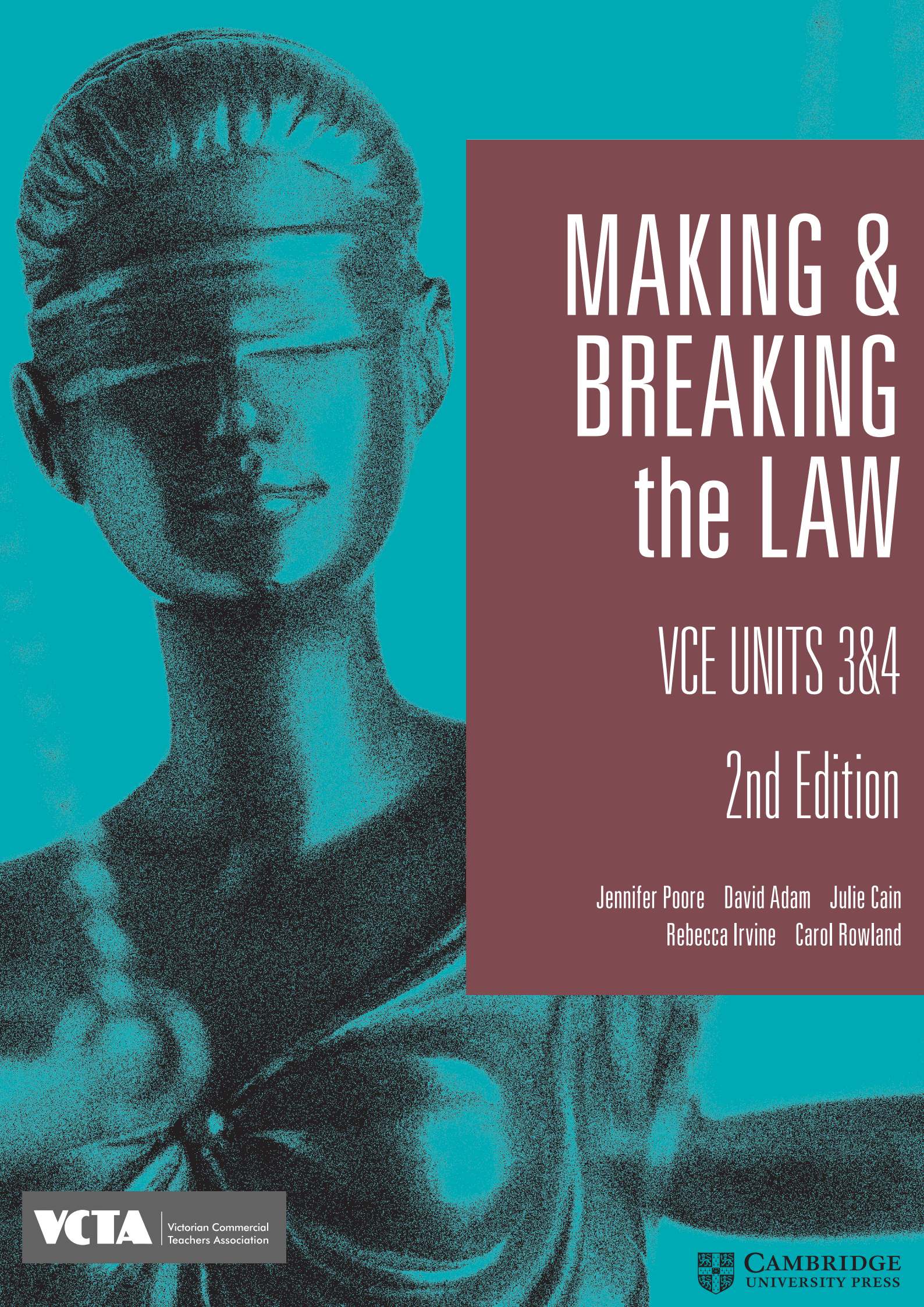

MAKING & BREAKING the LAW

VCE UNITS 3&4

2nd Edition

Jennifer Poore David Adam Julie Cain
Rebecca Irvine Carol Rowland

VCTA Victorian Commercial Teachers Association

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UNIT 3

Rights and justice

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Chapter 1

Area of Study 1

Law and justice: an introduction

In contemporary Australian society there is a range of laws that exist to protect the rights of individuals and to achieve social cohesion. This chapter provides an introduction to the sources of rules and laws. We will examine the difference between legal and non-legal rules. We will also look at the classification of laws as criminal or civil, and statute or common law. This chapter also examines the concept of justice – fairness, equality and access.

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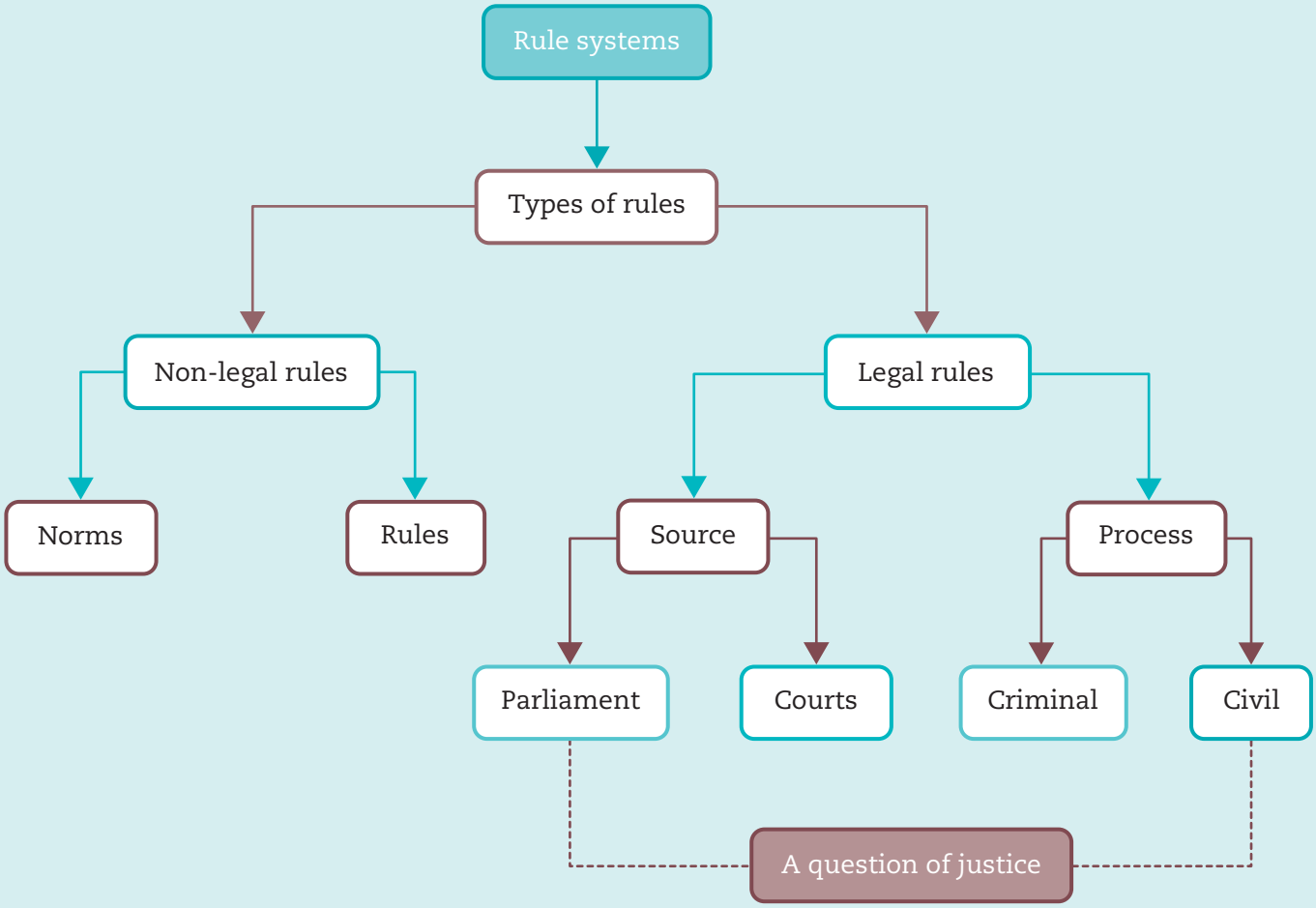

Key terms

access a principle of justice achieved if a range of institutions, specialist key personnel and methods to settle disputes are provided within the legal system

civil law laws regulating the behaviour of private individuals

common law law developed in the courts; also known as case law or judge-made law

contract a legally enforceable agreement

criminal law laws concerned not only with the rights of the individuals directly involved but also with the welfare of society as a whole

equality a principle of justice achieved if all citizens are provided with equal legal opportunities and equal treatment under the law

fairness a principle of justice acheived through the impartial treatment of all people under the law, without fear or favour

judge-made law the development of legal principles through the decisions made by judges or the interpretation of statutes

legal rules laws created by institutions within the legal system and enforced by the legal system

legislation an Act of Parliament, a statute or piece of delegated legislation

non-legal rules rules established within a group but not generally enforceable in the community

norms social expectations within social groups

statute law Acts of Parliament

tort a civil wrong that amounts to an act or failure to act that infringes on the rights of an individual; for example, negligence, trespass and nuisance

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1.1 Rules and laws

Rules can be legal rules or non-legal rules.

Laws consist of rules that establish modes of behaviour and procedures. However, not all rules are laws. As members of the community, we are subject to a range of rules – non-legal and legal – which determine our relationship with other members of society. Not all the rules that govern our actions have the same effect, importance, or repercussions.

Non-legal rules

Non-legal rules apply to a group but not to the community as a whole.

Not all rules are legal. Groups within society have rules to set out how they interact, and to establish the rights and responsibilities of individual members of those groups. They are known as **non-legal rules** and they help reduce conflict within that particular group. These rules are not found in the law. They are established by **norms**, which are other sorts of rules.

For instance, within our families, we are bound by rules of behaviour that set out the rights and responsibilities of each member. In a family, the rules are clearly communicated, but not usually written. Clubs, sporting associations and schools also require rules to function smoothly. Such rules may be more formally stated than norms and may impose sanctions (penalties) on members who break them.

Are rules in sport laws?

The players in the Australian Football League are subject to complex rules. However, these rules are not legal rules. Although they are binding on all members of the league, they are not binding on the rest of us. If you decide to play football with the AFL, you agree to abide by their rules. If you do not agree with these rules, you cannot play AFL football.

If an AFL player is charged with violating the rules of the game, there is an AFL tribunal to settle the dispute. If a player is found guilty, they are punished – either by being suspended from playing for a specific length of time or by being fined.

These rules provide us with a guide to our interaction with other members of our 'group'. The nature of the rules will alter from group to group. You cannot be made to join a particular group, and therefore cannot be made to abide by its rules.

In many cases, rules are not formally stated or formally learnt. They are instilled in us by conditioning – this is what makes them norms. For example, there is no law stating that we must respect our parents; however, most of us do. We have learnt to behave in this manner since we were young. The value has been instilled in us by verbal and behavioural messages from our families, and perhaps by our religious beliefs.

Legal rules

Legal rules are laws that apply to the whole community.

Legal rules are known as laws. These laws set out our rights as members of the community. For instance, human rights and equal opportunity legislation establishes the right of all individuals to be treated equally. The law also establishes our responsibilities to other members of the community or to the community as a whole. For example, laws about the use of motor vehicles place responsibilities on all owners and drivers of motor vehicles.

In any society, it is inevitable that there will be conflicts. The law gives us ways of settling these disputes peacefully. In Australia, the law provides a range of dispute settlement institutions and processes. For instance, courts have been established to resolve disputes. The Victorian Civil and Administrative Tribunal (VCAT) was established to resolve disputes between individuals. VCAT and the courts resolve disputes using a range of processes. We will look at these processes in more detail later.

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For laws to be established in a community, and to operate effectively, the authority of those laws must be recognised by that community. This recognition is generally granted because the law reflects the collective needs and values of society. In Australia, the individual is encouraged to take an active role in the development of laws through a number of democratic processes: the electoral system, the provision of representative and responsible government, and the jury system.

In summary, the basic features of a law are that it:

- specifies a particular behaviour or type of behaviour (it usually either prohibits or regulates that behaviour)
- provides a sanction (penalty) or remedy against anyone who violates the law
- is formed by an authority recognised by the community.

For example, the **criminal law** establishes expected behaviour by prohibiting certain actions. The criminal law is made by parliament, which is recognised by the community as having the authority to make the law for the community as a whole. If a person does something that has been prohibited by the criminal law, they will be punished by either having their liberty restricted or a fine imposed.

Sport – defining legal and non-legal rules

Some actions are only permitted within legally recognised games. For instance, the sport of boxing is strictly regulated and recognised organisations control boxing events. In a boxing match, punches are thrown with the intention of physical contact that may result in harm. Outside the boxing ring, these same actions would come under legal rules; in particular, the law of assault.

A boxer who agrees to take part in a legally recognised boxing match consents to actions that would otherwise be considered assault – provided that the match is conducted according to the rules of the sport of boxing. However, if a boxer were to continue the fight after the end of the match, that person would be acting outside the rules of the sport. In this case, the boxer may be subject to the legal rules of assault.

For example, in 2001 after American boxer James Butler lost a match, he removed his gloves and walked over as if to congratulate his opponent. Instead, Butler delivered a sucker punch that dislocated his opponent's jaw. Butler was charged with assault and sentenced to four months imprisonment.

At other times, behaviour during a match can break both the rules of the sport as well as laws. In the history of the AFL, there has been only one occasion in which a player has been prosecuted for an on-field incident. In 1985, Hawthorn player Leigh Matthews broke the jaw of Geelong's Neville Bruns in an unprovoked king hit while both players were far removed from the action of the game. Matthews was charged by police with assault, pleaded guilty, and was fined $1000. On appeal this was overturned and he was granted a 12-month good behaviour bond. The AFL separately sanctioned Matthews with a four-match suspension.

There can sometimes be a fine line between legal and non-legal rules. For instance, the AFL requires all players to agree to abide by the AFL rules (non-legal rules). However, the agreements made by professional players to play AFL football are contractual agreements (legal rules). Sometimes conflicts may arise between how the AFL Tribunal applies the AFL rules and the principles of natural justice. In such cases, the courts may be asked to review decisions made by the AFL Tribunal.

In a sporting match, players consent to the rules of the game. These rules determine acceptable conduct. Players do not consent to dangerous conduct outside these rules.

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1.2 A legal system

Legal rules differ from non-legal rules in that legal rules apply to the community as a whole. The legal system establishes procedures and institutions to make, administer, adjudicate and enforce the law in the community.

In our legal system, law-making is primarily the responsibility of the Commonwealth parliament and the State parliaments. Courts (judges and magistrates) are responsible for interpreting the law and resolving disputes when it is claimed that the law has been breached (adjudicating).

A variety of bodies have been established to enforce the law. For instance, the police have the power to impose on-the-spot fines and to arrest people suspected of having broken the law. The Department of Justice and Community Safety is a government department responsible for the administration of justice. Individuals who need legal help use solicitors and barristers, who advise them and may represent them in their dealings with the legal system.

1.3 Types of laws

Laws can be classified according to the source or the type of behaviour regulated.

The types of laws we have can be classified in a number of ways. Whatever method we use, it is necessary to remember that, in a developed society such as ours, the law is complex and constantly changing. New areas of law, which may not neatly fit into existing categories, develop. No one method of classification can cover all aspects of our law.

By looking at the different ways of classifying the law we can start to appreciate the complexity of our legal system. The methods used to classify our laws include:

- criminal or civil law (classifying according to type of behaviour)
- statute or common law (classifying according to the sources of law).

In Unit 3, we look at dispute settlement processes and procedures, and so we may want to classify the law according to the processes used to resolve disputes. Also, the dispute settlement processes and procedures differ according to whether they are for criminal or civil cases. In Unit 4 we look at the law-making process. For the purpose of our study in this section, we might want to classify the law according to the different processes used to make the law, or according to the sources of law.

In some cases, a wrongful act may involve more than one area of law. It may involve both the rights of individuals and the relationship between the individual and the state.

This is often the case in car accidents. For instance, a speeding driver who fails to stop at a red light is guilty of a criminal offence. This behaviour constitutes a danger to the community as a whole. While driving through the red light, the driver collides with another car. As a result of the collision, the second car has been damaged. The rights of the owner of the second car have been infringed. The driver of the second car could recover this loss through civil law by suing the other driver.

Criminal or civil law

Laws can be classified as either criminal or civil.

Laws can be classified as either criminal or civil. Criminal law is concerned with behaviour that affects not only the individuals directly involved but also the welfare of society as a whole. Criminal law aims to regulate the behaviour of individuals as members of the community and to protect the interests of society. **Civil law** is concerned with behaviour between one individual and another individual. It includes **contract** law and the law of **torts**.

Types of criminal laws

Criminal law is generally concerned with behaviour that is disruptive to the society as a whole. Some of the types of criminal offences are set out in Table 1.1.

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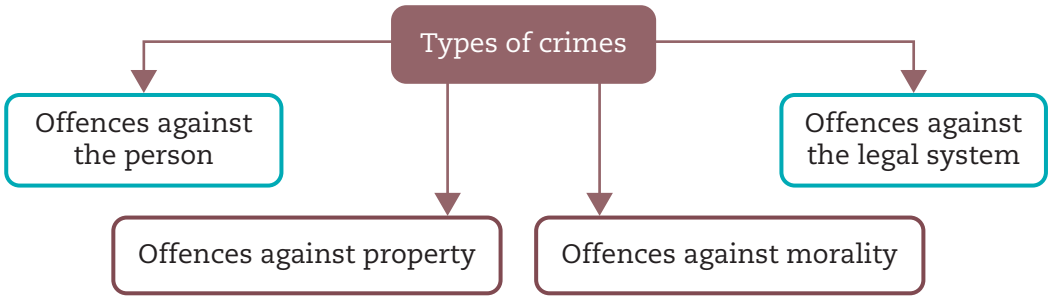
Table 1.1 Types of crimes

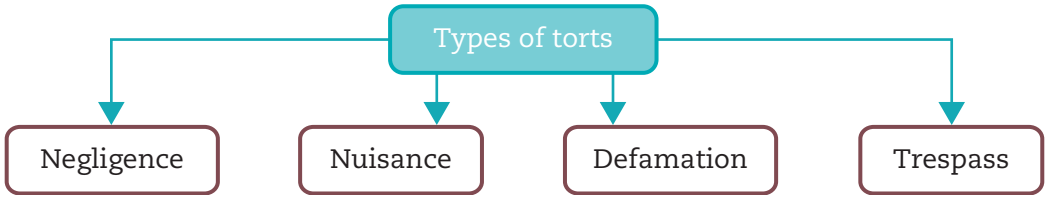


Types of crimes	Examples
Offences against the person	Offences relating to action that results in some form of personal injury, such as murder, assault, rape, or kidnapping
Offences against property	Offences involving conduct that results in damage to or loss of property, such as theft or acts of vandalism
Offences against morality	Offences concerned with maintaining certain values in our society, including incest, street prostitution and bigamy
Offences against the legal system	Offences regarding our responsibility to participate as responsible citizens in the administration of justice, such as perjury or failure to appear for jury service

Types of civil laws

Civil law includes contract law and the law of torts. Contract law is concerned with legally enforceable agreements made between individuals (a company, legally, is an individual, so this includes agreements made between one person and a company). Torts are concerned with the wrongful actions of one individual towards another individual. Some types of torts are set out in Table 1.2.

Table 1.2 Types of torts



Types of torts	Definitions
Negligence	Where the actions of an individual who has failed to exercise reasonable care adversely affects another individual
Nuisance	Where an individual interferes with another's enjoyment of their rights
Defamation	Where an individual damages the good name or reputation of another through false or misleading statements
Trespass	Where an individual physically interferes with another person, their goods, or their land

It is important to understand the difference between the two types of behaviour. Criminal law and civil law are dealt with by different procedures and have different consequences for the individuals involved. Criminal law is enforced by the police, the courts and Corrections Victoria. An individual who has been charged with a criminal offence will be prosecuted by the State, not by the individual who has been harmed, and if found guilty of an offence will be sanctioned. Sanctions are generally a fine, a community correction order, or imprisonment.

Criminal law and civil law are dealt with using different procedures.

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

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News report 1.1

George Pell sued over dropped criminal charges

Prosecutor's decision to drop criminal charges against Pell may lead victims to file a civil case instead.

Although a jury found Pell guilty in December of 2018 on charges of sexual abuse of choirboys in the 1990s, those were not the only charges brought against Pell. Pell also faced a second trial concerning allegations of indecent assault occurring in a swimming pool in Ballarat. These charges were ultimately discontinued by prosecutors, and the trial was abandoned, because of prosecutorial concerns that there was insufficient evidence to proceed. One of the complainants told the media that it had taken courage and soul searching to prepare himself to tell his story at trial, and that when the case was withdrawn he felt empty and that an injustice had occurred.

The complainant decided to file a statement of claim in the Supreme Court in Melbourne, which named Pell, the State of Victoria, and the Catholic Archdiocese of Melbourne as defendants in a civil case. The statement of claim alleged that while the plaintiff was a ward of the state in 1970s, Pell sexually abused him three or four times. It also alleged that a nun who worked at the home physically abused the plaintiff. On one occasion it was alleged that he was beaten to the face and head and unable to eat as a result of the abuse. On another occasion the nun was said to have rubbed excrement on the plaintiff's mouth. The plaintiff suffered severe physical and emotional abuse as a result of this and is suing for psychiatric injury, medical expenses, and a loss of earning capacity.

George Pell attends court for sentencing on child abuse charges.

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Statute or common law

There are two main sources of law in Australia:

- Parliaments are responsible for making statute law. **Statute law** is also referred to as **legislation** – Acts of Parliament. Parliaments may also delegate their law-making powers to other bodies, known as 'subordinate authorities', such as local councils, statutory authorities, or government departments. The laws made by these bodies are called a variety of terms, such as 'delegated legislation', 'regulations', 'orders-in-council' and 'local laws'.
- Courts also have responsibility for the development of the law, either through the process of interpreting the meaning of statutes as they apply to individual cases or through the declaration of **common law**. This is sometimes known as **judge-made law.**

We discuss these two sources of law in more detail in Unit 4.

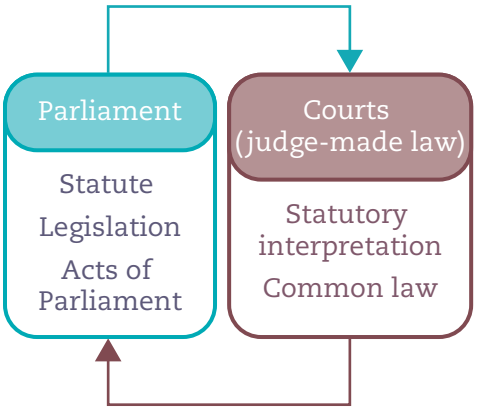

Figure 1.1 Sources of law

Australia's two main sources of law are parliament and the courts.

1.4 Why do we need laws?

The main function of law is to enable individuals to live peacefully together. Laws allow individuals to work cooperatively towards meeting their needs for the benefit of all members of the community. This is a concept known as 'social cohesion'. The term 'cohesion' means the act of uniting or sticking together. Laws aim to 'unite' or 'stick' society together.

To achieve social cohesion the law needs to be recognised or acknowledged by the community. The community will recognise the authority of the law if it:

Laws provide for social cohesion in our community.

- sets out the expected behaviour of individual members
- reflects the values of the majority of the community
- provides a means by which disputes can be resolved
- provides a means for changing the law.

Establishing expected behaviour

The law helps keep society together by prohibiting conduct that is disruptive. Prohibitions include laws about aggressive behaviour, the use of property and the use of roads. These matters are all regulated by the criminal law. To ensure that members of society abide by its rules, society imposes punishments (sanctions) on those who violate them. We look at this in more detail in Chapter 3.

We need laws to establish expected behaviour.

The rights of individuals are contained in the civil law. For example, the tort of negligence protects the rights of individuals to be free from harm that may result from the careless actions of others. Where the rights of individuals have been violated, the law provides for a range of remedies: the aim is generally to restore the individual to their original position.

There is an array of remedies because monetary compensation is not appropriate in all circumstances. For example, the law provides for court injunctions or orders that require an individual to behave in a particular manner. Remedies provided in civil cases are examined in more detail in Chapter 5.

By stating the rights and responsibilities of individuals and society, the law makes explicit the boundaries of behaviour. Each individual can know what is expected and how to plan their interactions with other members of society.

Resolving disputes

The law is necessary to provide for peaceful dispute resolution. Life in society would be impossible if each individual was free to resolve a dispute by any method. The law establishes a range of dispute settlement bodies to deal with disputes that may arise in the community. These dispute settlement bodies include courts and tribunals.

We need laws to resolve disputes.

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Reflecting values

We need laws that reflect the shared values of the community.

One common element in all legal systems is the reliance of law on a set of values that are shared by that society. These values are a collection of beliefs and attitudes about what is right or good. The values that are shared by the community form the basis of what is right or good in law. These values form the basis of the principles of justice.

Throughout the world, religious beliefs have strongly influenced the development of law. Australia is a diverse community consisting of numerous religious, cultural and ethnic groups. While there are some different values in different groups, there are some values that are shared. For example, the value that we place on human life is upheld by the majority of people in our community. The law upholds this value by making it an offence to take another person's life (murder). The law also recognises that there are some circumstances in which it may be excusable to take another's life. The right of each individual to use 'reasonable' force for self-protection is recognised by the laws relating to self-defence.

Australia – a land of many histories

> Australia is a land of many histories. There is the first history of its occupation by its Indigenous people, which stretches back 40 000 to 60 000 years. That occupation is reflected in the art, the songs, the stories and ceremonies, the laws and traditions and the languages of the people themselves which created and conveyed, from generation to generation, knowledge about the country and the way in which members of Indigenous societies should deal with each other.
>
> The second history is that of the British colonisers, dating back to the late 18th century, and their successors, who brought with them the common law of England and the concept of the Rule of Law, developed the legal systems of the colonies and, ultimately, the Commonwealth Constitution and the legal institutions which are part of our contemporary societal infrastructure today.
>
> The third of our histories is that of the migrants who have come to Australia over the past 50 years or so, creating a multi-ethnic society composed of people from 180 different countries. Something like 46% of all Australians today were either born overseas or have at least one parent born overseas.
>
> The history of Australia's first people looms over the other two.
>
> *Justice French, speaking at the National Indigenous Legal Conference*

Traditional law forms a part of the complex system of rules that govern the rights and responsibilities of Aboriginal and Torres Strait Islander peoples in Australia. The Indigenous systems of law – customary or traditional law – contains sophisticated elements. For instance, it allows dispute settlement, conciliation procedures and participation in the administration of justice, and stresses the rehabilitation of offenders.

Such dispute settlement methods are still evolving in other legal systems. Although European colonisation has lessened their influence in many regions, some Aboriginal and Torres Strait Islander groups in isolated areas still follow their customary laws. Indigenous law includes both sacred and secular laws. Sacred law is considered the more important, and involves many secret rites. Sacred law is linked to the Aboriginal concept of the Dreaming and the Torres Strait Islander concept of Bipo Taim, and many aspects of this have not been revealed to non-Indigenous people. Secular law is the body of rules members of an Indigenous community are expected to comply with.

Traditional First Nations groups have lawmen and lawwomen who are responsible for the interpretation of the sacred law. Sacred law imposes additional sanctions in matters such as theft, assault and adultery. The Elders of the community have considerable authority, and the council of Elders is the community's leadership group. The Anangu are one such community, consisting of about 4000 people spread over the Northern Territory, Western Australia and South Australia. They believe that their sacred law has always existed and will exist until the end of time.

The strength of the Indigenous legal systems can be seen in the fact that First Nations peoples have successfully lived according to their laws for thousands of years.

There has been ongoing debate about the extent to which traditional or customary law should be recognised.

In 2017, the Marriage Law Postal Survey asked Australians for their views on same-sex marriage. This ultimately led to a change in the law with the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) which redefined marriage as the union of two people.

It is difficult for the law to preserve the values of all members of society. In order for us to live together as a group, it is necessary for the law to uphold the values that are dominant. For example, the rules on marriage vary from one religion to another. Prior to amendments to the *Marriage Act 1961* (Cth) in 2017, Australia's laws defined marriage as the union of a man and a woman. Only monogamous, heterosexual marriages were legally binding. This did not necessarily reflect the sexual orientations and/or values of all groups or individuals. Many people strongly disagreed with the idea that marriage can exist only between a man and a woman and called for the law to change.

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The law reflects a variety of values, such as:

- the way in which members of society relate to others (social values)
- the fundamental beliefs about right and wrong (moral values)
- the rights of individuals in the economic system (economic values)
- the rights of individuals in the organisation of our legal system (political values).

How a country interprets these values will vary.

News report 1.2

Indigenous customary law

The Australian Law Reform Commission's 1986 report on the use of customary law for Aboriginal people was an initiative published well before its time. In the 40 years since the report was published, its recommendations have largely been ignored.

There have been a variety of law reform reports in Australian history examining the recognition of Aboriginal customary laws. The Law Reform Commission of Western Australia's 2006 report found that Aboriginal customary law was a simple fact of life for Indigenous Australians. The Northern Territory Law Reform Committee inquiry found that Aboriginal customary law is a positive force in the daily life of First Nations people, regardless of whether other Australians or the legal system recognise it.

The Australian Law Reform Commission's 1986 report was released after nine years of inquiry. The report investigated the interaction between the British common law legal system in Australia and the customary law of Aboriginal and Torres Strait Islander peoples. The purpose of the report was to examine whether it would be desirable to apply, either partially or fully, Aboriginal customary law to Aboriginal people. Amongst other things, it investigated whether Aboriginal customary laws could be applied in criminal cases, and whether Aboriginal communities should be part of the punishment and rehabilitation of Aboriginal community members.

Since the report was delivered, some jurisdictions in Australia have experimented with customary law in sentencing – such as Victoria's Koori Courts. Nevertheless, the report's recommendations have largely gone unimplemented and reform has not been as extensive as it has in countries like Canada. The use of Indigenous customary law in Australia's legal system remains infrequent. Formal recognition of Aboriginal and Torres Strait Islander people in the Australian Constitution would begin the path towards dialogue between peoples and the possibility for self-determination and greater use of customary law.

Thousands of people take to the streets of Melbourne in the annual NAIDOC march on 5 July 2019.

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News report 1.3

Burkinis caught up in French law

Invented in 2004, the burkini (the name is a portmanteau of the words 'burka' and 'bikini') is a swimsuit covering everything except the hands, feet and face. It is similar to a wetsuit. But to the Mayor of Cannes, on the French Riviera, it is 'the uniform of extremist Islamism' and French Prime Minister Manuel Valls said that burkinis are 'a symbol of the enslavement of women'.

With Cannes banning the burkini on public beaches, 30 municipalities followed.

However, France's highest administrative court, the Council of State, overturned the ban and ruled that mayors do not have the right to ban burkinis.

The Australian woman credited with creating the garment, Aheda Zanetti, said the swimwear represents freedom and healthy living, not oppression (she owns the trademarks to the words 'burqini' and 'burkini').

The full-face veil and hijab have become divisive symbols in some European countries. Britain, like Australia, values multiculturalism. In Australia, public servants who are Muslim are free to wear headscarves. Similarly, Jewish public servants can wear Jewish caps, known as kippas.

Burkinis are marketed to Muslim women as a way for them to swim in public while adhering to strict modesty edicts that are a part of their religious and cultural belief system.

The French bans referred to religious clothing and, as they were loosely phrased, came to be understood to include full-length clothing and head coverings worn on the beach – not just burkini swimsuits.

A law banning the wearing of face-covering headgear, including masks, helmets, balaclavas, hijabs and other veils covering the face in public places (except under specified circumstances) was introduced in France in 2011. It was introduced because the face coverings prevent the clear identification of people. Those breaking this law face a fine and/or citizenship education.

A ban on hijabs in France's public schools was adopted in the 2003–2004 school year. President Jacques Chirac said such a law was needed to protect the French principle of secularism. The French believe that secularism, or the separation of church and state, is the cornerstone of the modern French state. So important is this principle that it is guaranteed by the French Constitution (Article 1):

> France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.
> It shall respect all beliefs.

Given that the French Constitution also guarantees respect for all beliefs, it may be surprising to discover that France banned the wearing of religious apparel and signs that 'conspicuously show' a student's religious affiliation. While Jewish kippas and large Christian crosses would also be banned, the law was more directly aimed at removing Islamic hijabs from classrooms in state-run public schools. The Council of State said hijabs should be banned only when they are of an 'ostentatious character'. The judgment as to when a hijab is 'ostentatious in character' is left to the school to determine.

The same rules apply to the kippa and Christian crucifix. There have been no reported cases where schools have questioned the wearing of kippas or 'ostentatious' crosses, but every year there are about 150 complaints involving hijabs. These complaints are heard by mediators and, if unresolved, can lead to expulsion of the student/s. These laws do not apply to private schools.

This approach to defining secularism in France is not new. Since 1905, France has enforced a legal separation of church and state. A century ago, in the name of secularism, France removed crucifixes hanging in its classrooms. Crosses were even forbidden on coffins during funeral processions. The removal of crucifixes was seen as necessary, as it symbolised the separation of the state from the Roman Catholic Church.

There has been growing concern in France over other demands seen to challenge the notion of the secular state. Muslim groups have been seeking segregated classrooms for boys and girls and the recognition of Muslim holy days in school calendars, and some students have refused to take oral exams with examiners of the opposite sex.

How the law defines religious freedoms within a secular state is an issue faced in many democracies. In September 2016, Bulgaria banned women from wearing full-face veils in public. In the same year, Switzerland enforced a ban on the full-face veil and women wearing a burka could face a fine of almost €10 000. In 2015, the Netherlands approved a partial ban on the full-face veil. Full veils cannot be worn in schools, hospitals or on public transport. Since 2011, Belgium has banned the full-face veil. In contrast, Syria lifted a ban on teachers wearing the Islamic veil in 2011.

In 2017, One Nation leader Pauline Hanson wore a burka into the Australian Senate during Question Time as a way to send a political message that burkas should be banned in Government buildings in Australia. Senator Hanson's actions were widely criticised as being a political 'stunt', and offensive. Senator George Brandis, in his response to her question about banning burkas, accused her of ridiculing the Muslim community, mocking their religious garments, and cautioned Senator Hanson to be very careful of the offence she could cause.

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Mecca Laa Laa wears a burkini on her first surf lifesaving patrol at North Cronulla.

What French law says on secularism and religious clothing

- In 2010, France became the first European country to ban the full-face veil in public.
- A 2004 law forbids the wearing of religious emblems in schools and colleges. This includes Islamic headscarves (known as hijabs), Jewish caps (known as kippas) and large Christian crosses.
- In 1905, a law was passed that aimed to separate church and state. That law of separation guaranteed freedom of religion, and built on earlier laws enshrining secularism in education. No reference was made to clothing.

Providing for change

The law must be able to deal with the changing needs of the community. To do this, the legal system provides ways in which the law may be changed. We look at the role of law-making bodies in Unit 4. In Chapter 11, we look at the ways in which individuals, groups and institutions in the community can influence the law-making process.

The legal system provides ways to change the law.

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1.5 Principles of justice

'Justice' is a difficult term to define. It comes from the Latin term 'jus', meaning right or law. Often justice is defined in the community in terms of what is right, good or ethical.

Justice can be viewed in two ways:

- Social justice – based on the concepts of human rights and equality, and fairness in the distribution of wealth and opportunities
- Procedural justice – fairness in the processes used to resolve disputes, and access to dispute resolution processes.

'Justice' describes a set of values or principles. Throughout history there have been different opinions as to what these values or principles involve. However, common principles have been identified. These common principles include concepts such as **fairness**, **equality** and the ability to **access** the legal system.

The legal system can only operate effectively if it has the support of the majority of people in the community. People will support the legal system if they believe it will provide justice.

Fairness

The concept of fair play is essential to justice.

The principle of fairness relates to impartial treatment without fear or favour for all people under the law. This notion of a fair and unbiased hearing is based on the idea of 'fair play' and has been developed by the courts through common law. There are two key ideas. First, 'no person may be a judge in his own cause'. In other words, a person cannot make a decision when they have a financial, or other, interest in the outcome, or any known bias that might affect their impartiality. Second, we should always 'hear the other side'. In other words, the person directly affected by a decision must be given a fair opportunity to state their case and to know the allegations against them. In Chapter 3, we discuss the processes and procedures we use to ensure fairness in criminal cases. In Chapter 5, we explore the processes and procedures for fairness in civil disputes.

Equality

The justice system endeavours to provide equal treatment for all individuals.

The principle of equality requires the legal system to provide equal legal opportunities as well as equal treatment for all people under the law. This is considered fundamental to the achievement of justice in a democracy. It means that the legal system recognises the value, ability and merit of all individuals. A justice system that provides for equal treatment is a justice system that is even-handed or balanced in its treatment of all people. For example, court rules and procedures, such as the rules of evidence, apply to all parties equally, ensuring that everyone receives equal treatment under the law.

Equality, however, does not always mean that all individuals are treated in exactly the same manner. The law recognises that there are differences between individuals. It acknowledges these differences, and provides all individuals with an equal opportunity to exercise their rights. This means that it is sometimes necessary to establish special procedures or facilities to help particular individuals. For example, the law provides for interpreters to allow an accused the same opportunity to understand legal proceedings as anyone else, even if they do not speak English.

Access

Access to the law is achieved when there is a range of methods and institutions to resolve disputes in our legal system.

Access to the law means that people must be able to use a broad range of methods and institutions to resolve disputes within our legal system. Access includes being able to get appropriate legal advice, assistance and legal representation. It also means that there are processes and procedures for the determination of criminal cases or civil claims and legal institutions such as courts and tribunals for those processes to occur in. Factors that often disrupt people's ability to access the law include the high cost and time often associated with legal disputes, or even physical barriers such as lack of nearby courts in some geographic regions.

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What is equality?

There is a close relationship between the principle of equality and the ideal of justice. However, the principle of equality can be interpreted in many ways. Listed below are eight different interpretations of the term 'equality'.

'TO EACH THE SAME THING'

This means that every person in society gets an identical or equal share.

'TO EACH ACCORDING TO HIS/HER MERITS'

A person who is deserving of praise should receive better recognition and advancement in life.

'TO EACH ACCORDING TO HIS/HER WORKS'

Those who work harder for the benefit of society, or the advancement of the collective wealth, should receive more.

'TO EACH ACCORDING TO HIS/HER NEEDS'

Society ought to distribute benefits according to the individual needs of each person.

'TO EACH ACCORDING TO HIS/HER RANK'

The recognition of rank and position is important to a society.

'TO EACH ACCORDING TO HIS/HER LEGAL ENTITLEMENT'

The law of the community lays down our entitlement to benefits and privileges.

'TO EACH ACCORDING TO HIS/HER FITNESS'

The benefits that each individual receives should be decided according to their abilities.

'TO EACH ACCORDING TO HIS/HER POSITION'

Benefits cannot be distributed equally to all people. This principle would justify the proposition of first come, first served.

Based on Invitation to Law *by C.G. Weeramantry*

Protestors hold placards outside the Federal court in Melbourne on 19 September 2019 to show their support for a Tamil asylum seeker family at risk of deportation.

ISBN 978-1-108-87276-8 Poore et al.

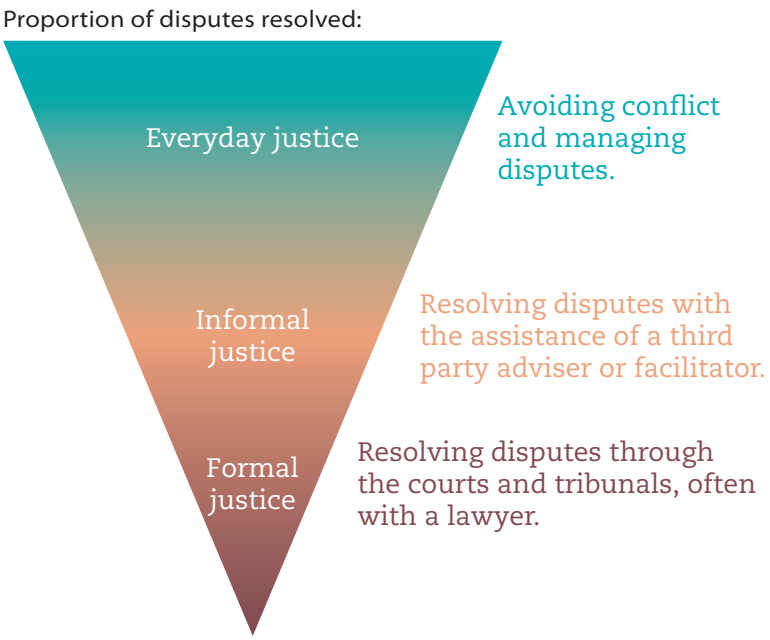
Accessing justice

Access to justice goes beyond courts and lawyers (although these are important). It incorporates everything people do to try to resolve the disputes they have, including accessing information and support to prevent, identify and resolve disputes.

This broad view of access to justice recognises that many people resolve disputes without going to court, and sometimes without seeking professional assistance.

There are three levels of justice:

1. Most disputes are resolved using everyday justice: by avoiding conflict and managing disputes.
2. The second most common form of resolving a dispute is through informal justice – such as using a third-party adviser or facilitator.
3. The least common form of resolving a dispute is through the formal justice system, including courts and tribunals, often with a lawyer.



Source: the website of the Australian Attorney General's Department

A broader interpretation of the term 'access to justice' may include:

- the equal ability of all people in the community to access the processes to enforce existing rights or laws
- equal access for all minority groups in the community to all the legal rights enjoyed by the majority of people in the community.

The concept of justice

There are many interpretations of the word 'justice'. Here are just a few.

Justice is conscience; not a personal conscience but the conscience of the whole of humanity.

Alexander Solzhenitsyn, Russian author and Nobel Prize winner

What justice requires can only be worked out over time with careful thought and patient negotiation on a basis of equality and mutual respect.

From a published statement by a number of eminent Australians, including retired judges, after the High Court decision on Mabo

… justice is not a captive of the criminal law. It is a concept that applies and arises just as much in civil disputes, albeit a little more quietly and less obviously. What is fair and just is often a key point of contention in civil cases.

Hon Marilyn Warren AC, former Chief Justice of Victoria

Justice Anne Ferguson was appointed Chief Justice of Victoria following the retirement of Hon Marilyn Warren in 2017.

ISBN 978-1-108-87276-8 Poore et al.

What does 'justice' mean?

As a supreme interpreter of justice in the legal system, the former Chief Justice of Victoria, the Hon Marilyn Warren AC, in her 2014 Newman lecture, explored the question 'What is justice?' She believes that for different people at different times, justice means different things:

> 'To the ordinary person, "justice" will often mean due punishment when a criminal is sentenced for a crime.
>
> To the popular media, "justice" will generally mean harsh punishment, primarily focused on a strong retribution and deterrence.
>
> Then there is a notion of social justice to be compared with legal justice … In this sense, the concept of justice is merged with factors of equality, opportunity and equity.'

She added, 'Justice is not solely about justice between the parties in a court case. It is also about justice to society. For justice in Australia to function, there must be fairness, equality and access.'

Fairness

The principles of justice and fairness can be regarded as the rules of fair play.

Justice Warren says that:

> To the accused person, justice means fairness: a fair hearing, a fair sentence that punishes not too harshly and offers hope …
>
> To the lawyer, justice means the application of the rule of law; that is, the certainty of applying legal rules developed over centuries to resolve disputes between citizens and between the citizen and the state.
>
> To the judge, justice is the application of the rule of law without fear or favour, affection or ill-will.

Equality

For an equitable system, there must be equality. There must be equality of access for the underprivileged. At the same time, we should aim for equality of outcomes by addressing the barriers faced by those trying to access the judicial system.

In Australia, equal pay, land rights and reconciliation emphasise the role of equality in the legal system. Chief Justice Warren noted:

> It is said to be "unjust" that some in society are homeless, receive a different standard of education or are unable to access necessary healthcare. In this sense, the concept of justice is merged with factors of equality, opportunity and equity.

She saw the Mabo land rights case as highlighting the importance of equality. The successful fight by women for equal pay is another illustration.

Former Chief Justice Warren

Access

Access to justice means different things to different people. It represents the formal ability to appear in court. A broader definition of access to justice encompasses the need to advocate for people who cannot afford lawyers, and also focuses on the inadequacies and limitations of the legal aid system.

The Productivity Commission conducted an inquiry into Access to Justice Arrangements. In its 2014 Report on the Inquiry, it found:

- widespread concerns that the civil justice system is too slow, too expensive and too adversarial
- that where disputes become intractable, many people are unnecessarily deterred by fears about costs and/or have difficulty in identifying whether and where to seek assistance
- that reforms to professional regulation are needed to ensure that clients are better informed and have more options in terms of selecting the tasks they want assistance with, and how they will be billed
- that more action is needed to reduce court costs and the length of litigation
- that changes to rules governing the conduct of the parties to a case, and of lawyers, and the way costs are awarded, would improve the resolution of disputes
- that disadvantaged people are more susceptible to, and less equipped to deal with, legal disputes: more resources are required to better meet the needs of disadvantaged people, and government-funded legal assistance services generate net benefits to the community
- that in some cases, legal aid funding should be redirected.

The Federal Government adopted a number of the recommendations.

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News report 1.4

What limits justice?

The legal system is not perfect. It reflects the range of individual differences that exist within our community. The effectiveness of the legal system can be limited by economic decisions about the allocation of resources, political decisions about the implementation of social policies, or the ignorance and prejudice of members of the community.

Many believe that the legal system is expensive, plagued by delays and intimidating for the average person. The success of alternative methods of dispute resolution (ADR) illustrates that methods that offer a faster, cheaper, simpler resolution to disputes are popular.

A legal system should be just, fair, comprehensible, certain and reasonably expeditious. In criminal matters, the law needs to balance the need to protect the innocent (not only from crime but also from wrongful conviction) at the same time as securing convictions.

Limited knowledge

Under the English common law tradition, there is an expectation that all people are treated as equal before the law. Consistent with this is an expectation that courts, tribunals and dispute resolution methods should be equally accessible to all. However, a number of factors limit access to courts and dispute resolution. Most members of the community have limited knowledge of the operation of the legal system and their rights. It is difficult to exercise your rights effectively unless you have some understanding of what those rights may be. The courts can only enforce rights where individuals bring a matter to the court.

Legal costs

There is a generally held view that dispute resolution through the courts is costly and should be avoided. For many people, involvement in a legal case is a once-in-a-lifetime event. In most instances, this will be in relation to a minor offence, a minor claim or as a prospective juror.

The tension between access to justice and legal costs is not new. Although we regard justice as a right, it is a right that must be paid for. Legal services are costly. This is not to say that the costs of legal services are unreasonable. The costs charged reflect the costs of offering the service of legal advice, in much the same manner as the service fees charged by a doctor may reflect the costs of running that business.

Limited legal aid

Access to the legal system is essential if the system is to achieve justice. The legal system recognises that costs may prohibit some people from exercising their rights. Legal aid schemes have been established to assist in these cases. However, these schemes have been criticised as leaving only the poorest with representation. It has been suggested that as a consequence it is only the very rich or very poor who have access to the legal system.

Impact of delays

A feature of particular concern to the legal system is delays. Delays can occur for a number of reasons in the stages leading up to a hearing. Such delays are largely in the hands of the parties, although in recent times the courts have taken greater control of the pre-trial exchanges between the parties. Some delays in the hearing of a case may be due not to the actions of the parties, but to a lack of court time or judges.

Delays also occur in the enforcement of criminal law. If an accused person is refused bail and there are delays in the preparation of the case for hearing, then an innocent person may have lost their liberty. Delays in criminal matters have serious consequences in terms of basic civil rights. One-third of those held on remand do not receive a jail sentence. They may be acquitted or granted a non-custodial sentence. However, during the remand period they have had their liberty denied. The right of an individual to be considered innocent until proven guilty is clearly compromised by the need to protect the community from someone who may be an offender.

Difficulties faced by migrant groups

The difficulties faced by individuals in accessing justice are compounded for members of the community who have recently migrated to Australia or who belong to an ethnic minority group. A migrant may be faced with a number of problems in their dealings with the Australian legal system. They may have difficulty in understanding Australian English. Even if they have a good understanding of English, they may find understanding the language of the law particularly difficult. Furthermore, many migrant groups would be unfamiliar with the operation of an English legal system and would therefore find an adversarial trial difficult to understand.

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What are the symbols of justice?

Justice has been symbolised by the figure of a woman holding scales in one hand and a sword in the other. This image, often called Lady Justice, can be traced back to the ancient Roman images of Justice. She was often portrayed wearing a blindfold, and carrying scales and a sword.

The blindfold

The blindfold is a symbol of 'blind justice'. This represents the concept that justice must include equality, which means treating all people equally.

The scales

The scales of justice represent the fact that justice must balance the needs of the individual against the needs of society. Justice must also balance the interests of one individual against those of another. The scales of justice symbolise fairness.

The sword

The sword of justice is a symbol of power and authority. It is a double-edged sword, meaning that it can be wielded either for or against each party.

Activity 1.1 Structured questions

Lady Justice

1 Look at the image of Lady Justice and list everything you can see, such as the blindfold, the sword, the scales and anything else you observe.

2 For each element of Lady Justice you have listed, what meaning do you think it has?

3 Explain how each of the elements of Lady Justice might relate to the concepts of fairness, equality, or access.

Activity 1.2 Folio exercise

What is justice?

Read 'What does "justice" mean?, 'What limits justice?', and 'What are the symbols of justice?' Complete the following tasks.

1 Design a diagram or comic strip to identify the key features of justice.

2 Explain the three key features of justice.

3 What problems limit individuals' access to the legal system? Explain.

4 Are all individuals equally affected by the problems that you have identified? Explain.

Activity 1.3 Report

Reporting on justice

Collect media reports on recent cases and write a report. Describe the extent to which you believe that justice has been achieved in the cases you have selected.

Your report should:

1 define the essential elements of justice

2 describe the facts of the selected cases

3 analyse the factors limiting the achievement of justice in the selected cases.

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Key point summary

Do your notes cover all the following points?

- ❑ Individuals living in the community may be bound by a range of systems of rules. Generally, these systems can be classified as either:
  - **legal rules** – laws
  - **non-legal rules** – rules of games, associations, organisations, churches and other institutions, or the norms of behaviour.
- ❑ Legal rules differ from non-legal rules because:
  - legal rules apply throughout the community
  - legal rules are made by parliaments and courts
  - legal rules are enforceable by courts and tribunals.
- ❑ There are a number of ways in which we can classify laws. For our purposes, the two main ways of classifying laws are:
  - criminal law and civil law
  - statute law and common law.
- ❑ The principles of justice are:
  - fairness
  - equality
  - access.

End-of-chapter questions

Revision questions

1 Describe the different ways in which laws may be classified.

2 Distinguish between statute law and common law.

3 What type of behaviour is regulated by criminal law?

4 What type of behaviour is regulated by civil law?

5 Outline the differences between criminal law and civil law.

6 Describe and explain the significant features of a legal system. Could the legal system operate without one of these features?

7 Write a paragraph outlining the key differences between the legal system and a system of rules.

8 Suggest ways in which the features of the legal system provide for:
  - fairness
  - equality
  - access.

9 The law recognises and upholds the principles of justice. Using examples, explain how the law achieves this.

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Practice exam questions

1 Simone is arrested for allegedly committing a home burglary. Her legal aid lawyer advises her that if she decides to plead not guilty, she will have a trial by jury. At Simone's trial, one of the witnesses is able to give evidence through a court-appointed translator.

Explain two ways in which the principles of justice are achieved in this case. [4 marks]

2 Discuss the extent to which fairness is achieved in Australia's criminal justice system. [5 marks]

Current issues folio

The law is constantly changing. To stay up-to-date you need to follow current events in newspapers and journals, or on television or online. The key to maintaining a current issues folio is organisation.

Keep your articles in a document wallet or a plastic pocket in your folder. Annotate each article. This may be done on a separate piece of paper stapled or clipped to the article.

The annotation should include the following points (see an example below):

- ❏ the source and date of the article
- ❏ a heading identifying the key legal issue discussed
- ❏ a brief summary of the issue
- ❏ notes on the relevant legal questions raised.

News report 1.5

Saw red over purple stamp

A man claimed that he stabbed his sister when an argument broke out because her pet guinea pig ate part of his stamp collection. The defendant claimed that when he saw his 1904 6-penny purple KEVII stamp in the guinea pig's mouth 'he just saw red'. He started yelling at his sister and, in the course of the argument, picked up a kitchen knife and struck her.

The man pleaded guilty in the Magistrates' Court to one charge of recklessly causing injury. He was given a six months community correction order.

After the case his sister said, 'A community correction order, it's like he didn't get anything. It has trivialised my experience'.

31 February 2028

M & B Review 31/2/28 ← Source and date

Sentencing ← Issue

Prosecution for recklessly causing injury ← Criminal law

Are community correction orders effective? ← Legal question

Make a start on your issues folio with the following exercise.

- ❏ Collect two articles illustrating aspects of criminal law.
- ❏ Collect two articles illustrating aspects of civil law.
- ❏ Collect two articles discussing proposed changes to statute law.
- ❏ Collect one article discussing an aspect of judge-made law.
- ❏ Annotate your articles as illustrated in the example above.

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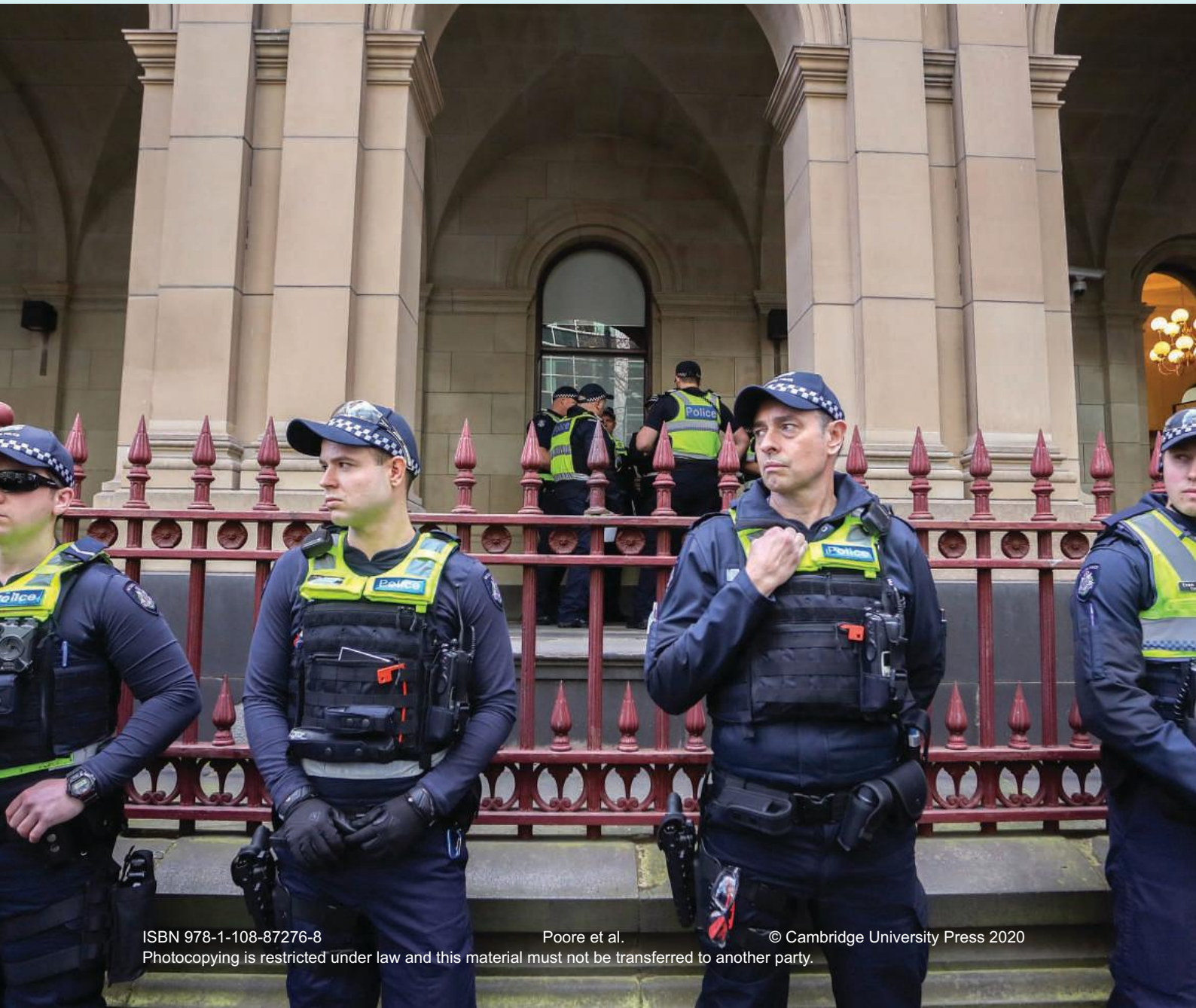
Chapter 2

Unit 3 – Area of Study 1

Criminal law and justice

This chapter explains the key concepts of the Victorian criminal justice system. First, it establishes the three principles of justice: fairness, equality and access. Second, four key concepts of the Victorian criminal justice system are examined: types of offences (summary offences and indictable offences), the burden of proof, the standard of proof and the presumption of innocence. Third, three specific rights of an accused are considered, including the right to be tried without unreasonable delay, the right to a fair hearing and the right to trial by jury. Finally, three rights of victims are explained, including the right to give evidence as a vulnerable witness, the right to be informed about the proceedings and the right to be informed of the likely release date of the accused.



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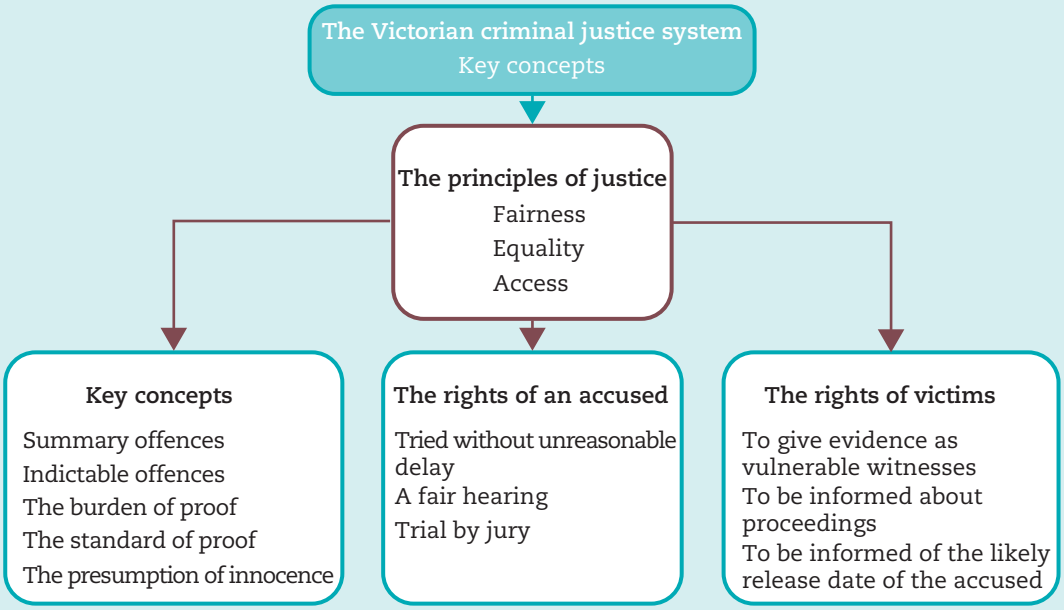

Key terms

access a principle of justice achieved if a range of institutions, specialist key personnel and methods to settle disputes are provided within the legal system

accused a person charged with an offence

bail the release of an accused back into society while awaiting his or her next hearing or trial; conditions may be attached

barrister a legal representative who is briefed by a solicitor to argue on behalf of their client at a hearing or trial

burden of proof the party that has the responsibility, or onus, of proving the case: in a criminal matter, the burden of proof rests with the prosecution

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to establish a *prima facie* case and support a conviction

common law law developed in the courts; also known as case law or judge-made law

complainant a person who alleges to the police that a criminal offence has been committed against them – once it is established that a crime has been committed and guilt is established, the complainant is referred to as the 'victim'; a person initiating a civil action in the Magistrates' Court can also be referred to as a complainant

crime an act or omission that offends against an existing law, is harmful against an individual or community at large, and is punishable by the law

defendant in criminal law, a person who has been brought to court charged with a criminal offence; in civil law, the defendant is a party defending an action and may make a counter-claim

equality a principle of justice achieved if all citizens are provided with equal legal opportunities and equal treatment under the law

evidence-in-chief the questioning of a lawyer's own witness (also known as examination-in-chief); the purpose is to establish a party's case and persuade the court

fairness a principle of justice achieved through the impartial treatment of all people under the law, without fear or favour

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court (Trial Division)

parole the conditional release of a prisoner before the end of their sentence; it allows a prisoner to serve part of their sentence of imprisonment in the community

parties in a criminal matter, the parties are the prosecution and the defendant (the accused); in a civil matter, the parties are the plaintiff and the defendant

presumption of innocence a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law

prosecution the party bringing the criminal charges to court; a prosecution may be initiated by a police prosecutor, or by the Office of Public Prosecutions on behalf of the Crown

remand the holding of an accused in custody while awaiting his or her next hearing or trial as bail has not been granted

solicitor a legal representative who provides legal advice, can represent a client in the Magistrates' Court, and briefs a barrister if a criminal matter proceeds to trial

standard of proof the level of proof that must be reached to prove a case in court: in a criminal case, the standard of proof is 'beyond reasonable doubt'; in a civil case, the standard of proof is 'on the balance of probabilities'

summary offence a less serious crime, heard and determined in the Magistrates' Court

victim a person who has suffered directly or indirectly from a crime

vulnerable witness a person who is required to give evidence in court and who is considered to be at particular risk or impressionable; includes children, people with a cognitive impairment, victims of sexual assault and victims of family violence

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2.1 The principles of justice in the Victorian criminal justice system

The accused, victims of crime and the community are all entitled to justice.

The Victorian criminal justice system aims to provide justice by ensuring that the three principles of justice – **fairness**, **equality** and **access** – are achieved for both the **accused** and the victim of crimes. It is also important that the community feels that a sense of justice has been achieved so that the criminal justice system is trusted and respected. It is important to uphold the principles of the rule of law.

Although justice is difficult to define, as it can often mean different things to different people, the three principles of justice, for the purposes of this study, are defined more definitively.

Fairness requires all people to be treated impartially, without fear or favour.

Fairness is achieved if all people are treated impartially under the law, without fear or favour.

Equality requires all citizens to be provided with equal legal opportunities and treatment.

Equality is achieved if all citizens are provided with equal legal opportunities and equal treatment under the law.

Access requires a range of methods and institutions to settle disputes to be provided.

Access is achieved if a range of methods and institutions to settle disputes within the legal system are provided.

Although many features and key concepts of the Victorian criminal justice system do achieve justice by providing for fairness, equality and access, there are some aspects which do not, or may not, achieve the three principles of justice. It is important to consider the extent to which different features and key concepts of the Victorian criminal justice system achieve, might achieve, do not achieve, or might not achieve the three distinct principles of justice. Such a consideration is important in evaluating the ability of the criminal justice system to achieve the principles of justice.

Activity 2.1 Debate

Achieving the principles of justice

Turn to a partner and debate how the Victorian criminal justice system achieves, might achieve, does not achieve and might not achieve the three principles of justice.

Fairness

Fairness differs to equality because achieving fairness might require people who are disadvantaged to be treated differently in order for them to achieve justice.

Fairness is achieved if all people are treated impartially under the law, without fear or favour.

In order to achieve fairness, it might mean that people are not necessarily treated the same (therefore, fairness can be different to equality). This is because certain individuals, or groups in society, may experience disadvantage which could negatively impact upon their experience in the Victorian criminal justice system. In order to achieve fairness, those who experience disadvantage may have additional or different processes and procedures available to them in order to create a fairer experience in the Victorian criminal justice system.

An example of this is the different types of support that can be provided to a victim who is classified as a **vulnerable witness**. Although the support provided to vulnerable witnesses can be different to that of other witnesses (therefore, their treatment is not equal), it is widely accepted that this achieves fairness, given the additional disadvantages and complexities that vulnerable witnesses are exposed to in the Victorian criminal justice system.

Fairness is achieved through the principles of the rule of law, natural justice and procedural fairness.

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Natural justice and procedural fairness

In the Victorian criminal justice system, it is important that the principles of natural justice and procedural fairness are upheld in order to achieve fairness. Natural justice includes the rule against bias (both actual bias and apprehended bias), and the right to a fair hearing. Although there is some technical debate amongst judges in a range of cases about the distinction between the terms 'natural justice' and 'procedural fairness', the terms, for our purposes, can be used to mean the same thing.

A magistrate or judge cannot allow bias to impact upon a decision and both parties in a criminal matter must receive a fair hearing.

The rule against bias

In a criminal matter, the judge or magistrate presiding over the hearing or trial must not make a decision that is the result of either actual bias or an apprehension (suspicion) of bias.

Actual bias means that there is evidence that the judge or magistrate prejudged the matter or that prejudice affected their decision-making. A judge or magistrate cannot allow a personal prejudice, opinion, or interest to impact upon their decision-making.

Actual bias is when there is *proof* that bias has affected a decision.

An apprehension of bias is based upon the appearance of bias, rather than evidence of actual bias. An apprehension of bias exists if a fair and objective observer might reasonably conclude that the judge or magistrate did not approach the matter with impartiality and an open mind.

An apprehension of bias is easier to establish than actual bias, because it is focused upon appearances. Tests for both kinds of bias initially developed through the **common law**.

An apprehension of bias is when it *appears* that bias has occurred.

The hearing rule

The hearing rule achieves fairness by ensuring that the judge or magistrate informs the accused of the case against them and gives him or her an opportunity to be heard.

It would be unfair for the court to give the prosecution the opportunity to present their case against the accused, but to not allow the accused to respond to the allegations. The hearing rule has mostly developed through the common law.

The hearing rule ensures that both parties are given the opportunity to present their case.

Equality

Equality is achieved if all citizens are provided with equal legal opportunities and equal treatment under the law. Equality aims to achieve some degree of uniformity, to the extent that it can, and to treat people in the same way.

Equality aims to treat all people the same, regardless of their individual characteristics or the disadvantages they might experience.

Equality is important in achieving justice due to the vastly different characteristics of the members of society. Ensuring that equality is achieved, as a principle of justice, means that a person's socio-economic background, beliefs, political views, gender, age and other unique individual factors will not impact upon the overall outcome of the criminal matter either directly or indirectly. Achieving equality ensures that justice is achieved, despite any potential disadvantage that a person facing the criminal justice system might experience.

Gender and race are examples of factors that should not stop equality from being achieved in the Victorian criminal justice system.

One example of how the Victorian criminal justice system attempts to achieve equality is by addressing cultural differences. In Victoria, an example is how Indigenous Australian offenders may qualify to have their matter heard in the Koori Court, depending upon a number of factors. The Koori Court aims to redress the inequality that some Aboriginal and Torres Strait Islander people experience when facing a criminal justice system that does not include the involvement of an Indigenous Elder or fails to adequately consider cultural differences and First Nations perspectives.

The Koori Court aims to help Indigenous Australian offenders achieve equality in the Victorian criminal justice system.

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Additional services, such as the Victorian Aboriginal Legal Service (VALS), are also available to address the specific needs of accused Indigenous Australian persons in order to help to achieve equality.

Recognising the cultural needs of First Nations Australians is important in achieving equality in the Victorian criminal justice system.

Access

Access includes access to the courts, legal advice, legal representation and information.

Access is achieved if a range of methods and institutions to settle disputes within the legal system are provided. In addition to being able to access the institution – namely, the court – access also includes access to legal advice, legal representation and information.

Access to institutions – the courts

A lack of funding and resources causes delays in the courts, which can limit access.

It is important that the **parties** in the Victorian criminal justice system are able to have access to the courts in a timely manner. Due to limitations in regard to funding and resources, Victorian courts often experience significant backlogs and delays which impact upon the timely access to courts, and therefore postpone the final outcome. These backlogs and delays hinder the achievement of access as a principle of justice, reinforcing the concept that 'justice delayed is justice denied'.

Access to the courts can be particularly problematic for indictable offences, where a **committal hearing** in the Magistrates' Court is required to determine if there is enough evidence against the accused to commit them to trial and, if so, whether or not the matter will then proceed to the County Court or Supreme Court (Trial Division) for a trial.

News report 2.1

Delays and backlogs limiting access to Victorian courts

Many Victorian courts are affected by significant backlogs and delays. This is hindering people's ability to access the Victorian criminal justice system. In the Magistrates' Court, the number of cases that are being brought before magistrates has risen sharply in recent years, meaning that the workload of magistrates has significantly increased. This means that many cases are subject to delays. Magistrates need to: listen to the perspectives of the defendant, witnesses and victims to ensure that all voices are heard; understand the facts of the cases (which can be complex); apply the relevant legislation (which can be complex and subject to change); and provide additional understanding and attention to defendants who are self-represented to ensure that they receive justice. The responsibilities of a magistrate are significant, and these responsibilities need to be balanced with the limited resources that are provided to the court and the pressure to have cases resolved in a timely manner in order to uphold justice. The delays that are being experienced due to the significant demands of each case mean that access to the Victorian criminal justice system can be argued to be compromised.

Access to legal advice and legal representation

An individual charged with a criminal offence may be significantly disadvantaged if he or she does not have access to legal advice and legal representation. Obtaining legal advice and legal representation can be very costly in a criminal matter, particularly for those charged with an indictable offence. The costs of pre-trial, trial and post-trial procedures can be considerable, due to the length of the proceedings, the time and expertise of the legal representatives (which is likely to include a **solicitor** and a **barrister**) and the court fees.

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The role of Victoria Legal Aid (VLA) is to help accused persons achieve justice by providing legal representation to those who qualify. Persons charged with a crime who apply to VLA need to meet strict means and merits tests in order to obtain assistance. This ensures that the limited resources of VLA, which is funded by the government, are directed to and utilised by those who are most in need (see Chapter 3).

If an accused cannot afford legal advice and legal representation, and does not qualify for assistance by VLA, he or she will be unable to obtain access to the legal expertise that is required to present his or her case in the best possible light. This is likely to have significant consequences for the accused, and hinder the achievement of justice.

An accused needs to have the opportunity to access legal representation in order to achieve justice.

Video

The financial cost of legal advice and legal representation can be a barrier to achieving access.

VLA can help achieve access to legal advice and representation; however, funding is limited and there are strict tests to qualify for support.

Access to information is important for both the accused and the victim of crime.

Access to information

Access to information is important for both an accused and a **complainant** (a person alleging they are a victim of crime). For an accused, it is important to have access to the details of the case that the **prosecution** is making. For example, before committal proceedings commence, the accused and his or her legal representative need to have access to a copy of the hand-up brief. A hand-up brief contains details of the allegations, including witness statements and the defendant's record of interview. This ensures that the **defendant** is aware of the allegations.

Activity 2.2 Folio exercise

Evaluate the ability of the Victorian criminal justice system to achieve the principles of justice.

Create a digital table and label the columns and rows as shown in the example below.

As you progress through this chapter, add to the table whenever you have an idea that shows how the particular topic you are studying achieves (or might achieve), does not achieve (or might not achieve) each of the three principles of justice.

You can develop and add to your table in later chapters as well. This will help you to evaluate the ability of the criminal justice system to achieve the principles of justice.

	Fairness achieved	Fairness not achieved	Equality achieved	Equality not achieved	Access achieved	Access not achieved
Key concepts Summary and indictable offences Burden of proof Standard of proof Presumption of innocence						
The rights of an accused Tried without unreasonable delay Fair hearing Trial by jury						
The rights of victims Give evidence as a vulnerable witness Informed about the proceedings Informed of the likely release date of the accused						

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It is also important that a victim of crime has access to certain information. A victim has a general right to be informed about the status of an investigation, subject to the progress and needs of the particular case, and to obtain certain details about the accused, such as his or her likely release date. Victims who qualify can receive additional access to information about the accused from the Victims Register.

Activity 2.3 Essay

The principles of justice

'All three principles of justice can never truly be achieved by the Victorian criminal justice system.' To what extent do you agree? Justify your position.

2.2 Key concepts in the criminal justice system

Most crimes require two elements to be established: the *mens rea* and the *actus reus*.

Broadly defined, a **crime** is an act or omission committed against an individual or the community at large that is punishable by the law. A person suspected of committing a criminal offence is prosecuted by the State. There are generally two elements that need to be present before an act or omission can be called a crime: a guilty act (*actus reus*) and a guilty mind (*mens rea*). An exception to this is a strict liability crime: where the wrongful act alone establishes the crime – speeding is an example of a strict liability crime.

Different types of criminal offences

Criminal offences are either summary offences or indictable offences. Some indictable offences can be tried summarily.

There are two main types of criminal offences: **summary offences** and **indictable offences**. Summary offences are less serious crimes, such as graffiti. These are heard in the Magistrates' Court before a magistrate. In contrast, indictable offences are more serious offences, such as rape. These are heard in the County Court or Supreme Court (Trial Division) by a judge and 12 jurors if the accused pleads not guilty.

Some indictable offences can be tried summarily. This means that a magistrate in the Magistrates' Court can hear and determine some indictable offences, if the accused gives his or her consent.

Graffiti is a summary offence heard in the Magistrates' Court.

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Indictable offences heard and determined summarily

Schedule 2 of the *Criminal Procedure Act 2009* (Vic) lists indictable offences that can be heard and determined summarily.

Section 28 of the *Criminal Procedure Act 2009* (Vic) directs readers to Schedule 2 of the Act for a list of the types of statutory indictable offences that can be heard and determined summarily. Some examples include: causing serious injury recklessly, assault with intent to commit a sexual offence, and a charge of robbery, burglary, or theft if the amount involved does not exceed $100 000.

Indictable offences that can be heard summarily by a magistrate must be a level 5 or level 6 offence, punishable by a level 5 or level 6 imprisonment or fine or both, or an offence punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 1200 penalty units or both.

Section 29 of the *Criminal Procedure Act 2009* (Vic) states the circumstances in which an indictable offence may be heard and determined summarily. The court will consider:

- the seriousness of the offence
- the adequacy of the sentences available to the court
- whether a co-accused is charged with the same offence
- any other matter of relevance to the court.

If a matter is to be heard and determined summarily, the accused must consent to this. An accused will usually seek legal advice as to whether his or her particular case is better determined summarily. Relevant factors include: cost, efficiency, sentencing options, and whether or not forgoing a trial by jury is beneficial.

Why have your case heard and determined summarily in the Magistrates' Court?

The advantages of having a matter heard and determined summarily in the Magistrates' Court include:

- The matter will be dealt with in a more timely manner when compared to being tried in the County Court, as there are less delays. This is particularly important if the defendant is remanded in custody until the matter is dealt with by the court.
- Having the matter heard in the Magistrates' Court will generally be less expensive than the County Court due to the lower costs of legal representation. In the Magistrates' Court, it is likely that the accused will only need a solicitor to appear for him or her. In the County Court, a solicitor and a barrister will generally be required.
- If the defendant is found guilty by the Magistrates' Court, the maximum penalty that can be issued by a magistrate is less than the maximum penalty that a judge of the County Court can hand down.
- The Magistrates' Court is less formal than the County Court. This can be less intimidating and it can mean that legal representation may not be absolutely necessary, depending upon the circumstances of the case.

Table 2.1 The distinction between summary offences and indictable offences

	Summary offences	Indictable offences	Indictable offences heard and determined summarily
Seriousness of offence	Minor	Serious	Less serious indictable offences. Listed in Schedule 2 of the *Criminal Procedure Act 2009* (Vic)
Examples of offences	Graffiti Drunkenness in a public place Traffic offences	Murder Rape Threats to kill	Assault with intent to commit a sexual offence Carjacking Fraudulently inducing persons to invest money
Courts involved in first instance	Magistrates' Court	County Court or Supreme Court (Trial Division)	Magistrates' Court

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The burden of proof and standard of proof

The burden of proof

In a criminal matter, the burden of proof generally rests with the prosecution.

In criminal cases, the prosecution generally carries the responsibility of proving the case against the defendant. This is known as the **burden of proof**. The burden of proof (or onus of proof) rests with the prosecution in a criminal case. This is thought to be fair, because the party making the allegations should have to prove them.

Although it is rare, some Acts of Parliament reverse the burden of proof and place the onus on the defendant. Examples at the Commonwealth level include some terrorism and drug offences. Some people argue that reversing the burden of proof undermines the principle of the presumption of innocence.

The standard of proof

In a criminal matter, the standard of proof is 'beyond reasonable doubt'.

In criminal law, the **standard of proof** is the level of proof that must be satisfied in order to find the accused guilty. The standard of proof that must be met in a criminal case is 'beyond reasonable doubt'. Under common law, a judge should not expand on the meaning of 'beyond reasonable doubt'. The *Jury Direction Act 2015* (Vic) provides that a judge may give a jury directions clarifying the meaning of 'beyond reasonable doubt' if the jury asks the trial judge:

- a direct question about the meaning of the phrase
- a question that indirectly raises the meaning of the phrase.

However, determining what this means, and how the standard applies to a case, is up to each individual juror.

The presumption of innocence

The **presumption of innocence** means that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law. The presumption of innocence has emerged through the common law.

The common law

An accused has the right to be presumed innocent until proven guilty.

In *Woolmington v DPP* [1935] AC 462, the UK House of Lords established that '[t]hroughout the web of the English criminal law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner's guilt'.

Legal brief 2.1

Reversing the burden of proof and its impact upon the presumption of innocence in light of the Victorian Charter rights

R v Momcilovic [2010] VSCA 50

Vera Momcilovic was a lawyer who had a de facto relationship with a man who was involved in trafficking drugs. Ms Momcilovic's de facto left drugs in her freezer, and other items related to his drug dealing in her apartment, which were discovered by police. Ms Momcilovic denied having any knowledge of the fact that the drugs were in her freezer.

Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) reversed the onus of proof – because the drugs were found to be in the house that Ms Momcilovic owned and occupied, she needed to prove her innocence in that she had no knowledge or control of the drugs.

Ms Momcilovic was convicted and sentenced, so she appealed to the Victorian Court of Appeal. One of the arguments made was that the reversal of the burden of proof under section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) infringed upon her right to the presumption of innocence under section 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The Court of Appeal made a declaration that the reversal of the burden of proof created by section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) was incompatible with the right to the presumption of innocence when charged with a criminal offence under section 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Court of Appeal's role was limited to interpreting the words of the Act and the Charter to determine that there was an incompatibility.

The case then went to the High Court of Australia in *Momcilovic v The Queen* [2011] HCA 34.

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More recently, in Australia, French CJ of the High Court stated, in *Momcilovic v The Queen* [2011] 245 CLR 1, that the, 'presumption of innocence' in criminal proceedings is 'an important incident of the liberty of the subject'.

The ICCPR

Australia is also a party to the *International Covenant on Civil and Political Rights* (ICCPR), which protects the presumption of innocence in Article 14(2).

Presumption of innocence

ICCPR – Article 14(2)

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The Victorian *Charter of Human Rights and Responsibilities*

In Victoria, the presumption of innocence is also stated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 25(1).

Presumption of innocence

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

Section 25 Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

The system of bail

The system of **bail** also upholds the presumption of innocence. The purpose of the *Bail Act 1977* (Vic) is to provide a framework for deciding whether an accused should be granted bail, with or without conditions imposed, or be remanded (held) in custody. Under the Act, an accused is entitled to be granted bail unless the bail decision-maker is required to refuse bail under the provisions of the Act. Bail is only refused in exceptional circumstances because to hold an accused in custody, without a court having found the accused guilty of a crime, undermines the presumption of innocence.

The presumption of innocence is established and upheld by common law, the *ICCPR*, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the system of bail.

News report 2.2

The problems with tougher bail laws

There have been many calls by sections of the Victorian community to make bail laws stricter. A number of significant crimes that have been committed in Victoria have been done so by people who were on bail at the time of the offending. Many argue that these people should have been on remand, and should 'never have been let out' of custody in the first place. Some members of the community, police force, politicians and the media have argued that bail laws need to be tougher. This is often a popular argument, as the broader community often demands for a strong sense of 'justice'.

However, there are significant issues that could arise from making bail laws tougher. The first is the undermining of the concept of the presumption of innocence. In Victoria, people charged with a criminal offence are presumed to be innocent until proven guilty. If more people are held on remand because it becomes even harder to be granted bail, it means that people will be held in custody without having been found guilty. This erodes the presumption of innocence as a fundamental human right, and a right contained in the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

In addition to the rights issues that are presented by calls to make bail laws tougher, there are also financial considerations. The cost of holding a person in custody, hundreds of dollars per day for each prisoner, is significant. This is a cost to the Victorian government; therefore, it must be funded by taxpayers. If bail laws become tougher, and more people are held on remand, the financial costs to the state will be significant in what is already an overcrowded prison system.

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Activity 2.4 Structured questions

Key concepts in the criminal justice system

1 Identify the standard of proof in a criminal trial.
2 Differentiate between a summary offence and an indictable offence.
3 Determine why an accused might agree to have their indictable offence heard and determined summarily.
4 Explain how the system of bail upholds the presumption of innocence.
5 'The burden of proof in a criminal hearing or trial should never be reversed under any circumstances'. Evaluate this statement, including whether or not you agree with it. Justify your position.

2.3 The rights of an accused

A person accused of a crime has the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury.

An accused is a person who is alleged to have committed a crime. An accused person has not yet been found guilty of a crime; therefore, the accused is entitled to the presumption of innocence. Three key rights of an accused include: the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury.

The right to be tried without unreasonable delay

A person charged with a crime must be brought to trial without unreasonable delay.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires a person who is arrested or detained on a criminal charge to be promptly brought before a court (section 21(5)(a)) and be brought to trial without unreasonable delay (sections 21(5)(b) and 25(2)(c)).

Justice Kellam considered this right in the context of a bail application in *Mokbel v DPP (No. 3)* [2002] VSC 393, stating that, 'the community will not tolerate the indefinite detention of persons awaiting trial'. In this case, the accused man, Antonius ('Tony') Mokbel, was held in custody awaiting trial for serious drug-related charges. Due to concerns surrounding the delays in committal proceedings and trial, bail was granted. Subsequently, Mr Mokbel breached his bail conditions and fled to Greece. He was discovered and extradited back to Australia 15 months later.

The *Criminal Procedure Act 2009* (Vic) sets time limits for the start of trials. If an accused is charged with a sexual offence, the trial must start within three months of the day on which the person is committed for trial. If an accused is charged with an offence other than a sexual offence, the trial must start within 12 months of the day on which the person is committed for trial.

Tony Mokbel is captured in Greece in 2008 after breaching bail conditions and fleeing from Australia and the serious criminal charges he faced here.

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The right to a fair hearing

Bail hearing

A bail hearing is a criminal pre-trial procedure. When charged with an indictable offence, an accused is able to make a bail application to determine whether he or she is able to be released back into the community while awaiting trial or the next hearing. If bail is granted, the accused must appear in court on the next set date, and there may be some bail conditions attached, as detailed in the *Bail Act 1977* (Vic).

Some examples of the conditions that can be imposed are:

- not contacting the victim/s or other witnesses
- attending counselling
- living at a particular address
- abiding by a curfew
- surrendering a passport
- regularly reporting to a police station.

Bail is decided by the court on a case-by-case basis. The court will hear evidence from the accused who seeks bail, or their legal representative, and may hear evidence from those opposing bail (often the police). If bail is not granted, the accused will be held on **remand** (in custody). An accused is held on remand if it is thought that he or she might: not attend a future court date, commit another offence while on bail, be a threat to the community, interfere with witnesses, abscond, or otherwise obstruct the course of justice.

A bail application, when heard by a magistrate in the Magistrates' Court, must be fair and determined in an unbiased manner.

A bail hearing protects the right of an accused to be treated fairly and without bias. A system of bail recognises that all people are considered innocent until proven guilty: a person who is accused of a crime but has not yet been convicted, is, in most cases, entitled to his or her liberty. If the accused needs to make a bail application at court, the magistrate must make a decision that is fair and unbiased, and in accordance with the legislative requirements of the *Bail Act 1977* (Vic). There are different requirements for bail if the accused is an Indigenous Australian, a vulnerable adult, or a person under 18 years of age. This ensures that a bail hearing is fair to those who may experience greater disadvantage than others.

Trial or hearing

A trial or hearing must be heard by an impartial judge or magistrate who follows the rules of evidence and procedure.

A person accused of a criminal offence must have their matter heard in a fair and impartial manner. In the case of a summary offence, the case is heard and determined by a magistrate. For indictable offences heard in the County Court or Supreme Court (Trial Division), where the accused pleads not guilty, the case is heard before a judge and jury. The rules of evidence and procedure used in a hearing or trial ensure that the prosecution and the defence have an equal and fair opportunity to present their case. The use of the jury in a criminal trial means that the final decision is made by unbiased and impartial representatives of the community.

Section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that, 'A person charged with a criminal offence … has the right to have the charge … decided by a competent, independent and impartial court … after a fair and public hearing.'

It is important to have a public hearing to ensure that the courts are transparent and accountable to the public. The community needs to feel a sense of open justice, and that decisions are not being hidden behind closed doors. However, in some circumstances, a court hearing or trial may operate *in camera* (in private) and therefore be closed to the public and the media. This is provided by section 24(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic): ' … a court … may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do by a law other than this Charter'.

The *Open Courts Act 2013* (Vic) was enacted to reform and consolidate the provisions for suppression orders. Suppression orders hide aspects of a case by forbidding the media to publish certain details of a trial or hearing. Journalists, particularly in Victoria where there are a significant number of suppression orders issued, have generally spoken out against these limitations as it hinders their ability to report openly on matters of public interest and undertake their work as the 'fourth estate'.

Court proceedings are often closed to the public and the media when the trial or hearing relates to a sexual offence, in order to protect the complainant.

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Media from around the world gather outside the Melbourne Magistrates' Court on 26 July 2017 as George Pell attends a closed court session in regard to historical child abuse charges.

Generally, the courts should be open to the public and the media in order to promote transparency and open justice.

In 2018, a senior member of the Catholic Church, George Pell, was subject to a committal hearing in regard to allegations of historical child sex offences. The charges against Cardinal Pell were subject to a suppression order, as was the outcome of his trial. This was to prevent the outcome of this trial impacting upon the impartiality of the court in a second trial that was scheduled to take place at a future date. Once the second trial was withdrawn, Australian media were able to reveal the outcome of the trial. Many in the media spoke out against the suppression order and argued that such orders were increasingly difficult to adhere to in the modern digital age, given that the outcome of the trial was widely reported by international news outlets.

News report 2.3

The use of suppression orders and a closed court in George Pell's committal proceedings and criminal trial

On 11 December 2018, a jury found Pell guilty of child sex offences.

The verdict and the proceedings that led to it were subject to blanket ban suppression orders, which prohibited any reporting on proceedings involving Pell. Today those orders were lifted.

…

The principle of open justice is summed up by the idea that 'justice should not only be done but should be seen to be done'. It is a fundamental principle of our legal system.

But it is not an absolute principle. Courts have various powers to depart from open justice by closing proceedings to the public, concealing information from those present in court, or by prohibiting or otherwise restricting publication of material.

A 'suppression order' is a kind of court order that prevents people from reporting on court proceedings. In Pell's case, the suppression orders were made under section 17 and section 18(1)(a) of Victoria's *Open Courts Act 2013*.

Chief Justice of the County Court, Peter Kidd, decided it was 'necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that [could not] be prevented by other reasonably available means'.

Source (*adapted*): *Michael Douglas and Jason Bosland*, The Conversation, *26 February 2019*

The right to silence

An accused can legally choose to exercise his or her right to silence at trial.

The right to silence is an important safeguard of a defendant's right to a fair and unbiased hearing. At trial, a defendant can remain silent or give evidence. If the defendant gives evidence, he or she may be cross-examined. The *Charter of Human Rights and Responsibilities Act 2006* (Vic), as well as protecting the right to silence, gives an accused person the right not to be compelled to testify against him or herself or confess guilt in a criminal trial (section 25(2)(k)).

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

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the rights of an accused to a fair and unbiased hearing. Section 24 of the Charter protects the right to a fair hearing and section 25 provides for a number of rights in criminal proceedings. See Table 2.2 for information on rights under the Charter.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the right to a fair and unbiased hearing.

Table 2.2 Rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Fair hearing – s 24	A person charged with a criminal offence has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
Rights in criminal proceedings – s 25	**1** A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. **2** A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees: **a** to be informed properly and in detail of the nature and reason for the charge in language or, if necessary, a type of communication that he or she speaks or understands **b** to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer **c** to be tried without unreasonable delay **d** to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid **e** to be told about the right, if eligible, to Victoria Legal Aid **f** to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria **g** to examine, or have examined, witnesses against him or her **h** to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution **i** to have the free assistance of an interpreter if he or she cannot understand or speak English **j** to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance **k** to not be compelled to testify against himself or herself to confess guilt.
Right to liberty and security of person – s 21	This section ensures that an accused person is not subject to arbitrary arrest or detention and is not deprived of his or her liberty unless this is allowed under law.
Humane treatment when deprived of liberty – s 22	If a person is deprived of their liberty, he or she must be treated with humanity and with respect. If an accused person is held without charge, such as when an accused is held on remand, he or she must be segregated from persons who have been convicted of offences and treated in a way which is appropriate for a person who has not been convicted.
Retrospective criminal laws – s 27	A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence at the time of the offence.

The right to a trial by jury

The right to a trial by jury, when an accused pleads not guilty to criminal charges, is important in a democratic society. This is because the jury:

Trial by jury for indictable offences is a feature of a democratic society.

- is randomly selected from the electoral roll and can represent community views and values in their decision-making
- allows for community participation in the criminal justice system
- protects against actual, or perceived, government corruption in the criminal justice system as the community members that comprise the jury are independent of, and not answerable to, government in terms of reaching a verdict.

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Right to trial by jury – Commonwealth

Section 80 of the Australian Constitution establishes the right to trial by jury for a Commonwealth indictable offence.

A person accused of a Commonwealth indictable offence is given the right to trial by jury pursuant to section 80 of the Australian Constitution.

The *Crimes Act 1914* (Cth) states that Commonwealth offences that are punishable by imprisonment for 12 months or more are indictable offences. Such offences can include treason and child sex tourism.

Decisions of the High Court of Australia have interpreted section 80 of the Australian Constitution as allowing the Commonwealth parliament to decide whether an offence is an indictable offence or a summary offence. In practice, this means that the Commonwealth parliament has control over how a Commonwealth offence is classified and, as a consequence, control over whether or not an accused has a right to a trial by jury.

Right to trial by jury – Victoria

In Victoria, indictable offences are heard at trial before a judge and a jury of 12 citizens.

In Victoria, all indictable offences tried in the County Court and Supreme Court (Trial Division) are heard before a jury of 12 randomly selected citizens from the electoral roll. The *Juries Act 2000* (Vic) governs jury requirements in Victoria.

The *Criminal Procedure Act 2009* (Vic) imposes a statutory requirement for a jury to be empanelled in Victoria if an accused pleads not guilty to an indictable offence.

Jurors must be impartial and reach a verdict based upon the evidence presented at trial.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) stresses the importance of impartiality by stating that a person charged with a criminal offence has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing (section 24(1)). In a jury trial, impartiality is achieved by empaneling jury members who do not come to the trial with preconceptions about the case, or personal biases.

Legal brief 2.2

Alqudsi v The Queen [2016] HCA 24

Jury must hear terrorist case – High Court

This High Court case concerned a NSW trial for terrorism recruitment offences. Hamdi Alqudsi, a disability pensioner from Sydney's southwest, was charged with seven offences against the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). The Act makes it an offence for a person to give money, goods, or services to a person or body for the purpose of supporting or promoting the commission of an incursion into a foreign country to engage in hostilities. Alqudsi made a motion to the High Court to be tried by a judge only. However, the High Court dismissed the motion. In its published reasons for the decision, the Court held that 'provisions of the *Criminal Procedure Act 1986* (NSW), which provided for trial by a judge without a jury, were not capable of being applied to the applicant's trial because their application would be inconsistent with section 80 of the Constitution'.

The Court, in its majority decision (Chief Justice Robert French dissented), upheld the view that section 80 cannot be interpreted to allow judge-only trials in any circumstances: 'a trial on indictment for an offence against a law of the Commonwealth does … have to be before a jury'.

Following the High Court decision, Alqudsi was found guilty in the NSW Supreme Court. He will be eligible for release in 2022, after serving a non-parole period of six years. He was the first person to be prosecuted for helping Australians fight in the Syrian conflict. At least 11 Australians have been convicted under the Act since 1978, mostly mercenaries who took part in conflicts in Yugoslavia, the Comoros Islands and West Papua.

In 2016, the High Court of Australia held, in *Alqudsi v The Queen*, that the right to trial by jury for a Commonwealth indictable offence, under section 80 of the Australian Constitution, cannot be waived.

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Activity 2.5 Structured questions

The rights of an accused

1 Outline one right that belongs to an accused.
2 Explain why it is important for an accused to be tried without unreasonable delay.
3 Evaluate the extent to which the use of a jury achieves a fair and unbiased hearing. Justify your response.
4 Explain how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) upholds the rights of an accused.
5 Compare the right to a trial by jury in Victoria with the right to a trial by jury under the Australian Constitution.
6 Explain how the right to a trial by jury achieves, or seeks to achieve, two principles of justice.
7 In *Alqudsi v The Queen*, the majority held that the right to trial by jury for Commonwealth offences under section 80 of the Australian Constitution could not be waived. In your opinion, does this decision achieve fairness as a principle of justice? Justify your response.
8 'Although the media may not be allowed to enter the courtroom and report on proceedings in some criminal matters, this is increasingly difficult for the courts to manage due to the realities of media in the digital age and the use of social media'. Discuss.

2.4 The rights of victims

A **victim** is a person who has either directly or indirectly been impacted by a crime. Victims of crime can experience many different physical, emotional and financial effects. During a criminal trial or hearing, the victim is referred to as the 'complainant', until the accused has been found guilty.

Victims of crime can be affected physically, emotionally and financially.

Victims of crime should be treated fairly by all parties involved in the case, such as police, the prosecution and victims' services providers.

The victim is referred to as the complainant until the accused is found guilty.

The *Victims' Charter Act 2006* (Vic) sets out principles on how the Victorian criminal justice system should best respond to victims of crime.

There are many things that the police should tell a victim (complainant) about the case. These include:

The criminal justice system should treat victims fairly.

- the victim's rights and the services that are available
- how the police are progressing with the case (as much as they can)
- if a person has been charged with the crime
- any court dates and times, and if the victim will be required as a witness
- if an accused has received bail, and what steps have been taken, or will be taken, to keep the victim safe.

Victims should also be informed:

- by the prosecutors about how the court system works, including what needs to happen if the victim is called as a witness
- about his or her right to be kept safe in court
- of the right to tell the judge or magistrate about how the crime affected him or her through a Victim Impact Statement, if the accused is found guilty
- of the right to seek compensation from the person who committed the crime and to apply for financial assistance from the government
- that he or she can receive information from the Victims Register about an offender sent to prison for a violent crime.

Three key rights of a victim include the right: to give evidence as a vulnerable witness, to be informed about the proceedings and to be informed of the likely release date of the accused.

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Don Damond, the fiancé of Australian woman Justine Ruszczyk Damond, reads a victim impact statement during the sentencing of former Minneapolis police officer Mohamed Noor at the Hennepin County District Court in Minneapolis, Minnesota on 7 June 2019. Noor was convicted of third-degree murder and second-degree manslaughter after fatally shooting Ms Ruszczyk Damond.

The right to give evidence as a vulnerable witness

Vulnerable witnesses include: children, people with a cognitive impairment, victims of sexual assault and victims of family violence.

Giving evidence in a criminal trial can be particularly distressing for vulnerable witnesses. Vulnerable witnesses include: children, people with a cognitive impairment, victims of sexual assault and victims of family violence.

The *Criminal Procedure Act 2009* (Vic) provides legislative support for vulnerable witnesses who give evidence.

Part 8.2 of the *Criminal Procedure Act 2009* (Vic) allows a court to make adjustments to the giving of evidence by vulnerable witnesses in certain circumstances. These arrangements are designed to make giving evidence less intimidating and, therefore, achieve a greater sense of fairness, equality and access for the vulnerable witness.

Protected witnesses

Offences that apply to protected witnesses

Section 353 of the *Criminal Procedure Act 2009* (Vic) states that a witness can be declared a protected witness in criminal proceedings that relates, wholly or in part, to a charge for:

- a sexual offence
- a family violence offence.

Who is a protected witness?

Section 354 of the *Criminal Procedure Act 2009* (Vic) states that a protected witness can be:

- the complainant
- a family member of the complainant (as defined by section 354 *Criminal Procedure Act 2009* (Vic)
- a family member of the accused
- any other witness whom the court declares to be a protected witness.

The court may, at any time, declare a witness to be a protected witness (section 355 *Criminal Procedure Act 2009* (Vic)).

A protected witness must not be cross-examined by the accused in person (section 356 *Criminal Procedure Act 2009* (Vic)).

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If the accused is not legally represented, section 357 of the *Criminal Procedure Act 2009* (Vic) requires the court to:

- inform the accused and the jury that the accused is not allowed to personally cross-examine a protected witness
- ask the accused if he or she has sought legal representation for the cross-examination of a protected witness
- grant an adjournment (break) if requested by the accused, if the court believes that the accused has not had a reasonable chance to obtain legal representation
- order Victoria Legal Aid to provide legal representation to cross-examine the protected witness on behalf of the accused if the accused does not obtain legal representation for this purpose.

A person can be declared a protected witness in a matter about a sexual offence or a family violence offence.

If the accused is only legally represented for the cross-examination of the protected witness, the trial judge must warn the jury that: this is a routine practice in these circumstances, no adverse inference is to be made against the accused due to this, and the evidence given under cross-examination is not to be treated with greater or lesser weight due to the cross-examination not being undertaken by the accused (section 358 *Criminal Procedure Act 2009* (Vic)).

These protections aim to limit the contact that the protected witness has with the accused in court so as to avoid further distress and intimidation. This helps to achieve fairness for the protected witness, so that he or she is able to participate in cross-examination without needing to directly address and respond to potentially challenging or traumatic direct questioning from the accused.

Protected witnesses are given support in order to avoid further distress and intimidation when giving evidence.

Alternative arrangements for giving evidence

When alternative arrangements apply

Section 359 of the *Criminal Procedure Act 2009* (Vic) states that the provisions for alternative arrangements apply in criminal proceedings that relate, wholly or in part, to:

- a sexual offence
- a family violence offence
- obscene or indecent behaviour in public, pursuant to section 17(1) of the *Summary Offences Act 1966* (Vic)
- public sexual exposure, pursuant to section 19 of the *Summary Offences Act 1966* (Vic).

Types of alternative arrangements

Section 360 of the *Criminal Procedure Act 2009* (Vic) states that the following alternative arrangements can be made for witnesses giving evidence:

- permitting evidence to be given from a place other than the courtroom via closed-circuit television (CCTV), or other similar communication facility
- using screens to remove the accused from the line of sight of the witness
- permitting an approved person to be beside the witness when giving evidence, for emotional support
- permitting only persons specified by the court to be present while the witness is giving evidence
- requiring legal representatives to not wear robes
- requiring legal representatives to be seated while examining, or cross-examining, the witness.

There are a range of different alternative arrangements that can be made for vulnerable witnesses.

Alternative arrangements protect witnesses from further engagement with the accused, helping to reduce anxiety and any further trauma from being exposed to him or her. The arrangements help to achieve fairness, so that the witness is able to give evidence in as comfortable a manner as possible under the circumstances. This is an example of where fairness and equality differ. As alternative arrangements only apply to witnesses who qualify under the legislation, these arrangements do not necessarily achieve equality (as different types of witnesses are not treated the same). However, as vulnerable witnesses experience inequality to begin with, due to the particularly traumatic nature of their experiences, alternative arrangements help to achieve a more level footing, to the extent that this is possible, when giving evidence. Alternative arrangements also achieve access by enabling the witness to give evidence in a manner which best suits their needs (such as by avoiding the accused, but still accessing the court through CCTV).

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Use of recorded evidence-in-chief

In some circumstances, a vulnerable witness can give evidence in the form of an audio or audio-visual recording.

In some circumstances, a witness may give **evidence-in-chief** (the questioning of a lawyer's own witness) by answering questions put to him or her in the form of an audio or audio-visual recording, as long as the recording adheres to the admissibility requirements stated in section 368 of the *Criminal Procedure Act 2009* (Vic).

This is available to a witness who:

- is under 18 years of age; or
- has a cognitive impairment.

Also, the criminal proceeding must relate wholly or in part to:

- a sexual offence
- a family violence offence
- an indictable offence which involves assault on or injury or a threat of injury to a person; or
- a common or aggravated assault charge under the *Summary Offences Act 1966* (Vic) if the offences are related to any of the other specified offences.

Special hearing

A special hearing is used for sexual offences when the complainant is under 18 years of age or has a cognitive impairment.

Under section 369 of the *Criminal Procedure Act 2009* (Vic), a special hearing is able to be used in a trial that wholly or in part relates to a charge for a sexual offence if the complainant is under 18 years of age or has a cognitive impairment.

All of the evidence given by the complainant must be given at a special hearing and recorded as an audio-visual recording (section 370 *Criminal Procedure Act 2009* (Vic)). Time limits are in place, although the court can extend the time limit if it is considered to be in the interests of justice to do so (section 371 *Criminal Procedure Act 2009* (Vic)).

During a special hearing, the accused and his or her legal practitioner are to be present in the courtroom, but the accused is not to be in the same room as the complainant when the complainant's evidence is being given. The accused is, however, entitled to see and hear the complainant while he or she is giving evidence and to be able to communicate with his or her legal practitioner at all times (section 372 *Criminal Procedure Act 2009* (Vic)).

The complainant's evidence cannot be cross-examined or re-examined without leave.

A special hearing aims to achieve fairness, equality and access for the most vulnerable witnesses in the criminal justice system.

The purpose of a special hearing is to protect the most vulnerable witnesses, so that they can provide evidence in a manner which is as fair as possible under the circumstances and helps to achieve access and equality. A special hearing removes the witness from direct contact with the accused, which aims to reduce trauma and anxiety for the vulnerable witness.

Improper questions – *Evidence Act 2008* (Vic)

Section 41 of the *Evidence Act 2008* (Vic) disallows improper questions that are put to a witness.

Section 41 of the *Evidence Act 2008* (Vic) states that the court may disallow an improper question that is put to the witness.

See Table 2.3 for information on rights of vulnerable witnesses.

The right to be informed about proceedings

The *Victims' Charter Act 2006* (Vic)

A victim must be kept reasonably informed about the progress of a criminal investigation.

Section 8 of the *Victims' Charter Act 2006* (Vic) requires an investigating agency to inform a victim, at reasonable intervals, about the progress of an investigation into a criminal offence unless the victim requests not to be given information, or if disclosure may harm the investigation.

The *Victims' Charter Act 2006* (Vic) requires victims to be provided with certain information from the prosecution.

A victim is to be provided with the following information from the prosecution (section 9 *Victims' Charter Act 2006* (Vic)):

- the charges against the person accused of the criminal offence
- if there are no charges against any person, the reason for this
- any decisions to substantially modify charges, not proceed with some or all of the charges, or to accept a plea of guilty to a lesser charge
- how to find out the date, time and place of the hearing, or the charges against the accused person

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- the outcome of the criminal proceeding against the accused person, including any sentence imposed
- details of an appeal if one is initiated.

A victim must also be informed of the court processes and his or her right to attend relevant court proceedings. However, section 336A of the *Criminal Procedure Act 2009* (Vic) states that the court may order the victim to leave the courtroom until they are required to give evidence if the victim is also a witness in the proceeding.

Table 2.3 Rights that can apply to a vulnerable witness

	Applicable legislation	Offences that attract the rights	Specific rights that apply	Witnesses who qualify
Declared to be a protected witness	*Criminal Procedure Act 2009* (Vic) s 353	Sexual offence Family violence offence	A protected witness must not be cross-examined by the accused in person The court is required to ensure that the accused is able to have an opportunity to seek legal representation for cross-examination A court can order Victoria Legal Aid to represent the accused for cross-examination The judge must warn the jury about their responsibilities if the accused is only represented for the purposes of cross-examination of the protected witness	The complainant (victim) A family member of the complainant A family member of the accused Any other witness whom the court declares to be a protected witness
Alternative arrangements	*Criminal Procedure Act 2009* (Vic) s 359	Sexual offence Family violence offence Obscene or indecent behavior in public Public sexual exposure	Permitted the use of CCTV, or other like communication facility, to give evidence from a place other than the courtroom Using screens to remove the accused from the line of sight of the witness Permitting an approved person to be beside the witness when giving evidence, for emotional support Permitting only persons specified by the court to be present while the witness is giving evidence Requiring legal representatives not to wear robes Requiring legal representatives to be seated while questioning the witness	To all witnesses of the stated offences, including the complainant
Use of recorded evidence-in-chief	*Criminal Procedure Act 2009* (Vic) s 368	Sexual offence Family violence offence Indictable offence which involves assault or injury or a threat of injury to a person A common assault or aggravated assault charge under the *Summary Offences Act 1966* (Vic) if the offences are related to any of the aforementioned offences	Giving evidence-in-chief by answering questions in the form of an audio or audio-visual recording	Witness under 18 years of age Witness with a cognitive impairment
Special hearing	*Criminal Procedure Act 2009* (Vic) s 369	Sexual offence	Evidence given at a special hearing Evidence recorded as an audio-visual recording Accused not to be in the same room as the complainant when the complainant's evidence is given The accused is entitled to see and hear the complainant while he or she is giving evidence and is able to communicate with his or her lawyer at all times Complainant's evidence cannot be cross-examined or re-examined without leave	Complainant under 18 years of age Complainant has a cognitive impairment
Improper questions disallowed	*Evidence Act 2008* (Vic) s 41	All	Court may disallow an improper question that is put to the witness	All witnesses

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The Victims of Crime Assistance Tribunal (VOCAT)

The Victims of Crime Assistance Tribunal (VOCAT) was established by the Victims of Crime Assistance Act 1996 (Vic). The tribunal operates in every Magistrates' Court of Victoria. VOCAT makes decisions about applications for financial assistance by victims of violent crime that have been committed in Victoria. The money given is designed to help reimburse the victim for the expenses that they have faced as a direct result of the crime.

The Victims of Crime Commissioner (VoCC)

The role of the Victims of Crime Commissioner (VoCC) was established by the *Victims of Crime Commissioner Act 2015* (Vic). The main functions of the Commissioner are to advocate for those who are victims of crime, and to investigate issues that might affect victims of crime when dealing with the criminal justice system. The VoCC reports to the Attorney-General on issues that are likely to be ongoing and that apply to many victims of crime. He or she advises the Attorney-General and government bodies about improving the justice system to meet victims' needs. The VoCC undertakes his or her role independently of the Victorian Government.

Specifically, the Commissioner has the power to:

- advocate for the recognition, inclusion, participation of and respect for victims of crime by government departments, Victoria Police, and agencies conducting criminal prosecutions
- inquire into issues that victims may experience with the processes of government departments, agencies, victims' services providers and the justice system
- report to the Attorney-General on issues that are likely to be ongoing and that apply to many victims of crime
- advise the Attorney-General and government bodies on improving the justice system to meet victims' needs.

Currently, the Commissioner is limited to assisting victims of violent crime where the issues are likely to be ongoing and affect many victims of crime.

Appointed in July 2019, Ms Fiona McCormack is the current Victims of Crime Commissioner. She was the former CEO of Domestic Violence Victoria and has a long history of advocating for victims.

The right to be informed of the likely release date of the accused

The Victims Register provides victims with certain information about the offender.

Victims who qualify under the *Corrections Act 1986* (Vic) – the offender must have been convicted of a criminal act of violence – are able to apply to receive information about the offender if they are on the Victims Register, which has its own set of eligibility criteria (section 17(1) *Victims' Charter Act 2006* (Vic)). Victims who are placed on the Register are able to learn of:

- the length of the offender's sentence
- the offender's earliest possible release date
- any change to the length of the offender's sentence
- the offender's **parole** status and conditions
- the offender's transfer to another state of Australia
- the offender's escape from prison
- the offender's death during his or her sentence.

A victim who has been included on the Victims Register is able to write a victim submission to the Adult Parole Board expressing how he or she might be affected by the offender's possible release on parole. The victim can ask that the offender does not initiate any contact or be present in the suburbs where the victim lives or works.

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Paramedics help injured people after James Gargasoulas deliberately drove his car into pedestrians at Bourke Street Mall in the Melbourne CBD on 20 January 2017.

Activity 2.6 Structured questions

The rights of victims

1 Look up the *Victims' Charter Act 2006* (Vic) in your search engine. In Part 1, section 1 the purposes of the Act are set out. Rewrite these purposes in your own words.

2 Read the objects of the Act under Part 1, section 4(1)(a)–(c). Rewrite these objects in your own words. Section 4(1)(c) refers to the likelihood of secondary victimisation by the criminal justice system. What do you think is meant by this?

3 Identify one piece of information that a victim is entitled to be informed about in relation to criminal proceedings.

4 Explain two rights of vulnerable witnesses.

5 Explain why victims should have the right to be informed of the release date of the accused.

6 'All victims, regardless of whether they are vulnerable witnesses or not, should have exactly the same rights in order to achieve fairness.' To what extent do you agree? Justify your opinion.

Flowers and teddy bears are left at a memorial held for victims of the Bourke Street Mall attack at Federation Square in Melbourne.

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Key point summary

Do your notes include all of the following points?

The principles of justice (fairness, equality, and access) and their link to the Victorian criminal justice system

- ❏ Fairness: is achieved if all people are treated impartially under the law, without fear or favour. An example of the Victorian criminal justice system achieving fairness is through the support provided to vulnerable witnesses, such as the alternative arrangement of CCTV to give evidence.
- ❏ Equality: is achieved if all citizens are provided with equal legal opportunities and equal treatment under the law. An example of the Victorian criminal justice system achieving equality is by affording the accused, as well as victims, with a set of rights.
- ❏ Access: is achieved if a range of methods and institutions to settle disputes within the legal system are provided. An example of the Victorian criminal justice system achieving access is by having the Victims Register, which provides access to information about an offender.

Key concepts in the Victorian criminal justice system

- ❏ The distinction between summary offences and indictable offences
  - A summary offence is a minor criminal offence (such as graffiti); whereas an indictable offence is a serious criminal offence (such as murder).
- ❏ The burden of proof
  - In a criminal matter, the burden of proof rests with the prosecution, as they are the party making the allegations.
  - In some limited instances, the burden of proof can be reversed onto the defendant. This is questioned, as it is thought to undermine the presumption of innocence.
- ❏ The standard of proof
  - In a criminal matter, the standard of proof is 'beyond reasonable doubt'.
- ❏ The presumption of innocence
  - A person charged with an offence is entitled to be presumed innocent until proven guilty.

The rights of an accused

- ❏ The right to be tried without unreasonable delay
  - The *Charter of Human Rights and Responsibilities Act 2006* (Vic)
  - The *Criminal Procedure Act 2009* (Vic)
- ❏ The right to a fair hearing
  - A bail hearing must be fair and determined by an impartial magistrate when the application is made in the Magistrates' Court.
  - A trial or hearing must be presided over by an impartial, fair and unbiased judge or magistrate.
  - The accused has a right to silence.
  - The *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- ❏ The right to trial by jury
  - Victoria: statutory requirement under the *Criminal Procedure Act 2009* (Vic) to empanel a jury for an indictable offence when the accused pleads not guilty. The *Juries Act 2000* (Vic) includes specific details of the role of the jury.
  - Commonwealth: section 80 of the Australian Constitution provides for a trial by jury for a Commonwealth indictable offence. This right cannot be waived (*Alqudsi v The Queen*).

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The rights of victims

- Victim: a person who has directly or indirectly been impacted by crime.
- The right to give evidence as a vulnerable witness
  - Children, people with a cognitive impairment, victims of sexual assault, and victims of family violence.
  - improper questions – section 41 of the *Evidence Act 2008* (Vic)
  - The *Criminal Procedure Act 2009* (Vic) sets out provisions for:
    - protected witnesses
    - alternative arrangements
    - recorded evidence-in-chief
    - special hearings.
- The right to be informed about the proceedings
  - The *Victims' Charter Act 2006* (Vic)
  - Generally, the right to be informed of:
    - the charges against the person accused of the criminal offence
    - the reason for there being no charges against any person
    - any decision to substantially modify charges, not proceed with some or all of the charges, or to accept a plea of guilty to a lesser charge
    - how to find out the date, time and place of the hearing, or the charges against the accused person
    - the outcome of the criminal proceeding against the accused person, including any sentence imposed
    - details of an appeal if one is initiated.
- The right to be informed of the likely release date of the accused
  - The *Victims' Charter Act 2006* (Vic)
  - The Victims Register and to generally be able to learn of:
    - the length of the offender's sentence
    - the offender's earliest possible release date
    - a change to the length of the offender's sentence
    - the offender's parole status and conditions
    - the offender's transfer to another state of Australia
    - the offender's escape from prison
    - the offender's death during his or her sentence.
- Victim of Crime Assistance Tribunal (VOCAT)
  - *Victims of Crime Assistance Act 1996* (Vic)
  - operates in every Magistrates' Court in Victoria
  - makes decisions about financial assistance to victims of crime
- Victims of Crimes Commissioner (VoCC)
  - *Victims of Crimes Commissioner Act 2015* (Vic)
  - an advocate for victims of crime in Victoria
  - investigates issues affecting victims of crime in the criminal justice system

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End-of-chapter questions

Revision questions

1 Identify the standard of proof in criminal law.

2 Distinguish between an indictable offence and a summary offence. In your response, provide one example of each.

3 Describe in what circumstances might the burden of proof be reversed under criminal law.

4 Explain how the Victorian criminal justice system upholds the presumption of innocence.

5 Explain how a trial by jury achieves fairness as a principle of justice.

6 Outline two rights that are given to vulnerable witnesses.

7 In your opinion, what is the most important right given to an accused? Justify your choice.

8 Explain why it is an important right of an accused to not be subject to unreasonable delays in the criminal justice system.

9 Assess how the Victims Register achieves access as a principle of justice.

10 Describe how the *Charter of Human Rights and Responsibilities Act 2006* (Vic) protects the right to a fair hearing.

Practice exam questions

1 Define 'vulnerable witness'. [1 mark]

2 Identify the party who holds the burden of proof in a criminal trial. [1 mark]

3 Provide one example of a summary offence and one example of an indictable offence. [2 marks]

4 Outline the right to a trial by jury in Victoria. [3 marks]

5 Explain two rights of a vulnerable witness. [4 marks]

6 Using examples, explain how the rights of an accused help to achieve the principles of justice. [6 marks]

7 The following statement contains errors. Identify three errors and explain why each error is incorrect. [6 marks]

Indiana has been charged with an indictable offence. Her lawyer, Shannon, informs Indiana that her offence will need to be heard in the Magistrates' Court and that the standard of proof that will be applied is on the balance of probabilities. Indiana believes that, as the accused, she has no rights that apply to her because only victims of crime are given rights in the Victorian criminal justice system.

When Indiana's matter is finally heard before the court, the prosecution states: 'This matter needs to be delayed so that we can have as much time as possible to find evidence and create strong legal arguments.' The prosecution argues that as Indiana has been charged with a state indictable offence, she must have a trial by jury due to section 80 of the Australian Constitution.

8 'Equality is the most important principle of justice in relation to the Victorian criminal justice system'. To what extent do you agree? Justify your position. [8 marks]

9 'The rights of victims, particularly vulnerable witnesses, are too strong and make the criminal justice system unfair'. Discuss. [8 marks]

10 'The presumption of innocence is very difficult to achieve in contemporary society, due to the influence of the media, including social media.' Discuss. In your response, explain how the presumption of innocence achieves one principle of justice. [10 marks]

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Crowds at the memorial held for victims of the Bourke Street Mall attack

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Chapter 3

Unit 3 – Area of Study 1

Determining a criminal case

Victoria is a society of economic and cultural diversity and, like all such societies, needs a range of institutions and personnel involved in the criminal justice system to ensure that justice is served. This chapter looks at the institutions and procedures that are used to try to make sure justice is attained within the criminal justice system.

The impact of being charged with a breach of criminal law has serious consequences that can affect an accused throughout their life. Whether a person is guilty or not guilty of an offence is determined through the court system. In our legal system, parties are in control of their own case within the bounds of the rules of evidence and procedure, and so an accused must be prepared for their day in court. There is a hierarchy of courts in Victoria that have specialised jurisdictions, procedures and personnel to deal with the complexities of criminal law.

Criminal pre-trial procedures are addressed in this chapter, including plea negotiations and sentence indications, along with the role of institutions in Victoria to assist a person charged with an offence. If the accused is found guilty 'beyond reasonable doubt' by the court, a sanction is imposed. The types and purposes of sanctions are discussed, along with sentencing considerations.

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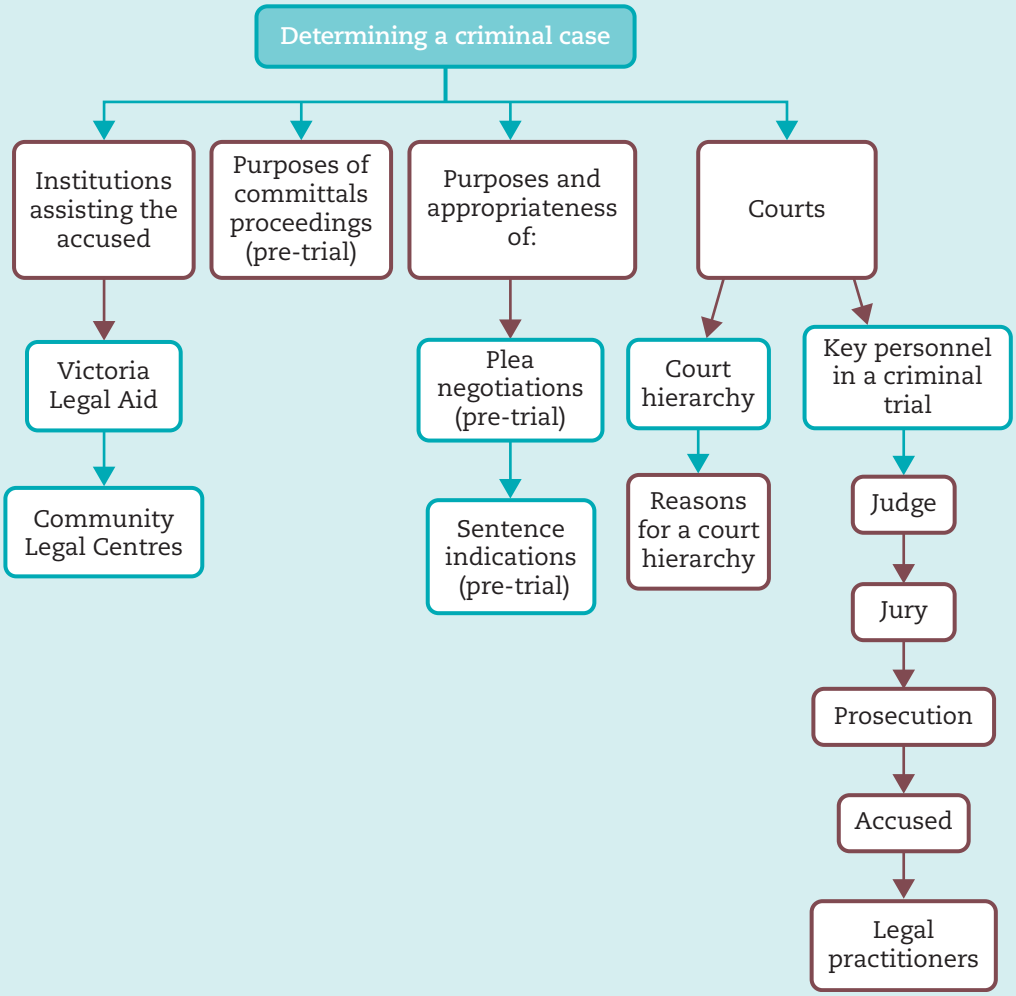

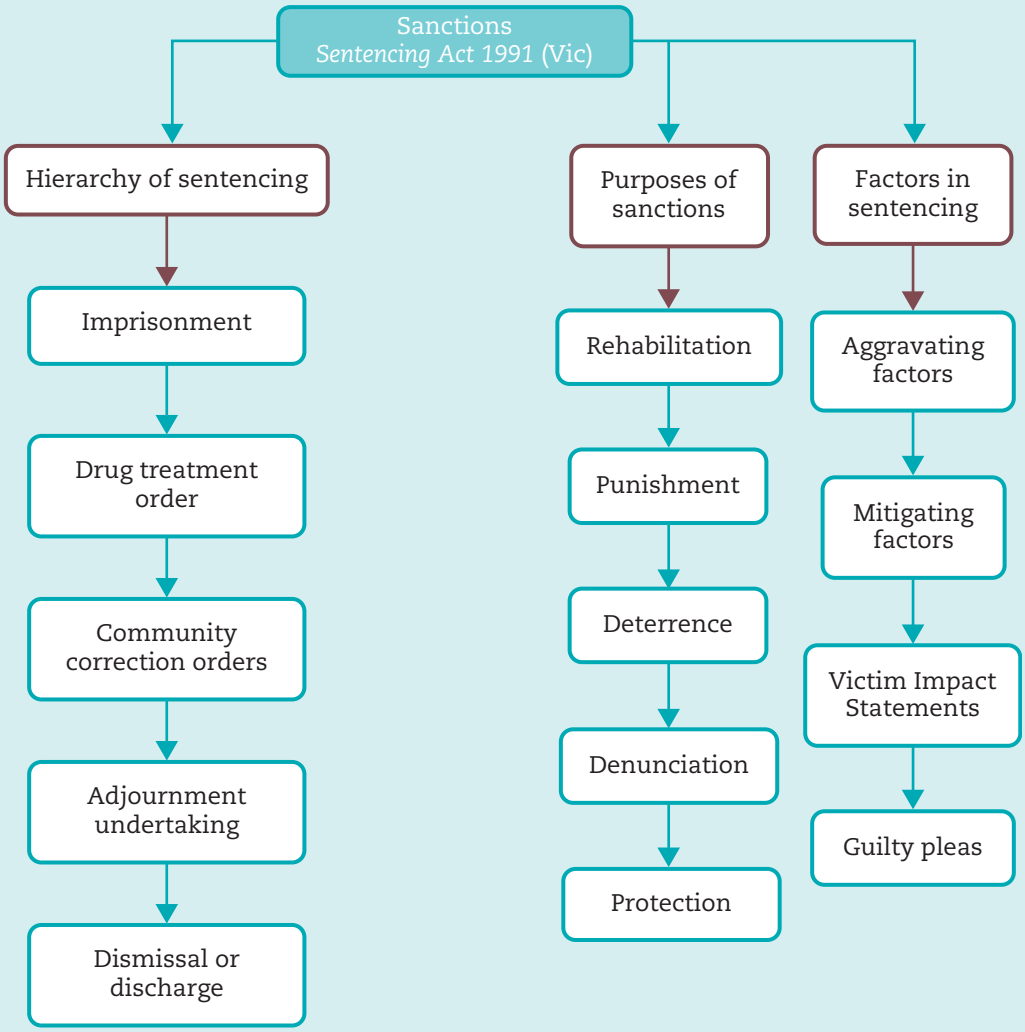

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Key terms

acquittal when a defendant is found not guilty by a court

aggravating factors evidence presented that increases the seriousness of the offence and so contributes to a harsher sentence; for example, use of a weapon, prior convictions

appellate jurisdiction the power of a court to review decisions made by a lower court.

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to establish a *prima facie* case and support a conviction

committal proceedings court hearings held in the Magistrates' Court for persons charged with an indictable offence to determine if there is sufficient evidence to require the defendant to stand trial in a higher court

community correction order (CCO) a sentencing order requiring an offender to comply with conditions while in the community; can include unpaid community work, drug/alcohol treatment or curfews

court hierarchy the ranking of courts from inferior to superior

custodial sentence a sentence handed down by a magistrate or judge that consists of the custody of an accused in a prison or another institution (such as Thomas Embling Hospital)

indictable offence heard summarily an indictable offence that can be tried before a magistrate without a jury if the accused and the court agree

jurisdiction the power or the authority of an institution: the power of a court to hear and determine particular offences or disputes; the power of parliament to make law as provided by the Constitution

mitigating factors evidence presented that reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

offender a person who has been convicted of breaching a criminal law

original jurisdiction the authority of a court to hear and determine a case in the first instance

parole the conditional release of a prisoner before the end of their sentence; it allows a prisoner to serve part of their sentence of imprisonment in the community

plea negotiations pre-trial in criminal cases where the defence counsel and prosecutor negotiate as to which charges the defendant will plead guilty in exchange for the withdrawal of other charges, or an accused can plead guilty when parties agree on the facts on which the plea is based; also known as charge negotiations or plea bargaining

pro bono legal work undertaken for free

recidivism when a person relapses into criminal behavior (a repeat offender)

sanction a penalty handed down by a court for someone found guilty of breaching a criminal law (for example, a fine or imprisonment); sometimes interchanged with 'sentence'

sentence a penalty handed down by a court for someone found guilty of breaching a law; to declare a sentence on a guilty person; sometimes interchanged with 'sanction'

sentence hearing a post-trial procedure at which the offender is given a sentence by the magistrate or judge; the court will hear mitigating and aggravating factors

sentence indication where the defence requests a statement from the court as to whether the accused is likely to receive a custodial or a non-custodial sentence; if it is custodial, the indication can include what the sentence is likely to be

specified sentence discount scheme a procedure whereby a court imposes a less severe sentence because the offender pleaded guilty

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3.1 The criminal justice system

Criminal law sets out the boundaries of acceptable behaviour of individuals for the protection and benefit of the community. When a law is broken, the criminal justice system, on behalf of the State, and thus of society as a whole, uses its processes, procedures, institutions and personnel to ensure that the correct person is charged and dealt with in a manner that is effective, but also fair and equitable. The accused must have access to services to ensure that their side of events is properly heard.

Victoria's criminal justice system is based on the presumption of innocence, meaning that the accused person is presumed innocent until their accuser, the prosecution, proves them guilty 'beyond reasonable doubt' to a magistrate (Magistrates' Court) or a jury (County or Supreme Court). The rules of evidence and procedure in our court system – the adversary system of trial – are strict and can be difficult to understand, so it is regarded as important for the accused to have legal advice and representation. Having the advice of a solicitor and the representation of a barrister in court is considered necessary for both pre-trial and trial procedures.

Legal representation can be expensive. This is one factor that limits the capacity of the criminal system to achieve justice. The High Court, in the case *Dietrich v The Queen* [1992] HCA 57 (see the following page), determined that if a person, through no fault of their own, was unable to obtain legal representation and was convicted of a serious offence, then that person has been convicted without a fair trial.

In most instances, offences come to the attention of the police in the normal course of their duties, or are reported by the public.

Activity 3.1 Folio exercise

The criminal justice system

1 What is the term given to the party that brings a criminal action against an accused? Who do they represent?

2 What standard is applied in the criminal justice system to determine if a person is guilty?

The Supreme Court of Victoria is the superior court for the State of Victoria. It was founded in 1852.

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3.2 Institutions to assist an accused

Legal representation is considered necessary in our legal system.

It is regarded as essential that an accused has legal representation to help them prepare their defence. If an accused cannot afford legal advice and representation, institutions such as Victoria Legal Aid and community legal centres have been established to assist them.

Legal brief 3.1

Dietrich v The Queen [1992] HCA 57

In 1988, the accused, Dietrich, was found guilty in the County Court of Victoria of importing a trafficable quantity of heroin into Australia.

Before the trial, Dietrich had made unsuccessful applications to be represented by Victoria Legal Aid (VLA). However, VLA would not represent him unless he pleaded guilty. Dietrich also applied, through Commonwealth legislation, to the Federal Minister for Justice and the Attorney-General, to have counsel appointed to represent him. These applications were also rejected. As a result, Dietrich was unrepresented at his trial. Before the trial, Dietrich argued that it should be adjourned or stayed (not proceed) until he had the opportunity to obtain legal representation. The County Court refused those requests.

After his trial, in which he was found guilty, Dietrich applied for leave to appeal to the Court of Appeal on the basis that there had been a miscarriage of justice as he did not have legal representation. The basis of the argument was that the lack of representation had denied him his right to a fair trial. The application to the Court of Appeal was dismissed.

Dietrich appealed to the High Court on the same basis.

The High Court allowed the appeal, holding that by not having legal representation the accused was denied a fair trial. The decision of the majority of the High Court was expressed by Mason CJ and McHugh J:

> … we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent (needy) accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

Dietrich was successful in his appeal to the High Court. The comments of the Justices were significant because of their implications for the provision of legal aid. That is:

1. Access to legal representation is fundamental to the achievement of justice in criminal law; and
2. Governments have the responsibility to provide sufficient funds for legal services, and their failure to do so may result in an indefinite stay of proceedings in trials for serious criminal offences (that is, until representation is secured).

What is legal aid?

Our legal system has complex processes and procedures. If justice is to be achieved, a person accused of a crime must have the opportunity to access legal advice and assistance that will place them on a 'level playing field' with the prosecution.

Under section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), one of the minimum rights of an individual charged with a criminal offence in Victoria is to be told about legal aid if they do not have a lawyer.

Legal aid services help people who are dealing with the criminal justice system. These services, which are provided free or at low cost, provide:

An accused must have the opportunity to access legal advice.

- legal information and advice
- legal representation.

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Victoria Legal Aid

In Victoria, legal aid is mainly provided by Victoria Legal Aid (VLA). This is an independent, government-funded organisation (by the Victorian and Commonwealth Governments) established to ensure that Victorians who cannot afford to pay for a private lawyer can receive assistance with their legal problems. It has 15 offices in metropolitan and regional Victoria which provide advice and guidance to people on a range of legal issues, including criminal matters for adults and children.

The purpose of VLA is to encourage a fair and transparent justice system. It does this by making a difference in the lives of its clients and the community through standing up for what is just, and aiming for what is fair when making decisions about which people are assisted with their legal problems, and what form this assistance takes.

VLA has lawyers and administrative personnel on staff. It can also employ private lawyers to represent clients.

VLA encourages a fair and transparent justice system.

The role of VLA

The role of VLA is to:

- provide effective and high-quality legal advice and representation to people who cannot otherwise afford legal assistance
- provide free legal information and education to Victorians
- focus on the prevention and early resolution of legal problems
- manage resources efficiently so that Victorians get value for money
- monitor and anticipate evolving needs of the community.

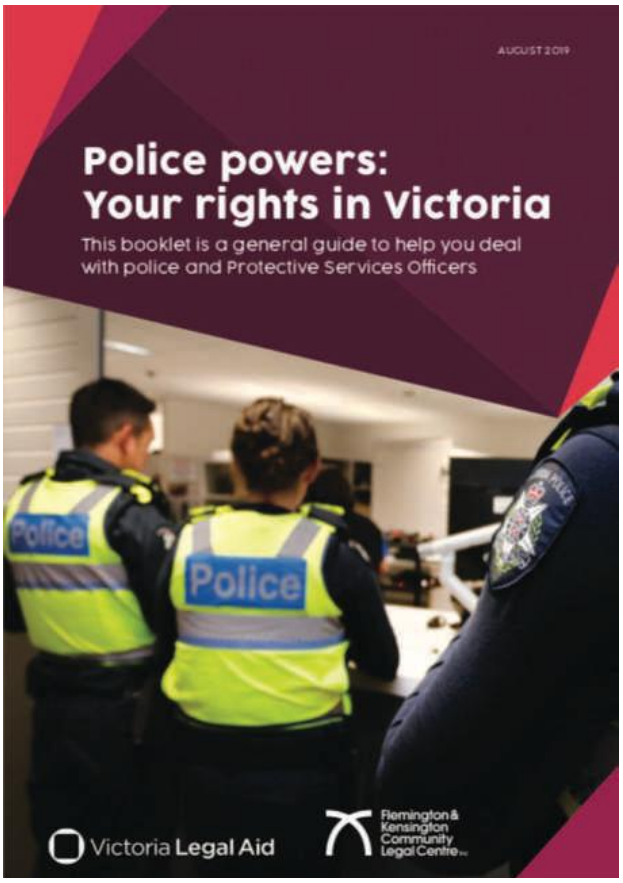
VLA can:

- provide legal advice in person, by video-conferencing, or over the phone
- provide assistance to a person in court who is unrepresented by a lawyer
- organise a case, which may include representing the person in court.

VLA can provide advice, assistance and representation.

VLA also publishes a number of booklets and pamphlets to help inform Victorians, including students, about the legal system and their rights.

VLA educates the public about the law.



VLA publishes booklets and pamphlets to help inform Victorians about their rights and work out their legal problems.

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Who can VLA help?

In its *Strategy 22*, VLA continues its focus on prioritising clients that face disadvantage within the legal system. In particular:

- children and young people
- people experiencing mental illness or living with a disability
- Aboriginal and Torres Strait Islander clients
- clients who encounter violence, trauma and abuse.

www.legalaid.vic.gov.au

Priority is given to those charged with serious criminal offences, whose liberty is threatened by the charges, or whose fundamental democratic freedom would be denied if legal assistance were not provided. Priority is also given to those who experience severe disadvantage, and children who are defendants in criminal matters.

Who can get legal aid?

In its 2018–19 annual report, the VLA assisted 100 061 'unique' clients (individuals who accessed one or more of the legal services, excluding those who just sought advice). VLA found there was a steady increase in the level of disadvantage experienced, including language, literacy, or cultural barriers, disability or other health issues, and social or geographic location. Specifically:

- 47% were receiving some form of government benefit
- 32% had no income
- 30% were living in regional or rural Victoria
- 25% disclosed they had a disability or mental illness
- 25% were from culturally and linguistically diverse backgrounds
- 18% were younger than 18 years of age.

Anyone can apply for legal assistance by completing and submitting an application online. Eligibility is determined by a means test and a merits test (sometimes referred to as a 'State reasonableness' test or 'interests of justice' test).

The means test is based on the client's:

- assessable income (including money received from work, welfare benefits and other sources)
- other assets (a house, car, savings)
- weekly living expenses (housing, utilities, childcare).

Legal assistance is provided if you satisfy a means test and a merits test.

The means test does not apply to children who are to appear in the Children's Court, or to a person involved in criminal proceedings under Part 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Under the State's reasonableness test, and because VLA funds are limited, an individual's lawyer or VLA must consider:

- the nature and extent of any benefit which a grant of legal assistance might give to the individual, the community in general, or a particular sector of the community
- the nature and extent of any detriment that a refusal of a grant might cause to the individual, the community in general, or a particular sector of the community
- in the case of assistance other than a criminal appeal, whether the proceeding is likely to result in a favourable outcome for the individual
- in relation to a criminal appeal, whether there are grounds for appeal.

VLA will also determine whether the person applying for a legal assistance grant can afford to pay the full costs of the legal services themselves. If a grant of assistance is made, VLA considers whether or not the person will be required to pay a contribution towards their legal costs.

A lifestyle test may also be applied. This considers any conflict between the information provided by the person in their application and their actual lifestyle. For example, there could be a conflict if an applicant claims to have no assets and very little income, but drives an expensive car.

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Legal brief 3.2

Adrian Bayley: should convicted criminals have the right to legal aid?

Adrian Bayley leaving the Supreme Court

In June 2013, Adrian Bayley, a serial sex offender, was sentenced to life imprisonment with a non-parole period of 35 years after pleading guilty to the rape and murder of ABC journalist, Jill Meagher. While serving this sentence, Bayley faced another three trials relating to sexual offences against other female victims. He was convicted of these offences at each of the trials which took place in July 2014 and March 2015.

As a result of these three convictions, Bayley received sentences that, cumulatively, meant that he would remain in prison for 43 years before being eligible for parole, by which time he would be 86 years old. One of the sentencing judges acknowledged that Bayley would probably die in prison.

Bayley received legal aid for his defence in each of these three trials.

After he was convicted in all three trials, Bayley decided to appeal the convictions of the first and third trials and applied to legal aid. This request was denied, firstly by VLA's Managing Director and then by an independent reviewer.

The independent reviewer commented that it was likely that the Court of Appeal would allow Bayley's appeal against his conviction in both the first and third trial, and if the convictions were quashed, the total effective sentence and non-parole period would be reduced. However, it was also stated that, '… The critical question so far as the present applications are concerned relate to the "reasonableness of providing legal assistance", i.e. the State reasonableness test…(and) there is an important public interest in ensuring public confidence in VLA's stewardship of the funds which are limited and taking all relevant matters into account I find that it is not reasonable to provide Mr Bayley with legal assistance for his appeals.'

Bayley appealed this review to the Supreme Court on the basis that it was not fair that the VLA has discretion whether to award funding or not. In his findings, Justice Kevin Bell found that the likelihood that Bayley could receive a lower non-parole period was significant as it could mean the difference between him dying in prison or being paroled in his old age. Justice Bell also acknowledged that the public confidence in the VLA was warranted but 'cannot be allowed to give rise to arbitrary decision-making or a de-facto character test.'

Bayley still applied to the Court of Appeal. However, his legal team this time was working ***pro bono*** (for free).

The Court of Appeal overturned Bayley's conviction from the first trial, which meant that his non-parole period was lowered to 40 years. The court described the decision not to provide him with legal aid as 'regrettable', saying, 'The applicant's case required the assistance of experienced counsel. He was in no position to adequately represent himself.'

Accessibility and VLA

VLA aims to provide accessible and appropriate information in a number of ways:

- The website has a 'Find Legal Answers' where an individual can look up information on a wide variety of issues, and find out who to contact for additional help.
- VLA operates a free telephone (Legal Helpline) and referral service during normal work hours.
- Interpreters are available in 18 languages. If a further language is required, a free Translating Service is available. If a person is deaf or has a speech impairment, the National Relay Service can be used to phone VLA over the internet.
- Services such as the Fitzroy Legal Service: this service operates out of the Fitzroy Town Hall and provides services during office hours, but also has a night service from 6 p.m. weeknights (6:30 p.m. Fridays).

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- The VLA regularly reviews its practices to ensure it aims at the groups in society most in need. At the beginning of 2016, VLA announced a change in criteria for the means test, which would allow an estimated additional 700 Victorians to receive legal aid. 'This will help people who currently fall through the cracks,' the Executive of VLA said. 'Often people who do not qualify for legal aid, but cannot afford a private lawyer, are forced to pay for representation on their credit cards or go without legal assistance.'
- In October 2016, the *Access to Justice Review* was released. The aim of this review was to identify ways to improve access to justice for Victorians with 'everyday' problems. In addition, it aimed to ensure that the disadvantaged and vulnerable, and those with Aboriginal and Torres Strait Islander backgrounds, were able to receive the support they need when engaging with the justice system. Sixty recommendations were made, including that VLA should take the role of leading, assisting and coordinating with other services providing legal information. In addition, VLA should continue to set the guidelines for eligibility for legal assistance and make decisions on individual applications.
- The *Client Priority and Capability Policy 2019* was published in March to help VLA to improve the ways in which it designed and provided services to those who need them.

The Victorian Aboriginal Legal Service (VALS)

The Victorian Aboriginal Legal Service (VALS) provides services to Aboriginal and Torres Strait Islander people who require legal assistance, including for criminal matters. Victoria Police are required to notify VALS when a person of Aboriginal or Torres Strait Islander descent is taken into custody.

Services provided include:

- legal advice and, if needed, referral services
- the assistance of a duty lawyer
- legal casework services, including representation and assistance in criminal law, in both summary and indictable offences, if necessary.

Priority will be given to:

- a person in custody
- where there is a real risk to a person's physical safety
- where personal or cultural wellbeing is at risk
- a family who has a member who died in custody and who is seeking representation at the inquiry into their death
- where a client would be significantly disadvantaged if assistance is not given.

The client must provide proof of their 'Aboriginality' (Confirmation of Aboriginal and/or Torres Strait Heritage) and must meet the requirements of a means and merit test. Applicants for legal casework need to satisfy one or more of the following requirements:

- be under 18 years of age
- have their main source of income coming from a Community Development Employment Project or Centrelink (or equivalent) benefits
- have a gross household income under $46 000.

The VALS uses its discretion to determine whether or not a particular case has merit.

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Community legal centres (CLCs)

CLCs are independent, non-profit, community-based organisations that provide free and accessible legal and related services.

Another source of assistance to the accused are community legal centres. There are currently 53 CLCs providing general and specific legal services to Victorians. These centres receive funding mainly from the Commonwealth and Victorian Governments, but are also funded by the VLA, local councils, universities and other organisations. They provide free and accessible legal and related services to the community and for those individuals who are experiencing discrimination and disadvantage.

The extent of services provided by CLCs varies considerably. Some CLCs only offer advice; others can arrange legal representation. Many offer assistance only to those who live in a particular geographic location, while others may deal with criminal matters but not indictable offences. Each CLC has its own criteria for eligibility for services, such as:

- what type of legal advice is required
- whether other services are available to better assist the client, e.g. Youthlaw
- whether the person has a reasonable chance of being successful.

For those clients who require more than legal advice, CLCs generally apply the same criteria as that of VLA.

CLCs provide free and accessible legal and related services to the community, particularly to those who are experiencing discrimination and disadvantage.

The work of CLCs generates savings for government and the community. The Productivity Commission of Australia report, *Access to Justice Arrangements Inquiry Report No 72* (September 2014), indicated that the positive flow-on effects to the wider community from providing legal assistance services justify government involvement in, and funding of, legal assistance services. It also highlighted that, in many types of disputes, the avoided costs are greater than the cost of providing funding to legal assistance services.

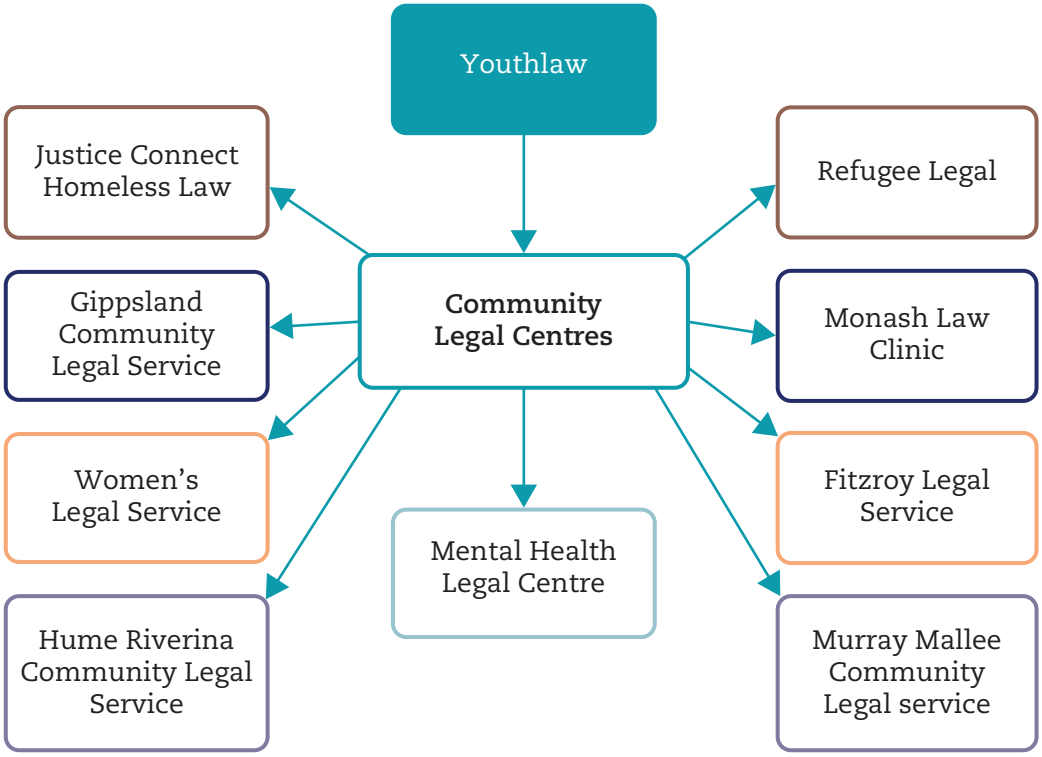

Figure 3.1 Examples of community legal centres in Victoria

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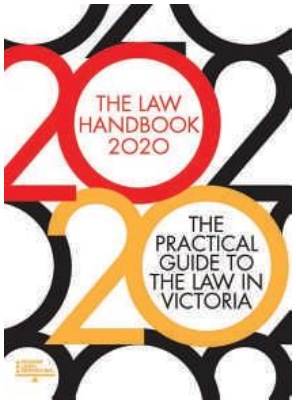
The role of CLCs



The Fitzroy Legal Service publishes the Law Handbook, a guide to laws that affect Victorians in everyday life.

Table 3.1 What do CLCs provide?

Legal advice and information	This can entail ongoing legal assistance and representation for those who face economic and social disadvantage, who are ineligible for legal aid and who cannot afford a private lawyer.
Duty lawyer	Where an urgent legal issue can be resolved in one day, a duty lawyer can provide advice and representation (see Table 3.2).
Community legal education	This is to allow people to know and better advocate for their rights. Written in plain English, legal resources are available for schools, community and other groups. For example, the Fitzroy Legal Service publishes *The Law Handbook* on an annual basis. The *Handbook* is a practical and comprehensive guide to law in Victoria, which is updated each year by over 80 legal experts.
Policy and advocacy	CLCs work to address economic and social injustice, such as unfair laws, policies and practices that can be the basis of legal problems; for example, the *Police Accountability Project* from the Flemington and Kensington Legal Centres. This empowers communities and drives law reform, campaigning against racially discriminatory police practices and calling for independent investigations into police misconduct.

For more information on community legal centres, visit the Federation of Community Legal Centres (Vic) website at www.fclc.org.au.

Table 3.2 Role of duty lawyers

Nature of assistance provided
Lawyers are placed at many courts across Victoria to help people who have a hearing, but do not have their own lawyer. The service is provided free of charge, but priority is given to those who: • cannot afford a private lawyer • have an intellectual disability, an acquired brain injury or mental illness • are experiencing or are at risk of homelessness • cannot speak, read, or write well in English • are Indigenous • are in custody or facing a serious penalty. Depending on an individual's circumstances, duty lawyers are able to give information (for some matters there is printed information available), provide legal advice about the law and what happens in court, represent the client in court on the day, or arrange for a legal aid lawyer to conduct the case. In criminal matters, assistance is automatically given to anyone going before the Children's Court. In the Magistrates' Court, priorities will include adults who have been remanded in custody and who are being brought before a court for the first time. The duty lawyer will provide advice and, where appropriate, make an application for bail.

Youthlaw

Youthlaw offers free legal advice if you are under 25 years of age.

Youthlaw is an example of a specialist community legal centre which provides free legal services for people who are under the age of 25 years. It has its base in Pelham Street, Melbourne, but also operates out of Frontyard Youth Services in King Street.

Youthlaw provides:

- Free legal advice if you are under 25 years. This can be provided via phone or email Victoria-wide.
- Outreach services and drop-in clinics via Frontyard Youth Services, but has also five Headspace centres and five youth centres.
- Legal information and resources; for example, Factsheets such as 'Becoming independent', 'Police powers and your rights on arrest', 'Going to court'.
- Policy and Advocacy Program for changes in laws, policies and practices which advance the human rights of young people.
- Family Violence Program, including support at Frontyard and a duty lawyer at the Melbourne Children's Court.
- Fines clinic, staffed by trained, later-year law students who are supervised by a lawyer.
- A legal training partnership with the Youth Affairs Council of Victoria.
- A legal education program.

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Access to CLCs

Advice is generally given to anyone, without conducting a formal means test; but where work is undertaken, a client is usually required to demonstrate an element of financial difficulty. If a client is able to pay for a private lawyer, an appropriate referral can be made. If court representation is required, the centre is able to arrange a barrister to appear on behalf of the client in court. Most barristers will appear for free or for a reduced fee, depending on the client's financial circumstances, the urgency of the case, the resources of the CLC's lawyer and the outcome of the application for legal assistance.

Anyone can seek advice from a CLC, but for further legal work a client needs to demonstrate financial difficulty.

News report 3.1

Legal action launched to get children out of adult prison

In December 2016, the Supreme Court heard a case brought against the Victorian Government by the Fitzroy Legal Service to ensure that children are not held in the Barwon maximum security adult prison.

About 16 children were sent to Barwon Prison after riots occurred at the Parkville Youth Justice Centre, resulting in considerable damage to facilities.

A spokesperson for the Fitzroy Legal Service said that all children have the right to be safe. Barwon Prison is undeniably unfit for children. Putting them in an adult jail is dangerous and sets a terrible precedent.

The Fitzroy Legal Service argued that the government:

- acted unlawfully when sending the children to Barwon Prison
- failed to act in the best interests of the children in its care; and
- breached the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in sending the children to an adult prison.

The children were locked in their cells for more than 20 hours per day. The spokesperson for the service said, 'Evidence shows that exposing children to these conditions causes irreparable psychological damage.'

Earlier, when a challenge on the same issue was brought by the Victorian Aboriginal Legal Service and the Human Rights Law Centre, the government had agreed not to hold Indigenous children in an adult prison.

The Supreme Court held that holding children in an adult prison was unlawful and that their human rights were at risk. Justice Garde ordered that the children be moved to a suitable youth facility by 4 p.m. the following day. However, he later granted a stay (halt) on that order, at least until 28 December, and acknowledged that the children had been sent to Barwon for emergency reasons and that there was nowhere else for them to go.

Following an unsuccessful appeal to the Court of Appeal, the Victorian Government reclassified a section of Barwon Prison as a youth justice facility. In May 2017, the Supreme Court again declared the detention of young offenders in an adult prison unlawful.

This second ruling forced the Victorian Government to find alternative housing for the 16 teenagers at Melbourne Youth Justice Centre in Parkville.

Justice John Dixon found that transferring and holding teenagers at an adult prison was infringing on their human rights. 'The limitations on the human rights imposed on the detainees was not demonstrably justified in a substantive sense as reasonable in a free and democratic society based on human dignity, equality and freedom.'

HM Barwon Prison

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Activity 3.2 Folio exercise

Institutions to assist an accused

1 Define the term 'legal aid'.
2 Provide two categories of people that legal aid can assist.
3 Justify why these people would need legal aid when confronted with a legal problem.
4 Explain the meaning of a means test and how it is assessed.
5 Explain the meaning of a merit test. Why do you think a merit test is applied when an application is made for legal aid?
6 Explain the role of Victoria Legal Aid (VLA).
7 Read Legal brief 3.2 'Adrian Bayley: should convicted killers have the right to legal aid?'

Draw up the following table:

Arguments in favour of providing legal aid to convicted criminals	Argument against providing legal aid for convicted criminals

List arguments for and against the provision of legal aid for people who have been convicted of serious criminal offences and are applying for an appeal.

8 Explain the role of community legal centres (CLCs). Outline the forms of services that CLCs can provide.
9 Some CLCs provide general legal information while others specialise to particular groups in the community. Use the Federation of Community Legal Centres (Vic) website to find the following information.
   - What is the nearest CLC to where you live? What services does it provide?
   - Look up the details of one CLC that provides general legal information and one that specialises in a particular area of need. How do the services of these CLCs differ?

3.3 Committal proceedings

When a person is charged with an indictable offence, there are pre-trial proceedings to ensure that the accused is treated fairly. Having a trial in the County Court or Supreme Court will be costly and stressful as well as taking time, so before the matter can proceed to a higher court, pre-trial proceedings are conducted in the Magistrates' Court.

In Victoria, the process for **committal proceedings** is governed by the *Criminal Procedure Act 2009* (Vic). Under section 96 of that Act, a committal proceeding will be heard in the Magistrates' Court when:

- a person has been charged with one or more indictable offences; and
- the accused has pleaded 'not guilty'.

Purposes of committal proceedings

Committal proceedings support an accused's rights.

Committal proceedings exist to prevent serious criminal prosecutions from being initiated indiscriminately. Under section 97 of the *Criminal Procedure Act*, the purposes of criminal proceedings are:

- to determine if there is evidence of sufficient weight to support a conviction
- to determine if the offence/s could be heard summarily before a magistrate in the Magistrates' Court
- to determine if the accused proposes to plead guilty or not guilty

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- if the matter goes to trial, to ensure it is a fair trial by:
  - ensuring the prosecution case against the accused is adequately disclosed
  - enabling the accused to know the evidence against them and to cross-examine witnesses
  - enabling the accused to adequately prepare and present a case
  - enabling the issues in contention to be clear and adequately defined.

There are different procedures within the committal proceedings heard before a magistrate in the Magistrates' Court.

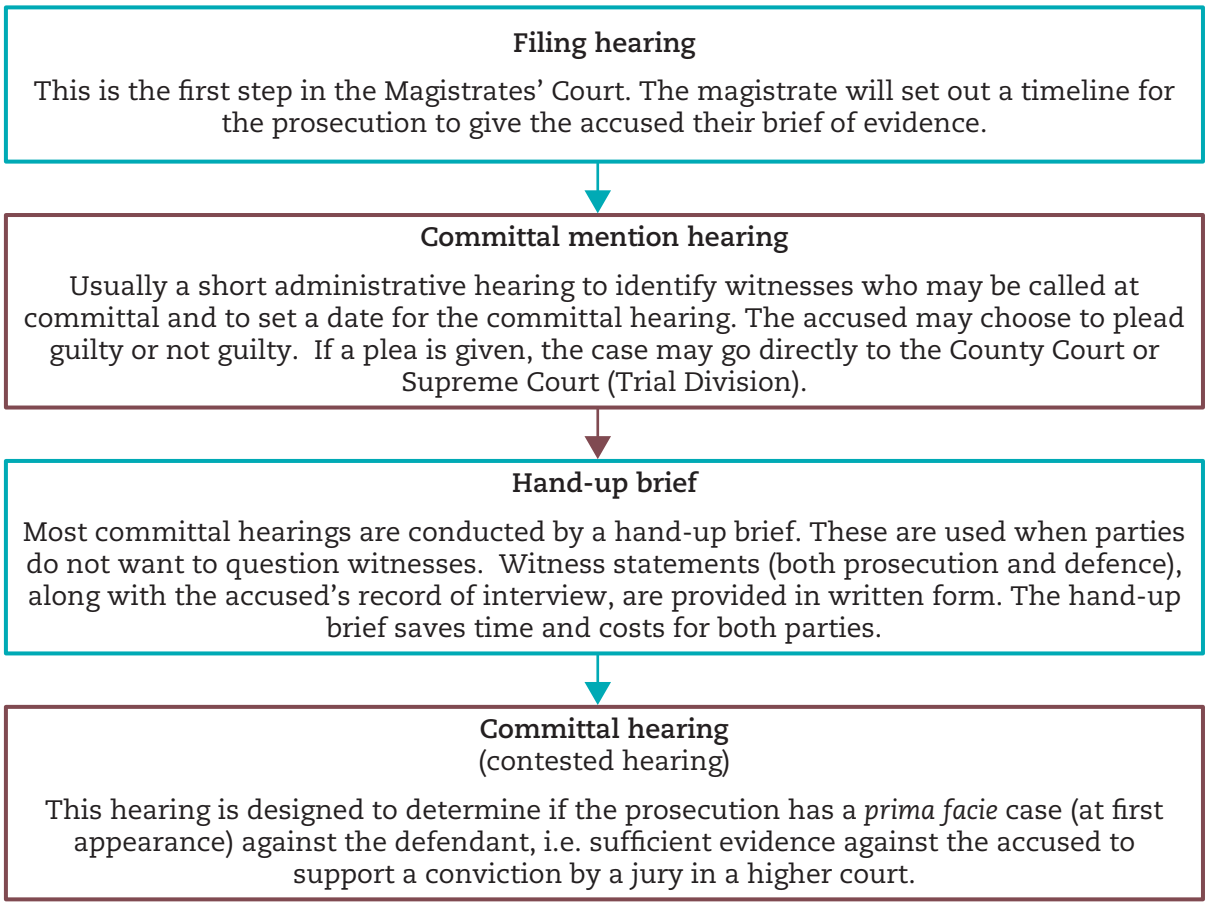

Figure 3.2 Procedures for committal proceedings

Although a magistrate may find from the **committal hearing** that the accused has a case to answer in a higher court, this does not mean that they will be found guilty at trial; rather, that at this point in time, there is enough evidence to commit the accused to trial. Committal proceedings also serve to expedite the operation of the higher courts and ensure that the time of a superior court is not wasted hearing matters that have no reasonable chance of a successful prosecution.

Most committals are conducted as hand-up briefs, where written documents are used instead of witnesses presenting evidence.

If the magistrate determines that the accused has a case to answer, the defence can request bail for the accused. Bail is the conditional release from custody while awaiting trial. It is presumed that an accused is entitled to be released on bail on their own surety. However, if the prosecution can show, to the satisfaction of the magistrate, that the accused should not be released pending his or her trial, they may be detained on remand; namely, held in custody awaiting their trial. This could occur if the accused is considered, for example, to be flight risk, likely to commit further crimes if released, or tamper with evidence.

A committal mention identifies those cases in which the defendant intends to plead guilty.

In cases where the magistrate deems that the prosecution does not have sufficient evidence for a jury to convict, the charges will be dismissed.

A committal hearing involves the hearing of the prosecution case in court. The defendant may elect to not present a defence.

The *Criminal Procedure Act 2009* (Vic) limits the cross-examination of some witnesses at a committal. These include:

- victims of a sexual offence
- children
- people with cognitive impairment (such as mental illness, intellectual disability, dementia, or brain injury).

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Committal proceedings are heard in the Magistrates' Court to determine if there is sufficient evidence to order an accused charged with a serious indictable offence to stand trial in a higher court.

Strengths and weaknesses of committal proceedings

Table 3.3 Strengths of committal proceedings

Fairness	A person does not have the expense of having a trial in a superior court, nor the stress or time delays it takes before a case is heard if, in the magistrate's opinion, the prosecution does not have enough evidence to support a conviction.
Onus is on the prosecution	It is the role of the prosecution to show the Magistrates' Court that there is a *prima facie* case against the accused. If the magistrate does not think enough evidence has been provided by the prosecution, the charges will be dismissed.
Accused is informed of the prosecution's case against them	The accused is able to better prepare for the case against them at trial. It can also better assist the accused to decide whether to plead guilty or not guilty. The accused is able to cross-examine witnesses (with some limitations) at a committal.
Dismissal of charges	If the defence is able to seriously challenge the evidence of a witness, the court may find that there is no reasonable prospect that a jury would convict. Therefore, the charges may be dismissed.
Prosecution can withdraw some charges	The prosecution is able to withdraw charges where the evidence is weak, thereby saving the DPP time and resources in a trial.
Saves limited court resources	Ensures that the time and limited resources of the higher courts and personnel are not wasted by trials that have no reasonable chance of a successful prosecution.

Table 3.4 Weaknesses of committal proceedings

Vulnerable witnesses	Witnesses, including the accused, can be treated to rigorous cross-examination. This is particularly difficult for vulnerable witnesses, including children and those involved in sexual assault offences.
Costly	The need for legal representation in committal proceedings, especially if the charges are to be contested (accused pleading not guilty and cross-examining witnesses) will add to costs.
Delays	Committal proceedings can add to the delays in getting a matter to trial. This will add to the costs and the stress of the accused.
Confusing	For people who do not understand the Victorian criminal justice system, they can confuse the committal proceedings with the actual trial.
Remand	Committal hearings add to delays in the legal system. Where the accused is held on remand (not granted bail), their employment, family and social situation will be affected. This will also make it more difficult in relation to the payment of costs, delays and stress.

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News report 3.2

Cardinal Pell to stand trial for historic sexual offences

After a four-week committal hearing, and eight months after charges had been laid, George Pell, the most senior Catholic leader in Australia, was committed to stand trial for historic sexual assault charges.

The Melbourne Magistrates' Court heard from 50 witnesses, 40 of whom gave evidence for the defence.

It took more than one hour for Magistrate Belinda Wallington to read out her decision. It included to strike out a series of serious charges against Pell, citing insufficient evidence for him to be convicted by a jury. She also found another group of charges that related to another complainant that could not be sustained, as well as inconsistencies in other evidence. However, the magistrate found that evidence from other witnesses was credible enough to be believed by a jury and ordered that the charges be heard in the Victorian County Court.

