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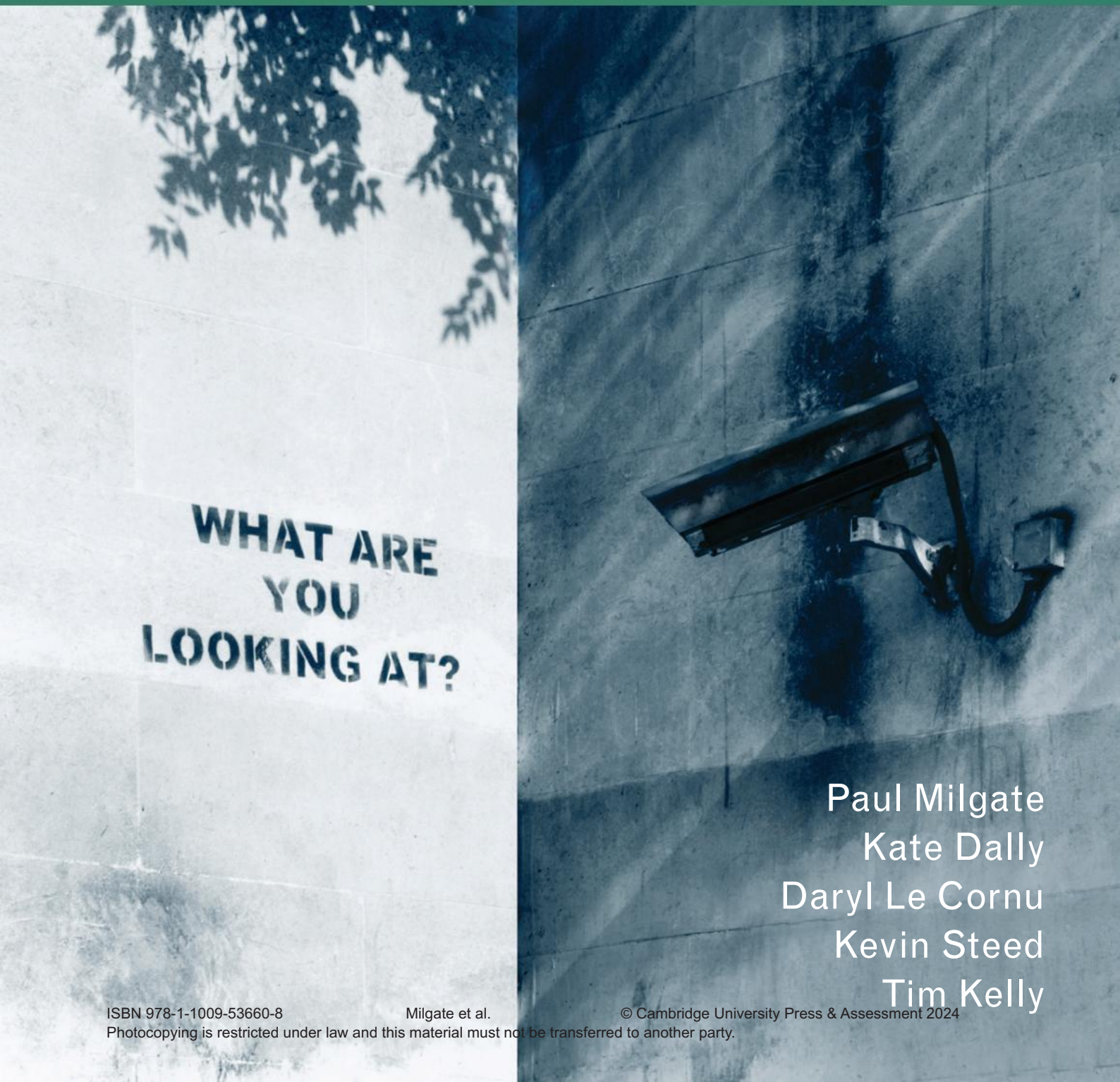

Paul Milgate
Kate Dally
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ISBN 978-1-1009-53660-8

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UNIVERSITY PRESS & ASSESSMENT

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

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First Edition © Kate Dally, Paul Milgate, Philip Webster and Tim Kelly 2006
Second, Third and Fourth Editions © Paul Milgate, Kate Dally, Phil Webster, Daryl Le Cornu and Tim Kelly 2010, 2013, 2016
Fifth Edition © Cambridge University Press 2020
Sixth Edition © Cambridge University Press & Assessment 2024

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First published 2006
Second Edition 2010
Third Edition 2013
Fourth Edition 2016
Fifth Edition 2020
Sixth Edition 2024
20 19 18 17 16 15 14 13 12 11 10 9 8 7 6 5 4 3 2 1

Cover designed by Jennifer Jones
Text designed by Shaun Jury
Typeset by Integra Software Services Pvt. Ltd.
Printed in Singapore by Markono Print Media Pte Ltd

A catalogue record for this book is available from the National Library of Australia at www.nla.gov.au

ISBN 978-1-1009-53660-8

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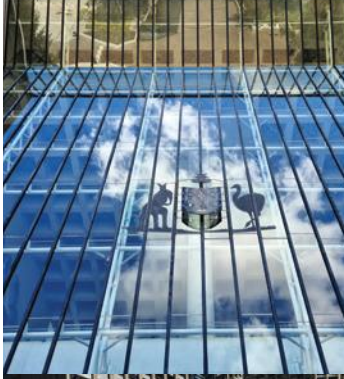

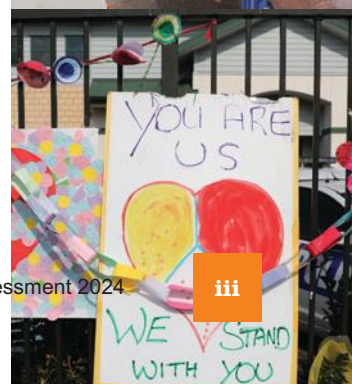

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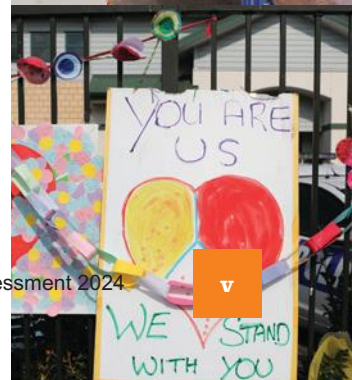

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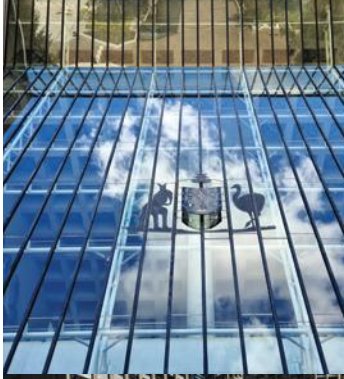

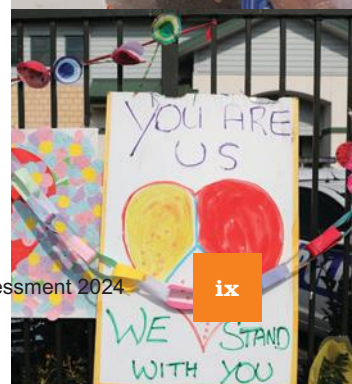

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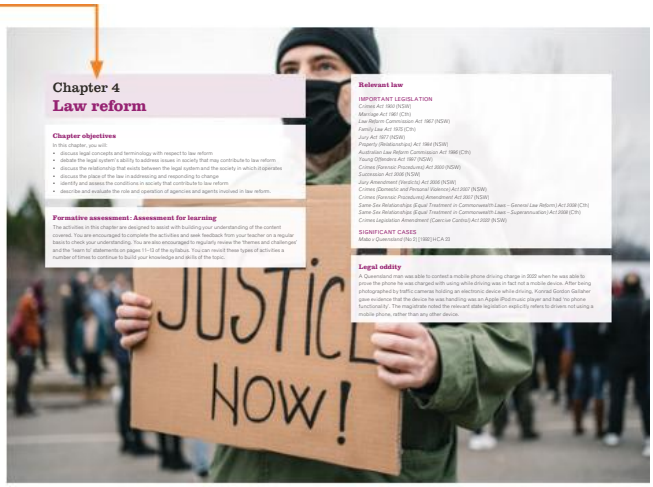
How to use this resource

Part and chapter openers
Each chapter of Cambridge Legal Studies Year 11 begins with an opener that contains chapter objectives, assessment for learning guidance, relevant law and a legal oddity. In addition, Part openers outline the principal focus and themes and challenges of the Part.



Media articles
A range of media articles are provided to help you understand how the law operates in real-world situations.

In Court
A number of relevant legal cases appear throughout the text. Each case allows you to apply your knowledge of the legal system to real-world situations. Many cases are followed by a range of questions to help you test what you've learnt.

Case Studies
Examples, or groups of examples, are examined in more depth to illustrate particular legal issues.

Analysis activities
Analysis activities support you in engaging with media articles, court cases, videos and online resources.

Legal Info
A number of relevant legal concepts are explored in order to give context to themes being explored.

Glossary terms
Glossary terms are bolded in the text, and defined for you in the margin of the print book, or as pop-ups in the interactive version. They are also gathered in the Glossary.

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Legal Links

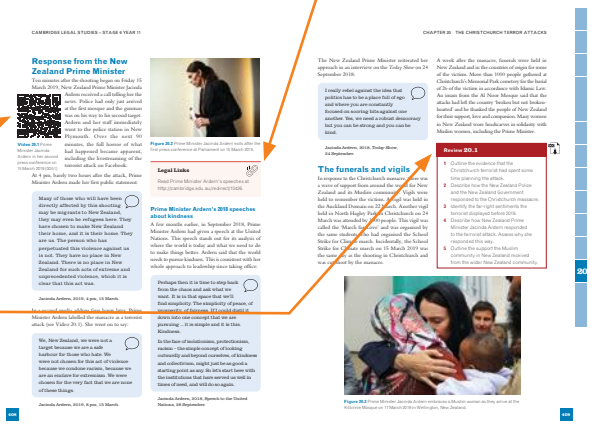
Legal links connect you with internet resources and activities that will help you extend your knowledge and stay up to date with changes in the legal system.

Video and audio

QR codes in the print book enable you to access video and audio items that enrich the learning experience.

Review and Research activities

Review activities are designed to help you test your knowledge of key concepts and skills. Research activities are designed to extend your knowledge by researching relevant cases or issues using source material.

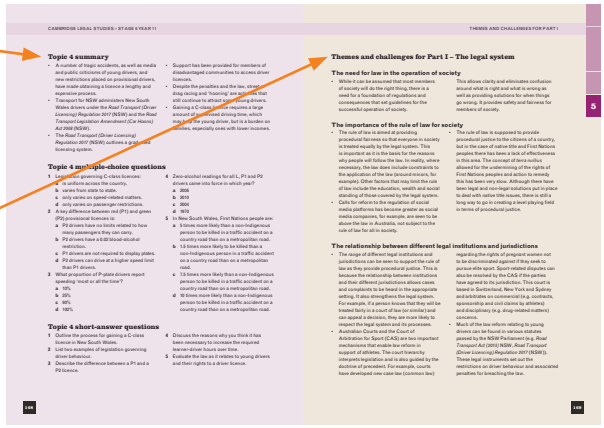


End-of-chapter sections

At the end of each chapter you will find a chapter summary and a set of questions to help you consolidate your learning from the chapter.

Themes and challenges

Option chapters, as well as the final chapters for Part I and Part II, have a summary of how the themes and challenges have been addressed.

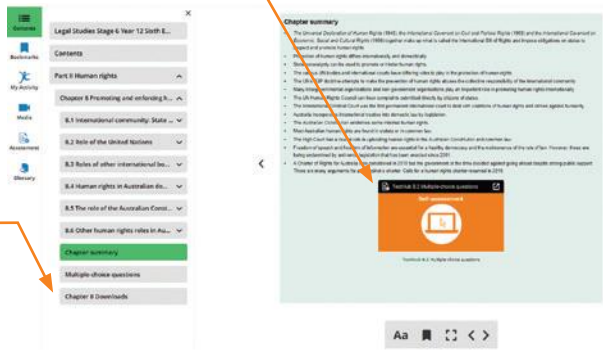


Interactive Textbook

The Interactive Textbook includes the full text of the print edition, including video and audio items, and digital-only chapters. There are also automarked activities (for example, drag-and-drop questions) to assist recall of facts and understanding of concepts.

Downloadable Word documents

All review, research and end-of-chapter questions are available as downloadable Word documents, which can be accessed from within the interactive textbook or via Cambridge GO.



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Introduction

To the student

Congratulations on choosing *Cambridge Legal Studies Year 11 Sixth Edition*.

Since the introduction of Legal Studies as a HSC discipline in 1989, the world has undergone incredible change. Predictions of increasingly 'disruptive' technologies will continue to challenge the ability of the law to balance the tension of individual and community rights. Regardless, Legal Studies continues to contribute to students completing their secondary schooling as better-informed citizens, able to think more critically about the processes and institutions that shape their lives on a daily basis.

The rights people enjoy within democratic societies have at times been eroded by governments when citizens become apathetic about their rights, freedoms and liberties. Legal Studies will allow you to explore the power vested in our democratic institutions and wielded by our elected leaders. It explores issues that will change the way you view the world and how you understand the concept of achieving justice through legal and non-legal means. Recent student action on climate change and increasingly the polarised state of politics and policymaking in Australia highlight a society undergoing rapid change socially, as well as economically with the gig economy.

Cambridge Legal Studies Year 11 Sixth Edition is a comprehensive resource that introduces you to a dynamic and challenging subject. It brings the law to life for you, both inside and outside the classroom.

You will discover a wealth of material that introduces you to the Australian legal system and how the individual interacts with and is affected by the law, and you will gain insight into how the law works in practice in a variety of contexts. You will be engaged and stimulated by up-to-date case law and recent legislative developments. Practically, updated research and review activities will help you build your research skills and make sure that you are ready for your exam.

We wish you luck and success.

Paul Milgate

The authors and publishers wish to thank the following for reviewing the manuscript and providing feedback: Goorlil Consulting, Renata Hecimovic.

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Glossary of key words

Syllabus outcomes, objectives, performance bands and examination questions have key words that state what you are expected to be able to do.

A glossary of key words has been developed to help provide a common language and consistent meaning in the HSC documents. Using this glossary will help you and your teacher understand what is expected in responses to examinations and assessment tasks.

account
account for; state reasons for; report on; give an account of; narrate a series of events or transactions

analyse
identify components and the relationship between them; draw out and relate implications

apply
use; utilise; employ in a particular situation

appreciate
make a judgement about the value of

assess
make a judgement of value, quality, outcomes, results or size

calculate
ascertain/determine from given facts, figures or information

clarify
make clear or plain

classify
arrange or include in classes/categories

compare
show how things are similar or different

construct
make; build; put together items or arguments

contrast
show how things are different or opposite

critically (analyse/evaluate)
add a degree or level of accuracy, depth, knowledge and understanding, logic, questioning, reflection and quality to

deduce
draw conclusions

define
state meaning and identify essential qualities

demonstrate
show by example

describe
provide characteristics and features

discuss
identify issues and provide points for and/or against

distinguish
recognise or note/indicate as being distinct or different from; note differences between

evaluate
make a judgement based on criteria; determine the value of

examine
inquire into

explain
relate cause and effect; make the relationships between things evident; provide why and/or how

extract
choose relevant and/or appropriate details

extrapolate
infer from what is known

identify
recognise and name

interpret
draw meaning from

investigate
plan, inquire into and draw conclusions about

justify
support an argument or conclusion

outline
sketch in general terms; indicate the main features of

predict
suggest what may happen based on available information

propose
put forward (for example, a point of view, idea, argument, suggestion) for consideration or action

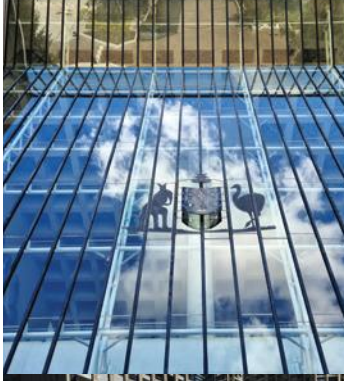
recall
present remembered ideas, facts or experiences

recommend
provide reasons in favour of

recount
retell a series of events

summarise
express the relevant details concisely

synthesise
put together various elements to make a whole



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Part I
The legal system

40% of course time

Principal focus

Students develop an understanding of the nature and functions of law through the examination of the law-making processes and institutions.

Themes and challenges

The themes and challenges covered in Part I include:

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

Chapters in this part

Chapter 1 **Basic legal concepts** 2

Chapter 2 **Sources of contemporary Australian law** 18

Chapter 3 **Classification of law** 68

Chapter 4 **Law reform** 88

Chapter 5 **Law reform in action** 110

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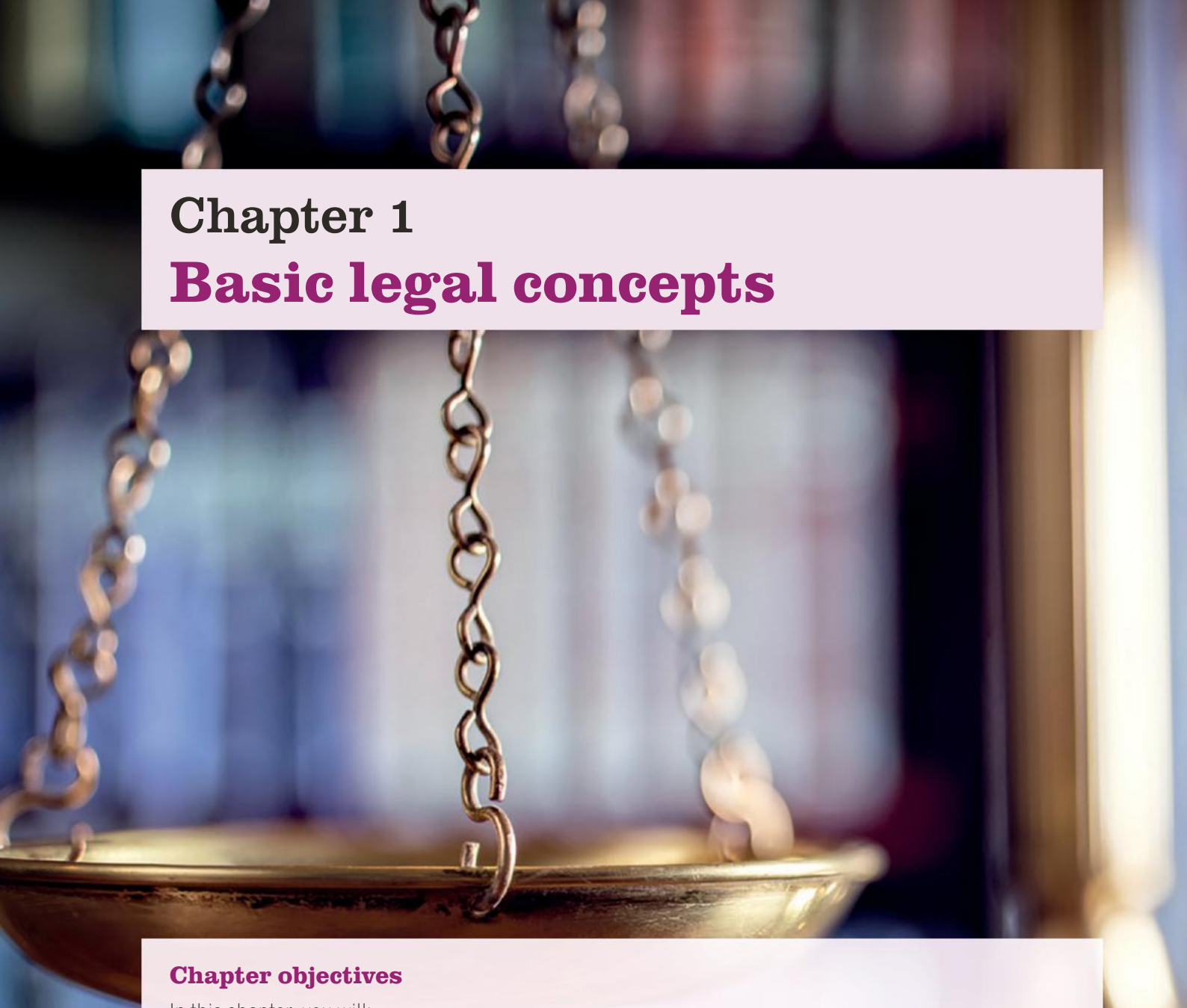

Chapter 1
Basic legal concepts

Chapter objectives

In this chapter, you will:

- identify and apply legal concepts and terminology
- identify the changing nature of the law
- distinguish between customs, rules, laws, values and ethics
- explain the relationship between the legal system and society
- discuss the nature of justice in terms of equality, fairness and access
- discuss the concept of procedural fairness and the rule of law
- discuss the concepts of anarchy and tyranny
- communicate legal information by using well-structured responses.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 11–13 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Abortion Law Reform Act 2019 (NSW)
Smoke-Free Environment Act 2000 (NSW)

SIGNIFICANT CASES

R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256

Legal oddity

Laws in Australia cover all kinds of human interaction and behaviour. Most of the time, these laws reflect the common values and beliefs of the majority of people, but here are some lesser-known and wonderfully unexpected laws from around the country.

- In Victoria, it is an offence to sing an 'obscene song or ballad' in a public place.
- In South Australia, unlawfully ringing doorbells can result in a fine of $250.
- In New South Wales, the driver of a car must lock it if they are going to be more than three metres away.

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1.1 The meaning of law

law
a set of rules imposed on all members of a community that are officially recognised, binding and enforceable by persons or organisations such as the police and/or courts

values
principles, standards or qualities considered worthwhile or desirable within a society

rules
regulations or principles governing procedure or controlling conduct

The **law** is a dynamic thing – a complex mechanism, evolving from hundreds of years of tradition, culture and **values**.

In general terms, the law is a set of enforceable **rules** of conduct that set down guidelines for relationships between people and organisations in a society. The law provides methods for ensuring the impartial treatment of people and outlines punishments for those who do not follow the agreed rules of conduct. Society is dynamic and so the law often seems to be playing catch-up, but law-makers do make a serious attempt to keep pace with changes.

To understand how these rules (known in modern society as 'the law') came about, we need to understand why we live in a society. A society is a group of human beings who are linked by mutual interests, relationships, shared institutions and a common culture. In earliest history, people usually banded together for basic survival and would agree to live by rules that protected their lives and their property.

This tradition has carried on throughout history. As groups of people formed societies, and cultural groups within these societies, they established and enforced rules about the conduct of relationships. Laws today are imposed by the administrative institutions that govern a society; they cover all members of society and there are consequences if they are breached (i.e. broken).

Figure 1.1 The Code of Hammurabi is a Babylonian legal text, dating back to 1750 BC.

Review 1.1

1. You belong to different communities; for example, a school, a sporting team or a religious group. Think of one community you belong to and write down four rules of this group. Outline how these rules are enforced. Discuss why you think group members follow these rules.
2. Suggest what types of penalties should be attached to non-compliance.
3. Identify at least five other rules.

Legal Links

- The NSW Bar Association's website has easy-to-read information about the Australian legal system.
- The State Library of NSW's website provides information about the history of the legal system in Australia.

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1.2 Customs, rules and law

Customs

Put simply, **customs** are established patterns of behaviour among people in a society or group. Customs vary depending on the culture, religion and history of a group of people, society or country. For example, in Australia it is customary to shake hands when greeting a friend, whereas in some parts of Europe this greeting may be in the form of a kiss on each cheek.

Where a custom is followed by most of the population over time, it may become part of the laws of that society; however, because of differences between societies, not all customs become law. **Customary law** refers to established patterns of behaviour that are accepted within a particular social or commercial setting and are of sufficient importance to be enforced. These principles and procedures develop through general usage according to the customs of a people, **state** or group of states. Customs arose to deal with problems in the most harmonious ways. Over time, these customs become accepted as legal requirements. Three types of customary law that have influenced the Australian legal system are:

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

In many societies, most customary law is never written down, as is the case with some First Nations peoples' customary laws. In other societies, customary law is eventually recorded and transferred into written law in formal legal systems.

customs
collective habits or traditions that have developed in a society over a long period of time

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation, or groups of nations, and are treated as obligatory

state
a politically independent country

Rules

If you were to look in a dictionary or on the internet, you would find many definitions of the word 'rules'. Generally, rules are prescribed directions for conduct in certain situations. Rules are generally made by groups and only affect people within those groups. These rules often vary between groups and are not enforceable by the state. For example, there are rules for playing games and for behaviour in a classroom.

Figure 1.2 Lady Justice sits on top of Old Bailey, the Central Criminal Court of England and Wales in London. One of the influences on Australia's legal system is English customary law.

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If these rules are broken, there is some form of punishment attached that is enforceable by those involved in the making of the rules (e.g. suspension or detention). Rules can also be altered by these people to deal with changes in situations. This usually happens after consultation with the members of the group.

In a legal sense, rules form the basis of laws. However, rules can be changed quickly with the agreement of those involved. Laws, as you will discover, are more difficult to change and punishment is not always a simple process.

Law

The law, as we know it, is made up of the formal rules of society. These 'legal rules' have been agreed upon by the majority of those in the group and govern their behaviour and activities.

Laws are different from rules. For example, at the shopping centre, a sign on the escalator requests that you stand to the left and do not take strollers on it. These rules exist for the safety and comfort of shoppers. However, they are just rules, and that is why you will still see people standing on the right and taking their prams on the escalator. There are also signs telling you that you cannot smoke in shopping centres. This is a law, and if someone did 'light up', they would be asked to leave the shopping centre by a security or police officer, and the smoker might incur a fine. The consequences of breaking rules are comparatively minor.

equitable
treating everyone in the same way

ethics
(1) rules or standards directing the behaviour of a person or the members of a profession; (2) a major branch of philosophy that investigates the nature of values and of right and wrong conduct

Laws allow and prohibit a whole variety of activities, from where rubbish should be placed to how we should treat our fellow human beings. Failure to follow laws incurs penalties ranging from a fine to imprisonment.

Laws have certain characteristics that make them different from rules:

1 **Laws are binding on the whole community.** This means that they apply to all members of society.
2 **Laws can be enforced.** This means that penalties apply if a law is broken.
3 **Laws are officially recognised.** This means that governments and courts recognise laws and enforce them.
4 **Laws are accessible (or discoverable).** This means that people can find out which law applies to a particular situation.
5 **Laws relate to public interest.** This means that laws exist for things that concern the whole of society, and that interest is considered to outweigh the costs or drawbacks of the government's involvement in enforcing the laws.
6 **Laws reflect rights and duties.** This means that everyone in society has responsibilities to others (e.g. the duty to drive safely) and that everyone has the right to be treated in a certain way.

In Australia today, the laws have been, and still are, mainly decided by elected government officials at local, state and federal government levels. Judges also have the power to make laws in certain cases when they set a precedent. This will be discussed in greater detail in the following chapters.

It is expected by society that the law looks after all members of the group and that laws are fair, just and **equitable**. It is also expected that laws reflect traditional and current **ethics** and values. Although this represents the ideal situation, what is actually attainable may be another matter.

Relationship between customs, rules and laws

As people have joined together in communities, a relationship has developed between rules, laws and customs:

- Whenever people have lived together in groups, they have developed rules to govern their behaviour and, thus, maintain the smooth running of activities.
- These rules were based on the traditions, customs and values of the group.
- These rules have penalties attached if members of the group fail to follow them.
- Groups usually put someone, or a small group, in charge to enforce these rules and the associated penalties; in modern times, this became the government.
- Over time, these rules became formalised laws, known in society as 'the law'.

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Table 1.1 Differences between laws and rules

Laws	Rules
to be obeyed by all citizens of a society	to be obeyed by specific individuals or groups
made by a law-making body	made by individuals or groups
enforced through the courts	enforced by the leaders of the group
a breach results in a prescribed sanction imposed by the courts	the consequences of a breach are at the discretion of the leader of the group

Review 1.2

1 Identify a custom that exists in your day-to-day life. This may be within your family, your favourite sport or at your school. Describe the custom and share it with the class.
2 Explain how laws are different from rules.
3 Describe the relationship between customs and rules and the process that may occur when rules transform into laws.

1.3 Values and ethics

We all have values by which we try to live. Living according to our ethics means that we do things that we consider to be morally right.

Law-makers try to incorporate these values and ethics into laws. However, it is very difficult to make rules, and thus laws, about everyone's values, especially as there are often groups in society that have different standards of what is morally right or wrong. For this reason, laws can only cover the ethical values that are common to the majority or the dominant group.

Over time, many groups have voiced their values and ethics in a public manner to try to influence the law and the legal system. Some recent examples (that had varying degrees of success) are:

- **School Strike 4 Climate** – In 2019, students from across the world took time off school to demand political action on climate change. Swedish student, Greta Thunberg – who protested outside the Swedish Parliament in 2018 – inspired the protests. The strikes had varying responses from politicians, community leaders and schools.

Figure 1.3 Many times Australians have voiced their values and ethics in a public manner to try to influence the law and the legal system. One example is the Indigenous Voice of the Nation rallies which were held during 2023 for and against the proposed changes to the *Australian Constitution*.

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- **Abortion** – On 2 October 2019 in New South Wales, legislation – the *Abortion Law Reform Act 2019* (NSW) – came into effect that legalised abortion for pregnancies up to 22 weeks' gestation and with the approval of two doctors. This legislation was the result of decades of campaigning by advocates (such as the Women's Abortion Action Campaign) who wanted the law changed.
- **Anti-vaccination and lockdown campaigns** – During 2020 and 2021, people rallied against restrictions placed on the community in the government's response to containing the spread of COVID-19.
- **Indigenous Voice of the Nation** – During 2023, rallies were held around Australia for and against the proposed changes to the *Australian Constitution*.

What is meant by ethical behaviour?

'Ethics' and 'ethical behaviour' are difficult things to define, especially since different people have different ethical standards. Simply put, ethics means doing the right thing; that is, making a judgement about what is the best thing to do in certain situations, and what would be the wrong thing to do. For example, the law does not say that you should open a door for someone whose hands are full of packages, or to help a parent with a stroller down a flight of stairs, but many people carry out these actions, as they are the right thing to do. Often ethical behaviour affects our integrity; that is, how we feel about ourselves and how others see us. As a result, most people behave in an ethical (or moral) way and so laws do not have to be put in place to ensure that people's behaviour is ethical.

1.4 Characteristics of just laws

justice
the legal principle of upholding generally accepted rights and enforcing responsibilities, ensuring that equal outcomes are achieved for those involved

The concept of **justice** involves the fair and impartial treatment of all persons, especially under the law. In simple terms, justice is the continued effort to do the fair thing by everyone. When it comes to making laws in a democratic society, justice involves consulting the people, and carrying out the decisions of the majority, while ensuring that the minority are able to put forward their point of view. A just law is one that allows everyone to receive fair treatment and outcomes, while also ensuring that human rights are recognised and respected. This is not always an easy thing to do, as you will learn throughout the Legal Studies course.

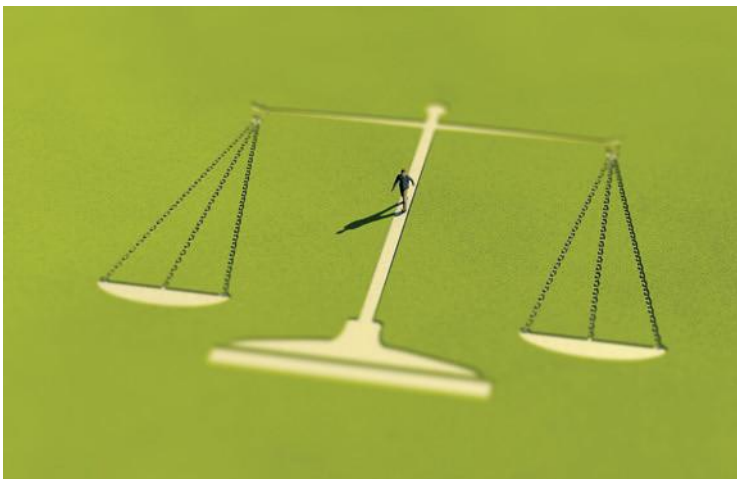

Figure 1.4 A just law is one that is fair and respects human rights

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1.5 The nature of justice

The interpretation and enforcement of laws by a country's system of courts (and those who work within the courts, such as judges and legal practitioners, prosecutors and police officers) is known as the **legal system**. It is the task of the legal system to ensure that all citizens have equal access to the law and that the law provides equality, fairness and justice to all members of society. **Equality**, **fairness** and justice are central concepts that allow us to distinguish good law from bad law. However, if not all citizens have full and equal access to the legal system, equality, fairness and justice are just empty concepts. It is only by combining all of these principles that a legal system can provide justifiable and appropriate outcomes.

Equality

Equality means that all people in a society are treated in the same way with respect to opportunities and political, social and civil rights; and that no-one enjoys unfair advantage or suffers unfair disadvantage. Although we would like to think that equality applies to everyone, our society tolerates many levels of equality and inequality. For example, depending on the situation, a 10-year-old child will be treated differently from a 17-year-old teenager or a 40-year-old adult. The law makes consideration of different capacities (e.g. maturity) and recognises that some people are more vulnerable than others and so provides protection for them. For example, children under 10 years of age cannot be held legally accountable for their actions and therefore cannot be convicted of a criminal offence. This presumption is known as ***doli incapax***. In the case of 10 to 14-year-olds, the court will make an assessment about whether the child can tell the difference between right and wrong, and this will influence the way in which the matter is handled (this is studied in greater detail in the Year 12 Legal Studies course).

legal system
the system of courts, prosecutors and police within a country

equality
the state or quality of being equal; that is, of having the same rights or status

fairness
freedom from bias, dishonesty or injustice; a concept commonly related to everyday activities

doli incapax
(Latin) 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for their actions and cannot be guilty of a criminal or civil offence

Figure 1.5 Children under 10 cannot be held legally accountable for their actions and therefore cannot be convicted of a criminal offence.

Fairness

Fairness and justice are usually associated with each other. The difference is that 'fairness' applies to everyday life, whereas 'justice' has more legal connotations. People may have different opinions about what is fair.

For example, suppose one team wins a sport competition because all its players, randomly selected, happen to be taller than the players on the other team. If the rules of the competition do not specify that both teams must have players of the same size, it may seem unfair to the losing team, but there is no 'fact of the matter'. If Ann places a bet on the team she knows has the taller players, and none of the other people who placed bets know anything about the teams or how tall the players are, Ann's winning of the bet may also be regarded as unfair – because of her having knowledge the others lacked. In other words, even if an opinion about what is fair is justified or mistaken, there is no single social mechanism for deciding what fair is or for ensuring fairness occurs.

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When rules are made, the expectation is that they will be fair to those covered by them. In the same way, when a rule is translated into law, it is expected that it will be fair to all members of society. Justice is more specific than fairness, as the term is applied to situations covered by the law, which tries to ensure that everyone has the same opportunities.

Access

In a democratic society, such as Australia, protecting the rights of all citizens is the ultimate goal of the law. However, for the legal system to meet this goal, all people must have the same level of **access** to the institutions and agencies of the law. Access is the ability to obtain or make use of something. The concept of justice suggests that everyone who is covered by a legal system and its laws should have equal access to that system. This includes ensuring that citizens are aware of the laws that affect them and understand their rights and responsibilities under these laws.

access
the right or opportunity to make use of something

However, in reality, the legal system is not accessible to everybody in an equal way. Such things as income, education and English-language skills can affect people's access to the law. In particular, women, financially disadvantaged people, people from non-English-speaking backgrounds, people living with disability, First Nations peoples and those who are institutionalised may have trouble finding appropriate legal solutions.

1.6 Procedural fairness and the principles of natural justice

procedural fairness/ natural justice
the body of principles used to ensure the fairness and justice of the decision-making procedures of courts; in Australia, it generally refers to the right to know the case against you and to present your case, the right to freedom from bias by decision-makers and the right to a decision based on relevant evidence

Procedural fairness refers to the idea that there must be fairness in the processes that resolve disputes. It is closely linked to the concept of **natural justice**; the two terms are often used interchangeably.

Natural justice refers to the fact that everyone should be treated fairly in legal situations. There are two main principles of natural justice. These are:

- the right to be heard – this includes the right to a fair hearing
- the right to have a decision made by an unbiased decision-maker – even an appearance of bias is enough to constitute a breach of natural justice.

The assertion that 'justice should not only be done but should be seen to be done' comes from the English case of *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256. During this criminal trial – which resulted in McCarthy being convicted of dangerous driving – it was discovered that a clerk to the magistrates was also a solicitor who had represented the person suing McCarthy in a separate civil case arising out of the accident. Although the magistrates did not consult the clerk for his opinion, and the clerk gave them no advice on the matter, McCarthy's conviction was overturned based on the possibility of bias.

Figure 1.6 Everyone should be treated fairly in legal situations

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1.7 The rule of law

The principle of the **rule of law** is that no-one is above the law, including those who make the law. This means that all the groups and individuals who are involved in the legal system – such as the legislators and judges who make, administer and interpret the laws; the police officers who enforce the law; and the lawyers who represent and advise people about the law – are answerable to the same laws as every other citizen. Thus, the rule of law means that everyone is subject to the same laws. Obvious breaches of the rule of law occur when officials make favourable decisions for relatives and friends but apply the law fully for everyone else.

rule of law
the principle that nobody is above the law; this can be seen in the requirement that governmental authority must be used in line with written, publicly disclosed laws, for which established procedural steps (due process) have been taken in the adoption and enforcement

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

Why do people obey the law?

Generally, people within a society like to have rules and laws because they create order. Laws help each person to feel a sense of security – the law is clear about what is expected of them as a citizen and what they can expect from others. As the law is based on customs, it also helps to reinforce the values of most members of society. In principle, the law embodies the concept that what each individual believes is important has the same importance to the larger group.

Laws also function to protect all members of society. They tell society which actions are allowed, and which actions are not allowed. Laws apply **sanctions** to those found guilty of a crime and may act as a deterrent to those who might otherwise commit a crime. Laws enable the resolution of disputes, as they empower police officers and the courts to carry out and administer the law.

Members of society will not follow rules if they do not agree with them or feel that the rules have no connection to them. This is especially so if the penalty attached to the rule is seen as inadequate. For example, think about the penalties for riding your bike or skateboard in areas where it is not permitted, or talking on a mobile phone when driving. While many people obey these rules and laws, others do not, as they do not consider the penalty (e.g. a fine or demerit points) to be enough of a deterrent. Sometimes people believe the law does not apply to them, or that they will not be caught, and so they do not comply with the law. As would be expected, laws against more serious offences carry a range of stricter penalties, which are intended to make people think seriously about the consequences before breaking the law.

Review 1.3

1 Identify why we need laws.
2 Define the following basic legal concepts. You can choose to use words, pictures or cartoons to define the concepts:
   - **a** custom
   - **b** rules
   - **c** law
   - **d** fairness
   - **e** equality
   - **f** justice
   - **g** values
   - **h** ethics.
3 Write an explanation of why you obey the law. Assess if there are any laws that you do not follow or believe in and outline why this is so.

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Figure 1.7 A man is seen vaping at a racecourse in Sydney in 2022. In 2018, the NSW Parliament passed legislation banning vaping from the same spaces in which cigarettes are banned.

Public authorities have been concerned about the effects of tobacco smoking. In 2013, the NSW Government brought in legislation that banned smoking in public places (e.g. building entrances, bus stops, train stations, swimming pools and sporting grounds).

In 2018, this law was widened to include electronic cigarettes (e-cigarettes) or vapes. The NSW Parliament passed legislation, the Smoke-free Environment Amendment Bill 2018 (NSW), which was then repealed, and a new act was legislated as the *Smoke Free Environment Act 2000* (NSW). This Act banned vaping from the same spaces in which cigarettes are banned. Under this legislation, e-cigarette smokers face fines of up to $550 if caught smoking in public spaces or on public transport. Using a vape while in a vehicle with children under the age of 16 can result in police issuing an offender with a penalty notice of $250. However, just like with smoking, fines are rarely enforced, as law enforcers often need to deal with more serious offences.

The news article below highlights that people who vape do not know that the laws around smoking now apply to vaping.

Media

Why vapers don't know they are also banned from non-smoking areas

Mary Ward

The Sydney Morning Herald

19 March 2023

Sydney councils are looking at updating their 'no smoking' signs to explicitly mention e-cigarettes after concerns that vapers do not know that the prohibitions apply to them too.

A legislative amendment in 2018 expanded all NSW non-smoking legislation – such as rules banning the use of cigarettes in indoor public areas, cars and outdoor dining areas – to include the smoking of e-cigarettes.

Last week, Mosman Council resolved to review its public smoking policy and signage with the view of incorporating more contemporary practices, such as vaping.

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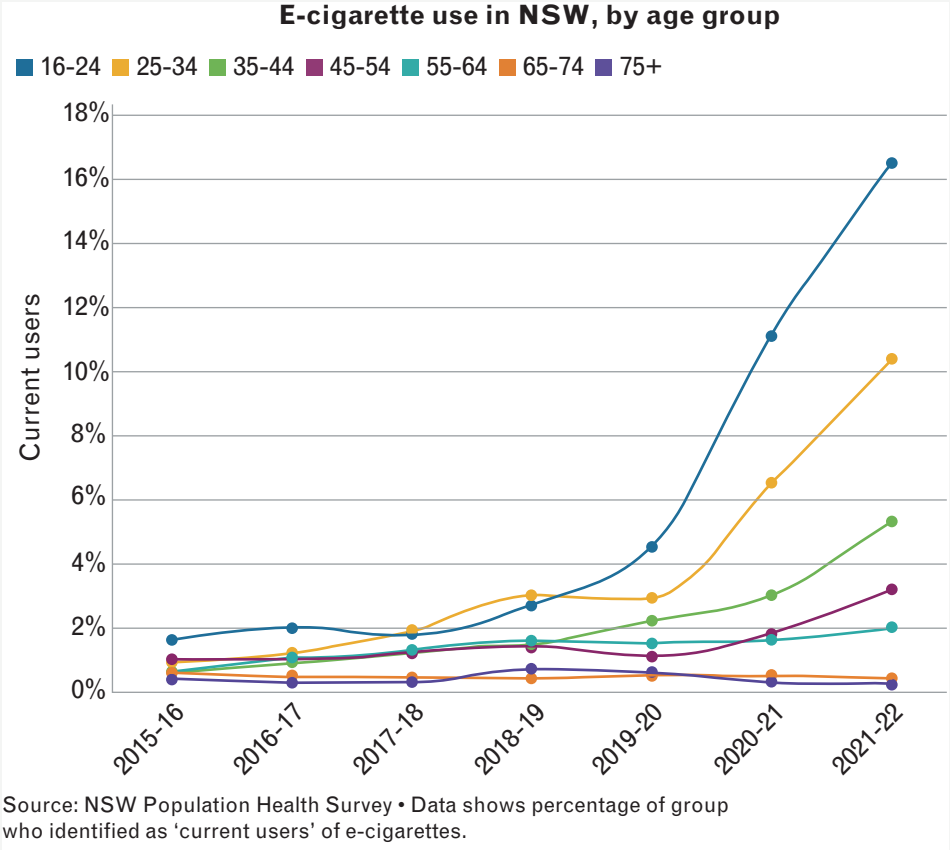
Data from Revenue NSW shows the number of fines issued for public smoking-related offences has declined over the past five years, despite a significant rise in vaping during this time.

The number of people who smoke cigarettes in NSW has dropped to record levels, although vaping is increasingly popular. The latest NSW Population Health Survey showed the number of people aged 16 to 24 who were current vape users more than doubled to 11 per cent in 2021.



Source: NSW Population Health Survey • Data shows percentage of group who identified as 'current users' of e-cigarettes.

Figure 1.8 E-cigarette use in New South Wales

Alecia Brooks, manager of Cancer Council NSW's tobacco control unit, said the laws prohibiting vaping in certain locations were clearly not being enforced – or even well communicated – with people vaping on the bus, in train stations, outdoor eating areas of pubs, and indoors in shopping centres and cinemas.

'When people smoke a cigarette in a place they shouldn't, it only takes a few seconds before someone asks them to stop because the social norms have shifted to a point where smoking is no longer an acceptable social behaviour, and we are acutely aware of second-hand exposure,' she said.

'We aren't there with vaping yet. And as more people vape around others this can increase perceptions that vaping is acceptable or normal and lead to an increase in use or uptake.'

Brooks was hopeful that attention to more targeted signage could bring a shift, with work underway with NSW Health to review smoke-free signage with the hope of reducing confusion.

'Unlike smoking, the impacts of second-hand vapour are still not firmly established,' she said.

(Continued)

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Media—Continued

'But if we draw on our learnings from smoking, you could imagine that inhaling an array of second-hand chemicals and toxins can't be good.'

Mosman Council's decision comes after Northern Beaches Council considered updating signage in a February meeting of its community safety advisory committee. However, it decided to wait for NSW Health to give its advice on an industry standard.

While the Inner West Council has not changed its signage, with dedicated no-smoking areas automatically considered to also prohibit vaping per the NSW law, a spokesperson said its staff used an 'educative approach' when required to enforce this.

Since 2019, the University of Sydney has updated some of its non-smoking area signs on campus to clarify that they also prohibit vaping.

'Not all external signage has been replaced to specifically mention vaping, however it will be included as signs are renewed as a matter of course,' a university spokesperson said.

'No smoking' signs at SW, UTS and Macquarie University do not make explicit mention of vaping.

Speaking at a forum hosted by the Cancer Council last week, NSW Health Minister Brad Hazzard said he was concerned by adults vaping freely in areas where the practice is technically prohibited.

'Where there's a no smoking sign in a particular area, people don't understand that vaping is caught up by the same regulatory requirements,' he said.

Hazzard, who is retiring after next weekend's state election, said he would be open to more stringent restrictions governing the sale and marketing of vapes in NSW – particularly plain packaging laws – if endorsed by health advice.

Labor health spokesperson Ryan Park told the forum he would also be open to further regulation of vaping if supported by health advice.

Analysis 1.1

Read the media article on pages 12–14.

1. Explain why people who vape may not know that they are breaking the law.
2. Outline the solutions that councils are putting in place.
3. Discuss why you think people may not obey smoking and vaping laws.
4. Analyse whether you think society needs a stronger type of legislation. Write two paragraphs, one arguing in favour of the legislation and the other arguing against it.
5. Research to see if you can find a more recent media item about whether these laws are working.

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1.8 Anarchy and tyranny

The rules and laws that have evolved for different societies are based on the customs, values and ethics that are part of these traditions. Most people want and accept rules as a necessary part of everyday life due to the belief that all people should be treated equally and with fairness.

Rules are needed to ensure that our behaviour is regulated to meet the common expectations of society. The absence of laws and the inability to enforce laws, or the unfair and unequal application of laws, can result in states of anarchy or tyranny.

Anarchy

When people believe that the law has let them down in some way, they may declare, 'We live in a state of **anarchy**!' What exactly do they mean by this? The word 'anarchy' is derived from *anarchia*, the Greek word for 'without a ruler'. Anarchy, therefore, is a term used to describe a state of chaos and disorder resulting from the absence of rules and laws.

A state of anarchy may break out during a revolution or after a natural disaster because the law-enforcement agencies no longer exist or are unable to enforce the laws. Violence and widespread looting are two early indicators that a society or group is on the verge of anarchy.

anarchy
the absence of laws and government

While most people believe that an absence of rules and laws leads to a disorganised and chaotic society, certain philosophers, theorists and anarchist movements believe that anarchy does not imply chaos, but rather a ruler-free society with voluntary social harmony.

Figure 1.9 Security people and police attempt to prevent people storming the US Capitol Building on 6 January 2021.

Research 1.1

Prepare a report that analyses anarchy and modern-day anarchist organisations. In your report include the following:

- a definition of anarchy
- a history of anarchy
- information about two anarchist organisations and their beliefs
- modern-day anarchists and their activities.

Two possible anarchist organisations are the Anarchist Federation and the Melbourne Anarchist Club; search online for information about these organisations. Alternatively, you may choose your own group to research.

Anarchist organisations often protest at:

- G8 summits
- European Union meetings
- World Trade Organization meetings.

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Tyranny

If anarchy is the absence of laws and law-enforcement agencies, then **tyranny** is the opposite. By definition, a tyrant is a single leader who has unlimited power over the people in a country or state. Generally, tyrannical power involves severe punishment for any infringements of the law. Some modern-day examples of tyrannical power in action include Saddam Hussein's rule in Iraq before his arrest in 2003, Bashar al-Assad's presidency in Syria, Robert Mugabe's 30-year control of power in Zimbabwe (before his overthrow in 2017) and Kim Jong-un's leadership of North Korea.

tyranny
rule by a single leader holding absolute power in a state

The Hong Kong demonstrations of 2019 are an example of how tyranny and anarchy can interact. The protests against the strong government intervention, perceived as being almost tyrannical, led to a lack of order in the streets of Hong Kong, rising to at times an almost anarchical situation.

Case Study

Hong Kong protests against government control

On 3 April 2019, a Bill was proposed in the semi-autonomous region of Hong Kong that would allow criminal suspects to be extradited to mainland China. This Bill was widely opposed due to concerns it could be used to silence criticisms of the Chinese Government, and on 9 June 2019, one million people marched in Hong Kong in protest of the Bill. This was the first of a series of ongoing demonstrations that expanded to being protests about general concerns over the communist Chinese Government's control over Hong Kong.

Video 1.1 Hong Kong protests

Hong Kong has been a semi-autonomous region since Britain returned the city to China in 1997. At this time, China agreed to give a 'high-level of autonomy' to Hong Kong for 50 years. This autonomy included free speech and the continuation of capitalist markets and democratic principles in Hong Kong. However, in recent years there has been widespread concern about the Chinese Government's increasing influence on the Hong Kong Government.

While the extradition Bill was formally withdrawn after two months of civil unrest, demonstrators continued to take to the streets with a list of other demands including an inquiry into police conduct and an amnesty for arrested protesters. Video footage of increasingly violent clashes between protestors and police officers was shown across the world. Hong Kong's airport was shut down for periods at a time, government offices were stormed by protesters, and police sprayed tear gas into crowds of demonstrators.

Figure 1.10 Hong Kong democracy activist Tony Chung poses in front of a flag reading 'Hong Kong Independence' in December 2023 after fleeing Hong Kong. In 2021, Chung, then 20, became the youngest person to be imprisoned under Hong Kong's national security law – imposed by Beijing after massive pro-democracy protests started in 2019 in the former British colony.

The movement, labelled an 'era of revolution' by protesters, has no clearly identified leader or structures but relies on multiple individuals or small-group organisers. The organisers alert people to *ad hoc* demonstrations via social media.

At the time of writing, the relationship between Hong Kong and mainland China is still rocky. The effects of COVID-19 and some electoral reform have led to fewer protests but the unrest continues. Students are advised to carry out research to keep up to date on this issue.

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Chapter summary

- The law of a country develops from the rules of the dominant community.
- These rules are based on the customs, values and ethics of that community.
- Rules and laws have different characteristics.
- The term for the absence of government is 'anarchy'.
- The law is based on the notions of fairness, equality and justice.
- The law covers all members of society and there are penalties for infringements of the law.
- People follow the law because it provides them with protection against wrongful behaviour.

Multiple-choice questions

1 Which of these statements about the difference between a rule and a law is true?
   - **a** Rules are not binding on the whole community.
   - **b** Rules are not enforceable.
   - **c** Rules have nothing to do with ethics.
   - **d** Rules do not involve rights and responsibilities.

2 What is anarchy?
   - **a** Anarchy is constant violence and disorder.
   - **b** Anarchy is the absence of law.
   - **c** Anarchy is wearing black clothes and breaking the rules.
   - **d** Anarchy is rebellion against the government.

3 What are ethics?
   - **a** Ethics allow people to be different.
   - **b** Ethics are a mix of equality and fairness.
   - **c** Ethics are the principles that help us make decisions about right and wrong behaviour.
   - **d** Ethics are different people's perceptions of the law.

4 A police officer charges a man for crossing the road against the lights but does not book a woman doing the same thing. Why is this unjust?
   - **a** The police officer should concentrate on serious crimes.
   - **b** Studies show that women are better at crossing roads.
   - **c** The police officer has not treated all pedestrians equally.
   - **d** You should be allowed to cross the road wherever you want.

5 What is the purpose of the law?
   - **a** The purpose of the law is to divide power among all the different groups in society.
   - **b** The purpose of the law is to provide stability for the ruling government.
   - **c** The purpose of the law is to maintain order in society.
   - **d** The purpose of the law is to make people do things that no-one wants to do.

Short-answer questions

1 Describe the difference between anarchy and the law.
2 Explain how anarchy and a structured system of law are not compatible.
3 Describe the relationship between rules, laws and customs.
4 Compare and contrast 'rules' and 'laws'.
5 Explain the relationship between fairness, equality and justice.
6 Critically analyse whether laws are necessary.

Extended-response question

Assess why people have different perceptions about the law. Explain your answer.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Chapter 2
Sources of contemporary Australian law

Chapter objectives

In this chapter, you will:

- identify and apply legal concepts and terminology
- describe the key features and operation of the Australian and international legal systems
- discuss the effectiveness of the legal system in dealing with relevant issues
- explain the relationship between the legal system and society
- describe the role of the law in conflict resolution and its ability to respond to and initiate change
- locate, select and organise legal information from a variety of sources
- communicate legal information by using well-structured responses.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 11–13 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Commonwealth of Australia Constitution Act 1900 (UK)
Migration Act 1958 (Cth)
Administrative Decisions (Judicial Review) Act 1977 (Cth)
World Heritage Properties Conservation Act 1983 (Cth)
Sex Discrimination Act 1984 (Cth)
Australia Act 1986 (Cth)
Federal Circuit and Family Court of Australia Act 2021 No. 12, 2021 (Cth)

SIGNIFICANT CASES

R v Brislan [1935] HCA 78
Murphyores Inc Pty Ltd v Commonwealth [1976] HCA 20 ('Fraser Island case')
Commonwealth v Tasmania [1983] HCA 21 ('Tasmanian Dam case')
Dow Jones & Co Inc v Gutnick [2002] HCA 56; (2002) 210 CLR 575
Roper v Simmons (2005) 543 US 551
Google Inc v Australian Competition and Consumer Commission [2013] HCA 1
Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann [2017] HCA 40
Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45 ('Citizenship Seven case')
Nathanson v Minister for Home Affairs [2019] FCA 1709
Love v Commonwealth of Australia [2020] HCA 3
NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor [2023] HCA 37

Legal oddity

Laws in Australia are the result of legislation passed in state and federal parliaments or because of legal precedents established in the courts. However, some laws seem odd today as they have become either outdated for the society of the time (e.g. transport for hire many years ago had to carry a bale of straw, presumably for horses) or are no longer needed as technology has rendered them irrelevant. Some laws passed in times of crisis or an emergency are not required as the crisis or emergency has passed. During the COVID-19 pandemic, new fines were introduced for people who breached lockdown laws. While these laws were a breach of freedom of movement, it was deemed appropriate at the time in terms of public health and safety to restrict or slow the spread of the virus. At the end of 2022, the NSW Government was forced to concede that some public health orders during the COVID-19 pandemic were too vague and to cancel 33000 unpaid fines.

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2.1 Australia's legal heritage

common law
law made by courts; historically, law common to England

statute law
law made by parliament

adversarial system
a system of resolving legal conflicts – used in common law countries such as the United Kingdom and Australia – that relies on the skill of representatives for each side (e.g. defence and prosecution lawyers) who present their cases to an impartial decision-maker

The legal processes and practices used in Australia today are based on the model developed in England. When the British came to Australia in 1788, they brought with them the law that applied in Britain, known as **common law**. Contemporary Australian law has evolved from both common law and statute law. Common law refers to laws created in court; that is, decisions made by judges. **Statute law** refers to laws made by parliament. These concepts are discussed in further detail in this chapter.

The adversarial system of trial

The English system of law has heavily influenced Australian law and practice, including the way court cases are conducted. Australia inherited the **adversarial system** as part of both criminal and civil court proceedings. The word 'adversary' means 'opponent'. In a trial, the two sides involved in the case try to prove their version of the facts and disprove the other side's version. In theory, the defendant in a criminal trial does not have to prove anything, as they are assumed innocent until proven guilty. However, the opposing sides to a trial, either civil or criminal, will have the opportunity to present arguments and both have the right to challenge the arguments each side is presenting. Most people involved in a trial will usually retain the services of a legal team to present and argue their case.

An impartial judge (and sometimes a jury) will listen to the evidence presented by both parties and make a decision as to which side has proved their case and, thus, disproved the other side's case. In some limited cases, the defendant and their legal team can decide if they want to be heard by only a judge or a judge and jury.

Juries are made up of a random selection of the public and there is a good chance that one day you, or someone you know, will be called for jury duty. The article on the following page explains the purpose of juries, how juries are selected and what happens in the courtroom.

Figure 2.1 A key feature of the adversary system of trial is juries.

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Media

Jury duty explained: From allowances to exemptions, here's what you need to know

ABC News

16 October 2019

If you're an Australian citizen and you're enrolled to vote, there's a good chance that one day you'll open your mailbox to find a fancy letter requiring you to attend your local court for jury duty.

If you haven't the faintest clue how the legal system works and your courtroom knowledge is limited to the storylines of TV legal dramas, you'll likely have a lot of questions.

For starters, what exactly does a juror do? If you've got to work, can you skip jury duty? What if you have family to look after or live far away from the court?

The good news is we've done the hard yards for you – so here's what you need to know.

What do juries do? And why do we have them?

Juries are a key part of our legal system. They're generally made up of 12 people who are tasked with hearing evidence presented in a trial and returning a verdict of guilty or not guilty.

So why do we have juries? And why don't we let judges decide everything?

The key reason is that juries help people trust the justice system. Without juries, trials would be decided by a single judge (who might not be representative of the broader population) instead of a group of people representing a cross-section of society.

Think about someone who is particularly biased or prejudiced: if they were deciding on a case themselves, the outcome could be very different than if they had to reach agreement with 11 other people in a jury room.

Having a jury also forces lawyers to explain things in terms an average person can understand, rather than a bunch of legal mumbo jumbo.

After all, we need to understand the law if we're going to avoid breaking it, says Jacqui Horan, a jury researcher and associate professor at Monash University.

How can you get excused from jury duty?

Look, I get it. You saw the jury duty letter and thought, 'How I am going to get out of this?'

We all have busy lives and jury duty can be a major inconvenience. But, like voting, it's an important civic duty that we shouldn't take for granted. (I'll get to this shortly.)

All that said, sometimes jury duty is going to be impractical or impossible, which is why courts allow people to be exempted or excused in certain circumstances.

Here's a short and abridged list of some of the reasons you might be excused, courtesy of David Tait, a professor of justice research at Western Sydney University:

- if you are self-employed or run a small business that would be affected by your absence
- if you are a student or apprentice
- if you have a health issue or live with a disability that would make jury service difficult
- if you aren't living in the state where you have been summoned to attend court, or if you have transport difficulties (e.g. you live very far from the court)
- some professions may exempt you from serving on a jury; this usually covers criminal lawyers, police officers and other people who work in the criminal justice system, but each jurisdiction is different.

(Continued)

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Media—Continued

For most people though, simply having to work is not going to be a good enough reason to avoid jury service.

For a case in point, consider the chief financial officer who tried to dodge jury duty in Victoria because he had meetings to attend. For his indiscretion, he was fined $2000 and ordered to do 80 hours of community service.

How are juries selected?

If you're called to court, it's not a given that you'll be put on a jury immediately.

For one, lawyers have an opportunity to veto potential jurors by using what's called a 'peremptory challenge'.

The reasoning for these challenges tend to be based on little more than superstition or folklore, says Professor Horan.

In Victoria, for instance, teachers and nurses are often challenged because of pervasive stereotypes that they have 'strong views' or are overly sympathetic to victims.

In many cases, lawyers will challenge potential jurors simply because of the way they look, Professor Horan adds.

If you are excused, challenged or otherwise exempted, you might be required to come back to court another time.

What does jury duty pay?

Jurors are paid allowances by the court for their time (and sometimes travel), which can range depending on the state.

In longer trials, jurors are typically paid more to make up for the inconvenience.

Your work may also pay you while you're on jury duty.

Under the National Employer Standards, all employers are required to top up their staff's jury pay to their normal wage for the first 10 days of jury service, but this does not cover casual workers.

Some states like Victoria require employers to keep paying their staff at full pay. Some lucky employees (often public servants) will get full pay even when it isn't required by law.

But, if you don't have access to these generous perks, you're a casual worker, or if you're assigned to a particularly long trial, there's a real chance you could be left worse off financially for serving on a jury.

How long do people serve on juries?

Jurors typically serve on trials that take between seven and 12 days, though more involved matters – such as those for alleged terrorists – can take months or even a year or more, says Professor Tait.

Jurors are often asked about their availability in advance if they could be selected for a particularly long trial.

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What happens in the court room?

In court, the role of the juror is to be a 'fact finder', Professor Horan says. In a jury trial, jurors are asked to decide upon the key facts of the case and return a verdict of guilty or not guilty. (In judge-only trials, the judge also takes on this responsibility.)

Consider someone on trial for allegedly driving a getaway car in a robbery: the jurors have to decide whether the accused intended to rob something, the extent of their involvement and whether they were acting in concert or alone, Professor Tait says.

The judge's role in jury trials, by comparison, is to deal with questions of law, such as what evidence can be presented to the court.

Juries in the internet and social media age

When jurors are empanelled, they are usually given stern instructions not to talk to anyone about the case or to look up information online.

The reason is fairness, Professor Tait says. In a court room, the defence lawyers have an opportunity to explain or question any evidence that's presented to the jury.

When a juror is searching around online in their private time, they might be reading something mistaken or misleading with knowing it. The defence doesn't have an opportunity to point this out, which could lead to a miscarriage of justice.

Similarly, jurors are often warned to keep off social media. The fear is that jurors could become aware of information that wasn't heard in court, that they contact people involved in the trial, or that they use social media to discuss the trial with others.

Judges take this stuff very seriously, and have even dismissed jurors who have researched online or posted about their cases on social media.

What's the experience like?

While most people are initially apprehensive about serving on a jury, those who have gone through it often value the experience.

'What we have learnt from surveying jurors is that although jurors are often initially nervous and hesitant … after they've been on a jury, they're far more inclined to do it again because they really appreciate what an amazing experience it can be,' Professor Horan says.

'You get to see what it's like being a judge for a week or two.'

For some people though, jury duty can be confronting and even traumatic.

If you're serving on a sexual assault or murder trial, you are likely to encounter confronting evidence. Jurors also feel pressure to make the right decision, which can be difficult when evidence is conflicting or confusing.

Sometimes, there are disagreements in the jury room. (In Australia, juries often have to come to an unanimous verdict, though in some circumstances judges will still accept verdicts of juries with one dissenting vote.)

It's a lot to deal with, so it's no surprise that one study found that 70% of Australian jurors found the experience stressful in some way. Today, many courts offer jurors counselling services to help manage this problem.

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Media—Continued

While it is not always going to be pleasant, jury duty can be a great experience – and one that we shouldn't necessarily shy away from.

'This is one of the most interesting experiences as a citizen you could possibly have,' Professor Tait says.

'You will meet people you would never meet otherwise, and you will have really momentous decisions resting on your shoulders. It's not just a duty, it's an opportunity.'

The inquisitorial system

inquisitorial system a legal system where the court or a part of the court (e.g. the judge) is actively involved in conducting the trial and determining what questions to ask; used in some countries that have civil legal systems rather than common law systems

In an **inquisitorial system**, the court is actively involved in determining the way in which the competing claims are presented. It is different from the adversarial system, where the court is required to act impartially, like a referee.

The inquisitorial system derives from the Roman and Napoleonic codes. It is found in Europe, as well as in Japan and some other countries. In this system, called the civil law system, a judge (or group of judges) has the task of investigating the case before them.

Indonesia uses an inquisitorial system for criminal trials. This means that the judges will conduct an inquiry into the truth of what occurred; that is, the facts behind the legal issues in dispute. They are able to admit evidence that might not be admitted in an Australian court. Judges are empowered to decide which witnesses will be called and can call for outside testimony that had not been requested by either side.

		Adversarial	Inquisitorial
Trial	Defence	Lawyer	Lawyer
	Investigation	Lawyer	Judge
	Decision	Judge	Judge

Figure 2.2 Comparison of the role of lawyers and judges in the adversarial and inquisitorial systems of law

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2.2 Common law

The term 'common law' has many different uses, and can be used in the following contexts:

- court-made law (as opposed to laws made by parliament or statute law)
- law developed by the courts of common law, as distinct from the courts of equity
- the system of court-based law used in the United Kingdom and many of its former colonies, including Australia, New Zealand, Canada and the United States.

Development of common law

The British legal system itself developed from a number of sources. In Anglo-Saxon England, for example, questions about rights and obligations were decided based on local custom, and disputes were resolved by local courts. After the Normans invaded England in the eleventh century, they began a system of travelling judges who applied a common set of laws to all areas of England. These judges, also known as magistrates, dealt with petitions from people who felt that the local courts had been unjust. They used the premise that similar cases should be treated in a similar way. The decisions made by the judges provided the standards, or precedents, for later cases, and the laws they applied became the basis of the British legal system.

This system was the one brought over to Australia with the First Fleet. Since then, Australia has gradually developed a legal system based on its own statute law and common law; however, many British legal principles have been retained in the Australian system. These include the principles of natural justice.

From about the sixth to the eleventh century in England, the law was enforced by local administrative bodies. The king's appointees, the church and local landlords all had a role in court resolution of legal matters. Crimes were treated as wrongs for which the offender had to compensate the victim. If the court accepted a case, both the person against whom the illegal act was allegedly committed (the plaintiff) and the person who was said to have committed it (the defendant) had to swear an oath. The defendant might have the help of 'oath-helpers' – people willing to swear to his innocence. If the court found the defendant's oath believable, they could simply walk away. If, however, the plaintiff had witnesses who would swear that the defendant had committed the act, the defendant might be required to participate in a 'trial by ordeal'.

Before the ordeal, the defendant had to fast for three days and attend a special Mass. They were then given a painful task to complete or to bear such as carrying a red-hot iron bar a certain distance in their bare hands, retrieving a stone from a cauldron of boiling water, putting their hand into a flame, or being thrown into a river or pond. If the defendant completed the task without injury or death, if the wound healed within a prescribed period, or if the defendant sank, they were considered innocent and set free; if not, execution usually followed.

Trial by ordeal continued after the Norman Conquest, though there were new requirements imposed by the church; for example, that no-one could be made to undergo an ordeal without a bishop's permission. The practice was eventually condemned by the church in 1215 and abolished by royal decree in 1219.

In order to consolidate his hold on the country, in the eleventh century, William the Conqueror sent judges (or justices) around the country with three main tasks to carry out:

- administer a common set of laws throughout the country
- report on any threats to the throne
- assess the wealth of the country so that taxes could be levied.

When Henry II came to the throne in 1154, there was a well-established practice of sending royal justices throughout the countryside to listen to disputes, work out solutions, apply punishments and ensure that common rulings were made overall.

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These judges also had authority to make decisions when they heard new cases. In this way, a set of uniform laws developed throughout England. Thus, common law as we know it today has evolved from judicial decisions that were based in tradition, custom and precedent.

Development of equity

The procedure for bringing a case before the court was rigidly formal. In Anglo-Saxon times, if a party failed to follow the prescribed steps, they could lose their case. Even later, the common law would hold that a person was bound by a contract, even if they had made a mistake or been tricked into signing it. By the fifteenth century, people were bringing petitions to the king claiming that the common law courts had made unjust decisions. It became the job of the Chancellor to deal with these petitions.

equity
the body of law that supplements the common law and corrects injustices by judging each case on its merits and applying principles of fairness

precedent
a judgment that is authority for a legal principle and that serves to provide guidance for deciding cases that have similar facts

stare decisis
(Latin) 'the decision stands'; the doctrine that a decision must be followed by all lower courts

For many years, the Chancellor was a priest as well as a judge. Chancellors did not base their judgments on precedent and form; instead, they were influenced by Christian principles. This body of law, which developed to deal with the injustices that had crept into the common law and was set up to hear these petitions, became known as **equity**.

As a court of equity, the Court of Chancery looked at the features of each case to decide what was fair or just in the particular circumstances. The moral principles on which equitable decisions were based were called the rules (or maxims) of equity, and these are still used today.

The systems of common law and equity co-existed, but not always peacefully. In the early seventeenth century, a dispute between the Chancellor and the Chief Justice of the King's Bench was resolved through the personal intervention of the king, James I, who called a conference of judges. They concluded that in the case of conflict between the common law and equity, equity should prevail. As a result, rules of equity always override common law.

There are equitable remedies for wrongs not recognised by the common law. Some of these remedies are non-financial; for example, the court may order someone to do what they had promised but then failed to do, or may set aside an unfair contract.

In the 1870s, the British parliament passed legislation merging the courts of common law and the courts of equity, allowing judges to apply the rules of common law or equity (or both) in a particular case. The Australian colonies followed suit with similar legislation.

The doctrine of precedent

As stated above, the common law (or case law) is the law developed by judges when deciding cases. In addition to rules on the presentation of evidence and the running of the case, judges must resolve disputes by considering previous decisions made in similar cases. A previous judgment on similar circumstances is called a **precedent**, and it provides the authority for the legal principle contained in the decision. The concept that like cases must be treated alike is called the doctrine of precedent or ***stare decisis***.

The purpose of precedent is to ensure that people are treated fairly and that the law develops in a consistent and coherent fashion. It means that old cases retain an authority, which allows their decisions to be used as the basis for decisions in newer court cases. Thus, the doctrine of precedent works to limit a judge's ability to be too creative when it comes to making a decision.

Making and following precedent

When there has been no previous decision to provide guidance for determining a case, a court must use principles of the existing common law and statute law to make its decision. The judge(s) will also pay attention to social developments and common sense. This new decision creates a new precedent.

Another way in which precedents are created is in the interpretation of legislation.

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Where there is a dispute about the meaning or application of a section of an act, or about the meaning of a word, a court may have to resolve the question. For example, if a statute requires that the local council must approve the removal of trees from any land, a developer might not agree that the term 'trees' includes dead trees. Judicial interpretation of the legislation might be needed to determine whether council approval must be sought for the removal of dead trees just as for live ones.

While courts are not bound to follow other courts' interpretations of statutes, they are usually expected to do so. This is because, if a court decision has not resulted in parliament changing the wording of legislation, it suggests that parliament is satisfied with the court's interpretation.

When a judge gives a decision in a case, it usually is made up of two parts:

- ***ratio decidendi*** – the essential legal reason why a judge came to a particular decision; a *decidendi* in a higher court sets a binding precedent on lower courts
- ***obiter dicta*** – other remarks made by the judge about the conduct of the trial (e.g. about the credibility of a witness); these remarks do not form part of the decision and, thus, do not set a precedent.

When precedent does not have to be followed

If the facts or relevant points of law are significantly different from a previous case, the case may be *distinguished* from the earlier one and its *ratio decidendi* will not have to be followed.

When a higher court upholds an appeal against a lower court's decision, the decision of the lower court is reversed.

A court may refuse to follow a decision of another court that is at a lower or equal level in the hierarchy. This refusal is called overruling the decision of the lower court.

Rules of precedent

Binding precedent

Lower courts are bound to follow decisions of superior courts, regardless of whether the judge believes that court's decision was correct. This is known as 'binding precedent'. For example, the Local Courts and District Court of New South Wales must follow the decisions of the Supreme Court of New South Wales, and all state and federal courts in Australia are bound by the decisions of the High Court of Australia. Only the *ratio decidendi* of the superior court is binding.

ratio decidendi
(Latin) the legal reason for a judge's decision

obiter dicta
(Latin) comments from a judge in a case that are not directly relevant to the case and, therefore, not legally binding (singular: *obiter dictum*)

Figure 2.3 Justice Elizabeth Fullerton – when a judge gives a decision in a case that involves a question of law, it is usually made up of two parts: the *ratio decidendi* and the *obiter dicta*.

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jurisdiction
the powers of a court, depending on its geographic area, the type of matters that can be decided, and the type of remedies that can be sought

defamation
the act of making statements or suggestions that cause damage to a person's reputation in the community

The High Court is not strictly bound by its own decisions, though it usually follows them.

Persuasive precedent

Superior courts do not have to follow decisions made in lower courts. They may, however, use them to help make a decision. This is called 'persuasive precedent'. Persuasive precedent may also include *obiter dicta* of a judge in a higher court.

Decisions made in other Australian states or other common law countries, such as the United States or the United Kingdom, may influence an Australian judgment. The higher the court in its own **jurisdiction**'s hierarchy, the more persuasive the precedent.

In Court

***Dow Jones & Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575**

In this case, the plaintiff (Gutnick) argued that he had been defamed on the internet. The defendant (Dow Jones) is the publisher of an online news magazine. An article in that magazine discussed the business dealings of the plaintiff – who is a prominent Melbourne businessman – and alleged that he was involved in money laundering and fraud.

Even though the article originated in New York, the plaintiff successfully argued that he had been defamed in his own city because more than 300 people had accessed the article in Melbourne. The Supreme Court of Victoria held that publication occurs when an article is downloaded, and that a plaintiff can bring proceedings in any jurisdiction where the offending statements can be accessed. The High Court of Australia upheld this decision in 2002.

This was one of the first legal cases to look at the internet as a source of **defamation**. It set a precedent for defamation claims being brought across jurisdictional boundaries and sparked international interest. The decision shows that internet communication is no different from other forms of communication and is subject to the same laws.

Analysis 2.1

Read the In Court above. Evaluate the importance of *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575 in the development of the law of defamation.

Review 2.1

1. Describe how common law originated.
2. Outline how people were tried for crimes in medieval England. Discuss the problems with this system.
3. Define equity law and explain how it differs from common law.
4. Describe how the principle of precedent is used in court decisions.
5. Explain why Australian law is based on common law principles.

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2.3 Court hierarchy

Australia has two overlapping jurisdictions of law: state and federal. As a result, there are separate state and federal jurisdictions, each of which has its own court structure.

All courts have the power to hear a case for the first time. Some courts can also hear **appeals** from lower courts. This means they can reconsider the decision of a lower court, where the losing party believes there has been an error in the lower court's legal reasoning. Figure 2.4 shows the structure of state courts in New South Wales and federal courts in Australia. The arrows show the specific courts that can hear appeals from each of the lower courts.

State and territory courts

The state court system in New South Wales operates under the following hierarchy:

1 lower courts
2 intermediate courts
3 superior courts.

The Australian Capital Territory does not have the intermediate level but is otherwise similar. Each court has its own jurisdiction, or area over which it has authority. Minor matters are dealt with lower in the court hierarchy, and the higher courts are reserved for more serious matters and appeals from the lower courts. In criminal cases, minor offences such as loitering and obstructing traffic are called **summary offences** – these are dealt with in the lower courts. More serious criminal offences, such as assault and murder, are called **indictable offences** – these are dealt with in the higher courts.

appeal
an application to have a higher court reconsider a lower court's decision, on the basis of an error of law

summary offence
a criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

Lower courts

Local Court and Magistrates Court

In New South Wales, the Local Court deals with minor criminal matters and minor civil disputes. In this court, a magistrate will hear and decide the case and will set the punishment for criminal offences. In the ACT, the court performing these functions is the Magistrates Court.

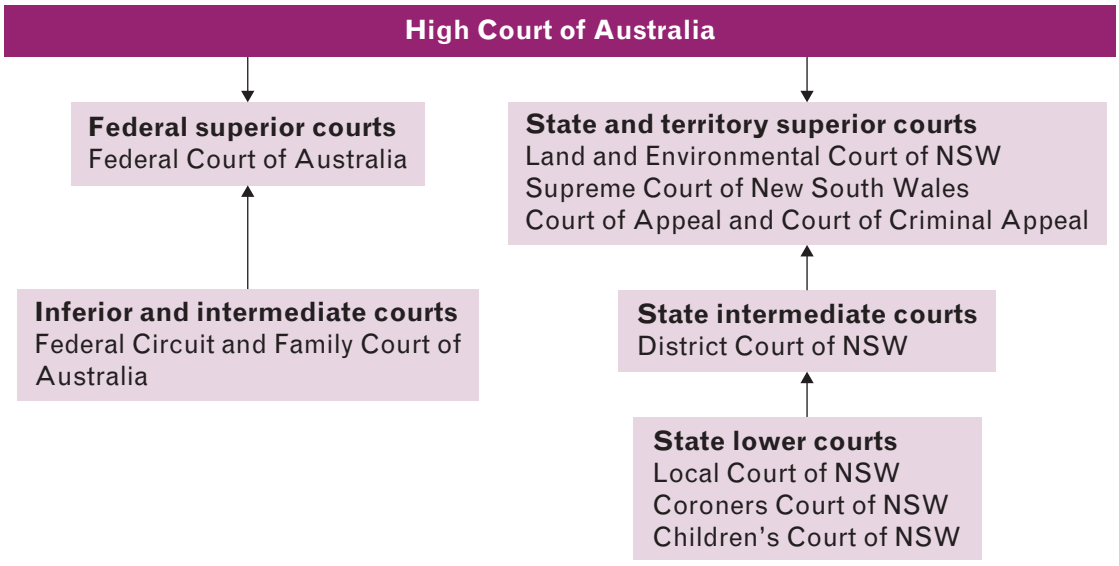

Figure 2.4 Australia's court hierarchy showing courts at the federal and New South Wales state levels.

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Most criminal matters are heard in the Local or Magistrates Court, as only serious crimes are referred to the District or Supreme Courts. In the case of indictable offences, the magistrate will listen to an outline of the evidence to determine whether the prosecution has a strong enough case to be able to try the defendant in the District Court or Supreme Court. This preliminary hearing is called a **committal hearing**.

The Local Court in New South Wales has jurisdiction to deal with the following areas:

- minor criminal and summary offences
- civil matters with a monetary value of up to $100 000
- committal hearings
- a limited range of family law matters (e.g. property settlements and residence orders for children); for these matters, the Local Court has federal jurisdiction and is essentially part of the Federal Court hierarchy.

The Magistrates Court of the Australian Capital Territory has similar jurisdiction, although it can hear and decide civil matters with a maximum monetary value of $250 000.

Coroners Court

The role of the Coroners Court of New South Wales and the ACT Coroners Court is to ensure that unexplained or suspicious deaths (or suspected deaths), fires and explosions are properly investigated. These courts may also make recommendations to government for changes to the law, professional training requirements, and procedures and protocols around safety. This was the case for the introduction of 40-kilometre speed limit signs on school buses after the death of a primary age child who was getting off a bus. If a **coronial inquest** finds evidence of criminal action(s), the case is handed to a higher court for trial. Notable coronial inquests in New South Wales include the 1977 Granville Rail Disaster, the 1991 Strathfield massacre and the 1995 death of Anna Wood.

Children's Court

The New South Wales and ACT Children's Courts deal with civil matters concerning the protection and care of children and young people. They also deal with criminal cases involving persons under the age of 18 at the time of the offence, or (in New South Wales) under the age of 21 when charged with a crime they committed while under the age of 18.

Intermediate courts

District Court of New South Wales

The District Court of New South Wales deals with more serious criminal matters. These range from charges of **larceny** up to charges such as manslaughter, sexual assault and large-scale drug importation. The only charges the District Court cannot deal with are murder, treason and piracy; these need to be dealt with by the Supreme Court.

A judge, and sometimes a jury, will hear cases tried in a District Court. The District Court deals with criminal offences such as:

- manslaughter, malicious wounding and dangerous driving
- assaults
- sexual assaults
- offences relating to property, including robbery, breaking and entering, larceny and embezzlement
- importing, supplying or possessing prohibited drugs
- offences involving fraud, including forgery, obtaining money by deception and passing valueless cheques.

The District Court's jurisdiction is unlimited in cases of claims for damages for personal injuries arising out of a motor vehicle accident. It also handles civil cases where the amount claimed is below $1 250 000, or larger amounts if both parties agree. It also has **appellate jurisdiction**.

committal hearing an inquiry held in the Local Court or Magistrates Court to determine whether there is enough evidence against the defendant to warrant a trial in a higher court (this is called establishing a *prima facie* case)

coronial inquest an investigation into a death that has occurred in unusual circumstances, held in the Coroners Court and overseen by a magistrate called the coroner

larceny taking another person's property with the intention of permanently depriving them of it; also known as stealing

appellate jurisdiction the ability or power of a court to hear appeals of the decisions of lower courts and to reject, affirm or modify those decisions

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Superior courts

Land and Environment Court

The Land and Environment Court is a specialist court responsible for interpreting and enforcing environmental law in New South Wales. It has a wide jurisdiction and deals with matters related to environmental planning (e.g. zoning of park lands), environmental offences (e.g. illegal polluting or dumping) and appeals against local council rulings.

Supreme Court of New South Wales

The Supreme Court is the highest court in the state or territory hierarchy. It deals with the most serious criminal matters, civil cases involving large sums of money and most cases where an equitable remedy is sought. It also deals with appeals from the lower courts in that state or territory.

The Supreme Court has criminal jurisdiction over the most serious indictable offences, such as manslaughter and murder, attempted murder, kidnapping, major conspiracy and drug-related charges. It also deals with Commonwealth prosecutions for major breaches of the **corporations law**.

In civil matters, there is no upper limit to monetary damages that can be awarded in the Supreme Court. This court hears matters on claims for damages for personal injury, professional negligence, breach of contract, defamation and possession of land. A judge alone deals with most civil matters, but a jury is used in some limited circumstances.

The Supreme Court also hears appeals. The Court of Appeal is the highest court in each state and territory, for both civil and criminal matters; in New South Wales, there is also a Court of Criminal Appeal, which is constituted separately from the Court of Appeal. It also makes decisions about procedural fairness in lower courts. Appeals are usually heard by three judges, but in some cases there are only two, and in special cases, more than three. If the judges cannot agree, a majority view is taken. It is possible to appeal from the Court of Appeal or Court of Criminal Appeal to the High Court, but only with special permission from the High Court.

Federal courts

The federal court system has a hierarchy similar to the state court system.

Federal Circuit and Family Court of Australia

In 1975, the Australian Parliament established the Family Court of Australia to rule on cases related to specialised areas in family law such as divorce, parenting orders, the division of property and spousal maintenance. In its appellate jurisdiction, it could hear appeals from a decision of a federal magistrate or a Family Court judge.

The Federal Magistrates Court was established by the Commonwealth Parliament towards the end of 1999 and conducted its first sittings in July 2000. The aim was to relieve some of the caseload of the Federal and Family Courts and reduce the cost and time required to deal with minor federal matters.

corporations law legislation that regulates corporations and the securities and futures industry in Australia; it is administered by the Australian Securities and Investments Commission

In November 2012, the federal parliament passed legislation changing the name to the Federal Circuit Court of Australia. The title of 'federal magistrate' was changed to 'judge'.

Figure 2.5 The High Court of Australia deals with appeals from lower circuit courts from around Australia.

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The Federal Circuit Court had jurisdiction over areas such as family law and child support, human rights, copyright, bankruptcy, migration, consumer protection and trade practices, privacy, administrative law and industrial law. It did not deal with criminal matters. It played a strong role in settling disputes in regard to trade practices, human rights, copyright, industrial law, privacy and migration. It also dealt with migration, bankruptcy applications and issues for Fair Work Australia, where workers had been underpaid.

On 1 September 2021, a new Federal Circuit and Family Court of Australia was created by the *Federal Circuit and Family Court of Australia Act 2021 No. 12, 2021* (Cth). This merged the Federal Circuit Court with the Family Court, in order to address non-compliance with court orders, which in this area of law are the worst in the country. The merger was opposed by the Law Council of Australia, but now provides a single entry point to the Family law system for the first time for all parties.

Federal Court of Australia

The Federal Court of Australia was established by the *Federal Court of Australia Act 1976* (Cth). It assumed some of the jurisdiction previously managed by the High Court of Australia and the entire jurisdiction of two courts that had dealt with industrial matters and bankruptcy. It deals with civil disputes governed by federal law (except for family law matters), as well as some summary criminal offences. The Federal Court's position in the federal court hierarchy is equivalent to that of the Supreme Courts in the states and territories. In terms of the federal court hierarchy, it is above the Federal Circuit and Family Court of Australia.

An example of the court's work can be seen where an application to review a migration decision of the Administrative Appeals Tribunal (AAT) was dismissed. The Federal Court did not accept the applicant's argument that the AAT had not afforded them procedural fairness in the conduct of their case: *Nathanson v Minister for Home Affairs* [2019] FCA 1709.

High Court of Australia

The High Court of Australia was established in 1901 under section 71 of the *Australian Constitution*. It is the highest court in the Australian judicial system and deals with appeals from the Federal Court of Australia, the Federal Circuit and Family Court of Australia, and the state and territory Supreme Courts. It also deals with cases concerning the interpretation of the *Australian Constitution* and the constitutional validity of laws.

In a recent case, the High Court had to make a decision about the validity of the Australian Marriage Law Postal Survey when two challenges were raised about the validity of using the Australian Bureau of Statistics and the Australian Electoral Commission in assisting to conduct this vote. The High Court ruled in favour of the government and the survey went ahead (*Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann* [2017] HCA 40).

In November 2023, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37, the High Court ruled that the stateless refugee known as 'NZYQ' was to be immediately released from immigration detention. NZYQ had previously had his protection visa refused due to a criminal conviction. The implication of this case overturned 20 years of settled cases in regard to 'stateless people' (people who do not have nationality of any country). Legally speaking, such individuals are not recognised as 'belonging' to any country in the world. The High Court's decision is a crucial first step in protecting stateless people from being deprived of their liberty indefinitely.

Legal Links

- The Legal Access Service's website was set up to provide legal advice to ordinary Australians. It provides information on the Australian legal system.
- The NSW Department of Justice's website has information about the state and federal courts in New South Wales.
- The ACT Law Courts and Tribunals' website provides information on the courts and tribunals in the Australian Capital Territory.
- The website of the Attorney-General's Department website has information about the federal legal system and courts.

