commencement of the proceedings. These procedures cover questioning and fingerprinting, for example.

One of the persistent debates about juvenile offenders concerns whether they are treated too harshly or (a more common accusation) too lightly. It is claimed, with some justification, that placing children in detention centres is likely to reinforce in them a criminal image of themselves and lead to reoffending.

**Figure 2.21** Different sentencing options apply to juveniles in Queensland.



# Chapter review

## Chapter summary

- Criminal behaviour can consist of both a criminal act (*actus reus*) and criminal intent (*mens rea*).
- Crimes can be divided into different categories: offences against the person; offences against property; public order offences; driving offences; and drug offences.
- Strict liability means only the criminal act, not criminal intent, needs to be proven.
- When police officers arrest a person, they must tell the person the nature of the arrest and provide their name, rank and station to the arrested person.
- A warrant can be issued for a person's arrest.
- The adversarial system of trial is used in Australia.
- Strict guidelines exist with respect to the search of persons and places, and the collection, storage and disposal of evidence.
- Police can seize property as evidence.
- Discretionary powers are afforded to police to make decisions based upon what seems to be the most appropriate course of action when enforcing criminal law.

## Short-response questions

- 1 Provide explanations to show your comprehension of the following legal concepts, principles and processes:
  - a what constitutes criminal behaviour
  - b the difference between an alleged and an accused offender
  - c the difference between summary and indictable offences
  - d the difference between a search and an arrest warrant
  - e the difference between direct and circumstantial evidence. (C)
- 2 Describe and analyse the role of police in the investigation process. (C)
- 3 Describe three specific items of evidence that police may collect at a crime scene. (C)
- 4 Brainstorm all the possible stakeholders who may be impacted in relation to criminal law. (A)
- 5 Explain why the statement 'no person is found guilty of a crime unless adequate evidence is provided by the prosecution' could be considered a disadvantage to the prosecutor. (C, A)

## Extended-response questions

- 1 Create an essay response to evaluate the statement 'the more records added to the NCIDD database, the greater the odds of making an accidental match'. Evaluate the relevance of such a statement and make a decision regarding the impact that the inclusion of every person's DNA profile in the database may have on just and equitable outcomes for Queenslanders. (E, Cr)
- 2 Create a presentation using digital technology to analyse three key stakeholders in the criminal investigation process. Make a decision on the effectiveness of just and equitable outcomes for each stakeholder and explain whether the current process in Queensland balances the individual's rights with society's need for order. (S, A, E, Cr)

## Response-to-stimulus questions

Read the following articles and answer the questions.

### Lockhart River man to face court on arson and wilful damage charges

Janessa Ekert, *The Cairns Post*, 6 October 2017

A Lockhart River man accused of destroying a car with fire has been remanded in custody until later this month.

Marco Glenn Accoom, 30, appeared in the Cairns Magistrates Court yesterday on charges of arson and wilful damage at Lockhart River.

It is alleged that about 6.30 pm on Tuesday, Accoom set fire to a vehicle on Taylors Landing Rd. The vehicle belonged to a 24-year-old woman who was known to the man. It was completely destroyed as a result of the fire.

No application for bail was made. Matters will be next mentioned on October 26.

### Questions

- 1 Research and analyse the penalties for arson and wilful damage to property. (S, A)
- 2 Discuss why the penalties are significantly different. Do you agree with the differences? (A, E)
- 3 Do you agree with both charges being laid for this offence? If yes, explain your opinion and state why. If no, explain which charges would be most appropriate in this case and why. (E)



Figure 2.22 A fire-damaged car

## A fourth teen has been arrested over the death of a Queensland man allegedly bashed for cigarettes

David Murray, Thomas Chamberlin, *Courier-Mail*, 22 September 2017

Detectives have arrested a fourth teen over the death of a Queensland man who was allegedly brutally bashed over a packet of cigarettes.

The boy, 16, was arrested in Boronia Heights this morning and taken into custody.

A police spokesman confirmed the teen had been taken to Brisbane City Watchhouse and would be charged later today.

Three other teens have been charged with the murder of Gregory Stephen Gardner at Stones Corner, in Brisbane's south, on January 10 this year.

Two of the boys were 14 when they allegedly launched a 'vicious and cowardly' attack.

Gardner was himself a notorious armed robber who became known as 'The Bad Tooth Bandit' after robbing building societies and credit unions in the 1990s.

Police will allege the teens followed Gardner from a local Night Owl convenience store, where he had bought cigarettes, before attacking him.

Gardner, 55, was left with severe injuries including a broken back and ribs.

He sought help at a nearby hotel and was taken to Brisbane's Princess Alexandra Hospital in an ambulance.

After discharging himself, he was found dead in his home five days later, allegedly from injuries sustained in the assault.

A protracted police investigation involving expert medical evidence culminated in the arrest yesterday of three boys – now 14, 15 and 16.

Detectives from the Dutton Park Criminal Investigation Branch and state homicide squad led the investigation into Gardner's death.

The charged teenagers are from Logan. Under Queensland law they cannot be named due to their age.

They appeared in Brisbane Children's Court and were remanded in custody.

### Questions

- 1 Discuss the murder charge for the four accused offenders. Do you agree that their actions constituted the crime of murder? (A, E)
- 2 Explain how the investigation process for these offenders would have differed from the criminal investigation process for adult offenders. (C)
- 3 Using the definitions of criminal behaviour and the elements of crimes, explain why a person involved in a serious offence, such as armed robbery, can be held liable for the crime of murder if a person is killed during the commission of that offence. (C)

**Figure 2.23** How would teen or young offenders be treated differently by the criminal system?



## CHAPTER 3

## Criminal trial process

## CHAPTER OBJECTIVES

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

- explain the trial process, including the court hierarchy as it applies to trials; key personnel; court processes; presumption of innocence and the burden of proof as a legal right to fairness
- use scenarios to explain bail conditions and decisions; jury selection; unanimous and majority verdicts, and standard of proof; and rules of evidence
- explain the attributes of a fair trial, including due process, natural justice and procedural fairness
- analyse a recent, relevant or hypothetical criminal case to examine legal concepts and principles
- analyse and apply defences on a range of criminal scenarios
- select legal information and analyse the legal issues concerning court processes that may create barriers to justice and equity or impede a right to a fair trial, by determining the nature and scope of the issue, and examining viewpoints and consequences
- evaluate the above legal situations by presenting alternatives to propose recommendations, and justifying using legal criteria and discussing implications
- analyse and evaluate legal issues where justice may be impeded during a criminal trial process by presenting alternatives, proposing recommendations, justifying recommendations using legal criteria and discussing implications
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

## Key concepts/legal terminology you will encounter in this chapter

- |                     |                        |                      |
|---------------------|------------------------|----------------------|
| • adjournment       | • counsel              | • jury               |
| • arraignment       | • Crown                | • majority decision  |
| • bail              | • defences and excuses | • prosecutor         |
| • bailiff           | • defendant            | • remand             |
| • barrister         | • double jeopardy      | • solicitor          |
| • committal hearing | • hand-up committal    | • unanimous decision |
| • conviction        | • judge                | • verdict            |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Bail Act 1980* (Qld)
- *Criminal Code Act 1899* (Qld)
- *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld)
- *Evidence Act 1977* (Qld)
- *Jury Act 1995* (Qld)
- *Penalties and Sentences Act 1992* (Qld)

### SIGNIFICANT CASES

- *Hawkins v The Queen* (1994) 179 CLR 500
- *Kioa v West* (1985) 159 CLR 550
- *R v Cox* [2016] QCA 165
- *R v Goode* [2004] QCA 211
- *R v Huni* [2014] QCA 324
- *R v Murray* [2018] QCA 057
- *R v Seboj ex parte A-G* (Qld) [200] QCA 426

## LEGAL ODDITY

With the passing of the *Jury Act Amendment Act 1923*, Queensland became the first state to allow women to sit on juries. Women still did not have equal status with men – eligible women had to register their willingness to undertake jury service. In June 1925, Mrs Maud White became the first female jury member when she was sworn in to sit on a case before the Innisfail Circuit Court involving a youth charged with stealing a saddle. By 1942, only 30 women were registered to serve; one of the reasons given for this low uptake was the fact that women were paid less than the male jurors.

## 3.1 Hearing criminal matters

In criminal law, after the investigation process is completed and the accused is charged with an offence, the person must be brought before a court. Unless the person pleads guilty, a hearing or trial is held. The relevant court and procedures for these hearings or trials depend on whether the offence is a summary (minor) offence or an indictable (more serious) offence and the original jurisdiction of each court (see Chapter 2).

There are many people involved in the process of having a matter dealt with by the courts. In a criminal case, the Crown (the prosecution) brings a case against a person. For example, with *R v Green*, Green would be referred to as the ‘accused’ or the ‘defendant’ and would be represented by the defence. The ‘R’ stands for the Latin terms of *Regina* (Queen) or *Rex* (King). *R v Green* therefore means ‘The Crown against Green’.

Before the hearing or trial, a **first mention** is held in the Magistrates Court. The prosecutor reads out the charges and the defendant or their legal representatives will be called upon to advise the court of the **plea** – either guilty or not guilty – to be entered. Where a change to the date set by the court is needed for any reason, either party can apply for an **adjournment** to reschedule the proceedings.

If the proceedings at this first mention are not finalised, a further mention date will be set to confirm that each party is ready to proceed. If the magistrate deems the accused a risk of not returning to the court, or a danger to the community or themselves, they may be held in custody on **remand**. If the magistrate does not think they are a risk, then the accused may be released on **bail**. However, if the criminal charge is for murder, bail applications must be made directly to the Supreme Court.

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**first mention** the first time that a matter is heard in the Magistrates Court. At the first mention, the matter can finish with a plea of guilty or be adjourned for further mentions.

**plea** in criminal proceedings, the answer given of ‘guilty’ or ‘not guilty’ in response to the charges

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**adjournment** the postponement of legal proceedings to a later date

**remand** (in custody) the procedure of keeping an accused person in legal custody while waiting to appear at a committal hearing or trial

**bail** the release of a person from the court (to be held in custody or not) until they are due to appear in court

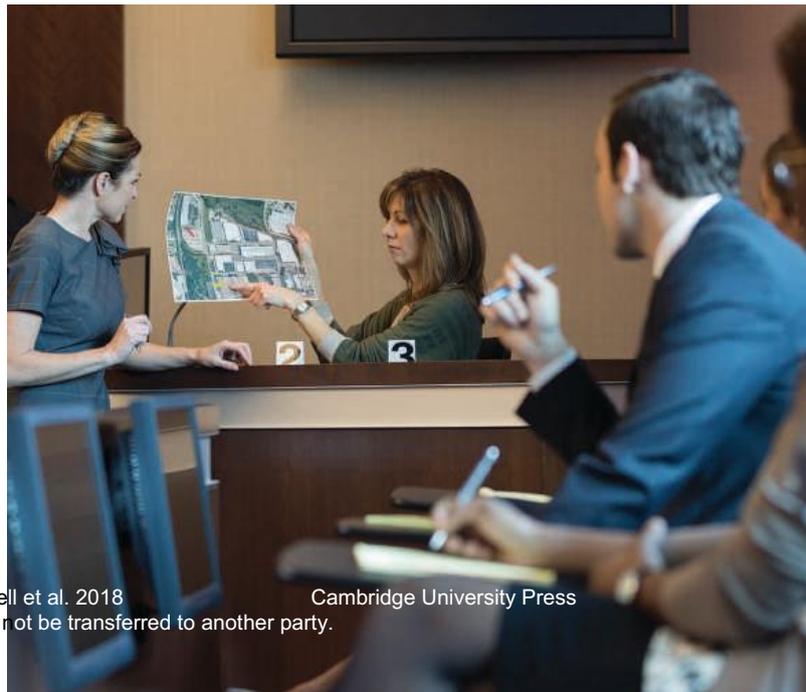
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### Bail

Bail is the procedure that allows a prescribed police officer or a court to release a person from custody until they are due to appear in court. Bail requires an undertaking by the defendant to surrender into custody as required (for example, on the day of the court appearance) and may be granted with or without sureties and with or without the deposit of money. A person may be held in a watchhouse (a secure building, usually attached to a police station) while they are awaiting bail.

The law in Queensland that deals with bail procedures is the *Bail Act 1980* (Qld). Section 11 empowers a court or a police officer to grant

**Figure 3.1** The hearing of criminal matters determines the guilt or innocence of the accused and delivers the sentence for the crimes of which the accused pleads or is found guilty.



bail subject to conditions. The general conditions include that the person not commit an offence or endanger the safety or welfare of the public or interfere with witnesses. Other discretionary conditions may include having to report to police or refrain from contacting a certain person.

Only the Supreme Court can grant bail to a person who has been charged with a serious offence where, if found guilty, a mandatory life sentence must be imposed or where an indefinite sentence may be imposed under the *Penalties and Sentences Act 1992* (Qld).

Bail shall be refused if there is an unacceptable risk that the defendant would:

- fail to appear and surrender into custody
- commit an offence
- endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare
- interfere with witnesses or otherwise obstruct the course of justice.
- This section also states that bail shall be refused if the court or police officer is satisfied that the defendant should remain in custody for their own protection.

**Figure 3.2** Section 16 of the *Bail Act 1980* (Qld) deals with the refusal of bail.

## REVIEW 3.1

Read each of the following scenarios and decide whether you would grant bail to the accused. Explain the reason for your decision using the *Bail Act 1980* (Qld).

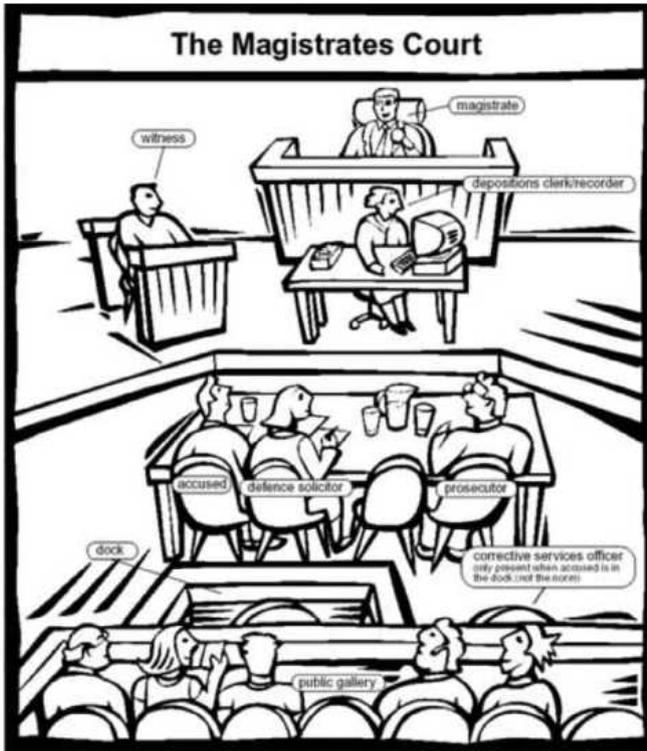
- 1** A 28-year-old man whose brother belongs to a 'bikie gang' is charged with drink driving. He has no criminal record but his 'close ties' to the motorcycle gang are raised by the prosecutor.
- 2** A 43-year-old woman is charged with shoplifting. She has a long criminal record for theft and fraud, and has spent many months in prison in the past, but has never committed a violent offence. She has no children but has a job in a fast-food restaurant.
- 3** A 33-year-old Aboriginal woman has been charged with dangerous driving causing bodily harm. The victim is in a serious but stable condition in hospital and is expected to make a full recovery. The accused has no criminal record. She has three young children to care for, and will lose her job if she is not released.
- 4** A 17-year-old male is accused of taking part in a violent break-and-enter in the home of an elderly couple. He is seeking release on bail. He and the 19-year-old co-accused broke into the couple's home, tied them up and ransacked the home. The couple were threatened but not harmed. (C, S)

## Hearing criminal matters in the Magistrates Court

The Magistrates Court is responsible for summary proceedings (in simple matters where it has final jurisdiction) and committal hearings (for serious offences that must finally be dealt with in a higher court). In Queensland, all criminal matters must come before a magistrate, who

hears the evidence and makes the decisions. There is no jury present in the Magistrates Court. While a magistrate can deal with some indictable offences, in most cases indictable offences are committed to be decided in the District or Supreme Court.

Domestic violence matters and orders (DVOs) are also within the Magistrates Court's jurisdiction. However, following consistent increases in



**Figure 3.3** A Magistrates Court in Queensland  
Source: Queensland Police Service.

## CHECK THIS OUT

There are now a number of offences to which offenders can plead guilty online. Have a look at the types of offences on the Queensland Government's Plead Guilty Online website, and discuss why these would have shifted from a court appearance to an online plea.

domestic violence applications in Queensland, a specialist Domestic and Family Violence Court is being trialled in Southport to provide quicker, coordinated and more consistent responses to these applications. More Domestic and Family Violence Courts are expected to open throughout Queensland by 2020.

## Domestic violence statistics show applications per Queensland court

By Felicity Caldwell, 7 October 2016

Southport and Beenleigh courts top the list for the highest number of applications for domestic violence protection orders in the past year. And high-profile cases have caused a spike in demand from women desperate for help against the 'insidious' issue.

At Southport, 3516 applications were lodged, with 2906 orders granted, with the orders finalised after an average of 36 days in 2015–16. There were 301 applications dismissed and 299 withdrawn, according to an answer to a question on notice tabled in Queensland's parliament.

At Beenleigh, 2594 applications were lodged, 2195 orders granted, with the orders finalised after 46 days on average.

Southport and Beenleigh courts had the highest number of domestic violence protection order applications in 2015–16.

There were 271 applications dismissed and 188 withdrawn. DVConnect chief executive officer Diane Mangan said Beenleigh and Southport were among the state's bigger courts, which could account for the higher number of applications.

'Southport is a specialist court, people can put their application in wherever, to whichever court they want to, it doesn't mean they have to live in that area,' Ms Mangan said.

A specialist domestic and family violence court was established at Southport in September 2015, initially as part of a six-month trial, in response to recommendations in the *Not Now, Not Ever: Putting an End to Domestic and Family Violence* report.

Ms Mangan said there were increasing numbers of women coming forward due to increased media attention and recent high-profile cases.

'There isn't one service in the sector that hasn't been overwhelmed by the increased demand for help since the murders of Tara Brown and Karina Lock,' she said.

Ms Mangan said increased media attention on the issue encouraged women to seek help.

'We need women to be reading these things, to know that there is help out there,' she said.

Ms Mangan said some women who called were not sure 'if what happens to them qualifies' as domestic or family violence.

‘It’s the classic case of fear instilling coercive control,’ she said. ‘This type of violence – you’re not going to hear it in the neighbourhood – but it’s hands around the throat, push up against the wall, terrifying and menacing threats.

‘These women are living in as much fear as a woman who is being physically assaulted on a regular basis.

‘These women are also in fear for their lives because they believe that something will happen to them.’

Ms Mangan said a significant number of women who called were from an educated, financially stable background.

‘I’m amazed at the number of women, because I speak to women myself, and I’m amazed at the number of well-educated women who say, “So it’s not my fault?”’ she said.

Ms Mangan said protection orders were a tool, and not the answer in every case, but meant that when an order was breached, it became a criminal matter.

She said the Queensland Government was very responsive, and was supportive with funding.

Prevention of Domestic and Family Violence Minister Shannon Fentiman said tackling the issue was one of the Palaszczuk government’s highest priorities.

‘We have increased penalties for breaches of domestic violence orders, introduced Queensland’s first ever dedicated Domestic and Family Violence Magistrates Court at Southport and this year have a record almost \$200 million budget to tackle domestic and family violence,’ Ms Fentiman said. ‘We are leading the conversation to bring domestic and family violence out from behind closed doors.

‘Violence has no place in Queensland and raising awareness of this insidious problem within the community has been a powerful trigger for social change.’

## REVIEW 3.2

- 1 Explain why domestic violence applications are being trialled in a specialist Domestic and Family Violence Court. (C)
- 2 Discuss whether you think the rate of domestic violence or just the rate of reporting is increasing. (A)
- 3 What responsibility does the court have in protecting victims of domestic violence? (C)
- 4 Evaluate the role of the Domestic and Family Violence Court and make a decision about whether this provides more just and equitable outcomes for stakeholders. (E)

## CHECK THIS OUT

Watch the *Southport Domestic and Family Violence Specialist Court* video on the Queensland Courts website, under ‘Specialist Domestic and Family Violence Court’.

## Summary proceedings

In summary proceedings, non-indictable offences or less serious offences such as drink driving offences, shoplifting and some minor drug offences are decided and dealt with by the magistrate. At a summary hearing, the accused can plead guilty or

not guilty. In the case of a guilty plea, the magistrate will then listen to the submissions of the prosecutor and defence and either decide the penalty or set a date for sentencing.

In a not guilty plea, the magistrate will listen to the submissions of the prosecutor and defence, the evidence presented and the calling and questioning of witnesses. Once all submissions have been made, the magistrate will decide whether there is enough evidence to find the accused guilty beyond reasonable doubt or whether to dismiss the charges.

If the magistrate finds the accused guilty, they will set the penalty or a date for sentencing in the Magistrates Court. In the sentencing, the magistrate

will decide whether or not to record a **conviction**. The magistrate must record a conviction if the offender is sentenced to imprisonment but for some sentences (e.g. a good behaviour bond), the magistrate may choose not to record a conviction.

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**conviction** record of judgment of a jury or magistrate that a person is guilty of a crime as charged

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## Committal hearings

A **committal hearing** takes place in a Magistrates Court. The case against the accused is presented to the magistrate, who then decides whether sufficient evidence exists to commit the matter to a higher court for trial or sentencing. The accused may plead guilty, not guilty or enter no plea at the committal hearing.

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**committal hearing** when a charge is more serious, the magistrate must decide whether the evidence against the accused is strong enough for the case to go to trial in a higher court. If the magistrate is satisfied that there is sufficient evidence, the case is committed for trial in the District Court or the Supreme Court, depending on the seriousness of the charge.

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If the accused pleads guilty, they will be committed to the higher court for sentencing. If the accused pleads not guilty and there is sufficient evidence for a trial, they are committed to the higher court for a trial by judge and jury.

**Figure 3.4** Pleading guilty at a committal hearing can be considered cooperation with the courts, and may be taken into account during sentencing.



There are three formats of committal proceedings for the magistrate to determine whether there is sufficient evidence:

- 1 Full **hand-up committal** without cross-examination:
  - No witnesses give evidence.
  - The prosecutor gives (hands up) evidence to the magistrate.
  - Evidence includes written statements, videos, audio tapes, fingerprint reports and any other evidence which police have to prove their case.
  - The matter is committed to the higher court for trial or sentence depending on whether the accused pleads guilty or not guilty.
  - The accused can choose to plead guilty, plead not guilty, or enter no plea at this stage.
- 2 Registry committal:
  - The accused must have legal representation.
  - All documents the police say are evidence against the accused are filed in the court, or their lawyer submits documentation confirming they have the evidence against them.
  - The matter is transferred to the higher court without the accused having to go to court for the committal. A notice will be sent explaining what has happened.
- 3 A committal hearing:
  - All or some of the witnesses appear in person to give evidence and can be cross-examined.
  - This kind of committal is only available if the prosecutor consents, or the court gives permission. There must be a reason why the witnesses need to come to court.
  - The magistrate decides whether there is enough evidence for the case to go to a trial in the higher court (this is called a prima facie case). If the magistrate doesn't think the police have shown enough evidence (i.e. they haven't proven they have a prima facie case), the magistrate can dismiss the case.
  - The accused can choose to plead guilty, plead not guilty, or enter no plea at this stage.

*Source:* Legal Aid Queensland.

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**hand-up committal** the prosecutor gives (hands up) evidence to the magistrate without having the witnesses present. The procedure was introduced to promote efficiency during committal proceedings.

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The purpose of the committal proceeding is to ensure that the time of the higher courts is not wasted by cases where there is insufficient evidence on which a reasonable argument could be put for a conviction. If the magistrate decides that sufficient evidence does exist (a *prima facie* case), it does not mean the accused person is guilty; it simply means the magistrate believes

that the prosecution has sufficient evidence to justify a trial.

The committal hearing is also of benefit to the accused, as it means they do not have to go through the hardship of a trial if sufficient evidence does not exist. If the magistrate decides that there is not sufficient evidence to proceed, then the case against the accused will be dismissed.

### REVIEW 3.3

- 1 Describe a summary proceeding. (C)
- 2 Explain the purpose of a committal hearing. (C)
- 3 Explain the difference between a hand-up committal and a committal hearing. (C)
- 4 Describe what happens if a defendant pleads guilty at their committal hearing. (C)

## Hearing criminal matters in the District and Supreme Courts

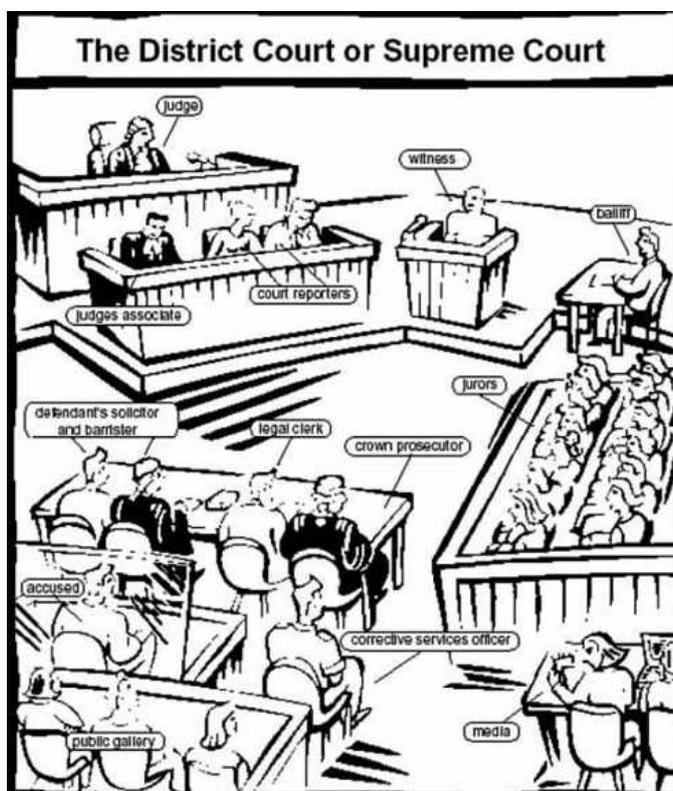
If the committal hearing has found that there is sufficient evidence to proceed to trial, the case is committed to the District or Supreme Court for trial, depending on the plea and the seriousness of the offence. If a guilty plea was entered, a sentencing hearing will occur in the District or Supreme Court, depending on what sentence could be imposed for the crimes committed.

The trial in the District or Supreme Court is deemed to begin at the **arraignment** of the accused. This means the indictment is presented to the court and the accused is called upon to plead. An **indictment** is a document that brings the matter to trial and contains all appropriate information about the charges the accused is facing. Once the indictment has been read, the accused may enter a plea of guilty or not guilty.

**arraignment** formal reading of the charges in the District or Supreme Court

**indictment** the document that brings the matter to trial and sets out all the appropriate information about the charges the accused is facing

**Figure 3.5** The District or Supreme Court in Queensland  
Source: Queensland Police Service.



## 3.2 Court personnel in a criminal trial

There are many people involved in the efficient operation of the court system. Courtroom personnel will differ depending on the type of court and the reason for attending court. The following are the main court personnel:

- **Judges.** Whatever the reason or whichever court you visit, you will either see a **judge** or a magistrate. Judges are commonly referred to as the ‘judiciary’, and take their place in courts such as the District Court and Supreme Court of Queensland. In court, judges are referred to as ‘Your Honour’ and will usually wear robes and a wig. Judges have the responsibility of ensuring that the rules of the court are adhered to. The judge also has the responsibility of passing sentence in a criminal trial if the accused is found or pleads guilty to the offence with which they have been charged. A judge is appointed for life (in reality, this means a judge retires on reaching the age of 70).
- **Magistrates.** A **magistrate** presides over the Magistrates Court, where they are referred to as ‘Your Honour’. The role of the magistrate is to decide on matters of law as well as matters of fact. That is, the magistrate has the responsibility of deciding whether or not sufficient evidence exists to meet the required standard of proof. In criminal matters, if the accused is found guilty, the magistrate also imposes the sentence. A magistrate is appointed for life (in reality, this means a magistrate retires on reaching the age of 65).
- **Lawyers.** There are many different areas of specialisation for lawyers, such as criminal law, family law, personal injuries and business law. In Queensland, lawyers can be **barristers** or **solicitors**. It is the job of a barrister to argue cases in court proceedings, while solicitors provide a wide range of legal information to their clients, along with briefing and supporting barristers during appearances. There seems to be a growing trend for some lawyers to work in very specialised areas – for example, solicitors are employed by a business to provide legal advice just to that organisation. This type of solicitor is referred to as a ‘general counsel’.
- **Prosecutors.** A police **prosecutor** is a specially trained police officer who generally wears the police uniform when presenting cases on behalf of the Crown in the Magistrates Court. The Crown prosecutor is involved in criminal cases on behalf of the Director of Public Prosecutions (DPP). The Crown prosecutor is a highly trained barrister who generally appears in the District and Supreme Courts.



**Figure 3.6** A judge has the responsibility of ensuring the rules of the court are adhered to.

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**judge** the senior judicial officer presiding in the District Court or higher courts, including the Supreme Court, Court of Appeal, Federal Court, Family Court and the High Court of Australia

**magistrate** the judicial officer presiding over the Magistrates Court

**barrister** argues cases in court proceedings

**solicitor** provides a wide range of legal information to clients

**prosecutor** a government official who conducts criminal prosecutions on behalf of the state

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**Figure 3.7** In a criminal trial, there are 12 jury members who decide, on the facts of the case, to deliver a verdict of guilty or not guilty.

- **Jury.** In a criminal trial, the jury is an important element of court proceedings. The jury is made up of 12 members who are ordinary citizens between the ages of 18 and 70 years, selected at random from the electoral roll to decide whether an accused is guilty or not guilty based on the facts of the case. For the jury to return a guilty **verdict**, it must be proven beyond a reasonable doubt that the accused has committed the offence/s.
- **Judge's associate.** Assists a judge in the District or Supreme Courts, usually sitting in front of and below the judge. They normally wear a black robe. Their role includes assisting the judge in research.
- **Bailiff.** Responsible for the general running of the courtroom. Their duties include administering oaths and attending to the jury.
- **Corrective services officer.** In criminal trials, it is their responsibility to supervise the accused as they are brought to and from the holding cells during court proceedings.
- **Court reporter.** Usually works in the District and Supreme Courts. They are responsible for taking a record of everything that is said during the court proceedings.

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**verdict** the finding of a judge or jury in a trial

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## 3.3 Trial by judge and jury

In a criminal trial, when the accused pleads not guilty, the prosecutor must prove in court that the accused did in fact commit the crime. The jury decides guilt or innocence, while all other decisions – including sentencing – are made by the judge. Some criminal trials may be held without a jury, in which case the judge will also decide whether an accused is guilty or not guilty.

The *Evidence Act 1977* (Qld) outlines the processes for collecting, using and destroying evidence, including who is able to give testimony and what evidence is admissible in court.

As explained in Chapter 2, the evidence collected during the investigation process may be direct or indirect – also known as circumstantial. The rules of evidence then govern what information is able to be placed before a court, which means the evidence is either **admissible** or **inadmissible** in court.

---

**admissible** evidence that is introduced and allowed during trial

**inadmissible** evidence against the accused that cannot be used in court during trial

---

Police collect evidence to be presented by the prosecution to prove that the accused is guilty of the crime beyond reasonable doubt. The three issues to be considered during the collection and submission of evidence are:

- how to present the evidence of the fact to the court
- whether the evidence is admissible
- the weight of the evidence.

### RESEARCH 3.1

- 1 Research the grounds on which evidence may be deemed inadmissible. (S, C)
- 2 Create an infographic to communicate these grounds of inadmissible evidence. (Cr, C)

## Presumption of innocence

As explained in Chapter 1, when it comes to proving criminal guilt, the onus or burden of proof falls on the prosecutor or the prosecution. As such, the accused is presumed innocent until they are proven guilty; this is often referred to as the **presumption of innocence**. In Australia, the presumption of innocence is a fundamental right. This is one of the cornerstones of our justice system, as it attempts to ensure that no person is found guilty of a crime unless adequate evidence is provided by the prosecution. It is not the defence's role to prove that the accused is innocent.

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**presumption of innocence** the concept that the accused is innocent until proven guilty

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This right is supported by the fact that Australia is a signatory to the International Covenant on Civil and Political Rights 99 UNTS 1. Article 14(2) states that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law'.

Within Australian domestic law, the presumption of innocence can be found within the Criminal Code 1995 (Cth). One key section is section 13.1, which relates to the legal burden of proof the prosecution has in a criminal case in proving every element of an offence. Another is section 13.2, which states that guilt must be proven beyond reasonable doubt.

### REVIEW 3.4

- 1 Explain what is meant by the term 'presumption of innocence'. (C)
- 2 Describe what is meant by 'beyond reasonable doubt'. (C)
- 3 Discuss why the burden of proof lies with the prosecution and not the defence. What impact does this have on just and equitable outcomes during the trial process? (A)

## Jury selection

The selection of jurors is covered under the *Jury Act 1995* (Qld), which explains the role and eligibility of jurors in Queensland. As mentioned earlier, in a criminal trial there are 12 jury members who are ordinary citizens between the ages of 18 and 70, randomly selected from the electoral roll and **empanelled** to serve on the jury. During the empanelling of jurors, at any time before the bailiff begins to recite the oath or affirmation, the prosecutor may say 'stand by' or the defence counsel may call 'challenge', meaning the juror has not been selected to serve on that jury. The juror returns to the back of the court. There are some exemptions to eligibility for jury service, and some reasons for which, when called for jury duty, citizens may apply to be considered for excusal, including:

- previous service as a juror in the past 12 months
- the state of health of the prospective juror
- where jury service would result in personal financial hardship
- where jury service would result in substantial financial hardship to a business at which the person is employed
- where jury service is against the person's religious beliefs
- where there are personal commitments during all or part of the time the person would be required that would make jury service impossible – for example, carer's responsibilities or work commitments.

**empanelled** the process of being chosen for jury service for a particular trial

### RESEARCH 3.2

- 1 Research the *Jury Act 1885* (Qld) and compile a list of those people who are ineligible for jury duty in Queensland. (S, C)
- 2 Explain why these particular groups would be considered ineligible for duty. (C)
- 3 Discuss the impact these groups might have on the outcome of the trial. (A)

### REVIEW 3.5

A 47-year-old male truck driver is on trial for the rape of a 21-year-old female hitchhiker in central Queensland. The case is being heard in the Bundaberg Supreme Court. The following prospective jurors have been called from the ballot. Discuss and make a decision on which jurors would be ineligible and which would likely be challenged by either the defence or the prosecution. Explain your decisions. (C, E)

- |   |  |
|---|--|
| 1 John Smith, 50, Bundaberg, Plumber                  | 9 Linda Rhodes, 21, Kensington, Student                      |
| 2 Sarah Johns, 30, Bundaberg North, Childcare Worker  | 10 John Esquivel, 38, Walkervale, Builder                    |
| 3 Mitchell Wong, 27, Norville, Financial Planner      | 11 Vincent Valenzuela, 45, Kepnock, Self-employed            |
| 4 Margaret Thomas, 72, Kepnock, Retired Bank Clerk    | 12 Roger Foulds, 48, Avoca, Royal Australian Air Force Pilot |
| 5 Craig Pritchard, 60, Bundaberg West, Retired Lawyer | 13 Jared Higgins, 25, Bundaberg North, Restaurant Manager    |
| 6 Sharon Abbott, 35, Norville, Home Duties            | 14 Rosemarie Castro, 28, Bundaberg West, Unemployed          |
| 7 Chester Crawford, 18, Kensington, Student           | 15 Lois Abbott, 22, Avoca, Retail Assistant                  |
| 8 Barry Mathis, 63, Walkervale, Teacher               |  |

### 1. First ballot

- A computer chooses people at random from the electoral roll.

### 2. Notice to prospective juror

- If you're chosen in the first ballot, you receive a letter called 'Notice to prospective juror', which includes a questionnaire and excusal application.
- Complete and send the questionnaire either:
  - *without excusal application*
  - *with excusal application and supporting documentation*. If you're not excused, you may go into the second ballot.

### 3. Second ballot

- People are chosen at random from the second ballot (those who returned questionnaires who are eligible and available to serve on a jury).
- You may not get selected in this ballot.

### 4. Summons

- If selected in the ballot, you receive a summons for jury service, stating that you may need to come to court for the jury-selection process (empanelment).
- Then your panel name and number is either:
  - selected for empanelment and you attend court on the day required
  - *not selected throughout the jury service period, so you don't have to attend court.*

### 5. Empanelment

- Cards with each potential juror's name, town or suburb and occupation are placed in a rotating box.
- The judge's associate takes a card and calls the name or number of a juror.
- The juror walks to the bailiff at the front of the court to swear an oath or make an affirmation – a pledge – stating that they will fulfil their service as a juror.
- At any time before the bailiff begins to recite the oath or affirmation, the prosecutor may say 'stand by' or the defence counsel may call 'challenge', meaning the juror has not been selected to serve on that jury. The juror returns to the back of the court and the judge's associate selects another card.
- If a juror is not asked to 'stand by' or 'challenged', they are directed to a seat in the jury box. (*Note: Being challenged or asked to stand by is no reflection on your character or ability.*)
- If your name is not called, you're not required to sit on the jury.

### 6. Swearing in

- If your name is called, you're asked to swear in. You're then directed to a seat in the jury box.

**Figure 3.8** The jury selection process

Source: Queensland Courts.

### The Magistrates Court process in Queensland

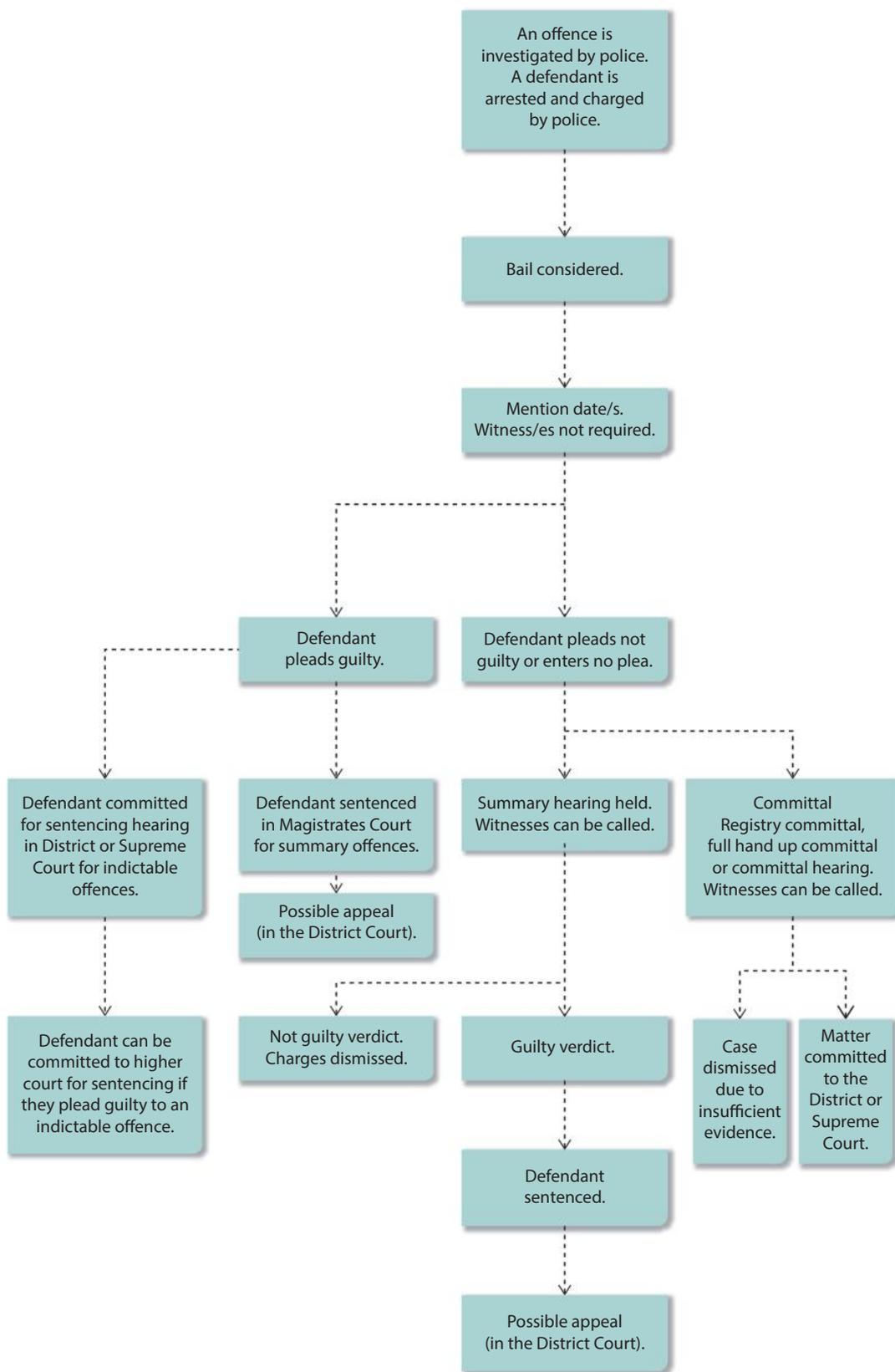


Figure 3.9 The criminal trial process in Queensland: Magistrates Court

Source: Queensland Department of Justice and Attorney-General.

## The trial process

In a criminal trial, the prosecution is the first to call witnesses and present evidence. It will first complete what is called the ‘examination-in-chief’ of each of its witnesses. This is the first time the witnesses have been examined by the court. Once the prosecution has completed the examination-in-chief, the defence gets the opportunity to cross-examine each of the prosecution’s witnesses. Once the cross-examination is completed, the prosecution is given the opportunity to re-examine each of the witnesses. It may choose to do this to clear up any uncertainties that arose out of the cross-examination. After the prosecution has called all of its witnesses and presented its evidence, the defence gets the opportunity to call witnesses and present evidence. The same process is then followed with defence witnesses as is followed by prosecution witnesses. They are subjected to the examination-in-chief by the defence, they are cross-examined by the prosecution, and they may then be re-examined by the defence.

If, after the prosecution has presented its evidence and called its witnesses, the defence believes there is no case to answer, it can make a submission to the judge to that effect. If it does this, the judge will hear arguments while the jury is not present, and decide on the submission. If the judge agrees that there is no case to answer, then the matter is discharged. However, it is rare for cases to be discharged at this point in the proceedings, as a magistrate has already heard much of the evidence and previously determined that there is sufficient evidence to suggest that the accused has a case to answer.

Once all of the evidence has been presented to the jury by both sides, including their summing up, the judge then sums up the evidence and gives the jury directions on any relevant points of law. It is then the duty of the jury to deliberate and decide the facts of the case – that is, consider its verdict – and return to the court. The foreperson of the jury announces the verdict to the court.

In 2008, the *Jury Act 1995* (old) was changed to provide for **majority verdicts** in criminal trials. This means that for some trials where the jury has a majority vote of 11 out of 12 members, the defendant can be found guilty. However, section 59 clearly outlines that **unanimous verdicts** are still required in trials on indictment for murder, and offences against the executive and legislative power with demands with menaces on agencies of government and Commonwealth offences. The accused person is acquitted if the jury returns a verdict of ‘not guilty’. If the jury returns a verdict of ‘guilty’, the accused is convicted. If the jury is unable to reach a verdict, the court will discharge the jury and exercise its discretion as to whether to order a **retrial**.

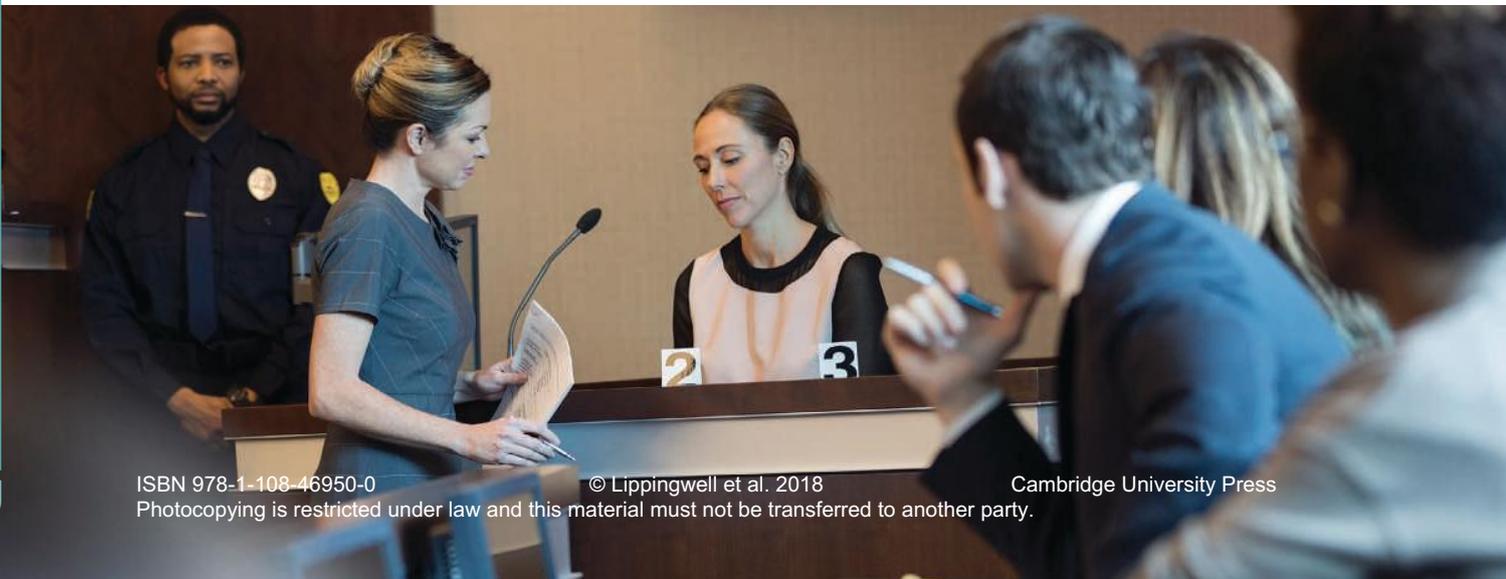
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**majority verdict** where a jury consists of 12 jurors, at least 11 jurors agree; or where a jury consists of 11 jurors, at least 10 jurors agree

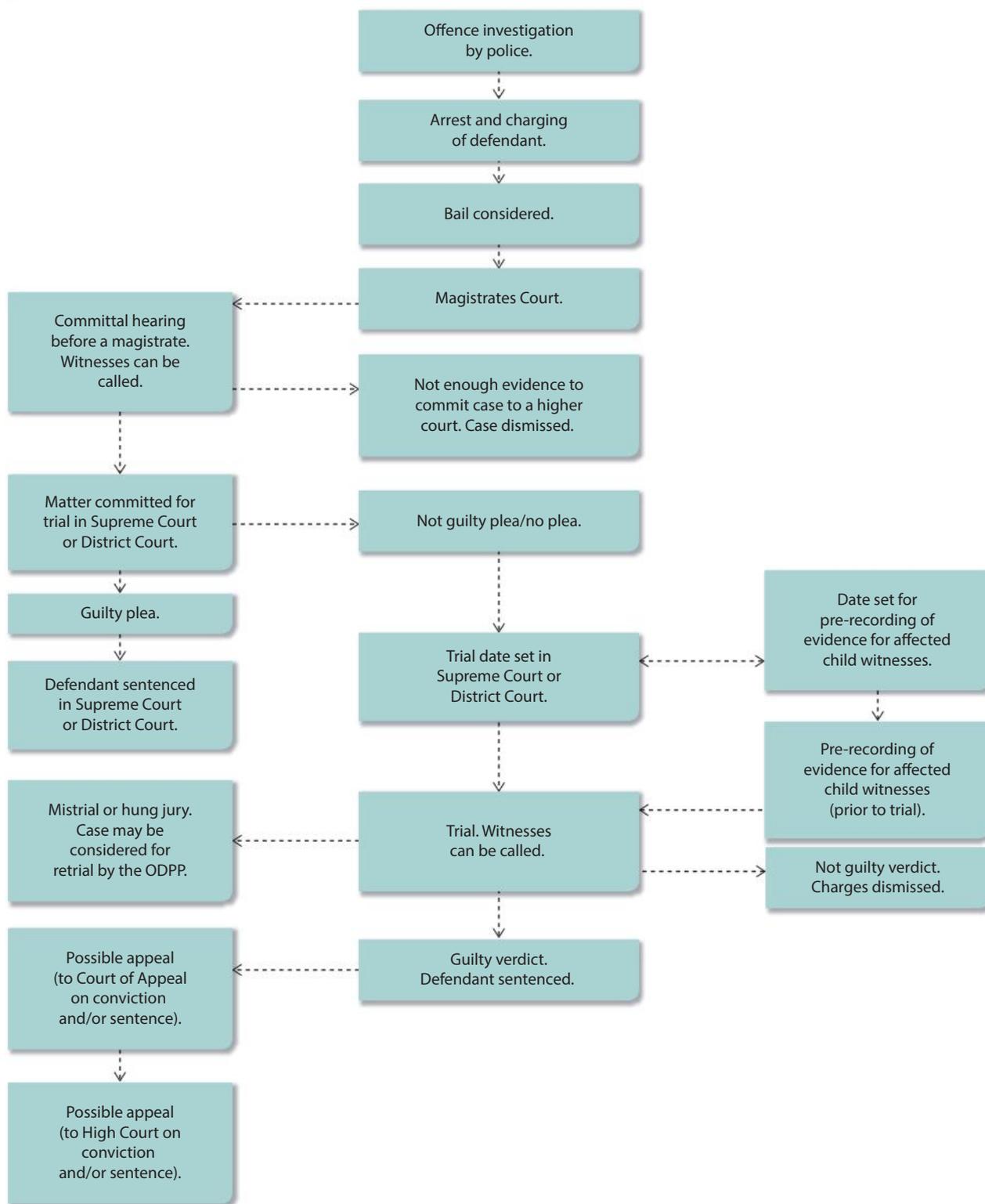
**unanimous verdict** where all jurors collectively agree on the verdict

**retrial** a new trial ordered after a jury has been unable to reach a verdict and has been discharged

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### The District Court and Supreme Court process



**Figure 3.10** The criminal trial process in Queensland: District Court and Supreme Court  
 Source: Queensland Department of Justice and Attorney-General.

When a not guilty verdict is delivered and the accused person is discharged, as a general rule the accused can never be tried for the same crime again. This is referred to as not allowing an accused person to face **double jeopardy**. However, in 2007, an amendment to the Criminal Code 1899 (Qld) through the *Criminal Code (Double Jeopardy) Amendment Act 2007* (Qld) allowed two

exceptions to this rule. (Note that the new law did not apply retrospectively; that is, it only applies to cases dealt with since 2007.) The relevant sections of the Criminal Code are as follows:

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**double jeopardy** a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction

---

#### 678B Court may order retrial for murder – fresh and compelling evidence

- 1 The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for the offence of murder if satisfied that –
- a there is fresh and compelling evidence against the acquitted person in relation to the offence; and
  - b in all the circumstances it is in the interests of justice for the order to be made.

#### 678C Court may order retrial for 25-year offence – tainted acquittal

- 2 The Court may, on the application of the director of public prosecutions, order an acquitted person to be retried for a 25-year offence if satisfied that –
- a the acquittal is a tainted acquittal; and
  - b in all the circumstances it is in the interests of justice for the order to be made.

### RESEARCH 3.3

Look up the definitions of the terms to explain the concepts of:

- 1 '25-year offence' – see Criminal Code 1899 (Qld), s 678(1)
- 2 'fresh and compelling evidence' – see Criminal Code 1899 (Qld), s 678D
- 3 'tainted acquittal' – see Criminal Code 1899 (Qld), s 678E
- 4 'matters for consideration' in considering 'the interests of justice' – see Criminal Code 1899 (Qld), s 678E. (S, C)

## SIDEBAR

A highly publicised case on double jeopardy is *R v Carroll* (2002) 213 CLR 635. Research the details of this case and think about whether the law on double jeopardy should be amended further to allow the prosecution of matters decided before 2007 if compelling new evidence is available.



## 3.4 Defences and excuses

In Queensland, a criminal defence allows the accused to claim a circumstance particular to either partly or wholly excuse them from the charges brought against them. The *Criminal Code Act* outlines how defences, or excuses for actions, can be invoked in certain situations, such as murder or assault, and whether they are complete or partial defences. Defences that only reduce the charges are known as 'partial defences'. Some defences that can be used are provocation, self-defence, defence of property, necessity, duress, accident, insanity, diminished responsibility and intoxication.

Using any form of defence in a criminal case is extremely difficult, and while such excuses often bring a great deal of media scrutiny, the elements that must be proven in a court of law are not always black and white, but far more complex. Of course, some forms of defence are more straightforward.

In Queensland, according to the Criminal Code 1899 (Qld), the existence of a full or partial defence to the crime is also identified and explained. This means that when the accused is guilty of committing a crime but seeks to apply a defence or excuse as justification for their behaviour, they are seeking to either:

- reduce the offence charged to a lesser offence for example have murder downgraded to manslaughter
- provide a complete defence to the charge, which results in the person being acquitted of the offence.

### Provocation

The defence of provocation is available as a partial defence for those charged with murder and as a complete defence for:

- common assault
- assault occasioning bodily harm
- unlawful wounding
- manslaughter
- grievous bodily harm.

To succeed in the defence of provocation, a person who is charged with an assault must establish the following:

- They were provoked into committing the assault.
- The provocation deprived the person of their power of self-control.
- They acted before their passion had time to cool.
- The force used was not disproportionate to the provocation.
- The force used was not intended or was not likely to cause death or grievous bodily harm.

The defence of provocation is in section 269 of the Criminal Code 1899 (Qld), which states:

- (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

**Figure 3.11** Defences seek to reduce the offence charged to a lesser offence or provide a complete defence to the charge.



As with many statutory provisions, it is left to the courts to interpret the legislation and develop how the statute or section of statute is to be used in practice. Thus, while section 269 of the Criminal Code 1899 (Qld) establishes provocation as a valid defence, it does not clearly explain what is needed for a person to be successful in their defence.

The defence of provocation is also listed in section 304 of the Criminal Code 1899 (Qld), where it applies to a person charged with murder. An amendment passed in 2011 had the effect of limiting provocation as a defence to murder to exclude where the argument is based on ‘words alone, other than in circumstances of a most extreme and exceptional character’. This section of the Criminal Code 1899 (Qld) states:



Figure 3.12 A defence of provocation is available in a criminal case.

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.
- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
- (3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if –
  - (a) a domestic relationship exists between 2 persons; and
  - (b) one person unlawfully kills the other person (the deceased); and
  - (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –
    - (i) to end the relationship; or
    - (ii) to change the nature of the relationship; or
    - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

### REVIEW 3.6

- 1 Describe the act of provocation and what an accused must prove to be successful. (C)
- 2 Describe two situations that may lead to an accused person using a defence of provocation. (C)
- 3 Create an analysis table to list the ‘for’ and ‘against’ reasons for the use of provocation as a defence. (Cr, A)
- 4 Create a paragraph response to evaluate whether provocation should be a partial defence or a full defence, or not be an allowable excuse. (Cr, E)

### RESEARCH 3.4

- 1 Research and explain how the defence of provocation applies for murder where the accused is a victim of domestic violence. (S, C)
- 2 Discuss what legal issues and impacts may arise from allowing such a defence and state whether you agree with this as a valid defence. (A, E)
- 3 Research and explain why the 2011 amendment excluding provocation where the argument is based on words alone was enacted. (C, S, A)

## Self-defence

**Self-defence** acts as a complete defence. As with provocation, to use this defence the accused must admit to having committed the act that caused the death of another person. This defence is found in sections 271 and 272 of the Criminal Code 1899 (Qld), as outlined below.

**self-defence** the lawful use of force against a person who is threatening the life or wellbeing of another

### Section 271: Self-defence against unprovoked assault

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

### Section 272: Self-defence against provoked assault

- (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
- (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.



**Figure 3.13** Self-defence uses an objective test to determine whether the defence applies.

Self-defence uses an objective test, but has a series of elements that need to be met in order to be used successfully. That is that the right to physically defend oneself was exercised with reasonable force and that the force is authorised, justified or excused by law. The aspect of reasonable force in the circumstances is the aspect that has often drawn the most attention in the media. One thing to remember is that when self-defence is evoked, there are two sides to the story, and it is this, in particular, that the jury is asked to evaluate.

### REVIEW 3.7

- 1 Describe the elements of self-defence. (C)
- 2 Describe a scenario that could see self-defence used in a court of law. (C)
- 3 Explain, using examples, what is meant by the statement 'when a person defends him or herself against the threat of harm, his or her actions must be proportionate to the harm threatened'. (C, S)

## Defence of property

Another form of self-defence is defence of property. This defence is found in section 278 of the Criminal Code 1899 (Qld), which states that a person can reasonably defend their home. This, like other forms of self-defence, means any form of defence that is reasonable and not excessive.

The effect of home invasions is often discussed in the media, with current affairs programs suggesting that the law favours criminals, and that any action taken to defend the home can result in the person being charged with a crime. While this is sometimes true, these stories need to consider that a person charged with a crime in this manner must prove that the defence was legitimate.

### CHECK THIS OUT

To see the advice often given to people on how to protect their home, examine the Home Security tips on the Queensland Police Service website.

## Intoxication

Section 28 of the Criminal Code 1899 (Qld) deals with the excuse of **intoxication**. This section sets out what must be proven in a court of law in order for a person to use the defence. The first important point is that this defence cannot be relied upon if the individual relying upon it has voluntarily consumed the drugs or alcohol that caused the intoxication.

**intoxication** the state of impairment caused by the consumption of alcohol or drugs

This is an important issue, as many people have argued that intoxication should never be an excuse. However, in a society in which the spiking of drinks is becoming more common, this defence does have relevance if the person who has been affected did not choose to ingest the offending substance. There

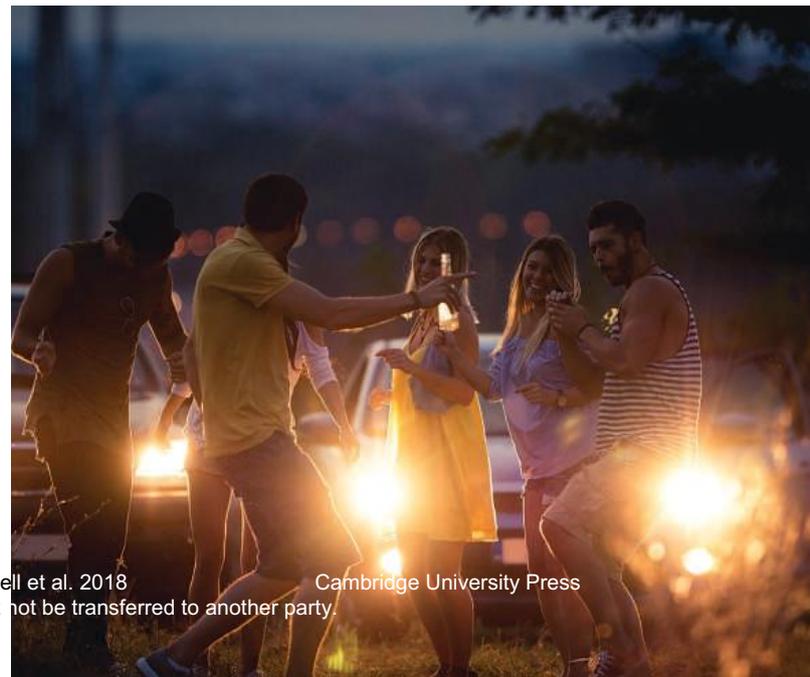
are some very important limits to this defence, though. Even if intoxication was accidental, the accused will be afforded the insanity defence only.

As with the other defences, an accused using intoxication as a defence must admit that they committed the act of which they are accused. If successful, intoxication will act as a full defence to criminal liability, as at the time of the act being committed the person was unable to determine right from wrong. This means that the accused will not be convicted of the crime they are accused of committing.

### RESEARCH 3.5

- 1 Research and then list the facts of a situation in which a crime occurs that give rise to the defence of intoxication. (S, C)
- 2 Go on to research and then list the facts of a situation in which a crime occurs and intoxication is involved but does not give rise to the defence. Explain the difference between the two situations. (S, C)
- 3 Explain why the legislature has distinguished voluntary intoxication from involuntary intoxication. Do you agree with such a distinction? (C, E)

**Figure 3.14** When using intoxication as a defence, the accused must admit that they committed the act of which they are accused.



## Insanity

**Insanity** as a defence is recorded in section 27 of the Criminal Code 1899 (Qld), which states that a person is not criminally responsible at the time of an offence if they are in a state of mental disease or natural mental infirmity. The condition does not have to be present at birth, but can be due to any number of mental disorders.

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**insanity** state of mental disease or natural mental infirmity

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If this defence is to be used by the accused, there will be a number of expert witnesses called upon in court to prove or disprove the first element of this defence: that there is indeed some form of mental illness. The second element that must be proven is that, at the time of the crime, the person did not know that what they were doing was wrong. Thus, if a person suffers from a mental illness but still knows that killing is wrong, they will not be able to use the defence.

This is often the hardest element to prove, as it is difficult to evaluate the state of mind of the person at the time of the crime – particularly given that the evaluation is done at a later date. The more time that elapses before the person is found and evaluated, the more difficult an accurate assessment is.

The case of *Hawkins v The Queen* (1994) 179 CLR 500 states that the key element for the jury to consider is the state of the criminal at the time of the crime. To do this, evidence must be considered regarding the person's personality and background, including evidence of a mental disease or disorder.

An accused who successfully pleads the defence of insanity is likely to be detained in a psychiatric facility or come under a mental health order with strict supervision.

## Diminished responsibility

Section 304 of the Criminal Code 1899 (Qld) establishes the excuse of **diminished responsibility** where unlawful killing is involved. This section states

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**diminished responsibility** a defence that is used when an accused does not fully understand what they have done

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that at the time of the crime, the person must be of abnormal mind and that this abnormality prevents the person from being able to understand that what they are doing is wrong and they cannot control their actions. If this can be proven, a person will be found guilty of manslaughter and not murder.

Diminished responsibility in this sense acts as a partial defence, as it reduces the conviction to manslaughter. As with insanity, to prove this defence a court will rely on expert testimony to support the claim by the accused. The experts will help prove the elements that the court considers, namely that:

- there was an unlawful killing that the accused acknowledges
- at the time of the killing, the person was of abnormal mind
- they did not know that what they were doing was wrong, and
- they were unable to control their actions.

Diminished responsibility can be difficult to prove, as one of the most difficult issues with which courts and juries deal is that those using this defence will often claim that their faculties were temporarily diminished.

## Extraordinary emergency

Extraordinary emergency is a defence covered by section 25 of the Criminal Code 1899 (Qld). According to section 25, a person cannot be held criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise. In a criminal case, this definition basically allows the jury in a case to apply a 'reasonable person' test to situations of sudden or extraordinary emergencies

### CHECK THIS OUT

Visit the *Murdoch University Electronic Journal of Law* website and read the article 'Sleepwalking: Insanity or automatism' (vol. 4, 1996) about sleepwalking and the defence of insanity.

to see whether the accused acted in the same way as any other ordinary person would have. If the circumstances do equate to a sudden or extraordinary emergency, and the accused acted as any reasonable person would have, then they will not be found guilty of the crime.

### REVIEW 3.8

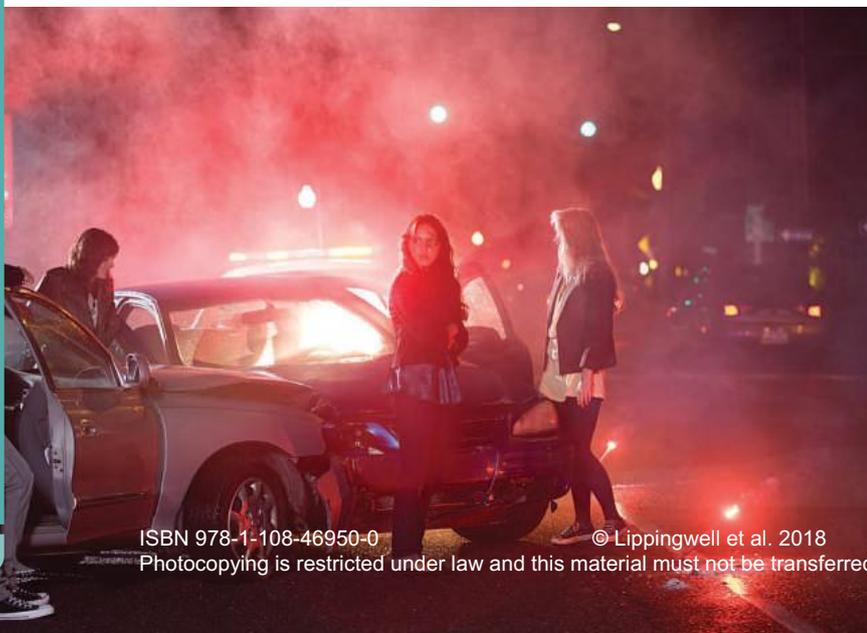
- 1 Why do you think that extraordinary emergency can only be used as a defence if other defences are not applicable? (C)
- 2 Describe any situations that may give rise to a defence of extraordinary emergency arising. (C)
- 3 Evaluate the use and success of the insanity defence in Queensland. Explain why some lawyers might recommend against using this defence. (S, A, E)

## Duress

**Duress** is found in section 31 of the Criminal Code 1899 (Qld). This defence is available in criminal law when a person, through some form of threat, is forced to be involved in a crime in which they otherwise would not willingly participate.

The Criminal Code 1899 (Qld) states that this defence will not extend to the crime of murder.

**Figure 3.15** The defence of accident must prove that the ordinary person would not have been reasonably able to foresee the eventual outcome of the behaviours resulting in a criminal situation.



**duress** an act carried out because of a threat to you or a loved one

## Accident

A genuine accident, as detailed under section 23 of the Criminal Code 1899 (Qld), will ensure that an accused person will not be found guilty as there is no motive or intent – an element necessary for most crimes. Another essential element that must be proven if a person relies on this excuse is that the ordinary person would not reasonably have been able to foresee the eventual outcome.

## Ignorance of the law – bona fide claim of right

Ignorance of the law is not usually a defence against a criminal charge. However, according to section 22 of the Criminal Code 1899 (Qld), a person is not criminally responsible for an offence relating to property if the person believed they had an honest claim of right to that property and they had no intent to defraud the rightful owner of the property.

## Intention – motive

According to section 23 of the Criminal Code 1899 (Qld), a person is not criminally responsible for an act or omission that occurs independently of the

exercising of the person's will. An example of the use of this excuse is if a person commits an offence while sleepwalking, or while they are affected by a temporary condition over which they have no physical control, such as concussion.

## Mistake of fact

According to section 24 of the Criminal Code 1899 (Qld), a person who does or omits to do an act under an honest, reasonable but mistaken belief in the existence of any state of things is not criminally responsible

for the act. They are, however, responsible for the act if, even if their mistaken belief was true, they would still have been committing a criminal act.

## Immature age

According to section 29 of the Criminal Code 1899 (Qld), a person who is younger than 10 years of age cannot be held criminally responsible for any act or omission. This section of the Act also states that a person under the age of 14 years is not criminally responsible for any act or omission unless, at the time of committing the act or making the omission, they had the capacity to know that they ought not to make the act or omission. Therefore, a child under the age of 10 cannot be charged with a criminal offence. A child under 14 can be charged with a criminal offence; however, the prosecution must prove that the child knew that what they were doing was wrong.



**Figure 3.16** No child under the age of 10 years can be guilty of an offence.

Sections 590A(1) and (2) of the Criminal Code 1899 (Qld) set out strict rules concerning notice that a defendant must follow if they intend to introduce evidence or call someone to give evidence in support of an alibi. Notice has to be given within the prescribed period.

### REVIEW 3.9

- 1 Describe the main factors necessary for a successful duress defence. (C)
- 2 Is ignorance of the law ever a legal excuse? Explain why. (C)
- 3 Provide an example of when mistake of fact could be used as a defence in criminal law. (C)

## Alibi

A commonly used term, and a plea that may be made in a criminal trial, is a claim made by a person that they have an alibi. The *Queensland Supreme and District Courts Bench Book*, in Chapter 40, offers this description of ‘alibi’ (Criminal Code 1899 (Qld) s 590A):

The defence is that the defendant was not at the place of the crime when it was allegedly committed but was instead somewhere else. As it is for the prosecution to prove the guilt of the defendant, it is for the prosecution to prove, beyond a reasonable doubt, that the defendant was present at the time and place when the offence was committed.

### RESEARCH 3.6

Research each of the following cases and identify what defence was claimed by the defendant. Was the claim successful? Do you agree with the application of the defence in each case?

- 1 *R v Cox* [2016] QCA 165
- 2 *R v Sebo; ex parte A-G* (Qld) [2007] QCA 426
- 3 *R v Huni* [2014] QCA 324
- 4 *R v Murray* [2018] QCA 057
- 5 *R v Goode* [2004] QCA 211 (S, A, E)

### REVIEW 3.10

- 1 Identify the first two requirements concerning the notice of alibi (s 590A(6)). (C)
- 2 Describe what is meant by ‘prescribed period’ (s 590A(7)). (C)

## 3.5 Appeals

In Queensland, the Court of Appeal is a division of the Supreme Court that hears all appeals from the Supreme and District Courts, and many tribunals. An **appeal** is an application to the courts when a party believes that the judge or jury made the wrong decision, or the trial wasn't conducted according to the law.

The court does not hear entire cases or have a jury. It deals only with the subject of the appeal listening to the arguments by the opposing sides

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**appeal** an application to the courts when a party believes that the judge or jury made the wrong decision, or the trial wasn't conducted according to the law

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and decides whether an error of law was made or some crucial fact was overlooked in the original hearing. An appeal is not a retrial or a re-sentencing, but rather the revisiting of a specific point from the hearing. It is not a chance to show new evidence as the appeals court will only consider the evidence that was given at the original trial or sentence. In criminal law, only a guilty verdict can be appealed. A not guilty verdict is final.

In Queensland, the court comprises three or five judges of the Supreme Court. Only the parties involved in the trial are able to appeal, so the defendant can appeal the guilty conviction or the sentence and the Crown can appeal the sentence.

## 3.6 A fair trial

Australians have a common law right to a **fair trial** – or, as some have expressed it, if they are facing trial, the right not to be tried unfairly. Article 14 of the International Covenant on Civil and Political Rights 99 UNTS 1 provides guidelines for ensuring that all persons are afforded **due process** and the right to a fair trial.

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**fair trial** a court hearing in which the procedures are fair to both sides

**due process** the concept that the fair and equal treatment of all persons can be ensured during trial through procedural legal processes

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In the criminal law, this right has traditionally been upheld through the process of trials being presided over by experienced judicial officers and the development of rules related to the admissibility of evidence. There are also some relevant statutory provisions. The *Evidence Act 1977* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld) have a bearing on matters of evidence and

investigation of crime. For example, section 130 of the *Evidence Act* recognises unfairness to the accused.

The foundation of a fair trial is that all persons face an assumption before the courts that they are equal. In a court hearing, fairness involves everyone being treated equally and the proper application of rules of evidence.

The right to due process begins at the start of any action, well before any hearing. In criminal matters, there are rules for questioning and the required warning must be given. Children are afforded additional rights and protections in these areas, to ensure fairness – these rights are enshrined in Article 40 of the UN Convention on the Rights of the Child.

More recently, the High Court has been active in considering procedures and remedies relating to the investigation of crime and the trial process, incorporating the right to a fair trial; and the legality of the means of collecting evidence. The High Court has recognised abuse of process (of the court) and unfairness, including the right to legal representation, as grounds to intervene. A usual

remedy is to grant a stay of proceedings – usually temporarily – so the potential unfairness is able to be remedied. The court, however, also recognises that this is a discretionary power that involves balancing the interests of the accused and the public interest – the right to expect that an accused person will be brought to trial (see Mason CJ in *Jago v District Court of NSW* (1989) 168 CLR 23; 87 ALR 577 HCA).

The attributes of a fair trial, or **natural justice**, mean that decision-making during the trial process must be fair and reasonable. Natural justice, or **procedural fairness** (these terms are often used interchangeably; in criminal law, it is more often referred to as procedural fairness), means that during the criminal trial process the following principles must be upheld:

- informing the accused of the case against them or their interests
- giving the accused a right to be heard (the ‘hearing’ rule)
- no decision-makers or stakeholders having a personal interest in the outcome (the rule against ‘bias’)
- all decision-makers acting only on the basis of logically probative evidence (the ‘no evidence’ rule).

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**natural justice** rules of fair play originally developed in the common law courts; rules and procedures to be followed by a person or body with the power to settle disputes

**procedural fairness** a common law duty to act fairly in the making of administrative decisions that affect a person’s rights, interests and legitimate expectations; the right to due process

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These principles or rules are implemented through due process and the presumption of innocence. While procedural fairness or natural justice rights are recognised as important in criminal law, they also apply to civil law, particularly where administrative decision-making is involved and where there is the potential for an adverse outcome

for an individual. Although not a criminal law case, Case Study 3.1 over the page establishes important principles relating to the place of natural justice and procedural fairness in Australian law.

## CHECK THIS OUT

Visit the Australian Government’s Smartraveller website and investigate the information provided for people travelling overseas if they are arrested or imprisoned. Why is the Vienna Convention on Consular Relations 596 UNTS 261 important for Australian travellers?

## REVIEW 3.11

- 1 Explain how the principle of procedural fairness applies to criminal law cases. (C)
- 2 Research the case of *Crump v Attorney-General and Minister for Justice* [2016] QSC 056.
  - a Consider and discuss whether the applicant’s argument that he was denied natural justice and procedural fairness when the Attorney-General didn’t refer his matter to the Court of Appeal is a valid argument, or whether he was in fact afforded natural justice.
  - b Create a letter to the editor to explain your evaluation of the case and whether you agree or disagree with the judgment delivered. (S, A, E, Cr)



## CASE STUDY 3.1

### *Kioa v West* (1985) 159 CLR 550

#### Facts

Mr and Mrs Kioa, from Tonga, entered Australia on temporary entry permits in 1981. They had changed their address without informing the authorities when their permits expired. Mr Kioa was arrested as a prohibited immigrant in 1983. Mr and Mrs Kioa had a daughter prior to his arrest; she was born in Australia, and therefore was an Australian citizen.

In 1983, a delegate of the Minister for Immigration and Ethnic Affairs decided that the Kioas should be deported. The Kioas unsuccessfully appealed the decision to the Federal Court and the Full Federal Court. They then appealed to the High Court.

#### Issues

The Kioas' principal argument was that the decision-maker had failed to afford them procedural fairness in not disclosing and allowing an opportunity to respond to the adverse allegations made in the departmental submission that they were involved with people circumventing immigration laws. The Federal Court upheld the decision of the delegate under the *Migration Act 1958* (Cth) dismissing the Kioas' appeal. The decision was once again affirmed on appeal to the Full Court of the Federal Court.

#### Law

Under the *Migration Act 1958* (Cth), Mr and Mrs Kioa were illegal immigrants and were to be deported. Mr and Mrs Kioa appealed this decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in the Federal Court of Australia.

#### Arguments

The Kioas argued that the delegate had wrongly failed to take into account:

- the detrimental effect the decision may have on their child; and
- the provisions of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

#### Decisions

The High Court was tasked first with determining whether the rules of natural justice had to be followed in the given situation and, if so, whether they had been breached. The court held by a majority of four to one that the rules of natural justice applied to a decision under the *Migration Act 1977* (Cth) to deport a prohibited immigrant. The court distinguished previous cases that had come to the opposite conclusion on the basis that these cases had been superseded by legislative developments.

#### Reasons

The decision in *Kioa* radically increased the number of decisions to which natural justice and procedural fairness applied, so today the question is often not whether procedural fairness should be afforded but the extent to which it should be afforded. Mason J said, 'It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.' This same principle also extends to criminal law appeals on the grounds of procedural fairness.

## Can jury trials still be fair in the age of social media?

By Elizabeth Byrne, 20 May 2017

Jurors running their own criminal investigations using the internet and social media are increasingly risking Australians' right to a fair trial, two senior legal minds in Canberra have warned.

Overseas jurors have been jailed for consulting the internet during trials and while nothing that severe has happened yet in Australia, there have been close calls.

A Queensland murder trial was aborted in 2014 after a juror researched the case on Facebook and admitted it to another juror. And last year in Western Australia, a juror was dismissed after posting on Facebook about the case.

One of the ACT's top defence barristers, James Lawton, said while juror misconduct was nothing new – an English jury in the 1990s consulted a Ouija board to arrive at their decision – the internet age meant jurors were finding it harder to switch off from the outside world.

'It's probably a bigger problem than we actually know about because I suspect a lot of it occurs but doesn't get discovered,' Mr Lawton said.

### Jurors behaving badly

Juries are supposed to only consider the details provided to them in court. Often aspects of the crime and even the accused's criminal history are deliberately kept from the jury so as not to taint their opinions. But Associate Professor of Law at the Australian National University, Mark Nolan, said a quick internet search could sometimes reveal all. 'There is a real risk that the deliberations of the jurors will include inadmissible evidence or evidence that's not really known to the prosecution or the defence,' Associate Professor

Nolan said. 'That introduces inherent injustices and illegalities.'

### Do the crime, serve the time

Queensland, New South Wales and Victoria all have laws targeting jurors who offend. Associate Professor Nolan said the threat of punishment worked. '[That is a] quite good deterrent, and what's important is that the direction is given to the jury at the start of the trial, at the earliest possible opportunity,' he said.

Mr Lawton also suggested ways of curbing the desire to check information online. 'I think we need to give juries a way of investigating, but put limits on it,' he said. 'Perhaps give them a data base in terms of questions they might want to ask ... so they aren't tempted to go to Google or to go to their smartphone during the trial.'

Mr Lawton said the internet age should also prompt a rethink for jurisdictions like the ACT, where juries are required for all sex offence and murder trials. 'They are the sort of trials where it's very hard to put emotions to one side and very hard to put initial prejudice against the type of offence to one side,' Mr Lawton said. Mandatory jury trials are thought to better meet community standards and save time by avoiding the need for judges to produce lengthy written reasons justifying their decision.

But Mr Lawton said sometimes it was important to see how a decision was reached, particularly in difficult cases. He suggested the ACT might be better served by a model similar to that of NSW where offenders could elect to have a judge alone trial, under particular conditions.

## REVIEW 3.12

- 1 Create a list of all the technology devices you currently use. (C)
- 2 Discuss the laws that surround the use of these devices. Are you aware of your legal rights and responsibilities regarding technology use? (A)
- 3 Debate the idea that the rapid growth of technology could impact on the fundamental foundation of our legal system: that a person is innocent until proven guilty, and that they are entitled to a fair trial. (A, E)

## Barriers to justice

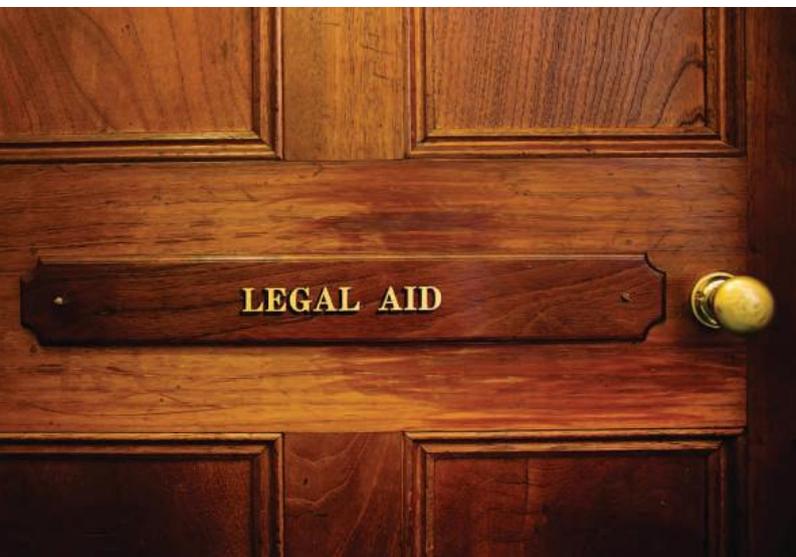
Along with the rights of procedural fairness or natural justice, the right to access justice is fundamental to a fair and inclusive society. Therefore, it is essential that the criminal justice system implements procedures and processes aimed to address disadvantage and inequality. These disadvantages and inequalities become barriers to justice for those involved, and may stem from ethnicity, culture, capacity, socioeconomic status or gender.

Certain groups can face difficulties in accessing legal services during the criminal trial process, including the following:

- **Homeless people.** The people in this group have a range of urgent competing needs and often cannot prioritise even significant legal issues.
- **People of culturally and linguistically diverse (CALD) backgrounds.** Many of the people in this group need access to translators to be able to access legal services. The cultural competencies of police may also pose difficulties for them. In addition, although the international human rights framework recognises that free access to an interpreter is necessary for procedural fairness in some trials, in Queensland there is no right to an interpreter in either criminal or civil trials.
- **People in rural, regional and remote areas.** People living outside major cities face a range of barriers when accessing the legal system. These include the limited number of solicitors available; frequency of conflict of interest (with limited number of legal firms in one location); additional travelling and communication costs; and a heavy reliance on communication technology (such as email, internet and teleconferencing), which is often inappropriate, unreliable or inaccessible.
- **Aboriginal and Torres Strait Islander peoples.** This group faces significant barriers to accessing legal services, including distrust of the legal system, a lack of cultural awareness of mainstream services, language barriers, systemic discrimination and a lack of understanding of potential legal resolutions to an issue.
- **Women.** The greatest legal needs of women are in the areas of family and civil law, as reflected by Legal Aid Queensland figures which show that women are less likely to have their legal aid applications granted than men, at 70.99 per cent compared with 81.38 per cent.
- **Older people.** The elderly may be dependent on a family member, friend or carer to facilitate access to a solicitor for matters such as wills or powers of attorney, leaving them vulnerable to abuse. Although legal services for seniors have been established, they are limited and are only able to assist clients who are capable of providing instructions.
- **People with disabilities or cognitive impairment.** This group may face a range of barriers to accessing legal services, including but not limited to physical access, limited access to Auslan interpreters, a lack of understanding of the legal aspects of their situation, communication difficulties, reliance on others to access lawyers, fear of retribution and discriminatory attitudes towards people with a disability.

### REVIEW 3.13

- 1 Create a table to analyse the issues faced by each of the groups listed above. Consider the impact that barriers to justice have on their right to a fair trial, and to achieving just and equitable outcomes. (Cr, A)
- 2 Explain why it is important for the legal system to ensure fair and equitable access to justice for all members of society. (C)
- 3 Discuss why women's legal aid applications appear to be approved at a lower rate than those of male applicants. (A, E)
- 4 Evaluate the implementation of due process and natural justice for these groups. (E)
- 5 Propose recommendations for the improvement of access to the criminal legal system for each of these groups. (E)
- 6 Discuss the implications of recommendations (e.g. cost, access, timeframes). (E)



**Figure 3.17** Legal Aid Queensland gives assistance to disadvantaged Queenslanders by providing solicitors to act on behalf of clients.

## Legal representation

Every person charged with an offence should be able to have **legal representation** – in other words, they should be able to engage a lawyer to represent them in court. However, not every person can afford a lawyer, and this is dealt with in the *Legal Aid Queensland Act 1997* (Qld).

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**legal representation** the legal work that a lawyer performs on behalf of a client

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This Act provides for the establishment of Legal Aid Queensland, which gives legal assistance to socially and financially disadvantaged Queenslanders by providing Legal Aid solicitors and, when necessary, solicitors from private firms to act on behalf of clients. These private lawyers

receive a small sum of money for their services from Legal Aid Queensland, but due to budget constraints they do not receive the full fee they would charge their full fee-paying clients.

## Youth and child offenders

Children are not treated in the same way as adults by the criminal justice system, as they are considered to be more vulnerable. The *Youth Justice Act 1992* (Qld) and the *Children's Court Act 1992* (Qld) are the two main laws that deal with juvenile offenders in Queensland. A person under the age of 18 years in Queensland is considered a juvenile in the eyes of the criminal law.

Schedule 1 of the *Youth Justice Act 1992* (Qld) states that children should only be detained as a last resort and that if they do have to be detained, they should only be held in a facility that is suitable for children. Sentencing options are also different for children than they are for adults. This is because the courts, wherever possible and in accordance with the principles of the *Youth Justice Act 1992* (Qld), try to ensure that children are not detained in custody unless they have an extensive criminal history or have committed a very serious or very violent offence. It is believed by many that if children are not exposed to the harsher side of the criminal justice system, such as detention centres, they are less likely to enter into a cycle of reoffending.

Matters involving children are most often heard by the Children's Court, in which a magistrate hears and decides the case. The Children's Court is closed, which means that the general public cannot enter and view the proceedings. However, as with adults, very serious offences such as murder must be heard in the Supreme Court, which is an open court.

### REVIEW 3.14

- 1 Explain the role of Legal Aid Queensland. (C)
- 2 Identify the law enacted to establish Legal Aid Queensland. (C)
- 3 Evaluate whether such a scheme is necessary in Queensland. Why is it needed or not needed? (E)

## 3.7 Alternatives to a criminal trial: The Drug Court

The *Drug Legislation Amendment Act 2006* (Qld) was passed to establish the **Drug Court** as a permanent feature of the Queensland criminal justice system. Drug courts were trialled in different parts of Queensland from 2000 and the success of these programs led to the court's permanent introduction. A key intention of the Drug Court is to keep offenders – particularly first-time offenders – out of the prison system so that they have a much higher chance of not reoffending.

**Drug Court** a Queensland Court that offers some drug-dependent offenders intensive rehabilitation instead of prison

The Drug Court sentences selected people who have pleaded guilty to certain drug offences in Queensland. An offender can only choose to appear before the Drug Court if they are over the age of 18, have been charged with a drug offence, have not been charged with any other offences (such as sexual offences), have not been imprisoned for a period exceeding 12 months, are not currently in prison, are drug dependent and intend to plead guilty to their offences. They must also be a suitable candidate for intensive drug rehabilitation.

### SIDEBAR

Discuss the advantages and disadvantages of using the alternative processes for criminal matters.

### RESEARCH 3.7

- 1 Research and explain the main aim of the Drug Court. (S, C)
- 2 Evaluate whether the introduction of the Drug Court is helping to achieve justice in Queensland. (E)
- 3 Create a one-paragraph response to explain your findings and to make a decision on whether or not the drug court is succeeding. (Consider the viewpoints of offenders as well as people who are the victims of drug offenders.) (A, E, Cr)

**Figure 3.18** Offenders in the Drug Court must meet a certain set of criteria in order to be sentenced within it.



# Chapter review

## Chapter summary

- People have rights to natural justice before the law, specifically to due process and a fair hearing.
- A summary proceeding is when a case is heard and decided in the Magistrates Court.
- A committal hearing is when a magistrate considers whether sufficient evidence exists to send the accused to trial.
- An indictment is prepared by the prosecution if the magistrate decides there is enough evidence to proceed to trial.
- Bail is the procedure that allows the accused to be released from police custody until they are due to appear in court, and for the court to release a person pending a further court appearance.
- A court process exists in Queensland that ensures both the prosecution and the defence are given a fair and equitable opportunity to present their case to the judge and jury.
- Legal Aid Queensland aims to provide legal representation to socially and financially disadvantaged Queenslanders.
- The onus of proof in a criminal case rests with the prosecution.
- The standard of proof in a criminal trial in Queensland is beyond reasonable doubt.
- Strict liability offences are offences that do not allow the use of a defence or excuse to escape conviction.
- Defences and excuses are used as a partial defence to either reduce the charge or as a complete defence to acquit a charge.

## Short-response questions

- 1 Provide explanations to show your comprehension of the following legal concepts, principles and processes:
  - a the importance of natural justice, procedural fairness and due process in the criminal trial process
  - b what bail is and when it will *not* be granted
  - c two advantages and two disadvantages of the jury system in Queensland
  - d the difference between majority and unanimous verdicts
  - e the purpose of committal hearings. (C)
- 2 Describe the function/role of three court personnel. (C)
- 3 Identify and explain the three types of 'examinations' witnesses may be required to undergo during a court case. (C)
- 4 Explain why a jury should be a 'cross-section of the community'. (C)
- 5 Explain where appeals from the Magistrates Court would be heard. (C)

## Extended-response questions

- 1 Write an extended response of 400–600 words that explains why the previous convictions of an offender are withheld from the court until the accused is being sentenced. Do you think this is fair? Why or why not? (C, E, Cr)
- 2 The 'presumption of innocence' is a cornerstone of our justice system. Research this statement and then write a short essay response that explains why this is the case. Make sure you give examples of situations where, without the presumption of innocence, a just and equitable outcome was not achieved. (C, S, A, Cr)

## Response-to-stimulus question

Research the case of *R v Dudley and Stephens* (1884) 14 QBD 273. Create a short multimodal presentation that details the facts of the case and what defence would be used in Queensland if the same situation happened today. (C, S, E, Cr)

## CHAPTER 4

## Punishment and sentencing

## CHAPTER OBJECTIVES

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

- describe the range of sentencing options
- explain the principles that affect sentencing decisions in Part 2 of the *Penalties and Sentences Act 1992* (Qld),
- analyse the principles of sentencing as they apply to scenarios to predict an outcome
- evaluate, using legal criteria, the effectiveness of sentencing and punishment
- select legal information, analyse legal issues about criminal justice, and evaluate legal situations involving punishments in Australian law and customary law; sentencing trends over time; the rates of incarceration of the general population compared to the number of Aboriginal and Torres Strait Islander peoples and other specific groups; reasons for the rate of criminal reoffending by different groups within Australia; the appeals process where a sentence is not considered to be appropriate
- analyse legal issues concerning the aim to reduce the rate of reoffending by determining the nature and scope of the issue, and examining viewpoints and consequences
- using the analysis (above), evaluate this legal situation by presenting alternatives to propose recommendations, and justifying using legal criteria and discussing implications
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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## Key concepts/legal terminology you will encounter in this chapter

- concurrent sentencing
- cumulative sentencing
- custodial sentences
- denunciation
- deterrence
- incarceration
- non-custodial sentences
- *obiter dicta*
- prevention
- *ratio decidendi*
- recidivism
- rehabilitation
- restorative justice
- retribution

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Criminal Code Act 1899* (Qld)
- *Criminal Code Act 1995* (Cth)
- *Penalties and Sentences Act 1992* (Qld)
- *Youth Justice Act 1992* (Qld)

### LEGAL ODDITY

From the beginning of European settlement until well into the twentieth century, capital punishment (the death penalty) was practised in Australia. These executions were carried out in public. Queensland was the first part of the British Commonwealth to abolish hanging in 1922.

## 4.1 The purpose of punishment

Following the trial process, if an offender pleads guilty or is found guilty by the court, they must be sentenced to punishment for their crime. Sentencing is a complex process and the law in Queensland that covers the general principles of sentencing of offenders is the *Penalties and Sentences Act 1992* (Qld). This Act was introduced to give courts the power to consistently sentence offenders with sufficient and fair punishments. Section 9 sets out five clear purposes why a court can impose a penalty on an offender:

- punishment of the offender
- rehabilitation of the offender
- deterrence for the rest of the community
- denunciation for particularly unacceptable crimes
- protection of the community.

These five purposes form the basis for the theories of punishment and are clearly reflected in the sentencing guidelines in section 9 of the *Penalties and Sentences Act 1992* (Qld). It is important to understand these theories, as they go a considerable way towards explaining the reasons for sentencing decisions.

According to section 9 of the Act:

The only purposes for which sentences may be imposed on an offender are:

- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
- (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- (c) to deter the offender or other persons from committing the same or a similar offence; or
- (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- (e) to protect the Queensland community from the offender.

**Figure 4.1** Section 9 of *Penalties and Sentences Act 1992* (Qld) outlines the purpose of sentences imposed on offenders.

Along with their role in investigating and prosecuting criminal behaviour, the Queensland Police Service is responsible for crime **prevention** in Queensland. This means police work with the community, government agencies and businesses to identify and prevent the causes of crime and anti-social behaviour. Strategies such as preventative detention, as outlined in the *Criminal Code Act 1995* (Cth), may be used to prevent terrorism activity.

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**prevention** the work of police, government agencies and businesses to identify and prevent the causes of crime and criminal behaviour

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### Alternatives to punishment

Alternatively, in some cases the victim of an offence and the offender may participate actively together in the resolution of matters arising from the crime. This approach, known as **confereencing**, focuses on the principles of **restorative justice**, and gives

the offender a chance to take responsibility for their actions and the impact they have had. These sessions are often difficult for both parties, and take place with the help of a facilitator. Restorative justice conferencing for adults is available primarily at the pre-sentencing stage.

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**confereencing** an alternative to traditional sentencing, involving the victim and offender coming together to enable the offender to accept responsibility and address the impacts of the offence

**restorative justice** a theory of criminal justice that emphasises the rehabilitation of offenders through reconciliation with victims and repairing the harm caused by criminal behaviour

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Where the offender is an Indigenous person, the conference convenor must consider asking an elder or respected member of the Indigenous community to attend the conference. There is also the use of specialist courts in Queensland, which provide

**Figure 4.2** Traditional methods of crime punishment are no longer the immediate go-to of the legal system. There are other avenues for law enforcement and the judiciary to take.

different approaches to sentencing Aboriginal and Torres Strait Islander offenders. These specialised sentencing courts aim to be inclusive and culturally fitting, and utilise the principles of customary law where appropriate.

This program is intended to divert defendants or offenders from the criminal justice system and result in less reoffending or recidivism. In Queensland, police initially may divert young offenders from the court system by referring them to conferencing, or the court could choose to divert or order a presentence conference or indefinite referral as a method of dealing with a charge.

When used in relation to juvenile offenders, the *Youth Justice Services Practice Manual* and *Youth Justice Conferencing Practice Manual*, produced in 2007, outline step-by-step processes for youth justice staff across both program areas, documenting best practice.

These manuals and cyclical reviews of the process aim to ensure the following principles of the *Youth Justice Act 1992* (Qld) continue to be reflected in youth justice practice:

- the community should be protected from offences
- young people should be held accountable and encouraged to accept responsibility for what they have done
- consideration should be given to a child's age, maturity and, where appropriate, cultural and religious beliefs and practices
- the youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.

*Source:* Queensland Government Youth Justice website.

## SIDEBAR

Visit the Queensland Government's Preventing Crime website and discuss the public prevention programs that are currently in place.

## SIDEBAR

Discuss the principles of the *Youth Justice Act 1992* (Qld) and how the use of conferencing contributes to just and equitable outcomes for criminal situations involving juvenile offenders.

During conferencing, offenders – whether adult or juvenile – are held accountable for their behaviour to the person(s) harmed by their actions. This process provides the victim(s) with an opportunity for healing and reintegration with their community, or with family (when a defendant or offender is a family member), as well as an opportunity to be involved in the criminal justice process.

In Queensland, there are no limitations regarding the types of offences that can be referred, so conferences can deal with a range of offences, such as shop stealing, break and enter, unlawful use of a motor vehicle, wilful damage, arson and assault. However, the program for adult offenders is targeted primarily at those with limited or no criminal history, and it is used predominantly in relation to less serious offences, such as property-related offences and minor assaults.

Mediation may be convened for more serious offences if it would benefit the complainant or victim.

Defendants must acknowledge responsibility for their actions in order to be able to participate. The program is based on restorative justice principles and uses a victim–offender conferencing model.

The **Australian Institute of Criminology (AIC)** reports that approximately 300 conferences are conducted in Queensland each year. This report (Report 127) also studied the impact of the conference experience on reoffending, among a sample of 25 young offenders who participated in conferences in Southeast Queensland between 2004 and 2006, the study found that reoffending was less likely for those young offenders who saw the conference as a positive experience after hearing the victim's story and realising the impact of their actions (Hayes, McGee & Cerruto 2011).

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**Australian Institute of Criminology (AIC)** Australia's pre-eminent national crime and criminal justice research agency

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**Table 4.1** The various restorative justice conferencing options that are currently available for both youth and adult offenders across Australia

	Youth conferencing	Adult conferencing	Victim–offender mediation	Circle sentencing
New South Wales	✓	✓	✓	✓
Victoria	✓			
Queensland	✓		✓	
South Australia	✓	✓	✓	
Western Australia	✓		✓	✓
Northern Territory	✓		✓	
Tasmania	✓		✓	
Australian Capital Territory	✓			

Source: Australian Institute of Criminology.

## REVIEW 4.1

- 1 Describe the concept of restorative justice. (C)
- 2 Explain why restorative justice helps to reduce the impact on the court system. (C)
- 3 Discuss why restorative justice has proven to be successful in preventing and deterring recidivism in Queensland. (A, E)

## Theories of punishment

Theories of punishment include the following:

- **Retribution.** The idea behind retribution, or just and appropriate punishment, is sometimes described as a form of payback against the offender – a version of ‘an eye for an eye’ belief.
- **Deterrence.** This theory is based on the premise that a penalty of appropriate severity sends a message that will deter the offender from reoffending and deter others from committing a crime. The efficacy of deterrence is often strongly debated.
- **Rehabilitation.** This theory is often criticised as being weak, but it is based on the idea that it is better to assist an offender with positive experiences (such as assistance with education, a job or counselling) that will lessen the ‘need’ to offend than to consign the offender to penalties that push them further into the criminal justice system, and thus into a long-term criminal identity. The theory recognises the role of family and other support networks. Sentences based on this theory are usually community based.
- **Denunciation.** The idea is that publicly condemning an offender’s action/s may work as a deterrent for the offender or for others in the community.

- **Community protection.** This theory focuses on implementing sentences that intend to protect the community from the offender and/or their action/s.

## Principles affecting punishment

Courts will often be required by the *Penalties and Sentences Act 1992* (Qld) to have regard to the character of the offender when considering the sentence. According to section 11 of the Act, when considering the character of the offender, the court must have regard to the number, seriousness, date, relevance and nature of any previous convictions of the offender, and to any significant contributions made to the community by the offender along with any other relevant factors.

The judge will also hear any relevant factors from both prosecution and defence that should be taken into account when determining appropriate sentencing. The principles that affect sentencing decisions are covered in Part 2 of the *Penalties and Sentences Act 1992* (Qld) and include the following elements:

- **Nature and gravity of the offence.** The offender’s intention/s when committing the offence and how they went about the act

**Figure 4.3** Counselling can be an important part of rehabilitation, especially for young offenders.



of offending are considered by the court in determining the nature and the gravity of the offence and the consequences of the offender's action. Actions that increase the nature and gravity of the offence may include the use of weapons, a breach of trust, alcohol and drug addiction.

- **Relevance of prior convictions.** Any previous convictions of the accused may now be made known. Until this point, it is not appropriate for the jury to be made aware of the defendant's past criminal history (known as 'antecedents'), as those crimes have already been dealt with and the jury may have their decision about the present case influenced unduly. However, previous convictions are relevant in sentencing. If the offender has a long criminal history, the judge may find it appropriate to sentence the offender to a harsher punishment than would be the case if the offender had no previous criminal convictions.
- **Mitigating/aggravating circumstances.** Aggravating factors are those factors that increase the seriousness of the offence or the offender's culpability – for example, the use of violence during an offence. Mitigating factors reduce the seriousness of the offence or the offender's

culpability – for example, an early guilty plea is often considered a mitigating factor during sentencing.

- **Victim impact statements.** The interests of victims must also be considered during sentencing. A victim will generally be able to present a statement at the sentencing of the offender. The sentencing court must take into account the harm or impact of the offender's action/s on the victim/s.
- **Current sentencing practices.** The courts must consider current sentencing practices, which assists in promoting consistency in sentencing. This means they take into account approaches currently adopted by sentencing judges when sentencing for particular offences. When sentencing, the sentencing practices considered are those current at the time of sentencing, not those that existed at the time an offence was committed. These practices are informed by statistics, reports and findings of key stakeholders. For example, in Queensland the Sentencing Advisory Council provides independent research and advice, seeks public views and promotes community understanding of sentencing matters.

## RESEARCH 4.1

Visit the Sentencing Council of Queensland website to see the report on sentencing practices regarding the homicide of children.

- 1 Analyse the penalties imposed on sentence for offences arising from the death of a child. Do the sentences for these offences adequately reflect the vulnerabilities of the victims? (A)
- 2 Explain the trends that occur in such sentencing – for example, the nature of the criminal culpability that forms the basis of a manslaughter charge, which may affect any sentence imposed. (A, C, E)



## 4.2 Decisions of judges

A jury can only decide whether an offender is guilty. A judge or magistrate decides the appropriate sentence. Judges need to provide reasons for the decision at which they arrive regarding an appropriate sentence. These decisions can sometimes be very long and wordy, and are included in the transcripts of cases and court proceedings.

There are two parts that make up the judge's decision. The main principle is referred to as the **ratio decidendi**, which means the reason for the decision. The **obiter dicta** of the case (meaning 'something said by the way') refers to all the other remarks of the judge in a case that are not necessarily critical to the decision, and not binding on other cases.

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**ratio decidendi** literally means 'reason for decision'; it is confined to the reasoning of the judge that is essential to the decision in the case and becomes the binding precedent

**obiter dicta** literally means 'something said by the way' – words used by a judge in a case that are not critical to the decision and therefore do not form part of a binding precedent

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As discussed in Chapter 1, common law or judge-made law is based on judges making decisions about issues that arise in court. In determining these issues, certain rules need to be followed.

These 'rules' form the doctrine of precedent. The doctrine of precedent is when a legal principle from one case is used to decide the same issue that might arise in a later case. This is an important principle used by our courts because it ensures that consistent decisions are made and that society sees that the law has been applied fairly.

- Lower courts are bound by the decisions of higher courts in the hierarchy. This is referred to as 'binding precedent'.
- Courts within Queensland's jurisdiction are not bound by decisions made in other state courts. However, all courts are bound by decisions made in the High Court of Australia. A Queensland court may take note of and be assisted by a decision from a court in another state.
- If a case is similar to an earlier case that has established a precedent, but the court has found there are some factors that make the two cases significantly different, then the court is not bound to follow the decision of the higher court. When this occurs, the case is said to have been 'distinguished'.
- Decisions from overseas courts are not binding on Australian courts. However, in some circumstances Australian courts have looked at overseas decisions to help make their decision. This is referred to as 'persuasive authority'.

**Figure 4.4** The decisions of judges can influence cases that follow them to ensure like cases are treated alike.



## 4.3 Sentencing options

While the general principles of sentencing of offenders are covered in the *Penalties and Sentences Act 1992* (Qld), the Criminal Code 1899 (Qld) prescribes the maximum sentences available for offences. The sentencing options reflect the nature and scope of the crime and the consideration of the principles that affect sentencing. The options available to judges when sentencing an offender include **custodial** and **non-custodial sentences** or **special orders**.

If an offender is convicted of committing more than one offence, they are sentenced separately for each offence. After each sentence is delivered, the court may order that the sentences be served at the same time, known as **concurrent sentencing**, or that each subsequent sentence is served after the first sentence has been served, known as **cumulative sentencing**.

Section 155 of the *Penalties and Sentences Act 1992* (Qld) states that unless otherwise ordered, sentences are served concurrently. This means that the length of time to be served would be equal to the length of the longest sentence imposed. However, cumulative sentences must be ordered when the offender has committed a serious violent offence, and that offence was committed while serving a term of imprisonment, on parole, on leave of absence from prison or at large after escaping from custody.

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**custodial sentence** punishment that involves serving time in a closed facility – for example, a prison or high-security psychiatric facility

**non-custodial sentence** punishment that does not include time in prison

**special order** punishment ordered by a specialist court like the Drug Court in place of time in prison

**concurrent sentencing** where more than one sentence can be served at the same time

**cumulative sentencing** where a subsequent sentence is served after the first sentence has been completed

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### Non-custodial sentences

#### *Release with no record of conviction*

The least serious punishment available to Queensland courts is to release the offender with no record of conviction. To do this, section 12 of the *Penalties and Sentences Act 1992* (Qld) instructs the court to have regard to a number of relevant factors, including:

- the offender's character, age, health and mental condition
- the nature of the offence
- the circumstances (if any) under which the offence was committed that make the offence less serious than what it would be if it had been committed under other circumstances
- the impact that recording a conviction will have on the offender's economic or social wellbeing and chances of finding employment.

#### *Fines*

Section 45 of the *Penalties and Sentences Act 1992* (Qld) states that an offender may be fined as punishment. The size of the fine will depend on the offence committed and the maximum penalty available according to relevant legislation – such as the *Drugs Misuse Act 1986* (Qld) for drug offences. When imposing a fine on the offender, according to section 48 of the Act, the court must consider the financial circumstances of the offender as well as the nature of the burden that payment of the fine will impose on the offender. The court can allow any fines imposed to be paid by the offender in instalments rather than in one lump sum to ease the financial burden.

#### *Fine option orders*

Section 55 of the *Penalties and Sentences Act 1992* (Qld) allows an offender who has been punished with a fine to make an application to the court for a fine option order. If the offender's application is successful, it means that they will have to perform



a prescribed amount of community service rather than paying the fine. Courts are instructed by section 58(1) to allow a fine option order to be granted when the offender cannot afford to pay the fine or where, if they did pay the fine, the offender and their family would suffer economic hardship. This order will only be granted if the court considers the offender a suitable candidate to perform community service.

### Good behaviour bonds

Good behaviour bonds in Queensland can be issued under sections 19, 24, 30, 31 and 32 of the *Penalties and Sentences Act 1992* (Qld), depending on the offence committed. A good behaviour bond allows the release of an offender into the community under strict conditions. These bonds are usually referred to as a recognisance, and are a promise that the offender will not break the law for a set period. These conditions may include a surety (guarantee or amount of money).

### Probation

Section 90 of the *Penalties and Sentences Act 1992* (Qld) states that the court may make a probation order against an offender. When an offender receives a probation order, they are released into the community under the supervision of an authorised officer for the period stated in the order. If the offender commits another offence while on probation, or breaches the order in some other way, they will be required to reappear in court and may be imprisoned. While on probation, the offender must report to the authorised officer assigned to them and take part in counselling and other assigned programs that are appropriate to their offence. A probation order can be an order between six months and three years (with or without recording a conviction) where the offender is allowed to remain in the community with monitoring and supervision.

### Community service orders

Section 100 of the *Penalties and Sentences Act 1992* (Qld) allows the court to make a community service order, which requires the offender to perform unpaid community service for a number of hours specified

by the court. As with good behaviour and probation orders, the offender must not commit another offence while serving the community service order or they may end up having to serve a term of imprisonment. Generally, offenders are given one year to perform the set number of community service hours. Some community service orders also require the offender to make restitution or pay compensation to their victim. An example of making restitution may be that the offender returns stolen property to the victim. Compensation may be money to pay for personal injury as a result of the offence committed.

## Custodial sentences

The court may sentence an offender to time in prison, referred to as a custodial sentencing order. Under Queensland legislation, however, sentencing an offender to imprisonment should only be imposed as a last resort. The length of time in prison depends on the offence, legislation, the particulars of the case and judicial discretion. The principles affecting custodial sentences are governed by parliament through legislation with regard to the following:

- **Maximum sentences.** A maximum sentence is the highest penalty that can be imposed on a person convicted of a particular offence. In Queensland, a life sentence is generally the highest maximum penalty available to a court, and precedents inform the courts that maximum penalties should be reserved for the worst category of offences.
- **Life sentences.** Various offences under Queensland legislation carry a life sentence as a maximum penalty. For example, adults convicted of murder or repeat child sex offences *must* be sentenced to life imprisonment or an indefinite sentence. The actual time spent in prison for a life sentence depends on any minimum non-parole period established by legislation, judicial discretion to increase the minimum non-parole period and subsequent decisions by the Queensland Parole Board. The *Corrective Services Act 2006* (Qld) establishes the following minimum non-parole periods:
  - 30 years for murder of more than one person or by an offender with a previous murder conviction



**Figure 4.6** Custodial sentences are used as a final resort.

- 25 years for murder of a police officer
  - 20 years for murder other than listed above or sentenced for a repeat serious child sex offence
  - 15 years for any other life sentence imposed for another offence, such as rape.
- **Indefinite sentences.** Section 163 of the *Penalties and Sentences Act 1992* (Qld) enables a court to impose an indefinite sentence instead of a fixed term for certain offences when an offender is considered a serious danger to the community. In these cases, the judge must specify the term of imprisonment that would have been imposed on the offender if they had not handed down an indefinite sentence.

## REVIEW 4.2

- 1 Explain the difference between life imprisonment and an indefinite sentence. (C)
- 2 Discuss the non-parole periods outlined in the *Corrective Services Act 2006* (Qld). Are these adequate for life imprisonment? Do they reflect a just and equitable sentence for the victims of such offences? (A, E)
- 3 Describe an offence where an indefinite sentence would be considered a more appropriate sentencing option than a life sentence. (C)
- 4 Discuss why Queensland legislation outlines the maximum penalties for sentencing offenders in Queensland and not minimum sentences. (A)

## Intensive correction orders

Section 111 of the *Penalties and Sentences Act 1992* (Qld) allows the court to order an intensive correction order if a conviction has been recorded. An intensive correction order is essentially a prison term that is served in the community. Intensive correction orders can require an offender to spend up to seven days in a community institution, such as a drug or alcohol detoxification centre. If an offender fails to comply with the terms of an intensive correction order, or commits another offence while serving the order, they can end up in prison.

## Imprisonment

Sections 9(2)(i) and (ii) of the *Penalties and Sentences Act 1992* (Qld) state that a 'sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable'. Section 10 of the Act requires the court to state and record reasons for the sentence of imprisonment in open court.

According to the Productivity Commission's *Report on Government Services* (2017), the current (at the time of writing) estimated cost of holding a prisoner in Queensland is \$294.55 per day.

This is a very expensive exercise for the Queensland Government. However, imprisonment is sometimes the only option for the court, especially for offences of a violent or sexual nature.

The main focus of placing an offender in a prison was once to punish them so harshly that they would never want to return to the prison system once they were released. This approach often made the offenders very angry individuals who were likely to commit more serious and violent crimes upon their release. The main focus of imprisonment in Queensland today is to rehabilitate offenders so that they can be released as useful, productive and positive members of society.

An offender who has served their non-parole period can apply to the Queensland Parole Board to be released from prison. Section 200 of the *Corrective Services Act 2006* (Qld) sets conditions for parole orders. An offender with a life sentence who is granted parole will remain on parole with conditions for the rest of their life.

### CHECK THIS OUT

Go to the Queensland Sentencing Advisory Council's Judge for Yourself website and listen to the cases. Make your own judgements about appropriate sentences.

**Figure 4.7** These new prisoners are being assessed to determine whether education and training programs might assist with changing their offending behaviour.



Table 4.2 Types of orders

Rehabilitation orders			
Intensive correction orders	Intensive drug rehabilitation order	Prison/probation order	Probation order
<ul style="list-style-type: none"> <li>Section 111 of the <i>Penalties and Sentences Act 1992</i> (Qld)</li> <li>A prison sentence that is served in the community rather than in prison</li> <li>Maximum time period is 12 months</li> <li>Requires counselling to be completed</li> <li>If an offender fails to comply with the terms of the order or commits another offence, they will return to jail to serve out their sentence</li> </ul>	<ul style="list-style-type: none"> <li><i>Drug Court Act 2000</i> (Qld)</li> <li>A suspended prison sentence</li> <li>Requires frequent appearances at the Drug Court, attendance at rehabilitation programs, and regular drug tests</li> </ul>	<ul style="list-style-type: none"> <li>Section 92(1)(b) of the <i>Penalties and Sentences Act 1992</i> (Qld)</li> <li>This type of order allows the offender who is to serve a jail sentence to serve the first part in jail up to a period of 12 months, and then finish the remaining time on a community probation order (up to three years)</li> </ul>	<ul style="list-style-type: none"> <li>Section 90 of the <i>Penalties and Sentences Act 1992</i> (Qld)</li> <li>The offender is released back into the community under supervision</li> <li>The order requires the offender to report regularly to community correctional officers</li> <li>Probation orders last from six months to three years</li> </ul>
Reparation orders			
Community service order		Fine option order	
<ul style="list-style-type: none"> <li>Section 100 of the <i>Penalties and Sentences Act 1992</i> (Qld)</li> <li>Requires the offender to perform work in the local community</li> <li>Orders can be made for between 40 and 240 hours</li> <li>Additional requirements, such as compensation and restitution, can also be attached</li> </ul>		<ul style="list-style-type: none"> <li>Section 55 of the <i>Penalties and Sentences Act 1992</i> (Qld) allows an offender who has been punished with a fine to make an application to the court for a fine option order</li> <li>The offender needs to prove that they are unable to pay the fine (such as because of suffering economic hardship): <i>Penalties and Sentences Act 1992</i> (Qld), s 58(1)</li> <li>If the offender's application is successful, it means they will have to perform a prescribed amount of community service rather than pay the fine</li> <li>The offender may pay off the fine while performing the community service order</li> </ul>	

## REVIEW 4.3

- 1 Create a table to describe the custodial and non-custodial options available to a court when sentencing an offender. Next to each option for punishment, include the section of the relevant Act that allows a court to impose such a sentence. (Cr, C, S)
- 2 Evaluate whether the character of the offender should have any bearing on the sentence imposed by the court. Why or why not? (E)
- 3 Explain the advantages and disadvantages of using suspended sentences. (C)

## 4.4 Sentencing of juvenile offenders

Alternatives to sentencing are built into the juvenile justice system. Many of these apply pre-sentencing and, in fact, pre-court. Initially, particularly for first offenders or minor offenders, the police may give a warning and not take the child to court. As discussed earlier, a more formal diversionary strategy is the Youth Justice Conferencing program, where guilt is acknowledged but court is avoided.

### Naming juvenile offenders

Juvenile offenders are generally protected from publicity and cannot be named in the media; this is to protect their reputation and to make it less likely that they will see themselves as criminal heroes or develop a ‘criminal identity’.



**Figure 4.8** Separate Queensland laws deal with the sentencing of juvenile offenders.

### Two out of three children in detention in Queensland are Indigenous

By Felicity Caldwell, 17 December 2017, 11.41 pm

Two out of three children in youth detention in Queensland are Indigenous, with the incarceration rates having a ‘devastating effect’ according to an advocate.

Children’s Court of Queensland president Judge Michael Shanahan said Aboriginal and Torres Strait Islander youth continued to be ‘grossly over-represented’ in the justice system.

Two out of three young people in detention in Queensland on an average day are Indigenous.

In 2016–17, young Indigenous people accounted for 48 per cent of young people who had a charge ‘disposed of’, a higher rate than in previous years.

A defendant is disposed of when all their charges are either proved, dismissed or withdrawn.

The over-representation of Indigenous youth was even more evident in detention, where two out of every three young people on an average day came from Aboriginal and Torres Strait Islander communities.