The 76-year-old will stand trial on charges relating to alleged sexual offending at a Ballarat swimming pool in the 1970s and at St Patrick's Cathedral in Melbourne in the 1990s.

Cardinal Pell pleaded not guilty to each of these charges.

For the first 10 days of the committal, the hearing was closed to journalists and the public. This is the usual practice with sexual assaults; it allows for the complainants' evidence to remain confidential.

The committal hearing though, has not been without its controversy.

Cardinal Pell's barrister, Robert Richter QC, is one of the most expensive silks in Australia, rumoured to charge a fee of $16 000 per day. Richter was critical of the police probe, called Operation Tethering, a taskforce set up in March 2013 to investigate historic sexual offences. Richter described it as an operation '… looking for a crime because no crime had been reported … Instead … they single-mindedly just pursued Pell'.

The prosecution of Cardinal Pell was brought by Victoria Police rather than the Director of Public Prosecutions (DPP), which normally handles major offences. It was reported in the media that the police brief was submitted to the DPP's office on two separate occasions, and returned both times, thus indicating that the DPP did not want to pursue it.

It is interesting to note that the DPP does not have to proceed with a trial if the committal hearing finds there is a case to answer. On the other hand, the DPP can also choose to proceed with a trial, even if a committal hearing has resulted in the dismissal of charges.

While some charges against Cardinal George Pell were dismissed for insufficient or inconsistent evidence, the magistrate committed him to stand trial in the County Court.

Activity 3.3 Folio exercise

Committal hearings

1 Define the term 'committal hearing'.

2 Outline the purposes of a committal hearing.

3 Read News report 3.2 'Cardinal Pell to stand trial for historic sexual offences'. With the use of a table, list the problems that arise for the accused and the witnesses from this case study.

Problems for the accused	Problems for the witnesses

The DPP can choose to proceed to trial, even though a magistrate has deemed there is not enough evidence to convict. The DPP can also choose *not* to go to trial, even when a magistrate has committed a person to trial. However, these should only occur in exceptional circumstances.

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3.4 Plea negotiations

Plea negotiations are informal discussions between the prosecution and defence to secure a guilty plea to lesser charges in exchange for the withdrawal of other charges; or an accused can plead guilty when both parties agree on the facts on which the plea is based.

Section 7 of the *Criminal Procedure Act 2009* (Vic) sets out that a proceeding for a summary offence must be commenced 12 months after the date the offence is alleged to have been committed; while, if a person is committed for an indictable offence (other than sexual offence), the indictment should be filed within 6 months after the date of committal (section 163).

The settlement of criminal disputes is an important part of obtaining justice for the victim, their family, the accused and the community in general. It is in the interests of all parties in the criminal justice system that matters are dealt with early and, where possible, that an appropriate resolution is sought.

The use of **plea negotiations** (also known as 'plea bargaining' or 'charge negotiations') is a well-established practice in the Victorian criminal justice system for both summary and indictable offences. However, the use of plea negotiations and sentence indications has attracted more attention than almost any other part of the criminal justice system.

Many legal practitioners argue that plea negotiations are an important, though controversial, part of reducing delays and costs for both the prosecution and defence, as well as reducing stress for the victim. Critics of the plea negotiation process refer to the fact that the sentencing judge may not be given all the information in relation to aggravating factors. A lack of transparency until after the trial has concluded can also give the impression of unfairness, and a lack of justice, to the victim and community.

Guilty pleas in court

In most criminal cases in Victoria, the accused person enters a guilty plea. According to the Sentencing Advisory Council, in the period 2008–14, almost 73% of criminal cases in the Supreme Court, and nearing 85% in the County Court, resulted in a plea of guilty without going to trial, or a plea of guilty being entered during the trial. For instance, if an accused makes a full admission about their involvement in the offence during an interview with police, it is likely that they will plead guilty at the trial. In such a case, there is no need for adjudication, and the role of the court is to determine the sanction that should apply.

Plea negotiations are informal processes between the defendant, and his/her legal representative, and the prosecution. The negotiations occur outside of court and involve discussions between the prosecution and the accused about securing a plea of guilty to a charge or charges in exchange for the withdrawal of other charges. An accused can plead guilty to a more serious offence if agreement can be reached on the facts on which the plea is based.

After the investigation of an offence, a number of decisions will be made. These decisions include whether to charge the suspect and, if so, what the charge or charges should be. In a number of cases, the charges initially filed are not those that eventually proceed. For example, if a person charged with a number of offences decides to plead guilty to some of them, the prosecution has the discretion to not proceed with other charges.

In many cases, the charge is clearly appropriate to the facts of the case, and the guilty plea can be seen as justified. In other cases, however, the police may 'overcharge'. This means that the police lay more charges than necessary because they expect that some of the charges will be withdrawn during pre-trial negotiations, in exchange for a plea of guilty to the remaining charges.

Controversy arises when the accused has negotiated a charge to a lesser crime than the one set out in the original charge. For example, this can arise if there are problems relating to evidence that will make it difficult for the prosecution to prove an issue with the credibility of an important witness.

Under the *Victims' Charter Act 2006* (Vic) the prosecution is required to inform victims about a decision to:

- accept a plea of guilty to a lesser offence
- substantially alter charges
- not proceed with some or all charges.

However, these obligations are not enforceable, and only require the victim to be informed of the decision after it has been made.

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Purposes of plea negotiations

Table 3.5 Purposes of plea negotiations

An early plea saves time, costs and stress for the prosecution, defence, the victims and witnesses in a criminal matter	According to a report of the Criminology Research Advisory Council in April 2018, late guilty pleas are among the main contributors to court delays. (Late guilty pleas are those entered on the day or up to two days prior to the commencement of a trial.) Late pleas waste preparation time and resources, and disrupt court schedules. A 'not guilty' plea that ends in a trial (or hearing) with the accused found guilty by a magistrate or jury means that witnesses and any victims have to face the trauma of reliving the crime and, in the process, being cross-examined as to their evidence. Delays and costs, both to the courts and limited legal aid resources, also occur.
Plea negotiations must ensure that when the accused negotiates for lesser charges, those charges still reflect the gravity of the original offence/s committed.	The community must have faith in the criminal justice system and not feel that the accused has 'gotten off lightly'.

An early guilty plea will save costs, time, stress and trauma.

Appropriateness of plea negotiations

To many, the process of plea negotiations looks like a 'win-win' situation. The prosecution secures a conviction, avoids the costs to the taxpayer of an expensive trial, and saves the victims of crime the trauma of appearing in court. Plea negotiations do indeed do this: they streamline the flow of cases by producing guilty pleas, thus saving court time, resources and stress.

The essence of any plea negotiation is to hasten the normal process, but at what cost? The potential for injustice to the defendant, the victim and the community can be great. An unprepared or inexperienced lawyer could advise a client to accept a plea negotiation when there may be the chance of an **acquittal**. The prosecution may go ahead with a lesser charge rather than prosecute for a more serious offence. A prosecution for a more serious offence may require lengthy argument, and the calling of many witnesses – this means considerable expense. Plea negotiations can be seen as a path to easy solutions to cases. However, how effective is our legal system if a plea negotiation discourages an accused from exercising their right to a fair hearing?

Critics of plea negotiations refer to the benefits it gives to the defendant. They argue that plea negotiations 'soften' the deterrent effect of punishment because they give criminal defendants the power to bargain for a lesser punishment. Some argue that more experienced criminals are more likely to receive favourable plea negotiations because they are familiar with the criminal law system. This operates against the idea that a criminal should receive a punishment that fits the crime.

Table 3.6 Appropriateness of plea negotiations

Strengths of plea negotiations	Weaknesses of plea negotiations
• The prosecution is able to get a conviction for the crime/s and the offender receives a sanction. • The process streamlines pre-trial and trial procedures and reduces delays in the legal system. • Plea negotiations save costs to the taxpayer. • The victim and other witnesses are saved the prolonged proceedings of a trial. If it was a violent crime, for example, it means they do not have to go through the circumstances again, including cross-examination by the defence counsel. • The offender may receive a reduced sentence from making an early guilty plea.	• Controversy arises when serious charges are downgraded. This can mean the public loses faith in the criminal system achieving justice and protecting the community. • The process lacks transparency – negotiations are not subject to review or appeal and are not reported. There are currently no legislative guidelines to plea negotiation procedures. • The victim does not get to testify against the accused so justice is not seen to be done. • Criminals who have committed serious crimes are back in the community earlier, having received a reduced sentence. • An inexperienced defence lawyer may encourage the accused to plead guilty as part of a plea negotiation when, in fact, if the case went to trial, the accused might have been acquitted.

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News report 3.3

Plea bargaining: a matter of negotiation

Plea bargaining is when a defendant pleads guilty to a lesser charge in order to be given a more lenient sentence. It is an important part of the criminal justice system, but not without controversy.

There was community shock when plea negotiations were used by gangland bosses Carl Williams and Tony Mokbel. Williams pleaded guilty to one count of conspiracy and three counts of murder on a plea deal with the Victorian Office of Public Prosecutions [OPP]; Mokbel was sentenced on drug trafficking offences after pleading guilty following a deal with the OPP, which allegedly included the withdrawal of eight additional drug-related charges and other charges related to his involvement in up to three murders.

However, Victoria's OPP firmly believes in plea bargaining, saying that by using this negotiation process, the backlog of criminal offences is reduced. It claims that the justice system is not undermined – arrangements reached in each case are based on justice, not expediency. They will reflect the evidence in the particular case and the charges the prosecutor thinks are appropriate.

Settlement of criminal cases can have positive effects for victims and their relatives, for the accused, and for the community's continued level of confidence in the criminal justice system.

Advantages and disadvantages of plea negotiations

Advantages of negotiating a settlement in criminal cases:

- There is certainty of the outcome for the prosecution and the community when the accused has pleaded guilty.
- Valuable community resources (both time and money) are used efficiently.
    - According to the OPP, each plea saves the justice system (and victims and witnesses) a trial. On average, a trial uses 7–10 days of court time, compared to about one day for a plea.
    - A 5% shift in completions from trials to pleas can reduce the number of trials by about 25 a year, saving approximately 175 court days. It is estimated that a day in court costs about $20 000 – this amounts to roughly $3.5 million per annum.
    - As a proportion of matters completed by the OPP, plea negotiations are growing significantly, with a corresponding fall in the proportion of cases going to trial.
- Decisions regarding plea negotiations are made according to the Director of Public Prosecution's (the DPP's) policy guidelines and in consultation with those involved.

Disadvantages of negotiating a settlement in criminal cases:

- Plea negotiations undermine the principles of public and open justice, where justice is seen to be done and the public has access to criminal proceedings.
- The lack of transparency can create perceptions of unfairness. The motives for plea negotiations can be unclear to the public and to victims. Victims may not be kept informed of the status of the case and may believe that the gravity of the offence is being lessened. For instance, during a bail hearing in the NSW Supreme Court, the judge criticised the DPP after learning that an offer had been made to reduce kidnapping charges against a man in 'secret negotiations' so that the case could be dealt with in the Local Court (equivalent to Victoria's Magistrates' Court). The judge was later advised that the DPP would not continue with the plea negotiation. The man was charged with kidnapping his former girlfriend and threatening to bury her alive.
- Plea negotiations are not formalised in Victoria's law. Their use falls within the discretionary powers of the prosecution.

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Activity 3.4 Folio exercise

Pleas: a matter of negotiation

1 Explain the meaning of 'plea negotiations'.
2 Explain how the availability of plea negotiations encourage guilty pleas.
3 Critics of plea negotiations argue that they 'soften the deterrent effect of punishment because they give criminal defendants the power to bargain for lesser punishments'.
   a Explain the meaning of the 'deterrent effect' of punishment.
   b Do you agree with the statement that plea negotiations soften the deterrent effect? Justify your answer.
4 'Plea negotiations are widely used in the criminal justice system, yet seldom praised.' Evaluate the weaknesses of the use of plea negotiations in the criminal justice system.
5 Do plea negotiations provide for justice in the criminal law system? Discuss.

3.5 Sentence indications

The sentence indication scheme was formally introduced into Victoria in 2008. Along with plea negotiations, it is another way of encouraging people to plead guilty early. Early guilty pleas save court time and costs, as well as sparing stress and trauma for the victims, the accused and witnesses.

Sentence indications can be given for summary and indictable offences. It allows an accused person, or their legal representative, to request an indication from the judge or magistrate as to whether:

- the accused will receive a **custodial sentence** and, if so, an idea of what that **sentence** may be
- another form of sentence would be given, such as a **community correction order (CCO)**.

Unlike a plea negotiation, a sentence indication involves going to court.

In relation to sentence indications, the *Criminal Procedure Act 2009* (Vic) provides that:

- If a non-custodial indication is given, and the accused pleads guilty at the next available opportunity (either immediately after the indication or at the next pre-trial hearing), this is then binding on the judge in sentencing, so a custodial sentence cannot be given.
- If a person pleads guilty after a custodial indication is given, this can be changed to a non-custodial penalty after the revelation of all material at a later plea hearing examination.
- If a sentencing indication is given, but the accused pleads 'not guilty', the case must be relisted with a different judge, unless all parties agree otherwise.

Under the *Sentencing Act 1991* (Vic), Victorian courts must take into account a guilty plea, and its timing, when determining an appropriate sentence.

A sentence indication allows a judge or magistrate to indicate to the accused whether they are likely to receive a custodial or a non-custodial sentence.

Sentence indications in the County Court or Supreme Court (indictable offences)

A sentence indication can be applied for only if the accused and the prosecution agree. This can occur at any time after the charges have been filed. However, in an indictable offence, there can only be one sentencing indication given unless the prosecution agrees to having a second indication.

A sentence indication for an indictable offence must have consent from the prosecution as well as the accused.

If the court agrees to a sentence indication, the judge is given a summary of the facts and any other relevant information. The judge is then able to indicate whether a custodial sentence is likely to be imposed if the accused pleads guilty at that time.

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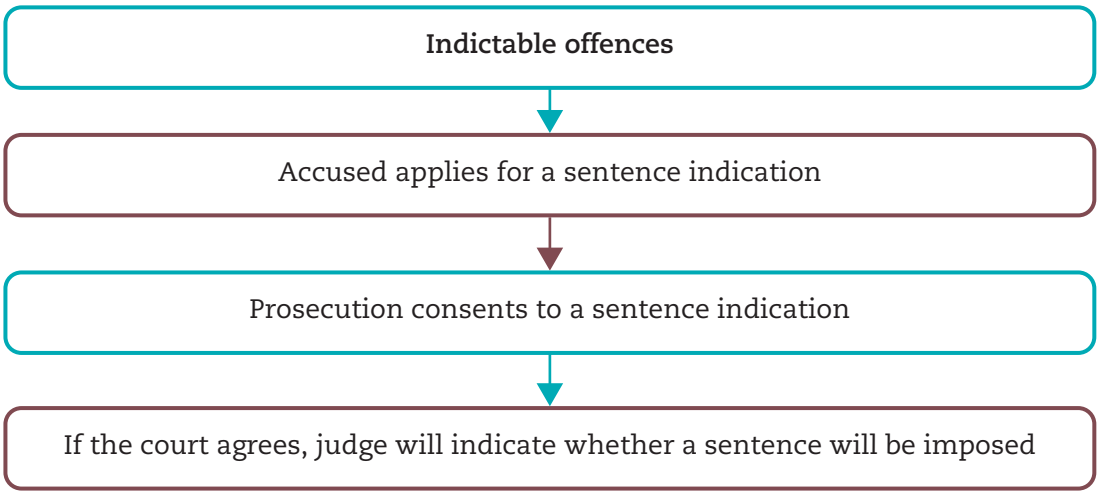


Figure 3.3 Process for sentencing indications for indictable offences

Sentence indications in the Magistrates' Court (summary offences)

A sentence indication can be given by a magistrate at any time during proceedings and includes an indication of:

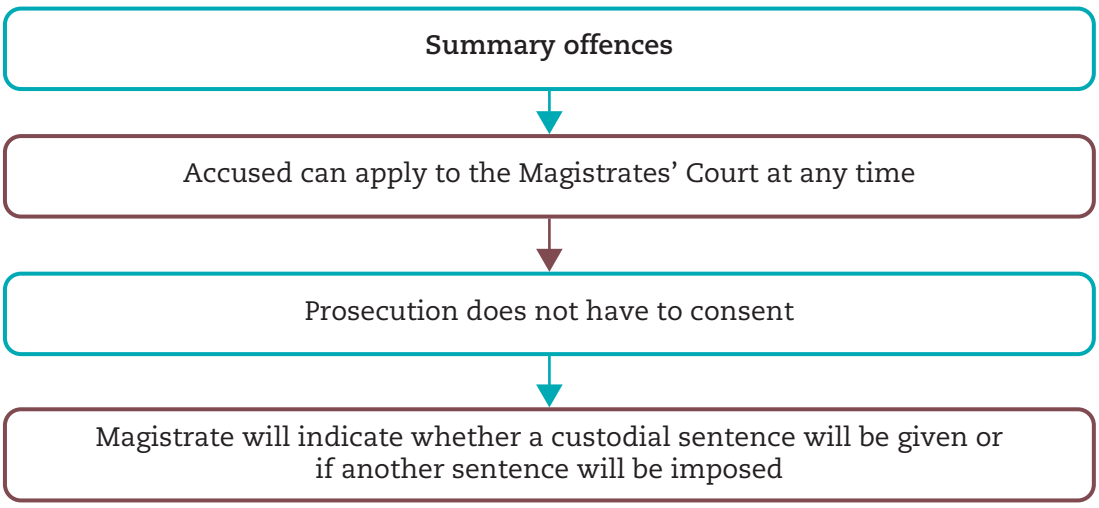
- whether the court is likely to impose an immediate custodial sentence
- the type of sentence that the court would be likely to impose, e.g. CCO.

In summary offences, the accused does not need to have the prosecution consent to a sentencing indication.

With summary offences, the accused can apply to the court for a sentence indication without the consent of the prosecution.

Purposes of sentence indications:

- A sentence indication can clarify the defendant's prospects about the likely sentence so that they can make an early decision about whether or not to plead guilty.
- The accused is likely to receive a lighter sentence.
- It allows for reduced delays in the court process which will also reduce costs, stress and inconvenience for the accused and the prosecution.
- It provides closure for the victim, their family and for witnesses. Having the accused sentenced can mean that they have accepted their responsibility for the crime (if pleaded guilty) and the victim feels vindicated.
- Victims and families do not have to go through a long trial or a contested hearing and the accompanying stress and trauma.
- Limited resources in the criminal justice system are freed up.



Figures 3.4 Process of sentencing indications for summary offences

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Appropriateness of sentence indications

A court can refuse to give a sentence indication depending on the type of case.

A sentence indication allows for an early plea and sentence, while allowing closure for the victim and related parties. It provides for a more efficient use of court resources. Whether sentence indications are appropriate will depend on several issues:

- The accused has to agree to, and apply for, a sentence indication. The court cannot give a sentence indication without the accused's consent.
- For indictable offences in the County Court or Supreme Court, the prosecution must agree to a sentence indication.
- A sentence indication can only be given once (unless the prosecution agrees to a second indication).
- The court can refuse to give a sentence indication depending on the type of case before them. Some offences, such as sexual offences and homicides, are regarded as inappropriate for sentence indications. There is considered to be community negativity towards those accused of domestic violence being allowed a sentence indication for an early plea. Likewise, cases heard in the Supreme Court are considered by many to be inappropriate for sentence indications.
- If the court deems there is 'insufficient information' of the impact of the offence on any victim, the judge or magistrate may refuse a sentence indication.

Strengths and weaknesses of sentence indications

Strengths of sentence indications:

- A sentence indication can lead to an early guilty plea and determination of the case. This reduces delays and lessens the backlog of court cases in the justice system.
- Sentence indications are considered beneficial for those accused who do not have legal representation. It can offer a better comprehension of the implications of a guilty plea. Many unrepresented people fear going to jail; they do not realise there are other sanctions, such as fines or CCOs.
- The stress, trauma and inconvenience for victims, their families and witnesses are minimised when an early plea is made. They do not have to go through the trial/hearing process. Witnesses do not have to undergo cross-examination.
- Victims can still give a Victim Impact Statement to the court for consideration in the sentence indication.
- The accused has certainty about the sentence they will receive; they do not need to wait until the end of the trial to learn their sentence.
- Under section 6AAA of the *Sentencing Act 1991* (Vic), a court is obliged to impose a less severe sentence than it would otherwise have imposed if the accused provides an early guilty plea.
- Sentence indications are more likely than plea negotiations to be accepted by the community.
- Sentence indications are able to be conducted in an open court. This provides for transparency and confidence in the justice system.

Weaknesses of sentence indications:

- Inappropriate sentences can be indicated, so that the saving of resources may be ineffectual if the DPP appeals the sentence in a higher court.
- It prioritises court efficiencies – reducing delays and early guilty pleas – above the interests of the public, victims and defendants.
- An accused may feel pressured to plead guilty rather than allowing a magistrate or jury to determine their guilt based on the evidence.
- An early guilty plea and a reduced sentence denies victims their day in court. Victims and their families may want to see justice occur in a guilty verdict (rather than a plea).
- A sentence indication and subsequent guilty plea may be given before all the evidence and facts of the case have been submitted to the court. Mitigating circumstances and aggravating factors may be unknown to the judge at the time of making the sentence indication. The sentence indication given may result in uncertainties for the accused in relation to what they would have received if all information had been provided to the court.

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- The law allows courts to conduct sentence indications in a closed court. When this occurs, it prevents transparency in the criminal justice system.
- For indictable offences, the court only has to indicate if the sentence will be custodial in nature – not length. This can still cause uncertainties for the accused.
- Some judges and magistrates may not provide a sentence indication, even though the accused has requested one. This does not allow for consistency or fairness in the criminal justice system.
- In the County Court and Supreme Court (although not the Magistrates' Court) the prosecution must agree to a sentence indication. Defence counsels argue that this does not provide for fairness in the criminal justice system.
- The scheme has also been criticised for its apparent incompatibility with other legislation, in particular the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that people charged with a criminal offence must 'not be compelled … to confess guilt'.
- Society's increasing pressure for harsher penalties may not be reflected in sentence indications.

News report 3.4

Banned Corio footballer Dylan Taylor jailed for on-field footy punch

Corio football player Dylan Taylor refused to plead guilty when given a sentence indication.

Banned Corio footballer Dylan Taylor has been jailed for six months for a brutal act of on-field thuggery in a practice match earlier this year.

Taylor, 25, threw a coward's punch that broke Newcomb ruckman, Tom Barber's jaw in two places and ended his season before it even began, the *Geelong Advertiser* reports.

He was deregistered from playing football in April after copping an 18-week suspension at the AFL Barwon tribunal for striking Barber, 26, off the ball.

'I think everyone understands that no form of violence is acceptable in the modern game … or off the field,' Mr Barber said outside court.

'I just play footy for a bit of fun and to try to help my team get off the bottom of the ladder, so for this to happen in a practice match … '

Barber was found semiconscious and bleeding moments after Taylor hit him, and had surgery the next day, while the match was abandoned.

The medicos inserted a permanent plate on each side of his jaw, six screws and also removed two of his wisdom teeth.

He was off work and eating pureed food for six weeks, and did not play football at all this year, but is hoping to return to the field in 2018.

Magistrate, Mr Coghlan, said Taylor's act needed to be condemned, noting such incidents scared parents off letting their children play football.

'This sort of thuggery on the football field, one would hope, was a thing of the past,' the magistrate said.

'A message needs to be sent that if you engage in this sort of violence on the football field, in an unprovoked manner, then terms of imprisonment will follow.'

Taylor's lawyer sought a community correction order for her client instead of a jail term.

When Taylor faced the Geelong Magistrates' Court in August he was offered a one-month jail term followed by a CCO [community correction order] for the crime by magistrate Ann McGarvie.

But to accept that sentence indication, Taylor, the father of one, had to plead guilty that day.

Instead, he opted to continue fighting the charges, and then changed his mind and agreed to plead guilty last week.

While his last-minute change of heart saved the court some time, Mr Coghlan noted it was a late plea that had chewed up police resources.

'In my view that (sentence) indication was a merciful one, and should've seriously been considered by you,' Mr Coghlan said on Thursday.

Source: Greg Dundas, Geelong Advertiser, *3 November 2017*

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Activity 3.5 Folio exercise

Sentence indications

1 What is a sentence indication?
2 Explain how a sentence indication operates for the court and the accused.
3 If a sentence indication is provided by a court, is the
   - court
   - accused

   then bound by it? Explain your answer.
4 Discuss how sentence indications affect the elements of justice in the criminal law system.
5 Read the case study of footballer, Dylan Taylor. Why would each hearing have a different magistrate?

3.6 Reasons for a court hierarchy

Each state, including Victoria, has its own hierarchy of courts that hear and determine matters relating to state law. In addition, there are federal courts, such as the Family Court, that deal with matters that have a federal jurisdiction. The High Court of Australia is our most superior court. It deals with the most complex disputes, including the interpretation of the Constitution, and is the highest court in Australia to hear appeals.

A **court hierarchy** means that courts are ranked from inferior to superior based on their **jurisdictions**. A jurisdiction relates to the power of a court to hear and determine particular cases.

A court hierarchy is a ranking in order of courts from inferior to superior.

There are two main types of jurisdictions:

- **Original jurisdiction**: the areas of law in which a court is able to hear and determine a case at the first instance (the first time the case is heard). If a person pleads not guilty, they will be tried in the court that specialises in that type of offence: for example, the Magistrates' Court is the lowest on the court hierarchy and will hear all summary offences, while the Supreme Court (Trial Division) will hear the most serious indictable offences, such as murder.

Original jurisdiction means the areas of law in which a court is able to hear and determine a case at first instance (the first time the case is heard).

- **Appellate jurisdiction**: the power of a court to review decisions made by lower courts. If a party is not satisfied the correct decision has been made by a court, they can apply to have an appeal heard by a superior court. These requests will usually be granted if there are suitable grounds.

Appellate jurisdiction is the power of a court to review decisions made by lower courts.

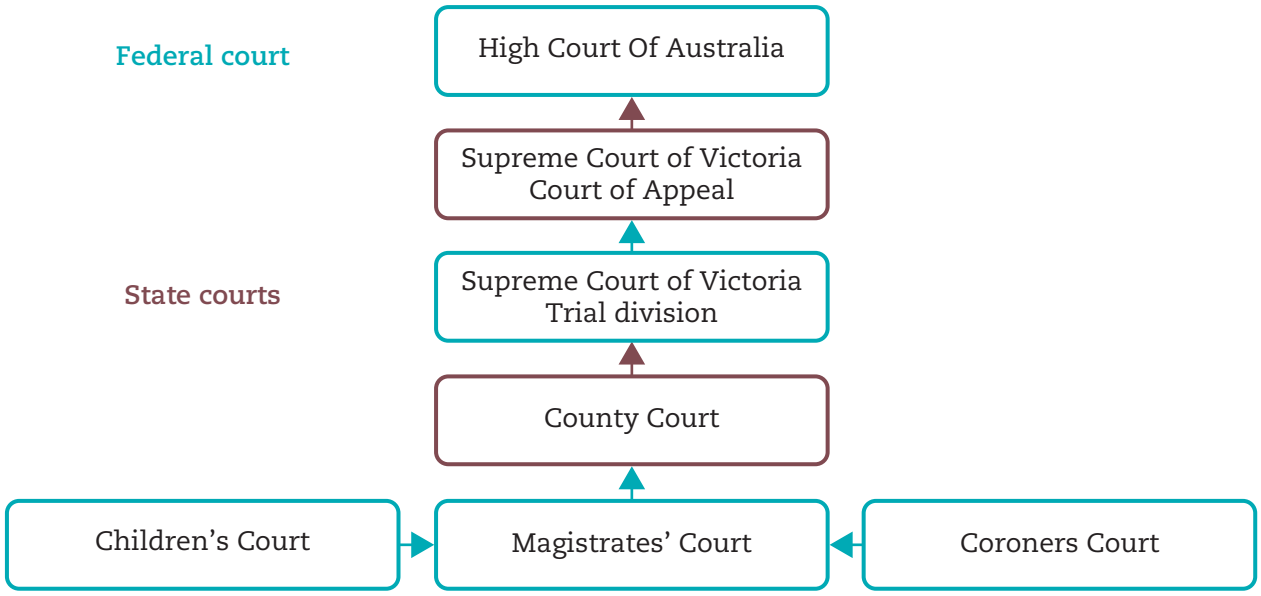

Figure 3.5 Court hierarchy

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Two key reasons for the Victorian court hierarchy in determining criminal cases are specialisation and to provide avenues for appeal.

Specialisation

A court hierarchy allows each court to develop the skills, expertise and processes to deal with specific types of disputes.

A court hierarchy enables the workload of the courts to be divided. Each court is limited to a specific area of jurisdiction in which it has expertise. The court processes are also streamlined to provide for specialised legal personnel and legal procedures. The judge or magistrate in each court can develop a specialised understanding of the law with respect to the types of cases that are determined in that particular court. This allows for consistency and reduced delays.

Here is a list of courts and examples of the cases that each one would hear:

- Supreme Court (Court of Appeal) – specialises in appeals relating to sentencing and convictions from the County Court and the Supreme Court (Trial Division). It will also hear matters on points of law
- Supreme Court (Trial Division) – hears and determines the most serious indictable offences, such as terrorism, murder and attempted murder
- County Court – hears and determines indictable offences such as drug trafficking, sexual offences, armed robbery and aggravated burglary
- Magistrates' Court – specialises in summary offences (e.g. traffic offences), **indictable offences heard summarily** and committal proceedings that are dealt with quickly.

Other courts have been established that specialise in particular cases; for example, the Children's Court and the Coroners Court. There can also be specialised divisions of the courts, such as the Koori Court (in both the Magistrates' Court and the County Court).

Appeals

The court hierarchy allows for a system of appeals to review the decisions of lower courts. This ensures fairness in the criminal justice system.

The right to appeal is fundamental to the concept of justice and fairness. A hierarchy allows an individual to appeal a case to a higher court. This would not be possible without a court hierarchy. People who believe that they have grounds for an appeal have the opportunity to have their case heard again in a superior court by a judge with specialist knowledge and expertise. The judge in the superior court is able to uphold the decision of the inferior court, or reverse the decision of the inferior court – this may create a precedent.

Legal brief 3.3

Cardinal George Pell's convictions quashed in High Court

Pell v The Queen [2020] HCA 12

In a unanimous outcome, the High Court quashed (reversed) Cardinal George Pell's convictions for child sexual assault.

Pell had served one year of a six-year sentence handed down by the County Court in March 2019, after a jury found him guilty of the commission of five sexual offences against children. (This was the second trial on these charges; the jury at the first trial was unable to agree on a verdict).

He appealed to the Court of Appeal, which delivered its decision in August 2019. In a 2:1 majority, it dismissed Pell's appeal, finding that there was sufficient evidence for the jury to find him guilty.

The applicant (Pell) applied to the High Court for special leave to appeal the Court of Appeal's decision in September 2019. In November 2019, Gordon and Edelman JJ referred the application to the Full Court of the High Court (seven Justices).

The High Court considered the question of whether there was a reasonable possibility that the offending had not taken place, and that there ought to have been reasonable doubt as to the applicant's guilt. This was based on other witnesses who had appeared in the County Court trial stating that it was Pell's practice to greet parishioners on the front steps of the cathedral after mass, thereby making it impossible for Pell to have committed the offences in the sacristy.

Pell's legal representative, Bret Walker SC, argued that the County Court conviction was unsound, and that the verdict of the jury was unreasonable given the evidence. In particular, there was the question of whether the jury had been affected by media attention. Also, the Court of Appeal had failed to take proper account of evidence that cast doubt on Pell's guilt.

The Court's decision, handed down by Chief Justice Susan Kiefel in April 2020, held that even though the jury had found the complainant's evidence in the County Court was thoroughly credible and reliable, the evidence of the other witnesses required the jury, if acting rationally, to have considered reasonable doubt as to Pell's guilt – 'a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof'.

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Koori Court – specialist court

The Koori Court is part of the Victorian Government's plans to reduce the overrepresentation of Aboriginal and Torres Strait Islander people in the justice system, both as offenders and victims. Koori Court divisions operate in Victoria in the Magistrates' Court (12 sites), County Court (four sites) and the Children's Court (12 sites).

'What's different about the Koori Court is that it provides an opportunity during the plea hearing for Elders to speak directly with offenders about their offending and the importance of offenders changing their behaviour,' said Judge-In-Charge Paul Grant at the opening of the Shepparton County Koori Court in 2018.

The Koori Court allows the participation of the Aboriginal or Torres Strait Islander community in the court process. The judge or magistrate is still in charge of the proceedings and will make the final decision on sentencing, but Elders and Respected Persons, a Koori Court officer, the defendant and their family can all contribute during the court hearing. The victim can also be present. It operates in a less formal setting, usually at a round or oval table that has the accused and their family and lawyers sitting alongside the magistrate, Elders or Respected Persons, and other relevant people. Participants speak in 'plain English' rather than legal jargon. Issues relating to the offence and sentence are discussed as a group. To appear before a Koori Court, the offender must identify as an Aboriginal or Torres Strait Islander person, and, because it is a sentencing court, they must have pleaded guilty to the charges. The court does not hear sexual offences.

The Koori Court was established so that the Aboriginal and Torres Strait Islander communities might better engage with the justice system. It aims to help offenders address the causes of their offending and so to prevent them reoffending.

The Koori Court is a sentencing court where Aboriginal Elders and Respected Persons assist the magistrate or judge to come to a culturally appropriate judgment.

The Koori Court is a sentencing court. This means that defendants must plead guilty to be able to come before it.

The Koori Court is culturally significant and reflects ownership in the administration of the law.

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News report 3.5

The benefits of Koori Courts

Victoria's Koori Court has been in operation since 2002, starting under the jurisdiction of the Magistrates' Court, then becoming part of the Children's Court, and finally forming part of the County Court network. Shepparton is the latest addition to the County Koori Court network in 2018.

The County Koori Court started as a four-year pilot program in 2009. An evaluation found that it provided for culturally relevant and appropriate justice. It was found that the experience of Indigenous defendants is vastly improved by the availability of this court: of the 15 who were interviewed, 14 said that it was more engaging, inclusive and less intimidating than the mainstream court.

These comments show the benefits of the Magistrates' Koori Court:

Ownership: Increases ownership of the administration of the law – breaks down the disengagement that Aboriginal and Torres Strait Islander people have had with courts. Offenders get a system that is far more meaningful to them and one they can readily engage with. Rather than being adversarial, the process allows Elders and Respected Persons to help get to the cause of criminal behaviour. They can offer advice and address the defendant.

Community awareness: The court is seen as part of the community. It helps people address and correct criminal behaviour within local Aboriginal or Torres Strait Islander communities, and increase awareness about community codes of conduct and standards of behaviour.

Breaks the cycle: Reduces the likelihood of people reoffending (**recidivism**) and entering a criminal career, and reduces the number of breached court orders. Sentencing alternatives can be explored. The role of Elders 'shaming' the offender can be more effective than a prison sentence, but Elders take no part in the sentencing. (Offenders have already pleaded guilty – they are subject to the same penalties as mainstream courts: about 70% receive a custodial sentence.)

Personal hearings: There is no dominance of legal professionals, no hierarchies of traditional courtrooms; all participants are able to fully participate and to speak for themselves. Elders or Respected Persons, the Koori Court officer (who has an integral role in protecting the community), the defendant and family can all contribute to the proceedings.

Easy understanding: There is no legal jargon – just plain English.

Offender participation: Actively encourages the participation of the offender and those who know him or her.

Victims: Offenders cannot shy away from the Victim Impact Statement. They have to sit at the table and have what they did to the victim said to them from a metre or so away. This can be devastating.

Racial bias reduced: Community participation removes racial bias in the court.

Embrace: The justice system, including the police, and the broader local community, has embraced the courts.

Children's Court – specialist court

The Children's Court has two divisions: a Criminal Division and a Family Division.

The criminal jurisdiction of the Children's Court is to hear and determine summary and indictable offences committed by persons from the age of 10 years to under 18 years at the time of the offence and under 19 years at the time of the hearing. It does not hear cases of murder, manslaughter, arson causing death, or culpable driving causing death (these are heard in the Supreme Court (Trial Division) or the County Court).

The Court has the jurisdiction to also hear and determine committal proceedings for all charges against children for indictable offences, bail applications, and breaches and/or variations of sentencing orders.

The Children's Court also has a Koori Court to hear matters relating to criminal offending by Aboriginal or Torres Strait Islander children and young people, other than sexual offences. They must:

- be Aboriginal or Torres Strait Islander
- want to go to the Koori Court
- not be charged with a sex offence; and
- plead guilty or have been found guilty of their offences.

Two Aboriginal Elders or Respected Persons participate with the presiding magistrate in the sentencing conversation. However, the determination of the sentence remains the magistrate's responsibility.

The President of the Children's Court is appointed from the County Court Bench. Magistrates in the Children's Court are trained and supported by a registrar, counsellors and court liaison officers.

ISBN 978-1-108-87276-8 Poore et al.

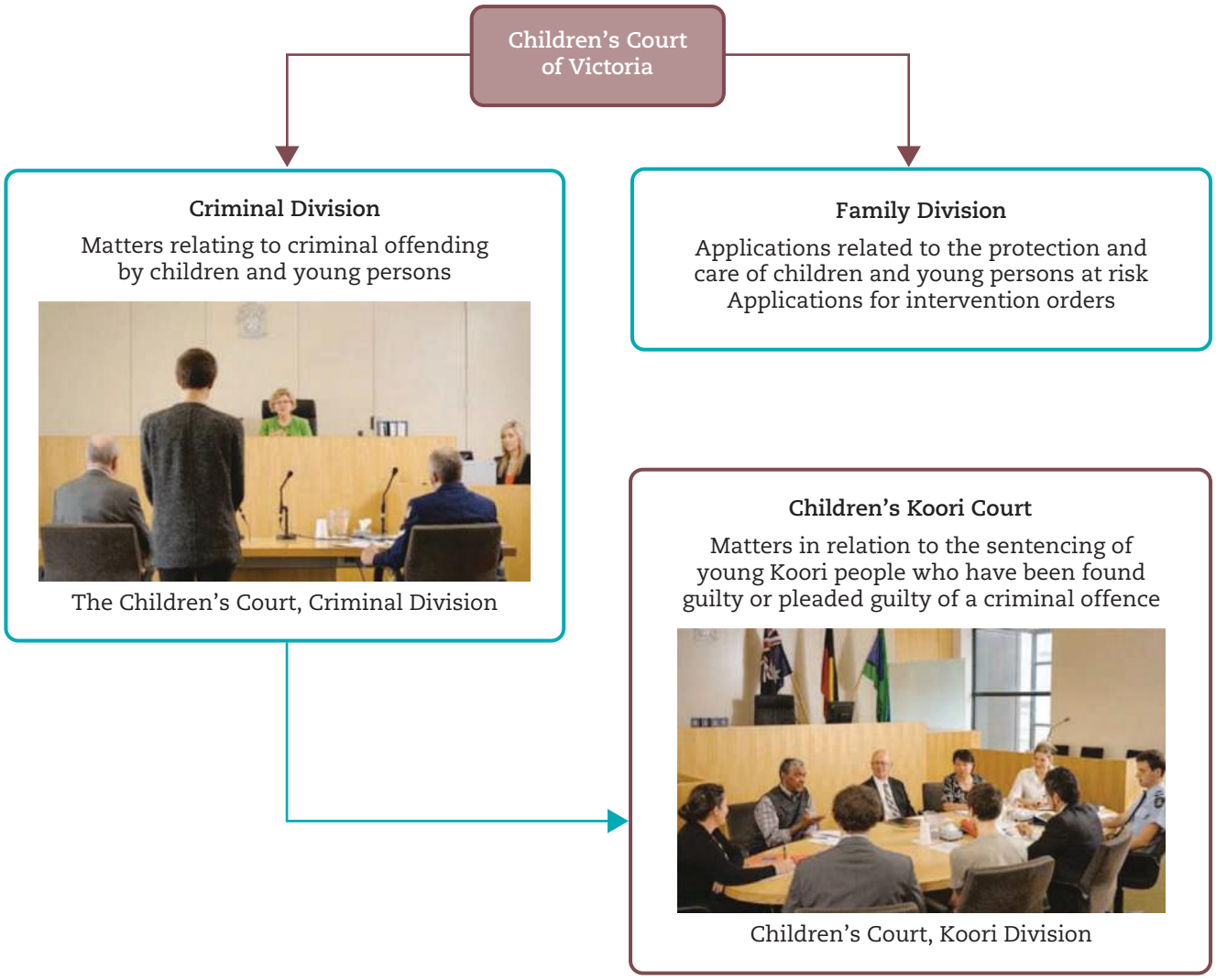

Figure 3.6 Children's Court of Victoria and divisions

Other reasons for a court hierarchy

Other reasons for a court hierarchy include the following:

Administrative convenience	A court hierarchy makes efficient use of the limited financial and physical resources available for criminal cases. A hierarchy is administratively convenient because it provides a means of allocating cases quickly, thus reducing the likelihood of delays. Summary offences can be allocated to the Magistrates' Court, where they can be heard relatively quickly. More complex indictable matters generally take longer to hear. These cases are heard in higher courts by judges with the expertise to deal with such matters.	A court hierarchy provides for the most efficient use of court resources and avoids delays.
Doctrine of precedent	The operation of the doctrine of judicial precedent is dependent on a hierarchy of courts. Precedents are new legal principles established in the superior courts. The decision of a superior court is binding on all courts lower in the same hierarchy in cases where the facts are similar. An important advantage of the doctrine of precedent is that it provides for consistency in laws.	A court hierarchy is necessary for the doctrine of precedent to operate.
Time and money	Determining a criminal case can be a costly and time-consuming process. A court hierarchy enables summary offences to be dealt with relatively quickly and inexpensively in the Magistrates' Court rather than having them determined in the County Court or Supreme Court. A visit to the local Magistrates' Court will illustrate how quickly some cases can be resolved: on any given day, it may hear many more cases than the County Court or Supreme Court could hear in days, weeks, or even months.	A court hierarchy allows minor cases to be heard relatively quickly and in a less costly manner.
Expertise and experience	A court hierarchy enables more serious, difficult, technical, or complex cases to be heard by experienced and specially qualified judges. Cases concerning murder are heard in the Supreme Court (Trial Division). Supreme Court judges have many years of experience as lawyers before their appointment. The parties to cases benefit from having highly qualified judges appointed to their case. Appeal cases can be particularly complex and demand an experienced and well-qualified judge.	A court hierarchy allows cases to be allocated to courts with the appropriate expertise and experience.
Minor matters determined locally	A court hierarchy also allows for the idea of a 'local' court to settle minor disputes. Minor matters are usually heard in the Magistrates' Court closest to the scene of the alleged offence.	A court hierarchy permits minor cases to be heard in local courts in local areas.

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Table 3.7 Criminal jurisdictions of Victoria's courts

Court	Original criminal jurisdiction (and court composition)	Appellate criminal jurisdiction (and court composition)
Supreme Court (Court of Appeal)	No original jurisdiction	Appeals from a single judge of the Supreme Court (Trial Division) or County Court
Supreme Court (Trial Division)	The most serious indictable offences, such as murder (one justice and, where the plea is 'not guilty', a jury of 12)	From a Magistrates' Court (one justice) on a point of law
County Court of Victoria	Majority of serious indictable offences, (one judge and, where the plea is 'not guilty', a jury of 12)	Appeals on conviction or sentence from the decision of a magistrate (one judge)
Magistrates' Court	All summary offences and indictable offences heard summarily Committal proceedings Warrants Bail applications (one magistrate)	No appeals, being the lowest court in the hierarchy

Why have your case heard in the Magistrates' Court?

The advantages of having an indictable matter prosecuted in the Magistrates' Court include:

- The matter will be dealt with relatively quickly and inexpensively, as compared with being tried in the County Court. This is particularly important if the defendant is remanded in custody until the matter is dealt with by the court.
- If the defendant is found guilty by the court, the maximum penalty that can be issued by a Magistrates' Court is less than the maximum penalty than a judge of the County Court can hand down. A magistrate can sentence up to two years per conviction with a total sentence of five years.
- The Magistrates' Court is less formal than the County Court. While representation by a lawyer is advisable, it is not absolutely necessary.
- Time delays are generally less when going to the Magistrates' Court than the County Court. This can save costs. Costs can further be saved if your solicitor can appear for you in the Magistrates' Court; in the Country Court you generally need a barrister as well as your solicitor.

Activity 3.6 Folio exercise

Reasons for a court hierarchy

1 Explain what is meant by a court hierarchy.

2 Define the term 'jurisdiction'.

3 Identify and explain two reasons for having a court hierarchy in relation to the criminal justice system.

4 Justify the existence of specialist courts such as the Children's Court and the Koori Courts for criminal proceedings.

5 Read Legal brief 3.3 'Cardinal George Pell's convictions quashed in High Court'.

- What court originally sentenced the defendant?
- Explain the role of the Court of Appeal and the High Court in relation to this case. To what extent does a system of appeals in the criminal justice system uphold the principles of justice?
- Explain the standard of proof in criminal law. What do you think the High Court meant by '…the evidence did not establish guilt to the requisite standard of proof'? With reference to this case, explain why it is important that the standard of proof is set so high.

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3.7 The responsibilities of key personnel in a criminal trial

Many people are involved in a criminal trial and each has a specific role.

There are many people involved in the criminal justice system and each has a key role. The adversary system is the method of trial used in Australia. An adversary is an opponent in a contest. The adversary system provides procedures for the parties (prosecution and defence) to present their evidence and arguments to an independent and impartial judge or magistrate. There will be one winner and one loser; the accused will be found either guilty or not guilty.

The key personnel – judge, jury, prosecutor, defence counsel (solicitors and barristers), accused and witnesses – all have important responsibilities during the trial.

The criminal trial

Before we continue, it may be helpful in your understanding of the responsibilities of key personnel in a criminal trial to give an overview of how a trial operates. This is not in the Study Design, it is just to assist your understanding.

The process of a trial is not in the Study Design. It may assist in your understanding of the role of key personnel in the criminal trial.

A criminal trial begins in the County Court or the Supreme Court and is heard before a judge or a jury. A hearing in the Magistrates' Court follows the same procedure but does not include a jury.

A criminal trial begins with the arraignment: this is when the judge's associate reads out the charge/s and asks the defendant whether they plead guilty or not guilty

Pleading guilty

If the accused pleads guilty, a summary of evidence is presented. Any earlier convictions are read out. Information in relation to the character of the accused may be presented. The victims can submit Victim Impact Statements. Counsel acting for the accused may submit arguments of leniency or an appropriate penalty. The judge then passes sentence; in some instances, the judge may wait until further information is available, particularly in relation to medical reports or earlier convictions. If the sentence is delayed, the accused may be remanded in custody or released on bail.

If the accused pleads guilty, a summary of the case is presented and the accused is sentenced.

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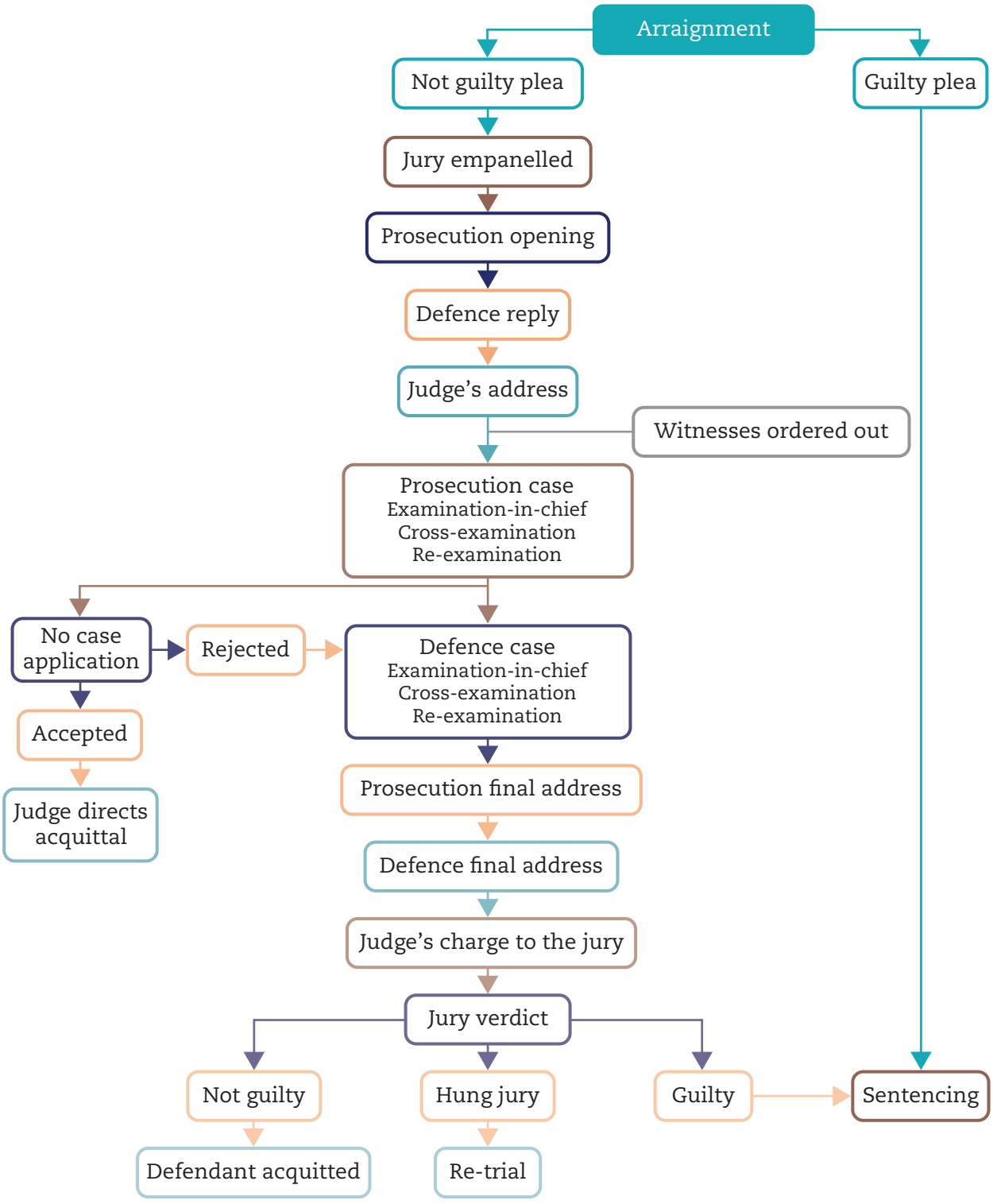

Figure 3.7 The criminal trial

The prosecution presents a summary of the case.

The defence presents a response to the prosecution.

Pleading not guilty

A 'not guilty' plea lengthens the trial process because the case is heard by a judge and 12 jurors. Following a plea of not guilty, a jury will be empanelled. The role of the jury is to decide whether the prosecution has proven that the accused is guilty 'beyond reasonable doubt'. Any questions of law that have not been resolved at the directions hearing (a pre-trial procedure) will be resolved prior to empanelling a jury.

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Table 3.8 The process of a criminal trial

Prosecution opening	The prosecution starts with a summary of the case. This summary explains: • the nature of the alleged offences • the elements that must be proved by the Crown • the evidence that the prosecution will be presenting to the court in order to prove the charges against the defendant.	The prosecution presents a summary of the case.
Defence reply	The defence presents a response to the prosecution opening. This response must outline the issues in the trial and identify those facts that are not contested (i.e. the facts the two sides agree on). This should be consistent with what was disclosed or identified in the pre-trial stages. The trial judge may limit the length of the prosecution opening or the defence response.	The defence presents a response to the prosecution.
Address to the jury	Immediately after the defence response to the prosecution opening, or at any other time the trial judge thinks appropriate, the trial judge may address the jury on: • the issues in the trial • the relevance to the conduct of the trial of any admissions made • directions given or matters determined before the start of the trial.	The judge addresses the jury on issues relating to the trial
Prosecution case	Before any witnesses are called, the court may 'order out' witnesses (ask them to leave the courtroom). Prosecution witnesses are then called, one at a time. Witnesses are examined-in-chief (by the prosecution), cross-examined (by the defence) and re-examined (by the prosecution). The rules of evidence are complex. The judge will decide whether questions or evidence are admissible. Court rules also govern how barristers question witnesses. Some evidence is not allowed in criminal trials because it is considered prejudicial to the accused. For example, as a general rule, evidence about previous convictions can only be introduced after the jury reaches a verdict. Evidence about previous convictions is used to help the judge determine the appropriate sentence. In some cases, the court can allow information about previous criminal convictions of defendants. This type of evidence is known as 'propensity' evidence. For instance, the prosecution may want to present evidence about previous convictions for violent offences to demonstrate that the accused has a propensity for (tendency towards, or habit of) violent behaviour.	The prosecution calls witnesses.
'No case' application	At the end of the prosecution's evidence, the defence may argue that there is no case to answer. If the judge agrees, the jury will be directed to acquit the accused.	
Defence case	If the case is still proceeding, the defence can then present witnesses. Defence witnesses are examined in the same way as prosecution witnesses; that is, a witness is examined-in-chief (by the defence counsel), cross-examined (by the prosecutor), and re-examined (by the defence counsel). The accused can remain silent, i.e. not take the stand to give evidence. The judge (and jury) and the prosecution cannot draw any inference from this: the fact that the defendant has decided not to give evidence cannot be taken as a sign that the defendant has something to hide.	The defence calls witnesses. The accused has the right to remain silent.
Final addresses	After the defence completes its case, both the prosecution and the defence address the jury. This stage can be quite crucial, particularly in longer trials in which the jury may have forgotten or overlooked evidence presented earlier. Counsel summarise the evidence presented, drawing attention to the strengths of their arguments and highlighting the weaknesses in the other side's argument.	The defence and prosecution sum up their case.
Judge's charge to the jury	The judge instructs the jury: • on the relevant points of law. This is referred to as the judge's 'charge' to the jury • summarises the evidence from both parties • advises the jury that the onus is on the Crown to prove 'beyond reasonable doubt' that the accused is guilty of the offence/s.	The judge instructs the jury on the relevant law.
Verdict	The jury then retires to the jury room to consider its verdict. When a jury cannot reach a unanimous verdict after a 'reasonable' time depending on the complexity of the evidence, a majority verdict may be accepted in some cases. A majority verdict is defined as the verdict of 11 out of 12 jurors. The judge can, on the advice of the jury foreperson, declare the jury a 'hung jury' – a jury unable to reach a verdict. In this case, the jury is discharged and a new trial is ordered. Obviously, this represents a great deal of time and considerable expense to the parties and the community. Consequently, it is preferable to extend the jury's time limit, particularly if an agreement is likely. Even if it appears that the jury is at loggerheads, the judge may return the jury to the jury room to reconsider the matter. When the jury reaches a verdict, the jury foreperson informs the court of the verdict. Being found not guilty means being acquitted. When there is a guilty verdict, the judge will pass sentence.	The jury reaches a verdict. A majority verdict can be accepted except in murder, serious drug offences and Commonwealth offences, where a unanimous verdict is required. After a guilty verdict is reached, the judge sentences the offender. The judge can take into account a range of factors, including the impact of the crime on the victim.

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Responsibilities of the judge in a criminal trial

The judge presides over the court.

The judge is responsible for ensuring that both parties obey the rules of evidence and court procedure. One important function of the judge is to ensure that the party who bears the burden of proving the case – the prosecution – has legally satisfied this responsibility.

Where there is a judge and a jury, the judge does not reach a decision as to guilt. At the end of the hearing, the judge presents a summary of the evidence, the issues presented by the parties and the relevant law to the jury. When doing this, the judge must act independently and impartially, and treat each party equally and fairly.

County Court of Victoria Chief Judge Peter Kidd

Table 3.9 The role of the judge

Deciding the admissibility of evidence	The judge may exclude inadmissible evidence, such as hearsay (hearsay evidence is when a person outside the courtroom relates, not what they know themselves, but what they have heard from others). Evidence must be relevant to the case, otherwise it may prejudice the jury's final decision. The *Evidence Act 2008* (Vic) governs the admissibility of evidence in Victoria. The judge may also need to decide on opinion evidence and expert witnesses. Opinions are not accepted in an adversary system of trial unless the person giving evidence is an expert witness, e.g. a psychiatrist.
The selection and empanelling of a jury	At the start of the trial, the judge will give an outline of the case to the potential jurors and the approximate length of the trial. The judge will need to decide if a juror needs to be excused from sitting on the jury (e.g. they know the defendant or their job prohibits them sitting on a long trial).
Assisting the jury	If the jury has any questions during the trial, they may ask the judge through the jury foreperson. The judge is responsible for clarifying any issues raised in the trial; e.g. the jury should not assume guilt if the accused has chosen not to give evidence. At the end of the trial the judge will sum up the evidence to the jury, outline what they need to decide and explain the standard of proof required.
Safeguarding the rules of procedure	The judge must ensure that each party acts according to the rules of procedure; e.g. there can be no 'leading questions' in examination-in-chief; prior convictions cannot be raised during the trial.
Deciding all questions of law	Although each party may present evidence to suggest which law applies to their case, the ultimate decision as to the relevant law is the judge's.
Deciding questions of fact when there is no jury	When there is no jury, such as in the Magistrates' Court, the magistrate performs the role of both judge and jury. The magistrate decides if the facts have been proven and how the law applies to those facts. Once these two issues have been decided, the magistrate reaches a decision (verdict). In the County Court or the Supreme Court, where a jury is present, the jury is the trier of facts. The jury must decide the facts of the case from the evidence given by each party and how the law, as prescribed by the judge, applies to the facts.
Deciding the sanction	In a criminal case where the defendant has been found/has pleaded guilty, the judge decides the appropriate sanction keeping in mind the guidelines set out in the *Sentencing Act 1991* (Vic); e.g. section 6AAA provides that a court needs to impose a less severe sentence than otherwise if the offender has pleaded guilty to the offence.

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A judge in a criminal trial must ensure parties adhere to the rules of evidence and procedure.

The judge may also need to assist a person representing themselves in court or directing them to the duty lawyer (VLA) for assistance before the trial/hearing begins.

The judge is not allowed to intervene unnecessarily in the conduct of the case. The judge must remain neutral and cannot assist the parties in the presentation of the trial, either to prompt a party to ask a particular question of a witness or to introduce a legal issue. The parties in an adversary trial are responsible for their case. The judge must listen carefully to all the evidence presented by both parties.

The judge can only ask questions of witnesses when it is necessary to clear up any point that has been overlooked or obscured. The impartiality of the judge in a trial is seen as the key to ensuring that justice is being done. Justice includes the concept that every individual will be treated fairly and equally. This can only be achieved if the judge is an impartial observer of the contest.

The role of the judge is to be independent and impartial.

Responsibilities of the jury

The use of juries is based on the idea that you have the right to be judged by your peers. The word 'peer' comes from a Latin word meaning equal. To be judged by your peers means to be judged by persons with the same legal standing – ordinary members of the community. Juries are made up of ordinary men and women randomly selected through the Victorian electoral roll. The jury system also reflects the idea that everyone in a community is responsible for the administration of justice.

A jury of 12 is used in criminal trials (that is, for indictable offences) in the County Court and Supreme Court in which the accused pleads not guilty.

The jury box in one of the courtrooms of the County Court of Victoria in Melbourne

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Table 3.10 Responsibilities of the jury

Attends the trial each day	If a trial is going to take an extended period of time, the judge may empanel up to 15 jurors in case, for example, any fall ill.
Listen to all the evidence and submissions by both parties	Jurors must listen to all evidence and submissions from both parties impartially, and without bias. They need to determine whether, and to what extent, the evidence is to be believed and whether any inferences can be drawn from the evidence. They need to put aside any prejudice they may have.
Listen to the judge in explaining the law	The jury must accept and apply the judge's direction of the law. They must follow instructions given by the judge on questions of evidence, procedure and points of law. They must also follow the judge's direction, if issued, to acquit the accused.
Decide questions of fact	Both parties in a trial will provide evidence to support their case. However, the jury alone is the decider of the facts.
Take note of the judge's final summary of the case	When both parties have concluded giving their evidence, the judge will give the jury directions which include the relevant law and, if necessary, an explanation of what it means. The judge will also sum up the relevant evidence and may explain the standard of proof that is required. In some cases, the jurors may be required to come to a unanimous verdict (12/12 jurors decide guilty, or 12/12 decide not guilty), or a majority verdict (11:1). Jurors may ask questions through the jury foreperson to clarify any issue.
Reach and deliver a verdict	The jury will retire to the jury room to deliberate. During this time, the jury must only speak about the case with the other jury members in the jury room and with all the jurors present. Jury members must be prepared to discuss the evidence with the other jurors, including what they think and why. They must also allow other jury members to speak. They need to come to an agreement based on the standard of proof. In a criminal case, this is 'beyond reasonable doubt'.

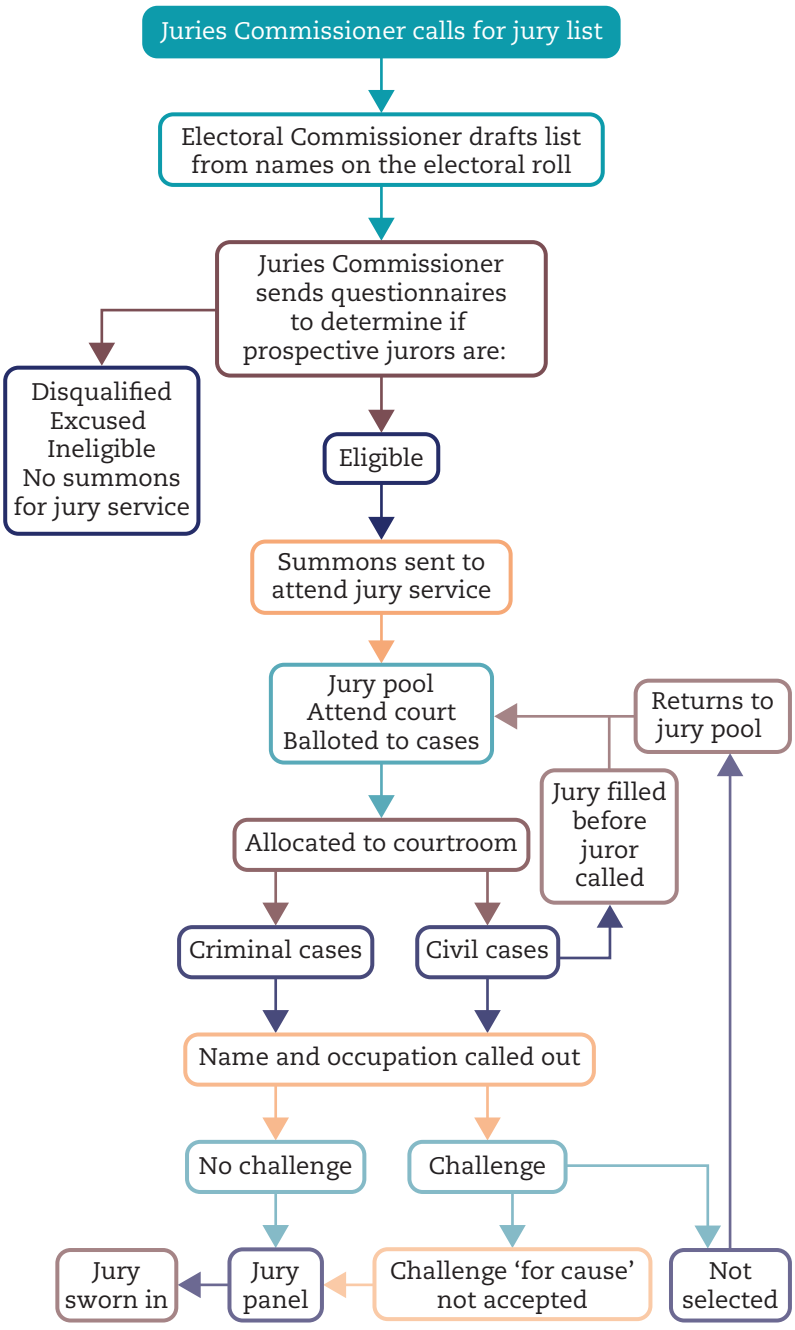

Figure 3.8 How juries are selected

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The responsibilities of the jury

Once the jury has been empanelled and sworn in, the judge will ask the jury to elect a foreperson.
The foreperson's role includes:

- asking the court questions on behalf of individual jury members or the whole jury
- taking responsibility for deliberations
- delivering the verdict.

The foreperson is not, however, meant to influence the jury's verdict. Their vote does not carry any extra weight.

When lawyers have presented their evidence and arguments, the trial judge will explain their role to the jury. Essentially, the jury is a fact-finding body that must:

- listen to all the evidence presented by both parties
- consider the evidence
- reach a decision based on the evidence.

The role of the judge in a jury trial

When a case is being heard by a judge and a jury, the judge presides over the court and instructs the jury on its role and responsibilities. The judge:

- explains which party has the burden of proof
- explains the standard of proof required
- applies the rules of evidence and procedure
- directs the jury as to the law that applies to the case
- gives rulings on points of law when appropriate
- summarises the law that is applicable to the case
- answers questions from the jury
- sentences the offender if s/he is found guilty.

The jury listens to the evidence of both parties, determines the facts of the case and reaches a verdict.

A jury for a criminal trial is made up of 12 people randomly selected from the electoral roll.

The judge will pass sentence.

In a criminal case, a judge may direct the jury to acquit the accused if the judge believes, at the conclusion of the prosecution evidence, that the charge has not been proved by the evidence.

After hearing the case, the jury retires to the jury room to consider the evidence and reach a verdict. When the jury reaches a verdict, the foreperson reads the verdict out to the court.

If a verdict cannot be reached, the judge may declare the jury to be a 'hung' jury. In this case, the jury is discharged and a new one is empanelled. The trial will then recommence, from the beginning. Judges are reluctant to discharge a jury because of the cost and the time involved in rehearing a case.

Magistrate Pauline Spencer

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News report 3.6

In the line of duty

Graphic evidence of rotting bodies in barrels and the death of a toddler would rock most people. Imagine sitting in the jury box and being confronted with graphic and horrific evidence. Imagine trying to put aside your emotions in an effort to be fair in reaching a verdict. Imagine how things heard during the trial could haunt you. Being a juror in any case is not easy. For some jurors, particularly those hearing murder cases, the experience can be traumatic. This can be the result of carrying out a civic duty, for a juror.

Snowtown murder case

Such was the trauma caused by the Snowtown murder trial that some of the jurors were counselled during the proceedings. Justice Brian Martin, of the South Australian Supreme Court, warned jurors not to think about the case. After leaving the court, they were addressed by a psychiatrist. Ongoing counselling was arranged for jurors, court officials and staff who saw and heard the evidence.

The jurors saw photographs of the autopsies of eight murder victims whose bodies had been kept in barrels. They heard what was found in barrels – large pieces of skin, matted knots of hair, a kneecap, bones, dismembered torsos, bodies slashed, tortured and cut. They heard evidence of the screams of victims as they were tortured. They heard of toes being crushed with pliers. One victim was decapitated and had her arms cut off.

This trial concerned the murder of 11 of the 13 victims. The killings were uncovered when police found eight rotting and dismembered bodies in six barrels inside a former bank in Snowtown, a country town north of Adelaide. Two other bodies were discovered in an Adelaide backyard two days later. Another man, whose body was found hanging from a tree, also became part of the murder count, as did the remains of a young man whose bones were discovered in 1994 but were only identified five years later.

Four jurors were excused during the 11-month trial, which cost $15 million. South Australia's first fully electronic courtroom was established to deal with the evidence, which included more than 1000 exhibits and resulted in 16 000 pages of court transcript. A total of 228 witnesses, many related to the alleged killers and the victims, were called. (At the end, the jury was hung.)

Jaidyn Leskie case

Across the border in Victoria, jurors in the trial of Greg Domaszewicz heard about the death of toddler Jaidyn Leskie. The Domaszewicz jury consisted of eight men and four women. They came from a panel of 60. Twenty-five asked to be excused. They were aged between early 20s and late 60s, and English-speaking. When asked by Justice Frank Vincent if any others had second thoughts, three more asked to be excused. The defence counsel challenged five members, and all were indeed rejected. The Crown made no challenges. One of the 12 jurors was excused late in the trial following the death of a relative.

Both of these shocking cases captured the attention of the nation.

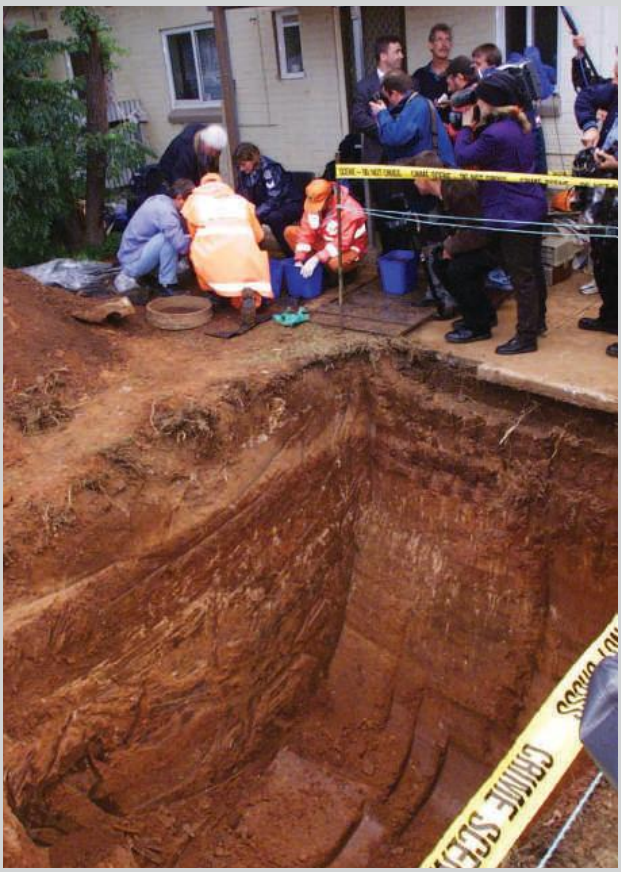
Civic duty

It is a civic duty to be a juror. Jurors come from and represent the community in which they live. They are there to reflect the values and moral codes of their community. It is not a glamorous job. The pay is lousy. Thanks are few – the judge may speak of a 'valuable contribution' at the end of the trial. Jurors will leave the court from a side door and may bid each other goodbye. That's it!

Stress factors

Studies report that jurors can experience stress. There can be rage, depression, flashbacks, nightmares, irritability and sleeplessness. A study by the University of NSW and the Justice Research Centre found that jurors experienced frustration due to time delays and not receiving all the relevant information about the case. They also had concerns about time, accommodation and food.

Stress factors for jurors can be multiple. They may include dealing with gruesome or graphic evidence, media attention, fear of revenge by the defendant, the length of the trial, community response, lack of anonymity in country locations, the personalities and group dynamics of the jury, and the sense of community responsibility. It is important to note that in Victoria, counselling and debriefing is now offered to jurors. Only about 1% of jurors actually participate in the programs offered.



Police sift through soil at the house where two bodies linked to the Snowtown case were discovered in a backyard grave.

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Activity 3.7 Structured questions

The jury in the criminal justice system

1 Explain the role of the jury in a criminal trial.
2 Discuss the purpose of having a jury determine a verdict in criminal cases in the County Court and the Supreme Court.
3 Distinguish between a unanimous verdict of a jury and a majority verdict.
4 Contrast the role of a magistrate to that of a judge in a jury trial.
5 Read News report 3.6 'In the line of duty' and outline the factors which could make jury service difficult.

News report 3.7

Five members of one family murdered

After three years of court hearings, including four separate trials, a NSW Supreme Court jury found Lian Bin 'Robert' Xie guilty of the murder of five members of his extended family. The majority decision was accepted by Supreme Court Justice Fullerton on 12 January 2017.

The trial involved the murder of Xie's brother-in-law, newsagent Min Lin, Min Lin's wife Lily Lin, her sister, Irene Lin, and Min and Lily's two sons, Henry (12) and Terry (9).

Xie was first charged with the murders in May 2011. In the first trial, the jury was discharged for legal reasons. The jury was again discharged in the second trial, due to the ill-health of the trial judge. The third trial, which lasted 10 months, failed to reach a verdict. The fourth trial, which led to the conviction, began in June 2016.

During this last trial the jury was sequestered (isolated) in a hotel from 12 November, to help them focus on the task. On 6 January, the jury stated that they could not reach a unanimous decision. The following Monday, when they restated their position, the court granted permission for them to hand in a majority verdict of 11 to 1.

In Victoria, a majority verdict is not permitted in murder trials.

Lian Bin 'Robert' Xie

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Activity 3.8 Case study

The role of the jury

1 Explain how the jury helps achieve fairness in the criminal justice system.

2 Read News report 3.7 'Five members of one family murdered'. What do you think the impact of a retrial would be on the accused, the prosecutor and witnesses?

3 In murder trials, a jury must come to a unanimous decision, meaning all 12 jurors must agree that the accused is guilty or all 12 jurors agree s/he is not guilty. Why do you think the NSW Supreme Court judge allowed a majority 11:1 verdict in Xie's case?

4 What impact could a majority verdict being accepted in a murder trial have on the achievement of justice?

5 Read News report 3.8 'The right to trial by jury'. Why is it considered so important in our legal system that the decision of guilt or innocence is left to the jury?

News report 3.8

The right to trial by jury

Jury trials in Victoria account for about 0.5% of criminal proceedings. The system is regarded as a very important institution.

The High Court's Justice Deane has probably given the best defence of the jury system. In the decision in *Kingswell v The Queen* (1985) 159 CLR 264, he said that the 'rationale and the essential function' of trial by jury is 'the protection of the citizen against those who customarily exercise the authority of government: legislators … administrators … judges'. He continued:

> Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a 'fair go' tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases.

Courtesy of the High Court of Australia

Responsibilities of the parties

In a criminal trial, there are two parties:

- the prosecution
- the accused (defendant).

In a criminal case, each party – the accused and the prosecution – is responsible for presenting the relevant evidence to support its case. In criminal cases in Victoria, which involve an offence against the State, the State is represented by the Director of Public Prosecutions (DPP).

The Office of Public Prosecutions prepares and conducts prosecutions for the DPP.

The prosecution will initiate a case against the defendant. The decision to initiate a case is based on evidence presented by a law enforcement officer. The law enforcement officer may be a police officer or other authority, such as a transit officer.

The prosecution can discontinue a prosecution.

In presenting their cases, each party decides which arguments they intend to rely on and selects the evidence that supports these arguments. In a criminal trial of an indictable offence, the prosecution must present the bulk of this evidence at the time of committal. The defendant is under no obligation to disclose evidence at the committal hearing.

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Mark Gibson SC, Crown prosecutor against Cardinal George Pell, arrives at the County Court in Melbourne.

The responsibilities of the prosecution

The prosecution is responsible for bringing criminal matters to court. They act for the government and the people of Victoria in pursuing action against those who have breached the criminal law.

In Victoria, the prosecution is comprised of the Director of Public Prosecutions (DPP) and the Office of Public Prosecutions (OPP) who work under the direction of the Solicitor for Public Prosecutions and the Crown Prosecutors' Chambers.

The prosecution is responsible for key decisions, including:

- whether to prosecute
- what the charges should be
- whether a criminal matter should be withdrawn or discontinued
- whether to appeal.

The prosecution's responsibilities include conducting committal proceedings in the Magistrates' Court, prosecuting indictable offences in the County and Supreme Court, and conducting criminal appeals.

Committal proceedings in the Magistrates' Court

Before an indictable offence can be heard before a judge and jury, an accused will have a committal hearing in the Magistrates' Court, where a magistrate will determine if there is enough evidence to commit them to trial. It is the responsibility of the prosecution to present all relevant evidence against the accused. If the magistrate decides there is sufficient evidence, the accused will be committed to trial; if not, the charges will be dismissed.

Summary offences (less serious offences) are usually prosecuted by Victoria Police; however, in particular circumstances, the DPP can prosecute some summary offences, e.g. when the prosecution involves a member of the police force.

Prosecuting indictable offences in the County and Supreme Court

The prosecutor must prepare a case for trial. This includes researching the relevant area of law and deciding which evidence and witnesses to call. The evidence and witnesses that the prosecution is going to rely on must be provided to the defendant prior to the trial.

In court, the prosecutor's role includes:

- taking part in empanelling the jury and assisting the judge in matters relating to the jury; the prosecutor is to assist the jury to determine the facts of the case
- giving an opening address to the jury outlining the prosecution's case
- presenting evidence and witnesses to support the prosecution case

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- giving a closing address to the jury providing a summation of the evidence presented by the prosecution
- making submissions to the court in relation to sentencing.

Criminal appeals

These generally occur in the County Court and the Court of Appeal. Most appeals conducted by the prosecution are in relation to conviction and/or sentence. For example, the DPP appealed against the manslaughter sentence imposed on Borce Ristevski (see Legal brief 3.6). He was sentenced by the Victorian Supreme Court to nine years imprisonment with a non-parole period of six years. The DPP appealed to the Court of Appeal on the basis that the sentence and non-parole period were 'manifestly inadequate'. The Court of Appeal increased Ristevski's prison sentence to 13 years with a non-parole period of 10 years.

A discontinued prosecution can be recommenced if further evidence becomes available.

The responsibilities of the accused

Pleading not guilty

The accused has the choice of pleading guilty or not guilty. Those who plead not guilty will have the opportunity to present a case in their defence. In most instances, the accused will engage a legal representative to prepare and present their case. The accused is responsible for arranging and paying for this. A solicitor will provide advice and will prepare the case (a 'brief') for a barrister. The barrister is a member of the Bar and will present the case in court.

The parties are responsible for presenting their case.

If a person does not hire a lawyer to present their case, they may be disadvantaged. Solicitors and barristers have expertise in the presentation of cases in court and may be able to present a more persuasive argument than an individual who does not have any experience with court processes. The trial may not be a contest between two equal parties if one of the parties does not have legal representation.

Pleading guilty

If the accused pleads guilty, a summary of the case is presented and the accused is sentenced.

If the accused pleads guilty:

- a summary of evidence is presented
- any earlier convictions are read out
- information in relation to the character of the accused may be presented
- counsel acting for the accused may submit arguments in favour of leniency or an appropriate penalty.

The judge then passes sentence. In some instances, the judge may wait until further information is available, particularly in relation to medical reports or earlier convictions. If the sentence is delayed, the accused may be remanded in custody or released on bail.

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The legal practitioners

Legal practitioners can be:

- A solicitor – when a matter is heading to court, the role of the solicitor is to prepare the 'brief' for the barrister. This will entail contacting the other party and the court, preparing documentation necessary for the case, researching the necessary law and relevant precedents and previous cases, gathering evidence, ensuring all material is ready for the trial and briefing the barrister.
- A barrister – also known as a counsel or advocate, the barrister will represent the party in court. The primary responsibility of a barrister is to act on behalf of their client. They act as independent practitioners who take their instruction from the solicitor.

Legal representatives prepare and present the case for the parties.

Legal practitioners prepare and present the case for the parties. They can be solicitors (who prepare the 'brief') or barristers (who represent the party in court).

Public Defenders Unit (PDU)

As a result of a recommendation by the Victorian Law Reform Commission (VLRC) to establish a Public Defender Scheme, VLA implemented the Public Defenders Unit (PDU), which is a team of advocates.

The role of the PDU includes:

- providing representation for clients with a grant of legal assistance
- conducting strategic and test case litigation to challenge the law
- being involved in justice and law reform activities
- developing initiatives to ensure quality advocacy for clients.

According to VLA: 'The PDU appears in some of the most difficult and complex matters VLA deals with, including murder, conspiracy, sex offences, arson and important test cases on issues such as human rights.'

The VLRC stated that the aim of establishing such a unit is to encourage the development of high-level skills among a select group of defence barristers and to provide a resource for educating later generations of criminal trial lawyers.

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Activity 3.9 Folio exercise

Criminal cases pre-trial procedure

1 Identify the parties in a criminal case.
2 Explain the role of the accused in a criminal trial.
3 Explain the role of the DPP in Victoria.
4 Distinguish between the role of the judge and a magistrate in the criminal justice system.
5 Explain the difference between the role of a solicitor and a barrister in a criminal trial.
6 Using an annotated flow chart, describe the pre-trial processes leading up to a trial in Victoria.
7 Draw up a table listing what you think are the strengths and weaknesses of parties being in control of their own case in the criminal justice system.

Strengths of parties in control of their own case	Weaknesses of parties in control of their own case

8 To what extent do the responsibilities of:
   a the judge
   b the jury
   uphold the principles of justice?

3.8 The purposes of criminal sanctions

The *Sentencing Act 1991* (Vic)

The *Sentencing Act* sets out a range of factors to be considered in determining a sanction.

The *Sentencing Act 1991* (Vic) is the key legislation guiding sentencing in Victoria. It sets out:

- the purpose of sentencing
- the hierarchy of sentencing options (organised from least severe to most severe)
- the factors a court considers when sentencing.

The purposes of the *Sentencing Act* includes:

- promoting consistency of approach when dealing with offenders
- providing fair procedures for:
  - imposing sentences
  - dealing with **offenders** who breach or contravene conditions of their sentence.

It offers a range of **sanctions,** including fines, community correction orders (CCOs) and imprisonment.

For information about sentencing, visit the Sentencing Advisory Council at www.sentencingcouncil.vic.gov.au.

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Former Chief Justice of Victoria Marilyn Warren

Crimes Act 1958 (Vic)

In addition to the *Sentencing Act 1991* (Vic), other important legislation guiding sentencing includes the *Crimes Act 1958* (Vic), which identifies indictable offences (the most serious offences) and states the maximum terms of imprisonment. The *Summary Offences Act 1966* (Vic) sets out summary offences (less serious offences). Drug-related offences and their maximum penalties are identified in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and driving offences are set out in the *Road Safety Act 1986* (Vic).

***Crimes Act 1958* (Vic)**

- Section 3 Punishment for murder

  Notwithstanding any rule of law to the contrary, a person convicted of murder is liable to—

  level 1 imprisonment (life); or

  imprisonment for such other term as is fixed by the court—as the court determines.

The *Sentencing Act 1991* (Vic) sets out the purposes or reasons for sanctions being imposed, which a judge must take into account. These include:

- *Just punishment:* to inflict some kind of loss or burden on the offender in a manner that is just, given the circumstances of the crime committed. The hierarchy of sentencing options allows various degrees of loss to be imposed, ranging from a financial loss (fine) to deprivation of liberty (imprisonment). The principle of proportionality operates to guard against the imposition of an unduly lenient or harsh sentence. For example, a long prison sentence would be considered a 'just punishment' for a serious crime such as murder. (The median sentence for murder – the sentence in the middle of all the sentences in length – is 20 years.)
- *Deterrence:* there are two types of deterrence: general (public) and specific. General deterrence is aimed at preventing crime in the general population for fear of the perceived consequences. The punishment serves as an example to members of the public who might be tempted to commit a crime. In contrast, specific deterrence is designed to deter the particular offender from reoffending. A person who loses their licence for drink driving will hopefully be deterred from driving under the influence again.
- *Rehabilitation:* to establish conditions that would alter or modify the behaviour of offenders so that they will abandon their wrongdoing and reintegrate into society as law-abiding citizens. Rehabilitation includes general education programs and drug dependency programs designed to address the underlying issues contributing to the criminal behaviour.

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- *Denunciation:* to condemn and criticise publicly the conduct of the offender as wrong and inexcusable. This is a fundamental purpose of criminal law and of sentencing, as it requires that a sentence should also communicate society's condemnation of the particular defendant's behaviour. The concept of denunciation is explained in *R v MacDonald* (unrep, 12/12/95, NSWCCA), where Gleeson CJ, Hunt CJ at CL and Kirby P said:

  > In a case such as the present, it is important to bear in mind the denunciatory role of sentencing. Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances calling for a variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime … The protection of human life and personal safety is a primary objective of the system of criminal justice. The value of which the community places upon human life is reflected in its expectations of that system … Society was entitled to have the conduct of the respondent denounced at least in that fashion.

- *Community protection:* sanctions should operate to protect the community against the potentially harmful actions of individuals: removing an offender from the community, for example, extinguishes the threat of harm to others. However, the principle of proportionality ensures that a sentence should not extend beyond what is appropriate to the crime merely to protect society. A custodial sentence or imprisonment (removing an individual from the community) is seen as a last resort.

The purpose of a sanction is to provide for just punishment, deterrence, rehabilitation, denunciation and community protection. For young offenders, rehabilitation is the principal consideration, as identified in the *Children, Youth and Families Act 2005* (Vic).

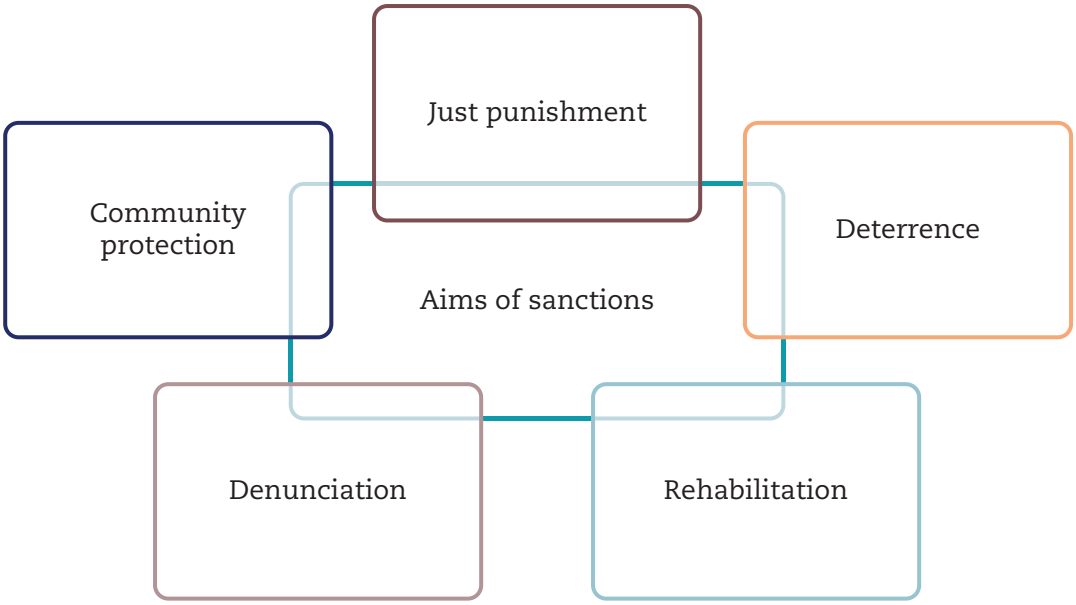

Figure 3.9 The purposes of a sanction are set out in section 5 of the *Sentencing Act 1991* (Vic).

3.9 Types of sanctions

There is a hierarchy of sanctions – imprisonment is considered the last resort.

The *Sentencing Act 1991* (Vic) sets out a hierarchy of sanctions. The courts are required to consider less severe sanctions, such as adjournments or fines, before imposing harsher sanctions, such as imprisonment. The provisions of the Act apply to all courts except the Children's Court.

Sentencing children

Sentencing children requires a different approach due to their vulnerability and need. The *Children, Youth and Families Act 2005* (Vic) identifies rehabilitation as the primary purpose in sentencing children in the criminal justice system.

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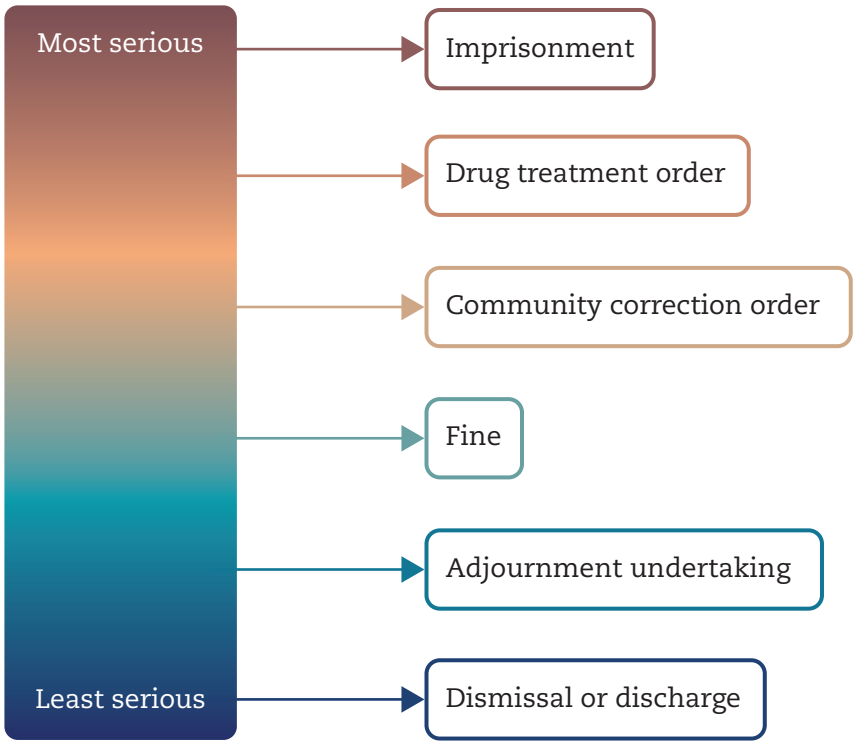

Figure 3.10 The *Sentencing Act* sets out a hierarchy of sanctions.

Dismissal, discharge and adjournment

Where possible, the aim is to not record a conviction against the defendant – even if he or she is found guilty of the offence. A criminal conviction of any kind can have a number of negative effects on an offender. Its immediate effects can include a licence cancellation, and/or financial loss due to a fine. It may also have indirect and long-lasting consequences. For example, applications for insurance, loans and jobs may be less likely to succeed, and may even be denied, on the grounds that the person has a criminal record.

A court will therefore consider the following factors in relation to whether or not to impose a recorded conviction:

- the nature of the offence committed
- the character and record of the offender
- the impact of the conviction on the offender's employment, social and economic wellbeing.

Dismissal

A dismissal is an order by which the court finds an offender guilty of an offence but does not record a conviction or impose a sanction.

Dismissal, discharge and adjournments give courts the discretion to not record a conviction and/or not impose a sanction. These options are most likely to be used in relation to relatively minor offences or first offences.

Discharge

A discharge is when the court finds an offender guilty of an offence and records a conviction but does not impose a sanction.

Adjournment

An adjournment which allows a person to be released into the community can be made with or without recording a conviction.

Adjournment without conviction

An adjournment without conviction is an order by which a court finds a defendant guilty of an offence, adjourns the hearing for up to 60 months and releases the defendant. An adjournment without conviction usually requires the defendant to agree to 'be of good behaviour'. Providing that the offender is of good behaviour for the period of the adjournment, no conviction is recorded. The adjournment may also specify that the defendant comply with special conditions imposed by the court. This is now a common order imposed by the Magistrates' Court for minor offences.

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Adjournment with conviction

A court can convict an offender for an offence and adjourn the case for up to 60 months. The offender is released after giving the court an undertaking to 'be of good behaviour' for the period of the adjournment. The court may also impose special conditions during this period.

The Criminal Justice Diversion Program (CJDP)

The CJDP is governed by section 59 of the *Criminal Procedure Act 2009* (Vic). It operates in all Magistrates' Courts, and provides a diversion program for those convicted for the first time and those convicted of minor offences. The program allows offenders to avoid a criminal record by accepting conditions. The conditions aim to benefit the offender, the victim and the community as a whole. For instance, offenders facing charges for minor driving offences could be ordered to attend a driver safety course rather than receive a bond or fine. Also, an offender may be required to make full reparation to their victim (pay back the costs of the offence to the victim) and to send a letter of apology. The program draws upon community resources for appropriate counselling or treatment, and helps local community projects by providing voluntary work and donations (from the offenders). The diversion program can be used where:

- the offence is able to be trialled summarily
- the defendant admits the facts, i.e. pleads guilty
- there is sufficient evidence to gain a conviction
- a diversion is appropriate in the circumstances.

While a diversion program is aimed at first-time offenders, it does not exclude someone with prior convictions. However, a judicial officer may take prior convictions into consideration when determining the suitability of a diversion.

Offences punishable by a minimum or fixed sentence or penalty are not appropriate for diversion. Using a diversion program requires the consent of the prosecution. Where a charge involves a victim, the court will ask for the victim's view as well. This may include information about the amount of compensation sought for property damage and whether an apology from the person charged would be valued.

Fines

A fine is a monetary penalty for an offence.

Fines are the most common sanction imposed in Victoria, and are used for summary and indictable offences. A court can impose a fine with or without recording a conviction. In determining the amount of the fine, the court must take into consideration, among other things, the financial circumstances of the offender. However, while the financial circumstances are important, they are not the only consideration in determining the amount of the fine.

Usually an Act sets a maximum fine for a particular offence, measured in penalty units, which have a monetary equivalent. For example, under section 5S of the *Tobacco Act 1987* (Vic), it is an offence to smoke in a motor vehicle, whether or not the car is in motion, if a person under the age of 18 years is present. Penalty: 5 penalty units.

Penalty units are organised into 11 levels for fines. Each level is equivalent to a set penalty unit value, as set out in Table 3.11. They are indexed annually.

Fines are an appropriate sentence option for low-level crime. They are a cost-effective and speedy sanction and generally serve as effective deterrents for minor offences. In 2014, the *Fines Reform Act* (Vic) was passed by the Victorian parliament. It established a new fines recovery model 'aimed at making Victoria's fine system fairer and more equitable for vulnerable and disadvantaged members of the community'. The legislative change was in response to recommendations made by the Sentencing Advisory Council and the Department of Justice.

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Under the *Infringements Act 2006* (Vic), there are special circumstances, such as drug addiction or homelessness, where an infringement notice can be withdrawn or an enforcement order cancelled. Melbourne City Council has waived parking fines for homeless people sleeping in vehicles.

News report 3.9

Homeless people more likely to be fined

Under the *Summary Offences Act 1966* (Vic), the maximum sentence for begging is 12 months jail. Fines are usually more than $100.

The non-profit organisation Justice Connect Homeless Law, which provides justice through *pro bono* work, has looked at public transport fines relating to homeless people. They noted:

People experiencing homelessness are:

- more likely to get fines and infringements because they are forced to carry out their private lives in public places; and
- less likely to be able to address the fines and infringements through payment or navigating the complex legal system.

A personal story of homelessness and fines

'Hamish', who incurred about $13 000 in public transport fines, said:

> 'There is no way I could've dealt with the fines by myself, the only way I did was with the help of workers and a lawyer. The letters kept coming and to deal with them there was lots of writing, it was all a bit much. On clearing the fines the judge took into account the fact that I haven't had any fines for almost two years. The way I stopped getting fines is that I stopped catching the tram. I have to ride or walk everywhere. I only buy tickets for appointments'.

What's the cost? Infringements system review

Homeless Law knows through its casework that once vulnerable people enter the infringements system, it is extremely difficult to exit. To help understand the resource implications of the current infringements system, Homeless Law engaged an independent consultant to undertake a high-level analysis of Victoria's infringements system.

The consultant reviewed 13 infringements files run by Homeless Law and mapped the complex way in which fines and infringements progress through multiple stages and involve a number of agencies and decision-makers. Some of the key findings from the consultant's analysis are:

- **Overwhelming debts** – On average, individuals accumulated 18 infringements each, valued at $6363 per person. One person had 61 infringements, with a total value of $17 237.
- **Difficult to resolve** – Duration of cases can vary, with cases analysed taking between six months and 2.5 years to resolve. The average time taken to resolve an infringement matter was 14 months.
- **Expensive** – The average cost to law firms of running an infringements matter was $19 825 per case. One case required an investment equivalent to $54 000 in fees to resolve.

Source (adapted): www.justiceconnect.org.au

Although people who sleep rough are the most visible, they only represent about 7% of the homeless population in Australia (Mission Australia).

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In 2014, the Victorian parliament passed the *Fines Reform Act 2014* (Vic) which came into force on 31 December 2017. It established a new body, Fines Victoria, to manage unpaid fines. The Act also sets out special processes for those who cannot afford to pay their fines.

The Act introduced a Work and Development Permit (WDP), which commenced operation on 1 July 2017. The WDP scheme aims to give vulnerable and disadvantaged people non-financial ways to pay off fines. They can work off the debt as well as address offending behaviour through approved activities and treatment. Vulnerable people who would be eligible to participate in the WDP scheme include people:

- with an intellectual or mental disability
- with addiction issues
- who are experiencing homelessness or acute financial hardship (this may include victims of family violence).

www.hlp.org.au/infringements

The *Fines Reform and Infringement Amendment Act 2016* (Vic) altered the commencement date for the *Fines Reform Act 2014* (Vic) from 30 June 2016 to 31 December 2017, but also allowed for the early commencement of some provisions of the *Fines Reform Act 2014* (Vic), including the WDP scheme.

Relief tickets for disadvantaged Victorians

On 6 December 2018, the Victorian Government announced a 12-month trial of weekly and monthly emergency public transport relief tickets for disadvantaged Victorians. The tickets are heavily discounted, making it cheaper and easier for vulnerable Victorians to catch public transport.

The move follows the recent *Ticketing Compliance and Enforcement Review* which found that the system was not striking the right balance between fare compliance and what is fair and reasonable. The Review found many poor, homeless and disadvantaged people were forced to fare evade to get to appointments and access basic services. As a result, many people were unnecessarily being caught up in the legal system.

Activity 3.10 Folio exercise

Fines – a new approach needed

Read the 'Fines' section, then complete the following tasks:

1 Identify and explain how fines achieve two purposes of sentencing in Victoria.

2 A review of fines was prompted because fines were seen as discriminatory towards the vulnerable and disadvantaged in society. What problems do you think vulnerable and disadvantaged people would encounter in dealing with fines?

3 Identify two reforms introduced to overcome problems with the use of a fine as a sanction.

4 Discuss the ability of fines to achieve the purposes of sentencing (include at least two strengths and two weaknesses in your discussion).

5 Suggest one reform to the system for the administration of fines which would further increase the ability of the criminal justice system to achieve fair and equitable outcomes in sentencing.

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Table 3.11 Penalty units and the corresponding monetary value for Victoria 2019–20

Note: In 2019–20, each penalty unit had a value of $165.22.

Level	Monetary value	Penalty units
1		Level 1 consists of very serious offences: there is no provision for a fine to be given
2	$495 660.00	3000 penalty units
3	$396 528.00	2400 penalty units
4	$297 396.00	1800 penalty units
5	$198 264.00	1200 penalty units
6	$99 132.00	600 penalty units
7	$39 652.80	240 penalty units
8	$19 826.40	120 penalty units
9	$9 913.20	60 penalty units
10	$1 652.20	10 penalty units
11	$826.10	5 penalty units
12	$165.22	1 penalty unit

Source: Sentencing Advisory Council

An offender who is required to pay a fine can apply to the court for:

- an instalment order – the offender pays a certain amount, say $10, each week; or
- time to pay – the offender is given a certain amount of time, say 3 months, to pay the fine.

News report 3.10

Are fines fair?

Fines are the most used criminal sanction. They are issued for a range of minor offences and are an alternative to going to court. But are they fair? People experiencing social or economic disadvantage are less likely to be able to pay any fines they are given and may also have difficulty getting legal assistance. There is also the issue of the number and range of finable offences and the lack of proportionality between some offences and their penalty amounts.

Realising this, some European countries are now pegging fines to people's wealth. Germany, France, Austria and the Nordic countries are issuing sliding-scale fines based on a person's wealth.

Take the case of a Finnish businessman who was caught going 125 km/h in an 80 km/h zone. The police officer who pulled him over used a federal taxpayer database to learn that his income was more than $9 million per year, and wrote the man a ticket for more than $77 000.

The independent thinktank, The Australia Institute, advocates for a proportional traffic fine system. For speeding 20 km/h over the limit, the average Australian fine is $236, regardless of whether you are on a low income or a millionaire, the Institute says. Under the Finnish model, the lowest income earners would be fined $100, and the highest earners would be fined more than $1000.

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Activity 3.11 Folio exercise

Sanctioning crime

1 The penalty for illegal use of a mobile phone (using a mobile phone while driving) is 4 demerit points and a fine of $484. Discuss how the monetary fine punishes drivers and describe the impact this may have on their future behaviour.

2 Other than deterrence and punishment, identify and explain another aim of sentencing that is achieved by imposing a financial penalty for using a mobile phone while driving.

3 Discuss two problems identified with using fines as a sanction.

Community correction orders (CCOs)

The community correction order (CCO) is a flexible sentencing order served in the community. Courts may apply conditions to match the circumstances of the offender and the nature of the crime.

CCOs were introduced in Victoria in 2012 under Part 3A of the *Sentencing Act*. They are highly flexible, and can be used alone or in addition to prison or a fine. CCOs aim to provide non-custodial sentence options which can be applied to a wide range of offending behaviours. They are regarded as a radical sentencing approach because they can be tailored to meet the particular circumstances of the offender and the crime. The court may attach a range of conditions which aim to achieve multiple sentencing purposes (punish, rehabilitate) simultaneously. CCOs are recognised as an appropriate alternative to imprisonment because of the flexibility they offer.

In 2013, the Director of Public Prosecutions, John Champion SC, applied to the full bench of the Court of Appeal to issue a guideline judgment on CCOs. The purpose of the appeal was to clarify when and in what circumstances a CCO may be applied by courts. Mr Champion stated that the guideline judgment would provide certainty and consistency in the sentencing process and so increase public confidence in the criminal justice system.

The Sentencing Advisory Council published the following report on the guideline judgment in the news section of their website.

News report 3.11

Watershed event in Victorian sentencing

On 22 December 2014, the Victorian Court of Appeal handed down its first guideline judgment in sentencing offenders. This judgment gives general guidance to Victorian courts on the imposition of a community correction order (CCO) – Victoria's newest intermediate sentencing order.

The purpose of a CCO is to provide a non-custodial sentence that may be used for a wide range of offending behaviours while having regard to, and addressing the circumstances of, the offender. CCOs come with a range of new conditions, and a CCO can be imposed for a period up to the maximum penalty for an offence in the County and Supreme Courts.

The Director of Public Prosecutions applied to the Court of Appeal in 2013 for a guideline judgment in relation to two cases in which the offender had applied for leave to appeal against the sentence: *R v Clements* (S APCR 2013 0141) and *R v Boulton* (S APCR 2013 0135). The Court of Appeal joined a third case: *R v Fitzgerald* (S APCR 2013 0177). All three appellants had received a lengthy CCO: 10 years, 8 years, and 5 years respectively.

Consistent with its statutory functions, the Sentencing Advisory Council indicated its support for the giving of a guideline judgment, and provided research materials to assist the Court of Appeal in making its decision.

The guideline judgment will assist all courts by structuring the approach to be taken in determining whether to impose a CCO and in setting the length and conditions of a CCO. This will enhance consistency and transparency in sentencing, and help promote greater public confidence in the criminal justice system.

A copy of the guideline judgment is available at the Australasian Legal Information Institute (AustLII) website.

Source: Sentencing Advisory Council, 5 January 2015

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From 20 March 2017, the maximum length of a CCO imposed in the higher courts for one or more offences is five years.

A CCO can be imposed for up to 5 years by the County or Supreme Courts.

In the Magistrates' Court, a single CCO can be imposed for a maximum of two years for one offence, four years in relation to two offences and five years in relation to three or more offences (that were committed at the same time). If the accused is sentenced to more than one CCO in the Magistrates' Court, the court may order the CCOs to be served cumulatively (one after the other) or concurrently (at the same time).

Conditions on CCOs

All those sentenced to a CCO must abide by basic conditions, such as:

- not reoffending
- not leaving Victoria without permission
- reporting to a community corrections centre
- abiding by any order of the Secretary of the Department of Justice and Community Safety.

Each CCO will also include at least one other 'optional' condition, chosen according to the purposes of sentencing for that offender and that offence. Optional conditions that may be attached to a CCO for all or part of its duration can require the offender to:

- undertake medical treatment or other rehabilitation
- remain free of alcohol and/or drugs
- not enter, remain within, or consume alcohol in a licensed premise (hotel, club, restaurant)
- complete unpaid community work up to a total of 600 hours
- be supervised, monitored and managed by a Corrections Victoria worker
- abstain from contact or association with particular people (for example, their co-offenders)
- live (or not live) at a specified address
- stay away from nominated places or areas
- abide by a curfew, remaining at a specified place for 2 to 12 hours each day
- be monitored and reviewed by the court to ensure compliance with the order
- pay a bond – a sum of money that may be forfeited wholly or partly if the offender fails to comply with any condition imposed.

An offender who breaches the conditions of their CCO may be resentenced for the original offence and face an additional 3 months imprisonment or a fine of 30 penalty units.

Intensive compliance period

If a court imposes a CCO of six months or longer, the court can set an intensive compliance period for part of the order. For example, if a CCO is imposed for one year, an intensive compliance period might be set for a lesser period, such as six months. The court will order that one or more of the conditions attached to the CCO must be completed during this intensive compliance period.

A person receiving a CCO will have to abide by basic conditions plus optional conditions the magistrate or judge can impose.

Serious offences committed by people on a CCO

A media release on 24 January 2019 reported that:

- nearly 15 000 people each year over the last three years have received a CCO, and that
- only 1.6% of people serving a CCO were sentenced in 2017–2018 for committing a serious offence.

The findings are part of the required Sentencing Advisory Council's annual report to Parliament on the number of serious offences committed by people on a CCO.

There were 632 people sentenced to a CCO in 2017–2018, compared to 551 in 2016–2017. However, the rate of contravention has not changed. The 1.6% was the same figure for 2016–2017.

The median age of people sentenced for serious offences while serving a CCO was 29 years. Ages ranged from 18 to 77 years. People aged 25–34 years were the largest age group (38.8%), while people aged 55 and over were the smallest (1.9%). The vast majority of people sentenced were male (93.5%).

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News report 3.12

CCOs – A get out of jail card?

A CCO is a flexible sentencing order served in the community, under a range of restrictions, including curfews and alcohol bans. The order can be imposed by itself or in addition to imprisonment or a fine.

According to the Sentencing Advisory Council's report to State parliament, nearly 15 000 people each year over the past three years have received a CCO.

In the period 2017–2018, 632 people were sentenced for committing 912 serious offences while serving a CCO. Although this is an increase from 551 people in 2016–2017, the rate of contravention has not changed. Only 1.6% of the almost 34 600 people who received a CCO in the three years to 30 June 2018 were sentenced for a serious offence committed while serving a CCO. This is the same rate for people sentenced in 2016–2017.

Council Chair Emeritus Professor Arie Freiberg said, 'The findings for 2017–18 are remarkably consistent with 2016–17. While there was a small increase in the number of people sentenced for a serious offence while on a CCO, the overall rate of serious offending remains low and is the same as 2016–17. The nature of the serious offending also remains very similar with threats of violence continuing to be the most common type of offending'.

Professor Freiberg further commented, '… the maximum term of imprisonment … was increased to two years in September 2014 … (which) … resulted in an influx of higher risk offenders in the CCO population. In March 2017, the maximum term of imprisonment that could be combined with a CCO was reduced to one year. This should help reduce the number of higher risk offenders receiving combined sentences.'

[Serious offences are defined by the *Corrections Act 1986* (Vic) to include 'serious violent offences' such as armed robbery, aggravated burglary, making a threat to kill and intentionally causing serious injury, and 'sexual offences' such as rape and sexual assault.

Under a 2015 amendment to the *Corrections Act,* the Sentencing Council has a requirement to report on serious offences committed on CCOs each financial year from 1 July 2016.]

Advantages of CCOs are that they:

- Can be both punitive and rehabilitative
- Offer courts the 'best opportunity' to promote the best interests of both the community and the offender
- Cost less than jail – offenders live at home, remain in the community, and can continue to financially support themselves and their family
- Ease jail crowding
- Offer a chance for offenders to complete drug/alcohol programs, psychological/psychiatric counselling or other Corrections Victoria programs outside jail
- Avoid exposing offenders to jail and prison conditions that may be unsafe.

Disadvantages of CCOS are that:

- Corrections Victoria staff, who are responsible for monitoring offenders on the orders, are overworked
- Offenders face long waits to access support programs, including alcohol and drug rehabilitation
- Public safety may be compromised – offenders are more easily able to continue criminal behaviour than if they were in prison
- Breaches could overrun the County Court.

The problem for the government is that the community may view CCOs as 'get out of jail' cards – offenders living in the community when they should be imprisoned. In 2016, following a number of controversial cases involving CCOs, a new law was made: those who were convicted of crimes such as murder, rape, sexual abuse of a child under 16, and commercial drug trafficking, are no longer eligible for CCOs. The State government currently has to deal with prison overcrowding, building a new youth justice centre, and the ballooning cost of the prison and corrections services.

Judges and magistrates have to be mindful when imposing CCOs. The Court of Appeal issued a guideline judgment that clarified what magistrates and judges should consider in making the orders, and how legal practitioners should make submissions on them.

Source: Sentencing Advisory Council, 24 January 2019

Courts may apply conditions to a CCO order to match the circumstances of the offender and the nature of the crime they committed.

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Activity 3.12 Folio exercise

Is it time to review CCOs?

Carefully read the whole section on CCOs then complete the following tasks:

1 What is a CCO?
2 Outline four conditions that may be imposed through a CCO and suggest why a magistrate or judge would impose each condition you have identified.
3 What is an intensive compliance period for a CCO?
4 One of the advantages of CCOs is that they can be both punitive and rehabilitative. Explain.
5 Evaluate the use of CCOs as a sanction. To what extent do you think CCOs contribute to the achievement of the principles of justice?

Drug treatment order (DTO)

A drug treatment order (DTO) allows a custodial sentence to be suspended to allow the offender to undertake a rehabilitation program.

The Drug Court, operating in the Magistrates' Court at Dandenong since 2002 and now also in Melbourne, can place offenders on a DTO. The court imposes a custodial sentence, which is suspended while the offender undertakes a rehabilitation program that has been specifically designed for the offender.

The offender is closely monitored. There are regular meetings with the magistrate and counsellors. The offender also needs to consent to urine tests. Breaches of parts of the treatment order can result in short periods of imprisonment. If the offender continues to offend, the original custodial sentence can be imposed.

The Drug Court will impose and administer an order called a drug treatment order (DTO).

Other court orders

Table 3.12 Court orders for youth and vulnerable offenders

Justice plans	The court may attach a 'justice plan' for intellectually disabled offenders as a condition of sentence. Justice plans are prepared by the Department of Human Services, and specify treatment services recommended to reduce the chances of reoffending.
Youth attendance orders	These impose a conviction and order that the young person (aged 15 and over) attend a youth justice unit for up to 10 hours per week attendance. It is an alternative to detention.
Youth Justice Centre Order	A court can record a conviction and order a Youth Justice Centre Order to detain a young person aged under 21 but over 15. The maximum terms are 2 years (in the Children's and Magistrates' Courts) and 3 years (in the County and Supreme Courts). This is the most severe sanction that may be imposed under the *Children, Youth and Families Act 2005* (Vic).
Youth Residential Centre Order	A court can record a conviction and order a Youth Residential Centre Order to detain a child aged between 10 and 15. The maximum terms are 1 year (in the Children's Court), 2 years (in the Magistrates' Court) and 3 years (in the County or Supreme Court).

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Imprisonment

Imprisonment means that a person is detained by the State and denied their liberty.

Imprisonment removes an offender from the community and denies them their liberty. This is considered the most severe sanction. The *Sentencing Act 1991* (Vic) recognises it as a sentence of last resort, which means that judges must consider all other sentencing options before imposing a prison term. Prison is seen as a way to protect the community, as well as to punish the offender and denounce the behaviour. Some would argue that imprisonment also acts as a deterrent. Programs offered within prison aim to provide for the rehabilitation of offenders.

Imprisonment is regarded as the most severe sanction.

Victoria's imprisonment rate

Victoria's imprisonment rates are consistently among the lowest in Australia. However, Victoria's prison population is up, fuelled by the increasing use of remand.

Victoria's prison population has grown by 81.5% in the period 2008–2018 (from 4223 prisoners to 7666), largely due to an increase in the number of people refused bail (particularly for violent offences).

In 2017–18, the Victorian County and Supreme Courts imposed custodial sentences of 72.1% (up from 40% in 2004–2005), and CCOs of 13.7%. The percentage of cases sentenced to imprisonment in the Magistrates' Court rose from 4.9% in 2004–05 to 8.4% in 2017–18. In the 2017–18 period, the Magistrates' Court most commonly imposed:

- fines (54.0%)
- adjourned undertakings (14.7%)
- CCOs (10.2% of sentences cases).

The *Sentencing Act* establishes levels of imprisonment. While Acts of Parliament specify the maximum sentence for all offences punishable by imprisonment, they rarely specify a minimum term. This allows the courts some discretion to determine lengths of imprisonment. A minimum term of imprisonment is the time that a prisoner must serve before they can apply for **parole**. In all cases courts are guided by the principle of parsimony, meaning that they must not impose a greater sentence than is necessary to achieve the purposes of sentencing. For example, the *Crimes Act 1958* (Vic) creates the offence of murder and sets a baseline sentence of 25 years, but it does not specify a minimum.

The Magistrates' Court has limited jurisdiction to impose a maximum term of two years imprisonment or a maximum of five years for multiple offences.

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Table 3.13 Levels of imprisonment – penalty scale

Level	Maximum term of imprisonment	Examples of offences
1	Life	Murder, trafficking drugs
2	25 years	Rape, armed robbery, arson
3	20 years	Manslaughter, serious injury
4	15 years	Recklessly causing serious injury
5	10 years	Threats to kill, indecent assault
6	5 years	Recklessly causing injury
7	2 years	Going equipped to steal
8	1 year	Cultivation of narcotic plant
9	6 months	Obstructing a police officer

Standard sentences

On 1 February 2018, the Victorian parliament passed laws enabling standard sentences to come into effect.

Standard sentences had two policy aims:

- to provide a numerical yardstick as to the objective seriousness of standard sentence offences
- to increase sentences for a number of specified offences.

The specified offences are:

- murder
- rape
- culpable driving causing death
- trafficking in a large commercial quantity of a drug of dependence
- eight different sexual offences involving children.

A standard sentence represents numerically what parliament considers to be the 'middle of the range of seriousness' when considering only the offence, not any subjective factors such as prior offending, plea and offender's circumstances. For most of the above offences, the standard sentence is set at 40% of the maximum penalty. For example, the maximum sentence for rape is 25 years imprisonment, making the standard sentence 10 years imprisonment.

Courts are required to consider the standard sentence alongside all other relevant sentencing principles and factors. Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires all courts to take 'current sentencing practices' into account.

Courts need to provide an explanation and reasons how the sentence imposed in a case relates to the relevant standard sentence. For example, where the behaviour of the offender is judged less serious than the midpoint of seriousness in other instances of the offence, the court may decide on a sentence that is less than the standard sentence.

Legal brief 3.4

Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014 (Vic)

This Act sets a mandatory non-parole period of 10 years for adults convicted of manslaughter committed by a single punch or in circumstances of gross violence.

Joseph Esmaili, 24, is the first person to receive a minimum 10-year jail sentence when he was found guilty of manslaughter after killing Melbourne surgeon, Patrick Pritzwald-Stegmann, in 2016. Esmaili killed Stegmann with a single punch in an argument over smoking near the entrance to the Box Hill Hospital. In 2019, he was sentenced to 10 years and six months, and must serve at least 10 years before becoming eligible for parole.

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A tribute to Melbourne surgeon Patrick Pritzwald-Stegmann outside Box Hill Hospital

Prison sentence options include the following:

Concurrent sentences	A concurrent sentence means that where the offender has committed more than one offence, the sentence for each offence can be served at the same time.
Cumulative sentences	Cumulative sentences are usually applied only for serious offences and if the offender has a long history of offending. A cumulative sentence means that all terms of imprisonment are added together to form a total period of imprisonment.
Serious offenders	A serious offender includes an offender who has repeatedly committed an arson, serious drug, or sexual offence. When sentencing a serious offender, the court will consider the protection of the community from the offender as the principal purpose for which the sentence is imposed. To achieve that purpose, the court may impose a longer sentence.
Serious sex offenders	Serious sex offenders must serve multiple jail terms (consecutively), except in exceptional circumstances. A serious sex offender is defined as anyone sentenced to jail for two or more sex offences.
Indefinite detentions	Indefinite jail sentences can be imposed for offences such as murder, manslaughter and sex offences. The offender serves their nominal sentence, after which their sentence is reviewed by a judge. If the judge decides at that stage that the offender is still a danger to the community, the offender will be returned to jail for another 3 years. After this time has elapsed, the case is reviewed once more.

An indefinite sentence can be imposed if a court believes that the offender is a serious danger to society.

Other court orders for criminal offences

In addition to sentencing, the courts can also make other orders. These include the following:

Other orders for criminal sanctions include compensation orders, restitution orders, hospital orders, the cancellation or suspension of licences or permits, and drug offender cautioning scheme.

Compensation orders	Courts have the power to make a compensation order if the defendant has been convicted of an offence and placed on a bond or CCO, and another person has suffered loss or property damage as a result of the offence. If the victim applies for compensation, the court can order the defendant to compensate the victim for the loss, damage, or destruction of property.
Restitution orders	Courts may order a defendant who has been found guilty of stealing goods or being in possession of stolen goods to return the goods to the owner. If the goods have been sold, the defendant may be ordered to pay compensation to the value of the goods stolen.
Hospital orders	Courts can make a diagnosis, assessment and treatment order for a period of up to 3 months. These orders can be made once a defendant has been found guilty. However, if, in the court's opinion, the defendant is suffering from a mental illness that requires treatment and admission to a psychiatric in-patient service, the defendant can be admitted as an involuntary patient.
Cancellation or suspension of licences or permits	Under the *Road Safety Act*, the courts and VicRoads have the power to suspend, cancel, or vary licences and permits issued under the Act.
Drug offender cautioning scheme	Under this scheme, first-time offenders for possession of drugs are formally cautioned by the police rather than being charged with an offence.

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Legal brief 3.5

Does life imprisonment mean life?

In Victoria, only the Supreme Court can impose a life sentence. A term of 'life' means for the term of an offender's natural life. However, the court must fix a non-parole period for any sentence of two years or more, unless it considers that the nature of the offence or the past history of the offender makes it inappropriate to fix a non-parole period. If a non-parole period is not set for a life sentence, the offender will remain in prison for their whole life.

For example, an offender may be sentenced to life imprisonment with a non-parole period of 25 years. This means that the offender must serve a minimum term of 25 years before becoming eligible for parole. In this example, the Adult Parole Board may release the offender after 25 years or may decide against parole, in which case the offender returns to prison until the Adult Parole Board rules them eligible for parole or until the end of their sentence.

What are indefinite sentences?

An indefinite sentence can be imposed if a court believes that the offender is a serious danger to society. This may be the case for serious violent or sexual offenders.

It is the court, not the Adult Parole Board, that decides whether release is appropriate. Release is only granted if the court finds that the offender is no longer a danger to the community.

Peter Dupas, serial rapist and murderer, is currently serving three cumulative life sentences. Justice Stephen Kaye, in handing down his verdict, said: 'It is clear, both in the present case and from your previous convictions for rape and like offences, that your offending is connected with a need by you to vindicate a perverted and sadistic hatred of women and a contempt for them and their right to live.'

In 2019, Robert Joe Wagner, 47, lost his appeal for a non-parole period to be set on his jail sentence. A non-parole period could have paved the way for his eventual release. In 2003, Wagner, known as the Snowtown 'bodies-in-the-barrels' killer, had been sentenced to life in prison without parole for his part in 10 murders committed in the 1990s. During Wagner's original trial, gruesome details emerged of how he and his co-offender, John Justin Bunting, had cannibalised one of their victims.

Judge Greg Parker dismissed Wagner's application for parole. 'I firmly consider that the "bodies-in-the-barrels" murders are the worst crimes ever to be detected in South Australia. None of the murders committed by the applicant displayed any mitigating features. The applicant is plainly a hardened killer.'

3.10 Factors considered in sentencing

If an offender pleads guilty or is found guilty, the judge will hold a sentencing hearing. The sentencing hearing is part of the post-trial process where the offender is given a sentence by the judge. The sanction may include a fine, a CCO, or imprisonment. Maximum penalties are legislated by parliament and are used by the courts as a reference point when sentencing. The courts consider a number of factors, including the impact of the crime on the victim.

By the time the sentencing hearing occurs, the court has heard evidence during the trial stage, including:

- **The nature and circumstances of the offence**. The way crimes are committed varies enormously. Some crimes are planned, while others are spur of the moment. Some cause a great harm; others very little.
- **The degree of criminality**. The extent of misconduct relates to the number of offences and their seriousness.
- **Injury, loss, or damage**. The extent and degree of injury or loss will affect the sentence.

The **sentence hearing** process allows for additional information to be presented to determine the most appropriate sentence. This includes the following mitigating and aggravating factors.

A sentence hearing allows for additional information to be presented to the court to determine the most appropriate sentence.

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Mitigating factors

Mitigating factors are evidence about the offender or the circumstances of the crime which may reduce the sentence, such as:

- The offender was an accessory to the crime (helped the main offender) but was not the main actor.
- The offender showed remorse for the crime.
- No one was hurt or likely to be hurt during the crime.
- The offender had minor or no criminal history.
- The offender pleaded guilty and co-operated with police.

Aggravating factors

Mitigating factors are evidence presented to the court that can reduce the sentence; aggravating factors are evidence presented that may increase the sentence.

Aggravating factors are evidence about the offender or the circumstances of the crime which may increase the sentence, such as:

- The offender has a criminal record.
- The nature of the crime was particularly cruel.
- The offender used a weapon.

Guilty pleas

Guilty pleas or intentions to plead guilty must be taken into account when sentencing.

They are treated as mitigating factors and can result in a reduced sentence. A plea of guilty may be taken into account through either a specified sentence discount or a sentence indication. A guilty plea may be taken as a sign of remorse. In addition, a guilty plea can also save the community the considerable cost of conducting a full trial and reduce delays in our court system. An early guilty plea will also spare victims and witnesses the potential trauma of giving evidence.

The most common guilty plea discount (in 44.9% of cases) for imprisonment sentences was between 20% and 30% less than the sentence that would otherwise have been imposed.

Specified sentence discount

The **specified sentence discount scheme** allows a judge or magistrate to impose a less severe sentence when the offender pleads guilty. In 2008, an amendment to the *Sentencing Act 1991* (Vic) required courts to provide a 'specified sentence discount'. The court will state what penalty would have been imposed (the overall sentence and the non-parole period) for the offence had the offender not pleaded guilty, and the final discounted sentence that recognises that the offender did plead guilty.

A specified sentencing discount in adult courts applies to:	A specified sentencing discount in the Children's Court applies to:
• all custodial orders • fines of 10 penalty units or more (or aggregated fines of 20 penalty units or more).	• Youth Attendance Orders • Youth Residential Centre Orders • Youth Justice Centre Orders.

The specified sentencing discount provides an incentive for pleading guilty at an early stage of proceedings. This places defendants in a better position to make this decision early in the criminal proceedings.

Sentence indication

Sentence indication is a process that permits a magistrate or judge to give a defendant a general indication of the sentence that would be likely to be imposed if the defendant pleaded guilty before a hearing or trial.

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Celebrity chef George Calombaris talks to media after attending Downing Centre Local Court in Sydney on 8 September 2017 for sentencing over a charge of assault at an A-league grand final in May 2017.

Sentence indications are used in the Victorian Supreme, County and Magistrates' Courts. In the Supreme and County Court, the accused can apply for a sentence indication at any stage in the proceedings after the written charges are filed. The prosecutor must consent to the application and the judge must agree to it as well. The judge will then be given a summary of the facts agreed to by both the prosecution and the defence, and other relevant information. Based on this information, the judge will indicate whether or not he or she is likely to impose a custodial sentence if the accused enters a guilty plea at that stage in the proceedings.

In the Magistrates' Court, a magistrate can indicate if he or she is likely to impose a custodial sentence, or can indicate the type of sentence likely to be imposed. For instance, the magistrate may indicate that he or she would be likely to impose a CCO.

Victim Impact Statements

The *Sentencing Act 1991* (Vic) states that the impact of the crimes on the victim or victims must be considered during the sentencing process. This helps courts understand the effect of the crime on the victim.

The court must consider:

- the impact of the offence on the victim/s
- the personal circumstances of the victim/s
- any injury, loss or damage resulting directly from the offence.

The Victim Impact Statement is a statutory declaration that may be read or presented to the court. It may include photos, drawings, poems and other material related to the impact on the victim.

Victims' Charter Act 2006 (Vic)

The *Victims' Charter Act 2006* (Vic) identifies key principles for the treatment of victims of crime when dealing with criminal justice agencies, including the right to prepare a Victim Impact Statement.

The victim of a violent crime committed by an adult offender may ask to be placed on the Victims Register: this allows them to be informed of the offender's parole or release.

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News report 3.13

A powerful voice

Victoria introduced Victim Impact Statement (VIS) legislation in 1994, providing victims with the chance to tell courts how a crime affected them. Later, the *Sentencing Act 1991* (Vic) was amended, requiring the court, when sentencing, to take into account not only the personal circumstances of the victim and any injury, loss, or damage resulting from of the offence, but also the impact of crime on victims.

The Victims Support Agency (VSA) prepared *A Victim's Voice – Victim Impact Statements in Victoria,* looking at VIS legislation in the state. It found that:

- Not all victims realise they have a choice about whether or not to make a statement.
- Victims usually have a very limited understanding of the criminal justice system and court processes.
- The way information is delivered is important.
- Providing information to victims sometimes includes 'expectation management'.

The VSA believed that the government should direct the VSA and the Department of Justice to assess the effectiveness of Victim Impact Statements, determining whether they:

- are the appropriate tool to inform the court about the impact of the crimes
- assist the court in determining a sentence
- increase victims' levels of satisfaction and participation in the criminal justice system.

The VSA consulted with police, prosecutors, defence counsel, judges and magistrates, victims' service agencies, witness assistance services and victims. This research found that:

> [T]wo-thirds of judges and magistrates felt that Victim Impact Statements were often or occasionally of help in determining a sentence. The same percentage felt that the statements could contain additional information relevant to sentencing.

Victim Impact Statements could be therapeutic and have a restorative element. For instance, in the trial of serial killer Peter Dupas, he could not be sentenced to further time in jail, but Justice Cummins viewed the use of the Victim Impact Statement in the trial as a vindication of the rights of all victims of crime.

Despite the power of Victim Impact Statements, some lawyers believe that Victim Impact Statements have several problems:

- The victim has to relive the event.
- Courts need to be careful not to allow the views of victims to disproportionately influence sentences.

Activity 3.13 Folio exercise

Victim Impact Statements

Read the News reports 3.13 and 3.14 'A powerful voice' and 'In their own words' and complete the following tasks:

1 Explain the purpose of Victim Impact Statements.

2 Reading through the Victim Impact Statement from Jill Meagher's husband, list the physical, psychological and emotional impacts.

Impacts of crime:

Physical impacts	Emotional impacts	Psychological impacts

Are there other impacts of crime given in this statement?

3 To what extent, and in what ways, do Victim Impact Statements promote the principles of justice?

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News report 3.14

In their own words

Jill Meagher: Victim Impact Statement
(tendered at Adrian Ernest Bayley's plea hearing).

Jill Meagher's husband

I was introduced to Jill in November 2001 by our mutual friend, Kiera. It was an awkward first encounter. I remember I couldn't shake her hand because it was bandaged up. She had injured it the previous day in a characteristically clumsy fashion. But this inelegant introduction began an 11-year adventure with the most wonderful person I have ever met.

Jill embodied everything I could ever ask for in a partner. Her sense of fun and adventure and her unquenchable lust for life pulled me through difficult times and lifted me even higher in good times. Now, as I go through the worst time in my life, the person whose passion, intelligence and strength got me through before is no longer there to help me with this struggle. What was stolen from me on 22 September 2012 was love, my best friend and my entire world. What was stolen from us was our future, the possibility of a family and our lives together.

What has been given to me is a lifetime of fear, insomnia, unending panic attacks, anger that I never wanted or asked for and first-hand knowledge of how deeply depraved and disgusting a human being can be. My world view has been significantly altered and my belief in the good of humanity has been shaken to its core.

I hesitate to leave my apartment because of the feverish prospect of an anxiety attack that can pounce at the most inappropriate times. Nightmare-ish and intrusive visions are constant and I don't escape this in sleeping or waking hours. I have been forced to move from our home in Brunswick, given its proximity to where Jill's death occurred and I am constantly confused, disoriented and unfocused. The pain of not being able to tell Jill that I loved her in her final moments, the knowledge that those last moments were terrifying and painful and the knowledge that with her final walk she had crossed paths with evil haunts me every day.

The initial stages of the police investigation necessitated a thorough examination of our apartment, our car and our private possessions, which was intrusive and extraordinarily uncomfortable. This was soon followed by unwelcome messages from members of the public, who convinced themselves that I was involved in Jill's disappearance. This has exacerbated feelings of horror and a lack of faith in the decency of humanity. The frequency of media intrusion has ebbed and flowed but has never stopped completely. I have been away from work for substantial periods of time, I have ongoing counselling for trauma and grief and, quite simply, my life will never be normal again.

Most of all I miss Jill. I miss waking up late on a Sunday and having breakfast at 2pm. I miss boozy afternoons in the sunshine, making plans, laughing with her and sharing my life with her. I miss her insight, fun and wit, her huge smile and the infectious personality. I think of her every second of every day and I think of the pain of never being able to laugh with her again. I think of the waste of a brilliant mind and a beautiful soul at the hands of a grotesque and soulless human being. I think of how in love we were and of how much I've lost and how much of my life and dreams were built around Jill. I am half a person because of this crime.

Source: 'Jill Meagher murder: the victim impact statements', The Age, *12 June 2013*

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Legal brief 3.6

Sentencing and the principles of justice

DPP v Borce Ristevski [2019] VSC 253

Controversy erupted after the Supreme Court sentenced Borce Ristevski to nine years in jail, with a non-parole period of six years, for the manslaughter of his wife, Karen.

'We did not get justice today,' Karen's distraught brother Stephen Williams told reporters outside court. 'As a society, in regard to domestic violence, we must, at some stage, take a stand.'

Ristevski had been married to his wife for 27 years when she went missing from the couple's home on 29 June 2016. Her remains were discovered between two logs in bushland in the Mount Macedon Regional Park almost eight months later.

Ristevski told police his wife went for a walk to 'clear her head' after a minor argument about money, but she never returned.

He strenuously denied any involvement in the case. He was pallbearer at his wife's funeral and had previously spoken alongside grieving family members, pleading for information about his wife's disappearance.

Ristevski was initially due to stand trial for murder but it was deemed there was insufficient evidence to secure a conviction. At this point, he pleaded guilty to manslaughter.

In sentencing Ristevski on 18 April 2019, Supreme Court Justice Christopher Beale made the following points in explaining the sentence:

1 The couple had been married for 27 years. This amplified the breach of trust that Ristevski broke when he killed his wife.
2 There was no previous history of family violence.
3 The seriousness of the crime. Ristevski had refused to reveal how or why he killed his wife, so it was impossible for Justice Beale to conclude whether the offence was a 'high range' or 'medium range' manslaughter. 'I do not regard your silence as to how you killed your wife as providing a sufficiently firm basis for an upper range example of the offence of manslaughter,' Justice Beale said.
4 The guilty plea. If it weren't for his plea of guilty, Justice Beale said he would have jailed Ristevski for a minimum of seven years and maximum of ten years.
5 Conduct after the crime. Ristevski dumped his wife's body in bushland and hid it so it was not found for eight months. He then lied about his involvement, even acting as pallbearer at Karen's funeral. It was ' … still fair to say that your disposal and concealment of Karen's body and the many lies you have told, worst of all to your daughter, constitute a circumstance of significant aggravation,' said Justice Beale.
6 Ristevski's history. He had no history of domestic violence, nor a criminal history. Justice Beale said that Ristevski had good prospects for rehabilitation and, apart from his crime and conduct afterwards, he had been a person of good character.
7 Victim Impact Statements. Ristevski's daughter did not provide a Victim Impact Statement but provided 'a glowing character reference' to the court. Karen's relatives did provide Victim Impact Statements; Justice Beale said they were powerful and moving. Family relationships were broken, they were haunted by the thought of Karen being dumped in bushland and will always be left wondering what happened to her.
8 Justice Beale looked to four other cases in determining Ristevski's sentence: Gabriel Omar Chang, Adam Emilio Mocenigo, James Stewart Ramage and Daniel Veerman.

Justice Beale addressed Ristevski: 'No sentence that I can impose will undo the suffering you have caused, and continue to cause, to those who knew and loved Karen.'

Note: The DPP, Kerri Judd QC, lodged an appeal in May 2019 against the sentence handed to Borce Ristevski for the manslaughter of his wife, Karen. In December 2019, Ristevski had his prison sentence increased to 13 years by the Court of Appeal. He must now serve a non-parole period of 10 years. 'As Mr Ristevski had not shown one scintilla of remorse ... [the Court] ... could not take remorse into account as a mitigating factor,' Chief Justice Anne Ferguson told the Court.

Mourners at the funeral of Karen Ristevski

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In sentencing, judges must ensure the hearing is conducted in an appropriate judicial manner reflecting two of the principles of justice:

1 The judge's discretion is exercised appropriately ensuring that similar cases are treated alike and there is consistency of approach in sentencing – ensuring that all people are treated equally.

2 The judge conducts the sentencing hearing in a way that is fair – ensuring that there are fair legal processes in place and all parties receive a fair hearing and are treated equally before the law with an equal opportunity to present their case.

The judge must conduct the sentencing hearing in accordance with the requirements of procedural fairness. This is carried out by the requirement that the defendant and prosecution have fair opportunity to tender evidence and make submissions to the court, rebutting findings that may potentially be adverse to either party.

Judicial discretion is a fundamental feature of the Victorian legal system, in particular in sentencing. Judges must exercise this power consistently with the rule of law and the principles of justice.

When a person is found guilty and is to be sentenced, it is a fundamental principle that the consequences the offender faces are proportionate to the crime they have committed and their responsibility for it. This means the seriousness of the punishment must be proportionate to the seriousness of the offence.

Another key feature of sentencing is that the judge must choose the least severe sentencing option which is available to him or her to punish the offender and protect the community.

These sentencing principles reflect the principles of parsimony; they reflect all three of the key principles of fairness, equality and access.

The judge must also take into account the specified purposes of sentencing and particular factors identified to be relevant to the sentencing under the law. These are the only purposes for which a sentence may be imposed in Victoria; namely, just punishment, deterrence, rehabilitation, denunciation and the protection of the community.

County Court of Victoria: Fact Sheet 5: Sentencing and Principles of Justice

Activity 3.14 Structured questions

Factors in sentencing

Read the information on the factors taken into account in determining a sentence and complete the following tasks:

1 What is the difference between aggravating circumstances and mitigating circumstances? (Define each term as part of your response.)

2 An early guilty plea can be seen as a mitigating factor. Explain.

3 It has been suggested that the sentencing discount for guilty pleas and sentence indications may be beneficial to victims of crimes. Explain.

4 It has been suggested that a by-product of schemes that encourage an early guilty plea is that an innocent person may feel under pressure to enter a guilty plea. Such schemes presume that the defendant is well advised and understands the process and the consequences. To what extent do you think that sentence discounts and sentence indications reflect the principles of justice?

5 How are Victim Impact Statements used in the sentencing process?

6 Outline three factors that a judge or magistrate will consider in sentencing. Discuss how each of these factors affects the ability of the criminal justice system to achieve the principles of justice for the offender and the victim.

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Other factors

The courts may also consider the following factors when sentencing:

- **Offender's personal circumstances:** the offender's character, previous behaviour, cultural background, age, physical and mental condition are all likely to be considered.
- **Victim's circumstances:** the victim's age and vulnerability (due to physical or mental impairment) may affect the sentence.
- **Offender's family and dependants:** only in exceptional circumstances will the court consider the impact of the sentence on the offender's family or dependants.

The role of the judge or magistrate, in integrating and balancing all relevant considerations, is challenging. The outcome sometimes does not please the victim, the offender or the public.

Sentencing guides

The *Sentencing Act 1991* (Vic) gives the Court of Appeal power to make guideline judgments for sentencing. These are used by other courts in sentencing offenders.

In 2003, an amendment to the *Sentencing Act* established the Sentencing Advisory Council. The Sentencing Advisory Council provides advice to the Court of Appeal on guideline judgments, conducts research into community attitudes on sentencing and reports on sentencing statistics.

Under the *Sentencing Act 1991* (Vic), imprisonment is recognised as a sentence of last resort.

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3.11 Justice in sentencing

Sentencing options aim to treat offenders fairly, with the sanctions reflecting the seriousness of the offence.

Sanctions aim to represent the values of the community. Sanctioning aims to provide just punishment, deterrence, denunciation and community protection. Although sanctions are supposed to represent the values of the community, the media sometimes report outrage at the sentences handed down by our courts.

Justice in sentencing is a complex matter. Basic principles of justice imply that all offenders facing the criminal justice system will have access to fair and equitable treatment. While this means that like cases will be treated alike, the sentencing process allows different sentences to be imposed on offenders, to reflect their different circumstances and degrees of culpability. For example, an offender found guilty of premeditated murder may receive a harsher sentence than an offender who has committed a spur of the moment killing. Both sentences could be considered fair given the different circumstances. The *Sentencing Act 1991* (Vic) requirement, that courts consider mitigating and aggravating factors, promotes fair sentencing outcomes for all offenders.

Sentencing guidelines promote fair and equitable sentencing for all offenders.

Sentencing guidelines set out in legislation assist the courts in sentencing. They are fundamental to the effective operation of the criminal justice system, and ensure that sanctions are:

- not unnecessarily severe, considering the purpose for which the sanction is imposed. For example, if a court can achieve the aim of the punishment with a fine, the court must not impose a CCO to achieve that purpose. Similarly, if a CCO will achieve the purpose, the court must not impose a prison term.
- proportional and measured in relation to the offending behaviour. For example, imposing one year's imprisonment for failure to pay a traffic fine would be deemed excessive, considering the lack of seriousness of the offence.
- equitable and similar across like offenders and like circumstances. Consistency, fairness and predictability in sentencing are essential if the community is to have confidence in the criminal justice system.
- just and appropriate in circumstances where an offender is sentenced for multiple offences. The guidelines indicate which sentences are to be served cumulatively and which are served concurrently, to ensure that sentences are not unnecessarily harsh.

The principles that guide sentencing

Parsimony	Parsimony means a court must not impose a sentence that is more severe than necessary to achieve the purpose/s for which the sentence is imposed.
Proportionality	Proportionality ensures that the overall punishment must be proportional to the gravity of the offending behaviour.
Parity	Parity promotes fairness for offenders by imposing similar sentences for comparable offences committed by offenders in similar circumstances.
Totality	Totality applies when a number of sentences are imposed and means adjusting the overall sentence to promote a just and appropriate outcome in light of the overall offending behaviour.

Cultural diversity and sentencing

Inequality in sentencing outcomes may occur because of an offender's cultural background. Victoria has one of the most culturally diverse populations in Australia and yet the law does not make concessions for recently arrived migrants, Aboriginal and Torres Strait Islander peoples, or refugees.

Minority groups may have difficulty understanding the sentencing process because of their cultural background, language barriers and different expectations of the legal system. This can result in unfair and unjust sentencing outcomes.

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Recommended reforms to the Victorian criminal justice system for just sentencing outcomes

A number of sentencing options to promote fair and just sentencing have been recommended by various bodies. These include:

Address underlying causes of criminal behaviour	This would be the most effective way to prevent recidivism and rehabilitate the offender. The average prisoner has not completed secondary school, is most likely unemployed at the time of committing the crime and has a history of substance abuse.
Focus on rehabilitation	Focus on vulnerable groups within the prison population, including Aboriginal and Torres Strait Islander prisoners, those with cognitive disability, women and young offenders. Focus on re-integrating these groups into the community upon release.
Engage support agencies	Engage family and community support agencies in pre- and post-release transition programs.
CCOs to focus on re-integrating young people	Ensure that CCOs are focused on re-integrating young people into the community by targeting programs linked to addressing the offending behaviour. It is considered crucial that sentencing options are effective as a deterrence to reoffending.
Meaningful community experiences	Develop and provide community experiences that are meaningful to young people, where they are treated with dignity, and can enter a trusting relationship with an adult. Conversely, 'meaningless work, [or] a dehumanising or violent experience will promote bitterness and militate against deterrence' (Australian Law Reform Commission, *Principles of Sentencing*).
Increase number of Neighbourhood Justice Centres (NJCs)	Currently, the City of Yarra has the only NCJ in Australia. The primary focus of the centre is to address the underlying issues causing criminal behaviour. As such, it brings together a multi-jurisdictional court, a broad team of support services and community support services. The NJC has successfully reduced crime and increased community safety, thus reducing costs in the criminal justice system. The Sentencing Advisory Council has endorsed this one-stop-shop approach, which brings together 20 independent agencies that work collaboratively to address the underlying causes of harmful behaviour.
Continued expansion of the Koori Court	Increase the number of locations for children's Koori Courts and broaden their use so that they can hear 'not guilty' pleas: this could further improve deterrence and promote alternative sentencing options before imprisonment for young Aboriginal and Torres Strait Islander offenders.

News report 3.15

Swedes give a new twist to rehabilitating prisoners

Swedish prisons are renowned for being liberal and progressive, with a focus on rehabilitation. The way Sweden treats prisoners may be partly responsible for keeping jail and recidivism rates low. Prison numbers have fallen and jails have closed.

Inmates are regarded as people with needs, to be assisted and helped. They learn how to be physical labourers, craftsmen … and even academics.

In high-security prisons, common areas include table tennis tables, pool tables, and steel darts. Correctional officers fill both rehabilitative and security roles.

The country also has 'open' prisons – prisoners stay in housing that resembles university dormitories and can commute to a job and visit families while electronically monitored. In these facilities, prisoners and staff eat together. They are not expected to wear uniforms.

Activity 3.15 Folio exercise

Swedish approach reduces recidivism

Read News report 3.15 'Swedes give a new twist to rehabilitating prisoners' and complete the following tasks:

1 Explain the approach adopted by Swedish corrective services to imprisonment and to reducing **recidivism** rates.

2 What evidence is there to suggest that Victoria is moving towards placing greater emphasis on the rehabilitation and re-integration of offenders into society?

3 To what extent do these recent reforms enhance the ability of the sentencing system to achieve the principles of justice?

4 Evaluate how effective Victorian prisons have been in achieving the aims of sanctions.

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Activity 3.16 Folio exercise

Reporting on the criminal justice system

In Activity 1.3 in Chapter 1 you started a collection of media reports that related to justice. Continue collecting media reports on the criminal justice system, including cases, changes to the law and proposed changes to the law, and discussions on the need to change the law.

With each article collected:

1 Make a note of the source and date

2 Write a brief summary of the main issues of the article. What you include in the summary will depend on what is contained in each article. For example, a summary could include:
   - the relevant sections of the article that relate to the study design
   - key terms with definitions
   - any relevant quotes that relate to those sections of the study design
   - any aspect within the article that relates to the elements of justice.

Evaluating sentencing

The approach taken to determining an appropriate sanction has strengths, but aspects of the sentencing process are the subject of ongoing community concern. It is not a perfect system. The table below outlines the key strengths and weaknesses of the sentencing process.

Table 3.14 Evaluation of sentencing

Strengths	Weaknesses
• Sentencing legislation, made by parliament, reflects community values. The legislation guides the courts when making sentencing orders. • Judges and magistrates retain discretion (in the majority of cases) when determining sentencing orders, meaning they can weigh up a number of individual factors to determine a fair outcome based on the nature of the offender and the severity of the offence. • Key sentencing principles (parsimony, proportionality, totality, parity) guide sentencing outcomes to ensure fairness for offenders by imposing similar sentences for comparable offences. • The Victim Impact Statement enables magistrates and judges to consider the impact the crime has on the victim and their family, thus promoting a fair outcome for the victim, the offender and the community. Similarly, the *Victims' Charter Act* promotes confidence in the sentencing process by informing victims of the right to have a voice in the sentencing process. • The *Sentencing Act* allows for the Court of Appeal to provide guideline judgments to help courts with their sentencing practices, in order to promote fair and just outcomes for offenders, victims and the community. • The Sentencing Advisory Committee monitors and evaluates sentencing practices to promote fair and consistent sentencing. The Committee provides expert advice and makes recommendations to the Attorney-General. • The appeal system exists to enable the OPP to appeal any sentence they regard as inappropriate. Similarly, offenders may appeal any sentence they consider too lengthy. The appeal system provides a safeguard against inappropriate sentencing. • The vast majority of sentences are not subject to appeal. They are regarded as just, fair and appropriate, and promote public confidence in the criminal justice and sentencing systems.	• The sentencing process is not a perfect system. • Understanding criminal behaviour and how best to respond to it in a manner that is fair, just and equal to the offender, the victim and the community is an ongoing challenge for the criminal justice system. • There are concerns within the community regarding some aspects of sentencing: in particular, for sexual assaults such as rape, and for sexual offences against children. • Sentencing ranges are broad, and this sometimes creates inconsistency in sentencing and may cause the public to question the sentencing. • Vulnerable, disabled and mentally impaired victims of crime may have difficulty communicating the impact of a crime/s in court and/or in an impact statement. This reduces the fairness of the sentencing process for marginal groups in society. • Constant changes in criminal behaviour may result in outdated and ineffective sentencing laws, and thus inappropriate and unjust outcomes. • Politically motivated agendas may result in the introduction of 'tough on crime' sentencing laws 'to protect and promote the safety of the community'. • Sentencing practices have traditionally focused on punishment and deterrence for adult offenders, but this approach has not effectively reduced crime rates or rehabilitated offenders. This may be considered unfair, as sentencing practices have failed to address the underlying issues of the offender's behaviour and failed to create a safer community. • High-profile cases involving well-known personalities, or particularly horrifying cases, attract social media attention and can lead to close public scrutiny of the sentence options. The community may form opinions without a full understanding of the facts or of the sentencing considerations judicial officers must consider.

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Key point summary

Do your notes cover all the following points?

Determining a criminal case

- ❑ Institutions to assist the accused
- ❑ The need for legal representation
  - The rules of evidence and procedure in our court system are strict and can be difficult to understand. Therefore, it is regarded as important for an accused to have legal advice and representation. The High Court, in *Dietrich v The Queen*, determined that an accused needed legal representation to have a fair trial.
- ❑ What is legal aid?
  - Legal aid provides services at free or lower cost. Services include legal information, legal advice and representation.
- ❑ Victoria Legal Aid
  - VLA is an independent, government-funded organisation established to ensure that Victorians who cannot afford legal advice or representation can receive assistance with their legal problems.
- ❑ Role of VLA
  - legal advice and representation to people who could not otherwise afford legal assistance
  - free information and education to Victorians
  - focus on the prevention and early resolution of legal problems.
- ❑ Community Legal Centres
  - CLCs are independent, non-profit, community-based organisations that provide free and accessible legal and related services to Victorians.
- ❑ Role of CLCs
  - legal advice and information
  - services of a duty lawyer
  - community legal education
- ❑ Other institutions and forms of assistance:
  - Victorian Aboriginal Legal Service
  - VALS provides services to Aboriginal and Torres Strait Islander people who require legal assistance, including criminal matters. Victoria Police is required to notify VALS if an Aboriginal or Torres Strait Islander person is taken into custody.
  - Services include:
    - legal advice
    - assistance of a duty lawyer
    - legal services, including representation in criminal matters, if necessary.
- ❑ Duty lawyer services
  - Duty lawyers are placed at many courts across Victoria to assist people who do not have their own lawyer. Priority is given to those who:
    - are appearing before the Children's Court (automatic assistance)
    - cannot afford a lawyer
    - have an intellectual disability, an acquired brain injury or mental illness
    - are experiencing or at risk of homelessness
    - cannot speak, read, or write well in English.
  - In the Magistrates' Court, priority will be given to anyone who has been remanded in custody and who is being brought before the court for the first time.

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- ❏ Committal proceedings
  - A committal proceeding is a hearing before a Magistrates' Court. The prosecution is required to present witnesses to prove that there is sufficient evidence to obtain a conviction in a higher court. The defendant does not have to enter a plea.
- ❏ Purposes of committal proceedings
  - determining if there is enough evidence of sufficient weight to support a conviction
  - determining if the offence/s can be heard summarily before a magistrate in the Magistrates' Court
  - determining if the accused proposes to plead guilty or not guilty
  - determining if a matter will go to trial, that there will be a fair trial by:
    - ensuring the prosecution discloses the case against the accused
    - enabling the accused to know the evidence against them and to cross-examine witnesses
    - enabling the issues in contention to be clear and adequately defined.
- ❏ Committal proceedings include the following:
  - Committal Mention Court: this court identifies those committals that are to be contested.
  - Hand-up brief: an alternative committal proceeding. Evidence is presented in the form of sworn statements.
  - Committal hearing: this is the prosecution's case in court. The defendant does not have to enter a plea.
- ❏ Strengths of committal proceedings include:
  - provides fairness by ensuring the accused is committed to trial only if enough evidence is provided by the prosecution
  - the accuser (the prosecution) must show, to the magistrate's satisfaction, that a *prima facie* case exists
  - the accused is informed of the prosecution's case against them
  - if insufficient evidence is provided by the prosecution, charges will be dismissed.
- ❏ Weaknesses of committal proceedings include:
  - cross-examination of witnesses can be vigorous
  - committal proceedings add to the costs of legal proceedings
  - committal proceedings add to delays in the legal system. This can be an issue if the accused is being held on remand.
- ❏ Pre-trial negotiations, including:
  - Plea negotiations: informal discussions between the prosecution and defence to secure a guilty plea to lesser charges in exchange for withdrawal of other charges. An accused can plead guilty when both parties agree on the facts on which the plea is based.
  - Purposes: Plea negotiations save time, costs and stress for the prosecution, the defence, victims and witnesses in a criminal matter.
- ❏ Strengths of plea negotiations include:
  - the prosecution is able to get a conviction for the crime
  - the process streamlines pre-trial and trial procedures and reduces delays in the legal system
  - the process saves costs to the taxpayer
  - the victim and other witnesses are saved the prolonged proceedings of a trial
  - the offender will receive a reduced sentence from making an early plea.
- ❏ Weaknesses of plea negotiations include:
  - the process is controversial when serious charges are downgraded
  - the victim does not get 'their day in court'. They do not get to testify against the accused, so justice is not seen to be done.
  - criminals who have committed serious offences are back in the community sooner, due to a reduced sentence.
- ❏ Sentence indications: The defence can request the court for an indication of whether the accused will:
  - receive a custodial sentence and, if so, provide a broad idea of what that sentence will be
  - receive another form of sanction, e.g. CCO.

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- ❏ Purposes of sentence indications
  - clarification of the defendant's prospects of a likely sentence so that they can make an early decision whether to plead guilty or not guilty
  - can allow the accused to receive a lighter sentence
  - allows for reduced delays in the court system; therefore, limited court resources are freed up
  - reduces costs, stress, inconvenience for the accused and prosecution
  - victims and witnesses do not have to go through a contested trial.
- ❏ Strengths of sentence indications include:
  - can lead to an early guilty plea
  - considered beneficial to those accused who do not have legal representation
  - stress, trauma and inconvenience to victims, their families and witnesses are minimised
  - the accused has certainty about the sentence they will receive
  - the *Sentencing Act* requires courts to impose a less severe sentence than otherwise for an early guilty plea.
- ❏ Weaknesses of sentence indications include:
  - inappropriate sentences can be indicated so that the saving of court resources is reduced if the DPP appeals the sentence in a higher court
  - prioritises court efficiencies, i.e. reducing delays and early guilty pleas, above the interests of the public, victims and defendants
  - an accused can feel pressured to enter a guilty plea rather than allowing the magistrate or jury to determine their guilt
  - sentence indications can be conducted in a closed court; therefore, there is a lack of transparency in the criminal justice system
  - a judge/magistrate may choose not to provide a sentencing indication even if requested.
- ❏ Reasons for a court hierarchy in determining criminal cases, include:
  - Specialisation: Each court is limited to a specific area of jurisdiction in which it has expertise.
  - Appeals: A court hierarchy allows an appeal to a superior court. This is fundamental to justice and fairness.
  - administrative convenience
  - doctrine of precedent
  - time and money
  - expertise and experience
  - minor matters determined locally.
- ❏ The responsibilities of key personnel in a criminal trial:
- ❏ *The judge*
  - decide admissibility of evidence
  - oversee selection and empanelment of a jury
  - assist the jury
  - safeguard the rules of procedure
  - decide all questions of law
  - decide questions of fact when there is no jury
  - decide the sanction.
- ❏ *The jury*
  - attend the trial each day
  - listen to all the evidence and submissions from both parties without bias
  - listen to the judge explain the law

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- decide questions of fact
- take note of the judge's final summary of the case
- reach and deliver a verdict.

❏ *The parties (accused/defence)*
- decide on a plea, or decide which charges to plead guilty to and which to plead not guilty
- engage a legal representative
- assist in the preparation and presentation of case.

❏ *Prosecution (OPP)*
- prepare the deposition
- conduct committal proceedings
- summary offences in the Magistrates' Court
- prosecution of indictable offences.

❏ *Legal practitioners: solicitors*
- provide legal advice to a defendant
- if the matter goes to court, prepare the 'brief' for the barrister, including documentation, research relevant law, gather evidence, ensure all materials are ready for the trial.

❏ *Legal practitioners: barrister*
- an independent practitioner who will represent the parties in court
- must primarily act on behalf of their client.

Sentencing and justice

❏ Key legislation regulating sentencing in Victoria is the *Sentencing Act 1991* (Vic) for all courts except the Children's Court.
- Sanctions for young offenders are set out in the *Children, Youth and Families Act 2005* (Vic).

❏ Purposes of sanctions:
- Punishment: To inflict some form of loss or burden on the offender in a manner that is just.
- Denunciation: To condemn and criticise publicly the conduct of the offender as wrong and inexcusable.
- Deterrence:
  - General deterrence: aimed at preventing crime in the general population.
  - Specific deterrence: designed to deter the particular offender from reoffending.
- Rehabilitation: To establish conditions that would alter or modify the behaviour of offenders so that they reintegrate into society in a positive manner.
- Protection of society: To protect the community from the harmful behaviour of individuals, e.g. removing them from the community.

❏ Hierarchy of sanctions for adults in Victoria includes:
- Dismissal, discharge and adjournment: A criminal conviction will have life-long effects on a person. Therefore, a court will consider various factors in relation to whether or not to impose a conviction, e.g. the character and record of the offender.
- Fines: A fine is a monetary penalty imposed for summary and indictable offences. In Victoria, fines are generally stated as penalty units. Purposes of a fine include:
  - to punish the offender
  - to act as a deterrent to the offender and the community in general
  - denunciation
  - rehabilitation.
- Community correction orders (CCOs): A CCO is a flexible sentencing order served in the community. Courts may apply conditions to match the circumstances of the offender and the nature of the crime. Purposes of a CCO include:
  - just punishment
  - rehabilitation
  - specific deterrence.

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- Imprisonment: A custodial sentence removes the offender from the community and denies them their liberty. It is considered the most severe sanction. Purposes of imprisonment include:
  - just punishment
  - general deterrence
  - specific deterrence
  - community protection
  - denunciation
  - rehabilitation, although this depends on the circumstances and resources provided in prison.

❏ Other orders:
- Youth Attendance Orders
- Youth Justice Centre Orders
- Youth Residential Centre Orders for children and young offenders
- Drug Treatment Order

❏ Factors considered by the court in sentencing:

❏ Mitigating factors: factors about the offender or the circumstances of the crime which may reduce the sentence. These include:
- the offender was an accessory to the crime
- the offender showed remorse for the crime
- no one was hurt or likely to be hurt during the crime
- the offender was a minor or had no criminal history
- the offender pleaded guilty and co-operated with police.

❏ Aggravating factors: evidence about the offender or the circumstances of the crime which may increase the sentence. These include:
- the offender has a criminal record
- the nature of the crime (particularly cruel)
- the offender used a weapon.

❏ Guilty pleas (sentence discount and sentence indication schemes)
- Guilty pleas or intentions to plead guilty must be taken into account when sentencing. They are treated as a mitigating factor and result in a reduced sentence. A plea of guilty may be taken into account through either a specified sentence discount or a sentence indication.

❏ Victim Impact Statements
- The Victim Impact Statement is a statutory declaration that may be read or presented to the court. It may include photos, drawings, poems and other material related to the impact on the victim.

❏ Other factors include:
- the offender's personal circumstances
- the victim's circumstances
- the offender's family and dependant/s
- the maximum penalty for the offence
- the sentencing guidelines for the offence.

❏ Justice in sentencing:
- cultural diversity in sentencing
- recommended reforms to the Victorian criminal justice system for just sentencing outcomes.

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End-of-chapter questions

Revision questions

1 Outline the meaning of the presumption of innocence. Describe two ways this principle is reflected in the criminal justice system.

2 Explain the role of plea negotiations in the criminal justice system.

3 Explain how specialisation in the court hierarchy contributes to a fair criminal justice system.

4 Outline the purpose of committal proceedings.

5 Explain a hand-up brief. How does this procedure reduce delays in committal proceedings?

6 Explain the role of Victoria Legal Aid in the community. How does legal aid support the principle of justice?

7 Discuss the role of the Office of Public Prosecutions.

8 Outline the responsibilities of juries in the Victorian criminal justice system.

9 Discuss the role of juries in achieving justice in the criminal justice system.

10 In your opinion, what is the main purpose of a sentence indication? Explain.

11 Explain why legal representation is considered necessary for an accused.

12 Outline the processes and procedures that ensure that an individual charged with a criminal offence will receive a fair hearing.

13 Evaluate the appropriateness of criminal pre-trial plea negotiations.

14 Explain two aspects of the sentencing process which promote the principles of justice.

15 Judges have often commented that sentencing is one of the most trying facets of their job. Describe two factors that a judge may take into account in determining an appropriate sanction and comment on why the courts find this role challenging.

16 Describe one feature of the sentencing process which promotes justice for each of the following: the offender, the victim and the community.

17 To what extent do you consider that the sentencing process provides for access to fair and equal treatment?

18 Briefly describe three sanctions and discuss the ability of these sanctions to achieve their purposes.

19 'It would be unjust to send all offenders to prison.' To what extent do you agree with this statement? Justify your answer.

20 Describe two advantages of having multiple sentencing options to choose from.

21 'Community correction orders have enormous potential to address the underlying causes of criminal behaviour.' Present one argument in support of and one argument against this statement.

22 Discuss the extent to which the sanction of imprisonment enhances the ability of the criminal justice system to achieve the principles of justice.

23 'Cultural factors may reduce the ability of the sentencing process to enhance the achievement of the principles of justice in some cases.' Synthesise the relevant information in the text and comment on the accuracy of this statement. Discuss one other factor which may reduce the capacity of the sentencing process to deliver justice for offenders.