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Review 2.2

1 Outline the need for courts in society.
2 Explain what 'court hierarchy' means.
3 Identify the highest court in Australia.
4 Describe the types of cases that are dealt with in the District Court of New South Wales. Identify who decides these cases.
5 Describe the role of the Supreme Court of New South Wales.
6 Explain the importance of the High Court of Australia.
7 Identify which court would likely hear the following matters:
   a a murder trial
   b an appeal from the Supreme Court of New South Wales
   c a hearing for the offence of using offensive language in public
   d an investigation into a suspicious death
   e an armed robbery trial
   f a preliminary hearing for a kidnapping case
   g a civil dispute between business partners involving $100 million
   h a case dealing with an aspect of the *Australian Constitution*.

2.4 Statute law

Statute law is the law made by parliament. It is also known as 'legislation' or 'Acts of Parliament'. In Australia, any parliament has the power to make statute law. This means that state, territory and federal governments all have the right to make laws. The *Australian Constitution* sets out the powers of the state and federal parliaments with respect to making law.

Legal Links

The Find Legal Answers section at the State Library of NSW contains an 11-minute video explaining how our laws are made.

The role and structure of parliament

A parliament is a body of elected representatives. It debates proposed legislation, passes or rejects it, and amends legislation. Apart from Queensland and the territories, all state parliaments and the federal parliament are **bicameral**. This means that they have two houses, an upper house and a lower house. The Australian Capital Territory's parliament is unicameral: it only has a lower house, called the Legislative Assembly. In New South Wales, the lower house is known as the Legislative Assembly and the upper house is called the Legislative Council.

In federal parliament, the upper house is the Senate and the lower house is the House of Representatives. The political party that wins the majority of seats in the lower house forms the government. Sometimes different parties will unite to form a government (such as the Liberal–National Coalition). The leader of the winning party becomes the prime minister and, hence, is the leader of the government. The political party or parties who have the remaining seats in the lower house form the opposition.

Ministers are those members of the government who have a special responsibility for particular departments; for example, Minister for Education or Minister for the Environment.

bicameral
containing two chambers or Houses of Parliament

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Figure 2.6 Prime Minister Anthony Albanese in 2023

The prime minister offers positions (or portfolios) to some members of parliament, and these ministers usually form the Cabinet, or the 'front bench', as they sit at the front in parliament sittings. Cabinet makes decisions on policy and laws to be drafted for consideration by parliament.

Bill
a drafted law that has not yet been passed by parliament

Non-ministerial members of parliament are known as the 'back bench'. When changes are made to the front bench positions, this is known as 'reshuffling the Cabinet'.

The opposition party appoints shadow ministers, who are responsible for forming and promoting the opposition's position on such areas as defence, health and education.

The Executive Council is made up of the Governor or Governor-General and selected ministers. It is the body that enables legislation to be put into operation. The British monarchy still plays a role in parliament in Australia – the British monarch must assent to laws. At the federal level, the monarch is represented by the Governor-General and at the state level by a governor in each state.

Legal Links

For information about the Commonwealth Parliament, go to the Parliament of Australia's website.

The legislative process

Passing legislation

One of the most important functions of parliament is the passing of laws. The party that holds government introduces most laws. A proposed new law is known as a **Bill**. Ministers, who are responsible for their preparation, usually introduce Bills; however, any Member of Parliament can introduce a Bill. When a non-ministerial member (backbencher) introduces a Bill, it is known as a private member's Bill.

The making of a law can be time-consuming and difficult. The process is open to public scrutiny and, as a result, well-organised pressure groups and members of the public can influence parliamentarians' opinions.

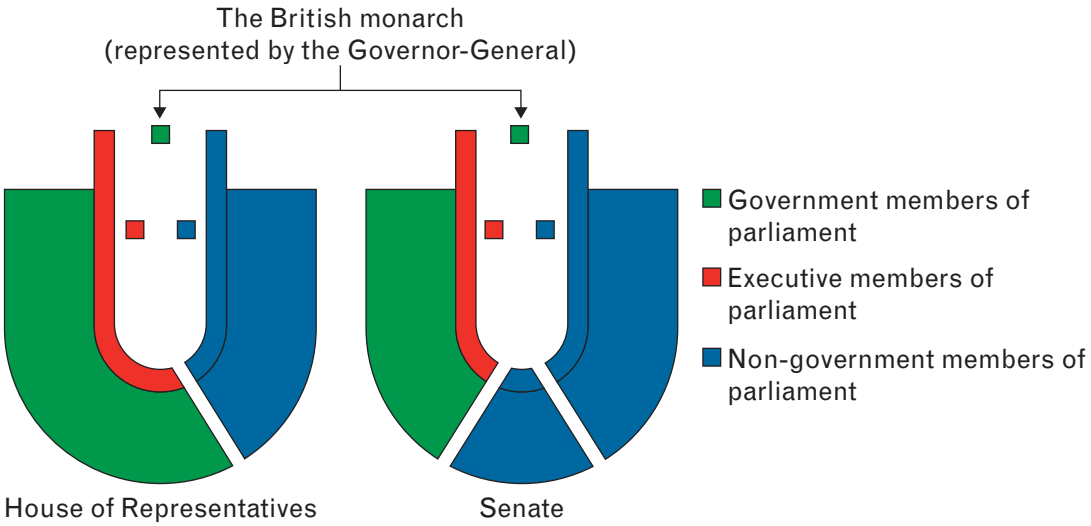

Figure 2.7 The Parliament of Australia – the number of members of parliament in each house is determined at the conclusion of each election.

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As members of parliament are subject to elections every few years, they are well aware of the consequences of passing unpopular legislation. This means that proposed legislation often undergoes much discussion in parliament and may be redrafted many times.

Before a Bill passes and becomes federal law, it requires the approval of both Houses of Parliament and the Governor-General. It then becomes an **Act of Parliament**.

The process for passing laws through the New South Wales Parliament (as well as in other states with bicameral parliaments) is generally the same as passing laws through federal parliament. This process is outlined in Figure 2.8.

Act of Parliament statute law, resulting from a Bill successfully passing through parliament and gaining royal assent

The process for passing laws in the Legislative Assembly of the Australian Capital Territory has fewer steps, as there is only one legislative chamber. Bills of the Australian Capital Territory are not given royal assent by the Governor-General, and this territory has no governor or administrator.

The process of passing a Bill through parliament

Need for new law is identified
Influences on governments to make laws come from many and varied sources. These include:
- community interest/lobby groups
- electoral mandate
- the need to continue or enhance existing laws
- party policy
- national/international events
- proposals put forward during election campaigns.

↓

Draft Bill
Cabinet approves the drafting of a Bill.
The proposed Bill is drafted by parliamentary clerks and timetabled for its first reading in the lower house. The Bill is presented by the minister, ready for its first reading.

↓

First reading
The first 'formal' reading of the Bill takes place: the Clerk of the Parliament reads out the title of the Bill. Each member receives a copy of the proposed Act.

↓

Second reading
The minister then speaks about the proposed Act, elaborating on its general aims. Debate over the Bill takes place. This stage is completed by the clerk, who reads the title of the Bill for the second time.

↓

Committee stage
The Bill is examined and debated in detail and changes (known as amendments) are made if necessary.

↓

Third reading
During the third reading, a vote is taken on the Bill. If the Bill passes, it moves to the upper house.

↓

Upper house
In the upper house, the process is repeated. If the Bill does not pass in the upper house, it may be returned to the lower house for amendments or may be rejected.

↓

Royal assent
If the Bill is passed in the upper house, it is presented to the Governor (in the case of New South Wales legislation) or Governor-General (in the case of federal legislation) for formal approval. The Bill now becomes an Act of Parliament and is law as of the date specified in the Act.

Figure 2.8 The passage of a Bill through parliament

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Delegated legislation

Delegated legislation is legislation made by non-parliamentary bodies. It involves 'less important' laws that parliament does not have time to draft, consider and pass, and so delegates (passes on) the responsibility to 'subordinate' bodies such as government departments or local councils. The Act that authorises a body to make delegated legislation is called an 'enabling Act'.

delegated legislation laws made by authorities other than parliament, which are delegated the power to do this by an Act of Parliament

Types of delegated legislation include:

- **regulations** – laws made by the Governor-General, state governors or members of the Executive Council
- **ordinances** – laws made for Australian territories (e.g. Norfolk Island and the Australian Antarctic Territory)
- **rules** – legislation made for government departments, usually by the department involved
- **by-laws** – laws made by local councils, which are restricted to the area governed by that council.

Table 2.1 The advantages and disadvantages of delegated legislation

Advantages	Disadvantages
• The people making the legislation are usually experts in that field. • Delegation of minor legislation frees up parliamentary time for very serious issues. • It is easier to amend delegated legislation; thus, it is more flexible.	• Elected members of parliament do not have the time or expertise to fully check the delegated legislation. • With many different bodies involved in making delegated legislation, there can be inconsistencies. • Little publicity surrounds delegated legislation; thus, the public usually cannot voice their views.

Review 2.3

1. Describe the differences between court-made law and statute law.
2. Explain how an Act of Parliament is made. You may wish to use a diagram, a series of cartoons or a storyboard.
3. Using examples, explain the need for delegated legislation. Describe the extent to which delegated legislation can be undemocratic.

Figure 2.9 The House of Representatives in Parliament House, Canberra

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2.5 The *Australian Constitution*

Video 2.1 Introducing the Australian Constitution (02:25)

A constitution is a set of rules or principles that may apply to a social club, a large-scale organisation or even a nation. A constitution provides the framework, or guidelines, outlining how these institutions function. On 1 January 1901, Australia gained a Commonwealth *Constitution*, which outlined the legal framework and rules that apply to the governance of Australia.

Prior to the *Australian Constitution* coming into force, Australia consisted of six colonies, which were independent of each other, each with the right to govern within their own borders. These six colonies were not answerable to any authority in Australia, but rather to the British Government. Throughout the 1800s, many groups and individuals began to promote the concept that Australia should amalgamate the six colonies into one nation under one centralised government. An emotional and sometimes bitter debate raged for the two decades in the lead up to **Federation** in 1901.

The smaller colonies' different viewpoints and fears of being 'consumed' by New South Wales and Victoria played a substantial role in shaping the final constitution document. In any democratic process, politicians have to persuade the public to vote for their proposals, and sometimes they have to make trade-offs to gain voter confidence. This was essential to get the necessary votes in each of the Federation **referendums**.

After a series of referendums in 1898, 1899 and 1900, the colonies eventually found a compromise on a proposed constitution, but, before it could take effect, approval from the British Parliament was required. The *Commonwealth of Australia Constitution Act 1900* (UK) was passed, and Australia came into existence as a nation on 1 January 1901.

Federation
the process of uniting several states to form a single national government

referendum
the referral of a particular issue to the electorate for a vote

rail gauge
the distance between the inner sides of the two rails of a train track

White Australia Policy
the government policy of allowing only Europeans and English-speaking people to immigrate to Australia; so-called 'undesirables' were kept out by use of the infamous 'Dictation Test'

tariff
a tax that must be paid on imports or exports

Table 2.2 Arguments for and against Federation in 1901

Arguments for Federation	Arguments against Federation
• **Economics** – the removal of trade barriers between the colonies would promote a more efficient economy • **Transport** – a national rail network would overcome problems caused by the colonies having different **rail gauges** • **Defence** – as the colonies were far from Britain and from Britain's ability to assist in the event of an attack, a unified military force would reduce vulnerability • **Nationalism** – there was a desire to foster a unique Australian identity and culture distinct from the 'mother country' of England (in 1900, 96% of Australians were of British origin) • **Racial 'purity'** – implementing national policies restricting immigration would 'keep Australia white' (the **White Australia Policy**)	• **Trade** – **tariffs** could be used to protect industries in certain colonies from competition in other colonies • **Fear** – smaller states believed that the more populous and 'richer' states would override their interests • **Apathy** – many people felt that Federation was irrelevant to their daily lives; this was compounded by the severe economic depression of the 1890s • **Expense** – a Federation would be expensive to achieve, and a national government would be expensive to run • **Cheap labour** – Queensland was determined to protect its sugar industry by allowing Pacific Islander 'kanakas' to work on the sugar plantations

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The following are the key features of this British Act:

- Australia was a federated nation consisting of six states (Western Australia joined shortly after the other states). The Northern Territory gained self-government in 1978 and the Australian Capital Territory in 1988.
- There was a bicameral federal parliament (House of Representatives and Senate).
- A High Court of Australia was established to oversee any other courts and provide 'final and conclusive' judgments upon any appeals it hears (s 73 *Australian Constitution*).
- It outlined both the division of power (s 51) and the separation of powers as they would apply in Australia.
- It enabled the *Constitution* to be altered by a referendum (s 128 *Australian Constitution*).

The *Constitution* itself is section 9 of the *Commonwealth of Australia Constitution Act 1900* (UK). Although the *Constitution* came into force through an Act of the British Parliament, the Act brought the Commonwealth of Australia into existence as a nation, and the *Constitution* can be changed only by a referendum of Australian voters.

The 'founding fathers' were also very wary of foreign interference in the functioning of the new parliament of Australia and inserted sections that have had lasting, and a surprising, impact. Neither Britain, the United States, Canada nor New Zealand exclude dual citizens from becoming a member of parliament, but section 44 of the Australian Parliament states:

Australian Constitution
44. Disqualification

Any person who:
(i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

Throughout the latter half of 2017, this section of the *Australian Constitution* had a dramatic impact on the makeup of parliament, with the development of a parliamentary eligibility crisis. Several parliamentarians were ruled ineligible by the High Court and many more referred themselves to seek clarification of their status. The High Court's role in this will be examined later in the chapter.

The *Australian Constitution* contains certain 'checks and balances' as a result of debate and discussion during the Federation process:

- The Senate provides a 'check' (restraint) on the power of the House of Representatives. The Senate is sometimes called the 'states' house', since all states have the same number of senators (12) regardless of population. Each territory has two senators.
- Section 128, which covers the process for altering the *Constitution*, specifies that a majority of states need to vote 'yes' on a proposal for it to succeed; that is, four out of six states. In addition, an absolute majority of voters Australia-wide must vote 'yes'; that is, 50 per cent of voters plus one. It should be noted that this strict requirement has made constitutional change very difficult: no referendum has succeeded since 1977.
- The 'division of power' outlined in section 51 ensures that the states have control over the 'residual powers'; that is, those not listed in section 51. This will be examined in detail later in this chapter.

Figure 2.10 Senator Jacinta Nampijinpa Price speaking in the Senate in 2023. The Senate provides a 'check' (restraint) on the power of the House of Representatives.

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Division of power

The actual makeup of the *Australian Constitution* clearly reflects the chief concerns of the Federation process as outlined in Table 2.2. The reluctance of the states to hand over complete control to the Commonwealth is evident in Chapter I, Part V of the *Constitution*, in sections 51 to 60. These sections provided the split (or division) of powers between the Commonwealth and the states.

Legislative powers

Section 51 of the *Constitution* specifies the **legislative powers** of the federal parliament. The federal parliament has the power to make laws with respect to all of the matters listed in section 51. These are sometimes referred to as the 'enumerated powers'. It is important to realise that the states can also make laws in many of the areas listed in section 51; namely, those areas over which the federal and state governments have **concurrent powers**.

legislative power
the legal power or capacity to make laws

concurrent powers
existing at the same time; powers held by both state and federal parliaments

Australian Constitution

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:

(i) trade and commerce with other countries, and among the States;
(ii) taxation; but so as not to discriminate between States or parts of States;
[...]
(v) postal, telegraphic, telephonic, and other like services;
(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
[...]
(xii) currency, coinage, and legal tender;
[...]
(xv) weights and measures;
[...]
(xix) naturalization and aliens;
[...]
(xxi) marriage;
(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
(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 authorize any form of civil conscription), benefits to students and family allowances;
[...]
(xxvi) the people of any race, for whom it is deemed necessary to make special laws;
(xxvii) immigration and emigration;
(xxviii) the influx of criminals;
(xxix) external affairs;
[...]
(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(Continued)

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(xxxii) the control of railways with respect to transport for the naval and military purposes of the Commonwealth;
(xxxiii) the acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
(xxxiv) railway construction and extension in any State with the consent of that State;
(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
[...]
(xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

Exclusive powers

Section 52 outlines the **exclusive powers** of the federal government; that is, only the Commonwealth (federal) Parliament can legislate on:

Australian Constitution
52. Exclusive powers of the Parliament

i the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes
ii matters relating to any department of the public service [controlled by the Commonwealth, according to the Constitution]
iii other matters declared by the Constitution to be within the exclusive power of the parliament.

The exclusive powers of the federal government include the areas of trade and commerce with other countries, foreign relations ('external affairs') and national defence. While section 90, for example, states clearly that the federal government has exclusive power over customs, and section 114 forbids the states from raising or maintaining any military force, determining how the *Constitution* applies to a real-life question or dispute is not always clear-cut. As society, technology, and values and ethics have evolved over time, it has fallen to the High Court to interpret how the *Constitution* applies in a contemporary context (see High Court cases later in this chapter).

Obviously there needs to be a conflict-resolution mechanism in place if a state and the Commonwealth make contradictory laws. This is found in section 109: '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.' This will be discussed later in this chapter.

Figure 2.11 The exclusive powers of the federal government include the areas of trade and commerce with other countries.

Residual powers

Those powers that belong solely to the states are known as the **residual powers**; that is, all the powers left over that are not otherwise given to the Commonwealth exclusively.

exclusive powers powers that can be exercised only by the federal parliament

residual powers those matters on which the states can legislate, as they are not referred to in the *Australian Constitution*

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Each state has its own constitution, which enables the state to make laws in various areas, but excludes any area directly denied to the states by the *Australian Constitution*. Chapter V of the *Constitution* outlines some of these prohibitions. Some of the key residual powers are in the areas of de facto relationships (in New South Wales this now includes same-sex relationships), crime, hospitals and public transport.

Environmental protection is another obvious area that was not a consideration at the time the *Constitution* was drafted and is thus considered a 'residual power'. In the HSC unit 'Global Environmental Protection', the question of how the federal government has gained some power over this is explained in detail. This is also referred to in the Tasmanian Dam case, below.

In Court

Commonwealth v Tasmania [1983] HCA 21 ('Tasmanian Dam case')

If either the Commonwealth Government or a state government passes a law that contravenes the *Australian Constitution*, that law is unconstitutional and invalid. Technically, the government passing the contravening law is acting ***ultra vires*** (beyond legal authority). But what happens if the state and Commonwealth laws are both valid, as can often be the case with a concurrent power? This situation arose in the case of *Commonwealth v Tasmania* [1983] HCA 21, known more commonly as the 'Tasmanian Dam case'.

ultra vires
(Latin) beyond the power or authority legally held by a person, institution or statute to perform an act

Tasmania wanted to build a hydroelectric dam on the Franklin and Gordon river system. A group of environmentalists began a campaign against this proposal, and the Wilderness Society and the Australian Conservation Foundation got actively involved. Nationwide protests were organised under the 'no dams' slogan, and a range of high-profile personalities took up the cause.

Figure 2.12 People in rubber dinghies lined up on the Franklin River as a 'no dams' protest, 15 December 1982.

(Continued)

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In Court—Continued

The Tasmanian Government argued that the building of the dam was a residual power and the protesters, while entitled to their view, were not going to change the Tasmanian Government's decision. In the lead-up to the 1983 federal election, the leader of the Australian Labor Party promised to stop the dam if elected. Labor won the election, but Tasmania continued to build the dam.

external affairs power
the power of the Commonwealth to legislate on international matters involving Australia; interpreted by the High Court to mean that when the Commonwealth signs an international treaty or convention, it has the authority to enact laws to give effect to this international law within Australia

The federal government recognised the Wild Rivers area in Tasmania as a region of special significance, and it was listed under the World Heritage Convention. The federal government also passed the *World Heritage Properties Conservation Act 1983* (Cth), which specified that such areas of special significance should be protected. The Franklin River was included as one such area. Now there was a state law allowing the construction of the dam and a federal law that demanded it be stopped. The case went to the High Court.

There are seven judges on the full bench of the High Court. In a 4–3 decision, the court ruled that the federal government was validly using the **external affairs power** of the *Constitution* (s 51(xxix)), which gives it the authority to legislate on any matter of 'international concern'. Although the Tasmanian Government argued that the construction of the dam and the regulation of that area were purely internal or domestic affairs, the High Court held that the Commonwealth had the power to make laws with respect to international obligations that also govern conduct within Australia. Under section 109 of the *Constitution*, the federal law overrides the state law; section 109 states that 'when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. The construction of the dam was stopped and the Franklin River was ultimately preserved for future generations.

Analysis 2.2

Read the In Court on page 41–2. Discuss how the decision in the Tasmanian Dam case gave the federal government power to make a law over the environment when this is considered a residual power.

Referral of powers

It should be noted that there is a provision in section 51(xxxvii) of the *Australian Constitution* that allows for a 'referral of powers', whereby states are able to 'give' power to the Commonwealth to make laws with regard to a specific matter (e.g. in 2009, New South Wales referred some industrial relations matters to the Commonwealth under the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW)).

Review 2.4

1. Using examples, explain how the *Australian Constitution* reflects the concerns of the former colonies.
2. Australia has six states and two territories. Refer to section 121 of the *Constitution* and identify whether this is the maximum number of states that Australia may have.
3. Go online to find the current senators from New South Wales and Tasmania. Using each state's population, calculate how many people a Tasmanian senator represents compared to a New South Wales senator. Assess the implication of this difference.
4. Define the term 'division of power'.

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Separation of powers

In 1887 Lord Acton, an English historian, writer and member of the British House of Commons, famously stated: Power tends to corrupt, and absolute power corrupts absolutely.

This well-known quote is often attributed with outlining the fundamental reasoning behind the separation of powers doctrine that underpins modern democracies. It was developed by the eighteenth century French political philosopher Charles de Secondat Montesquieu. He believed that the civil liberties of society were at risk if the key organs of government were controlled by one person or group.

Montesquieu identified these key organs of government as:

- **the legislature** – the law-makers (in Australia this is the parliament: the House of Representatives and the Senate)
- **the executive** – the ministers and government departments who administer the laws made by parliament (in Australia the Governor-General, the prime minister and the Cabinet are members of the executive)
- **the judiciary** – the courts which interpret and apply the law.

If one person or group controls all three organs or arms of government, then that person or group has unfettered power, so the risk of dictatorship is very real. If the three arms are independent, each arm acts as a check on the others, ensuring that no branch has absolute power and that **civil liberties** are protected.

civil liberties basic rights of individuals that are protected by law; for example, freedom of religion and freedom of speech

Figure 2.13 French political philosopher Charles de Secondat Montesquieu believed a society's civil liberties, such as the right to protest, were at risk if the key organs of government were controlled by one person or group.

Australia's founders certainly wanted the doctrine of the separation of powers to apply upon Federation. The first three chapters of the *Constitution* are set out in accordance with the doctrine:

- Chapter I – The Parliament (ss 1–60)
- Chapter II – The Executive (ss 61–70)
- Chapter III – The Judicature (ss 71–80).

In theory, Australia has adopted the doctrine of the separation of powers but, in fact, the *Australian Constitution* only partially realised this because some members of the executive are also members of the legislature; that is, the ministers and the prime minister are members of both the executive and the legislature – the separation of powers does not exist in its pure form in Australia.

The key feature of the separation of powers in Australia in regard to the functioning of democracy is that there is a clear distinction between the judiciary and the other arms of government. For a true democracy to operate and in the interests of justice, it is imperative that there be no overlap between the judicial and non-judicial arms of government. Protecting the independence of the judiciary is one of the cornerstones of our democracy. This becomes evident when a court makes a decision that is not in accordance with government policy. For example, during 2023 and 2024, the High Court ruled that 'indefinite detention' was unlawful and unconstitutional, leading to the release of numerous immigration detainees even though this was against the Australian Government's policy at the time.

Review 2.5

1 Outline the role of the three 'arms' of government. Explain how the separation of powers operates in Australia.
2 Outline the significance of the separation of powers for the functioning of a democracy.

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Research 2.1

1 Investigate the concept of mandatory sentencing and discuss how this may come into conflict with the independence of the judiciary when determining punishments. Go online to identify current New South Wales crimes that have mandatory sentencing provisions.
2 Explain how the 'separation of powers' operates under the leadership of Kim Jong-un in North Korea.

Figure 2.14 Kim Jong-un – the 'Supreme Leader' of North Korea

Role of the High Court

Chapter III of the *Australian Constitution* is titled 'The Judicature' and it is within this chapter that the judicial system of the Commonwealth is created. Section 71 creates the High Court of Australia and specifies that it must contain one Chief Justice and at least two other judges.

The first sitting of the High Court was on 6 October 1903, with three judges. In 1906 the number of judges was increased to five and in 1912 the number of judges was further increased to its current number, seven.

Section 71 also allows the Commonwealth Parliament to create other courts. Over time, parliament has created the Federal Court, and the Federal Circuit and Family Court of Australia, which are all under federal jurisdiction.

Section 72 outlines how High Court judges are appointed, and as a result of a successful referendum in 1977, specifies that they must retire when they reach the age of 70. In November 2023, then Chief Justice Susan Kiefel announced her retirement two months short of her 70th birthday. Most High Court judges come from the bench of the state

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Supreme Courts or the Federal Court. They are chosen by the 'Governor-General in Council', which essentially means they are chosen by the government of the day. While most sittings are in Canberra, cases can be heard in the other capital cities and even by video-link if it is warranted.

High Court jurisdiction

The High Court has both original and appellate jurisdiction. The **original jurisdiction** of the High Court is outlined in sections 75 and 76.

Australian Constitution

75. Original jurisdiction of High Court

In all matters –

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(vi) between States, or between residents of different States, or between a State and a resident of another State;

(xii) in which a writ of **mandamus** or **prohibition** or an **injunction** is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.

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;

(vi) relating to the same subject matter claimed under the laws of different States.

Cases that come under original jurisdiction begin in the High Court itself. Matters relating to the interpretation of the *Constitution* fall under section 76(i), and this role of the High Court has, at times, had an enormous influence on determining the division of power between the states and the Commonwealth.

As community conditions, standards and attitudes evolve, they should be reflected in the views and decisions of the judiciary. This is another way in which the law maintains its relevance, effectiveness and acceptance by the community.

When a case concerning the interpretation of the *Constitution* comes before the High Court, generally all seven judges hear and decide the matter (in some cases, a panel of five of the judges decides the case). This ensures a final decision, even though decisions need not be unanimous. The High Court is the highest court in the Australian judicial system and, since 1986, there are no other avenues of appeal available. Prior to this time, appeals from the Australian judicial system could go to the Privy Council in England for final determination; however, the *Australia Act 1986* (Cth) severed this judicial link with England.

original jurisdiction the ability or power of a court to hear a case in the first instance

mandamus a court order compelling a government official or organisation to perform a particular task

prohibition a court order that forbids a lower-level court from hearing or taking further action in a case or matter

injunction a court order requiring an individual or organisation to perform, or (more commonly) not to perform, a particular action

The influence of the High Court: Interpreting the *Constitution*

While the High Court has various roles, such as determining whether a particular body has the jurisdiction to exercise judicial power, one of its fundamental duties is to make final determinations about how the *Constitution* is to be interpreted. Invariably, the High Court's interpretation of the *Constitution* involves stipulating what areas the Commonwealth can legislate on and what areas belong to the states. In association with such decisions, the High Court makes statements on how each level of government can use its powers and outlines any limits on such powers.

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For example, in the Tasmanian Dam case, the High Court said in *obiter dicta* that the Commonwealth can only use the external affairs power when entering legitimate international treaties or conventions. In other words, the Commonwealth Government could not enter a treaty with another country simply to gain legitimacy to override a state law that it disagreed with. Initially, High Court decisions favoured the states but, over time, a broader approach to interpreting the *Constitution* has seen a shift in the legislative balance between the states and the Commonwealth. The In Court cases below are examples of the High Court exercising its original jurisdiction to interpret the *Constitution*.

In Court

***Love v Commonwealth of Australia* [2020] HCA 3**

In February 2020, the High Court of Australia – in a 4 to 3 decision – held that First Nations people cannot be considered to be 'aliens' (see s 51(xix) *Australian Constitution*) even if they were born overseas and do not have Australian citizenship. The case was brought by lawyers on behalf of two First Nations men, Brendan Thoms, Gunggari man, and Daniel Love, Kamilaroi man, both of whom were born overseas but have Indigenous heritage. Both men live in Australia and – due to their criminal convictions – faced deportation to the country of their birth under the *Migration Act 1958* (Cth).

Justice James Edelman said that 'The sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation.'

Justice Virginia Bell determined that an Indigenous person cannot be considered to be an alien because 'an Aboriginal Australian cannot be said to belong to another place'.

In his article, 'The High Court has widened the horizon on what it is to be indigenous and belong to Australia' (*ABC News*, 15 February 2020), Indigenous commentator Stan Grant emphasised the High Court's *obiter dictum* that 'Indigenous Australians don't enjoy the same political sovereignty as Native Americans or New Zealand Maori'.

***Murphyores Inc Pty Ltd v Commonwealth* [1976] HCA 20 ('Fraser Island case')**

The Murphyores mining company extracted certain minerals from sands on K'gari, otherwise known as Fraser Island, under a lease granted by the Queensland Government. Such a lease was constitutionally valid, and the environmental consequences were also a state concern.

The Commonwealth Government disagreed with the mining project, partly on environmental grounds, but had no constitutional power to shut down the operations on K'gari. Instead, the Commonwealth Government relied on one of its legislative powers – specifically, section 51(i) of the *Constitution*, over trade and commerce – to prohibit the export of the minerals. Also, under section 112 of the *Customs Act 1901* (Cth), the Commonwealth Government can prohibit the export of any goods from Australia, either absolutely or unless certain conditions are complied with.

The financial viability of Murphyores' mine relied on being able to export the minerals to overseas markets, so Murphyores took the matter to the High Court. Murphyores argued that the Commonwealth Government had acted outside its constitutional power. However, the High Court noted that – while the effect of using section 51 of the *Constitution* may well be to override a traditional state power – the Commonwealth Government was within its rights to prohibit the export of the minerals. The motivation for the Commonwealth's use of the power (e.g. a concern about the environmental effects of the mine) was irrelevant.

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R v Brislan [1935] HCA 78

In 1935, Dulcie Williams was convicted of receiving messages by 'wireless telegraphy' without proper authorisation. Williams was receiving the messages via a 'wireless broadcasting receiving set' (that is, a radio). In the appeal, it was argued that the Commonwealth had acted *ultra vires* by charging her under the *Wireless Telegraphy Act 1905* (Cth) (now repealed). It was argued that the section of the Act Williams was charged under does not extend to radio sets. Furthermore, Williams argued that if the section had extended to radio sets, it would have been invalid anyway because section 51(v) of the *Australian Constitution* covers 'postal, telegraphic, telephonic and other like services' but not broadcasting.

The High Court ruled that 'upon its true interpretation' the Commonwealth is able to legislate about any broadcasting services. Consequently, it has been accepted that the Commonwealth has constitutional power to make laws about new developments in communications technology and is thus responsible for the roll-out of the National Broadband Network.

Figure 2.15 A series of disclosures throughout 2017 highlighted that several members of parliament had dual citizenship, which is not allowed under Section 44 of the Constitution. This included the then Deputy Prime Minister Barnaby Joyce.

Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; *Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 ('Citizenship Seven case')

While challenges to parliamentarians' eligibility have been a feature of Australian politics for over 50 years, the crisis that emerged in 2017 once again shone a spotlight on the binding nature of the specific wording of the *Australian Constitution* (in this case, section 44 – see earlier in this chapter).

In 1950, Henry William Crittenden took legal action in the High Court against Gordon Anderson (the successful candidate for the seat of Kingsford Smith) on the grounds that since Anderson was a Catholic, he would be under allegiance to a foreign power, namely the Vatican. Crittenden lost the case and was ordered to pay costs. The court ruled that excluding Catholics from public office would breach section 116 of the *Constitution* as it would, in effect, place a religious test on any person applying for public office.

A series of disclosures throughout 2017 highlighted that many members of parliament had dual citizenship. Some parliamentarians were completely unaware of this as often their 'citizenship' was automatically inherited from parents and grandparents when they were born. The 'Citizenship Seven' case was actually a number of cases heard in the one sitting by the High Court to clarify the situation.

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In Court—Continued

In October 2017, the High Court handed down a unanimous decision on its interpretation of section 44 of the *Constitution*. This section provides that a person will be disqualified from parliament if they are a dual citizen unless they have taken 'all steps that are reasonably required' to renounce any other citizenship than Australian. On the ABC's *Q&A*, then Prime Minister Malcolm Turnbull stated:

'The reality is that the courts adopted a very literal meaning of section 44(i) … Yes, I think the section 44(i) should be amended … but in the meantime, we have to live with the section as it is and as the High Court has interpreted it.'

In an attempt to restore public confidence in the parliamentary system, all members of parliament had to disclose their family heritage on a register; Turnbull noted, 'The only creatures in Australia that have more of their pedigree published than Australian politicians now are thoroughbred race horses'.

Research 2.2

Divide the class into pairs and choose one month from the last year. View the summary of High Court decisions from that month as outlined in the monthly bulletins. Each pair is to select one case and prepare a presentation that includes:

- an outline of the case 'handed down' by the High Court
- a brief overview of the facts of the case and the decision.

Appeals to the High Court from lower courts

Section 73 outlines the appellate jurisdiction of the High Court. It stipulates that the High Court has jurisdiction to 'hear and determine all judgments' from any cases emanating from:

- the High Court exercising its original jurisdiction
- any Federal Court exercising federal jurisdiction
- the Supreme Court of any state.

special leave where the High Court grants approval for the case to come before it in its appellate jurisdiction

question of law a disputed legal contention that is left for the judge to decide; for example, whether certain evidence is admissible

Section 73 also states that 'the judgment of the High Court in all such cases shall be final and conclusive'. Currently, all appeal cases must be granted **special leave** before the case will be heard by the High Court. Chapter 4 of the *High Court Rules 2004*, which became effective on 1 January 2005, deals with the practice and procedure of the High Court in its appellate jurisdiction.

Generally, appeals relate to **questions of law**, or a matter that is of such significance as to warrant the attention of the High Court, or a dispute between the opinions of various courts that requires a final adjudication. The workload of the High Court has built up over the decades and there are numerous examples of the High Court deciding matters in its appellate jurisdiction.

Judicial review

The system of judicial review involves review of the actions of a government official or department by a court of law. Generally, the system involves investigating the legality of a decision or action. The High Court exercises judicial review whenever it makes a decision about whether a particular law is constitutionally valid or not. It has almost unlimited jurisdiction to review Commonwealth administrative decisions.

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In Court

***Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1**

This case involved four businesses (STA Travel, Carsales, AusDog and the Trading Post) sponsoring links on Google that would appear when certain key words were entered – specifically, if you used Google to search for the name of a company that was in competition with, for example, STA Travel, then a link to STA Travel would appear prominently, rather than a link to the rival company. The aim of the sponsored links was to divert web traffic away from rivals. Some people wrongly assumed that the 'results' of their searches were organic but in fact they were sponsored links.

The High Court held Google responsible for the misleading and deceptive conduct of the four businesses, which means that Google is no different from any other medium that hosts advertisements. In *obiter dicta*, the court noted that if Google (or any publisher) is aware that material is misleading or deceptive, they can be held liable as per section 251 of the *Australian Consumer Law*.

The Federal Court undertakes most judicial reviews by applying the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It is important to understand that this Act applies strict rules and does not give the Federal Court the power to review a decision on its merits. Appeals can go to the High Court, by special leave.

A far more effective and efficient way for individuals to appeal the decision of a government official or body is through non-judicial review of administrative action in the Administrative Appeals Tribunal, which has jurisdiction to review the merits, that is, decide the case again. As stated on its website:

> The AAT aims to provide fair, impartial, high quality and prompt review with as little formality and technicality as possible.

Courts other than federal courts may also review decisions on the merits if they have statutory authority to do so.

Generally, judicial review involves the court with appropriate jurisdiction investigating whether a government official or department has acted *ultra vires*, or whether they have followed the rules of natural justice (procedural fairness). These concepts are covered in the HSC course.

Amending the *Australian Constitution*

The law and the legal system must be dynamic to be effective. Mechanisms must be in place to change ineffective, obsolete or unfair laws. Statutes (Acts of Parliament) can be changed through the parliamentary process. Common law can be changed through the courts when a judge sets a new precedent. The *Australian Constitution*, while technically a statute, has a unique alteration process contained within it. This process is found in section 128 under Chapter VII, 'Alteration of the *Constitution*', and is known as a referendum.

Once again, the smaller colonies' fear of being made irrelevant by Federation resulted in a process that makes constitutional change difficult. Of the 45 proposed amendments to the *Constitution*, only eight have been successful. In some published copies of the *Australian Constitution*, these successful amendments are shown in bold type or by having deleted parts ruled through (see s 51(xxvi)). The margin notes also indicate alterations made to the *Constitution* after a successful referendum. The specifics of successfully altering the *Australian Constitution*, as set out in section 128, are:

- The proposed change must pass both houses (the Senate and House of Representatives) with an absolute majority.

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- The proposed change must be put to the electors 'not less than two months nor more than six months' after going through both houses.
- There must be an absolute majority of voters Australia-wide who approve the change; that is, 50 per cent of voters plus one.
- There must be a majority of states that approve the change; that is, four of the six states must vote for the change.
- The alteration must go to the Governor-General for royal assent.

bipartisan
having the support of the two major political parties

In 1967, the most successful referendum in Australian history (90.77% vote in favour) altered section 51(xxvi) and deleted section 127, which enabled the Commonwealth Government to pass laws in relation to First Nations peoples. This ensured consistency of laws, as some states had discriminatory laws and were reluctant to change them. Further, prior to this, First Nations people were not allowed to be included in the national census.

The last successful referendum was in 1977, when section 72 was amended so that judges in the High Court and the other federal courts had to retire at age 70. The next nine referendum proposals were all defeated. The two most recent were:

- On 6 November 1999, a referendum was held to change Australia to a republic with a president appointed by a two-thirds majority of both Houses of Parliament, which would require **bipartisan** support of the nomination. The proposal was soundly defeated.
- In October 2023, a referendum to provide First Nations peoples with a 'Voice' to parliament was also defeated.

Review 2.6

Class activity – Conduct your own 'referendum' (use your class or year level to 'vote')

1. Decide on an issue (e.g. Is NRL better than AFL? Is a Kit Kat a better chocolate bar than a Crunchie?). Create ballot papers with your 'issue'; voters must answer 'yes' or 'no'.
2. Divide the class or year into Australia's six states and two territories. Use the following approximate percentages: New South Wales – 30%, Victoria – 20%, Queensland – 20%, Western Australia – 10%, South Australia – 5%, Tasmania – 5%, Australian Capital Territory – 5%, Northern Territory – 5%.
3. Give each student one ballot paper and tally the votes. Apply points three and four of the referendum rules (note that the territories are only counted as part of the Australia-wide vote) and determine whether your referendum would succeed.

Research 2.3

1. Conduct online research into the state and territory breakdown of the Yes/No votes for the 2023 Voice referendum. Specify the grounds on which it failed under section 128.
2. Investigate section 59 of the *Australian Constitution*. Conduct a class discussion on what section 59 means.

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2.6 Aboriginal and Torres Strait Islander peoples' customary laws

Aboriginal and Torres Strait Islander peoples have the oldest living cultures in the world. For at least 60 000 years, First Nations peoples have lived on the continent now known as Australia as many different societies with diverse cultural relationships with their lands. More than 200 distinct languages, and countless dialects, were in use when European colonisation began. People in some communities continue to speak their ancestral languages, but many others are seeking to record and revive stolen ones. First Nations peoples retain a connection to their traditional lands regardless of where they live.

There is growing evidence that at the time of British colonisation, First Nations peoples had sophisticated systems of agriculture, domesticated plants, irrigation, and harvesting and storing processes. These systems varied between different communities across the continent and were dependent on local conditions and seasons.

There is no single system of First Nations law. First Nations communities developed their own laws, but there were also common aspects among groups. There is still much non-Indigenous people are learning about First Nations laws prior to colonisation. First Nations laws are based on tradition, ritual and socially acceptable conduct. For this reason, they are known in Australia's current Western system as '**customary law**'.

Historically, a main difference between First Nations customary law and the British legal tradition can be seen in the area of land ownership. The right to possess property is a key principle of English and European laws; but to many First Nations peoples, land is not 'owned' in the same way as under European law. A simplified way of expressing this would be to say that First Nations peoples view themselves as custodians of the land, looking after it for future generations. However, it is important to recognise that the connection to Country can be complex and diverse. Furthermore, this is not to say that there were not defined areas of land occupied by certain groups. This collective guardianship is a key feature of customary law; however, the lack of tangible ownership (such as fences, which indicated land ownership in the British system) is one way the British justified their colonisation and imposition of British property law on the continent now known as Australia, despite resistance from First Nations people. The British falsely declared the land ***terra nullius***, a Latin expression meaning 'land belonging to no-one'.

Although today federal and state legislation and the common law govern Australia, many First Nations peoples follow customary law as well.

customary law
the body of rules, values and traditions which are accepted by the members of an Aboriginal or Torres Strait Islander community as establishing standards or procedures to be upheld in that community

terra nullius
(Latin) 'land belonging to no-one'; the idea and legal concept that when the first British people came to the continent now known as Australia, the land was owned by no-one and thus was open to settlement; this concept has been judged to be legally invalid

Diversity of First Nations societies

Different First Nations groups have their own variations of customary law. Australia is a large land mass and, as a result, different languages and modes of conduct developed. However, the similarities in customary law outweigh the differences.

For example, under customary law, the majority First Nations communities consider that disputes are not restricted to individuals. The resolution of the dispute, involving negotiation, mediation and conciliation, will involve everyone in the community. There are also offences that are not recognised by non-customary law but that are punishable under customary law. Examples include insulting an **Elder** and the singing of sacred songs in public.

Elders
older people of recognised wisdom and authority, who are the keepers of traditional knowledge within First Nations communities; they are responsible for such things as initiations and the handing down of punishments when community laws are broken

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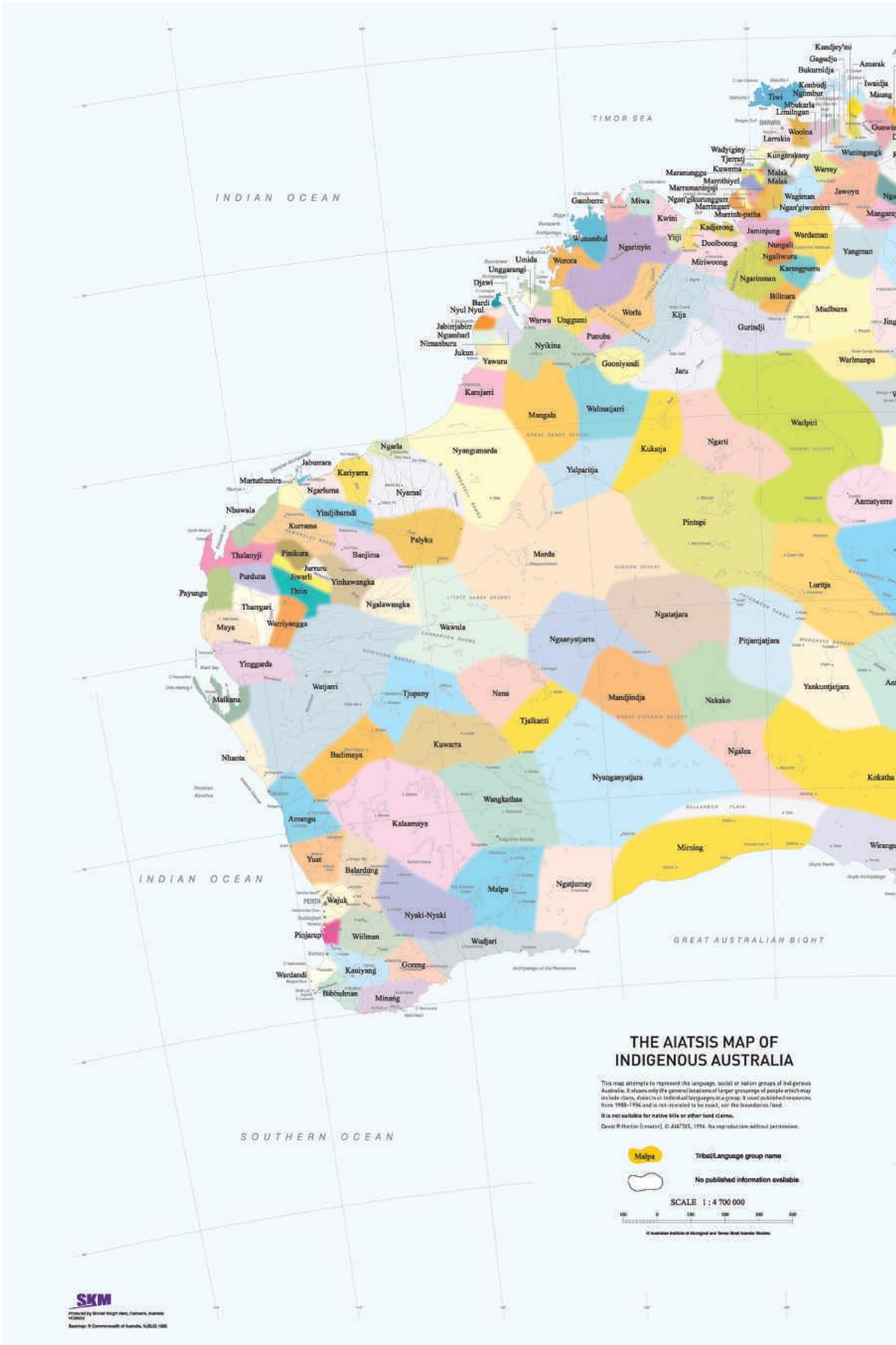

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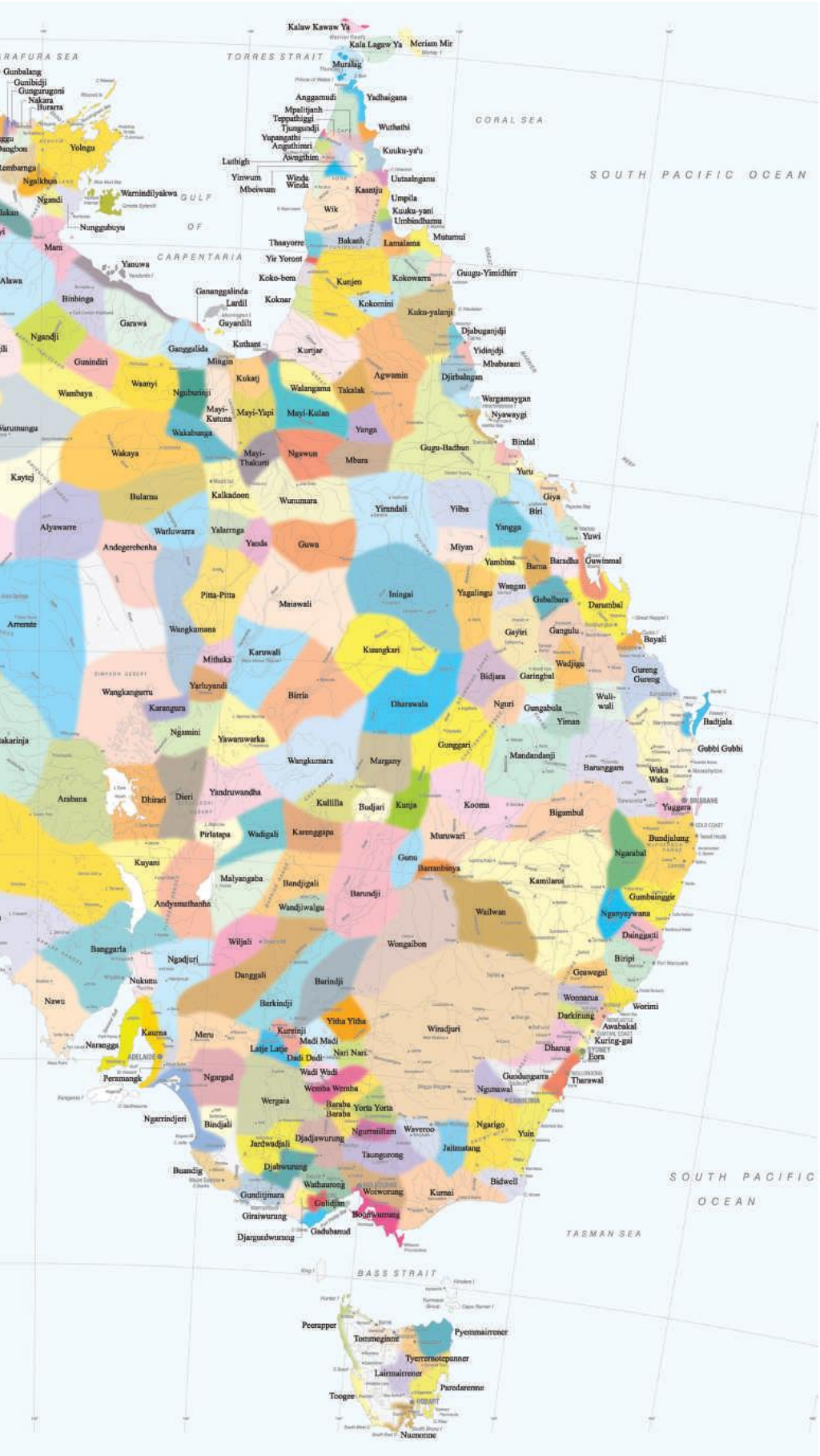

Figure 2.16 This map attempts to represent the language, social or nation groups of Aboriginal Australia. It shows only the general locations of larger groupings of people, which may include clans, dialects or individual languages in a group. It used published resources from 1988–1994 and is not intended to be exact, nor are the boundaries fixed. It is not suitable for native title or other land claims. David R. Horton (creator), © Aboriginal Studies Press, AIATSIS, 1996. No reproduction without permission. To purchase a print version, visit the AIATSIS website.

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The spiritual nature of Aboriginal and Torres Strait Islander customary law

The Dreaming is the basis of much Aboriginal peoples' law. The Dreaming is the creation and teaching stories of Aboriginal peoples, explaining how the land, animals, plants and sky were created. It is not just the past, but also the present ant the future, and has a very strong spiritual element.

The Dreaming
the source of Aboriginal peoples' customary law

Due to the secrecy that covers many of the traditional laws, and the cultural role played by oral history in contrast to written documentation, it is hard to describe these laws and their links to The Dreaming. In addition, laws will differ from community to community.

However, it can be agreed that law and spirituality are very closely related, and that many laws have evolved from The Dreaming and are concerned with the treatment of the land and those who live on it.

Since 1788, many First Nations peoples have lived under two legal systems: the common law system derived from Britain and customary law. First Nations peoples living in remote communities are more likely to use customary law to settle certain types of disputes, but this varies across a range of communities.

The significance of land and bodies of water to First Nations societies

Historically, the concept and need for individual land ownership was alien to First Nations thought. Being a member of a group means that a person is able to live on and use the resources of certain lands. Thus, the land belongs to the group and when this land is stolen the group's culture and history is lost. In the same way, First Nations peoples have links with the sea, lakes, rivers and all bodies of water. These are not owned by individuals but are cared for by the group under customary law.

Each group has distinct responsibilities governing the way that they look after their land and bodies of water.

Figure 2.17 The summit of Wollumbin (Mt Warning) is a sacred place to the Bundjalung People and was declared an Aboriginal Place in 2014. In 2022 the summit was closed to non-Indigenous people.

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These responsibilities are tied into traditional laws and the stories and rituals that pass on these laws and responsibilities. Failure to follow the traditional laws can be seen as a failure to show respect for the land and traditional values.

Ritual and oral traditions within First Nations societies

First Nations law is part of everyday life. The law is an integral part of the values, customs and ethics of many First Nations peoples and has developed over many thousands of years. Most laws relate to marriage, child-rearing, spirituality, family and **kinship**. Customary laws have been passed from generation to generation by word of mouth and through ritual. Stories, songs and dances are used to help people remember the laws of their group. Different people in the group know different laws. For example, women have knowledge of some laws that they pass on to girls at a certain age.

During ceremonial meetings at communal gathering places, laws are passed on by, and to, the appropriate people and reinforced often through dance and storytelling. Many of these ceremonies are sacred and people from outside the community are not permitted to participate nor, in some instances, watch. The stories have been handed down for thousands of years and explain concepts such as the creation of all things, why events happen, tribal boundaries, family relationships, cultural practices and forbidden acts.

Dispute resolution within First Nations societies

When customary laws are broken or disputes arise within traditional First Nations communities, the family and the community are often involved. Discussions or meetings, rather than formal judicial processes, are held during ceremonial times. Elders and influential members of the community might meet with those in conflict and use discussion and dialogue in an attempt to settle the dispute.

Relationships and their maintenance are very important in First Nations communities. It is through these relationships that people are able to pass on and follow traditional laws. As a result, **mediation** has an important role in dispute resolution.

mediation
a form of alternative dispute resolution designed to help two (or more) parties, in the presence of a neutral third party, to reach an agreement

Enforcement and sanction within First Nations societies

It is expected that everyone in the community will follow and reinforce traditional laws. In traditional societies, order is maintained through self-regulation and consensus among family heads. Elders play an important role in guiding decisions related to enforcing the law, intervening as necessary.

Offences under traditional law may be breaches of sacred law or offences against property or persons. There is not always a clear line between these categories. Where sacred law has been broken, Elders are often directly involved in applying **sanctions**.

kinship
family relationships, including all extended family relationships; an important part of First Nations cultures and values, which dictate how all people in the group behave towards each other

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

Sanctions vary from place to place. The relatives of the wronged party, ceremonial leaders or both may be involved in the punishment, the form of which may be determined through negotiations and/or kinship relationships. For the most serious offences, Elders may need to ensure that the punishment is appropriately carried out and restraint is exercised.

There is a wide variety of traditional punishments and responses to disputes that can apply depending on the location, sex, status and prior history of the wrongdoer, the status and behaviour of the victim and the community's view of the offence. Some of these include ridicule, shaming, exile, spearing and beating. The justification for physical punishments, such as spearing or beatings, is sometimes expressed as to 'restore balance' for the parties and their families.

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The relevance of customary law today

In the past 20 years, there has been greater legal recognition of First Nations rights as the traditional landholders of Australia. Many aspects of customary law are embodied in Australian law today. The practices of sustainable development, for example, have and continue to be influenced by Aboriginal land practices such as fire management. Conciliation and mediation are increasingly used to resolve disputes in criminal, consumer and employment law.

mitigation making the severity of an offence or a sentence milder or less severe

Customary laws are also sometimes taken into account when a First Nations person is charged with a crime. For example, where an act has been done because First Nations customary law requires it, but the act amounts to an offence under Australian law, this may be raised in **mitigation** of the offence. Evidence that a criminal offence was provoked by the victim's breaking customary law may also be a mitigating factor, and evidence that an offender is to receive traditional punishment may be submitted in the modifying of a sentence.

In some places where there are a large number of people living a traditional lifestyle, Elders will be consulted by those involved in maintaining and enforcing the law. However, there is much debate about the role of customary law in prosecuting, defending and punishing offenders, and those in the legal system are always wary of being accused of unfairness if everyone is not treated equally by the law. As a result, legislatures have been reluctant to formally incorporate customary laws into Australian law.

Review 2.7

1. Describe the importance of tradition in First Nations customary law.
2. Discuss the historical differences that Europeans and First Nations peoples had in their relationship with the land.
3. Outline why it is not possible to refer to a uniform First Nations customary law.
4. Identify what the laws of First Nations peoples have in common.
5. Explain some ways in which customary law is relevant to the Australian contemporary legal system.
6. Using examples, describe where customary law has been incorporated into the Australian legal system.

Analysis 2.3

Go to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) website and complete the following activities.

1. Identify who provides this website and what type of information it contains.
2. Explain the importance of The Dreaming to Aboriginal peoples.
3. Explore the Map of Indigenous Australia (see pages 52–53).
   - **a** Explain what the map illustrates.
   - **b** Explain what Country is and how a person can identify whose Country someone is on.

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2.7 International law

States and sovereignty: The differences between domestic and international law

Each country has laws for its own people, known as **domestic law**. A country can make these laws because it is an autonomous (independent) state that has sovereignty (i.e. the authority to rule itself).

A state, in the legal sense, is an independent entity that is recognised by other states on an international basis. In order to be a state, a place must have:

- a defined territory
- a permanent population
- an effective government
- the capacity to enter into international negotiations.

Sovereignty means the state has the authority to make rules for its population and the power to enforce these rules. The term 'state' can refer to a political division within a Federation, such as New South Wales or Tasmania, or (in an international context) to an autonomous state, such as a nation.

International law governs the relationships between nation states. International law enables states to participate in trade and commerce and provides mechanisms for the maintenance of peace and security and the reduction of conflict. International law also covers fundamental human rights, making it illegal to do such things as torture political prisoners or commit genocide.

One of the main criticisms of international law is that it lacks the power to enforce the constraints contained in this law. There are many examples around the world of states breaching international law, especially in the area of human rights. International law could not prevent genocide in Rwanda in the 1990s and has not prevented crimes against humanity committed in the Darfur region of Sudan since 2003 or those of the Syrian civil war (which is still continuing at the time of writing). In January 2024, South Africa addressed the International Court of Justice arguing that Israel had been committing genocide against Palestinians.

In this sense, international law is different from domestic law. States are powerful entities and to force another state to take a particular course of action can have far-reaching implications for the international community. As a result, international law relies on countries consenting to cooperate in the enforcement of these laws.

domestic law
the law of a state

A further point of difference is that law is adhered to not simply because it can be enforced, but because it is generally accepted by the whole community. As the world is made up of diverse cultures with different values, not all countries will agree with all international laws and may ignore a law if they feel that it is not in their national interest to adhere to it.

However, states are interdependent in many ways and the recognition of this global interdependence, creating a world community, provides one of the motivating forces for following international law.

Sources of international law

The main sources of international law are customs, declarations, treaties, legal decisions and legal writings.

Customary international law

Customary international law is not contained within a written document. Instead it is based on long-established traditions or common practices followed by many states to the point that they are accepted as being fair and right by the international community. For example, customary international law regulating war had been in existence for a long time before The Hague (1989) and Geneva Conventions (1864, 1906, 1929, 1949) explicitly outlined rules governing the conduct of states in conflict, such as the manner in which prisoners of war and civilians were to be treated.

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This form of international law develops over time as it requires 'constant and uniform' practice of states in order to be accepted as law. It should be noted that, even if there is constant and uniform practice, it is still not considered law unless the states accept that the practice is binding upon them. This principle is termed ***opinio juris sive necessitatis*** (shortened to *opinio juris*).

opinio juris sive necessitatis
(Latin) 'opinion that an act is necessary by rule of law'; the principle that for the practice of a state to be customary international law, the state must believe that international law requires it

declaration
a formal statement of a party's position on a particular issue; a declaration is not legally binding under international law

treaty
defined by *Vienna Convention on the Law of Treaties* (1969) as 'an international agreement concluded between states in written form and governed by international law'; treaties may also be referred to as conventions or covenants

Critics of customary international law point out that it can be difficult to establish that it exists, and the time lag involved in its being accepted as law has rendered it secondary to treaties and conventions as a source of international obligations. The number of nations in existence since the end of World War I (1918) has also grown considerably, so getting consensus has become more problematic. In addition, the rate of change in the world today is rapid and at times requires a more immediate response. For example, what is the most effective means of limiting damage from the economic crisis of 2008? Would customary law or treaties be the more appropriate way of regulating global financial markets?

Most of the laws prohibiting crimes against humanity originated as customary international law. Important examples include the condemnation of slavery and genocide.

Declarations

Declarations are international instruments that state and clarify the parties' position on particular issues, but that do not impose legally binding provisions that must be followed. A famous example is *The Universal Declaration of Human Rights* (1948) – the first universal statement on the basic principles of human rights. The United Nations Commission on Human Rights was established to draft the declaration following World War II and the Holocaust. Among its chief purposes was to define the terms used in the UN Charter: 'human rights' and 'fundamental freedoms'.

In 1948 the declaration was ratified by a proclamation by the United Nations General Assembly.

Figure 2.18 *The Universal Declaration of Human Rights* (1948) – the first universal statement on the basic principles of human rights, still holds relevance today. In 2015, during an event for International Human Rights Day, the Declaration was made available in various languages for audience members.

Forty-eight countries voted in favour of it, with none voting against it and only eight abstaining (not voting). The declaration is the basis for two binding United Nations human rights covenants: the *International Covenant on Economic, Social and Cultural Rights* (1966) and the *International Covenant on Civil and Political Rights* (1966). Its principles are contained in other treaties as well.

Treaties

Treaties are the most commonly used source of international law. According to the *Vienna Convention on the Law of Treaties* (1969), a treaty is 'an international agreement concluded between states in written form and governed by international law'. Another way of looking at it is that a treaty is an agreement between legal equals and may cover any sphere of international relations between the parties.

Treaties can be either:

- **bilateral** – between two nations; for example, the *Agreement between the Republic of Indonesia and Australia on the Framework for Security Cooperation* (2006) ('The Lombok Treaty'), concerning the countries' common security and respective national security
- **multilateral** – between many states; for example, the *Charter of the United Nations* (1945), which established the United Nations and its organs and agencies, where each country that is a signatory to this treaty has a seat in the General Assembly and participates in UN processes.

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The more states that sign a treaty, the more powerful that treaty will be. Treaties are used to make specific laws and to control conduct and cooperation between and within states. A treaty may also establish an international organisation; for example, the *Statute of the International Criminal Court* (2002). There is no set way of making a treaty, but most treaties are made through direct negotiations between states. If all parties involved agree, the treaty will be signed. A document will only become a treaty if all parties have the intention of being bound by its provisions and obligations at the time of signing. The treaty only becomes binding on a state when that state **ratifies** it; that is, confirms that it intends to be bound by the conditions placed on it by the treaty.

For some countries, such as France, treaties that the country has ratified automatically become part of the domestic law. Other countries require domestic legislation to be passed in order for the treaty to be implemented into their law. In other cases, whether domestic legislation is required will depend on the type of treaty. In Australia, human rights treaties such as the *International Covenant on Civil and Political Rights* (1966) have been ratified through the passing of a number of pieces of legislation such as the *Sex Discrimination Act 1984* (Cth).

ratify
to formally confirm that the country intends to be bound by the treaty

Case Study

Child executions

There are still a handful of countries in the world today that execute offenders for crimes committed when they were under the age of 18.

It is evident that child executions breach international treaties. Article 6 of the *International Covenant on Civil and Political Rights* (1966) says that a 'sentence of death shall not be imposed for crimes committed by persons below 18 years of age'.

Article 37 of the *United Nations Convention on the Rights of the Child* (1989) provides that 'neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age'.

In *Roper v Simmons* (2005) 543 US 551, the US Supreme Court found that executing offenders who were minors when they committed the crime violates the Eighth Amendment, which prohibits 'cruel and unusual punishments'. In 1989, the same court had held that it was within the US Constitution to execute 16- and 17-year-old offenders, but it found that standards of decency had evolved since the US Constitution had been written. There was now a national consensus that death is disproportionate punishment for juveniles. In addition to state legislation and practice, the court also considered international trends.

Bodies, including the Inter-American Commission on Human Rights and Amnesty International, believe that 'the exclusion of child offenders from the death penalty is now so widely accepted in law and practice that it has become a rule of customary international law'.

However, the practice continues in some parts of the world with Amnesty International recording that between 1990 and 2022 there were 163 juvenile offenders executed, across 10 different countries. For the final three years (2020–2022), all of the child executions – eleven in total – took place in Iran.

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Legal decisions

United Nations a world organisation dedicated to world peace and the sovereignty and equality of all its members

The International Court of Justice (ICJ), which is part of the **United Nations**, is the judicial body that deals with disputes between states. Many treaties designate the ICJ as the means of resolving disputes that arise under the treaty.

Stare decisis (or precedent) does not apply to decisions of the ICJ. According to Article 59 of the *Statute of the International Court of Justice*, a decision of this court only binds the parties to the particular dispute. However, the court considers past rulings in its decisions, and ICJ decisions may help to shape the content of treaties.

There are other international courts and tribunals whose judgments contribute to establishing international law. The International Criminal Court (ICC) and the European Court of Human Rights (ECHR) are two examples. The ICC was set up to prosecute the most serious crimes concerning the worldwide community; the ECHR is a regional court that rules on violations of the *European Convention on Human Rights*. Specialised courts have also been set up for particular purposes and timeframes, such as to deal with war crimes committed during a specific conflict. Examples of this type of court are the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

Legal writings

Due to the changing international political landscape and the developing nature of international law, the writings of respected international lawyers, judges and academics have an important part to play in guiding decision-making and treaty formation. Along with judicial decisions, scholarly writings are mentioned in Article 38(1)(d) of the *Statute of the International Criminal Court* as a means of determining the rules of international law. Scholarly legal writings may be drawn upon for the purpose of interpreting treaties or determining their application in international disputes.

Governments may also seek the advice of experts on matters of international law. For example, in 2007 the Sydney Panel of Independent International Legal Experts provided advice to the Australian Government on whether the legality of Japan's 'scientific' whaling program could be challenged under the Antarctic Treaty System, the *International Convention for the Regulation of Whaling* (1946) and two other treaties. Although commercial whaling has been prohibited since 1986 for all members of the International Whaling Commission, Japan has relied on an exemption in the whaling treaty that permits killing whales for scientific research.

Review 2.8

1. Explain two different ways that the word 'state' can be used.
2. Identify what is meant by the term 'international law'. Outline the different ways in which international law is made.
3. Outline some of the strengths and weaknesses of the enforcement of international law.

International organisations

The United Nations

The United Nations is the chief organisation involved in international law. The *Charter of the United Nations* established it in 1945. At its first meetings, 51 countries were represented; in 2019, there were 193 members. The United Nations' main objectives are to maintain global peace and security; to develop good relations between states based on recognition of equal rights and each state's right to govern its own political, economic and social development; and to promote cooperation in solving international problems. The United Nations has been central to the protection of human rights and to developing a legal framework to address terrorism, drug trafficking, the clearing of landmines and protection of the environment. It has also been active in concrete efforts to fight disease, reduce poverty, provide emergency relief in natural disasters and in many other humanitarian operations.

Video 2.2 Overview of the United Nations

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The UN International Law Commission is the body primarily responsible for codifying and developing international law. The UN General Assembly's Legal Committee (Sixth Committee) receives the Commission's reports and considers its recommendations. It may then organise a conference to draw up a convention based on those recommendations, which the member states then vote upon.

Critics of the United Nations believe that reform is necessary for its continued relevance. State sovereignty often poses a challenge to the authority of the United Nations, especially in situations involving peace and security. It has also been suggested that the structure of the Security Council should be re-examined (this will be discussed later). Since the United Nations has no powers to make states enact its resolutions into domestic law or to follow a particular course of action, its effectiveness is greatly dependent on the political will of states.

The General Assembly

The **General Assembly** is made up of representatives from all member states and is the main forum for multilateral discussion on all international matters covered by the UN Charter. It discusses and makes recommendations on the operation of the United Nations, on conflicts between states, and on practical questions regarding political cooperation, human rights and international law. It appoints the non-permanent members of the Security Council and oversees the UN budget. It has established a number of committees, commissions and working groups for particular purposes. The General Assembly meets every year and can meet more often if required.

General Assembly the main body of the United Nations, made up of all of the member states

The Security Council

The **Security Council** is the most powerful part of the United Nations. It is the executive of the United Nations and has the final say

Security Council the arm of the United Nations responsible for maintaining world peace and security

Figure 2.19 Members of the Security Council vote on a resolution that called for humanitarian pauses between Israel and Hamas in 2023. The five permanent members of the Security Council are the United States, China, the Russian Federation, France and the United Kingdom.

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about the security and peacekeeping activities of the General Assembly. The Security Council consists of five permanent members: the United Kingdom, the United States, Russia, China and France (countries that were victorious in World War II). There are also 10 non-permanent members who serve for two years each. Australia has been a member of the UN Security Council on five occasions: 1946–1947, 1956–1957, 1973–1974, 1985–1986 and 2013–2014.

Under the Charter of the United Nations, the Security Council has primary responsibility for maintaining international peace and security. As such, it is able to investigate disputes that could lead to conflict. It can issue economic sanctions against nation states to persuade them to change their policies, or to prevent or stop aggression. It can also send 'peacekeeping' troops from member states into areas where there is conflict, to separate opposing forces and to reduce tension. It may also authorise collective military action. Security Council resolutions require a unanimous vote of all five permanent members of the Security Council. If one of the permanent members votes against the resolution, then it is not carried. This is called the 'veto power' and is considered one of the fundamental weaknesses of the current structure of the Security Council. For example, in 2004, the Security Council held continuing discussions to address the humanitarian crisis in the Darfur region of Sudan. There, Arab militias with Sudanese Government backing were engaged in a horrific campaign of forcible relocation of certain groups ('ethnic cleansing') involving rape, murder and torture. China and Russia, which had significant oil interests in Sudan, threatened to veto any Security Council resolution involving economic sanctions. Resolution 1564, passed in September 2004, disappointed many human rights groups due to the absence of stronger measures such as an immediate oil embargo and targeted sanctions against government officials. In 2019, the United Nations imposed economic sanctions on North Korea as it had been increasing its nuclear testing. These sanctions are still in place today. Far-reaching economic sanctions have been imposed on Russia for the illegal invasion of Ukraine in 2023. Punitive measures have also been taken against a number of Russian oligarchs,

Figure 2.20 The United Nations Security Council discusses the situation in the Democratic People's Republic of Korea at the United Nations Headquarters in New York City, United States, on 17 August 2023.

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who are extremely wealthy, such as freezing money and assets held in the United States and the European Union as well as taking possession of 'super yachts' and restricting the oligarchs movement.

A criticism of the Security Council is that, having been set up over 60 years ago, it does not reflect a broad spectrum of the cultural values evident in the world today. For example, it could be argued that the inclusion of a Muslim nation as a permanent member would make the Security Council a more representative body.

The other main organs of the United Nations are the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice.

Courts and tribunals

The International Court of Justice

The International Court of Justice (ICJ) is the primary judicial body of the United Nations. It was established in 1945 and its principal activities are to settle disputes submitted to it by states and to give advisory opinions on legal questions submitted by the General Assembly, the Security Council or other bodies as permitted by the General Assembly. The ICJ can only hear disputes if the nations involved accept the jurisdiction of the court.

The court may rule on two separate types of cases. The first type is legal disputes (contentious issues) between states, on which the court produces binding rulings. For example, Australia initiated action against Japan and whaling in the ICJ. The court ruled that Japan had to cease whaling in Southern Ocean waters.

The second type of case is advisory proceedings, in which the General Assembly or the Security Council requests the court's opinion on any legal question. Other UN organs may request advisory opinions, but only with respect to their own activities. Advisory opinions often concern particular controversies between states, although they do not have to do so.

Cases heard by the ICJ can be seen at its website. A famous case from 1986 was *Nicaragua v United States of America*. The United States had been supporting right-wing rebel groups against the Nicaraguan government, and the ICJ ruled that this was a violation of international law.

International Criminal Court

The *Rome Statute of the International Criminal Court* (1998) ('Rome Statute') is a treaty signed by 121 states, including Australia, establishing the International Criminal Court (ICC) as a permanent court in which individuals can be tried for mass-atrocity crimes such as genocide, war crimes and crimes against humanity. The ICC has held this jurisdiction since 2002.

Legal Links

For more information about UN bodies, view the website of the United Nations.

Review 2.9

1. Identify why the United Nations was established.
2. Describe the functions of the UN General Assembly.
3. Explain the importance of the UN Security Council.
4. Outline the role of the International Court of Justice. Discuss its limitations.

Figure 2.21 Members of the Japanese delegation wait prior to the verdict in the case against Japanese whaling in Australia at the International Court of Justice in The Hague, the Netherlands.

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In 2023, Vladimir Putin was indicted by the ICC for allegedly being responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.

Intergovernmental organisations

Intergovernmental organisations (IGOs) are created by states through multilateral treaties that act like a constitution in that the states' parties are consenting to be bound by the treaty that sets up the agencies, functions and purposes of the organisation. Many IGOs are subsidiary agencies of the United Nations; others have been formed to make collective decisions about international issues such as refugees, tariffs or wealth. The International Labour Organization is a UN agency whose mandate is to advance social and economic justice by setting international labour standards. Founded in October 1919 under the League of Nations, it is one of the first and oldest specialised agencies of the United Nations.

Regional organisations also play an important role in international decision-making. For example, the European Union is an economic and political partnership of European nations that have agreed to cooperate for the common good. It has regulatory powers covering areas such as human rights, the environment, economic policies and trade.

Non-government organisations

Non-government organisations (NGOs) are associations based on common interests and aims, and which have no connection with any government.

They contribute to a wide range of areas, from world peace, disaster relief and environmental protection to promoting education and alleviating poverty. They do this by informing the public and lobbying governments to take action on issues of concern. Examples of international NGOs include the Red Cross, Greenpeace and World Vision.

A well-known human rights NGO is Amnesty International, a 'global movement of over seven million people committed to defending those who are denied justice or freedom'. It is independent of any national government; that is, it does not rely on funding from any national government. It campaigns on a wide range of issues, including the rights of women, refugees and First Nations peoples; regulation of the global sale of weapons; and the abolition of torture and the death penalty.

Figure 2.22 Medical aid packages from the International Committee of the Red Cross arrive in Gaza in 2020. Non-government organisations, such as the Red Cross, contribute to a wide range of humanitarian causes around the world.

Research 2.4

View the website of the United Nations. Choose one of the issues that the United Nations deals with (e.g. human rights) and complete the following tasks.

1. Investigate and explain some of the recent initiatives taken by the United Nations in this area.
2. Outline any problems that you see the United Nations facing as it undertakes these initiatives.

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Relevance of international law to Australian law

As discussed earlier, in some countries ratification of a treaty automatically makes it part of that country's domestic law. This is not the case in Australia.

For some treaties, new legislation may be required to implement it in Australian law. For others, existing federal or state/territory legislation is sufficient (in other words, domestic law is already satisfying the terms of the convention).

To pass new legislation implementing a treaty, the federal government may rely on the external affairs power in section 51(xxix) of the *Constitution*.

Figure 2.23 The Australia Telescope Compact Array radio telescope at Paul Wild Observatory Narrabri is one of the most important astronomical facilities in the southern hemisphere. The *Space Activities Act 1998* (Cth) contains provisions from several United Nations treaties regulating the exploration and use of outer space.

It may also rely on other powers such as the trade and commerce power in section 51(i) if the subject matter involves shipping.

International law does not dictate the way in which Australia implements the obligations it has under treaties. The preferred method of giving effect to most treaty obligations is by incorporating the actual text of the treaty provisions into domestic legislation. For example, the *Space Activities Act 1998* (Cth) contains provisions from several United Nations treaties regulating the exploration and use of outer space.

Treaties also influence Australian law in the development of the common law, in judicial review of decisions and in the judicial interpretation of statutes.

Examples of human rights treaties that have some of their provisions reflected in state or territory and/or federal legislation include:

- *International Covenant on Civil and Political Rights* (1966) – see, for example, *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld)
- *United Nations Convention on the Rights of the Child* (1989) – see, for example, *Family Law Act 1975* (Cth), in particular section 67ZC
- *Convention on the Elimination of All Forms of Discrimination against Women* (1979) – *Sex Discrimination Act 1984* (Cth)
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) – division 274 of the *Criminal Code Act 1995* (Cth).

Review 2.10

1 Discuss the limitations of international law.
2 Identify and outline the role of some of the main organisations that influence international law.

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Chapter summary

- The *Australian Constitution* took shape during the Federation process.
- The constitutional division of powers outlines the responsibilities of the Commonwealth and the states by reference to concurrent, exclusive and residual powers.
- The High Court has the ultimate responsibility for interpreting the *Australian Constitution*.
- The High Court is the final court of appeal in Australia (its appellate jurisdiction), but it also has original jurisdiction for some matters, notably constitutional law.
- The *Australian Constitution* indicates how the separation of powers operates in Australia. It is important to note that only the judiciary is truly independent in Australia.
- The separation of powers ensures that individual rights and the democratic system are protected.
- The law in Australia, prior to European settlement, was customary law based on First Nations traditions, rituals and acceptable conduct.
- Customary law is still relevant in Australia today and elements of it have been incorporated into dispute resolution procedures.
- Contemporary Australian law is based on English common law and has been adapted over time to suit modern Australian society.
- The *Australian Constitution* sets out the fundamental rules of the Australian legal and political systems, including the roles of the state governments and the federal government. It shows the division of powers among the levels of government to make laws.
- Parliament has the power to make changes to these laws as long as the correct processes are followed.
- The doctrine of precedent is an element of common law that requires judges to follow rulings made in previous court cases unless they are inconsistent with a higher court's decision or are wrong in law.
- Australia is recognised internationally as a sovereign state with the authority to make its own laws.
- Australia also takes part in international law-making through its membership of the United Nations and by being a signatory of international treaties.

Multiple-choice questions

1 What section of the *Australian Constitution* outlines the 'Division of Power?
- **a** Section 51
- **b** Section 73
- **c** Section 109
- **d** Section 128

2 When is a binding precedent set?
- **a** A binding precedent is set when a precedent is established by a higher court.
- **b** A binding precedent is set when a judge has determined that the facts of a case are similar to another case.
- **c** A binding precedent is set when a judge accepts the advice from a judge in a higher court.
- **d** A binding precedent is set when parliament passes a law about a case.

3 A government minister contacts a judge in the Federal Court and directs them to make a decision that is favourable to the government's interests. Why would this decision be overturned by the legal system?
- **a** It offends the division of powers.
- **b** It offends the separation of powers.
- **c** It would be *ultra vires*.
- **d** It is not allowed under the referendum provisions of section 128.

4 The main purpose of equity is to achieve:
- **a** justice.
- **b** fairness.
- **c** equality.
- **d** damages.

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5 Which United Nations body is primarily responsible for codifying and developing international law?
   a UN Security Council
   b General Assembly's Legal Committee
   c International Law Commission
   d International Court of Justice

Short-answer questions

1 Describe the different 'checks and balances' provided by the *Australian Constitution.*
2 Explain the difference between the 'division of power' and the 'separation of powers' under the *Australian Constitution*.
3 Use examples to describe the various roles of the High Court.
4 Explain the difference between common law and statute law. Analyse their relationship.
5 Describe the distinguishing features of First Nations customary law.
6 Discuss the relationship between the government and the whole parliament when it comes to making new laws or amending current laws.

Extended-response question

Critically analyse the ways that First Nations customary law has been, and can be, incorporated into the contemporary Australian legal system.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Chapter 3
Classification of law

Chapter objectives

In this chapter, you will:

- identify and apply legal concepts and terminology
- describe the key features and operation of the Australian and international legal systems
- discuss the effectiveness of the legal system in dealing with relevant issues
- explain the relationship between the legal system and society
- describe the role of the law in conflict resolution and its ability to respond to and initiate change
- locate, select and organise legal information from a variety of sources
- communicate legal information by using well-structured responses.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 11–13 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Commonwealth of Australia Constitution Act 1900 (UK)
Crimes Act 1900 (ACT)
Crimes Act 1900 (NSW)
Judiciary Act 1903 (Cth)
Commonwealth Electoral Act 1918 (Cth)
Criminal Code 2002 (ACT)

SIGNIFICANT CASES

Donoghue v Stevenson [1932] AC 562
Roach v Electoral Commissioner [2007] HCA 43
Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; *Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45
NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (Case no S28/2023)

Legal oddity

You could be fined for not bowing when entering or leaving a courtroom. Courtroom etiquette rules exist in all Australian states to foster respect for the legal system and this includes the type of clothing worn. In New South Wales, men are expected to wear long trousers and a long-sleeved shirt, while women should have dress pants, dresses or skirts below knee-length. The list of items that should not be worn include singlets or strapless tops, transparent tops, clothing with provocative slogans or graphics, denim, thongs, and hats or caps.

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3.1 Public law

public law
the body of law governing relationships between individuals and the state, and the structure and operation of government itself; for example, criminal, administrative and constitutional law

private law
the body of law governing relationships between individuals; for example, contract law, torts, family law and property law

There are many ways of classifying law. One is to separate the law into two main categories: **public law** and **private law**.

Public law deals with the powers and obligations of government and citizens, and the relationships between persons and the state. The three main areas of public law are criminal, administrative and constitutional law.

Criminal law

Criminal law is the body of rules under which certain acts or omissions are punished by the state. The function of criminal law is to maintain public safety and order for the whole of society. The state is responsible for criminal law because a criminal offence is considered to be an offence against the whole community – even if only one individual is affected. This is because a criminal offence is seen to damage the moral order of society; that is, the safety of people and property.

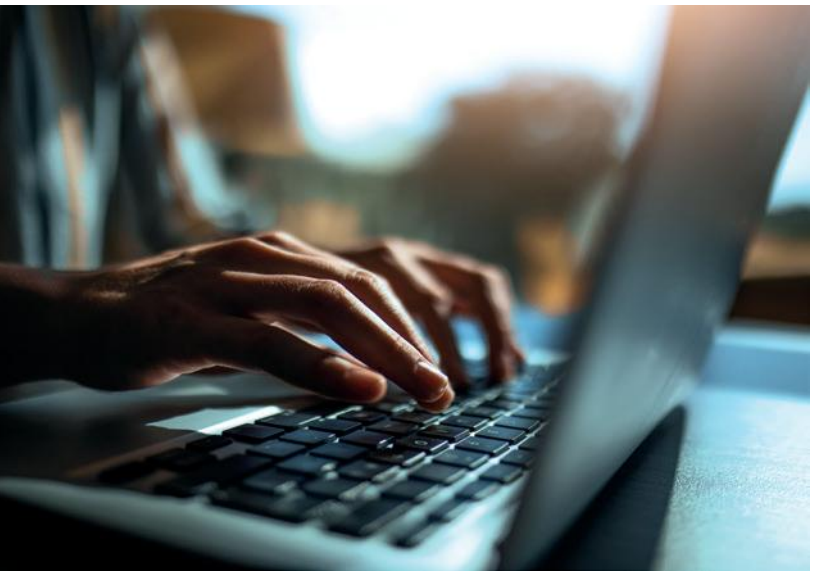

Figure 3.1 The Crimes Acts have been amended to respond to contemporary issues, such as computer crimes.

In Australia, criminal law is the responsibility of each state and territory. The actions and punishments covered by criminal law are the same, or similar, in all the states and territories, as it would be too confusing for everyone involved if what was a major crime in one state was not in another. The way the criminal justice system operates is also similar in the states and territories.

In New South Wales, the main criminal statute is the *Crimes Act 1900* (NSW). The Australian Capital Territory has its own *Crimes Act 1900* (ACT) and the *Criminal Code 2002* (ACT). This code is the result of the Australian Capital Territory adopting provisions of the Model Criminal Code, a cooperative project between the Commonwealth, state and territory governments to develop more uniform legislation.

Over the years, parts of these Acts have been reviewed and changed to reflect changes in society. For example, the Crimes Acts have been amended to cover automobile and computer crimes. As with all areas of law, sections of Acts will always lag behind changes in society due to the speed of change and the slower procedures and processes involved in changing laws. For this reason, changes to law tend to be reactive rather than proactive.

Legal Links

The following Acts are available in full online:

- *Crimes Act 1900* (ACT)
- *Crimes Act 1900* (NSW)
- *Criminal Code 2002* (ACT).

Administrative law

Administrative law looks after government powers and the decisions of government organisations. It is based on the English model. Administrative law exists to ensure the accountability of the administrative decisions and actions made by the government and its departments.

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Administrative law cannot be used to challenge all government dealings; for example, policy decisions and the giving of advice. An example of a decision that cannot be challenged is an increase in taxes. However, the actions of the government departments that administer policy decisions can be challenged under administrative law. In this way, a taxpayer could challenge their tax assessment under administrative law, on certain specific grounds.

In Australia, administrative law is complicated due to the different levels of government. An individual must be aware of which government body was responsible for the action before they can challenge it.

A person can seek a review of a decision made by a government agency in one of the following three ways:

- **Internal review** – When a member or officer of an agency has made a decision, that decision can be reviewed by someone else within the agency. Sometimes there are formal mechanisms laying down set procedures for seeking an internal review; if this is not the case, a person can simply request that a decision be reconsidered.
- **External review** – This is a more formal system, where a person or body outside the agency (such as the Administrative Appeals Tribunal) reviews the merits of a decision made by an agency.
- **Judicial review** – Only courts can provide judicial review of administrative decisions. The only area a court can consider is whether a decision was lawfully, fairly and rationally made. The High Court has the power, under the *Australian Constitution*, to give specified remedies against unlawful action by federal government officers. Similarly, in section 39B of the *Judiciary Act 1903* (Cth), parliament gave similar jurisdiction to the Federal Court.

The avenue of review taken depends on the nature of the complaint and whether the complaint is made against a federal or state decision. Government departments place information about appealing decisions on their websites. In New South Wales and the Australian Capital Territory, appeals against government decisions are heard by, respectively, the NSW Civil and Administrative Tribunal and the ACT Civil and Administrative Tribunal.

Figure 3.2 The High Court of Australia in Canberra has the role of deciding cases of special federal significance, such as the constitutional validity of laws.

Constitutional law

Constitutional law is the branch of public law that focuses on the rules governing the executive, legislative and judicial functions of government. In Australia, legislative power is divided between the Commonwealth and the states, as the *Australian Constitution* has given the Commonwealth Parliament power to make laws with respect to particular areas (e.g. defence). The *Australian Constitution* also specifies that Commonwealth law prevails when there are inconsistencies between state and Commonwealth legislation.

If a law violates the rules in the *Australian Constitution*, the case must go to the High Court of Australia. The High Court has the role of deciding cases of special federal significance, such as challenges to the constitutional validity of laws. Procedures in the High Court are similar to those of other courts in that they are very formal and the two sides argue their cases, usually represented by highly respected barristers.