That percentage had increased from 67 per cent in 2012–13 to 71 per cent in 2016–17.

‘More needs to be done in relation to addressing the causes of offending by Indigenous young people if this trend is to be reversed,’ Judge Shanahan said.

Young Aboriginal and Torres Strait Islander people aged 10 to 17 were 29 times as likely as other young people to have been in youth detention last year.

Youth Affairs Network of Queensland director Siyavash Doostkhah said the government had done the right thing by moving Youth Justice into the Child Protection and Youth portfolio.

But Mr Doostkhah said he was disappointed at the increasing rate of Indigenous youth being incarcerated and called for a clear government strategy to deal with the crisis.

‘Bold steps must be taken to put an end to this discrimination; clearly Indigenous young people are being over-policed and not diverted from the criminal justice system,’ he said.

‘This discrimination has a devastating effect on these young people and in many cases pushes them towards lifelong criminalisation.’

Mr Doostkhah also called for the Queensland government to adopt recommendations from a Northern Territory royal commission which recommended the age of criminal responsibility to be raised from 10 to 12.

‘This will free much needed resources to be diverted to social and health services to deal with vulnerable children in an appropriate manner,’ he said.

Youth Minister Di Farmer said the Palaszczuk government was deeply concerned about the rates of Indigenous youths in detention and was actively addressing the issue.

‘We have established a Youth Justice First Nations Action Board, the first of its kind in Australia,’ she said.

‘The board is made up of youth justice staff from Aboriginal and Torres Strait Islander backgrounds, who will advise on ways to reduce over-representation of young people in the youth justice system.’

Ms Farmer said there was no current plans to raise the age of criminal responsibility in Queensland.

‘The Palaszczuk government is in the advanced stages of transitioning 17-year-olds into the youth justice system, and we note Judge Shanahan said “the government is to be congratulated on this long-overdue reform,”’ she said.

There was an 8.3 per cent decrease across all courts of juvenile defendants disposed of in 2016–17 compared with the previous year – down to 6479.

A defendant is disposed of when all their charges are either proved, dismissed or withdrawn.

The number of individual young people dealt with decreased from 3743 to 3654.

The average daily number of young people in youth detention was 179 in 2016–17, compared with 186 the previous year.

Last year, 80.9 per cent of all juvenile defendants were either found guilty or pleaded guilty.

Only 90 – or 1.7 per cent of – juveniles who were found guilty of offences were sentenced to detention.

Reprimands and other minor penalties were ordered for 35.4 per cent, 21 per cent received probation and 17.6 per cent a good behaviour order.

The 10-year trend did not show a dramatic increase in youth offending since 2007–08.

But a relatively small number of juvenile offenders were again responsible for a large number of offences – 10 per cent were responsible for 43 per cent of proven offences in 2016–17.

More than half of all defendants were aged 15 and 16, while males accounted for 72.8 per cent of all finalised defendant matters in 2016–17.

The majority of young people in detention were on remand – 79 per cent on an average day.

Of all court appearance in 2016–17 at which a detention order was made, 41 per cent resulted in the young person being released from court following sentencing, with no time remaining to serve in custody.

Judge Shanahan said, as recommended in the previous year’s report, more should be done to provide facilities other than detention centres for those on remand.

‘The government has recently announced the establishment of a number of “supervised bail houses” which will, hopefully, reduce the number of juveniles held on remand because of otherwise unsuitable residential alternatives,’ he said.

It took an average of 51 days to finalise cases in the Magistrates Court and 369 days in the Children’s Court.

## REVIEW 4.4

- 1 Discuss the trends of juvenile incarceration. Compare the percentage of Indigenous detention within the general population. (A)
- 2 Analyse the reasons presented in the article for the percentage of juvenile offenders in detention. (A)
- 3 Evaluate the effectiveness of juvenile detention for Indigenous juvenile offenders. (E)
- 4 Recommend alternatives to detention for juvenile offenders. Consider the implications for both Indigenous and non-Indigenous offenders. (A, E)

## RESEARCH 4.2

- 1 Research and discuss why the article raises the issue that cases in the Children’s Court take so much longer to finalise than those in the Magistrates Court. (S, A)
- 2 Discuss the legal issues and implications of such lengthy processing times. (A)
- 3 Propose recommendations for more efficient processing time in the Children’s Court. (E)

However, section 234 of the *Youth Justice Act 1992* (Qld) sets out circumstances in which a court may allow the publication of identifying information of juvenile offenders who have committed a very serious offence. The theories behind this provision – often referred to as ‘naming and shaming’ – are that it may act in the

interests of justice and be a deterrent to potential juvenile offenders, and that the public may be informed.

The *Youth Justice Act 1992* (Qld) allows an exception to the confidentiality principle and for certain offenders to be named. The relevant section of the Act is reproduced on this page.

#### *Youth Justice Act 1992, s 234*

##### 234 Court may allow publication of identifying information

- (1) This section applies if a court makes an order under section 176(3)(b).
- (2) The court may order that identifying information about the child may be published if the court considers it would be in the interests of justice to allow the publication, having regard to – (a) the need to protect the community; and (b) the safety or wellbeing of a person other than the child; and (c) the impact of publication on the child’s rehabilitation; and (d) any other relevant matter
- (3) The order does not authorise publication of identifying information before the end of any appeal period or, if the child gives notice of appeal or of application for leave to appeal, before any appeal proceeding has ended.
- (4) To remove any doubt, it is declared this section does not apply to a Children’s Court constituted by a Children’s Court magistrate.
- (5) In this section appeal period means the 1 calendar month from the date of conviction or sentence mentioned in the Criminal Code, section 671.

### RESEARCH 4.3

Look up the sentencing principles in section 150 of the *Youth Justice Act 1992* (Qld) and, assuming you are the magistrate and bearing these principles in mind, outline what sentence you would impose in the following cases, both of which are based on real cases. Explain your decision using the legal case study format, under the following headings: facts, issues, law, arguments, decision (the sentence) and reasons.

- 1 A 15-year-old male blocked traffic on a busy road for two and a half hours. During that time, he had a weapon and fired 30 shots. He was eventually detained by police and was charged with 11 offences, including attempted murder, unlawful possession of a firearm, unlawful discharge of a weapon, going armed in public and wilful damage. He appeared in the Children’s Court and was remanded in custody for a committal hearing. (Although the outcome is not known, for the purposes of this activity, assume that the prosecution did not proceed with the attempted murder charges, but that the offender pleaded guilty to all other charges. He had previous convictions for assault and stealing.)
- 2 A 12-year-old boy is in court for stealing milk money. He can hardly see over the desk. He is from a poor family and has no money of his own. When the charges are read out in court, he walks up to the magistrate and gives him a handful of money he has saved from his pocket money to pay back what he had stolen. (C, A, E)

### SIDEBAR

Research how many cases there have been in Queensland of child offenders being allowed to be named.



## 4.5 Sentencing trends

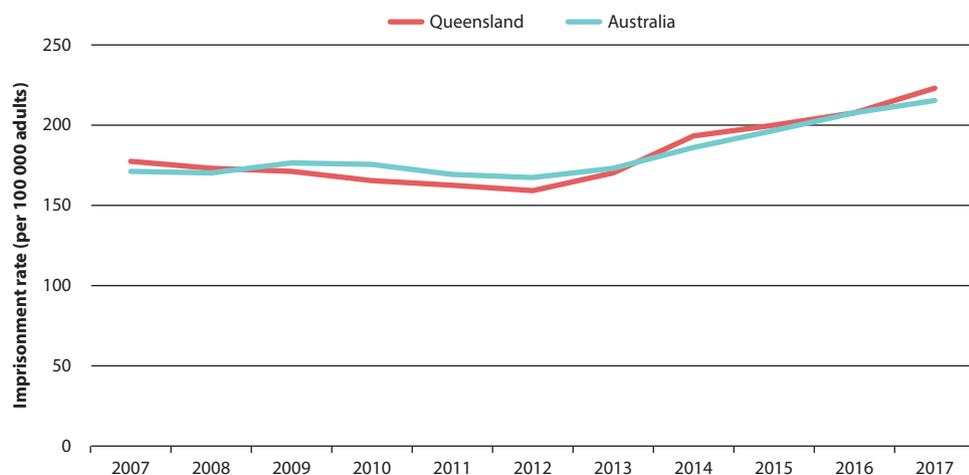
The opinion of the public, influences on the law and the media often offer a commentary on trends and issues regarding crime and sentencing. These opinions help to shape government responses through legislation and trends in sentencing.

In Queensland, there has been growing concern about the leniency of sentences, and while it is not necessary for judges to take this into consideration, it may have some impact on the determination of sentences.

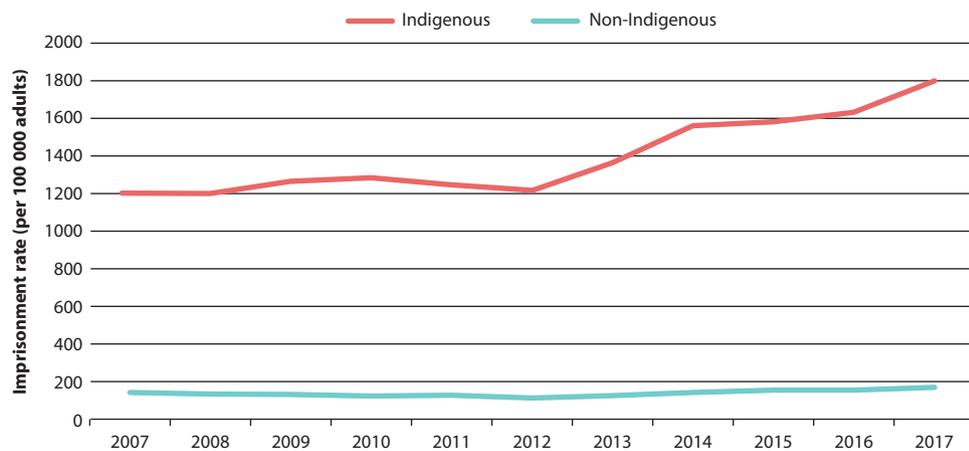


**Figure 4.9** The opinions of the public can influence sentencing trends of some particular crimes.

### Crude imprisonment rate



### Indigenous and non-Indigenous age<sup>1</sup> standardised imprisonment rates, Queensland



**Figure 4.10** Rates of offenders in Queensland in the 2017 Prison Census

<sup>1</sup>Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations.

# Outrage as courts go soft on Queensland criminals

Jessica Marszalek, *Courier-Mail*, 9 December 2016

Just one person has received the maximum prison term for a raft of the most serious crimes committed in the state in the past four years.

The *Courier-Mail* can reveal that out of 3302 people sentenced for rape, attempted rape, armed robbery, unarmed robbery and serious assault since 2012–13, only one person was handed the maximum sentence.

And nearly 650 got no jail time at all.

The statistics have angered victim advocates, who describe them as an ‘outrage’ and say they give credence to years of complaints from members of the public about lenient sentences handed down in Queensland courts.

Victim advocate Ross Thompson, who heads the Queensland Homicide Victims’ Support Group, said it was remarkable that only one person’s crime was deemed serious enough for the maximum sentence.



P/c: Jono Searle.

**Figure 4.11** Ross Thompson says sentencing in Queensland is ‘ridiculous’.

‘The judiciary has always been a problem ... and I think that just proves it,’ he said. ‘I think one out of 3000 to receive the maximum sentence is ridiculous.’

‘You can’t tell me that 0.001 per cent of these individuals were serious enough to have a maximum sentence. It’s an outrage.’

Matthew Stanley Foundation anti-violence campaigner Paul Stanley questioned why there was a maximum penalty if it wasn’t used.

In September, 2006, Mr Stanley’s 15-year-old son Matthew was killed after he was bashed outside a party. His teenage killer was jailed for five years.

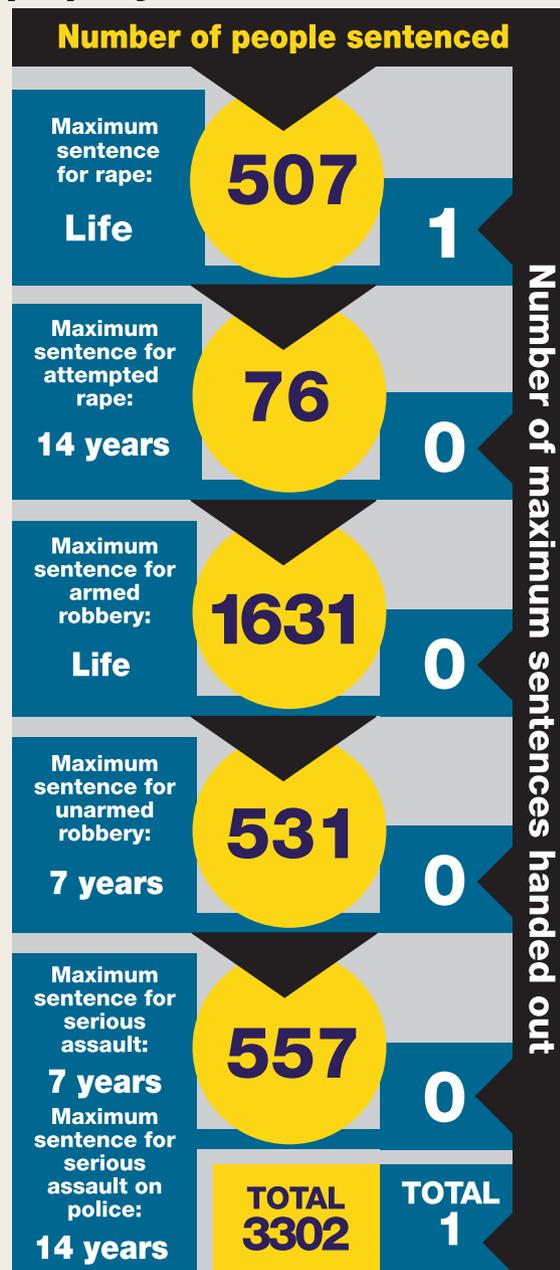
‘I’m led to believe one of the reasons they don’t lock people up for a long, long time is because they don’t have the room,’ Mr Stanley said.

‘It just seems that having these shorter terms is a bit of a cop-out, especially when you have people who are repeatedly offending and they just get a little slap on the wrist.’

‘It’s pretty appalling really.’

‘It makes the victims of this world just feel the only people suffering are the victims themselves and their families.’

## Is Queensland failing to properly sentence its criminals?



Figures from 2012–2013 to 2015–2016

**Figure 4.12** Are prison terms too lenient?



Pic: Darren England.

**Figure 4.13** Paul Stanley's son Matthew died after being bashed outside a party.

However, he said more work needed to be done towards prevention of crime. Gold Coast Centre Against Sexual Violence director Di Macleod said she wasn't surprised at the figures.

Ms Macleod said that in the majority of rape cases she had been involved with in 40 years, the offenders had received one to five years' jail – far less than the allowable life sentence for the horrific crime.

'I think the community expects that someone who has committed a heinous crime would do the time and that doesn't always happen as, clearly, these statistics show,' she said.

'I don't think there's enough weight given to the available maximum sentence and too much weight given to current sentencing practice.' She said the way an offender's good character was taken into account in sentencing was wrong.

'You've just had someone who has been found guilty of rape and then you have all these people saying what a great bloke he is,' she said.

'Well he might be a great bloke in your workplace or to have a beer with on a Friday night, but the person

has just been found guilty of raping someone so he can't be of good character.'

Ms Macleod called for an overhaul of court processes for sexual crimes, much like what was happening for family violence. The figures follow the Palaszczuk Government's reinstatement of its Sentencing Advisory Council, which was promoted as a bridge between community expectations and the judiciary.

But chairman James Morton said it would be his job to explain how judges formulate sentences, not tell the judiciary that criminals deserve harsher terms.

'A lot of community members don't understand what goes into a sentencing process and they are very delicate issues,' he said.

'I think people expect harsh outcomes and some people in the community seem to be not persuaded, or not buoyed, by the end result.

'It's more about getting the community to understand how the wheels of justice turn,' he said.

A spokeswoman for Attorney-General Yvette D'Ath said that the council's other roles included gathering community views, advising government and giving input on guideline judgments to the Court of Appeal if requested.

She said Ms D'Ath recognised the strong community interest in sentencing, which was 'a complex and difficult process'.

'Under our separation of powers, sentencing is undertaken by an independent judiciary based upon the matters presented to the court,' she said.

## REVIEW 4.5

- 1 Explain why maximum penalties are not being imposed in Queensland, (C)
- 2 Explain the viewpoint of three stakeholders presented in the article. Do all stakeholders share the same view on the effectiveness of sentencing in Queensland? Why or why not? (A)
- 3 Discuss the arguments raised for more severe sentencing. What implications would this have in Queensland? Consider the implications of enacting more severe sentences. (A, E)

## RESEARCH 4.4

- 1 Research sentencing in other jurisdictions and compare the statistics of maximum sentences to those in Queensland. (S, A)
- 2 Discuss your findings and evaluate the effectiveness of the Queensland criminal justice system in comparison to other jurisdictions. (A)
- 3 Create a letter to the editor to outline your findings and opinions on the just and equitable outcomes in relation to maximum sentences. (Cr, E)

## 4.6 Criminal reoffending

When an offender engages in repeated criminal activity, they are considered to be a repeat offender. Their behaviour, termed **recidivism**, refers to their repeated criminal activity. The rate of recidivism is measured by the number of offenders who are returned to prison.

The AIC reports that about 60 per cent of those in custody in Australia have been imprisoned before. Recidivism can be influenced by many factors, including poor education and employment histories, mental illness and bad

physical health, as well as drug and alcohol misuse.

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**recidivism** the repeat offending of a convicted offender

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The current trends in Queensland show a continued gradual increase in the proportion of repeat adult offenders; therefore the issues of criminal justice and current theories of punishment need to be evaluated with the aim of reducing the rate of reoffending in Queensland.

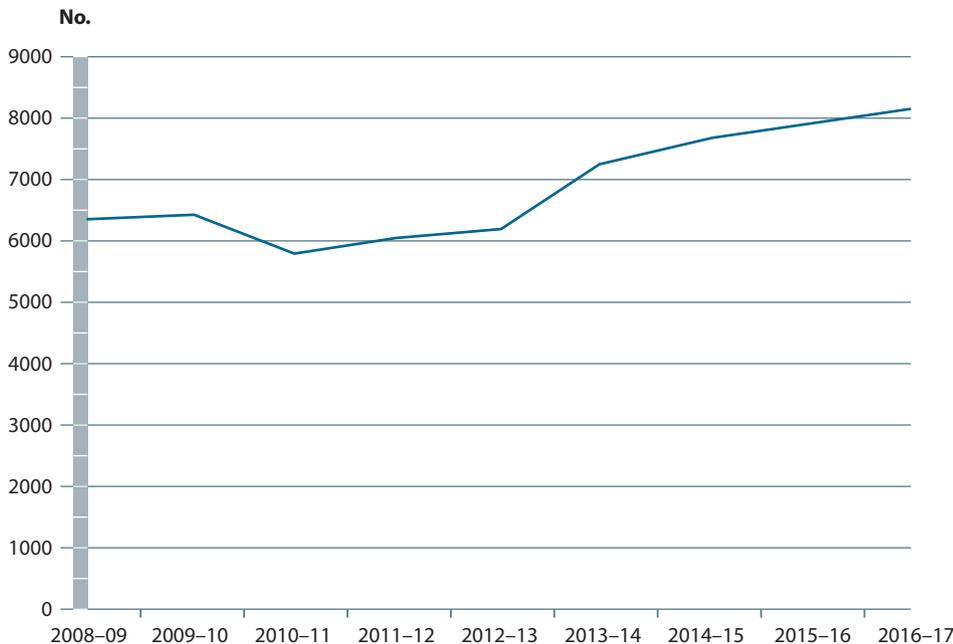


Figure 4.14 Recorded crime – offenders, Prisoners in Queensland 2017

### RESEARCH 4.5

Research and discuss the current trends of sentencing and repeat offending in Queensland. Look at the types of offences most common among reoffenders and the types of punishment and sentencing implemented for first-time offenders.

- 1 Explain which offences have the highest rate of recidivism in Queensland. (C)
- 2 Explain the types of punishment and sentencing usually implemented for first-time offenders of the offences explained in the previous question. (C)
- 3 Discuss whether there is a link between the punishment and sentencing decisions and the rates of recidivism. (A)
- 4 Suggest ways to reduce the rate of reoffending. (E)
- 5 Discuss the implications of the suggestions made in the previous question. (E)

# Chapter review

## Chapter summary

- According to section 9 of the *Penalties and Sentences Act 1992* (Qld), the reasons for imposing penalties in Queensland can include punishment of the offender, rehabilitation of the offender, deterrence for the rest of the community, denunciation for particularly unacceptable crimes and protection of the community.
- Penalties available in Queensland include custodial and non-custodial sentences.
- Sentences in Queensland can be served concurrently or cumulatively.
- Recidivism is the rate at which offenders are returned to prison for repeat offences.
- Alternative methods of sentencing include conferencing and restorative justice.

## Short-response questions

- 1 Provide explanations to show your comprehension of the following legal concepts, principles and processes:
  - a the purpose of punishment and sentencing in Queensland
  - b the difference between custodial and non-custodial sentences
  - c the reasons for using concurrent or cumulative sentencing
  - d the relevance of restorative justice in sentencing and punishment
  - e the importance of customary law when sentencing Indigenous offenders
  - f how sentencing trends influence the decisions of judges in sentencing. (C)
- 2 Explain why imprisonment is not an option that is favoured by the courts for many criminal offences. (C)
- 3 Explain why the *obiter dicta* and *ratio decidendi* are recorded and relevant during sentencing. (C)
- 4 Create a table to analyse the advantages and disadvantages of imprisonment as a punishment. (A, Cr)
- 5 Discuss whether you think it is fair that the penalty imposed on an offender convicted of dangerous driving is influenced by the outcome of the accident in which they were involved (such as whether someone was killed). Why or why not? (A, E)
- 6 Explain why the antecedents of an offender are withheld from the court until the accused is being sentenced. Do you think this is fair? Why or why not? (C, E)
- 7 Explain why reoffending rates differ for different groups in the community. What is the responsibility of the courts in addressing these issues? (C, A)

## Response-to-stimulus question

Read each of the following scenarios of actual sentences given in Queensland Courts and then answer the questions that follow.

### *Jail fail: How we're being let down*

**Offender:** Werner Leo Holzinger

**Crime:** Rape

**Sentence:** Life sentence

A rare life sentence for child rape was handed to Holzinger last year in Brisbane District Court. He was convicted of three charges of rape, which earned him a mandatory life sentence as a repeat child sex offender. The sentence was a result of tough laws brought in by the state government in 2012. Holzinger raped a child between the ages of four and eight. He had a previous 1990s conviction for child sex offences.

**Offender:** Ashraf Kamal Makary

**Crime:** Rape

**Sentence:** 18 years, 6 months (maximum: life)

Serial rapist Makary came close to receiving a life sentence earlier this year for the rapes of two Korean women and the attempted rape of a third. He was sentenced to jail for 18.5 years, and will be eligible for parole after serving 15 years.

**Offender:** 'Buxom Bandit' Tonee Walker

**Crime:** Armed robbery

**Sentence:** Four years (maximum: life)

Walker got a four-year jail term in 2013 for the provocative armed robbery of a service station on the Gold Coast a year earlier. CCTV footage played in the Southport District Court showed Walker, clad in a low-cut top, terrorising the attendant with a flick knife and laughing as she ran out with \$300. Walker pleaded guilty and will be eligible for release on parole after 16 months.

**Offender:** Erick Oseguedo

**Crime:** Rape

**Sentence:** 12 months, suspended (maximum: life)

Erick Oseguedo walked free in September after he pleaded guilty to raping a 14-year-old girl and received a 12-month wholly suspended sentence. The 21-year-old had no previous criminal history when he was sentenced in the Brisbane District Court in September over the April 2013 attack on a bus, which involved a digital rape. The court was told he had an honest, but unreasonable, belief that the girl was consenting.

**Offender:** Douglas Memefata Asiata

**Crime:** Serious assault on police

**Sentence:** 18-month probation order (maximum: 14 years)

Asiata's 18-month probation order for coward-punching a cop during a drunken brawl sparked outrage among police. The 25-year-old pleaded guilty in June to affray and serious assault over the incident, which had happened the previous year.

### Questions

Analyse the nature and scope of each of the crimes committed and the sentence given. Consider the principles of sentencing and factors affecting sentencing.

- 1 Evaluate the effectiveness of the sentence given and make a decision on whether each sentence offers just and equitable outcomes for stakeholders. (A, E)
- 2 Propose alternative sentences you would implement if you were the sentencing judge for each of the cases. Explain the reasons for your decisions. (C, E)

## Extended-response questions

- 1 Prepare a letter to the editor of the *Courier-Mail* to communicate your opinion about the effectiveness of current sentencing and punishment practices in Queensland. (C, E, Cr)
- 2 Write an extended response of 400–600 words to respond to the argument that more offenders should be sent to prison for punishment. State whether or not you agree with the statement and give clear reasons for your opinion, ensuring that you consider the views of the offenders, victims, taxpayers, police and prison officers. (A, E, Cr)



Figure 4.15 Wolston Correctional Centre, Queensland

# Unit review

## Short-response questions

- 1 Explain why rules and laws are necessary in society. (C)
- 2 Explain the sources of law in the criminal legal system. (C)
- 3 Describe the criminal jurisdiction of each of the courts in the Queensland legal system. (C)
- 4 Explain what is meant by the concept of a 'just and equitable' outcome. (C)
- 5 Explain why alleged criminal behaviour has consequences in terms of trial processes, punishment and sentences. (C)
- 6 Describe the types of appeals that a convicted person can seek. (C)

## Extended-response questions

- 1 Create one-paragraph responses to evaluate the following criminal law issues:
  - a To what extent does the criminal law system balance the rights of victims, offenders and society?
  - b To what extent does criminal law in Queensland reflect the moral and ethical standards of society?
  - c To what extent does the concept of discretion affect just and equitable outcomes in criminal law? (A, E, Cr)
- 2 Write a 400–600 word essay response evaluating alternative methods to sentencing and the concept of restorative justice. (E, Cr)

## Response-to-stimulus question

Listen to 'Speaking with: David Field About Unusual Crimes that Have Changed the Law' on *The Conversation* website. Create a short essay response using examples to explain:

- why laws change over time
- the influences of law
- the impact of criminal laws that haven't changed in accordance with society's views. (C, S, E, Cr)

# Balance of probabilities

## Focus: How does the Australian legal system respond to current issues in civil law in order to protect the rights and obligations of all stakeholders?

Legal Studies focuses on the interaction between society and the discipline of law. Students study the legal system and how it regulates activities, and aims to protect the rights of individuals while balancing these with obligations and responsibilities. An understanding of legal processes and concepts enables citizens to be better informed and able to constructively question and contribute to the improvement of laws and legal processes. This is important as the law is dynamic and evolving, based on values, customs and norms that are challenged by technology, society and global influences.

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## UNIT OBJECTIVES

**By the end of this unit, students should be able to:**

- comprehend legal concepts, principles and processes of the Australian and Queensland civil justice systems, and in legal interactions that are planned (contract) and unplanned (the concept of negligence)
- analyse legal issues involving the Australian and/or Queensland civil justice systems
- evaluate legal situations relevant to the Australian and/or Queensland civil justice systems
- create responses that communicate meaning to suit the intended purpose.

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## CHAPTERS/TOPICS IN THIS UNIT

- Chapter 5: Civil law foundations
- Chapter 6: Contractual obligations 1
- Chapter 7: Contractual obligations 2
- Chapter 8: Negligence and duty of care

## CHAPTER 5

# Civil law foundations

### CHAPTER OBJECTIVES

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

- describe the different methods of resolving civil disputes, through judicial determination and alternative methods in courts, tribunals and independent bodies
- compare civil and criminal actions, including pre-trial procedures and court processes
- distinguish the role of civil courts from the criminal system, including key roles and persons, civil trial procedure, and burden of proof and standard of proof
- explain:
  - rights that are protected by civil law, and link these to obligations imposed by laws
  - sources of civil law and the relationship between common law and statute
  - the doctrine of precedent
  - the civil jurisdiction and the court hierarchy for civil matters
  - the objectives of the *Civil Dispute Resolution Act 2011* (Cth) and discuss its role with respect to Part 6 of the *Civil Proceedings Act 2011* (Qld)
  - the types of alternative dispute-resolution processes, for example, facilitative process i.e. mediation, advisory process i.e. conciliation and determinative process i.e. arbitration
  - the relationship between courts and alternative dispute resolution processes
- analyse and evaluate equitable access to the civil justice system and how personal, social or economic circumstances or background can present legal barriers for groups within society
- explain and compare:
  - forms of alternative dispute resolution
  - the role of dispute resolution processes and structures, including tribunals and ombudsmen, and restorative justice – for example, the financial ombudsman and telecommunications ombudsman
- select legal information and analyse legal issues concerning a civil issue taken to an independent authority, e.g. the Queensland Civil and Administrative Tribunal (QCAT), Administrative Appeals Tribunal (AAT) or Ombudsman by:
  - determining the nature and scope of the issue
  - examining viewpoints and consequences
- evaluate the above legal situations by
  - presenting alternatives to make a decision or propose recommendations
  - justifying using legal criteria and discussing implication

- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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### Key concepts/legal terminology you will encounter in this chapter

- alternative dispute resolution
- balance of probabilities
- burden of proof
- class action
- counter-claim
- damages
- defendant
- injunction
- interlocutory steps
- interrogatories
- ombudsman
- plaintiff
- precedent
- tribunal

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Acts Interpretation Act 1954* (Qld)
- Australian Consumer Law (ACL)
- *Civil Dispute Resolution Act 2011* (Cth)
- *Civil Liability Act 2003* (Qld)
- *Civil Proceedings Act 2011* (Qld)
- *Competition and Consumer Act 2010* (Cth) (CCA)
- Criminal Code 1899 (Qld)
- *Dispute Resolution Centres Act 1990* (Qld)
- *Limitation of Actions Act 1974* (Qld) (LAA)
- *Ombudsman Act 2001* (Qld)
- *Public Interest Disclosure Act 2010* (Qld)
- Queensland Civil and Administrative Tribunal Rules 2009 (Qld)
- Uniform Civil Procedure Rules 1999 (Qld)

### SIGNIFICANT CASES

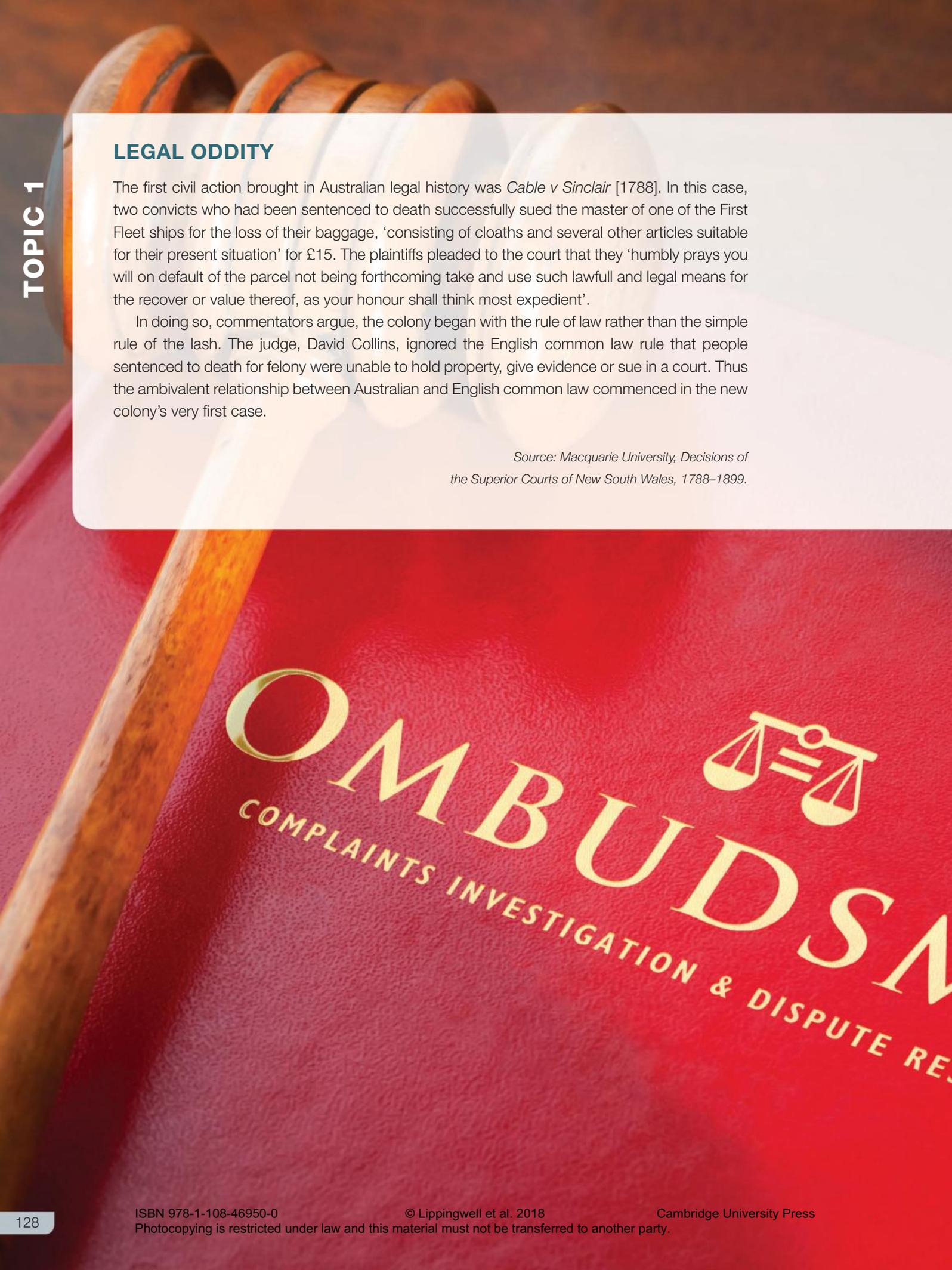
- *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
- *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

## LEGAL ODDITY

The first civil action brought in Australian legal history was *Cable v Sinclair* [1788]. In this case, two convicts who had been sentenced to death successfully sued the master of one of the First Fleet ships for the loss of their baggage, 'consisting of cloaths and several other articles suitable for their present situation' for £15. The plaintiffs pleaded to the court that they 'humbly prays you will on default of the parcel not being forthcoming take and use such lawfull and legal means for the recover or value thereof, as your honour shall think most expedient'.

In doing so, commentators argue, the colony began with the rule of law rather than the simple rule of the lash. The judge, David Collins, ignored the English common law rule that people sentenced to death for felony were unable to hold property, give evidence or sue in a court. Thus the ambivalent relationship between Australian and English common law commenced in the new colony's very first case.

*Source: Macquarie University, Decisions of the Superior Courts of New South Wales, 1788–1899.*



OMBUDSMAN  
COMPLAINTS INVESTIGATION & DISPUTE RESOLUTION

## 5.1 Differences between civil law and criminal law

The two main areas of law in Queensland are criminal law and civil law.

Criminal law attempts to balance the rights of individuals to freedom from interference with person or property and society's need for order. Criminal laws are codified in the Criminal Code 1899 (Qld), while other Acts of Parliament deal with more specific types of criminal offences.

Civil law attempts to protect the rights and responsibilities of individuals in their behaviour and

interactions with others. If this freedom is infringed or breached by another party (another individual, organisation or government agency), the aggrieved person has the right to request compensation for the suffering, injury and/or financial loss incurred. A breach of civil law does not normally constitute a criminal offence.

Criminal law and civil law have a number of differences that it is important to recognise, as depicted in Table 5.1.

**Table 5.1** Civil law definitions

	Civil wrong (private)	Community wrong (criminal)
Objective/remedy	Compensatory damages	Punishment of offender
Nature	<i>Citizen(s) v Citizen(s)</i>	<i>R v Citizen(s)</i>
Name of court action	Suit	Trial
Source of law	Common law, but increasing trend of statute law	Criminal Code 1899 (Qld)
Initiated by	Victim of the tort	The Crown
Parties involved	Plaintiff/claimant/appellant	Prosecution/defendant/accused
Standard of proof	Balance of probabilities	Beyond reasonable doubt
Aim	Protect the individual	Protect the public
Burden of proof (generally)	Plaintiff	Prosecution

### REVIEW 5.1

State whether each scenario below is criminal law or civil law. (C)

- An individual has his trade secret stolen (intellectual property) by a competitor
- A middle-aged man is charged with drink driving
- A man burns his lips drinking coffee at a fast-food takeaway restaurant
- An employee has been unfairly dismissed without notice
- A claim for insurance has been summarily rejected without a just reason
- A woman sets fire to a friend's house
- A patient subsequently dies after a mistake during a surgical procedure
- A prominent businessman has his reputation attacked in a newspaper report
- A subcontractor is left with nothing when a construction company goes bankrupt
- Thousands of bank customers bring a class action against a bank due to unfair interest rates on credit cards
- A person is accused of taking part in a break and enter robbery
- A second-hand car salesman has told a customer lies about the car in order to sell the vehicle
- An investor feels that he has lost a large amount of money due to the advice of a financial adviser
- An elderly man steals some apples from the local fruit market

In a civil case, the person who brings the matter to the courts is referred to as the plaintiff or applicant. The plaintiff's name appears first in the case title, such as *Zapata* in *Zapata v Gunce*. The person against whom an action is taken is called the defendant or respondent, and their name appears second in the case title (Gunce in the example provided). In an appeal case, the person who is appealing the original decision is referred to as the appellant, and the person who the appeal is against is referred to as the respondent. In our example, if Gunce is appealing the original decision, then the case would be represented as *Gunce v Zapata*.

In a criminal case, the Crown (the prosecution) brings a case against a person. For example, with *R v Green*, Green would be referred to as the accused or defendant. The 'R' stands for the Latin terms of Regina (Queen) or Rex (King). *R v Green* therefore means 'The Crown against Green'.

In a civil case, the standard of proof is on the balance of probabilities. A fact is proved to be true on the balance of probabilities if its existence is more probable than not. In comparison, criminal cases work on the standard of beyond reasonable doubt. In *R v Standley* (1996), the court directed the jury as follows, 'If you think there is a reasonable possibility that the accused is not guilty, then he is entitled to be found not guilty.'

The burden of proof referred to by courts defines who has the obligation of having to prove or disprove a disputed fact. In civil matters, this is the plaintiff/applicant; in the criminal system, it is the prosecution.

A research report compiled by the Law and Justice Foundation of NSW in 2012, *Legal Australia-Wide Survey: Legal Need in Australia*, studied the most common legal matters reported across Australia. The results of this survey are indicated in Figure 5.1.

It is obvious from this survey that civil law, not criminal law, is of most concern to the majority of Australians. People are worried that their personal rights and freedoms are being encroached upon by other parties.

There are several situations that can give rise to both criminal and civil proceedings. For example, when a person is assaulted, they will normally go to the police, who after investigating the matter may commence criminal proceedings against the accused. If found guilty, the accused will be sentenced and given an appropriate penalty. But while justice has been served, the victim of the assault has not been adequately compensated for their loss and is not in the same position that they were in before the assault was committed – for example, where there are severe physical injuries. In this case, the victim can commence a civil action seeking compensation for damages and losses suffered.

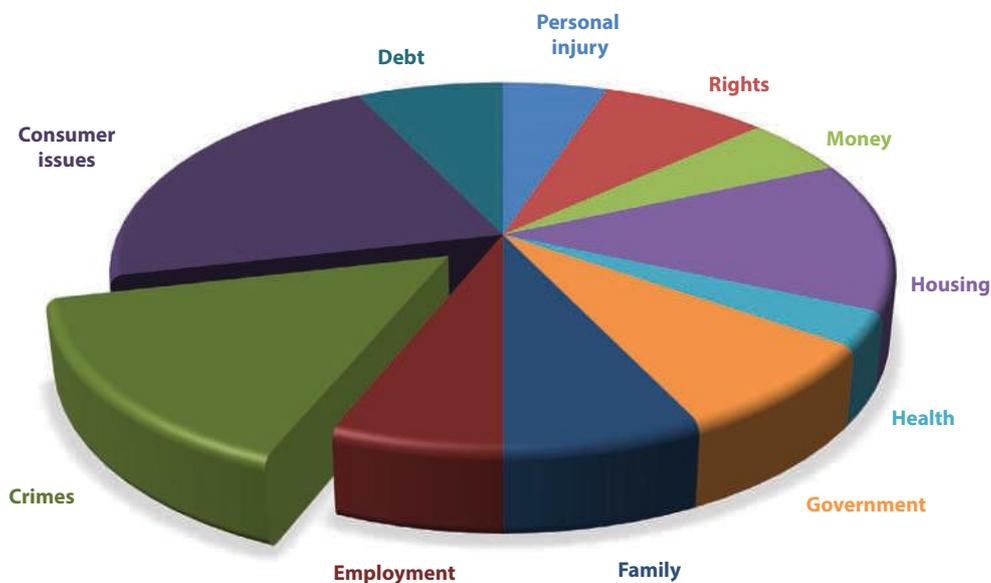


Figure 5.1 Prevalence of legal problems

## 5.2 Sources of civil law

The government and the courts have a duty to protect members of society with laws that are clear, concise, understandable and able to be enforced. These rights of an individual are protected by civil law principles and obligations imposed by laws. Laws are based on both common law and **statute law**.

---

**statute law** the most common form of law within our society. It is a law passed by parliament that can cover any topic and it takes precedence over common law.

---

### Common law

Common law is developed and constantly changing, based on judges' decisions handed down over hundreds of years. As a result, common law is sometimes referred to as judge-made law. Quite often, judges refer to the common law to find a case of a similar nature to the one over which they are presiding to help them make their current decision. For example, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 looked at the legal principle of acceptance

of a contract. The decision in that case then formed the basis upon which all other similar cases dealing with contracts were adjudicated and decided across Australia. You will find more information on this case in both Chapters 6 and 10.

The knowledge and the associated reasons for decisions, or *ratio decidendi*, of these precedent cases are regularly researched by the courts, the judges and the general legal fraternity, and can be studied and researched on legal databases. However, at times courts are faced with the problem that there are no similar cases to assist them in their decision-making. This is particularly true when considering the constantly changing nature of civil law, due to the increased use of e-commerce and internet sales – for example, the electronic signing of contracts.

### Statute law

Laws are also made by parliament, and these are referred to as statute law. Parliaments have the power to make new laws, replace existing common law, amend existing laws and even repeal existing

**Figure 5.2** Common law is sometimes referred to as judge-made law.



statute law – for example, the *Fair Trading Act 1989* (Qld).

Statute law is the main source of law change in Australia. However, as is the case with common law, parliaments struggle to keep up with changes in society due to the time lag in passing new legislation.

Statute law is written in clear and concise documents with the aim of the legislation stated within the document. For example, the aim of the *Competition and Consumer Act 2010* (Cth) is to enhance the welfare of Australians through the promotion of competition and fair trading, and by providing consumer protection.

## Relationship between common law and statute law

There is an increasing trend of seeing statute law replacing common law across all states and territories. However, this does not mean that the role of the courts is diminishing. The courts still have a major role to

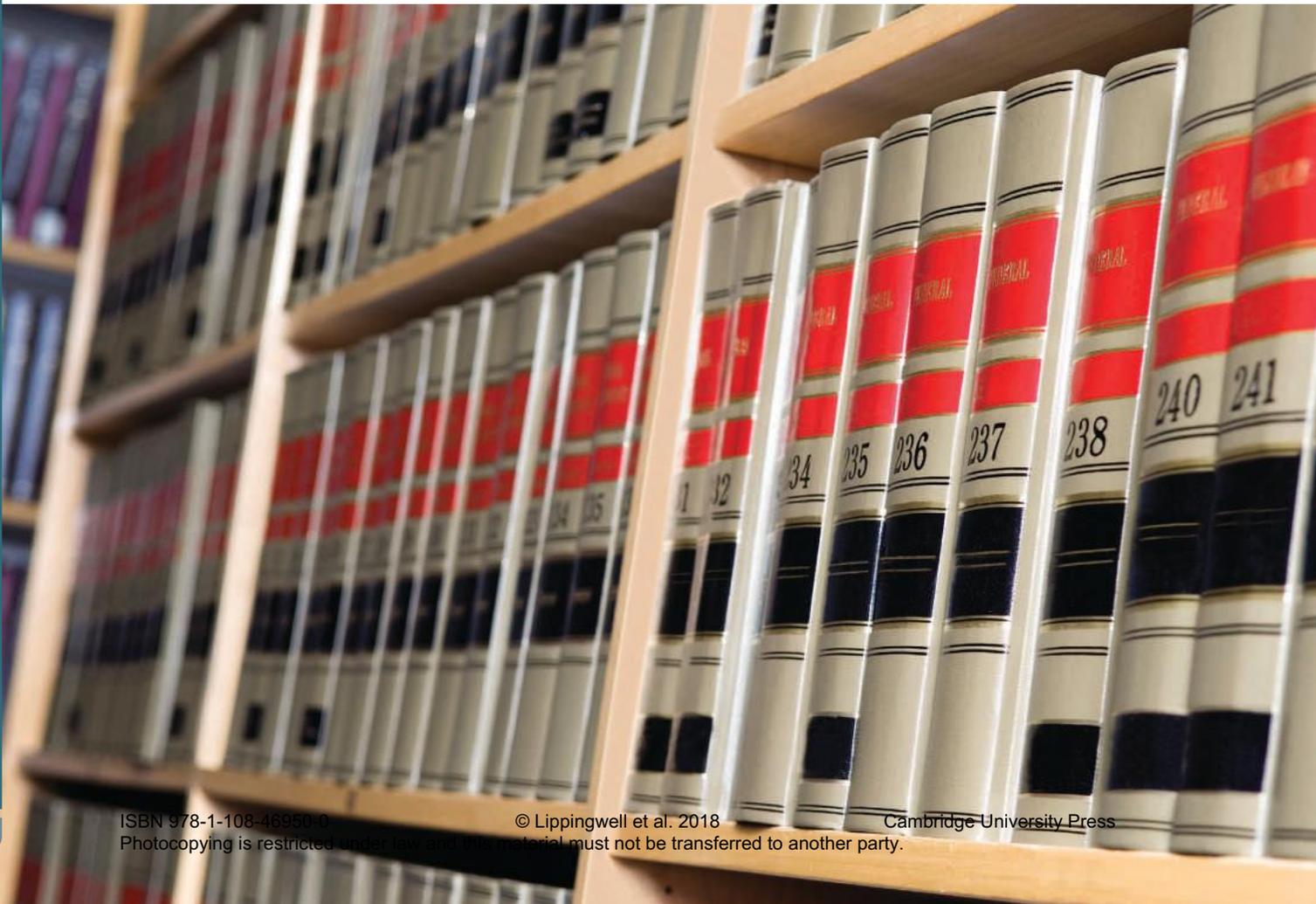
### RESEARCH 5.1

Research the following Acts and devise a table that:

- 1 states the main purpose/aim of each Act (C)
- 2 lists and briefly explains four of the most important sections included in each Act.
  - *Civil Proceedings Act 2011* (Qld)
  - *Succession Act 1981* (Qld)
  - *Civil Liability Act 2003* (Qld)
  - *Fair Trading Act 1989* (Qld) (C, S, Cr)

play as they are required to interpret the legislation made by the parliament. Because interpretation can be a difficult task, given the intricacies of the case being heard, the *Acts Interpretation Act 1954* (Qld) was legislated to outline a set of rules or procedures for judges to follow.

**Figure 5.3** There is an increasing trend of seeing statute law replacing common law across all states and territories.



## Types of civil law

Civil law is divided into two main areas: **tort** law and contract law.

Contract law differs from tort law in that there is a clear relationship between the parties that is legally binding. An example of a contract is where you offer a person a certain sum of money for their land, they accept the offer and you pay them the prescribed amount. It would be a legally binding agreement and if either party to the contract breached their promise, there would be legal consequences under contract law.

With tort law, there is no such established, clear relationship between the parties, so the courts generally have to decide on individual roles and responsibilities in any relationship. Certain relationships, such as teacher–student and doctor–patient, are easier for the courts to interpret due to

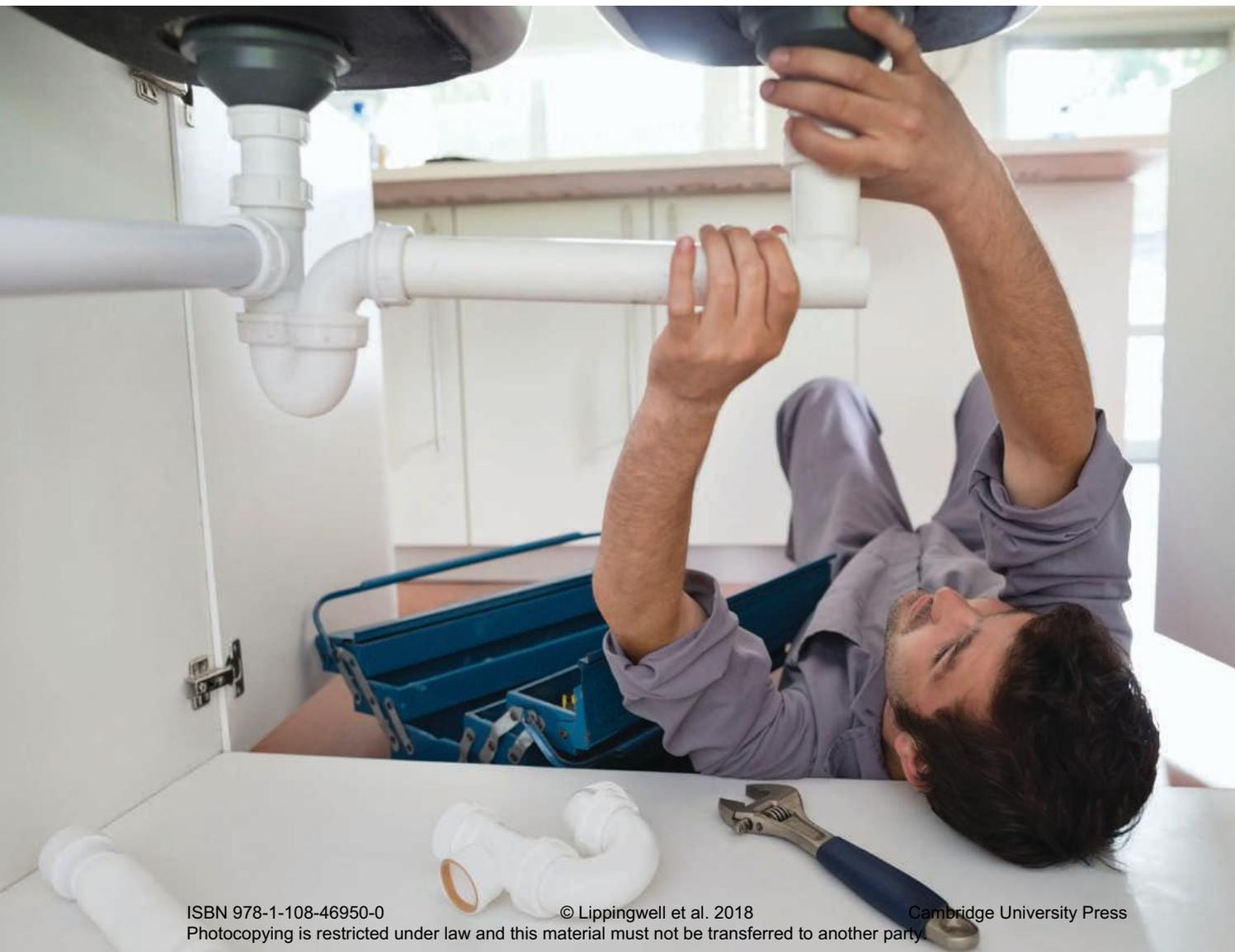
principles established from previous court decisions. Other areas of tort law include trespass to person, trespass to land, private nuisance, defamation and negligence.

### RESEARCH 5.2

Research the differences between the torts of public nuisance and private nuisance. Make a list of examples of nuisance situations that occur in daily life. (S, C)

**tort** a legal wrong that is not a criminal offence

**Figure 5.4** A potential civil dispute may occur if a job is not carried out with due care.



## 5.3 Resolving the civil dispute

Due to the very nature and behaviour of humans, there will be disputes in the area of civil law. It could be that the contractor hired to fix the leaking tap did not do their job properly or it could be a much more serious and costly matter involving millions of dollars.

Regardless of whether you are the victim or the perpetrator, the process of finding a resolution to a civil dispute can be both lengthy and expensive. One option is to take the matter to court, but this is a long and costly process. If you can settle the matter without starting proceedings, you will save yourself a lot of time, energy and possibly money.

There are a number of steps you can take to resolve a civil dispute.

### Discussion

The first step is to have a discussion with the person or business with which you are having a dispute. It is important to attempt direct conciliation amicably before proceeding to further steps.

### Letter of demand

A letter of demand is a formal request from one party to another asking them to accept your claim that money is owed to you. The letter must include such essentials as the date, the amount owed, why the debt is owed and a demand for payment within a certain time (e.g. 14 days), based on the date of the letter. Copies of relevant documents such as invoices and contracts should also be included. The letter would further advise the debtor (one presumed to owe the money) that if the letter is ignored, legal proceedings will be commenced. The creditor must be careful not to harass the person or make it look as though it is a legal document, as this may inflame the dispute.

If a consumer wishes to discuss faulty goods or problems with a service, a letter of complaint can be sent to the other party asking for the matter to be rectified.

A recipient of a letter of demand from a creditor (one requesting payment) or debt-collection agency should not ignore the letter. Any ambiguities should be cleared up in a reply letter and legal advice sought if the claim is false. If the claims are valid, the debtor can either pay the full amount or attempt to negotiate settlement terms to resolve the matter.

### REVIEW 5.2

- 1 Work in pairs to carry out the following tasks.
  - a Student A writes a letter of demand to student B for \$1000 that they owe you for cementing their driveway.
  - b Student B responds in writing to student A stating that they are unwilling to pay the balance of debt due to small cracks in one section and because there was rubbish left behind by the workers. (C, Cr)
- 2 These letters can then be analysed by other pairs in the class, or the class as a whole, to consider the appropriateness of their wording. (A)
- 3 Discuss whether the letters will help or hinder the progress of an amicable settlement. (A)

### Alternative dispute resolution

The court system is not the only way of settling a dispute between two parties. In some cases, an alternative method such as **alternative dispute resolution** (ADR) may be a better option.

**alternative dispute resolution** settling a dispute without having to go through a more formal process such as a court hearing; methods include mediation, conciliation, arbitration, case appraisal and settlement

While ADR has been used in Australia for many years, it has not been used extensively in all jurisdictions. The relationship between courts and ADR is now a dynamic one. ADR works hand in hand with litigation for resolving conflicts in a timely, cost-efficient and equitable manner.

ADR is commonly used today by government agencies, tribunals and courts. There are a number of different ADR methods that can be used to solve a legal problem, including those shown in Table 5.2.

ADR can be either court or tribunal based (the Queensland Civil and Administrative Tribunal regularly refers cases for mediation) or individuals may voluntarily opt to conduct their own mediation services. The Queensland Government has free Dispute Resolution Centres spread across the state,

which can assist in mediation services. In areas with no resolution centre, staff at local Magistrates Courts act as mediators.

Assistance is also available from Legal Aid, the Legal Services Commission, the Caxton Street Legal Service in Brisbane, the Queensland Law Society and other community-based services. Parties can also pay a fee to a qualified lawyer who will act as a mediator and assist in the drafting of an agreement if consensus is reached.

Mediation is normally carried out on a voluntary basis and the mediator attempts to get the parties to reach an agreement based upon their individual needs. The mediator is not always legally trained and avoids giving advice on the strengths or weakness of each party's case. The agreement, if reached, is not enforceable by the courts.

**Table 5.2** A variety of ADR methods

Type of ADR	Description
Assisted negotiation	<ul style="list-style-type: none"> <li>You and your solicitor meet with the other parties and their solicitors to discuss the issues.</li> </ul>
Mediation	<ul style="list-style-type: none"> <li>This form of ADR is the most commonly used and involves the disputing parties coming together with an independent and neutral third person (known as the mediator) to work towards a mutually agreeable solution.</li> <li>The mediator encourages the parties to come up with potential solutions.</li> <li>Unless the court/tribunal orders you to try mediation, the process is usually voluntary.</li> <li>The parties own the outcome.</li> <li>An informal atmosphere encourages cooperation.</li> <li>It is inappropriate for one party to show total dominance as the resolution may not be just.</li> <li>Mediation is not legally binding.</li> </ul>
Conciliation	<ul style="list-style-type: none"> <li>Similar to mediation but the conciliator (mediator) also often offers advice.</li> <li>May assist in drafting the settlement agreement.</li> <li>Usually the conciliator is an expert on the subject of the dispute, but may not be a trained lawyer.</li> <li>Conciliators are more active in finding a solution and help you and the other parties to look at the strengths and weaknesses of your arguments.</li> <li>You retain control of the outcome.</li> <li>Unless the courts/tribunals order you to try conciliation, the process is usually voluntary.</li> <li>The conciliator can influence the process by suggesting possible resolutions.</li> </ul>
Case appraisal	<ul style="list-style-type: none"> <li>An independent person (the case appraiser) assesses the merits of the case and makes a decision.</li> <li>The decision is put in writing.</li> <li>The case appraiser files a certificate with the Registrar with a copy of the decision.</li> <li>If either party disagrees with the case appraiser's decision, they may elect to go to trial in the usual way.</li> </ul>
Arbitration	<ul style="list-style-type: none"> <li>The parties to the dispute choose an independent person (the arbitrator) to act as a judge. The arbitrator makes a decision after listening to both sides and comes up with a decision that can be final and legally binding on both parties.</li> <li>By listening to the parties, but still imposing a legally binding decision, arbitration can achieve a mutually acceptable decision that courts often cannot.</li> <li>The decision is not 'owned by the parties', as the arbitrator makes the decision.</li> </ul>



**Figure 5.5** Mediation is usually a voluntary process and can occur in a number of different settings, such as in divorce proceedings, custody agreements and office disagreements.

## Legislation and ADR

Both the Commonwealth and a number of state governments have introduced laws relating to the use of ADR in court procedures.

The *Civil Dispute Resolution Act 2011* (Cth) applies to the Federal Court and Federal Circuit Court, and aims 'to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted'. For the purposes of this Act, 'genuine steps' constitute a sincere attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute. Examples of such steps are notifying the other person of the issues that are in dispute and offering to discuss them or initiate an ADR process.

Not long after the *Civil Dispute Resolution Act 2011* (Cth) was legislated, the *Civil Proceedings Act 2011* (Qld) was introduced to replace the *Supreme Court Act 1995* (Qld). The focus of the Act was

to make new provisions for civil proceedings in the Supreme Court, District Court and Magistrates Court. Part 6 of the Act covers the ADR processes in Queensland courts and contains some of the following aims:

- to provide an opportunity for litigants to participate in ADR processes to achieve negotiated settlements and satisfactory resolution of disputes
- to improve access to justice for litigants and to reduce cost and delay
- to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible.

If both parties in a dispute consent to a mediation process, they can apply for a consent order through the Queensland court system. The meeting could be a mediation process or even a case appraisal.



**Figure 5.6** A mediator can help solve disputes between conflicting parties.

In Queensland, all state courts can order parties to attend mediation or a case appraisal process under the Uniform Civil Procedure Rules 1999 (Qld). Even if parties do not agree to attend ADR, the court may order the parties by filing a referring order to make the attendance compulsory.

## Advantages and limitations of ADR

There are a number of advantages of using ADR methods to resolve disputes, including the following:

- Litigation is expensive and ADR is seen as a cheaper alternative.
- ADR can reach outcomes outside of the court's traditional court approach or jurisdiction.
- Court proceedings are often a lengthy process.
- As parties work through issues, there is the chance of an amicable solution in a win-win situation.

There are also the following limitations:

- the relative commitment of the parties to the resolution process

- the degree to which the parties can define the issues and relevance of matters in the dispute
- a possible power imbalance between the parties, due to factors such as personality and education
- the skills and qualifications of the mediator
- the degree of intervention by the mediator
- the legal status of any agreement reached.

## Restorative justice programs

Restorative justice programs are another means of dispute and conflict resolution. Restorative justice is used mainly in juvenile criminal matters, but can also be used in a number of civil issues, such as neighbourhood and workplace disputes.

Restorative justice is a practice designed to make the wrongdoer take responsibility for their actions by directly participating in a discussion with the people affected by their actions. Victims have the opportunity to discuss how the offending issue will be resolved while the perpetrators contemplate the harm their actions have caused.



**Figure 5.7** A university is an example of one of the common agencies referred to by the ombudsman.

## The ombudsman

### *Queensland Ombudsman*

An ombudsman is a role that exists at both the federal and state levels of government. Members of the public can direct complaints against government departmental decisions to the ombudsman, ensuring that the accountability of these departments is maintained.

The *Ombudsman Act 2001* (Qld) continues to ensure that Queensland's public agencies act appropriately within their authority, as set out by the laws that control them. The Queensland Ombudsman also acts as the agency for the *Public Interest Disclosure Act 2010* (Qld), which aims to facilitate the disclosure of information about public wrongdoing and protect those who make the disclosures.

The ombudsman often investigates complaints about the actions and decisions of state government departments, state schools, TAFE colleges and local

councils. The complaints and investigation service is free and independent. Some people refer to the role of the ombudsman as a 'watchdog' for government departments.

However, to improve its watchdog capabilities, the Queensland Ombudsman website allows the public to make complaints seeking a resolution to disputes in a number of other areas apart from government departments. If the complaint is not directly related to a government department, the ombudsman will provide links to address a variety of other issues, including toll charges, and gas and electricity bills.

Common agencies referred to by the ombudsman include:

- a Queensland government organisation (including state schools and TAFE)
- a Queensland local council
- a Queensland public university
- a Commonwealth Government department (e.g. Centrelink, Child Support Agency, ATO)

- a consumer matter – something you bought or rented from a business
- banking, finance, insurance or superannuation
- telephone or internet (e.g. NBN)
- a private education or training provider
- private health care, private hospital, aged care or health insurance.

There is a direct link between the ombudsman and the Queensland Civil and Administrative Tribunal (QCAT), which can refer complaints to each other for referrals and action.

An example of the Queensland Ombudsman looking into a local council can be found in the Cairns Regional Council Councillor Conflicts of Interest Report of October 2017. This report outlines the findings of an investigation into whether Cairns Regional Council and its councillors failed to comply with relevant legislative and policy requirements in relation to the disclosure and the management of councillors' conflicts of interest. It identified a lack of understanding of a number of requirements regarding the disclosure of conflicts of interest and a sense of complacency by some councillors regarding matters that were their own personal responsibility.

### **Financial Ombudsman Service**

There are a number of ombudsman services in Australia, covering different industries and activities. If a consumer has a complaint about banking, finance, insurance or superannuation, they can find fair and independent information from the Financial Ombudsman Service (FOS) Australia. This is a not-for-profit, non-government organisation helping consumers to resolve complaints, and is free of charge. The expenses are covered by members of the FOS, including banks, debt collection agencies and insurance companies. The services of the FOS are available for both consumers and financial service providers who are members.

Upon contacting the FOS, consumers have 45 days to resolve the dispute (21 days for situations of financial difficulty) with the provider under the internal dispute resolution (IDR) system.

If the matter is not resolved with the provider in this period, the FOS will commence an investigation. If successful in negotiation, the

consumers are offered a variety of remedies that include a release of security over the debt; the debt being waived or varied; the interest rate changed; or, in cases of financial hardship, the terms of the contract varied.

The FOS will not, however, be involved in matters that have already been dealt with by a court, tribunal, arbitrator or another external dispute-resolution scheme, and will only deal with matters involving members of the FOS.

### **Tribunals**

Recently, there has been a move towards specialist tribunals as another alternative to the court system. Tribunals are less formal and expensive than a court. In many tribunals, there is no legal representation and, even where this is permitted, it is not common. Tribunals are not restricted by the rules of evidence.

Tribunals can be either administrative or civil. Administrative tribunals are concerned with executive actions of government, while civil tribunals deal with resolving private disputes.

Persons who preside over and make decisions in tribunals may be legally trained or may be persons with other specialist expertise relating to the area of operation of the particular tribunal. They are responsible for ensuring that principles such as natural justice are applied – that persons appearing before the tribunal are not



disadvantaged and are given the opportunity of presenting their requests.

Examples of tribunals include:

- the Queensland Civil and Administrative Tribunal (QCAT)
- the Residential Tenancies Authority (RTA)
- the Mental Health Review Tribunal
- the Superannuation Complaints Tribunal
- the Australian Financial Securities Authority.

## Taking the matter to court

Adjudicative processes include litigation or arbitration, in which a judge, jury or arbitrator determines the outcome. These are formally known as the judicial process. Judicial processes are a last resort for businesses when all other dispute-resolution attempts have failed.

If such avenues fail, the only option left will be action in the courts. Starting proceedings in court to claim damages is a serious step. There may be significant cost consequences if the claim is not successful. There is also the issue of the defendant's finances – that is, whether they have enough to pay the plaintiff.

Judicial determination is when parties, and their legal representation, present arguments to an impartial third party – a judge or magistrate – who then imposes a legally binding decision. The process is significantly more formal than mediation, conciliation, and even arbitration.

Possible problems with taking a civil matter to court include the following:

- It can be very expensive.
- The outcome is difficult to predict.
- It is time-consuming.
- It can cause emotional and physical suffering.
- It is confrontational by its very nature.

**Figure 5.8** The RTA tribunal adjudicates on disputes relating to tenancy.



## 5.4 Civil trial procedures

### Role of courts

Courts have two very important roles to play in civil trial procedures. First, courts are a place to resolve disputes. Disputes can range from an argument between neighbours to seeking compensation from someone who has not fulfilled their responsibilities in a contract. The role of the courts is also to determine whether or not someone has broken the law and to uphold the laws that apply to society.

Many courts have both a civil jurisdiction (the authority to hear a civil case) and a criminal jurisdiction (the authority to hear a criminal case). Courts have been given their power by way of an Act of Parliament. For example, the Magistrates Court in Queensland was established by the *Magistrates Court Act 1921* (Qld) and the *Justices Act 1886* (Qld).

Courts have a very important role in creating law. As mentioned earlier, common law is based on judges making decisions about issues that arise in court. In determining these issues, certain rules need to be followed. These 'rules' form the doctrine of precedent.

The doctrine of precedent is when a legal principle from one case is used to decide the same issue that might arise in a later case. This is an important principle used by our courts because it ensures that consistent decisions are made.

### Court personnel

The court personnel used in civil and criminal courts are largely the same, in that there are judges, magistrates, lawyers, judges' associates, bailiffs, court reporters, Legal Aid officers and the clerk of the court. There are, however, no prosecutors as in a criminal trial.

In a civil matter, it is usually the role of judges and magistrates to hear evidence and to decide the outcome of the matter. They decide on questions of law and questions of fact (in the absence of a jury). It is their responsibility to decide whether sufficient evidence exists to meet the required standard of proof – the balance of probabilities.

The role of lawyers in Queensland civil cases finds them increasingly taking on a role as cooperative problem-solvers rather than acting in an adversarial role. Lawyers now have a duty to inform their clients about possible alternatives to litigation (rule 12.3 of Solicitor's Rules 1997 (Qld)).

In civil trials, a jury consists of four jurors. The jury's role is to listen to the evidence and unanimously decide on which version of events is more likely to be true. Jury trials are not permitted in personal injury proceedings, such as regarding motor vehicle accidents. There is an ever-growing call from law reformists to see the jury abolished in all civil suits as they consider the role obsolete.

### Types of courts and jurisdiction

A number of Australian and Queensland courts have jurisdiction to hear both civil and criminal cases (see Table 5.3 over the page).

### Queensland Civil and Administrative Tribunal

In 2009, QCAT came into existence, amalgamating 19 different tribunals – the main one being the Small Claims Tribunal. This tribunal is an inexpensive and easily accessible method of resolving a dispute that involves amounts of money up to \$25 000. Disputes range across a number of different areas – for example:

- money owed for the removal of minor overhanging branches
- debt disputes – for example, an unpaid invoice or money lent and not repaid)
- rent arrears, other than arrears of rent for a residential tenancy
- work done and/or goods supplied with the cost having been agreed beforehand
- wages owing
- dishonoured cheques
- some anti-discrimination matters.

**Table 5.3** Types of courts and jurisdiction

<b>High Court of Australia</b>	
The High Court of Australia has two main roles as the highest decision-making court in the country. It hears cases on constitutional matters and operates as an appellate court. It also has the authority to hear appeals not only from the federal court system, but also from state and territory courts. To be granted leave to appeal, there needs to be a significant error in either fact or law. The issue also needs to be of public importance and enhance the interests of justice.	
<b>The Supreme Court</b>	
The Supreme Court is the highest court within the Queensland court hierarchy. It is made up of two parts: the appellate jurisdiction (the Court of Appeal) and the trial jurisdiction.	
<b>The Court of Appeal Appellate jurisdiction</b>	
Consists of either three or five judges who hear appeals from the District or Supreme Courts. The Court of Appeal can hear appeals from or review decisions of a lower court from both criminal and civil cases.	
<b>Supreme Court Original jurisdiction</b>	
<b>Criminal jurisdiction</b>	<b>Civil jurisdiction</b>
The Supreme Court has the jurisdiction to hear indictable offences, which usually carry penalties greater than 14 years' imprisonment.	Civil cases in the Supreme Court relate to matters involving disputes of more than \$750 000. There is no maximum limit.
Matters are heard before a judge and jury.	
<b>District Court Original and appellate jurisdiction</b>	
The District Court has the authority to hear appeal cases from the Magistrates Court.	
<b>Criminal jurisdiction</b>	<b>Civil jurisdiction</b>
The District Court has the jurisdiction to hear criminal matters that carry a maximum penalty of less than 14 years' imprisonment.	Civil cases in the District Court relate to matters involving disputes over amounts between \$150 000 and \$750 000.
Criminal matters are heard before a judge, or a judge and a jury.	Civil cases are normally heard by a judge, but there is the option of a jury trial.
<b>Magistrates Court Original jurisdiction</b>	
The Magistrates Court is the lowest court in the state court hierarchy. It has both criminal and civil jurisdictions.	
<b>Criminal jurisdiction</b>	<b>Civil jurisdiction</b>
The Magistrates Court has the authority to hear and determine minor criminal offences, and conduct committal hearings.	The Magistrates Court hears civil disputes involving amounts up to \$150 000. If the claim requires a judgment that is not based on a monetary amount (e.g. an injunction), it must be made in the District or Supreme Courts.
Usually a single magistrate presides over the court. There is no jury in a Magistrates Court.	
<b>Specialist Children's Court</b>	
The Children's Court of Queensland is presided over by a judge at District Court level and a magistrate at the lower level. It can hear both criminal and civil matters (e.g. child protection).	
<b>Queensland Civil and Administrative Tribunal (QCAT)</b>	
Minor civil disputes (\$0–\$25 000) will go to QCAT. QCAT is not a court, but is still part of Queensland's legal system.	

**Table 5.4** Lodgement and clearance rates of matters before QCAT

	Lodgements			Clearance rates		
	2014–15	2015–16	Difference	2014–15	2015–16	Difference
<b>Human rights</b>						
Anti-discrimination	108	104	–4%	101%	95%	–6%
Children	297	348	17%	94%	94%	0%
Guardianship	10 402	11 623	12%	101%	95%	–6%
<b>Civil</b>						
Building	265	307	16%	116%	90%	–26%
Retail shop leases	126	150	19%	107%	91%	–16%
Minor civil disputes	16 030	16 222	1%	113%	109%	–4%
Other civil disputes	88	78	–11%	115%	103%	–12%
Neighbourhood disputes	208	203	–2%	106%	100%	–6%
<b>Administrative and disciplinary</b>						
General administrative review	316	314	–1%	126%	94%	–32%
Occupational regulation	240	216	–10%	118%	104%	–14%

People who attend QCAT are generally self-represented and do not have a lawyer acting on their behalf. QCAT is not bound by the same rules of evidence and procedure as the Queensland courts. The disputes are normally resolved through a hearing and they may have to go through some form of mediation with a member of QCAT in the first instance.

Tribunal orders are legally binding and enforceable. If QCAT finds in favour of an applicant, the respondent is legally obliged to meet the debt. If these obligations are not met, a magistrate may issue an enforcement warrant to possess the debtor's property.

One of the main areas of civil disputes lodged with QCAT involves disputes over property rentals. The flowchart in Figure 5.9, over the page, illustrates the dispute-resolution process and the role of QCAT and the Residential Tenancy Authority.

## Court processes and procedures

Once the decision to take the matter to court is finalised, there are a number of procedural

requirements and pre-court proceedings that have to be met in accordance with the Uniform Civil Procedure Rules 1999 (Qld). There is no need to have a legal representation in any of Queensland's courts.

The jurisdiction (or legal institution) in which the case is heard will depend on the type of civil matter and the amount of damages claimed.

In order for the plaintiff to take part in a civil proceeding, the person must have standing. In general terms, this means that the person needs to show that their rights or interests have been or will be affected by the dispute in question. This is normally an easy criterion to meet.

The plaintiff must also prove that they have been legally wronged by providing factual proof that the claim can be heard in court. Without a justifiable case being put forward, the matter may not progress. This procedure stops unjustifiable cases clogging up the courts.

The plaintiff also needs to make sure their claim has been made within the time limitation outlined in the *Limitation of Actions Act 1974* (Qld) (LAA). Time limitations are imposed to ensure that evidence is not lost, parties recall all facts and the dispute is settled as quickly as possible.

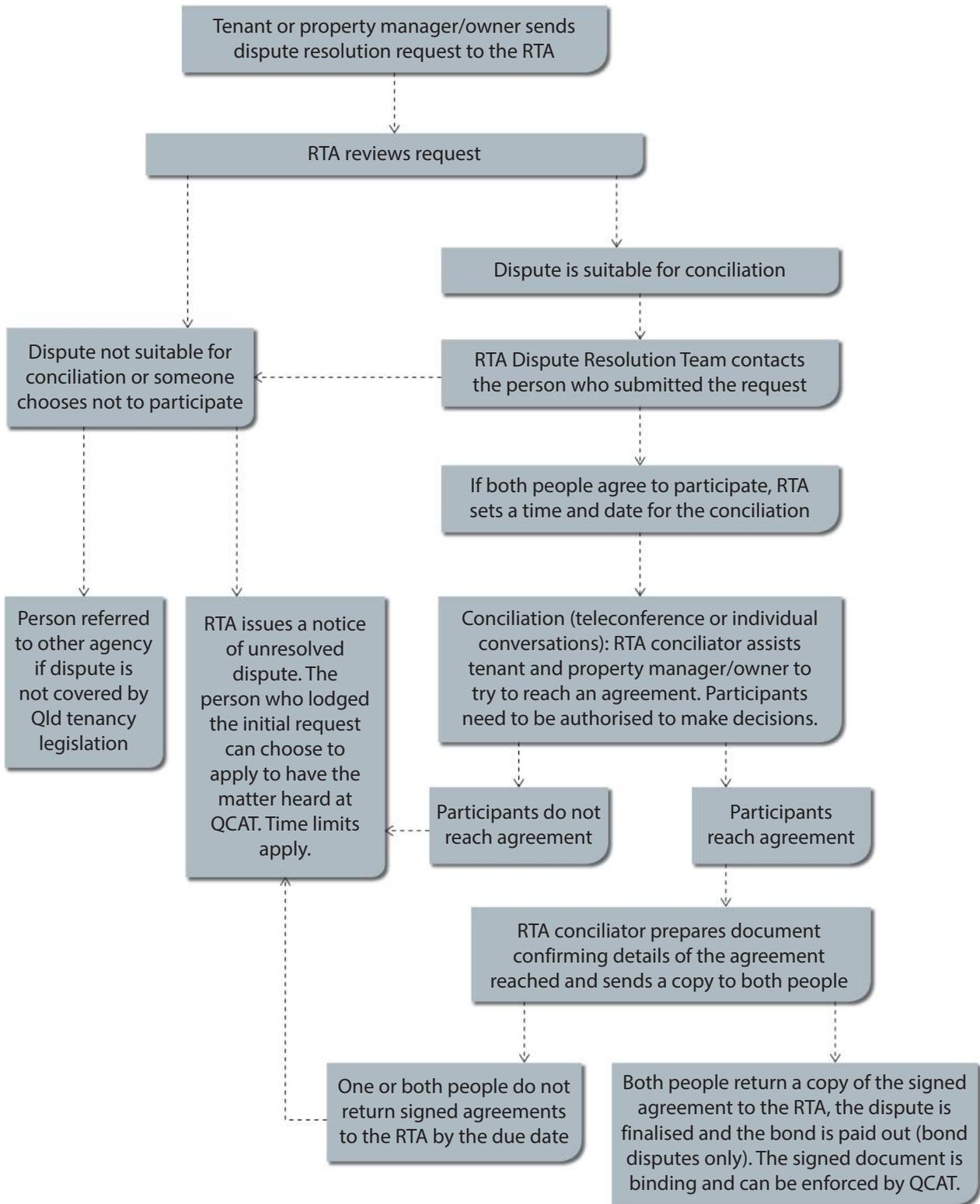


Figure 5.9 Steps for dispute resolution involving the RTA and QCAT

If the time limits are not prescribed in the LAA, other specific legislation may need to be researched.

Examples of time limitations are:

- six years from the date the action arose for a contract issue without personal injury (such as economic loss) (LAA, s 10)
- 21 days from the date of termination of employment for unfair dismissal (*Industrial Relations Act 1999* (Qld), s 74(2)(a))
- one year from the date of the publication of the matter complained of for defamation action (LAA, s 10).

The flowchart in Figure 5.10 illustrates the proceedings used to commence a civil action

If the claim is ignored by the defendant/s within the specified time, the plaintiff may request that the court enter a **default judgment** against the defendant, including that the defendant pay the plaintiff's legal costs plus interest and expenses.

After the commencing proceedings, **pleadings** take place. Pleadings are simply the documents where the plaintiff and defendant set out what they hope to prove at the trial. These include the statement of claim, the notice of defence and the plaintiff's reply to the defence.

The next phase in the court process is to take **interlocutory steps**, where a disclosure of documents and **interrogatories** (requests for further information) are made. Disclosure is the procedure that ensures each party is aware of and can access all documentary evidence. The plaintiff may now request that the court set the matter for a hearing. At any time before the trial, corrections to documents can be made (with court approval) and parties can make settlement offers in an effort to resolve the case by agreement before the hearing.

During the hearing, both sides present their case to the judge or magistrate. The court may also order both parties to attend mediation in an effort to resolve the dispute and work out a settlement before judgment. Quite often, settlements are made before a final decision is handed down by the court.

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**default judgment** given in favour of the plaintiff because the defendant has failed to file a notice of intention to defend

**pleadings** the documents in which the plaintiff and defendant set out what they hope to prove at the trial

**interlocutory steps** judgments being given on specific issues or points during the course of a legal action

**interrogatories** a formal set of written questions that one party may ask another party to clarify before a hearing

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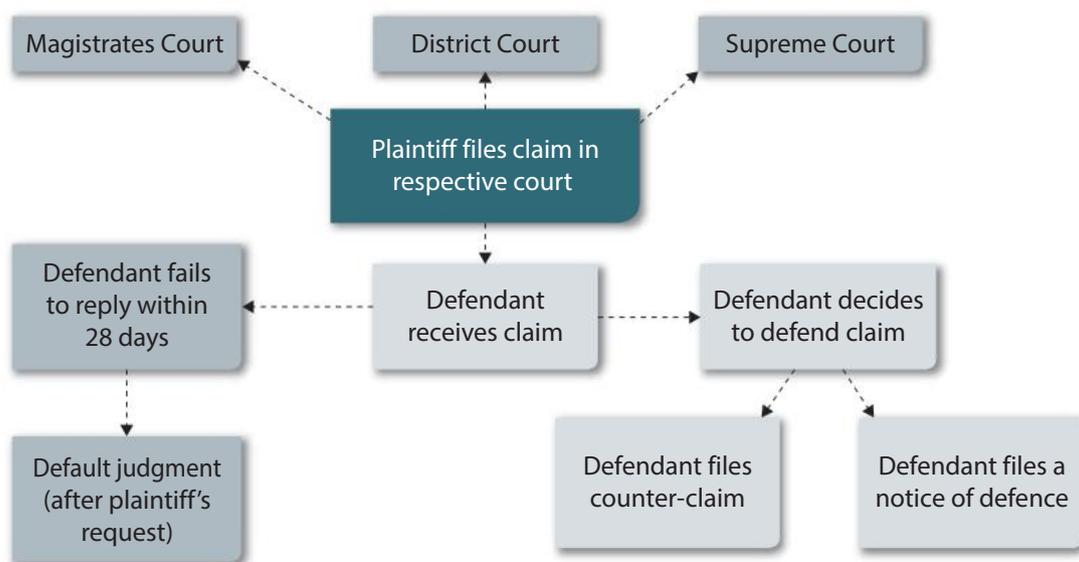


Figure 5.10 Commencement of proceedings



**Figure 5.11** 'Disclosure' is the procedure that ensures each party is aware of and can access all documentary evidence.

At any stage during the hearing, the plaintiff or defendant may apply for **summary judgment**.

If the court finds that one party did not adhere to their part of the agreement, an **injunction** may be ordered – for example, stopping the construction of a building due to breach of contract. The courts may also order the offending party to pay **damages** to the other party. The aim of damages is to place the innocent party in the same position that they would have been in if the contract had been carried out.

In contract law, the damages are often capable of being calculated and are called liquidated damages. Quite often in cases of torts, the damages can only be estimated, as they are impossible to calculate exactly. These damages are unliquidated damages. Specific types of unliquidated damages will be covered in Chapter 8. In order to be awarded

damages, the plaintiff must prove that they have suffered loss or damage as a direct result of the breach of contract by the other party.

Once a decision has been made, the unsuccessful party has the option of appealing the case to either the Court of Appeal or the District Court. Costs in proceedings usually follow the case and are normally awarded to the successful party.

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**summary judgment** the court makes a judgment due to the weakness of the case presented by the other party

**injunction** a court orders a person to do or refrain from doing a particular activity

**damages** compensation, in the form of money, awarded by a court to the successful claimant in a legal action

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## 5.5 Equitable access to the civil law system

The aim of the civil law justice system is to provide an equitable justice system to all individuals and groups within society.

However, there is a general consensus that the justice system is not perfect, and some disadvantaged members of the community are more vulnerable to becoming victims because they do not possess the knowledge or the skills to uphold their individual rights. The demographic groups most likely to be in this position include:

- people living in remote communities
- people of Aboriginal and Torres Strait Islander descent
- people from culturally diverse backgrounds
- people whose language is not English
- people with low levels of education
- people with a disability
- single parents
- people on social security payments
- the unemployed
- people living in disadvantaged housing
- old-age pensioners.

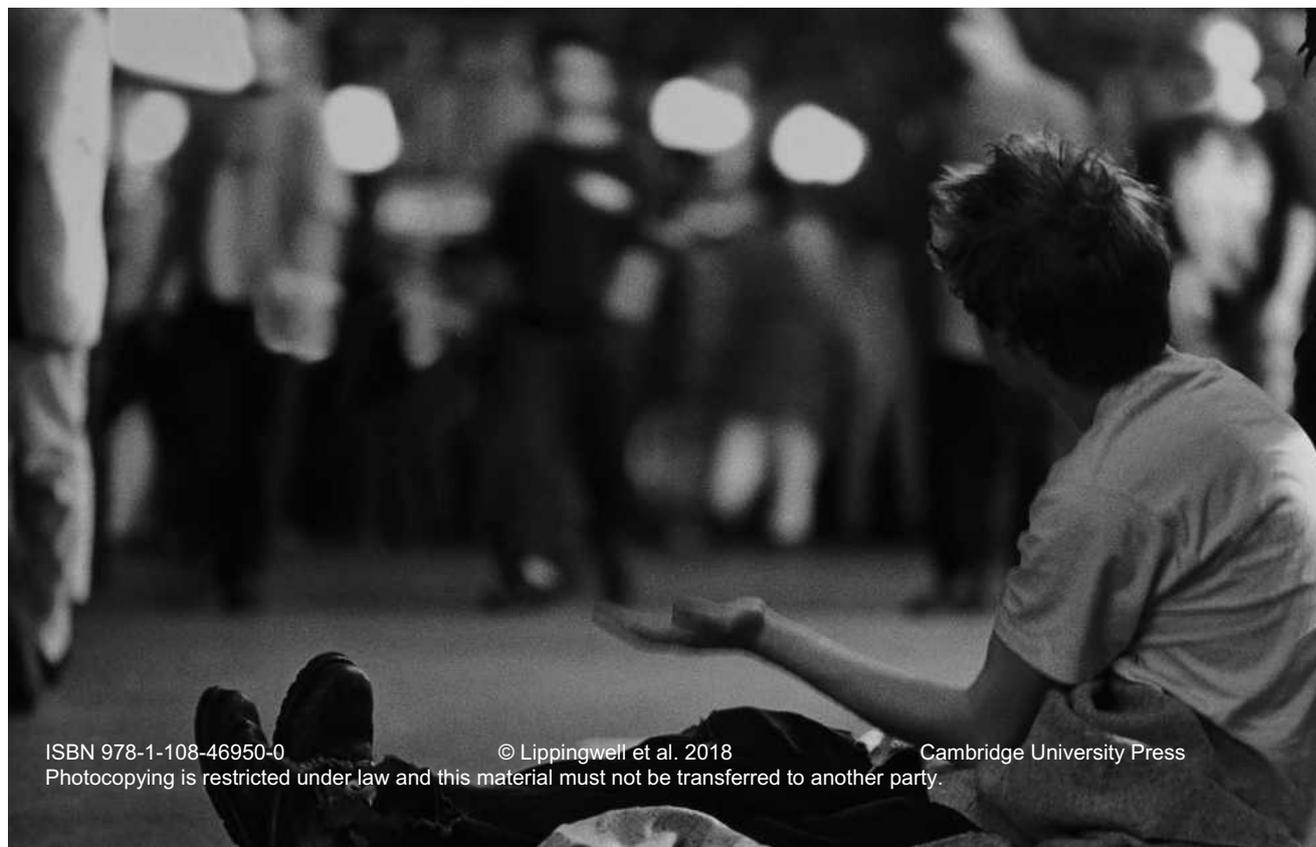
The government, the courts and community organisations have tried to implement systems to help those

in need of assistance to understand the civil justice system and their individual rights. There is access to ombudsmen, tribunals, Legal Aid, the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, community legal centres, Queensland Public Interest Law Clearing House, Caxton Legal Centre, Qld Law Society, Women's Legal Service, LawRight and, of course, private lawyers. There are also other government bodies, trade unions, financial advisers, health advisers and educational institutions that can assist members of the community. Legal brochures are often written in a number of languages.

In September 2017, the Queensland Office of Fair Trading affirmed its commitment to prioritising Aboriginal and Torres Strait Islander consumer disadvantage in the marketplace as Australian consumer agencies launch the National Indigenous Consumer Strategy (NICS) Action Plan 2017–19.

However, even with all this assistance, information and free legal advice available, there are still problems. What does an individual do when confronted by a letter of demand or a threatening letter from a debt-collection agency? Many people in the community are not aware of their legal rights and do not know where to go for advice.

**Figure 5.12** Some disadvantaged members of the community are more vulnerable.



Some people will just pay up because they fear getting into trouble with the law.

Some members of society feel threatened, and the issue of civil litigation is often the cause of a great deal of hardship that affects their daily lives. Others may ask a family and friends for advice or look up self-help sites on the internet. A threatened monetary claim may result in a great deal of financial strain on their income, which then can result in stress-related illness, anxiety, lack of sleep, arguments in the family, relationship breakdowns and other adverse negative reactions.

Many people do not realise that the issue could be resolved without the need for a court appearance if they asked for professional advice in a formal capacity from the professionals and

organisations outlined on the previous page. The widespread introduction of ADR for civil disputes in Queensland is a positive way forward with regard to alleviating fears of expensive court costs and lawyers' fees. Furthermore, having an Australia-wide, uniform approach to consumer law via the Australian Competition and Consumer Commission (ACCC) will further increase society's understanding.

An overriding problem is dissemination of the information to all members of the community – especially the disadvantaged and vulnerable people who experience challenges accessing the legal system. They need to be aware of their rights and know how to avoid the need to appear before a court or tribunal.

## 5.6 Class action

**Class actions** are one of Australia's fastest-growing types of litigation. It is now possible to bring a class action in the Supreme Court of Queensland since legislation was passed by the parliament on 24 February 2017. *The Civil Proceedings Act 2011 (Qld)* Part 13A, includes the following provisions:

- There must be at least seven members of the 'group' for a proceeding to be commenced.
- There needs to be a single representative on behalf of all members of the group.
- The claim must arise out of similar circumstances and raise a substantial common issue of law or fact.

- Consent of a person to be a group member is not required; however, all members of the group must be notified of the action and their right to opt out of the group (by a set date) should they not wish to be bound by the judgment or settlement.

---

**class action** a lawsuit initiated by a single person on behalf of members of a group of people who are seeking financial compensation for wrongdoing

---

Some members of society fear that the introduction of class actions will bring about a litigation explosion, especially when the actions are funded

Figure 5.13 The 2011 floods in Brisbane



and the members of the class action face no expenses if they are unsuccessful in their action. Unfunded class actions will, however, leave the members of the class action with large legal costs if unsuccessful.

Class actions can be commenced in many areas of civil law. One of Australia's largest class actions (commenced before the legislation was passed in Queensland and being heard in New South Wales)

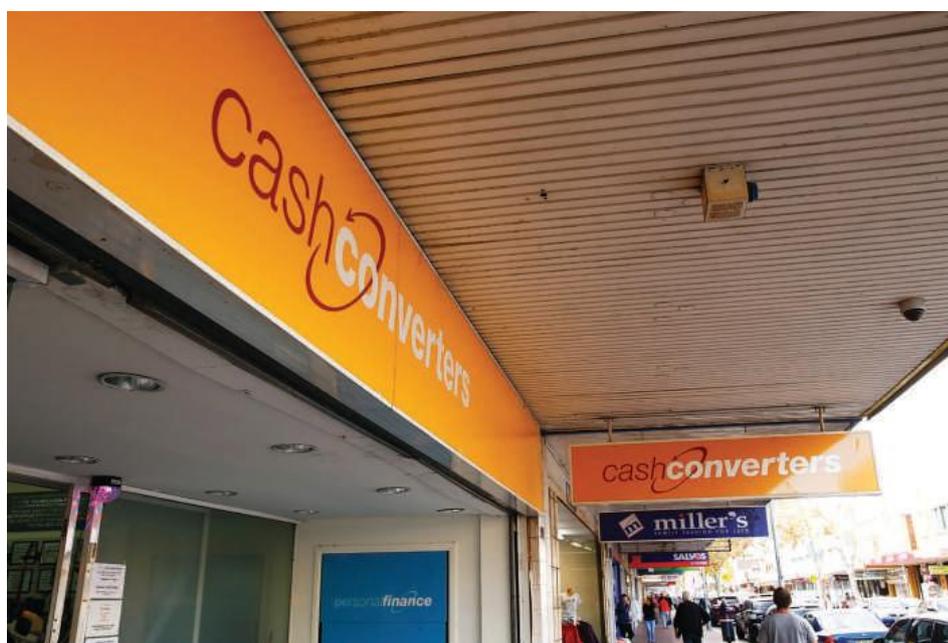
involves 7000 people in a civil litigation against the Queensland Government for the 2011 Brisbane and Lockyer Valley floods. This is a worrying factor for the Queensland Government, given the frequency of large-scale natural disasters.

Mr Potts of the Queensland Law Society stated that, 'class actions are often the only way that poorly resourced victims of disasters and other tragedies can uphold their rights'.

### REVIEW 5.3

Cash Converters has been accused of charging effective interest rates of up to 420 per cent against vulnerable borrowers in a class action filed in the Federal Court in Brisbane by a Gold Coast carer and disability pensioner Kim McKenzie. Maurice Blackburn Lawyers special counsel Miranda Nagy said the \$17 million class action would seek to obtain refunds of all brokerage fees paid by about 23 000 Queenslanders between 30 July 2009 and 30 June 2013.

'The class actions regime gives people an equality of arms through strength in numbers, meaning that big companies can't just win by attrition, which is something to be grateful for in cases like this,' Ms Nagy commented.



**Figure 5.14** Cash Converters

- 1 Research the meanings of 'open class' and 'closed class' actions and explain the differences between them. (S, A)
- 2 Analyse the statement that there could be a conflict of interest between the litigant, the lawyers and the financial 'funders' of a class action when a settlement offer is made. (C, A)

## 5.7 Civil issue taken to an independent authority

A common transaction like buying furniture can end up being a complicated civil dispute.

### CASE STUDY 5.1

#### *Matthews v Inspirations Furniture Design & Ors [2016] QCAT 525i*

##### Facts

The applicant (A) purchased five pieces of furniture from the respondent (R). A claimed the furniture was not of an acceptable quality and believed that there was misrepresentation concerning the materials used, the warranty and country of manufacture. After numerous attempts by phone and email to rectify the problem and obtaining an independent inspection, A commenced action with QCAT. R rejected the claims and obtained an independent inspection. A asked for a refund of \$14 300.00, reimbursement of \$1 222.00 for inspection and testing, \$1560.00 to dispose of the furniture and \$294.60 QCAT filing fee.

##### Issues

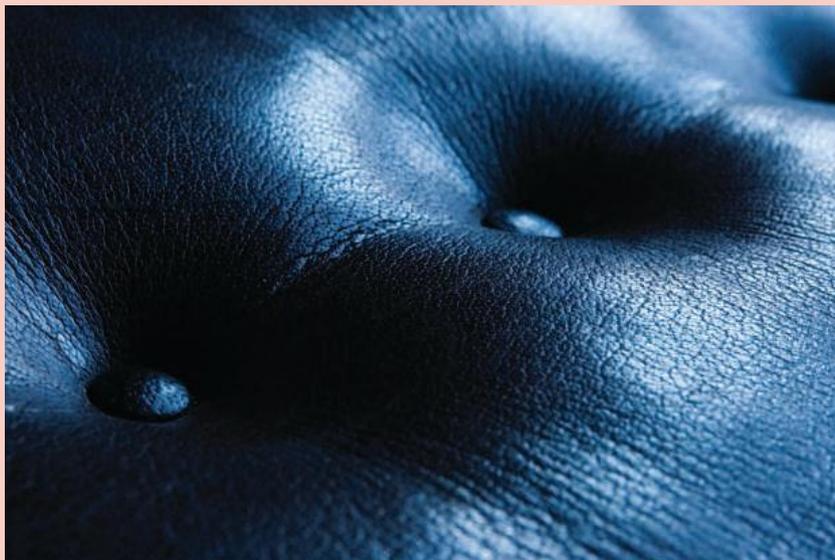
A summary of the more important issues:

- **Quality of merchandise.** Black spots on leather, leather of poor quality, leather peeling off and recliner mechanisms not working.

- **Misrepresentation.** A claimed she was told the goods were German made and had a 10-year unlimited warranty. A claimed she told R that she had chronic fatigue syndrome and allergies and could not tolerate harsh chemicals. An independent report by the University of NSW found excessive levels of chromium in the leather. The manufacturer of the furniture and R disclaimed responsibility but did offer to provide replacement covers.

##### Law

- Australian Consumer Law, ss 29, 33, 54, 55, 102, 136, 192, 236, 259, 260
- *Queensland Civil and Administrative Tribunal Act (2009)*, ss 11, 12, 102
- Queensland Civil and Administrative Tribunal Rules 2009, r 83



## Arguments

- R denied saying the goods were German made.
- R denied saying there was a 10-year unlimited warranty.
- R claimed the problem with the leather was due to inadequate cleaning and maintenance, and perspiration residue – a result of medications taken by A's family.
- R stated that the furniture would normally last for 10 to 12 years if looked after correctly.

## Decision

Refund of the purchase price of \$7600.00 on two pieces of furniture with major faults, \$100 for the

inspection fee and QCAT filing fee of \$294.60. Other items with minor faults to be repaired and refunded items collected.

## Reasons

Adjudicator Mewing found that there were major faults with the quality of two pieces of furniture and that A had rejected the goods within a reasonable time and was entitled to a refund (ACL, ss 54(1) and 29(1)(a)). The case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* was one of the precedents used by the adjudicator to arrive at her decision. The other claims were dismissed due to lack of substantiation, or were outside the jurisdiction of QCAT.

## REVIEW 5.4

- 1 Is the decision made by Adjudicator Mewing legally binding? Can the applicant appeal the decision? (C, A)
- 2 Do you think the applicant should have consulted a legal practitioner to obtain legal advice before commencing legal action? Explain your reasoning. (C, A)
- 3 Research *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and explain why it was used as a precedent case in the hearing. (C, A, S)
- 4 Analyse the nature and scope of the applicant's claims in the previous case. (A)
- 5 Discuss the point of view that a hearing of a dispute must adequately cover the viewpoints of both parties in an equitable manner. (C, A)
- 6 Do you think this dispute was solved in a fair, just, accessible, quick and inexpensive way? (These words are part of QCAT's vision statement.) Explain your answer. (C, A, E)

**Figure 5.15** Independent authorities such as QCAT are an option in civil disputes and keep the already overloaded court system from becoming further overburdened.



# Chapter review

## Chapter summary

- Civil law attempts to protect the rights and responsibilities of individuals in their behaviour and interactions with others.
- The standard of proof in a civil case is on the balance of probabilities.
- The burden of proof in a civil case is with the plaintiff/applicant.
- Common law is the body of laws made through the decisions of the courts.
- Statute law is law passed by parliament and takes precedence over common law.
- Jurisdiction is the legal authority of a court to hear and pass judgments on cases.
- The *Civil Dispute Resolution Act 2001* (Cth) aims to ensure that people take genuine steps to resolve disputes before civil proceedings commence.
- QCAT is an inexpensive and easily accessible method of resolving certain disputes.
- A letter of demand is often one of the first steps taken to resolve a civil dispute.
- ADR is a way of settling a civil dispute without having to go to court.
- ADR includes mediation, conciliation, case appraisal and arbitration.
- There is a strong relationship between the courts and ADR processes.
- Restorative justice programs are used in a number of civil disputes, such as neighbourhood and workplace conflicts.
- The Queensland Ombudsman can help to solve disputes in areas that relate to government departments.
- There are various types of tribunals available to help resolve issues and conflicts.
- The civil justice system aims to provide an equitable justice system to all groups within our society.
- It is now possible to bring a class action in the Queensland Supreme Court.

## Short-response questions

- 1 Explain the difference between mediation and conciliation. (C)
- 2 With regard to court procedures, outline the major differences between criminal and civil law. (C)
- 3 Explain the role of an ombudsman in the resolution of civil disputes. (C)
- 4 List the matters or conflicts covered by QCAT. (C)

## Extended-response questions

- 1 Evaluate the strengths and weaknesses of the various forms of ADR in solving civil disputes. (A, E)
- 2 General members of the public with a civil law problem are faced with far too many options. There are mediators, arbitrators, conciliators, ombudsmen, lawyers, community resolution centres, the courts, tribunals and so on. Evaluate the idea that the current laws are just too complicated. (C, A, E)

## Response-to-stimulus questions

- 1 A research study carried out by the Australia Institute in 2009 (Institute Paper no. 8, March 2012) found that 88 per cent of survey respondents agreed that the legal system was too complicated to understand properly and 83 per cent thought that only the very wealthy could afford to protect their legal rights. In light of the introduction of the *Civil Dispute Resolution Act 2011* (Cth), the *Civil Proceedings Act 2011* (Qld) and the widespread use of ADR, analyse the statement that ‘the current civil law justice system in Queensland provides equitable justice to all groups within society’. (A)
- 2 Read the following case scenario and write a report outlining the alternatives offered to Ben by our present justice system in Queensland. Compare and contrast the differing solutions (based on the law and Graham’s willingness to participate) and make recommendations re the best way for the stakeholders to arrive at a just and equitable outcome to the dispute. (C, A, E, Cr)

Graham owns a unit in Newstead, Queensland, and has recently signed a lease agreement to rent it out to a quiet university student called Ben for \$300 per week. Both parties signed the lease and Ben paid a bond of \$1200 to the Residential Tenancies Authority.

Graham thought everything was going well when Ben moved in on 1 October 2017. However, little did Graham know that Ben was unhappy that the dishwasher wasn’t working properly and he had to wash his dishes by hand. On 14 October, Ben lodged a Notice to Remedy Breach with Graham about the dishwasher. Swiftly following receipt of the notice, Graham arranged for the dishwasher to be fixed on 19 October, but Ben would not let the tradesperson into the unit until 23 October. The dishwasher was subsequently fixed on 23 October.

Three days later, Ben lodged a Notice to Leave to Graham, giving 14 days’ notice for the reasons of an unactioned Notice to Remedy Breach. When Graham called Ben to ask why he had given the notice, he said that the dishwasher wasn’t repaired within seven days. Graham, with a quiver in his voice, responded that if Ben had allowed the tradesperson on site on

19 October, it would have been fixed within the seven days. Ben refused to listen and hung up the phone.

Graham tried to call Ben numerous times by phone and he didn’t answer. Ben moved out of the unit on 6 November.

It took Graham three months to rent out the unit and he had to reduce the rent to \$250 per week. Ben made no attempt to pay Graham for the readvertising costs or the payment of rent for those three months, as required by the termination of lease obligations. Ben also left the unit in a very messy state, with rubbish strewn all over the floor. Graham had to spend \$1000 in cleaning fees just to get it looking like it did before Ben moved in.



## CHAPTER 6

## Contractual obligations 1

## CHAPTER OBJECTIVES

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

- explain the need for contract law
- describe the elements of a legal contract using examples or cases and legal terminology, including agreement (certainty), offer and acceptance, intention, consideration, mutuality, capacity, formalities and breach of contract
- explain the legal defences available to the defendant (and consumers) and remedies available to the plaintiff
- analyse and apply the elements of a valid contract and precedents to determine legal outcomes of contractual disagreements
- analyse and apply situations where contracts may be terminated through performance, agreement, breach, frustration and/or illegality
- analyse and evaluate the ability of contract law to find acceptable balances between competing interests, and include a justification using legal criteria and a discussion of implications
- create responses that communicate meaning to suit the intended purpose in using paragraphs and extended responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

## Key concepts/legal terminology you will encounter in this chapter

- |                      |                        |                        |
|----------------------|------------------------|------------------------|
| • agreement          | • exemption clause     | • revocation           |
| • breach of contract | • frustration          | • statutory protection |
| • capacity           | • injunction           | • terms                |
| • clause             | • intention            | • unconscionable       |
| • conditions         | • misrepresentation    | • void                 |
| • consideration      | • mutuality            | • voidable             |
| • counter-offer      | • offer and acceptance | • warranties           |
| • damages            | • plaintiff            |                        |
| • defendant          | • representation       |                        |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Bills of Exchange Act 1909* (Cth)
- *Civil Liability Act 2003* (Qld)
- *Competition and Consumer Act 2010* (Cth)
- Consumer Credit Code 1994 (Cth)
- *Copyright Act 1968* (Cth)
- Criminal Code 1899 (Qld)
- *Electronic Transactions (Queensland) Act 2001* (Qld)
- *Fair Trading Act 1989* (Qld)
- *Family Law Act 1975* (Cth)
- *Supreme Court Act 1995* (Qld)

### SIGNIFICANT CASES

- *Alexander v Rayson* [1936] 1 KB 169
- *Allcard v Skinner* (1887) 36 Ch D 145
- *Bundara Investments Pty Ltd as Trustee for The Hills Family Trust trading as Seashells Fish Bar v Short* [2011] QCAT 738
- *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256
- *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
- *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465
- *Hitchcock v TCN Channel Nine Pty Ltd* [2000] NSWSC 198
- *In re Baby M* 109 NJ 396 (1988)
- *LG Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235
- *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] VSC 331
- *McCann v Switzerland Insurance* [2000] 203 CLR 579
- *MAM Mortgages Ltd (in liq) and Anor v Cameron Bros & Ors* [2002] QCA 330
- *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70
- *Matthews v Baxter* (1873) LR 8 Exch 132
- *Moulton v Camroux* (1848) 2 Ex 487
- *Nash v Inman* [1908] 2 KB 1
- *Roberts v Gray* [1913] KB 520
- *Roscorla v Thomas* (1842) 3 QB 234
- *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564
- *Thorne v Kennedy* [2017] HCA 49 (8 November 2017)

## LEGAL ODDITY

Until the late nineteenth century, married women in Australia were not allowed to enter into contracts and basically had no legal existence. When discussing the laws of coverture, Sir William Blackstone stated that a 'husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage'. An earlier English judge, Sir Thomas Smith, commented in court that it is 'assumed that the man should be the dominant party because his superior physical strength'. 'Dominance was a man's natural right'. 'God hath given the man greater wit, better strength, better courage, to compel the women to obey, by reason or force; and to woman, beauty, fair countenance, and sweet words, to make the man obey her again for love.' However, this all came to an end in 1884 with the *Married Women's Property Act*, which entitled married women to own property in their own right.

## 6.1 The need for contract law

Contract law supports everyday life in Australia. Consumers make contracts by opening a bank account, renting a movie online, being employed at McDonald's or simply buying groceries from a shop. The shop would also enter into contracts with consumers for goods, in addition to contracts with their suppliers for bulk goods, building owners for leases and employees for service. Contract law is important because it facilitates all these transactions and reassures both parties that the contract will be performed.

By definition, a contract is a promise between two parties that is enforceable by law. Contract law can require that the person performs their promise or compensates the other party for

non-performance. Contract law is mainly developed from common law (judge-made law). Over many years, judicial decisions have sought to balance the interests of a free market while protecting weaker parties from unfairness.

Not all promises are legally enforceable. There are specific requirements that must be met for a contract to be formed. Moreover, there are many situations where a person does not have the ability to enter a contract. This chapter will identify the elements of a legally binding contract and the circumstances under which contracts can be terminated. It will also study what happens when one party does not perform their promise and what remedies may be available to the other party.

## 6.2 Elements of a contract

Most agreements that occur in less-formal situations are generally treated as a promise. For example, let's say you make an agreement with your parents that they will pay you a certain amount for mowing the lawn. However, after you mow the lawn, they discover that you haven't done your homework, so they don't pay you. In this scenario, which involves a type of agreement called a 'domestic agreement', your parents would not be bound by the promise to pay you.

The situation would be different if you offered to mow someone else's lawn for a specified amount and the other person accepted the offer and promised to pay you the specified amount.

In this case, a contract would exist. You and the other person would have intended your agreement to be binding on both parties. If the other person refused to pay you for the mowing, they would be in violation of the contract. The main differences between these two situations are the intention of the parties to be bound by the promise and the nature of the relationship between the two parties.

Most contracts are in written form; however, oral contracts are also legally enforceable unless expressly required to be in writing. The main difficulty associated with oral contracts is that the terms of the agreement can be more difficult to prove.

To help establish which contracts are valid and which are not, the common law has developed the following basic elements:

- **Agreement.** Is there an agreement in existence between the parties?
- **Intention.** Is any such agreement intended to be legally binding?
- **Consideration.** Is the agreement supported by consideration?
- **Capacity.** Do the parties have the legal capacity to enter into a contract?
- **Formalities.** Has the contract complied with any required formalities?

If all of these elements are present, then it is likely that the contract will be legally binding.

### SIDE BAR

This is a valid contract to be envious of – in early 2018 it was reported that Mercedes would turn their attention to rubber-stamping Lewis Hamilton's new contract, worth around US\$210 million. The huge sum is expected to be worth almost US\$192 000 a day.

## Agreements

Agreements are an exchange of promises between two or more people whereby one person promises to do something and in return the other person promises to do something else. To establish that an agreement has been made, there must first be an offer made by one party that is accepted by another. This is referred to as offer and acceptance.

## Offers

An offer can be made in writing, orally or through an act that indicates an offer has been made. The person making the offer is known as the offeror, and is bound by an offer when it is accepted. For an offer to be binding, it must be communicated clearly by the offeree (the person accepting the offer). An offer can be withdrawn prior to acceptance as long as the withdrawal is communicated clearly.

In normal situations, a shopper, in indicating a desire to buy merchandise, is doing no more than offering to buy. The shopkeeper then decides whether they want to accept the offer and sell the goods. A price tag on a good is not an offer to sell the goods at that price. It is merely an **invitation to treat**. This is an invitation for potential customers to make an offer. A supermarket is therefore not bound to sell goods at the price marked on the tag, although it often will – even if the goods have been wrongly marked – in order to preserve good relations with its customers (and to avoid any penalties it may face under other laws, such as false advertising).

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**invitation to treat** an invitation for potential customers to make an offer

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Imagine that your cat has just had kittens. You have posted signs around town advertising them for sale for \$150. Have you made an offer to sell? What if someone phones you and offers you \$120? Have they accepted your offer, but at a lower price? If you refuse, can they take legal action?

An offer capable of acceptance is required for an agreement to occur. In the previous example, the advertisements are not actually offers to sell the kittens, but an ‘invitation to treat’. This is an



Figure 6.1 For sale – \$150

important difference, as it gives the person who is inviting offers control over who they wish to sell the kittens to. Most advertisements are invitations to treat rather than actual offers. If the law did not regard such signs as invitations to treat, the seller would be faced with having to deliver kittens to everyone who ‘accepted’ their alleged ‘offer’, or compensate them for their loss.

An offer can be terminated in a number of ways. Commonly, an offer will be open for a certain period of time. For example, a car yard may offer to sell you a car for \$10 000 and give you until 2.00 pm the following day to accept the offer. After this time, the offer will lapse. If no time limit is given, the offer will expire after a **reasonable** period of time.

When an offer has been made, the offeror can terminate the offer at any time before acceptance. This is known as **revocation**. If one party makes an offer, and the other party rejects it or makes a **counter-offer**, this will also terminate the offer. This means that a person or business cannot reject an offer and then later decide to accept it.

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**reasonable** having sound judgement; fair and sensible

**revocation** the cancellation of an offer or a contract

**counter-offer** an offer made in response to a previous offer

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An offer can be made to the public at large if some means of acceptance of the offer is indicated when the offer is made. For example, when you receive advertisements in your letterbox, the prices listed are not an offer to the public at large, as there is no means of accepting them. You need to go to the shop and make an offer to buy the goods at the

price in the brochure. Technically, the shop could decide not to accept your offer, but this is unlikely unless the wrong price was shown in the brochure. The advertising is an invitation to treat.

### *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256

Probably the most famous of all contract cases in this area is *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256. In this instance, the court found that it was possible for an advertisement to be an offer to the world at large.

This case involved a device called a ‘smoke ball’ that was advertised as being effective in stopping a person from getting colds or flu. The procedure was to squeeze a rubber ball filled with carbolic acid to let vapours enter the nasal cavity.

The case revolved around the wording of an advertisement by the company, which read:

£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.

**Figure 6.2** The defendant argued that the advertisement was not an offer capable of acceptance.

Mrs Carlill bought the smoke ball, used it ‘properly’, yet still caught the flu. The defendant argued that the advertisement was not an offer capable of acceptance. The company tried to argue that the advertisement was merely ‘sales talk’, and not intended to be a promise.

Alternatively, it said that it was in fact a contract, but one made with the world, and that such a contract could not be validly made. The court rejected these arguments. It was held that the advertisement was an offer of a unilateral contract between the Carbolic Smoke Ball Company and anyone who satisfied the conditions set out in the advertisement. Furthermore, the £1000 bank deposit to show the company’s sincerity in the matter meant that the advertisement was not just ‘puff’, but was actually a serious offer.

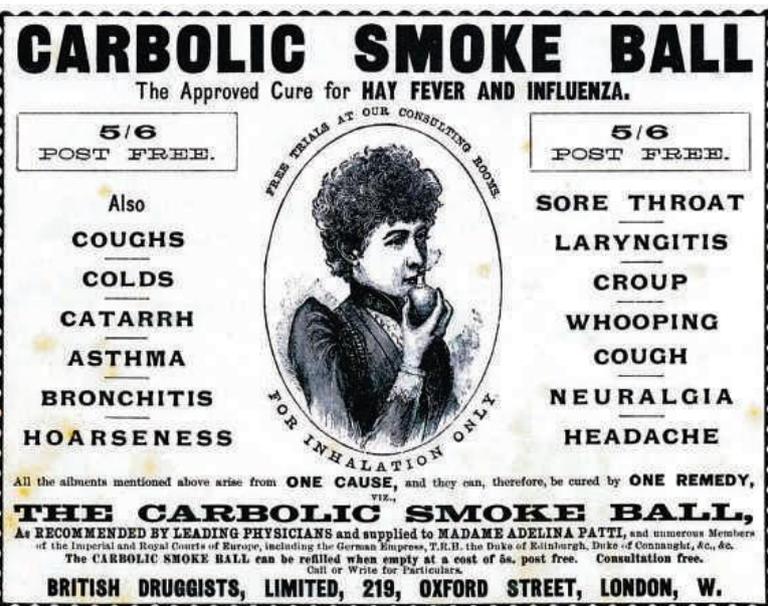
## Acceptance

Acceptance occurs when the offeree agrees to the proposal of the offeror. Once acceptance is communicated, it cannot be withdrawn unless the person making the offer agrees. It is important to note that only a party to whom an offer has been made can accept the offer.

Unlike the ‘offer’, acceptance does not need to be communicated directly to the offeror. Acceptance does need to be spoken or put in writing; it may be oral or the offeree’s conduct may indicate that they have accepted the offer.

It is not permitted to specify that silence is acceptance. This means that an offeror cannot state that that acceptance will be assumed if they do not hear back from the person to whom the offer was made. Acceptance is therefore not effective until it has been communicated to the offeror, although there can be exceptions to the rule. In the *Carbolic Smoke Ball Case*, the mere act of using the smoke ball as instructed was seen as sufficient for acceptance of the offer.

An important exception to the rule that acceptance must be communicated is known as the ‘postal acceptance rule’. This rule states that if acceptance is made by mail, the acceptance is deemed to have taken place once the letter of acceptance has been posted.



The *Electronic Transactions (Queensland) Act 2001* (Qld) has attempted to formalise the rules about when communication is sent and received by electronic systems such as email. There are three issues:

- **Time of despatch.** This is generally regarded as the time the communication enters an information system outside of the control of the sender.
- **Time of receipt.** This is generally when the email is received in the recipient's mail server. This causes problems with the recipient not being aware of the email and fails to acknowledge receipt of the email.
- **Electronic signature.** This could simply be copy-and-paste photo of an individual's handwritten signature or the use of third-party software products to verify the identity of the sender.

The timing of these issues can cause disputes involving the timing of offer and acceptance (which came first) or the withdrawal of an offer.

The law has developed a long way from only accepting a handwritten signature as an acceptance of an offer. Electronic signatures can now safely be used as long as the legislative requirements of the *Electronic Transactions (Queensland) Act 2001* (Qld) are met. The business world has embraced the use of the electronic signature and the practice is now widespread. There is however a lack of understanding among consumers concerning e-signatures and digital signatures.