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Practice exam questions

1 Define the term 'plea negotiations'. [2 marks]

2 Describe the role of community legal centres in Victoria. [3 marks]

3 Describe two responsibilities of a judge in a criminal court. [3 marks]

4 Identify and explain the factors that are taken into consideration when determining whether a person is eligible for legal aid. [4 marks]

5 Explain what a committal hearing is, and its purpose. What would happen if a magistrate found that there was not enough evidence? Does this mean that the accused cannot be charged again for their crimes? [5 marks]

6 Explain how committal proceedings contribute to a just legal system. [4 marks]

7 Should committal hearings be abolished? Discuss. [8 marks]

8 Describe the role of the Office of Public Prosecutions in Victoria. [4 marks]

9 'Committal hearings cause delays and have no useful purpose.' Discuss the extent to which you agree or disagree with this statement. [5 marks]

10 Explain how a court hierarchy reflects the principles of justice. [4 marks]

11 Discuss the role of the judge in achieving justice in the criminal justice system. [6 marks]

12 What is a sentence indication? Discuss the role of a sentence indication and its appropriateness in achieving justice in the criminal justice system. [5 marks]

13 Describe how the availability of legal aid contributes to a fair and equal hearing in the criminal justice system. [6 marks]

14 Evaluate the extent to which two criminal procedures contribute to the ability of the criminal justice system to achieve the principles of justice. [8 marks]

15 Explain the term 'rehabilitation'. [2 marks]

16 Describe the main components of a community correction order. [2 marks]

17 Describe two purposes of imprisonment. [4 marks]

18 What is an aggravating factor? [2 marks]

19 Explain how a guilty plea may be taken into account in the sanctioning process. [4 marks]

20 What is a Victim Impact Statement and what effect does it have on the sentencing process? [5 marks]

21 Outline the four purposes of sanctions. [4 marks]

22 Discuss two sanctions other than imprisonment. For each sanction, outline how it fulfils the purposes of sanctions. [6 marks]

23 What is a penalty unit? Why are fines in Victoria mainly expressed in penalty units and why is it indexed yearly? What is the current value of a penalty unit? [4 marks]

24 Explain why you think a custodial sentence is regarded as a punishment of last resort. [4 marks]

25 Explain three factors that a judge would take into consideration in determining an appropriate sanction. [6 marks]

26 To what extent do those three factors you chose in Question 25 reflect the purposes of sentencing? [3 marks]

27 Explain how you think the Victim Impact Statement can assist a judge in determining a just sentence. [6 marks]

28 Identify one problem in relation to sanctioning that involves costs or time. [2 marks]

29 'Sanctioning options provide that individuals are treated fairly, as the sanction reflects the seriousness of the offence.' Using examples, analyse this statement. [8 marks]

30 Evaluate the extent to which two sanctions contribute to the effective operation of the legal system. [8 marks]

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Chapter 4

Unit 3 – Area of Study 1

Evaluation of the criminal justice system

The Victorian criminal justice system aims to protect the rights of individuals and uphold the principles of justice: fairness, equality and access. In previous chapters, key concepts of the criminal justice system were examined, along with the rights of the accused and victims. Some institutions, key personnel and methods used in the criminal justice system, along with their appropriateness, were considered in the determination of criminal cases.

This chapter looks at how well the principles of justice are upheld and how the factors of costs, time and cultural differences can impact the ability of the Victorian criminal system to achieve those principles. Recent and recommended reforms in the criminal system are evaluated in relation to their ability to achieve justice.

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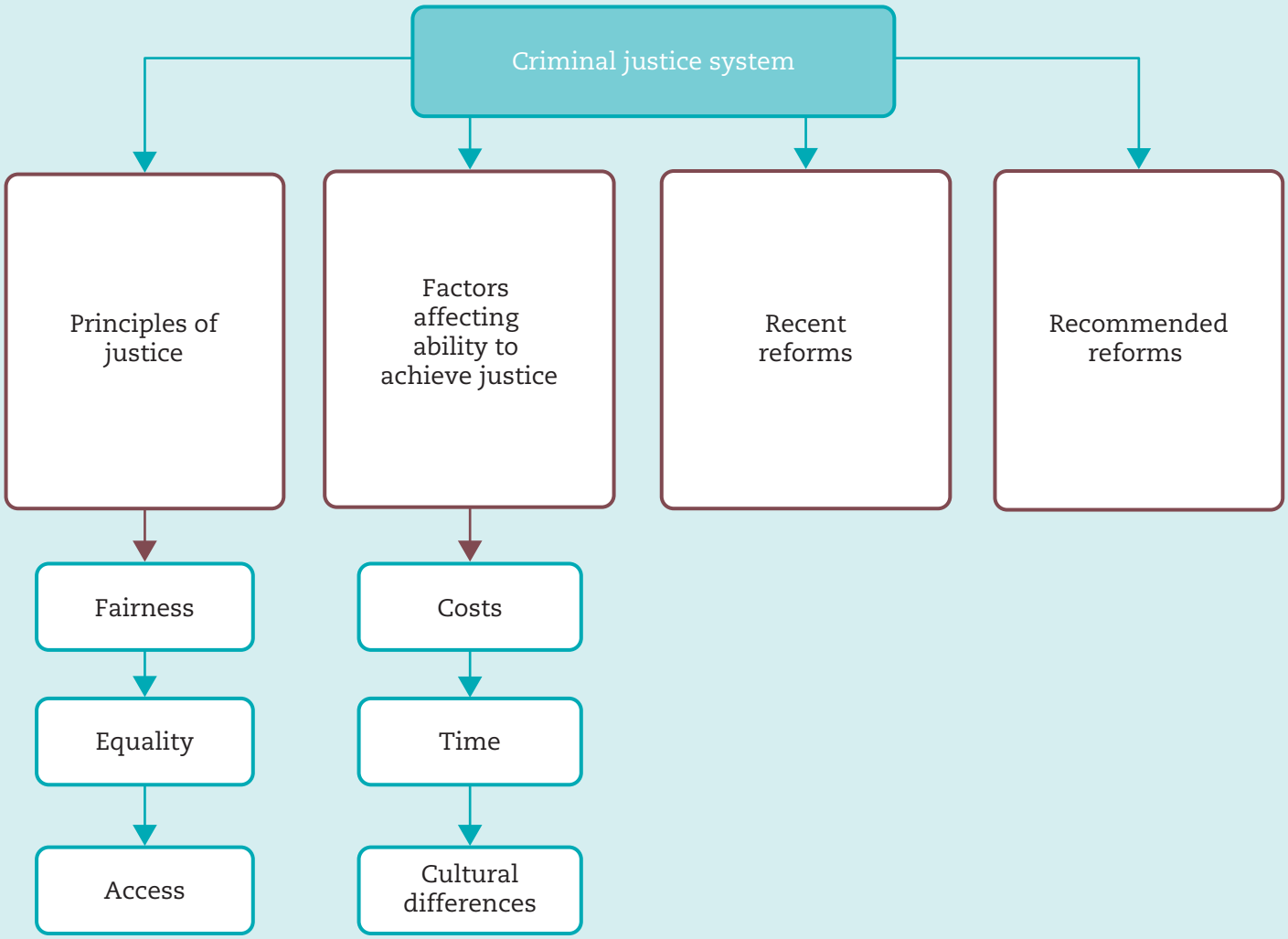

Key terms

access a principle of justice achieved if a range of institutions, specialist key personnel and methods to settle disputes are provided within the legal system

equality a principle of justice achieved if all citizens are provided with equal legal opportunities and equal treatment under the law

fairness a principle of justice achieved through the impartial treatment of all people under the law, without fear or favour

presumption of innocence a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law

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4.1 Justice in the criminal justice system

The purpose of criminal law is to achieve justice. Chapter 1 discussed the concept of justice and addressed the difficulties in defining it. Whether justice has been achieved is dependent on the values of the community at the time, the particular circumstances relating to a case, the individuals who have been affected and how they have been affected. One thing that is clear is that the concept of justice involves being respectful towards all people.

A legal system can only operate if it has the support of the majority, and the community will only support the legal system if justice is served and is seen to be served.

It is difficult for the legal system to meet all the expectations of the parties involved in a criminal case – the accused and their family, the victim and their family, and the community – as often their interests and expectations conflict.

The common elements of justice are fairness, equality and access to the legal system.

Fairness

Fairness involves impartial treatment for all people without fear or favour.

Criminal trials provide for a fair hearing with an independent and impartial magistrate or judge and jury.

The presumption of innocence, the right to silence and the right to trial by jury are principles that aim to provide for a fair trial and to ensure that we are all treated equally.

Fairness involves impartial treatment for all people, without fear or favour. Everyone has the right to a lawful hearing and procedural fairness or impartiality. This means decision-making that is objective and reasonable by the person exercising administrative power, i.e. the magistrate or judge. They must also be independent, and have no constraints or bias in their decision-making.

The criminal pre-trial procedures aim to provide individuals with a fair hearing. Individuals have the right to remain silent. This recognises that everyone has the right to be considered innocent until proven guilty: that is, the **presumption of innocence**. This also protects individuals against self-incrimination.

Criminal law and the processes and procedures within our legal system reflect our basic values. These include the principle that we are entitled to fair treatment in a criminal matter. These values are reflected in:

- the right to be considered innocent until proven guilty: the burden of proof is on the accuser to prove the guilt of the accused 'beyond reasonable doubt'
- the right to silence: we have the right not to incriminate ourselves, but there are many other reasons for reticence – fear of the police, lack of understanding of the legal system, of what is being asked, a lack of confidence in expressing oneself. Guilt cannot be assumed if a person chooses not to speak in court
- the right of the accused to be represented in court
- the right of the accused to be subject to the same rules of evidence and procedure as the accuser
- the right to trial by jury: a cross-section of the community means a range of values is represented, making sure the law remains relevant and meaningful
- the right to have a decision reviewed by a superior court if the outcome is considered unfair.

A person accused of a criminal offence has their case heard before an independent and impartial body. The rules of evidence and procedure used in a trial ensure that the prosecution and the defence have an equal opportunity to present their case. The use of the jury means that the final decision is made by unbiased and impartial representatives of the community who are applying current community values to the law.

Fairness is not the same as equal treatment. Some groups of people in our society need more assistance to achieve justice.

Do all people receive a fair hearing? Fairness does not mean that people are treated the same in our society: it is important to realise that fairness is not the same as equality. For example, a number of factors may affect the fair and equal treatment of minority groups. Some groups need more assistance to achieve fairness and justice in our society.

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Equality

Equality involves the provision of equal legal opportunities and equal treatment for all citizens under the law.

Under section 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), every person is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

Legal brief 4.1

Matsoukatidou v Yarra Ranges Council [2017] VSC 61

In February 2017, the Victorian Supreme Court delivered an important decision on the obligations of courts to ensure a fair hearing and equal rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This was in the context of unrepresented litigants and, in particular, where a litigant has a cognitive disability.

Mother and daughter, Betty and Maria Matsoukatidou, were charged by the Yarra Ranges Council with offences under the *Building Act 1993* (Vic) for failing to secure and demolish their home after it was destroyed following an arson attack. They each received fines (Betty also received a conviction) from the Magistrates' Court.

Betty and Maria appealed to the County Court, but the appeal was struck out for non-attendance. They applied for orders reinstating them. At the hearing, Maria and Betty appeared self-represented. Maria has a learning disability and Betty's first language was not English. Consequently, they struggled to present their case and the judge dismissed their application without adequately explaining the relevant procedure or applicable legal test.

Maria and Betty sought judicial review of the orders made on the grounds that, in the way that the hearing was conducted, the judge failed to ensure their human rights to equality and a fair hearing under the Charter were met.

Justice Bell of the Supreme Court had to consider whether a judge in the County Court is required to apply those rights under the Charter when hearing and determining legal proceedings.

Decision

Justice Bell accepted that courts (and tribunals) have an obligation to apply human rights in circumstances covered by the Charter. The right to equality contained in section 8(3) of the Charter includes the right to equal and effective protection against discrimination, as defined in the *Equal Opportunity Act 2010* (Vic).

Justice Bell identified that Maria's learning disability substantially diminished her capability to participate effectively in the hearing, including her ability to communicate with the judge.

The County Court judge should have recognised Maria as a person with a disability. Conducting the hearing on the basis she was an adult without a disability had the effect of disadvantaging her. As the judge failed to make any adjustments and accommodations in relation to the conduct of the hearing, a fundamental deficiency had occurred in relation to Maria's right to be equally and effectively protected from (indirect) discrimination.

Under the Charter, people appearing before a court have the right to a fair and public hearing as well as the right to a decision by a competent and impartial court. Justice Bell identified that self-represented litigants are usually disadvantaged in all kinds of legal proceedings. As a consequence, a judge has a duty to ensure a fair trial by providing due assistance. Justice Bell stated, 'The proper scope of the assistance depends on the particular litigant and the nature of the case – the touchstones are fairness and balance.'

In relation to the County Court, Betty and Maria's application was listed for the day after the strike out orders were issued. Yarra Ranges Council were represented through counsel instructed by a solicitor, whereas Maria and Betty were self-represented. Justice Bell found that the County Court judge did not appear to take into account Maria and Betty's capacity; the hearing was conducted too quickly for their comprehension and this compounded the disadvantage they experienced.

The Supreme Court accepted that courts have an obligation to apply human rights in circumstances covered by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

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The criminal justice system strives to achieve non-discriminatory outcomes and to protect all who come before it. In theory, everyone should be treated the same, enjoying equal rights and opportunities throughout the legal system. However, the reality is that not all groups in our society have a fair and equal chance of succeeding. In this regard, the overall aim of the criminal justice system is that no person is disadvantaged.

Wealth and power can cause differences in equality in Australia, but the criminal justice system tries to provide balance by implementing, for example, the following:

- services available to the accused, including legal aid
- pre-trial procedures to determine if enough evidence is actually available to commit the person to trial
- trial procedures that require the same rules of evidence, processes and procedures for both parties
- having a jury of 12 from the general community determine the outcome for serious offences.

Equality involves the provision of equal legal opportunities for all citizens under the law.

Equal treatment is reflected in:

- the use of interpreters for people with language difficulties
- specialist courts, such as the Koori Court, that recognise cultural differences and their importance
- evidence given orally in court so that it can be tested through cross-examination.

Equality is reflected through non-discriminatory processes and procedures that treat everyone in the criminal justice system the same way.

Equal and fair sentencing

Our sentencing system is not perfect, and many social and cultural factors, as well as time and financial costs, affect the system's ability to deliver fair and equal treatment to all.

For a start, a range of factors affect the offender's ability to understand the sentencing process. These factors include education, housing, mental health and drug/alcohol dependence.

The 2015 Victorian Ombudsman's report, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, stated:

- only 14% of prisoners completed secondary school
- 75% of male and 83% of female prisoners had a history of substance abuse
- the average prisoner was unemployed at the time of offending
- 40% of prisoners suffered from mental illness and cognitive disabilities and were homeless.

Traditional sentencing options, particularly imprisonment, often fail to address the underlying cause of the criminal behaviour. Given that 99% of prisoners in Victoria will be released at some point, there is a pressing need to address the offending behaviours and an equal need to prepare prisoners to re-enter society as law-abiding citizens. This requires treatment and education while offenders are in prison and transition support when they are back in the community.

Access

Some groups in our community need additional services and assistance so that they are on a level playing field with mainstream society.

Access to the law involves a range of methods and institutions to settle disputes within the legal system. It also means access to the personnel who can assist an individual involved in the criminal justice system – whether an accused, victim or a family member of either.

Access also means that you know your legal rights or are able to find out what those rights are. A criminal justice system must be accessible to all members of society for it to be considered fair and just. Everyone has the right to defend themselves and receive justice – whether they are the accused or the victim. However, a person without effective legal representation, for example, could be considered unlikely to receive a fair trial.

All Victorians caught up in the criminal justice system have the right to defend themselves to achieve justice.

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Under sections 25 (2) (e) and (f) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), an accused has the right to be told, if she or he does not have legal assistance, about the right, if eligible, to legal aid under the *Legal Aid Act 1978* (Vic); and to have legal aid provided if the interests of justice require it, without costs, if the accused meets the eligibility criteria.

The High Court of Australia has determined, in *Dietrich v The Queen* [1992] HCA 57, that if a person accused of a serious crime cannot get legal representation through no fault of their own, any conviction of the crime must be quashed by an appellate court as, ' … there has been a miscarriage of justice in that the accused has been convicted without a fair trial.'

Access also means an accused is informed and has access to advice about the processes such as plea negotiations and sentence indications, which can be the means to reduce delays in procedures and a reduced incarceration period.

Access involves the provision of a range of methods and institutions to settle disputes within the legal system.

All Australians have, under the law, the right to seek justice. But this right does not count for much if it cannot be exercised.

Access means to know your legal rights or be able to find out what those rights are.

According to the Law Council of Australia, each year one in four Australians will experience a legal problem substantial enough to require a lawyer, yet a lawyer may not always available to them.

Less than 10% of people account for approximately 66% of legal problems. More than 13% of Australians live under the poverty line, but with limited resources available, legal aid is available to just 8%. Many impoverished people are considered too wealthy to get basic legal help. Legal issues compound other social and economic challenges, creating a dire situation for those in need of assistance.

Disadvantaged groups of people in our community need additional support to achieve justice.

Activity 4.1 Folio exercise

Achieving justice

1 Outline the meaning of each of the three principles of justice.

2 'To provide a fair and equal criminal justice system, everyone must be treated the same.'

Explain why this statement is incorrect. Provide two groups of people who would need additional assistance in our legal system. Outline why they would need the additional assistance.

4.2 Factors affecting the criminal justice system's ability to achieve justice

In the pursuit of justice and its principles of fairness, equality and access in our criminal justice system, the issue of disadvantage must also be addressed. Three factors that contribute to a person being treated unfavourably in the legal system are:

- costs
- time delays
- cultural diversity.

Costs, time delays and cultural diversity are three factors that may affect the ability of the criminal justice system to achieve justice.

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Cost factors

In the case of *Dietrich v The Queen*, the High Court determined that legal representation was necessary for anyone charged with a serious offence. Without it, and if the person is convicted, then the resulting trial is not fair.

The need for suitable legal assistance was also highlighted in *R v Chaouk* [2013] VSCA 99 by the Court of Appeal. At the beginning of 2013, Victoria Legal Aid capped funding for instructing solicitors, limiting their court attendance to two half days. Justice Lex Lasry of the Supreme Court put a stay (halt) on the trial of Mr Chaouk because his trial was, ' … unlikely to be fair in the sense that it carries the risk of improper conviction' unless he had a solicitor to instruct counsel on a daily basis for the duration of the trial. The Director of Public Prosecutions appealed to the Court of Appeal on Justice Lasry's ruling to stay the trial.

The Court of Appeal upheld Justice Lasry's decision and confirmed that courts can stay criminal trials where they consider the absence of an instructing solicitor to result in an unfair outcome.

Legal advice and representation are the main legal costs to a defendant in a criminal matter.

Legal advice and representation in court are the main costs that relate to the defendant in a criminal matter. A criminal conviction can affect people for the rest of their lives – in their employment, family and social relationships. It is therefore considered important that if a person is charged with a criminal offence, they obtain legal advice as soon as possible.

Legal assistance and representation are regarded as necessary, not just for the trial but also for the pre-trial proceedings:

- to clarify the charges
- to determine the plea, including understanding the ability to negotiate a plea and request a sentence indication; and
- in relation to a bail application.

Our legal system of trial relies on each party having the best assistance in order to maximise their chance of winning. The costs will be dependent on such things as:

- the complexity of the case
- the court that will hear the matter
- the nature of the case; for example, the number of witnesses, the extent of the evidence, number of documents
- length of time of proceedings.

Costs can be formidable for many Australians. For cases in the superior courts, the daily court fee for a junior barrister to work with a solicitor can start at around $5000. Experienced or senior barristers can charge around $10 000 or more a day, while those with special expertise can charge $20 000 – $25 000. It was estimated that Cardinal Pell's first barrister, Robert Richter QC, would charge $16 000 per day. His next barrister, Brett Walker SC, was expected to charge $25 000 per day.

Cardinal George Pell with barrister Robert Richter QC who, it was reported, could charge up to $16 000 per day

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It is not just the costs that arise in the courtroom, however. Interviewing witnesses, meetings, drafting documents and reviewing prosecution documents all require legal expertise. Other costs arise for administrative tasks as phone calls, emails, postage, photocopying and filing documents for the court.

A victim may also need to seek legal advice. A victim may need legal assistance to:

- assist with information about the rights and entitlements of victims in relation to court processes
- provide information about the progress of the victim's matter
- provide support for the victim during pre-court conferences with prosecutors
- assist a victim to understand the legal process, including giving evidence and the process of making a Victim Impact Statement
- assist with the arrangements for attending court
- refer the victim to other specialist services.

A victim may need to seek legal advice.

Table 4.1 The effects of costs on the principles of justice

Principle	Effect
Fairness	The criminal justice system is complex in its rules of evidence, processes and procedures. If an accused is unable to afford legal advice and representation, they can be treated unfairly in the pre-trial, trial and post-trial procedures. This can be made worse when the accused is unable to understand the English language, is unable to understand the terminology of the criminal courtroom, or comes from a country with a different legal system.
Equality	An accused without legal advice and representation is not on a level playing field as they face prosecutors who are skilled and have expertise in the law, its rules of evidence and procedures. This disadvantage can mean, for example, they are unable to take advantage of plea negotiations or a sentence discount for a guilty plea.
Access	If an accused is unable to afford legal advice, they are unable to access resources available to assist in their defence; for example, knowing that duty lawyers are available or the availability of specialist courts. They may feel pressured to plead guilty even though they did not commit the crime.

Time delays

It is important that criminal procedures are conducted within a 'reasonable' time period. The accused, victims and witnesses can experience significant stress waiting for a case to be finalised. For a person who has been denied bail – that is, held on remand – the consequence of delay is that they are denied their liberty. This can affect their employment, personal wellbeing and relationships.

Under section 25 (2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), one of the rights in criminal proceedings is 'to be tried without unreasonable delay'.

A number of pre-trial procedures have been introduced to reduce delays:

- The committal process filters out cases where there is not sufficient evidence to obtain a conviction in a higher court.
- Sentence indications encourage a guilty plea to remove the need for a trial.
- Committal mention hearings have been introduced to identify cases in which the defendant intends to plead guilty.

These processes are designed to make the committal procedure more efficient and to reduce delays. However, it has been suggested that more can be done to encourage the early identification of guilty pleas.

There is no one measure of what is a reasonable time for the resolution of a criminal matter. Time must be allowed for an allegation to be fully investigated and for a court to hear all the relevant evidence; however, it is also important that criminal cases should not be unduly delayed.

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News report 4.1

Delays end on permanent stay

Consider the case of Kara Lesley Mills. In October 2006, Mills was charged in the ACT with four offences, including trafficking in a controlled drug, or alternatively, possessing that drug, and receiving stolen property. On 6 September 2007, following a committal hearing, Mills was committed to stand trial.

On 28 July 2008, the trial started, but it was stopped after the informant revealed in evidence that fingerprints on the bags containing the drugs had been tested – the defence had been told that it had not. Evidence was given that although fingerprint analysis had been undertaken it revealed no useful information. That was highly relevant to Mills's defence, which was that the bags were left by someone else. DNA analysis had been requested but it had not been conducted.

A pre-arraignment conference was scheduled for 30 June 2009, but it was twice adjourned (because of counsel and witness unavailability), and when the matter returned on 11 August 2009, counsel for Mills indicated that representations were being made to the DPP regarding a permanent stay of proceedings because of delays. Consideration of that issue led to further adjournments.

On 29 October 2009, the next case conference was held and the matter was set down for trial on 7 March 2011. The stay application was foreshadowed and a timetable was set. On 14 April 2010, the prosecution informed Mills's solicitors that no DNA analysis of the seized drug packaging would be conducted. No reason was given. On 15 April 2010, the pre-trial application was part-heard but then not relisted until 18 February 2011, apparently because of a death in the family of counsel for the prosecution. On 7 March 2011, some four years after Mills was charged, the rest of the application was heard.

The matter was taken to the ACT Supreme Court. Chief Justice Terrence Higgins found that for a matter to take four years to come to trial after the decision to prosecute was unreasonable. He said, 'The delay of two and a half years from the first trial, in a relatively simple case is … egregiously unreasonable, for whatever reason it might happen.' Judge Higgins granted a permanent stay, believing it was the only appropriate response; the alternatives – an award of costs, relaxed bail conditions or credit for time served – were not.

Delays can cause significant hardship and undermine public confidence in the legal system.

Delays and justice

The criminal justice system includes processes for the investigation, adjudication and sanctioning of criminal offences. These processes aim to provide fair and equal treatment of those accused or convicted of an offence. The accused is protected by the principles of a fair trial and guilt must be proven beyond reasonable doubt. Delays limit the capacity of the criminal justice system to achieve these aims.

Why are delays a problem?

There are a number of consequences of delays in the criminal justice system:

- Delays may result in unnecessary hardship for victims and their families.
- Witnesses may have difficulty remembering details.
- A person accused of a crime may be denied their liberty and held on remand.
- Delays undermine public confidence in the ability of the criminal justice system and send the wrong message to offenders in the community.
- Delays undermine the morale of those in the community who are responsible for enforcing the criminal law.

Delays contribute to the costs of the criminal justice system. Delays increase the cost of court administration as well as cost implications for witnesses and victims. Contested cases are generally very time-consuming, especially in the higher courts where a jury must be empanelled. For participants engaged in the hearing of a contested case, this can result in additional pressure.

What causes delays?

The processes and procedures for hearing criminal cases are complex. Delays can occur in the investigation of an offence, in the pre-trial stages, or during a trial. Some of the reasons for delays are listed in Table 4.2.

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Table 4.2 Causes of delays in the criminal justice system

Delays in determining a plea	In most cases, the defendant pleads guilty and the case is not contested. However, even uncontested cases can result in delays. These delays can be due to a late plea negotiation between the defence and the prosecution.
Delays in the preparation of cases	Delays can occur in the delivery of a brief, and the preparation, disclosure and filing processes. These are compounded by defence difficulties and the unavailability of legal aid.
Court workloads	Delays are a by-product of increased workload due to: • the increased number of cases heard by the courts • the average length of criminal cases • the number of court appearances needed to resolve a matter.
Delays in collecting evidence	The prosecution of complex cases relies on quality evidence resulting from the police investigation. Such investigations typically require costly and time-consuming research and expertise.
Adjournments	A case may be adjourned because the courts have over-listed the number of cases that can be heard, or due to limited court facilities – such as access to videoconferencing facilities – or because a witness is not available on the day of the trial.
Rules of evidence	The rules of evidence and the reliance on oral evidence contribute to delays in the criminal justice system. It takes time, for example, to examine-in-chief and cross-examine witnesses.

Legal brief 4.2

DPP v Gargasoulas [2019] VSC 87

On 20 January 2017, a car driven by Dimitrious (James) Gargasoulas, drove into pedestrians in Bourke Street, Melbourne. In the filing hearing in the Magistrates' Court on 23 January 2017, he was charged with six counts of murder and 27 counts of reckless conduct endangering life. Gargasoulas was remanded in custody.

Normally, a case such as this would not proceed to the Supreme Court until after the accused is committed by the Magistrates' Court. However, in this case, the public and media were applying pressure to see justice served.

On 17 February 2017, Justice Lex Lasry invited the prosecution to advise the Supreme Court of the progress of the case. In calling this hearing, the Justice was trying to hurry proceedings along. '[A] … case like this tends to be lost in the list for months and sometimes years,' he said.

The DPP, John Champion QC, told the Court this was 'a very complex' case; the committal was not expected to begin until December. Police were taking statements from 1000 witnesses, there were hundreds of victims, '… countless hours of video footage, CCTV and footage from mobile telephone devices'. The police were set on 'assessing it all'. 'There are multiple crime scenes, even within the CBD, that need to be dealt with,' said Mr Champion.

The committal mention hearing was heard in the Magistrates' Court in mid-December 2017 with the Supreme Court direction's hearing occurring three days later.

In March 2018, prosecutor Andrew Tinney told the Supreme Court that the OPP was seeking reports into Gargasoulas' mental state from a psychologist and a psychiatrist, but that these would not be ready until the end of May. Justice Lex Lasry again raised concerns about how long the matter was taking.

In a further mention hearing in May 2018, the Supreme Court heard that Gargasoulas had been assessed by four mental health experts who all diagnosed him with a form of mental illness, but there were still opposing views from the defence about whether he was fit to stand trial.

In June 2018, a Supreme Court investigation was held to determine if Gargasoulas was fit to stand trial, but the jury was discharged after failing to reach a verdict. The Supreme Court set a new date for a fitness hearing in October, at the end of which the jury found Gargasoulas fit to stand trial.

On 13 November 2018, in the case *DPP v Gargasoulas* [2019] VSC 87, the jury convicted the accused. At the sentence hearing held on 22 February 2019, Justice Mark Weinberg sentenced Gargasoulas to life imprisonment with a non-parole period of 46 years.

'Despite the mitigating factors upon which your counsel relied, your crimes can only be described as horrendous. Your actions were both callous and cowardly … As I have said, you have shown no genuine remorse and I do not accept that you have displayed any true empathy for those whose lives you have shattered or destroyed,' Justice Weinberg said.

James Gargasoulas was sentenced to life imprisonment in the Victorian Supreme Court with a non-parole period of 46 years.

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Table 4.3 The effect of delays on the principles of justice

Principle	Effect
Fairness	Unreasonable delays in the legal system cause stress and trauma for the accused, witnesses, the victims and their families. It can cause witnesses to forget details and victims to feel that justice is not being served. If the accused is being held in remand (custody), this can affect their employment, family and social standing.
Equality	Delays can cause further disadvantage to a person held in remand for a long period. The longer it takes for a case to come to trial, the more expensive legal costs will be. The victim and their family are unable to feel that justice has been served the longer a case takes to get to court.
Access	Delays can enhance the trauma and stress felt by parties – the accused is unsure of the outcome of the trial and the victim can feel that the justice system has failed them. The community can feel that justice is not being served.

Activity 4.2 Folio exercise

Delays in the criminal justice system

1 Explain how delays impact the principles of justice in the criminal justice system.

2 Outline ways the criminal justice system tries to reduce delays.

3 Read Legal brief 4.2: *DPP v Gargasoulas*:
- What were the reasons given for the delay in bringing Gargasoulas to trial?
- What do you think might have happened had the police not investigated the case properly?
- Do you think the delays in this trial reasonable? Justify your response.

4 Discuss how the delays in the Gargasoulas trial impacted on:
- the victims
- the victims' families
- the accused
- the community.

Why trials are delayed

A report, *Criminal Trial Delays in Australia: Trial Listing Outcomes*, prepared by the Australian Institute of Criminology, examined the reasons for delays in the hearing of criminal trials.

The study found that for every 10 criminal trials listed to begin on a certain date:

- three would proceed as scheduled
- four would be settled without a trial, either through a guilty plea or withdrawal of the case by the prosecution
- three would be adjourned and rescheduled.

The reasons for trial adjournment or delay were identified as:

- legal counsel did not prepare for the trial because they believed it was unlikely to proceed
- the prosecution was uncertain about the strength of its case and how to proceed
- the prosecution decided to amend the charges shortly before the trial date, leading to late plea negotiations.

Trial delays were also due to a lack of experienced lawyers, limited or late disclosure of evidence, limited or late communication between the prosecution and defence, limited incentives for early guilty pleas and confusion about probable sentencing outcomes.

Other reasons for trial delays are limited consequences for intentional delay of the trial, and failure to manage victims and witnesses so that they are able to appear on the scheduled trial date.

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Cultural diversity and justice

The laws in our criminal justice system reflect the values and culture of a mainly white Anglo-Saxon society, whereas Australia is one of the most ethnically and culturally diverse societies in the world. Almost one in four Australian residents were born outside Australia and many more are first-or second-generation Australians, the children or grandchildren of migrants and refugees. The variety of these backgrounds, together with the oldest living cultures in the world – Indigenous Australians (Aboriginal and Torres Strait Islander peoples), who make up approximately 2.8% of the population – have created a unique society. English is spoken at home by less than 73% of the population, with the main languages being (in order) Mandarin, Arabic, Cantonese, Vietnamese and Italian.

These fundamental differences, if not recognised in our community and addressed where necessary, can create injustices in our criminal law system. Two groups in particular are at risk: Indigenous people and migrants.

Cultural diversity can cause injustice in our legal system.

The 2016 Census showed Australia as a fast-changing, ever-expanding and culturally diverse nation. However, cultural diversity can cause injustice in the legal system.

Indigenous Australians

Our legal system is based on oral evidence in the courtroom. Where an accused person or witness is unable to speak or understand English, an interpreter is provided. However, currently in Australia there are approximately 200 different Indigenous languages – a number of which are no longer spoken (there were estimated to be 250 at the time of colonisation). For people needing an interpreter, usually older Indigenous people, the interpreter may have to be a family member or friend of the accused. This may not in itself be easy, bearing in mind the complex kinship rules of First Nations peoples and the fact that many Indigenous cultures forbid the discussion of certain subjects in general or within particular groups.

Australian Aboriginal English is a recognised form of the English language. However, its use can still present problems in terms of understanding in the courtroom, particularly for non-Indigenous members of a jury.

There are differences in pronunciation and grammar in Australian Aboriginal English, a recognised form of English. This form of English can present a problem in terms of understanding for the jury when an accused Indigenous person is being tried. Courts have started to recognise Aboriginal English, but many injustices have occurred through a lack of awareness and understanding.

Further cultural differences that have caused injustices in the legal system include:

- the way direct questioning is carried out with Indigenous witnesses or accused persons
- the fact that it is seen as disrespectful to have or maintain direct eye contact with a 'respected person', whether Indigenous or non-Indigenous
- the fact that it is not acceptable in Indigenous cultures to disagree with a 'respected person', whether Indigenous or non-Indigenous
- the fact that it is not acceptable for a woman to discuss matters of a sexual nature, particularly with a man (many police and legal personnel are men).

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Over-representation in the legal system

Statistical evidence bears testament to the disadvantage experienced by Aboriginal and Torres Strait Islander people in their dealings with the criminal justice system:

- Indigenous people make up 2.8% of Australia's population, but in 2019 made up 28% of the adult prison population.
- Indigenous incarceration has increased by 45% since 2008.
- Indigenous men are 15 times more likely to be in custody than non-Indigenous males.
- Indigenous women are 21 times more likely to be in custody than non-Indigenous women.
- Indigenous children are 26 times more likely to be detained than non-Indigenous children.
- Indigenous children make up 7% of the general youth population but 54% of those in youth detention across Australia. This ranges, on average, from 15% in Victoria to 97% in the Northern Territory.
- Laws allow for children aged 10 and 11 years old to be detained in violation of the United Nations *Convention on the Rights of the Child*.
- Most of the deaths of Indigenous Australians in custody are of male youths and men aged between 15 and 40 years who are serving sentences of less than 6 months.

An inquiry by the Australian Law Reform Commission (ALRC), led by Federal Court Judge Matthew Myers, was commissioned by the Federal Government to investigate whether courts, police and prisons were contributing to the over-incarceration of Indigenous Australian peoples.

The short answer, the inquiry found, is yes. The justice system was often entrenched in inequalities by not providing enough sentencing options and diversion programs for Indigenous offenders.

A submission to the ALRC inquiry from Jesuit Social Services summed up a common assessment: 'The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is a national disgrace'.

Keenan Mundine, who had a troubled childhood growing up in Redfern in Sydney, said he encountered a discriminatory legal system when he was sent to youth detention as a teenager. 'I fell through the gaps in the justice system and dealt with a lot of injustices, a lot of policies that were made by non-Indigenous people that affected me as an Indigenous person,' he said.

It is worth noting here that the United Nations has stated that the over-incarceration of Indigenous people in Australia is a major human rights concern. The UN representative, Ms Tauli-Corpuz said that the detention of young Indigenous children was 'the most distressing aspect of her visit to Australia.'

People demonstrate against the eviction of residents of the Redfern Aboriginal tent embassy outside the Federal Court in Sydney on 10 July 2015.

ISBN 978-1-108-87276-8 Poore et al.

News report 4.2

Patrick Dodson makes impassioned plea for 'a smarter form of justice'

Australia's legal system has become a 'feared and despised processing plant' for most Aboriginal people, propelling the most vulnerable and disadvantaged towards a 'broken, bleak future', according to Senator Patrick Dodson.

Lamenting that the situation has deteriorated since the landmark Royal Commission into Aboriginal Deaths in Custody in 1991, Professor Dodson has called for a formal engagement between Indigenous Australia and the parliament on a new approach.

'Accepting the status quo permits the criminal justice system to continue to suck us up like a vacuum cleaner and deposit us like waste in custodial institutions,' Professor Dodson declared in an impassioned speech to mark the 25th anniversary of the report.

'We need a smarter form of justice that takes us beyond a narrow-eyed focus on punishment and penalties, to look more broadly at a vision of justice as a coherent, integrated whole.'

Professor Dodson was one of the commissioners who investigated 99 Aboriginal deaths in custody between 1980 and 1989 and made 339 recommendations.

Since the report was tabled in federal parliament in May 1991, the rate at which Indigenous people are imprisoned has more than doubled, raising questions about how effectively the recommendations have been implemented.

'Certainly, one has to wonder what happened to the principle of imprisonment as last resort and the 29 recommendations relating to this issue,' said Professor Dodson.

Professor Dodson said mandatory sentencing, imprisonment for fine defaults, 'paperless' arrest laws, tough bail and parole conditions and punitive sentencing regimes had all contributed to high incarceration rates, along with funding cuts to frontline legal services and inadequate resourcing for much-needed diversionary programs.

'This suggests that legislators in some jurisdictions have not learnt from the past, and are still intent on arresting their way out of Indigenous disadvantage,' he told the National Press Club.

Professor Dodson cited the 'devastating' case of 22-year old Ms Dhu, who died in the Port Hedland lock-up in 2014, and said her story 'could have been plucked at random from almost any moment in the modern story of Aboriginal injustice'.

'For our communities, the storyline is all too familiar: the minor offence; the innocuous behaviour; the unnecessary detention; the failure to uphold the duty of care; the lack of respect for human dignity; the lonely death; the grief, loss and pain of the family.'

A quarter of a century after the report, Indigenous people were more likely to come to the attention of police, more likely to be arrested and charged and more likely to go to jail, Senator Dodson said.

'The statistics speak for themselves and the cold hard facts remain an indictment on all of us,' he said.

In the past decade, the incarceration rate for Indigenous men had more than doubled; Indigenous youths now comprised more than 50% of juveniles in detention; and, for Indigenous women, the rate of imprisonment was accelerating even faster – a 74% increase in the past 15 years.

'If we are to disrupt current trends, we must invest in rebuilding the capacity of families and communities to deal with the social problems that contribute to these appalling indicators.'

Professor Dodson stressed the need to develop preventative programs that engage the community in winding back 'the ravages of drug and alcohol abuse, the scourge of family violence and welfare dependency'.

'We will not be liberated from the tyranny of the criminal justice system unless we acknowledge the problems in our own communities and take responsibility for the hurt we inflict and cause to each other.'

Professor Dodson appealed to governments to embrace the royal commission's call for a response based on a philosophy of empowerment.

'The Australian Parliament needs to be more open to the idea of engaging in a formal way with Indigenous people on matters that affect our social, cultural and economic interests as well as our political status within the nation state,' he said.

Professor Dodson said he hoped to play a constructive role in advancing solutions in his new role as a senator.

Source: Michael Gordon, The Age*, 13 April 2016*

Senator Patrick Dodson

Video

ISBN 978-1-108-87276-8 Poore et al.

Legal brief 4.3

Coroner to look at whether systematic racism played role in death

The Coroner in the inquest into Yorta Yorta woman Tanya Day's death in police custody agreed to look at whether systemic racism played a role in Ms Day's treatment and ultimate death.

In a momentous decision, the Acting Victorian State Coroner, Caitlin English, ruled that she 'will allow witnesses to be questioned as to whether racism played a part of their decision making, including Ms Day's treatment, options considered, their motivations and potential unintended effects of their decision making.' The Coroner has also allowed an expert report on systemic racism to be included in the material and will allow witnesses to be asked to produce relevant 'policies, procedures and training.'

Tanya Day's children, who have advocated for the coroner to investigate the role racism played in their mother's death since the beginning, said, 'We are extremely pleased Coroner English has accepted our submission of systemic racism, and hope that doing so shines a light on the system that failed our mother and led to her dying in police custody.'

On December 2017, Tanya Day was taken off a train in Castlemaine after a V/Line officer called the police. She was then arrested and locked up for the offence of being drunk in a public place. In custody, Tanya Day fell and hit her head on a number of occasions causing a brain haemorrhage from which she later died.

'The past 18 months has been particularly painful for our family. Our mum was a beautiful woman who deserved dignity and respect, especially at her most vulnerable time. We will continue to fight for justice for her as she did for others.'

At the last directions hearing, it was revealed that at the time of Ms Day's death, Indigenous women were approximately ten times more likely to be targeted by police for being drunk in public than non-Indigenous women.

Ruth Barson, Legal Director at the Human Rights Law Centre, who is representing the family, said it was important that the link between the offence of public drunkenness, racialised decision-making and Aboriginal deaths in custody be explored.

'It is right for the Coroner to look into whether racism played a part in Tanya Day going from being asleep on a train to dying in police custody. The truth of the matter is that Tanya Day would be alive if the Victorian Government had done the right thing and repealed public drunkenness laws – laws that criminalise behaviour for some people that is completely overlooked for others,' said Barson.

Over the past three decades, the Aboriginal and Torres Strait Islander community and numerous expert reports, including the Royal Commission into Aboriginal Deaths in Custody in 1991, have recommended that the offence of public drunkenness be abolished and replaced with a public-health response.

'If Premier Andrews does not get rid of the offence of public drunkenness and confront the racism that leads to Aboriginal and Torres Strait Islander people being targeted and locked up – then deaths in custody will continue. If somebody is too drunk, they need help to get home or for an ambulance to be called – they should not be behind bars,' said Barson.

'If Day had been a non-Indigenous person travelling home drunk from the Melbourne Cup, she would not have been arrested,' said Barson. 'Most Victorians have committed the offence of public drunkenness.'

In April 2020, Coroner Caitlin English found that the 2017 death of Yorta Yorta woman Tanya Day in police custody was 'clearly preventable'. She has referred Tanya Day's death in police custody to prosecutors for further investigation. 'I believe an indictable offence may have been committed in connection to Ms Day's death,' the coroner said.

She found there was 'unconscious bias' in the V/Line conductor reporting Ms Day to the police. 'I find the decision to define…[Ms Day] as unruly and to call for police rather than pursue other options has been influenced by her Aboriginality,' the coroner said.

Coroner English also found that police officers attending to the V/Line call at Castlemaine railway station did not deal with her medical situation adequately and that the quality of cell checks on Ms Day did not meet Victoria Police manual guidelines. The two police officers attending to Ms Day in the cells showed 'cultural complacency'.

The coroner made a number of recommendations to the Attorney-General, Victoria's Police Commissioner, the V/Line chief executive and the secretary of the Department of Justice, including that the *Coroners Act 2008* be amended to give coroners more control over the investigation, conducted by police, that informs an inquest. She also recommended that a falls risk assessment be placed in the Victoria Police manual guidelines for holding people in custody.

Source (adapted): Human Rights Law Centre, 27 June 2019

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Aboriginal deaths in custody

The *Guardian* newspaper published a report in 2018 on the number of Aboriginal deaths in custody since the Royal Commission 1991. It was found that, even though the Royal Commission stated the importance of monitoring and keeping accurate data about deaths in custody, detailed information was difficult to find. Nevertheless, the *Guardian* found more than 400 deaths had occurred since the inquiry.

Activity 4.3 Structured questions

Smarter justice for Indigenous people

Read News report 4.2 'Patrick Dodson makes impassionate plea for a "smarter form of justice"' and complete the following tasks:

1 List the sentencing practices Dodson identified as contributing to the increasing incarceration rates of Indigenous offenders.

2 Suggest one reason for Indigenous people to being 'more likely to come to the attention of the police, more likely to be arrested and charged and more likely to go to jail'.

3 Evaluate whether the statistics quoted on Indigenous prisoners in the box 'Over-representation in the legal system' and in this news report support Senator Dodson's arguments.

4 Draw on the material in News report 4.2 and Legal brief 4.3 to suggest two reforms to improve the treatment of Indigenous people in the criminal justice system.

Immigrants and refugees

One in four Australians are born overseas. There are 300 separately identified languages spoken in Australia, including Indigenous languages. According to the 2016 Australian Census, more than one-fifth of the population speaks a language other than English at home.

Australia is a country built on immigration.

Immigrants, refugees and justice

Immigrants and refugees can have particular issues with the police and the criminal justice system. The most important of these issues relate to pre-migration life experiences and the difficulties associated with settling in a new country. Refugees, in particular, have left their country at short notice, often without their families, are unable to return to their country of origin and are uncertain about the possibility of maintaining links with their family. In addition, they face a severe lack of social, economic and political opportunities and life choices, making integration difficult.

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The traumatic background experiences of young migrants and refugees, coupled with the barriers some face in Australia, make them some of the most vulnerable members of our society.

Refugees can be suffering undiagnosed and/or untreated trauma.

Research indicates that it is young immigrants who are more likely to come into contact with the police and the justice system.

There are few ongoing programs to improve migrants' knowledge and understanding of the criminal justice system and the role of the police.

Some of the more specific problems that are experienced include:

- discrimination and prejudice
- social isolation and disenfranchisement
- difficulties assimilating with the broader Australian culture and/or maintaining a sense of their own identity with their original culture.

Refugees can also be suffering trauma from their past. All these factors affect their involvement in society generally, and in the criminal justice system.

Some of the key issues with the criminal justice system are:

- difficulties with police, including perceptions of racism, bias and over-policing
- racially motivated attacks – or 'hate' crimes – predominantly by strangers
- a disproportionately high fear of crime
- a lack of awareness of the law and of how the criminal justice system operates
- under-reporting crime as victims: this may be due to a lack of understanding of, or confidence in, the criminal justice system and a fear of police
- concern about the stigma and shame associated with contacting the criminal justice system: this can also be a barrier to the use of both formal and informal support services
- difficulties accessing culturally appropriate programs such as legal assistance.

A report published by the Judicial Council on Cultural Diversity (in 2016) revealed that migrant and refugee communities do not have the same access to justice as mainstream Australians. The Judicial Council stated that for justice to be accessible, equitable and fair, courts must be able to understand and respond to the needs of our culturally diverse society, and citizens must be able to understand and respond to our legal system. The Council highlighted four key areas where inequalities cause major concern:

- a lack of coordination across the judiciary in addressing areas of concern arising from cultural and linguistic diversity
- an absence of national competencies in relation to cultural diversity
- a lack of consistency in the requirements for engaging interpreters, as well as their underutilisation, and concerns about the interpreter quality; and
- insufficient resources and/or formal structures dedicated to help judicial officers (judges and magistrates) and administrative staff to design or implement cultural diversity policies.

A further problem for immigrants and refugees is the use of sensational language in the media. The following have been quotes from leaders in our community:

- 'We decide who comes to this country.' (John Howard, 2001 Election speech)
- ' … they may be paedophiles, rapists or murderers … ' (Scott Morrison, 6 February 2019 in relation to men on Nauru and Manus Island coming to Australia for medical treatment)
- 'Stop the boats' (Liberal and Labor politicians)
- 'Australians will be kicked off waiting lists for healthcare and public housing.' (Peter Dutton, 28 February 2019)
- 'Victorians are scared to go out to restaurants because of African gang violence.' (Peter Dutton, 3 January 2018)
- '(But) you know what's depressing wages at the moment? You know what's sending house prices and rent up? It's immigration.' (Tony Abbott, 12 April 2019)

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- 'There is no "us" any more, as a tidal wave of immigrants sweeps away what's left of our national identity … Christianity is losing its hold as the country's faith and is followed now by just over half the population.' (Andrew Bolt, 3 August 2018)
- 'It's OK to be white …' (Pauline Hanson in presenting a motion in the Senate, 15 October 2018. The bill failed, despite support from the Liberal-National coalition)
- 'Islam is a disease; we need to vaccinate ourselves against that' and 'Muslims want to impose Sharia law because they "hate Western society"'. (Pauline Hanson, 24 March 2017)
- 'The record of Muslims who have already come to this country in terms of rates of crime, welfare dependency, and terrorism are the worst of any migrant [group] and vastly exceed any other immigrant group … the majority of Muslims in Australia of working age do not work and live on welfare'. (Fraser Anning, Queensland Senator, 15 August 2018)

A young person responding to media stories about African young people commented:

> Imagine opening your newspaper only to find the headline which suggests that all young people like me, who have my skin colour, are criminals. There are so many good Australians who are working against the racial discriminatory and divisive stereotyping yet it makes it so hard for me to feel like I belong in this society. And we're not disengaged, although every time I see another instance of racial discrimination or racial stereotyping, it makes us feel just a little bit more disconnected from the society that we call home.

Nyadol Nyuon, a commercial lawyer with a top-tier law firm in Melbourne, was born in an Ethiopian refugee camp where her family fled to escape civil war. Commenting on Immigration Minister Peter Dutton's comments on deporting African youth who cause trouble, she states, 'It means that for me, as a South Sudanese Australian, my citizenship, my sense of identity and attachment to Australia is not as valued as an Anglo person.'

Nyadol Nyuon

Cultural diversity and sentencing

Inequality in sentencing outcomes may occur because of an offender's cultural background. Victoria has one of the most culturally diverse populations in Australia and yet the law does not make concessions for recently arrived migrants, Indigenous Australians or refugees.

Minority groups may have difficulty understanding and effectively contributing to the sentencing process because of their cultural background, language barriers and different expectations of the legal system. This can result in unfair and unjust sentencing outcomes.

Table 4.4 The effect of cultural diversity on the principles of justice

Principle	Effect
Fairness	Coming from countries with a different legal system can cause difficulties in understanding a person's rights or even that they are able to obtain legal advice or an interpreter. The cultural differences with Indigenous people can cause unfairness in how they are treated. Language differences can cause misunderstandings.
Equality	Migrants and refugees coming from a different legal system may not know of, or understand, that there are resources available to assist them when they have been accused or charged with a crime. Cultural differences of Indigenous people can mean it is more difficult for them to present their case on an equal basis.
Access	A lack of understanding of the legal system, of awareness of the law and how the criminal justice system operates, a fear of police and discrimination generally felt against a cultural group can affect a person's ability to access resources to assist them in the community.

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Activity 4.4 Folio exercise

Migrants, refugees and justice

1 Explain how fairness, equality and access to the legal system relate to justice.
2 Outline some difficulties experienced by migrants and refugees in dealing with the criminal justice system.
3 To what extent do you think these difficulties you outlined in Question 2 limit the achievement of justice?
4 Describe what changes to the criminal justice system could help to overcome these problems.

4.3 Recent reforms in the criminal justice system

Recent reforms in the Study Design refer to those that have occurred within the last four years.

The Victorian criminal justice system is a dynamic institution. To be effective, it cannot remain static but must change to meet the changing needs and values of our society.

Activity 4.5 Folio exercise

Recent reforms and recommendations

1 In this section, there is a list of recent reforms and recommendations to enhance the ability of the criminal justice system in achieving the principles of justice. At the start of each reform or recommendation you will see a series of three boxes like this:

Fairness	Equality	Access

Some reforms or recommendations clearly relate to one of the factors affecting the ability of the legal system to achieve the principles of justice. Some may relate to two or even all three factors. As you read through, mark which factor/s relate to the reform or recommendation.

For example, in the first reform, the increase in funding from the Federal Budget will assist more people to gain legal assistance. Therefore, the box 'Fairness' should be marked. However, this funding will also make legal resources accessible to more people so therefore you can also mark the box 'Access '. You could even argue that an increase in legal aid could improve equality.

It is important that you note why the reform or recommendation relates to the principle/s you have marked. This will assist you in evaluating the reforms or recommendations. Importantly, it will also enable you to choose a selection of recent reforms and recommendations to learn for your SACs and examination.

2 Reforms and recommendations for reforms will arise in the news during your school year. Be aware of such news items from reliable sources of information that relate to your course of study. Set aside a folder to collect articles and make notes. They can be newspaper items, notes you take from current affairs or from an online media source.

If you are asked to discuss recent reforms to the criminal justice system, this means reforms in the last four years.

2019–20 Federal Budget: funding to Community Legal Centres

Fairness	Equality	Access

The Federal Budget for 2019–20 allocated funding for community legal centres (CLCs) across Australia. Core community funding for CLCs was due to finish on 30 June 2020. The Federal Budget also included funding for Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services (ATSILS).

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Some of the welcome measures in the Budget were:

- small funding increases for community legal centres of $7.25 million over three years
- reversal of funding cuts scheduled to hit Aboriginal and Torres Strait Islander Legal Services
- an additional $30.5 million for legal assistance services broadly over three years (at the time this book went to print, this amount was yet to be allocated)
- $528 million to establish a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, including some additional funding for the provision of legal advice services by community legal services.

CLCs are independent, non-profit, community-based organisations that provide free and accessible legal and related services to everyday people. Nationally, CLCs help over 200 000 people annually, but are forced to turn away over 170 000 people each year due to limited resources.

Victoria's Government provides additional funding to support Community Legal Centres

Fairness	Equality	Access

In July 2019, the Victorian government made available $1.8 million to support the extension of Community Legal Centres with service providers such as health services. CLCs were being encouraged to apply for the grants to help them build their capacities and maximise the reach of their services.

The grants will provide members of the community with increased access to legal and social services. Previous grants included the Inner Melbourne Community Legal Centre to work in partnership with the Royal Melbourne Hospital to provide advice, casework and community education. Attorney-General Jill Hennessey stated, 'Every Victorian should be able to access the legal services they need, when they need … We're making sure our Community Legal Centres are able to reach people who may fall through the cracks.'

2019–20 Victorian Budget: reforms to the prison system

Fairness	Equality	Access

The Victorian Government instigated a number of reforms to the prison system.

It was announced in May 2019 that the Victorian prison system would be expanded and boosted with behaviour programs as the government took action to break the cycle of offending and so keep the community safe.

The *Victorian Budget 2019–20* provided for an additional amount of $1.8 billion to meet growing demand in the prison system. Changes included a new jail next to the existing Barwon Prison. This will become the state's largest maximum-security lock-up when completed.

The Budget also provided for significant redevelopment to the women's prison system, with $237 million allocated to expansion and upgraded infrastructure.

With more people on remand (in custody awaiting trial), $6 million was allocated for a new custody and court complex next to the current Melbourne Assessment Prison (Spencer Street). This was expected to improve delays in the criminal justice system by building additional courts for magistrates to hear matters. It also meant that transport no longer had to be arranged for prisoners to be moved to the Melbourne Magistrates' Court for hearings, nor did video-conferencing need to be organised. It was expected to improve the ability of the criminal justice system to manage growth in prison numbers by delivering short-stay cells and additional courts for magistrates to hear matters.

To help break the cycle of offending, the Budget provided $42.7 million for programs and services focused on keeping young people aged between 10–24 years out of the criminal justice system, including women and Indigenous people. As part of this, $1.4 million were be used for Youth Crime Prevention Grants for seven organisations with a track record for delivering services supporting young people to stay out of trouble.

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The Youth Junction was one of these organisations. It received $200 000 for its Youth Umbrella Project (YUP). The project connects young people with practical services, education and training programs to help empower them. Since receiving the government grants, the YUP reached more than 200 disadvantaged culturally and linguistically diverse young people aged 12–24 years in Brimbank.

Client Priority and Capability Policy 2019: Victoria Legal Aid

Fairness	Equality	Access

Victoria Legal Aid (VLA) issued its *Client Priority and Capability Policy 2019* to help improve the ways in which the VLA designs and provides services to those who need them; thus, improving the efficiency of the criminal justice system.

Under the Policy, VLA outlined its approach to prioritising services by considering three factors:

1. The priority characteristics relevant to the individual
2. Their capability to understand and address the legal problem
3. The context and characteristics of the legal problem the individual presents with and considerations related to a possible service response to the problem.

Priority characteristics:

Some people are more vulnerable to legal problems and less likely to seek legal help to address them – inequality, poverty, trauma and disadvantage cause many legal repercussions for people. The VLA has drawn up three broad groups of people who will receive prioritised services.

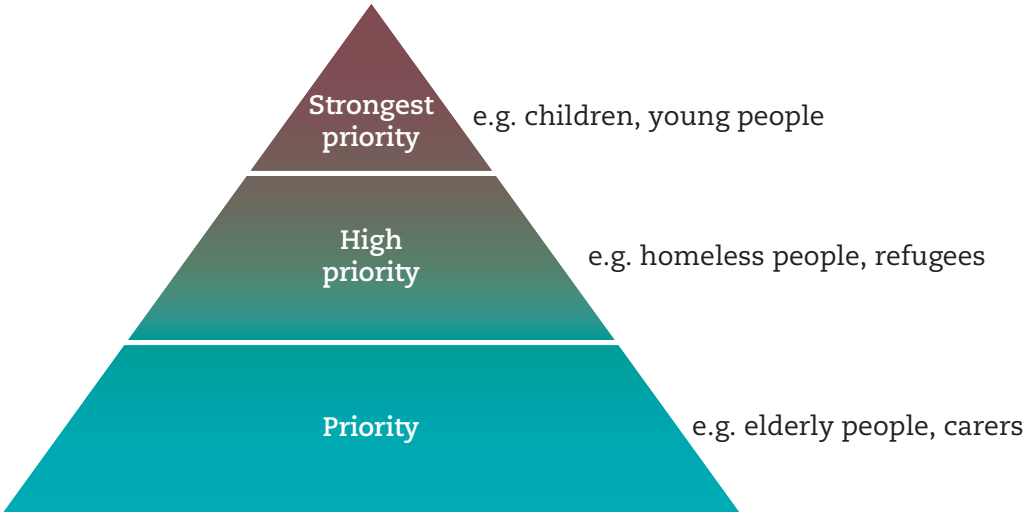

Figure 4.1 VLA *Client Priority and Capability Policy 2019* tiers of prioritised services

1. Strongest priority

   This group requires a high level of legal need with more intensive assistance to address the legal problem; for example, financial assistance through the VLA's means test. They may need extra assistance before a court event and may be eligible for further casework assistance through a grant of legal aid. This group includes:

   - children and young people
   - Aboriginal and Torres Strait Islander people
   - people living with cognitive impairment
   - people who experience a mental health issue
   - people experiencing financial hardship (subject to means and income test). This can include those unemployed, relying on government benefits or otherwise living on a low income.

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2 High priority

The VLA aims to provide direct assistance at courts and other entry points to:

- people experiencing family violence, elder abuse or recent serious trauma including being a victim of violent crime
- people who are detained by the State, e.g. in police custody, court cells, prison, or immigration detention, or involuntarily held in a mental health facility or other closed environment
- the homeless or those who live in crisis or temporary accommodation
- those who have difficulty with reading and writing in daily life
- recent arrivals in Australia who experience significant challenges interacting with the Australian and government systems, e.g. refugees, asylum seekers.

Some groups in our community are more susceptible to legal problems.

3 Priority

The VLA aims to address the particular needs of the following groups:

- elderly who have limited family support
- single parents or carers (of children or people living with a disability)
- people experiencing a drug or alcohol dependency or gambling dependency
- people with chronic illness or significant physical disability.

The *Policy* would come into effect immediately.

Experiencing homelessness increases the risk of a person becoming involved in the criminal justice system.

Victoria Legal Aid: new services available in Mallee region

Fairness	Equality	Access

Disadvantaged people in the Mallee region now have greater access to legal assistance with the launch of a new VLA office in Mildura in August 2017.

The service is in partnership with the Sunraysia's Community Health Services. It was decided to partner with the health services when research showed only 16% of people with legal issues ever got help from a lawyer.

'This new service will help people who might not ordinarily have seen a lawyer, to get help when they need it most … Research shows people are more likely to talk to health professionals such as a doctor, nurse or social worker, than with a lawyer … So it makes sense for us to locate our staff close to services that are readily accessed for other purposes,' said Executive Director of Services and Innovation, Peter Noble.

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Increased funding in Victoria's justice system: Budget 2018–19

Fairness	Equality	Access

Concern has been expressed for some time about the workloads of magistrates, the backlog in bail applications and the large number of people on remand. Indicative of the pressures on the Victorian criminal justice system is that the annual report of the Magistrates' Court for 2016–17 was not tabled in parliament until 2 May 2019. It had been signed off by Chief Magistrate, Peter Lauristen, 18 months previously.

A Productivity Commission report, released in January 2017, showed that, as at 30 June 2016, more than a quarter of the cases in the Magistrates' Court system had been waiting for more than six months, with 8.7% of cases waiting more than a year.

In the Victorian Budget 2018–19, $257.4 million were set aside to recruit new judges and magistrates, implement new counter-terrorism reforms and upgrade courts across Victoria.

The Budget provided $128.9 million to increase Victoria's court capacity, including a new Supreme Court judge, two new County Court judges and 18 new magistrates. Fifteen magistrates were to go to the Magistrates' Court to meet increasing demand, while a new Bail and Remand Court would be established by three magistrates, as part of the Melbourne Magistrates' complex.

Victoria Legal Aid would receive $37.3 million over four years to deliver more legal services, including grants of legal aid and duty lawyers. The Office of Public Prosecutions received $21.8 million to recruit more prosecutors and support the prosecution of the most serious crimes. On top of this, $97 million was provided for new police prosecutors and additional staff.

In addition:

- $7.2 million was provided for the Victims Assistance Program to provide enhanced support to victims, including through case management and recovery support, the Victims of Crime Helpline and support workers
- $2.9 million was supplied to extend the intermediary scheme, which involves communication specialists helping children and vulnerable people provide evidence to police and in court
- $5.4 million was provided for additional services and support for people with disabilities in police interviews
- $20 million was supplied for the next stages of acquiring land for the Werribee and Bendigo law court developments, and $5 million for security upgrades for the Echuca Law Courts.

A new Koori County Court in Shepparton

Fairness	Equality	Access

The Koori Court is a significant part of the Victorian government policy to reduce the over-representation of Indigenous people in the criminal justice system.

A new Koori County Court was opened in Shepparton on 26 July 2018. 'The Shepparton County Koori Court represents a significant step towards improving the justice outcomes for the Koori community in our State. A justice system which supports the participation of Elders and Respected Persons from local Aboriginal communities results in better engagement with the system by Aboriginal Victorians and better helps offenders address the causes of their offending and helps prevent re-offending,' Chief Justice Peter Kidd said in opening the Court.

To have a matter referred to a Koori County Court, the offender must plead guilty (therefore the Koori Court is a sentencing court) and must consent to participating in a process that involves engaging with Elders and Respected Persons from the Indigenous community. Once a formal guilty plea is entered, a sentencing conversation follows which includes the judge, Elders and Respected Persons, the Koori Court Officer, the Corrections Officer and those people who may be present to support the offender. If a victim is present, they will also participate. Everyone has the opportunity to speak.

The judge has the sole responsibility for imposing sentence.

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Indigenous people have greater access to the Koori Court after a Supreme Court ruling – September 2018

Fairness	Equality	Access

An accused's task of persuading a magistrate to transfer their case to the Koori Court is expected to be easier after a decision by the Supreme Court.

Cemino, a 19-year-old Yorta Yorta man who lived in Echuca in Victoria's north, was charged with 25 criminal offences allegedly committed in or near Echuca over a six-month period. He pleaded guilty and applied to have his charges transferred to the Koori Magistrates' Court in Shepparton. Cemino felt that he would feel more comfortable discussing the recent death of his mother, a Yorta Yorta woman, and other personal information with Elders of the Koori Court.

The magistrate refused the application on the basis that the case should be heard at the Magistrates' Court in Echuca, where the offences occurred.

When his request was refused, the Victorian Aboriginal Legal Service (VALS) challenged the decision in the Supreme Court on the basis of Cemino's human rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and judicial error.

Decision

Justice Timothy Ginnane of the Supreme Court found the magistrate failed to properly exercise his discretion in accordance with the scope, purposes and objectives of Koori Court legislation, and the creation of the Koori Court, along with other considerations. He ordered that the offender's request for transfer of his case be heard again by a different magistrate.

'This is an important case as it confirms Aboriginal people's right to access a justice system that incorporates Aboriginal knowledge, cultural beliefs and practices,' Victorian Human Rights Commissioner Kristen Hilton said.

Engaging in traditional cultural practices is a key factor in alleviating First Nations peoples' disadvantage and taking a rightful place in broader Australian society.

Victorian Government's investment in justice outcomes for Aboriginal people – August 2018

Fairness	Equality	Access

The Victorian Government is investing $40.3 million as part of a five-year agreement to implement the Victorian Aboriginal Justice Agreement. This Agreement addresses the key issues of reducing the number of First Nations people in the justice system and a more effective justice system with greater Indigenous involvement and increased self-determination for Aboriginal and Torres Strait Islander people in the justice sector.

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Actor Uncle Jack Charles is a mentor to incarcerated Indigenous youth.

The funding will include:

- $12.3 million to expand Koori Courts in the County, Magistrates' and Children's Courts and to strengthen the Koori Victims of Crime Assistance Tribunal (VOCAT)
- $10.8 million for a number of Aboriginal youth justice initiatives, including boosting the Aboriginal Liaison Officer Program and establishing the Elders In-reach program in youth justice custody centres
- $15 million for a range of community-led self-determination initiatives, including the expansion of Aboriginal Community Justice Panels across Victoria
- $2.2 million to expand the Statewide Indigenous Arts in Prisons and Community Program, The Torch project.

New justice centre opens in Melbourne CBD

Fairness	Equality	Access

Justice services can now be accessed at a new centre opened in April 2019 in the Melbourne CBD, improving access to legal services for Victorians.

Members of the community can make sheriff payments, submit births, deaths and marriage applications at the Franklin Street hub, as well as provide court-ordered supervision and treatment to offenders on community-based orders. The building also houses the Adult Parole Board, the Post-Sentence Authority and a number of specialist Corrections Victoria staff, including Community Correctional Service officers.

The new Centre centralises a range of services that were previously delivered across a number of locations.

Drug Court expanded to regional Victoria

Fairness	Equality	Access

Legislation introduced to parliament in March 2020 established a Drug Court Division within the Victorian County Court in Ballarat and Shepparton. The expansion is expected to provide capacity for as many as 120 offenders to address their drug and alcohol issues and substance-related offending.

The first Drug Court was established in Dandenong in 2002, followed by a Melbourne Court in 2017. These existing Drug Courts have proven successful in reducing reoffending, improving community safety and decreasing the burden on the courts and corrections system. The County Court Drug and Alcohol Court was expected to commence towards the end of 2020 with two regional Drug Court locations anticipated to commence in 2021.

Jury Directions and Other Acts Amendment Act 2017 (Vic)

Fairness	Equality	Access

The Victorian parliament passed this law to simplify and improve the way information is provided to juries in a criminal trial. The reforms are expected to help reduce delays, deliver shorter trials and ensure fewer costly appeals and retrials.

'Re-trials due to errors in the jury selection process can be very distressing, particularly for the victims and families involved. That's why we're taking the steps to prevent this from happening in the future.' This was a statement made by Attorney-General Martin Pakula on

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21 February 2017 in the Victorian Government's *Delivering for All Victorians – Reforms to Continue to Improve Jury Directions*.

Changes made to the way a jury will operate, included:

- Allowing judges to address misconceptions that victims in sexual offence trials should be able to remember all the details of an offence and describe it consistently each time. Under the reforms, the trial judge will be able to explain to jurors that victims often describe the offence differently at different times.
- The mandatory six-hour minimum timeframe for jury deliberations before a majority verdict will be accepted has been removed. This means that judges will be able to make directions sooner if a jury becomes deadlocked early in its deliberations.

Addressing historical injustice and improving the rights of victims

Fairness	Equality	Access

Historically, child welfare and protection applications were made by the State as criminal proceedings, with care and protection orders made by courts recorded on criminal records. This meant, for example, that children who were neglected by their parents had a criminal record. The *Victims and Other Legislation Amendment Act 2018* (Vic) is a response to a number of recommendations from the Victorian Law Reform Commission's 2016 report on *The Role of Victims of Crime in the Criminal Trial Process*.

The Act includes a Statement of Recognition acknowledging the considerable harm and distress caused by these historical recording practices, including the disproportionate effect these practices had on First Nations children.

The Act also strengthens the *Victims' Charter Act 2006* (Vic) that formally recognises the rights of victims as participants in criminal proceedings and requires that they be treated with courtesy and respect. The Charter also requires the Director of Public Prosecutions to consult victims on key milestones in criminal proceedings, including details of hearings, and inform them of the reasons for any significant decisions.

Victorian Government's response to the Royal Commission into Institutional Responses to Child Sexual Abuse

Fairness	Equality	Access

The Victorian Government committed to reporting annually, until 2022, on its response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Victorian Government's 2018 response included a number of recommendations and policy changes to support victims of crime and strengthen laws to better protect children from abuse. (Not all these recommendations and policy changes are relevant to the VCE Legal Studies course).

On the recommendation of the Royal Commission – that governments work to ensure delays are reduced and kept to a minimum in prosecutions for child sexual abuse – the Victorian Government has implemented reforms. The Children's Court, Magistrates' Court and County Court each manages cases of sexual offences in Victoria through specialist sexual offences lists (a form of specialised court), serviced by specialist sexual offence prosecutors.

The Royal Commission also recommended that the judiciary and the legal profession receive regular training and education programs in relation to understanding child sexual abuse.

Material and training has been made available to legal professionals, including jury directions. The Office of Public Prosecutions Victoria conducts training designed to ensure staff who have contact with victims understand the nature and impact of the sexual abuse of minors and also how it can affect people who are involved in the prosecution process. In addition, a multi-disciplinary team of solicitors and social workers was established to ensure the services work closely together to support victims and witnesses, and reduce delays.

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Shake-up of Victoria's bail system

Fairness	Equality	Access

A Bail and Remand Court began operations in May 2018. The Court hears bail applications after hours and on weekends. This means more magistrates are available to consider bail applications for people charged with violent offences, in cases where the police oppose bail.

The Victorian parliament took steps to toughen bail laws with legislative amendments that reverse the presumption of bail for people who have been charged with serious offences and have convictions for failing to appear on bail in the past five years. People who fail to appear on bail will have their sentence doubled. There is now a presumption against bail if the accused is charged with aggravated carjacking, home invasion, or aggravated home invasion. These new laws are the *Bail Amendment (Stage One) Act 2017* and the *Bail Amendment (Stage Two) Act 2018*.

New *pro bono* platform to increase access to justice

Fairness	Equality	Access

A new online system that will improve access to legal representation for the state's most vulnerable and disadvantaged people was launched in November 2019. The Victorian Bar's *Pro Bono* Platform allows the Supreme Court, County Court and Coroners Court to make targeted *pro bono* referrals directly to barristers.

Pro bono legal services ensure fair access to legal representation for all individuals regardless of their age, gender, race, disability or socio-economic status. It is expected that all current practising Victorian Bar members (2100) will take part in the scheme, thereby doubling the numbers of previous participation.

Court officials will facilitate referrals which will include the relevant practice area, the scope of the request and court documents, sending requests via email to all relevant barristers or a specific barrister. The barrister will then be able to view and accept requests, view documents, upload files and track their *pro bono* work.

At the launch, Attorney-General Jill Hennessy stated, 'The new platform will allow the courts to more efficiently refer matters to barristers for *pro bono* services, ensuring we're continuing to focus efforts on access to justice for those most in need.'

Lawyer service provided at night court

Fairness	Equality	Access

Following a funding announcement by the Victorian Government in January 2018, Victoria Legal Aid is providing a lawyer service at night at the Bail and Remand Court.

Enhancing transparency in courts

Fairness	Equality	Access

The *Open Courts and Other Acts Amendment Act 2019* (Vic) passed parliament in May 2019, amending existing laws to reinforce the presumption in favour of open justice and the disclosure of information in Victorian courts.

The new laws mean that suppression and closed court orders can only be used when necessary; for example, where publishing information would be a substantial risk to the administration of justice, cause undue distress to victims of a sexual or family violence offence, or risk the safety of any person. The changes also mean that victims over the age of 18 will be allowed to tell their story if they wish, with the courts able to publish a victim's identity, with their consent.

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The new laws give County Court and Supreme Court judges the discretion to publish a person's youth convictions in sentencing remarks if they are sufficiently similar to the offences for which the person is being sentenced and the offences are serious.

Giving at-risk kids a chance to reboot

Fairness	Equality	Access

In 2019, the Victorian Government provided $1.4 million to the ReBoot youth crime prevention program run by Anglicare. The program, which helps young people aged 10–14 years, identifies the services that lend support to young persons who need to steer clear of the criminal justice system. Through a tailored program connecting young people and their families to support and educational opportunities, young people will receive mentoring to explore their interests and aspirations, and identify education and recreational activities.

The Victorian Government has funded more than 683 projects since 2015 under its Community Crime Prevention Program, representing a total investment of almost $36 million.

Activity 4.6 Folio exercise

Reforms and the principles of justice

1 For each of the following circumstances, find a recent reform that can assist the person involved. Explain how the reform will assist.
   - A young man has been charged with a criminal offence in Melbourne on a Saturday. He is worried he may have to remain in custody (remand) until Monday, at least, before a magistrate will hear his bail application.
   - An Indigenous teenager has been charged by the police when he was caught breaking into a factory. He wants to plead guilty, but is frightened of the police and courts.
   - One of your friends, Sam, is unemployed and has been couch-surfing for the last three months. She needs assistance with a legal problem but doesn't think she can afford it or know where to go to seek help.

2 Choose a reform that promotes justice for each of the following groups. Provide an explanation of how that reform promotes justice for each group.
   - an offender
   - a victim
   - the community.

3 Outline two strengths of having a Bail and Remand Court operate on the weekend.

4 Draw up the following table. Choose four reforms and complete the details.

Reform	Nature of the reform	Which factor/s does/do the reform address?	Extent to which the reform addresses the principles of justice

4.4 Recommended reforms

Major review of Victoria's committal system

Fairness	Equality	Access

In October 2018, the Victorian Government announced a review of the committal system by the Victorian Law Reform Commission (VLRC) to help reduce victims' trauma, ensure the accused's right to a fair trial, and improve the efficiency of the criminal justice system.

In the case of serious criminal offences where the accused pleads not guilty, committal proceedings are held before a magistrate to determine whether, there is enough evidence to support a conviction in a higher court. While this gives the accused a chance to find out

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the evidence against them and test that evidence through cross-examination of prosecution witnesses, a committal can be quite traumatic to both victims and witnesses. Committals also ensure prosecutors only pursue charges that have a reasonable amount of success.

Under the terms of reference, the VLRC will consider best practice for supporting victims and examine:

- whether Victoria should maintain, abolish, replace, or reform the current committal system
- opportunities for reform that enable early identification of cases that can be determined summarily, encourage appropriate early guilty pleas, facilitate efficient use of court time and encourage parties' proper preparation for trial
- ways of improving early disclosure processes in criminal prosecutions brought in the indictable stream
- if, when and in what circumstances witnesses should be examined prior to trial, including consideration of ways to minimise the need for victims and other vulnerable witnesses to give evidence multiple times
- whether a magistrate should determine if there is sufficient evidence to commit an accused to stand trial and, if so, what test to apply, having regard to the Director of Public Prosecutions' power to directly indict; and
- the impacts of any recommended changes on the criminal justice system, as well as what will be needed to ensure the successful implementation and operation of those changes.

The VLRC delivered its report to the Victorian parliament on 31 March 2020.

A copy of the full terms of reference of VLRC's review of the committal system is available at www.lawreform.vic.gov.au

Victorian Law Reform Commission

Legal brief 4.4

Committals and Victoria's criminal justice system

Over a number of years, the question of the worth of committal in Victoria's criminal justice system has been raised. It resurfaced when, in 2015, a 14-year-old girl was raped in Geelong by three men, aged 30, 29 and 21. The men were committed to stand trial, but the case was withdrawn by the girl's parents. The parents said they decided to discontinue the Supreme Court trial due to fears their daughter would be further damaged by the defendants' cross-examination (each defendant had their own counsel, which meant the girl would be cross-examined three times).

The girl's mother said her daughter feared the trauma of being cross-examined after the distress caused by the public airing of some details from the committal hearing. 'The media reported in extraordinary detail and that was harrowing. She was re-victimised to the point where she couldn't go to school,' her mother said.

After the withdrawal from the trial, Premier Dan Andrews and Attorney-General, Martin Pakula, said they would meet with the family. 'If there are things we can change, if there are learnings that we can glean from the tragedy of this case, then we will make those changes,' Mr Andrews said.

Victoria has a lengthier committal process than other states still using the system. New South Wales abolished the committal system in April 2018. Western Australia and Tasmania have also abolished committals, while South Australia, the ACT, NT and Queensland have either restricted the committal process to written statements or limited cross-examination at committals.

Office of Public Prosecutions: proposed reforms to reduce trauma to victims and witnesses, reduce delays in the criminal justice system and reduce costs

Fairness	Equality	Access

In 2018, the Director of Public Prosecutions, Kerri Judd QC, released a proposal for reforms to the pre-trial procedure of criminal offences. The proposal set out to build on the role of the magistrate in ensuring proper disclosure of evidence, narrowing the issues in dispute and obtaining fair resolutions as early as possible.

The role of assessing the strength of evidence at pre-trial will be the responsibility of the Director of Public Prosecutions.

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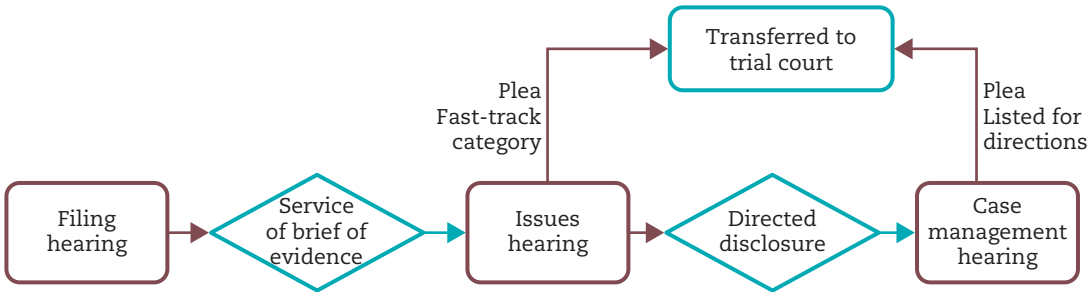

Figure 4.2 The proposed procedure for the prosecution of an indictable offence, *Proposed reforms to reduce further trauma to victims and witnesses* – Policy Paper 1 October 2018

Proposed key changes include:

- limiting the cross-examination of prosecution witnesses to once only
- removing the 'committal decision' of determining if enough evidence exists
- requiring the prosecution to indicate at the Case Management Hearing the charges it considers to have reasonable prospects of conviction (therefore, likely to appear on the indictment)
- requiring police to provide a more complete hand-up brief (brief of evidence in written form). The brief is expected to include all material in existence regarding the matter, including disclosure material commonly requested by the defence, e.g. police notes and criminal records of witnesses
- enabling fast-tracking certain criminal cases into the trial courts.

This proposal is designed to deliver quicker outcomes and reduce the trauma experienced by victims. It fast-tracks the criminal justice process to deliver fair and efficient justice to victims and accused persons, while retaining the key trigger points for early resolution.

New developments include an Issues Hearing, where the court will ensure the prosecution case is properly disclosed and parties engage in resolution discussions. If the matter is resolved at this point, it can move to a plea hearing.

If charges are in dispute in the Issues Hearing, some cases might be fast-tracked; for example, where the issue of mental impairment has been raised. For other cases, the magistrate will determine any applications – for example, cross-examination of witnesses – and set a date for a Case Management Hearing. If this occurs, any things said, done, or tendered at the Issues Hearing will be inadmissible as evidence unless the parties agree otherwise.

At the Directions Hearing, the court can make directions for when the indictment, prosecution opening and defence response must be served, and arrange a timetable for hearing pre-trial issues. A trial date will be set which allows parties to have continuity in both preparing and conducting the trial.

Table 4.5 Reasons to make changes to the criminal justice system

More efficient criminal proceedings	This proposal will speed up criminal proceedings by encouraging better disclosure (leading to earlier resolutions), reducing the delay caused by committal court dates that suit all parties and having witnesses cross-examined.
Reduce delays	Prosecutors and defence are required to undertake a more thorough analysis of the brief at an early stage.
Reduce expenses	Abolishing committals will significantly reduce the costs associated with conducting a criminal procedure with minimal interference to the effectiveness and fairness of the system.
Fairness to the accused persons	Changes could mean there is less time in pre-sentence custody or for the accused having charges hanging over their heads. Long delays is a disadvantage to an accused at trial and an accepted matter in mitigation at sentence. The right of a person 'to be tried without unreasonable delay' is a right under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Call to reform prison system in response to growing numbers

The Andrews Government wants changes to the prison system, including moving the focus from the security of the prisons to including the welfare of prisoners. Two key components considered to reduce the record number of people in custody are:

- the rehabilitation of prisoners to reduce the level of recidivism; and
- the improvement of bail access services.

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Victorians are being locked in prison at the same rate as in the late nineteenth century. In June 2019, Victoria had 8110 prisoners, with numbers expected to increase to 11 130 by mid-2023.

Many of those imprisoned are poor and experiencing mental health problems. The growth is far greater for women than men; it is greater still for Indigenous people, and even higher for Indigenous women.

Spending on Victoria's prisoners has increased by 90% from 2011–12 to 2017–18. To put this in perspective, in the same period, social and public housing spending has increased by 1%, school education 25% and public hospitals 48%. Victoria spends an average of $323 per day on its prisoners – far more than any other state or territory.

Not only are more Victorians being locked up, but current statistics show that half of the prisoners released return to custody within two years.

Victoria's Corrections Minister, Ben Carroll, is considering a review of the *Corrections Act 1986* (Vic) amid concern regarding the numbers of people in prison and the high level of recidivism (repeat offending).

Criminal lawyer and principal legal officer for the Law and Advocacy Centre for Women, Jill Prior, believes that high-profile media reporting of crimes such as those involving Adrian Bayley and James Gargasoulas, along with reports of gang violence, has led to stringent parole and bail laws. '[However], the laws are catching everyone', especially so for imprisoned women, many of whom are also victims of male violence.

Arie Freiberg, chairman of the Sentencing Advisory Council, points to the increasing hysteria from some sections of the media. 'The way some media highlight events affects peoples' tolerance of adverse events … '. He says that the politicians and police are affected by the media and public mood. Judges too, indirectly. 'Maybe when in doubt, don't let them out,' Freiberg says.

The Andrews Government plans to put $93.2 million in the State Budget for programs and services to keep people out of the prison system, including $20 million to decrease the incarceration of women, and $23 million for diversion, rehabilitation and reintegration programs.

Corrections Minister Carroll has been looking to the Norwegian correction system as well as others. Norway has a preventative approach which includes:

- small facilities within communities designed to copy non-prison life; and
- housing for all prisoners on release.

It has a recidivism rate of just 20%, less than half the Australian rate.

Balit Ngulu: funding needed for Indigenous children

Fairness	Equality	Access

A connection to culture creates strong, positive benefits for Indigenous communities and individuals.

In 2017, Victoria Aboriginal Legal Service (VALS) established a culturally appropriate legal service named Balit Ngulu to specifically address the needs of First Nations children and young people in their legal proceedings. However, after 12 months and assisting around 100 Indigenous children, VALS was no longer able to provide finance to continue its operation.

Indigenous Australian children move in and out of the child protection and youth justice system with little legal representation. Contact with the legal system is often associated with intergenerational trauma, substance misuse, family violence, grief and poverty. Once they become part of the system, the children often move down a path of disconnected care, trauma, intermittent incarceration and disadvantage.

VALS launched Balit Ngulu when a 16-year-old Aboriginal child in youth justice was overheard to make the comment, 'I'm a lost cause, aren't I?' Balit Ngulu (meaning 'strong voice') was established to ensure that no child would ever feel this way.

The existence of Balit Ngulu meant that Indigenous children had appropriate connection to community to support the essential kinship ties necessary for children to thrive, particularly in times of vulnerability. 'Sadly, many of the children represented have fallen through the cracks of familial breakdown, disconnect with culture and home instability, and require frontline legal services to maintain their rights and ensure they have a future,' said Nerita Waight, (then Acting) Director of Executive and Corporate Services at VALS.

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A report released in August 2018 by the Koorie Youth Council, which represents young Indigenous people in Victoria, found that not only did Indigenous children prefer using a service like Balit Ngulu, but that it was more likely to stop youth reoffending.

However, in September 2018, without specific State or Commonwealth funding, the legal service for children was forced to close. 'We know our children deserve legal services that respect their cultural needs as much as advocate for their legal rights. Children need to be nurtured and supported to reach their full potential, not punished for circumstances beyond their control,' Ms Waight said.

A recommendation is for VALS to receive specific funding to support the Balit Ngulu legal services for children.

Maranguka Justice Reinvestment offers a solution to high Indigenous incarceration rates

Fairness	Equality	Access

Indigenous people constitute approximately 2.8% of Australia's population, but make up 28% of the prison numbers.

The release of the Australian Law Reform Commission's *Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People* was delivered to the federal Attorney-General in December 2017. The inquiry, led by Federal Court Judge Matthew Myers, was commissioned by the Federal Government to investigate whether courts, police and prisons were contributing to the over-incarceration of Indigenous Australian people.

The Inquiry recommended:

- an independent justice reinvestment body be set up with Aboriginal and Torres Strait Islander leadership. This would provide technical expertise and promote the reinvestment of resources from the criminal justice system into community-based initiatives that address the causes of crime and incarceration
- governments support justice reinvestment trials in partnership with Aboriginal and Torres Strait Islander communities. This would allow access to local criminal justice data which, in turn, would support local justice reinvestment initiatives and facilitate participation and coordination between relevant government departments and agencies.

The ALRC inquiry found a small number of community-led justice reinvestment trials taking place in Australia. One example is the Maranguka Justice Reinvestment Project in Bourke, NSW. The project aims at building a safer and stronger community, leading to significant reductions in crime and reoffending. From 2016–17, the Bourke community experienced a:

- 23% reduction in police-recorded incidents of domestic violence
- 14% reduction in bail breaches for adults
- 42% reduction in days spent in custody for adults
- 38% reduction in charges across the top five juvenile offence categories.

A KPMG impact assessment found the Maranguka project achieved savings of $3.1 million in 2017. The financial impact of the project is about five times greater than its operational costs.

The ALRC inquiry also found a link between locational disadvantage and crime. Six percent of postcodes in Victoria, for example, accounted for half of all prison admissions. Justice mapping brings together information about the criminal justice system with other measures of wellbeing in the community – employment rates, health and education levels.

Law Council of Australia: *The Justice Project*

Fairness	Equality	Access

The Law Council of Australia is the peak national representative body of the Australian legal profession. It works on the improvement of the law and the administration of justice.

The Law Council undertook a comprehensive national review into the state of access to justice in Australia. *The Justice Project*, which began in early 2017, was chaired by former High Court Chief Justice, the Hon Robert French AC, with a Steering Committee of eminent lawyers, jurists (judges) and academics.

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Looking at the justice system from the people's point of view, *The Justice Project* focused on barriers for those with significant social and economic disadvantage, as well as identifing what is needed to remove those barriers. The final report detailed recommendations to provide a roadmap for future action, building the case for whole-of-government justice strategies secured by appropriate funding. It included 59 recommendations.

The Law Council believes that a system which delivers access to justice should be:

- fair
- just in the results that it delivers
- accessible to the people who need to use it
- responsive to their needs; and
- properly resourced.

Some of the recommendations in *The Justice Project* are:

- A minimum of $390 million should be invested by Commonwealth, state and territory governments to provide additional resources to address critical criminal legal assistance service gaps (e.g. Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services).
- To enable legal assistance services to build and maintain trust with individuals and communities who need legal help, governments should:
    - prioritise adequate, predictable, sustainable and long-term funding models for those services above; and
    - provide ongoing pathways to enable innovative pilots and community-led initiatives that have demonstrated success to flourish longer term. Specific funding should also be allocated for their evaluation.
- Governments in Australia should resource legal assistance services to employ non-legal liaison officers – such as Aboriginal and Torres Strait Islander, cultural, disability, or youth liaison officers – to reach and build trust with specific client groups who have high levels of legal need but are unlikely to seek help.
- Technological innovation should be pursued in the delivery of legal services to clients experiencing disadvantage.
- Specialist legal assistance services, such as outreach and referral networks, should be supported to expand their reach, particularly to overcome geographic and jurisdictional inequity of access.
- Governments, peak legal assistance and legal professional bodies should cooperate to develop:
    - strategies to overcome conflict of interest issues which prevent many disadvantaged people from accessing justice
    - rural, regional and remote access to justice strategies to ensure an appropriate and tailored mix of services in areas of critical need; for example, resourcing additional legal services, increasing legal aid rates and facilitating *pro bono* assistance.
- Australian courts should review their current interpreter practices and procedures (set out in the Judicial Council of Cultural Diversity's *Recommended National Standards for Working with Interpreters in Courts and Tribunals*) and governments should provide courts with adequate resources to ensure all courts can implement these standards.
- For example, the role of identifying the need for an interpreter by the accused or witnesses should be made by the legal representative of the defendant. Also, the judicial officer must ensure that the accused understands English before a plea is entered. In cases of any doubt, the trial should not proceed until the judicial officer is satisfied that the accused has a sufficient understanding to plead to the charge and instruct their legal representatives.
- Government should establish additional, and continue to support existing, specialist Aboriginal and Torres Strait Islander sentencing courts.

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Trial by judge alone

Fairness	Equality	Access

In December 2018, the Victorian Government announced that it would consider introducing judge-only trials in Victoria in a move to increase the right to a fair trial.

Two senior lawyers, Peter Chadwick QC and Remy van de Wiel QC, have questioned whether jurors could shut off their perceptions and focus solely on the criminal allegations and evidence presented in court when the accused has a high profile in the media.

In delivering a High Court judgment in the case *Patel v The Queen* [2012] HCA 29, against manslaughter convictions of Queensland surgeon Jayant Patel (dubbed 'Dr Death'), Justice Dyson Heydon said:

> It is difficult to imagine there could be many speakers of English living in Australia, even parts of Australia outside Queensland, in the years before the trial who had not been exposed to the massively unfavourable publicity that [Patel] received during these events. It was inflammatory, derisive and bitter.

Similarly to the Patel case, in cases such as Adrian Bayley or Cardinal Pell, where the defendants were the subject of heavy media coverage, there would be few Australians who were not aware of the allegations. Is it possible to empanel a jury that could bring a fair and open mind to the court? It should also be questioned as to whether judges are able to disassociate themselves from unconscious bias.

Nick Papas QC, a former Victorian Chief Magistrate who now both defends and prosecutes in trials, said judges gave strong directions to jurors about the importance of focusing solely on the evidence, and that the courts' faith in the jury to carry out their roles was well-founded, 'My experience of the law is that jurors can be trusted to do their job. I am confident … [Pell] can get a fair trial.'

Our legal system insists on a fair trial. Indeed, section 24 (1) of the Victorian *Charter of Human Rights and Responsibilities Act 2006* states that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court. In an age of not only mainstream media, but social media, the likelihood of prospective jurors being independent and impartial, is questionable.

However, Mr Barns, spokesperson for the Australian Lawyers Alliance said that ' … the option of a judge-alone trial would stand as an added protection'.

New South Wales, Queensland and Western Australia already have the option of requesting a judge-only trial. Victorian Attorney-General, Jill Hennessy, has asked her department to examine the issue.

Supreme Court: virtual courtrooms

Fairness	Equality	Access

The Supreme Court is looking at the possibility of using virtual courtrooms for hearings. Pauline Diano, the Court's Program Director for Digital Strategy, said the virtual courtrooms will enable the Supreme Court of Victoria to ' … be able to sit anywhere in the world. The judge can dial the parties, dial out to the public and … there's a directions hearing in Chambers'.

Diano also predicted an 'exponential' increase in electronic trials, rather than relying on paper files. Industry data has shown that an electronic trial can be one-third faster due, in part, to the ease of finding a relevant part of an exhibit.

Victoria to have a legislated spent convictions scheme

Fairness	Equality	Access

Legislation is to be introduced into the Victorian parliament to ensure old criminal records for eligible offences do not impact on an individual's opportunity to gain employment and rehabilitate. This is in response to recommendations of the Legislative Council Legal and

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Social Issues Committee's *Inquiry into a Legislated Spent Convictions Scheme* tabled in parliament in February 2020.

Historical criminal records can have a lasting and damaging effect on an individual; for example, limiting their ability to gain employment, secure housing, or undertake volunteer work. This new legislation will ensure that a person's historical criminal record no longer shows up in a police check after a set period of time, provided they have not reoffended.

Certain convictions, such as sexual or violent offences, will not be eligible. Also, complete criminal records will still be released to enable certain employers and third parties to make well-informed risk assessments; for example, when issuing Working with Children Checks or licensing trusted professionals.

The government will consult with stakeholders, including law enforcement, justice sector agencies, victims' representatives and Indigenous groups, to develop the detail of the scheme, including eligibility criteria. Attorney-General Jill Hennessey commented, 'People who have committed eligible offences, who have worked hard to turn their lives around, deserve the opportunity to reach their full potential.'

Activity 4.7 Folio exercise

Recommended reforms and the principles of justice

1 Explain the difference between a reform and a recommended reform in the criminal justice system.

2 Explain how the increased use of technology in the legal system would enhance an individual's access to the criminal justice system.

3 Discuss how a judge-only trial in the County or Supreme Court would enhance the principles of justice in the criminal justice system.

4 Draw up the following table.

a Complete the details in the table for the first recommendation:

Recommendation	Nature of the recommendation	Which factor/s does the recommendation address?	Extent to which the recommendation addresses the principles of justice
The abolishment of committal hearings			

b Add two additional lines in the above table. Choose two further recommendations and complete the details.

Activity 4.8 Written report

The legal system and difficulties faced by Indigenous people

Present a written report analysing the effectiveness of the legal system and the difficulties faced by Indigenous individuals in their dealings with the criminal justice system.

Part 1

Justice in the criminal justice system:

1 Identify two principles of justice reflected in the operation of the criminal justice system.

2 How do the principles you chose apply to sentencing? In your report you may refer to aspects of the sentencing process or to specific sanctions.

Part 2

Problems in the criminal justice system:

1 Identify and explain at least two problems faced by Indigenous people in their dealings with the criminal justice system.

2 What effects do these problems have on the capacity of the criminal justice system to achieve the principles of justice for Indigenous offenders?

Part 3

Describe and evaluate two recent reforms, or recommendations for reform, that aim to improve the operation of the legal system in relation to Indigenous peoples.

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Key point summary

Do your notes cover the following points?

Evaluation of the criminal justice system

- ❑ The principles of justice – explanation of each principle with examples that relate to the criminal justice system:
  - fairness
  - equality
  - access
- ❑ Factors that affect the ability of the criminal justice system to achieve the principles of justice – explanation of each factor with examples that relate to the criminal justice system.
- ❑ Costs
  - What causes high costs in the criminal justice system?
  - How costs relate to fairness in the criminal justice system.
  - How costs relate to equality in the criminal justice system.
  - How costs relate to access in the criminal justice system.
- ❑ Time delays
  - What causes delays in the criminal justice system?
  - How delays affect fairness in the criminal justice system.
  - How delays affect equality in the criminal justice system.
  - How delays affect access in the criminal justice system.
- ❑ Cultural differences
  - Indigenous people
    - How are Indigenous people disadvantaged in the criminal justice system?
      - Culturally (e.g. disrespectful to disagree with an Elder or Respected Person)
      - Within the justice system (e.g. over-representation in the prison system)
  - Migrants and refugees
    - Difficulties faced by migrants and refugees in the criminal justice system (e.g. language skills, different expectations of the legal system)

Recent reforms to the criminal justice system

Choose four reforms and use the template below to summarise each reform. The Study Design requires that you are able to discuss each reform and evaluate its ability to achieve the principles of justice.

- ❑ Nature of the reform
- ❑ Factors that affect the ability of the criminal justice system to achieve the principles of justice, i.e. costs, delays, cultural differences
- ❑ Extent to which the reform addresses the principles of justice (fairness, equality, access)

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End-of-chapter questions

Revision questions

1 The concept of justice comprises the principles of fairness, equality and access. Explain what each principle means and how it relates to achieving justice in the criminal justice system.

2 Explain why equality, as a principle of justice, does not mean everyone is treated the same. Provide two examples in your answer.

3 Explain how the presumption of innocence would contribute to a fair and just criminal justice system.

4 Evaluate the ability of the criminal justice system to achieve the principles of justice.

5 Outline the significance of the Supreme Court decision in the case *Matsoukatidou v Yarra Ranges Council* (see Legal brief 4.1).

6 How do costs affect the principle of access in a criminal trial?

7 Why are delays (see News report 4.1) a problem for an individual in seeking justice in the criminal justice system? Give examples of how delays can occur.

8 When there was so much footage available of Gargasoulas running down people in Bourke Street, Melbourne in January 2017, why did it still take so long to get the case to trial? Why do you think the Supreme Court, through Justice Lex Lasry, was interested in moving the case along? What did the then DPP, John Champion, say was the problem?

9 Outline problems that some Indigenous Australians experience in the criminal justice system.

10 Explain some of the problems that migrants and refugees experience in Victoria's criminal justice system. Provide two resources available to migrants in accessing the legal system.

11 Choose a recommended reform and list its strengths and weaknesses in achieving justice.

12 As a result of its *Client Priority and Capability Policy 2019*, VLA has established a system of priorities of clients: strongest priority, high priority and priority. How do you think this would assist in making sure the limited funding of VLA reaches its clients most in need?

13 'Committal proceedings are designed to speed up the resolution of criminal cases.' Comment on this statement. Why do you think there is a question whether committal proceedings should be abolished?

14 Discuss how a judge-only trial would fulfil the principles of justice.

15 Describe the operation of the Koori Court and how it aims to achieve justice in the criminal justice system.

Practice exam questions

1 Discuss how the principles of fairness, equality and access contribute to achieving justice in the criminal justice system. [6 marks]

2 Describe one group in Australian society that needs additional assistance to deal with the criminal justice system. Explain why they may have problems with the legal system. [4 marks]

3 Describe two problems in the criminal justice system that hinder the achievement of justice. What changes, or recommendations for change, do you think could help to improve access to the legal system in relation to these problems? [6 marks]

4 Outline one reform and one recommended reform. Explain how each addresses the issue of delays to the criminal justice system. [8 marks]

5 Evaluate one recent reform and the extent to which it achieves the principles of justice to the criminal justice system. [6 marks]

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Chapter 5

Unit 3 – Area of Study 2

The Victorian civil justice system

The Victorian civil justice system aims to restore a wronged party to the position they were in before the breach of civil law occurred. This chapter explores the operation of the civil justice system and the factors relevant to initiating a civil claim. The legal system involves a range of institutions to resolve a civil dispute, including complaints bodies, tribunals and courts. We examine the institutions, methods and key personnel involved in resolving civil disputes, the types of remedies available and their ability to attain their purpose: to achieve the principles of justice.

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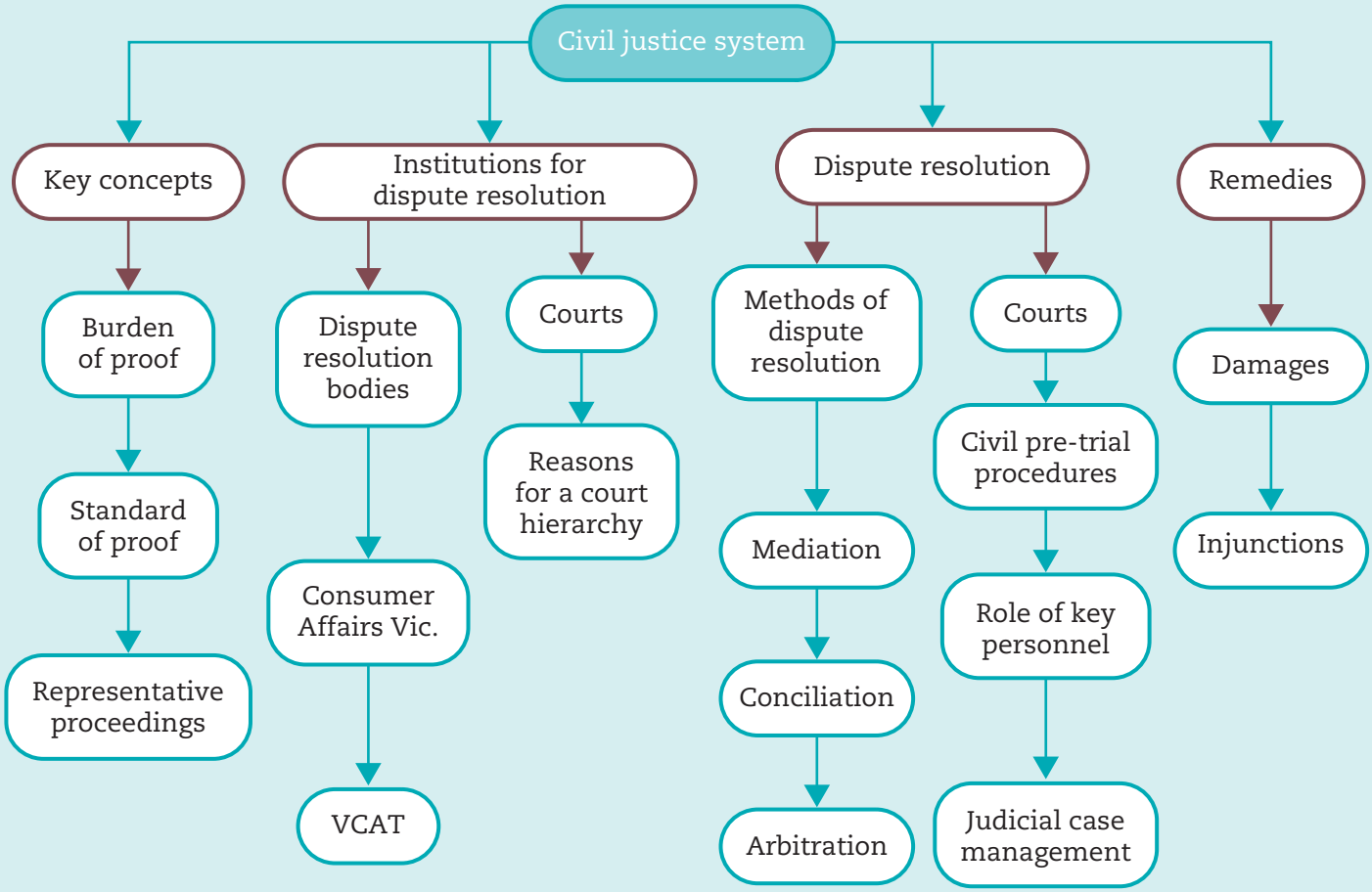

Key terms

appropriate dispute resolution also known as alternative dispute resolution; processes other than judicial determination where a third party assists the parties to resolve the dispute (such as mediation, conciliation, arbitration)

arbitration a method of dispute resolution whereby an independent third party (known as an arbitrator) is appointed to listen to the evidence of both parties and make a binding decision

balance of probabilities the standard of proof required in a civil case: to be successful, litigants must prove that their case, their version of the facts, is more probable than the other party's version

case management Victorian parliament has given the judiciary the power to manage civil disputes, including ordering parties to mediation and give directions; provides for efficiency and more effective use of resources

civil wrong an infringement of a person's rights under civil law

class action *see* **representative proceedings**

complainant a person who alleges to the police that a criminal offence has been committed against them – once it is established that a crime has been committed and guilt is established, the complainant is referred to as the 'victim'; a person initiating a civil action in the Magistrates' Court can also be referred to as a complainant

conciliation a method of dispute resolution whereby a third party assists the disputing parties to reach their own decision; the conciliator can offer advice and make suggestions to assist parties

counter-claim a cross-action by the defendant in a civil claim that, although capable of supporting an independent action, is pleaded in an existing claim; usually heard at the same time as the originating claim

damages a monetary award; this is the most common outcome of a civil case

defendant in criminal law, a party who has been brought to court charged with a criminal offence; in civil law, the defendant is a party defending an action and may make a counter-claim

directions hearing a pre-trial hearing in a civil proceeding conducted by a judge that allows the court to establish, for example, timelines for the completion of the pre-trial stages in a civil matter

discovery the pre-hearing stage in civil proceedings where the parties exchange further details and information; it may include documents, written interrogatories (questions) and/or an oral examination

injunction a remedy in civil law that is an order for a party to do, or refrain from doing, a particular thing; a court order for an action to be taken or for the deferment of an action

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interrogatories written questions sent during the pre-trial process by one party to another to find out the basis of a civil dispute

mediation a method of dispute resolution with a structured negotiation process, comprising an independent person (mediator) assisting parties to identify and assess options and negotiate an agreement to resolve their dispute

plaintiff the party who initiates a civil action

pleadings a civil pre-trial procedure that involves an exchange of information between parties that establishes the nature of the claim, the defence and the remedy sought

remedy any means by which a civil wrong is redressed

representative proceedings legal proceedings by a group of people with a similar or related legal interest; the claim is initiated by one person (the 'lead' plaintiff); also called a class action or group proceeding

statement of claim a civil pre-trial procedure that is part of pleadings; a document in which the plaintiff sets out the facts they are relying on in the claim against the defendant, together with the remedy they are seeking

writ the originating document filed with the court used to begin a civil action

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5.1 Types of civil law

All members of the community have rights and obligations. Some of these rights and obligations fall within the criminal law and some fall within the civil law.

Civil law includes torts, contracts and other disputes, such as family law and inheritance.

A civil action arises when an individual suffers damage as a result of their rights being infringed by the actions or omissions of another party. The individual affected by the breach is responsible for initiating a civil claim. While the costs of a civil action are borne by the parties in dispute, the losing party may be ordered to pay the costs of both parties.

The two main areas of civil law are torts and contract. The word 'tort' comes from the French word meaning 'wrong'.

Torts

The law of torts includes actions for negligence, defamation, trespass or nuisance. A monetary award of **damages** or compensation is the most common remedy in such actions.

Contract

Contract law involves a legally binding agreement between two or more parties. Most disputes concerning the law of contract arise when one party breaches the terms of the agreement. The plaintiff usually seeks financial compensation or an order requiring the defendant to perform or refrain from performing some specific action to uphold the terms of the contract.

The purposes of civil law

The key purposes of civil law are to protect rights under civil law, resolve disputes and restore the injured party to their original position via the allocation of an appropriate **remedy**/s. In many cases, the **civil wrong** can be easily settled by the parties negotiating and reaching a suitable agreement. However, if an agreement is not reached, the wronged party may consider other options available to assist them to settle the matter.

The purposes of civil law is to uphold rights, resolve disputes and restore the injured party/s to their original position.

Figure 5.1 Purposes of civil law

Parties in a civil dispute

The person initiating a civil action is referred to as the **complainant** (in cases heard in the Magistrates' Court) or the **plaintiff** (in cases heard in the County Court or Supreme Court). The party responding is referred to as the **defendant**.

Features of a civil case

The key features of a civil case include:

- a dispute between individuals/organisations
- the breach of a right
- claim initiated by the plaintiff/organisation
- a remedy/s.

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News report 5.1

Prince Harry accepts apology, 'substantial' damages from the paparazzi

Prince Harry settled privacy and data protection claims against a news agency that hovered over his private home in a helicopter and took photos directly into his living room and bedroom.

Harry accepted substantial damages and an apology from Splash News and Picture Agency. The figure was not disclosed.

In a statement read at High Court in London on Prince Harry's behalf, his attorney Gerrard Tyrrell said the home in Oxfordshire, central England was chosen because of 'the high level of privacy it afforded', but that now he and his wife Meghan Markle feel 'they are no longer able to live at the property'.

The home was privately rented by the Duke and Duchess of Sussex while their Frogmore Cottage residence was being renovated.

The agency also pledged to 'cease and desist from selling, issuing, publishing or making available the photographs'. Splash also promised 'not to repeat its conduct by using any aerial means to take photographs or film footage of the Duke's private home.'

Splash says it ' recognized that this situation represents an error of judgment' and promised it would not happen again.

Source: Associated Press, 16 May 2019

Institutions that resolve civil disputes

Civil disputes are between individuals and/or organisations and involve a breach of a right.

Complaints bodies	Tribunals	Courts
• Consumer Affairs Victoria (CAV)	• Victorian Civil and Administative Tribunal (VCAT)	• Magistrates' Court • County Court • Supreme Court

Figure 5.2 Types of institutions that resolve civil disputes

The civil justice system provides a range of institutions, methods, procedures and personnel to provide for fair, equitable and accessible options for parties to resolve civil disputes and seek redress.

Civil law institutions, including complaints bodies such as Consumer Affairs Victoria (CAV), and tribunals, including the Victorian Civil and Administrative Tribunal (VCAT), assist the courts (Magistrates' Court, County Court and Supreme Court) to resolve civil matters. These bodies use a range of methods and personnel and each institution has jurisdiction to hear and determine particular civil matters.

The aim of the civil justice system is to resolve disputes while upholding the principles of justice: fairness, equality and access.

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5.2 The principles of justice and civil law

The principles of justice: fairness, equality and access apply to civil law.

The civil justice system, like the criminal justice system, is founded on the three principles of justice: fairness, equality and accessibility. The institutions, methods and personnel involved in civil dispute settlement contribute to the achievement of justice. These principles measure the extent to which the civil justice system achieves or does not achieve justice.

These principles are embedded into key legislation guiding the resolution of civil disputes in Victoria, including the *Civil Procedure Act 2010* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Fairness

- consistent processes and procedure
- impartial pre-trial, trial and post-trial processes
- timely resolution.

Equality

- unbiased/impartial treatment irrespective of personal, economic, or social differences
- Sometimes different treatment is required for equity, e.g. Indigenous peoples, vulnerable witnesses.

Access

- understand legal rights, advice and assistance
- ability to read information and use services
- opportunity to pursue a case through courts, tribunals, complaints bodies.

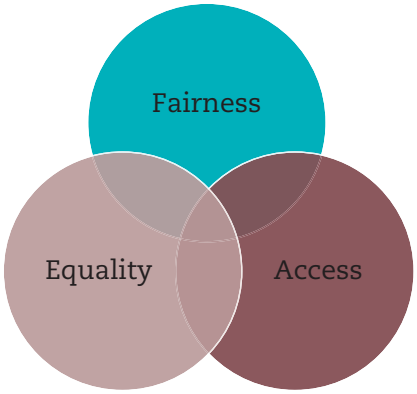

Figure 5.3 The principles of justice

Fairness

The principle of fairness is a vital component of justice and central to the idea of 'fair play' in a civil case.

The community expects that the key features of the civil justice system will abide by the rules of natural justice. This means that the person making the decision:

- will be free from bias, whether apprehended (suspicion) or actual; and
- that the process will be seen as fair (also known as 'procedural fairness')

Some examples that illustrate the ways in which the civil justice system aims to promote fairness when resolving disputes include:

- the existence of safeguards to ensure bodies involved in dispute resolution are free from bias. VCAT abides by the rules of natural justice and the courts adhere to the strict rules of evidence and procedure of the adversary system.
- the transparent rules and processes apply to both parties and seek to remove any opportunity for bias from the adjudicators. These rules ensure parties have a fair opportunity to present their version of the issues in dispute.
- The burden of proof as a key concept in civil law also aims to promote fairness. The burden to prove the claim rests with the complainant/plaintiff and safeguards against unsubstantiated or nuisance claims being initiated against a defendant. The plaintiff must demonstrate there is a valid claim in law against the defendant. This ensures the defendant has a case to answer and has sufficient time to prepare a defence. Placing the responsibility on the plaintiff to demonstrate a case against the defendant is fair and reasonable and thus promotes justice.
- The appeal process also promotes fairness. Parties in a civil dispute may seek leave to have a higher court review the decision made by an inferior court or tribunal. Appeals may be initiated on a point of law or the remedy awarded. The appeal process protects against incorrect, unfair, or biased outcomes and promotes confidence in decision-making and thus contributes to justice.

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Equality

The principle of equality is also fundamental to achieving justice in the civil justice system. The idea that all individuals, irrespective of culture, gender, disability, background and economic status, are treated in a uniform manner is paramount if justice is to be achieved.

The principle of equality is another vital element of justice and is protected in the Victorian *Charter of Human Rights and Responsibilties Act 2006* (Vic).

Section 8 of the Charter upholds the right to equality before the law without discrimination.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Section 8 Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

The following examples illustrate the ways in which the civil justice system aims to promote equality when resolving disputes:

- The civil pre-trial, trial and post-trial processes and procedures aim to provide similar and uniform treatment for all people.
- Independent third-party adjudicators ensure equality is promoted in decision-making. Arbitrators, conciliators, mediators, magistrates, judges and juries act in a neutral and independent manner, ensuring all are treated equally, irrespective of any differences.
- Parties are treated with the same rules of evidence and procedures, ensuring consistency and predictability.
- Assisting bodies (such as CAV and VCAT) and the courts aim to provide equal information to all clients. All institutions provide information in over 20 languages and interpreter services. The legal system is broadening with the inclusion of Aboriginal and Torres Strait Islander languages and the needs of those with a disability. This will promote more equal treatment of minority groups involved in civil disputes.

Access

The principle of access to the law is another value underpinning justice. Access refers to the ability of individuals to understand their rights, to be able to use information and services available and the opportunity to pursue a case to protect their rights. This implies all individuals understand the variety of dispute settlement options available to resolve their particular claim.

The following examples illustrate the ways the civil justice system aims to promote access when resolving disputes:

- Free legal advice, information and assistance ensures individuals involved in civil disputes may seek assistance free of charge or at low cost
- Assistance completing application forms, particularly for self-represented clients, and interpreter services to enable those affected by money and language barriers to have the opportunity to present their case.

The legal system provides a variety of dispute resolution options to cater for the varying nature and complexity of civil complaints. For example, CAV has a broad jurisdiction to settle consumer complaints where conciliation is likely to resolve the dispute; whereas the Supreme Court may be the most appropriate means to resolve a dispute involving a complex legal issue. CAV is free and informal, while the Supreme Court is more formal, costly and time consuming.

However, many factors may negatively impact on the ability of the civil justice system to uphold fair, equitable and accessible hearings and processes. The costs associated with civil disputes, the delays involved in filing and determining civil claims and some cultural factors may inhibit the ability of the civil justice system to uphold these key principles.

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5.3 Key concepts in civil justice

Upholding justice and protecting individual rights is essential for a civil justice system to operate effectively. The law recognises that individuals have the right to have their disputes determined by a 'competent, independent and impartial' body.

Civil law concepts recognise the importance of protecting the individual's rights to fairness, equality and access to the law. Key concepts protecting these values include:

Figure 5.4 Key concepts in the Victorian civil justice system

Burden of proof

The burden of proof refers to the responsibility the plaintiff has to present the necessary facts (evidence) to establish the case against the defendant. It is fair that the party making the allegation has the task of establishing liability. The burden of proof in civil law rests with the plaintiff and safeguards against unsubstantiated or nuisance claims initiated against a defendant. The plaintiff must demonstrate that there is a valid claim in law against the defendant. This ensures the defendant has a case to answer and has time to prepare a defence. Placing the responsibility on the plaintiff to demonstrate a case against the defendant is fair and reasonable and thus promotes justice.

There can be times in civil law when the defendant has the burden of proof. This is when the defendant is making a **counter-claim** against the plaintiff. For example:

A runner was running along a pathway next to a road that bisected a park and sporting grounds. A cyclist was travelling along the road that, in this particular section, had cars parked on both sides. The runner ran across the road to the sporting ovals without looking and was hit by the cyclist. The plaintiff, the runner, was suing the cyclist for negligence. The cyclist made a counter-claim against the runner for contributory negligence. In this case, the defendant would also have the burden of proving that the plaintiff contributed to the accident and injuries.

In a civil case the person bringing the claim, the plaintiff, has the burden of proof.

Standard of proof

The standard of proof refers to the amount of evidence the plaintiff must present to the court to win. In civil law, the plaintiff must present sufficient evidence to prove, on the **balance of probabilities**, that the facts they claim are substantially the truth. The level of evidence required is what would be regarded as adequate by a reasonable person and thus promotes justice.

The balance of probabilities

In civil matters, such as the case of Prince Harry suing for damages (News report 5.1), the plaintiff (Prince Harry) needed to prove, on the balance of probabilities, that his account of the facts was right. In other words, the plaintiff must prove that their version of the facts is the more likely. In this particular case, Prince Harry successfully proved to the court that, on the balance of probabilities, the media knew that they were violating the couple's right to privacy when they flew the helicopter close to the window to photograph the couple in their home.

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Representative proceedings

Representative proceedings are recognised as a fundamental concept in civil law and are commonly known as a **class action**. They refer to claims initiated by a plaintiff on their own behalf (known as a 'lead plaintiff') and on behalf of 'group members' where the claim arises out of a similar or related legal interest. A minimum of seven members is required to form a class action.

For example, the largest Victorian class action to date is the Black Saturday bushfires. These fires burnt out 4500 km^2 in the period 7 February – 14 March 2009. More than 400 fires were reported on 7 February. During the period of the fires, there were 173 deaths with many more injuries, and over 3500 buildings were destroyed, including 2029 houses.

Instead of each individual initiating separate legal proceedings, it was possible for a lead plaintiff to begin a single legal action on behalf of all the people affected.

Representative proceedings are a growing feature of Australian litigation. They promote access to justice as they allow individuals who may be discouraged from taking action, due to cost barriers or ignorance of their legal rights, to be part of proceedings and access a remedy. Representative proceedings are also an effective use of court resources by determining large numbers of claims in a timely and efficient manner.

Representative proceedings allow numerous legal claims to combine into a single action that saves legal costs and provides access to justice.

In Victoria, group members automatically become a member of the representative proceedings without having to give consent to the lead plaintiff. Although members are not required to register their claim, it is beneficial for a group member to present elements of their claim so that they receive benefit from the settlement.

Individuals not wishing to be part of a representative proceedings may sign the opt-out notice. This means individuals:

- will not be bound by the outcome
- will not be entitled to share the benefit of the outcome
- will be eligible to seek legal advice about initiating their own claim.

Disbursements costs are incurred by a lawyer on behalf of a client, such as the fees charged by a barrister or expert witness and court fees.

Group members are defined as individuals in a class action who have similar claims against the defendant.

Litigation funder: a commercial entity that agrees to pay the costs of the litigation in return for a share of the award if the claim succeeds (usually a high percentage of the award of damages). A litigation funder is not a party to the proceedings and does not otherwise have an interest in the litigation.

Contingency fee: a fee that is calculated as a share of the amount recovered if the litigation is successful. No fee is charged if the litigation is unsuccessful. Litigation funders charge on this basis, but lawyers are prohibited from doing so.

Opt-out notice: members not wishing to be part of representative proceedings must sign and register the opt-out notice from the class action at the relevant court by a due date.

A class action (also known as representative or group proceedings) is a proceeding brought on behalf of seven or more people where the claims arise out of the same, similar, or related circumstances. The claim is brought by a lead plaintiff.

Representative proceedings allow a group of individuals with a common grievance to bring a joint action. This promotes justice by enabling plaintiffs who may be unable to initiate civil proceedings, due to the high cost, to share costs and thus access the civil justice system.

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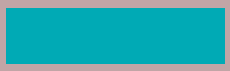
Table 5.1 Representative proceedings have advantages and disadvantages that parties need to evaluate before deciding to stay in or opt out of proceedings

Advantages	Disadvantages
• Individuals save costs as they do not fund a separate claim. This promotes access to justice as individuals who may otherwise be discouraged from taking action, due to costs or ignorance of their legal rights, may be part of proceedings • It reduces the financial risk associated with litigation (litigation funders) • Individuals gain a share of the settlement money / court-awarded damages • Court resources are used efficiently by determining large numbers of claims in a timely and efficient manner, reducing delays and thus improving access for others • Removes the power imbalance, allowing individuals to hold powerful organisations accountable for their actions • Lawyers have professional responsibilities guided by the *Civil Procedure Act 2010* (Vic) and the court rules to uphold ethical duties to the courts, protecting against any conflict of interest	• Group members are bound by the judgment, unless they opted out, and they are unable to initiate a private claim in the future • Controversy over the equitable distribution of the amount awarded among large number of claimants (e.g. 5800 claimants in Murrindindi–Marysville fire class action) • Excessive legal costs of the litigation funder may consume the entire amount awarded by the court (e.g. the Huon Corporation case in Legal brief 5.5) • Due to the volume of matters to be settled and the complexity of evidence involved, representative proceedings may take years to settle (e.g. the Black Saturday bushfires was the largest class action in Victoria to date and took nine years to settle) • Litigation funders are likely to only accept matters with a high likelihood of success • Potential conflict of interest may arise. Class actions create a three-way relationship between litigation funders, lawyers and plaintiffs and may create a conflict of interest. The litigation funder and lawyers are contractually obligated to each other as well as individually to the plaintiff. Thus, the commercial interests of the litigation funder or the lawyers may be given priority over the plaintiff's interests. Additionally, in class actions, the lawyers act for all class members, so competing needs may also give rise to conflicts of interest • Members not wishing to be part of representative proceedings must sign and register the opt-out notice from the class action at the relevant court by a due date or they automatically become part of the class action • The percentage or commission charged by litigation funders is between 25% and 40% of any compensation awarded. This may mean that little or no money is remaining after legal fees and disbursements for the members to the class action



Legal brief 5.1

Class actions update 21 June 2018

Reforming the class actions landscape: VLRC recommendations

In October 2016, the Victorian Attorney-General publicly criticised the outcome produced by the litigation funding and class actions system in the Huon Corporation case (2016), where an insurer settled a class action on behalf of 300 former employees for more than $5 million, but the class members received nothing: *Fitzgerald v CLBL Insurance* [2014] VSC 493.

Consequently, the Attorney-General asked the Victorian Law Reform Commission (VLRC) to review the powers of the Supreme Court to supervise litigation funders, whether law firms should be allowed to charge contingency fees and whether class actions should be further regulated by introducing a certification requirement or statutory criteria for court approval of settlements.

The VLRC published its report, making 31 recommendations to the Victorian Government and the Supreme Court of Victoria, focusing on increasing regulation and supervision of litigation funding in Victoria.

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Legal brief 5.2

Murillo v SKM Services Pty Ltd S CI 2017 02779

IMPORTANT NOTICE

On 21 July 2017, Mr Murillo (plaintiff) commenced this group proceeding in the Supreme Court of Victoria against the operator of the Coolaroo Recycling Plant, SKM Services Pty Ltd (SKM). This group proceeding arises out of the fire that commenced at the Coolaroo Recycling Plant on 13 July 2017 (Coolaroo Fire) and is brought by the plaintiff on his own behalf and on behalf of persons who suffered personal injury or loss of or damage to property as a result of the fire that commenced at the Coolaroo Recycling Plant on 13 July 2017 (Coolaroo Fire).

The Supreme Court has ordered that this notice be published for the information of persons who might be group members on whose behalf this group proceeding is brought and who may be affected by it.

You should read this notice carefully as it may affect your rights. Any questions you have concerning the matters contained in this notice should not be directed to the Court. If there is anything in this notice that you do not understand, you should seek legal advice.

1 What is a group proceeding?

A group proceeding, also known as a class action, is a proceeding brought by the plaintiff on his own behalf and on behalf of group members against the defendant, where the plaintiff and the group members have similar claims against the defendant.

Group members are bound by any judgment or settlement entered into in the group proceeding unless they choose not to participate by 'opting out' of the proceeding.

Source (extract): Supreme Court of Victoria

Legal brief 5.3

Class action filed against Toyota Australia

Lawyers filed a class action against Toyota Motor Corporation Australia Ltd in the Federal Court on 1 August 2019, claiming that:

- certain models of Toyota motor vehicle in the Hilux, Prado and Fortuner ranges fitted with a diesel particulate filter (DPF) are defective
- these vehicles fail to comply with the statutory guarantee as to acceptable quality provided under the Australian Consumer Law; and
- Toyota Australia has engaged in conduct that was misleading or deceptive and, in the circumstances, unconscionable.

The proceedings are being brought by Kenneth Williams (lead plaintiff) on his and others behalf who acquired one of the models of Toyota between 1 October 2015 and 26 July 2019 that was fitted with a DPF.

The claim also alleges that Toyota has misrepresented the quality of the affected vehicles. It is said that Toyota has known of the issues affecting the DPF system in the affected cars since February 2016 and therefore the company's conduct was misleading and unconscionable.

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Legal brief 5.4

The Black Saturday bushfires matter remains an example of Victoria's longest and most expensive representative proceeding

Multi-million dollar settlement: Black Saturday bushfires Kilmore east – Kinglake 7 February 2009: Bushfire class action settled via mediation 2014, pay-outs distributed in 2016–17:

- 119 dead
- 1242 homes destroyed
- 1084 homes damaged
- 125 000 hectares of land burnt.

2013: Class action (negligence) initiated in Supreme Court

Maurice Blackburn Lawyers represented Kinglake plaintiffs who suffered 'injury, loss or damage'.

The action was against AusNet (electricity provider) and four other defendants.

- lead plaintiff (Carol Matthews) represented 10 000 group members as part of class action
- largest class action in Australian history
- trial lasts for 16 months (208 days).

July 2014: Supreme Court approves settlement

Plaintiffs and defendants reached agreement to settle dispute via mediation.

- $494 million awarded in record payout
- lawyer fees were $60 million

November 2016: Hundreds of victims still awaiting pay-out due to complexity of case

Plaintiffs criticised the delay (12–18 months), stating that 'justice delayed is justice denied'.

2017: Hundreds await payment due to delay in administering the payment funds

Note: The trial was held in a purpose-built court to accommodate the large legal teams, numerous expert witnesses and interested community members. The trial ran for 16 months.

Carol Matthews, who lost her son in the Black Saturday Bushfires, was the lead plaintiff.

News report 5.2

Power to the people

A representative proceeding or representative action is more commonly known as a class action. This procedure allows a legal claim to be made by many people at the same time, as long as they have sustained a similar type of harm as a result of a similar type of circumstance. It allows proceedings to be brought on behalf of a group or a class of people, making justice more easily achieved by those who are most in need.

The precedent for class actions of such magnitude as the Black Saturday bushfires trial was set in 1998 following a gas explosion at Esso's Longford plant. Two workers were killed and Victoria's gas supply was shut down for almost two weeks. In 2002, four legal firms conducted the class actions in the Supreme Court on behalf of thousands of businesses, consumers and workers who were adversely affected by the interruption of gas supply following the explosion. The matter was settled in December 2004.

Never before in the English-speaking world had there been a case like this where a customer of a public utility sued for an interruption of supply.

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https://www.supremecourt.vic.gov.au/law-and-practice/class-actions

Activity 5.1 Folio exercise

Representative proceedings

Read Legal brief 5.4 on the Black Saturday bushfires and News report 5.2 'Power to the people' and complete the following tasks:

1 What is a representative proceeding? Briefly describe the nature of a representative proceeding before the Supreme Court.
2 What are two advantages of representative proceedings? Justify your view, drawing on information from the two case studies.
3 Explain why representative proceedings are acknowledged as a key concept in the civil justice system.
4 What is one factor an individual affected by the Coolaroo Recycling Plant fire may have considered before deciding whether to opt out of the representative proceedings?
5 Discuss one benefit of litigation funders in representative proceedings.
6 Analysis the extent to which representative proceedings uphold one of the principles of justice.

5.4 Factors to consider when initiating a civil claim

Court action is costly and time-consuming. A number of factors must be taken into consideration before initiating a claim in the courts.

In any civil matter, the plaintiff will seek legal advice to establish if there is a remedy available and, if so, the likelihood of success. Court action is an expensive and time-consuming process. Before any action is started, the plaintiff must consider the following factors.

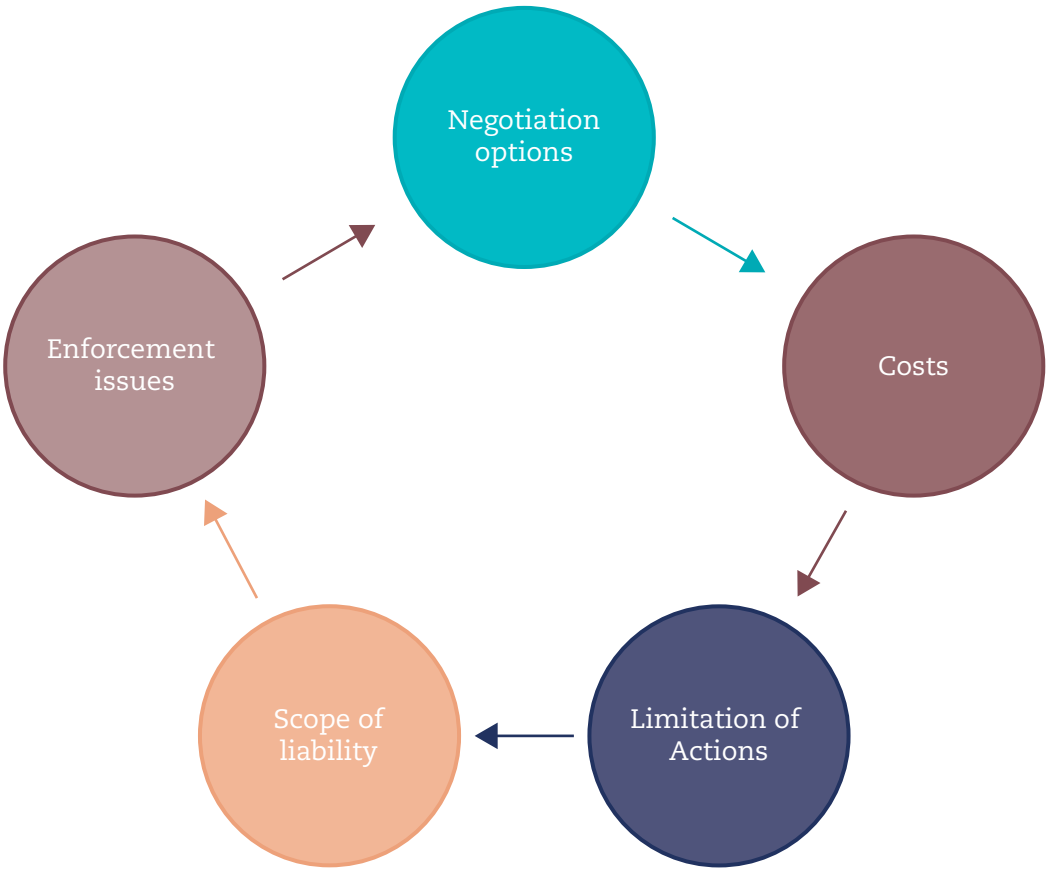

Figure 5.5 Factors parties need to consider before initiating civil action

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Negotiation options

Negotiation options		
Self-help and negotiation	Mediation	Conciliation

Figure 5.6 Negotiation options available in civil disputes

Self-help and negotiation, mediation, conciliation

Self-help is the first and cheapest option to resolve a civil dispute and involves the parties talking about the dispute to reach a resolution.

There are several ways to resolve civil disputes rather than going to trial, which is time-consuming and costly. **Appropriate dispute resolution** options, also known as alternative dispute resolution methods, provide opportunity for parties to settle the matter with the assistance of a third party in an informal and more cost-effective setting. The majority of civil claims do not proceed to court, with 95% of all civil claims resolved through negotiated settlement before the trial begins. Settlement may result after parties use one or more of the following options:

- self-help and negotiation with other party (informal discussion)
- discussions with legal representatives regarding the merits and weaknesses of the claim
- assistance of a third party via mediation and conciliation.

Some criminal matters can give rise to a civil action. For example, civil family violence law can interact with criminal law.

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Negotiation options are informal agreements between parties which result in a settlement before trial. These methods include self-help and negotiation, mediation and conciliation.

Negotiation options focus on identifying the needs and wants of each party, and generally emphasise a win–win solution. This is particularly advantageous where the parties want confidentiality or to maintain a relationship after the dispute is resolved. Negotiations are the first, simplest and cheapest option and are the most time-efficient dispute resolution process.

However, before agreeing to a negotiated settlement, it is important the plaintiff seeks legal advice and considers if the agreement is just in the circumstances. Factors to consider include:

- the likelihood of winning the action if taken to court
- the monetary value of the claim sought compared to the likely costs
- time and emotional commitment required to pursue the case
- private verses public settlement of the issue
- impact of signing a private agreement preventing further civil action.

The majority of civil claims are settled via informal settlement options. If negotiation options are not appropriate or unsuccessful, parties may decide to have their dispute settled via arbitration or litigation.

In the event that negotiation options do not resolve the dispute, abandoning a civil claim may be considered due to barriers, such as costs and the time required. This may result in an infringement of rights and the dispute remaining unresolved, impacting on the ability of the civil justice system to promote justice in all cases.

Costs

In civil matters, the parties bear the costs of the action. The parties need to carefully consider the costs and the possible financial consequences if they are unsuccessful.

- **What will it cost?** It is not until legal action is initiated that the costs of legal proceedings become evident. There are legal fees and report costs, payment for expert witnesses and court costs.
- **Will I recover the costs?** The cost of legal proceedings could easily be greater than the amount of compensation or damages awarded. The costs awarded by the court may also not cover all the costs of the action. Costs are usually allocated to cover 'in-court' action, but may not take into consideration all the actions taken before the court hearing.
- **Will the defendant be able to pay the costs?** It is not worth spending time and money to seek an award of damages if the defendant is a 'straw person' – a term used to describe someone who has no money. They will not be able to pay the compensation or the costs of the court action.

The *Access to Justice Report 2016* identified legal costs as the most significant factor in determining whether a civil action will be initiated or not.

In addition to the time and emotional costs associated with initiating a civil claim, the financial cost is considered the most significant factor in determining whether a civil action is pursued or not. Therefore, both parties need to carefully consider the costs and the likely financial consequences before deciding to litigate as a means of resolving their dispute.

CAV offers free advice and assistance with self-help and conciliation services.

Costs will vary, depending on the institution and method chosen to resolve the civil dispute. The appropriate body is usually decided based on the nature of the dispute, the complexity of the evidence and the law surrounding the matter. Some civil matters may be resolved by complaints bodies at low or no cost. Complaints bodies such as CAV are free. CAV encourages self-help and offers free conciliation for a number of consumer-related areas.

VCAT offers free or lower cost dispute resolution options in a wide range of civil disputes.

Similarly, tribunals are another option for resolving civil disputes at a lower cost than courts. Tribunals such as the VCAT offer a variety of dispute resolution methods and varying fees depending on the nature of the claim and the amount of money involved. Generally, the fees are cheaper and the time for settling disputes shorter than the courts; however, some administrative and hearing fees may still apply.

Courts are a final option and generally more expensive, with costs incurred at the pre-trial, the trial and post-trial phases.

View the Court of Appeal fees list on the Supreme Court of Victoria site at www.supremecourt.vic.gov.au.

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Table 5.2 Costs incurred in the pre-trial, trial and post-trial phases of civil litigation

Pre-trial costs	Trial costs	Post-trial costs
• Legal advice and research of legal precedents (complex cases) • Interview and prepare witnesses • Mediation fees • Filing fees	• Daily hearing fees • Administration fees • Legal representation • Copies of documents • Expert witnesses • Jury	• Standard costs (paid by losing party) • Appeals • Enforcement orders

The high costs associated with initiating civil claims is the most significant factor impacting on whether a civil action is initiated.

The impact of costs on resolving civil disputes was highlighted in the *Productivity Commission Report 2014* and *Access to Justice Report 2016*. These reports identified the following findings in relation to costs in the civil justice system:

- The majority of the population (the 'missing middle') is unable to access legal representation
- Less than 8% of the population are eligible for legal assistance, meaning an increasing number of individuals appear in civil cases as self-represented clients
- Increased numbers of clients are applying for limited legal assistance. However, the lack of legal aid funding reduces the ability of Victorian Legal Aid and community legal centres to provide assistance in civil matters.

The 'missing middle' refers to individuals not rich enough to afford private lawyers, but are not poor enough to qualify for legal aid.

Limitation of actions

Another factor which must be considered before initiating a civil claim is the time period between when the damage occurred and when the legal action is actually initiated. Limitation of actions refers to the maximum time limit that a plaintiff has to initiate a civil claim against a defendant. The *Limitation of Actions Act 1958* (Vic) specifies the time limits within which actions must be commenced in Victoria. Other legislation, including the *Trade Practices Act 1974* (Cth) and the *Wrongs Act 1958* (Vic), also state time limitations for civil actions.

The purpose of time limits is to:

- ensure the availability of witnesses and documentation
- prevent actions being initiated after a substantial period of time and provides for personal and business certainty
- ensure that plaintiffs act within a timely manner to resolve issues.

The *Limitation of Actions Act* provides a framework identifying the time periods within which an action must be initiated. The time varies depending on the type of claim:

Table 5.3 The *Limitation of Actions Act 1958* (Vic) provides the time limits within which civil actions must be commenced

For breaches of contract	A 6-year maximum time limit for simple contracts, including oral contracts. (section 5(1)(a) of the *Limitation of Actions Act*). Parties may agree, in the contract, to extend this period.
For tort	A 6-year maximum time limit commencing from the date the damage occurs. (section 5(1)(a) of the *Limitation of Actions Act*).
For personal injury tort	A 3-year maximum time limit from the date the cause of action is discovered by the plaintiff (section 27D(1) (a) and (b) of the *Limitation of Actions Act*). **Note:** In 2015, the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) was passed. It removed 'the limitation periods that apply to actions that relate to death or personal injury resulting from child abuse'.

It is very important for individuals to be aware that maximum limitation periods apply to commencing civil claims. This knowledge ensures that, in the event of an infringement of rights or a breach of contract, an individual will need to initiate an action within the prescribed time to ensure access to justice. The limitation periods aim to provide a balance between upholding the interests of all parties and ensure disputes are resolved in a timely manner.

Courts have discretion to extend time limits where it is 'just and reasonable' to do so.

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Courts have discretion to extend time limits to enable proceedings to be initiated beyond the limitation period. Courts may grant an extension of time where it is believed that it is 'just and reasonable' to do so. The court will consider a number of factors, including: the length of the delay, the reasons for the delay, and the impact on the defendant of being deprived of the protection of the limitation period.

The *Limitation of Actions Amendment (Child Abuse) Act 2015* removed the limitations period that apply to civil actions for damages caused by criminal child abuse.

In 2015, the Victorian Government, in response to the *Betrayal of Trust Report* (2013) decided that the existing civil limitations periods were inappropriate for criminal child abuse cases as it denied victims suffering deep psychological harm from seeking compensation. Victorian parliament passed the *Limitation of Actions Amendment (Child Abuse) Act 2015*. The amendment removed the limitations period that apply to civil actions for damages caused by criminal child abuse. It also removed the 12-year limitation period under the *Wrongs Act 1958* (Vic) for claims for compensation for all victims of child sexual abuse. The amendment recognised that victims suffering trauma are often unable to initiate claims until decades after the abuse occurred.

The 2015 amendment removed the time barriers that denied victims of child sexual abuse from accessing justice. For all other matters, the courts decide how applicable the limitations of actions are, based on the facts of the case and the relevant law. The Limitations of Actions framework aims to promote justice. It is considered fair that the party suffering damages initiates a claim in the time limit specified to ensure the evidence is reliable. This requirement also protects possible individuals and businesses against unexpected claims throughout their lifetime.

News report 5.3

Supreme Court extends statute of limitations in the interests of justice

In the case of *Mackenzie v Positive Concepts Pty Ltd & Anon* [2016] VCS 259, the Victorian Supreme Court extended the six-year time limit to 13 years, in the interests of justice.

In 2002, Mackenzie sustained serious injuries following an assault while working at a hotel as a security officer. In 2003, he engaged lawyers to represent him in his WorkCover claim. The insurance company paid for his weekly benefits and determined that his injuries were not sufficient to get impairment compensation. Mackenzie's lawyers did not advise him that he could take further legal action against his employer and the hotel in common law proceedings.

In 2013, Mr Mackenzie engaged another law firm to pursue his entitlements.

In May 2015, Mackenzie started action against his employer and the operator of the hotel. Both defendants pleaded that Mackenzie was out of time, as he only had six years from the date of assault to commence action. Mackenzie sought an extension of time to bring his claim.

The finding

The Court found in favour of Mackenzie because:

- he suffered physical and serious psychological injuries from the accident, requiring him to have continuing treatment and medication, and resulting in disability
- his former lawyers did not advise him of his right to bring a claim in court
- he believed that he had exhausted all his legal rights
- after Mackenzie was encouraged to see a lawyer, he attended and instructed his current lawyers.

The Court accepted that Mackenzie was a credible and honest witness and that the delay caused no prejudice to the defendants.

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Scope of liability

The scope of liability refers to an assessment of whether the defendant's actions or omission causes the harm which is the basis of the claim; namely, causation and remoteness of damage. This is an important factor for both parties to consider before initiating a civil action as it relates to the legal elements that must be established to prove liability. In the event of injury, the plaintiff must establish who they will sue and how they will prove the extent of the defendant's liability. For example, in negligence, the plaintiff must establish that the defendant owed a duty of care, that the duty was breached and that the plaintiff was injured as a consequence of the breach. In fairness to the defendant, the court's measure of responsibility is limited to that expected of a 'reasonable person'. For example, in *Donoghue v Stevenson* [1932] AC 562, the court decided that it was foreseeable that the plaintiff's injuries resulted from the defendant's failure to take reasonable care. However, if the defendant had demonstrated that all reasonable care had been taken and the risk unforeseeable, the defendant's actions would be considered outside the scope of liability.

The burden of proof rests with the plaintiff to establish on the balance of probabilities that the defendant's actions were within the scope of liability. The defendant may deny liability claiming other factors or unforeseeable circumstances were responsible.

The scope of a defendant's liability is a matter for the court to decide based on the facts of the case and the relevant law. This promotes justice as it is fair that the party making a claim has the responsibility to prove the allegations and that the defendant's actions are measured against that of a reasonable person in similar circumstances.

Scope of liability for negligence

Scope of liability for negligence is provided in section 51 of the *Wrongs Act 1958* (Vic).

Section 51 – General Principles

(1) 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) it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

(2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the injured person) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

Sometimes the scope or assessment of the defendant's liability is difficult to determine. The scope of liability in *Rebel Wilson v Bauer Media Pty Ltd* [2017] VSC 521 was controversial and the case was appealed by both parties from the Supreme Court of Victoria to the Court of Appeal and finally to the High Court of Australia before a final deliberation as to the scope of Bauer Media's liability was determined. The High Court upheld the Court of Appeal finding that Bauer Media was not liable for economic loss suffered as a result of the defamatory statements. The High Court upheld that Ms Wilson was unable to establish a causal link between the defamatory publications and the economic loss claimed.

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Rebel Wilson with her legal team outside the Victorian Supreme Court

Who can be sued?

- Any human being or legal person may be a party in a civil action. A 'legal person' includes corporate bodies such as companies or incorporated clubs and associations.
- A party may be vicariously liable for the actions of another person. Vicarious liability is when one person (such as an employer) is held liable or sued for the acts or omissions of another (an employee).

Enforcement issues

Finally, the parties initiating a civil claim need to consider the possible outcomes and the issues surrounding the enforcement of agreements (negotiation options) or court judgments and orders should the matter proceed to court. Enforcement issues relating to informal agreements may be difficult to enforce as they rely on the other party upholding the agreement. However, even a successful court judgment against a defendant does not always ensure the plaintiff receives the amount that has been awarded. This may be because:

- the legal fees exceed the amount awarded by the court
- the defendant's assets do not cover the damages awarded. The term 'straw person' is used in law to refer to a defendant without assets

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- the failure of the defendant to abide by the court's judgment intentionally or unintentionally
- the defendant cannot be located
- the defendant is seeking leave to appeal the decision.

Where a defendant fails to comply with the court judgment to award damages and costs, the plaintiff may apply to the court to issue one or more of the following orders to instruct payment.

Types of enforcement orders

The warrant of distress	an order to seize and sell the defendant's property to be sold and to repay the amount owing
A garnishee order	an order that compels a third party who owes money to the defendant to pay the plaintiff
An attachment of earnings	an order that instructs the defendant's employer to deduct the amount owing from the defendant's wages or salary
Bankruptcy and liquidation	an order to declare the defendant bankrupt and their assets sold. The amount received by the plaintiff may not be the full judgment amount.

Figure 5.7 Types of enforcement orders

Although the courts have the authority to enforce judgments, parties need to consider the risks and issues that may negatively impact on the outcome and their ability to seek redress, even if the outcome is successful.

The impact of enforcement orders adds to the costs and delays in the post-trial phase.

The Huon Corporation case (see Legal brief 5.5) demonstrates the risks involved in initiating a civil claim. Although the Supreme Court found in favour of the plaintiffs, the 300 employees did not receive the amount awarded by the court due to the excessive legal costs. In this case, the legal fees exceeded the amount awarded by the court and the plaintiffs received no compensation.

Legal brief 5.5

Costly class actions

Three hundred former employees of Huon Corporation successfully won their 10-year class action to be paid their entitlements following the collapse of the auto parts company.

In 2015, the Victorian Supreme Court awarded $5 million to the employees. However, the cost of solicitor's fees, fees paid to Senior Counsel and other professional services meant that no money was left to be distributed to the employees. This case demonstrates the high costs associated with initiating legal matters and the risks to plaintiffs when undertaking civil litigation. The apparent injustice to the employees, caused by the excessive legal cost, has also highlighted the role of litigation funders in financing representative proceedings and has prompted the Victorian Government to ask the Victorian Law Reform Commission to review the role of litigation funders in the civil justice system.

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Other factors

Other factors to take into consideration include:

- **What about the publicity?** In some cases, litigation may result in unwanted publicity. For instance, a public personality may have been wrongfully and unlawfully detained for shoplifting. Their rights have been infringed. However, taking court action may result in more publicity about the alleged shoplifting. This publicity may be seen as more damaging than the unlawful detention.
- **Am I likely to succeed?** In cases involving complex or novel circumstances, the common law may be uncertain. There is a risk in taking these cases to court. If you lose, you will be required to pay – not only compensation, but also the legal costs.
- **Is it worth the inconvenience?** Civil action presents the average person with a mass of complicated legal procedures and formalities leading up to and during the trial. Pre-trial stages require an exchange of several documents. The litigant may need to:
  - visit a solicitor and discuss matters relevant to the case
  - obtain evidence and reports
  - attend medical consultations. In some cases, it may take several years before the matter is heard by a court. The plaintiff may not consider the matter serious enough to justify the time and expense.
- **Which court will hear the case?** Claims for less than $100 000 may be heard in the Magistrates' Court. The County Court and the Supreme Court can hear claims for unlimited amounts.

5.5 Methods of dispute resolution

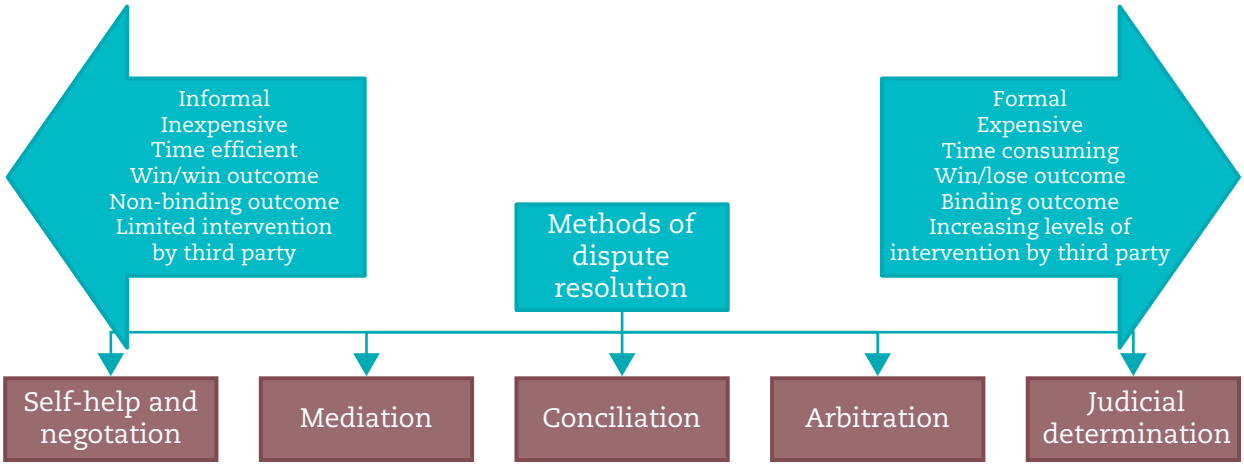

Figure 5.8 Types of dispute resolution

Appropriate Dispute Resolution (ADR) methods refer to the processes where an independent third party assists parties to resolve their dispute and includes mediation, conciliation and arbitration. ADR does not include judicial determination, such as decisions made by a court or tribunal.

Civil dispute resolution is different from proceedings in criminal law as a variety of methods may be used to resolve civil disputes. The method chosen by the parties as most appropriate will depend on a variety of factors relating to the parties and the nature and complexity of the dispute. Initiating a civil claim in the courts is a formal and often costly means of resolving a dispute. Consequently, all courts encourage alternative or appropriate dispute resolution methods to be attempted by parties prior to initiating a court action.

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Minister for Home Affairs Peter Dutton speaks at a press conference after the Commonwealth Bank accepts the largest civil penalty in Australian corporate history to settle claims that it breached anti-money laundering and counter-terrorism financing laws.

Additionally, other institutions, including complaints bodies and tribunals, offer alternative avenues for dispute resolution including conciliation, mediation and arbitration. These methods are referred to as Appropriate (or Alternative) Dispute Resolution (ADR) methods. The term refers to the processes involving an independent third party who assists parties to resolve their dispute. ADR does not include judicial determination, such as decisions made by a court or tribunal. For instance, CAV provides free advice to businesses about their rights and responsibilities. Similarly, VCAT use a range of appropriate dispute resolution methods.

All civil disputes have the potential to be resolved in a number of ways.

Mediation

Many people use **mediation** to settle a variety of disputes. In mediation sessions, disputing parties, with the help of a neutral third person (the mediator), resolve the dispute in a way that is fair and acceptable to all concerned. During mediation, the mediator assists parties to identify the disputed issues, develop options and consider alternatives to a resolution. The parties to the dispute determine the final agreement. The mediator may act as a messenger for the two parties if mediation is held separately. The mediator will determine the most appropriate structure for mediation, depending on the needs of the parties and the nature of the dispute. The process is informal and discussions are confidential.

Mediation is the process in which an impartial third person (or persons) helps the parties identify the issues in dispute and facilitates discussion of possible solutions. The parties make the final decision.

Mediation is used as a dispute resolution method by a range of bodies in the community. The agreement reached in mediation is not binding unless both parties agree to enter into terms of agreement.

Both the courts and VCAT use mediation. Mediation works in tandem with, rather than in opposition to, the court system. The Magistrates' Court, County Court and Supreme Court refer civil cases to mediation. If the parties reach a settlement they can make a written agreement to this effect. The parties may apply to the court to have orders made to finalise their case.

The outcome of mediation is not binding unless the parties include the agreement in a 'terms of agreement'.

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Mediation is most appropriate when parties feel in control and safe.

Mediation and the Magistrates' Court

In the Magistrates' Court, all civil cases that are being defended are referred to as either a pre-hearing conference or mediation before they are listed for hearing. Mediations are conducted where the amount in dispute is $40 000 or more. The parties will be informed of the court's intention to refer the matter to mediation. The parties are given 21 days to raise with the Registrar any matters that would be relevant to a decision about mediation or when the mediation should occur. If no issues are raised by the parties, a mediation order will be made.

Mediation and the County and Supreme Court

All cases in the Common Law and Commercial Division are referred to mediation. Mediation is encouraged in the majority of civil cases before the County Court.

The County Court *Annual Report 2018–19* reported that 100% of all disputes in the Commercial Division were successfully resolved via mediation.

VCAT also refers matters to mediation and has a purpose-built mediation centre. When VCAT refers parties to mediation, an agreement reached in mediation can become part of an order of the tribunal.

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Mediation at VCAT

Short mediation

Short Mediation and Hearings (SMAHs) are a shortened form of mediation. If the parties are unable to resolve their dispute during the SMAH, the matter proceeds to a hearing on the same day. SMAHs are conducted by accredited VCAT staff mediators. SMAHs are currently available in the Civil Claims List.

Role of the mediator

The role of the mediator is to facilitate the discussion and help the parties identify the issues. There are a number of models of mediation. There may be one or more mediators involved. The mediators do not give advice or make suggestions as to what should be done. The mediators do not make a decision for the parties. Mediation does not try to discover truth or establish fault.

The role of the mediator is to facilitate discussion between the parties and help them identify the issues in the dispute.

How mediation works

Individuals may choose to go to mediation voluntarily or mediation may be ordered by a court or VCAT. The aim of the mediation process is to help people come to a win–win solution. To achieve this, the process aims to first establish effective communication between the parties.

Mediation focuses on the ongoing relationship between the parties and emphasises co-operation. It allows the parties to make decisions about what best suits them. It is based on the principle that people are most likely to be satisfied by agreements that they have developed themselves. Parties who have reached a mutually acceptable agreement are likely to comply with the decision.

Mediation offers many advantages to parties; however, the process also has some limitations that must be considered before deciding whether mediation is the most appropiate dispute resolution option for the particular dispute.

Mediation is most appropriate where parties wish to have control over the outcome and where an ongoing relationship is a priority, such as when determining parenting arrangements, property settlement, neighbour and employment disputes.

Figure 5.9 Key features of a mediation process

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Table 5.4 Appropriateness of mediation

Why mediation may be appropriate	Why mediation may not be appropriate
Mediation is often less expensive. Mediation avoids the costs of a trial and is significantly less expensive than litigation. Parties may not require legal representation, and the fees involved for the services of mediators are lower than court fees. However, court-ordered mediation may involve a referral to use a senior barrister as a mediator, which can be quite expensive.	**Mediation may not produce a solution.** The mediation process may not produce a solution. One party may refuse to participate in good faith or may refuse to reach a compromise. If the dispute is not resolved through mediation, the parties may then have to face far more formal dispute resolution and much higher costs. The use of mediation in these cases may add to delays in settling a dispute.
Mediation is generally faster. Mediation is often quicker than going to trial, and a dispute may be resolved in a matter of days or weeks instead of months or years.	**There is limited public scrutiny of mediation.** Mediation may provide settlements that are confidential. There is therefore little public scrutiny of matters resolved in this fashion. As a result, there may be limited checks that individuals are being treated fairly.
Win–win solution. Mediation can produce a win–win solution where both parties feel that they have got something out of the process. This is particularly appropriate where the parties to the dispute have to continue to have contact with one another, such as in the case of neighbours, families, or business partners.	**There may be an imbalance of power.** The process is inappropriate where the two parties have unequal power in the relationship; the more dominant party may force the other party to accept a solution which is unjust.
Informal atmosphere. The informal atmosphere of mediation encourages compromise. Mediation encourages a problem-solving approach: the parties in conflict sit down and discuss the issues involved, consider options and reach an agreement through negotiation. It is a less intimidating method of dispute resolution than courts.	**Informal atmosphere.** There can be too much informality with mediation and a more powerful or confident party can take advantage of this. This may produce a result that reflects the imbalance of bargaining power.
Parties are encouraged to come to their own solution. Mediation is a cooperative method of resolving disputes. It encourages parties in dispute to try to resolve their own conflict with the assistance of third parties who are experienced in mediation procedures, rather than leaving the resolution to the legal system.	**Is it a binding decision?** Although mediation, as part of a pre-hearing process with a court or tribunal may be binding, other forms of mediation are not binding. VCAT/courts can recognise the terms agreed to in mediation in court or tribunal orders.

Mediation is a cooperative method of dispute resolution. The mediator assists parties to come to their own agreement.

Mediation: increasing access to dispute resolution

One popular form of dispute resolution method has been mediation. Over time, this approach has been integrated into the court process. The practical reality is that only a small minority of cases go to trial. In recent years, courts have drawn upon dispute resolution methods, such as mediation, in an effort to speed things up, to relieve the burden on the courts, to reduce the cost of dispute resolution, and simply to provide litigants with additional options.

For many years, the only way to resolve disputes was to go to court, which was expensive. People who could not afford a solicitor or court action could not resolve their disputes. This often meant that disputes were left until the situation had become serious before action was taken. Sometimes when a judge resolves a dispute, neither party is satisfied with the outcome. This can lead to increased tension between the parties. In some cases, this can result in ongoing disputes.

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Dispute Settlement Centre of Victoria

In Victoria, mediation centres offering free services have been set up specifically to encourage mediation for the resolution of minor disputes.

The Dispute Settlement Centre of Victoria coordinates the work of mediators throughout Victoria and offers mediation and conciliation services. It deals with a variety of problems between neighbours, including disputes about fence boundaries, trees or plants, abuse between neighbours, animals, family relationships, drainage, and several other kinds of problems. The Centre also deals with youth homelessness and offers a parent–adolescent mediation service. The Centre offers a number of services aimed at helping people resolve disputes, including:

- advice and coaching on methods of dispute resolution
- court-based mediation of civil claims under $40 000 at some Magistrates' Courts
- mediation of Intervention Order applications referred by the police or the courts.

Courts and mediation

Victorian courts encourage the use of mediation in the majority of civil cases.

In some cases, mediation may be ordered, without the consent of the parties, at the pre-hearing conference or **directions hearing.**

The County and Supreme Courts may, at any stage of a civil case (with or without the consent of the parties) order a case to mediation. At any time, parties can ask the court to refer them to a mediator. The mediator can be appointed by the court or agreed upon by the parties. The parties share the costs of the mediator.

The Family Court provides a number of mediation services to help people come to an agreement about matters relating to a separation or divorce. Generally, mediation can cover issues relating to children, or financial issues, or both. A court mediator, who is a trained social worker or psychologist, conducts mediations for issues relating to children. A deputy registrar (a court lawyer) may mediate financial matters.

For more information on dispute resolution in the Dispute Settlement Centre of Victoria, go to www.disputes.vic.gov.au

News report 5.4

Mediation streamlines justice

Mediation is streamlining the wheels of justice at all levels. Whether in the Supreme Court or for minor matters, dispute resolution is cutting time and legal costs, often removing stress, and providing parties with certainty.

The court benefits from the mediation process because every case that settles before reaching judgment frees up judicial time and resources for other proceedings. Multi-million dollar claims, such as the Black Saturday bushfires and the Murrindindi Black Saturday bushfire class action, have been settled through mediation.

Former Chief Justice of the Supreme Court of Victoria, Marilyn Warren, says mediation:

> … is not an inferior type of justice. It is a different type of justice. All studies of dispute resolution show that people greatly value quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.

Activity 5.2 Folio exercise

The role of mediation in civil dispute resolution

Read the box 'Mediation: increasing access to dispute resolution' on the previous page, then complete the following tasks:

1 Describe three features of mediation.

2 Briefly explain two advantages associated with the Supreme Court referring cases to mediation. Use an example to justify your answer.

3 Suggest and justify one circumstance when mediation may not be appropriate to resolve a civil dispute.

4 Discuss why mediation may be considered a more appropriate form of dispute resolution than courts in some civil disputes.

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Conciliation

Conciliation involves an impartial third party who listens to both sides and suggests ways in which the parties could resolve the dispute. The parties make the final decision.

Conciliation is another example of an appropriate dispute resolution process used to settle civil disputes where an impartial third party assists and advises parties to negotiate an agreement.

The third party is known as a 'conciliator'. The conciliator listens carefully to all the evidence and the arguments of each party. The conciliator may suggest a resolution to the dispute but does not force the parties to reach an agreement. The decision reached by the parties is not binding unless it is incorporated into a formal settlement or incorporated into an order made by a court or a tribunal. However, as with mediation, because they have reached a mutually acceptable agreement, the parties are more likely to keep to its terms. Conciliation is regarded as an informal method of dispute resolution.

Conciliation differs from mediation in that the conciliator has more influence over the outcome of the dispute. The conciliator can raise options to the parties and possible solutions for an appropriate outcome. Therefore, the conciliator can give more directions than the mediator.

Conciliation is one of the main methods of dispute resolution used by Consumer Affairs Victoria (CAV) and is also used in the Victorian Civil and Administrative Tribunal (VCAT).

A number of lists at VCAT require the parties to attend a compulsory conference which is like a conciliation. A list is a section of VCAT that hears specific types of cases. For instance, the Civil List would hear civil disputes, including consumer matters and retail tenancies. The parties must attend the conference, and in some, legal representation is permitted. The VCAT member may suggest ways to settle the dispute, but the parties make the final decision. If no decision is reached, the case will proceed to a hearing for arbitration. If a decision is made, the VCAT member can make orders recording the settlement.

A conciliator is usually a person with expertise in an area of law who can suggest options and possible solutions.

Conciliation is also used in Magistrates', County and Supreme Courts. The Magistrates' Court uses a form of conciliation in pre-hearing conferences. The pre-hearing conference is a compulsory meeting of parties and/or their legal representatives at the court. The conference is normally conducted by a registrar, who will help the parties attempt to resolve the dispute. The process is informal, and discussions are confidential. When a pre-hearing conference does not resolve the dispute, the matter will be listed for arbitration, hearing, or a trial.

The County and Supreme Courts may also refer cases to conciliation.

Features of conciliation

- an independent third party, referred to as a conciliator
- the conciliator listens carefully to all the evidence and the arguments of each party
- the conciliator may suggest a resolution to the dispute but does not force the parties to reach an agreement
- the decision reached by the parties is not binding unless it is incorporated into a formal settlement or incorporated into an order made by a court or a tribunal
- however, as with mediation, because they have reached a mutually acceptable agreement, the parties are more likely to keep to its terms

Most appropriate when

- disputes involve Industry Agreements or contracts where expert advice on regulations to legislation is necessary
- communication and discussion about the issues will lead to a resolution of the dispute
- parties are prepared to discuss issues and act in good faith to resolve their dispute
- parties feel in control and safe
- there will be an ongoing relationship
- confidentiality is preferred

Least appropriate when

- disputes involve complex evidence and law
- the dispute requires an interpretation of the law or a legal ruling
- the parties are not willing to attend the conciliation or negotiate in good faith
- there a history of broken agreements between the parties
- a party is under pressure to attend
- an imbalance of power exists between the parties: for example, an ongoing history of violence between the parties

Figure 5.10 Key features of the conciliation process

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Conciliation offers many advantages to parties; however, the process also has some limitations that must be considered before parties decide whether conciliation is the most appropiate dispute resolution option for their particular dispute.