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However, the procedures in the High Court differ in the following ways:

- Cases in the High Court are heard by one or more judges (called justices). Cases involving interpretation of the *Australian Constitution* and those of great public importance are heard by all seven justices.
- Decisions are not given at the end of the hearing. They are only delivered after much deliberation.
- Each justice makes an independent decision on cases. When a decision is not unanimous, the majority decision prevails.
- High Court decisions are binding on all courts in Australia.

In Court

***Roach v Electoral Commissioner* [2007] HCA 43**

This case challenged the constitutionality of a statute. Before the 2006 amendment of the *Commonwealth Electoral Act 1918* (Cth), prisoners serving a sentence of less than three years were entitled to vote in elections. The 2006 amendments took away the right to vote for all prisoners serving a sentence.

Vickie Lee Roach, a serving prisoner, took the case to the High Court on the grounds that the Act as amended was unconstitutional. Her team of lawyers argued that the new law breached her implied constitutional freedoms of political participation and political communication. After hearing the case, the majority of the court found the amended law to be invalid, but accepted the validity of the previous law, which banned prisoners from voting if they were serving a term of three years or more.

***Re Canavan; Re Ludlam; Re Waters; Re Roberts* [No 2]; *Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45**

In 2017, the High Court heard the high-profile case of the 'citizenship seven'. The High Court had to determine whether several politicians who had dual citizenship should be allowed to remain as serving members of parliament. This was discussed in an In Court box in Chapter 2.

***NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (Case no S28/2023)**

In a more recent case, the High Court ruled that indefinite immigration detention is unlawful and unconstitutional in cases where there is no prospect of people being returned to their country of birth.

Review 3.1

1. Outline the differences between private law and public law.
2. Explain why it is important for Australia's states and territories to have similar criminal laws.
3. Describe the role of administrative law. Outline how an administrative decision of a government body can be challenged.
4. Identify the courts that can decide questions of constitutional law. State the types of questions that are included in this category.

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3.2 Private law

Private law regulates the relationships between persons, companies and organisations. Rights are protected by both statute and common law. When seeking to bring court action against an individual for infringement of one's private rights, it must be in a court exercising **civil jurisdiction**; the action is known as a civil proceeding. Three major areas of civil law are contract law, tort law and property law.

Contract law

A contract is an agreement, or promise, between two or more parties that is recognised by law. Contract law is concerned with the recognition of this agreement and the actions taken to enforce it.

When one of the parties to a contract believes that all or part of the contract has been breached, they can bring a legal action in a civil court. **Damages** are most often the common law remedy available for breach of contract. Damages are viewed as a substitute for performance of the contract; that is, for the other party doing what they agreed to do by signing the contract. Thus, damages are designed to put the **plaintiff** in the position they would have been in if the contract had been performed properly; that is, to compensate them. The amount of compensatory damages is intended to provide the plaintiff with the benefits that they would have had if the defendant had kept the agreement. Damages are not intended to punish the defendant.

The plaintiff may also seek one of the following remedies:

- An **injunction** – This is an order usually directing a party not to do something (e.g. ordering the defendant to cease the conduct breaching the contract). In some cases, an injunction may require the party to do something (e.g. require a telephone customer to remove wiring that they installed and that was not authorised by the telephone company).
- **Specific performance** – This is an order in which the court specifies the way in which the breaching party is to perform the contract. Specific performance is only ordered if the amount of damages provides insufficient compensation.

In each instance, civil court case procedures are followed; that is, the offended party must argue that a breach of contract has occurred. The level of court where the case is heard depends on the amount of damages sought.

civil jurisdiction
the power of a court to hear matters involving disputes between private individuals and to award civil remedies

damages
monetary compensation for harm or loss suffered

plaintiff
the person who initiates a civil action

injunction
a court order requiring an individual or organisation to perform, or (more commonly) not to perform, a particular action

specific performance
an order requiring the defendant to perform the acts that the contract obliged them to perform

Tort law

Torts are 'civil wrongs'. The word 'tort' comes from the French word meaning 'wrong'. Tort cases deal with situations in which someone (or an organisation) has done something to interfere with the rights of someone else. Another way of putting it is that a tort occurs when someone breaches or fails to fulfil a duty that they owe to someone.

Breach of contract is also a civil wrong. Where there is a contract or agreement, there is already a legal relationship between the parties at the time of the wrong, whereas in torts, there is no legal relationship prior to the wrong. The law of torts tries to restore the plaintiff to the position they were in before the wrong was committed. For example, someone who slipped on the floor of a supermarket might sue the supermarket for medical costs.

All torts entitle the alleged victim to take legal action against the alleged perpetrator in a civil court and claim compensation. However, court action can be expensive and time-consuming, so it is important that plaintiffs consider this when deciding whether a wrongdoing is worth bringing a case. This issue is illustrated in the following news article.

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Media

Simple hygiene reason a woman was awarded $27000 in compensation after she slipped on a grape in a Coles supermarket

Ashley Nickel

Daily Mail Australia

17 December 2022

A woman who slipped on a grape while grocery shopping has been awarded more than $27000.

The ACT Court of Appeal ordered Coles pay the Canberra woman $27309 compensation for expenses she suffered after slipping on a grape in its Woden store.

The money will cover her general damages, domestic assistance and out-of-pocket expenses.

The court heard the woman was shopping in the store's fresh meat section when she slipped on a grape.

It was initially found Coles had not breached its duty of care by failing to notice the grape but the Court of Appeal found the discarded grape was the result of an inadequate cleaning system.

'That system carried with it the likelihood that spills and items on the floor would be missed because there was no dedicated attention paid to that issue at any particular time,' it said.

'It inevitably subordinated the detection of spills and hazardous items to the performance of the staff members' other duties.'

The court previously heard from employees who said grapes are one of the products that pose the biggest slip hazard.

They said customers – particularly with young children – will often carry grapes around the store to eat while shopping.

So, grapes can be left discarded on the floor almost anywhere within a store rather than just the fruit and veggies section.

The court found that Coles should have a dedicated system to prevent slip and fall hazards around its stores.

'A system of dedicated inspection would have detected a grape or other spill or slip hazard in the area,' its judgement said.

'Thus, if a reasonable system would have included hourly (or more frequent) inspection, the probability is that such a system would have prevented the harm that occurred.'

Figure 3.3 In 2022, Coles was ordered to pay compensation after a customer was injured while shopping. The court said the supermarket should have a dedicated system to prevent slip and fall hazards around its stores.

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Analysis 3.1

Read the media article on the previous page.

1 Outline the arguments used by the plaintiff and the defendant in court and the decision of the court.
2 Do you think that Coles would be justified in saying that customers should be more careful? Provide your reasons.

In 2015, in a high-profile (and expensive and lengthy) case, the actor Rebel Wilson successfully sued Bauer Media for defamation. Wilson claimed that articles published by Bauer Media about her led to her losing work opportunities. Wilson was awarded more than $4.7 million in compensation, which was the largest defamation damages payout ever ordered by an Australian court. However, Bauer Media appealed the decision and the Court of Appeal ordered Wilson to pay back $4.1 million of those damages and 80 per cent of the magazine publisher's legal costs. The court found that 'there was no basis in the evidence for making any award of damages for economic loss'. The actor's legal team took this decision to the High Court who upheld the decision made by the Court of Appeal.

There are many different types of torts, all of which are regulated by statute and common law. Torts arise from different types of activity and include:

- negligence
- nuisance – public and private
- trespass (on land)
- false imprisonment
- defamation.

The case that established the modern tort of negligence and that clearly shows the difference between tort law and contract law is 'the snail in the bottle' case (*Donoghue v Stevenson* [1932] AC 562) (see In Court below).

In Court

***Donoghue v Stevenson* [1932] AC 562**

A friend bought May Donoghue some ginger beer in a dark glass bottle, which prevented Donoghue from seeing the contents. Some ginger beer was poured into a glass for her, which she drank.

When the remaining ginger beer was poured into the glass, a decomposing snail came out of the bottle. This made Donoghue feel quite ill, and later she suffered from severe gastroenteritis. She sued David Stevenson (the respondent), who was the manufacturer of the ginger beer.

This case was an appeal by Donoghue, the plaintiff in the original decision. The defendant's appeal had succeeded; Donoghue then appealed to the House of Lords.

Donoghue alleged that Stevenson had failed in his duty of care to provide:

- a system of working his business that would prevent snails from getting into ginger beer bottles
- an efficient system of inspection of the bottles before they were sold to consumers, including clear bottles that would make it easier to inspect the bottles.

The court held that a manufacturer is under a legal duty to the consumer to take reasonable care that the article will not cause injury to health.

Lord Atkin, one of the presiding judges, referred to the precedent case of *Heaven v Pender* (1883) 11 QBD 503, which established that 'under certain circumstances, one man may owe a duty to another, even though there is no contract between them'.

(Continued)

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In Court—Continued

However, Lord Atkin went further than the narrow decision in the Heaven case, citing *obiter dicta* (comments other than the main legal tenant of the case) of the dissenting judge, Brett MR, who extended the notion of a duty of care to anyone in a position where failing to use 'care and skill in his conduct … would cause danger of injury'.

Until *Donoghue v Stevenson*, individuals had no rights against suppliers with whom they did not have a contract. As Donoghue did not actually buy the ginger beer and, thus, had no contractual relationship with the manufacturer, in previous times she would not have been able to sue.

Donoghue v Stevenson became a landmark decision and formed the basis of the tort of negligence worldwide. This occurred not only because of the judgment relating to non-contractual duty of care but also because of Lord Atkin's 'neighbour principle':

> [T]here must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … 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 that are called in question.

Property law

Property law is a wide area of law that governs relations involving things and interests that can be owned and that have a commercial value. These include objects capable of being possessed physically, as well as less tangible interests, such as shares in a company. The products of creative effort – including text, images, designs, inventions, computer programs and other intangible objects – are protected by statute and common law governing **intellectual property**.

intellectual property intangible property that has commercial value and can be protected by law; for example text, images, designs, inventions and computer programs

One of the most important types of property dealt with under property law is real property. Real property is the actual land and anything attached to that land, as opposed to personal property, which includes everything else.

Property rights are legal rights to possess, use or benefit from property. A violation of such rights often involves breaking the terms of a contract. Legal action for breaches of property law can take place in either the criminal court or civil court, depending on the offending action.

Review 3.2

1. Describe contract law and what it is concerned with.
2. Outline the types of remedies that can be sought by the plaintiff if a contract is breached.
3. Describe tort law. Outline the types of activities that tort law seeks to address.
4. Identify the different types of property that are protected by property law.

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3.3 Criminal and civil court procedures

There are many differences between criminal and civil law court cases. Before discussing criminal and civil court procedures in more depth, it is necessary to be familiar with some of the key differences and the relevant terminology. Some of these are outlined in Table 3.1.

There can be an overlap between criminal and civil law. The victim in a case that has been heard in a criminal court may also wish to gain compensation for injuries caused by the defendant. They can, therefore, take their case to a civil court as well. In both cases, the adversarial system of trial will be used to decide the legal outcome. That is, representatives of the parties involved will put forward both sides of the case to a judge or magistrate, and sometimes to a **jury**. The judge or magistrate will consider the evidence and make a decision in favour of one of the parties.

Table 3.1 Key differences between criminal and civil court proceedings

	Criminal	Civil
People	A **prosecutor** and a **defendant**	A plaintiff and a defendant
Who brings the case to court	**The state**	An individual or organisation
Onus to prove the case	On the prosecutor	On the plaintiff
Standard of proof	The prosecutor must prove the case **beyond reasonable doubt**. (This is a higher standard of proof than is required in civil cases.)	The plaintiff must meet the **balance of probabilities**. (This is a lower standard of proof than is needed in criminal cases.)

Figure 3.4 A jury is sworn in before the trial begins. They will listen to all of the evidence in a court case and decide on the verdict.

Video 3.1 Criminal and civil court procedures

jury
a group of people who listen to all of the evidence in a court case and decide on the verdict

prosecutor
the person formally conducting legal proceedings against someone accused of a criminal offence; the prosecutor acts on behalf of the state or the Crown

defendant
the person who is accused of a crime or a civil wrong; in a criminal case, the defendant is also referred to as 'the accused'

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

onus
the burden or duty of proving a case to a court

standard of proof
the degree or level of proof required for the plaintiff (in a civil case) or the prosecution (in a criminal case) to prove their case

beyond reasonable doubt
the standard of proof required in a criminal case for the prosecution (the state) to obtain a conviction against the accused

balance of probabilities
the standard of proof required in a civil case for a plaintiff to succeed in proving the case against the defendant

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Criminal procedure

Criminal law proceedings are the legal processes in which a person accused of a crime is prosecuted. If a person is found guilty of a crime, usually a conviction and punishment is handed down, such as a fine or imprisonment. The two main types of criminal hearings are summary hearings and trial by jury. The type of hearing depends on the seriousness of the offence the accused is alleged to have committed; that is, whether it is a summary or an indictable offence.

Summary offences are relatively minor and include certain traffic offences and offensive behaviour. They are heard and decided by a magistrate or judge without a jury.

Indictable offences are serious criminal offences and may be heard by a judge and a jury. Crimes in this category include murder, sexual assault and malicious wounding.

Legislation has been passed to allow some indictable offences to be prosecuted summarily (that is, as summary proceedings) in the Local Court (NSW) or Magistrates Court (ACT). These offences involve crimes that have a penalty of less than 10 years' jail time. The defendant and the magistrate must agree for an indictable crime to be prosecuted summarily.

In New South Wales, the police may prosecute summary matters in the Local Court. Not only do the police investigate crimes and arrest suspects, but they also have specially trained police officers, called police prosecutors, who represent the state in court. The office of the Director of Public Prosecutions (DPP) employs lawyers who represent the DPP in court and prosecutes serious crimes. In the Australian Capital Territory, the DPP is responsible for prosecuting all criminal matters in both the Magistrates Court and the Supreme Court.

Figure 3.5 The defendant will usually employ a lawyer to defend them during indictments or trials.

The accused, known as 'the defendant', will usually employ a lawyer to represent them. Some people may choose to represent themselves, depending on the seriousness of the charges. The case that the accused puts forward is called 'the defence'.

Before an accused person can be tried for an indictable offence, there must be a committal hearing. To have the matter put before a jury, the prosecutor must convince the magistrate that there is sufficient evidence that the accused has committed the indictable offence. If there is not enough evidence to bring about a conviction, the time and expense of a court case is saved.

Trials of indictable matters take place in the District Court or Supreme Court in New South Wales (depending on the seriousness of the offence) and in the Supreme Court in the Australian Capital Territory. Criminal trials are heard before a jury of 12 people unless the accused elects to have their case heard before a judge alone. The jury's job is to consider whether there is enough evidence to convict the accused. The judge presides over the case, advising the jury and dealing with questions of law. The jury considers the evidence provided in court and makes decisions on issues of fact on the basis of this evidence.

In both New South Wales and the Australian Capital Territory, the jury must come to a common verdict. In New South Wales, juries used to have to reach a unanimous verdict (all jurors agree) but in 2006, new legislation allowed for the following:

- if there are 12 jurors and if after at least eight hours they cannot all agree, then the verdict is allowed to be agreed on by 11 jurors or
- if there are 11 jurors and after at least eight hours they cannot all agree, the verdict can be agreed on by 10 jurors.

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Criminal trial process

At the start of a trial, the indictment is read to the accused, who may plead guilty or not guilty. The prosecution begins with an opening address, setting out the facts of the case and the evidence that they will present to prove the defendant's guilt.

Each side then calls witnesses and 'examines' them by asking them questions. This is called the **examination in chief**. Its purpose, for the prosecution, is to establish facts to prove their case. For the defence, its purpose is to disprove the prosecution's case. **Cross-examination** allows each side to examine the witnesses of its opponent, to question the opponent's version of the facts or a witness's **credibility**.

After all the evidence has been given, each side gives a closing address where they sum up their case. This final speech draws together the evidence and provides an argument for that side's position. A closing address may also answer arguments that could be made by the other side. The judge then 'sums up' the case and instructs the jury (if applicable) on how to go about the task of reaching a verdict. The jury goes to another room to deliberate until a verdict is reached. If the jury returns a verdict of 'guilty', sentencing occurs either at that time, or at a later date determined by the court.

Burden and standard of proof in criminal cases

In criminal cases, the defendant is presumed to be innocent until proven guilty. The **burden of proof** (i.e. the onus) rests on the prosecution, which must prove beyond reasonable doubt that the accused has committed the offence with which they are charged. The prosecution needs to convince the judge/jury to find the defendant guilty of committing the crime. It is the job of the defence to disprove the prosecution's case and to provide evidence to show the innocence of their client.

The standard of proof is the level of proof required for the party that has the burden of proof to succeed. In a criminal case, the standard of proof is 'beyond reasonable doubt'. This means that to return a guilty verdict, no more than one jury member can have any reasonable doubt that the crime was committed by the accused.

Hearings in the different courts

Local and Magistrates courts

The Local Court or Magistrates Court deals with most criminal cases. These courts do not have juries and judges. Rather, a magistrate determines each case. Matters are generally handled quickly, efficiently and cost-effectively.

In the Local Court and Magistrates Court, the proceedings are less formal than in the higher courts (e.g. lawyers and magistrates do not wear traditional robes). Also, it is solicitors rather than barristers who carry out most of the legal work. In these lower courts, many defendants choose to represent themselves and so argue their case without the help of a lawyer.

examination in chief questioning of a witness by the barrister who called that witness

cross-examination questioning of a witness called by the other side to produce information relevant to one's case or to call the witness's credibility into question

credibility trustworthiness, reliability, believability

burden of proof the responsibility of a party to prove a case in court

Figure 3.6 The Downing Centre is the main court complex in Sydney, containing local courts, state government courts and the District Court of New South Wales.

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Coronial inquests

A coronial inquest occurs when there is an unnatural death or an unexplained fire or explosion. The proceedings are more inquisitorial than in normal court proceedings, as the coroner's office gathers all of the evidence. If there is evidence that a serious crime has been committed, the coroner will recommend that an indictment be issued, and the accused will be tried in a court of law in the usual way.

Children's Court hearings

Most charges against people under 18 years of age are heard in a special Children's Court hearing. Children charged with a crime are treated differently by the legal system, as children are considered to have a lower level of responsibility than adults. Conviction by a Children's Court, even for a serious crime, has less severe consequences than conviction in an ordinary criminal court.

Cases before the Children's Court are usually heard before a magistrate who specialises in children's cases and who takes reasonable measures to ensure the child understands the proceedings. Cases at the Children's Court are heard in a closed court, which means the public are not allowed to attend. If journalists are present, they are not permitted to publish the identity of the offender. In New South Wales, if the child is under 16 years of age, no conviction is recorded.

Figure 3.7 People leave the Coroners Court in Melbourne in January 2023. The gathering was held to demand a new inquest into the death of Veronica Marie Nelson, a Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman who died in a cell at Melbourne's Dame Phyllis Frost Centre in January 2020. A coronial inquest occurs when there is an unnatural death or an unexplained fire or explosion.

Review 3.3

1. Identify the differences and similarities between civil and criminal court cases.
2. Outline the differences between an indictable offence and a summary offence.
3. What is a committal hearing?
4. Describe the task of the prosecution in a criminal trial and how the prosecution goes about carrying out this task.
5. Compare and contrast the roles of the prosecution and the defence in a criminal trial.
6. Describe the role played by a jury and how members of a jury are selected.
7. Describe what happens in a coronial inquest.
8. Outline the ways in which children who are charged with a crime are protected. Account for this protection. Assess whether you think this protection is reasonable.

Research 3.1

View the website of the NSW Department of Communities and Justice.

1. Identify who hosts this website and why it was set up.
2. View the 'Legal and Justice' section of the site. Imagine you are doing work experience at a local primary school and have to teach a Year 6 class about one of the links on this webpage. Develop an internet activity based on the information on the website.

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Civil procedure

Civil proceedings are court actions that occur due to disputes between individuals. Civil proceedings are initiated by individuals or organisations, rather than the state. Civil proceedings manage matters such as breach of contract, property disputes and negligence. The person who brought the civil action, called 'the plaintiff', begins proceedings by issuing a statement of claim or a summons to 'the defendant', who is the individual or organisation that committed the breach or wrong.

The process in a civil claim

A statement of claim outlines the facts of a dispute and the parties involved in the dispute. There are strict rules for the way in which a statement of claim must be 'served' on the defendant. As discussed in Chapter 2, which court has the jurisdiction (i.e. authority) to decide a civil matter depends on the type of claim and the monetary amount involved.

The documents that the defendant and plaintiff exchange and file with the court (these documents set out the issues to be decided by the court) are called **pleadings**. Therefore, the statement of claim or originating application is the first pleading in the sequence of the case. There may be many pleadings, alternating between the parties, over the course of a case.

The defendant responds with a statement of defence. This statement may deny or challenge the plaintiff's allegations, or admit them but plead additional facts to counter the effect of admitting to them. A defendant may also file a counterclaim against the plaintiff.

At this stage, the parties can obtain more information about each other's arguments through a process called 'discovery'. This process allows each party to obtain information to assist them to respond to the other party's claims and allegations. Interrogatories are written questions submitted to the other party, which must be answered. They must be relevant to a matter in question. At this point, many civil disputes are resolved as a settlement can be agreed on. In most cases, legal practitioners prepare the documents, as they have an understanding of the processes and can give appropriate and timely advice on legal matters.

If a dispute cannot be settled, the matter is referred to trial. During a trial, each side has the right to produce evidence, call witnesses and carry out cross-examinations. When both sides have presented all their evidence, the judge makes a ruling. If the plaintiff is successful, the judge determines the amount of relief (or compensation) to be given to the plaintiff by the defendant. This compensation usually takes the form of damages in a monetary form or an injunction, which is a court order prohibiting specified activities. Sometimes a specific performance is required under the judgment.

pleadings
written statements of the parties to a civil dispute that set out the issues to be decided by the court

Burden and standard of proof in civil cases

In a civil case, the burden of proof is on the injured party (the plaintiff) to prove their allegations. The rules of civil procedure give the defendant the chance to provide evidence that rebuts the case made by the plaintiff.

Review 3.4

1. Draw a diagram that shows the steps taken in civil legal action.
2. Describe how you would decide whether or not to make a personal injury claim for negligence that resulted in medical bills of $100 000. Identify the court that would hear this case.
3. Outline the facts that might be sought in a case involving a debt that was not paid.
4. Discuss whether it is more difficult to prove a case in criminal law or civil law. Explain your answer.
5. Draw up a table that lists as many civil wrongs and criminal acts as you can and the respective courts in which cases about these wrongdoings would be heard. Alternatively, with a classmate, create a poster that shows as many civil wrongs and criminal acts as you can and the courts in which they would be heard.

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To disprove a statement or evidence presented by another is generally referred to as a rebuttal.

In civil cases, the standard of proof is 'on the balance of probabilities'. This means that the plaintiff, who has the burden of proof, must prove that it was more probable than not that they suffered injury or loss because of the defendant's actions or that 'his or her claim is correct in law'.

Understanding criminal and civil cases

There are a number of ways in which you can gain a better understanding and appreciation of the operation of criminal and civil law. This can be done by completing the following tasks.

- **Compiling a media file** – Keeping a record of specific cases that are reported in the media is an excellent method for building a sound understanding of criminal and civil cases. To help you record and summarise your findings, a 'media file proforma' is provided on the Cambridge GO website. It is recommended that you print a number of copies of this proforma, make notes specific to each case and attach them to each article you collect.
- **Reading about cases online** – Accessing cases online is one of the most time-efficient ways of collecting information about criminal and civil cases. Two reliable websites to visit are NSW Caselaw and the Australasian Legal Information Institute. These sites have information about rulings on a wide variety of court cases.
- **Observing a court case** – Observing a court case is an important way of reinforcing and extending your knowledge of criminal and civil law. The NSW Department of Justice website lists all the courts in New South Wales, and information about Australian Capital Territory courts can be found on the ACT Courts and Tribunals website. Students can visit most courts that are open to the public. However, if a school group is thinking about attending a court hearing, it is important to contact the court to ensure that correct protocols and etiquette are followed.

Personnel

Court cases involve a number of participants. Some of these people play an official legal role in the court proceedings, while others play an unofficial role. The official and unofficial participants of most court cases are outlined over the following pages.

Judges and magistrates

Judges and magistrates preside over court cases; they make sure the rules are followed and that the trial is fair. These officials are legally qualified professionals with a great deal of experience in the law.

Judges sit in intermediate and superior courts (District and Supreme Courts) and adjudicate cases. The judge makes decisions about points of law and gives instructions to the jury to make sure that they understand the proceedings and the evidence presented. The judge is required to hand down sentences and rulings. In civil cases, the judge sits without a jury and therefore is responsible for the final decision.

A magistrate is in charge of a lower court. After hearing both sides of the case, a magistrate decides whether a person is guilty or innocent. A magistrate decides on the punishment in criminal cases, and the amount of money awarded in civil cases.

Figure 3.8 Former AC/DC drummer Phil Rudd (left) stands in the dock flanked by security while facing charges at the District Court in Tauranga, New Zealand, in April 2015. One of the participants in a criminal case is a corrective services officer (right), who also escorts the accused to and from the courtroom and guards the accused.

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Magistrates refer very serious criminal offences to the District Court (in NSW) or to the Supreme Court (in the ACT). Magistrates hear some indictable matters to determine whether they should go to trial. If there is enough evidence to establish a ***prima facie*** case, and thus justify the expense of a trial, the case is referred to a higher court.

Judge's associate

A judge's associate is a confidential secretary to the judge and performs clerical duties for the court in which the judge is presiding. Judges' associates usually have a law degree.

Tipstaff

A tipstaff supports the judge in matters of procedure and organisation when court is in session. When court is not in session, a tipstaff may provide research and administrative support.

Barristers and solicitors

People seeking legal advice usually contact a solicitor first. Solicitors give legal advice to people on a wide range of legal issues. Solicitors have completed a law degree and have carried out relevant work experience to achieve their qualification.

Solicitors may work in a number of practice areas. Some of the main areas that solicitors work in are family law, conveyancing for real estate transactions, and the preparation of wills and contracts. Traditionally, only barristers can represent parties in court. Solicitors usually prepare a brief for a barrister when a case must go before a court, as well as doing research and providing legal advice. However, in the Local Court or Magistrates Court, it is more common to see solicitors appearing on behalf of clients. For each state and territory, there are separate associations for solicitors and barristers, and in New South Wales, solicitors and barristers are issued different practising certificates.

Barristers often specialise in one area of law (e.g. family law), which allows them to develop a depth of knowledge and expertise in the area.

A solicitor will generally approach a barrister on behalf of their client. The barrister will then represent the client in either a criminal or civil court proceeding.

prima facie
(Latin) 'on the face'; at first sight, having sufficient evidence established against a defendant to warrant a trial in a higher court of law

Barristers have two main roles in court proceedings:

- to provide legal advice on the likely outcome of a court case, based on the facts provided to them by their client; this allows the client to decide which course of action is best
- to present their client's case in court.

Witness

A witness gives evidence regarding the case in court. Both parties can call witnesses to support their claims. A witness cannot enter the courtroom until their name is called. Once called, the witness must take the stand and swear an oath or make an affirmation to tell the truth.

Court officer

A court officer is responsible for the court lists and calls witnesses into the courtroom. They administer the oath or affirmation, ensure the public are seated in the right area, and announce the arrival and departure of the judge(s). A court officer communicates questions from jurors to the judge and passes documents from the bar table to the judge's associate. The associate then gives these documents to the judge, jury or to witnesses. A court officer also advises the judge's associate when the jury is ready to return a verdict, operates audio visual equipment where necessary, gives instructions to the jury, answers questions from jurors, and manages the jury room and the comfort of the jurors.

Court reporter

All court proceedings must be recorded. This recording may be written (in shorthand or using a shorthand machine) or it may be in an audio and/or visual format. A transcript of the proceedings is an accurate written record of what has been said in the courtroom.

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Corrective services officer

In a criminal case, a corrective services officer escorts the accused to and from the courtroom and guards the accused.

Jury

A jury is a panel of citizens who consider the evidence presented and decide on questions raised in a case. Their job can be described as 'fact-finding', and a jury's decision is called a verdict. The members of a jury are ordinary people, randomly selected from the jury list, which is compiled from the electoral roll. In most cases, a criminal trial involves a jury of 12 people. Civil cases may be heard by a judge alone or sometimes (in NSW) with a jury of four people.

Before a court case begins, members of the jury are sworn in. In a criminal trial, both the prosecution and the defence are entitled to challenge the selection of individual jurors, or the panel as a whole. 'Challenges for cause' must have a reason; for example, the person is not qualified to serve on a jury, they are ineligible or disqualified, or they are suspected of bias. Both sides also have the right to a certain number of 'peremptory challenges' of prospective jurors, without having to give a reason. However, the only thing they know in advance about the jurors is their names, so peremptory challenges are usually based on nothing more than the juror's name or appearance (e.g. age, gender, race, clothing or physique).

Plaintiffs and defendants

The person who brings a civil action against someone else is called the 'plaintiff'. The person who must defend their actions is called the 'defendant'. In a criminal trial, the defendant is the person accused of the crime, and there is no plaintiff.

Media

Journalists often attend high-profile court cases to report on them. Generally, representatives from the media sit in the media gallery or wait outside the court to interview people.

Figure 3.9 Australian national Sara Connor appears in court as a witness for the trial of British national David Taylor in Indonesia in 2017. During a trial, each side has the right to produce evidence, call witnesses and carry out cross-examinations.

Review 3.5

1. Outline the role of a judge or magistrate in court proceedings.
2. Identify the types of legal representation available to a person who is having legal problems.
3. Describe the roles of the judge and the jury in a court case.

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3.4 Common and civil law systems

Many countries have a system of law that is based on the common and civil principles of law, or a combination of both.

Civil law has its origins in Roman law. It is a codified system that uses a set of rules (known as the code of law) that are applied and interpreted by judges. This form of legal system is still used in many countries.

Common law, on the other hand, was developed by custom. It began long before there were any written laws but continued to be applied by courts long after written laws came into use.

The main difference between the two systems of law is that, in civil law, judges apply the rules in the code of law to the various cases before them, whereas in common law, the rules are derived in part from specific court rulings.

In countries that have a legal system based on common law, the term 'civil law' refers to the area of law that governs relationships between private individuals (which differs from criminal law).

Civil law systems in other countries

The term 'civil law' can be confusing. Within Australia's legal system, civil law means private law; that is, disputes between individuals. However, the term is also used to describe the legal systems of countries that have developed from the Roman law system and not the English common law system; for example, France, Germany and Italy.

Whereas common law countries like Australia have an adversarial system, civil law countries usually have an inquisitorial system. This means that the judge collects the evidence for both sides in a dispute and so is actively involved in the fact-finding task.

Figure 3.10 Members of the Court of Cassation in Paris gather together before a formal sitting in January 2024. The legal system in France developed from the Roman law system.

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Chapter summary

- There are two main categories of law: public law and private law. There are differences in the ways that infringements of public and private law are dealt with by the courts.
- Public law deals with the interactions between people and the state. Public law includes criminal, administrative and constitutional law.
- The *Australian Constitution* sets out the foundational rules of the Australian Government. Constitutional law governs any changes made to these rules.
- Private law governs the relationships between individuals or between individuals and organisations or companies. Private law includes contract, tort and property law.
- Determining which court hears a case depends on the severity of the crime in criminal cases and the amount of damages sought in civil cases.
- Criminal and civil court procedures are different in a number of ways. In a criminal trial, the burden of proof is on the prosecution. In a civil matter, the burden of proof is on the plaintiff.
- The standard of proof in a criminal trial is beyond reasonable doubt. In a civil hearing, the standard of proof is on the balance of probabilities.
- Contemporary Australian law is based on English common law. Many other countries use the civil law system, which is based on a statutory code rather than on precedence.

Multiple-choice questions

1 Why is criminal law prosecuted by the state rather than by individual citizens?
- **a** Victims of crime are usually unable to afford legal representation.
- **b** Crime is considered a wrong against us all and thus a matter of public law.
- **c** Crime is often due to government decisions or policy and the state must take responsibility for it.
- **d** It is a matter of organisation and thus is a subset of administrative law.

2 What is the main purpose of administrative law?
- **a** The main purpose of administrative law is to achieve justice in civil cases.
- **b** The main purpose of administrative law is to ensure government decisions are fair.
- **c** The main purpose of administrative law is to allow people to bring criminal charges against government departments.
- **d** The main purpose of administrative law is to allow people to receive damages in civil cases.

3 What is the High Court's role in relation to the laws made by parliament?
- **a** The High Court decides whether laws are consistent with the *Australian Constitution.*
- **b** The High Court exercises veto power, if necessary, when a Bill comes before parliament.
- **c** The High Court ensures that laws are consistent with international treaties that Australia has signed.
- **d** The High Court advises the minor political parties on how they can get laws passed.

4 What can a plaintiff expect from a successful tort claim?
- **a** A plaintiff can expect compensation from the defendant in the form of damages.
- **b** A plaintiff can expect compensation from the state.
- **c** A plaintiff can expect an injunction to prevent the defendant from approaching the plaintiff's solicitor.
- **d** A plaintiff can expect an order of specific performance.

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5 Which of these statements about the burden and standard of proof is true?
   - **a** The defence in a criminal trial must prove that the defendant is innocent, beyond reasonable doubt.
   - **b** The defendant in a civil trial must prove that the plaintiff's case is flawed, on the balance of probabilities.
   - **c** The plaintiff in a civil trial must prove their case on the balance of probabilities.
   - **d** The plaintiff in a civil trial must prove that the defendant is guilty beyond reasonable doubt.

Short-answer questions

1 Outline the main ways that a person can seek a remedy if a government decision is unfair.
2 Outline what is needed for a committal hearing to progress to a court case. How does this put pressure on the police and prosecution?
3 Describe the remedies available when you have a contract for services and the other party fails to do what they agreed to do.
4 Describe tort law.
5 Discuss the notion that tort law has turned us into a society that sues each other when things go wrong.
6 Describe the roles of the prosecution and the defence in a criminal case.

Extended-response question

Compare and contrast the features of criminal and civil law.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Chapter 4
Law reform

Chapter objectives

In this chapter, you will:

- discuss legal concepts and terminology with respect to law reform
- debate the legal system's ability to address issues in society that may contribute to law reform
- discuss the relationship that exists between the legal system and the society in which it operates
- discuss the place of the law in addressing and responding to change
- identify and assess the conditions in society that contribute to law reform
- describe and evaluate the role and operation of agencies and agents involved in law reform.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 11–13 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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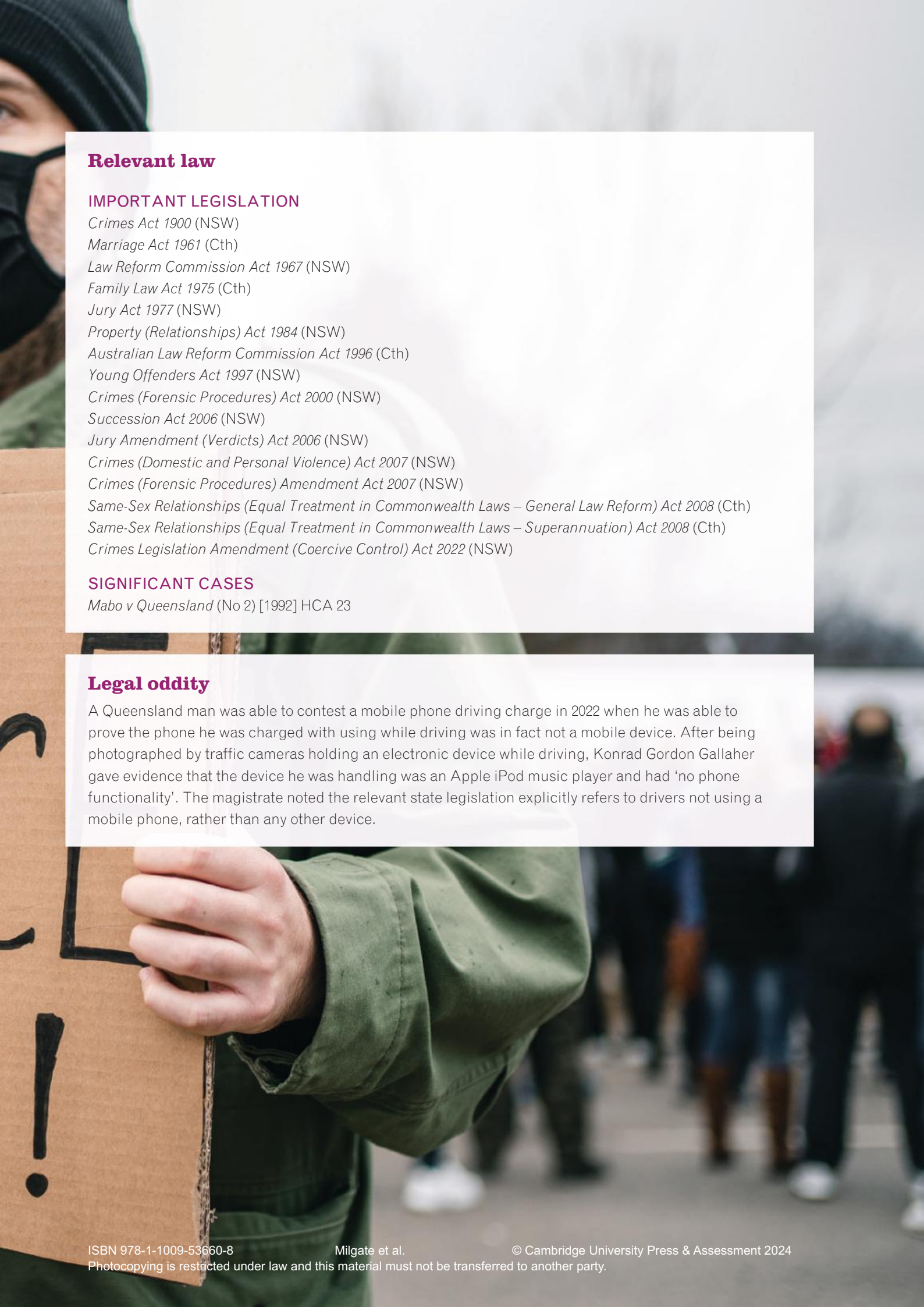

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Marriage Act 1961 (Cth)
Law Reform Commission Act 1967 (NSW)
Family Law Act 1975 (Cth)
Jury Act 1977 (NSW)
Property (Relationships) Act 1984 (NSW)
Australian Law Reform Commission Act 1996 (Cth)
Young Offenders Act 1997 (NSW)
Crimes (Forensic Procedures) Act 2000 (NSW)
Succession Act 2006 (NSW)
Jury Amendment (Verdicts) Act 2006 (NSW)
Crimes (Domestic and Personal Violence) Act 2007 (NSW)
Crimes (Forensic Procedures) Amendment Act 2007 (NSW)
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008 (Cth)
Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW)

SIGNIFICANT CASES

Mabo v Queensland (No 2) [1992] HCA 23

Legal oddity

A Queensland man was able to contest a mobile phone driving charge in 2022 when he was able to prove the phone he was charged with using while driving was in fact not a mobile device. After being photographed by traffic cameras holding an electronic device while driving, Konrad Gordon Gallaher gave evidence that the device he was handling was an Apple iPod music player and had 'no phone functionality'. The magistrate noted the relevant state legislation explicitly refers to drivers not using a mobile phone, rather than any other device.

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4.1 What is law reform?

Australian society is constantly evolving and changing. Given the speed at which social values change, the law can sometimes seem anachronistic, or slow to respond. The saying often quoted is 'society moves ahead and the law limps behind'.

As suggested in previous chapters, the law needs to be dynamic for the community to respect and follow it. But mere change is not enough to constitute 'reform'. As the Hon. Justice Michael Kirby, a former member of the High Court bench, wrote:

> In our language, the word 'reform' tends to connote an improvement, an advance: not just for change, a change for the better.

Michael Kirby, 1983, *Reform the law: Essays on the renewal of the Australian legal system*, Oxford University Press, Melbourne, p. 7.

Changes to laws should not only recognise the changes taking place in society but should also reflect the changes that have produced better circumstances for significant portions of society, as well as providing protections against harm.

However, law reform is not always smooth or easy, as not all members of society may agree with particular changes to the law or see the need for them. The extent of disagreement often depends on the conditions that gave rise to law reform; in other words, on what is driving the need to reform the law.

This chapter examines the conditions that give rise to law reform, and the agents and mechanisms that can bring it about once the reform needed has been identified.

4.2 Conditions that give rise to law reform

Changing social values

Social values are standards or principles that guide people in their thinking about aspects of their society and are underpinned by beliefs about right and wrong. Social values are not necessarily the same as individual values, but they both influence and are influenced by individuals' judgement. Both individual and social values are shaped by various cultural factors, often including religion.

social values ethical standards that guide people in their thinking about aspects of their society

public morality standards of behaviour generally agreed upon by the community

When the majority of people within a society hold similar views about an issue, the views can be said to reflect **public morality**. The law must reflect the social values of the majority of the community if it is to stay relevant and be assured of a high rate of compliance.

Figure 4.1 Individual and social values are shaped by various cultural factors including religion.

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As Australia is a diverse multicultural society, it can sometimes be difficult to gauge if there is anything approaching consensus on an issue.

The problem for law-makers is that public morality is not static; it continues to evolve. These changing social values are an impetus for law reform. There are many examples of legislation that has been introduced, repealed or amended after courts have handed down decisions. Judicial decisions are one way in which legislators and others recognise that the existing law no longer reflects the community's social values. In most cases, as indicated above, the law usually lags behind changes in social values. This is not always a negative feature of the law, as deliberate and well-thought-out changes to our laws take time.

The following example demonstrates how law reform has been a direct response to changing social values.

Example: Same-sex relationships

Many of Australia's social values have been influenced by its Christian traditions, including the belief that the family is one of the cornerstones of a stable society. Part of this traditional belief has been the understanding that a family must have a mother and a father in a heterosexual relationship that has been recognised formally by a religious ceremony and legally by marriage legislation – currently the *Marriage Act 1961* (Cth).

Over the past 40 years, the idea of what constitutes a family has evolved to the point that the definition above no longer reflects the social values of a significant number of Australians. Moreover, many Australians in same-sex relationships were living together without the legal protections afforded to people living in heterosexual relationships. This meant that they had few rights – especially property rights – if the relationship ended.

In 1984, the NSW Government passed the *De Facto Relationships Act 1984* (NSW), which established certain rights for people living in **de facto relationships**. At this time, there were calls to recognise same-sex couples in the same way. After some impassioned speeches in both Houses of Parliament in New South Wales, the *De Facto Relationships Act 1984* (NSW) was amended to include same-sex couples and was renamed the *Property (Relationships) Act 1984* (NSW). (For people separating now, these matters are dealt with under the *Family Law Act 1975* (Cth); this Act now deals with matters regarding property and children in relation to de facto couples as well as married couples.)

Under the *De Facto Relationships Act 1984* (NSW), factors for a court to consider when determining whether a couple are in a de facto relationship include the duration of the relationship, how long they have lived together, whether it is a sexual relationship, and their financial dependence or interdependence. Importantly, these factors also include the degree of mutual commitment to a shared bond and whether they are publicly recognised as a couple. This Act gave couples in these relationships certain property rights, and recognised the legitimacy and value of their relationship.

Further legislative change occurred with the *Property (Relationships) Legislation Amendment Act 1999* (NSW), which amended 25 other Acts whose provisions excluded same-sex couples. For example, it amended the *Probate and Administration Act 1898* (NSW) to give a de facto spouse of a person who died without a will the same rights as a husband or wife with respect to the deceased person's **estate**. The *Succession Act 2006* (NSW) now covers this, as the *Wills, Probate and Administration (Amendment) Act 1989* (NSW) has been repealed.

estate
all of the property that a person leaves upon death

de facto relationship
(Latin) 'existing in fact'; a relationship between two adults who are not married but are living together as a couple

In 2008, the Rudd government acted on the Australian Human Rights Commission's report, *Same-Sex: Same Entitlements*, and conducted an audit of Commonwealth legislation to remove discrimination and to enable same-sex couples and their children to be recognised by Commonwealth law. These changes were legislated to ensure that Australia remains a fair and just community by allowing same-sex couples and their families to enjoy the same entitlements as

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opposite-sex de facto couples. The legislation that enacted these changes are the:

- *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth)
- *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cth).

This legislation removed discrimination from 85 pieces of federal legislation in areas such as taxation, superannuation, social security, the Pharmaceutical Benefits Scheme, Medicare safety nets and aged care. It also amended legislation that did not recognise same-sex couples for the purposes of child support, immigration, veterans affairs and citizenship.

There was much debate about amending the *Marriage Act 1961* (Cth) to allow same-sex couples to marry. The Labour Government, under Malcolm Turnbull, had pledged to hold a plebiscite on this issue in 2016 – a plebiscite is when Australians on the electoral roll vote directly on a particular issue. The Labor Party advocated that parliament should act to amend the Marriage Act, given, they argued, that the majority of Australians supported the change.

Following unsuccessful attempts to pass legislation allowing a plebiscite, in 2017 the Turnbull government took a new approach to assessing popular opinion: the Australian Marriage Law Postal Survey. The Australian Bureau of Statistics, rather than the Australian Electoral Commission, ran this survey.

While everyone on the federal electoral roll received the survey, voting on the matter was not compulsory. The vote was 61.1 per cent in favour of same-sex marriage. As a result, in December 2017 the Marriage Act was amended to change the definition of marriage to 'the union of two people' who meet all the other requirements of the Act. This ended a 40-year struggle for full equality of the rights of same-sex couples. Today the law protects the rights of all people in a marriage or recognised de facto relationship, whether it be heterosexual or same-sex.

Case Study

Whose social values should prevail?

In California, United States, in May 2008, same-sex marriages were recognised when the Supreme Court of California ruled that legislation banning same-sex marriages was discriminatory and violated the state's Constitution. After this decision, in California, many same-sex couples legitimised their relationships in the eyes of the law through marriage.

In November 2008, Californian voters overturned the Supreme Court's ruling by agreeing, via a referendum, to change the state's Constitution in a ballot called 'Proposition 8'. In an article titled, 'California bans same-sex marriage', the BBC reported that, 'The referendum called for the California constitution to be amended by adding the phrase: "Only marriage between a man and a woman is valid or recognised in California."' The state's Attorney-General has stated that the marriages conducted after the court ruling remain valid.

More recently on 26 June 2015, the Supreme Court of the United States legalised same-sex marriage in a decision that applies nationwide (*Obergefell v Hodges*). The court held that the Fourteenth Amendment of the US Constitution requires states to offer same-sex marriage and to recognise same-sex marriages performed in another jurisdiction.

Public morality is not clear-cut on this issue in the United States even if the law supports marriage equality. There are certain sections of the American public that are opposed to any such changes.

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Review 4.1

1 Outline the sequence of events that led to the reform of the *Marriage Act 1961* (Cth) in 2017. Recall what the reform accomplished.
2 Identify other types of social change that might lead to law reform and how the reform might be accomplished.

New concepts of justice

When the law is unable to deliver just outcomes to individuals and the community, there may be a need for law reform. For example, if criminal law is failing victims, the community and/or the accused, new concepts of justice may need to be formulated.

Example: Abolition of capital punishment

In the past, **capital punishment** for particular murder offences was seen as the most effective way of dealing with the most heinous crimes. This punishment was a case of society delivering pure retribution for a crime: 'a life for a life'. It was also suggested that capital punishment provided a strong deterrent to those who might commit murder. However, in a significant number of homicides, the offender and the victim knew each other and many involved extreme breakdowns of family relationships. Many murderers could be described as one-time killers who are unlikely to re-offend. When capital punishment was abolished in each of the Australian states, the murder rate remained relatively unchanged, suggesting this punishment had little effect as a deterrent.

Not only does executing a person completely remove the possibility of rehabilitation, but there are also strong arguments that capital punishment violates prohibitions of cruel, inhuman and degrading punishments in international human rights treaties. In addition, where capital punishment exists, it is imposed more often on poor, uneducated and otherwise vulnerable people. There is also the risk of killing an innocent person who has been wrongly convicted.

These moral arguments and practical considerations shifted social attitudes about capital punishment and it is no longer permitted in any Australian jurisdiction. Due to a greater emphasis on rehabilitation as a means of achieving justice, and the recognition that capital punishment is not an effective deterrent, this method of punishment no longer serves the community's purposes. A contrast between Australia and the United States is that there are still jurisdictions in the United States that utilise capital punishment. Twenty-four people (one woman) were executed in the United States in 2023.

Example: Youth Justice Conferences

Another notable example of a change in the way the law punishes offenders is the introduction of **Youth Justice Conferences**, which were established by the *Young Offenders Act 1997* (NSW). (This is discussed in more detail in Chapter 9.) Youth Justice Conferences try to divert young, first-time offenders away from the court system – and help these young offenders avoid getting a criminal record. The aim of these conferences is to act as a 'circuit breaker' in a young person's behaviour trajectory.

capital punishment the practice of sentencing a person to death by judicial process; also referred to as the 'death penalty'

Youth Justice Conference a meeting of all the people who may be affected by a crime committed by a young offender; used to help the offender to accept responsibility for their actions while avoiding the court system

Figure 4.2 Youth Justice Conferences may be attended by members of the community, the offender's family, the victim and their family, and relevant professionals. The aim of the conference is to act as a 'circuit breaker' in a young person's behaviour trajectory.

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A conference may be attended by members of the community, the offender's family, the victim and their family, and relevant professionals (e.g. a social worker).

Youth Justice Conferences have enjoyed support from the community as they have achieved positive results for young, first-time offenders. Some people have argued that these conferences should be used for a wider range of offences because attending a conference makes a young person consider the consequences of their actions, especially the harm they have caused the victim. In 2022–2023, there were 866 young people participating in Youth Justice Conferences.

Other law reform initiatives that involve new procedures to deal with offenders include circle sentencing for First Nations offenders, the New South Wales Drug Court, and the enforcement of parenting orders in the Federal Circuit and Family Court. These reforms are attempts to deal with issues that the current laws were failing to address.

Example: Sexual assault court

There has also been some speculation over the years about the introduction of a specialist court to deal with sexual assault matters. This has been put forward because of a new depth of understanding about sexual assault, including:

- a recognition that victims should be dealt with sensitively during the legal process
- a better understanding of the context of sexual assault and what that means with respect to the physical collection of evidence from victims
- a recognition of the complexity of the task of proving that consent was not given.

Our legal system is based on an adversarial system in which witnesses for the prosecution can be subject to robust questioning by the defence. This is considered to be an important part of ensuring that people are not wrongly convicted. However, being a witness can be a traumatic experience for victims of sexual assault as it involves re-telling their experiences and rebutting questions about their credibility. There is a concern that such questioning may deter victims from reporting a crime. It is a challenge to find the balance between ensuring the accused can pursue a defence fairly, while avoiding re-victimising a victim. A specialist court may be better placed to achieve this.

Example: Combating domestic violence

Overview

Domestic violence is different from violence perpetrated on the street, in schools or in the workplace. The Domestic Violence Resource Centre offers the following definition:

> Domestic and family violence is when someone intentionally uses violence, threats, force or intimidation to control or manipulate a partner, former partner or family member.

Domestic violence can manifest sexually, physically, verbally or financially and in most cases causes psychological harm to the victim. Victims of domestic violence are usually isolated socially and often stay in abusive relationships for many reasons, including fear of reprisal.

In the past, victims of domestic violence had to report incidences of violence to the local police. In many cases, the victim was told that domestic violence was a private matter more appropriately sorted out within the family. Research has indicated that the initial response of the police to a victim's report of domestic violence determines whether that victim proceeds further with the complaint.

The victim also had to rely on assault provisions under the relevant criminal legislation. Not only were there often delays in bringing the matter to court, but the necessity of proving the charge beyond reasonable doubt could also be a high hurdle when the evidence was essentially one person's word against another's. Victims of domestic violence had inadequate protection under the law and it was clear that the legislation was not sufficient.

Legislation

In New South Wales, the *Crimes (Domestic Violence) Amendment Act 1982* (NSW) inserted new provisions into the *Crimes Act 1900* (NSW)

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introducing the concept of an **Apprehended Domestic Violence Order** (ADVO). Victims can obtain ADVOs through the Local Court or the police. The court must be satisfied 'on the balance of probabilities' that the person has reasonable grounds for fear – a lower standard of proof than 'beyond reasonable doubt'. An ADVO can be tailored to suit the victim's situation; for example, it can forbid the accused from coming close to the victim's children, residence, place of work or another specified place that the victim frequents. It is a criminal offence to breach an ADVO, but the ADVO is not itself a criminal conviction.

As the community's understanding of the perpetrators and circumstances of domestic violence developed, significant law reform continued to unfold. Some of these developments include:

- The *Crimes (Domestic Violence) Amendment Act 1993* (NSW) allows police to apply for interim ADVOs after hours by telephone and has made it an offence to 'stalk' or 'intimidate' a person.
- The *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) distinguishes between orders taken out for domestic violence and those relating to 'personal violence' in other situations (e.g. disputes between neighbours). In addition, this Act introduced the requirement that police officers record in writing why they did not proceed with criminal charges for a breach of an ADVO.
- Amendments to the *Bail Act 2013* (NSW) have removed the presumption that bail will be granted for perpetrators of domestic violence and for those who have breached an ADVO, where the defendant has a history of violence.
- Amendments to the *Firearms Act 1996* (NSW) allow police to seize any firearms present when called to the scene of a domestic violence incident.
- Amendments to the *Crimes Act 1900* (NSW) in 2018 introduced a new offence of strangulation with a lower proof threshold.

After 30 years of amendments to various legislation, especially to the *Crimes Act 1900* (NSW), it was felt that the crime of domestic violence deserved a standalone Act of Parliament. Hence, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) was passed and took effect in 2008.

Apprehended Domestic Violence Order
a court order used for the protection of a person involved in an intimate, spousal or de facto relationship

This Act repealed Part 15A of the *Crimes Act 1900* (NSW), which dealt with apprehended violence orders, and re-enacted those provisions as a new Act, with some modifications and additional provisions. It was also felt that domestic violence was treated as a lesser crime, hidden in the *Crimes Act 1900* (NSW). Under the new Act, a person may be charged with a 'domestic violence offence'. While the acts constituting such an offence are not new, being charged with the criminal acts under the new name has significant implications for bail, the offender's criminal record, and any future convictions.

Under section 38 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), an ADVO made to protect an adult must automatically include any children living with that adult, unless sufficient reasons are given as to why the children should not be protected by the ADVO.

Additional domestic violence initiatives

Governments around Australia have recognised that there is still room for improvement in the way they tackle domestic violence. New approaches to justice continue to be implemented to complement the legislative provisions in place to protect victims. Since 2015, the following initiatives have been introduced:

- In domestic violence cases in New South Wales, women and children can give evidence via audio- or video-link.
- Police officers have the power to collect video and photographic evidence at the time of responding to incidents of domestic violence.

In October 2022, the Australian, state and territory governments released the National Plan to End Violence against Women and Children 2022–2032 (National Plan) and committed to spend $1.3 billion over the following five years, 2022–2026.

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The Department of Social Services stated that the National Plan needs to address the following four key initiatives to move towards ending violence in one generation:

1 Prevention
2 Early intervention
3 Response
4 Recovery and healing.

The NSW Government has also released its Domestic and Family Violence Plan 2022–2027, which will align and coordinate with the National Plan. Some of the initiatives will be community- and context-based to best meet local needs. In the 2023–2024 Budget, the NSW Government committed $39.1 million to prevent domestic, family and sexual violence and support victim safety.

In 2022, the NSW Government introduced a specific offence of 'coercive control' through the *Crimes Legislation Amendment (Coercive Control) Act 2022*. This recognises that coercive control consists of a pattern of behaviour where one person uses their power to dominate another, depriving the victim of their own autonomy and has now made it a standalone offence. Coercive control was present in 99 per cent of relationships prior to domestic homicides in New South Wales; however, it is not just an early warning sign of potential violence, it is a form of violence itself.

Future reform

Further reform is still required.

NSW Premier Chris Minns has called for a review into bail laws pertaining to domestic violence incidences. Cases of stalking and intimidation have escalated, and the current laws have been branded too weak and ineffectual to protect women.

The number of women killed from domestic violence also appears to be increasing. In 2022–23, on average one woman was killed by an intimate partner every 11 days (and one man every 91 days). But the April 2024 killing of Molly Ticehurst, allegedly by her partner, was the 25th case in Australia that year of a woman dying from gender-based violence. This was 11 more than in the same time period the previous year, and means that for these four months, the average was two women every nine days. There have been calls nationally and in New South Wales for a Royal Commission into what is now being called a national crisis of staggering proportions.

New technology

Advances in technology always put the law under pressure to remain current. New technology contributes to changes that may be either radical and sweeping or subtle and incremental. For instance, the invention of the petrol-powered motor vehicle changed the way people in industrialised countries lived over the course of the twentieth century, and required the introduction of new laws for safety, ownership and licensing, and (eventually) environmental protection.

The development of life-support devices and treatments since the 1960s has meant that the legal definition of death had to be changed. As it is now possible to keep a person's heart and lungs operating, without brain function, for a significant period, most jurisdictions now define death as the irreversible cessation of all functions of the entire brain, rather than just referring to the cessation of respiration and heartbeat.

More recently, the progress made in 'birth technologies' has seen changes made to laws at both state and federal levels to resolve issues about parentage, inheritance and financial maintenance. As children can now be conceived from donated biological material, the law had to clarify and differentiate biological rights and obligations from 'social' rights and obligations deriving from the family roles and relationships in which people actually live.

Example: DNA evidence in criminal matters

The use of DNA evidence in criminal matters has led to convictions where previously, without other physical evidence, there would have been no conviction. As technology has improved, so have the chances of solving 'cold cases'. In New South Wales, there are more than 400 unsolved homicides dating back to 1975. Because DNA is very stable over a significant period, collected biological material can be used decades later to create DNA profiles for analysis. Many cold cases are being re-opened for police investigation, with DNA evidence and analysis being a key factor.

The *Crimes (Forensic Procedures) Act 2000* (NSW) was introduced to set guidelines for the DNA testing of criminal suspects. The Act sets out who may

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Figure 4.3 The *Crimes (Forensic Procedures) Act 2000* (NSW) was introduced to set guidelines for the DNA testing of criminal suspects.

be tested and who may order the test, as well as detailed requirements for how the procedures may be conducted. The manner in which a DNA sample is obtained can determine its admissibility in court. In 2007, several amendments to this Act took place. Among other changes, section 11 was revised to allow DNA samples to be collected from suspects in an increased range of offences, which include some indictable offences and a number of summary offences.

Another major change concerns the period of time that a suspect's DNA material can be kept for **forensic** use. Under the *Crimes (Forensic Procedures) Act 2000* (NSW), prior to the 2007 amendments, DNA material had to be destroyed after 12 months if the criminal case against the person did not proceed. However, under the amended section 88(2)(c), where DNA has been collected from a suspect who ends up being convicted of a different crime as a result of an investigation of the same acts, the DNA material does not have to be destroyed.

Such provisions are intended to increase conviction rates. However, some have argued that without sufficient legislative protections relating to the use of this technology, there could be an erosion of the rights of accused persons. For example, the wait time for the results of a DNA test can be up to 180 days. This raises serious issues if the prosecution's case is dependent on that evidence, especially if the accused has been refused bail.

To speed up the process, in 2008, the NSW Government decided to outsource some DNA testing to private laboratories. Such delegation of responsibility generally requires further safeguards to ensure the privacy, confidentiality and integrity of the testing procedures. In 2018, a Queensland DNA laboratory used by the Queensland Government was the subject of investigation by a Commission of Inquiry. In the final report, delivered 13 December 2022, Inquiry Commissioner, Walter Sofronoff KC, said:

> I have the unfortunate duty to report that the methods, systems and processes used at the forensic DNA laboratory did not, in many ways, measure up to best practice. The laboratory has, for some time, focused on throughput and quick reporting of results to the detriment of high-quality science.

Walter Sofronoff KC, 2022, *Commission of Inquiry into Forensic DNA Testing in Queensland*, Final report, 13 December, p. xii.

forensic relating to the detection and investigation of crime

At times, there is continued pressure to speed up results as criminal procedures and accused persons waiting in remand are dependent on the delivery of these results. However, delays in testing still provide significant challenges for the criminal justice system in most states in Australia.

The Law Society of NSW has a criminal law committee that believes delays in DNA analysis are still common. The committee has predicted that the adverse impact on the criminal justice system caused by backlogs at the laboratory will worsen.

Review 4.2

1 Identify some of the challenges new technologies can create for the criminal justice system. Assess how law reform has attempted to mitigate these challenges.
2 Outline some scientific advances (other than DNA testing) that have led, or may lead, to legislative changes. Construct a list of some of the factors that need to be considered or balanced when making changes.

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Example: Identity theft

In more recent years there has been an increase in what is known as '**identity theft**' or 'identity **fraud**'. With the development of more sophisticated computers, scanning devices and software applications, this type of crime has become easier. It is also attractive, as it can yield significant rewards with a high probability of not being caught.

identity theft
obtaining or using the identity of another person in order to commit a range of fraudulent activities, usually to obtain financial gain

fraud
a dishonest act, done intentionally in order to deceive

Identity theft has the potential to cause immediate financial loss as well as damage to a victim's credit rating and reputation. It can also be psychologically distressing to know that someone else is using your identity to engage in serious criminal activities. These activities could include using credit card numbers; fraudulently obtaining loans, government benefits or employment benefits; evading the payment of taxes; money laundering; drug smuggling; people smuggling; or stalking or intimidating someone.

The theft or assumption of another person's identity – or the use of their personal information – is not itself a criminal offence under Australian federal law, or in most states (except in South Australia and Queensland, which enacted legislation specifically criminalising identity theft in 2003 and 2007, respectively). Rather, it is what is done with the stolen identity that could be considered criminal conduct. Because assuming another person's identity is often a preparatory step in the commission of offences such as fraud or theft, such offences can be used to prosecute the identity theft. However, that requires the prosecution to prove the associated offence.

It can be difficult to adapt specific theft, fraud and forgery offences to fit the facts of identity crime. Most existing legislation, including the Model Criminal Code referred to in Chapter 3, requires at least proof that the accused had the intent to use the information to obtain a financial benefit. However, identities can be assumed for other reasons, such as to cross national borders for the purposes of organised crime or terrorism.

Law reform in this area could include enacting state and federal legislation that creates one or more general identity crime offences. In 2008, this was the recommendation of the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General. The model offences could include making, supplying or using information about a person that is capable of being used to identify them; possessing such information with intent to commit or facilitate an indictable offence; and possessing equipment to create such information.

Legislative provisions for identity theft in New South Wales

Section 192E of the *Crimes Act 1900* (NSW) is the provision most directly relevant to identity theft.

Crimes Act 1900 (NSW)
Section 192E Fraud

1 A person who, by any deception, dishonestly:
- **a** obtains property belonging to another, or
- **b** obtains any financial advantage or causes any financial disadvantage,

is guilty of the offence of fraud.
Maximum penalty: Imprisonment for 10 years.

Section 192E is contained in the new Part 4AA, which deals with fraud. Also enacted were Part 4AB, which deals with identity offences specifically, and Part 4AC, which deals with money laundering. Specific sections within these parts defined such terms as 'deception', 'obtaining financial advantage or causing financial disadvantage' and 'identification information'.

Other sections in these parts of the *Crimes Act 1900* (NSW) that could be used to prosecute identity crime include:
- dealing with identification information (s 192J)
- possession of identification information (s 192K)
- possession of equipment to make identification documents or things (s 192L)
- intention to defraud by false or misleading statement (s 192G)
- intention to defraud by destroying or concealing accounting records (s 192F).

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Unauthorised access to and modification of computer data are covered in Part 6 of the *Crimes Act 1900* (NSW), and these also might be used to prosecute identity crime.

As of June 2023, according to the Australian Institute of Criminology, 31 per cent of respondents have experienced identity crime in their lifetime. Recent high-profile breaches of data security at companies such as Optus and Medibank Private have exposed many more Australians to identity theft. Proposed additional legislative controls and continued education have highlighted the issue of the amount of customer data companies retain and raised questions regarding the extent this is necessary. It has also been proposed that government and companies are responsible for ensuring this data is secure.

Example: Social media

The advent of social media platforms has thrown up a number of complex challenges, one of which is the responsibility that social media companies (e.g. X, formerly Twitter) have in regard to what is posted on their platforms. After the live-streamed stabbing of Assyrian church bishop Mar Mari Emmanuel in western Sydney in April 2024, the Australian Government requested X remove the video from its platform due to its violent nature. This denial of this request by X has galvanised all sides of politics to strengthen laws regarding the regulation of social media content within Australian borders.

Recently introduced 'post and boast laws' are a further example of law reform in relation to the use of social media platforms to boast about crimes committed. The laws are in response to the 'growing phenomenon' of crimes being posted to social media, with the arrests coming under specialist Strike Force Sweetenham. The laws introduced in March 2024 can add up to two years to a prison sentence.

Figure 4.4 In 2022, a Russian hacker carried out a cyberattack on Australia's largest health insurance company, Medibank, that exposed the data of 9.7 million people, including the prime minister's data.

Research 4.1

Using the internet, research the types of criminal activities that can be carried out under the following topics:

- terrorism
- unlawful immigration
- fraud involving email and the internet
- dissemination of obscene materials electronically
- funds transfer fraud
- health benefits fraud
- social security fraud.

However, please be careful to only access legitimate websites as these topics are fraught with the possibility of inappropriate material being presented online.

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4.3 Agencies of reform

As discussed, there are various reasons why the law may become dated or no longer able to regulate society in a fair and just manner. The extent to which the law may need to be reformed is usually investigated and reported on by one or more of the following organisations or groups.

Law reform commissions

Law reform commissions have been established by various parliaments within their own jurisdictions to report on matters referred to them under what is called the **terms of reference** for a particular inquiry. The reports may contain recommendations for ways to modernise or simplify the law, or to eliminate defects.

terms of reference a set of guidelines used to define the purpose and scope of an inquiry

harmonisation agreement among the laws of different jurisdictions

An essential feature of law reform commissions is that they are independent of the parliament that established them. This is important because political interference in the research and reporting process can skew the findings. It has also been said that when a government provides the terms of reference for an inquiry into an area of law reform, it should not already know the answer. In other words, the government should not know what the end result or recommendations will be.

For the purposes of our area of study, the two law reform commissions to be examined are the Australian Law Reform Commission and the NSW Law Reform Commission.

Australian Law Reform Commission

The Australian Law Reform Commission (ALRC) was established in 1975 and operates under the *Australian Law Reform Commission Act 1996* (Cth). It is an independent statutory body (i.e. it was established by an Act of Parliament).

The main role of the ALRC is to review Commonwealth laws relevant to matters referred to it by the Attorney-General, to conduct inquiries into areas of law reform in these areas, and to advise the government on how the law can be changed to meet current needs. The ALRC also works to bring about **harmonisation** of Commonwealth, state and territory laws where possible. The ALRC must ensure that laws, proposals and recommendations do not trespass on personal rights and are consistent with Australia's international obligations, particularly in the area of human rights.

An inquiry involves a process of research and consultation. Once the ALRC has completed an inquiry and report, it makes recommendations to the federal government through the Attorney-General.

Analysis 4.1

Scan the QR code to hear Justice Berna Collier talk about her time as Commissioner of the ALRC.

1. What ALRC contribution to law reform did Justice Berna Collier identify as being the most significant? Discuss why Justice Collier found this contribution to be the most significant.
2. Explain why she believes that the difficulties of keeping up with technological change rank highly as a challenge for law reform in the next decade.
3. Suggest why challenges like these make the ALRC the 'ideal vehicle' to assist government in the law reform process.

Video 4.1 Justice Berna Collier talks about her time as a Commissioner of the ALRC. (02:12)

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The government can accept all or some of the recommendations or can ignore the report altogether. Sometimes the political climate at the time may determine whether the ALRC's recommendations become enacted into law.

In its annual reports, the ALRC publishes a summary of the implementation status of its recommendations. More than 80 per cent of the ALRC's recommendations have been either substantially or partially implemented by the government. Some of the areas of law recently examined by the ALRC are the federal laws affecting **elder abuse**, the family law system, and the incarceration rates of First Nations peoples.

NSW Law Reform Commission

The NSW Law Reform Commission was set up under the *Law Reform Commission Act 1967* (NSW). It was the first of its kind in Australia. It has a similar role to that of the ALRC, but at the state level: to consider the laws of New South Wales with a view to eliminating aspects of the law that are out-of-date, unnecessary, too complex or defective. The commission's role includes consolidating overlapping legislation, hence simplifying the law. The NSW Government refers issues to the commission for investigation as to what, if any, law reform is necessary. In its research, the commission will generally consult with the public.

Example: Unanimous vs majority jury decisions

In 2005, the NSW Law Reform Commission investigated changing the requirement that verdicts by juries be unanimous to verdicts being majority decisions of 11 out of 12 jurors, or 10 out of 11 jurors. Prior to this inquiry, research in 2002 by the NSW Bureau of Crime Statistics and Research showed that eight per cent of trials in the District Court between 1998 and 2001 resulted in a **hung jury**. This research also showed that in over 90 per cent of these hung juries, the vote was 7–5 or 8–4. Given these statistics, there did not appear to be a strong basis for changing the system. There were not many cases in which a jury was unable to return a verdict because of one juror. Other arguments put forward in favour of majority verdicts were that they would make verdicts quicker and easier, would create less pressure on jurors, and would be consistent with most other Australian jurisdictions.

elder abuse
an act or failure to act to the disadvantage of an older person occurring in a relationship of trust

hung jury
a jury that is unable to reach agreement

Arguments put forward for retaining unanimous jury verdicts included:

- unanimity accords with the principle of 'beyond reasonable doubt'; arguably, if one or two jurors are not confident that the accused is guilty, that is enough to constitute reasonable doubt
- unanimity allows for greater deliberation of the issues
- juries may disagree for good reasons
- unanimity promotes community confidence in the justice system
- unanimity is consistent with the requirement of unanimity in trials for Commonwealth offences
- the number of hung juries is relatively small.

Figure 4.5 A lawyer talks to the jury during a trial. In 2005, the NSW Law Reform Commission investigated changing the requirement that verdicts by juries be unanimous to verdicts being majority decisions of 11 or 10 jurors.

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In its conclusions, the commission stated:

> We believe that until a comprehensive study is conducted in New South Wales to determine the existing practices in New South Wales jury trials, and what improvements need to be made, no major overhaul of the jury system should be attempted ... The facts are that we simply do not know enough about how actual juries really deliberate and why they reach the decisions they do ... Until more information is uncovered as to the problems that need to be addressed, the introduction of majority verdicts would be of limited value.

Despite this advice, the NSW Government passed the *Jury Amendment (Verdicts) Act 2006* (NSW). It amends the *Jury Act 1977* (NSW) to allow majority verdicts of 11–1 or 10–1 after a reasonable time for deliberation has passed (not less than eight hours) and where the court is satisfied that it is unlikely the jury will reach a unanimous verdict.

This case study, although historical, clearly illustrates that the changes may have been politically motivated, rather than to reform a law that was not working. An appeal to the 'law and order' vote has been a common feature of the political landscape since the late 1980s in New South Wales. A reason given for the introduction of the law was to protect the victims of crime from the anguish of a lengthy retrial. The extent to which this law will compromise the right of the accused to a trial with the highest standard of proof remains to be seen.

The extent to which New South Wales adopts recommendations of the NSW Law Reform Commission usually depends on economic and political considerations at the time. Further, the work of law reform commissions may provide evidence-based advice for governments that can be ignored subject to the political agenda of the government.

Research 4.2

View the website of the Australasian Legal Information Institute and select one of the NSW Law Reform Commission's completed reports. Provide a brief outline of the following:

- the purpose of the report
- the findings of the report.

Ask your teacher for some assistance as you review the report you have chosen.

Parliamentary committees

Parliamentary committees can be established by both Houses of Parliament. For example, at the federal level, the House of Representatives and/or the Senate may not have sufficient time in parliamentary sitting sessions to discuss issues that arise from a particular piece of legislation. There may be flaws in the effectiveness of a law or the legislation may be particularly complex, requiring greater scrutiny. Committees scrutinise government activity, including policy and administrative decisions, and oversee the expenditure of public money.

A vote is usually taken to take something to committee. A committee may involve only senators or only members of the House of Representatives. A 'joint committee' has both members and senators.

A 'standing committee' is a committee that is permanent during the life of the body that appointed it. Standing committees inquire into and report on matters referred to them by the Senate or House of Representatives, including estimates of expenditure, Bills and the performance of departments allocated to them. An example of such a committee is the Senate Standing Committee on Finance and Public Administration.

'Select committees' are small committees appointed for a particular purpose, or a once-only task.

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Once a committee has been asked to undertake an inquiry, the terms of reference are drawn up. Members of the public and experts in a field may be asked to give submissions. The committee hears witnesses, examines evidence and formulates conclusions. The media usually attends and reports on committee proceedings.

As the hearings are conducted in public, every submission is recorded in **Hansard** and is available on the internet. At the end of an inquiry, the committee writes and **tables** a report in parliament.

The media

One of the hallmarks of a sound working democracy is a 'free' and 'fair' press. This means that the government is not meant to be able to influence what is reported and how it is reported, so stories that reach the public are an accurate account of what is really happening. Another essential feature of a working democracy is diversity of media ownership to dilute the influence of individuals or media companies that may have a particular ideological view to push.

Because of their large audience and geographical reach, current affairs programs like the ABC's *7.30 Report* are able to interview important political figures, such as the prime minister, state premiers and cabinet ministers, about contentious issues. Keeping citizens informed allows members of the public to apply pressure on governments to address injustice, incompetence or corruption. Thus, the media can be a powerful vehicle for holding governments accountable.

The effectiveness of non-legal mechanisms in influencing law reform can depend on the politics of the day. For example, an issue that affects voters in a hotly contested electorate, or an electorate that is part of the government's key support base, is more likely to be addressed than one that affects voters in a safe seat. If votes in an electorate do not pose a threat to seats in parliament, then the issue may be ignored in the hope that it will eventually fade from public attention.

The modern media can promote law reform simply by reporting the stories of individuals who suffer discrimination, persecution or financial loss due to a poorly framed law. For example, the plight of victims of sexual assault has received significant attention by all forms of mass media over the past few years. The resulting law reform recognised that sexual assault is a 'special crime' that cannot be treated like other crimes, requiring additional legal responses. This will be examined in detail in Chapter 5.

Hansard
a full account of what is said in parliament or in parliamentary inquiries; named after the English printer T.C. Hansard (1776–1833), who first printed a parliamentary transcript

table
to begin consideration or discussion

Non-government organisations

Non-government organisations (NGOs) are independent of governments. They are under no obligation to conform to any government policy and therefore can be a source of objective information about various issues around the world. This is particularly important for people who live in countries with repressive governments that restrict freedom of speech.

The report *Non-Governmental Organisations in the Commonwealth: Guidelines for Good Policy and Practice*, written by Colin Ball and Leith Dunn in 1994, identified the common characteristics of NGOs:

- NGOs are formed voluntarily by individuals.
- NGOs are independent of government.
- NGOs are not for private personal gain or profit. Money generated goes towards the goals of the organisation, though it may also be used to produce information and pay for expenses such as utilities, publications and paid employees.
- The aim of NGOs is to improve people's circumstances and prospects, within the scope of their mission.

NGOs can work with governments where there are shared goals.

As a mechanism for law reform, the effectiveness of NGOs can vary. Some NGOs, such as Amnesty International and Greenpeace, have developed a formidable reputation in their pursuit of goals such as human rights and combatting environmental threats.

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Consequently, they now have the resources and the tactics, developed over many years, to put pressure on governments.

However, due to NGOs' independent status, governments and other institutions can ignore them and continue to carry out practices that are contrary to the NGOs' goals. For example, the Royal Society for the Prevention of Cruelty to Animals has campaigned for an end to live animal exports to other countries, but the Australian Government is reluctant to stop this profitable trade.

Lobby groups

A lobby group is an organised group of people who try to influence government ministers or other members of parliament to advance their social or political agenda. The goal may be to change the law, to keep a particular existing law or to introduce new laws.

Lobby groups target members of parliament, parliamentary committees, the media and the public as well as governmental inquiries.

Figure 4.6 First Nations people occupy the foyer and front entry of Parliament House in 2019 in Canberra, calling for government action on climate change and water protection in Australia. Lobby groups often target parliament to advance their social or political agendas.

They may do this by writing letters, requesting a meeting with a representative or senator, making policy submissions, writing letters to the editor or calling talkback radio. A lobby group may also be an NGO, an industry group or other interest group.

For example, the Lone Fathers Association of Australia has been a strong advocate for 'shared equal parenting'. This association is a national peak body for separated parents and states on its website that it is a non-sexist, non-sectarian, non-profit and self-help educational and welfare organisation devoted to the interests of lone fathers and their children, as well as their friends, extended family and carers. Membership is open to all separated parents – with the proviso that members must be willing to help financially support their children. Thirty-five per cent of the association's membership are women.

Amendments made to the *Family Law Act 1975* (Cth) in 2006 were intended to encourage the use of non-court-based services to deal with relationship difficulties and separation, and to ensure that children have meaningful relationships with both parents after a separation or divorce. A number of organisations – including the Women's Community Shelters, Legal Aid NSW and the Women's Legal Service NSW – made submissions to a state inquiry into the effects of the amendments, expressing concern that they not only subordinated children's best interests to the interests of the parents, but also offered reduced protections for victims of family violence. A former Chief Justice of the Family Court, Alastair Nicholson, commented that the amendments were 'ill-researched, unduly influenced by fathers' groups and did little to reform family law'.

Further reform to the *Family Law Act 1975* (Cth), to attempt to address the adverse fallout of the previous reforms, came into effect in June 2012. Lobby groups can be important agents of law reform as long as some groups' interests are not favoured over others simply because they are better organised and can more effectively articulate their views.

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Review 4.3

1 Compare and contrast the aims and methods of the following law reform agencies:
   - **a** law reform commissions and lobby groups
   - **b** parliamentary committees and law reform commissions
   - **c** lobby groups and the media
   - **d** lobby groups and non-government organisations.

2 Identify ways individuals can contribute to an inquiry by a law reform commission or a parliamentary committee on an issue that concerns them.

4.4 Mechanisms of law reform

The mechanisms of law reform are the 'machinery' that actually brings about changes. These include judicial and legislative branches of government and international organisations.

Courts

The manner in which courts make law through **precedent** (as outlined in Chapter 2) can be considered a means of law reform. Precedents made in higher courts clarify what the law should be in cases where the law is in an early stage of development or where there is a need to clarify the meaning of words contained in legislation.

Sometimes, matters come before a court before they have been considered by parliament. However, courts do not consciously set out to reform the law. The role of judges is to apply the law to the situation presented to them, and as such, law reform in the courts comes about in an *ad hoc* way. Although changes to the law do occur because of judicial decisions, they do so over an extended period.

Even so, it is well recognised that courts, especially the High Court of Australia, have delivered and will continue to deliver decisions that revolutionise the legal landscape in Australia. An obvious example is the 1992 Mabo decision (*Mabo v Queensland* (No 2) [1992] HCA 23), which declared that native title still existed within Australia and that the concept of *terra nullius* was a legal lie perpetuated by the British at the time of settlement.

Parliaments

Parliaments today are the institution where most law reform is realised. The process of changing the law occurs through the passage of Bills.

However, the impetus for this type of change usually comes from other sources; namely, the conditions that lead to law reform and the agents of reform. Detailed knowledge of the subject matter is often required to report and comment accurately on areas where reform is needed, and parliamentarians' expertise does not always extend to this level.

precedent
a judgment that is authority for a legal principle and that provides guidance for deciding cases that have similar facts

balance of power
the power held by the political party whose vote is needed to pass legislation; under the Westminster system of government in Australia, usually determined in the upper house of Parliament

The parliament is still a place, though, where proposed laws are debated. This can be a rigorous and intense process, especially if a proposed law is controversial or is a radical departure from previous laws. If a political party holds government, it obviously has a greater chance of its Bills being passed. A Bill's fate, however, may depend on which party or parties hold the **balance of power** in the Senate or, in New South Wales, in the Legislative Council.

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Figure 4.7 Australian Labor Party leader Kevin Rudd during the 2007 election campaign. He campaigned with the promise of repealing 'WorkChoices' legislation, which was done in 2008 after he won an extra term.

Political parties present their policies to the voters before each election, and if voted into power they are expected to fulfil these promises. For example, the Labor Party, under former leader Kevin Rudd, campaigned in 2007 with the promise of repealing John Howard's 'WorkChoices' legislation. By the end of 2008, the Rudd government had introduced new workplace relations legislation that abolished some of the harsher elements of WorkChoices. In 2012, the Gillard government, being a minority government, had to make many compromises with the Greens Party and independent members of parliament to pass legislation. In contrast, the commanding majority of the Baird Liberal NSW Government (2016) made the passage of legislation a smoother process.

As parliament is the branch of government that makes law, it will continue to be the main mechanism by which major law reform is carried out.

Amending Acts

Parliament must pass another Act to amend an existing Act. For example, the *Crimes (Forensic Procedures) Amendment Act 2007* (NSW), which changed several sections of the *Crimes (Forensic Procedures) Act 2000* (NSW), was enacted and came into force through normal parliamentary procedures. However, you will not find it in the current statutes of New South Wales, because it has been repealed. Indeed, section 4(1) of the Act states that 'this Act is repealed on the day following the day on which all of the provisions of this Act have commenced'. What's going on? Amending Acts are passed for a very specific purpose: to amend another piece of legislation. Once this is done, they are often no longer needed, though they must contain a provision to guard against their purpose being 'undone' when they are repealed. Section 4(2) of the *Crimes (Forensic Procedures) Amendment Act 2007* (NSW) states that 'the repeal

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of this Act does not … affect any amendment made by this Act'. The function of an amending Act is just that: to amend. The Act that it amends is called the 'principal Act'. View some amending Acts, and previous versions of principal Acts, by choosing 'historical notes' or 'Acts (as made)' in an online legislation database.

Lists of 'consolidated Acts' and 'in force legislation' will contain Acts that are currently in force; that is, that have not been repealed.

United Nations

The United Nations is the chief organisation involved in international law and is the primary mechanism in the evolution and reform of the law governing states. The role of the United Nations in the development and implementation of international treaties and the effectiveness of the United Nations in promoting peace and security around the world via international law was discussed in Chapter 2. Law reform may take place when Australia implements a treaty by passing domestic legislation that takes account of its international obligations.

Intergovernmental organisations

As mentioned in Chapter 2, many intergovernmental organisations are subsidiaries of the United Nations. These bodies are established to meet and decide upon certain international issues (e.g. refugees, tariffs and wealth). To this extent, they contribute to international law reform on global and regional scales through the promotion and development of multilateral and bilateral treaties.

Other agencies

Other agencies of law reform are:

- Royal Commissions
- the NSW coroner
- the Office of the NSW Ombudsman
- the Australian Human Rights Commission.

For more information about the role these agencies play in law reform in Australia, visit the agencies' websites.

Figure 4.8 The 2021 Western Australia Royal Commission into Crown Resorts investigated operations at Crown Perth Casino. Royal Commissions can act as agencies of law reform.

Review 4.4

1 Define 'precedents' and identify their role in court decisions.
2 Outline the process for amending a principal Act.
3 Identify the role of the United Nations.

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Chapter summary

- Law reform is the process of changing the law to make it more current, to correct defects, to simplify it and to remedy injustice.
- The conditions that give rise to law reform are changing social conditions, new concepts of justice and new technology.
- The law must reflect social values if it is to stay relevant and to ensure a high rate of compliance.
- When the law fails to deliver just outcomes to individuals or groups within the community, this may mean that new concepts of justice are needed.
- The rate of technological change in the world today has put the law under significant pressure to stay current. The law must change to accommodate new possibilities.
- Law reform commissions have been established by various parliaments within their own jurisdictions to report on matters referred to them. These commissions are independent of the government and submit recommendations that the government can implement fully, partially or not at all.
- Parliamentary committees are established by both Houses of Parliament to examine ways of addressing flaws in legislation, to look at how to simplify the effectiveness of a law, or to examine more closely legislation that is particularly complex. It could also be the case that developments within society warrant greater attention from the legislature and therefore a committee is set up.
- The media influence law reform by keeping citizens informed and holding governments accountable.
- Non-government organisations are organisations that are independent of governments. Their aim is to influence governments to make changes that will improve people's lives.
- The primary mechanisms of law reform are the courts and parliaments. The United Nations can be a mechanism of law reform in Australia through the country's participation in international treaties.

Multiple-choice questions

1 Which of the following statements is the most correct way to describe public morality?
- **a** Public morality is a shared set of religious beliefs.
- **b** Public morality refers to the crimes committed against the community.
- **c** Public morality refers to the similar values and beliefs held by the majority of the community at a particular point in time.
- **d** Public morality is the shared set of beliefs held by the Australian Parliament.

2 Law reform is necessary at times because technology is advancing so fast. Which of the following is NOT an area in which the law has had to change due to technological change?
- **a** Identity theft
- **b** Same-sex relationships
- **c** DNA evidence in criminal cases
- **d** Legal definition of death

3 Law reform commissions have been set up by parliaments to investigate which areas of the law need to be reformed. Which of the following determines the scope of their investigation?
- **a** Ministers' directions to the law reform commission
- **b** Terms of reference
- **c** Public opinion
- **d** Media commentary

4 Which of the following is NOT an agent of law reform?
- **a** The media
- **b** The Queen or King
- **c** Superior courts
- **d** Lobby groups

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5 What could citizens do about a federal law that explicitly discriminates against naturalised citizens who were born overseas?
   - **a** Form a law reform commission at the local level
   - **b** Bring defamation proceedings against TV or radio stations that run programs on that law
   - **c** Call talkback radio stations and form a lobby group to pressure parliament
   - **d** Lobby the state Supreme Court

Short-answer questions

1 Explain why changing social conditions contribute to the need for law reform.
2 Explain, using examples, how and why the law has lagged behind technology.
3 Discuss the reasons why Australia no longer imposes capital punishment for murder.
4 Outline some of the problems that have arisen with the advancement of DNA evidence.
5 Explain why identity crime can be difficult to prosecute.
6 Explain how the United Nations can be a vehicle for law reform in Australia.