RESEARCH 6.1

Research the difference between e-signatures and digital signatures and write a paragraph about which signature provides the best protection for all parties. (C, S, A)

The general principles of acceptance are as follows:

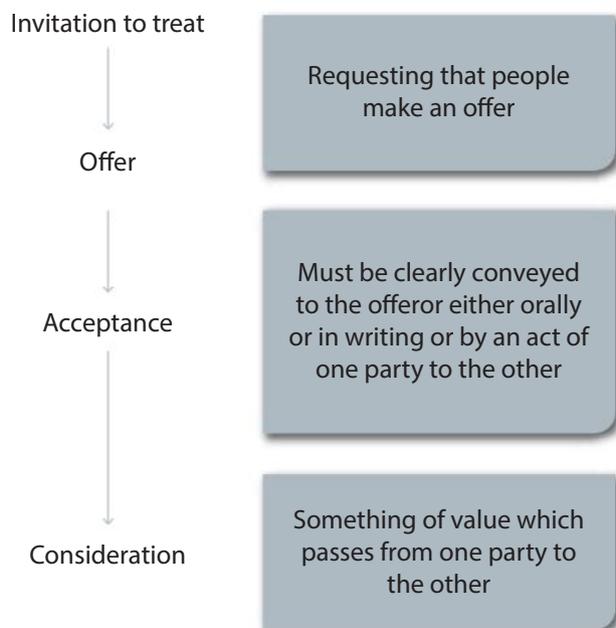
- Acceptance must actually be communicated unless the offer requires an act to be done that

does not have to be communicated to the person making the offer.

- A qualified acceptance cannot be made. Any offer must be wholly accepted.
- Any conditions stated in the offer must be followed before an acceptance can be said to have taken place.
- Acceptance can be made only by the parties to whom the offer was made.
- Once acceptance is communicated, it cannot be withdrawn except with the consent of the person making the offer.
- As with an offer, an acceptance must be made within the time prescribed, or if no time has been prescribed, within a reasonable time.
- The person accepting an offer must know that it exists. No one can accept an offer if they don't know it exists.

## Intention

The second element of a legally binding contract is whether the parties to a contract intended it to be a legally binding arrangement and not merely a social arrangement. A court will look at the behaviour and statements of the parties to determine whether they had such an intention.



**Figure 6.3** Flow of elements in making an offer



**Figure 6.4** Cash consideration

For example, a promise to meet someone for dinner would not be legally enforceable should one of the parties fail to arrive. In this case, the law presumes that this arrangement did not involve the intention to create legal relations and would not entitle you to sue them for breach of contract.

## Consideration

Consideration is the third element necessary for an agreement to be legally binding. Consideration is the price given by the offeree as a response to the promise made by the offeror. It is the value that passes from one party to another in return for the promise made. The most common form of consideration is money.



**Figure 6.5** Consideration

If parties fall into dispute and one party refuses to carry out their obligations, the other party can take the dispute to court. In order for their case to be successful, they must show that they gave consideration for the other's promise. There must be consideration given by the person who wants to enforce the promise. This principle means that if a person does not provide consideration in return for a promise, the person cannot enforce that promise in court – that is, sue the other party for breaching the contract.

Consideration in the form of a promise must be clear and certain. For example, a promise from Person A to keep a book to sell to Person B sometime in the future, when Person B needs it, would be seen as too vague and not a real promise to sell the book, so thus not legally binding.

Consideration does not have to be the market value of the promise for which it is given. A person can enforce an agreement even though the consideration that person gave for the promise the other person made is less than what that promise is worth to others.

There are two classes of contract – contracts by deed and simple contracts – but only one of these requires consideration to be present. A deed is a formal legal document. It must fulfil certain requirements, such as containing wording at the end that states it has been 'signed, sealed and delivered by ...' Deeds usually convey or transfer property or create a legal obligation or contract. Consideration is given simply by the fact that the contract is drawn up as a deed.

Contracts that are not deeds are known as 'simple contracts'. Most contracts are simple contracts. Consideration is required for these contracts to be enforceable.

Consideration cannot be something that occurred in the past. For example, let's say you aren't feeling well and a friend helps you do your washing. If, afterwards, you say you will give the friend \$20 for helping out and then forget, this offer cannot be enforced. The reason for this is that consideration – the act of sorting and doing the washing – took place before the offer of money was made.

Consideration must also be provided by the person making the promise. A third party cannot provide the consideration unless it is specified when the agreement is made.

## Capacity

Capacity refers to the ability that certain people or classes of people have to be legally capable of entering into a contract or properly understand their obligations under a contract.

Non-Australian citizens are subject to foreign investment legislation requirements before they are legally allowed to enter into property contracts. People who are bankrupt or in jail are prohibited from entering into contracts involving the transfer of land, or the purchase of a car, or entering into a loan contract with a bank. Any such contracts formed with the above people are classified as void contracts. If a contract is void, it means it is of

## REVIEW 6.1

- 1 Research the case of *Roscorla v Thomas* (1842) 3 QB 234 and explain why the contract was deemed to be valid. (S, A)
- 2 Read the following situations and decide whether you think a valid contract exists. Give a reason for your decisions.
  - a You go to a garage sale and see a couch that you want to buy, so you give the owner a deposit.
  - b Linda's mum agrees to pay her \$10 per week for doing the dishes after dinner.
  - c Lynne asks Trevor to feed her dog while she's on holiday. When she returns, she offers to pay him \$50 for his trouble, but forgets. (C, A)
- 3 Read the following scenarios and answer the questions.
  - a Toby was told by Sarah that an engagement ring contained a 0.5-carat diamond and was worth \$3000. He offered to buy it for that price. Sarah accepted and handed over the ring. But before Toby paid for the ring, he discovered that it was an imitation diamond and refused to pay the \$3000. Sarah said that he had examined the ring and agreed to pay the amount. Is the contract enforceable?
  - b Hema sold antique furniture from her shop in Toowoomba. Stephanie saw a table for only \$500. She decided to buy it immediately. Hema explained to Stephanie that the table had been marked incorrectly and that the price was actually \$5000. Was the price tag an offer? Does Hema have to sell the table for \$500? (A)
- 4 Read the following scenario and answer the questions.
 

Tamara puts an advertisement in the newspaper to sell her TV for \$2300. She gives a post office box number as her contact details. Grant sees the advertisement and writes to Tamara, posting the letter on 25 January, saying 'he will take the TV at the price listed'. Tamara receives a number of other responses expressing interest in the TV. On 3 February, she writes to Grant and tells him that she now wants \$2500 for the TV and will keep her offer open for one week.

Grant receives the letter on 14 February and writes back to Tamara saying he will not accept the offer. He posts the letter on 15 February but Tamara doesn't receive it until 19 February. On 2 March, Tamara agrees to sell the TV to her friend Jocelyn for \$1500 as long as she babysits Tamara's children on Saturday nights for the next two months.

  - a Identify the following by picking out the words in the scenario in Question 4 that indicate:
    - invitation to treat
    - intention to create legal relations
    - offer
    - consideration
    - acceptance
    - breach of contract
    - vagueness of terms. (C)
  - b Was Grant's first letter to Tamara an offer or acceptance? Give the reasons for your decision. Has Tamara breached her contract with Grant? Explain your reasoning. (C, A)



**Figure 6.6** People who are bankrupt or in prison are prohibited from entering into a number of contractual agreements.

no legal effect between the parties and essentially does not exist.

A void contract is different from a **voidable** contract, in which one of the parties may choose to continue to proceed with the contract even though the other party has done something (called a **breach** of contract) that could in theory allow them to end (or 'terminate') the contract. An example is if a person is required to pay the balance of a deposit by a certain date and does not do so. The person to whom the deposit is owed could choose to allow them a little more time. The contract is voidable as one side has not complied with their obligations under it, but it can continue if the 'wronged' party wishes to do so.

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**voidable** cancelled or returnable

**breach** broken rule or promise

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## Impaired mental capacity

It is considered important that people with impaired mental capacity are given protection by the law in contractual negotiations. At the same time, some people who have impaired mental capacity may at certain times be capable of complete lucidity and may be perfectly able to negotiate their own contracts without any disadvantage.

The courts will not enforce contracts against someone with impaired mental capacity if it can be proven that, at the time of entering into the contract, the person's mind was so affected by the impairment

that they were incapable of understanding the nature of what they were doing. However, it must be proven that the person making the contract with the mentally impaired person must have been aware or should have been aware of the impairment. This comes down to a matter of evidence.

## Intoxication

In the case of *Matthews v Baxter* (1873) LR 8 Exch 132, Baxter agreed to purchase a house at an auction. He was drunk at the time. When he sobered up, he agreed at first to be bound by the contract, but then changed his mind. He alleged that he was intoxicated at the time he made the contract and that the other party should have known that. The court held that he may have been in a position to escape from his obligations under the contract on the grounds of lack of capacity, but as he agreed to be bound by it when he was sober, he was now obliged to proceed with the contract. This means that such contracts are actually voidable rather than void, as the party whose capacity is in question is capable of proceeding with the contract if they wish.



**Figure 6.7** This drunk man may not have the capacity to enter into a contract.

## Minors

Another category of persons who may not have the capacity to form legally enforceable contracts is minors. In the eyes of the law, minors are persons who have not reached the age of 18 years.

It has been considered important that minors (sometimes called ‘infants’) are protected from making bad decisions based on their youth or inexperience, particularly in a commercial agreement.

The general rule at common law is that a contract made with a minor is voidable. This is, however, subject to some important exceptions:

- **Cash purchases made by minors.**
- **Contracts for necessities.** Minors can be bound by contracts for ‘necessaries’, which are those things that a minor needs to maintain the standard of living that they currently enjoy. They are particular to that individual and therefore may differ between people. They are not limited to the basic needs of living (such as air, food and water) but rather encompass the particular needs of the minor. Necessities often include goods and services such as accommodation, medicine and education.
- **Beneficial contract of service.** Another exception to the rule is when a minor signs a contract of service that is beneficial to them. For example, a minor may sign an apprenticeship contract with an employer. Such a contract is

considered of benefit to the minor, as it would provide them with work and a possible career.

- **Contracts for the acquisition of land or ongoing obligations** such as purchasing of shares.

The above contracts are deemed to be enforceable by the courts unless the minor **repudiates** the contracts due to lack of capacity. All other contracts entered into are voidable unless affirmed or **ratified** by the minor after acquiring the age of majority.

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**repudiation** upon becoming an adult, the minor states that they are not prepared to perform their obligations under the contract

**ratification (minors)** upon becoming an adult, the minor confirms that they are prepared to perform their obligations under the contract, making the contract legally binding

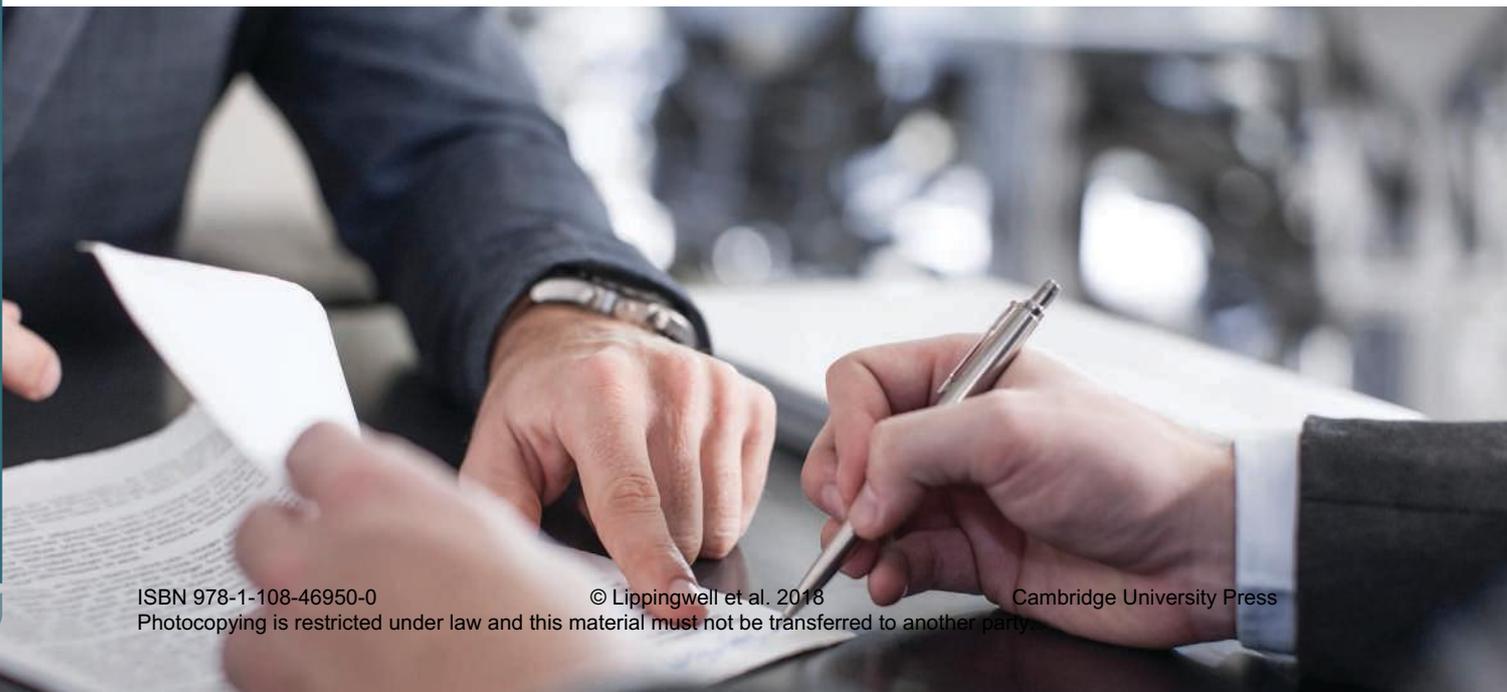
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## Formalities

Some types of contracts must be in writing, including contracts covering the sale of land, purchasing an automobile, door-to-door sales and transfers of shares.

Statutes such as the *Copyright Act 1968* (Cth) and the *Bills of Exchange Act 1909* (Cth) also require written contracts. These are known as ‘standard form contracts’, as they often appear as printed, ready-made forms, which generally means it is unlikely that the terms of the contract will be altered.

**Figure 6.8** A contract is an important legal document with certain terms that must be met.



## 6.3 The terms of a contract

Contracts, whether written or oral, include express terms. These are the words that clearly define the items in the contract that are legally binding. For example, with regard to buying a new car, the express terms would be the make and model of the car, its year of manufacture, and its colour and price. The main terms of a contract are known as the conditions of the contract. A term that is written down in a contract is known as a clause.

Implied terms are those that can logically be assumed by the person entering the contract. For example, it was implied in a contract of employment of a nanny that the nanny owed a duty of confidentiality to the homeowner and could not disclose details of information learned during her employment to the public. An injunction was granted in the case of *Hitchcock v TCN Channel Nine Pty Ltd* [2000] NSWSC 198 to stop the nanny from appearing on *A Current Affair* with her story.

### Express terms

Usually express terms can easily be identifiable where they are written on a contract. However, this is not always the case. One example is where a contract has both written and oral terms. If there is an agreement in written form, the court will assume that the written contract contains all the terms of the contract. This means that no oral evidence can be used to add, change or contradict the terms of the written agreement. This is what is known as the ‘parol evidence rule’. It is also consistent with the rules that apply to what is allowed as evidence in court (admissibility).

The courts have noted that this can in fact cause some unfairness. For example, one party may say things to another party to convince them to sign a contract. However, the contract then does not include what has been said. If the person who made the statements could legally deny making the comments, this would be unfair on the person who relied upon them. This exception means that the courts will allow oral evidence to show that one

party has made a false statement to the other before the contract was agreed to.

When a statement is made but is not included in a written contract, it is very important to decide whether the statement is actually a part of the contract or a **representation**. This is important because it can determine the legal remedies available to the plaintiff if the statement is in fact the truth. The courts have developed several tests to decide this:

- If a long time has passed between when the statement was made and the contract was entered into, the statement is probably not a term of the contract.
- If the statement was made orally and not included in the contract, it is probably not a term.
- If the statement was important to a party’s decision to enter the agreement, it probably is a term.

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**representation** a statement made before a contract is entered into that affects matters relating to the contract

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Where the person who makes the statement is in a better position than the other person to check the accuracy of the statement, it is likely to be a term. Representations and terms of the contract need to be separated from sales talk. The statements made by a salesperson to persuade a buyer are called ‘puff’. They are exaggerated comments about the product that no reasonable person would believe – for example, ‘If you wear this cologne, all the ladies will want you!’

### SIDEBAR

Goods are often advertised as ‘the fastest’, ‘the most economical’, ‘the best’, ‘the greatest’ or ‘the most’. It is similar to you saying that you are so hungry you could eat a horse.

Think of some other statements made by salespeople or in advertisements that are obviously ‘puff’.



Figure 6.9 Car park exemption clause

Some contracts will include terms that specifically limit one party's obligations or liability. This is known as an exclusion clause or an **exemption clause**. A common example is the terms of a car park, which state that the car park will not be responsible for damage or theft from your vehicle. Exemption clauses can be valid so long as they do not break the obligations placed on that person by law.

**exemption clause** a term in a contract that seeks to restrict the rights of the parties under the contract

## REVIEW 6.2

Are the following statements made by a salesperson puff, representations or actual terms of a contract? Explain.

- 1 'I'll supply and install seat covers if you sign the contract today.'
- 2 'This coin is a limited edition. Only 500 of them were made!'
- 3 'This motorbike is in mint condition. There's nothing mechanically wrong with it.' (A)

## Implied terms

Implied terms can form part of the contract even though they have not been discussed or written down. These terms can be implied either by common law or by statute. Common law can imply a term based on the presumed intention of the parties. This will depend on the facts of each case, and must be a term that is reasonable, does not contradict an express term of the contract and is so obvious that 'it goes without saying'.

## Conditions and warranties

Conditions and warranties are generally considered the 'terms' of a contract. Conditions are the fundamental terms of a contract, without which it is likely that the contract would never have been entered into. If these conditions are breached, the contract is voidable.

A warranty is similarly defined, but is of lesser importance – it is more likely that the contract still would have been entered into if this element were not a consideration. For example, a person was offered a job at a clothing store and accepted the contract, which included a term that they would receive a

5 per cent discount on any items purchased from the store. This discount is considered a warranty as the person would more than likely have accepted the job even if the discount had not been included.

If a warranty is breached, damages can be claimed for any loss, but the contract is not void.

If a court determines a breach of contract, it will try to put the injured party back into the position the party was in before the agreement was breached.

The best way of identifying what the courts regard as conditions and warranties is to examine real cases. In one such case, *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322, an agreement between a newspaper and a cartoonist provided that a particular cartoon would be printed on the paper's front page. However, the newspaper did not do this. The court found the term to be a condition due to its importance.

### REVIEW 6.3

- 1 Outline the difference between an express term and an implied term in a contract. (C)
- 2 Explain why the term of a cartoon being printed on the front page of a paper was considered a condition in *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322. Why was it considered so important to the contract? (S, A)
- 3 Explain why the term of sending out a sales representative to each named company once a week to solicit sales was considered a warranty in *LG Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. Why was it considered to be less important to the contract? (S, A)

## 6.4 Performance and breach

There are several ways in which a contract can come to an end. First, a contract can be completed by performance, and both parties fulfilling their contractual obligations. A contract can also be terminated by mutual agreement between the parties. In some cases, a contract can also be terminated when one party breaches the contract.

A breach of contract is a situation where one party fails to perform a term that formed part or all of the contract. A party can terminate for breach of contract if:

- a provision of the contract permits discharge for breach
- the other party repudiates the contract
- the breach is sufficiently serious.

A breach is sufficiently serious when it breaches an essential term or deprives the other party of a substantial benefit. A party cannot normally terminate for minor technical breaches.

If any of the elements of a contract (agreement, intention, consideration, capacity and formalities) are missing, the contract can be unenforceable.

### Defences for breach of contract

#### *Misrepresentation*

If a statement that is made as a representation is false, it is known as a **misrepresentation** and the innocent party affected by the statement has a legal right to be compensated for it. In order for the courts to determine that a representation is in fact a misrepresentation, the following criteria must be met:

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**misrepresentation** any statement of fact by one person to another, either by words or actions, which is not in accordance with the actual facts

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- There must be a false representation of an existing or past fact.
- It must be addressed to the plaintiff by the person making the representation.
- It must be made before or when the contract is entered into.

- It must have been intended to persuade the plaintiff to enter into the contract, and it must have persuaded the plaintiff.
- The misrepresentation must also concern factual information, not an opinion. Sometimes silence can be interpreted as a misrepresentation, especially when it has the effect of a misleading impression or statement.

If a party makes a false representation but the plaintiff does not rely on it, the plaintiff cannot get compensation for misrepresentation. 'Rely' means that the person places importance on the statement and it influences the person's behaviour.

## REVIEW 6.4

A dive boat owner was trying to sell his dive boat. A potential buyer wanted to see how many passengers the boat was currently taking out to sea. The owner took the potential buyer out on a day when he had arranged for the boat to be filled with family and friends, to make the boat appear busier than it actually was. The boat owner did not tell the buyer this.

Would the court find that the owner has misrepresented the boat to the potential buyer? Explain your reasoning. (A)

## Types of misrepresentation

### *Innocent*

This is a statement made by a party in the belief that it is in fact true and the party is not aware that it is incorrect. In this case, the wronged party may be able to rescind the contract but may not be able to claim damages. It would depend on whether what was misrepresented was 'mere puff' (no action may be taken), a warranty (damages

only) or a condition (rescind/affirm the contract and/or sue for damages). For example, a person selling a house might say it has a view of Mt Brown, when in fact it is Mt White, and they have simply misidentified the mountain.

### *Negligent*

Negligent misrepresentation occurs when a statement is made by a party without taking reasonable care to ensure that the statement is in fact true. The contract may be rescinded and/or damages may be sought. A negligent misrepresentation may have occurred, for example, if the seller of a house stated that the view from the house could never be blocked by another dwelling, when in fact it could. If another dwelling was built that did block the view, the buyer may be able to take action against the seller for negligent misrepresentation, as the seller did not take care to ensure that what they were saying was correct.

### *Fraudulent*

Where a party makes a statement knowing that it is false, or is reckless, or does not care whether it is true or false, then that party has made a fraudulent misrepresentation. The impact of such a statement on the contract is severe. The wronged party may rescind the contract and seek damages. The statement made must not just be opinion, but must be represented as fact.

Proving fraudulent misrepresentation can be difficult. A number of points must be established in order for such an action to succeed:

- The statement was actually made.
- It was untrue.
- The party making the statement knew it was untrue.
- The party did not care whether it was true or not.
- The party intended the other party to act on it.
- The other party did act on it.
- The other party suffered damage as a result.

## CASE STUDY 6.1

### *Derry v Peek* (1889) 5 TLR 625

#### Facts

Henry Peek (the plaintiff) read a prospectus from a company that stated it had permission to use trams powered by steam in place of horse-drawn power. Peek bought shares in the company as an investment. The company did not, however, have direct approval from the authorities before issuing the prospectus. Peek then sued for fraudulent misrepresentation.

#### Issues/law

The law at this stage was unsure of what constituted false misrepresentation and had to decide on whether the statement in the prospectus was actually fraudulent or just incorrect.

#### Arguments

The defendant's main argument was that it honestly believed that it would be given the right to use steam

power. It had applied for the rights and reasonably expected to be granted permission.

#### Decision

The shareholder's claim was ultimately rejected after appeals. The court held that it was not proven by the shareholders that the director of the company was dishonest in his belief that he would be granted the rights to use steam power.

#### Reasons

The court defined fraudulent misrepresentation as a false statement that is made (1) knowingly; (2) without belief in its truth; or (3) recklessly, careless of whether it be true or false. Based upon this definition, the plaintiff could not claim against the defendant.

While *Derry v Peek* happened a long time ago in the United Kingdom, it is considered to be a landmark civil law case. The definition provided by Lord Herschell is still used in courts today. Examples of cases that directly quote the 1889 definition in their judgments include:

- *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465
- *McCann v Switzerland Insurance* [2000] 203 CLR 579
- *MAM Mortgages Ltd & Anor v Cameron Bros & Ors* [2002] QCA 330.

The common law definition of fraudulent misrepresentation also forms the basis of section 18 of the Australian Consumer Law, dealing with misleading or deceptive conduct. This illustrates how common law and statute law work together to provide equitable and understandable laws.

### RESEARCH 6.2

Research the three cases listed that refer to the definition of fraudulent misrepresentation. Write a paragraph on each of the cases, referring to the judges' reasons for deciding the outcome of the case. (C, S, A)

### Mistakes

A factor that can affect the validity of a contract is when one or both parties make mistakes, either in relation to the law or about important facts. People cannot simply say 'I made a mistake' and walk away from contracts. As a general rule, a person is



Figure 6.10 Sorry, it was a mistake.

bound by their signature to a document, whether or not they have read or understood the document. However, in some circumstances, a doctrine called *non-est factum* ('it is not my deed') may assist people to avoid liability under a contract

The use of this rule in modern times has been restricted. For a successful plea of *non-est factum*, two factors have to be established:

- The signer was not careless in signing.
- There is a radical or extreme difference between the document that was signed and what the signer thought they were signing.

### Mistake of law

Parties are sometimes mistaken as to the legality of the agreements they make. In general terms, such a mistake will not normally allow parties to avoid their responsibilities under a contract. However, if a contract is formed for an illegal purpose, such as an agreement to distribute stolen goods, the contract is void.

### Mistake of fact

In certain circumstances, parties to contracts may be genuinely mistaken about certain important facts that are the subject of the contract. The case of *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564 demonstrates how a contractual obligation may be avoided if a genuine mistake has been made. The defendants bid for two lots at an auction, believing both to be natural hemp. In fact, Lot A was natural hemp, but Lot B was of inferior quality.

The defendants refused to pay for Lot B and the sellers sued. Both lots contained the same shipping

mark, 'SL', and witnesses stated that in their experience, the two different substances never came from the same ship under the same shipping mark. The defendants had been shown bales of natural hemp as 'samples of the "SL" goods'. The court held that the defendants were mistaken as to what they were buying, and as a result could not be bound to the contract.



Figure 6.11 Is this rope from Lot A or Lot B?

## Undue influence

This occurs when a party enters into a contract due to pressure placed upon them by another party. If this occurs to such a degree that one party is unable to form an independent judgement about the contract, then such a contract may be set aside.

Certain relationships are presumed by the court to be relationships that may give rise to undue influence. This means that the onus of proof is on the party who is in the position of influence to prove that they did not use that influence in an undue manner. The link between a solicitor and their client is such a relationship. The solicitor could be seen to be in a position to influence the client to such an extent that the client acts in a manner that is not consistent with the exercising of their own free and informed consent.

Other relationships that may give rise to the presumption of undue influence are those between doctors and patients, parents and children, religious advisers and their parishioners, and trustees and beneficiaries.



Figure 6.12 A trusted relationship

## Unconscionable conduct

Sometimes conduct goes beyond using influence unfairly. Parties to contracts do occasionally take ‘unfair advantage’ of another party.

If someone has simply made a contract that is not particularly advantageous to them, the court will not interfere for that reason alone. After all, in the commercial world risk is a significant factor and a party must accept this when entering into agreements. It is also important to note the principle of *caveat emptor*. This is Latin for what is commonly known as ‘buyer beware’. This is an obligation for a buyer to reasonably examine any property before purchasing it.

However, in some cases, the courts will find that a contract should not be allowed to proceed because it was **unconscionable** – in good conscience, the agreement should not stand. It may be that one party has taken unfair advantage of the other party’s lack of education, or their illness or problems with language. In cases like this, the courts may set aside such a contract.

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**caveat emptor** an obligation for a buyer to reasonably examine any property before purchasing it; buyer beware

**unconscionable** being taken advantage of in a transaction in a way that offends the conscience

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## Duress

Related to the concepts of undue influence and unconscionable dealing is the concept of duress. Duress is the threatened or actual application of violence towards a party in order to induce them to enter into a contract. The issue is whether a party

can be said to have truly consented to enter into the contract of their own free will or whether they did so because they felt they had no alternative. The threats can be made against the party to the contract, their immediate family or close relatives. They also do not have to be made directly by the other party to the contract, but can be made on their behalf.

### REVIEW 6.5

Read the following scenarios and answer the questions.

- David is a lawyer who has a wealthy elderly client. She dies, but not before she executes a contract to transfer her house to him. Her relatives make an application to have the contract set aside. Will they succeed? What does the court need to consider in arriving at a decision? (C, A)
- Jock is a chronic alcoholic. His son, Fred, gets him to sign a document transferring ownership in the house and family business over to him. What would need to be established to set aside the transfer? (C, A)



Figure 6.13 Signing of a will

- Patricia owns a beautiful house. One day she is paid a visit by Steven, a local ‘tough guy’. He says, ‘I like your house and I want to buy it. Sell it to me cheaply or something bad may happen to it.’ Patricia is scared and sells the house to him cheaply. Could she have the contract set aside? (A)

## CASE STUDY 6.2

### *Thorne v Kennedy* [2017] HCA 49 (8 November 2017)

#### Facts

Mr Kennedy was a multi-millionaire property developer. He met Ms Thorne, who was from Eastern Europe, on the internet. About seven months later, Ms Thorne flew to Australia to marry Mr Kennedy. It was only 10 days out from the wedding when Mr Kennedy asked Ms Thorne to sign a prenuptial agreement. This is a binding financial agreement that sets terms of how the wealth of the parties will be divided following a divorce.

Ms Thorne's family had already flown to Australia for the wedding. Mr Kennedy said that if Ms Thorne did not sign the agreement, the wedding would be cancelled. Ms Thorne then obtained independent legal advice, where she was told not to sign the contract because the agreement was unreasonable and Ms Thorne's entitlement was very small. Despite this, she signed the agreement four days before the wedding.

#### Issues/law

Was the agreement voidable for duress, undue influence or unconscionable conduct?

#### Arguments

Ms Thorne's main argument was that she was powerless and had no choice but to sign the

agreement. Some of her reasons for this included that she had no permanent residency in Australia, she really wanted a child, she relied on Mr Kennedy for everything and her upcoming marriage was very public.

The counter-argument is that Ms Thorne obtained and understood her independent legal advice and decided to sign the agreement anyway.

#### Decision

The High Court decided that the agreement was voidable on the grounds of unconscionable conduct and undue influence.

#### Reasons

The circumstances surrounding the impending wedding would have seriously impacted Ms Thorne's state of mind, and would have rendered her incapable of making a judgement in her own best interests. Ms Thorne was at a special disadvantage, because she knew that if she did not sign, the wedding would be cancelled and there would be adverse consequences. Because the prenuptial agreement was not fair or reasonable, it was decided that Mr Kennedy took unconscionable advantage of Ms Thorne and the contract was voidable.

### REVIEW 6.6

Case Study 6.2 illustrates a situation where the law attempts to find a balance between competing interests.

- 1 Analyse the consequences for society if all contracts were enforced once they had been agreed to, regardless of the circumstances. (A)
- 2 Identify other situations where one party may have much greater bargaining power than the other. Discuss the principles the courts could apply to help address the imbalance. (A, E)

## Lack of ‘good faith’

The enforceability of contracts is questionable in certain circumstances because of a lack of good faith. This essentially means that information of relevance to the contract must be disclosed. In contracts of insurance, for example, a party applying for insurance must disclose any and all important facts that may influence whether they would actually receive cover.

## Restraint of trade

Sometimes contracts are considered unreasonable by the courts if they unfairly restrict the ability of one of the parties to earn a living. Such clauses in a contract are held to be a restraint of trade.

A restraint of trade clause often forms part of a contract of employment. It usually states that if the employee leaves their employment, the employee must agree not to work in that industry/trade or

occupation within a certain geographic area and/ or within a certain time so they do not compete with their former employer. For example, the restraint clause may have the following times and geographical limits in it:

- one year and 5 kilometres
- five years and 10 kilometres.

The court must decide which of these two clauses, if any, is a reasonable restriction on the ability of the employee to earn a living if the employee leaves their employer. What would be a reasonable restraint of trade relates to the relevant facts in each individual case.

## Illegal contracts

A contract that is not within the law is not enforceable through the courts. For example, if you contracted to buy stolen goods, the contract would not be valid, and therefore would not be enforceable.

**Figure 6.14** Illegal activity cannot be contracted.



## IN RE BABY M 109 NJ 396 (1988)

Stern entered into a surrogacy agreement with Whitehead. Whitehead agreed to be artificially inseminated with Stern's sperm, to carry the child and to give the child to Stern and his wife when it was born. Whitehead agreed to renounce parental rights and allow the Sterns to adopt the baby. In return, she would receive \$10 000. However, when 'Baby M' was born, Whitehead did not want to give the child up.

The Supreme Court of the United States held that the surrogacy contract was illegal because it contravened state laws. The contract was therefore not enforceable. The court, however, decided to leave the baby with the Sterns because it thought that the child would have a better quality of life with them. This case is discussed in more detail in Case Study 10.1.

## Frustration

Sometimes events occur after a contract is made that fundamentally change the nature of what the parties had contracted for, without any party being

at fault. For example, if a party contracts with an artist to paint a portrait and the artist dies before he can start work on it, the contract could be said to have been frustrated. In this case it would be held unfair to enforce the original agreement.

**Figure 6.15** Where the painter would be unable to complete the portrait due to his death, the contract would be said to be frustrated.



## 6.5 Remedies

Following a breach, the innocent party may be entitled to a remedy. Most commonly, the party will seek money to compensate them, which is known as ‘damages’. The amount of money awarded for damages should be enough to put the party in the same position they would have been in had the contract been performed. The damages could be seen as a ‘substitute for the contracted performance’. The claim for damages cannot be too remote (see Chapter 8) from the breach of contract. Punitive damages (extra damages considered as a punishment) are not available for a breach of contract under Australian law, but may still be made in property damage claims and for personal injuries resulting from an intentional test.

There are also liquidated damages, which can occur in a contract (especially in the construction

and IT industries) that sets a sum of money payable as damages for the other party’s breach.

Sometimes damages are not sufficient and the court may force the breaching party to perform their contractual obligations. These are called equitable remedies and there are two main types.

The first is specific performance that is only awarded in situations where damages will not provide adequate compensation. This remedy is not available for contracts of personal service. An example is the sale of land. As each parcel of land is unique, a party cannot simply purchase another property of the same market value without being disadvantaged. For this reason, damages are seen as an inadequate remedy.

The second equitable remedy is to award an injunction that is a direct order to a party ‘not to do something’.

### RESEARCH 6.3

This case is an example of how a breach of contract offers the plaintiff a number of alternatives to find a remedy to their conflict.

Seashells was a fish and chip shop that had a tenancy for a retail shop in Townsville. Seashells claimed that the landlord had not completed repair and maintenance work, for which the landlord was responsible.

Because this work was not completed, Seashells refused to pay rent to the landlord. The landlord issued notices to Seashells to remedy this breach of contract and pay the rent. Seashells did not pay rent and the landlord subsequently changed the locks and refused entry to Seashells. Seashells claimed that the landlord did not have the right to terminate.

Seashells had a number of options, including:

- a common law remedy of suing for breach of contract
- a statute law remedy of taking the matter to the Queensland Civil and Administrative Tribunal (QCAT).

In this case, it chose the second option. However, if it had chosen to sue for breach of contract:

- 1 Explain the processes needed to be followed to take the matter to court. (C, A)
- 2 Analyse the statement that taking the dispute to court would be ‘a risky, expensive and time-consuming activity’. (A)
- 3 Suppose Seashells won the case. Outline the remedies that would have been offered to the plaintiff. (C, A)

# Chapter review

## Chapter summary

- An agreement is an exchange of promises between two or more people, whereby one person promises to do something and in return the other person promises to do something else.
- A contract is a promise between two parties that is enforceable by law.
- An invitation to treat is an invitation for potential customers to make an offer.
- Some types of contracts must be written, such as for the sale of land or an automobile, door-to-door sales, transfers of shares and guarantees.
- Acceptance occurs when the party to whom the offer is made (offeree) agrees to the proposal of the person making the offer (offeror).
- Consideration is the value that passes from one party to another in return for the promise made.
- Issues affecting the validity of contracts include capacity, conditions and warranties, misrepresentation, undue influence, unconscionable dealing, duress, lack of good faith, restraint of trade and frustration.
- Express terms are the words that clearly define the items in the contract that are legally binding.
- Conditions and warranties are generally considered to be the terms of the contract.
- There are three different types of misrepresentation: innocent, negligent and fraudulent.
- A contract can be completed by performance, where both parties fulfil their contractual obligations.
- A contract can be terminated by mutual agreement between the parties or by a breach of contract.
- The most common remedy for a breach of contract is compensation through damages.

**Figure 6.16** Marriage in Australia is a legally recognised contract.



## Short-response questions

- 1 Explain ratification and provide an example to demonstrate it in practice. (C)
- 2 Outline the basic differences between a domestic agreement and a contract. (C)
- 3 Describe the difference between an offer and an invitation to treat. Give an example of each. (C)
- 4 Define and explain the differences between a condition and a warranty. (C)

## Extended-response questions

- 1 Write a short essay and argue why you think the courts have divided misrepresentation into three categories. Find examples of cases to justify your response. (A, Cr)
- 2 Evaluate the viewpoint that the laws are keeping up with the advances of technology when it comes to the offer, acceptance and signing of contracts over the internet. (C, A, E)

## Response-to-stimulus questions

- 1 Carefully consider the advantages and disadvantages of common law listed below and critically analyse each of them in relation to the common law of contract.

After analysing the issues, evaluate the effectiveness of common law to arrive at acceptable resolutions to complicated contract disagreements in our ever-changing world. Justify your decisions with real-life examples.

Advantages of common law	Disadvantages of common law
The wording of legislative law is often complicated. Common law interprets and implements legislation when confronted with specific facts.	Courts can only change the law after 'something has happened' and the facts are presented in the case being heard.
It is not possible to legislate for every situation that might arise in society. Common law can respond to situations not foreseen by legislators.	The courts, main role is to administer justice. The development of common law is a secondary matter.
All parties to legal disputes have the ability to understand the decision-making process of the courts as previous binding decisions are well documented.	Judges are not elected by a democratic process and make decisions that may not be in line with core community standards and expectations.
Common law can quickly respond to changing societal values while a judge reviews a case. Courts are not bound to lengthy legislative constraints and processes.	Compared to parliament with its myriad of reviews and inquiries, the courts lack the time and resources to fully deliberate on the changes they make to the law.
Courts are not controlled by political parties and can reform the law in controversial matters that may be unpopular with voters.	Legislation made by the parliament can overrule common law.

Source: lawgovpol.com.

- 2 Punitive or exemplary damages are not available for a common law breach of contract under the Australian legal system. While the aim of the courts to compensate the claimant is not in dispute, many want to see the perpetrators of unfair contracts punished so that it will deter others from committing such actions.

You are required to write an argumentative essay that investigates both sides of this debate.

For a good starting point, access Lauree Coci's article, 'It's Time Exemplary Damages were Part of the Judicial Armoury in Contract' (*UWA Law Review*, 1 2016). (C, S, A, E, Cr)

## CHAPTER 7

## Contractual obligations 2

## CHAPTER OBJECTIVES

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

- explain the need for contract law, and why consumer protection provisions are needed in addition to the general law of contract
- explain the role of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) in providing consumer protection
- explain the legal defences available to the defendant (and consumers), and remedies available to the plaintiff, including statutory protection
- analyse the role of the Australian Competition and Consumer Commission in consumer contractual arrangements and the viewpoints of involved stakeholders
- analyse and evaluate the mechanisms and avenues of dispute resolution using case studies
- analyse and evaluate the ability of contract law to find acceptable balances between competing interests, and include a justification using legal criteria and a discussion of implications
- select legal information, then analyse and evaluate to resolve a contract law issue
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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## Key concepts/legal terminology you will encounter in this chapter

- |                                  |                     |                        |
|----------------------------------|---------------------|------------------------|
| • alternative dispute resolution | • damages           | • plaintiff            |
| • breach of contract             | • defendant         | • precedent            |
| • <i>caveat emptor</i>           | • e-commerce        | • remedy               |
| • <i>caveat venditor</i>         | • frustration       | • standard of proof    |
| • claimant                       | • guarantees        | • statutory protection |
| • common law                     | • implied condition | • strict liability     |
| • consumer                       | • injunction        | • tort                 |
| • cooling-off period             | • misrepresentation | • tribunal             |
|                                  | • ombudsman         | • unconscionable       |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- Australian Consumer Law – Schedule 2 of the *Competition and Consumer Act 2010* (Cth)
- *Australian Securities and Investments Commission Act 2001* (Cth)
- *Building and Construction Industry Payments Act 2004* (Qld)
- *Civil Dispute Resolution Act 2011* (Cth)
- *Civil Proceedings Act 2011* (Qld)
- *Competition and Consumer Act 2010* (Cth)
- *Corporations Act 2001* (Cth)
- *Fair Trading Act 1989* (Qld)
- *Fair Work Act 2009* (Cth)
- *Insurance Contracts Act 1984* (Cth)
- *Imported Food Control Act 1992* (Cth)
- *Limitations of Actions Act 1974* (Qld)
- *Motor Dealers and Chattel Auctioneers Act 2014* (Qld)
- *National Consumer Credit Protection Act 2009* (Cth)
- *Queensland Building and Construction Commission Act 1991* (Qld)
- *Sale of Goods Act 1896* (Qld)

### CASES

- *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350
- *ACCC v Allphones Retail Pty Ltd (No. 2)* [2009] FCA 1230
- *ACCC v Cotton On Kids Pty Ltd* [2012] FCA 1428
- *ACCC v Derodi Pty Ltd* [2016] FCA 365
- *ACCC v Jewellery Group Pty Limited (No. 2)* [2013] FCA 14
- *ACCC v Pirovic Enterprises Pty Ltd* [2014] FCA 1028
- *ACCC v RL Adams Pty Ltd* [2015] FCA 1016
- *ACCC v Snowdale Holdings Pty Ltd (No. 2)* [2017] FCA 834
- *ACCC v Valve Corporation (No. 3)* [2016] FCA 196
- *Civil Mining & Construction Pty Ltd v Isaac Regional Council* [2014] QSC 231
- *Falgat Constructions v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259; (2005) 62 NSWLR 385
- *Hurley v McDonald's Australia Ltd* [1999] FCA 1728

**LEGAL ODDITY**

The following is from Section 8 of the General Rules Affecting Property within the *Property Law Act 1974* (Qld) and a remnant from the colonial days. Can you make sense of this?

All lands and all interests in land shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale, or by lease and release, and a conveyance of an interest in land may operate to pass the possession or right to possession of land, without actual entry, but subject to all prior rights to the land.



## 7.1 The need for statutory protection in contract law

Historically, contract law has been an area of law that has primarily relied on cases and the decisions of the courts to establish the applicable legal principles. This is called ‘common law’, and the common law of contract has been covered in Chapter 6.

However, in more recent times, government intervention in the area of contract law has resulted in a series of statutes being passed at the state and federal levels. These laws attempt to regulate or control certain contractual common law principles, especially in the area of consumer protection. In most instances, the legislative provisions seek to address concerns of a substantial difference or imbalance of bargaining power between parties to a contract.

This perceived imbalance generally relates to the increasing number of large corporations with which people trade in modern society. In the event of a dispute over contractual terms with a company, the average person does not have the resources to

take action to resolve such a dispute in their favour. The bargaining position of the respective parties in this case is clearly not equal. It has therefore become increasingly important that the contractual rights of parties be protected, especially for the consumer. To provide this protection, laws are constantly being created, reviewed and amended as the law evolves through a combination of common law developments and legislative reform.

### RESEARCH 7.1

Research the meanings of *caveat emptor* and *caveat venditor*. Analyse which of these two concepts is most prevalent in today’s contract law setting. Explain the reasons behind your conclusion and provide real-life examples. (C, S, A, Cr)

**Figure 7.1** Signing contracts is a common occurrence.



Nonetheless, the law does not always keep up with societal changes. The growth of large corporations is only one of the changes in society that is driving amendments to civil law. Another big influence on contractual obligations is the constant advances occurring in technology. E-commerce and globalisation have created a major challenge to law-makers and law enforcers in our fast-changing society.

Another area of civil law is tort law, which deals with issues such as defamation, private nuisance and negligence (see Chapter 8). While torts were originally determined by common law, there is an increasing trend of government-made laws providing statutory protection for the individual. This is evident in the tort of misrepresentation, which is now largely covered by the *Competition and Consumer Act 2010* (Cth) (CCA).



Figure 7.2 The global world of commerce is changing.

## 7.2 Role of the Australian Consumer Law in providing consumer protection

People are entering into contracts constantly. Every time they go the supermarket, buy something online, buy a new washing machine or purchase a car, they are entering into a contract. At times, the **consumer** is let down as the product purchased at the supermarket was incorrectly labelled, the goods ordered did not arrive, the washing machine broke down after three months and the odometer of the car purchased had been tampered with. The Australian Consumer Law (ACL) aims to provide consumers with protection against unfair practices in a transparent and fair manner.

The major legislation governing consumer protection in Queensland is:

- the Australian Consumer Law (contained in Schedule 2 of the CCA) (ACL)
- the *Sale of Goods Act 1896* (Qld) (SOGA)
- the *Fair Trading Act 1989* (Qld) (OFT).

**consumer** for the purposes of the ACL, a person is a 'consumer' if they acquire goods or services that are priced at less than \$40 000. A person is also a 'consumer' if they acquire goods or services that are priced at more than \$40 000 but they are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'.

The Australian Government enacted the *Competition and Consumer Act 2010* (Cth) (CCA) to enhance the welfare of Australians through the promotion of competition and fair trading, and



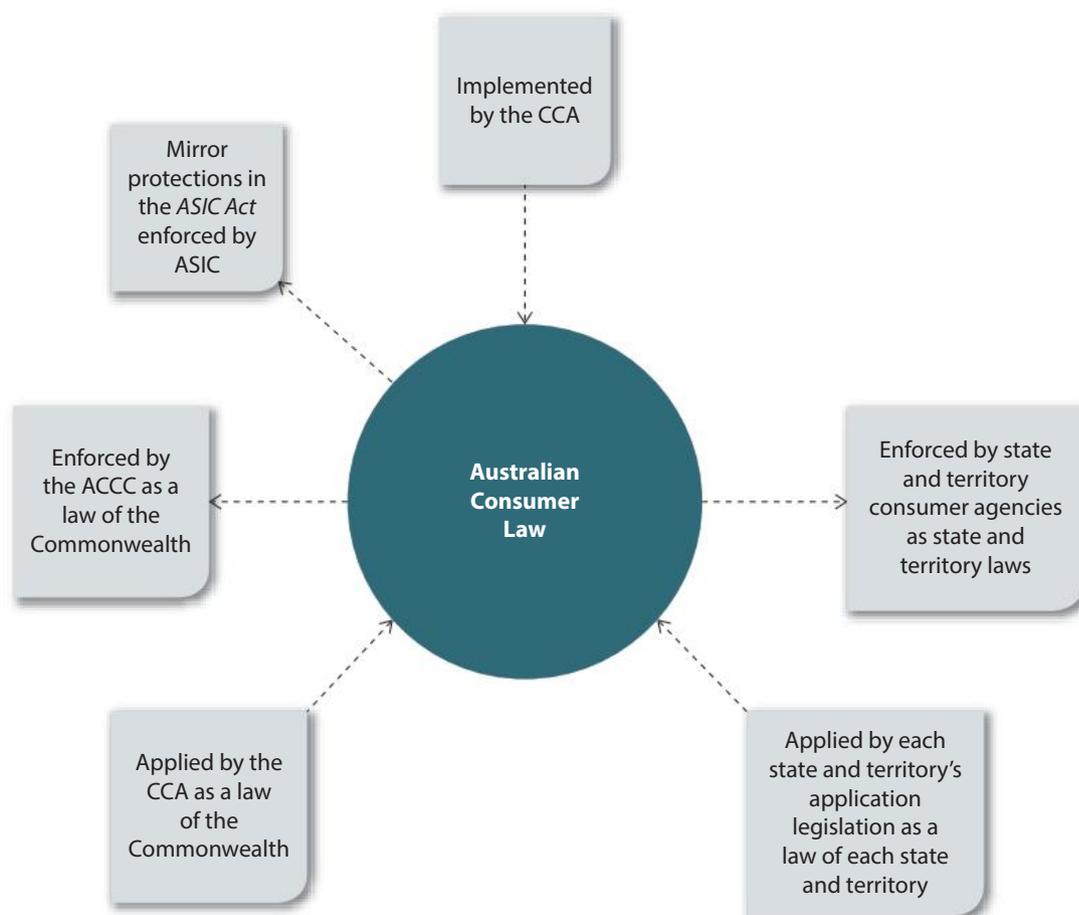
Figure 7.3 Odometer tampering

provision for consumer protection. Schedule 2 of the CCA includes ACL. It is administered and enforced jointly by the Australian Competition and Consumer Commission (ACCC) and the state and territory consumer protection agencies, including the Office of Fair Trading in Queensland. The Australian Securities and Investments Commission (ASIC) enforces similar consumer protections under the *Australian Securities and Investments Commission Act 2001* (Cth) for financial products and services, which include superannuation and insurance.

The ACCC is an independent Commonwealth statutory authority, with responsibility for enforcing and regulating the CCA. It also regulates a range of additional legislation aimed to promote competition and fair trading.

The most important limitation is that the CCA only applies where the trader is a corporation and excludes private sales and auctions. This is due to section 51 of the Australian Constitution, which establishes the division of powers between the federal and state parliaments. As the CCA is a Commonwealth Act (and the federal parliament has the power to make laws concerning corporations), the majority of the CCA applies only to corporations. The ACL applies to Queensland law through the *Fair Trading Act 1989*, so the application of the ACL extends to individuals.

The Queensland *Sale of Goods Act 1896* applies to individuals as well as companies, but it is possible to contract out of the *Sale of Goods Act 1896* by incorporating a clause in the contract stating that the provisions of the Act do not apply.



**Figure 7.4** Overview of ACL framework

Source: Australian Government, *The Australian Consumer Law*.

## 7.3 Consumer protection provisions of the Australian Consumer Law

**Table 7.1** Consumer guarantees

The goods will be of acceptable quality	The goods will be fit for the purpose
The goods will conform to the description	The consumer has clear title to the goods
The goods will conform to the sample	Express warranties exist on goods
Repairs and spare parts for the goods will be reasonably available	Consumer guarantees exist for services

### Consumer guarantees: Goods

The ACL implies a number of important guarantees into contracts and these sections are found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). These guarantees do not need to be specifically covered in the contract to be enforced, and they cannot be negated by a term in the contract.

- **The goods will be of acceptable quality (ACL, s 54).** This implied condition means that the goods must be of acceptable quality, taking into consideration the purpose for which they were bought, the price and all other relevant circumstances.
- **The goods will conform to the description given by the seller (ACL, s 56).** If a party wishes to purchase a sewing machine advertised



**Figure 7.5** But I ordered pink shoes!

for sale as being in ‘excellent condition’, then that party may reasonably expect the sewing machine to be in excellent condition. This is important where the purchase takes place without the buyer actually seeing the item, such as when ordering from a catalogue or via the internet. The description can be conveyed verbally by the seller or displayed on packaging or labelling.

- **The goods will conform to the sample, if one was given (ACL, s 57).** If a sample is supplied, the goods must match the sample or the buyer may be entitled to reject the goods. If you sample chocolate at a chocolate factory, it tastes good and you order a box of those chocolates on the basis of that sample, then you are entitled to expect they will taste as good out of the box as they did in the factory.
- **The goods will be fit for the purpose for which they are intended (ACL, s 55).** This condition is implied when the party buying the goods tells the party selling the goods the purpose for which the goods are being bought, and the buyer makes it known either expressly or implicitly that they are relying on the skill and judgement of the seller. The seller is then required to provide goods that are reasonably fit for the stated purpose.
- **The consumer has clear title to the goods (ACL, s 51).** This condition assists consumers to avoid situations in which they may have paid



**Figure 7.6** Are all these watches legal?

money for something the seller has no right to sell. It may be the case that the seller of the goods does not own the goods. Any legal restrictions on ownership must be brought to the attention of the customer before purchase.

- **Express warranties (ACL, s 59).** An express warranty is an extra promise that a business makes about the quality or standard of a good. This representation can be made verbally or in writing. An example of an express warranty would be for goods advertised with a lifetime guarantee – for example, Global knives and certain Tupperware products sold in Australia.
- **Repairs and spare parts will be reasonably available (ACL, s 58).** The manufacturer of the goods guarantees that services used for the repair of the goods, as well as spare parts for the goods, will be reasonably available for a reasonable time after the goods are supplied. Note that this does not apply to private sales.



Figure 7.7 Some products have a lifetime guarantee.

### RESEARCH 7.2

Carry out research online.

- 1 Make a list of goods that offer lifetime guarantees.
- 2 Report on cases of consumers who have not had a good experience with lifetime guarantees. (S, C).

## Consumer guarantees: Services

The provision of services also has guarantees (ACL, ss 60–62), as services provided should be:

- delivered with due skill and care
- fit for the purpose when the purchaser has made the purpose known
- supplied within a reasonable time.

Services not covered under the ACL include insurance contracts and contracts for transportation or storage of goods for the purposes of a business.

### RESEARCH 7.3

One consumer guarantee – the goods will be of acceptable quality (CCA, s 54) – is similarly mentioned in section 17C of the *Sale of Goods Act 1896* (Qld) as an implied condition, namely, the goods shall be of merchantable quality.

- 1 Research the SOGA (Qld) and list any warranties or conditions similar in nature to the consumer guarantees (applying to goods) contained in the CCA. (S)
- 2 Outline the differences between the SOGA and the CCA and clarify why there appears to be some similarities in the content of certain warranties/guarantees (in relation to the sale of goods) in federal and state legislation. (C, A)

Figure 7.8 An incompetent repair person



## Remedies to breach of implied guarantee

The first step is to contact the seller to explain the problem and suggest ways to mutually resolve the issue. If no resolution is forthcoming, the ACCC or OFT should be contacted for advice. They may offer to assist in negotiation between the parties or even take action on behalf of the consumer.

Another alternative is to contact an industry ombudsman. They are available to assist in a number of industries such as telecommunications and financial services. The final step is to take legal action through a tribunal such as QCAT or commence private legal action in the civil court system. The role of ADR procedures, conciliation, the ombudsman and the various tribunals and agencies is covered in Chapter 5.

If it is proven that the supplier or seller has failed to meet a guarantee, the consumer has the right to the following **remedies**:

- If it is a minor failure and the problem is easily rectified, the seller can give a refund, repair the product or replace the product (in the case of goods). The most common remedy for a minor failure for a service difficulty is simply to get the particular service done again.
- If the failure is of a major nature and not easily rectified, the seller can give a refund, replace the item or the purchaser may keep the item and request compensation. A major failure in supply enables the consumer to cancel the contract and seek a refund (depending on work completed) or keep the contract and ask for a reduced price.

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**remedy** relief for loss or damage that may be given or ordered by a court to compensate for a wrong

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### REVIEW 7.1

- 1 You purchased a surfboard from a store. On your first wave, the board snaps in half. The wave was small and you did nothing to place undue stress on the board. Can you take any action against the shop that sold the surfboard to you, or the manufacturer? (A)
- 2 Compare and contrast the remedies available for a breach of implied guarantee. (C, A)

**Figure 7.9** Is it the manufacturer or the retailer who is in breach of implied guarantee in this instance?



## Unfair business practices

The CCA sets out a number of provisions that cover many of the common problems consumers encounter when entering into a contract. The main areas covered by the CCA are listed in Table 7.2.

### *Misleading or deceptive conduct*

Section 18 of the CCA prohibits any conduct that misleads or deceives, or is likely to do so. This often

occurs in advertising, the sale of second-hand cars and employment contracts.

**Table 7.2** Main areas of the CCA

Misleading or deceptive conduct	Unconscionable conduct
False or misleading representations	Unsolicited consumer agreements
Product liability and product safety	Issues such as measurements and bait advertising
Unfair contract terms	Country of origin representations

## REVIEW 7.2

### Coronis fined for misleading advertisement

Queensland Government, 30 September 2016

A Queensland real estate agency has been fined \$10 800 by the Office of Fair Trading after misleading a buyer about the future development potential of a Kings Beach property.

Coronis Caloundra claimed in an advertisement that development applications would be accepted to a height of seven stories, subject to council approval. The council development guidelines, however, prohibited heights above three storeys.

A consumer purchased the property, based on the misrepresentation, in the belief that it had significant development potential and would provide good investment returns.

‘Like all businesses, real estate agents cannot rely on disclaimers, caveats, fine print, or terms and conditions in their advertising to moderate or discount a headline claim,’ Ms Simmers said. ‘The OFT encourages real estate agents to familiarise themselves with the ACL, especially their legal obligations when advertising property.’

#### Question

Discuss the statement that a ‘purchaser has an inherent responsibility to check out the validity of any claims before signing a contract and handing over the money’. (C, A)



**Figure 7.10** Real estate listings

## Unconscionable conduct

While the term ‘unconscionable conduct’ is not defined in the CCA, it is clear that a supplier cannot take unreasonable advantage of consumers. At times, the consumer is at a disadvantage as they may not

understand the complexities of a contract or have been pressured unduly by the seller. The protections under the ACL apply only to dealings for goods and services that are ordinarily for personal or household use.

### CASE STUDY 7.1

#### **ACCC v Excite Mobile Pty Ltd [2013] FCA 350: A landmark decision on unconscionable conduct and mobile phone contracts**

##### Facts

Excite Mobile (EM) offered mobile phone contracts on a \$33 monthly plan with a daily cap of \$2.20, after which higher rates were charged. EM could directly debit a consumer’s bank account after \$50 of unbilled calls. Debt collection letters (from a fictitious agency) were sent to consumers suggesting that the courts would order a late fee of 20 per cent on unpaid bills or order repossession of all assets (including children’s toys).

##### Issues

EM was in a position of relative advantage over the customer, who did not fully understand the terms and conditions. There was undue pressure and the tactics used on the consumer and the debt collection tactics were unconscionable.

##### Law

*Trade Practices Act 1974* (renamed the CCA), ss 51AB, 52, 53(c), 53(g) and 60.

##### Arguments

The directors of EM did not resist the findings but denied the accusations of unconscionable

conduct, coercion and misleading or deceptive representations.

##### Decision

EM was ordered to pay penalties totalling \$455 000 for engaging in false, misleading and unconscionable conduct and using undue coercion. The directors were disqualified from managing a corporation for three years and two and a half years respectively. The court ordered the ACCC’s costs to be paid as well.

##### Reasons

Justice Mansfield stated that the conduct engaged was deliberate, noting that ‘the design of the “day cap” was destined to expose its customers to quite substantial monthly charges, but was presented in such a way that effectively concealed that reality’ and ‘directly caused significant loss to individual consumers’. The coercion conduct was the ‘worst feature’ of the debt collection conduct, causing ‘customers to suffer financial loss and damage’ as well as ‘non-financial harm such as the stress caused by threats and intimidation’.

Source: ACCC.

### REVIEW 7.3

Consumers living in Aboriginal communities and remote areas in Queensland constituted a large number of Excite Mobile’s customers. Referring to Case Study 7.1, answer the following questions.

- 1 Write a paragraph commenting on why these particular customers could be in a position of consumer disadvantage in the marketplace. (C, A)
- 2 Suggest ways by which the law could rectify this imbalance. (E)



**Figure 7.11** Mobile phones are a necessity in outback Australia.

## RESEARCH 7.4

The court used the precedent cases of *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 and *ACCC v Allphones Retail Pty Ltd (No. 2)* [2009] FCA 1230 in helping it decide whether the actions were unconscionable.

- 1 Research these cases and identify the issues that constituted unconscionable action. (S)
- 2 Comment on the use of precedent in these cases. (C, A)

## SIDEBAR

According to the Australian Bureau of Statistics (ABS), there were more mobile handset subscriptions (26.3 million) than people in Australia in 2017.

### *False or misleading representations about goods and services*

It is illegal to make false representations about the standard of the goods and services, such as:

- previous history of the goods
- saying something is new when it has in fact been used
- exaggerating the availability of repairs for the product
- inflating the original cost price.

### *Unsolicited consumer agreements*

This provision covers issues such as door-to-door and telephone sales that do not take place at the supplier's business. This may be by phone, by letter, in a display at a shopping centre or in the consumer's home or workplace, or any place where the trader normally does not do business. The supplier must make the first approach if the consumer is to be protected by the ACL.

**Figure 7.12** This car is in new condition – trust me!





**Attention salespeople**

**DO NOT  
KNOCK**

**Please leave these  
premises immediately**



Figure 7.13 Do Not Knock

## SIDEBAR

Did you know that the permitted hours for telemarketing and door knocking are between 9.00 am and 5.00 pm every day except Sunday, when they can keep going until 8.00 pm?

### REVIEW 7.4

## Office of Fair Trading turns the heat up on door-to-door air conditioning sales

28 July 2017

A solar and air-conditioning marketing business in North Queensland has paid a penalty of \$10 800 following an investigation by the Office of Fair Trading.

The director of Oz Solar Needs Pty Ltd and an employee entered the Aboriginal community of Yarrabah and township of Laura in early May 2017 and signed up a number of consumers to contracts to have air-conditioning units installed in their homes. An investigation found Oz Solar Needs breached the door-to-door trading provisions of the ACL.

Under the ACL, door-to-door traders are required to provide a written contract to consumers, including a notice informing consumers they have a cooling-off period of 10 business days, which they can exercise to cancel the contract and get a full refund. Oz Solar failed to advise consumers of their cooling-off rights or provide the cancellation notice.

### Question

Comment on the need for door-to-door traders to provide a written contract to consumers. (A)

## Product liability and product safety

The CCA imposes strict liability on manufacturers of defective products, which may cause injury or damage. 'Strict liability' means that the

manufacturers are liable if goods are defective, regardless of whether negligence can be proved in the manufacture as a breach of common law duty of care.

### SIDEBAR

There are currently over 60 000 Avon 'ladies' in Australia selling beauty products door to door. Comment on the notion that this type of marketing technique will become obsolete in the future, given the new laws and the ever-increasing online sales of such products. (A)



Figure 7.14 Avon calling

## Other issues such as measurements, harassment, bait advertising, pyramid selling and multiple pricing

Examples of these issues include when a product's packaging information contains misleading information about the true weight of its contents.

Bait advertising concerns advertising goods or services at a price set to attract customers when there is no guarantee that there are adequate supplies of the goods and service to meet the demand.

### Unfair contract terms

Any unfair terms in standard form consumer contracts render the contract void. A consumer contract is one for the supply of goods or services, or for the sale or grant of an interest in land to an individual

for personal, domestic or household use or consumption. This provision does not apply to business-to-business contracts.

**Figure 7.15** Pyramid selling is where the revenue of the company comes from a non-salaried workforce, while the earnings of that workforce are derived from commission. It is a style of business that generally benefits only those in charge.



## Country of origin representations

Products often claim to be made in Australia or grown in Australia. There is no general legal requirement under the ACL to clearly place country of origin details on products. It is, however, illegal to mislead the public into thinking the product is Australian made by including details that are deceptive by nature – for example, having a map of Australia on the label when the goods have been imported. Other legislation does have specific requirements, especially for food items – for example, the *Imported Food Control Act 1992* (Cth).



Figure 7.16 Made in Australia

### REVIEW 7.5

- 1 A change to the *Wine Australia Corporation Act 1980* (Cth) means that Australian wine cannot be labelled sherry, port or champagne as the names belong to regions of wine-making districts in Europe. Investigate the reasons for this change in the law. (S, A)
- 2 Do Australian consumers expect items such Turkish rugs and Turkish coffee to be made in Turkey? Is it misleading and deceptive if the goods are actually made in China (and clearly labelled as such)? Justify your reasoning. (A)



Figure 7.17 Turkish rugs – but where are they made?

All the mentioned provisions of CCA are mirrored in the *Fair Trading Act 1989* (Qld) and apply to ‘persons’ rather than just companies. The Office of Fair Trading in Queensland (OFT) is responsible for administering and regulating the obligations imposed on parties under the consumer protection laws in place in Queensland. It investigates complaints made in relation to contractual matters and will also accept undertakings made by a company, individual or partnership as an alternative to court proceedings.

### CHECK THIS OUT

Check out the media statements on fair trading topics on the Queensland Office of Fair Trading website. Investigate two of the most interesting media statements and report back to the class on the issues involved. (S, C)

## CASE STUDY 7.2

### *ACCC v Jewellery Group Pty Limited (No. 2) [2013] FCA 14*

#### Facts

Between November 2008 and May 2010, Zamel's Jewellery misled consumers about the savings they would make during sales using dual-price advertising – for example, 'Was \$275, Now \$149'. This occurred through the Zamel's website, in a flyer, in catalogues and in store.

#### Issues

The court considered whether the items were sold by Zamel's at the advertised higher price outside the sale period. The trial judge also looked at how many copies of the catalogue had been printed and its target consumers.



**Figure 7.18** Is this 40 per cent off?

#### Law

The court considered whether Zamel's had breached the *Trade Practices Act 1974* (Cth) (TPA), which has now been replaced by the CCA. The courts specifically looked at misleading or deceptive conduct and false representations.

#### Arguments

Zamel's believed that it was acting in compliance with its legal obligations in relation to advertising.

#### Decision

The court found that in relation to the 44 jewellery items, Zamel's conduct was misleading or deceptive, or likely to mislead or deceive (TPA, s 52) and amounted to false or misleading representations in relation to the price of the goods (TPA, s 53). Zamel's was ordered to pay a \$250 000 fine, publish corrective advertising, establish a trade practices compliance program and pay the ACCC's costs.

#### Reasons

The court found that, based on the advertising, customers would have expected to save the amounts listed because of the sale. In fact, they would have saved the same amounts during non-sale periods.

### REVIEW 7.6

- 1 Identify the section(s) of the CCA that replaced sections 52 and 53(e) of the TPA. (S)
- 2 Research whether the case was appealed by Zamel's and record the outcome of any appeal. (S)
- 3 As a result of this judgment, discuss the viewpoint that consumers will now feel more comfortable with sales advertising massive discounts off the original price. (A)
- 4 Appraise the implications of this fine to other jewellery stores such as Michael Hill and Prouds. Will the penalty deter other retailers from using deceptive practices in the future? Justify your reasoning. (A, E)

## 7.4 Industry codes

### Mandatory industry codes

Mandatory industry codes serve to protect both the consumer and other stakeholders.

The ACCC regulates mandatory industry codes prescribed under the CCA. Examples of such codes include:

- energy ratings set out minimum energy performance standards and labelling for common appliances in Australia
- water efficiency standards
- fuel consumption standards.

Businesses should follow these codes, as it may help them avoid:

- the cost of recalling unsafe products
- damaging their reputation and corporate image
- a decrease in their market share
- damages from legal action
- fines (\$220 000 for an individual or \$1.1 million for a corporation).

Many industries also set up their own voluntary industry codes with assistance from the ACCC. These codes set out standards of conduct for an industry, including how to deal with its associated



Figure 7.19 Washing machine energy rating

Figure 7.20 Voluntary codes for major grocery retailers



members and its customers. These codes do not negate existing provisions of the CCA. Examples of these codes include the following:

- **The Horticulture Code of Conduct.** This governs the trading arrangements between growers and traders in the horticulture sector (fruit, vegetables, etc.) by requiring written contracts. The code also sets out ways to resolve disputes.
- **The Food and Grocery Code of Conduct.** This code governs conduct by grocery retailers and

wholesalers in their dealings with suppliers. It is a voluntary code and the major grocery retailers – ALDI, Coles and Woolworths – are signatories. Members of the Food and Grocery Code have also shown their willingness to comply with consumer laws and product recalls. A recall of goods can be ordered if the goods are likely to injure people or not comply with a standard. A recall of goods can be ordered by the government or declared voluntarily by a supplier.

## Recall: Cocofrio Dairy & Gluten Free Frozen Dessert Strawberry Choc-Chip

Organic coconut milk ice cream, strawberry choc-chip flavoured. 500mL paper tub with lid and shrink-wrap tamper evident sleeve on the lid.

The product contains the presence of undeclared allergens. Consumers who have a pecan, hazelnut, cashew or pistachio allergy or intolerance should not consume this product and should return the product

to the place of purchase for a full refund. (IGA and independent grocery stores – NSW, Queensland, Victoria, Tasmania, SA, WA)

*Source:* ACCC – Product Safety Australia.

### REVIEW 7.7

- 1 Analyse the reasons why major grocery corporations are so keen to comply with the industry standards. (A)
- 2 Comment on the availability and access of information regarding product recalls to the general population. (A, E)

Figure 7.21 Nutrition fact sheet



## Mandatory product safety for consumers

The ACL also regulates unsafe consumer goods by regulating goods and services through imposing safety standards. All products sold to Australian customers (including online sales) are required to meet product safety requirements under the ACL. These mandatory standards are law, and there are serious penalties and consequences for those sellers that do not comply.

There are two types of mandatory product standards:

- **Safety standards.** Goods sold in Australia must meet the standards – for example, in manufacture, performance, packaging and design. Clear warnings of any safety dangers must be displayed.
- **Information standards.** Information is required to be clearly given or displayed to consumers – for example, labelling of clothing and cosmetics.

Mandatory product standards are regularly reviewed and revised if necessary. In 1989, a standard for elastic luggage straps was introduced, yet many

Australians were still seriously injured on an annual basis. The ACCC has recently amended the standard, which now reads ‘WARNING. Rebounding hooks cause blindness. Place hooks with care. Keep face and body out of rebound path. DO NOT overstretch. DO NOT use when strap has visible signs of wear or damage.’

Another revision that relates directly Case Study 7.3 was made in 2017 when there was a safety standard revision of the Children’s Nightwear and Limited Daywear Standard to make the labelling standards higher.



**Figure 7.22** Children’s sleepwear must meet certain safety standards.

### CASE STUDY 7.3

#### *ACCC v Cotton On Kids Pty Ltd [2012] FCA 1428*

### Cotton On fined \$1m over fiery children’s sleepwear

Petra Starke, News Corp Australia Network, 18 December 2012

National clothing retailer Cotton On has been fined \$1 million for selling highly flammable children’s sleepwear misleadingly labelled as ‘low fire danger’.

The penalties, handed down today by the Federal Court in Victoria, are the highest of their type ever imposed against a company and follow more than two years of action by the Australian Competition and Consumer Commission.

The discount clothing retailer, which has more than 900 outlets across the country, was fined \$400 000 for selling more than 1000 nightdresses that breached Australian fire safety standards, and a further \$400 000 for selling more than 1000 unsafe pairs of girls’ pyjamas between September and December 2010.

It was fined a further \$200 000 for false and misleading labels on both sets of clothing items, which claimed they were ‘low fire danger’.

- 1 Discuss the potential consequences to consumers if there were no safety standards enforced on the sales of clothing. (A)
- 2 Identify the actions that constituted 'acting in an unconscionable manner' by Cotton On. (C)
- 3 Describe any possible defences Cotton On could have used in the Federal Court hearing. (C)
- 4 Comment on the adequacy of the fine to deter others. (A, E)
- 5 Both elastic straps and inflammable nightwear have obvious safety risks. Investigate the reasons why the authorities took so long to adopt acceptable and commonsense standards. (S, A)
- 6 Importers and retailers will have a transition period until January 2020 to implement the new requirements for the nightwear. Discuss the reasons why the government could justify this long transition period. (A, E)
- 7 Compare and contrast the differing positions of various stakeholders regarding this new safety standard. (A)

## SIDEBAR

Did you know that:

- tomato sauce is banned in many schools across France
- Kinder eggs are banned by US Customs and Border Protection
- Denmark has banned Marmite
- haggis is banned in the United States
- raw, unpasteurised milk is banned in many states in the United States and Canada?

Research the listed points and identify the reasons why these products were banned. Discuss the notion that they should also be banned in Australia. (S, A)

## Unfair contract terms

The ACL defines a consumer contract as a contract for the supply of goods or services, or the sale or grant of an interest in land, to an individual for personal, domestic or household use or consumption.

Many businesses offer customers the same or a similar contract, and this is commonly known as a standard form contract. They are used extensively for domestic building, motor vehicle rentals, telecommunications and finance. While businesses use standard form contracts to improve efficiency, they must be careful about terms incorporated into the document, as there are laws in place to protect the consumer from unfair terms.



**Figure 7.23** These items are banned in some countries.

Parts 2–3 of the ACL provide that a court may determine that a term of a standard form consumer contract is unfair and therefore void. For instance, a contract cannot exclude any of the ACL's implied conditions and warranties. If a contract inserts a clause such as that they 'will accept no responsibility

for loss or damage', then this clause will be invalid. Section 60 of the ACL requires that there is an implied warranty that the services will be rendered with due care and skill, and if this is not completed to a satisfactory standard, the clause stipulating 'no responsibility' is void.

## 7.5 Enforcement and remedies: Legislation

*The Fair Trading Act 1989* (Qld) offers enforcement and remedies for breaches and suspected breaches of the national consumer law through the OFT in Queensland. These replicate the remedies under the ACL and the Federal courts under the CCA provision shown in Figure 7.24.

These actions aim not just to enforce the law, but also to promote market and community confidence in transactions between consumers and businesses. In an effort to reach this goal, consumer agencies endeavour to educate the parties involved and attempt to find solutions to disputes that do not end up in court. However, court action can be initiated for serious breaches, especially when the offender

has gained financially due to non-compliance with the consumer laws.

The current legislation under the ACL offers a range of enforcement and other remedies:

- **Official warnings** can be given for minor breaches when the wrongdoer did not act dishonestly and cooperates with any investigation. The business must also take action not to repeat the offending behaviour.
- **Infringement notices** or a civil penalty fine can be issued for less serious types of breach that are generally isolated. Such breaches would generally be of a common variety and the offenders have few defences for their actions.

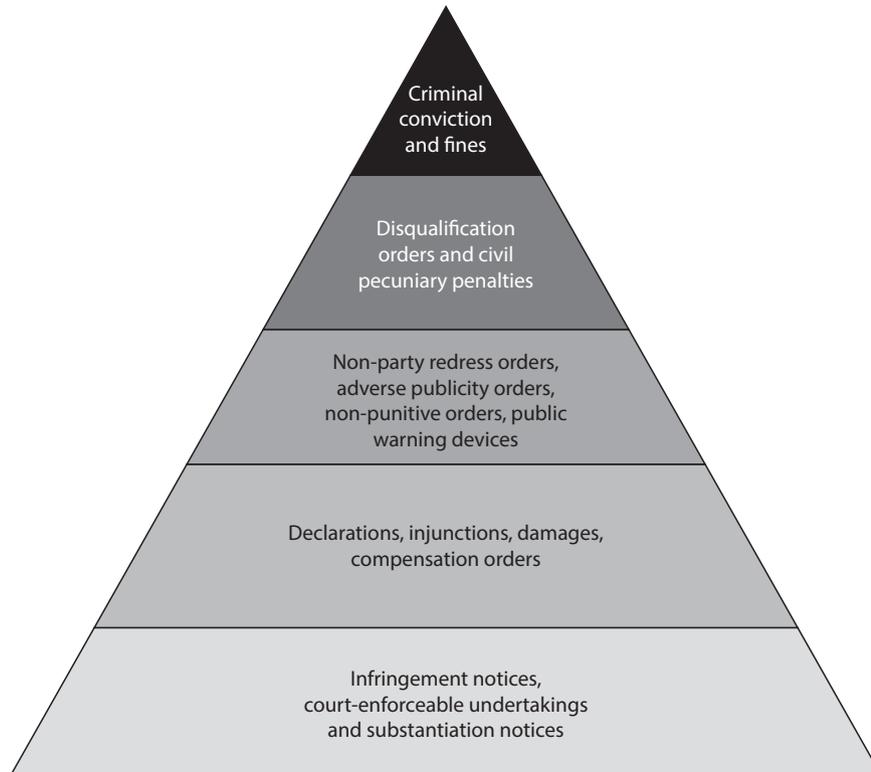


Figure 7.24 Enforcement and remedies under the ACL

- **A court injunction** can be issued to a business to force it to stop engaging in an action that is a breach of the ACL. A consumer agency such as the OFT or an individual may apply to the courts.
- **Enforceable undertakings** occur when a person informs a consumer agency that they may have breached the ACL and agree to an undertaking that they will not repeat the action and take steps to comply. If accepted by the consumer agency, the undertakings are court enforceable and can be publicised in the media.
- **Public warnings and naming** are published if there is evidence of deliberate and extensive misconduct. They can also be issued if the offender refuses to respond to a notice.
- **Compensation** may be granted to consumers affected by a breach of the ACL for loss or damage suffered, or likely to be suffered. The court may order the offending business to repair or replace a product, return money or property, pay a restitution or perform a service.
- **Adverse publicity orders** (an advertisement) may be imposed by a court to a consumer agency for a breach to disclose the nature of the breach to the affected parties.
- **Civil pecuniary penalties** or monetary fines may be imposed as a form of punishment and deterrence if the contravention of the Act is proved on the balance of probabilities. If the fine is not paid, the courts may seize assets, commence bankruptcy proceedings or impose imprisonment.
- **Disqualification** of a person managing a corporation may occur.
- **Prosecution or tribunal action** is taken for serious breaches, constant reoffending or where the issue is deemed to be in the public interest. A business may also elect to take the matter to court.

## REVIEW 7.9

Attorney-General and Minister for Justice Yvette D'Ath has warned Queensland consumers to be very cautious about buying event or concert tickets from ticket resale website Viagogo. The Queensland OFT has received 49 complaints from consumers about Viagogo, with 43 received in the last 12 months.

Viagogo is a reputable agency, and possibly the largest live entertainment ticket agency in the world. The company has also been investigated in a probe into suspected breaches of consumer law in the United Kingdom.

Comment on whether or not you think it is fair to issue public warnings and possibly destroy the reputation of the business based on just 49 complaints. (S, A)

**Figure 7.25** The movement viaNOgo started in 2013 when football supporters successfully demonstrated against German football club Schalke 04 for signing a contract with viagogo that could lead to a 100% increase in the price of tickets. In 2017 the logo was again used when disgruntled customers petitioned the UK Government to stop the resale of concert tickets at inflated prices on secondary websites.



## 7.6 Other issues

### Stakeholders

In a legal sense, a stakeholder is any person or organisation that has a direct interest in, or is affected by, the activities of a contractual arrangement.

There are many stakeholders in a contractual agreement:

- the consumer who wants to purchase the goods and services
- the third parties directly affected and related to the consumer – for example, their family
- the seller, who may be an individual, a small business or a large multinational company
- the manufacturer of the product
- the banking system, the insurers, the government, the legislators, the legal profession and the courts, among others.

The CCA applies to just about every aspect of a business, including advertising, price-setting and transactions with consumers and other businesses, as well as from business to business. The number of consumer protection laws make it essential for all businesses to understand the laws, regulations and industry standards.

The current laws are also demonstrating the need to protect small business. A business is considered a consumer when it buys goods or services that are under \$40,000, or over \$40,000 if normally bought for personal, domestic or household use or consumption, and the goods are not resold.

**Figure 7.26** The driving force of all markets



**Figure 7.27** All members of society are stakeholders in fair contracts.

Small businesses (employing less than 20 people, including casual employees) have protection against unfair contract terms by amendments to standard-form contracts. The ACCC has taken a number of successful court actions against unfair contract terms, and ACCC Deputy Chair Dr Michael Schaper said, 'These cases show the ACCC is serious about enforcing the new laws, and we will continue to take action where appropriate to ensure that small businesses are protected.'

Large businesses are not afforded the same protection by the legislators as they have a responsibility to consider the larger ramifications of non-compliance with the law and the national standards. Corporate social responsibility (CSR) is a business approach aimed to develop fair and economic social benefits for all stakeholders.

#### REVIEW 7.10

Profit and not fairness is unfortunately often the ultimate goal for the seller or the financier.

- 1 Examine ways for contract law to find an acceptable balance between these competing interests. (A)
- 2 Evaluate the success of the law in responding to this imbalance. (E)

## e-commerce and online contracts

The internet has revolutionised the ways individuals and businesses engage in commercial activity, and is having a significant impact on the laws relating to contracts. The courts generally rely on contractual common law principles (Chapter 6) to decide issues, while at the same time laws are being legislated at state and federal level to transfer legal principles from the 'paper world' to the 'electronic realm'. One particular area of interest concerns jurisdiction issues when purchasing internationally.

## Cooling-off periods

Another recent development in contract law has been the growing application of cooling-off periods. A cooling-off period is a time period during which a party to a contract may reconsider their commitment to completing the terms of the agreement. If they decide not to proceed with the contract, they may withdraw from it.

### CASE STUDY 7.4

#### **ACCC v Valve Corporation (No 3) [2016] FCA 196**

### **Video games website Steam fined \$3 million for refusing refunds**

**23 December 2016**

US gaming company Valve Corporation (*Half-Life*, *Counter-Strike*) has been fined \$3 million after the Federal Court found its online games site Steam breached Australian Consumer Laws.

The court imposed the maximum fine requested by Australia's competition regulator because of Valve's disregard for Australian law and lack of contrition. The company did not obtain legal advice when it set up in Australia, and did not check its obligations until the ACCC got involved in April 2014. Valve is a US company with 2.2 million Australian accounts.

A court found that Steam's website breached Australian consumer law because it stated that consumers were not entitled to a refund and had no access to quality guarantees.

The defendant claimed it was not an Australian company and therefore not subject to the ACL rules. It based

its claims on the fact that the business, including its staff, its headquarters, its website and support services, was in the United States. All payments were made in US dollars.



**Figure 7.28** Internet gaming

## REVIEW 7.11

- 1 Are the defences of Valve Corporation justifiable? (A)
- 2 Comment on whether or not you think the decision made in this case could be used as a precedent, showing that international transactions involving Australian consumers occurring over the internet are subject to the ACL. (A, E)
- 3 Research the existence of any international laws covering e-commerce. (S)

A cooling-off period gives parties time to think through their contractual commitment and is aimed at allowing more informed and reasoned decision-making in contractual dealings – for example, comparing other offers.

There is a statutory cooling-off period for unsolicited consumer agreements. To terminate the agreement within the cooling-off period, you must notify the supplier. You can do this either verbally or in writing. If the consumer misses the deadline, they will normally be bound by the contract.

A contract for the sale of a used motor vehicle by a motor dealer is legally bound to include a cooling-off period clause in the contract: see *Motor Dealers and Chattel Auctioneers Act 2014* (Qld). If this is not present, the buyer can void the contract up to seven days after the day the car legally changes ownership.

## Anti-competitive behaviour

The CCA prohibits contracts or arrangements that intend to lessen competition in a market. Any business practices that limit or prevent competition are against the law. These laws are not only beneficial for the economy, but they serve the interests of the consumer, the seller and the manufacturer.

Examples of anti-competitive behaviour include businesses that make agreements with their competitors to fix prices at an artificially high level, or restrict outputs to reduce consumer choice. Such behaviour is commonly referred to as the misuse of market power.

Under the ACL, businesses must not engage in unconscionable conduct when dealing with other businesses or their customers. This also includes behaviour that limits competition by mergers of companies, predatory pricing, imposing minimum prices on retailers and supplier refusal to supply goods or services without just cause. Maximum fines for breaches by corporations are \$30 million, and \$500 000 for individuals.

**Figure 7.29** Price fixing and collusion between market leaders is anti-competitive behaviour that negatively impacts on the consumer.



## REVIEW 7.12

It is of interest to note that, while the ACCC opposes mergers that have a negative effect on competition, it has the legal power to authorise mergers that are in the best interests of the public.

- 1 Identify a situation that would legally allow large corporations to merge and still serve the best interests of consumers. (S, A)
- 2 Discuss how a free-market system (where all traders have an equal opportunity to trade) may not satisfy all stakeholders. (A, E)

## Review of the ACL

A review of the ACL was completed in 2017, with 19 changes to the ACL proposed to make the law up to date and able to respond to new issues confronting consumers in the marketplace. The majority of these amendments were agreed to by the various ministers of fair-trading and consumer protection agencies, but they were not yet law at the time of writing.

### CHECK THIS OUT

Visit the ACCC website to view the current status of the ACL review.

The main proposals are:

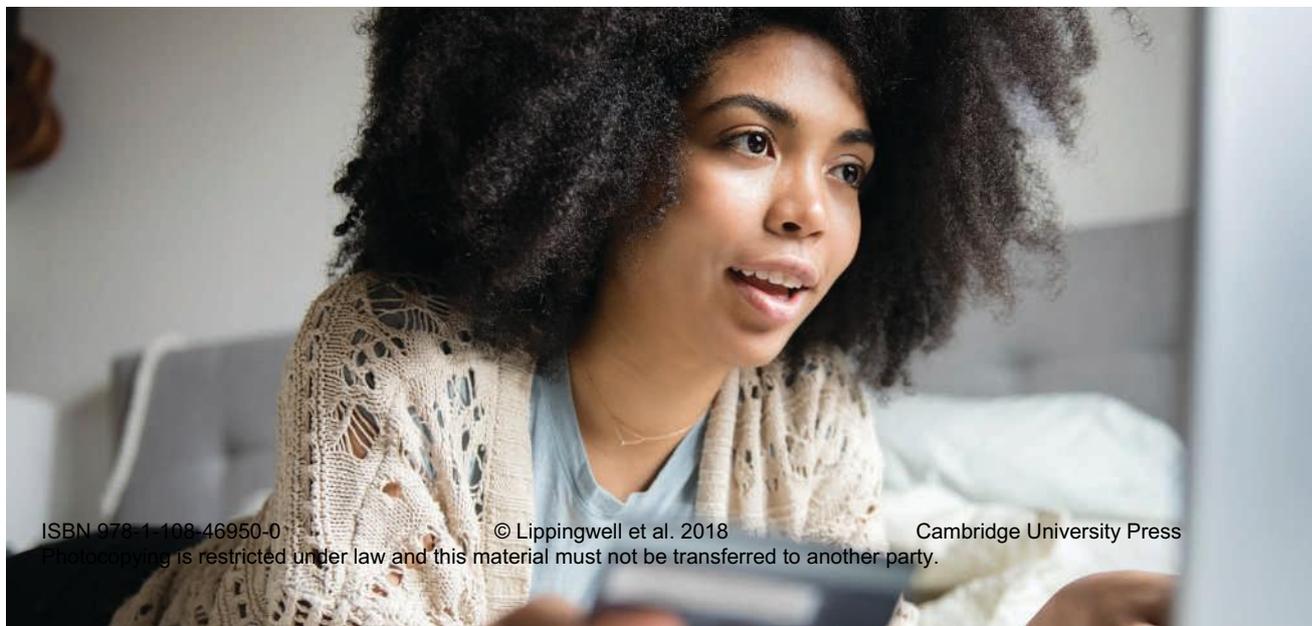
- to increase the maximum financial penalties for breaches for individuals to \$500 000 and \$10 million for corporations
- that the ACL definition of a 'consumer' threshold be raised to \$100 000
- to make online shopping fairer by making the price include all additional fees
- to include insurance contracts under the protections against unfair contract terms
- to introduce a general safety provision requiring traders to ensure that their products meet safety standards before entering the market.

The Productivity Commission also conducted research into consumer law enforcement and administration in Australia in 2017. The main aim of this report was to assess the role of the single-law, multiple-regulator model through which the Commonwealth, states and territories enforce the ACL.

While the commission found the multiple-regulator model to be working 'reasonably effectively', it found inconsistencies and deficiencies in the administration of consumer law, particularly in relation to electrical goods and building and construction.

A further recommendation included that Australian governments 'establish an independent review of consumer alternative dispute resolution mechanisms', which should give regulators greater powers to compel businesses to cooperate.

**Figure 7.30** Cheap prices of online goods are often misleading, so be careful online! Retailers sometimes engage in 'drip pricing', where small fees and charges are added during the purchase process so that the final price is much higher than the initial price. The ACCC has fined companies such as Jetstar and Virgin for engaging in this, and amendments to the ACL are looking to make online shopping fairer.



## 7.7 Specific industry areas

Specific industry areas related to contract law include employment contracts and other agreements, and mechanisms for dispute resolution.

### The role of employment contracts and other agreements

An employment contract is an agreement between an employer and employee that sets out terms and conditions of employment. It can be written or verbal.

Underpinning common law employment contracts is the *Fair Work Act 2009* (Cth). Within the *Fair Work Act 2009* (Cth), there are National Employment Standards (NES), which provide minimum employment standards for all employees within Australia regarding terms such as leave, notice of termination and redundancy.

In Australia, a common law employment contract is also normally underpinned by an Enterprise Agreement or a Modern Award. Enterprise Agreements outline the minimum terms and conditions for employees and are made collectively between employees and employer(s). They are approved by the Fair Work Commission. Modern Awards are created by the Fair Work Commission in consultation with employer and employee representatives. Modern Awards outline the minimum terms and conditions for employees in particular occupations or industries.

All common law employment contracts must meet the NES/Modern Award/Enterprise Agreement terms and conditions, or the employer will face legal exposure if they do not comply. An example is where an employment contract stipulates that an employee is entitled to five days of personal leave, when the NES states that they are entitled to 10 days.

### Breaching employment contracts

Common law employment contracts can be breached by either an employee or the employer. For example, where an employment contract explicitly states that an employee will have the position for a fixed period of two years and the employer ends the employment after one year, the employer will have breached the contract and the employee will be entitled to bring a claim against the employer for the remaining year of wages.

Other examples of breaches of express terms of an employment contract include:

- an employee breaching restraint of trade terms
- an employer not providing the required notice of termination under the contract
- an employer not providing the wage specified in the contract.

**Figure 7.31** Breaches of contract can result in civil action against an employer or employee.





**Figure 7.32** Employees who feel they have been unfairly dismissed can contact the Fair Work Commission to help in seeking compensation or the reinstatement of their position.

Employment contracts also have a number of implied terms that may be breached. A term may be implied in an employment contract because it should be inferred, or the contract will not work without the term. For example, where a contract does not have a termination clause, the courts will consider that the term is implied and impose it.

Where an employee believes their employer has breached their employment contract, they can seek assistance from a lawyer, the Fair Work Ombudsman, the Fair Work Commission, or civil

courts and tribunals such as the Magistrates Court and QCAT to resolve their complaint. Breaches of contract can expose an employer to pay:

- damages to compensate for any loss suffered
- any monies owed
- interest on damages
- the legal costs of the employee.

The *Fair Work Act 2009* (Cth) also has civil penalty provisions – this means corporations and individuals can be fined for breaches.

## REVIEW 7.13

A Brazilian student, Keelie, moved to Australia on a visa to work for the Australian Mobile Network Co (AMN Co) as a web designer. She would be paid at the rate of \$18 per hour for 38 hours per week according to the signed employment contract.

Keelie commenced work in February 2019. In April 2019, Keelie noticed that she had not been paid for that month. When she asked her manager about it, she received a cheque, which bounced at the bank. The manager then sent her emails threatening to inform the Department of Immigration that she was in breach of her visa and would subsequently be deported.

Keelie never received any superannuation payments. She should have been employed as a Level 4 employee under the Telecommunications Award 2010 and paid at least \$23 per hour.

Keelie resigned from her employment in May 2019.

- 1 Go to the Fair Work Ombudsman website and research how to bring a claim for unpaid wages, then analyse the avenues available for Keelie to resolve her contract law issue. (S, A)
- 2 Identify any common law breaches of contract in this case. (C, A)

## Avenues and mechanisms for dispute resolution in the building industry

There are many avenues and mechanisms for dispute resolution, and these can change depending on the industry and the nature of the dispute. Quite often, disputes are settled through discussions, negotiations and mediation processes.

Many industries also have schemes and authorities available to assist in settling disputes. This section will concentrate on the avenues for solving disputes in the Queensland housing and construction industry. Under the *Queensland Building and Construction Commission Act 1991* (Qld), the Queensland Building and Construction Commission (QBCC) can help to resolve disputes over defective work when building or renovating a house or unit. Parties to such disputes are required to partake in a dispute-resolution process with the QBCC before they can make a dispute application to QCAT.

There are two variations of complaint resolution with the QBCC. First, if the complaint about the building work is lodged at the end of the contract, the owner can lodge a complaint within six years and three months from when the work is completed, and within 12 months of noticing the defect.

If the complaint is made before the contract is completed, the applicant can be assisted by the

Early Dispute Resolution (EDR) service. The EDR provides a facilitation-based approach to resolving disputes when Resolution Services Officers try to provide a solution by discussing the problem with the building contractor. If this approach fails, a site inspection can be carried out by a QBCC Inspector, who tries to solve the problem through direct negotiation. If such negotiation fails, the QBCC may issue a direction to the builder to rectify the work or face action in QCAT or the Magistrates Court.

If the matter is referred to QCAT, a hearing will occur. An example of a hearing is outlined below.

CITATION: *Mead v Walker* [2017] QCAT432  
 MATTER TYPE: Building matters  
 HEARING DATE: 1 September 2017  
 HEARD AT: Maroochydore  
 ORDERS MADE: The applicant pay the respondent the sum of \$3150 within 14 days of the date of order.

The facts of the case were that a painting contractor (the applicant – Mead) agreed to paint the inside of Walker’s (the respondent’s) house for \$3920. Mead received a deposit of \$1600 and proceeded to paint the house over a two-month period. Walker maintained that the job was poorly done and he refused to pay the rest. Mr Mead sued in the tribunal for the balance of

**Figure 7.33** Disputes are common in the construction industry.



\$2620. The tribunal found that the work was not of a suitable standard and was not completed with reasonable care. This lack of care amounted to a breach of section 22 of the *Queensland Building and Construction Commission Act 1991*. Subsequently, the applicant was ordered to pay \$3150 to the respondent to arrange for another painter to rectify the problem.

Not all disputes in this industry end up with such a small restitution order. For example, in December 2017, Santos (a natural gas corporation) filed a damages claim of almost \$1.5 billion against Fluor Corporation in the Queensland Supreme Court over work carried out during the development of its US\$18.5 billion project in Queensland.



**Figure 7.34** All tradespeople, including painters, must complete their work to a satisfactory standard or face the possibility of a civil claim against them.

## RESEARCH 7.5

- 1 Research the Supreme Court case of *Civil Mining & Construction Pty Ltd v Isaac Regional Council* [2014] QSC 231. This was a building and construction dispute over payment for work completed. (S)
- 2 Investigate the facts and issues of this case and discuss how the case utilised a variety of legal procedures (arbitration, common law, contract law, statute law and court decisions) to resolve this dispute. (C, A)

**Figure 7.35** The Australian company Santos filed a damages claim against the US-based contractor Fluor Corporation with the contention that Fluor was not entitled to some \$1.47 billion of costs under the terms of its engineering and construction contract for the GLNG gas project in the Surat Basin in Queensland.



# Chapter review

## Chapter summary

- Most consumer dealings are based on the common law of contract.
- There is an increasing level of government intervention in the area of contract law at both the state and federal levels.
- Advances in technology represent a challenge to the laws governing contract law.
- The CCA was introduced to enhance the promotion of competition and fair-trading, and provision for consumer protection.
- There are a number of consumer guarantees on goods and services implied in all contracts.
- The ACCC regulates a number of industry codes, which can be mandatory or voluntary.
- Consumer product safety is regulated by mandatory product standards on safety and information.
- A broad range of enforcement options and remedies have been instituted by the ACL.
- Laws, safety standards and product standards are constantly reviewed.
- Anti-competitive behaviour is outlawed by the ACL.
- A standard form contract has been pre-prepared by one party to the contract and is not subject to negotiation.
- Contract terms and exclusion clauses cannot exclude any of the ACL's implied conditions and warranties.
- A stakeholder is a person who has a direct interest in or is affected by the activities of a contractual arrangement.
- Legislation and case law have an impact on employment contracts.
- The QBCC assists in providing mechanisms for dispute resolution in the building and construction industry.
- A cooling-off period is mandatory in some contractual agreements.
- The government has attempted to deal with e-commerce and the effects of technology on contract law.

## Short-response questions

- 1 Outline the steps a consumer should take when they feel they have been affected by breaches of implied statutory obligations. (C)
- 2 Describe an enforceable undertaking. (C)
- 3 Outline five consumer guarantees implied by the CCA. (C)

## Extended-response questions

- 1 Examine the viewpoint that the current statutory laws covering consumer protection in Australia provide too much protection for the buyer and not enough for the seller. (C, A)
- 2 Analyse the statement that 'the overall success of ACL will ultimately depend on the ability of both consumers and traders to understand their statutory rights and obligations'. (C, A)
- 3 Are the Australian consumer laws keeping up with changes in technology, and societal norms and expectations? Discuss. (C, A, E)

## Response-to-stimulus question

After reading and researching the three stimulus items, you are required to write an argumentative essay that analyses the success or failure of the ACL in carrying out its role in relation to the production and sale of free-range eggs in Australia. (C, S, A, E, Cr)

### *Stimulus 1: ACCC v Snowdale Holdings Pty Ltd (No. 2) [2017] FCA 834*

#### **Egg producer penalised \$750 000 for misleading ‘free range’ claims**

25 July 2017

The Federal Court has ordered Snowdale Holdings Pty Ltd to pay penalties totalling \$750 000 for making false or misleading representations that its eggs were ‘free range’, in proceedings brought by the ACCC.

‘Consumers pay a higher price for free range eggs, so when a “free range” claim is made, it’s important that consumers are purchasing eggs laid by chickens in free range conditions.’

‘Farmers who have invested in changes to their farming practices so they can make valid credence claims such as “free range” also need protection from others making false credence claims,’ Mr Keogh said.

Snowdale was also ordered to implement a consumer law compliance program and pay a contribution towards the ACCC’s costs.

### *Stimulus 2: Similar cases*

Research similar cases that have come before the ACCC:

- *ACCC v Pirovic Enterprises Pty Ltd* [2014] FCA 1028
- *ACCC v RL Adams Pty Ltd* [2015] FCA 1016
- *ACCC v Derodi Pty Ltd* [2016] FCA 365

### *Stimulus 3: Egg labelling standard*

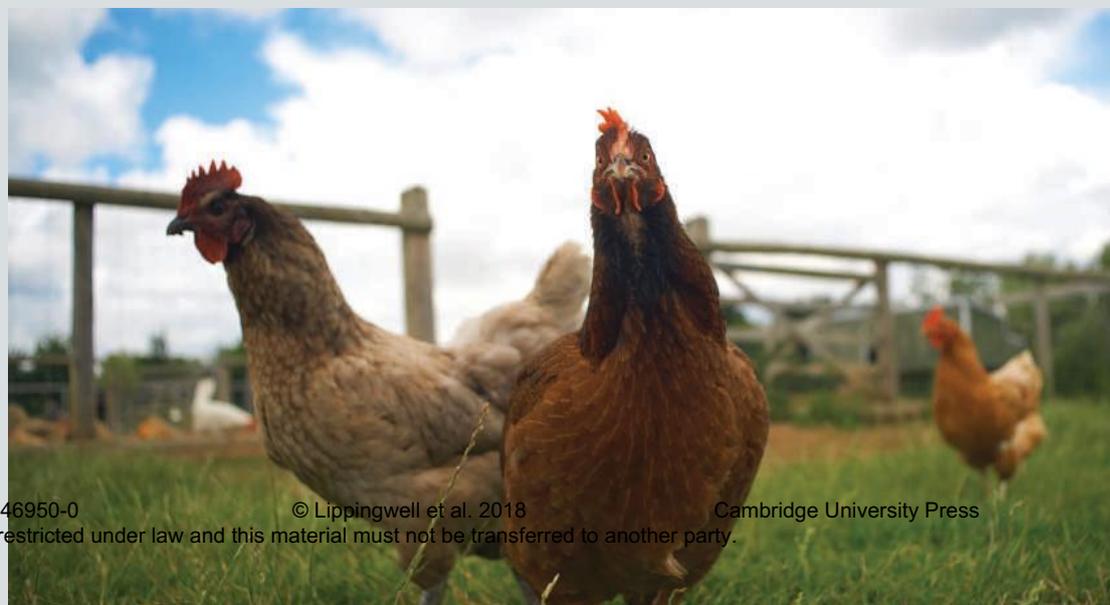
Research the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 and any articles about or criticism of the new law.

#### *Essay plan*

Issues to be covered in the essay may include:

- the use of precedent
- pecuniary penalties
- the role of previous cases in sending a clear message of deterrence to the egg industry
- the role of environmental pressure groups
- the impact on various stakeholders, such as the consumer, the producer, the farmers and the competitors
- mitigating circumstances due to the lack of a clear standard of what a free-range egg is
- the time taken to amend the standard
- any other relevant issue
- conclusion.

**Figure 7.36** Free-range chicken



## CHAPTER 8

# Negligence and duty of care

### CHAPTER OBJECTIVES

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

- describe the element of negligence, including duty of care, breach of duty of care, injury/damage and the effect of the *Civil Liability Act 2003* (Qld) on those elements
- explain the legal concept of ‘neighbour’ through relevant case law, including *Donoghue v Stevenson* [1932] AC 562
- explain the defences available to the defendant and remedies available to the plaintiff in a civil negligence action
- analyse and apply the elements and precedents to evaluate legal outcomes in civil negligence scenarios
- select legal information and data to analyse the extent to which Australians seek legal action, including patterns and trends over time and barriers experienced by socio-economic and other groups with respect to negligence issues
- analyse and evaluate the ability of the law of negligence to find just and equitable outcomes for parties, then justify using legal criteria and discuss implications
- select legal information, then analyse and evaluate the effectiveness of negligence laws in particular contemporary contexts – for example:
  - duty of care to players, officials, spectators and between players in sport
  - duty of care with regard to motorists
  - professional liability – for example medical, legal and school
  - workplace in terms of vicarious liability or duty of care
- create responses that communicate legal meaning to suit the intended purpose in paragraphs and extended responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

### Key concepts/legal terminology you will encounter in this chapter

- but-for test
- causation
- civil law
- compensation
- compensatory damages
- contributory negligence
- defendant
- duty of care
- foreseeable damage
- foreseeability
- negligence
- neighbour principle
- *novus actus interveniens*
- omission

- onus of proof
- plaintiff
- proximity
- reasonable contemplation test
- remoteness of damage
- standard of care
- vicarious liability
- *volenti non fit injuria*

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Civil Liability Act 2003* (Qld)
- *Law Reform Act 1995* (Qld)
- *Residential Tenancy and Rooming Accommodation Act 2008* (Qld)

### CASES

- *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No. 2)* [2016] NSWSC 1123
- *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479
- *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582
- *Cook v Cook* (1986) 162 CLR 376
- *Donoghue v Stevenson* [1932] AC 562
- *Geyer v Downs* (1977) 17 ALR 408
- *Hadley v Baxendale* (1854) 156 ER 145
- *Imbree v Mc Neilly* (2008) HCA 40
- *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506
- *Ramsey v Larsen* (1964) 111 CLR 16
- *Rogers v Whitaker* (1992) HCA 58
- *Strong v Woolworths Ltd* [2012] HCA 5
- *Wyong v Shirt* (1980) 146 CLR 40

## LEGAL ODDITY

According to the *Summary Offences Act 1966* (Cth), you must not fly kites or play games in public that may annoy other people.

This is the final chapter to be studied in Unit 2. The focus of this chapter is on the key principles of negligence and duty of care. The chapter begins with a study of the elements and limitations of negligence. Categories of duty of care, defences and remedies to negligence, and the role of landmark

cases that established precedents which changed the common law of negligence are evaluated. Also explored is the application of negligence to sport. The chapter concludes with a study of the extent to which Australians seek legal actions with respect to negligence issues.

## 8.1 The elements of negligence

What is **negligence**? It is an important legal principle that enables a party who has suffered loss or damage resulting from the wrongful actions or inactions of another to claim compensation from the party responsible for their loss. No contractual

**negligence** an important legal principle that enables a party who has suffered loss or damage resulting from the wrongful actions or inactions of another to claim compensation from the party responsible for their loss; no contractual relationship between the parties is necessary

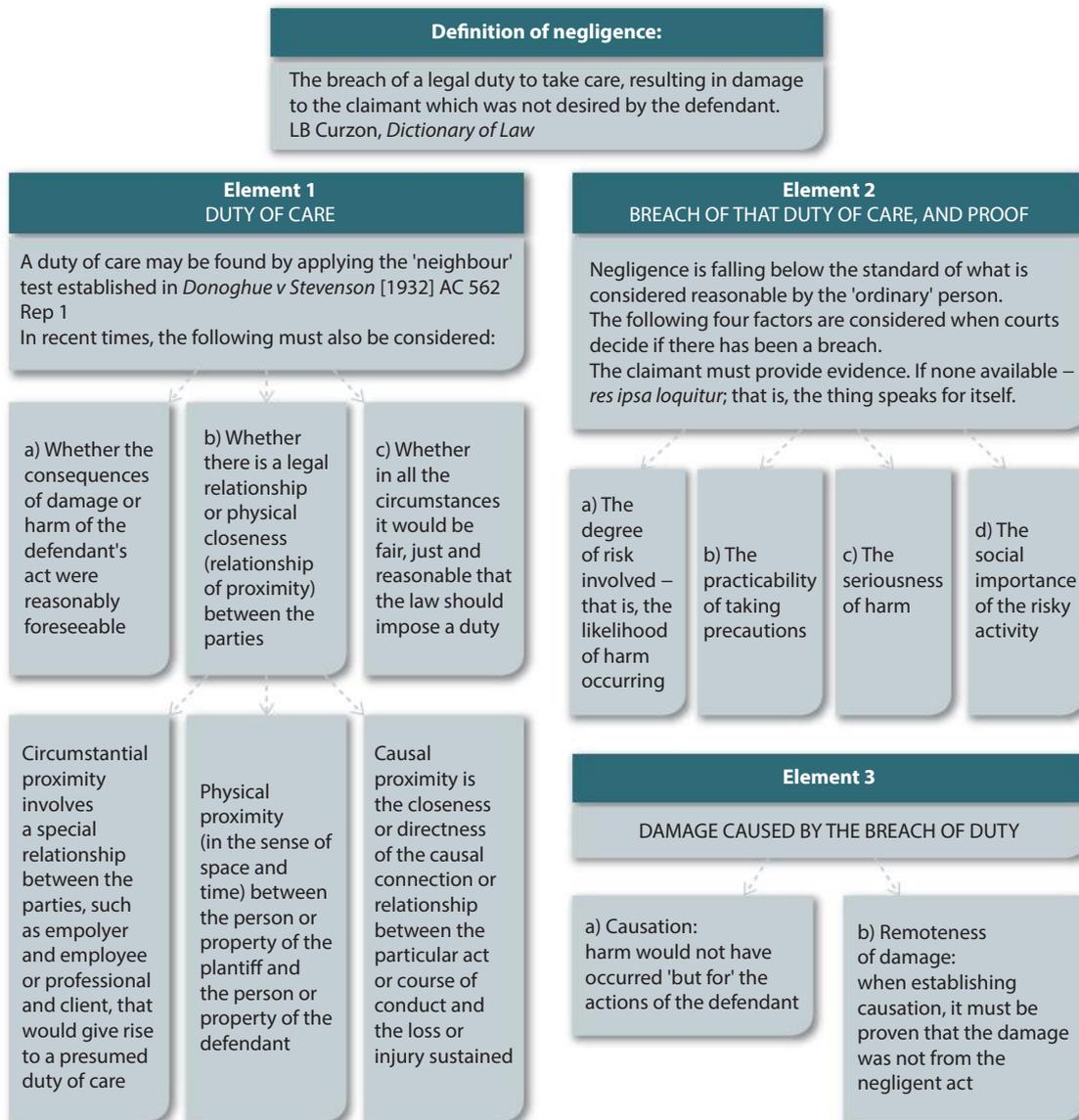


Figure 8.1 Summary of the three elements of negligence

relationship between the parties is necessary. Negligence is civil action as opposed to a criminal action brought by the police under the criminal code. Negligence consists of three key elements that must be established before an action can proceed:

- the existence of a **duty of care**
- a breach or breaches of that duty
- reasonably **foreseeable damage** as a consequence of the breach of duty

Source: *Concise Australian Legal Dictionary*, 2011, p. 395.

**duty of care** an obligation imposed on a person to take reasonable care to ensure that they do not cause another person to suffer harm

**foreseeable damage** damage that occurs as a result of an action that a person should reasonably have foreseen would happen if they were negligent

Negligence is a form of **civil law**, specifically a tort that applies when a person fails to take reasonable care, and injury or damage results. The aim is to protect innocent victims from any loss or suffering they may have experienced due to someone else's negligence.

The law of negligence requires that the injured person find someone to blame for the incident. The courts then have the power to order that person to pay **compensation** for the injury, loss or damage to the innocent party. This way of apportioning blame according to the person at fault is still regarded by our legal system as the fairest way of compensating people for their loss. The threat of a lawsuit against anyone who behaves negligently is meant to act as a deterrent against negligent behaviour in the community.

**civil law** a body of rules (torts) that delineate private rights and remedies, and govern disputes between individuals in such areas as contracts, property and family law; distinct from criminal law

**compensation** something – typically money – awarded to someone in recognition of loss, suffering or injury

Thus the main purposes of the laws regarding negligence are to:

- compensate victims who have suffered loss by transferring the loss from them to the person who caused the loss



**Figure 8.2** Employers have a duty of care to their employees to protect them from harm in the workplace.

- deter members of our society from engaging in unsafe behaviour without due regard for others by imposing heavy personal and financial penalties for such behaviour.

Negligence can:

- be accidental harm
- result from types of accidents
- cause physical and/or property damage
- be careless business errors.

In a tort of negligence, it is necessary for the **plaintiff** to prove that they or their property has been damaged or harmed by the actions or omissions of the **defendant**. Another requirement is that the defendant must be at 'fault'. The onus or burden of proof in a negligence action rests with the plaintiff or the person bringing the action.

**plaintiff** a person who brings a case against another in a court of law

**defendant** an individual, company or institution sued or accused in a court of law

## The 'eggshell skull' rule

Another important consideration in finding someone to blame for a negligence incident is that the defendant must take the person who has suffered the injury as they find them.

This is based on the idea that it is fair for a defendant to compensate an injured person for



Figure 8.3 The 'eggshell skull' rule

any harm caused regardless of any unforeseeable medical conditions that exist and as a result the injury suffered might be more severe than would otherwise be the case. This is referred to as the eggshell skull or eggshell plaintiff rule, which states that someone who harms another must pay for whatever damage the injured person suffered, even if it was much worse than anyone would have expected. The eggshell skull rule describes an imaginary person who has an extremely thin skull that is as fragile as an eggshell, even though they look completely 'normal'. This person is hit in the head by someone else. A 'normal' person would only have been bruised by the hit, but the person with the eggshell skull dies. The eggshell skull rule says that the person who hit the eggshell-skulled person is responsible for the much greater harm caused by the death, not just the amount of harm that a normal person would have suffered.

## Element 1: Existence of a duty of care

For an action in negligence to be brought, it must first be established that the negligence occurred

as a result of a breach of duty between one party or parties and another party or parties. If a duty of care does not exist between the parties, then no negligence claim can arise. A duty of care means that there is a legal obligation and responsibility placed on all individuals that they accept a reasonable and identifiable standard of care while doing anything (or omitting to do something – an omission) that could foreseeably harm others. If you can reasonably foresee that what you are about to do is going to hurt someone, the responsibility is on you not to do it. The courts apply the 'neighbour test' established in *Donoghue v Stevenson* [1932]

AC 562 Rep 1 to establish whether a duty of care exists (see box, and later in the chapter).

The courts will also consider:

- whether the consequences of damage or harm of the defendant's act were reasonably foreseeable (**foreseeability**)
- whether there is a legal relationship or physical closeness (relationship of **proximity**) between the parties.

**foreseeability** the ability to reasonably anticipate the potential results of an action, such as the damage or injury that may happen if one is negligent or acts in a particular way

**proximity** nearness or closeness in space, time or relationship

### THE NEIGHBOUR PRINCIPLE

A landmark or precedent case in establishing the difference between tort law (negligence) and contract law was *Donoghue v Stevenson* [1932] AC 562, the 'snail in the bottle' case. It formed the basis of the tort of negligence worldwide because of the judgment relating to the non-contractual duty of care and because it established the 'neighbour principle'.

## Foreseeability

The concept of foreseeability is an important part of establishing whether a duty of care is owed and whether the chance of injury or damage is

reasonably foreseeable. Foreseeability is when a reasonable person is able to predict that harm will take place if due care and attention is not taken in a particular situation.

### CASE STUDY 8.1

#### *Strong v Woolworths Ltd* [2012] HCA 5



**Figure 8.4** Big W is owned by Woolworths Ltd.

#### Facts

On 24 September 2011, Ms Strong was shopping at Big W (owned by Woolworths Ltd) in the Centro Shopping Centre in Taree. Big W had arranged a display of pot plants on sale around the store's entrance, which it was responsible for cleaning. Ms Strong, who was an amputee and used crutches, was approaching the pot plants at lunchtime when one of her crutches slipped on a squashed hot chip, causing her to fall and suffer serious spinal injuries. While the shopping centre had cleaners that inspected and cleaned common areas of the shopping centre every 15 minutes, Big W did not, and its cleaners had not inspected the area displaying the pot plants since 8.00 am. Ms Strong commenced proceedings against Woolworths Ltd and CPT Manager Ltd, the owner of the shopping centre, in the New South Wales District Court, claiming negligence and damages. The District Court found Woolworths Ltd liable and awarded Ms Strong \$580,299; the claim against CPT Manager Ltd was dismissed. However, Woolworths Ltd appealed to the New South Wales Court of Appeal, which overturned the decision of the District Court. The Court of Appeal found that Ms Strong had not proven that if Big W's cleaners had inspected the store at 15-minute intervals, she would not have slipped on the chip. Ms Strong then

appealed that decision, and the matter was heard in the High Court of Australia.

#### Legal issues

Was Big W's alleged failure to adequately inspect and clean areas of its responsibility, taking into consideration all possibilities, the likely cause of Ms Strong's fall and injuries? The laws that were considered and applied were section 5D(1) of the *Civil Liability Act 2002* (NSW), which states that:

A determination that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the occurrence of the harm (*factual causation*), and
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*)

#### Legal arguments

Ms Strong argued that a reasonable time period in which the chip may have been dropped on the floor was between 8.00 am and 12.10 pm, although there was little evidence to suggest whether the chip had been on the ground for a short or long time. As such, it could be argued that Big W did not have an adequate system for inspecting and cleaning.

#### Decision

On 7 March 2012, the High Court decided that Woolworths was responsible for Ms Strong's injuries, upholding the earlier decision of the New South Wales District Court. The High Court held that '*reasonable care* required inspection and removal of slipping hazards at intervals not greater than 20 minutes'.

## REVIEW 8.1

In a one-paragraph response, evaluate the legal issues involved that gave rise to the negligence and damages action. Explain the legal issues that the Court of Appeal might have considered when it dismissed the claim on appeal. Analyse the legal issues and reasons why the High Court upheld the original judgment. (C, A, E, Cr)

### *Fair, just and reasonable*

Even if the harm is reasonably foreseeable and there is proximity between the plaintiff and defendant, a court may still find that there is no duty of care if it is not fair, just or reasonable to impose a duty on the defendant. This final factor covers a range of issues such as whether the obligations of a duty of care would impede the defendant from doing their job properly, or if the injured person was assisting in a criminal act.