Table 5.5 Appropriateness of conciliation

Why conciliation may be appropriate	Why conciliation may not be appropriate
Parties have control over the outcome. Conciliation promotes party control in determining the outcome and allows parties to have their say without strict rules of evidence and procedure.	**Power imbalance between the parties may deem conciliation inappropriate.** One party may feel unsafe or under pressure to attend the conciliation by the other. If the case is not resolved, the use of conciliation may add to the delays in getting a case in court, and therefore to the cost of taking action.
The dispute requires the expertise from an expert. The conciliator usually has expertise in the area of law in dispute. For instance, conciliation conferences held by the Family Court are usually compulsory; they are between people who have not been able to reach an agreement about the division of their assets. A registrar of the court, who is an experienced family lawyer, conducts these conferences.	**Decision may not be binding.** A decision made in conciliation or pre-hearing court procedures is not binding and may result in either party not upholding the decision.
Conciliation is an inexpensive and informal process. Conciliation is less costly than taking a case to court, and its informality encourages co-operation. The conciliator facilitates, identifies the issues in dispute, areas of agreement and explains the law regulating the area. They may make suggestions or give options for resolving the complaint.	**Lack of finality.** Although the conciliator may suggest a solution, the conciliator cannot impose one. Conciliation agreements depend on both parties being willing to compromise. If no agreement is reached, the process could further delay a court hearing to resolve the dispute.
Conciliation is more cooperative and less competitive than the adversarial court process. The conciliation process tends to generate less ill will between parties. This is advantageous where the parties have an ongoing relationship, such as in family and work-related disputes.	**Parties fail to act in good faith**. Successful conciliation relies on both parties acting in good faith and attempting to resolve the dispute in the interest of both parties; however, one or both parties may refuse the offer or may withdraw at any time.
Specifically addresses the needs of the parties. The conciliator works with the parties on their specific dispute. It is the role of the conciliator to listen to the evidence and arguments of both parties.	**Conciliation may prolong the dispute**. If the case is not resolved, the use of conciliation may add to the delays in getting a case in court, and therefore to the cost of taking action. Conciliation is not appropriate if the dispute requires an interpretation of the law.
Parties feel safe and supported. Parties are in an environment with a third party and therefore feel safe and supported in a neutral place. One of the conciliator's roles is to ensure parties are on a 'level playing field'.	**Conciliation relies on goodwill**. A conciliator attempts to resolve a dispute by talking through the issues with the parties in the hope that agreement can be reached. In trying to help the parties reach agreement, conciliators may meet with the parties and indicate to them the strengths and weaknesses of their case. A conciliator can suggest options for settlement. However, one party may refuse to attend or may withdraw at any time.

Disputes unsuitable for mediation and conciliation

Mediation and conciliation are not suitable for all disputes. Examples of disputes that are not suitable to be heard by mediation or conciliation include:

- where one or both parties refuse to come to a mutual agreement
- where there is a gross imbalance of power (and the third party cannot level out that power)
- where there is a history of threatening behaviour and violence
- where there are overwhelming emotions
- where the resolution of the dispute is urgent
- where one party has mental health issues
- where one party has a history of broken promises.

Arbitration

Arbitration is another method in which the parties refer the dispute to a third person to make a decision. The third person is known as the 'arbitrator'. The arbitrator resolves the dispute by listening to the views and facts from both parties and making a decision in favour of one of the parties. The arbitrator has the power to make an order that is binding on the parties. This outcome is referred to as a judgment. Often there are limited rights of appeal against an arbitrator's decision.

Arbitration involves a third party listening to the evidence and arguments of both parties and making an order that is binding.

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Arbitration is often used in VCAT Lists, and the Magistrates' Court uses compulsory arbitration to resolve civil disputes where the claim is less than $10 000. The County and Supreme Courts may also refer parties to arbitration if the process is considered appropriate.

After considering the points of view and facts on the issue in question, the arbitrator comes to a decision in support of one of the parties.

Features of arbitration

- the third person is referred to as the arbitrator
- the arbitrator resolves the dispute by listening to the views and facts from both parties and making a decision in favour of one of the parties
- may be voluntary or court ordered (Magistrates' Court)
- a contract may nominate arbitration as a term of the contract should a dispute arise
- the arbitrator has the power to make an order (judgment) that is binding on the parties
- provides certainty as there are limited rights of appeal against an arbitrator's decision

Most appropriate when

- parties require a binding decision, enforceable via the courts
- the dispute involves less then $10 000
- involving Industry Agreements or contracts where expert advice on regulations and legislation is necessary
- communication and discussion about the issues will lead to a resolution of the dispute
- parties are prepared to discuss issues and act in good faith to resolve their dispute
- parties feel in control and safe
- there will be an ongoing relationship
- confidentiality is preferred

Least appropriate when

- complex evidence and law is involved
- the dispute requires an interpretation of the law or a legal ruling
- the parties are not willing to attend the arbitration or negotiate in good faith
- there a history of broken agreements between the parties
- a party is under pressure to attend
- an imbalance of power exists between the parties: for example, an ongoing history of violence between the parties

Figure 5.11 Key features of the arbitration process

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Arbitration offers many advantages to parties; however, the process also has some limitations that must be considered before the parties decide why arbitration is the most appropiate dispute resolution option for their particular dispute.

Table 5.6 Appropriateness of arbitration

Why arbitration may be appropriate	Why arbitration may not be appropriate
Provides a binding and final decision. The arbitrator has the power to make an order that is binding on the parties. Decisions reached are final and enforceable in the courts.	**Win–lose scenario.** An arbitrated decision is a decision in favour of one party: one party wins and the other party loses. One party will feel less satisfied with the outcome of the arbitration.
It is less formal than courts and usually faster. Rules of natural justice apply instead of the strict rules of evidence and procedure in the court. This allows for less formality and a speedier result while upholding a just outcome.	**Arbitration is not always a quick dispute resolution method.** Arbitration can require a client to pass through many stages before a decision is reached. As a result, it can be confusing and does not necessarily work out to be quicker or cheaper than court proceedings.
The arbitrator has considerable expertise in the area. Arbitration usually involves taking the dispute to a qualified independent third party who has expertise in the area of law relevant to the dispute.	**Appeals are limited.** Arbitration decisions are legally binding and enforceable and the right of appeal from such decisions is very limited – successful appeals are uncommon.
Costs are lower than court. Arbitration allows individuals to recover debts or exercise their rights without facing significant costs. Parties are more likely to exercise their rights making justice more accessible.	**Arbitration may be expensive**. Legal representation may be required as issues may be complex, involving evidence and witnesses and therefore time consuming. Legal representation may be required. In addition, the parties may have to bear some of the costs of engaging the arbitrator.

Table 5.7 Comparison of dispute resolution methods

Method	Strengths	Weaknesses
Mediation	• often less expensive • generally faster than taking a case to court • win–win solution • informal atmosphere • parties are encouraged to resolve their own dispute	• may not produce a solution • informal atmosphere may allow a more confident party to take advantage • limited public scrutiny of the outcomes of mediation
Conciliation	• allows parties to have their say • expertise of conciliator can help parties reach a decision • informal process and relatively inexpensive • more co-operative and less competitive than court action	• lack of finality if the parties cannot agree • relies on goodwill • may prolong the case if not resolved
Arbitration	• binding decision • usually faster than taking a case to court • the arbitrator may have specialised expertise in the area relating to the dispute • can offer remedies that courts cannot • more formal procedure is appropriate for more serious disputes • limited costs	• can be expensive • appeals are limited • not always a quick dispute resolution method • win–lose scenario

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Activity 5.3 Folio exercise

The role of dispute resolution methods

1 Describe one key difference between conciliation and arbitration as dispute resolution methods.
2 Identify and explain when conciliation may not be appropriate as a means of resolving a civil dispute.
3 Justify when litigation may be the most appropriate method to resolve a civil dispute.
4 'The range of dispute resolution methods aim to provide appropriate options to suit a variety of different civil disputes.' To what extent do you agree with this statement?

Judicial determination

The President of VCAT is appointed from the Supreme Court Bench, while a Vice-President is appointed from the County Court Bench. Therefore, if the President or a Vice-President presides in a VCAT dispute, they are using judicial determination.

Judicial determination refers to a formal process whereby a magistrate, judge or VCAT member (where the President or Vice-President decides the outcome) listens to the evidence and arguments of the parties and makes a binding decision. All decisions are enforceable via the courts. The outcome is referred to as a 'judgment' and the reasons are usually published. The courts use litigation as a last resort when all other appropriate methods to resolve the dispute have been unsuccessful or inappropriate. The majority of civil disputes initiated by parties to be resolved via the courts are settled during the pre-trial processes or during the trial phase and do not require a judicial determination. For example, in 2017–18, 100% of the cases initiated in the Commercial Division of the County Court were settled without a judicial determination.

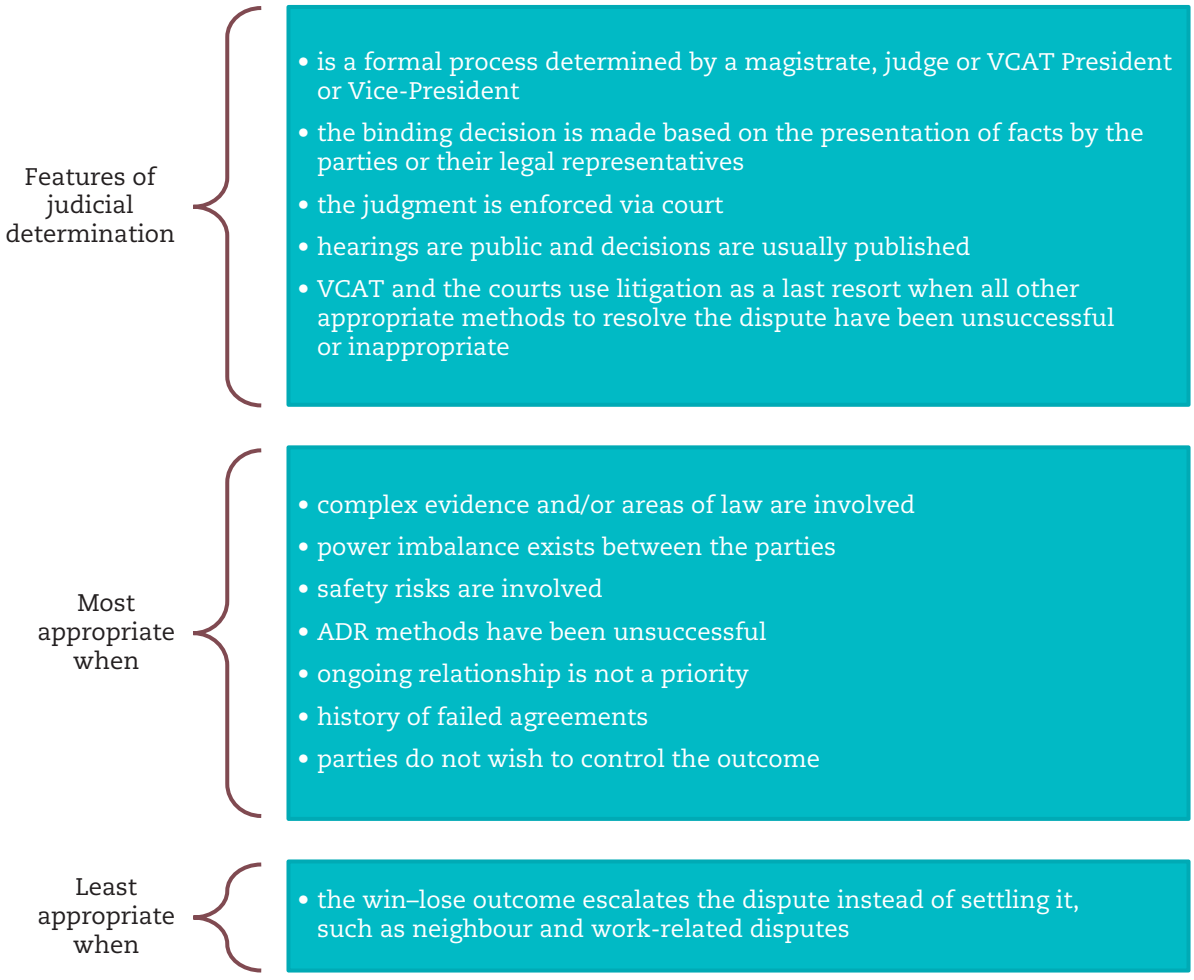

Figure 5.12 Key features of the judicial determination process

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5.6 Institutions that resolve civil disputes

The civil justice system provides a framework of institutions that play a significant role in resolving civil disputes in society. While the courts are traditionally the primary dispute resolution bodies, assisting bodies such as CAV use methods and personnel that provide parties with fair, equal and accessible options to resolve civil disputes and seek redress.

Complaints bodies: Consumer Affairs Victoria (CAV)

Tribunals: Victorian Civil and Administrative Tribunal (VCAT)

Courts: Magistrates' Court, County Court, Supreme Court and High Court

Figure 5.13 Types of institutions that can resolve civil disputes

Complaints body: Consumer Affairs Victoria

CAV is a statutory body created under the *Australian Consumer Law and Fair Trading Act 2012* (Vic). It is the business unit of the Department of Justice and Community Safety within the Victorian Government. CAV is Victoria's consumer affairs regulator, which has the main purpose of assisting Victorians to be responsible and informed businesses and consumers.

CAV provides free information and advice to all Victorians. It has wide jurisdiction in diverse areas aimed to protect consumers in the marketplace. The jurisdiction of CAV includes disputes that fall under the following Victorian legislation:

- *Australian Consumer Law and Fair Trading Act 2012* (goods and services)
- *Residential Tenancies Act 1997* (renting or leasing accommodation)
- *Estate Agents Act 1980* (auctions, private sales)
- *Conveyancers Act 2006* (housing contracts)
- *Owners Corporations Act 2006* (body corporates)
- *Retirement Villages Act 1986* (contracts)
- *Motor Car Traders Act 1986* (buying and selling cars)
- *Domestic Building Contracts Act 1995* (building/renovations).

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Purposes of Consumer Affairs Victoria

CAV provides information and advice to all businesses, consumers, landlords and tenants about their rights and responsibilities.

The key purpose of CAV is to help Victorians be responsible and informed businesses and consumers, and to promote a fair and competitive market place. It does this by:

- advising and educating consumers, tenants, businesses and landlords on their rights, responsibilities and changes to the law
- conciliating disputes between consumers and traders, and tenants and landlords
- registering and licensing businesses and occupations
- enforcing and ensuring compliance with consumer laws
- reviewing and advising the Victorian Government on consumer legislation and industry codes.

Figure 5.14 Purposes of CAV

CAV ensures that businesses abide by consumer laws and provides consumers with avenues to exercise their rights. The CAV is widely accessible and provides advice and information through its website, telephone helpline and social media. This includes:

- information and advice about consumer rights and obligations
- answers to commonly asked questions or common disputes
- self-help tools, such as sample letters and checklists.

In 2018–2019, CAV provided information and advice to 295 995 consumers, tenants and businesses through their telephone service and a further 115 479 through other services including written correspondence, face-to-face contact and dispute assistance.

Criteria to access CAV

CAV will not conciliate all complaints, but will provide a conciliation service where:

- CAV has the jurisdiction to deal with a claim
- self-help attempts have been unsuccessful
- neither VCAT nor the courts have been involved in the dispute
- there is a 'reasonable' likelihood of success.

The outcome from a conciliation conducted by CAV is referred to as an 'agreement'. They are non-binding unless parties formalise the decision via a 'terms of agreement'. If either party breaks the informal agreement, further action may be necessary.

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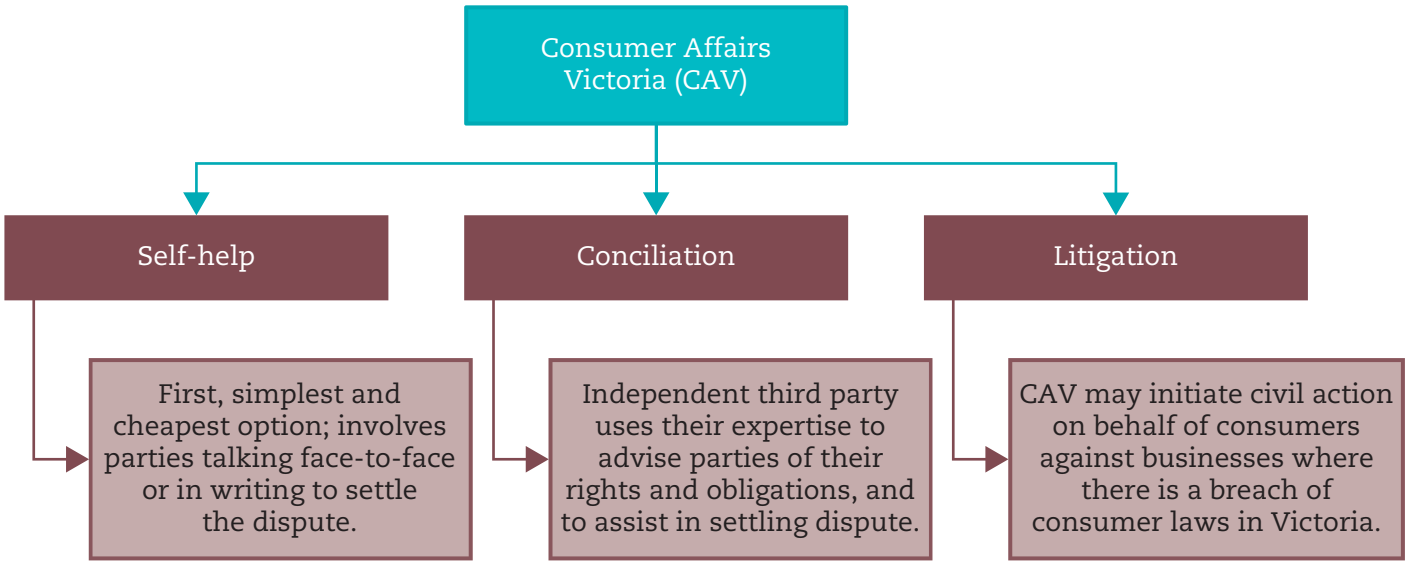
Dispute resolution methods used by CAV



Self-help

In the first instance, CAV will assist consumers to resolve the matter themselves. CAV provides advice and templates of letters for consumers to approach the supplier or service provider directly. Self-help is the fastest and cheapest option to resolve a dispute. However, if a satisfactory resolution does not result, then CAV will conciliate on a client's behalf.

Conciliation

CAV uses conciliation to resolve the majority of disputes. Conciliation is conducted by a CAV officer and is generally conducted over the phone. The conciliator will outline the rights and responsibilities of the parties and suggest what may constitute a reasonable outcome. However, participation in conciliation is a voluntary process and CAV cannot compel parties to participate; nor can CAV make a binding determination in a dispute. However, CAV will inform the parties if access to civil remedies via the courts or VCAT are an option.

Conciliation at the CAV can be carried out over the phone.

Litigation

As part of CAV regulatory powers, CAV officers regularly initiate litigation on behalf of consumers to ensure businesses abide by consumer laws in Victoria. Legal brief 5.6 contains examples of litigation initiated by CAV to enforce compliance of car traders and real estate agents to the laws regulating the industries.

CAV and the principles of justice

CAV plays an important role in promoting justice by balancing the interests and rights of businesses and consumers by providing processes that are fair, equal and accessible to all.

Fair: The conciliation processes ensure procedural fairness, with outcomes based on what is fair and reasonable in the circumstances and under the law.

Equal: CAV is an independent body and offers impartial advice when resolving disputes.

Access: Free information and advice is available to all Victorians. CAV will conciliate a dispute for consumers who satisfy their dispute resolution criteria.

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Legal brief 5.6

Litigation initiated by CAV

CAV primarily offers dispute resolution services, but also has the power to litigate against traders in court if they have breached their obligations under law.

Truc Thanh Le Nguyen (a.k.a Judy Nguyen): Court outcome, 11 June 2019

A former Glen Waverley real estate agent has been sentenced to 20 months in jail, with a minimum term of eight months, after pleading guilty to 11 charges of misusing more than $800 000 of her clients' money in breach of the *Estate Agents Act 1980* (the Act).

Truc Thanh Le Nguyen (aka Judy Nguyen), 44, operated six LJ Hooker franchises with her ex-husband and business partner, Joseph Ngo, under the name JNT Law Investments Pty Ltd (in liquidation).

Consumer Affairs Victoria took action in the County Court of Victoria after investigations in 2016 revealed that, among other things, the company's trust account was overdrawn by more than $150 000. An independent auditor also advised CAV of trust account irregularities.

Ms Nguyen pleaded guilty to 11 charges of 'wrongful conversion'. This involved her taking deposits received from home sale transactions out of the required trust account and transferring them into JNT Law Investments' general account.

For example:

- on 9 February 2016, Ms Nguyen took $188 800 of deposit money out of the company's sale trust account, and fraudulently converted it for her own use in a general account
- on 10 March and 11 March 2016, she took $159 590 and $82 000 respectively of deposit money out of the company's sale trust account, and fraudulently converted it for her own use.

The Court also found that Ms Nguyen, as the officer in effective control of JNT Law Investments, breached her legal duties in relation to the conduct of Mr Ngo by not ensuring that other employees of the business were complying with the Act's provisions.

Ms Nguyen initially pleaded not guilty to the charges, before changing her plea on 27 May 2019.

The Victorian Property Fund (VPF) provides financial compensation to consumers who have been affected by an estate agent's misuse of money. The VPF has paid out approximately $2.1 million to affected consumers in relation to the conduct of Ms Nguyen and Mr Ngo.

Under Victorian law, an estate agent has strict obligations to deposit clients' money into a relevant trust account in certain situations. Agents may also be held responsible if they do not ensure that other agents or staff at the business comply with the law.

Ms Nguyen was also fined $1500 for her failure as an officer in effective control to properly supervise a licensed estate agency.

Source: https://www.consumer.vic.gov.au/latest-news/former-estateagent-jailed-media-release

Associates of Truc Thanh Le Nguyen leave the County Court of Victoria on 11 June 2019.

Gelzar Ali Aziz: Court outcome, 23 April 2019

A woman from North Fitzroy pleaded guilty to unlicensed car trading, in breach of the *Motor Car Traders Act 1986* (Vic), and has been fined $35 670 and ordered to pay costs of $6662 following an appeal in the County Court.

Source (adapted): https://www.consumer.vic.gov.au/latest-news/gelzar-ali-aziz-court-outcome

Meganita Marannu: Court outcome, 13 November 2018

A Preston woman has been jailed for one year and must complete a three-year community corrections order following her release. She admitted to stealing and misusing $130 000 of clients' money whilst operating as a conveyancer. She was also found guilty of two theft charges brought against her by Victoria Police.

Source: https://www.consumer.vic.gov.au/latest-news/meganita-marannu-court-outcome

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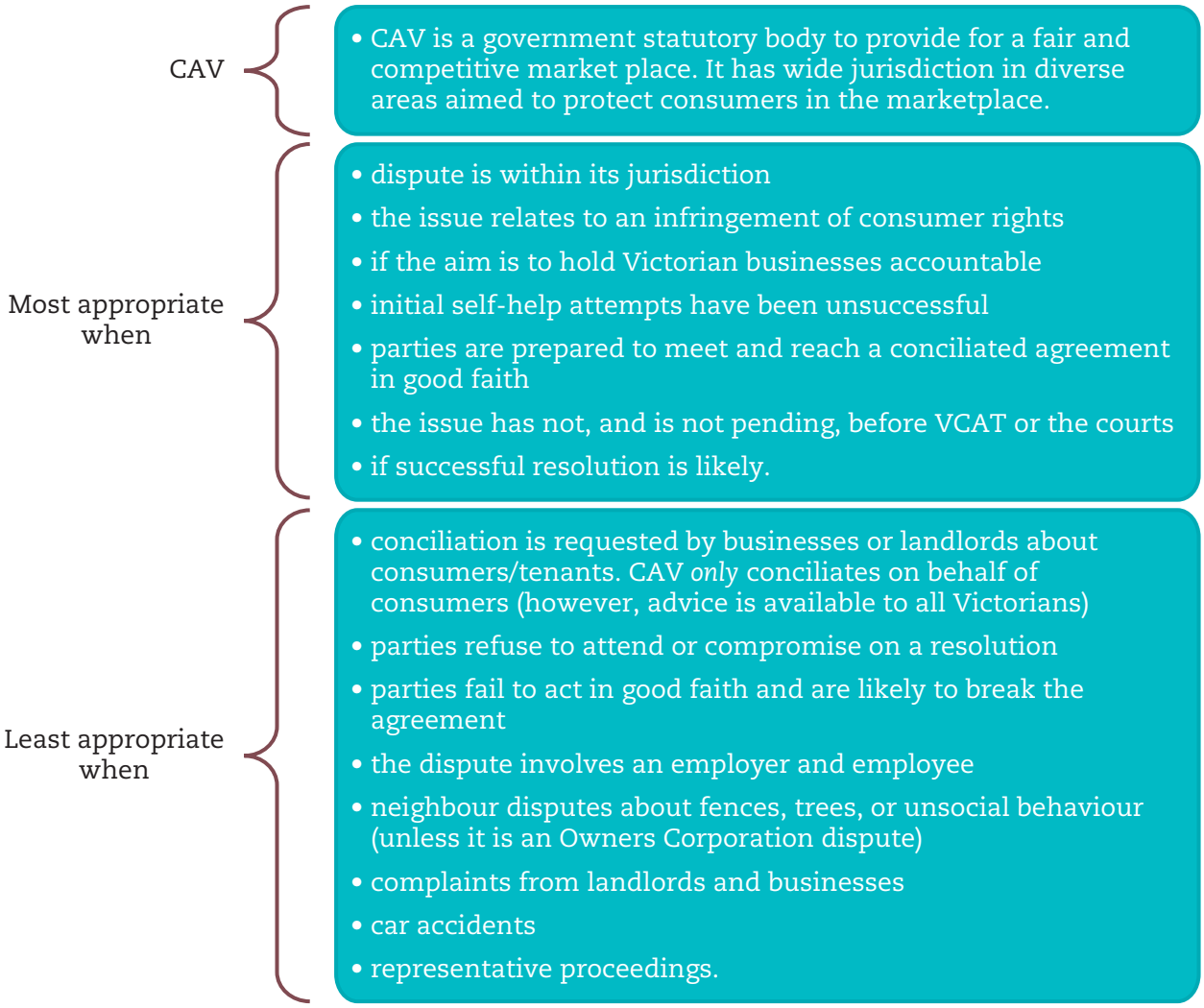

Figure 5.15 Appropriateness of CAV

Table 5.8 Strengths and weaknesses of conciliation process with CAV

Strengths	Weaknesses
CAV provides procedural fairness. Both parties are able to present their evidence and arguments to an independent and impartial third party in conciliation.	For the CAV to participate in the resolution of a dispute, it must come within its jurisdiction.
Conciliation is free, and available to all Victorians regardless of income.	CAV has limited resources so there can be a priority system regarding the disputes.
The process is informal. It can be held in a CAV office or there is a telephone service available, which means that it is more accessible and less intimidating.	A conciliation process is voluntary so the CAV cannot force a party to attend.
The conciliation process allows parties to come to their own decision. This makes the process less adversarial and parties are more likely to adhere to the agreement.	The relative lack of formality may mean that a party may not take the process and/or outcome seriously. Even though there may be an agreement, a party may not adhere to it.
Dispute resolution is achieved in a timely manner.	CAV has no power to enforce an agreement.
CAV will take a party to court when necessary.	If an agreement is not reached or a party fails to comply with an outcome, the other party may be forced to either drop the issue, and therefore not achieve justice, or proceed to another form of dispute resolution. This will extend the time before justice is served, and may be in a more formal method of resolution and more costly.

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News report 5.5

Melbourne real estate agency Hocking Stuart given Victoria's largest fine for under-quoting

A Melbourne real estate agency has been fined $330 000 plus $80 000 legal costs for creating the 'illusion of a bargain' by under-quoting on 11 properties in the sought-after suburbs of Richmond and Kew between January 2014 and June 2015.

The Federal Court judge, Justice John Middleton, said the agency, Hocking Stuart Richmond, lured buyers to false bargains by a 'misleading marketing web' and may have contributed to those buyers missing the chance to buy elsewhere. He said the agency's prices created the 'illusion of a bargain'.

The fine is the State's largest underquoting penalty.

Justice Middleton said the under-quoting was a serious contravention of the rules.

'Price is an essential piece of information about the property being offered for sale,' Justice Middleton said. 'Many consumers are seeking to buy a home were likely to be significantly inconvenienced, disappointed and deceived.

'Some may have missed the opportunity to buy elsewhere, being lured to a bargain that did not, and was never going to, eventuate.'

Hocking Stuart's chief executive, Simon Jovanovic, said he was disappointed the Richmond office was being made an example of for an issue that affects the real estate industry as a whole.

'This is an area that agents, regulatory bodies and industry associations need to come together on to ensure the best outcome for home buyers,' Jovanovic said.

Consumer Affairs Victoria had sought a fine of about $750 000 to take into account the money obtained in connection with the deceptive conduct. Hocking Stuart Richmond earned commissions of $148 044 from the sale of the houses.

The agency was also ordered to pay CAV's costs in the range of $80 000 to $90 000.

Source: Australian Associated Press via The Guardian*, 6 October 2016*

Activity 5.4 Folio exercise

1 Test your knowledge by answering True or False to the following statements
   - a CAV can register businesses such as estate agents. T / F
   - b CAV uses conciliation to resolve disputes. T / F
   - c CAV decisions are binding on parties. T / F
   - d CAV advise government of proposed changes to the law based on evidence from consumers. T / F
   - e CAV has the jurisdiction to hear complaints from car traders and retirement villages. T / F
   - f CAV has very wide jurisdiction. T / F
   - g CAV cannot order any remedies. T / F
   - h Consumers must try and resolve the dispute first before approaching CAV. T / F
   - i CAV may not initiate court action to enforce compliance of the law. T / F
2 Discuss the extent to which CAV promotes the principles of justice.
3 Read News report 5.5 and answer the questions that follow:
   - a Identify the main issue in dispute and explain why CAV initiated the court action. [2 marks]
   - b Which key purpose is CAV achieving by initiating the court action? Explain. [2 marks]
   - c Which court determined this dispute? [1 mark]
   - d Who presided over the case? Explain the method that was used to resolve the dispute. [3 marks]
   - e Describe TWO responsibilities of the adjudicator in this case. [4 marks]
   - f Outline ONE factor CAV would have considered before initiating this case in court? [2 marks]
   - g Justify why CAV was the most appropriate body to initiate this dispute. [2 marks]
   - h Research the type of remedies that were imposed in this case. [3 marks]

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Tribunals

When civil disputes are not resolved via negotiation options or a complaints body such as CAV, they may require access to a tribunal. Tribunals are usually more specialised and the proceedings are less formal than in courts. In many instances, the rules of evidence and procedure are also less strict than courts and legal representation may not be required. In some tribunals, legal representation is not allowed.

This informality means that people feel less intimidated and find it easier to express themselves as well as understand the proceedings. Tribunals are less expensive than courts and most matters can be dealt with in a shorter period of time than that taken by courts. The decisions made by a tribunal are usually final.

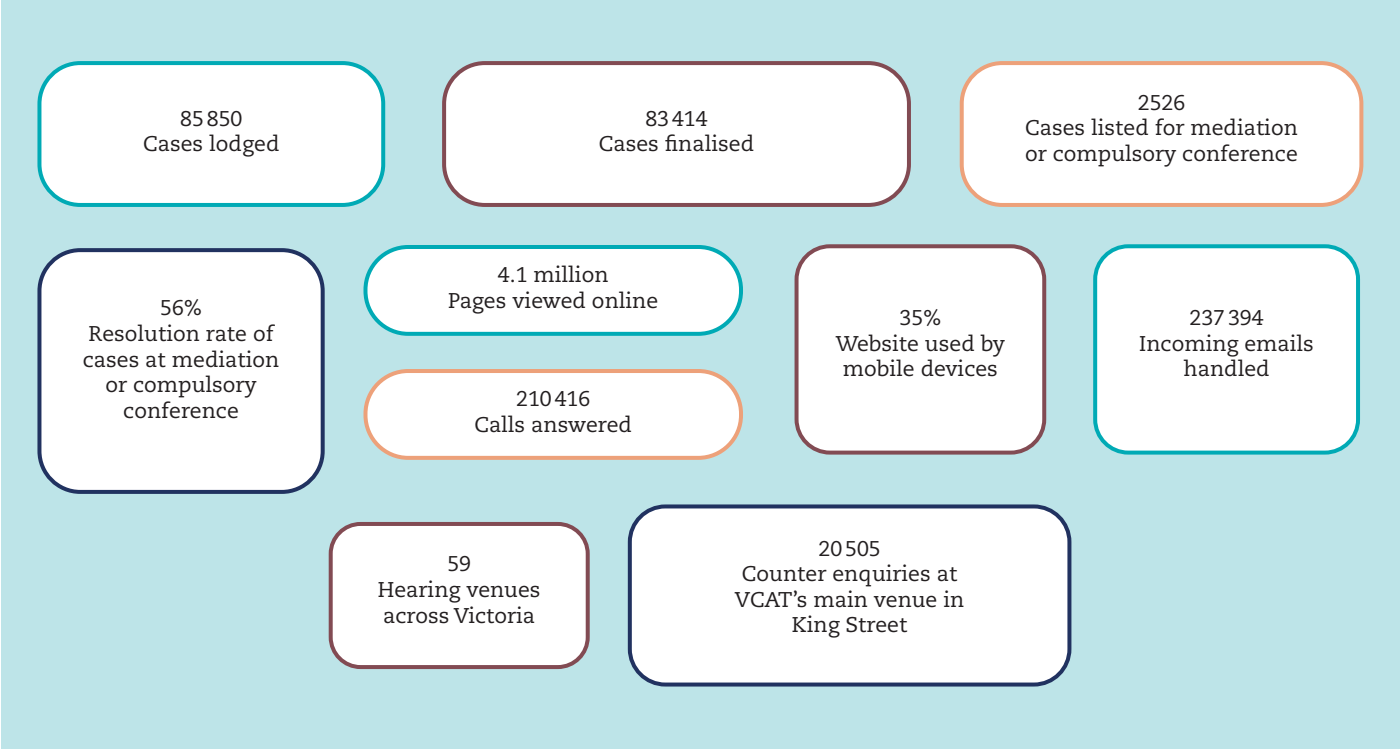
However, there are some disadvantages associated with the use of tribunals. There may be a restricted right of appeal against a decision made in a tribunal. The formality of the courts gives each individual an equal opportunity to represent their case, whereas the less formal atmosphere of a tribunal may allow a more confident party to dominate.

Victorian Civil and Administrative Tribunal (VCAT)

VCAT is an 'umbrella' tribunal established by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). It is an independent government body established to resolve disputes in 'a timely, cost effective and efficient manner in a modern and accessible tribunal'. The tribunal comprises five divisions; each division handles different types of cases, referred to as Lists. The tribunal is not bound by precedent and its decisions are final with appeals restricted to points of law.

Video

VCAT is an 'umbrella' tribunal established in 1998 by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).



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Each of the five Divisions has different Lists, which specialise in a particular area of civil law, as shown in Figure 5.16.

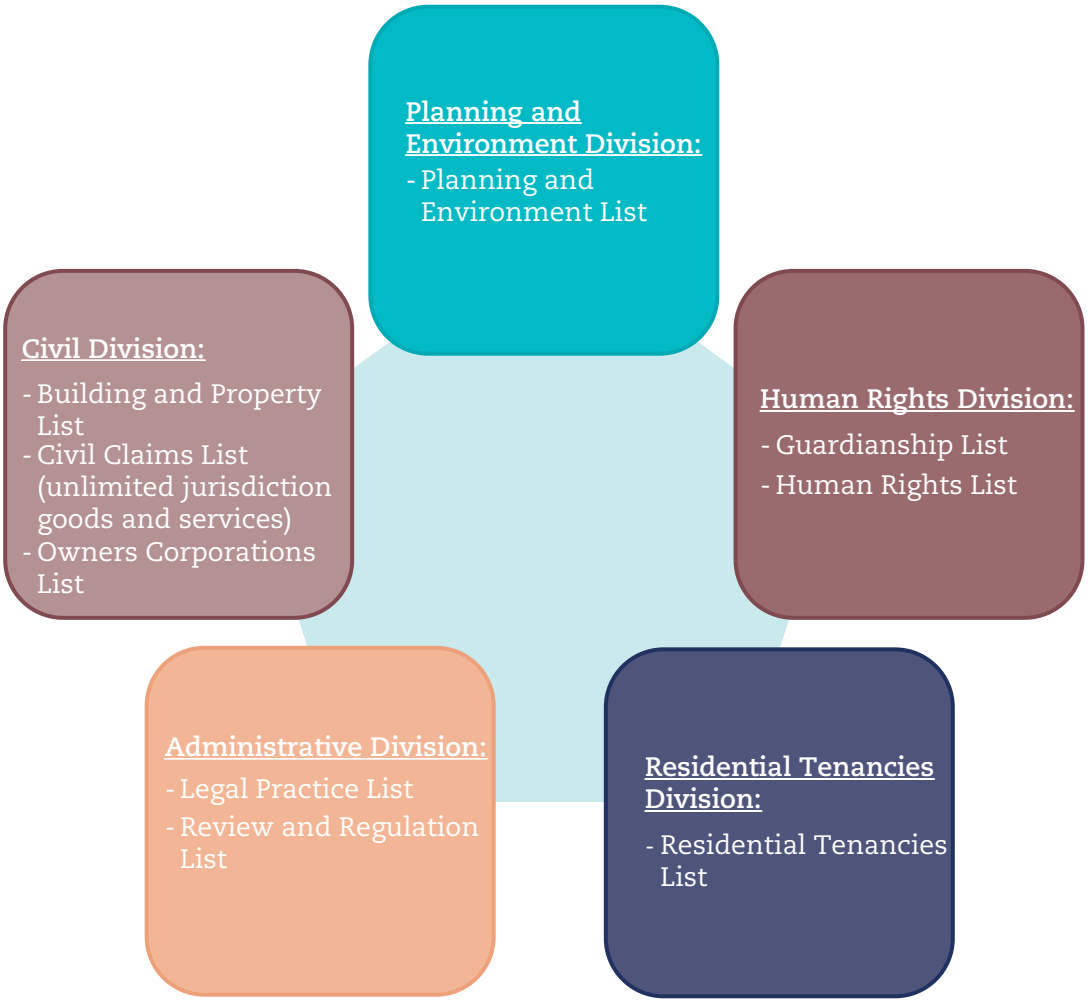

Figure 5.16 VCAT's Divisions and Lists

Pastor Danny Nalliah, leader of the evangelical Christian ministry Catch the Fire, and speaker Daniel Scot on the steps of VCAT on 17 December 2004. VCAT found that the ministry had vilified Islam during a seminar and in a newsletter that mocked the religion.

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The purpose of VCAT

VCAT's role is to provide a low-cost, accessible, efficient and independent tribunal delivering high-quality dispute resolution. VCAT achieves this by using a range of dispute resolution processes. In this way, VCAT is often seen as being more accessible than courts, which tend to be more formal, stressful and expensive.

VCAT aims to provide dispute resolution that is:

- cost-effective
- informal
- fair
- consistent
- accessible
- timely
- impartial.

VCAT filing fees are lower than the fees charged by courts and, in some Lists, legal representation is not needed. VCAT is more accessible because the proceedings are relatively informal. They are not bound by the same rules of evidence of courts and parties may feel comfortable telling their story. The emphasis is on bringing the parties to a mutually acceptable agreement. VCAT encourages the use of mediation. Proceedings heard by VCAT can be heard in a relatively timely manner – with some Lists hearing disputes in a matter of weeks.

Personnel

VCAT is headed by a president, who is also a Supreme Court judge. Vice-presidents are County Court judges and members of the tribunal who assist the president. Members are responsible for settling individual disputes, and are allocated to each List. These members have legal or professional skills, are experts in their area and have excellent communication and interpersonal skills that assist them to make fair and speedy decisions.

For more information on VCAT, go to www.vcat.vic.gov.au.

Dispute resolution methods

VCAT's dispute resolution process may vary from List to List. Different types of disputes require different approaches. A full hearing may take from 15 minutes to an hour in small civil disputes, owners corporations and residential tenancy matters. In other Lists, hearings can take up to a day or longer. In more complicated cases, a hearing may be held over a period of several days. Generally, VCAT dispute resolution methods include mediation and compulsory conferences.

VCAT uses a range of dispute resolution methods, including mediation, conciliation in compulsory conferences and hearings.

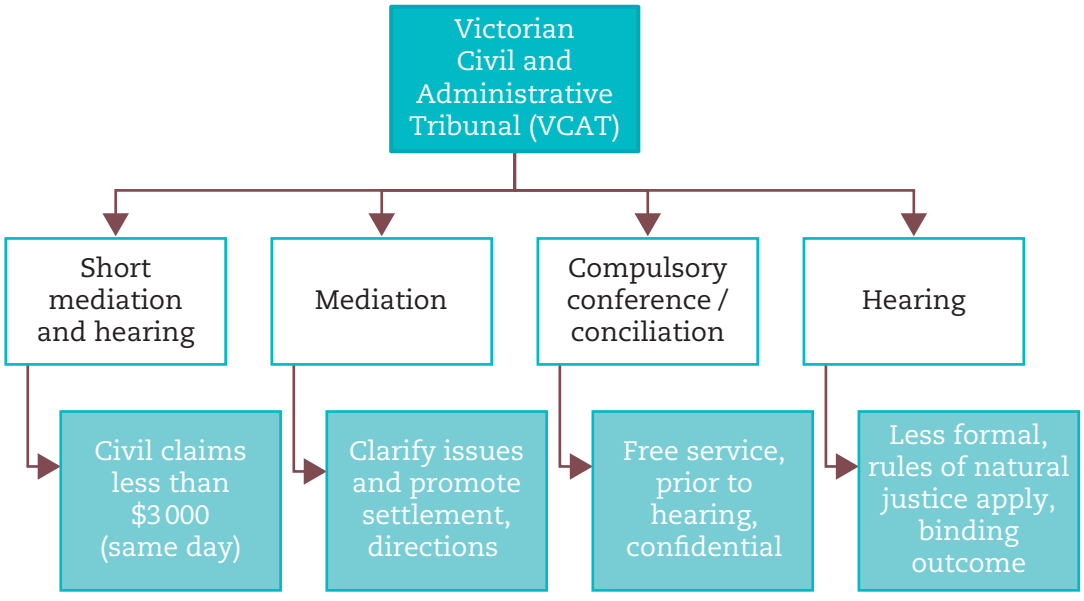

Figure 5.17 VCAT dispute resolution methods

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Compulsory conferences

VCAT may direct the parties to attend a compulsory conference – an informal pre-hearing conference using alternate dispute resolution methods. It may be held to:

- identify and clarify the issues in dispute
- promote a settlement
- identify the questions of fact and law to be decided
- allow directions to be given concerning the conduct of the hearing (such as about the filing and serving of witness statements).

Compulsory conferences can be used to clarify issues and promote a settlement.

Parties who fail to attend a compulsory conference may have their case struck out or a decision made against them. Statements made during a conference can only be used during a hearing if both parties agree.

Mediation

To help settle disputes, VCAT can arrange for a case to be mediated. This usually occurs before a hearing commences. VCAT does not charge a fee for the mediation. If the mediation is successful, the mediator notifies VCAT that the parties have agreed to settle.

VCAT's Annual Report can be downloaded at https://www.vcat.vic.gov.au/resources/annual-report-2018-19

VCAT will make out the necessary orders to give effect to the settlement. If mediation is not successful, the matter will be listed for a hearing. Statements made during mediation remain confidential and cannot be used as evidence in the hearing.

VCAT can refer a case for mediation.

Parties who fail to attend a mediation session may have their case struck out or a decision made against them.

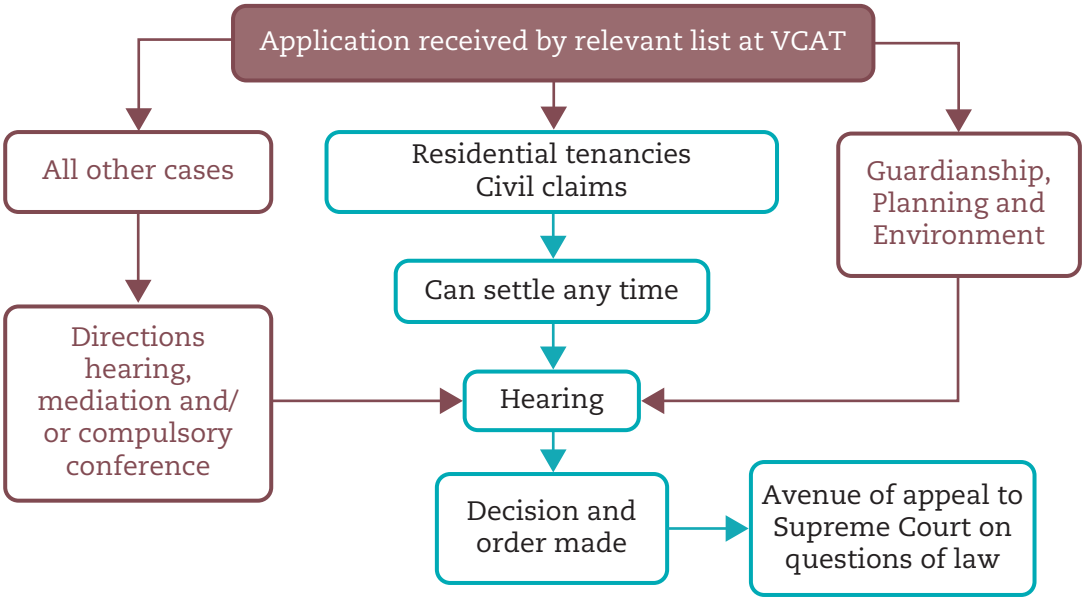

Figure 5.18 A simplified approach to resolving disputes. Note: a case can settle at any time, and there are a range of options before a guardianship matter goes to hearing.

Hearings

VCAT hearings are relatively informal and not bound by the rules of evidence. However, VCAT is bound by the rules of natural justice.

When a hearing is held, it takes place before a member of VCAT. Although hearings are conducted in a relatively informal atmosphere, the degree of formality will vary according to the nature of the dispute. Parties must act respectfully and be prepared to give evidence on oath or affirmation. They will have the opportunity to call or give evidence, ask questions of witnesses and make submissions. VCAT is bound by the rules of natural justice. A person is not excused from giving evidence on the grounds that it may be self-incriminating. However, such evidence would not be admissible in a court for criminal proceedings.

Generally, the hearing is conducted in public. However, VCAT can order that the hearing or part of the hearing be in private. VCAT also has the power to restrict or prohibit the publication of certain evidence.

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VCAT can sit at any place in Victoria. It may also conduct a hearing by means of a conference, using telephone, video, or other communication links. In addition, if the parties agree, the hearing can be conducted entirely 'on the papers': that is, without either party appearing in person at the hearing. Parties can put their case directly to VCAT themselves, or in some circumstances VCAT can allow the use of a lawyer or professional advocate to help settle the matter. In limited circumstances, parties are automatically allowed to have a legal representative or professional advocate.

Outcomes

Decisions made by VCAT are binding and enforceable in the courts.

Remedies

VCAT has the power to make a range of orders, such as orders to:

- pay money
- restore goods
- undertake work
- vacate property
- vary or cancel a contract
- dismiss a claim.

Enforcement

Orders may be enforced through the appropriate Victorian courts; for example, orders less than $100 000 are enforced through the Magistrates' Court. The Magistrates' Court can make certain orders to enforce payment. This includes requiring that the payment be made by instalments or issuing a warrant to seize property.

Appeals

A party who is dissatisfied with VCAT's decision can lodge an appeal, on a question of law, against an order of VCAT to:

- the Court of Appeal, if the president or vice-president was sitting on the VCAT panel that made the order
- the Trial Division of the Supreme Court in all other cases.

In order to have an appeal heard by the Supreme Court or the Court of Appeal, the court must grant permission to appeal ('leave to appeal'). When the Supreme Court or the Court of Appeal hears an appeal from VCAT, it may:

- affirm, vary, or set aside the order
- make an order that VCAT could have made in the proceedings
- send the case back to VCAT to be heard again.

The Productivity Commission has found that fees charged by VCAT are significantly less than the courts.

Costs

While the aim of VCAT is to provide a low-cost alternative to the courts, in recent years the fees of VCAT have increased. In 2016, the Victorian Civil Administrative Tribunal introduced a new $51 charge for all residents wanting to be heard individually in a planning matter. Similarly, daily hearing fees have also been introduced to encourage parties to use an ADR method as a preferred option. Mediation at VCAT is free.

While the Property Council has welcomed these fees, as it reduces the likelihood of vexatious and frivolous objections, it may also limit an individual's access to justice.

One key advantage of VCAT is acknowledged in section 109 (1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) which states that each party has the responsibility to pay their own costs with a VCAT appeal. For example, this means each party involved in an appeal against a local council planning decision would be responsible for any costs relating to town planning drawings, expert witnesses and other legal expenses.

However, VCAT does have the discretion to make orders requiring one party to pay the costs if it is considered fair in the particular circumstances.

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Table 5.9 VCAT fees in relation to disputes about goods and services

Application fees for claims between	Standard	Corporate	Health Care Card
$1–$3000	$65.30	$93.30	No fee
$3001–$15 000	$217.70	$311	No fee
$15 001–$100 000	$487.30	$696.10	$162.90
$100 001–$500 000	$798.30	$1140.40	$162.90
$500 001–$1 million	$1088.60	$1555.10	$162.90
$1 000 001–$5 million	$1378.80	$1969.70	$162.90
$5 million or more	$1669.10	$2384.40	$162.90
No monetary value	$487.30	$696.10	$162.90

Table 5.10 Where disputes are more complex, VCAT fees apply for each day or part of hearing day

https://www.vcat.vic.gov.au/resources/goods-and-services-fees

Hearing fees for the following duration	Standard	Corporate	Health Care Card
Day 1	$362.90	$518.40	$162.90
Day 2–4	$362.90	$518.40	$162.90
Day 5–9	$725.70	$1036.70	$162.90
Day 10 and any further days	$1088.60	$1555.10	$162.90
Complex cases	$1835.00	$2621.40	$162.90

Table 5.11 Types of disputes heard by VCAT

Anti-discrimination	Unlawful discrimination, sexual harassment, victimisation, vilification, exemptions, etc.
Building and construction	Disputes between a home-owner, builder, architect, engineer and other building professional
Goods and services	Disputes about goods bought or sold, or relating to someone you hired (or someone who hired you) to supply a service in trade or commerce
Equal opportunity	Disputes about unlawful discrimination, sexual harassment, victimisation or vilification under the *Equal Opportunity Act 2010* (Vic)
Reviews decision made by government departments	Reviews Victorian Government decisions (state, statutory authorities and local councils), including decisions made by TAC (the Transport Accident Commission) or the Victims of Crime Assistance Tribunal
Guardians – administrators	Hears applications and makes orders for guardianship and/or administration. Appoints a substitute decision-maker when it is in the best interests of an adult with a disability
Property	Hears and determines disputes related to real estate, and subdivision disputes affecting an owners corporation
Planning and environment	Hears and decides applications by individuals and bodies involving disputes about the use and development of land

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At a glance
Cases snapshot | **09**

Cases snapshot

While applications remained steady overall, in our highest volume lists this year — Residential Tenancies and Guardianship — there was a notable increase in the complexity of cases.

Applications increased in five of our nine lists: Building and Property (32%), Civil Claims (8%), Owners Corporations (17%), Legal Practice (27%) and Review and Regulation (1%).

In the Building and Property List, there was a significant increase in applications where parties had been to Domestic Building Dispute Resolution Victoria (DBDRV). This new service initially reduced applications to VCAT. However, we are now receiving more building applications than ever before (see p. 40).

Applications to our Civil Claims List have increased almost 40 per cent over the past four years. Despite the rise, our clearance rate was almost 100 per cent (see p. 42).

Our Legal Practice List saw a 27 per cent increase in applications, continuing an upward trend. However, application numbers in this list are relatively small, so slight increases show as large statistical variations (see p. 48).

We experienced a six per cent drop in applications to our Planning and Environment List, reflecting a slower economy (see p. 52). Growth in the size and complexity of projects coming before VCAT, which need longer hearings to resolve, may have contributed to lower finalisation rates.

Our Residential Tenancies List was again VCAT's busiest list by volume, handling more than 52,000 applications, mostly from landlords represented by estate agents or property managers. Applications from tenants and residents continued to rise (see p. 56).

Overview	2016–17	2017–18	2018–19	% Change
Cases lodged	86,461	85,191	85,850	1%
Cases finalised	84,878	83,424	83,414	0%
Cases pending	8,288	8,855	9,653	9%
Clearance rate	98%	98%	97%	–1%
Hearing venues used	58	59	59	0%

Lists	Cases lodged per list				Timeliness (weeks)		
Civil Division	2016–17	2017–18	2018–19	% change	2018–19 Median	2018–19 80th percentile	Target
Building and Property	1,856	1,739	2,298	32%	16	34	
Civil Claims	8,758	8,764	9,488	8%	10	16	19
Owners Corporations	3,126	2,763	3,245	17%	9	13	10
Residential Tenancies Division							
Residential Tenancies	54,551	53,212	52,412	–2%	3	7	6
Administrative Division							
Legal Practice	68	98	124	27%	17	33	40
Review and Regulation	994	1,087	1,100	1%	21	51	
Planning and Environment Division*							
Planning and Environment*	2,878	2,816	2,652	–6%	26	34	
Human Rights Division							
Guardianship	13,896	14,249	14,076	–1%			
Human Rights	334	463	455	–2%	16	30	
Total	**86,461**	**85,191**	**85,850**	**1%**	**11**	**24**	**26**

* The Planning and Environment List was established on 28 June. Until then it was managed under the Administrative Division.

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News report 5.6

Police cannot keep beards – Court

A group of Victorian police officers lost their bid to keep facial hair and ponytails after a Supreme Court judge upheld a tribunal decision that found the police force's policy was not discriminatory.

A group of police officers challenged the force's ban on beards and ponytails at VCAT, arguing that they were discriminated against on the basis of their physical appearance.

Judge Gregory Garde found there was no error in VCAT's 2013 finding in favour of Police Commissioner Ken Lay, and dismissed the matter.

'The Tribunal was not satisfied that having a goatee imparts any information or ideas or conveys any meaning at all,' the judge said. Judge Garde concluded that there was no reason why the Chief Commissioner could not set other grooming standards, as he has done.

Goatee-wearing Leading Senior Constable Michael Kuyken (pictured) and 15 other officers made the challenge.

News report 5.7

Student's VCAT action against school fails

A private school girl took a case against her school to VCAT, claiming that the school was responsible for the fact that she did not gain entry to her preferred university course.

The student had attended the school in Year 9 and part of Year 10. She suffered glandular fever and subsequently completed her studies in Sydney. However, her ATAR score was not high enough to get her into law at the University of Sydney.

She sought $95 000 from the school for the additional fees she would incur studying law at a postgraduate level and her inability to earn income in the meantime. Her mother had sought $450 000 in lost earnings as well as the cost of moving from country NSW to Sydney, where the student finished her schooling. They claimed that the student had failed to reach her academic potential because she did not have access to appropriate academic support.

School staff told the hearing that the student was disorganised and needed to be reminded to attend classes on time and with the relevant books.

VCAT dismissed the claim. VCAT's Deputy President, Ian Lulham, found that the student had failed to see that attending class, having access to school tutoring facilities and additional input from a teacher were all forms of academic support.

In his judgment, he said: 'Support does not mean that the school does the work for the student.'

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Appropriateness of VCAT in resolving disputes

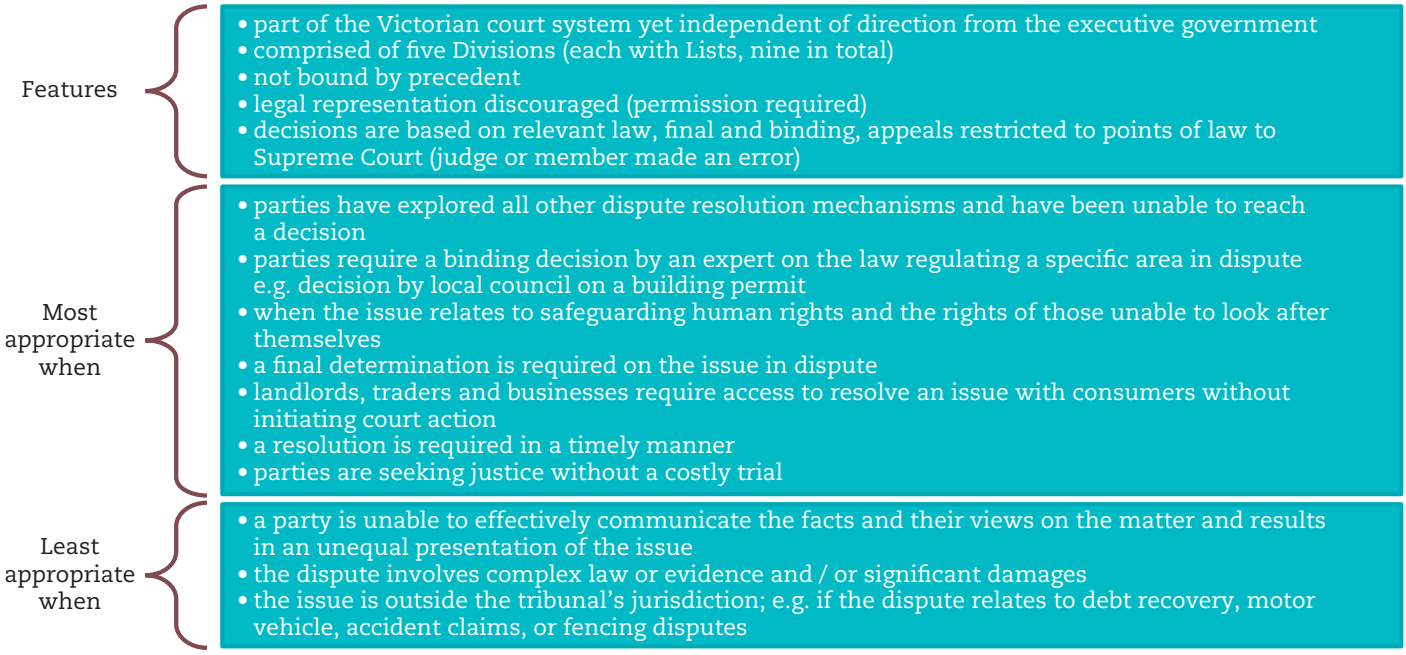

Figure 5.19 Appropriateness of VCAT in resolving disputes

VCAT offers many advantages to parties; however, the body also has some limitations. Parties need to analyse these limitations before deciding if VCAT is the most appropriate body to resolve their particular dispute.

Activity 5.5 Folio exercise

The role of VCAT

1 Explain the purpose of VCAT in the civil justice system.

2 Briefly describe the jurisdiction of VCAT and personnel who make the decisions on civil matters.

3 Suggest the methods of dispute resolution most likely to be used by VCAT to resolve the disputes discussed in the News report 5.6 'Police cannot keep beards – Court' and News report 5.7 'Student's VCAT action against school fails'. Comment on why you consider the methods appropriate in each case.

4 Discuss two aspects of VCAT's operation or structure which make it an appropriate body to resolve some civil disputes.

5 Explain when VCAT may not always be an appropriate body to settle a civil dispute.

Activity 5.6 Multimedia report

Victorian Civil and Administrative Tribunal (VCAT)

1 Using the VCAT website, find out more about this tribunal. Prepare a multimedia presentation and a written report. A multimedia presentation may include:
- presentation software such as Prezi and a set of written notes
- a PowerPoint presentation and an oral presentation.

2 Your multimedia presentation should deal with:
- the purpose of VCAT
- the dispute resolution methods used by VCAT
- when and why VCAT is an appropriate body to resolve disputes
- the relationship between VCAT and the court hierarchy.

3 Prepare a written report discussing the purpose and appropriateness of VCAT to settle civil disputes. You should prepare an oral presentation of your work in addition to the multimedia summaries.

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Dispute resolution methods used by VCAT have a number of strengths that contribute to its appropriateness.

Dispute resolution methods used by VCAT are less expensive, less time-consuming and less formal (or intimidating) than traditional courts.

The parties are encouraged to reach an agreement themselves, but they can walk away from mediation or a compulsory conference.

VCAT is not suitable for all disputes.

The overall cost of VCAT hearings has escalated in recent years, as more parties are now using legal representation.

VCAT hearings provide a win-lose resolution similar to the courts.

There is a limited right to appeal against a decision made by VCAT.

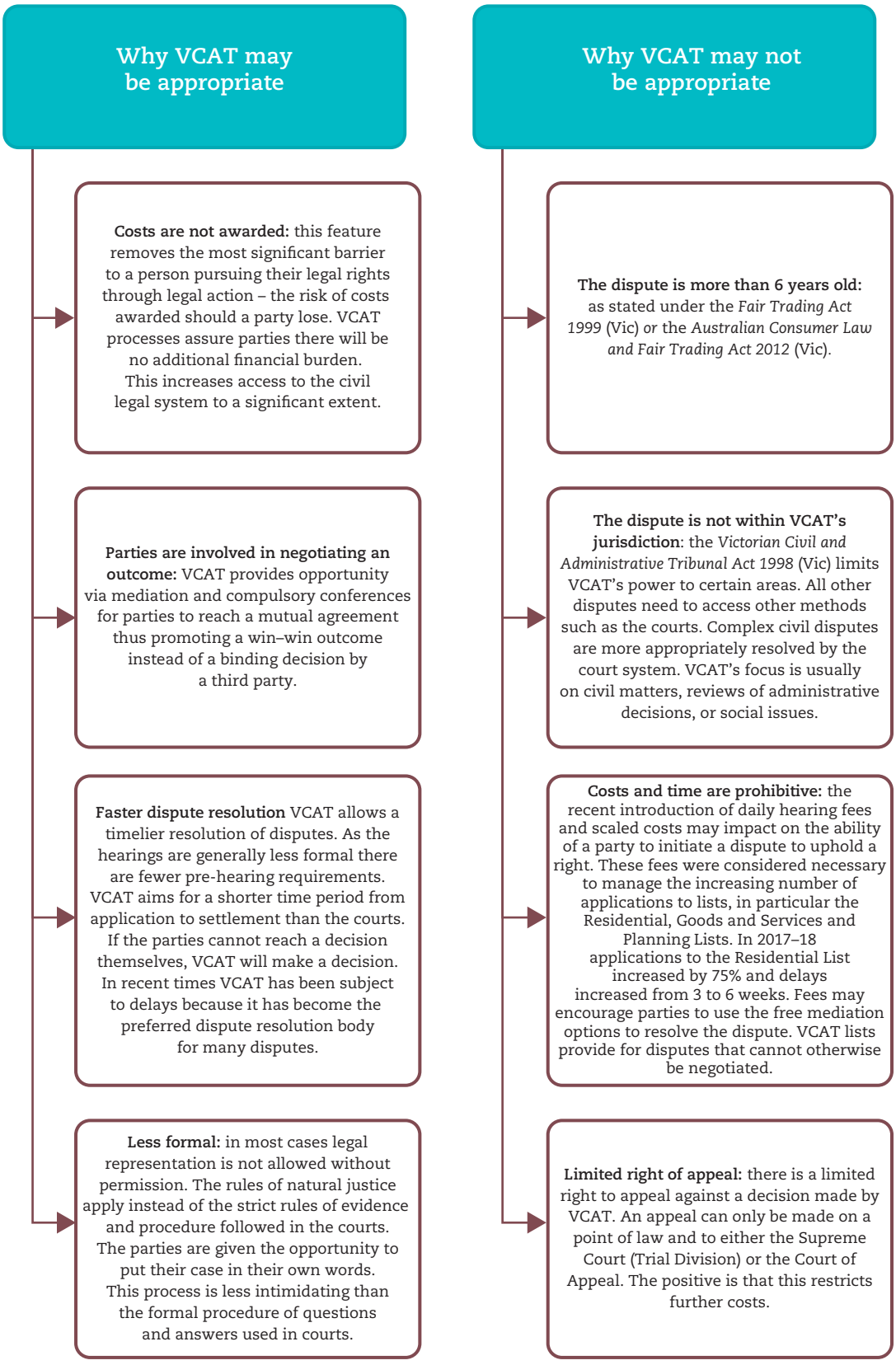

Figure 5.20 Appropriateness of VCAT

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5.7 Courts – civil jurisdiction

The adversary system of trial has complex rules of evidence and procedure. Parties to a dispute to be heard in a court, particularly a superior court, will find it an advantage to have a solicitor and barrister represent them.

When civil disputes are not resolved by a complaints body (e.g. CAV) or tribunal (e.g. VCAT), then parties may decide to initiate litigation in the courts. In Australia, courts are arranged in a hierarchy or ranked according to their jurisdiction. The Magistrates' Court, County Court and Supreme Courts (Trial Division and Court of Appeal) all have jurisdiction to resolve civil disputes. The Victorian hierarchy also includes the High Court of Australia, which has jurisdiction over matters that relate to the whole of Australia. A court's power or jurisdiction to hear disputes may be categorised as:

- **original jurisdiction**: the power to hear and determine a civil dispute when first presented
- **appellate jurisdiction**: the power to hear and determine cases *on appeal* from lower courts

Courts are arranged in a hierarchy or a ranking according to their jurisdiction.

Each court is guided by the *Civil Procedure Act 2018* (Vic) to deal with a case in a just, effective and timely manner. This means that each case is to be resolved in a prompt and economical manner and allocated the appropriate court resources depending on the complexity of the issue in dispute.

Each court has its own civil jurisdiction. The term 'civil jurisdiction' means power to hear and determine a civil dispute. In other words, each court has the power to hear and determine certain types of civil cases. The Magistrates' Court determines civil disputes to the value of $100 000, while the Supreme Court resolves the complex civil disputes with no financial limit.

Table 5.12 Civil jurisdictions of courts

	Original jurisdiction	Appellate jurisdiction
High Court	• Constitutional matters (5–7 justices) • Federal matters (1 justice)	• Appeals from a single justice of the High Court • Appeals from the Full Court of State Supreme Courts – in Victoria, appeals from the Court of Appeal (at least 2 justices)
Supreme Court of Victoria (Court of Appeal)		• Appeals from a single judge of the Supreme or County Court
Supreme Court of Victoria (Trial Division)	• Damages claims for unlimited amounts (1 justice with an optional jury of 6)	• An appeal on a point of law from a Magistrates' Court (1 justice)
County Court of Victoria	• Damages claims for unlimited amounts (1 justice with an optional jury of 6)	
Magistrates' Court	• Claims up to $100 000	

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Magistrates' Court

The Magistrates' Court is the lowest court and hears civil claims up to $100 000.

The Magistrates' Court has original jurisdiction in civil matters for claims up to $100 000. The Magistrates' Court is responsible for processing over 90% of all civil cases. Examples include negligence, personal injury, or debts. The Magistrates' Court cannot hear appeals.

Magistrates' Court

Where is the court?

The Magistrates' Court is a local court. The locations of the courts are listed on the court's website.

What types of cases does it hear?

The Magistrates' Court hears civil claims to the value of $100 000.

Can the court hear appeals?

No.

Who presides in the court?

Magistrate alone.

Methods

There are several dispute settlement methods that can be used by the Magistrates' Court to settle civil disputes. These methods include mediation, conciliation, arbitration and judicial determination.

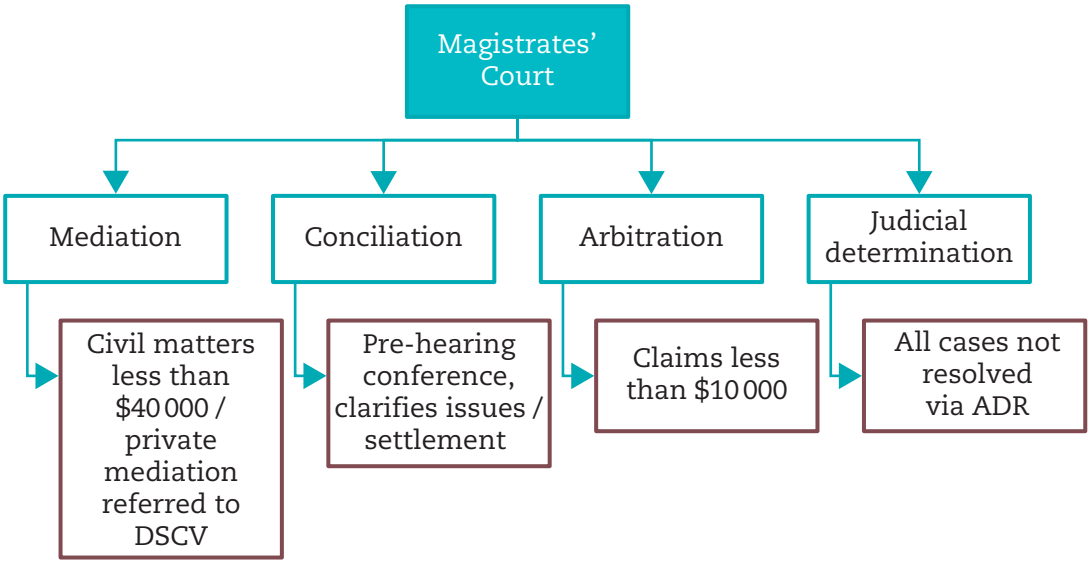

Figure 5.21 Civil jurisdiction of the Magistrates' Court

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Mediation

The Magistrates' Court can refer a civil dispute to mediation when the amount in dispute is $40 000 or less. A registrar reviews the case and decides if the case is suitable to be referred to mediation. In some suburban and regional Magistrates' Courts, claims for less than $40 000 are referred to mediation at the Dispute Settlement Centre of Victoria (DSCV). This service is free and quick. Otherwise, the court provides a list of accredited mediators for the parties to select an agreed mediator. Alternatively, the matter may be referred directly to a pre-hearing conference for conciliation.

Some Magistrates' Courts refer some civil disputes to mediation where the amount is less than $40 000.

Conciliation

Pre-hearing conferences in the Magistrates' Court use the process of conciliation. Parties to a dispute may apply to have a pre-hearing conference. Magistrates or registrars may also refer cases to a pre-hearing conference. A pre-hearing conference will be used when the court believes that it will encourage an out-of-court settlement or if there are complex issues and some may be resolved before the court hearing.

If both parties agree on a settlement at mediation or conciliation, a consent order will be entered by the magistrate or registrar. However, if a settlement cannot be reached, the case will be referred to the court for judicial determination.

For more information on the Magistrates' Court, go to www.mcv.vic.gov.au.

Arbitration

In civil matters where the claim for compensation is less than $10 000, parties are ordered to compulsory arbitration. Arbitration is a less formal process than a court hearing, and is conducted by a registrar. The process is free and the decision of the arbitrator is final and binding.

Under special circumstances, an application can be made to have a case involving less than $10 000 heard by the court. These special circumstances include:

- the case involves a complex question of law
- the facts of the case are not in dispute
- the parties involved are in agreement.

The Magistrates' Court uses compulsory arbitration for civil claims up to $10 000.

An appeal against a final order in a civil matter must be made within 30 days of the date of the decision.

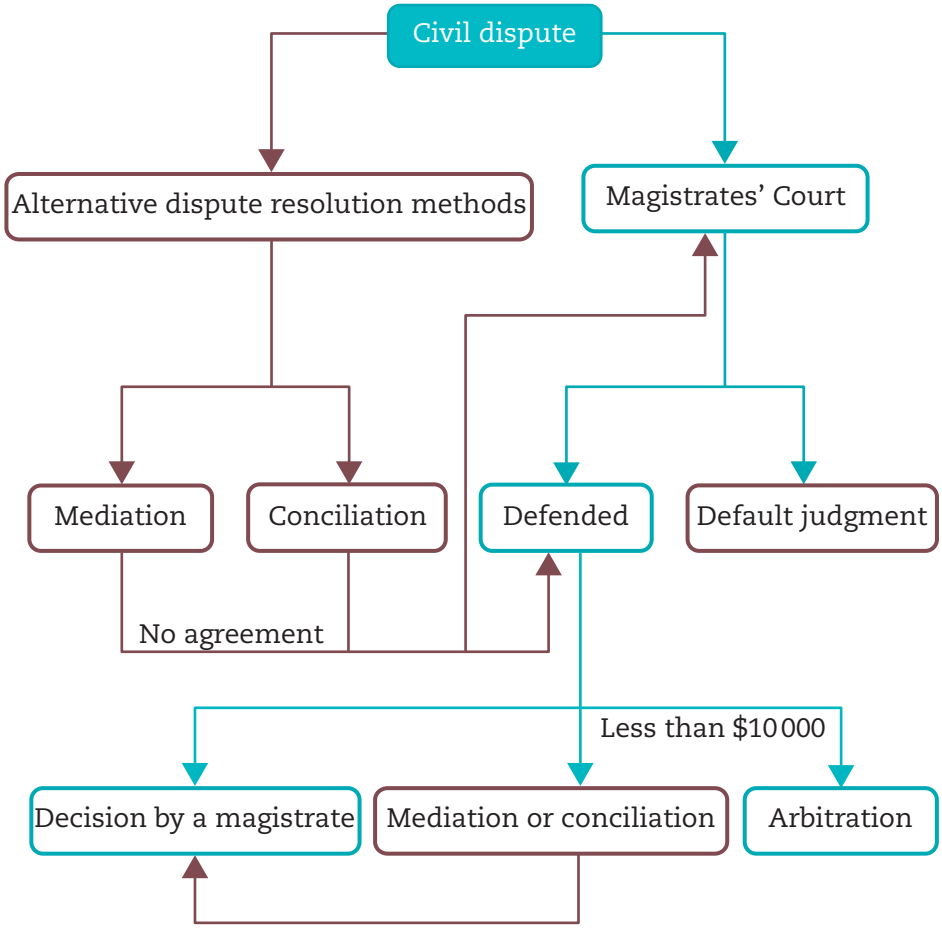

Figure 5.22 Civil dispute resolution in the Magistrates' Court

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Outcomes

Decisions made by the magistrate are binding and enforceable in the courts. Remedies include a range of orders (depending on the circumstances of the dispute) and monetary damages.

Appeals

Appeals on a point of law in civil cases decided in the Magistrates' Court are heard in the Supreme Court (Trial Division).

The only right of appeal for a civil case heard in the Magistrates' Court is an appeal on a point of law which goes to the Supreme Court (Trial Division). The Supreme Court can:

- affirm the decision
- reverse the decision
- send the case back to the Magistrates' Court and direct that the magistrate apply the law as decided in the Supreme Court.

County Court

The County Court hears civil claims for unlimited amounts.

The County Court has original jurisdiction to hear and determine civil matters. The civil jurisdiction is divided into two Divisions: the Commercial Division and the Common Law Division. Civil juries of six members can be used, but only if requested by the plaintiff or defendant.

Outcome

The decision made by the judge is binding and enforceable in the courts. Remedies include a range of orders (depending on the circumstances of the dispute) and monetary damages.

Appeals

Appeals from the County Court are heard in the Court of Appeal.

The County Court cannot hear appeals on civil matters from the Magistrates' Court. In civil matters, an appeal from a decision of the County Court can be heard by the Supreme Court – Court of Appeal on the following grounds:

- a point of law
- a decision as to the facts
- the amount of damages awarded.

For more information on the County Court, go to www.countycourt.vic.gov.au.

County Court

Where is the Court?

The County Court is in Melbourne; circuit sittings are held in major country towns.

What types of civil cases does it hear?

The County Court has unlimited jurisdiction for civil claims for personal injuries such as medical negligence, defamation and commercial contracts.

Can the Court hear appeals?

The County Court does not hear civil appeals from a Magistrates' Court.

Who presides in the Court?

Judge alone or Judge with a jury of six.

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Supreme Court

The Supreme Court consists of a Trial Division and the Court of Appeal. The Trial Division has extensive original jurisdiction in civil matters. The Supreme Court can hear civil claims for unlimited amounts. There is an option to use a jury of six in civil matters.

The Supreme Court hears civil claims for unlimited amounts.

For more information on the Supreme Court, go to www.supremecourt.vic.gov.au.

Supreme Court

Where is the Court?

The Supreme Court is in Melbourne. There are circuit sittings in major country centres.

What types of cases does it hear?

The Supreme Court consists of a Trial Division and the Court of Appeal. The Trial Division has an unlimited civil jurisdiction.

Can the Court hear appeals?

A single judge of the Supreme Court hears appeals from the Magistrates' Court on a point of law. Appeals from the County Court and from a single judge of the Supreme Court (Trial Division) are heard by the Court of Appeal.

Who presides in the Court?

Judge alone or judge and jury of six.

Outcome

The decision made by the judge is binding and enforceable in the courts. Remedies include a wide range of orders (depending on the circumstances of the dispute) and monetary damages.

Appeals

A single justice of the Supreme Court will hear appeals:

- on a point of law (civil case) from the Magistrates' Court
- some VCAT cases on a point of law.

A single justice of the Supreme Court hears appeals from the Magistrates' Court and VCAT.

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Court of Appeal

The Court of Appeal hears appeals from the County Court and Supreme Court (Trial Division).

The Court of Appeal hears civil appeals from the County Court and from decisions made by a single justice of the Supreme Court. It also hears appeals from proceedings that have come before VCAT, where an order has been made by the president or a vice-president of the tribunal.

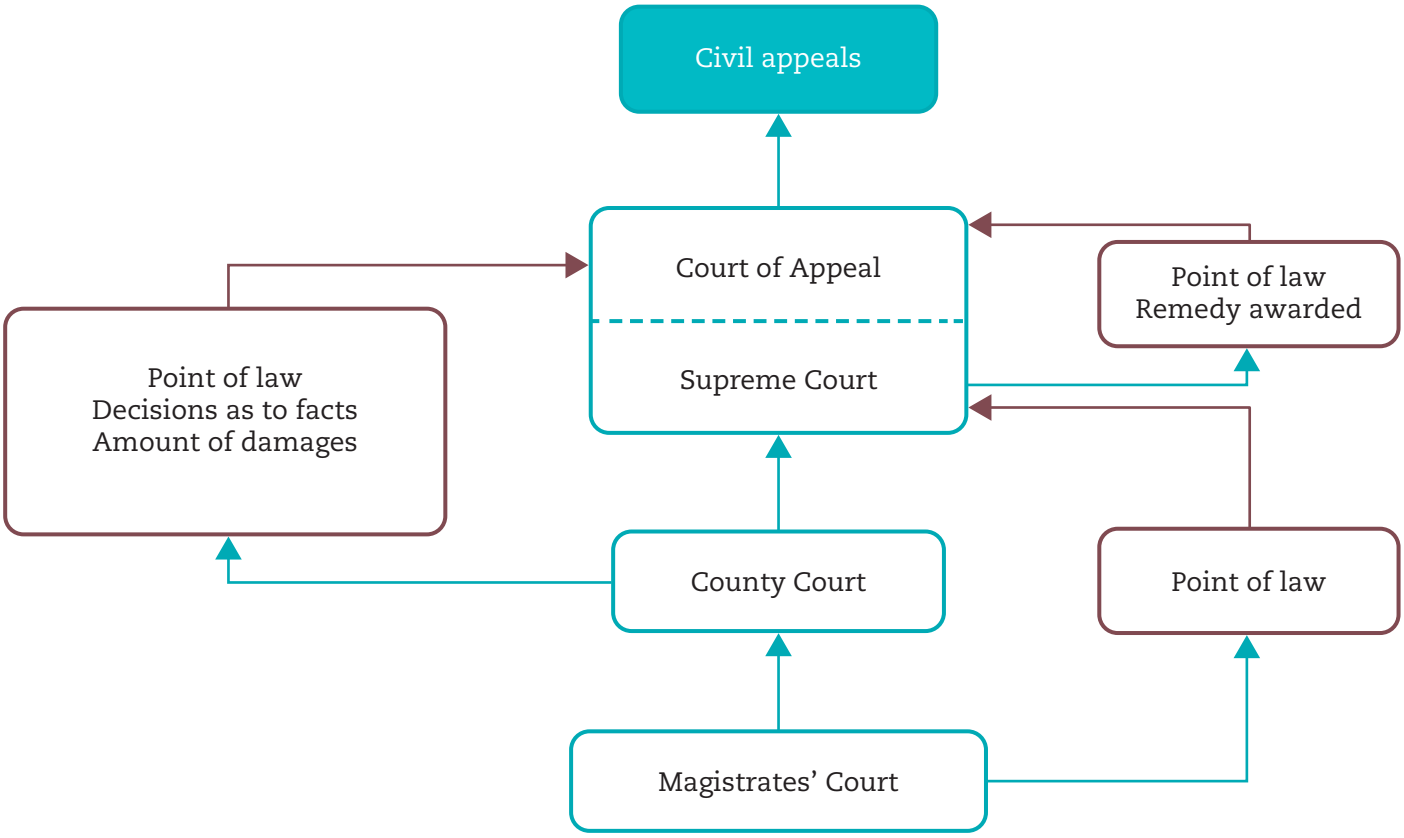

Figure 5.23 The appeal process from the Magistrates' Court, County Court and Supreme Court (Trial Division and Court of Appeal)

News report 5.8

Modernising case-flow at the Supreme Court: Paper-free court

RedCrest is a case management system available to Supreme Court Commercial Court users 24 hours a day, 7 days a week. It plays a crucial role in facilitating the court's objectives of becoming paper-free and more service-oriented by providing an easy-to-use platform for electronically filing documents of varying sizes, formats and complexity.

It also frees up staff from data entry, file management and counter duties to better manage proceedings, ensuring that cases are properly prioritised and moved through the court as quickly as possible. The Commercial Court Registry now delivers a paper-free service to its users.

From 2 July 2018, the RedCrest system extended to all documents for Common Law, the Commercial Court and Costs Court, meaning that all matters will be required to electronically filed using the RedCrest electronic filing system.

High Court of Australia

For more information on the High Court, go to www.hcourt.gov.au.

The High Court is the highest court in the Australian hierarchy. The High Court is the final court of appeal.

ISBN 978-1-108-87276-8 Poore et al.

By supporting efficiencies that lessen delays and facilitating the opportunity to appeal a verdict, the courts' hierarchical structure benefits civil cases.

5.8 Reasons for a court hierarchy

There are a number of significant reasons for arranging our courts in a hierarchical structure that benefit parties in a civil dispute. A number of these reasons were discussed in relation to the hearing of criminal cases in Chapter 3 and apply equally to civil disputes.

The courts' hierarchical structure benefits civil cases by promoting efficiencies which reduce delays and by providing an opportunity to appeal a decision. Without streamlined processes to maximise the use of limited court resources, extra costs, confusion and delays would reduce parties access to justice. Similarly, without a court hierarchy, dissatisfied parties would have no access to an appeal system to have their case reviewed.

The main reasons for a court hierarchy are to enable the following.

Administrative convenience

- A hierarchy promotes the efficient use of limited financial and physical resources. The distribution of cases are based on complexity to reduce delays. This efficiency promotes cost savings, and promotes specialisation and timely access
- Claims for less than $100 000 are directed to the Magistrates' Court and heard relatively quickly
- Minor claims make up the majority of civil disputes and so over 120 magistrates and 51 Magistrates' Courts are resourced and located throughout Victoria. There are also 16 magistrates who sit at the Children's Court and seven who sit at the Coroners Court.

Fundamental to the concept of justice is the opportunity to access dispute resolution options. A court hierarchy makes efficient use of the limited financial and physical resources available. A hierarchy allows for the allocation of cases according to their complexity and thereby reduces the likelihood of delays. This provides cost savings and promotes timely access for litigants. Minor civil cases can be allocated to the lower courts where they can be heard relatively quickly. More complex civil matters generally take longer to hear. These cases are heard in higher courts by judges with the expertise to deal with such matters. The jurisdiction of each court is clearly established so people do not waste time, money and energy initiating an action in an inappropriate court.

A court hierarchy provides for the most efficient use of court resources and avoids delays.

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Appeals

- The hierarchy provides a system for decisions to be reviewed by superior judges with expertise
- The hierarchy protects the right to appeal which promotes the concept of justice.

A court hierarchy allows for a system of review.

Fundamental to the concept of justice is the right to appeal. Appeals allow for the review of decisions made by courts. A system of review would not be possible without a court hierarchy. Parties who believe that they have grounds for an appeal have the opportunity to have their case heard again in a superior court by a judge with specialist knowledge and expertise, thereby ensuring certainty, consistency and fairness.

The system of precedent is largely reliant on appeals from the lower courts. Many precedents would never be established if there were no opportunity for an individual to appeal against the decision made by an adjudicator in a lower court.

Other reasons

Precedent

A court hierarchy is necessary for the doctrine of precedent to operate.

The doctrine of judicial precedent is largely dependent on a hierarchy of courts. Precedents are established in the superior courts and binding on all courts lower in the hierarchy, thereby providing consistency in decisions. The doctrine of precedent cannot operate unless there is a hierarchy of courts.

Specialisation

A court hierarchy allows each court to develop the skills, expertise and processes to deal with specific types of disputes.

A court hierarchy enables the workload of the courts to be spread, and for courts to develop expertise in hearing particular types of disputes. A judge hearing civil matters in the Common Law Division of the Supreme Court, for instance, develops expertise in matters relating to negligence.

Time and money

A court hierarchy allows minor cases to be heard relatively quickly and in a less costly manner.

A court hierarchy enables minor matters to be dealt with relatively quickly and in a cost-effective manner in the Magistrates' Court rather than in the County Court or Supreme Court, where it may cost thousands of dollars and take years before the case is finally determined.

Appropriateness of courts in resolving disputes

The civil justice system provides parties with a range of institutions and methods to resolve civil disputes. Initiating a civil claim in court is a costly, time-consuming and often stressful process. However, in some circumstances, the courts may be the most appropriate body to resolve the particular dispute.

Features of courts	• last-resort option • judge determines a binding outcome having listened to the evidence and arguments of the parties • adversary system of trial follows strict rules of evidence and procedure
Most appropriate when	• disputes involve complex evidence and/or questions of law • the matter is urgent • there is a power imbalance between the parties • all ADR methods have failed • safety risks are involved • there is a history of failed agreements between the parties • an ongoing relationship is not a priority • parties do not wish to be responsible for outcome
Least appropriate when	• the win/lose outcome escalates the dispute instead of settling it

Figure 5.24 Appropriateness of courts in resolving civil disputes

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Judicial determination in the courts offers many advantages to parties; however, the courts also have some limitations and parties need to analyse these before deciding whether judicial determination by the courts is the most appropriate option to resolve their particular matter.

Table 5.13 The appropriates of judicial determination in courts

Why judicial determination in the courts may be appropriate	Why judicial determination in the courts may not be appropriate
Nature and complexity of dispute: requires legal experts to present and deliberate on the case to deliver the best possible outcome in the circumstances.	**Win–lose outcome:** may diminish any possibility of an ongoing relationship between the parties. Disputes between family, neighbours and business partners may escalate the dispute in the future rather than settle it.
Provide a binding outcome: if parties are unable to resolve a dispute using other ADR methods, a judicial determination by a court provides a resolution which is final and binding.	**Costs may outweigh the value of the amount in dispute:** this may prevent or discourage some parties from pursuing a valid claim through the courts. This is a concern for those parties whose dispute cannot be settled through other dispute resolution methods or is outside the jurisdiction of VCAT.
The outcome is fair: the court system uses an adversarial process to hear cases. This includes strict rules of evidence and procedure allowing each party an equal opportunity to present their case and challenge the opposing evidence.	**Time-consuming process:** over months or years the court process may outweigh any advantage of a successful outcome. Complex and multi-faceted cases may take years to prepare for trial.
If the dispute requires expertise: the hierarchy promotes specialisation in hearing civil cases such as tort and commercial law, and so develops appropriate procedures to effectively settle these disputes.	**The area of law is uncertain:** and the likelihood of winning is uncertain.

Other points to consider include:

- **Courts can adjudicate on a range of civil disputes:** The court hierarchy enables courts to specialise in hearing specific types of cases such as family law and tort law, and so develops appropriate procedures to effectively settle these disputes.
- **Courts allow for legal representation to prepare and present the case:** Every party in a dispute has the right to seek legal representation to argue their case. The use of legal representation ensures that both parties are treated equally and that each party has the opportunity to present their side of the facts in an objective, reasoned way.

Taking a civil dispute to court provides a binding decision but is very costly and time-consuming.

- **Courts are bound by the principles of natural justice:** An important feature of Australia's legal system is that the person presiding over the case (judge or magistrate) must ensure that the rules of natural justice are observed. Natural justice is based on the concept of 'fair play' and was originally developed through the common law. According to the principles of natural justice, every person is entitled to a fair and unbiased hearing. Courts must remain impartial at all times. Both parties are considered equal before the law and have the right to present their version of the facts to the court, which will not favour either party.

Courts are bound by the principles of natural justice which promotes the principles of justice.

However:

- **Courts can be very expensive:** Courts are very expensive due to court costs and the need for legal representation. The unsuccessful party in a civil matter has to consider the possibility of paying large amounts in damages, party-party costs (what a court orders one party to pay the other as part of the terms of settlement) and court costs. Even the successful party will be out of pocket, because whatever amount is awarded will not cover all their solicitor's costs. This may prevent or discourage some parties from pursuing a valid civil claim through the courts. This is particularly a concern for those parties whose dispute cannot be settled through other dispute resolution methods or is outside the jurisdiction of VCAT.

Courts are very expensive due to high court costs and the need for legal representation.

- **There is a need for legal representation:** Lack of legal representation may hinder access to justice or equal treatment. Individuals who are unable to afford their own legal representative and are ineligible for legal aid are at a huge disadvantage in the court system. In civil cases, legal aid is often unable to represent parties. Individuals who cannot afford legal representation may find it difficult to prepare a case and understand proceedings. Their chances of presenting a successful case in a courtroom, pitted against an experienced lawyer, are not good.

Individuals who are unable to afford their own legal representative and are ineligible for legal aid are at a huge disadvantage in the court system.

- **Court decision may not be an appropriate method in all disputes:** A final determination by a court creates a situation where there is a winner and a loser. This may not be appropriate where there is an ongoing relationship between disputing parties. For instance, if a dispute is between neighbours, the winner and loser outcome may in fact escalate the dispute in the future rather than settle it.

Judicial processes are adversarial, and there is always a winner and a loser.

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A number of influencing factors will ultimately determine which institution a party decides will be most appropriate to resolve their dispute. The nature and complexity of the dispute will largely influence which institution is the most appropriate. For example, consumer disputes arising from goods and services may be settled via self-help or conciliation with the assistance of CAV or VCAT, while complex questions of law may require a Supreme Court judge to deliberate on the issue.

Factors that may influence the decision to initiate a civil action were identified at the beginning of the chapter. The decision here is in relation to which body is the most appropriate, and so some additional factors may be considered:

- the jurisdiction of the body to determine the matter
- the formality of the process
- the authority of the decision-maker to determine a binding outcome
- the impact of the decision on the relationship of parties
- the right of appeal
- confidentiality of process.

In deciding which method is most appropriate, each party must consider why and when each institution may be the most appropriate, remembering that each body will also have strengths and weaknesses associated with the process and the outcome.

Geoffrey Rush leaving the appeal court after the *Daily Telegraph* withdraws claims of apprehended bias by the judge

Activity 5.7 Folio exercise

Are alternative dispute resolutions more appropriate?

The practice of using alternative dispute resolution methods has become an accepted part of the Australian court system. Courts, including the Magistrates', County and Supreme courts, in addition to using judicial determination may direct parties to mediation, conciliation and arbitration aimed at clarifying issues and promoting settlement. VCAT was established utilising these methods. However, while alternative dispute resolution methods are credited with high settlement rates, some commentators remain cautious about their benefits.

1 Outline the four dispute resolution options identified in the paragraph.
2 Using examples, explain when each method may be the most appropriate method to resolve a dispute.
3 Discuss the use of compulsory arbitration in the Magistrates' Court.
4 Explain why courts remain an essential dispute resolution option in civil cases.

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5.9 Key purposes of pre-trial procedures

Civil matters filed to be heard in the County Court and Supreme Court must undergo a series of pre-trial processes. Some examples of pre-trial processes include the issue of a writ, pleadings, discovery and case management (directions hearings) procedures. Each of these pre-trial procedures contribute to achieving the main aim of a 'just, efficient, timely and cost-effective resolution of the real issues in dispute' as stated in section 7 of the *Civil Procedure Act 2010* (Vic). This significant piece of legislation was introduced by the Victorian Government to reduce the costs and delays associated with civil disputes.

The main purpose of civil proceedings is stated in section 7 of the *Civil Procedure Act 2010* (Vic) as facilitating 'the just, efficient, timely and cost-effective resolution of the real issues in dispute'.

The legislation provides the courts with a framework to guide not only civil pre-trial processes but also the trial and post-trial procedures in Victoria. This means that the courts now have the authority (under section 9 (1)) to make an order or give direction to achieve a just determination, an early settlement of disputes, efficient conduct of the court's business, minimise delay and deal with a proceeding in a manner proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

This instruction implies that the courts treat all people equally, conduct court business in an efficient manner, and act in the public and parties' interests to settle disputes early. These values underpin the rules regulating civil processes and aim to promote the principles of justice and the key concepts in civil law.

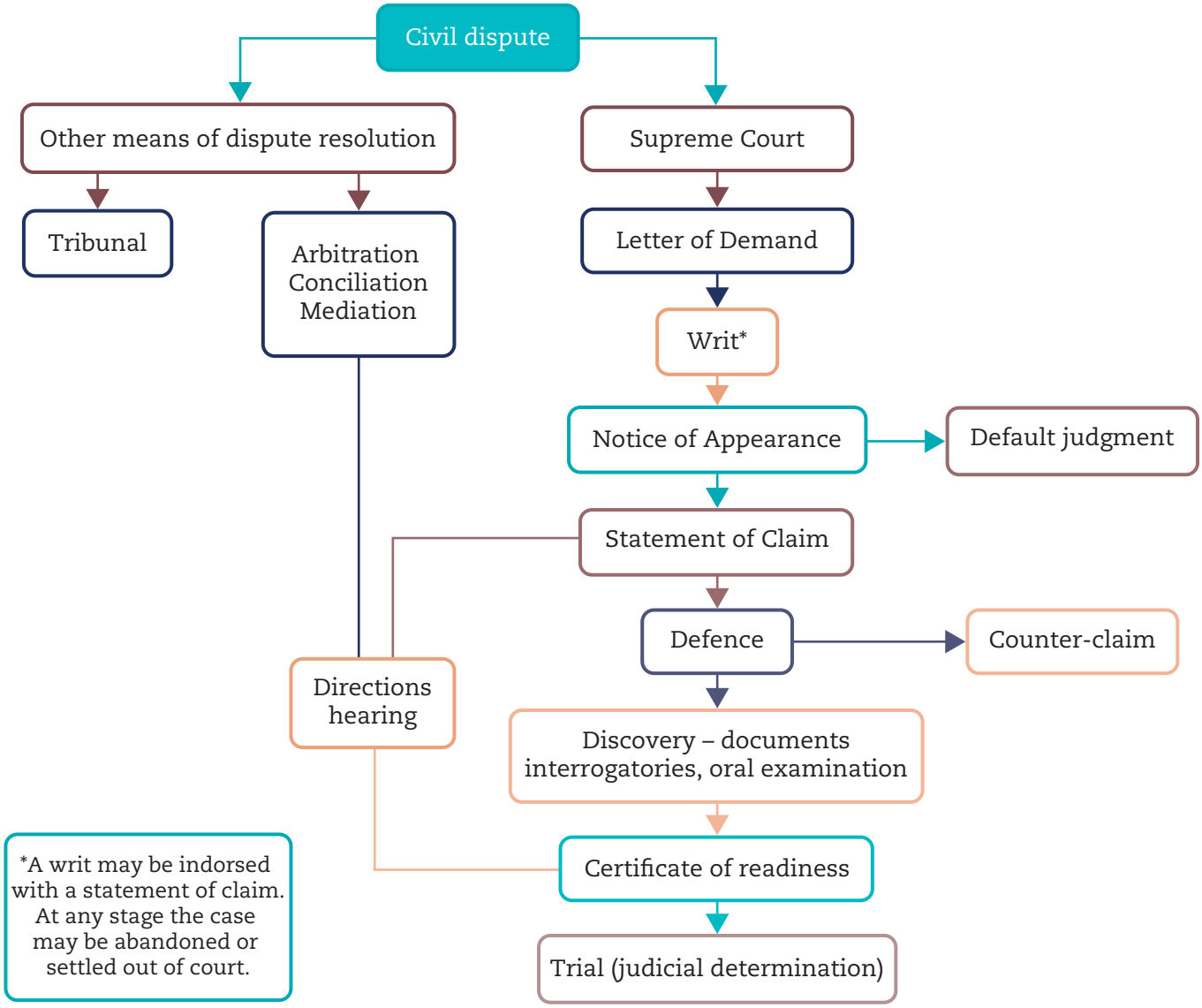

Figure 5.25 Pre-trial proceedings – civil disputes

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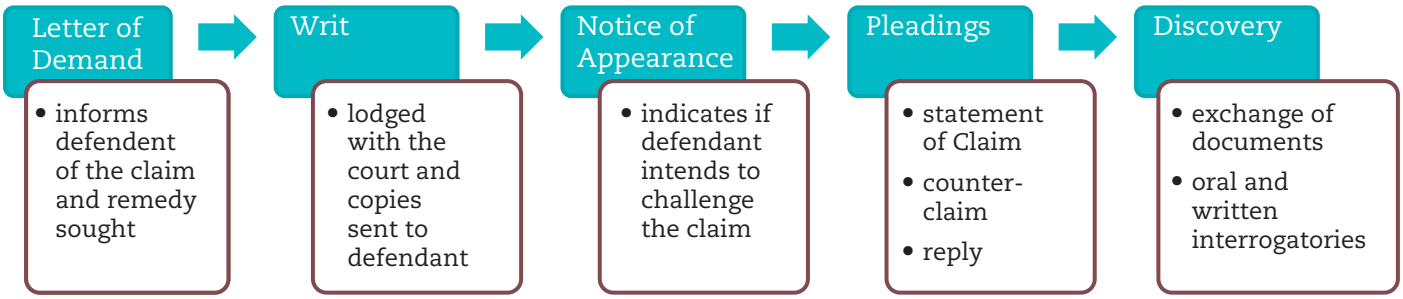

Figure 5.26 Pre-trial processes and their purpose

The civil pre-trial process

Disputes not resolved via negotiated options, CAV, or VCAT may enter the court system for resolution. All cases filed in the County Court and Supreme Court must observe the procedures of the court before trial. The *Civil Procedure Act 2010* (Vic) enables judges to exercise control and flexibility in determining the appropriateness and timing of the pre-trial processes.

Letter of Demand

The Letter of Demand refers to communication from the plaintiff's solicitor to the defendant, advising them that legal proceedings will be initiated unless agreement is reached.

Purposes

- informs the defendant that the solicitor is acting on behalf of the plaintiff
- establishes the nature of the plaintiff's claim and the remedy sought
- indicates a time limit (usually about two weeks) within which the defendant must respond
- informs the defendant that a writ will be issued and served for failure to respond
- explains that if the defendant does not reply to the letter, or responds by denying the claim and/or informs the solicitor of an intention to defend the claim, legal proceedings will commence
- enables an early settlement without litigation.

When the Letter of Demand does not resolve the matter, the next step is usually for the plaintiff to issue a writ with the court to determine the matter.

Mr Michael Stubbs
82 View Street
Carlton Victoria 3053
1 April 2020
Dear Mr Stubbs,

I represent Anthony John Highbrow, the pedestrian struck by your scooter on the footpath at the intersection of Morgan and Willet Streets, Carlton, on 10 November 2019. The circumstances indicate that travelling at an excessive speed and your failure to keep a proper lookout were the sole causes of the accident. Accordingly, I look to you to compensate my client for his personal injuries. As a result of the collision my client suffered a broken arm. He has been unable to work for 10 weeks and required medical treatment. The estimated costs are: (i) loss of earnings $24 000 (ii) medical expenses $510. I therefore seek total of $24 510 compensation on behalf of my client. If full settlement is not received within 14 days, legal action will be taken against you. I would be obliged if you would advise me within seven days of your intentions. Please note that if recourse is had to legal proceedings this letter will be tendered in court as evidence of your failure to attempt settlement.

Yours sincerely,

R

RU Kiddin
Solicitor

Figure 5.27 Sample Letter of Demand

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Supreme Court: Pre-trial proceedings

The procedures outlined in the following discussion are the procedures used for Supreme Court cases. The *Supreme Court (General Civil Procedure) Rules 2015* reflect the intentions stated in the *Civil Procedure Act 2010* (Vic). Note that cases appearing before the County Court would be equally bound to follow the *County Court Civil Procedure Rules 2018*.

Pre-trial proceedings in a civil case begin with the exchange of a series of legal documents. The *Civil Procedure Act 2010* (Vic) enables court management of the dispute during the pre-trial phase. The nature of the case may influence which procedures are adopted and the timing of those procedures. For example, complex cases in the Supreme Court may benefit from multiple directions hearings early in the process to identify key issues in dispute and streamline the exchange of evidence between parties to ensure a timely process.

Writ

When the Letter of Demand does not resolve the matter, the next step is usually for the plaintiff to issue a **writ** with the court to determine the matter.

In the Supreme Court proceedings, a writ informs the defendant of the nature of the claim, the remedy sought, the date and time of the court hearing, and the mode of trial.

In most cases to be heard in the Supreme Court, a writ is served to notify the defendant of the case. The writ is prepared by the plaintiff's solicitor. A copy of the writ is filed in the court. The writ is registered (and receives a number). It is issued and witnessed by the court and served on (sent or delivered to) the defendant.

Purposes

A writ may also include the formal statement of claim.

- informs the defendant that litigation on the issue in dispute has now been initiated against them, the particular court in which the matter will be heard and the mode of trial (either party may choose to have a jury)
- outlines the title of the action, the full names and addresses of the parties, and an endorsement of the claim: the endorsement of the claim is either the formal **statement of claim** or a statement that gives sufficient details of the nature of the plaintiff's claim
- provides a timeline for execution of the writ (within 12 months); however, this time can be extended by the court for up to an additional 12 months. If a writ is not served within the prescribed time limit, it is deemed to have 'gone stale' and becomes invalid
- explains the protocol for issuing a writ either served on the defendant or on the defendant's solicitor personally: the Supreme Court rules also allow for service by fax or telephone.

An originating motion

An originating motion is an alternative to a writ. The Supreme Court provides for the use of an originating motion where there is no defendant to the proceedings, or where an application is authorised by the court, or where required by Supreme Court rules. The Supreme Court rules provide that a proceeding may be commenced by an originating motion where there is no substantial dispute of fact. In such cases, there is no need for pleadings or discovery.

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WRIT

IN THE SUPREME COURT **2020 No. #**
OF VICTORIA
AT
BETWEEN

ANTHONY JOHN HIGHBROW **Plaintiff**

And

MICHAEL RONALD STUBBS **Defendant**

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ. IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below. YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –

1. (a) filing a 'Notice of Appearance' in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
2. (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows –

(a) where you are served with the writ in Victoria, within 10 days after service;

(b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

(c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;

(d) where you are served with the writ in any other place, within 42 days after service.

IF the plaintiff claims a debt only and you pay that debt, namely, XXX and XXX for legal costs to the plaintiff or his solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court. FILED 15 April 2020

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

[Plaintiff's indorsement of a statement of claim or of a statement sufficient to give with reasonable particularity notice of the nature of the claim and the cause thereof and of the relief or remedy sought in the proceeding.]

ANTHONY JOHN HIGHBROW was struck by a scooter ridden on the footpath by MICHAEL RONALD STUBBS at the intersection of Morgan and Willet Streets, Carlton, on 10 November 2019. The circumstances indicate that travelling at an excessive speed and failure to keep a proper lookout were the sole causes of the accident.

1. Place of trial – (If no place of trial is specified, trial will be in Melbourne.)
2. Mode of trial – (If trial before a Judge and jury is not specified, trial will be before a Judge sitting alone.)
3. † This writ was filed –
   (a) by the plaintiff in person;
   (b) for the plaintiff by [RU Kiddin], solicitor, of [1 Stubbs Rd, Carlton];
   (c) for the plaintiff by [name of firm of solicitor], solicitor, of [business address of solicitor] as agent for [name or firm of principal solicitor], solicitor, of [business address of principal].
4. The address of the plaintiff is – 1 Morgan Street, Carlton
5. The address for service of the plaintiff is – 1 Stubbs Rd, Carlton
6. The address of the defendant is – 82 View Street, Carlton

* [Strike out this paragraph where order made fixing time for appearance and substitute 'THE PROPER TIME TO FILE AN APPEARANCE' is within … days after service on you of this writ.'] † [Complete or strike out as appropriate.]

Adapted from Supreme Court (General Civil Procedure) Rules, 2005, © Department of Justice, Victoria

Figure 5.28 Sample writ

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Notice of Appearance

This document must be lodged by the defendant within 10 days of receiving the writ from the plaintiff.

A Notice of Appearance tells the plaintiff and the court that the defendant intends to defend the claim.

Purposes

- allows the defendant to choose whether they will represent themselves by filing a Notice of Appearance or ignore the writ (this may result in a default judgment being made against the defendant)
- informs the plaintiff that the action will be defended.

Pleadings

The lodging of the Notice of Appearance by the defendant communicates to the plaintiff that a challenge in court is proceeding and the Pleadings process will begin.

Pleadings provide for an exchange of information between the plaintiff and the defendant. Pleadings consist of a number of stages.

Pleadings refer to the large number of documents exchanged between the parties and filed with the court before the trial. The documents support their particular case and includes:

- Statement of Claim
- Defence and/or counter-claim
- Reply

Purposes

- outlines the precise nature of the claim: defines the issues in dispute and the remedy sought by the plaintiff
- provides the defendant with a fair opportunity to deny, defend, admit, or counter the plaintiff's claim
- provides both parties with insights into the opposing case and enables the parties to know what evidence will be necessary to have available – this provides procedural fairness
- prevents injustices that may occur if a party is taken by surprise
- avoids wasting court time with unnecessary questions that are not in dispute – this reduces the cost of the claim
- allows the parties to weigh the strength of their case and helps the parties reach an out-of-court settlement.

The purpose of pleadings can be shown by the comments of Mason CJ and Gaudron J in the case *Banque Commerciale SA, En liquidation v Akhil Holdings Pty Ltd [1990]* HCA 11 when it was stated:

> ' … pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision … pleadings secures a party's right to this basic requirement of procedural fairness.'

Statement of Claim

The Statement of Claim is the first document exchanged as part of the pleading process. This document clearly sets out the precise details of the plaintiff's claim.

Purposes

- informs the defendant of the full details of the cause of action
- states the facts alleged by the plaintiff
- informs the defendant of the remedy being sought or the amount of compensation being claimed
- enables the court to assess if there is reason to strike out the case – this may occur if there are insufficient facts to prove the claim.

A Statement of Claim is sent by the plaintiff to the defendant. It explains the claim in more detail.

It is not necessary for the plaintiff to supply documentary or other evidence at this stage.

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Statement of Claim (Extract)

IN THE SUPREME COURT OF VICTORIA AT **2020 No. #**

BETWEEN **ANTHONY JOHN HIGHBROW** **Plaintiff**

And

MICHAEL RONALD STUBBS **Defendant**

The Plaintiff says:

1. On the 10th day of November 2019 the Plaintiff was standing at or near the intersection of Morgan Street and Willet Street, Carlton, in the said State when a scooter travelling on a footpath and under the control of the Defendant struck the Plaintiff.
2. The said collision was caused by the negligence of the Defendant.
3. Particulars of Negligence:
   (a) Failing to keep a proper lookout
   (b) Travelling at an excessive speed in the circumstances
4. By reason of the said collision the Plaintiff suffered personal injuries.

Figure 5.29 Sample Statement of Claim

Defence

The Defence is sent by the defendant to the plaintiff. It sets out details of the defence.

The Defence is a document lodged by the defendant (or their solicitor) in response to the statement of claim.

Purposes

- allows the defendant to present their version of the facts and defend any of the claims being made against them: the defendant may admit to some allegations and deny others
- sets out the extent to which the defendant considers they are liable: where a defendant files an appearance, a defence should generally be served within 30 days of receiving either the endorsed writ or a statement of claim.

Counter-claim

In some situations, the defendant may respond to a statement of claim with a **counter-claim**.

Purpose

- Provides the defendant with the opportunity to bring an action against the plaintiff, claiming that the plaintiff was either partly or completely responsible for the damage or injury.

Under the Supreme Court rules, a defendant who has a claim against the plaintiff may counter-claim in the proceeding. The defence and the counter-claim are included in one document. The counter-claim will be tried at the trial of the plaintiff's claim unless the court orders otherwise.

The court may decide not to hear the counter-claim as part of the proceedings where a counter-claim may delay the trial of the plaintiff's claim or cause prejudice to one of the parties. The court may:

- order separate trials of the counter-claim and the claim of the plaintiff
- order that any claim included in the counter-claim be excluded
- strike out the counter-claim without prejudice to the right of the defendant to assert the claim in a separate proceeding
- order that any person joined as defendant to the counter-claim cease to be a party to the counter-claim.

A counter-claim is the defendant's response to a claim, in the form of a claim against the plaintiff.

Either party can apply to the court to order that further and better particulars be provided about any fact or matter stated in the pleadings. Further information is also obtained during the discovery process.

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Reply

The plaintiff may choose to respond to the statement of defence. A reply is not necessary if the reply is a denial of all allegations in the defence.

In some cases, the plaintiff may send the defendant a reply to the defence claimed.

Purpose

- allows the plaintiff to clarify any allegation made in the defence: for instance, the statement of defence may claim that there is no right to action because the time in which this action can be taken under the *Limitation of Actions Act 1958* (Vic) has expired. In this case, the plaintiff would need to show why the claim is not barred by the *Limitation of Actions Act*. Usually, pleadings do not continue after the reply.

Discovery

Discovery by inspection of documents

Once the parameters of the case have been established via the pleading process, the **discovery** process begins. This allows parties to request and copy documents relevant to the case. Parties can send a Notice to Produce Information which may include:

- medical reports, expert witness reports
- letters, emails, contracts
- photographs, recordings, other documentary materials.

A Notice of Discovery is sent requesting documents relevant to the case.

The discovery process includes more information relevant to the facts of the case.

An affidavit of documents must be filed and a copy must be served on the party requesting discovery. The affidavit of documents identifies the documents that are, or have been, in the possession of the party making the affidavit. Generally, a party cannot refuse to produce documentary evidence if requested to do so by the other party. Failure to provide the documents means that the documents cannot be produced as evidence in court.

Purposes

- allows the parties to request more information and inspection of documents relevant to the facts of the case
- ensures that parties disclose all relevant documents in their possession to the other party
- promotes timely access to dispute resolution as the court has the power to prevent unnecessary discovery and limit the number of documents
- promotes an out-of-court settlement, as the parties gain a greater understanding of their chances of success in court.

Discovery can include the inspection of a variety of relevant documents.

Discovery via interrogatories

Both parties have a right to request more information from the other or to ask further questions to gain a better understanding of the facts. These written questions, or **interrogatories**, are limited to matters of fact. Interrogatories must be answered in writing, by affidavit.

Discovery can include asking specific questions, known as interrogatories.

Purposes

- provides the parties with more detailed and specific information
- encourages an out-of-court settlement as parties gain greater understanding of inconsistencies of the evidence in the case
- crosschecks evidence given in court with that presented in the interrogatories: inconsistencies between information in the interrogatory and evidence given in court may weaken an individual's case.

Discovery by oral examination

The Supreme Court rules provide that a party may orally examine the other party. Discovery by oral examination cannot be conducted without the consent of the relevant party (the consent must be written). A party who has consented to be orally examined by another is not required to answer written interrogatories, but they can agree to do so.

Discovery can also include oral examination.

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Responses to questions asked during the examination are recorded in a deposition (a written record). Where there is an objection to any question, the objection is also recorded in the deposition. These answers may be used as evidence at the trial.

Other information

In addition to the discovery of documents and interrogatories, the Supreme Court rules provide for the exchange of other information that may be relevant to a case. These rules are designed to ensure that all parties are fully informed and that the case, should it go to court, will proceed smoothly.

- At any time, the parties to a dispute may make voluntary admissions. An admission is an acknowledgment that a statement is true.
- A party may also serve a notice seeking the admission of a factual statement or recognition of the authenticity of a document.
- The parties are required to declare the use of expert evidence. The use of an expert witness should be declared at least 10 days before the trial. A statement should be sent that:
  - identifies the witness
  - describes their qualifications to give evidence as an expert
  - details the substance of the evidence they will give.

5.10 Judicial powers of case management

The judiciary have powers of case management including the power to order mediation and give directions.

The *Civil Procedure Act 2010* (Vic) empowers judges to adopt a flexible and individual approach to manage each case.

Case management is an approach where judicial officers control civil proceedings by ordering directions and mediation to resolve disputes as quickly, inexpensively and efficiently as possible while upholding the principles of justice.

Case management is a system of rules introduced to reduce costs and delays in the court system. The systems and processes introduced reflect the principles of justice and guide the judiciary, litigants and legal representatives to resolve disputes in a fair and equal way, while improving access to the courts.

The *Civil Procedure Act 2010* (Vic) empowers the courts to adopt a flexible approach and treat each case individually and proportionately, instead of each case following a prescribed process. The reasoning for this is that not all cases need to proceed through a prescribed process; instead, the nature and complexity of the case will determine the level of court management and direction and ensure the overarching aim of the Civil Procedure Act is achieved.

As already discussed, the *Civil Procedure Act 2010* (Vic) is fundamental to the operation of civil disputes and guides the development of case management rules and practices. Individual courts have adopted the rules best suited to their jurisdiction. The *Supreme Court Rules 2015* implement ways to facilitate the just, efficient, timely and cost-effective resolution of issues in dispute. The legislation and the court rules give broad powers to judicial officers to manage cases. This means the court can give any direction or instruction appropriate to achieve justice in the case or in the public interest.

The development of case management processes has changed the role of the judiciary in a fundamental way. Australian courts traditionally adopted a strict adversary approach, meaning the judge remained detached and independent throughout the pre-trial and trial and post-trial processes. However, the courts have now adopted some of the features of the inquisitorial process and a 'case manager approach' where the trial judge maintains control of the case from its initiation to its settlement. The increased judicial powers to manage civil processes means the parties and legal representatives must comply with specific directions or instructions and may be ordered to mediation. Failure to do so may result in fines from the court. New technologies have also helped the courts achieve these goals.

The two main ways the courts manage cases is through their powers to instruct parties to:

- directions
- mediation.

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Case management

Case management allows:

- each case to be assessed on the basis of its needs and complexity
- early planning, scheduling and control over proceedings by a judicial officer
- ongoing communication between the court and the parties.

Case management enhances the ability of the civil justice system to achieve justice.

Directions hearings

The Supreme Court has introduced directions hearings to allow the court to take an active role in the conduct of the proceedings. Matters dealt with at a directions hearing include:

- the state of the pleadings
- any disputes concerning the state of the pleadings, requests for details or complaints
- timeframes for discovery (documents, interrogatories, oral examination), mediation, filing of court books (a compilation of documents relevant to the case)
- referral to mediation
- ordering the parties to provide each other with a list of witnesses and a summary of the evidence of each witness
- fixing the date for trial or a further directions hearing.

In some civil matters, the Supreme Court provides that there may be two or more directions hearings. At the first directions hearing, matters relating to the conduct of the proceedings are discussed and a date for the second directions hearing is set. At the second directions hearing, a trial date will be fixed. This means that the parties will know when they must be ready for trial. Wherever possible, directions, other than directions for the trial, will be given 'on the papers' without the need for any attendance by parties. Further directions hearings may be held where necessary.

A directions hearing allows the court to give directions about the conduct of the case. It is also an opportunity to encourage the parties to resolve the dispute or refer the case to mediation.

Directions refer to instructions made by judicial officers ordering the party/s to undertake particular actions. Directions may be made at any stage of civil proceedings and relate to any issue relevant to the achieving the overarching purpose.

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Judicial powers in case management

- occurs primarily at directions hearings
- directions given to assist the effective, prompt and economical resolution of disputes
- initial directions hearing are always conducted
- direction must be followed (court orders)
- court will encourage, even order, pre-trial mediation.

Purposes

Primary purpose: effective, prompt and economical resolution

Other purposes:

- encourage cooperation between parties
- identify key issues early
- decide which issues need full investigation and dispose summarily of others
- fix timetable to control process.

Proportionality

Court resources used and time spent on a case must be proportional to the amount sought or the issue in dispute.

Judicial powers to order mediation

The Supreme Court now refers all civil matters to mediation to promote out-of-court settlements and reduce the backlog of civil cases waiting for trial. During the directions hearing – and, in fact, at any stage in the proceedings – the court may, with or without the parties' consent, order the parties to mediation. At any stage during the proceedings, the court may also, with the consent of the parties, refer the parties to arbitration.

News report 5.9

Why do courts encourage mediation?

Mediation has gained increasing acceptance as a dispute resolution process. This dispute resolution process is now widely recognised by the Supreme Court as a means of reducing the backlog of civil cases. Mediation has also been used by the County Court. The Magistrates' Court has the power to refer cases to mediation provided by the Dispute Settlement Centre of Victoria.

When should mediation be used?

Mediation is appropriate for most of the disputes that come before our courts. Whether a case can be resolved by mediation will depend on a number of factors.

First, the parties must be willing, and they must be capable of discussion and negotiation. The primary intention of the parties in attending the mediation sessions must be to settle the dispute.

Second, the parties need to be on an equal standing. In other words, one party should not be more powerful than the other. Third, the parties need to be in equal bargaining positions for mediation to be effective. Each party needs to be aware of the range of options and be in a position to make real choices.

Mediation is most effective if it is used early in a dispute. As a dispute develops, individuals tend to develop polarised views. Perceptions of injustice rise, and the dispute builds over time. These emotions will hinder the dispute resolution process.

However, mediation cannot take place until issues have been defined. Each party will need an understanding of the other's claim. To achieve this, there needs to be adequate exchange of information between the parties. In some cases – which would otherwise be heard before a higher court – this may not be possible until pleadings have been conducted.

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News report 5.10

Bushfire class action settled through mediation

On the eve of the sixth anniversary of the Black Saturday bushfires, the Murrindindi Black Saturday bushfire class action settled, after being referred to court-led judicial mediation. The successful mediation resulted in significant cost and time savings for the community, the legal system and all parties involved. Importantly, it also saved witnesses and victims the psychological and emotional stress of enduring a lengthy trial.

The Black Saturday bushfires remains one of Australia's longest and most expensive class action cases and was successfully settled via court-ordered mediation.

In July 2014, Justice Dixon, who was hearing the preliminary arguments in the class action, referred the matter to the Court's Appropriate Dispute Resolution (ADR) [also known as Alternative Dispute Resolution] team for judicial mediation by Associate Justice Efthim, in the hope that a settlement could be reached without the matter having to go to trial.

Associate Justice Efthim convened preliminary meetings involving representatives from both parties and expert witnesses. His Honour engaged an expert mathematician and valuer to determine a sample by which [the] quantum of the claim could be estimated. A valuer was then engaged to obtain a relevant sample by which the question of loss could be estimated.

Case management conferences were next held with the valuer and the parties to estimate loss. When the parties were in agreement as to the estimate of the loss, the mediation commenced.

The matter was settled, through mediation, without the need for a trial. The mediation resulted in a $300 million settlement, without admissions of liability, and brought an end to the multiple legal actions arising from the deadly 2009 Murrindindi bushfire.

Judicial mediation in this matter allowed for a streamlined process, and made full use of the Court's facilities and expertise in complicated class actions. The efficiency of the judicial mediation system is clear.

It must be duly noted and acknowledged that Associate Justice Efthim played a pivotal role assisting the parties to resolve the case.

Upon settlement, Justice Dixon thanked the parties, assisted by their lawyers and the mediator (Associate Justice Efthim) for the sensible and necessary compromises that had brought the Murrindindi proceeding to a close.

'Active management of these proceedings by judges facilitated timely disclosure of documents, evidence, expert opinions and arguments and helped all those involved in these disputes, whether as plaintiffs, defendants, witnesses, experts or lawyers, to find an appropriate compromise. Resolution of so many claims within that time frame is an achievement worthy of note.'

The settlement was subject to Court approval (as are all class actions), largely to safeguard the interests of group members. The settlement was approved by Justice Emerton in May 2015.

The settlement of the Murrindindi class action followed the settlement of the separate class action in relation to the Kilmore East–Kinglake fire. In contrast, this matter went through an external mediation process.

On 15 July 2014, after a 200-day trial before Justice Jack Forrest, the parties agreed to a settlement without admission of liability worth $494 million, the largest in Australian legal history. The Court heard the application on 24 and 25 November 2014 and received approval from Justice Osborn on 23 December 2014.

The Supreme Court of Victoria is supervising the ongoing process of distribution of settlement funds as it has done with earlier Court-approved settlements arising out of the Beechworth, Coleraine, Horsham and Pomborneit fires.

Key issues in this matter included the pre-trial management of 40 expert witnesses, the use of expert conclaves, the effectiveness of concurrent evidence and the use of expert assessors to assist judicial officers.

The length and scope of the Kilmore East–Kinglake trial also demanded that the Court adopt flexible and innovative case management practices, including the use of a paperless 'e-trial'.

Since settlement, the Court has commissioned research into the way in which these issues were addressed in the context of the Kilmore East–Kinglake trial which will highlight lessons to be learned for the future conduct of a large-scale litigation. It is expected that the research will be published in early 2016.

Source: Supreme Court of Victoria Annual Report 2014–15

The Black Saturday bushfires case remains one of the longest and most expensive class action cases.

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The courts encourage the use of mediation and arbitration to resolve civil disputes.

Activity 5.8 Written report

Civil pre-trial processes: is mediation the answer?

Read News report 5.10 'Bushfire class action settled through mediation' and prepare a report. Your report may be presented as a multimedia presentation or a written report.

A multimedia presentation may include:

- presentation software such as Prezi and a set of written notes
- a PowerPoint presentation and an oral presentation
- using a multimedia package to prepare a computer presentation and an oral presentation.

Your report should address the following:

- describe the judges' role in the pre-trial process: identify two other pre-trial processes parties are likely to have undertaken in preparing for trial
- at what stages in the pre-trial process is mediation most likely to occur? Justify your view
- suggest why the judge ordered the parties to mediation part way into the trial
- list the advantages of mediation highlighted in the article.

News report 5.11

Police make big pay-out to two teenage migrants

A civil action in the County Court has resulted in Victoria Police paying thousands of dollars to two teenage migrants. During the 16-day hearing, the court heard allegations from two young African migrants against eight police officers and the State.

In evidence, the teenagers described being beaten by police officers, handcuffed, and then falsely imprisoned. They said they had done nothing wrong.

Police said the use of force and the pepper spray was necessary because the young men resisted arrest.

The day before Judge Susan Cohen was due to retire to consider a verdict, the police sought to settle the allegations out of court. The following morning a confidential agreement between the parties was signed.

By settling out of court, Victoria Police avoided the possibility of an adverse finding. It is believed that the payment was about $200 000. This included compensation to the two young men, legal costs associated with three weeks in court, and two months of trial preparation.

It is estimated that Victoria Police's own legal representation, court costs and the wages of the eight police officers who attended court proceedings amount to between $200 000 and $250 000. Altogether, close to $500 000 of public funds was spent on the case.

Protesters demonstrate against the racial profiling of African youths at the Channel 7 protest: Enough Is Enough on 28 July 2018 in Melbourne, Victoria. The protest opposed the media's ongoing reporting that connected crime and gang violence to people of African descent.

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Activity 5.9 Folio exercise

Settling out of court

Read News report 5.11 'Police make big pay-out to two teenage migrants' and complete the following tasks:

1 Briefly outline the allegations made by the plaintiffs in this case.
2 Which court heard this case? What was the outcome of the case?
3 One purpose of pre-trial procedures is to promote out-of-court settlements. Describe other purposes of pre-trial procedures leading up to the hearing of a civil case. Evaluate the extent to which these pre-trial procedures achieve the purposes you have identified.
4 Discuss what factors you think contributed to the parties settling out of court in this case.
5 The overarching aim of pre-trial processes is to enable the court to facilitate 'the just, efficient, timely and cost-effective resolution of the real issues in dispute'. To what extent and in what ways did the pre-trial process achieve any ONE of the principles of justice?

5.11 Responsibilities of key personnel in a civil trial

The purpose of a civil trial is to facilitate the just resolution of disputes 'as quickly, inexpensively and efficiently as possible'. In Australia, we use the adversary system of trial to resolve civil disputes. This system is based on the concept of two opposing parties fighting for the truth in court. It may also be referred to as the 'accusatorial model' as it involves one party accusing the other. A number of personnel play a role and hold key responsibilities in the delivery of a just outcome: the judge, the jury, the parties and the legal practitioners. Each has specific responsibilities and tasks to perform to ensure that the outcome balances the interests of the plaintiff and the defendant.

The Study Design refers to key personnel in a civil trial as the judge, the jury, the parties and legal practitioners. You could be asked a question on the responsibilities of any of these four.

Responsibilities of the judge

A civil trial may be heard by a judge or by a judge and a jury of six. The judge has a responsibility to act as an impartial and independent adjudicator. The judge must not intervene unnecessarily in the conduct of the case, and must remain neutral, act impartially and treat each party equally. The judge cannot help the parties in the presentation of their case, either by prompting a party to ask an appropriate question of a witness or by introducing a legal issue. The judge can only ask questions of witnesses when it is necessary to clear up a point that has been overlooked or obscured. The judge's duties include:

The judge is an impartial adjudicator, responsible for managing the case, empanelling a jury, deciding the admissibility of evidence, applying the rules of procedure, deciding questions of law, determining the verdict (if there is no jury) and deciding the remedy.

- **Upholding the overarching aim of the *Civil Procedure Act 2010* (Vic)** to deal with the case in a just manner.
- **Undertake appropriate case management** to order mediation or give directions.
- **Overseeing the jury selection and empanelling process:** The judge is responsible for the process through which a jury is selected and empanelled.
- **Deciding the admissibility of evidence:** The judge may prevent a jury hearing inadmissible evidence because that evidence may prejudice the jury's final decision.
- **Enforcing the rules of evidence and procedure:** The judge must ensure that each party acts according to the rules of procedure so that each has an equal opportunity to present their case.
- **Deciding all questions of law and ruling on their relevance:** Although each party may present evidence to suggest the relevant law that applies to their case, the ultimate decision as to the relevant law is the responsibility of the judge.
- **Ensuring that the plaintiff has legally established the 'burden of proof'.**

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- **Summarising the facts and explaining the relevant law to the jury:** Once all the evidence has been heard and final addresses made, the judge will need to summarise the case to the jury. They must instruct the jury about the law that is relevant to the case, identify the issues in the case and relate the law to those issues.
- **Deciding questions of fact:** In the County Court and the Supreme Court when there is a judge alone (no jury), the judge will decide fault and award costs ordering the losing party to pay the other party's legal costs. Where a jury is present, the jury is the trier of facts. The jury must decide their verdict on the facts of the case and how the law, as prescribed by the judge, applies to the facts.
- **Determining the remedy:** In a civil case, the plaintiff can choose to have either the judge or the jury determine the appropriate award. In defamation cases, a jury cannot determine damages.

The *Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017* (Vic) reduced peremptory challenges (challenges without a reason) in civil trials from three to two. These changes came into effect on 1 May 2018.

The impartiality of the judge in a civil trial promotes fair and equal treatment and is seen as the key to ensuring that the principles of justice are upheld. When a decision is made by an independent body, it is more likely to be accepted by the parties and the community as a fair decision.

If either party has opted for a trial by judge and jury, the trial will start with the empanelling of the jury. The jury panel will consist of six jurors. Each party is permitted to challenge two of the potential jurors from a list of 12 without having to give a reason for the challenge.

An additional two jurors may be selected in long cases. However, only six jurors make the final decision.

Where there is a judge and a jury, the judge presents a summary of the evidence and the issues presented by the parties to the jury. When doing this, the judge again must act impartially and treat each party equally.

Responsibilities of the jury

The use of a jury of six people is optional in civil trials. The role of the jury is to reach a decision, but it can also determine the level of damages.

The jury is not an essential feature of the civil trial process and is used in only approximately 2% of trials in the County and Supreme Courts. The responsibilities of the jury include:

- listening to and evaluating evidence
- determining questions of fact and applying the law as explained by the judge
- deciding fault and awarding damages
- remaining unbiased and making a decision on the evidence presented.

Under the *Defamation Act 2005* (Vic), juries cannot determine damages in defamation cases.

The jury safeguards the rights of the parties by reflecting community standards and thus promoting justice that is in line with community values. Impartiality is central to the concept of a fair trial. The random selection process and the checks to excuse potential jurors ensure a fair trial.

What are the responsibilities of the jury in a civil trial?

Either party to a civil case can request a jury, providing they are prepared to meet the cost. The jury's main task is to listen to the evidence presented by both parties, and to consider the facts of the case according to the relevant law. The standard of proof required is on the 'balance of probabilities'. The balance of probabilities means that one account of the facts is, on balance, more probable than the other. If the jury is unable to reach a unanimous decision after three hours, a majority verdict (five out of six jurors) is acceptable. The task of the civil jury does not stop at delivering the verdict. If the jury decides in favour of the plaintiff, then it may also be asked to decide the extent of damages to be awarded to the plaintiff. The jury may also need to consider whether the plaintiff can be blamed in part for any of the loss, damage, or suffering. If so, the plaintiff's award of damages is reduced in proportion to the extent of blame.

Actor Geoffrey Rush attends the Federal Law court in a civil trial against Sydney newspaper *The Daily Telegraph* on 8 November 2018. Rush successfully sued the newspaper for defamation.

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Should juries assess damages?

Using juries in civil cases to determine the level of damages has been criticised. It is claimed that there are inconsistencies between the amounts awarded by different juries in similar cases. A jury does not give reasons for its decision. It does not account for how it arrived at the final amount of damages awarded. This means that it is difficult to know if the jury has taken into account all aspects of damages, such as pain and suffering. In some cases, juries are said to be 'excessively generous'. This criticism is frequently made of juries in cases of negligence involving an individual and an insurance company. On the other hand, some jury estimations of damages can be very conservative. The difficulty in predicting how juries will calculate damages discourages some people from using a jury in a civil case. In defamation cases, damages can only be assessed by the judge.

Activity 5.10 Folio exercise

Juries in civil trials

1 Describe how juries operate in the civil justice system and outline their key responsibilities in a case. Your response should consider:
   - the number of jurors who form the jury
   - the circumstances in which a jury trial is required and those in which it is not
   - the standard of proof required.
2 Discuss two reasons why the right to trial by jury in a civil cases should be retained.

A solicitor gives legal advice and prepares the 'brief' for the barrister.

Responsibilities of parties (the plaintiff and the defendant)

In our adversary system of trial, each party to a dispute has responsibility for, and control over, the conduct of their case. This means that the plaintiff and the defendant is responsible both for preparing and for presenting their case in court. This includes conducting the pre-trial stages and presenting the case in court and, if necessary, lodging an appeal or an enforcement order after the judgment is determined.

In civil cases, the plaintiff needs to prove their claims on the balance of probabilities while the defendant may admit or challenge all or some of the claims.

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The role played by parties in civil proceedings is referred to as 'party control'. They decide all matters relating to:

- initiating the action and nominating the relevant court or dispute resolution body
- if a jury will be used
- pre-trial processes
- identifying key issues to be presented in court
- researching and controlling the evidence, the law and its presentation
- the type and number of witnesses to be called.

Parties to a civil action may decide to use a legal practitioner to present the case on their behalf.

Responsibilities of the plaintiff

- uphold the overarching aim of the *Civil Procedure Act 2010* (Vic) to deal with the case in a just manner
- decide to abandon the claim or initiate a claim against a defendant
- decide the appropriate court based on the remedy sought
- undertake the necessary pre-trial processes
- decide to engage legal representation or to self-represent
- present opening and closing arguments
- decide which evidence and witnesses to present during pre-trial processes and at trial
- ensure the evidence presented meets the standard of proof required based on the balance of probabilities
- decide whether to appeal the decision within 28 days and the grounds for appeal
- request enforcement orders if the defendant fails to uphold the judgment.

Responsibilities of the defendant

Parties are referred to as a 'self-representative client' if they choose to appear in court without a legal representative. Approximately 30% of civil clients appear as self-represented.

- decide to agree, partly agree, or deny the claims stated in the Letter of Demand
- decide the method of trial (judge alone or judge and jury of six)
- undertake the necessary pre-trial processes
- decide to engage legal representation or to self-represent
- decide whether to issue a counter-claim in response to the plaintiff's claims
- decide which evidence and witnesses to present during pre-trial processes and at trial
- present opening and closing arguments
- ensure the evidence presented meets the standard of proof required based on the balance of probabilities
- decide whether to appeal the decision within 28 days and the grounds for appeal
- if unsuccessful, pay costs and abide by any court orders regarding the appropriate remedies.

Responsibilities of legal practitioners

The adversary system of trial follows complex rules regulating court procedures and the admissibility of evidence. This means that parties may choose to pay legal representatives, a solicitor and barrister, to control the case for them. While this is expensive, it is advantageous, as court processes are complex and there is a heavy reliance on oral evidence – so selecting the correct questions to ask witnesses is essential.

Legal representatives take on the role of the parties as outlined above and have a number of responsibilities:

- uphold the overarching aim of the *Civil Procedure Act 2010* (Vic) to deal with the case in a just manner
- representing the parties in court
- protecting the rights of individuals by ensuring fair and equal treatment in court
- researching the facts and the relevant law
- deciding the order and presentation of relevant material and witnesses.

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By providing both parties equal representation, it is assumed that the truth will emerge and a just and fair outcome will result. Financial disadvantage or one party appearing without representation may contribute to an unfair decision.

What control do parties have?

Initiate the case

The parties are responsible for initiating the case. In a civil case, it is up to the individual parties involved to determine whether the case should go to court. The plaintiff will initiate the case by the issue of a writ or summons (depending on which court is to hear the case). The individual parties are also responsible for completing the pleadings and discovery stages. These steps ensure that the parties are properly prepared before the court hearing.

The parties initiate the case.

Decide the facts and issues

In a civil case, the parties decide on the relevant points of law to be considered by the court and the relevant facts at issue. In presenting their cases, each party decides which arguments they intend to rely on and selects the evidence that supports these arguments. In a civil case, the parties may disclose their arguments and the evidence they intend to rely on during the pre-trial stages. Parties must decide if they intend to disclose any evidence and when such disclosures should take place.

The parties decide on the issues in the dispute and what evidence to put forward to prove their case.

Role in determining the time, place and mode of trial

The parties also have a role in determining the time and place of the trial. In a civil case, the plaintiff may nominate the court. If the case is to be heard in the County Court or the Supreme Court, they can choose to have the case heard by a judge, or a judge and jury.

The parties determine in what court the trial will take place.

Presenting their case in court

The parties are responsible for presenting their case in court. In most instances, the individual will engage a legal representative to prepare and present their case. A court case often appears, therefore, as a contest between two lawyers. The individual parties have responsibility for arranging and paying for legal representation.

The parties are responsible for presenting their cases.

Is legal representation necessary?

In civil cases, an individual has a right to appear unrepresented in court and tribunals. Litigants may be unable to afford a lawyer, or may not be able to find a lawyer to represent them or may choose to represent themselves in court. However, evidence suggests that if a person does not hire a lawyer to represent their case, they may be disadvantaged. The majority of unrepresented litigants appear in the civil jurisdiction. Courts in the Victorian court hierarchy have rules to help litigants navigate the civil administrative procedures. The courts help self-represented litigants prepare for court, file documents and understand court procedure.

Parties to a dispute are responsible for initiating the case, determining if the dispute will go to court, whether they will have legal representation and the preparation and execution of their case in court.

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News report 5.12

Self-represented litigants seek their day in court

Victorians have the right to represent themselves in court. With the high cost of legal representation and tight legal aid budgets, the number of unrepresented litigants is increasing. But it is not easy.

They have to pit themselves against the complexities of our adversarial legal system, procedural barriers such as legal terms and court rules, and possibly against solicitors and barristers, as well as obey the instructions of magistrates and judges, and seek the help of court officers. Judges may be required to spend more time conducting a hearing because of the lack of legal knowledge of the litigant. The judge or magistrate has a duty to tell the self-representing litigant their rights but cannot give tactical advice.

To help self-represented litigants, the Victorian County Court has a self-represented litigants' coordinator and an instructive video, explaining matters such as who the plaintiff and defendant are, how to prepare the case, what the expectation is, and court rules. A booklet is also available.

When taking on a civil case, the losing party is usually ordered to pay the costs of the winning party, which may be more than the amount in dispute.

The High Court has provided general advice to courts dealing with unrepresented litigants: 'There is no limited category of matters regarding which a judge must advise an unrepresented accused – the judge must give an unrepresented accused such information as is necessary to enable him to have a fair trial.'

The High Court recognised the problem of self-representation in *Neil v Nott* [1994] HCA 23: 'A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated (complicated) by their own advocacy.'

5.12 Civil remedies and their purposes

The main aim of the civil justice system is to uphold an individual's rights, decide fault and return the injured party, as much as possible, back to the position they were in prior to the loss or damage occurring via a remedy. The plaintiff will specify the type of remedy and the amount sought in the statement of claim.

A common remedy is an award of damages. In some cases, the court may make an order requiring the defendant to do or refrain from doing something. It is also possible to request the court order an injunction, requiring the defendant to do or refrain from doing something or an order of specific performance demanding the defendant fulfil a contract.

Damages

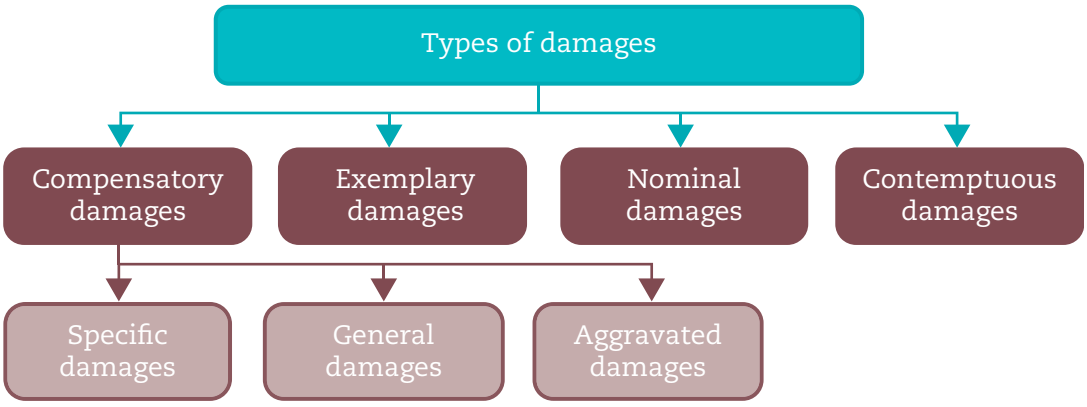

Figure 5.30 Types of damages

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The most common remedy for any civil action is an award of damages. The court generally orders the defendant to pay a sum of money to restore the plaintiff to their original position by providing compensation for the injury or damage suffered. The amount awarded will largely depend on the sum claimed by the plaintiff and the jurisdiction of the court. Damages fall into the following categories.

Compensatory damages: The most common form of damages is an award that attempts to compensate the plaintiff for the injury or damage suffered. Compensatory damages are of three main types:

- **Specific or special damages:** This type of award is made to compensate the plaintiff for items that can be easily measured in terms of money, such as medical and hospital expenses and loss of income.
- **General damages:** It is difficult to accurately determine the cost of pain, suffering and loss of enjoyment of life. General damages are calculated according to the degree that the injury or damage has affected the plaintiff's lifestyle. For example, a permanent leg injury that requires continued physiotherapy and restricts activity may be said to have a greater effect on a young professional footballer than it would on a retired golfer. The footballer's entire sporting career may be at risk, while the impact on the golfer may be to lifestyle rather than career. Consequently, the amount of damages awarded to the two would differ, even though the nature of the injuries may be similar.
- **Aggravated damages:** These damages can be awarded in addition to other damages when the court feels that the plaintiff should be compensated further for the humiliation or emotional harm that the defendant has caused. The purpose of aggravated damages is to show the court's disapproval of the defendant's behaviour towards the plaintiff.

Exemplary damages: (also known as punitive damages) Sometimes the court may intend to make the defendant an example to the rest of the community. In such cases, the defendant may be ordered to pay a large amount of money, either to punish them or to deter others from acting in the same way.

Nominal damages: In some instances, the plaintiff may not have suffered any significant injury, loss or damage. The principle of the matter is more important than the amount of compensation required. In such cases, the court may order the defendant to pay nominal damages to the plaintiff. Nominal damages are awarded to reinforce the legal interest of the plaintiff.

Contemptuous damages: In some cases, the plaintiff may have a valid claim and may even be successful in exercising such rights. However, the court may not be particularly sympathetic. Consequently, the plaintiff may be awarded an amount that may seem to make a mockery of the court action.

News report 5.13

Footballer compensated for knee injury

Junior footballer Beau Hart was 17 when he injured his knee when taking a mark. In seeking compensation, he argued that the injury was caused when he fell on a steel fence which was too close to the boundary line.

The defendants – the Beaumaris Football Club, the Southern Metro Junior Football League and Bayside Council – claimed that the boundary line was in line with the standards set by the Victorian Amateur Football Association: at least three metres from the fence.

Taking into account maps and evidence from witnesses, the County Court's Judge Robert Dyer said the boundary and the fence were about 2.68 metres apart.

Hart required knee surgery, and was in hospital for more than 3 weeks. The accident happened in 2009. Hart is now a qualified carpenter but cannot maintain his work rate and will need a knee replacement. In 2016, he was awarded $589 525.

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Are there any limits on damages?

The *Wrongs Act 1958* (Vic) is the main legislation in Victoria that applies to claims for personal injury or wrongful death in Victoria. The Act deals with injuries other than transport accidents, workplace injuries, or injuries as a result of intentional sexual assault or misconduct.

The following provisions of the *Wrongs Act* apply to injuries that occurred on or after 21 May 2003, or where proceedings were commenced on or after 1 October 2003. According to the Act, personal injuries can take the form of:

- loss of earnings and future earning capacity; however, a court will disregard any amount of the plaintiff's gross weekly earnings that exceeds three times the average weekly earnings
- the maximum amount of damages for non-economic loss was increased in 2015 to $577 050
- damages for pain and suffering, although they are only recoverable where a plaintiff has suffered a 'significant injury'. The minimum level for recovery of damages is:
  - an impairment of 5% or more for spinal injury, as set out in the *American Medical Association Guide to the Evaluation of Permanent Impairment*
  - an impairment of 10% or more for a psychiatric injury, as set out in the Clinical Guidelines to the Rating of Psychiatric Impairment; arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth; or the injury is the loss of a breast.

Injunctions

An injunction is a court order that requires the defendant to do something or to refrain from doing something.

In certain circumstances, an award of damages is inappropriate. This may be the case when the plaintiff is trying to prevent the defendant from doing something or force the defendant to do something. In these circumstances, an injunction may be a more appropriate remedy. An **injunction** is an order awarded against the losing party in a civil action that commands or prohibits certain behaviour.

When an injunction orders the defendant to perform some action – such as fulfilling the terms of a contract – this is known as a 'mandatory' or 'compulsive injunction'. Injunctions can be temporary or ongoing. An injunction that is temporary is known as an 'interlocutory', 'provisional' or 'interim' injunction. These injunctions are issued before a case has been finally decided to prevent a party from continuing an action before or during the court hearing. Injunctions that have an ongoing effect are referred to as 'perpetual injunctions'.

Do civil remedies achieve their purpose?

Damages	Injunctions
YES • Damages are effective in cases involving economic loss, particularly cases where the specific value of the damage can be clearly identified, such as a debt owing or loss of wages. • It may be possible to measure an economic loss such as wages. **However** • Determining the level of damages for pain and suffering and loss of future earnings is difficult to calculate. • The ability of damages to restore the plaintiff to their original position depends on the nature of the damage suffered. For instance, in the case of the loss of a limb, the loss of a loved one, or stress and anxiety it may be difficult to calculate a monetary value – nothing will restore the plaintiff to their original position. • In some instances, Acts of Parliament, such as the *Wrongs Act 1958* (Vic), place restrictions on the amounts that can be awarded. This may mean that the plaintiff is not fully compensated for the damage suffered. • Taking a case to court can be a very time-consuming, stressful and costly process. Damages cannot compensate for these factors.	**YES** • An injunction can restore a plaintiff to their original position by ordering the defendant to fulfil an obligation, such as perform their part of a contract. • Injunctions also prevent or stop any further damage. • Orders for injunctions are enforceable in the courts. **However** • Where the actions of the defendant have already caused damage, an injunction will not restore the plaintiff. • The effectiveness of an injunction may depend on the willingness of a defendant to comply with the injunction. • The enforcement of an injunction can be time-consuming and costly.

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Other remedies

Orders of specific performance

In cases involving breach of contract, the plaintiff may want the defendant to fulfil the contract rather than pay damages. In such a case, the court can grant an order for specific performance.

A specific performance order requires that the defendant fulfil a contract.

Restitution

If the defendant has property belonging to the plaintiff, the court may make an order of restitution. This compels the defendant to return the property.

Restitution requires the defendant to return property to the plaintiff.

Rescission

In a dispute involving a contract, a breach of a condition of the contract may result in the court making an order to rescind or cancel the contract. Generally, such a rescission order is not made unless the parties can be restored to their original position before the contract. However, legislation does allow for rescission orders to be made in some circumstances, even if neither party can be fully restored to their original position.

Rescission cancels a contract in circumstances where the plaintiff can be returned to their original position.

News report 5.14

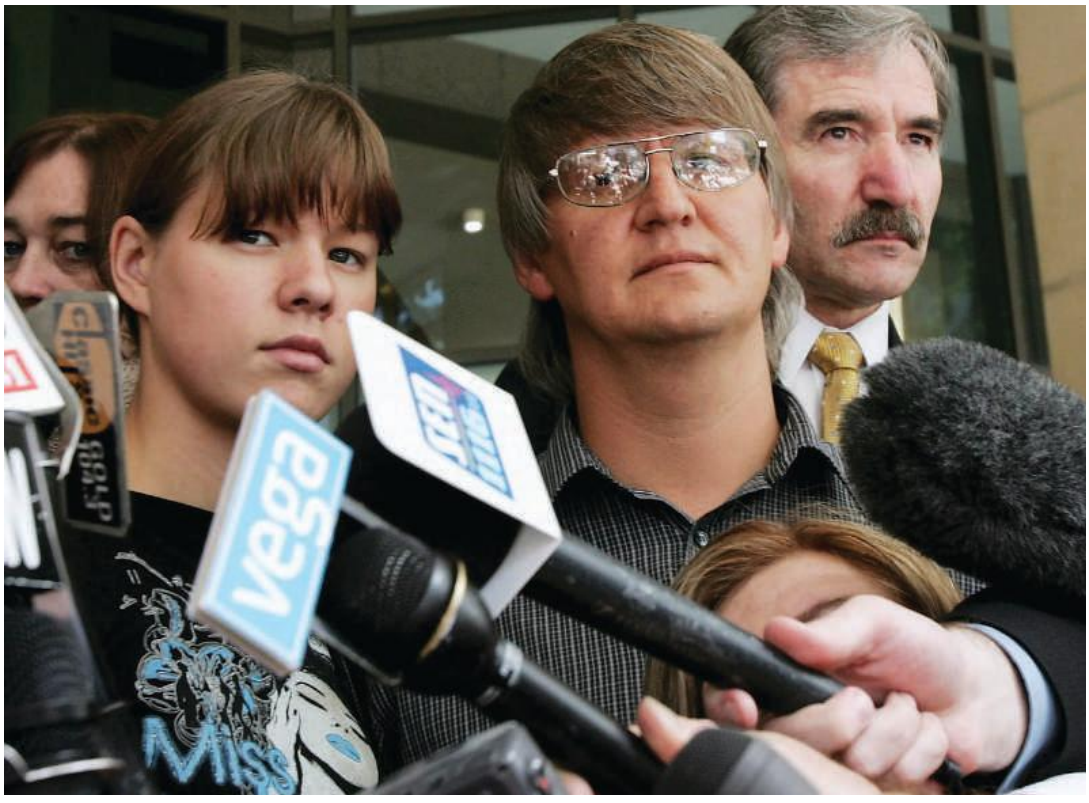
Wedding cake fall leads to damages

The father of the bride was placing a wedding cake in the boot of his car when he fell and landed in a sunken garden bed. He injured his arm and shoulder, requiring surgery.

Glenn Turner, a diesel mechanic, sued the Harrington Grove Country Club, in Sydney's southwest, and architectural firm Hassell.

Judge John Hatzistergos, in the NSW District Court, ordered the club and Hassell to pay Turner $216 000 plus his legal costs. He said the depth of the garden bed was not obvious and the risk of serious injury was high.

An award of more than $250 000 would have been made, the judge said, except that Turner's stepping onto the kerb behind his car was considered contributory negligence.



Ukrainian swim coach Mihail Zubkov and his daughter Kateryna face the media outside the Melbourne Magistrates' Court on 29 March 2007 after an interim intervention order against Mihail was dropped. The intervention order had been issued by the court after Mihail was filmed having a physical altercation with Kateryna before her World Swimming Championships heat.

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News report 5.15

First cancer lawsuit over weedkiller Roundup filed in Australia

Michael Ogliarolo, 54 years of age, launched legal action in the Supreme Court with a writ filed on 4 June 2019. He is suing agribusiness giant, Monsanto, claiming his cancer was caused by the use of the herbicide Roundup.

Mr Ogliaro, represented by his lawyer, Mr Tony Carbone, owned a landscaping and gardening business until 2015 when he had to retire due to ill health. As part of his work, Mr Ogliarolo would mix Roundup and apply it to weeds.

Mr Carbone said that Monsanto failed to warn his client that the herbicide was dangerous and was capable of causing serious harm. The plaintiff claims there were no warnings on the label to say '…wear a mask, wash your hands…'. It is being claimed that, as a consequence, Mr Ogliarolo was diagnosed with non-Hodgkins lymphoma (NHL).

Mr Cabone said that they would be asking for exemplary damages in this case.

Monsanto is facing thousands of actions in the US, which is prompting Australian cases. US courts have largely found against the agricultural chemical company because they did not give proper warning to wear protective clothing when applying the weedkiller. Bayer – which owns Monsanto – is wanting to settle a mass-tort litigation in the US with an estimated 75 000 claimants.

Class action expert Peter Cashman said that any settlement in the US would not have an impact on a case going to trial in Australia.

John Fenton, a 57-year-old from Robe, South Australia, is now the lead plaintiff in a class action against Monsanto. He believes his NHL diagnosed in 2008 was caused by glyphosate, the active ingredient in Roundup. He grew up in a farm and owned a weed-spraying business for six years; '…our predominant

chemical was Roundup,' he said. Heather Slade, also diagnosed with NHL, started using Roundup in the 1970s, 'There was nothing at all saying to use protective gear and that sort of thing – everyone just sprayed.' There are currently about 150 plaintiffs in this class action ranging from farmers, council workers, hobby farmers and ordinary mums and dads.

The first directions hearing in the class action was held in the Federal Court in December 2019. It is alleged that Monsanto misled users of the product by suggesting that glyphosate, the active ingredient in Roundup, was safe and did not pose a health risk to those who followed the company's product safety directions.

A second class action with about 100 plaintiffs was lodged in Victoria's Supreme Court in December 2019. The Federal Court and the Victorian Supreme Court will liaise on 23 March to assess the situation regarding the two separate class actions. 'The two courts need to assess the multiplicity across the two cases and if they decide they are similar enough then they could be merged into one action,' a lawyer for the first action stated.

Sources (adapted): 'Australia the next legal battleground over claims Monsanto weedkiller Roundup causes cancer', Jess Davis, ABC News, *23 February 2020*

Activity 5.11 Folio exercise

Read News report 5.15 'First cancer lawsuit over weedkiller Roundup filed in Australia' and answer the following questions.

1 Who are the parties in each of the disputes mentioned in this news report?
2 What is a class action? Explain the advantages for the plaintiffs and the legal system in forming a class action.
3 Describe the purpose of a directions hearing. Discuss the responsibility of the judge in managing a dispute during the pre-trial stage.
4 Who will bear the burden of proof in a civil case?
5 Analyse the impact the Limitations of Actions may have on these cases proceeding to trial.
6 Explain one way the parties in these disputes will benefit from the arrangement of the courts in a hierarchy and the extent to which this promotes one principle of justice.
7 Why are these disputes not appearing before the Victorian Civil and Administrative Tribunal?
8 Discuss one advantage of a jury deliberating should a case proceed to trial.
9 Justify why mediation OR conciliation may be most appropriate method to resolve civil disputes such as these.
10 Describe the remedy most likely to be awarded in the Roundup case if Mr Ogliarolo is successful. Evaluate the ability of the remedy to achieve its purpose.

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News report 5.16

Geoffrey Rush defamation case: Murdoch-owned *Daily Telegraph* in Sydney found to have behaved in 'recklessly irresponsible' journalism

News Corp has been ordered to pay more than $850 000 plus possibly millions more after a court found the Sydney's Daily Telegraph defamed him. Geoffrey Rush sued the News Corp-owned *Daily Telegraph* newspaper and journalist, Jonathon Moran, over an article that alleged he had sexually harassed and inappropriately touched a female co-star during a Sydney production of King Lear. The article was published on 30 November 2017.

Rush claimed the article, headed 'King Leer', conveyed the imputation that he is a 'pervert', a 'sexual predator' and 'committed sexual assault'. The *Daily Telegraph* is using the defence of truth.

When determining whether defamation has occurred, the judge needs to determine whether the imputations (or claims) – that Rush was a 'pervert', 'predator' and committed sexual assault during the King Lear production – are true in general.

In a damning judgment, Federal Court judge Michael Wigney, said the reports were 'a recklessly irresponsible piece of sensationalist journalism of the worst kind.'

Justice Wigney awarded more than $850 000 in compensation for aggravated damages. He reserved an assessment of further compensation for special damages, which would be based on expert advice that Rush would likely not receive any 'real' offers of work for 12 months and would likely get 50% of his usual rate for the first 12–18 months after that, and then 75% for the 18–24 months. The size of the payout is up to the judge and, based on Rush's loss of past and future earnings, Judge Wigney awarded $2.9 million.

The article was published in November 2017. Rush lodged his defamation action in December 2017, with the trial beginning in the Federal Court in October 2018. An appeal was lodged in May 2019 and heard by the full bench of the Federal Court in a two-day hearing in November 2019.

Tom Blackburn SC, counsel for Nationwide News (parent company of News Corp), challenged the judgment of defamation and the award of $2.9 million as being 'excessive'. Criticism of Justice Wigney's tone of voice and 'apprehended bias' were also raised, but later withdrawn.

Judgment has been deferred to a later date.

Activity 5.12 Folio exercise

Read News report 5.16 'Geoffrey Rush defamation case' and answer the following questions.

1 Identify the plaintiff and defendant in this case.
2 Explain the central issues to this case. You may have to carry out some research to answer this question.
3 Who determined the facts of the case? Was there a jury?
4 Why was the defendant found liable in this case?
5 Describe the two types of remedies awarded to Rush. Discuss the ability of each remedy to achieve its purposes.
6 Why do you think this case went to a court rather than to mediation? Explain your response.
7 Although Rush won the defamation case, Nationwide News, the parent company of News Corp, lodged an appeal. Outline the factors that could affect Rush achieving justice in this dispute.
8 Investigate the outcome of the appeal by News Corp. In your opinion, was justice served?

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Key point summary

Do your notes cover all the following points?

Evaluation of the civil justice system

- ❑ The principles of justice and civil law
  - Fairness
  - Equality
  - Access
- ❑ Types of civil law
- ❑ Purpose of civil law
- ❑ Features of civil law
- ❑ Key concepts in civil law
  - burden of proof
  - standard of proof
  - representative proceedings
- ❑ Factors to consider when initiating a civil claim
  - Negotiation options
    - self-help
    - mediation
    - conciliation
  - Costs
    - pre-trial
    - trial
    - post-trial
  - Limitation of actions
  - The scope of liability
  - Enforcement of issues
- ❑ Methods of dispute resolution
  - Mediation
    - key features of mediation
    - role of mediation
    - appropriateness of mediation
      - when appropriate
      - when not appropriate
    - Use of mediation in the courts
    - Use of mediation at VCAT
    - Dispute Settlement Centre of Victoria
  - Conciliation
    - key features of conciliation
    - role of conciliator
    - appropriateness of conciliation
      - when appropriate
      - when not appropriate

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- Arbitration
  - key features of arbitration
  - role of arbitrator
  - appropriateness of arbitration
- Judicial determination
  - key features of judicial determination
  - role of judicial officer
  - appropriateness of judicial determination

❏ Institutions that resolve civil disputes
- Consumer Affairs Victoria (CAV) – example of a complaints body
  - purposes of CAV
  - criteria to access CAV
  - dispute resolution methods at CAV
  - appropriateness of CAV
- Victorian Civil and Administrative Tribunal (VCAT) – example of a tribunal
  - types of disputes heard, including Divisions and Lists
  - purposes of VCAT
  - dispute resolution methods at VCAT
  - appropriateness of VCAT
- Courts
  - methods of dispute resolution used
  - appropriateness of courts in civil dispute resolution

❏ Reasons for a court hierarchy
- administrative convenience
- appeals

❏ Civil pre-trial procedures
- examples of civil pre-trial procedures
- purposes of civil pre-trial procedures

❏ Judicial powers of case management
- Meaning
- Powers of the judiciary
  - directions hearings
  - mediation
  - other directions

❏ Responsibilities of key personnel in a civil trial
- judge
- jury
- the parties – plaintiff, defendant
- legal practitioners – solicitor, barrister

❏ Civil remedies
- Purpose of civil remedies overall
  - damages
  - types of damages and their specific purposes
  - injunctions
  - specific purpose of injunctions
- Do civil remedies achieve their purposes?

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End-of-chapter questions

Revision questions

1 Define the term 'equality' as it relates to civil law.

2 Distinguish between the burden of proof and the standard of proof in a civil dispute.

3 Outline two factors that a person may need to consider before proceeding with civil action.

4 Discuss how representative proceedings enhance the achievement of justice in the civil justice system.

5 Using examples of courts that you have studied, explain the reasons for a court hierarchy.

6 Discuss what methods could be used to resolve civil disputes.

7 Discuss why alternative dispute resolution methods – such as mediation, conciliation and arbitration – are suitable for resolving civil disputes.

8 Outline how the role of the mediator and conciliator differ.

9 Explain the role of VCAT.

10 Discuss the appropriateness of CAV.

11 To what extent do courts use a range of dispute resolution methods?

12 Outline the responsibilities of the following personnel in the resolution of a civil dispute:

- a Judge
- b Jury
- c The parties
- d Legal practitioners.