Extended-response question

Describe the extent to which the law has improved its response to domestic violence.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Chapter 5
Law reform in action

Chapter objectives

In this chapter, you will:

- identify and apply legal concepts and terminology
- discuss the effectiveness of the legal system in addressing issues
- investigate the interrelationship between the legal system and society
- discuss the role of law in encouraging cooperation and resolving conflict
- discuss the role of law in initiating and responding to change
- locate, select and organise legal information from a variety of sources including legislation, cases, media reports, international instruments and documents
- account for differing perspectives and interpretations of legal information and issues
- communicate legal information using well-structured responses.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 11–13 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Legal oddity

In New South Wales, when motorists make petrol stops, they are required by law to lock their car before entering the service station. Indeed, drivers who move more than three metres away from their car without locking the doors and securing the windows are liable for a fine.

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Topic 1
Law reform and native title

Reader advice

This section contains information about colonial violence that may be traumatising to Aboriginal and Torres Strait Islander students. Teachers should ensure cultural safety of students engaging with this material.

The section also contains historical material that includes racist ideas, practices and terminology.

Relevant law

IMPORTANT LEGISLATION

National Parks and Wildlife Act 1974 (NSW)
Racial Discrimination Act 1975 (Cth)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Aboriginal Land Rights Act 1983 (NSW)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
Native Title Act 1993 (Cth)
Native Title Amendment Act 1998 (Cth)
Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)
Native Title Amendment Act 2007 (Cth)
Native Title Amendment (Technical Amendments) Act 2007 (Cth)
Native Title Amendment Act 2009 (Cth)
Native Title Amendment Act (No 1) 2010 (Cth)
Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)
Native Title Legislation Amendment Act 2021 (Cth)

SIGNIFICANT CASES

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Mabo v Queensland [1988] HCA 69
Mabo v Queensland (No 2) [1992] HCA 23 ('Mabo case')
Wik Peoples v Queensland [1996] HCA 40 ('Pastoral leases case')
Yarmirr v Northern Territory (2001) 208 CLR 1
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58
Bennell v Western Australia [2006] FCA 1243
Bodney v Bennell [2008] FCAFC 63
Manado on behalf of the Bindunbur Native Title Claim Group v Western Australia [2018] FCAFC 238
Galarrwuy Yunupingu (on behalf of the Gumatj Clan or Estate Group) Compensation Claim (DP2019/001)

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5.1 Conditions that led to law reform relating to native title

In basic terms, **native title** refers to the ownership of and accessibility rights to land by the original inhabitants. In Australia it has a legal significance as a right to an area of land, claimed by peoples whose ancestors were the original inhabitants before European colonisation and who can prove that they have had a continuous association with that land. It is a contentious topic in Australian law as, traditionally, First Nations peoples followed community-based models of land ownership or custodianship. Thus, the concept of native title has meant that, to retain access to their traditional lands, First Nations peoples have had to expand their understandings of land ownership to include the Western notion of property ownership, or else continue to have their land stolen through ongoing expansion of the colony.

In fact, the term 'native title' has such significance that the High Court used it when they recognised First Nations peoples' property rights in *Mabo v Queensland (No 2)* [1992] HCA 23 ('Mabo case'). The Mabo decision was the first legal recognition that Aboriginal and Torres Strait Islander peoples had systems of law and ownership of their lands that existed long before European occupation and colonisation. This recognition overthrew the idea of ***terra nullius***, and subsequent cases have led to efforts to enshrine native title in legislation.

native title
the right of First Nations peoples to their traditional lands

terra nullius
(Latin) 'land belonging to no-one'; the idea and legal concept that when the first Europeans came to Australia, the land was owned by no-one and was therefore open to settlement; this concept has been judged to be legally invalid

History of government policy

First Nations peoples have inhabited the Australian continent for over 60 000 years. Although they did not use legal documents or written laws, it is undisputed that First Nations peoples used oral law, customs and traditions to maintain order and control behaviour. Elders employed negotiation, discussion, rulings and sanctions when it came to unacceptable behaviour. First Nations peoples' societies were, and still are, rule-governed.

Figure 5.1 Waier Island, part of the Murray Islands group – the land contested in the Mabo decision

It is clear from the map in Chapter 2 that First Nations peoples lived in distinct cultural and language groups; and so it is not accurate to categorise First Nations peoples as belonging to a single cultural group. In 1788, when the First Fleet arrived, white colonisers attempted to categorise the continent as *terra nullius* because of the different ways in which land ownership was understood by First Nations people. This was a common approach of white colonisers all over the world, and led to the attempted destruction of many Indigenous peoples.

The colonial laws and policies that were developed in relation to First Nations peoples did not serve their interests, but rather those of the white colonists. Some examples of these laws and policies can be seen in Table 5.1.

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Table 5.1 Government policies and their effects on First Nations peoples

Policy or law	Effect
Dispossession/dispersal (1788–1800s)	
Since First Nations people were not recognised as citizens, it was not a criminal offence to hunt, shoot and kill them. The general belief was that First Nations peoples would eventually 'die out'. **Martial law** in New South Wales (1816) Martial law in Tasmania (1824)	Massive reduction in First Nations population. First Nations peoples' traditional areas were converted to farming lands. First Nations people could be shot on sight if armed with spears, or even if they were unarmed and within a certain distance of houses or settlements. Settlers were authorised to shoot First Nations people.
Protection (1869–1909)	
Aboriginal Protection Act 1869 (Vic) *Aborigines Protection Act 1909* (NSW)	These Acts gave wide powers to the Board for the Protection of Aborigines, which governed where First Nations people could live and work, what jobs they could do, and who they could marry and associate with. The powers of the board under the New South Wales Act were similarly wide and included the power to remove children from homes to be placed in missions. This was the beginning of the Stolen Generations.
Assimilation and integration (1900–1962)	
By this time, First Nations peoples were a long way from 'dying out'; there was a policy shift to 'Europeanise' them so that they would abandon their language, culture, artefacts and traditions, and become 'similar' to Europeans.	The European majority attempted to teach First Nations peoples to be 'white'. This was met with both submission and resistance.
Nationality and Citizenship Act 1948 (Cth)	First Nations people became Australian citizens, along with everyone else, but not all states gave them full rights (e.g. the right to vote in Commonwealth elections).
In the 1940s 'exemption certificates' or 'citizenship certificates' were given to some First Nations people by some states.	Effectively, these certificates meant the holders were 'not Aboriginal'. The certificates had strict conditions (e.g. certificate holders had to live a 'European lifestyle') and could be revoked without warning.
1962 amendments to the *Commonwealth Electoral Act 1918* (Cth)	The 1962 amendments gave the right to vote in Commonwealth elections to all First Nations people in states that had not already provided this right.

dispossession
the removal or expulsion of people from their traditional lands

martial law
law enforced by the military over civilian affairs; overrides civilian law

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Table 5.1 *(Continued)*

Policy or law	Effect
Reconciliation (1967–)	
1967 referendum amending the *Australian Constitution*	The phrase 'other than the Aboriginal race in any state' was removed from section 51(xxvi) of the *Australian Constitution*, giving the Commonwealth Government the power to make laws specifically for the benefit of First Nations peoples. Section 127 – which provided that First Nations people were not counted as part of the population for census purposes – was deleted.
Report, 'Creating a Nation for All of Us' (2011), presented to the Prime Minister in 2012	The final report from an expert panel recommends that the *Australian Constitution* be amended to recognise First Nations peoples.
Closing the Gap framework (2008–2018)	An Australian Government strategy that aimed to reduce disadvantage among First Nations people. It was based on seven targets, and the Department of the Prime Minister and Cabinet produced a report at the end of each year analysing progress on each of these targets.
Closing the Gap framework (2019–2029)	In 2019, a new agreement was signed, with a revised framework and 16 new targets. These include life expectancy; education (including early childhood education); employment; housing; not being over-represented in the criminal justice or child protection systems; social and emotional wellbeing; and cultural, spiritual, physical and economic relationship with their land and waters. Reports on these targets are issued by the Productivity Commission.
Uluru Statement from the Heart (2017)	A petition written and endorsed by the First Nations delegates to the First Nations National Constitutional Convention. It is directed to the people of Australia, with the aim of bringing about an Indigenous voice in parliament. Although the referendum to change the *Constitution* to include this failed, it did raise greater awareness of issues faced by First Nations peoples.

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Review 5.1

1 Write a meaning for 'native title'.
2 Identify the Latin term that means 'land belonging to no-one'. Outline why the British Government wrongly operated as though the land in Australia had no ownership.
3 Describe the legal systems of First Nations peoples prior to 1788.
4 Describe the three main policies of Australian governments in relation to First Nations peoples from 1788 to 1967. List one effect of each policy.
5 For the *Australian Constitution* to recognise First Nations peoples, it has to be amended. Using your legal knowledge, outline the processes required to change the *Constitution*.

Research 5.1

Research 'The Voice to Parliament' and identify the arguments and campaigns for and against 'The Voice'.

5.2 Operation of the legal system relating to native title

Part of the rich and diverse cultural heritage of First Nations peoples is a well-developed structure of laws that governed, and in many cases continues to govern, their relationships with one another, and with the land. All of this changed with European colonisation. European colonisation and subsequent laws and policies attempted to dismantle First Nations governance structures. It has taken 200 years for these systems to be formally recognised by the colony.

The doctrine of *terra nullius* in Australia

The term *terra nullius* means 'land belonging to no-one'. As a common law concept, it refers not only to uninhabited territory, but also to territory that has no recognisable system of law, or social or political organisation. Under the 'doctrine of reception', when uninhabited land was colonised by Britain and no other system of law was recognised, then British law was forced upon the people.

Over the course of a few decades, the perception that the country had very few inhabitants, and that they had no political or legal organisation, and thus no sovereignty, led to the legal fiction justifying British possession and the imposition of British law. Although Governor Arthur Phillip was under orders to establish friendly relations with First Nations peoples and did make serious efforts in this area, language and cultural barriers meant that negotiations had limited success. *Terra nullius*, as a justification for British policy, was evident by 1835 when explorer John Batman attempted to lease land from the Kulin Nations peoples in the area around the Birrarung, now known as the Yarra River, in what is now Victoria. Batman negotiated a treaty for the transfer of the land in exchange for tools, weapons, food and blankets. Shortly thereafter, Governor Richard Bourke declared the treaty null and void, on the basis that New South Wales – which at the time extended from Cape York in the north to Wilsons Promontory in the south and nearly as far west as the current border of Western Australia – belonged to the Crown, not to First Nations peoples.

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Figure 5.2 Governor Arthur Phillip was under orders to establish friendly relations with First Nations peoples but had limited success.

The concept of *terra nullius* has had a vast impact on First Nations peoples. Their treatment by the colonists, which involved theft of land, theft and active dismantling of culture and forced dispersal, has led to considerable and ongoing oppression and marginalisation. This will be discussed in more detail later in the text. By the 1840s, for example, most Aboriginal people in Tasmania had been killed by the colonists, had died from introduced diseases, or had been forcibly relocated.

The concept of *terra nullius* has also had an enormous impact on native title claims (that is, the right to claim ownership of traditional lands and waters). Any First Nations community that has tried to claim native title has had to prove that they are the Traditional Owners of the land and have an ongoing connection with it. As the land was falsely deemed as vacant by the British, it also meant that the settlers could take possession of most of the arable land with government approval – which entailed driving off anyone else who might be living on this land at the time. Thus, the quandary arises, if the Traditional Owners of the land have been forced off their land (in some cases, 200 years ago), how then do they prove a continuing connection with this land under First Nations law and custom?

The legal status of First Nations peoples up to 1967

The doctrine of *terra nullius* meant that legally, First Nations peoples did not exist as citizens. The criminal laws did not protect First Nations peoples and, throughout the first half of the nineteenth century, government policies tended to accept violence as a way of dealing with conflicts. One of the most significant and tragic events of the 1800s occurred in New South Wales at Myall Creek, near Bingara. In June 1838, a group of Wirraayaraay people who had set up camp on a cattle station were brutally attacked and killed by a group of white men (11 convicts and one free man), who claimed they were acting in retaliation for the theft of cattle. Twenty-eight Wirraayaraay men, women and children were slaughtered.

The Governor of New South Wales, Sir George Gipps, ordered a police investigation into the massacre. This was the first time that the British colonial administration had taken a decision to apply the criminal law on behalf of First Nations people. Initially, the 11 convicts were found not guilty of the crime; however, a subsequent retrial sent seven men to their death by hanging. As a result of these consequences, further massacres of First Nations peoples went unreported.

Until the 1967 referendum, there were two references to First Nations peoples in the *Australian Constitution*: section 51(xxvi) and section 127. Section 127 excluded First Nations peoples from the census. Section 51(xxvi) enabled the Commonwealth to make laws in respect of 'people of any race for whom it is deemed necessary to make special laws' but excluded 'the Aboriginal race' from this power. This effectively reserved the responsibility of matters regarding First Nations peoples for state governments. Since there were no federal laws governing the welfare of First Nations peoples, different states interpreted their rights and legal status in various ways, resulting in inconsistencies and inhumanity.

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Many people incorrectly believe that the 1967 referendum gave First Nations peoples the right to vote. However, amendments in 1962 to the Commonwealth Electoral Act had already extended the right to vote in Commonwealth elections to all First Nations peoples who did not already have this right under the laws of their state – namely, those in Western Australia and Queensland. The right to vote in state elections had been achieved in all states by 1965. By contrast, most Australians had been able to vote in federal and state elections since 1911.

Nor did the referendum grant citizenship to First Nations people: most of the federal and state laws discriminating against them had been repealed by 1967. Over 90 per cent of the population voted 'yes' on the amendments to the *Constitution*. Section 51(xxvi) was amended to allow the federal government to legislate for First Nations peoples and to override any discriminatory state laws. Section 127 was deleted. From this point on, Indigenous affairs became a federal issue, and First Nations peoples were counted in the census.

The development of native title

Native title claims in the Northern Territory

In 1963, Yolngu people from the Gove Peninsula, in eastern Arnhem Land, sent a bark petition to the Commonwealth Government protesting the removal of some 300 hectares of land for bauxite mining without their permission. The petition failed to move the federal government to recognise the rights of the Yolngu people and hence the 'Gove land rights case' (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141) commenced in the Northern Territory Supreme Court in 1971. In his ruling, Justice Blackburn stated that if the Yolngu people did have any type of native title rights, they would have been extinguished under common law. Thus, the doctrine of *terra nullius* prevailed and they could not prevent mining on the land.

Figure 5.3 The annual Garma festival is held at Gulkula, a significant ceremonial site for the Yolngu people of north-east Arnhem Land. In 1963, a bark petition was sent by the Yolngu people to the Commonwealth Government protesting the removal of some 300 hectares of land for bauxite mining without their permission.

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Three years after the unsuccessful Yolngu petition, members of the Gurindji people walked off the job at two cattle stations in the Northern Territory, protesting against poor working conditions and pay. Their action was also a protest against dispossession of their traditional lands by **pastoralists**.

In 1972, the Australian Labor Party, led by Gough Whitlam, was elected after 23 years in opposition. That year, the government responded to the failed Gove land rights case by establishing the Department of Aboriginal Affairs. A Royal Commission into Aboriginal land rights was established, under Justice Edward Woodward, who as a barrister had acted for the Yolngu people in the case. Following the commission's findings, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was drafted. This legislation established a process for Traditional Owners to claim various parcels of land that were listed as available.

Mabo cases

Between 1985 and 1992, Eddie Koiki Mabo and four other men from Mer (the Murray Islands) in the Torres Strait challenged the Queensland Government in two cases in the High Court of Australia: *Mabo v Queensland* [1988] HCA 69 and *Mabo v Queensland* (No 2) [1992] HCA 23.

The first case questioned the validity of a state law that attempted to abolish native title by asserting state ownership of the islands off the coast of Queensland. The High Court held that the Queensland Act was inconsistent with the *Racial Discrimination Act 1975* (Cth), because under it, the Meriam people's right to own property would be limited to a greater extent than that of other members of the community. Under the Constitution, federal law prevails where there is a conflict between state and federal laws.

The second case, now known as the Mabo case, concerned the Meriam people's right to occupy and control Murray Island (Mer). Although Eddie Mabo and one of his fellow plaintiffs died during the course of the case, in May 1992, the High Court ruled (by six judges to one) that Australia was not *terra nullius* and that the Meriam people clearly held native title to their land.

The High Court's decision in the Mabo case gave Australian law the doctrine of native title. The court recognised the traditional rights of the Meriam people to the eastern Torres Strait islands, and also held that native title existed for all First Nations peoples in Australia before European contact. To make clearer the legal position of landholders and the processes that must be followed in claiming native title, the federal government passed the *Native Title Act 1993* (Cth).

pastoralists
farmers raising sheep or cattle, usually on large areas of land

The Mabo case and the ensuing legislation significantly changed the legal status of First Nations peoples in relation to native title and gave some people access to parcels of land throughout Australia to practise their traditional way of life. It did not allow First Nations peoples to 'own' land, as this could, thereby, restrict current owners' access to that land. In December 1993, during the passage of the Native Title Bill through parliament, Prime Minister Paul Keating said:

> [T]oday, as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the Indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women – as a defining element in the character of this nation – and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.
>
> Paul Keating, December 1993.

Growing recognition of native title in some countries

Native title means the right of First Nations peoples to live on their land and use it for traditional purposes. Throughout the world, there has been growing recognition of the rights of First Nations peoples to their own lands.

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Figure 5.4 Display of Aboriginal bark paintings, which double as legal documents, spelling out the case for First Nations sea rights at an exhibition held in Sydney in 2022. The works were painted by artists among the Yolngu to express their traditional ties with the region's coastal zone.

Hunting and fishing rights and land ownership rights have been returned to many First Nations groups in different countries.

There has also been a move to give greater self-determination to First Nations groups. Self-determination means the right of First Nations peoples to control the use of their traditional lands, as well as the local economy and social policy. Māori in New Zealand, Inuit in Greenland and Canada, and Aboriginal and Torres Strait Islander peoples are three groups who have been given greater recognition in terms of native title and self-determination in their own countries.

Legal Links

The Australian Institute of Aboriginal and Torres Strait Islander Studies publishes independent research on native title. This research is available on the institute's website.

Review 5.2

1. Outline the legal status of First Nations peoples prior to 1967.
2. With regard to the recognition of First Nations peoples, recall the changes that occurred between 1967 and 1993. Analyse why these changes occurred.
3. Describe how the Yolngu people's native title claim was resolved in court. Recall how the newly elected Whitlam government responded to this decision.
4. Explain the importance of the 1992 Mabo decision for the legal status of First Nations peoples.
5. Evaluate the importance of the statement made by Prime Minister Paul Keating in 1993 on the passing of the *Native Title Act 1993* (Cth).

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5.3 Agencies of law reform relating to native title

National Native Title Tribunal

The National Native Title Tribunal (NNTT) is a federal government agency set up under the *Native Title Act 1993* (Cth). Under the direction of the Federal Court of Australia, it mediates claims for native title.

The aim of the NNTT is to help resolve native title issues. The tribunal plays a variety of roles; for example, it may act as an arbitrator if the people involved are unable to come to an agreement about proposed developments. It also helps in the negotiation of other sorts of agreements, such as those for First Nations peoples' land use. If requested, the tribunal will aid people who are negotiating proposed developments (future acts) such as mining. It is not a court and does not decide whether native title exists.

Figure 5.5 The process of proving native title can be slow and expensive. In 2016, then Prime Minister Malcolm Turnbull handed over the deeds during the Kenbi Land Claim Title Deed Handover ceremony in Darwin. The Kenbi Land Claim is the most complex and most strongly contested claim in the history of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). It has been the subject of two extensive hearings, three federal court reviews and two High Court appeals.

The process of proving native title can be slow and expensive. For example, in the period between the establishment of the NNTT and 31 December 2011, 200 applications were submitted and 175 determinations were made. Of these 175 determinations:

- 134 were that native title exists over all or part of the claimed area
- 41 were that native title does not exist.

Demonstrating how long the process can take, the Yamatji Marlpa Aboriginal Corporation made a large native title claim in 1996 (covering an area of 48 000 square kilometres in Western Australia), which was only finalised in February 2020.

It is important to keep up to date on native title claims by checking media reports and the NNTT website.

Legal Links

More information about the National Native Title Tribunal can be found on the tribunal's website.

Native title as a collective right

A collective right is one that is claimed and shared by a group of people. Native title is a collective right, as it cannot be claimed by an individual, only by a group (e.g. the Wik people). All members of the group share the rights that are gained.

However, despite native title being a collective right, an individual can bring a claim before the courts, as seen in the Mabo case. As the individual is acting on behalf of the group, all members of the community that they represent will share the rights gained.

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5.4 Mechanisms of law reform relating to native title

When claiming traditional ownership of land, First Nations groups must have their claims legally validated. The only courts that can make this determination are the Federal Court and the High Court. Initial claims are brought to the NNTT, but this body cannot make legal decisions about native title; it can only carry out research and make recommendations.

Claimants may obtain one of three types of determination:

- unopposed determination (if the application is uncontested)
- consented determination (if the parties involved reach an agreement through mediation)
- litigated determination (the application is contested in a court of law, and a judge makes a decision).

Legal Links

The Federal Court of Australia's website provides information about the processes involved in claiming native title and judgments on native title cases.

High Court

When it comes to native title claims, the High Court of Australia has the same role as it does with any other legal case: as a court that hears appeals about decisions made in other courts of Australia. It cannot show sympathy or favouritism or be swayed by public opinion when hearing these cases.

Initial claims of native title made by First Nations peoples are brought before the NNTT, which investigates and mediates between claimants and non-claimants. The Federal Court of Australia will make the determination on whether native title exists. Any appeal against a determination is made to a full sitting of the Federal Court and then to the High Court of Australia. Thus, the High Court acts as a court of last resort in determining whether native title exists in claims made about certain geographical places in Australia.

Mabo case

The Mabo case is important because it led to the introduction of native title legislation. It is also significant because it gave recognition to the First Nations inhabitants of Australia.

In this case, the High Court recognised the existence of native title for a group of Murray Islander people in the Torres Strait. Eddie Koiki Mabo argued that they could prove uninterrupted occupancy of traditional lands, and that the state legislation annexing the islands did not extinguish their pre-existing rights to it.

The case required the High Court to consider the legality of the declaration of *terra nullius*. The court ruled that the Murray Islander people were the Traditional Owners of the land and that they had the right to possess and occupy the islands and enjoy use of their traditional lands. The High Court also established guidelines for future claims of native title. These guidelines included the provision of compensation where the federal government took the native title rights back.

Because of the Mabo decision, the federal government enacted the *Native Title Act 1993* (Cth). The Act has the purpose of:

- providing for native title recognition and protection
- establishing methods and standards by which future dealings that affect native title may proceed
- establishing a process for resolving native title claims and validating past grants of property interests that may be thrown into doubt because of the recognition of native title.

The Act stopped short of defining native title and created the Native Title Tribunal to determine the validity of native title claims. If native titleholders are unable to reclaim their lands and thus exercise their rights, the tribunal determines the compensation to be paid.

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Wik case

The Mabo decision and the *Native Title Act 1993* (Cth) resulted in other First Nations groups attempting to reclaim land. In 1966, the Wik and the Thaayorre people launched a case against the Queensland Government, claiming native title rights to land that was being used by pastoralists, under pastoral leases. Under a pastoral lease, the government owns the land but the farmers have exclusive right to use it. The Federal Court ruled that the existence of pastoral leases extinguished the right to native title. This decision was appealed to the High Court, which ruled that the Wik and Thaayorre people were entitled to their traditional lands. The court found that pastoral leases and native title could co-exist but that when conflict arose, the pastoral leases would prevail (*Wik Peoples v Queensland* [1996] HCA 40).

While the Wik decision did not grant automatic title over Crown land, it caused concern among pastoralists and mining companies that they would have to enter into lengthy negotiations with First Nations peoples over access to and use of land. In response to this concern in rural Australia, the federal government enacted the *Native Title Amendment Act 1998* (Cth), which amended the *Native Title Act 1993* (Cth) and introduced some additional changes. There was much debate in parliament over this Act before it was passed. While the government had a large majority in the House of Representatives, it did not enjoy as much support in the Senate so the transition of the changes were not as smooth as the government would have liked.

The main provisions of the Act are as follows:

- It extinguished native title over any land that was considered privately owned prior to 1 January 1994.
- When native title exists alongside a pastoral lease, the pastoralist is allowed to use the land for primary production without having to consult persons who have native title interests.
- Tough tests were imposed to determine the right to native title. At least one member of the claimants must prove a continuous link with the traditional lands.

Figure 5.6 Dancers of the Wik peoples from Cape York in far north Australia perform outside the Federal Parliament in Canberra in 1998 as Parliament debated the *Native Title Amendment Act 1998* (Cth).

Yorta Yorta case

The Yorta Yorta people are Aboriginal people whose traditional lands are located in north-east Victoria. In February 1994, they applied to the Native Title Tribunal for determination of native title in respect of public land and water. The Yorta Yorta Aboriginal community claimed that some areas of state forests and waterways in northern Victoria and southern New South Wales were their traditional lands. In May 1994, the Native Title Registrar, who assesses claimants' applications to the Tribunal, accepted their application. The application was under mediation from September 1994 until May 1995, when it was then referred to the Federal Court.

The Federal Court dismissed the claim. Justice Olney found that, as the Yorta Yorta people had stopped occupying their traditional lands in the nineteenth century, the evidence did not support the claim. He said, 'The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs.'

The Yorta Yorta people appealed this decision but the Full Court of the Federal Court upheld Justice Olney's findings.

The Yorta Yorta people then appealed to the High Court (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58).

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They claimed that the previous judgments had been wrong in requiring them to prove continuous observance of traditional laws and customs in relation to land. In December 2002, the High Court handed down its decision to uphold the decision of the Federal Court by a majority of five to two.

In its decision, the High Court examined the phrase 'traditional laws and customs' and considered what was required for proving continuous observance of these laws and customs. In its decision, which was to influence future native title claims, the court held that claimants seeking to prove native title must establish that there has been an acknowledgment and observance of customs and laws on a substantially uninterrupted basis since the arrival of British sovereignty. The fact that these laws and customs have been passed down orally is not sufficient; claimants must show that their way of life is influenced by these traditions. In this way, the High Court decision clarified the law with respect to the evidence necessary to prove native title.

Other cases

There have been other significant cases and amendments that have strengthened First Nations peoples' rights in the area of native title in Australia. In 2001, the case of *Yarmirr v Northern Territory* (2001) 208 CLR 1 determined that the native title rights of the Croker Island community included free access to the sea and seabed, the first time that rights involving waters had been allowed.

In *Bennell v Western Australia* [2006] FCA 1243, the judge ruled that native title existed within an area in and around Perth. This was the first time native title was recognised over a capital city and its surroundings. A subsequent appeal, *Bodney v Bennell* [2008] FCAFC 63, lessened the impact of this judgment.

In May 2023, in the Galarrwuy Yunupingu (on behalf of the Gumatj Clan or Estate Group) Compensation Claim (DP2019/001), the full Federal Court found that when the Commonwealth had granted a mining licence to Nabalco in 1968, it had taken without consent the land of the Gumatj people and several other clans. At the time of writing, the amount of compensation was yet to be decided. Whatever the amount, this ruling will have an impact on other native title compensation claims.

Native title cases take a long time to be determined. This can be seen in the case of *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2017] FCA 136. The claim first came to the Federal Court's notice in 2013, with a hearing starting in September 2015 and a decision made in late 2017. Not all parties involved in the claim were happy with the decision and appeals were made against it. However, in one of the last decisions of 2018, the full Federal Court handed down its judgment in favour of the Bindunbur and Jabirr Jabirr/Ngumbarl native title claim groups over land near Broome (*Manado on behalf of the Bindunbur Native Title Claim Group v Western Australia* [2018] FCAFC 238). The whole legal process was time-consuming, expensive and wearying for all involved.

Review 5.3

1. Define 'native title' and 'self-determination'. Identify which First Nations peoples have gained greater recognition in these areas.
2. Assess the significance of the Mabo decision.
3. Outline the impact of the Wik case.
4. Providing examples, explain how a government might respond to the following scenarios:
   - **a** a court decision whose outcomes or likely consequences the government supports
   - **b** a decision that has unclear consequences
   - **c** the concerns of groups within society about a court decision.
5. Describe the native title claim of the Yorta Yorta community.
6. Outline the legal history of the Yorta Yorta claim to native title.
7. Explain why the Yorta Yorta native title claim was denied.
8. Discuss how the Yorta Yorta decision may affect other native title claims.

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Research 5.2

Research to find out the aftermath of the Gumatji compensation decision. Find out how much compensation was given, appeals against this decision and how it impacted on other claims.

Analysis 5.1

Read online the article 'Native title rights, regulations and licences: The Torres Strait Sea Claim' (*The Conversation*, 8 August 2013) at the following link: http://cambridge.edu.au/redirect/10374. Compare the Torres Strait Sea Claim to the original Mabo case.

1 Summarise three important preliminary points discussed in the article.
2 Describe how previous cases paved the way for the Torres Strait Sea Claim case.

Parliament

Parliament's role in recognising native title is to enact legislation to protect the property rights of First Nations peoples.

Public pressure and lobbying by interested parties have seen new laws regarding native title introduced in Australia. As mentioned previously, the *Native Title Act 1993* (Cth) was enacted in response to lobbying by First Nations communities for statutory law reflecting the Mabo case, but also lobbying by the mining and pastoral sectors concerned about potential claims of native title on their land.

Members of parliament, as representatives of their constituents, also have a role to play in introducing and encouraging discussion and debate about issues that concern all Australians. In this way parliament is able to address issues of equity and justice.

In 2008, the then Prime Minister, Kevin Rudd, apologised to First Nations peoples for the past injustices inflicted on them. Speaking in the House of Representatives in Canberra on 13 February 2008, Rudd said the parliament apologised for laws and policies that had 'inflicted profound grief, suffering and loss on these, our fellow Australians'. Actions such as these by politicians and parliament are a way of bringing about social, if not legal, change.

Video 5.1 Opening of Prime Minister Kevin Rudd's apology to Indigenous Australians for past injustices inflicted upon them (03:14)

State legislation

As discussed, the Mabo and Wik decisions led to Commonwealth legislation in the area of native title and self-determination for First Nations peoples. State legislation has also been enacted to give rights to and protect the interests of First Nations peoples. The *National Parks and Wildlife Act 1974* (NSW) provides for the protection of places and relics of significance to First Nations peoples' cultures. Under this Act, it is an offence to knowingly destroy, disturb or remove these objects or to destroy, deface or damage these places.

The *Aboriginal Land Rights Act 1983* (NSW) recognises that:

- land was traditionally owned and occupied by First Nations peoples
- land has spiritual, social, cultural and economic significance to First Nations peoples
- it is appropriate to acknowledge the importance of land to First Nations peoples
- government decisions made in the past have had a negative effect on First Nations peoples' land ownership.

This Act established a system of land councils. The NSW Aboriginal Land Council has the power to make claims on Crown land, approve or reject agreements to allow mining on First Nations peoples' land, conciliate disputes and advise the state government on land rights. The Act provided for the ownership of reserve land to be transferred to First Nations peoples through a local council or the state Land Council; however, only a small percentage of land has actually been transferred. Section 28 of the Act provided for 7.5 per cent of land tax in New South Wales to be paid to the state Aboriginal Land Council to meet administrative costs and to finance land purchases and future development, but this ceased in 1998 due to a 'sunset clause' in the Act, and section 28 was repealed in 2001.

The Act also permits local Land Councils to negotiate agreements with the owners of land to give First Nations peoples access for the purpose of hunting, fishing or gathering.

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Figure 5.7 Hand stencils are an example of the Aboriginal rock art and engravings at Mutawintji National Park in the Far West region of New South Wales. The *National Parks and Wildlife Act 1974* (NSW) provides for the protection of places and relics which are of significance to Aboriginal cultures.

Just as with native title claims, the legal machinations around land rights claims move slowly. In 2022, *The Conversation* reported on the number of unprocessed land rights claims in New South Wales.

> [There] were reportedly 37 000 [unprocessed claims] as of 2020 – many of them having been lodged more than a decade earlier.
>
> The number in 2022 has climbed higher still, and is now 38 200.
>
> Based on the current rate of approvals, it would not be until 2044 that these claims would be processed. These claims impact more than 1.12 million hectares of land.

Lydia McGrady, 2022, 'In NSW there have been significant wins for First Nations land rights. But unprocessed claims still outnumber the successes', *The Conversation*, 14 July.

The NSW Audit Office carried out investigations into the land rights claims process and the backlog in 2022. The investigation found that key government departments (the Department of the Premier and Cabinet and the Department of Planning and the Environment) were failing to meet statutory obligations to process First Nations peoples' land claims. The Office made recommendations about changes that needed to be made.

You should try to keep up to date with information in this area.

Federal legislation

Federal parliament has enacted legislation to protect all parties involved in, and affected by, native title claims. As previously discussed, the *Native Title Act 1993* (Cth) was the Australian Government's response to the High Court's Mabo decision. The Act provides for native title to be recognised and integrated into the land title system. However, if state or territory laws can function concurrently with the Act, then the Commonwealth Government is not allowed to interfere with their operation.

The Howard federal government responded to the High Court's Wik decision with the *Native Title Amendment Act 1998* (Cth). The amendments incorporated the High Court's decision that native title rights could co-exist on land held by pastoral leaseholders. The same government amended the legislation by the *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth). These changes also allowed for township leases. This is where the Australian Government and the Traditional Owners in a township negotiate for a town to be leased for between 40–99 years. The Office of Town Leases oversees the leases and processes. The effects of the 2007 changes were intended to improve the overall efficiency of the processes involved in claiming native title.

Commonwealth legislation has also been enacted to provide some First Nations peoples rights over bodies of water. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is used to protect areas of water and of land that have cultural significance for First Nations peoples.

Further changes

The *Native Title Amendment Act 2007* (Cth) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) were passed by the Howard government in 2007 to bring efficiency to the native title process by speeding up determinations. The *Native Title Act 1993* (Cth) was further amended by the Rudd government with the *Native Title Amendment Act 2009* (Cth), which allowed both the court and the tribunal to mediate. The court is also allowed to refer an application to another 'appropriate person or body' to mediate. More amendments came with the *Native Title Amendment Act (No 1) 2010* (Cth).

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It sets up a process for dealing with the construction of public housing and some other public facilities.

The *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) was passed to provide greater clarification and give greater validity and enforceability to First Nations peoples' land use agreements.

On 16 February 2021, the *Native Title Legislation Amendment Act 2021* (Cth) (the Amendment Act) received royal assent. The Amendment Act amends the *Native Title Act 1993* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) with an aim to improve the native title claims resolution, agreement-making, decision-making and dispute-resolution processes.

As part of your studies in this subject, you should regularly check for more recent updates on these matters.

5.5 Effectiveness of law reform relating to native title

As discussed, there has been progress in the area of law reform relating to native title; however, this progress has been relatively slow. Due to the nature of the law, all stakeholders involved in (and affected by) native title claims must be considered when proposing and enacting new legislation and, as such, the *Native Title Act 1993* (Cth) and its amendments recognise not only the rights of the Traditional Owners, but also those of current landholders.

Although one of the biggest legal steps forward was the overturning of the concept of *terra nullius* in the Mabo case, the initial use of *terra nullius* by the British has continued to be a major obstacle for those communities making native title claims. Consider the Yorta Yorta people's claim for their traditional lands in Victoria; the court cases took eight years and the claim was eventually denied. The basis of the High Court's determination was that the Yorta Yorta people could not prove a recent history of traditional ownership of this land. The main reason that they could not prove this history of ownership was that, when the British took over this land, they excluded the Yorta Yorta community from it. This is a problem faced by other First Nations communities in claiming traditional ownership.

It is undeniable that major steps have been taken with respect to native title by both the judicial and legislative branches of government. However, those interested in reform are also faced with the fact that the law protects the property rights of people who themselves had nothing to do with colonial dispossession, but who directly benefit from the displacement of Aboriginal peoples from their lands, and whose interests are at odds with native title claims. In addition, legal progress is very slow; for example, in 1996 the Yaygir people lodged a claim over land around the mouth of the Clarence River (known as Boorimbah or Yaygir to the Bundjalung and Yaygir peoples). Further claims were lodged in 1998 and 2011 over adjoining lands. By the time native title was finally awarded in 2015, many of the original claimants had died.

Future progress is likely to depend on the articulation and maintenance of new concepts of justice, and sustained public commitment to electing governments that will legislate for those aims. As has been discussed previously, the federal parliament does make ongoing amendments to current legislation regarding land rights.

Review 5.4

1. Construct a timeline showing the recognition of native title rights and self-determination for First Nations peoples in general, and in New South Wales in particular.
2. Outline the major legislation governing native title at the federal and state levels.
3. Describe the major federal and state legislation that protects places and objects of cultural significance for First Nations peoples.
4. Assess in what way native title is a collective right.

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Topic 1 summary

- 'Native title' is the right of First Nations people to an area of land with which they have an ongoing association.
- The concept of *terra nullius* was used to justify the implementation of British law and the dispossession of First Nations peoples.
- The 1967 referendum amended the *Australian Constitution* to allow the Commonwealth to legislate for First Nations people, and to allow them to be counted in the census.
- The Mabo case was a significant High Court decision that abolished the concept of *terra nullius* and led to the federal government passing the *Native Title Act 1993* (Cth).
- Further state and federal legislation and court decisions have been instrumental in law reform in the area of native title.

Topic 1 multiple-choice questions

1 British policies towards First Nations peoples were based on which of the following?
- **a** Colonial conquest, then attempts at assimilation
- **b** Mediation
- **c** Native title
- **d** Implied rights contained in the *Australian Constitution*

2 What was the effect of the 1967 amendments to the *Australian Constitution*?
- **a** The amendments gave First Nations people the right to vote.
- **b** The amendments allowed the Commonwealth to make laws for First Nations people and allowed them to be counted in the census.
- **c** The amendments gave First Nations peoples native title.
- **d** The amendments gave Australian citizenship to all First Nations people in New South Wales and Victoria.

3 Which of the following statements is true of the Wik decision?
- **a** The Wik decision gave First Nations peoples native title over all pastoral land.
- **b** The High Court held that pastoral leases can co-exist with native title, but where there is a conflict, the pastoral lease takes priority.
- **c** The Wik decision overturned Mabo.
- **d** The High Court found that the *Native Title Act 1993* (Cth) was unconstitutional.

4 The National Native Title Tribunal aims to:
- **a** assist with native title negotiations.
- **b** determine whether a particular place is *terra nullius*.
- **c** advise the Federal Court of Australia on native title.
- **d** hear criminal cases involving First Nations people.

5 Which of the following statements is true of native title?
- **a** Native title can be claimed by an individual.
- **b** Native title is a collective right shared by a group.
- **c** Native title is the modern term for *terra nullius*.
- **d** Native title is contained in section 128 of the *Australian Constitution*.

Topic 1 short-answer questions

1 Outline the role of the National Native Title Tribunal.

2 Who was Eddie Mabo? Describe how he changed the trajectory of First Nations People's rights being recognised

3 Discuss the relationship between court decisions and subsequent legislation. Explain how law reform relating to native title has taken place so far.

4 Reforms continue to take place in regard to native title. Research and write a brief summary of the more recent changes to the law in regard to native title and the mainstream community opinions about this issue.

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Topic 2
Law reform and sport

Relevant law

IMPORTANT LEGISLATION

Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Sports Commission Act 1989 (Cth)
Disability Discrimination Act 1992 (Cth)
Fair Work Act 2009 (Cth)
Crimes Amendment (Cheating at Gambling) Act 2012 (NSW)

SIGNIFICANT CASES

Darren Kennedy v Narooma Rugby League & Gary Pender (unreported, Bega District Court, 2001)
Gardner v AANA Ltd [2003] FMCA 81
Taylor v Moorabbin Saints Junior Football League & Football Victoria Ltd [2004] VCAT 158
Director of Public Prosecutions (NSW) v Elias [2013] NSWSC 28
De Belin v Australian Rugby League Commission Limited [2019] FCA 688
USM Events Pty Ltd v James [2023] QCA 71

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5.6 Conditions that led to law reform relating to sport

Significant changes have occurred within the Australian sporting landscape over the past few decades. Sport has become an integral part of our national culture, with our sports heroes having performed incredibly well domestically and internationally. The rise of professional sport has allowed athletes such as Sam Kerr, Andrew Bogut and Steve Smith to be 'at work' when we watch them play. Legally, these athletes are now considered to be employees of their respective sporting organisations.

Domestically, intense competition and high stakes surround sports such as rugby league (NRL), rugby union (Rugby AU), Australian Rules (AFL), soccer, basketball and netball. In addition, sports such as tennis, swimming and athletics have achieved high status globally. Unsurprisingly, Australian sport has become 'big business' and significant prize-money and prestige are the norm. Increasingly, large corporations are aligning themselves with a team, athlete or competition through **sponsorship** deals that provide significant financial incentives for athletes and teams in exchange for advertising and media exposure. By winning competitions or being associated with highly successful teams, 'sponsors' hope to increase profits and market share.

sponsorship
the support of an individual, event or organisation financially or through the provision of products or services

In recent times, the pressure on athletes and teams to excel and an apparent 'win-at-any-cost' mindset has resulted in a wide range of legal issues. These issues include off-field criminal behaviour, gambling on competition matches, harm suffered by athletes during the course of a game, the use of performance-enhancing drugs and player safety related to long-term injuries. These issues are governed by many areas of law, although traditionally, the laws and rules of sporting competitions have been strongly influenced by the expression 'what happens on the field, stays on the field'. The need for law reform within Australian sport arises out of changing social, legal and technological factors and will be discussed throughout this chapter.

Criminal law: On-field and off-field behaviour

Criminal law is not excluded from behaviour on a sporting field or considered separate from an athlete's right to compete. The referee and judiciary may impose on-the-spot penalties or future match suspensions for illegal acts, such as punching during a game. In 1985, during a professional Australian Rules match, Hawthorn captain Leigh Matthews struck an opponent in the face, breaking his jaw. Days later, Matthews was arrested, charged and convicted of assault and ordered to pay a $1000 fine. His conviction was eventually overturned on appeal; however, the case illustrates that criminal law is not excluded from the sporting arena.

In addition to changes in the way sport is seen, there have been broader social changes that affect the ways in which sport and the law interact. Gambling on sporting outcomes, in particular, has become more prominent in recent years. As technology has allowed online betting to flourish, a number of athletes have attempted to influence the outcome of games in which they are involved for personal gain.

In 2010, Ryan Tandy, a NRL player, bet several thousand dollars on a game through his manager and friends, on an aspect of the match in which Tandy was involved (*Director of Public Prosecutions (NSW) v Elias* [2013] NSWSC 28 (1 February 2013)). In the opening part of the match, Tandy deliberately caused a penalty to enable a situation to arise that may have netted him and his entourage a huge pay-out. Tandy was found guilty of match fixing and sentenced to community service. Sadly, Tandy died of an apparent drug overdose in 2014.

In 2019, AFL player Jaidyn Stephenson was served with the most severe ban for betting on football in the competition's history. The AFL imposed a 10-match ban and a $20 000 fine after Stephenson was found to be gambling on games.

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More seriously, Rugby League player Jack de Belin was charged with four counts of aggravated sexual assault in company and aggravated sexual assault in company causing actual bodily harm. Large sections of the sporting community called for the suspension of de Belin from all playing duties, despite the presumption of innocence. The governing body, the Australian Rugby League Commission (ALRC) reacted swiftly with the introduction of a policy to suspend players from playing in the NRL competition if charged with a criminal offence carrying a jail sentence of over 11 years. The policy enforced the standing down of a player until the matter had been dealt with by the courts, although players could still receive wages and train with their team. Jack de Belin was the first player impacted by the new rule, and he challenged the policy in *De Belin v Australian Rugby League Commission Limited* [2019] FCA 688. The court upheld the ALRC's policy and de Belin was prevented from playing in the 2019 NRL season. By 2021, de Belin had been found not guilty of sexual assault and he resumed his playing career.

As discussed in Chapter 4, law reform can be prompted by the recommendations of specialised law reform bodies or various other agencies or agents, and it can be brought about directly by court decisions and various incidences on and off the sporting field.

Civil law: Breach of contract

Professional athletes are required to sign contracts that legally bind their playing services to a club and competition and govern their off-field behaviour, including their use of social media. In November 2021, for example, Penrith Panthers rugby league player Tyrone May's contract was terminated following a questionable Instagram post making reference to his earlier conviction regarding the recording and uploading of an intimate image without consent. The Penrith Panthers Board of Directors held that May's social media conduct, in conjunction with previous breaches, led them to terminate his National Rugby League (NRL) players contract.

Review 5.5

1 Define the term 'sports law'. List some of the factors that have created the need for law reform.
2 Discuss some of the consequences of sport being 'big business'. Construct a list and rank in order three issues that arise out of the intense desire to win competitions.
3 With reference to the Tyrone May case, evaluate the rights of a sporting body to regulate the behaviour of one of their players' social media activities.

Figure 5.8 Professional athletes are required to sign contracts that legally bind their playing services to a specific club and competition. Sam Kerr poses for a photo after signing a contract extension with Chelsea Women in November 2021.

Civil law: Harm suffered in sport

Rules, laws or codes of conduct in contact sports often concern the safety of players. Despite this, amateur and professional players give **express consent** to acts that would constitute the basis for a criminal offence of assault – an

express consent consent given directly, either orally or in writing

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indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

trespass to the person
a tort involving direct contact with a person's body without that person's consent

indictable offence – if enacted in a non-sporting context. When players participate in various sports, they accept the foreseeable risk that personal harm can occur during that activity, and within the rules. In contact sports such as Rugby League, Rugby Union and Australian Rules football, players can break bones, be rendered unconscious and, in extreme cases, be injured to the point of quadriplegia. Clubs, leagues or other agencies involved have a duty of care to their participants.

In 2014, Alex McKinnon, a NRL player, was severely injured in a tackle. He was lifted by a number of defenders and landed on his neck, causing a spinal cord injury with permanent effects. Grabbing a person and slamming them to the ground would be the basis of an assault charge if inflicted without consent. However, players give express consent to being tackled in rugby. Nevertheless, they do not give express consent to behaviour that is prohibited by the rules and so McKinnon initially sought compensation through legal channels by suing the opposition club and the sport's governing body. By 2019, McKinnon had resolved his dispute and was employed by a media outlet as a guest commentator after the NRL also raised significant funds to assist in his rehabilitation.

Figure 5.9 Alex McKinnon (left) with Kurt Gidley (centre) and Willie Mason (right) of the Knights before the game during the round 19 NRL match between the Newcastle Knights and Gold Coast Titans at Hunter Stadium Newcastle

Even in the 'non-professionalised' world of amateur sport, material loss may be considered in the decision about the amount of damages to award. Athletes have sought damages for loss of wages, in addition to medical expenses, pain and suffering. In 1997, Gary Pender broke Darren Kennedy's jaw in an illegal tackle in an amateur game of rugby league in New South Wales. Kennedy sued both Pender and the Narooma Rugby League Football Club for $40 000 in medical expenses. The club's lawyers argued that because the players were volunteers, the club could not be responsible for their conduct.

The New South Wales District Court held that although players were not paid to play, the benefits that they derived from the relationship were significant enough to form a relationship of employment, thereby ruling in Kennedy's favour.

While there are criminal compensation schemes for victims, maintained and administered by the state, the compensation sums involved are generally much lower than the amount of financial compensation that a successful plaintiff could receive in civil damages. The maximum compensation available in New South Wales for a victim of a violent crime is $30 000. Since professional athletes can earn hundreds of thousands of dollars a year, victims' compensation is seen as inadequate. When pursued as a civil case, direct contact with a person's body without the person's consent is one of the intentional torts of **trespass to the person**. Therefore, players have usually chosen to sue other players or clubs for damages and loss of wages through the civil law system.

As discussed in Chapter 3, the standard of proof required of the prosecution in a criminal case is 'beyond reasonable doubt'. In a civil case, the plaintiff need only prove the defendant's liability 'on the balance of probabilities'. In other words, it is more probable than not that the defendant is responsible for the wrong suffered – an easier requirement to satisfy.

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In Court

***USM Events Pty Ltd v James* [2023] QCA 71**

This case related to a 2018 Gold Coast modified triathlon event involving over 1400 athletes including eight para-athletes. Sally James, an able-bodied athlete, was completing a running leg of the triathlon when she was struck by a para-athlete in a wheelchair travelling at speed on an 'S-bend' section of the course. James was knocked backwards, hitting her head, causing her to sustain a traumatic brain injury, whiplash, concussion and post-traumatic stress disorder.

The Queensland Court of Appeal found the event organiser to be negligent, having failed to exercise due care in its organisation of the event. Over one million dollars in civil damages was awarded to James for the injuries sustained. Further, the decision raised many duty-of-care questions for sporting event organisers regarding their risk assessment, and planning and safety protocols.

Analysis 5.2

Use the internet to read more about *USM Events Pty Ltd v James*. Describe how it may have changed the way in which sporting events are organised in our country.

Review 5.6

1 Consider the idea that 'what happens on the field, stays on the field'. Assess whether this approach is appropriate in sport. Discuss with examples.
2 Explain why athletes would pursue civil action rather than criminal action.

Equal opportunity in sport

In 2003, a junior Australian Rules football league in Victoria banned a 13-year-old from playing in its competition because of her sex. The player, Helen Taylor, along with two other girls aged 14 and 15, challenged the ban. While both the number of girls and women involved in sport and the range of sports open to female players have increased dramatically over the past few decades, there are still some challenges to be addressed, socially and legally.

Taylor's case, in the Victorian Civil and Administrative Tribunal (*Taylor v Moorabbin Saints Junior Football League & Football Victoria Ltd* [2004] VCAT 158), questioned the exclusion of all girls aged 12 or over from competing alongside boys in the junior competitions. Despite anti-discrimination legislation in the various states and territories and at federal level, all Australian jurisdictions contain exceptions allowing exclusions based on sex. The *Equal Opportunity Act 1995* (Vic) permits the exclusion of one sex from a sport if strength, stamina or size is relevant. Post-puberty, the average boy has greater lean body mass than the average girl, and there is an appreciable difference in their performance in sports. The judge's task was to determine at what age there is a lawful reason to separate the boys from the girls. He concluded that the differences are not sufficiently great in the under-14 age group, but they are for the under-15s. So excluding Helen Taylor was unlawful, but excluding the other two girls was not. The judge added that it would be preferable if Football Victoria would, instead of excluding girls, give them the choice of whether to participate.

While the decision was a victory for Helen Taylor, questions remain about its application to other sports, and how great the differences between boys' and girls' physical attributes would have to be sports to justify an exception to the relevant legislation. There are also differences in the legislation of the various states and territories.

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In New South Wales, the exception to the prohibition of sex discrimination is much less specific and allows female (or male) players to be excluded in any circumstances.

Section 38 of the *Anti-Discrimination Act 1977* (NSW), headed 'Sport', states:

> ***Anti-Discrimination Act 1977 (NSW)***
> **Section 38**
> Nothing in this Part renders unlawful the exclusion of persons of the one sex from participation in any sporting activity not being the coaching of persons engaged in any sporting activity, the administration of any sporting activity or any prescribed sporting activity.

Women's sports began to grow at such a rapid pace that, by 2019, seven professional women's sports leagues had been established. Indeed, cricket (WBBL), Australian Rules (AFLW) and Soccer (W League) enjoy increased media exposure; however, only 10 per cent of live sports broadcasts are devoted to women's competitions, reaching just 36 per cent of the audience of men's sports. Despite these statistics, approximately 48 per cent of people indicated that they would watch more women's sports on free-to-air TV if its availability were increased.

While there is still much to be done in terms of gender discrimination and the promotion of equal opportunity, the success of the Matildas at the 2023 Soccer World Cup is regarded by many to be a catalyst for positive change in Australian women's sport.

Media

Goodwill alone isn't enough for women's sport after Matildas crash through grass ceiling

Angela Pippos

The Guardian

21 August 2023

In 2015, the Matildas made it to the quarter-finals of the World Cup and they achieved something that no Australian senior football team has ever managed – a win in the knockout stage of the tournament.

That same year the Diamonds won the Netball World Cup and got a five-year commercial television deal, Michelle Payne became the first woman to win the Melbourne Cup in its 155-year history (and told the doubters to get stuffed), the Women's Big Bash League started and the AFL launched AFL Women's.

Finally, women were crashing through the grass ceiling. The old mantra of 'we're just grateful to be playing the sport we love' was replaced by something far more compelling – a genuine fight for equality. No longer prepared to accept the crumbs, women in sport found their voice and demanded a better go. To borrow from Billie Jean King, they disrupted 'business as usual'.

In the second half of 2015, the Matildas pushed their demands for a new collective bargaining agreement and boycotted the US tour where they were scheduled to play against the reigning world champions in front of sell-out crowds. Their demands included basic minimum standards set out in the CBA, equal pay and equality of opportunity, and a career pathway to make football the sport of choice for girls.

The team known as the Female Socceroos before 1995 had forged its own identity and was leading the fight for respect. Their actions sent a loud and unequivocal message that women belong in football.

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The moral argument that girls deserve the same opportunities and pathways in sport started to gain traction. The conversation started to change – and for once women were actually in the conversation. In 2015 this felt big.

Over the past few weeks, it's been impossible not to reflect on the rise of women in sport. It's also important not to forget where we've come from. There have been strong gains – women and girls have more choices, elite women athletes are more visible and broadcasters are showing more women's sport.

But compared to men, women are still underrepresented in organised sport – as participants, coaches, officials, administrators, and board members. There are still barriers – structural and attitudinal – that stop women and girls from thriving in sport. This is why this Matildas' World Cup campaign is so important.

Let's not underplay what's just happened. The Matildas have captivated the nation in a way never seen before. Eleven million viewers tuned in to Channel 7 to watch the Australia v England semi-final. Deakin University research estimated 17.16 million people tuned into the match cumulatively across Channel 7, Optus Sport, venues and live sites.

That's approximately 64% of the Australian population. The most viewed event in Australian history. Let that sink in.

The Matildas' history-making success has become a springboard to bigger conversations. The narrative has quickly shifted to investing in girls and women's sport – and holding sporting bodies and governments to account.

Already, the federal government has announced an extra $200m for women's sport, and a review of the anti-siphoning list to consider women's sports. Just as 2015 felt like a turning point, 2023 feels like a line in the sand. Collectively, we have to say, we're not going back.

Women want a fair share of the sporting pie – more women in decision-making roles, more female-friendly facilities, improved lighting, better playing surfaces and funding for grass roots.

Culture-shifting events like this one and the Women's T20 World Cup in 2020 (86,174 fans at the MCG) don't happen by accident. The will to see things through has to be there. Respect. Invest. Promote. Goodwill alone isn't enough. It's time to stop chipping away at progress with a toothpick – let's bring out the hammer. Seize this moment with full hearts and finish the job.

Meanwhile, the 2023 AFLW has 18 teams. Games in its inaugural season in 2017 were largely free to attend, while the broadcast strategy revolved around coverage in local markets on the Seven Network – mainly the free-to-air digital service 7mate – with further national coverage provided by Fox. Nielsen, an information, data and measurement company, reports that 41 per cent of Australians are interested in women's AFL. Significantly, they also indicate that Suncorp Super Netball draws larger audiences across the season than any other women's code and has the largest share of female viewers.

Market research company Roy Morgan has revealed that over 2.6 million Australians aged 14 years and over (12.4%) watched AFLW matches on television in 2020, although this has declined in recent years. Despite this, 2023 witnessed record crowds at AFLW games. Nielsen suggests that women's sport has intangible association value. Around 78 per cent of female sports fans say it is important for sponsors to support women's sport and 74 per cent say companies involved in sponsoring sport gain in appeal with the audience.

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Consequently, there has been a shift in partnerships across women's sport in recent times. Existing brand sponsors are either expanding their portfolios or switching completely from men's sport to women's sport.

Interestingly, wider societal trends revolving around notions of diversity and equality may also be influencing women's sports investment decisions. This is enhanced by a strong positive sentiment towards sponsors who are associated with women's sport sponsorship. This is also exemplified by the sponsorship of individual female athletes such as Sam Kerr (soccer) and Ellyse Perry (cricket), both of whom are seen as inspirational role models and positive advocates of healthy body image.

Sexual harassment of AFLW player in the media

In 2019, inappropriate comments were posted on social media when a photo of AFLW player Tayla Harris was released across multiple media platforms. Large sections of the community rushed to her defence by condemning such blatant harassment. Clearly, the rise of female athletes as both role models and professional athletes does not sit comfortably with some people.

Figure 5.10 The Matildas in action against England during a semi-final match of the FIFA Women's World Cup in Sydney in 2023. The success of the Matildas during the tournament is regarded by many to be a catalyst for positive change in Australian women's sport.

Figure 5.11 Tayla Harris of the Demons kicks the ball during the 2022 AFLW Grand Final match between the Adelaide Crows and the Melbourne Demons at Adelaide Oval.

Analysis 5.3

Use the internet to find the *Anti-Discrimination Act 1977* (NSW).

1. Discrimination based on gender is explicitly prohibited by this Act. Outline other characteristics besides gender that do not justify discrimination, according to the Act.
2. Discuss if any of these characteristics are relevant to discrimination within sport. Describe any situations in which they might be relevant.
3. Assess whether a person's gender is different in any way from these other characteristics. Justify your response.

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5.7 Agencies of law reform relating to sport

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is an independent statutory organisation, established in 1986. It was called the Human Rights and Equal Opportunity Commission before 2008. The AHRC investigates and reports to federal parliament about issues of human rights compliance, resolves discrimination complaints and breaches of human rights, holds public inquiries, provides advice and submissions to parliament, and conducts research into human rights and discrimination issues. These issues cover a broad range of areas such as the provision of goods and services, education, employment and sport.

The AHRC can investigate complaints of discrimination and assist in reaching agreement between a complainant and the organisation or company against which the complaint is made. It does this through **conciliation**, in which it acts as an impartial referee while the parties talk through their concerns and look for solutions.

In 2001, the All Australia Netball Association (AANA) issued a ban to prevent pregnant women from playing in the national competition. This included the captain of the Adelaide Ravens, Trudy Gardner, who was 15-weeks pregnant at the time. Gardner lodged a complaint with HREOC, claiming discrimination on the grounds of her pregnancy under the *Sex Discrimination Act 1984* (Cth). Gardner and the AANA were unable to resolve the disagreement in that forum and she took them to court, seeking an injunction to allow her to continue to play pending the outcome of her complaint. She missed three games due to the ban, but the Federal Magistrates Court (now called the Federal Circuit Court) granted the interim injunction. Gardner lost match payments and sponsorship as a consequence of missing those three games.

Gardner successfully sued the Netball Association in 2003 (*Gardner v AANA Ltd* [2003] FMCA 81), seeking damages for distress, pain and suffering, as well as the loss of the match payments and sponsorship income. The Federal Magistrates Court found that the prohibition had breached sections 7 and 22 of the *Sex Discrimination Act 1984* (Cth).

Research 5.3

View the Australian Human Rights Commission's (AHRC) website and research other areas dealt with by the AHRC in relation to sport. You might first try searching the site using the word 'sport'.

NSW Law Reform Commission

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes an active role, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for the parties

Match-fixing is a term used to describe corrupt behaviour in predetermining the result of any particular sporting event. The sole reason for fixing a match is to guarantee the result so that a bet placed on the match would lead to a windfall for a gambler. In 2011, the NSW Law Reform Commission described some reasons why existing common law and statutory offences that might apply in circumstances of match-fixing were inadequate to cover the range of new match-fixing behaviours. For example, in rugby league, bets can now be placed on whether the first scoring play of a game is a penalty goal or a try.

The commission was responding to cases such as that of Ryan Tandy, who played in an NRL match in August 2010 and was found guilty of criminal behaviour because of his actions during the first few minutes of the match. Tandy created a situation that may have led to the opposing team taking a penalty goal in the first few minutes of play. The result of the match overall was of little concern. Prior to this case, 'match-fixing' could be prosecuted under offences that did not use consistent terminology – some focusing on fraud,

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dishonesty and/or corruption – or that required the person charged to have obtained a benefit or be directly engaged in gambling. Since Tandy did not place a bet on the game in question, but informed others of his intended actions so they could benefit, his defence revolved around the argument that he had not placed a bet on this particular match.

Under the laws at the time, Tandy may not have had charges laid against him; however, by 2012, the *Crimes Act (Cheating at Gambling) 2012* (NSW) had been enacted. This legislation aimed to outlaw behaviour that was previously inadequately addressed.

Australian Sports Commission

The Australian Sports Commission (ASC) is an Australian Government statutory authority. Established through the *Australian Sports Commission Act 1989* (Cth), the ASC is involved in the operation and development of sport at all levels. It provides advice to the government and funding to national sporting organisations. The Australian Institute for Sport is one of its divisions.

Because of the netball ban mentioned previously, the ASC was asked to investigate the issues surrounding pregnant athletes. It hosted the National Forum on Pregnancy in Sport in August 2001, with participants from government, industry and non-government organisations. Its conclusions formed the basis for a set of guidelines for the Australian sporting industry on pregnancy in sport. In addition to clearing the way for pregnant women to continue playing sport, the guidelines offer information and advice to protect sporting clubs. As employers, clubs are concerned to avoid being sued for negligence if a player suffers foreseeable harm to herself or her foetus while engaging in sport.

5.8 Mechanisms of law reform relating to sport

The courts

As discussed in Chapter 4, the courts' role is to interpret and clarify legislation while applying it to specific cases. Where a higher court sets a precedent, it is making a statement about the application of the legislation or common law rule to a set of facts. It also establishes protocols for future applications of the law by lower courts. A court's consideration of a situation and the arguments for and against a claim can reveal unfairness or injustice in the legislation itself.

In 2003, the then federal Sex Discrimination Commissioner, Pru Goward, commented on Trudy Gardner's case, saying that it was good to see the courts developing case law around the *Sex Discrimination Act 1984* (Cth). The rights of pregnant women wishing to pursue elite sport therefore constituted a new application of anti-discrimination legislation.

Court of Arbitration for Sport

The Court of Arbitration for Sport (CAS) was established in 1984 as part of the International Olympic Committee. It is an international arbitration body established to settle sport-related disputes. Based in Lausanne, Switzerland, it has courts in New York City and Sydney, as well as *ad hoc*, temporary courts in Olympic host cities. The CAS settles disputes through arbitration, where the parties have agreed to its jurisdiction, and its decisions are binding. It hears two types of dispute:

- commercial, including contract disputes, sponsorship and television rights, as well as civil liability claims such as athletes' accidental injuries during competition
- disciplinary, including drug-related problems, violence on the field and abuse of referees.

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Figure 5.12 Sun Yang (centre) at a Court of Arbitration for Sport hearing on 15 November 2019 in Montreux, Switzerland

Disciplinary cases are generally first dealt with by the 'competent sports authorities'; for example, the Australian Olympic Committee. Appeals then may go to the CAS. In 2019, Chinese swimmer Sun Yang smashed a vial of his own blood, rendering the sample useless for analysis. Yang claimed the officer taking the sample did not have proper accreditation and that he feared for his own security. The governing body representing World Swimming, FINA, investigated the matter, but appeared to condone Yang's actions and he went unpunished, despite claims in the Australian media that he was a drug cheat and feared being found out through the blood sample.

The World Anti-Doping Agency (WADA) appealed the outcome of the FINA investigation, asking that Sun Yang be banned from competing for a maximum of eight years.

In November 2019, Sun Yang appeared before the CAS in order to clear his name. This event was public and live-streamed, which was unusual for a CAS hearing. Also, translation issues were experienced throughout the day.

The February 2020 judgment by three senior judges found Sun Yang guilty of refusing to cooperate with the sample testers and banned him from swimming for a period of eight years, effectively ending his career.

Subsequently, the CAS president John Coates defended the integrity of Sun Yang's hearing, saying that the translation issues did not affect the judgment and that the defendant's lawyers could have requested for the case to be heard over a longer period.

Parliaments

As we have seen, matters sometimes come before a court before they have been considered by parliament. When a legal decision reflects new social patterns or attitudes, parliaments may enact, amend or repeal legislation to ensure that the statute law stays current and credible. This often happens after extensive consultation with bodies such as law reform commissions, human rights commissions, or – in the case of sports law – the Australian Sports Commission.

Review 5.7

1 Assess whether the law that relates to pregnant athletes should be different from the law that protects equal opportunity for female athletes.
2 Consider the Court of Arbitration for Sport to complete the following tasks.
   a Identify the types of matters heard by the Court of Arbitration for Sport.
   b Review the Sun Yang case.
   c Discuss if the Court of Arbitration for Sport should be able to overrule governing bodies like FINA.
3 Discuss whether a fight on a football field is different from a fight on a street corner. Assess whether penalties for fights on a sporting ground should be less than for assaults committed on the street.

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5.9 Effectiveness of law reform relating to sport

Contract

Breaches of contract in the sporting world may have differing particulars from breaches of contract in other areas of business, but the mechanisms and remedies are not markedly different. The Tyrone May and Jack de Belin cases illustrate the increasingly changing nature of commercial sport relating to human rights and equality as the community demands the highest standards of conduct off the field. However, it is not clear that there is a significant need for law reform in this area.

Harm suffered in sport

Two social factors contributing to players' preference for civil rather than criminal remedies relate to a greater readiness to sue, as well as the professional culture that pervades contemporary sport. While the sums of money involved are relatively large in professional sport, the purpose of **tort law** remains the same: to compensate people for losses or damage suffered because they have been wronged. As mentioned, Alex McKinnon sought compensation of up to $10 million to cover his physical and medical needs for his lifetime, as well as the potential loss of income and welfare.

tort law
the body of law that deals with civil wrongs including negligence, defamation, trespass and nuisance

One consequence of widespread recourse to the civil law is fear of lawsuits. For example, schools may decide to phase out contact sports such as the rugby codes if claims by students injured while playing become a common occurrence. Another concern is that players who are seriously hurt in situations where no-one is at fault – for example, where a tackle is perfectly within the rules of the game – are just as much in need of financial assistance as those awarded damages, yet insurance coverage may be inadequate for their needs.

Figure 5.13 In the United States, NFL is a sport with a long history of player injuries and concussions, which have the potential to cause lifetime harm to athletes.

Indeed, in 2013, the National Football League (NFL) of the United States settled on a $765 million package to support 4500 players who were suing the league for damages. These players claimed the NFL had known of the long-term dangers of head collisions, that they had concealed such information from players and failed to notify them of such dangers during their careers. By 2015, the NRL had introduced new rules whereby players who received head knocks are to be assessed by a doctor and often not allowed to continue the match. This rule is designed to recognise the issue of long-term brain damage to athletes who receive repeated head traumas. However, in 2019, confusion continued to reign over players being allowed to return to the field during match days. NRL player Robbie Farah received a knock to his head during a game and appeared to stumble as he was escorted from the field. He subsequently passed his head injury assessment but was not permitted to re-enter the match, much to his coach's displeasure as his team lost an important match.

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Media

'Matter of life and death': Rugby league brain injuries claim heading for court

Aaron Bower

The Guardian

3 August 2023

The legal dispute involving 125 former rugby league players who have been diagnosed with brain injuries they claim resulted from playing the game is heading for the courts. Proceedings are to be served against the Rugby Football League, the British Amateur Rugby League Association (Barla), and International Rugby League.

Rylands Garth will this week formally launch the action on behalf of the group who have been diagnosed with conditions including early onset dementia and chronic traumatic encephalopathy (CTE), mirroring the legal dispute embroiling rugby union. Richard Boardman of Rylands says the action is a matter of 'life and death'.

They argue the sport did not take proper action to protect rugby league players from injuries caused by repetitive concussive and sub-concussive blows during games throughout their careers and are now seeking damages as a result.

Rylands also represents more than 300 players in rugby union in a case that has begun its journey with an initial hearing in June. Now, the three league bodies cited in the legal action will also be heading for the courts after proceedings were formally served. That group includes the former Great Britain half-back Bobbie Goulding and the former Super League forward Nick Fozzard.

A pre-action phase began in September 2021 to encourage the disputing parties to reach an early settlement and stop the matter escalating into court action. However, that has not happened and Rylands will formally serve proceedings in the coming days, meaning the courts will take control of the process.

The legal process could cost the sport a significant sum and take months to be resolved. The action now includes the governing body for the international game, after Rylands added the IRL to the claim as a third defendant alongside the RFL and amateur body, Barla.

Rylands is representing league players as young as their 20s in the dispute. 'If they all had wonky fingers and stiff backs and we were suing over that you'd tell them where to go,' Boardman said. 'But this is far more serious than that, this is life and death. This is a real issue for players of all ages, and we want to do what we can to help.

'Some of these lads are in a really bad state and to their critics saying they're just unlucky, I'd say wear another man's shoes for a day and experience what they're going through. No one signed up for permanent, progressive brain damage.'

In a further statement, Rylands said it believes neither rugby code is safe in its existing format, which potentially expose current and future players to neurological impairment. Rugby league is trialling a new system in academy fixtures where the legal tackle height is lowered to below the armpit in an attempt to reduce contact with the head. The early findings have suggested that head collisions have been reduced, but it has been met with frustration with penalty counts running at more than 50 and a feeling that the game would not adapt positively to such a drastic change.

(Continued)

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Media—Continued

The full results of that trial are expected to be published in the coming weeks.

The RFL, which oversees Barla, said: 'The RFL takes player safety and welfare extremely seriously and it has been desperately sad to hear of any players' difficulties. Rugby league is a contact sport and, while there is an element of risk to playing any sport, player welfare is always of paramount importance.'

'As a result of scientific knowledge, the sport of rugby league continues to improve and develop its approach to concussion, head injury assessment, education, management, and prevention across the whole game. We will continue to use medical evidence and research to reinforce and enhance our approach.'

Analysis 5.4

1 Read the media article on pages 141–2.
   a Why does British law firm Rylands Garth argue this class action is a matter of life and death?
   b Assess whether former rugby players should have the right to compensation considering they have given express consent in a sport that allows strong physical contact.
2 Examine the online 2023 rules for head injury assessment in any contact sport of choice. What are the new rules and why do you think they have been updated?
3 Evaluate the effectiveness of sports law in dealing with the rights of players to safety and/or compensation for injuries.

Equal opportunity in sport

Local, national and international interest in ensuring women's equality with men in all areas, including participation in sport, has prompted legislation at both state and federal level. Australia is a signatory to the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and domestic legislation implementing this treaty makes discrimination on the basis of gender unlawful.

In addition, legislation such as the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth) protects other groups that have historically been disadvantaged. The work of statutory bodies such as the Australian Human Rights Commission is vital in addressing issues of equal opportunity, and court cases such as Trudy Gardner's have provided further factors for parliaments to think about when drafting legislation.

Figure 5.14 All athletes in Australia should have the right to equal opportunity in sport.

In the course of law reform, parliaments must balance concerns about negligence claims against the need for fairness.

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Topic 2 summary

- Sports law is a complex combination of tort, criminal and contract law, and both statute and common law.
- Sport has changed dramatically in the past 40 years: it is broadcast nationwide, and major companies spend vast sums of money sponsoring teams and competitions. Gambling on a range of sporting outcomes has become far more widespread.
- Athletes are held responsible for their intentional actions both on and off the sporting field.
- Rules of the games, set down by governing bodies, can be enforced in court, and players may face criminal charges or civil action for harm inflicted.
- Coaches, referees and administrators may be subject to a claim in negligence for breaching their duty of care.
- Agencies of law reform in sport include the Australian Sports Commission and the Australian Human Rights Commission.

Topic 2 multiple-choice questions

1 Sports law is:
- **a** the rules of any particular sporting body.
- **b** the law made by the Australian Sports Commission.
- **c** a combination of various statutes, common law judgments and tort law.
- **d** none of the above.

2 Express consent means:
- **a** players may do whatever it takes to win a game.
- **b** what happens on the field stays on the field.
- **c** players must give consent before they play a game.
- **d** players accept the possibilities that can occur within the course of a game.

3 Victims of assault on a sporting field usually take legal action through civil courts because:
- **a** criminal law does not apply on the sporting field.
- **b** victims' compensation is inadequate for professional athletes.
- **c** there is usually not enough evidence to prosecute a criminal case.
- **d** witness statements from players cannot be accepted in courts.

4 The *Anti-Discrimination Act 1977* (NSW) gives an exception to the prohibition of sex discrimination for which participants in sporting activities?
- **a** Coaches
- **b** Players
- **c** Administrators
- **d** All of the above

5 The case of Trudy Gardner demonstrates:
- **a** a conflict between sporting rules and anti-discrimination laws.
- **b** how sporting bodies are subject to legal action.
- **c** the ability of individuals to challenge decisions in courts.
- **d** all of the above.

Topic 2 short-answer questions

1 Outline the changes in attitudes to sport that have occurred over the past few decades. List some of the consequences of these changes.

2 Explain the importance of the law in governing on-field behaviour in contact sports.

3 Explain how contract law relates to professional athletes and clubs. Describe what can happen if a contract is breached.

4 Assess why victims of violence on the sporting field do not report the offence to police.

5 Explain the link between the NFL, NRL and Rugby Australia in terms of head injury assessments and concussions. Discuss whether governing bodies should take such precautions.

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Topic 3
Law reform and sexual assault

Reader advice

This chapter contains material that may be confronting to some students. Topics covered include sexual assault.

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Criminal Procedure Act 1986 (NSW)
Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005 (NSW)
Criminal Procedure Amendment (Evidence) Act 2005 (NSW)
Criminal Procedure Further Amendment (Evidence) Act 2005 (NSW)
Crimes Amendment (Consent – Sexual Assault Offences) Act 2007 (NSW)
Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021 (NSW)
Crimes Legislation Amendment (Coercive Control) Act 2022 (NSW)

SIGNIFICANT CASES

R v Lazarus [2017] NSWCCA 279

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5.10 Conditions that led to law reform relating to sexual assault

One of the central aims of the criminal justice system is to prosecute criminal offenders on behalf of the victims and the community. Throughout the process, there is tension between the rights of the accused and the interests of individuals and the community; getting this balance right is a constant challenge for the state.

There has been significant law reform in relation to **sexual assault** offences over the past decade. This has been motivated by perceptions that the criminal justice system was failing to deliver justice for sexual assault victims and just outcomes for the community.

Current statistics allude to the shocking extent of sexual assault and sexual violence experienced by (mainly) women in Australia. According to the Australian Bureau of Statistics (ABS), the sexual assault victimisation rate in 2022 and 2023 increased from 126 to 136 victims per 100 000 persons. As shown by Figure 5.15, this marked a dramatic increase on an already upward trend.

Women are affected more often than men by sexual assault and sexual violence. One in five women will experience sexual violence in their lifetime compared to one in 20 men, according to the Australian Government's 2018 report, *Family, Domestic and Sexual Violence in Australia*.

Sexual offences are the least-reported crimes in New South Wales. As found by the Australian Law Reform Commission (ALRC), this under-reporting makes it difficult for the legal system to respond to this type of crime.

sexual assault
a general term for criminal offences involving unwanted sexual contact; acts include unwanted touching or groping, indecent acts of other kinds, and rape

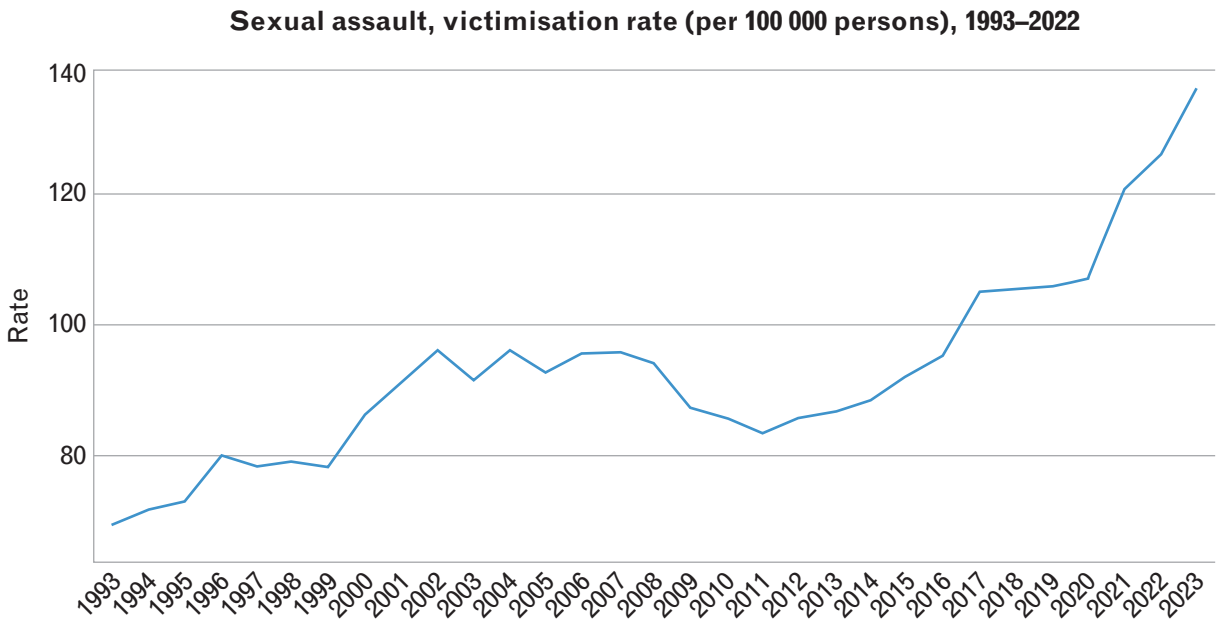

Figure 5.15 The rate of sexual assault has continued to rise despite numerous decades of education and law reform efforts.
Source: Australian Bureau of Statistics

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> Understanding that sexual assault is under-reported is crucial background when considering the response of the criminal justice system. The vast majority of incidents of sexual assault do not come to the attention of the legal system. The problem is exacerbated in the family violence context. Therefore, an important part of the law reform focus should be on measures that might promote reporting and challenge community attitudes to sexual assault that continue to reinforce its invisibility.
>
> ALRC, *Family violence: A national legal response*, 2010.

Recording of video evidence, with the consent of victim–survivors, at the time of attending the scene of the offence was introduced in 2020. This video evidence can be used as evidence in court for incidences of domestic and sexual violence. This is a further example of ongoing efforts to improve reporting and conviction rates. However, the law is limited to the extent that underlying societal and cultural constructs in regard to the rights and attitudes to women continue to present barriers to lifting the effectiveness of the legal response.

Under-reporting is hard to gauge so the incidence of sexual assault in the home and in the broader community can only be approximated. Organisations such as Rape and Domestic Violence Services Australia and Australia's National Research Organisation for Women's Safety are sources of information about the rate of domestic and sexual violence against women. The ABS also periodically conducts a 'Personal Safety Survey'. Figure 5.16 illustrates the results from the 2020–2021 survey, which covers areas such as:

- intimate partner violence
- emotional abuse
- sexual violence
- the stranger rape myth
- sexual harassment
- stalking.

Some of the key findings of the survey were that:

- 22 per cent of women and 6.1 per cent of men aged over 15 have experienced sexual violence
- 1 in 6 women and 1 in 18 men have experienced physical or sexual violence by a cohabitating partner
- 13 per cent of women and 4.5 per cent of men have experienced sexual harassment
- an estimated 8 per cent of women who experienced sexual assault said the police were contacted about the most recent incident, either by themselves or others
- the majority (92%) of women who experienced sexual assault did not report the incident to the police.

Under-reporting can be attributed to several factors. Many victim–survivors do not report sexual assault because they believe they would not win a court case or that it will be too much trouble, or they cannot face it emotionally. Compounding this is the fact that in 70 per cent or more of cases, the person knows the offender.

The Director of Public Prosecutions will generally prosecute if there are prospects of a conviction and it is in the public interest. Where the person knows their attacker – which is the case in the majority of reported sexual assault cases – much of the case relies on one person's word against another's, unless there is convincing physical evidence. Advocates for victim–survivors of sexual assault argue that cases involving a stranger are more likely to proceed, because it is easier to establish that the sex was not consensual, the assaults are often more severe, and there is more likely to be strong physical evidence.

Physical evidence often poses another major obstacle in prosecuting sexual assault cases. Victim–survivors of sexual assault generally need to be physically examined and questioned in detail to obtain evidence that can be used in court – many consider this process to be too traumatic.

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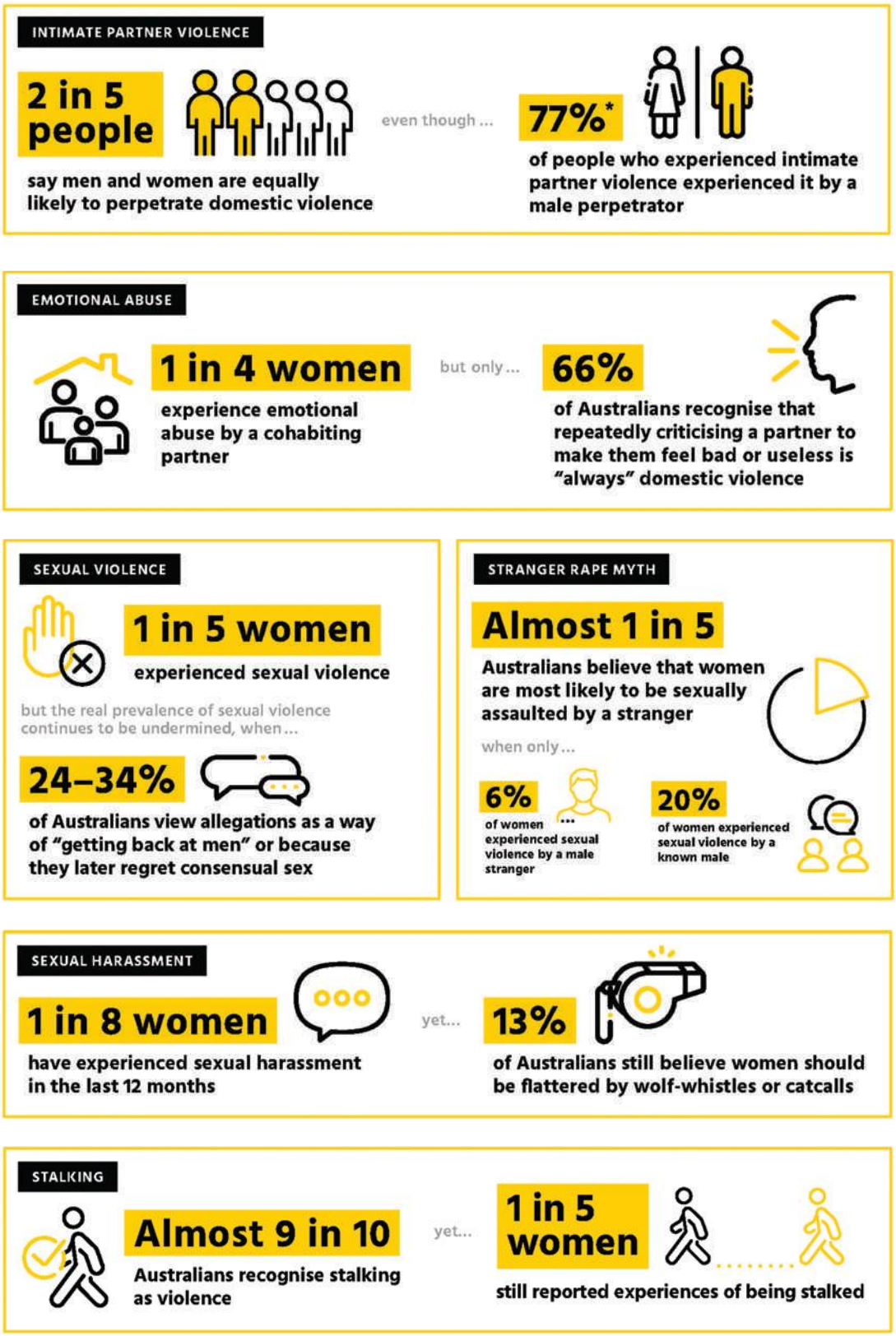

Figure 5.16 Research from the 2020–2021 ABS Personal Safety Survey and the Australian Institute of Criminology shows that there are still unacceptable levels of domestic and sexual violence in Australia. Domestic and sexual violence is overwhelmingly committed by men against women.

Source: ANROWS_NCAS_Personal-Safety-Survey-2023_Fact-sheet-Copy.pdf based on the ABS Personal Safety Survey 2020–2021

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In addition, there has been a lack of state resources provided to doctors who work in sexual assault services. In September 2018, the International Association of Forensic Nurses announced that the Sexual Assault Nurse Examiner Education Guidelines had been updated. These guidelines help sexual assault nurse examiners meet the medicolegal needs of those who have been affected by sexual violence, including individual patients, their families, communities and systems.

Although there have been improvements in this area, victim–survivors still must go through a difficult ordeal to ensure sufficient physical evidence is obtained to strengthen prospects of a successful prosecution.

Because of these and other factors, a formal complaint of a sexual offence has a low likelihood of leading to a formal investigation, and even when there is an investigation it probably will not result in a trial. The ABS's 2020–2021 national Personal Safety Survey reported that approximately eight per cent of women who had experienced sexual violence by a male offender had reported the violence to the police. Again, this figure is hard to accurately quantify.

Given the estimates of the number of unreported incidents, the data shown in Figure 5.15 probably represents a small proportion of the incidents that are occurring. It is worth asking why this is the case, especially when compared to other categories of crime.

Review 5.8

1 Outline some reasons for the low percentage of sexual crimes reported to the police.
2 Discuss some of the difficulties in proving a sexual assault case when the person knows their attacker.
3 Discuss why specific training is important for doctors and nurses who deal with victim–survivors of sexual assault.

5.11 Agencies of law reform relating to sexual assault

As will be seen in the next section, the NSW Government has a responsibility for effective law reform in the area of sexual assault and sexual violence. However, it also has a role in ensuring there is a more coordinated approach to addressing the issue of sexual assault and violence. One example is the NSW Sexual Violence Plan 2022–2027. It aims to ensure that all agencies of government, from health, legal and law enforcement to victim support, are working in a coordinated and effective way to address this extremely complex area of law.