### *Proximity*

Proximity involves the notion of nearness or closeness between the parties, and includes physical, circumstantial and causal proximity.

**Physical proximity.** When an act by one party has a direct physical impact on the person or property of another. A student who throws a book owned by another student in a classroom full of other students might cause physical injury to other students and damage to the property of another.

**Circumstantial proximity.** When a special relationship exists between the parties that would give rise to a degree of 'closeness' so that the actions of one party would affect the other party such as between a professional person and their client. For example, if a lawyer forgets to file an important document on behalf of a client and causes the client to lose a large sum of money. The lawyer may not have been in physical proximity to the client, but by virtue of circumstances and relationship, the lawyer has breached a duty to file the documents in a timely manner so as not to cause harm to their client.

**Causal proximity.** Refers to the closeness or directness of the causal connection or relationship between the particular act or conduct and the

loss, damage or injury sustained. However, this notion has been rejected by the High Court as a determinant of the existence and context of duty of care.

*Source:* Lexis Nexis, *Concise Australian Legal Dictionary*, 2011, p. 474.

## Element 2: Breach of duty

Once it is established that the defendant owed the plaintiff a duty of care, it is then necessary to prove that the defendant breached that duty. A plaintiff has the burden of proof to prove, on the balance of probabilities, that the defendant had a duty of care and that duty has been breached. This simply means that, in negligence cases, it is the responsibility of the plaintiff to prove that the defendant was probably responsible for the damage suffered due to a breach of the defendant's duty of care to the plaintiff. To decide whether a breach of the duty of care has occurred, the court will ask the question: 'Has the defendant failed to reach the **standard of care** required by the circumstances in this case?'

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**standard of care** the degree of caution required, usually with reference to the 'reasonable person', of an individual who owes a duty of care

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Each case will be decided on its facts. If the court finds that a reasonable person would not have acted as the defendant did, then it is likely that a breach of a duty of care would have occurred. For example, watching a game of cricket is not really a dangerous activity, unless you get hit by the ball. Nor should living near a cricket ground be dangerous, especially if protective fences have been erected around the field.

## Test to determine breach of duty of care

The HCA laid down a test in *Wyong v Shirt* (1980) 146 CLR 40 to determine whether a defendant has breached any duty of care. The test requires two questions to be answered:

- 1 Would a reasonable person in a position of the defendant have foreseen a risk of injury to the plaintiff or the class of persons to which the plaintiff belonged arising from their conduct?
- 2 What would a reasonable person have done in response to that foreseeable risk?

## Element 3: Foreseeable damage

Once a breach of duty of care has been proved, it is necessary to show that the breach resulted in damage to the plaintiff. In most cases, proving that damage occurred as a result of the breach is relatively simple. However, if something happens between the time of the breach of duty of care and the damage or loss suffered, then that intervening

act breaks the **causal relationship** between the defendant and the plaintiff.

**causal relationship** the direct relationship between the harm and damage caused by the original action

**novus actus interveniens** an act that breaks the chain of causation and, if proven, means that the defendant may not be liable for the damages caused to the plaintiff

**causation** the harm, damage or injury that was directly caused by the defendant

### INTERVENING ACT

An intervening act, or **novus actus interveniens**, is an act that breaks the chain of **causation** and, if proven, means that the defendant may not be liable for the damages caused to the plaintiff. However, it is usually hard to establish that an action of another party was an intervening act unless it resulted from a voluntary human act by either party that was free, deliberate and informed, or the act was not the result of or influenced by the original negligence, or the act was the result of an extraordinary coincidental event.

**Figure 8.5** *Wyong Shire Council v Shirt* (1980) involved a water skiing accident in which the judge had to decide if the council was in breach of their duty of care towards those who participated in water sports on their land.



## Causation

Causation relates to harm, damage or injury that was directly caused by the defendant. The courts are concerned with establishing whether a particular act or omission is connected to the result that has occurred and, if so, whether a legal responsibility is owed. Causation is the link between the behaviour of the accused and the result – that is, the defendant acted in a way that caused damage to the plaintiff. Causation is a complex legal concept, and can be used as a defence if the causal relationship between the act or omission has been broken. It can limit the plaintiff's ability to recover damages to only those that were actually caused by the negligent act.

A plaintiff must establish that the defendant's negligence caused the damage they seek to recover. When determining causation, the courts apply the **but-for test**: would the harm have occurred but for (if not for) the actions of the defendant? However, the courts have come to accept that the test for causation is more comprehensive than the but-for test, and the lead case that challenged that legal thinking was *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506.

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**but-for test** if the defendant had taken the action or not taken the action, would the harm or damage have occurred anyway? Did harm occur because of the defendant's sole action?

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### CASE STUDY 8.2

#### *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506



**Figure 8.6** This case involved the plaintiff driving under the influence of alcohol.

#### Facts

The defendant (Stramare) parked a truck in the middle of the road while unloading items into a shop in the early hours of the morning. The plaintiff (March) was driving a vehicle speeding while drunk and smashed into the truck, suffering physical injuries as a result of the collision.

#### Legal issue

The defendant alleged that it was the negligent driving of the plaintiff that was the cause of the collision

occasioning him harm, and not the defendant's negligence in the way the truck had been parked. Therefore, the matter for the court was to determine whether a causal relationship existed such that the damage caused was the result of the plaintiff's action and, if so, whether that causal relationship was broken in any way.

#### Decision

The but-for test fails on two accounts where there are multiple causes and where there is an intervening act or acts. Thus the but-for test is not an exclusive test for causation. A value judgement of common sense and public policy considerations need to supplement the but-for test. An act cannot be considered an intervening act if that act was also the result of the original negligence of the plaintiff. Any other rule limiting the responsibility for damage caused by a wrongful act or omission should be recognised as a policy-based rule concerned with remoteness of damage and not causation.

## 8.2 Limitations to negligence

### SIDEBAR

There are limits to the period between when an action allegedly occurred occasioning damage or harm and the commencement of an action to recover damages. The limitation periods for negligence actions are set out for Queensland in the *Limitations of Actions Act 1974* (Qld). The periods are:

- six years from the date that the cause of the action or omission occurred in relation to recovery for property damage (s 10)
- three years from the date that the cause of action or omission arose in relation to recovery for personal injuries (s 11).

Why does the law place these time limits on negligence actions? (E)

Unlike a criminal action, where penalties can range from fines, good behaviour bonds and restitution (community service) to imprisonment, the remedy in a negligence action generally is **compensatory damages**. However, even when a defendant has caused damage to the plaintiff, it does not necessarily mean that an action in negligence will be successful. For example, a negligence action involves a number of different issues (questions) of law and fact that need thorough legal evaluation to determine whether a breach should be compensated (see Table 8.1).

**Table 8.1** Questions of law or fact in negligence

Question of law	Question of fact
Duty of care – does or did a duty of care exist? (See test to determine breach duty of care on page 217.)	Duty of care – who owed the duty of care?
Breach of duty – what was or is the relevant standard of care?	Breach of duty – was the standard breached?
Damage – is the damage recognised by law? Damage – was the damage too 'remote'?	Damage – was the damage caused by the defendant?

**compensatory damages** damages that are awarded in order to compensate a plaintiff for personal injury or injury to property caused by the defendant's wrongful act

A negligence action might also be limited by the courts if the damage was too remote from the original cause of the damage, so the courts apply

the **reasonable contemplation test** formulated in *Hadley v Baxendale* (1854) 156 ER 145. That is that the defendant should only be held liable for the loss or damage caused to the plaintiff that could reasonably be contemplated by both parties. Both parties should have been able to contemplate that loss or damage would result either because it arises naturally in the usual course of events or because it arises from the special facts known to both parties (Willmott, *Contract Law*, 2013, p. 810).

**reasonable contemplation test** the defendant should only be held liable for the loss or damage caused to the plaintiff that could reasonably be contemplated by both parties

**Figure 8.7** Would an injury to a chef while preparing food pass a reasonable contemplation test?



## Remoteness

For a negligence action to be successful and for the plaintiff to obtain compensation, the damage caused must not be too remote from its cause, and the damage or harm must have been reasonably contemplated by the defendant. The courts place a limit upon compensatory damages by using the concept of foreseeability. That is, a defendant is not held to be liable for damage or harm that is caused by the breach of duty of care if the harm so caused to the plaintiff was too remote or removed from the original breach. The test used by the

courts to determine whether the damage caused was too remote, and therefore not recoverable, is whether the damage was reasonably foreseeable by the defendant.

### REMOTENESS OF DAMAGE

The defendant in a negligence suit must have been able to reasonably foresee that someone could be hurt by their actions. If they could not have seen this, it would be held that the possibility of damage was too remote. This concept is referred to as 'remoteness of damage'.

### REVIEW 8.2

- 1 Describe the purpose of a tort of negligence. (C)
- 2 List the three key elements of negligence. Analyse why they are important. (C, A)
- 3 Analyse the significance of the but-for test in determining causation. (A)
- 4 Evaluate how the chain of causation, if broken, limits the liability of the plaintiff. (E)
- 5 Describe the eggshell skull rule and evaluate how the courts apply it. (C, E)
- 6 Analyse remoteness of damage and explain how it applies to negligence actions. (C, A)
- 7 Define the reasonable contemplation test and explain how it is applied by the courts. (C)
- 8 Describe how the courts place a limit on compensatory damages. (C)

## 8.3 Categories of duty of care

The recognition of a duty of care is one aspect used in the courts to control the limits of negligence. Certain relationships have been recognised by the courts that give rise to a duty of care owed by one

party to another. These relationships are referred to as established or select duties and are established in common law (case law).



**Figure 8.8** Carers must actively supervise.

The duty of care owed by one party to another will most often be determined by reference to categories of duty already recognised at law. However, these categories are not closed, as new duties of care may be recognised by the courts in subsequent cases. Some of the more common categories are described in the following pages.

## Category 1: Third party

Prior to the precedent case *Donoghue v Stevenson* [1932] AC 562, no legal relationship was recognised as existing between the manufacturer of a product

and the consumer of that product unless a contract existed between them.

As a result of this case, duty of care was extended to include a contractual relationship between a third party and the consumer. Consequently, a tort action for such a breach could now be brought against the manufacturer of the ginger beer. The judgment resulted in the introduction of the **neighbour principle** as a test to establish whether one party owed a duty of care to another.

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**neighbour principle** a test to establish whether one party owes a duty of care to another

---

### CASE STUDY 8.3

#### *Donoghue v Stevenson* [1932] AC 562



**Figure 8.9** *Donoghue v Stevenson* is known as the 'snail in a bottle' precedent case.

#### Facts

The plaintiff and her friend were in a café when her friend bought her a bottle of ginger beer in a bottle made of dark glass, through which the contents could not be seen. The owner of the café poured some of the ginger beer from the bottle into a glass. Once the plaintiff had drunk some of the ginger beer from the glass, the plaintiff's friend poured the remainder of the ginger beer into the glass, at which

point the decomposed remains of a snail fell from the bottle. The plaintiff suffered shock at the sight of the snail and severe gastroenteritis from having consumed the polluted ginger beer.

#### Legal issues

Because the plaintiff did not buy the ginger beer, she had no contractual relationship with the café owner (seller). She therefore sued the manufacturer of the bottle of ginger beer, claiming that the manufacturer had a duty of care to her. Thus the basis of the plaintiff's claim was that her shock and illness had been caused by the defendant's failure to take reasonable care in making and bottling the ginger beer.

#### Decision

A majority of the House of Lords (three to two) decided that the defendant owed a duty of care to the plaintiff and had breached that duty in manufacturing the product in question. Significantly, the court held that the fact there was no contractual relationship between the plaintiff and the defendant did not stop the plaintiff from suing the defendant for a tort.

Common law now required that a party ought reasonably to take others into their contemplation who are so closely and directly affected by an act that they might be harmed by it. Therefore, this case established an obligation to take reasonable care of your legal neighbour as a legal duty owed to them. The judgment established that a legal duty and a contract could exist at the same time or independently of each other, changing the scope of the tort of negligence. Duty of care could now arise, causing injury, damage or loss that, prior to this case, was not recognised by the courts.

## Category 2: Premises

An occupier of premises owes a duty of care to a person or persons entering the premises regarding any risk of personal injury as a result of the condition of the premises: see *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

The Queensland Government has extended this duty to include rental properties. The Palaszczuk state government has made changes to the *Residential Tenancy and Rooming Accommodation Act 2008* (RTRAA) so that, in the future, rental properties will

### DUTY OF CARE TOWARDS VISITORS ON YOUR PROPERTY

As the invitee, you owe the highest level of responsibility to those persons with whom you are conducting business. Basically, you owe a higher duty of care to your customers than you do to people who are invited onto your land where no fee is charged – for example, someone who wants to hunt or walk on your land (licensee).

Figure 8.10 Warning of risk of injury



## CASE STUDY 8.4

**Safeway Stores v Zaluzna (1987) 162 CLR 479****Facts**

On 20 January 1979, the respondent entered the 'foyer area' of the appellant's supermarket at Mount Waverley, Victoria, intending to buy some cheese. It was a rainy day, and in consequence the vinyl tiled floor of the foyer had become wet. Unfortunately, before entering the area of the supermarket where the merchandise was displayed, the respondent slipped and fell heavily on the floor. She sustained a personal injury.

**Legal issues**

Does an occupier owe a duty of care to take positive steps to protect persons lawfully entering their

property, and if they are injured is the occupier liable for damages? The question of duty and failure to prevent foreseeable injuries has also been applied to business premises open to the public, such as supermarkets.

**Decision**

The High Court held that the fact that the respondent was a lawful entrant upon the land of the appellant established a *relationship* between them, which of itself suffices to give rise to a duty on the part of the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent.

have to meet defined minimum standards before being listed for rent. The amendments to the RTRAA were introduced and passed by parliament in 2017. The changes will impose an obligation on lessors who rent properties to ensure that they meet the minimum standards. The changes also provide greater protections for people in retirement homes and will enforce minimum standards for issues that could include sanitation, ventilation, insulation,

protection from damp, the dimensions of rooms, privacy and security, provision of water supply, laundry and cooking facilities, lighting, freedom from vermin infestation and energy efficiency.

The duty of care owed by a landlord to their tenant with regard to providing and maintaining the minimum standards will therefore be legally enforceable and allow tenants a course of redress through the courts if these standards are not met.

**Figure 8.11** Landlords have a duty of care to their tenants.



## Category 3: Employers

Employers owe their employees a duty of care to take reasonable care not to expose them to an unnecessary risk of injury. The scope of duty includes providing the employee with a safe system of work, safe plant and equipment, and competent supervisory staff. To that end, employers need to conduct risk assessments of tasks and of the machinery to be used by employees to ascertain the possible risk and to take reasonable steps to minimise it. This may include providing appropriate staff training. School teachers have a duty to their students to conduct a risk assessment of any activity with the potential to cause injury or harm to their students – for example, when they want to take students on an excursion.

### *Vicarious liability*

In certain circumstances, a person is regarded by the law as responsible for the acts or omissions of another person – that is, they are said to have **vicarious liability**.

While the party held to be liable or jointly liable may not personally have been at fault, they have a relationship with the person held responsible for the original action occasioning harm, damage or injury. The most common of these relationships is that between an employee and an employer.

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**vicarious liability** a third party such as an employer is regarded as being liable or responsible for the acts or omissions of another person

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## Category 4: Road users

A driver of a motor vehicle owes a duty of care to their passengers and to other road users, including

pedestrians. The scope of this duty is to use reasonable and proper care not to harm or injure other road users or to damage any premises while in control of a motor vehicle. The lead case used to determine the duty owed by a driver, including a learner driver, was *Cook v Cook* (1986) 162 CLR 376 but this was later modified by *Imbree v Mc Neilly* (2008) HCA 40.

In *Cook v Cook*, the court ruled that a person who voluntarily undertakes to instruct a learner driver of a motor vehicle is owed a lower standard of care than that owed to other road users. This was because the court acknowledged the inexperience of the learner driver. A person instructing a learner driver is owed a duty of care of the standard expected of a reasonable driver. This ‘special relationship’ was said to exist because of the passenger’s (instructor’s) knowledge of the learner driver’s inexperience and lack of driving skill. However, on 28 August 2008, the High Court handed down its decision in *Imbree v Mc Neilly* (2008) HCA 40 overturning the decision in *Cook v Cook* (see box).



**Figure 8.12** Drivers have a duty of care to passengers and other road users.

### THE DECISION IN *IMBREE V MCNEILLY* (2008) HCA 40

The standard of care owed by McNeilly to Imbree was the standard of care expected of a reasonable driver, and was not modified by the experience (or inexperience) of the driver or whether they were licensed. Imbree’s knowledge of the driver’s inexperience was not sufficient to warrant the application of a modified standard of care, although the issue may be relevant to the issues of contributory negligence. The court’s assessment of Imbree’s contributory negligence was set at 30 per cent. This decision overruled the High Court’s previous decision in *Cook v Cook*, meaning Imbree could recover damages from McNeilly.

## Category 5: Medical practitioners and hospitals

Medical practitioners (doctors and nurses) owe their patients a duty of care in the provision of their healthcare, diagnosis, treatment and advice. Hospitals and other medical institutions such as aged care facilities are included in this aspect of duty of care. Alleged breaches of this duty that have resulted in harm may result in a civil action, usually in the tort of negligence. The lead case in this matter is *Rogers v Whitaker* (1992) HCA 58.

The High Court rejected the notion that the standard of care owed to a patient was subject to medical judgement. Instead, it held that the standard of care to be observed in Australia by a person with special skill or competence is that of an ordinary skilled person exercising and professing to have a

special skill, and is not determined by reference to practice followed or supported by a reasonable body of medical opinion. Therefore, in regard to non-disclosure of risk and the provision of advice and information, the Bolam principle was discarded and replaced with the principle that a person is entitled to make decisions about their own life after full disclosure of the risk involved. With regard to the duty to warn, the court upheld the principle that a doctor has a duty to their patient to warn them of any inherent risk in the proposed medical treatment.

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**Bolam principle** a doctor is not negligent if they act in accordance with accepted practice at the time, as deemed proper by a responsible body of medical opinion, even though other doctors adopt a different practice

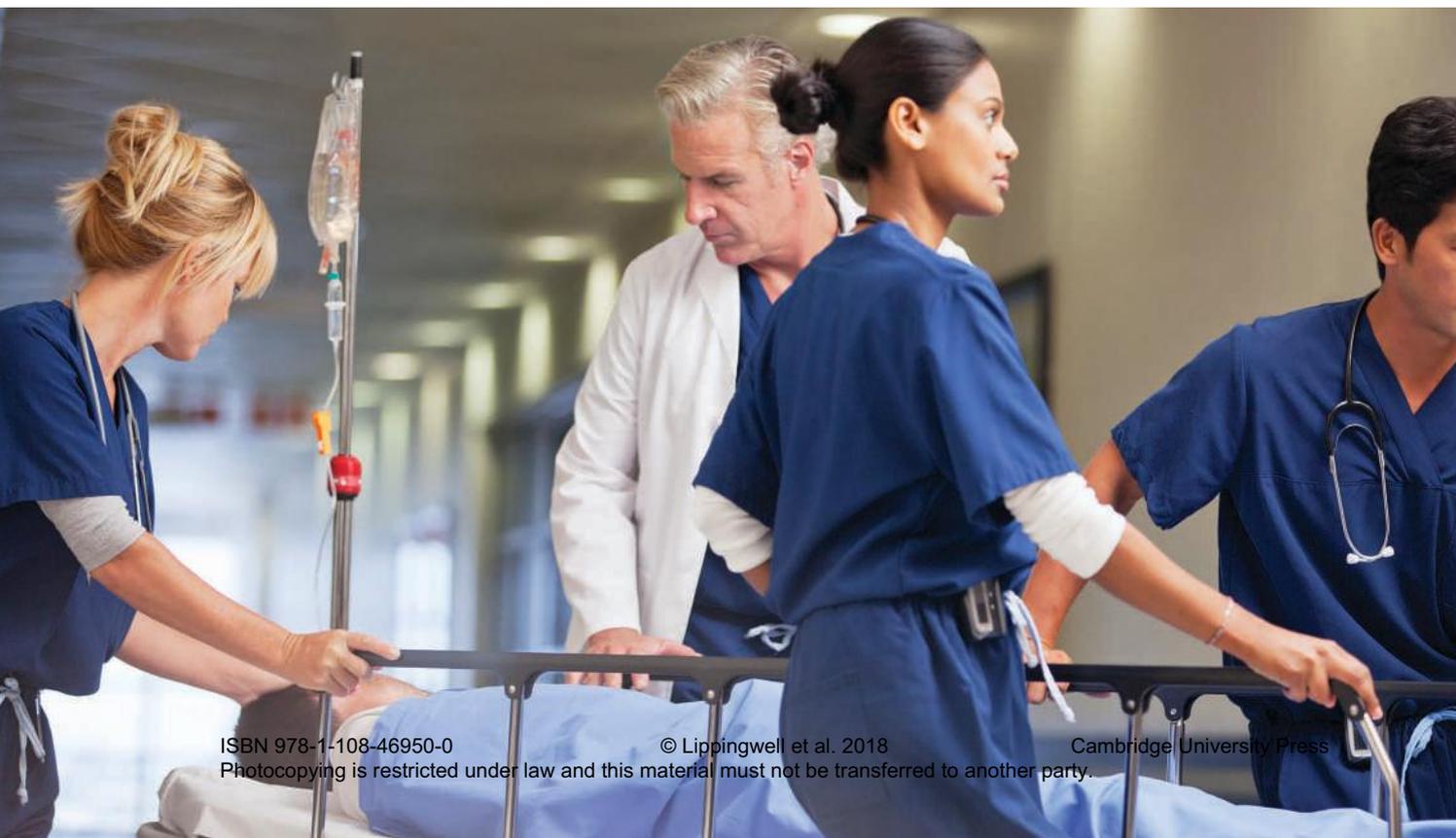
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### SIDEBAR

The judgment in *Rogers v Whitaker* (1992) HCA 58 was significant with regard to the duty of care owed by medical practitioners to their patients. The High Court rejected the **Bolam principle** defence as applied in the United Kingdom in *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582. The principle formulated in *Bolam v Friern* was that a doctor is not negligent if they act in accordance with accepted practice at the time as deemed proper by a responsible body of medical opinion even though other doctors adopt a different practice.

Do you agree or disagree with the High Court decision to reject the Bolam principle? Justify your response. (A, E)

**Figure 8.13** Medical staff owe a duty of care to their patients.



## Category 6: Schools

School authorities and teachers owe a duty of care to their students. This includes the school and teacher taking reasonable precautions to ensure the safety of students. The test applied by the courts to determine whether any breach of duty has occurred is to establish whether the school and/or teacher acted in the way a reasonable parent would have acted when faced with the same circumstances. School authorities and teachers owe a duty to their students both during school hours and outside of school hours as a result of the judgment in *Geyer v Downs* (1977) 17 ALR 408 (see box).

Vicarious liability has been discussed on page 224 in relation to employer–employee relationships. Applying this principle to a school situation, a

teacher has a duty of care to their students and so too does the school that employs them. If a teacher breaches that duty, the teacher and the school can both be held liable for the breach. A school owes a non-delegable duty of care to ensure that all reasonable care is taken for its pupils' safety, and this duty of care arises solely from that relationship as the employing authority of the teacher.

Liability is imposed particularly when there is inadequate supervision or when it is clearly foreseeable that the employing authority's acts or omissions are likely to place students at risk of harm. The teacher and defendant school authority would have to show that they had provided adequate supervision (Torts & Personal Injury Law, *Australian Torts Commentary*, 2012).

### THE DECISION IN GEYER V DOWNS (1977) 17 ALR 408

The court found that the headmaster owed the student a duty of care and that he should take such measures that were reasonable in the circumstances to prevent physical injury. By virtue of the fact that the headmaster had opened the gates and allowed the children onto the school grounds before school hours, he exercised authority over them and established a duty of care to them. Consequently, by not providing adequate supervision, the headmaster was liable and the school authority was vicariously liable for the damages to the plaintiff.



Figure 8.15 Students must be supervised adequately.



Figure 8.14 Teachers must actively supervise.

### THE DECISION IN RAMSEY V LARSEN (1964) 111 CLR 16

A student had climbed a tree against his teacher's instructions, but the teacher then took advantage of the student's presence in the tree and asked him to pass a rope over a higher branch. In the process of doing so, the student fell to the ground and was injured. The High Court rejected the view that a teacher who had breached his duty of care towards a student was personally liable. The court held that the school authority, the NSW Government, was vicariously liable for the teacher's negligence when the student suffered injury.



**Figure 8.16** Solicitors owe a duty of care to their clients.

## Category 7: Legal profession

Legal practitioners (lawyers) owe a duty of care to their clients to exercise reasonable care in the provision of their professional services as defined in terms of their retainer.

There is an expectation that solicitors in general practice are entitled to rely on advice from the counsel (barristers) who specialise in an area of the law and are engaged by the solicitor to assist in a case. However, it is expected that in order

to reasonably discharge their duty of care to their clients, the solicitor will ensure counsel is adequately briefed.

Therefore, a solicitor has a duty to reasonably consider a barrister's advice, and if the advice is obviously or glaringly wrong, the solicitor has a duty to reject it in the best interests of their client. A solicitor is not entitled to shrink from raising doubts on counsel's advice – even from eminent counsel – in order to act in the best interests of the client, and reasonably and professionally discharge their duty of care to the client.

### REVIEW 8.3

- 1 In your opinion, explain why the Queensland Government amended the *Residential Tenancy and Rooming Accommodation Act 2008* and evaluate the legal implications for landlords. (C, E)
- 2 Evaluate the significance of the judgment in *Rogers v Whitaker* (1992) HCA 58 with regard to medical negligence. (C, E)
- 3 Define vicarious liability. (C)
- 4 With reference to the lead case, describe the test used by the courts to determine a breach of duty of care. (C, E)

### RESEARCH 8.1

- 1 Research and evaluate the legal significance of the recognition of duty of care in negligence actions. (C, A, Cr)
- 2 Research the legal significance of the judgment in *Donoghue v Stevenson* [1932] AC 562 and analyse its implications on the tort of negligence. (C, E, Cr)
- 3 Research how the legal relationship and responsibilities that were recognised in *Safeway Stores v Zaluzna* (1987) 162 CLR 479 have been applied in other negligence actions. (C, E, Cr)

## 8.4 Defences to negligence

The principal defences to an action in negligence are:

- contributory negligence
- voluntary assumption of risk (*volenti non fit injuria*)
- illegality of the activity.

### Contributory negligence

In common law, **contributory negligence** was a complete defence. No compensation could be recovered where the plaintiff suffered damage partly through their own negligence and partly through the negligence of another. However, the defence of contributory negligence is now governed by legislation that allows for the apportionment of damage (Turner et al., *Concise Australian Commercial Law*, 2017, pp. 379–8). For example, the *Law Reform Act 1995* (Qld) provides that where a person suffers damage partly due to their own fault and partly due to the fault of another party, the damages recoverable shall be reduced with regard to the claimant's share or contribution to the damage, harm or injury. Similar laws apply in all other state jurisdictions.

So what is contributory negligence? It is when a person has acted or omitted to act in such a way that they have contributed to or partly caused the damage to themselves. To be 'contributory', the plaintiff must have acted in such a way that this negligence partly caused the damage suffered. Contributory negligence is a special defence that can be pleaded by the defendant with the burden of proving any contribution to the damage by the plaintiff on the party alleging it (the defendant). Where the court accepts the existence of contributory negligence, the compensation awarded is reduced by the percentage of the plaintiff's contribution.

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**contributory negligence** when a person has acted or omitted to act in such a way that they have contributed to or partly caused the damage to themselves

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If you decide to go skydiving or bungy jumping, and you are made aware of the risks and have signed an acknowledgement of that risk before engaging in the activity, you have assumed the risk of injury. Notwithstanding this acknowledgement, it may not fully indemnify the operator of the service from prosecution if it can be proved that they did not take all reasonable steps to foresee and prevent any risk of injury to their patrons – for example, carrying out regular maintenance of all the equipment to be used, including safety equipment, and providing appropriate training of all staff involved in the activity.

An intoxicated person who staggers onto the road and is hit by a passing vehicle may be held by the court to have contributed to their injuries. However, this does not absolve the driver, who is expected to take reasonable precautions to avoid pedestrians on the road and to foresee the possibility of an accident with an intoxicated person who might enter the roadway. In such cases, the court will determine the extent of liability to be apportioned to each party.

Section 47 of the *Civil Liability Act 2003* (Qld) establishes the presumption that a plaintiff who is intoxicated at the time they are injured may have been contributorily negligent. However, this could be rebutted in court by the plaintiff if the intoxication was not a factor in the occurrence of the harm, injury or damage, or the intoxication was not self-induced.

### Voluntary assumption of risk (*volenti non fit injuria*)

Unlike contributory negligence, a successful plea of voluntary assumption of risk is a complete defence against the allegation of wrongdoing resulting in harm to another. The thought underpinning this aspect is that no wrong can be done to a person or party who has consented to engage in the action and who has accepted the risk involved.

## CASE STUDY 8.5

***Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No. 2) [2016] NSWSC 1123***

Carolin Alzawy attended a Bible study group that met in a building on the grounds of the Church of St Mary and Merkorious in Sydney.

After the meeting, she descended a flight of stairs as she had done many times before. The staircase consisted of tiled steps with 'nose steps' laid on the outer edge of each tread and a handrail along the entire length. The 'nose' tile on one of the steps had been broken four years earlier but never fixed. Ms Alzawy did not use the handrail as she descended the stairs. Some way down the staircase, she fell forward, hitting her head forcefully on the metal handrail before falling to the bottom of the stairs.

The trial judge was satisfied that the plaintiff had stepped on the broken tile when she slipped. As such, the broken tile itself, and the church's failure to fix it, had caused the damage the plaintiff had suffered. The defendant was therefore held liable for the plaintiff's injuries. However, the judge found a person descending a flight of stairs ought to take reasonable care for their own safety. In this instance, reasonable care included simple precautionary measures such as the use of the handrail and keeping a proper lookout.

The plaintiff was found to have been 50 per cent responsible for the injuries she suffered on account of her contributory negligence.

However, the courts have limited the scope of this defence, requiring the defendant to show that the plaintiff knew the risk beforehand and that they fully appreciated the risk involved and accepted that risk freely and willingly. ***Volenti non fit injuria*** translates approximately to 'there can be no injury to the willing'. Nowadays this defence is rarely raised successfully.

---

***volenti non fit injuria*** a Latin term meaning 'there can be no injury to the willing'; a person who has contributed to their own injury

---

## Illegality of the activity

If either or both of the parties are involved in illegal activity or a criminal act at the time the injury occurred, illegal enterprise is the common law defence. Involvement in illegal activity can extinguish any duty of care owed by one party to another. This defence is based upon public policy considerations that the law should not recognise that the plaintiff has any rights to recover damages where the plaintiff was involved in an illegal act at the time the harm, injury or damage occurred.

**Figure 8.17** Everyone must take reasonable precaution for their own safety, such as using handrails when provided, paying attention to signs that indicate hazards or keeping an ample lookout on their walkway.





**Figure 8.18** Bungee jumpers must accept the risk involved.

## REVIEW 8.4

- 1 Define contributory negligence and explain how it is applied by the courts in negligence cases. (C)
- 2 Explain how illegal enterprise is used as a defence. Provide examples. (C)
- 3 Explain the defence of intoxication. (C)

## RESEARCH 8.2

- 1 Research common law and statute law, and evaluate the different ways they are applied in the tort of negligence. (C, E, Cr)
- 2 Research the role of precedent cases in the law. Provide at least two examples to illustrate how they have changed the tort of negligence. (C, E, Cr)

## 8.5 Sport and negligence

Negligence also applies to sport because the law considers that any party involved in a sport or a sporting organisation has a special relationship with the participants, including the spectators. This special relationship means that they must take reasonable measures to prevent the risk of harm. A duty of care therefore exists between:

- competitors and other competitors
- competitors and spectators
- owners and occupiers and organisers, and spectators
- owners and occupiers and organisers, and competitors
- organisers and strangers
- coaches and players
- schools, and players, spectators and visitors.

Participation in sporting activities often gives rise to potential liability of the participants. The duty of care owed depends on the circumstances of the individual case.

**Figure 8.19** What do the organisers of a sporting event owe the spectators who come to their venue to view a sporting match?



## CASE STUDY 8.6

### Alex McKinnon

Alex McKinnon was an NRL football player for the Newcastle Knights when he was injured on field in a game in 2014. As a result, Alex suffered a spinal cord injury that left him in a wheelchair.



Figure 8.20 Alex McKinnon in 2017

The Alex McKinnon case marked the first time a football player had directly sued the National Rugby League (NRL) governing body for negligence, claiming compensatory damages for his injuries.

Prior to this case, players had sued other players over injuries they deemed to have suffered as a result of their illegal play on the football field, causing damage (injury). These cases in negligence provided what is referred to in the law as 'test cases', which test the established legal concepts of duty of care, voluntary assumption of risk (*volenti non fit injuria*) and vicarious liability.

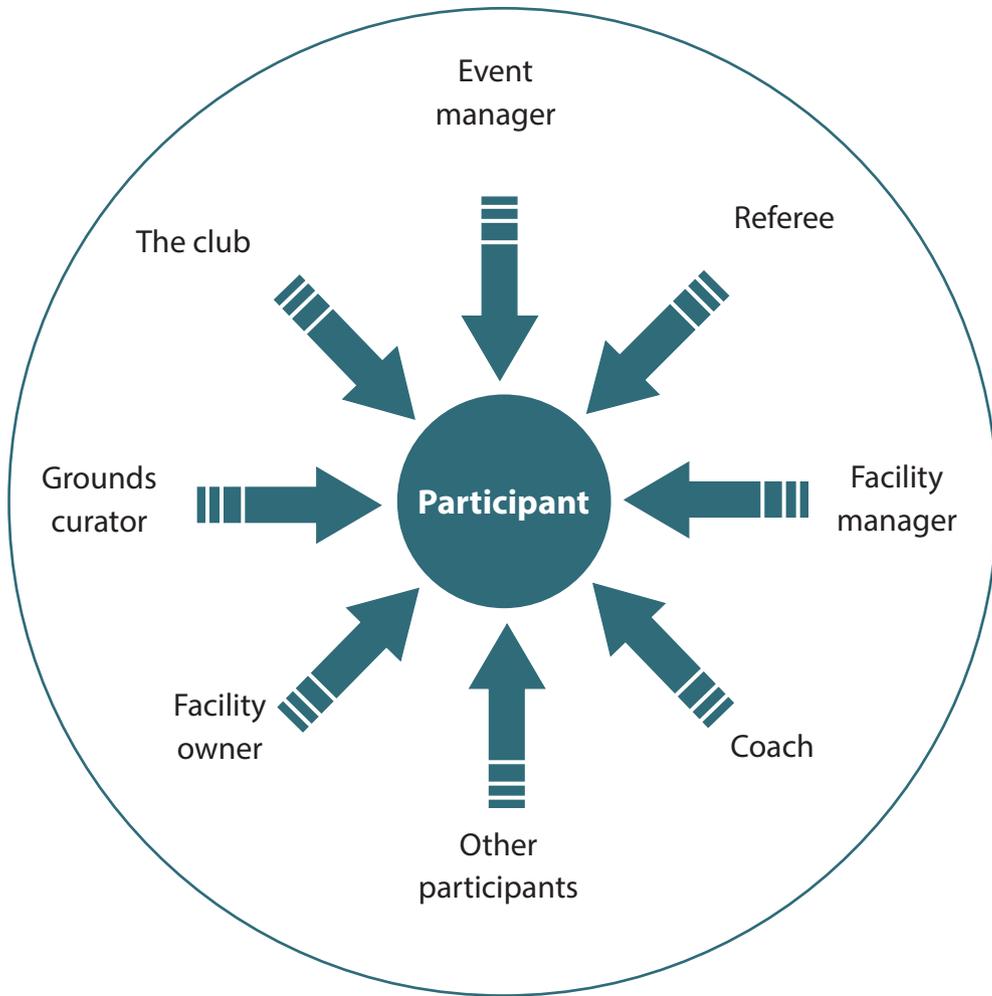
While the NRL has been supportive of McKinnon, offering him a job for life, this would not be sufficient to meet the ongoing costs of his disability. The claim for compensation would need to include the cost of meeting his basic needs for the rest of his life as well as compensation for the life he would have had as an A-Grade Rugby League player but for the negligence of another player and, vicariously, the football clubs of each player and the NRL as the organiser and owners of the game.

### REVIEW 8.5

- 1 In Case Study 8.6, what legal arguments might be presented to the court to support and to refute his claim for compensatory damages? (C)
- 2 In small groups, brainstorm why there has (or has not) been a move towards more litigation by people injured in sport. Summarise and present your findings to the class. (C, A, E, Cr)
- 3 In your legal opinion, why is a higher standard of care expected:
  - a from senior sporting officials with more expertise and experience
  - b when working with the very young and the very old
  - c when coaching or training beginners and inexperienced participants? (C, E, Cr)

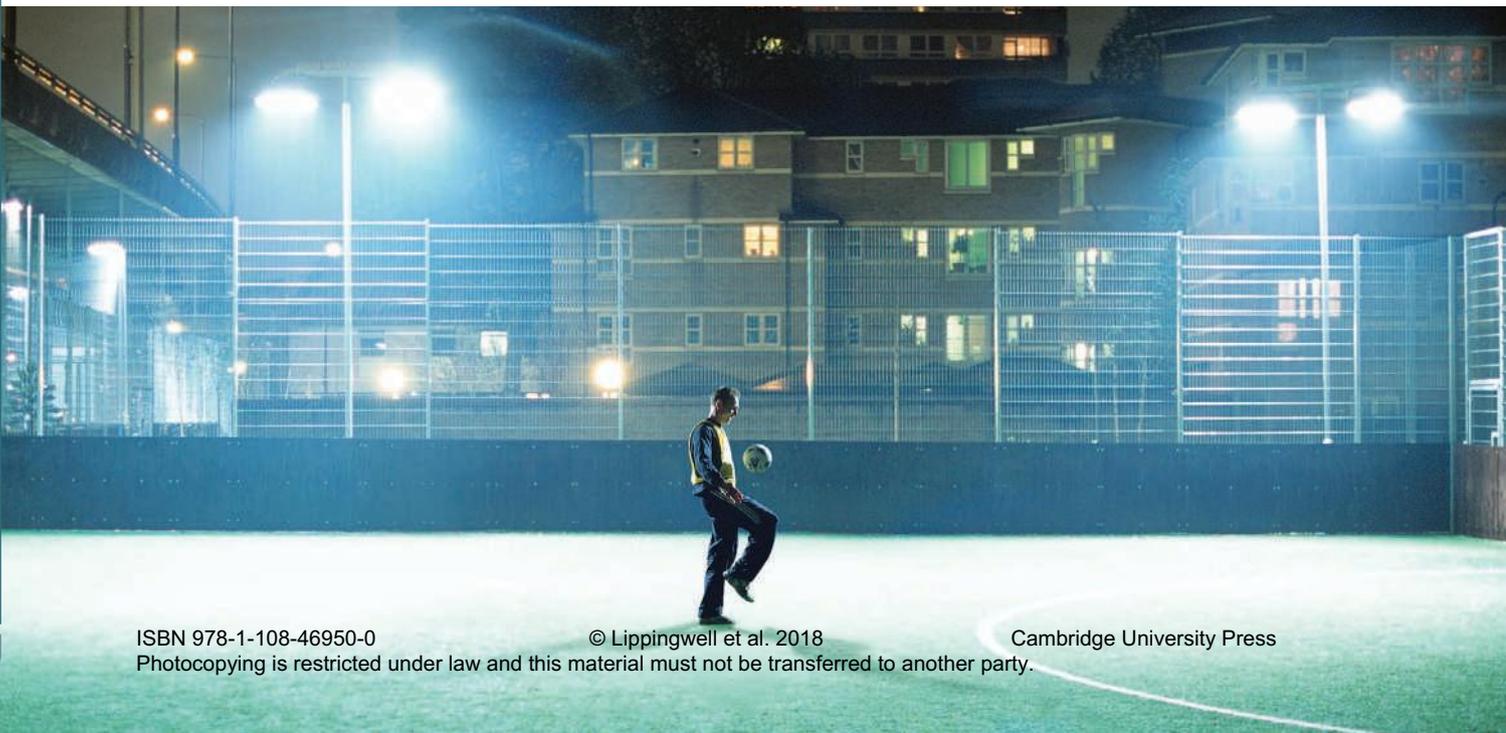
### SPECTATOR DAMAGES

In *Langham v Connell Point Rovers Soccer Club* (2005) NSWCA 461, a spectator was awarded compensatory damages after tripping over a rope in a car park when attending a soccer match. The soccer club was held liable because it had not taken reasonable steps to foresee and reasonably prevent the risk of injury by installing the rope in the car park in a different colour to the dirt in the car park, making it hard to see.



**Figure 8.21** Who owes a duty of care?

**Figure 8.22** What other elements might organisers need to take into consideration when using an urban playing field? Think about factors relating to traffic, public transport and safety of passers-by.



## 8.6 Legal actions and negligence issues

The Legal Australia Wide Survey (2012) was the most comprehensive quantitative survey of legal needs conducted across all states and territories in Australia. It contains data relating to both the extent to which Australians seek legal actions and matters concerning negligence issues.

It reported on the legal problems experienced by Australians, the actions we take to try to resolve those legal problems, where we go for advice and the legal outcomes achieved. More importantly, the survey measured how many Australians were able to resolve their legal problems and how many of us failed to do so.

It also provided some evidence of the disadvantaged groups in our society that are particularly vulnerable to legal problems.

### CHECK THIS OUT

Have a look at the Legal Australia Wide Survey website.

Select some relevant data and use it to evaluate actions and matters concerning negligence issues. Argue that the law of negligence has or has not been effective in compensating parties who have suffered harm, damage or injury. (C, S, E, Cr)

**Figure 8.23** According to the Legal Australia Wide Survey, the remote areas of Queensland represent nine out of 20 of the most disadvantaged statistical local areas in the country. What does this mean in regard to their ability to access legal advice and ability to resolve matters of negligence?



# Chapter review

## Chapter summary

- Negligence is a form of civil law that applies when a person fails to take reasonable care, and injury or damage results.
- The onus of proof in a negligence action rests with the person bringing the action.
- Negligence comprises three key elements: the existence of a duty; a breach of that duty; and reasonably foreseeable damages as a result of the breach of duty.
- Negligence can present in several different forms, including accidental harm, all types of accidents, physical or property damage, or careless business errors.
- Proximity involves the notion of nearness or closeness between the parties, and includes physical, circumstantial and causal proximity.
- Foreseeability is an important part of establishing whether a duty of care is owed and whether the chance of injury or damage is reasonably foreseeable.
- Causation relates to the harm directly caused, and is the link between the behaviour that caused the damage and the damage caused.
- The but-for test is used by the courts to determine whether the defendant's negligence caused the damage or the damage would have occurred anyway, regardless of the defendant's action.
- The *Limitations of Actions Act 1974* (Qld) set specific time limits for negligence actions.
- The eggshell rule states that you must take your victim as you find them.
- For a negligence action to succeed, the damage caused must not be too remote or removed from the cause of the damage.
- The 2017 amendments to the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) mean that a landlord now has a legal duty to their tenant to provide and maintain minimum standards.
- The three main defences to negligence are contributory negligence, voluntary assumption of risk and illegality of the activity engaged in that resulted in the damage or injury.

## Short-response questions

- 1 Evaluate situations where a voluntary assumption of risk may not fully indemnify a defendant to a negligence action. (E)
- 2 Compare and contrast contributory negligence and vicarious liability. Explain how these concepts are applied by the courts using examples to support your response. (C, A)
- 3 Briefly explain the use of the neighbour principle. (C)
- 4 Evaluate the purpose of:
  - a negligence laws
  - b onus of proof in a negligence action
  - c what must be established for a negligence action to be brought. (C, E)

## Extended-response questions

- 1 Research *Geyer v Downs* (1977) 17 ALR 408. In small groups, discuss the legal issues the court would have considered in arriving at its judgment. Summarise your findings and present them to the class. (C, A, E, Cr)
- 2 Research a negligence case of your choice. Analyse the facts of the matter and evaluate the decision of the court. Do you agree or disagree with the court? Why or why not? (S, A, E, Cr)

## Response-to-stimulus questions

- 1 Go to the *Sydney Morning Herald* website and read the article 'High Court Rules on Potato Chip: \$580 000 for Slip Injury'. Evaluate the legal issues that the court would have considered in this negligence case. Do you agree or disagree with the court's decision? Why or why not? (C, A, E, Cr)
- 2 Go to the Australian Law Reform Commission (ALRC) website and access the report *Serious Invasions of Privacy in the Digital Era* (Chapter 7: Fault). Research the case for and against the invasion of privacy becoming an actionable offence under the tort of negligence. Argue the case for or against. Justify your response. (C, S, E, Cr)

### High Court rules on potato chip: \$580 000 for slip injury

7 March 2012 By AAP and Louise Hall

#### High Court judgment

The High Court has found retail giant Woolworths negligent in failing to remove a greasy potato chip from the floor of one of its shopping centres.

As a result Kathryn Strong, an amputee who walked with the aid of crutches, fell heavily to the floor of a food court area at the Centro Taree Shopping Centre in September 2004.

She suffered a serious spinal injury.

Ms Strong sued Woolworths in the NSW District Court, claiming its negligence caused her injury as the area was inspected more than four hours before the accident.

She was awarded damages of \$580 299.

Woolworths took the case to the NSW Court of Appeal, disputing its responsibility for the injury.

That court ruled in favour of Woolworths, finding Ms Strong had failed to prove on the balance of probabilities that its negligence caused her fall.

As the chip was probably deposited at lunchtime it could not be concluded that, had there been a dedicated cleaning of the area every 15 minutes, the accident might not have occurred, the court found.

The High Court today ruled the NSW Court of Appeal finding was wrong.

In a majority decision, four of the court's judges said reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was next to the food court.

On the balance of probabilities, Ms Strong would not have fallen but for the negligence of Woolworths.

The decision restores the original verdict from the NSW District Court.

Commenting on the decision, Majed Issa, a personal injury lawyer with Maurice Blackburn, said the High Court decision had wide-reaching implications for people injured in public places who under the law must show that their injury was caused by negligence of a third party.

'In this case the High Court agreed that shopping centres and stores should have in place a reasonable inspection and cleaning system that would detect and remove hazards that could cause injury within a reasonable timeframe,' Mr Issa said.

'In this case, the court determined that a hazard should be identified and removed if it has existed for at least 20 minutes or longer.

'This obligation also exists if stores have merchandise outside their own physical store, especially in an area where food and drinks are being consumed.'

Mr Issa said Ms Strong, who was injured almost eight years ago, would have spent enormous sums of money in medical and rehabilitation costs.

'Injuries in shopping centres are more common than you would imagine and there is a big cost to the community and individuals when people are injured through no fault of their own,' he said.

# Unit review

## Short-response questions

- 1 Outline the differences between conciliation and arbitration. (C)
- 2 Explain (with examples) two unfair business practices covered in the CCA. (C)
- 3 Explain the legal importance of the decision in *March v (E & M) Stramare Pty Ltd* (1991) 171 CLR 506. (C)

## Extended-response questions

- 1 Examine the various methods of ADR, commenting on the opinion that both parties to a dispute are given the opportunity to derive a just and equitable outcome. (C, E)
- 2 Compare and contrast the ability of common law practices and statute law to protect all stakeholders in contractual agreements. (C, A)
- 3 Research *Wagon Wheel Mound Case (Overseas Tankship [UK] Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No. 1)* [1961] AC 388). In a one-paragraph response, evaluate the significance of this case for the tort of negligence. (S, E, Cr)

## Response-to-stimulus questions

- 1 The Magistrates Court of Queensland, District Court of Queensland and Supreme Court of Queensland Annual Reports 2015–16 indicate that:
  - in the Magistrates Court, the number of claims dealt with was 25 425, a decrease of 3143 from the previous year
  - in the District Court, the number of civil cases lodged was 5012, while it was 5322 the previous year
  - in the Supreme Court, filings of civil applications decreased from 124 to 108 while filings of general civil appeals decreased from 137 to 99.
- 2 On 29 April 2016, the trial judge Justice Edelman ordered Reckitt Benckiser to pay a penalty of \$1.7 million for making misleading representations about its Nurofen Specific Pain products. On 16 December 2016, the Full Court ordered Reckitt Benckiser to pay a revised penalty of \$6 million for making misleading representations about its Nurofen Specific Pain products.

It was further revealed by the courts that if the current guidelines on contravention, at \$1.1 million for each contravention, were adhered to, the maximum penalty would be in the billions of dollars.

Discuss the ability of the judicial system to administer justice with regard to contraventions of contract law when vendors do not understand or fail to adhere to the laws. (C, A, E, Cr)

- 3 Go to the Law Teacher website and search for *Baker v Willoughby* [1970] AC 467. Read the case notes. In a paragraph, summarise the facts of the case and evaluate its significance as a lead case in causation. Argue whether agree or disagree with the decision? Why or why not? (C, A, E, Cr)

In 2015–16, it appears there was a decrease in the number of civil cases in the Queensland court system. Evaluate the success of the current laws and procedures in allowing conflicting parties to solve disputes outside the court system. (C, A, E, Cr)

# Law, governance and change

## Focus: Why is an understanding of the law, governance, and change that has occurred in the Australian legal system important?

While Legal Studies explores the role and development of law in response to current issues, issues of governance are the foundation of the Australian and Queensland legal systems. Knowledge of the law enables students to have confidence in approaching and accessing the legal system and provides them with an appreciation of the influences that shape the legal system.

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## UNIT OBJECTIVES

**By the end of this unit, students should be able to:**

- comprehend legal concepts, principles and processes of Australian and Queensland governance and law reform
- select legal information from sources relevant to law reform issues
- analyse legal issues involving Australian and/or Queensland governance and law reform
- evaluate legal situations relevant to Australian and/or Queensland governance and law reform
- create responses that communicate meaning to suit the intended purpose.

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## CHAPTERS IN THIS UNIT

- Chapter 9: Governance in Australia 1
- Chapter 10: Governance in Australia 2
- Chapter 11: Law reform within a dynamic society 1
- Chapter 12: Law reform within a dynamic society 2

## CHAPTER 9

# Governance in Australia 1

### CHAPTER OBJECTIVES

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

- describe key features of the Australian Constitution – for example, section 51, section 109, section 128
- analyse and apply features of the Australian Constitution, such as:
  - the challenges of changing the Australian Constitution, using past referenda as examples
  - the separation of powers and the importance of an independent judicial system
  - the role of section 51 of the Australian Constitution, and residual powers with reference to current and/or landmark (precedent) cases – for example, the *Tasmanian Dam Case*, *Commonwealth v Tasmania* (1983) 158 CLR 1
- describe the structure and function of the three levels of government in Australia, and the concepts of representative and responsible government, accountability of parliament and the rule of law
- explain the role of the Crown (Governor-General, state Governors and territory Administrators), and the upper and lower houses of parliament
- explain differing legislative powers of federal and state parliaments under the Constitution – for example, in the areas of health, education, immigration and the environment
- explain the implications of a unicameral parliament
- explain the implications of single majority, double majority and minority governments
- explain the function of parliament as a law-making body and describe the legislative process
- explain and analyse the strengths and weaknesses of parliament as a law-making body
- analyse legal issues by:
  - determining the nature and scope of the issue
  - examining viewpoints and consequences
- evaluate the legal situation using the above analysis by:
  - presenting alternatives to make a decision or propose recommendations
  - justifying using legal criteria and discussing implications
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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### Key concepts/legal terminology you will encounter in this chapter

- Australian Constitution
- balance of power
- bicameral
- bipartisan
- bureaucratic procedures
- coalition
- colonisation
- committee system
- concurrent powers
- councillors
- customary law
- democracy
- double dissolution
- double majority
- electoral rolls
- electorates
- exclusive powers
- executive and executive government
- governance
- joint sitting
- judiciary
- jurist
- legislature
- Member of the House of Representatives
- Member of the Legislative Assembly
- minority government
- parliamentary democracy
- President of the Senate
- proviso
- Question Time
- received law
- referendum
- representative government
- reserve powers
- residual powers
- responsible government
- Royal Assent
- senators
- separation of powers doctrine
- Speaker
- *terra nullius*
- the rule of law
- town plan
- unicameral
- Westminster system

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *The Australian Courts Act 1828* (UK)
- *City of Brisbane Act 2010* (Qld)
- *Commonwealth of Australia Act 1900* (UK)
- *Constitution Act 1867* (UK)
- *Constitution (Office of Governor) Act 1987* (Qld)
- *Immigration Restriction Act 1901* (Cth)
- *Local Government Act 2009* (Qld)
- *London Hackney Carriage Act 1831* (UK)
- *New South Wales Act 1823* (UK)
- *Northern Territory (Administration) Act 1910* (Cth)
- Treaty of Waitangi (NZ)

### CASES

- *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*)
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

### LEGAL ODDITY

It is mandated by the Australian Government that every Australian child should attend school until at least the age of 15. However, when the British campaign for mass education began during the Industrial Revolution in the nineteenth century, there were many opponents whose views are difficult to relate to today. A minister of parliament said that '[giving] education to the labouring classes of ... would, in effect, be found to be prejudicial to their morals and happiness; it would teach them to despise their lot in life, instead of making them good servants in agriculture and other laborious employments to which their rank in society had destined them ... it would enable them to read seditious pamphlets, vicious books, and publications against Christianity; it would render them insolent to their superiors ... Besides, if this Bill were to pass into law, it would go to burden this country with a most enormous and incalculable expense, and to load the industrious orders with still heavier imposts.'

This chapter is the first to be studied in Unit 3. It explores the legal history of Australia to provide the legal background that led to Federation in 1901, when Australia formed a national government. The legal document that allowed that to happen was the Australian Constitution. The intent of the Constitution reflected the values of the society in 1901, but our ‘founding fathers’ built into it a legal mechanism that would allow it to be changed through referenda to reflect the changing needs of contemporary society. The Constitution of Australia established our legal and judicial framework, based upon the laws of Great Britain. In a vibrant

democracy such as Australia, it recognised that good governance relies upon the separation of powers and an independent judiciary, representative and responsible government and the rule of law. The law-making powers and responsibilities of federal and state parliaments under the Constitution and the role of the Governor-General and state Governors who represent the Queen as our head of state are explored. Finally, the implications of unicameral and bicameral parliaments, how governments are formed and unformed, and the legislative law-making process are evaluated.

## 9.1 Legal history of Australia

Aboriginal and Torres Strait Islander peoples occupied the continent now known as Australia for thousands of years before European settlement. Some historians suggest that they have lived on this land for at least 100 000 years.

Refer back to Figure 1.6 for a flowchart of key dates in Australian legal history.

### Pre-existing legal and governance system

A key legal issue for European colonial powers was whether the lands they discovered had a legal and governance system in place. This was important because, according to eighteenth-century international law, if a land was uninhabited and without **governance**, it could be occupied and claimed by another nation without the need for negotiations, treaties or the use of force to conquer that land. In *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, the High Court accepted that native title existed at the time of European settlement, and as a result ruled that the doctrine used to claim the

land was flawed. Therefore, could it now be argued that an Indigenous Australian legal and governance system was in place when the British arrived?

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**governance** a method or system of government

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### Doctrine of *terra nullius*

The land we now know as Australia was claimed in the name of the British King George III by Captain James Cook on 22 August 1770, when he took possession of the entire eastern half of the continent under the doctrine of **terra nullius**. King George III had given specific instructions to Cook before he set sail on his first voyage of discovery. These instructions provided Cook with his responsibilities concerning British law should he discover a land that was either occupied or uninhabited – the former required negotiation with the indigenous peoples encountered.

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**terra nullius** a Latin expression meaning ‘land belonging to no one’, which is used in international law to describe territory that has never been subject to the sovereignty of any state

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## SIDEBAR

In 1768, King George III provided Captain James Cook with what today might be called a legal brief. The brief provided instructions to Cook that outlined the protocols he was expected to follow when taking possession of a land in the name of the British King:

You are also with the consent of the natives to take possession of convenient situations in the country, in the name of the King of Great Britain, or if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.

Source: Vines, *Law and Justice in Australia*, 2009, p. 116.

Why did the King provide these instructions? (C, E, A, Cr)

However, Cook decided not to seek and obtain the consent of the Indigenous Australians. This act by Cook was followed in 1788 by the settlement of Sydney Cove by Captain Arthur Phillip, with the east coast of the continent being declared Crown land. Ninety years later, the British colony of Queensland would claim the Torres Strait Islands (though this would be challenged over a century later in the High Court of Australia by Eddie Mabo and four other Torres Strait Islanders). This trio of land claims by the British represented significant points in the legal history of Australia. The first dispossessed Aboriginal people of their land through the declaration of *terra nullius*. The second act began the British ‘settlement’ of Australia and imposed the laws of the British Government and the King of Great Britain upon all the inhabitants of the land. The third dispossessed the Torres Strait Islanders of their lands.

### REVIEW 9.1

- 1 How did Australia come to be regarded as ‘settled’? (C)
- 2 Why did Captain Cook not follow the King’s instructions when he encountered Aboriginal people? (C)



Figure 9.1 The settlement of Sydney Cove in 1788

## International law and European colonisation

In the late eighteenth century, powerful European countries such as Spain, Portugal, France, Holland and Great Britain were engaged in extensive voyages of discovery and the **colonisation** of new land in a quest to maintain their influence and expand their empires. They developed rules of international law that would be recognised and applied to their colonising activities. As a result, the doctrine of *terra nullius* emerged as the rule these nations could apply to claim territory they discovered was uninhabited, a desert or uncultivated land that had no sovereign system of governance or laws.

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**colonisation** the establishment of colonies; settlement

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These rules were founded on the views of historians of the day, such as Emerich de Vattel, who wrote *The Law of Nations* (1758), and Hugo Grotius, who was regarded as the father of international law. Three key questions were at issue:

- 1 How much of a country could be claimed on discovery?
- 2 What was required to convert a claim of a country into a right?
- 3 What were the consequences of settling or conquering another land?

## Views of the early European historians

De Vattel's view was that a country could take possession of another country that was 'vacant' and claim both its 'empire' and sovereignty, and its 'domain' or use of land. The Europeans therefore developed the rule that a discovered land could be claimed if it was uninhabited. However, even if it was inhabited, it still could be claimed provided the original inhabitants were not cultivating the land. The legal issue here lay in how the cultivation of the land was defined. To the British, cultivation meant clearing the land to make way for farming and towns based upon ownership of property and land (property rights). But to the Aboriginal people, cultivation of the land meant that it was not over-used and was maintained in sacred trust for future generations.

De Vattel also argued that the obligation of inhabitants to cultivate the land in order to claim sovereignty over it might not apply to a land in a desert state. In this case, a country could claim title to its possession only if this claim was followed by real possession of it. We can assume that what De Vattel meant by this was that the land should be settled. Grotius was of a similar view, believing that 'discovery' was only possible if the land discovered was vacant. It appears that these conditions were developed into a rule of law, resulting in the emergence of the doctrine of *terra nullius*.

The philosopher John Locke was also of the view that cultivation of the land was an important condition of a claim to ownership over it. He argued that cultivation of land was a 'law of nature' and a precondition to sovereignty. He believed that labour was needed to establish ownership of land by the cultivation of that land, presumably by the farming and clearing of it to make way for villages and towns, as the British were used to doing.

As much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property.

Source: John Locke, cited in Vines, *Law and Justice in Australia*, 2009, p. 119.

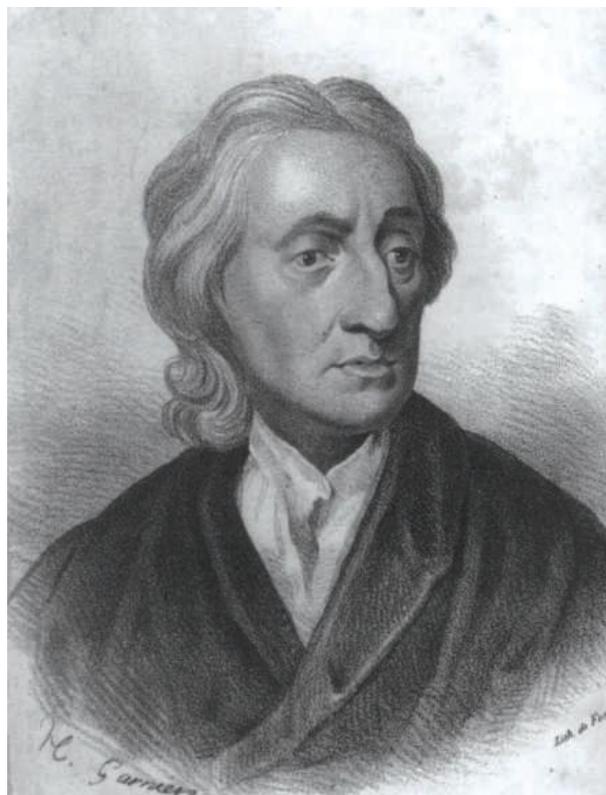


Figure 9.2 John Locke

These views were all used by the British to justify their 'lawful' occupation of Australia when they discovered it. Applying the thinking of de Vattel, Grotius and Locke, the British courts justified Britain's claim over Australia by arguing that Aboriginal people were not using their labour to demonstrate that they were cultivating it; therefore, in accordance with eighteenth-century international law, they did not own it. The British ignored the evidence that the nomadic lifestyle of Aboriginal people involved regularly returning to the same locations, that they were managing the land using fire to clear it for small-scale farming and that they had even established substantial villages. Alternatively, they simply did not accept or recognise this use of labour to manage the land as the cultivation of it. Had they done so, the land could not have been settled because Aboriginal people would have had lawful sovereignty over it and the British would have had to negotiate a treaty or conquer the land.

The British now began to push Aboriginal people off their traditional lands, refusing to recognise the various clans' and tribes' ownership of the land. This meant that the Aboriginal people were cut off from their traditional food sources. Then, when they took a sheep or cow for food, they were punished under British law. They did not see this as theft, as the livestock were on their traditional lands, there for the taking, but they were nonetheless forced to endure a justice system they did not understand. Clearly, the British notion of property rights was at odds with traditional Aboriginal **customary law**.

**customary law** the practices and systems among Aboriginal people that have developed over time, regulating behaviour and connecting people with each other and the land through a system of relationships

In New Zealand, the Māori very nearly won a war against the British occupiers of their land. Lord Grey had to ask England for reinforcements to prevent a Māori victory, and even then the British won the battle mainly because of their superior weapons and firepower. However, a significant difference between the British occupation of New Zealand and



Figure 9.3 Stamp commemorating the Treaty of Waitangi

their occupation of Australia was the making of the Treaty of Waitangi. The doctrine of *terra nullius* was not applied in New Zealand as it was in Australia.

## REVIEW 9.2

- 1 Analyse how the doctrine of *terra nullius* emerged and state its key purpose. (A)
- 2 Evaluate why the British did not recognise the way in which Aboriginal people were cultivating the land. (E)
- 3 Why were Aboriginal people at the time of the arrival of the British not seen to conform to any recognisable system of government? (C)

## Received law

Whereas the doctrine of *terra nullius* paved the way for the settlement of Australia by the British, it was the imposition of English law that gave birth to the Australian legal system of law-making and governance. In the colony of New South Wales, the laws of England – including common law, equity law and statute law – were transplanted to Australia on 26 January 1788, when the colony was proclaimed. So the laws of England were ‘received’ as the laws of the colony. This process of acquiring a legal system of justice is referred to as **received law**.

At the time of settlement, eighteenth-century English law provided that where an uninhabited land had been claimed and consequently settled, the laws of England were immediately in force. Sir William Blackstone was an English **jurist** renowned at the time for his commentaries on the doctrines of English law. His commentary and **proviso** on

**received law** the reception of English law into the penal colony of New South Wales

**jurist** from Medieval Latin: someone who researches and studies jurisprudence (the theory of law)

**proviso** Latin meaning provided; a clause, condition, stipulation or limitation

received law proved to be beneficial for Australia, as it led to the development of an independent Australian legal system that was based in, rather than dependent upon, English law. The view was that ‘colonists carry with them only so much of the English law as is applicable to their new situation and the condition of the infant colony’ (Cook et al., *Laying Down the Law*, 2012, p. 39).

### SIR WILLIAM BLACKSTONE

Sir William Blackstone was born on 10 July 1723 in London, and died on 14 February 1780 in Wallingford, Oxfordshire. He was an English jurist whose four-volume *Commentaries on the Laws of England* (1765–69) provide the best-known description of the doctrines of English law. The work became the basis of university legal education in Great Britain and North America.

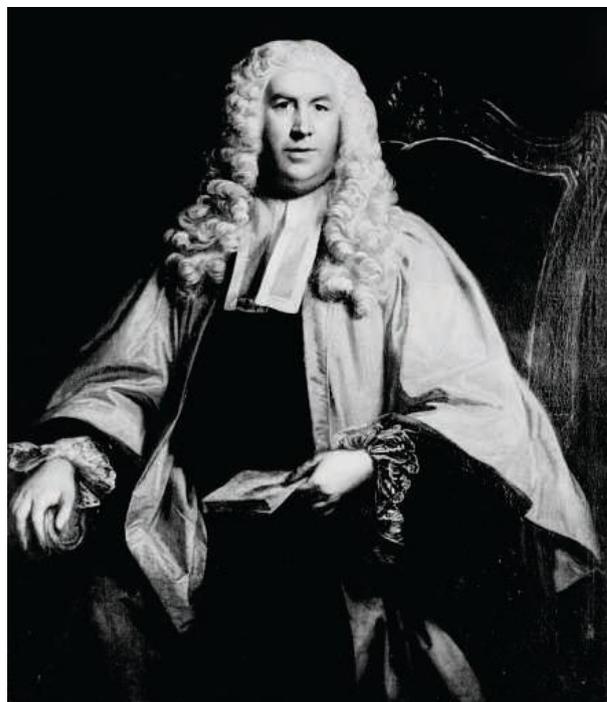


Figure 9.4 Sir William Blackstone

## 9.2 The Australian Constitution

The road to legal independence from England was a long and drawn-out process. In 1823, the British Government passed the *New South Wales Act*, which granted NSW the status of a colony with the legislative power to pass its own laws, with the proviso that the laws of the colony did not conflict with English law. The passing of the *Australian Courts Act* in 1828 meant that the existing laws of England up to and including 1828 applied in Australia, but after 1828 any law passed by the British Parliament would no longer automatically apply to Australia unless it was passed specifically for the colonies. Therefore, Australian law was able to adapt to local circumstances in the colony, but it wasn't until the passing of the *Commonwealth of Australia Act* in 1900 that a legal document setting out the basic legal and legislative rules for the government of Australia existed.

The Australian Constitution was originally passed as part of this English Act of the British Parliament in 1900. On 1 January 1901, when the Constitution took effect, the Australian colonies became an independent nation as the Commonwealth of

Australia. Prior to the Australian Constitution, Australia was made up of a number of separate British colonies with no federal government.

The **Australian Constitution** was drafted by forming an agreement with the former British self-governing colonies of New South Wales,

**Australian Constitution** the set of basic rules by which a country or state is governed; Australia's Constitution is set out in the *Commonwealth of Australia Constitution Act 1900*

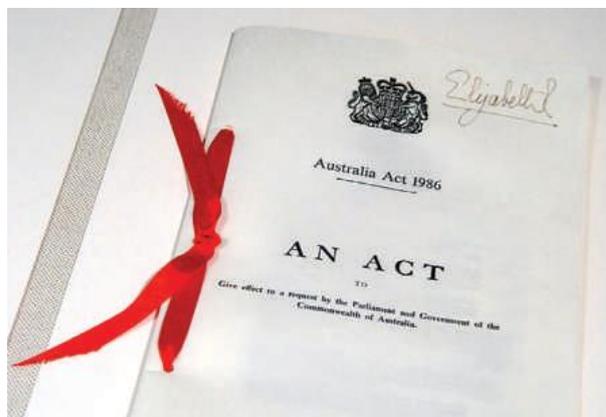


Figure 9.5 The Australian Constitution

Queensland, South Australia, Tasmania, Victoria and Western Australia, which agreed to come together and form one nation. They would keep the systems of government that they had developed as separate colonies but would also have a federal government that was responsible for matters concerning the whole nation. When the Australian Constitution came into force, the colonies collectively became states of the Commonwealth of Australia, and a new federal parliament was established.

## Key features of the Australian Constitution

The Australian Constitution is made up of eight chapters and 128 sections, which set out the basic principles and aspects of government in Australia, including the structure and powers of the federal, state and local governments, and the establishment of the High Court. It contains a number of key or important features and sections, such as section 128, which provides the legal mechanism to make changes to the Constitution so as to enable it to maintain its relevance to contemporary Australian society. Section 128 requires the approval of a majority of voters nationwide, and also a majority of voters in at least four states, to vote in favour of any change. This vote is referred to as a referendum.

So the Australian Constitution is essentially the legal rule book that outlines the legal and political system by which Australia is governed. Within this framework, the Commonwealth Government and the state governments have different responsibilities. The Australian Constitution does not include a Bill of Rights; however, some human rights are mentioned, including the right to compensation if the government acquires your property (s 51(xxxi)). In section 80, the right to a trial by jury is guaranteed, and section 116 provides the freedom to practise your own religion (Parliamentary Education Office).

What are some of the key features of the Australian Constitution? These include establishing a **bicameral** parliament, defining the responsibilities of the federal government, which include international and interstate trade, foreign

## SIDEBAR

Australia and the United States have written constitutions, but unlike the United States, Australia did not include a Bill of Rights.

What were the reasons for not including a Bill of Rights in the Australian Constitution? (C, E, Cr)

affairs, defence, immigration, taxation, banking, insurance and marriage, and who is eligible to stand for election to the federal parliament (s 44). The governments of states and territories are responsible for all matters not assigned to the Commonwealth. So the Constitution established our **legislature** (parliament), **executive government** (Prime Minister and ministers), referred to as the **executive**, the **judiciary** (courts) and the relationship between them, including the powers of the federal parliament in relation to the states.

**bicameral** a legislature, assembly or parliament consisting of two houses

**legislature** parliaments or assemblies such as the Legislative Assembly in Queensland with the power to make, change and amend laws

**executive and executive government** the Prime Minister and ministers (also called the ministry) who lead and manage government departments and are responsible for putting into action government policy and the laws made by the parliament

**judiciary** the High Court and other federal courts that make judgments about the law

## CHECK THIS OUT

Go to the Parliamentary Education Office website and read 'Key Features of the Constitution'. Create a two-column table using the headings 'Chapter' and 'Summary'. Summarise the key features of each chapter of the Australian Constitution.

## Key sections of the Constitution

Section 51 is particularly significant because it lists most of the areas in which the Australian Parliament can make laws. The Commonwealth makes laws on a range of issues (such as regulating marriage and divorce), but the Constitution allows other powers, such as providing for roads and transport, health and education, and law enforcement, to remain with the states.

### RESEARCH 9.1

Find a copy of the Australian Constitution online and go to Chapter 1, Part V. Read 'Powers of the Parliament – Sections 51–60'.

Prepare a report that explains how these sections give the parliament the power to make laws for the peace, order and good government of the Commonwealth. (S, A, Cr)

## Section 51: Legislative powers of the parliament

Section 51 of the Australian Constitution sets out the legislative powers of the Commonwealth Parliament, giving it the power to make laws for the peace, order and good government of the Commonwealth.

## Section 109: Inconsistency of laws

Section 109 deals with any inconsistency that might arise between the laws of the Commonwealth and those of the states. This arises with regard to the residual powers of the Commonwealth, which were assumed as the responsibility of the states, and in areas where both the states and the Commonwealth legislate – for example, health. If a state was to pass a law different from a law passed by the Commonwealth Parliament, this inconsistency or conflict is resolved by section 109, which states that 'when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

**Figure 9.6** In 1999, Australia had a referendum about whether to remain a monarchy or become a republic.



## Section 128: Mode of altering the Constitution

Section 128 of the Constitution provides the manner by which the Constitution can be altered, changed or modified so it reflects the changing needs of an evolving Australian society. The Australian Constitution can be changed by referendum according to the rules set out in section 128 of the Constitution. Any proposed change must first be approved as a Bill by the Commonwealth Parliament. The Bill must be approved by both the House of Representatives and the Senate with an absolute majority. It is then sent to the Governor-General, who will issue a writ so the referendum can occur.

In a referendum, the parliament asks eligible electors who are on the electoral roll in each state and territory to vote for or against the proposed change. The parliament must submit the referendum to the voting public not less than two and not more than six months after it has passed through both federal houses of parliament.

If a majority of voters in a majority of states and a majority of voters across the whole country as a whole vote 'yes' to the proposed change, then the proposal to alter, change or modify the Constitution has been agreed to and the referendum has been successful. This is referred to as a **double majority**, and is difficult to achieve – which explains why most referenda in Australia have failed to pass.

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**double majority** a majority of voters in a majority of states, together with a majority of voters across the whole country, voting 'yes' in a referendum

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## Section 44: Disqualification

Section 44 of the Constitution shot to prominence in 2017 when a number of sitting federal parliamentarians were referred to the High Court for a determination on their eligibility to sit in the Commonwealth Parliament (both the House of Representatives and the Senate). The Australian Government found that it had to defend itself in the High Court over a recent ruling on the basis of section 44 that a number of members of the

Commonwealth Parliament held dual citizenship, which at the time of their election had not been revoked, thus making them ineligible in accordance with section 44. The problem for the government was the literal interpretation of section 44 by the High Court. The origin of the law goes back to the colonial legal system.

Section 44 of the Australian Constitution prohibits people with dual citizenship from serving in the parliament. Things got complicated when the High Court disqualified seven senators and four other members of parliament. While the decision seems legitimate from a constitutional perspective, the Australian Government was arguing for a less literal interpretation of section 44.

Several high-profile politicians were caught by section 44, including the Greens co-deputy leader Larissa Waters, Nationals senators Fiona Nash and Matt Canavan, cross-bencher Nick Xenophon and then Deputy Prime Minister Barnaby Joyce, who were all dual citizens. The defence that these 'natural born' Australians were not aware of their dual citizenship was not sufficient to save them from being ruled ineligible.

Section 44 states that:

### Any person who-

- (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights & privileges of a subject or citizen of a foreign power: or
- (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- (iii) Is an undischarged bankrupt or insolvent: or
- (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons: shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. However, sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

## Section 44 ruling constitutional crisis for the government?

Kiwis, Brits, a Canadian and an Italian? SBS World News explains the dual-citizenship saga gripping Parliament House, and the ramifications for the Turnbull government

Updated 27 October 2017

By James Elton-Pym

It started with the shock resignation of WA Greens senator Scott Ludlam in July. A surprise New Zealand citizenship – a legacy from his childhood – had rendered him invalidly elected under Section 44 of the Constitution.

In the weeks that followed, foreign-born and second-generation MPs and senators from across the political spectrum pored through their records, checking whether they too were dual citizens. It turns out the Greens were not alone.

### High Court to decide fate

Seven politicians were referred to the High Court, where their political fates were debated in October 2017. They include the deputy prime minister Barnaby Joyce.

His case is crucial, not just because of his high profile, but because he sits in the House of Representatives, where the Coalition has a slim one-seat majority. If the court finds Mr Joyce's election was invalid, it will trigger a by-election in the seat of New England, which could threaten that majority and prompt a full election.

The others are all senators: Matt Canavan and Fiona Nash of the Nationals, Malcolm Roberts of One Nation, key cross-bencher Nick Xenophon, and the two ex-Greens senators Larissa Waters and Scott Ludlam – both of whom resigned.

The High Court will hand down its judgments on all seven cases on Friday, 27 October 2017.

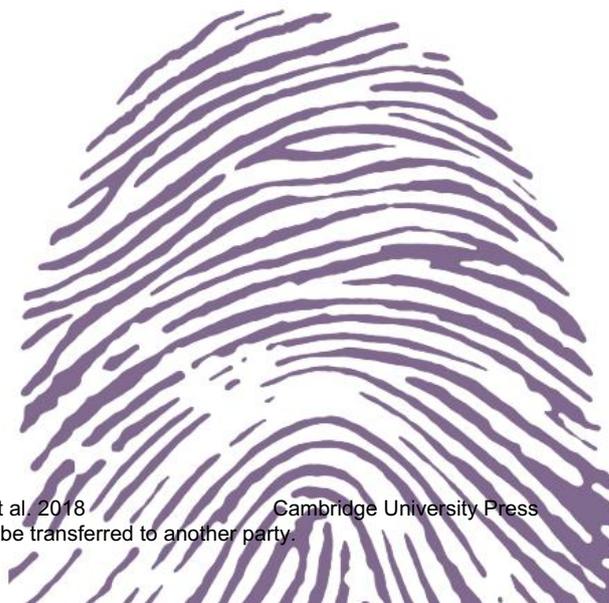
*Source: SBS News, 27 October 2017.*

### REVIEW 9.3

- 1 How was early Australian law able to adapt to local circumstances in the colony? (C)
- 2 Identify the three arms of government established in the Constitution. (C)
- 3 Explain the legal importance to Australian law-making of section 51 of the Constitution. (C)
- 4 Identify the source of power to legislate for same-sex marriage in Australia. (C)
- 5 Evaluate the legal significance and relevance to representative government in Australia of section 109 of the Constitution. (E)
- 6 Analyse the legal importance and implications of section 128 of the Constitution. (A)
- 7 Explain the legal intent of section 44 of the Constitution. (C)

### RESEARCH 9.2

Read the news article 'Section 44 Ruling Constitutional Crisis for the Government?' Explain and evaluate the legal issues and impacts for good governance raised in the article. Provide examples. Your response should be 300–350 words in length. (C, A, E, Cr)



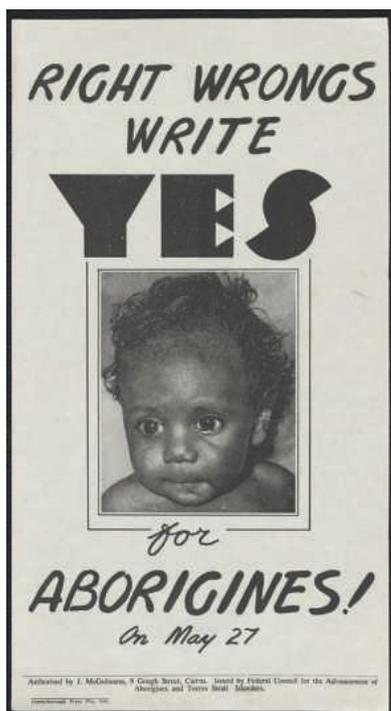
## Referenda

Changing the Australian Constitution does involve several hurdles and legal challenges, which must be overcome before the change can be made. The first challenge relates to any proposed change being approved by both houses of the federal parliament with an absolute majority. At face value, this appears to be relatively simple, but in the cut and thrust of modern Australian politics, it is not. The best chance a government of the day has of achieving this goal is if the proposed Bill has **bipartisan** support from the political parties who have elected representatives sitting in both houses of federal parliament.

**bipartisan** involving the agreement or cooperation of political parties that usually oppose each other's policies

### CHECK THIS OUT

Have a look at 'Referendum dates and results' on the Australian Electoral Commission website. Summarise the information about all of the referenda conducted in Australia since Federation using the headings 'Successful Referenda' and 'Unsuccessful Referenda'.



**Figure 9.7** In 1967, Australia voted 'yes' to allow the government to make laws concerning Aboriginal and Torres Strait Islander people.

The second challenge lies in the requirement that a successful referendum must pass with a double majority: at least four of the states as well as a majority of voters across the whole country must return a 'yes' vote. While some referenda have achieved this requirement, most of those that have been put to the Australian people have failed to do so.

The third challenge may lie in the way that some referenda have been put to voters. For example, the 1974 referendum proposed to synchronise elections for both houses of federal parliament and allow the territories to vote in referenda. At face value, both are reasonable propositions; however, the question allowing the territories a vote was bundled with another question that would have changed the passing of future referenda from a majority of states to only half of the states. It also linked changes to the composition of the electorates and the power of the Commonwealth to borrow money. These other questions may have been received with some suspicion by the voting public, which might explain why the referendum was unsuccessful.

Another issue could be how the voting public perceives the motivation underpinning the questions or questions put to them as perhaps being politically motivated rather than in the best interests of the nation. For example, the 1913 referendum was a response to a railways dispute, so the Commonwealth sought power over industrial relations, which would have allowed it to intervene in a matter that was a state responsibility. This combination, together with other questions that sought to also give powers to the Commonwealth over corporations, trusts and monopolies, may have been perceived as politically motivated rather than intended to promote good governance. The referendum failed.

## Non-referenda constitutional change

Constitutional change without referenda has occurred through the funding arrangements between the Commonwealth Government and the states, and through the interpretations of the Australian Constitution by the High Court. For example, the Commonwealth's increased power to collect income tax has meant it has a much greater share of revenue

than the states. Sometimes the Commonwealth will attach terms and conditions to its state grants, to gain control over areas of responsibility that the states previously controlled – for example, tertiary education. The interpretation by the High Court

of the Commonwealth's external affairs powers has meant Commonwealth law implementing international treaties can be applied to the states in areas such as environmental protection, which was another area previously controlled by the states.

## CASE STUDY 9.1

### *Commonwealth v Tasmania (1983) 158 CLR 1 (Tasmanian Dam Case)*

#### Facts

The south-west of Tasmania is one of the few wilderness areas untouched by human development. In 1970, the Tasmanian Hydro-Electric Commission proposed the construction of two dams on the Gordon River. The dams would generate a third of the State's electricity but wipe out 35 per cent of the wilderness areas. The then state Labor government made the area a national park in 1981.

At the state election in 1982, a new Liberal government was elected that supported the construction of the dams. Conservation groups opposed the project. In 1982, UNESCO, a United Nations agency, declared south-west Tasmania's wilderness area a World Heritage site and the federal Hawke Labor government passed the *World Heritage Properties Act 1982* (Cth). This law halted the building of any dams in the Tasmanian wilderness. The Tasmanian state government appealed this new law in the High Court.

#### Issues

Was the *World Heritage Properties Act 1982* (Cth) constitutionally invalid because the Commonwealth

Government had exceeded its section 51 powers, specifically its authority to legislate for external affairs (s 51(xxix)) and to regulate corporations (s 51(xx))? The federal government argued that under section 51(xxix), the Commonwealth was entitled to pass legislation in order to give force to an international law treaty.

#### Decision

In July 1983, the High Court ruled that while some sections of the Commonwealth legislation were unconstitutional, the section ordering the suspension of dam construction in Tasmania was valid.

#### Implication

The legal implication of this decision was that it marked a radical and controversial change in the external affairs power in section 51(xxix), allowing the Commonwealth to make laws codifying or enforcing international treaties, and therefore increasing its law-making power at the expense of the states.

#### REVIEW 9.4

- 1 Analyse the legal issues that our lawmakers face in achieving successful referenda. (A)
- 2 Evaluate how the Constitution has changed without referenda. (E)

#### RESEARCH 9.3

Compare and contrast two successful referenda with two unsuccessful referenda. Evaluate the legal issues involved, and make recommendations for future referenda. Your response should be 300–350 words in length. (C, E, Cr)

## 9.3 Separation of powers

The first three chapters of the Australian Constitution define and set out the powers and responsibilities of the three separate arms of government. Chapter 1 deals with the parliament (ss 1–60), Chapter 2 with the executive (ss 61–70) and Chapter 3 with the judicature (ss 71–80). The Constitution divided the power to make and manage federal law between these three arms of government, and that division of power is based upon the **separation of powers doctrine**. The idea that the powers of the three arms of government should be separate was to avoid one arm or group having all of the power, which would be counterproductive in a vibrant democracy such as Australia.

**separation of powers doctrine** requires that all three arms be separated to ensure that no individual body or person has complete control; the distinct roles of the executive, the judiciary and the legislature are strictly maintained

### SIDEBAR

The origins of the separation of powers doctrine can be traced back as far as ancient Greece. It was made popular much later by French philosopher Charles de Montesquieu in 1748 in his work *L'esprit des lois*, meaning 'the spirit of the laws'. He wrote that a nation's freedom depended on the three powers of governance – the legislature, executive and judicature – each having their own separate institution. This principle has been widely used in the development of many democracies since that time.

Is the separation of powers essential in a democratic system of governance? Why or why not? (C, E, Cr)

In Australia, including Queensland, our system of government is based on the **Westminster system** of government adopted from England at the time of settlement. Under the Westminster system of **parliamentary democracy**, the power to govern is distributed between the parliament, the executive and the judiciary, each with separate responsibilities.

However, Australia does not have a complete separation of powers, because some of the roles of the parliament, executive and judiciary overlap. For example, the Prime Minister and Cabinet ministers are part of the executive and the parliament. High Court judges, the Prime Minister and Cabinet ministers are officially appointed by the Governor-General, who is also part of the parliament and the executive arms of government.

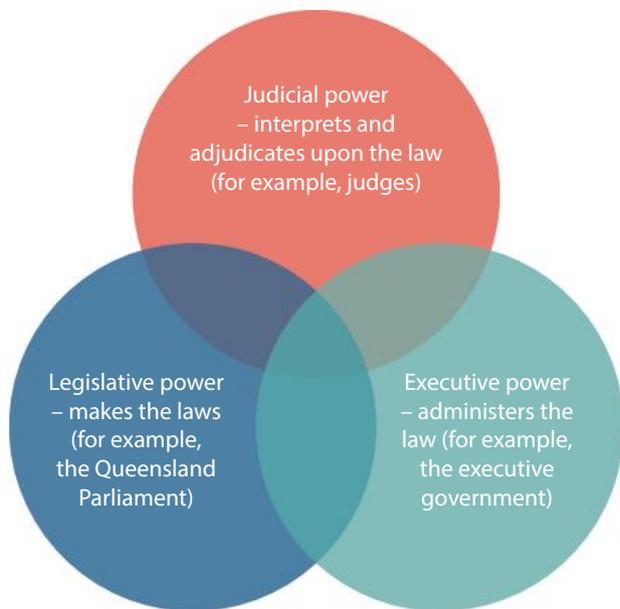
**Table 9.1** Role and responsibility of the three arms of government

Arm of government	Responsibility	Composition
Parliament	The parliament makes, amends and repeals the law and derives its powers from sections 1–60 of the Constitution.	The parliament (also referred to as the legislature) is made up of the Queen (represented by the Governor-General), the Senate and the House of Representatives.
Executive	The executive puts the law into action and derives its powers from sections 61–70 of the Constitution.	The executive is made up of the Queen (represented by the Governor-General), the Prime Minister and Cabinet ministers.
Judiciary	The judiciary makes judgments about the law and derives its powers from sections 71–80 of the Constitution.	The judiciary (also referred to as the judicature) is made up of the High Court and other federal courts.

Source: Adapted from Parliamentary Education Office, Separation of Powers Fact Sheet.

**Westminster system** a system of government, originating in Britain, the main features of which are a head of state who is not the head of government, and an executive that is drawn from and directly responsible to the parliament

**parliamentary democracy** a political system based on the idea that parliament is supreme, or sovereign



**Figure 9.8** Arms of government powers and overlap

Section 61 of the Constitution states that ‘the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative’. This means that the Governor-General has been given certain powers to act on behalf of the Queen in the Constitution. However, the role and responsibilities of the Governor-General are also derived from customs and tradition, as the Governor-General is the ‘ceremonial’ head of state of the Commonwealth of Australia. This means that while executive power is exercised by the Governor-General under the Constitution, this is done on advice from the Prime Minister and Cabinet ministers of the day, who are responsible for governing Australia.

*Source:* Parliamentary Education Office.

**Figure 9.9** The Queen and Governor-General of Australia, Sir Peter Cosgrove, AKMC (Retd)



## SIDEBAR

Westminster is the name given to the system of parliamentary democracy used in countries such as Britain, Canada, Australia and New Zealand, and is named after the area in central London where the parliament of the United Kingdom is located. All state and territory parliaments in Australia follow the Westminster system.

What is the relevance of the Westminster system to Australia? (C, A, Cr)

## The Governor-General's reserve powers

In some matters, the Constitution gives the Governor-General powers to act independently. These include the power to dissolve the House of Representatives and, in certain situations, both houses of parliament. However, the convention is that the Governor-General follows the advice of the Prime Minister of the day, who has the confidence of the house (majority in the house).

The powers of the Governor-General to act without advice are referred to as prerogative or **reserve powers**, but are not clearly defined in the Constitution. Constitutional experts do not agree on their precise extent or on the nature of the exceptional

**reserve powers** rarely used powers that enable the Governor-General to act independently

circumstances in which they may be exercised. Should the Governor-General have reserve powers?

The Governor-General has some powers that may be exercised without ministerial advice, or even in contradiction to ministerial advice. However, because of the reliance of the Australian Constitution on convention, not all of the reserve powers are explicitly stated in the Constitution. This means that the exact nature and scope of the reserve powers is open to interpretation, and there is some dispute about their use. The reserve powers of the Governor-General have been used on four occasions in the history of Australia:

- In 1904, Governor-General Lord Northcote refused to dissolve the House of Representatives to allow for a federal election.
- In 1905, Governor-General Lord Northcote allowed Alfred Deakin to replace George Reid as Prime Minister without facing an election.
- In 1909, Governor-General William Humble Ward allowed an unelected coalition of parties to form a government.
- In 1975, Governor-General Sir John Kerr sacked Prime Minister Gough Whitlam and forced a federal election. Whitlam's party, the Australian Labor Party, subsequently lost.

**Figure 9.10** Former Governor-General Quentin Bryce, the first female Governor-General of Australia and former Governor of Queensland from 2003 to 2008



The exercise of the reserve powers of the Governor-General by Sir John Kerr in 1975 was the most famous of these, causing much outrage and controversy in Australia at the time.

On 11 November 1975, the Governor-General, Sir John Kerr, dismissed Gough Whitlam as Prime Minister and appointed Malcolm Fraser as a Caretaker Prime Minister. This occurred because a number of events resulted in the refusal by the Senate to pass the government's Budget Bill in October 1975. As a result, the Whitlam government was unable to fund the day-to-day operation of the Commonwealth. After the dismissal of the government by the Governor-General, a **double dissolution** general election was held on 13 December 1975, which Whitlam lost.

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**double dissolution** the simultaneous termination of the House of Representatives and the Senate by the Governor-General and the calling of new elections for both houses

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The dismissal of the Whitlam government and the calling of a double dissolution election of both houses of federal parliament is commonly referred to as the 1975 Constitutional Crisis, and it is one of the most significant domestic constitutional and political events in Australian legal history. It was the first time that an unelected representative of the Queen, using the reserve powers, had removed from office a Prime Minister who still had a majority in the House of Representatives.

The Australian Constitution gives almost identical powers to the House of Representatives and the Senate, and the drafters of the Constitution included a provision that in the event that both houses could not agree on a Bill, the deadlock between the houses could be broken by dissolving both houses and calling a double dissolution election.

Section 57 of the Constitution outlines the conditions that must be met for a double dissolution

**Figure 9.11** David Smith, Official Secretary to the Governor-General, reads the proclamation dissolving both Houses of Parliament on the steps of Parliament House, Canberra, 11 November 1975.

*Source:* Image courtesy of the National Library of Australia.





**Figure 9.12** Then Prime Minister Gough Whitlam addresses reporters outside the Parliament building in Canberra after his dismissal by Australia's Governor-General Sir John Kerr, 11 November 1975. Kerr named opposition leader Malcolm Fraser to lead a caretaker government until elections in December.

election. A Bill must be rejected by the Senate at least twice, giving the Prime Minister of the day a 'trigger' for the double dissolution election of both houses of the Commonwealth Parliament. However, a double dissolution election cannot be triggered if the government is in the last six months of its three-year term.

After a double dissolution election, the Bills that caused the election must be presented to both houses of the new federal parliament, sitting separately, and if a deadlock occurs again – as was the case after the 1974 double dissolution election – the Governor-General may order a **joint sitting** of all members of parliament from both houses to

meet together and vote on the Bill or Bills in an attempt to resolve the deadlock. Unfortunately for the re-elected Whitlam government, the deadlock that triggered the 1974 double dissolution election was not resolved in the joint sitting. Prime Minister Whitlam did not want to recommend another double dissolution, which eventually resulted in the Governor-General dismissing the government and calling another double dissolution election in 1975.

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**joint sitting** a meeting of both houses of parliament together to make a decision on a proposed law on which the two houses, sitting separately, have not been able to agree

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### REVIEW 9.5

- 1 What is set out in the first three chapters of the Australian Constitution? Explain the legal intent of these chapters. (C)
- 2 The division of power to make and manage federal law is based on what legal principle? (C)
- 3 Explain how Australia does not have a complete separation of powers. (C)
- 4 Explain the reserve power of the Governor-General. (C)

### RESEARCH 9.4

Analyse the constitutional role of a double dissolution of federal parliament. Explain the bureaucratic processes involved and comment on their legal purpose and effectiveness. Present possible alternatives. (C, A, E, Cr)

## 9.4 Representative and responsible government

### Representative government

In democratic countries such as in Australia, the citizens vote for other citizens to represent them in the parliament. These representatives become members of parliament or senators, and they represent the voters in their electorates or states. As our law-makers, these representatives are expected to act in the best interests of the people and make laws for the good governance of the Commonwealth. Since the government of the day is also made up of these elected representatives, it is referred to as a **representative government**.

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**representative government** a basis for government where the citizens elect representatives to serve in the parliament and make decisions on their behalf

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The representatives of the people meet in parliament and perform a number of functions, including deciding who will form the government; making, amending and repealing laws; debating political and legal issues and proposed laws; representing and acting for their constituents to government and the public service; and monitoring the expenditure of public money and the actions of the government. The parliament is the practical expression of a simple reality: it isn't feasible for all of the people to be involved all of the time –

even if they were so inclined – in the business of government, so representative government exists, whereby the people delegate the task of government to representatives chosen at regular elections.

### Three levels of representative government

In Australia, representative government is reflected in the three levels of government – local, state and federal – and authority is shared between them. Citizens (those people who are eligible to vote and who are on the **electoral roll**) can vote in elections for all three levels of government.

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**electoral roll** list of people who are registered and eligible to vote at federal, state, territory and local government elections and referenda

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Each state has its own parliament and government, and makes laws in relation to areas over which it has control. Local councils are given power by way of the states passing Acts of parliament (*Local Government Acts*) in each state, which delegate certain authority to local councils.

The state parliaments can pass laws on a wider range of areas than the Commonwealth Parliament because they existed before the Commonwealth

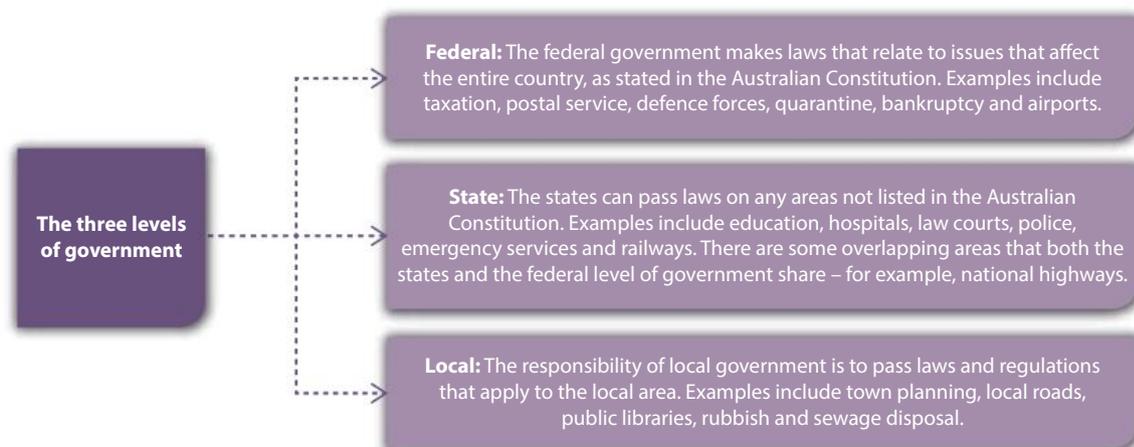


Figure 9.13 The three levels of government

and had their own separate constitutions; over time, however, the Commonwealth has assumed more authority over state matters. The powers that were given to the federal government in the Australian Constitution are known as exclusive powers. The remaining powers were taken over by the states and are referred to as residual powers. In some instances, both the states and the federal government have the right to pass laws pertaining to certain areas, such as the environment, health and education. These powers are referred to as ‘concurrent powers’.

## Local government

Local government is the level of government that is concerned with everyday local community matters such as collecting the garbage and fixing a pothole outside your house. The decision-making body responsible for these local matters is the shire or council. A shire or council is made up of several electorates called divisions or wards, and the citizens who live in these electorates vote for representatives called **councillors**. The head of a local government area or region is the mayor.

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**councillors** people elected as representatives of a division or ward on a local government council

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The local shire, regional or city council – for example, the Brisbane City Council or the Noosa Shire Council – makes laws that reflect community needs and ensures they govern their local area. Local laws can differ between local governments, and these laws have to be approved by the state parliament because shires and councils are created by state parliaments. They decide what duties the councils will perform. The duties, powers and responsibilities are laid out in *Local Government Acts*. Currently, local governments in Queensland are governed by the *Local Government Act 2009*, with Brisbane City Council being governed by the *City of Brisbane Act 2010*.

Councils pay for their services with state and federal funding, and also with revenue that they raise from rates, licences and permit fees, parking tickets, fines, building approvals and the like. Local councils are responsible for the parts of the local community that are public property, such as local roads and parklands, and decide where new roads and buildings should go and which natural areas and historic places should be protected. The plans for all new buildings must be approved by a council in accordance with its **town plan**.

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**town plan** a plan of the physical and social development of a town, including the construction of all new facilities, buildings, roads and parks

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The main responsibilities of local governments relate to areas that many might take for granted, such as arranging for garbage and recyclable rubbish collection and providing and maintaining the local dump (tip). Councils are also responsible for some aspects of public health and safety – for example, checking the health standards in shops, clubs, pubs and restaurants, dog registrations and the control and destruction of vermin. Your local council is also responsible for street signs and traffic control, and some operate libraries, museums and theatres, and provide public halls and swimming pools.

## CHECK IT OUT

Do taxis in Queensland have to carry a bale of hay in the boot of their cab? In the 1800s, cabbies drove horse-drawn carriages. The *London Hackney Carriage Act 1831* made it illegal for drivers to feed their horse unless it was from a bag of corn or hay from their hands. Presumably, this was to prevent traffic jams in the street while they refuelled. Or maybe it was to stop the horse nibbling people’s front gardens. Drivers had to have a handy stack of hay available on board at all times to meet their horse’s needs. This law also existed in Australia before it was repealed in 1980. Prior to that, it was technically illegal for a taxi cab to drive around without a hay bale in the boot! It was an odd law that once served its purpose and is no longer relevant in modern Australia.



**Figure 9.14** Queensland Parliament House

## State government

Each state and territory has its own government and its own constitution and parliament, which is the decision-making authority for each state and territory, and is located in each capital city. Each state derives its powers from the residual and concurrent powers under the Australian Constitution and is responsible for all of the areas not listed as Commonwealth responsibilities.

Often the states engage in programs that involve a contribution from the other levels of government. That is, sometimes a substantial project might be funded by a contribution from the Commonwealth and local authority.

Each state government is a constitutional monarchy, and their respective *Constitution Acts* specifically recognise that the parliament consists of the sovereign (known as the Crown), a lower house and an upper house (except in Queensland). Each



**Figure 9.15** The ceiling of the Legislative Council chamber of the State Parliament of Queensland

state has a Governor who is the representative of the Queen in the state. The Governor is appointed by the sovereign, by commission, on the advice tendered by the state Premier. The appointment is for an unlimited term, but the accepted convention is a term of five years. The powers of the Governor are similar to those of the Governor-General except at a state level. For example, in Queensland the Governor in Council is a title used when the Governor is acting by and with the advice of the Executive Council. This Council is constituted under section 6 of the *Constitution (Office of Governor) Act 1987* (Qld), and comprises all members of the ministry. As the representative of the Queen, the Governor must always remain apolitical. The Crown represents the interests of all people. It is incumbent upon the Governor to ensure that the people of Queensland enjoy a continuance of stable government.

State governments receive funding from a number of sources, including revenue from the federal government; this is derived mainly from the Goods and Services Tax (GST) and state-based fees, levies and charges. While the states do have

some responsibilities that tend to be state-based, such as the Queensland Police Service, prisons, public works, and community services and water, many of the other responsibilities overlap with Commonwealth responsibilities – for example, education, health, the environment, transport, primary industries, industrial relations, sport and recreation, and consumer affairs.

Citizens in state government **electorates** vote for representatives who will represent them in the state parliaments. In Queensland, there are 93 electorates and the representatives elected are referred to as **Members of the Legislative Assembly** (or MPs). Unlike the other states, Queensland no longer has an upper house, having abolished the Legislative Council in 1922. The Queensland Parliament is unique among Australian states in that it was the only

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**electorates** districts comprising an approximately equal number of voters that each elect a single member to the parliament

**Member of the Legislative Assembly (MP)** a representative elected to represent an electorate in the Queensland Parliament

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## SIDEBAR

The Queensland Police Service (QPS) is the law-enforcement agency responsible for policing Queensland. In 1990, the Queensland Police Force was officially renamed the Queensland Police Service and the old motto of 'Firmness with Courtesy' was changed to 'With Honour We Serve'. The headquarters of the Queensland Police Service is located at 200 Roma Street, Brisbane.



Figure 9.16 Queensland Police Service

colonial parliament (pre-1901) to commence with two chambers and is now the only state parliament to have just one chamber. The *Constitution Act 1867* (UK) was further amended, providing that the Legislative Council can only be restored by a state referendum. As a result, Queensland has a **unicameral** legislature, or a parliament with only one house or chamber. Both territory governments also operate under a unicameral legislature. Without an upper house to review legislation and provide

the checks and balances afforded by a bicameral system of governance, Queensland relies on the **committee system**.

**unicameral** a system of governance where there is only one legislature or parliament

**committee system** committees comprising members of parliament that scrutinise government activities, including legislation, and inquire into specified matters

The role of committees is to investigate specific issues and report back to the parliament. Some committees also have continuing roles to monitor and review public-sector organisations or keep areas of the law or activity under review. The committee system is important because a strong, active committee system is an asset in any functioning parliamentary democracy. A comprehensive system of parliamentary committees provides greater accountability by making the policy and administrative functions of government more open and accountable. Committees provide a forum for an investigation into matters of public importance and give the members of the parliament the opportunity to enhance their knowledge of such issues. The committee system allows the parliament to ensure that the right decisions are being made at the right time and for the right reasons. At the same time, they effectively enhance the democratic process by taking the parliament to the people and giving them a role in its operations (Queensland Parliament). The head of government in a state is known as the Premier.

## Territory government

The Australian Capital Territory and the Northern Territory governments were created by the Commonwealth under section 122 of the Constitution, which allows for the creation of territories that were either surrendered or otherwise acquired by the Commonwealth.

The Northern Territory was originally part of South Australia, but at Federation, South Australia surrendered it to the new Commonwealth Government. The Commonwealth assumed responsibility for the administration of the Territory under the *Northern Territory (Administration) Act 1910* (Cth). From 1911, the laws of the Territory were made by the Commonwealth Government and Parliament until, in 1947, the *Northern Territory (Administration) Act 1910* (Cth) was amended to provide for a Territory legislature. The first Legislative Council for the Northern Territory assembled in Darwin in March 1948 and consisted of seven official members appointed by the Governor-General, six elected members and an Administrator as president of the Council.

The Australian Capital Territory (ACT) was administered by the federal government through the Minister for Territories, and the capital was named Canberra – a name derived from the Aboriginal word ‘Kamberra’, meaning ‘meeting place’. The ACT was granted self-government by the federal parliament in 1989. The head of government in the ACT and the Northern Territory is known as the Chief Minister.

### CHECK THIS OUT

Have a look at the ‘How Government Works – State and Territory Government’ page on the Australian Government website.

- Research the information on the state and territory governments.
- Identify the other territories that are administered by the federal government that have been granted a limited right of self-government. (S, A, Cr)

## Federal government

The federal government is our national government, responsible for the governance of the Commonwealth of Australia. The Australian Parliament comprises the Queen (represented by the Governor-General), the Senate and the House of Representatives.

### House of Representatives

The House of Representatives consists of 150 members of parliament elected by citizens who are on the electoral rolls in each federal electorate. The Australian Government is formed in this house, usually by the political party or coalition of parties that can command the majority of members on the floor of the parliament. The **Speaker** of the house is in charge of the **bureaucratic procedures** of the house. The Speaker of the House of Representatives and the President of the Senate together are known as the parliament’s presiding officers. They jointly have responsibility for the provision of services to the parliament by the Department of Parliamentary Services.

**Members of parliament**, also known as Members of the House of Representatives, have three key roles:

- 1 They represent the views of Australians and discuss matters of national and international importance.

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**Speaker** makes sure that members of the house obey the rules (standing orders) of the house and follow the correct procedures

**bureaucratic procedures** rules and often time-consuming methods, procedures and protocols for carrying out the business of a house of parliament or government department

**member of parliament (MP)** a member of a house of parliament, usually used to describe a member of a lower house and, in Australia, referring to Members of the House of Representatives, who may use the initials MP after their names

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- 2 They make and change federal law by debating and voting on Bills. A Bill must be agreed to in identical form by the House of Representatives and the Senate, and given **Royal Assent** by the Governor-General. It then becomes law.
- 3 They scrutinise (closely examine) the work of the government, especially in **Question Time** and through parliamentary committees.

**Royal Assent** the signing of a Bill by the Governor-General, which is the last step in making a Bill into an Act of Parliament, or law

**Question Time** a daily period of time in each house of the parliament in which ministers are asked questions without notice by other members concerning their responsibilities

## Senate

The Senate consists of 76 **senators** elected by citizens who are on the electoral roll in each federal electorate. The Senate was established at Federation as the states house, with the intention that it would represent and safeguard the rights of the states who had ceded some of their powers to the federal parliament so that the Commonwealth could be formed. Today, that role is more as a house of review of the legislation being proposed by the government of the day. Twelve senators are elected from each state and two are elected from each territory (ACT and the Northern Territory). The territories that are administered by the Commonwealth are not represented in the Senate. Members of the Senate have the same three key roles as the House of Representatives, with the primary role of acting as scrutineers on the government and representing state and territory interests in the federal parliament. The **President of the Senate** is in charge of the bureaucratic procedures in the Senate.

**senators** members of the Australian Senate, the upper house of the federal parliament

**President of the Senate** the equivalent of the Speaker in the House of Representatives; the presiding officer responsible for the bureaucratic procedures of the Senate

## THE WHITE AUSTRALIA POLICY

One of the first pieces of legislation passed by the federal parliament was the *Immigration Restriction Act 1901* (Cth). It was part of a package of legislation aimed at preventing all non-European migration to Australia. The Act was the basis of the White Australia policy, which defined Australia as white, and influenced Aboriginal Australian and immigration policy for the next 70 years.

Concerns about the development of a low-paid underclass of migrant workers, which would depress wages for all, generated support for the policy. The *Immigration Restriction Act 1901*, although amended frequently, was not repealed until 1958.



**Figure 9.17** March of the Great White Policy poster  
Source: W.E. Naunton, *White Australia: March of the Great White Policy*, Melbourne: Published for the composer by A.M. Dinsdale, 1910, National Library of Australia, MUS no. 786.21599 N312.

## RESEARCH 9.5

Analyse why the *Immigration Restriction Act 1901* (Cth) was law until 1958 and evaluate why it was part of Australian immigration policy until 1966. Decide whether this was a good or bad law. Why or why not? (A, E, Cr)

the parliament depends for its survival on the support of other political parties or independents. When this is the case, these other political parties or independents are said to hold the **balance of power**. In order to govern, the minority government must maintain the confidence or support of these other members of the parliament to remain the government. This provides another check on the executive arm of government, ensuring it remains accountable to the parliament and is not able to abuse its powers.

## Responsible government

The separation of powers works together with another principle, **responsible government**, to guide the way the law is made and managed by the parliament. This means that a political party, or **coalition** of parties, must maintain the support of the majority of members of the House of Representatives in order to remain in government. This is not usually a problem if the government of the day has an **absolute majority** on the floor of the parliament. That is, the government has more than 50 per cent of the members – the most members in the parliament – and does not need to rely on the support of other political parties or independents to pass its legislation.

Sometimes, however, a **minority government** is formed when no clear majority has been achieved. A minority government occurs when a government that is lacking an outright majority of seats in

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**responsible government** a system where the government is answerable to elected representatives of the people for its actions, especially a system where the ministry is drawn from within the parliament from members of the political party or parties with the support of a majority of the lower house (in Australia, the House of Representatives), and must maintain the confidence of the majority of that house

**coalition** a government formed with the support and cooperation of two or more political parties

**absolute majority** the government has more than half of all members elected to the Parliament

**minority government** a government formed by a party or coalition of parties or independents that do not have a majority in the lower house of parliament on their own

**balance of power** when another political party or independent members support a minority government, these other members hold the balance of power in the parliament

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## Queensland Labor leader Anastacia Palaszczuk has been sworn in as the state's 39th Premier at Government House in Brisbane

Ms Palaszczuk took the oath of allegiance at a ceremony which began at 9.00 am, two weeks to the day after Queenslanders went to the polls. 'I congratulate you on your appointment,' Queensland Governor Paul de Jersey said as Ms Palaszczuk signed the paperwork to install her as the new Premier.

Labor won 44 seats and will have the crucial 45 to form a minority government with the support of

independent Peter Wellington. The MP for Nicklin on the Sunshine Coast said on Friday he was proud to be backing Ms Palaszczuk to form a minority government. The Liberal National Party (LNP) finished the election with 42 seats and Katter's Australian Party (KAP) with two seats – although it has yet to announce which party it will back.



**Figure 9.18** Queensland Governor Paul de Jersey shakes hands with Labor leader Annastacia Palaszczuk after her swearing in as Queensland Premier at Government House in Brisbane; Labor formed a minority government in 2015.

## REVIEW 9.6

Some argue that minority governments tend to be more responsible governments. Do you agree or disagree with this proposition? Why or why not? (C, A, E)



## REVIEW 9.7

- 1 Explain the purpose, concept and responsibilities of representative government. (C)
- 2 Explain the meaning of exclusive, residual and concurrent powers. (C)
- 3 Explain the source of powers for each level of government. (C)
- 4 Describe the role and function of the state Governors. (C)
- 5 What are the names given to the heads of local, state, territory and federal governments? (C)
- 6 Explain why Queensland is the only state government without an upper house of parliament. (C)
- 7 Explain unicameral and bicameral parliaments. (C)
- 8 What was the source of power used by the federal parliament to create the ACT and the Northern Territory? (C)
- 9 Describe the role and constitutional responsibilities of the Governor-General. (C)
- 10 Explain the role of the Speaker of Parliament and the President of the Senate. (C)
- 11 Describe the key three roles of members of parliament (MP). (C)
- 12 Explain how a Bill becomes law. (C)
- 13 What is Question Time? (C)
- 14 How many senators are there in the federal Senate? Who do they represent? (C)
- 15 Explain the principle of responsible government. (C)
- 16 Explain the meaning of coalition, absolute majority, minority government and balance of power. (C)

# Chapter review

## Chapter summary

- Captain James Cook claimed British ownership of Australia in 1770 under the doctrine of *terra nullius*.
- The concept of *terra nullius* was developed to assist colonising nations to claim sovereignty over a new land.
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 overturned the belief that Australia was uninhabited in 1770, as was claimed by Captain Cook under the doctrine of *terra nullius*.
- The laws of Australia were received from England.
- The Australian Constitution established our legal and governance framework.
- The Australian Constitution can be changed by referenda.
- In Australia, the three arms of government – local, state and federal – are separate.
- Governance in Australia is based on a bicameral legislature, except for Queensland and the territories, which have a unicameral legislature.
- Section 51 of the Constitution sets out the exclusive powers of the Commonwealth.
- If a state law is inconsistent with federal law on the same matter, federal law prevails.
- A person's eligibility to stand for federal parliament is dealt with in section 44 of the Australian Constitution.
- Australian parliamentary democracy is based on the Westminster system of governance, including representative and responsible government.
- The Governor-General, who is our head of state, and state Governors, are representatives of the Crown (Queen).
- Each Australian state has its own constitution.
- The heads of government are the Prime Minister, Premiers, Chief Ministers or mayors at each level of government.
- A Bill becomes a law when it is signed by the Governor-General or state Governor.
- The Senate represents the states but today is more commonly a house of review.
- The Speaker of Parliament and the President of the Senate control proceedings in the houses of parliament.

**Figure 9.19** Dancers from the Guriwari people stand amid wreaths floating at the spot where Captain Cook landed at Botany Bay.



## Short-response questions

- 1 How was eighteenth-century international law used to dispossess Aboriginal people of their land? (C)
- 2 Explain how section 44 of the Constitution has been problematic for some elected representatives in both houses of the federal parliament. (C)
- 3 Evaluate the role and responsibility of each arm of government. (E)
- 4 Summarise the role of each level of government. (C)

## Response-to-stimulus questions

- 1 Locate the *Review of the Queensland Parliamentary Committee System* report to the Queensland parliament online. Critically evaluate and analyse the recommendations proposed. What further recommendations would you suggest to reinforce responsible government in Queensland? (S, E, A, Cr)

## Extended-response questions

- 1 Conduct an inquiry into the 1974 Constitutional crisis that resulted in the dismissal of the Whitlam government by the Governor-General. Evaluate the constitutional issues involved and the role of the Governor-General. Analyse alternative causes of action that might have been considered. Propose recommendations that could avoid a future occurrence. (S, E, A, Cr)
- 2 Analyse Sir William Blackstone's proviso that the reception of English law should be applied in situations applicable in a colony. Evaluate how the adoption of this proviso helped to shape the legal and governance system that eventually emerged in Australia. (A, E, Cr)
- 2 Locate the Magna Carta fact sheet on the Parliamentary Education Office website. Evaluate the legal legacy of this document and analyse how it influenced the development of Australian democracy. Decide whether this document was significant for the way our democracy developed. Explain your response. (S, E, A, Cr)

**Figure 9.20** Paul de Jersey is received by Queen Elizabeth II in the 1844 Room in Buckingham Palace upon his appointment as Governor of Queensland in 2014.