13 Discuss the appropriateness of VCAT and the courts as dispute resolution bodies.

14 Explain how the judicial powers of case management promote fairness, equality and access to the civil justice system.

15 Outline the purpose and function of a directions hearing.

16 With the use of an example, outline the purpose of civil remedies.

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Practice exam questions

1 Define the following terms:

   a representative proceedings

   b compensatory damages

   c arbitration

   d case management [4 marks]

2 Outline the role of CAV in the resolution of a civil dispute. [2 marks]

3 Explain the role and responsibilities of the judge in the civil justice system. [4 marks]

4 What factors need to be considered when initiating a civil claim? How can these factors affect whether a person goes ahead with the claim? [6 marks]

5 Discuss how the use of mediation as a dispute resolution method assists in overcoming costs, time delays and access to the civil justice system. [8 marks]

6 Discuss three factors that an individual would need to take into account before initiating a civil action. [6 marks]

7 Explain the standard and burden of proof in a civil case. [2 marks]

8 Carefully read the following case study and answer the questions that follow.

   A man successfully sued a ski-lift operator and was awarded $278 000 compensation after being injured during a ski lesson. The lesson was meant to be conducted on conventional runs. However, some of the skiers in the group became bored and the group was taken to a 'terrain park' used by experienced snowboarders. The man broke his back after falling from a ski jump in the terrain park. He was rushed to hospital and underwent a spinal fusion involving the insertion of screws and titanium plates to prevent the vertebrae from collapsing onto his spinal cord. Following the court decision, the man suggested that this was a case of an instructor not properly looking after students. The jury recognised that ski instructors, like other teachers, had a duty of care to their students.

   a Describe the purpose of the processes leading up to the hearing of such a civil claim in a higher court. [6 marks]

   b Explain how a directions hearing would have assisted in the preparation of this case for trial. [2 marks]

   c In this case, a remedy of compensatory damages has been awarded. Explain what compensatory damages are. Describe the purpose of two other remedies that may be awarded by a court. [6 marks]

   d Discuss two ways this case may benefit from the arrangement of courts in a hierarchy. [6 marks]

9 Explain the purpose and appropriateness of CAV. [6 marks]

10 To what extent do the processes and procedures for hearing a civil claim contribute to the effective operation of the civil justice system to achieve the principles of justice? [10 marks]

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Chapter 6

Unit 3 – Area of Study 2

Evaluation of the civil justice system

The Victorian civil justice system aims to restore a wronged party to the position they were originally in before the civil wrong occurred. It also aims to protect the rights of individuals and uphold the principles of justice: fairness, equality and access. The last chapter examined key concepts of civil law, along with examples of the types of institutions available to settle civil disputes, the procedures, methods used, and the types and purposes of civil remedies.

This chapter looks at the principles of justice and how well the civil justice system upholds those principles in Victoria. In particular, the factors that affect the ability of the civil system to achieve those principles of justice – costs, time and accessibility – are examined. Recent and recommended reforms to enhance the ability of the civil system to deliver justice are evaluated.

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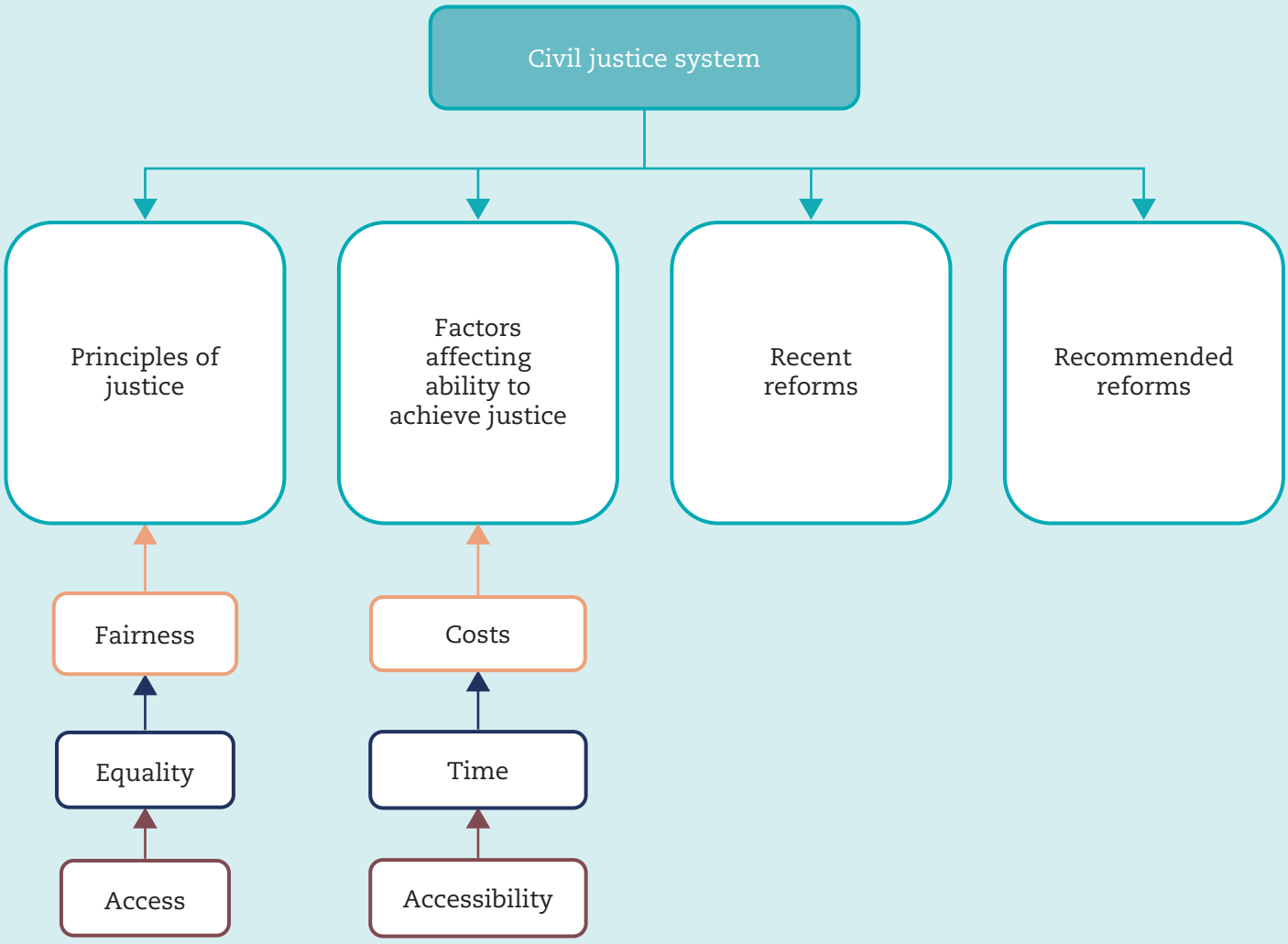

Key terms

access a principle of justice achieved if a range of institutions, specialist key personnel and methods to settle disputes are provided within the legal system

contingency fees lawyer fees only paid if a case is won; associated with 'no win, no fee'

equality a principle of justice achieved if all citizens are provided with equal legal opportunities and equal treatment under the law

fairness a principle of justice achieved through the impartial treatment of all people under the law, without fear or favour

missing middle people who do not qualify for legal aid but are not wealthy enough to afford a lawyer or to take legal action; the group most impacted by legal costs

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6.1 Justice in the civil justice system

The key aim of our civil justice system is to resolve disputes while upholding the principles of justice. The concept of justice implies that all citizens will receive fair and equal treatment before the law with access to resources including complaints bodies, tribunals and courts to protect their legal and human rights. However, a number of factors impact on the system's ability to uphold these principles of justice for all. These factors challenge the government and the Department of Justice and Community Safety to find innovative ways to reform the system to enhance the civil justice system's ability to support the principles of justice.

A legal system must have the majority of the population support it, while the community in general must have confidence that justice is not only being served, but seen to be served.

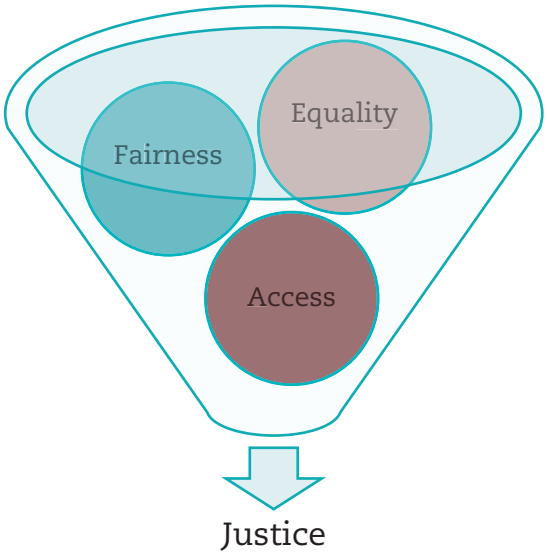

Figure 6.1 The three principles of justice

Fairness in the civil justice system

Fairness is a principle of justice. It refers to the impartial treatment of all parties in the civil law process.

Fairness refers to impartial treatment for all parties in civil law. This means that:

- a party who feels they have had a breach of their rights under civil law is able to seek justice
- a range of institutions and methods of dispute resolution are available
- a third party who has expertise in their field, and is independent and impartial, is able to assist in the resolution of the dispute
- the burden of proof is on the plaintiff
- representative proceedings are available to enable all parties to a civil wrong to have access to the law while minimising costs and delays
- procedural fairness applies in that the law and rules apply to both parties
- outcomes of disputes are consistent.

Equality

Equality is a principle of justice in the civil law system. It refers to the provision of the same legal opportunities and treatment for all Victorians without favour.

Some groups in our society are more vulnerable and need assistance to put them on a level playing field.

Equality refers to the provision of equal legal opportunities and equal treatment for all without favour. It does not, however, mean that all people are treated the same. As discussed in previous chapters, some groups in our society are more vulnerable and need assistance to put them on a level playing field.

In civil law, equality means that:

- both parties have an equal opportunity to present their evidence and arguments
- legal advice and representation is available
- for those who cannot afford legal representation, or when it is not allowed in the particular method of resolution, the third party is able to provide assistance
- information, advice and legal resources are available to all
- disadvantaged and vulnerable people – such as the homeless, disabled, Indigenous peoples and those in lower income groups – are provided with the resources needed to seek justice.

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Police evict a homeless man from a makeshift camp that was erected outside Flinders Street Station in Melbourne.

Access

Access refers to the provision of advice, resources, institutions and personnel to settle disputes in civil law. It also means that people are aware that their rights have been breached and that resources are available to pursue justice.

This can be shown through:

- the range of dispute resolution bodies such as complaints bodies, tribunals and courts
- a range of methods available within dispute resolution bodies that can meet the specific needs of the parties, such as mediation, conciliation, arbitration and judicial determination
- the institutions that provide advice, e.g. community legal centres, Victoria Legal Aid, the Law Institute of Victoria
- pre-trial procedures that ensure that all evidence is available to parties so they can best present their side of events. It will also ensure delays and costs are minimised
- the different levels of formality within the dispute resolution methods.

Access is a principle of justice in the civil law system. It refers to the provision of advice, resources, institutions and personnel to all Victorians to settle disputes. It also means that people are aware that their rights have been breached and that resources are available to pursue justice.

The legal system provides for effective access to mechanisms for the resolution of civil disputes through its processes, institutions and systems of review.

Family lawyer Carina Ford speaks to the media outside the Federal Court in Melbourne after a Tamil asylum seeker family, including two Australian-born children, temporarily avoided deportation to Sri Lanka.

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6.2 Factors affecting the ability of the civil justice system to achieve justice

The present institutions, personnel and methods used in the civil justice system successfully promote the principles of justice to a significant extent. However, the civil area of law is under increasing pressure to ensure the principles of justice are maintained for all Victorians, especially for vulnerable groups in society.

In particular, three factors affect the ability of the civil justice system to achieve the principles of justice. These are:

- costs
- time delays; and
- accessibility of the legal system to all Victorians.

Each of these factors will be discussed in terms of the effect they have on the ability of the civil law system to achieve the principles of justice. We will also consider recent reforms introduced to overcome the problems and discuss future recommendations. In each case, a discussion of the effect of these changes and recommendations on the system's ability to achieve justice will be undertaken.

Costs

The high costs associated with civil claims are the most significant factor impacting the ability of the civil law system to achieve just outcomes. In Chapter 5, we considered the three main types of institutions: complaints bodies (e.g. CAV), tribunals (e.g. VCAT) and courts. We explored the services each institution offers, their jurisdictions and the different methods each body used and their related costs. CAV provides free legal advice to all Victorians and free conciliation to all consumers. VCAT provides a free or low-cost fee structure based on income. We learned that the Magistrates' Court offers free mediation for disputes less than $40 000.

Despite this wide availability of dispute resolution, the Access to Justice Review Summary Report 2016, published by the Department of Justice and Regulation, found that the majority of people in Australia could not afford legal assistance. The report referred to this group as the '**missing middle**', meaning they did not qualify for legal aid and were not rich enough to afford a private lawyer.

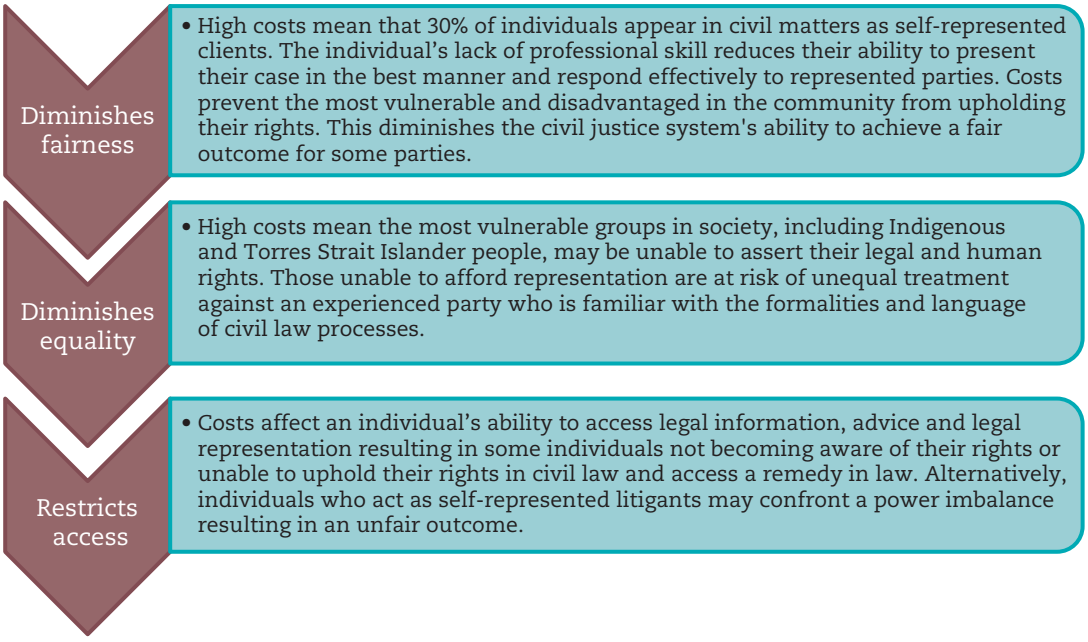

Figure 6.2 The negative impact of costs on the civil justice system

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The impact of the costs associated with initiating civil claims significantly affects the ability of the civil justice system to achieve fair, equitable and accessible outcomes. The effect of costs may impact the system in both negative and positive ways. Figure 6.2 outlines the main negative impacts.

On the other hand, in some instances costs may serve as a beneficial mechanism in the civil justice system and contribute to achieving the principles of justice. Imposing costs on services may assist users in selecting the most appropriate service for their needs. Costs also ensure that, where appropriate, users bear some of the financial burden of those services to the extent that they are able. High court costs have also resulted in the growth of alternative dispute resolution methods that have a positive impact on the system's ability to achieve the principles of justice as well as enabling a dispute to be resolved with less animosity.

Any evaluation of the civil justice system demands that consideration be given to the alternative options that exist to resolve civil disputes other than through the courts.

The impact of the costs associated with initiating civil claims significantly affects the ability of the civil justice system to achieve fair, equitable and accessible outcomes.

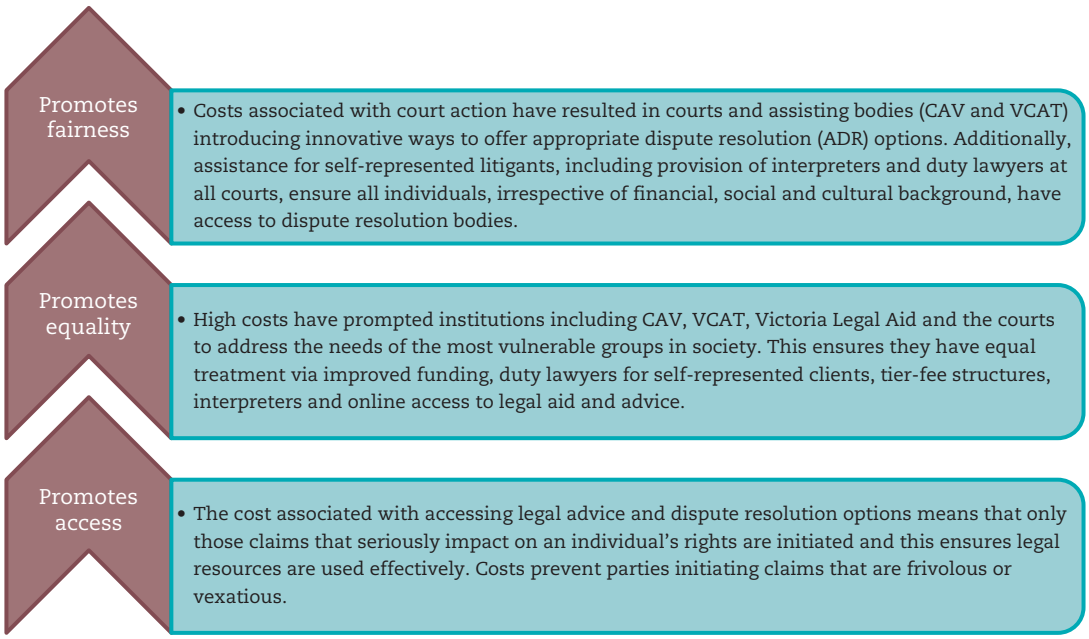

Figure 6.3 The positive impact of costs on the civil justice system

Legal brief 6.1

Do costs limit the civil justice system?

Costs can deter people from accessing dispute resolution.

Why are costs a problem?

The costs of taking a civil action are high and increasing. This can deter individuals from exercising their rights and therefore limit their access to dispute resolution. If individuals are not able to exercise their rights, the civil justice system cannot operate effectively.

Who can afford a civil case?

A study found that most actions involving claims for damages for personal injuries are brought by ordinary people in the community. These people are neither very rich nor very poor. This may be partly due to the growth in the practice of solicitors acting on alternative fee arrangements. Solicitors acting on such arrangements are willing to take the work on the basis that if the case is lost, they will not expect to recover their fees. The success rate of such cases is high. However, the situation in relation to commercial claims is different. Most plaintiffs in these actions fall into the 'very rich' category. In practice, many of these plaintiffs are corporations.

What effect do pre-trial procedures have on costs?

Costs include the cost of legal assistance, the cost of running pre-trial procedures and costs associated with self-represented people.

Recent attempts to increase access to justice have seen an increase in judicial management of cases. This includes the use of directions hearings (a pre-trial hearing conducted by a judge that allows the court to establish, for example, timelines for the completion of the pre-trial stages). However, directions hearings can add to the costs of justice. When a lawyer attends a direction hearing the 'meter is on'. Furthermore, the practice of charging on the basis of time spent rewards delay and

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inefficiency. Changing the system of charging for legal services may result in a more efficient system of litigation.

What impact does self-representation have on costs?

A self-represented litigant is a person who does not have legal representation. A self-represented litigant imposes additional work on the courts. The civil justice system operates on the presumption that lawyers will represent parties in court. Individuals representing themselves are less likely to be adequately informed or prepared. They may lack knowledge of court procedures, they may not understand the law and legal terminology and they often will not have the skills to present their case; but if court officials or judges help them the system is vulnerable to claims of bias.

When one party has no legal representation, it may increase the costs for all parties involved. A self-represented litigant may require more pre-trial procedures. The issues in the case may be poorly defined and require further clarification. There may be more time and expense spent in responding to unclear or irrelevant evidence.

What is the cost to the community?

There are too many civil cases that take longer than is really needed to reach a resolution. These cases consume more public and private resources than is desirable. Longer cases result in delays in the court system and the need for increased court services.

If the cost of litigation is too great, the integrity of our civil justice system will suffer. The public will see the system as ineffective and seek other means to resolve their disputes.

How can we reduce costs?

Our methods of trying civil cases need to change. Changes should aim to reduce the costs to the parties in a civil action. Saving costs for litigants would also save costs for the community. Exploring new and innovative methods to resolve civil disputes, such as online dispute resolution options, may result in reducing the costs for parties and save community resources.

Dispute resolution methods

In recent years, alternative dispute resolution methods (also referred to as appropriate dispute resolution methods) have been encouraged. Parties in a civil dispute are free to choose the kind of dispute resolution they want to use. All Victorian courts have adopted ADR methods as part of their case management strategy and encourage parties to seek alternatives to judicial determination. In addition, there is a range of civil matters that can be dealt with by tribunals. These tribunals are an alternative to other dispute resolution methods and parties frequently do not require legal representation.

The impact of costs could be reduced by the use of other dispute resolution methods, providing legal insurance, the use of contingency fees and increasing access to legal assistance.

The *Access to Justice Review Summary Report 2016* referred to the 'missing middle' – those people who do not qualify for legal aid but were not rich enough to afford a private lawyer.

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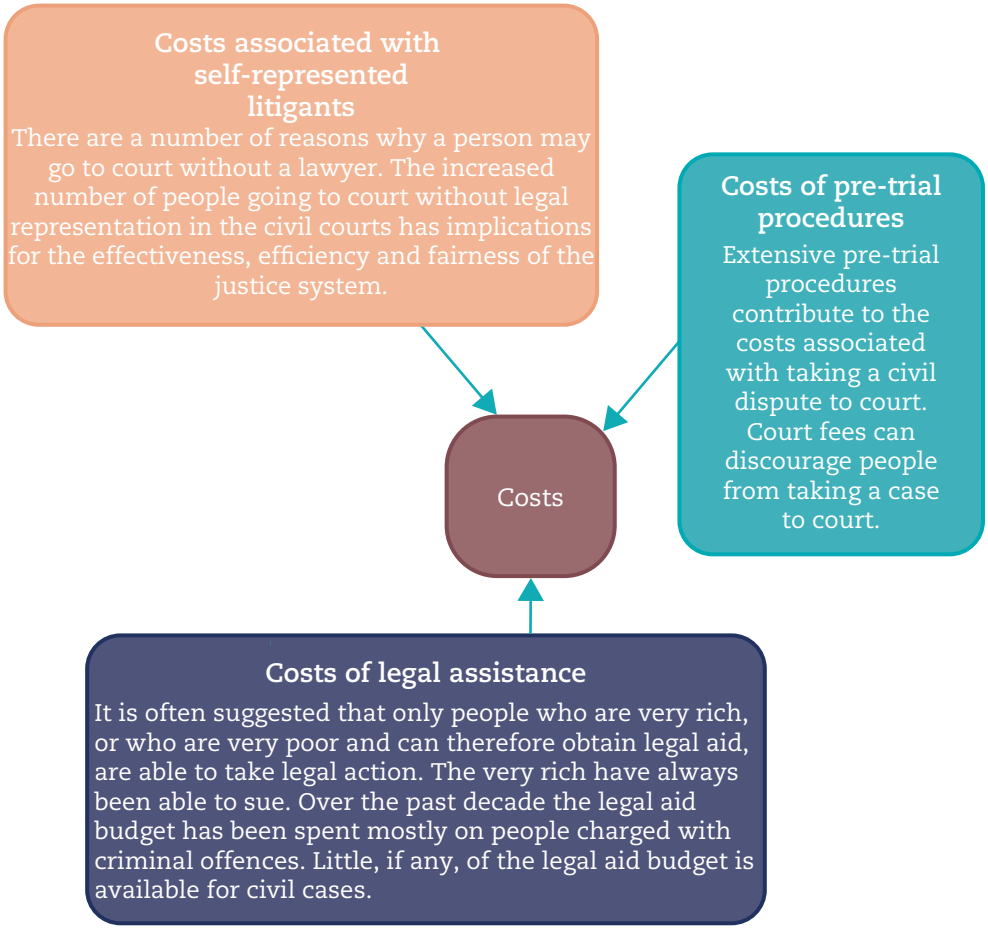

Figure 6.4 Costs involved in a civil dispute can have impacts on the parties involved and on the civil justice system.

Legal insurance

It has been suggested that one way to improve access to justice would be to introduce a system, similar to that in Germany, of publicly-funded legal insurance. This would guarantee that all people could afford to take legal action. But what would be the consequences for the court system? The number of judges per head of population in Germany is greater than the number in Australia. Would it be possible to increase access to justice and allow more people to go to court without increasing the number of courts and judges? Would it be worth increasing the numbers if the result was more efficient and effective use of our legal processes?

The use of funding arrangements

Both lawyers and litigation-funding companies can provide support for a client to bring their case. However, support provided by a lawyer is different from funding provided by a litigation-funding company. Litigation-funding companies charge a fee which is a share of the amount awarded by the court to the plaintiff. Lawyers are prohibited from using this type of charging arrangement.

Litigation-funder agreements may increase the capacity of individuals to exercise their rights through the courts. Litigation funders provide security for costs and agree to pay any adverse costs ordered by the court. The funder is paid a share of the amount recovered and is not paid if the case is unsuccessful. It has been suggested that the use of litigation-funder arrangements could increase access to justice.

In 2017, the Victorian Law Reform Commission began an inquiry into litigation funding and group proceedings. The Commission was asked to report on:

- the supervision of litigation funders, including clear disclosure requirements, limits on the success fees that can be charged by a litigation funder to plaintiffs when a decision or settlement results in a payment to the plaintiffs by a defendant, and obligations to disclose funding arrangements
- whether the existing prohibition on law firms charging contingency fees would help mitigate the issues presented by the practice of litigation funding (case selection, costs and client interests).

For more information on the VLRC inquiry see www.lawreform.vic.gov.au.

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Conditional billing arrangements

Some firms offer a 'no win, no fee' approach, also known as 'conditional billing'. The law firm Slater & Gordon pioneered this approach in Victoria in 1994 and has taken out a trademark on their No Win – No Fee™ scheme. The scheme was introduced in response to growing community concern about access to justice. The No Win – No Fee arrangement provides that if a claim is not successful, the plaintiff is not required to pay any legal fees to the firm. However, the plaintiff may still be required to pay 'disbursements' (costs such as court costs or witness expenses that a legal representative has to pay and so should reasonably expect to be reimbursed for) and bears the risk of paying the other party's costs if they are unsuccessful in their claim. If the claim is successful, the plaintiff is charged legal fees. These fees may include an 'uplift' (or success) fee. In Victoria, an uplift fee of up to 25% is allowed. Conditional billing is most commonly used in personal injury, workers' compensation, disputes over wills and defamation cases.

Introduction of electronic case management

In Australia, large law firms have been involved in eDiscovery, or electronic case management, for some time. eDiscovery – 'electronic discovery' – refers to the process of collecting and processing material for use in civil litigation electronically. The Supreme Court Practice Notes require the use of electronic documents to reduce costs.

Increase access to legal assistance

- Limitations in legal aid funding and the need to help people access the legal system when they do not have legal representation has resulted in a number of changes. Legal aid recommendations to improve access to justice include:
- **Extra investment from State and Federal governments:** Additional funds would allow more services, which would meet the needs of broader groups of people. Victorian Legal Aid called for a further investment of almost $72 million per year from Federal and State governments.
- **Expand key services:** The self-help website and Legal Help phone line offer advice and referral information in over 20 languages. Improvement to this service would greatly enhance access for individuals seeking assistance to address civil issues.
- **Lower the eligibility criteria to ensure that more people qualify for assistance:** The means-test criterion means that services are only available to the most disadvantaged and vulnerable groups. The eligibility criteria need to realistically reflect the level of disadvantage and the cost of legal assistance.

Civil pre-trial procedures allow for the timely resolution of disputes by ensuring that the parties are fully informed and by encouraging out-of-court settlements.

Civil trial procedures provide for a fair and unbiased hearing before an independent and impartial third person. The appeals process allows an independent review of a decision.

Table 6.1 The use of electronic documentation in civil disputes reduces costs and improves efficiency in case management

Principle	Assumptions
Dealings in hard copy are to be the exception rather than the rule in all aspects of civil litigation in the court. Converting electronic documents into hard copy requires justification.	Communications and dealings in modern society are predominantly conducted electronically. A large number of discoverable documents are stored by parties electronically.
The inability or reluctance of a lawyer to use common technologies should not mean additional costs for other parties. Sourcing technology services through a third-party provider is accepted practice.	The use of common technologies is a core skill for lawyers and a basic component of all legal practice, whether provided in house or through a third-party provider.
Wherever possible, parties are to exchange documents in a useable, searchable format or in the format in which the documents are ordinarily maintained. The exchange format should allow the party receiving the documents the same ability to access, search, review and display the documents as the party producing the documents.	Documents in electronic form offer greater functionality and efficiency in dealing with information.
An unreasonable failure to cooperate in the use of technology which occasions additional costs will constitute a breach of the overarching obligations of the parties.	Co-operation between the parties in the use of technology reduces costs.
Parties should be prepared to address the court on the use of technology at an early stage of a proceeding.	The early and consistent use of technology in a proceeding may produce efficiencies for both the parties and the court.
The increased capacity to store, search and access a large volume of documents through the use of technology does not relieve parties of the obligation to limit the presentation of documentary evidence to that which is necessary and proportionate to the conduct of the case.	Parties will refine the documents to be presented to the court to those which are necessary for the conduct of the proceeding.

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Time delays

The time it takes to resolve civil disputes has been an ongoing concern for those seeking to improve our civil system of justice. For litigants, the concern may relate to the wait for personal injury compensation. A case may be weakened where witnesses die or forget evidence.

- **Delays in civil cases hinder the timely resolution of disputes**. Delays can be due to the actions of the parties, the range of pre-trial procedures that need to be completed, or the workload of the courts.
- **Delays result in uncertainty and anxiety for all parties.** For the courts generally, delays may harm their public reputation as effective institutions and deter individuals from exercising their rights. However, it is important to remember that courts (and other dispute resolution bodies) aim to provide a definite answer to important issues between disputing parties. Gathering relevant information, and the consideration of that evidence, may take considerable time.
- **The justice system does have a responsibility to reduce 'unacceptable' and 'avoidable' delays.** A number of factors contribute to these sorts of delays, including lengthy pre-trial and trial practices and procedures, insufficient resources (judiciary, court staff, facilities) and lack of court control.

Delays result in further suffering for the plaintiff.

Delays have an impact on the reliability of evidence.

Delays lessen the community's respect for the law.

Delays may be caused by individuals, lawyers, the use of juries, or the workload of courts.

Legal brief 6.2

Do delays limit the civil justice system?

Speedy justice is highly valued in our legal system. It is often said that 'justice delayed is justice denied'. Delays detract from the effective operation of the civil justice system.

Why are delays a problem?

Delays can result in injustice to individuals. For example, a plaintiff who has suffered a personal injury can experience hardship if there is a wait for compensation. A litigant's case may be weakened by delay because witnesses die or forget.

Delays also increase the period of uncertainty for litigants and lead to unnecessary anxieties. Witnesses, including medical practitioners and other experts, incur costs if they have to wait around a court for a long time before being called to give evidence. Delays may also result in general harm to the community through the court not being available to resolve other disputes.

Delays reduce the general community's respect for legal processes and procedures. This deters individuals from using the courts to settle disputes. If people are not able to use the courts to settle disputes, the legal system cannot operate effectively.

But do quick hearings lead to justice? The legal process needs time in order for things to be done properly. A quick resolution could result in a greater injustice. A certain amount of delay is inherent in the system. Court action aims to provide a definite answer to problems. Therefore, it requires careful preparation and consideration.

The question is: when do delays become excessive and intolerable? At what point does the delay limit the effective operation of the legal system? The answer to these questions seems to be that undue delay occurs when, in the circumstances, the lapse of time is both considerable and not essential to a just resolution of the claim.

What causes delays?

Delays result from a combination of factors. Some of the reasons for such delays are outlined below. None of these factors alone leads directly to a delay, but all of them contribute to them.

How do individuals contribute to delays?

The role of the individual in contributing to delays cannot be overlooked. The defendant who seeks legal advice at the last possible moment contributes to delays. They may seek an adjournment so that their case can be properly prepared. The plaintiff who fails to attend a doctor's appointment for an assessment of their condition may prolong pleadings. Human failings, combined with the problems that exist in the structures of our legal system, contribute to significant delays.

How do lawyers contribute to delays?

As in all professions, there are some lawyers who are more efficient and knowledgeable in specialist areas than others. Some lawyers

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are more in demand than others. The workloads of individual lawyers can have an impact on delays in the courts.

There are many steps in the preparation of a court action. Lawyers who have a large workload may need to put off some tasks because of the pressure to have another case ready for court. Solicitors also rely on barristers to draft documents and to give advice in relation to the law affecting their case. Here again there is potential for delay. The barrister is not involved in all the stages of litigation and may take some time to become familiar with the facts. A solicitor may not brief a barrister until just before the hearing. These practices can result in court delays. A deep-pocketed defendant or their insurer may have little commercial motive to resolve claims quickly.

Delays during the actual hearing of a case may result from either a party's lack of preparation or late amendments to pleadings. The use of directions hearings in the pre-trial stages aims to ensure that the parties are adequately prepared for the court hearing.

How can we reduce delays?

One way of reducing delays and costs is to allow the courts greater control. The involvement of courts through the directions hearing process has meant that timelines for the conduct of the pre-trial stages can be established. This has reduced delays in the pre-trial processes.

Over the past 10 years, the Supreme Court of Victoria has introduced a number of initiatives to reduce delays in hearing civil cases. These include:

- **Increased use of technology**: During the Kilmore East bushfire trial, the Supreme Court made sure that the judge, Justice Jack Forrest, had the use of leading-edge technology in a special courtroom with the support of a technical team facing the lawyers. It was found that almost one-third of the predicted court time was saved by using technology in the courtroom.
- **Organising the administration of cases into lists**: 'Lists' are managed in the pre-trial stages using the directions hearing process; all specialist lists are managed by particular judges, with the aim of reducing delays and costs. The Court of Appeal eliminated the automatic right of appeal – appeals now require leave (permission of the Court to appeal the case). Specialist appeal benches have been established: for instance, an insolvency case will have insolvency expert judges.
- **Increased referral of parties to mediation**: Court-annexed mediation, especially using associate judges, is proving effective and beneficial to parties, saving time and money. For instance, in the Commercial Court, it is not unusual, after the plaintiff's case is opened and the defendant responds, that the judge then refers the matter to court-annexed mediation.

Appoint more judges

It is sometimes suggested that the appointment of more judges would help to reduce delays in our court system. The number of judges certainly has an effect on delays. However, the number of judges appointed to the court is not the only factor that determines the amount of 'judge time' in court.

Carmel Barbagallo SC arrives at the West Australian District Court building on 25 November 2019

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Increasing the number of judges in the court would result in considerable expense. When calculating the costs of employing new judges, we must also consider the cost of their associates, tipstaff, court reporters, registrars and other court officials, as well as the provision of facilities.

Extend court sitting times

The average number of days that a judge sits in court depends on the number of days the courts are open. Apart from public holidays, the courts observe a six-week vacation from just before Christmas and another break for the first fortnight in July. A 'vacation judge' is available to hear urgent matters during these times. One way to reduce delays would be to require the courts to operate during these vacation times.

However, judges argue that they will often work during these times on tasks such as writing reserved judgments. The main cause of delay is the difficulty in accurately estimating the amount of judge time needed. If officials knew that a given number of judges would be required at a given time, there would be fewer delays.

Delays could be reduced by appointing more judges, reducing court workload, delegating some functions to court officials, extending the sitting times of courts and/or imposing time limits on some procedures.

Paper-free court

The RedCrest electronic filing system is available to Commercial Court users and plays a crucial role in facilitating the court's objectives of becoming paper-free. It frees up staff from file management and other duties to better manage proceedings, ensuring that cases are moved through the court quickly. The system includes a number of case management efficiencies, such as:

- ensuring a central, secure and verifiable repository of all documents filed in a proceeding
- allowing different levels of access to the file of the judiciary, judicial support, registry staff and legal practitioners
- providing access for judicial officers and associates to materials on the court file at all times, without having to move the file between the registry and the barristers' chambers
- automated notifications to chambers and parties when a new document is filed.

RedCrest's operation in the Commercial Court is unique because, unlike similar court systems, it allows both practitioners and the court to directly interact with the electronic court file. Some of the defining features of this innovation are:

- allowing a user to register a system account and having access rights assigned based on their role in the proceedings
- enabling parties to initiate a case and make payments without having to leave their desk
- facilitating the filing of documents to the court file in real time with email notifications of filings being automatically sent to each Court
- permitting electronic service of documents by the parties.

The system currently accepts filings in all judge-managed matters in the General Commercial, Corporation, Intellectual Property, and Technology, Engineering and Construction Lists.

The Court is committed to the continued improvement of all its systems and processes and has actively encouraged and welcomed feedback from users about RedCrest's functionality.

Activity 6.1 Structured questions

Time and money – civil justice

Read Legal brief 6.1 'Do costs limit the civil justice system?' and Legal brief 6.2 'Do delays limit the civil justice system?' and complete the following tasks:

1 Outline the purpose of two pre-trial processes.

2 Describe how two procedures and/or processes used to resolve civil disputes provide for:
   - fairness
   - equality
   - access.

3 What impacts do delays have on the ability of the civil justice system to achieve the principles of justice?

4 Describe how the costs of litigation affect the ability of the civil justice system to achieve the principles of justice.

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Reforming the civil justice system

Numerous organisations and institutions review and monitor the ability of the civil justice system to achieve the principles of justice and uphold the elements of fairness, equality and access.

In 2016, the Department of Justice and Regulation released The *Access to Justice Review* to the Victorian Government. The report compiled findings based on 'extensive consultation with key stakeholders and the community' on ways to improve access to justice for Victorians.

The purpose of the report was to ensure that individuals with everyday problems, as well as disadvantaged and vulnerable groups, receive assistance when they engage with the law and the justice system.

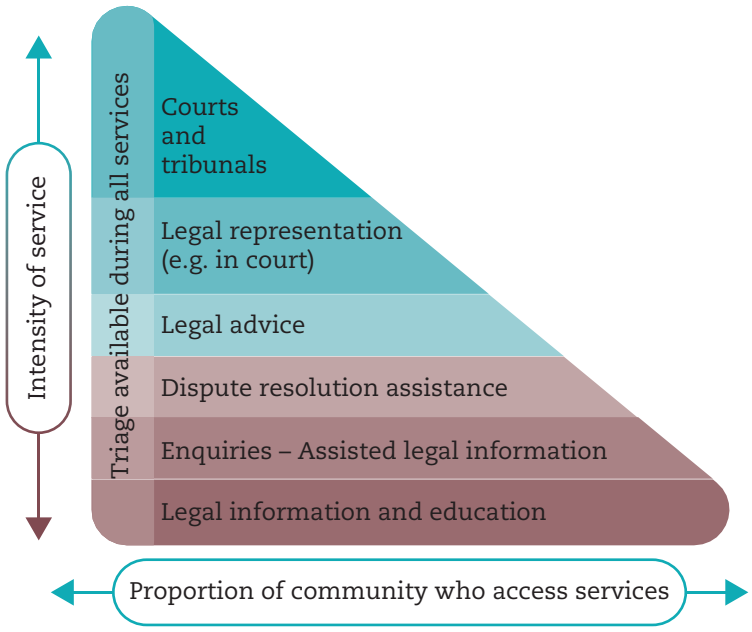
The report made 60 recommendations. It proposed four key strategies:

- **Better information:** Improve systems that provide legal information to the public. This would assist people who are not eligible for assistance but are unable to afford help. Access to relevant information for the 'missing middle' would empower them to solve the issue. It was recommended that Victoria Legal Aid be the central entry point for Victorians seeking legal advice.
- **More flexible and integrated services:** The report recommended a system that catered for a variety of people and problems, at the right time and at the right place. Providing accessible information and dispute resolution processes that are appropriate would help the 'middle group' resolve their claims. The recommendation supports a 'no wrong door' approach, so that people get the advice they need when they need it.
- **Better use of technology:** The report acknowledged the changing expectations the public has around accessing information on mobile devices outside regular business hours. It was recommended that complaints bodies, tribunals and courts make better use of different technological platforms to access and be accessed by the community. For example, an online tool that connects *pro bono* legal practitioners to community legal centres would improve the public's access to information and dispute settlement.
- **Stronger leadership, governance and linkages:** Despite ongoing improvements in this area, it was recommended that better communication and more sharing of experience and expertise (in areas such as ADR and self-representation) would improve the efficient delivery of justice.

Other key recommendations included:

- widening the use of alternative dispute resolution
- improving VLA services for disadvantaged and vulnerable groups
- improving access to the VCAT civil claims list (online dispute resolution)
- assisting self-represented Victorians
- improving *pro bono* services.

The *Access to Justice Review* has pointed a direction to other organisations in the community about the needs of Victorians and how to improve access to the legal system.



Accessibility

The principles of justice are underpinned by the assumption that all citizens have equal treatment before the law and equal opportunity to protect their rights by accessing the law. However, the growing demand for legal aid services means that not everyone is able to get the assistance they need. People are missing out on assistance because of where they live, because they cannot afford a lawyer or because they do not understand the legal system. This reduces the ability of the civil justice system to dispense justice equally to all. It is not considered fair if some in society are left to represent themselves or abandon legal action altogether or enter a dispute with an organisation where the power imbalance may result in an unfair outcome.

Key barriers to accessing justice include cultural and linguistic diversity, homelessness, unemployment, social disadvantage and exclusion.

Key barriers to accessing justice include:

- **cultural and linguistic diversity** which is associated with the low prior knowledge of the civil justice system and communication difficulties. A survey carried out noted that the ineffective identification of a legal need was a major factor by people with a non-English-speaking first language in their failure to pursue justice.

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- **high social exclusion, disadvantage and cultural differences**, particularly with Indigenous Australians, which tend to reduce access to the legal system and legal services. In Victoria, Indigenous Australians presented twice as likely to experience multiple legal needs than non-Indigenous Australians.
- **socio-economic disadvantaged communities** have been found to not only have higher legal needs, but also experience substantially higher barriers to accessing the legal system and services. Unemployed people have also been found to have a higher need for legal services, along with those living in disadvantaged housing.
- **homelessness and risk of homelessness.** The high rate of legal needs for homeless persons is further complicated by the daily struggles of homelessness and additional forms of social disadvantage, e.g. mental illness.

The Standing Committee on Finance and Public Administration, reporting to the Commonwealth Parliament in September 2019, found that the areas of unmet legal needs of Indigenous people and the barriers to them accessing legal services included:

- a lack of awareness of legal matters
- geographic barriers
- a lack of interpreters
- conflicts of interest, and
- a lack of culturally appropriate services.

Yet another study by the Law Foundation found that people with cognitive impairment had justice issues with access to legal services. Some of the main issues arising from this study found barriers included:

- a lack of awareness of legal rights and options
- the high dependence on others (carers, family members) to take action for them
- legal personnel not recognising a cognitive impairment or failing to ask if their client has a cognitive impairment
- a fear of retribution for raising a complaint – this is particularly the case when the grievance is about a family member or carer
- communication barriers, since alternative forms of dispute resolution, which are cheaper and generally thought to be more accessible to the general population, are quite reliant on effective communication between parties
- systematic barriers such as the reliance on formal written documents
- the stress and anxiety of court proceedings.

In a report called *Access to Justice* in the United Kingdom, Lord Woolf noted that a civil justice system should meet the following criteria:

- be *just* in the results it delivers
- be *fair* in the way it treats litigants
- offer appropriate procedures at reasonable *cost*
- deal with cases with reasonable *speed*
- be *understandable* to those who use it
- be *responsive* to the needs of those who use it
- provide as much *certainty* as the nature of particular cases allows; and
- be *effective*, adequately resourced and organised.

Activity 6.2 Folio exercise

Factors affecting the ability of the civil justice system to achieve justice

1 Outline the meaning of equality in the civil justice system.

2 Explain how costs cause a barrier to justice in the area of civil law. Include three examples of costs that arise in civil law proceedings in your response.

3 Create a mind map of the barriers that can deny access to people achieving justice in civil law.

4 Draw up a table that sets out the effects of time delays on each of the three principles of justice in civil law.

5 According to the Australian Bureau of Statistics, almost one in five Australians live with a disability. This includes more than one million Victorians. Discuss how disabilities can affect the achievement of justice in the area of civil law in Victoria.

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6.3 Recent reforms in the civil justice system

Civil law cannot remain static if it is to pursue justice for all Victorians. It must continually look at areas where improvement can be made to meet the changing needs of the community.

If the principles of justice are to be achieved in the civil justice system, it is necessary that reforms are adopted to address the issues surrounding costs in particular. Similarly, it is important that recommendations from authorities, including the Productivity Commission and government agencies, are considered and tested for their ability to further contribute to enhancing the system's operation. This is an ongoing challenge for the legal system as it struggles to deliver an innovative, efficient and effective system to reduce the inequality, unfairness and lack of access caused by costs, delays and accessibility issues posed for Victorians.

The Study Design requires you to discuss recent reforms and recommended reforms to the civil justice system. The term 'recent' means the last four years.

Activity 6.3 Folio exercise

Recent reforms and recommendations

1 This exercise will be easier and more effective if you work with a partner.

In sections 6.3 and 6.4, there are a number of reforms and recommendations to improve the ability of civil law to achieve the principles of justice. At the start of each reform or recommendation, you will see a series of boxes that look like this:

Fairness	Equality	Access

Some reforms or recommendations clearly relate to one of the principles of justice; some may relate to two or even all three principles. As you work through these two sections, mark which principles apply to each reform or recommendation.

It is also important that you make notes on why the change/proposed change relates to the principle/s you have marked. This will assist in your understanding and evaluation of the reform or recommendation. An example of an evaluation can be as follows in relation to VCAT's online dispute resolution:

Fair	The online system of dispute resolution has the potential to provide a fair means to resolve disputes, as it offers consistent processes and procedures embedded into the technology. This would ensure that all clients would be treated impartially throughout the dispute resolution process. The online access would also be timely as it would allow 24/7 access and eliminate the time travelling to and from institutions for conferences and hearings. No mention is made as to whether a cost would be incurred for the use of the service, but it could be expected to be a nominal fee. However, the fairness of the process relies on all individuals having access to computers and the ability and interest to use the online option. Some social, personal, cultural and linguistic factors may diminish the fairness of the system and its ability to be used by all.
Equal	The online system has the potential for clients to receive equal treatment when resolving their disputes. It would ensure individuals receive unbiased, impartial treatment as the facts of the case would be the only criteria considered when making the decision. This would remove any unconscious bias that may sometimes exist when meeting face-to-face to resolve the dispute. However, many disadvantaged and vulnerable Victorians may be challenged to engage with the online process and this would diminish its capacity to enhance equality as a principle of justice.
Access	The online system has excellent potential to significantly improve access to justice. Online communication is second nature to people who already use video and text chat. Applying the skills to business disputes is an extension of online communication and an easy transition to make. Surveys conducted by the Department of Justice found that 70% of people interviewed reported that they would use the platform to resolve disputes. This online availability would significantly promote access to the 'missing middle' who currently are the group most impacted by costs. However, the process assumes that individuals are aware of their rights and do not need advice or assistance, that they are able to read and write effectively and use technology. The challenge for the developers is to explore the ideal functioning of the technology to ensure that, if the recommendation is adopted in the future, that it will be user-friendly for the majority of the public.

2 Keep a folio of reforms and recommendations that occur in the news during your school year. Set them aside in their own folder with the name of the source and date on each article. They can be from newspapers, magazines or notes you take from current affairs programs or an online source, for example.

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Justice Legislation Amendment (Access to Justice) Act 2018 (Vic)

Fairness	Equality	Access

The Victorian Parliament passed legislation on 27 March 2018 introducing new laws to strengthen the legal assistance sector, improve access to legal information and to make it easier and faster to resolve civil disputes.

The legislation implements 16 recommendations from the *Access to Justice Review 2016*. VLA will have a new role coordinating Victoria's legal sector, working with government, community legal centres and private lawyers to coordinate the delivery of legal assistance services across the state.

The Victorian Law Foundation will have a new role as a research centre on legal need and access to civil justice to help anticipate future changes to the legal system.

VCAT proceedings will be made simpler and faster by allowing the electronic service of documents and making it easier to access mediation services and enforce VCAT orders.

The legislation clears up powers of the courts to make 'protective costs orders' to cap the legal costs of disadvantaged Victorians in legal proceedings which raise public interest issues.

'These reforms will make it simpler and fairer for Victorians to resolve disputes and access legal information and assistance services when they need them,' said Attorney-General Martin Pakula.

Victoria Legal Aid: increase funding for civil law matters

Fairness	Equality	Access

At the beginning of April 2018, VLA changed its guidelines to assist more Victorians facing significant legal issues. In particular, the changes are to assist more people with mental illnesses who are facing compulsory medical treatment and detention in psychiatric wards, more people who have a disability and are subject to a guardianship or administration order and more people facing eviction into homelessness.

Key changes are:

- increasing the scope of key mental health and disability guidelines for Mental Health Tribunal matters, and for Guardianship and/or Administration matters at VCAT
- introducing a new guideline for eviction cases at VCAT where the application is due to tenant fault (other than rent arrears) and no alternative service (e.g. duty lawyer) is available
- introducing an appeal and judicial review guideline for mental health and disability, tenancy and equal opportunity matters to ensure key institutions can be held to account in the Supreme Court
- amending general Commonwealth civil law guidelines to include assistance for mediation.

Improvements to VCAT: Annual Report 2017–18

Fairness	Equality	Access

VCAT was established in 1998 to provide fair, efficient and accessible civil dispute resolution. Costs remain a significant barrier to the civil justice system achieving the principles of justice for all Victorians. The increasing demand to access dispute resolution is placing pressure on government and institutions to adopt innovative and cost-effective means to resolve disputes. The *Access to Justice Review 2016* recommended that VCAT partner with the Department of Justice and Community Safety to develop an online dispute resolution pilot.

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In September 2018, VCAT and the Victorian Government conducted an online dispute resolution pilot. The pilot was to test whether using web-based dispute resolution technologies could improve access to justice for Victorians with small civil claims; that is, disputes under $15 000 regarding goods and services. The pilot was designed with the aim to provide better, less costly and more efficient justice. National and international research suggests that online dispute resolution can improve access to justice, particularly for people from disadvantaged groups, by reducing barriers associated with geographical isolation, disability or impairment, language, lack of confidence or competence in face-to-face communication, and fear of intimidation.

Other VCAT improvements

- In July 2017, VCAT began a four-year digital strategy to deliver better online services. This was supported by $4.55 million from the Victorian Government and additional funding from Consumer Affairs Victoria (CAV). The plan started with preparatory work to deliver electronic case files, document automation, workflow and online lodgment of claims, particularly for planning and environment cases.
- VCAT moved to a new information technology platform as part of a Court Services Victoria initiative. This will help improve customer services, including easier access for people in remote areas.
- A new digital service was implemented to make it easier for users to interact with VCAT across their website, forms, online platforms and communications.
- Information is to be presented in 'plain language' across all areas of VCAT and communications to simplify and standardise processes to make them clearer and more user-friendly. This will make the information more accessible.
- In August 2017, VCAT moved to a single phone number, replacing more than 20 phone numbers, making it easier for the community. It is expected to be particularly beneficial for self-represented litigants who will be able to contact VCAT without first needing to determine their case type and specific number to call. This will provide easier access to justice.
- VCAT is also continuing its work with the community legal centre, Justice Connect, to identify the unmet needs of people representing themselves.
- VCAT has begun to conduct hearings using the new Shepparton Law Courts' 'Remote Judge' technology. The VCAT member can connect to the hearing from another location. This technology enables urgent matters to be heard on days when VCAT does not have a member present at the venue, so that clients do not have to travel long distances or attend by phone. It also makes it easier for people giving evidence.
- VCAT has improved access to mediation for Victorians with small civil claims. This is in partnership with the Dispute Settlement Centre of Victoria. Further expansion is planned on mediation services in the coming years.
- In February 2018, VCAT launched its *Accessibility Action Plan 2018–2022* (see below). This plan aligns with *Victoria's Absolutely Everyone: State Disability Plan 2017–2020* and VCAT's *Strategic Plan: VCAT for the future 2018–2022*.
- VCAT launched its *Koori Inclusion Action Plan* in July 2017. Under this plan:
  - a new Koori Engagement Manager was employed to manage specific initiatives, particularly in residential tenancies
  - Koori cultural awareness training was incorporated into VCAT members' professional development program and staff induction program
  - updated guidance for members using interpreter and language services was provided.

For more details on VCAT's policy documents:
- VCAT for the future: Strategic Plan 2018–2022
- VCAT Annual Reports
- Koori Inclusion Plan
- Accessibility Action Plan

go to: www.vcat.vic.gov.au/aboutus/annual-reports-and-strategic-plans

VCAT Accessibility Action Plan 2018–2022

Fairness	Equality	Access

This is the first Accessibility Action Plan for VCAT, outlining how people with disabilities will gain better access to the tribunal and to reduce barriers to provide justice for people with diverse needs. This will raise awareness, build competencies and provide the foundation for driving cultural change.

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Surveys undertaken indicate that approximately 7% of people contacting VCAT had some form of disability. This equates to nearly 6000 of VCAT's clients in 2017–18.

The plan includes:

- physical changes, e.g. lowered curb for wheelchair access, subtitles used in videos
- development of services for a range of disabilities
- online technology
- education programs.

People with disabilities can face physical barriers in gaining access to the civil justice system.

All online services, including websites, online forms, electronic documents and online tools, will conform to Level AA of the *Web Content Accessibility Guidelines*. These guidelines provide a globally accepted and adopted set of guidelines for accessibility.

The Action Plan will be incorporated into VCAT's customer service, delivering a range of outcomes to improve services to clients, including:

- increased accessibility and user-friendly VCAT services
- reduced customer effort
- a faster and more effective resolution of customer queries.

Disability Liaison Officers will be appointed as key contacts for people coming to VCAT who have concerns regarding accessibility. These Officers will assist in alleviating any barriers, ensuring that facilities are booked and the necessary supports are available to clients. They will also support VCAT staff and members with advice and resources.

VCAT will regularly monitor, evaluate and review the Action Plan and make a public report on the Plan's progress.

New VCAT venue for Oakleigh

Fairness	Equality	Access

A new Victorian Civil and Administrative Tribunal (VCAT) venue opened in Oakleigh in February 2020. The purpose-designed venue will allow VCAT to handle more cases, with enhanced digital technologies enabling more efficient hearings. Improvements have also been made to technology upgrades, better communications and security.

Oakleigh is the first of several new VCAT locations for metropolitan Melbourne, with further venues to be extended to Frankston and the northern metropolitan area to be delivered in 2021. This will allow improved accessibility for dispute resolution, in particular for consumer disputes, renting and guardianship.

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Spaces are available in the new venue to be used flexibly for private discussions, mediation and support services for duty lawyers to better assist clients who need assistance attending VCAT.

Electronic filing (eFiling) in courts

Fairness	Equality	Access

Supreme Court

The *Supreme Court (E-Filing and Other Amendments) Rules 2018* came into effect on 2 July 2018. From this date, all documents sought or required to be filed in a proceeding of the Commercial Court, the Common Law Division or the Costs Court shall be filed in RedCrest, the electronic filing system in operation in the Court.

On 30 September 2019, electronic filing was introduced in the Court of Appeal following the successful transition of the courts mentioned previously.

County Court

In April 2018, the County Court increased its use of eFiling. This new focus aims to improve around-the-clock access to filing court documents and enhance the court-user's experience. All new civil cases initiated will now be filed electronically and available online to judges and their associates. The eFiling arrangement improves the efficiency of accessing documents for all parties. Almost 90% of documents filed in the County Court are now eFiled. The reform reduces the amount of time and cost and improves the efficiency of court processes and access to information. This change successfully enhances fairness, equality and accessibility for all involved in civil dispute resolution.

Supreme Court – eCourts

Fairness	Equality	Access

The Supreme Court has been engaging in the redesign of its courtrooms with digitisation at its core to deliver a more efficient and accessible justice system. The Court rebuilt its exclusive internet access, improving speed and reliability quite markedly. This provided the foundation for the rest of the transformation to be able to be built upon.

The Court then digitised how cases were initiated by practitioners, administered and allocated by the Registry and managed by the judicial officer through eFiling. An electronic format of the paper court file is now the primary file that is used from initiation, administration and management of a matter before it is digitally archived.

The final piece of the digital transformation is the electronic courtroom. By mid-2021, all 31 courtrooms and three mediation rooms will be renewed to support the increasingly digital nature of matters heard at the Supreme Court. For example:

- each courtroom will have ultra-high definition video-conferencing capability, an upgraded evidence presentation system, livestream and webcast capability and amplified acoustics
- CCTV, images and video captured on mobile devices will be displayed in ultra-high definition and practitioners will have the capability to connect both wired and wirelessly by WiFi or HDMI.

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Supreme Court – now sitting at Shepparton

Fairness	Equality	Access

As from April 2018, the Supreme Court (Trial Division) and Court of Appeal are sitting at the new Shepparton Law Courts (which were officially opened in March 2018). The new $73 million building sets the standard for future regional court buildings, supporting the functions of a modern multi-jurisdictional facility that will contribute to improving access to justice for the Shepparton and surrounding community. The purpose-built courthouse supports the needs of all jurisdictions and provides more accessible and responsive services for regional Victoria. The design enables the Supreme, County, Magistrates', Children's and Coroners Courts, the Victorian Civil and Administrative Tribunal, and the Federal Circuit Court to hold sittings locally.

Supreme Court evaluation

Fairness	Equality	Access

Figures released from the Productivity Commission in January 2018 show the Supreme Court is improving its performance. While having the highest clearance rate for criminal cases among all Supreme Court jurisdictions in Victoria, the Court has met or exceeded demand in all Trial and Appeal divisions. As a whole, the Supreme Court's clearance rate was 105.3%. The clearance rate shows the number of cases finalised, expressed as a percentage of the number of cases initiated and is the strongest indicator of the efficiency of a court's processes. The value above 100% means that the Supreme Court has cleared cases that were pending from the previous period of time.

In the civil trial divisions, the clearance rate was above 100%. The Court also maintained a clearance rate for civil appeals above 100%, the highest among Supreme Court jurisdictions for the period. Overall, the number of pending matters has decreased in most divisions from the previous year:

- Civil appeal matters decreased by 16%
- Civil Trial Division matters decreased by 6%
- Criminal Trial Division matters decreased by 12%.

Chief Justice Ferguson said the Court's program of reform has improved efficiency and access to justice. Investment in the Court's Digital Strategy and, in particular, innovations in electronic filing and electronic case management, are anticipated to further improve clearance rates. Similarly, projects such as the continuing development of the Commercial Court, the Common Law Improvement Program and reform to the Court of Appeal's processes have demonstrated the value in investment in the Court's Divisions in reducing the cost and delay to litigants, the Court and society.

Reforms in the County Court

The key purpose of the courts is to hear matters in a fair, timely, efficient and accessible way. An ongoing challenge facing the courts is to find the balance between the need to deliver timely and efficient access to dispute resolution while not compromising high-quality outcomes.

A study of the Common Law Division of the County Court demonstrates how that court aims to deliver timely outcomes while upholding the principles of justice in a dramatically changing environment. The Common Law Division of the County Court has unlimited monetary jurisdiction to hear cases seeking damages in a range of areas, including industrial and transport accidents, defamation and medical negligence. In 2017, the Court experienced a 30% increase in the number of cases listed for trial with the majority of matters listed for trial within six months of the request for a trial.

To cope with the rising demand for disputes in the area, the Court has recently introduced a number of reforms. Each change seeks to improve the efficiencies of the Court and enhance the principles of justice. Timely settlement of disputes is essential to maintain community trust in the ability of the civil justice system to achieve a just outcome.

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Reforms to the Common Law Division of the County Court to reduce delays

Reform 1

Fairness	Equality	Access

The Practice Note issued in January 2018 aimed to improve the efficiency of trials and ensure timely resolution. It placed a number of time restrictions on a party's opening, cross-examination and closing statements. A number of other restrictions were also imposed on the parties, including limiting the number of expert medical reports presented as evidence. The reform led to a reduction in the time taken to determine matters and successfully freed up court resources. This change in practice significantly contributed to reducing time delays and improved access to dispute resolution while also promoting fairness and equality for parties.

Reform 2

Fairness	Equality	Access

The Common Law General Division operates a 'reserve list'. This means the court over-lists the trials to be heard on any one day. As 75–80% of matters listed are settled prior to trial or on the day of the trial, the reserve list means that there are always trials listed to ensure the court's resources are used in a timely and efficient manner. Of the 3641 trials listed in 2017, only 989 were heard by a judge and only 1% were not determined within their trial date. The reserve list successfully ensured the timely scheduling of trials in 2017 despite a 11% increase in the trials listed in the Court. This time-saving strategy also enhanced the principles of fairness and equality.

Reform 3

Fairness	Equality	Access

The County Court has increased its use of eFiling.

Courts change method of operation in response to the novel coronavirus (COVID-19) pandemic

Fairness	Equality	Access

In 2020, the COVID-19 disease caused by the novel coronavirus had a substantial impact on all aspects of our lives. With social distancing laws, delays and costs within the court system increased, requiring intervention from the justice system.

Legal institutions have provided information to assist courts and court users. The Judicial College of Victoria, for example, created the webpage 'Coronavirus and the courts' to describe the nationwide impact of the virus on the court system. Its 'Coronavirus Jurisprudence' page tracked the developing impact on common law in cases. This was designed to assist judicial officers and legal practitioners to approach issues in an informed and consistent manner in such unusual circumstances.

Victorian courts changed the way they operate in relation to the coronavirus pandemic. The Supreme Court introduced virtual hearings with civil matters to be heard by Webex, Skype or Zoom, depending on the requirements of the proceedings. Information about the virtual hearings is available on the Court's website.

Examples of changes to civil proceedings in the Supreme Court have included:

- electronic delivery of almost all its personal service

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- acceptance of unsworn affidavits for filing if they met the requirements set out on the Court's website
- the production of copy documents in electronic format was permitted in response to a subpoena
- mediation services and hearings continued via telephone or AV link
- new jury trials were suspended from 16 March 2020 indefinitely. Those existing at the time were completed. Cases that continued past that date were judge-only.

The County Court started operating similarly to the Supreme Court. It scaled down its operation but worked with parties to hear matters remotely via telephone and AV link. Documents could be filed electronically using the Court's eFiling systems and electronic signatures were allowed temporarily. Parties were encouraged to email documents and all pre-trial directions hearings and management matters were conducted on the papers or electronically.

Examples of changes to civil matters in the Magistrates' Court have included:

- no practitioners or parties allowed to attend court unless otherwise directed
- parties were encouraged to resolve matters by consent
- non-urgent matters were heard on papers and all required documents were to be filed via email or post
- all decisions were delivered in writing, by telephone or AV link
- all required documents were emailed 14 days prior to a pre-hearing conference
- civil pre-hearings were conducted by telephone.

As of mid-2020, the legal fallout from the coronavirus is likely to be enormous. The NSW Government and NSW Police are investigating potential criminal charges against Carnival Cruise Line Australia, the owner of the cruise ship *Ruby Princess*. NSW Premier Gladys Berejiklian has ordered a special inquiry into the cruise ship fiasco. There is also talk of civil claims, as passengers seek damages for being infected by COVID-19 or living under the threat of being exposed to the virus. Family members who have contracted the virus from passengers released from the cruise ship are also threatening action.

Shine Lawyers is one law firm organising a class action on behalf of passengers, and litigation funders have expressed interest in financing the case. It will most likely be heard in the Federal Court and will probably relate to breaches in consumer law, contract and negligence. There may also be a claim of disappointment. Generally, a person cannot sue for disappointment or distress after a breach of contract; however, a case relating to the issue of damages for disappointment is now before the High Court regarding a Scenic Cruise in Europe in 2013. This High Court decision could be setting an important precedent for cases such as the *Ruby Princess*.

Investigations are being undertaken into certain class actions to hold the *Ruby Princess*'s owners and operator Carnival Corporation accountable for failing to protect the health and safety of passengers in the coronavirus pandemic.

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6.4 Recommended reforms

VCAT: further development of online dispute resolution

Fairness	Equality	Access

Based on the success of the online dispute resolution pilot for goods and services, it was recommended that VCAT now explore the possibility of developing technology to assist with resolving everyday business disputes online. The project is innovative and will require potential users to apply video and text chat to business situations. Consumers will need to adopt a new mindset and be comfortable communicating via technology to resolve a dispute instead of talking with personnel in institutions.

Initial trials indicate the likelihood of successfully using technology to greatly improve access to justice while providing fair and equal opportunity to dispute resolution. The recommendation to further develop and implement the online dispute resolution platform promises to enhance the ability of the civil law system to improve justice for Victorians. However, as with all processes and procedures, there may be limitations and these will need to be evaluated against the strengths of the proposed change.

The County Court of Victoria: Court Directions 2017–2022

Recommendation to reduce delays

Fairness	Equality	Access

The *Court Directions 2017–2022* identifies key recommendations to continue to test and implement improved case management systems to bring about the timely resolution of cases. The Court will trial the use of digital court books with a small cohort of judicial officers in relation to civil matters. It will also implement an eCase file solution for civil matters. This is expected to reduce delays and improve accessibility for judicial officers and Court staff while allowing multiple users access to case material at the same time.

Recommendations to enhance access

Despite ongoing reforms, the courts continue to face new challenges. An increasing number of civil claims, often involving complex issues, places pressure on limited court resources. The increasing number of self-represented clients, and expectations that disadvantaged and vulnerable members participate in legal processes and formalities, is challenging. Institutions such as the County Court have undertaken a review of their operations and have listed a series of recommendations to ensure the Court continues to deliver the highest standards of justice into the future. The *Courts Direction 2017–22* outlines the key recommendations to be addressed in the coming years to enhance the delivery of fair, equal and accessible outcomes for clients.

Below are two examples of recommendations to enhance access for County Court users.

Recommendation 1

Fairness	Equality	Access

The *Courts Direction 2017–22* identifies key recommendations to improve access for clients. The aim is to investigate ways to deliver high-quality court services to the community. This will involve understanding the needs and interests of clients, particularly self-represented clients, and making information, services and programs easy to find and understandable to court users. There will be an emphasis on social media, digital channels and educational programs to enhance the understanding of the work of the court. The redevelopment of the

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court's webpage aims to provide user-friendly information. The challenge will be to reduce the complexity, the time and the cost of existing systems to enhance the usability, efficiency and effectiveness of the services offered.

Recommendation 2

Fairness	Equality	Access

The *Courts Direction 2017–22* recommended a new organisational structure and new roles with a customer-centric focus to improve access for parties. This means that work practices and staff will focus on adding value to court users. This will require a transformational change in emphasis and the way services are delivered. If successful, the County Court will achieve its aim to significantly improve access to the Court and improve clients' experience. In doing so, the Court will also achieve fairer and more equal outcomes for all.

The institutions, methods and personnel comprising the civil justice system uphold the principles of justice to a significant extent. However, the civil justice system is dynamic and facing ongoing challenges. Therefore, the system requires ongoing monitoring and reforms to ensure the Court delivers fair, timely, efficient and accessible dispute resolution without compromising the underpinning principles of justice: fairness, equality and accessibility.

Victoria Law Reform Commission: Inquiry into Litigation Funding and Group Proceedings

Fairness	Equality	Access

The terms of reference for this Inquiry were about accessing justice; namely, the ability of those who seek to enforce their rights to use the legal system to obtain an outcome by the means of a fair and open process, including:

- appropriate regulation of litigation funders
- maintaining the proper and ethical conduct of lawyers
- not imposing unfair or disproportionate burdens on litigants.

The report was tabled in the Victoria Parliament in June 2018.

'Litigation funding' refers to an arrangement between a commercial litigation funder and one or more litigants to pay the costs of a legal action in return for a share of the award if the outcome is successful. The litigation funder is not a party to the court action; it is a simply a commercial entity that has no other interest in the dispute.

Over the past 20 years, litigation funders have become an accepted feature of the legal system. They enhance access to justice by reducing the financial risk and postponing or removing the cost barrier to a legal action. A group proceeding is a class action. This also provides access to justice for the class members by allowing them to share the costs of taking action, each paying less than the cost of bringing separate proceedings.

As a result of their inquiry, the VLRC made 31 recommendations, including:

- Supreme Court practices should be implemented that aim towards a national approach to litigation and class action regulation
- litigation funding should have tighter regulations and supervision Australia-wide
- the Supreme Court should have the power to order a common fund for a litigation service fee where the fee is calculated as a percentage of any recovered amount and the liability of payment is shared by all class members
- a judicial panel for class actions is established to make decisions relating to cross-vesting of class actions, where multiple cases relating to the same subject matter or cause of action are filed in different jurisdictions. ('Cross-vesting' is where the federal jurisdiction of federal courts is also vested in the non-federal jurisdiction of the state courts, and vice-versa. In other words, each court is given the power of the other).
- the Supreme Court should draft standard forms regarding opt-out or settlement notices in plain English. This should be done in consultation with the Victorian Law Foundation and published in an accessible manner on the Supreme Court website.

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Improving access to justice for class actions

Fairness	Equality	Access

On 27 November 2019, the Victorian Government introduced the *Justice Legislation Miscellaneous Amendments Bill 2019* to parliament. This Bill would allow lawyers to receive a **contingency fee**, calculated as a percentage of the settlement of damages in class actions. This would permit plaintiff's law firms to receive a percentage of damages awarded to all members of the action. (Contingency fees for lawyers have historically been prohibited in Australia.)

The Bill proposes changes to the *Supreme Court Act 1986* (Vic) to introduce powers so the Supreme Court can make 'group cost orders' in class actions. This would reduce the financial risk faced by the representative or lead plaintiff.

If the Bill were to be passed, it would likely lead to an increase in class actions commenced in the Supreme Court.

It was a recommendation of the Victorian Law Reform Commission (VLRC) that the ban on contingency fees be lifted. It found that plaintiffs fear they would face the burden of legal costs if a matter is unsuccessful. This is a deterrent to bringing action, particularly against large corporations.

If the Bill were to be passed by parliament, it would improve access to justice, making it easier to bring class actions. Class actions are important in the civil justice system as they allow a number of plaintiffs to combine to seek redress. Vulnerable groups such as employees and consumers are able to access lawyers to seek damages for loss incurred.

Federal Government announces new court

Fairness	Equality	Access

As of mid-2020, the *Circuit and Family Court of Australia Bill 2019* is before the Commonwealth parliament, passing the Second Reading stage of the House of Representatives on 5 December 2019. The Bill will bring together the Family Court of Australia and the Federal Circuit Court of Australia to be known as the Federal Circuit and Family Court of Australia (FCFCA).

This will mean there will be a single entry-point for all family matters. Under the current system, applications can either be filed in the Family Court or the Federal Circuit Court. This has caused delays, inconsistencies, uncertainty and unnecessary costs. A lot of people in family law proceedings represent themselves and having to navigate parallel court systems without a lawyer can be confusing and frustrating. The structural reforms will have a common set of rules, procedures, practices and approaches to case management. This is expected to reduce the costs and delays for families, creating greater accessibility, efficiencies and consistency in the federal family law court system.

The Family Court will continue to exist as the Federal Circuit and Family Court (Division 1), and the Federal Circuit Court will continue as the Federal Circuit and Family Court (Division 2). The existing Family Court's appellate jurisdiction will be part of Division 1.

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Activity 6.4 Structured question

Reform and recommendation

Explain one recent reform and one recommendation to overcome one of the factors affecting the ability of the civil justice system to achieve the principles of justice. Discuss the extent to which the reform and recommendation enhances the ability to achieve the principles of justice.

Activity 6.5 Structured question

Recent reforms in achieving the principles of justice

Evaluate the effectiveness of two recent reforms in achieving the principles of justice in the civil justice system.

Activity 6.6 Essay

Do Victorians have an effective justice system?

Critics of our civil justice system claim that it does not provide an effective means for resolving civil disputes. It needs to be understood that there is no simple, magic solution that will allow everybody who thinks they have a grievance to have it resolved by a court cheaply and quickly. If civil cases are going to be fought to the bitter end, as they often are, they will inevitably be expensive. In your essay, include the following:

- an outline of the principles of justice
- a description of the purposes of the civil pre-trial procedures in the Supreme Court
- a description of two factors that limit the effectiveness of these processes to achieve the principles of justice
- a discussion of two recent reforms, or recommendations for reform, aimed to enhance the effective operation of the civil justice system.

Activity 6.7 Analytical exercise

Reform and recommendation investigation

Form a group with at least one other person in your class. Each person in your group chooses one reform and one recommendation. Conduct the following investigation, then report to the rest of your group with your findings.

For each reform and recommendation, investigate the following:

- the nature of the reform and recommendation
- the need for the reform and recommendation
- the extent to which the reform and recommendation affects each of the principles of justice
- the issues that need to be considered in implementing this reform and recommendation
- what the legal system must provide to enable the reform and recommendation to become part of the civil justice system.

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Key point summary

Do your notes cover all the following points?

- ❏ The principles of justice – explanation of each principle with examples that relate to the civil justice system
  - Fairness
  - Equality
  - Access.
- ❏ Factors that affect the ability of the civil justice system to achieve the principles of justice – explanation of each factor with examples that relate to the civil justice system
  - Costs
    - What causes high costs in the civil justice system?
    - How do costs relate to fairness in the civil justice system?
    - How do costs relate to equality in the civil justice system?
    - How do costs relate to access in the civil justice system?
  - Time delays
    - What causes delays in the civil justice system?
    - How do delays affect fairness in the civil justice system?
    - How do delays affect equality in the civil justice system?
    - How do delays affect access in the civil justice system?
  - Accessibility
    - What makes access difficult in the civil justice system?
    - How does access affect fairness in the civil justice system?
    - How does access affect equality in the civil justice system?
- ❏ Recent reforms – choose at least three reforms and evaluate each (see Activity 6.3 for an example)
  - Reform 1 – description and evaluation
  - Reform 2 – description and evaluation
  - Reform 3 – description and evaluation
- ❏ Recent recommendations – choose at least three recommendations and evaluate each (see Activity 6.3 for an example)
  - Reform 1 – description and evaluation
  - Reform 2 – description and evaluation
  - Reform 3 – description and evaluation
- ❏ An overall evaluation of the civil justice system

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End-of-chapter questions

Revision questions

1 Describe how delays in the hearing of a civil case can result in injustice.

2 How does accessing legal advice relate to the principles of justice?

3 Outline the impact that delays in the hearing of civil cases have on the ability of the civil justice system to achieve justice.

4 Why do you think legal aid is not as available to civil litigants as it is to criminal defendants?

5 Discuss two recent reforms or recommendations that aim to increase access for people who cannot afford to take a civil case to court.

6 Discuss how costs in the hearing of a civil case can result in injustice.

Practice exam questions

1 Outline the principles of justice and how they each relate to the civil justice system. [6 marks]

2 Explain two benefits of civil law remedies. How do these benefits relate to the principles of justice? [5 marks]

3 With the use of examples, explain how the increased use of technology is assisting to promote justice in the civil justice system. [8 marks]

4 Discuss why delays are a problem in a civil dispute. Evaluate two reasons for delays occurring in the hearing of a civil dispute. [8 marks]

5 Evaluate the extent to which two recent reforms or two recommendations overcome the problem of accessibility or costs in the hearing of civil disputes and enhance the principles of justice. [8 marks]

6 'To some extent, the civil justice system provides justice to the parties; however, some changes should be made.' Discuss this comment. [10 marks]

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UNIT 4

The people and the law

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Chapter 7

Area of Study 1

The Australian parliamentary system

The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers. In this chapter, we explore the role of parliament in law-making and also examine the roles played by the Crown and the houses of parliament at the Commonwealth and state level. In order to understand these roles, it is necessary to learn about the development of the Australian parliamentary system.

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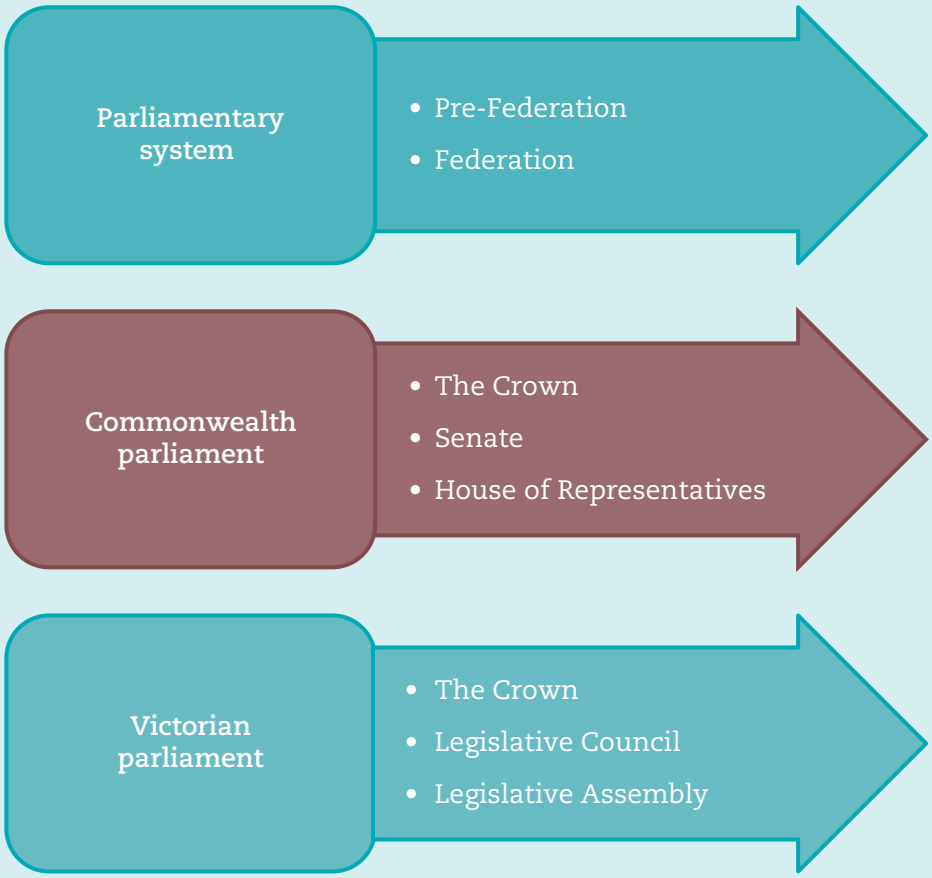

Key terms

bicameral a parliament with an upper and a lower house

Crown the authority of the monarch, represented in Australia by governors in each state and the Governor-General at the federal level

Federation the formation of sovereign states that relinquished some powers to a central parliament (Commonwealth parliament) to form one nation

government the political party (or parties in coalition) that hold a majority of seats in the lower house

High Court the highest court in Australia, established by the Constitution, and the only court with the authority to hear and determine disputes about the Constitution; it is the highest court of appeal

House of Representatives the lower house of the Commonwealth parliament

Legislative Assembly the lower house of the Victorian parliament

Legislative Council the upper house of the Victorian parliament

parliament the supreme law-making body, consisting of elected representatives and the Crown

Senate the upper house of the Commonwealth parliament

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7.1 The Westminster system

Australia adopted the Westminster system of parliament from Great Britain.

Australia's legal system is based on the British legal system. Like most countries colonised by Great Britain, Australia adopted the basic structure of the British parliamentary system. This is known as the Westminster system, named after Westminster Palace in London, where the British parliament sits.

Video

Figure 7.1 Bicameral parliament

In the Westminster system, parliament consists of two houses and the Crown. However, in Queensland, the Northern Territory and the ACT parliament, there is one house of parliament and the Crown. This is a unicameral parliament.

The Westminster system of parliament consists of two houses and the sovereign (monarch). A parliament that consists of two houses is known as a **bicameral** parliament.

The monarch is referred to as the **Crown.**

Parliament is the ultimate law-making authority. It is a democratic body that represents and is responsible to the people. The Crown retains the right to accept or refuse proposals of legislation passed by both houses of parliament. The usual practice, however, is that the Crown accepts Royal assent to bills passed by parliament.

7.2 Parliament in Australia

Both the Commonwealth and Victorian parliaments are based on the Westminster system. The structure of Australia's Commonwealth parliament is formally set out in the Commonwealth Constitution.

Before Federation

The *terra nullius* claim

When the British colonised Australia, they brought with them the English legal system. They did not recognise the existence of Indigenous legal systems or the land rights of the Indigenous peoples. At that time, Australia was considered to be *terra nullius* – in other words, Australia was considered an empty land. It was not until 3 June 1992, in the famous Mabo case (*Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1), that the High Court recognised native title, or ownership of land by Aboriginal and Torres Strait Islander peoples.

After the arrival of the British in 1788, Australia was settled as a convict colony. These convicts were released after serving their sentences and moved to various parts of the country. Free settlers also arrived and began industries and trade. These settlers wanted representative and responsible **government** in the form of a Westminster-style parliament.

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This was granted by the British parliament passing a Constitution for each of the colonies (today's states). These constitutions meant that each colony had a parliament with limited law-making powers. Each colony could make its own laws and had its own courts. These courts could hear and determine legal disputes.

Before Federation, each colony had its own parliament.

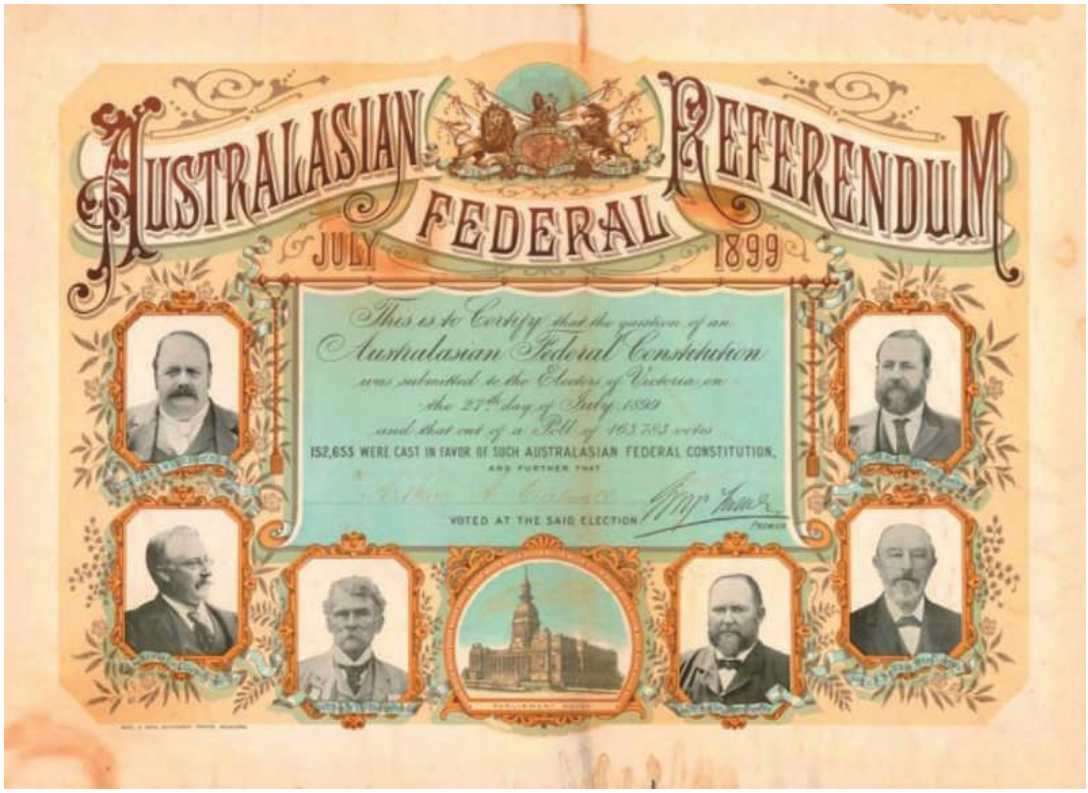
Federation

Between 1881 and 1900, the colonies met to discuss forming a **Federation** of six colonies. The colonies wanted to create a central authority to legislate on national issues. Each colony also wanted to retain the power to govern in its own right. A federal political system that would balance these interests had to be designed. Some powers had to be set aside for a central authority and other powers had to be reserved for the colonies.

What is a federal system?

Australia has a federal system of government. Under this federal system, the country is divided into states. Each state has its own parliament, which can exercise powers relating to certain issues, such as transport, power, water and education. In a federation, the people of the states agree that specified matters are more effectively handled by a national authority rather than a state body. Therefore, the central authority – the parliament of Australia – has the power to make laws about matters that would affect the whole country, such as defence, currency, trade, immigration and postal services.

Voting for Federation



Federation Referendum Certificate

The Australian Constitution

The Australian Constitution was drafted at a series of constitutional conventions held in the 1890s. It was passed by the British Parliament as part of the *Commonwealth of Australia Constitution Act 1900* (UK) and took effect on 1 January 1901. The Constitution is a formal legal document that sets out the legal framework and the set of rules for how Australia is governed.

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Australia became a federation of states in 1901, when the Australian Constitution came into force.

The Australian Constitution sets out the structure of the Commonwealth parliament.

The Constitution establishes the composition of the Commonwealth parliament, and describes how parliament operates, what powers it has, how federal and state parliaments share power, and the roles of the executive government and the High Court. It also defines the relationship between the Commonwealth parliament and the state parliaments. It established that the Commonwealth parliament has a **House of Representatives** (lower house) and a **Senate** (upper house).

In addition to the Australian Constitution, each Australian state has its own constitution. The Australian Capital Territory and Northern Territory have self-government Acts which were passed by the Commonwealth parliament.

The Australian Constitution sets out the three main functions of government:

- the legislative function, including the structure of the Commonwealth parliament and its law-making powers
- the executive (administration) function of government, which includes establishing the Executive Council (the ministers and parliamentary secretaries)
- the judicial function, including establishing the High Court.

The Constitution established the **High Court** which is the 'guardian' of the Constitution. When the Constitution came into force, the colonies became known as states. These states have their own parliaments with some of the law-making powers that they exercised as colonies.

Between 1901 and 1986, the historical influence of the British legal system on the Australian parliaments and the courts waned. The *Australia Act 1986* is the title of a pair of separate but related statutes that cut the last links between Great Britain and the Commonwealth and state parliaments. These nearly identical Acts were enacted by both the British and Australian parliaments, and they came into force on the same date. The *Australia Act* established the Australian High Court as the final court of appeal.

Outline of the Australian Constitution

Legislative function	**Chapter I – The Parliament** Chapter 1 sets out the structure and powers of the Commonwealth parliament. This chapter includes the powers of the Governor-General, the structure of the Senate and the House of Representatives, how elections will be conducted, and the law-making powers of the Commonwealth parliament.
Executive function	**Chapter II – The Executive Government** Chapter 2 discusses the powers of the executive government and the role of ministers.
Judicial function	**Chapter III – The Judicature** This chapter sets out the role of the High Court, the power to establish federal courts and how judges are appointed.
	Chapter IV – Finance and Trade This chapter discusses the Commonwealth government's responsibilities in relation to trade and finance.
	Chapter V – The States Chapter 5 recognises the powers of the states and the right of residents of all states to be treated equally, and places some limitations on the powers of the State parliaments.
	Chapter VI – New states This chapter sets out the process relating to how new states may be formed.
	Chapter VII – Miscellaneous This chapter describes how the Australian Capital Territory would be formed and established as the place for the new federal parliament.
	Chapter VIII – Altering the Constitution This describes the process that is used to change the Constitution. A referendum is the only means by which the Constitution can be modified.

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7.3 Commonwealth parliament

The Commonwealth parliament is a bicameral parliament. It consists of the House of Representatives (lower house), the Senate (upper house) and the Crown.

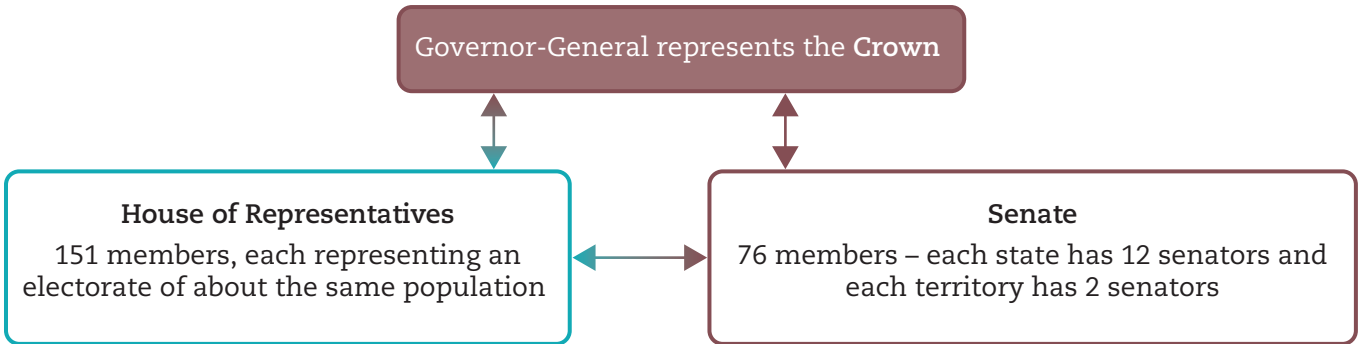

Figure 7.2 The Parliament of Australia consists of the Queen's representative (the Governor-General), the House of Representatives and the Senate.

Commonwealth parliament

The House of Representatives

The lower house of the Commonwealth parliament is known as the House of Representatives. As of the 2019 election, the House of Representatives consists of 151 members. Each member of this house represents an electorate which contains approximately the same number of voters.

For more information on the parliament of Australia, go to https://www.aph.gov.au.

Voters directly elect one member for their electorate in elections held every three years. The members elected are responsible to their electorate and represent the interests of their constituents.

The House of Representatives is designed to represent the interests of people in Australia. For this reason, it is sometimes referred to as the 'people's house'. The House of Representatives also plays an important role in the formation of government. The political party or parties (parties may form a coalition to govern) that win a majority of seats in the House of Representatives form the government.

The House of Representatives is the lower house of federal parliament, and represents the interests of constituents.

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How many representatives?

The number of representatives from any state varies according to the population of the state. The Constitution allows parliament to increase or decrease the total number of members in the House of Representatives. This is to ensure that the number of members shall be as near as practicable to twice the number in the Senate (as set out in section 24 of the Constitution). The Constitution also states that no state shall have fewer than five representatives.

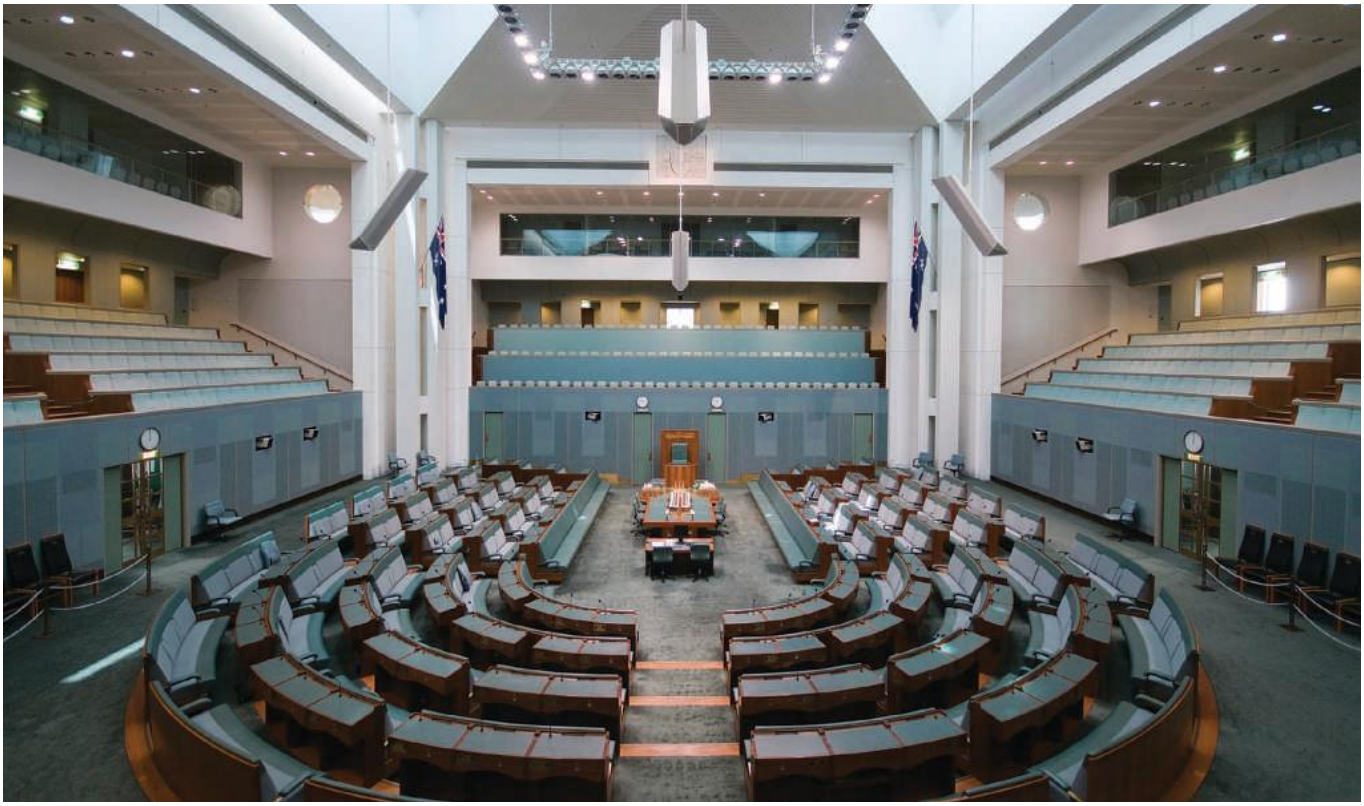
The role of the House of Representatives

The role of the House of Representatives includes making laws, representing the majority and forming government.

The main function of the House of Representatives is to make laws. It shares this function with the Senate. A Bill (a proposed new law) must be passed by both the House of Representatives and the Senate before receiving Royal assent when it can become law (it is then called an Act). Any member of the House of Representatives can introduce a proposal for a new law. However, most Bills come from members of the government. To become a law, the Bill must receive the approval of both houses of parliament and Royal assent. It can also be amended by both houses of parliament before it becomes a law. Appropriation Bills can only be introduced to parliament in the House of Representatives.

Table 7.1 Key roles of the House of Representatives

Role	Explanation
Determining government	The party or parties with a majority in the lower house form the government. The party/parties must maintain the support of the majority of members in the lower house.
Providing representative government	Members of parliament are elected to represent approximately the same number of electors in each electorate.
Providing responsible government	Individual members have the opportunity to present the views of their electorate by presenting petitions or raising issues with ministers at Question Time.
Scrutinising government	The House of Representatives plays an important role. Legislation is debated, ministers make policy statements and matters of public importance are discussed.
Controlling government spending	The government can only collect taxes or allocate the spending of public money if a law is passed by parliament. Appropriation Bills are initiated in the House of Representatives.



The House of Representatives

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The Senate

The Senate is the upper house. Each state elects 12 senators and each territory elects 2 senators.

The Senate consists of 76 members. Each state elects 12 representatives and each territory elects two. This system guarantees equal representation for each state irrespective of population. The Australian Constitution maintains a balance of numbers between the lower house and the upper house by ensuring that the lower house has roughly double the number of members of the upper house (s 24).

The Senate is directly elected by all Australians who qualify to vote and are on the electoral roll. Voting is conducted according to the proportional representation system: groups and independent candidates are elected to the parliament in proportion to the number of votes they receive. With the exception of Financial Bills, the Senate has powers equal to those of the House of Representatives.

Senators are elected for a term of six years. Half the Senate retires every three years. Whenever possible, these elections are held at the same time as the House of Representative elections. All members of the House of Representatives must be elected every three years; therefore, the Senate provides stability.

The role of the Senate

The role of the Senate includes making laws, reviewing laws and representing the interests of the states.

The Senate shares the law-making role with the House of Representatives. A Bill must be passed by both the Senate and the House of Representatives to become a law. Most Bills are proposed by the government and start in the House of Representatives, but new laws can also be introduced in the Senate.

Table 7.2 Key roles of the Senate

Role	Explanation
Reviewing legislation	The Senate reviews legislation passed by the House of Representatives. Often the Senate scrutinises legislation and is referred to as the 'House of Review'. The Senate can originate, amend, or reject any proposed law.
Providing for representative government	A function of the Senate is to safeguard the interests of the states. As each state elects an equal number of senators, it provides for equal representation among the states regardless of population size.
Providing for responsible government	The party or parties that have formed the government do not need a majority in the Senate, although it may mean that a government has to negotiate with other parties to ensure legislation is passed. The Senate can call the government to account for its actions. It is able to present petitions and raise issues during Question Time.
Scrutinising government	The Senate has responsibility for supervising administrative laws, protecting the rights of citizens, debating and presenting different points of view and gathering and disseminating information.

The Senate

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News report 7.1

Retiring parliamentarian calls for reform to the Senate

Kelly O'Dwyer has used her final speech in politics to call for the Australian parliament to adopt a British convention allowing governments to pursue their mandates when policies have been fairly disclosed to the public during elections.

The Victorian Liberal used her valedictory address to make some broad observations about the state of contemporary politics and the quality of democracy.

Echoing commentary from Liberals like Craig Laundy, O'Dwyer encouraged colleagues to spend less time in 'tribal echo chambers' (a description of a situation in which beliefs are amplified or reinforced by communication and repetition inside a closed system) and more time in their local communities. 'My time in this place has coincided with a deterioration of trust in both this institution and, indeed, the very concept of democracy.'

'Social media, and a proliferation of tribal echo chambers, have led to warped perceptions of Australians' views, a failure to listen to alternative ideas and a decline in genuine policy debate and civil discourse.'

'Time spent in the community is the best antidote.'

O'Dwyer noted that technology has accelerated our lives and expectations but complex policy making remains tough and slow. 'Complex policy issues in an increasingly complex world don't usually have an easy answer.'

O'Dwyer said the role of the Australian Senate had evolved from house of review, and house of states' rights, to a chamber 'to frustrate the government's agenda and the will of the people'.

'This has contributed to undermining faith in our democracy and its institutions and long-term policy outcomes for our country,' she said.

O'Dwyer supported a call for the local adoption of the Salisbury convention. The Salisbury convention has been in place in the United Kingdom since the late 1940s. It says the House of Lords will not block a policy that is explicitly part of a party's election manifesto and proposed policies.

'As my final observation in this place, I think that elected governments should be able to implement their mandates,' O'Dwyer said on Wednesday. 'I support the proposition endorsed by the Senate president for major parties to consider implementing an Australian version of the Salisbury convention.'

'This would mean parties agreeing to abide by a convention that the Senate won't obstruct the passage of legislation to effect government policy which has been fully and fairly disclosed to the Australian people well before voting commences in an election.'

Source: 'Kelly O'Dwyer calls for parliamentary reform and an end to echo chambers', Katharine Murphy, The Guardian, *20 February 2019*

Kelly O'Dwyer

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Activity 7.1 Folio exercise

Part One
The role of the Senate

1 Outline the differences between the role of the House of Representatives and the role of the Senate.

2 Read News report 7.1. The article states that the role of the Senate had evolved from house of review, and house of states' rights, to a chamber 'to frustrate the government's agenda and the will of the people'. Evaluate this statement. How might the view of Kelly O'Dwyer be in conflict with the original role of the Senate?

3 Evaluate how the bicameral structure of the Australian parliament can support effective law-making.

Part Two

The following table shows the composition, by party, of the Senate in 2016–19 (Australia's 45th parliament).

State or Territory	Political Party
Australian Capital Territory	1 – Australian Labor Party (ALP) 1 – Liberal Party (LP)
New South Wales	1 – Australian Greens (AG) 4 – ALP 1 – Liberal Democratic Party (LDP) 4 – LP 1 – National Party of Australia (NPA) 1 – Pauline Hanson's One Nation (PHON) 1 – United Australia Party (UAP)
Northern Territory	1 – ALP 1 – NPA
Queensland	1 – AG 4 – ALP 1 – Independent 3 – LP 2 – NPA 1 – PHON
South Australia	1 – Australian Conservatives (AC) 1 – AG 3 – ALP 2 – Centre Alliance (CA) 1 – Independent 4 – LP
Tasmania	2 – AG 5 – ALP 4 – LP
Victoria	2 – AG 4 – ALP 1 – Derryn Hinch's Justice Party (DHJP) 4 – LP 1 – NPA
Western Australia	2 – AG 4 – ALP 5 – LP 1 – PHON

1 The Senate was established as a house to represent the interests of the states. Is this the situation for the 2016–19 Parliament? Justify your response.

2 Go to the Australian Parliament website: www.aph.gov.au/senate/los and examine the results of the 2019 federal election. Has there been a change in the composition of the Senate? Explain the implications of the current parliament and whether the current government will have more success in implementing its policies.

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The Crown

The Governor-General represents the Crown.

The Queen, on the recommendation of the Prime Minister, appoints the Governor-General. The Governor-General represents the Crown, and exercises the powers and functions given to the position by the Constitution. The Governor-General acts on the advice of the Executive Council.

The Commonwealth of Australia's Coat of Arms

Role of the Governor-General

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

The role of the Governor-General includes granting Royal assent, issuing writs for elections and proroguing parliament.

The powers of the Crown include:

- to grant Royal assent to legislation
- to appoint the times for the holding of parliament
- to end a session of parliament without dissolving it (to prorogue the parliament)
- to dissolve the House of Representatives and bring about an election
- to cause writs to be issued for the general election of members of the House of Representatives
- to choose and summon executive councillors (ministers and parliamentary secretaries) and to appoint ministers of state for Australia.

The Governor-General has wide powers as a representative of the Crown. He or she can dissolve both houses of parliament. This action effectively dismisses the elected government and results in an election. This happened in 1975 when Governor-General Sir John Kerr dismissed the Whitlam Labor Government.

Crown or republic?

The Crown is formally the Head of State in Australia. There has been a continuing debate in Australia about the appropriateness of the Queen still holding this position. In 1998, a Constitutional Convention was held to consider alternatives. In 1999, following the Convention, a referendum was held. Australians were asked to vote on whether Australia should become a republic. The referendum proposal was not successful, but the issue was raised again in the Senate in 2009.

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News report 7.2

Two-step plebiscite proposed on republic issue

A recent report suggested Australia's head of state, Queen Elizabeth, wants Australia to 'get on with' moving towards becoming a republic rather than holding a morbid 'death watch'.

Federal Labor announced its preference for not one, but two, public votes on Australia becoming a republic, if the party won the 2019 election. A republic is a system of government where the people, through their elected representatives, hold ultimate power.

The idea was to have an initial plebiscite (vote) to gauge Australians' preferences; that is, generally whether they were for or against dropping the British monarchy from our constitutional system. Then, if the answer to the first question is 'yes', a Labor government would have held another public vote, this time a binding constitutional referendum. If the answer were 'no', then no second vote would be necessary.

Labor's two-vote approach avoids a trap through what some call a 'mandate referendum' (or 'mandate plebiscite' if it's not binding). The initial vote shows whether there is popular support for a reform. Once that's decided in the affirmative, all that is left is to choose the most popular specific option for reform.

And note how Labor's proposed two-vote model might actually have some benefits for deliberation. Once a first vote endorses reform, this can clarify important matters and issues.

Labor's two-vote model may seem cumbersome, but running two votes, separated by several months or even a year or two, might have benefits. It could allow voters to think hard and learn about constitutional details in the intervening period.

Source (adapted): 'Referendum redux: Labor's two-step plan for a vote on becoming a republic has some precedents', Ron Levy, The Conversation, *15 November 2018*

Activity 7.2 Analysis

Australia becoming a republic

1 Describe how and why Australia may become a republic.

2 'Australia is a country that should be responsible for its own government, the Governor-General as the Crown's representative should not have any power'. To what extent do you agree with this statement. Justify your response.

Figure 7.3 Role of ministers of government in upholding the principles of responsible government

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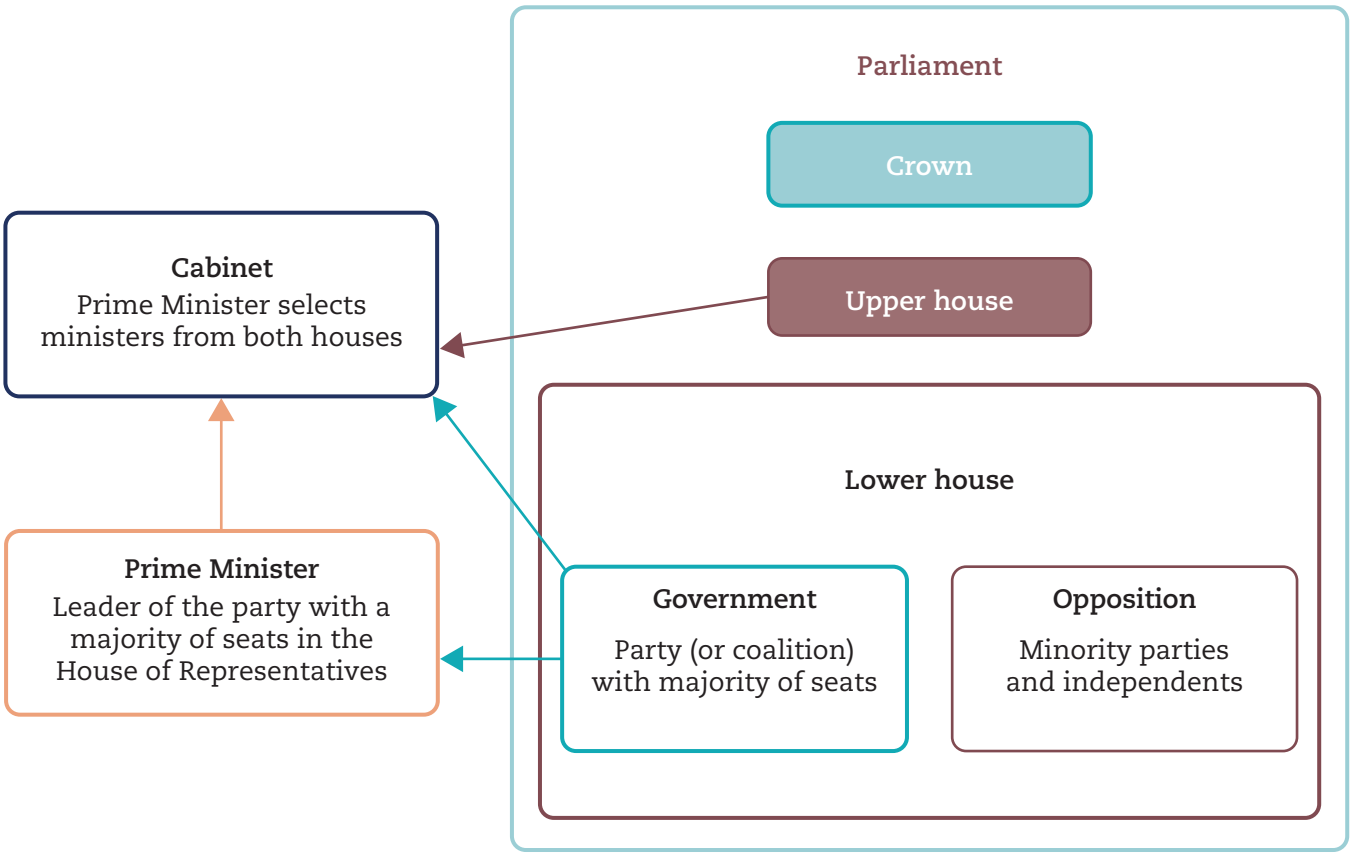
How is government formed?

The political party, or parties in a coalition, with a majority of seats in the lower house (House of Representatives) form the government. The other party/parties form the opposition. The Victorian Government is formed in the same way.



How is a Prime Minister selected?

The leader of the party that holds a majority in the House of Representatives becomes the Prime Minister. At the state level, the Premier is selected in a similar manner.

What is a minister?

The Prime Minister recommends other members of the majority party (or parties in coalition) to the Governor-General to be appointed as ministers of state.

A minister is responsible and answerable to parliament for the actions of a government department. Ministers can be responsible for a range of departments (or portfolios – which is a special area of responsibility). Examples include: defence, finance, education and health. A minister must be a member of parliament; they may be a member of either the House of Representatives or the Senate.

The minister is responsible to the Governor-General, the Prime Minister and to the members of both houses. Ministers can be asked to answer questions on all aspects of the departments for which they are accountable. This is a key feature of responsible government. At a state level, ministers are responsible to the Governor, the Premier and the State parliament (see Figure 7.3).

What is Cabinet?

Cabinet is a meeting of ministers. Members of Cabinet form the Executive Council. Most members of Cabinet are ministers 'with a portfolio'. The members of Cabinet determine the general policy of the government. Most Bills are approved by Cabinet before they are presented to the parliament.

The way Cabinet works is not set out in the Constitution. Cabinet operates according to practices inherited from the Westminster system, which are designed to reflect the principles of responsible government.

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7.4 Victorian parliament

The Victorian parliament also has a bicameral system. It consists of the **Legislative Assembly** (lower house), the **Legislative Council** (upper house) and the Crown (represented by the Governor).

The Legislative Assembly

The Legislative Assembly is the lower house of the Victorian parliament. It consists of 88 representatives. Members are elected by constituents and each electorate represents approximately 50 000 voters. Members of the Legislative Assembly are elected for four years with the election held on the last Saturday in November.

The Legislative Assembly is the lower house representing the interests of the majority of people.

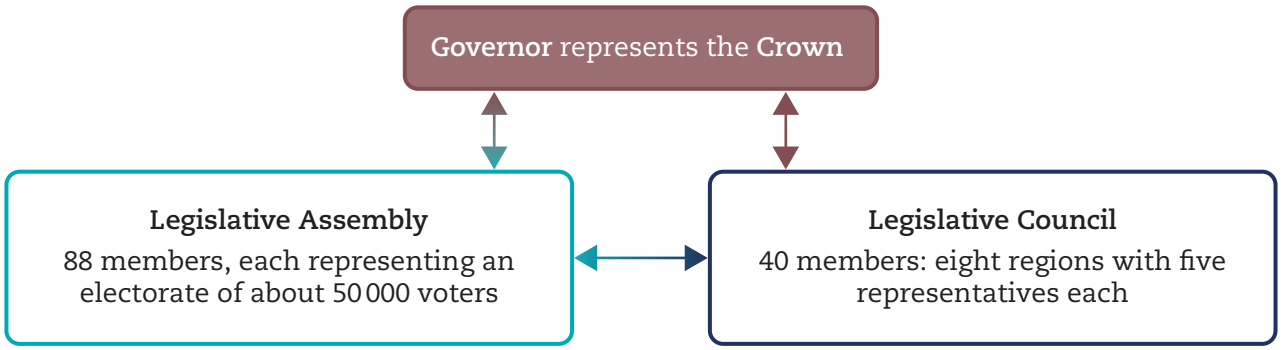

Figure 7.4 The Victorian parliament consists of the Queen's representative (the Governor), the Legislative Assembly and the Legislative Council.

Victorian parliament

The role of the Legislative Assembly

The Legislative Assembly performs a role similar to that of the House of Representatives. It is made up of members elected by the people. Each member must represent the interests of the people who elected them. Government is formed by the party/parties (coalition) with the majority of elected representatives in this house. The main function of the Legislative Assembly is to make laws; it shares this role with the Legislative Council. To become a law, the proposal must receive the approval of both houses of parliament and Royal assent from the Governor. The majority of Bills are initiated in the Legislative Assembly, where government is formed.

The role of the Legislative Assembly includes making laws, representing the majority of voters and forming government.

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

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The Legislative Assembly

The Legislative Council

The Legislative Council is the upper house in the Victorian parliament and represents the interests of the people in different areas.

The Legislative Council is the upper house of the Victorian parliament. It consists of 40 members representing eight regions. Each region is made up of 11 electoral districts, each of about 470 000 electors. Each region elects five representatives. Members of the Legislative Council are elected for eight years with half elected every four years at each election for the lower house.

The role of the Legislative Council

The role of the Legislative Council includes making laws, reviewing laws and representing the interests of different regions.

The Legislative Council plays an important role in law-making. A Bill must be passed by both the Legislative Assembly and the Legislative Council before it can become law. Most laws are proposed by the government and therefore start in the Legislative Assembly and are reviewed by the Legislative Council. However, bills can also be initiated in the Legislative Council. The Legislative Council represents the regions of Victoria. Each region elects five representatives to represent their interests in the laws that are made.

The Legislative Council

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Table 7.3 Key functions of the Legislative Assembly and Legislative Council

Role	Explanation	
	Legislative Assembly	**Legislative Council**
Determining government	The party, or parties in coalition, with a majority in the lower house forms government.	
Representative government	Members of the Legislative Assembly are elected to represent areas of approximately the same number of electors. The electoral system ensures that the Legislative Assembly represents the interests of the majority of voters.	A function of the Legislative Council is to safeguard the interests of people in all areas of Victoria. Each region elects an equal number of representatives; therefore, the Legislative Council provides equal representation of all areas in the state.
Responsible government	Individual members of the Legislative Assembly have the opportunity to put forward the views of their electorate by presenting petitions or raising issues with ministers during Question Time.	When the Legislative Council is not composed of a majority of members from the party forming government it may be more forceful in requiring the government to account for its actions. In addition, individual members have the opportunity to present petitions and to raise issues during Question Time.
Scrutinising government	The Legislative Assembly plays an important role in providing for responsible government. Legislation is debated, ministers make policy statements, matters of public importance are discussed and ministers are questioned during Question Time.	The Legislative Council can supervise administrative laws, protect the rights of citizens, present conflicting views in open debate, and gather and disseminate information.
Controlling government spending	The government can only collect taxes or allocate the spending of public money if a law is passed by parliament. Appropriation Bills must be initiated in the lower house.	
Reviewing laws	While most Bills are initiated by the government in the Legislative Assembly, they can be initiated in the Legislative Council. Where this occurs, the Legislative Assembly will review those proposed laws passed by the Legislative Council.	The Legislative Council provides for the review of legislation passed by the Legislative Assembly. The Legislative Council can originate, amend or reject proposed laws (except an Appropriation Bill which allows for money to be spent).

Can the Legislative Council block supply?

The Legislative Council cannot block supply. A Supply Bill is an Appropriation Bill concerned with taxation or government spending. The Legislative Council can debate and consider Appropriation Bills. The Legislative Council has one month to consider such Bills. If, in that time, the Legislative Council does not pass the Bill, it will automatically be presented to the Governor for Royal assent.

The Crown

At a state level, the Crown is represented by the Governor. The role of the Governor is similar to the role of the Governor-General.

Video

Victorian Governor Linda Dessau

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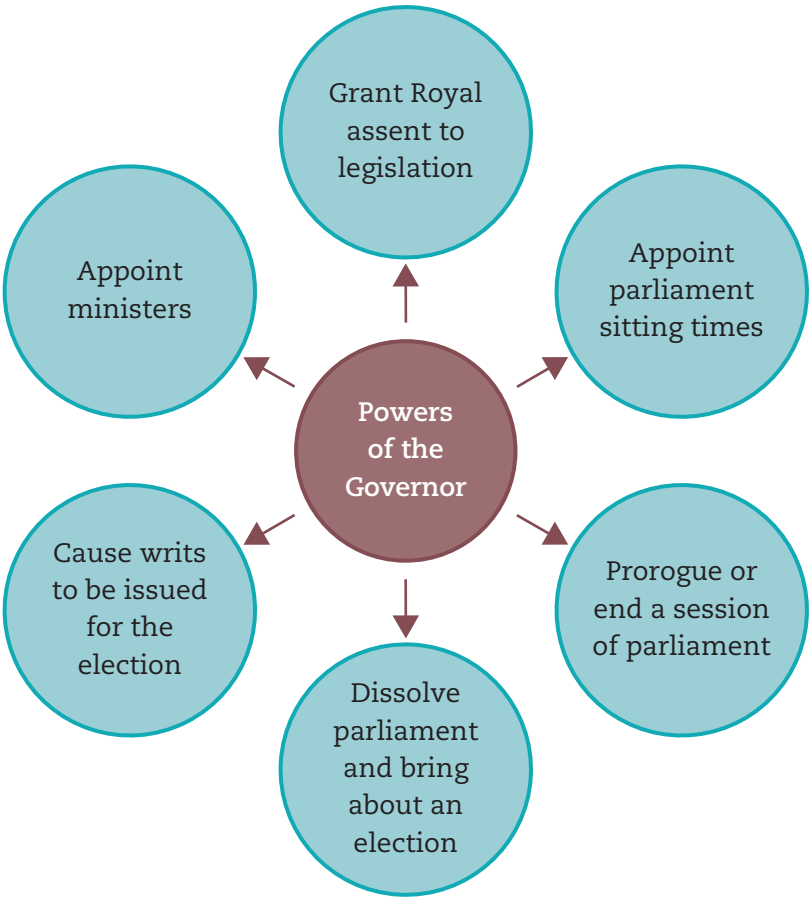
The role of the Governor



The role of the Governor includes granting Royal assent to Bills, issuing writs for elections and proroguing parliament.

For more information on the Victorian Governor, go to www.governor.vic.gov.au

Figure 7.5 Powers of the Governor

News report 7.3

Do state governments actually matter?

A former adviser to a NSW Premier recently tweeted: 'State government in 2018 is about running four or five businesses. The whole Westminster thing is preposterous. An efficient model would be a six-person executive guided by a People's Convention meeting every two years for a month.'

That seems unlikely, but the idea that state governments have become too municipal to be taken seriously is familiar. Through Australia's history large fields of activity remained predominantly state matters after Federation – education, health and hospitals, public transport and roads, local government, and law and order.

In the area of social security after the Second World War, the Commonwealth parliament has become more important. The Commonwealth also left some fields to the states even where its authority to act was unquestioned – such as in marriage and divorce law before 1959–61 and, for most of the twentieth century, most major public utilities, such as railways, were controlled by the states.

The 1980s revealed some of the limits for state governments in economic policy. When the Goods and Services Tax (GST) was introduced, the then Prime Minister, John Howard, made an agreement with the states to provide an agreed amount of taxation revenue each year.

Where does this leave state government today? In the first place, it shares control with federal government over areas that are among the most controversial and difficult for government.

State government's capacity for innovation and experimentation in fields that matter, and are not dependent on federal control, remains alive.

It seems that in a time of growing mistrust of some politicians that state government provides electoral choice, checks on federal government power, and a large array of the services that Australians think of as the province of government.

Source (adapted): 'State governments are vital for Australian democracy: here's why', Frank Bongiorno, The Conversation, *29 October 2018*

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Activity 7.3 Folio exercise

Parliament online

Using the Australian parliament's homepage (www.aph.gov.au), complete the following research on the role of the Commonwealth parliament:

1 Go to 'About Parliament', 'House of Representatives'. Go to 'About the House of Representatives'. Complete the following tasks:
   - The House of Representatives is sometimes called the 'people's house' or the 'house of government'. Explain this idea.
   - Go to 'Seating Plan for the House of Representatives'. Create a diagram to explain the composition of the House of Representatives.

2 Go to 'About the House of Representatives', then to 'Infosheet 19' – 'The House, Government and Opposition'. Complete the following tasks:
   - Explain the role of the government and those in opposition in the House of Representatives.
   - How is government formed?
   - Describe the role of the following:
     - Prime Minister
     - Leader of the Opposition
     - ministers
     - backbenchers
     - shadow ministers.

3 Go to 'Senate' and then to 'About the Senate'. Complete the following tasks:
   - What is the role of the Senate?
   - How often are elections held for the Senate?

4 Prepare a written response to the following by drawing on the material covered in your internet research and notes taken from the text:
   - Describe the structure of the Commonwealth parliament.
   - Describe the role and function of each house of the Commonwealth parliament.

5 Read News report 7.3 and answer the following questions.
   - Describe the relationship between the Commonwealth and state governments as outlined in the article.
   - Distinguish between the role and purpose of the Commonwealth and state parliaments.

6 News report 7.3 states that 'state government provides electoral choice, checks on federal government power, and a large array of the services.' Explain this statement.

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Key point summary

Do your notes cover all of the following points?

- ❏ Structure of parliament and the roles played by the two houses and the Crown
  - Australia is a federation of states and territories.
  - The structure of parliament in Australia is based on the British Westminster model.
  - The Commonwealth parliament and the Victorian parliament are bicameral.
- ❏ Commonwealth parliament
  - Consists of the House of Representatives (lower house), Senate (upper house) and the Governor-General (Crown)
    - The House of Representatives consists of 151 members and is designed to represent the interests of the majority of people. Each member represents an electorate of approximately the same number of electors. Government is formed by the party or parties with a majority in the House of Representatives.
    - The Senate consists of 76 senators: 12 from each State and two from each Territory. The Senate provides:
      - equal representation for all states
      - a means to review legislation passed by the lower house.
- ❏ The role of the Governor-General
  - The Crown is represented by the Governor-General at a federal level. Powers include:
    - Royal assent to legislation
    - appointing parliament's sitting times
    - dissolving or proroguing parliament
    - issuing writs for general elections
    - appointing ministers and other officials.
- ❏ Victorian parliament
  - Consists of the Legislative Assembly (lower house), Legislative Council (upper house) and the Governor (Crown).
  - The Legislative Assembly consists of 88 members and is designed to represent the interests of the majority of people. Each member represents an electorate of approximately the same number of electors. Government is formed by the party or parties with a majority in the Legislative Assembly.
  - The Legislative Council consists of eight regions, each with five members, and provides:
    - equal representation of all regions
    - an avenue to review legislation passed by the lower house.
- ❏ The role of the Governor
  - The Crown is represented by the Governor at a state level. Powers include:
    - Royal assent to legislation
    - appointing parliament's sitting times
    - dissolving or proroguing parliament
    - issuing writs for general elections.

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End-of-chapter questions

Revision questions

1 Outline the structure of the Victorian and the Commonwealth parliaments.

2 Describe the role of the lower house in both the Commonwealth and the Victorian parliaments.

3 Describe the role of the upper house in a bicameral system.

4 Explain the role of the Crown in the Australian parliamentary system.

Practice exam questions

1 Outline the structure of the Victorian and Commonwealth parliaments. [6 marks]

2 Identify two roles played by the Crown in the Australian parliamentary system. [2 marks]

3 Explain why the Senate is referred to as the 'states' house'. [2 marks]

4 Why is it that the lower house of both the Victorian (Legislative Assembly) and the Commonwealth (House of Representatives) parliaments form government? [2 marks]

5 How does the bicameral structure of the Commonwealth parliament provide for effective law-making? [6 marks]

6 Explain the role played by each of the houses of parliament and the relationship between the two houses. [6 marks]

7 'The lower house provides for the interests of the majority of people to be represented. We do not need a Senate.' Do you agree? Justify your decision. [6 marks]

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Chapter 8

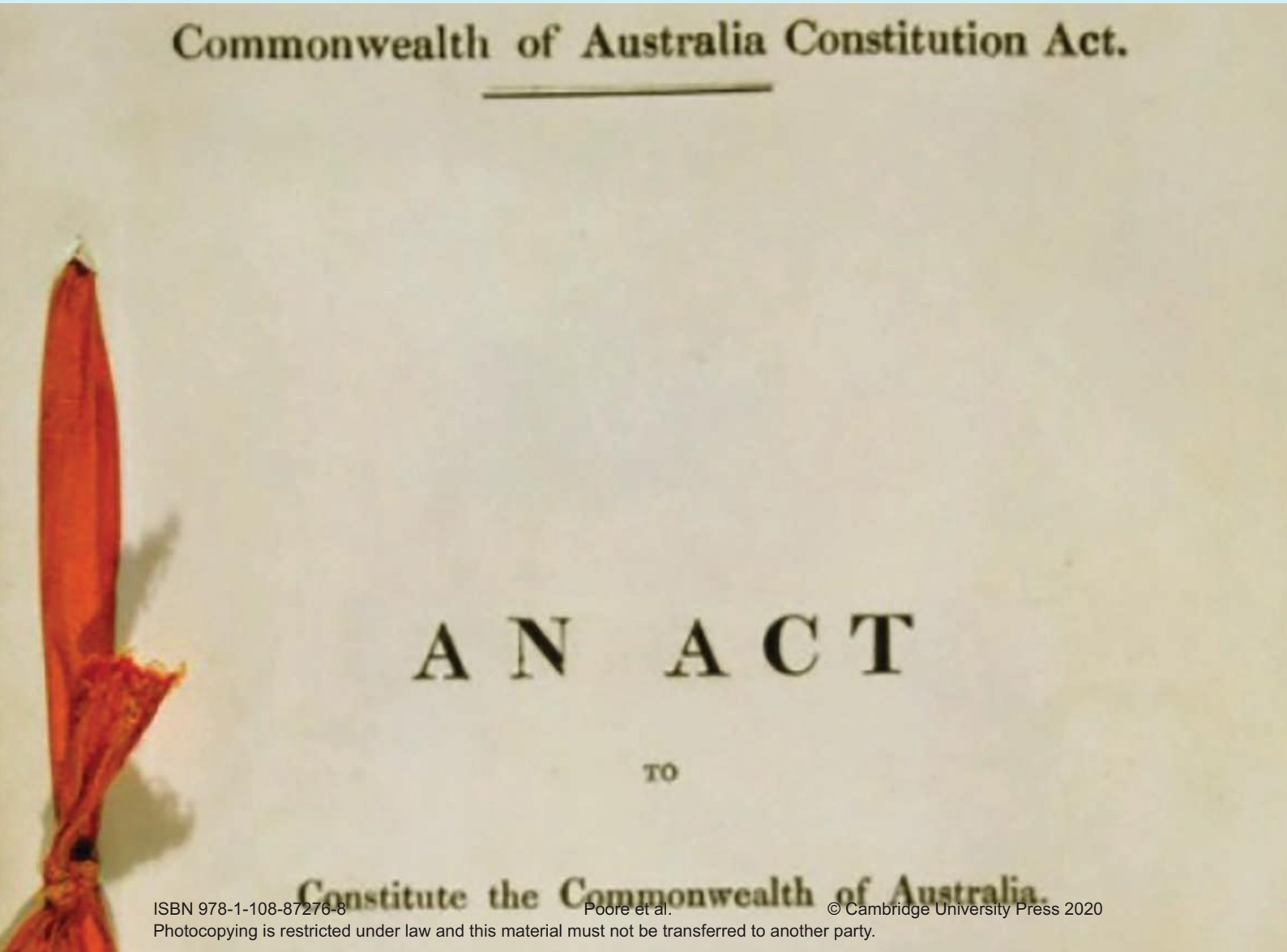
Unit 4 – Area of Study 1

The people and the Australian Constitution

This chapter focuses on exploring the relationship between the people and the Australian Constitution. We begin by exploring the constitutional division of law-making powers of the State and Commonwealth parliaments and the significance of section 109 of the Australian Constitution in relation to these powers. The Australian Constitution also acts as a check on parliament in law-making and we explore the mechanisms that ensure that parliament does not make laws beyond its powers.

We also explore the role of the people in protecting and changing the Constitution by looking at the referendum process, the role of the High Court as a guardian of the Australian Constitution and the impact of international declarations and treaties on the interpretation of the Commonwealth's external affairs power.

The Commonwealth Of Australia Constitution Act 1900 (UK)


Commonwealth of Australia Constitution Act.

AN ACT

TO

Constitute the Commonwealth of Australia.

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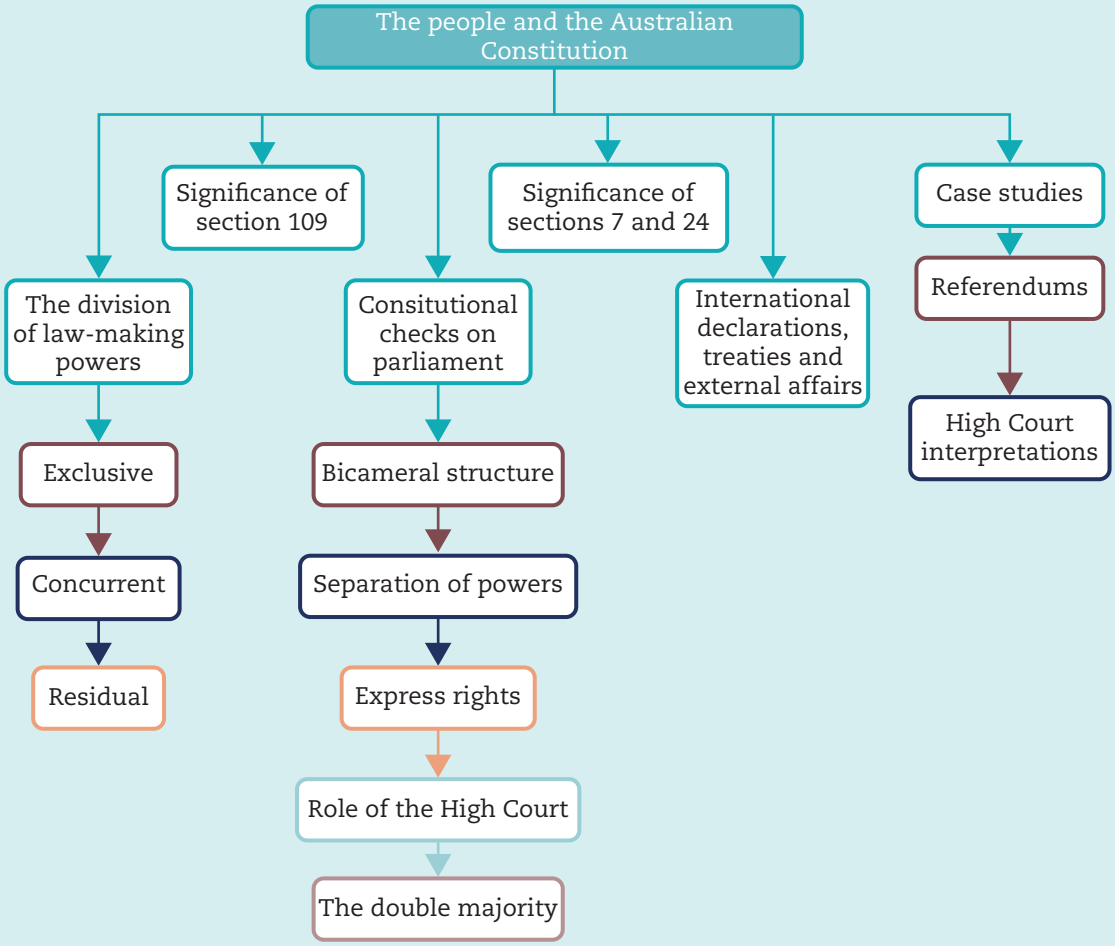

Key terms

bicameral a parliament with an upper and a lower house

bilateral agreement an agreement between Australia and one other country

concurrent powers specific law-making powers in the Constitution that may be exercised by both the Commonwealth and State parliaments; namely, shared law-making powers

constitution fundamental rules or principles and structures to which a nation is governed

division of powers the system in which law-making powers are divided between the Commonwealth and the states

double majority where, for a referendum to be passed, it must have a 'yes' vote from the majority of electors throughout Australia, plus a 'yes' vote from the majority of electors in the majority of states

exclusive powers law-making powers set out in the Constitution that may only be exercised by the Commonwealth parliament

executive function part of the separation of powers under the Australian Constitution: the power to implement and administer laws, exercised by the Governor-General on the advice of the government

express rights rights that are written into the Australian Constitution; these rights can only be changed by a referendum

High Court the highest court in Australia, established by the Constitution, and the only court with the authority to hear and determine disputes about the Constitution; it is the highest court of appeal

international declaration a non-binding agreement between countries

judicial function part of the separation of powers under the Australian Constitution: the power to enforce the law and settle disputes, exercised by the courts

legislative function part of the separation of powers under the Australian Constitution: the power to make laws, exercised by parliament

multilateral agreement an agreement between three or more countries

referendum the process set out in section 128 of the Constitution to allow the Constitution to be formally altered; requires a vote by the Australian public and to achieve a double majority

residual powers law-making powers that remained with the state parliaments after Federation

separation of powers a principle established by the Australian Constitution that entails the division of powers of government among legislative, administrative and judicial bodies, to provide a system of checks and balances

specific powers the legislative powers of the Commonwealth parliament stated (specified) in the Australian Constitution

treaty a formal agreement between nations that is binding at international law

ultra vires outside of parliament's law-making power

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8.1 The Australian Constitution

The Australian Constitution sets out the structure and role of the Commonwealth parliament and its power to make laws. It lays out the Commonwealth's relationship to the states and their parliaments.

A **constitution** for a country is a body of fundamental principles or rules by which it is governed. It establishes the structures of governance and the powers, as well as the limitations, of government, and provides for a system of checks and balances.

Before 1901, Australia consisted of six separate colonies that were largely self-governing, but also subject to the British Parliament. The inefficiencies of how Australia was governed was highlighted when, during the 1880s and 1890s, the fear of invasion grew. Countries such as Germany, France and Russia had colonised parts of the South Pacific while other countries in the region, such as China and Japan, had large populations and a strong military presence. During the 1890s, a series of conventions were held, with representatives from each state (except WA) to draw up a draft Constitution. The final draft was approved by the Australian people by voting in a referendum, but it had to be passed by the British Parliament because they still had ultimate control over the colonies. The British Act was passed on 9 July 1900 and assented to by Queen Victoria. It took effect on 1 January 1901. This Act is the *Commonwealth of Australia Constitution Act 1900* (UK). The Australian Constitution established the legal and political framework for Australia, and made Australia a legal entity.

The colonies became a federation of states under one central government. (The territories were not established until 1911, and although they are still part of the Commonwealth of Australia, they do not have the same status as the states).

The Australian Constitution set out the basic rules for our system of government – how power is shared and exercised by political and legal institutions. The Constitution established the structure of the Australian parliament and its power to make laws, distributed powers between the Commonwealth and the six states, and defined the relationship between the Australian parliament and the states and their parliaments.

Since 1901, there have been some alterations to the Australian Constitution, which demonstrates that it is indeed a living and dynamic document.

The formal title of Australia's Constitution is the *Commonwealth of Australia Constitution Act 1900* (UK).

Alterations to the Australian Constitution

- *Constitution Alteration (Senate Elections) 1906* (No. 1 of 1907)
- *Constitution Alteration (State Debts) 1909* (No. 3 of 1910)
- *Constitution Alteration (State Debts) 1928* (No. 1 of 1929)
- *Constitution Alteration (Social Services) 1946* (No. 81 of 1946)
- *Constitution Alteration (Aboriginals) 1967* (No. 55 of 1967)
- *Constitution Alteration (Senate Casual Vacancies) 1977* (No. 82 of 1977)
- *Constitution Alteration (Retirement of Judges) 1977* (No. 83 of 1977)
- *Constitution Alteration (Referendums) 1977* (No. 84 of 1977)

The *Commonwealth of Australia Constitution Act 1900* (UK) came into effect on 1 January 1901.

Download a copy of the Australian Constitution to refer to throughout this chapter. A PDF of the Constitution can be downloaded from the Parliament of Australia website at https://www.aph.gov.au

The people and the Australian Constitution

In reality, … the Constitution is a document which was conceived by Australians, drafted by Australians and approved by Australians.

Since that time, Australia has become an independent nation, and the character of the Constitution as the fundamental law of Australia is now seen as resting predominantly, not on its status as an Act of the British Parliament, which no longer has any power over Australia, but on the Australian people's decision to approve and be bound by the terms of the Constitution.

What has been judicially described as 'the sovereignty of the Australian people' is also recognised by section 128, which provides that any change to the Constitution must be approved by the people of Australia.

Source: Australia's Constitution—Background information: with overview and notes by the Australian Government Solicitor

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Activity 8.1 Folio exercise

Features of the Australian Constitution

1 Use your copy of the Australian Constitution to look at the following features. The Australian Constitution is made up of eight chapters:

- Chapter 1: The Parliament
  - Part I: General
  - Part II: The Senate
  - Part III: The House of Representatives
  - Part IV: Both Houses of Parliament
  - Part V: Powers of the Parliament
- Chapter II: The Executive Government
- Chapter III: The Judicature
- Chapter IV: Finance and Trade
- Chapter V: The States
- Chapter VI: New States
- Chapter VII: Miscellaneous
- Chapter VIII: Alteration of the Constitution

Chapters I, II and III set out the separation of powers which underpins our system of democracy; that is, that the parliament (makes law), the executive (administers the law), and the judiciary (enforces the law) are largely independent and separate from each other. This means that no one body has absolute power or control over the political or legal system. Why do you think this separation of law makers, administers and enforcers of the law, needs to exist?

2 The Constitution establishes the Commonwealth parliament in Chapter I, including its structure of a Senate and the House of Representatives (bicameral system of parliament), the composition of those Houses and their roles. For example, section 24 provides that the House of Representatives will be composed of members directly chosen by the people and the number of such members shall be, as nearly as practicable, twice the number of senators. How many members are there currently in the House of Representatives? How many in the Senate? Look at Chapter I Part III of the Constitution. Can you find where it states how often an election must be held?

3 The Constitution established the High Court of Australia. The High Court was established as a separate power to the Commonwealth parliament and has, at times, overturned decisions made by the Australian Government if determined unconstitutional. Look up section 71 (Chapter III). Sections 75 and 76 set out the original jurisdiction of the Court. What is the Court's jurisdiction under section 76 (i)?

4 The Constitution sets out the division of law-making powers between the Commonwealth parliament and the state parliaments. All the law-making powers of the Commonwealth parliament are listed in the Constitution in sections 51 and 52. Read through these two sections of the Constitution and summarise in your own words.

5 Section 128 sets out how the wording of the Constitution is able to be changed; that is, by a referendum. It seems a convoluted process, but it is very important that such a document can only be changed by the people, not on the whim of a government. Why do you think this is the case?

6 What do you think happened to section 127? We explore this further in Chapter 8.6 when we look at a referendum that was successful in changing the wording of the Constitution.

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8.2 Division of law-making powers between the Commonwealth and state parliaments

Parliament is the supreme law-making body in Australia. There are nine parliaments in Australia (one Commonwealth, six states and two territories) and each is the supreme law-making body when they are acting within their jurisdiction. The **division of powers** refers to how the areas of law-making are divided between the Commonwealth parliament and the state parliaments. The Australian Constitution sets out the law-making jurisdictions of the parliaments. These law-making powers are:

- **Specific powers** – all law-making powers of the Commonwealth parliament are specified or listed in the Constitution
- **Exclusive powers** – law-making powers that are solely the jurisdiction of the Commonwealth parliament
- **Concurrent powers** – law-making powers that are shared by the Commonwealth and state parliaments
- **Residual powers** – law-making powers that were left with the states at the time of federation. The Commonwealth parliament has no jurisdiction to make law in these areas.

'Section' can be abbreviated to 's', and 'sections' to 'ss'.

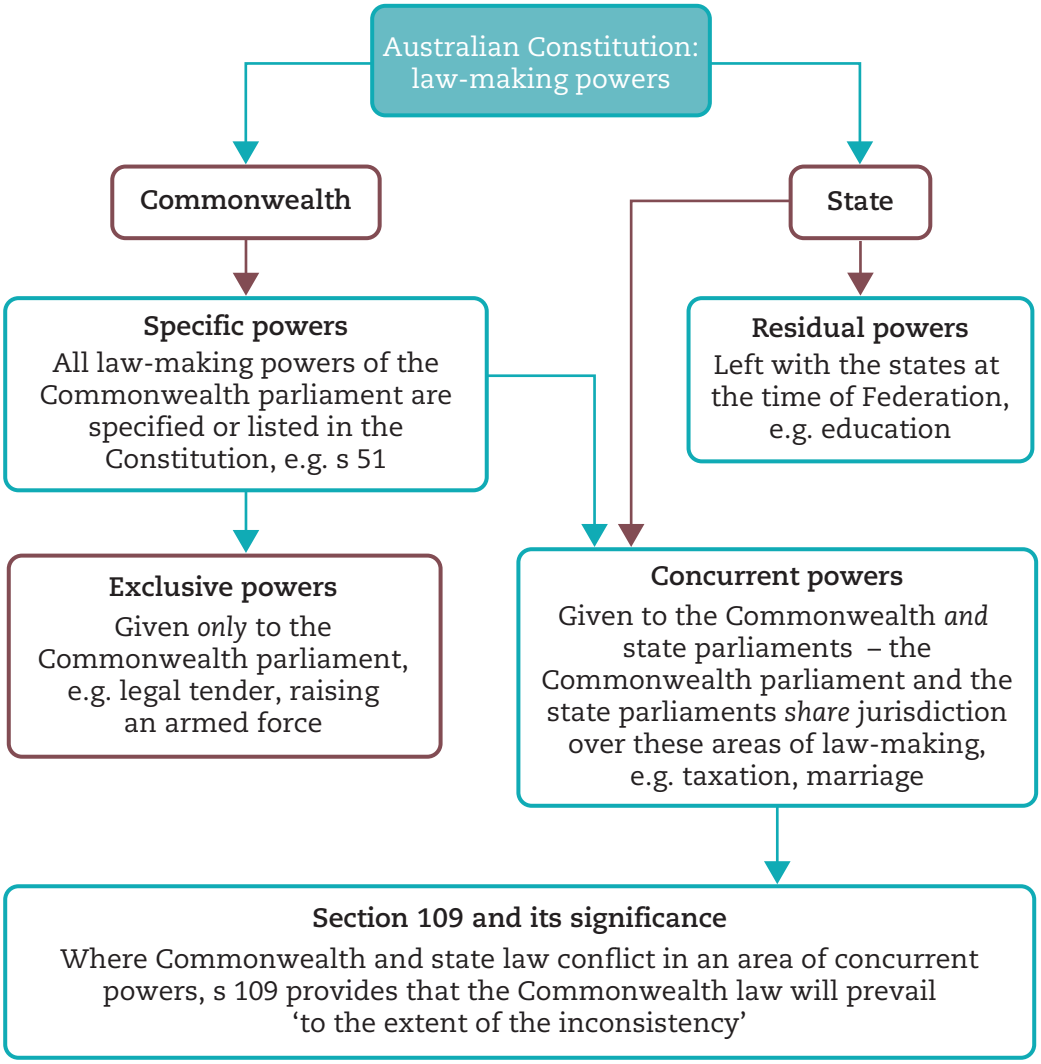

Figure 8.1 The division of law-making powers in the Australian Constitution

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The Constitution divides the law-making powers between the Commonwealth parliament and state parliaments. All powers of the Commonwealth parliament are specified; that is, listed in the Constitution. These powers are known as 'specific powers', and are mentioned separately or named one by one.

The Constitution states the law-making powers of the Commonwealth.

Most of the specific powers of the Commonwealth parliament are listed in sections 51 and 52 of the Constitution.

The majority of the Commonwealth law-making powers are listed in section 51 of the Constitution. These laws are either exclusive law-making powers given to the Commonwealth parliament or concurrent law-making powers. Section 51 states that the Commonwealth parliament may make laws 'for the peace, order and good government of the Commonwealth' in respect of any of the categories listed. These include taxation, external affairs and immigration.

Sections 51 and 52 list the specific powers of the Commonwealth parliament.

Section 52 states three further areas in which the Commonwealth parliament has exclusive power.

Some law-making powers listed in section 51 may be used only by the Commonwealth parliament; others may be used by the Commonwealth and State parliaments concurrently.

Some law-making powers listed in section 51 may be used only by the Commonwealth parliament; others may be used by the Commonwealth and state parliaments concurrently.

Activity 8.2 Folio exercise

Features of the Australian Constitution (continued)

Refer to your copy of the Constitution. Look up sections 51 and 52. These are the law-making powers of the Commonwealth parliament.

1 What is the phrase that introduces section 51?

2 What law-making powers of the Commonwealth are listed under the following sub-sections of section 51?

- (i)
- (vi)
- (vii)
- (viii)
- (ix)
- (xi)
- (xii)
- (xxi)
- (xxii)
- (xxvi)
- (xxxi)

3 What is the phrase that introduces section 52? How is this different from the introduction to section 51?

4 Keep in mind that the Constitution was written in the 1890s. Read the three areas of law-making power the Commonwealth has in section 52. Rewrite them in your own words.

5 Look up section 51(vi). What does it say? Given that a naval force is specifically mentioned, why do you think an airforce is not? Thinking in terms of statutory interpretation, do you think that the term 'military defence' would include an airforce?

The specific law-making powers of the Commonwealth are either an exclusive power or a concurrent power.

Exclusive powers

An exclusive power is a law-making power that is not shared with any other law-making authority. An exclusive Commonwealth power is a law-making power that can only be exercised by the Commonwealth parliament.

Exclusive powers are law-making powers that can only be used by the Commonwealth.

Section 52

All the powers in section 52 are exclusive powers. Section 52 states that the Commonwealth parliament has the exclusive power to make laws about:

All the powers in section 52 are exclusive.

- the Australian Capital Territory
- matters relating to the control of the public service
- other matters declared by the Constitution to be within the exclusive power of the Commonwealth parliament.

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Section 51

Some powers in section 51 are exclusive.

Many of the exclusive powers of the Commonwealth parliament are stated in section 51 of the Constitution. However, not all of the powers set out in section 51 are exclusive. Those law-making powers that are exclusive can be:

- exclusive by nature
- exclusive because the states are prohibited.

To understand which powers in section 51 are the exclusive powers of the Commonwealth parliament you may need to look at other sections of the Constitution.

Exclusive by nature

Some powers are exclusive to the Commonwealth because of what they are about.

In other words, they are exclusive because they refer to things that only a Commonwealth parliament can do. Examples of these powers are shown in Table 8.1.

Table 8.1 Law-making powers of the Commonwealth parliament that are, by their nature, exclusive

Section	Law-making power
51(iv)	Borrowing money on the public credit of the Commonwealth
51(xxiv)	The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the states
51(xxv)	The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the states
51(xxx)	The relations of the Commonwealth with the islands of the Pacific
51(xxxi)	The acquisition of property on just terms
51(xxxii)	The control of railways for defence purposes
51(xxxiii)	Acquisition of state railways, with permission from the state/s

Exclusive because states are prohibited

Making laws about currency is an exclusive power.

Some powers listed in section 51 can be used only by the Commonwealth parliament. For example, section 51(xii) gives the Commonwealth parliament the power to make laws about currency, coinage and legal tender. Section 115 declares: 'A state shall not coin money, nor make anything but gold and silver coin legal tender in payment of debts.' Thus, section 51 gives the power to make laws about currency to the Commonwealth parliament, and section 115 specifically prohibits states from coining money. Therefore, only the Commonwealth parliament has the power to coin money. The power to make laws about currency is therefore an exclusive power of the Commonwealth parliament.

Making laws about naval or military forces is an exclusive power.

Similarly, section 51(vi) of the Constitution specifies that the Commonwealth parliament can make laws about raising a naval and military defence, while section 114 states, 'a state shall not … raise or maintain any naval or military force'. Therefore, the power to make laws about military forces is an exclusive power of Commonwealth parliament.

Section 51(iii) grants the Commonwealth parliament the power to make laws concerning the imposition of bounties on the production or export of goods, and section 90 of the Constitution states that this is an exclusive power.

Table 8.2 Examples of law-making powers of the Commonwealth made exclusive by prohibiting states in other sections of the Constitution

Law-making power given to the Commonwealth parliament	Law-making power denied to the states
Section 51(xii) Currency, coinage and legal tender	**Section 115** A state shall not coin money. Therefore. legal tender is an exclusive law-making power of the Commonwealth parliament.
Section 51(vi) Naval and military defence	**Section 114** A state shall not raise or maintain any naval or military force. Therefore, this is an area of exclusive law-making power by the Commonwealth.
Section 51(iii) Imposition of bounties on the production or export of goods (i.e. customs and excise)	**Section 90** Bounties on the production or export of goods, customs duties and excise are stated as being exclusive to the Commonwealth.

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To understand the division of law-making powers between the two levels of government, it is necessary to read the entire Constitution.

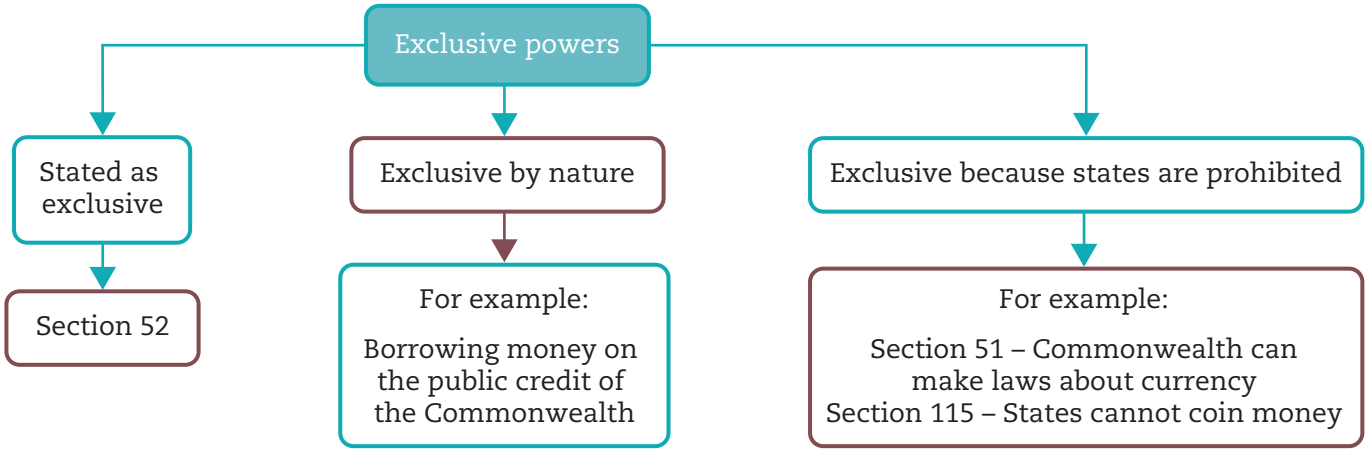
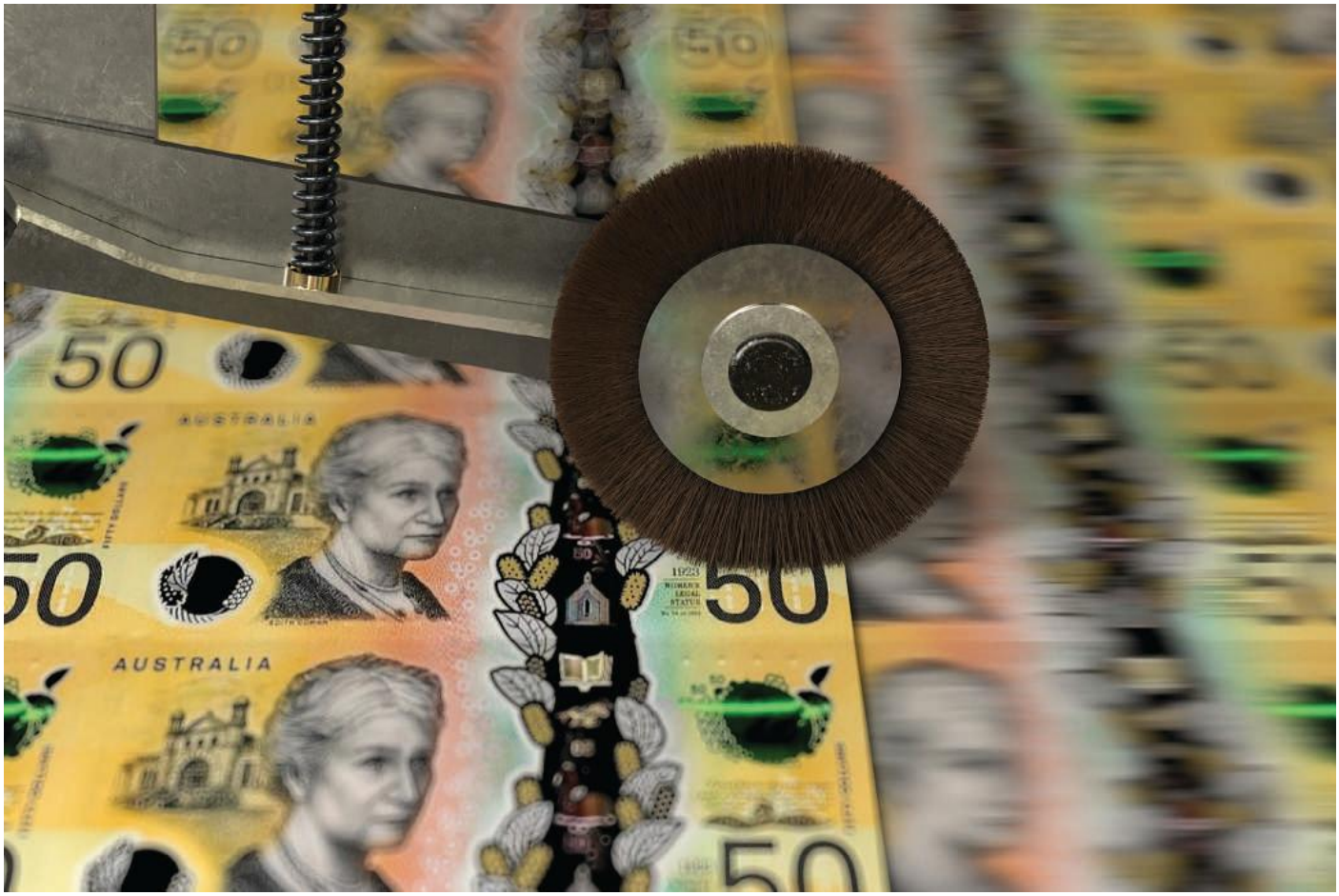


Figure 8.2 Exclusive powers



Currency – the printing and coining of money –is an exclusive law-making power of the Commonwealth parliament under the Australian Constitution.

Concurrent powers

Although some powers listed in section 51 can be used only by the Commonwealth parliament, the states are not excluded from legislating on all the areas listed in that section. State parliaments can make laws about some areas set out in section 51 provided they are not excluded from using that power by another section of the Constitution. These powers are known as concurrent powers.

Some powers stated in section 51 are shared with the states – these are called concurrent powers.

Concurrent powers are those for which both the Commonwealth parliament and state parliaments have law-making power; namely, shared law-making powers. The states share law-making powers with the Commonwealth parliament in many areas listed in section 51. These areas include marriage, divorce, taxation and bankruptcy.

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Table 8.3 Powers of parliament

Exclusive powers	Specific powers: ss 51 and 52	Concurrent powers
	s 51 The Parliament shall, subject to this Constitution, have power to make laws for peace, order and good government of the Commonwealth with respect to:	
s 90 States cannot levy custom or excise s 114 States cannot raise armies or navies s 115 States cannot coin money or legal tender	(iii) bounties on the production of goods (vi) navy and military defences (xii) currency, coinage and legal tender	
	(xxi) marriage laws (xxii) divorce and matrimonial causes	States can make laws about child welfare, some forms of maintenance and some property disputes
Law-making power of the Commonwealth parliament	Law-making power shared by State and Commonwealth parliaments	

Residual powers

Residual powers are the law-making powers of the states.

Commonwealth parliament makes laws on matters set out in the Constitution. Areas of law-making such as criminal law, police, education, health, laws on roads, public transport and the environment are not mentioned in the Constitution. These areas of law remained with the states and only the states have the power to make laws about these matters. These law-making powers are referred to as the 'residual powers' of the states. In this case, 'residual' means that which is left over: powers that remained with the states after Federation became the residual powers of the states. The Constitution does not list these residual powers. However, the Constitution recognises the power of state parliaments in section 107, and section 106 recognises the validity of the separate state constitutions.

Residual powers are not listed in the Constitution.

Section 106 Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 107 Saving of power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Section 96 allows the Commonwealth parliament to make grants of money to the states. When the Commonwealth grants money to a state, it can impose conditions on the way in which the state spends that money. For example, health is a state power but the Commonwealth parliament may direct money to the building of a particular hospital in one of the states. These conditions that the Commonwealth put on the spending of money may influence the policies of state governments.

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Section 96 Financial assistance to States

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Australia has 10 territories, including the Northern Territory and the Australian Capital Territory. NT and the ACT are by and large treated as states, although sections 111 and 122 of the Constitution give exclusive power to the Commonwealth in relation to the territories.

Activity 8.3 Folio exercise

Understanding the division of powers

The Study Design requires you to **compare** the constitutional law-making powers of the state and Commonwealth parliaments, using examples. This means that you should know the similarities and differences between the types of law-making powers.

1 Complete the following chart by providing a clear explanation as well as an example of each:

Law-making powers	Explanation	Example
Specific powers		
Exclusive powers		
Concurrent powers		
Residual powers		

2 With the use of examples, define the Commonwealth law-making powers.

3 Explain how the division of law-making powers under the Constitution can restrict the states.

4 Compare law-making powers of the Commonwealth parliament with those of the states.

5 What section/s of the Australian Constitution is/are relevant to the states being prevented from raising their own military force? Why do you think the states are restricted in raising their own armed force?

8.3 Significance of section 109 of the Australian Constitution

Section 109 Inconsistency of laws

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.

If the Commonwealth parliament and a state parliament make a law on the same area (under concurrent powers), and the state law is inconsistent with the Commonwealth law, then there is conflict between the state and Commonwealth legislation.

Section 109 of the Constitution provides a mechanism to resolve this. It says that Commonwealth law stands above state law so, if there is a conflict, the Commonwealth law prevails and the inconsistent part of the state law is invalid.

Section 109 states that when state and Commonwealth laws conflict, in an area of concurrent law-making power, Commonwealth law prevails to the extent of the inconsistency.

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The impact of section 109

Marriage is an area of concurrent power. The *Marriage Act 1958* (Vic) provided laws for a valid marriage. Before this Act, there was no Commonealth law about marriage. When the Commonwealth parliament passed the *Marriage Act 1961* (Cth), it made the pre-existing Victorian legislation largely redundant because both laws covered the same areas, so the Commonwealth law prevailed. In this case, there was no conflict between the state law and the Commonwealth law; the Victorian law was redundant because there was now a Commonwealth law that covered the same area. Since this time, the inconsistent areas of the Victorian Act have been repealed (removed from the Act).

Table 8.4 The significance of section 109

Significance	Explanation
Mechanism to resolve conflict	If there is conflict or inconsistencies between a state law and Commonwealth law in an area of concurrent law-making power, section 109 states that it is the Commonwealth law that will prevail.
An inconsistency must be challenged	An inconsistent law that exists between a state and the Commonwealth must be challenged (by the Commonwealth, an individual or group) before section 109 is enforced.
Restriction on state power	If a state makes a law on an area of concurrent power and that law conflicts with a Commonwealth law, the Commonwealth law will prevail to the extent of the inconsistency. This restricts the states in making laws on concurrent powers if a Commonwealth law already exists.
Only a restriction to the states if law is inconsistent	Section 109 is only a restriction where there is an inconsistency or overlap between the state law and Commonwealth law.
State law will only be deemed invalid where there is an inconsistency	An inconsistency can be a word, phrase, section or the whole law, for example.

Legal brief 8.1

John McBain v The State of Victoria and others [2000] FCE 1009

Under section 8 of the *Infertility Treatment Act 1995* (Vic), in order to receive IVF treatment, a woman had to be either:

- married and living with her husband; or
- living with a man in a de facto relationship.

Therefore, single women (also married women who were separated from their husbands, and lesbians) were excluded from IVF treatment.

However, section 22 of the *Sex Discrimination Act 1984* (Cth) made it unlawful for a person to refuse to provide a service to another on the grounds of that person's marital or relationship status. Under this Act, marital or relationship status means being any of the following:

- single; married; married, but living separately and apart from his or her spouse;
- divorced; the de facto partner of another person; the de facto partner of another person, but living separately and apart from that other person;
- the former de facto partner of another person; the surviving partner of a person who has died.

Dr John McBain was a gynaecologist and specialised in reproductive technology. He was providing a patient, Leesa Meldrum, with IVF treatment. However, as the law in Victoria stood, this treatment was deemed illegal as Ms Meldrum was single. Dr McBain challenged the Victorian law as being inconsistent with that of the Commonwealth law. Under the Victorian law, he was not able to provide a single woman access to IVF treatment but he could be prosecuted under the Commonwealth Act if he denied access to treatment.

The Federal Court held that the Victorian and Commonwealth legislation were inconsistent and therefore, section 109 of the Constitution applied; the Commonwealth law would prevail and the section of the Victorian law that denied IVF treatment on the basis of marital status was invalid. Justice Sundberg in the Federal Court found in favour of Dr McBain and stated that fertility treatments such as IVF are 'services provided by medical practitioners', within the meaning of section 22 of the *Sex Discrimination Act*.

The significance of this decision was that people could not be denied access to IVF treatment in Victoria on the basis of their marital status. This is illustrated in Figure 8.3.