Criminal Justice Sexual Offences Taskforce

The Criminal Justice Sexual Offences Taskforce was established in 2004 by the New South Wales Attorney-General to investigate issues relating to sexual assault and the prosecution of these crimes. Its task was to advise the Attorney-General on how the criminal justice system could become more responsive to victim-survivors of sexual assault without undermining the right of the accused to receive a fair trial.

The taskforce had input from a broad cross-section of government and non-government organisations, in an effort to obtain various viewpoints on the criminal justice system. It produced 70 recommendations. Because of its report, new legislation was passed from 2005, some of which is discussed in future content. In conjunction with the taskforce investigation, the NSW Government also asked the Australian Institute of Criminology (AIC) to investigate whether giving evidence via closed-circuit TV altered the impact of the evidence as it was received; that is, whether it was likely to reduce the empathy the jury might have for the victim or the accused. The AIC found that there was no real difference in jury responses.

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These findings went some way to convincing the government that closed-circuit TV could be a reliable mode of delivering evidence for traumatised victim–survivors who did not want to be in the same room as the accused.

As a result, since 2015, victim–survivors of sexual assault have been able to give evidence via closed-circuit TV, speaking to a camera, the feed from which is shown on a screen in the court. This means that the victim–survivors does not have to go into the courtroom to give evidence. Further, if there is an aborted trial, a hung jury or a retrial, the recording from the first trial can be re-used, avoiding the need to give evidence a second time. The law says that in a following trial the 'best copy' of the evidence in-chief and cross-examination can be used. This may be a written transcript, an audio recording or a video recording. Such changes attempt to reduce further traumatisation of the victim–survivor in these trials.

Rape and Domestic Violence Services Australia

Rape and Domestic Violence Services Australia is at the forefront of reforms to the way sexual assault matters are dealt with in the criminal justice system. The organisation provides support services, undertakes research and links to other bodies in Australia. It provides support and counselling for anyone who has experienced sexual violence.

Legal Links

For more information, view the website of Rape and Domestic Violence Services Australia.

NSW Bar Association

The NSW Bar Association, the professional organisation for barristers in the state, has rewritten its own rules for the cross-examination of alleged victim–survivors of sexual assault. Questions that belittle, confuse or mislead are banned. Attacks on the victim–survivor, it is hoped, will now not be permitted in the courtroom.

The media

Criminal cases involving sexual assault have received significant media attention over the past decade. The media's influence on public opinion, law organisations and governments has resulted in changes that improve the treatment of victim–survivors of serious sexual assault crimes in court. People being forced to recount their experience over and over, and defence counsel badgering them in cross-examination to call their credibility into question, have been graphically portrayed by the media and have horrified the public and many in the legal profession. Frequently, however, the positive outcomes have been accompanied by less desirable ones, such as the rights of the accused being accorded a low importance, and a readiness to exploit the prejudices of some segments of the public.

Figure 5.17 Brittany Higgins, a former parliamentary aide, arrives at court in 2022 after she alleged that she had been raped by a colleague, Bruce Lehrmann, in Australia's Federal Parliament House in 2019.

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Analysis 5.5

On the internet, find some or all of the following articles, or research some independently:

- Adele Horin, 'One in four women suffer sexual violence: Study', *The Sydney Morning Herald*, 3 August 2011. http://cambridge.edu.au/redirect/10375
- Adele Horin, 'SlutWalk turns apathy into action on sex attacks', *The Sydney Morning Herald*, 13 June 2011. http://cambridge.edu.au/redirect/10376
- Stephanie Anderson, 'Sexual assault: How common is it in Australia?', *SBS*, 17 July 2015 (updated 23 August 2015). http://cambridge.edu.au/redirect/10377
- Sonia Hickey, 'A history of sexual consent laws in Australia', *Sydney Criminal Lawyers*, 13 September 2023. http://cambridge.edu.au/redirect/10378
- Aleisha Orr, 'New figures paint stark picture of sexual violence and harassment in Australia', *SBS*, 23 August 2023. http://cambridge.edu.au/redirect/10379
- Bianca Fileborn, Angela Dwyer, Ash Barnes and Nicole L. Asquith, 'The reporting process was more traumatising than the assault itself': LGBTQ+ survivors on accessing support after sexual violence', *The Conversation*, 28 March 2023. http://cambridge.edu.au/redirect/10380

1 Read these articles and comment on the historical complexity of the sexual assault issue and the difficulty in ensuring justice is achieved.
2 Outline the criticisms made of the criminal justice system in these articles. Identify and discuss some reforms that could improve the effectiveness of sexual assault laws.
3 Research the extent to which some of these improvements have been achieved.

5.12 Mechanisms of law reform relating to sexual assault

Parliament

There were many Acts passed by the New South Wales Parliament in the early twenty-first century to usher in reform in sexual assault matters. Some of the key legislation is:

- *Criminal Procedure Amendment (Sexual Offence Case Management) Act 2005* (NSW): This Act amended the *Criminal Procedure Act 1986* (NSW) to provide that a pre-trial order made by a judge in proceedings relating to a sexual offence is binding on whatever judge presides at the trial. Rulings on the admissibility of evidence by a judge other than the trial judge need to be binding on the trial judge, so that delays in the commencement of criminal proceedings are minimised. The legislation was designed to minimise the stress and trauma on **complainants** giving evidence, who had to prepare themselves to give evidence every time a trial was scheduled and rescheduled.
- *Criminal Procedure Amendment (Evidence) Act 2005* (NSW): This Act amended the *Criminal Procedure Act 1986* (NSW) to allow a transcript or recording of a complainant's evidence in any retrial. If the evidence is admitted in a retrial, the complainant cannot be forced to give further evidence unless they decide to do so.

complainant
a person making a formal complaint in a court of law

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- *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW): Certain provisions of this Act were designed to ensure that improper questions were not put to complainants during cross-examination. It also provided for evidence to be given ***in camera*** (privately) and for support people to be close to a complainant when they are giving evidence. The Act also introduced a new section into the *Criminal Procedure Act 1986* (NSW) to prevent an unrepresented accused from cross-examining the complainant.
- *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW): A person's lack of **consent** and knowledge that a person is not consenting are elements of sexual assault offences such as rape. If someone is under the influence of alcohol or drugs, they may not have the capacity to give consent. In court, an accused will be examined by the prosecution on what steps they took to ensure that there was consent. The *Crimes Act 1900* (NSW) was amended to place the onus on the defendant to prove there was consent; in the past the prosecution had this responsibility.

In 2019, there were calls to further amend the laws of consent concerning sexual assault after the NSW Law Reform Commission tabled a report. One recommendation in the report was that a person does not consent to sex if they do not 'say or do anything' to communicate consent. This was aimed to protect the rights of victim–survivors who may, in the words of the commission, 'freeze' in fear. Concerns about the efficacy of existing consent laws were triggered by *R v Lazarus* [2017] NSWCCA 279 – ('the Lazarus case'). This case essentially determined that consent needs to be verbally or physically communicated. A person's silence or lack of resistance to sexual intercourse will not amount to reasonable grounds to believe that they are consenting. As a result, it was deemed the consent laws at the time were not adequate as they did not require this. After growing community concern through 2020 and 2021, the NSW Government acted to amend consent laws.

In June 2022, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) implemented consent reforms that aim to:

- clarify consent provisions in the *Crimes Act 1900* (NSW), including that consent is a free and voluntary agreement that should not be presumed
- clarify that consent involves ongoing and mutual communication
- clarify that consent cannot be given if someone is so intoxicated or under the influence of drugs that they cannot choose or refuse to participate
- strengthen laws to confirm that consent can be withdrawn, and that if someone consents to one sexual act, it does not mean they have consented to other sexual acts
- ensure fairer and more effective prosecutions of sexual offences
- address misconceptions about consent in trial proceedings
- improve the victim–survivor's experience of the justice system and juror understanding of the complexities of sexual offending and reporting through the introduction of new jury directions.

in camera
(Latin) 'privately'; only specified persons (e.g. a judge) can be present during the testimony or proceeding

consent
free and voluntary agreement by a rational person who is able to understand and make a decision about the matter to which they agree

As part of its response to recommendations from the Joint Select Committee on Coercive Control, the NSW Government passed the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW), which outlaws coercive control in current and former intimate partner relationships. The legislation introduces a standalone offence of coercive control into the *Crimes Act 1900* (NSW). This made New South Wales the first Australian state or territory to create a standalone offence for coercive control. Coercive control is complex, insidious and, sadly, a significant 'red flag' for intimate partner homicide. It is a form of domestic abuse that involves patterns of behaviour that have the cumulative effect of denying victim–survivors their autonomy and independence. This abuse can include physical, sexual, psychological or financial abuse.

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Media

It's time we aligned sexual consent laws across Australia – but this faces formidable challenges

Jonathan Crowe – Professor of Law, Bond University

Guzyal Hill – Senior Lecturer, Charles Darwin University

15 December 2022

Federal Labor Senator Nita Green has recently moved to establish a Senate inquiry into sexual consent laws.

These are the laws that describe how sexual consent is defined for rape and sexual assault offences. In Australia, these definitions differ across the states and territories, which causes inconsistencies and confusion, as well as complexities in sexual consent education.

The varying definitions create a situation where victims are protected differently depending on what jurisdiction they live in. This makes it challenging to send clear and unambiguous messages about what the law requires in sexual encounters.

One focus of the inquiry would be to look at whether there are benefits to aligning, or harmonising, the definitions across Australia.

The Senate inquiry has the backing of Greens Senator Larissa Waters and follows earlier calls by Grace Tame for sexual consent laws to be made uniform across the country.

This area of law has been under the spotlight following recent legal changes in NSW, the ACT and Victoria. Each has taken law reform steps towards an affirmative consent standard, which means consent is understood as ongoing communication.

Each person must say or do something to indicate consent and check that the other is willing to proceed. Tasmania was the first state to move towards affirmative consent in 2004.

The current push to harmonise sexual consent law is important and timely. It would help support educational efforts around sexual consent and reduce confusion about the law. It has the potential to clarify the standard of ongoing communication expected before and during sex – a crucial component of affirmative consent models.

The recent legal reforms in NSW, the ACT and Victoria, along with announcements or enquiries in Queensland and WA, mean the time is right to address this issue on a national level.

Risks and challenges

Nonetheless, the push to harmonise sexual consent laws faces significant risks and challenges.

We recently conducted the first comprehensive academic study of the prospects for success in this area, which is due to be published in mid-2023.

One risk is what we term the 'levelling-down' problem. This occurs when jurisdictions that are progressive and reformist adopt legal principles favoured by less reformist ones to achieve common standards. Harmonisation to the lowest common denominator risks slowing needed reforms.

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In the case of sexual consent laws, it seems unlikely that Tasmania, NSW, the ACT and Victoria, having endorsed affirmative consent, would roll back those reforms to attain uniformity. This suggests harmonisation should aim at some form of affirmative consent standard.

However, although these jurisdictions have moved towards affirmative consent, their laws differ in their details. For example, they apply different tests for whether a defendant has a reasonable but mistaken belief in consent, which provides an excuse for rape charges.

Deep-seated differences also exist between common law and code-based criminal law jurisdictions. These differences would need to be overcome to produce a common model.

There are other reasons why legal harmonisation may not be easy. Criminal law reform – and sexual offence law in particular – tends to engage strong advocacy coalitions.

These advocacy groups, on all sides of the issue, often have entrenched positions that are difficult to change. Some engage in public advocacy and media work, while others rely on informal networks and lobby behind the scenes.

The difficulty of satisfying all these groups creates a challenging political dynamic. It gives legislators an incentive to preserve the status quo.

It's particularly difficult for criminal law reforms to succeed without the support of legal professional bodies, but these groups tend to be conservative on such issues.

For example, the strong opposition of the Queensland Law Society and Bar Association to consent law reforms in that state arguably explains the past reluctance of the state government to drive legal changes in this area.

The history of criminal law harmonisation in Australia also sounds a note of caution. For example, the campaign for a Model Criminal Code in the mid 1990s – which aimed to craft a common criminal code for all Australian jurisdictions – fell well short of its aims.

Persistence will be needed

History suggests harmonisation won't occur unless done in a politically strategic way that aims to build a broad consensus for reform – while also being willing to push past the objections of groups that actively work to preserve the status quo.

The harmonisation effort must be accompanied by prolonged attention, political will and sufficient resources if it's to overcome jurisdictional differences, historical inertia and entrenched views of advocacy coalitions within the criminal law arena.

The courts

While recommendations of the Criminal Justice Sexual Offences Taskforce have changed the manner in which judges and the courts deal with matters of serious sexual assaults, these changes have largely been brought about as a result of legislation. Changes in social attitudes regarding sex crimes will doubtless lead to future court decisions rethinking the law or looking at criminal law issues in the area of sexual assault in a way that leads to law reform.

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Judges in cases where a guilty verdict was returned have handed down some severe penalties, both to send a message of general deterrence to the community and to reflect the severity of the offences. For example, Bilal Skaf, who was convicted as the ringleader in a series of gang rapes in Sydney in 2000, received a sentence of 55 years' imprisonment, with a 40-year non-parole period (this was reduced on appeal).

It has been suggested that specialist courts for sexual offences would lessen the trauma suffered by victim–survivors when giving evidence and would improve conviction rates. Such courts could have appropriate technology (e.g. closed-circuit TV) and relevant facilities (e.g. separate entrances for defendants and victim–survivors) and be staffed by specially trained judges and prosecutors.

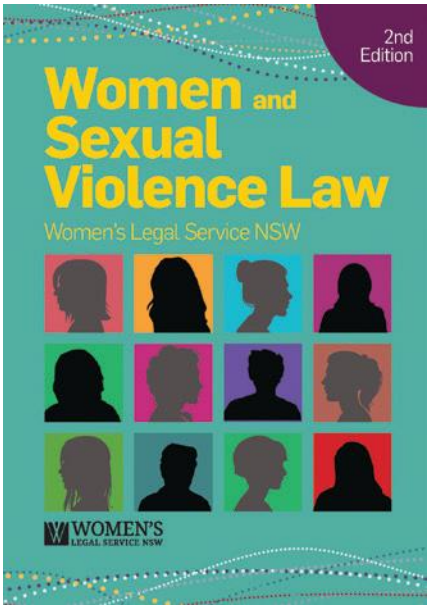

Figure 5.18 The NSW Women's Legal Service provides court support for women who are victim–survivors of sexual assault.

5.13 Effectiveness of law reform relating to sexual assault

As discussed, the low reporting rates for sexual crimes and the low number of offenders successfully prosecuted are serious concerns for the NSW Government and for the community at large. The legislation passed from 2005 onwards has attempted to address these problems. The chief task of this legislation is to ensure that the court process, while protecting the right of accused people to a fair trial, does not further traumatise victim–survivors.

The introduction of affirmative consent laws, made in late 2007 as a result of the Lazarus case, now means that those accused of sexual assault will need to show that consent was present. This may deliver a significant shift in outcomes for complainants. In the vast majority of matters, where the complainant knows the accused, a reversal of the onus of proof of consent may make it more difficult for the accused to deny criminal responsibility. What remains questionable is the extent to which the 'reasonable grounds' requirement for believing that there was consent will unfairly prejudice juries against defendants.

The changes to the NSW Barristers' Rules about questioning sexual assault victim–survivors can only be a good thing. It is also a sign that the publicity and pressure exerted by the various agencies of law reform have prompted defence lawyers to rethink their conduct in future cases.

State governments have implemented at least two-thirds of the 70 recommendations from the Criminal Justice Sexual Offences Taskforce, including:

- trying to address delays in sexual assault matters coming to court; the District Court has introduced mandatory timetables
- closing court when victim–survivors are giving evidence
- allowing complainants to use remote witness facilities in 78 locations across the state
- requiring judges to disallow improper cross-examination questions.

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Coercive control laws were introduced as additional measures to confront the crisis in domestic violence, but evidence has shown there is a significant prevalence of sexual violence involved as well, which links to the affirmative consent laws. The success of these two latest reforms is yet to be seen.

Finally, continuing efforts to educate the public are equally important. Sexual assault crimes are crimes of violence, and certain beliefs about gender in our society need to be articulated and challenged if these crimes are to be properly addressed by the criminal justice system.

According to the Australian Institute of Health and Welfare in 2023:

- female sexual assault victimisation rates increased by 43 per cent between 2010 and 2022
- 7.7 per cent of women who experienced sexual assault by a male in the 10 years before 2021–2022 contacted police about the most recent incident
- 3 in 4 (76%) sexual assaults recorded by police in 2022 were perpetrated by someone known to the person.

The National Plan to End Violence against Women and Children 2022–2032 (the National Plan) highlights that more work is needed to remove barriers to reporting of sexual assault to police by victim–survivors. Continuing education and reforms to the criminal justice system will be necessary to improve reporting and collection of evidence to assist in more successful prosecutions, while balancing the rights of the accused with those of the victim–survivor and the community.

Figure 5.19 Women in Australia march in 2021 in support of the '#MeToo' movement to highlight the inadequacies of the law in providing justice to women who have experienced sexual violence and/or sexual harassment in the workplace.

Review 5.9

1. Identify how the NSW Parliament has addressed the need for reform in the area of sexual assault crimes. Give examples.
2. Describe other agencies that have had a role in bringing about changes to the way sexual assault trials are conducted. Classify each of these agencies with respect to their function and purpose within the legal system.
3. Outline some of the changes to sexual assault law that have taken place.
4. Discuss how success in this area could be measured. Give examples.

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Topic 3 summary

- There has been significant law reform relating to sexual assault over the past decade, prompted by the failure of the criminal justice system to deliver justice to victim–survivors.
- Sexual assault is a crime with one of the lowest conviction rates in New South Wales due to investigation failures, delays in cases, a lack of resources and a lack of information provided to victim–survivors.
- Law reform agencies that work in the area of sexual assault include parliamentary inquiries (e.g. the Criminal Justice Sexual Offence Taskforce), non-government organisations (e.g. Rape and Domestic Violence Services Australia) and professional organisations.
- The media have been influential in putting pressure on governments to reform the laws relating to sexual assault.

Topic 3 multiple-choice questions

1 Which of the following was NOT a reason to reform the law in the area of sexual assault?
- **a** A low rate of reported sexual offences
- **b** A low rate of convictions
- **c** The poor level of service to victim–survivors in terms of information and resources
- **d** The media was insufficiently interested in sexual assault cases

2 The Criminal Justice Sexual Offence Taskforce, set up in 2004, has brought about which of the following changes?
- **a** Legislation to improve procedures for giving evidence
- **b** Legislation requiring judgments to reflect public opinion about sexual offenders
- **c** A greater number of sexual offences being reported
- **d** A statutory requirement that the media report cases with greater understanding of the law

3 The NSW Government asked the Australian Institute of Criminology to investigate whether giving evidence via closed-circuit TV altered the way in which the evidence was received; that is, whether it affected juries' empathy for the victim–survivors or the accused. Which of the following best reflects the Institute's findings?
- **a** Juries were more likely to favour the accused.
- **b** Juries were more likely to favour the victim–survivor.
- **c** There was no difference in jury responses.
- **d** Closed-circuit TV evidence was more likely to permit the presentation of graphic evidence.

4 The *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW) changed the *Crimes Act 1900* (NSW) with respect to consent. Which of the following is correct?
- **a** Documentary evidence is needed to establish consent.
- **b** The onus of proof of consent has been reversed.
- **c** Partial consent may be established.
- **d** None of the above.

5 The *Criminal Procedure Further Amendment (Evidence) Act 2005* (NSW) made which of the following changes to the *Criminal Procedure Act 1986* (NSW)?
- **a** Hearsay evidence can now be admitted to the court to prove that the complainant consented to sexual intercourse.
- **b** It prohibited the cross-examination of victim–survivors by an unrepresented accused person.
- **c** It allows a transcript or recording of a complainant's evidence in any retrial.
- **d** It reaffirmed the right of an unrepresented accused to cross-examine the alleged victim–survivor.

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Topic 3 short-answer questions

1 Outline the main issues that prompted law reform in the area of sexual assault.
2 Discuss the changes to the law of consent from the perspective of the victim–survivor and the accused.
3 Identify and describe the role of some non-legal measures in addressing the effectiveness of the law in dealing with sexual assault.
4 Describe at least three reforms to the law relating to sexual assault.
5 Assess the effectiveness of law reform in addressing the issues around sexual assault.

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Topic 4
Young drivers and the law

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Road Transport (Safety and Traffic Management) Act 1999 (NSW)
Road Transport Legislation Amendment (Car Hoons) Act 2008 (NSW)
Road Transport Act 2013 (NSW)
Road Transport (Driver Licensing) Regulation 2017 (NSW)

SIGNIFICANT CASES

R v Edwards [2023] NSWDC 530

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5.14 Conditions that led to law reform relating to young drivers

For most Australian young people aged 16–25, learning to drive a car and gaining a licence to drive without adult supervision is considered to be a rite of passage. It is generally accepted that being able to drive facilitates freedom from parents, public transport and a general sense of not having to rely on others to go places. However, the ability to drive a vehicle without adult supervision carries enormous responsibilities and is subject to frequent legislative changes.

When speaking to older generations of drivers, many can recite stories about going to the nearest police station and doing a driving test with a police officer and being granted a licence with very little fuss. No photo identification, written tests or logbooks were required in those times. More recently, drivers could obtain a learners permit at 16 years and nine months and then could practise their driving with relatives or instructors. During the 1980s, a person could be granted a provisional licence (P-plates) on their seventeenth birthday if they passed a practical and written test. After one year on P-plates, drivers were automatically granted a C-class licence.

However, in recent years, due to a number of tragic accidents, and media and public criticism of young drivers, new restrictions have been placed on provisional drivers. The reasons for these restrictions are summarised in the following points:

- A 17-year-old driver with a P-plate licence is four times more likely than drivers over 26 years to be involved in fatal accidents.
- One third of all speeding drivers and/or riders in fatal crashes are males aged 17–25; six per cent are females aged 17–25.
- Statistics indicate that car crashes (head-on collision, rear end, side impact and roll over) involving P-platers in New South Wales have seen a worrying increase in metropolitan areas.
- Forty-five per cent of all young Australian injury deaths are due to traffic crashes.
- Of all hospitalisations of young Australians, almost half are drivers involved in a road traffic crash and another quarter are passengers.
- Drivers aged under 26 make up 15 per cent of licence holders but are involved in 36 per cent of road fatalities.
- One P-plate driver dies in New South Wales every six days.
- Seventeen P-plate drivers crash every day.
- Mobile phone distraction is problematic and has caused numerous fatalities for 18- to 21-year-olds in recent years.
- Crashes cause 66 per cent of deaths among 17- to 20-year-olds.
- Speed is a contributing factor in 80 per cent of crashes.
- Twenty-five per cent of P-plate drivers admit speeding 'most of or all the time'.
- In their first year of driving, 33 per cent of drivers crash.
- Restricting red P-plate drivers to one passenger saves 18 lives a year.

Media

NRMA finds that the public backs more police as NSW road toll skyrockets

NRMA Press release

13 September 2023

There is overwhelming public support for the work of NSW Police in reducing the state's road toll as the number of deaths in 2023 skyrockets to a catastrophic 253 – an increase of 60 on the same time last year.

(Continued)

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Media—Continued

The NRMA survey of 3,305 members across NSW and the ACT found almost two-thirds (65%) believed visible marked police cars were the most effective way to tackle bad driver behaviour. An additional 10 per cent supported unmarked police cars.

There is overwhelming public support for NSW Police with 90 per cent of respondents saying there should be more visible policing on our roads.

NSW finds itself in the midst of a road safety crisis with a 31 per cent increase on road deaths compared to the same time last. The NRMA is also hugely concerned with the national road toll of 721 deaths as of the end of July– a seven per cent increase on the same period last year.

According to those surveyed, the top five methods for tackling bad driver behaviour are:

1 Visible marked police cars 65%
2 Combined speed and red-light cameras 11%
3 Unmarked police cars 10%
4 Mobile speed cameras 7%
5 Fixed speed cameras 4%

The research also found the top five road safety issues were:

1 Speeding 59%
2 Drink driving 58%
3 Illegal phone use while driving 55%
4 Aggressive driving 50%
5 Drug driving 48%

The NRMA has released the research in the midst of the state's worsening road safety crisis and in the lead-up to next week's NSW Budget.

NRMA spokesperson Peter Khoury said the latest research supported the NRMA's long held view that investing in more Police on the state's roads was critical to saving lives.

'2023 has been a horrific year on the state's roads so far and the NRMA wants to see more clearly marked visible Police across the road network all-year-round,' Mr Khoury said.

'We cannot allow the carnage to continue – we are facing a national crisis with over 1,200 deaths in the first seven months alone.'

'Governments must invest in effective enforcement and improving our roads while individual drivers have to take responsibility for their actions behind the wheel.'

Analysis 5.6

Read the media article on pages 159–60. Explain why the NRMA believe more police will help to reduce road fatalities.

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Over the past few years, obtaining a driver licence has become more time-consuming, and there are now more restrictions on driver behaviour. All states and territories in Australia have a uniform driver licence system: in all of them, a **C-class licence** (a car licence) allows a driver to drive a car, utility, light truck or van provided it is not heavier than 4.5 tonnes. However, as state governments have legislative responsibility for the administration of drivers, laws regarding driver behaviour vary. While most states allow 16-year-olds to learn to drive a vehicle or motorcycle under the supervision of a fully licensed driver, there are subtle variations in learner driver supervision requirements, speeds and the number of passengers allowable. For example, learner drivers in New South Wales must record 120 hours of driving with at least 20 of these hours being at night (between sunset and sunrise). Learner drivers in New South Wales may drive to a 90 km/h maximum, but South Australia allows 100 km/h. Many states do not restrict the number of passengers P-plate drivers can carry, but in New South Wales, P1 drivers are restricted to one passenger between the hours of 11 pm and 5 am. In Western Australia, P-plate drivers cannot drive between midnight and 5 am, except for work or family reasons.

The responsiveness of the legal system

In 1970, 1309 people were killed on the roads in New South Wales. This is not the highest figure in absolute terms since records have been kept – records started in 1908 – but by dividing the population of the state by the number of fatalities, a figure of 28.98 fatalities per 100 000 persons was recorded. By 2006, the road toll had fallen dramatically to 496, a figure of 7.23 fatalities per 100 000. While the annual road toll has hovered around this figure since the 1990s, laws and restrictions for young drivers in New South Wales are continually changing to try to minimise fatalities and injuries on our roads.

C-class licence
'C' stands for car; an unrestricted driver licence often known as a 'black' or 'full' licence in terms of restrictions on speed, mobile phone use, passengers carried and blood alcohol readings

Figure 5.20 Laws and restrictions for young drivers in New South Wales are continually changing to try to minimise fatalities and injuries on our roads.

In 2022 and 2023, respectively, two car accidents involving young people and resulting in fatalities and serious injury occurred. The first accident was a horrific motor accident in New South Wales at Buxton, south-west of Sydney. The second, took place on Sydney's northern beaches.

In Court

***R v Edwards* [2023] NSWDC 530**

A 19-year-old P-plate driver was driving at 118 km/h in a 60 km/h zone on 6 September 2022 when his car hit two trees at Buxton, south west of Sydney, killing five of his teenage passengers. The driver was charged with five counts of aggravated dangerous driving occasioning death. Each of these charges carries a sentence of up to 14 years in prison.

The teenager pleaded guilty to the charges in Picton local court. It was noted by the magistrate that 'the aggravated dangerous driving was particularly egregious in that it was dangerous driving repeated over a period of time ultimately leading to the loss of control of the vehicle'. Further, court documents indicated that the teen used his phone to record himself swerving the vehicle while driving at speeds of up to 147 km/h.

The District Court of NSW sentenced the teen to 12 years imprisonment, with a non-parole period of 7 years.

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In Court

A car crash occurred in Sydney's northern beaches on Saturday 7 October 2023. A 17-year-old P-plate driver was at the wheel when it left the road hitting a tree, resulting in the death of a 16-year-old front-seat passenger and the hospitalisation of five other teenagers.

The driver was flown to Royal Prince Alfred Hospital in a critical condition, while the passengers were treated by paramedics at the scene and transferred to the Royal North Shore Hospital.

The 17-year-old driver was arrested by police the following Thursday and charged with 10 offences, the most serious being: dangerous driving occasioning death, two counts of dangerous driving occasioning grievous bodily harm and two counts of causing bodily harm by misconduct in charge of a motor vehicle.

The driver's licence was also suspended, and he was granted strict conditional bail prior to appearing before a Children's Court on 10 January 2024.

Analysis 5.7

Read the two In Court items above and on the previous page.

1 Compare and contrast the two cases.
2 Describe your understanding of the terms 'justice', 'law' and 'society' in relation to these motor vehicle crashes.

5.15 Agencies of law reform relating to young drivers

Roads and Maritime Services and Transport for NSW (TfNSW, called the 'NSW Roads and Maritime Services Authority' (RMS) prior to 1 December 2019) administers laws relating to New South Wales drivers under the *Road Transport Act 2013* (NSW) and the *Road Transport (Driver Licensing) Regulation 2017* (NSW). These legal instruments set out a multitude of restrictions on driver behaviour and penalties for infringements.

There are severe penalties for driving recklessly, both legally and socially. Under the *Crimes Act 1900* (NSW), reckless drivers can go to jail. Accidents also change the lives of victims' families as they deal with the loss of, or serious injury to, loved ones. The law tries to satisfy society's desire to see offenders punished for breaching the law by driving a vehicle irresponsibly.

VicRoads is the statutory authority that administers laws relating to drivers in Victoria. VicRoads aims to reduce the number and severity of road crashes and road trauma incidents, assists in the development of the road transport system, and minimises the impact of roads and traffic on society. VicRoads' powers arise from the *Transport Integration Act 2010* (Vic), the *Road Management Act 2004* (Vic) and the *Road Safety Act 1986* (Vic). In Queensland, the Department of Transport and Main Roads administers the law for drivers under the *Transport Operations (Road Use Management) Act 1995* (Qld). Each of these agencies is also concerned with changing the law to lower the road toll and ensure that all drivers are safe on Australian roads. Each agency has its own mechanisms, but they each have similar law reform objectives.

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Review 5.10

1 Account for the increasing complexity of restrictions on learner drivers since the 1980s.
2 Outline some similarities and differences between the states in relation to P-plate and C-class licences.
3 Outline the relationship between law, justice and society in relation to learner drivers.

5.16 Mechanisms of law reform relating to young drivers

The *Road Transport (Driver Licensing) Regulation 2017* (NSW) outlines a **graduated licensing system**. This system allows young drivers to move through three stages of competency, from supervised learning to unsupervised driving. At stage 1, 16-year-olds can obtain a learner's licence (L-plates) after passing a multiple-choice test. They must then complete 120 hours of driving supervised by someone with a full Australian driver licence. This driving must be recorded in a logbook (or digitally recorded) and verified by the person who supervised the driving. At stage 2, when they are 17, drivers can sit a test to obtain their **P1** licence (red provisional licence) (P-plates). At 18, drivers can progress to a **P2** (green provisional licence) after passing a 'hazard perception test'. In New South Wales, this system has been changed on numerous occasions.

graduated licensing system
a licensing system in which drivers pass through stages leading up to the granting of a full C-class licence

P1
red provisional plates

P2
green provisional plates

The restrictions for young drivers as of the time of writing (June 2024) are summarised on the next page. These restrictions have been changed significantly in response to pressure from the media, the public and the families of victims who lost their lives in horrific crashes. Despite New South Wales introducing a zero-alcohol limit for all P-plate drivers in 2004 (this already applied to L-plate drivers), crashes involving alcohol are still occurring.

Figure 5.21 In New South Wales, speed restrictions are placed on L-plate and P-plate drivers. L-plate and P1 drivers must not exceed 90 km/h, while P2 drivers must not exceed 100 km/h.

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A summary of restrictions on L-plate and P-plate drivers

In New South Wales, L-plate and P-plate drivers are subject to the following restrictions:

- **Speed** – L-plate drivers must not exceed 90 km/h; P1 drivers must not exceed 90 km/h; P2 drivers must not exceed 100 km/h. Any L-plate or P-plate driver caught speeding (either by exceeding these limits or exceeding a marked limit) will be fined, given four demerit points and will lose their licence for three months.
- **Mobile phones** – All mobile phone use while driving is banned for L-plate and P1 drivers.
- **Passenger restrictions** – P1 (red) drivers under the age of 25 may only carry one passenger under the age of 21 between 11 pm and 5 am; a breach of this rule will incur a loss of three demerit points – a fine may also be imposed.
- **Vehicle restrictions** – P1 and P2 drivers are not allowed to drive 'high performance' vehicles (including electric vehicles) defined as having:
  - a power to tare mass ratio (PMR) of greater than 130 kilowatts per tonne, or
  - a significant engine modification, or
  - other specifications or data suggesting that it is a high risk for novice drivers.
- This applies to all P1 and P2 NSW licence holders, even if driving interstate, but not to learners.
- An online search for prohibited vehicles can be made on the NSW Government website.
- **Logbooks** – Learner drivers must log 120 hours of supervised driving in a logbook. A person with a full Australian driver licence or a driving instructor must sign each entry. At least 20 hours of driving must be at night.
- **Progression** – Drivers must pass a hazard perception test to progress from a P1 (red) licence to a P2 (green) licence.
- **Alcohol and drugs** – L-plate, P1 and P2 drivers may not record any blood-alcohol reading above zero or drive under the influence of drugs.

The development and reform of law as a reflection of society

In response to accidents, the NSW Government made several key amendments to the legislation governing young drivers. In 2007, the graduated licensing system was amended to include 150 hours of supervised driving experience for L-platers (later amended to 120 hours). This was the beginning of a logbook system: all hours driven were to be recorded and verified by the supervising driver. The intention was to increase drivers' experience, which would improve their skills and so avoid tragedies. According to the TfNSW, drivers can reduce their chances of being in a car accident by 30 per cent by increasing the number of supervised driving hours they complete.

Figure 5.22 A proud P-plater – the first P-plate in NSW was issued on 4 January 1966.

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However, according to law academic, Bronwyn Naylor, critics of the logbook system argue that drivers from disadvantaged backgrounds were being treated unfairly:

> Magistrate Stephanie Tonkin in Townsville has been increasingly concerned about the number of young people – Aboriginal and non-Aboriginal – coming before her prosecuted for driving without a licence. The introduction of the 100 hours requirement [in Queensland] makes it even more difficult to ever achieve a full licence. Her colleagues in other states also point to increasing numbers of marginalised families unable to provide the supervised driving required, whose teenage children are simply driving unlicensed.

Bronwyn Naylor, 2010, 'L-plates, logbooks and losing out: Regulating for safety – or creating new criminals?' *Alternative Law Journal*, vol. 32, no. 2.

In New South Wales, First Nations people are 1.5 times more likely to be killed or injured in a car crash compared with non-Indigenous people and are around five times more likely to be killed on a country road than on a metropolitan road. According to a TfNSW study, the problems learner drivers most often identify are 'the licensed driver helping often didn't have time to help me go driving' (33%); 'sometimes I couldn't find a licensed driver to teach/help me' (27%); and 'I couldn't afford a driving instructor' (23%).

TfNSW has responded to these statistics by introducing programs promoting safe behaviour and a reduction in car accidents in First Nations communities. These communities are supported in 18 places across New South Wales, including Orange, Bourke, Lake Cargelligo and Moree. Further, 1000 free places are offered each year in the Safer Drivers Course to assist young learner drivers from disadvantaged backgrounds and First Nations communities.

Restricted P1 Provisional licence for selected areas west of the Newell Highway

Under 25-year-old learner drivers living in Brewarrina, Walgett, Bourke, Broken Hill, Balranald and Hay can now apply for a restricted P1 provisional licence so they can drive to work, an educational institution and medical appointments. Learners in these areas will be able to apply for the restricted P1 provisional licence after they have completed 50 hours of on-road supervised driving (including at least 10 hours of night driving) over a 10-month period, with these hours recorded in their logbooks.

NSW Centre for Road Safety

The importance of the rule of law

The TfNSW claimed it had caught 32 learner drivers falsifying logbooks in 2010, compared with 189 in 2009 and 84 in 2008. Victorian and Queensland departments reported similar figures over the last four years, with similar reasons given for attempting to disobey the law. Despite the apparent ease of falsifying logbooks, asking parents to 'bump up' the hours behind the wheel so as to speed up the process of gaining a provisional licence clearly demonstrates a lack of respect for, and understanding of, the rule of law. The intention of the legislation is to improve the experience, knowledge and skill of learner drivers in order to reduce the road toll and save lives and prevent injuries on our roads.

In response to the falsifying of paper logbooks, the TfNSW introduced a digital logbook app called L2P. The digital logbook is designed for the latest generation of learner drivers. It features a countdown to motivate learners, real-time tracking and recording of driving sessions plus an online educational platform with demonstrations presented as video clips.

Legal Links

Read about the penalties imposed for cheating on your logbook from the following link: http://cambridge.edu.au/redirect/10381.

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5.17 Effectiveness of law reform relating to young drivers

In 2007, just 48 hours after the passing of legislation restricting the number of passengers that P1 drivers are allowed to carry, a young female passenger was killed in Sydney's Royal National Park. A 19-year-old learner driver lost control of his vehicle on a bend, killing 17-year-old Kim O'Brien and injuring another three passengers. These tragedies highlight the intention of the legislation: it restricts P1 drivers under the age of 25 to carrying no more than one passenger who is under the age of 21 between 11 pm and 5 am.

In February 2012, a 23-year-old woman and the tow-truck operator who came to her aid were killed in a horrific accident. Sarah Frazer's car broke down near Mittagong, near the New South Wales Southern Highlands, and needed to be towed. Both Sarah and the tow-truck operator who came to her aid were killed when they were hit by a passing vehicle. A Road Safety Group (http://cambridge.edu.au/redirect/10455) was started by Sarah Frazer's father. In May 2012, he presented a petition to the New South Wales Parliament calling for a change to the National Road Rules. The petition had 23 000 signatures. One of the changes the petition called for was the introduction of a 'move over and slow down' law.

Figure 5.23 Five teenagers were killed in a single-vehicle crash on 6 September 2022 at Buxton, south-west of Sydney.

Slow down, move over and give space: A road rule has changed

The trial of a rule that required motorists to slow down to 40 km/h when passing stationary emergency vehicles with flashing blue or red lights has been completed. A review of the trial, which included community feedback, has resulted in a change to the road rules. This rule has been changed to improve the safety of emergency services personnel, tow-truck operators and breakdown assistance providers working on the road, as well as the people they are helping. The changes also make it safer on higher speed roads where the time and distance required to reduce speed to 40 km/h is the greatest. The changes to the rule commenced on 26 September 2019.

NSW Centre for Road Safety

Street or drag racing and 'anti-hoon' legislation

Another behaviour associated with young drivers is 'drag' or street racing. The use of suburban roads for racing cars has had fatal consequences on many occasions. This 'hoon' (antisocial) behaviour has been outlawed since 1999 through the *Road Transport (Safety and Traffic Management) Act 1999* (NSW), the *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW) and subsequently by the *Road Transport Act 2013* (NSW) because of the danger it poses to both drivers and the public. Under the legislation, a court can impose a fine for a first offence of $3300, and can impose a fine of $3300 and/or nine months' imprisonment for a second or subsequent offence. A 12-month automatic licence disqualification applies to those convicted of this offence.

'Burnouts' – intentionally spinning the wheels of a vehicle at high revs to burn the rubber of the tyres,

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creating smoke and a distinctive smell – are also considered to be 'hoon' behaviour. The risk of cars becoming out-of-control is high, which is why burnouts are outlawed. An 'aggravated burnout' is also an offence; this covers a hoon driver's friends who willingly participate in, urge others to participate in, photograph or film to promote, or organise hoon activity. The maximum court-imposed fine for a first offence is $3300; it is $3300 and/or nine months' imprisonment for a second or subsequent offence. A 12-month automatic licence disqualification applies to those convicted of this offence.

Despite the penalties for these offences, street racing continues to create problems for police, victims, their families and the public.

Discussions about deaths caused by street racing, as opposed to those caused by driving dangerously, involve comparing the harm that a driver may cause to members of the public or innocent bystanders in various situations. It seems obvious that the risks posed by street racing are higher than those posed by general incidents of speeding or driver inexperience. The fine – $3300 – can seem a very small price to pay compared with incarceration for a number of years.

The importance of driving unsupervised for many young Australians has not changed since the 1950s. Driving remains a rite of passage for many teenagers, but it clearly carries important legal and social responsibilities. There are severe consequences for those who blatantly disregard both the law and the lives of others, and prosecutions can result in incarceration for drivers – not to mention the wrath and pain of the families of victims lost in senseless car accidents.

Getting a C-Class licence now requires significant time behind the wheel and significant financial costs. Many families from lower-income groups claim the costs prohibit their children from accessing private transport.

Review 5.11

1 Discuss the contribution to road safety of the mandatory 120 hours of supervised driving for learners.
2 Explain the statement 'logbook requirements only create more criminals'.
3 Evaluate the effectiveness of law reform in relation to young drivers. Refer to the accident in Sydney's Royal National Park and the death of Sarah Frazer outlined on the previous page.
4 Compare the fines and penalties for street racing with those of speeding and mobile phone use while driving. Do you think the penalties are justified? Give reasons to support your opinion.

Analysis 5.8

1 Find online the article 'Street race death horrifies NSW minister' (*News.com.au*, 7 August 2012). Outline the minister's response to the street racing accident.
2 Explain the importance of driving within the speed limit.

Research 5.4

1 Choose an act of reckless driving (e.g. driving under the influence or street racing) and research it. List the penalties for the offence and explain the dangers involved.
2 'Police should not be able to confiscate vehicles under any circumstances.' Research the legislation about the confiscation of vehicles and, in relation to it, discuss the key issues surrounding the role of the state in governing driver behaviour.

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Topic 4 summary

- A number of tragic accidents, as well as media and public criticisms of young drivers, and new restrictions placed on provisional drivers, have made obtaining a licence a lengthy and expensive process.
- Transport for NSW administers New South Wales drivers under the *Road Transport (Driver Licensing) Regulation 2017* (NSW) and the *Road Transport Legislation Amendment (Car Hoons) Act 2008* (NSW).
- The *Road Transport (Driver Licensing) Regulation 2017* (NSW) outlines a graduated licensing system.
- Support has been provided for members of disadvantaged communities to access driver licences.
- Despite the penalties and the law, street or drag racing and 'hooning' are activities that still continue to attract some young drivers.
- Gaining a C-class licence requires a large amount of supervised driving time, which may help the young driver, but is a burden on families, especially ones with lower incomes.

Topic 4 multiple-choice questions

1 Legislation governing C-class licences:
   - **a** is uniform across the country.
   - **b** varies from state to state.
   - **c** only varies on speed-related matters.
   - **d** only varies on passenger restrictions.

2 A key difference between red (P1) and green (P2) provisional licences is:
   - **a** P2 drivers have no limits related to how many passengers they can carry.
   - **b** P2 drivers have a 0.02 blood-alcohol restriction.
   - **c** P1 drivers are not required to display plates.
   - **d** P2 drivers can drive at a higher speed limit than P1 drivers.

3 What proportion of P-plate drivers report speeding 'most of or all the time'?
   - **a** 10%
   - **b** 25%
   - **c** 90%
   - **d** 100%

4 Zero-alcohol readings for all L, P1 and P2 drivers came into force in which year?
   - **a** 2006
   - **b** 2010
   - **c** 2004
   - **d** 1970

5 What length of disqualification from holding a driver licence applies to those convicted of hooning offences?
   - **a** 6 months
   - **b** 12 months
   - **c** 18 months
   - **d** 24 months

Topic 4 short-answer questions

1 Outline the process for gaining a C-class licence in New South Wales.

2 List two examples of legislation governing driver behaviour.

3 Describe the difference between a P1 and a P2 licence.

4 Discuss the reasons why you think it has been necessary to increase the required learner-driver hours over time.

5 Evaluate the law as it relates to young drivers and their rights to a driver licence.

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Themes and challenges for Part I – The legal system

The need for law in the operation of society

- While it can be assumed that most members of society will do the right thing, there is a need for a foundation of regulations and consequences that set guidelines for the successful operation of society. This allows clarity and eliminates confusion around what is right and what is wrong, as well as providing solutions for when things go wrong. It provides safety and fairness for members of society.

The importance of the rule of law for society

- The rule of law is aimed at providing procedural fairness so that everyone in society is treated equally by the legal system. This is important as it is the basis for why people will follow the law. In reality, where necessary, the law includes constraints to its application (for example, around minors). Other factors that may limit the rule of law in practice include the education, wealth and social standing of those covered by the legal system.
- The rule of law is supposed to provide procedural justice to the citizens of a country, but in the case of native title and First Nations peoples, there has been a lack of effectiveness in this area. The concept of *terra nullius* allowed for the undermining of the rights of First Nations peoples and action to remedy this has been very slow. Although there have been legal and non-legal solutions put in place to deal with native title issues, there is still a long way to go in creating a level playing field in terms of procedural justice.

The relationship between different legal institutions and jurisdictions

- Having a range of legal institutions and jurisdictions supports the rule of law through providing for procedural justice. This is because the relationship between institutions and their jurisdictions allows cases and complaints to be heard in the appropriate setting. This strengthens the legal system. For example, if a person knows that they will be treated fairly in a court of law (or similar) and can appeal a decision, they are more likely to respect the legal system and its processes.
- The court hierarchy interprets legislation and is also guided by the doctrine of precedent. Lower courts are bound to follow decisions of superior courts, while superior courts may use decisions of lower courts to help them make a decision. Decisions of courts in other jurisdictions (other Australian states, or other common law countries) may also influence a judgment, but are not binding.
- The Court of Arbitration for Sport (CAS) is an important mechanism for law reform in sport, and is an avenue for resolving sport-related disputes, if the parties agree to its jurisdiction.
- Much of the law reform relating to young drivers can be found in various statutes passed by the NSW Parliament (e.g. *Road Transport Act (2013)* NSW, *Road Transport (Driver Licencing) Regulation 2017* (NSW)). These legal instruments set out the restrictions on driver behaviour and associated penalties for breaching the law.
- International law governs the relationships between nation states, and fundamental human rights, but is criticised for lacking enforcement powers. It relies on countries consenting to cooperate in the enforcement of laws.
- An international treaty only becomes binding on a state when the state has ratified it. For some countries, ratifying a treaty automatically makes it part of domestic law; other countries may also require domestic laws to be passed.

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The development of law as a reflection of society

- Groups that have been historically marginalised, or in a less powerful position, and over time society may come to recognise that law reform is needed in connection with these groups. Since the 1980s there have been various law reforms relating to same-sex couples, first giving them the same legal protections as other de facto couples, and then in 2017 the right to marry.
- The 1992 Mabo case was the first legal recognition that First Nations peoples had systems of law and ownership of their lands that long predated European colonisation. This overthrew the idea of *terra nullius*, and subsequent cases have led to efforts to enshrine native title in legislation.
- Constant reform has occurred to ensure, to the extent possible, that the law provides adequate protection for victims of domestic violence. The law is continually challenged to meet this need as up to four women per week are killed nationally as a result of domestic violence.
- Professional athletes are now considered to be the employees of various sporting organisations. The contemporary employer–employee relationship that now exists in professional sport is characterised by complex contractual legal relationships that did not previously exist at the amateur level.
- Body contact sports, such as Rugby League, are inherently dangerous. Most players give permission to be tackled in the course of a game; however, they do not consent to behaviour that is prohibited by the rules. As a consequence, there have been numerous recent instances of players injured in on-field assaults seeking compensation via the court hierarchy. In the years to come, players' families may sue the National Rugby League for damages as a result of their loved ones developing CTE (chronic traumatic encephalopathy) caused by repeated head knocks and concussion.
- Sexual assault is one of the most under-reported crimes in Australia and when reported it has a very low conviction rate. As a result, there have been many changes to the law to improve the efficacy of the criminal justice system to be more responsive to, and a reflection of, the needs of society in delivering justice to victim–survivors of sexual assault. There is ongoing effort to make the trail process less traumatic for victim–survivors, and another recent change has been the introduction of new consent laws in 2022 that provide further clarity on what are reasonable grounds to believe that a person is consenting.
- The high incidence of tragic car accidents and death involving young drivers on Australian roads in recent years has led to the law being amended in an attempt to reduce the road toll. For example, obtaining a driver licence now requires a significant amount of driving experience.

Influences on the Australian legal system

- Contemporary Australian law has evolved from the model developed in England, and brought here by the British colonisers.
- Our common law uses the adversarial system of trial, rather than the inquisitorial system used in Europe, Japan and some other countries.
- The *Australian Constitution* sets out the powers of the state and federal parliaments with respect to making law.
- A legal system is the product of the society it operates within, so as a society changes this has an influence on the law.
- Examples of this are noted above, such as the case law and legislation surrounding First Nations land rights, the legal recognition of same-sex partnerships, and the development of laws around sexual assault.
- Another influence is technological developments. This can lead to legislation being required in new areas, such as rights and obligations arising from the use of birth technologies, and crimes of identity theft. It can also affect the legal processes themselves, in areas including the acceptance of DNA evidence, and court appearance via closed-circuit television.

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Part II
The individual and the law

30% of course time

Principal focus

Students investigate the way in which the law impacts on individuals by referring to legal and non-legal institutions, laws and media reports.

Themes and challenges

The themes and challenges covered in Part II include:

- the relationship between justice, law and society
- the relationship between rights and responsibilities
- balancing the rights of individuals with the needs of the state
- the role of the law in regulating technology
- the effectiveness of legal mechanisms for achieving justice for individuals and society.

Chapters in this part

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Chapter 8 **Contemporary issue: The individual and technology** 212

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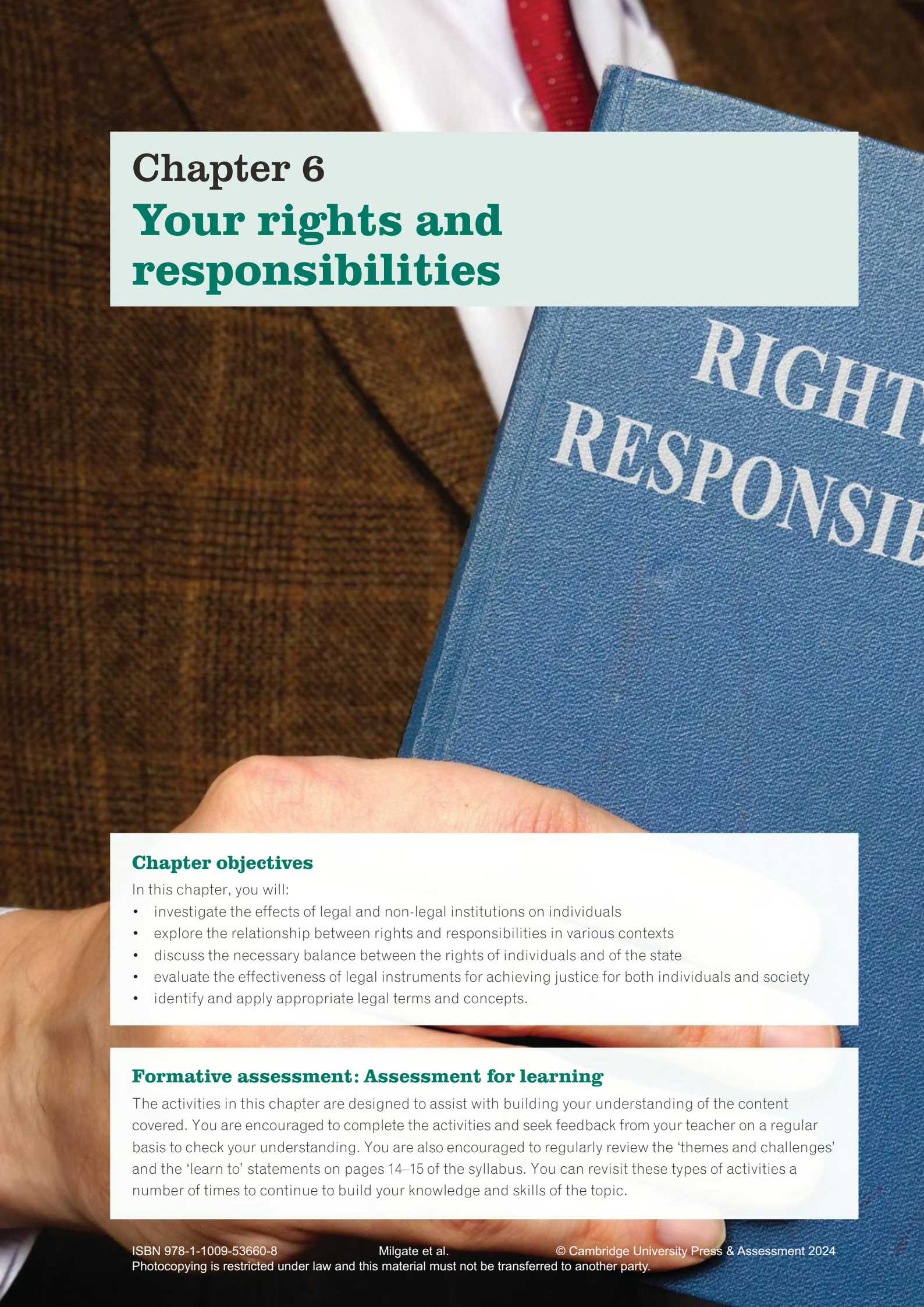

Chapter 6
Your rights and responsibilities

Chapter objectives

In this chapter, you will:

- investigate the effects of legal and non-legal institutions on individuals
- explore the relationship between rights and responsibilities in various contexts
- discuss the necessary balance between the rights of individuals and of the state
- evaluate the effectiveness of legal instruments for achieving justice for both individuals and society
- identify and apply appropriate legal terms and concepts.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 14–15 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Defence Act 1903 (Cth)
Crimes Act 1914 (Cth)
Racial Discrimination Act 1975 (Cth)
Education Act 1990 (NSW)
Disability Discrimination Act 1992 (Cth)
Criminal Code Act 1995 (Cth)
Fair Work Act 2009 (Cth)
Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)

SIGNIFICANT CASES

Donoghue v Stevenson [1932] AC 562
Dietrich v R [1992] HCA 57
Roach v Electoral Commissioner [2007] HCA 43
Rush v Nationwide News Pty Ltd (No 7) [2019] FCA 496
Larter v Hazzard (No 2) [2021] NSWSC 1451
Kozarov v State of Victoria [2022] HCA 12
Nkamba v Queensland Childcare Service Pty Ltd [2022] QDC 292

Legal oddity

In Western Australia it used to be illegal to carry more than 50 kilograms of potatoes. Under the *Marketing of Potatoes Act 1946*, which was repealed in May 2021, members of the Potato Marketing Authority had the legal right to stop a person's car to search for potatoes if they suspected that the legal limit had been exceeded. They also had the right to seize the potatoes in evidence. A first offence carried a fine of $2000, while a second transgression incurred a $5000 fine.

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6.1 What are rights and responsibilities?

rights
legal or moral entitlements or permissions

responsibilities
legal or moral obligations to others

tortious
wrongful; constituting a tort or breach of duty to others

express rights
civil and political rights that are clearly and absolutely outlined in the *Australian Constitution*

implied rights
civil and political rights that can be inferred from the *Australian Constitution*, rather than being expressly stated

Charter of Rights
also referred to as a Bill of Rights; a legal document or charter, setting out the most important rights of citizens in relation to their country

Rights are entitlements that people have under the protection of the law and/or moral authority. Rights refer to a way that people should be treated. In most cases, this treatment must be fair, respectful and equal. If you have a right to something, others are legally or morally prohibited from taking it from you. A person has a right to do something or possess something as a result of simply being human; hence, the expression 'human rights'. For example, students with disabilities have the right to attend a public school in their local residential area. The 'local' school (under the *Disability Discrimination Act 1992* (Cth)) must treat students with disabilities in the same way as all other students.

Responsibilities are legal or moral obligations that a person may have to another person; to a group; or to the state, society or other people generally. There are responsibilities to act in particular ways, as well as responsibilities to refrain from certain acts. For example, parents have both a legal and moral responsibility to care for their children, and all persons have a responsibility not to commit criminal and **tortious** acts. States, groups, organisations, corporations and societies have responsibilities, just as individuals do.

Rights and responsibilities are related. Where citizens have particular rights, the state has a responsibility to protect those rights and ensure that individuals, groups or the state itself does not violate them. Where the members of a group have a legal responsibility to do something, the group has a right to expect it. For example, school principals have the responsibility to allow a disabled student the right to attend their local school by facilitating such things as wheelchair access and/or teacher professional learning where required.

Legal basis of rights

For a right to have a legal basis, it must be protected by law and be enforceable. In Australia, legal rights flow from our *Constitution* and from statute and common law.

Australian Constitution

The *Australian Constitution* sets out two types of rights: express and implied. **Express rights** are clearly stated in the *Constitution*, and government and the Courts cannot pass legislation or make rulings that go against those rights. For example, section 116 gives the right of freedom of religion. **Implied rights** such as the right to 'freedom of speech' are not expressly written into the *Australian Constitution*. However, while Australia does not have a **Charter of Rights** enshrined in the *Constitution,* the High Court has found that the implied language and structure of the *Australian Constitution* protects individual human rights. These rights are also safeguarded in legislation passed by Commonwealth, state and territory parliaments.

Statute

Examples of rights protected by statute are the rights not to be excluded or restricted based on race or ethnic origin, or physical or mental disability. These rights are contained in the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth), respectively. For example, an employer would not be able to dismiss an employee because they were from a certain racial group. Nor would a political party be able to refuse an individual membership because of their ethnic origin.

Common law

Other rights have their origins in common law; that is, by decisions of the courts and judges. For example, in *Dietrich v R* [1992] HCA 57, the High Court ruled that individuals have the right to a

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fair trial, which includes legal representation paid by the state in serious criminal trials. Further, in *Roach v Electoral Commissioner* [2007] HCA 43, the High Court ruled that imprisoned individuals serving less than three years have the right to vote in elections.

Legal basis of responsibilities

As stated previously, where someone has a right, another individual has a corresponding responsibility.

Statute

Legal responsibilities are also called 'obligations' or 'duties'. An example of a statutory obligation is parents' duty to send their children to school or to arrange for their children to be home schooled. Another is the duty of the state to ensure that every child has the best possible education and to provide public schools. These duties are contained in statutes such as the *Education Act 1990* (NSW) and are based on the principle, stated in section 4 of the Act, that every child has the right to an education.

Common law

Other legal responsibilities are based on common law such as the duty of care. As expressed in *Donoghue v Stevenson* [1932] AC 562, a duty of care is owed to all persons who are likely to be 'closely and directly affected' by your behaviour. In short, a supplier, such as a soft drink manufacturer, must take care to ensure their products do not injure or harm consumers.

Figure 6.1 Employers owe a duty of care to their employees, such as putting control measures in place to protect workers' health and safety by providing appropriate protective equipment.

negligence
carelessness; a tort that involves breach of a duty of care resulting in harm that could have been foreseen

In another context, employers owe a duty of care to their employees. Any breach of the duty of care, resulting in harm that could have been foreseen, entitles the person harmed to bring an action for **negligence**. For example, a recent High Court Case *Kozarov v State of Victoria* [2022] HCA 12, reaffirmed that an employer has a duty of care for its workers. Ms Kozarov suffered post-traumatic stress disorder because of the nature of her work with the Victorian Office of Public Prosecutions. She sued the government because it had breached its duty of care to her by failing to prevent the development of a workplace injury. The High Court ruled in favour of Kozarov and awarded $435 000 in damages.

In Court

***Nkamba v Queensland Childcare Service Pty Ltd* [2022] QDC 292**

Early one morning in poor lighting, Mrs Nkamba was setting up a children's activity in her capacity as a childcare worker employed by Queensland Childcare Services. The plaintiff stepped backwards and down from a storage shed onto an area covered with synthetic grass. Unfortunately for her, the poor lighting meant that she stepped onto a small toy block. Consequently, her ankle inverted and she fell suffering a 'disruption to the anterior talofibular ligament' of her right ankle. Despite therapeutic treatment over a long period of time, her painful injury persisted, severely limiting her daily life and ability to work. This resulted in deep depression.

The court found that these injuries occurred as a result of inadequate duty of care in the workplace and employer-based negligence. The plaintiff was subsequently awarded $197 013.98 in damages.

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Analysis 6.1

Read the In Court on the previous page. Assess the extent to which employees have a right to duty-of-care compensation resulting from foreseeable accidents in the workplace.

Review 6.1

1 Explain the difference between rights and responsibilities and describe how they are related.
2 Describe how and why a right can be recognised as law.
3 Identify other terms used to describe legal responsibilities.

6.2 The nature of individual rights

The distinction between moral and legal rights

Legal rights, as previously outlined, emanate from the *Australian Constitution*, statutes and common law. By contrast, moral rights may be considered from differing viewpoints, and may or may not be upheld by those in sociocultural authority. For example, most of us would expect the right to fidelity when in a close personal relationship. But it is not a breach of statutory, common or constitutional law for people to engage in extra-marital affairs. Therefore, while an act of infidelity may be immoral, it is not illegal.

Video 6.1 People respond to the passing of the Marriage Amendment (Definition and Religious Freedoms) Bill on 7 December 2017 (00:54)

While moral rights and responsibilities may have binding force for everyone, only those who believe that they are binding are likely to behave accordingly, and try to persuade others to do likewise. In other words, moral rights and responsibilities are not enforceable. While many laws exist because they accord with the moral views and behaviours of most people in a community, the law is sometimes slow to adapt to changes in social attitudes and public morality. The same-sex marriage debate is a good example. Polling by Galaxy Research (2009–2012) found that 64 per cent of survey respondents agreed with amending the *Marriage Act 1961* (Cth) to allow same-sex couples matrimonial rights. However, it was not until after the formal Australian Marriage Law Postal Survey in 2017 that the government enacted legislation giving people in same-sex relationships identical marriage rights as people in heterosexual relationships, with the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

A Charter of Rights?

Protections provided by Charters or Bills of Rights

Countries including the United States, the United Kingdom and New Zealand have a document known as a Bill of Rights (today the term Charter of Rights is more commonly used). Such a document sets out specifically what individuals are entitled to expect of their government. As mentioned previously, Australia does not have a Charter of Rights. Indeed, it is the only Western democracy without one.

Although the United Kingdom has no single constitutional document, the English *Bill of Rights of 1689* sets out a few fundamental rights, which are still recognised today. However, it is limited in its scope and deals mainly with succession to the throne and the way in which English law should be adopted in colonies (see the discussion of the 'doctrine of reception' in the section 'The rights of First Nations peoples' in section 6.4 of this chapter).

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Figure 6.2 The United States *Bill of Rights* addresses the fundamental rights of individuals relating to private life, the criminal justice process and the government.

As one of the 47 member countries of the Council of Europe, the United Kingdom is a party to, and bound by, the *European Convention on Human Rights* (1953). The United Kingdom introduced the *Human Rights Act 1998* (UK) to give further legal effect to the rights contained within this convention.

In the United States, the *Bill of Rights*, ratified in 1791, consists of the first 10 amendments to their Constitution, which address the fundamental rights of individuals relating to private life, the criminal justice process and the government.

New Zealand's *Bill of Rights Act 1990* (NZ) contains civil, democratic and human rights, including freedom from discrimination and freedoms from government intrusions into individuals' lives.

Table 6.1 provides some examples of rights contained in the mentioned Bills of Rights.

Table 6.1 Examples of rights enshrined in a Bill of Rights

New Zealand: Bill of Rights Act 1990 (NZ)	United States: *Bill of Rights* (1791)	European Union: *European Convention on Human Rights* (1953)
The right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment (s 9)	Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted (Amendment VIII)	No one shall be subjected to torture or to inhuman or degrading treatment or punishment (Article 3)
The right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference [and] the right to freedom of expression (ss 13 and 14)	Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press (Amendment I)	The right to freedom of thought, conscience, and religion (Article 9); freedom of expression [including] freedom to hold opinions and to receive and impart information and ideas without interference (Article 10)
Everyone who is arrested … shall be informed … of the reason for it; and … shall have [and be informed of] the right to consult and instruct a lawyer … to be released if the arrest or detention is not lawful … to be charged [and brought to court] promptly or to be released, and [not to be a witness against himself] (s 23)	No person shall be held to answer for a capital … crime … unless on a presentment or indictment of a Grand Jury … nor … compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law (Amendment V) The right to a speedy and public trial by … jury … to be informed of the nature and cause of the accusation … to have [a lawyer] (Amendment VI)	Right to a fair trial … Everyone charged with a criminal offence shall be presumed innocent until proved guilty [and] has the following minimum rights: to be informed promptly … of the nature and cause of the accusation against him; to have adequate time and facilities for the preparation of his defence; [to have a lawyer]; to have … witnesses on his behalf under the same conditions as witnesses against him (Article 6)

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Analysis 6.2

View the US *Bill of Rights* online (the first 10 amendments to the US Constitution). Choose three rights that are contained in this legal document and complete the following questions.

1. Summarise each of these three rights in your own words.
2. Explain why these three rights were considered to be important amendments to the US *Bill of Rights*.
3. Assess whether these considerations are still relevant today. Justify your response.

Arguments for and against an Australian Charter of Rights

In Australia, a Bill of Rights, or Charter of Rights, has never existed, as the authors of the *Australian Constitution* believed that citizens' rights would be protected by decisions of the courts (common law) or by various statutes made as the need arose. The *Australian Constitution* does set out a number of express rights, including the right to religious freedom (s 116) and the right to trial by jury (s 80). However, the debate over the need for explicit constitutional protection for a broader range of human rights has featured in Australian political dialogue since the 1890s and continues today. Some of the arguments for and against a Charter of Rights are summarised in Table 6.2.

Table 6.2 Arguments for and against a Charter of Rights in Australia

For	Against
Australian law gives insufficient protection to fundamental freedoms, and a Charter of Rights would enshrine those rights.	Statutes and the common law already protect rights.
A Charter of Rights would make our current laws more cohesive and accessible, rather than being 'locked up' in past judgments and statutes.	A Charter of Rights makes little practical difference in the protection of rights.
We are becoming increasingly internationalised and need to be aware of international laws; a Charter of Rights would bring Australia into line with other countries.	Enabling judges to strike down laws made by parliament that are inconsistent with a Charter of Rights would be undemocratic.
A Charter of Rights would allow Australia to meet its international obligations more effectively.	Rights contained in a Charter of Rights can become outdated very quickly in a rapidly changing world.
A Charter of Rights would protect the rights of minorities.	A Charter of Rights would actually restrict rights, because once defined, a right is limited by the words that delineate it.
The High Court's interpretation of 'implied rights' in the Constitution is too limited; we need a document that explicitly sets out our rights.	The judiciary would become too political if there were a Charter of Rights.

Review 6.2

1. List five rights and their corresponding responsibilities.
2. Using an example, describe the difference between legal and moral rights.
3. 'Citizens have the right to end their own lives if they are terminally ill.' Discuss the legal and moral issues arising from this idea.
4. Identify one further argument for and one against an Australian Charter of Rights. In your view, does Australia need a Charter of Rights? Discuss why.

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6.3 Individuals' rights and responsibilities in relation to the state

Conflicts between rights and responsibilities

In June 2019, the Australian Federal Police (AFP) raided the offices of the Australian Broadcasting Corporation (ABC) to investigate potential criminal behaviour by two journalists, Sam Clark and Dan Oakes. The AFP claimed that the journalists had illegally obtained information to use in a story about the behaviour of Australian Special Forces in Afghanistan between 2009 and 2013. This incident clearly highlighted a conflict between the rights of journalists to know and publish information regarding the activities of elite Australian soldiers, and the responsibilities of the government (represented by the AFP) to keep information about military operations secret in order to protect its citizens. It is the first time in our history that Australian journalists were targeted as suspects in relation to three alleged offences: one under section 79(6) of the *Crimes Act 1914* (Cth) concerning 'the receipt of prescribed information', one under section 73A(2) of the *Defence Act 1903* (Cth) concerning 'unlawfully obtaining information' and another under section 132 1(1) of the *Criminal Code Act 1995* (Cth) concerning 'dishonestly receiving stolen property'.

At the time, such developments appeared to be part of a new socio-legal climate in which journalists and their sources, sometimes referred to as 'whistleblowers', were targeted. News Corp journalist Anneke Smethurst's home was also searched just 24 hours prior to the ABC raid. Smethurst had written a story about Australia's intelligence agencies, which the AFP argued was not for public broadcast. Interestingly, in light of a broad media campaign for press freedom in late 2020, a decision was made not to prosecute these journalists and all charges were dropped.

By 2022, Ben Roberts-Smith, a highly decorated Australian soldier who served in Afghanistan,

Figure 6.3 Australia's leading newspapers blacked out front pages in October 2019 to protest against government secrecy and a crackdown on press freedom.

initiated what was to be an unsuccessful defamation case against a range of media companies based around the work of Clark and Oakes. In June 2023, Justice Besanko dismissed Roberts-Smith's defamation case. Subsequent to this, Roberts-Smith's legal team appealed Justice Besanko's decision before three Federal Court Justices in 2024, arguing that Justice Besanko had made errors of law in his earlier judgment and his findings should not stand. At the time of writing, the final judgment was still to be handed down. If Robert-Smith's appeal fails, he may explore options to take the case to the High Court.

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Media

ABC journalist Dan Oakes will not be charged over Afghan Files reporting, AFP says

Paul Karp

The Guardian

15 October 2020

Commonwealth prosecutors have declined to charge the ABC journalist Dan Oakes over his reporting of alleged war crimes by Australian special forces in Afghanistan.

In a statement on Thursday, the Australian federal police said although commonwealth prosecutors advised there were 'reasonable prospects' of convictions in relation to two charges, they had decided not to prosecute due to 'public interest' considerations.

The decision follows similar moves by the AFP to rule out charges against News Corp's Annika Smethurst in May and against Oakes' producer Sam Clark in July, as police sought to limit the fallout from two high-profile cases that caused a broad media campaign for press freedom.

Analysis 6.3

Read the media article above.

Outline the reasons why, despite the AFP raids, the Commonwealth Prosecutors decided not to charge the ABC journalist.

State interference with personal liberties

Since the COVID-19 pandemic of 2020, and the subsequent rise of vaccines to counter the virus, many arguments have arisen over the right of individuals choose whether or not to receive a vaccine. There were numerous protests around the world in which so-called 'anti-vaxxers' argued vehemently for their rights to be vaccine-free, for a range of reasons. In New South Wales, the government insisted on many of their employees, including teachers, nurses and ambulance staff, receiving a double dose of the COVID vaccine.

In the case of *Larter v Hazzard (No 2)* [2021] NSWSC 1451, the NSW Supreme Court ruled against the plaintiff's argument that he and other NSW Health workers should not be forced into vaccinations against their health concerns.

Less seriously, authorities in the United States have been issuing fines of US$85 to pedestrians who walk and send text messages at the same time. In Fort Worth, New Jersey, there have been 23 minor accidents between cars and pedestrians and three people have been killed because of not paying attention to traffic due to using their phones while walking.

Use of mobile phones while walking is also a concern in Australia, as shown in the following media report by the National Roads and Motorists' Association (NRMA). The NRMA report issued strong advice to pedestrians to 'put their phones in their pockets', but there have also been calls to explicitly outlaw people from using their phones while walking. Is this an invasion of our personal liberties or does the state have the responsibility to outlaw such behaviour?

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Media

'Smombies' on our streets: NRMA Pedestrian Report

NRMA Report

2019

New research conducted by the NRMA has found that over one-in-three pedestrians are behaving like 'smombies' (smartphone zombies) by crossing busy city streets while engrossed in their smartphone or wearing headphones.

The NRMA has today released its pedestrian safety report, Look Up, as the fifth instalment in its road safety series. The report includes an observational study of 26390 pedestrians across three intersections in the Sydney CBD and one in Parramatta.

Video 6.2 'Smombies' on our streets (01:19)

The report indicated that:

- 36 per cent crossed the road while distracted by their smartphone or wearing earphones.
- Almost eight per cent (7.5%) crossed the road illegally.
- Over three per cent (3.4%) crossed illegally while using their smartphone or wearing earphones.

Pedestrian trauma accounts for 17 per cent of all deaths on NSW roads and nine per cent of serious injuries. More than 1900 pedestrians are killed or hospitalised from road traffic crashes each year and in 2018, 67 pedestrians lost their lives.

NRMA Road Safety Expert Dimitra Vlahomitros said smombies needed to put their phones in their pockets and focus on crossing intersections safely.

'Distracted walking is a form of inattentional blindness and when you undertake this behaviour you are effectively playing chicken with fast moving traffic-the results of which can be catastrophic,' Ms Vlahomitros said.

'Almost every Australian owns a smartphone and too many of them are focusing on their screens or blocking out their ability to hear traffic instead of focusing on crossing the road safely. The fact that three in every 100 pedestrians are crossing illegally while using their phones is also alarming.

'Statistics already show that the elderly, very young and those who have been drinking are already at risk when crossing the road, so adding smombies to the list only further enhances the need to crack down on this behaviour.'

Look Up also outlines a series of engineering solutions to help keep pedestrians safe. These include refuge islands on large streets, countdown timers, installation of over-and-under-pass bridges, longer walk times for pedestrians and reflective pavement markings to improve visibility.

Look Up, also calls for the removal of green-on-green signals, which places pedestrians at particular risk by putting them on a collision course with turning vehicles.

The observational study occurred during April and May 2019 between 7:00 am-1:00 pm and 1:00 pm-7:00 pm. The four intersections were York/Margaret streets, Pitt/Park streets and Pitt/Goulburn streets in Sydney and Church/Argyle Streets in Parramatta.

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Review 6.3

Discuss the rights of a government to:

1. ban access to information relating to military operations
2. ban the use of mobile phones while walking in public
3. ban passengers from carrying water and other liquids on an aircraft
4. force workers to receive a vaccine during future virus-related pandemics.

It's a free world?

As discussed, the *Australian Constitution* does not contain a Bill of Rights. However, it does expressly protect a few rights of individuals. These are:

- section 80: the right to a trial by jury
- section 116: freedom of religion
- section 117: the right not to be discriminated against on the basis of one's state of residence.

In addition, Australia is a party to seven core international human rights treaties. The right to freedom of opinion and expression is contained in Articles 19 and 20 of the *International Covenant on Civil and Political Rights* (1966).

In 2009, social commentator Andrew Bolt was brought to account over comments he made about 'light-skinned' First Nations people. Bolt claimed that many such people falsely claimed to be Indigenous so they could claim welfare payments from the government. In 2011, a group of 'fair-skinned' First Nations people led by Pat Eatock successfully sued Andrew Bolt in the Federal Court. Bolt and his publishers were forced to issue an apology over the incident.

Section 18C of the *Racial Discrimination Act 1975* (Cth) became known as the 'Bolt laws'. Prior to the 2013 federal election, one of the federal Coalition's promises was to repeal this. They felt that commentators like Andrew Bolt did have a right to express their opinions on race in a general sense and that Andrew Bolt's loss demonstrated the loss of the right of free speech. By 2018, federal law-makers had decided not to proceed with the alteration of section 18C of the *Racial Discrimination Act 1975* (Cth).

Figure 6.4 In 2009, social commentator Andrew Bolt was brought to account over comments he made about 'light-skinned' First Nations people. These comments violated Section 18C of the *Racial Discrimination Act 1975* (Cth).

Freedom of religion

During 2019, the issue of religious expression and discrimination re-emerged through the behaviour of Australian Rugby player, Israel Folau. Folau was stood down as a player for posting messages on his Instagram account claiming that certain people were destined to 'go to hell' if they did not follow Christianity. This issue highlights two main arguments: first, Folau claimed he had a right to say what he wished as a follower of the Christian faith and second, Folau challenged his dismissal under section 72 of the *Fair Work Act 2009* (Cth), claiming his employer did not have the right to release him from his contract.

Folau claimed he had rights as a man of religion and that he was expressing his beliefs. He claimed he genuinely believed that sinners were destined for hell and that he was the victim of discrimination by those who disagreed with his views. The federal government responded by introducing the Religious Freedom Bills (the collective name for three draft Bills: the Religious Discrimination Bill 2019 (Cth), the Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth)), which aim to protect individuals such as Folau from scrutiny and persecution for publicly announcing their views and from the risk of being sacked from their jobs.

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Media

Israel Folau offered to apologise over anti-gay Instagram post, court documents reveal

By David Mark, senior national sport reporter

ABC News

26 September 2019

Former Wallabies star Israel Folau offered to publicly apologise over his anti-gay social media post warning homosexuals would go to hell, court documents have revealed.

In addition, the sacked rugby union international admitted he had breached the Rugby Australia Code of Conduct.

The fresh information came in documents lodged by Rugby Australia outlining its defence in its Federal Circuit Court case against Folau.

Folau is suing Rugby Australia and Rugby NSW for unlawful termination of his $5.7 million contract.

Folau is also demanding his job back, an apology from Rugby Australia and Rugby NSW and compensation, which was previously claimed to be worth about $5 million.

Rugby Australia is arguing that Folau was responsible for a high-level breach of its Code of Conduct over the posts.

The court documents also said Folau could not argue that 'Rugby Australia or Rugby NSW terminated his employment for reasons that included his religion or his political opinion'.

In December 2019, Rugby Australia and Israel Folau settled their dispute out of court for an undisclosed sum. In 2022, the Religious Discrimination Bill (2019) was defeated in the lower house of the Federal Parliament.

Review 6.4

1 Explain the difference between an 'express right' and an 'implied right'.
2 Outline the rights expressly guaranteed by the *Australian Constitution.*
3 Discuss whether Australians have a right to freedom of expression. Justify your response with reference to media reports regarding the Israel Folau case.
4 Research the Religious Freedom Bills and discuss the implications of such Bills being enacted.

Defamation

defamation the act of making statements or suggestions that cause damage to a person's reputation in the community

Another factor complicating the exercise of freedom of expression is the risk of **defamation**. To what extent can you criticise your teacher, friend or boss, and possibly damage their reputation? What legal rights and responsibilities do you have as the speaker or writer? In addition, how well does the law work to protect individual reputations on the one hand, and free speech on the other?

You are legally protected from being sued if:

- what you say is true
- it is your honest opinion, not a statement of fact, on a matter of public interest, and the facts on which the opinion is based are clearly stated or
- you have a legal, social or moral duty to communicate something to a person and the person has a corresponding duty to hear or read it.

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Even if you were taken to court and successfully used one of the three defences listed, it may cost you a significant sum in legal fees. Consider the case of actor Geoffrey Rush below.

Media

Geoffrey Rush wins defamation case against Nationwide News, publisher of The Daily Telegraph

Jamie McKinnell

ABC News

11 April 2019

Oscar-winning actor Geoffrey Rush has been awarded $850 000 in initial damages after winning his defamation case against Nationwide News over two articles published by *The Daily Telegraph* in 2017.

In a damning judgment in the Federal Court, Justice Michael Wigney said Nationwide News and journalist Jonathan Moran failed to prove the imputations published in two articles in late 2017 were true.

Justice Wigney said in publishing unsubstantiated stories alleging Mr Rush behaved inappropriately towards a female co-star during a 2015–2016 production of *King Lear*, the newspaper produced 'recklessly irresponsible pieces of sensationalist journalism of the very worst kind'.

He said he would determine an amount of damages related to lost income for Mr Rush – on top of the $850 000 awarded today – at a later date.

To read more about the final amount of damages awarded to Mr Rush in 2020, see the following link: http://cambridge.edu.au/redirect/10382.

Analysis 6.4

Read the media article above.

1. Outline the reason Mr Rush was suing Nationwide News for defamation. Identify the argument Nationwide News used in contesting this defamation case.
2. Evaluate the current laws on defamation. Outline the responsibilities you have when you talk about someone else.
3. Search online for the cases of:
   - Ben Roberts-Smith
   - Craig McLachlan
   - David Russell Lange.

   Explain the importance of at least one of these cases to defamation law.

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6.4 International protection of rights

As discussed in Chapter 2, international law can be made through the formation of treaties between two or more nations. Treaties become binding on the citizens of an individual nation either automatically upon **ratification** if the treaty is **self-executing**, or once the nation has passed domestic legislation to implement the treaty as part of its own laws. In Australia, treaties must be implemented through domestic legislation in order to become binding.

Declarations are different from treaties in that they simply state the parties' intentions; they express the international community's aspirations with respect to an area of human rights. They are generally developed through the United Nations or other international organisations, such as subsidiary bodies of the United Nations or the World Trade Organization, and while they are not legally binding, they are morally binding and influential in setting standards for the protection of rights. *The Universal Declaration of Human Rights* (1948) is an important declaration of the rights to which all humans are entitled. The following extract summarises what the United Nations is trying to achieve internationally. (The full text can be viewed online.)

The Universal Declaration of Human Rights

Article 3. Everyone has the right to life, liberty and security of person.

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

1 Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2 No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 15.

1 Everyone has the right to a nationality.
2 No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Limitations of international law in protecting rights

Parties to international law are nation states, not individuals, and international law requires the full participation and cooperation of nation states in order to function effectively. Some states may occasionally or frequently choose to ignore declarations, treaties and UN resolutions, just as some citizens choose to ignore the laws of their state. The consequences for nation states, however, are seldom as immediate or certain as they are for individuals who ignore the law.

ratification (of a treaty) is a formal ceremony after a treaty has been signed, whereby the parties to the treaty exchange solemn confirmations of it

self-executing (of a treaty) automatically becoming binding on a state party to the treaty as soon as the treaty has been ratified

Rights are something thought to be possessed not only by individuals but also by peoples or nations.

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self-determination the right of people to determine their political status or how they will be governed based on territory or national grouping, as well as the right to pursue their own economic, social and cultural development

Self-determination is a key right of peoples. It means the right of a group to determine their own political status (how they want to be recognised) and to pursue their own economic, social and cultural development. Self-determination is enshrined in the United Nations' Charter, as well as in the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966). Article 15 of *The Universal Declaration of Human Rights* (1948) expresses this right in terms of all individuals' right to a nationality.

The UN Charter, Chapter 1, Article 1, Part 2 includes self-determination as one of the purposes or goals of the United Nations:

> ***UN Charter***
> **Chapter 1, Article 1, Part 2**
> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Self-determination is a constant theme in international politics; for example, in the Basque independence movement in Spain and that of the Tamil Tigers in Sri Lanka. In some cases, the United Nations has intervened. In other cases, sometimes because of individual member states' reluctance to become involved in high-risk conflicts where their own interests are at stake, there has been no UN action.

political autonomy self-determination, independence

One place where the United Nations has intervened, with limited success, has been in Syria, due to increasing conflict and violence against civilians. In 2012, the United Nations intervened in an attempt to quell violence and civil unrest. The United Nations Supervision Mission in Syria lasted 90 days and was suspended due to rising levels of violence and an inability to broker a ceasefire between the warring factions.

Figure 6.5 Self-determination is a constant theme in international politics. In July 2023, a spokesman for the Basque Group spoke during an event on self-government in Spain. The defence of self-government and national identity are core elements of the group's program.

The rights of First Nations peoples

The question of whether peoples who want independence from a colonial power have a right to such independence may be addressed from a general viewpoint but also considered in the context of the particular historical facts of a place. The United Nations declared a decade for World Indigenous Rights from 1995 to 2004. The United Nations hoped to promote the rights, languages and cultures of all indigenous peoples and to draft a Charter of Indigenous Human Rights.

As outlined in Chapters 2 and 5, First Nations peoples have faced serious challenges to their **political autonomy** since European colonisation. Their laws were radically different from British laws and were not considered by the British to constitute a system of law at all, despite the existence of complex cultures and law/lores. The 'doctrine of reception' mandated that uninhabited land colonised by Britain would be subject to English law – despite the vastly different languages, cultures, beliefs and traditions of the people who actually inhabited the land.

One way in which self-determination is demonstrated in First Nations communities is using customary law rather than the English common law. Circle sentencing is an example of customary law in practice.

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Circle sentencing

Circle sentencing courts have been established in several locations in New South Wales, the Australian Capital Territory and Western Australia. Their introduction is based on the experience of Canadian indigenous communities and has the goal of preventing crime, supporting victims and giving First Nations peoples greater involvement in the criminal justice system. Sentences are more likely to be meaningful for the offender if imposed by authorities within their own community.

Circle sentencing works in the following way. When an accused person in a criminal trial has pleaded guilty or been found guilty, and they are member of a First Nations community, the magistrate travels to the accused's community for the purpose of sentencing. The magistrate and other persons sit in a circle, talk through the issue and come to a suitable sentence. The group includes the offender and victim, their families, as well as respected members of the community.

There has been debate as to the effectiveness of the program, with some arguing that the sentencing itself did not reduce recidivism. However, supporters of circle sentencing include Magistrate Claire Girotto, a magistrate who spent from 2015 to 2020 in charge of courts including Dubbo, Walgett and Wellington. In more than 25 circles, Magistrate Claire Girotto had only witnessed one re-offender and she praised the success of the program.

Figure 6.6 Supporters of the circle sentencing program in the town of Walgett in New South Wales have praised its success.

Review 6.5

1 Identify the purposes of *The Universal Declaration of Human Rights* (1948).
2 Suggest some possible ways rights are enforced and how they could be more effectively enforced.

Analysis 6.5

Read 'Does circle sentencing reduce recidivism and keep Indigenous offenders out of jail? A study will find out' at http://cambridge.edu.au/redirect/10383.

1 Outline the aims of circle sentencing.
2 Discuss the role of circle sentencing in small towns throughout New South Wales.
3 Discuss whether First Nations offenders should have a right to different sentencing procedures.

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Chapter summary

- Rights and responsibilities are derived from the *Australian Constitution* and from statute and common law.
- Moral rights are not enforceable by law and therefore cannot be upheld in a court of law.
- Australia is the only Western democracy that does not have a Bill of Rights.
- The rights and responsibilities of individuals and the state have varied over time and have included measures that significantly limit people's rights.
- The *Australian Constitution* expressly protects individual rights.
- The High Court has recently defined an implied right to freedom of political communication.
- International efforts to articulate and protect rights are embedded in numerous conventions, treaties and declarations. It is often difficult to enforce these international instruments, as some states do not recognise such agreements or have not incorporated these rights into their domestic legislation.
- The right to self-determination is an internationally recognised right.