# CHAPTER 10

## Governance in Australia 2

### CHAPTER OBJECTIVES

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

- describe the division of powers and the role of the High Court of Australia (HCA)
- analyse and evaluate:
  - the role of the courts in law-making through the interpretation of statutes and the development of legal principles through the application of the doctrine of precedent – for example, *Donoghue v Stevenson* [1932] AC 562; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
  - the ability of the Australian legal system to achieve just and equitable outcomes in a range of real-life situations – for example, the division of powers, the role of the Senate, constitutional protection of rights and the separation of powers
  - the accountability of government – for example, the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry, 1987–89)
- describe the relationship between legislation and case law
- describe the relationship of specialist courts and tribunals with state and federal jurisdictions – for example, the Family Court, Children’s Court, Murri Court, Administrative Appeals Tribunal (AAT) and Queensland Civil and Administrative Tribunal (QCAT)
- describe the role of landmark court decisions in influencing legal change or law reform – for example:
  - *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; [1992] HCA 23
  - *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40
  - *New South Wales v Commonwealth* (2006) 229 CLR 1; [2006] HCA 52
  - *Roadshow Films v iiNet Limited* (2002) 248 CLR 42; [2012] HCA 16
  - *R v Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8; [1986]
  - *Al Masri v Minister for Immigration & Multicultural and Indigenous Affairs* (2002) 192 ALR 609; [2002] FCA 1009
  - *The Attorney-General for the Commonwealth & ‘Kevin & Jennifer’ & Human Rights and Equal Opportunity Commission* (2003) 172 FLR 300; [2003] FamCA 94
  - *Dietrich v the Queen* (1992) 177 CLR 292; and [1992] HCA 57
- analyse legal issues by:
  - determining the nature and scope of the issue
  - examining viewpoints and consequences

- analyse and evaluate the legal situation using the analysis by:
  - presenting alternatives to make a decision or propose recommendations
  - justifying using legal criteria and discussing implications
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

### Key concepts/legal terminology you will encounter in this chapter

- appellate court
- case law
- Chief Justice
- commissions of inquiry
- common law
- criminal offences
- equitable
- fair
- Full Bench
- Full Court
- jurisdiction
- justices
- juveniles
- legally binding
- legislation
- precedents
- Privy Council
- reasonable
- *ultra vires*

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Acts Interpretation Act 1954* (Qld)
- *Administrative Appeals Tribunal Act 1975* (Cth)
- *Australia Act 1968* (Cth)
- *Integrity Act 2009* (Qld)
- *Right to Information Act 2009* (Qld)

## CASES

- *The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*Engineers Case*)
- *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256
- *Commonwealth v Tasmania* (1983) 158 CLR1 (*Tasmanian Dam Case*)
- *Donoghue v Stevenson* [1932] AC 562
- *Harvester Judgment Ex parte McKay* (1907) 2 CAR 1
- *In re Baby M* 109 NJ 396 (1988)
- *Mabo v Queensland (No. 2)* (1992)175 CLR 1; [1992] HCA 23
- *New South Wales v Commonwealth* (2006) 231 ALR 1 (*Work Choices Case*)

## LEGAL ODDITY

In the modern Australian legal system, trials and lawsuits have reached a high degree of uniformity. Typically, evidence and arguments will be presented, and a decision will be made by the judge and/or jury. However, in earlier times there was a much wider range of trials, including trial by ordeal, wherein a defendant would be deemed innocent if they survived a test such as walking over red-hot iron. One of the most interesting of the forms of trial by ordeal was the judicial duel or trial by combat. Often favoured by the nobility, this involved the defendant and the plaintiff fighting a duel, with the successful party deemed the winner in the lawsuit as well.

This chapter extends and builds upon the concepts studied in Chapter 9. The chapter begins with a study of our most significant and influential court, the High Court of Australia (HCA). Apart from the High Court, Australia has a number of other lower courts, and their role in interpreting statutes will be examined. As well as the traditional courts, Australia also operates specialist courts and tribunals, including the Family

Court, Children's Court, Murri Court, Administrative Appeals Tribunal (AAT) and Queensland Civil and Administrative Tribunal (QCAT). The chapter examines how the Australian legal system achieves just and equitable legal outcomes. It concludes with a study of how legal change has been achieved through landmark or precedent court decisions.

## 10.1 The High Court of Australia

The High Court of Australia (HCA) is the highest court in the Australian judicial system. It was established in 1901 under section 71 of the Constitution. The primary function of the High Court was to interpret the Constitution. However, today it also interprets and applies the laws of Australia, decides cases of special federal significance, including challenges to the constitutional validity of laws, and hears appeals, by special leave, from the federal, state and territory courts. In 1986, the High Court of Australia became the highest court of appeal (**appellate court**) in Australia when the *Australia Act 1968* (Cth) abolished appeals from all jurisdictions to the **Privy Council** in England.

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**appellate court** any court that can hear an appeal from another court: when the Supreme Court sits as the Court of Appeal; or the High Court as the final court of appeal

**Privy Council** the principal council advising the sovereign (Queen); the court of final appeal for the UK overseas territories and Crown dependencies and Commonwealth countries that have retained their appeal to the Queen in Council

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The High Court of Australia is located in Canberra in its own building within the parliamentary triangle. The High Court building houses three courtrooms, justices' chambers, and the court's main registry, library and corporate services facilities. In addition, there are offices of the High Court Registry in Sydney and Melbourne, staffed by officers of the High Court. In Adelaide, Brisbane, Darwin and Perth, registry functions are performed on behalf of the High Court by officers of the Federal Court

### SIDEBAR

#### Section 11 (1), *Australia Act 1968* (Cth)

##### Termination of appeals to Her Majesty in Council

Section 11 (1): Subject to subsection (4) below, no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise, from or in respect of any decision of an Australian court.

What was the legal significance of this change? (C)

of Australia and in Hobart, they are performed by officers of the Supreme Court of Tasmania. Registries are responsible for the secure custody and safekeeping of court records, including collecting and accounting for all fees received by the court and all aspects of proceedings and appeals.

The High Court conducts its sittings in Canberra and such other places determined by a rule of court made by the justices in the preceding year. Approximately two-thirds of all sitting days are in Canberra. In addition, applications for special leave to appeal to the court are heard regularly in Sydney and Melbourne. The High Court also sits in Brisbane, Adelaide, Perth and Hobart once each year. When sitting in Sydney, Melbourne, Brisbane, Adelaide and Perth, the court uses Commonwealth Law Courts buildings. In Hobart, facilities are provided with the cooperation and assistance of the Tasmanian Supreme Court.

The High Court can invalidate any legislation or parts of legislation that it finds to be unconstitutional. Sometimes the High Court is asked to decide whether the Commonwealth Government or a state government has the authority and responsibility to deal with a matter. At other times, because the Constitution provides specific limits to what the Commonwealth Government is empowered to do, the High Court may be asked to decide whether a law made by the Commonwealth Government is within that power. Evolving interpretations of the Constitution by the High Court have resulted in stronger law-making powers for the Commonwealth, without any changes to the words of the Constitution.

Important court cases have included *The Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 (*Engineers Case*), *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmanian Dam Case*) and *New South Wales v Commonwealth* (2006) 231 ALR 1 (the *Work Choices Case*). The Work Choices legislation, which came into effect in March 2006, made substantial changes to the regulation of employment conditions and industrial relations. The legislation used the ‘corporations power’ granted by section 51(xx) of the Constitution, rather than the conciliation and arbitration power in section 51(xxxv) that historically has been the foundation of Australia’s industrial legislation, to make the changes. The Commonwealth’s use of the corporations power was challenged by the states and territories in the High Court, along with other aspects of the Work Choices reforms. However, the challenge was rejected by a majority of the court, and the legislation was upheld. The principal function of the High Court of Australia is to interpret the Constitution and to

## SIDEBAR

### Australian Constitution – Section 71 – Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

How have the role, powers and function of the High Court changed? (C, E, Cr)

settle disputes about its meaning (Parliamentary Education Office).

There are currently seven High Court **Justices**, including a **Chief Justice** who, depending upon the matter before the court, can sit individually, as a **Full Court** with two or more justices or as a **Full Bench** with all seven justices presiding.

**Justices** judges appointed to the High Court of Australia

**Chief Justice** the senior justice of the High Court of Australia

**Full Court** when two or more justices, or judges, sit to hear a matter before the court

**Full Bench** when all justices, or judges, of the court (High Court and Supreme Court) sit together to hear a matter, usually in cases of significant legal or constitutional importance

Justices are appointed by the federal government, on advice to the Governor-General, and as a result of the 1977 referendum are required to retire when they turn 70 years of age.

Figure 10.1 The High Court of Australia



Cases that involve an interpretation of the Constitution, or where the court may be invited to depart from one of its previous decisions, or where the court considers the principle of law involved to be one of major public importance, are normally determined by a Full Bench of the High Court. Other

cases, such as appeals against the decisions of the Supreme Courts of the states and territories, of the Federal Court of Australia and of the Family Court of Australia, are dealt with by a Full Court of not less than two justices. In addition, there are certain matters that can be heard and determined by a single justice.

## Justices of the High Court

**Table 10.1** High Court Justices (2018)

Justices of the Australian High Court – 2018						
No.	Name	State	Date started	PM at time of appt	Party in govt at time of appt	Retires
1	Susan Kiefel (Chief Justice)	Qld	03-09-2007	Howard	Liberal	17-01-2024
2	Virginia Bell	NSW	03-02-2009	Rudd	ALP	07-03-2021
3	Stephen Gageler	NSW	09-10-2012	Gillard	ALP	05-07-2028
4	Patrick Keane	Qld	05-03-2013	Gillard	ALP	26-10-2022
5	Geoffrey Nettle	Vic	03-02-2015	Abbott	Liberal	02-12-2020
6	Michelle Gordon	Vic	09-06-2015	Abbott	Liberal	18-11-2034
7	James Edelman	WA	30-01-2017	Turnbull	Liberal	09-01-2044

Source: AustralianPolitics.com.

### SIDEBAR

The final abolition of Privy Council appeals has had a dramatic effect on the High Court's own jurisprudence. Many commentators have observed that the abolition did more than formally make the High Court the final court of appeal for all Australian matters. It also contributed to a new judicial mindset. Liberated from the correction of a higher court and then from competition in relation to appeals from state courts, the High Court became the true apex of the Australian hierarchy and took on a new responsibility for shaping the law for Australia. (Constitution Education Fund Australia)

Do you agree or disagree with this statement? Why or why not? (C, A, Cr)

### REVIEW 10.1

- 1 When was the High Court of Australia established? What was the authority? (C)
- 2 Explain the role and function of the High Court. (C)
- 3 Where is the High Court located? (C)
- 4 List the High Court Registries. What is their function? (C)
- 5 How many justices (judges) sit on the High Court? (C)
- 6 Who is the current Chief Justice of the High Court? (C)
- 7 When must a High Court justice retire? (C)
- 8 On what occasions do a Full Court, a Full Bench and a single justice of the High Court sit? (C)

## 10.2 The role of the courts

The role of the Australian courts is to interpret and decide matters of law that come before the courts. Each court has its own jurisdiction, and can only hear matters that fall within that jurisdiction. Each state and territory has its own courts, which deal with matters relating to that state or territory, except for the High Court, which has jurisdiction over all the laws of the Commonwealth of Australia.

We learned in Chapter 9 that the judiciary is a separate arm of government in Australia, for good legal reason. It is important that the courts are able to act independently and without interference from the parliament or the executive when they are interpreting and applying the rule of law within their respective jurisdictions.

### State political parties must create judicial commission to ensure a robust and accountable judiciary for all Queenslanders: says QLS

13 November 2017

The state's peak lawyer group is demanding political parties commit to the creation of an independent judicial commission to ensure all Queenslanders can be confident they have an independent, fair and accountable judiciary.

Queensland Law Society highlighted the need for the reform in its 2017 State Election Call to Parties – saying the establishment of a commission to preserve and enhance a strong and independent judiciary is critical to the preservation and evolution of the justice system.

President Christine Smyth said public confidence in the administration of justice in Queensland would be fortified by ensuring all processes surrounding the judicial appointments, conduct and education were open, transparent and independent.

'Queensland is fortunate to have an excellent judiciary who dispense justice daily and do so with distinction,' Ms Smyth said.

'A judicial commission would ameliorate the perception of political appointments, introduce a level independence not currently evident, address allegations of judicial misconduct and provide ongoing education to judicial officers.'

'In addition, the very existence of the commission would go a long way to blunt ill-informed attacks on the integrity of the system.'

Ms Smyth said the commission should also be charged with formulating a list of potential judicial appointments from which the Queensland Attorney-General must choose.

'Any deviations from this list must be openly reported to Parliament,' she said.

#### REVIEW 10.2

Do you agree or disagree with the Queensland Law Society that the introduction of a Judicial Commission would 'enhance a strong and independent judiciary'? Justify your response. (C, E, Cr)

### Australia's federal courts

Chapter 3 of the Australian Constitution established the High Court of Australia and empowered the Commonwealth Government to create other federal courts and to vest federal judicial power in state and territory courts. Apart from the High Court of Australia (HCA), there are three other principal federal courts: the Federal Court of Australia, the Federal Circuit Court of Australia and the Family Court.



**Figure 10.2** Native title recognises the traditional rights and interests to land and water of Aboriginal and Torres Strait Islander people. Under the *Native Title Act 1993* (NTA), claimants can make an application to the Federal Court to have their native title recognised by Australian law.

## Federal Court of Australia

The Federal Court of Australia hears matters on a range of different subject-matter, including bankruptcy, corporations, industrial relations, native title, taxation and trade practices laws, and hears appeals from decisions (except family law decisions) of the Federal Magistrates Court.

## Federal Circuit Court of Australia

The Federal Circuit Court of Australia was previously known as the Federal Magistrates Court but on 12 April 2013 it was renamed the Federal Circuit Court of Australia and the titles of 'Chief Federal Magistrate' and 'Federal Magistrate' were changed to 'Chief Judge' and 'Judge' respectively. The court hears less complex disputes in matters under family, administrative, bankruptcy, industrial relations, migration and trade practices laws.

As well as these courts, each state and territory has its own laws and court system. State and territory courts fall within the responsibilities of the relevant state or territory Attorney-General or Minister for Justice.

## Family Court

The Family Court is a superior court of record established by parliament in 1975 under Chapter 3 of the Constitution. It deals with more complex matters, which may include:

- **parenting cases**, including those that involve a child welfare agency and/or allegations of sexual abuse or serious physical abuse of a child (Magellan cases), family violence and/or mental health issues with other complexities, multiple parties, complex cases where orders are sought having the effect of preventing a parent from communicating with or spending time with a child, multiple expert witnesses, complex questions of law and/or special jurisdictional issues, international child abduction under the Hague Convention, special medical procedures and international relocation
- **financial cases** that involve multiple parties, valuation of complex interests in trusts or corporate structures, including minority interests, multiple expert witnesses, complex questions of law and/or jurisdictional issues (including accrued jurisdiction) or complex issues concerning superannuation (such as complex valuations of defined benefit superannuation schemes).

The Family Court commenced operations on 5 January 1976 and consists of a Chief Justice, a Deputy Chief Justice and other judges. The court maintains registries in all Australian states and territories except Western Australia. The court's goal is to deliver excellence in service for children, families and parties through effective judicial and non-judicial processes and high-quality and timely judgments, while respecting the needs of separating families.

Refer back to page 29 in Chapter 1 for more detail on the proposed changes to the Australian court structure that will be implemented in 2019. Figure 1.18 will also be helpful in understanding Australian court structure.

## Interpretation of statutes

When laws are drafted by the parliament, important factors need to be considered. The drafter of a new law needs to consider not only the intent of the Act but also the actual wording of the document to ensure that the future possibilities that may arise will be covered by the new legislation or law. This can sometimes cause problems where meanings of certain words are ambiguous or unclear, making the interpretation of the new law difficult for the courts. However,

it is a role of the courts to interpret the meaning and intent of the wording of an Act and apply that interpretation to the matter it is considering. In this way, the court might depart from the original meaning and interpret the intent of the law through its judgments.

### REVIEW 10.3

- 1 Read the article below and evaluate the main issues raised, identifying the legal 'loophole' and its effect on the law. (C, E)
- 2 Discuss your interpretation of what Dr Bricknell means when she states that familiarity with legislation can be exploited. Do you agree or disagree with her proposition? Justify your decision. (C, A, E)

## 260 000 illegal guns in Australia, thanks to legal ambiguity

15 October 2012

Australian Institute of Criminology researcher Dr Samantha Bricknell revealed in a July 2012 report that in Australia between 2004 and 2009, more than 7700 firearms were reported as stolen each year, with only 12 to 14 per cent recovered by police, 'indicating a sizeable, annual contribution of stolen firearms to the illicit market'. Queensland laws allowed handguns that had been rendered inoperable to be deregistered, resulting in the potential for guns to be reactivated or to have their serial numbers transferred to working weapons.

Dr Bricknell criticised missing uniform data due to a lack of a national firearms register, calling it a 'huge issue'. She stated that, currently, there are over 30 separate registries and databases across federal, state and territory agencies that remain unlinked. 'It makes it very difficult to trace a firearm when it moves from the licit market into the illicit market,' she said. 'With 250 000-odd firearms moving around the illicit market, we should be concerned.'

State police ministers are planning on creating a draft for a national firearms register by next year.

Corrupt gun dealers, along with theft, missing weapons and not having a national firearms database,

have factored in approximately 260 000 guns circulating illegally in Australia.

Dr Bricknell raised alarm about the rising number of handmade guns, with forecasts of a 'growing domestic market of locally manufactured firearms.'

In the report, Dr Bricknell also commented on how corrupt licensed dealers were 'well-placed ... to divert firearms'. She explained how a careless inspection culture resulted in thousands of badly deactivated handguns being reactivated by enthusiasts and criminals, with many going straight on to the black market.

'They have access to large firearm collections, and their familiarity with legislation and processes around the importation, distribution of firearms will have revealed where vulnerabilities exist and can best be exploited,' she said.

According to Dr Bricknell, the grey market – made up of rifles and shotguns that under the 1996 national gun buyback should have been registered or surrendered – was also a chief source of criminal weapons. Despite the loophole being closed early last decade, a great many of the guns which were illegally reactivated are thought to be circulating today.



**Figure 10.3** Australia has held two national gun amnesties, which allow anyone with unwanted or unregistered firearms to legally register or drop them off without fear of being arrested or prosecuted. The first was after the 1996 Port Arthur massacre; the other was held from July to September 2017.

A number of rules are used to aid understanding of the intent of an Act, to help the judiciary to interpret the meaning of the law. Some of these rules stated in the *Acts Interpretation Act 1954* (Qld), include:

- **literal rules** – meaning that the actual words used are given their ordinary meaning
- **purposive rules** – ask the reader to look at the intention of parliament; this can be achieved by reading through speeches from parliamentary debates to help provide interpretation of meanings or the intent of the Act
- **specific rules** – refers to reading a particular section in the context of the entire Act to understand the Act's intention.

When an Act is drafted, it is divided into parts, which makes it easy to quickly find what you are looking for. Often a definitions section is included at the beginning of the Act, or a dictionary section is included in a Schedule at the end of the Act. Refer back to Figure 1.14 in Chapter 1 for more detail on the parts of an Act.

#### REVIEW 10.4

- 1 Summarise the three rules used to aid an understanding of an Act of Parliament. (C)
- 2 Explain the extent and purpose of delegated legislation. (C)

**Table 10.2** Comparing the role of parliament and the courts

Parliament	Courts
<ul style="list-style-type: none"> <li>• Can change or amend any laws</li> <li>• Bound by Constitution</li> </ul>	<ul style="list-style-type: none"> <li>• All courts are bound by the decisions of higher courts, with the exception of the High Court</li> </ul>
<ul style="list-style-type: none"> <li>• Can change laws to suit future needs</li> </ul>	<ul style="list-style-type: none"> <li>• Required to apply existing laws</li> </ul>
<ul style="list-style-type: none"> <li>• Can change or pass legislation on any issue within its jurisdiction under the Constitution</li> </ul>	<ul style="list-style-type: none"> <li>• Can only decide on issues presented in the case before them</li> </ul>
<ul style="list-style-type: none"> <li>• Politicians are elected by the electorate</li> </ul>	<ul style="list-style-type: none"> <li>• The judiciary is not elected by the public, but appointed by the government</li> </ul>
<ul style="list-style-type: none"> <li>• The government is responsible to, and influenced by, the electorate</li> <li>• Can be influenced by public concern or certain groups</li> </ul>	<ul style="list-style-type: none"> <li>• The courts are independent, and are deemed to be above influence or interference</li> </ul>
<ul style="list-style-type: none"> <li>• Politicians can be removed from parliament at an election</li> </ul>	<ul style="list-style-type: none"> <li>• Judges cannot be removed (except under exceptional circumstances) until they retire</li> </ul>
<ul style="list-style-type: none"> <li>• Parliament has the role to make laws to allow for peace and order</li> </ul>	<ul style="list-style-type: none"> <li>• Courts have the responsibility to adjudicate disputes that arise within our society</li> </ul>
<ul style="list-style-type: none"> <li>• Laws passed by parliament – statute law overrides common law</li> </ul>	<ul style="list-style-type: none"> <li>• If there is a conflict between the courts and parliament, statute law overrides common law</li> </ul>

**Figure 10.4** Queen Elizabeth II Courts of Law, Brisbane Supreme Court, Queensland

## Parliament and the courts

Table 10.2 contains a comparison of the two important bodies that make up our legal system – our parliament and our courts.

## Delegated legislation

When legislation is passed, it is not always possible for it to adequately cover the entire desired scope of the new law or to deal with the day-to-day implementation of the Act. To deal with this, the legislation may delegate to the Governor in Council or local government the power to make regulations, by-laws, rules and the like. Delegated legislation cannot be made unless the power to do so is given by the legislation. If laws are made that are outside the boundaries, they are deemed to be **ultra vires** and are invalid.

**ultra vires** Latin term meaning ‘beyond power’, acting outside the scope of a granted power



Figure 10.5 Legislation and case law regulate society.

### REVIEW 10.5

Carefully read Table 10.2. In your opinion, do the differences in the roles reinforce or distract from the rule of law? Justify your response. (C, E)

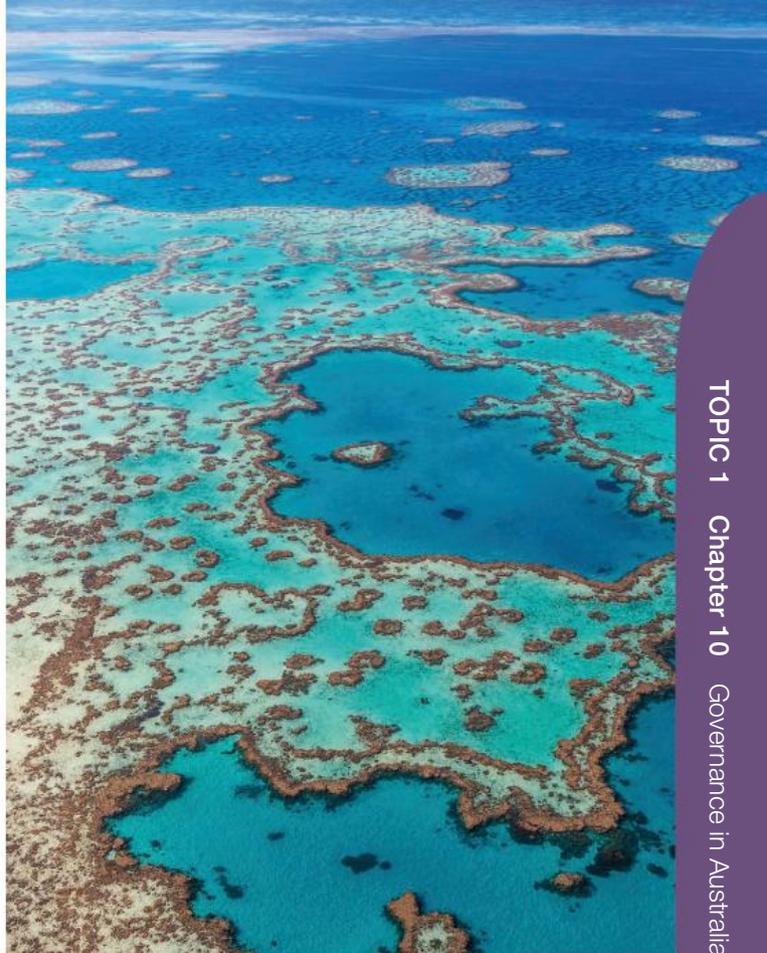
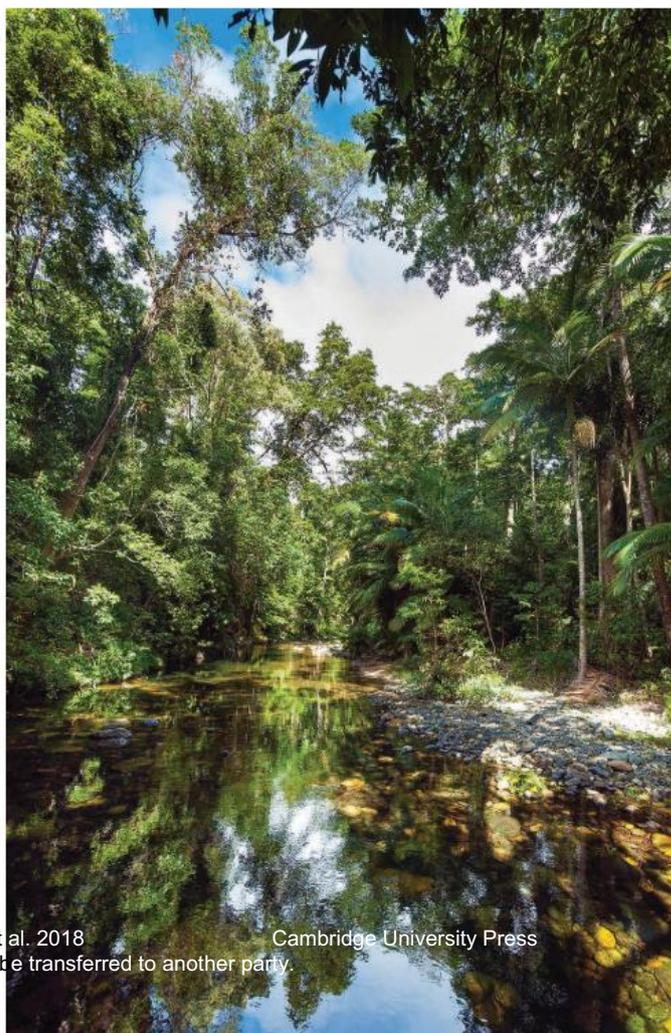


Figure 10.6 The Great Barrier Reef and the Daintree Rainforest are just two of Queensland’s great natural wonders that are protected by certain laws.



## 10.3 Legislation and case law

We have already learned that in Australia the laws are made in the legislature or parliament and the courts through interpretation and judgments make up a body of law called common law, which is also referred to as **case law**. The early Australian parliaments were not very active in making laws, so when a case did come before the courts, the judge would publish the decision (*ratio decidendi*) together with the reasons for those decisions in law reports. As a result, a body of case law emerged that other judges could consult and use as **precedents** when deciding their own cases.

Since the mid-nineteenth century, the laws and Acts made by parliament (**legislation**) have significantly increased. It is important to note that these statutes and Acts (which are collectively known as legislation, overrule common law if both apply to the same area.

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**case law** the principles of law arising from judicial decisions as distinguished from statute law; also termed common law

**precedents** rules or principles established in previous legal cases that are either persuasive to or binding on a court when it is deciding subsequent cases with similar facts or issues

**legislation** a law or body of laws formally made by parliament

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Sometimes the courts will decide a matter that results in a ‘law’ in the absence of legislation on the matter. Such an instance occurred with the *Harvester Judgment Ex parte McKay* (1907) 2 CAR 1, when the Commonwealth Court of Conciliation and Arbitration ruled that an employee should be paid a living wage that guaranteed them a standard of living reasonable for ‘a human being in a civilised community to support a wife and three children in frugal comfort’. At the time of this judgment, no legislation was enacted that would guarantee workers a minimum wage. However, this judgment did set in motion the requirement for a basic wage, which dominated Australian economic life for the next 60 to 80 years.

We have learned that when the courts decide a matter that creates a precedent for other courts to follow, the law can change or its scope can be extended. This was the case in *Donoghue v Stevenson*

[1932] AC 562, discussed in Chapter 8. In this matter, the judgment resulted in the introduction of the ‘neighbour principle’ as a test to establish whether one party owed a duty of care to another that previously did not exist. Common law (case law) now required that a party ought reasonably to take others into their contemplation who were so closely and directly affected by an act that they might be harmed by it. So the judgment in *Donoghue v Stevenson* effectively changed the tort of negligence in the absence of legislation on the matter.

Another important precedent case is *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, discussed in Chapter 6. The Carbolic Smoke Ball Company had placed an advertisement in a newspaper claiming that any person who used its product would be guaranteed a cure from influenza, and if they were not, would be paid the sum of £100 as a ‘reward’. Mrs Carlill used the product and was not cured of influenza, but when she went to claim the £100, the Carbolic Smoke Ball Company refused to pay. The point of law in this matter was whether the advertisement constituted an offer that was capable of acceptance and, if so, whether a legally binding contract existed. The court ruled that the three elements of a contract and the rules of offer and acceptance had been met. The printed directions on how to use the product constituted the terms and conditions of a contract and, once complied with, discharged the requirements to meet the contractual obligations. A guarantee or promise to cure influenza was implied by the contract. The sum of £1000 deposited with the bank was evidence of consideration if the product failed to meet the conditions set out in the directions (contract conditions). A consumer of the product might not have purchased the product if this ‘guarantee’ had not been made. Therefore, the court ruled that the advertisement was indeed an offer that was capable of acceptance and, provided all the instructions on how to use the product were complied with, a legally binding contract was in place. So the judgment in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 effectively extended the scope of the law of contract in the absence of legislation, and this later led to laws regarding misleading advertising.



## RESEARCH 10.1

- 1 Go to the Queensland Department of Justice and Attorney-General website and read the factsheet 'Domestic and Family Violence Specialist Court'. (C)
- 2 Summarise the legal reasons for the introduction of the Domestic and Family Violence Court by the Queensland Government. (C)
- 3 Decide whether this is evidence of the government responding to the needs of a changing society. Justify your response. (C, E, Cr)

## Mental Health Court

The Mental Health Court (MHC) was originally established under the *Mental Health Act 2000* (Qld), and has been operating as a specialist court since 28 February 2002. The Act was updated in 2016. The Mental Health Court decides whether a person charged with a criminal offence has a 'mental health defence'. The court has two key roles:

- 1 to decide whether the person was of unsound mind at the time of the offence (suffering mental illness or intellectual disability to such a degree as to not be able to be held responsible for their actions)
- 2 to decide whether the person is fit for trial (unable to stand trial because of mental illness or intellectual disability). A person may be found not fit for trial either permanently or not permanently.

According to the *Mental Health Act 2016* (Qld):

The Court may make a forensic order requiring the involuntary treatment for the patient and also hears appeals against decisions of the *Mental Health Review Tribunal (MHRT)*. In addition, the Court may investigate the detention of patients in authorized mental health services.

The Mental Health Court is presided over by a Supreme Court judge who may seek advice from two assisting psychiatrists. The Mental Health Court has replaced the Mental Health Tribunal (MHT) which performed much the same role under the previous legislation.

## Children's Court

In Queensland, matters involving children are dealt with in either a special court at Magistrates Court or District Court level, depending on the type of matter. In the Magistrates Court, any matter involving **juveniles** (persons under the age of 18) are dealt with in a special court known as the Children's Court. The court is a special form of District Court that deals with serious **criminal offences** committed by juveniles.

**juvenile** a person who is not old enough to be held responsible for criminal acts; in most states and on the federal level, this age threshold is set at 18 years

**criminal offences** offences or crimes against the state; often called 'breaking the law'

The Family Court of Australia is different from this court. The Children's Court is a state court, whereas the Family Court deals with other family-related proceedings such as custody issues between parents, and is a federal court.

Queensland was the only state or territory that tried juveniles as adults once they turned 17. However the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) which commenced on 12 February 2018 corrected this situation. Now in Queensland young offenders aged 17 will be dealt with in the youth justice system. The commencement of the legislation brought Queensland into line with the United Nations Convention on the Rights of the Child, and the law in all other Australian jurisdictions.

The legislation supports the wide-sweeping reforms being implemented across Youth Justice in Queensland to ensure the rehabilitation of young offenders. Under the Act, children aged 17 years old can access the same support and services that children aged 16 and under can access. This includes:

- access to a support person when interviewed by police
- legal advice and separate conditions for watch houses
- age and developmentally-appropriate interventions.

*Source:* Department of Communities, Disability Services and Seniors, 2018.

## Children's Court proceedings

All Children's Court proceedings at the Magistrates Court level are heard in a closed court, which means that only people directly involved in the case may be present and no information identifying a juvenile defendant can be published. The court can hear and determine matters involving juveniles with regard to a range of issues, including:

- youth justice proceedings involving juveniles who commit, or are alleged to have committed, offences
- child protection proceedings relating to applications by the Department of Child Safety or the Director of Child Protection Litigation regarding protecting children from harm
- adoption proceedings to provide for a child's long-term care, wellbeing and development by creating a permanent parent-child relationship between the child and their adoptive parents.

## Children's (District) Court matters

Certain serious indictable criminal offences allegedly committed by juveniles are heard in the District Court, sitting as the Children's Court of Queensland (CCQ). However, the most serious offences such as murder must be heard in the Supreme Court. The court also determines parentage orders and discharge of parentage orders. A parentage order is a court order that transfers parentage from the birth parent or parents to the intended parent or parents as part of a surrogacy arrangement. This means the birth mother and her partner (if she has one) will no longer have a legal parental relationship with the child and the intended parents become the child's legal parents. A surrogacy arrangement is an arrangement between a woman (the birth mother) and another person or couple (the intended parents) where the birth mother agrees to become pregnant with a child for the intended parents. After the baby's birth, the birth mother gives the baby to the intended parents.

### CASE STUDY 10.1

#### *In re Baby M 109 NJ 396 (1988)*

Mary Beth Whitehead entered into a surrogacy agreement with Bill Stern. The agreement was for Whitehead to be artificially inseminated with Stern's sperm and to give the child to Stern and his wife after birth. Whitehead agreed to allow the Sterns to adopt the baby and renounce parental rights. She would receive \$10 000 in return. However, after birth Whitehead did not want to give 'Baby M' to the Sterns.

The Supreme Court of the United States held that the surrogacy contract was not enforceable because it contravened state laws outlining the sale of babies. The contract was deemed illegal. However, the court thought that the child would have a better quality



of life with the Sterns and decided to allow them to keep the baby – Whitehead and her husband had two other children, financial problems and some marital discord, while the Sterns both held doctoral degrees and led quiet, respectable lives.

### REVIEW 10.7

Evaluate the legal issues involved in this case. Do you agree or disagree with the court's decision? Justify your answer. (E, Cr)



## Murri Court

The Murri Court is the way the criminal justice system links Aboriginal and Torres Strait Islander defendants to cultural and support services. Elders or respected persons from the Aboriginal and Torres Strait Islander community are in the court room to guide and encourage defendants and help magistrates understand more about defendants' personal and cultural circumstances. The Murri Court is less formal than a mainstream court, but it is not a 'soft option'. Defendants are expected to work hard to make better choices. Murri Courts are located in the Magistrates and Children's Courts in Brisbane, Caboolture, Cairns, Cherbourg, Cleveland, Mackay, Maroochydore, Mount Isa, Richlands, Rockhampton, St George, Toowoomba, Townsville and Wynnum, and their main aim is to try to reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

### RESEARCH 10.2

- 1 Go to the Queensland Courts website and view the video *What is Murri Court?* (C)
- 2 Evaluate the aims and goals of the Murri Court. Decide how effective the court has been in reducing Aboriginal and Torres Strait Islander representation in the criminal justice system. Justify your answer. (E, A, Cr)

## Administrative Appeals Tribunal (AAT)

The Administrative Appeals Tribunal (AAT) conducts independent merits reviews of administrative decisions made under Commonwealth laws. It reviews decisions made by Australian Government ministers, departments and agencies and, in limited circumstances, decisions made by state government and non-government bodies. It also reviews decisions made under Norfolk Island laws. The

AAT was established by the *Administrative Appeals Tribunal Act 1975* and commenced operation on 1 July 1976.

On 1 July 2015, the Migration Review Tribunal, Refugee Review Tribunal and Social Security Appeals Tribunal were merged with the AAT. The AAT falls within the portfolio of the Attorney-General. The AAT does not have a general power to review decisions. It can only review a decision if an Act, regulation or other legislative instrument states that the decision can be reviewed by the AAT. The AAT can review decisions made under more than 400 Commonwealth Acts and legislative instruments. The most common types of decisions the AAT can review relate to:

- child support
- Commonwealth worker's compensation
- family assistance, paid parental leave, social security and student assistance
- migration and refugee visas and visa-related decisions
- taxation
- veterans' entitlements.

It can also review decisions relating to:

- Australian citizenship
- bankruptcy
- civil aviation
- corporations and financial services regulation
- customs
- freedom of information
- the National Disability Insurance Scheme (NDIS)
- passports
- security assessments by the Australian Security Intelligence Organisation (ASIO).

In relation to Norfolk Island, the AAT can review decisions made under 39 Norfolk Island laws, including decisions about customs, planning and social services.

The AAT is not always the first step in having a decision reviewed. In some cases, it cannot review a decision until there has been an internal review of the primary decision or review by a specialist review body like the Veterans' Review Board.



**Figure 10.8** The Queensland Civil and Administrative Tribunal (QCAT) aim to resolve disputes between parties on a wide range of matters.

## Queensland Civil and Administrative Tribunal (QCAT)

The Queensland Civil and Administrative Tribunal (QCAT) offers dispute resolution without the need to go to court.

Depending on the nature of the dispute, the parties to a dispute can first try to reach agreement through mediation or compulsory conferencing through QCAT. If the disputing parties are unable to come to an agreement, the dispute will go to a hearing for the tribunal to decide on a solution. The tribunal will consider the evidence and arguments of all parties in the dispute before coming to a fair and **legally binding** decision.

**legally binding** a court or tribunal decision that is binding on the parties; agreement or contract that has the force of law

If the parties do not comply with QCAT's decision, it can be enforced through the courts. QCAT can make decisions about:

- disputes between residential tenants and landlords
- retail shop lease disputes
- debts up to \$25 000 – for example, money lent that has not been repaid
- products and services you have bought to a value of \$25 000

- damage to property
- disputes between neighbours over dividing fences to the value of \$25 000 and over trees
- the building of houses and commercial buildings
- children and young people, including reviewing child protection decisions, adoption applications and blue-card applications
- guardianship and administration for adults
- referrals relating to discrimination, including sexual harassment or racial discrimination
- job regulations, including disciplinary and licensing disputes
- disciplinary and licensing issues – for example, about teachers or health practitioners reviewing previous decisions made by government agencies and statutory authorities, such as restrictions on or breaches of privacy rights.

### REVIEW 10.8

- 1 Summarise the main functions of the Family Court of Australia. (C)
- 2 Evaluate the role of the Children's Court. (E)
- 3 The Murri Court is a culturally appropriate environment for dealing with Aboriginal and Torres Strait Islander people in the criminal justice system. Do you agree or disagree with this statement? Why or why not? (C, E, Cr)

## 10.5 Just and equitable legal outcomes

The ability of the Australian legal system to achieve just and equitable outcomes is due to the application of what is **fair**, equitable and reasonable. For example, if your neighbour entered your property and took your garden hose because they did not have one, then used it to put out a fire in their house, it might be unreasonable, in the circumstances, to charge them with trespass and stealing.

**fair** treating people equally without favouritism or discrimination

The Australian legal system is founded on the concept of the rule of law. The three main principles of that legal system are fairness, equality before the law and justice. The system and its law-makers strive to achieve equal outcomes for the protection of all citizens by making fair and just decisions. In order for laws to be effective, they must:

- be understood by most people
- reflect the values of the majority of society
- be implemented effectively and quickly.

Our courts, judges, law enforcers and individuals all have a responsibility to work towards achieving the ideals of fairness, equality and justice. The rule of law is discussed in more detail in Chapter 1.

### Fair and reasonable outcomes

What is fair and reasonable is an important legal concept. The aim of the law is to achieve equal and equitable outcomes and to treat all citizens equally before the law. In the courts, the principle of fairness is applied by taking individual circumstances into account. The court will make provision for people from different cultures and languages, or people with a physical and mental disability, in a fair and reasonable manner – for example, by providing access to an interpreter or medical professional, or ensuring wheelchair access is available to the court. The court will also take into consideration any other circumstances or personal history to help it bring down a fair judgment or impose a remedy (tort matter) or punishment (criminal matter).

**Figure 10.9** Everyone is equal before the law in Australia's legal system.



## Equal before the law

The application of equality by the courts means that everyone should be treated equally, that every person is equal before the law, regardless of their position or socio-economic status or cultural background. The expectation is that everyone will have access to the same legal rights and opportunities, and that no one will be disadvantaged. The principle of equality is reflected in federal, state and territory laws that provide equal opportunities for education, health services, freedom of religion, anti-discrimination access to legal aid and dispute-resolution procedures, equal employment and a minimum standard of living for all citizens within their jurisdictions.

## Just legal outcomes

Achieving just legal outcomes also includes fairness and equality, and access to basic human rights. In Australia, all legislatures and judicatures operate with a constitutional legal and governance system where they enact laws that are in the best interests of

the people. The judiciaries have the role of ensuring that this is the case through their interpretation and case law judgments. Australian courts have a long legal history of dispensing ethical justice that is based on consideration of accepted legal principles, doctrines and precedents (case law). In this way, just legal outcomes are achieved that are reflective of the needs and values of contemporary Australian society.

### REVIEW 10.9

- 1 Explain the three main principles of the legal system. What is their relationship to just and equitable outcomes? (C)
- 2 Evaluate the importance to parliamentary democracy of achieving fair and reasonable outcomes for all citizens. (E)
- 3 Analyse the principle of equality before the law. (A)



## 10.6 Accountability of government

We have learned that Australia's system of government is a representative democracy, but what does this mean with regard to accountable government? An accountable government is one that answers to the people who elected it, and that is open and transparent.

In open and accountable government, the actions and decisions of the government and parliament are open to public scrutiny. An open and accountable government will make information about its activities available to the public in a range of formats, and will have an accountability framework in place. For example, the Queensland Government conducted a review of the legislation, policies and institutions that make up Queensland's integrity framework. The Premier convened an Open Government Policy Forum in August 2017, which explored and discussed a range of integrity and accountability matters.

In Queensland, the public can hold their government to account through:

- **accessing information** – the *Right to Information Act 2009* (Qld) protects personal information and promotes accountability and transparency. Governments and their departments are the custodians of community information, and an open and transparent

government will release government-held information to the public unless it is not in the interests of the public or is private.

- **participating in government decision-making** by signing a petition, participating in community Cabinet meetings and lobbying local representatives.

The Queensland Government introduced the *Integrity Act 2009* (Qld), which came into effect on 1 January 2010. The Integrity Commissioner is responsible for administering the Register of Lobbyists and other integrity matters regarding government.

Another way to keep government honest, open and accountable is through **Commissions of Inquiry**. For example, The Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry, 1987–89) was triggered by the media and resulted in the establishment of the Electoral and Administrative Review Commission (EARC) and the Criminal Justice Commission (CJC) – now the Crime and Corruption Commission (CCC) – as well as reform of the Queensland Police Force.

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**Commission of Inquiry** the highest form of inquiry on matters of public importance

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**Figure 10.10** How accountable is our government to Australian citizens and all people that live here?



## CASE STUDY 10.2

## Tony Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct

**3 July 1989**

This inquiry uncovered long-term systemic political corruption and abuse of power in Queensland and changed the policing and political landscape across Australia.

### Overview

In May 1987, Acting Queensland Premier Bill Gunn ordered a commission of inquiry after the media reported possible police corruption involving illegal gambling and prostitution. Tony Fitzgerald QC was appointed to lead the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, known as the Fitzgerald Inquiry.

During the inquiry, the terms of reference were extended to look into 'any other matter or thing appertaining to the aforesaid matters', which enabled Fitzgerald to further investigate evidence of political corruption.

Initially expected to last about six weeks, the inquiry spent almost two years conducting a comprehensive investigation of long-term

systemic political corruption and abuse of power in Queensland. Public sittings were held on 238 sitting days, hearing testimony from 339 witnesses and focusing public attention in Queensland and throughout Australia on integrity and accountability in public office, including policing.

The inquiry changed the policing and political landscape in Queensland and across Australia. Significant prosecutions followed the inquiry, leading to four ministers being imprisoned and numerous convictions of other police. Former Police Commissioner Sir Terence Lewis was convicted of corruption, jailed and stripped of his knighthood, and former Premier Sir Joh Bjelke-Petersen was charged with perjury for evidence given to the inquiry, although the trial was aborted due to a hung jury.

The 630-page Fitzgerald Report was tabled in parliament in July 1989. It made over 100 recommendations, covering the establishment of the Electoral and Administrative Review Commission (EARC) and the Criminal Justice Commission (CJC) and reform of the Queensland Police Force.

### REVIEW 10.10

Analyse the role of the media and evaluate the importance of commissions of inquiry in keeping governments open and honest. Justify your response. (A, E, Cr)



## 10.7 Legal change and precedent cases

Apart from commissions of inquiry, legal change and law reform can also occur through landmark or precedent case court decisions (see Chapter 9).

One of the most significant cases that led to new legislation and reforms was *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; HCA 23.

### CASE STUDY 10.3

#### *Mabo v Queensland (No. 2)* (1992) 175 CLR 1

##### Facts

Eddie Koiki Mabo was a Torres Strait Islander man. He and four other Torres Strait Islanders, who lived on the Murray Islands, took the state of Queensland to court seeking a declaration on whether they had native title over the Murray Islands. The case was first heard in the Supreme Court of Queensland and then in the High Court of Australia, where a decision was brought down in 1992.

##### Issues

At the time of the arrival of the British, did Aboriginal and Torres Strait Islander peoples have sovereign power over their lands? If so, was the doctrine of *terra nullius*, which had been used to settle the continent, incorrectly applied? Specifically, was there a form of Indigenous ownership of the land such that the Torres Strait Islanders of the Murray Islands had lawful native title? If so, should that title be legally recognised by the Australian courts?

##### Decision

Ten years after Eddie Mabo and the four other Torres Strait Islanders commenced legal proceedings against the state of Queensland, the High Court of Australia brought down its judgment. The full court of seven High Court justices had heard the case. Six justices ruled that the Murray Islanders did have a legally recognisable native title over their lands and that the land was not uninhabited on settlement. They also ruled that the use of the doctrine of *terra nullius* by the British to claim sovereignty over Australia was flawed and that it did not extinguish the ownership of the land by the Murray Islanders. One

High Court justice did not agree. However, because a majority was achieved and no appeal now exists for a decision of the High Court, the case was won by Eddie Mabo.

##### Extract from judgment no. 1

The following comment was made by Justice Brennan regarding the doctrine of *terra nullius*:

The common law of this country would perpetuate an injustice if we were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the Indigenous inhabitants of Australian colonies as peoples too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.

##### Extract from judgment no. 2

The following comment regarding social justice and equality was made by Justices Deane and Gaudron:

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

Since the *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 decision, the process of legal reform has continued with regard to land claims by Aboriginal and Torres Strait Islander peoples. The *Native Title Act 1993* (Cth) was passed by the federal parliament one year after the High Court brought down its judgment in the *Mabo Case*. It was not until the introduction of the *Native Title Act 1993* that **native title** was formally recognised, protected and regulated.

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**native title** a form of land title that recognises the unique ties Aboriginal and Torres Strait Islander peoples have to land

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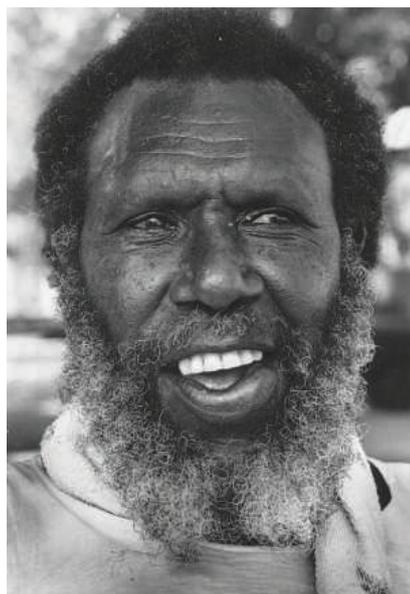
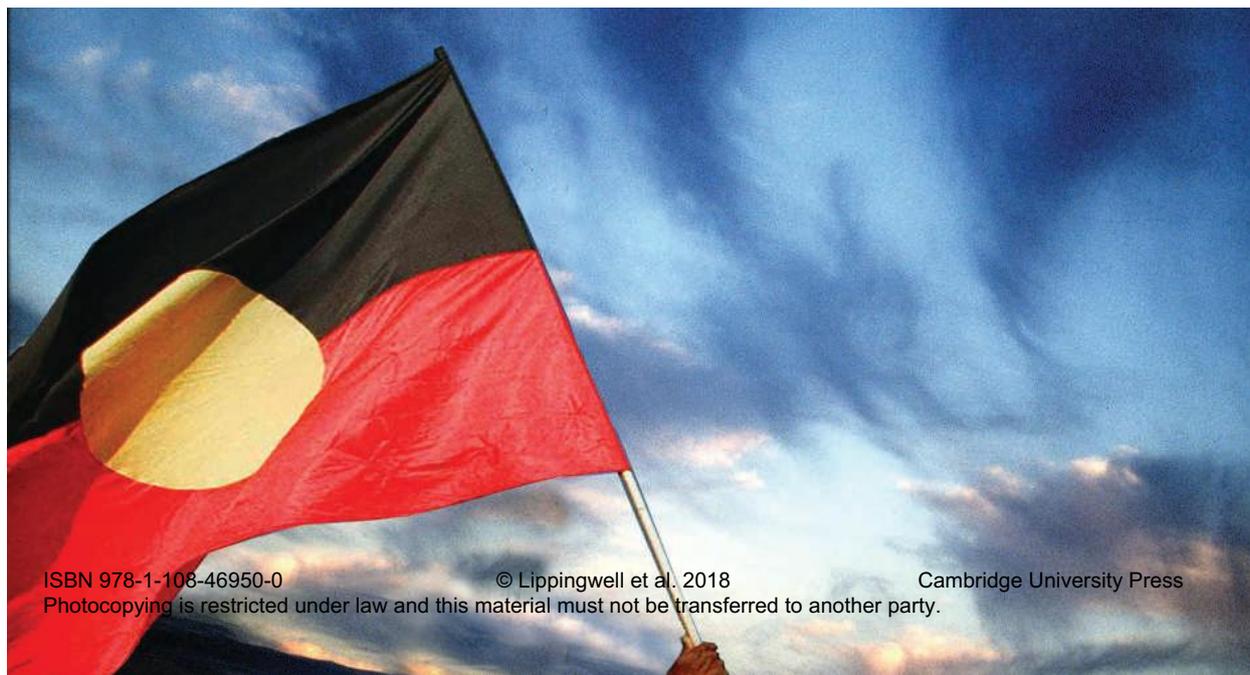


Figure 10.11 Eddie Koiki Mabo (1936–92)

### RESEARCH 10.3

- 1 Carefully read the decision of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and the judgment extracts in Case Study 10.3. (C)
- 2 Conduct more research into the decisions handed down by the individual High Court justices, then briefly summarise your responses to the following questions. Share your viewpoint with other members of your class.
  - a Why was this case heard by the Full Bench of the High Court of Australia?
  - b Which justice did not agree with the other six justices? Explain why this was so.
  - c How did this landmark decision of the High Court of Australia impact all Aboriginal and Torres Strait Islander people? What was its impact on Australian law?
  - d What did Justice Brennan mean by his comment that ‘common law of this country would perpetuate an injustice if it were to continue to embrace the enlarged notion of *terra nullius*’? Was Justice Brennan trying to redress the wrongs of the past? Explain why or why not. (S, C, A)

Figure 10.12 *Mabo v Queensland* led to significant law reform.



# Chapter review

## Chapter summary

- The High Court of Australia (HCA) is Australia's highest appellate court.
- Australian courts can only decide matters within their jurisdictions.
- Federal courts decide matters regarding federal laws.
- State courts decide matters regarding state laws.
- Precedent or landmark cases change and extend the scope of common law in the absence of legislation on the matter decided.
- Specialist courts and tribunals free up the traditional courts and make the law more responsive and accessible to the people.
- Just and equitable outcomes are achieved through the application of what is fair and reasonable.

- In Australia, all citizens are equal before the law.
- Accountable governments are open and transparent.

## Short-response questions

- 1 How did the High Court become Australia's highest appellate court? (C)
- 2 'Courts in Australia are not completely free to disregard the "seriously considered dicta" uttered by the majority of the High Court.' Explain this statement. (C)
- 3 Summarise the role and functions of the Queensland Civil and Administrative Tribunal (QCAT) and the Administrative Appeals Tribunal (AAT). (C)
- 4 What was the role of the Privy Council? (C)

Figure 10.13 The High Court of Australia



## Extended-response questions

- 1 Research the decision that the High Court of Australia brought down in *New South Wales v Commonwealth* (2006) 231 ALR (the *Work Choices Case*). Analyse the legal issues involved and evaluate the use of section 51(xx) rather than section 51(xxxv) of the Australian Constitution. Do you agree or disagree with the decision? Why or why not? (S, A, E, Cr)
- 2 Research one or two of the following landmark cases. Analyse the legal issues involved in each case. Evaluate how these cases changed common law (case law) and led to legal reform.
  - *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40
  - *New South Wales v Commonwealth* (2006) 229 CLR 1; [2006] HCA 52
  - *Roadshow Films v iiNet Limited* (2002) 248 CLR 42; [2012] HCA 16
  - *R v Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8; [1986]
  - *Al Masri v Minister for Immigration & Multicultural and Indigenous Affairs* (2002) 192 ALR 609; [2002] FCA 1009

- *The Attorney-General for the Commonwealth & 'Kevin & Jennifer' & Human Rights and Equal Opportunity Commission* (2003) 172 FLR 300; [2003] FamCA 94
- *Dietrich v the Queen* (1992) 177 CLR 292; and [1992] HCA 57. (S, A, E, Cr)

## Response-to-stimulus questions

- 1 Go to the Queensland Health website and view the video *Explaining the Mental Health Act 2016*. Evaluate the objectives and principles of the *Mental Health Act 2016*. Decide whether this Act ensures that all people are equal before the law. Justify your response. (C, E, Cr)
- 2 Go to the High Court website and view the video *A Short Documentary on the High Court of Australia*. Summarise your understanding of how the High Court upholds the rule of law in Australia. Do you agree or disagree with the statement that the High Court has a significant role in our democracy with regard to resolving complex legal issues? (S, C, E, Cr)

**Figure 10.14** The Archer River flows through the land contested in *Wik Peoples v Queensland*.



## CHAPTER 11

# Law reform within a dynamic society 1

### CHAPTER OBJECTIVES

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

- describe why laws and related processes require change because of a range of impetus, for example:
  - society’s changing values, needs, morality and ethics
  - the influence of lobby groups and advocacy groups and media – for example, in relation to double jeopardy and same-sex marriage
  - patterns of crimes and civil offences – for example, domestic and family violence, medical negligence, privacy, restraining orders and alcohol-fuelled violence
  - technological advances, both to assist in the investigative process, such as developments in forensic science, and to facilitate criminal activity – for example, online fraud, cyberstalking and digital piracy (*Copyright Act 1968* (Cth), s 115A)
  - increased transnational and organised crime
  - the change impetus of significant events, for example the Port Arthur massacre (1996) and September 11 terrorist attacks (2001)
  - a current issue
- select legal information and analyse the challenges to law reform – for example, social divisions, government budgetary constraints, political pressures, the ‘nanny state’ and other barriers to legal change and evaluate possible alternatives to propose recommendations
- select legal information and analyse legal issues and then evaluate the situation to propose recommendations to current issues – for example, domestic and family violence, elder abuse, consumer fraud, defamation, privacy, cybercrime and forensics
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

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### Key concepts/legal terminology you will encounter in this chapter

- |                             |                           |                         |
|-----------------------------|---------------------------|-------------------------|
| • aggrieved person          | • defamation              | • respondent person     |
| • codifying legislation     | • double jeopardy         | • sectional lobby group |
| • complementary legislation | • grooming                | • Task Force Argos      |
| • consolidating legislation | • lobby group             | • unlawful stalking     |
| • cyberbullying             | • promotional lobby group | • white-collar crime    |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Copyright Act 1968* (Cth)
- Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth)
- Criminal Code 1995 (Cth)
- *Domestic and Family Violence Act 2012* (Qld)
- *Family Law Act 1975* (Cth)
- Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth)
- *Native Title Act 1993* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Summary Offences Act 2005* (Qld), s 21
- Tackling Alcohol-Fuelled Violence Amendment Bill 2016 (Qld)
- *Youth Justice Act 1992* (Qld)

### CASES

- *Patel v the Queen* [2012] HCA 29
- *R v Martin Bryant*, 22 November 1996 (Port Arthur massacre)
- *R v Runjanjic and Kontinnen* (1992) 56 SASR 114

### LEGAL ODDITY

In Queensland, it is illegal to publish a notice or advertisement that falsely reports, expressly or by implication, that a child has been born, a person has died, a funeral is planned or has occurred, a couple has become engaged or is about to marry, or has been married, or that a job is available (*Summary Offences Act 2005* (Qld), s 21). You can be fined up to 10 penalty units (\$1219) or be imprisoned for up to six months.

This is the first chapter to be studied in Topic 2: Law Reform within a Dynamic Society. The chapter begins with a study of how the law meets the changing needs of contemporary Australian society.

We learned in Topic 1: Governance in Australia that the received law of England embedded in the Constitution of Australia has changed significantly since Federation. In this chapter, we extend the concept of an evolving legal system that is responsive

to the changing needs of our society. The chapter explores the role of lobby and advocacy groups, and the media, as catalysts for law reform and analyses how the law responds to patterns of crime and civil offences, and technological advances. The ways in which crime has changed, including transnational and organised crime, and the challenges this presents for the law are evaluated. The chapter concludes with a review of some contested current legal issues that are at the forefront of law reform.

## 11.1 The law and the changing needs of society

A significant challenge for the Australian legal system is how to keep pace with the changing needs of society so that our laws maintain their contemporary relevance. We learned in Chapter 10 how the law can be changed through the parliament or the courts. However, the law can also change in other ways on an ongoing basis, such as in response to political pressure from lobby and advocacy groups.

So what is law reform? It is a process whereby the law is updated to reflect the needs of the current society. When the law changes in this way, it maintains its fairness and relevance, and allows the legislation to be kept up to date. A number of laws that were based on out-dated or irrelevant past values have been changed in this way. Another aspect of law reform is the ability of the law to have the capacity to respond to situations and scenarios thrown up by a changing society, including new forms of criminal activity and the use of technology (**white-collar crime**).

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**white-collar crime** non-violent criminal offences committed by business and government professionals for financial gain; fraud committed by respected and trusted professionals in the course of carrying out their profession

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Figure 11.1 Equal pay for equal work

## SIDEBAR

In 1972, Australian unions and the newly elected Whitlam Labor government lobbied the Australian Conciliation and Arbitration Commission (ACAC) to re-evaluate its earlier decision granting equal pay to women only in those instances where they did exactly the same work as men. The ACAC agreed to a review in which they granted women equal pay for work of *equal* value to men. This meant that what traditionally had been female roles began to be assessed for their contribution to a workplace or industry, instead of their level of resemblance to traditional male roles.

Discuss how this event changed our labour laws. (C, A, E)

## Australian Law Reform Commission

Law reform in a dynamic society can occur through new or changed legislation and can be influenced by the Australian Law Reform Commission (ALRC) and its state equivalents. Introducing mandatory sentencing for certain offences, or excising parts of Australia for the purpose of the processing of asylum-seekers are examples of the federal parliament changing laws in response to political issues and responding to the changing needs and values of Australian society.

The ALRC is an important non-government body that can advocate for law reform. It was established in 1975 by the federal parliament and is a permanent and independent federal statutory body. The role of the ALRC is to examine how areas of law might be changed or reformed. The ALRC is officially requested by the Attorney-General to look into laws of the Commonwealth of Australia. Although it was established and is directed by the federal government, the ALRC is an independent authority that is able to release reports and make recommendations in an unbiased and non-partisan way free from political interference.

The focus of the ALRC is on federal laws and the processes of the legal system. In conducting its inquiries, the official aims of the ALRC are:

- to simplify and modernise the law
- to improve access to justice
- to remove obsolete or unnecessary laws, and eliminate defects in the law
- to suggest new or more effective methods for administering the law and dispensing justice

- to ensure harmonisation of federal, state and territory laws where possible, and
- to monitor overseas legal systems.

The recommendations the ALRC gives to the government do not automatically become enacted as law through legislative amendments, but the ALRC has a strong historical record of having its recommendations put into practice. It has been reported that nearly 80 per cent of the ALRC's reports has been either substantially or partially implemented. This record makes it one of the most effective and influential bodies involved in legal reform in Australia (ALRC).

## Alternative dispute resolution

The development of alternative dispute resolution (ADR) is an example of a law reform measure. It involves an impartial mediator directing parties in a dispute to come together and discuss in a non-legal setting. One of the reasons why this service arose was to lower the cost of resolving disputes and relieve pressure on the courts. Another reason is the belief that it can be an effective way of resolving disputes, especially where parties need to live or work together.

## Law of equity

Law reform in a dynamic society has also occurred through the development of the law of equity. Where a strict application of the common law (case law) would lead to an unfair or unconscionable result, the law of equity can provide remedies. In addition, it has provided remedies that supplement the common law – for example court orders to stop

or prevent a person acting in a certain way (an ‘injunction’) or orders that instruct a person to act in a different way so as to prevent unjust or unfair situations from continuing.

## Law reform

Law reform in a dynamic society can also result from the legislative process. This is when the government wants to simplify or ‘tidy up’ the law to make it easier to access and understand, or to ensure it is more consistent for all Australians. In Australia, our laws are spread across federal, state and territory governments, resulting in thousands of different laws that can make the law confusing, contradictory or difficult to access. Sometimes the federal parliament will decide to limit this by passing **codifying legislation**, **complementary legislation** or **consolidating legislation**.

**codifying legislation** incorporating common law principles and decisions into legislation

**complementary legislation** legislation introduced through a Bill that mirrors legislation in another state or territory to ensure the law is the same in all parts of Australia

**consolidating legislation** a statute that combines in one Act all the legislation in force relating to a particular area in that jurisdiction

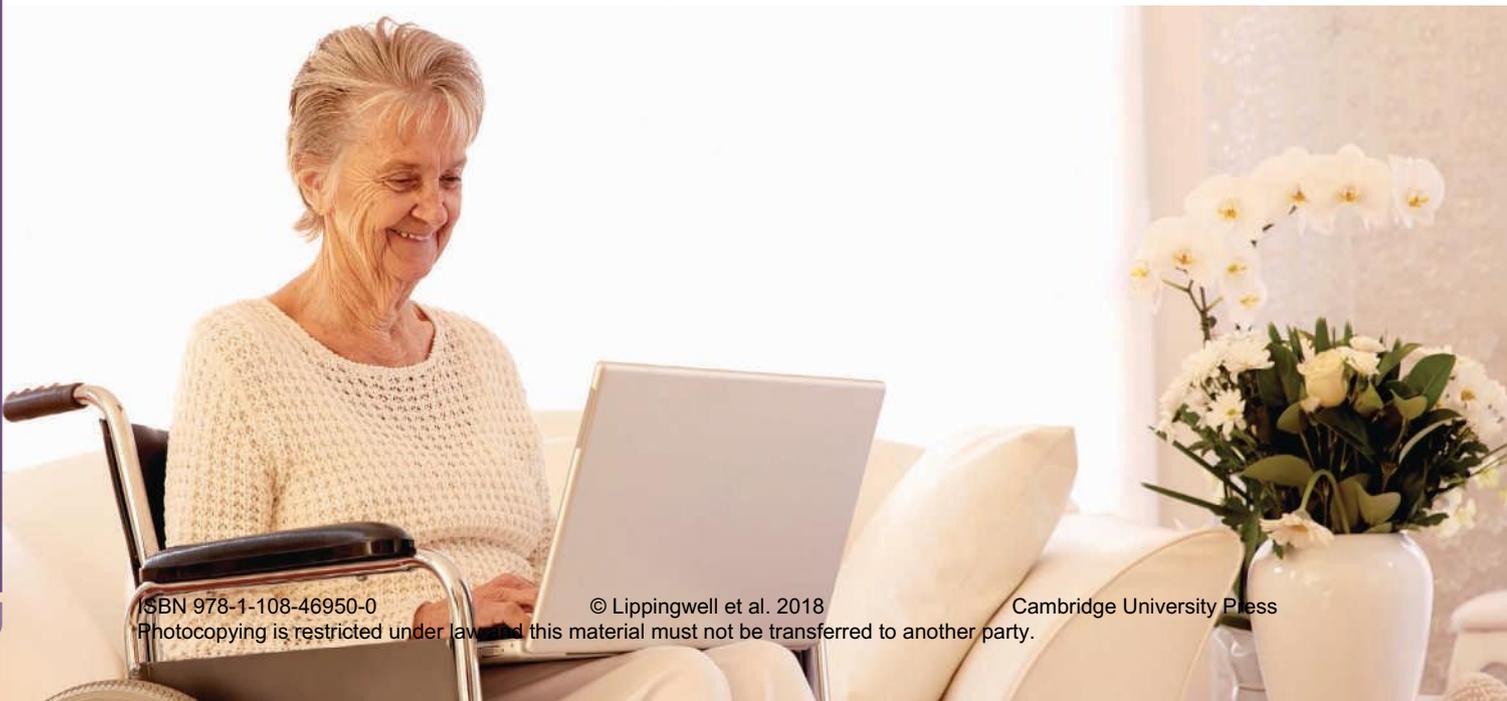
So what are these different forms of legislation and how do they contribute to reform of our laws?

- **Codifying legislation** is introduced through a Bill that sets in statute an existing judicial precedent or statutory interpretation (common law or case law) to ensure that the common law is fixed in statute law and not subject to change by future court decisions.
- **Complementary legislation** is introduced through a Bill that mirrors legislation in another state or territory to ensure the law is the same in all parts of Australia. This is to ensure that people can enjoy similar rights and laws.
- **Consolidating legislation** simplifies access to the law by amalgamating related laws under the same Act of Parliament and removing unnecessary laws. It is introduced through a Bill that repeals (removes) two or more existing laws and combines their content in the one law.

### RESEARCH 11.1

Research how the Australian Law Reform Commission can influence law reform in Australia. Provide examples to support your evaluation. (S, E, Cr)

**Figure 11.2** The Australian Law Reform Commission encourages all Australians to have a say in reforming laws that affect them by participating in their inquiries via social media.



## 11.2 Lobby and advocacy groups

In the Australian system of governance, our law-makers and the government of the day are mindful that they must face the people periodically at election time. This can make them responsive to law reform issues, especially when the community is organised as a lobby or advocacy group such as Greenpeace.

Many Queenslanders are members of various special-interest groups such as a church society, school association, conservation group, trade union, business organisation and/or political party. Sometimes these interest groups will lobby governments to achieve an outcome that they want. In our representative democracy, individuals do have the right to discuss an issue with, or 'lobby', their elected representatives at all three levels of government. However, when this is organised collectively, the special interest group becomes a **lobby group**, often bringing more powerful pressure to bear on our decision-makers and law-makers. Lobby groups can be classified as either a **sectional lobby group** or a **promotional lobby group**.

### Sectional lobby group

A sectional lobby group is a self-interest group such as a trade union; business and farming association; church group; ethnic association; pensioner group; or returned service organisation, such as the Returned Services League (RSL).

### Promotional lobby group

A promotional lobby group promotes a particular cause, beliefs or values – for example, a conservation group (Greenpeace), a women's issues group, and Aboriginal, civil or moral rights groups.

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**lobby group** an organised group or association that attempts to influence legislators and officials

**sectional lobby group** a self-interest lobby group such as a trade union

**promotional lobby group** an organised group promoting a particular cause

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Figure 11.3 An anti-Adani protest





Figure 11.4 Cultural influences

## Social influence

Another vehicle of law reform is social influence – that is, how our law-makers respond to society's changing values in an attempt to keep the law relevant and up to date. For example, what we consider 'normal' today may at one time have been considered inappropriate by society's standards. Bullying, divorce, same-sex marriages, drink driving disciplining children and the minimum driving age are all examples of areas in which changes have occurred because of society's influence. Our law-makers have responded to changing beliefs within society, and laws have changed as a result. For example, during the 1970s, considerable pressure was placed on governments by women who were protesting against discrimination. This resulted in the introduction of legislation such as the *Sex Discrimination Act 1984* (Cth).

As our society discusses and questions certain topical issues through the many different avenues available to it – especially through the media (news and current affairs programs, talkback radio, and

print and online media) – the pressure is put on governments to act to ensure that our laws reflect the current needs of citizens. For example, in 2014, victim lobby groups successfully pressured the Queensland Government to overhaul Queensland's double jeopardy laws in the wake of *R v Carroll* (2002) 213 CLR some 41 years earlier. (See Chapter 3, page 84).

## Cultural influence

Law reform can occur through cultural influence. Since Federation, the composition of Australia has significantly changed as a result of immigration. Today, Australia is a multicultural society with a vast range of people from different cultural backgrounds, and the law has changed to cater to their needs. To ensure that fairness exists between different cultural groups in Australia, and to ensure that all people are equal before the law, certain pieces of legislation have been passed. These include the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).

## Moral influences

If you saw someone stealing your best friend's mobile phone, would you tell anyone? We all make decisions about what we believe is right or wrong. A number of different factors mould our moral beliefs, such as our:

- parents
- religious beliefs
- cultural heritage
- education
- peers.

These and many other factors can have some influence on our moral make-up. The right-to-life debate is an issue that continually rises to the surface, as do the debates about capital punishment, euthanasia and embryonic stem cell research. How the law deals with such complex issues is important, particularly with regard to the moral and religious influences that are evident in areas such as criminal law and family law.

### SIDEBAR

- Can you think of a law that was made as a result of society's moral or religious beliefs? (S)
- Evaluate this law and discuss in small groups how it reflects the changing needs of society. (E)
- Present your findings to the whole class. (Cr)

## Political influences

In Australia, members of a number of political parties are elected to parliament. At different levels of government (federal, state and local), the governing party of the day influences the types of laws passed. This can be shown by examining the differences between some of the political parties in Australia – we have highlighted just some of the core beliefs of the various parties:

- The Liberal Party believes in equal opportunity for all Australians, and the encouragement and facilitation of wealth so that all may enjoy the highest possible standards of living, health, education and social justice.
- The Australian Labor Party (ALP) in the twenty-first century strives to create a fair, prosperous Australia in which everyone has opportunities and no one is left out or left behind.
- Other political parties like the Greens are dedicated to conservation and environmental issues.

External pressures are placed on the governing party by different lobby groups (e.g. peak bodies that represent certain industries or business), which try to persuade the government to amend or make new laws on certain topics. These lobby groups try to influence the government to make changes that will provide the best outcomes for the bodies they represent.

Figure 11.5 A climate change protest



## Economic influences

The passing of some laws can either be a response to economic circumstances or have some form of economic impact on our society. Certain lobby groups

may consist of large multinationals such as Shell, Apple, Microsoft or Coca-Cola. Economic influences can take other forms as well. Our law-makers can also be influenced by economic market factors such as inflation, interest rates and the stock market.

### MORATORIUMS TO PROTEST AGAINST AUSTRALIAN INVOLVEMENT IN THE VIETNAM WAR

The Vietnam Moratorium protests, the first of which took place on 8 May 1970, were the largest public demonstrations in Australia's history at the time. They represented growing discontent within a portion of the Australian population to the government's commitment to the Vietnam War in general and conscription in particular.

The protests took place during a period of great social change in Australia, when people from a range of backgrounds were prepared to defy authority.

Evaluate how a change in the beliefs and values of society at the time of the Vietnam War brought about law and government policy reform. (E)

#### REVIEW 11.1

- 1 Explain the role of lobby groups. (C)
- 2 Describe how social influences have resulted in law reform. (C)
- 3 Evaluate the impact of moral influences on the law. (E)

#### RESEARCH 11.2

- 1 In a paragraph, analyse how the law has or could be reformed to meet the changing needs and values of multicultural Australian society. (C, A, Cr)
- 2 In a paragraph, explain how political and economic issues in contemporary Australian society can influence or have influenced law reform. (C, E, Cr)

Figure 11.6 An anti-Vietnam War protest



## 11.3 Patterns of crime and civil offences

Identifying patterns of crime and civil offending allows our law-makers to make, amend and reform the law to respond to the community's expectation that the government will maintain law and order. A range of different strategies can be applied that involve individuals, communities, businesses, non-government organisations and all levels of government to target the various social and environmental factors that increase the risk of crime, disorder and victimisation in our community. Law reform can also be influenced by an understanding of local crime and crime patterns, resulting in decisions about how crime can be prevented. Key areas of law reform in Australia have included domestic and family violence, medical negligence, juvenile crime and alcohol-fuelled violence.

### Domestic and family violence

For a long time, there was a belief that situations that arose within the family were solely a private matter. Women were treated as possessions of men,

and the law did not recognise the rape of a wife by her husband until the law was reformed. But in recent times, society's attitudes towards violence within the home have changed considerably. Once, the only avenue that existed for victims of domestic violence was criminal law. Now all states of Australia have enacted various forms of domestic violence legislation to deal with this growing problem within our communities. Domestic violence affects both men and women – the Australian Bureau of Statistics' 2005 Personal Safety Survey revealed that approximately 1.3 million women and nearly half a million men had experienced violence by a previous or current partner. Forms of domestic violence include:

- **physical abuse:** pushing, grabbing, slapping, kicking
- **sexual abuse:** sexual assault, sexual acts carried out against a person's will (without their consent)
- **psychological abuse:** yelling, swearing, criticising a person's personality or looks

**Figure 11.7** Domestic violence is never excusable.



- **financial abuse:** controlling all money in the household, making a person hand over their money
- **social abuse:** controlling who a person sees – for example, not allowing contact with family or friends.

### Statutes

The current legislation in Queensland that deals specifically with domestic violence is the *Domestic and Family Violence Protection Act 2012* (Qld). The Act operates on the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, is paramount (s 4). Section 8 of the Act defines domestic and family violence as abusive or violent behaviour used by a person to control or

dominate another person within a relationship. These behaviours include:

- physical or sexual abuse
- emotional or psychological abuse
- economic abuse
- threatening behaviour
- coercive behaviour
- any other behaviour that controls or dominates or causes fear to another person.

A number of orders can be used to provide protection from domestic violence. A domestic violence order (s 23) is an order made by a court that is aimed at stopping the behaviour of one person against another. This can either be a protection order or a temporary protection order.

Under a protection order, a person must not commit domestic violence against any other person.

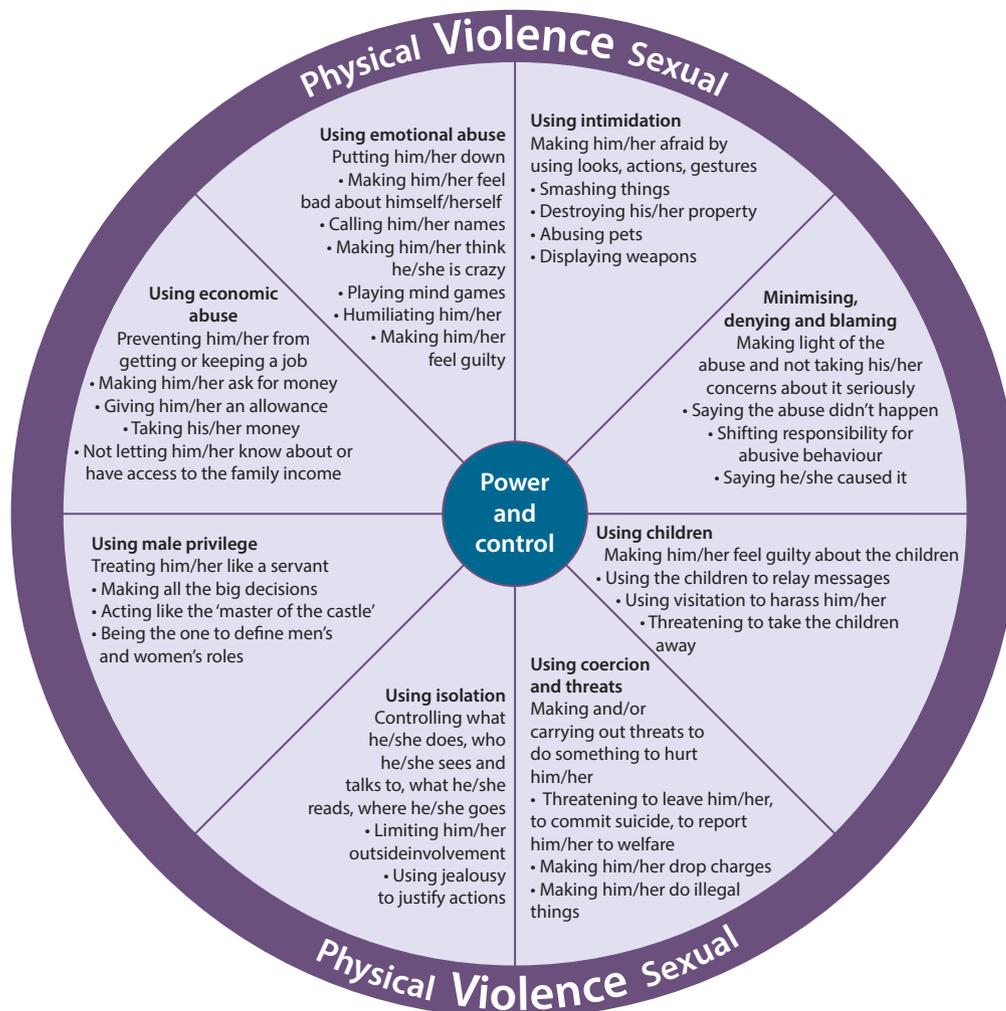


Figure 11.8 Power and control wheel

The court can also impose other conditions, such as that the person cannot go near the home or workplace of the **aggrieved person**.

There are two things about which the court must be satisfied in order to make a protection order against the **respondent person**:

- 1 that there has been an act of domestic violence
- 2 that a protection order is necessary and desirable in the circumstances.

---

**aggrieved person** someone who is seeking protection in case of domestic violence (a 'victim')

**respondent person** someone against whom the aggrieved is seeking a protection order (a 'perpetrator')

---

When the respondent person is served with a protection order by the police, they have four options when they attend court:

- 1 to consent to the application for a protection order
- 2 to consent to the application for a protection order without admitting any of the facts contained in the application for a protection order
- 3 to adjourn the application to obtain legal advice
- 4 to deny the allegations contained in the application for a protection order and set the matter down for a hearing.

Before a protection order is made, the court can issue a temporary protection order, which is a short-term order that will remain in force until a final decision is made by the court.

Often, the police are the first to be called to instances of domestic violence. Under the *Domestic and Family Violence Protection Act 2012* (Qld), police have the ability to issue a police protection order. Unlike an order for protection, which requires waiting until the courts issue it, the police protection order can be issued immediately (s 101); this is issued when the police either believe that some form of domestic violence has been committed or they suspect that an order is needed to protect the aggrieved person. An advantage of such an order is that it will remain in place until the courts have dealt with the complaint (s 113).

If a protection order or a police protection order is breached by the respondent, the maximum penalty provided under section 177 of the *Domestic*

*and Family Violence Protection Act 2012* (Qld) is two years' imprisonment or 60 penalty units (\$6000).

The commencement of the specialist Domestic and Family Violence Court in Queensland has seen the appointment of a specialised magistrate appointed in each location, the standard length of time a protection order is applied for increased from two to five years, and a reverse onus on bail where the defendant has to show cause as to why they should be given bail if charged with a serious domestic violence offence. This has the effect of also giving victims or their families more time to move for their safety while the respondent is likely spending the night in the watch-house or other police custody.

One of the effects for the respondent is that all weapons licences that the respondent holds are suspended while the temporary protection order (*Weapons Act 1990*, s 27A) or protection order (*Weapons Act 1990*, s 28A) is in force.

## REVIEW 11.2

List the different types of abuse that might be evident in domestic violence cases and provide examples for each. (C)

## RESEARCH 11.3

Compare the *Domestic and Family Violence Protection Act 2012* (Qld) with domestic violence legislation from other states. In one paragraph, identify and evaluate any differences that exist between various Acts. (S, C, E)

## SUMMARY OF DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012 (QLD)

**Table 11.1** *Domestic and Family Violence Protection Act 2012 (Qld)*

Intimate personal relationships			Family relationship	Informal care relationships
Spousal relationship	Engagement relationship	Couple relationship	Between two people, one of whom is or was a relative of the other	One person is dependent on another for daily living assistance
e.g. de facto, married, registered relationship, engagement relationship	Two people who were or are engaged to be married	Two people who have or had a relationship as a couple	Connected by blood or by marriage	Does not include child–parent relationship or commercial arrangements

Summarise the different relationships that are classified in the *Domestic and Family Violence Protection Act 2012 (Qld)*. (C)

### Defences

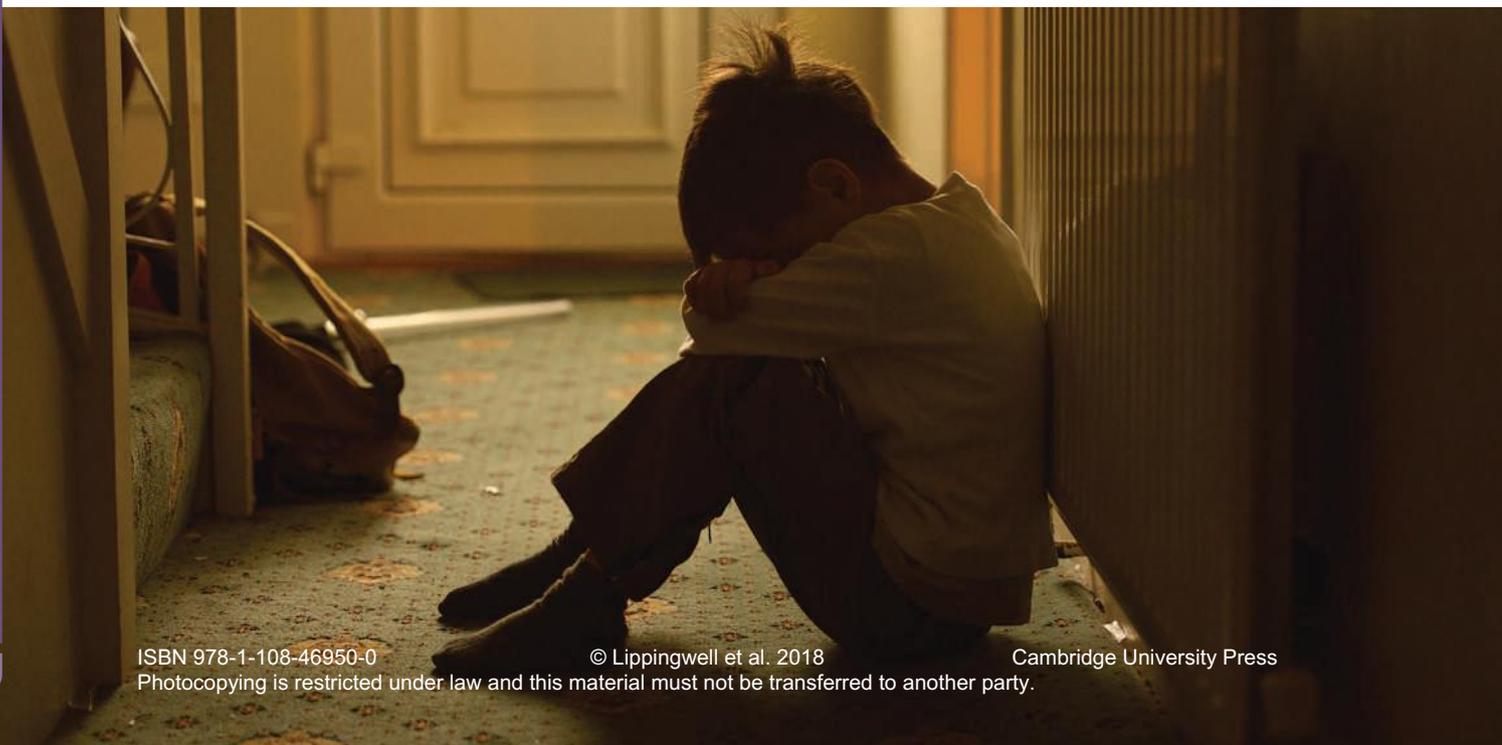
Domestic violence is a difficult area because the law is dealing with people's emotions. In some instances, the victim fights back and then becomes the perpetrator of an offence. How the law now deals with someone who has been subjected to acts of violence over a prolonged period and then reacts is another difficult area.

The most relied-upon defence is that of self-defence. Under section 25 of the Criminal Code

1899 (Qld), self-defence relates to acts done upon compulsion, provocation or in self-defence. If this defence is claimed successfully, a person is not criminally responsible for an act or omission done or made under circumstances of sudden or extraordinary emergency.

Another form of defence that began to appear in Australian courts in the 1990s was the idea of 'battered wife syndrome'. This is a mental condition suffered by the aggrieved spouse as a result of violence.

**Figure 11.9** Domestic violence is a difficult area to understand, and even more difficult to experience.



## CASE STUDY 11.1

***R v Runjanjic and Kontinnen (1992) 56 SASR 114***

In this case, the victim was asleep. The defendant had suffered severe physical, sexual and mental abuse at the hands of the victim, and on the night of his death, before going to sleep, he had told the defendant that he would kill her and their son when he woke up.

Although she doesn't consciously remember her decision-making process, Kontinnen, the defendant, grabbed a shotgun and shot him in the back of the head, which killed him. Kontinnen was charged with murder.

Psychologists testified that the defendant was suffering from battered wife syndrome. The case of Runjanjic and Kontinnen was the first Australian trial

to accept battered wife syndrome in the evidence presented by an expert in court. Prior to this, women were limited to a defence based on factually relevant evidence as opposed to contextual factors existing at the time. This made it difficult to build a self-defence claim.

Erika Kontinnen was acquitted after a trial in the Adelaide Supreme Court, lasting two weeks.

With regard to the charge of murder, the decision in this case was significant because it added the defence of 'battered wife syndrome' to common law.

*Source: The Citizen, 21 November 2013.*

In 2010, a partial defence was added to the Criminal Code 1899 (Qld), at s 304B – the defence of 'killing for preservation in an abusive domestic relationship'. This defence goes beyond self-defence (s 272) and provocation (s 268), and allows 'genuine victims' the appropriate legal protection and judges greater latitude when sentencing.

## SIDEBAR

Why is provocation a difficult defence to use in domestic violence cases and how is the new defence any better? (C, A)

**Queensland's domestic killing defence an Australian first**

**Courtney Trenwith, *Brisbane Times*, 10 February 2010**

Victims of long-term domestic violence who kill their abuser will now have wider defence options under the criminal law after changes were passed in the Queensland Parliament overnight.

A partial defence of 'killing in an abusive domestic relationship' was added to the Criminal Code and goes beyond the present defences of provocation and self-defence. The clause will provide battered partners some immunity in court and give judges greater discretion when sentencing on the charge of murder.

Attorney-General Cameron Dick said Queensland was the first Australian state to provide the partial defence. The amendment included safeguards to ensure it only applied to those who had suffered severe domestic violence leading up to the killing, he said.

In order for the defence to apply, accused people will have to prove they had been in an abusive domestic relationship and the person they killed had committed acts of serious domestic violence against them during the relationship.

At the time of the killing, the accused must have believed their acts were necessary to avoid death or grievous bodily harm and that there were reasonable grounds for this belief.

Mr Dick said the changes marked an important step in the protection of Queenslanders' rights and recognised the need to provide legal protection to 'genuine victims' of domestic abuse.

'Research reviewed during the development process found that victims of seriously abusive

relationships often commit offences in circumstances that fall outside existing defences, such as self-defence and provocation,' Mr Dick said. 'This defence will be available for victims of serious domestic violence where all the necessary criteria for its use have been met. It doesn't excuse victims, but it does broaden the court's sentencing options. The defence is framed in a way that will ensure it is reserved for genuine victims and not misused. This represents a balance between necessarily punishing those who would otherwise be guilty of murder while providing some legal protection for victims of serious abuse.'

It should be noted that the amendment introduced in February 2010, the defence of killing for preservation

in an abusive domestic relationship, which, like in Victoria, reduces murder to manslaughter. This is particularly significant in the Queensland context, where murder carries a mandatory life penalty.

Importantly, the legislative definition of 'abusive domestic relationship' recognises the victims' reality of violence, since it acknowledges that 'a history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation'. However, this section is yet to be tested in case law to any great degree. Even if the defence is successfully argued, it will still result in a manslaughter conviction, which may deny victims of domestic violence in such circumstances true justice.

### REVIEW 11.3

Read the above article and answer the questions.

- 1 Identify the amendment made to the Criminal Code. (C)
- 2 Analyse how this amendment compares with the defence of provocation. (A)
- 3 Do you think the amendments listed in the article will improve the system? Justify your reasoning. (E)

## Medical negligence

The law of Queensland protects people from medical negligence. Medical negligence or malpractice occurs when a medical practitioner, health professional or health facility fails in their duty of care to their patient or fails to take reasonable care, causing injury or damage including physical or psychological injury. A significant medical negligence case in Queensland was *Patel v The Queen* [2012] HCA 29.

Jayant Patel was a surgeon at Bundaberg Base Hospital in Queensland. He was accused of medical malpractice, causing the suffering and death of



Figure 11.10 Dr Jayant Patel

patients, and there was a lengthy and vigorous public campaign to have him 'brought to justice' – not under the civil law, which one might expect, but under the criminal law.

## CASE STUDY 11.2

### *Patel v The Queen* [2012] HCA 29

#### Facts

Patel was charged with three counts of manslaughter and one of doing grievous bodily harm in respect of four patients at Bundaberg Base Hospital, where he was employed as a surgeon in 2003–04. He was found guilty after a 58-day trial, and on 1 July 2010 was sentenced to seven years' imprisonment for each of the manslaughter offences (to be served concurrently) and three years' imprisonment for the grievous bodily harm offence.

Patel appealed against his convictions and applied for special leave to appeal against the sentence. The Queensland Attorney-General appealed against the sentence. The appeals were determined in the Queensland Court of Appeal on 21 April 2011. The court dismissed both appeals and refused Patel's application for leave to appeal against the sentence: see [*R v Patel; ex parte A-G (Qld)*] [2011] QCA 81. Patel then appealed to the High Court.

#### Issues

In the trial, the prosecution submitted a new set of particulars on day 43 of the trial, and this had the effect of narrowing the case against the defendant. The defence objected, and unsuccessfully sought to have the jury discharged. Did the action of the prosecution constitute a miscarriage of justice in the conduct of the trial, as certain evidence, now inadmissible, had been admitted?

#### Law

The law at issue before the High Court was not the Criminal Code 1899 (Qld), but the process of the trial – originally canvassing a wide scope, including the decision to perform the surgery and post-operative care. Following the narrowing of the particulars, the issue, as clarified by the High Court and quoting from the trial judge, was that:

this trial is not about botched surgery. Instead, it is about surgery performed competently enough. It is not how the Accused performed surgery that matters in these four cases. What mattered was the appellant's judgement in deciding to commend the surgery and then, having obtained a patient's consent, performing the surgery, and that the prosecution contended that the operations were unnecessary or inappropriate.

#### Arguments

The opposing sides argued the case as to whether or not the circumstances constituted a miscarriage of justice.

#### Decision

Special leave to appeal was granted. The order of the Queensland Court of Appeal of 21 April 2012 was set aside, and in its place it was ordered that the appellant's appeal to that court be allowed, that his convictions for manslaughter and doing grievous bodily harm be quashed, and that there be a new trial.

#### Reasons

Much of the evidence was inadmissible, and its nature was likely to 'have had a profound and illegitimate effect on the jury'. The trial judge's efforts to minimise the problems were commendable, but 'circumstances had conspired to ensure that the prejudice to which the prosecution's conduct of the trial had exposed the applicant was incapable of being overcome.'

The prosecution decided to take each case separately, initially proceeding on one of the manslaughter charges. The trial was set down for a hearing to commence early in 2013. Patel applied for a judge-only trial on the grounds that the amount of publicity in the case would not guarantee him a fair trial. This request was heard in the Supreme Court and, on 27 November 2012, was denied. Justice Douglas stated that the law recognised juries were

capable of handling prejudice arising from pre-trial publicity:

While I recognise the severity of the criticism of Dr Patel in the pre-trial publicity, and that it may affect jury deliberations, I am not persuaded that a properly directed jury will have difficulty in ignoring it in favour of the evidence that is led before it. In other words, I believe that a fair trial can proceed before a jury in spite of the publicity.

Source: Ava Benny-Morrison (2012), 'Jayant Patel's judge-only trial application dismissed'. *Queensland Times*, 27 November 2012.

An application by Patel for a permanent stay of proceedings was not successful. On 13 March 2013, a jury found Patel not guilty of manslaughter.

In November 2013, Patel pleaded guilty to four counts of fraud relating to dishonestly obtaining registration and employment in Queensland. He was sentenced to two years' imprisonment, wholly suspended.

Queensland's Director of Public Prosecutions decided not to pursue any other charges.

## REVIEW 11.4

- 1 Do you believe there was an argument that the retrial should not have proceeded (or that proceedings should be permanently stayed)? Why or why not? (C, A, E)
- 2 Describe the legal implications of this case for medical negligence. (C)
- 3 There have been reports that Patel is planning to write a book. Should he be able to benefit? Research the law on the proceeds of crime. (S, A)

treatment of children and young persons detained in youth detention facilities administered by the government of the Northern Territory, including the Don Dale Youth Detention Centre. This is discussed in more detail in Chapter 12.

### *Alternatives for juveniles*

There are alternatives to sentencing built into the juvenile justice system. Many of these apply pre-sentencing and even pre-court. Initially, particularly for first offenders or minor offenders, the police may give a warning and not take the child to court. A more formal diversionary strategy is the Youth Justice Conferencing program, where guilt is acknowledged, but court is avoided.

## Juveniles and the law

The *Youth Justice Act 1992* (Qld) sets out the provisions for the sentencing of juveniles. While these are mostly similar to the options for adults, there are some differences, and some conditions apply. A significant issue for the law has been where to detain juveniles once they have been sentenced. Instead of detaining them in an adult prison, they are sent to a youth detention centre. However, concerns regarding the conditions and treatment of juveniles in detention centres were raised by the ABC's *Four Corners* program, which showed disturbing images of possible abusive behaviours, including an image of a hooded detainee strapped to a chair in a Northern Territory detention centre. Shortly afterwards, the Turnbull Coalition government established a Royal Commission to inquire into the



Figure 11.11 A juvenile offender

## CHECK THIS OUT

For an outline of the Youth Justice Conferencing program, visit the Queensland Government website, and search for 'Youth Justice Conferencing'.

## Alcohol-fuelled violence

Tackling alcohol-fuelled violence has become a priority for the Queensland Government after significant lobbying from community stakeholders. The Premier announced the government's new reforms in 2017.

### Tackling alcohol-fuelled violence

Queensland Government, Premier of Queensland Anastacia Palaszczuk MP

We are delivering on our commitment to keep Queenslanders safe with the passage of the Tackling Alcohol-Fuelled Violence Amendment Bill, a historic step forward for reducing alcohol-fuelled violence in Queensland.

'The evidence is clear: reduced trading hours leads to reduced violence, and that's what this Bill delivers,' Ms Palaszczuk said.

'Doing nothing is not an option. I've spoken to countless doctors, nurses, paramedics, police, parents, and grandparents who have urged me to take action to curb alcohol-fuelled violence.'

'I want Queenslanders and visitors to our state to go out and enjoy our state's vibrant nightlife, but I also want them to return home safely to their families and loved ones.'

'We are putting the safety of Queenslanders first and driving cultural change. We will continue to work with the community and stakeholders to deliver these important reforms.'

Changes to trading hours begin to take effect from 1 July 2016, with Safe Night Precincts – including high-traffic areas such as Fortitude Valley, Surfers Paradise, Cairns and Bundaberg – calling last drinks at 3.00 am, with a 1.00 am lockdown to be imposed from 1 February 2017.



**Figure 11.12** The Premier announces the new legislation to tackle alcohol-fuelled violence.

Source: Queensland Premier's Department.

### RESEARCH 11.4

Research the Tackling Alcohol-Fuelled Violence Amendment Bill, announced by the Premier in 2017.

- 1 Select current and relevant information and use it to analyse and evaluate the government reform in this area of the law.
- 2 In your opinion is this a 'good' or a 'bad' law? Justify your response. (S, C, A, E)

## 11.4 The role of technology in the law

Rapid technological changes have been problematic for the law, as new cybercrimes are difficult to detect and punish – often crossing national borders and creating jurisdiction issues for law enforcement officers. As new technologies and medical advances develop and come into common use, they impact the way people live and behave. Sometimes they present ethical issues, strong opposing viewpoints and legal problems for governments that struggle to respond through effective law-making. The rapid expansion of the internet, mobile phones and other technological devices has provided law-makers with new challenges. These technologies have created behaviours that a decade ago were unlikely or even unheard of, such as software piracy, phishing, sexting, and cyberbullying and e-stalking.

Technological advancements create difficulties for tort law. Many advancements such as mobile phones may or may not cause harm to the human body, so these matters cannot be successfully litigated until sufficient evidence of causation exists.

For children, the internet is simply another means of communicating with their peers. But there are risks involved, including **grooming** and **cyberbullying**.

**grooming** a process whereby a sexual predator seeks out a victim online by attempting to develop a relationship through private conversations, email, texting or voice over internet protocol (VoIP). This process can continue for months before the predator will try to arrange a physical meeting.

**cyberbullying** when a child or teenager is bullied, embarrassed, threatened or harassed by another child or teenager using interactive technologies (e.g. mobile phones, blogs, tweets, Facebook, interactive games)

### Grooming

Grooming occurs when an individual tries to build a trusting relationship with a child by making regular contact online. This may occur in chat rooms, on

**Table 11.2** Legislation dealing with grooming

Legislation	Section	Details	Maximum penalty
<i>Criminal Code Act 1995</i> (Cth)	s 474.26	Using a carriage service to procure persons under 16 years of age for sexual activity	15 years
	s 474.27	Using a carriage service to groom persons under 16 years with intention of making it easier to procure a person	12 years
Criminal Code 1899 (Qld)	s 218A	Using the internet, etc. to procure a child under 16	10 years*
		Using the internet, etc. to procure a child under 12	14 years*
	s 218B*	Grooming children under 16 1 Any adult who engages in any conduct in relation to a person under the age of 16 years, or a person the adult believes is under the age of 16 years, with intent to: (a) facilitate the procurement of the person to engage in a sexual act, either in Queensland or elsewhere; or (b) expose, without legitimate reason, the person to any indecent matter, either in Queensland or elsewhere commits a crime.	5 years*
		Note: See section 1 for the definition of indecent matter. 2 The adult is liable to 10 years' imprisonment if the person is: (a) a person under 12 years; or (b) a person the adult believes is under 12 years.	10 years*

\* includes passing of the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld).



**Figure 11.13** Will the child be meeting who they think they are chatting to?

gaming or social media sites, or by email. The purpose of grooming is to lure the child away from safety and cause physical harm – for example, the abduction of a child for the purpose of sexual assault.

In Australia, legislative amendments have been made to criminalise the online grooming or luring of children for sexual purposes.

## Online child grooming

*ABC News, 7 July 2017*

On 7 July 2017 the ABC reported that a man was arrested and charged with online child grooming offences. The Solomon Islands national was granted bail after being arrested for online child grooming offences at Brisbane’s International Airport. However, his freedom was short-lived, as he was detained by the Department of Immigration after the hearing. The man was arrested by Task Force Argos officers at the airport on Thursday afternoon as he arrived in Australia. Police alleged the 37-year-old engaged in sexually explicit communications with a police detective posing as a 14-year-old girl.

He appeared in the Brisbane Magistrates Court where he applied for bail, but police prosecutor Sergeant Matt Kahler opposed bail saying Rova posed a flight risk and a risk of reoffending.

Detective Acting Superintendent Garry Watts urged parents to monitor who their children talk to online, and have a ‘hard conversation’ about the dangers of the internet. ‘These people are out there, and they will prey on the children,’ he said. ‘It could be a variety of forums, chat sites, even online gaming provides platforms for these predators to engage with children.’

He said it was a constant challenge for police to keep up with criminals trying to exploit children.

## REVIEW 11.5

Read the article below and answer the questions.

- 1 Identify the key points presented by the author of this article. (C)
- 2 When this article was written, and prior to the expected 2013 amendments to Queensland’s Criminal Code 1899 (Qld), the penalties for these offences were a maximum of five years if the victim was under the age of 16, or 10 years if they were under the age of 12. Provide an extended response to suggest why the Queensland Government increased these ‘maximum sentences’. Do these changes provide enough of a deterrent to prevent such offences from reoccurring? Remember to justify your answer. (C, E, Cr)

## TASK FORCE ARGOS

Task Force Argos is a highly specialised branch of the Queensland Police Service, responsible for the investigation of online child exploitation and abuse.

## Cyberbullying

Cyberbullying is the modern form of workplace/school-based harassment and teasing. Regardless of how advanced technology becomes, some basic human interactions continue to prevail, bullying



Figure 11.14 Cyberbullying occurs 24/7.

among them. Unfortunately, with mobile phones, emails and social media, it is exceedingly hard to switch off cyberbullying.

Cyberbullying is the act of harassing a person using technology such as smartphones and email. Considering the complexity and potential anonymity of cyberbullying, it can be very difficult to bring a bully to justice. Under the current law, the victims are limited to making a complaint of **unlawful stalking** (Criminal Code 1899 (Qld), Chapter 33A) or suing for **defamation**.

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**unlawful stalking** intentional conduct directed at a person, on more than one occasion, that causes the person apprehension or fear of violence to themselves or another

**defamation** an act of communication that injures another person's reputation without good reason or justification, causing them to be shamed, ridiculed, held in contempt and to lose their standing in the community or their place of work

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## 11.5 Transnational and organised crime

Piracy is a delicate issue in modern international law. Vital shipping routes in the Gulf of Aden near the Asian end of the Suez Canal, in the Straits of Malacca and in the South China Sea have been plagued by an upsurge in piratical activity, with the pirates using such modern equipment as high-speed powerboats and machine guns. The profits enjoyed by pirates come from the sale of captured goods as well as, most significantly, the ransoming of captured sailors. The payment of these ransoms contravenes US Government policy to never negotiate with terrorists, so the US Navy has seen a lot of action in the Gulf of Aden in particular, helping to protect merchant fleets from attack.

In the early years of the United States, piracy was also a problem for US merchant fleets, which were regularly attacked by pirates operating in the Mediterranean. The nascent government of the United States signed a treaty with a number

of North African states, including Morocco, Algeria, Tunis and Tripoli, whereby those states would release captured sailors and ships in return for a payment negotiated as a term of the treaty. As these states asked for more and more money, the Americans became increasingly frustrated, which led to the formation of the US Navy and the First Barbary War of 1801–05.

Many criminal activities are not limited to the borders of a country or the states/towns within it. We often hear the term 'international crime syndicate'. Many such organisations operate for monetary gain. However, there are also those that are politically or religiously motivated, and these are sometimes termed 'terrorist organisations'. Due to recent technological development, including the internet, and the relative ease with which people can now move between countries, there has been an increase in these kinds of international activities.

## Record cocaine haul bound for Australia seized in South Pacific

Liz Burke and AAP, 4 August 2017

A massive cocaine haul bound for Australia has been intercepted by the French Navy in the South Pacific before hitting our shores. The record-breaking 1.464 tonnes of the drug was seized near New Caledonia just last week on July 27, after authorities discovered the stash hidden in the hull of a yacht.



**Figure 11.15** What \$322 million worth of cocaine looks like. A record haul of the drug seized from a vessel in the South Pacific.

Source: The Australian Criminal Intelligence Commission/AAP.

Four crew on board the yacht *Afalina* were arrested, believed to be Lithuanian and Latvian, the Australian Criminal Intelligence Commission (ACIC) said.

ACIC officials worked closely with French authorities to foil the plot, which is believed to have been organised by a South American crime syndicate.

The agency's executive director of intelligence Colonel Blanch last night congratulated the French teams involved.

'Congratulations to the Marine Francaise and Gendarmerie Nationale for their efforts in relation to this record seizure of cocaine,' Mr Blanch said in a statement.

'We are thankful for the action taken by French authorities which have stopped a significant amount of drugs reaching the streets of Australia.' The drugs have an estimated street value of \$322 million.

The vessel has been towed to Noumea for further investigation and testing.

The haul eclipsed the previous record seizure of Australian-bound cocaine, which was 1.422 tonnes found on a New Zealand yacht earlier this year.

### RESEARCH 11.5

Read the article and answer the questions.

- 1 Detecting this crime was a collaboration between different law enforcement agencies. Analyse how this could be problematic for Australian law enforcement. (A)
- 2 Discuss whether you think the collaboration between international agencies is effective in combating international crime. (E)
- 3 What else could be done? Justify your response. (E)

**Figure 11.16** Military officers board, search and seize illegal narcotics in the Gulf of Aden, off the coast of Somalia.



## 11.6 Significant crime and law reform

Law reform is sometimes the result of a government's response to an unimaginable catastrophic crime such as a terrorist attack or a massacre. For example, events that resulted in law reform have included the 11 September 2001 terrorist attacks in the United States, the 2001 Port Arthur massacre, the 2009

Victorian 'Black Saturday' bushfires and the 2002 Bali bombings. All of these events prompted a significant review of laws or amendments to existing laws. Sometimes the event may be relatively minor, such as a single criminal case, yet it may highlight an inefficiency, loophole or shortcoming in existing laws.

### COUNTER-TERRORISM MEASURES

The federal government recently made the most significant changes to Australia's counter-terrorism laws in over a decade. The changes were introduced by the government under the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), which, with the support of Labor, was passed into law on 30 October 2014.

The new laws extend the operation of Australia's existing counter-terrorism regimes, create new criminal offences relating to terrorism, and introduce other restrictive measures and executive powers to strengthen national security. The stated purpose of the changes is to address the security threat posed by so-called 'foreign fighters' – people who return to Australia after participating in foreign conflicts or training with extremist groups.

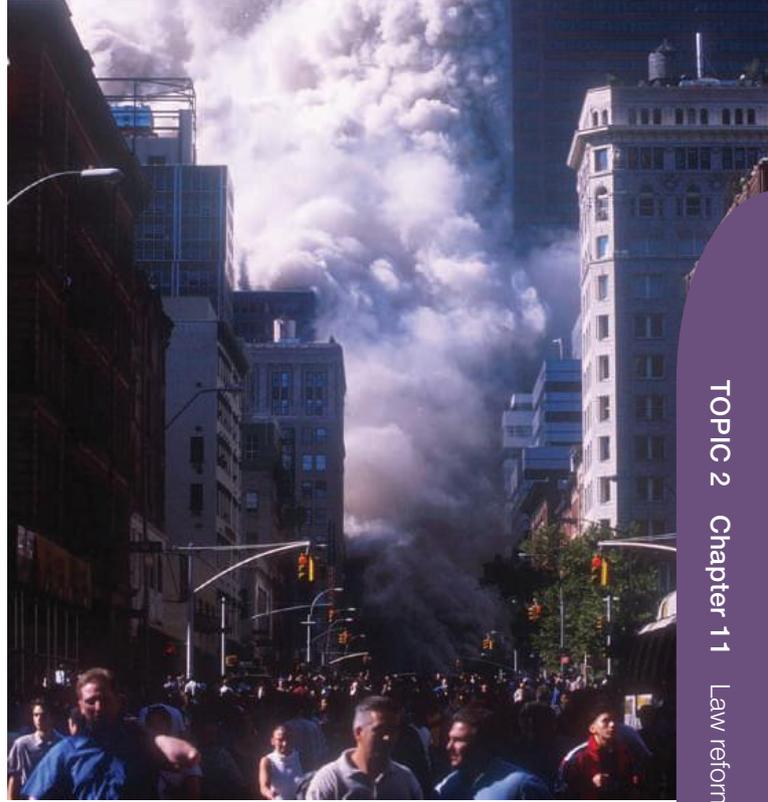
Figure 11.17 A counter-terrorism raid in Sydney, 2017



# Terrorism

## *International: September 11 terrorist attacks*

Terrorism is a form of warfare. Some commentators argue that terrorism is merely the privatisation of war. Throughout history, in common with guerrilla warfare, terrorism has been the chosen method of warfare when one's enemy has a vastly superior military force. Over the last century, terrorism has become a more potent form of warfare, with advancements in the development of explosives. The 9/11 attacks on New York's World Trade Center and the Pentagon signalled the transformation of terrorism into a global phenomenon. There are now loosely allied networks of terrorist groups across the world. The legal responses to terrorism have varied from country to country and have led to debate about human rights.



**Figure 11.18** On 11 September 2001, terrorists crashed two aircraft into the twin towers of the World Trade Center in New York.

### REVIEW 11.6

Read the following article and answer the questions. Although this article is several years old, 9/11 ushered in a period of significant law reform regarding how governments responded to terrorism through new anti-terrorism laws – in that sense it was a precedent event that spawned a whole suite of legislative responses.

- 1 Explain why the *Sydney Morning Herald* thinks Australia's efforts at counter-terrorism have been draconian and arbitrary. Do you agree or disagree? Explain your response. (C, E)
- 2 Evaluate why Australia's 'gigantic policy response has been at odds with the reality of the risk of terrorism in Australia'. (E)
- 3 Explain what the *Sydney Morning Herald* means by the statement that 'Australia has not turned into an Orwellian police state'. (C)
- 4 Evaluate how the government has used counter-terrorism law reform to address other areas considered to be risks to public safety – for example, bikie-gang violence. Do you agree or disagree that this is a further negative effect? Justify your response. (A, E)
- 5 Explain why the *Sydney Morning Herald* believes the *National Security Legislation Amendment Act (2010)* (Cth) did little to address the worst aspects of 'Australia's flawed anti-terrorism laws'. (C)
- 6 Evaluate the statement 'Australia's counter-terrorism law and policy are close to moral and political bankruptcy'. Do you agree or disagree with this statement? Why or why not? (E)
- 7 Research what the *Sydney Morning Herald* refers to as 'the most shameful episode in Australia's "war on terrorism"'. Provide an extended response stating whether you do or don't agree with this statement. Explain your reasons. (S, C, E, Cr)
- 8 Analyse the harmful effects of the government's counter-terrorism laws on Australia's Muslim communities. Evaluate whether this is at odds with treating all citizens as equal before the law. Justify your response. (A, E)

## Our flawed responses to 9/11

*Sydney Morning Herald*, 8 September 2011

In the past 10 years, Australia's efforts at counterterrorism have become Draconian and arbitrary.

Ten years ago the terrorist attacks in the United States shook much of the world to its core. At first, the catastrophic events seemed a world away for many Australians, who felt confident that geographical fortuity insulated them from international turmoil. However, this perception changed 13 months later when terrorists bombed two nightclubs in Bali. Among the 202 people killed on 12 October 2002 were 88 Australian tourists.

The Bali bombings were commonly seen as evidence that terrorism had arrived on Australia's doorstep. Indeed, this proposition was actively advanced by the Howard government, which cited the Bali bombings as evidence that international terrorism had reached Australia. The prime minister and other senior cabinet ministers repeatedly sought to capitalise on the issue politically, often employing the most colourful language. Launching the government's White Paper in 2004, for instance, the then foreign minister, Alexander Downer, boldly proclaimed that Australia was engaged in a 'struggle to the death over value' against 'Islamofascists' who were 'convinced that their destiny was to overshadow the democratic West' and who had embarked on a ruthless mission to 'destroy our society by waging a version of total war'.

The government's response, however, was not limited to martial rhetoric. Since 2001, Australia's total defence spending has increased 59 per cent from \$13.7 billion to \$21.8 billion. Over the same period, ASIO's budget has increased by 655 per cent, the Australian Federal Police budget by 161 per cent, ASIS by 236 per cent and the Office of National Assessments by 441 per cent.

The legislative response has been unprecedented, too. Since 9/11, federal parliament has enacted more than 40 pieces of 'security legislation', which ensure that Australia has some of the most Draconian anti-terrorism laws in the Western world. In fact, it is the only Western liberal democracy that allows its domestic intelligence agency, ASIO, to detain persons for seven days without charge or trial and without reasonable suspicion that those detained are actually involved in any terrorist activity.

This gigantic policy response has been at odds with the reality of the risk of terrorism in Australia. To date, not a single person has been killed in a terrorist

attack on Australian soil in the post-9/11 era. About 100 Australians have died in terrorist attacks overseas, most of them in the Bali bombings. Indeed, chances of dying in a terrorist attack in Australia are close to zero.

Figures at the legal front tell a similar story. In spite of the prolific legislative activity in the field of counterterrorism over the past decade, few criminal prosecutions and even fewer convictions have resulted from the legislative changes. None of the 40 or so people charged under new anti-terrorism laws were charged with actually engaging in a terrorist act.

Instead, the handful of defendants who ended up getting convicted was prosecuted under extremely broad ancillary offences such as 'collecting documents connected with the preparation for a terrorist act'.

At the same time, the increase of investigatory, control and detention powers of Australia's security agencies has not resulted in large-scale violations of civil liberties. Despite the mishandled affair of Gold Coast doctor Mohammed Haneef and the unlawful kidnapping of Sydney student Izhar ul-Haque by ASIO, Australia has not turned into an Orwellian police state. Nonetheless, the government's counterterrorism law and policy have had harmful effects on Australia's Muslim communities. Although the laws are expressed in ethnically and religiously neutral terms, there is a perception among Australian Arabs and Muslims that they are targeted by these laws and by those who apply them. This has led to the alienation of some members of those communities, increased fear, and insecurity and created a growing distrust of authority.

A further negative effect of Australia's counterterrorism law and policy has been that extraordinary legislative measures are normalised and adopted to address other areas considered to be risks to public safety. Recent non-terrorism laws in South Australia and NSW have adopted provisions and arrangements similar to those of federal anti-terrorism legislation but aimed at criminal organisations and biker-gang violence. The High Court has subsequently struck down these laws. Yet, the temptation for legislators to use federal anti-terrorism legislation as a blueprint for developing laws aimed at responding to the nuisances of the day remains.

The Labor governments of Rudd and Gillard have so far shown little enthusiasm for comprehensive review and reform. In 2010, the government adopted

the *National Security Legislation Amendment Act 2010* (Cth). While comprehensive in size, this legislation did little to address the worst aspects of Australia's flawed anti-terrorism laws. Similarly, it took the government 10 years to establish and appoint Australia's first Independent National Security Legislation Monitor.

This position, currently held in a part-time capacity by Sydney silk Bret Walker SC, is mandated to review the operation of the anti-terrorism legislation. While certainly a welcome improvement of current oversight arrangements, it remains to be seen how much Walker can actually achieve: his office is operating with an annual budget less than the cost of three special counter-terrorism vehicles recently received by the police in South Australia, the Northern Territory, and the ACT.

The most shameful episode in Australia's 'war on terrorism', however, has been the treatment of former Guantanamo detainees Mamdouh Habib and David Hicks. In the case of Habib, both Coalition and Labor governments have consistently denied any knowledge of his presence in Egypt in between his arrest in Pakistan and his transfer to Cuba. These denials must now be seriously questioned. Leaked witness statements suggest that Australian officials not only knew of Habib's rendition but were also present when he was tortured in Egypt.