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Leesa Meldrum outside the High Court

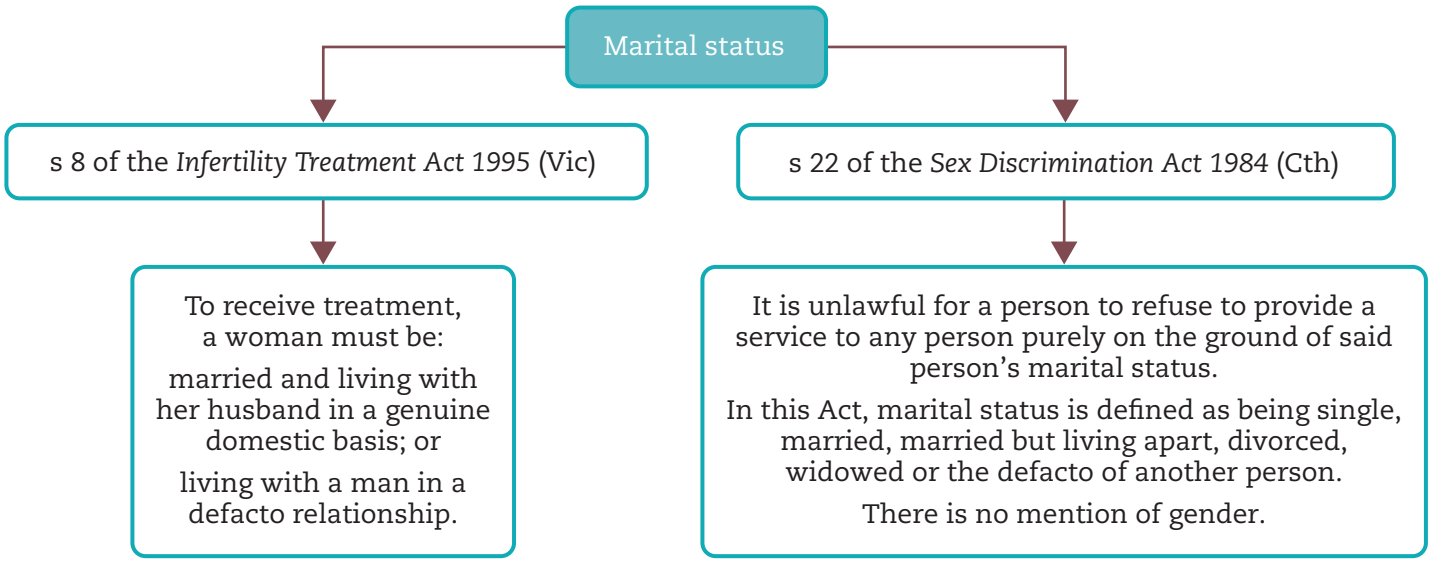

Figure 8.3 The impact of section 109

Activity 8.4 Folio exercise

Understanding the significance of section 109.

1 Using the example of *McBain v The State of Victoria* (Legal brief 8.1), explain the significance of section 109 of the Australian Constitution.

2 Explain the significance that section 109 can have on the law-making powers of the Commonwealth and on the States.

3 Discuss how section 109 can restrict the states' law-making powers.

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8.4 Constitutional checks on parliament

A check established under the Constitution means to limit, restrain or safeguard.

Parliament, whether state or Federal, is the supreme law-making body as long as it acts within its jurisdiction set out within the Australian Constitution. There are checks written into the Constitution so that parliament, or any other body or individual, can not have absolute power. Referring to a 'check' under the Constitution is the means to limit or restrain parliament, or to provide safeguards against absolute power.

These checks were designed to prevent governmental power being concentrated in the hands of a small number of people who might then abuse it. These checks include:

- the **bicameral** structure of the Commonwealth parliament
- the **separation of powers**; namely, the legislative (power to make laws), executive (power to administer laws) and the judicial (power to enforce law)
- express protection of rights
- the role of the **High Court** in interpreting and applying the wording of the Constitution
- the stipulation that changing the Australian Constitution requires a **referendum** and that there has to be a **double majority** for a referendum to be successful (section 128).

The Study Design requires you to evaluate the ways in which the Constitution acts as a check on parliament. You need to not only understand the checks, but also the strengths and weaknesses of each.

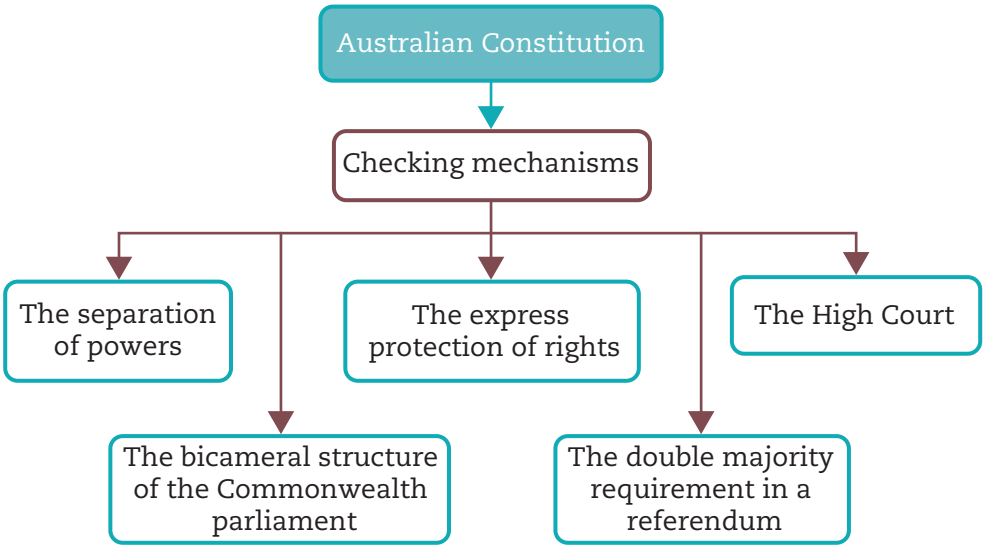

Figure 8.4 Checking mechanisms of the Australian Constitution

Bicameral structure of the Commonwealth parliament

As you read in Chapter 7, Australia adopted the Westminster system of parliament. This system consists of two houses – a lower and an upper house – and the Crown.

Section 1 Legislative power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called 'The Parliament,' or 'The Parliament of the Commonwealth.'

Section 2 Governor-General

A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth …

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Parliament is comprised of elected representatives in the lower and upper house. Each house has a role in the parliamentary process to ensure the representation of the people and states. Parliament can make, change or abrogate (get rid of) federal law by debating and voting on Bills. Money Bills must be initiated in the lower house with the seat of government; however, other Bills can be initiated in either house of parliament (although most begin in the lower house as a government Bill). To become a law, a Bill must be agreed to in the identical form in the House of Representatives and the Senate before given Royal assent by the Governor-General (on behalf of the Queen).

House of Representatives

The lower house of parliament is known as the House of Representatives. As of the 2019 Federal election, there are 151 members elected to the House of Representatives, each member representing an electorate. There are approximately 100 000 voters in each electorate. The House of Representatives plays a crucial role in representative government. To be voted as a member of the lower house and to remain as such, a member must represent the interests of the people who elected him/her. Elections for this house are held every three years.

Section 24 Constitution of the House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth …

Section 28 Duration of House of Representatives

Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Government is formed from the party – or coalition of parties – with the majority of seats in the lower house. The leader of the political party that forms government becomes the Prime Minister who, in turn, appoints ministers of government. A government must maintain the confidence and support of the majority of members in the lower house.

The government is responsible to the parliament; it is directly answerable and accountable for its actions and policies. Question Time is an important feature of government accountability when the opposition can ask questions of the government or specific ministers about their decisions and actions in their portfolio (area of responsibility).

If the government does not hold a majority of seats in the lower house (at least 76), it is known as a 'hung parliament'. This means the government does not have overall control and will need to gather enough votes from other parties or independents to pass important Bills; in particular, the budget.

Minority government – election 2010

In the 2010 election, the ALP (led by Julia Gilliard) and the Coalition (led by Tony Abbott) each won 72 seats in the 150-seat House of Representatives. This was four short of the requirement for a majority government. Six crossbench members (independent or minority party) held the balance of power. One Greens member and three independents declared their support for the ALP in return for some legislative concessions. This allowed Julia Gillard and Labor to form a 76:74 minority government.

Senate

The upper house of Commonwealth parliament is the Senate. It is currently comprised of 76 senators – 12 from each state and 2 from each mainland territory. This means that regardless of a state's population size, there is equal representation of a state's interests. Under the Constitution, senators are chosen by the people in their state and so should represent and safeguard the interests of those they represent.

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Section 7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

As most Bills are initiated in the lower house, the Senate reviews the Bills passed by the House of Representatives. Bills can be accepted, rejected, or amended by the Senate. In practice, however, senators tend to vote with the policies of their political party. The government does not need to have a majority in the Senate to form government. However, when the government does have a majority in the Senate as well as the lower house, Bills can be passed that are unpopular with the general public. This is referred to as 'rubber stamping' – where a Bill is passed without much scrutiny. This brings into question the system of checks under the Constitution. Alternatively, if the Opposition holds the balance of power in the Senate, changes can be made that may reduce the impact of the law. If the government does not hold a majority in the upper house, the Senate can question the government on its actions and policies quite effectively.

Legal brief 8.2

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

In 2005, the Australian Government led by John Howard passed the *Workplace Relations Amendment (Work Choices) Act 2005*. It came into effect on 27 March 2007. At that time, the government held a majority in both the House of Representatives and the Senate. While the Act was to create ' … a more flexible, simpler and fairer system of workplace relations for Australia', it was strongly opposed by the Opposition and general public, particularly in relation to its unfair dismissal and unlawful termination changes. It was argued that the laws stripped away basic employee rights and was fundamentally unfair, particularly to women and low-income workers.

When the Bill was tabled in parliament, there were significant concerns from civil libertarians and the Opposition in relation to how the Bill was passed too quickly for those voting on it to read the document closely, and that insufficient copies had been given to the Opposition to read before voting was held.

A campaign 'Your Rights at Work', attacking the new laws, was run with mass rallies and marches, television and radio advertisements, court action and e-activism. A week of action was held with large rallies in capital cities and regional areas. Individual state governments also opposed the changes. The issue dominated the election campaign in 2007 and was regarded as a factor in the Coalition losing government.

Thousands of workers marched through the streets of Melbourne to protest the new work laws.

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Strengths of a bicameral structure of parliament as a check on parliament in law-making:

- The Australian Constitution specifically requires a bicameral structure for the Commonwealth parliament (section 8.1). A change in this structure can only occur through the detailed process of a referendum (see section 8.5). This can only be consented to by the people, not on the whim of a government.
- Members (lower house) and senators (upper house) are elected by the people they represent (sections 7 and 24 of the Australian Constitution). If they do not act according to the interests of the people in their electorate or state, they will not be re-elected.
- In a bicameral system of parliament, the second house, usually the Senate, acts as a house of review. This allows scrutiny of Bills in case of omissions, ambiguities, etc.
- A bicameral system of parliament acts as a check against the abuse of power by the government.
- The numbers in each House (151 House of Representatives, 76 Senate) allows for detailed debate and discussion. If numbers in the government and those held by the Opposition and crossbench are close, debate and discussion will be further enhanced.

Weaknesses of a bicameral structure of parliament as a check on parliament in law-making:

- If the government has a strong majority in the lower house, debate and discussion on Bills will not occur, or will not be as rigorous.
- If the government has a majority in both the lower and upper houses, scrutiny of Bills will be minimal or not at all; i.e. 'rubber stamping' (see Legal brief 8.2 on the *Workplace Relations Amendment (Work Choices) Act*). Therefore, laws may be less effective due to omissions or inconsistencies, for example.
- When the government does not have a clear majority in the lower house (see the box 'Minority government – election 2010' on page 309), compromises need to be made to the crossbench; therefore, making law-making less effective. Depending on numbers, this can also result in the Opposition voting against government bills. This can mean that laws that need to be passed are not.
- It is important to note that while the Australian Constitution requires the Commonwealth parliament to be bicameral, there is no such requirement for the state parliaments. While most state parliaments are bicameral, Queensland, the Northern Territory and the ACT parliaments are unicameral (one house).

Go to https://www.aph.gov.au/Senators_and_Members/Members, and view 'Members by party'.

Go to https://www.aph.gov.au/Senators_and_Members/Senators, and view 'Current Senators by party'.

Activity 8.5 Folio exercise

Bicameral structure of the Commonwealth parliament

1 Define a bicameral system of parliament and relate it to the Australian context.

2 Explain why the Commonwealth parliament is bicameral.

3 Explain how the bicameral structure of the Commonwealth parliament acts as a check on its law-making.

4 Determine the current makeup of the House of Representatives with numbers for each party and independents.

From the numbers for each party and independents, evaluate how the lower house will operate in its law-making capacity.

5 Determine the current makeup of the Senate with numbers for each party and independents.

6 From the composition of the lower and upper house that you found in questions 4 and 5 above, evaluate the effectiveness of the current parliament in its law-making ability.

7 Read Legal brief 8.2 '*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)'. Evaluate the effectiveness of a bicameral parliament in relation to the introduction of this Act.

8 As stated above, Queensland, the NT and ACT parliaments are unicameral; that is, they consist of one house. Do you think this house would reflect the upper house or lower house of the other parliaments? Justify your answer.

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The separation of powers

There are three main functions to be performed by any political system:

- the making of laws
- the administration of those laws; and
- the enforcement of laws.

The Australian Constitution separates these three powers to ensure the effective operation of the nation and as part of the framework of our democratic system.

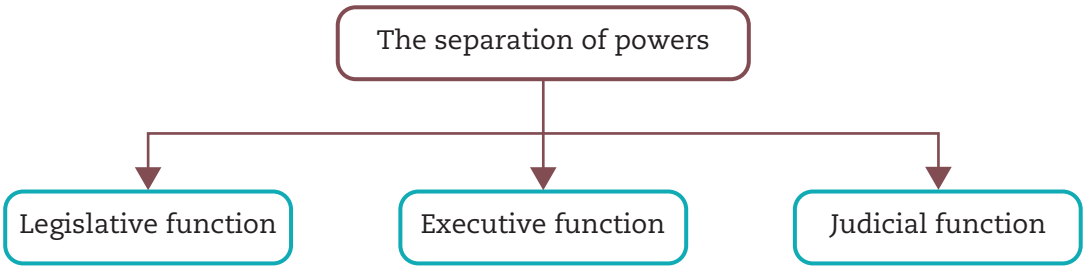

Figure 8.5 The separation of powers

The **legislative function** is the power to make laws. Under the Australian Constitution, this power resides with parliament (Chapter 1). The opening of section 1 states: 'The legislative power of the Commonwealth shall be vested in a Federal Parliament … '.

The **executive function** is the power to administer the law and to manage the business of government. Under the Australian Constitution, this power is given to the Governor-General under Chapter 2. Section 61 states: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative … '.

The executive function includes the day-to-day management of government affairs and the Governor-General acts on the advice of the government on this area. Therefore, it is largely the government – the prime minister, ministers and their departments – that administers the law and is largely responsible for carrying out this power.

The **judicial function** is the power of applying the law. This function is given to the courts. In Chapter 3 of the Australian Constitution, section 71 states: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia … '.

The courts have the power to interpret the laws and to decide how the laws apply to individual cases. Courts are independent of the legislative and executive functions of the government. Therefore, the courts are not subject to political interference. The courts can act as a check on the use of law-making powers of parliament and on government actions.

This system was established to prevent the concentration of government power, in the belief that the concentration of power tends to cause corruption and the abuse of power. It is designed to protect the rights of the people by providing checks and balances that ensure that the government cannot become oppressive.

'Separation of powers' means that different bodies perform the three functions of a legal system: legislative, executive and judicial.

The courts (the judicial arm of the system) have an important role to play. The separation of powers relies on courts being independent of the legislature and the executive. An aggrieved person is able take action in the courts, and the courts can act as a check on the other two arms of government if need be.

The Australian Bar Association described an independent judiciary as 'a keystone in the democratic arch and … If it crumbles, democracy falls with it'. Judge Christopher Weeramantry, chairperson of the Judicial Integrity Group, similarly observed that, 'A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on its rights and freedoms under law'.

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News report 8.1

Judiciary free from political interference

The issue of separation of powers came to the fore in 2017 when three Federal Cabinet Ministers made comments that could be interpreted as critical of Victorian judges' leniency to sentencing terror offenders.

The Ministers – Greg Hunt, Alan Tudge and Michael Sukkar – later made an abject apology after being required to appear before the Victorian Court of Appeals. They had faced possible contempt of court charges.

Following comments, Melbourne barrister Rob Stary told ABC Radio Melbourne: 'We must have in a separation of powers doctrine an independent judiciary who should be free from political interference.' He added: 'Judges are independent and they should be free from any political interference.'

The separation of powers ensures that courts act as independent umpires. They limit the action of the political and executive arms of government.

Two former High Court judges have made this very clear. In 1981, Sir Ninian Stephen, a former High Court justice, said:

> Governments of the present day necessarily pose a greater threat to individual liberties than did those of last century. Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern. The greater the intrusion the more occasions there will be for the citizen to complain of it. [To protect their rights,] it will be primarily to an independent judiciary that the citizen must look.

So if a citizen thinks that the Australian parliament has exceeded its law-making powers, it is vital that there be an independent umpire. This is the job of the High Court. It resolves these disputes. The independence of the High Court is important in that it stands between the citizen and the law, and between the Australian parliament and the law in determining questions of rights.

The separation of powers can create tension between the political arms of government (the legislature and the executive) and the courts. That is a sign that the separation is working effectively, that the courts are helping to ensure good government. In 1999 the Chief Justice of the High Court, Murray Gleeson, put it this way:

> It is self-evident that the exercise of [judicial review] will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action … This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.

Source (adapted): M Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 Public Law Review *108 at 111*

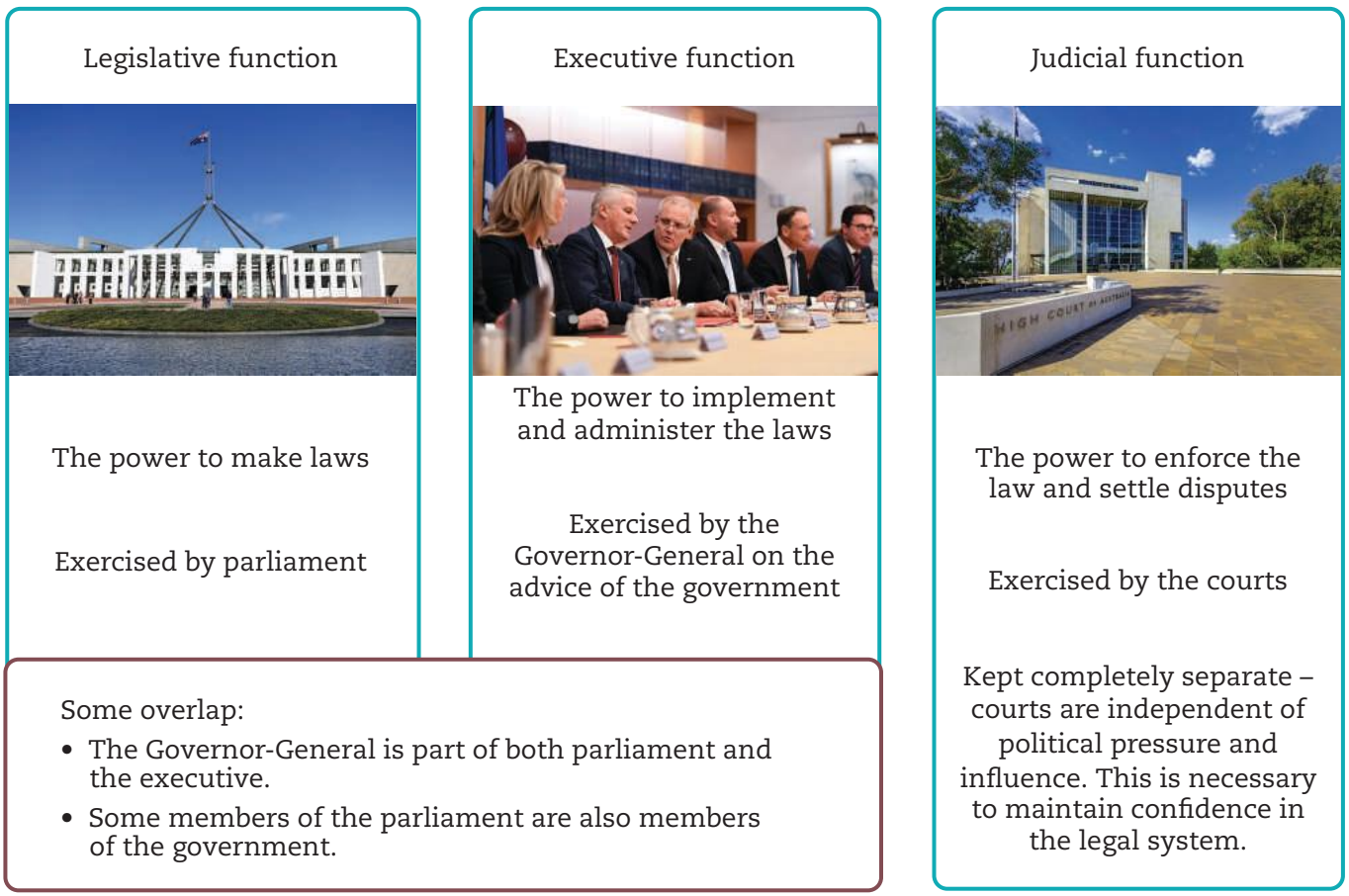

Figure 8.6 Separation of powers

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Although in theory there is a separation of powers between the executive and legislative functions, in practice this distinction is blurred. Because the party that holds a majority in the lower house of parliament forms the government, there is some overlap. This is because some members of parliament (who perform a legislative function) are also ministers of the government (and perform an executive function). Furthermore, parliament sometimes gives the power to make regulations to government departments.

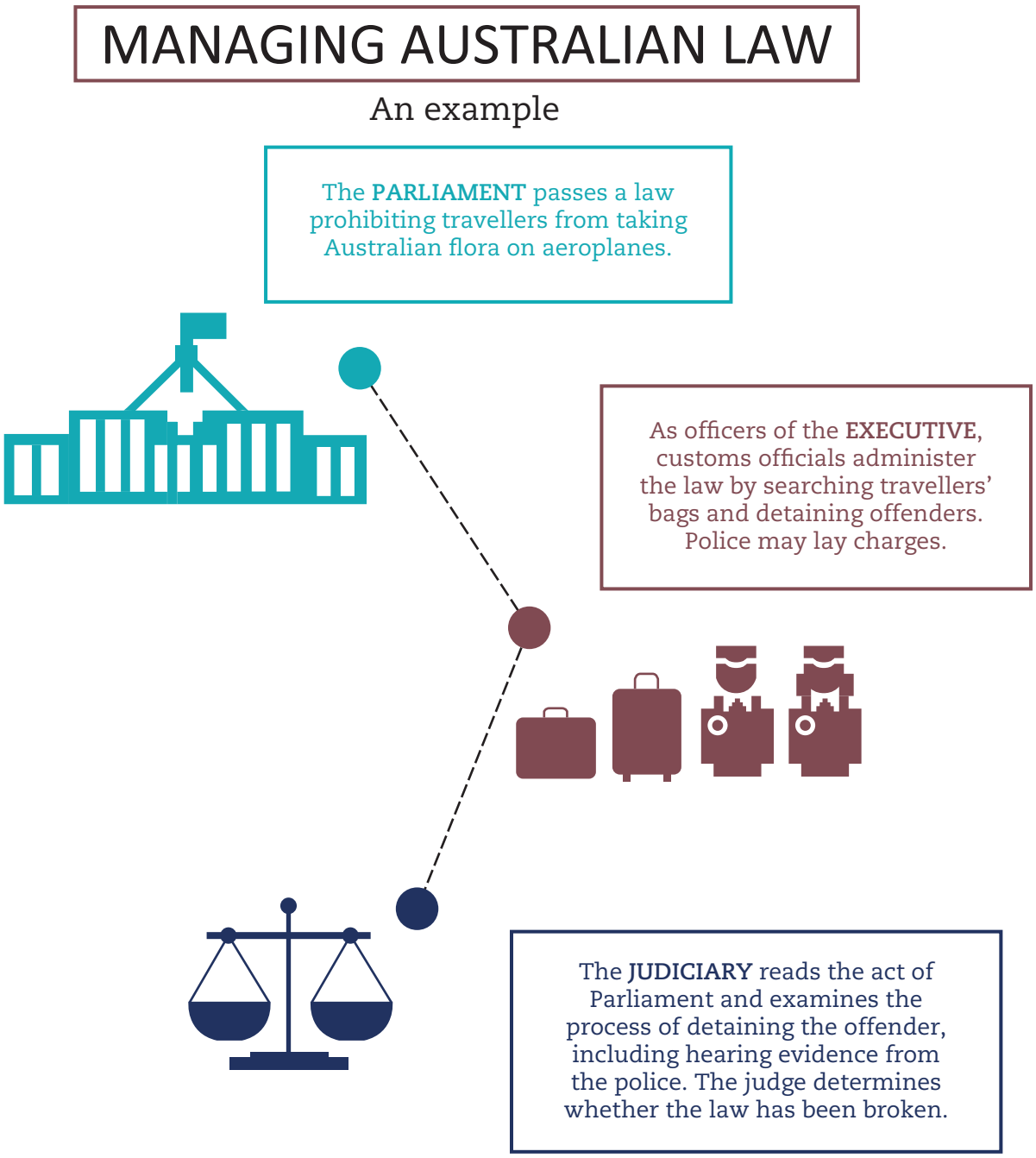

Figure 8.7 Separation of powers in action

What would happen if the separation of powers was not in place? The executive and legislature would be free to do what they wanted.

Strengths of the separation of powers as a check on parliament in law-making:

- By having a separation of the three powers, no one body or individual can have absolute power, which is essential for democracy. It also means that no one body or individual can control the operation of another, e.g. the government of the day controlling the courts.

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- The legislative function – i.e. parliament – scrutinises the policies and actions of government. Question Time in both the House of Representatives and Senate is an important element of parliamentary scrutiny of the government, the Prime Minister, Cabinet, ministers and their departments.
- The judicial function is independent of both the legislative and executive. The executive will appoint the judiciary; however, once on the Bench, judges must act independently and impartially when interpreting and applying the law.
- While parliament is the 'supreme lawmaker', the High Court can overrule unconstitutional laws.
- If the Senate is controlled by the Opposition and/or crossbench, a greater level of scrutiny can be applied to government and Cabinet policies and actions.

News report 8.2

High Court throws out immigration policy

In July 2011, the Labor Government announced a new immigration policy: the 'Malaysia Solution'. It centred on Malaysia accepting 800 boat people from Australia, and Australia taking 4000 'genuine refugees' from Malaysia and resettling them into the community.

The Immigration Minister, Chris Bowen, made the deal using his ministerial powers rather than by trying to amend the *Migration Act 1958* (Cth).

The policy was successfully challenged in the High Court. In a 6:1 decision, the court said Malaysia did not have laws in place to ensure the safety of asylum seekers. (Malaysia is not a party to the UN *Convention Relating to the Status of Refugees 1951*, or its Protocol – and Australia is.)

The ruling meant that unaccompanied children could not be sent away from Australia without the written consent of the Immigration Minister.

Protesters demonstrate against the Labor Government's proposed 'Malaysia Solution'.

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- The separation of powers is entrenched in the Australian Constitution (Chapters I, II, III). The Constitution can only be changed by a referendum process that must go through parliament and be presented to the people. It cannot be changed on the whim of a government.

Weaknesses of the separation of powers as a check on parliament in law-making:

- While the separation of powers is meant to have the three functions acting independently, the legislative and executive function overlap in that the government is part of the parliament.
- If the government has a majority in the Senate, there can be a lack of scrutiny of laws as they are passed, and of government actions.
- If the Opposition and/or crossbench have the balance of power in the upper house, there can be an obstruction or 'watering down' of the effectiveness of laws.
- Judges are appointed by the executive, i.e. the government. This can result in the public perception of a lack of independence of the judiciary.

NOTE: The Australian Constitution does not have a requirement for state parliaments to have the separation of powers. Currently, however, all state parliaments do have this principle in their own constitutions.

Activity 8.6 Folio exercise

Understanding separation of powers

1 Identify and outline the three types of powers that form the separation of powers.
2 Explain why the separation of powers is seen as fundamental to Australia's democracy.
3 Are the three functions of Australia's political system truly separate? Explain.
4 Read News report 8.1 'Judiciary free from political interference' and News report 8.2 'High Court throws out immigration policy' and complete the following tasks:
   a Define the term 'separation of powers'.
   b Explain how the structure of the separation of powers protects the rights of the people.
   c Discuss why courts are so important to the separation of powers.
   d Evaluate the separation of powers as a constitutional check on the law-making powers of parliament.

Express rights

The Australian Constitution includes five entrenched or express rights.

Express rights are those clearly stated or entrenched in the Australian Constitution. These express rights cannot be removed or changed without the process and criteria of a referendum (section 128). Neither the Commonwealth or any state parliament can pass legislation that is in breach of any of the express rights. Express rights are fully enforceable by the High Court as 'guardian' of the Constitution. There are five express rights of individuals in the Constitution, as shown in Table 8.5.

Table 8.5 Express rights under the Australian Constitution

An express right cannot be removed or changed without the process and successful criteria of a referendum.

Express rights are fully enforceable by the High Court.

Section of Constitution	Express right
s 51(xxxi)	The acquisition of property 'on just terms' for any purpose in respect of which the Commonwealth parliament can make laws.
s 80	The right to trial by jury for Commonwealth indictable offences.
s 92	The right to free interstate trade and commerce.
s 116	Freedom of religion by the prevention of the Commonwealth establishing any religion, imposing any religious observance, prohibiting the exercise of any religion and disallowing any religious test as a qualification for any Commonwealth position.
s 117	Individuals cannot be discriminated against based on the state they reside in.

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News report 8.3

The High Court and the Marlboro Man: the Plain Packaging Decision

The High Court of Australia's ruling on the plain packaging of tobacco products is one of the great constitutional cases of our age. The ruling has resonated throughout the world as other countries have sought to emulate Australia's plain packaging regime.

The *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act), which came into effect in 2012, introduced tight controls over the packaging of cigarettes. This included a restriction on the use of trade marks and a requirement that the colour of the packaging must be a 'drab dark brown'. The brand name may appear on the packaging but only in a standard location in small plain lettering. Information and warnings about the use of tobacco products would take up much of the free space on the package. Section 15 of the TPP Act provides that the 'Act does not apply to the extent (if any) that its operation would result in an acquisition of property from a person otherwise than on just terms'.

In *JT International SA v Commonwealth* [2012] HCA 43, JT International SA (JTI) challenged the Act on the basis that it effected an acquisition of their intellectual property rights and goodwill, contrary to section 51(xxxi) of the Australian Constitution. The plaintiff brought proceedings in the High Court challenging the validity of the TPP Act, arguing that the Commonwealth did not acquire their intellectual property rights and goodwill on just terms.

By a majority of six to one, the High Court of Australia rejected the arguments of the tobacco company that there had been an acquisition of property under the Australian Constitution. The majority judges variously described the case of the tobacco companies as 'delusive', 'synthetic', 'unreal', and suffering 'fatal' defects in logic and reasoning.

It was held that the TPP Act was valid as it did not acquire property and therefore did not engage section 51(xxxi) of the Constitution as it did not give proprietory benefit or interest to the Commonwealth or any individual. The plain packaging regime did not amount to an acquisition of property.

This ruling is consistent with precedents on intellectual property and constitutional law, such as the Grain Pool case, the Nintendo case, and the Phonographic ruling.

In a judgment notable for its clarity and precision, Justices Hayne and Bell ruled, 'The Plain Packaging Act is not a law by which the Commonwealth acquires any interest in property, however slight or insubstantial it may be.'

'The Plain Packaging Act is not a law with respect to the acquisition of property,' they concluded.

Source (adapted): Matthew Rimmer, The Conversation, *18 October 2012*

The High Court held that the *Tobacco Plain Packaging Act 2011* (Cth) was valid and did not contravene acquisition of property rights under the Australian Constitution.

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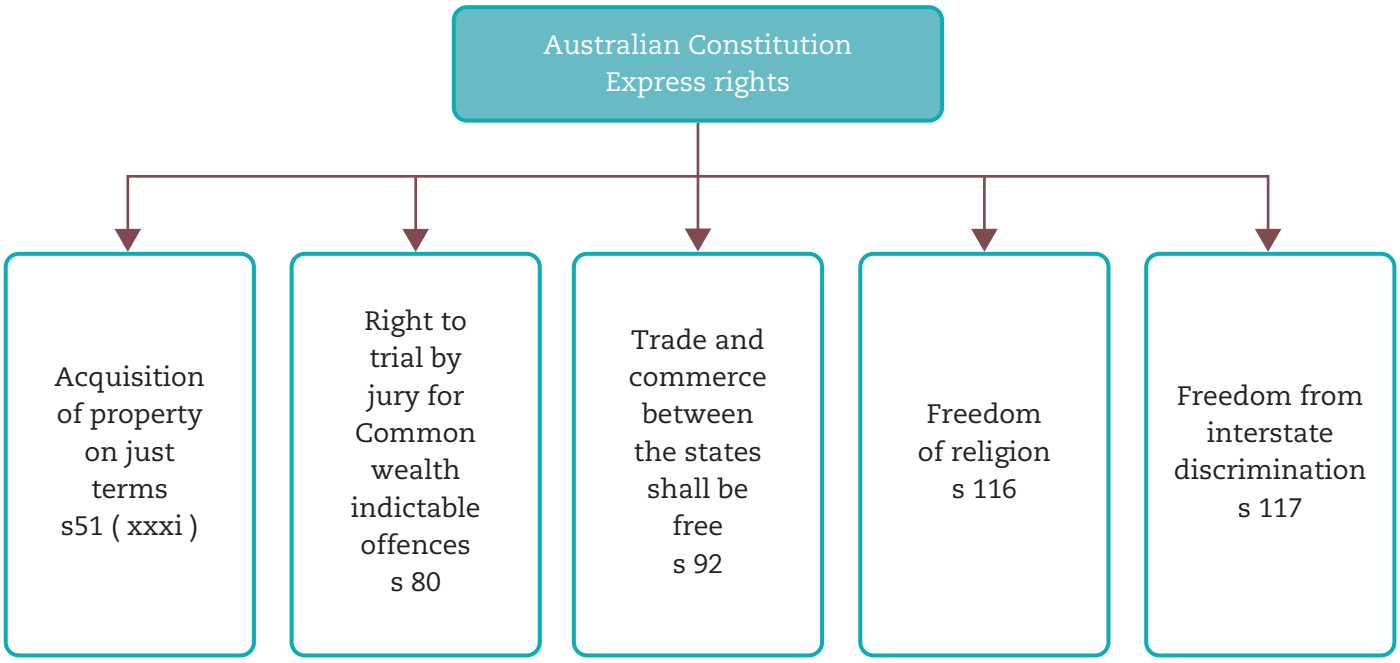

Figure 8.8 Express rights entrenched in the Constitution

The acquisition of property on just terms

The full citations for the cases in News report 8.3 are: *Grain Pool of WA v Commonwealth* [2000] HCA 14; *Ninento Co Ltd v Centronics Systems Pty Ltd* [1994] HCA 27; *Phonographic Performances Company of Australia Ltd v Commonwealth of Australia* [2012] HCA 8.

The Australian Constitution contains limited property rights.

Section 51(xxxi) of the Australian Constitution provides that the Commonwealth parliament may make laws to acquire property from individuals 'on just terms'. Although this section of the Constitution may appear to recognise the right of individuals to own property, it also recognises that there may be reasons why parliament needs to acquire property from an individual. High Court interpretations of the Constitution indicate that:

- the Commonwealth parliament may acquire property for a purpose for which it has the power to make laws
- the Commonwealth must be able to show 'just terms' – the Commonwealth must provide individuals with a fair and reasonable level of compensation.

Examples of why the Commonwealth may need to acquire property include the expansion of an international airport or building military facilities.

News report 8.4

Just terms challenged

In October 2007, the Aboriginal community of Maningrida in Arnhem Land lodged a High Court challenge against the Federal government's takeover of Aboriginal land in the Northern Territory. The action was taken by traditional owner Reggie Wurridjal and Bawinanga Aboriginal Corporation, a Maningrida community organisation. They claimed that the takeover had not been done on 'just terms'.

The High Court challenge aimed to prevent the government's compulsory acquisition of Aboriginal land and other assets under five-year leases, and the abolition of the permit system controlling entry onto Aboriginal land. These controversial measures were imposed following a report into child sex abuse in Aboriginal communities in the Northern Territory.

The plaintiffs were seeking compensation in the High Court because:

- abolishing the permit system would allow unlimited access to sacred sites
- native title rights would be suspended; and
- the Commonwealth would have exclusive possession over Aboriginal land.

The plaintiffs sought to have the takeover declared constitutionally invalid.

The Commonwealth, in response, argued that the plaintiffs had no case for compensation under section 51(xxxi) of the Constitution because the Commonwealth laws were made under the Territories' power contained in section 122 of the Constitution, and that power does not require acquisitions of property to be on just terms. The Commonwealth relied on the 1969 case *Teori Tau v The Commonwealth* [1969] HCA 62, in which the High Court held that laws made under section 122 were not subject to the 'just terms' requirement.

In February 2009, the High Court found for the Commonwealth, and held that the takeover was valid. But the Court also overruled *Teori Tau v The Commonwealth*, holding that the requirement for just terms compensation did apply to laws made under the Territories' power. The Commonwealth would thus be required to pay compensation.

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The right to a trial by jury for indictable Commonwealth offences

Section 80 of the Australian Constitution guarantees the right to trial by jury for Commonwealth indictable offences.

The Australian Constitution guarantees a trial by jury for Commonwealth indictable offences.

Section 80 of the Constitution guarantees the right to a trial by jury for offences under Commonwealth law that are indictable. The constitutional right to a trial by jury does not extend, in theory, to offences against state law. High Court interpretations have further defined the right to a trial by jury:

- An accused person cannot elect to have a trial by a judge alone for a Commonwealth offence.
- Majority verdicts cannot be used for Commonwealth offences – in all indictable Commonwealth offence trials, the jury verdict must be unanimous (this is not the case in relation to all offences that are indictable under state law).

An important limitation on the right to trial by jury is the fact that parliament can define which offences are 'indictable' offences.

Commonwealth offences

Laws regarding Commonwealth offences are set out in the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth). They are offences that come within the law-making responsibilities of the Australian Federal Government and generally are punishable by a period of imprisonment exceeding 10 years. Some examples are: child sex offences by Australians in foreign countries, cyber-crimes committed against Commonwealth government departments, drug importation and exportation, people smuggling, human trafficking, terrorism, fraud against the government (e.g. Medicare, Centrelink, Australian Tax Office) and threats made against government officials.

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Legal brief 8.3

Trial by jury

Brown v R (1986) 160 CLR 171

In *Brown v R*, the accused, Michael Rodney Jonathon Brown, was presented for trial in the Supreme Court of South Australia. He was charged with offences under section 233B(1)(ca) of the *Customs Act 1901* (Cth). He pleaded not guilty. Before a jury was empanelled, he elected to be tried by a judge alone under section 7(1) of the *Juries Act 1927* (SA). The trial judge ruled that, under section 80 of the Constitution, it is not possible for a person indicted for an offence against a law of the Commonwealth – Brown's case did fall into this category – to make an election to be tried by a judge alone.

Brown appealed the case to the High Court. The High Court decided that section 7 of the Juries Act (SA) contravened section 80 of the Australian Constitution, which states that there should be trial by jury for indictable Commonwealth offences. A person charged with an indictable Commonwealth offence who pleads not guilty must be tried by jury. This is an example of the rule that Commonwealth law prevails over state law when they are in conflict, to the extent of the conflict.

Freedom of movement

The Australian Constitution provides for limited freedom of movement.

Section 92 of the Constitution provides that 'on the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'.

High Court interpretations have found the following:

- that this freedom primarily relates to trade, commerce and communications
- that 'the protection of s 92 is given to the movement of people, the transport of goods, the transmission of communications, the passage of signals of any kind and any other means by which "interchange, converse and dealings between States in the affairs of life" are carried across State boundaries … The means of movement will vary with what is moved; it is not essential that the means of movement be physically perceptible' (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29 per Brennan J)
- that section 92 does not provide an absolute guarantee of freedom of movement. In *Cole v Whitfield* (1988) 165 CLR 360, the High Court stated that personal movement across a border cannot, generally speaking, be impeded. More recent cases illustrate that section 92 does not provide an absolute guarantee of freedom of movement. If a law is not directly regulating interstate communication, but affects interstate commerce as part of regulating some other activity, it does not contravene the freedom expressed in section 92 provided that the law is not disproportionate or inappropriate to the legitimate constitutional purpose for which it has been made. For instance, in *AMS v AIF* (1999) 199 CLR 160, an injunction to restrain a mother from moving her child from Western Australia to the Northern Territory was found not to infringe section 92 (see Legal brief 8.4).

Due to the nature of the wording, this right applies to both Commonwealth and state law.

Freedom of religion

Section 116 of the Constitution provides for freedom of religion in that:

- the Commonwealth cannot make a law to create a national religion
- the Commonwealth cannot impose any religious observance
- the Commonwealth cannot prohibit the free exercise of any religion
- no religious test is to be applied as a qualification for any office or public trust under the Commonwealth.

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Legal brief 8.4

AMS v AIF (1999) 199 CLR 160

A couple met and had a child in Perth in 1990. The couple went to live in Darwin for a period of time before returning to Perth. The mother was granted custody when the couple separated in 1994. The mother wanted to take the child to live in Darwin. The father applied for an order restraining the mother from removing the child on the basis that he would not be able to see his child very often. The mother applied to change the child's place of residence.

Under section 92 of the Constitution, there must be freedom of movement between states. However in *Cole v Whitfield* [1988], this was not meant to mean that every form of movement must be left without any restriction or regulation in order to satisfy the guarantee of freedom.

It was felt that in this case, consideration should be given to the welfare of the child and the fact that, although the mother had freedom of movement, she was limited because she had custody of the child. The High Court stated:

> For all of the child's life he has had the benefit of considerable contact with each of his parents. Each of them has had considerable input into the child's upbringing. Although the child has always enjoyed a relationship with members of the extended families, since the mother has moved to Perth he has been brought up in an environment of close interaction with members of both extended families. From the point of view of the welfare of the child it seems to me that he has been in as an ideal situation as he could possibly be given that his parents do not live together. It is my opinion that the welfare of the child would be better promoted by him continuing in that situation in the absence of any compelling reasons to the contrary. Accordingly, the mother's application … will be dismissed and an injunction will be made restraining her removing the child from the Perth Metropolitan area.

The High Court, in fact, found that an injunction preventing the mother taking the child to Darwin was not an infringement of section 92 of the Constitution.

Section 116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Australian Constitution provides for freedom of religion.

Further, the High Court has determined that freedom of religion also means the right of an individual to be an atheist, i.e. to have no religion.

- In *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) HCA 2, the High Court determined that the Commonwealth cannot establish a particular religion, but could assist the practice of religions by providing financial assistance to religious schools.
- The Commonwealth cannot make a law imposing religious observance.
- The Commonwealth cannot make a law that requires a person to have a particular religious belief in order to be employed by the Commonwealth or to be appointed to a Commonwealth office.
- In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, Justice Rich noted: 'Any regulations, therefore, which empower the Government to prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of the war do not infringe s 116. The peace, order and good government of the Commonwealth may be protected at the same time as the freedom of religion is safeguarded.'
- Section 116 applies only to the Commonwealth. Few state constitutions specifically recognise religious freedom.The right may be limited in the interest of national security or to ensure that people follow the 'ordinary laws' of the community.

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News report 8.5

The High Court school chaplains case and what it means for Commonwealth funding

***Williams v Commonwealth* (2012) 248 CLR 156 involved a challenge to the National School Chaplaincy Program (NSCP) brought by Ronald Williams, a parent of children who attended the Darling Heights State Primary School in Queensland. Williams challenged a funding agreement entered into between the Commonwealth and Scripture Union of Queensland, the group who provided chaplaincy services at the School.**

So how can a case about school chaplains affect how the government in Canberra funds programs?

A complicated case

There were several bases for the constitutional challenge. One of the most publicised was the argument that it breached section 116 of the Constitution by requiring a religious test for an office under the Commonwealth. At Darling Heights State Primary School, the chaplain was employed by Scripture Union of Queensland, which was funded by the Commonwealth.

The High Court unanimously dismissed this argument, and held that the connection between the chaplain and the Commonwealth was not sufficient to render the chaplain an 'office under the Commonwealth'.

The point the case turned on then involved the breadth of the Commonwealth government's power to spend money and enter into contracts. This power is governed by the breadth of the Commonwealth's executive power, but this power is ill-defined.

Section 51 lists the legislative 'heads of power' – specific areas of power. But executive power is not spelled out in the same way under section 61.

Money and power

Prior to this case, there had been a long-held assumption that the Commonwealth executive power extended to entering into contracts and funding agreements in, at least, areas that fell within the Commonwealth's legislative heads of power – even where the parliament had not passed legislation authorising those contracts and agreements.

If that was correct, the question would have been whether the funding agreement between the Commonwealth and the Scripture Union fell within the legislative heads of power, argued in this case under section 51(xx) and section 51(xxiiiA) of the Constitution with respect to trading corporations and the provision of benefits to students.

In this case, four of the judges (Chief Justice French and Justices Gummow, Bell and Crennan) expressly rejected this position. Two judges (Justices Hayne and Kiefel) did not determine this issue because they found the funding agreement did not fall within sections 51(xx) or (xxiiiA). Justice Heydon dissented.

The majority decision

The main reasons advanced by the majority centred on the federal nature of our constitutional system, and the importance of responsible and representative government (and therefore the role of parliament) in it.

So, for example, Chief Justice French noted that if the Commonwealth had a wide executive power to spend money, there are 'consequences for the Federation' which would flow from that. After all, funding is an essential tool of public administration and for government policy.

If the Commonwealth had power to enter into such agreements without legislative backing, policies could be implemented in the absence of scrutiny from the parliament, including the Senate.

So, generally speaking, it appears that the Commonwealth will need statutory authority to enter into contracts and spend public money. This exposes funding agreements to the scrutiny of the Houses of Parliament.

However, the majority indicated there will be some exceptions to this position; for example, contracts required to administer the departments of the Commonwealth pursuant to section 64 of the Constitution.

The funding agreement for the chaplaincy program was held by the majority not to fall within these exceptions and was, therefore, invalid.

Flow on effects

There are many other funding agreements made by the Commonwealth – for example, many of the grants paid directly to local governments – which will fall outside these exceptions.

The Commonwealth must act quickly if it wants to save these types of agreements, including the agreements under the school chaplaincy program. Commonwealth funding agreements must be divided into two types: those with respect to the Commonwealth's legislative specific areas of power but have no legislative backing at the moment; and those not with respect to the Commonwealth's legislative specific areas of power.

The first type can probably be saved relatively easily by legislation that retrospectively validates and provides authority to enter into these contracts.

This could be done on a piecemeal basis, or as Sir Owen Dixon once suggested, through a 'General Contracts Act'. This could say that the Commonwealth Executive is and has been authorised to enter into any particular contract or agreement, the entry into which could be or could have been authorised by any law made pursuant to any of the heads of legislative power in sections 51, 52 and 122 of the Constitution.

For the agreements under the NSCP, this would then raise the question of whether they are 'with respect to' any of the heads of legislative power. Justices Hayne and Kiefel have already expressly found that they are not. Justice Heydon found that they are. The other judges did not decide the question.

Those agreements that are not referable to a head of legislative power cannot be saved in this way. That's not to say these funding arrangements cannot be saved at all. The Commonwealth Parliament has an (almost) unlimited power to make grants to States, on the terms and conditions it sees fit.

Source (adapted): Gabrielle Appleby, The Conversation, *20 June 2012*

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Protection against discrimination on basis of state of residence

The Australian Constitution prohibits discrimination against a person because of the state they live in.

Section 117 of the Constitution provides that residents of any state 'shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other state'. This section makes it unlawful to discriminate against a person based on the fact that they live in another state. It does not provide a general protection against discrimination.

For instance, in *Re Loubie* [1986] 1 Qd R 272, a resident of New South Wales was charged with a criminal offence in Queensland. Under the *Bail Act 1980* (Qld), he would have been entitled to bail except for the fact that he was ordinarily a resident outside the State of Queensland. In the case, this provision of the *Bail Act* was seen as contravening section 117 of the Constitution, and thus invalid.

Clearly, these express rights are a check on parliament in relation to law-making in these areas.

Table 8.6 Limitations of express rights

Section of Constitution	Limitation
s 51(xxxi) The acquisition of property on just terms	This section of the Constitution **does not apply** to the acquisition of property by **state governments**.
s 80 The right to a jury trial for indictable Commonwealth offences	Section 80 only applies to **Commonwealth offences**. Therefore, this is a limited protection as **most indictable offences are state offences because 'law enforcement' is a residual power**. The High Court has ruled that 'indictable' means 'crimes tried on indictment'. Hence the Commonwealth parliament can avoid s 80, and thus avoid a jury trial for a particular offence, by legislating for the offence to be a summary offence.
s 92 Interstate trade and commerce	The right to interstate trade and commerce is more of an economic right than a fundamental democratic or human right. Section 92 does not provide an absolute guarantee of freedom of movement.
s 116 Freedom of religion	Section 116 only prohibits the Commonwealth parliament from passing legislation that restricts religious freedom in four ways: it **does not apply to state laws**.
s 117 Discrimination of residents based on the State they reside in	This section does not provide a general protection against discrimination; for example, it does not provide protection against other forms of discrimination – such as race or sex discrimination. But these are protected by other legislation.

Do express rights protect us?

Strengths of express rights include:

- The five express rights are entrenched in the Constitution. They can only be removed or changed by a referendum (s 128).
- Express rights are fully enforceable by the High Court. If a person believes an Act of parliament *infringes* an express right, they can challenge that law in the High Court. If the Court finds the challenge valid, it can declare the legislation *invalid* and *unconstitutional*.
- While parliament is the 'supreme law-maker', the High Court can declare legislation that infringes any of the express rights as ***ultra vires***, i.e. void.
- Express rights are a limitation on what laws the Commonwealth parliament is able to make. While Australians do not have a Bill of Rights, the public are protected from the Commonwealth infringing these rights.

Weaknesses of express rights include:

- There are only five express rights, which provide for only *limited* protection. Australia does not have a Bill of Rights.
- The protection of express rights by the High Court is a *complaint-based approach* to the protection of rights. For legislation to be declared *ultra vires*, an individual or group 'with standing' (directly affected) must challenge the law in the Court.

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- The people/groups who believe their rights have been infringed must bring a case before the High Court before it can declare the legislation unconstitutional. This can be expensive and time-consuming.
- Legislation will remain in place until, and unless, an individual or group challenge that law.
- Express rights can only be changed or added to by a referendum under section 128. This involves a detailed process and vote by the Australian public. The double majority criteria also makes it difficult for change. Therefore, it is unlikely that additional express rights will be able to be included into the Constitution.

Activity 8.7 Folio exercise

Understanding express rights

1 Define the term 'express rights'.

2 Complete the table below in relation to the rights that are expressly stated in the Constitution.

Express right	Section	Explanation	Example (case)
The acquisition of property on just terms			
The right to a jury trial for indictable Commonwealth offences			
Interstate trade and commerce			
Freedom of religion			
Discrimination of residents based on the State they reside in			

3 'Express rights are entrenched in the Australian Constitution and therefore fully protect the people of Australia.' Discuss.

4 Evaluate whether express rights provide a check on the legislative power of the Commonwealth parliament.

Role of the High Court in interpreting the Australian Constitution

The High Court is the most superior court in Australia's judicial system. Section 71 of the Constitution established the High Court, while sections 75 and 76 give the Court its original jurisdiction. Section 76 in particular provides the High Court with its power to hear and determine disputes arising from the 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 …

Section 76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

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Table 8.7 The principal role of the High Court in relation to the Constitution is to:

Act as 'guardian' of the Constitution	The High Court can be asked to decide whether the Commonwealth parliament has the authority to deal with a particular matter or whether a law made by the Commonwealth (or state) parliament is within its power.
Be a check on any abuse of power	The High Court will declare a law *ultra vires*, i.e. make void any legislation that it finds to be unconstitutional. The constitutional powers of the Commonwealth (or state) parliament can be challenged by an individual or a group of individuals. Individuals or groups can challenge the constitutional power of the Commonwealth if the law affects them, i.e. they have 'standing'.
Provide meaning to the wording of the Constitution	The High Court cannot change the wording of the Constitution; it will hear challenges to the constitutional validity of laws, interpret the wording of the Constitution, and *apply* it to the dispute. This means that the Constitution will remain relevant to the Australian public and can be used in a day-to-day application. An interpretation of the Constitution can give rise to implied rights, i.e. not expressly stated in the Constitution, but 'read into' it by the High Court. All seven Justices of the High Court will normally sit on a dispute that relates to the Constitution. Each Justice will make his/her decision on a case. Where decisions are not unanimous, the majority decision prevails. These decisions are recorded in law reports and can be referred to in cases of similar fact in the future.

High Court interprets the meaning of wording in the Constitution and applies that meaning to the dispute before it.

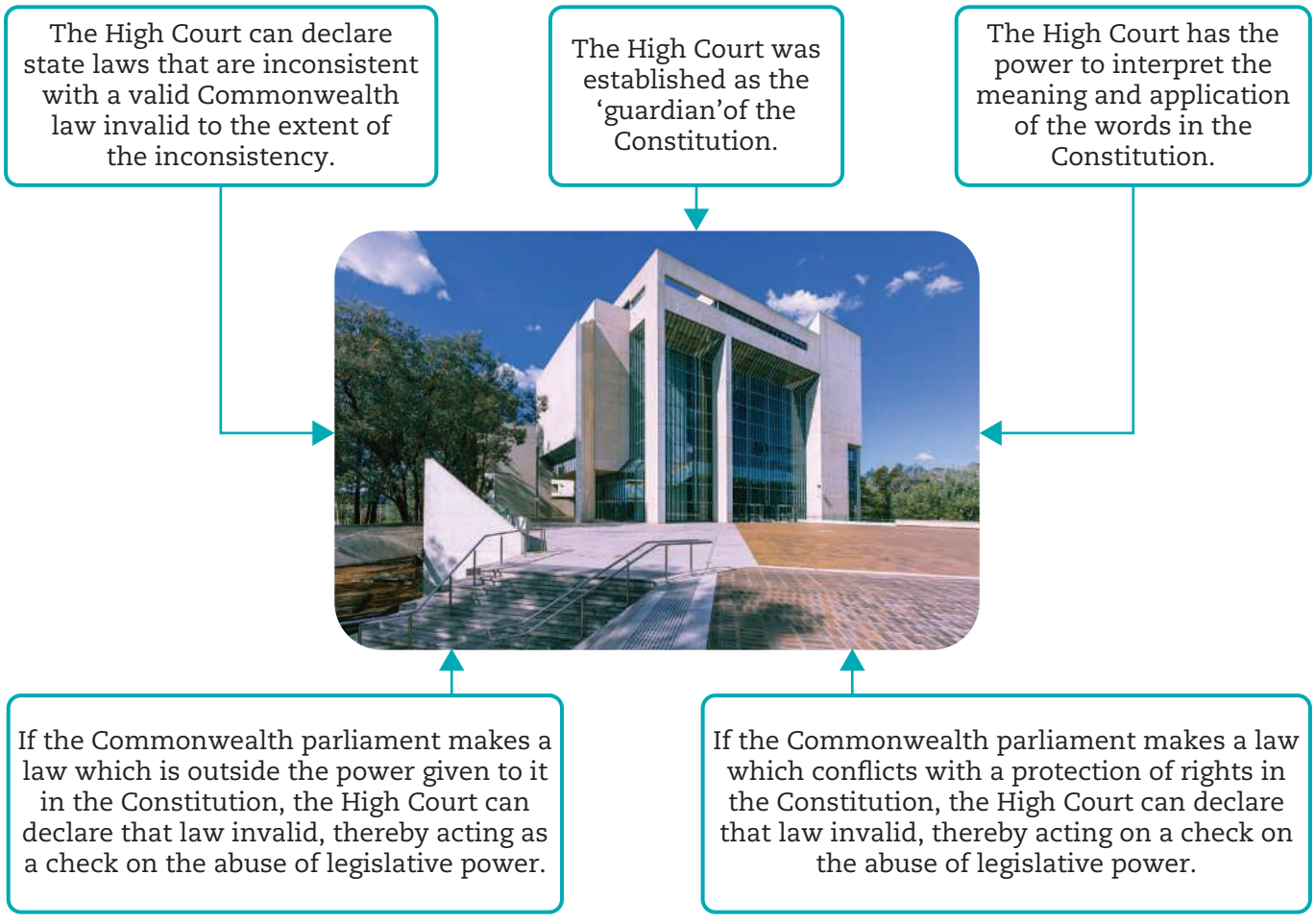

Figure 8.9 The role of the High Court in interpreting the Constitution

When adjudicating a dispute, the High Court's interpretation of the Constitution can:

- alter the division of law-making powers
- determine implied rights. Implied rights are not expressly stated in the Constitution, but are provided indirectly.

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Can grants to schools be a form of discrimination?

In the case of *Attorney-General (Vic); ex rel Black v The Commonwealth* [1981] HCA 2, a group of individuals challenged provisions of the State grants legislation. The legislation permitted money grants to denominational schools. This case claimed that these grants amounted to discrimination in favour of particular religious groups. It was argued that discrimination in favour of a religious group contravened section 116 of the Constitution. The High Court disagreed. The grants were not made to any one religious group. Therefore, the grants did not contravene section 116 of the Constitution.

Legal brief 8.5

Commonwealth of Australia & Anor v The State of Tasmania & Ors (1983) 158 CLR 1 (the Tasmanian Dam case/Franklin Dam case)

This case was a landmark decision in Australia's constitutional law.

Tasmania wanted to dam the Franklin River to create hydro-electricity for the state's power needs. Tasmania passed the *Gordon River Hydro-electric Power Development Act 1982* (Tas); however, the proposed site for the dam was in a World Heritage-listed area. With national and international outcry, the Commonwealth parliament passed the *World Heritage Properties Conservation Act 1983* (Cth) which, in conjunction with the *National Parks and Conservation Act 1975* (Cth), prohibited the clearing, excavation and construction of the dam.

In appearing before the High Court, Tasmania argued that this was an area of state's residual power. The Commonwealth argued that, under the Constitution, 'external affairs' under section 51(xxix) was a Commonwealth power which included areas that were covered by World Heritage Listing.

The High Court held that external affairs covered all aspects of Australia's relationships with other countries. As this area of the Franklin River was under an international treaty, it came under the external affairs of the Commonwealth.

As a result of this decision, there was an inconsistency between the Commonwealth law – *World Heritage Properties Conservation Act 1983* – and the Tasmanian law – *Gordon River Hydro-Electric Power Development Act 1982*. Under section 109 of the Constitution, the Commonwealth law prevailed and the Tasmanian law was invalid in relation to the building of the dam.

Significance of the interpretation

This interpretation meant that any area that was covered by an international treaty came under the Commonwealth power of 'external affairs' and, as such, the Federal Parliament was able to legislate on any of the state's residual law-making powers where there was an international treaty. This increased the law-making powers of the Commonwealth and the interpretation has been applied in many disputes since this case, including human rights, protection of the environment and the jurisdiction of Australia's off-shore region.

The fight to protect the Franklin River became one of the most important environmental campaigns in Australia.

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How can the ability of the High Court to interpret the Australian Constitution act as a check on parliament's law-making?

Strengths of the High Court in acting as a check on parliament in law-making include:

- Once appointed to the Bench, Justices of the High Court are independent and impartial. They will, therefore, apply the law to a dispute before them.
- The High Court acts as a check on the law-making power of the parliament. It will declare legislation *ultra vires* if determined to be outside the law-making powers of the parliament.
- An interpretation of the Constitution by the High Court in a dispute keeps the law relevant and current to the needs of Australians.
- An interpretation of the Constitution made by the High Court will be used as a precedent for future disputes in matters of similar fact.
- An individual or group within Australia has the right to challenge any law believed to have contravened their rights under the Constitution.

Weaknesses of the High Court in acting as a check on parliament in law-making include:

- Justices of the High Court must wait for an individual or group to challenge the constitutional validity of a law by parliament before they are able to make a ruling on it.
- A person or group must have 'standing' to be able to challenge a law, i.e. they must be directly affected by the legislation.
- To be able to challenge the validity of legislation is expensive, time-consuming and stressful which can dissuade a person from pursuing justice. This can also mean that there are unconstitutional laws in existence but no one has challenged them as yet.
- The High Court interprets the wording of the Constitution and applies it to the dispute before them. The High Court, however, cannot change the wording of the Constitution.
- A decision of the High Court can depend on the composition of the Justices at that time. The majority of the Bench may hold conservative views which can mean change can be unlikely.

For more information about the role of the High Court, go to https://www.hcourt.gov.au.

Requirement for a double majority in a referendum

As we have seen, the Australian Constitution acts as a check on parliament in the area of law-making. One important check is the process for changing the Constitution set out in section 128, known as a 'referendum'.

While parliament must abide by the law-making powers given to it in the Constitution, or have the High Court invalidate the contravening legislation, it cannot change the wording without going through the strict process set out in section 128. The writers of the Constitution considered the Constitution to be so important that they made changing it a difficult process. To change the wording, a proposed change:

A proposed change to the Constitution must be passed by both houses of parliament before being put to the voting public.

- must be passed by the Commonwealth parliament in the form of a Bill; parliament being representative of the people and state's interests.
- can be introduced to either the House of Representatives or the Senate as a Bill. It must then be approved by parliament before the proposal can be put to the public. The proposal must be passed by both houses. Special provisions apply when one house rejects a referendum proposal twice.
- must be presented to the Australian voting public and receive a 'double majority' criteria. After it has been passed in both houses, the amendment is put to all enrolled electors nationally in the form of a question requiring a vote of 'yes' or 'no'. To be successful, the proposed change must receive a 'yes' vote from a majority of electors in Australia nationally, and a 'yes' vote from a majority of voters in a majority of the states (at least four out of six). This is sometimes referred to as a 'double majority'. The double majority stipulation in the Constitution acts as a check on the law-making power of parliament. It ensures that the interests of the states and the interests of the national population are considered equally before any change to the Constitution can be made.
- must be presented to the Governor-General to receive Royal assent.

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1999 Referendum

The question on the republic put to electors at the 1999 referendum was whether they approved of a proposed law: to alter the Constitution to establish a Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.

This photo by Unknown Author is licensed under CC BY-SA.

A referendum can only be passed with a double majority: a 'yes' vote from a majority of electors in Australia nationally (states and territories), and a 'yes' vote from a majority of voters in a majority of the states (at least four out of six).

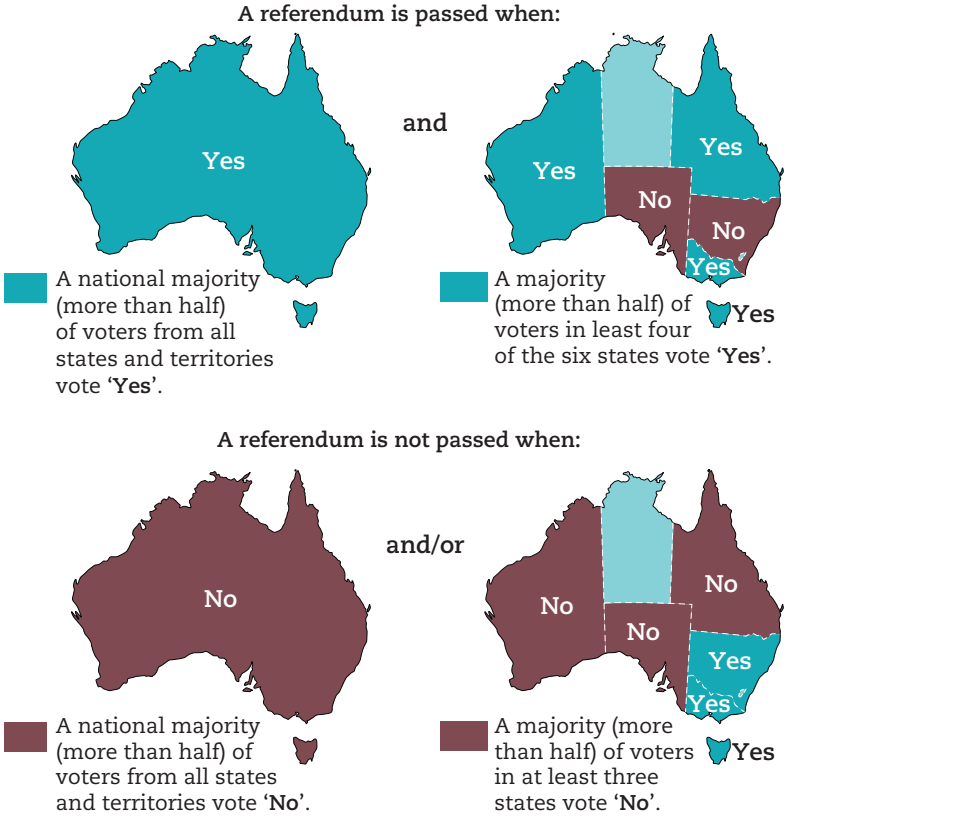

Figure 8.10 Double majority in a referendum

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Section 128 Mode of altering the Constitution

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes …

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, *Territory* means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Section 128 sets out the process of a referendum to change the wording of the Constitution.

Strengths of the requirement of a double majority in a referendum in acting as a check on parliament in law-making:

- The double majority requirement in section 128 of the Constitution is strict. Only eight out of 44 proposed changes to the Constitution have been achieved. The Governor-General will not give Royal assent unless the criteria for success is achieved.
- The Constitution cannot be changed on the whim of a government. A proposed change must be accepted by the majority of voters throughout Australia (including territories) and the majority of voters in at least four of the six states.
- The proposed change to the referendum is put in the form of a question requiring a deliberate 'Yes' or 'No' response by the electors. This means there should be less chance of ineligible votes made.
- The double majority criteria allows the Australian voters to have the power to allow or disallow a change in the Constitution.
- The double majority requirement provides equal protection to all states, regardless of their population size. Smaller populated states such as Tasmania or South Australia have equal rights as the higher populated states such as NSW or Victoria.
- Australia has compulsory voting so all eligible electors are required to vote.
- The Australian Electoral Office has the responsibility of distributing information about the referendum and the different points of view to all eligible electors. Therefore, the information received will be neutral and unbiased.

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Weaknesses of the requirement of a double majority in a referendum in acting as a check on parliament:

- The criteria of a double majority makes it difficult to amend the Constitution. The requirement of a majority of electors in the majority of states is what makes an amendment particularly difficult to achieve.
- Requiring the double majority vote has meant that only those changes with overwhelming support of the voting public or those that are not controversial are successful. Historically, the Australian voting public have been reluctant to grant additional power to the Commonwealth parliament through referendums.
- The double majority adds to the costs and time of a referendum. Interested parties and the Australian Electoral Commission (AEC) must ensure information is provided so the voting public is able to make an informed vote. The AEC calculated the 1999 referendum cost nearly $67 million.

Indigenous woman Harriet Ellis casts her vote at the Sydney Town Hall in the 1967 referendum on 27 May 1967.

8.5 The referendum process

Section 128 sets out the process for changing or amending the written words of the Constitution. This process is a protection of the Constitution in that to change the physical wording, the Australian voting public must approve of that change. As you have learnt in the previous section, it is not only a majority of voters throughout Australia that must approve of a change, but the majority of voters in at least four out of the six states of Australia.

Since 1901 there have been 44 proposed referendum changes put to the Australian people. Only eight of these have been successful.

Under section 128, the initiation of a referendum proposal can only come from the Commonwealth parliament.

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Stages of a referendum

There are three stages in a referendum, and they involve:

- the parliament
- the people
- the Governor-General.

The parliament

Any proposed change must first be put in a Constitutional Alteration Bill that must pass both houses of parliament or one house twice if the Governor-General allows it. If one house passes the proposed change and the other house rejects it, after a period of three months it can be passed through the first house again. If it is rejected a second time by the second house, the Governor-General may still submit the proposed change to the people if he/she feels that it is a sufficiently important issue.

The *Constitution Alteration (Establishment of Republic) Bill 1999* (Cth) was passed by the Federal parliament.

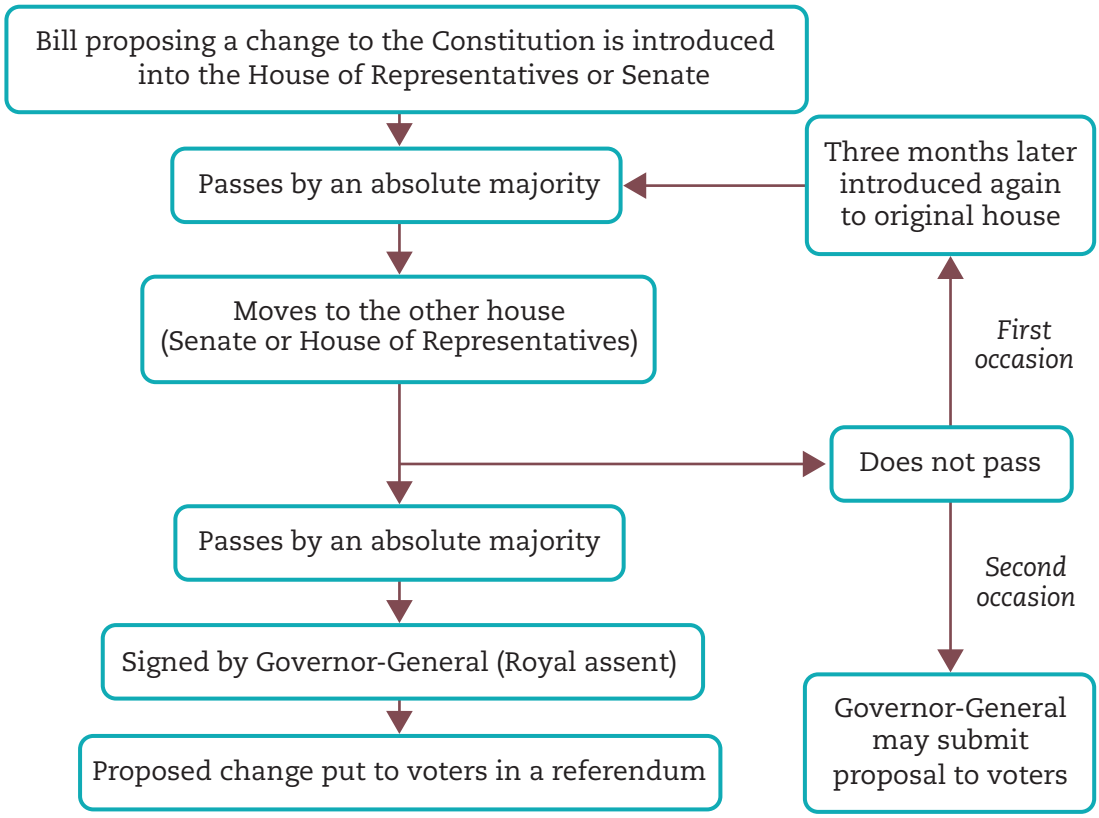

Figure 8.11 The process of a referendum through parliament

The people

The proposed change is put to the people no sooner than two months and no later than six months after the Bill has passed parliament.

Before the referendum is put to the people, the Australian Electoral Commission sends information to every household that explains the proposed change and provides the arguments for and against the change.

The referendum is put to all eligible voters. Voters are required to answer 'yes' or 'no' to the question asked. For example, in the 1967 referendum:

DO YOU APPROVE the proposed law for the alteration of the Constitution entitled –

'An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population?'

For a referendum to pass it must achieve a double majority. This process is explained in Figure 8.12.

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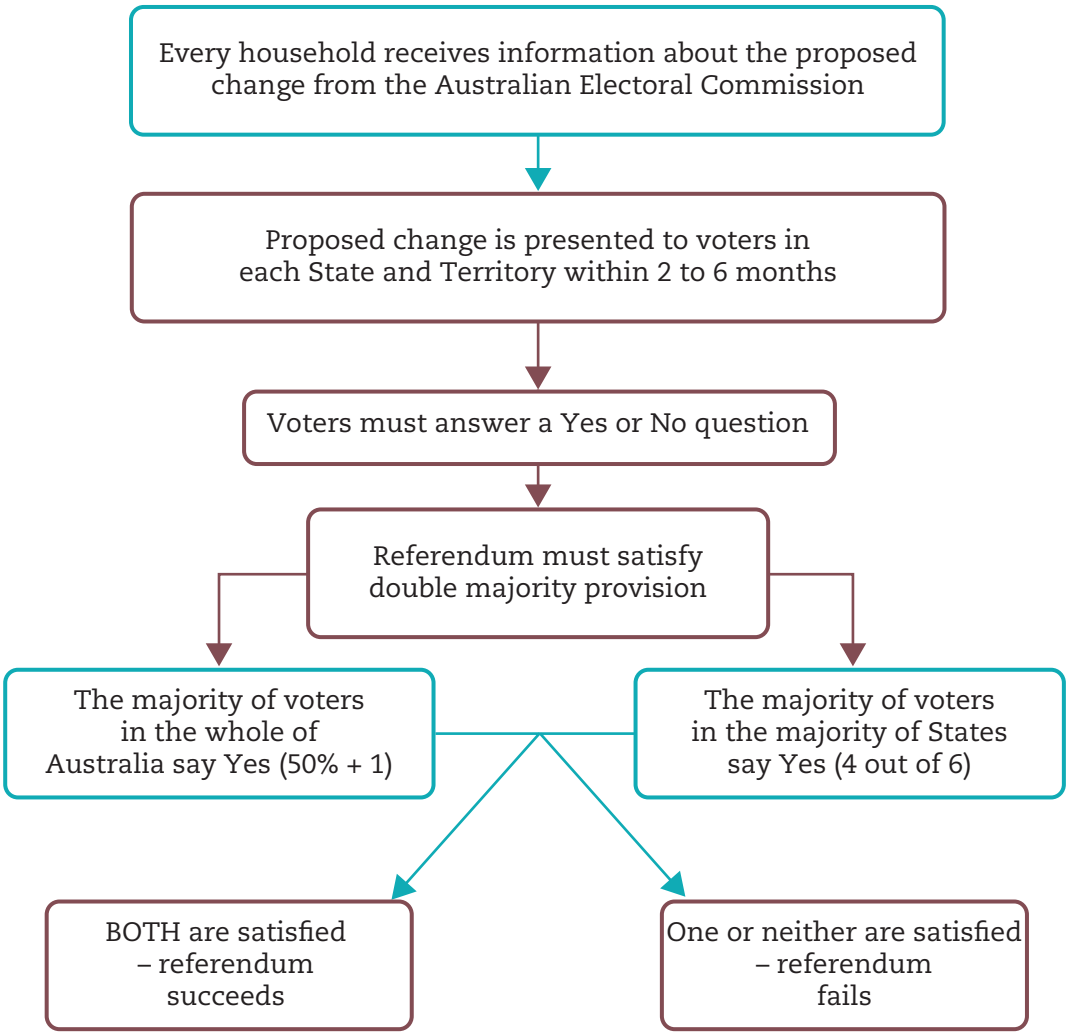

Figure 8.12 The process for the people

The Governor-General

If the referendum achieves a double majority, it is then passed to the Governor-General for Royal assent. Once Royal assent has been given, the change to the Constitution is made.

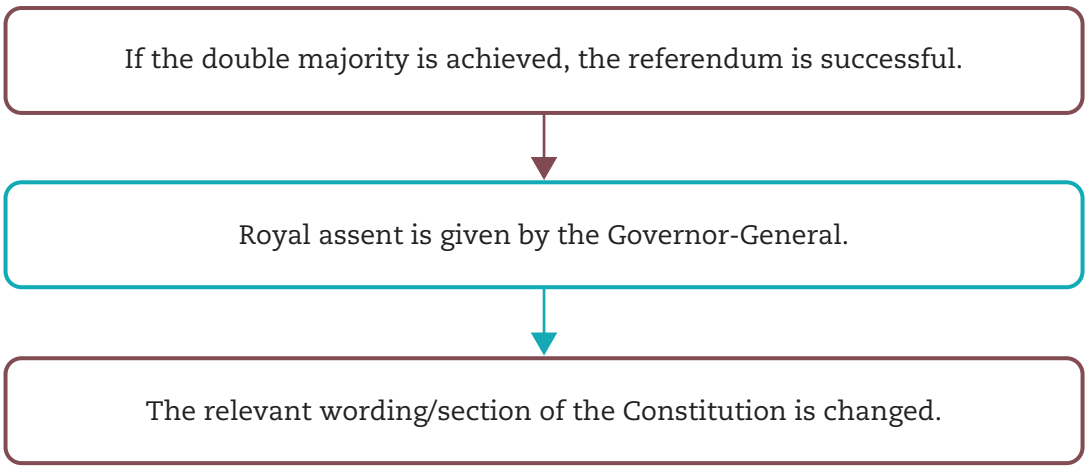

Figure 8.13 The process for the Governor-General

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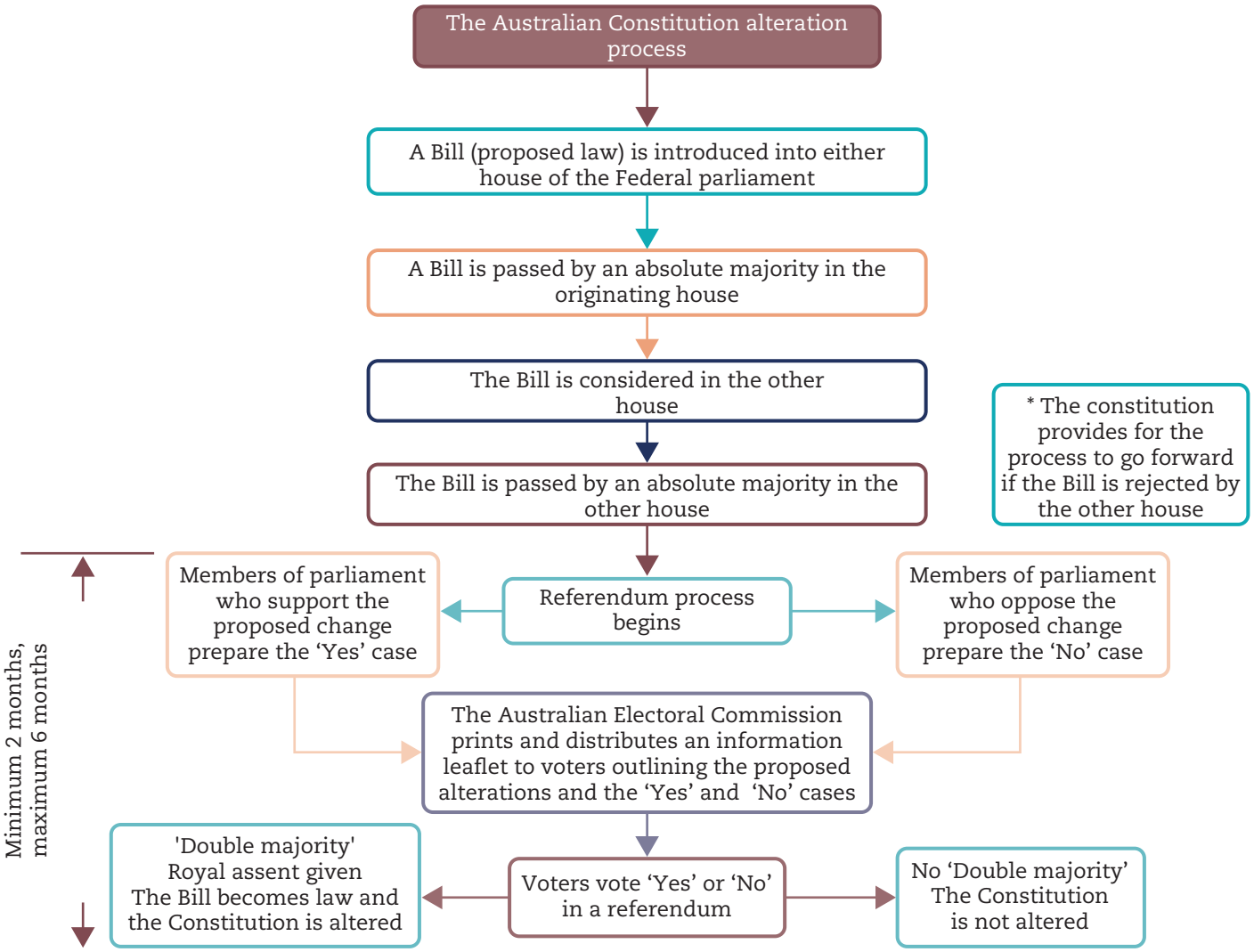

Figure 8.14 Changing the Constitution – an overview

How does a referendum change the Constitution?

A referendum is the only way in which the actual wording of the Constitution can be changed. A successful referendum can result in words being inserted into the Constitution or words being deleted from the Constitution.

A referendum changes the wording of the Constitution.

Inserting new words

The Constitution has always clearly stated the power of the Commonwealth to make laws about invalid and old-age pensions.

In 1946, a successful referendum clarified the power of the Commonwealth parliament to make laws about other social security benefits. This referendum resulted in a new subsection being added: section 51(xxiiiA).

Section 51 Legislative Powers of the Parliament

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:

(xxiii) invalid and old-age pensions;

The following words were inserted into the Constitution:

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances …

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Deleting words

The Constitution originally gave the Commonwealth parliament power to make laws with respect to the people of any race other than the 'aboriginal race'. In 1967, a referendum was held to remove this phrase discriminating against Indigenous people.

The proposal was that section 51(xxvi) be amended to strike out the term 'other than the aboriginal race in any State', and that section 127 be struck out in its entirety.

Since 1967, the Constitution appears with a line through the terms to be struck out below.

Section 51 Legislative Powers of the Parliament

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: (xxvi) the people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws;

Section 127

~~Aborigines not to be counted in reckoning population~~

~~In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted~~;

In recent reprints of the Constitution, the words are deleted and a note about the amendment is inserted.

8.6 Significance of the 1967 referendum

The 1967 referendum was about allowing the Commonwealth the legal right to create special laws for the benefit of Aboriginal and Torres Strait Islander peoples, including being counted in future census figures.

The 1967 referendum was not about giving Aboriginal and Torres Strait Islander peoples the right to vote. This had already been given in 1962 with the passing of the *Commonwealth Electoral Act 1962* (Cth), which amended the *Commonwealth Electoral Act 1918* (Cth).

The then Prime Minister of Australia, Harold Holt, introduced legislation into the Commonwealth parliament for a referendum to be held on 27 May 1967.

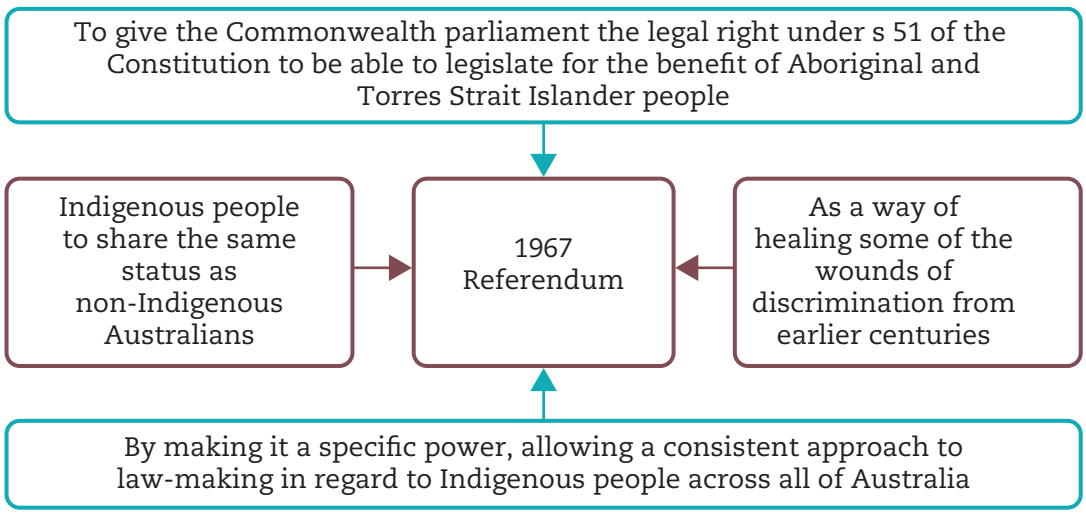

Figure 8.15 Reasons for holding the 1967 referendum

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This referendum was successful, with nearly 91% of electors throughout Australia, and a majority of voters in every state, voting in favour of the change. It demonstrates the importance that the people of Australia placed on making this change to their Constitution.

News report 8.6

1967 – a time for change

Before 1967, section 51(xxvi) of the Constitution was worded in such a way that it prevented the Commonwealth parliament from legislating in relation to Australia's Indigenous peoples. Since this power was not given to the Commonwealth, it remained with the State parliaments as a residual power.

In 1967, a referendum was held to alter the words of the Australian Constitution. The referendum succeeded, and this resulted in the deletion of words from the Constitution.

This referendum affected the division of legislative powers: the words in the Constitution had until then stopped the Commonwealth from legislating for Indigenous peoples, so this power had rested with the states, as a residual power. However, the successful referendum gave the Commonwealth specific (concurrent) power to make laws for Aboriginal and Torres Strait Island people.

Video

Bill Onus, President of the Victorian Aborigines' Advancement League

Eight successful referendums

This formula for popular approval was based on the procedure used in the Swiss Federation. During the first 70 years of its operation in Switzerland, this procedure resulted in 47 changes. In Australia, only eight changes have resulted from 44 referendum proposals.

The writers of the Constitution wanted a simple formula for amending the Constitution; however, they did not want one that would make the process too easy.

Referendum proposals are difficult to pass. The requirement to obtain a double majority poses many problems. If a major political party does not support the proposal, the supporters of that political party will often vote against the proposal. Many voters do not understand the nature of the Constitution and the extent of the powers given to the Commonwealth parliament. These voters may not understand the effect of the proposed changes. As a result, they may vote against them.

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Table 8.8 History of referendums

Year	Subject	Government submitting	States where voters in favour of proposal	Percentage of voters in favour of proposal
1906	**Senate elections**	***Protectionist**	**6 (All)**	**82.65**
1910	Finance	*Fusion	3 (Qld, WA, Tas.)	49.04
	State debts	***Fusion**	**5 (All exc. NSW)**	**54.95**
1911	Legislative powers	Labor	1 (WA)	39.42
	Monopolies	Labor	1 (WA)	39.89
1913	Trade and commerce	*Labor	3 (Qld, SA, WA)	49.38
	Corporations	*Labor	3 (Qld, SA, WA)	49.33
	Industrial matters	*Labor	3 (Qld, SA, WA)	49.33
	Railway disputes	*Labor	3 (Qld, SA, WA)	49.13
	Trusts	*Labor	3 (Qld, SA, WA)	49.78
	Monopolies	*Labor	3 (Qld, SA, WA)	49.33
1919	Legislative powers	*Nationalist	3 (Vic, Qld, WA)	49.65
	Monopolies	*Nationalist	3 (Vic, Qld, WA)	48.64
1926	Industry and commerce	Nat-CP	2 (NSW, Qld)	43.50
	Essential services	Nat-CP	2 (NSW, Qld)	42.79
1928	**State debts**	***Nat-CP**	**6 (All)**	**74.30**
1937	Aviation	UAP	2 (Vic, Qld)	53.56
	Marketing	UAP	0	36.26
1944	Post-war powers	Labor	2 (SA, WA)	45.99
1946	**Social services**	***Labor**	**6 (All)**	**54.39**
	Marketing	* Labor	3 (NSW, Vic, WA)	50.57
	Industrial employment	* Labor	3 (NSW, Vic, WA)	50.30
1948	Rents, prices	Labor	0	40.66
1951	Communists	Liberal/CP	3 (Qld, WA, Tas.)	49.44
1967	Nexus (Parliament)	Liberal/CP	1 (NSW)	40.25
	Aboriginal people	**Liberal/CP**	**6 (All)**	**90.77**
1973	Prices	Labor	0	43.81
	Incomes	Labor	0	34.42
1974	Simultaneous elections	*Labor	1 (NSW)	48.32
	Amendment	* Labor	1 (NSW)	48.02
	Democratic elections	* Labor	1 (NSW)	47.23
	Local government	* Labor	1 (NSW)	46.87
1977	Simultaneous elections	Liberal/NCP	3 (NSW, Vic, SA)	62.20
	Casual vacancies	**Liberal/NCP**	**6 (All)**	**73.30**
	Territorial votes	**Liberal/NCP**	**6 (All)**	**77.70**
	Retirement of judges	**Liberal/NCP**	**6 (All)**	**80.10**
1984	Terms of senators	* Labor	2 (NSW, Vic)	50.60
	Interchange of powers	* Labor	0	47.10
1988	Parliamentary terms	Labor	0	32.80
	Fair elections	Labor	0 States (ACT in favour)	37.41
	Local government	Labor	0	33.48
	Rights and freedoms	Labor	0	30.62
1999	Republic	Liberal/NCP	0 States (ACT in favour)	45.13
	Preamble	Liberal/NCP	0	39.34

Note: Referendum held at the same time as a federal election.Source: Australian Electoral Commission.*

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Multiple referendum questions

Note that a referendum is one question. As can be seen from Table 8.8, there have been times when multiple referendum questions have been put to the Australian people. For example, in the 1967 referendum there were actually two questions put to voters. One was on Indigenous peoples while the other, referred to as Nexus, related to the numbers in the House of Representatives and the Senate. This latter question failed.

Voters who do not understand the Constitution may see a referendum as an attempt to increase the power of federal politicians. This distrust of politicians may sway an elector to vote 'No'. Voters in smaller States in particular tend to vote against anything they see as an increase in Commonwealth power.

Since 1967, however, there has been an increase in the success rate of referendums. This reflects changing attitudes to the structure of federalism in Australia. It also reflects the changing economic needs of our country. Today, we expect the Commonwealth government to provide social services and improve our quality of life. The states cannot fund such costly programs because the Commonwealth has the power to raise revenue by taxing incomes, so it has been necessary to alter the Constitution to allow the Commonwealth parliament to legislate in these areas.

The proposed 2013 referendum to give local government financial powers was deferred because it had been legislated to be held only on 14 September. The election was conducted a week earlier.

Referendum proposals for substantial change have generally not been successful.

Those concerned with minor changes to the Constitution, such as the retirement age of judges and rules for the filling of casual vacancies in parliament, have been far more easily accepted.

In March 2013, both houses of the Commonwealth parliament passed an Act to give further recognition to Indigenous peoples in Australia. The *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) aimed to raise awareness to better protect the rights of Indigenous peoples. The Act provided for a two-year program of community awareness on the issue in preparation for a referendum on the topic. Also, in March 2013, a Joint Standing Committee of both houses of the Commonwealth parliament recommended a separate referendum to give the Commonwealth the power to directly finance local government activities. The referendum was initially planned for the same day as the 2013 federal election. Some states, such as Victoria, opposed the 'Yes' vote (go to www.aph.gov.au for further details).

You can track the progress of these proposals by visiting www.aph.gov.au.

The 'Recognise' campaign aimed to bring about constitutional reform by recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

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News report 8.7

Why referendums fail – lessons from the referendum for a republic

In Australia, most referendums do not succeed. This is because the formal process of seeking a change to the Constitution is so demanding. When writing the Commonwealth Constitution, it was believed that a more demanding referendum process was needed to protect Australians from proposals with unsound or unclear implications. For a referendum to succeed, a 'special majority' of Australians is required: the double majority – an overall majority plus majorities in a majority of States.

A costly process

It was estimated that the 1999 republic referendum cost nearly $67 million. This included the cost of a nationwide education program, advertising, the preparation of ballot papers and a poll by the Electoral Commission. The costs of the Electoral Commission alone were estimated to be in excess of $55 million.

A difficult process

Difficulties in initiating constitutional change start with the amendment procedure. Section 128 of the Constitution sets out the conditions for changing the Constitution, which starts in the Commonwealth parliament. This means that the government may have the whip hand from the start if the issue is one that the opposition does not support.

A referendum Bill must first be passed by both houses, but in practice, the Governor-General acts in the way he or she always acts: he or she will sign the writ for a referendum only on the recommendation of the Prime Minister. The current polarisation of federal politics has resulted in a referendum being a 'political football', with both major parties being concerned with concentrating political power rather than dispersing or sharing it.

The double majority

The 'special majority' required for the success of a referendum proposal can be viewed as a veto. Australians have not been afraid to use this veto, saying no to 36 of 44 proposals. Of the defeats, 31 proposals received less than 50% of the total vote and 11 failed to receive majorities in any of the six States. Only five proposals have failed because, despite receiving a majority of votes, they did not obtain the support of a majority of States. Proposals of low significance have tended to succeed.

Apathy or understanding

The failure of referendums is sometimes attributed to voter apathy and failure to understand the nature of the proposal.

Some people could view the history of referendum proposals as showing that Australians were non-thinkers and negative. However, research has shown that informal voting is low and that voters have been able to distinguish between proposals when two or more are put to the vote.

Keys to success

One essential element is needed for a referendum proposal to be successful: there must be federal consensus before and during the referendum campaign. The Prime Minister, as leader of the government, is usually pivotal in the referendum debate. The republic question showed for the first time a Prime Minister actively campaigning against the proposal. However, two leading frontbenchers, Treasurer Peter Costello and Industrial Relations Minister Peter Reith, had views different from their leader. The double majority requirement for success means that the support of key players for the referendum must be evident, not only at a national level, but also at a state level.

Another essential element is communicating the reasons for change clearly to voters. One lesson learnt from the republic referendum is the importance of those advocating change being able to communicate the advantages of the change.

The Yes/No referendum booklet, advising voters of both sides of the argument.

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Activity 8.8 Folio exercise

Referendums – a critical appraisal

Read News report 8.7 'Why referendums fail – lessons from the referendum for a republic' and News report 8.6 '1967 – a time for change' and complete the following tasks:

1 Design a flow chart that illustrates the process used to bring about a change in the wording of the Constitution.
2 Explain what is meant by the term 'double majority'.
3 Analyse the effectiveness of the referendum process in bringing about a change in the Constitution.
4 List the factors that limit the likely success of a referendum proposal.
5 Does section 128 protect the Australian Constitution? Discuss.
6 Before 1967, the Constitution did not give the Commonwealth the specific power to make laws about Indigenous people. Who held this legislative power? What term would be used to describe this type of law-making power? Explain. What is the term for this law-making power after the referendum?
7 Explain how the Commonwealth parliament, having the power to make laws for Indigenous peoples, should improve the problems that existed before the 1967 referendum.

Activity 8.9 Multimedia report

Change and protection

Section 128 exists to allow changes to be made to the Australian Constitution, and also to protect it.

1 Present a multimedia report to the class that addresses both aspects – change and protection of the Constitution. Your multimedia presentation should involve the use of at least one of the following:
   - presentation software such as Prezi and a set of guide notes
   - a PowerPoint presentation and a set of speaker notes
   - a multimedia package to prepare a computer presentation and a set of student notes.
2 Provide an oral presentation of your work in addition to the multimedia presentation. Your presentation should do the following:
   - Outline the process that would be used to change any aspect of the Constitution (by adding new words or deleting content).
   - Discuss the part or parts of the change process that exist to protect the Constitution.
   - What factors would influence the likely success or failure of this process?

8.7 Impact of a High Court case on law-making powers

The High Court interprets the day-to-day application of the Constitution.

It is the role of the High Court to interpret the Constitution and to determine its day-to-day application to a dispute before it; it does not alter the written words. Its role is to determine the intentions of the founders when they wrote the Constitution and how those intentions apply to the present circumstances.

Legal brief 8.6 illustrates the impact a High Court interpretation of the Constitution can have on the division of law-making powers between the Commonwealth and the states.

Case related to division of law-making powers; *R v Brislan; Ex parte Williams* [1935] HCA 78: (1935) 54 CLR 262.

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Legal brief 8.6

Does 'like services' include new technologies?

***R v Brislan; Ex parte Williams* (1935) 54 CLR 262**

Section 51(v) of the Constitution gives the Commonwealth parliament the power to make laws about 'postal, telegraphic, telephonic and other like services'. When the Constitution was written, the post and telegraph were the main forms of communication. In 1905, the Commonwealth parliament passed the *Wireless Telegraphy Act 1905* (Cth). Under this Act, all owners of wireless sets (radios) were required to have a licence. The defendant was charged with having a wireless without a licence. She challenged the validity of the law, claiming that the Constitution did not give the Commonwealth parliament power to make laws about wireless sets.

To resolve this dispute, the High Court had to interpret the meaning of the words 'like services' in section 51(v). The Court ruled that wireless came under section 51(v) of the Constitution which gave the Commonwealth power to legislate on 'postal, telegraphic, telephonic, and other like services'.

Justice Latham stated:

> The common characteristic of postal, telegraphic and telephonic services, which is relevant in this connection is, in my opinion, to be found in the function which they perform. They are, each of them, communications services. This is also the characteristic of a broadcasting service in all its forms, which is therefore, in my opinion, a 'like service' within the meaning of section 51(v) of the Constitution.

The High Court decided that a wireless was a 'like service'. Therefore, the *Wireless Telegraphy Act* was valid.

***Jones v Commonwealth (No. 2)* (1965) 112 CLR 206**

A similar case occurred in 1965. In this case, the validity of the *Broadcasting and Television Act 1942–1962* (Cth) was questioned. Television had not been invented when the Constitution was written. There is no direct reference to making laws about television in the Constitution. In this case, the High Court decided that television was also a 'like service' under section 51(v). Therefore the *Broadcasting and Television Act* was valid.

These interpretations of the Constitution indicate that the term 'like services' gives the Commonwealth parliament the power to make laws on a range of communication technologies.

Significance of the interpretation

The judgment in Brislan widened the scope of section 51(v) and expanded the Commonwealth's power in relation to electronic communication. It set a precedent that led to the Commonwealth controlling television, satellite communication, the internet – and things we have not even thought of yet.

This case had a significant impact as it meant a shift in the division of law-making powers from the states to the Commonwealth as a concurrent power: the power to make laws in relation to broadcasting and wireless sets now lay with the Commonwealth parliament. Of course, the states could still make laws in this area, but if there was ever any conflict between their laws and the Constitution, section 109 would apply and the Commonwealth law would prevail to the extent of any inconsistency.

The impact of the High Court's determination of 'like services' has meant a shift in law-making powers.

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Activity 8.10 Folio exercise

The role of the High Court

1 Complete the table below, providing a detailed explanation of the roles of the High Court in relation to the Constitution.

Role	Explanation
Acts as a guardian of the Constitution	
Keeps the Constitution relevant and up-to-date	
Forms one of the checking mechanisms related to any injustice or abuse of power that may arise	
Gives meaning to the words in the Constitution	
Applies the Constitution to everyday situations when a case is brought before it	

2 Can the High Court make actual changes to the wording of the Constitution? Explain.

3 Read Legal brief 8.6 (the Brislan and Jones cases) and complete the following tasks in relation to each case:

- Why was the defendant charged?
- Which section of the Constitution was interpreted?
- Explain why Brislan felt that the charges should not have been brought in the first place.
- Outline the High Court's decision in each case.
- Do you agree with the High Court's decision? Explain your reasoning.
- Do you think that 'like services' would include new technologies today? Explain your answer.

8.8 Significance of the High Court's interpretation of sections 7 and 24

A key principle of the Australian parliamentary system is to ensure that we have a representative government: this means preventing governments abusing their power by making them answerable and accountable to the people at regular elections. This also aims to ensure that members of parliament represent the views and needs of those who voted for them.

Representative government is established by two sections of the Australian Constitution:

- section 7, which requires that the Senate be 'directly chosen by the people'; and
- section 24, which states that the House of Representatives must be 'directly chosen by the people'.

Roach v Electoral Commissioner [2007] HCA 43; (2007) 233 CLR 162

The High Court can declare laws invalid.

Case related to interpretation of sections 7 and 24: *Roach v AEC* (2007) 233 CLR 162.

In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the High Court held that the requirement that there be representative government indirectly protected the right of adults to vote. If the parliament passed legislation that, for example, took away the right of women to vote, it would be contrary to representative government, and therefore not a valid law.

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Legal brief 8.7

Do we have the right to vote?

The Australian Constitution sets up the structure of representative government in the following way: members of parliament must be voted in by, and must represent, their electorates. Sections 7 (Senate) and 24 (House of Representatives) require that members of parliament be 'directly chosen by the people'.

Facts of the case

Vicki Lee Roach was a 49-year-old Australian Aboriginal woman from the Yuin nation who, in 2004, was convicted of criminal offences and sentenced to six years imprisonment with eligibility for parole in 2008.

The Commonwealth parliament passed the *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth), which banned prisoners serving three or more years in prison from voting in federal elections. In 2006, the Commonwealth Parliament passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), to prohibit all prisoners serving a current sentence from voting in a federal election.

In 2007, Roach took a case to the High Court seeking to clarify whether the Constitution protected the right to vote. At the time, Ms Roach was validly enrolled to vote in the Federal seat of Kooyong in Victoria. She would still be imprisoned during the November 2007 election. Ms Roach sought to challenge legislation that would stop her from voting at that election.

Ms Roach sued the Electoral Commission in the High Court of Australia. She argued that the complete ban was invalid since:

- it interfered with the system of representative government the Constitution set up, thus breaching sections 7 and 24; or
- it violated the implied right to political freedom of communication.

The decision

In majority, the High Court held that the Constitution's requirement for representative government was a restriction on the Australian parliament's power to decide who may vote. The High Court held that there is now constitutional protection of the right of Australian adults to vote. However, the Court held that the right to vote was not protected by the implied right of political communication.

Instead, the majority held that the structure of representative government in the Constitution limits the Australian parliament's power to decide who may vote. So the parliament cannot pass laws that, by unreasonably taking away the right to vote of a class of persons, would interfere with representative government.

In this case, the complete ban on prisoners voting was unreasonable (2006 Act), since many were serving short terms for minor offences. But the old ban (2004 Act) – on prisoners who are serving terms of three years or more – was valid, since the length of sentence indicated that the prisoner had engaged in conduct that was viewed as taking them outside community expectations. So Ms Roach won the legal point but did not regain her vote.

Significance of the decision

The decision of the High Court affirmed the constitutional right to vote in Australia was protected by the structural right of representative government established in sections 7 and 24. Therefore, sections 7 and 24 can act as a limitation on the powers and sovereignty of the Commonwealth parliament, which cannot legislate away the right to vote without good reason.

This decision was a significant one, as the High Court's interpretation of the two sections of the Constitution has seen a range of views being expressed by eminent academic lawyers seeking to further clarify the relationship between the structures and text of the Constitution and rights which are protected. It will be interesting to see how future cases develop and clarify the reasoning of the Court in this area.

Vickie Lee Roach

Implications of representative government

Implied rights can be 'read into' the Constitution by the High Court.

In addition to the express rights, the High Court has considered that some rights may be implied by the Constitution. This involves drawing implications from the words of the Constitution. An implication is something that is meant or intended but not actually stated. An implied right is a right that was intended by the drafters of the Constitution but not expressly stated in the document.

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The idea that the Constitution can be interpreted to include rights that are implied, but not stated, is much debated. Some commentators feel that these interpretations go beyond the role of the Court, which is to interpret the meaning of the Constitution. However, as the Constitution provides for an elected and representative government, one could argue that it implies the need for a free debate so that the vote is informed and the representative government is effective.

Right to freedom of political communication

The right to freedom of speech is not stated in the Constitution. However, the High Court has determined that the Constitution contains an implied right to freedom of communication on political matters.

Freedom of communication on public affairs and political matters is implied in the Constitution.

This implied right was first recognised in the case of *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* (1992) 66 ALJR 695. This case is also known as the 'political advertising case'.

News report 8.8

Political advertising case

A television broadcaster challenged the validity of changes made to the *Broadcasting Act 1942* (Cth) by the *Political Broadcasts and Political Disclosure Act 1991* (Cth). These amendments imposed bans on radio and television advertising for federal, state and local government elections. The High Court held that the law was invalid because there was an implied right of freedom of communication on political matters.

The High Court stated that:

- the Constitution establishes a system (or structure) of representative government
- in a representative government, members of parliament are directly elected by the vote of electors
- a free discussion or debate about public affairs and political matters is essential to an informed vote, which is essential to the system of representative government
- since the Constitution provides for an elected and representative government, it implies the need for a free debate so that the vote is informed and the representative government is effective.

Impact on defamation laws

This interpretation of freedom of communication on political matters was extended in 1994 in the case of *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104. In this case, the High Court decided that the Constitution protected, in most circumstances, those who commented on individuals engaged in political debates from being sued for defamation. It stated that the Constitution protects a 'free flow' of information and ideas between politicians, voters and anyone else involved in political processes (such as trade unions, community groups, and political and economic commentators).

The Constitution therefore protects discussion of the political views and public conduct of people who are engaged in activities that have become the subject of political debate. The result of the Theophanous case means that the implied right of freedom of communication on political matters could be used as a defence in a defamation action.

News report 8.9

The gun control case

In 1995, the Victorian County Court heard one of the first cases claiming freedom of speech on government and political matters. The defence was based on the Theophanous case.

The case involved the Sporting Shooters' Association of Australia, Victoria (SSAAV) and Gun Control Australia. The SSAAV sued Gun Control Australia for defamation. The SSAAV claimed that two defamatory articles were published in the Gun Control Australia magazine in January and May 1990. In determining whether the articles could be described as 'government and political matters', the judge considered the context in which the articles were published.

The SSAAV and Gun Control Australia were the main parties involved in a public gun control debate. The judge considered that the articles were part of the ongoing debate about gun control and therefore part of a political discussion. The judge found that the defendants were not liable for defamation because the articles were part of a political debate and there is a constitutional right to freedom of communication on government and political matters.

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Limitations on freedom of political communication

In 1997, the High Court considered a defamation suit brought against the Australian Broadcasting Corporation (ABC) by former New Zealand Prime Minister David Lange. In this case, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court held that there was no absolute right to freedom of communication.

The High Court stated that parliament can pass a law restricting freedom of communication for legitimate reasons. These restrictions would be valid if:

- the object of the law is compatible with the maintenance of the system of representative and responsible government provided for by the Constitution; and
- the law is reasonably appropriate and adapted to achieving that legitimate object or end.

Freedom of political communication operates as a limit on parliament's powers. There is no absolute right to freedom of communication.

This freedom limits the ability of parliament to restrict free political communication, rather than guaranteeing the rights of individuals. In addition, freedom of communication does not apply to the discussion of political matters in other countries.

Changes in High Court interpretations over time

In the first 20 years after Federation, the High Court interpreted the powers of the Commonwealth parliament in a very limited way. The High Court was more attuned to protecting states' rights, and took the view that any Commonwealth law that would restrict these 'reserved powers' was invalid.

This changed in 1920 when the High Court decided that the Constitution should be given a much broader interpretation – it should be interpreted according to the natural meaning of the words. Since the 1980s, the High Court has appeared to be giving the Constitution a liberal interpretation, expanding the range of law-making powers that can be used by the Commonwealth parliament.

In recent years, some commentators have suggested that the High Court has adopted an 'activist' role in interpreting the Constitution. The term 'activist' implies that the High Court is working towards bringing about change.

There are a number of reasons for the High Court adopting an activist approach to the Constitution. These reasons include economic changes, changes in the nature of war and therefore defence, and changes in communication and transportation. Between 1901 and the start of the twenty-first century, there have been significant changes in world politics and in the nature of diplomacy. The High Court must somehow take all of this into account.

The impact of High Court interpretations of the Constitution can be seen in several areas:

- the powers of the Commonwealth parliament in relation to external affairs
- the financial relationship between the Commonwealth and state governments
- the implied right of political communication.

News report 8.10

Has the High Court gone too far?

For many Australians, the High Court may conjure up images of bewigged elderly men toiling over books. Long seen as the bastion of tradition and conservative attitudes, the High Court provided a narrow and legalistic application of our Constitution in the past.

However, since the mid-1980s, things have been rapidly changing. The rate of change in recent years has resulted in the Court being criticised for being too revolutionary – an unaccountable, unelected maker of new laws.

1980s – a change in approach

From 1987 onwards, there has been a clear change in approach: the High Court now considers the intentions of the authors of the Constitution in deciding how the Constitution should be interpreted.

Under Chief Justice Mason (1987–95), the High Court had been the most activist court that Australia had ever seen. In the landmark case of *Cole v Whitfield* (1988) 165 CLR 360, the Court increased the power of governments to regulate interstate trade by reversing the established interpretation of section 92 of the Constitution.

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Susan Kiefel, the first female Chief Justice of the High Court

1990s – protecting rights

In the 1990s, the Court signalled a new era of constitutional interpretation. It protected the rights of the accused to a fair trial. It recognised the right to freedom of speech as an implied intention of the founding fathers. This was a period of new commitment to the protection of rights.

George Williams, a well-known scholar in constitutional law, describes the High Court at this time as 'avowedly activist in that it was prepared to confront its role in common law and the interpretation of the Constitution where justice or the needs of contemporary Australia dictated'.

The pace of change

The 1990s were also a period of significant controversy about the role of the High Court. No longer was the High Court seen as irrelevant to or remote from daily affairs. It became the subject of media and public debate. Under Chief Justice Mason, the High Court handed down a great number of landmark decisions over a relatively short period of time. The pace of change was partly due to the types of cases that the Court was now hearing. The High Court only hears the most difficult cases. There are no easy answers to these cases and they often have political implications.

The pace of change can also be attributed to the membership of the Court. During the Mason period, the court was made up of judges who were prepared to recognise their role as law-makers.

High Court or parliament?

Some commentators see Australia's High Court as travelling too far from the traditions of British legal principles. It has been claimed that the Court has moved too close to the US model, where the Supreme Court is seen as the last line of defence against bad laws and government interference in civil liberties.

Critics also argue that there has been a shift in political responsibility from the parliament to the High Court and that politically contentious issues are best handled by parliament.

Others contest this view. They argue that the High Court was established as part of a system of checks and balances on the power of parliament and the executive. The High Court performs an important role in protecting our rights. It protects us against potential abuse of power. It interprets the powers of the parliament and the limits on the use of those powers. Given a global context of rapid social, economic and political change, this is not an easy task.

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High Court landmarks

- 1901 The High Court was created by the Constitution.
- 1901–20 The High Court had a strict interpretation of the meaning of the Constitution. Three of the judges who were sitting on the High Court were involved in drafting the Constitution. These judges saw the Constitution as an agreement between the states that gave the Commonwealth parliament restricted and limited powers. The Constitution was interpreted in a way that would preserve the reserved powers of the states.
- 1920 The High Court heard the *Engineers' Case (Amalgamated Society of Engineers v Adelaide Steamship Co.* (1920) 28 CLR 129). In this case, the High Court established the principle that it would give the Constitution the broadest possible meaning. Over the following years, there was a general widening of the interpretation of section 51.
- 1940s In the *First Uniform Tax Case* (*South Australia v Commonwealth* (1942) 65 CLR 373), the High Court decided that the Commonwealth parliament had the power to tax incomes. The Commonwealth had, using its taxation power, passed legislation that created a national income tax. Before then, each state had its own income tax laws. The new Commonwealth income tax was payable at such a high rate that a taxpayer could not effectively pay both income taxes. The states challenged the tax in the High Court. They argued that:
    - taxation was a concurrent power,
    - the Commonwealth tax was so high that people would not be able to pay state income tax; and therefore,
    - the states would no longer be able to impose income taxes.
    - The High Court disagreed, and held that since section 109 ensured that Commonwealth law overrode inconsistent state laws on concurrent powers, the Commonwealth could impose such a tax. This decision gave the Commonwealth government a significant financial advantage over state governments, and broadened the Commonwealth parliament's powers in relation to taxation. In the State Banking Case of 1947, the High Court held that the Commonwealth parliament cannot pass laws whose sole purpose is to restrict and control state governments (*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31). However, the judgment of the First Uniform Tax case stood, giving the Commonwealth the ability to dominate this area of concurrent power.
- 1980s The High Court broadened its interpretation of external affairs power to include making laws to implement international treaties in *Koowarta v Bjelke-Petersen and Others* (1982) 153 CLR 168, and *Commonwealth v Tasmania* (Tasmanian Dam Case) (1983) 158 CLR 1.
- 1990s The High Court recognised that there is an implied right to freedom of communication about political affairs.
- 2000s The High Court emphasised the importance of a representative government in its interpretation of sections 7 and 24 in the case of *Roach v AEC* (2007) 233 CLR 162.

Activity 8.11 Folio exercise

Understanding the significance of sections 7 and 24 of the Australian Constitution

Read Legal brief 8.7 'Do we have the right to vote?' and News report 8.8 'Political advertising case' then complete the following tasks:

1 Define the term 'representative government'.

2 Identify the two sections in the Constitution that relate to having a representative government.

3 Although the Constitution does not provide Australians with the express right to vote, with reference to the Roach case, explain how representative government protects the right to vote.

4 Referring to News report 8.8, explain how the structure of representative government impliedly protects freedom of communication on political matters.

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Table 8.9 Does the Australian Constitution protect our rights?

Feature	Strengths	Weaknesses
Approach to the recognition of rights	• Express rights are entrenched in the Constitution and cannot be removed except by referendum. • Implied rights have been interpreted by the High Court and reflect the capacity of the Constitution to meet the changing needs and values of our society.	• The number of rights entrenched is very limited. Referendums to alter these rights, or to entrench other rights, are rarely successful. • Implied rights develop through case law and do not provide a comprehensive recognition of rights. They develop in an ad hoc manner.
Nature of the rights protected	• Express rights are mainly civil and political rights. • There is an implied right to freedom of communication on public affairs and political matters.	• Civil and political rights are limited; democratic rights are not mentioned in the Constitution. • Most rights are concerned with limitations on the action that the Commonwealth may take in relation to individuals.
Enforcement	• Express and implied rights are fully enforceable by the High Court, which can invalidate legislation that infringes those rights. • Rights stated in the Constitution operate as limitations on parliament's power. Some rights are expressed as specific prohibitions. The Commonwealth parliament cannot make laws that conflict with an express or implied right.	• Enforcement through the High Court is time-consuming and costly. • Express rights mainly relate to the action of the Commonwealth parliament. • The Constitution does not necessarily safeguard individuals from the actions of state parliaments.
Constitutional interpretation	• The High Court interprets the meaning and application of those rights expressed in the Constitution. • High Court interpretation has implied rights consistent with fundamental democratic principles.	• Historically, the interpretation of express rights has been narrow. • The development of implied rights has been limited.

The High Court was established under the Australian Constitution (s 71) to interpret the Constitution and apply it to a dispute before it (s 76). It is the 'guardian' of the Constitution.

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8.9 International declarations and treaties and their impact on the external affairs power

Section 51 External affairs powers

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:

(xxix) external affairs.

Since the 1980s, High Court decisions have broadened the scope of the Commonwealth's power over external affairs, including the ability to pass domestic legislation to uphold international agreements made in treaties. This has enabled the Commonwealth parliament to make laws on areas that are not listed in the Australian Constitution, including possible residual powers of the state parliaments.

The external affairs power means that the Commonwealth can make laws to implement international declarations and treaties.

What are treaties and declarations?

Treaties, otherwise known as international conventions, are formal agreements between nations which are binding at international law. Treaties can be:

- **bilateral:** between Australia and one other country; for example, an aviation agreement exists between Australia and the United States
- **multilateral:** between three or more countries; for example, the *United Nations Charter of Human Rights*.

Treaties are formal agreements between two or more nations. They are binding at international law and they cover areas of importance to all signatories.

Frequently, **international declarations** such as the *Declaration of the Rights of the Child*, are adopted by the UN General Assembly. However, those declarations are not treaties, which means they are not intended to be binding. Such declarations may, however, be part of a long process that leads ultimately to the negotiation of a UN convention, such as the UN *Convention on the Rights of the Child*, which is intended to be binding on the member states that adopt it. They may also, in certain circumstances, help in the interpretation of a treaty, as is the case with the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970)*.

International declarations are different from treaties in that they are not intended to be binding. However, they may, in certain circumstances, help in the interpretation of a treaty.

There are 195 countries in the world today. The UN represents 193 member states and two non-member observer states (the Holy See and the State of Palestine).

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News report 8.11

What does the Constitution say about treaties and declarations?

The Constitution sets out two powers in relation to international declarations and treaties:

- First: there is the power to enter into international declarations and treaties, which is an executive (Commonwealth government/Cabinet) power.
- Second: there is the power to implement international declarations and treaties, which is a legislative (Commonwealth parliament) power.

Section 51(xxix) of the Constitution gives the Commonwealth parliament the power to legislate with respect to 'external affairs'. This has been interpreted by the High Court to mean that the Commonwealth parliament may legislate to implement in Australian law an international declaration or treaty that has been entered into by the executive under section 61 of the Constitution.

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Why do we need treaties?

The number of treaties has increased as the world's interdependence has intensified. Improvements in technology and the increasing globalisation of the world have meant that countries are interacting more frequently. This can be challenging, and concerns should be discussed between all relevant parties. Thus, if a country has a vested interest in a particular industry or issue they may sign a treaty either with one other nation (bilateral) or with several other nations or international organisations (multilateral) to ensure that their voice is heard on that particular area.

Importance of treaties

To give an idea of how important treaties have become, areas of international treaties include: postal, shipping, social security and health arrangements, defence and security, nuclear non-proliferation, civil aviation, maritime delimitation, technological exchanges, and agreements designed to establish universal standards in relation to the treatment of civilians in time of war, the outlaw of weapons of mass destruction, and various laws of the sea and the international trading system. Global rules on the protection and promotion of human rights, education, the environment, wildlife and the world's cultural and natural heritage are widely accepted as necessary. More recently, the establishment of effective international regimes to combat criminal activity which does not respect national borders, including terrorism, has taken on a new urgency.

Australia remains the only Commonwealth country to not have a treaty with its Indigenous peoples.

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What areas does Australia have a vested interest in?

Australia has a vested interest in many areas that are either covered by treaties or continue to be developed into treaties. Examples include:

- Shipping – Given that Australia is an island, many of our treaties relate to our borders. In the area of shipping, Australia has assisted in revising the *Convention on the Law of the Seas Convention*. This allowed Australia to gain sovereign rights over large areas of sea and the Continental Shelf.
- Weapons of mass destruction – Australia has a vested interest in ensuring that weapons of mass destruction are removed from the world, and has worked on putting together a comprehensive *Chemical Weapons Convention* draft – which in fact is fast approaching universal acceptance.
- Nuclear non-proliferation – With the continued threat of nuclear weapons, Australia provided the stimulus to the development of a comprehensive *Nuclear Test Ban Treaty*, which aims to ban the testing of nuclear weapons.
- International cooperation on law enforcement – Borders do not stop criminal activity. Australia has played a significant role in relation to treaties on international cooperation on law enforcement, such as those in relation to drug trafficking and terrorists.

Impact of treaties on the Constitution

As we saw earlier, section 61 provides the power to the executive, rather than parliament, to enter into treaties. This means that important decisions related to treaty negotiations – which include determining the objectives of the treaty, determining the limits of Australia's power and, finally, deciding whether or not Australia should actually sign and ratify the treaty being discussed – are taken at ministerial level, usually by Cabinet.

However, just signing a treaty does not make it law in Australia. The Commonwealth parliament must pass legislation to implement the terms of the treaty. The Commonwealth parliament is given this power in section 51(xxix) of the Constitution.

What are external affairs?

At the time when the Constitution was being drafted, the subject of international declarations and treaties was not considered particularly important. The Commonwealth parliament was given power to implement these for Australia by way of legislation. However, the types of declarations and treaties that existed at that time were unlikely to have a significant impact on traditional areas of government responsibility.

As noted by Sir Robert Menzies in 'The High Court and the external affairs power' (H P Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Law Book Co, 1992):

> When the draftsmen of the Constitution wrote down the magic words 'external affairs', there did not leap into their minds any vision of the complex and novel things that were to come many years later. Least of all could they have imagined a comprehensive world organisation of which Australia would be a member, that there would be an International Labour Organisation, or that the political stuff of 19th century treaties would largely have substituted for it the bargaining of merchants, of exporters and importers, agreements in the fields of health and science, the literally hundreds of matters engaging our attention and turning our eyes out to other lands and other peoples.

External affairs today

Today, the external affairs power is seen as giving the Commonwealth parliament the power to make laws about matters physically external to Australia and laws affecting Australia's relations with other nations. This power enables the Commonwealth parliament to legislate to implement Australia's obligations under international agreements. The interpretation of the external affairs power by the High Court has also allowed the Commonwealth parliament to make laws about matters that have traditionally been considered the residual powers of the States.

However, there are some limitations to the scope of the power. They include:

- constitutional restrictions and prohibitions on the Commonwealth parliament – express constitutional guarantees (such as freedom of interstate trade) and implied constitutional guarantees (such as the prohibition on legislation discriminating against the states or preventing a state from continuing to exist and function as such)
- the treaty must be genuine (bona fide)
- the law implementing the treaty must be a reasonable and appropriate means of giving effect to the purpose of the treaty.

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International declarations, treaties and Australian law

The Constitution gave the Commonwealth the power to enter into treaties and international declarations.

The Commonwealth's powers in relation to treaties were not widely used until the past 30 years. Although the Commonwealth government had unlimited powers to sign treaties, it was not clear that the Commonwealth parliament would be able to pass laws to implement treaty obligations. The position was clarified in the following cases, which indicate that the Commonwealth parliament has a broad power to legislate to implement the terms of an international agreement.

Legal brief 8.8

Seas and submerged lands case

***New South Wales v Commonwealth* (1975) 135 CLR 337**

In 1973, the Commonwealth parliament passed the *Seas and Submerged Lands Act,* which gave the Commonwealth sovereign rights over the continental shelf for the purpose of exploration and development of natural resources. This included sovereignty over an area of the sea adjacent to the Australian coast including the airspace over that sea, the seabed and subsoil.

Australia was a signatory to two international conventions that related to this: the *Convention on the Continental Shelf (1958)* and the *Convention on the Territorial Sea and the Contiguous Zone (1958).* These treaties came into force in September 1964 and both these treaties gave Australia sovereign rights to these areas.

High Court decision

Despite all the states challenging the validity of the Commonwealth legislation, the majority of the High Court found in favour of the Commonwealth parliament in that the Covenants, through the external affairs powers under section 51(xxix) of the Constitution, gave the Commonwealth the power to pass the legislation. The Court held the legislation fell within the external affairs power because it implemented the treaties, and also because it related to an area external to Australia.

Impact of the decision

In this case, Barwick CJ explained the reasons for the choice of words 'external affairs' rather than 'foreign affairs', as relating to Australia's status.

> 'External affairs is a larger expression than foreign affairs, though the expressions are often used interchangeably. In my opinion, the description "external affairs" covers a larger area of legislative power … The description of the subject matter of the power and the preference for external affairs rather than foreign affairs in the Constitution was doubtless designed to include matters which in Imperial days may not have been regarded as foreign affairs … The power extends, in my opinion, to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole. For this purpose, the continent of Australia and the island of Tasmania are, in my opinion, bounded by the low-water mark on the coasts.'

Hence, the term 'external affairs' was given a broad interpretation.

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Legal brief 8.9

The Koowarta case

***Koowarta v Bjelke-Petersen and Others* (1982) 153 CLR 168**

In this case, John Koowarta, an Aboriginal Australian man, attempted to purchase the Archer River cattle station, which covered much of the Wik nation's traditional land.

The Queensland government, headed by Joh Bjelke-Petersen, blocked the sale on the grounds that Aboriginal people should not be allowed to buy large areas of land.

Koowarta argued that the Queensland government could not do this under the *Racial Discrimination Act 1975* (Cth), a Commonwealth Act which ratified an international treaty – the United Nations' *International Convention on the Elimination of All Forms of Racial Discrimination* (1966).

The Queensland government argued that the *Racial Discrimination Act* was not valid because the Commonwealth parliament did not have the power to make laws about racial discrimination. The Queensland government argued that the external affairs power should be given a limited interpretation. It should not be used to allow the Commonwealth parliament to take over the residual powers of the States.

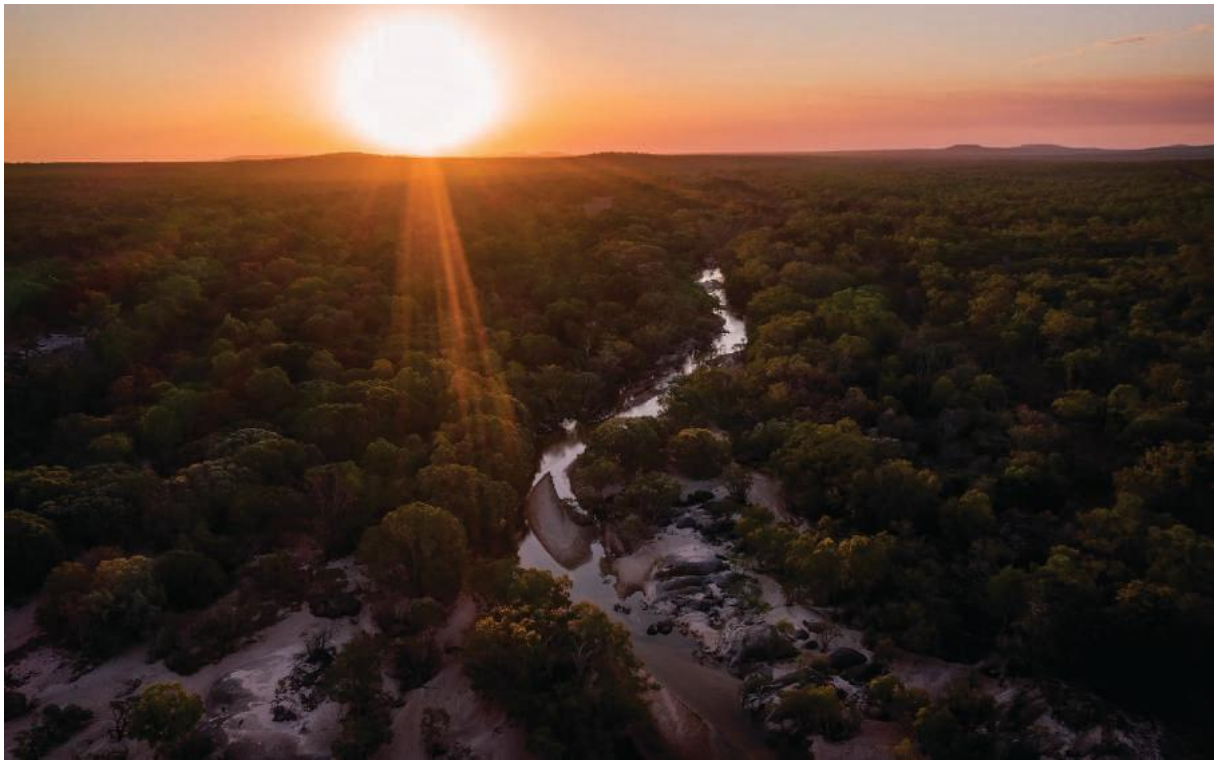
High Court decision

The majority of the judges in this case decided that the *Racial Discrimination Act* was valid: it was a legitimate use of the Commonwealth's power to make laws to implement international agreements. The Commonwealth parliament can use the external affairs power to pass a law, provided it:

- gives effect to an obligation
- is imposed on Australia by an international convention or treaty to which Australia is a party
- concerns a matter of that convention or treaty which is an international concern; and
- concerns the relationship between Australia and other countries.

Impact of the High Court decision

The decision in the Koowarta case established the powers of the Commonwealth parliament to make laws with respect to external affairs. The Commonwealth parliament could extend its law-making powers to a matter of international concern where Australia had undertaken obligations, even if that matter was not otherwise the subject of the law-making powers of the Commonwealth. This meant that the *Racial Discrimination Act* became integral into Australian law and was an important aspect of Australia's human rights legislation.



The Archer River flows through the land contested in *Koowarta v Bjelke-Petersen*.

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Legal brief 8.10

The Franklin Dam (Tasmanian Dam) case

***Commonwealth v Tasmania* (1983) 158 CLR 1**

In this case, the Tasmanian government challenged the validity of the *World Heritage Properties Conservation Act 1983* (Cth). This Act was passed by the Commonwealth parliament. The Act prohibited the clearing, excavation and building of a dam in protected areas, including an area on the Gordon River (below its junction with the Franklin River). The Gordon and Franklin Rivers run through large areas of untouched wilderness.

These wilderness areas contain many unique features. The flooding of the two rivers would have seriously damaged this significant area.

The area was nominated by the Commonwealth government to be included in the World Heritage List. The World Heritage List was established by an international treaty, which Australia had signed, and aimed to protect the world's cultural and natural heritage. The treaty was the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, which governs UNESCO's World Heritage program. The High Court was asked to determine whether the Commonwealth parliament had the power to ban the building of a dam in Tasmania.

The Commonwealth parliament claimed that, under sections 51(xxix), 51(xx) and 51(xxvi), the Constitution implied that it could make laws on matters of national concern.

High Court decision

The High Court decided that the external affairs power gave the Commonwealth parliament the power to make laws that fulfil Australia's obligations under international treaties. Australia had signed a treaty to protect World Heritage areas; therefore, the Commonwealth parliament was able to make laws to protect Australia's heritage.

Impact of the High Court decision

Through the High Court's interpretation of external affairs in section 51(xxix) of the Constitution, there has been a shift of law-making powers from the states in relation to their residual powers, to that of the Commonwealth where there is an international treaty.

Decisions in cases such as the Koowarta case and the Franklin Dam case were seen as greatly expanding the powers of Commonwealth parliament. In the past 30 years, the Commonwealth parliament has passed laws relating to the environment, racial discrimination and human rights, and has increased the size of the Australian fishing zone – all based on its external affairs power. It has been speculated that, unless the High Court acts to limit the interpretation of this power, the external affairs powers of the Commonwealth parliament are almost unlimited.

There have been a number of High Court cases looking at treaties and the interpretation of what constitutes an 'external affair'.

The impact of the Franklin River campaign, a landmark in Australia's environmental protection, resulted in a shift of the Commonwealth parliament's law-making power through the High Court's interpretation of external affairs.

The High Court's interpretation of external affairs has expanded the Commonwealth's law-making powers.

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Legal brief 8.11

Lemonthyme Forest case

***Richardson v the Forestry Commission* (1988)164 CLR 261**

The *Lemonthyme and Southern Forests (Commission of Enquiry) Act 1987* (Cth) established a Commission of Inquiry to determine whether the Lemonthyme and Southern Forests areas in Tasmania formed part of a World Heritage area, and should be listed under the Convention for the Protection of the World Cultural and Natural Heritage. The Act provided interim protection for the area while the Inquiry was carried out, to prevent damage or destruction prior to the Commission making its decision.

The Commonwealth Minister for the Environment (plaintiff) commenced an action against the Forestry Commission of Tasmania and a timber business, claiming that they breached the interim protection measures in the Act. Under sections 16(1) and (2) of the Act certain acts, such as timber harvesting, were prohibited during an interim protection period (unless written consent had been given by the Minister).

The defendants claimed that the Convention did not apply and so therefore the Commonwealth law was invalid.

High Court decision

The High Court held that the Commonwealth had the power to pass this legislation because the external affairs power extends to:

- a law required to discharge a treaty obligation that is known to exist; and
- a law that is required to ensure the discharge of a treaty obligation which is reasonably appropriate to exist.

The majority of the High Court held that it was not the role of the Court to decide whether the Commonwealth legislation was 'appropriate and adapted' to attaining the object of the Convention. It was noted by Mason CJ and Brennan J:

> '… when Parliament exercises the external affairs power so as to carry into effect or give effect to such a treaty, it is for Parliament to choose the means by which this is to be achieved, provided at any rate that the means chosen are capable of being reasonably considered to be appropriate and adapted to that end'.

Thus, it is for the Court to decide whether the relevant legislative scheme is capable of being 'reasonably considered' to be appropriate and adapted to implementing the treaty. Deane J also held that the external affairs power extended to laws whose object was to obtain an international benefit.

Impact of the decision

As with the Franklin Dam case, the High Court decided that the Commonwealth parliament was able to create legislation in respect to external affairs under section 51(xxix). Therefore, establishing a Commission to determine which areas needed to have World Heritage protection was a law-making power of the Commonwealth.

The High Court has also determined that the external affairs powers of the Commonwealth parliament, under section 51(xxix), can also make legislation that relates to conduct that takes place outside of Australia.

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Legal brief 8.12

The War Crimes Case

***Polyukhovich v Commonwealth* [1991] HCA 32**

In 1988, the *War Crimes Act 1945* (Cth) was amended (section 9) to include that any person who committed a war crime in Europe between 1 September 1939 and 8 May 1945 was guilty of an indictable offence. The person charged only needed to be an Australian citizen or resident at the time s/he is charged.

Ivan Timofeyevich Polyukhovich was born in the Ukraine in 1916. During the Second World War, the Ukraine was occupied by Nazi forces. Polyukhovich was known to have collaborated with the Wehrmacht, the German army from 1935 to 1945.

Polyukhovich became an Australian citizen in 1958. In January 1990, Polyukhovich was prosecuted for his alleged involvement in the mass killing of approximately 850 people from a Jewish ghetto in the village Serniki and for killing another 24 people between August and September 1942.

Before his indictment could be heard, Polyukhovich commenced action in the High Court on the basis that the *War Crimes Act* was beyond the scope of the Commonwealth parliament under the Constitution, specifically the defence power (section 51(vi)) and the external affairs power (section 51(xxix)). He also argued that making past criminal conduct an offence was an invalid attempt to usurp the Commonwealth's judicial power. This meant that amending the legislation in 1988 to retrospectively take into effect from 1939–1945 meant that it declared a person guilty without a trial.

The High Court had to decide:

- whether the Commonwealth parliament had the power to enact the legislation under section 51(xxix) external affairs
- whether the Commonwealth had the power to make the retrospective laws in this instance
- whether the 1988 amendments were valid.

High Court decision

Relying upon the comments made by the High Court in the Seas and Submerged Lands case, most of the judges in Polyukhovich case were of the view that the external affairs power extended to matters, things and relationships which were external to Australia.

The majority of the High Court held that the *War Crimes Act* was a valid use of the external affairs power to the extent that it related to conduct which took place outside Australia. This was because events that take place outside Australia – namely, the investigation and prosecution of the deaths – are 'external' for the purposes of 'external affairs'.

In relation to the retrospectivity of section 9 in the *War Crimes Act,* the High Court determined that the changes were in line with the United Nations *International Covenant on Civil and Political Rights,* which Australia became a signatory in 1980.

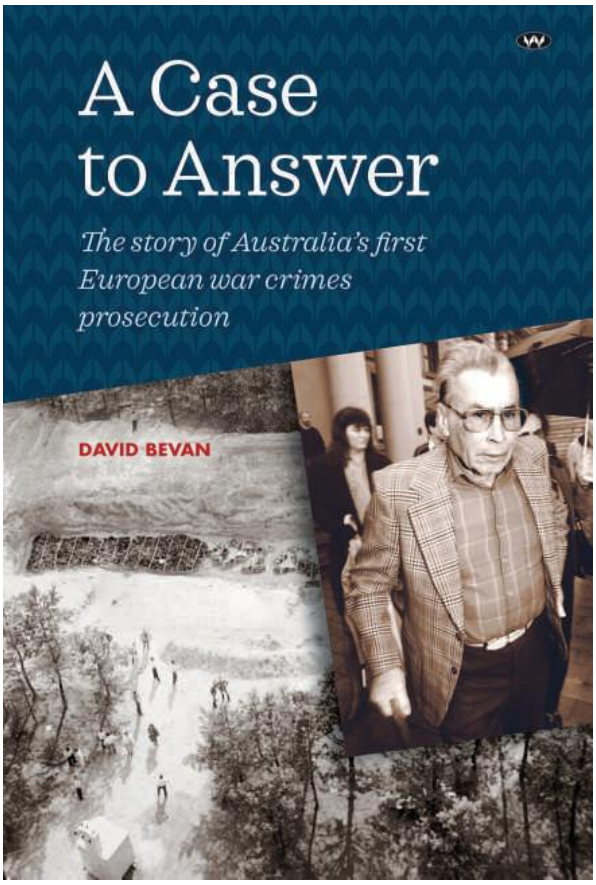
Polyukhovich was tried before a jury for the crimes, but was acquitted in May 1993 due to insufficient evidence to continue with the case.

Impact of the decision

The external affairs power of the Commonwealth parliament is related to Australia's interests outside of the country. In this case, the *War Crimes Act* was valid because it is a law with a subject matter related to the external affairs of Australia.

It was also stated that ' … it is sufficient that the Parliament considered that Australia had an interest or concern in the subject matter of the legislation in order to sustain its validity, rather than that the Court should decide on this'.

In relation that the law operates on conduct committed by persons who, at the time of commission, had no connection to Australia, it was held that ' … the externality of the conduct which the law prescribes as the foundation of the criminal offence is enough without more to constitute it as a law with respect to external affairs'. Therefore, 'it makes no difference whether the law creates a criminal liabililty by reference to past or future conduct, so long as the conduct is external to Australia'.



The War Crimes Case was a significant case decided by the High Court in relation to the extent of Australia's constitutional external affairs power and the Commonwealth parliament's ability to make retrospective laws.
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Legal brief 8.13

The Croome case

***Croome v Tasmania* (1997) 191 CLR 119**

Under Tasmanian criminal law in the 1990s, homosexual activities were illegal and were punishable by up to 25 years imprisonment.

As a signatory of the United Nations *International Covenant on Civil and Political Rights (1966)*, the Commonwealth parliament passed the *Human Rights (Sexual Conduct) Act 1994* (Cth). This Act legalised homosexual activity between consenting adults 18 years and over throughout Australia.

The Tasmanian Government argued that, under the Constitution, criminal law was a residual power of the states. In 1997, Rodney Croome applied to the High Court on the basis that the relevant section of the Tasmanian criminal code was inconsistent with the Commonwealth Act.

High Court decision

The High Court held that the Commonwealth parliament had the right to pass the *Human Rights (Sexual Conduct) Act* under their external affairs powers in section 51(xxix) of the Constitution. The relevant section under the criminal code denied Tasmanians the right to privacy under Article 17 of the *International Covenant on Civil and Political Rights*.

Impact of the decision

The section of the Tasmanian criminal code that was inconsistent with the Commonwealth Act was invalid (section 109 – 'to the extent of the inconsistency'). Tasmania later repealed this section of the criminal law.

Rodney Croome is arrested for advocating gay rights

The impact of international declarations and treaties on the interpretation of the external affairs power

As already stated, in most cases, international declarations do not create a legally binding obligation on countries that are signatories; namely, it is an indication that parties merely want to declare particular aspirations or goals by being signatories. However, a declaration can be intended to be binding at international law so, where there is a dispute, it is necessary to determine the intention of the particular signatory.

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For example, the United Nations *Universal Declaration of Human Rights*, while not binding, is generally agreed to be the foundation of numerous international human rights laws and has inspired many legally binding international human relationship treaties.

On the other hand, a treaty – otherwise known as an international convenant – is binding.

Through the case studies in the previous legal briefs, it can be seen that the High Court has interpreted and applied the section 51(xxix) external affairs of the Constitution broadly. The following are examples of the High Court providing a broad definition to the Commonwealth parliament in relation to international declarations and treaties on external affairs power:

- Where Australia has been a signatory to an international treaty or declaration, the Commonwealth parliament is able to make laws overriding the states residual power 'to the extent of the inconsistency'; that is, where the Commonwealth does not have express jurisdiction in the Constitution. This can be seen in the Franklin Dam case, in relation to the environment, or the Croome case, in relation to human rights.
- The High Court has given a broad interpretation of the term 'external affairs' to include international issues (e.g. Polyukhovich case) and within its territorial waters (e.g. Seas and Submerged Lands case).
- The Commonwealth parliament is able to make laws on global issues where it is a signatory on an international treaty or declaration.
- The High Court, in the Lemonthyme Forest case, allowed the Commonwealth parliament to decide how to implement the obligations set out in a treaty; e.g. allowed the Commonwealth to establish interim protection until further decisions could be made.

Activity 8.12 Folio exercise

International declarations, treaties and external affairs

1 Name two international treaties that Australia has signed and identify the legislation that was passed to implement these treaties.

2 Explain how the High Court's decision in two of the previous legal brief cases changed our understanding of the Commonwealth's power to make laws relating to external affairs.

MP Colonel Michael Joseph Kelly of Australia signs the first international treaty regulating global arms trade at the United Nations on 3 June 2013 in New York City, USA.

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Key point summary

Do your notes cover all the following points?

The Australian Constitution

- ❑ Came into force on 1 January 1901

The purpose of the Australian Constitution

- ❑ Sets out the structure, function and law-making powers of the Commonwealth parliament
- ❑ Established the High Court
- ❑ Provided the framework for Federation
- ❑ Set out the law-making powers of Commonwealth parliament

The division of law-making powers

- ❑ Exclusive powers (mainly in sections 51 and 52) are exclusive to the Commonwealth parliament and cannot be used by the States
- ❑ Concurrent powers are those that are shared between state and Commonwealth parliaments
- ❑ Residual powers are those that fall under the law-making powers of the States

Significance of section 109

- ❑ If there is an inconsistency between a state law and a Commonwealth law relating to an area of concurrent law-making power, Commonwealth law will prevail to the extent of the inconsistency

Constitutional checks on parliament

- ❑ Bicameral structure (see Chapter 7)
- ❑ Separation of powers: the powers of government are divided to provide a system of checks and balances
  - legislative: make the laws
  - executive: administer the laws
  - judicial: enforce the laws
- ❑ Express rights in the Constitution
  - acquisition of property on just terms
  - trial by jury for a Commonwealth offence that is indictable
  - freedom of movement
  - freedom of religion
  - protection against discrimination
- ❑ Double majority for a successful referendum: section 128 of the Australian Constitution – a referendum allows for a change to the written words of the Constitution
- ❑ A referendum can only be passed by a double majority
  - Step 1: the proposal is approved by an absolute majority in both houses of parliament
  - Step 2: the proposal is approved to go to a national vote by the Governor-General
  - Step 3: the proposal is put to a vote to succeed: the proposal must be passed by the majority of people nationally and a majority of people in a majority of states
  - Step 4: if the vote succeeds, the change to the Constitution is given Royal assent by the Governor-General

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- The 1967 referendum was about allowing the Commonwealth parliament to make special laws for the benefit of Aboriginal and Torres Strait Islander peoples, and about including Aboriginal and Torres Strait Islander peoples in future census figures
- The 1967 referendum was successful, with almost 91% of voters throughout Australia voting 'yes' and a majority in all six states
- Role of the High Court is:
  - to interpret the Constitution and to determine its day-to-day operation and application
  - to apply meaning to the text of the Constitution; it cannot alter the written words
  - to determine the intentions of the founders when they wrote the Constitution and how those intentions apply to the present circumstances
- High Court interpretation: cases involving the interpretation of the Constitution arise in:
  - a conflict between a state and the Commonwealth parliament
  - a dispute between individuals or groups and the state or the Commonwealth government
- The impact of the High Court's interpretations on parliament includes:
  - in the early 1900s, the High Court took a more legalistic approach to the Constitution, but over the past 30 years the High Court has played a more liberal and activist role
  - *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 had a significant impact as it meant a shift in the division of law-making powers from the states to the Commonwealth
- Significance of the High Court's interpretation of sections 7 and 24, relating to representative government
  - a key principle of the Australian parliamentary system is to ensure that we have a representative government
  - this prevents governments from abusing power by making them answerable to the people at elections, and ensuring that members of parliament represent the views and needs of those who voted for them
  - section 7 requires that the Senate be 'directly chosen by the people'
  - section 24 states that the House of Representatives must be 'directly chosen by the people'
  - cases related to interpretation of sections 7 and 24
    - *Roach v AEC* (2007) 233 CLR 162: the High Court held that the requirement of s 7 to have a representative government protects the right to vote by prohibiting the parliament from making a law that unreasonably takes away that right to vote
    - *Australian Capital Television Pty Ltd v The Commonwealth (No. 2)* (1992) 66 ALJR 695: the High Court held that the Constitution provides for an elected and representative government, and for this to be effective there is an implied right to freedom of communication on political matters

The impact of international declarations and treaties on the interpretation of the external affairs power

- Definitions of:
  - international declarations
  - treaties
  - external affairs as used in section 51(xxix) of the Australian Constitution

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- ❏ Powers as set out in the Australian Constitution related to this area
- ❏ Impact of treaties on the Constitution in the area of legislation
  - signing treaties
  - implementing treaties
- ❏ What external affairs means today
  - legislative: through parliament
  - interpretation: by the High Court
- ❏ Limitations of these powers
- ❏ Cases where international declarations and treaties have impacted on the interpretation of the external affairs power
  - racial discrimination – Koowarta case
  - World Heritage Convention – Franklin Dam case
  - Lemonthyme Forest case
  - Retrospective war crimes – Polyukhovich case
  - Human Rights – Croome case

End-of-chapter questions

Revision questions

1 Explain the meaning of the following terms and give examples:
   - residual powers
   - concurrent powers
   - exclusive powers.

2 Using an example, explain the significance of section 109 of the Australian Constitution.

3 Outline the referendum process.

4 Explain the significance of the double majority.

5 To what extent does the referendum process provide an effective mechanism for bringing about a change in the Constitution?

6 What is the role of the High Court in relation to the Constitution?

7 Using examples, describe the significance of a High Court case that has interpreted the Constitution and its effect on the law-making powers of the state and Commonwealth parliaments.

8 Express rights exist to act as a check and balance on parliament. List and explain the express rights contained in the Australian Constitution.

9 Outline the significance of sections 7 and 24 of the Australian Constitution.

10 Although the Constitution does not give Australians the express right to vote, with the use of a case, explain how sections 7 and 24 protect our right to vote.

11 With the use of a case, explain how sections 7 and 24 protect our right to freedom of political communication.

12 Explain the meaning of the following terms:
   - international declarations
   - treaties
   - external affairs.

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13 The World Heritage Convention was adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) General Conference at its 17th session in Paris on 16 November 1972. The Convention came into force in 1975. In August 1974, Australia became one of the first countries to ratify the Convention. Using an example, explain how the signing of this treaty impacted, through the Constitution and the High Court, on the external affairs power of the Commonwealth and State parliaments.

14 On 13 October 1966, Australia signed the *International Convention on the Elimination of All Forms of Racial Discrimination*. Using an example, explain how the signing of this treaty impacted, through the Constitution and the High Court, the external affairs power of the Commonwealth and state parliaments.

Practice exam questions

1 Outline the purpose of the Australian Constitution. [2 marks]

2 Using examples, describe the way in which the Constitution sets out the law-making powers of the Commonwealth parliament. [6 marks]

3 Explain the relevance of section 109 of the Constitution to the division of law-making powers of the Commonwealth and state parliaments. [3 marks]

4 To what extent do you agree that the separation of powers under the Australian Constitution is an essential element of Australia's democracy. [6 marks]

5 Describe the 'double majority' in relation to the referendum process. Justify why it is considered necessary to have a double majority for wording to change in the Australian Constitution. [5 marks]

6 Explain how express rights can be a restriction on the Commonwealth parliament's law-making ability. [4 marks]

7 Using one High Court case, analyse the significance of High Court interpretations of sections 7 and 24 of the Constitution. [5 marks]

8 Explain the significance of one referendum that has changed the wording of the Australian Constitution. [6 marks]

9 Discuss one case in which the High Court has interpreted the Australian Constitution. What effect did the case have on the law-making powers of the Commonwealth and the states? [5 marks]

10 Using a case, discuss the impact international declarations may have on the interpretation of the external affairs power. [8 marks]

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Chapter 9

Unit 4 – Area of Study 2

Parliament and law-making

Parliament is the supreme law-making body. It is able to make or change the law as long as it is acting within its jurisdiction according to the Australian Constitution. This chapter explains the process of law-making and some of the factors that affect parliament's ability to make law. These factors include the roles of the houses of parliament, the representative nature of parliament, political pressures and restrictions that apply to parliament in making law.

The House of Representatives

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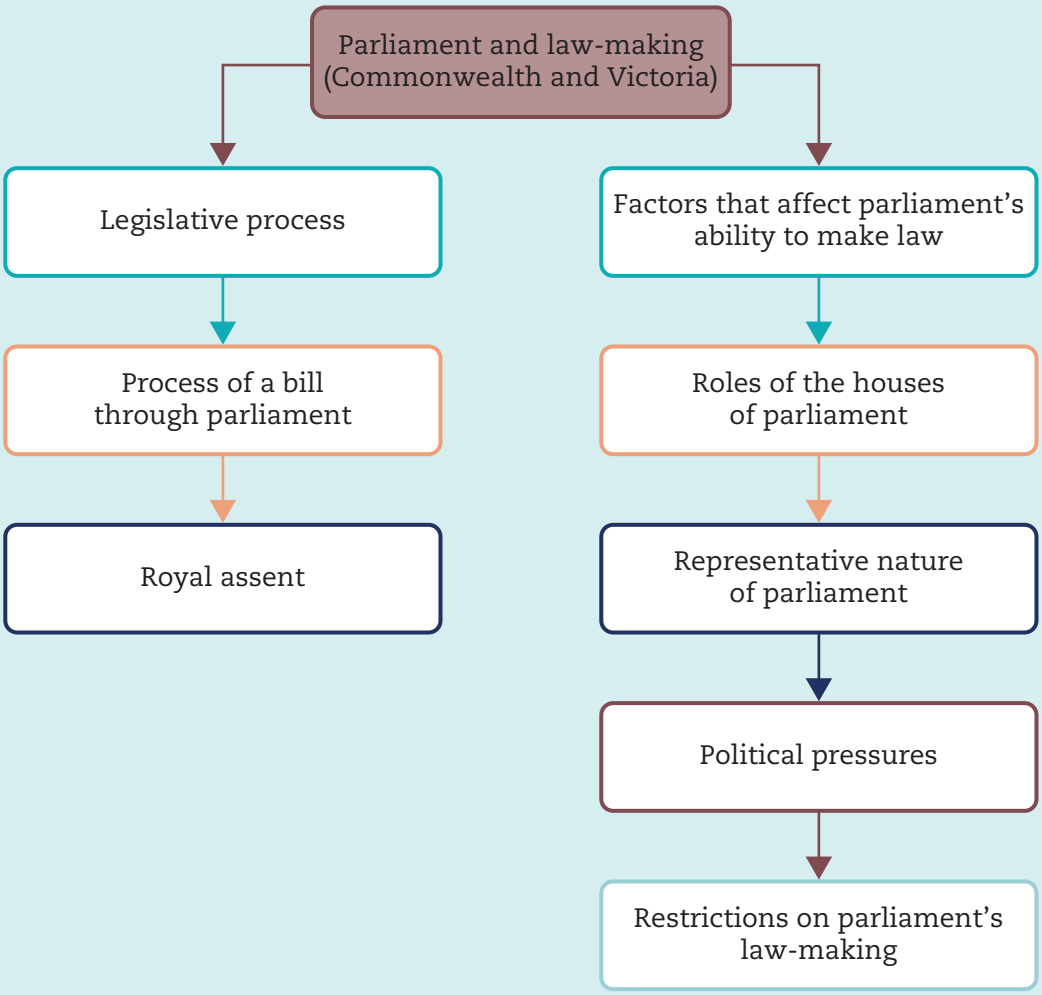

Key terms

Act a law passed by parliament

backbencher a member of parliament who sits on the backbench; does not have a portfolio and is not a member of Cabinet

bicameral a parliament with an upper and a lower house

Bill a proposed law to be considered by parliament

Cabinet the policy-making body of the parliament comprising of the leader of the government and senior ministers

crossing the floor voting against approved party lines

government the ruling political party (or parties in a coalition) that hold a majority of seats in the lower house

jurisdiction the power or the authority of an institution: the power of a court to hear and determine particular offences or disputes; the power of parliament to make law as provided by the Constitution

legislation an Act of Parliament, a statute or piece of delegated legislation

legislative process the process used by parliament to make laws

minority government a government that does not hold a clear majority of seats in the lower house and requires the support of independents and/or minor parties to pass legislation

opposition the political party that has the second highest number of elected members in the lower house of parliament

parliament the supreme law-making body, consisting of elected representatives and the Crown

ultra vires outside of parliament's law-making power

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9.1 Parliament's ability to make law

Parliament is the supreme law-maker.

Video

The primary role of **parliament** is to make laws. Parliament is democratically elected by the people to act as the supreme law-maker at both state (Victorian) and federal (Commonwealth) level. Parliament is able to make new laws, amend (make changes to) existing laws, and abolish (remove) laws that are within its law-making power. In order to make, amend, or abolish statutory law, a **Bill** (proposed law) must pass each stage of the **legislative process**. Additionally, parliament needs to ensure that the laws that are passed reflect the views and values of voters, or else members of parliament could be voted out in the next election.

9.2 The legislative process

A Bill must pass all stages of the legislative process in order to become an Act.

A law that is passed by parliament is known as an **Act**, **legislation**, or a statute (statutory law). In order for a law to be created, amended, or abolished by parliament, a Bill must pass through all stages of the legislative process. After a Bill is drafted by Parliamentary Counsel (the official parliamentary draftsperson), in consultation with the relevant minister, the Bill is introduced to parliament. The introduction of the Bill is the first stage of the legislative process.

Bills

A Bill is a proposed law.

A Bill is a proposed law. A Bill will become a law after it has been passed by both the upper house and lower house of parliament, and assented to by the Crown. There are a range of different types of Bills.

Drafting a Bill

Bills are drafted (created) by the Parliamentary Counsel's Office.

Parliamentary Counsel is responsible for drafting Bills. It is an Administrative Office attached, in relation to Victoria, to the Department of the Premier and Cabinet. The minister responsible for the introduction of a Bill, or the relevant government department, will advise the Parliamentary Counsel on what needs to be included in the Bill.

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Types of Bills

Government Bills

A Government Bill is one that has been approved by the **Cabinet**. These Bills are created and introduced as a result of either: government policy, community needs and expectations, or after recommendations have been made by a **government** department, other relevant body (such as a law reform commission), or general interest group in the community.

Government Bills include Appropriation Bills, also known as money bills or supply bills, which allow for government spending.

Government Bills have the support of Cabinet.

What is cabinet?

At Commonwealth level, Cabinet consists of the Prime Minister and senior ministers. At a state level, Cabinet consists of the Premier and senior ministers. Government policies are decided at Cabinet meetings. Government policies guide Cabinet to decide which proposed changes to the law will be presented to parliament in the form of a Bill.

The 30th Prime Minister of Australia, Scott Morrison, and his Cabinet members, pictured on the day they were sworn in by the Governor-General on 29 May 2019

Private members' Bills

Any member of parliament can introduce a Bill, including Bills which do not have Cabinet support. A Bill may be introduced by a member of the opposition, by a government **backbencher** or an independent. These Bills are known as private members' Bills.

Private members' Bills are usually unsuccessful. Private members' Bills that have been introduced by the **opposition** are usually defeated, as members of the party in government will often vote against the proposition. A private member's Bill introduced by a government backbencher may encounter similar problems.

A private members' Bill may be introduced by any member of parliament. They are usually unsuccessful as they do not normally have the support of Cabinet.

Private Bills

Sometimes it is necessary to pass a Bill that affects only a small proportion of the community, or even one person within a community.

These are known as private Bills and they are usually passed without opposition. For example, the *Corrections Amendment (Parole) Act 2014* (Vic) amends the *Corrections Act 1986* (Vic) to insert a section which applies only to one notorious Victorian prisoner, Julian Knight. A similar private Bill was passed in 2018 in relation to another Victorian prisoner, Craig Minogue.

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Stages in the legislative process

Before a Bill becomes a law, it must pass a number of stages. These stages make up the legislative process. Both the Commonwealth and Victorian parliaments are **bicameral**; that is, they have two houses – a lower house and an upper house.

A Bill must pass through the number of stages, known as the legislative process.

A Bill, with the exception of a money Bill, may start in either house. A money Bill must start in the lower house. Most legislation is initiated in the lower house as a Government Bill, and once the Bill passes the lower house, it is then sent to the upper house.

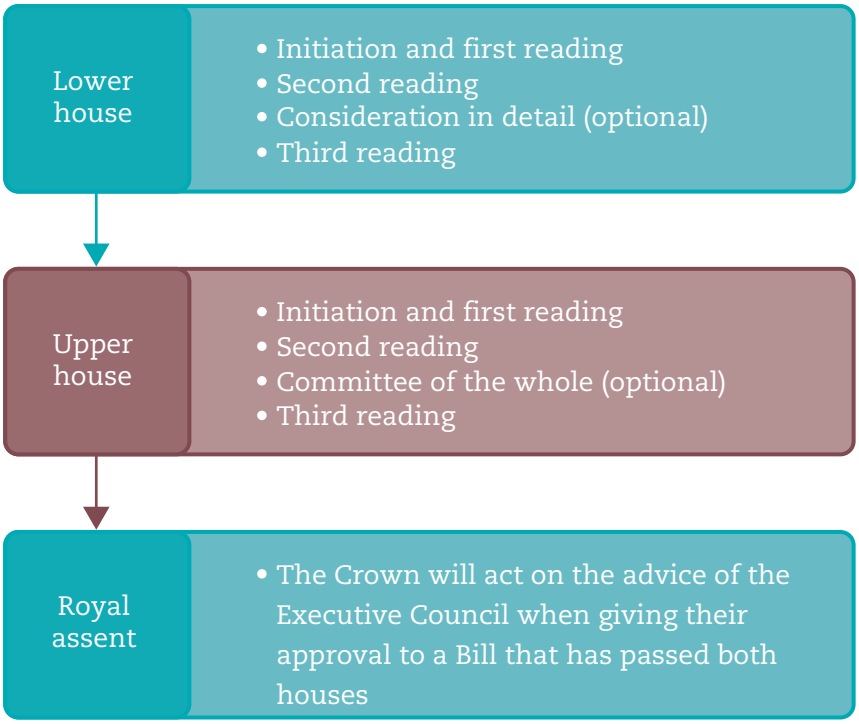

Figure 9.1 The legislative process.

Most Bills must pass through the lower house before proceeding to the upper house. Pictured is the Legislative Assembly, the name for the lower house in Victoria, with state Premier Daniel Andrews speaking in early 2020.

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Table 9.1 The legislative process

Lower house	
Introduction and first reading	The first reading is the Bill's formal introduction. The member must present the Bill to the house. The title is read out. There is no discussion or debate. Copies are provided to all members of the house. At this time, the Bill may move immediately to the second reading, or a future date for the second reading is set.
Second reading	At the second reading, the minister will deliver a speech explaining the main purpose of the Bill. The minister then presents an explanatory memorandum to the house. The explanatory memorandum includes the reasons for the Bill and outlines its main provisions. Further debate on the Bill may be deferred and a time set for the continuation of the second reading. This allows time to study the Bill, as well as the opportunity for public discussion or reaction. When the debate resumes, the opposition will outline their response to the Bill. The government and opposition will then take turns to speak either for or against the Bill. It is important to note that the opposition does not necessarily oppose all Bills. At the end of the debate, the house will vote either for or against the the Bill. The second reading debate is usually the most substantial debate, as it is when the general principles and the reasons for and against the Bill are discussed.
Consideration in detail (optional) ***Referred to as Committee of the whole in the upper house***	Having accepted the main purpose of the Bill, the house may consider it in detail. The deputy speaker takes the speaker's place. The house is now said to be in Consideration in detail. The deputy speaker proposes each clause of the Bill to the house for agreement. Discussion and amendment may occur. When the considerations are completed, the Bill is either adopted with or without amendment. In some instances, the house may agree that the Bill does not need to be considered in detail – this stage is not compulsory. When a Bill is not controversial, the house may agree to bypass this stage and go directly to the third reading.
Third reading	The house will formally accept or reject the Bill. There may be some further debate. However, the third reading is usually a formality in the lower house, as the government has a majority in the lower house, and the government introduces most Bills. The house will vote for or against the Bill at the completion of the third reading.
Upper house	
When the Bill has been passed in the lower house, it is sent to the upper house. The Bill will go through the three reading stages in the upper house. When the Bill has passed the upper house, it is returned to the lower house, either with or without amendment. Both houses must approve amendments in identical form. The upper house can reject a Bill passed by the lower house. When there are disagreements, messages may pass between the two houses so that an agreement can be reached about the provisions in the Bill. If no agreement can be reached, the Bill cannot pass.	
Crown	
Royal assent	The final stage in the legislative process is known as Royal assent. When both houses have passed a Bill, it is presented to the Crown to obtain approval. The Crown will act on the advice of the Executive Council to give Royal assent. Once a Bill receives Royal assent, it becomes an Act. An Act will come into force either: on a date set in the Act, on a date proclaimed by the Crown, or, if no commencement date is specified, 28 days after Royal assent.