Multiple-choice questions

1 How are legal rights protected?
- **a** Legal rights are protected by statute law alone.
- **b** Legal rights are protected by common law alone.
- **c** Legal rights are protected by both statute and common law.
- **d** Legal rights are protected by ethics and religious customs.

2 Which of these statements about moral rights is true?
- **a** Moral rights have no legal basis.
- **b** Moral rights can be enforced.
- **c** Moral rights are the same as legal rights.
- **d** None of the above statements are true.

3 Which of these statements about a Bill of Rights is true?
- **a** Every state in the world has a Bill of Rights.
- **b** Only the United Nations can draft a Bill of Rights.
- **c** A Bill of Rights is a document setting out the rights of individual citizens.
- **d** A Bill of Rights is part of the *Australian Constitution.*

4 Which of the following is NOT a legal protection from being sued for defamation?
- **a** what you say is true.
- **b** it is your honest opinion, not a statement of fact, on a matter of public interest, and the facts on which the opinion is based are clearly stated.
- **c** what you say is only posted on social media.
- **d** you have a legal, social or moral duty to communicate something to a person and the person has a corresponding duty to hear or read it.

5 How is the right to freedom of speech protected?
- **a** The right to freedom of speech is protected by statute law.
- **b** The right to freedom of speech is protected by common law.
- **c** The right to freedom of speech is protected by both statute and common law.
- **d** The right to freedom of speech is not protected by either statute or common law.

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Short-answer questions

1 List two examples of how rights are protected by statute and common law in Australia.
2 Using examples, describe the difference between moral rights and legal rights.
3 Discuss the extent to which journalists are in conflict with a government's responsibility to protect its citizens. Outline how this might be resolved.
4 Explain the concept of circle sentencing and why it may be effective.
5 Explain the reasons for drafting declarations of rights. Outline some examples of such declarations.
6 Outline other rights that are not expressly contained in the *Australian Constitution* but that are enjoyed by Australians as a result of statute and common law.

Extended-response question

Discuss how defamation poses a threat to individuals' free expression. Outline the defences available to someone who would seek to criticise a political figure.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Chapter 7
Resolving disputes

Chapter objectives

In this chapter, you will:

- investigate the roles of various law enforcement agencies
- discuss various methods of dispute resolution between individuals
- investigate formal and informal methods of dispute resolution between individuals and the state
- assess the effectiveness of legal and non-legal instruments in resolving disputes between individuals and the state
- compare and contrast individuals' disputes with other individuals and with the state
- identify the difference between formal and informal methods of challenging state power as the state attempts to enforce rights
- identify and apply appropriate legal terms and concepts.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 14–15 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Crimes Act 1914 (Cth)
Income Tax Assessment Act 1936 (Cth)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Australian Federal Police Act 1979 (Cth)
Australian Security Intelligence Organisation Act 1979 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Privacy Act 1988 (Cth)
Independent Commission Against Corruption Act 1988 (NSW)
Freedom of Information Act 1989 (NSW)
Criminal Records Act 1991 (NSW)
Human Rights (Sexual Conduct) Act 1994 (Cth)
Criminal Code Act 1995 (Cth)
Residential Parks Act 1998 (NSW)
Privacy and Personal Information Protection Act 1998 (NSW)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Australian Crime Commission Act 2002 (Cth)
Health Records and Information Privacy Act 2002 (NSW)
Australian Crime Commission (New South Wales) Act 2003 (NSW)
Trees (Disputes Between Neighbours) Act 2006 (NSW)
Government Information (Public Access) Act 2009 (NSW)
Crimes (Criminal Organisations Control) Act 2012 (NSW)

SIGNIFICANT CASES

Toonen v Australia, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)
Croome v Tasmania [1997] HCA 5
Bowan v Glanville [2008] NSWLEC 10
Hacienda Caravan Park Pty Ltd v Howarde [2016] NSWCATAP 1
R v Christopher Michael Dawson [2018]

Legal oddity

A young married Queensland couple had been living in their apartment for four years with their 16-month-old child and their dog. They had never received any noise complaints from their neighbours before. This changed when a new couple moved in downstairs during 2023. Soon after, a series of complaints were received that their toddler's footsteps and noise were disturbing the new neighbours. On a number of occasions it was explained to the new neighbours that toddlers walk and play and it was unreasonable to expect any child to behave otherwise. The new couple subsequently submitted an official complaint to the complex's management. In response, the young parents offered to turn their music down and exercise greater control over their dog – but would not compromise on how their daughter chose to spend her time in her own home. Building management accepted that compromise.

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7.1 Law enforcement agencies

law enforcement agencies
those bodies that have the role of enforcing the law; they are created by Acts of Parliament and include the police and some government departments

There are a number of **law enforcement agencies** and they have an important role in upholding statutes at state and federal levels. There are legal restrictions placed on these law enforcement agencies, to protect members of society from an abuse of power.

The police

State and territory police

Under the *Australian Constitution*, state governments are responsible for providing police services. The police service of each Australian state and territory is responsible for upholding the law, preventing and investigating crime, and providing community protection. In addition, police services manage emergency incidents, enforce road and traffic rules, and deal with missing persons reports.

The *Law Enforcement (Police Responsibilities) Act 2002* (NSW) sets out the laws NSW Police officers must obey when they perform their duties. For example, to ensure that evidence is collected correctly and thus is able to be used by the prosecution in a court case, the police are guided by this Act, which covers:

- the powers of police officers to stop, search and detain people
- the powers of police officers to enter and search premises, and to seize property
- the powers of police officers to arrest, detain and question suspects
- the way in which suspects and others are to be treated by police officers.

Apprehended Violence Order
a court order to protect a person who fears violence or harassment from a particular person; in New South Wales, Apprehended Personal Violence Orders prohibit violence between members of the public and Apprehended Domestic Violence Orders prohibit violence between family members

state police
law enforcement agencies with state-wide jurisdiction

Each state and territory in Australia has its own police force. The NSW Police Force is primarily concerned with enforcing criminal law, particularly those offences contained in the *Crimes Act 1900* (NSW) (e.g. homicide, manslaughter and sexual assault). More recently, legislation – such as the *Crimes (Criminal Organisations Control) Act 2012* (NSW) – has been introduced to help the state police combat the rise of bikie gangs and terrorist activities.

Other aspects of state policing include assisting with mediation in family and neighbourhood disputes, particularly those involving domestic violence. The application and enforcement of Domestic and Personal **Apprehended Violence Orders** (AVOs) restricting the movements of some individuals in relation to others is another role of the **state police**.

A recent controversial issue for state policing is the use of sniffer dogs for drug detection at music festivals, which are attended mostly by 18- to 25-year-olds. Following the deaths of six young festival-goers over a two-year period, a coronial inquiry in November 2019 recommended the trialling of pill-testing and an end to the use of sniffer dogs and strip-searching suspects. Both of these had the potential to intimidate users into ingesting dangerous doses in panic. Pill-testing, on the other hand, would allow the potential user to have the contents of the drug tested to check whether there were harmful substances present.

Figure 7.1 Police with sniffer dogs search patrons before entry into a music festival in Melbourne in 2015. The use of sniffer dogs for drug detection at music festivals, which are mainly attended by young people, has caused controversy.

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While this will not help the habitual drug user, this non-judgemental stance may result in better decision-making for those who never usually take drugs. The six young people who died were not thought to be habitual drug users, so were therefore not cognisant of the risks and safe dosage of the drugs. Controversy raged over the revelations that children as young as 12 were being made to 'strip and squat' to be searched for drugs. The NSW Police Force responded by stating that if festival-goers did not take drugs to festivals, they would have nothing to fear from sniffer dogs or being searched under section 146 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

Media

Waiting for a crisis: Fears as NSW enters festival season without drug reform

Amber Schultz

The Sydney Morning Herald

23 September 2023

Drug reform advocates are concerned about NSW's upcoming festival season, fearing drug deaths will reach crisis point before the government implements promised reforms.

NSW Premier Chris Minns has ruled out introducing pill testing ahead of the festival season, which begins next Saturday with Listen Out Festival in Centennial Park, while NSW Police have confirmed drug detection dogs will be used at the festival as part of a 'high-visibility police operation'.

Pill testing and decriminalisation were among the recommendations of the 2019 Ice Inquiry along with a coroner's report that same year into the drug-related deaths of six festival-goers between December 2017 and January 2019, which also recommended scrapping sniffer dogs at festivals.

Most of the drug policies of the former government remain in place as Minns has pushed back any reforms until after the long-promised drug summit which aims to replicate the success of former premier Bob Carr's 1999 summit.

While in 2019 Minns originally pledged to hold the summit in his first six months, in the last election the promise was to hold it within the first term.

Carr held the 1999 summit within two months of being re-elected.

On Saturday, Minns reiterated his position: 'Illicit drugs are illegal, and that has always been the case,' he said.

Minns said previous autopsy toxicology reports from people who died at music festivals found heat and dehydration contributed to deaths at music festivals more than tainted drugs.

'We are looking at health messages in relation to the use of illicit drugs at those music festivals, but we are not changing the law of the land … that's been the case of the previous government and the one before that.'

The premier has also rebuffed calls to decriminalise small quantities of drugs.

Managing director of the Australian Festival Association Mitch Wilson said the delay in announcing a drug summit was 'disappointing'.

(Continued)

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Media—Continued

'We had hoped the summit would be held this year, so that pill testing services, if supported, could be rolled out at festivals this summer,' they said.

'We know the warm weather being predicted is cause for concern that the harms from illicit drug use could be higher this summer.'

President of Harm Reduction Australia and Pill Testing Australia Gino Vumbaca said he was worried about the upcoming festival season.

'We had hoped with a change of government that there would be a rethink on this,' he said.

In February, a 26-year-old man died from a suspected drug overdose after attending Transmission music festival in Sydney, while earlier this month, a Victorian coroner called for the introduction of pill testing after a man died from a pill with dangerously high concentrations of MDMA.

Harm Reduction Australia has offered to run a free pill testing trial at any festival of the NSW government's choosing, but has been told no decisions will be made until after a drug summit.

During its first six months of operation, Canberra's pill testing facility found more than half the drugs tested contained unexpected substances, leading to one in ten samples being discarded on site.

Vumbaca is also worried that drug sniffer dogs, which a coroner found to have been linked to the deaths of at least three young people who attended music festivals between 2017 and 2019, would cause attendees to panic and consume more drugs than planned.

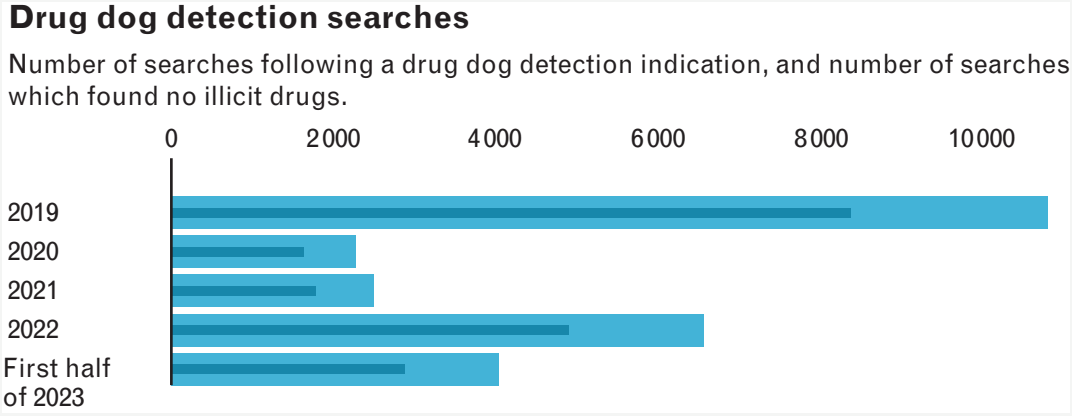

Figure 7.2 Drug dog detection searches, 2019–2023

As revealed in state parliament, over 4000 searches have been conducted following a drug detection dog indication in the first six months of the year, compared with 6500 in the whole of 2022. More than two-thirds of those searches found no illicit drugs.

'We're putting people through this very humiliating experience, and for some a very traumatic experience for those who might have trauma in their past, based on whether the dog sits down beside you,' Vumbaca said.

NSW Greens MLC Cate Faehrmann said the state risked another series of overdoses if drug policy continued on its current trajectory.

'The very same practice [as the previous government] will be rolled out at music festivals over the summer. A huge concern of mine is the continued police harassment which makes drug taking less safe and does nothing to stop people taking drugs,' she said.

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'The government is only going to act on drug reform after a crisis.'

There was no line item for the summit in Tuesday's budget, though it may be included in the overall $31 billion health budget.

Earlier this week, Minns said the government was determined to hold a drug summit, but had 'a lot on [its] plate'.

'We're committed to doing it … When it's time to announce the next stage of the drug summit, I'll announce it,' he said.

Analysis 7.1

Read the media article on pages 193–5.

1. Explain why drug reform advocates were concerned about the 2023 'Listen Out Festival' in Sydney during late 2023.
2. Outline the recommendations of the 2019 Ice Inquiry. State how NSW Premier Chris Minns has responded to these recommendations.
3. Describe how Harm Reduction Australia has sought to assist in the reduction of drug overdoses at music festivals.
4. Explain why some believe that drug detection dogs at music festivals are problematic.

Federal police

The **Australian Federal Police** (AFP) is responsible for enforcing federal law and criminal law where crimes cross state boundaries. A key role is the prevention and detection of crimes within Australia against Commonwealth law. In certain circumstances, police may also deal with Australians overseas. Crime legislation enforced by the AFP includes the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth). Offences include drug importation and distribution, and crimes relating to Commonwealth entities (e.g. bribery of Commonwealth public officials). The powers of the AFP are set out in the *Australian Federal Police Act 1979* (Cth).

The nature of the AFP and what is required of it have changed as a consequence of 11 September 2001, when four coordinated terrorist attacks occurred in the United States. The AFP has been forced to adapt to a rapidly changing environment, particularly in relation to terrorism and terrorist organisations. There is now a greater focus on international operations.

The new challenges the AFP faces include terrorism, cybercrime, human trafficking and sexual slavery. It may also be involved in the family law process if the Federal Circuit and Family Court makes specific orders requiring

Australian Federal Police the federal police agency of the Commonwealth of Australia, set up to enforce federal laws and to protect the interests of Australia both domestically and internationally

Figure 7.3 AFP Commissioner Reece Kershaw speaks to the media in June 2021 regarding mass raids and arrests that had been undertaken by the AFP across Australia. These arrests were based upon intelligence gathered from an encrypted communications platform widely used by organised crime figures.

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the involvement of the AFP such as if the court believes that a child may be taken unlawfully from Australia. Under sections 65Y and 65Z of the *Family Law Act 1975* (Cth), children involved in family law proceedings must not be removed from Australia. There is a penalty of up to three years' imprisonment for anyone who attempts to do this. As mentioned in Chapter 6, the AFP recently searched the home of Annika Smethurst and the ABC offices in Sydney to search for evidence of criminal activity by journalists.

An older example is the AFP's investigations into Mohamed Haneef's alleged role in a terrorist attack in Glasgow, Scotland, in 2006. Much to the embarrassment of the AFP, they spent $8 million investigating Dr Haneef, only for him to be released for wrongful arrest. Chapter 14 explores the controversy surrounding AFP cooperation with the Indonesian National Police regarding the arrest and prosecution of the Bali Nine.

Additional law enforcement agencies in Australia

Australian Border Force

The Australian Customs Service was renamed the Australian Border Force (ABF) in 2015. It was originally known as the Department of Trade and Customs and was the first government department established in 1901. Approximately 20 million passengers each year move through Australian air and seaports. ABF works closely with the AFP, as well as with the Australian Quarantine and Inspection Service, the Department of Immigration and Citizenship and the Department of Defence to detect and discourage unlawful movement of goods and people across the border.

The ABF website describes its functions as:

- facilitating the lawful passage of people and goods
- investigations, compliance and enforcement in relation to illicit goods and immigration malpractice
- onshore detention, removals and support to regional processing arrangements.

The ABF employs more than 5500 people in Australia and overseas, has a fleet of sea patrol vessels, and uses two aerial surveillance planes for the surveillance of Australia's borders. The key areas of concern for the ABF are:

- immigration – ensuring that passengers are moving legally across borders
- quarantine – monitoring and confiscating goods harmful to animal and human life
- family law – enforcing court orders and preventing parents from illegally removing their children from Australia
- law enforcement.

A high priority is the protection of the Australian community by intercepting illegal drugs and firearms. The ABF uses sophisticated techniques to identify suspicious aircraft, vessels, cargo, postal items and travellers. The techniques include intelligence analyses as well as the use of detector dogs and computer technology.

In June 2019, the Australian Federal Police made one of the largest drug seizures in the country's history. Approximately 1.2 tonnes of illicit drugs were seized in Sydney with an estimated street value of $1.2 billion.

Figure 7.4 Protecting the Australian community by intercepting illegal drugs and firearms is of high priority for the Australian Federal Police. In 2017, the AFP seized enough methamphetamine precursor chemicals to make $3.6 billion of ice. The 3.9 tonne bust, in a shipment of green tea bottles from Thailand, is the biggest ephedrine haul in Australian history.

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Australian Criminal Intelligence Commission

The *Australian Crime Commission Act 2002* (Cth) established the Australian Crime Commission (ACC), which, in July 2016, merged with CrimTrac to become the Australian Criminal Intelligence Commission (ACIC). It works at a national level with other federal, state and territory agencies to combat serious and organised crime. In New South Wales, the *Australian Crime Commission (New South Wales) Act 2003* (NSW) was passed to enable the full operation of the ACIC in New South Wales. Similar legislation was passed in the other states and territories, effectively bringing the *Australian Crime Commission Act 2002* (Cth) into state and territory law. All arms of intelligence gathering and law enforcement were thereby unified to combat serious, organised criminal activity.

Video 7.1 About the Australian Criminal Intelligence Commission (01:32)

The ACIC has a number of important functions, involving both intelligence and investigative roles:

- collecting and analysing criminal intelligence data
- giving advice about national criminal intelligence priorities to the ACIC Board
- managing criminal intelligence systems, such as the Australian Criminal Intelligence Database
- investigating federally relevant criminal activity and forming task forces; for example, Strike Force Tuno II, a homicide squad established to investigate a string of possibly related murders, attempted murders and suspected murders over a 15-year period.

Many other task forces are established as the need arises to tackle serious issues of organised crime, terror and drug importation.

Australian High Tech Crime Centre

The Australian High Tech Crime Centre (AHTCC) is hosted by the AFP and attempts to provide a national approach to technology crime. Its role is to address serious and complex crimes involving computer technology, such as online fraud, **mule recruitment**, and offensive and prohibited internet content. 'Technology-enabled crime' includes crimes committed directly against computers and computer systems, and also traditional crimes committed with the use of technology.

mule recruitment the attempt to procure a person (the 'mule') to receive and deliver illegal funds to criminals abroad or at home without the knowledge of the 'mule'; this is usually done through a fake company and may involve getting an unsuspecting employee to sign a contract and transfer funds on behalf of organised criminals

The first category, detailed in Part 10.7 of the *Criminal Code Act 1995* (Cth), includes:

- computer intrusions (gaining unauthorised access to data in a computer or computer system)
- unauthorised modification or destruction of data
- denial-of-service attacks (deliberate removal of service)
- creation and distribution of malicious software such as viruses, worms or trojans.

Each state and territory in Australia has its own legislation, similar to the Commonwealth legislation, covering computer-related offences.

Another task of the AHTCC is to police and remove inappropriate and illegal internet content such as child pornography and racially based 'hate' sites. Identity fraud is also a growing criminal activity, especially with the increasing use of social networking sites such as Instagram, Snapchat and Facebook. Identities are usually stolen through 'phishing', which involves luring unsuspecting victims to a fake website where they are asked to provide their bank account details.

Australian Security Intelligence Organisation

The Australian Security Intelligence Organisation (ASIO) is Australia's national security service, established under the *Australian Security Intelligence Organisation Act 1979* (Cth). It was initially established in 1949 as Australia's security service to guard against activities such as espionage (spying), sabotage, politically motivated violence and attacks on our nation's defence systems. ASIO's main role is to gather information that will help the federal government and other law enforcement agencies, such as the AFP, to prevent attacks on Australia. ASIO's role is expanding; it employs approximately 1500 people and 75 government departments, the police and senior decision-makers all use ASIO's information.

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Government departments

Some Commonwealth and state government departments have the authority to enforce specific laws. The Australian Tax Office (ATO) has the power to enforce certain laws for the protection and benefit of society. For example, under the *Income Tax Assessment Act 1936* (Cth), the ATO can investigate and prosecute individuals or companies in relation to tax offences.

The main issues relating to income tax involve either the 'avoidance' or the 'underpayment' of tax. In 2018, ATO Deputy Commissioner Michael Cranston, his son Adam and daughter Lauren were accused of a $165 million tax fraud. Adam and Lauren received jail sentences of 15 years and 8 years, respectively, in 2023. Their father, however, was found to have played no role in the conspiracy.

Other laws administered by the ATO include those governing fringe benefits tax (FBT), the Goods and Services Tax (GST) and superannuation.

In December 2016, the federal government formed a new ministerial department named the Department of Home Affairs.

The department 'brings together Australia's federal law enforcement, national and transport security, criminal justice, emergency management, multicultural affairs and immigration and border-related functions and agencies, working together to keep Australia safe.'

Review 7.1

1 What is a law enforcement agency? Explain the role of the police in the legal system.
2 Outline the differences between the roles of state and federal police.
3 Describe a current legal issue or a dispute between groups at either the state or federal level. Outline the main legal arguments on each side of the dispute.
4 Choose two law enforcement agencies and describe the importance of their role. Mention any current media stories or cases before the courts that involve these agencies.

Figure 7.5 Former ATO Deputy Commissioner Michael Cranston attends court on 25 January 2019 in Sydney, Australia. On 15 February, the jury found him not guilty of dishonestly obtaining information or using his influence for the benefit of his son.

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7.2 Disputes between individuals

Disputes between individuals are highly variable in terms of their nature, complexity and seriousness. One of the more common types of disputes between individuals is that of 'neighbourhood' disputes. The existence of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) clearly indicates that vegetation can be a significant source of conflict among neighbours. Disputes can even become violent and result in tragic circumstances, as shown in the media article below.

Media

Melbourne man jailed for double murder after garden hose dispute with neighbours

The Guardian

31 July 2023

Angry with his neighbours for turning off the hose he used to water the communal garden in their apartment complex, Rodney Lee turned to murder.

Lee was jailed for 30 years on Monday, having pleaded guilty to murdering Saumotu Gasio, 62, and Tibor Laszlo, 57 at their Melbourne public housing complex in January last year.

The Victorian supreme court was told Lee, 74, had taken an active role in maintaining the communal areas at the Mordialloc complex since 2006, including tending to the garden. He would often leave the hose running to water his plants.

Lee's relationship with neighbours deteriorated in 2020 when he took exception to loud music and the consumption of alcohol in communal spaces. When a new resident moved in the next year, Lee began to make complaints to police about a suspicion the man was cooking and dealing drugs.

Issues over the tap peaked in January 2022. Lee struck a man with a garden chair in a confrontation about it being turned off, the court heard.

Alternative dispute resolution

Seeking a court-based remedy can be expensive in terms of both money and time. There has been pressure to provide alternatives to court processes for solving legal disputes. It has been estimated that the average civil case costs between $30 000 and $40 000, which puts many average wage earners in a precarious position should they lose. Logically, any claim against another party for less than this amount would seem useless, yet the financial cost of loss or damage below this amount may still be significant to the person who suffers it.

Alternative dispute resolution uses a variety of methods to resolve disputes between parties without involving court processes. It allows the participants to save time and money and to have more control over proceedings.

alternative dispute resolution dispute resolution processes, such as mediation, arbitration and conciliation, that do not involve the courts

Alternative dispute resolution may be as simple as two parties talking through their dispute, or as complex as court-ordered mediation or arbitration. Mediation involves a neutral third party attempting to help parties come to an agreement. In arbitration, the neutral third party makes a decision that is binding on the parties involved in the dispute. These dispute-resolution options are discussed in the following pages.

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Negotiation

Negotiation is discussion between two or more parties with the aim of reaching a mutually beneficial outcome. It involves consideration of the other party's views, and often, some degree of compromise. Many parents teach their children negotiating skills and you would probably be surprised at how often you negotiate with friends, teachers and parents. In a legal sense, negotiation is frequently the first stage of resolving a dispute between parties. Negotiation only involves the parties to a dispute and hence is usually low in cost.

Mediation and conciliation

Mediation and **conciliation** are similar procedures and are usually confidential. Both processes involve a neutral and independent third party who helps the parties to negotiate their disagreement and come to a decision that is mutually acceptable.

negotiation
any dialogue intended to resolve disputes and/or produce an agreement on further courses of action

mediation
a form of alternative dispute resolution designed to help two (or more) parties, in the presence of a neutral third party, to reach an agreement

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes an active role advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for the parties

arbitration
a form of alternative dispute resolution in which the disputing parties present their cases before an arbitrator, who makes a decision that is binding on the parties

A mediator does not provide advice on the matters or impose a decision on the parties. They may not have specific expertise in the subject area, but will be highly skilled in the process of mediation. By using their negotiation and listening skills, the mediator is able to assist conflicting parties to examine the issues, and develop their own strategies for dispute-resolution.

In conciliation, the third party also helps the parties to identify the issues, consider alternative options to solve the dispute and reach an agreement. In contrast to a mediator, the conciliator may advise the parties. However, they do not make a decision for them. A conciliator may be a legal practitioner or professionally qualified in the subject matter of the dispute. They will be responsible for managing the process, explaining the rules and acting as an umpire. The disputing parties may also have their own legal advisers during a conciliation process.

Community Justice Centres and Conflict Resolution Service

Community Justice Centres (CJCs) aim to resolve disputes through mediation. In New South Wales, there are six centres, which offer informal and impartial dispute resolution services to government agencies and to all sections of the community. CJCs are funded by the NSW Government and provide their services free of charge.

CJCs deal with disputes within families (including youth conflict), workplaces, neighbourhoods and communities. Indeed, CJCs are designed to resolve disputes between members of the same community. As these people usually have an ongoing relationship, it is important that disputes over something like fence repairs can be resolved as quickly and economically as possible with no long-lasting acrimony. Such disputes are better resolved at a CJC, with the parties talking through their dispute with a neutral mediator, rather than by resorting to adversarial courtroom litigation.

In the ACT, the Conflict Resolution Service (CRS) has existed since 1988 as a non-profit organisation to help resolve disputes between neighbours. One of the main methods used to solve disputes is mediation. According to the CRS website, 83 per cent of mediated neighbourhood disputes are solved by mutual agreement.

Arbitration

Arbitration is a formal process in which an independent third party (the arbitrator) is utilised to determine how a dispute can be resolved. It is useful when the subject matter of the dispute requires an expert and/or when a court-like procedure is desired (with a greater degree of confidentiality). The process is used, for example, when a contract specifies the use of arbitration to resolve disputes; in industrial relations matters; or in tenant and landlord disagreements. Moreover, it has become the preferred procedure in Australia for the resolution of commercial contract disputes.

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Figure 7.6 Shayna Jack of Team Australia celebrates after winning a gold medal in the women's 4 x 100 m freestyle on day one of the Budapest 2022 FINA World Championships. In 2019, she had tested positive to the prohibited substance Ligandrol and was banned from elite-level swimming for four years. But Jack appealed this decision via the Court of Arbitration for Sport and the case was dismissed in 2021.

In 2019, Australian swimmer Shayna Jack tested positive to Ligandrol, a prohibited substance, thereby breaching Swimming Australia's Anti-Doping Policy. Accordingly, she was banned from swimming at the elite level for a period of four years. Jack appealed this decision via the Court of Arbitration for Sport (CAS) in 2020. The sole arbitrator, Alan Sullivan QC, found that the swimmer had not ingested the prohibited substance 'intentionally' and was therefore eligible to return to the sport and hence compete for selection in national swimming teams. The World Anti-Doping Agency and Sport Integrity Australia lodged an appeal against the arbitrator's decision. However, this was dismissed by the CAS in 2021.

Review 7.2

1. Assess the importance of alternative dispute resolution.
2. Distinguish between the processes of mediation, conciliation and arbitration. Identify where negotiation fits into the dispute resolution process.
3. Discuss why someone might prefer alternative dispute resolution to taking the other party to court.

Courts

If the individuals involved in a dispute cannot resolve it by way of alternative methods, they will need to take the matter to litigation. One example of a court that deals with disputes between individuals is the NSW Land and Environment Court.

NSW Land and Environment Court

The NSW Land and Environment Court (LEC) is a specialist court with a wide jurisdiction. It has the same status in the court hierarchy as the Supreme Court of New South Wales and is responsible for interpreting and enforcing environmental law in New South Wales. Proceedings that can come before the LEC include:

- administrative or merits review: the court re-hears a case that has been decided by a body such as a local council
- civil proceedings arising from a breach, or potential breach, of the law
- criminal proceedings for environmental offences.

More than 60 New South Wales Acts grant the LEC's jurisdiction. It does not have the power to hear matters outside that statutory jurisdiction. The court deals with environmental, development, building and planning disputes, and certain types of native title claims. Alternative dispute resolution is integrated throughout its procedures.

Among the statutes granting the court jurisdiction is the *Trees (Disputes Between Neighbours) Act 2006* (NSW). This Act empowers the court to hand down judgments relating to the removal or pruning of trees and who should pay.

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Tribunals

Tribunals offer a less formal and less expensive method of dispute resolution than courts. Individuals do not normally need legal representation – it is often not even permitted – and the person presiding over the tribunal may have specialist expertise rather than specific legal training. Their background should enable them to understand the details of the dispute, and they ensure that the principles of natural justice are applied, so that all the parties have an opportunity to put forward their position, and nobody is disadvantaged.

NSW Civil and Administrative Tribunal

The NSW Civil and Administrative Tribunal (NCAT) was established on 1 January 2014, combining the roles of 22 separate tribunals. NCAT has four main divisions (the Administrative and Equal Opportunity Division, Consumer and Commercial Division, Guardianship Division, and the Occupational Division) and deals with various types of disputes between individuals, as well as between individuals and organisations.

Disputes between individuals are often heard by NCAT's Consumer and Commercial Division. This includes disputes about repairing or replacing a fence between two residential properties, excessive noise or pet ownership within a block of units or townhouses, as well as appeals from previous judgments. For example, in *Hacienda Caravan Park Pty Ltd v Howarde* [2016] NSWCATAP 1, Howarde disputed a decision made by the Consumer and Commercial Division. This appeal was based around Howarde and his partner being able to live permanently in a cabin they purchased at the Hacienda Caravan Park. Hacienda attempted to evict Howarde under the *Residential Parks Act 1998* (NSW), on the basis that Howarde had purchased the cabin from another tenant, so he did not have a permanent arrangement with Hacienda and therefore could not live on Hacienda's property. NCAT upheld the appeal.

Review 7.3

1. Define alternative dispute resolution. Outline some of the forms it may take. Identify which form of dispute resolution you think would have the most desirable results. Justify your response.
2. If you are having problems with your neighbours, explain why going to court should be your last option.
3. Outline what alternatives exist for dispute resolution with your neighbour. Discuss these with reference to the types of disputes that might arise.
4. Describe the extent to which the legal system assists in dispute resolution. Refer to *Hacienda Caravan Park Pty Ltd v Howarde* [2016] NSWCATAP 1.

Analysis 7.2

View the NSW Caselaw website and search for the case *Bowan v Glanville* [2008] NSWLEC 10.

1. Summarise the dispute between the neighbours.
2. Evaluate the court's judgment.
3. Explain why the neighbours were not able to negotiate a settlement without resorting to the Land and Environment Court.

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7.3 Disputes with the state

There are a number of avenues available to challenge state power or government decisions and policies. Some of these are informal or 'non-legal', while others employ formal legal pathways.

Non-legal methods of challenging state power

The media

Citizens are able to inform the community of a decision they think is unfair, unjust or too harsh. This can be achieved by letter writing campaigns, emails, telephone calls to television and radio stations, or by posting to social media sites. There have been many instances in which major television and radio networks have taken on a story and caused the state to overturn a decision. Two examples are the cases of Lynette Dawson and Keli Lane.

Lynette Dawson mysteriously disappeared in January 1982, leaving behind two young children. It was alleged that Chris Dawson, her husband, had been conducting an affair with a former student at the time of his wife's disappearance. Chris Dawson denied killing his wife. At the time, the NSW Coroner recommended a charge of murder be laid, yet the NSW Director of Public Prosecutions ignored the recommendations, apparently citing the absence of Lynette Dawson's body.

In 2018 *The Australian* newspaper, led by Hedley Thomas and David Murray, along with the family of Lynette Dawson, launched an unprecedented media campaign involving a highly popular podcast series, 'The Teacher's Pet', that detailed the life of Chris Dawson and the circumstances surrounding Lynette's disappearance.

After a number of failed investigations, Lynette's husband, Chris Dawson, was finally arrested in 2018 and eventually found guilty of murder (2022) and carnal knowledge (2023). He is currently serving prison terms of 24 years and three years, respectively, for those offences.

In a reverse situation, Keli Lane was convicted in 2010 for the 1996 murder of her young child, despite the child's body never being located. Lane was sentenced to a jail term of 18 years. Attempts by her lawyers to appeal were all rejected, and Lane subsequently asked journalist Caro Meldrum-Hanna to conduct an investigation. The result was a three-part documentary, *EXPOSED: The Case of Keli Lane*, which broadcast on the ABC in September–October 2018. This was followed by calls via social media for people who might have knowledge of events from 1996, such as anyone living in the same apartment block, but there was no further legal action.

Members of parliament

State and federal members of parliament (MPs) are elected by voters to represent a particular area or electorate. For example, Dave Sharma held the Federal House of Representatives seat of Wentworth in Sydney, before being defeated by Allegra Spender in the 2022 federal election. Despite that loss, Sharma was later appointed to the Federal Senate in November 2023.

All citizens within an electorate are able to contact the office of their representative and speak to their MP about issues that may concern them. The MP may take this issue back to Parliament in Canberra and discuss it with other MPs or the party that is in power.

Some electorates or regions are significantly more affected by certain issues than others. If the Pacific Highway between Sydney and Brisbane were to be widened, residents of towns along this highway could be directly affected. An MP in an affected area might be able to convince their party to reconsider an executive or Cabinet decision. However, this issue would clearly be irrelevant to residents of Western Australia.

Members of the public can also contact their federal or state MP, or local councillor, if they feel a government department or agency in that jurisdiction has wronged them. MPs and councillors can assist in the resolution of a dispute and hence avoid courts or tribunals. MPs and councillors rely on being re-elected to their position, so it is in their interest to help their constituents resolve disputes quickly.

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Figure 7.7 Australian Prime Minister Anthony Albanese (centre) speaks in the House of Representatives at Parliament House in Canberra. All citizens within an electorate are able to contact the office of their representative and speak to their member of parliament about issues that may concern them.

Trade unions

Groups of people in various industries unite to form trade unions, which protect their employee rights and working conditions. Unions can help to negotiate workplace agreements containing important provisions about workplace safety, wages and conditions. They will also take action when an employer proposes changes to the conditions of work that are detrimental to employees. In Australia, the legislative approach to industrial relations has historically been based on conciliation and arbitration. Strike action is regarded as a last resort.

Video 7.2 In 1969, after being elected as president of the ACTU, Bob Hawke (future Prime Minister) talked to the press about his view for a modernised trade union movement. (01:46)

In the early 1970s, one union, the Builders Labourers Federation, banned workers from worksites protecting various sites of heritage value in Sydney from being demolished for potential property development. These so-called 'green bans' were highly successful, including in saving a small park in Hunters Hill and terrace houses in Victoria Street Potts Point, both of which still exist today. The historic area of Sydney known as The Rocks was another area saved and protected by green bans in the 1970s.

More recently, the Australian Council of Trade Unions (ACTU) ran a campaign against Australia's Free Trade agreement with China. The ACTU is concerned about the loss of jobs to Australians and the possibility of overseas workers being paid less to work in Australia.

Review 7.4

1 Assess how you would challenge the state if it refused to award you the Higher School Certificate (HSC). Describe the laws and means you would utilise to investigate why you did not receive your HSC.
2 In your dispute with the state about your HSC, identify which of the informal methods of challenging state power would be the most effective and why.

Interest groups, including non-government organisations

People can also form groups based on shared political values or aims or with a specific goal of challenging a state decision. Individuals can join these groups and engage in activities of various types, or donate money to fund their activities.

GetUp! Action for Australia is an example of a non-government organisation, which according to its website:

> ... is an independent, grass-roots community advocacy organisation which aims to build a more progressive Australia by giving everyday Australians the opportunity to get involved and hold politicians accountable on important issues.

The organisation links its 600 000 members through email and social media, and was actively involved in the fight against Woolworths' ownership of poker machines in Australia. GetUp! believes that there should be some sort of regulation regarding poker machines to stop people from losing large amounts of money.

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Legal methods of challenging power

Challenges to decisions of government or government bodies can also be made on a formal legal basis.

Internal reviews

In New South Wales, government departments can review their own decisions, procedures or behaviour. Such reviews are very cost-effective, but they can be ineffective in terms of practical outcomes if the people conducting the review were involved in the action under investigation.

An example of an internal review being requested comes from the Combined Pensioners and Superannuants Association of NSW (CPSA), which promotes the interests of pensioners and low-income retirees. When a booking fee was introduced for country train fares in 2006, the CPSA applied to RailCorp, the state-owned passenger rail system, to see documents related to community consultation. Previously, pensioners had been entitled to four free rail trips per year. The Minister for Transport claimed that there had been extensive consultation indicating 'overwhelming community support' for the booking fee.

The CPSA's application was made under the *Freedom of Information Act 1989* (NSW), which has since been repealed and replaced by the *Government Information (Public Access) Act 2009* (NSW). This legislation also gives the right to request changes to personal records that are inaccurate, incomplete or out of date, and to seek review of a decision not to grant access or to amend records. Other states and territories, and the Commonwealth, have similar **freedom of information** legislation.

The CPSA's application was denied, so they requested RailCorp perform an internal review. The review found that there had been no community consultation about the booking fee.

External reviews

Reviews of government activities can also be undertaken externally. There are a number of avenues by which an external review can be pursued, such as the following.

Administrative and other tribunals

Administrative and other quasi-judicial tribunals are bodies that review specific administrative decisions of government agencies. They offer a time-efficient, low-cost means of resolving legal disputes and problems. They are different from courts as they have narrow areas of jurisdiction, are less formal, usually do not allow legal representation and are not bound by rules of evidence, and so can take into account a variety of factors in finding a solution.

One tribunal in New South Wales is the NSW Civil and Administrative Tribunal (NCAT), which deals with disputes between consumers and businesses, or tenants and landlords, as well as between individuals. The NCAT was established in 2014, replacing a number of other tribunals, including the former Administrative Decisions Tribunal of New South Wales.

The NCAT consists of four divisions and an appeal panel:

- The Administrative and Equal Opportunity Division reviews administrative decisions made by NSW Government agencies across a range of areas, including privacy, community services, firearm licensing and working with children checks. It also deals with complaints referred to it by the NSW Anti-Discrimination Board
- The Consumer and Commercial Division is responsible for resolving everyday disputes around housing (for example, tenancy, social housing and home building) and around consumers and businesses (including consumer claims, motor vehicles and **conveyancers** costs).
- The Guardianship Division takes applications about adults who have a decision making disability, and may need a legally appointed decision maker, for personal, financial or health decisions.
- The Occupational Division reviews government agency decisions about occupational licensing, including drivers,

freedom of information
the principle that people should be able to have access to information relating to the administration of government decision-making and information held by the government; the legislation governs the processes of obtaining this information, at state and federal levels

conveyancer
a person who deals professionally with the legal and practical matters involved in the transfer of titles to property when real estate is sold and purchased

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security guards, travel agents and many others. It also hears discipline cases about health, legal, veterinary, architectural and building professionals.
- The Appeal Panel offers an avenue for those who want to appeal a decision made by one of the other NCAT divisions. It can also hear designated external appeals.

Privacy bodies

All individuals have a right to privacy. Most people would agree that it is not a pleasant feeling to know that somebody who is not close to you has access to information about you.

In a broad sense, laws have been enacted at both the state and federal level to prevent information about you from being released to companies, government departments or other citizens. Under the *Privacy Act 1988* (Cth), people are entitled to make a complaint if they believe that the Commonwealth Government or a private organisation has mishandled their personal information, including their health information. There are legal responsibilities that government departments are obliged to fulfil when collecting and storing the personal information of individuals.

For example, if you have been convicted of a criminal offence, there are limits on how long information about this can be used. The *Criminal Records Act 1991* (NSW) provides that after a person has been crime-free for a certain amount of time, most minor offences are treated as 'spent' convictions. Once a conviction is spent, the person does not have to disclose it to prospective employers, insurance agents, banks and so on. Unauthorised release of information about a person's spent conviction is subject to penalties.

Figure 7.8 Under the *Privacy Act 1988* (Cth), people are entitled to make a complaint if they believe that a Commonwealth Government or private organisation has mishandled their personal information, including health information.

At the state level in New South Wales, the chief Acts protecting privacy are the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW). Persons who feel that their personal information has been misused may either request an internal review or complain to Privacy NSW, established under the state privacy legislation to help people to protect their privacy.

The courts

Law courts at both the state and federal level have the power to review administrative decisions and actions. As discussed in Chapter 2, the term 'judicial review' is used to describe the process whereby a court with the relevant jurisdiction can review a decision made by a government department to determine whether it was lawfully made. Judicial review does not pronounce on the merits of the decision; that is, whether or not it was a good decision or the right decision in the circumstances.

What is legal can vary depending on the circumstances of each case, but generally, decisions are subject to the following requirements:
- Natural justice: You will study this concept in detail in the HSC course. In this context, natural justice refers to the person affected having the opportunity to be heard and the decision being unbiased.
- The decision must be authorised by the Act under which it was made and must be based only on relevant considerations.
- The decision-maker must have jurisdiction to make the decision.
- The decision must be justified by appropriate evidence.
- The decision-maker must have observed all procedures required by law in making the decision, and there must have been no errors in law.

A person desiring judicial review must have standing; that is, the issue must directly affect them. There would be huge costs associated with judicial reviews if any interested persons could order them, irrespective of whether they were directly affected or not.

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If a judicial review finds a decision flawed in one or more ways, the remedies that courts can issue will depend on the nature of the error that was made by the decision-maker. They include:

- **prohibition** – an order that stops a decision from being made or implemented
- **certiorari** – an order that reverses a decision that has already been made
- **mandamus** – an order that compels the decision-maker to perform certain types of public duties that have not been performed
- **injunction** – an order that prohibits the decision-maker from implementing an invalid decision or compels the performance of a duty in decisions where mandamus is not available.

The Office of the Ombudsman

In 1809, the Swedish Parliament created a new official known as the *Justitieombudsmannen*. This loosely translates as 'citizens' defender' or 'representative of the people'. This concept was adopted in Australia, with the Office of the Ombudsman created by statute in 1974 in New South Wales, and federally in 1977.

The office acts as a formal external control, with legal power to investigate complaints made by citizens. Public sector agencies and some private sector agencies providing public services (for example, non-government schools, and agencies providing childcare and residential care) can use the Ombudsman's office to deal with complaints against them or their officers. The NSW Ombudsman does not have the power to impose any punishment or fine on a government agency or department. They can, however, make recommendations to the department in question or to the NSW Parliament.

Some of the main areas of complaint received by the office involve:

- delivery of community services
- child abuse and neglect
- the operation of the police force.

Any citizen can make a complaint to the Ombudsman, but it must be in writing. All complaints are taken seriously, but they are only followed through if a *prima facie* case exists; that is, if the complaint would raise concern 'on first view'. Such concern could only exist if there were witnesses to an event or if a citizen had very strong and irrefutable evidence.

If a complaint is made in writing, the Ombudsman's office will investigate and assess whether the complaint is justified. If it sees that the complaint is justified, the Ombudsman will make recommendations for rectifying the problem.

Media

Statement on High Court decision in indefinite immigration detention

Commonwealth Ombudsman – media release

13 November 2023

The Commonwealth Ombudsman, as the Commonwealth National Preventative Mechanism (NPM) overseeing the conditions of immigration detention in Australia, welcomes the High Court's decision last week in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*.

This decision is likely to have significant impact on others in long-term immigration detention and the broader system of immigration detention in Australia.

'I have previously expressed concerns that there are people who face being held in immigration detention indefinitely, without any clear immigration or removal pathway. I have made many recommendations to the department of Home Affairs and to relevant ministers to consider alternative arrangements for people facing prolonged or indefinite detention,' said Iain Anderson, Commonwealth Ombudsman. 'Regardless of whether someone has committed a crime in the past, for which they have served their sentence, immigration detention must not be punitive.'

The Commonwealth NPM will continue to monitor place of immigration detention, pursuing systematic change under our mandate of preventing torture and ill-treatment in detention.

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New South Wales statutory bodies

Statutory bodies are authorities created by statute for a public purpose. The following statutory bodies can investigate complaints and disputes of certain types.

Anti-Discrimination Board of NSW

The Anti-Discrimination Board of NSW (ADB) is part of the NSW Attorney-General's Department and was established under the *Anti-Discrimination Act 1977* (NSW). Its role is to promote principles and policies of equal opportunity throughout New South Wales to ensure that people are protected from discrimination on the basis of characteristics such as disability, age, race and sex. It advises the government and also provides an inquiry service to inform people about their rights and responsibilities under anti-discrimination laws. The ADB will investigate and conciliate complaints when action is necessary. It has the power to issue fines for behaviour that violates anti-discrimination laws.

Commissions of inquiry

Commissions of inquiry are set up to investigate serious matters at both state and federal level. They are not judicial proceedings but fact-finding exercises. Royal Commissions are commissions of inquiry with particularly strong powers with respect to calling witnesses. In the past, such inquiries have investigated issues such as Aboriginal deaths in custody (Commonwealth, 1987) and corruption in the NSW Police Force (NSW, 1995). More recently, there has been a Royal Commission into the Robodebt Scheme (Commonwealth, 2023).

Commissions of inquiry do not have the power to prosecute offenders. At the end of an inquiry, the commission will produce a report containing recommendations, which may include recommending criminal prosecution of individuals. The government may decide to act on the commission's recommendations. For example, a number of police officers were sent to jail as a result of the NSW Royal Commission. However, it has been argued that the inquiry into Aboriginal deaths in custody has failed to produce significant improvements in the conditions leading to these deaths.

Independent Commission Against Corruption

While the Ombudsman has the power to investigate complaints made by the public, the Independent Commission Against Corruption (ICAC) has greater power. The *Independent Commission Against Corruption Act 1988* (NSW) created ICAC as an independent statutory body to investigate alleged corruption in government. ICAC attempts to protect the interests of the public, prevent breaches of public trust and influence the behaviour of public officials.

Some examples of corrupt behaviour include bribery, fraud and theft. ICAC has the power to investigate the activities of private citizens if such behaviour affects the proper administration of public offices.

ICAC has the authority to ask the police service to assist in its investigations, and it is therefore able to search for and seize evidence where it sees fit. It does not have the power to prosecute offenders (that is the job of the Director of Public Prosecutions). At the end of an investigation, it can report to parliament that corrupt behaviour has occurred, who committed it and what further action should be taken. If a NSW citizen feels they have been wrongfully accused of corruption, they may seek judicial review in the New South Wales Supreme Court.

During 2014, ICAC conducted a major investigation into New South Wales politicians and their alleged corrupt conduct. Eddie Obeid and Joe Tripodi were found to be corrupt over dealings involving the leases of cafes at Circular Quay in Sydney. In 2016, the Supreme Court justice Robert Beech-Jones said, regarding Obeid, 'no penalty other than imprisonment is appropriate' for the corrupt former Labor minister. He imposed a maximum sentence of five years with a non-parole period of three years.

In September 2021, serving NSW Premier Gladys Berejiklian resigned as Premier after an ICAC investigation exposed a 'breach of public trust' in relation to her relationship with serving MP Daryl Maguire. The former Premier was accused of covering up Maguire's behaviour in relation to grants to the Australian Clay Target Association and the Riverina Conservatorium of Music in Wagga Wagga in 2018.

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Review 7.5

1 Explain the process of internal review of a government agency's decision. Discuss the potential problems with internal review.
2 Explain the function of freedom of information legislation.
3 Describe the role administrative tribunals and other tribunals play in settling legal disputes. Give an example.
4 Outline the ways in which people's privacy is protected in New South Wales.
5 Discuss what judicial review is and how it differs from review of the merits of a decision.
6 Outline the role of ICAC.
7 Using a media article about the resignation of NSW Premier Gladys Berejiklian (e.g. *The Guardian* on 1 October 2021, available at http://cambridge.edu.au/redirect/10384) outline the importance of ICAC in delivering justice for New South Wales residents.
8 Explain the importance of natural justice as the state attempts to enforce laws.

Research 7.1

The Anti-Discrimination Board of NSW (ADB) has a monthly newsletter called *Equal Time*. Back issues of *Equal Time* are available on the ADB's website. From back issues of the newsletter, select two cases and evaluate the effectiveness of the ADB in bringing about just outcomes in these cases. You should aim to include a case that has been dismissed by the ADB.

National and international bodies

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is a national government body directly responsible to the Federal Attorney-General. It was formerly called the Human Rights and Equal Opportunity Commission, and was established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (which is now called the *Australian Human Rights Commission Act 1986* (Cth)).

As detailed in Chapter 5, the AHRC plays a key part in ensuring that we live in a tolerant, equitable and democratic society. It provides information through public education programs aimed at the community, government and business sectors. It also holds public inquiries, advises parliament, conducts research and investigates discrimination complaints.

The United Nations

International treaties and declarations containing key principles of human rights include:

- *The Universal Declaration of Human Rights* (1948)
- *International Convention on the Elimination of All Forms of Racial Discrimination* (1965)
- *International Covenant on Civil and Political Rights* (1966)
- *International Covenant on Economic, Social and Cultural Rights* (1966)
- *Convention on the Elimination of All Forms of Discrimination against Women* (1979)
- *United Nations Convention on the Rights of the Child* (1989).

Human rights bodies under the umbrella of the United Nations include the Commission on Human Rights, now known as the Human Rights Council, whose state members discuss and debate human rights concerns. There are also committees that monitor each of the conventions listed above, and that can rule on individual complaints, although only as relates to the convention they oversee. The UN Human Rights Committee is one of these.

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Figure 7.9 UN High Commissioner for Human Rights, Volker Türk, delivers a speech during the 52nd UN Human Rights Council session in Geneva on 27 February 2023.

It rules on individual complaints pertaining only to the *International Covenant on Civil and Political Rights* (1966) (ICCPR). State signatories to the First Optional Protocol to the ICCPR have agreed that their citizens can seek an opinion from the committee regarding breaches of the ICCPR.

In 1991, a Tasmanian man, Nicholas Toonen, complained to the committee that certain sections of Tasmania's Criminal Code criminalised his sexual orientation. In the case *Toonen v Australia* (1994), it was argued that the Tasmanian legislation breached Articles 2, 17 and 26 of the ICCPR; namely, the right to privacy and the right to equal treatment before the law. The Human Rights Committee ruled that the Tasmanian law constituted a violation of individuals' privacy under Article 17 and that Tasmania should amend its criminal code.

The federal government responded by enacting the *Human Rights (Sexual Conduct) Act 1994* (Cth) to override the offending sections of the *Criminal Code Act 1924* (Tas). Nonetheless, Tasmania was reluctant to change its laws. It took a High Court decision (*Croome v Tasmania* [1997] HCA 5), which held that Tasmania's law was inconsistent with the Commonwealth Act, for an amendment to be made to the Tasmanian Criminal Code.

Research 7.2

1. Investigate the provisions of the six human rights treaties listed in this section.
2. Briefly summarise the purpose of each of these treaties.
3. Compare and contrast the rights in the *International Covenant on Civil and Political Rights* (1966) with the rights in the *International Covenant on Economic, Social and Cultural Rights* (1966).

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Chapter summary

- Law enforcement agencies at the local, state and federal levels have the task of enforcing laws and rights within their jurisdiction. These agencies include state and federal police, the Australian Security Intelligence Organisation, the Australian Customs and Border Protection Service, the Australian Criminal Intelligence Commission and the Australian High Tech Crime Centre.
- The nature of policing has changed since 2001 due to the emerging issues of terrorism, cybercrime and border protection.
- Police are governed by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).
- Disputes between individuals can be resolved using various legal (formal) and non-legal (informal) methods.
- Disputes between individuals and the state can be resolved using formal and informal methods. The state does not have unlimited or arbitrary power.
- The Australian Human Rights Commission and the Anti-Discrimination Board of NSW carry out vital roles in enforcing legislation that protects rights.
- Cases such as *Toonen v Australia* illustrate the ongoing need for law reform in relation to human rights and their enforcement.

Multiple-choice questions

1 State and federal police officers:
   - **a** make and enforce laws.
   - **b** enforce laws.
   - **c** investigate criminal laws in New South Wales.
   - **d** do none of the above.

2 The AFP's role has:
   - **a** changed dramatically since 2001.
   - **b** remained unchanged since 1901.
   - **c** been modified by NSW Police.
   - **d** been seconded by the Australian Security Intelligence Organisation.

3 When disputing parties present their cases to an independent person who makes a decision that is legally binding, the process is known as:
   - **a** negotiation.
   - **b** mediation.
   - **c** arbitration.
   - **d** all of the above.

4 Non-legal methods of challenging state power include:
   - **a** media, trade unions and interest groups.
   - **b** trade unions, internal review and courts.
   - **c** members of parliament, trade unions and media.
   - **d** internal and external review and media.

5 An example of a statutory body is:
   - **a** Amnesty International.
   - **b** the Independent Commission Against Corruption.
   - **c** the Anti-Discrimination Board of NSW.
   - **d** the Australian Human Rights Commission.

Short-answer questions

1 Describe the role of at least three law enforcement agencies that operate in New South Wales.
2 Explain how the role of one law enforcement agency has changed since 2001.
3 Discuss why an independent and neutral third party is part of the mediation and conciliation process.
4 Research and evaluate the Dawson case in which law enforcement were eventually able to arrest Chris Dawson for murder and carnal knowledge.
5 Identify and describe a recent dispute between individuals that has been solved through mediation, arbitration or negotiation.

Extended-response question

Describe the roles of the Australian Human Rights Commission, the Anti-Discrimination Board of NSW and the Independent Commission Against Corruption. Explain why individuals and the state require such bodies.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Chapter 8

Contemporary issue: The individual and technology

Chapter objectives

In this chapter, you will:

- investigate the way in which the law impacts the relationship between individuals and technology in cyberspace
- identify the key features of the relationship between individuals and technology in cyberspace
- investigate the nature of the relationship between individuals, the legal system and cyberspace
- discuss the effectiveness of the legal system in addressing issues that relate to individuals in cyberspace.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 14–15 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Crimes Act 1914 (Cth)
Copyright Act 1968 (Cth)
Privacy Act 1988 (Cth)
Criminal Code Act 1995 (Cth)
Cybercrime Act 2001 (Cth)
Spam Act 2003 (Cth)
Copyright Amendment (Online Infringement) Act 2015 (Cth)

SIGNIFICANT CASES

Reno v American Civil Liberties Union, 521 US 844 (1997)
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63
R v Boden [2002] QCA 164

Legal oddity

Unlike traditional media companies, online tech companies are not liable for the content that is shared on their platforms. This is due to a key US law (section 230 of the *Communications Decency Act 1996* (US) enacted three decades ago to help companies get started on the internet during its early years. Section 230 treats internet platforms in a similar way to phone companies in that they are not liable for the content posted on them by users. This is in contrast to media companies and publishers, who can be held accountable for what they publish. As a result, online companies like Meta (Facebook), X and Alphabet (YouTube) are reluctant to take responsibility for the content that appears on their platforms. In recent years, they have even been using algorithms to recommend extreme material to their users in a quest for more user engagement. In the US Congress, there have been bipartisan calls since 2023 to reform section 230.

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8.1 The impacts of technology on the individual

digital technology
computerised devices, connected to the internet, that are used to generate, store and process data

internet
a global network of interconnected computer networks that allows users to obtain and share information in a number of ways

cyberspace
the 'environment' in which electronic communication occurs; the culture of the internet

World Wide Web
also known as WWW, a user-friendly information system that enables the sharing of text, images, audio and video across the internet using web browsers that access public websites or webpages

The impact of technology on the individual is one of the most important issues that we all face today. This is especially the case concerning **digital technology**. Since the creation of the **internet** in 1983, a whole new online world has evolved, known as **cyberspace**. In the twenty-first century, we have become very dependent on the internet across all realms of human activity, including communication, business, education, politics, religion, warfare and relationships. We have all become participants in this digital revolution and it has changed the way we think, communicate and interact.

In 1993 when the **World Wide Web** started, there was a mood of optimism about the potential of what some called the 'information superhighway'. Some visionaries saw a 'techno-utopian' future that would benefit all of humankind. In the 2000s, as the internet increased its global reach, global internet companies such as Google (now Alphabet), Facebook (now Meta), Amazon and Apple emerged and grew to become the biggest businesses in history, with enormous economic power and political influence. By the mid-2020s, the digital revolution reached into every aspect of society and continues to unleash seismic changes that have implications for personal freedom and wellbeing, our communities, the economy and democracy. It even impacts (both positively and negatively) the sustainability of life on this planet.

Recently, it has become clear that timely, effective and well-focused legal responses to the digital revolution will become indispensable to ensure that technology serves humanity and is not used to enslave it. The lack of legal restraints on social media platforms has presented a number of challenges to governments around the world over the last decade. Added to this, the unknown consequences of large-scale use of artificial intelligence tools on society, the economy and politics, means that, more than ever, governments need to use the legal mechanisms at their disposal and step up to the challenge. However, there are no borders in cyberspace, so the legislation that governments create needs to be accompanied by global cooperation to be effective.

There are also many risks and challenges for individuals as they navigate their online lives. This can be viewed as a societal issue; more educational initiatives are needed to support people in making informed decisions in this space.

Figure 8.1 In 2023, the dystopian film *Leave the World Behind* provided a nightmarish picture of the impact on society if all access to the internet and cyberspace ceased. The film starred Kevin Bacon, Sam Esmail, Ethan Hawke, Julia Roberts, Farrah Mackenzie, Charlie Evans, Mahershala Ali and Myha'la Herrold; it premiered in New York on 4 December 2023.

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The internet

One of the most important and interesting recent technological developments, particularly in terms of the law, has been the creation of the internet. As of 2024, there are approximately six billion internet users and this number increases by the minute. As a result, digital technology and cyberspace are essential areas of interest for citizens and law-makers all over the world.

Figure 8.2 Though the internet played a crucial role in everyday life and even in people's survival during the COVID-19 pandemic, the amount of time children spent on screens each day increased by more than 50 per cent, the equivalent of an extra hour and twenty minutes. Researchers say that unmoderated screen time can have long-lasting effects on a child's mental and physical health.

Research 8.1

View the website of Worldometers at http://cambridge.edu.au/redirect/10385, or a similar website, and locate the current statistics.

1. State the number of internet users there are today.
2. State the number of Google searches there were today.
3. State the number of tweets there were today.

The jurisdiction of cyberspace

Nearly three decades after the novelist William Gibson coined the term 'cyberspace' in his 1982 story 'Burning Chrome', the internet has become so widely available that it has forever changed our lives. Cyberspace is the global online virtual world created by the interconnection of millions of computers on the internet. By the third decade of the twenty-first century, cyberspace has touched just about every aspect of our lives. Increasingly, our online and offline lives are merging. Like any other new area of human activity, there is a need for law applicable to cyberspace. Currently, no government or court can claim cyberspace as its exclusive jurisdiction. The global nature of cyberspace poses unique challenges for the law.

Figure 8.3 In 1982, American–Canadian science fiction writer William Gibson (pictured here in 2010) coined the term 'cyberspace' in his short story 'Burning Chrome'. This was well before the internet as we know it existed. The term and the concept were later popularised in Gibson's debut novel, *Neuromancer*.

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The nature of digital technology in cyberspace

There are at least three distinctive features of cyberspace that pose unique challenges for legal regulation:

- **Cyberspace facilitates anonymity.** The internet has made it much easier for persons to distribute information and messages anonymously or using a pseudonym. Social media platforms allow you to create a username and hide your identity if you wish.
- **Cyberspace facilitates creativity.** The computers connected to the internet do not just retrieve information like a television receives programs from a network; they also permit information and services to be created and supplied. This feature makes the internet unlike any other electrical device or network that has ever been developed. Technology in cyberspace is constantly evolving at a rapid pace, while the law struggles to keep up.
- **Cyberspace is global.** The internet went from being a collection of networks in the United States to being a global system. Cyberspace lacks national boundaries. Like-minded people can communicate with each other and join online communities regardless of where they live in the world. The downside to this is that it is difficult for a nation state to control what goes on within its territorial borders if those activities take place in cyberspace.

Figure 8.4 Johann Hari in his 2023 book, *Stolen Focus: Why You Can't Pay Attention*, argues that the big tech companies are stripping humanity of the ability to pay attention to what is happening in our own lives, the lives of our loved ones and the big challenges that the world faces today.

algorithm
a series of instructions telling a computer how to transform facts and data into an executable form to accomplish a task or solve a problem; these are key to any computer application, such as navigation systems, search engines, social media platforms and music streaming services

Individual wellbeing

There have been countless books written on the impact of the digital world on the wellbeing of the individual. One example is *Stolen Focus: Why You Can't Pay Attention*, by Johann Hari in 2023. Hari argues that current technology is impacting the lives of everyone by making it more difficult to focus. Our attention and focus is fundamental to a good life, well-functioning democracy and solving difficult problems. According to Hari, our attention crisis is largely due to tech platforms' business models, which use **algorithms** on their platforms to maximise their profits by keeping our attention glued on screens. Action at the level of governance is needed. In Hari's view, whether it is the individual dealing with personal matters in their lives or governments dealing with existential threats like climate change, we need to deal with our attention problems before we can achieve important goals. He fears a 'downgraded humanity' stripped of the ability to pay attention to the big collective crises of our time.

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Review 8.1

1 Outline some of the positive aspects of the global nature of cyberspace.
2 Outline some of the drawbacks of cyberspace, especially with respect to the enactment and enforcement of laws.
3 Identify how your own life is dependent on cyberspace. If all access to cyberspace suddenly stopped, describe how it would affect life as we know it for you personally and for society.

8.2 Legal implications

Even in cases where jurisdiction is clear, there are difficulties with enforcement of the law in cyberspace. Criminal and civil wrongs in cyberspace can sometimes be classified into familiar categories, but they may also take on new characteristics. Some of the areas of law concerning cyberspace are as follows.

Cybercrimes

Hacking

Hacking is unauthorised access to data held in a computer or computer system, changing the data, interfering with electronic communication between computers, or impairing the security, reliability or function of stored electronic data. A person may engage in hacking out of curiosity, for monetary gain or to alter data for some other reason. Hacking also has the potential to be used in an act of terrorism.

The *Cybercrime Act 2001* (Cth) amended the *Criminal Code Act 1995* (Cth), as well as the *Crimes Act 1914* (Cth) and several other Commonwealth Acts. It created offences pertaining to computers, data and the internet, now contained in the *Criminal Code Act 1995* (Cth). As these are federal offences, there must be a 'Commonwealth connecting factor'; for example, the computers are owned or operated by the federal government, the data is held by the federal government or the offender's actions are carried out via a 'telecommunications network', which includes the internet.

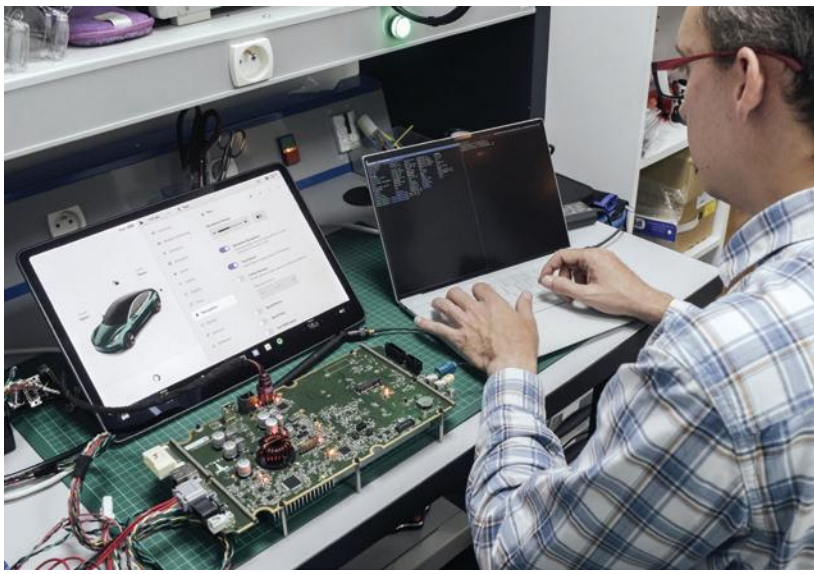

Figure 8.5 On 26 July 2023, in Paris, Vincent Dehors, cyber engineer at the cybersecurity company Synacktiv, demonstrated how easy it was to hack into the computer system of Tesla's electric cars. Elon Musk designed his Tesla cars so that they would be constantly connected to the internet via the car's own built-in modem. All the data collected from all the Tesla cars, and all the drivers of these cars, is used to further improve the cars and to achieve Musk's dream of auto-piloted cars. However, this internet connectivity leaves Tesla cars open to being hacked. In the 2023 dystopian film *Leave the World Behind*, there is a scene where a large number of Tesla cars take off on their own from a factory, causing mayhem.

A hacker may also be charged under state law. For example, in 2001, a company that set up a computerised sewerage system for Maroochy Shire Council, Queensland, was hacked by an ex-employee, who made one million litres of raw sewage run into public parks and creeks in the Sunshine Coast area.

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The hacker was convicted on various charges stemming from his breach of section 408D of the *Criminal Code 1899* (Qld), which prohibits unauthorised use of identification information for the purpose of committing an indictable offence. The legislation is not specifically about computer hacking. On appeal, convictions on two of the charges were set aside but the sentence of two years imprisonment remained (*R v Boden* [2002] QCA 164).

Malware

Malware (short for 'malicious software') is software that is designed to damage a computer or network. One of the earliest examples was the Morris worm of 1988, which rapidly replicated itself, slowing and causing computer systems to crash. The creator of the worm was the first person convicted under the United States' legislation, the *Computer Fraud and Abuse Act 1984* (US).

Another development has been the use of ransomware, in which access to data on the infected computer is blocked and a ransom payment is demanded for its release. There may also be a threat to publish the data if a payment is not made. Ransomware scams have been increasing since 2012, with some examples including:

- CryptoLocker ($US400 ransom) – 2013
- CryptoWall ($US500 random initially, increasing to $US1000 after seven days) – 2014
- WannaCry ($US300 ransom) – 2017.

In 2023, Australia was ranked in the top 10 countries affected by ransomware attacks.

Businesses also fall victim to ransomware. For example, at the end of January 2020, Maze ransomware group targeted Bouygues Construction, asking for a ransom equivalent to US$10 million. The COVID-19 pandemic also provided opportunities for criminals to use malware. One example was an Android COVID-19 tracking app that promised to track coronavirus cases near the user, but which infected the user's phone with ransomware that demanded large amounts of money.

Research 8.2

Research on the internet to complete the following tasks. A good starting point is the Australian Signals Directorate material on malware at the following link: http://cambridge.edu.au/redirect/10386.

1. Outline the reasons for using malware.
2. Describe how malware is distributed.
3. Describe the types of malware that exist currently.

Internet fraud

Fraud is intentionally misrepresenting or concealing information to deceive or mislead. On the internet, fraud can be carried out in a number of ways and can occur in conjunction with hacking.

A scam is an attempt to obtain money through deception. Many scams unique to the internet have developed in recent years. They can function through unsolicited emails, websites promoting pyramid selling (where people are offered the right to sell a product or service, as well as the right to sell the scheme itself in the same way) and unsolicited advertisements.

Perhaps the best-known email scams are the ones in which the email promises the recipient huge rewards for helping a government, a bank, an organisation or a family in a distant country out of some legal or financial difficulty. This assistance invariably involves transferring money electronically or supplying bank account details.

Another type of scam is 'phishing', where a person is sent an email apparently from a legitimate institution, such as a bank, asking the person for sensitive information, such as their account details. The information is then used to carry out fraudulent activities or to steal the person's money.

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Figure 8.6 In 2023, a screen displays phishing scam information at the Westpac Banking Corporation's Financial Crime Hub in Sydney. Westpac had recently opened the fraud prevention centre, adding 540 financial crime specialists. Westpac is one of 17 banks that was taking part in the Australian Financial Crimes Exchange program, which established a system that allows banks to report suspected scams and freeze funds more easily.

Figure 8.7 From 2023, the arrival of ChatGPT has made writing computer code and cheating on homework easier. Darktrace, a British cybersecurity firm, warned that this made email scams far more difficult for the ordinary person to detect.

Research 8.3

Go online to the Scamwatch website, to complete the following tasks.

1. Identify the definitions for the scams listed below:
   - **a** online auction and shopping scams
   - **b** domain name renewal scams
   - **c** spam (junk mail) offers
   - **d** free offers on the internet
   - **e** modem jacking
   - **f** spyware and key-loggers
   - **g** ringtone scams
   - **h** up-front payment scams.
2. Construct a list of other types of internet scams.

Spam

Spam is junk mail received electronically. Some spam is harmless, but much of it is malicious and potentially damaging to the recipient. Spam is also known as unsolicited bulk email; that is, email sent to large numbers of people who have not asked for it, nor granted permission to receive it. It does not matter what the content of the email is; if it is unsolicited, it is spam.

Under the *Spam Act 2003* (Cth), it is illegal to send, or cause to be sent, unsolicited commercial electronic messages through email, instant message services (IM), telephone text messages (Short Message Service or SMS) or multimedia message services (MMS). It does not cover faxes, voice telephone calls or messages, or unsolicited ads that pop up to be seen by an internet user.

The Spam Act was passed as a result of public concerns about spam. As discussed previously, email can be used for the purpose of fraud. The ways in which people's email addresses and personal information are collected and handled for the purpose of 'spamming' also raises privacy issues. Although the Spam Act applies to any spam regardless of content, a significant portion of the unwanted spam contains advertisements for pornography and other products related to sex, illegal gambling schemes, pyramid selling, and misleading or deceptive advertisements. Its method of distribution also means that inappropriate material can be sent to minors.

The Australian Communications and Media Authority, a Commonwealth statutory authority responsible for the regulation of radio and television broadcasting, telephone communications and the internet, enforce the Spam Act.

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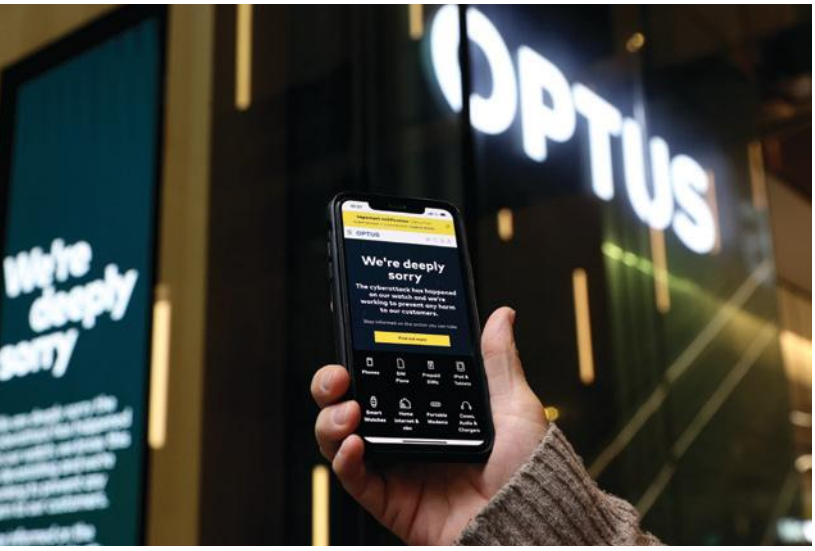

Figure 8.8 An Optus service message onscreen in 2022, when as a result of a data breach, 9.8 million Optus customers had their identification details stolen.

Analysis 8.1

Read 'This is the most detailed portrait yet of data breaches in Australia' by Julian Fell, Georgina Piper and Matt Liddy (*ABC News*, 28 March 2023) at the following link: http://cambridge.edu.au/redirect/10387.

1. State how many people in Australia have been affected by data breaches.
2. Explain why the statistics on data breaches might not reflect the full scope of the problem.
3. Identify the five largest data breaches since 2020. Which of these impacted Australia?
4. Outline the legislative changes that have been made to address this problem.
5. Search for more recent articles that give an updated picture of data breaches.
6. Assess the effectiveness of government measures to deal with this problem in the last few years.

Cyberterrorism

Cyberterrorism is the use of information to intimidate or coerce a government or its people to further a group's or person's political agenda. Attacks could lead to economic loss, collapse of critical infrastructure, bodily injury or death. Some military commentators describe this as the 'new terrorism' of our times. Instead of carrying a backpack filled with explosives, a terrorist can cause far greater damage by unleashing a carefully engineered packet of data onto the internet and directing it at systems that control essential infrastructure such as power stations, dams, airports, hospitals, electricity grids and financial systems.

Terrorist acts could include attacks against:

- internet nodes
- defence systems
- networks and computer systems
- telecommunications infrastructure
- stock market
- nuclear power plants
- critical infrastructure such as electricity grids
- water supply
- transportation systems
- health infrastructure.

Terrorists could also make use of:

- 'botnets' of thousands of computers to launch an attack
- electronic threats
- virtual blockades
- email attacks
- viruses and worms
- artificial intelligence.

The reality is that governments may never be fully prepared for serious cyberterrorist attacks. As Jonathan Zittrain (an American professor of internet law and the George Bemis Professor of International Law at Harvard Law School) said in his book *The Future of the Internet and How to Stop It*, we have not yet 'experienced a 9/11 on the internet' (that is, an event as catastrophic as the September 11 attacks in the United States in 2001). He argues that governments will only act decisively to improve security against cyberterrorism and other threats on the internet if they experience a massive catastrophe; in other words, a 9/11 in cyberspace.

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Figure 8.9 An image of a seized ransomware website displayed at a press conference in 2023 at which the US Justice Department announced that the FBI had seized the website of HIVE, a notorious ransomware gang that had extorted approximately US$100 million from its victims.

Cyberwarfare

Cyberwar is now an integral part of any war-fighting strategy. One of the problems of a cyberattack is that it is hard to notice when it starts. It may take days before realising an attack is under way.

There are several methods of attack in cyberwarfare:

- propaganda – using propaganda on the internet to wage a psychological war against an adversary
- cyberespionage – obtaining secrets from an adversary using the internet
- probing attacks – designed to find weaknesses in an adversary's defences in preparation for a much larger attack in the future
- distributed denial-of-service (DDoS) attacks – when a large number of computers in one country are used to launch a DDoS attack against systems in another country
- disruption of equipment essential for the defence services of an adversary country such as computer networks, satellites and communications
- attacking essential infrastructure such as water, power, fuel, communications and transportation systems.

In 2017, Wikileaks published a series of documents, known as Vault 7, which showed the capabilities of the CIA to engage in cyberwarfare, including by accessing computer operating systems, web browsers, smartphones and smart televisions. They also described CIA monitoring of the 2012 French presidential election.

In 2016, the Russian Government engaged in an 'influence campaign' over the United States presidential elections, with activities that included spreading fake news on social media and hacking the Democratic National Committee's computer network to publish (via Wikileaks) material damaging to the reputation of candidate Hilary Clinton.

Figure 8.10 On 12 December 2023, Kyivstar, Ukraine's largest mobile network, was hit by a 48-hour Russian cyberattack impacting mobile phones and data, as well as disrupting air raid sirens, hitting the Ukrainian Monobank, and shutting down ATMs and point-of-sale terminals. This was the biggest and most destructive cyberattack on Ukraine since the beginning of the Russian invasion on 24 February 2022. In response, Ukraine's Defense Intelligence Directorate attacked Russia's federal tax service using malware and infected thousands of servers, destroying databases and backups.

The lines are blurred between cybercrime, cyberterrorism, hybrid war and cyberwarfare. The reality is that criminals, terrorists and state-backed actors use similar methods in launching cyberattacks to extract money, exert influence or to wreak havoc. Though they differ in their motivation, cybercriminals and cyberterrorists often cooperate.

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hybrid war
a type of war that involves launching simultaneous attacks using multiple methods to disrupt an opponent, but without launching all-out war; this usually includes a cyberspace dimension such as disinformation campaigns or hacking into critical infrastructure or business systems

grey zone operations
operations that are meant to cause significant harm to an opponent without crossing the threshold for all-out war

Nations also engage in cyberattacks as part of **hybrid war** or **grey zone operations**. These tactics are used to disrupt an opposing nation state without escalating to all-out war. These sorts of cyberattacks are now a daily feature between powerful countries such as the United States, China, Russia and the United Kingdom. Cyberattacks can also be used by larger or more powerful nations against weaker or smaller nations. In recent years, cyberattacks on Australia by China and Russia have occurred frequently.

Intellectual property in cyberspace

The term 'intellectual property' refers to creations of the mind that have commercial value. These include inventions, literary works, artistic works, music, software programs, databases, plant varieties, trademarks and designs. Most of these things can be created or published on the internet.

Intellectual property law protects the legal rights arising from a person's intellectual creations. It applies not to the ideas themselves but to the expression of those ideas. To qualify for protection, the idea must have developed into something tangible; for example, a software program or an essay.

Analysis 8.2

Read 'China blamed as major backer behind hacking of Australian companies and infrastructure' by Matthew Doran (*The Guardian*, 15 November 2023) at http://cambridge.edu.au/redirect/10388.

1. Describe the scale of the cyberattacks in these years.
2. Describe some examples of significant damage from cyberattacks.
3. Identify the culprits in this hacking.
4. Explain why Australia is an attractive target.
5. Describe what the Australian Government is doing about this threat.

Review 8.2

1. Identify three types of crime committed via the internet. Explain how each crime can harm people.
2. Define 'fraud'. Describe how fraud can be committed via the internet. Discuss other ways that fraud can be committed.
3. Define 'spam'. Using examples, discuss whether spam is merely an annoyance or if it raises serious legal issues.
4. Construct a list of legislation that specifically deals with cybercrime. Identify other legislation that has been used to prosecute crimes committed in cyberspace.
5. Identify the factors that make it difficult to deal with the increasing number of cyberattacks in Australia.
6. Identify the types of cyberattacks that can be launched by a nation state.

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Three types of intellectual property rights are **copyright**, **trademarks** and **patents**.

Intellectual property is the exception when it comes to international law and cyberspace. In many areas of law, international treaties do not distinguish between offences committed in cyberspace and otherwise; however, there are a number of treaties and international organisations that deal specifically with intellectual property issues on the internet.

copyright
an exclusive right to publish, copy, publicly perform, broadcast or make an adaptation of certain forms of expression; namely, sounds, words or visual images

trademarks
words, names, symbols or devices, used individually or in combination, to identify and distinguish the goods or services of one company from those of another

patents
rights granted for a device, method, substance or process that is new, inventive or useful

Research 8.4

View the website of the World Intellectual Property Organization (WIPO) at http://cambridge.edu.au/redirect/10390.

1. Identify WIPO's definition of 'intellectual property'. What services does this international organisation offer?
2. View the WIPO Administered Treaties webpage at the following link: http://cambridge.edu.au/redirect/10389. Investigate several of the treaties from the list on the website. Describe what each of these treaties aims to do.

Copyright

Copyright is the type of protection given to works intended to convey information or enjoyment in literary form such as books, software, broadcasts, films and music. The *Copyright Act 1968* (Cth) protects material that has been produced in Australia. The laws of other countries that have signed the international treaties to which Australia is a signatory also protect this material. The international conventions that ensure that any protection given to Australian creative works also applies globally are:

- *Berne Convention for the Protection of Literary and Artistic Works* (1886)
- *Universal Copyright Convention* (1952)
- *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (1961)
- *World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994)
- *WIPO Copyright Treaty* (1996)
- *WIPO Performances and Phonograms Treaty* (1996)
- *Copyright Amendment (Online Infringement) Act 2015* (Cth).

Another major area of copyright violation involves computer software that is copied and sold without authorisation, causing losses of billions of dollars to the companies that originally created the programs. Such unauthorised production is in breach of the World Trade Organization (WTO) agreements on intellectual property and information technology, negotiated and signed by most of the world's trading nations. If countries refuse to act against intellectual property violations within their borders, other countries whose companies are suffering loss as a result can ask the WTO to take action.

Figure 8.11 In 2020, the European Union unveiled new laws that oblige online companies to protect users from illegal content, increase accountability and limit the market power of tech giants.

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Trademarks

Trademarks are signs or symbols that give a person or corporation the legal right to use, license or sell the product or service for which it is registered.

A trademark distinguishes a person's or company's product from all others' products. Some registered trademarks have become famous images that will forever be associated with certain brands of goods.

Patents

Patents are for the protection of intellectual property in inventions. The aim of patent laws is to encourage people continued research or development of new products and technology. A patent gives its owner the exclusive right to derive commercial benefit from the invention within Australia and its territories for the term of the patent. International agreements regarding patents, such as the Patent Cooperation Treaty (1970), give Australia's trading partners similar rights and ensure that the patent rights of our inventors are upheld overseas.

Of these three types of rights – copyright, trademarks and patent – copyright has the most relevance to cyberspace. Information technology has greatly reduced the cost of reproducing text, images and multimedia products, and the internet has similarly reduced the cost of transportation and distribution. Consider the difference between a truckload of books and the same content published electronically.

The 'culture' of the internet has been a further issue for intellectual property law; many resources are freely shared in cyberspace, with no or minimal commercial profit expected. While the ease of obtaining material without paying for it clearly causes disadvantage to the people who produce that material, some have argued that with the rapid development of cyberspace, we need to rethink the concept of property and the laws that govern property of all types.

Legal Links

For more information about trademarks and patents, view IP Australia's website at: http://cambridge.edu.au/redirect/10391.

Review 8.3

1. Define 'property rights'. Explain the specific nature of intellectual property rights, in contrast to other kinds of property rights.
2. Recall what can be protected by each of the following and explain how each of these works:
   - **a** copyright
   - **b** trademark
   - **c** patent.
3. Discuss, with examples, how intellectual property rights are affected by the increasing use of the internet.
4. Outline some of the legal means of protecting intellectual property in Australia and internationally.

Who rules in cyberspace?

Obviously, in this most important area of human civilisation, there is need for government regulation. However, there are 194 governments across the world, and the world's biggest tech companies are now more wealthy and more powerful than many nation states. Only a few of the most powerful nations, such as the United States and China, have the means to regulate the tech companies. In addition, we are increasingly looking at a splintering of the internet between rival geopolitical blocs, with the West and its allies on one side and China leading the other side, which includes Russia and other countries with strong economic ties to China. The United Nations has treaties that govern aspects of cyberspace but enforceability is not guaranteed.

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Figure 8.12 On 19 May 2023, Yanis Varoufakis, a controversial Greek politician, delivered a speech during his party's main election campaign rally in Athens. Until May 2023, he was a politician and briefly served as minister of finance during the Greek government's debt crisis negotiations with the European Union. Later in 2023, Varoufakis released a book called *Technofeudalism: What Killed Capitalism*, which presented a warning about the direction in which 'big tech' is taking the world.

Yanis Varoufakis, in his 2023 book *Technofeudalism: What Killed Capitalism*, argued that capitalism was being replaced by a privatised digital landscape in which a small number of very powerful companies (which he calls 'big tech') monopolise 'the cloud' and charge everyone else rent to use it. In his view, big tech is a 'totalising power' that is creating a 'wholly new form of governance by the few over the many' and transforming the nature of capitalism. Varoufakis calls this new system of governance 'technofeudalism', a term that expands upon the traditional concept of **feudalism**. In this new system, which substitutes rents for profits and monopoly power for market competition, he argues we are all 'cloud **serfs**'.

Jonathan Taplin, in his 2023 book *The End Reality: How Four Billionaires are Selling Out Our Future*, argued that our future is being sold out by four billionaires (Peter Thiel, Mark Zuckerberg, Marc Andreesen and Elon Musk), who he calls 'the Technocrats'. These four technocrats are using their immense power and wealth to promote their schemes for a metaverse, cryptocurrency and space travel. In doing this, they divert our attention away from issues that really matter, such as the crises of income inequality, climate, extremism, violence and the erosion of democracy. Each of their schemes involve further transformation of some aspect of the digital world.

feudalism
a western European social system from the Middle Ages, in which the ruler owned all the land and allowed others to occupy and use it in return for money, goods or services

serf
a person who worked the land in feudal times and had to obey the landowner

Platforms such as Facebook, X and YouTube provide benefits in the way they enable people across the world to connect and share. However, they can also be divisive. Taplan points out that since 2009, when Facebook's feed became more algorithm-based, the major online platforms have created an online 'outrage machine' that has polarised society and poisoned politics.

Figure 8.13 Jonathan Taplin speaking at a conference on 'big tech'. In Taplin's 2023 book *The End Reality: How Four Billionaires are Selling Out Our Future*, he argued that our future is being sold out by four billionaires (Peter Thiel, Mark Zuckerberg, Marc Andreesen and Elon Musk), who he calls 'the technocrats'.

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8.3 Difficulties with enforcing rights

cyberbullying harassment using digital media, such as websites, email, chat rooms, social networking platforms or instant messaging

cyberstalking repeated harassment using email, text messaging or other digital media with the intention of causing fear or intimidation

disinhibition effect the tendency to say and do things in cyberspace that the person would not ordinarily say or do in the face-to-face world

There are many ways in which individuals are vulnerable in cyberspace. These include:

- **cyberbullying**
- **cyberstalking**
- racial hatred
- exposure to violent, disturbing and/or illegal material, including child pornography
- exposure to adult material inappropriate for children
- intrusions into privacy.