The abandonment of an Australian citizen by his government and its complicity in torture raises serious questions. Nevertheless, rather than setting up a public inquiry into the matter, the Gillard Government, last December, paid an undisclosed amount of money to Habib in return for his dropping a civil case against the

Government and signing a confidentiality agreement.

The latest developments in the Hicks case are equally disquieting. Documents from the office of the former US vice-president, Dick Cheney, suggest that John Howard called in a political favour from the US government amidst his ill-fated bid for re-election in 2007.

Howard desperately begged the Americans to get any charge possible laid against Hicks whom he had earlier branded as among the 'worst of the worst' terrorists at Guantanamo.

These disclosures also shed an interesting light on former Howard ministers like Philip Ruddock who recently resurfaced from political oblivion to voice his support for the confiscation of royalties which Hicks received from the publication of his autobiographical book *Guantanamo: My Journey*.

Leaving the technical legal flaws of the pending court case aside, the matter is a classic case of applying double standards: if Chopper Read and white-collar criminals are allowed to profit from their memoirs, then so should Hicks, in particular in light of the fact that his 'conviction' was handed down by a military tribunal which was severely compromised in all sort of respects.

Australia's counterterrorism law and policy are close to moral and political bankruptcy.

The 10th anniversary of the 9/11 attacks provides an opportune moment to correct that course.

A comprehensive review and reform of anti-terrorism legislation, as well as a public inquiry into what went wrong in the cases of Habib and Hicks, would be a good way to start.

**Figure 11.19** The World Trade Center memorial site in New York City



## Domestic: Port Arthur massacre

On 28 April 1996, 35 people lost their lives and at least 18 more were injured when a lone gunman went on a shooting rampage in Port Arthur, Tasmania.

Within four months of the tragedy, the recently elected conservative Coalition government under John Howard had orchestrated a tightening of Australia's state and territory gun laws, which are now some of the strictest in the world.

### RESEARCH 11.6

- 1 Go to the National Museum of Australia website and read the case information '1996: Port Arthur Massacre Leads to Tighter Gun Laws'. Evaluate the Howard government's response to the Port Arthur massacre with regard to the way it reformed our gun laws. (S, E)
- 2 Comment on whether the reforms were an appropriate response to this tragedy. In your opinion, are they likely to be effective in preventing similar crimes? (C, A)



**Figure 11.20** The memorial cross bearing the names of the 35 victims during the 20th anniversary commemoration service of the Port Arthur massacre

**Table 11.3** Multiple killings in Australia prior to the Port Arthur massacre

Year	Significant crime
August 1987	Hoddle Street massacre in Melbourne – seven people shot
December 1987	Queen Street massacre in Melbourne – eight people killed
August 1990	Surry Hills massacre in Sydney – five people shot
August 1991	Strathfield shopping Plaza massacre in Sydney – six people shot and one stabbed
October 1992	New South Wales Central Coast massacre – six people shot by a lone gunman
February 1992	Perth farmhouse massacre in Western Australia – four people hacked to death
August 1993	Inner west of Sydney massacre – three people shot dead by a gunman
December 1995	Brisbane, Queensland massacre – three members of one family knifed to death
January 1996	Brisbane, Queensland massacre – seven people shot dead in murder-suicide

Source: Parliament of Australia.

## 11.7 Current legal issues

Law reform can be in response to a current legal issue that has been addressed by the parliament. An example is the passage of the Marriage Amendment (Definition and Religious Freedoms)

Bill 2017 (Cth) by the federal parliament, allowing same-sex marriage in Australia. Other current law reform issues are summarised in the following table.

**Table 11.4** Summary of popular current law reform issues

Category	Issue
Social	Abortion; same-sex marriage; euthanasia; safe schools
Science	Mandatory sentencing; nuclear energy
Immigration	Boat immigrants; dual citizenship
Healthcare	Mental health; universal dental care; hospitals; legalisation of marijuana
Economic	Welfare drug testing; taxation; National Broadband Network
Environmental	Fracking; plastic products (including bags) ban; coal seam gas (CSG); uranium mining; the Great Barrier Reef
Transportation	Public transportation
Foreign policy	North Korea military strikes; Syrian refugees; ISIS ground troops; whaling
Domestic policy	Internet regulation; Aboriginal constitutional recognition; live cattle exports; government surveillance
Education	University funding and fees; public schools
Electoral	Criminal politicians; candidate transparency; campaign finance; minimum voting age
Criminal	Prison overcrowding; criminal voting rights; illegal weapons; juvenile crime

Source: iSideWith.com.

### RESEARCH 11.7

With reference to Table 11.4, select one popular current law reform issue from each category. Conduct further research into the legal issues of your choice. Evaluate the issue and propose recommendations for law reform. (E, Cr)

**Figure 11.21** Footage revealing appalling conditions on ships transporting livestock to foreign countries led to calls for a total ban on live exports.



# Chapter review

## Chapter summary

- A significant law reform issue for Australian law-makers is keeping pace with the changing needs of society.
- The Australian Law Reform Commission (ALRC) is an important non-government body that advocates for law reform.
- Alternative dispute resolution (ADR) is a cost-effective way of resolving disputes.
- The law of equity developed to provide remedies when common law (case law) leads to an unfair result.
- Legislative procedural reforms include codifying, complementary and consolidating legislation.
- Lobby groups exert powerful pressure on our law-makers for law reform.
- Law reform can occur as a result of social, cultural, moral, political and economic influences.
- Identifying and responding to patterns of crime has led to important law reform.
- Rapid technological changes have been problematic for law reform.
- Australia collaborates with international agencies to combat transnational and organised crime.
- Significant and often catastrophic crimes have resulted in important law reform.
- Issues of current importance in society – for example, marriage equality – often result in law reform.

## Short-response questions

- 1 Research the role and purpose of the *Sex Discrimination Act 1984* (Cth). In your view, has this been an effective law reform? (S, E)
- 2 Compare and contrast sectional and promotional lobby groups. Evaluate how they can influence law reform. (E)
- 3 Explain the kinds of relationships that now fall under the *Domestic and Family Violence Protection Act 2012* (Qld). (C)

## Extended-response questions

- 1 Using the internet, research Task Force Argos. Identify the purpose of this branch of the Queensland Police Service and its effectiveness in achieving its purpose. (S, E)
- 2 Research Commonwealth terrorism legislation and provide an analysis of whether the laws are too harsh, particularly in relation to civil liberties. Evaluate whether these laws make Australia more or less safe from the threat of terrorism. Justify your response. (S, A, E)

## Response-to-stimulus questions

- 1 Go to the Australian Institute of Criminology website and look at the statistics on contemporary trends in violent crimes. In a paragraph, evaluate whether the crime trends differ across different jurisdictions in Australia. Analyse why responding to these crime trends is problematic for our policy-makers and law-makers. (S, E, A, Cr)
- 2 Go to the Parliament of Australia website and search for Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth). Read the sections 'Background' and 'History of the same-sex marriage debate' in the Bill. Identify the changes in society's values that were at play. Evaluate the process that was followed and whether it was appropriate. Propose alternative approaches that the government could have taken to pursue this legislative change. (C, A, E, Cr)

**Figure 11.22** Celebrating the passage of the Marriage Amendment allowing same-sex marriage in Australia



## CHAPTER 12

# Law reform within a dynamic society 2

### CHAPTER OBJECTIVES

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

- explain the role of law reform commissions, and examine the guiding criteria of making laws and related processes more equitable, modern, fair and efficient – for example:
  - the Royal Commission into Institutional Responses to Child Sexual Abuse
  - the Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory
  - the Royal Commission into the Home Insulation Program
  - the Royal Commission into Trade Union Governance and Corruption
  - parliamentary inquiries
  - coronial Inquests – for example, Gabe Watson (the ‘Honeymoon Killer’)
  - specialist taskforces – for example, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland Report*, 2015
- explain the role of the Australian Institute of Criminology in communicating patterns and costs of crimes, and how this can influence law reform
- select legal information, analyse and evaluate legal issues to propose recommendations (e.g. specific new legislation) that improve outcomes for those affected by the Australian or Queensland legal system, justify using legal criteria and discuss implications
- create responses that communicate meaning to suit the intended purpose in paragraphs and extended responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

### Key concepts/legal terminology you will encounter in this chapter

- coronial inquest
- crime statistics
- issue papers
- law reform
- parliamentary inquiries
- recommendations
- Royal Commissions of Inquiry
- Select Committee
- specialist taskforce
- Standing Committee
- submissions
- terms of reference
- utilitarianism

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Criminology Research Act 1971* (Cth)
- *Domestic and Family Violence Protection Act 2012* (Qld)
- *Evidence Act 1977* (Qld)
- *Family Law Act 1975* (Cth)
- *Financial Management and Accountability Act 1997* (Cth)
- *Royal Commissions Act 1902* (Cth)

### CASES

- Gabe Watson case – ‘The Honeymoon Killer’
- *R v Wyborn* [2013] QCA 400 (13/0081) Holmes and Muir JJA and Applegarth J

## LEGAL ODDITY

When white settlers first started turning the Australian landscape into sugar cane plantations, they found it hard going in the tropical heat. A solution was found in sailing out to Pacific islands and kidnapping people to bring back to the cane fields. Starting around 1860, at least 60 000 Pacific Islanders were sold to Queensland sugar cane growers. Though officially they were not slaves, the pay was so little that they could not afford to return home and they had little choice other than to stay and work to survive. The government passed the *Pacific Island Labourer Act 1901* (Cth) to abolish this practice and by 1906 ordered their repatriation.

Source: *Amazing Australia*.

This is the second chapter to be studied in Topic 2: Law Reform within a Dynamic Society. It explores the different ways in which law reform takes place across all jurisdictions. The chapter begins with a discussion of law reform bodies and commissions, and how they influence the law reform process. Next, it looks at the role of Royal Commissions, parliamentary inquiries and

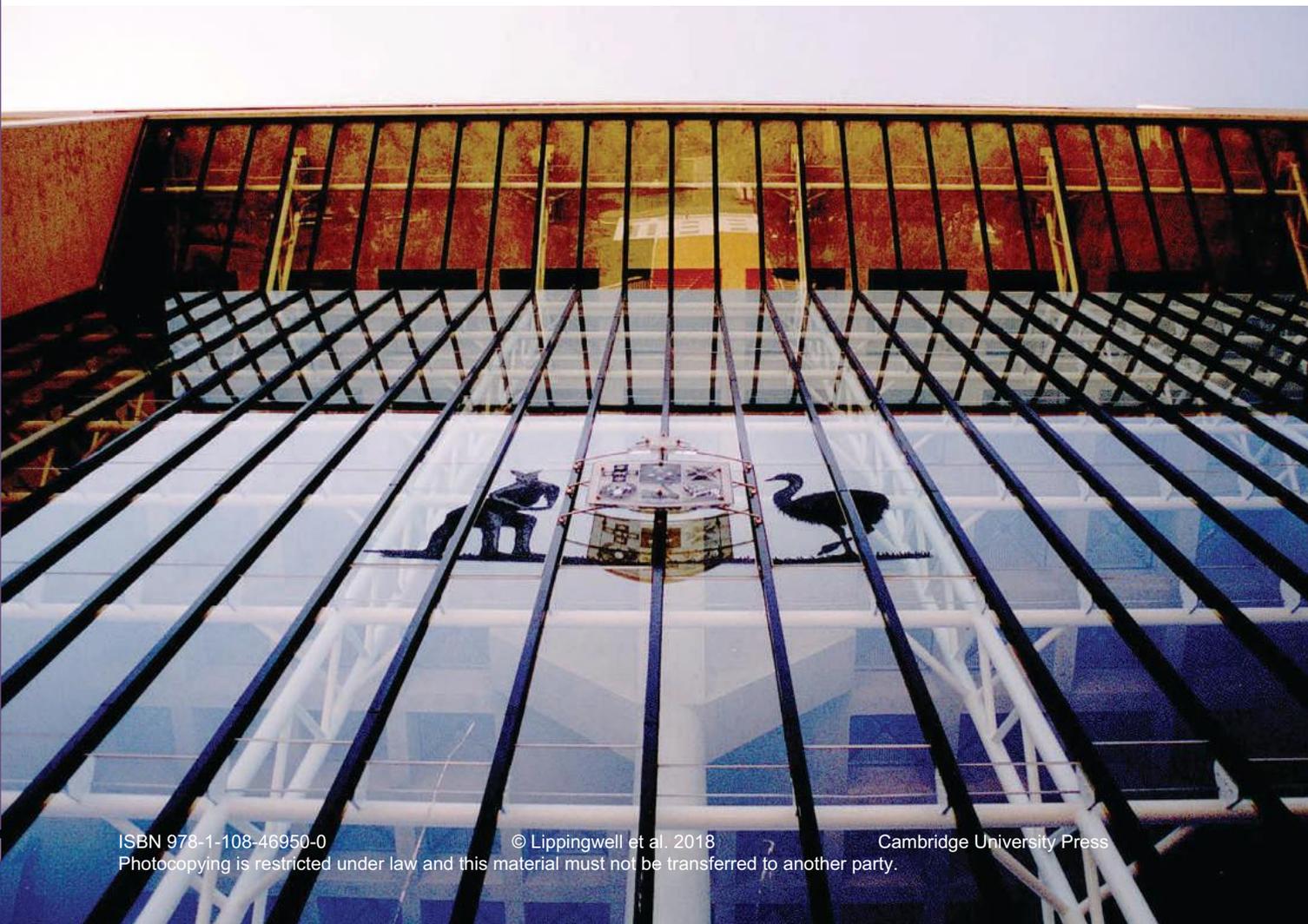
specialist taskforces, and how the contribution of their recommendations into law reform is explored. The chapter concludes with a study of the role and function of the Australian Institute of Criminology and the way it highlights the patterns and costs of crimes and influences law reform in a dynamic Australian society.

## 12.1 Law reform bodies and commissions

The role of Royal Commissions of Inquiry has been pivotal in addressing critical issues within Australian society, and often their findings and recommendations result in important law reforms. At the federal level, the Australian Law Reform Commission (ALRC) has the important function of reviewing Australia's laws and making recommendations to the federal government on

law reform. At the state and territory levels, this role is the responsibility of the various state and territory law reform bodies. The ALRC and the state and territory law reform bodies are discussed in Chapter 16. However, law reform also occurs through Royal Commissions of Inquiry and some of the significant examples will be explored in this chapter.

**Figure 12.1** Sometimes laws need to change to reflect changing values or past misconduct by the courts and legal institutions.



## 12.2 Royal Commissions of Inquiry

**Royal Commissions of Inquiry** are usually held in response to widespread community support for an inquiry, which can include lobby groups (see Chapter 11), interested stakeholders or those directly involved – which, depending on the nature of the inquiry, might include victims. Once the government has decided to hold a Royal Commission of Inquiry, it establishes the **terms of reference** of the inquiry that set the scope and powers of the inquiry. A commissioner is appointed as the chair of the inquiry, and sometimes other commissioners are appointed to work under the direction of the chair.

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**Royal Commission of Inquiry** a federal Royal Commission is a government inquiry established by the Governor-General pursuant to the *Royal Commissions Act 1902* (Cth)

**terms of reference** the scope and powers of an inquiry; what is to be investigated

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### Royal Commission into Institutional Responses to Child Sexual Abuse

On 12 November 2012, the Gillard Labor government announced the creation of a national Royal Commission into Institutional Responses to Instances of Child Sexual Abuse. The announcement was a response to pressure to act following increasing calls by the public, as well as to allegations by a senior New South Wales police investigator that the Catholic Church had covered up evidence of paedophile priests.

The Hon Justice Peter McClellan AM was the chair of the Royal Commission and he worked with five other commissioners. The terms of reference were to inquire into and report upon responses by institutions to instances and allegations of child sexual abuse in Australia. The establishment of the commission followed revelations of child abusers being moved from place to place, instead of their abuse and crimes being reported. There were also allegations that adults who knew of the offending did not try to stop or report acts of child abuse. The Commission examined the history of

abuse in educational institutions, religious groups, sporting organisations, state institutions and youth organisations. The final report of the Commission was made public on 15 December 2017.

Public hearings were held in relation to the following organisations:

- Scouts Australia
- YMCA NSW
- The Salvation Army
- Towards Healing
- Mangrove Yoga Ashram
- Knox Grammar School and Uniting Church
- Yeshiva, Melbourne and Yeshiva, Bondi
- Australian Defence Force
- Catholic Church Authorities in Ballarat.

In total, the Commission made 409 **recommendations**, aimed at keeping children safe. On 15 December 2017, the Royal Commission presented a final report to the Governor-General, after a five-year inquiry into institutional responses to child sexual abuse and related matters. Table 12.1 over the page is based on an article that appeared in the *Sydney Morning Herald* on 15 December 2017. It summarises the key recommendations made by the Commission of Inquiry in its report to the government.

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**recommendations** suggestions or proposals for action put forward by an authoritative body

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**Figure 12.2** Justice Peter McClellan prepares to give his opening remarks at the beginning of the public hearings at the Royal Commission into Institutional Responses to Child Sexual Abuse in Sydney on 16 September 2013.

**Table 12.1** Summary of key recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse

Key recommendation	Proposed actions
Introduce new laws	New laws should be enacted requiring ministers of religion, out-of-home care workers, childcare workers, registered psychologists and school counsellors to report sexual abuse.
Open the confessional	Ministers of religion should have a legal obligation to report information confided to them during a confession if it relates to sexual abuse.
Introduce new criminal offences	Failure to protect children from sexual abuse and failure to report child sexual abuse in an institution should be a criminal offence in each state and territory. This should include instances where a person does not report to police when they know, suspect or should have suspected that an adult associated with the institution was sexually abusing or had sexually abused a child under the age of 17.
Make celibacy voluntary	The Australian Catholic Church should request permission from the Vatican to introduce voluntary, rather than compulsory, celibacy for diocesan clergy.
Remove religious ministers convicted of sexual abuse	Any minister who has a substantiated sexual abuse complaint or a conviction relating to child sexual abuse should be removed permanently.
Schools should be liable	Schools should be able to be sued for sexual abuse committed by their staff, regardless of whether the school was negligent (vicarious liability).
Introduce psychological testing	Candidates for religious ministry should undergo external psychological testing, including psycho-sexual assessment, for the purposes of determining their suitability to undertake work involving children.
Create a national office for child safety	A national statutory office for child safety should be established within 18 months as part of the Department of the Prime Minister and Cabinet. It should develop and implement a national framework to prevent child sexual abuse.
Introduce child safe standards	A list of child safety standards identified by the Royal Commission should be implemented by all institutions and enforced by federal, state and territory governments.
Introduce national registers	Religious organisations should consider establishing a national register recording information to assist affiliated institutions to identify and respond to any risks to children that may be posed by people in religious or pastoral ministry.
Establish a legal service for victims	The federal government should establish and fund a legal advice and referral service for victims and survivors of institutional child sexual abuse.
Children must be kept out of adult prisons	Children (minors) must be kept out of adult prisons. Youth detention centres should consider using technology, such as CCTV and body cameras, to film interactions between children and staff members.
Government should respond in six months	The federal government should respond to the Royal Commission's recommendations within six months. It should report on the implementation of the recommendations within 12 months. Furthermore, in 10 years, there should be a review to examine whether the measures have been effective.
Create a national memorial	The federal government should create a national memorial for the victims and survivors of child sexual abuse suffered in institutional care. Victims and survivors should be consulted on the memorial design, and it should be located in Canberra.

## Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory

This Royal Commission was sparked by an ABC *Four Corners* report on the Don Dale Youth Detention Centre in the Northern Territory, screened on 25 July 2016, which reported on conditions in the Territory's

detention centres. In the program, the conditions and treatment of youths in detention was highlighted, including an image of a hooded youth restrained in a chair. Shortly afterwards, the Turnbull government



**Figure 12.3** Don Dale Youth Detention Centre

established a Royal Commission to inquire into the treatment of children and young persons detained in youth detention facilities administered by the Northern Territory Government, including the Don Dale Youth Detention Centre. The Royal Commission handed its report to the government on 31 March 2017.

The terms of reference were to focus on the specific systemic problems identified in the Northern Territory, how those problems arose and the failure to identify and correct them. The Royal Commission examined:

- failings in the child protection and youth detention systems of the Government of the Northern Territory
- the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate
- cultural and management issues that may exist within the Northern Territory youth detention system
- whether the treatment of detainees breached laws or the detainees' human rights
- whether more should have been done by the Northern Territory Government to take appropriate measures to prevent the reoccurrence of inappropriate treatment.

*Source:* Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory. Media release, 28 July 2016.

The Royal Commission's brief was to make recommendations to the federal government regarding the reforms necessary to prevent the inappropriate treatment of children and young persons in detention and improve the child

protection system. The expectation was that the recommendations and findings of this Royal Commission would be of use in other states and territories, in considering how their juvenile detention systems could be reformed.

## Royal Commission into the Home Insulation Program

Sometimes the best **utilitarianism** intentions of a government can go awry, as was the case for the Rudd Labor government in 2009. The government wanted to stimulate jobs growth and encourage home owners to reduce energy consumption by installing roof insulation in their homes. The government announced its Energy Efficient Homes Package (EEHP), which was later renamed the Home Insulation Program (HIP). The HIP provided government funding to home owners to cover the cost of installing roof insulation in their homes. However, the government was criticised for allowing inexperienced workers employed by inexperienced employers to install the roof insulation. As a result, hundreds of house fires occurred. When four young, inexperienced installers were electrocuted, causing their deaths, the tide of public opinion turned against the government. On 12 December 2013, the government announced a Royal Commission of Inquiry into the Home Insulation Program.

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**utilitarianism** a system of thought stating that the best action or decision in a particular situation is the one that brings the most advantages to the most people

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## Royal Commission says insulation deaths were fault of the government's program

*The Conversation*, 1 September 2014

The deaths of four installers participating in the Rudd government's home insulation program would not have occurred if the scheme had been properly designed and implemented, a Royal Commission has found.

The Royal Commission found the government 'conceived of, devised, designed and implemented a program that enabled very large numbers of inexperienced workers – often engaged by unscrupulous and avaricious employers or head contractors, who were themselves inexperienced in insulation installation – to undertake potentially dangerous work'.

The men who died were Matthew Fuller (14 October 2009), Rueben Barnes (18 November 2009), Marcus Wilson (21 November 2009) and Mitchell Sweeney (4 February 2010).

The decision to permit the use of reflective foil sheeting as ceiling insulation was, in the Commissioner's view, fundamentally flawed and contributed directly to the deaths of Mr Fuller and Mr Sweeney.

Despite knowing that installers were installing reflective foil sheeting across ceiling joists, and attaching it with metal staples, well before 14 October 2009, nothing was done to stop the practice, the Commissioner said.

'Deficiencies in the supervision of employees, which contributed to the death of Mr Marcus Wilson ... were also known to be an issue well prior to 14 October 2009 but, again, nothing meaningful was done.'



**Figure 12.4** Murray Barnes, father of Ruben Barnes, who was killed installing insulation batts under the Rudd government's Home Insulation Program

'Finally, despite electrical safety issues being raised squarely as an issue after the death of Mr Fuller, insufficient action was taken to prevent further tragedies – had it been, I am satisfied that Reuben Barnes' death could have been avoided.'

The Royal Commission – promised by the Coalition in opposition – was the fourth Australian government investigation into the project.

The Commissioner said there was an inevitable and predictable conflict between the two aims of the program. One was to insulate 2.2 million homes, and the other was to stimulate the economy.

'The first required detailed and careful planning over time and the other was to speed up the insulation process. A practically unachievable commencement date for the program if it was to be properly and carefully designed, was unrealistically adhered to.'

The report said that neither Environment Minister Peter Garrett nor Parliamentary Secretary for Government Service Delivery Mark Arbib was specifically advised of the risk of injury to installers before the first death.

The program aimed to achieve an about 15-fold increase in the number of installations a year.

The number of installation businesses increased from about 200 before the program's announcement to 8359 registered businesses with a workforce of more than 12 000 in October 2009.

The tension between the stimulus and energy-efficiency aspects of the program 'caused a number of decisions to be made ... which unnecessarily exposed workers, particularly inexperienced ones, to an unacceptably high risk of injury or death'.

'It ought to have been obvious to any competent administration that the injection of a large amount of money into an industry that was largely 'unregulated' would carry the risk of roting and other unscrupulous behaviour.'

The decision, in light of the problems, to effectively terminate the program had a profound effect on businesses engaged in manufacturing insulation and installing it.

'The closure of the HIP caused great hardship for businesses that had, before the HIP, carried out the installation of insulation.'

## RESEARCH 12.1

- 1 Conduct some research into the findings handed down by the Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory. In one paragraph, summarise the recommendations made to government by the Royal Commission. (S, C, Cr)
- 2 Comment on whether the expectations in the terms of reference were achieved. (S, E)
- 3 Evaluate the response in the other government jurisdictions. (E)



**Figure 12.5** The Royal Commission found that the deaths could have been preventable if the Rudd government's home insulation scheme had been properly planned and implemented.

## REVIEW 12.1

- 1 In your opinion, did the Rudd government breach its duty of care to young, inexperienced installers? Justify your response. (C)
- 2 Evaluate the utilitarianism objective of the government. Propose why this was not achieved and how the government might have been negligent. (E, A)
- 3 Evaluate the implications of the findings of this Royal Commission with regard to law reform in the roof insulation industry. (E)

## Royal Commission into Trade Union Governance and Corruption

Another significant Royal Commission was the one announced by the Abbott government in 2014, inquiring into trade union governance and corruption. The government established broad terms of reference for the Royal Commission, making it one of the most probing and far-reaching contemporary inquiries into trade union governance in Australia. It had powers to inquire into alleged financial irregularities associated with the affairs of trade unions, including:

- the Australian Workers Union (AWU)
- the Construction, Forestry, Mining, and Energy Union (CFMEU)
- the Electrical Trades Union (ETU)
- the Health Services Union (HSU)
- the Transport Workers Union (TWU).

### CHECK THIS OUT

Go to the Royal Commission into Trade Union Governance and Corruption website, and look at Volume 1 of its final report.

Select one recommendation from each of the 10 chapters and evaluate why these are, in your opinion, the most important with regard to law reform. (S, E, Cr)

## Royal Commission into the Banking Sector

### What the Royal Commission into the Banking Sector will do

The Prime Minister, Mr Turnbull said it would investigate ‘how financial institutions had dealt with cases of misconduct in the past, and whether those examples expose issues in terms of the cultural and governance issues in terms of the regulation and supervision of the industry.’

‘This will not be an open-ended commission; it will not put capitalism on trial,’ he said.

Treasurer Scott Morrison emphasised the royal commission did not undermine the strength of Australian banks.

‘Australia’s banks are unquestionably strong. Nothing that we have announced today changes this or gives any reason to question this, on the part of the Government,’ Mr Morrison said.

‘This is an important message for markets and the international financial community; it does not question the robust nature of our prudential system.’

*Source: ABC News, 11 April 2016.*



**Figure 12.6** Australia’s Prime Minister Malcolm Turnbull (right) speaks during a joint press conference with Treasurer Scott Morrison (left) in Sydney on 4 August 2016.

### Malcolm Turnbull backflips on Banking Royal Commission after big four calls for inquiry to restore public faith

By political reporter Lucy Sweeney and political correspondent Louise Yaxley, *ABC News*, 30 November 2017

Malcolm Turnbull has announced a Royal Commission into the Banking Sector, after sustained pressure from within his own government and an admission by

Australia’s big four banks that an inquiry is necessary to restore public faith in the financial system.

**Key points**

- PM says Royal Commission ‘only way’ to restore public faith in banking sector.
- Big four banks wrote to Treasurer saying even though sector had long been against the royal commission, inquiry now ‘in the national interest’.
- Move heads off Nationals’ bid to force an inquiry through the Senate.

‘Since the financial crisis, there have been examples of misconduct by financial institutions. Some of them extremely serious. And that’s demanded a response from the institutions themselves and from the government,’ Mr Turnbull said.

‘The only way we can give all Australians a greater degree of assurance is a Royal Commission into misconduct into the financial services industry.’

The Prime Minister described it as a ‘comprehensive inquiry’ that would cover the nation’s banks, wealth managers, superannuation providers and insurance companies.

**Was the PM dragged to the table?**

Nationals senator Barry O’ Sullivan had been working with other parties and was prepared to pass legislation for an inquiry that, until today, the government has been strongly resisting.

But Senator O’ Sullivan insisted the Prime Minister was not ‘dragged to the table’ on a banking Royal Commission because of his Private Member’s Bill.

‘He was making his own journey in relation to these matters.’

But George Christensen, one of the Nationals who vowed to support Senator O’ Sullivan’s Bill, was not so convinced.

‘I just don’t understand why it took a number of National Party backbenchers to drag the Prime Minister kicking and screaming to this decision,’ he said.

‘I’m hoping that this is going to be a thorough root-and-branch review of the banking sector.

‘It’s going to weed out these systemic cases of misconduct, and perhaps criminal actions by big banks, and we’ll get some justice for the victims of banking misconduct.’

The federal opposition has been pressuring the government to hold a Royal Commission since April last year when it announced that a Labor government would call one.

Labor has argued for more than 18 months that a Royal Commission would make the sector stronger.

The Royal Commission will have 12 months to complete its inquiries, with a final report expected to be delivered by 1 February 2019.

**REVIEW 12.2**

- 1 Why did the government decide it was important to establish this inquiry? (C)
- 2 In your opinion, was the government’s decision to call a Royal Commission into banking evidence of the ‘power of public opinion’? Justify your response. (A)
- 3 The big four banks, in a letter to the Treasurer, agreed to the Royal Commission despite campaigning against it. Evaluate the possible reasons for this backflip. (E)
- 4 Evaluate the role of the Labor opposition in potentially forcing the government to establish the Royal Commission. Is this evidence of the parliament working effectively in the interests of Australia’s citizens? Why or why not? (E, A)

**RESEARCH 12.2**

Analyse the political pressure that was exerted on the Prime Minister by his own political party to establish the Royal Commission into Banking. In your opinion, was the government acting in the best interest of the public or in its own best interest? Justify your response. (A, E)



## 12.3 Parliamentary inquiries

**Parliamentary inquiries** are conducted by committees comprising members of parliament that inquire into various contemporary issues and report back to the parliament. The purpose is to investigate and make recommendations that may translate into law reform. Parliamentary inquiries occur at the federal, state and territory levels. We learned in Chapter 9 that in Queensland this function is performed by the committee system.

The federal Senate has a comprehensive number of Select or Standing Committees of Inquiry. A **Select Committee** is appointed by the Senate to conduct an inquiry into a specific matter, and must report back to the Senate within a particular timeframe that has been established in its terms of reference. Once a Select Committee has completed its work, it is disbanded. A **Standing Committee** is a permanent committee that 'stands' or remains for the term of the parliament. Standing committees are classified into three categories:

- domestic committees
- legislative scrutiny committees
- legislative and general-purpose committees.

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**parliamentary inquiry** investigation by a parliamentary committee into an issue of political, social or legal interest

**Select Committee** a federal Senate committee that conducts an inquiry, reports to parliament and is then disbanded

**Standing Committee** a permanent federal Senate committee that exists for the term of the parliament to conduct inquiries into matters referred to it

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Some issues into which the Senate has recently conducted parliamentary inquiries are:

- aged care
- climate change
- the National Disability Insurance Scheme (NDIS)
- social services.

### WHAT IS A SUBMISSION?

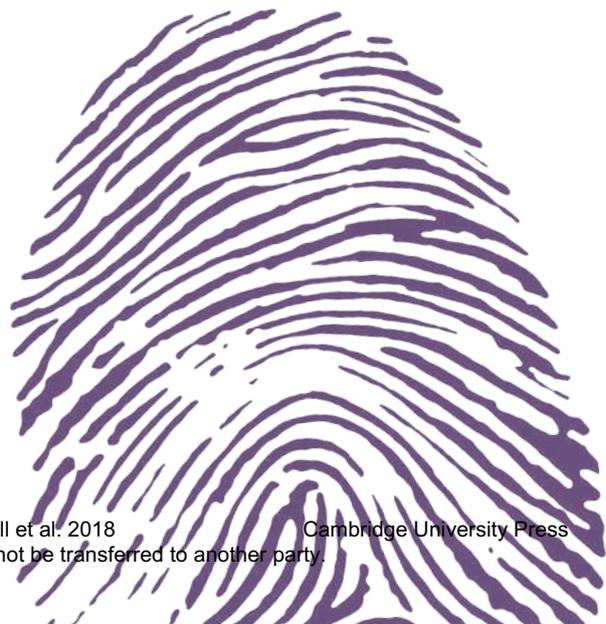
As part of an inquiry, a committee usually asks for written submissions addressing the terms of reference. The terms of reference for each inquiry are on the committee's website. There are no terms of reference when a Bill is being considered by a committee because the committee is seeking comments on the Bill itself.

### CHECK THIS OUT

Look at the Senate page of the Parliament of Australia website and summarise the role and function of each type of Senate Standing Committee. (S, C)

### RESEARCH 12.3

- 1 Following this link <http://cambridge.edu.au/redirect/8129> go to the Brotherhood of St Laurence website and check out the different categories of parliamentary inquiries. Select one of interest, click on the link and research the work of the respective committee. (S, C)
- 2 In one paragraph, summarise the purpose of the inquiry and comment on the possible implications for law reform. (C, E, Cr)



## 12.4 Coronial inquests

A **coronial inquest** is another way that law reform can occur in Australia. Each jurisdiction has a coroner that may conduct an inquest (inquiry) into the death of a person or persons if the death was suspected to be caused by an unlawful act or a tragic event has occurred. Depending on the nature of the inquest, the coroner might recommend to the government an action including law reform to prevent or minimise a recurrence of the event or prosecution for criminal offences.

The coroner controls and coordinates each step of the investigation with the police and has wide powers of investigation, including:

- requesting additional reports, statements or information about the death or deaths

- obtaining more information from investigators, police, doctors, engineers, workplace health and safety inspectors, mining inspectors, air safety officers, electrical inspectors and other witnesses.

Inquests usually are conducted in the Magistrates Court by the coroner for the purpose of gathering information and facts about the probable cause of death and whether any negligence was involved or any law has been broken.

*Source:* Queensland Courts: Coronial investigations.

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**coronial inquest** an inquest or autopsy into the death of a person or persons conducted by the Coroner

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### MOTOR VEHICLE FATALITY RECOMMENDATIONS

Following an inquest by the coroner in 2017 into a fatal motor vehicle collision, the coroner recommended that the Queensland Government review and consider implementing a specific legislative provision to allow for the admissibility, perhaps similar to the *Evidence Act 1977* (Qld), s 95A of the downloaded motor vehicle EDR data report. The coroner also recommended that, within six months, the Queensland Government review the laws regarding overtaking (particularly overtaking of multiple vehicles in a single manoeuvre) to determine whether they are adequate or should be more appropriately expressed in the *Transport Operations (Road Use Management) Act 1995* (Coroners Court of Queensland, Findings of Inquest, s [54], p. 16.

*Source:* Coroners Court of Queensland Findings of Inquest Joint Inquest into the deaths of Lardeen Bernadette Glennon and Matthew David Glennon.

**Figure 12.7** A fatal car crash led to a coronial inquiry which may mean changes to laws in Queensland.



## CHECK THIS OUT

Have a look at the Queensland Courts website. Go to the Coroners Court page, and search for the results of the inquest into the death of 'Watson, Christina Mae'. Read the recommendations the coroner made in the case of Christina's husband, Gabe Watson, widely known as 'the Honeymoon Killer'. (S, C)

Thinking about the result in the courts and what the Coroner recommended, was justice served? (C, A)

### Questions remain about whether 'Honeymoon Killer' Gabe Watson was let off the hook over the death of his wife, Tina Watson

Patrick Hatch, Tuck Thompson, *Herald Sun*, 22 October 2013

Tina Watson died on 22 October 2003, while on a diving trip on her honeymoon at the Great Barrier Reef. The 26-year-old bride drowned during a dive to the SS *Yongala*.

Gabe Watson, Tina's athletic husband and scuba-diving buddy, was convicted of manslaughter for abandoning her during the fatal dive and served 18 months in an Ipswich prison.

After being released, Watson was charged with murder for money by an Alabama grand jury but was later acquitted following a brief but vitriolic trial where a judge determined the case was too weak to send to the jury, over the prosecutor's objections.

#### Was justice done in the Honeymoon Killer case?

The case of the 'honeymoon killer' gripped the nation and made headlines around the world.

Eleven days after marrying her sweetheart in Alabama, Christina 'Tina' Mae Thomas lay motionless on the ocean floor.

At first her death off the coast of Townsville, Queensland appeared to be a tragic accident, but suspicion soon shifted to her husband, Gabe Watson.

With a mountain of evidence compiled, Watson was charged twice with murdering his wife, but never faced a jury.

Criminologists Dr Asher Flynn, from Monash University, and Dr Kate Fitz-Gibbon, from Deakin University, have examined Watson's trials in Queensland and Alabama, and in a new book say justice was denied for one reason: money.

#### A honeymoon nightmare

On 22 October 2003, newlyweds Tina Thomas and Gabe Watson embarked on a seven-day scuba diving

expedition in Queensland, the high-point of their dream Australian honeymoon.

Soon after entering the water at the historic SS *Yongala* shipwreck site, they returned to the surface.

Watson complained that there was something wrong with his dive-computer, and after fixing the problem, they returned to the water for a second and final time.

To date, Watson has given almost 16 different accounts of what happened next.

Noticing her 30 m below the surface, the dive instructor made a valiant effort to save Tina, but it was no use; she was pronounced dead almost an hour later.

#### Hunt for the truth

Police spent five years investigating Tina's death, in a case that spread from Townsville to the couple's home town in the US and included members of the Helena Police Department in Alabama, and even the FBI.

Allegations were made that he had asked his wife to increase her life insurance fivefold before leaving for their honeymoon, a financial motive for murder.

The mountain of collected evidence was presented to a coronial inquest in 2008, and Watson, who had returned to the US, was committed to stand trial in Queensland for murder.

Watson returned to Australia and struck a deal with prosecutors to plead guilty to the lesser charge of manslaughter.

In June 2009, he was sentenced to four years' jail. He was a free man after 18 months.

But if police and the coroner were so convinced of Watson's guilt, then why did the court let him off?

Courts were falling well behind national efficiency standards, while horrendously overworked prosecutors were lumbered with an average of 79 cases a year.

Their interstate counterparts were handling just 27.

The courts were further strained by two other expensive and lengthy trials, including manslaughter charges against notorious Bundaberg Hospital doctor Jayant Patel.

As part of the deal, a summary of facts was agreed on by the prosecution and defence teams, which the judge used to decide on a sentence.

‘The police felt all the inaccuracies and inconsistencies in Gabe’s story they identified in their investigation weren’t reflected in the summary of facts, and as a result, the sentence imposed wasn’t reflective of what it should have been,’ she said.

In Queensland, financial constraints would rob Tina’s family of justice.

Prosecutors could not afford to produce key witnesses from Australia and were unable to present key evidence painstakingly constructed by police.

Three pieces of evidence, in particular, damaged the prosecutors’ case.

First, police had videoed a re-enactment of the dive with the advice of local oceanographers.

The video cast doubts over Watson’s account of events, but the judge refused to allow it to be admitted as evidence because the Queensland scientists who worked on the re-enactment were unable to be cross-examined.

Police also uncovered an email that Watson had sent the dive operator five months before the honeymoon, inquiring about the diving conditions at the SS *Yongala* site.

An employee replied that because Tina was an inexperienced diver, she should either take an orientation dive or not dive at the site at all.

Neither happened, and the email contradicted Watson’s statements to police after Tina’s death that he ‘didn’t know anything about the dive before we did it’.

But again, the judge refused to allow the evidence to be used, because the employee was unable to testify.

The judge also refused to allow Tina’s father to testify that Watson had asked his daughter to increase the value of her life insurance policy.

With the prosecution hamstrung, the judge decided there was not enough evidence to continue proceedings and threw the case out.

Watson was acquitted on all charges and would never face a jury over Tina’s death, an enduring cause of angst for investigators and the dead woman’s family.

The Watson family felt that without a jury making a decision on Gabe’s guilt, he was denied the chance to clear his name once and for all.

### REVIEW 12.3

- 1 Thinking about the Australian justice system, evaluate the statement ‘justice was being controlled by money’. Do you agree or disagree? Why or why not? (E)
- 2 As a result of the coronial inquest into the death of Tina Watson, Gabe Watson was charged with murder, but the charge was downgraded to manslaughter. Analyse the legal issues that resulted in that outcome. (A)
- 3 Evaluate the statement that the ‘Queensland justice system is a basket case’. Do you agree or disagree? Justify your response. (E)

### RESEARCH 12.4

In the Gabe Watson case, evaluate the legal, political and social issues involved and propose law reform recommendations that, in your legal opinion, would ensure justice is served in the future. (E)

## 12.5 Specialist taskforces

Specialist taskforces are similar to parliamentary committees in that they inquire into a specific issue and report back to government. While the function is the same, however, with a **specialist taskforce** the inquiry is conducted by specialists in the field of inquiry rather than by members of parliament. The report and recommendations made by specialist taskforces can translate into law reform, and they operate at the federal, state and territory levels. Recent specialist taskforces include:

- the Special Taskforce on Domestic and Family Violence in Queensland
- the Western Australian Government specialist taskforce to rebuild Warmun
- Rethinking Regulation: Federal Taskforce on Reducing Regulatory Burdens on Business

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**specialist taskforce** inquiry conducted by specialists in the field of inquiry rather than by a parliamentary committee

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- the Australian Taxation Office Special Taskforce to Tackle Cryptocurrency Tax Evasion

### AUSTRALIAN TAXATION OFFICE SPECIAL TASKFORCE TO TACKLE CRYPTOCURRENCY TAX EVASION

The Australian Taxation Office (ATO) is putting together a special taskforce of tax experts, lawyers, technology specialists, bankers and financial advisers to help it identify and track cryptocurrency transactions to ensure all taxes are being paid.

A top team of industry specialists will work with tax officials to work out strategies for ‘following the money’, involving transactions using the digital ‘distributed’ ledgers that have no central data storage, which makes them difficult to trace and track.

The ATO is also believed to be working closely with banks, Austrac, state revenue offices that collect revenues, particularly for property transactions, and officials involved with the Black Economy Taskforce, which has been identifying evasion estimated to be worth \$30 billion and costing the nation about \$2.5 billion in forgone tax revenue each year.

There is also growing concern about cryptocurrency spruikers using inaccurate or misleading information about the income and capital gains tax liabilities to try to cash in on recent buyer mania.

‘We are consulting with key stakeholders who have expressed an interest in tax issues relating to cryptocurrencies,’ a spokesman for the department said.

‘We will discuss common queries and scenarios, practical issues and the tax implications for current and anticipated future developments in relation to cryptocurrencies.’

It is also intended to ‘help inform the ATO’s strategy for supporting the community in understanding the tax implications of cryptocurrency arrangements they may enter into, including any additional advice and guidance.’

The Australian Taxation Office warns that Bitcoin is ‘neither money nor a foreign currency’.

**Figure 12.8** A cryptocurrency investor watches Bitcoin charts using a phone app.



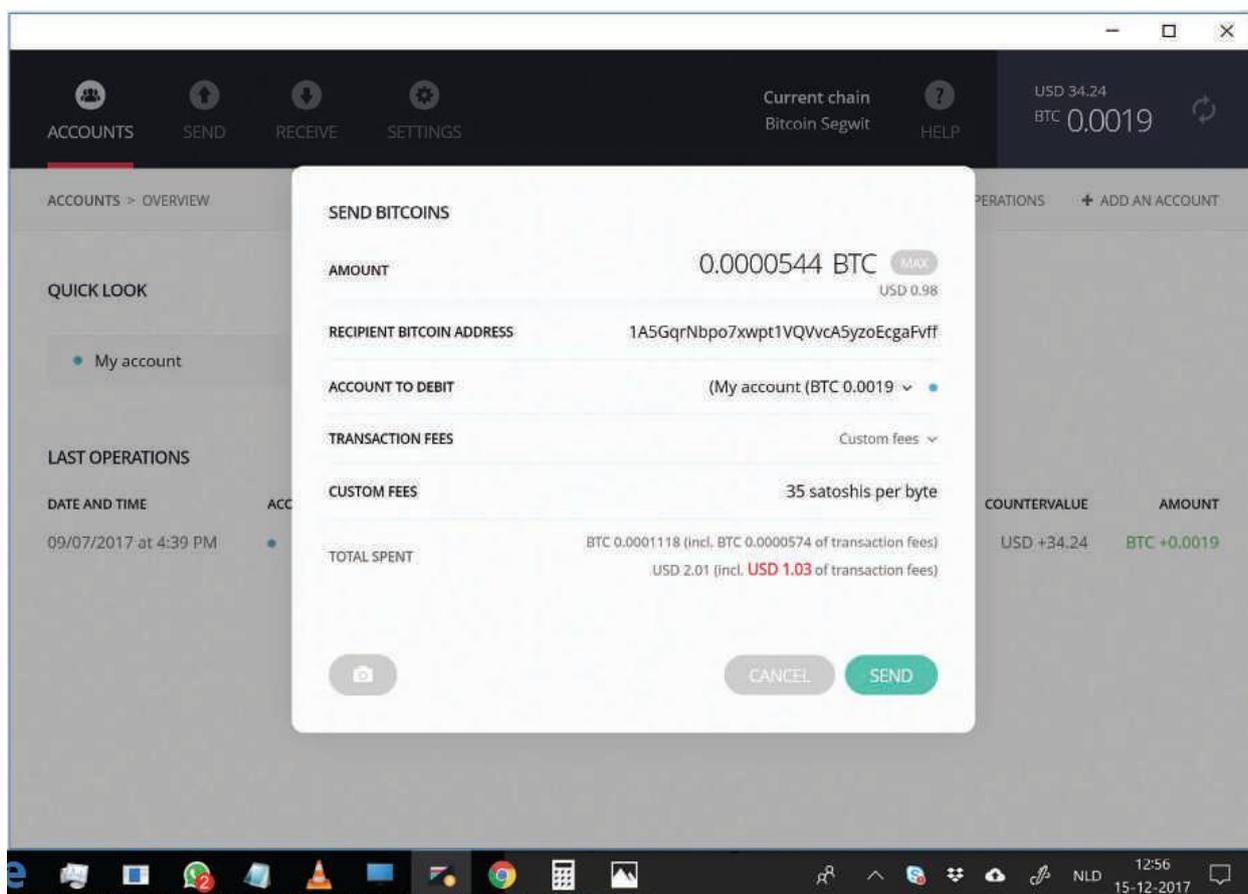


Figure 12.9 The ATO keeps an eye on cryptocurrency.

## REVIEW 12.4

While it is not subject to goods and services tax (GST), cryptocurrency is an asset that can be used to generate income and for calculating capital gains tax (CGT). What are the possible law reform implications of this special taskforce? (C, A)

## Special Taskforce on Domestic and Family Violence in Queensland

We learned in Chapter 11 that in Queensland, the law that deals with family violence is the *Domestic and Family Violence Protection Act 2012* (Qld). However, as a result of significant public pressure, federal, state and territory governments have decided to do more to put an end to domestic violence. The

feeling in the community was that domestic violence in all of its forms was unacceptable and should not be tolerated – not now, and not ever. Existing laws came under the legal and social microscope, and questions were posed as to whether they were adequate in contemporary Australia. As a result, the Queensland Government established a special taskforce in 2014 to inquire into domestic and family violence and report back to the government with law reform and other recommendations.

### The Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland Special Taskforce

The Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland Special Taskforce was chaired by the Hon. Quentin Bryce AD CVO and requested to deliver a report to the Premier of Queensland by 28 February 2015.



Figure 12.10 Report into domestic and family violence

## DOMESTIC AND FAMILY VIOLENCE

Broadly, under Queensland law, domestic and family violence includes behaviour that is physically, sexually, emotionally, psychologically or economically abusive, threatening and coercive, or aimed at controlling or dominating the other person through fear. The violence and abuse can take many forms, ranging from physical, emotional and sexual assault through to financial control, isolation from family and friends, threats of self-harm or harm to pets or loved ones, checking on whereabouts or stalking.

In the context of Queensland legislation, intimate personal relationships include married and de facto spouses, parents of a child, people who are or were engaged, and people in couple relationships, including same-sex couples. Family relationships exist between two people who are related by either blood or marriage, including extended or kinship relationships where a person is regarded as a relative. Informal care relationships exist where one person is dependent on another person for help with essential daily tasks, such as dressing or grooming, meal preparation, grocery shopping or arranging medical care, where care is provided without payment.

What did the Queensland Government want the special taskforce to achieve? The taskforce's role was defined in its terms of reference to inquire into the issue of domestic and family violence in Queensland. It was instructed to make recommendations to inform the development of a long-term vision and strategy for implementation by the state government, and to make suggestions that the government could consider that would support the community, including the victims of domestic violence. The special taskforce, guided by its terms of reference, gathered information and evidence in a number of ways, including:

- listening to the stories of victims and other stakeholders
- calling for submissions and ideas on suggested reforms and outcomes that would form the basis of recommendations to government
- gathering research from specialists, including service providers, government agencies and members of the public
- receiving submissions from people who had experienced domestic and family violence
- meeting with different groups of victims
- hosting awareness-raising events
- conducting focus groups
- considering the responses received from domestic and family violence surveys.

There were 66016 occurrences of domestic and family violence reported to Queensland police in 2013–14 (see Table 12.2).

The special taskforce uncovered some disturbing evidence of domestic and family violence in Aboriginal and Torres Strait Islander communities. It found that violence and abuse in some communities were so prevalent that people living in the communities affected considered domestic and family violence a 'normal' part of 'everyday' life. On investigation, the special taskforce further found that a lack of support services and relatively poor access to the justice system often meant that domestic and family violence went unchecked, making it difficult for the victims – mostly women and children – to escape the violence.



**Figure 12.11** Rosie Batty, 2015 Australian of the Year

**Table 12.2** Occurrences of domestic and family violence reported to Queensland Police in 2013–14

Category	Occurrences
Frequency of domestic and family violence	180 incidents of domestic and family violence reported daily in Queensland
Family violence-related deaths	17 deaths in 2012–13 On average across Australia, one women is killed every week by their partner
Cost to Queensland economy	\$2.7–3.7 billion

Source: Based on *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* report.

However, the special taskforce did find that domestic and family violence awareness and prevention programs and messages that had been supported across the country by all levels of government, such as White Ribbon (a male-led campaign) and Australia’s CEO Challenge (a workplace domestic violence prevention program), were helping to break the silence and ‘normalised culture’ surrounding domestic and family violence. The naming of Rosie Batty as 2015 Australian of the Year for her campaign against family violence recognised the voice of an inspiring survivor and campaigner against family violence.

**Figure 12.12** The special taskforce found that a lack of support services and relatively poor access to the justice system often meant domestic and family violence went unchecked.



## CASE STUDY 12.1

***R v Wyborn [2013] QCA 400 (13/0081) Holmes and Muir JJA and Applegarth J*****Facts**

The defendant was convicted of manslaughter and appealed the decision to the Queensland Court of Appeal. The appellant applied scalding liquid to the deceased's face and head, causing burns in those areas, and blistering and swelling to his upper airways – where death was caused by deep venous thrombi that developed after a period of immobility and caused a fatal pulmonary embolism.

**Issues**

The Queensland Court of Appeal was asked whether the verdict was unreasonable because the evidence did not prove that any act by the defendant caused the death. The issue was whether the excuse of an accident under section 23(1)(b) of the Criminal Code

1899 could not be excluded on the ground that the trial judge did not adequately direct the jury on the excuse of an accident under section 23(1)(b): [1].

**Decision**

The court found that there were a number of means apparent by which severe burns might prove fatal, but that despite evidence indicating the burns were impacted by factors personal to the deceased and the three-week timeframe between the incident and the death of Mr McCarthy, the trial judge was correct to direct the jury that the relevant question was whether a reasonable person would foresee death as a possible outcome of the act of applying scalding hot water to Mr McCarthy. The appeal was dismissed.

## RESEARCH 12.5

Read Case Study 12.1. Conduct further research into this case and evaluate the legal issues the court would have considered when deciding to allow or disallow the appeal. Do you agree or disagree with the decision of the Queensland Court of Appeal? Why or why not? (S, E, Cr)

The special taskforce developed comprehensive recommendations that could form the basis of a framework for a Queensland Domestic and Family Violence Prevention Strategy. Some key findings included:

- Domestic and family violence, in all forms, is a violation of basic human rights.
- Everyone, regardless of their sex, religion, nationality, race, language, relationship or living arrangements, has the right to feel safe and be safe in public and at home.
- Domestic and family violence, which is perpetrated in the home or among family members, is as much a matter of public concern as crime in the streets.
- Domestic and family violence must not be accepted or excused.
- The majority of people who experience domestic and family violence in Queensland are women.
- Men can be, and are, victims of violence and coercive control, and are victims of domestic and family violence homicides.
- Any domestic and family violence, regardless of who the victim and perpetrator are, is unacceptable.



**Figure 12.13** Protesters holding banners during a march against domestic violence

- Particular groups are more vulnerable and at risk than others in the community – for example, people from culturally and linguistically diverse backgrounds, the elderly, people in remote communities, lesbian, gay, bisexual, transgender and intersex people, people with a disability and children.
- A government commission should review the impacts of domestic and family violence on two key vulnerable groups: people with a disability and the elderly.

With regard to Aboriginal and Torres Strait Islander communities, the special taskforce identified three key areas that need urgent change:

- the cultural attitudes of our community
- the role of services and the importance of an integrated response
- the functions of the legal and justice systems.

The recommendations of the special task force focused on bringing about cultural change

to our institutional structures, practices and laws. To ensure that the long-term aim of eliminating domestic and family violence can be realised, the special taskforce recommended that the Queensland Government establish a comprehensive and coordinated Domestic and Family Violence Prevention Strategy.

*Source: Based on Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland report.*

## CHECK THIS OUT

Go online and access the document *Queensland Government Response to the Report of the Special Taskforce on Domestic and Family Violence, Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*. In one paragraph, summarise the government response. Thinking about social, political and law reform, do you believe that the state government response is appropriate? Why or why not? (S, C, E)

## 12.6 Australian Institute of Criminology

We have learned that **law reform** occurs in a number of different ways in a dynamic society. Another important way in which this happens in Australia is through the Australian Institute of Criminology (AIC). In recent times, the AIC has conducted research into a number of contested political, social and legal issues, and its recommendations to government have often been the basis for substantial law reforms. The AIC has influenced law reform in Australia by:

- brokering national agreements into a specific area of the law so that all states and territories have the same way of dealing with a particular matter
- identifying loopholes in the laws to eliminate legislative variations and inconsistencies between the same laws in all government jurisdictions
- recommending specific legislative changes, including the introduction of new offences and increasing penalties and fines for certain offences
- promoting justice and reducing crime by undertaking and communicating evidence-based research to inform policy and practice.

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**law reform** the process of examining existing laws, and advocating and implementing changes in a legal system, usually with the aim of enhancing justice or efficiency

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### SIDEBAR

The Australian Institute of Criminology (AIC) was established in 1973 under the *Criminology Research Act 1971* (Cth) and is a Commonwealth statutory authority regulated under the *Financial Management and Accountability Act 1997* (Cth). The AIC conducts criminological research, conferences and seminars, publishes its findings and makes recommendations to government. The AIC has been responsible for significant law reform at the federal, state and territory levels.

Another important way in which the AIC informs law reform is by providing **crime statistics** on various aspects of crime in Australia. This includes statistics about victims of crime, those who are offending, prisoners in correction facilities, including prisoner health, corrective services management reform, prisoner return to the community and offender treatment in correctional facilities and court convictions. Crime statistics are available in a number of crime categories, including:

- crime and criminal justice
- deaths in custody
- homicides
- illicit drugs
- victims of crime
- violent crimes.

---

**crime statistics** data and information gathered on various types of crime

---

The AIC also conducts research on crime-related matters, such as:

- drugs and alcohol
- violence
- property crime
- cybercrime
- economic crime
- environmental crime
- organised and transnational crime.



The statistics are made available to the government and all other interested stakeholders, including the public, and form an important crime database about the patterns and costs of crime that can influence the law reform process across the whole country.

The AIC also conducts inquiries into specific legal issues, and its findings can be valuable to governments regarding important areas of law reform. Recent inquiries include:

- a 2017 review of the family law system
- a 2016 review of incarceration rates of Aboriginal and Torres Strait Islander people
- a 2016 review of elder abuse
- a 2013 review into serious invasions of privacy
- a 2012 review into age barriers to work
- a 2010 review into family violence and Commonwealth laws
- a 2009 review into homosexual law reform in Australia.

## ISSUES PAPERS

Issues papers are papers presented to an inquiry detailing the issues under investigation. They can provide information, data and further explanations that would assist in the inquiry and reporting process.

## Indigenous Justice Clearinghouse (IJC)

A number of other ways exist by which law reform can occur in Australia: through non-government research and input from the public, universities and other interested organisations such as the Indigenous Justice Clearinghouse (IJC). The Clearinghouse is a national resource on Indigenous justice. Its aim is to promote discussion and disseminate relevant Indigenous justice information to government policy-makers and those working in the field of Indigenous justice. It calls for authors to submit papers on legal issues that are of interest to, involve or are of concern to Aboriginal and Torres Strait Islander people. It publishes the papers and advocates for law reform.

The IJC has recently called for experienced researchers to have input into the following legal issues with regard to Indigenous peoples:

- implementation options and evaluation of integrated service model responses to address family violence in remote Aboriginal and Torres Strait Islander communities
- development and effectiveness of local authority models in responding to crime and violence in Aboriginal and Torres Strait Islander communities, with a priority focus on addressing domestic and family violence, including a cross-jurisdictional analysis of effective local authority models and key ingredients for success
- growth in remand and its impact on Aboriginal and Torres Strait Islander over-representation in the criminal justice system
- prisoner through-care
- Indigenous peoples in Australia and New Zealand and the intergenerational effects of incarceration
- custody notification services.

IJC publications provide an overview and analysis of key Indigenous justice issues in Australia and New Zealand, and include examples of programs that are working to reduce the incarceration of Aboriginal and Torres Strait Islander people and to keep communities safe. Each publication attracts a payment of \$5000.

The IJC is a joint project of the Law, Crime and Community Safety Council and the Australian Institute of Criminology (AIC), and is hosted by the NSW Department of Justice in Sydney. The goal of the Clearinghouse is to share knowledge about

what works to address Indigenous criminal justice issues. IJC publications are widely distributed to public servants and those working in the Indigenous justice field, and can significantly influence law reform at the federal, state and territory levels. An example of the work of the IJC is recent research published on Indigenous Justice Agreements (IJAs). The research evaluates IJAs introduced by Australian states and territories, and examines whether strategic planning on Indigenous justice issues is improving Indigenous justice outcomes as intended.



**Figure 12.14** Indigenous Justice Clearinghouse

Source: Indigenous Justice Clearinghouse. Logo design by Garry Jones for Indigenous Justice Clearinghouse.

## CHECK THIS OUT

Have a look at the website for the Indigenous Justice Clearinghouse. Click on the publication 'Indigenous Justice Agreements'. Read the paper and in one paragraph summarise the key findings. Do you agree or disagree with the findings of the authors? Justify your response. (C, A, E)

**Figure 12.15** A protest against Indigenous deaths in custody in Brisbane, 2014



# Chapter review

## Chapter summary

- Law reform in a dynamic society occurs in a number of different ways.
- Royal Commissions of Inquiry conduct investigations into legal issues in response to widespread community, political and interested stakeholder support – for example, the 2017 Royal Commission into the Banking Sector.
- A number of Royal Commissions conducted in Australia have resulted in law reform.
- Parliamentary inquiries are conducted by committees comprising members of parliament.
- The federal Senate has a comprehensive number of Select and Standing Committees.
- The Coroner conducts an inquest into the death or deaths of people, and sometimes their findings influence law reform.
- Specialist taskforces are similar to parliamentary committees except they are conducted by specialists in the field of inquiry.
- One in four children and one in two Aboriginal children are exposed to family and domestic violence during childhood.
- Aboriginal women are more likely to be hospitalised due to domestic violence-related assault than non-Aboriginal women.
- The Australian Institute of Criminology (AIC) conducts research into a number of political, social and legal issues that have influenced law reform.
- The Indigenous Justice Clearinghouse (IJC) publishes issues papers and advocates for law reform on Indigenous justice matters.

## Short-response questions

- 1 Evaluate why the ATO is putting together a special taskforce to look at cryptocurrency. (E)
- 2 Explain the different ways in which law reform occurs in a dynamic society such as Australia. (C)
- 3 Investigate which of the key recommendations from the Royal Commission into Institutional Child Sexual Abuse have been implemented. (A)
- 4 Explain the concept of utilitarianism and how it is applied by government. (C)
- 5 Explain the difference between parliamentary inquiries and Senate Select and Standing Committees. (C)

## Extended-response questions

- 1 In the Gabe Watson (the 'Honeymoon Killer') case, identify the legal challenges for the Australian justice system. Compare and contrast the coroner's recommendations with the legal outcomes achieved. (C, E)
- 2 Research a specialist taskforce of your choice and evaluate the recommendations and their impact on law reform. What recommendations would you make? (S, E)

## Response-to-stimulus questions

- 1 Go to the IJC website and research the meaning of the IJC logo. (A)
- 2 Have a look at the statistics on the Australian Institute of Criminology website. Check out the statistics available in each crime category. Select one area of interest and evaluate the pattern of crime. Make some law reform suggestions to reduce the pattern of crime. (S, E, Cr)

# Unit review

## Short-response questions

- 1 Evaluate the British notion of property rights and how this was at odds with the customary laws of Aboriginal people. (E)
- 2 Explain the difference between legislation and case law. (C)
- 3 Analyse the role of codifying legislation, complementary legislation and consolidating legislation to the law reform process. (A)
- 4 Explain the role of law reform bodies and commissions and how they influence the law reform process in a dynamic Australian society. (C)

## Extended-response questions

- 1 Unlike the other states, Queensland no longer has an upper house, having abolished the Legislative Council in 1922. Argue the case for or against the reintroduction of the Legislative Council in Queensland. (C, E)
- 2 In 1986 the High Court of Australia became the highest court of appeal (appellate court) in Australia when the *Australia Act 1968* (Cth) abolished appeals from all jurisdictions to the Privy Council in England. Evaluate the legal arguments for and against this decision. (E)
- 3 Select and research a lobby group that has been actively pressuring the government for law reform and evaluate how successful it has been. Justify your response. (S, C, E)
- 4 Analyse and evaluate the findings and recommendations of the Royal Commission into the banking sector announced by the Prime Minister in 2017. (A, E)

## Response-to-stimulus questions

- 1 Go to the Parliament of Australia website and search for 'Practice and Procedure: Powers, Practice and Procedure'. Prepare a report that explains how the Australian legal and governance system was developed from the Westminster system. (S, C, E, Cr)
- 2 Go to the *Sydney Morning Herald* website. Read the article 'Not all Equal Before the Law'. Critically evaluate the article and the expectation in Australia that everyone should be equal before the law. In your opinion, is this a flawed expectation? Why or why not? (C, E, Cr)
- 3 Go to the Compensation Connection website. Select a medical negligence case of interest to you. Evaluate the legal issues the court considered and analyse the impact of the decision on the tort of medical negligence. (S, E, A, Cr)
- 4 Go to the ABC News website and read the article, 'Don Dale: Northern Territory Government Announces \$70m for New Youth Justice Centres'. Thinking about law reform, prepare a report summarising how the Northern Territory responded to the recommendations of the Royal Commission on Youth Detention and Protection in the Northern Territory. (C, A, Cr)

# Human rights in legal contexts

## **Focus: How are fundamental human rights concepts protected and does Australia meet its obligations in relation to these concepts, both domestically and internationally?**

Students explore the global context of human rights and how international laws and institutions affect Australia. They recognise how human rights create challenges in national and international contexts, and for minority groups, and examine the impact of international law on the Australian legal system and those who are subject to it.

This unit features contemporary contexts involving human rights matters in Australia, or where Australia has a current role or interest internationally. Examples of issues include:

- Australian Aboriginal and Torres Strait Islander people's access to health and other community services
- parents' and children's human rights in surrogacy and artificial conception agreements
- the right to marry and create a family
- people smuggling and the treatment of asylum seekers
- war and peace issues, such as the Geneva Conventions and peacekeeping forces
- environmental issues, for example, climate change and the rights of future generations.

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## **UNIT OBJECTIVES**

**By the end of this unit, students should be able to:**

- comprehend legal concepts, principles and processes of Australian human rights laws and obligations in national and international contexts
- select legal information from sources relevant to Australian human rights laws and obligations in international contexts
- analyse legal issues involving Australian human rights laws and obligations in national and international legal contexts
- evaluate legal situations relevant to Australian human rights laws and obligations in national and international legal contexts
- create responses that communicate meaning to suit the intended purpose.

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## **CHAPTERS/TOPICS IN THIS UNIT**

- Chapter 13: Human rights part 1 – general
- Chapter 14: Human rights part 2 – international context
- Chapter 15: The effectiveness of international law
- Chapter 16: Human rights in Australian contexts

# CHAPTER 13

## Human rights part 1 – general

### CHAPTER OBJECTIVES

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

- explain the process by which treaty obligations translate into domestic law through accession or ratification, the role of reservations, and the effect of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
- describe key human rights initiated or promoted in the following important legal documents
  - Magna Carta 1215
  - *Racial Discrimination Act 1975* (Cth)
  - *Sex Discrimination Act 1984* (Cth)
  - *Disability Discrimination Act 1992* (Cth)
- describe and explain the role of the Australian Constitution (including the foreign affairs power within s 51) in protecting express and implied human rights in Australia
- create responses that communicate meaning to suit the intended purpose.

Key concepts/legal terminology you will encounter in this chapter

- Bill of Rights
- human rights
- rights
- Royal Commission

### RELEVANT LAW

#### IMPORTANT LEGISLATION

- *Age Discrimination Act 2004* (Cth)
- *Anti-Discrimination Act 1991* (Qld)
- *Anti-Terrorism Act (No. 2) 2005* (Cth)
- *Australian Constitution (Commonwealth of Australia Constitution Act 1900* (Imp 64 & 64 Vict c 12)
- *Australian Security Intelligence Organisation Act 1979* (Cth)
- *Commonwealth Electoral Act 1918* (Cth)
- *Commonwealth Franchise Act 1902* (Cth)
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
- Convention on the Rights of the Child 1577 UNTS 3
- Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967
- Criminal Code 1995 (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Freedom of Information Act 1982* (Cth)
- *Human Rights Act 2004* (ACT)
- *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth)

- *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
- *Human Rights (Sexual Conduct) Act 1994* (Cth)
- International Covenant on Civil and Political Rights 99 UNTS 1
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD)
- Magna Carta (1215)
- *Organisation Legislation Amendment (Terrorism) Act 2003* (Cth)
- *Privacy Act 1988* (Cth)
- *Queensland Elections Act 1885* (Qld)
- *Racial Discrimination Act 1975* (Cth)
- *Security Legislation Amendment (Terrorism) Act 2002* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- United Nations Charter 1945
- Universal Declaration of Human Rights 1948

### CASES

- *Lange v Australian Broadcasting Corporation* (1997) 135 ALR 96
- *Mabo v Queensland (No. 2)* (1992) 175 CLR 1
- *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 131
- *New South Wales v Commonwealth* (2006) 231 ALR 1 (*Work Choices Case*)
- *R v Thomas* [2006] VSCA 165
- *Stephens v West Australia Newspapers Limited* (1994) 182 CLR 211
- *The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 Ltd (*Engineers Case*)
- *Theophanous v The Herald and Weekly Times Limited and Anor* (1994) 182 CLR 104
- *Williams v Commonwealth of Australia* [2012] HCA 23

### LEGAL ODDITY

The United States is the only UN member state not to have ratified the Kyoto Agreement on Climate Change, which set targets to reduce carbon emissions. The United States initially signed it, but then president George W. Bush decided against full ratification due to concerns over the economic impact it would have.

It is less well known that the United States has the worst track record for ratifying human rights treaties of all wealthy nations. The Convention on the Rights of the Child has been ratified by every country in the United Nations except the United States and Somalia. The United States is also one of only seven countries not to have signed the Convention on the Elimination of All Forms of Discrimination Against Women.



**Figure 13.1** People gather in front of the White House for the Women's March following Donald Trump's inauguration as US President, 20 January 2018.

## 13.1 Sources of individual rights

Let's begin by defining **human rights**. The word 'human' means a member of the *Homo sapiens* species: a man, a woman or child – a person. The term 'right', in this instance, means morally good, justified or acceptable. So the term 'human rights' is closely linked to the values we believe in and accept within our society. Many of these basic rights and values were developed by religious beliefs and

the work of some of the great philosophers, such as Plato and Locke. Table 13.1 outlines some important dates in the development of human rights.

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**human rights** fundamental rights that are considered to belong to every person regardless of race, gender, age, nationality or religion

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### RESEARCH 13.1

- 1 Research the following people and describe their contributions to the protection of human rights.
  - a Eleanor Roosevelt
  - b Nelson Mandela
  - c Martin Luther King Jr
  - d Charles Perkins. (A, E)
- 2 Research the situation in Myanmar regarding the Rohingya Muslims. Analyse and evaluate the role of Nobel Peace Prize winner Aung San Suu Kyi in their plight. (A, E)

**Table 13.1** Key dates in the development of human rights

Date	Human rights development
Unknown	The Ten Commandments
1215	Magna Carta
1628	British Petition of Rights
1689	British Bill of Rights 1689, 1 Wm & M 2, c 2
1776	United States Declaration of Independence
1789	French Declaration of the Rights of Man and the Citizen
1791	Bill of Rights (United States)
1833	<i>Abolition Act 1833</i> , 3 & 4 Will IV
1863	Emancipation Proclamation
1945	United Nations established
1948	Universal Declaration of Human Rights
1948	Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277
1951	Convention on the Status of Refugees 189 UNTS 150
1960	The International Labour Organization's Discrimination (Employment and Occupation) Convention 362 UNTS 31
1966	The International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195
1966	The International Covenant on Economic, Social and Cultural Rights 993 UNTS 3
1966	The International Covenant on Civil and Political Rights 99 UNTS 1
1975	The <i>Racial Discrimination Act 1975</i> (Cth) passed in Australia
1979	The Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13
1981	The <i>Human Rights Commission Act 1981</i> (Cth) passed in Australia, establishing the national Human Rights Commission
1984	The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1365 UNTS 85
1989	The Convention on the Rights of the Child 1577 UNTS 3
1990	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3
1992	The <i>Disability Discrimination Act 1992</i> (Cth) came into force in Australia
1993	The Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner created in Australia
2002	The International Criminal Court established
2002	The <i>Age Discrimination Act 2002</i> (Cth) came into force in Australia
2004	The <i>Human Rights Act 2004</i> (ACT) enacted
2006	Convention on the Rights of Persons with Disabilities 2515 UNTS 3
2007	Declaration on the Rights of Indigenous Peoples
2010	International Convention for the Protection of All Persons from Enforced Disappearance

Fundamentally, human rights are based on the principle that an individual should be treated with dignity, freedom and respect. Human rights are often spoken about with reference to international laws. However, human rights are equally important

to individuals. Throughout history, there have been a number of people who have been regarded as great humanitarians, who have stood up for human rights in some way.



**Figure 13.2** Anti-Vietnam War protesters and police officers face off in 1967.

Sometimes, you might hear a person say, ‘I’ve got the right to do that’, but do they actually have that right? What are they referring to when they say that? The idea of having a ‘right’ is something that humans believe we possess automatically, but rights are generally an entitlement that people have been given.

This idea of having a ‘right’ can have different meanings and can exist in different forms. The notion of ‘free speech’ is often one of the very first rights that we automatically think of as a citizen, but is it a right? In reality, our rights are limited by the rules set by the government of the day.

## The nature of rights

The most basic types of **rights** are legal and moral rights. A legal right exists in either common or statute law. The rights that exist in common law are those that, over time, were developed in order to provide some form of protection. The rules established in regard to negligence are a good example of common law rights – for example, *Donoghue v Stevenson* [1932] AC 562, in which duty of care was established. In law, protection is

provided from acts or omissions that could affect those who are closely related.

An example of a legal right can easily be found in a range of Acts of Parliament designed to ensure that certain rights are protected. For example, a person has the right not to be discriminated against. This can be found in section 6(1) of the *Anti-Discrimination Act 1991* (Qld), which aims ‘to promote equality of opportunity for everyone by protecting them from unfair discrimination’. We will discuss legal rights that grant or protect human rights in Australian law in more detail later in this chapter.

---

**right** the privilege or power to be able to do something; some rights are recognised by law

---

Moral rights exist within our society and in some respects are formally binding on us. One example of a moral right is the controversial right to die. It is not a legal right throughout Australia, which frustrates many people who support voluntary euthanasia (which, in general terms for these purposes, is the right to end one’s own life with the assistance of a medical professional in order to ensure as little suffering as possible). A person may make these



**Figure 13.3** One example of a moral right is voluntary euthanasia.

arguments from a moral perspective, but in doing so also has to accept that a counter-argument may be offered. Another moral right that has recently moved to have the status of a legal right is the right of same-sex couples to be treated as equal to opposite-sex couples, and to have equal rights in marriage. In 2017, this right was confirmed as a legal right following changes to the *Marriage Act* and other related legislation. This occurred after a postal survey confirmed that a majority of Australians supported the change from a moral to a legal right.

## Balancing competing rights

Across the world, some people and some groups find it difficult to claim their rights. It seems that the people in power, and even the law, could do more to ensure that people have equal rights and know how to claim those rights. On the other hand, in some situations the competing rights of individuals need to be balanced. Governments have interpreted the limitations and balancing of rights in different ways. The most obvious example of this is that ‘the people’ have given to the government the power to make and implement laws that remove the right of liberty from those who offend against the criminal laws of the country.

There are some people who believe that government ‘interference’ in the lives of citizens is almost always wrong, and that the rights of the individual are paramount. This argument is prominent when the issue of gun control is considered in the United States. In 1791, an amendment to the Constitution of the United States of America (the Second Amendment) stated:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

It was originally introduced to ensure the state militias (a military force raised from a civilian population to assist the regular army in an emergency) that existed in the United States at the time were armed sufficiently to oppose any foreign force or a tyrannical federal government that may control the new country of the United States. Having fought a war of independence against England from 1775 to 1783, this desire to ensure that citizens were able to protect themselves was understandable at the time.

The problem is that this amendment continues to be interpreted in different ways. Some argue that it is an anachronism that was never intended to allow the citizens of the United States to own what are

now very dangerous automatic or semi-automatic weapons like those used in the Columbine High School shooting in 1999, where 15 people died, or the Las Vegas shooting in 2017 that resulted in the deaths of 60 people and the injuries of over 500, or the Florida school shooting in 2018, where 17 people were killed. The rate of gun violence in the United States is such that some studies have found a US citizen is 10 times more likely to die in a gun-related incident than citizens of other developed countries.

Others maintain that it is the right of the individual to own such a weapon, as protected by the Second Amendment, and that the state should not interfere with this right. Australia has had its own difficulties with this issue, including the 1996 Port Arthur massacre, where a lone gunman killed 35 people and injured another 23. This resulted in laws being passed that made it much more difficult for Australians to own weapons.

Clearly, in this area, the rights of the individual seem to be leading to a much higher risk of death than if the state were able to pass laws to make society a safer place. It remains a very divisive issue in the United States, a country that prides itself on protecting the rights of the individual as much as possible.

## SIDEBAR

What do you think? Should the rights of the individual be better protected by Australia's gun laws? Why or why not? Justify your answer in a short argumentative essay (400–600 words) using at least two arguments. (A, E)

The existence of these different types of rights within our society is important, but unless they have been recognised and enforced by the law, some would question whether these rights actually do exist. Individual rights in Australia stem from or are protected by a variety of processes and sources, some of which we now consider.

## Customary rights

Customary rights originate from customs and traditions that have been established over time within a certain socio-cultural group like a trade or locality,

but they have no legal basis. Customary rights have also been discussed in Chapter 1.

An example at school would be when a group of friends always sits in the same position at break time. Whereas this may be the tradition for that group, they would certainly have no legal right to this spot if another group decided to sit there one day. In a broader sense, the practice of 'squatting', or staying in houses or on land that you do not own, is an example of customary rights.



**Figure 13.4** Customary rights are born from traditions and customs that have grown over time within a particular socio-cultural group, even in small instances like children in a playground.

Social behaviours between individuals or groups in society sometimes become so important that they gain the force of law, or become law. There is a certain respect between individuals, at least on most occasions, and this often becomes customary behaviour that, if breached, will bring customary enforcement or penalty. There is a hint of this in negligence and other law that, via the common law, applies the 'reasonable person' test.

Another example is the customary law of Aboriginal and Torres Strait Islander peoples. Many of the laws that constitute Aboriginal customary laws vary between different Aboriginal communities, and in many cases these laws are kept secret within a particular community. These laws developed as part of a culture that traditionally passed them on verbally through the generations.

## The Australian Constitution

The Australian Constitution is a set of rules that outlines the legal and political system by which Australia is governed. Within the framework of

the Australian Constitution, the Commonwealth Government and the state governments have different responsibilities. The following extract from an article that was published in *The Australian* newspaper explains this division further.

### ‘The Constitution of Australia: Rights and responsibilities are clearly written out’, *Government Today: How We are Governed: A Resource for Schools*

Christine Kilpatrick, *The Australian*, 6 August

Although both the US and Australia have a written constitution, we don’t have a **Bill of Rights**, so we can’t go about demanding them. However, the laws of the Australian Constitution can be changed with the approval of the people, through a referendum ... The Constitution of Australia defines the responsibilities of the federal government which include international and inter-state trade, foreign affairs, defence, immigration,

taxation, banking, insurance and marriage, to name a few. Governments of states and territories are responsible for all matters not assigned to the Commonwealth.

*Source:* This legislative material is reproduced by permission, but is not the official or authorised version. It is subject to Commonwealth of Australia copyright.

**Bill of Rights** a formal declaration of the legal and civil rights of the citizens of any state, country or federation

The title of this article suggests clarity, but is it really as clear and as final as is claimed to be? It is section 51 of the Australian Constitution that is being referred to, which begins:

What is not included in section 51 remains the jurisdiction of state parliaments.

There have been a number of High Court challenges to the power of the Commonwealth to make laws under section 51 – usually challenges by the states, indicating that certainty is not guaranteed. It is the role of the High Court to interpret the meaning of the Australian Constitution and to settle any disputes about its meaning. Perhaps surprisingly, the Australian Constitution is not a list of rights; however, some rights are listed:

#### Chapter I. The Parliament

##### Part V – Powers of the Parliament

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

**section 51 (xxxi):** The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

**section 80:** The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

**section 116:** The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

*Source:* Parliament of Australia. Subject to Commonwealth of Australia copyright.

## CASE STUDY 13.1

### ***Williams v Commonwealth of Australia* [2012] HCA 23 (also known as the *School Chaplains Case*)**

#### **Facts**

The Commonwealth Government and Scripture Union Queensland entered into a contract for Scripture Union Queensland to provide chaplaincy services for a Queensland state school. A father of four children at the school, Williams, objected to the religious aspect of these services and challenged the right and ability of the Commonwealth to provide such services in a state school on the basis that this arrangement could not be supported by section 61 of the Constitution. Section 61 is the so-called 'Executive power' that gives the Prime Minister and Cabinet ('the Executive'), through the Governor-General as the Queen's representative in Australia, power to execute and maintain the laws of the Commonwealth.

#### **Issues**

Could section 61 be used by the government to enter into agreements that weren't necessarily supported by the other powers given to it under the Constitution? In other words, given that there was no specific right in the Constitution to fund religious instruction, could section 61 be used to authorise such an arrangement?

#### **Law**

The Constitution of Australia 1901, section 61 in particular.

#### **Arguments**

The Commonwealth argued that section 61 granted it the power to enter into arrangements that the executive deemed necessary as in this case. They also argued Mr Williams did not have standing to challenge the executive decisions.

Mr Williams argued that the executive had exceeded the power granted to it under section

61 and therefore the funding arrangements with Scripture Union Queensland were unlawful.

#### **Decision**

The High Court agreed that the executive had exceeded the power granted to it under the Constitution and that Mr Williams did have standing to challenge the decision of the executive.

#### **Reasons**

The High Court found that the arrangement and payments made to Scripture Union Queensland were invalid because they were beyond the executive power of the Commonwealth granted under section 61.

The court also held that the Commonwealth's executive power does not include a power to do what the Commonwealth Parliament could authorise the executive to do. In other words, just because the parliament could authorise such an arrangement and payments to Scripture Union Queensland, this did not then give the executive the right to do so unless that right was supported by other sections of the Constitution. Section 61 was not a blanket right to do whatever the executive deemed necessary.

The court also found that Mr Williams did have standing to challenge the decisions made by the executive.

#### **Epilogue**

There was a second case: *Williams v The Commonwealth (No. 2)* [2012] HCA 23. Following the first decision, the Commonwealth tried to authorise payments by passing a law called the Financial Framework Legislation Amendment Bill (No. 3) in an attempt to validate the National School Chaplaincy Program (among others). Mr Williams again challenged the validity of that statute and the court was unanimous in finding for him in this second case.

## State and federal legislation

Apart from the Constitution of Australia, there are other laws that seek to protect human rights in Australia in a more direct manner. These will be explored in more detail in Chapter 16, but are outlined briefly here.

### *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*

This Act is a very important one in the Australian framework of laws that seek to protect human rights. Under the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*, all new Bills must be compatible with the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the International Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination Against Women
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

*Source:* Attorney-General's Department.

The Act also requires the establishment of a Parliamentary Joint Committee on Human Rights.

The committee:

- examines Bills, Acts and legislative instruments for compatibility with human rights
- examines Acts for compatibility with human rights, and
- inquires into any matter relating to human rights referred to it by the Attorney-General.

**Figure 13.5** In December 2016, the '100 Million for 100 Million' campaign was launched. It strives to change the future of millions of children worldwide.



Read the following extract from the Australian Lawyers Alliance website:

The Parliamentary Joint Committee on Human Rights (PJCHR) has fulfilled its duty very well and with perhaps surprising meticulousness and forensic assessment; on 2 December 2014 it tabled its 17th Report to the Parliament of Australia. The PJCHR has been kept very busy. Many Bills that have been proposed by successive governments in relation to our treatment of vulnerable groups (and which clearly violate our international obligations) have been red flagged by the Committee. However, its powers are limited beyond recommendation, and many Bills, including the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 have passed in vibrant violation of international law.

Source: B Coyne, 'Rechampioning a charter's chances: A Human Rights Act for Australia', opinion piece first published by the Australian Lawyers Alliance (ALA) on 10 December 2014 on the ALA website.

- 1 Analyse the weakness(es) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) indicated in this extract. (A, E)
- 2 Research the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Infer and explain why this extract refers to it as being 'in vibrant violation of international law'. Do you agree? Why or why not? Justify your answer. (C, A, E)

## Racial Discrimination Act 1975 (Cth)

Racial discrimination occurs under the *Racial Discrimination Act 1975* (Cth) (RDA) when someone is treated less fairly than someone else in a similar situation because of their race, colour, descent, or national or ethnic origin. Racial discrimination is also deemed to have taken place when a rule or policy appears to treat everyone in the same way but has an unfair effect on more people of a particular race, colour, descent or national or ethnic origin than it does on others.

The RDA also sets out certain guidelines about exactly how or in what situations it is against the law to discriminate. These include things such as:

- **access to places and facilities for use by the public** (RDA, s 11) – when trying to use parks, libraries, government offices, hotels, places of worship, entertainment centres or hire cars
- **housing or accommodation** (RDA, s 12) – when buying or renting a house
- **provision of goods and services** (RDA, s 13) – when buying something, applying for

credit, using banks, seeking assistance from government departments, lawyers, doctors and hospitals, or attending restaurants, pubs or entertainment venues

- **employment** (RDA, s 15) – when seeking employment, training, promotion, equal pay or conditions of employment
- **advertising** (RDA, s 16) – when advertising for a job, stating that people from a certain ethnic group cannot apply.

If a person believes they have been discriminated against under the RDA, they can make a complaint to the Australian Human Rights Commission (AHRC), a body set up to investigate and advise in relation to matters of human rights concern in Australia. This body and the processes it uses will be explored in more detail in Chapter 16. If the Human Rights Commission is unable to resolve this complaint, matters can be brought before the Federal Court of Australia, which may make orders as it sees fit, including compensation orders. The RDA has been the subject of much debate recently, due to the federal Coalition government proposing changes to the wording of section 18C.

## The history of the *Racial Discrimination Act*

By political reporter Jane Norman, updated 21 March 2017

On one side of this debate you have libertarians and conservatives who argue the laws are too subjective and have a chilling effect on free speech.

Across the divide are the moderates and those representing ethnic communities who believe the laws effectively protect against hate speech and should remain unchanged.

Both sides agree on one issue: the Human Rights Commission's complaints handling process needs to be changed.

### So what is Section 18C?

Section 18C was added to the *Racial Discrimination Act* in 1995 and makes it illegal to offend, insult, humiliate or intimidate on the basis of a person's race, colour or national or ethnic origin.

But Section 18D provides wide-ranging exemptions including anything said or done 'in the performance of an artistic work' and in the publishing of 'a fair and accurate report' of 'fair comment'.

### How are complaints made?

Complaints can be lodged with the Human Rights Commission, which will investigate and either dismiss the complaint, or initiate conciliation processes.

If the matter cannot be resolved, it can be taken to court but – as of 2014 – fewer than 5 per cent of complaints made it this far.

Of the complaints that have made it to court, the majority were dismissed. Indigenous people have lodged most of the complaints to date, followed by members of the Jewish community.

HRC President Gillian Triggs previously noted the commission receives about 20 000 complaints each year, and under the Act, it must investigate any that are in writing.

### Why all the controversy?

The first major push to change the laws came in 2011 when News Corp columnist Andrew

Bolt was found to have breached the *Racial Discrimination Act* over two articles he wrote in 2009, in which he implied light-skinned people who identified as Aboriginal did so for personal gain.

Then-Liberal leader Tony Abbott slammed the decision and promised to repeal section 18C if he became prime minister. Well, he did become PM, but the move proved so controversial and divisive that he dumped plans to amend the Act in 2014.

Since then, there have been two high profile cases under Section 18C involving the late News Corp cartoonist Bill Leak and students from the Queensland University of Technology.

Both complaints have been dismissed but critics argue they highlight everything that is wrong with the controversial section.

### What changes are being proposed?

A recent Parliamentary Inquiry recommended some procedural changes to the way the HRC deals with complaints, to speed up the process and give the commission the power to knock back vexatious claims, or those with little prospect of success, at an earlier stage.

But it failed to make any concrete recommendations about the wording of Section 18C itself. There's a push within sections of the Government to raise the threshold by replacing the words 'insult' and 'offend' with a stronger word like 'harass'.

That view is not shared by all Coalition members though, meaning the Prime Minister will need to build consensus for change and ultimately come up with a compromise.



**Figure 13.6** Racism and racist speech is still a problem in Australia.



**Figure 13.7** Police officers at Surfers Paradise on 18 December 2005. The police presence increased after text messages began circulating, encouraging violence against ethnic groups.

## REVIEW 13.2

Read the article and answer the questions.

- 1 Identify the groups that have lodged the most complaints. (C)
- 2 Describe what changes to the law are being proposed. (C, A)
- 3 Evaluate the proposed changes. Do you agree with them? Why or why not? (A, E)

### ***Sex Discrimination Act 1984 (Cth)***

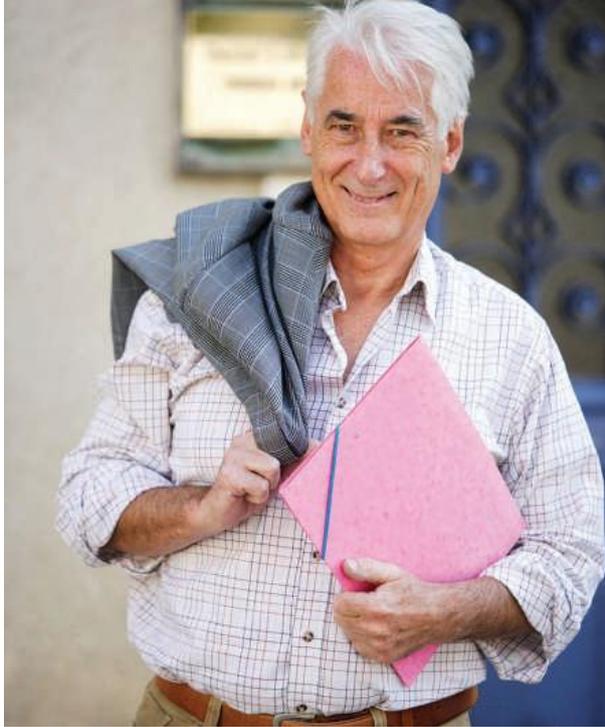
The *Sex Discrimination Act 1984 (Cth)* (SDA) prohibits discrimination on the basis of sex, marital or relationship status, actual or potential pregnancy, sexual orientation, gender identity, intersex status or breastfeeding in a range of areas of public life. Like the RDA, it specifically prohibits discrimination in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal

of land, the activities of clubs and the administration of Commonwealth laws and programs.

The processes that support the enforcement of the SDA are similar to those that assist the RDA – for example, referral to the AHRC for resolution and, if that is unable to occur, recourse to the Federal Court of Australia.

### ***Disability Discrimination Act 1992 (Cth)***

Like the RDA and the SDA, the *Disability Discrimination Act 1992 (Cth)* (DDA) exists to ensure freedom from discrimination for people suffering from a disability. It prohibits discrimination against persons with disabilities in employment, education, publicly available premises, provision of goods and services, accommodation, clubs and associations, and other contexts. Discrimination is defined to include failing to make reasonable adjustments for the person. Again, referral to the Australian Human Rights Commission and then the Federal Court of Australia is the process by which a person seeks enforcement of the Act.



**Figure 13.8** Older job seekers report that they are candidly or surreptitiously rejected through recruitment processes on the basis of age alone.

## *Age Discrimination Act 2004 (Cth)*

A more recent addition to the laws protecting the right to freedom from discrimination in Australia is the *Age Discrimination Act 2004 (Cth)* (ADA). The ADA prohibits age discrimination in areas such as employment, education, accommodation and the provision of goods and services. Under the Act, people of any age may not be unlawfully discriminated against. This has been increasingly important in Australia in recent times, as people are generally working later in life so need the protection from discrimination that this legislation provides. There are also, however, a number of exemptions from this Act. These include religious organisations, charitable organisations and so-called ‘positive’ discrimination, where someone may deliberately want to employ someone who is much older.

## **Age discrimination in the workplace happening to people as young as 45: Study**

Opinion, *The Conversation*

By Justine Irving, University of South Australia, 28 April 2017

Almost a third of Australians perceived some form of age-related discrimination while employed or looking for work in the last 12 months – starting as early as 45 years of age, our study finds.

We conducted a national survey of 2100 men and women aged 45 years and over, and 100 telephone interviews.

The most common form of perceived discrimination was negative assumptions about older workers’ skills, learning abilities or cognition.

Survey participants also reported limited or no opportunities for promotion or training, working in an organisation that under-valued them and difficulty securing work due to age.

Our findings align with previous research from the Australian Human Rights Commission, where 27 per cent of Australians aged 50 years and over had recent experience of age-based discrimination in the workplace.

In this survey, the most common forms were limited employment, promotion or training opportunities, and perceptions that older people have outdated skills or are too slow to learn new things.

Older adults in our study described a subtle pressure from their colleagues and management to stop working in order to ‘make room for the younger generation’.

This was regardless of their experience, enduring capabilities or working preferences.

Workers also faced patronising attitudes, where employers or colleagues assumed they would struggle to pick up new technology or work systems quickly, due to their age.

Some survey participants felt they were not afforded the same promotional or training opportunities as their younger colleagues.

Experiences differed for men and women in our survey.

Men were more likely to suggest discrimination based on assumptions about their physical abilities or working pace, and women reported the organisation they worked for undervaluing older workers as a group.

To avoid discrimination, interviewees reported using strategies such as minimising health conditions, concealing their age or maintaining a ‘youthful’ appearance.

Although there has been some research into industry-specific experiences of age discrimination, there are limited comparisons in research of prevalence and type of discrimination between industries.

Our data indicate that age-related discrimination traverses all industries in worrying proportions.

Industries where age discrimination was particularly common included construction, administrative services, education, manufacturing, essential services, information technology and professional service industries.

### Hiring and firing of older workers

Over two-thirds of retirees in our study, who had experienced age-related discrimination, attributed their retirement to involuntary factors such as ‘having no choice’, redundancy or dismissal.

Negative experiences at work (with a colleague, management or client) or dissatisfaction with organisational changes were often the trigger events for retirement.

Older job seekers reported being candidly or surreptitiously rejected through recruitment processes on the basis of age alone.

Education, training and a steady working history were not guaranteed to help study participants in their search for employment.

Some interviewees had found it necessary to accept work for which they felt over-qualified.

Job seeker services in particular were considered ill-equipped to assist older, highly experienced and often well-educated adults.

These findings are in line with similar research in which study participants interpreted suggestions from potential employees that they were over-qualified or experienced for a role to mean they were ‘too old’.

Our interviewees believed that younger managers can feel intimidated by older workers. This may be based on concerns regarding an older employee’s

ability to take instruction from somebody younger, learn new work methods and technologies or readily adopt change.

### Why we should fight age discrimination

Beyond the moral and ethical issues of how older adults are treated, the experiences recorded in our study can have tangible implications for individuals and employers.

The government is trying to reduce dependency on the aged care pension by encouraging workers to stay in the workforce longer and accumulate sufficient superannuation (and other assets).

Employment in high-quality work can support and protect the health of men and women as they age.

But adults who feel devalued in their workplace, or unable to find suitable employment, are more likely to enter retirement earlier than anticipated and less inclined to re-enter the workforce.

Our survey results also suggest that people experiencing work-related ageism tend to report poorer health, lower household incomes and lower total superannuation fund balances than those who have not had this experience.

Mature-aged workers bring with them a range of favourable characteristics such as stability, reliability, loyalty, experience, wisdom and maturity.

One way to tackle work-related ageism is to first address negative perceptions regarding the competency of older workers.

This may best be addressed by employment services and human resource staff who are often on the front line of helping these workers find suitable employment.

These workers can be skilled to respond to the needs of mature-age job seekers.

The introduction or reinforcement of policies supporting diversity in the workplace is another important step to support older worker participation.

*Justine Irving researches older workers, retirement and ageism at the University of South Australia.*

## REVIEW 13.3

Read the article and answer the following questions.

- 1 Identify what percentage of people aged 50 and older believe they have been discriminated against in the workforce. (C)
- 2 Describe what reasons/excuses are given for this discrimination. Name at least three. (C, S)
- 3 Analyse the solutions to this problem that are proposed. Do you believe they will help? Why or why not? (A, E)

## Anti-Discrimination Act 1991 (Qld)

At a state level, Queensland has its own Act that seeks to protect the right to freedom from discrimination. This Act prohibits discrimination on the basis of the following attributes:

- sex
- relationship status
- pregnancy
- parental status
- breastfeeding
- age
- race
- impairment
- religious belief or religious activity
- political belief or activity
- trade union activity
- lawful sexual activity
- gender identity
- sexuality
- family responsibilities
- association or relationship with a person identified on the basis of any of the above attributes.

Source: Anti-Discrimination Act 1991 (Qld).

**Table 13.2** Discrimination – grounds covered

Ground	Cth	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
Age	•	•	•	•	•	•	•	•	
Breastfeeding			•	•			•	•	
Colour	•	•	•	•	•	•		•	•
Compulsory retirement	•	•	•	•	•	•		•	•
Criminal record (irrelevant or spent conviction)	•				•		•	•	
Descent	•	•					•		
Disability	•	•					•		
Ethnicity	•	•					•		
Family responsibilities	•	•					•		
Impairment	•	•					•		
Marital status	•	•					•		
Medical record	•	•					•		
National origin	•	•					•		
Nationality	•	•					•		
Parenthood	•	•					•		
Physical features	•	•					•		
Politics	•	•					•		
Pregnancy	•	•					•		
Race	•	•					•		
Racial hatred	•	•					•		
Religion	•	•					•		
Sex	•	•					•		
Sexual harassment	•	•					•		
Sexuality	•	•					•		
Trade union activities	•	•					•		
Transgender	•	•					•		

Source: Australian Human Rights Commission (2013), 'How are human rights protected in Australian law?'. [www.humanrights.gov.au/human\\_rights\\_dialogue/aua\\_law.html](http://www.humanrights.gov.au/human_rights_dialogue/aua_law.html)

Similar to the various federal laws, this Act operates in areas related to work, education, accommodation, and supply of goods and services. Queensland

has also established its own commission, the Anti-Discrimination Commission, to investigate, enforce and/or resolve matters brought to it under the Act.

## RESEARCH 13.2

- 1 From the list provided in Table 13.2, select one area and research the laws in each state/ jurisdiction. Compare and contrast the similarities and the differences in the laws and present your findings to the class. (C, S, Cr)
- 2 It was suggested that ethical behaviour includes not interfering with the recognised rights of another individual. Describe a circumstance in which you believe this would not be possible from your 'ethical' perspective. (A, E, Cr)

## 13.2 Other human rights sources and processes

While human rights are often enshrined in legislation under Australian law, there are other important legal documents and processes that, over time, have acted to formalise and protect certain rights. Some of these are quite old but are still viewed as being significant parts of the complex web of human rights protections that exist in Australia today.

### Some important historical documents

#### *The Cyrus Cylinder*

Cyrus the Great was the first King of Persia. In 539 BCE, his Persian army conquered the ancient Medish city of Babylon as part of his military campaign to expand his empire. However, rather than acting like a conqueror, he made a number of decrees that even today still have an influence on how we look at human rights. He ordered that all slaves be freed, declared that all people had the right to choose their own religion and established

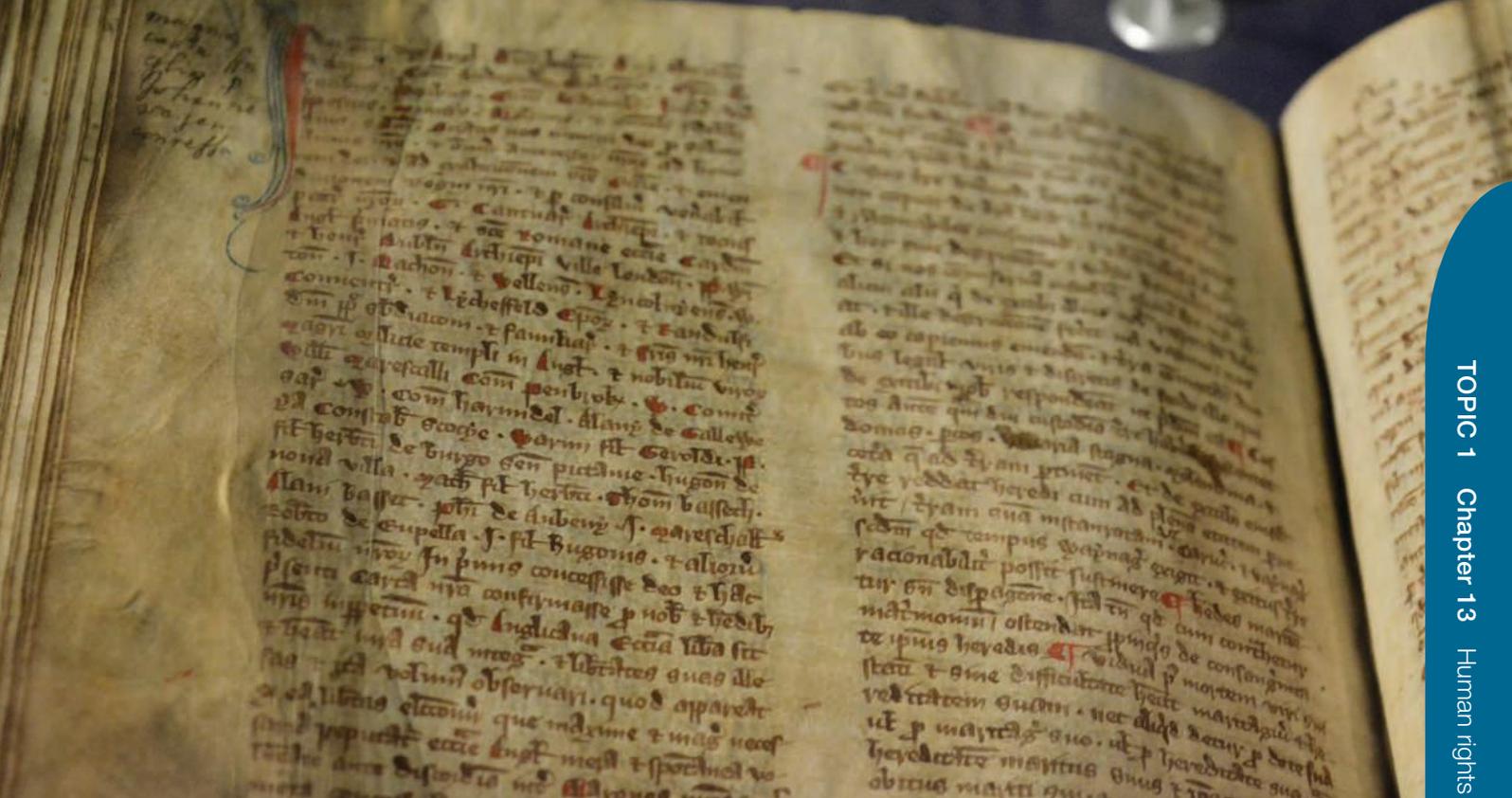
racial equality. He had these decrees recorded in Akkadian cuneiform script (a very ancient type of writing) and baked on a clay cylinder.

This is known today as the Cyrus Cylinder, and has been recognised as the world's first charter of human rights. Its provisions are seen today in the first four Articles of the Universal Declaration of Human Rights and it has been translated into all six official languages of the United Nations. While it has not been imported directly from Persia into Australian law, it set out principles that have been recognised by our own legal system and that have influenced the types of rights we hold dear in Australia today.

#### *The Magna Carta (1215)*

The Magna Carta, or 'Great Charter', is often considered the cornerstone of human rights protections in the English-speaking world.

In 1215, King John of England (the brother of the famous Richard the Lionheart) was facing much criticism. He was considered by many of the nobles in the kingdom to have violated a number of ancient



**Figure 13.9** A copy of the Magna Carta in Christ Church, Dublin

English laws and customs by which England had been governed. Following a long struggle against his own barons, he was forced to sign the Magna Carta in 1215, which set out a number of principles that later came to be thought of as human rights.

The Magna Carta established principles of due process and equality before the law, such as the right to a trial by a jury of one's peers and not being held imprisoned without the prospect of a fair trial. This came about because King John (and other kings and queens before him) had essentially acted as 'judge and jury', and would hand out punishments as they thought fit, rather than following an established legal process. It also enshrined the right of the church to be free from governmental interference, as well as the rights of all free citizens to own and inherit property.

The Magna Carta contained provisions that guaranteed protection from excessive and/or arbitrary taxation and also protected the right of widows who owned property to choose not to remarry. It also had a number of provisions forbidding bribery and official misconduct. It is clear to see that, based on these provisions alone, the Magna Carta remains one of the most important documents to protect human rights in legal history.

While the provisions of the Magna Carta have not been imported 'word for word' into Australian law, any law that sought to contradict the principles and rights protections of the Magna Carta would be viewed with scepticism and caution even today.

### **Petition of Right (1628)**

In 1628, the English Parliament sent this statement of civil liberties to King Charles I. This arose because King Charles I had exacted forced loans and quartered troops in subjects' houses as an economy measure to support his unpopular foreign policy. The Parliament of the time had refused to support this, and as a result the two sides were in conflict. Citizens were subjected to a number of unpopular measures, including arbitrary arrest and imprisonment. The Petition of Right was based upon earlier statutes and charters, and asserted four principles: (1) No taxes may be levied without consent of Parliament; (2) No subject may be imprisoned without cause shown (reaffirmation of the right of *habeas corpus*); (3) No soldiers may be quartered upon the citizenry; and (4) Martial law may not be used in time of peace.

## Declaration of the Rights of Man and of the Citizen (1789)

In 1789, the people of France violently overthrew their monarchy, executed their king and queen, and established a different form of government called a republic. The Declaration of the Rights of Man and of the Citizen (in French, La Déclaration des Droits de l'Homme et du Citoyen) was adopted by the National Constituent Assembly for the new Republic of France.

The Declaration stated that all citizens are to be guaranteed the rights of 'liberty, property, security, and resistance to oppression'. It argued that the need for law derives from the fact that 'the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights'.

Source: United for Human Rights.



Figure 13.10 A copy of the Declaration of the Rights of Man

## The First Geneva Convention

This came about as a result of the horror that one man felt following his visit to wounded soldiers after a battle in 1859. A Swiss businessman called Henry Dunant was shocked by the inadequate medical aid and lack of facilities to help these soldiers. His experiences led him to suggest:

- a permanent relief agency for humanitarian aid in times of war
- a government treaty recognising the neutrality of the agency and allowing it to provide aid in a war zone.

The proposal led to the establishment of the Red Cross in Geneva. In 1864, the Geneva Convention was established. It was the first codified international treaty that covered the treatment and care of sick and wounded soldiers in the battlefield. It has been amended several times since, but remains important today in terms of how the Australian armed forces conduct themselves in battle as well as how they would expect to be treated. It has also evolved to protect civilians caught in conflict situations and guarantees the right to a fair trial if a person is accused of a war crime (such as executing prisoners or taking hostages, among other things).

In recent times, a number of people and/or countries have been accused of breaching the Geneva Conventions. This topic is discussed further in Chapter 15.

### RESEARCH 13.3

Research one of the following to summarise the alleged breaches of the Geneva Convention. Investigate what they were accused of doing and explain whether this was a breach of the Geneva Convention:

- 1 Saddam Hussein
- 2 the United States and Guantanamo Bay
- 3 Australian troops in Afghanistan and Iraq
- 4 the Russian invasion of Ukraine. (S, A, E)

## Australian processes

### Royal Commissions

In Australia, the highest form of inquiry into matters of public importance is a Royal Commission (see Chapter 12). Royal Commissions are a type of public inquiry by bodies appointed by the executive government to provide advice or to investigate some issue of public importance. These are often, but not always, into issues that may be considered human rights matters, such as the protection of the rights of the child as demonstrated by the Royal Commission into Institutional Responses to Child Sexual Abuse which reported in 2017 (see Chapter 12).

Royal Commissions are established under specific legislation – the *Royal Commission Act 1902* (Cth) – that confers specific powers of investigation on them. These powers include but are not limited to the ability to call and cross-examine witnesses, rights of entry and ‘phone-tapping’ while also providing protection to witnesses and inquiry members from legal action such as defamation.

In Australia, there have been over 120 Royal Commissions at the Commonwealth level (state governments can also call them) into matters such as corruption of public officials, inquiries into major

natural disasters such as fires and floods, and more recently, institutional child abuse. They remain the last resort of governments when an issue is of particular public importance or sensitivity, and a government wishes to have the matter investigated but also to be seen as independent from the process. As such, Royal Commissions are an important tool for the protection of human rights in our legal system today. The most recent Royal Commission is into the Australian banking industry. This has come about in response to a number of concerns raised about the conduct of and large profits made by Australian banks. It could be argued that conduct by the banks in this way infringes the rights of Australians to their own money, as bank practices are regarded by many as unnecessarily ‘profit hungry’. The counter-argument is that Australia needs a strong banking system and that banks are expected to focus on making a profit for their shareholders. As a result of public concern, a Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was announced by Prime Minister Malcolm Turnbull in December 2017, following an admission by the banking industry itself that such a step was necessary to restore public confidence in the financial system.

### Growing calls for a Bank Royal Commission

Adele Ferguson, 5 August 2017

When Commonwealth Bank boss Ian Narev hits the podium on August 9 to present the bank’s full-year financial results, he will need to think long and hard about the way he answers questions relating to serious allegations that the country’s biggest bank breached money-laundering and terrorism finance laws.

He should also think about the reason for the growing calls for a Royal Commission into the financial services sector and the anger felt in the community about this latest turn of events.

Austrac has launched civil proceedings in the federal court alleging that CBA failed to comply with the law on more than 50 000 occasions.

Greens Treasury spokesperson Senator Peter Whish-Wilson says the Turnbull government needs to relent on a Royal Commission after the latest scandal and the board should cancel all executive bonuses.



Figure 13.11 Ian Narev, former CEO of CBA

‘I am calling on the board of Commbank to scrap any bonus payments they were considering giving to the CEO and senior executives. The public will never

forgive an organisation that pays millions in bonuses to people who couldn't even ensure that their company could obey laws put in place to stop organised crime,' Senator Whish-Wilson said on Friday.

It won't be the first time Narev has had to face questions about an alleged scandal involving the bank's compliance and culture. Since he took the top job in December 2011, he and the bank have had to front a series of inquiries and respond to a series of scandals, including those over financial planning and life insurance.

Last year CBA shareholders took a stand and slapped the bank with a historic first strike against its remuneration report.

My colleague Clancy Yeates reported at the time that the 'trigger for the backlash was a move to link Narev's long-term bonus to new 'soft targets', and concerns about the payment of multi-million-dollar bonuses despite a series of scandals.'

Despite all of this, the board – past and present – has never felt compelled to make any executives responsible. In some cases, executives involved in the planning scandal left the bank and set up shop elsewhere.

When Narev presents the bank's full-year results, he will receive a series of questions from analysts about how CBA plans to deal with the government's financial intelligence unit Austrac's legal action, how much it is likely to cost, whether it will make any provisions and what sort of remedies are in place.

For now, the best the bank will do is inform the ASX that the matter is subject to court proceedings.

'We are currently reviewing Austrac's claim and will file a statement of defence,' CBA said in a statement to the ASX on Friday.

It says it will keep the market informed of any updates.

But the elephant in the room is how a company considered to be fabulous with big IT can get itself into a situation where Austrac has had to resort to a 500-page statement of claim in the Federal Court.

The regulator alleges CBA committed 53 506 contraventions of the Act, which attracts a maximum fine of \$18 million per transaction or equivalent to \$966 billion. If the allegations hold up, it is highly unlikely that such a figure would be the ultimate penalty as it would rock the sector and involve nationalising the bank.

But even a fraction of that amount would have an impact on the financial accounts of the bank, never mind the reputational damage to a brand that has already taken a beating – all of its own doing.

Managing risks and engendering trust is the be-all and end-all of a bank. Without it, things fall apart. It is

what a banking licence is all about. It is why getting the culture right is paramount and it is why the board needs to show some strength.

If the allegations are even partly right, CBA will have a lot of damage to repair.

As outlined in the summary of Austrac's statement of claim the Australian Federal Police informed CBA that numerous accounts in one syndicate were connected to a serious investigation into serious criminal offences, but CBA allowed some of the accounts to remain open and further transactions occurred. There are a litany of other cases where checks and balances didn't happen.

CBA isn't the first bank to be busted for failure to comply with anti-money-laundering laws.

In 2012 – while CBA was rolling out a new ATM system, known as Intelligent Deposit Machines (IDMs), which are at the heart of the latest allegations – HSBC was fined US\$1.9 billion for a 'blatant failure' to implement anti-money-laundering controls.

HSBC, for its part, copped the fine and said it was 'profoundly sorry for past mistakes' that allowed Mexican drug traffickers to deposit hundreds of thousands of dollars each day in HSBC accounts.

The spotlight again went on money laundering in 2014 when Standard Chartered was fined US\$300 million by the New York State Department of Financial Services. It followed a similar fine in 2012 that related to its anti-money-laundering compliance, which was described as leaving the American financial system 'susceptible to terrorists and drug kingpins'. All up, in 2012 Standard Chartered paid \$US667 million to regulators.

Other banks have been slapped with fines for failure to have the proper systems in place to spot and report suspicious transactions.

Austrac alleges CBA didn't carry out any risk assessment of money laundering or counter terrorism when it rolled out its IDMs, which enabled crooks to set up fake accounts and deposit money anonymously.

When word got around that CBA had a blind spot in its systems, crooks went into overdrive and cash deposits into IDMs started to rise exponentially. Austrac alleges the bank failed to investigate what might be going on. Nor did it do anything in response to alerts raised in internal transaction monitoring systems or review its money laundering risk assessment despite identification by law enforcement of significant instances of money laundering through IDMs.

While CBA mulls over its response to the legal action, the investment community – and Australians – want some clarity and leadership.

In the case of CBA's financial planning scandal, compliance systems were sadly lacking, with customer files going missing and dodgy planners breaching the law but managing to flout the lax compliance procedures.

CBA's life insurance scandal put the spotlight on the \$44 billion life insurance sector, including an investigation by ASIC, which found that the data and information on individual insurers was not 'entirely reliable or consistent', and some systems were antiquated to the point where they didn't readily allow

proper reporting, had poor data quality or were too heavily reliant on key staff.

How the sector has got away with such substandard systems, given reliable systems are the lifeblood of a financial services business, beggars belief.

But in the case of anti-money-laundering systems, Westpac, ANZ and NAB are confident their machines are fully compliant. Let's hope this court case sends a message to one and all how important it is to get it right.

## REVIEW 13.4

Read the article and answer the questions.