Proclamation

Proclamation means that the date for the commencement of the Act may be announced (proclaimed) by the Crown in the *Government Gazette*. A proclamation can be used to set the date for the commencement of an Act or parts of an Act.

Statement of Compatibility – human rights

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* requires a Statement of Compatibility to be presented to parliament before the second reading speech. The Statement of Compatibility explains how the Bill is compatible with the Charter rights, or explains the nature and extent of any incompatibility between the Charter rights and the Bill.

A Statement of Compatibility is required in Victoria and at the Commonwealth level to state whether Bills comply with human rights instruments.

At the Commonwealth level, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires a Statement of Compatibility to accompany all Bills to assess whether the Bill is compatible with the seven key international human rights treaties that Australia has ratified.

Activity 9.1 Structured questions

The legislative process

1 Differentiate between a Bill and an Act.
2 Why are Government Bills the most common type of Bill?
3 Outline two stages of the legislative process.
4 Explain why a Statement of Compatibility is required in Victoria.
5 In your opinion, what is the most important stage of the legislative process? Justify your response.

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9.3 Factors that affect parliament's ability to make law

Although parliament is the supreme law-maker, there are a number of factors that impact upon its law-making powers. The factors can either support or restrict parliament's ability to make laws. Four factors are:

- the roles of the houses of parliament
- the representative nature of parliament
- political pressures; and
- restrictions on the law-making powers of parliament.

Factor #1: The roles of both houses of parliament

Both the Commonwealth parliament and the Victorian parliament are comprised of a bicameral structure, meaning that there are two houses of parliament: the upper house and the lower house.

Role of the lower house – Commonwealth parliament

Most Bills start in the lower house; therefore, the lower house has a significant role in making laws for the Commonwealth.

The lower house in the Commonwealth parliament is the House of Representatives. The lower house represents the will of the majority of people in Australia in law-making, as the lower house is elected by the people to represent the views and values of the people.

Most Bills are Government Bills. These originate in the lower house; therefore, the lower house has a significant role in law-making. Money Bills (Bills about finances) can only originate in the lower house. The lower house has a significant role in making laws for the Commonwealth.

The Commonwealth lower House – the House of Representatives

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Role of the upper house – Commonwealth parliament

The upper house in the Commonwealth parliament is the Senate. The upper house represents the interests of the states and territories of Australia. This is important when it comes to law-making because it ensures that any laws that are proposed are considered in light of the interests of the individual states and territories. This acknowledges that when it comes to making Commonwealth laws, different states and territories may have different interests, perspectives and needs.

The main role of the upper house is to act as a house of review.

As the majority of laws commence in the lower house, the main role of the upper house is to act as a house of review when it comes to law-making. By reviewing Bills, the upper house can act as a check and balance on the law-making powers of the lower house. This is a particularly powerful role when there is a hostile Senate; that is, when the party with the majority in the lower house does not hold a majority in the upper house. Conversely, if the same party holds the majority in the upper house as the lower house, the role of the upper house is likened to that of a 'rubber stamp', as it is unlikely to scrutinise the Bill robustly.

Although the upper house cannot initiate money Bills, the upper house does have the power to initiate other Bills, which are then sent to the lower house for review.

The Commonwealth upper house – the Senate

Role of the lower house – Victorian (state) parliament

The key role of the Victorian lower house is to represent the will of the majority of people in the state of Victoria.

The lower house in the Victorian parliament is the Legislative Assembly. Like the House of Representatives, the Legislative Assembly represents the will of the majority of people; however, in this case, it is the people of the state of Victoria. The ability of the Legislative Assembly to make law is limited to the Victorian jurisdiction and, similarly to the Commonwealth, money Bills can only originate in the lower house.

Role of the upper house – Victorian (state) parliament

The Legislative Council is the Victorian upper house. Its role is to consider the different interests of the regions of Victoria when laws are proposed.

The upper house in the Victorian parliament is the Legislative Council. The upper house represents the interests of the regions in Victoria. The role of the Legislative Council is to consider proposed laws from the particular perspectives of the different regions of Victoria. This is important as it ensures that regional and rural interests are taken into account when laws are proposed, in addition to the needs of metropolitan Melbourne.

Although the Legislative Council can propose Bills (with the exception of money Bills), its primary role is to act as a house of review by scrutinising Bills passed by the Legislative Assembly to ensure that a range of interests are represented in the law-making process. In this sense, it has a similar role to the Senate.

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Activity 9.2 Structured questions

Factors that impact parliament's law-making powers

1 State the name of the lower house in the Commonwealth parliament, and outline its role in law-making.
2 Explain how the role of the lower house affects the parliament's ability to make laws.
3 Outline one key role of the upper house in law-making.
4 'The bicameral structure of parliament makes it very difficult for parliament to pass laws'. To what extent do you agree? Justify your response.

Factor #2: The representative nature of parliament

Representative government is essential in a democratic society, such as Australia.

At both federal and state level in Australia, parliament is elected to represent the interests of the people (lower house), and the interests of the states (Senate) or regions (Legislative Council). The concept of representative government underpins democracy.

The representative nature of parliament ensures that the majority is represented, although the views of the minority should not be ignored. In Australia, democratic elections ensure that voters are given the opportunity to elect their preferred candidates for parliament, thereby establishing a representative government.

Representative government

Voters democratically elect the government to make laws that reflect the views of the majority of the people.

Representative government is achieved in Australia at both federal and state levels, as members of government have been democratically elected by voters. Voters have elected the government to make laws on behalf of the people, incorporating the views and values of the majority.

If the government does not make laws which reflect the wishes of the majority, they could be voted out at the next election.

Representative government supports a democratic system. If a government does not make laws which are deemed to be acceptable by voters, then the government risks being elected out of power at the next election.

News report 9.1

Scott Morrison hails 'miracle' as Coalition snatches unexpected victory [in 2019 federal election]

The Liberal National Coalition has been re-elected in Australia's federal election, in a shock result in which Labor lost seats in Queensland, Tasmania and NSW and failed to make more than minimal gains nationally.

…

'How good is Australia and how good are Australians.' He [Morrison] said the 'quiet Australians' had 'won a great victory tonight', and repeated his pledge to 'burn' for all Australians 'every single day'.

The defeat is shattering for Labor, which ran a high-risk campaign that included tax hikes to pay for big spending programs.

…

After ringing Morrison to concede defeat, Bill Shorten announced he will not recontest the leadership, although he intends to remain in parliament. Anthony Albanese… will run for the leadership. Many in Labor thought Albanese would have been a better bet as leader than Shorten, who always had bad personal ratings.

…

The outcome is completely opposite to the polls, which all had Labor ahead going into the election, albeit narrowly and with some tightening during the campaign.

…

Morrison ran a much stronger campaign than many had expected – even so, the Coalition had been bracing itself for defeat. Labor had thought it would get over the line right to the end, although ALP sources had become increasingly nervous in the last days of the contest, as the Coalition scare campaign over the ALP's policies to clamp down on negative gearing and franking credit cash refunds increasingly had its effect.

Source (adapted): Michelle Grattan, The Conversation, *18 May 2019*

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Representing the majority

The representative nature of parliament means that the party that forms government, at federal or state level, needs to represent the views and values of the majority. Not everyone will agree with every decision and/or law that parliament makes. However, it is accepted that the majority of the people will support the actions of the parliament because parliament has been voted in to represent the people.

The debates that take place during the legislative process help to consider a wide range of views on a proposed law.

However, in representing the majority in law-making, the parliament should not entirely discount the views of the minority.

Famed nineteenth-century British philosopher John Stuart Mill argued that a weakness of representing the majority is that it can lead to minority groups and their views and values being oppressed. Mill labelled this critique as the 'tyranny of the majority'. It is, therefore, important that a truly representative government consider the wide range of perspectives in the areas in which it makes laws. The debates that occur during the legislative process help to achieve this.

Daniel Andrews retained his position as the Victorian Premier after the Labor Party won the 2018 Victorian state election.

Democratic elections

Free and fair elections are essential in a democracy. In Australia, all eligible voters who are enrolled on the electoral roll are subject to compulsory voting requirements. This ensures that all eligible voters are able to elect their preferred candidate in an election, and thereby have a say in who should represent the people in the parliament.

In Australia, eligible voters who are enrolled on the electoral roll must vote in a federal election and their state's election.

The Australian Electoral Commission (AEC) administers the processes and procedures for federal elections, and the Victorian Electoral Commission (VEC) does the same for Victorian state elections.

Federal elections take place every three years on a date that is announced by the incumbent Prime Minister. In Victoria, the state election is held on the last Saturday of November every four years.

Activity 9.3 Structured questions

Representative government

1 What is meant by representative government?
2 Explain how elections uphold the representative nature of parliament.
3 Describe one way that the representative nature of parliament helps the parliament to make laws.
4 How might the representative nature of parliament hinder parliament's ability to make laws? Justify your response.

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Factor #3: Political pressures

The parliament needs to respond appropriately to competing political pressures, otherwise ministers risk being voted out at the next election.

As the parliament must represent the majority of voters, the parliament and those seeking to be elected to parliament often face a range of different types of political pressures. Sometimes, different types of pressures will compete with each other and the parliament will need to consider how to most effectively represent the people. If the parliament does not respond appropriately to the political pressures placed upon them when making laws, ministers risk being voted out at the next election.

Election pressures

Candidates and political parties need to measure the support for, and potential backlash over, any proposed laws within an electorate.

Upcoming elections place significant political pressures on parliament's ability to make laws. A candidate, or political party, needs to persuade electors to vote for them in an election. As a result the candidate, or party, needs to carefully consider which Bills should or should not be initiated or supported so as to maximise their chance of being elected into power. Forthcoming elections can, therefore, affect parliament's ability to make laws as the parliament will be overly aware of any strong support for, or backlash against, a law which may be divisive in electorates.

Pressure groups are important as a means for individuals to try to influence parliament in its law-making.

During an election period, the government will enter caretaker mode and avoid making significant decisions, including making laws, unless they are urgent.

In the lead-up to the election, and for a period of time following an election, the government will act within a 'caretaker mode'. This means that the government is likely to follow caretaker conventions during this time and will not make major policy or law-making decisions, unless it is a matter of urgency.

Commonwealth (federal) political pressures

State political issues can sometimes place political pressure on the federal government, particularly during an election.

Although, strictly speaking, federal and state politics operate independently of each other, in practice, federal political issues can influence state politics, and vice versa. This was seen in 2020, when the Commonwealth government and state governments needed to consider each other's positions when legislating for, and making government policy in response to, the global COVID-19 outbreak and its impact on Australia.

The Commonwealth parliament can face political pressures from state issues, particularly during an election. Candidates for the House of Representatives (lower house) must listen and respond to issues that arise in their electorate and consider how any federal laws might impact upon their constituents. If a federal member of parliament does not consider the views of the people who voted them in when making federal laws, then the member risks being voted out at the next election.

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Protests and rallies directly inform parliament of community concerns.

Victorian (state) political pressures

The Victorian state parliament can face political pressures that come from the Commonwealth parliament.

The Victorian parliament can face political pressures that arise from federal laws. If a federal government proposes, or makes, a law that impacts upon the state of Victoria in a particular way, then it can place pressure on the Victorian government to respond. The pressure faced is often even stronger if the political party who governs in Victoria is different to the political party who has the majority at the Commonwealth level. This is because the federal parliament may be actively attempting to put pressure on an opposing state government as a political tactic.

The Victorian government has been stripping buildings of flammable cladding. The Andrews Government has requested the Federal Government to contribute.

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Throughout the 2019 federal election, the Commonwealth Treasurer Josh Frydenberg – a Victorian – used the Victorian issue of building the proposed East West Link tollway in his federal election campaign.

Pressure within a minority government context

If a political party does not hold a majority of the seats, it can still form a majority government with the support of elected independants and/or members of minor parties.

A **minority government** arises when the government does not hold a clear majority of the seats in the lower house. A minority government is only able to hold power, and therefore be assured of passing legislation, with the support of independents or members of minor parties.

Relying upon the support of other members of parliament places political pressure on a minority government because if that support is withdrawn, the government's ability to pass legislation is compromised.

A minority government faces political pressure from the members of parliament. It relies upon the support of independents and members of minor parties to pass legislation.

In order to gain and maintain the support of independents and minor parties, a minority government might need to make concessions to their own policy and law-making agenda. A minority government can, therefore, transform the typically weak influence and legislative power of independents and representatives of minor parties to a position of disproportionate strength.

Internal party pressure

The potential for a member of government to cross the floor on a Bill places pressure on a government, as it suggests there may be instability within the government.

Parliament's ability to make law can be affected by internal party pressures. Ideally, a government will be unified when making laws in parliament. This means that all members of government will support a government Bill in order to guarantee its success in passing the lower house (assuming that the government is not a minority government). A government Bill relies upon the Cabinet having previously discussed the Bill and endorsed its inclusions prior to the commencement of the legislative process.

However, this may not be always the case. A member, or members, of the government (most likely a backbencher) may not agree with a Bill and could vote against party lines in a move that is called **'crossing the floor'**. The potential for a member to cross the floor on a Bill places political pressure on a government. This is because crossing the floor on a Bill illustrates division within the government, and may suggest tension or factions within the party in power. This could concern voters who are wary of political instability.

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Protestors who gather for union rallies place political pressure on the parliament to make laws that reflect their needs.

Internal party pressures may arise prior to the drafting of a Bill. Although Cabinet discussions are confidential, it is likely that there is significant discussion and disagreement, even amongst Cabinet members, about proposed legislation. Any Cabinet disagreement places political pressure on a government, as it is important for Cabinet members to appear to be a united front to the public.

Internal disagreements between Cabinet members place political pressure on the government, as the Cabinet needs to appear to be united.

Community pressure

Individuals and groups within the community can contribute to the political pressures faced by the parliament in law-making. A prominent, articulate, respected, persuasive, and/or authoritative individual may be able to place pressure on the parliament individually, or by attracting the support of other members of the community. Additionally, an individual who invokes empathy or relatability may be able to influence parliament's legislative agenda.

An individual may have qualities that place pressure on parliament individually, or by attracting the wider support of the community.

Groups within the community, including businesses, are also able to put political pressures on the parliament. This can include smaller, grassroots interest groups who focus on a particular issue, through to unions and larger business groups who represent the interests of the private sector.

Interest groups, unions and business groups can place political pressures on the parliament.

Funding pressure

Finances can place political pressures on the parliament. This can include the financial donations that are made to political parties to fund their election campaigns or to directly, or indirectly, influence their policies and legislative agenda. Additionally, political parties who are well resourced and are able to advertise extensively can use their presence and publicity to place political pressure on under-resourced parties/independents.

Financial donations and well resourced political parties lead to funding issues that can add to political pressures.

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News report 9.2

After Clive Palmer's $60 million campaign, limits on political advertising are more important than ever

Can billionaires buy elections in Australia? In the 2019 election, Clive Palmer demonstrated they can certainly flood the print media, airwaves, social media and billboards with advertising and have an impact on the results through their preferences and negative advertising.

Apart from United Australia Party hype about how it was going to win government, most of the high-profile advertising in the 2019 campaign was negative. There is a longstanding 48-hour ban on political advertising in radio and broadcast media prior to polling day, but advertising on social media is not covered. The very useful Facebook Ad Library showed the kind of horrors being broadcast during the 48-hour blackout.

The Coalition was running many 'death tax' ads on the Thursday and Friday. These were ads cut to show one Labor frontbencher after another saying the words 'death tax', when in fact they were denying a rumour about such a tax. Negativity, or even sheer invention, proved very effective.

By comparison, Labor ads on issues such as childcare or the gender pay gap – as well as its own negative ads aimed at the Coalition's disunity and climate change policies – appeared to have little impact.

Lack of regulations at federal level

How have we arrived at a place where our elections are awash with paid advertising? Believe it or not, this has been a relatively recent phenomenon.

In 1903, the Labor Party's manifesto proudly promoted the restrictions that had been placed on campaign expenditure in the *Commonwealth Electoral Act* the year before:

Elaborate precautions exist to prevent wealthy men practically purchasing seats: the expenditure of a senatorial candidate is limited to £250 and of a candidate for the other House to £100.

These expenditure limits became increasingly obsolete and were not enforced. They were discarded at the federal level after 1980, following a successful challenge to the election of three candidates in the Tasmanian seat of Denison for each having spent more than AUD$1500 in the 1979 state election.

From that time, Australia has been notable for the laxity of its regulation of political finance. At the federal level, there are no restrictions on the size or source of donations to political parties, apart from the recent ban on foreign donations. And there are no limits on campaign expenditure or paid advertising, apart from the requirement for authorisation.

As a result, industry bodies wishing to fend off government regulation of guns or poker machines or financial advice are free to spend as much as they like on political donations and advertising.

There is also no 'truth in advertising' requirement at the federal level, and the Australian Electoral Commission does not have the authority to approve electoral communications for publication. The only requirement in the *Commonwealth Electoral Act* is for authorisation, including of electronic advertising. Ultimately, it is up to the courts to enforce this, on a case-by-case basis.

This differs greatly from many countries in Europe, including the UK, Ireland and the Scandinavian countries, which have never allowed such paid political advertising. Two-thirds of European countries limit the amount a candidate can spend on a campaign, including advertising, and 43% of European countries limit the amount a party can spend.

When the House of Lords upheld the UK prohibition on political advertising in 2008, it argued the ban was necessary to maintain a level playing field, preventing 'well-endowed interests' from using 'the power of the purse to give enhanced prominence to their views'.

In Australia, the Hawke Government tried to stop the arms race over paid political advertising by banning it in 1991 and replacing it with free broadcast time *(Political Broadcasts and Political Disclosures Act 1991 (Cth)). But the following year, the High Court in Australian Capital Television Pty Ltd v Commonwealth,* found that this ban contravened an implied freedom of political communication in the Constitution.

This decision put a dampener on reform at the federal level. It is only recently the High Court has changed course to find that burdens on free speech can be legitimate if they serve another democratic purpose, such as political equality.

In the *McCloy v NSW* case in 2015, the High Court upheld a cap on political donations and a total ban on political donations by property developers, finding the restrictions on freedom of political communication were more than balanced by the benefits of ensuring the integrity of the political system and 'equality of opportunity to participate in the exercise of political sovereignty'.

The constitutionality of regulating political donations was reaffirmed by the High Court in April 2019.

The government had passed amendments to the *Commonwealth Electoral Act* to enable Commonwealth law to override the tighter regulation of political donations at the state or territory level. This provision was overturned by the High Court and Queensland's ban on developer donations was upheld. This was despite an attempt by the plaintiff, former LNP Queensland President Gary Spence, to argue it restricted freedom of political communication.

These High Court decisions open the way to possible future caps on expenditure and donations at the federal level, which could reduce the torrent

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of negative political advertising that democracy is currently drowning in.

Impacts of unlimited spending on democracy
The lack of restrictions on political expenditure or donations at the federal level has contributed to perceptions that government is run primarily for the benefit of the big end of town. In 2016, 56% of respondents to the Australian Election Study believed this.

In addition, negative advertising further erodes the public's faith in government. American political scientist Joseph Nye observed more than 20 years ago a relationship between negative advertising and loss of trust in political parties and government. In the Democracy 2025 survey conducted in Australia in 2018, respondents were asked about possible reforms to rebuild trust in government. It revealed strongest support for limits on political donations and campaign expenditure.

The laxity of political finance regulation at the federal level also creates loopholes at the state or territory level, where genuine progress has been made in limiting political expenditure by parties, candidates and lobbying groups.

It is equally important that allowing paid political advertising in electronic media drives up the costs of political campaigns and increases dependence on wealthy donors.

Australia could rein in the ever-increasing role of private money in its federal elections. Labor and the Greens are committed to greater transparency for political donations and spending caps on federal campaign expenditure, while the High Court has shown it is now unlikely to strike down reasonable (proportionate) regulation of political finance.

Democracy should be about political equality, not about the deep pockets of billionaires.

Source: Marian Sawer, The Conversation, *21 May 2019*

Factor #4: Restrictions on parliament's law-making powers

Although parliament is the supreme law-making authority, there are a number of factors that can limit the parliament's law-making powers. These include:

- the legislative process
- jurisdictional issues
- the Constitution
- interpretations of the High Court
- human rights considerations; and
- international law obligations.

The legislative process

The many stages of the legislative process can act as a restriction on the law-making powers of parliament.

The strict requirements of the legislative process can act as a restriction on the law-making powers of parliament. There are multiple stages in the legislative process which act as checks and balances on proposed laws. Before a Bill can become an Act, the Bill must pass through a number of steps to ensure that it is appropriately scrutinised and subject to debate by the public and within parliament itself. The Bill must pass through all of the required stages in both houses of parliament, regardless of whether it is a Commonwealth or Victorian Bill.

The legislative process is a restriction on the parliament's ability to pass to laws because a Bill must pass through the required stages prior to becoming an Act. This means that the parliament cannot rush law-making, particularly if there is a hostile upper house. Although this can cause delays to the law-making process, the legislative process is an important safeguard which ensures that proposed laws are carefully considered and robustly debated.

Jurisdiction

Parliament can only make laws within its jurisdiction (area of law-making power).

In order for parliament to pass a law it must be within an area of their law-making power, known as their '**jurisdiction**', as set out in the Australian Constitution.

This can include geographical jurisdiction; for example, the Victorian parliament cannot make a law about Queensland because this is outside of Victoria's geographical law-making jurisdiction.

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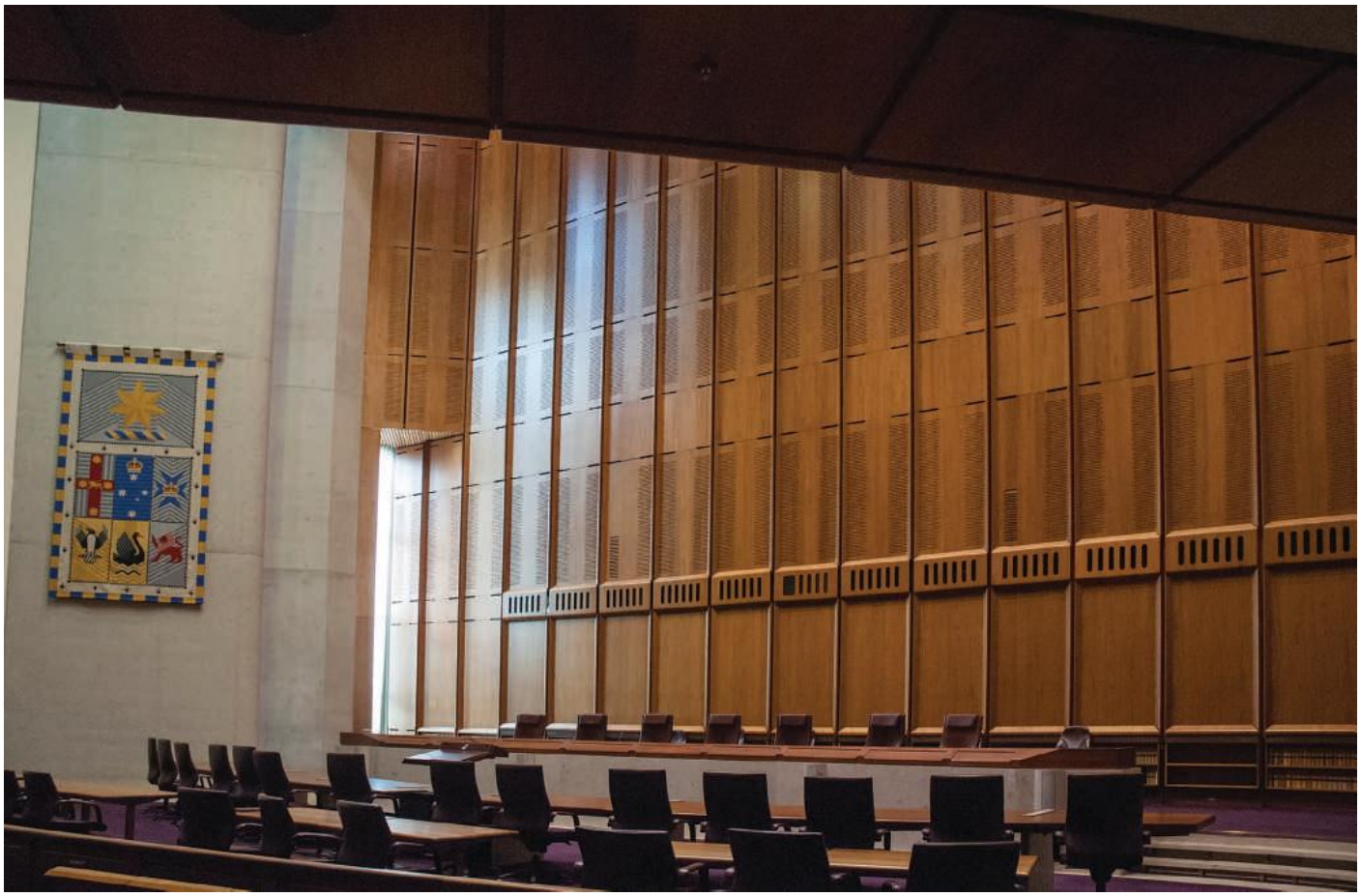
Parliament can also be restricted from making laws that are outside of its subject-matter jurisdiction. For example, the Commonwealth parliament has no jurisdiction (power) to make laws in areas of residual powers because these belong to the states. As education is a residual power, this means that the Commonwealth parliament is restricted from making laws about education (therefore, making laws about education is within the Victorian parliament's jurisdiction).

The Australian Constitution

The Constitution acts as a restriction on both the Commonwealth and state parliaments' law-making ability. The Constitution establishes the law-making authority of the federal and state parliaments, creating areas of law-making that are exclusive (belong only to the Commonwealth parliament), concurrent (shared between the Commonwealth and state parliaments), and residual (laws left to be made by the state parliaments).

Parliament is only able to make laws in areas in which the Constitution allows. If a parliament makes a law outside of its law-making powers, pursuant to the Constitution, it is likely that the law will be challenged in the High Court of Australia and the Court will declare the law to be ***ultra vires*** (outside of the parliament's law-making powers).



A court room within the High Court of Australia. The High Court of Australia is located in Canberra, in the Australian Capital Territory.

The High Court of Australia

The High Court of Australia is the 'guardian' of the Australian Constitution as it has jurisdiction over constitutional matters.

The High Court can act as a restriction on parliament's law-making powers, due to its power to declare a law to be *ultra vires* – outside of a parliament's jurisdiction – pursuant to the provisions of the Constitution. If the High Court declares a law to be *ultra vires*, it means that the law is invalid because it has been made outside of the parliament's law-making powers and is, therefore, unconstitutional.

A declaration of *ultra vires* by the High Court means that a law has been made outside of parliament's law-making power. This is a significant restriction on parliament's law-making powers.

A ruling of *ultra vires* by the High Court of Australia cannot be abrogated (overcome by changing the legislation), which is a significant limitation on the law-making powers of parliament. The only way for parliament to circumvent a ruling of *ultra vires* is to change the wording of the Constitution, which would require a referendum.

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Human rights and international law

Human rights considerations and instruments can be a restriction on the law-making powers of parliament.

At a Commonwealth level, the *Human Rights (Parliamentary Scrutiny) Act 2011* requires all Bills to be accompanied by a Statement of Compatibility which assesses whether the Bill aligns with the international human rights treaties that Australia has ratified. This can be a restriction on the Commonwealth parliament as even if the Commonwealth wishes to proceed with a Bill that infringes upon a treaty obligation, it forces the parliament to consider and justify such a decision.

The *Human Rights (Parliamentary Scrutiny) Act 2011* ensures that Commonwealth Bills are considered in line with Australia's international human rights obligations.

Similarly, at a state level the Victorian *Charter of Human Rights and Responsibilities Act 2006* requires a Statement of Compatibility to be presented to the Victorian parliament for each Bill. Any incompatibility between the Charter and the Bill needs to be identified, explained and justified. This places a restriction on the Victorian parliament, as it cannot pass Bills that clash with Charter rights without expressly considering such a conflict.

Laws that are proposed at both Commonwealth and state level should be considered in line with Australia's international law obligations.

Activity 9.4 Structured questions

Restrictions on parliament's law-making powers

1 How do jurisdictional issues affect the ability of parliament to make laws?

2 Apart from jurisdictional issues, outline one other restriction that may affect the ability of parliament to make laws.

3 'The Australian Constitution places too many restrictions on the supremacy of parliament as a law-maker.' Discuss.

Sydneysiders rally at Parliament House in Sydney, NSW, on 20 August 2019 in support of decriminalising abortion in response to the introduction of the Reproductive Health Care Reform Bill 2019 to the Upper House of the NSW parliament.

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Key point summary

Do your notes cover all of the following points?

Parliament's ability to make law

The legislative process

- ❏ Bills: Bills are a proposed law. In order to become an Act, a Bill must pass through the stages of the legislative process.
- ❏ Drafting a Bill: Bills are drafted by Parliamentary Counsel who acts on the advice of the relevant minister of parliament.
- ❏ Stages in the legislative process: The legislative process is comprised of numerous stages. This enables a Bill to be carefully considered and robustly debated. A Bill must pass the legislative process in both houses of parliament in a bicameral parliamentary structure.
- ❏ Statement of Compatibility: At federal level a Bill must be accompanied by a Statement of Compatibility pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
- ❏ In Victoria, a Bill must be accompanied by a Statement of Compatibility pursuant to the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Factors that affect parliament's ability to make laws

- ❏ The roles of both houses of parliament
  - Role of the lower house – Commonwealth parliament: The House of Representatives represents the will of the majority of people in Australia.
  - Role of the upper house – Commonwealth parliament: The Senate represents the interests of the states and territories of Australia.
  - Role of the lower house – Victorian (state) parliament: The Legislative Assembly represents the will of the majority of people in Victoria.
  - Role of the upper house – Victorian (state) parliament: The Legislative Council represents the interests of the regions in Victoria.
- ❏ The representative nature of parliament
  - Representative government
  - Voters democratically elect the government to make laws that reflect the views of the majority of people.
  - Representing the majority: The parliament should reflect the views of the majority, but not ignore the needs of the minority
  - Democratic elections: Eligible voters who are enrolled on the electoral roll must vote in federal and state elections in Australia.
- ❏ Political pressures
  - Election pressures: During an election period, parties need to consider the support for, and any potential backlash over, any proposed laws.
  - Commonwealth (federal) political pressures: State political issues can sometimes place political pressure on the federal government.
  - Victorian (state) political pressures: Federal political issues can sometimes place political pressure on the state government.
  - Pressure within a minority government context: If a political party is relying upon the support of independents and members of minor parties to form a minority government, there can be pressure to maintain that support in order to be able to pass legislation in the lower house.
  - Internal party pressure: Internal party pressures include factions, Cabinet disagreements, and the threat of 'crossing the floor'.
  - Community pressure: Influential individuals and community groups can pressure parliament's legislative agenda.
  - Funding pressure: Financial donations and well-resourced parties can put pressure on parties or independents who are under-resourced.

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- ❑ Restrictions on parliament's law-making powers
  - The legislative process: The numerous and sometimes onerous stages can restrict parliament's ability to make laws in a timely manner.
  - Jurisdiction: Parliament can only make laws for matters that fall within its jurisdiction.
  - The Australian Constitution: The Australia Constitution establishes the law-making powers for the Commonwealth and state parliaments by establishing exclusive, concurrent, and residual law-making powers.
  - The High Court of Australia: The High Court can restrict parliament's law-making powers by declaring legislation to be *ultra vires* (outside of law-making powers).
  - Human rights and international law: Proposed legislation needs to be considered against human rights and international law requirements.

End-of-chapter questions

Revision questions

1 Define a Bill.

2 Distinguish between the roles of the upper house and lower house in law-making.

3 Explain how the parliament represents the majority in law-making.

4 What is the most significant political pressure that affects the ability of parliament to make laws? Justify your response.

5 'The Commonwealth parliament faces greater political pressures than the state parliament.' Discuss the extent to which you agree with this statement.

6 Why must parliament reflect the views and needs of the people? What do you think would happen if the Commonwealth parliament ignored what the majority of people wanted in its law-making?

Practice exam questions

1 State the name of the upper house in the Victorian parliament. [1 mark]

2 Outline one factor that restricts the law-making ability of parliament. [2 marks]

3 Explain the role of the House of Representatives in law-making. [3 marks]

4 How do political pressures affect the ability of parliament to make law? [4 marks]

5 'The High Court of Australia and the Australian Constitution undermine parliamentary supremacy as both completely restrict the ability of parliament to make laws.' Discuss. [10 marks]

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Chapter 10

Unit 4 – Area of Study 2

The role of the courts in law-making

In the Australian legal system, parliament is the 'supreme' law-making body, but courts are also part of the law-making process. The courts (common law) and parliament (statute law) have complementary roles. This chapter considers the role of courts in making laws. It traces the development of judge-made law, the operation of the doctrine of precedent and the interpretation of statutes by judges. The roles of the High Court and Victorian courts in law-making are examined, as are the reasons for, and the effects of, statutory interpretation. Factors that affect the ability of courts to make law are discussed. The chapter concludes by examining the relationship between courts and parliament in relation to law-making.

Julie Cameron, an advocate for victims of child sexual abuse, outside the Supreme Court

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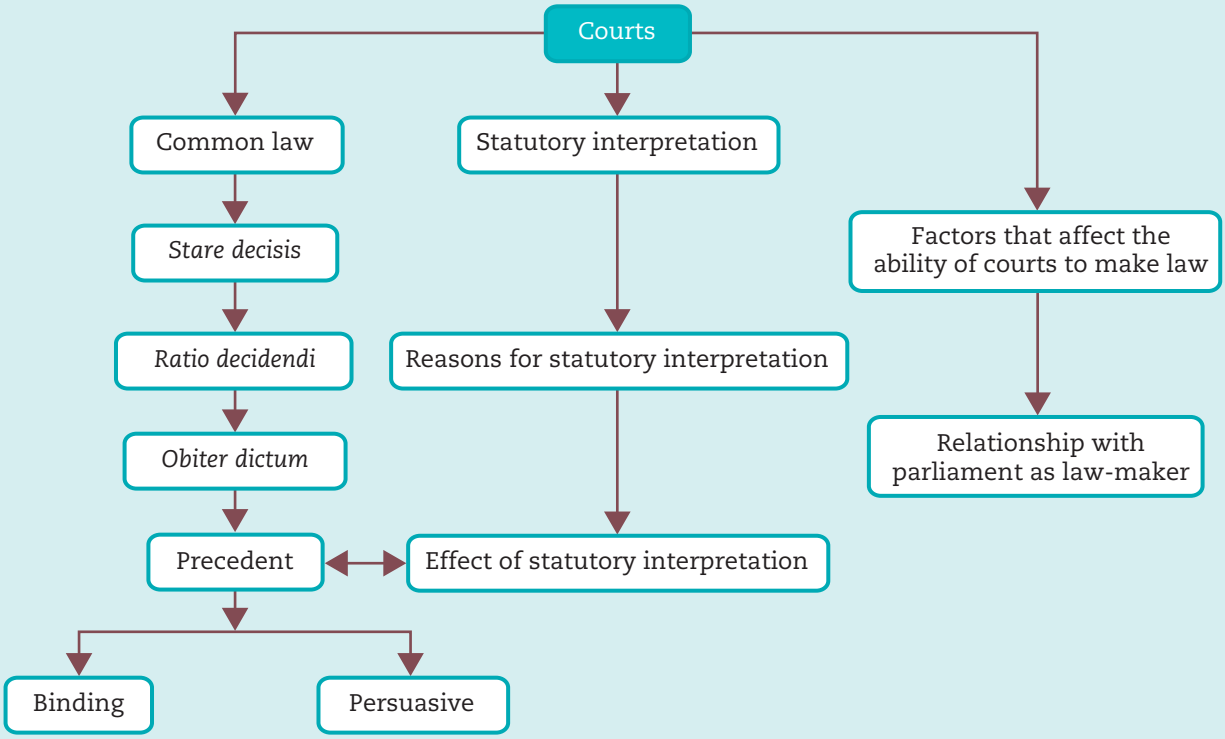

Key terms

binding precedent formed from the legal reasoning (or *ratio decidendi*): a precedent that must be followed by lower courts in the same hierarchy in matters of similar fact; for instance, a decision of the High Court is a precedent that must be followed

codification when parliament creates a statute that covers all areas of a law, including common law

common law law developed in the courts; also known as case law or judge-made law

disapproving when a judge refuses to follow an earlier decision of another judge in a court of equal standing

distinguishing if a judge finds that the facts of a new case are sufficiently different from the earlier case that has set precedent, the judge is able to avoid using the earlier precedent

doctrine of precedent the system used by courts to make law: judgments of superior courts are written and reported in law reports and applied to future cases with similar facts (note: the expression 'doctrine of precedent' refers to the overall system used to create law in courts, not to specific judgments)

ejusdem generis a legal maxim used in the interpretation of statutes, meaning 'of the same kind': when a general term is interpreted to include the category indicated by the specific terms that precede it; the rule is that the general words are limited in meaning to the same kinds of things as the specific words in the list (for example, if a statute applied to tigers, lions, leopards and other animals, it could be assumed that a panther would be included as 'other animals', but not a cow)

inter partes a decision between the parties, in which one wins and one loses

judicial activism when a judge is aware of the need to develop the law and adopts a broad interpretation of legislation in deciding cases

judicial conservatism when a judge declares that there is no course of action under common law and dismisses a case, or adopts a narrow interpretation of legislation when deciding cases and thus avoids controversy

legal maxim a traditional rule, convention, or practice

novel case (or test case) a case of a particular issue or legal question that has not been decided before in a court of superior record

obiter dictum 'matters by the way'; a judge's statement of opinion or observation made during a judgment but not part of the reason for a decision; may be persuasive in future cases

overruling a higher court that decides not to follow the decision of a lower court in a previous case will overrule the earlier decision

persuasive precedent the legal reasoning of a court: a court does not have to follow this reasoning, but it can be influential; applies to decisions of a lower court or a court at the same level

precedent law made by courts: a reported judgment of a court that establishes a point of law

ratio decidendi the legal reasoning, or rule, upon which a decision is based; forms a binding precedent

reversing when a higher court hearing a case on appeal decides that the lower court made the wrong decision and reverses the decision

standing where a party has been directly affected by matters and so has the right to take legal action; also known as *locus standi*

stare decisis 'to stand by what has been decided'; the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

statutory interpretation the process of judges giving meaning to words within an Act where there is a dispute as to the application of the Act

ultra vires outside of parliament's law-making power

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10.1 What is the doctrine of precedent?

One of the most important ways that the legal system achieves fairness is by making sure that like cases are treated alike. The idea here is simple, and we see instances of it in everyday life. For example, imagine a teacher states that there will be no talking during class time, and enforces that rule with all students – except one. Allowing one student to talk while everyone else in the class may not is inconsistent, therefore unfair, and should not happen. Once a rule is set up, it should be applied to all students.

In the same way, it would be grossly unjust if the law with respect to murder was applied to most people, but not all. Those people who avoided a murder conviction might feel happy, but those who did not would be outraged – and society would be confused about whether murder was illegal or not. Instead of social cohesion, there would be social discord.

The **doctrine of precedent** is simply a system used by courts to make sure that similar cases are dealt with in similar ways, in the interests of consistency and fairness. Precedent is reliant on the court hierarchy to make law.

The main role of courts is to resolve criminal matters and settle disputes. Each court has its own jurisdiction. Parliament is the 'supreme' law-maker and so courts must follow legislation if it addresses the matter before it. If legislation does not specifically address the matter before the court, then courts are able to make law.

Australia's court hierarchy

In Australia, courts are ranked in a hierarchy from inferior to superior. Australia's most superior court, the High Court of Australia, was established by the Australian Constitution (section 71) to hear and determine matters that arise under the Constitution (section 76). It is also the highest court of appeal. There are federal courts that deal with matters relating to federal areas of law with jurisdiction throughout Australia, while state courts deal with matters given to them under the Constitution with state-wide jurisdiction.

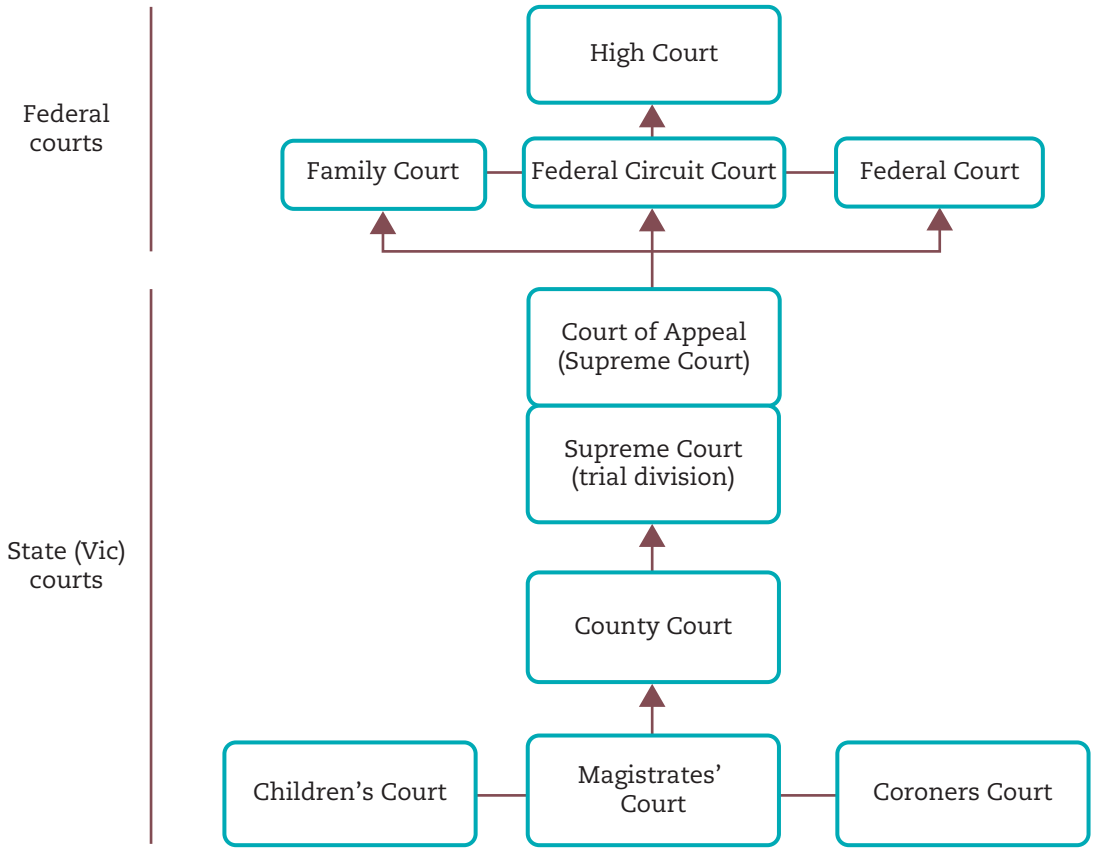

Figure 10.1 Victorian court hierarchy

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The more superior a court, the more serious and complex the issues it deals with. As stated previously, if a dispute arises relating to the Constitution, the High Court will hear and determine the case. The Family Court will hear and determine matters that relate to the dissolution of marriage, and therefore requires a federal jurisdiction. The Victorian Supreme Court (trial division) will hear the most serious indictable offences, while the Magistrates' Court will hear all summary matters. Likewise, the judges and justices in the more superior courts have expertise and specialist knowledge in the law and the areas they are adjudicating.

When a legal dispute arises, the courts are the place where it will be resolved. In order to make sure that each case is dealt with fairly (and consistently), courts will look to see: first, if any legislation applies, as parliament is our main law-maker. If none apply, the court will then determine if any previous case (that is, a **precedent)** has dealt with the same fact situation, and will apply that precedent to ensure consistency. To enable courts to find precedents, judgments of courts are recorded in written reports called law reports.

Common law evolves from decisions made by courts.

The doctrine (that is, system) of precedent grew out of the courts' role of adjudicating disputes, and their desire to be fair in doing so.

Law created by courts using the doctrine of precedent is referred to as **common law**, precedent, or judge-made law.

Common law can also be referred to as case law or judge-made law.

10.2 How did common law develop?

The evolution of the common law can be traced back to the days of Anglo-Saxon England. Before 1066, when the Normans under William the Conqueror invaded England, the Saxons had established a system of local courts throughout the country. These courts applied laws that consisted of a combination of local customs and laws made by the kings.

A system of courts

After the Norman Conquest, the Norman kings introduced a more centralised structure for government and the administration of justice. This evolved over many centuries. At first, the Norman kings relied on the existing courts to administer justice, but they sent out their own officials to preside over cases.

The role of these justices was mainly to collect taxes, but they also had the responsibility of settling minor disputes. They travelled around England collecting taxes and hearing

The system of common law, based on reported court decisions, developed in England after the Norman Conquest in 1066.

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disputes. These travelling justices became known as 'circuit' judges. Today, judges travelling to regional centres to hear cases are still referred to as being 'on circuit'.

By the 12th century, a network of king's courts had developed and the local courts became less important. A major advantage of taking a case to the king's court was that the decisions were more effectively enforced. The decisions of the king's court had the backing of the king's power.

Referring to past decisions

The rulings and principles established by judges developed into a uniform system of law. The circuit judges would meet and compare the cases that they had heard throughout the country. They would discuss the advantages and disadvantages of the various local customs that they had experienced. Gradually, the judges began to replace the local customs they considered to be unfair with the customs applied in similar cases from other areas. As a result, a body of 'common customs' evolved. This provided for greater consistency and certainty throughout England.

Common law evolves through the application of the doctrine of precedent.

The law that was common throughout England became the law declared by judges. The judges would look at previous cases to decide what the law should be. This process is known as precedent. The operation of the doctrine of precedent is a feature of the common law system.

Common law evolved from judges looking at previous cases to determine what the law should be. Each time a judge decides that an established rule applies to a new situation, the judge is using precedent. Other judges would apply the same legal principles in similar cases. This is different from the law made by parliament, which is found in Acts or statutes.

Common law and statute law

The main role of courts is to resolve criminal cases and settle civil disputes.

If common law and statute law conflict, statute law prevails.

Today, many of the common law principles have been rewritten in statutes. Where there is a conflict between common law and statute law, statute law prevails. In other words, if common law says one thing and the statute law states something different, the courts must obey the statute law.

10.3 Precedents

A precedent is a reported judgment of a court that establishes a point of law.

A precedent is a reported judgment of a court that establishes a point of law. A judgment is a court decision. The judgment will include the reasons for the decision. The reasons for the decision are known as the ***ratio decidendi***. The judgments of courts are published in law reports.

Only reported decisions can form a precedent.

The *ratio decidendi* forms the legal principle. These legal principles are used to determine later cases. The doctrine of precedent refers to rules used by the court to decide when they should use the legal principle established in a past case.

Not all court judgments are reported. Only the decisions of the higher courts (known as 'courts of superior record') that involve new or significant issues of law are published in law reports. To determine what the law should be, lawyers and judges refer to the reports of past similar (or like) cases. In Australia, all courts in the court hierarchy from the Supreme Court and above are courts of superior record.

Reported judgments

To understand how lawyers and judges use precedent, it is important to understand how to read a reported case. When a case is reported, a full statement of the case is printed. This statement will include:

- the names of the parties involved in the dispute
- the name of the court and the year the case was heard
- a summary of the facts
- the arguments presented by both sides
- the judgments of the judge/s – the reasons given by a judge, explaining and justifying the decision made
- a decision ***inter partes*** – a decision in favour of one of the parties, specifying which party won the case.

Go to the Library section of the High Court of Australia's website (http://www.hcourt.gov.au/library/about-the-library) for examples of recent judgments.

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Ratio decidendi

Not everything said by a judge (or judges) in the course of reaching a decision is a precedent. Only the *ratio decidendi* forms the legal principle to be used in future cases.

The term *ratio decidendi* means literally 'the reason for deciding'. The *ratio decidendi* is the rule of law stated by the judge as the reason for deciding. According to the doctrine of precedent, in cases that have similar circumstances, the *ratio decidendi* of higher courts will be binding on all lower courts (in the same court hierarchy), when there are similar fact circumstances.

The *ratio decidendi*, or reason for deciding, forms the legal principle.

Obiter dictum

A comment made by a judge that is on a question of law, but not directly relevant to deciding the case, is an ***obiter dictum***: a statement made 'by the way'. A judge's statement or opinion in a judgment that is not part of the *ratio decidendi* (precedent) may be used as a persuasive argument in later cases.

Obiter dicta, the plural of *obiter dictum*, are statements made that do not form a *ratio decidendi* but may be persuasive.

Stare decisis

Stare decisis means 'to stand by what has been decided'. Lower courts stand by, or follow, the decisions of the higher courts in 'like cases'.

Stare decisis means to stand by what has been decided.

The rules relating to *stare decisis* can be summarised as follows:

- Precedents can be set only by a higher court (usually when exercising an appellate (appeal) jurisdiction).
- All lower courts are bound by the decisions of higher courts in the same hierarchy. For instance, the Victorian County Court is bound by the decisions of the Victorian Supreme Court. Both courts are part of the Victorian court hierarchy. The Victorian County Court does not, however, have to follow a decision of the South Australian Supreme Court – the South Australian Supreme Court is not part of the Victorian court hierarchy. (A decision of a court from outside the hierarchy is 'persuasive' – it can be used as a convincing argument about what the law should be – but it is not binding.)
- Decisions of courts at the same level, or equal standing, are not binding. For example, a judge of the Supreme Court may disagree with previous decisions of other judges in the Supreme Court. The previous decisions are seen as highly persuasive. By convention, a judge will follow a decision by an earlier judge in the same court. This convention is seen as providing for certainty and consistency. One exception to this convention is the High Court (the highest court in Australia): it is not bound by its own past decisions.

Binding precedent

A **binding precedent** is a legal principle that must be followed. The doctrine of precedent depends on lower courts following the decisions of higher courts. The general rule is that a decision of a higher court in the same hierarchy is binding or must be followed by lower

A precedent made by a higher court that must be followed is a binding precedent.

A crowd gathers outside the Supreme Court of Victoria in anticipation of the court's decision on Cardinal George Pell's appeal against a child sexual assault conviction.

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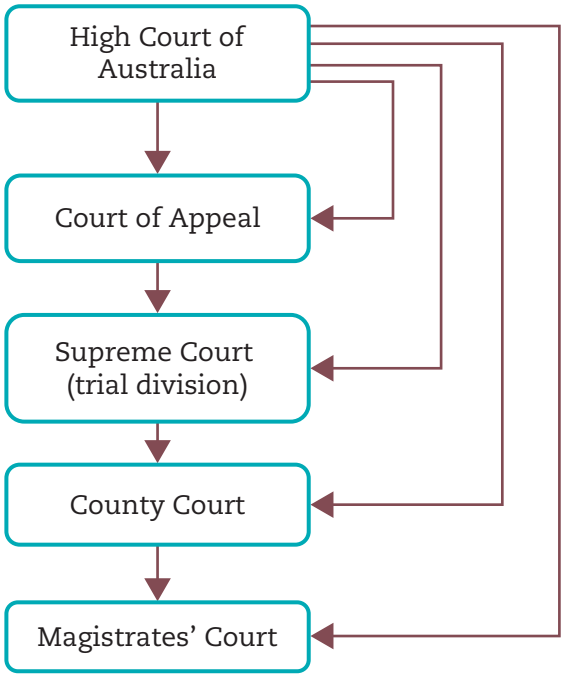
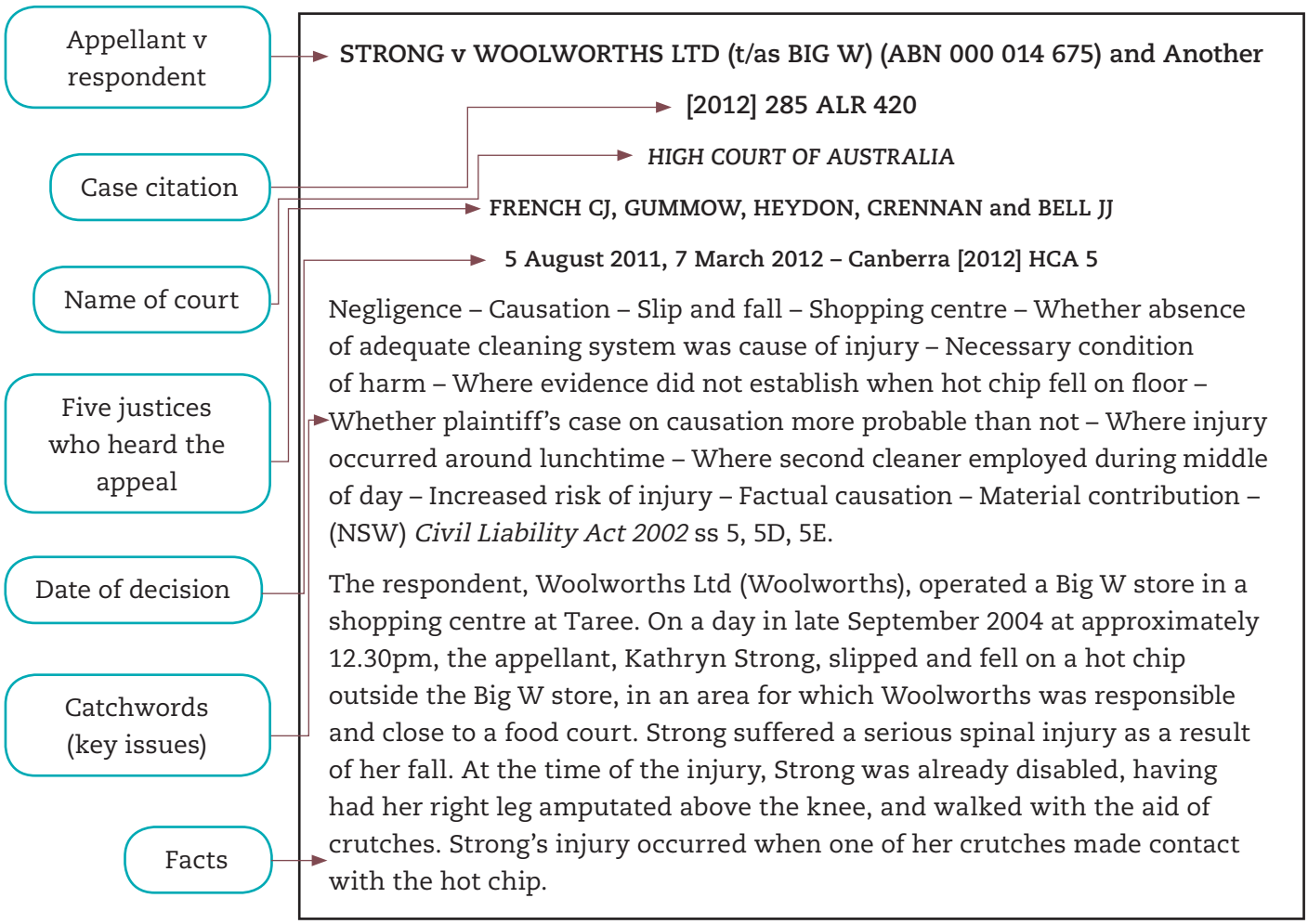
courts in the same hierarchy when deciding similar or 'like' cases. For instance, in Victoria, a judge of the County Court must follow the decisions of judges in the Supreme Court. A decision of the High Court is binding on all other Australian courts.



The *ratio decidendi* from decisions made in the High Court are binding on all courts lower in the same hierarchy in cases of similar material fact.

Similar material facts refers to the facts of the case or central issues.

Figure 10.2 Binding precedent in Victoria



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Strong brought proceedings for negligence against Woolworths in the District Court of NSW. At first instance, Robison DCJ awarded Strong over $580,000 damages. On appeal, the NSW Court of Appeal (Campbell JA, Handley AJA and Harrison J) found that Strong had failed to prove that Woolworths' negligence was a cause of her injury: see *Woolworths Ltd v Strong [2010]* NSWCA 282.

Strong appealed to the High Court of Australia.

Held, per French CJ, Gummow, Crennan and Bell JJ

Summary of decision

(Heydon J dissenting), allowing the appeal:

Per French CJ, Gummow, Crennan and Bell JJ:

(i) It was not necessary for Strong to point to evidence permitting an inference as to when the hot chip had been deposited on the floor. It was sufficient for Strong to prove that it was more probable than not that Woolworths' negligence was a necessary condition of her fall. This required a consideration of the probabilities in light of the evidence which did not establish when the hot chip was deposited: at [34].

Kocis v SE Dickens Pty Ltd [1998] 3 VR 408, applied.

(ii) The engagement of a second cleaner between 11am and 2pm did not support the conclusion that the probabilities were against the chip being deposited before 12.15pm. The cleaning company did not increase the frequency of inspections during this time and the full-time cleaner took a lunchbreak during this time. Both of these facts tend against a finding of an increased risk of injury during this period: at [36].

(iii) There was no evidentiary basis for the finding that the hot chip was dropped shortly before Strong's accident. There was no evidentiary basis for the finding that hot chips are more likely to be consumed at lunch rather than for breakfast or for a mid-morning snack. The conclusion that the hot chip was deposited on the floor at a particular time was only speculation: at [37], [38].

An example of a reported judgment. Read more about this case in Legal brief 10.4.

In judgments, 'Brown CJ' refers to Chief Justice Brown. Other judges are referred to as Smith J, and if there is a list of judges, JJ is used to mean the plural: Smith, Jones and Black JJ.

Persuasive precedent

A **persuasive precedent** is a precedent that contains a 'convincing' argument, but one that does not have to be followed because it is not binding: it is not a decision made by a higher court in the same court hierarchy in a case with similar facts.

A persuasive precedent does not have to be followed. It may be contained in *obiter dicta*, or in a decision of a lower or court of equal standing, or a court in another hierarchy.

Decisions that are considered to be persuasive authority include:

- *obiter dicta* statements of a court at the same level in the same court hierarchy; for example, a Supreme Court judge is not bound by the *obiter dicta* statements made by other Supreme Court judges in past cases
- *ratio decidendi* of courts of the same level or lower in the same hierarchy; for example, a County Court judge would not be bound by a decision of another County Court judge or a decision of a magistrate in a previous case.
- the decision of a court in another hierarchy.

Although not binding, such cases may be seen as points of reference. They give an indication of what other judges think the law should be.

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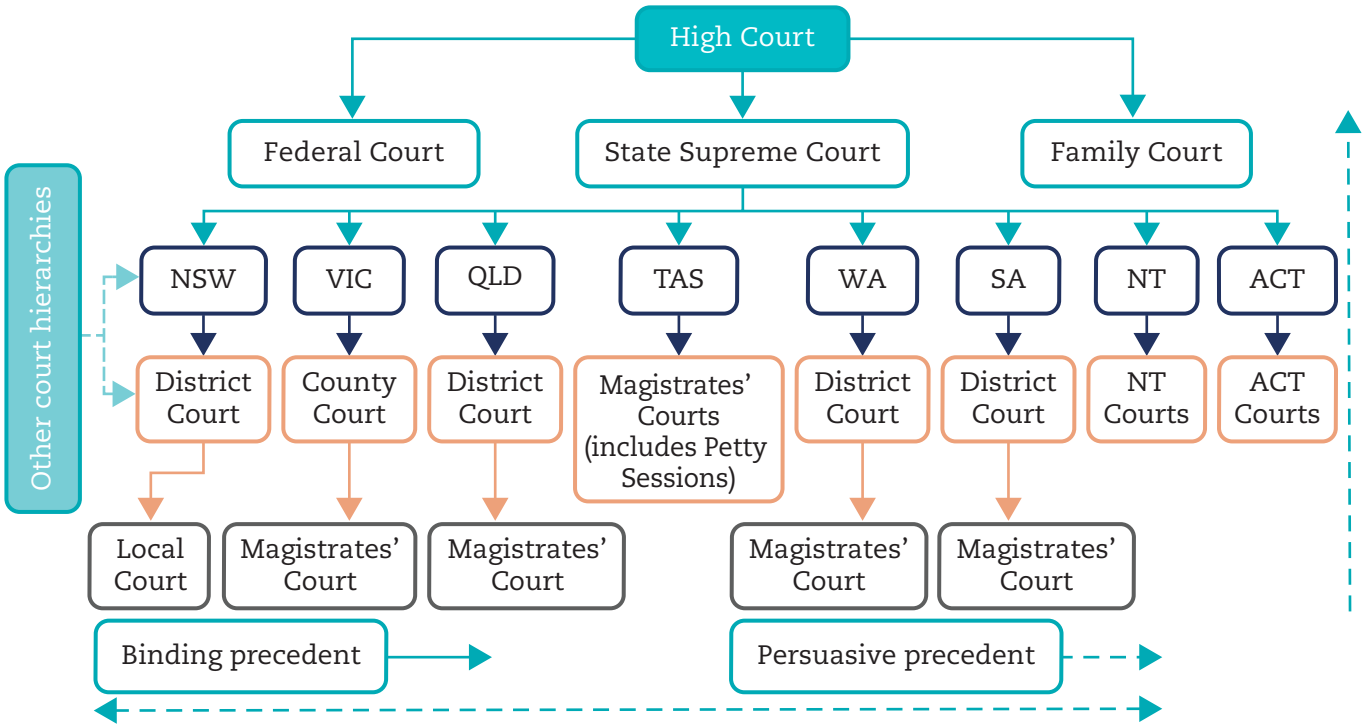

Figure 10.3 Courts forming a binding precedent

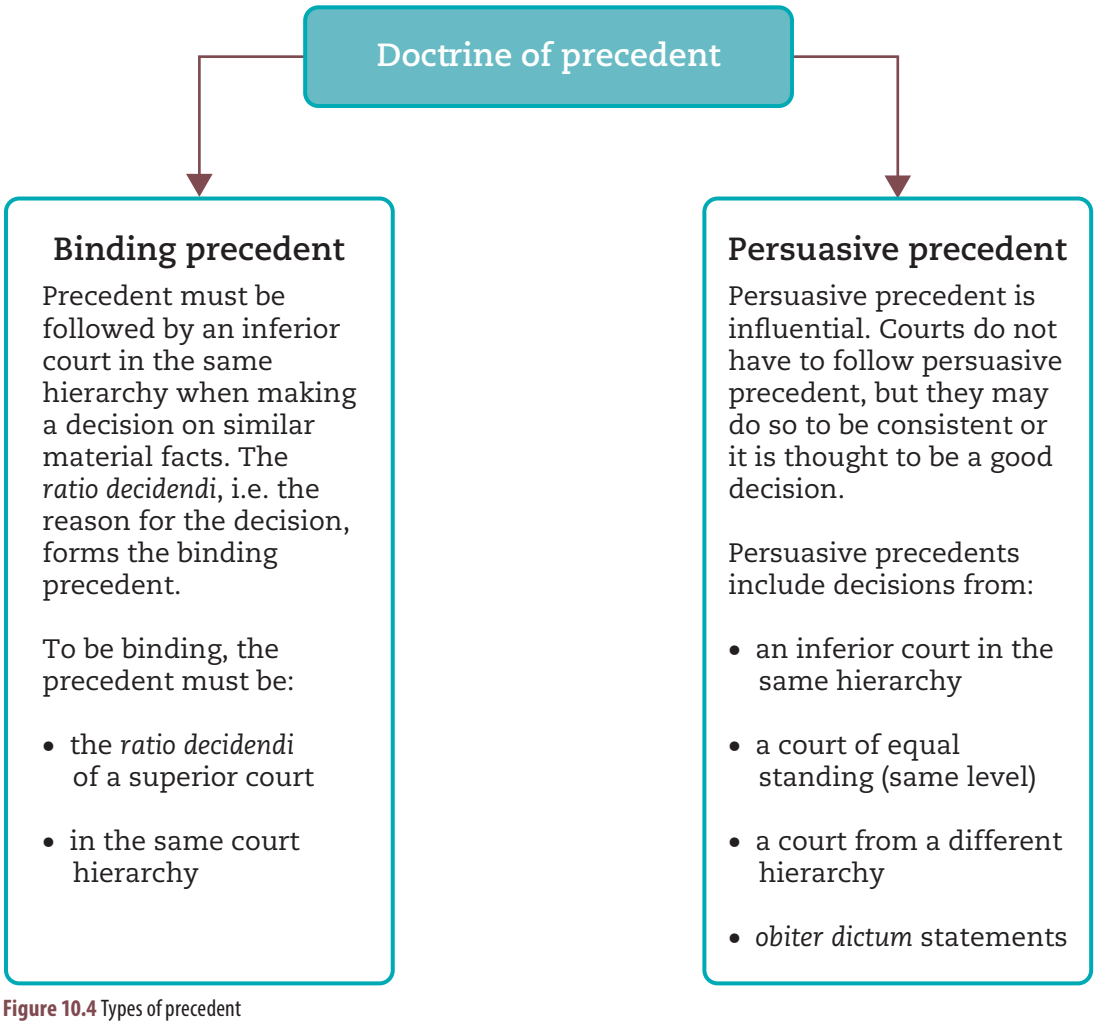

Figure 10.4 Types of precedent

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Precedent in action

The operation of the doctrine of precedent is easier to understand by looking at examples. The case of *Donoghue v Stevenson* [1932] AC 562 is a significant case. In this case, the fundamental legal principle of negligence was established.

Donoghue v Stevenson

A friend of Mrs Donoghue bought her a bottle of ginger beer. The beer was served in a dark, opaque (not able to be seen through) bottle. Mrs Donoghue had drunk about half the bottle of ginger beer before emptying what remained onto her ice-cream. As she did this, a partly decomposed snail floated out of the bottle. Mrs Donoghue became ill. She suffered gastroenteritis and shock. She claimed that her illness was a direct result of consuming the ginger beer and seeing the decomposed snail.

Mrs Donoghue sued the manufacturer of the ginger beer. She claimed that they had been negligent. Mrs Donoghue could not bring an action under the law of contract because she was not a party to the contract. The contract for the sale of the ginger beer had been formed between the manufacturer and Mrs Donoghue's friend who had bought the drink. The defence counsel argued on behalf of the manufacturer that there was no duty of care because there was no contract between the manufacturer and Mrs Donoghue. A duty of care only applied to 'dangerous things'. The ginger beer could not be considered a 'dangerous thing'.

However, the House of Lords decided that Mrs Donoghue was entitled to be compensated by the manufacturer. This was the first case in which the House of Lords decided that the manufacturer owed a duty of care to the ultimate consumer.

The basic legal principle of negligence is based on Lord Atkin's *ratio decidendi*:

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

Legal brief 10.1

Donoghue v Stevenson [1932] AC 562

The appeal was heard by five judges of the House of Lords. Lord Atkin summed up the majority view:

> The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' [blame], is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay … The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.
>
> … [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care … It is a proposition that I dare to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

The result was that, by a majority of 3:2, the Lords held that there was a valid cause of action.

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Grant v Australian Knitting Mills

A later Australian case heard in the Privy Council, *Grant v Australian Knitting Mills* [1936] AC 85, involved similar circumstances. In this case the plaintiff, Dr Grant, bought some woollen underwear from a store. The underwear had been manufactured by the Australian Knitting Mills Ltd. There was nothing to say that the underwear should be washed before wearing and Dr Grant did not do so. Dr Grant suffered dermatitis as a result of wearing the woollen underwear. It was later discovered that the condition was caused by the excessive use of chemicals in the process used to make the underwear. Although not identical, this case can be seen as having similar circumstances to the earlier case of *Donoghue v Stevenson*.

According to the doctrine of precedent, the Court would have applied the rule of law stated in *Donoghue v Stevenson* to the case of *Grant v Australian Knitting Mills*. Like Mrs Donoghue, Dr Grant was deemed to be a 'neighbour'. He was a person who was closely and directly affected by the act of the manufacturer and the manufacturer ought to have had him in mind as being affected when preparing the underwear. The manufacturer had a duty to take reasonable care to avoid acts that they could reasonably foresee would be likely to injure consumers such as Dr Grant. Dr Grant was successful in his claim for damages. This was the first Australian case to adopt the legal principle of negligence.

Table 10.1 Are the fact situations the same?

Donoghue v Stevenson	*Grant v Australian Knitting Mills*
• A consumer purchased goods. • Mrs Donoghue did not have a contract with the manufacturer. • There was a snail in the bottle. • The bottle of ginger beer had been carelessly prepared. • The ginger beer manufacturer could have reasonably foreseen that damage would result from the carelessness. • Mrs Donoghue was closely and directly affected by the actions of the manufacturer. • Mrs Donoghue suffered gastroenteritis and shock.	• A consumer purchased goods. • Dr Grant did not have a contract with the manufacturer. • Underwear contained chemical residues. • The underwear had been carelessly prepared. • The underwear manufacturer could have reasonably foreseen that damage would result from the carelessness. • Dr Grant was closely and directly affected by the actions of the manufacturer. • Dr Grant suffered dermatitis.

Hedley Byrne v Heller

The principles of *Donoghue v Stevenson* have been applied and extended to many other cases. For example, in the case of *Hedley Byrne v Heller* [1964] AC 465, the principles were extended to include liability for providing information and advice.

In this case, a banker was asked by a creditor to provide information about the creditworthiness of another person. The banker provided the information, stating that the individual in question had a good credit rating. On the basis of this information, credit was given. However, the loan was not repaid and the information supplied by the bank was found to be incorrect. The creditor sued the banker but was unsuccessful. Although the court agreed that a duty of care was owed, the banker had clearly stated that the advice was given 'without responsibility on the part of the bank or its officials'.

The Court found in favour of the banker. The Court also stated that if the banker had not made the disclaimer, the banker would have been found liable. (A disclaimer is a statement that you will not be responsible. In this case, the disclaimer stated that the bank would not be responsible for the information.) The Court based this decision on the fact that a 'special relationship' existed between the person giving the statement and the person relying on the statement. The banker owed a duty of care to the creditor. This case provided the basis for many cases about the giving of special expert advice in a particular area. It applies to advice given by doctors, lawyers, financial advisers and other professionals.

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Legal brief 10.2

Fuller-Lyons v New South Wales

There have been many cases which have applied the principles of *Donoghue v Stevenson* – and the application has not just been to a manufacturer or a person. An example is the case of *Fuller-Lyons v New South Wales* [2015] HCA 31.

In this case, the State of New South Wales, as the legal entity responsible for the operation of the rail network in NSW, was sued for negligence. In 2011, eight-year-old Corey Travis Fuller-Lyons fell from a train about two minutes after it had left the station. Although there was no evidence about how he fell from the train, he must have fallen through the front doors of the train carriage. These doors were fitted with locks that were centrally operated by the guard on the train. When these doors were locked, they could not be forced open. The primary judge found that the most likely explanation for the boy having fallen out of the carriage was that he had been caught in the doors as they closed. This would have left at least part of his body out of the train as it left the station. The facts indicate that the boy fell from the train as it negotiated a bend at about 100 kilometres per hour.

The appellant successfully argued that the failure of a railway employee to keep a proper lookout before signalling the guard that it was safe for a train to depart from a station was negligence. This left young Corey vulnerable to falling out of the moving train because the carriage door was not properly closed.

The State appealed to the Court of Appeal of the Supreme Court of New South Wales against the finding of liability. This case was successful but the subsequent appeal by Fuller-Lyons to the High Court of Australia reversed that decision.

The legal principle established in *Donoghue v Stevenson [1932]* was applied to a legal entity, that is, the State of New South Wales.

Activity 10.1 Folio exercise

You be the judge

Using the principle established in the *Donoghue v Stevenson* case, make a decision on each of the following cases. In each response, you must give your decision and your *ratio decidendi* (the reason for your decision).

1 Alena and Marita are at the Melbourne v St Kilda football game at the MCG. At half time, they decide to get some warm sausage rolls to eat. Alena bites into hers and finds a piece of bandaid in the filling. She is violently ill and must seek medical assistance with St Johns First Aid. She is suing the catering firm at the football ground. Will Alena be successful?

2 James and Leo are both carpenters and workmates. They are attending a Christmas BBQ at their boss's place when Leo tells James about the great deal he made with his new shares in the Raptoir Company. He urges James to 'get in on the action'. Unfortunately for James, once he invested his money into the company, it started to decline and eventually went into receivership. James is really annoyed with Leo and is seeking legal advice about getting redress from him. Will James be successful in suing Leo?

3 Billy and Kate live in a suburban house. They carried out renovations which included an in-ground pool in the back yard. Unfortunately, their neighbour has a large gum tree with big branches that hang over their yard and Kate is tired of cleaning the leaves out of the pool. They have tried to speak to their neighbour about the tree but he refuses to do anything about it, telling Billy and Kate that it is their problem. One weekend, Kate and Billy use their chainsaw to cut off the offending branches. However, the branches did not fall as they expected. One fell onto the fence, breaking it before rolling onto the neighbour's shed and destroying it. Kate and Billy refuse to do anything about replacing the fence or the shed, telling the neighbour it was his tree that did the damage. Does the neighbour have recourse?

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10.4 Flexibility and precedents

The processes of reversing, overruling, distinguishing and disapproving allow for flexibility in precedent.

As we have already discussed, the doctrine of precedent means that lower courts rely on the decisions of higher courts to decide what the law should be. This may give the impression that the law, once stated by a court, can never be changed or modified. This is not true. There are a number of approaches that judges can take to ensure that the law avoids injustices and keeps pace with the changing needs and values of society.

Following

When a subsequent court uses a precedent, it is said to be 'following' the previous decision. Lawyers also refer to this as seeing a precedent being 'applied' to a later case.

Reversing

Where a higher court hears a case on appeal and decides that the lower court which had heard the case had decided the case wrongly, it will **reverse** the decision. The *ratio decidendi* of the lower court is no longer valid. It is replaced by the *ratio decidendi* of the higher court. Examples of reversing are *Strong v Woolworths* and *Fuller-Lyons v New South Wales*.

Legal brief 10.3

Car theft – a joint enterprise?

An example of a decision being reversed on appeal occurred in a case involving the theft of a motor vehicle and subsequent accident. In this case, it was claimed that the driver owed a duty of care to the passenger who had jointly stolen the car that had been driven.

In *Miller v Miller* [2011] HCA 9, 16-year-old Danelle Miller had been drinking and unsuccessfully tried to enter a nightclub. Having been refused entry, she decided to steal a car to get home. She did steal a car, and then she asked her older sister, Narelle (who was unlicensed and had also been drinking), to drive her younger cousin and herself home. Maurin (aged 27), Narelle's uncle, was at a taxi rank and saw Narelle begin to drive off. He stopped her and said he would drive. Some of Maurin's friends also got into the car. In total, there were nine passengers crammed in the car, with Maurin driving. When Maurin began to speed and drive erratically, Danelle asked him to stop and let her out. He did not. Later, when the car slowed down, Danelle again asked Maurin to stop and let her out. Maurin ignored her requests to let her get out of the car.

Shortly afterwards Maurin lost control of the car and it struck a pole. One passenger was killed. Danelle was very seriously injured. She sued Maurin in the District Court of Western Australia for negligence, and won that case. However, on appeal to the Court of Appeal of Western Australia, the Court concluded that Maurin did not owe Danelle a duty of care because Maurin and Danelle had engaged in a joint illegal enterprise – being the illegal use of a motor car. On appeal to the Full Court of the High Court, the Court reversed this decision. It held that Danelle had withdrawn from that joint enterprise when she asked to be allowed to get out of the car:

> Because Danelle had withdrawn from, and was no longer participating in, the crime of illegally using the car when the accident happened, it could no longer be said that Maurin owed her no duty of care. That he owed her no duty earlier in the journey is not the point. When he ran off the road, he owed a passenger, who was not then complicit in the crime which he was then committing, a duty to take reasonable care.

The High Court concluded, therefore, that the orders of the Court of Appeal of the Supreme Court of Western Australia be set aside, and the appeal to the Court of Appeal of the Supreme Court be dismissed.

Overruling

A case may come before a higher court that relies on a legal principle that has been set in an earlier (and different) case decided in a lower court. The judge presiding in the higher court may believe that the earlier case had been wrongly decided and the higher court would not follow the decision made by the lower court. When a higher court decides not to follow the decision of a lower court in a previous case, the higher court is **overruling** the earlier decision.

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Reversing and overruling are different processes in that overruling a case requires two separate cases. (A decision being reversed involves one case that is subject to an appeal to a higher court.)

Disapproving

Courts at the same level are not bound by each other's decisions. Where a judge in a court refuses to follow an earlier decision of another judge at the same level, that judge is said to be **disapproving** of the other decision. In other words, they have demonstrated that their opinion of the law differs from that of the judge in the earlier case. This may result in an appeal to a higher court to determine what the law should be.

Inferior courts that are bound to follow a previous decision set by a superior court may disapprove of the binding precedent. When handing down his/her decision on the case, the judge may make comment about the precedent. This can act as a signal to superior courts or parliament that, in the opinion on the judge, the law needs to change.

Lower courts can also disapprove a binding precedent. However, they are bound to apply the precedent.

Distinguishing

Courts are bound only by the decisions of higher courts in similar fact cases. Where the facts of a case are sufficiently different from those in a previous case, the decision in the previous case will not be considered binding. Of course, no two cases are exactly the same. Provided a judge is satisfied that the facts of the new case are sufficiently different from the earlier one so that it would be unjust to apply the earlier precedent, then the precedent will be 'distinguished'. The **distinguishing** elements between the cases are given in the judge's comments in handing down his/her decision. This is an appropriate way to avoid using the earlier precedent. The judge may decide the new case by formulating a new precedent. This process allows for the continued development of the common law to meet new situations.

Activity 10.2 Folio exercise

Explaining the doctrine of precedent

1 Define precedent. Explain the difference between a precedent and the doctrine of precedent.
2 Explain why the principle of *stare decisis* is essential to the effective operation of the doctrine of precedent.
3 Distinguish between *ratio decidendi* and *obiter dictum*.
4 Describe the difference between a binding and a persuasive precedent.
5 Identify the circumstances under which a precedent will be considered binding.
6 Will judges always follow past decisions? Explain the processes of reversing, overruling, disapproving and distinguishing a decision. What impact does each of these processes have on the operation of the doctrine of precedent?

Sweden's top court on 23 January 2020 granted a Sami village in the country's far north to administer local hunting and fishing rights, scoring a legal precedent in favour of the Indigenous community.

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Legal brief 10.4

The chip, the slip and the trip to court

At about 12.30 pm on 24 September 2004, the plaintiff, Ms Strong, was browsing at a shopping centre with her daughter and a friend. The plaintiff walked with the aid of crutches after having had her right leg amputated above the knee a number of years earlier. Unfortunately for her, as she browsed an area out the front of the local Big W store (owned by Woolworths, the defendant), her right crutch lost its grip when it came into contact with a greasy chip on the ground. The plaintiff slipped and fell heavily, injuring her spine severely.

The plaintiff sued the defendant for negligence in the District Court of NSW, arguing that she fell because the defendant failed to have a system to regularly clean the area, causing the chip to become a hazard. The District Court found for the plaintiff and awarded over $580 000 in damages.

The defendant appealed to the NSW Court of Appeal. The defendant did not deny that reasonable care required that they inspect and clean the area at regular intervals – say every 20 minutes. But the defendant then argued that the plaintiff had not proved that the defendant's failure to have such a system had caused her injury. The reason? The plaintiff had not proved the chip had been on the ground longer than 20 minutes.

The Court of Appeal agreed with the defendant, holding that there was no evidence the chip had been on the ground long enough for the defendant to have removed it if the defendant had been inspecting the area every 20 minutes. The evidence that would have helped the plaintiff here included things like the chip being dirty, or no longer hot.

The plaintiff appealed this decision to the Full Court of the High Court.

The facts in detail

The defendant's store was very close to a food court in a shopping centre, similar to many other shopping centres. The defendant was running a pot plant sale in the area just outside the entrance of its store, with two racks of plants on display. The plaintiff, her daughter and her friend were browsing in this area, and as the plaintiff approached the pot plants on her right, the tip of her crutch slipped out from underneath her after coming into contact with the chip.

As noted, the defendant had no specific system in place to ensure inspection and cleaning of the pot plant sale area. However, the defendant did not deny that it was responsible for ensuring the safety of those in the area.

The defendant's argument: the plaintiff hasn't proved our failure to clean caused the injury

Elsewhere in the centre, the owner of the centre was responsible for inspecting and cleaning. It had hired a cleaning company to ensure that common area floors were kept clean of rubbish, and inspected and cleaned at intervals of no more than 15 minutes. The defendant admitted that the system used by the owner of the centre could be used as evidence of what was reasonable care.

But the defendant argued that the plaintiff had not proved that the failure to clean regularly had caused the plaintiff's injury. Lawyers call this 'proving causation'. The defendant said that, in order to prove causation, the plaintiff needed to provide some proof that the chip had been on the ground for longer than 15 minutes, which was the maximum wait between cleanings that the defendant should have provided. Since the accident happened at about 12.30pm, the defendant effectively argued that the chip had most likely been dropped less than 15 minutes earlier. Even if the defendant had been cleaning the area every 15 minutes, this newly dropped chip would still have been there. Thus, the defendant's breach was not the cause of the injury to the plaintiff.

The decision

A majority of the High Court (French CJ, Gummow, Crennan and Bell JJ) rejected the defendant's argument, and decided in favour of the plaintiff.

The majority spent some time considering the correct interpretation of NSW legislation on the question of causation, but concluded that the real question in the case was about whether the plaintiff had provided enough proof to show the defendant's breach had caused the plaintiff's injury.

On that point, the majority rejected the defendant's argument that the plaintiff had to prove the chip had been put on the ground earlier than 20 minutes before her fall. Instead, the matter depended on considering the probabilities. If there was no evidence that the chip had been dropped at a particular point in time, the probability was that it was dropped in the first half of the day, rather than the 20 minutes before the plaintiff fell.

There was no evidence that the chip had been dropped less than 20 minutes before the accident, or at any other particular time of day. Although the incident had occurred at lunchtime, the Court felt the evidence pointed to the chip having been dropped much earlier:

> Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court … The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall …

On that basis, the Court reversed the decision of the Court of Appeal and restored the damages awarded to the plaintiff in the District Court.

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Activity 10.3 Folio exercise

The chip, the slip and the trip to court: a case study of precedent in action

1 Read Legal brief 10.4 'The chip, the slip and the trip to court' and complete the following tasks:
- Refer back to the case of *Donoghue v Stevenson* (1932) AC 562.
- What is the law of negligence?

2 To what extent is the fact situation in the case described similar to the fact situation in *Donoghue v Stevenson*?
- Use the following table to set out the similarities.

The chip, the slip and the trip to court case	*Donoghue v Stevenson*

- Outline any differences that you have noted between the fact situations in the two cases. To what extent do you consider these differences significant?
- Use the following table to set out the differences.

The chip, the slip and the trip to court case	*Donoghue v Stevenson*

- What is a binding precedent?
- Do you think that the principles of negligence should be applied in the chip, slip and trip case? Explain your position.

3 This case was heard on appeal by the High Court. It reversed the decision of the NSW Court of Appeal. Explain what the term 'reversed' means. What impact would the decision made in this case have on future cases concerned with slipping over? Would the case be binding on Victorian courts?

4 Consider each of the following situations. Using the judgment in the case, do you think that the principles of negligence could apply? Explain.
- Assume that the defendant could prove the chip fell five minutes before the plaintiff slipped. Would the defendant still be liable?
- Now assume the plaintiff could show the chip fell 25 minutes before her slip. Would the defendant be liable?
- Now assume the same situation occurred as in the real case – except that the defendant's staff had put a witch's hat near the chip while they waited for cleaners to arrive. The area was unattended in the meantime. Would the defendant still be liable?

Read the following excerpt of the dissenting judgment of Justice Heydon in the case of *Strong v Woolworths Limited* [2012] HCA 5 at [70]:

> … An employee of the [defendant], who was a witness whose evidence the trial judge accepted, and who worked as 'people greeter' near the place where the [plaintiff] fell, said it was her duty and practice to call the cleaners as soon as she saw a spillage, and that they would respond in a minute or two. She also said that the employees of the [defendant] were trained to be constantly vigilant for spillages … [This] evidence indicates that the risk was reduced by the unsystematic means … described.

- What is a dissenting judgment?
- Can a dissenting judgment influence the future development of the law? Explain.
- How does the operation of the doctrine of precedent help the community know what the law requires in a situation?

Negligence is a failure to take reasonable care to avoid causing injury or loss to another person.

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10.5 Interpreting past decisions

Following the development of legal principles through the decisions of judges in earlier cases can be difficult. Determining which precedent, if any, applies in a particular case is part of the expertise and analytical skill required of the legal profession. It is the role of lawyers to present to the court the principles which they believe support their arguments and case. It is the role of the judge to determine how these arguments apply to the facts of the case.

Problems in using precedent include locating the relevant cases, identifying the *ratio decidendi*, determining what is a like case and checking for conflicting decisions.

There are several reasons for it being difficult to determine how a precedent – or which precedent – will apply to a case. As we have already seen, precedent is based on the concept that judges will follow the past decisions of judges in higher courts in reported cases. However, finding the relevant cases from the large number of reported cases can be difficult.

Problems in interpreting past decisions include the following.

Table 10.2 Problems in interpreting past decisions

Problem	Explanation
Locating relevant cases	Over time, there may have been numerous cases relating to a particular area of law. A lawyer may have failed to find all the relevant cases or a particularly significant case where the facts in question are crucial.
Identifying the relevant *ratio decidendi*	Even when the relevant cases have all been located, identifying the *ratio decidendi* can also be problematic. Reported cases often involve complex arguments. The judgment may contain many comments about the facts of the case, references to other cases, and statements about general propositions of law as well as the reasons for deciding. It may be difficult to determine what is *obiter dictum* and what is the *ratio decidendi*.
Cases with more than one *ratio decidendi*	Precedents are often established by courts hearing appeals. In these cases, the court will be presided over by three, five, or even seven judges. While the judges may agree on the final outcome of the case, each judge may have a different reason for deciding. In such cases each judge prepares a statement of their own reasons for deciding and there may be multiple *rationes decidendi*. This makes it very difficult to decide which fundamental principle of law in the reported case will apply to future cases (see Legal brief 10.5).
Dissenting judgments	In some instances, one or more judges may dissent or disagree with the final decision. The dissenting judges prepare a statement of their reasons for dissenting. Where there is more than one judgment, it is even more difficult to determine what the relevant law is.
Determining what is a like case	Of course, no two cases are exactly alike. There may be a number of factual and legal similarities between a case currently being considered and past cases, but each case also has things that distinguish it from earlier cases. It may be difficult to determine the extent to which the specific facts of a case can be generalised to fit a category that would give rise to a particular legal right. For instance, to what extent do the facts of *Grant v Australian Knitting Mills* match the facts of *Donoghue v Stevenson*? Certainly, there are many similarities. However, *Donoghue v Stevenson* was concerned with goods sold for consumption and *Grant v Australian Knitting Mills* was concerned with clothing. Do the cases fit into the same general category, which gives rise to a legal right? Is the difference in the purpose for which the goods were sold significant enough to distinguish the case? In *Grant v Australian Knitting Mills*, the judges decided that the facts, although slightly different, did fit into the same general category.
Conflicting authorities	In some cases, more than one precedent may be presented to the court. Where a judge is faced with conflicting authorities, a decision will have to be made about which precedent to follow. Factors that may influence this decision will include the level of the court hearing the previous case, the number of judges and whether or not they all agreed, as well as the degree to which the decision has been followed by other courts.

Legal brief 10.5

Many reasons – same conclusion

The case of *Smith v Jenkins* [1970] HCA 2 was referred to in the High Court case of *Miller v Miller* [2011] HCA 9. Both cases concerned a driver and passenger in a car accident and the illegal use of a vehicle, and negligence was an issue. In *Smith v Jenkins*, the High Court concluded, unanimously, that the plaintiff could not recover damages from the driver of the motor vehicle where both plaintiff and driver were illegally using a motor vehicle at the time of the accident. Each member of the Court gave separate reasons.

In this case, three of the Justices commented:

- Chief Justice Barwick rested his conclusion on there being no duty of care owed by one illegal user to another.
- Justice Kitto's opinion was that the important consideration was that the actual act done negligently was itself the criminal act in which both plaintiff and defendant were engaged.
- Justice Owen stated that the relationship between two criminals engaged in carrying out a criminal venture gave rise to no duty of care owed by one to the other 'in the execution of the crime'.

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Judges of an appeal court in agreement on the outcome of a dispute can each have different reasoning in coming to their decision.

Activity 10.4 Folio exercise

Judge-made law

1 Describe the role of the Supreme Court in the law-making process. Would the decisions of the following courts be binding on the Victorian Supreme Court? Explain your response.
   - Supreme Court of NSW
   - High Court
   - Supreme Court of Canada.

2 Explain the difference between the following terms:
   - overruling and reversing
   - disapproving and distinguishing.

3 What would you expect to be the outcome if a judge did not follow a precedent that is clearly binding on the court?

4 How does the doctrine of precedent operate to reduce conflict in the community?

5 Outline the major problems that may be experienced in interpreting past decisions.

6 'The doctrine of precedent provides for the consistent application of legal principles as well as providing a means to develop the common law to meet the needs of the community.' Do you agree? Justify your opinion.

10.6 Statutory interpretation

The role of a court is to apply the law to resolve disputes. As well as applying common law to resolve a case, courts may also need to apply statutes or Acts of Parliament.

Judges must interpret the words of an Act when a case comes before the court in which the intention or the meaning of words used is disputed. This is called **statutory interpretation.** By doing this, judges are often involved in clarifying what is the law.

Statutory interpretation is when judges decide on the meaning and application of the words or terms in an Act to resolve a dispute before the court.

The English language is very complex. This is particularly true of its legal terminology. Acts of Parliament can be difficult to understand. Attempts are being made to simplify the language used so that the average person can more easily understand it. However, judges may still need to interpret Acts of Parliament. Even some lawyers and judges find that the language used in Acts is confusing. In many instances, there is argument about what the words and phrases mean. The easiest way to understand how judges interpret statutes is to look at an example. Consider the following case in Legal brief 10.6.

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Legal brief 10.6

Searching for meaning (*Siddique v Martin* 51 VR 564 [2016] VSCA 274)

Brett Whiteley's *Opera House*

In March 2014, police investigating the alleged fraud and sale of works by Australian artist Brett Whiteley applied for two search warrants. The search warrants were issued under section 465(1) of the *Crimes Act 1958* (Vic). The warrants allowed the police to break, enter and search for:

> Any paint, frames, solvents, sketches, notebooks or any other item used in the manufacturing of the fraudulent WHITELEY paintings. Evidence of financial transactions, photographs and/or digital images relating to fraudulent WHITELEY paintings.

The place named in the first warrant was the private home of suspect Mohamed Siddique. The second was his business premises.

A total of 36 items were seized in Siddique's home and 23 items were seized from his business premises. Some of the items seized were named or described in the warrant. Others were not, including paintings attributed to Australian artists Charles Blackman and Howard Arkley.

The police documents listing the items seized did not distinguish between items named or described in the warrant and other items. The police also requested that some items be analysed or examined and retained as evidence. The police lodged the relevant documentation with the Magistrates' Court.

On 16 May 2014, Siddique filed an application with the Magistrates' Court, in accordance with section 78(6) of the *Magistrates' Court Act 1989* (Vic) for the return of all items seized.

Section 78(6) says:

> The Court may direct that any article, thing or material seized under a search warrant be returned to its owner, subject to any condition that the court thinks fit …

Some goods were returned; others were not.

On 27 August 2014, Siddique's application under section 78(6) for the outstanding goods came before the Magistrates' Court. The Court decided that it did not have jurisdiction to order the return of the items not specified on the warrants. The magistrate accepted the submission that the property had been seized under common law and not under section 78(6) of the *Magistrates' Court Act*. The magistrate concluded that Siddique needed to commence a separate civil proceeding against the police.

On 20 June 2014, Siddique filed a writ in the Victorian Supreme Court Trial Division, claiming damages for trespass on grounds including that some of the goods seized were seized unlawfully because they were not goods described in the warrants. He also lodged an application to appeal to the Trial Division of the Supreme Court challenging the magistrate's interpretation.

The issue for deliberation by Justice Bell of the Supreme Court was whether the paintings were 'seized under a search warrant' within the meaning of section 78(6). The question of whether the paintings were 'unlawfully seized' was to be decided by the trial judge in a separate civil case.

Justice Bell decided that an:

> interpretation of the word 'under' in s 78(6) that requires the relevantly seized item to be joined up with the authority to seize in the subject warrant is supported by the context of s 78 as a whole …
>
> s 78(6) is a provision that, properly interpreted, confers discretion upon the court to order the return of seized property as specified in the warrant concerned. It is not a provision that confers discretion to order the return of other items seized, whether lawfully or unlawfully, during the execution of the warrant. That may be a pity because it forces individuals to seek separate recovery of property seized during the execution of, but not under, a warrant when, in most cases, the discretionary procedure in s 78(6) might conveniently cover both situations. That is a matter for the legislature, not this court.

Justice Bell decided that the magistrate was correct in his interpretation of section 78(6) and dismissed the appeal.

Siddique sought leave to appeal to the Court of Appeal. The question was whether section 78(6) covers items seized 'under a search warrant' but not named or described in the search warrant. Justice Bell also noted that:

> The matter depends principally on the proper construct of s 78(6). That in turn requires that attention be focused on the statutory text, context and purpose.

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Interpreting the search warrant case

When interpreting the words or terms used in an Act, the court will consider the purpose of the provisions. In deciding this question, the Court considered the purpose of section 78(6) to be to facilitate the recovery of a person's property when it has been taken by the state against their will or without their consent.

Courts can refer to a range of intrinsic and extrinsic sources to assist in the interpretation of legislation. They may also refer to precedent.

Referring to extrinsic material

Extrinsic material refers to sources outside of an Act of Parliament. In this case, the word 'under' required context. The Court considered the definition of 'under' according to various dictionaries, where it was defined as 'in accordance with', 'pursuant to', and 'by virtue of', and concluded that the use of 'under' in a statutory provision:

- sets up a convenient, summary method for citizens to obtain the return of their own property after it has been taken from them against their will
- and so protects individuals from intrusion by the state.

Referring to precedent

The Court referred to a number of past cases. These cases considered the rights of individuals in relation to the execution of search warrants. They considered both common law and statutory protections. The Court referred to a number of past decisions. Referring to the case of *Southam v Smout* [1964] 1 QB 308, at 320, Lord Denning MR said, adopting a quotation from the Earl of Chatham:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement. So be it – unless he has justification by law …

In *Trans Nominees Pty Ltd v Scheffler* (1986) 42 SASR 361, at 369, it was noted that:

> the court will construe such statutes strictly, resolving any ambiguity in favour of the subject, and insist upon strict compliance with the statute and the conditions by which the warrant is authorised.

The Court indicated that there was not:

> any reason why parliament would have intended to distinguish between seized items that have been named and described in the relevant warrant and other items seized in the course of executing the self-same warrant.

'Under a warrant'

The Court found that the items were seized 'under the warrant'. The Court referred to the case of *Ghani v Jones* [1970] 1 QB 693 at 706, in which Lord Denning stated, in relation to the execution of a search warrant by police officers:

> If in the course of their search they come upon other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary.

The Court concluded that:

> none of the items was seized under purely common law powers and all of them were seized 'under' a search warrant within the meaning and for the purpose of s 78(6).

and, later, that:

> without a warrant the police officers would be trespassing on private property and invading the occupier of the house. In those circumstances the officers would need to rely upon purely common law powers, if available, to justify seizure of property.

The court stated that a strict interpretation of the provision:

> may be mandated with respect to the authorisation of State interference with private property, [and] a broad construction is to be preferred with respect to a statutory provision that alleviates that interference. Nor does there seem to be any reason why parliament would have intended to distinguish between seized items that had been named and described in the relevant warrant and other items seized in the course of the execution of the self-same warrant.

Decision

The Court of Appeal decided that goods not named or described in the warrant but lawfully seized in the execution of the warrant should be treated as goods 'seized under the search warrant' for the purposes of section 78(6). Therefore, the Magistrates' Court could order the return of the items seized by the police. In reaching this decision, the Court stressed the importance of the purpose of section 78(6) as a means for individuals to obtain the return of their property and a protection to lessen the effect of interference with private property by the state.

The Court of Appeal quashed the decision of the magistrate to dismiss the application for the return of the property. The Court of Appeal did not decide if Siddique's property should be returned to him. The case was returned to the Magistrates' Court to be reheard and redetermined.

In May 2016, a Supreme Court of Victoria jury found Siddique guilty on two counts of obtaining financial advantage by deception and one count of attempting to do so. In May 2017, the Court of Appeal set aside the convictions and ordered a verdict of acquittal.

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Activity 10.5 Folio exercise

Applying an interpretation

1 Describe the role of the courts in interpreting an Act.

2 Outline the approaches used by judges in determining the meaning of a particular statute. How were some of these approaches used in the case of *Siddique v Martin*? (Legal brief 10.6)

3 To what extent do you think that the Court of Appeal in the *Siddique v Martin* case created law? Explain.

10.7 Reasons for interpreting statutes

An Act may need to be interpreted because it was written in broad terms or there were problems interpreting the Act.

An Act may need to be interpreted because there are problems relating to defining terms, or the meaning of terms has changed over time. When interpreting an Act, judges must interpret the intention of parliament.

There are several reasons why it is necessary for the courts to interpret a statute. One of the problems in drafting legislation is that legislation attempts to cover every situation that has happened (or that might arise). But Acts of Parliament often set out the law dealing with a specific area only in broad terms. The courts will need to interpret whether the broad terms set out in the Act include the specific circumstances in the case before them.

Table 10.3 Why legislation may need to be interpreted

The intention of the Act is not clear	• Parliament's intention may not be clear enough. Accurate instructions and direction may not have been given to the Parliamentary Counsel.
The Act is about a complex and technical topic	• Parliamentary Counsel may not be familiar with specialist areas, such as areas of technology.
Difficulty in foreseeing possible future applications of the Act	• It is difficult to consider all future applications of an Act. In our rapidly evolving society, it is almost impossible to predict changes in technology and science, or social and environmental conditions.
Inconsistencies within an Act or between Acts	• Lengthy Acts, or Acts that have been amended a number of times, may cause problems in that there may be inconsistencies. Various provisions within an Act may vary slightly, as the same word may be used in more than one context within the Act, resulting in confusion.
Time pressures in drafting legislation	• There may have been pressure to draft the Act in a hurry, resulting in clumsy, vague or ambiguous wording within the Act. • Due to time pressures in drafting legislation, there may not have been sufficient communication between the instructing minister and the Parliamentary Counsel. • There may have been little opportunity to check the legislation after drafting. This may result in loopholes.
Problems relating to defining words	• The words used in an Act may attempt to cover a broad range of situations, but the courts have to interpret whether a specific situation comes under this broad definition. • Words may not be defined within the Act. • Often Acts need to be interpreted to limit conflict between Acts within a state or between a state and the Commonwealth. • Language is by its nature imprecise – words may change meaning over time.
Words used may not cover recent changes	• Legislation may have become outdated and need to be revised. The wording of an Act may not cover recent changes. For instance, a statute may refer to records and tape recordings but not specifically refer to other forms of recording technology, such as DVDs or the downloading of music from the internet.

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10.8 How judges interpret legislation

When interpreting the words or phrases in Acts of Parliament, courts consider what parliament had in mind when making the legislation in question; that is, what parliament's intent or purpose was.

There are a number of sources or aids used by judges to help them arrive at the intention of the legislation. These sources may be either intrinsic or extrinsic. Intrinsic sources are those that are contained within the Act. Extrinsic sources are sources that are not contained in the Act.

Intrinsic sources

Judges will refer to other sections of the Act to interpret the meaning of terms or words within an Act. For instance, judges will refer to the words in the Act, the margin notes, the footnotes, the long title and the object or purpose clauses. Most Acts contain a section where words used commonly throughout the Act are defined. For example, the *Transport Accident Act 1986* (Vic) defines a 'transport accident' as 'an incident directly caused by, or arising out of, the driving of a motor car, railway train or tram'. Some Acts also have schedules that may help. Schedules appear after the main sections in the text of the Act. They are often used to spell out in more detail how the provisions of the Act are to work in practice. The *Road Safety Act 1986* (Vic), for instance, contains a schedule that links a driver's blood alcohol content to the maximum period of licence cancellation.

Judges can refer to intrinsic sources. These include looking at sections within an Act to determine its meaning: margin notes, footnotes, the definition sections and the object or purpose clause.

Extrinsic sources

Judges may also refer to sources outside the Act to guide them in the task of interpretation. These include dictionaries, legislative guidelines, second reading speeches from parliament, and previous decisions.

Judges can refer to extrinsic sources. These include dictionaries, second reading speeches from parliament, legislative guidelines and previous decisions.

Dictionaries

Courts may refer to authoritative legal dictionaries, such as *Jowitt's Dictionary of English Law*, or to standard English dictionaries, such as the *Cambridge English Dictionary*.

Legislative guidelines

There is legislation passed by both the Commonwealth and state parliaments specifically to guide courts. It sets out what other sources judges can use when interpreting legislation.

Table 10.4 Legislation provides guides for interpretation

***Acts Interpretation Act 1901* (Cth)**	***Interpretation of Legislation Act 1984* (Vic)**
• Commonwealth Acts must be read or interpreted in accordance with the purpose or spirit of the legislation. • Since 1981, all Acts of the Commonwealth parliament contain object clauses. These clauses are sections within the body of the Act setting out the general aims of the legislation. • Courts are permitted to refer to any reports prepared before the provisions were enacted. This includes reports by a Law Reform Commission, and treaties and international agreements referred to in the parliamentary process. • Courts are required to consider explanatory materials when interpreting legislation.	• Courts are required to interpret legislation according to the purpose and intention of the statute. • Courts may refer to the following materials in interpreting legislation: parliamentary debates, reports of parliamentary committees, royal commissions, law reform commissioners and commissions, boards of inquiry and other similar material. • The Act allows courts to refer to headings, schedules, marginal notes, footnotes, and other parts, divisions or subdivisions within the Act. • Commonly used terms that regularly appear in most Acts of Parliament or are explained or defined within the *Interpretation of Legislation Act 1984* (Cth).

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Second reading speeches

The second reading speech is where the relevant minister explains the reasons for putting the proposed law to parliament. This helps make clear what the intent of the proposed legislation is. All parliamentary proceedings are recorded in *Hansard*.

An example of a second reading speech can be found on the Hansard website (http://hansard.parliament.vic.gov.au). Search for the speech in relation to the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014*.

This was presented to the Victorian parliament by the then Attorney-General, Andrew Clark.

Previous decisions

It is possible that words requiring interpretation have already been interpreted by a court in an earlier case. The court may look at that earlier decision to interpret the legislation. Where the interpretation was made in a higher court, and the case involves the same Act, then the previous decision is a binding precedent.

Common law principles of interpretation

Before the passing of the Commonwealth and state legislation judges used traditional common law principles as a guide when interpreting statutes. These traditional approaches were referred to as rules or **legal maxims**. Although these rules have been largely replaced by the guidelines set out by parliament, it is still important to understand some of the maxims referred to by judges.

The maxim of ***ejusdem generis*** is particularly important. This term literally means 'of the same kind'. This rule of interpretation applies when judges are faced with interpreting the meaning of a section of an Act in which a number of specific terms are followed by a general term. This may sound a little confusing. Consider the following hypothetical example.

Parliament passes a law that requires a flagpole to be installed on every 'house, flat, bungalow or other dwelling'. Mr W owns a caravan that is his permanent home. He refuses to install a flagpole. In deciding whether Mr W has committed an offence, the court would need to consider whether a caravan is a 'dwelling' as referred to in the Act.

According to the *ejusdem generis* maxim, where specific words have been used to form a class, the general words immediately following that class should be given a meaning confined to that class. In this instance, the specific words are 'house, bungalow, flat'. The meaning of the term 'other dwelling' should be confined to dwellings used for the same purpose. A house, bungalow and flat are residential dwellings. Therefore, the term 'other dwelling' could be seen as applying to buildings used for residential purposes. Mr W's caravan is used for residential purposes. It could therefore be argued that his caravan is an 'other dwelling' for the purposes of this Act.

Table 10.5 Other maxims

expressio unius est exclusio alterius	The express mention of one term is to the exclusion of others.
ut res magis valeat quam pereat	It is preferable to preserve a piece of legislation than to destroy it.
noscitur a sociis	A word is known by 'the company it keeps' – or, as some legal texts say, 'words of a feather flock together'! The meaning of a word is limited by the words immediately preceding it.
lex non cogit ad impossibilia	The law does not expect a person to do that which is impossible (not merely difficult or inconvenient).

10.9 What effect does statutory interpretation have?

Statutory interpretation gives meaning to terms but does not alter the written words in an Act.

Statutory interpretation does not amend or change the printed words of an Act. The immediate effect of statutory interpretation is that the meaning of the words in the Act is determined in order to settle a dispute.

However, statutory interpretation can also have a number of other effects. Among other things, statutory interpretation can do the following.

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Table 10.6 Other effects of statutory interpretation

Form a precedent	If the decision has been made by a higher court, the reason for that decision will form a binding precedent to be followed by lower courts in the same court hierarchy in similar cases.
Limit the scope of the legislation	If the court gives a narrow or limited interpretation to words or terms, the interpretation may limit the range of circumstances that the Act may apply to.
Increase the scope of legislation	If the court gives a broad interpretation to words or terms, the interpretation may extend the range of circumstances that the Act may apply to.

Statutory interpretation can form a precedent for future cases.

Statutory interpretation can either broaden or limit the scope of an Act.

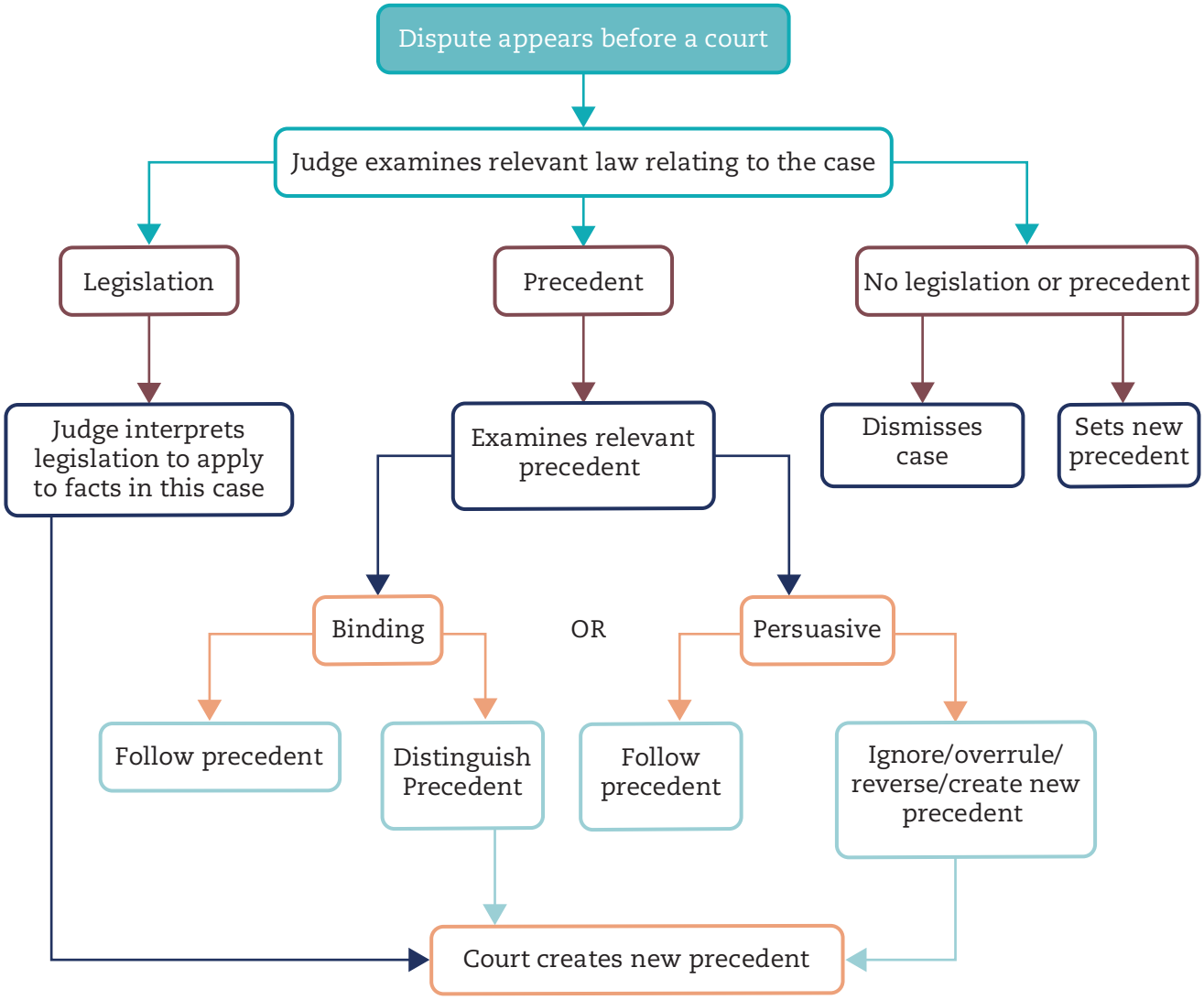

Figure 10.5 Law-making through the courts

Activity 10.6 Folio exercise

Statutory interpretation in action

Consider the decision of Justice Beach in the studded belt case in Legal brief 10.7, and complete the following tasks:

1 Explain the role of the court in this case.

2 The studded belt case highlights one reason for the meaning of a statute not being clear. List and discuss two other reasons for an Act of Parliament being diffcult to understand.

3 Outline the sources used by the judge to interpret the meaning of the word 'weapon'. What additional material could the judge have referred to in determining the meaning of 'weapon' for the purpose of the Act?

4 What impact do you think that the decision in this case may have had on changes made to the *Control of Weapons Act*?

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Legal brief 10.7

Is a studded belt a weapon?

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

A young man, aged 20, was apprehended by the police while purchasing food from McDonald's. He was wearing a black leather belt to hold up his pants. The belt, which he had purchased earlier from a market stall, had raised silver studs on it. He was charged with an offence under section 6 of the *Control of Weapons Act 1990* (Vic), which reads:

1 A person must not possess, carry or use any regulated weapon without lawful excuse. Penalty: 60 penalty units or imprisonment for 6 months. [now 120 units or 1 year]

2 A person must not carry a regulated weapon unless it is carried in a safe and secure manner consistent with the lawful excuse for which it is possessed or is carried or is to be used. Penalty: 10 penalty units. [now 20 penalty units]

3 In this section 'lawful excuse' includes:

- a the pursuit of any lawful employment, duty or activity; and
- b participation in any lawful sport, recreation or entertainment; and
- c the legitimate collection, display or exhibition of weapons, but does not include for the purpose of self-defence.

On 20 December 1990, the Governor-in-Council made the *Control of Weapons Regulations 1990* (Vic). Under these Regulations, a regulated weapon included any article fitted with raised pointed studs and which is designed to be worn as an article of clothing.

The young man was found guilty in the Magistrates' Court of possessing a regulated weapon. The young man subsequently appealed to the Supreme Court. The questions to be decided by the Supreme Court were:

- Is a studded belt a regulated weapon?
- Is wearing a studded belt to hold up trousers a lawful excuse for possessing the studded belt?

Looking at the purpose of the Act

The purpose of the Act was 'to regulate weapons other than firearms'. What constituted a 'weapon' was not defined in the Act, although objects that may be considered to be weapons were listed in the Regulations.

Using dictionaries

As the word 'weapon' was not defined in the Act, the judge had to use other references to determine the meaning: the *Oxford English Dictionary* and the legal encyclopaedia *Halsbury's Laws of England*. In *Deing v Tarola* [1993] 2 VR 163, Justice Beach stated:

> The Oxford English Dictionary defines 'weapon' as 'An instrument of any kind used in warfare or in combat to attack and overcome an enemy'.
>
> That would seem to me to be a particularly wide definition; not one which gives great assistance when construing the provisions of the Act and regulations made under it. Given a literal interpretation it could encompass such things as pieces of timber, lengths of piping, brickbats and the like. Indeed, in one view of the matter, it could include almost any physical object.
>
> It would seem to me that a more appropriate interpretation of the word 'weapon' is that appearing in *Halsbury's Laws of England* (3rd edition, Volume 10 at page 653). Then, when dealing with the phrase 'offensive weapon', the learned author says: 'Large clubs or sticks are offensive weapons. The expression includes anything that is not in common use for any other purpose but that of a weapon. But a common whip is not such a weapon; nor probably is a hatchet which is caught up accidentally during the heat of an affray.

Using precedent

The judge also referred to previous cases that had dealt with interpreting the meaning of 'weapon'. He referred to the case of *Wilson v Kuhl*; *Ryan v Kuhl* [1979] VR 315, in which the meaning of the term 'offensive weapon' was considered. In that case, the judge said that:

> Any physical article is an offensive weapon if it is an article of a kind normally used only to inflict or threaten injury. A knuckleduster is an article of this kind. In my opinion, an article such as a sawn-off shotgun is, of itself, an offensive weapon … An article of a kind which is not normally used only to inflict or threaten injury is an offensive weapon only if the person found armed with it had then any intention to use it for an offensive, that is, an aggressive purpose. A carving knife is an article of this kind.

The decision

Justice Beach concluded:

> The proposition that, without more, the possession, the carrying or the use of such a belt amounts to the possession [of a weapon], is a proposition I feel a reasonable man would regard with derision.
>
> The conclusion I have come to in the matter is that a studded belt is not a weapon; although like many other articles in common use throughout the community, [it] may be used as such. In that situation, I consider it is not within the regulating power of the Governor-in- Council to prescribe it as a regulated weapon …
>
> I consider it is a lawful excuse for possessing a studded belt that the belt is used to hold up the trousers of the person wearing it, or that it is being worn for decorative purposes. A belt, whether studded or not, is an article of wearing apparel. If a person's intent is to wear it as a piece of clothing or

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wearing apparel, such an intent is perfectly innocent. If a person has a completely innocent intent, as is the situation in the present case, then in my opinion that innocent intent constitutes a lawful excuse for that person's actions.

The judge ordered that the magistrate's order for the studded belt be forfeited and destroyed be quashed (set aside).

Parliament changes the law

Since this case was heard, the *Control of Weapons Act* has been amended. Neither the Act nor the Regulations refers to studded belts. The Act refers to 'dangerous articles'. A dangerous article is an article that has been adapted so that it can be used as a weapon or carried with the intention of being used as a weapon. The Act also provides that it is a lawful excuse to carry a dangerous article if you use the article for 'the purpose that it is designed or intended for'.

The 'studded belt' case is an example of statutory interpretation. Victoria parliament has since passed amending legislation to clarify the law on 'dangerous articles'.

10.10 The ability of judges and courts to make law

Courts can set a new precedent when they hear a case on which there is no clear statement of law.

Sometimes a case comes before the courts concerning a matter on which there has been no clear statement of law, or where the existing principles of law are out of date and require change. In these circumstances, having the matter resolved by the courts may result in a change in the law. Recent examples of such issues include disputes about the rights of the unborn child, surrogacy, access to reproductive technologies and the recognition of Native Title.

However, not all cases which come before the courts result in 'law-making' by courts. The factors that affect the ability of the courts to make law can be said to relate to:

- the limitations of the doctrine of precedent
- the willingness of judges to change existing law
- the costs and time involved in bringing a case to court; and
- the requirement for 'standing'.

The doctrine of precedent

The courts are not free to make law in the same sense as parliament is. Unlike parliament, judges cannot make law as an immediate response to a community demand or when a general need is perceived. The courts can act only to declare the legal principles that apply to the facts of the cases before them. In the majority of cases, judges have no discretion to make law.

'Novel' cases

Courts need a 'novel' or test case before a new precedent can be made.

Before a court can declare a new legal principle, it must wait for a **novel case:** a case concerned with a particular issue or legal question that has not been decided before in a court of superior record in the same hierarchy. A novel case is one in which the fact situation can be distinguished from the facts in previously decided cases (that is, the facts are different), and in which, therefore, no precedent applies. An example of a novel case is *Donoghue v Stevenson* (see page 391). A novel case is also called a test case.

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Test cases

Test cases are not common. In the first instance, parties must have sufficient financial backing to bear the costs involved in taking a court action. As such a case is *res integra* (a case of first impression) there are no guarantees that their claim will be successful. If the party bringing the case to court is unsuccessful, they risk having to meet not only their own legal costs, but also the costs of the other party.

Higher courts

For a new legal principle to develop, the case must be heard by a higher court.

The operation of the doctrine of precedent may mean that lower courts are not in a position to develop a new legal principle. The operation of *stare decisis* means that, in effect, only higher courts can make or change a binding precedent. For a change to occur, the case presented before the higher court must concern a new fact situation to which no existing binding precedent applies. Even so, the court can only reach a decision in relation to the information presented in that individual case. It cannot change entire areas of law in the same way that parliament can.

Judicial conservatism or activism

The judge must be prepared to adopt a law-making role.

For a court to change the law, a case must come before a court in which the judges are prepared to adopt a law-making role. **Judicial conservatism** is when a judge may declare that the plaintiff has no cause of action under common law and dismiss the case. But another judge may decide that there is nothing to prevent the court from deciding the case. They may also adopt a narrow interpretation of legislation when deciding cases, thereby avoiding controversy. Such a judge may be aware of the need to develop the law – this is sometimes referred to as **'judicial activism'**.

For courts to have the ability to make law, either by statutory interpretation or setting a new legal principle, a case must come before a court. Then, if relevant, the judge must be prepared to take a law-making role.

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What is judicial activism?

Chief Justice RS French, in 'Judicial Activism – The boundaries of the judicial role', writes:

> Australian constitutional law academic, Professor Craven, has offered three definitions which are really one, relating respectively to the common law, the statute law and to the Constitution. Judicial activism in his view involves the conscious development of the common law according to the perceptions of the court as to the direction the law should take in terms of legal, social or other policy. It exists in relation to statute law where a court consciously adopts an interpretation of statutory language which goes well beyond the ordinary import of the words because the court believes that an extended interpretation is necessary to give effect to the true legislative intention or because it wishes to frustrate an unpalatable legislative intention. In connection with constitutional interpretation he appears to equate activism with 'progressivism'. This he describes as an approach to constitutional interpretation which requires continual updating of the Constitution in line with the perceived community and social expectations rather than according to its tenor or [in] conformity with the intentions of those who wrote it.

Over the years, the role of judges as law-makers has been debated at length. The degree to which judges are prepared to distinguish one case from previous cases will depend in part on the judges' view of their role in the law-making process, and some judges are reluctant to be seen as law-makers. In order for the courts to be properly involved in the law-making process, they must assert their power to bring about a change in the law.

The case of *Donoghue v Stevenson* ultimately resulted in judges looking beyond the contractual relationship between parties and considering the scope of the duty of care owed by one party to another. This case is a good example of judicial activism (but in the Australian context, it did rely on the judges in the *Grant v Australian Knitting Mills* case being prepared to follow the House of Lords' departure from the 'norm').

Courts can also be very conservative. In 1985, the Victorian County Court, hearing a marital rape case, applied an English precedent from the 1700s. This precedent stated that a 'husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract'.

It took less than a month for parliament to step in and amended the *Crimes Act* to remove the marital exemption to rape.

The case of *State Government Insurance Commission v Trigwell* [1979] HCA 40 is another example of judicial conservatism. In this case, a 1947 English precedent that farmers did not owe a duty of care to road users if their stock strayed onto roads was upheld (see Legal brief 10.8).

Costs

The parties must have the financial resources to take a case to court.

Court action, especially before our higher courts, is expensive. Individuals may therefore be reluctant to take novel cases to court due to the uncertainty of the outcome. There are court fees and legal costs. Court fees are payments to the court for the costs of legal proceedings. These include the costs of filing a writ, and other procedures requiring the services of a court officer.

Legal costs are the fees and charges of a solicitor for the legal services that they provide, which may include disbursement costs such as the barrister's fees and costs of expert reports. A Senior Counsel (a top-level barrister) may charge more than $500.00 an hour.

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Table 10.7 Sample of fees and charges, Supreme Court 2019–2020

Supreme Court	
	Standard fees
Commencement Commencing a proceeding or an appeal (other than an appeal from an associate Judge or Judicial Registrar)	$ 742.00
Commencement of a counterclaim under Order 10 of Chapter 1; or a third party proceeding; or a claim by a third or subsequent party under Order 11 of Chapter 1	$ 742.00
Case Management Commencement of an interlocutory application within a proceeding including the first day of hearing that application For every sitting of a Judge, an Associate Judge, a judicial registrar or a court official at mediation – per half day or part of a half day	 $ 576.10 $ 306.60
Setting down and hearing Setting down of a trial or appeal For hearing a trial or an appeal for the first day – per day or part of a day for days 2 to 4 – per day or part of a day for days 5 to 9 – per day or part of a day for day 10 and subsequent days – per day or part of a day	 $ 835.30 $ 613.15 $ 835.30 $1301.80 $1858.70
Jury fees On setting a proceeding down for trial by a jury in the Supreme Court or the County Court On days 2 – 6 On day 7+	 $ 804.20 (first day jury of 6) $ 577.80 $ 1146.00

'Indexation of fees and penalties – Department of Treasury and Finance'. Source: Supreme Court of Victoria – Prothonotary's Office Fees (effective July 2019)

A person taking a civil action may face considerable expense. The costs in Table 10.7 are an indication of some of the costs of taking a civil action to court.

Time

For a new precedent to be set, the parties must be determined to proceed with the court action. However, some cases cannot proceed immediately after an injury or damage is suffered – time may be needed for medical treatment or for an injury to stabilise. During this process, costs may be incurred.

The parties may also need time to seek legal advice, or to negotiate a resolution without taking legal action. The pre-trial procedures used to resolve civil disputes also take time. There can be delays at any stage of all these processes, and they all add to the time taken to resolve disputes.

A decision by a court about what the law should be is not always reached quickly. Courts cannot reach a decision before they hear all the arguments put by both parties. In complex cases, this can take a considerable amount of time. A final determination as to what the law should be, may not be reached until after a case has been heard on appeal. This may take years – which means the law can be slow to change. The Mabo case (see News report 10.1) took 10 years.

Standing

For more information about civil procedures see Chapter 5.

'Standing' (*locus standi*) is the right of a party to start a legal action in a court. A party will have standing if they have what is considered sufficient connection to, and interest in, the court action. To put it another way, a person has 'standing' if they are directly affected by an action which would continue unless relief is granted by an order of the court. If the person does not stand to lose something, they do not have 'standing'.

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Demonstrating a special interest

Generally, a person's standing is clear and not in dispute. The common law test for standing is that the person has either a private right that is affected (such as a property right) or can demonstrate that they have a 'special interest' in the matter. When the standing of a party is disputed, the parties need to demonstrate that they have a special interest. The most common examples of a party claiming a special interest are:

- a public interest group challenging a policy of a government which is a concern for the group
- a trade union or association challenging a government decision that affects their members
- a commercial entity challenging a government decision that they claim is to the benefit of a competitor
- a person challenging a government decision that is a concern to them even though it does not affect their rights.

'Standing' is crucial in both common law and statute in Australia. The relevant statute law is the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the common law relating to standing is found in decisions of the High Court of Australia. When a party's standing is denied, the party may appeal, but this will happen only if the party is again prepared to risk the costs of such an action. As already mentioned, for any change to occur, the case may need to come before a judge who is willing to adopt a new direction in precedent.

The leading case in this area is *Australian Conservation Foundation v Commonwealth* [1980] HCA 53. In this case, the Australian Conservation Foundation objected to the approval of a proposal for a company to establish and operate a resort and tourist area at Farnborough, in Central Queensland. The case went all the way to the High Court, and the first issue for them was whether the Foundation had *locus standi*.

Gibbs J, in his judgment, indicated that the common law test for standing is whether the plaintiff has a 'special interest in the subject matter of the action'. He later concluded:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it. It is quite clear that when the rule is thus understood, the Foundation has no special interest in the preservation of the environment at Farnborough …

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Legal brief 10.8

Are farmers responsible for animals that stray?

Australian law about the liability of farmers for animals straying onto highways was based on a long-standing British precedent. This precedent dated back to the times when farms did not have fences, before the invention of cars or the development of major roads and highways. The legal principle was that owners of land adjoining a road were under no legal obligation to fence in animals to avoid their straying onto the road. Farmers did not 'owe a duty of care' to road users. This rule was upheld in the English case of *Searle v Wallbank* [1947] 1 All ER 12.

This law applied to all Australian states that had not passed legislation on the rights of farmers and road users. The application of the legal principles of *Searle v Wallbank* was challenged in *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617.

Trigwell's case

As a result of the court decision in the Trigwell case, Victoria parliament passed legislation to abolish the common law principle that related to straying farm animals.

In this case, a woman was travelling at night along a road in rural South Australia. When she saw a car approaching from the opposite direction she dipped her car headlights. However, as her headlights were on low, she did not see two sheep that had strayed onto the road from a nearby farm. In the collision with the sheep, the car swerved across the road and collided with the oncoming car, in which the Trigwell family was travelling. The woman driving the car was killed and members of the Trigwell family were seriously injured.

The Trigwells sued for the damages caused by the accident. They claimed that the accident was caused by the negligence of:

- the farmer in failing to ensure that his sheep did not escape through broken fences; and
- the driver of the other car.

The State Government Insurance Commission was the deceased driver's insurance company. They would be responsible for paying for any damages caused by the negligent actions of the driver. The Supreme Court of South Australia decided that the State Government Insurance Commission had to pay the Trigwells for the damages resulting from the negligent actions of the driver.

Evidence was presented to the court that indicated that the driver had not tried to slow down after hitting the sheep. This evidence was sufficient to convince the judges that there had been a failure on the part of the driver to exercise reasonable care. However, the Court decided that the farmer, who had not repaired his fences and had thereby failed to stop the sheep from straying onto the road, was not liable, under the legal principles established in *Searle v Wallbank*.

The State Government Insurance Commission appealed to the High Court against the decision of the Supreme Court of South Australia.

The High Court decision

The High Court decided that the legal principles developed in *Searle v Wallbank* applied in Australia, and their decision in this case was a binding precedent on all state courts. Unless a State had legislated to override the common law relating to stray animals, the courts were bound to apply this precedent. To overcome this problem, the Victorian parliament later passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic). Similarly, the South Australian parliament legislated in 1983 to limit the application of the precedent in that State.

Are courts law-makers?

The statements made by the judges in Trigwell's case reveal the attitudes that some judges have to the role of the courts in changing the law.

The court is not a legislator

Justice Mason (who represented the majority view) stated:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular circumstances or conditions, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency.
>
> Its responsibility is to decide cases by applying the law to the facts found. The court's facilities, techniques and procedures are adapted to that responsibility; they are

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not adapted to the legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for and examine submissions from groups or individuals who may be vitally interested in the making of changes to the law.

Common law adapts to change

Justice Murphy, in his dissenting judgment, stated that:

> a judge in a common law system may rightly refuse to follow precedent which is absurd, contrary to reason, or plainly inconvenient … The virtue of the common law is that it can be adapted day-to-day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that parliament must intervene. The extreme case is where the judiciary recognises that a rule adopted by its predecessors was either unjust or has become so and yet it still maintains it, suggesting that the legislature should correct it. This is a nadir of the judicial process. The results of legislative intervention often produce difficulties … because legislation does not fit easily with 'seamless fabric' of the common law.

10.11 The relationship between courts and parliament

In contemporary Australian society, there is a complex range of laws. These laws are necessary to protect the rights of individuals and to achieve social cohesion. The dynamic relationship between parliament and the courts in law-making is crucial to maintaining the effectiveness of these laws.

Supremacy of parliament

As stated earlier, parliament is the supreme law-making authority, answerable to the people. It should be remembered that courts only exist because they were created by Acts of Parliament. For example, the High Court of Australia is provided for by the *Commonwealth of Australia Constitution Act 1900* (UK), and the Victorian Supreme Court, founded in 1852, derives its authority from the Victorian Constitution. A court's authority, including its jurisdictional limit, has been set by parliament. Since parliament can make or unmake any of its own laws (subject also to the relevant Constitution) it follows that, other than the High Court, a parliament can both limit the authority of a court and abolish it.

If parliament passes a law outside its constitutional power, the courts may declare it *ultra vires*: outside that body's law-making power.

Parliament can pass a law to override the common law made by the courts. The courts can declare a law made by parliament ***ultra vires*** when it exceeds the law-making authority set out in the Constitution.

The codification of common law

Parliament may decide to bring common law principles within statute law. This process is known as '**codification**'. This means that the common law is restated in Acts and becomes statute law.

The abrogation of common law

Parliament may also abolish common law principles it disagrees with. This is referred to as 'abrogation'.

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Parliament can pass laws to either abrogate (override) or codify (restate) common law.

Justice Gibbs, in *Australian Conservation Foundation v Commonwealth* [1980] HCA 53, clearly stated that it is the responsibility of parliament, not the courts, to abrogate:

> In any case, if the law is settled, it is our duty to apply it, not to abrogate it. It is for the Parliament, whose members are the elected representatives of the people, to change an established rule if they consider it to be undesirable, and not for judges, unelected and unrepresentative, to determine not what is, but what ought to be, the law.

Parliament's ability to codify and abrogate common law is an important aspect of the relationship between courts and parliaments as law-makers. The *Mabo* case and the *Native Title Act 1993* (Cth) (see 'Eddie Mabo's epic fight for land rights changed Australian law and history', News report 10.1) is an example of codification, and the Victorian parliament's response to Trigwell's case and the Widow's discount case are examples of abrogation.

Animals straying on highways – abrogation in action

After Trigwell's case (Legal brief 10.8) held that farmers were not responsible for the damage done by their animals that strayed onto roads, the Victorian parliament acted to abrogate (that is, legislatively abolish) this decision. It passed the *Wrongs (Animals Straying on Highways) Act 1984*, which altered the law so that farmers were responsible for the actions of their animals on the roads.

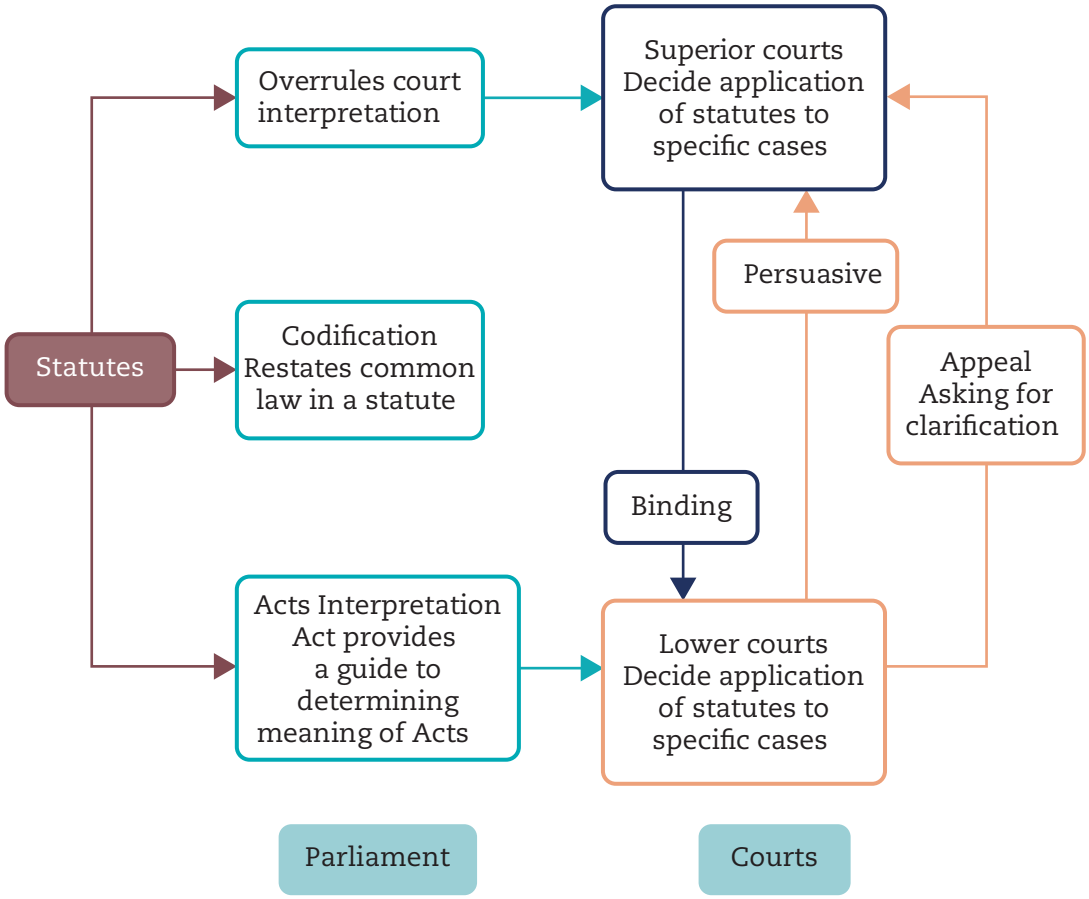

Figure 10.6 Relationship between parliament and the courts in law-making.

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Legal brief 10.9

Widow's discount

A Western Australian widow, Teresa de Sales, whose husband drowned, claimed damages under Western Australia's *Fatal Accidents Act 1959*. This Act gave widows access to compensation for economic or material disadvantage caused by the death of their spouse.

In 2000, the WA District Court reduced the original compensation awarded to her by 5% ($120 000). In an appeal to the Full Court of the Supreme Court of Western Australia, this reduction was increased to 20%. The Full Court cited 'remarriage contingency', known as the 'widow's discount,' as the basis for the reduction.

The Full Court decision was based on a precedent set by an 1863 ruling in England and Australian legal precedents in the 1930s. England changed its law in 1971 to make remarriage prospects irrelevant in calculating compensation, but the precedent remained in Australia. Early last century, most women were financially dependent on their husbands and widows were expected to remarry to survive economically. Today, these assumptions are seen as sexist and not consistent with our community values.

An appeal to the High Court in November 2002 reversed this decision, but there was still concern that the widow's discount could apply to other women in future cases. The Victorian parliament responded in 2004 by passing the *Wrongs (Remarriage Discount) Act* to clarify the law in Victoria.

Teresa de Sales

10.12 The ability of courts to influence parliament

Courts can influence parliament in law-making.

The courts are responsible for determining the day-to-day application of the law. Courts will do this in two ways.

1. If a case comes before the court, the court will look at statute law to determine what the law is. In order to do this, the court will need to interpret or give meaning to the words used in Acts. Through interpretation of words in statutes challenged in court cases, courts are able to ascertain what parliament meant when passing that legislation, and then apply either a literal (narrow) or liberal (wide) interpretation. A court's reason for deciding the meaning of words or phrases in an Act also forms a *ratio decidendi*.

   The decision of a court about the interpretations that should be applied to words or phrases in an Act therefore becomes a precedent, which will be used for later cases. Then the legislation and the precedent must be read together. In many instances, the court's interpretation may result in the need for amendment to the Act in question.

   At times, the interpretation given to legislation may not be that foreseen by the parliament, or at least the government, when the legislation was introduced. However, parliament is the ultimate law-making body. If parliament does not agree with a court's interpretation of a statute, it can amend the statute to overrule the court's interpretation.

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Where there is no existing statute law, judges may apply precedents.

2 Judges make law when deciding on a case for which there is no existing statute or common law. At these times, courts break new ground. The reason for the court's decision, the *ratio decidendi*, is then binding on lower courts in future cases. In some circumstances, parliament may have failed to legislate on an issue because of the issue's complexity or because it is controversial. Since courts are independent of the political process, they may be able to make laws that parliament finds difficult. Courts thus have an important role of 'filling the gaps' left by parliament. Parliament may later decide to legislate to fill the gaps. This occurred in the Mabo case.

Eddie Koiki Mabo

News report 10.1

Eddie Mabo's epic fight for land rights changed Australian law and history

Eddie Mabo's love for his homeland drove the proud Torres Strait Islander to undertake a 10-year legal battle that rewrote Australia's history.

Tragically, he would not live to see victory.

Just after his death in early 1992, the highest court in Australia ruled in his favour in a case that reshaped our laws and became synonymous with Mabo's name.

'Oh, the Aboriginal guy. Told the government to shove it,' said Darryl Kerrigan, in *The Castle*.

Eddie Koiki Mabo was born on Murray Island, in the Torres Strait, on June 29, 1936.

A member of the Meriam people, who know the island as Mer, Mabo was adopted and raised by his uncle, from whom he took his name, after his mother's death.

He was expelled from the island for breaking customary laws when he was 16, and travelled around northern Queensland working various jobs.

He eventually settled in Townsville, where he married Bonita Nehow at age 23.

Bonita was a traditional owner of nearby Palm Island, and together they would have ten children.

Speaking in 1993, she said her husband started to question his rights in 1969, when he tried to return to Murray Island to visit his dying father, only to be refused entry by authorities who feared he was a troublemaker.

'That's when he started talking about his land,' she said.

Mabo started work as a gardener at James Cook University when he was 31, and it was here a chance conversation would shake his understanding of his people's land to the core.

Having lunch in 1974 with historian Henry Reynolds and academic Noel Loos, Mabo was shocked when they explained that his people's traditional ownership of the island was not recognised by Australian law.

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The courts worked on the principal that Australia was *terra nullius* – 'land belonging to no one' – prior to European settlement.

The state of Queensland annexed Murray and other Torres Strait islands in 1879, and according to *terra nullius*, owned that land.

Speaking to *The Australian* last year, Professor Reynolds remembered Mabo's reaction.

'He said, "Everybody knows it's Mabo land, it's been Mabo land for generations – no one would dream of trying to move in on it",' he said.

Professor Reynolds said the revelation 'struck the spark' for Mabo's legal battle.

In 1982, Mabo and four other Torres Strait Islanders – Celuia Mapo Salee, Sam Passi, Father Dave Passi and James Rice – started legal action against the State of Queensland to establish who owned the island.

Queensland's Bjelke-Petersen Government was so concerned by the case, [that] it passed laws to cement ownership of the Torres Strait Islands.

Those laws were quashed by the High Court in 1988 in what become known as *Mabo I* – the first step towards his ultimate victory.

In 1990, Justice Martin Moynihan of the Queensland Supreme Court handed down findings on a series of disputed facts involved in the case.

Justice Moynihan was highly critical of Mabo and rejected his claim to land on Murray Island.

He did conclude, however, that the Meriam people lived on the island prior to European settlement, in a society where land was divided and owned by individuals and families.

Those findings were then used in Mabo's favour when the case went to the High Court.

On June 3, 1992, ten years after the epic legal saga began, the High Court ruled by a six-to-one majority that the Meriam people held native title over Murray Island.

The decision ended the legal fiction of terra nullius, and was the first time Native Title was recognised in Australia.

The Prime Minister at the time, Paul Keating, applauded the decision, saying it removed the greatest barrier to reconciliation.

'By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for justice,' Mr Keating said in his historic speech at Sydney's Redfern Park.

'There is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include Indigenous Australians.'

In 1993 the Federal Parliament passed the *Native Title Act*, which established a legal framework for Native Title claims throughout the country.

But Mabo was not there to see his victory. He died of cancer, aged 55, just five months before the High Court's decision.

Only two of the original five Murray Island plaintiffs were alive by the time the ruling was handed down.

On the third anniversary of the decision, a traditional 'tombstone ceremony'was held at Mabo's grave in Townsville.

That night his grave was vandalised and painted with swastikas and racial slurs.

Mabo's body was moved to Murray Island, the land he dedicated his life to.

He was buried in a traditional ceremony reserved for Meriam Kings, which had not been performed for over 80 years.

Source: Patrick Hatch, Herald Sun*, 5 April 2013*

Eddie Mabo's grave, Mer Island in the Torres Strait

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News report 10.2

Why has the law about abortion been so slow to develop?

Until 2008, section 65 of the *Crimes Act 1958* (Vic) stated that procuring an 'unlawful' abortion was a serious crime. However, the Victorian parliament did not define when an abortion was 'unlawful'. It left the determination of this (that is, when an abortion was unlawful, and when it would be legal) to the courts. The courts came to hold that, in Victoria, abortion was legal only in certain conditions – generally, where the health of the mother is 'in danger'. Thus, the real application of the law was set in precedent rather than in statute.

Menhennitt ruling

In a test case decided in 1969 (*R v Davidson* [1969] VR 667), Justice Menhennitt of the Victorian Supreme Court ruled that an abortion was lawful if the doctor 'honestly believed on reasonable grounds that the act done by him was … necessary to preserve the woman from a serious danger to her life or her physical or mental health'. Although in theory a higher court could overturn the ruling in this case at any time, it remained unchallenged for over 30 years.

Following the Menhennitt ruling, abortions were permitted where a doctor honestly believed that it was necessary to preserve the woman from serious danger to her life, or to her physical or mental health.

High Court appeal

In 1996, the High Court faced a potential test case on abortion when an appeal was lodged from a NSW medical negligence case. The case concerned a woman who became pregnant in the 1980s and gave birth to a healthy child. The single mother's pregnancy was not diagnosed by her clinic until it was too late for her to have an abortion. This, she claimed, deprived her of the right to have an abortion and forced her to have a child.

The woman sued for the costs relating to having and rearing a child. The NSW Supreme Court dismissed the case, ruling that the woman had no right to claim damages because abortion was illegal in that State. This decision was overturned by the NSW Court of Appeal.

A subsequent appeal was lodged with the High Court. The emergence of a High Court test case on abortion again fuelled community debate about the legal status of abortion.

The community debate

It has been suggested that it is not appropriate for the courts to decide cases such as this, which involve complex moral issues. The courts are not in a position to assess community attitudes and it is inappropriate for judges to impose their own personal standards on the community as law.

Others suggest that it is better that the courts interpret laws on abortion. It would be difficult to legislate to ensure that the law reflects the values of all sections of the community and adequately covers all circumstances.

Possible impacts

These difficulties are borne out by the events leading up to the High Court appeal. The Australian Catholic Health Care Association was given legal advice that the case could establish a precedent requiring the 57 Catholic hospitals throughout Australia to advise women about termination. This is something that Catholic hospitals were not required to do at the time – and a legal condition they may find difficult to fulfil. The Association applied to argue their position as a 'friend of the court' in the case. They argued that the court should not recognise a claim for the loss of an opportunity to terminate a pregnancy because it is not lawful to terminate.

The Abortion Providers Federation of Australasia also applied for status as a 'friend of the court'. They argued that 'if the status quo is to be disturbed it should be done by parliament, not judicial decision'.

So with powerful interest groups involved, a medical negligence case was poised to bring the whole abortion issue to a head in the High Court. The High Court was spared the difficult decision when the parties decided to settle the case out of court. However, for the medical profession, the law was still unclear. Abortion remained a criminal offence except in the circumstances defined by the common law that made it lawful.

Review and reform

In 2007, Victorian MP Candy Broad proposed a private member's Bill to decriminalise abortion. The private member's Bill was withdrawn when the Victorian Premier, John Brumby, announced moves to refer the issue of abortion to the Victorian Law Reform Commission for investigation. The Victorian government undertook to act on the advice of the Victorian Law Reform Commission, which eventually reported back recommending its decriminalisation. On 10 October 2008, the Victorian parliament passed the *Abortion Law Reform Act 2008* (Vic), which gives women the right to an abortion, free from fear of criminal charge, until 24 weeks' gestation. After that, the Act states that abortions may still be performed, but that two doctors must believe it appropriate on medical grounds. Doctors with conscientious objections may refer women to another doctor who does perform abortions. There was strong pressure both for and against change in the law, with both pro-choice and anti-abortion protesters attempting to influence parliament.

While public protests continue – for example, the annual 'March for Babies' – the basic tenet of the 2008 Act remains the law in Victoria. Victoria has the most liberal abortion laws in Australia.

A 2015 Bill – the Infant Viability Bill – proposed that abortions, except for medical emergency, be prohibited after 24 weeks and that, in the case of a medical emergency, the end of pregnancy should be performed in such a way that still gives the preborn child the best chance of survival. Parliament did not pass this Bill.

In 2016, a successful amendment to the *Public Health and Wellbeing Act 2008* (Vic) provided for safe access zones of 150 metres outside places where abortions are conducted. This change was brought about in response to long-standing harassment from protesters outside abortion clinics.

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Activity 10.7 Folio exercise

Understanding native title

1 What was the legal principle of *terra nullius*?

2 What was the role of the High Court in determining whether or not native title existed?

3 Justice Brennan stated, in *Mabo and Others v State of Queensland (No. 2)* (1992) 175 CLR 1:

> It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in this land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.

- What factors did the High Court take into consideration when deciding whether or not the common law concept of *terra nullius* should be applied?
- Suggest why it is 'imperative in today's world' for the common law not to be seen to be 'frozen'.
- How far does the set of rules that make up the doctrine of precedent restrain the courts from changing the law to meet the changing needs of society?

4 What impact did the *Native Title Act* have on the High Court Mabo case ruling? In your answer you should refer to the term 'codification'. Explain the relationship between parliament and the courts in law-making.

Activity 10.8 Folio exercise

Making judgments on abortion

Read News report 10.2 'Why has the law about abortion been so slow to develop?' and complete the following tasks:

1 Briefly summarise the law concerning abortion before 2008. How has this been affected by judicial decision? Why do you think parliament left it to the courts to decide when an abortion was unlawful?

2 'Making and interpreting laws on abortion has been notoriously diffcult.'

- What do you think are the weaknesses of relying on court interpretations to determine when an abortion has been (or will be) unlawful?
- If the community became dissatisfied with the way in which the courts have interpreted these laws, what action could be taken? What would be the effect?

3 It has been suggested that the independence of courts makes them the best law-makers to deal with controversial and divisive issues such as abortion.

- What are the strengths of including the courts in the law-making process?
- Do you agree with the above statement? Why/why not?

Activity 10.9 Folio exercise

Judge-made law and change

A famous English judge, Lord Denning, described the role of judges in changing the law: 'On the one hand there were the timorous souls who were fearful of allowing a new course of action. On the other hand were the bold spirits who were ready to allow it if justice so required … '

1 What is 'judge-made' law? Explain the operation of the doctrine of precedent. How can it result in a change in the law?

2 What factors limit the effectiveness of the courts in bringing about a change in the law?

3 To what extent does the fact that a judge is a 'bold spirit' or 'timorous soul' affect the capacity of courts to change the law?

4 What is statutory interpretation? What is the relationship between the doctrine of precedent and statutory interpretation?

5 Describe the relationship between parliament and the courts in law-making.

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Key point summary

Do your notes cover all of the following points?

❑ Courts play two roles in the law-making process: common law and statutory interpretation.

Common law

❑ Common law is the law that has evolved through the decisions of judges. Originally, the term referred to the general principles of law that applied throughout the English courts. Common law was developed by judges looking back at previous decisions in past cases to determine what the law should be.

❑ A precedent is a reported judgment of a court that establishes a point of law.

❑ A reported decision will contain three key elements:
- a decision *inter partes* – the decision between the parties
- the *ratio decidendi* – the legal principle the decision is based on
- possibly *obiter dicta* – statements of opinion that do not form the legal reasoning for the current decision.

❑ The operation of precedent is based on the principle of *stare decisis*.

❑ *Stare decisis* means that a court will stand by what has been decided:
- a precedent can only be set by a superior court in the same hierarchy
- for a decision to be considered a 'binding precedent' it must be made by a superior court (usually in the exercise of its appellate [appeal] jurisdiction)
- all lower courts are bound by the decisions of higher courts in the same hierarchy in like cases
- decisions of courts at the same level are not binding.

❑ Binding precedent: A precedent will be considered to be binding if:
- there is a 'like' fact situation; and
- it is made by a superior court in the same hierarchy.

❑ Persuasive precedent: A persuasive precedent is a convincing argument. It does not have to be followed. A precedent will be considered persuasive if:
- it is the *ratio decidendi* of a court at the same level or lower level in the same hierarchy
- it is the *ratio decidendi* of a court from another hierarchy
- the *obiter dicta* contained in a judgment of a court in the same hierarchy or different hierarchy.

❑ Flexibility in precedent
- following a precedent – where a later court hears a case and applies a precedent to resolve the dispute
- reversing a precedent – where a higher court hears a case on appeal and decides that the lower court has wrongly decided the case, it may reverse the decision
- overruling precedent – where a case coming before a higher court relies on a legal principle that has been formed in an earlier case decided in a lower court, the higher court may determine that the earlier case was wrongly decided
- disapproving – where a judge refuses to follow the decision of another judge at the same level in an earlier case, or when a judge in a lower court expresses concerns about the application of a precedent but is still bound to apply it
- distinguishing – where a judge finds that the material facts of a case are different from the facts in an earlier case and decides that the precedent in the earlier case should not be applied

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Statutory interpretation

- Statutory interpretation is the process by which courts determine the application of words, terms and phrases used in Acts of Parliament and delegated legislation. Statutory interpretation decisions are an example of courts making precedents, this time about the meaning of words in legislation.
- Reasons for statutory interpretation:
  - problems in drafting a Bill.
  - inaccurate directions or instructions to the Parliamentary Counsel
  - difficulties in predicting future circumstances
  - time pressure may lead to errors or poor expression
  - lengthy Bills or numerous amendments may lead to inconsistencies
  - Bills may relate to a technical area in which the Parliamentary Counsel may not have expertise
  - lack of communication between the Parliamentary Counsel and the minister who is tasked with proposing the Bill.
- Wording and definitions:
  - disputes about the meaning of terms and phrases
  - words may have more than one meaning or the terms used may be too broad – the meaning of words and terms changes over time
  - a word may not encompass recent changes
  - possible conflicts with other Acts.
- Other reasons:
  - to avoid loopholes
  - to avoid contradictions between Acts
  - because legislation has become out of date and needs to be revised.
- Guides to interpreting statutes
  - Intrinsic – interpretation of sections within Acts
    - long title
    - purposes or objectives of the Act
    - definitions
    - margin notes
    - footnotes
  - Extrinsic – sources outside the Act:
    - dictionaries
    - legislative guidelines: *Acts Interpretation Act 1901* (Cth), *Interpretation of Legislation Act 1984* (Vic)
    - previous decisions.
- The decisions made by courts about the meaning of terms, phrases or words in an Act form precedents to be followed in subsequent cases.
- Impact of statutory interpretation:
  - statutory interpretation does not amend or change the printed words
  - the immediate effect of statutory interpretation is that the meaning of the Act is determined in order to settle a dispute
  - other effects of statutory interpretation:
    - forms a precedent
    - limits the scope of the legislation
    - increases the scope of the legislation.

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Factors that affect the ability of courts to make law

- The factors that affect the ability of the courts to make law can be said to relate to:
  - the limitations of the doctrine of precedent
  - the willingness of the judges to change existing law (judicial conservatism, judicial activism)
  - costs and time in bringing an action
  - requirement for standing.
- Courts can only consider the law when a case comes before them for decision, and to break new ground the case has to be a novel (or test) case and heard by a higher court.
- The approach taken by judges can either hinder (by being too conservative) or assist (by being what is called 'activist') the capacity of courts to make law.
- Parties face considerable costs – legal costs and court costs – in bringing a case to court.
- It can take considerable time before a matter comes to court, then add the trial time and possibly time for an appeal. This, plus the high cost of litigation, can deter people from testing the law.
- All parties to a case must have sufficient connection to and interest in the court action to support their participation in a case. This is called having 'standing' to take a matter to court.

Relationship between courts and parliament in law-making

- Where statute law and common law conflict, statute law prevails. This is because parliament is the supreme law-making authority.
- Courts give meaning to the terms used in Acts in order to apply them to specific cases.
- The decisions made by courts about the meaning of terms used in an Act form a precedent for future cases.
- Parliament may legislate to abrogate or codify the decisions made by a court.

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End-of-chapter questions

Revision questions

1 What is the doctrine of precedent?

2 Define the following terms:

- binding precedent
- persuasive precedent
- *stare decisis*
- *obiter dictum*
- *ratio decidendi*
- overruling
- reversing
- distinguishing
- disapproving.

3 Explain how the application of the doctrine of precedent can result in a change in the application of the law.

4 Define statutory interpretation.

5 Describe the role of the Parliamentary Counsel in the law-making process.

6 Outline reasons for an Act needing to be interpreted by a court.

7 List the guides or rules that judges use to help them in determining the meaning or purpose of an Act of Parliament.

8 Describe the relationship between parliament and the courts as law-making bodies.

9 'A number of factors limit the ability of courts to make laws.' Discuss.

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Practice exam questions

1 Define the terms *ratio decidendi* and *obiter dicta*. Distinguish between the meanings of the two terms. [4 marks]

2 Under what circumstance can a judge distinguish a case? [2 marks]

3 A legal critic once said, 'Parliament cannot make laws that override decisions made by the Supreme Court of Victoria.' Is this statement correct or incorrect? Explain your answer. [3 marks]

4 Distinguish between a binding precedent and a persuasive precedent. [4 marks]

5 Explain why the principle of *stare decisis* is essential to the operation of the doctrine of precedent. [4 marks]

6 'In a recent decision the Supreme Court of Victoria (Trial Division) established a new precedent.' To what extent are judges bound to follow the new precedents in future cases with similar fact situations? [5 marks]

7 A man who started his car so that a friend could drive him home lost his appeal in the Supreme Court. The man, found by police sitting behind the driver's wheel with the engine running, had a blood alcohol concentration in excess of 0.05%. He claimed he was not attempting to drive the car. The Supreme Court was asked to consider whether the phrase 'start to drive' had the same meaning as 'attempting to drive'. The court found that the words 'start to drive' mean 'to cause the engine to fire'. As the man was sitting in the driver's seat and had started the engine, he was 'in charge of the vehicle' within the meaning of the *Road Safety Act 1986* (Vic).

   a Explain why a court may need to interpret legislation. [4 marks]

   b Outline the process and sources of information that the Supreme Court judge would have used to interpret the *Road Safety Act 1986* (Vic). [8 marks]

8 Other than statutory interpretation, describe one other relationship between courts and parliament in law-making. [2 marks]

9 Discuss the impact of judicial conservatism and judicial activism on the ability of the courts to make laws. In your response, refer to cases as examples. [8 marks]

10 'The system of precedent is undemocratic and inflexible.' Do you agree? In your answer, consider the factors that affect the ability of courts to make law. [8 marks]

11 Using examples, analyse the ability of courts to influence parliament to change the law. [6 marks]

12 'The role of the courts is to resolve disputes. The doctrine of precedent simply ensures that disputes are resolved fairly.' Referring to this statement, explain how courts make law. Include definitions of the terms 'reversing', 'overruling', 'distinguishing' and 'disapproving' in your answer. [10 marks]

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The Victorian parliament upper house debates the Voluntary Assisted Dying Bill 2017 on 21 November 2017. The historic voluntary euthanasia Bill passed the lower house after 26 hours of debate.

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Chapter 11

Unit 4 – Area of Study 2

Reforming the law

This chapter explores the influences on laws and law reform. It looks at why laws need to be reformed, the influences on laws, including the influences of individuals and groups on law reform and how the media can influence law reform. This chapter also examines how the Victorian Law Reform Commission, Royal Commissions and parliamentary committees can have an impact on laws and influence law-makers. This chapter looks at examples during the past four years of the law reform bodies recommending legislative change.

Protesters demanding action on climate change.

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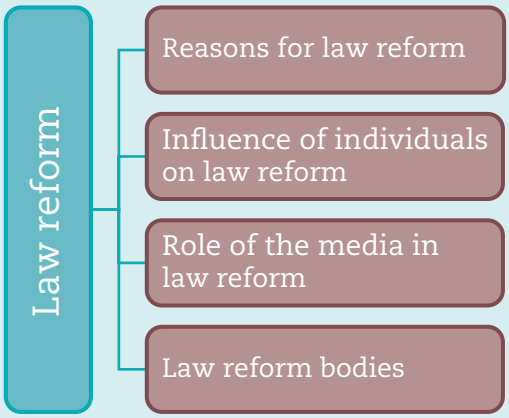

Key terms

boycott a group action carried out by individuals who refuse to buy an item or participate in a particular activity

demonstration a public exhibition of sympathy or support for or opposition to a particular issue; may take the form of a march or rally

e-petition an electronic petition; allows individuals to submit petitions, to share information about petitions on social networks and to sign existing petitions online

parliamentary committees select, standing or joint committees made up of members of parliament, formed by the parliament for specific purposes

petition a formal written statement calling on parliament to change the law

pressure group a group that acts to advance a particular issue or interest

royal commission the highest form of inquiry appointed by the Governor-General-in-Council (or the Governor-in-Council), with extensive powers of investigation

social media computer-based technology that can create and share information and ideas online to web-based networks and communities

Victorian Law Reform Commission (VLRC) a permanent body established by the Victorian parliament specifically to investigate the need for law reform

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. He noted that child sexual assault prosecutions should focus on uncovering the truth, otherwise there would be no reason for assault survivors to participate.

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11.1 Why laws need to change

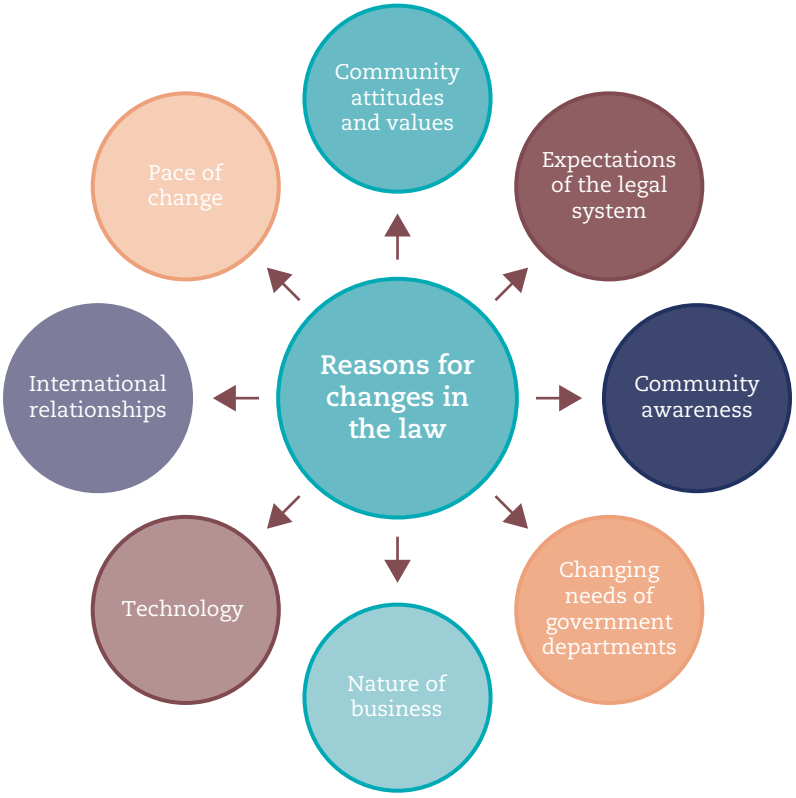

Figure 11.1 Reasons laws change

Laws need to change to reflect the needs and values of the community.

There has never been a time in the history of Australia's legal system when the law has remained completely static. The legal system consists of institutions that interact with society. As society changes, it needs new and different laws. The law can operate effectively only if it reflects the needs and values of the community it seeks to serve. Therefore, the law must continue to change and evolve with the changes in the community.

Over the past century, we have witnessed rapid change in the structure of our society. The legal system sometimes finds it difficult to keep pace with the changing nature of society and the economy. Every year, Commonwealth and state parliaments pass more than 1000 Acts. In addition, subordinate bodies make regulations that affect us all. The volume of law grows, and the types of law change as society evolves and adapts.

There are several factors that can create a need for law reform:

- changing community attitudes and values
- changing expectations of the legal system
- community awareness
- changing needs of government departments
- the changing nature of business
- changing technology
- changes in our international relationships
- pace of change.

Changing community attitudes and values

Changes in society and community attitudes can result in a change in the law. There have been significant changes in the community over the past 100 years, including those listed in Table 11.1.