In cyberspace, there are few barriers between individuals, and there is potentially harmful content. In addition, people who have grown up with the internet and are comfortable using it and other forms of digital technology may be less cautious than those who have adapted to it and adopted it at a later point in their lives. Online, people tend to loosen up and reveal things that they would be less likely to divulge in their offline world. Psychologists call this feeling of invincibility the **disinhibition effect**.

Approaches to rights in cyberspace

The original *laissez-faire* approach to rights

The people who originally created the internet advocated a ***laissez-faire*** approach to it, which means they did not think it should be regulated in any way. They argued that individuals are capable of determining the quality of internet content and that governments should not intervene in the 'marketplace of ideas'. One of the organisations promoting this view was the Electronic Frontier Foundation, which was founded in 1990 with the primary goal of defending free speech, privacy and consumer rights.

laissez-faire (French) 'allow to do'; may be used in a broad sense of minimal government intervention in most aspects of society

Analysis 8.3

Read John Barlow's article 'A declaration of the independence of cyberspace' (8 February 1996) at the following link: http://cambridge.edu.au/redirect/10392.

1. Outline the key points of Barlow's article.
2. Discuss Barlow's assertion that governments should keep out of cyberspace.
3. Discuss why this has not been possible.

The internet cannot be a law-free zone

As the internet evolved and became a powerful global reality, the need for laws was unavoidable. The utopian vision espoused by its founders was unsustainable. There is no area of human activity that can be free of any rules. Though law in cyberspace is viewed as inevitable, there are ongoing debates about how far the law should go to minimise harm and ensure justice, and what is actually possible in this new borderless jurisdiction.

Some commentators have argued that it is appropriate for governments to ensure that the law deals with online phenomena, such as race hatred and revenge pornography, and to ensure reasonable quality overall. This view represents a distrust in the marketplace of ideas. They advocate a more active role for governments in regulating quality on the internet, involving:

- enacting legislation and/or international treaties
- imposing obligations on ISPs to block certain content
- strengthening enforcement agencies.

Other possible methods of improving the quality of information rely on the active involvement of online communities and of key actors and stakeholders, including governments, parents, teachers, software companies and other businesses. To achieve this, governments would need to take a leadership role, but would also need to give the

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other agents considerable freedom and scope. Some of the ideas include:

- the establishment of national or international bodies for the accreditation of websites
- greater use of reputation and industry ratings systems, as used by YouTube, eBay and iTunes
- greater use of brands and labels ('trust marks')
- government funding of internet awareness and digital media literacy skills classes in schools
- search engine filtering
- encouragement of social norms; for example, as Wikipedia has done with respect to the requirement of a 'neutral point of view' in all of its content.

In most cases, the law can only set minimum standards. Making laws in relation to cyberspace is very difficult, and there are few effective international agreements. Most of the laws regarding cyberspace are national and are based on local values. The enforcement of law in cyberspace is limited by its global nature.

Figure 8.14 On 3 March 2022, Frances Haugen spoke to students at Stanford University in Stanford. Haugen was a data scientist who came forward as a whistleblower in 2021 against her employer, Facebook. She disclosed tens of thousands of the company's documents that showed that Facebook executives knew that their company's algorithms were dangerous, harmed children and weakened democracy.

Privacy

Social networking sites such as X and Facebook and online communication media such as chat rooms require varying degrees of public personal disclosure; that is, information of a personal nature shared in what is essentially a public forum. The impression that friends are 'chatting' in a controlled, private space is an illusion. Other people can access this information, either immediately or at some later stage, as online information remains indefinitely in cyberspace.

The information that we present about ourselves online, including photographs, forms our **digital dossier**. This digital dossier comprises all the information about a person held in multiple locations.

Governments and businesses have always collected information about individuals, but now the speed of data collection practices has outpaced methods of protecting that data. In early 2018, it was revealed that a political consulting firm called Cambridge Analytica had mined the personal data of over 80 million Facebook users without their consent. This was done by way of a personality quiz app, which retrieved personal information not only of the 300 000 people who installed the app (arguably consenting to the information gathering), but also that of all their Facebook friends. The app developer shared this data with Cambridge Analytica, who in turn made it available to a number of political organisations who wanted to target messaging and influence people in matters such as the 2016 US presidential election, the 2016 Brexit vote and the 2018 Mexican general election. Facebook CEO, Mark Zuckerberg, issued a personal apology and promised to change Facebook's processes.

digital dossier all the types of information about a person that they have deliberately or unintentionally put onto the internet, held in multiple locations

There has been a trend towards the use of services and storage of personal and other data on 'the cloud', on sites that the user does not own or control; also, the user need not have knowledge of or expertise in their creation or maintenance.

Video 8.1 Cambridge Analytica (05:21)

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Individuals have little control over how the most powerful search engines use their information. Information, stories, photos and anything else you may post on a website may be removed later, but they have already been recorded in an internet archive, as well as in a search engine 'cache' – a 'snapshot' that is taken of the page as it originally appeared. Other people may also copy your words or photos and post them on their own websites or webpages. In this way, your information acts like a 'digital tattoo': even when it's no longer wanted for display, it is not easily removed.

Privacy laws

The *Privacy Act 1988* (Cth) contains 'privacy principles' covering federal government agencies and relating to the handling of citizens' personal information such as their social security, health insurance and taxation details.

surveillance capitalism the name given to the new reality of the online world in online internet platforms that have created a mass surveillance system to capture and use our personal data for commercial purposes

Amendments to the Privacy Act in 2000 extended the privacy regime to parts of the private sector, impacting how businesses collect, store, use and disclose personal information. Some states and territories, including New South Wales, have also enacted privacy legislation, while others have privacy schemes for government agencies based on the privacy principles contained in the federal Privacy Act.

There is currently no statutory tort for breach of privacy. However, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, the High Court held that there was nothing standing in the way of developing one. Since then, there have been several cases heard in state courts that point towards the recognition of such a tort.

In May 2016, the European Union passed a law for data protection and privacy for all citizens of the European Union. The General Data Protection Regulation (GDPR) came into force in April 2018. The GDPR also has an impact outside Europe because it lays down the requirements for transfer of information outside Europe. It requires all controllers of personal data to have processes that safeguard personal data and to use the highest privacy settings as default.

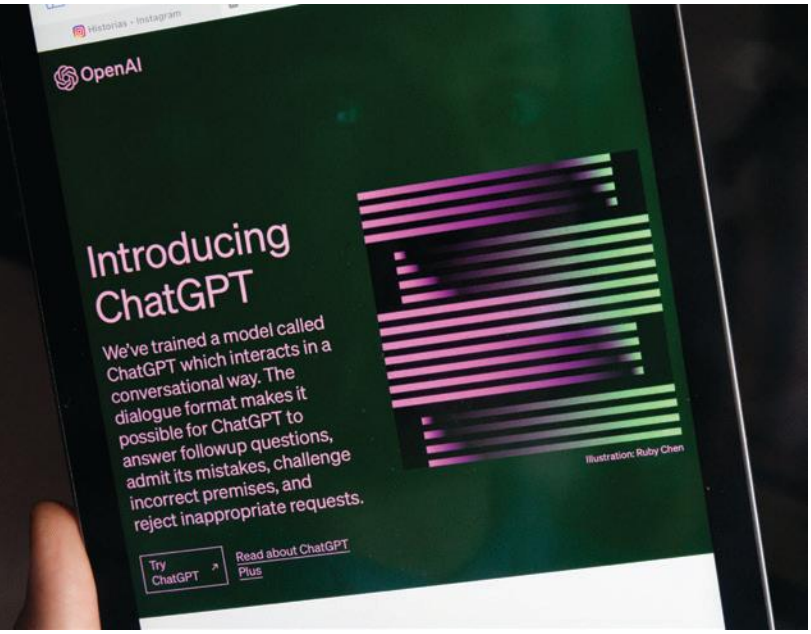

Figure 8.15 On 14 April 2023, the Spanish Data Protection Agency initiated proceedings against the US company Open AI, owner of the ChatGPT service, for a possible breach of regulations. The Agency believes that the global processing operations may have a significant impact on the rights of individuals.

Surveillance capitalism: The economics of control

The problem with enforcing privacy rights in the online world today is that a powerful new economic model has emerged, controlled by a small number of online companies, including Google, Meta and Amazon. Along with governments, these online companies use our data on an industrial scale. In the recent book *Data and Goliath* by Bruce Schneier, the author claims that we are living in the 'golden age of surveillance' and that the technology of today gives 'governments and corporations robust capabilities for mass surveillance' and that our response to this 'creeping surveillance has largely been passive'.

'Data is the new oil' is a phrase that is often quoted to draw the comparison between the role that data plays in fuelling online business in the digital age and the role oil played in powering industrial transformations in the past. There is now an unprecedented amount of personal data in cyberspace and this has led to the evolution of a new type of capitalism: **surveillance capitalism**.

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Our data is collected by just about every company and organisation that we interact with online, particularly by those that offer free online services, such as Google, Meta, Instagram, TikTok and Amazon. The data is often collected from the same people who will ultimately be targeted by it, but there are also third-party data-brokers who resell our data. The big tech platforms rely on this data to make money.

In her landmark 2019 book *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Shoshana Zuboff describes how the big tech companies have persuaded us to give up our privacy, and how they use our 'data' (personal information) to predict our behaviour. They do this by using predictive algorithms (that is, mathematical calculations of human behaviour). However, Zuboff argues that they go even further. The big tech companies aim to influence and modify our behaviour. This has serious long-term consequences for both our personal freedom and for society as a whole. In this new economic order, Zuboff asserts, democracy and human rights are under threat.

Figure 8.16 On 7 November 2019, American author Shoshana Zuboff received the Axel Springer Award in Berlin.

The problem, Zuboff argues, is that online tech platforms operate at a hyperscale. They are bigger than anything in history. They have an approach known as 'radical indifference', in which growth of their businesses wins out over morality. In this new economic order, the people who use online services are merely 'users' with no rights. The customers are the businesses that pay for advertising on the platform; however, they too are at the mercy of these online companies, which monopolise information services. Furthermore, surveillance capitalism has no boundaries and threatens to destroy our greatest moral and political achievements. What these tech companies are doing, according to Zuboff, is a market-driven coup from above. Surveillance capitalism, she explains, is anti-democratic and anti-egalitarian and threatens to deliver a 'sanitised tyranny'.

Research 8.5

Some governments, particularly in authoritarian nations such as China, block access to certain online platforms. Other governments make little or no attempt to address potential issues of concern.

Conduct internet research to find out how the Australian Government is responding to the concerns of surveillance capitalism.

Artificial intelligence

The biggest issue currently is the impact of artificial intelligence (AI) on just about everything connected with cyberspace. Many governments are concerned about the impact of AI, but the European Union has moved the fastest on this issue, drafting a set of rules in 2021 that deal with AI. In December 2023, this culminated in an agreement among the 27 member states for a European Union AI Act. The motivation for this new legislation was to ensure that AI systems that operate in the European Union are 'safe, transparent, traceable, non-discriminatory and environmentally friendly'.

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Furthermore, AI systems should not be automated but should be run by people. Generative models like ChatGPT will have to disclose when content is generated by AI, and these models will have to ensure that they cannot be used to generate illegal content.

However, there has been some commentary that the European Union approach is too risk-averse and may hinder people who could genuinely benefit from AI, such as those with disabilities. There are also concerns that the European Union may have problems with enforcement. AI models are categorised into one of four risk levels – unacceptable, high, limited and minimal – and while it may be straightforward to ban those classed as 'unacceptable', it will be extremely challenging to regulate high-risk algorithms.

Analysis 8.4

Read the article 'European Union reaches deal on world's first rules for artificial intelligence' (*ABC News*, 9 December 2023) at http://cambridge.edu.au/redirect/10393.

1. Discuss why the European Union legislation on AI was significant.
2. State what foundation models are. Explain why the European Union legislators pushed to include them.
3. Explain what large language models are. Outline why they are important to AI.
4. Identify the fears researchers and rights groups have about these foundation models built by the big tech companies.
5. Find recent media articles about legislative responses to AI.
   - **a** Assess the effectiveness of the European Union AI Act up to the present.
   - **b** Compare the responses of other jurisdictions to AI with that of the European Union.

Case Study

Wikipedia – The factual netting for the internet

Figure 8.17 Wikipedia was created in 2001 as a free-content online encyclopaedia. It has 700 full-time employees, millions of voluntary contributors, with about 120 000 of those being regular writers and editors. In 2024, its website claimed it was 'the largest and most-read reference work in history and that it was the fifth most-viewed website'.

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In a July 2023 *New York Times* article titled 'Wikipedia's moment of truth', Jon Gerter wrote about the pivotal role that Wikipedia played on the internet and flagged concerns about the impact of AI. Wikipedia was no longer just an encyclopaedia but had evolved into a universally accepted knowledge base for the entire online world. All of the knowledge, text and data on Wikipedia compiled over the last few decades was due to the diligent work of its volunteer army of over 46 million human contributors motivated by a commitment to truth and accuracy, something that machine intelligence does not possess.

By 2024, it was evident that Wikipedia was extremely important to the training of the various AI models. For some time now, Wikipedia has been a source of information for Google and Bing searches, for Siri and Alexa, and YouTube uses it to counter misinformation. Now, Wikipedia's data is also used to train chatbots and AI systems. The problem that Jon Gerter identified was that eventually Wikipedia itself may be taken over by AI and that facts will be generated by machines with limited human input or oversight. Humanity already has a monumental problem on the internet with misinformation. If human editors are taken out of the equation, this could have dire consequences for humanity.

Legislating across national boundaries

National

At a national level, both statutes and court decisions are used to govern the use of the internet within nation states. Many laws relating to cyberspace are contained within more general statutes, as outlined previously in this chapter. Examples include sections 308–308I of the *Crimes Act 1900* (NSW), which set out computer offences including hacking, and the *Spam Act 2003* (Cth). Superior courts can also create precedents in relation to the legalities of activities in cyberspace. However, the reality for law-makers in Australia is that the global big tech companies are based overseas, with many of them in Silicon Valley. This means that the Australian Government is always operating from a weak position when crafting laws to regulate cyberspace.

Analysis 8.5

Read 'The Australian government wants to fight online misinformation. Here's why it's so difficult' by Andrew Thorpe (*ABC News*, 27 June 2023) at http://cambridge.edu.au/redirect/10394.

1. State the aim of the new legislation being proposed.
2. Outline the new powers that were planned for the eSafety Commissioner.
3. Identify the new powers that the Australian Communications and Media Authority has been given.
4. Discuss why it is not possible to just ban misinformation.
5. Explain the factors that determine a country's ability to hold big tech accountable. Search for more recent media reports on the Australian Government's attempts to make big tech companies accountable.
6. Assess the effectiveness of the Australian Government's attempts to use laws to ensure that Australian's best interests are promoted.

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International

Unlike other areas of law where issues cross national boundaries, there are few international treaties that deal specifically with cyberspace. Given the exponential rise in internet use since the 1990s, one would expect that there would be many international treaties to deal with the common issues related to the internet faced by all states. However, this is yet to occur.

Figure 8.18 World Intellectual Property Organization, Geneva, Switzerland

Some international organisations and their current roles with respect to governance in cyberspace are:

- **United Nations:** The United Nations has little control over the internet or what happens in cyberspace, except in the area of intellectual property. There are no United Nations sponsored treaties or conventions that are specifically designed to govern cyberspace.
- **World Intellectual Property Organization (WIPO):** WIPO is a specialised agency of the United Nations concerned with intellectual property.
- **European Union:** The European Union is an economic and political partnership of European nations that has regulatory powers in various areas of social and economic life. In 2003, the European Union reformulated its regulatory framework covering communications to cover 'all electronic communication networks and services' and since then has ensured that it stays current. In 2018, the EU Electronic Communications Code was implemented with the aim to drive competition and innovation and ensure access to a fast and reliable internet service. It was envisaged that this would lead to a digital transformation across Europe by the 2030s.
- **World Trade Organization (WTO):** The WTO looks after trade matters between nations. This includes trade aspects of intellectual property, which are dealt with via the TRIPS agreement. The WTO also deals with ecommerce matters.
- **Internet Corporation for Assigned Names and Numbers (ICANN):** This non-profit corporation was established in 1998 to coordinate the naming system on the internet, which is used to identify all websites. It has international representation but is very much under US government control. ICANN's role is strictly limited to the management of the domain naming system. However, it has the potential to become the most powerful organisation overseeing the internet if in the future there is a wider representation of the international community.
- **Internet Assigned Numbers Authority (IANA):** IANA is one of the oldest internationally organised institutions, having been established by the US Defence Information Agency in 1972 for the purpose of assigning unique addresses to all computers connected in networks at that time. Today it manages over 20 million domain names, with around 40 000 registered every day.

All of these organisations have websites that you can view for further information.

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8.4 Future directions

As John Naughton pointed out in his 2012 book, *What You Really Need to Know about the Internet From Gutenberg to Zuckerberg*, the internet is disruptive by its very nature and is effectively 'a global machine for springing surprises'. Back in 2012, Naughton believed that this would be even more the case with cloud computing, which was then in its infancy. Ever since the modern internet was born in 1983 and went mainstream with the World Wide Web in 1993, large cultural, social and economic changes have been occurring that are only now becoming clearly visible. Naughton said that one thing that we learn from the history of technology is that we tend to overestimate the short-term impact and underestimate the long-term impact. As Naughton argued in 2012, we are yet to fully grasp the implications of the changes since 1993, let alone the changes that will be wrought by new disruptive technologies such as AI.

Figure 8.19 Big tech refers to the biggest information technology companies. These are the logos of four of the biggest: Google (owned by Alphabet), Amazon, Apple and Facebook (part of Meta). Microsoft is also in this category. In China, the big tech companies that dominate the market are Alibaba, Tencent, Xiaomi and Baidu.

2025 and beyond

Three decades on from the creation of the World Wide Web, there are few areas of society or our personal lives that are not touched by cyberspace in some way. One quarter of the way into the twenty-first century, the digital revolution has fundamentally transformed the way business is done, the way the economy works, how we get our news and information, how politics is conducted and how we go about our daily lives. However, the accelerating pace of change continues to blur the boundaries of the online and offline worlds. It is now clear that the trajectories of some of these major developments in cyberspace represent an increasing threat to privacy and freedom.

Some of the major developments that need to be addressed as we move towards the mid-twenty-first century are the following:

- The ongoing issues of dealing with various types of cybercrime and the increasing challenge as cybercriminals make use of new technology.
- The integration of cyberwar into general war strategy and the increasing use of grey zone tactics to wreak havoc on adversaries in cyberspace.
- The geopolitical fault lines of the internet between democracies and autocracies creating what will eventually lead to a 'splinternet'.
- The ethics of the business models of the big online tech platforms, which prioritise engagement and profit above privacy, safety and human wellbeing.
- The transformation of the global economy through the rise of surveillance capitalism and technofeudalism, and the implications of these for democracy and human rights.
- The unprecedented wealth and power of the technocrats and their global internet platforms, together with their lack of accountability.
- The harvesting of vast amounts of personal data by surveillance capitalists, and their use of this to predict and modify human behaviour.
- The impact of 'stolen focus' on human wellbeing caused by the algorithms used by online tech platforms to keep people's attention on their screens.
- The proliferation of misinformation, conspiracy theories and hate speech that has real-world adverse impacts for individuals, communities and whole countries.
- The impact of all of the above on civic life, community, human rights and democracy.

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In dealing with these issues, serious decisions need to be made at a personal level, in our families and communities, at the national level and globally. Many of the big decisions that will be made in the coming decade will involve the law, and urgent action is required. The trajectories of several of the issues mentioned in this chapter, if left unchecked, will lead to a world in which democracy ceases to exist and human rights vanish. Only through many people becoming informed and active citizens can government be pressured to take effective action in ensuring that cyberspace serves humanity, and not the other way around.

Figure 8.20 On 13 September 2023, Tristan Harris, Executive Director of the Center for Humane Technology, arrives for the first 'AI Insight Forum' in Washington DC. Nine forums were held, resulting in an AI policy roadmap to guide Congress in harnessing the opportunities and addressing the risks of this transformational technology.

The most desirable future path is to have the rights of all digital citizens on the planet factored into internet governance. People need to be treated with dignity on the internet as digital citizens, not as users to have their data exploited by surveillance capitalists. The guiding light for the creation of a digital citizenship could be *The Universal Declaration of Human Rights* (1948). This would be more in line with the vision of the internet promoted by those first internet pioneers. As with all other areas of law, the most desirable framework for governance in cyberspace is one based on human rights.

Several of the thinkers mentioned in this chapter have highlighted the big issues that we now face with cyberspace. There are many individuals, groups and organisations working towards a more humane internet. One of these is the *Center for Humane Technology*. This organisation has the experience, has done the research and has a plan for working towards making digital technology subservient to the rights of humanity.

Research 8.6

Visit the website for the Center for Humane Technology at the following link: http://cambridge.edu.au/redirect/10395. Study the website and consider its analysis of the problems in cyberspace and the solutions offered.

Use this website, or other internet research, to complete the following tasks.

1. Describe the dark side of social media. Outline the solutions that are offered.
2. Outline how democracies worldwide have been adversely affected by the online media landscape. Propose what can be done about this.
3. Pick one of the issues raised by the Center for Humane Technology and search for recent media reports about it. Assess the effectiveness of legal systems in dealing with this issue.

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Chapter summary

- Cyberspace is an area in which the law is playing an increasing but controversial role. The characteristics of cyberspace include global coverage, easy anonymity for users and the facilitation of creative activity.
- The original idea that the internet could be a government-free zone eventually gave way to the necessity for government intervention and law in cyberspace.
- Crimes specific to cyberspace include hacking and spam. Other crimes, such as fraud, violations of intellectual property rights and racial vilification, though not specific to cyberspace, take on a distinctive character in that context.
- Cyberattacks could lead to economic loss, collapse of critical infrastructure, bodily injury or death. Criminals and even state actors often use the same methods as cyberterrorists.
- The three types of intellectual property rights are copyright, trademarks and patents. Unlike other areas of cyberspace, there are a number of treaties that govern intellectual property and that can be enforced in cyberspace.
- There are a number of international organisations that make laws and regulations about the internet. The European Union has been the leader in creating privacy laws for the internet.
- Technofeudalism and surveillance capitalism are new terms that describe the economic forces that have evolved with cyberspace in the twenty-first century.
- Our data is collected by nearly every company and organisation that we interact with online, particularly those that offer free online services, such as Google, Meta, Instagram, TikTok and Amazon. We all have a 'digital dossier' that includes all the data, held in multiple locations, about all of our interactions in cyberspace.
- Surveillance capitalism (the name given to the new reality of the online world) has created a mass surveillance system that captures and uses our personal data for commercial purposes.
- Combating serious criminal activity in cyberspace is difficult due to the lack of laws and enforcement mechanisms that cross international boundaries.
- While greater government control of cyberspace has clear benefits with respect to fighting crime, democratic governments must ensure that the individual's civil rights are not violated.
- International regulation of cyberspace is in its infancy.

Multiple-choice questions

1 Two distinct features of cyberspace that will influence laws relating to it are its:
- **a** security and predictability.
- **b** anonymity and global character.
- **c** political progressivism and educational value.
- **d** democracy and the connection between individual and community.

2 Critics argue that the big tech companies use of algorithms in their business models has:
- **a** negatively impacted the wellbeing of many people.
- **b** weakened democracy.
- **c** taken away society's ability to deal with the really important issues of our time.
- **d** included all of the above.

3 The international organisation concerned with copyright law is the:
- **a** Internet Corporation for Assigned Names and Numbers.
- **b** Internet Assigned Numbers Authority.
- **c** United Nations.
- **d** World Intellectual Property Organization.

4 Spam is:
- **a** the unauthorised duplication of goods protected by intellectual property law.
- **b** an unsolicited commercial electronic message.
- **c** an attempt to gain money through some sort of deception.
- **d** the intentional misrepresentation or concealment of information in order to deceive or mislead.

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5 A digital tattoo is:
   - **a** a unique type of computer identifier used by some European countries.
   - **b** a software program unique to the individual, which is stored online somewhere in cyberspace.
   - **c** a type of internet scam.
   - **d** information placed on the internet that is no longer wanted but that cannot be easily removed.

Short-answer questions

1 List the different types of intellectual property and explain how cyberspace may pose unique problems for intellectual property law.
2 Describe the various ways in which privacy can be violated in cyberspace.
3 Explain how privacy is protected in Australia.
4 List some of the problems arising from the free and unrestricted transmission of information in cyberspace.
5 Explain why government control of cyberspace is constantly challenged.
6 List the international organisations that have some authority for the regulation of cyberspace. Describe the function and jurisdiction of each organisation.
7 Outline the reasons why the law is not always effective in cyberspace.
8 Outline the major challenges that have emerged in cyberspace in the last decade.

Extended-response question

Using examples from this chapter, assess the effectiveness of the law in addressing technological issues and enforcing rights.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Themes and challenges for Part II – The individual and the law

Relationship between justice, law and society

- The internet and all the new technology that has come with it have transformed domestic and global society. Just about every new development and innovation has implications for society. Society's attitudes are also changing. Therefore, seeking justice is difficult because the law is always playing catch-up. Legal responses also differ in each jurisdiction, and at the international level the law is weak.
- The global technology companies that dominate the internet now hold an enormous amount of power. These companies generate more revenue than the gross domestic product of many countries. Furthermore, these companies are owned by billionaires who are often unresponsive to the rights of individuals and the rule of law.

Relationship between rights and responsibilities

- The human rights of all Australians are protected under statute, common, constitutional and international law. However, it is important to remember that rights are always balanced by responsibilities. For example, individuals have a legal right to establish a business in Australia, but they also have a legal responsibility to ensure that the products/services they provide do not harm their customers. In recent times, the regulation of communications technology has proven to be a huge challenge for our legal system. For example, the social media companies X and Meta claim to be guardians of free and democratic speech, yet they have been accused by some governments of being socially divisive because of their reluctance to remove material from their platforms that is socially harmful, violent and/or incorrect.
- Unlike the United States, Australia does not have a formal Charter or Bill of Rights enshrined in the *Constitution*. The *Australian Constitution* expressly states that we have a right to trial by jury, freedom to follow our own religion and the right not to be discriminated against on the basis of the state/territory in which we live. The remainder of our rights emanate from statute, common and international law. Some would like to see the *Constitution* changed with the incorporation of a Charter of Rights. However, this will be a challenge given that constitutional change has been notoriously difficult to achieve in Australia, with only eight amendments made since 1901.

Balancing the rights of individuals with the needs of the state

- Law enforcement agencies seek to balance the rights of individuals with the needs of the state when resolving disputes. The principal enforcement agencies are the police (state and federal), courts, government departments, community justice centres and tribunals.
- A recent controversial issue with regard to policing has been the use of sniffer dogs for drug detection at music festivals. While the state is keen to eliminate drug use in our society, there has been concern about the police's use of sniffer dogs and strip searches of minors as young as 12 at such festivals.

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Role of the law in regulating technology

- The regulation of technology is quite challenging for the legal system. The Australian High Tech Crime Centre, which is hosted by the Australian Federal Police (AFP), attempts to provide a national approach to technology crime, such as online fraud, mule recruitment, and offensive and prohibited internet content (such as child pornography and racially based 'hate' sites). The difficulty for the AFP and the Australian legal system is that much of this activity originates from outside Australia. Thus, the unknown perpetrators are difficult to arrest and charge.
- As communities have become aware of the adverse effects of various aspects of cyberspace, there have been moves for reform. Jurisdictions have implemented laws relating to privacy, domestic violence and children, but they are limited by the global nature of the internet and the lack of responsiveness of the big tech companies to calls for reform.

Effectiveness of legal mechanisms for achieving justice for individuals and society

- Democratic governments and legal systems have been attempting to bring about the rule of law in cyberspace, but success has been patchy. There are limits to what can be achieved due to the lack of treaties or global mechanisms governing cyberspace.
- There are also many bad actors that weaponise the internet for their own gain. This includes criminals and authoritarian regimes.
- Given the number of countries in the world, all of which have some stake in the internet, responses to issues arising in the digital world vary greatly and there are significant gaps and blind spots in global governance of the internet.
- Only in the area of intellectual property are international treaties robust enough to impose standards across the world.
- Many experts have become aware of the negative aspects of cyberspace and their warnings have led to greater pressure on those in power to hold big tech companies accountable for the impact of their business practices.

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Part III
Law in practice

30% of course time

Principal focus

Students investigate contemporary issues that illustrate how the law operates in practice.

Themes and challenges

The themes and challenges covered in Part III include:

- the relationship between justice, law and society
- the development and reform of law as a reflection of society
- the importance of the rule of law
- the responsiveness of the legal system in dealing with issues
- the effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society.

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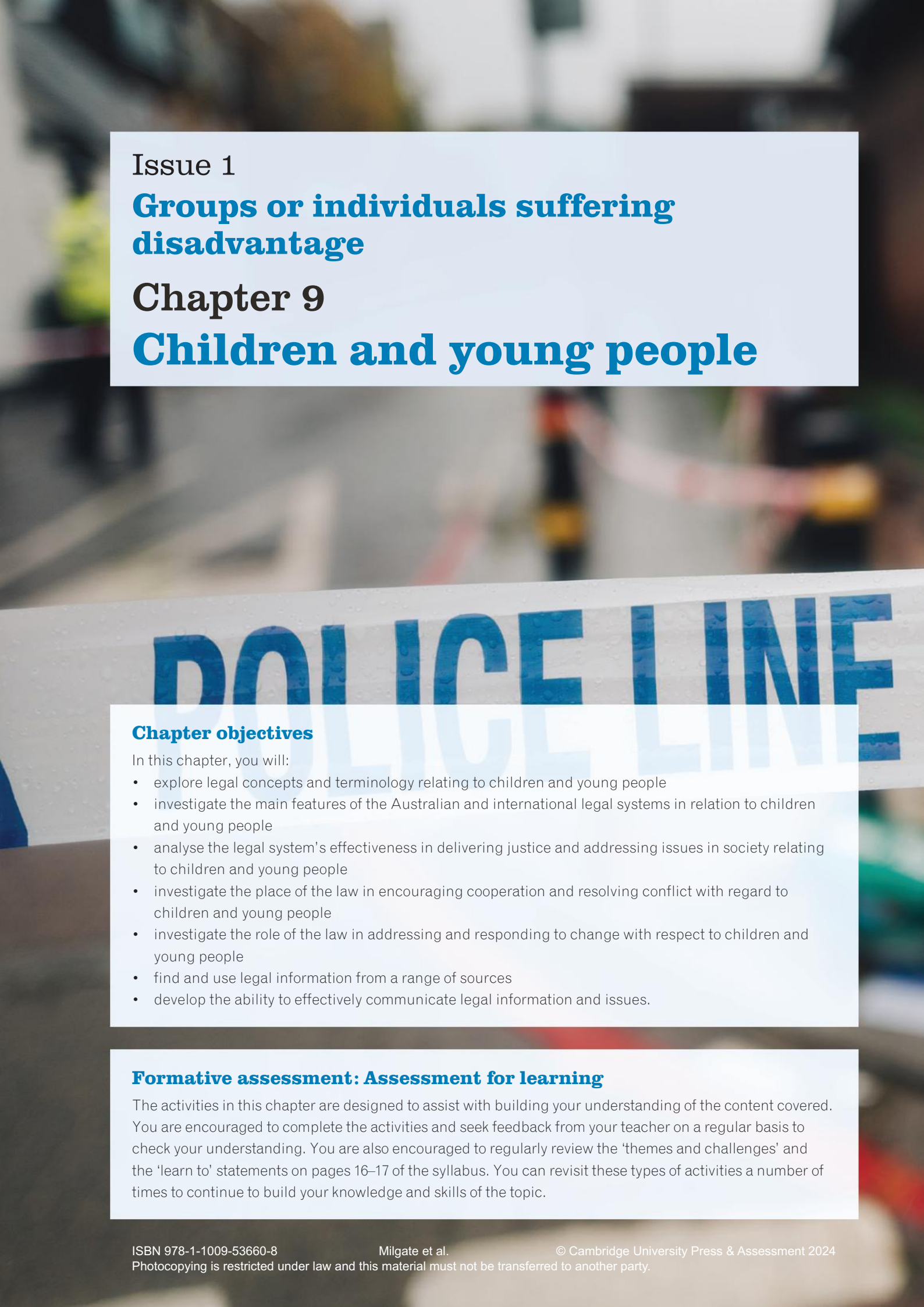

Issue 1

Groups or individuals suffering disadvantage

Chapter 9

Children and young people

Chapter objectives

In this chapter, you will:

- explore legal concepts and terminology relating to children and young people
- investigate the main features of the Australian and international legal systems in relation to children and young people
- analyse the legal system's effectiveness in delivering justice and addressing issues in society relating to children and young people
- investigate the place of the law in encouraging cooperation and resolving conflict with regard to children and young people
- investigate the role of the law in addressing and responding to change with respect to children and young people
- find and use legal information from a range of sources
- develop the ability to effectively communicate legal information and issues.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Reader advice

This chapter contains material that may be confronting to some students. Topics covered include child abuse and child executions.

Relevant law

IMPORTANT LEGISLATION

Marriage Act 1961 (Cth)
Minors (Property and Contracts) Act 1970 (NSW)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children's Court Act 1987 (NSW)
Education Act 1990 (NSW)
Births, Deaths and Marriages Registration Act 1995 (NSW)
Status of Children Act 1996 (NSW)
Children (Protection and Parental Responsibility) Act 1997 (NSW)
Young Offenders Act 1997 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)
Adoption Act 2000 (NSW)
Succession Act 2006 (NSW)
Australian Citizenship Act 2007 (Cth)
Advocate for Children and Young People Act 2014 (NSW)
Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023 (ACT)

SIGNIFICANT CASES

Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402
Department of Health & Community Services (NT) v JWB & SMB [1992] HCA 15 ('Marion's case')
Re W (A Minor) [1993] Fam 64

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9.1 Children, young people and the law

children
generally, persons aged 15 years and younger, depending on the legal context

young people
in New South Wales, persons aged between 16 and 18 years

doli incapax
(Latin) 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for their actions and cannot be guilty of a criminal or civil offence

Children and **young people** represent the future of society. The respect we afford them and the way in which we support and nurture their social, emotional and cognitive development are crucial to the maintenance of a fair and just community.

How the law defines 'children' and 'young people'

Traditionally, the legal age of adulthood was 21 years. In the past 20–30 years, most jurisdictions have lowered this age to 18 years.

Article 1 of the *United Nations Convention on the Rights of the Child* (1989) states that anyone under the age of 18 is a child unless the national law specifies an earlier age.

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) defines a 'young person' as someone aged between 16 and 18.

These definitions are important because laws treat children and young people differently from adults. These laws are intended to:

- prevent them from being exploited
- protect them from the consequences of making uninformed decisions
- protect others from being disadvantaged by dealing with a person who is a minor.

A history of the status of children and young people

Historically, children had no legal rights until they reached adulthood. It was not until the late nineteenth century that concern about the working conditions of children, and the broader effects that child labour had on the quality of many children's lives, set in motion significant changes.

Throughout the nineteenth century, children in poorer families were constantly threatened by the spread of disease. They lived in dirty, overcrowded housing with very poor sanitation. The infant mortality rate was as high as 50 per cent for children in their first year. Many children also experienced violence on a regular basis. For many, poverty and crime were significant influences in their formative years. Joining a gang and participating in crime and prostitution were ways of surviving until adulthood.

Children committing criminal acts were treated in the same way as adult offenders. The concept of an age before which a person could not be held criminally responsible – ***doli incapax*** – did not exist, and children as young as seven or eight were convicted of serious criminal offences.

Children were also often forced to work from a young age. The beginning of the industrial era saw the beginning of child labour in factories, where they worked long hours, usually with dangerous machinery, for very low pay. They also experienced work-related diseases due to hard physical labour or from working with industrial chemicals while unprotected.

The concept of public education did not exist. The education children received depended on the wealth of their family. Private tutors or governesses who taught the children at home were one option for the rich, or boys could be sent to exclusive boarding schools.

In 1870, the *Elementary Education Act* was passed in England, introducing compulsory universal education for children aged 5–13 years. In Australia, the Church of England initially assumed responsibility for the education of colonists. Following disagreements between Anglicans,

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Presbyterians and Catholics as to which religion had authority for this task, each colony between 1872 and 1895 passed Education Acts making primary education a state responsibility and stipulating that it would be 'free, compulsory and secular'. Many parents of limited economic means needed their children to be working, and it was not until the introduction of a minimum working age that children began to attend school regularly.

By the end of the nineteenth century, governments, religious institutions and charities had become aware that children required specific legislation to protect them from violence and abuse, and to give them greater opportunities to develop socially and emotionally.

Recognition of children's rights

Two significant events in the 1980s that advanced the rights of children and young people, internationally and in common law countries, were the opening for signature of the *United Nations Convention on the Rights of the Child* (1989) and the Gillick case in England.

United Nations Convention on the Rights of the Child

The *United Nations Convention on the Rights of the Child* (1989) sets out a comprehensive set of rights for all children and young people. It covers civil, political, economic, social and cultural rights, and requires that all state parties act in the best interests of the child. The *Family Law Act 1975* (Cth) and other Australian legislation endeavour to reflect that objective. The basic rights of a child, as set out in Articles 1–40 of the *United Nations Convention on the Rights of the Child* (1989), include the right to life, to have one's own name and identity, to be raised by one's family and to have a relationship with both parents, even if the parents are separated.

The *United Nations Convention on the Rights of the Child* (1989) is the most widely ratified human rights treaty, with more than 193 countries having ratified it. The exceptions are the United States and Somalia. It is monitored by the UN Committee on the Rights of the Child, which assesses state parties' performance, reports to the UN General Assembly and makes recommendations. The committee does not have the power to hear individual complaints of violations of children's rights.

The Gillick case

The *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 ('Gillick case') was a House of Lords decision. The Department of Health and Social Security (DHSS) had distributed a flyer advising doctors that they could lawfully provide contraception and advice to persons under 16 years old without their parents' consent. The local health authority refused to promise Victoria Gillick, a mother of five daughters, that they would not provide advice and contraception to her daughters without her consent. Gillick brought an action against the health authority and the DHSS, based on her belief that a child under 16 was too young to make such a decision without parental consent. Justice Woolf in the first instance held that Mrs Gillick was not entitled to declarations prohibiting the doctors at the clinic

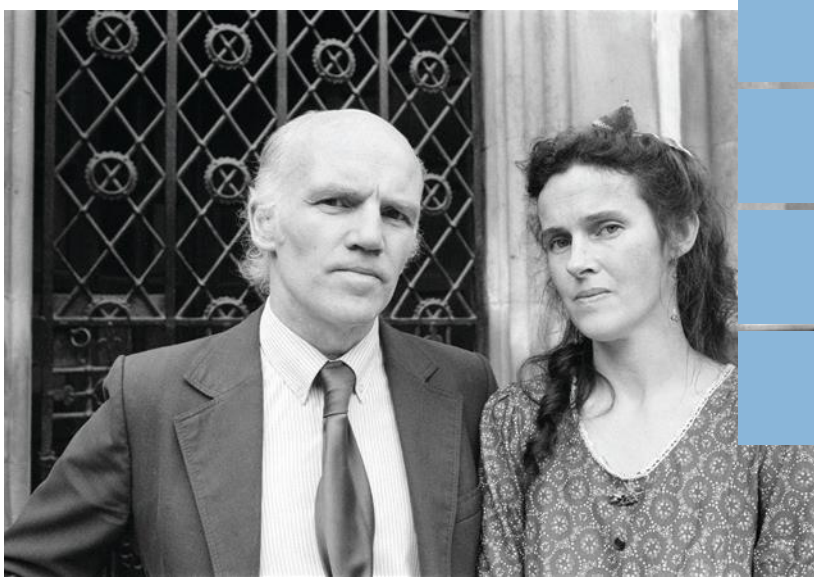

Figure 9.1 Campaigner Victoria Gillick leaving the High Court with her husband Gordon Gillick in 1983 after she failed in her bid to prevent doctors prescribing contraception to under-16s without parental consent.

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from prescribing contraceptives or providing advice to her daughters. The Court of Appeal allowed Mrs Gillick's appeal, and the Department of Health and Social Security, on behalf of the health authority, took the matter to the House of Lords, which affirmed the appeal on the basis that a child under 16 years was capable of consent in medical matters, provided that they had 'sufficient understanding and intelligence to enable him or her to understand fully what is proposed'. In other words, children have the right and the ability to make decisions that affect their lives, and they can do so competently as long as they understand the implications of their decisions.

Review 9.1

1 Identify some of the challenges children and young people experienced in England in the nineteenth century.
2 Define the term *doli incapax*.
3 Using examples, outline how the law defines children and young people.
4 Read about the Gillick case online. Critically analyse the implication of the House of Lords' decision.

Analysis 9.1

Find the *United Nations Convention on the Rights of the Child* (1989) on the Office of the United Nations High Commissioner for Human Rights website (http://cambridge.edu.au/redirect/10396).

1 Outline the main rights in this convention.
2 Identify the significance of this convention.
3 Outline any similarities between this convention and the Gillick case.

9.2 Legal responses

foundling
a deserted infant whose parents' identity is unknown

adoption order
a court order that establishes a new legal relationship between potential adoptive parents and a child eligible for adoption; an adoption order also severs the legal relationship that existed between the adoptive child and their natural or legally recognised parents or guardians prior to the adoption process

Civil law in relation to children and young people

The *Family Law Act 1975* (Cth) governs disputes between married and de facto couples, including disputes relating to children. The 'paramount consideration' for orders relating to children made under this Act must be the children's best interests.

Many other aspects of the law applying to children come under state jurisdiction. In New South Wales, these include the following matters.

Registration

Under the *Births, Deaths and Marriages Registration Act 1995* (NSW), parents have seven days after the birth of a child to give notice of the birth and 60 days to complete the registration process. This puts the existence of the child on the public record and gives the child a legal name, that of the father or mother in most cases, and therefore affords to the child all legal rights and protections. The parent or parents also assume responsibilities under the law for the child's welfare. If a child is stillborn, the state Registrar of Births, Deaths and Marriages must be notified within 48 hours.

If a child is a **foundling**, the person who has been granted guardianship of the child is responsible for having the child's birth registered. An **adoption order**

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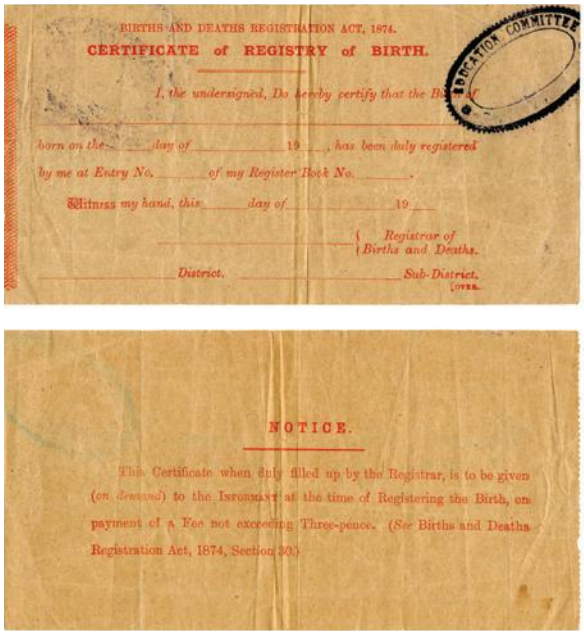
BIRTHS AND DEATHS REGISTRATION ACT, 1874.

CERTIFICATE of REGISTRY of BIRTH.

I, the undersigned, Do hereby certify that the Birth of

born on the day of 19 , has been duly registered

by me at Entry No. of my Register Book No.

Witness my hand, this day of 19

Registrar of Births and Deaths.

District. Sub-District.

NOTICE.

This Certificate when duly filled up by the Registrar, is to be given (on demand) to the Informant at the time of Registering the Birth, on payment of a Fee not exceeding Three-pence. (See Births and Deaths Registration Act, 1874, Section 30.)

Figure 9.2 Example of an old British certificate of the registry of birth of a child. In New South Wales, parents have seven days after the birth of a child to give notice of the birth and 60 days to complete the registration process.

made under the *Adoption Act 2000* (NSW) must also be registered (*Births, Deaths and Marriages Registration Act 1995* (NSW) s 23). A child's name may be changed, and children over the age of 12 must consent to this change (*Adoption Act 2000* (NSW) s 101; *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 28, 29).

Citizenship

The *Australian Citizenship Act 2007* (Cth) replaced the *Australian Citizenship Act 1948* (Cth). It sets out how a person becomes an Australian citizen, the circumstances in which a person may cease to be a citizen, and some other matters related to citizenship. Under the Act, a child is automatically an Australian citizen if they are born in Australia with at least one parent who is an Australian citizen. If a child is born overseas with at least one parent who is an Australian citizen, they may apply to be registered as an Australian citizen by descent, although certain criteria must be met. A child who is a permanent resident and who has been legally adopted also automatically acquires Australian citizenship.

Education

Children have the right to be educated, and it is compulsory for children aged 6–17 to attend school under the *Education Act 1990* (NSW). Under section 22 of this Act, parents must send their children to a government school or a non-government school registered with the NSW Education Standards Authority, or register them for home schooling. Section 4 of the Act asserts that it is the duty of the state to ensure that every child receives an education of the highest quality.

Work

Generally it is acknowledged that it is in the best interests of children that they remain in school and receive a formal primary and secondary education. According to the NSW Office of Industrial Relations, there is no minimum legal age limit for young workers. If, however, they are under 15 years, they must receive authorisation from the NSW Department of Education to leave school. Young people in the workplace are covered by all of the relevant workplace and safety legislation for workers in New South Wales.

The NSW Commission for Children and Young People, in its 2005 Children at Work report, surveyed 10 999 children and young people in Years 7–10 living in New South Wales about their working experiences. Although the survey found that the majority of children could list both positive and negative aspects of working, and that they especially liked getting paid and gaining experience and responsibility, the report also showed some trends of concern:

- Children living in less disadvantaged areas were more likely to work, and work decreased with increased social disadvantage.
- Children with greater household responsibilities had fewer opportunities to work.
- Young workers were paid less than mature people doing the same jobs, possibly because they often work on an informal or casual basis and their work is outside regulatory requirements. Court cases from 2017 to and 2019 documented the underpayment of many young people across a range of industries in Australia. A report produced by the Young Workers Centre estimates that one in five young workers are paid below award wages.
- High levels of harassment and injury were reported by the children surveyed.

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Figure 9.3 Child fatalities in the workplace in Australia, 2003–2016.
Source: SafeWork Australia

In addition to these issues – which were still prevalent in 2019 – Safe Work Australia has repeatedly highlighted the extent to which children and young people are harmed or injured while at work. It has been reported that, on average, every 4 minutes and 24 seconds a young person is injured in an Australian workplace (SafeWork Australia, 2019). Research from SafeWork NSW indicates that 15 to 25-year-olds have a 75 per cent greater chance of being injured at work (SafeWork NSW, 2017).

Research 9.1

View the website for Youth Law Australia (http://cambridge.edu.au/redirect/10456) to research other aspects of work for children and young people. Summarise your findings in a few paragraphs.

Medical treatment

In the case of the *Department of Health & Community Services (NT) v JWB & SMB* [1992] HCA 15 ('Marion's case'), the High Court of Australia followed the decision in the Gillick case, holding that once a person has sufficient maturity and intelligence to understand what is proposed, they are capable of consenting to medical treatment. This common law test is subject to section 49 of the *Minors (Property and Contracts) Act 1970* (NSW), which protects a medical practitioner from liability in tort for treating a young person, if the young person has given consent to the medical or dental treatment and is aged 14 years or over. Parents have the responsibility to seek proper medical care for their children, even if they have religious objections. Section 174 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) authorises a medical or dental practitioner to carry out emergency treatment on a child or young person without parental consent.

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As legislation does not deal with a young person's right to refuse medical treatment, this issue is governed by the common law. If a child under 16 years refuses medical treatment, parents have a right to insist that it be performed, despite the Gillick test of competency (*Re W (A Minor)* [1993] Fam 64). A court can override a young person's refusal of medical treatment if the refusal is not in their best interests.

Discrimination

Children and young people are protected from discrimination on the basis of age by Part 4G of the *Anti-Discrimination Act 1977* (NSW). This Act also outlaws discrimination on the basis of sex, race, sexuality and other characteristics, and applies to discrimination in work, education and the provision of goods and services. There are a number of exceptions, however, relating to superannuation, insurance, credit applications, vehicle safety and sport, and the Act does not affect the operation of laws relating to the legal capacity of children or laws specifically designed to protect them.

Contracts

Under the *Minors (Property and Contracts) Act 1970* (NSW), people under 18 years are generally not bound by a contract, lease or other transaction (ss 8, 17). The courts will not enforce such contracts, even if they do exist. The exception to this, contained in section 19 of the Act, is a situation where a young person enters an into agreement that is for their own benefit and is a necessity, such as for the provision of accommodation or food. For example, a young person who leaves home at age 17 to take an apprenticeship and has to sign a rental lease for accommodation or needs to buy a car on finance for transport will be bound by the contract.

Some minors may be able to enter into certain contractual arrangements if they have a parent or guardian who acts as a **guarantor** to ensure that the contractual obligations are fulfilled.

The Supreme Court of New South Wales can confer the capacity to enter a legal contract upon a minor (s 26).

Torts

There is no age restriction on taking legal action for a civil wrong. If a child is injured as a result of someone else's negligence, is a victim of defamation, or suffers loss or damage as a result of some other wrongful behaviour, he or she is entitled to sue the wrongdoer.

A child is also personally responsible for their own wrongful acts. The general rule is that parents are not liable for torts committed by their children.

Leaving home

Young people do not have the right to leave their parents' home before the age of 18. However, the law would not normally force young people over the age of 16 to stay at home against their wishes. The following factors would be considered: maturity, accommodation, safe living environment and the parents' attitude.

Inheritance and parentage

The *Status of Children Act 1996* (NSW) provides that all children, including **ex-nuptial children**, are treated the same as those whose parents are married. This essentially means that ex-nuptial children have the same rights in relation to the disposition of property made by a will or without a will as those born in wedlock. Any person left out of a will can contest this under Chapter 3 of the *Succession Act 2006* (NSW).

guarantor
a person who gives a formal promise that someone else's contract will be fulfilled, often backed by some form of asset that will stand as collateral to secure the promise

ex-nuptial children
children born of parents who are not legally married

presumption of parentage
outlines a specific condition whereby a man and/or a woman are presumed to be the parents of a child

The *Status of Children Act 1996* (NSW) clarifies issues of parentage for children in New South Wales. There is a **presumption of parentage** if a child is born within a marriage. In addition, if a child is born within 44 weeks after the death of the spouse, the child is presumed to be the child of the deceased spouse.

For couples who live together but who are not married, section 10 of the Act goes on to state:

> A child born to a woman is presumed to be a man's child if, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the man and the woman cohabit but are not married.

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In all of the above cases the law clearly states that the birth mother is the legal mother; this is especially important in cases in which birth technologies have been used.

If a child is born through the use of fertilisation procedures, section 14 of the Act states that the intended 'social parents' are also the legal parents, provided they consented to the procedure. Men and women who donate biological material to assist in these procedures are not presumed to be the mother or father of the child who is the result of that pregnancy. Under the Act, any presumptions arising under the above provisions are irrebuttable. The Act also states that in the case of a married or de facto couple, there is a presumption of consent to the procedure by the spouse or de facto partner. However, this can be challenged in court on the balance of probabilities.

The *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth) are consistent with the approach used in the *Status of Children Act 1996* (NSW). Presumptions of parentage are in place to ensure that all children, where possible, will have assigned to them one or two parents with the responsibility outlined under the law to care for and maintain them.

Care and control

Children have the right not to be neglected or abused physically, sexually or emotionally. Child abuse in Australia is a worrying aspect of our society. Governments have passed laws to combat this, but to date the effectiveness of these initiatives has been limited.

The Department of Communities and Justice is responsible for the care and protection of children in New South Wales. It carries out this role in cooperation with non-government organisations and government agencies. Its activities include the provision of accommodation and support for children and young people who need to live away from their families, the regulation of childcare through licensing, and the funding and regulation of adoption services. The Department of Communities and Justice is authorised to intervene between parents and children where there is a need for care and protection. A child or a parent can also request the Stronger Communities Investment Unit to assist in cases where the family is experiencing difficulties. Intervention by the state can include preventative services such as family support and respite childcare, through to extreme cases where children are removed from their families, or where police action is taken against abusers.

Why should our society protect children from abuse?

The following points outline the underlying presumptions for the prevention of abuse:

- Children are important community members, and they have the right to be safe from abuse.
- In time, children may themselves become parents, and the way they parent their own children will be influenced by their own childhood.
- Research suggests that there is a strong link between child abuse and subsequent social problems.
- Prevention pays for itself in the long run.

Australia's signature on the *United Nations Convention on the Rights of the Child* (1989) means that the Australian Government is obliged to ensure that legislation and policy are put in place to protect children.

What is abuse?

Generally, there are four types of abuse:

- **physical abuse** – this can involve any type of physical injury
- **sexual abuse** – this can be in many forms, from suggestive comments to sexual intercourse
- **neglect** – this can involve children not receiving adequate food, clothing, shelter or healthcare
- **emotional abuse** – this can result from things that are said or implied.

Abuse generally lowers a person's sense of self-worth and affects a child or young person's ability to develop socially, emotionally and cognitively. Usually a child who is abused in any of these first three ways will have suffered some form of emotional abuse as well. Regardless of the type of abuse, they all have consequences for our society.

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Figure 9.4 Malka Leifer (centre) is a former teacher found guilty of 18 charges, including rape and sexual abuse, of girls under her care at a school in Melbourne. Leifer fled to Israel in 2008 but was extradited to Australia in January of 2021.

Child sexual assault is often hidden. Children often find it hard to talk about sexual assault because they think it is their fault or that no-one will believe them. Even if children consent, sexual and indecent assaults against children are crimes. If the offender says the child consented, there is one defence only: where the child was aged 14–16 years and the offender believed the child was over 16 years. The notification rate over the past 20 years has increased at a rate that has put Department of Communities and Justice resources under enormous pressure. It is believed that this trend will continue at a similar or increasing rate.

Children and Young Persons (Care and Protection) Act

The guiding principles for administering the *Children and Young Persons (Care and Protection) Act 1998* (NSW) are as follows:

- The safety, welfare and wellbeing of children and young people are the paramount considerations.
- Children and young people must be given an opportunity to express their views concerning their safety and welfare, and these must be given due consideration.
- The culture, disability, language, religion and sexuality of the child or young person must be taken into account.
- Any course of action followed should be the least intrusive for the child or young person and their family.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), a child or young person is considered at **risk of harm** when:

risk of harm
concerns about the safety, welfare and wellbeing of a child or young person because of sexual, physical or emotional abuse and/or neglect

a the child's or young person's basic physical or psychological needs are not being met or are at risk of not being met,

b the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care,

b1 in the case of a child or young person who is required to attend school in accordance with the *Education Act 1990* – the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive an education in accordance with that Act,

c the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,

d the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm,

e a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,

f the child was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

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mandatory reporting
a person working in child-related employment must, by law, report to care and protection agencies a child who they believe to be at 'risk of harm'

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

juvenile
a child or young person, generally under 18 years of age, although this may vary depending on the context

summary offence
a criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

Reporting of children and young people at risk

Under section 24 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), any person who has reasonable grounds for believing that a child or young person is at risk of harm may make a report to the Department of Communities and Justice. **Mandatory reporting** is a responsibility of all paid workers who are involved in delivering welfare services, healthcare, children's services, education, residential services or law enforcement, partly or fully, to children. They must make a report to the Department of Communities and Justice if they become aware during the course of their work that a child is at risk of harm.

The final report from the Royal Commission into Institutional Responses to Child Sexual Abuse was published in 2018. The report stated that there had been systematic oversight and a failure to act to address the child abuse being perpetrated by members of a range of institutions. The final report is available on the Royal Commission's website. Work is still ongoing to ensure child-related institutions adopt all recommendations from the Royal Commission.

Criminal law in relation to children and young people

Section 5 of the *Children (Criminal Proceedings) Act 1987* (NSW) clearly states the principle of *doli incapax*: 'It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.' This is the same in all jurisdictions in Australia.

Between the ages of 10 and 14 a child may be found guilty of a criminal offence, but the prosecution must rebut the notion of *doli incapax* and show that the child, at the time of the alleged offence, could distinguish between right and wrong. From the ages of 14 to 17, children and young people are held fully responsible for their actions. However, they are subject to a different range of criminal **sanctions** than adults who have committed the same offences. Detention is a last resort for a **juvenile** offender in all states and territories.

Young Offenders Act

The *Young Offenders Act 1997* (NSW) has the aim of providing diversionary measures for young offenders as alternatives to court appearances. The Act only applies to **summary offences** and to those **indictable offences** that can be dealt with summarily.

The principles of the Young Offenders Act are that:

- the least restrictive sanction should be applied where possible
- children should be informed of their right to seek legal advice
- criminal proceedings are not to be started if there is an appropriate alternative for dealing with a matter.

Review 9.2

1 Outline how a child becomes an Australian citizen.
2 Construct a list of a child's or young person's legal rights and responsibilities in each of the following areas, along with the statutory or common law source of each of the rights and obligations:
   a education
   b work
   c medical treatment
   d entering a contract.

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Under the Young Offenders Act, children and young people who committed an offence covered in the Act may proceed through a three-tiered system of diversionary processes, comprising **warnings**, **cautions** and **Youth Justice Conferences**.

A warning can be given by a police officer, either at the place where the child was found offending or anywhere else. The child must be told of the nature, purpose and effect of the warning. No conditions can be attached to the warning, and no additional sanctions imposed. The police officer must ensure that the child understands the warning and must notify the parents.

A caution is given by a police officer or a specialist youth officer when the child admits the offence. It is used where the offence is more serious. The officer must determine whether a matter would be appropriately dealt with by caution by considering the seriousness of the offence, the degree of violence involved, harm caused to the victim, and the number and nature of any offences the child has committed. He or she must ensure that the child understands the nature, purpose and effect of the caution, and that he or she is entitled to obtain legal advice and to choose to have a court deal with the matter. A court may also give a caution. Before a caution is given, the offender must be given a written notice of it.

Figure 9.5 Young offenders can be issued with a warning, which is a formal notice usually for a first minor offence, or a caution, which is issued when the offence is more serious.

A Youth Justice Conference may be used for offences of the same gravity as those for which a caution is imposed or that are more serious, such as those involving harm to a victim. Conferences are designed to encourage the offender to take responsibility for their own actions, to provide support services, to promote the rights of victims, and to involve families and others in the justice process.

warning
a formal notice given to a young offender, usually for a first minor offence

caution
a formal notice given to a young offender where the offence is more serious than one appropriately dealt with by a warning

Youth Justice Conference
a meeting of all the people who may be affected by a crime committed by a young offender; used to help the offender to accept responsibility for their actions while avoiding the court system

Crimes Legislation Amendment (Police and Public Safety) Act

The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) was introduced as a result of an increase in knife-related violence in New South Wales. The Act amended the *Summary Offences Act 1998* (NSW), creating new knife-related offences and giving additional search powers and 'move on' powers to police. It aims to reduce the number of weapons used, or even carried, in a public place by:

- providing police with extra power to conduct a search on an individual and to confiscate any dangerous implements they find
- allowing police to give reasonable directions to a person where necessary in public places
- enabling police to demand the name and address of a person who might provide information about serious offences.

The Act is seen as an anti-gang measure to allow police to disperse groups of people before situations escalate.

Children (Protection and Parental Responsibility) Act

The *Children (Protection and Parental Responsibility) Act 1997* (NSW) enables local police to remove young people under 16 years who are at risk in public places and return them to their parents. The Act is unique in that the police are only given these powers in local government areas considered operational areas.

Currently in New South Wales, there are four operational areas: Ballina, Orange, Coonamble and Moree. Local governments can apply to

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operational area a local government area that can apply for police to be given additional powers under the *Children (Protection and Parental Responsibility) Act 1997* (NSW)

the Attorney-General's Office to become an **operational area**. They must demonstrate that they have adequate crime prevention and youth support programs. Reviews undertaken by the Australian Human Rights Commission have highlighted the disproportionate impact of these powers for police on Indigenous children and young people where they are in operation.

In an operational area, the police can 'safely escort' a young person under 16 years from a public place if the young person is not being supervised by a responsible adult and is at risk.

The other main section of the Act gives the Children's Court the power to make parents attend the court with their children and to make them sign an 'undertaking' for their child's behaviour. In more serious cases, the court could punish the parents if it can be shown that their neglect has caused their children's offending.

Legal Links

The NSW Police Force's website has information on warnings, cautions and Youth Justice Conferences.

Review 9.3

1. Outline how children and young people are protected from discrimination.
2. Explain the purpose of *doli incapax*. Identify what age group *doli incapax* applies to.
3. Identify the offences in the *Young Offenders Act 1997* (NSW).

The role of the United Nations

The *United Nations Convention on the Rights of the Child* (1989) has been important in putting the rights of children on the global agenda. Ratification usually means a government passing domestic laws to give effect to some or all of the principles of an international treaty. Once a state has signed and ratified a treaty, the United Nations committee structure monitors and reports on the extent to which that state is complying with its international obligations.

The Committee on the Rights of the Child meets to examine reports from ratifying countries. The 18 committee members are independent experts in the field of human rights, who are elected by the governments of ratifying countries. As mentioned, the committee has no coercive power. Australia has a responsibility under the convention to report to the committee on the steps that it has taken to give full effect to the contained rights.

The role of parliament and the courts

Federal and state parliaments have passed numerous Acts that protect children and young people by restricting their activities and by placing responsibilities on adults to ensure the welfare of children and young people. Certain rights of children have also been enshrined in legislation, which in turn has created legal institutions and processes that promote and protect these rights. The courts have also played a role, through cases that have affirmed the current law or changed the law through reinterpretation.

Some of the legal institutions in New South Wales that have been set up to protect children and young people follow.

NSW Advocate for Children and Young People

The NSW Advocate for Children and Young People is a statutory body set up to promote respect for and understanding of the interests and needs of children and young people. It was established in 2015 under the *Advocate for Children and Young People Act 2014* (NSW) and took over some of the functions of the previous NSW Commission for Children and Young People.

Its key role is making recommendations to government and non-government organisations

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regarding legislation, policies, services and other matters that affect children and young people. For example, the previous body (NSW Commission for Children and Young People) made a submission to the Review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW) in December 2011.

It also undertakes research into matters that affect children and young people and prepares a three-year strategic plan for children and young people in New South Wales.

NSW Office of the Children's Guardian

The NSW Office of the Children's Guardian was first set up under the *Children and Young Persons (Care and Protection) Act 1988* (NSW), and under further legislation in 2013 it became an independent government agency.

The office took over the former NSW Commission for Children and Young People's responsibility for implementing and monitoring the **working with children check**. This is the mandatory employment screening by employers of job applicants in child-related employment, as outlined in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). There are penalties for employers who engage someone in employment relating to children without sufficient scrutiny of the person, or if they are aware the employee is a **prohibited person** for child-related employment. These requirements reduce the likelihood of prohibited persons having contact with children in the course of their work.

The office also has a range of responsibilities connected with out-of-home care in New South Wales, manages accreditation of non-government adoption services and authorises employment of young children in the entertainment industry.

Children's courts

The *Children's Court Act 1987* (NSW) deals with children's courts in New South Wales. There are seven specialist Children's Courts, five of them in metropolitan areas, with 13 Children's Magistrates. There are also five Children's Registrars who aid in administering matters before the court. The court has a dual role: determining matters of juvenile offenders that appear before it and determining care and protection matters concerning children on application to it by the Department of Communities and Justice.

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (ss 71, 72), the court 'may make a care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any reason'.

Review 9.4

1 Outline the main role of the NSW Advocate for Children and Young People.
2 Describe what the 'working with children check' means.

Legal Aid NSW

Legal Aid NSW provides a range of services to children and young people in New South Wales. It represents children and young people in a variety of matters, from welfare proceedings in the Children's Court to family law matters in the Federal Circuit and Family Court of Australia. Its legal representatives will also appear for children and young people facing criminal charges in the Children's Court.

working with children check
a check by the NSW Office of the Children's Guardian on the appropriateness of a person in New South Wales to work in child-related employment

prohibited person
a person prohibited from working in child-related employment because of a conviction of a serious sex offence, murder of a child, or an offence involving violence towards a child

NSW Ombudsman

The main role of the NSW Ombudsman is to act as an independent review body that deals with individuals' complaints about the administration of government agencies or the agencies' compliance with specific legislation. Traditionally, the office is seen as representing the people's interests, and its credibility comes from its reputation for impartiality, independence from government and confidentiality.

There have been calls for a specialist 'children's ombudsman' that can take a more targeted approach to issues facing children and young people in their dealings with government agencies.

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Another important role performed by the ombudsman's office is investigating and reporting on 'reviewable deaths' of children in New South Wales. A death is reviewable if at any time in the three years before the death, the child or a sibling has been reported to the Department of Community Services (DOCS) for any matter. With the objective of preventing harm, abuse and neglect of children, the ombudsman's office assesses whether the child protection system could have prevented some of these deaths. The process to review deaths of children and young people each calendar year considers the number of these that are suspicious, were the result of neglect, involved individuals known to the Department of Communities and Justice or were in out-of-home care. This is an important function of the NSW Ombudsman's office, to continually assess the extent to which children and young people are being protected within their families or by the system.

Figure 9.6 There are a number of organisations and courts that work to protect the rights of children and young people.

NSW Civil and Administrative Tribunal

As discussed in Chapter 7, the NSW Civil and Administrative Tribunal reviews the administrative decisions of NSW Government bodies. Its Administrative and Equal Opportunity Division deals with applications for review of decisions made by DOCS. The division also hears applications for declarations that a person seeking to apply for a job working with children is not a prohibited person under the Commission for *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Council of Australian Governments National Framework

In 2021, the Council of Australian Governments, an intergovernmental forum made up of the federal and all state and territory governments, published a *National Framework for Protecting Australia's Children 2009–2020*. In 2021 a successor to this framework was developed by the Australian, state and territory governments, along with Aboriginal and Torres Strait Islander representative and the non-government area. *Safe and Supported: The National Framework for Protecting Australia's Children 2021–2031* sets out how all governments, First Nations leaders and the non-government sector will work together to help children, young people and families in need of support. This initiative has the aim of fighting child abuse and neglect by preventing it in the first place; that is, by protecting the safety and wellbeing of children. Following the Royal Commission into Institutional Responses to Child Sexual Abuse, which showed the inadequacies of institutions in protecting children from abuse, a range of recommendations were handed down that have had a significant impact on the current framework for government and non-government agencies.

Review 9.5

1. Describe the role of the NSW Ombudsman in protecting the rights of children and young people.
2. Outline the role the NSW Civil and Administrative Tribunal can play in protecting the rights of children.
3. Discuss the strengths and weaknesses of non-legal mechanisms in their ability to protect the rights of children.

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9.3 Non-legal responses

As children and young people cannot vote, it is difficult at times for their voices to be heard. Some very effective non-legal mechanisms keep the issues of children and young people on the political agenda. These mechanisms may be the first point of call, and they can either provide valuable information about a person's rights or refer the person on to a relevant source.

Trade unions

Trade unions are organisations of workers who act together to maintain their rights to good working conditions. The Australian Council of Trade Unions provides information about pay and conditions, health and safety issues, apprenticeships and training, and negotiates employment contracts for young people entering the workforce for the first time.

Kids Helpline

Kids Helpline is just one of many organisations from which children and young people in crisis can seek advice. It offers 24-hour free telephone and online counselling, and referral for issues such as family relationships, child abuse, mental health, bullying, drugs and alcohol, and eating and weight issues, as well as specific issues faced by people from First Nations, non-English-speaking or rural backgrounds. View the Kids Helpline website for more information.

Australian Childhood Foundation

The Australian Childhood Foundation works to educate the community about child abuse. It also provides a list of services that offer help and support for people who have experienced child abuse, as well as resources for parents and others who are concerned about their own situation or want to report child abuse.

Legal Links

The Worksite for Schools' website (http://cambridge.edu.au/redirect/9038) provides fact sheets, case studies, job profiles and other information about work that is specifically directed at young people.

Research 9.2

The organisations listed below are involved in protecting the interests of children and young people. Select two organisations and find their websites. Construct a fact sheet about each organisation.

- Committee on the Rights of the Child
- NSW Advocate for Children and Young People
- NSW Office of the Children's Guardian
- NSW Children's Court
- Department of Communities and Justice
- Legal Aid NSW
- NSW Ombudsman
- Australian Council of Trade Unions.

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9.4 Effectiveness of responses

As they grow through adolescence and into adulthood, young people are more likely to take risks. At the same time, there are adults in society who abuse and exploit children and young people. This means that children and young people will sometimes be at risk of harm, or at risk of harming others. It is in this light that the legislation and mechanisms in place to ensure justice for children and young people will be evaluated.

Children and young people and the criminal justice system

If children and young people are exposed to the criminal justice system, it is usually through interaction with a police officer when being arrested or questioned about some matter. This experience can influence their attitude to authority and to the wider community in general.

A joint inquiry of the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission was conducted in 1997. The inquiry titled *Seen and Heard: Priority for Children in the Legal Process* examined the relationship of children and young people and the legal process. Of the 843 children and young people surveyed, 78 per cent said the police rarely treated young people with sufficient respect. Although undertaken 25 years ago, the Australian Law Reform Commission stated that, 'studies in Australia and overseas have consistently identified police/youth relations as inherently conflictual and underpinned by mutual antipathy and intolerance. This level of conflict is a matter of serious concern.'

Young people are frequently targeted for police intervention – for lacking 'respect', for being 'rowdy', for being part of the 'rave culture', or simply for being young and out in public.

'Young people and public space', 2002, conference workshop presented by the Youth Justice Coalition and Youth Action and Policy Association.

The *Seen and Heard* inquiry also examined how policing could become more consistent with provisions in the *United Nations Convention on the Rights of the Child* (1989), and recommended that national standards should be implemented via legislation or policy in certain areas of concern. Some of the main areas follow.

Young people and public spaces

There is a need to develop better guidelines on the use of public space by children and young people. In some states the police can remove children from public places when they are considered to be at risk of offending, whether they are suspected of illegal behaviour or not. It is argued that this is a restriction of children and young people's freedom of assembly and erodes their civil rights.

The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) was introduced in response to the increased offences related to knives between 1996 and 1997. The Act made it an offence to carry a knife in a public place and gave the police the power to search people for knives and other weapons. It also gave the police the power to search people in public places if their behaviour appeared to cause fear, obstruct, harass or intimidate.

One way to gauge the effectiveness of this legislation is the extent to which knife-related offences have decreased because of the extra powers given to police. The NSW Ombudsman's Office conducted a review of the legislation in 1999. The Youth Action and Policy Association, in a paper entitled 'Knives Legislation to Stay', commented that the report found that in the first year of operation the increased powers of the police had led to an increase in arbitrary stop-and-search procedures with only a modest increase in the rate of uncovering a knife. It also found an enormous increase in searches where no knife was found. The report indicated that, midway through 1999, 81.9 per cent of people searched carried no weapon that would be a threat to public safety.

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The paper went on to state:

> As many of us had always expected, young people were the clear target of these new powers. What was surprising was the levels of harassment of young people ... An incredible 68% of people searched were aged 25 or under. Not only were young people targeted for these searches, they were more likely unfairly targeted. Whereas only one in seven 17-year-olds who were searched was found to have knives, almost one in two 37-year-olds had knives. The Youth Justice Coalition and other groups have argued that police stop and search powers should be consolidated into one piece of legislation as at present there are a minimum of six acts giving police the power to stop and search people which can cause confusion for the police and citizens alike.

Youth Action and Policy Association, 1999, 'Knives legislation to stay'.

Recently, the increased practice of using strip searches at a number of musical festivals across the country has been called into question due to reported incidents during 2018–2022 in which minors were searched with no adult present. The use of sniffer dogs has also been contentious for some time due to concerns around the extent to which they accurately indicate a 'reasonable suspicion' that a crime, in this case drug possession, has been committed. In 2019, The New South Wales Law Enforcement Conduct Commission opened an inquiry investigating the complaints of five young women who were searched at music festivals, including the alleged unlawful strip search of a girl at the 2018 Splendour in the Grass festival near Byron Bay. The Commission acknowledged that many of the people who experienced such strip searches found it humiliating and degrading. It stated that not all police at such festivals were experienced at exercising search powers at festivals and it recommended training be provided for the proper exercise of such powers. NSW Police will continue to follow their usual procedures. Documents obtained by the Redfern Legal Centre through freedom of information in August 2022 found that police have not taken seriously the recommendations from the Law Enforcement Conduct Commission to overhaul policies around the use of strip searches and that police themselves still do not fully understand their own strip search powers.

Analysis 9.2

Study the article 'NSW police complied with rules to protect dignity in just 27% of strip-searches, records suggest' at http://cambridge.edu.au/redirect/10397.

1. Outline the extent of strip searches and the impact these have had on young people.
2. Outline the guarantees that this will not keep happening.

Figure 9.7 Police 'strip searches' at music festivals in NSW have led to scrutiny against the practice, particularly when used on under-age children.

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The *Children (Protection and Parental Responsibility) Act 1997* (NSW) was introduced to address the rise in juvenile crime caused by a lack of parental supervision. This Act has also been criticised for the way that it impedes children and young people's use of public spaces. A review of policy and legislation relating to youth street rights, conducted by the University of Technology Sydney's Community Law and Legal Research Centre and the Youth Justice Coalition, found that this Act contravened the *United Nations Convention on the Rights of the Child* (1989) in a number of ways, including by:

- impeding young people's rights of freedom of association and assembly
- discriminating against young people due to their visibility in public spaces
- giving the police arbitrary power of detention
- failing to consider the child's 'best interests'.

The *Seen and Heard* report produced by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission also stated the legislation has problems. It outlined that police officers can scrutinise the behaviour of children and young people even if it is not criminal, and they can act on stereotypes about young people.

Public spaces are very important to young people, who have very few places that they can get to meet and spend time. Young people congregating in groups are often branded as anti-social, even though crime statistics show that young people are more likely to be victims than offenders. Move-on and stop-and-search powers serve the law-and-order agendas of governments by trying to clear the streets, supposedly making the community safer. Given this, and the diminishing amount of public spaces available due to the increase in privately owned shopping malls, the civil rights of children and young people are frequently being infringed.

Arrest and police interview

In some jurisdictions, it is alleged that police rely heavily on arrests to gather evidence or to further the interrogation of suspects. In other words, arrest can be used as a method of investigation. This is especially so for First Nations youth.

Figure 9.8 Nicola Wyn Williams, Senior Crown Prosecutor, makes a statement outside Manchester Crown Court, in Manchester, England, in February 2024 after the sentencing of Brianna Ghey's killers. Two teenagers were sentenced to life in prison for the murder of the young trans woman in 2023. Article 37(b) of the *United Nations Convention on the Rights of the Child* (1989) states that arrest should be a 'last resort', not a routine practice.

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Disproportionate arrest levels should be considered within the broader racist ideas and policies that police and systems hold towards First Nations people, and the impacts this has on First Nations offenders.

Article 37(b) of the *United Nations Convention on the Rights of the Child* (1989) states that arrest should be a 'last resort' for children and young people, not a routine practice, due to the harm it can cause them. The *Seen and Heard* report also recommended that, for children at risk, welfare and health services might be the more appropriate agencies to respond to these individuals' needs. This is not to deny that arrest is appropriate when necessary to protect the community.

All suspects have the right to contact a lawyer and to have them present during questioning, as long as this does not interfere with the police investigation. Persons under 18 can contact the Legal Aid Youth Hotline if they have been arrested and need legal advice. However, people do not always exercise this opportunity because they are not aware of their rights. Further, the situation is sometimes exacerbated by language barriers, cultural differences or age. The Australian Law Reform Commission and others have recommended greater efforts by police to inform accused persons of their rights in terms that they can understand and act on.

Sentencing of young offenders

Another area of concern is the sentencing of juveniles. Children and young people, more than any other offenders, have the best chance of rehabilitation and reintegration into society. As such, the sentence that offenders receive should take into account their age and the circumstances under which the offence was committed. The *Seen and Heard* report noted that research has indicated that detention and other harsh sentencing options are generally ineffective as deterrents to re-offending.

Most jurisdictions consider these factors. In New South Wales, the courts follow guidelines under the *Children (Criminal Proceedings) Act 1987* (NSW), which considers juvenile offenders. However, *Seen and Heard* the report suggested that there was room for improvement in this

Figure 9.9 Many sentencing matters regarding children and young people are conducted in the NSW Children's Court.

area, observing that 'magistrates often do not take sufficient account of social factors such as homelessness, family circumstances, educational needs and so on in determining sentences for children'. It was recommended that 'sentencing options should take into account the special health and other requirements of children and young people'.

Youth conferencing

While youth conferencing generally deals with matters that would be dealt with summarily, it can, under the *Young Offenders Act 1997* (NSW), be used for some indictable offences such as robbery and aggravated break, enter and steal. One of the criticisms of well-intentioned laws like the Young Offenders Act is that they are not being used for a sufficiently wide range of offences, and therefore some young offenders are missing out on the benefits that conferencing offers.

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The Shopfront Youth Legal Centre, in its submission in response to the NSW Law Reform Commission paper on sentencing young offenders in 2003, argued that:

> Youth justice conferencing is suitable for a wide range of offences, even very serious ones. It is not a 'soft option'. Indeed, it could be said that conferencing works best in the case of relatively serious offences because the young offender is obliged to consider the consequences of his or her actions, in particular the harm caused to the victim. In most cases, conferencing is a more effective mechanism than court for achieving this.

Shopfront Youth Legal Centre, 2003, Submission in response to NSW Law Reform Commission paper on sentencing young offenders.

A further criticism of the application of the provisions of the Young Offenders Act suggests that conferencing needs to be supported by additional rehabilitative measures. According to the Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, in March 2012, 'the conference regime established under the *Young Offenders Act 1997* (NSW) is currently no more effective than the NSW Children's Court in reducing juvenile reoffending among persons eligible for a conference'.

Conferencing in Victoria produced lower re-offending figures, but it is also suggested that this may be influenced by the fact that Youth Justice Conferencing in that state considers matters that are more serious, and conferencing is not as easy to dismiss as a soft option.

Dr Weatherburn went on to say that '[o]ne can only speculate about the reasons for this but one possible explanation is that YJCs do not address the underlying causes of juvenile offending (e.g. drug and alcohol use, parental neglect and abuse, poor school performance, boredom and unemployment).'

The NSW Commission for Children and Young People supported this in its submission to the Review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW) in December 2011. It believes the current legislation does not meet the needs of children and young people for the following reasons:

- Recent research has revealed a greater understanding of the development of the adolescent brain until the age of 25. It has suggested that our understanding of the meaning of criminal responsibility for children and young people may need to be reassessed. In October 2019, Centre Alliance's Rebekha Sharkie put legislation to parliament to lift the age of criminal responsibility from 10 to 14, which was backed by independent MP Zali Steggall. The Australian Capital Territory in 2020 was the first jurisdiction in Australia to raise the age of criminal responsibility from 10 to 14, in the *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT).
- 'The attempt to combine the so called "justice" and "welfare" models of juvenile justice in the legislation has created a complex and sometimes contradictory amalgam of community-based sanctions and controls alongside formal court processes and detention. It is possible that this has led to "net widening", as police warn, caution or refer to conferencing children who might otherwise have been dealt with informally.'
- The principles of restorative justice that underpin youth justice conferencing are contentious and there is insufficient evidence for the effectiveness of youth justice conferencing in its current form in reducing recidivism. This supports the view expressed by Dr Weatherburn.

No further reviews have been undertaken of the *Young Offenders Act 1997* (NSW), but similar calls for raising the age of criminal responsibility were still being reported in 2023. Further, a general shift towards understanding young offenders in a more integrated and holistic way that includes their communities and families is important to break patterns of offending.

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Care and protection of children and young people

The Wood Royal Commission (1997) into police corruption spent its last two years investigating issues surrounding child abuse. Evidence emerged about the lack of effective procedures and processes for reporting and following up alleged instances of child abuse within government agencies and the broader community. It also highlighted the magnitude of child abuse in society and the need for better legislative responses to deal more effectively with the complexity of the issues surrounding child abuse.

As the rights of children emerged, so too did an awareness of the problems associated with child abuse and the long-term damage it can cause. Evidence also began to emerge that domestic violence and child abuse are linked, and they are good predictors of each happening.

In August 2006, the Northern Territory commissioned an investigation into child sexual abuse within Aboriginal communities. A report entitled *Little Children are Sacred, or Ampe Akelyernemane Meke Mekarle* was published in 2007. In response, the Howard government instituted the Northern Territory National Emergency Response, which included alcohol restrictions and partial quarantining of welfare benefits. This was widely criticised for its lack of consultation with First Nations peoples: it seemed to ignore the notion of self-determination, and was perceived by many as racist, protectionist and regressive.

In 2008, Justice James Wood headed the Special Commission of Inquiry into Child Protection Services in New South Wales, and recommended a number of changes to the child protection system currently operating in New South Wales. As the system is crumbling under the weight of notification of 'children at risk', Wood proposed a new category of mandatory reporting, whereby only the more serious matters will be referred to the Department of Communities and Justice, while non-urgent or less serious matters can be handled by the police, teachers and doctors.

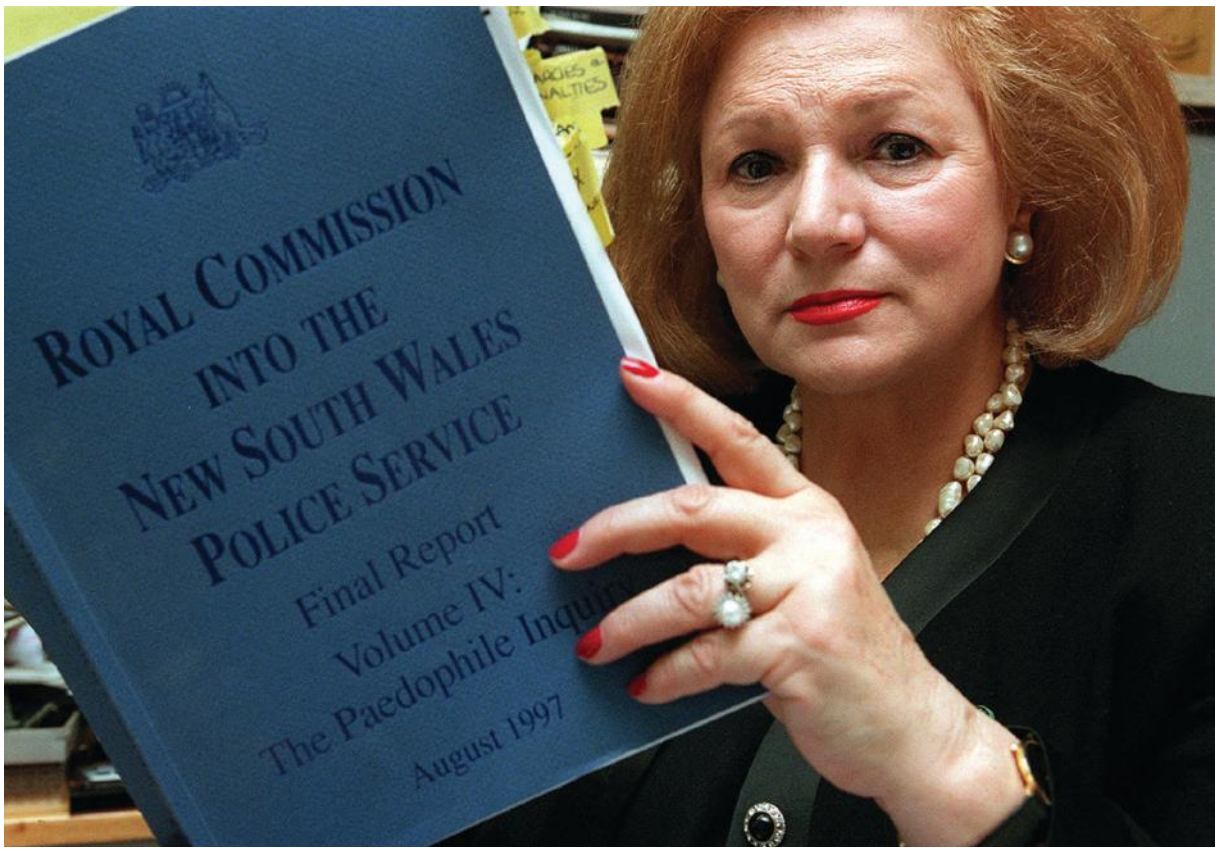

Figure 9.10 The 1997 Wood Royal Commission into police corruption spent its last two years investigating issues surrounding child abuse.

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The Royal Commission into Institutional Responses to Child Sexual Abuse has well documented the failing of a range of institutions across the country in adequately dealing with instances of child sexual abuse. In October 2018, the Federal Parliament issued an apology on behalf of the nation to victims whose cries for help were ignored. The extent to which adequate compensation will be forthcoming and the implementation of the commission's recommendations will be a test of the Commonwealth's resolve to finally ensure that the laws in place to protect children and young people are more effectively administered. All states have now been called upon to implement the child safe standards recommended by the Commission, but this issue continues to pose many challenges.

According to the Australian Institute of Health and Welfare, in 2021–2022 around 178 000 children came into contact with state and territory child protection services. This was a decrease from 2020–2021 (about 179 000 children), but before that, numbers had been rising since at least 2016–2017, when the number was about 168 300. It also noted that as at 30 June 2022, 45 400 children were in out-of-home care. Since 2018, the rate at which children are in out-of-home care has been fairly stable, at around 8.0 per 1000. Of those children in out-of-home care, around 90 per cent were in a home-based care placement. During 2021–2022, 70 per cent of children in out-of-home care had been in care for at least two years.

Children and young people in the workplace

A number of children and young people are engaged in the workplace, and most are satisfied with the benefits this offers. The two main issues, as outlined earlier, are that the incidence of work-related injuries and of harassment continue to be too high.