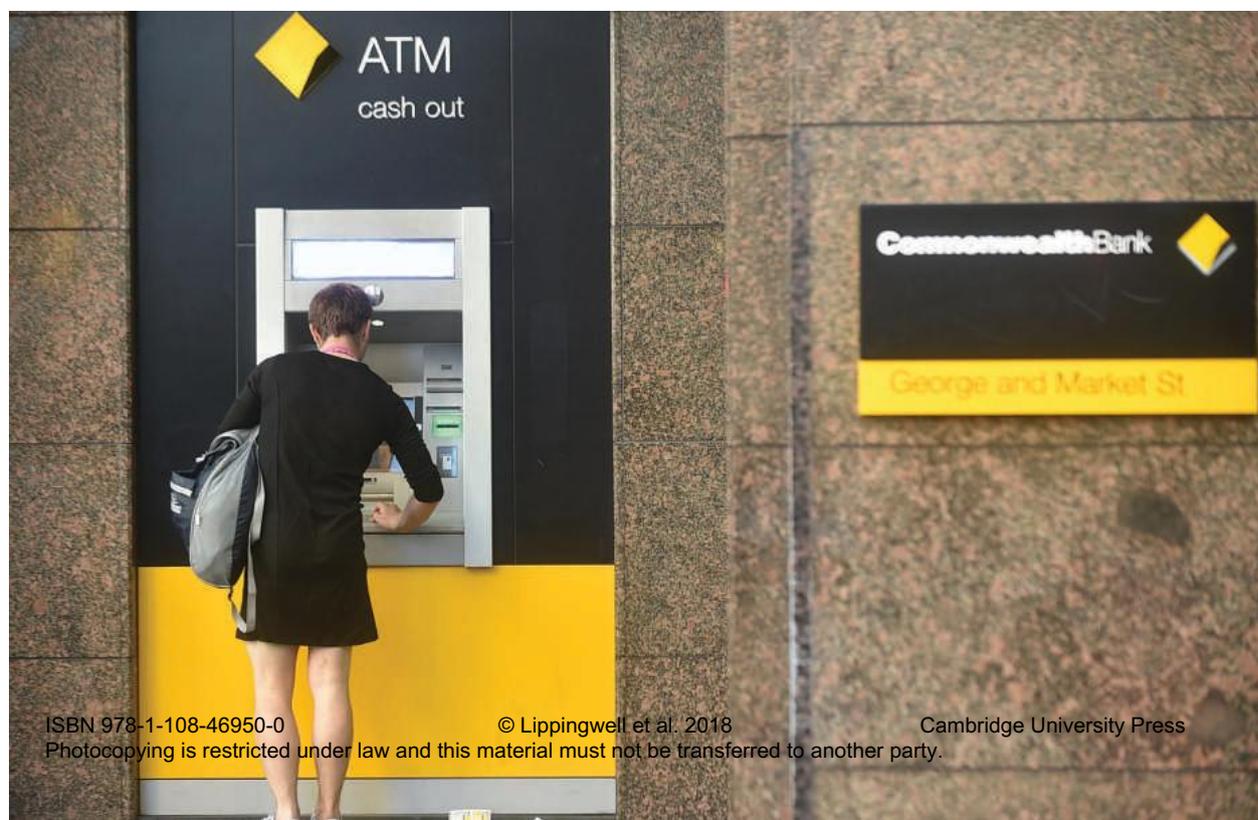
- 1 Identify the inquiries/bodies that have sought to regulate the behaviour of the banks in Australia. (C, S)
- 2 Explain what problems exist with the behaviour of the banks according to the author. (A, E)
- 3 Assess and evaluate how the Royal Commission into banking conduct is an important step in protecting the human rights of Australian citizens. Justify why such a step was or was not necessary. (A, E)

## Australian Human Rights Commission

This body will be explored in more detail in Chapter 16, but in essence the laws Australia has passed that seek to protect human rights, such as

the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth), are enforced through the Australian Human Rights Commission (AHRC). This organisation has powers to investigate and try to resolve matters that may involve breaches of these laws.

**Figure 13.12** The Commonwealth Bank has also faced scrutiny by the Royal Commission.



# Chapter review

## Chapter summary

- The term ‘human rights’ is closely linked to the values we believe and accept in our society.
- Human rights are based on the principle that an individual should be treated with dignity, freedom and respect.
- Legal rights are those rights that exist in either common or statute law.
- The rules established in negligence are a good example of common law rights.
- Australia’s legal system has a number of laws that deal with the protection of human rights at the state and federal levels.
- Section 6(1) of the *Anti-Discrimination Act 1991* (Qld) aims ‘to promote equality of opportunity for everyone by protecting them from unfair discrimination’.
- Moral rights exist within our society, and in some respects have some formal binding action on us.
- It is not ethical to act towards another person in a manner that is discriminatory or negligent.
- Customary rights originate from customs and traditions, but they have no legal basis.
- The Australian Constitution is a set of rules that outlines the legal and political system under which Australia is governed.
- It is the role of the High Court to interpret the meaning of the Australian Constitution and to settle any disputes.
- Australia is also part of an international framework of processes that attempts to protect human rights around the world, through its involvement with the United Nations.
- The most relevant and most quoted United Nations convention dealing with rights is the Universal Declaration of Human Rights (1948).

## Short-response questions

- 1 List the advantages and disadvantages of using Aboriginal customary laws as part of the criminal system. (C, A, E)
- 2 Discuss whether you think there would be a problem with different penalties handed out for similar crimes just because the courts deem it to be a cultural issue. (A, E)

## Extended-response questions

- 1 Table 13.2 highlights the areas in which some form of protection with regard to discrimination has been provided in each state and territory. Discuss why different states/territories have varying forms of protection and provide some suggestions for how all states/territories could be protected equally. Is this necessary? (C, A, Cr)
- 2 Visit the Department of Immigration and Citizenship website and, using the list of democratic rights and liberties, research these in our society. Prepare a presentation on how these rights and liberties impact our lives. (C, A, E, Cr)

## Response-to-stimulus questions

- 1 'The United States should not follow the Australian system when it comes to gun control. The rights of the individual are always more important than the rights delegated to the state.' Write a 200–300-word persuasive speech about this statement. Try to include at least two arguments from either side of the debate and persuade your audience that your perspective is the correct one. (C, A, E, Cr)
- 2 Analyse the cartoon in Figure 13.13. Infer what points the author is trying to make about the banking system and the federal government. Do you agree/disagree? Justify your response. (A, E)



Figure 13.13 Cartoon by Fiona Katauskas

## CHAPTER 14

Human rights part 2 –  
international context

## CHAPTER OBJECTIVES

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

- describe the main features of international law developed from the International Bill of Human Rights
- describe the main features of principal treaties
- explain the
  - process by which treaty obligations translate into domestic law through accession or ratification, the role of reservations, and the effect of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
  - rights of states (sovereignty, equality, political independence and territorial integrity), including Articles 2.1, 2.4 and 2.7 of the United Nations Charter
  - role of the UN, its agencies and other organisations, including the United Nations High Commissioner for Refugees
- create responses that communicate meaning to suit the intended purpose.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

## Key concepts/legal terminology you will encounter in this chapter

- |                  |                    |
|------------------|--------------------|
| • accession      | • ratification     |
| • bilateral      | • reservation      |
| • Bill of Rights | • Royal Commission |
| • convention     | • sovereignty      |
| • covenant       | • states           |
| • human rights   | • treaties         |
| • multilateral   |                    |

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Age Discrimination Act 2004* (Cth)
- *Anti-Discrimination Act 1991* (Qld)
- *Anti-Terrorism Act (No. 2) 2005* (Cth)
- Australian Constitution (*Commonwealth of Australia Constitution Act 1900* (Imp) 64 & 64 Vict c 12)
- *Australian Security Intelligence Organisation Act 1979* (Cth)
- *Commonwealth Electoral Act 1918* (Cth)
- *Commonwealth Franchise Act 1902* (Cth)
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
- Convention on the Rights of the Child 1577 UNTS 3
- Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967
- Criminal Code 1995 (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Freedom of Information Act 1982* (Cth)
- *Human Rights Act 2004* (ACT)
- *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)
- *Human Rights (Sexual Conduct) Act 1994* (Cth)
- *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth)
- International Covenant on Civil and Political Rights 99 UNTS 1
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD)
- Magna Carta 1215
- *Organisation Legislation Amendment (Terrorism) Act 2003* (Cth)
- *Privacy Act 1988* (Cth)
- *Queensland Elections Act 1885* (Qld)
- *Racial Discrimination Act 1975* (Cth)
- *Security Legislation Amendment (Terrorism) Act 2002* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- United Nations Charter
- Universal Declaration of Human Rights 1948

## CASES

- *Agiza v Sweden* CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005
- *Case of the Mapiripán Massacre*
- *Federal Republic of Germany v Giovanni Mantelli and Others*. Order No. 14201
- *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)
- *Judge v Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998
- *Germany v United States of America (LaGrand Case)*, International Court of Justice (ICJ), 27 June 2001
- *Larrañaga v Philippines* UN. Doc. CCPR/C/87/D/1421/2005
- *Lawless v Ireland* (no. 3) ECHR 1 Jul 1961
- *Robert Faurisson v France*, Communication No. 550/1993, UN Doc. CCPR/C/58/D/550/1993(1996)
- *Sunday Times v United Kingdom (No. 1)* ECHR (26 April 1979)
- *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
- *Western Sahara* (Advisory Opinion) of 16 October 1975

## LEGAL ODDITY

In Malta, a strange form of discrimination in law exists. A kidnapper, ‘after abducting a person, shall marry such person, he shall not be liable to prosecution’. This means that the rights of women in this country are subject to a law that allows them to be kidnapped and then potentially forced into marriage. This law has been the subject of international condemnation by numerous human rights groups, but currently still exists.

## 14.1 International bodies and human rights

In the last chapter, we saw an overview of how human rights were protected, with a focus on some of the processes used to protect these rights in a broad Australian context. This topic will be explored in more detail in Chapter 16. An examination of human rights protections would be incomplete without a detailed consideration of how rights are viewed and protected from an international perspective. This means that the role of the United Nations in promoting and protecting human rights must be considered more closely. Australia has acknowledged a series of United Nations conventions dealing with rights, although they are not a formal part of our laws. The most relevant and most quoted one is the Universal Declaration of Human Rights (1948), some Articles of which have already been discussed. The role and function of the United Nations need to be examined in order to understand how the Universal Declaration of Human Rights came to be and what Australia's obligations may be in relation to it.

### The United Nations

#### Background

In 1945, the leaders of 50 nations came together in San Francisco with representatives from many non-government organisations (NGOs). The meeting



Figure 14.1 The United Nations building in New York

took place following the end of World War II, and was held with the determination that the world would never again experience such widespread destruction. The United Nations was thus formed. The UN Charter begins with the following words:

We the peoples of the United Nations determined:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom.

Source: United Nations.

#### *The post-war record of the United Nations*

In its roughly 70-year history, the UN has:

- promoted the idea that everyone has human rights regardless of where they live
- led numerous peacekeeping operations
- served as the hub of a massive body of international law
- enabled dialogue to continue between hostile nations
- kept all nations as members, even those that have been at odds with the international community
- acted as a court of world opinion on issues of great importance.

Most importantly, since the organisation's formation, no further world wars have occurred because the United Nations has acted as a forum in which to discuss problems, has worked hard to bring together rival groups to prevent war and, significantly, has made the powerful nations of the world significant participants in the United Nations by giving them extraordinary powers as the five permanent members of the Security Council.

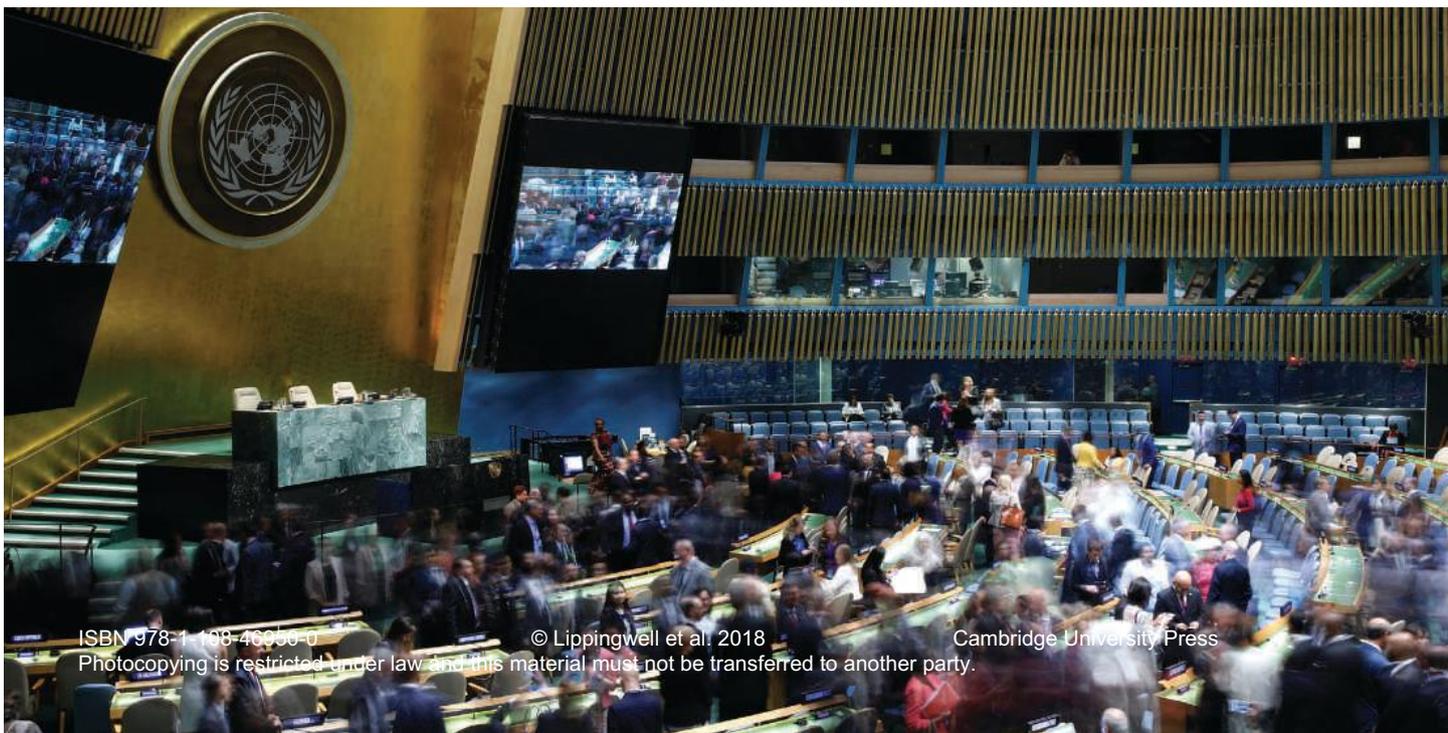
## *The organisation of the United Nations into separate bodies*

The United Nations is divided into a number of separate bodies, each with a specific function and areas of control. These are:

- The **General Assembly** is like the parliament and voting body of the United Nations for all member states. Each country has one vote and this body makes appointments to the other bodies. It may also make recommendations to the Security Council, decides on admission of new members and develops a UN budget.
- The **Secretariat** comprises the Secretary-General and tens of thousands of international UN staff members who carry out the day-to-day work of the United Nations as mandated by the General Assembly and the organisation's other principal organs. UN staff members are recruited internationally and locally, and work in duty stations and on peacekeeping missions all around the world.
- The **International Court of Justice (ICJ)** is the judicial body of the United Nations and is based in the Hague (Netherlands). The role of the ICJ is to settle legal disputes submitted to it by nation-states according to the principles of international law. The ICJ will be examined more thoroughly in Chapter 15.
- The **Security Council** is responsible for the maintenance of international peace and security. It takes the lead in determining the existence of a threat to the peace or act of aggression. The Security Council has 15 members consisting of five permanent members (the United States, the United Kingdom, China, the Russian Federation and France) and 10 non-permanent members. Each member has one vote and under the UN Charter, all Member States have to comply with Security Council decisions. It calls upon the parties to a dispute to settle it by peaceful means and recommends methods of adjustment or terms of settlement. The Security Council has the power to impose sanctions or even authorise the use of force to maintain or restore international peace and security.

Chapter VII of the UN Charter states that the UN Security Council can act under Article 42 of this part of the charter to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'. However, for nearly 50 years after World War II, tension existed between the two most powerful nations (or ideologies) of that era – the United States and the Soviet Union (the largest country of which was Russia). This was known as the Cold War. It prevented the Security Council from exercising its military

**Figure 14.2** The United Nations General Assembly during a meeting



powers because either the United States or the Soviet Union would veto any Security Council resolution that threatened its interests. A negative vote by any one of the five permanent members of the Security Council (the United States, Russia, China, Britain and France) can veto any of the council's measures or proposals or any changes to the United Nations as a whole. This makes UN reform very difficult to secure.

- The **Economic and Social Council** is the principal body responsible for economic, social and environmental issues. It is also in charge of the implementation of internationally agreed development goals and is the United Nations' central body for reflection, debate and innovative thinking on sustainable development.
- The **Trusteeship Council** was established to provide international supervision for 11 Trust Territories (such as the Cameroons, New Guinea and Western Samoa, among others) and ensure that adequate steps were taken to prepare the Territories for self-government and independence. By 1994, all Trust Territories had attained self-government or independence, so the Trusteeship Council suspended operations. It now only meets as required – by its decision or the decision of its president, or at the request of a majority of its members or the General Assembly or the Security Council.

### *The UN Charter*

The UN Charter is similar to a constitution, outlining the rights and obligations of the members of the United Nations. The purposes of the United Nations, as stated in the charter, are to:

- cooperate in solving international problems of an economic, social, cultural and humanitarian nature
- promote respect for human rights.

The UN Charter also states that the United Nations should act in accordance with the following principles:

- the sovereign equality of its members
- the peaceful settlement of international disputes
- refraining from the threat or use of force against any nation
- non-intervention in matters within the domestic jurisdiction of any nation.

The UN Charter can only be amended by a two-thirds vote in the General Assembly of all member nations and the five permanent members of the Security Council. It was signed by 50 countries on 26 June 1945 and laid out the main functions and structure of this world body. The United Nations then officially came into existence on 24 October 1945, when the UN Charter was ratified by China, France, the Soviet Union, the United Kingdom, the United States and a majority of the other members.

## International Human Rights Treaties and Conventions

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights. This declaration represents basic human rights and protections inherent to every human being and has been endorsed by all countries. Its framework covers a broad range of areas that include civil, political, cultural, economic and solidarity rights. The following are some examples of the rights and freedoms it enshrines.





**Figure 14.3** The right to seek asylum: Syrian refugees arrive on a beach covered with dinghies and life-jackets on the Greek island of Lesbos.

## Universal Declaration of Human Rights (1948)

### Article 1

All human beings are born free and equal in dignity and rights ...

### Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ...

### Article 3

Everyone has the right to life, liberty and security of person ...

### Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination ...

### Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him ...

### Article 13(1)

Everyone has the right to seek and to enjoy in other countries asylum from persecution ...

### Article 16(1)

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution ...

### Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

### Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

### Article 20(1)

Everyone has the right to freedom of peaceful assembly and association.

### Article 26(1)

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit ...

*Source:* United Nations (2013).

In addition to the Universal Declaration of Human Rights (1948), Australia is also a signatory to a number of international **treaties** relating to the protection of human rights. Treaties are agreements between countries (often called **states**), which have international binding agreement. A treaty is sometimes referred to as a charter, **convention**, **covenant**, protocol and/or statute (see Chapter 15).

**Multilateral treaties** are agreements entered into by more than two nation-states), while **bilateral treaties** are agreements between two nation-states. Treaties in general will be explored more thoroughly in Chapter 15. Some of these treaties, however, are worth examining more closely from a human rights perspective.

**treaty** a formalised agreement between two or more nations about a particular area of mutual interest (such as trade, prisoner exchanges or human rights); often used synonymously with convention, covenant, charter, protocol and/or statute

**states** countries recognised as having legal standing under international law as they have a defined territory, one government and a permanent population coupled with the ability to enter into relationships recognised by law with other states

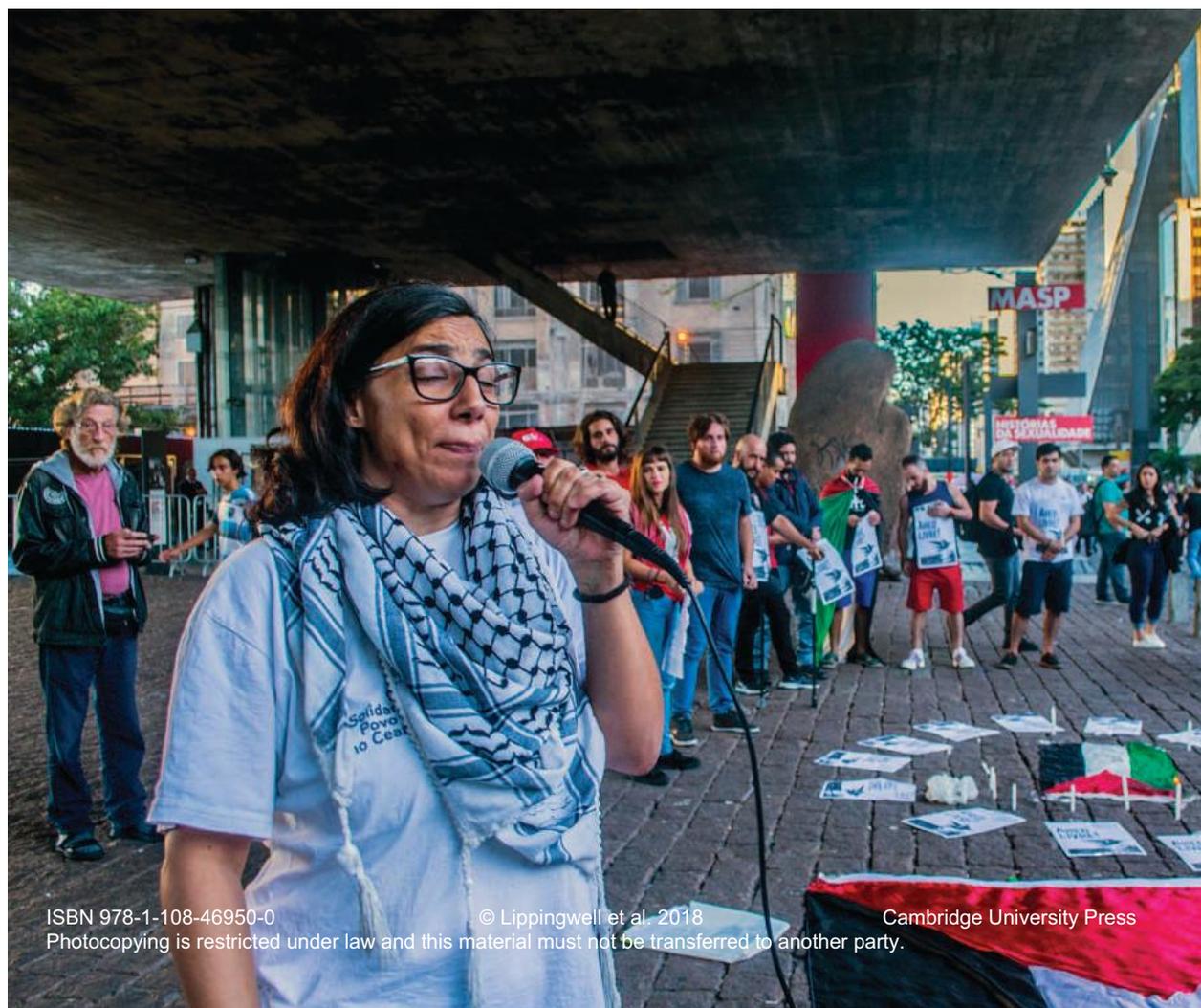
**convention** similar to a treaty but more often on specific matters or issues, and sometimes of a less formal nature; often used synonymously with treaty, covenant, charter, protocol and/or statute

**covenant** similar to a convention in effect and use; often used synonymously with treaty, convention, charter, protocol and/or statute

**multilateral treaty** a formal agreement entered into by more than two nation-states

**bilateral treaty** a formal agreement entered into by two nation-states

**Figure 14.4** The right to freedom of opinion and expression: civil rights activists of the Palestinian community of Brazil gather in solidarity with Ahd Tamimi, a young Palestinian girl incarcerated by Israel in 2017.



## CHECK THIS OUT

Visit the United Nations Department of Public Information website and see how many UN conventions deal with human rights. In particular, look at the Articles in the Universal Declaration of Human Rights (1948) and list the rights that are most important to you. (S, A ,E)

## CASE STUDY 14.1

### *Toonen v Australia, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)*

#### Facts

Nicholas Toonen was a gay man living in Tasmania. He challenged sections 122(a), 122(c) and 123 of the Criminal Code 1924 (Tasmania). These sections outlawed sexual acts between men and effectively allowed aspects of his private life to be the subject of police investigation. If an offence was suspected, they could also detain him. Toonen alleged that the existence of these laws was a threat to his privacy and liberty, even if they were not enforced because of his homosexuality, and his work as a sexual health worker and gay rights activist. He claimed these laws violated Articles 17, 2(1) and 26 of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, because the laws discriminated against him on the basis of his sexual identity and orientation.

Interestingly, the Australian federal government presented arguments in support of Toonen and against the submissions of the Tasmanian state government.

#### Issues

Did the laws of Tasmania violate the International Covenant on Civil and Political Rights?

#### Law

Sections 122(a), 122(c) and 123 of the Criminal Code 1924 (Tasmania) and Articles 17, 2(1) and 26 of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

#### Arguments

Tasmania denied that Toonen's rights under the ICCPR had been violated on the basis that the laws had not actually been enforced against Toonen as the most recent prosecution of the stated provisions was some 10 years earlier. Tasmania also argued that the provisions were necessary to protect Tasmanians from the spread of HIV/AIDS and moral depravity.

Toonen and the Australian Government rejected the arguments of the Tasmanian Government, and claimed that the laws violated Toonen's rights because they discriminated against him on the basis of his sexual orientation.

#### Decision

Toonen had been discriminated against for the purposes of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, even though the criminal law had not been enforced against him.

It was recommended that Tasmania repeal the sections of the law that violated the ICCPR.

#### Reasons

The threat of enforcement of the laws, as well as their adverse impact on public opinion about homosexuals, meant the laws had been to the detriment of Toonen. The criminalisation of acts between men was not a reasonable measure and as similar laws had been repealed in all other Australian states, Tasmania's invasion of Toonen's privacy could not be deemed reasonable.

## *International Covenant on Civil and Political Rights 99 UNTS 1*

This covenant came into force in 1976 and commits its parties to respect a number of important civil and political rights. These include the rights of an individual to life, freedom of assembly, electoral rights, freedom of religion, freedom of speech, a fair trial and due process.

## *International Covenant on Economic, Social and Cultural Rights 993 UNTS 3*

In 1976, this covenant came into force and commits its parties to work towards the granting of economic, social and cultural rights, including labour rights, the right to self-determination, freedom from discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It also protects the right to

housing and health, the right to education, and the right to an adequate standard of living.

## *United Nations Convention on the Rights of the Child 1577 UNTS 3 (UNCRC)*

This convention in 1989 set out the civil, political, economic, social, health and cultural rights of children. A child is defined as any human being under the age of 18, unless the age of majority is attained earlier under a country's own legislation. Every child is deemed to have basic rights, including the right to life, to be raised by their parents within a family or cultural grouping, and to have a relationship with both parents, even if they are separated. Children also have a right to their own name and identity. It also requires signatories to provide for separate legal representation for a child in judicial disputes concerning their care and asks that the child's viewpoint be heard and prohibits capital punishment for children.

**Table 14.1** A simplified version of the United Nations Convention on the Rights of the Child

<b>Article 1</b> Everyone under 18 years of age has all the rights in this Convention.	<b>Article 2</b> The Convention applies to everyone whatever their race, religion, abilities, whatever they think or say, whatever type of family they come from.
<b>Article 3</b> All organisations concerned with children should work towards what is best for each child.	<b>Article 4</b> Governments should make these rights available to children.
<b>Article 5</b> Governments should respect the rights and responsibilities of families to guide their children so that, as they grow up, they learn to use their rights properly.	<b>Article 6</b> Children have the right to live a full life. Governments should ensure that children survive and develop healthily.
<b>Article 7</b> Children have the right to a legally registered name and nationality. Children also have the right to know their parents and, as far as possible, to be cared for by them.	<b>Article 8</b> Governments should respect a child's right to a name, a nationality and family ties.
<b>Article 9</b> Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.	<b>Article 10</b> Families who live in different countries should be allowed to move between those countries so that parents and children can stay in contact, or get back together as a family.
<b>Article 11</b> Governments should take steps to stop children being taken out of their own country illegally.	<b>Article 12</b> Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.
<b>Article 13</b> Children have the right to get and to share information, as long as the information is not damaging to them or to others.	<b>Article 14</b> Children have the right to think and believe what they want and to practise their religion, as long as they are not stopping other people from enjoying their rights. Parents should guide children on these matters.

Table 14.1 (Continued)

<b>Article 15</b> Children have the right to meet with other children and young people and to join groups and organisations, as long as this does not stop other people from enjoying their rights.	<b>Article 16</b> Children have the right to privacy. The law should protect them from attacks against their way of life, their good name, their family and their home.
<b>Article 17</b> Children have the right to reliable information from the media. Mass media such as television, radio and newspapers should provide information that children can understand and should not promote materials that could harm children.	<b>Article 18</b> Both parents share responsibility for bringing up their children and should always consider what is best for each child. Governments should help parents by providing services to support them, especially if both parents work.
<b>Article 19</b> Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them.	<b>Article 20</b> Children who cannot be looked after by their own family must be looked after properly by people who respect their religion, culture and language.
<b>Article 21</b> When children are adopted the first concern must be what is best for them. The same rules should apply whether children are adopted in the country of their birth or if they are taken to live in another country.	<b>Article 22</b> Children who come into a country as refugees should have the same rights as children who are born in that country.
<b>Article 23</b> Children who have any kind of disability should receive special care and support so that they can live a full and independent life.	<b>Article 24</b> Children have the right to good quality health care, clean water, nutritious food and a clean environment so that they will stay healthy. Richer countries should help poorer countries achieve this.
<b>Article 25</b> Children who are looked after by their local authority rather than their parents should have their situation reviewed regularly.	<b>Article 26</b> The government should provide extra money for the children of families in need.
<b>Article 27</b> Children have the right to a standard of living that is good enough to meet their physical and mental needs. The government should help families who cannot afford to provide this.	<b>Article 28</b> Children have the right to an education. Discipline in schools should respect children's human dignity. Primary education should be free. Wealthier countries should help poorer countries achieve this.
<b>Article 29</b> Education should develop each child's personality and talents to the full. It should encourage children to respect their parents, their cultures and other cultures.	<b>Article 30</b> Children have the right to learn and use the language and customs of their families, whether or not these are shared by the majority of the people in the country where they live, as long as this does not harm others.
<b>Article 31</b> Children have the right to relax, play and to join in a wide range of leisure activities.	<b>Article 32</b> Governments should protect children from work that is dangerous or that might harm their health or education.
<b>Article 33</b> Governments should provide ways of protecting children from dangerous drugs.	<b>Article 34</b> Governments should protect children from sexual abuse.
<b>Article 35</b> Governments should make sure that children are not abducted or sold.	<b>Article 36</b> Children should be protected from any activities that could harm their development.
<b>Article 37</b> Children who break the law should not be treated cruelly. They should not be put in a prison with adults and should be able to keep in contact with their family.	<b>Article 38</b> Governments should not allow children under 15 to join the army. Children in war zones should receive special protection.
<b>Article 39</b> Children who have been neglected or abused should receive special help to restore their self-respect.	<b>Article 40</b> Children who are accused of breaking the law should receive legal help. Prison sentences for children should only be used for the most serious offences.
<b>Article 41</b> If the laws of a particular country protect children better than the articles of the Convention, then those laws should override the Convention.	<b>Article 42</b> Governments should make the Convention known to all parents and children.

The Convention on the Rights of the Child has 54 articles in all. Articles 43–54 are about how adults and governments should work together to make sure that all children get all their rights. Go to [www.unicef.org/crc](http://www.unicef.org/crc) to read all the articles.

Source: UNICEF.

Review the simplified UNICEF version of the United Nations Convention on the Rights of the Child.

- 1 Identify some of the most important rights of the child in your opinion. Name your top five and justify why they are the most worthy of protection. (C, S, A, E)
- 2 Articles 43–54 are about how adults and governments should work together to make sure that all children get all their rights. List at least three of the responsibilities imposed on governments in these articles. You may have to follow the link on the UNICEF website to examine these. (C, S)

## SIDEBAR

Australia has been the subject of some criticism internationally for the processing and settlement offshore (not in Australia) of asylum seekers. Go to the Australian Human Rights Commission website and see what the AHRC has to say about our government's policies. Do you agree or disagree? (C, A, E)

### *Convention Relating to the Status of Refugees 1951 and Protocol (1967)*

This Convention elaborates on Article 13 of the 1948 Universal Declaration of Human Rights. It recognises the right of persons to seek asylum from persecution in other countries. It defines who is a refugee, and outlines what asylum is and the rights of individuals who are granted asylum. It also details the responsibilities of nations that grant asylum.

### *International Convention on the Elimination of All Forms of Racial Discrimination 1966*

This convention commits parties to the elimination of all forms of racial discrimination. It requires the elimination of racial segregation and the criminalisation of incitement of racial hatred as well as the promotion of understanding and tolerance.

### *Convention on the Elimination of All Forms of Discrimination Against Women 1979*

This convention outlines non-discrimination requirements and women's rights, with an emphasis on political life, representation, and rights to nationality, education, employment and health. It also details women's right to equality in marriage and family life, along with the right to equality before the law.

A number of these international treaties combine to form the International Bill of Rights.

It consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

**Figure 14.5** Discrimination still exists against women despite the 1979 Convention. The wage gap between men and women for doing the same work for differing pay is just one such example.



## UNESCO and Pakistan stand up for girls' right to education

UNESCOPRESS, 6 November 2012

UNESCO Director-General Irina Bokova and the President of Pakistan, Asif Ali Zardari, will host a high-level advocacy event called 'Stand Up for Malala – Stand Up for Girls' Right to Education' on 10 December in Paris. The event, which will coincide with the United Nations Human Rights Day, is designed to generate political will and accelerate action in favour of every girl's right to go to school.

On 9 October 2012, the international community was shaken by the brutal assassination attempt against Malala Yousafzai, a 13-year-old girl from Pakistan. Malala was attacked by extremists while she was on a school bus, because of her known efforts from an early age to promote the right to education for girls, defying obstacles and even death threats. Pakistan reacted firmly and expressed its determination to renew commitment and impetus to protect and promote girls' education.

'The assassination attempt on Malala represents an extreme violation of the right of girls to an education. In far too many countries, girls are deprived of this fundamental human right that is the key to dignity and a decent future.

'Discrimination starts early in a girl's life. We must harness the global movement of solidarity around Malala to strengthen political will and put in place all the measures required to ensure that all girls have a place in school.'

Historically, girls and women have been disproportionately excluded from education worldwide.

They face more challenges and have fewer opportunities to access, complete and benefit from education than boys. According to the UNESCO's 2012 *Education for All Global Monitoring Report*, girls are the majority of the 61 million children who are out of school at the primary level alone.



**Figure 14.6** Malala Yousafzai speaks at a Goalkeepers event at New York City in 2017.

Although school enrolment in Pakistan has increased by over three million since 1999, more than 5 million children are still without an education; 63% of them – over three million – are girls. Two-thirds of the 49.5 million illiterate Pakistani adults are women. Despite these difficulties, the percentage of poorest girls out of school has fallen from 78% to 62%.

The event will mobilise heads of state and government, leaders of UN agencies, international and bilateral organisations, foundations, donors, the private sector, civil society, academics, religious leaders, eminent personalities, the media and other stakeholders in an effort to reinforce commitment in favour of programmes for girls' education.

Source: UNESCO.

### REVIEW 14.2

Read the article and answer the following questions.

- 1 Outline the events relating to the attempted assassination of Malala Yousafzai. (C, S)
- 2 Discuss the discrimination that exists with regard to girls and women and the impact this has on basic human rights. (C, A, E)
- 3 Research some initiatives that have been implemented to increase girls' participation in education. (C, S, A)

## 14.2 Bringing international treaty obligations into Australian law

These treaty obligations become part of Australian law when they undergo a process called **ratification**. Under section 61 of the Australian Constitution, the Australian Government can enter into a treaty obligation without the approval of Parliament. This means the treaty has been signed but not actually implemented.

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**ratification (treaties)** the process of full adoption of the obligations imposed by a treaty or covenant into Australian law by the passing of legislation through the federal parliament that mirrors and enacts the treaty obligations

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In order for the treaty obligation to become a full part of the Australian legal system and have practical legal force in Australian law, the parliament must pass domestic laws that mirror the treaty obligations. Therefore, a treaty like the International Convention on the Elimination of All Forms of Racial Discrimination only truly became part of the Australian legal system when the Commonwealth Government passed the *Racial Discrimination Act* in 1975.

Another process by which Australia can be bound to international human rights obligations is called **accession**. This is where we may enter into a treaty that has already been formed after it has already been negotiated and signed by other states. It has the same legal effect as ratification.

Sometimes countries don't wish to be bound by all aspects of a treaty and may only ratify part of it. This is called a **reservation**, and usually comes about where a treaty contains elements that contradict current domestic law in a country. One of the most famous reservations is that of the United States requiring the right of approval before it will have a matter heard before the International Court of Justice (ICJ). This came about when it signed the Convention on the Prevention and Punishment of the Crime of Genocide in 1986, and meant that the United States essentially would not recognise the right of the ICJ to rule unless it agreed with such a ruling.

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**accession** when a nation-state enters into a treaty that has already been formed after it has been negotiated and signed by other states

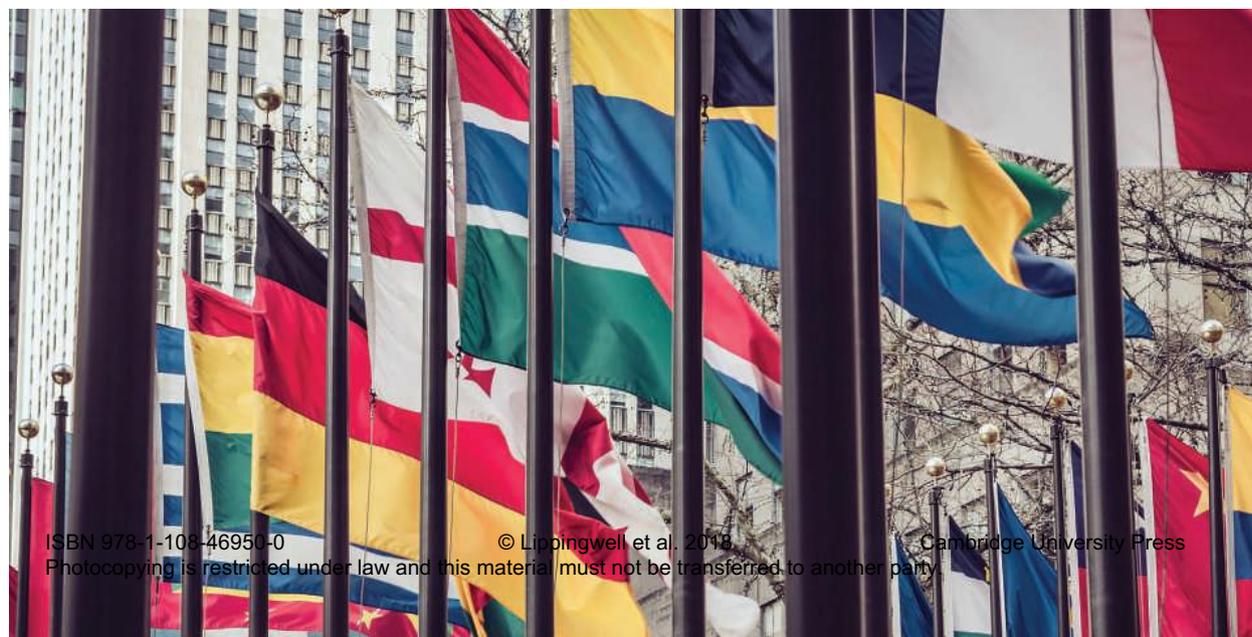
**reservation** when a nation-state does not wish to be bound by every provision in a treaty so ratifies only the parts of the treaty by which it does agree to be bound

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### SIDEBAR

The position the United States has taken in relation to the ICJ's jurisdiction has been the subject of some criticism, with some claiming that it essentially weakens the position and threatens the credibility of the ICJ. Do you agree or disagree? Justify your answer. (A, E)

**Figure 14.7** Flags of some members of the United Nations



## The rights of nation-states

As well as the rights of individuals, the United Nations also recognises the rights of individual nations (called 'states' in this context). The UN Charter outlines what rights and responsibilities a state has. Article 2, in particular, addresses a number of these rights.

### Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

- 1 The Organization is based on the principle of the sovereign equality of all its Members.
- 2 All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
- 3 All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
- 4 All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
- 5 All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
- 6 The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
- 7 Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

*Source:* United Nations.

Article 2.1 confirms the equal **sovereignty** of all members of the United Nations. This means a government exercises full control over affairs within a geographical or territorial limit, and can pass laws and enforce them within this area and exist as an essentially independent legal and political body in this space. Equal sovereignty or equality means that under the UN Charter, all countries will be treated equally and their right to make laws for their own territory will be respected. No country is given any more rights under the UN Charter just because they may be more powerful or larger than other nation-states. The concept of the right to equality of nations is therefore enshrined in the Charter.

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**sovereignty** the concept that a government exercises full control over affairs within a geographical or territorial limit; this means it can pass laws and enforce them within this area and exists as an essentially independent legal and political body in this space

---

In Article 2.4, the UN Charter adopted the idea that force or the threat of force should not be the norm in international relations. It states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations.

However, the UN Charter recognised that force would sometimes be used and so it sought to create a legal framework for this.

In Article 51, the UN Charter states that force can be used in self-defence. This means that the US invasion of Afghanistan in November 2001 was legal, and did not breach international law. The invasion was legal because it was carried out in response to an attack on the United States on 11 September 2001 by terrorists who were said to be from the Al-Qaeda organisation. At the time of the attack, Al-Qaeda had its bases in Afghanistan and was supported by the Taliban regime in that country.



**Figure 14.8** A child poses in front of a tank as the armed forces of Ukraine display their military vehicles, tanks and missiles in August 2017.

It does mean that **territorial integrity** (the idea that a state has the right to its own territory and another state should not do anything to infringe that right – for example, invade another country) is meant to be respected under international law and consequences apply when this is not respected. An example from more recent times was the Russian annexation of part of Ukraine.

**territorial integrity** the idea that a state has the right to its own territory and another state should not do anything to infringe that right

## RESEARCH 14.1

Go to the *Forbes* website and search for the following article: Paul Roderick Gregory, 'International Criminal Court: Russia's Invasion of Ukraine is a "Crime", Not a Civil War' (20 November 2016).

- 1 Identify the 'crime' that Russia has allegedly committed in relation to Ukraine. (C, S)
- 2 Analyse and evaluate the consequences that have been applied to Russia as a result. Explain they are or are not appropriate. (C, A, E)

## CHECK THIS OUT

Conduct an internet search using the phrase 'Russia Ukraine sanctions'. Identify what sanctions have been put in place and by whom. Is there any evidence you can find that the sanctions are effective? (C, S, A, E)

The same applies to the concept of nations having the right to political independence. This right ensures that within the territorial boundaries of a state, that state has the right to an independent political system of its own choice and should be

free from interference from any other state in how that is exercised. This was called into question in the 2016 US presidential election with allegations of Russian interference in the electoral process.

## Russian hackers targeted 21 US states during election, Homeland Security official says

Reuters, 22 June 2017

Russian hackers targeted election systems in 21 states in last year's United States presidential race, a Department of Homeland Security official has told Congress.

But a former Obama official added that a video of US President Donald Trump bragging of sexual conquests distracted attention from Washington's warnings.

Key points:

- Official won't identify specific states.
- Senators push for more details about the hacking.
- Arizona and Illinois last year confirmed they were targeted.

Jeanette Manfra, the department's acting deputy undersecretary of cyber security, would not identify which states had been targeted, citing confidentiality agreements.

She reiterated that there was no evidence that any actual votes were manipulated.

'As of right now, we have evidence that election-related systems in 21 states were targeted,' Ms Manfra told the Senate Intelligence Committee, which is investigating Russia's meddling in the 2016 presidential election.

Systems were breached in a smaller number of states, she said, but did not give a specific figure.

Jeh Johnson, who led the Homeland Security Department until the end of the Obama administration, added that his department had issued warnings about hacking into voter registration databases.

But he told the US House Intelligence Committee, which is investigating alleged Russian meddling in the election, that the notices did not get the attention he would have liked, blaming the emergence of a 2005 tape – in which Mr Trump brags about sexually assaulting women – for distracting the American public.

The extent of interference by Russian hackers has been the source of speculation and media reports for months – the Russia issue has cast a shadow over Mr Trump's first five months in office.

Department officials had said about 20 states had been probed by hackers working on behalf of the

Russian Government, but recent news media reports had suggested the number could have been far higher.

Mark Warner, the top Democrat on the Senate panel, expressed frustration at Ms Manfra's refusal to identify which states had been targeted.

'I just fundamentally disagree,' he said.

Senator Warner on Tuesday sent a letter to Homeland Security Secretary John Kelly asking the agency to disclose more information about hacking attempts on state and local election systems.

**Small amount of votes could swing election: Senator** Arizona and Illinois have confirmed that hackers had targeted their voter registration systems.

US intelligence agencies concluded that the Kremlin orchestrated a wide-ranging influence operation that included email hacking and online propaganda in order to discredit Democratic presidential candidate Hillary Clinton and help Mr Trump win the White House.

**Russia ties 'will dwarf Watergate'**

Ms Manfra and other officials testifying on Wednesday reiterated that US elections are resilient to hacking in part because they are decentralised and largely operated on the state and local level.

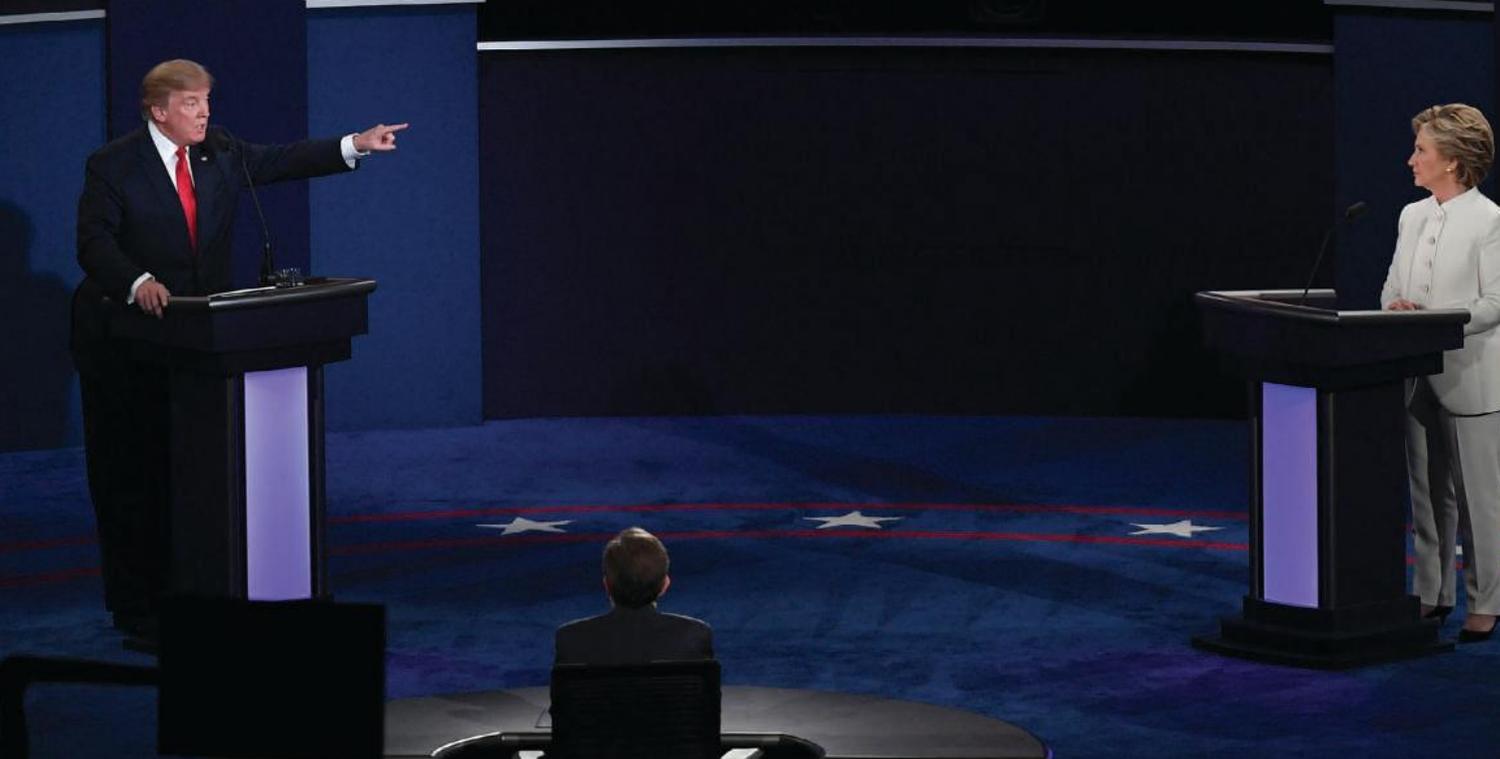
Senator Angus King, an independent from Maine who caucuses with the Democrats, expressed scepticism at that assertion, saying only a small amount of votes in key battleground states would need to be altered to tip the scales of an election.

'A sophisticated actor could hack an election simply by focusing on certain counties,' Senator King said.

'I don't think it works just to say it's a big system and diversity will protect us.'

Russia has repeatedly denied responsibility for any cyber attacks during the US presidential election.

Mr Trump has inconsistently said Russia may or may not have been responsible for the hacking, but has dismissed allegations that his associates colluded with Moscow as 'fake news'.



**Figure 14.9** The final presidential debate between candidates Donald Trump and Hillary Clinton, held in Las Vegas on 19 October 2016

**REVIEW 14.3**

Read the article on the previous page and answer the following questions.

- 1** Identify the right Russia has apparently breached in relation to the United States in this case. (C, S)
- 2** Research and list what consequences (if any) the United States has put in place as a result of this breach. (C, S)
- 3** Do you consider these consequences to be effective? Why or why not? (A, E)

Article 2.7 is an interesting provision. It ensures the independence of states from UN interference in domestic matters within a state, unless such matters are potentially deemed a threat to international security. As well as including a self-defence clause, the UN Charter was realistic enough to legally allow the use of force in circumstances other than self-defence. The restriction placed upon this use of force was that it had to be agreed to by the UN Security Council. The UN Security Council is like an inner circle of major nations consisting of the five permanent members: the United States, Russia, China, the United Kingdom and France. It also has 10 non-permanent members elected for two-year terms by the General Assembly. Chapter VII of the UN Charter states that the UN Security Council can act under Article 42 of this part of the Charter to 'take such action by air, sea or land forces as may be necessary to maintain or restore international

peace and security'. This will be explored in more depth in Chapter 15, but it did allow a coalition of nations to invade Iraq after Iraq invaded Kuwait in 1990. This is a power that has been exercised very rarely, given the primary purpose of the United Nations to promote peace and the right to peaceful resolution of disputes.

**CHECK THIS OUT**

Go to the UN Security Council website FAQs and look at the answer to Question 14: 'What kind of measures involving the use of armed force has the Security Council imposed in the past?'

Identify examples of when the Security Council has authorised the use of force, and compare and contrast the different types of force and sanctions used. (C, S, A, E)

## Specialised UN agencies

A number of UN agencies play important roles in world affairs. At the moment, there are 15 specialised agencies:

- 1 Food and Agriculture Organization (FAO)
- 2 International Civil Aviation Organization (ICAO)
- 3 International Fund for Agricultural Development (IFAD)
- 4 International Labour Organization (ILO)
- 5 International Maritime Organization (IMO)
- 6 International Monetary Fund (IMF)
- 7 International Telecommunication Union (ITU)
- 8 United Nations Educational, Scientific and Cultural Organization (UNESCO)
- 9 United Nations Industrial Development Organization (UNIDO)
- 10 Universal Postal Union (UPU)
- 11 World Bank Group (WBG)
  - 11.1 International Bank for Reconstruction and Development (IBRD)
  - 11.2 International Finance Corporation (IFC)
  - 11.3 International Development Association (IDA)
- 12 World Health Organization (WHO)
- 13 World Intellectual Property Organization (WIPO)
- 14 World Meteorological Organization (WMO)
- 15 World Tourism Organization (UNWTO)

Several of these are worth closer examination, due to the impact they have on Human Rights issues.

### *The World Health Organization*

The World Health Organization (WHO) coordinates action on international health issues, sanitation and diseases. It also sends medical teams to help fight the spread of epidemics such as the Ebola outbreak in West Africa in 2013–16 that claimed some 12 000

lives. The WHO states its objective ‘is the attainment by all people of the highest possible level of health’.

### *The International Monetary Fund*

The International Monetary Fund (IMF) is part of the UN system and has a formal relationship agreement with the United Nations, but retains its independence. The IMF provides monetary cooperation and financial stability, and acts as a forum for advice, negotiation and assistance on financial issues. It aims to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.

### *The World Bank Group*

The World Bank Group (WBG) consists of five international organisations that make loans to developing countries. These are the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). The first two are sometimes known as the World Bank.

The World Bank’s activities are focused on developing countries, in areas such as human, agriculture and rural development (e.g. irrigation and rural services), environmental protection (e.g. pollution reduction, establishing and enforcing regulations), infrastructure (e.g. roads, urban regeneration, and electricity), large industrial construction projects, and governance (e.g. anti-corruption, legal institutions development).

## CHECK THIS OUT

Go to the World Health Organization website and examine what is listed under the Outbreaks and Emergencies section. Is there anything there that you find surprising or disturbing that is still an issue? (C, A, E)

## Non-government organisations

A number of non-profit, non-government bodies also have been set up to protect the rights of human beings across the world. Two of these are examined in detail in order to better understand the part they play in seeking to protect rights around the world.

### UNICEF

UNICEF stands for the United Nations Children's Fund (the words 'International' and 'Emergency' were originally part of the full name but have been dropped). It was created in 1946 to assist children in countries affected by World War II, but continues to operate today. It relies on donations and funding from governments around the world to provide children with services such as emergency food, shelter and healthcare. The organisation therefore fulfils an important role in a number of ways, and is present in over 190 countries and territories around the world.

### Amnesty International

Amnesty International seeks to protect human rights around the world. It states that its primary objective is 'to conduct research and generate action to prevent and end abuses of human rights, and to demand justice for those whose rights have been violated'. Amnesty focuses on a number of key areas:

- protection of human dignity
- ending torture
- abolition of the death penalty
- rights of refugees
- rights of prisoners of conscience
- women's, children's, minorities' and Indigenous rights.

#### RESEARCH 14.2

Visit the UNICEF website.

- 1 What programs are identified on the website? (C, S)
- 2 Choose one program and write a 100-word summary of what UNICEF does in this area. (C, S, A)

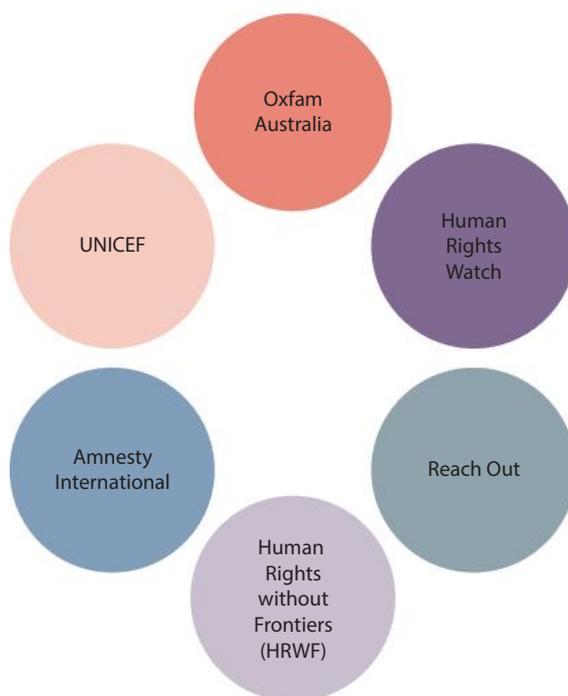


Figure 14.10 International aid organisations

## RESEARCH 14.3

Visit the Amnesty International website and answer the following questions.

- 1 What human rights issues has Amnesty International identified in our region of the world? (Look at the 'What we do' page for information/map about this.) How many are 'Australian' issues and what are they? (C,S)
- 2 Choose one of the issues in our region of the world and summarise what the issue is and why Amnesty International believes more needs to be done in this area. (C, A, E)

## RESEARCH 14.4

Investigate each of the other non-government organisations (apart from UNICEF and Amnesty International). For each, identify the following:

- 1 What is the key human rights area on which the organisation focuses? (C, S)
- 2 What is the international declaration or convention that relates to that human right? (C, S)
- 3 Select one non-government organisation and discuss its role in addressing human rights issues. Your answer should also discuss how successful the organisation is in achieving its goals regarding human rights. (S, A, E)

Figure 14.11 Amnesty International holds protests and provides aid all over the world.



## UN High Commissioners

There are a couple of special positions in the United Nations structure that relate closely to human rights issues. The UN High Commissioner for Human Rights coordinates human rights activities and supervises the Human Rights Council in Geneva, Switzerland. They work to protect and promote human rights that are guaranteed under international law and specified in the UN Universal Declaration of Human Rights of 1948. The High Commissioner also promotes human rights that are yet to be recognised in international law, such as the adoption of economic, social and cultural rights. These are not currently protected by any international laws, and therefore the UN High Commissioner of Human Rights is working to promote the idea that they should be.

There is also a UN High Commissioner for Refugees (UNHCR). This person is the head of the agency tasked with leading and coordinating international efforts to protect refugees and resolve refugee problems worldwide. This agency works to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, with the option to return home voluntarily, integrate locally or to resettle in a third country. In recent times, the UNHCR has continued to battle against restrictive asylum policies in many developed and/or wealthy nations, including Australia, that run contrary to the principles established in the Universal Declaration of Human Rights and the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. In fact, Australia has been singled out by the UNHCR due to its concerns about our asylum seeker policies, and has been the subject of some condemnation.

**Figure 14.12** Some members of the Australian public agree with the UN High Commissioner that the Australian Government hasn't done enough to protect those coming to Australia to seek asylum.



## Australia's human rights record criticised by UN expert committee

Australia has been criticised by an expert United Nations Committee following its appearance before the UN Committee for Economic, Social and Cultural Rights last month.

Last night the UN Committee released its Concluding Observations, a statement outlining its assessment of Australia's performance under the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The statement highlighted a range of significant concerns in relation to Australia's treatment of Aboriginal and Torres Strait Islander people and refugees and asylum seekers; a range of policies and measures undermining people's right to an adequate standard of living, including inadequacy of social security and housing and the gender wage gap; education funding and access to culturally appropriate and safe early education programmes; as well as landmark comments on the rights of intersex people.

A coalition of almost 50 non-government organisations (NGOs) that provided information to the Committee as part of the appearance have welcomed the Concluding Observations.

'The Committee recognised positive steps taken by Australia since its last review in 2009, however it also expressed serious concerns about Australia's failure to fully incorporate economic, social and cultural rights into domestic legislation and frameworks as well as across a range of policy areas,' said Amanda Alford, Director Policy and Advocacy at the National Association of Community Legal Centres (NACLC), one of the organisations involved in coordinating the NGO coalition.

'We welcome the Committee's observations, including its recognition of the need for a national Human Rights Act or Bill of Rights, something NGOs have been advocating for over many years,' added Anna Cody, Director of Kingsford Legal Centre, which was one of the other coordinating NGOs.

### The rights of Aboriginal and Torres Strait Islander peoples

The Committee highlighted concerns in a range of areas, but one in particular was concern that Aboriginal and Torres Strait Islander peoples 'continue to experience high levels of disadvantage across all socio-economic indicators'.

'Time and time again we see expert reports and UN bodies and representatives expressing extreme concern about the treatment of Aboriginal and Torres Strait Islander peoples in Australia. This is yet another reminder that much remains to be done to address major human rights concerns for Aboriginal and Torres Strait Islander peoples in Australia,' said Ms Alford.

'The Committee also rightly highlighted that Aboriginal and Torres Strait Islander peoples, communities and organisations must lead development of policies and programs that affect them as well as the need for a funded national representative body,' she added.

### Refugees and asylum seekers

'We welcome the Committee's concluding observations in relation to refugees and people seeking asylum. The Committee's recommendations set out clear and pragmatic steps that the Australian Government can take immediately to improve the rights of people seeking asylum and refugees,' said Khanh Hoang from the Australian Lawyers for Human Rights Refugee Rights Subcommittee.

'In particular, we endorse the Committee's recommendations for Australia to end its policy of offshore processing, improve access to family reunion, and to ensure that adequate legal and social support is given to the "Legacy Caseload" currently seeking protection in Australia,' Mr Hoang said.

### People with disability

Therese Sands, Director of Disabled People's Organisations Australia added, 'We welcome the expert committee's recognition of the high levels of violence against people with disability, particularly women and people with intellectual disability. In doing so, the Committee has joined the growing chorus of voices from civil society calling for a Royal Commission into violence against people with disability. We urge the Government to act swiftly and establish a Royal Commission now.'

### Treatment of intersex children

The committee made explicit comments in relation to medical interventions performed on intersex children. 'We know that human rights violations including medically unnecessary and harmful surgeries on young children take place across Australia. It is welcome

news that, for the first time, the UN has stated that such interventions only take place when intersex children are “able to provide full and informed consent,” said Morgan Carpenter, Co-Executive Director of OII Australia.

#### Government response and implementation

‘This latest review of Australia’s human rights record highlights that the Government has work to do in improving its domestic human rights record if it wants

to be taken seriously in its bid for Human Rights Council membership later this year,’ added Ms Alford.

‘As always, NGOs welcome the opportunity to engage constructively with the Government on the issues identified in the statement to ensure the ongoing protection and promotion of human rights in Australia,’ concluded Ms Alford.

*Source:* National Association of Community Legal Centres.

### REVIEW 14.4

Read the article and answer the questions.

- 1 List the issues identified in this article as concerns from a human rights perspective in Australia. (C, S)
- 2 Identify the recommendations that were made in relation to a national Human Rights Act/Bill of Rights. Evaluate why this would help, and justify your answer. (C, S, A, E)

**Figure 14.13** Protesters demanding the closure of offshore immigration detention centres



# Chapter review

## Chapter summary

- There are a number of international bodies and organisations that work to protect human rights. The United Nations is the most significant of these.
- The United Nations is divided into a number of separate bodies, each with a specific function and areas of control. These are:
  - the General Assembly
  - the Secretariat
  - the International Court of Justice
  - the Security Council
  - the Economic and Social Council
  - the Trusteeship Council.
- The UN Charter outlines the rights and obligations of the members of the United Nations. The purposes of the United Nations, as stated in the Charter, are to:
  - maintain international peace and security
  - develop friendly relations between nations
  - cooperate in solving international problems of an economic, social, cultural and humanitarian nature
  - promote respect for human rights.
- There are a number of important international human rights treaties and conventions, the most important of which is the Universal Declaration of Human Rights. This declaration represents basic human rights and protections inherent to every human being.
- Treaties are usually multilateral (undertaken by more than two nation-states), but can be bilateral (between two nation-states).
- Other important treaties and covenants are:
  - International Covenant on Civil and Political Rights 99 UNTS 1
  - International Covenant on Economic, Social and Cultural Rights 993 UNTS 3
  - United Nations Convention on the Rights of the Child 1577 UNTS 3 (UNCRC)
  - Convention relating to the Status of Refugees 1951
  - International Convention on the Elimination of All Forms of Racial Discrimination 1966
  - Convention on the Elimination of All Forms of Discrimination against Women 1979.
- Ratification is a process by which Australia can be bound to international human rights obligations.
- Sometimes countries don't wish to be bound by all aspects of a treaty and may only ratify part of it. This is called a reservation.
- A number of non-profit, non-government bodies have also been set up to protect the rights of people across the world, including UNICEF and Amnesty International.
- There are a couple of special positions in the United Nations structure that relate closely to human rights issues: the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees (UNHCR).

## Short-response questions

- 1 Describe the process of ratification in Australia. (C)
- 2 From where do international human rights laws come? Name the main document/treaty/convention. (C, S)
- 3 Discuss the different types of rights that are protected by the UNDHR. Include examples to help support your answer. (C, S)
- 4 Give two examples of international laws/treaties that protect human rights apart from the UNDHR. (C, S)
- 5 Explain the limitations of the Australian Constitution in providing rights to the country's citizens. (C, S, A, E)
- 6 Compare the arguments for and against protecting the rights of nation-states. (C, A, E)
- 7 Discuss the importance of NGOs. (C, A, E)
- 8 What is the role of the United Nations Security Council? (C)
- 9 What are multilateral and bilateral treaties? (C)
- 10 Prepare a well-supported argument either for or against the assertion that 'Australia has a strong record of protecting human rights'. (C, S, A, E)

## Extended-response questions

- 1 Explain how the Australian Constitution protects basic human rights and freedoms. Your answer should incorporate comparisons with countries such as the United States and New Zealand, and links to the Universal Declaration of Human Rights (1948). (C, S, A, E)
- 2 ‘The rights of women are currently in a much better state around the world than they have ever been’ In a short argumentative essay of 400–600 words outline whether or not you agree with this statement. Your answer should include supporting material. (C, S, A, E)

## Response-to-stimulus questions

- 1 Research via your preferred search engine cartoons on the right to bear arms and choose a cartoon that appeals to you. Write an argumentative essay of 600–800 words about whether the right to bear arms is supported by the cartoonist and whether they get their message across. Discuss whether, in your view, Australian citizens should also have the right to bear arms. (C, S, A, E)
- 2 ‘The five permanent members of the UN Security Council operate as an exclusive undemocratic nuclear “club”, which allows them to further their own strategic and political interests at the expense of true international representation.’ Analyse this statement and evaluate the operation of the UN Security Council. Justify your response with reference to at least two international conflicts. (C, A, E)

**Figure 14.14** While there is no UN-sanctioned Declaration of Animal Rights, in 2016 the UN Committee on World Farming Security approved policy recommendations intended to improve animal health, food security and nutrition.



## CHAPTER 15

# The effectiveness of international law

### CHAPTER OBJECTIVES

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

- explain how human rights are monitored, including the reporting system, United Nations Special Rapporteurs, inter-state complaints, ancillary bodies and individuals
- explain the role of international legal institutions in upholding rights, including those within the International Court of Justice (ICJ) and the International Criminal Court (ICC)
- examine the legal implications of becoming a signatory to various internationally recognised treaties and conventions related to the protection of global citizens and property – for example:
  - the Universal Declaration of Human Rights 1948
  - the Protocol Relating to the Status of Refugees 1967
  - the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the ‘Hague Abduction Convention’)
  - the United Nations Declaration on the Rights of Indigenous Peoples 2006
  - the Geneva Conventions 1949 and The Hague Conventions of 1899 and 1907
- select legal information, then analyse and evaluate the current effectiveness of international law and legal institutions in protecting human rights, focusing on a contemporary legal issue for example:
  - the Universal Declaration of Human Rights 1948
  - the Convention Relating to the Status of Refugees 1951
  - the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the ‘Hague Abduction Convention’)
  - the United Nations Declaration on the Rights of Indigenous Peoples 2006
  - the Geneva Conventions 1949 and The Hague Conventions of 1899 and 1907
  - the International Court of Justice (ICJ)
  - the International Criminal Court (ICC)
- create responses that communicate meaning to suit the intended purpose in paragraphs and argumentative essay responses.

*Legal Studies 2019 v1.1 General Senior Syllabus © Queensland Curriculum & Assessment Authority.*

### Key concepts/legal terminology you will encounter in this chapter

- bilateral
- extradition
- genocide
- globalisation
- *mandamus*
- multilateral
- pandemic
- publicist

- quasi-judicial
- sovereignty
- state
- treaty
- unilateral
- veto
- world order

## RELEVANT LAW

### IMPORTANT LEGISLATION

International law comes from a number of sources. For legislation to have international recognition, it generally has to take the form of a treaty that is then incorporated into the domestic laws of other countries through laws passed in those countries. The following is a list of major treaties, conventions and internationally recognised instruments that seek to regulate the behaviour and relationships of nation-states and their citizens in international contexts.

- Comprehensive Test Ban Treaty (1996)
- Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1985)
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
- Convention on the Law of the Sea (1982)
- Convention on the Prevention and Punishment of the Crime of Genocide (1951)
- Convention on the Rights of the Child (1989)
- Convention Relating to the Status of Refugees (1951) and the Protocol Relating to the Status of Refugees (1967)
- General Agreement on Tariffs and Trade, updated in 1994 into the Marrakesh Agreement Establishing the World Trade Organization
- Global Plan of Action to Combat Trafficking in Persons (2010)
- International Convention on the Elimination of All Forms of Racial Discrimination (1966) (ICERD)
- International Treaty on Plant Genetic Resources for Food and Agriculture (2001)
- Kyoto Protocol (1997)
- Magna Carta (1215)
- Nuclear Non-Proliferation Treaty (1968)
- Rome Statute of the International Criminal Court (1998)
- Statute of the International Court of Justice (1948)
- Treaty of Good-Neighborliness and Friendly Cooperation Between the People's Republic of China and the Russian Federation (2001)

- Treaty on the Prohibition of Nuclear Weapons (2017)
- Twin Covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- United Nations Charter (1948)
- Universal Declaration of Human Rights (1948)

### CASES

- Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)
- Application of the International Convention on the Elimination of All Forms of Racial Discrimination
- *Chow Hung Ching v R* (1948) 77 CLR 449
- *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmania Dam Case*)
- International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 1996 ICJ 2
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory
- *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14
- *Nuclear Tests Case (Australia v France)*
- *Nuclear Tests Case (New Zealand v France)*
- *Nulyarimma v Thompson* (1999) 164 ALR 621
- Questions relating to the Obligation to Prosecute or Extradite
- *Philippines v China* (PCA case number 2013–19)
- Whaling in the Antarctic (Australia and New Zealand v Japan)

### LEGAL ODDITY

The Walk Free Foundation estimates that there are currently 45.8 million slaves worldwide, which is more than at any other time in human history. This is despite the existence of the UN Slavery Convention (Amended) 1955. In Australia, it is estimated that up to 4300 people are living in slavery and the number of slavery-related Australian Federal Police investigations has doubled in the last few years. The problem has become so prevalent that the United Kingdom has recently passed legislation to better deal with the issue in the form of the *UK Modern Slavery Act* and has established an Anti-Slavery Commissioner. At the time of writing, no such legislation or position exists in Australia.

Source: Walk Free Foundation.

## 15.1 Overview of international law

In previous chapters, we have touched on the topic of international law as it relates specifically to human rights. Obviously there is more to international law than just the Universal Declaration of Human Rights and other associated conventions or treaties that seek to protect people around the world. This means that an examination of international law as it operates more broadly is necessary. In particular, the effectiveness of international law needs to be considered closely, as there is some debate about how effective international law can be if enforcement by any one sovereign body is not possible. The United Nations does not seek to operate as a 'ruling body' over nations, so there is always some debate about what to do if a nation chooses to ignore the United Nations or does not abide by UN treaties or conventions. A number of obligations may be imposed on people and countries that extend the concept of what is right or legal beyond basic or fundamental human rights.

### (Public) international law

Due to the rapid **globalisation** of the world, the importance of international law has increased. This is evident with regard to the global issues of climate change and human rights. The international mobility of Australians has prompted interest in a wide range of international affairs, including the activities and dealings of Australian citizens in other countries.

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**globalisation** the reality that all countries are becoming more dependent on and connected with one another, socially, economically and through international law

---

International law is basically a set of rules that relate to how countries from around the world will deal with each other, and it has a long history. When we think of this area of law, the things that usually come to mind are war and attempts at peace, the United Nations and treaties, and Australian citizens who have been caught up in the laws of another country.

International law is mainly divided into public international law and private international law. Public international law is also described as 'the law of nations', but is generally referred to simply as 'international law', which is the approach followed in this textbook – that is, when we refer to international law, we mean public international law. Private international law refers to matters in a domestic jurisdiction that have a foreign element. For example, liability could follow if an Australian citizen holidaying in a foreign country had an accident.



Figure 15.1 Divisions of international law



Figure 15.2 International travel and the law

## Definitions

International law is different from the laws of Australia, where laws are passed by the legislative arm of government (the parliament), implemented by the executive arm of government (the Cabinet and government departments) and interpreted by the judicial arm of government (the courts). International law arises from a variety of sources; whether it applies in a particular country depends in large measure on whether that country recognises the law.

Here is an example of a traditional definition of international law:

that body of law comprising principles and rules that states recognise as legally binding and that regulate the conduct of subjects of the law and relate to events and issues that transcend national boundaries (and are of international concern).

*Source:* Blay, Pitrowicz and Tsamenyi, *Public International Law: An Australian Perspective*, 1998, p. 1.

In simple terms, according to this definition, international law is made up of the legally binding rules that apply in international matters between countries.

Some writers, however, point to the need to extend this definition of international law because of global developments – for example, international bodies and international moves to protect human rights and freedoms – and set out rules for the punishment of persons found guilty of international crime. An example of such an extended definition is:

that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their formal relations with each other, and which includes also: (a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and (b) certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.

*Source:* Reicher, *Australian International Law: Cases and Materials*, 1995, p. 3.

International law is a subset of a broader concept: **world order**. One of the major features of world order has been the dramatic growth and development of international law over the last 60 years. In that time, international law has become a powerful force for world peace – for example, through the establishment of strategies for mediation and peacekeeping. Participants in international law are not individuals, but independent nations, the United Nations and other international organisations sometimes established as a result of specific treaties.

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**world order** the activities of, and relationships between, all the world's countries, including power relations, international law, the global economy and global politics

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## Historical development

To fully understand the development of international law, we need to delve into a little history. This will be confined to an examination of the international approach to the use of force and the role of the United Nations.

### *The use of force*

'Force' is not necessarily a totally negative word. We are influenced by others (parents included) to do certain things, many of which are to our long-term advantage. When we use the word 'force', negative connotations arise, but in any civilised society there is the need, on occasion, to allow the use of legitimate force to protect others.

The twentieth century presented many examples of countries using force against one another – force that most would now regard as having been a negative blot on the history of the world. In regard to the international arena, we will briefly examine the approach that has been taken with the controlled use of force following the two world wars. There are situations in which the use of military force is seen as appropriate and/or legal. The two world organisations established in the twentieth century to prevent war – the League of Nations and the United Nations – both recognised circumstances in which the use of force would be regarded as legal. In fact, there were few international rules on the use of force until the twentieth century.

After World War I, the League of Nations was formed. It attempted the approach of requiring that member countries try every other way of resolving a matter before resorting to war. In 1928, a statement was made renouncing war. This was a positive step towards the elimination of war, but it was not a global treaty for peace and therefore was not applicable to non-member countries. This had negligible restraining influence on national leaders who were determined to use aggressive force.

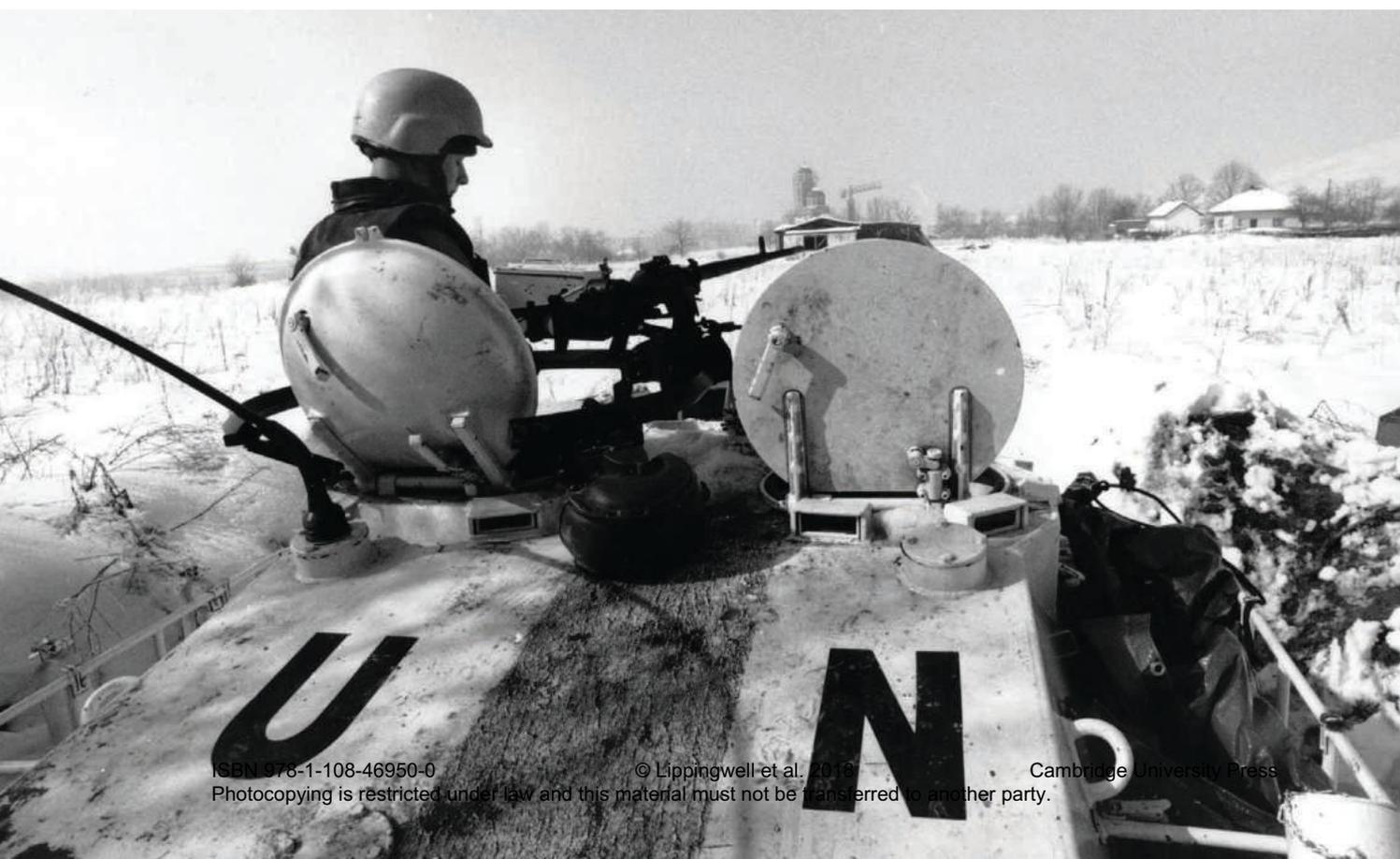
Following World War II, the United Nations was formed. The Charter of the United Nations (UN Charter) adopted the idea that force or the threat of force should not be the norm in international relations. The UN Charter states in Article 2(4), that:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations.

However, the UN Charter recognised that force would sometimes be used, so it sought to create a legal framework for this. In Article 51, the UN Charter states that force can be used in self-defence. As discussed in Chapter 14, this Article has been used to justify military action recently following the 9/11 terrorist attacks in 2001.

As well as including a self-defence clause, the UN Charter was realistic enough to legally allow the use of force in circumstances other than self-defence. The restriction placed upon this use of force was that it had to be agreed to by the UN Security Council (which is like an inner circle of major nations).

**Figure 15.3** Force has a role in the maintenance of law and order in the international sphere.



Chapter VII of the UN Charter states that the UN Security Council can act under Article 42 of this part of the charter to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'. However, due to the tensions that existed between the United States and its allies, and the Soviet Union and its allies, from the formation of the United Nations, the ability of the Security Council to exercise its military powers has been compromised. This is because either the United States or the former Soviet Union (now Russia) would use its **veto** power if any Council resolution affected its interests. The veto power means any of the five permanent members of the Security Council

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**veto** a constitutional right to reject a legal enactment

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(the United States, Russia, China, Britain and France) can vote against any of the Council's resolutions/motions or any changes to the United Nations as a whole, and effectively block such resolutions or changes. This makes reform of the United Nations very difficult.

When the United Nations was being formed, it was made clear to the other nations of the world

that without this veto power being given to the so-called 'Big Five' powers, there would not be a United Nations. As a result, many view the veto power as the most undemocratic part of the United Nations. In recent years, the United States has been active in exercising the veto power. In December 2017, the United States vetoed a draft resolution calling on countries to avoid establishing embassies in Jerusalem. This was done because it conflicted with the US approach in deciding to recognise Jerusalem as the Israeli capital, a move that angered many nations in the region who oppose such recognition.

Another example of its use was in November 2017, when Russia vetoed a 30-day renewal of a commission investigating chemical weapons attacks

## SIDEBAR

Go to the United Nations Security Council website and search for 'The Right to Veto' under 'Voting System and Records'.

How many times has the veto power been exercised? For what reasons and by whom? Should it be changed? (C, S, A, E)

**Figure 15.4** The NATO action in Kosovo begs the question of what circumstances make the use of force legal under international law.



in Syria. Russia has close ties with the government of Syria, and the veto follows on from a February 2017 veto when China and Russia vetoed UN sanctions over chemical weapons in Syria. These uses of the veto power give credit to the argument that such a power is not always used in the best interests of all the world's nations.

On 29 November 1990, a year after the collapse of the Soviet Union, the Chapter VII rules were applied for the first time since the foundation of the United Nations, when Iraq invaded Kuwait. They were used to authorise a multinational force against Iraq.

Another attempt at such **multilateral** action took place in Kosovo in 1998; however, the threat of veto by Russia and China – two of the permanent Security Council members – was enough to stop the council from taking immediate action to intervene in the **genocide** taking place in Kosovo, which is part of the nation of Serbia. Action was thought necessary because the Serbian Government,

under the leadership of Slobodan Milosevic, had begun conducting 'ethnic cleansing' of the Muslim population in Kosovo.

The prospect of a humanitarian disaster prompted by the acts of genocide perpetrated by the Serbian forces caused great concern in Europe and the United States. As a result, in March 1999 the North Atlantic Treaty Organisation (NATO) successfully intervened in Kosovo. The UN Security Council, minus China (which abstained), then called for an international civil and security presence in Kosovo, thus enabling the NATO intervention to be viewed as legal and legitimate under international law.

As a general rule, multilateral or collective military intervention has the sanction of international law if it is in response to a situation where the threat to peace is significant. So the more multilateral a military intervention is, the more legal it is under international law. On the other hand, **unilateral** military intervention has been prohibited under international law since the end of World War II.

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**multilateral** undertaken by more than two nation-states

**genocide** the deliberate extermination of a race of people

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**unilateral** action taken by one nation-state alone

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## REVIEW 15.1

- 1 Identify the five permanent members of the United Nations Security Council. (C, S)
- 2 List three instances of multilateral intervention that have occurred in the last 50 years and analyse how effective these interventions have been in the long term. (C, S, A)
- 3 Evaluate whether the 2003 invasion of Iraq was legal under international law. Use the internet to research views on the legality of the invasion. Draw up a table of arguments for the legality and illegality of the war. Write an argumentative essay of 600–800 words outlining your position. (C, A, E, Cr)

**Figure 15.5** Refugees demonstrate during a 2018 UN Security Council delegation visit to Bangladesh to engage with the approximately 70 000 Rohingya Muslims seeking UN protection to return home to Myanmar.



## 15.2 The United Nations

As discussed in Chapters 13 and 14, in 1945 the leaders of 50 nations came together in San Francisco with representatives from many non-government organisations (NGOs). The meeting took place following the end of World War II and was due to a determination that the world would never again experience such widespread destruction. The United Nations was thus formed. Since the organisation's formation, no further world wars have occurred.

### The UN Charter

The UN Charter is similar to a constitution, outlining the rights and obligations of the members of the United Nations. The purposes of the United Nations, as stated in the charter, are to:

- maintain international peace and security
- develop friendly relations between nations
- cooperate in solving international problems of an economic, social, cultural and humanitarian nature
- promote respect for human rights.

The UN Charter also states that the United Nations should act in accordance with the following principles:

- the sovereign equality of its members
- the peaceful settlement of international disputes
- refraining from the threat or use of force against any nation
- non-intervention in matters within the domestic jurisdiction of any nation.

**Figure 15.6** UN Security Council meeting held to discuss chemical weapons in Syria on 23 January 2018



## UN bodies

Table 15.1 provides a list of bodies that exist under the umbrella of the United Nations. One such body is the International Law Commission, which comprises a body of experts whose role is to codify and develop international law. The commission was established in 1947 and works on treaties, criminal law and the law of the high seas.

Another very important UN body is the United Nations Human Rights Council (UNHRC). This is the body that investigates abuses of human rights and

so is often the primary reporting body of human rights issues. Complaints can be made to this body by individuals or groups that are victims of or have knowledge of human rights violations.

### CHECK THIS OUT

Go to the UNHRC website and access the 'Human Rights Council Complaint Procedure' page. How are complaints made? Is this process an effective one? (C, A, E)

**Table 15.1** The UN bodies

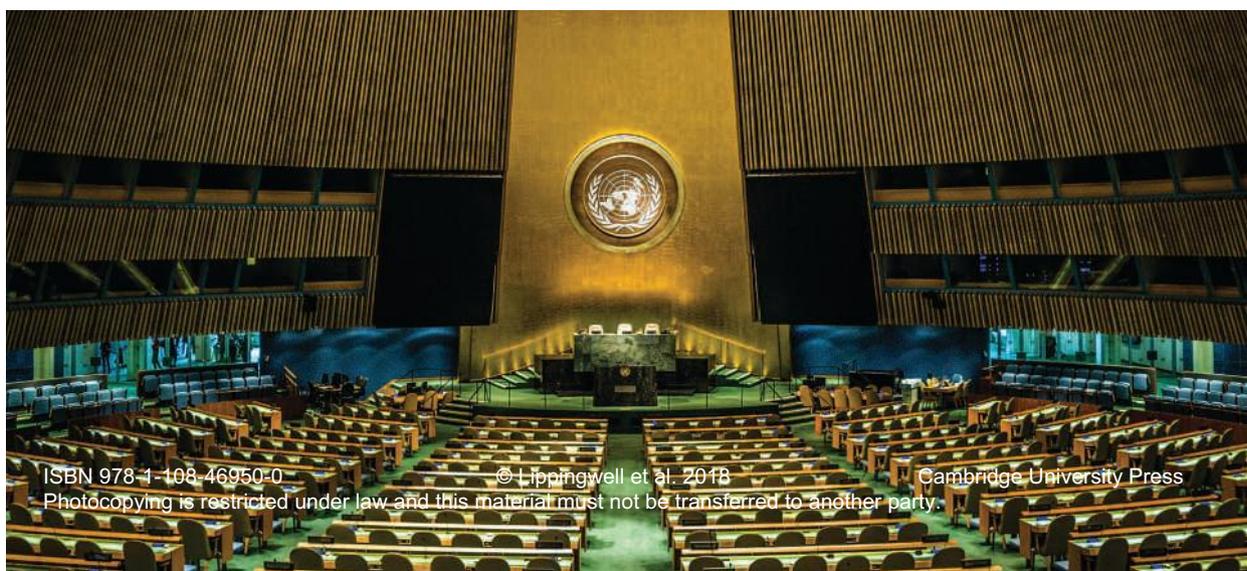
Peace and security	Development	Human rights	Humanitarian affairs	International law
<ul style="list-style-type: none"> <li>• Security Council</li> <li>• Peacebuilding Commission</li> <li>• Counter-terrorism Implementation Taskforce</li> <li>• Disarmament Commission</li> <li>• Committee on the Peaceful Uses of Outer Space</li> </ul>	<ul style="list-style-type: none"> <li>• General Assembly Second Committee (Economic and Financial)</li> <li>• General Assembly Third Committee (Social, Humanitarian and Cultural)</li> <li>• Economic and Social Council</li> <li>• Economic and Social Council Commissions and Expert Bodies</li> </ul>	<ul style="list-style-type: none"> <li>• General Assembly Third Committee (Social, Humanitarian and Cultural)</li> <li>• UN Human Rights Council</li> <li>• Charter-based and Treaty-based Bodies</li> </ul>	<ul style="list-style-type: none"> <li>• General Assembly Third Committee (Social, Humanitarian and Cultural)</li> <li>• Economic and Social Council</li> <li>• United Nations Children's Fund</li> <li>• United Nations Development Programme</li> <li>• World Food Programme</li> </ul>	<ul style="list-style-type: none"> <li>• General Assembly Sixth Committee (Legal)</li> <li>• International Law Commission</li> <li>• United Nations Commissions on International Trade Law</li> </ul>

## UN Special Rapporteurs

As well as specially constructed UN bodies and ancillary organisations, the United Nations also has the power to appoint individual experts to

work on its behalf. The title often given to these experts is Special Rapporteur (*rappporteur* is the French word for an investigator who reports to a deliberative body). They are appointed through the UNHRC and serve for between one and three years.

**Figure 15.7** UN General Assembly



Special Rapporteurs are often tasked to investigate allegations of human rights violations. They can only go to countries that have invited them, and if a complaint is found to have been justified, they then inform the government of that nation by letter or appeal that such a complaint exists and needs to be attended to.

There are two different types of Special Rapporteur or independent expert appointed to act in this way. One type is appointed to a country or territory. Currently there are 10 individual

countries/territories that have Special Rapporteurs or independent experts appointed to oversee and investigate human rights issues within those states.

The other type is appointed to serve under what is called a thematic mandate. These themes include concerns such as the environment, contemporary forms of slavery, education and freedom of opinion or expression. At the time of writing, there are over 30 of these themes that the United Nations considers important enough at a global level to appoint Special Rapporteurs/experts to oversee them.

## REVIEW 15.2

Go to the UNHRC website and locate the answers to the following questions.

- 1 List which countries currently have an independent expert or Special Rapporteur appointed to them by the United Nations. (C, S)
- 2 Select three of these nations and identify and analyse the reason why they have been appointed a Special Rapporteur. (C, S, A)
- 3 Identify the themes that currently have a Special Rapporteur/independent expert appointed. Evaluate why these themes are considered worthy of special attention. (C, A, E)

**Figure 15.8** The meetings of the United Nations Human Rights Council take place in the Human Rights and Alliance of Civilizations Room of the Palace of Nations.



## 15.3 Sources of international law

The major sources of international law are customary international law and treaties. However, general principles and the judicial decisions/teachings of **publicists** are also relevant.

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**publicist** in a legal context, a legal, respected figure who is recognised through their teachings and who demonstrates wisdom of a high order in legal matters

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### Custom

Generally, issues of international customary law arise when nations feel bound to follow accepted customs or 'rules', such as the law of the sea or the law in relation to genocide.

International customary law is not written, but is based on the practices and behaviours of most nations over a long period of time. A certain type of behaviour or practice is regarded as part of this law if there is widespread agreement about it by the international community.

A specific example of international customary law is the concept of diplomatic immunity, in which the embassy of a foreign nation is considered part of that nation's territory. This customary right has existed since ancient times. Foreign diplomats have immunity from criminal prosecution or civil action in the countries to which they have been posted, but may be returned to their home country to face legal action there. In the case of *Chow Hung Ching v R* (1948) 77 CLR 449, the custom of immunity from prosecution was extended to the armed forces of a country.

Over time, much international customary law has been incorporated into treaty law. Treaties have gradually replaced international customary law in a way similar to the way customary law (or common law) has been replaced by legislation in some areas of the domestic law in Queensland.

### Treaties

Treaties are agreements between countries (states) that have an international binding arrangement. A treaty is sometimes referred to as a convention, charter, covenant, protocol and/or statute. These all refer to a process by which nations agree to be bound by a voluntary written agreement. The agreement, or treaty, places an obligation on signatory nations to act in a particular way or to adopt a certain type of behaviour as the norm. Usually, nations sign treaties because they perceive it will be to their benefit. Treaties are usually multilateral, though they can be bilateral. Australia's relationship with the United States is a good example of one that involves close links due to shared security and economic interests. The two countries both put their signature to the ANZUS Treaty, which was signed in 1951. This agreement requires both countries to cooperate on military and security issues.

Treaties cover trade, fishing rights, pollution, telecommunications, mineral rights, airspace, drug trafficking, economic cooperation, outer space and cyberspace. Nations may agree to be bound by a treaty even if it limits their own sovereignty.

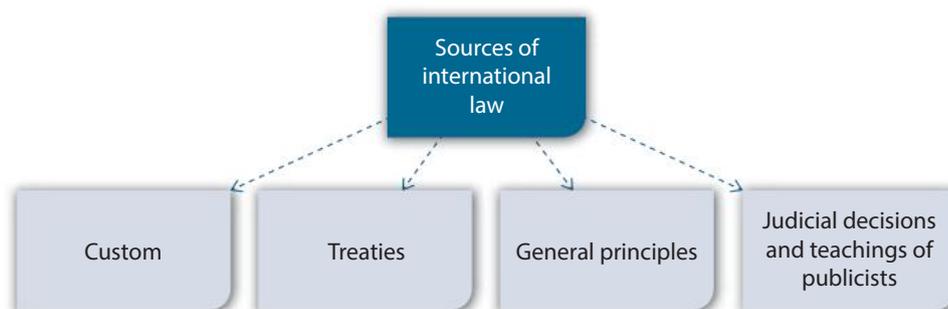


Figure 15.9 Sources of international law

Another form of treaty is an **extradition** treaty. This is a treaty between countries that regulates arrangements for the transfer of people who have committed a crime in one jurisdiction to the other jurisdiction or country. Generally, unless an extradition treaty is in place, such a transfer is unlikely. This occasionally allows some people to avoid facing justice if they are able to flee to a country that has no extradition treaty with the country in which they allegedly offended.

## SIDEBAR

Julian Assange is an Australian citizen currently residing in the Ecuadoran Embassy in London. Why is he there, and how is he able to remain in the United Kingdom, with which Sweden and the United States have extradition treaties?

Since 1945, all nations have been obliged to lodge their treaties with the United Nations. This is stated in Article 102 of the UN Charter:

Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

This requirement emerged after the end of World War II and had its origins in former US president Woodrow Wilson's 'Fourteen Points' speech of January 1919. The first of Wilson's 14 points was that treaties should be arrived at openly. This declaration was made in response to the belief that one cause of World War I was the existence in 1914 of secret

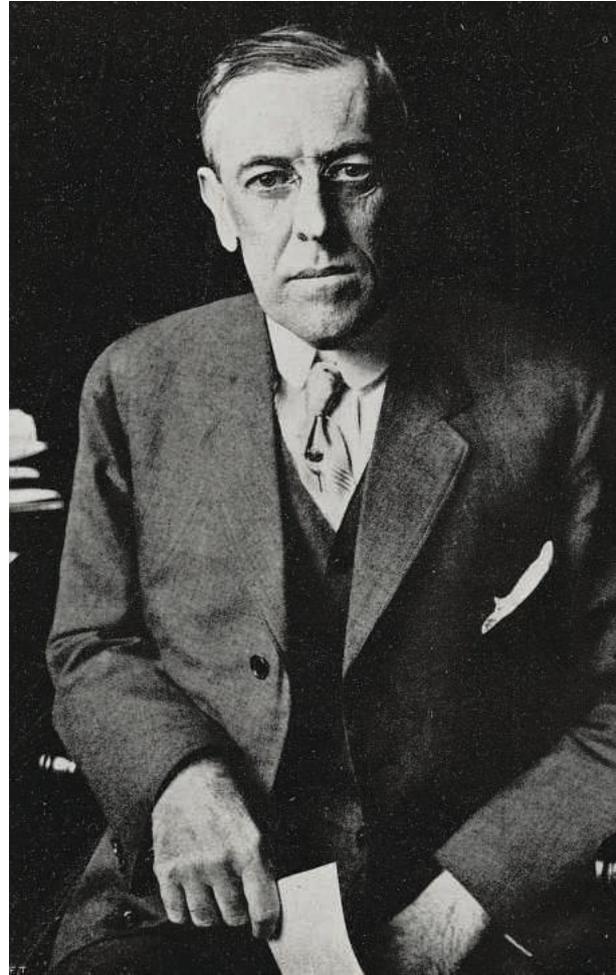


Figure 15.10 Former US president Woodrow Wilson

treaties between governments that had not been approved by the peoples of the signatory nations.

**extradition** the act of forced transfer/delivery of a person who is alleged to have committed a crime in one jurisdiction to the law enforcement agencies of the jurisdiction from which they have fled

## REVIEW 15.3

- 1 Explain international customary law. (C)
- 2 Investigate and list the major terms of the ANZUS Treaty (1951) between the United States and Australia. (C, S)
- 3 Discuss which country stands to benefit the most from the treaty and why. (A, E)
- 4 Australia is a party to a range of agreements that cover areas such as shipping, health, defence, nuclear non-proliferation, the environment, maritime issues and technology. Select one of the areas in which Australia has signed treaties. Research the treaties that exist and write a brief summary of their content to share with your class. (A, E, Cr)

**Table 15.2** Significant treaties since 1945

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• General Agreement on Tariffs and Trade 55 UNTS 194, updated in 1994 into the Marrakesh Agreement Establishing the World Trade Organisation 1867 UNTS 3</li> <li>• Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277</li> <li>• Convention on the Status of Refugees 189 UNTS 150 and Protocol relating to the Status of Refugees 606 UNTS 267</li> <li>• Twin Covenants: The International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 ('ICESCR')</li> <li>• Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161</li> <li>• Convention on the Law of the Sea 1833 UNTS 396</li> <li>• Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1465 UNTS 85</li> <li>• Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148</li> <li>• Comprehensive Nuclear Test Ban Treaty (1996)</li> <li>• Rome Statute of the International Criminal Court 2187 UNTS 90</li> </ul> | <ul style="list-style-type: none"> <li>• General Agreement on Tariffs and Trade (1947), updated in 1994 into the World Trade Organization</li> <li>• Genocide Convention (1951)</li> <li>• Refugee Convention (1951) and Protocol (1967)</li> <li>• Twin Covenants: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)</li> <li>• Nuclear Non-Proliferation Treaty (1968)</li> <li>• The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 'Hague Abduction Convention') 11.2.7–9</li> <li>• Convention on the Law of the Sea (1982)</li> <li>• Convention Against Torture (1984)</li> <li>• Kyoto Protocol (1997)</li> <li>• Comprehensive Test Ban Treaty (1996)</li> <li>• Rome Statute of the International Criminal Court (1998)</li> <li>• Treaty of Good-Neighborliness and Friendly Cooperation Between the People's Republic of China and the Russian Federation (2001)</li> <li>• International Treaty on Plant Genetic Resources for Food and Agriculture (2001)</li> <li>• Global Plan of Action to Combat Trafficking in Persons (2010)</li> <li>• Treaty on the Prohibition of Nuclear Weapons (2017)</li> </ul> |
|---|--|

We examined the Universal Declaration of Human Rights in some detail in Chapter 13, but some of these other important treaties should be examined to see how effective they are in operation, and particularly how they sometimes have a direct impact on Australians.

wrongful removal of a child from a country. It is aimed at deterring a parent from crossing international boundaries in search of a more sympathetic court. The Convention applies only to children under the age of 16.

### ***The Hague Convention on the Civil Aspects of International Child Abduction 1980 (the 'Hague Abduction Convention') 11.2.7–9***

The Hague Convention on the Civil Aspects of International Child Abduction 1980 is aimed at providing a way for a parent whose child has been abducted by the other parent and taken overseas illegally to recover the child. The essential aim of the Convention is to preserve the custody arrangements that may have existed immediately before any alleged

**Figure 15.11** International child abduction is a serious crime.

## International parental child abduction is a cinch in Australia

A child is abducted by a parent and taken overseas several times a week in Australia. How are the parents left behind supposed to get their child back?

Sally Faulkner returns home to her youngest child after a failed attempt to retrieve her other two children from Lebanon.

A child is buckled into a seat before the plane engine roars and they are soon soaring through the clouds, away from the only home and family they have ever known.

But this is not a return trip.

The child's parent who has carefully packed their bags and led them onto the plane doesn't plan on bringing them back or giving access to the other parent ever again. The odds they'll get away with it are good.

This is the story of some 250–300 Australian children who are at the centre of international parental child disputes every year.

Once an Australian child is on foreign soil, there's not much anyone can do under current Australian laws to bring them home unless the country is a signatory to The Hague Convention – which many are not.

International parental child abduction is not a criminal offence in Australia, with the exception of cases where a Family Court order restricting travel is already in place.

That means one parent can simply book a flight for their child to another non-signatory country under the guise of a holiday or similar and never return to Australia, with no legal repercussions.

A government recovery mission will not be declared, a search party will not be launched and charges will not be laid against the person who took the child in the first place.

A spokesperson for the Department of Foreign Affairs and Trade said consular officers 'can provide general advice and support and will seek, as far as possible, to ensure the welfare of the children'.

'They cannot, however, intervene in family law matters or custody disputes, or provide legal advice,' the spokesperson said.

Australian courts can issue a recovery order that allows the Australian Federal Police to speak to customs and border control and find out where the child is. But it does not enable them to enforce the order in another country or retrieve the child.

'Where children are involved in a foreign jurisdiction it is local courts, not the Australian government or private citizens who make decisions about

child custody,' a spokesperson for Attorney-General George Brandis wrote in a statement to news.com.au.

Parents left behind are typically advised by the Australian government to go through the court process in the country their child has been taken to in a bid to recover them.

But many can't afford the expense of living in a foreign country where they don't have the right to work on top of hefty legal fees and are therefore unable to pursue this line of action.

In many cases, the parent left behind goes years without seeing their child, or never sees them again.

That's where child recovery agencies are often brought into the equation and extreme risks are taken.

It can happen to anyone, as Queensland mother Sally Faulkner – the mother at the centre of the child snatch scandal with a *60 Minutes* crew in Lebanon – knows all too well.

But her case is not an isolated one.

Australia has the highest per capita rate of parental child abduction in the world with about 250–300 cases every year. It also has one of the lowest rates of recovery of abducted children.

There is some protection in the form of The Hague Convention in countries that are signatories to the treaty which provides a lawful procedure for seeking the return of abducted children to their home country. It also provides assistance to parents to obtain contact or access to children overseas.

But fewer than half of the 114 children taken from Australia during custody disputes to a country that is a signatory to The Hague Convention in the past financial year have been returned, despite appropriate action having been taken under treaty, figures from the Attorney-General's office show.

The process from application to recovery can take weeks, months or years to complete.

Some applications are rejected on the basis that the child in question has spent 12 months or more in the country he or she was taken to and 'settled', according to the Attorney-General's Department.

Countries that aren't signatories to The Hague Convention – including Afghanistan, Lebanon and Taiwan – have no obligation to return a child to their country of origin.

Even under The Hague Convention, the parental child abductor can only be brought to court over a broken court order when fleeing Australia with the child. They can't be charged with international parental child abduction because it's not illegal in Australia, unlike in the US and UK.

Coalition of Parents with Abducted Children founder Ken Thompson said criminalising absconding overseas would force authorities to take the issue more seriously.

'It's not about criminality for the purpose of punishment, it's criminality for the purpose of getting things done,' Mr Thompson told *The Australian* in the wake of the *60 Minutes* scandal.

'The only options are turning your back on the kid, or do whatever you can to get them back.'

Mr Thompson's own three-year-old son was abducted in 2008 and found in the Netherlands in 2011.

'Any parent ... will tell you it should be a criminal offence – that's why I'm throwing my weight behind this issue. I know first-hand what it's like to have a child abducted and it's absolutely horrible,' he told news.com.au.

'Unless it's before the Family Court, you're on your own. The Australian Federal Police can't provide any support to parents because it's not a crime.'

Duncan Holmes, a family lawyer and director of KD Holmes solicitors, has acted in a number of Hague abduction cases, *The Australian* reported.

'The question is: will making it a crime get the children back?' he said.

'The real problem isn't stopping the parent leaving the country; it's getting them back once they leave. And that's where The Hague Convention is looking a little tired.'

A 2011 Senate inquiry into international parental child abduction made 11 recommendations, including reassessing whether 'stronger measures' such as 'the possibility of a stand-alone criminal offence for international parental child abduction', were needed.

Lauchlan Leishman, whose child was snatched and taken abroad, pleaded with the government to make parental child abduction a crime. The fact it is not means that 'getting information is like dragging gold out of seawater', he told *The Australian*.

'If I stole someone else's child I would be hounded by the criminal justice system. This is no different.'

## REVIEW 15.4

Read the article and answer the questions.

- 1 Identify the international law in this area. (C)
- 2 Analyse the operation of this law and identify criticism or 'loopholes' that seem to make this law less effective than it could be. (A, E)
- 3 Evaluate what solutions could be offered to potentially address these problems. (A, E)

### *United Nations Declaration of the Rights of Indigenous Peoples 2006 3.1 (IDRIP)*

The Declaration is an important document in international human rights law that sets out the individual and collective rights of Indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. It emphasises the following rights:

- **The right to self-determination.** Indigenous peoples have the right to make their own decisions on issues that concern them
- **The right to cultural identity.** Indigenous peoples are equal to all other peoples, but they also have the right to be different and culturally distinct.
- **The right to free, prior and informed consent.** Indigenous peoples have the right to be consulted and make decisions on any matter that may affect them, having all the information, before anything happens, and without being pressured.
- **The right to be free from discrimination.** Governments must ensure that Indigenous peoples and individuals are treated equally, regardless of sex, disability or religion.

A total of 144 countries voted in favour of the IDRIP. Australia, under the Howard Coalition government, was one of only four countries that voted against the Declaration (along with Canada, the United States and New Zealand). As a result, Australia cannot officially become a signatory to the Declaration. In 2009, the Rudd government made a decision to formally endorse the Declaration, but Aboriginal leader Professor Mick Dodson stated, 'The value of human rights is not in their existence, it's in their implementation. That is the challenge for the world with this declaration. The standards have been set, it is up to us to meet them.'

### REVIEW 15.5

- 1 Analyse why the United Nations saw a need to issue this declaration. Justify your answer with reference to at least two examples. (A, E)
- 2 How do you feel about the fact that Australia was one of only four out of 148 countries to vote against the Declaration? Why do you think the countries that did not support it acted in the way they did? (A, E)

## Geneva Conventions 1949

This important treaty (actually a series of treaties and protocols over a number of different decades in both the nineteenth and twentieth centuries) was developed in response to circumstances at those times. The First Geneva Convention is outlined in Chapter 13. Some breaches of the Convention are treated more seriously than others. More serious breaches (called 'grave breaches') include things like:

- depriving a protected person of the right to a fair trial if accused of a war crime
- taking hostages

- wilful killing, torture or inhumane treatment, including biological experiments
- compelling a protected person to serve in the armed forces of a hostile power
- causing great suffering or serious injury to body or health
- unlawful deportation, transfer or confinement
- extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

These actions are also sometimes referred to as war crimes, and are able to be prosecuted as such in the International Criminal Court. Nation-states are required to enact laws penalising these crimes and to enforce them against anyone accused of committing them, regardless of nationality or where the crimes were committed.

### RESEARCH 15.1

- 1 Conduct an internet search using the term 'Australian soldiers Geneva Convention'. Analyse the circumstances involved in alleged breaches and justify whether you believe these breaches to have occurred. (S, A, E)
- 2 Research the nature of the Second, Third and Fourth Geneva Conventions and Additional Protocols I and II. How effective do you consider they are today? (C, S, A, E)

**Figure 15.12** A visitor looking at victims' portraits at the Kigali Genocide Museum in Rwanda. The Rwandan Genocide is considered a grave breach of the Geneva Conventions.



In recent times, a number of people and/or countries have been accused of breaching the Geneva Conventions.

### *Hague Conventions of 1899 and 1907 11.2.7–9*

The Hague Conventions of 1899 and 1907 were similar in tone but slightly different in emphasis. The Geneva Conventions deal with people in war but the Hague Conventions tend to focus more on the use of weapons in war. The Hague Conventions sought to regulate the use of a number of things in warfare, including bans on the use of gas and poison, projectiles and explosives fired from balloons, and so-called ‘dum dum’ bullets that spread on impact. Ironically, another conference was scheduled for 1914 but did not take place due to the outbreak of World War I, where many of the things banned in the Conventions were used anyway. Somewhat confusingly named, the Geneva Protocol to the Hague Conventions is considered an important addition to the Hague Conventions. The Geneva Protocol (1925) banned the use of all forms of chemical and biological warfare. The Protocol was considered necessary following the use of weapons such as mustard and chlorine gas in World War I and the horrors that resulted. The Biological Weapons Convention (1972) and the Chemical Weapons Convention (1993) have further

added to the restrictions on the way war can be waged and the types of weapons able to be used.

#### SIDEBAR

In 2013, 2014, 2016 and 2018, the Syrian government is alleged to have carried out chemical weapons attacks against its own citizens. What evidence can you find in your own research that the Hague Conventions were applied and operated effectively? Identify the issues in ensuring such attacks are stopped in the future.

### *Convention Relating to the Status of Refugees (1951) and Protocol (1967)*

This Convention, as an elaboration on Article 13 of the 1948 Universal Declaration of Human Rights, is discussed in Chapter 14, which also discusses the role of the UN High Commissioner for Refugees (UNHCR).

#### SIDEBAR

In view of the current widespread refugee global situation, discuss how effective the current conventions and protocols are in protecting the interests of those seeking asylum in other countries. (A, E)

**Figure 15.13** A boat carrying 150 suspected asylum seekers is spotted by crew on board MV *Bison*, prior to the vessel sinking.



## General principles

This refers to general principles of law recognised by civilised nations. Those principles that are accepted as law are usually marked by a practice of acceptance without protest over a considerable time. Silence and an absence of protest are indicators that the general practice has been accepted.

## Judicial decisions and teaching of publicists

When a judicial decision is made between two parties, such as between two countries, the decisions are only binding on the parties. However, the decisions do state principles that may be influential in another similar case between other parties. Likewise, the teachings of the most

highly qualified publicists of the various nations are not binding, but are useful. These include teachings of highly knowledgeable and skilled academics and international law experts. As with domestic law, they may make very useful analysis and comment about interpretations of the law, but they do not make the law. Their teachings may therefore be taken note of, but they do not represent a decision that any particular party is bound to follow.

## SIDEBAR

Go to the Department of Foreign Affairs and Trade website and access the 'Treaty Making Process' page. Discuss the treaty-making process.

**Figure 15.14** Emblem of the United Nations in the General Assembly, United Nations Building, New York



## RESEARCH 15.2

Visit the United Nations website and select one of the legal areas listed, then conduct an investigation by completing the following questions.

- 1 Describe the main aspects of the selected area. (C, S)
- 2 Identify and explain the laws that are applicable. (C, S)
- 3 Examine how this area of law applies. (A)
- 4 Do the laws consider justice, fairness, equity and ethics? Explain your response. (A, E)
- 5 Do the legal system and laws adequately address the issue? Explain your response. (A, E)



## 15.4 Australia and international law and tribunals

The concept of **state sovereignty** is vital in the legal framework of international order. This means that no international obligations to uphold a legal principle will have any force in Australia unless the Commonwealth Parliament specifically incorporates

it into Australian law. This principle in Australia dates back to the 1949 case in Case Study 15.1.

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**state sovereignty** the power of a government to run its own affairs and make laws for its territory

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### CASE STUDY 15.1

#### *Chow Hung Ching v R (1948) 77 CLR 449*

##### Facts

In 1948, there were present on Manus Island (in the mandated Territory of New Guinea) some 300 Chinese nationals, sent there to collect surplus war supplies sold to the Republic of China by the United States. They included army personnel and labourers. There was evidence that they were subjected to military discipline, exercised by officers of the Chinese Army, and that they were also subjected to Chinese military law. They did not carry arms. The army personnel acted as guards and the labourers as workmen. Two labourers, members of this body, were charged with having assaulted a native of the island and were convicted. They sought to appeal to the High Court of Australia, which had this jurisdiction.

##### Decision

The accused were not members of a military force, and therefore had none of the immunity from prosecution that might have been possessed by a member of such a force.

##### Implications

This seems like a straightforward decision, but the case is still regarded as significant, not so

much for its particular facts and the decision but for the authority it continues to hold (even more than 60 years later) concerning the application of international law in Australia. Dixon J made these important remarks:

The true view, it is held, is ‘that international law is not part, but is one of the sources, of English law ... In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law’.

Since Australia initially adopted English law and was then for many years bound by English decisions in its hierarchy of courts, such law applied in Australia. Consequently, the only difference to how the remarks of Dixon J are now read is that ‘English law’ should be read as ‘Australian law’.

It is clear that Dixon J is saying that international law is only one of a number of sources of law in a country like Australia. It does not automatically become part of Australian domestic law and each rule or custom needs to be examined individually to see whether it has been enacted into Australian domestic law. This position is reinforced by reference to another interesting, more recent case (Case Study 15.2).

## CASE STUDY 15.2

### *Nulyarimma v Thompson* (1999) 164 ALR 621

#### Facts

An application was made to the registrar of the Magistrates Court of the Australian Capital Territory to issue warrants for the arrest of the Prime Minister, Deputy Prime Minister and two members of federal parliament on the allegation that they had committed the criminal offence of genocide in connection with the formulation of the federal government's native title 'Ten Point Plan' to enact the *Native Title Amendment Act 1998* (Cth). The registrar refused to issue the warrants and Crispin J of the Supreme Court of the ACT rejected the applicants' bid for **mandamus** against the Registrar. The applicants appealed to the Full Court of the Federal Court.

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**mandamus** an order sought from a court making it mandatory for a party to perform a specified act

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#### Issues

In view of the decision that follows, it was not necessary to decide whether the acts complained of did constitute genocide, but remarks made indicate that the finding may have been that the elements of genocide had not been established. It was also remarked that an order of *mandamus* would not be available, upholding public policy considerations – meaning that it would not be good for the administration of justice in Australia.

#### Decision

- Genocide was not a breach of Australian law.
- An offence of genocide is recognised under customary international law, giving rise to obligations on Australia under the Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277.
- Australia had not legislated to introduce the relevant aspects of international customary law into Australian criminal law.
- Legislation was necessary to introduce the norms of customary international law into Australian criminal law, just as it was necessary to implement Australia's obligations under international treaties. This was so even if some non-criminal norms of customary international law could be regarded as having been introduced into Australian law without legislative intervention.

#### Implications

The decisions, as summarised above, stand for themselves – although an act may be a crime under international law, it cannot be prosecuted under domestic law unless it has been specifically enacted into domestic law. It is therefore unenforceable.

## REVIEW 15.6

- 1 In your own words, explain the concept of state sovereignty. (C, Cr)
- 2 Justify why *Chow Hung Ching v R* (1949) 77 CLR 449 is such an important case. (A, E)
- 3 Discuss in class how the decision listed in the second bullet point in Case Study 15.2 is able to be included with the other decisions. (A, E)



Figure 15.15 Australian Coat of Arms

## The Australian Constitution

The structure of Australia's federal government has implications for determining Australia's response to the search for international law. First, section 51(xxix) of the Australian Constitution states that only the federal government has the power to make laws with respect to external affairs, which would include entering into international treaties and agreements for Australia.

Technically, the executive branch of the federal government can sign any international agreement on its own without consulting parliament, but this is rare since the executive arm of government usually controls parliament. If the federal government wants to implement new legislation to support an international agreement that it has signed, then this must go through both houses of parliament.

## The states and international law

Any international agreement entered into by the federal government can affect the states in some way. The federal government usually consults the states before signing an international agreement, but it is not obliged to do so. Sometimes international agreements can be a point of debate between the states and the federal government. In 1983, the federal government used its external affairs powers under the Australian Constitution to bring a halt to

the Tasmanian Government's proposed construction of a hydro-electric dam on the Gordon River below its confluence with the Franklin River, which would have flooded a large section of the Franklin River. The High Court heard the matter in *Commonwealth v Tasmania* (1983) 158 CLR 1 (the *Tasmania Dam Case*). This case was mentioned previously in Case Study 9.1 on page 251.

The question that was considered by the High Court was clarified by Gibbs CJ, as seen in this extract from his judgment (1983) 158 CLR 1 at 60:

No lawyer will need to be told that in these proceedings the court is not called upon to decide whether the Gordon-below-Franklin Scheme ought to proceed. It is not for the court to weigh the economic needs of Tasmania against the possible damage that will be caused to the archaeological sites and the wilderness area if the construction of the dam proceeds. The wisdom and the expectancy of the two competing courses are matters of policy for the Government to consider, and not for the court. We are concerned with a strictly legal question – whether the Commonwealth regulations and the Commonwealth statute [law passed by parliament] are within constitutional power.