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Table 11.1 Some significant changes in the community over the past 100 years

Then	Now
Average life expectancy: 47 years	Average life expectancy: 80 years (men) and 84 years (women)
Horseback	Cars and aeroplanes
Gaslights	Electric streetlights
Pen and paper	Computers
Chalkboards	Interactive whiteboards and e-learning systems
Board games	Electronic games – such as Play Station and X-box
Silent movies	Full colour, sound, CGI, 3D animation
Compass	GPS navigation systems
Wood-burning stoves	Microwave ovens

Laws need to change to reflect the changing social, moral, economic and political values of the community.

Along with these changes, there have also been changes in community attitudes and values. For instance, 100 years ago, marriage was considered to be a lifelong commitment. Under the *Matrimonial Causes Act 1959* (Cth), divorce was a matter of attributing fault to one of the parties.

Today, we recognise that marriage breakdown is not necessarily the fault of one person. The *Family Law Act 1975* (Cth) altered the law on divorce to recognise this change in attitude. Today, a divorce can be obtained if the marriage has 'irretrievably broken down' as evidenced by a separation of 12 months. Changing attitudes to relationships are also reflected in the increasing recognition of de facto and same-sex relationships in our laws. In 2017, a vote on marriage equality was conducted, with Federal parliament subsequently passing a law legalising same-sex marriage.

Over 100 years ago, children were seen almost as the property of their parents. Children could be put to work at an early age. Today, we value the rights of children as individuals. In recent years, our courts see the interests of the child as paramount in determining parenting issues. Various laws have been introduced to protect children from abuse and provide for access to education.

In recent years, there has also been increasing concern for the protection of the environment and, in the lead up to the 2019 election, addressing climate change. The need for action and legislation became an important election issue.

News report 11.1

Endangered species list grows

The federal parliament lists flora and fauna under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Australia's biodiversity is currently in decline; more than 1700 species and ecological communities are known to be threatened or at risk of extinction.

The key threats to species are loss, degradation and fragmentation of habitat, invasive species and altered fire regimes. Other threats include unsustainable use and management of natural resources, changes to the aquatic environment and water flows, and climate change.

Many animals, such as the Gouldian finch, are now endangered in Australia.

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Laws need to change to reflect community expectations that the law will regulate behaviour and protect the community from harm.

Australia is witnessing changes in political values. Despite the failed referendum of 1999, the republic debate continues. We are also seeing growing community support for the concept of a Bill of Rights. In 2006, the Victorian parliament passed the *Charter of Human Rights and Responsibilities Act*, which recognised the basic rights of people living in Victoria.

Sometimes, an event occurs which is not consistent with the values of the community. Such an event can result in demands for changes in the law; for example, changes to legislation with the introduction of the 'one-punch' law, as well as increased offences and penalties for workplace accidents and the liability of businesses and directors as a response to changes in community demands and attitudes.

News report 11.2

Outrage over the sentence given to two women who attacked a paramedic

Many Victorian ambulances were painted with anti-violence messages and the Andrews government promised to introduce tough new sentencing laws after a court decision to quash the jail sentences of two women who attacked and badly injured a long-serving ambulance officer.

The Health Minister, Jill Hennessy, stated that the government wanted to change the sentencing laws and increase sentences for offenders who attacked emergency services personnel. Two women viciously attacked a paramedic in the course of his duty and, while found guilty, avoided going to jail. The government has promised to close the loophole in the law that meant if there were special circumstances it was not an automatic jail sentence.

There was a public outcry after the decision by the appeal court. The paramedic who was attacked stated he was appalled that the two attackers were not sent to jail.

After the decision was made public, ambulances across Victoria were painted with the slogan 'It's not OK to assault paramedics' – in an echo of public action taken during the 2014 paramedic pay dispute. Ambulance Victoria CEO Tony Walker stated that the ambulance workforce was left angry and frustrated.

Source (adapted): '"Not OK'" Tougher laws promised after ambos protest over sentencing', Aisha Dow and Noel Towell, The Age, *16 May 2018*

Paramedics are concerned about their safety.

Activity 11.1 Folio exercise

Community attitudes and values

Read News report 11.2 and answer the following questions:

1 Outline how the paramedics and politicians have responded to the outcome of the appeal.

2 How does this reflect the values and attitudes of the community?

Changing expectations of the legal system

Our attitude to the role of law and government in the community is also changing. One hundred years ago, the community expected the law to clearly regulate behaviour – that is, to set out what could and could not be done. Today, we expect the legal system to take a far more active role – not only stating the rights of individuals, but also protecting individuals from harm.

An example of this is the compulsory wearing of bicycle helmets for cyclists. The law cannot stop all road accidents; however, wearing helmets can minimise harm to a cyclist if they are involved in an accident. These laws are enforced by the police and are generally recognised by the community as a justifiable intrusion on a person's liberty. However, not all countries have compulsory helmet legislation and, in some countries, such as the Netherlands, helmets are not required to be worn due to the safe cycling environment. In some states of the United States, such compulsory helmet laws can be seen as an intrusion on the rights of an individual.

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Changing community awareness

Laws need to change to reflect the increasing community awareness of rights and demands for access to the law.

People are better educated and more informed than ever before. Individuals are also more aware of their legal rights and responsibilities. Members of the community now are more likely to question the law. Today, people do not automatically comply with the law or accept laws and consequences they believe are outdated and irrelevant. Individuals now demand greater involvement in the processes of decision-making about the law and its institutions. It is inevitable that this will result in challenges and changes to the law.

Changing community awareness of individual rights has also resulted in increased community demand for access to the law. This can be seen in the growth of alternative dispute resolution methods in areas such as neighbourhood disputes, consumer claims and tenancy. Tribunals have been introduced to meet these demands. There have also been increased demands for legal advice and assistance.

Major Events Legislation Amendment (Ticket Scalping and Other Matters) Act 2018 (Vic)

The purpose of the Act is to provide for control in the secondary ticket market for major sporting and cultural events. The Act establishes the right to declare a 'ticketed event' to ensure that tickets are not 'scalped' and sold for a large profit. The ticket cannot be sold for more than 10% of the face value of the ticket.

Changing needs of government departments

Laws may need to change because of the administrative needs of a government department.

Government departments are responsible for the day-to-day administration of government policies. They have the power to make a range of important decisions that may affect the rights and responsibilities of individuals. These decisions include matters such as pension entitlements, taxation assessments and health benefits. Government departments can identify difficulties in the operation of the law and recommend changes to overcome the problems.

The changing nature of business

Laws need to change because of changes in the nature of business, globalisation, trade and the economy.

The changing nature of business has given rise to changes in the law. The growth of retail stores and online shopping have resulted in the need for different laws and legislation. Laws cover areas such as consumer protection and trade practices to ensure that consumers' rights are protected. The way businesses transact – for example, e-commerce, electronic credit and payment facilities – have also required different laws and regulations.

The growth and changes in business has led to the need for new laws in relation to consumer protection, digital and electronic signatures, internet banking, copyright, trademarks, privacy, censorship and taxation. The growth in e-commerce has outstripped the growth in the law in many of these areas.

Australia is part of a global economy.

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Changing technology

Technology has resulted in changes in the way business operates, and in communication and transportation. The law needs to change to meet the new demands created by new technologies.

A self-driving car by Google, one of the first companies to build driverless car prototypes

The introduction of the car is a good example of how new technology results in the need to change the law. At the turn of the twentieth century, we did not need extensive regulations to control road users. However, the number of people driving cars has grown and the speed at which cars travel has increased. As a result, there has been a need to increase the number of laws to regulate motor vehicles and road use. The development of driverless cars will continue and it is expected that many people will own these cars within a decade. This will mean that new laws will have to be created and implemented.

News report 11.3

Green light for driverless cars in Victoria

Although cars can't yet fly, it would seem we're moving closer towards not actually having to drive them. The Victorian government is championing the automated vehicle (AV) cause, with new laws passed allowing for their trial.

The government is working towards reducing driver error and making our roads safer.

Changes to the *Road Safety Act 1986* (Vic) will make permits available to those interested in testing AVs. Initially requiring supervised testing, these trials will gradually become less supervised as vehicle safety gets the green light. This technology has the potential to save lives, helping to improve the safety of all Victorians on our roads.

Source: VicRoads news release, 5 March 2018

Laws need to change due to technological developments.

Other laws have changed because of technology. The law defining criminal fraud also needed revision because of the introduction of computer technology. Changes in the law relating to cyber security have been introduced, as have laws regarding data, and privacy laws have been amended. The widespread use of many types of technology have led to the need to introduce laws in response to technological developments in social media, trolling online and identity fraud. Many of these developments are world-wide and make it difficult for nations and states to implement and enforce laws.

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News report 11.4

Cyber security

Fake Paypal emails request 'account details'.
The Australian Cyber Security Centre (ACSC) is aware of malicious emails that are falsely advising Australians that their account has violated Paypal rules. These phishing emails try to lure the recipient into sharing personal information, which could then be used for identity theft and financial gain by cyber criminals.

The recipient is told their account will be permanently disabled within 48 hours unless the user logs-in using the link provided within the email to 'update account details' and 'activate your account'. The link sends you to a fake PayPal login portal where your details will be harvested.

The Australian Cyber Security Centre (ACSC) is aware of a phone scam in which scammers are posing as employees from Australian government agencies. Scammers are attempting to convince you that your computer has been compromised and, to assist in their investigation, they are asking for remote access to a person's computer. In another scam, people are asked to provide details to enter a URL which allows them to access online banking information.

The growth of social media, the internet and the way people communicate all have implications for the community and governments at the state and federal level, which need to ensure that laws keep up to date with the changes.

A number of laws need to be changed, updated or developed in areas such as:

- copyright and intellectual property
- social media
- privacy
- online fraud and identity theft.

Source: Australian Cyber Security Centre news release, 30 March 2019

Facebook CEO Mark Zuckerberg testifies before a House Energy and Commerce Committee on the protection of user data on 11 April 2018.

Changes in our international relationships

Over the past century, there have been dramatic changes in the relationships between nations. A former Secretary General of the United Nations, Ban Ki Moon, stated that, 'By strengthening the three pillars of the United Nations – security, development and human rights – we can build a more peaceful, more prosperous and more just world for our succeeding generations.'

Laws need to change due to changes in international relationships or events.

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The Commonwealth Government has the power to enter into international agreements (or treaties) under section 51(xxix) of the Constitution. However, these international agreements generally do not become law in Australia unless the Commonwealth parliament passes a law. The Australian Treaties Library lists over 3000 treaties in force in Australia.

International affairs can also influence the need to change the law in Australia. There are a range of different areas where laws and agreements exist.

These include:

1 **Anti-terrorism**

Keeping Australia and Australians safe, secure and free is a priority of the Australian government. Underpinning Australia's fight against terrorism is Australia's Counter-Terrorism Strategy, which is based on partnerships between all levels of government, communities and the private sector. The Strategy focuses on:

- disrupting terrorist activity within Australia
- ensuring an effective response to and recovery from any terrorist incidents
- reducing the lure of violent extremist ideologies
- stopping Australians from using violence to express their views; and
- contributing to global counter-terrorism efforts.

2 **Climate change**

Australia is committed to taking strong domestic and international action to reduce emissions and build resilience to the impacts of climate change. Australia's *Foreign Policy White Paper* recognises the challenges that climate change will increasingly present in the coming years, and the economic opportunities in the transition to a low emissions global economy.

An effective response to climate change requires collective action by all countries and sectors. Recognising this, Australia contributes to action under multilateral platforms including the United Nations Framework Convention on Climate Change (UNFCCC), the Montreal Protocol, the International Civil Aviation Organisation and the International Maritime Organisation.

Climate change is a concern across the globe.

ISBN 978-1-108-87276-8 Poore et al.

Pace of change

Changes in society alter our perception of the rights and responsibilities of individuals and may change the types of disputes that arise and the methods used to resolve them. To meet the changing needs and circumstances of society, new laws have to be introduced or existing laws expanded.

In some instances, the law may provide an impetus for social change. For example, equal opportunity and anti-discrimination legislation passed in the 1970s and 1980s changed social attitudes to equality. These laws made it an offence to discriminate against a person on the grounds of sex, race or religion: initially, the laws focused on discrimination in employment. Since these laws were first passed, the categories of discrimination have expanded as society has continued to develop.

Changes have continued to take place in society due to increased mobility of the population, immigration, changes in values and attitudes, changes in the workforce and the way businesses operate and technological developments that continue to move at an exponential rate.

When the law fails to respond to demands for change, the result is a loss of respect for our legal institutions. If the public becomes less likely to adhere to the law, the law becomes irrelevant or ineffective and therefore cannot provide for social order.

If the law does not adapt to changing demands in a timely manner, it cannot provide for social order.

Activity 11.2 Folio exercise

Why do laws change over time?

1 Explain why laws may change over time.

2 Discuss why a law may change due to technological developments or a change in community attitudes.

11.2 Influencing law reform

Law-making bodies can be influenced and pressured to bring about changes to the law from a range of sources including individuals, the media and law reform bodies.

Individuals (as well as groups of individuals) can attempt to influence law-makers to change the law. These groups are outside the formal structures of parliament and government. They may take a number of different types of actions to influence change, including petitions, writing letters to newspapers, creating or raising awareness of an issue using **social media**, or by demonstrating and protesting. Individuals can also use the courts to try to change the law.

Other influences or pressures on law reform include the media, which can take an issue and highlight concerns or problems and raise awareness within the community. Editorial opinion can also be a powerful influence on politicians and parliament, which may lead to changes in the law.

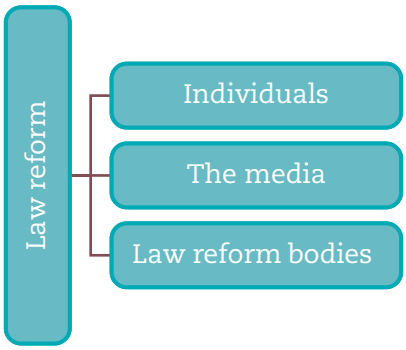

Figure 11.2 Law reform can be influenced by the actions of individuals, the media and law reform bodies.

Law reform bodies also have a profound influence on parliament and the law. Often, a report will provide recommendations to parliament which will then pass laws. The **Victorian Law Reform Commission** (VLRC) was established to assess the need for law reform.

Parliamentary committees can be asked by parliament to review an area of law with a view to what changes are needed. **Royal commissions** can be appointed by the government to review legal and political issues. As a result of these reviews, changes in the law may be recommended.

Individuals, media and law reform bodies can influence the law.

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11.3 Individuals and law reform

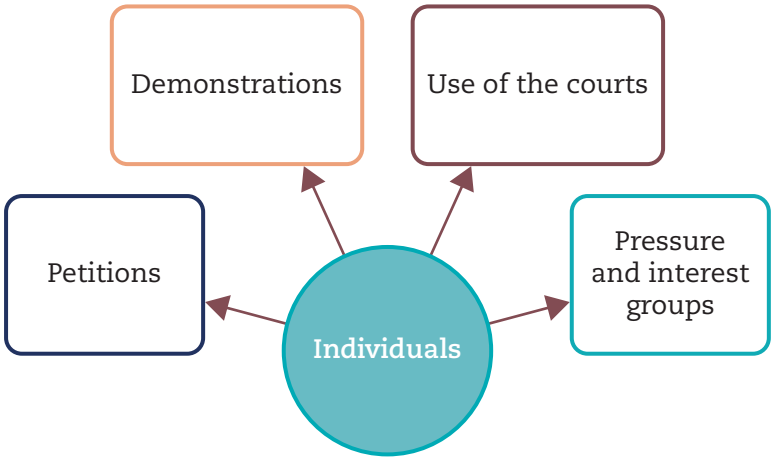

Figure 11.3 Individuals and law reform

Individuals and groups often act outside the formal structures of parliament to influence law reform.

Individuals and groups can act informally to bring about a change in law in a number of ways. For example, an individual who seeks to bring about a change in a law can raise awareness through social media, organise a petition, write letters and approach their member of parliament. Individuals or groups contribute to the public debate on a particular issue and can influence the law.

Individuals or groups can act to increase public awareness of a particular issue. This can put pressure on members of parliament and political parties. Individuals or groups can influence government policies or present submissions for consideration by formal groups. Groups of individuals who act collectively to raise awareness of the need for law reform are known as 'pressure groups'. **Pressure groups** seek to raise awareness of an issue or issues relating to a particular group of people – the group they represent. There are a number of methods used to do this:

- highlighting their cause or concerns in the media
- distributing information to the community
- using lobbyists to pressure politicians; and
- present petitions to members of parliament.

To make effective laws, parliament must determine not only what is acceptable to individuals within society but also what is acceptable to society as a whole. As a democratically elected law-making body, parliament is more likely to respond to views that are perceived to be held by the majority of the community. Therefore, the more people who appear to be in favour of a particular change, the greater is the likelihood of success. However, it is often difficult for parliament to make changes and new laws as in almost all cases there will be some sections of the community who will not support the changes. Change is more likely to occur where groups of individuals act.

Individuals

An individual has a limited influence on changing the law, as parliament reflects community views.

Although individuals or groups may raise awareness of the need for change, parliament must still assess whether these views reflect those of the majority of the community. For instance, an individual who protests outside parliament about the need for a particular law to be changed may effectively gain the attention of members of parliament. However, that person may not represent the interests of the majority of people.

While everyone has the right to present a reasoned argument for a change in the law, individuals acting alone are likely to have a limited impact on changing the law.

Parliament responds to what are perceived to be the demands of the majority of people. Therefore, the greater the number of people who appear to be in favour of a particular change, the greater the likelihood of success.

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Victoria's occupational health and safety regulations

There have been a number of changes to Victoria's occupational health and safety regulations. These changes are usually due to demands from trade unions and the community to ensure that everyone works in a safe and healthy workplace. A number of changes were introduced in June 2017 and included a number of areas. Changes include the prevention of falls, the handling of hazardous materials, the review of risk control measures and the management of confined spaces and working conditions in them.

Another difficulty experienced by individuals who want to change the law is knowing the appropriate law-making body to approach. A person wanting to change the law on the importation of hazardous wastes, for example, would need to know whether it is under the jurisdiction of the Commonwealth parliament, a state parliament, or local government. The individual would also need to be aware of the government policies in the area of law that they wish to change.

The standing, influence and position of a person in the community may also be important. A person who is a recognised authority on a subject may have a great influence in bringing about a change. The opinions of an environmental scientist, for example, may be highly influential in bringing about a reform in the law that protects endangered species. Members of the legal profession deal with the law on a day-to-day basis; they are likely to be aware of the need for law reform and may comment on the effectiveness of a particular law by writing articles in newspapers or professional journals.

Pressure groups and interest groups

Change is more likely to occur if people act together. Pressure groups can use many of the methods used by individuals. The advantage of a pressure group is that the spokesperson can claim that it represents a large proportion of the community, which may mean it has more influence on the law-making body to act. Pressure groups take a variety of forms. They may be small groups, or they may be large organisations. Pressure groups are sometimes called lobby groups.

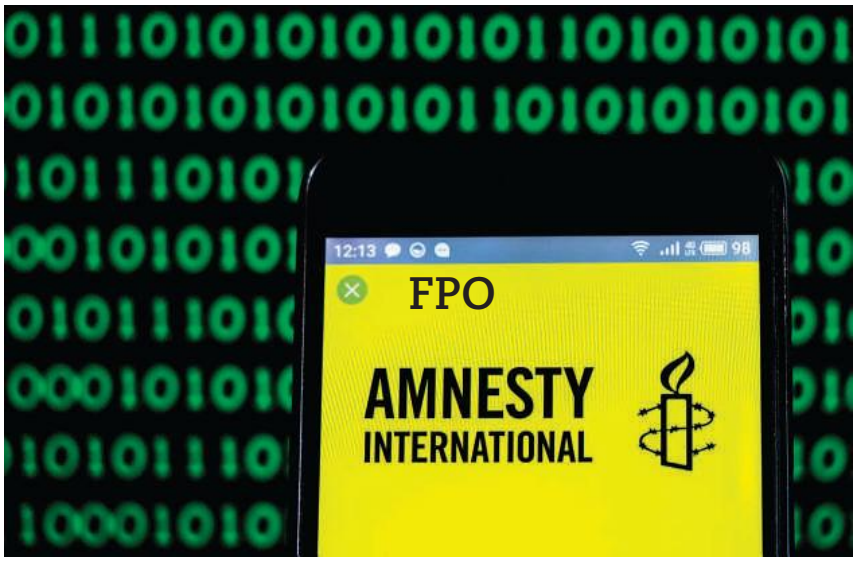
There are pressure groups that represent a particular cause or an area of concern. Examples of these groups include the Australian Conservation Foundation, Gun Control Australia and the Public Transport Users Association.

Groups of individuals acting together are more likely to influence a change in the law. These groups are known as pressure groups. Often a group has a particular focus, these are known as interest groups.

Amnesty International Australia

Amnesty International Australia is part of a global movement defending human rights. The group mobilises people, it campaigns on issues, conducts research and raises money to support the work of the group. It promotes human rights to ensure they are embraced, recognised, valued and protected.

For more information about Amnesty International Australia, go to https://www.amnesty.org.au



Amnesty International lobbies governments across the world.

ISBN 978-1-108-87276-8 Poore et al.

Industry groups

Some pressure groups, such as the Victorian Farmers Federation, represent the interests of a particular industry group. The federation aims to develop a community of farmers who create a profitable, sustainable and socially responsible agricultural industry connecting with all Victorians. The RACV (Royal Automobile Club of Victoria) aims to deliver benefits to its members and their communities and to lobby the government and raise awareness of issues such as electric vehicles on the roads, traffic congestion, regional roads and identifying dangerous roads.

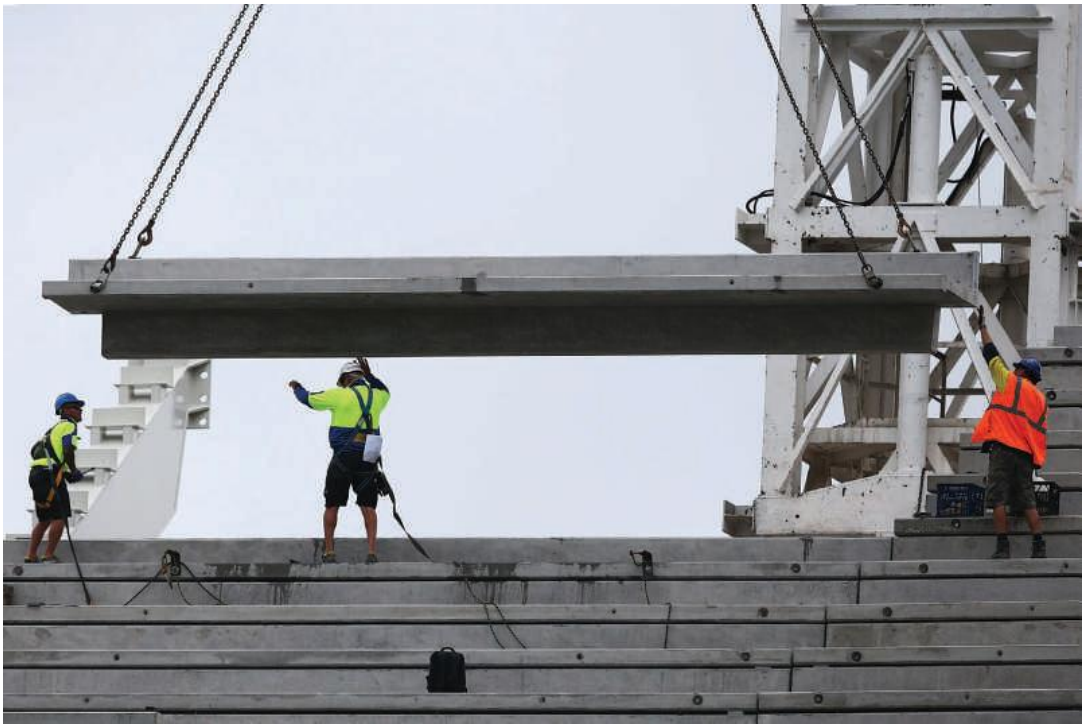
Professional groups

Professional groups are also concerned with changes in the law in their area. For instance, the Australian Medical Association (AMA) represents the interests of doctors. It has expressed views on a range of medical issues, such as laws relating to child abuse, access to health care and health policies.

The legal profession also influences change in the legal system. Lawyers are represented by organisations such as the Victorian Bar, the Criminal Bar Association and the Law Institute of Victoria. These associations can become aware of a need for a change in the law, and draw the attention of the government to this need. They can also act against a proposed change. Lawyers throughout Australia are also members of the Law Council of Australia, which performs a similar function at a Commonwealth level.

Master Builders Australia (MBA)

The MBA promotes the interests, viewpoints and contribution of its members in the building and construction industry. It represents all sectors of the industry and comprises large and small businesses, residential and commercial builders, suppliers, subcontractors and professional industry advisers. It has over 32 000 members. It advocates on a range of areas such as safe and productive workplaces, affordable housing, skills and jobs for the future, infrastructure and investment, and small business.



The Masters Builders Association advocates on behalf of its members.

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News report 11.5

Who's in the room? Access and influence in Australian politics

Australians are concerned about the role of special interests in politics. Even a healthy democracy like Australia can be vulnerable to policy capture. Well-resourced interests – such as big business, unions and not-for-profits – use money, resources and relationships to influence policy to serve their interests, at times at the expense of the public interest.

Money and relationships can boost access: time with ministers and their shadows is explicitly 'for sale' at fundraising dinners, and major donors are more likely to get a meeting with a senior minister.

Special interests also seek influence through the public debate. The idea is simple: if you can capture the 'hearts and minds' of the public then policy makers will usually follow. Major advertising campaigns are the preserve of well-resourced groups: unions, industry peak bodies and GetUp! were major spenders in the past decade.

'Who's in the room? Access and influence in Australian politics' is a Grattan Institute Report released in September 2018. It proposed changes that would improve the quality of policy debate and boost the public's confidence that policy is being made for all Australians.

Recommendations include;

- Improve transparency in policy making
- Publish ministerial diaries to enable public scrutiny of who ministers are meeting – and not meeting – and encourage them to seek out a wider range of views.
- Link the lobbyists register to 'orange passes' to identify commercial and in-house lobbyists with privileged behind-the-scenes access to Parliament House.
- Ensure all lobbyists and pressure groups comply with the lobbying code of conduct.
- Improve the visibility of political donations by lowering the donations disclosure threshold to $5000.
- Clarify conflicts of interest for all parliamentarians – particularly around hospitality, gifts and secondary employment – and set a standard for the public, media and parliament to hold elected officials to.
- Independently administer codes of conduct, to build public confidence that people are complying with them.
- Appoint a separate ethics adviser to encourage current and former politicians to seek advice when they are in doubt.
- Establish a federal integrity or anti-corruption body to investigate potential misconduct or corruption, publish findings, and refer any corrupt activity to the Commonwealth Director of Public Prosecutions.
- Level the playing field by capping political advertising expenditure by political parties and third parties during election campaigns to reduce the imbalance between groups with different means to broadcast political views.
- Boost countervailing voices through more inclusive policy review processes and advocacy for under-represented groups to give politicians better information with which to adjudicate the public interest.

Source (adapted): Danielle Wood and Kate Griffiths, Grattan Institute No. 2018-12, September 2018

Senator Larissa Waters proposed a Greens bill to establish a federal anti-corruption commission in the Senate at Parliament House in Canberra on 9 September 2019.

ISBN 978-1-108-87276-8 Poore et al.

11.4 Methods used by individuals and groups

Individuals and groups use a variety of methods to influence a change in the law.

A number of methods may be used by individuals and groups to influence lawmakers to try to have a change made in the law. These methods include signing a petition, participating in demonstrations, taking a case to court and using the media, particularly social media.

Other methods include preparing submissions to law reform bodies, parliamentary committees and other bodies, civil disobedience, political action and lobbying politicians directly.

Petitions

Petitions are a formal request for parliament to take action on an issue.

Individuals and groups can use petitions to influence parliament to change the law. A **petition** is a formal written request, typically signed by many people, that parliament or the government take action on an issue. In both the Commonwealth and state parliaments a member of parliament may present a petition to parliament on behalf of the people in their electorate. During each sitting of parliament, the president or speaker will ask members to read out petitions and these are recorded in *Hansard*. There is a website called Change.org that individuals and groups can use to set up a petition.

Format for petitions

Since the 13th century, citizens have had the right to petition the Crown and parliament under the Westminster system. The petition must:

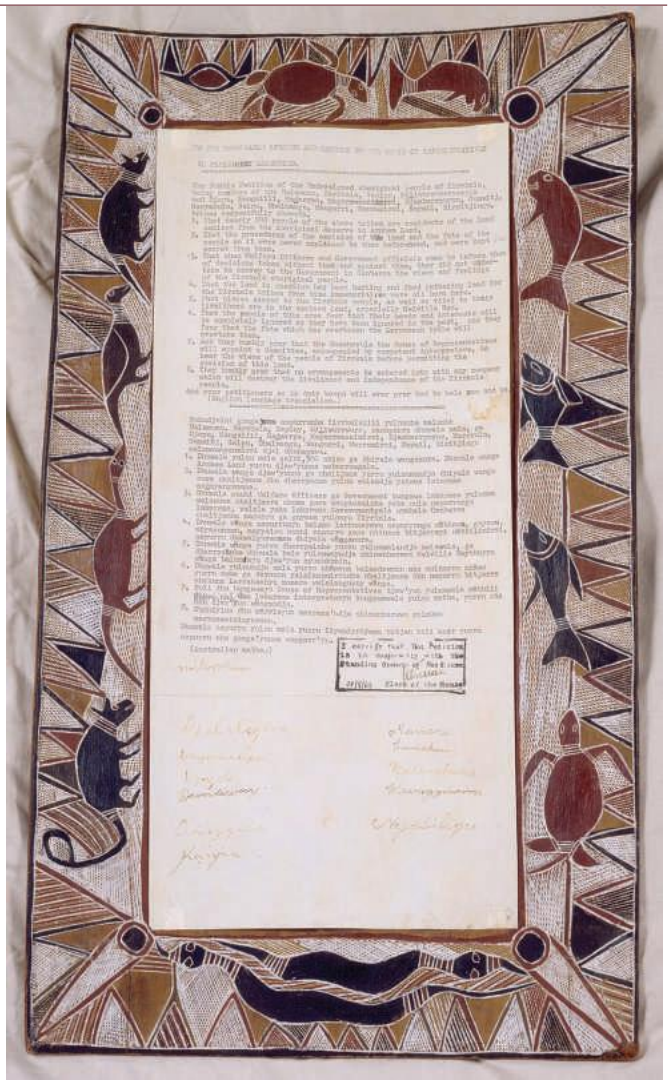
- relate to a matter parliament has the power to act on
- set out the facts clearly
- use respectful and moderate language
- contain a request for action.

A petition only requires one signature. However, when a petition is signed by a large number of people it demonstrates to parliament the level of community support for an issue. The number of people who have signed a petition is recorded in *Hansard* (the record of the proceedings of the Australian parliament).

There are rules about how the petition is presented. For instance, the House of Representatives accepts electronic or internet-based petitions. The Senate allows electronic petitions only if a senator certifies that the text was available to all signatories, and it must be lodged as a paper document.

The first petition lodged with federal parliament was by two members of the Presbyterian Church, calling for prayers to be said at the opening of parliament each day. Recent petitions have included petitions on data collection, outlawing cats in Australia, alternative screening for passengers unable to undergo a body scan at the airport, paid parental leave where men and women are eligible, and to reinstate funding to Channel 31.

The following flowchart is an example of the format for petitions accepted by the House of Representatives.



The Yirrkala bark petitions were presented to Parliament by members of the clan groups living in the area of Yirrkala in August 1963. They are written in both Yolngu Matha and English, and protest the loss of land traditionally owned by the people of Yirrkala. The land was excised and leased for bauxite mining without consultation with traditional owners.

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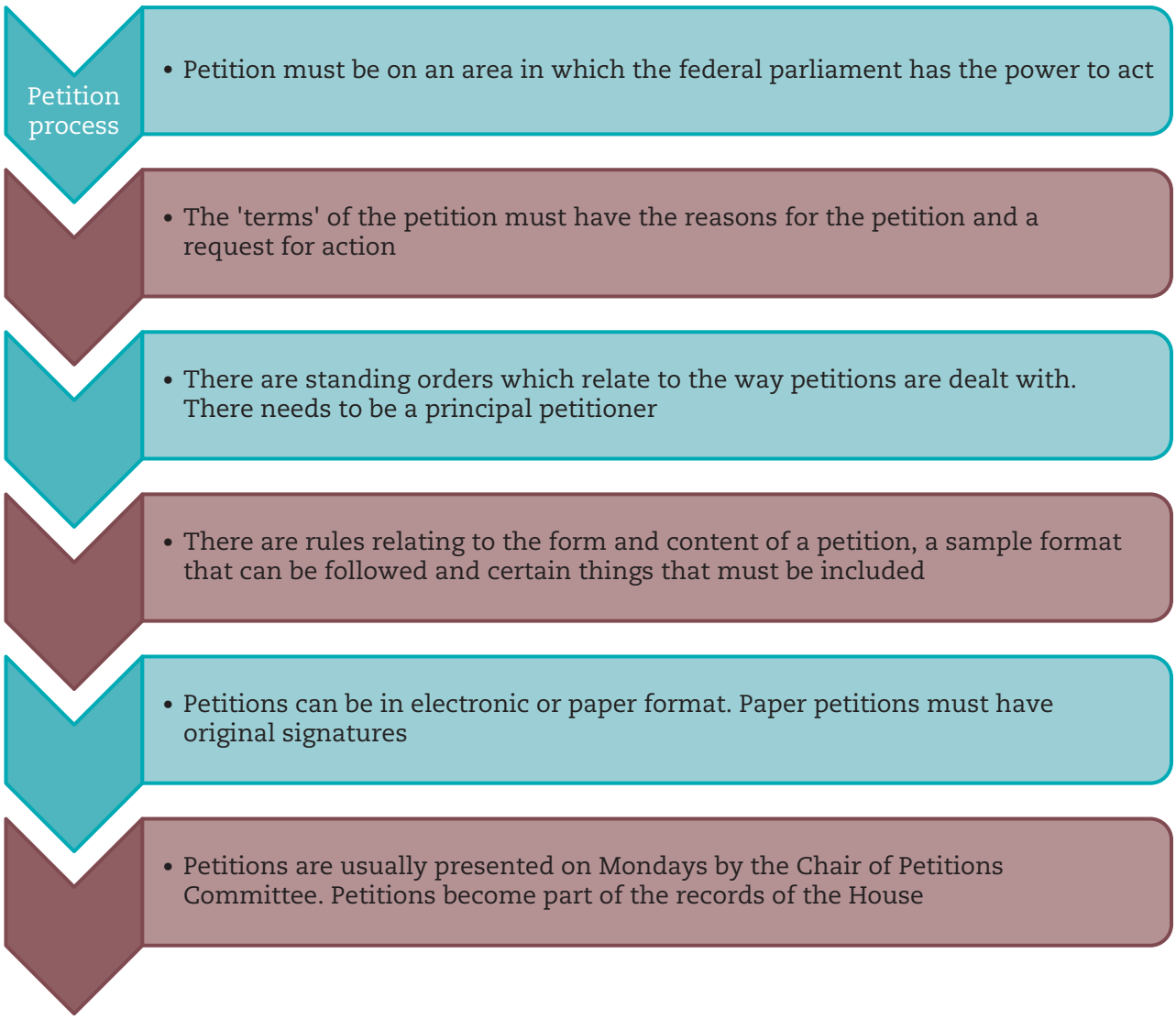

Figure 11.4 How a petition goes to parliament

Number of petitions and signatures

Since 2008, an average 121 petitions have been presented each year to the House of Representatives. Since 1988, when the number of signatures was first recorded, the petition with the greatest number of signatures was one presented on 26 February 2014 concerning funding support for community pharmacies. Petitions received cover a wide range of issues including, for example, health care, education and the environment.

E-petitions

E-petition systems allow individuals to submit petitions, to share information about petitions on social networks and to sign existing petitions online. E-petitions are also used by groups in the community to demonstrate general support for particular issues in the community. Online sites such as Change.org and GetUp! have been instrumental in influencing change. Examples of petitions on Change.org include one to make election polling voting centres wheelchair accessible; others centre on introducing a Parliamentary Code of Conduct, flying the Aboriginal flag 365 days a year and mandatory palm oil labelling on all products in Australia by January 2020.

The orangutans' habitat is threatened by palm oil.

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Activity 11.3 Folio exercise

Petitions and influencing legislation

1 Go to Change.org and select three current petitions. For each petition state:
   - the name of the petition
   - the purpose of the petition
   - the number of people who have signed the petition.

2 Explain why individuals use sites such as this to try to influence government legislation and decisions.

Demonstrations

Individuals and groups may march or rally to demonstrate their disapproval of a law.

Individuals or groups may also organise a **demonstration**, perhaps taking the form of a march or a rally. Australia has a long history of demonstrations as a means of expressing a political opinion. Following the 1854 Eureka uprising, 10 000 people protested in the streets of Melbourne. (At that time 10 000 people was about one-third of the total population of Melbourne.) Anti-Vietnam War marches in the 1970s attracted up to 100 000 protesters and had a significant impact on Australian political policies. In 2018 and 2019, large numbers of students and young people demonstrated about climate change.

Individuals and groups can hold demonstrations, such as rallies or marches, to influence a change in the law.

Boycotts

A **boycott** is another type of group action, but it is one that is invisible on the streets. A boycott may be a refusal to buy an item or to participate in a particular activity. For instance, the RSPCA (Royal Society for the Prevention of Cruelty to Animals) encouraged people not to buy puppies from puppy farms. The Victorian parliament reacted by introducing the *Domestic Animals Amendment (Puppy Farms and Pet Shops) Act 2017*. This law regulates the sale of puppies and cats in pet shops and 'puppy farms' and the registration of single-use permits to sell certain animals.

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The use of the courts

Parliament is the supreme law-making body. Reforming the law is not the primary role of the courts. The role of courts in law-making was discussed in more detail in Chapter 10. However, there are a number of ways in which individuals can use the courts to try to change the law.

An individual can take a case for which there is no applicable precedent or statute law to court. Courts can perform a law-making role when hearing a case where no legislation or binding precedent applies. In these cases, the courts will make a decision as to the principles that should be applied in order to resolve the dispute. The decision in the case is binding on the parties to the dispute, and the principles applied are a guide as to how future disputes will be decided.

An individual can take a case to court for which there is no applicable precedent or statute law in an effort to change a law.

Until a new precedent is set, or parliament passes a law in relation to that particular matter, the precedent applies only to future 'like' cases (depending on the court's place in the court hierarchy). Through judicial decisions the courts can reform the law. The rules of common law allow judges to reform laws by setting new precedents when an appropriate case comes before them.

Individuals can also use courts by taking a case to court so that the meaning or application of a statute can be clarified. By interpreting the law, the courts can either expand or limit the circumstances in which the law applies. One role of the courts is to interpret the laws made by parliament. If parliament does not agree with the court's interpretation it can pass a law to override the court decision or clarify the law.

Individuals can use courts by taking a case to court so that the meaning or application of a statute can be clarified.

Individuals can also use the court to challenge the validity of legislation. Parliaments must act within their constitutional law-making powers. If a court determines that an Act is outside the law-making power of the parliament, the court can declare the legislation *ultra vires*, which means it is 'outside the law' and cannot be applied.

Individuals can also use courts to challenge the validity of legislation.

News report 11.6

Can a Federal Court case against pokies succeed where politics has failed?

In 2017 legal firm Maurice Blackburn launched a case in the Federal Court against a poker machine manufacturer Aristocrat Technologies Australia and casino owner Crown Melbourne. The case was to determine whether the design and operation of poker machines could deliberately deceive players about their chances of winning.

While the case was ultimately not successful, it did publicise the impact of gambling on the community and the losses many people endure. Many sectors of the community argue that gambling is a free choice so the casinos and other gambling companies are not responsible. It was argued that some of the design features of poker machines could mislead consumers. These features included symbols that were not evenly distributed across the screen making it more difficult to win, and that onscreen information misled players about the likely returns from playing the machine.

Despite being unsuccessful, a number of statements were made by the High Court. In the most damning part of her ruling, Justice Mortimer agreed with leading applicant, Shona Guy's claim that the 'theoretical return to player' statements on the machines may be confusing to the ordinary gambler.

She said it was likely to be construed as an indication of how much 'he or she as an individual' might expect to receive during the gambling session.

Justice Mortimer found the poker machine's design features did not amount to misleading or unconscionable conduct.

Source (adapted): Cristy Clark, The Conversation, *12 September 2017*

Activity 11.4 Folio exercise

Federal court case against pokies

Read the News report 11.6 and answer the following questions:

1 Outline the main issues and facts of the court case.

2 Describe the role of the individual in this case and what area of law it is trying to influence.

3 Dr Livingstone, Monash University professor of public health, stated that, 'both the courts and governments will recognise the harm brought about by poker machines'. Explain the implications of this statement in regards to a possible change in the law.

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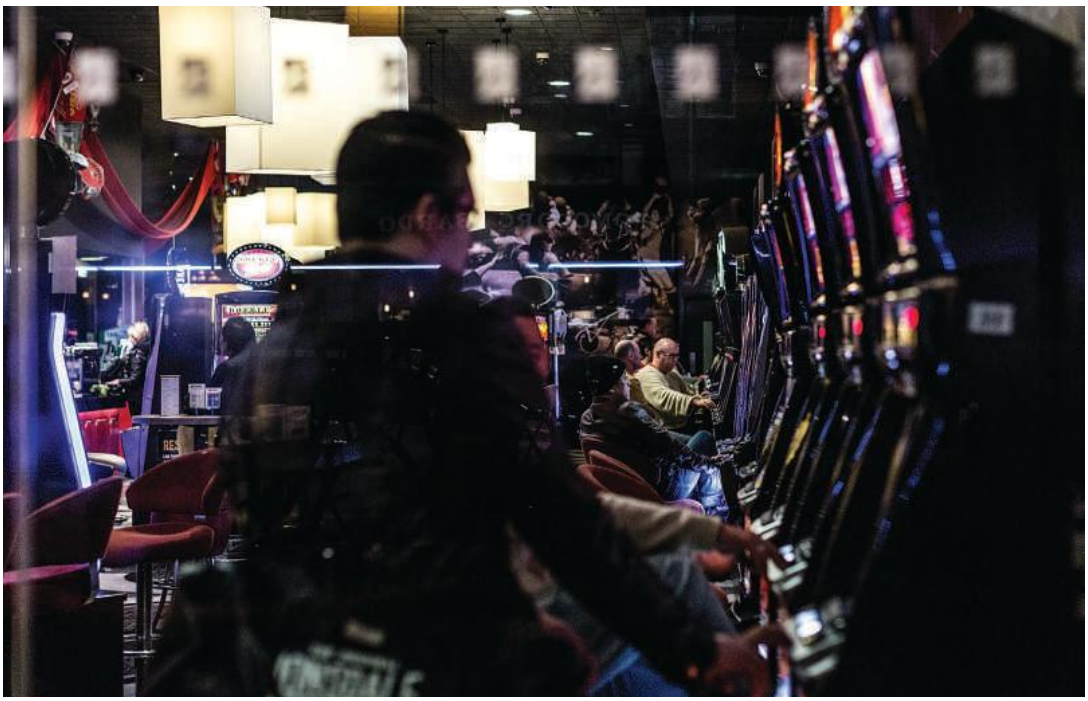

Although Maurice Blackburn's case against Aristocrat Technologies Australia and Crown Melbourne was unsuccessful, it publicised the impact of gambling on the community.

Statements made by judges and decisions made by the courts can influence law reform.

Sometimes, when making a decision, a judge can express dissatisfaction with the current law. Although the judge cannot change the law, the statement can influence parliament to take action. Decisions made by judges can identify weaknesses in the law. From time to time a judge may, in a decision, make specific reference to the need for a law to change.

11.5 The media and law reform

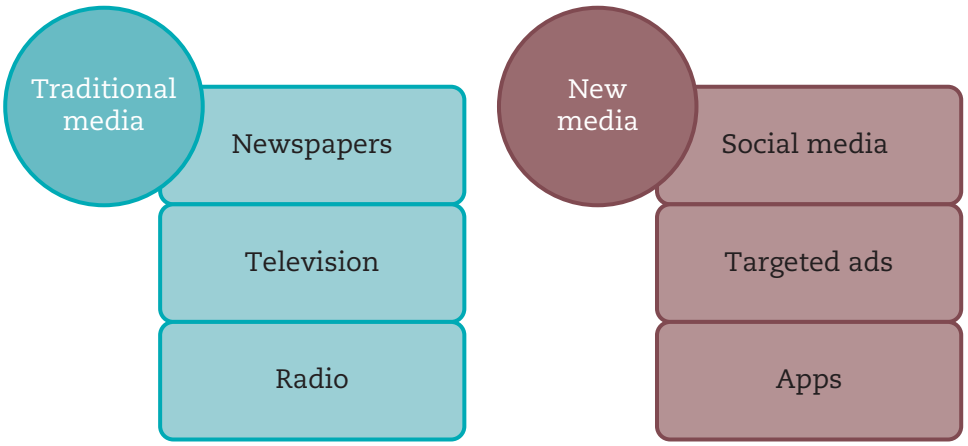

Figure 11.5 Media and law reform

Individuals and groups can use the media to communicate their views to others.

The media is often used to help influence a change in the law. People contact newspapers with their concerns, writing a letter to the editor. They may also participate in television or radio interviews and discussions.

A spokesperson for a pressure group may be interviewed for a current affairs television program or a newspaper or their actions may be reported as part of regular news broadcasts. Alternatively, a pressure group can raise enough money to mount a media campaign of its own, running advertisements in newspapers and magazines or television, or arranging for material to be delivered by mail. In a number of cases journalists and investigative television and radio programs may investigate and decide to pursue issues that they believe are important for the community.

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Social media has emerged as a powerful tool to influence reforms in the law. It involves websites and applications that enable users to create and share content or to participate in social networking. Groups and individuals participate in blogs and discussion forums and can set up websites to promote a discussion of issues. Social networking sites, such as Facebook, can also be used to gather support for a change in the law.

News report 11.7

Social media as an influence on law-making and a way for people to take action: ban 'puppy factories' in NSW

Thousands of breeding dogs are suffering on puppy factories to produce puppies that are sold in New South Wales pet stores. Despite huge support to shut down the trade, the NSW Government STILL hasn't acted.

Send an email, ACT NOW.

Dear Member of Parliament,

I am pleased to have heard that the opposition have released a policy stating they will tackle the issues of puppy farming in New South Wales and have met with the group Oscar's Law to clarify their position.

However, it is concerning to hear that your Government is still yet to take a position on this important issue that matters a lot to many of your voters.

In New South Wales, dogs suffer tremendously on both illegal and legal government-sanctioned puppy factories across the state.

Pet shops are no place for young puppies and sadly they are supplied to stores by these cruel puppy factories mentioned above.

The Victorian Government recently made a bold move to ban the sale of puppies in pet shops and it received wide support. With the state election quickly approaching, I am calling on you to make the same commitments as them.

Source: GetUp!

The sale of dogs is now regulated in Victoria. The hashtag #ClosePuppyFactories has been used on social media platforms to promote and show support for the stand against 'puppy factories' in NSW.

Tens of thousands marched for better work conditions and higher wages in Australia on 10 April 2019, bringing Melbourne to a standstill.

Social media is a powerful influence, increasing opportunities to influence others and allowing individuals greater scope to express their views.

The media can also act as a pressure group acting to bring about changes in the law.

Newspapers often give opinions which can influence law makers. *The Age* and a number of other newspapers and media outlets have publicised a range of issues and given people an avenue to voice their opinions and experiences. One recent example has been the exploitation of employees who have been underpaid.

ISBN 978-1-108-87276-8 Poore et al.

News report 11.8

We've let wage exploitation become the default experience of migrant workers

Australia's Fair Work Commission has recently examined more than 12 cases of wages theft. These cases have involved hundreds of workers and millions of dollars in underpayments. A government report into the exploitation of migrant workers concluded that wages theft is widespread with a possible 50% of temporary migrant workers being underpaid.

The federal government agreed in principle to act on all of the recommendations. Two of the recommendations include an amendment to the *Fair Work Act 2009* (Cth) to expressly state that it covers migrant workers and secondly to extend the Fair Entitlements Guarantee program which covers the cost of entitlements left unpaid when a worker misses out on their entitlements. The report also recommended that an easier claims process be introduced and that penalties against companies are increased.

There have been issues in the agriculture and hospitality sectors and with business structures such as franchises and labour-hire companies. The community now expects governments to protect the community and are concerned with the exploitation of workers who are often underpaid and miss out on entitlements.

There have been a number of cases of businesses and franchises underpaying and exploiting workers during the past few years. 7-Eleven, for example, was found to have underpaid employees across many of the franchises. Similarly, Domino's Pizza and some restaurants were also found to have underpaid employees or made them work without receiving overtime payments.

GetUp!

Who we are

The GetUp! movement is powered by the values and hopes of everyday people. By combining the power of one million members, movement partners and a central team of expert strategists, we do whatever it takes to make an extraordinary impact.

GetUp! members come from every walk of life, coming together around a shared belief in fairness, compassion and courage. It is GetUp! members who set our movement's agenda on issues they care about, in the fields of environmental justice, human rights, economic fairness and democratic integrity. Our work is driven by values, not party politics.

What do we work on?

From making sure hundreds of thousands more people are able to vote in elections, to successfully stopping major projects threatening the Great Barrier Reef, or securing billions of dollars in new funding for mental health – we have a decade-long history of taking on powerful interests, and winning. Some of the things we do are:

- fighting for a safe and healthy climate
- protecting the future of our reef
- holding governments to account
- stopping the world's biggest coal mine
- defending refugees and asylum seekers
- campaigning for a fair and just Australia.

How do we do it?

Sometimes we gather in raucous protest, at other times we partner with policy experts to develop new solutions – and everything in between. Whatever we do, we do it with as many people as possible, using our hands, our hearts, our voices to fight for the issues that matter most.

Online

Simple actions that together amount to a great deal of power: signing petitions, writing emails to influence decision makers or chipping in money to fund polling, research or advertising.

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Offline

Careful, strategic and bold action in the real world: meeting local MPs, handing out How To Vote cards at polling booths or attending rallies.

In the media

A powerful and respected voice in Australian politics: Building greater awareness of the issues we care about and holding decision makers accountable in the public arena.

Our movement does what it takes to win.

When you support GetUp! you are not just funding political noise. You're powering a million-strong, strategically savvy organisation that makes real change happen.

Get Up! uses social media and direct action to influence policies and laws.

Source: https://www.getup.org.au/about

Legal brief 11.1

Changing the law

In December 2016, the Victorian Government published its first *Community Safety Statement* (CSS). The CSS is an agreement between the Victorian Government and the Chief Commissioner of Police and sets out the community safety outcomes that the government is seeking to achieve, including its priorities for Victoria Police, and how Victoria Police will be resourced to deliver on those priorities.

The CSS identifies five priority areas. These include:

- reducing harm
- increasing connection to the community
- putting victims first
- holding offenders to account; and
- improving Victoria Police capability, culture and technology

Former police officer, Mr Ron Iddles, was asked to provide advice to the government about community safety and the delivery of reforms in this area. In June 2017 a report was published. In April 2018 the state government published its Community Safety Statement which recommitted to the priorities stated above. In June 2018, the Government introduced the Justice Legislation (Police and Other Matters) Bill to parliament.

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The Bill sought to deliver on a number of the commitments outlined in the first and second Community Safety Statements including reforms to the justice system in Victoria to ensure police had the power to investigate and prosecute offenders and increase the protection of police officers.

One of these was to amend the *Crimes Act 1958* (Vic) to create new powers for police to take a DNA sample from certain suspects and offenders without a court order. During the reading of the Bill, it was argued that there were around 11 000 unsolved crimes in Victoria where an unidentified DNA sample had been recorded. The Minister argued that the reforms would address this and put the powers on the same level as other states.

The Bill sought to amend and create powers to allow police to:

- take DNA samples from certain suspects and offenders without a court order
- introduce new criminal offences and sanctions
- increase penalties for some crimes such as drug trafficking
- introduce new offences for acts that harm or threaten police officers, protective services officers and policy custody officers.

The powers relating to collecting DNA samples defined what a 'DNA profile sample' was (sample of hair, a blood sample, saliva and/or scraping from the mouth).

The sample could be requested if an adult was suspected of having committed or attempted to commit an indictable office or a child over 15 who was suspected of committing or attempting to commit a DNA sample offence.

If consent is not given, then a senior police officer may give an authorisation for a sample to be taken, under proposed new section 464SE. The Bill stipulates that prior to granting authorisation, certain conditions must first be met: for example, the senior police officer giving authorisation is not involved in investigating the offence, the person is under lawful arrest, or in custody of an investigating official and other specific circumstances.

The Bill was designed to remove the requirement to obtain a court order when requesting a DNA sample.

A number of interest groups provided feedback and input to ensure community ideas and opinions were taken into consideration.

Victoria passed the *Justice Legislation Amendment (Police and Other Matters) Act* in March 2019.

Table 11.2 Interest groups that provided feedback to the Justice Legislation Amendment (Police and Other Matters) Bill 2019.

Interest group	Ideas and opinions
Australian Institute of Criminology	Analysed five case studies and concluded that the collection or testing of DNA was associated with a significant increase in convictions.
Victorian Privacy Commissioner	Stated that there needs to be a balance between the right to personal privacy and the need for police to investigate and obtain evidence in relation to serious crimes. It was important that safeguards were put in place to ensure this happens.
Victoria Police	Advocated for the change as it would allow the police to identify recidivist offenders and reduce the harm and volume of crimes and further protect the community. It would also streamline procedures and reduce time as court orders were not needed.
Law community	A number of groups opposed the amendments relating to DNA. The President of the Law Institute of Victoria stated that the court approval ensured that police powers were not misused. He also stated that DNA sampling is more invasive than fingerprinting and that they were two different issues. Victoria Legal Aid echoed similar concerns. A representative of the Australian Lawyers Alliance also voiced apprehension around the lack of independent oversight and was concerned it might lead to wrongful convictions if a person was simply near a crime scene. Youthlaw (a youth community legal centre advocacy group) raised the issue of appeals of decisions to take a forensic sample which are currently available, but would no longer be available to suspects under the amended system. Concerns were also raised about samples being taken from 15- to 18-year-olds. Liberty Victoria were concerned that there may be an invasion of privacy.
Media	*The Age* argued that there are crimes where the offender may not be caught as there is no record of DNA samples. In its editorial it argued that for the safety of the community the law should be passed quickly.

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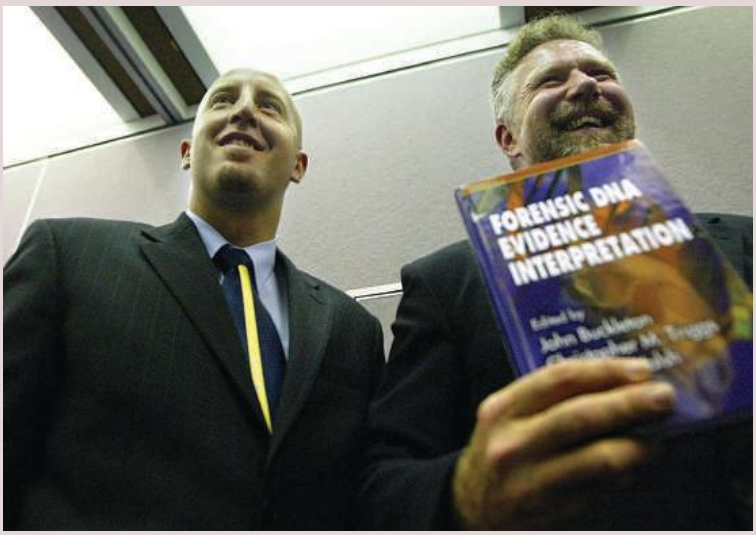
Activity 11.5 Folio exercise

Read Legal brief 11.1 on changes to the law surrounding DNA samples and answer the questions that follow.

1 Outline the changes that have been made to the *Crimes Act*.
2 Identify the key changes that were proposed.
3 There were a number of different opinions relating to the changes for DNA samples and police powers. Identify and explain the views of two of the groups who provided feedback.
4 Explain the role of pressure groups and their influence when parliament proposes a change in the law.
5 'It is unlikely that there will be total agreement on any laws or proposals. It is always a case of trying to balance the needs and interests of different group and individuals '. Evaluate this statement.



The book *Forensic DNA Evidence Interpretation*, written by DNA expert Simon Walsh (left) and renowned New Zealand forensic scientist John Buckleton (right), is a comprehensive handbook on the use of DNA evidence for lawyers, police and scientists and helps bridge the gap between lab and law enforcement.

Table 11.3 Taking action to influence change – an overview

Action taken	Explanation	Likely effectiveness
Petition	A formal written statement calling on parliament to change a law and listing the signatures of those in support of the change. The petition is presented to parliament by a member of parliament. The petition and the number of signatures are recorded in *Hansard*.	Petitions are easy to organise and provide for a peaceful means to influence change. A petition can draw parliament's attention to an issue. However, once a petition has been presented there is no guarantee that parliament will take any further action. The number of signatures indicating support for the petition may influence members of parliament.
Demonstrations	Taking action to publicly display support for a particular issue. This may take the form of a march or rally. A boycott – a refusal to buy an item or participate in a particular activity – is another way to demonstrate dissatisfaction and press for a change to the law.	Demonstrations draw attention to an issue, demonstrate the extent of public support and attract media attention. However, if the demonstration involves acts of violence or unlawful acts it may result in adverse media attention and reduce community support. Boycotts are only effective if a large number of people agree to take the action.
Use of the courts	An individual could: • challenge the validity of legislation • challenge the interpretation of the law • take a case to court that sets a new precedent. A judge hearing a case may identify a problem and call for a reform in the law.	Effectiveness is likely to be limited by costs, time and opportunity to take a court action. Usually only wealthy or large bodies have the resources to challenge the law. Alternatively, an individual may be a member of a class action. Court decisions may highlight the need for a reform in the law but it is parliament that has to respond. The conservative nature of some judges may limit the capacity of the courts to reform the law.
Role of the media, including social media: • letter to the editor • article • participating in radio or television interviews and debates • taking out advertisements • creating a webpage, blog, YouTube video, etc.	Creating public awareness of a point of view to inform a broader audience of your views and to raise awareness of an issue.	The use of the media can create public awareness of an issue and increase support. By using the media, individuals and groups can demonstrate public support for their view. The effectiveness of this method may be limited because: • there are some controls on traditional media and they do not always publish or broadcast the views of all groups or consider particular issues. However, online media provides opportunities for individuals to self-publish their views • views expressed in the media may reflect the views of vocal minorities • the argument may not be expressed accurately or persuasively.

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11.6 Other ways of influencing change

Individuals and groups can write submissions to formal law reform bodies.

There are other actions that individuals and groups can take to influence and lead to a change in the law. Individuals or groups can make direct approaches to members of parliament to express their views on an issue. Alternatively, they can prepare submissions to parliamentary inquiries or law reform bodies. In some instances, individuals or groups may express their disapproval for a law by not obeying the law (civil disobedience).

Individuals can also take political actions such as voting, joining a political party or standing for parliament. The methods and actions are set out in the following table.

Table 11.4 Other ways to influence change in the law

Approaches	Explanation
Lobbying	Individuals talk to their local member of parliament or a minister. Sometimes interest groups may employ a lobbyist.
Preparing submissions	An individual or group may write to various organisations, royal commissions, law reform bodies or other formal bodies set up by parliament to try to influence a possible change to a law.
Civil disobedience	In demonstrating their view on an issue, some groups may deliberately , but peacefully, break the law. This is sometimes done in order to bring attention to their cause. When there is a large group of people dissatisfied with an issue, civil disobedience can become so disruptive that the government is forced to respond.
Voting	An individual can demonstrate support for a change in the law at an election. They may vote for a candidate due to the policies that have been presented to the electorate.
Standing for election	An individual who wants to influence change in the law may stand for election to state or federal parliament. They can be either an independent candidate or a representative of a political party.
Joining or forming a political party	An individual can join a political party. Joining a political party gives the individual two ways of influencing change: • by influencing the types of policies that are developed by the political party, and • by becoming involved in the process used to select candidates to represent the party at the next election. Alternatively, an individual can form a political party with the express purpose of influencing a change in the law. For instance, the Shooters Party promotes the right to own and use a firearm for legitimate purposes, including self-defence.

Individuals can use political processes – such as voting, joining or forming a political party, and standing for election – to influence the law.

An individual can demonstrate support for a change in the law at an election.

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News report 11.9

Pressure for change

Members of parliament are used to being pressured. Being a decision-maker in a governing body means being exposed to pressure from a broad range of pressure groups. These groups are a way for ordinary citizens to influence the decision-making process. Similarly, parliament can be better informed of the electorate's sensitivities to issues because of the arguments put by these groups.

How pressure groups work

Pressure groups use a variety of methods to pursue their goals:

- lobbying politicians and parliament using petitions, letters and deputations (usually politicians gauge community interest through emails and letters – each letter/email received represents the concerns of approximately 100 constituents)
- consulting with ministers or senior public servants
- hiring professional lobbyists
- taking legal action through injunctions or appeals to higher courts
- campaigning for or opposing certain candidates at elections
- demonstrating outside parliament and government offices or marching in the streets.

Governments respond to pressure

The fingerprints of some pressure groups can be seen on particular pieces of legislation. For instance, our shop trading laws have been influenced by various groups. Under these laws, Good Friday is a public holiday and shops are not permitted to open. Easter Saturday is also a public holiday, but all shops may trade. Easter Sunday is not a public holiday but is a non-trading day, with special exceptions applying. On Easter Sunday, cafes, takeaway food outlets, video shops, hardware stores, chemists, nurseries and service stations may open. Major retailers, such as supermarkets and department stores, may not. These restrictions reflect the views of trade unions and church groups regarding a 'balance between work and family life'.

Lobbying for influence

Lobbying also works internationally. London-based Amnesty International seeks to bring about change over time to governments that infringe human rights. This non-political body also tries to stop the abuse of prisoners.

In 2019, there were protests around farms and the keeping of animals. A group protested in a number of capital cities and blocked traffic in Melbourne to publicise their cause and views. There have also been protests about live animal exports to the Middle East as a number of sheep died due to the heat.

Public or self-interest?

The impact of pressure groups on major changes in our laws should not be underestimated. Some of the achievements that have been made possible with the aid of pressure groups include:

- the right of women to vote
- the recognition of Indigenous land rights
- the protection of Tasmania's rainforest and Franklin River.

However, pressure groups can be criticised on the grounds that they:

- may be selfish and self-interested
- may be too powerful and not acting in the public interest
- sometimes adopt undesirable tactics
- represent wealthy sections of society who have a distinct advantage, as they have access to greater funds and are thus able to have more influence.

On the other hand, a study for MPs on relationships between nationally organised pressure groups and the Commonwealth parliament had some positive findings. It found:

- pressure groups are not all-powerful
- governments and public departments are sufficiently powerful to counter the influence of pressure groups and can scrutinise their demands in accordance with public interest
- pressure groups do not bypass parliament to influence policy outcomes
- self-interest claims are 'vacuous'.

The study recognised that freedom to organise and engage in peaceful political activity is an essential part of democracy. The report concluded that pressure groups provide for peaceful political discussion and promote social cohesion. Consultation with pressure groups leads to popular acceptance of the political decisions made by governments and the laws made by parliament.

Franklin-Gordon Wild Rivers National Park, Tasmania

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Activity 11.6 Folio exercise

Influencing change

Read News report 11.9 'Pressure for change' and complete the following tasks:

1 The News report states that pressure groups provide 'a way for ordinary citizens to influence the decision-making process'. Explain.

2 There are a number of ways in which individuals and groups can act to influence a change in the law or government policy.

- Create a table like the one below. In the first column list the types of actions that may be taken by individuals and groups to influence a change in the law. In the second column provide a recent example.

Action for change	Recent example

- Identify the most effective way in which an individual or group could influence change. Justify your answer.

3 The News report presents a number of criticisms of the influence of pressure groups. Explain two of these.

4 The News report states that 'freedom to organise and engage in peaceful political activity is an essential part of democracy'. Do you agree with this statement? Discuss with reference to the principles of the Australian parliamentary system.

Activity 11.7 Folio exercise

Legislative change

Choose an area of law that has been changed by parliament or is currently under consideration for change. Using the information, complete the table below. Use the second column to explain or describe the change or proposed change.

Conduct research on the internet to find out more about the change or proposed change. Use parliament homepages to access *Hansard* and committee reports as part of your research. During your research you should note:

The law or proposed law to be changed	
The action taken by individuals or groups to bring about the change	
The response of parliament to the demands for change. Identify the parliament that is considering the reform.	
Analyse why the changes in the law were or may be needed.	
Critically evaluate the ability and the means by which individuals can influence law reform.	
Evaluate whether the actions of the individuals and groups will lead to a change in the law.	

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11.7 Law reform bodies

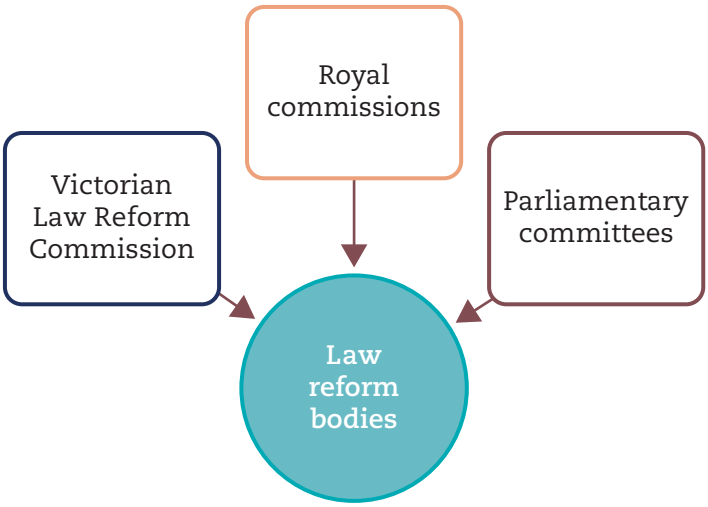

Figure 11.6 Law reform bodies make recommendations and include the Victorian Law Reform Commission, royal commissions and parliamentary committees.

One way parliament can respond to pressures for change is to refer a matter to a law reform body. This body can undertake a detailed investigation into the need for a change in the law. A law reform body can assess community attitudes and opinions, and then complete a report. This body, however, only makes recommendations to parliament. If the recommendations are accepted then parliament may change the law. Law reform bodies include the Victorian Law Reform Commission, royal commissions and parliamentary committees.

11.8 Victorian Law Reform Commission (VLRC)

The Victorian Law Reform Commission (VLRC) was established in 2001 by the *Victorian Law Reform Commission Act 2000* (Vic). The VLRC is an independent, government-funded body responsible for developing, monitoring and coordinating law reform activity in Victoria.

The VLRC will investigate issues referred to it by the Victorian Attorney-General or community law reform projects.

The VLRC was established by the Victorian parliament to investigate issues and recommend possible changes in the law. It consists of a full-time chairperson, full-time and part-time members and support staff. The Commission may also employ consultants to assist in the preparation of inquiries.

Role

Generally, the role of the VLRC is to:

- examine, report and make recommendations to the Attorney-General on any proposal or matter relating to law reform in Victoria that is referred to the Commission by the Attorney-General
- examine, report and make recommendations to the Attorney-General on any matter that the Commission believes raises relatively minor legal issues that are of general community concern
- present to the Attorney-General a proposal or matter relating to law reform in Victoria.

The VLRC also has a role in providing educational programs in relation to law reform and possible changes in the law. The Commission may also supply information to parliament and parliamentary committees.

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Table 11.5 VLRC inquiries

Current projects	Examples of completed projects
• Improving the response of the justice system to sexual offences • Jurors with hearing or visual impairments	• Abortion • Adoption *Act* • Access to justice: litigation funding and group proceedings • Assistance animals • Assisted reproductive technology and adoption • Bail • Child protection • Civil justice • Committals • Contempt of court • Crimes (mental impairment) • Defences to homicide • Evidence • Failure to appear in court in response to bail • Family violence • Funeral and burial instructions • Intellectual disabilities • Jury directions • Jury empanelment • Medicinal cannabis • Neighbourhood tree disputes • Regulatory regimes preventing sexual offences • Victims of crime in the criminal trial process

Process

The VLRC process allows for extensive consultation.

The VLRC uses extensive consultation processes to assess the need for change. An investigation may be initiated in several ways.

In most instances, the Victorian Attorney-General will refer an issue to the VLRC for investigation. The Attorney-General will set out the issues to be investigated in a statement known as a reference.

Members of the community can initiate community law reform projects. Individuals or groups may identify minor problems in the law. The Commission will consider whether the matter is in the public interest and whether it can be undertaken as a community law reform project. Alternatively, the Commission may refer the matter to the Attorney-General as a possible reference.

The VLRC consults widely with people who may be affected by proposed reforms, and with individuals and groups who have expertise in the area. The VLRC uses a variety of approaches to assess community views, including:

- preparing discussion papers
- publishing issues papers
- preparing research papers
- conducting surveys
- engaging specialist consultants
- inviting public submissions
- conducting private and public meetings
- conducting personal interviews.

For more information on the VLRC, go to www.lawreform.vic.gov.au.

Reports from the VLRC are submitted to the Attorney-General, who must table the report within 14 parliamentary sitting days of receiving it.

The VLRC reports to the Attorney-General on law reform proposals. The Attorney-General tables the VLRC's reports within 14 parliamentary sitting days of receiving them. The government decides if it will act on the VLRC's recommendations. The law will change if and when Parliament passes new legislation.

Information about consultation strategies, timelines and progress reports is publicised on the VLRC's homepage. Individuals can lodge submissions electronically via the website.

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Figure 11.7 VLRC law reform poster (to view in full, go to www.lawreform.vic.gov.au)

Legal brief 11.2

The role of victims of crime in the criminal trial process

What was this project about?

The project addressed the question: What role should a victim of crime have in the criminal trial process?

The term 'victim' includes people who have directly suffered harm from a crime, the parents of child victims and family members of homicide victims.

The criminal trial process includes everything from the point where the Director of Public Prosecutions takes over a prosecution for an indictable (serious) offence, including: committal proceedings, trials and sentencing, and appeals. Almost every criminal case, including for indictable offences, begins in the Magistrates' Court, but criminal trials take place only in the Supreme and County Courts.

Adversarial criminal trials are a contest between two parties: the State (the prosecution) and the accused. But where does the victim fit in?

Why did the law need to change?

The law needed to change because society's understanding of the role of the victim has changed.

In the past, a victim of crime had no role in the trial unless they appeared as a witness for the prosecution. They did not have any special rights to information, support, to tell their story or to be treated with respect in court.

Gradually, over the past 30 years, law reforms enabled victims to be more involved in the criminal trial process. Today, victims are entitled to make a victim impact statement about how the crime has affected them, there are new procedures to reduce the trauma of giving evidence, and victims have the right to apply for compensation. The Victorian Victims Charter requires police and prosecutors to keep victims informed about the trial and treat them with respect.

However, in spite of these changes, victims often have a hard time in practice. Experiencing a crime – such as an assault, rape, or the murder of a loved one – causes harm and trauma which can be made even worse by negative experiences during the trial process. This is why the Attorney-General asked the Commission to review the law and make recommendations for change that would improve the experiences of victims.

What was the Commission's task?

The Attorney-General asked the Commission to review the role of victims in the criminal trial process, including:

- how criminal trials developed in England and other common law systems, and how adversarial trials (where there is a prosecution and a defence) compare with inquisitorial trials (where there are judges alone)
- recent innovations such as victim impact statements
- the role of victims at different stages of the criminal trial process
- how orders for compensation and restitution are made
- support provided to victims in relation to the criminal trial process.

The Attorney-General gave the Commission the reference on Victims of Crime in October 2014. Four information papers were published in May and June 2015. A report delivered in September 2016 was tabled in Parliament in November 2016; a number of bills were passed during 2018.

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What were the issues?

Respect

Victims of crime should consistently be treated with respect. Victims feel respected when they are provided with information and support, can participate in decision-making, are protected from unnecessary trauma, and can claim compensation or restitution. Authorities should also respond to the diverse needs of victims.

Information and support

Victims' experiences depend largely on how well they are prepared and supported. They need to be informed about what support services are available; about the progress and outcome of cases; about court processes and their role as a witness (if applicable); about decisions to modify charges or drop charges; and about victim impact statements.

Participation

Participation means giving victims a voice in what happens. Victims want their views to be considered when important decisions are made, such as the decision to modify or drop charges. The right to make a victim impact statement is another important means of participation.

Protection

Giving evidence in court can be intimidating for victims, especially when they are cross-examined by the defence. It can be particularly traumatic for victims of sexual offences. The right for accused persons to test the evidence against them is an important aspect of a criminal trial, but victims must also be treated with respect.

Financial reparation

Victims have an interest in how harm may be repaired through the criminal justice system, for example through compensation. It can be very hard for victims to obtain compensation.

What did the community say?

The Commission held 75 consultations across Victoria, meeting with victims of crime and their families, lawyers, judges, police, victim support and therapeutic professionals, and experts in victims' rights. A number of concerns were raised including: being treated with a lack of respect by lawyers and judges, safety issues, cross-examination and offensive questions and a lack of information about the process and issues such as how to access compensation.

What was recommended?

The Commission's report recommended cultural change within the criminal justice system to ensure victims are properly acknowledged and respected.

The rights of victims should be expanded and explicitly stated in the *Victims' Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The victim should have a right to be:

a acknowledged as a participant with an interest in the proceedings

b treated with respect at all times

c protected from unnecessary trauma, intimidation and distress when giving evidence.

The Commission made 51 recommendations in total. They included:

- Victims should be provided with information and support by the prosecution.
- There should be more protection for victims who give evidence.
- Judges should disallow improper questions asked of victim-witnesses, to prevent bullying and humiliation.
- Seeking compensation should be easier.
- A new legal service should advise and support victims of violent crime who need independent legal advice.
- A witness intermediary scheme should assist child victims and victims who have a disability that impairs their ability to give evidence.
- Victims should have more rights with regard to victim impact statements.
- Restorative justice should be introduced in some circumstances. (Restorative justice means processes that focus on repairing harm, involve the perpetrators taking responsibility for their actions and increase the involvement of victims).
- There should be more training for lawyers, judges and others on victims' rights.

What happened next?

Significant changes to the rights of victims of crime were made in September 2018 with the passage of the *Victims and Other Legislation Amendment Act 2018* (Vic).

The Act recognises that a victim of crime has an 'inherent interest' in the response by the criminal justice system to that crime. This acknowledges the victim's role as a participant in proceedings for criminal offences.

The Act requires all agencies to respect the rights and entitlements of victims as participants in proceedings, and consider the particular needs of victims in rural and regional locations.

The new Act requires the Director of Public Prosecutions to take all reasonable steps to:

- advise a victim of the details of criminal proceedings and the progress of a prosecution
- seek a victim's views regarding modifying charges, discontinuing a prosecution, or an appeal and provide reasons for decisions to a victim.

The *Sentencing Act 1991* (Vic) has been amended in relation to the contents of victim impact statements. The Act provides that a victim impact statement is allowed in a case and cannot be ruled out or ruled as inadmissible because it contains subjective or emotive material.

Source: https://www.lawreform.vic.gov.au/projects/case-study-role-victims-crime-criminal-trial-process

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Activity 11.8 Folio exercise

VLRC – assessing the need for change

1 Outline the role and structure of the VLRC.
2 Describe the processes used by the VLRC to assess the need for change in the law.
3 Explain how these processes provide an effective means of reviewing the need for change.
4 Outline the relationship between the Victorian parliament and the VLRC.
5 Carefully read 'The VLRC – effective law reform?'. Evaluate the extent to which you think that the VLRC is effective in influencing reform in the law.
6 Could the Victorian parliament make effective laws without the VLRC?

The VLRC – effective law reform?

The VLRC has a leading role in the reform of law in Victoria. Its main aims are to review the law and to suggest possible reforms to the law. The VLRC is committed to providing inclusive law reform, independent of the political process. To achieve this aim, the VLRC publishes reports and discussion papers on matters referred to it for consideration. The VLRC can also consider community law reform projects.

Why do we need a law reform commission?

Victorians need a law reform commission to provide for a full investigation of the law. The VLRC allows us to understand the content of the law and the fundamental legal principles. The VLRC can provide a comprehensive investigation of an entire area of law.

Also, a law reform commission allows for a broadly based public consultation process. The process aims to enhance the cohesiveness of the law. It strengthens legal principles and improves people's understanding of the law. People can then feel confident that parliament is making laws that represent the will of the people.

The VLRC uses a community consultation approach to assessing the need for change in the law. Community consultation includes submissions, public hearings and community education. At the same time, it draws upon the work of specialists, academic lawyers and legal practitioners.

Has it been successful?

How successful has the VLRC been? It is difficult to measure. It is important to remember that the VLRC is a law reform body, but it cannot change the law. The Attorney-General refers matters to the VLRC and therefore the investigations of the VLRC are likely to have government support. The VLRC makes recommendations for actions in its reports. However, investigations can take time and a change in the law only occurs if parliament passes legislation to implement the recommendations.

11.9 Royal commissions

Royal Commissions of Inquiry, commonly referred to as royal commissions, are inquiries appointed by the Crown on the recommendation of the government. Traditionally, the term 'royal' is used when the body has been established under the authority of a Governor or Governor-General. These inquiries are temporary, and are made by a body appointed by the government to provide advice on, or to investigate, a particular issue. These inquiries are usually open to the public and seek input from the community. The reports of royal commissions are tabled in parliament.

A royal commission is an inquiry appointed by the Crown on the recommendation of the government.

Royal commissions may be called by:

- the Commonwealth government;
- the State government; or
- the Commonwealth government and State government.

The Commonwealth government has the power to establish a royal commission under the *Royal Commissions Act 1902* (Cth). The Victorian government can establish a royal commission under the *Inquiries Act 2014* (Vic).

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Role

A royal commission can be established for a number of reasons. It may be established to draw upon expert opinion about the approach that should be adopted by the government on an issue. In many instances, the issues considered may relate to a controversial matter that the government has been unable, or unwilling, to resolve.

In political terms, a royal commission may be used by a government to shift the decision-making responsibility in controversial areas from the government to another body, to avoid public criticism. At times, this creates a significant delay in the decision-making process. Royal commissions can also perform an educative function: they allow various views to be published and the reasons for government action to be known to the community.

Process

The scope of a royal commission is set out in the Letters Patent.

A royal commission is established when the Governor-General or Governor issues 'Letters Patent'. Letters Patent are issued under the Public Seal of State. The Letters Patent will state who will form part of the royal commission, who will chair the royal commission and the terms of reference. The terms of reference may also set the time by which the royal commission is to report.

A royal commission has extensive powers, including coercive powers, and can apply for warrants to search and seize.

Royal commissions have specific powers of investigation. They include wide-ranging coercive powers of investigation, such as the ability to summons and cross-examine witnesses, and to obtain evidence. Royal commissions can also apply for warrants to search and to seize evidence.

A royal commission is not bound by the same rules of evidence as a court.

A royal commission has extensive powers to conduct hearings. These hearings are usually formal in nature and involve interviewing witnesses and taking evidence. A royal commission is not bound by the same rules of procedure and evidence as a courtroom. However, it has the power to compel people to appear before the hearings and to give evidence (usually under oath). It can also compel a witness to produce documents.

A royal commission can also provide protection to witnesses. Penalties can be imposed for non-compliance with a summons from a royal commission.

Royal commissions can prepare and release issues papers, conduct consultations, call for written submissions and hold public hearings.

Often a royal commission is chaired by a retired or serving judge or a Senior Counsel/Queen's Counsel. The chair of the commission will be assisted by legal counsel and staff. The processes used by royal commissions to investigate an issue may vary. However, the process will usually involve:

- research, and the release of an issues paper
- consultations with experts and stakeholder groups
- calls for written submissions
- community consultations and public hearings.

The findings of royal commissions are published in reports. The reports are formally submitted to the Governor-General or the Governor.

The findings of Royal Commissions are published in reports that are formally submitted to the Governor-General or the Governor. The report is tabled in parliament, but there is no requirement for parliament to adopt any of the recommendations made. These reports, however, are often influential, with the government enacting some or all recommendations into law. Nonetheless, it should be noted that the work of some royal commissions has had limited impact.

Royal commissions are official inquiries into matters of public concern and are typically established whenever there is a question of ongoing impropriety, illegal activity or gross administrative incompetence. A royal commission can inquire into any area of Australian life: for instance, the inquiry into Misconduct in the Banking, Superannuation and Financial Services Industry (report tabled in parliament in February 2019) and in mid-January 2019, a Royal Commission into Aged Care Quality and Safety was established.

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Commonwealth royal commissions are conducted under the *Royal Commissions Act 1902* (Cth). This Act has been amended more than 20 times since its enactment. The last amendment was in 2013, and allowed for private sessions to be conducted by the Child Sexual Abuse Royal Commission.

Royal commissions do have a number of benefits and a number of disadvantages.

Table 11.6 Benefits and disadvantages of royal commissions

Benefits	Disadvantages/concerns
Highest form of inquiry on matters of public importance	The *Royal Commission Act 1902* (Cth) has caused difficulties in some inquiries because of a lack of power to investigate breaches of the Act, the inadequacy of penalties for a failure to comply with the Act and the inability of royal commissions to communicate information about unlawful behaviour to law enforcement bodies. Royal commissions can be expensive, the legitimacy and authority of royal commissions may diminish if inquiries are established too quickly.
Unique and coercive powers of investigation including the power to summon witnesses to give evidence under oath or produce documents	Royal commissions are sometimes criticised for taking too long (the Aboriginal Deaths in Custody hearings were in 1987–9; the report was not published until 1991). Time is taken in creating a commission: engaging personnel, finding premises, purchasing or renting office furniture and equipment, seeing to the formation of an administrative structure, and recruiting a team of lawyers to handle the evidence and to present witnesses at public hearings.
Powers are beyond those available to courts	There may be difficulty in finding lawyers who are prepared to leave or disrupt their practices for a prolonged period of time.
Royal commissions can be established at any time and have a single purpose	The appointment of commissioners may create problems, particularly where the issues to be investigated involve a mixture of law and policy or policy alone (as distinct from investigation of facts or an inquiry into the existing state of the law).
Royal commission reports are tabled in parliament and are generally made public	The appointment of judges to royal commissions may have implications for judicial independence.
Royal commissions are not passive – non-binding recommendations are made	Investigatory functions can resemble adversarial contests, like courts, which sometimes leads to allegations being unresolved.
Royal commissions can seek expert advice from a range of sources	Media reporting may result in serious damage to the reputations and interests of individuals, particularly at the investigation stage, where individuals have limited or no opportunity to participate.
Royal commissions serve an important democratic function and allow people to participate	The government does not have to follow royal commission recommendations.
They are able to manage competing interests and political turmoil	If a different political party wins government at an election, it may decide to repeal laws previously made based on the commission's recommendations.

Two tiers of inquiries?

The Australian Law Reform Commission looked into whether there was any need to develop an alternative form or forms of Commonwealth executive inquiry. These alternatives would be established by statute to provide more flexibility, less formality and greater cost-effectiveness than a royal commission. A number of recommendations were made including: establishing two tiers of public inquiry; royal commissions and official inquiries. Official inquiries could be established to look at matters of public importance and be able to require attendance at hearings and reports produced and tabled quickly.

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Legal brief 11.3

Royal Commission into the Banking, Superannuation and Financial Services Industry

The main task of the Royal Commission was to inquire into, and report on, whether any conduct of financial service entities might have amounted to misconduct and whether any conduct, practices, behaviour or business activities might have fallen below community standards and expectations. The Royal Commission received 10 323 submissions and held seven public hearings across the country. There were also a number of background reports that were used in the final report.

> The conduct identified and described in the Commission's interim report and the further conduct identified and described in this Report includes conduct by many entities that has taken place over many years causing substantial loss to many customers but yielding substantial profit to the entities concerned. Very often, the conduct has broken the law. And if it has not broken the law, the conduct has fallen short of the kind of behaviour the community not only expects of financial services entities but is also entitled to expect of them.

The Final Report sought to take what was learned in respect to the different parts of the financial services industry and make recommendations.

The Commission focused on four observations about the connection between conduct and reward, the asymmetry of power and information between financial services entities and their customers, the effect of conflicts between duty and interest and holding entities to account.

The Commission found that in almost every case, the conduct in issue was driven, not only by the relevant entity's pursuit of profit, but also by individuals' pursuit of gain, whether in the form of remuneration for the individual or profit for the individual's business. Providing a service to customers was relegated to second place. Sales became all important. Those who dealt with customers became sellers. And the confusion of roles extended well beyond front-line service staff. Advisers became sellers and sellers became advisers.

The Commission found that it was difficult if not impossible to manage 'conflicts of interest' and that in most cases, self-interest usually won over duty to the client and that a 'good enough' outcome was pursued instead of the best interests of the relevant clients or members. The Commission also found that often financial entities that broke the law were not properly held to account. Wrong doing and misconduct were not denounced or punished. The community, however, expects that financial services entities that break the law will be held to account. The final report made 76 recommendations and 24 referrals for potentially criminal conduct to make institutions and individuals accountable for past actions and to look to the future to ensure that this does not reoccur.

Some of the recommendations from the Royal Commission are listed below.

Consumer lending; direct lending

The *National Consumer Protection Act* 2009 (Cth) should not be amended to alter the obligation to assess unsuitability.

(Recommendation 1.2) The law should be amended to provide that mortgage brokers must act in the best interests of the intending borrower.

(Recommendation 1.3) The borrower, not the lender, should pay the mortgage broker fee for acting in connection with home lending.

(Recommendation 1.4) A treasury-led working group should be established to monitor and adjust the renumeration model discussed above.

(Recommendation 1.5) Mortgage brokers should be subject to and regulated by the laws that apply to entities providing financial product advice.

Consumer lending: intermediated lending for vehicles and other consumer goods

Removal of point-of-sale exemption: the exemption of retail dealers from the operation of the NCCP Act should be abolished.

Access to banking services

Amending the Banking Code

(Recommendation 1.8) The Banking Code should be amended to provide that banks will work with customers:

- who live in remote areas; or
- who are not adept in using English, to identify a suitable way for those customers to access and undertake their banking;

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- without prior express agreement with the customer, banks will not allow informal overdrafts on basic accounts; and
- banks will not charge dishonour fees on basic accounts.

Lending to small and medium enterprises

(Recommendation 1.9) – No extension of the NCCP Act

The NCCP Act should not be amended to extend its operation to lending to small businesses.

(Recommendation 1.10) – Definition of 'small business'

The ABA should amend the definition of 'small business' in the Banking Code so that the Code applies to any business or group employing fewer than 100 full-time employees, where the loan applied for is less than $5 million.

(Recommendation 1.11) – Farm debt mediation

A national scheme of farm debt mediation should be enacted.

(Recommendation 1.12) – Valuations of land

APRA should amend Prudential Standard APS 220 to:

- require that internal appraisals of the value of land taken or to be taken as security should be independent of loan origination, loan processing and loan decision processes; and
- provide for valuation of agricultural land in a manner that will recognise, to the extent possible, the likelihood of external events affecting its realisable value.

(Recommendation 1.13) – Charging default interest

The ABA should amend the Banking Code to provide that, while a declaration remains in force, banks will not charge default interest on loans secured by agricultural land in an area declared to be affected by drought or other natural disaster.

Financial advice: Ongoing fee arrangements

Annual renewal and payment

(Recommendation 2.1) The law should be amended to provide that ongoing fee arrangements (whenever made):

- must be renewed annually by the client and
- must record in writing each year the services that the client will be entitled to receive and the total of the fees that are to be charged.

Lack of independence

(Recommendation 2.2) The law should be amended to require that a financial adviser who would contravene section 923A of the *Corporations Act 2001* (Cth) by assuming or using any of the restricted words or expressions identified in section 923A(5) (including 'independent', 'impartial' and 'unbiased') must, before providing personal advice to a retail client, give a written statement explaining simply and concisely why the advisor is not independent and unbiased.

Quality of advice

Review of measures to improve the quality of advice

(Recommendation 2.3) There should be a review by Government in consultation with ASIC of the effectiveness of measures that have been implemented by the Government, regulators and financial services entities to improve the quality of financial advice. The review should be completed no later than 31 December 2022.

Conflicted remuneration

(Recommendation 2.4) – **Grandfathered commissions**

Grandfathering provisions for conflicted remuneration should be repealed as soon as is reasonably practicable.

Professional discipline of financial advisers

(Recommendation 2.7) – **Reference checking and information sharing**

All AFSL holders should be required, as a condition of their licence, to give effect to reference checking and information-sharing protocols for financial advisers.

ABA: Australian Banking Association

AFSL: Australian Financial Services Licence

APRA: Australian Prudential Regulation Authority

ASIC: Australian Securities and Investments Commission

NCCP Act: *National Consumer Credit Protection Act 2009* (Cth)

Prudential Standard APS 220 – Credit Quality

A grandfather commission is an exemption that allows persons or entities to continue with activities that were approved before the implementation of new rules, regulations or laws. May only be granted for a set period of time.

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(Recommendation 2.8) – **Reporting compliance concerns**

All AFSL holders should be required, as a condition of their licence, to report 'serious compliance concerns' about individual financial advisers to ASIC on a quarterly basis.

(Recommendation 2.9) – **Misconduct by financial advisers**

All AFSL holders should be required, as a condition of their licence, to take the following steps when they detect that a financial adviser has engaged in misconduct in respect of financial advice given to a retail client (whether by giving inappropriate advice or otherwise):

- make whatever inquiries are reasonably necessary to determine the nature and full extent of the adviser's misconduct; and
- where there is sufficient information to suggest that an adviser has engaged in misconduct, tell affected clients and remediate those clients promptly.

Superannuation

(Recommendation 3.4) – **No hawking**

Hawking of superannuation products should be prohibited. That is, the unsolicited offer or sale of superannuation should be prohibited except to those who are not retail clients and except for offers made under an eligible employee share scheme.

The law should be amended to make clear that contact with a person during which one kind of product is offered is unsolicited unless the person attended the meeting, made or received the telephone call, or initiated the contact for the express purpose of inquiring about, discussing or entering into negotiations in relation to the offer of that kind of product.

Insurance

(Recommendation 4.1) – **No hawking of insurance**

Consistently with Recommendation 3.4, which prohibits the hawking of superannuation products, hawking of insurance products should be prohibited.

(Recommendation 4.2) – **Removing the exemptions for funeral expenses policies**

The law should be amended to:

- remove the exclusion of funeral expenses policies from the definition of 'financial product'; and
- put beyond doubt that the consumer protection provisions of the *ASIC Act 2001* (Cth) apply to funeral expenses policies.

(Recommendation 4.7) – **Application of unfair contract terms provisions to insurance contracts**

The unfair contract terms provisions now set out in the *ASIC Act 2001* (Cth) should apply to insurance contracts regulated by the *Insurance Contracts Act 1984* (Cth). The provisions should be amended to provide a definition of the 'main subject matter' of an insurance contract as the terms of the contract that describe what is being insured.

Oversight

Recommendation 6.14) – **A new oversight authority**

A new oversight authority for APRA and ASIC, independent of Government, should be established by legislation to assess the effectiveness of each regulator in discharging its functions and meeting its statutory objects.

- The authority should be comprised of three part-time members and staffed by a permanent secretariat.
- It should be required to report to the Minister in respect of each regulator at least biannually.

Simplification so that the law's intent is met

(Recommendation 7.3) – **Exceptions and qualifications**

As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.

(Recommendation 7.4) – **Fundamental norms**

As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.

Source: https://treasury.gov.au/publication/p2019-fsrc-final-report

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News report 11.10

Constructively tough? Neither side has committed to fully adopting perhaps the most important recommendation of the Banking Royal Commission

Among the many recommendations of the Banking Royal Commission was a Board of Oversight for the two regulators in charge of financial institutions; the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority: ASIC and APRA.

Since then APRA's own internal review has found APRA to be soft on enforcement and timid by comparison to its international peers.

It sounds like 'tough but flexible', a contradiction in terms if ever there was one. APRA still seems not to have internalised the message: fraud and theft are not up for negotiated settlement. This is why a board of oversight is so necessary.

Of concern, however, is that the commissioner elected to leave the details of how the board would work to parliament. It is here that the process faces its greatest risk: the risk of clumsy albeit well-intentioned implementation, all the way to purposefully bad implementation, fully intended to undermine the fundamental goals of the whole endeavour, and facilitated by equally captured and suborned politicians.

Source: Dr Andrew Schmulaw, The Conversation, *18 April 2019*

In 2017, the Banking Royal Commission was established to inquire into the banking, superannuation and financial services industry.

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Activity 11.9 Folio exercise

Royal commissions

1 Outline the role and structure of a royal commission.
2 Describe the processes used by royal commissions to assess the need for law reform.
3 Determine how many of the recommendations have been introduced by the four largest banks. You may go to the Australian Parliament website, (www.aph.gov.au) or the websites of *The Age* or *The Conversation* for further information.
4 Assess the extent to which these processes provide an effective means of reviewing the need for change.
5 Describe the relationship between the Australian parliament and a royal commission.
6 Evaluate the extent to which you think that a royal commission is effective in influencing a law reform.

11.10 Parliamentary committees

A parliamentary committee is a committee formed by members of parliament, appointed by one or both houses of parliament, to undertake specific tasks.

A **parliamentary committee** is formed by members of parliament appointed by one, or both, houses of parliament to undertake a specified task. The committee includes government members of parliament and non-government members (opposition and cross-bencher members of parliament). Both the state and Commonwealth parliaments have a committee system.

Table 11.7 Types of parliamentary committees

Standing committees	Committees appointed for the life of a parliament. These committees are usually re-established in some form after each election. Committees are established by the house at the commencement of each parliament to inquire into and report upon any matters referred to them. These committees specialise by subject area.
Select committees	Committees appointed as the need arises for a specific purpose; they have a limited life.
Joint committees	Committees made up of members from both houses of parliament. They report to both houses of parliament.
Statutory committees	Committees established by an Act of Parliament.
Domestic or internal committees	Committees concerned with the powers and procedures of the house or the administration of parliament.
Estimates committees	Committees that usually meet three times a year to scrutinise how the government has spent Budget funds.

Role

Parliamentary committees can be asked to investigate particular issues.

Parliamentary committees can investigate:

- specific matters of policy
- government administration or performance.

Committees are designed to provide parliament with advice on issues. They can draw on expertise from outside parliament and assess community views. Committees are able to conduct inquiries to find out the facts of a case or issue, gathering evidence from expert groups or individuals. The use of committees provides for a broad range of views to be represented and they make recommendations to parliament in a final report.

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Process

Committees have considerable powers including the power to order people to attend by summons to give evidence and to produce documents. Committee proceedings are considered 'proceedings in parliament', which means they are 'privileged': members and witnesses cannot be sued or prosecuted for anything they say during a committee hearing. These powers ensure that committees are able to get a comprehensive view of an issue.

The terms of reference are set out for each committee inquiry. Depending on the type of committee, the terms of reference may be set by the house, by a minister, by statute, or by the committee itself.

The committee will advertise its terms of reference in the media and on the internet so that it can receive evidence and submissions from interested parties. Stakeholders or people with particular expertise or interest may be directly approached to make a submission.

The scope of a parliamentary committee inquiry is set out in its terms of reference.

Legal advisers and research officers are employed by parliament to work with committees and they often produce a discussion paper. The research officers will also analyse evidence in submissions and evidence presented at public hearings.

As well as running public hearings, seminars, public meetings, focus groups and roundtable discussions, committees may also inspect facilities or visit places relevant to the inquiry. Hearings are generally open to the public, but in special circumstances evidence may be heard in private. *Hansard* provides a transcript of evidence taken at public hearings. Evidence taken in private is not disclosed or published.

Parliamentary committees can have public hearings, seminars, public meetings, focus groups, roundtable discussions, publish interim reports and conduct site visits.

After examining all the evidence, the committee will prepare a report setting out its conclusions and making recommendations. This report is presented to the house that initiated the inquiry, or to both houses in the case of a joint committee. Sometimes some members of a committee do not agree with all recommendations in the report. If a member of the committee does not agree with the majority of the committee, they may publish a minority or dissenting report.

The committee will prepare a report which is presented to parliament; the government generally has six months to respond to the report.

The government will respond to the committee report by presenting a statement in parliament. In this statement the government may accept all, some or none of the committee's recommendations, and announce its intention to take certain actions. Often the recommendations lead to changes in the law.

Parliamentary committees

In recent times, committees have increasingly used social media to seek community participation in the inquiry process. The Commonwealth parliament publicises inquiries and committee activities through the 'About the House' Twitter and Facebook accounts.

Legal brief 11.4

Inquiry into the external oversight of police corruption and misconduct in Victoria

The Integrity and Oversight Committee was a joint investigatory committee of the Parliament of Victoria. The Committee was created when the Accountability and Oversight Committee and the Independent Broad-based Anti-Corruption Commission Committee were amalgamated.

The issue

The inquiry was established to examine the external oversight of police corruption and misconduct in Victoria. The committee was set up to examine the current system for the oversight of police corruption and misconduct in Victoria, in particular:

- the role of IBAC (Independent Broad-based Anti-corruption Commission) and the Victorian Inspectorate
- identify and assess best-practice models for the oversight of police
- identify and review the main challenges to the effective oversight and investigation of complaints and disclosures about police in Victoria
- consider best-practice strategies to improve the oversight and investigation of police corruption and misconduct and how they may be implemented in Victoria.

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Terms of reference

The IBAC Committee is constituted under section 12A of the *Parliamentary Committees Act 2003*. The functions of the Committee are to:

- monitor and review the performance of the duties and functions of the IBAC
- report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament
- examine any reports made by the IBAC
- consider any proposed appointment of a Commissioner and to exercise a power of veto in accordance with the *Independent Broad-based Anti-corruption Commission Act 2011* (VIC)
- carry out any other function conferred on the IBAC Committee by or under this Act or the *Independent Broad-based Anti-corruption Commission Act 2011*
- monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers (Victorian Auditor-General's Office) or Ombudsman officers
- report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate that require the attention of the Parliament, other than those in respect of VAGO officers or Ombudsman officers
- examine any reports made by the Victorian Inspectorate, other than reports in respect of VAGO officers or Ombudsman officers
- consider any proposed appointment of an Inspector and to exercise a power of veto in accordance with the *Victorian Inspectorate Act 2011*.

Shortcomings of the law

Police play a critical role in society, preventing and combating crime, enforcing the law and protecting, assisting and engaging with the community in myriad ways. The job of a police officer is a demanding one: they can be called on to make split-second decisions in complex, stressful and dangerous circumstances. In order to do their jobs effectively, police officers have distinctive powers to arrest, detain, search and use force against individuals. However, the use of these powers is strictly governed by the law and by the understanding that effective and legitimate policing rests on the consent and confidence of the community – an understanding central to the values and commitments of Victoria Police. While the majority of Victoria Police officers do a fine job in serving the community, the maintenance of public confidence in police depends to a considerable degree on how officers who do the wrong thing are held accountable. In this regard, an effective system for handling complaints and disclosures ('whistleblower' complaints) is vital.

Timeline

The committee was to report no later than 30 June 2018.

Submissions and hearings

The committee held informal meetings and site visits in Australia and overseas. Countries visited included: Austria, France, England, Northern Ireland, Latvia, Hong Kong and New Zealand. The committee received 54 submissions and heard from 55 witnesses.

Key findings

The committee examined the key inquiries into police corruption and other misconduct in other countries and also identified best-practice principles to draw on in its assessment of the operation of the Victorian system. A number of key themes and lessons arose out of the Committee's survey of past inquiries into police corruption, misconduct and complaints systems.

Given the extensive powers exercised by police, and the particular challenges of investigating police, it has been argued that there is a need for robust, independent, external oversight.

Recommendations were tabled in the report. These included the following (with corresponding page numbers in the report in brackets):

RECOMMENDATION 1 (p. 50)

That IBAC, as an independent body, retain its role in receiving, handling, investigating and overseeing complaints and disclosures about police; it is not necessary to create a new body in addition to IBAC to undertake these tasks.

RECOMMENDATION 2 (p. 52)

That IBAC should formally establish a dedicated Police Corruption and Misconduct Division to increase public confidence in Victoria's system for the handling of complaints about police corruption and other misconduct, improve its capacity to conduct effective investigations, enhance its independence, develop its expertise and improve its overall performance.

RECOMMENDATION 3 (p. 52)

That IBAC increase the number of staff dedicated to the investigation of complaints and disclosures about police within the proposed Police Corruption and Misconduct Division. In addition, IBAC should increase the number of civilian specialists it recruits from a diverse range of backgrounds and disciplines.

RECOMMENDATION 4 (p. 52)

That the Victorian Government adequately resource the Police Corruption and Misconduct Division in IBAC to ensure that it can independently and effectively investigate complaints and disclosures about Victoria Police.

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RECOMMENDATION 5 (p. 104)

That the Victorian Government review the legislative regime for complaints and disclosures about police and consolidate, simplify and clarify the legislative provisions on who may make a complaint or disclosure, how they may make a complaint or disclosure, and to whom …

RECOMMENDATION 6 (p. 104)

That the Victorian Government apply plain-language principles to improve the design of the *IBAC Act 2011* (Vic), *Victoria Police Act 2013* (Vic) and the *Protected Disclosure Act 2012* (Vic) so that they are easier to use, understand and navigate …

RECOMMENDATION 18 (p. 184)

That the Victorian Government seek to amend relevant provisions of the *Victoria Police Act* and the *IBAC Act* to clarify that 'complaints' and 'disclosures' about Victoria Police include Victoria Police's categories of Management Intervention Model (MIM) and Local Management Resolution (LMR) matters and that Victoria Police be required to report all these matters to IBAC for assessment, monitoring and review …

RECOMMENDATION 19 (p. 184)

That IBAC include in its annual reports an account of the number and nature of MIMs and LMRs they have received from Victoria Police as well as the number of MIMs and LMRs that were incorrectly classified.

RECOMMENDATION 20 (p. 189)

That the Victorian Government seek to amend the *Victoria Police Act 2013* (Vic) ('Victoria Police Act') and *IBAC Act 2011* (Vic) ('IBAC Act') so that the provisions defining police misconduct are consolidated, simplified and clarified …

RECOMMENDATION 21 (p. 190)

That the Victorian Government seek amendment of the definition of 'relevant offence' in s 3 of the *IBAC Act* to include any indictable common law offence committed in Victoria.

RECOMMENDATION 27 (p. 219)

That the Victorian Government seek the amendment of s 73 of the *IBAC Act* to prohibit, unless there are exceptional circumstances, IBAC referring to Victoria Police for investigation any complaint or disclosure about 'serious police misconduct' (as defined in this report) …

RECOMMENDATION 37 (p. 251)

That the Victorian Government seek the amendment of the *IBAC Act* to require that, unless there are exceptional circumstances, IBAC, rather than Victoria Police, investigate complaints and disclosures about 'serious police misconduct' …

RECOMMENDATION 38 (p. 252)

That the Victorian Government seek the amendment of s 15(2) of the *IBAC Act* to provide that IBAC has functions of investigating police misconduct and serious police misconduct …

RECOMMENDATION 59 (p. 302)

That the Victorian Government seek the amendment of the *Victoria Police Act* to require Professional Standards Command, Victoria Police, to:

- approve the appointment of any police investigators of complaints about police
- certify that any appointed investigator is impartial and not affected by a conflict of interest
- report that certification (with supporting reasons) in writing to IBAC.

Government response

In March 2019, the Victorian Parliament passed new legislation – Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2019 – which makes some changes to Victoria's integrity system.

The new legislation introduced some changes to the *Protected Disclosure Act 2012* to support people making disclosures which are in the public interest. On 1 January 2020, these changes will replace existing 'protected disclosure' arrangements (PDs) with 'public interest disclosures' (PIDs).

The new legislation encourages and facilitates the reporting of improper conduct in the public sector, expands and clarifies the types of wrong doing, simplifies pathways, clarifies confidentiality obligations, expands the range of bodies that can investigate and makes Victoria's system of accountability more efficient.

Activity 11.10 Folio exercise

Oversight of police corruption and misconduct

1 Outline the role and structure of the parliamentary committee set up for the inquiry into the external oversight of police corruption and misconduct in Victoria.
2 Describe the processes used by the parliamentary committee to assess the need for a reform in the law.
3 Evaluate whether these processes provide an effective means of reviewing the need for change.
4 Explain whether or not parliament has to respond to the report of the committee.
5 Evaluate the extent to which you think that a parliamentary committee is effective in influencing law reform.

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News report 11.11

How do committees inform the legislative process?

The role of committees

Both the Commonwealth and the Victorian parliaments use committees to assess community opinions on proposed changes in the law. The committees promote public debate on the proposed changes, and allow community groups or individuals to have their say on issues being considered by parliament. This ensures that the laws made represent the views of the community.

A parliamentary committee is made up of both government and opposition members of parliament. Committees investigate and examine specific issues, gather evidence from experts, community groups or individuals, and then report to the parliament. With the support of parliamentary staff, each committee focuses on a defined area and builds up expertise and specialised knowledge.

Committees represent a significant strength of the parliamentary process for changing the law because they undertake extended investigations that cannot be performed in the parliament during the legislative process.

Committees contribute significantly to the functions of government. They allow for better policy-making. The work of committees enable members of parliament to be better informed on issues. This improves their contribution to policy and legislative review. Committees generate discussion of issues across party lines. Finally, inquiries can increase public awareness of the work of parliament.

The Senate as a 'house of review'

The importance of the role of committees in the review of legislation is well illustrated by the processes adopted in the Senate.

Senate committees

The Scrutiny of Bills Committee examines each Bill that comes before the Senate to ensure that legislation does not impinge unduly on the fundamental rights and liberties of citizens. When the committee identifies a potential problem with a Bill, it alerts the Senate and the responsible minister. After considering the minister's response, the committee reports back to the Senate. Based on the issues raised by the committee, individual senators may propose amendments to the Bill. These amendments may be dealt with in the Committee of the whole stage.

The role of the Senate as a 'house of review' is also evident in the work of its legislative and general purpose standing committees. The Selection of Bills Committee considers all Bills (except Appropriation Bills) before the Senate and decides which Bills should be referred to a Senate committee for further consideration and which Bills should be debated by the Senate in the usual way. If Bills are complex, controversial or contentious they are usually referred to Senate committees. This will often happen before the second reading.

If a Bill is referred to a Senate committee, that committee will examine the Bill in detail. The committee may call for submissions and witnesses from interested bodies or government departments to give evidence. Through this process, previously unforeseen problems may be identified or misunderstandings about the impact of the Bill resolved. After its investigations, the committee reports back to the Senate. The report may contain recommendations for amendments or changes to the Bill. Of course, other amendments may be put forward by the Senate during the Committee of the whole stage.

Approximately 20% of Bills have been referred to standing committees using this process. This process prevents time being wasted on lengthy debate and ensures that all Bills are examined in detail. In theory, this process should result in better quality legislation.

This system gives senators the opportunity to have a thorough look at the legislation. Committees can hear submissions from groups and individuals interested in the legislation. The public has the opportunity to contribute to the legislative process.

It is important to note, however, that even after a Bill has been referred to a Senate committee and returned to the Senate for debate, it may still be considered by the Committee of the whole.

Activity 11.11 Folio exercise

The role of committees in the legislative process

Read News report 11.11 'How do committees inform the legislative process?' and answer the questions below:

1 Define a parliamentary committee.

2 Describe the impact that the work of parliamentary committees can have on the legislative process.

3 Explain the main advantages of the committee system used by parliament.

4 Explain the key advantages of the Bills going to committee processes used by the Senate.

5 One criticism of this process is that it can result in delays in the legislative process:

   a Account for any delays that might occur.

   b Assess what would be the impact of such delays on the effectiveness of parliament.

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Activity 11.12 Structured questions

Committees in action

Undertake research into a parliamentary committee using the homepage of either the Commonwealth parliament (www.aph.gov.au) or the Victorian parliament (www.parliament.vic.gov.au).

1 Select a committee. Describe the role and function of that committee.
2 Select an inquiry concerned with the need to change the law.
   a Outline the area of law being discussed in the inquiry.
   b Explain why the law needed to change.
   c Describe the action taken by the committee to review the need for a change in the law.
3 Prepare a 1–2 page summary of your findings using the headings of:
   a area of law
   b why the law needed to be changed
   c action taken by the committee
4 Design a diagram, flow chart or concept map to illustrate the process used by parliamentary committees for reviewing the need to reform the law.
5 Evaluate the contribution of parliamentary committees to parliament's effectiveness as a law-maker.

Independent MP Alex Greenwich in NSW Parliament on 26 September 2019 in Sydney, NSW. Greenwich introduced the Reproductive Health Care Reform Bill 2019 that ultimately passed the Upper House of the NSW Parliament to decriminalise abortion.

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Key point summary

Do your notes cover all the following points?

Need for change

- ❑ Factors that may result in a need for law reform:
  - community attitudes and values
  - expectations of the legal system
  - the needs of government departments
  - the nature of business
  - technology
  - community awareness
  - pace of community changes
  - international relationships.

Parliament and change

- ❑ Actions that may influence law reform – make sure you can give examples of all of these:
  - Actions taken by individuals:
    - petitions
    - demonstrations
    - use of the courts
  - Use of the media, including social media – to report on the actions of others or act directly to influence public opinion on a selected issue.
  - The role of the Victorian Law Reform Commission (VLRC) and its ability to influence law-makers.
    - The VLRC examines, reports and makes recommendations to the Attorney-General on areas referred to the Commission by the Attorney-General, and on minor legal issues of general community concern.
    - The VLRC suggests to the Attorney-General proposed law reform issues and educates the community on law reform issues.
    - Include a recent example of the VLRC recommending law reform. Recent projects can be found at www.lawreform.vic.gov.au/all-projects
  - The role of a royal commission and its ability to influence law reform.
    - Royal commissions examine, report and make recommendations to the Crown on areas referred to the Commission by the Crown in the Letters Patent.
    - Royal commissions have special powers.
    - Royal commissions can prepare and release issues papers, conduct consultations, call for written submissions and hold public hearings.
    - Include the role of one royal commission* and its ability to influence law reform. For information, go to: www.royalcommission.gov.au (Commonwealth) or www.vic.gov.au/inquiries-and-royal-commissions (Victoria)
  - The role of a parliamentary committee and its ability to influence law reform.
    - Parliamentary committees examine, report and make recommendations to the parliament on areas referred to the committee in the terms of reference.
    - Parliamentary committees can conduct public hearings, seminars, public meetings, focus groups, roundtable discussions and site visits. They can also publish interim reports.
    - Parliamentary committee reports are presented to parliament and the government generally has six months to respond to the report.
    - Include the role of one parliamentary committee* and its ability to influence law reform. For information, go to: www.aph.gov.au/Parliamentary_Business/Committees (Commonwealth) or www.parliament.vic.gov.au/committees/list-of-committees (Victoria)

*Note: The Study Design requires you to know the role of one parliamentary committee OR one royal commission and its ability to influence law reform.

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End-of-chapter questions

Revision questions

1 Explain why the law may need to change.

2 Explain the reasons for law reform using recent examples.

3 Explain the means by which individuals can influence changes to the law.

4 Comment on the effectiveness of each method you discussed in question 3. You may use a table to set this out.

5 Analyse how the media can be used to influence changes to the law.

6 Using examples, analyse how social media can be used to influence changes to the law.

7 Using a recent example, evaluate the role of the Victorian Law Reform Commission in law reform.

8 Evaluate the role of either a royal commission or a parliamentary committee in influencing changes to the law. In your response you should refer to a recent example (within the last four years).

Practice exam questions

1 Changes in technology are one reason for the law needing to change. Explain two other reasons why a law might need to be changed. [4 marks]

2 Many groups and individuals are unhappy with proposed changes. You are upset about a recent proposal to change the law. Propose and justify one method individuals or groups can try to influence laws. [4 marks]

3 Evaluate two other methods that an individual may use to influence a change to the law. [6 marks]

4 To what extent do you think a petition is likely to be a successful method of influencing changes in the law? Include e-petitions as part of your response. [6 marks]

5 Using a recent example, evaluate the ability of law reform bodies to influence a change in the law. [8 marks]

6 Evaluate the role of a parliamentary committee or a royal commission in influencing changes to the law. [6 marks]

7 With the use of current examples (from the last four years), explain the influences on legislative change and evaluate the ability of individuals to influence a change in the law. [8 marks]

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Chapter 12

Unit 4 – Area of Study 2

Parliament and the courts: the ability to respond to the need for law reform

To understand the operation of Australia's laws and legal system we need to appreciate the institutions that make and reform our laws, as well as the relationship between the Australian people, the Australian Constitution, and law-making bodies. In this chapter, we bring together this study to evaluate the ability of parliament and the courts to respond to the need for changes to the law.

After decades of protests and a national postal vote giving 61.6% support to marriage equality, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) was passed by the Australian parliament on 7 December 2017 and received Royal assent from the Governor-General the next day.

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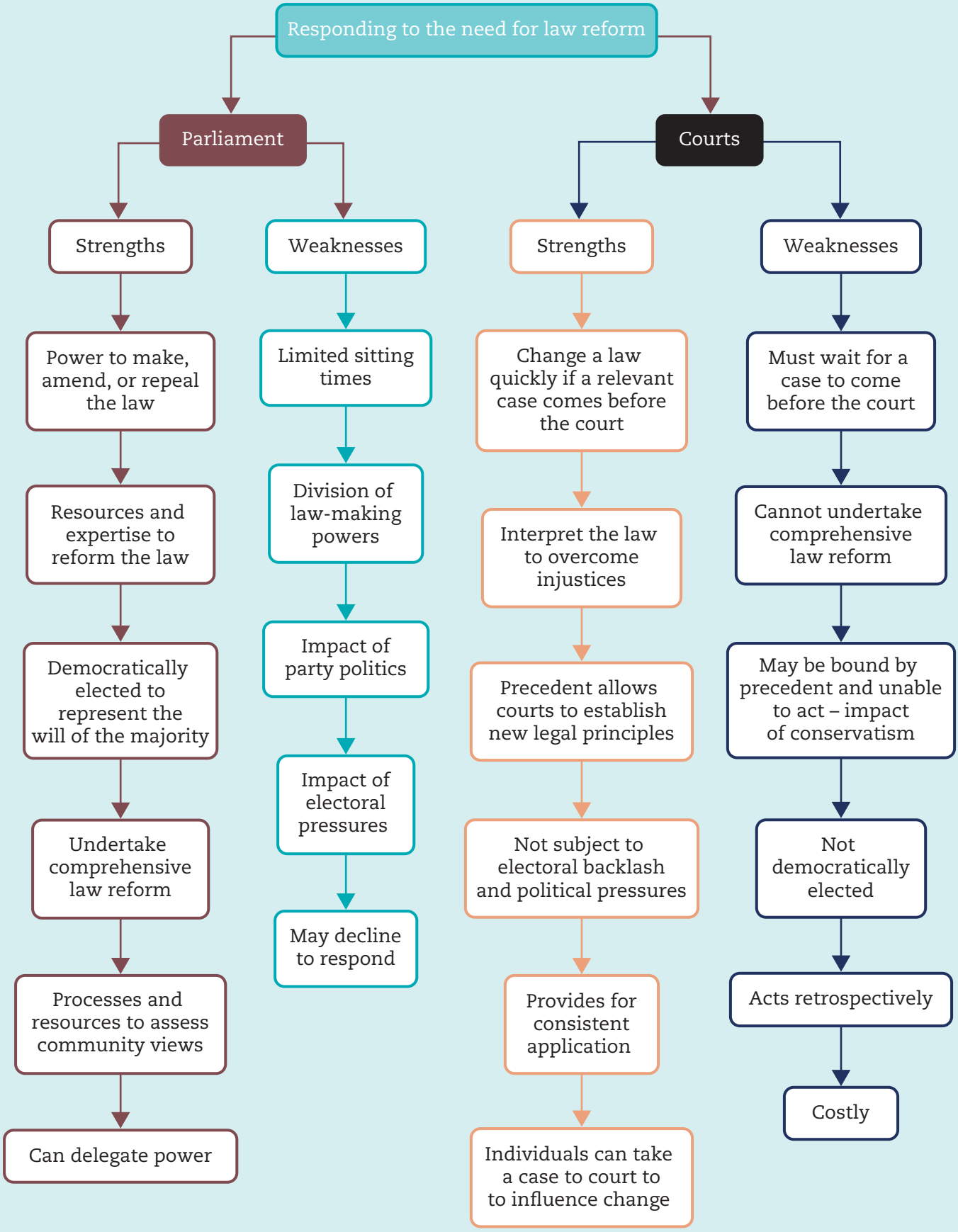

Key terms

amend to make changes to legislation

delegated legislation law-making powers given by parliament to subordinate bodies such as local councils, government departments and statutory authorities

ex post facto a term used to refer to a law being made to establish a legal consequence for a situation that has already occurred

repeal to remove or annul a law or an Act of Parliament

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12.1 The role of parliament and courts in law reform

Although a significant feature of the law is that it is stable and predictable, the law is not rigid and fixed. The law is a reflection of the society in which it operates. It must be able to evolve and change to meet the changing needs of society. There is always a need for changes to the law – to examine the law, to revise it and to keep it relevant to the changes that take place in our community.

Reform in the law can come about through court decisions and by parliament passing legislation. Parliament is the supreme law-making body. Therefore, it is appropriate that most changes in the law are as a result of legislation. However, it is important to recognise that the courts have a complementary role in law-making. Courts can make laws through the operation of the doctrine of precedent and through statutory interpretation.

12.2 Parliament as a law-maker

The main purpose of parliament is to make laws. If statute law and common law conflict, statute law will prevail. Parliament has many strengths as a democratic law-making body.

The Commonwealth Coat of Arms on top of Parliament House in Canberra, Australia

Strengths of parliament as a law-maker

Provided that the parliament is making laws within its constitutional limits, it has the ultimate power to make, amend or repeal law.

The primary role of parliament is to make laws. Parliament can make laws to remedy existing problems or in anticipation of future problems (*in futuro*). Parliament can also respond to the need to change the law by **repealing** or **amending** a law. Alternatively, parliament can undertake substantial reform of the law. Provided that parliament is operating within its constitutional limits, it can make, amend or repeal law.

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Resources for law-making

Parliament is an elected and representative body. It has the resources and expertise necessary for the drafting of legislation. Ministers may call on the specialist knowledge of members of their departments to advise on the content of proposed laws and on the need to change the law. Parliament can form committees, working parties and special bodies to assess the need for change and make recommendations for change. As parliament has access to expert information, it is able to keep up with changes in society and monitor the need for reform in the law.

Parliament has the resources and expertise to change the law.

News report 12.1

Parliamentary Committee recommends new euthanasia legislation

The bipartisan Victorian Parliamentary Committee delivered a ground-breaking report that led to new assisted dying legislation.

The Victorian Legislative Council's Legal and Social Issues Committee was investigating options for the terminally ill for over 10 months before it delivered its report in June 2016. The report made 49 recommendations in relation to the legalisation of assisted dying, including calling for amendments to the *Crimes Act 1958* (Vic) and protections for doctors who act within the proposed assisted dying legislative framework.

The Committee held a number of public hearings to consult with experts and the community in relation to end-of-life options for the terminally ill. These consultations included a wide range of organisations, including the Australian Medical Association Victoria, the Catholic Archdiocese of Melbourne and the Law Institute of Victoria. The Committee also heard from individuals with a terminal illness, as well their friends and family, in relation to end-of-life options. The Committee's inquiry process involved visiting and learning from other countries who had implemented assisted dying legislation.

These inquiries allowed the Committee to provide Parliament with a comprehensive overview drawing on expert knowledge and wider community views on assisted dying. The Committee's report ultimately led to the passage of the *Voluntary Assisted Dying Act 2017 (Vic).*

Democratically elected

Parliament is democratically elected. This process aims to ensure that legislation reflects the will of the majority of people and the changing needs of society. Governments that ignore the community's wishes to change unpopular laws may suffer the consequences at election time.

Parliament can adjourn debates to allow for further time to consider the views of the community. Parliament can also refer a Bill to a parliamentary committee for more detailed consideration.

The government may sometimes delay passing a Bill to allow time for public reaction and debate. Individuals and groups can seek to influence change in the law by directly approaching members of parliament or through petitions, demonstrations or the media. Members of parliament are responsible and answerable to the people. As noted above, if voters are dissatisfied with the laws that parliament make, there can be an electoral backlash.

Parliament is democratically elected to represent the will of the majority.

Comprehensive law reform

Parliament is capable of undertaking comprehensive law reform. It may legislate to cover entire areas of public policy. It may establish moral obligations. Alternatively, legislation may act to support community attitudes, such as when the Victorian parliament acted to restrict smoking within four metres of school entrances.

Parliament can undertake large-scale reform of entire areas of law.

Provides for debate

The legislative process has many stages. These stages allow members to be informed about proposed changes and to express their views. The use of parliamentary committees allows for a detailed review of complex or controversial legislation. The debates of parliament are broadcast, streamed online and published in *Hansard*. In theory, members of the public can follow the parliamentary debates; they can certainly express their concerns to their local member. This means that the laws passed by parliament have been fully considered and represent the views of the community.

The legislative process ensures that views about proposed changes in the law are reflected in parliamentary debates.

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News report 12.2

Senate has marathon 28-hour debate

Senators debated proposed changes to senate election voting during an all-night parliamentary debate that saw some Senators leaving in pairs for shower breaks.

The Commonwealth Electoral Amendment Bill 2016 (Cth) sought to change the way Senate voting works during elections by allowing voters to number six boxes above the line on a senate ballot paper. Opponents of the Bill were worried the changes would make it harder to elect micro-parties and independents to the Senate. Supporters of the Bill claimed it would ensure that Senate election results truly reflect the will of the majority of Australians.

The Labor party and many crossbench Senators opposed the Bill, but the combined support of the Coalition and the Greens meant that the Bill had the numbers to pass the Senate. Despite this, the debate was one of the longest-lasting in 26 years. There was a total of 40 hours of debate on the Bill, with the final 28 hours occurring in one sitting. Labor and a number of crossbench Senators tried to delay a vote on the Bill by extending debate as long as possible.

The debate lasted overnight and well into the morning and not all Senators treated it with equal seriousness. Nick Xenophon was removed from the Senate for wearing his pyjamas. Labor's Stephen Conroy argued with Liberal Senator James McGrath over whether 'bum' or 'bottom' was the most appropriate term to use in parliament. At other times, Senators left in pairs for shower breaks.

The Bill was eventually passed shortly after 1:30p.m. on Friday 18 March 2016 by 36 votes to 23. Some viewed the Senate's marathon debate session as an important part of its role in debating and reviewing legislation. Others viewed it as nothing more than obstruction and a political stunt.

Delegation of power

Parliament can delegate law-making powers.

Parliament may authorise subordinate bodies (such as local councils, government departments and statutory authorities) to make what is called '**delegated legislation**' by passing an enabling Act. This aims to allow law-making to be more flexible and efficient. By delegating authority, parliament allows law-making to be directly responsive to local needs or specialist demands. For instance, local councils can make laws to meet specific needs in their local area. Statutory authorities are bodies established by an Act of Parliament. The Victorian Curriculum and Assessment Authority (VCAA) is a statutory authority. VCAA has been given the power to set rules for the conduct of assessments including examinations.

Weaknesses of parliament as a law-maker

Although parliament has significant strengths as a law-making body, there are also some limitations on parliament's ability to respond to the need for changes to the law.

Delays in law-making

Parliament can only change the law when it is sitting.

Although parliament can change the law at any time, in order to do that, parliament must be meeting. These times are known as 'sittings'. Parliament does not sit every day of the year. Generally, parliaments tend to sit 40–70 days a year. During non-sitting periods, members of parliament work on committees and/or in their electorates.

News report 12.3

Crossbenchers support extra parliamentary sitting days

Crossbenchers call for extra parliamentary sitting days in the wake of the Royal Commission's final report into misconduct in the banking industry.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry tabled its final report in Parliament on 4 February 2019. Although the Federal Government had promised to act on the report's recommendations, the Labor party and key crossbenchers urged the Coalition to schedule more parliamentary sitting days so there would be enough time to properly consider any legislation before the 2019 election. The Government declined to change the sitting calendar. By contrast, Prime Minister Malcolm Turnbull recalled Parliament for an extra three sitting weeks prior to the 2016 election in order to consider the Government's key

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industrial relations legislation. At the time, the Prime Minister said that he would 'make no apology for interrupting senators' seven-week break to bring them back to deal with this legislation', indicating that even though Parliament typically only sits between 40–70 days a year, calling extraordinary sitting days is always a possibility.

Federal system

In a federal system, there may be some confusion about the division of law-making responsibilities between the federal and state levels of government. This division of powers may result in a failure to legislate to cover a community need, or in the passing of conflicting legislation.

In some instances, both the Commonwealth and a state parliament need to pass laws to effectively regulate an issue. For example, the regulation of gun ownership requires cooperation between states and territories and the Commonwealth government: the Commonwealth parliament can make laws about the importation of guns, but the ownership, possession and use of firearms is regulated by state laws.

The division of powers may result in confusion and inconsistencies.

Impact of party politics

Members of parliament are elected to represent the interests of the people in their electorate. However, most members of parliament are also members of a political party. Political parties can exercise strong discipline over their members of parliament. Members of parliament are expected to vote according to their party's policy.

Party politics also impact on the function of the upper house. Although the upper house is intended to represent the interests of regions or states, it also acts as a house of review. A hostile upper house can frustrate the government's legislative agenda. This can occur when the government, which of course has a majority in the lower house, does not also have a majority in the upper house. Alternatively, if the government does have a majority in the upper house, the upper house may become a 'rubber stamp' and automatically approve government Bills.

Members of parliament may represent the views of their political parties rather than of their electorates.

News report 12.4

Same-sex marriage Bill allows conscience vote

Conscience vote on same-sex marriage Bill means that MPs were freed from the normal expectations to vote along party lines.

Members of parliament are almost always expected to vote according to their party's policy. This was not the case for the historic same-sex marriage Bill, which allowed a conscience vote – meaning that MPs were free to vote in any way they wished or even to abstain from voting. There was overwhelming support for the same-sex marriage bill, providing the rare sight in parliament of the Government benches teeming with Coalition, Labor, and crossbench supporters alike. In the 150-seat parliament, only four MPs voted 'no' – Queensland's Bob Katter as well as the Coalition's Russell Broadbent, Keith Pitt, and David Littleproud. Notable for their absence was former Prime Minister Tony Abbott, as well as Deputy Prime Minister Barnaby Joyce, who abstained from voting on the bill.

On 7 December 2017 the House of Representatives passed the same-sex marriage Bill with less than five MPs opposed.

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Impact of electoral pressures

Parliament may be reluctant to act on controversial issues due to the government's wish to remain in government at the next election – this is called 'electoral pressure'.

The legislative process is dominated by the government, through the Cabinet, as it is Cabinet's legislative proposals that generally make up the majority of the parliament's law-making work. The government, through Cabinet, may be reluctant to take a stand – propose legislation – in relation to issues where there is no dominant community view (there may be several equally strongly held views), or where its own party policy is considered to be different from the dominant community view. These electoral pressures mean that some issues are not dealt with at all in parliament.

Delegating law-making power

Parliament may not have adequate control of delegated legislation.

Parliament has adopted the practice of delegating legislative power for the sake of administrative efficiency. However, it often fails to adequately supervise delegated legislation, and has created a vast range of subordinate authorities that act with the authority of parliament. This lessens the extent to which parliament can be said to be the prime source of law.

Slow to change

There are many stages in making a new law. The process of investigating and passing a new law can be time-consuming. This can result in delays in changing the law.

Parliament may be slow to take action when the law has become out of date.

Parliament has the power to amend and to change any law within its constitutional power. However, it may be slow to repeal legislation that is obsolete. For instance, the *Statute Law Revision Bill 2016* (Cth) proposed:

- making minor amendments to 20 statutes to correct various technical errors as a result of drafting and clerical mistakes
- updating some expressions to accord with contemporary drafting practice
- repealing obsolete provisions in two Acts.

Activity 12.1 Folio exercise

Parliament and law-making

1 What factors affect the ability of parliament to make laws?
2 What do you consider to be the three most important strengths of the ability of parliament to respond to the need for changes to the law? Justify your view.
3 What do you consider to be the three most important weaknesses of the ability of parliament to respond to the need for changes to the law? Justify your view.

12.3 Courts as law-makers

The main role of the courts is to resolve disputes. Precedent develops as judges reach decisions in the disputes they hear in court, and laws are made as a result. In this sense, law-making is a by-product of the dispute resolution procedures used by courts.

A court has to administer the law, but courts also have the power to interpret statutes. When dealing with precedent, the courts will usually just modify the existing principles. When there is a conflict between judge-made law and statute law, statute law will prevail.

Strengths of the courts as law-makers

The role of the courts in reforming the law has a number of strengths. These include the following.

Courts can change a law quickly

A court can change a law quickly if a relevant case is brought before it.

The primary role of the courts is to settle disputes. In the process of resolving a dispute, courts can provide an immediate response to what the law should be in relation to a particular case.

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In applying the law day-to-day, the courts determine how the law is applied. This means that justice can be achieved in individual cases by interpreting the law as it relates to the facts of that case. Courts can distinguish, reverse or overrule decisions, and this can result in a change in precedent.

Courts can interpret the meaning of words in statutes to overcome injustices.

Flexibility

Through the application of precedent, courts provide considerable flexibility for the law to adapt to the changing needs of society. For example, the *ratio decidendi* of *the Donoghue v Stevenson case* [1932] AC 562 has been extended to apply to a variety of situations involving negligence. By distinguishing past cases or reversing or overruling past decisions, a court can change an established legal principle.

By distinguishing past cases or reversing or overruling past decisions, a court may change an established legal principle.

Independent of the political process

Courts are not subject to political pressures. They need only consider the submissions put forward by counsel acting on behalf of the parties. Courts may consider the changed values in our society; however, there is far less pressure on them than on members of parliament to do so. The judiciary is independent. Although judges are not elected, they are in an informed position to determine the law. Each party to a dispute has a responsibility to prepare and present their own case to the judge, and each will research and debate the need for change or for a new interpretation in order to win their case. Judges can maintain or change the law as required, without the fear of an electoral backlash.

Judges can maintain or change the law as required, without the fear of an electoral backlash.

News report 12.5

Mabo case highlights importance of fearless, independent judiciary

More than 25 years on, the *Mabo* decision still represents a landmark moment in Australian judicial history.

In June of 1992 the High Court of Australia delivered its judgment in what has become known as perhaps the most famous case in Australian judicial history. The *Mabo* decision rejected the legal argument that Australia had been 'terra nullius', or uninhabited land, prior to British colonisation. Instead, the High Court recognised that Indigenous peoples in Australia had prior rights to the land, known as 'native title'.

At the time, the *Mabo* decision was controversial and gave rise to a great number of fears for many Australians. Some people produced maps showing great swathes of the Australian continent being transferred into Aboriginal or Torres Strait Islander ownership. Others claimed that suburban backyards would be under threat from native title claims.

The Court sustained heavy criticism for what was described as 'judicial activism'; a term typically used pejoratively at the time to criticise the Court for what some perceived as stepping beyond its role in interpreting and making law.

Yet, looking back at the *Mabo* decision from more than 25 years on, it is recognised as one of Australia's most important cases and vital step forward for Australia's development as a nation. A key legacy of the *Mabo* case has been to shift the debate about native land rights back to the political realm. It galvanised the government into action, resulting in the passage of the *Native Title Act 1993* (Cth). *Mabo* forced our politicians to confront an important issue that otherwise would have been avoided as it was politically unpopular. *Mabo* shows us how important it is to have a fearless, independent judiciary capable of making difficult decisions without fear of electoral backlash.

Consistency and fairness

The courts provide consistent application of precedent and interpretation of legislation. The application of the doctrine of precedent ensures that cases relating to similar legal issues are decided in a consistent manner. This is a fundamental aspect of fairness.

Courts provide consistent application of precedent and interpretation of legislation.

Predictability

Parties can reasonably predict how the law will apply by looking at previous decisions of the courts in similar cases.

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Access to change

In theory, we all have the opportunity in matters that directly affect us to take a case that may change the law to court.

Any individual has the right to take a case to court, provided they have standing. This means that they need to be able to show the court that they are directly affected by the issues. Therefore, in theory, we all have the opportunity in matters that directly affect us to take a case to court that may change the law.

Courts can identify needs for reform

Judicial decisions are free from outside pressure.

Judges deal with the day-to-day application of the law and can identify areas of the law that are in need of reform. Judicial decisions are free from outside pressure and therefore judges can, if an appropriate case comes before the court, deal with controversial issues without the fear of electoral backlash. In making a decision, a judge may highlight the need for parliament to change the law.

Efficiency of operation

The doctrine of precedent provides judges and the legal profession with principles of law. Consequently, courts and lawyers can refer to previous cases in reaching their decisions. The system ensures that judges are protected from professional criticism, as their decisions have been made while taking earlier precedents into account.

Weaknesses of the courts in law-making

The role of the courts in reforming the law has a number of weaknesses. These include the following.

A case must come before the courts

Courts must wait until a legal action is brought before them.

Courts must wait until a legal action is brought before them. Even then, the law-making power of the courts is restricted by the nature of the dispute: that is, whether there is any existing common law or legislation in the area. Therefore, the ability of the courts to respond to the need for changes to the law may be slow and spasmodic.

The decision in a case only directly affects the parties

Judge-made law does not have the same wide-reaching effect as laws made by parliament.

Judge-made law cannot have the same wide-reaching effect as laws made by parliament because the decision in a case directly affects only the parties to the case. However, the reason for the decision in a case can act as an important influence on people considering a similar action.

Time-consuming process

A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take years.

A decision by a court about what the law should be is not always reached quickly. Courts cannot reach a decision before they hear all the arguments put by both parties. In complex cases, this can take a considerable amount of time. A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take years.

Rigidity

A court may be bound by precedent, whether or not the judge agrees with the outcome of the application of those principles.

The doctrine of precedent binds courts to decisions made in superior courts. Unless a court is considering a new or novel situation, it must apply the existing precedent. A court may be bound by precedent, whether or not the judge agrees with the outcome of the application of those principles. The doctrine of precedent implies not only consistency, but also some rigidity. However, parliament can override a precedent established by the courts. When a precedent becomes out of date, for example, parliament can make a law to change it.

Undemocratic

Courts are not democratically elected or representative law-making bodies.

Courts are not representative of the community, because they are appointed; they are not elected. This means that members of the community do not know what the values and attitudes of judges are. Judges are independent of parliament and government, and are not directly answerable to the electorate. Only in very rare circumstances will a judge be removed from office.

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Retrospective

The primary role of courts is to settle disputes. Courts decide a case 'after the event'. They are always acting retrospectively; that is, they look at an existing problem and decide how this problem can be overcome. In law, this is known as acting ***ex post facto***, or 'after the fact'. As the individual parties to a civil dispute bear the costs of the action, this is a costly way for individuals to find out what the law should be.

Courts act retrospectively – after a dispute has occurred.

Precedent may be slow to change

The development of the law is dependent on a case being taken to court. The more conservative judges may be reluctant to change the law by departing from the precedents, whether or not the precedent is generally considered to be outdated. Even where a new precedent is created, it only applies to a limited set of circumstances (as all precedents do), and it may take many years for a whole area of law to develop. An excellent example of where the courts continued to be bound to an outmoded and unjust precedent was the law relating to rape in marriage. In a 1985 Victorian case, a judge decided that he was bound by an old precedent which held that a man could not be convicted of raping his wife because entering marriage involved a grant of irrevocable consent to sexual intercourse. Public outrage over the case quickly resulted in Victorian parliament passing legislation to overturn the outdated precedent.

Conservative judges may be reluctant to depart from precedents even when they are outdated.

Costly

The high cost of preparing a court case may prevent individuals from seeking to change the law by taking a case to court. If an individual seeking to bring about a change in the law through the courts loses, they risk paying not only their own costs but the costs of the defendant and of the court.

Individuals may be reluctant to seek to influence a change in the law by taking a case to court because of the costs.

Stacks of legal documents are wheeled into the Supreme Court of New South Wales on 9 October 2013 for a legal case involving billionaire Gina Rinehart's children taking Rinehart to court to remove her as the head of the multi-billion dollar family trust.

Lack of certainty

Precedent is based on previous court decisions with facts that are similar, but there may still be uncertainty for litigants, as no two cases are exactly the same. The court may decide that there are sufficient differences to distinguish the present case from earlier cases. Also, a precedent may be overruled, disapproved or reversed. It is often necessary to examine a number of cases to determine precisely the legal principle that is applicable; this may lead to further uncertainty, as the outcome of each case may vary slightly, resulting in some conflict within the law.

Precedent is not a concise statement of law, but is based on previous court decisions where the facts of a case are similar. This may result in uncertainty, as no two cases are exactly the same.

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Courts do not have the resources to research the need for change

Courts cannot comprehensively research and review the need for law reform in the same way as parliament.

Courts can only focus on issues presented by parties to a dispute, and must rely on the information presented to them in court. They cannot comprehensively research and review the need for law reform. Courts make rulings on the legal issues relevant to the case before them. They cannot seek public opinion, form committees or refer matters to law reform bodies before making a decision.

News report 12.6

Courts do make law

Courts do make law. Some may argue that courts simply declare what the law is: in other words, when the law is unclear, the courts hear legal arguments and apply strict legal logic to resolve the dispute, and declare what the law is. These people believe that any change in the law should be left to the elected parliament. However, it is now widely accepted that in resolving disputes, judges exercise a wide range of choices and are making laws, not merely declaring legal principles. In doing so, judges are subject to many constraints. They are accountable in ways that are different from the ways an elected parliament is accountable.

Interpretation and change

Through the process of statutory interpretation, the courts tell us what parliament meant in Acts. When a judge is faced with circumstances in a case that were not anticipated by parliament, the judge is clearly making law when deciding upon a particular interpretation of the legislation. Bishop Hoadly, in 1717, said, ' … whosoever hath the power to interpret the law hath the power to make it'. Should parliament be dissatisfied with the meanings construed by the courts, it can pass legislation to change the interpretation.

Common law and change

However, it is in the field of common law that the law-making role of the courts is highlighted. The common law has evolved from thousands of decisions over hundreds of years. It forms a body of law much larger than all the statutes passed by Australian parliaments. Common law covers areas as diverse as contract, negligence and nuisance – and it has been made by unelected judges for almost 1000 years.

When a judge decides that an established principle of law applies to a particular set of facts, and a court has not considered that question in the past, the judge is making law. The decision made by the judge adds to the body of the law to be used and applied in future cases.

The High Court and change

Sometimes higher courts, particularly the High Court, go further than making incremental changes to existing legal principles. The High Court can overrule previous understandings of the common law and establish new principles. Even in this area, the power of the courts to make law is subject to constraints: parliament can pass laws to change common law principles.

The common law develops in a sequential and systematic manner. It is formed by the application of existing rules to a series of fact situations, with existing principles being adapted to new situations. It changes and adapts gradually over time. Comprehensive, wholesale change to an area of law is left to parliament. Courts do not have the facilities, techniques or procedures to undertake comprehensive review of the need for change in entire areas of law.

However, there are numerous cases where the High Court has 'modernised' the common law, such as abolishing the marital exemption to rape and recognising native title in the Mabo case.

In the Mabo case, the High Court decided that the common-law principle of 'terra nullius' was no longer law. The Court recognised that native title exists. This decision exemplifies an important constraint on courts in law-making. The Mabo case was decided in relation to a specific set of circumstances. Although the Court formulated a principle to resolve that dispute, it did not provide a comprehensive code for the regulation of native title disputes. It was parliament that introduced legislation to codify native title law for the broader recognition of native title in future cases and to establish a dispute resolution process.

Novel cases and change

The operation of the doctrine of precedent provides for continuity and consistency in the application of law to new circumstances. However, it is when a novel situation arises that the law-making role of the courts is most evident and controversial. In the case of *Cattanach v Melchior* (2003) 215 CLR 1, the High Court considered whether damages could be recovered by parents for the cost of raising a healthy child born after a failed sterilisation procedure. The case was based on a claim that the surgeon who performed the sterilisation had been negligent. The Court decided that the parents could claim damages. The case was decided by a majority of four to three. The majority judgment declared that the principles of negligence applied and that the recovery of economic loss was therefore also recognised by the law. The case resulted in considerable public comment and criticism. Critics argued that it was not consistent with community values to allow parents to recover damages for the costs of raising a healthy child.

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Should courts change the law?
What should a court do when faced with a choice between maintaining an existing legal principle and establishing a new rule? Many would argue that the courts have an obligation to maintain the status quo.

This approach places value on the certainty and stability inherent in the doctrine of precedent as well as on the need for substantial change in the law to take into account community views. However, others argue that it is appropriate for the courts to take a more active role in changing the law given that parliament can take action to change it if necessary.

Parliaments have acted to impose limitations on the common law. They have replaced common law rights with statutory schemes for compensation, set caps on the award of damages and established exclusions.

Both parliament and the courts are accountable for their law-making, but in different ways. Parliament is accountable through the electoral process. Courts are also accountable: they are open to the public and publish reasons for their decisions. This means that our courts are open to scrutiny and criticism. Professor Michael Coper suggested that parliament and the courts are partners in law-making, although their respective roles can bring them into conflict. In particular, they act as a brake on each other: the court interpreting and even invalidating the legislation of parliament, and the parliament modifying and even abolishing parts of the common law when it finds the court to have been too bold or not bold enough.

Activity 12.2 Folio exercise

Courts as law-makers

Read News report 12.6 'Courts do make law' and complete the following tasks:

1 Explain the operation of the doctrine of precedent and the role of the courts in the interpretation of legislation.
2 The News report refers to the High Court as a law-maker. Explain the significance of the High Court in the law-making process.
3 What limits the capacity of courts to change the law?
4 Analyse two strengths of the courts in the law-making process.
5 The News report concludes that parliament and the courts are accountable in law-making but in different ways. Explain.

Activity 12.3 Essay

Law-making by the courts

'The concept that the courts merely apply the law is a fairytale. The role of the courts in reforming the law is crucial to the smooth functioning of the law.' Considering the quote above, complete the following tasks:

1 Describe how a superior court can respond to the need to change the law.
2 Analyse two strengths and two weaknesses of the ability of the courts to respond to the need to change the law.
3 Why is the role of the courts important in the law-making process?

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Key point summary

Do your notes cover all the following points?

❑ The ability of parliament to respond to the need for law reform:

Strengths	Weaknesses
• Provided that the parliament is making laws within its constitutional limits, it has the ultimate power to make, amend, or repeal the law. • Parliament has the resources and expertise to change the law. • Parliament is democratically elected to represent the will of the majority. • Parliament can undertake large-scale reform of entire areas of law. • The legislative process ensures that the views of the community about proposed changes in the law are reflected in parliamentary debates. • Parliament can delegate law-making powers.	• Parliament can only change the law when it is sitting. • The division of powers may result in confusion and inconsistencies. • Members of parliament may represent the views of their political parties rather than their electorates. • Parliament may be reluctant to act on controversial issues due to electoral pressures. • Parliament may not have adequate control of delegated legislation. • Parliament may be slow to take action when the law has become out of date.

❑ The ability of courts to respond to the need for law reform:

Strengths	Weaknesses
• Courts can change a law quickly if a relevant case is brought before them. • Courts can also interpret the meaning of words in statutes to overcome injustices. • By distinguishing past cases or reversing or overruling past decisions, a court may change an established legal principle. • Judges can maintain or change the law as required, without the fear of an electoral backlash. • The courts provide for the consistent application of precedent and interpretation of legislation. • In theory, we all have the opportunity in matters that directly affect us to take a case that may change the law to court. • Judicial decisions are free from outside pressure.	• Courts must wait until a legal action is brought before them. • Judge-made law may not be seen to have the same wide-reaching effect as laws made by parliament, as it directly affects only the parties in the particular case. • A final determination as to what the law should be may not be reached until after a case has been heard on appeal. This may take years. • A court may be bound by precedent, whether or not the judge agrees with the outcome of the application of the precedent. • Courts are not democratically elected or representative law-making bodies. • Courts act retrospectively – after a dispute has occurred. • Conservative judges may be reluctant to depart from outdated precedents and therefore the law may be slow to change. • Individuals may be reluctant to seek to influence a change in the law by taking a case to court due to the costs. • There is no certainty of success when seeking to influence a change in the law through the courts. • Courts cannot comprehensively research and review the need for changes to the law in the same way as parliament.

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End-of-chapter questions

Revision questions

1 What factors affect the ability of parliament to make the law?

2 Describe four strengths and four weaknesses of parliament's role in responding to the need for law reform.

3 What factors affect the ability of courts to make the law?

4 Describe four strengths and four weaknesses of the courts' capacity to respond to the need for law reform.

5 'The law-making process of parliament provides an effective means to respond to the need for change in the law.' Present two arguments to support this statement.

6 'Courts are not elected or representative bodies. The role of the courts is to apply the law, not to make laws.' Discuss.

Practice exam questions

1 'The best way for individuals to influence law-makers is through the courts.' Discuss the extent to which you agree with this statement. [6 marks]

2 'Without the Victorian Law Reform Commission, parliament would be extremely limited in its ability to pass laws that reflect the views of the community.' To what extent do you agree with this statement? Justify your response. [6 marks]

3 'In 2016, the Victorian Legislative Council's Legal and Social Issues Committee delivered its final report in its inquiry into end-of-life choices. The report made 49 recommendations in relation to the legalisation of assisted dying. It conducted a number of public hearings, during which it heard evidence from a wide range of organisations, including the Australian Medical Association Victoria, the Catholic Archdiocese of Melbourne, as well as individuals with a terminal illness.' Discuss the ability of the Commonwealth Parliament to respond to the need for law reform [7 marks].

4 Extract from dissenting judgment in *Aubrey v The Queen* [2017] HCA 18, in which the High Court overruled an 1888 precedent (Clarence) that held that transmitting a sexually-transmitted infection did not fall within the meaning of 'inflicting harm':

> 'It is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where the effect of that departure is to extend the scope of criminal liability. For more than a century [the precedent in] *Clarence* has stood as an authoritative statement [of the law]. If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency … '
>
> To what extent does the doctrine of precedent limit the courts' ability to respond to the need for law reform? [8 marks]

5 Both parliaments and the courts have an important role in law reform. Which of the two means of bringing about a change in the law is likely to be the most effective? Justify your response. [8 marks]

6 Evaluate the ability of parliament and the courts to respond to the need for law reform. In your answer, refer to the role of the media in law reform. [10 marks]

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Glossary

access a principle of justice achieved if a range of institutions, specialist key personnel and methods to settle disputes are provided within the legal system

accused a person charged with an offence

acquittal when a defendant is found not guilty by a court

Act a law passed by parliament

aggravating factors evidence presented that increases the seriousness of the offence and so contributes to a harsher sentence; for example, use of a weapon, prior convictions

amend to make changes to legislation

appellate jurisdiction the power of a court to review decisions made by a lower court

appropriate dispute resolution also known as alternative dispute resolution; processes other than judicial determination where a third party assist the parties to resolve the dispute (such as mediation, conciliation, arbitration)

arbitration a method of dispute resolution whereby an independent third party (known as an arbitrator) is appointed to listen to the evidence of both parties and make a binding decision

backbencher a member of parliament who sits on the backbench; does not have a portfolio and is not a member of Cabinet

bail the release of an accused back into society while awaiting his or her next hearing or trial; conditions may be attached

balance of probabilities the standard of proof required in a civil case: to be successful, litigants must prove that their case, their version of the facts, is more probable than the other party's version

barrister a legal representative who is briefed by a solicitor to argue on behalf of their client at a hearing or trial

bicameral a parliament with an upper and a lower house

bilateral agreement an agreement between Australia and one other country

Bill a proposed law to be considered by parliament

binding precedent formed from the legal reasoning (or *ratio decidendi*): a precedent that must be followed by lower courts in the same hierarchy in matters of similar fact; for instance, a decision of the High Court is a precedent that must be followed

boycott a group action carried out by individuals who refuse to buy an item or participate in a particular activity

burden of proof the party that has the responsibility, or onus, of proving the case: in a criminal matter, the burden of proof rests with the prosecution

Cabinet the policy-making body of parliament comprising of the leader of the government and senior ministers

case management Victorian parliament has given the judiciary the power to manage civil disputes, including ordering parties to mediation and give directions; provides for efficiency and more effective use of resources

civil law laws regulating the behaviour of private individuals

civil wrong an infringement of a person's rights under civil law

class action *see* **representative proceedings**

codification when parliament creates a statute that covers all areas of a law, including common law

committal hearing a pre-trial hearing in the Magistrates' Court to determine if the prosecution has enough evidence to establish a *prima facie* case and support a conviction

committal proceedings court hearings held in the Magistrates' Court for persons charged with an indictable offence to determine if there is sufficient evidence to require the defendant to stand trial in a higher court

common law law developed in the courts; also known as case law or judge-made law

community correction order (CCO) a sentencing order requiring an offender to comply with conditions while in the community; can include doing unpaid community work, drug/alcohol treatment or curfews

complainant a person who alleges to the police that a criminal offence has been committed against them – once it is established that a crime has been committed and guilt is established, the complainant is referred to as the 'victim'; a person initiating a civil action in the Magistrates' Court can also be referred to as a complainant

conciliation a method of dispute resolution whereby a third party assists the disputing

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parties to reach their own decision; the conciliator can offer advice and make suggestions to assist parties

concurrent powers specific law-making powers in the Constitution that may be exercised by both the Commonwealth and State parliaments; namely, shared law-making powers

constitution fundamental rules or principles and structures to which a nation is governed

contingency fees lawyer fees only paid if a case is won; associated with 'no win, no fee'

contract a legally enforceable agreement

counter-claim a cross-action by the defendant in a civil claim that, although capable of supporting an independent action, is pleaded in an existing claim; usually heard at the same time as the originating claim

court hierarchy the ranking of courts from inferior to superior

crime an act or omission that offends against an existing law, is harmful against an individual or community at large, and is punishable by the law

criminal law laws concerned not only with the rights of the individuals directly involved but also with the welfare of society as a whole

crossing the floor voting against approved party lines

Crown the authority of the monarch, represented in Australia by governors in each state and the Governor-General at the federal level

custodial sentence a sentence handed down by a magistrate or judge that consists of the custody of an accused in a prison or another institution (such as Thomas Embling Hospital)

damages a monetary award; this is the most common outcome of a civil case

defendant in criminal law, a party who has been brought to court charged with a criminal offence; in civil law, the defendant is a party defending an action and may make a counter-claim

delegated legislation law-making powers given by parliament to subordinate bodies such as local councils, government departments and statutory authorities

demonstration a public exhibition of sympathy or support for or opposition to a particular issue; may take the form of a march or rally

directions hearing a pre-trial hearing in civil proceedings conducted by a judge that allows the court to establish, for example, timelines for the completion of the pre-trial stages in a civil matter

disapproving when a judge refuses to follow the earlier decision of another judge in a court of equal standing

discovery the pre-hearing stage in civil proceedings where the parties exchange further details and information; it may include documents, written interrogatories (questions) and/or an oral examination

distinguishing if a judge finds the facts of a new case are sufficiently different from an earlier case that has set a precedent, the judge is able to avoid using the earlier precedent

division of powers the system in which law-making powers are divided between the Commonwealth and the states

doctrine of precedent the system used by courts to make law: judgments of superior courts are written and reported in law reports and applied to future cases with similar facts (note: the expression 'doctrine of precedent' refers to the overall system used to create law in courts, not to specific judgments)

double majority where, for a referendum to be passed, it must have a 'yes' vote from the majority of electors throughout Australia, plus a 'yes' vote from the majority of electors in the majority of states

ejusdem generis a legal maxim used in the interpretation of statutes, meaning 'of the same kind': when a general term is interpreted to include the category indicated by the specific terms that precede it; the rule is that the general words are limited in meaning to the same kinds of things as the specific words in the list (for example, if a statute applied to tigers, lions, leopards and other animals, it could be assumed that a panther would be included as 'other animals', but not a cow)

e-petition an eletronic petition; allows individuals to submit petitions, to share information about petitions on social networks and to sign existing petitions online

equality a principle of justice achieved if all citizens are provided with equal legal opportunities and equal treatment under the law

evidence-in-chief the questioning of a lawyer's own witness (also known as examination-in-chief); the purpose is to establish a party's case and persuade the court

ex post facto a term used to refer to a law being made to establish a legal consequence for a situation that has already occurred

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exclusive powers law-making powers set out in the Constitution that may only be exercised by the Commonwealth parliament

executive function part of the separation of powers under the Australian Constitution: the power to implement and administer law, exercised by the Governor-General on the advice of the Government

express rights rights that are written into the Australian Constitution; these rights can only be changed by a referendum

fairness a principle of justice achieved through the impartial treatment of all people under the law, without fear or favour

Federation the formation of sovereign states that relinquished some powers to a central parliament (Commonwealth parliament) to form one nation

government the ruling political party (or parties in coalition) that hold a majority of seats in the lower house

High Court the highest court in Australia, established by the Constitution, and the only court with the authority to hear and determine disputes about the Constitution; it is the highest court of appeal

House of Representatives the lower house of the Commonwealth parliament

indictable offence a more serious criminal offence, usually heard before a judge and jury in the County Court or Supreme Court (Trial Division)

indictable offence heard summarily an indictable offence that can be tried before a magistrate without a jury if the accused and the court agree

injunction a remedy in civil law that is an order for a party to do, or refrain from doing, a particular thing; a court order for an action to be taken or for the deferment of an action

international declaration a non-binding agreement between countries

inter partes a decision between the parties, in which one wins and one loses

interrogatories written questions sent during the pre-trial process by one party to another to find out the basis of a civil dispute

judge-made law the development of legal principles through the decisions made by judges or the interpretation of statutes

judicial activism when a judge is aware of the need to develop the law and adopts a broad interpretation of legislation in deciding cases

judicial conservatism when a judge declares there is no course of action under common law and dismisses a case, or adopts a narrow interpretation of legislation when deciding cases and thus avoids controversy

judicial function part of the separation of powers under the Australian Constitution: the power to enforce the law and settle disputes, exercised by the courts

jurisdiction the power or the authority of an institution: the power of a court to hear and determine particular offences or disputes; the power of parliament to make law as provided by the Constitution

legal maxim a traditional rule, convention, or practice

legal rules laws created by institutions within the legal system and enforced by the legal system

legislation an Act of Parliament, a statute or piece of delegated legislation

Legislative Assembly the lower house of the Victorian parliament

Legislative Council the upper house of the Victorian parliament

legislative function part of the separation of powers under the Australian Constitution: the power to make laws, exercised by parliament

legislative process the process used by parliament to make laws

mediation a method of dispute resolution with a structured negotiation process, comprising an independent person (mediator) assisting parties to identify and assess options and negotiate an agreement to resolve their dispute

minority government a government that does not hold a clear majority of seats in the lower house and requires the support of independents and/or minor parties to pass legislation

missing middle people who do not qualify for legal aid but are not wealthy enough to afford a lawyer or to take legal action; the group most impacted by legal costs

mitigating factors evidence presented that reduces the seriousness of the offence or the offender's culpability (for example, the defendant's good character), resulting in a lower sentence

multilateral agreement an agreement between three or more countries

non-legal rules rules established within a group but not generally enforceable in the community

norms social expectations within social groups

novel case (or test case) a case concerned with a particular issue or legal question that

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has not been decided before in a court of superior record

obiter dictum 'matters by the way'; a judge's statement of opinion or observation made during a judgment but not part of the reason for a decision; may be persuasive in future cases

offender a person who has been convicted of breaching a criminal law

opposition the political party that has the second highest number of elected members in the lower house of parliament

original jurisdiction the authority of a court to hear and determine a case in the first instance

overruling a higher court that decides not to follow a decision of a lower court in a previous case will overrule the earlier decision

parliament the supreme law-making body, consisting of elected representatives and the Crown

parliamentary committees select, standing, or joint committees made up of members of parliament of any party, formed by the parliament for specific purposes

parole the conditional release of a prisoner before the end of their sentence; it allows a prisoner to serve part of their sentence of imprisonment in the community

parties in a criminal matter, the parties are the prosecution and the defendant (the accused); in a civil matter, the parties are the plaintiff and the defendant

persuasive precedent the legal reasoning of a court: a court does not have to follow this reasoning, but it can be influential; applies to decisions of a lower court or a court at the same level

petition a formal written statement calling on parliament to change the law

plaintiff the party who initiates a civil action

plea negotiations pre-trial in criminal cases where the defence counsel and prosecutor negotiate as to which charges the defendant will plead guilty in exchange for the withdrawal of other charges, or an accused can plead guilty when parties agree on the facts on which the plea is based; also known as charge negotiations or plea bargaining

pleadings a civil pre-trial procedure that involves an exchange of information between parties that establishes the nature of the claim, the defence and the remedy sought

precedent law made by courts: a reported judgment of a court that establishes a point of law

pressure group a group that acts to advance a particular issue or interest

presumption of innocence a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law

pro bono legal work undertaken for free

prosecution the party bringing the criminal charges to court; a prosecution may be initiated by a police prosecutor, or by the Office of Public Prosecutions on behalf of the Crown

ratio decidendi the legal reasoning, or rule, upon which a decision is based; forms a binding precedent

recidivism when a person relapses into criminal behaviour (a repeat offender)

referendum the process set out in section 128 of the Constitution to allow the Constitution to be formally altered; requires a vote by the Australian public and to achieve a double majority

remand the holding of an accused in custody while awaiting his or her next hearing or trial as bail has not been granted

remedy any means by which a civil wrong is redressed

repeal to remove or annul a law or an Act of Parliament

representative proceedings legal proceedings by a group of people with a similar or related legal interest; the claim is initiated by one person (the 'lead' plaintiff); also called a class action or group proceeding

residual powers law-making powers that remained with the state parliaments after Federation

reversing when a higher court hearing a case on appeal decides that the lower court made a wrong decision and reverses the decision

royal commission the highest form of inquiry appointed by the Governor-General-in-Council (or the Governor-in-Council) with extensive powers of investigation

sanction a penalty handed down by a court for someone found guilty of breaching a criminal law (for example, a fine or imprisonment); sometimes interchanged with 'sentence'

Senate the upper house of the Commonwealth parliament

sentence a penalty handed down by a court for someone found guilty of breaching a law; to declare a sentence on a guilty person; sometimes interchanged with 'sanction'

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sentence hearing a post-trial procedure at which the offender is given a sentence by the magistrate or judge; the court will hear mitigating and aggravating factors

sentence indication where the defence requests a statement from the court as to whether the accused is likely to receive a custodial or a non-custodial sentence if they plead guilty; if it is custodial, the indication can include what the sentence is likely to be

separation of powers a principle established by the Australian Constitution that entails the division of powers of government among legislative, administrative and judicial bodies, to provide a system of checks and balances

social media computer-based technology that can create and share information and ideas online to web-based networks and communities

solicitor a legal representative who provides legal advice, can represent a client in the Magistrates' Court, and briefs a barrister if a criminal matter proceeds to trial

specific powers the legislative powers of the Commonwealth parliament stated (specified) in the Australian Constitution

specified sentence discount scheme a procedure whereby a court imposes a less severe sentence because the offender pleaded guilty

standard of proof the level of proof that must be reached to prove a case in court: in a criminal case, the standard of proof is 'beyond reasonable doubt'; in a civil case, the standard is 'on the balance of probabilities'

standing where a party has been directly affected by matters and so has the right to take legal action; also known as *locus standi*

stare decisis 'to stand by what has been decided'; the basis of the doctrine of precedent, where inferior courts stand by the decisions of superior courts

statement of claim a civil pre-trial procedure that is part of pleadings; a document in which the plaintiff sets out the facts they are relying on in the claim against the defendant, together with the remedy they are seeking

statute law Acts of Parliament

statutory interpretation the process of judges giving meaning to words within an Act where there is a dispute as to the application of the Act

summary offence a less serious crime, heard and determined in the Magistrates' Court

tort a civil wrong that amounts to an act or failure to act that infringes on the rights of an individual; for example, negligence, trespass and nuisance

treaty a formal agreement between nations that is binding at international law

ultra vires outside of parliament's law-making power

victim a person who has suffered directly or indirectly from a crime

Victorian Law Reform Commission (VLRC) a permanent body established by the Victorian parliament specifically to investigate the need for law reform

vulnerable witness a person required to give evidence in court and who is considered to be at particular risk or impressionable; includes children, people with a cognitive impairment, victims of sexual assault and victims of family violence

writ the originating document filed with the court used to begin a civil claim

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