The High Court decided (by a majority of four to three) that the federal government did have the constitutional power to make the law stopping the damming of the Gordon River. The external affairs power came into play in this instance because the federal government had placed the Franklin River on the World Heritage List.

### REVIEW 15.7

- 1 Identify and explain the power that section 5 of the Australian Constitution gives the federal government. (C, S)
- 2 Explain how international law enabled the federal government to stop the damming of the Gordon River by the Tasmanian Government in 1983. (C, A)
- 3 Summarise the statement by Gibbs CJ. How did he distinguish the legal question from non-legal questions? (A, E)

Prior to Prime Minister Kevin Rudd ratifying the Kyoto Protocol in December 2007, a number of the states had been at odds with the previous government's refusal to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 on global warming. The states cannot enter into international agreements in their own right because this is the sole constitutional power of the Commonwealth. However, they can enact their own legislation that is in harmony with international agreements. For instance, the New South Wales Government went further in adhering to UN human rights treaties with its *Anti-Discrimination Act 1977* (NSW) than the federal government did with the *Racial Discrimination Act 1975* (Cth).

## Australia's role in global affairs

Since Federation, Australia, as a single nation, has taken its global responsibilities seriously. Australia's massive human contribution in World War I was due to its obligations to the maintenance of the British Empire, which it saw as essential to global stability, the spread of civilisation and the rule of law. Australia's contribution during World War I earned it recognition as a nation in its own right in the League of Nations, along with the other British countries of Canada, New Zealand and South Africa. As a foundation member of the League of Nations,

Australia played a very active role internationally, and has continued to do so since, cooperating in many ways with the United Nations.

## *Australia's contribution to peacekeeping*

Australia has consistently been involved in UN peacekeeping missions. It has contributed either military forces and/or police to more than 50 multilateral peacekeeping and security operations since 1947.

In 1999–2000, Australia played a leading role in establishing order in East Timor when Indonesian-backed militia went on a killing rampage after the East Timorese people voted for independence from Indonesia in a 1999 UN referendum.

In November 2001, Australia sent units of its special forces to assist in the UN-sanctioned US invasion of Afghanistan. Then, in 2005, Australia recommitted Special Forces to Afghanistan to counter a resurgence of Taliban activity there. The majority of Australian combat forces withdrew from the country in 2013 but there are currently still around 400 Australian military personnel in Afghanistan in mentoring and advisory roles to the Afghan military.

Australia has also been engaged in peacekeeping efforts internationally outside the United Nations. In recent years, Australia has conducted a peacekeeping operation in the Solomon Islands and committed police officers to assist Papua New Guinea.

**Figure 15.16** Australian peacekeeping soldiers watch a ceremony marking East Timor's Independence Day in 2008.



Australia is a leading advocate of the international doctrine Responsibility to Protect (R2P). This doctrine represents the commitment by a number of nations to ensure that the world is free of genocide, ethnic cleansing and other mass atrocities against humanity.

## Australia and international agreements

Australia has also been a part of many international agreements to promote world order – for example, the 1947 General Agreement on Tariffs and Trade 55 UNTS 194 (GATT) and, since 1995, the Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (WTO). Australia is also a signatory to the Geneva Conventions and the Rome Statute of the International Criminal Court 2187 UNTS 90, which led to the establishment of the International Criminal Court in 2002. Australia has many international obligations outside its multilateral agreements. The majority of the 900 treaties that Australia has signed are bilateral. For example, most of the \$1 billion in Australian aid for the victims of the 2004 Boxing Day tsunami was given as part of a bilateral agreement.

### REVIEW 15.8

- 1 Identify why Australia was involved in a peacekeeping operation in East Timor. (C, S)
- 2 Explain why international doctrine R2P may have come about. What historical events indicate a need for this type of doctrine? (A, E)
- 3 Identify the important bilateral treaty that was passed by the Senate in 2004 only after significant amendments had been made. Justify why these amendments were required. (C, A, E)

## International tribunals

Enforcement of the law is always an issue. In international law, it is a very complex matter. The bulk of international law exists for mutual benefit,

which means that nations sign treaties because they will benefit from them. Yet in other areas of international law, there is a problem of enforcement because there is no international police force that can routinely carry out law enforcement.

## International Court of Justice

The International Court of Justice (ICJ) is a global court that is designed to deal with disputes between nations. It was established in 1946 as an organ of the United Nations; however, if a powerful nation decides to ignore a decision of the ICJ, the court is powerless to act. The ICJ can only hope that negative world opinion might shame the non-compliant nation into action.

The ICJ is based at The Hague in the Netherlands and has 15 judges elected by the United Nations. The questions before the court are usually decided by a majority of judges, and decisions are arrived at by applying international treaties/conventions and international customary law. The ICJ may refer to academic writings and previous decisions to interpret the law, although it is not bound by previous decisions. If no clear-cut conventions apply to a case, the court may make decisions based on the concept of ‘justice and fairness’ as long as the two parties agree to this basis for decision-making.

**Figure 15.17** The International Court of Justice in The Hague is the principal judicial organ of the United Nations.



The ICJ hears two types of case:

- **Contentious issues between nations.** The court produces binding rulings between nations that have agreed to have their case submitted to the rulings of the court.
- **Advisory jurisdiction.** The court provides reasoned but non-binding rulings on questions of international law submitted by the UN General Assembly.

There are numerous treaties that confer jurisdiction on the ICJ.

In theory, the court's decisions are binding on the parties, final and without appeal, except in cases where it gives an advisory opinion. In practice, though, the ICJ's effectiveness has often been limited by the unwillingness of the unsuccessful party to abide by the court's ruling, as well as the reluctance of the Security Council to support action against a country to enforce the rulings. For example, in the case *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, the court ruled that the United States had

to cease unlawful activities against Nicaragua. The majority of the ICJ judges reasoned that US actions against Nicaragua were in breach of the customary international law to not use force against another nation. The court ordered that the United States pay reparation to Nicaragua. However, the United States ignored the decision, refused to pay Nicaragua and withdrew from the ICJ. This demonstrates the difficulty of enforcing international law, especially against the most powerful nations. It means the effectiveness of international law and the bodies that seek to enforce it, like the ICJ, are often called into question.

### RESEARCH 15.3

- 1 Conduct an internet search using the term 'ICJ verdicts ignored'. (C, S)
- 2 List examples of at least three different rulings of the ICJ ignored by powerful nations. (C, S)
- 3 How can the rulings of the ICJ be made more binding? (A, E, Cr)

### RESEARCH 15.4

Visit The Hague Justice Portal and investigate the proceedings instigated by Australia against the government of Japan concerning Japan's alleged breach of its international obligations over whaling. Your search should include:

- background information regarding Japan's whaling program
- discussion about Australia's interpretation of the 1946 International Convention for the Regulation of Whaling 161 UNTS 72
- an analysis of Australia's application to the International Court of Justice and the importance of the proceedings for Australians. (C, S, A, E)

## International Criminal Court

This court is an independent organisation separate from the United Nations. The Rome Statute of the International Criminal Court 2187 UNTS 90 is a treaty that was signed in 1998 by 121 nations, including Australia, which pledged the signatory nations to the establishment of a permanent International Criminal Court (ICC). The ICC was established in 2002 in The Hague, although its statute allows it to hear cases anywhere in the world if necessary. The ICC was given jurisdiction over genocide, war

crimes and crimes against humanity – the three most serious types of international crime. Despite this autonomy, the ICC works closely with the United Nations. The establishment of the ICC was a historic event because it was the first permanent court in which individuals could be tried for crimes against humanity. The court is made up of four organs: the Presidency, the Judicial Division, the Office of the Prosecutor and the Registry.

The ICC has been criticised as focusing on smaller, less powerful nations and punishing leaders

of those countries, while ignoring crimes committed by richer and more powerful states. Nations from Africa in particular have accused the ICC of an anti-African agenda and there have been threats from various African nations to withdraw from the ICC (with Burundi in fact doing so and South Africa confirming its intention to do the same).

There have also been some indications that the operation of the ICC means that dictators are now less likely to stand down peacefully as they fear prosecution by the ICC after they have left office.

The fact that the government of a nation is also required to cooperate with ICC case investigations means a potential war criminal in power may simply refuse to cooperate and therefore essentially stall a potential investigation.

### CHECK THIS OUT

To find out more information about the ICC, visit the ICC website.

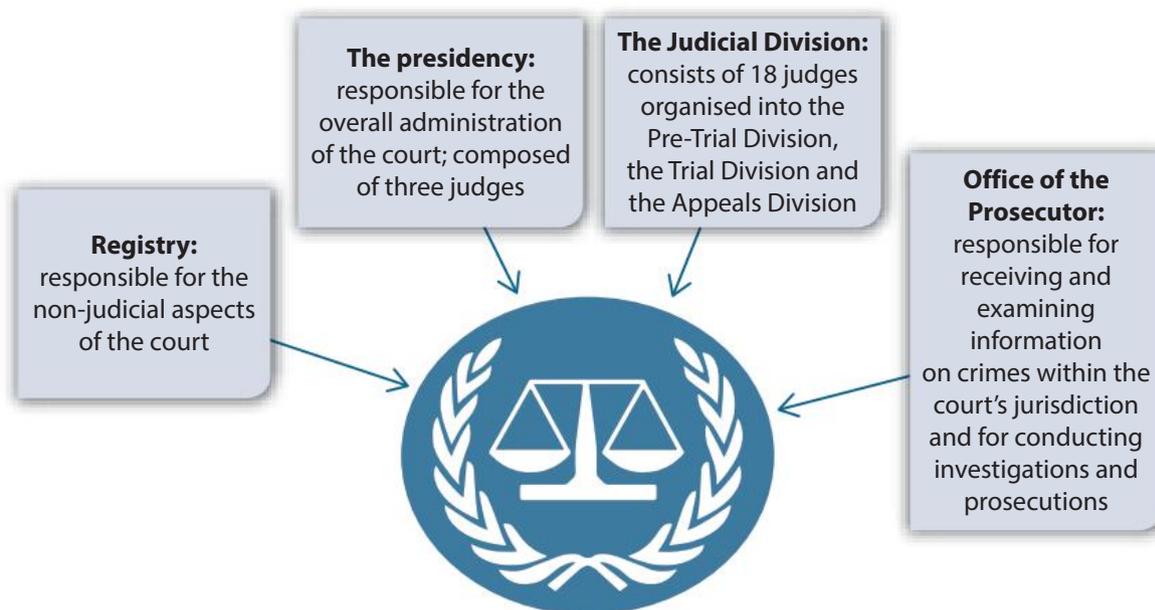


Figure 15.18 The International Criminal Court



Figure 15.19 Wanted poster with portraits of those accused of perpetrating genocide with a bounty of US\$500 000 per head

### REVIEW 15.9

What is the attitude of the United States to the ICC? Use the following as a guide to your answer:

- 1 Outline US opposition to the ICC. (C, A)
- 2 Outline the following measures that the United States has taken against the ICC:
  - a American Service Members' Protection Act 22 US81 (2002) (Hague Invasion Act)
  - b the threat to use the power of veto in the UN Security Council
  - c Article 98 agreements. (C, A)



**Figure 15.20** Former Serbian leader Slobodan Milosevic on trial for war crimes and crimes against humanity in Kosovo

## Other international tribunals

A number of other major international tribunals have been established. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a UN Security Council resolution in 1993. It has jurisdiction over breaches of the Geneva Conventions and international customary law committed in the territory of the former Yugoslavia since 1991. The most high-profile case to date was that of former Serbian leader Slobodan Milosevic, who was arrested in 2001 for war crimes

and crimes against humanity in Kosovo and placed on trial in 2002. Milosevic died in 2006, before the completion of his trial. The International Criminal Tribunal for Rwanda was established in 1994 and is based on the model of the ICTY. It has jurisdiction over acts of genocide committed in Rwanda in 1994. The Special Court for Sierra Leone was jointly established by the United Nations and the government of Sierra Leone. The function of the court is to try those who have violated the conventions for international humanitarian law since 1996.

### REVIEW 15.10

Read the article on page 427 and answer the questions.

- 1 Explain who Charles Taylor is. (C, S)
- 2 Investigate why the process used in prosecuting Charles Taylor is seen as biased. (A, E)
- 3 Discuss the discrepancies that exist in the administration of justice as described in the article. Do you consider the system to be flawed or is it the best that can be done? Discuss your answer. (A, E)

## Special court for Sierra Leone

28 May 2012

African states that have entrusted themselves to international justice should not be seen as the targets of neocolonial persecution. They have decided to be ‘out front’ and steer a new era of international justice, and for that we are grateful. As stated by the new Gambian prosecutor at the International Criminal Court (ICC), Fatou Bensouda, these are ‘principled states ... determined to use the power of the law, not the power of arms, to protect their citizens and their territories’.

By contrast, nations resistant to the ICC, such as the United States, show an unwillingness to yield any authority over their citizens to international organisations, and for this they come in for valid condemnation. The United Kingdom chose to place itself at odds with the United States and stand with the bulk of the international community in laying the groundwork for an historic organisation.

The seven situations currently before the permanent ICC are from the continent of Africa. There are also two other international tribunals, the Rwanda Tribunal and the Special Court for Sierra Leone (SCSL), devoted to African conflicts. The newly elected government of Sierra Leone entered into an agreement with the UN to establish the SCSL. However, the fundamentals of the system of international criminal justice are from Europe and not Africa.

This Wednesday, former Liberian president Charles Taylor will be sentenced in The Hague by the SCSL for his part in Sierra Leone’s bloody conflict. Taylor’s crime was providing arms to a group he knew were using them to commit atrocities.

If judges impose a sentence much less than the prosecution’s unlikely request for 80 years’ imprisonment, Taylor could soon be on his way to the UK to serve out his time. Courtenay Griffiths QC (Taylor’s lawyer) has been outspoken about his belief that Taylor’s prosecution is part of an inherently biased and flawed international criminal justice system, in prolongation of an anti-African agenda.

In 1993, the United Nations established the Yugoslavia tribunal that set the precedent for the other international tribunals that followed. Slobodan Milosevic may have been the first former head of state to be convicted by an international court, but he died

before the trial was over. It now appears that it will be Taylor who will be the first former head of state to be convicted by an international court. As the Taylor trial nears its end, the trials of Bosnian Serbs Mladic and Karadzic (accused of war crimes, crimes against humanity and genocide) continue.

Notably, there are flaws in our new system of international justice. For one thing, those who choose not to sign up to it face little potential of being brought before an international court. The shortcoming of this is that some people claim that international law simply doesn’t apply to the big powers or their political leaders. Yet this is only part of the story: standards are being set, standards that will no doubt one day pertain to all.

Uganda, the Central African Republic and the Democratic Republic of Congo put themselves before the ICC for investigation. Although initiated by the ICC prosecutor, the Kenyan cases continue to receive support from the Kenyan Human Rights Commission, and at least one of the accused favoured the ICC rather than being prosecuted by a Kenyan court.

There is some concern in the international community that African perpetrators may be singled out more than others. This may be the case, but from the victims’ perspective this is, of course, complete nonsense. For the victims of gang rape or amputation, or the children who are forced to join rebel gangs, justice is all they can hope for.



**Figure 15.21** Former Liberian president Charles Taylor during his trial. He was subsequently sentenced to 50 years imprisonment, which he is serving in a UK jail.



Figure 15.22 Philippe Sands, a leading international lawyer

The Appellate Body of the World Trade Organization (WTO), which was established by the WTO in 1995, has jurisdiction over trade disputes. According to international lawyer Philippe Sands in his 2006 book *Lawless World: America and the Making and Breaking of Global Rule*, the Appellate Body's **quasi-judicial** system for enforcing international laws makes it potentially the most powerful international tribunal in the world (for further information, see the WTO's Appellate Body website).

The European Court of Human Rights was set up in 1959 and has jurisdiction over issues relating to violations of human and political rights which are outlined in the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (European Convention on Human Rights). The court is made up of a number of judges equal to the number of member states of the Council of Europe, ratified in the European Convention on Human Rights. Each of the judges sits in their own right and does not represent any country.

Source: *The Guardian* (UK).

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**quasi-judicial** authority that is judicial in nature, often exercised by a tribunal, as distinct from a court where a judge presides

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## CHECK THIS OUT

- Visit the Global Policy Forum website for information on International Criminal Tribunals and Special Courts.
- Visit the World Legal Information Institute website for information on International Courts and Tribunals.



## 15.5 Contemporary developments in international law

### Changing social values and composition of society

World opinion is shaped by changing social values and can represent a powerful agency of reform. The changing social values of the international community can often prompt the UN General Assembly to look into an issue and take action. A century ago, the social values of the majority of people of the world had little impact on world affairs and world opinion was not an ingredient of reform. World War I changed this. Many individuals opposed what they saw as the insanity of the war, believing that in future the people of each nation should have control of foreign policy, and that world opinion must exert itself through a world forum.

Former US president Woodrow Wilson was the first world leader to attempt to mobilise world opinion about war through his various speeches between 1916 and 1919, which were directed at people on both sides of World War I.

Today, politicians cannot afford to ignore world opinion and must take the changing social values of the international community into account. World opinion led to UN intervention in the former Yugoslavia, Rwanda and Somalia due to the genocide being committed in those countries. Since 2005, world opinion has been exerting pressure for action over human rights violations in Myanmar, North Korea, Zimbabwe and Sudan. In China, practitioners of Falun Gong were singled out and tortured as well as put into detention. World opinion was also instrumental in ensuring global responses

to natural disasters such as the Boxing Day tsunami in 2004 and the earthquakes in Pakistan in 2005 and in Haiti in 2010. However, countries do sometimes take action that is not necessarily supported by world opinion.

### The United Nations

In 1997, during his first term as UN Secretary-General, Kofi Annan started working on a major report on UN reform. In March 2005, this report was presented to the UN General Assembly and a high-level panel, consisting of experts and former government leaders, was established to guide the process of reform. The final report was debated by the world's leaders at the UN for three days in September 2005. However, they could not agree on many of the most important recommendations. (For further information, see the United Nations' *In Larger Freedom* website.)

### Multilateral cooperation

Multilateral forms of cooperation have evolved outside the United Nations. Nations cooperate multilaterally to promote stability and reform of the world order, working through international organisations (such as the World Bank), regional organisations (such as the European Union) and NGOs (such as Oxfam). Nations have signed more than 500 major multilateral treaties. These have been negotiated outside the United Nations, although under Article 102 of the UN Charter, all treaties of member states must be lodged with the United Nations.

### CHECK THIS OUT

Select one of the following issues and gather more information on it:

- Falun Gong
- the initial failure of Libya to bring Colonel Gaddafi before a judge and how he was eventually dealt with
- the international sanctions against North Korea or Iran. (C, S)

## Regional organisations

One of the most successful regional organisations is the European Union (EU), which has prevented major war from occurring in Europe through economic and political cooperation. The EU has also made a commitment to the rule of law and human rights as major criteria for membership. Examples of other regional organisations include the Asia-Pacific Economic Cooperation (APEC) forum, the African Union and the Union of South American Nations (UNASUR).

## Non-government organisations (NGOs)

In the area of international law, the major success story in the last 70 years has been the civilising and reforming role played by NGOs. These organisations investigate major issues, publicise them to the international community, lobby governments and give relief to those in need. There are now many NGOs constantly working to bring about much-needed reforms. NGOs also have invaluable input at international conferences and often work in partnership with nations and the United Nations on various projects. Many NGOs work in the area of upholding the international rule of law. NGOs also provide an effective avenue through which private citizens can play a role in reform in the international arena.

## International law and new technology

As with any other area of law, international law is continually trying to keep pace with new technology, particularly in the area of trade and investment. The WTO Appellate Body and other international trade and investment tribunals repeatedly have to resolve difficult issues in this area, and in the process make rulings that set precedents for the conduct of trade and investment.

Another technological area that has required the development of a range of international protocols, rules and regulations in recent years is the internet.



Figure 15.23 Cyber security is a growing issue.

One of the most contentious issues in this area was over who was to have control of the gateway servers for the internet. The United States controls the domain name system (DNS) and certain root name servers that sit atop the internet, directing traffic. As well as control, there are many other matters relating to the internet that call for continuing law reform, such as scams, fraud, gambling, spam and websites that incite hatred or violence.

The most important area of new technology with which international law has tried to keep pace is that which has enabled the development of increasingly powerful weapons. Various treaties have been signed outlawing whole classes of nuclear, chemical and biological weapons, which are more commonly known as weapons of mass destruction (WMDs). One example is the 1972 Anti-Ballistic Missile Treaty 944 UNTS 13, which effectively stopped the production of this type of missile by the United States and the Soviet Union. However, the United States later ignored this treaty and developed its National Missile Defence (NMD) program, otherwise known as 'son of Star Wars'.

## Other conditions that give rise to the need for reform

Since 2000, other issues have emerged or been recognised that will continue to give rise to the need for reform of international law.

## *Nuclear war*

The international community still does not have a way of effectively reducing the threat of nuclear war, which some consider to be the major area in which law reform is needed. The Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161 (NPT) served to restrain the proliferation of nuclear weapons for many years. However, the ongoing effectiveness of the NPT is questionable, given the failure of negotiations over its renewal in 2005. Another impediment is the apparent lack of consistency in the expectations of different nations, including the determination of the US administration in the first decade of the twenty-first century to press ahead with the development of new types of nuclear weapons (such as bunker-buster atomic bombs) and adventurous weapons systems (such as the NMD program), which

breach treaties such as the Anti-Ballistic Missile Treaty 944 UNTS 13.

## *Global terrorism*

Terrorism is a form of warfare. Some commentators argue that terrorism is merely the privatisation of war. Throughout history, in common with guerrilla warfare, terrorism has been the chosen method of warfare when one's enemy has a vastly superior military force. Over the last century, terrorism has become a more potent form of warfare with advancements in the development of explosives. The 9/11 attack on New York's World Trade Center signalled the transformation of terrorism into a global phenomenon. There are now loosely allied networks of terrorist groups across the world. The legal responses to terrorism have varied from country to country and have led to debate about human rights.

**Figure 15.24** On 11 September 2001, terrorists crashed two planes into the towers of New York's World Trade Center.



## Tyranny and human rights violations

The continued existence of tyranny and human rights violations, such as those that occurred under the policies of tyrants such as Adolf Hitler (Germany), Saddam Hussein (Iraq) and Pol Pot (Cambodia), prompts calls for further reform and action. It is interesting to note that Saddam Hussein was given due process in a fair trial before being executed in December 2006.

## Environmental threats

The international community has realised for over 20 years that serious environmental threats exist that can only be met adequately by united action. The Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 (Kyoto Protocol) is a starting point for dealing with the problem of global warming. The Kyoto Protocol is an international treaty designed to limit global greenhouse gas emissions. Many parties to the Kyoto Protocol, including Australia, have signed it since negotiations were concluded at the third session of the Conference of the Parties to the UNFCCC (COP 3). Australia signed the Kyoto Protocol in 1997. By signing the Kyoto Protocol, countries agree to continue with the treaty-making process but do not consent to be bound by it. The rules for implementing the Kyoto Protocol were developed following COP 3, with negotiation concluded at COP 7 in Marrakesh in November 2001. After entry came into force on

16 February 2005, the Kyoto Protocol became legally binding for countries that had ratified it (referred to as 'Parties to the Kyoto Protocol'). In 2012, Australia and 36 other countries from around the world signed up for binding emission cuts by 2020. This agreement was part of a package of agreements extending the life of the Kyoto Protocol. Under this continued agreement, Australia agreed to reduce its emissions by 5 per cent on 2000 levels but has left the way open to increase this pledge to up to 25 per cent in the future.

## Disease

The threat from global epidemics will rise due to increasing travel and migration between countries. From time to time, including in 2003, fears have been raised about a Severe Acute Respiratory Syndrome (SARS) epidemic becoming a real threat to the world. In October 2005, Asian bird flu re-emerged as a major concern, with researchers discovering that the 1918–19 flu **pandemic** that killed 50 million people at the close of World War I had originated from birds. The very serious threat of Asian bird flu has led to calls for more reform and combined action to deal with any outbreaks immediately, with the United Nations and the World Health Organization taking prominent roles.

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**pandemic** an epidemic that affects a whole country, or the whole world

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**Figure 15.25** A representative of Médecins sans Frontières (Doctors without Borders, or MSF) briefs local MSF staff in establishing the new Ebola Clinic in Liberia.





# SUSTAINABLE DEVELOPMENT GOALS



Figure 15.26 The UN Sustainable Development Goals

## Poverty

According to UNICEF, 22000 children die from poverty each day. There is a concern that globalisation is making poverty worse in many parts of the world. In 2016, the United Nations 17 Sustainable Development Goals (SDGs) came into force. The countries of the world adopted a set of goals aiming to end poverty, protect the planet and ensure prosperity for all. The goals are shown in Figure 15.26.

The idea is that the countries of the world will work together to monitor and track progress towards the achievement of these goals over the next 15 years, but there are no consequences if the targets are not reached.

## Globalisation

Globalisation is increasing the interdependence of communities around the world. While many people benefit from globalisation, for others globalisation has led to increased insecurity and poverty. The title of former Australian federal opposition leader Mark Latham's 1997 book, *Civilising Global Capital: New Thinking for Australian Labor*, still sums up this concern about globalisation. When the forces of global capitalism are 'civilised' through the reform of international law, then a globalised system that benefits only the few will not have a future.

## CHECK THIS OUT

Go to the UN Sustainable Development Goals website. How will the SDGs be monitored and what are the targets for achievement? (C, A)

# Chapter review

## Chapter summary

- International law can be divided into public international law and private international law.
- Public international law is generally referred to simply as ‘international law’, while private international law is referred to as a ‘domestic matter with a foreign element’.
- International law is a broad concept that takes into account relationships between countries and between international bodies.
- Historically, the United Nations has played a significant role in the development of international law, including when the use of force is accepted.
- The sources of international law are customs, treaties, general principles and the judicial decisions/teachings of publicists.
- International customary law is based on the practices of most nations.
- Treaties may be bilateral or multilateral.
- International law is not effective in Australia unless it has been specifically incorporated into domestic law by an action of the Commonwealth Parliament.
- Only the federal government (not the states or territories) has the constitutional power to ratify international treaties.
- The federal government has used its external affairs power to override the wishes of states.
- Australia has a long record of effective involvement in international affairs, including peacekeeping.
- Attempts have been made to establish tribunals to deal with conflicts between countries. Major tribunals with wide jurisdiction are the ICJ and the ICC.
- The effectiveness of these tribunals is affected by state sovereignty.
- Other tribunals have been established to deal with particular breaches of international law in specific countries, including Kosovo and Rwanda.
- The Appellate Body of the WTO is said to be likely to become a powerful international tribunal.
- In a rapidly changing world, there are many issues that affect relations between countries.
- These issues give urgency to the need for international law reform.
- Challenges include the difficulty of getting agreement between world leaders, rapid changes in technology, the fear of nuclear war and the threat of terrorism.
- The impacts of human rights violations, disease, poverty and globalisation are also issues of concern for international law.

## Short-response questions

- 1 What were the details of the alleged crimes of Slobodan Milosevic? (C, S)
- 2 Suggest reasons why the WTO Appellate Body has been touted as ‘becoming the most powerful international court’. (C, A, E)

## Extended-response questions

- 1 Evaluate the effect of the two cases *Chow Hung Ching v R* (1948) 77 CLR 449 and *Nulyarimma v Thompson* (1999) 164 ALR 621 on Australia’s adoption of international law. (A, E)
- 2 Investigate the conflict between Japan and other countries (including Australia) over whaling. What international tribunal has jurisdiction in this matter? (C, S, A)
- 3 What are the issues of the various countries involved and how do you think this conflict might be resolved? (C, A, E, Cr)

## Response-to-stimulus questions

- 1 'Diplomatic immunity is a concept that is able to be relied on to protect a person from criminal action for wrongdoing.' In an argumentative essay of 600-800 words, analyse this statement, justifying this customary right and discussing whether there should be exceptions to its application. (C, S, A, E)
- 2 'International law is a "toothless tiger". Without a sovereign body or state to enforce it, international law is of limited effectiveness.' In an argumentative essay of 600-800 words, analyse this statement and evaluate its accuracy with reference to examples. (C, S, A, E)



**Figure 15.27** The whaling ship *Nisshin Maru* berths at a whaling festival in Kagoshima, Japan.

## CHAPTER 16

# Human rights in Australian contexts

### CHAPTER OBJECTIVES

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

- explain and analyse the rights that Australians have in criminal and civil contexts, including the role of express and implied rights in ensuring equality under the law – for example, the right to:
  - free speech
  - freedom of assembly
  - freedom from discrimination
  - democratic representation
  - freedom of religion
  - trial by jury
- explain the legal processes available to citizens for resolving human rights complaints in Australia, including protesting, lodging complaints and tribunals/court actions
- explain and analyse the role of the following groups in protecting and/or advocating for human rights in Australia:
  - the Australian Human Rights Commission, Australian Law Reform Commission, and state and territory law reform bodies
  - the courts
  - the Queensland Council for Civil Liberties, Australian Human Rights Centre and Australian Lawyers for Human Rights
  - special-interest groups, for example Amnesty International, church groups, the International Federation of Red Cross and Crescent Societies (IFRC)
  - the media
- analyse and apply human rights principles to a variety of Queensland and/or Australian case studies by:
  - determining the nature and scope of the issue
  - examining viewpoints and consequences
- evaluate the legal situation using the analysis by:
  - presenting alternatives to make a decision or propose recommendations
  - justifying using legal criteria and discussing implications
- analyse and evaluate legal issues to resolve or improve human rights in Australia and Queensland.

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### Key concepts/legal terminology you will encounter in this chapter

- assembly
- atheistic
- ballot box
- civil rights
- demonstration
- discrimination
- freedom of expression
- freedom of opinion
- human rights
- human rights treaties
- implied right
- indictable offence
- international law
- lodged
- lower courts
- non-theistic
- notice of termination
- protest
- rally
- regulated right
- reprisal
- right to vote
- summary offences
- superior courts

## RELEVANT LAW

### IMPORTANT LEGISLATION

- *Act of Toleration of 1689*
- *Age Discrimination Act 2004 (Cth)*
- *Anti-Discrimination Act 1991 (Qld)*
- *Australian Human Rights Commission Act 1986 (Cth)*
- *Commonwealth Electoral Act 1911 (Cth)*
- *Convention on the Rights of Persons with Disabilities*
- *Corrective Services Act 2000 (Qld)*
- *Criminal Code Act 1889 (Qld)*
- *Criminal Code Act 1995 (Qld)*
- *Defamation Act 2005 (Qld)*
- *Disability Discrimination Act 1999 (Cth)*
- *Guardianship and Administration Act 2000 (Qld)*
- *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *International Covenant on Civil and Political Rights*
- *Jury Act 1995 (Qld)*
- *Legislative Standards Act 1992 (Qld)*
- *Mental Health Act 2000 (Qld)*
- *Peaceful Assembly Act 1992 (Qld)*
- *Privacy Act 1988 (Cth)*
- *Public Interest Disclosure Act 2010 (Qld)*
- *Racial Discrimination Act 1975 (Cth)*
- *Sex Discrimination Act 1984 (Cth)*
- *Summary Offences Act 2005 (Qld)*
- *Universal Declaration of Human Rights*
- *Youth Justice Act 1992 (Qld)*

## CASES

- Human Rights Committee Communication No. 941/2000 (*Young v Australia*)
- Human Rights Committee Communication No. 1050/2002 (*D & E v Australia*)
- Human Rights Committee Communication No. 1184/2003 (*Brough v Australia*)

## LEGAL ODDITY

The first of Queensland's 'protectionist' laws – the *Aboriginals Protection and Restriction of the Sale of Opium Act* – was proclaimed in 1897, and established the framework for government control of reserves and the lives of Aboriginal people, thereby removing the basic freedoms of all Aboriginal people in Queensland. It remained in force until 1939.

Source: Anti-Discrimination Commission Queensland.



This chapter extends and builds upon the concepts studied in the previous two chapters on human rights, and focuses learning on human rights in Australian contexts. The chapter begins with a study of criminal and civil human rights (even criminals have human rights) and the source of power for these rights – statutory, constitutional or bestowed

under international human rights covenants. The chapter evaluates how human rights complaints are resolved and how we protect and advocate for human rights in Australia. It concludes with the application of human rights principles using a case study approach.

## 16.1 Australian criminal and civil human rights

We learned in Chapter 9 that the Australian Constitution does not include a Bill of Rights but some human rights are mentioned, such as the right to compensation if the government acquires your property (s 51(xxxi)), your right to a trial by jury (s 80) and the freedom to practise your own religion (s 116). Apart from these protections, how does Australia guarantee and protect your **civil rights** and your rights if you are in prison?

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**civil rights** a class of rights that protect individuals' freedom from infringement by governments, social organisations and private individuals

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### Federal human rights protections

At the federal level, human rights are protected by legislation that has ratified Australia's obligations under international law. These laws include:

- *Australian Human Rights Commission Act 1986* (Cth)
- *Privacy Act 1988* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1999* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)

In addition to these Acts, the federal parliament enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) which requires that a member of parliament who proposes to introduce a Bill to the

parliament must include a statement of compatibility that contains an assessment of whether the Bill is compatible with human rights.

### Queensland human rights protections

Unlike the Australian Capital Territory (ACT) or Victoria, Queensland does not have specific human rights legislation (based on the human rights listed in the International Covenant on Civil and Political Rights) that addresses the limited number of rights mentioned in the Australian Constitution. So to respect, protect and fulfil our human rights, Queensland relies mainly on the courts applying common law principles and the federal government's obligations under **international law**, as well as specific state legislation such as:

- *Anti-Discrimination Act 1991* (Qld)
- *Legislative Standards Act 1992* (Qld)
- *Criminal Code Act 1889* (Qld)
- *Youth Justice Act 1992* (Qld)
- *Guardianship and Administration Act 2000* (Qld)
- *Mental Health Act 2000* (Qld).

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**international law** a body of rules established by custom or treaty and recognised by nations as binding in their relations with one another

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Because human rights protections in Queensland exist under a number of different statutes, it can be difficult to determine what protections are available

to individuals in any given matter. As a result, some bodies, such as the Queensland Law Society, have suggested that the administration of justice would benefit from human rights in Queensland being affirmed in one Act of Parliament. According to the Inquiry into a Possible Human Rights Act for Queensland in 2016, the *Anti-Discrimination Act 1991* (Qld) is the primary piece of legislation that currently provides human rights protections in Queensland. The Act provides that it is an offence for a person to be discriminated against on the basis of factors such as sex, age, gender identity, race and impairment, and in certain contexts including work, education and the provision of goods and services. The Anti-Discrimination Commission Queensland (ADCQ) has called for amendment of this legislation, stating that ‘improvements could be made to the *Anti-Discrimination Act 1991* (Qld) which is now 25 years old, to provide better protection from discrimination, sexual harassment, victimisation and vilification’.

## Prisoners’ rights

In Queensland, a sentenced prisoner still has their basic human rights and entitlements protected by common law and the Acts mentioned previously. These include:

- the right to a lawyer
- the right to information
- the right to vote (conditional)

- the right to medical attention
- the right to make a complaint
- the right to complain about discrimination
- the right to complain about health services
- the right to sue for damages
- the right to apply for transfer to another prison, including an interstate prison.

Prisoners have the right to vote in federal elections and referenda if they are serving three years or less of a prison sentence, but under Queensland law they cannot vote in Queensland state or local elections.

## CHECK THIS OUT

Go to the Anti-Discrimination Commission Queensland website and search for ‘Human Rights and Prisons – an Overview’. Look at the *Corrective Services Act 2000* (Qld).

In one paragraph, analyse how the rights of prisoners in Queensland are protected. Evaluate the challenges involved for prison administrators and the government. (S, A, E, Cr)

## Human Rights Act

On 3 December 2015, the Legislative Assembly established a parliamentary committee to inquire into whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland,

**Figure 16.1** In Queensland, a sentenced prisoner has the right to apply for transfer to another prison, including an interstate prison.



other than through a constitutionally entrenched model. The committee was required to report to the parliament by 30 June 2016. The parliamentary committee of inquiry identified key issues raised by those who made submissions and considered features of human rights legislation in other jurisdictions. However, the committee was unable to agree on whether it would be appropriate and desirable to introduce human rights legislation in Queensland. Government members of the committee concluded that it was appropriate and desirable to have a Human Rights Act in Queensland but non-government members of the committee thought that the current range of legislation in Queensland was sufficient.

*Source:* Legal Affairs and Community Safety Committee, 2016.

## REVIEW 16.1

- 1 Explain the purpose of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). (C)
- 2 Describe how Queensland protects human rights without specific human rights legislation. (C)
- 3 Identify the key Act used in Queensland that provides human rights protections. (C)
- 4 Explain why the Anti-Discrimination Commission Queensland has called for an amendment to the *Anti-Discrimination Act 1991* (Qld). (C)
- 5 Summarise the rights of prisoners in Queensland. (C)

## RESEARCH 16.1

Research the *Anti-Discrimination Act 1991* (Qld). In your view, does this Act provide adequate protection for human rights in Queensland? Justify your response. (S, A, E)

## Right to free speech

In Australia, do we have the right to free speech? Whereas the Australian Constitution does not specifically outline the right to free speech, it is an **implied right** within our democratic form of government. So in Australia citizens do not have a constitutional right to free speech as is the case in the United States, where free speech is guaranteed to its citizens in the **First Amendment**. In Australia, there are basically two elements to free speech: **freedom of opinion** and **freedom of expression**.

**implied right** a right that is not clearly outlined in the Australian Constitution but suggested or inferred in its text

**First Amendment** an amendment to the US Constitution that forbids Congress from interfering with a citizen's freedom of religion, speech, assembly or petition

**freedom of opinion** the right to communicate one's opinions and ideas without fear of government retaliation or censorship

**freedom of expression** the right to express your opinion in any medium; a human right under Article 19 of the Universal Declaration of Human Rights and recognised in international human rights law in the International Covenant on Civil and Political Rights (ICCPR).

## SIDEBAR

Free speech is not a guaranteed right in the Australian Constitution; it is an implied right regulated by statute and common law. Do you agree or disagree that this should be a right guaranteed by an Australian Bill of Rights? Justify your response. (E)

Freedom of opinion is the right to hold opinions without interference; there are no exceptions to or restrictions on this right.

Freedom of expression is your right to use any medium, including written and oral communication, the media, public protest, broadcasting, artistic works and commercial advertising. This right is restricted in areas such as posting on the internet, the urging of violence or classification of artistic material and publishing defamatory information about someone. Your right to freedom of expression relates to any



**Figure 16.2** Free speech in Australia is not a guaranteed right in the Australian Constitution.

medium. This right protects unpopular ideas as well as favourable ones, including opinions that may offend or shock, subject to some limitations and restrictions.

The source of power in Australia for the right to free speech is contained in seven core international human rights treaties to which Australia is a signatory. The right to freedom of opinion and expression is contained in the International Covenant on Civil and Political Rights. The Convention on the Rights of Persons with Disabilities gives people with a disability the right to accessible formats and technologies, enabling them to exercise their right to freedom of opinion and expression.

So while we do have freedom of opinion and expression, Australian laws strike a balance between preserving these freedoms and protecting people from unfair treatment and discrimination. Therefore, Australia has domestic laws to protect the community against exposure to obscenities and to protect a person's good name and integrity against false information such as defamation and discrimination. Laws regulating such matters are contained in the *Defamation Act 2005* (Qld) and *Anti-Discrimination Act 1991* (Qld). There are also laws to protect a person's private information and against saying or writing things to incite hatred against others because of their race, religion, sexuality or gender identity. Freedom of speech is not an excuse to harm others.

Although people in Australia have the right to express their opinion about the government, either

verbally or in writing, the *Criminal Code Act 1995* (Qld) restricts this right in relation to any comments urging force or violence, or the overthrow of the Constitution or the government of Queensland or Australia. It also contains offences relating to using the fixed and mobile telephone network if it is used to menace, harass or offend people.

Under the *Anti-Discrimination Act 1991* (Qld), it is illegal to incite others to hatred, serious contempt or severe ridicule of a person or group because of their race, religion, sexuality or gender identity – for example, by publicly encouraging another person to hate disadvantaged or minority groups. Under the *Racial Discrimination Act 1975* (Qld), it is illegal to commit an act likely to offend, insult, humiliate or intimidate another person or group if you are doing it because of their race, colour or national or ethnic origin. Any act or action by another party that results in the abovementioned forms of discrimination relates to the content of any material that could be offensive to another person, as well as how and where such content has or was distributed, and exhibited.

## CHECK THIS OUT

Go to the ABC News website and locate the article by Corinne Grant titled 'A Helpful Guide to Free Speech: Don't Be a Dick' (17 February 2016).

Evaluate whether we really have freedom of expression in this country. Do you agree or disagree? Justify your response. (C, E)



**Figure 16.3** Peaceful public assemblies in Queensland are defined in the Act as any rally or demonstration held in a public place, including those that move between an assembly point and another location.

## Right to protest and freedom of assembly

The right to **protest** and hold a peaceful **assembly** in Queensland is governed by the *Peaceful Assembly Act 1992* (Qld).

Peaceful public assemblies in Queensland are defined in the Act as any **rally** or **demonstration** held in a public place, including those that move between an assembly point and another location. A public place includes a road, a place usually open to or used by the public, or a place that is temporarily open or being used by the public. The right to protest and freedom of assembly in Queensland is a **regulated right** that is restricted under Queensland law. The state government imposes restrictions in the interests

of protecting public safety, maintaining public order, protection of others' rights and freedoms, and the rights of other people not involved in the protest or assembly to enjoy the natural environment and carry on their business.

**protest** a statement or action expressing disapproval of or objection to something

**assembly** a group of people gathered together in one place for a common purpose

**rally** a mass meeting of people making a political protest or showing support for a cause

**demonstration** a public meeting or march protesting against something or expressing views on a political issue

**regulated right** a right that is regulated, defined and controlled in legislation

### CHECK THIS OUT

Go to the Queensland Government website and search for 'Right to Protest'. Read and summarise 'How to Get Your Public Assembly Approved' and the other relevant sections. Discuss whether these requirements are in the best public interest or a breach of our human rights. Why or why not? Justify your opinion. (C, E)

The *Peaceful Assembly Act 1992* (Qld) requires that any public protest or assembly must be authorised by the police and other relevant local authorities – for example, local government (council). This involves giving the relevant authorities a notice of intention to hold the protest or assembly and getting official approval to do so.

*Source:* Queensland Government, Right to Protest.

## Queensland's VLAD law 'pushed bikies away from creating chaos': Shadow AG

By Chris O'Brien, Nick Wiggins, and staff, ABC Radio Brisbane, updated 5 April 2016

The Queensland Opposition is digging in against changes to anti-gang laws that it says will reduce the state's crime-fighting powers from the nation's strongest to the weakest.

The Government plans to scrap the former LNP government's Vicious Lawless Association Disestablishment (VLAD) law, as well as laws preventing bikie gang members meeting in groups of three or more. The decision follows recommendations made in an independent report by Justice Alan Wilson.

Instead, there will be sentencing provisions for 'serious organised crime' with a mandatory jail penalty, and consorting laws to prevent people convicted of crimes from meeting.

'There's certainly lots of strong talk there, but anyone reading between the lines knows that these laws are going to be watered down,' shadow attorney-general Ian Walker told 612 ABC Brisbane.

'We now have the prospect of moving from the strongest anti-gang laws to the weakest.'

The VLAD law had secured only two convictions, but Mr Walker said they were a deterrent.

'The fact that the laws have been in effect has pushed the bikies away from creating chaos,' he said.

'These laws have been fair, they've been strong, and they have had the desired effect of keeping the gangs out of Queensland.'

'The Premier keeps saying she wants convictions – you can only get convictions if you have crime. We don't want convictions; we want no crime.'

The LNP also opposes replacing anti-association provisions with anti-consorting legislation, which would ban gang members gathering if they had a conviction.

'Our anti-association laws are there to make sure that we prevent the association, not deal with it after it happens,' Mr Walker said.

'There has been no proper review of these laws as to whether they're working or not. There's simply been a taskforce report on how to get rid of them.'

Mr Walker said the Crime and Corruption Commission had warned that outlaw motorcycle gangs were scheming to return if the VLAD legislation was repealed.

'The gangs are smarter than the Attorney-General, I'm afraid to say.'

### Proposed replacement laws concerning to civil libertarians

Attorney-General Yvette D'Ath acknowledged the LNP's laws deterred gang crime but said they had to be legally solid and operationally effective.

'The anti-association provision itself has not been tested in the High Court, and that is the one that really is the crux of this, the one the Newman government put all the eggs in the basket about,' Ms D'Ath said.

'It is the one area that the task force says is most likely to fail in a High Court challenge.'

'So it's constitutionally important that the laws were robust, but it's also important operationally that we can actually get convictions.'

'They were a good deterrent, and we don't deny that. But if you're going to have a big stick, every now and then you have to show that you're going to use it and it works, and the problem is with these laws we weren't getting [many] convictions.'

The Government will introduce its laws in August.

The Queensland Council for Civil Liberties welcomed the government's decision to repeal VLAD law but said it had concerns about proposed replacements.

Council vice president Terry O'Gorman said introducing control orders on people convicted of organised crime was the wrong move.

'Control orders in respect of organised crime have no place because what it does is it continues to punish people, once they've been punished for the main offence,' he said.

Read the article on the previous page and answer the questions.

- 1 Analyse what the shadow Attorney-General means when he states that ‘we now have the prospect of moving from the strongest anti-gang laws to the weakest’. Do you agree or disagree with this statement? Justify your response. (A)
- 2 Identify the main criticisms of the proposed change to the VLAD laws. (C)
- 3 Explain anti-consorting legislation. (C)
- 4 Evaluate Mr Walker’s allegation that the Crime and Corruption Commission (CCC) has warned that outlaw motor cycle gangs were scheming to return if the VLAD laws were repealed. Explain how Mr Walker is using this to persuade the legislature to keep the VLAD laws. (E)
- 5 Evaluate why the proposed replacement laws are concerning for civil libertarians. (E)



**Figure 16.4** The Queensland Council for Civil Liberties welcomed the government’s decision to repeal the VLAD laws, but said it had concerns about proposed replacements.

## Freedom from discrimination

The federal, state and territory governments have introduced a number of laws to help protect people from discrimination and harassment. In Queensland, the primary law that protects your right to freedom from discrimination is the *Anti-Discrimination Act 1991* (Qld). Commonwealth laws and the state and territory laws generally overlap, and prohibit the same type of discrimination. As both state and territory laws and federal laws apply, you must comply with both. However, state and territory laws are not identical to other state and territory laws or to Commonwealth laws, so they apply in slightly different ways; this results in some gaps in the protections offered between different states and territories and at a federal level.

*Source:* Australian Human Rights Commission, *A Quick Guide to Australian Discrimination Laws*.

## SIDEBAR

Forty years ago, the Commonwealth Parliament enacted the first federal human rights and discrimination legislation. The *Racial Discrimination Act 1975* (Cth) was a landmark in Australian race relations. Enacted shortly after the formal abandonment of the White Australia policy, it was a legislative expression of a new commitment to multiculturalism – and reflected the ratification by Australia of the International Convention on the Elimination of All Forms of Racial Discrimination and its commitment under that Convention. As described by Prime Minister Gough Whitlam at a ceremony for its proclamation in October 1975, the Act was ‘a historic measure’ that aimed to ‘entrench new attitudes of tolerance and understanding in the hearts and minds of the people’.

*Source:* Australian Human Rights Commission.

Evaluate the legal importance of this Act regarding the right of freedom from discrimination. (E)

## Right to democratic representation

As we learned in Chapter 9, the right to democratic representation is provided for in the Australian Constitution. However, the political idea of representation is based on the principle of representative government, where the people elect others to represent their beliefs, attitudes and perspectives in parliaments and local councils across the country.

In Australia, this occurs through the electoral process and requires that Australians also have the **right to vote**. The idea underpinning democratic representative government is the concept of government of the people, by the people, for the people (President Abraham Lincoln, Gettysburg Address 1863), a concept embraced here in Australia that requires our elected representatives to face the people at regular intervals to be either chosen again as representatives or replaced. This occurs in elections for all three levels of government in Australia. So the right to democratic representation in Australia is exercised through the **ballot box**. Once elected, the representatives of the people are delegated responsibility by the people who elected them to perform certain functions, including:

- deciding who will form government
- making laws in the best interest of the people, country, state or territory

**Figure 16.5** LNP candidate for the seat of Brisbane Trevor Evans at a polling booth in Brisbane on 2 July 2016



## CHECK THIS OUT

Go to the Australian Human Rights Commission website and read 'A Quick Guide to Australian Discrimination Laws'. Compare and contrast the laws of the other states and territories with those of Queensland. Summarise the similarities and differences. Propose recommendations for improvements. (C, A, E)

Click on the link to the video *Freedom Then, Freedom Now*. Evaluate the comment that 'freedom isn't just set we have to keep fighting for it'. (E)

- debating and investigating issues on behalf of the people (constituents) they represent
- making representations on behalf of their constituents to the government and the public service
- monitoring the expenditure of public money and the actions of the government.

**right to vote** a constitutional or legislated right of eligible citizens to elect a representative to parliament or a local council from a list of candidates

**ballot box** the sealed container into which an elector places a completed ballot paper

## COMPULSORY ELECTORAL ENROLMENT

According to the Museum of Australian Democracy website, the *Commonwealth Electoral Act 1911* (Cth) introduced compulsory electoral enrolment for all Australians who are eligible to vote. Compulsory voting was first advocated by Alfred Deakin shortly after Federation, but voting remained voluntary at the first nine federal elections. Proponents of compulsory voting argue that it teaches citizens the benefits of participation in political and parliamentary representation. Since the introduction of compulsory voting in 1924, the turnout at Australian elections has never fallen below 90 per cent.

## SIDEBAR

The achievement of representative government is the central tenet of modern politics. In its European homeland, it took several centuries (and often a revolution) to consolidate representative institutions. Monarchs had to be brought under the control of the assembly. Then parliament had to be subjected to a democratic election. Democratic elements had to be grafted onto ancient pre-democratic institutions of representation.

*Source: Hague, Harrop & Breslin, Comparative Government and Politics, 1998, p. 22.*

Do you agree or disagree with this statement? Justify your response. (A)

## REVIEW 16.3

Read the following quotes and answer the questions that follow.

*One of the most important ways that individuals can influence governmental decision-making is through voting in parliamentary elections. In a representative democracy such as Australia, voting gives people the power to affect how their country is governed by electing those who will represent their interests in parliament.*

- 1 Evaluate this statement. In your opinion, is this process effective regarding the right to democratic representation for all Australians? Justify your response. (C, E)

*While the right to vote was one of the principles of democratic reform demanded by the British Chartists, it was initially limited in colonial Australia to a select group of men who held property of a certain value. The list of those eligible to vote was gradually expanded but universal suffrage, the right of all adult men and women to vote, was not achieved nationally until 1963 when Indigenous Australians were granted the right to vote at federal elections.*

- 2 Argue whether the right to democratic representation is conditional upon all Australians having the right to vote. Justify your response. (C, A)

*Source: Museum of Australian Democracy, Old Parliament House, Canberra.*

In Australia, our federal, state and territory parliaments and local councils carry out the role of representing the people because it is not feasible for all the people to be involved all the time, even if they were so inclined, in the business of government.

So the right to democratic representation in Australia means that the people delegate the task of representation to their elected members of parliament and local government councils.

## Freedom of religion

The right to freedom of religion in Australia is provided under Section 116 of the Constitution of Australia, which makes it a protected constitutional right. It prohibits the federal parliament from enacting laws establishing any religion, imposing any religious observance or prohibiting the free exercise of any religion, and prevents the Commonwealth making religious tests a requirement as a qualification to hold any office or public trust.

In Queensland, the right to freedom of religion is protected under the *Anti-Discrimination Act 1991* (Qld), which makes it illegal to discriminate against a person based on 'religious belief or activity'. However, this is a restricted or limited right. The legal protection offered under state law must take into account Article 18(3) of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory. For example, the law is limited or restricted to those laws that are necessary for the protection of public safety, order, health or morals, or the fundamental rights and freedoms of others.

The right of freedom of thought, conscience, and religion is recognised in Article 18 of the ICCPR. The right to freedom of religion given in Article 18 protects not only the 'traditional' religious beliefs

of the major religions but also **non-theistic** and **atheistic** beliefs, as well as the right not to profess *any* religion or belief.

The right recognised in Article 18 is simultaneously an individual right and a collective right. It has both an 'internal' dimension (the freedom to *adopt* or *hold* a belief) and an 'external' dimension (the freedom to *manifest* that belief in worship, observance, practice or teaching).

*Source:* Australian Human Rights Commission.

**non-theistic** not believing in one God as the creator and ruler of the universe

**atheistic** the doctrine or belief that there is no God

### SIDEBAR

Legal protection of religious freedom is a relatively modern phenomenon. British history is punctuated by Acts of Parliament that discriminated against some groups on the basis of religion. For instance, the *Act of Toleration* of 1689 – a reform Act of its day – allowed freedom of worship to Protestants who dissented from the Church of England (known as Nonconformists) but not to Catholics, atheists or believers in other faiths such as Judaism

*Source:* ALRC.

**Figure 16.6** In 2016, almost one in three Brisbane people reported that they had no religion.



## Unholy row over religious instruction in Queensland schools

By Felicity Caldwell, *Brisbane Times*, 27 July 2017

An unholy row has broken out over religious instruction in Queensland schools.

Education Minister Kate Jones released a statement on Thursday insisting there was no change to religious instruction policies.

Education Minister Kate Jones said there had been no change to religious instruction policies in schools.

A review of the *God Space* religious instruction materials, completed in March 2017, said RI instructors should be reminded that students ‘should not be encouraged to evangelise other students at the school’.

‘The department expects schools to take appropriate action if aware that students participating in RI are evangelising students who do not participate in their RI class, given this could adversely affect the school’s ability to provide a safe, supportive and inclusive environment for all students,’ it reads.

*The Australian* reported Christian groups were alarmed by an ‘unofficial policy’ to ban references to Jesus in the primary schoolyard.

But Ms Jones said nobody was telling a child what they could and could not say on the playground.

‘The policy in place in Queensland state schools today is exactly the same as the policy in place under the former Newman government and has been the same for more than 20 years,’ she said.

‘We are an inclusive education system that aims to provide a good education for all students of all faiths.

‘Our government made it very clear last year that we support religious instruction in schools where the parents and school community decide they want that for their children.’

Last August, the government said it would adopt all seven recommendations from a review of the Connect religious instruction materials, with changes including a new process for the department to review RI programs to ensure they comply with legislation.

There was also a new form created for parents which more explicitly asked whether they wanted their child to participate in RI.

The Education Queensland review came after Windsor State School principal Matthew Keong wrote to parents to announce he had suspended religious instruction at his school after finding it may entreat children to the Christian faith.

Queensland Parents for Secular State Schools described the recommendation in the *God Space* review as the Education Department ‘simply [telling] religious instruction volunteers not to incite children to evangelise their friends.’

Liberal National Party MP Fiona Simpson accused Ms Jones of giving in to the ‘anti-God police.’

‘The reality is that in many countries which ban freedom of religion, those who are punished for evangelising have simply talked about their faith,’ she said.

One Nation MP Steve Dickson claimed bureaucrats were bending over backwards to cater for minorities in the community.

‘This country has long held a set of Christian values which should not be undermined by bureaucratic nonsense such as this,’ he said.

The religious instruction spat comes despite increasing numbers of Australians declaring ‘no religion’ in the Census.

Almost one in three Brisbane people reported they had no religion in 2016.

In estimates this week, Ms Jones confirmed the government continued to fund chaplaincy programs, with \$4.3 million provided in the latest budget.

‘We support all religions in schools,’ Ms Jones said on Tuesday.

Meanwhile, federal funding for Safe Schools is due to expire in October, and the Queensland government is still determining how it will be funded in the future.

## REVIEW 16.4

Read the article. Thinking about the right of freedom of religion and the legal obligations involved for our governments and school authorities, answer the following questions.

- 1 Evaluate the statement that instructors should be reminded that students 'should not be encouraged to evangelise other students at the school'. Explain how this could potentially breach the right to freedom of religion. (E)
- 2 Explain why Christian groups are alarmed by an 'unofficial policy' to ban references to Jesus in the primary schoolyard. (E)
- 3 Analyse the statement by Education Minister Kate Jones that 'we are an inclusive education system that aims to provide a good education for all students of all faiths'. Evaluate the legal implications. (A, E)
- 4 Evaluate the legal importance of asking parents whether they want their child to participate or not participate in religious instruction at school. (E)
- 5 With reference to the *Anti-Discrimination Act 1991* (Qld), explain why Windsor State School principal Matthew Keong suspended religious instruction at the school. (A, E)
- 6 Considering that 'almost one in three Brisbane people reported they had no religion in 2016', evaluate the comment by One Nation MP Steve Dickson that Christian values should not be undermined by bureaucrats and minorities in the community. (E)

## Right to trial by jury

The right to trial by jury is provided for in section 80 of the Australian Constitution. However, this right only applies to the more serious indictable offences that are heard in the **superior courts**, such as the District or Supreme Courts. The minor summary offences are dealt with in the **lower courts**, or Magistrates Courts, in each state or territory jurisdiction as a judge-only trial. So the right to trial by jury in Australia is a limited right that depends on the nature of the offence. (Refer to Chapter 3 for further information.)

**superior court** a higher court of record or general jurisdiction; a state Supreme Court

**lower court** the first court in a hierarchy; the Magistrates Court

## Summary and indictable offences

In Queensland, the majority of criminal laws have been codified in the *Criminal Code Act 1995* (Qld). The Code covers a range of offences relating to violence, sex offences, property, fraud, arson, corruption, breaches of the peace and others. It also contains procedural rules and practices to be followed. Summary offences in the Code include disorderly behaviour, traffic offences, and minor criminal offences and misdemeanours. The more serious indictable offences mentioned in the Code, such as murder, rape, robbery, assault, and break and enter, are referred by the Magistrates Courts to the higher courts for trial by jury. The *Jury Act 1995* (Qld) provides for the selection and composition and role and responsibilities of jurors.

In Queensland the *Summary Offences Act 2005* creates a range of offences which are generally designed to maintain good order in the community, most particularly in public spaces. Despite the title of the Act, some of the offences contained in it are serious and carry a maximum penalty of imprisonment upon conviction.

Source: Armstrong, *Legal Brisbane*.

## Trials by judge alone

In Queensland, some indictable offences can be heard by a judge alone instead of by a judge and jury. The prosecution or the defence may apply to the court for a no jury order under section 614 of the Criminal Code (Qld). If it is an application from the prosecution, the accused must agree to the court granting a judge-only trial instead of a trial by jury. The judge will decide whether such an order should be made and apply an ‘interests of justice’ test – that is, the judge will only permit this mode of

trial if it is in the interests of justice to do so under section 615(1) of the Code. Sometimes it is argued that the interests of justice cannot be served by a trial by jury if:

- the trial would be unreasonably burdensome on a jury because of its length or legal complexity
- there is a possibility of offences against jury members
- there has been significant pre-trial publicity that would compromise the principle of a fair trial.

### Queensland – s 615 Criminal Code 1899

#### *Making a no jury order*

- (1) The court may make a no jury order if it considers it is in the interests of justice to do so.
- (2) However, if the prosecutor applies for the no jury order, the court may only make the no jury order if the accused person consents to it.
- (3) If the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application.  
Without limiting subsection (1), (2) or (3), the court may make a no jury order if it considers that any of the following apply:
  - a The trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;
  - b There is a real possibility that acts that may constitute an offence under section 119B would be committed in relation to a member of a jury;
  - c There has been significant pre-trial publicity that may affect jury deliberations.

Without limiting subsection (1), the court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

## SIDEBAR

Evaluate how the court would apply this section of the Code when deciding whether or not to grant a judge-only trial. (E)

**Figure 16.7** Jurors are banned from looking up aspects of their case online during the trial.



**Figure 16.8** Various types of decision strategies – some of them inappropriate – have helped juries to make up their minds.

## REVIEW 16.5

Do you remember an article called 'Can Jury Trials Still be Fair in the Age of Social media?' that you read in Year 11? You will find it on page 95 in Chapter 3. Re-read the article and, using the knowledge and insights you have acquired since then, respond to the Review questions that follow. Thinking about the right of trial by jury, section 615 of the Criminal Code Queensland and the 'interests under justice' test that a judge will apply when deciding to order a judge-only trial instead of trial by jury, answer the following questions.

- 1 Analyse how jurors using the internet and social media to conduct their own criminal investigations risks the right of the defendant to a fair trial. (A)
- 2 Evaluate the legal implications inherent in the statement 'the internet age meant jurors were finding it harder to switch off from the outside world'. (E)
- 3 Evaluate why it is important for any prior criminal history of the defendant *not* to be disclosed to a juror. (E)
- 4 Do you agree or disagree with Professor Nolan that jurors who offend should be punished? Why or why not? (A)
- 5 In some jurisdictions, a judge-only trial is not an option, where juries are required for all sex offences and murder trials. Evaluate why the internet age could compromise the impartiality of a juror. (E)
- 6 Unlike a jury in a judge-only trial, the judge must give reasons for their decision. Evaluate both situations. In the interest of justice, identify situations where each option would be best. Justify your response. (E)

## 16.2 Resolving human rights complaints

In Australia, there are three avenues available to persons who wish to resolve a human rights complaint: under federal legislation or, in Queensland, under the *Anti-Discrimination Act 1991* (Qld), or through the Australian Human Rights Commission (AHRC).

### Australian Human Rights Commission

The AHRC can investigate and resolve complaints of discrimination, harassment and bullying based on a person's:

- **sex**, including pregnancy, marital or relationship status (including same-sex de facto couples), breastfeeding, family responsibilities, sexual harassment, gender identity, intersex status and sexual orientation
- **disability**, including temporary and permanent disabilities; physical, intellectual, sensory and psychiatric disabilities, diseases or illnesses; medical conditions; work-related injuries; past, present and future disabilities; and association with a person with a disability
- **race**, including colour, descent, national or ethnic origin, immigrant status and racial hatred
- **age**, covering young people and older people.

A complaint on one of the listed grounds is considered a complaint of unlawful **discrimination** and as such may also constitute a breach of federal, state and territory anti-discrimination laws.

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**discrimination** unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age or sex

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The AHRC can also investigate and resolve complaints of discrimination, harassment and bullying in employment, based on a person's criminal record, trade union activity, political opinion, religion or social origin. It also investigates and resolves complaints about alleged breaches of human rights against the Commonwealth and its agencies.

In Australia, it is against the law to be discriminated against in many areas of public life, including employment, education, the provision of goods, services and facilities, accommodation, sport and the administration of Commonwealth laws and services.

Source: AHRC.

## CHECK THIS OUT

Go to the AHRC website and search for 'Complaint Information'. Explain the complaints process and how the Commission resolves complaints. (C)

## Federal legislation

A human rights complaint can be brought under various federal Acts, depending on the nature of the alleged breach. These complaints are heard in the Federal Court of Australia and can be brought under any one or more of the following Acts:

- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)



**Figure 16.9** The AHRC can investigate and resolve complaints of discrimination, harassment and bullying.

- *Racial Discrimination Act 1975* (Cth)
- *Age Discrimination Act 2004* (Cth).

The Federal Court has the power to hear proceedings under section 46PO of the *Australian Human Rights Commission Act 1986* (Cth). However, if the matter is or has been before the Commission, the Commission must issue a **notice of termination** before the Federal Court can begin to deal with the complaint.

All Australian states and territories have enacted anti-discrimination legislation. Under the Australian Constitution, they can do so, as long as the state laws are not inconsistent with federal laws. Often the state laws go further in the protection they offer because states are not limited in their powers, as the federal government is, by the terms of international treaties. Some state laws, for example, protect against discrimination on the ground of religion or sexuality, grounds not covered by federal laws

Source: State Library of NSW.

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**notice of termination** an official written notification that a matter has been terminated

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## State legislation

In Queensland, the state government has responsibilities for human rights enacted by the parliament in the *Anti-Discrimination Act 1991* (Qld), and a human rights complaint can be brought under this Act. The aim of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct. The principles contained in the *Anti-Discrimination Act 1991* (Qld) are derived from international **human rights treaties**. Any alleged breach of human rights under this Act can be lodged with the Anti-Discrimination Commission Queensland, which is the statutory authority that promotes and protects human rights in Queensland.

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**human rights treaty** an agreement and obligation undertaken by signatory nations to ensure that everyone enjoys the human rights set out in the treaty

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## Lodging complaints

A human rights complaint can be **lodged** through the AHRC for a federal breach or with the Anti-Discrimination Commission Queensland for a state or local breach.

To lodge a complaint with the AHRC, the complaint must be in writing and include details of all necessary information regarding the nature of the complaint. The AHRC prefers the details of the complaint to be completed on their complaint forms, which are available from the Commission online or in hard copy by request. A person can submit the complaint form online or by printing the completed form and posting it to the Commission.

The Anti-Discrimination Commission Queensland (ADCQ) has a similar process for lodging a human rights complaint. The complaint must be in writing on a complaint form that can be downloaded from the Commission's site. The ADCQ requires that a complaint must set out reasonably sufficient details to show that the person complained about may have breached the *Anti-Discrimination Act 1991* (Qld) or committed a **reprisal** under the *Public Interest*

*Disclosure Act 2010* (Qld), and has lodged the completed complaint form with the Commission. The ADCQ requires that all complaints be lodged within one year of the incident complained about; however, the Commission can accept a complaint made more than one year from the alleged contravention or reprisal if the person making the complaint shows good cause.

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**lodge** present a complaint, appeal or claim formally to the proper authorities

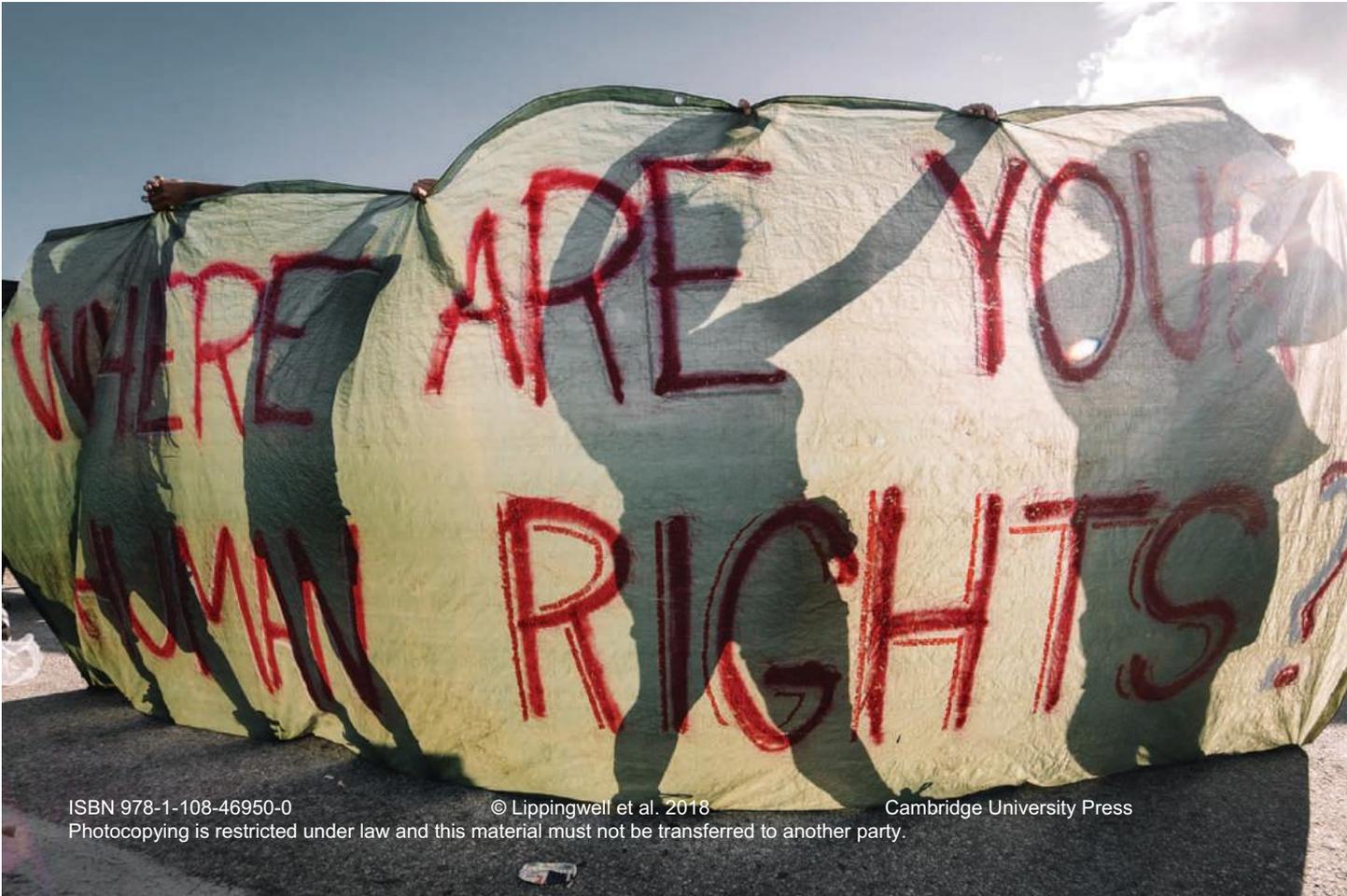
**reprisal** an act of retaliation

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To lodge a complaint with the Federal Court of Australia, it must be lodged within 60 days after the issue of the notice of termination from the AHRC. The person making the complaint must prove three things:

- what happened, what was done and who did it
- that what happened was unlawful under one of the discrimination statutes
- that harm or damage was suffered because of what was done.

**Figure 16.10** The principles contained in the *Anti-Discrimination Act 1991* (Qld) are derived from international human rights treaties.



## 16.3 Law reform bodies and human rights

In Chapters 11 and 12, we learned how law reform responds to the changing needs of contemporary Australian society. This process is also important to the laws on which we rely to protect our human rights. To ensure that the various statutes that protect human rights across all jurisdictions are equitable, modern, fair and efficient, the federal government established the Australian Law Reform Commission (ALRC) to oversee human rights law reform.

### The Australian Law Reform Commission

The ALRC is a federal agency that reviews Australia's laws to ensure they provide all Australians with improved access to justice. The Commission is a federal agency operating under the *Australian Law Reform Commission Act 1996* (Cth) and the *Public Governance, Performance, and Accountability Act 2013* (Cth).

The ALRC conducts inquiries, also known as references, into areas of law at the request of the Commonwealth Attorney-General. Based on its research and consultations throughout an inquiry, the ALRC makes recommendations to the government so that government can make informed decisions about law reform. The ALRC recommendations do not automatically become law; however, over 85 per cent of ALRC reports have been either substantially

or partially implemented, making it one of the most effective and influential agents for legal reform in Australia.

The ALRC is part of the Attorney-General's portfolio. However, it is independent of government and is able to undertake research, consultations and legal policy development, and to make recommendations that:

- bring the law into line with current conditions and needs
- remove defects in the law
- simplify the law
- adopt new or more effective methods for administering the law and dispensing justice, and
- provide improved access to justice.

When conducting an inquiry, the ALRC also monitors overseas legal systems to ensure Australia compares favourably with international best practice.

The ALRC aims to ensure that the proposals and recommendations it makes do not trespass unduly on personal rights and liberties of citizens, or make those rights and liberties unduly dependent on administrative, rather than judicial, decisions and that, as far as practicable, they are consistent with the International Covenant on Civil and Political Rights (ICCPR).

The ALRC must also have regard to any effect that its recommendations may have on the costs of access to, and dispensing of, justice.

#### REVIEW 16.6

- 1 Explain the three avenues available to a person attempting to resolve a human rights complaint in Australia. (C)
- 2 In the Federal Court of Australia, under what Acts can the court hear a human rights complaint? (C)
- 3 Explain how a Notice of Termination is used in a human rights complaint before the Federal Court of Australia. (C)
- 4 Identify the Queensland Act that protects human rights in the state and analyse how a complaint can be lodged under this Act. (C)
- 5 Explain the three things that a person lodging a human rights complaint must prove. (C)
- 6 List the different state and territory law reform bodies that are responsible for state and territory law reform. (C)

## State and territory law reform bodies

Each state and territory has its own approach to human rights law reform (see Table 16.1).

### Queensland Council for Civil Liberties

The Queensland Council for Civil Liberties (QCCL) is a voluntary organisation concerned with the protection of individual rights and civil liberties. It was founded in 1966 with the aim of protecting

and promoting the human rights and freedoms of Queensland citizens. The desire to create a civil liberties organisation began in the shadow of what many considered to be the Queensland Government's repression of civil liberties during anti-Vietnam War protests. The first public Annual General Meeting was held on 29 March 1967 and QCCL has worked ceaselessly to promote civil liberties ever since.

QCCL works towards a society in which the human rights enshrined in such documents as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory, are enjoyed by all Queenslanders and Australian citizens.

**Table 16.1** State and territory law reform bodies

Jurisdiction	Reform body
New South Wales	The NSW Law Reform Commission is an independent statutory body constituted under the <i>Law Reform Commission Act 1967</i> (NSW). Provides expert law reform advice to the NSW Government on matters that the Attorney-General refers to it.
Victoria	The Victorian Law Reform Commission is the central agency for law reform in Victoria. It is a statutory authority, established under the <i>Law Reform Commission Act 2000</i> (Vic).
Tasmania	The Tasmanian Law Reform Institute was established in 2001 by agreement between the state government, the University of Tasmania and the Law Society. The functions of the Institute include the review and reform of Tasmanian laws.
South Australia	The South Australian Law Reform Institute was established in December 2010. The Institute, based at the Adelaide Law School, is formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.
Western Australia	The Law Reform Commission of Western Australia assists in keeping the law up to date and relevant to the needs of society by making recommendations for the reform of areas of law referred to it by the Attorney-General. The Attorney-General tables the Commission's reports in parliament as required by the <i>Law Reform Commission Act 1972</i> (WA).
Queensland	The Queensland Law Reform Commission is an independent statutory body established under the <i>Law Reform Commission Act 1968</i> (Qld). The Commission's key statutory duties, as provided in section 10(3) of the <i>Law Reform Commission Act</i> , include undertaking law reform reviews referred to it by the Attorney-General.
Australian Capital Territory	The ACT Law Reform Advisory Council (LRAC) was established in 2009 as a collaboration between the ACT Government and the ANU College of Law. LRAC's Terms of Reference specify that its role is to 'provide expert advice and recommendations to the Attorney-General on terms of reference dealing with law reform matters referred to it by the Attorney-General'.
Northern Territory	The Northern Territory Law Reform Committee is a non-statutory committee established to advise the Attorney-General on the reform of the law in the Northern Territory. The Committee considers matters referred to it from time to time by the Attorney-General. The Legal Policy Division of the Department of the Attorney-General and Justice provides executive and administrative support to the Committee.

The aims of the QCCL are to:

- be vigilant in matters affecting civil liberties and to safeguard and develop respect for human rights and freedoms
- provide information about threats to, and the abuse of, rights and liberties and to foster the study of legal and human rights
- seek solutions to problems related to civil liberties, including prison reform, censorship and rights of minority groups
- provide, when necessary, neutral observers at marches and demonstrations.

## CHECK THIS OUT

Go to the Queensland Parliament website and read the letter sent to the Queensland Parliament by QCCL Vice-President Terry O’Gorman regarding the Serious and Organised Crime Legislation Amendment Bill 2016; <http://cambridge.edu.au/redirect/8162>.

In a paragraph, evaluate the concerns of the QCCL regarding possible human rights breaches in the proposed legislation. (S, E, Cr)

## Australian Human Rights Centre

The Australian Human Rights Centre (AHRC) is an interdisciplinary research and teaching institute based in the Faculty of Law at the University of New South Wales. The centre was established in 1986 and is one of the oldest centres in the university’s Faculty

of Law. It is highly respected as a focus of academic and public intellectual thought in the human rights sphere in Australia and overseas. The centre promotes public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications.

The AHRC brings together lawyers, policy-makers, researchers and students from Australian and international organisations and universities to engage in research and teaching activities and public debate on a range of human rights issues. These include issues related to disability, violence, gender, social security, social media, migrants and refugees, housing and health. The centre publishes the *Australian Journal of Human Rights*, a high-quality peer-reviewed research publication, and the *Human Rights Defender*, a more informal and accessible publication for a general audience. Each year, the AHRC convenes a number of public seminars and events, coordinates human rights courses and internships for students and hosts a number of international and Australian Visiting Fellows. The centre is an important advocacy source for human rights in Australia.

## Australian Lawyers for Human Rights

Australian Lawyers for Human Rights (ALHR) was established in 1993 and incorporated as an association in New South Wales in 1998. ALHR is an

**Figure 16.11** Advocating for the protection of human rights freedoms is ongoing.



association of legal professionals active in practising and promoting awareness of international human rights standards in Australia. It has a national membership of Australian lawyers, barristers, judicial officers, legal academics and law students, with active national, state and territory committees and national specialist thematic committees. ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights in Australia in order to:

- promote and support lawyers' practice of human rights law in Australia
- promote federal, state and territory laws across Australia that comply with the principles of international human rights law
- engage with the United Nations in relation to Australian human rights violations
- engage internationally to promote human rights and the rule of law.

## Calls for age of responsibility to change in the ACT

12 December 2017

Australian Lawyers for Human Rights (ALHR) has called on the ACT Government to raise the age of criminal responsibility from 10 years to an absolute minimum of 12 years of age.

An 11-year-old girl recently appeared in the Australian Capital Territory (ACT) Children's Court charged with offences relating to alleged violence against her carers. Due to the lack of a 'therapeutic protection place', which is legislated in the ACT *Children and Young Person's Act*, she was sent back to her carers.

Organisations have noted a lack of services for those above eight years of age but under 12 years of age in the Australian Capital Territory. Attempts have been made to set up a dedicated 'therapeutic protection place', but this has failed to date.

ALHR ACT Convenor Ms Sangeeta Sharmin says 'The Royal Commission into the Protection and Detention of Children in the Northern Territory recently recommended that the age of criminal responsibility be urgently raised to 12 years of age. The UN Committee on the Rights of the Child has stated very clearly that anything below 12 years of age is not internationally acceptable. Indeed, the European average is 14 years of age.'

'ALHR urges the ACT Government to set an example to other Australian jurisdictions by leading the way and raising the age of criminal responsibility to 14 years of age. We also call for urgent measures to create a "therapeutic protection place" as provided for under ACT legislation or a similar alternative to deal with children falling between the gaps and not receiving appropriate care.



**Figure 16.12** There is a call to raise the age of criminal responsibility from 10 years to an absolute minimum of 12 years.

'The results of the ACT taskforce looking into the achievements of a long-term youth justice framework should be released, recommendations made and implemented as a matter of urgency.'

Source: ALHR.

## 16.4 Specialist interest groups

### Amnesty International

Amnesty International is a global movement of more than seven million people who take injustice personally. It is an advocacy group campaigning for a world where human rights are enjoyed by all.

Amnesty International is funded by its members and is independent of any political ideology, economic interest or religion. It believes that no government is beyond scrutiny and no situation is beyond hope. In 1961, British lawyer Peter Benenson was outraged when two Portuguese students were jailed just for raising a toast to freedom. He wrote an article in *The Observer* newspaper and launched a campaign that provoked an incredible response. Reprinted in newspapers across the world, his call to action sparked the idea that people everywhere can unite in solidarity for justice and freedom. This inspiring moment didn't just give birth to an extraordinary movement; it was the start of extraordinary social change:

Few would have predicted when we started that torturers would become international outlaws. That most countries would abolish the death penalty,

and seemingly untouchable dictators would be made to answer for their crimes.

### International Federation of Red Cross and Red Crescent Societies (IFRC)

The International Federation of Red Cross and Red Crescent Societies (IFRC) was founded in 1919 in Paris in the aftermath of World War I. The war had revealed a need for close cooperation between Red Cross Societies, which through their humanitarian activities on behalf of prisoners of war and combatants had attracted millions of volunteers and built a large body of expertise. A devastated Europe could not afford to lose such a resource.

It was Henry Davison, president of the American Red Cross War Committee, who proposed forming a federation of these National Societies. An international medical conference initiated by Davison resulted in the birth of the League of Red Cross Societies, which in October 1983 was renamed the League of Red Cross and Red Crescent Societies, and then in

**Figure 16.13** Red Cross volunteers during World War I – the beginning of a movement



## SIDEBAR

Only when the last prisoner of conscience has been freed, when the last torture chamber has been closed, when the United Nations Universal Declaration of Human Rights is a reality for the world's people, will our work be done.

*Source: Peter Benenson, Amnesty International founder.*

November 1991 became the International Federation of Red Cross and Red Crescent Societies.

The first objective of the IFRC was to improve the health of people in countries that had suffered greatly during the four years of war. Its goals were 'to strengthen and unite, for health activities, already-existing Red Cross Societies and to promote the creation of new Societies'.

There were five founding member societies: Britain, France, Italy, Japan and the United States. This number has grown over the years, and there are now 190 recognised National Societies – one in almost every country in the world.

**Figure 16.14** The Australian Red Cross at the site of the 2016 Dreamworld incident



## The World Council of Churches

The World Council of Churches (WCC) is a special interest ecumenical group that advocates and lobbies for human rights. It achieves this by bringing together churches of various denominations in more than 110 countries and territories throughout the world. The World Council of Churches represents over 500 million Christians, including most of the world's Orthodox churches, scores of Anglican, Baptist, Lutheran, Methodist and Reformed churches, as well as many United and independent churches.

While the bulk of the WCC's founding churches were European and North American, today most member churches are in Africa, Asia, the Caribbean, Latin America, the Middle East and the Pacific. There are now 348 member churches. A key aim of the WCC is to serve a human need by breaking down barriers between people and seeking justice and peace throughout the world.

**Figure 16.15** Former Australian Prime Minister Julia Gillard with a Red Cross volunteer at a Bundaberg evacuation centre following the floods in 2010



## 16.5 Human rights case studies

Several case studies are provided here for comparison, discussion and evaluation of the human rights issues involved. You can look up the

details of each case and other cases by searching for additional information online.

### CASE STUDY 16.1

#### Human Rights Committee Communication No. 941/2000 (*Young v Australia*)

In August 2003, Mr Young was successful in his communication to the Human Rights Committee alleging discrimination on the basis of sexual orientation against the Australian Government, in violation of the ICCPR. Mr Young was in a same-sex relationship with a veteran. Due to his sexual orientation, upon his partner's death, Mr Young was denied a pension benefit. The Human Rights Committee found that the denial of the pension violated Mr Young's right to equal treatment before the law and was contrary to Article 26 of the ICCPR. The Howard Coalition government refused to amend the relevant legislation. In 2006, the Commonwealth Human Rights and Equal Opportunity Commission

(now the Australian Human Rights Commission) conducted a review of the Commonwealth laws that discriminate against same-sex couples and their children. It identified at least 58 instances of discrimination. The Rudd Labor government was elected on a platform of removing those discriminatory laws and announced measures to amend the discriminatory laws identified by HREOC (now known as the 'Australian Human Rights Commission') in addition to over 40 further instances identified by the government. Amendments to relevant legislation were passed into law in mid-2009.

*Source:* State Library of New South Wales.

### CASE STUDY 16.2

#### Human Rights Committee Communication No. 1184/2003 (*Brough v Australia*)

In March 2006, Mr Corey Brough was successful in his communication to the Human Rights Committee. Mr Brough was an Aboriginal youth who was an inmate at a juvenile justice centre. He participated in a riot and was transferred to an adult correctional centre where he was held for prolonged periods, alone, in a so-called 'safe cell'. The Committee said that Mr Brough's 'extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged

periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal'. The Committee found a breach of Articles 10 and 24 of the ICCPR and emphasised Mr Brough's right to an effective remedy. No such remedy was granted by either the NSW or the Australian Government.

*Source:* State Library of New South Wales.

## CASE STUDY 16.3

### Human Rights Committee Communication No. 1050/2002 (*D & E v Australia*)

In 2002, an Iranian family, including two young children, made a complaint to the Human Rights Committee that Australia had violated their right to be protected from arbitrary detention under the ICCPR by detaining them for three years and two months in Curtin Detention Centre. Their application for asylum had been refused twice, and the minister had declined to exercise his discretion to grant a favourable outcome under section 417 of the *Migration Act 1958* (Cth).

In its submissions to the Committee, Australia argued that the complaint was inadmissible because, *inter alia*, the family had not exhausted all possible domestic avenues, in particular those available to it in the form of judicial review to the Federal Court or the High Court of Australia. The Committee did not accept this submission, noting that because Australia's High Court has held the policy of mandatory detention to be constitutional, this remedy would not have been effective. As a result, it was not necessary for the family to have

pursued a judicial review claim in the courts before the Committee could hear the family's claim.

The Committee agreed that the family's detention was in breach of Article 9(1) of the ICCPR, reaffirming its previous jurisprudence that detention will become arbitrary if it continues beyond the period for which a state party can provide appropriate justification. The Committee observed that, in this particular case, 'whatever justification there may have been for an initial detention', Australia had failed to demonstrate that the detention was justified for such an extended period or that compliance with Australia's immigration policies could not have been achieved by less intrusive measures. The Committee further found that the allegation that the prolonged detention of children breached Article 24(1) of the ICCPR was insufficiently substantiated in light of Australia's efforts to provide educational and recreational programs for children in immigration detention.

*Source:* Australian Human Rights Commission.

## REVIEW 16.7

- 1 Evaluate how the Australian Human Rights Centre (AHRC) lobbies for human rights and law reform in Australia. Do you think it has been effective? Why or why not? (E)
- 2 Analyse how Australian Lawyers for Human Rights (ALHR) advocates for and promotes human rights issues in Australia and worldwide. (A)
- 3 Evaluate the significance, importance and effectiveness of the following specialist interest groups protecting and advocating for human rights:
  - a Amnesty International
  - b the International Federation of Red Cross and Red Crescent Societies (IFRC)
  - c the World Council of Churches. (E)



# Chapter review

## Chapter summary

- At the federal level, human rights are protected in Australia by legislation that identifies Australia's obligations under international law.
- Human rights protections in state and territory jurisdictions exist under state and territory statute laws.
- The *Anti-Discrimination Act 1991* (Qld) is the key legislation providing human rights protections in Queensland.
- Freedom from discrimination is protected under federal, state and territory *Anti-Discrimination Acts*.
- The Australian Constitution protects a limited number of human rights; all other human rights are implied rights under state and territory laws.
- The right to trial by jury only applies to indictable offences; all other summary offences are judge-only trials.
- Significant pre-trial publicity and access to the internet and mobile phones by jurors have made appointing impartial juries and ensuring a fair trial difficult for the courts.
- Human rights complaints in Australia can be resolved in three ways: under federal legislation, or state and territory legislation, or through the Australian Human Rights Commission.
- The Australian Law Reform Commission oversees human rights law reform.
- Each state and territory has its own law reform body that includes human rights law reform.
- Specialist interest groups are non-government organisations that also promote and advocate for human rights.
- Australia has been prosecuted for human rights breaches in the Australian Human Rights Commission.

## Short-response questions

- 1 Explain why prisoners cannot vote in Queensland but can do so in federal elections. Do you agree or disagree with this? Why or why not? (C, A)
- 2 Evaluate how the Australian Law Reform Commission (ALRC) reviews Australia's laws to ensure improved access to justice for all. (E)
- 3 Propose recommendations to improve the jury system in the interests of justice for all who come before the courts. (C, A, E)
- 4 List the major aims of the Queensland Council of Civil Liberties (QCCL). (C)
- 3 Evaluate how each state and territory engages in law reform. Propose recommendations that would improve this process with regard to human rights law reform. (E, A, Cr)

## Extended-response questions

- 1 Research the arguments for and against the introduction of a Human Rights Act in Queensland. Argue the case for and against the introduction of such an Act. (C, E, Cr)
- 2 In a paragraph, compare and contrast the different law-reform bodies in each state and territory. (C, E, Cr)
- 1 Go to the State Library of New South Wales website and under 'Find Legal Answers: Hot Topics 77: Refugees' search for 'Chapter 6: Landmark cases in Australia'. In a paragraph, evaluate how landmark cases have resulted in important legislative changes and human rights law reform in Australia. Select two cases as examples to support your response. (S, C, E, Cr)
- 2 Go to the Australian Human Rights Commission website and search for 'Human Rights Explained: Case Studies: Complaints about Australia to the Human Rights Committee'. Scroll through the cases and select a case of interest. Evaluate the human rights breaches involved. Consider the outcome and the decision of the Commission. Do you agree or disagree? Propose recommendations that would ensure similar breaches are avoided in the future. (S, E, Cr)

# Unit review

## Short-response questions

- 1 Identify four purposes of the United Nations as stated in the United Nations Charter. (C, S)
- 2 List the different types of Special Rapporteur and summarise what they do. (C, S)
- 3 In the absence of a Bill of Rights in Australia, explain how our human rights are protected. (C)

## Extended-response questions

- 1 Analyse and evaluate the role of non-government organisations in protecting human rights around the world in a 250-word response. (A, E, Cr)
- 2 Analyse and evaluate the United Nations' approach to the use of force in international relations in a 250-word response. (A, E, Cr)
- 3 Argue the case for and against the introduction of a Human Rights Act in Queensland. (E)

## Response-to-stimulus questions

- 1 Research Australia's human rights record. Argue that our human rights record is or is not one of sustained fairness and excellence. Justify your response. (S, C, A, E, Cr)
- 2 Research the outcomes achieved by the International Court of Justice with regard to recent human rights cases. Argue that the court is or is not an effective arbiter of human rights conflicts between nations. (S, C, A, E, Cr)
- 3 Go to the Amnesty International website. Evaluate how Amnesty International advocates for human rights law reform in Australia and the world. (S, C, E, Cr)



# Glossary

**absolute majority** the government has more than half of all members elected to the parliament

**accession** when a nation-state enters into a treaty that has already been formed after it has been negotiated and signed by other states

**adjournment** the postponement of legal proceedings to a later date

**admissible** evidence that is introduced and allowed during trial

**adversarial system** a system of law in which each side presents evidence in order to prove their case

**aggrieved person** someone who is seeking protection in case of domestic violence (a 'victim')

**alleged criminal situation** where an unproven accusation of a crime is reported to the police for investigation

**alternative dispute resolution** settling a dispute without having to go through a more formal process, such as a court hearing; methods include mediation, conciliation, arbitration, case appraisal and settlement

**appeal** an application to the courts when a party believes that the judge or jury made the wrong decision, or the trial wasn't conducted according to the law

**appellate court** any court that can hear an appeal from another court: when the Supreme Court sits as the Court of Appeal; or the High Court as the final court of appeal

**arraignment** formal reading of the charges in the District or Supreme Court

**assault** the unlawful, intentional threat of force or infliction of injury on another person

**assembly** a group of people gathered together in one place for a common purpose

**atheistic** the doctrine or belief that there is no God

**Australian Constitution** the set of basic rules by which a country or state is governed; Australia's Constitution is set out in the *Commonwealth of Australia Constitution Act 1900*

**Australian Institute of Criminology (AIC)** Australia's pre-eminent national crime and criminal justice research agency

**bail** the release of a person from the court (to be held in custody or not) until they are due to appear in court

**balance of power** when another political party or independent members support a minority government, these other members hold the balance of power in the parliament

**balance of probabilities** the standard of proof in civil cases that the more likely or probable version of the truth should succeed

**ballot box** the sealed container into which an elector places a completed ballot paper

**barrister** argues cases in court proceedings

**beyond reasonable doubt** there needs to be no other alternative or any doubt in the mind of the jury that the accused committed the offences with which they are charged

**bicameral** a legislature, assembly or parliament consisting of two houses

**bilateral treaty** a formal agreement entered into by two nation-states

**Bill** a drafted law that has not yet passed through parliament or received Royal Assent

**Bill of Rights** a formal declaration of the legal and civil rights of the citizens of any state, country or federation

**bipartisan** involving the agreement or cooperation of political parties that usually oppose each other's policies

**Bolam principle** a doctor is not negligent if they act in accordance with accepted practice at the time, as deemed proper by a responsible body of medical opinion, even though other doctors adopt a different practice

**breach** broken rule or promise

**bureaucratic procedures** rules and often time-consuming methods, procedures and protocols for carrying out the business of a house of parliament or government department

**burglary** the act of entering a building or other premises with the intent to commit a felony

**but-for test** if the defendant had taken the action or not taken the action would the harm or damage have occurred anyway? Did harm occur because of the defendant's sole action?

**carnal knowledge** the act of engaging in sexual intercourse

**case law** the principles of law arising from judicial decisions as distinguished from statute law; also termed common law

**causal relationship** the direct relationship between the harm and damage caused by the original action

**causation** the harm, damage or injury that was directly caused by the defendant

**caveat emptor** an obligation for a buyer to reasonably examine any property before purchasing it; buyer beware

**Chief Justice** the senior justice of the High Court of Australia

**civil law** a body of rules (torts) that delineate private rights and remedies, and govern disputes between individuals in such areas as contracts, property and family law; distinct from criminal law

**civil rights** a class of rights that protects individuals' freedom from infringement by governments, social organisations and private individuals

**class action** a lawsuit initiated by a single person on behalf of members of a group of people who are seeking financial compensation for wrongdoing

**coalition** a government formed with the support and cooperation of two or more political parties

**code** a written form of the laws of a society; may also indicate appropriate sanctions for a breach of the code

**codifying legislation** incorporating common law principles and decisions into legislation

**cognitive capacity** capable of understanding the nature and effect of decisions about the matter and freely and voluntarily able to make decisions about the matter and communicate decisions in the same way

**colonisation** the establishment of colonies; settlement

**Commission of Inquiry** the highest form of inquiry on matters of public importance

**committal hearing** when a charge is more serious, the magistrate must decide whether the evidence against the accused is strong enough for the case to go to trial in a higher court. If the magistrate is satisfied that there is sufficient evidence, the case is committed for trial in the District Court or the Supreme Court, depending on the seriousness of the charge.

**committee system** committees comprising members of parliament that scrutinise government activities, including legislation, and inquire into specified matters

**common law** the body of laws made through decisions of the courts, as distinct from statute law; also referred to as judge-made law

**compensation** something – typically money – awarded to someone in recognition of loss, suffering or injury

**compensatory damages** damages that are awarded in order to compensate a plaintiff for personal injury or injury to property caused by the defendant's wrongful act

**complementary legislation** legislation introduced through a Bill that mirrors legislation in another state or territory to ensure the law is the same in all parts of Australia

**concurrent powers** powers under the Constitution that may be exercised by both the Commonwealth and the states

**concurrent sentencing** where more than one sentence can be served at the same time

**conferencing** an alternative to traditional sentencing, involving the victim and offender coming together to enable the offender to accept responsibility and address the impacts of the offence

**consolidating legislation** a statute that combines in one Act all the legislation in force relating to a particular area in that jurisdiction

**consumer** for the purposes of the ACL, a person is a 'consumer' if they acquire goods or services that are priced at less than \$40 000. A person is also a 'consumer' if they acquire goods or services that are priced at more than \$40 000 but they are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'.

**contributory negligence** when a person has acted or omitted to act in such a way that they have contributed to or partly caused the damage to themselves

**convention** similar to a treaty but more often on specific matters or issues, and sometimes of a less formal nature; often used synonymously with treaty, covenant, charter, protocol and/or statute

**conviction** record of judgment of a jury or magistrate that a person is guilty of a crime as charged

**coronial inquest** an inquest or autopsy into the death of a person or persons conducted by the Coroner

**councillors** people elected as representatives of a division or ward on a local government council

**counter-offer** an offer made in response to a previous offer

**covenant** similar to a convention in effect and use; often used synonymously with treaty, convention, charter, protocol and/or statute

**crime** an act or omission punishable by the state

**crime statistics** data and information gathered on various types of crime

**criminal act (*actus reus*)** the physical performance of a crime (guilty act)

**criminal intent (*mens rea*)** a person's mental state and awareness of the fact that their conduct is criminal

**criminal offences** offences or crimes against the state; often called 'breaking the law'

**cumulative sentencing** where a subsequent sentence is served after the first sentence has been completed

**custodial sentence** punishment that involves serving time in a closed facility – for example, a prison or high-security psychiatric facility

**customary law** the practices and systems among Aboriginal people that have developed over time, regulating behaviour and connecting people with each other and the land through a system of relationships

**cyberbullying** when a child or teenager is bullied, embarrassed, threatened or harassed by another child or teenager using interactive technologies (e.g. mobile phones, blogs, tweets, Facebook, interactive games)

**damages** compensation, in the form of money, awarded by a court to the successful claimant in a legal action

**defamation** an act of communication that injures another person's reputation without good reason or justification, causing them to be shamed, ridiculed, held in contempt and to lose their standing in the community or their place of work

**default judgment** given in favour of the plaintiff because the defendant has failed to file a notice of intention to defend

**defence** the claims of the defendant in opposition to complaints against them; the party who presents and argues the case on behalf of the accused or the defendant

**defendant** an individual, company or institution sued or accused in a court of law

**democracy** government by the people, directly or indirectly, through a system of representation, usually involving periodically held free elections

**demonstration** a public meeting or march protesting against something or expressing views on a political issue

**diminished responsibility** a defence that is used when an accused does not fully understand what they have done

**discrimination** unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age or sex

**doctrine of precedent** a principle of common law that requires judges to follow the rulings of judges in higher courts on previous cases where the issues and facts were similar

**double dissolution** the simultaneous termination of the House of Representatives and the Senate by the Governor-General and the calling of new elections for both houses

**double jeopardy** a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction

**double majority** a majority of voters in a majority of states, together with a majority of voters across the whole country, voting 'yes' in a referendum

**Drug Court** a Queensland Court that offers some drug-dependent offenders intensive rehabilitation instead of prison

**due process** the concept that the fair and equal treatment of all persons can be ensured during trial through procedural legal processes

**duress** an act carried out because of a threat to you or a loved one

**duty of care** an obligation imposed on a person to take reasonable care to ensure that they do not cause another person to suffer harm

**electoral roll** list of people who are registered and eligible to vote at federal, state, territory and local government elections and referenda

**electorates** districts comprising an approximately equal number of voters that each elect a single member to the parliament

**elements of an offence** the facts of an offence that must be proven to find the offender guilty

**empanelled** the process of being chosen for jury service for a particular trial

**equitable** even and impartial; balance between the rule of law and the rights and freedoms of individuals and society; impartial and fair outcome or result where the statute law is silent

**evidence** facts or information indicating whether a belief or proposition is true or valid

**exclusive powers** the powers given to the federal government by the Constitution, such as defence, immigration, customs and excise duties

**executive and executive government** the Prime Minister and ministers (also called the ministry) who lead and manage government departments and are

responsible for putting into action government policy and the laws made by the parliament

**exemption clause** a term in a contract that seeks to restrict the rights of the parties under the contract

**extradition** the act of forced transfer/delivery of a person who is alleged to have committed a crime in one jurisdiction to the law enforcement agencies of the jurisdiction from which they have fled

**fair** treating people equally without favouritism or discrimination

**fair trial** a court hearing in which the procedures are fair to both sides

**First Amendment** an amendment to the US Constitution that forbids Congress from interfering with a citizen's freedom of religion, speech, assembly or petition

**first mention** the first time a matter is heard in the Magistrates Court. At the first mention, the matter can finish with a plea of guilty or be adjourned for further mentions.

**foreseeability** the ability to reasonably anticipate the potential results of an action, such as the damage or injury that may happen if one is negligent or acts in a particular way

**foreseeable damage** damage that occurs as a result of an action that a person should reasonably have foreseen would happen if they were negligent

**freedom of expression** the right to express your opinion in any medium; a human right under Article 19 of the Universal Declaration of Human Rights and recognised in international human rights law in the International Covenant on Civil and Political Rights (ICCPR).

**freedom of opinion** the right to communicate one's opinions and ideas without fear of government retaliation or censorship

**Full Bench** when all justices, or judges, of the court (High Court and Supreme Court) sit together to hear a matter, usually in cases of significant legal or constitutional importance

**Full Court** when two or more justices, or judges, sit to hear a matter before the court

**genocide** the deliberate extermination of a race of people

**globalisation** the reality that all countries are becoming more dependent on and connected with one another, socially, economically and through international law

**governance** a method or system of government

**grooming** a process whereby a sexual predator seeks out a victim online by attempting to develop a relationship through private conversations, email, texting or voice over internet protocol (VoIP). This process can continue for months before the predator will try to arrange a physical meeting.

**hand-up committal** the prosecutor gives (hands up) evidence to the magistrate without having the witnesses present. The procedure was introduced to promote efficiency during committal proceedings.

**human rights** fundamental rights that are considered to belong to every person regardless of race, gender, age, nationality or religion

**human rights treaty** an agreement and obligation undertaken by signatory nations to ensure that everyone enjoys the human rights set out in the treaty

**implied right** a right that is not clearly outlined in the Australian Constitution but suggested or inferred in its text

**inadmissible** evidence against the accused that cannot be used in court during trial

**indictable offence** more serious criminal offence that requires a committal hearing and trial

**indictment** the document that brings the matter to trial and sets out all the appropriate information about the charges the accused is facing

**injunction** a court orders a person to do or refrain from doing a particular activity

**inquisitorial system** a method of legal practice in which the judge endeavours to discover facts while simultaneously representing the interests of the state in a trial

**insanity** state of mental disease or natural mental infirmity

**interlocutory steps** judgments being given on specific issues or points during the course of a legal action

**international law** a body of rules established by custom or treaty and recognised by nations as binding in their relations with one another

**interrogatories** a formal set of written questions that one party may ask another party to clarify before a hearing

**intoxication** the state of impairment caused by the consumption of alcohol or drugs

**invitation to treat** an invitation for potential customers to make an offer

**joint sitting** a meeting of both houses of parliament together to make a decision on a proposed law on which the two houses, sitting separately, have not been able to agree

**judge** the senior judicial officer presiding in the District Court or higher courts, including the Supreme Court, Court of Appeal, Federal Court, Family Court and the High Court of Australia

**judiciary** the High Court and other federal courts that make judgments about the law

**jurisdiction** the power or authority of a court to hear and try a case, including the geographic area in which a court has power or the types of cases it has the power to hear

**jurist** from Medieval Latin: someone who researches and studies jurisprudence (the theory of law)

**jury** body of people sworn to judge and give a verdict on a given court matter; the jury will consist of 12 people for a criminal trial

**just** legally right, conforming to that which is lawful or fair and proper in the (or all) circumstances

**justices** judges appointed to the High Court of Australia

**juvenile** a person who is not old enough to be held responsible for criminal acts; in most states and on the federal level, this age threshold is set at 18 years

**law reform** the process of examining existing laws, and advocating and implementing changes in a legal system, usually with the aim of enhancing justice or efficiency

**laws** rules that are made by government to ensure that our society functions properly

**legal representation** the legal work that a lawyer performs on behalf of a client

**legally binding** a court or tribunal decision that is binding on the parties; an agreement or contract that has the force of law

**legislation** a law or body of laws formally made by parliament

**legislature** parliaments or assemblies such as the Legislative Assembly in Queensland with the power to make, change and amend laws

**lobby group** an organised group or association that attempts to influence legislators and officials

**lodge** present a complaint, appeal or claim formally to the proper authorities

**loiter** linger idly by; to move slowly about

**lower court** the first court in a hierarchy; the Magistrates Court

**magistrate** the judicial officer presiding over the Magistrates Court

**majority verdict** where a jury consists of 12 jurors, at least 11 jurors agree; or where a jury consists of 11 jurors, at least 10 jurors agree

**mandamus** an order sought from a court making it mandatory for a party to perform a specified act

**Member of the Legislative Assembly (MP)** a representative elected to represent an electorate in the Queensland Parliament

**member of parliament (MP)** a member of a house of parliament, usually used to describe a member of a lower house and, in Australia, referring to Members of the House of Representatives, who may use the initials MP after their names

**minority government** a government formed by a party or coalition of parties or independents that do not have a majority in the lower house of parliament on their own

**misrepresentation** any statement of fact by one person to another, either by words or actions, that is not in accordance with the actual facts

**multilateral** undertaken by more than two nation-states

**multilateral treaty** a formal agreement entered into by more than two nation-states

**native title** a form of land title that recognises the unique ties Aboriginal and Torres Strait Islander peoples have to land

**natural justice** rules of fair play originally developed in the common law courts; rules and procedures to be followed by a person or body with the power to settle disputes

**nature** (of a legal issue) the essence and elements of the legal issue being considered

**negligence** an important legal principle that enables a party who has suffered loss or damage resulting from the wrongful actions or inactions of another to claim compensation from the party responsible for their loss; no contractual relationship between the parties is necessary

**neighbour principle** a test to establish whether one party owes a duty of care to another

**non-custodial sentence** punishment that does not include time in prison

**non-theistic** not believing in one God as the creator and ruler of the universe

**notice of termination** an official written notification that a matter has been terminated

**novus actus interveniens** an act that breaks the chain of causation and, if proven, means that the defendant may not be liable for the damages caused to the plaintiff

**obiter dicta** literally means ‘something said by the way’ – words used by a judge in a case that are not critical to the decision and therefore do not form part of a binding precedent

**offence** an act that breaks the law

**omission** a failure to act, resulting in a breach of duty or damage

**onus or burden of proof** the responsibility of proving a disputed charge or allegation; lies with the person making the allegation

**pandemic** an epidemic that affects a whole country, or the whole world

**parliamentary democracy** a political system based on the idea that parliament is supreme, or sovereign

**parliamentary inquiry** investigation by a parliamentary committee into an issue of political, social or legal interest

**plaintiff** a person who brings a case against another in a court of law

**plea** in criminal proceedings, the answer given of ‘guilty’ or ‘not guilty’ in response to the charges

**pleadings** the documents in which the plaintiff and defendant set out what they hope to prove at the trial

**police discretionary powers** the power afforded to police to make decisions based upon what seems to be the most appropriate action in the circumstances

**possession** for a person to be in possession of a drug, they generally have to be aware of its existence and be exercising control over it. The person must also know that the substance is a drug, or have reason to suspect that it is a drug.

**precedents** rules or principles established in previous legal cases that are either persuasive to or binding on a court when it is deciding subsequent cases with similar facts or issues

**prescribed** in this context, something that is laid down in legislation – contained in Acts and regulations

**President of the Senate** the equivalent of the Speaker in the House of Representatives; the presiding officer responsible for the bureaucratic procedures of the Senate

**presumption of innocence** the concept that the accused is innocent until proven guilty

**prevention** the work of police, government agencies and businesses to identify and prevent the causes of crime and criminal behaviour

**Privy Council** the principal council advising the sovereign (Queen); the court of final appeal for the UK overseas territories and Crown dependencies and Commonwealth countries that have retained their appeal to the Queen in Council

**procedural fairness** a common law duty to act fairly in the making of administrative decisions that affect a person's rights, interests and legitimate expectations; the right to due process

**promotional lobby group** an organised group promoting a particular cause

**prosecution** the party who presents and argues the case on behalf of the Crown against the accused

**prosecutor** a government official who conducts criminal prosecutions on behalf of the state

**protest** a statement or action expressing disapproval of or objection to something

**proviso** Latin meaning provided; a clause, condition, stipulation or limitation

**proximity** nearness or closeness in space, time or relationship

**publicist** in a legal context, a legal, respected figure who is recognised through their teachings and who demonstrates wisdom of a high order in legal matters

**punishment** financial loss, confinement or another penalty imposed for wrongdoing

**quasi-judicial** authority that is judicial in nature, often exercised by a tribunal, as distinct from a court where a judge presides

**Question Time** a daily period of time in each house of the parliament in which ministers are asked questions without notice by other members concerning their responsibilities

**rally** a mass meeting of people making a political protest or showing support for a cause

**ratification (minors)** upon becoming an adult, the minor confirms that they are prepared to perform their obligations under the contract, making the contract legally binding

**ratification (treaties)** the process of full adoption of the obligations imposed by a treaty or covenant into Australian law by the passing of legislation through the federal parliament that mirrors and enacts the treaty obligations

**ratio decidendi** literally means 'reason for decision'; it is confined to the reasoning of the judge that is essential to the decision in the case and becomes the binding precedent

**reasonable** having sound judgement; fair and sensible

**reasonable contemplation test** the defendant should only be held liable for the loss or damage caused to the plaintiff that could reasonably be contemplated by both parties

**reasonable suspicion** facts that would cause a reasonably minded person to conclude something – this may be an incorrect suspicion, but it must be a reasonable one

**received law** the reception of English law into the penal colony of New South Wales

**recidivism** the repeat offending of a convicted offender

**recommendations** suggestions or proposals for action put forward by an authoritative body

**referendum** a vote on a direct question or proposal presented to all members of a country or electorate for their approval or rejection. Any change to the Constitution requires a referendum and the approval of a majority of voters nationwide.

**regulated right** a right that is regulated, defined and controlled in legislation

**regulatory offence** an act that is prohibited by legislation and carries a fine as its maximum penalty

**remand** (in custody) the procedure of keeping an accused person in legal custody while waiting to appear at a committal hearing or trial

**remedy** relief for loss or damage that may be given or ordered by a court to compensate for a wrong

**representation** a statement made before a contract is entered into that affects matters relating to the contract

**representative government** a basis for government where the citizens elect representatives to serve in the parliament and make decisions on their behalf

**reprisal** an act of retaliation

**repudiation** upon becoming an adult, the minor states that they are not prepared to perform their obligations under the contract

**reservation** when a nation-state does not wish to be bound by every provision in a treaty so ratifies only the parts of the treaty by which it does agree to be bound

**reserve powers** rarely used powers that enable the Governor-General to act independently

**residual powers** the legislative powers not covered by section 51 of the Constitution, which remain with the states

**respondent person** someone against whom the aggrieved is seeking a protection order (a 'perpetrator')

**responsible government** a system where the government is answerable to elected representatives of the people for its actions, especially a system where the ministry is drawn from within the parliament from members of the political party or parties with the support of a majority of the lower house (in Australia, the House of Representatives), and must maintain the confidence of the majority of that house

**restorative justice** a theory of criminal justice that emphasises the rehabilitation of offenders through reconciliation with victims and repairing the harm caused by criminal behaviour

**retrial** a new trial ordered after a jury has been unable to reach a verdict and has been discharged

**revocation** the cancellation of an offer or a contract

**right** the privilege or power to be able to do something; some rights are recognised by law

**right to vote** a Constitutional or legislated right of eligible citizens to elect a representative to parliament or a local council from a list of candidates

**Royal Assent** the signing of a Bill by the Governor-General, which is the last step in making a Bill into an Act of Parliament, or law

**Royal Commission of Inquiry** A federal Royal Commission is a government inquiry established by the Governor-General pursuant to the *Royal Commissions Act 1902* (Cth)

**rule of law** the principle that all people are subject to the law and equal before the law

**rules** the decisions your parents, guardians and school make about your safety and needs

**scope** (of a legal issue) the extent of the components of the legal issue

**sectional lobby group** a self-interest lobby group such as a trade union

**Select Committee** a federal Senate committee that conducts an inquiry, reports to parliament and is then disbanded

**self-defence** the lawful use of force against a person who is threatening the life or wellbeing of another

**senators** members of the Australian Senate, the upper house of the federal parliament

**separation of powers doctrine** requires that all three arms be separated to ensure that no individual body or person has complete control; the distinct roles of the executive, the judiciary and the legislature are strictly maintained

**solicitor** provides a wide range of legal information to clients

**sovereignty** the concept that a government exercises full control over affairs within a geographical or

territorial limit; this means it can pass laws and enforce them within this area and exists as an essentially independent legal and political body in this space

**Speaker** makes sure that members of the house obey the rules (standing orders) of the house and follow the correct procedures

**special order** punishment ordered by a specialist court like the Drug Court in place of time in prison

**specialist taskforce** inquiry conducted by specialists in the field of inquiry rather than by a parliamentary committee

**stakeholder** person, group or organisation that is affected by, can affect or is concerned with an issue

**standard of care** the degree of caution required, usually with reference to the 'reasonable person', of an individual who owes a duty of care

**standard of proof** (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond a reasonable doubt. (2) In a civil proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

**Standing Committee** a permanent federal Senate committee that exists for the term of the parliament to conduct inquiries into matters referred to it

**state** a term used to refer to the government and the people it governs

**states** countries recognised as having legal standing under international law as they have a defined territory, one government and a permanent population coupled with the ability to enter into relationships recognised by law with other states

**state sovereignty** the power of a government to run its own affairs and make laws for its territory

**statute law** the most common form of law within our society. It is a law passed by parliament that can cover any topic and it takes precedence over common law.

**statutory interpretation** the process used by judges and magistrates in court to interpret and apply the legislation

**strict liability** offences where only the criminal action (*actus reus*) needs to be proved

**subpoena** an official document that requires a person to give evidence in the District or Supreme Court

**summary judgment** the court makes a judgment due to the weakness of the case presented by the other party

**summary offence** simple or less serious criminal offence heard by a magistrate

**summons** an official document that requires a person to give evidence in the Magistrates Court

**superior court** a higher court of record or general jurisdiction; a State Supreme Court

**terms of reference** the scope and powers of an inquiry; what is to be investigated

**terra nullius** a Latin expression meaning 'land belonging to no one', which is used in international law to describe territory that has never been subject to the sovereignty of any state

**territorial integrity** the idea that a state has the right to its own territory and another state should not do anything to infringe that right

**town plan** a plan of the physical and social development of a town, including the construction of all new facilities, buildings, roads and parks

**tort** a legal wrong that is not a criminal offence

**trafficking** typically, selling drugs; however, 'trafficking' is of wider import, meaning 'knowingly engaging in the movement of drugs from source to ultimate user'

**treaty** a formalised agreement between two or more nations about a particular area of mutual interest (such as trade, prisoner exchanges or human rights); often used synonymously with convention, covenant, charter, protocol and/or statute

**ultra vires** Latin term meaning 'beyond power', acting outside the scope of a granted power

**unanimous verdict** where all jurors collectively agree on the verdict

**unconscionable** being taken advantage of in a transaction in a way that offends the conscience

**unicameral** a system of governance where there is only one legislature or parliament

**unilateral** action taken by one nation-state alone

**unlawful stalking** intentional conduct directed at a person, on more than one occasion, that causes the person apprehension or fear of violence to themselves or another

**utilitarianism** a system of thought stating that the best action or decision in a particular situation is the one that brings the most advantages to the most people

**verdict** the finding of a judge or jury in a trial

**veto** a constitutional right to reject a legal enactment

**vicarious liability** a third party such as an employer is regarded as being liable or responsible for the acts or omissions of another person

**voidable** cancelled or returnable

**volenti non fit injuria** a Latin term meaning 'there can be no injury to the willing'; a person who has contributed to their own injury

**Westminster system** a system of government, originating in Britain, the main features of which are a head of state who is not the head of government, and an executive that is drawn from and directly responsible to the parliament

**white-collar crime** non-violent criminal offences committed by business and government professionals for financial gain; fraud committed by respected and trusted professionals in the course of carrying out their profession

**world order** the activities of, and relationships between, all the world's countries, including power relations, international law, the global economy and global politics

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