A further two issues regarding children in the workplace are rates of junior pay, which are in breach of the *United Nations Convention on the Rights of the Child* (1989), and the use of child labour in some industries in Australia. Child labour is where children between the ages of 4 and 15 years are forced to do work that affects their education and their social and psychological development. This is generally associated with poorer developing countries but has been identified in Australia in the textile industry. Reports have been made of children working long hours at sewing machines after school and during the school holidays. As these reports are made, they continue to be investigated by unions and governments.

International issues

Children around the world are exploited and abused where the laws of their countries fail to offer protection to them. In 2020, it was estimated that 300 000 children around the world were actively participating in more than 30 armed conflicts. Many of these children had been abducted, coerced or drugged into being soldiers; some had no other option. Children are often more easily manipulated because of their psychological and physical immaturity, making them obedient, cheap and disposable soldiers.

As of 2023, approximately 160 million children around the world were engaged in child labour, with negative implications for their physical, mental and social development. Nearly half of them – 79 million children – were working under hazardous conditions.

In countries ravaged by war and famine, where family structures have been destroyed, children lack the protection normally afforded to them within the family. Recently, in Australia, children sat in immigration detention centres, having broken no laws, as a result of the previous federal government's punitive laws relating to asylum seekers. In other countries, minors are still being executed for the crimes they have committed.

Australia's obligations under the *United Nations Convention on the Rights of the Child* (1989)

As discussed earlier in this chapter, the Committee on the Rights of the Child examines parties' compliance to the *United Nations Convention on the Rights of the Child* (1989) and their obligations under this convention. The committee can report and publish adverse findings on countries that have failed to enforce the rights of its children. States can choose to ignore or comply with such findings.

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Australia has been a strong supporter of this convention from the beginning and has an extensive body of federal and state law in place designed to protect and promote the welfare of children and young people. At the same time, there are still areas where Australia can do better.

Current deficiencies in Australian law regarding the *United Nations Convention on the Rights of the Child* (1989) include the following:

- The defence of 'lawful correction' is still available in all states and territories to parents who use **corporal punishment** on their children, although in New South Wales it has been limited by legislation prohibiting force to the head or neck, and force causing harm 'likely to last for more than a short period'.
- There are laws under which police can deny children and young people use of **public space** by asking them to leave or removing them; for example, Part 3, Division 2 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW).
- Children and young people are paid less for doing the same work as adults. Young people continue to be injured in the workplace at greater rates than adults.
- It has been argued that the criminal age of responsibility of 10 years is too low and should be raised to 14.

Execution of children

Child executions violate international law. It is acknowledged throughout the international community that putting to death child offenders negates the current thinking that children and young people have the potential for growth and change, and hence rehabilitation. It is further argued that execution denies the child or young person this chance. International law clearly denounces the death penalty for children and young people who have committed crimes when they were under the age of 18.

corporal punishment the physical punishment of people, especially of children, by hitting them

public space areas set aside in which members of the community can associate and assemble

Despite this, some countries still use the death penalty. The number of executions is small, but as Amnesty International states in its report *Stop Child Executions*, it is 'an affront to all notions of morality and decency when it comes to the protection of children – one of the most vulnerable groups in society'. Of those countries that still use the death penalty, many have publicly stated that they will not use it against children and young people. This, it is said, reflects 'the conviction that the lives of child offenders – due to a young person's immaturity, impulsiveness, vulnerability and capacity for rehabilitation – should never be simply written off'.

In Court

***Roper v Simmons* 543 US 551 (2005)**

In 2005 in the case of *Roper v Simmons*, the US Supreme Court ruled that the execution of child offenders is a violation of the US Constitution. This contrasts a ruling made in 1989 by the same court that executing 16- and 17-year-old offenders was constitutional. In 2005, the court found that there was now a national consensus against executing child offenders. The court reached this conclusion after considering international and national trends, scientific evidence, and appeals from human rights, religious, legal and child advocacy organisations.

Amnesty International has called for an immediate end to all child executions.

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The Amnesty International report quotes Mary Robinson, the former United Nations High Commissioner for Human Rights:

> The overwhelming international consensus that the death penalty should not apply to juvenile offenders stems from the recognition that young persons, because of their immaturity, may not fully comprehend the consequences of their actions and should therefore benefit from less severe sanctions than adults. More importantly, it reflects the firm belief that young persons are more susceptible to change, and thus have a greater potential for rehabilitation than adults.

Mary Robinson, 2022, Amnesty International, August.

Between 1990 and 2022, Amnesty International has documented 163 executions across 10 countries of persons who were children at the time of the offence for which they were convicted. These countries are China, Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, South Sudan, Sudan, the United States and Yemen. Several of these countries have changed their laws to exclude the practice. Iran has executed more than twice as many such persons as the other nine countries combined; at the time of writing Iran has executed 113 adults who were children at the time of the offence, since 1990.

Amnesty International states that:

> the exclusion of child offenders from the death penalty is now so widely accepted in law and practice that it has become a rule of customary international law – international rules derived from state practice and regarded as law (*opinio juris*) – and therefore binding on every state, except on those that have 'persistently objected' to the rule in question.

Amnesty International

Child executions also breach international treaties such as:

- The *International Covenant of Civil and Political Rights* (1966), Article 6: 'Sentence of death shall not be imposed for crimes committed by persons below 18 years of age.'
- The *United Nations Convention on the Rights of the Child* (1989), Article 37: 'Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age.'

Research 9.3

Research an international human rights issue that relates to children and young people (e.g. child slavery, child soldiers, forced child labour). Construct a fact sheet outlining the issue. To get started, search for the issue on the website of Amnesty International.

Figure 9.11 A child seen working at a ready-made garment factory in Dhaka, Bangladesh

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Table 9.1 Recorded executions of child offenders since 1990

Year	Recorded executions of child offenders	Total recorded executions worldwide	Countries carrying out executions of child offenders (numbers of reported executions are shown in parentheses)
1990	2	2029	Iran (1), United States (1)
1991	0	2086	
1992	6	1708	Iran (3), Pakistan (1), Saudi Arabia (1), United States (1)
1993	5	1831	United States (4), Yemen (1)
1994	0	2331	
1995	1	3276	Iran (1)
1996	0	4272	
1997	2	2607	Nigeria (1), Pakistan (1)
1998	3	2258	United States (3)
1999	2	1813	Iran (1), United States (1)
2000	6	1457	Democratic Republic of Congo (1), Iran (1), United States (4)
2001	3	3048	Iran (1), Pakistan (1), United States (1)
2002	3	1526	United States (3)
2003	2	1146	China (1), United States (1)
2004	4	3797	China (1), Iran (3)
2005	10	2148	Iran (8), Sudan (2)
2006	5	1591	Iran (4), Pakistan (1)
2007	14	1252	Iran (11), Saudi Arabia (2), Yemen (1)
2008	8	2390	Iran (8)
2009	7	714, excluding China	Iran (5), Saudi Arabia (2)
2010	1	527, excluding China	Iran (1)
2011	3	676, excluding China	Iran (3)
2012	1	682, excluding China	Yemen (1)
2013	3	778, excluding China	Saudi Arabia (3)
2014	12	1061, excluding China	Iran (12)
2015	9	1634, excluding China	Pakistan (5), Iran (4)
2016	2	1032, excluding China	Iran (2)
2017	6	993, excluding China	Iran (4), South Sudan (2)
2018	8	690, excluding China	Iran (7), South Sudan (1)
2019	7	657, excluding China	Iran (5), Saudi Arabia (1), South Sudan (1)
2020	3	483, excluding China	Iran (3)
2021	3	579, excluding China	Iran (3)
2022	5	835, excluding China	Iran (5)

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Chapter summary

- Historically, children had no legal rights. This began to change gradually in the nineteenth century, with the introduction of free compulsory education and laws limiting children's labour.
- The *United Nations Convention on the Rights of the Child* (1989) was an important development in promoting the rights of children and young people. More countries have signed this convention than any other international treaty.
- The law generally defines a child as a person under the age of 16, and a young person as a person aged 16–18.
- The status and rights of children under the law are contained mainly in legislation in the areas of work, education, discrimination, medical treatment and contracts.
- All states in Australia have enacted care and protection legislation over the last 30 years.
- Children and young people are given special consideration in respect to criminal law, which takes into account the age of the offender at the time of the offence.
- The *Young Offenders Act 1997* (NSW) provides diversionary measures for young offenders who have committed summary offences and some indictable offences.
- The United Nations Committee on the Rights of the Child oversees the implementation of the *United Nations Convention on the Rights of the Child* (1989).
- The NSW Advocate for Children and Young People is an independent body that conducts research related to children and young people.
- The Office of the Children's Guardian monitors out-of-home care in New South Wales and non-government adoption service providers. It also conducts 'working with children' checks.
- The Children's Court of New South Wales has a dual role with respect to children and young people. It hears criminal matters relating to young offenders handles care applications for children and young people who are considered to be at risk of harm.
- Department of Communities and Justice investigates reports of children who are considered at risk of harm.
- Non-legal mechanisms for protecting the rights of children and young people include counselling services and services offered by community organisations.

Multiple-choice questions

1 Which of the following is a feature of *doli incapax* in New South Wales?
- **a** Children and young people are responsible for their crimes from the age of 14.
- **b** There are certain crimes for which children and young people are not responsible.
- **c** Children under the age of 10 are not responsible for their crimes.
- **d** People with mental disabilities are not responsible for their crimes.

2 A 'young person' is a person:
- **a** under the age of 16.
- **b** between the ages of 12 and 16.
- **c** between the ages of 16 and 18.
- **d** between the ages of 18 and 25.

3 Which of the following is NOT a reason for the law to treat children and young people differently?
- **a** To prevent them from being exploited
- **b** To protect them from the consequences of making uninformed decisions
- **c** To give them the best chance of finding appropriate employment
- **d** To protect others from being disadvantaged by dealing with a person who is a minor

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4 Which of the following statements best describes Australia's obligations under the *United Nations Convention on the Rights of the Child* (1989)?
   a Laws must be passed within Australia to implement all of the convention's provisions.
   b Australia can pass whatever laws it chooses to, as it is a sovereign state.
   c Australia can pass whatever laws it chooses to, as it is a sovereign state, but it is obliged to pass laws to implement the provisions contained in the convention.
   d Australia will pass laws recommended by the UN General Assembly.

5 Which of the following bodies monitors the mandatory screening of applicants for jobs in childcare?
   a Australian Council of Trade Unions
   b Department of Communities and Justice
   c NSW Office of the Children's Guardian
   d Committee on the Rights of the Child

Short-answer questions

1 Outline what changed in the treatment of children and young people by the end of the nineteenth century. Explain why this occurred.
2 Provide examples of contexts where the criminal justice system treats children and young people differently from adults.
3 Explain how the *Young Offenders Act 1997* (NSW) is unique and outline some of the recent criticisms made of the Act.
4 Comment on the extent to which the United Nations can regulate the implementation of the *United Nations Convention on the Rights of the Child* (1989) throughout Australia and the rest of the world.
5 Outline the roles of the NSW Commission for Children and Young People.
6 Discuss some challenges that may confront the Department of Communities and Justice in performing its role effectively.
7 Identify at least two non-legal mechanisms that promote the rights of children and young people.

Extended-response question

Critically evaluate how the legal system responds to the issue of juvenile justice. Refer to strategies for crime prevention, issues surrounding arrest and detention, diversionary schemes and court proceedings for young people.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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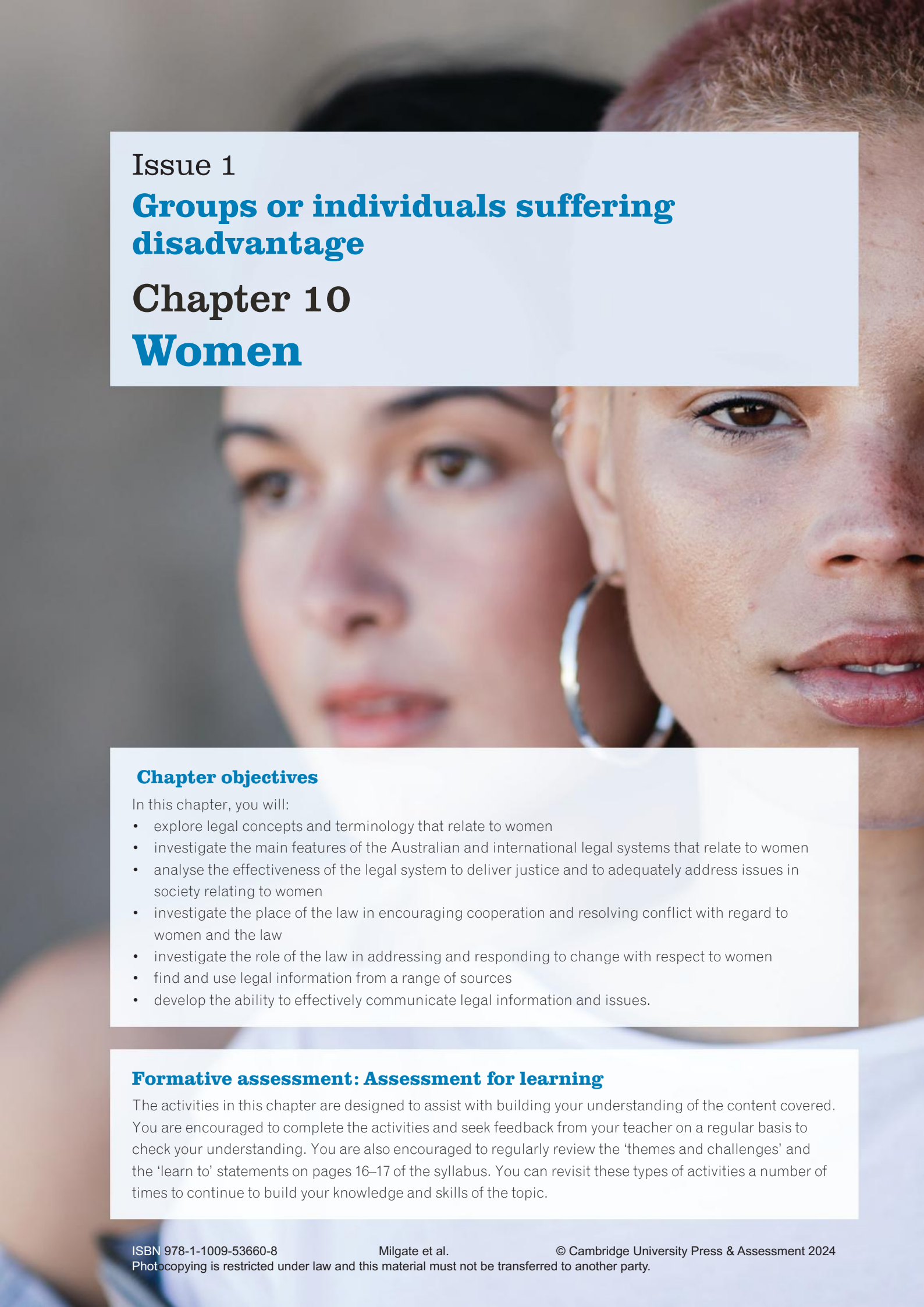

Issue 1

Groups or individuals suffering disadvantage

Chapter 10

Women

Chapter objectives

In this chapter, you will:

- explore legal concepts and terminology that relate to women
- investigate the main features of the Australian and international legal systems that relate to women
- analyse the effectiveness of the legal system to deliver justice and to adequately address issues in society relating to women
- investigate the place of the law in encouraging cooperation and resolving conflict with regard to women and the law
- investigate the role of the law in addressing and responding to change with respect to women
- find and use legal information from a range of sources
- develop the ability to effectively communicate legal information and issues.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Married Persons (Property and Torts) Act 1901 (NSW)
Women's Legal Status Act 1918 (NSW)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Jury Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Property (Relationships) Legislation Amendment Act 1999 (NSW)
Family Law Legislation Amendment (Superannuation) Act 2001 (Cth)
Fair Work Act 2009 (Cth)
Workplace Gender Equality Act 2012 (Cth)
Civil and Administrative Tribunal Act 2013 (NSW)
Civil Law and Justice Legislation Amendment Act 2018 (Cth)
The Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023 (Cth)

SIGNIFICANT CASES

O'Callaghan v Loder [1984] EOC 92–023
Australian Iron & Steel v Banovic [1989] HCA 56

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10.1 Women and the law

For centuries, women have campaigned for change in order to have their voices heard. Throughout history and around the world, men have held most of the political and social power as well as most of the wealth. Intentionally or not, policies and laws have favoured men in all facets of society, especially in the workplace. Gender should not be a factor in determining the worth of an individual's work, but women have been discriminated against in many areas and denied equality of opportunity.

While this chapter primarily examines the experiences of women in relation to the law, it is important to recognise that gender is not binary. As well as men and women, there are many diverse genders including transgender, non-binary and gender fluid people.

At both federal and state levels, there is a substantial body of legislation and policy specifically relating to the rights of women. In this unit of study, the changing status of women in Australia today will be examined, as well as the legal and non-legal mechanisms for achieving equality (primarily in the workplace). The unit will also include an evaluation of the effectiveness of these responses.

Other issues relevant to the rights of women in Australia today will be covered in the HSC course in the unit on family law.

Historical roles and attitudes

For much of recorded history, the attitude that women are different from, and inferior to, men in significant ways has been reflected in national laws and policies, including in Australia. These attitudes, ideas and policies meant that women had only a short period of paid employment – if any – until they married and took up the role they were expected to fulfil: homemaker. Men – often white men, particularly in Western societies – almost exclusively held all positions of power and owned practically all property. It followed that the position of women in society was one of subservience and powerlessness. Women's working lives involved domestic duties such as rearing children, preparing food, sewing and various other tasks in the home.

feminism
the advocacy of rights for women on the basis of the equality of men and women; there are many varieties of feminist ideas in political and social thought

Because most women were bearing children (due to no reliable and safe contraception being available), they had to remain at home, dependent on their male partners.

Views of women's 'essential nature' extended to various aspects of social life, and sometimes attempts were made to explain or justify these views. In Victorian England, for example, much was written and said by men about women, from perspectives on why women belonged in the home bearing children to analysis by men of women's sexual desires.

There have been significant times throughout the last 120 years where women's expected roles were more prominently challenged. During the two World Wars, many women, particularly white women, successfully took on traditionally male roles due to the shortage of men at home.

This was especially so during World War II. Women ran farms, worked in factories and generally maintained productivity at home. Although this work was at times difficult, many women also found it liberating. It provided an opportunity to show that they had potential beyond their traditional roles in society, and they began to ask why many areas of employment were denied to them and, importantly, why they did not receive equal pay. In 1943, an Australian Women's Conference for Victory in War and Victory in Peace was held in Sydney. The participants drew up a program of reforms for the government to incorporate into post-war Australia. This document, the Australian Women's Charter, contained 23 objectives, including the establishment of a national network of child-care centres and equal pay. It is considered a 'landmark manifesto' of Australian **feminism**.

For many women, though, the end of the war meant room had to be made for the returning soldiers, and they resumed their domestic roles as wives, mothers and homemakers.

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Figure 10.1 A 1991 stamp commemorates the 50th anniversary of Women's Wartime Services during World War II, highlighting the many roles women took on during this period.

The 1960s and 1970s was the next important period when women challenged their enforced secondary status to men. The feminist movement of this time took on matters such as discrimination in the workplace and liquor licensing laws in some states, which said women could not be served in a public bar. Important pieces of legislation such as the *Family Law Act 1975* (Cth), the *Anti-Discrimination Act 1977* (NSW) and the *Sex Discrimination Act 1984* (Cth) were products of this era.

In 1975, the United Nations proclaimed that year to be International Women's Year, to promote issues relating to women around the world. Today in Australia there is a significant body of law that protects the rights of women and promotes equality of opportunity. Having said this, the status of women in society continues to be affected by particular issues and concerns. For example, women still lack pay equity, are significantly more likely to experience violence from a partner and are under-represented in senior management roles in the workplace and in parliamentary roles at the state and federal level.

In 2017, the #MeToo movement emerged in response to the treatment of women in the entertainment industry, but quickly grew to include the experiences of all women. The movement involved women publicly sharing their experiences of sexual harassment and discrimination. Some of the experiences reported involved high-profile men, who in some cases went on to be charged with criminal offences. For example, in 2020, Harvey Weinstein – one of the most influential movie producers in Hollywood – was found guilty of sexual assault offences and was sentenced to 23 years imprisonment. The movement broke the silence over the treatment of women and garnered significant publicity and support worldwide. This was further animated by the case of the actress Alyssa Milano in 2017, which shone a light on the scale and extent of sexual harassment of women at work. However, it was the Brittany Higgins case, in which it was alleged that Higgins was raped in a federal parliamentary office, that is considered to have ignited the Australian #MeToo movement nationally. This case was abandoned, but in a subsequent civil defamation case, using the standard of 'balance of probabilities', the judge decided that there was 'substantial truth' to the allegation that Higgins had been raped.

Review 10.1

1 Describe the social attitudes about women prior to the twentieth century and give some reasons why these attitudes permeated society.
2 Construct a detailed timeline to outline the historical development of the roles of women in society.

Progress and challenges for women

Education, training and workforce participation

A person's status in Western society is greatly influenced by opportunities to acquire skilled employment. Historically, women who wanted to enter professions had many barriers to overcome, some of which persist today. The formal education that most young girls received was usually short in duration and assumed a future as a homemaker.

In the nineteenth century, social and political norms provided little motivation and a significant lack of support for women who wished to study beyond primary school. Those women who were able to attend university to study subjects such as law and medicine did so in the knowledge that even if they passed their exams, they would not be given degrees and were effectively barred from practising in their chosen field.

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Figure 10.2 Gender indicators in education.
Source: Australian Bureau of Statistics

This did not deter some women, whose thirst for knowledge, equity, equality and a chance to use their talents spurred them on regardless.

Passage of the *Women's Legal Status Act 1918* (NSW) opened the way to recognition of women's right to enter professions. Many women who had successfully completed their degrees were able to do so, and the first women were elected to parliament in the 1920s.

The rate of women's participation in education and attainment of qualifications has continued to increase significantly over the decades, with women now more likely than men to hold higher education degrees (see Figure 10.2). The extent to which this has improved the pay gap between men and women will be discussed later in this chapter.

Women enrolled in higher education comprised 60.4 per cent of enrolments in 2021. However, women have been under-represented in trade apprenticeships in Australia and are substantially under-represented in the manual trades. The number of women in manual trades was less than 3 per cent in 2022. This seems consistent with the level of occupational segregation seen in New South Wales and throughout Australia today, especially in the trades. With respect to labour force participation, women have made significant gains in the period covered by the Australian Bureau of Statistics Labour Force statistics, with participation rising from 43.5 per cent in February 1978 to 62.2 per cent in 2023. However, across Australia, women still constitute the majority of part-time and casual workers. In 2022, women made up 39 per cent of all full-time workers and 68 per cent of part-time workers. This trend has remained relatively unchanged over the last decade. Workers in these categories are often not afforded the same job stability, opportunities and other benefits available to those in full-time employment, such as parental leave and holiday pay.

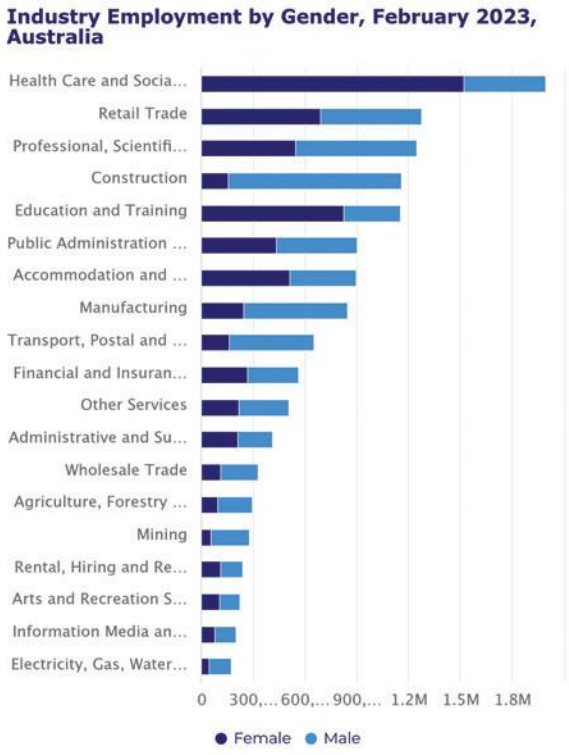

Figure 10.3 Workforce participation by gender and occupation

Analysis 10.1

1 Examine Figure 10.3 and list the occupation groups in which women are well represented and under-represented.
2 Outline possible reasons, stemming from the history of job availability for men and women, for women's under-representation in the following occupations: construction, manufacturing, mining, transport, postal and warehousing.

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Social security

In the early twentieth century, the provision of welfare payments to people who were unemployed or otherwise experiencing difficulty earning an income was not seen as a responsibility of the federal government. This changed with the Great Depression in the early 1930s, when it became apparent that, at times, people might be unemployed due to circumstances beyond their control.

Unemployment benefits today are available to women as well as men. There are also family allowance payments to assist with the costs of raising children, and low-income families may receive rental assistance to help with the costs of private rental accommodation.

All people who have carers' responsibilities – for example, for a family member with a disability – can receive Carer Payment benefits, because their responsibilities affect their ability to earn an income. The majority of carers are women. Most recipients of parenting payments are also women. A person, regardless of marital status, can qualify for parenting payments if they have primary responsibility for one or more young children and meet certain income tests. Separated parents can receive financial assistance with the cost of caring for their children through the Child Support Agency.

Figure 10.4 Studies have shown that, over the long term, women fare far worse financially than men after a divorce.

In addition, in 2023, approximately 80 per cent of lone-parent families were headed by women. The responsibilities of childcare present significant barriers to entering the workforce. While financial support from the government is therefore vital, most people who are dependent on welfare as their main source of income nevertheless live on or below the **poverty line**.

poverty line
the minimum level of income needed to meet basic necessities below which a household is defined as poor; the poverty line is different in different countries

Marriage

In the past, when a woman married she effectively lost the legal identity she had as a single person. The law did not recognise the existence of the woman within the marriage, as her legal identity became that of her husband's. They were regarded as ***unito caro***.

unito caro
(Latin) 'one in flesh'; meaning that when a woman married, in the eyes of the law, she assumed the legal identity of her husband

In 1765, William Blackstone, Vinerian Professor of Law and Solicitor General, said (using language that was sexist, both then and now):

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover*, she performs everything and is therefore called in our law-french a *feme-covert*.

William Blackstone, 1765, *Commentaries on the laws of England, Book 1*, p. 442.

The effect of this type of legal reasoning and attitude was far-reaching. Almost all women before the twentieth century were married and as a result nearly all women were assigned an inferior status in society. Evidence of this can also be found in the areas discussed in this chapter.

Today, the rights and responsibilities of men and women in relationships can be found in the *Family Law Act 1975* (Cth) and the *Property (Relationships) Legislation Amendment Act 1999* (NSW).

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The right to own property

A married woman lost all control over any personal property she owned at the time of the marriage, and also any she acquired during the marriage. If she owned any **real property**, it came under her husband's control, but remained hers for the purpose of inheritance. As the husband was the breadwinner and the wife was dependent on him (an inferior position), women were generally subject to the will of their husbands.

real property
property consisting of land and the buildings on it

feme sole
(French) a single woman

suffrage
the right to vote, guaranteed by the law

suffragette
a term used to describe a supporter (whether male or female) of the suffrage movement

This situation continued until the *Married Women's Property Act 1882* was passed in England, and later a similar act was passed in New South Wales: the *Married Persons (Property and Torts) Act 1901* (NSW). These Acts gave women greater control over their personal property. At the time of its passing, the 1901 Act was seen as forward-thinking and progressive, and it established an independent legal status for married women.

The Act effectively allowed women to retain ownership of any property they brought into the marriage and to make dispositions of property by means of a gift. The Act also protected any property left to a woman in a will and protected a woman from a husband who was unscrupulous or a spendthrift. In other words, a husband could not spend his wife's money or sell any property his wife had inherited from her family or other sources. Today, men and women can hold, manage and dispose of property in their own right and as they see fit. The *Family Law Act 1975* (Cth) and the *Property (Relationships) Legislation Amendment Act 1999* (NSW) recognise the financial and non-financial contributions made by parties to a marriage or de facto (including same-sex) relationship before, during and after the relationship. As such, these pieces of legislation recognise the role played by the homemaker in contributing to the assets of the family.

The *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) now allows superannuation to be divided in the event of marriage breakdown. This was an important development, as superannuation is a sizeable asset, especially in the future when it matures. Prior to the passing of this Act, there were strict rules about when and how you could collect your superannuation; for example, when a person resigned from their job. As a result, many women who had been contributing in the home, but who had no formal superannuation in their name, had no access to their share of the family's superannuation, which was usually in the husband's name. The legislation allows the superannuation to be split into two funds, one in each spouse's name. These aspects of property in relationships will be covered in the HSC course under family law.

The ability to sue and enter contracts

Before 1901, a ***feme sole***, or single woman, had the same rights as a man for civil wrongdoing (torts) and the same rights to sue or be sued and to enter into contracts, but this was not the case for married women. If a married woman was being sued, her husband had to be a co-defendant, and if she wanted to sue someone, her husband had to be a co-plaintiff. A husband and wife were also not permitted to sue each other.

Similarly, by herself, a married woman was not allowed to enter into a contract – her husband's signed authority was required. The legal position of women at this time reaffirmed the legal reasoning that husband and wife were one in law.

This situation changed with the *Married Persons (Property and Torts) Act 1901* (NSW). Either partner had the ability to sue or be sued, to sue the other and to obtain remedies to seize and protect their own separate property. Women could also enter into contracts on their own. Today, the common law and legislation recognise the rights of all men and women who are not minors to sue and be sued, and to enter contracts.

The right to vote

For women everywhere, the right to vote (**suffrage**) has always symbolised the fundamental right of all members of a democratic society. But until the early twentieth century, this right was not generally available to women. The right to vote was also an important symbol of women's struggle for equality. In Britain, Emmeline Pankhurst was the driving force behind the **suffragette** movement.

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Suffragette marches on parliament grew in size from approximately 300 marchers in 1906 to 4000 marchers in 1907. Suffragettes chained themselves to pylons and gates and disrupted many political meetings.

Emmeline Pankhurst was driven by the injustice of a lack of universal suffrage. She was determined to right this wrong, as was evident when she said that to get reform realised:

> You have to make more noise than anybody else, you have to make yourself more obtrusive than anybody else, you have to fill all the papers more than anybody else, in fact you have to be there all the time and see that they do not snow you under.

Emmeline Pankhurst, 1913, 'Freedom or death' speech delivered in Hartford, Connecticut, 13 November.

Rose Scott was an important person in the Australian suffragette movement. In a similar vein to the movement in England, Scott, along with other women, marched and held rallies to raise awareness around the issue of the right to vote.

Politicians in Australia were certainly more receptive to the issue of universal suffrage. This may have been in part due to the fact that Australia was a young country and the contributions that women had made in a pioneering sense were well appreciated. Hence, the vote for women in England lagged behind that of Australia, even though it was the suffragette movement in England that inspired the movement in Australia. Regardless, Australia certainly was one of the world leaders in giving women the vote.

As can be seen in Table 10.1, women in South Australia gained the vote in 1894, and all non-Indigenous women were allowed to vote in Commonwealth elections as of 1902. The rest of the states soon followed. First Nations women did not gain the right to vote in federal elections, in every state, until 1962. Until that time, First Nations women had been excluded by the *Commonwealth Franchise Act 1902* (Cth) (now repealed).

Table 10.1 Years in which voting rights for non-Indigenous Australian women were won

State	Voting rights	Right to stand for parliament
South Australia	1894	1894
Western Australia	1899	1920
Australia (Commonwealth)	1902	1902
New South Wales	1902	1918
Tasmania	1903	1921
Queensland	1905	1915
Victoria	1908	1923

Jury service

Even though women had gained the right to vote, the right to serve on juries came much later. In New South Wales, like many other parts of Australia, a person had to satisfy certain property qualifications to serve on a jury. This was discriminatory because at the time most household property was in the husband's name. In 1947, this requirement was dropped, but there was still no automatic right to serve; women had to apply to do so. In 1968, the jury roll automatically included all women, but if a women didn't wish to be included she could simply advise the officer responsible for the rolls, and she would be removed.

During debate in parliament over the introduction of the *Jury Act 1977* (NSW), the Attorney-General, F.J. Walker, said:

exemption being immune from certain duties and obligations

> ... that because of an outmoded selection system and the proliferation of persons who may claim **exemption** from jury service, the stage has been reached where the jury rolls now in use are not truly representative of the ordinary citizen.

Attorney-General F.J. Walker.

As the main aim of the Jury Act was to ensure 'that jury service, so far as is practicable, will be shared equally by all adult members of the community',

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the responsibility to serve on juries was extended to all those enrolled to vote. This, of course, included all women.

Women from non-English-speaking backgrounds

Migrant women throughout Australia experience the same barriers as other women, but the problems are compounded by a language barrier, especially in the workplace, and also by racism. There is a high concentration of migrant women in blue-collar jobs, which are not known for flexible working hours. Generally, migrant women have less confidence in negotiating job-sharing or part-time options with their employers. Moreover, they are often less able to afford to work only part-time.

Figure 10.5 Migrant women throughout Australia experience problems compounded by a language barrier, especially in the workplace.

Migrant women have been employed in factories in substandard conditions throughout Australia. Because these women have little English, their rights have not always been made clear to them. Some of these workplaces are characterised by unsafe conditions, onerous shift work, bullying, inadequate toilet and rest room facilities, little attempt to have multilingual health and safety signs, and pay that is lower than the legal minimum wage. The trend towards contracting labour hire companies for casual workers has exacerbated the problems, as companies thereby avoid legal obligations that they would otherwise have to employees.

A large number of migrant women also carry out home-based work. While this work offers flexible hours, and there is no need to pay for childcare, evidence suggests that many women work long hours in poor conditions and are paid a pittance on a piecework basis. As far back as 1992, the federal government initiated an 'Inquiry into Equal Opportunity and Equal Status for Women in Australia', which resulted in the publication of the *Half Way to Equal* report. This report identified the key issues blocking migrant women from obtaining work outside the home were proficiency in English, access to child care and equal access to opportunities. It recommended providing more services aimed at migrant women, as well as expanding workplace induction and training programs. However, more than ten years later, the 2007-08 report of the Australian Human Rights Commission Listening Tour recorded the Asian Women at Work Action Group's concerns about the lack of support and assistance for migrant women. These problems affecting migrant women are still very much in evidence in 2023.

The discussion paper 'Migrant and Refugee Women' from the Office of the Prime Minister and Cabinet in 2023 highlighted the following statistics:

- The unemployment rate for women who have migrated to Australia is 6.29 per cent compared to 5.40 per cent for all Australian women and migrant men.
- Migrant and refugee women have a significantly lower rate of workforce participation compared to migrant and refugee men (47.3 per cent and 69.5 per cent respectively).
- Migrant and refugee women are over-represented in non-professional care occupations including child carers, personal care assistants, and aged and disability carers.
- Only 47 per cent of migrant women without a qualification were employed in 2018–2019, compared to 71 per cent of migrant males without a qualification.

Department of the Prime Minister and Cabinet, 2023, 'Migrant and refugee women'.

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Today, even migrant women with a high level of educational qualifications may not be able to work in Australia without undertaking expensive bridging courses, sometimes on top of a recognised language course. As a result, these women must take jobs that pay far less than the jobs they would have in their home countries, because their qualifications are not recognised in Australia.

Review 10.2

1 Explain some of the main issues workplaces create for women from non-English-speaking backgrounds.
2 Outline why women from non-English-speaking backgrounds are more likely to be exploited in the workplace than women who speak English.

Research 10.1

Asian Women at Work (AWATW) has a membership of over 1300 migrant women workers. The group works to educate and empower Asian women workers in Australia. View the website of AWATW for more information.

1 Search online for websites that discuss AWATW's activities.
2 Outline the specific difficulties that migrant women face at work.
3 Outline how AWATW recommends women can tackle these difficulties.
4 Discuss which agents would be involved in these efforts to tackle difficulties at work and the roles of these agents.

First Nations women

Aboriginal and Torres Strait Islander people should be aware that this section contains information which may be confronting.

The impact of invasion and colonisation on First Nations women was, and continues to be, devastating. In addition to disease and massacre, it is generally accepted that there were many examples of young girls and women being victims of sexual assaults by members of the non-Indigenous community. For the children of the Stolen Generations and their families, the practice of taking children from their parents resulted in great spiritual, physical and emotional suffering. Today, First Nations women experience lower outcomes on most indicators of health and wellbeing. As at 2023, the life expectancy of First Nations women is 75.6 years for females, 8.1 years less than for non-Indigenous females (83.8 years).

First Nations women are twice as likely to suffer from cervical cancer and eight times more likely to die from it than non-Indigenous women. Diabetes is also a major problem. First Nations women between the ages of 35 and 64 are 33 times more likely to die from diabetes than non-Indigenous women.

The labour force participation rate for First Nations women is substantially lower (51.5 per cent) than that for First Nations men (65 per cent) and non-Indigenous women (59.2 per cent). With respect to educational indicators, First Nations women fare significantly worse than non-Indigenous women and the general non-Indigenous population on retention rates to Years 11 and 12, and post-school and tertiary qualifications. There has been a slight improvement in some of these areas, but thus far, government attempts to overcome these entrenched disadvantages have failed.

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Review 10.3

1 Outline some of the challenges facing First Nations women today.
2 Assess why some of the attempts to resolve these issues have failed.

Figure 10.6 The rate of Indigenous women gaining tertiary qualifications is increasing, but it is still lower than the rate for non-Indigenous women, due to the barriers faced by First Nations women.

10.2 Legal responses

International law

opened for signature (of a treaty) negotiations have concluded and the treaty is ready for parties' signatures; many treaties, especially those convened by the United Nations, will be open for signature only until a certain date; others, such as the Geneva Conventions, are open for signature indefinitely

entered into force (of a treaty) having become binding on those states that have consented to be bound by it

The main treaty that addresses discrimination against women around the world is the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW). It was **opened for signature** in 1979 and was **entered into force** in 1981.

The preamble of CEDAW acknowledges that the *Charter of the United Nations (1945)* and *The Universal Declaration of Human Rights* (1948) affirm that all human beings are born free and are equal in dignity and rights. It also acknowledges that under human rights treaties, states have responsibilities to 'ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights'.

It affirms that, in spite of this, there is still discrimination against women around the world. The treaty states that this discrimination:

> ***Convention on the Elimination of All Forms of Discrimination against Women* (1979)**
> ... hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.

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Figure 10.7 A discussion held in Spain in 2021 as part of activities revolving around the *Convention on the Elimination of All Forms of Discrimination against Women* (1979)

The CEDAW contains 30 Articles. Articles 1–16 set out the main rights of women. Articles 17–22 outline the powers and responsibilities of the Committee on the Elimination of Discrimination against Women, the body set up to monitor the implementation of the treaty. Articles 23–30 set out the provisions governing the formal operation of the treaty; for example, the time frame for its being open for signature and entering into force, and how disputes about interpretation are to be resolved.

As a signatory country, Australia has an obligation to ensure that its laws and policies protect the rights of all women and promote equality of opportunity.

The role of the United Nations in protecting the rights of women

The United Nations is the mechanism whereby countries around the world meet and sign international declarations and treaties. The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) has been important for forwarding the rights of women throughout the world. Today there are 189 parties to this convention.

However, with all aspects of international law there is a difference between signing an international treaty and ratification. Due to the sovereignty of all **states**, there generally has to be the political and/or economic will before a state will agree to sign a treaty. Most states act out of self-interest, and the United Nations can only pressure states to comply with international law. Once a state has signed a treaty, the UN committee structure monitors and reports on the extent to which they are complying with their international obligations.

state
a politically independent country

This is no different for the CEDAW. The Committee for the Convention on the Elimination of Discrimination against Women was established under Article 17 of the convention. The committee has 23 members who are considered experts in fields relevant to the treaty. This committee is different from other human rights committees in that all the members have always been women. The members of the committee serve four-year terms and usually meet once a year for two weeks. The committee monitors the implementation of the treaty by examining reports submitted by states that have ratified or acceded to CEDAW.

Australia has a responsibility under CEDAW to report to the committee every four years, or as the committee may require, on the steps it has taken to give full effect to the rights contained in it. However, having a federal government structure can present difficulties in ensuring that all states are complying with the treaty.

The committee experiences significant difficulties as a mechanism set up to oversee the implementation of the treaty because the states that have become a party to it have made many **reservations**. It is well documented that CEDAW has had more reservations than any other treaty and hence the committee has limited powers to promote its implementation.

reservation
a statement made by a state when signing or ratifying a treaty that allows it to exclude certain provisions or modify them as they apply to the state's own practice

The main provisions in Articles 1–16 of CEDAW are outlined on the following page.

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***Convention on the Elimination of All Forms of Discrimination against Women* (1979)**

Article 1 Defines discrimination against women as 'any distinction, exclusion or restriction made on the basis of sex that impairs or nullifies women's enjoyment of human rights and fundamental freedoms'.

Article 2 States that are a party to the treaty will condemn discrimination against women and will pursue means to eliminate it.

Article 3 States should take 'all appropriate measures, including legislation, to ensure the full development and advancement of women' guaranteeing them the same fundamental human rights and freedom as men.

Article 4 Parties are to adopt special measures to ensure the equality of de facto couples between men and women and to protect maternity. These positive measures are not to be considered discriminatory.

Article 5 Social and cultural patterns of men and women are to be modified with the aim of eliminating prejudices and customary practices that are based on the inferiority/superiority or stereotyped roles of men and women. The importance of maternity to children and parenting as the responsibility of both men and women is to be upheld.

Article 6 All forms of traffic in women and exploitation of prostitution of women are to be eliminated.

Article 7 Discrimination against women in public and political life in regard to voting, participation in government and non-government organisations is to be eliminated.

Article 8 Women shall be given 'the opportunity to represent their Governments at the international level and to participate in the work of international organizations'.

Article 9 Women shall have 'equal rights with men to acquire, change or retain their nationality'.

Article 10 Women shall have the same rights as men to education and training.

Article 11 Workplace discrimination against women is to be eliminated. This includes equality of opportunity, equal pay and conditions, as well as discrimination on the basis of pregnancy and maternity.

Article 12 Discrimination in the area of healthcare is to be eliminated, and adequate services throughout pregnancy, confinement and the post-natal period are to be available to all women.

Article 13 Discrimination against women in economic areas such as family benefits and finance are to be eliminated, and women's participation in areas of social life such as sports and cultural activities is to be promoted.

Article 14 Discrimination against women who face particular problems in rural areas is to be eliminated.

Article 15 Women are to be equal with men before the law. This includes in all aspects of civil law and with respect to contracts.

Article 16 Discrimination against women in marriage and family relations is to be eliminated. This includes equal rights with men in respect to entering a marriage and dissolution of a marriage. It also includes the same rights and responsibilities for both parents.

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Research 10.2

1 Select five Articles from the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW). Outline some state or federal legislation that has provisions consistent with CEDAW.
2 View the CEDAW website and identify some countries that are not signatories to the treaty. Propose a hypothesis on why this might be the case.

Domestic law

Legislation protecting women from discrimination exists at both state and federal level in Australia.

Discrimination means treating someone unfairly because of some characteristic. Discrimination on the basis of sex may be considered to include discrimination because of someone's marital status or because they are pregnant or likely to become pregnant. There are two types of sex discrimination: **direct discrimination** and **indirect discrimination**. Direct discrimination is a more blatant form and is more easily identified; for example, male employees being offered first choice for extra overtime ahead of female employees.

Indirect discrimination is usually harder to detect. It occurs when there is a procedure, rule or practice that, on the face of it, is the same for everyone and not discriminatory, but when carried out actually discriminates against a particular group of people. Indirect discrimination can occur even when there is no intention to discriminate. An example provided by the Australian Human Rights Commission is a situation where a manager offers a wage increase to all employees who have worked for the company for a number of years without interruption. On the face of it this may not seem discriminatory; however, given the fact that many more women than men interrupt their working lives for a period of time when they have children, this policy has the effect of treating women less favourably than men.

Sex Discrimination Act

Some, but not all, provisions of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) were implemented in Australian law through the *Sex Discrimination Act 1984* (Cth).

The Act aims to eliminate discrimination on the basis of sex, marital status or pregnancy in a number of key areas, such as employment; education; the provision of goods, facilities and services; accommodation and housing; insurance; and superannuation. The Act explicitly included **sexual harassment** as a form of discrimination in employment and education and makes this behaviour illegal.

Figure 10.8 Sex discrimination continues to be a topical issue. In 2021, Independent Zali Stegall introduced the Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill in Parliament.

direct discrimination a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of sex, race, national or ethnic origin, age, sexuality or other characteristic

indirect discrimination a practice or policy that appears to treat everyone in the same manner, but which adversely affects a higher proportion of people from one particular group

sexual harassment any unwelcome sexual behaviour, such as sexual advances, suggestive comments, unwanted touching, written communications or gestures, especially in the workplace

The other main aim of the Act is to promote community respect for the principle of the equality of men and women. The Act makes it illegal to:

- discriminate against someone on the basis of sex, marital status or pregnancy
- dismiss someone from their job on the basis of the person's family responsibilities
- sexually harass someone.

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Sexual harassment is any unwelcome or unwanted sexual behaviour that makes a person feel humiliated or offended, and where that reaction is reasonable in the circumstances. It occurs when a person is subject to unwelcome behaviour from others because of their gender. This behaviour can include unwanted sexual advances, touching without consent, or making gender-oriented jokes or suggestive comments.

Often there is a power imbalance between the harasser and the harassed; usually the harasser occupies a higher position in the workplace. The person being harassed may think that their advancement, or indeed continued employment, depends on accepting such sexual overtures. This can make it difficult to establish a case for the harassment if the person decides later to make a complaint. In *O'Callaghan v Loder* [1984] EOC 92–023, Loder, who was the Commissioner for Main Roads, made sexual advances to an employee, O'Callaghan. While the NSW Equal Opportunity Tribunal recognised the power imbalance and was sympathetic to O'Callaghan, it nevertheless held that there is also an onus on the employee to make it known to the employer if their conduct is unwelcome. The tribunal was not satisfied that O'Callaghan had made it clear to Loder that she was offended by his behaviour; therefore, if Loder was not aware that his conduct amounted to sexual harassment, he did not breach the law.

Sexual harassment is still a pervasive element in the workforce today. The #MeToo movement during 2017–2022 exposed the harassment of women within the entertainment industry by some high-profile men in Hollywood and around the world. The election of seven women in what were 'traditional' Liberal party seats at the 2022 election (the Teal Seats) triggered commentary that had these women pursued the traditional pathway through the Liberal party, most would probably not have been preselected to contest those seats. There are still calls for the Liberal party today to increase its percentage of female parliamentarians and continued debate around quotas. The Labour party, which has had quotas in place for some time, has 10 women in its 23-member Cabinet.

A person who has a complaint under the *Sex Discrimination Act 1984* (Cth) can take action through the Australian Human Rights Commission (AHRC), which was set up under the *Australian Human Rights Commission Act 1986* (Cth). The AHRC will investigate the complaint and organise a conciliation conference with the other party to try to resolve it. If conciliation fails, the complainant may make an application to the Federal Circuit Court or Federal Court to have the complaint heard.

Media

Twelve women sue fresh produce giant over alleged sexual harassment

Simone Fox Koob

The Sydney Morning Herald

20 January 2024

Twelve women who were seasonal workers at a giant South Australian tomato glasshouse are suing one of the country's largest fresh produce companies for almost $4 million, alleging they were repeatedly sexually harassed at work.

The case, lodged last year in the Federal Court, has been brought by women who were employed by a labour hire company and performed contract work for Perfection Fresh at the Two Wells Glasshouse, a 43-hectare farm about 50 kilometres north of Adelaide.

Documents released by the court to this masthead outline the workers' claims of sexual harassment, which they allege was carried out by two men who were in positions of 'authority, trust and control in relation to the applicants'.

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The women claim sexual harassment was widespread across the workforce, an allegation denied by Perfection Fresh. A court order prevents identifying the women.

The first man is alleged to have made unwanted sexual advances and requests for sexual favours. He allegedly told one woman he wanted to have sex with her on work premises, offered to get them a motel room, asked to kiss her and regularly touched her in a sexualised manner.

In one alleged incident, while the woman was picking vegetables, he is said to have approached her from behind and pushed his hands down the front of her pants. He is alleged to have exposed himself several times at work, in one instance saying: 'Can you have a feel of it; is it different from your husband?'

Another woman says that while she was cleaning a lunchroom, the same man exposed himself to her and pulled her hands towards his genitals before she struggled free and fled. She says that on more than a dozen occasions, he would come into the lunchroom while she was cleaning and expose his penis and ask her to touch or suck it.

While she was working in the rows where workers pick tomatoes in the glasshouse, on at least half a dozen occasions he allegedly unzipped his pants and grabbed her hands, aggressively pulling them towards his crotch and occasionally forcing her hands onto his penis.

Figure 10.9 In 2024, female seasonal workers at a giant South Australian tomato glasshouse alleged they had been repeatedly sexually harassed at work.

The court documents say the second man is alleged to have touched, squeezed and grabbed the workers' bottoms and breasts on dozens of occasions, and in one incident allegedly placed his hand between a woman's legs.

The women say this man had supervisory responsibilities, but Perfection Fresh denies he was working in a supervisory capacity in respect to the women. He is also listed as a respondent in the case. His legal representative did not respond to a request for comment.

In their claim, the workers say the men's alleged conduct was in contravention of the Sex Discrimination Act and Perfection Fresh is liable for sexual harassment as it let the conduct occur and tolerated it by not having effective policies to prevent it. It also allegedly did not encourage workers to report sexual harassment and did not take prompt and efficient action on complaints.

'On each occasion the applicant was distressed, humiliated and offended, angered, embarrassed, ashamed, in many cases fearful, and, on the occasions of physical conduct, had their right to physical autonomy intruded upon. They suffered from stress and anxiety, and lost their enjoyment of life and the amenities of life,' the workers' claim says.

'The conduct was outrageous. It involved the abuse of power by a superior against employees who were socially, racially, and economically vulnerable,' the claim says.

The women are seeking $3.905 million in compensation and damages, and want the court to order that Perfection Fresh conduct more training on sexual harassment and for the Australian Human Rights Commission to review the company's procedures.

(Continued)

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Media—Continued

In its response lodged with the court, Perfection Fresh says the union first alerted it to a complaint of sexual harassment against the first man. He was suspended and an investigation was launched. The investigation substantiated several allegations and the man was fired.

Complaints of sexual harassment were then received about the second man, and he was suspended. He resigned a month later, so no investigation was undertaken. The company says that while some of the allegations were substantiated by their investigation, it was not aware of some of the other allegations in the court claim.

It argues it is not liable for any of the alleged conduct of the two men, as the company did not 'cause, aid, instruct or permit the conduct to occur', and it took all reasonable steps to prevent employees engaging in unlawful sexual harassment, including having policies in place which governed the conduct of employees and engaging all workers in a detailed induction process which outlined the expectations and who they should report issues to.

'The applicants are not entitled to the relief sought or at all,' it says in court documents. It denies the issues were widespread across the workforce and argues it took a proactive and swift approach to complaints.

Perfection Fresh is one of the country's largest private fruit and vegetable growers. It owns exclusive rights to grow a number of popular varieties including broccolini and qukes (mini cucumbers) and is a major supplier to the supermarket chains. It operates farms across the country, including the Two Wells tomato glasshouse, the largest of its kind in the southern hemisphere.

The United Workers Union is representing the workers, with farm sector executive director Caterina Cinanni describing it as 'one of the biggest cases against workplace sexual harassment and assault' brought before the Federal Court.

'It must be the responsibility of an employer to provide a safe workplace free from gendered workplace violence especially when the employment model increases a power imbalance, as it does for women that come to work in the horticulture sector in Australia on the Pacific Australia Labour Mobility (PALM) program,' she said.

'What these women are doing is not an easy thing to do … They are taking a stand to hold one of the biggest and wealthiest growers accountable because change needs to come from the top in this industry and in this country. These workers want women to be safe at work.'

A Perfection Fresh spokesman said the company took any allegation of sexual harassment extremely seriously and it had responded accordingly to the complaints against the two employees.

'Perfection Fresh acknowledges the very serious nature of the complaints and the distress this has caused for the women involved,' he said. 'We are committed to continuing to provide a safe workplace for all employees and look forward to resolving this legal matter amicably.'

It's not the first time there have been issues raised about conditions at the South Australian glasshouse. In 2015, the ABC's Four Corners program reported worker underpayment and exploitation of workers at the glasshouse, which was operated by Perfection Fresh, then known as D'Vine Ripe. In response the company terminated its contracts with the labour-hire firm caught up in the scandal.

Cinanni said the union had supported workers in 2015 to speak to the media about sexual harassment and other workplace abuses at the glasshouse, and it was disappointing to see that similar conduct was again being alleged at the same premises.

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Analysis 10.2

1 Outline the nature of the allegations made against Perfection Fresh.
2 Suggest what needs to be considered to determine if the company has failed in its obligations to provide a safe workplace free from harassment and discrimination.

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) is the new name of the Human Rights and Equal Opportunity Commission. It is an independent federal statutory body created by the *Australian Human Rights Commission Act 1986* (Cth). It has the responsibility to administer the five federal discrimination laws, each with their own commissioner. There is a president who is aided by the Human Rights, Race, Sex, Disability, Aboriginal and Torres Strait Islander, and Social Justice Commissioners.

The Sex Discrimination Commissioner's role is to promote greater equality between men and women. The main way this is to be achieved is through the development of policy, initiation of research, and education of all people in respect to the behaviours and structures that contribute to sex discrimination. The trafficking of women to Australia to work in the sex industry or to be exploited in other work-related areas is still a concern, not only for the commission. A number of other agencies, including the Australian Federal Police, and Australian Border Force, have responsibilities in combating this issue.

When people have complaints under the *Sex Discrimination Act 1984* (Cth), they lodge these with the complaints-handling section within the AHRC. The complaints-handling section has a responsibility to investigate and conciliate all complaints under the *Australian Human Rights Commission Act 1986* (Cth), including complaints about sex discrimination.

Table 10.2 *Sex Discrimination Act 1984* (Cth) – complaints received by ground, 2021–2022

Sex Discrimination Act – grounds	Number	Percentage
Sex discrimination	418	32
Marital or relationship status	75	6
Pregnancy	114	9
Sexual harassment	298	23
Sex based harassment	26	2
Family responsibilities	68	1
Breastfeeding	12	<1
Gender identity	82	6
Intersex	3	<1
Sexual orientation	50	4
Victimisation	117	9
Causes, instructs, induces, aids or permits an unlawful act	16	1
Advertisements		
Total	**988**	

Source: Australian Human Rights Commission, *2021–2022 Complaint Statistics*.

Research 10.3

View the website of the Australian Human Rights Commission.
1 Summarise the role of the Australian Human Rights Commission.
2 Identify some of the issues the commission deals with.

Anti-Discrimination Act

The broad-based *Anti-Discrimination Act 1977* (NSW) makes unlawful discrimination on the basis of sex, race, marital status, disability, responsibility as a carer, sexuality and age. It also established the Anti-Discrimination Board, which is part of the NSW Attorney-General's Department, to oversee the implementation of the Act. The Equal Opportunity Division of the NSW Administrative Decisions Tribunal hears complaints of discrimination.

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Women who feel they have been discriminated against can make a complaint to the Anti-Discrimination Board, which will investigate the complaint and try to help the parties to reach a solution. If the board cannot resolve a complaint, women can take their case to the Administrative Law and Equal Opportunity Division of the NSW Civil and Administrative Tribunal, established under the *Civil and Administrative Tribunal Act 2013* (NSW), which can make a decision, like a court.

Complainants generally must make their complaint within 12 months of the alleged incident and it must be in writing.

Fair Work Australia is another authority that addresses discrimination in the workplace affecting all workers, including women.

Review 10.4

1. Describe the difference between direct and indirect discrimination.
2. Explain why indirect discrimination is difficult to establish and prove.
3. Outline the objectives of the *Sex Discrimination Act 1984* (Cth).
4. Define what is meant by 'sexual harassment'. Outline what needs to occur before a complaint of sexual harassment can be initiated.

Workplace Gender Equality Act

The principles of equal opportunity in the workplace reflect the right to equitable access to jobs, career paths, training and staff development and equitable conditions of employment.

In essence, equal opportunity is about:

- treating people with dignity and respect
- unbiased management decisions
- ensuring equal access in all areas of employment, including recruitment, transfer, promotion, training and development, information access, management and supervision of staff and conditions of employment, with all selection based on merit (the best person for the job)
- recognition and respect for the cultural and social backgrounds of staff and customers.

In other words, diversity is valued. The *Workplace Gender Equality Act 2012* (Cth) requires any organisation that has 100 or more employees or that is a higher education institution, to submit an annual report about its policies and actions on gender equality. The Workplace Gender Equality Agency was established to oversee the implementation of the Act.

The objectives of the *Workplace Gender Equality Act 2012* (Cth) reflect the idea that in a just and fair world there should be an equitable spread of both sexes in management and support jobs across all industries. At present, this is not case. The Act is not about putting women in jobs ahead of men: it is about fostering gender equality.

The annual report organisations must submit is against six Gender Equality Indicators:

- gender composition of the workforce
- gender composition of the board or other governing body
- pay gap between men and women, and actions are being taken to reduce this
- policies around flexible working arrangements
- consultation with employees on gender equality issues
- policies, strategies and actions to prevent and respond to sexual harassment, harassment on the ground of sex, or discrimination.

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According to Workplace Gender Equality Agency statistics in February 2022:

- women hold 17.6 per cent of chair positions and 31.2 per cent of directorships and represent 19.4 per cent of CEOs and 34.5 per cent of key management personnel
- 22.3 per cent of boards and governing bodies have no female directors and, by contrast, only 0.6 per cent had no male directors.

Further statistics from the Australian Institute of Company Directors revealed:

- 34.2 per cent of directors in the ASX 200 are women, as of 30 November 2021
- women comprised 41.8 per cent of new appointments to ASX 200 boards as of 30 November 2021.

Workplace Gender Equality Agency, 2022, 'Gender workplace statistics at a glance', February.

Figure 10.10 How to foster equity for women in audio across the region was discussed at a Spotify event in 2023 in Sydney.

Media

Climbing the ranks: Australia's gender equity breakthrough

Joanne Enticott, Rhonda Garad, Helena Teede

Lens – Monash University

13 September 2023

When Kylea Tink, Member for North Sydney, decried the 'unconstructive noise and aggression' in Australia's Parliament this week, she wasn't merely venting frustration. She was challenging the nation's political culture, a gesture that marks a turning point in the gender dynamics of Australian leadership.

This significant moment dovetails with Australia's impressive rise in the World Economic Forum's Global Gender Gap Report 2023. The country catapulted from a mediocre 50th in 2021 to a commendable 26th rank recently. This leap is not accidental; it results from deliberate political action to empower women.

The Global Gender Gap Index annually benchmarks the state and evolution of gender parity across four key dimensions (Economic Participation and Opportunity; Political Empowerment; Educational Attainment, and Health and Survival). It's the longest-standing index tracking the progress of numerous countries' efforts towards closing these gaps over time since its inception in 2006.

(Continued)

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Media—Continued

Further progress has been made in Economic Participation and Opportunity. Australia's rank has climbed from 70th in 2021 to 42nd. While this is a laudable achievement, there's still much work to be done.

As of 2023, our overall global ranking stands at 26, which has improved since last year, but is still behind New Zealand's fourth place, Rwanda's 12th, and the UK's 15th.

Monash University academics Professor Helena Teede and Associate Professor Joanne Enticott, from the Monash Centre for Health Research and Implementation (MCHRI), have confirmed this upward trajectory.

Their analysis (see Figure 10.11) of a series of World Economic Forum reports reveals a clear link between political empowerment and improved gender equity ranking. They also show how quotas, affirmative action, and other targeted measures have dramatically increased the number of women in politics.

'The gender makeup in Parliament is not just symbolic, it's instrumental to national progress,' says Professor Teede.

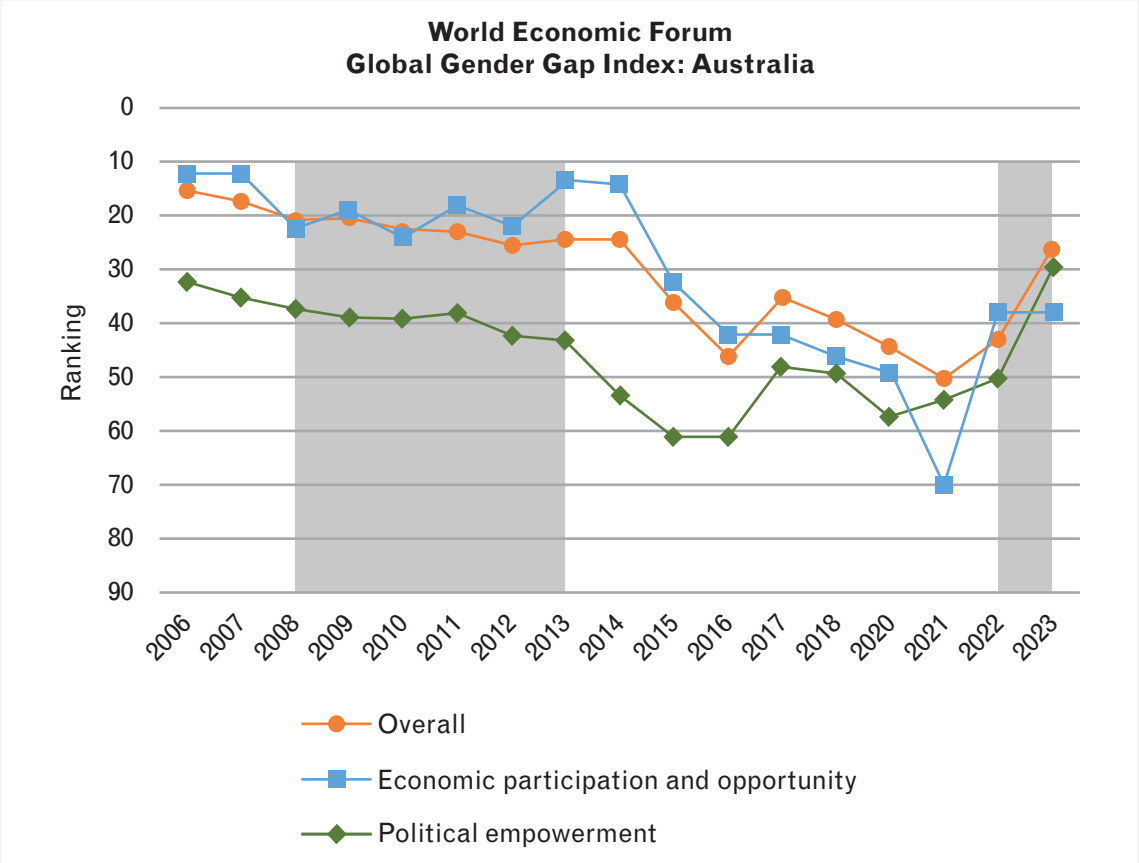

Figure 10.11 Global Gap Index for Australia (orange line) measured by the World Economic Forum. Also shown are sub-indices for Economic Participation and Opportunity (blue line) and Political Empowerment (green line). Shading shows the federal government: white is the Coalition and grey is Labor. Shading shows that a Coalition federal government in Australia results in gender issues going backwards, favouring men over women.

The overall rise in ranking in the Gender Equity Index is largely a result of the increase in the number of women in political leadership.

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Overall, women make up 45 per cent of federal parliamentarians. While Labor and the Greens lead with the highest representation (53%) of the political parties, independents have the highest representation of women (77%).

In stark contrast, the Liberal Party and the Nationals lag significantly behind (28%).

Meanwhile, smaller parties such as CA (Centre Alliance) and JLN (Jacqui Lambie Network) show 100 per cent female representation, but their small size has less impact.

This illustrates that while Labor and the Greens are making significant strides as a consequence of equity policies, others without these policies have a long way to go, reflecting the broader cultural and institutional challenges that still need to be addressed.

MCHRI academic and local government councillor Rhonda Garad emphasises the spillover effect of more women in political power.

'A critical mass of women in government can transform a culture, leading us from power displays to more respectful collaborative environments that benefit the nation,' she says.

All authors are at pains to point out that the imperative for change is not ideological, it's empirical.

Take, for example, the recently-passed Workplace Gender Equality Amendment, aiming to close the gender pay gap. Starting in 2024, employers with more than 100 employees will have their gender pay gaps published.

A direct consequence of a more gender-balanced Parliament, this amendment is critical to addressing the current 13 per cent national gender pay gap (compared to 15% in OECD countries).

The spillover of transformative leadership extends beyond politics, positively impacting the corporate, not-for-profit, and healthcare sectors.

Initiatives such as the $5 million National Advancing Women in Healthcare Leadership Program, spearheaded by Professor Teede, serve as prime examples of intentional structural reform. This program is designed to elevate women into healthcare leadership roles, with the specific aim of measurably improving outcomes for women.

The National Workplace Gender Equality Agency's data corroborates that organisations with more women in leadership roles are more profitable and efficient.

And it's not just about the economy. Associate Professor Enticott sums it up:

'This is not just a women's issue, it's societal. It impacts the entire health of the nation, both economically and socially.'

The good news is that in 2023, the world has closed about 68 per cent of its gender gap, improving slightly from last year. At this slow pace, though, it will take 131 years to reach equality between men and women.

While no country has fully closed its gender gap, Iceland leads the pack, and New Zealand in the Asia Pacific is doing very well (largely the legacy of Jacinda Ardern's gender reforms). Different areas such as health and education are closer to equality, but politics and jobs still have a long way to go.

Australia has made some progress, but we're still behind countries such as New Zealand and Rwanda. If we keep moving at this rate, it will take centuries to close the gaps in politics and the workforce.

So, when leaders such as Kylea Tink call for change, they join a collective effort to dismantle the outdated strongman politics that has long stalled Australia's progress.

She contributes to a broader momentum for the intentional, strategic empowerment of women, an approach already yielding substantial gains in economic, corporate, and healthcare sectors.

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Research 10.4

1 View the website of the NSW Department of Justice and research some decisions made by the NSW Civil and Administrative Tribunal (in the Administrative and Equal Opportunity Division) in 2023.
2 View the website of the Anti-Discrimination Board of NSW. Click on 'Publications' and then 'Factsheets'. Select a fact sheet that is relevant to women and summarise women's rights in this area.
3 Comment on the extent to which workplace gender equality has improved.

Government agencies

There are agencies at both the federal and state levels that provide policy advice on women's issues.

Office for Women

The federal Office for Women is part of the Department of the Prime Minister and Cabinet. Its primary role is to provide policy advice to the Minister for Women, and to ensure that government and Cabinet decisions about legislation, policy and budgetary matters are made with a view to their effect on women. The Office for Women also administers programs to combat issues such as domestic violence and sexual assault, represents the Australian Government at national and international forums on women's issues, and has primary responsibility within the government for Australia's obligations under CEDAW.

portfolio a key area of government responsibility headed by a minister

Women NSW

At a state level in New South Wales, Women NSW is part of the NSW Department of Health. It advises the state government and works with other government agencies and non-government organisations to develop programs and policies with positive consequences for women. Women NSW is also responsible for domestic violence prevention: to lead and manage government policy relating to the prevention of domestic and family violence.

Workplace Gender Equality Agency

The Workplace Gender Equality Agency (WGEA) is the new name of the Equal Opportunity for Women in the Workplace Agency (EOWA). The WGEA is a statutory body set up under the *Workplace Gender Equality Act 2012* (Cth). It is a part of the federal Department of the Prime Minister and Cabinet **portfolio**. WGEA's main objective is to promote and improve gender equality in the workplace.

One of the challenges faced by WGEA is convincing organisations that there are many benefits to having an equal opportunity workplace. Some of these are that it helps in hiring and retaining the best applicants, improves productivity and creativity, attracts more female customers and enhances the organisation's management style. Organisations with more than 100 employees have to report annually to WGEA the steps they are taking to promote equal opportunity. Companies that do not comply with the legislation face two sanctions:

- being named in the federal parliament in a report put on the public record (referred to as the 'naming sanction')
- being unable to tender for federal government contracts and industry assistance.

Another important role performed by WGEA is the gathering of statistical data from a number of sources to give an up-to-date overview of women in the labour force. This is compiled annually and allows WGEA to track trends in equal opportunity in the workplace.

WGEA is an important mechanism if women are to achieve economic equality. It focuses attention on the position of women in the labour force, their representation at management levels, their level of earnings, their participation in work-related and employer-sponsored training schemes, and their employment status (full-time, part-time or casual). All of these factors impact greatly on women's ability to enjoy economic equality.

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Figure 10.12 The 2022–2023 'Gender equality scorecard' released by the Australian Workplace Gender Equality Agency

Review 10.5

1 Explain the roles of the Office for Women, and Women NSW.
2 Outline and discuss some issues that might be raised by the Office for Women and by Women NSW in the development of law and policy relating to:
   a requirements for businesses regarding conditions of employment
   b budget provisions regarding the funding of healthcare
   c programs in which business leaders provide mentoring for high-achieving university graduates.

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Amnesty International

Case Study

Discrimination – the basis for the torture of women

One of Amnesty International's projects is the 'stop violence against women' campaign. The following information supplied by Amnesty International outlines the facts and issues on how discrimination is the basis for the torture of women. Better compliance by states and enforcement mechanisms through the CEDAW, especially Article 1, would help alleviate this problem throughout the world.

The torture of women is rooted in a global culture that denies women equal rights with men, and legitimises the violent appropriation of women's bodies for individual gratification or political ends. In recent decades, women's groups and other human rights activists and non-governmental organisations around the world have made significant advances in preventing and combating abuses, providing support and redress for survivors of abuse and winning greater equality for women. Yet women worldwide still earn less than men, own less property than men, and have less access to education, employment and health care. Pervasive discrimination continues to deny women full political and economic equality with men.

Violence against women feeds off this discrimination and reinforces it. When women are abused in custody, when they are raped by armed forces as 'spoils of war', when they are bought and sold as trafficked women, bonded labourers or in forced marriages, when they are terrorized by violence in the home, unequal power relations between men and women are both manifested and enforced. The torture of women will not be eradicated until discrimination on the grounds of gender is addressed.

Violence against women is compounded by discrimination on the grounds of race, ethnicity, sexual orientation, social status, class and age. Poor and socially marginalised women are particularly liable to torture and ill-treatment. Such multiple discrimination further restricts women's choices, increases their vulnerability to violence, and makes it even harder for them to gain redress.

Sometimes the perpetrators of these acts of violence are state officials such as police, prison guards or soldiers. Sometimes they are members of armed groups fighting against the government. However, much of the violence faced by women is at the hands of the people with whom they share their lives, whether as members of their family, of their community or as their employers. There is an unbroken spectrum of violence that women face at the hands of men who exert control over them.

Amnesty International

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10.3 Non-legal responses

Legal mechanisms have been put in place to overcome the historical and cultural barriers that women still face. There are also some very effective informal measures that keep the issues of women on the political agenda. However, statistics show that women continue to do more housework than men.

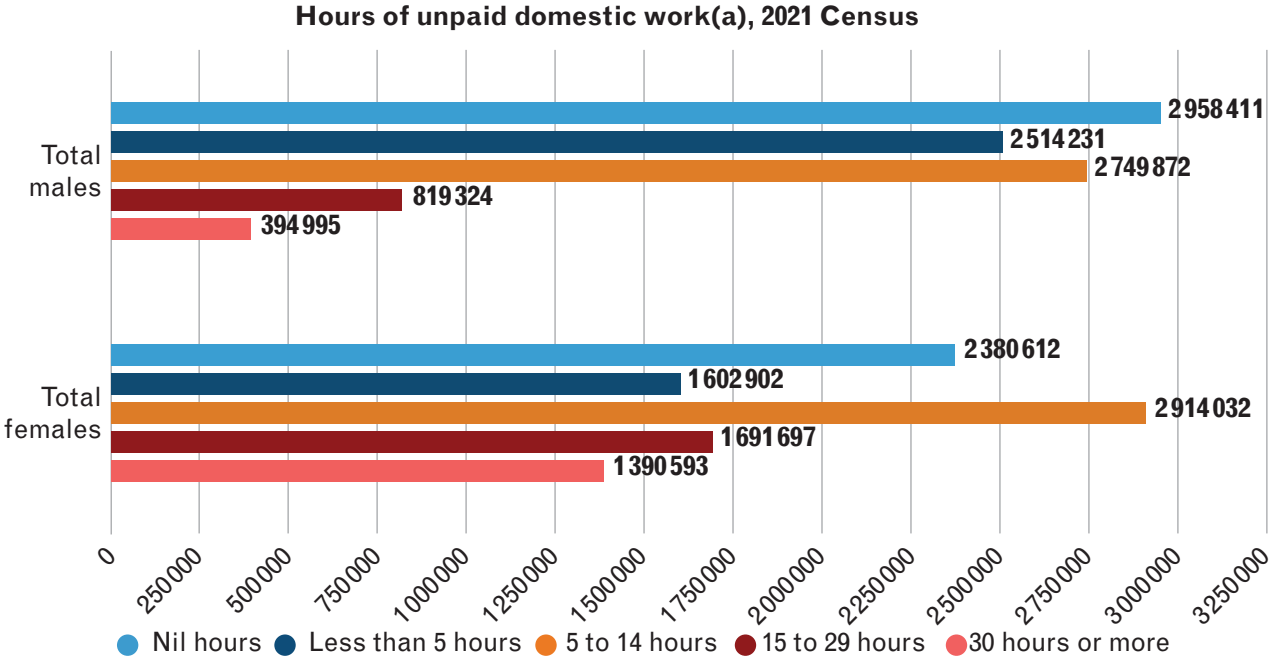

Figure 10.13 Weekly hours of unpaid domestic work
Source: Australian Bureau of Statistics, 2021 Census

Trade unions

In the early part of the twentieth century, unions were against women's full participation in the workplace. As women were paid less than men, unions did not want a situation where employers were able to exploit this cheap labour and force men out of jobs.

Today, unions are strong advocates for the rights of women in the workplace. The Australian Council of Trade Unions (ACTU) lists the following achievements to which the union movement has contributed:

- the principle of equal pay for equal work
- women's parental leave
- improved childcare
- universal superannuation
- anti-discrimination and affirmative action (equal employment opportunity) legislation.

A fundamental challenge still facing the ACTU is the fact that the major unions in Australia have a much lower percentage of women at the executive level than among the general membership.

Most recently, the ACTU campaigned for paid maternity leave, which it believes is a fundamental human right and a necessary measure to address the discrimination and disadvantage suffered by women who are parents. At least 157 countries have some form of paid leave, and of those 30 are member states of the Organization for Economic Co-operation and Development (OECD). Without paid maternity leave, women face a lack of job security and income loss if they take time off after having a child. Paid maternity leave gives mothers time to bond with and breastfeed their babies without financial considerations necessitating an early return to work.

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In 2011, the federal government introduced 18 weeks' paid parental leave for working women. The scheme extends paid leave to either parent of a newborn child if they are the primary carer and earns less than $100 000 per year. The decision was welcomed by parents, the union movement and past Sex Discrimination Commissioner Elizabeth Broderick. Other commentators have commended the change, arguing that law and policies making it easier for fathers to take a greater role in childcare are necessary in order for women to have true choices. In July 2023, the length of paid parental leave was increased to 100 days, or 20 weeks. The income test is also reviewed regularly, and for 2022–2023 was $168 865. Over time the scheme will ideally become one of the 'norms' accepted for women in the workplace.

Lobby groups

There are non-government organisations (NGOs) throughout Australia that promote issues important to women. A well-known NGO is the Women's Electoral Lobby, founded in 1972. The Women's Electoral Lobby is dedicated to 'creating a society where women's participation and their ability to fulfil their potential are unrestricted, acknowledged and respected and where women and men share equally in society's responsibilities and rewards'. The Women's Electoral Lobby is a self-funded, non-profit organisation, not affiliated with any political party. It lobbies governments, publishes research papers, participates in public debate, participates in legal cases where women's human rights are at issue and conducts campaigns to raise awareness of these issues.

Research 10.5

1 Find the website of the Office for Women (PM&C). From the Consultations page, find the 'National Strategy to Achieve Gender Equality' easy read summary. Outline what the strategy is about and what it is hoping to achieve.
2 View the website of the Women's Electoral Lobby and research two policy positions of the group. Write a one-page report on what you discover.

10.4 Effectiveness of responses

The law is constantly evolving through legislation and the courts to reflect the changing values of the society it is meant to regulate. Over the past 30 years, women in Australia have seen landmark legislation passed addressing the issues they face, especially in the workplace.

In spite of the many improvements that women have fought for and achieved, there are still many areas that require constant vigilance and persistence in order for change to occur. It is in this light that the legislation and mechanisms for achieving justice for women will be evaluated. We will look at the responsiveness of the law in relation to Australia's international obligations under CEDAW, discrimination, equality of opportunity (especially in the workplace), and issues emanating from these, such as pay equity, **gender segregation**, sexual harassment and childcare.

gender segregation the separation of people according to their gender

International

Women around the world are exploited and abused as a result of their unequal position under the laws of their countries. The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) was a significant step forward in highlighting the issues and getting states to commit to ending discrimination against women.

States can choose to comply with or ignore their international obligations and usually act out of economic or political self-interest in determining their course of action. CEDAW is one of the treaties most ignored by states. Those states that have signed the treaty have included many reservations, which allow them to refuse to comply with certain parts of the treaty. Hence, the Committee on the Elimination of Discrimination against Women is not able to declare a state to be in violation of the

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treaty where it has entered certain reservations. The committee can only continue to encourage states to review their current reservations.

Upon ratification in 1983, the Australian Government entered a reservation with respect to paid maternity leave; a provision it has since complied with. It also entered a reservation stating that it 'does not accept the application of CEDAW in so far as it would require alteration of defence force policy that excludes women from combat duties'. The Australian Defence Force exclusion of women from combat-related roles was dropped in 1990, and since 2016 women have been allowed to serve in frontline combat positions. In 2018, section 43 of the *Sex Discrimination Act 1984* (Cth), which gave the Australian Defence Force permission to discriminate against women in connection with combat duties, was removed by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth). However, structural and cultural discrimination is still very much evident in the defence forces. It may be some time before such entrenched cultural attitudes towards women are overcome.

Due in large part to reservations of nation states, there are still many areas where women experience discrimination and violations of their human rights. It is believed women and girls account for 4.9 million of those in forced commercial sexual exploitation and 6 million of those in forced labour in other economic sectors. Approximately 736 million (one in three) women have been subjected to domestic violence. It is estimated that up to 200 million women are victims of genital mutilation. Literacy is still a major cause of concern: two-thirds of all adults who are illiterate are women. This is a consequence of poorer education opportunities for girls compared to boys, especially in developing countries.

At the same time, 189 countries have ratified CEDAW and have passed laws consistent with the treaty. Millions more girls now receive a primary school education and millions of women have been able to take out loans or now have the right to own or inherit property in their own right. The issues previously listed are now well established on the global agenda, whereas prior to CEDAW they were isolated issues in different countries, the extent of which was not effectively monitored.

An **optional protocol** has been approved by the UN General Assembly to provide an additional enforcement mechanism, as exists with most other human rights instruments. This would allow individuals and groups to be able to make a direct complaint to the CEDAW committee about alleged breaches of the treaty. The optional protocol does not add extra rights. Rather, it tries to improve the enforceability of the existing instrument. The Australian Government signed the optional protocol in 2008, thus sending a message to the international community about its commitment to the treaty.

optional protocol an addendum to a treaty, agreed to by the parties at a later date, to create enforcement provisions or to interpret the treaty in light of later developments

Australia has a good record with respect to laws and policies for women compared to other countries in the world. The *Sex Discrimination Act 1984* (Cth) is one example of this. However, critical assessments have suggested that there are gaps in our laws with respect to women. For example, the Australian Human Rights Commission 1999 report, *Pregnant and Productive,* discussed the idea that it is a right, not a privilege, to work while pregnant, and pointed out gaps in the coverage of federal anti-discrimination legislation regarding that issue. Other critics have noted that the *Sex Discrimination Act 1984* (Cth) fails to take into account the fact that gender may combine with other characteristics of a person (e.g. race, disability or sexuality), resulting in different forms of disadvantage. In other words, it is not the case that discrimination is the same for all women, regardless of their individual attributes. Moreover, its reliance on complaints by individuals or groups directly affected, rather than addressing discrimination at the systemic level, makes enforcement problematic (see Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives', *University of New South Wales Law Journal*, 2004, p. 53).

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Figure 10.14 Most blatant forms of discrimination have disappeared due to complaints made against employers and the educative effect of the law. Discrimination today is usually more subtle and covert.

The Australian Human Rights Commission argued that Australia's signing on to the optional protocol would provide the will to correct such deficiencies, as individuals then would be able to complain directly to the committee, putting added pressure on the Australian Government.

Review 10.6

1. Explain, with examples, why there is a need for treaties such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) (CEDAW).
2. Define reservations and how they limit the effectiveness of CEDAW.
3. Evaluate the extent to which the Australian Government has implemented the provisions of CEDAW.
4. Outline how the signing of the optional protocol for CEDAW will strengthen the enforcement of the treaty.

Domestic

Anti-discrimination legislation

State and federal anti-discrimination Acts provide far-reaching protection to women who experience any form of discrimination in the workplace. There are few restrictions placed on women as to what work they do. This is to some extent due to anti-discrimination law. Women today have moved into the workforce in unprecedented numbers.

The effectiveness of the legislation may, however, still be limited by a lack of knowledge of rights or reluctance to exercise those rights. This can be for many reasons, including fear of dismissal, failure to recognise that there is a problem or being unaware that such rights exist in the first place.

Most of the blatant forms of discrimination have disappeared due to complaints made against employers and the educative effect of the laws. Discrimination today is usually more subtle and covert. Generally these types of discrimination involve systematic practices of disadvantage. If an employer has such a practice or policy that does

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disadvantage women, it is not illegal if the court believes it to be 'reasonable' (s 7B *Sex Discrimination Act 1984* (Cth)). This may go part of the way towards explaining the **glass ceiling** that women have described as an impediment to their career progression.

There are other factors that limit the effectiveness of the legislation in redressing grievances. Even if a complainant wins the case and is awarded damages, a woman may have to return to a hostile work environment. On top of this, the cost – economic and emotional – may be extensive.

Proving that an employer or other person has discriminated against a complainant can be difficult, and most of the time impossible. At the same time, the *Sex Discrimination Act 1984* (Cth) has enabled some important cases to be won. In 1994, a woman won $160 000 after losing her career and a position as a partner in a law firm. This was the largest award under the Act at the time, but many would argue that this is a small amount for a career. A study completed in 2012 by Paula McDonald at the Business School at the Queensland University of Technology, and Sara Charlesworth of the University of South Australia, found that half of all financial settlements for sexual harassment were below $7000. These amounts are significantly lower than what might be achieved through the judicial system. Redress through the courts, however, is more than ever today out of reach for most women due to time, stress and cost, and very few of these disputes end up in court.

The provisions of the *Sex Discrimination Act 1984* (Cth) about sexual harassment have been effective in that the only requirement is to show that the unacceptable behaviour actually took place. Complaints of sexual harassment remain high, but this could also be attributed to women's greater awareness of their rights. The #MeToo movement has further highlighted the inadequacies of the formal legal and non-legal mechanisms in place and how they have been fundamentally undermined by the power imbalance that still exists in many workplaces and in other parts of society.

The Australian Human Rights Commission estimates that reporting of workplace sexual harassment remains alarmingly low, at only 18 per cent. Women (41%) were far more likely than men (26%) to experience harassment, and more than three quarters of harassers were men (77%). Its data continues to show that approximately 20 per cent of complaints received by the Australian Human Rights Commission were under the *Sex Discrimination Act 1984* (Cth), and that a high percentage of these complaints relate to sex discrimination in the workplace. New technologies, including mobile phones, email and social networking, have increased opportunities for sexual harassment by providing new ways in which it may occur. Conversely, the digital footprints these avenues leave also enables evidence to be gathered. The Australian Human Rights Commission estimates that over two-thirds of those who made a complaint left their place of employment. Although the economic cost of this staff turnover to employers and the community is unmeasured, it is certainly a poor use of human resources. It also reflects a residual lack of respect for female colleagues in the workplace, as most of the complainants are women.

glass ceiling
an invisible barrier that prevents women from rising in an organisation through promotion; on the face of it, a company may not directly discriminate, but subtle practices may still discourage women or prevent them from being promoted to more responsible and better-paid positions

In spite of some of the criticisms outlined previously, the *Sex Discrimination Act 1984* (Cth) has continued to evolve. In 1992, the Act was amended to ban discrimination on the basis of the occupation or identity of one's husband or wife. The idea of 'reasonableness' as a defence for direct discrimination on the grounds of pregnancy was also removed.

In indirect discrimination cases, the onus of proof is on employers to provide a defence as to why systems and policies alleged to be indirectly discriminatory are reasonable and necessary. The definition of 'sexual harassment' has also been strengthened, with the complainant only having to show that they 'reasonably' felt offended, humiliated or intimidated.

In 1994, amendments extended the scope of protection under the Act. One of these measures was to simplify the definition of 'indirect discrimination'. The number of exemptions under the Act, such as those relating to superannuation and insurance, has also recently been reduced.

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It should be noted that the difference between the anti-discrimination and equal opportunity laws is that discrimination legislation is complaint-based, whereas the *Workplace Gender Equality Act 2012* (Cth) is based on the introduction of programs to eliminate discrimination at a systemic level. This Act has failed to significantly improve the representation of women in senior management and boards of Australia's top 200 companies. While there have been some successes in the introduction of equality of opportunity programs in some workplaces, it seems that structural and cultural impediments to equality of opportunity for women in the workplace continue to prove difficult to overcome.

Under-representation of women has again been highlighted in the federal parliament based on the 2022 election. As discussed in the media article beginning on page 287, the Labor and Green parties have better representation of women than the Liberal Party and the Nationals. The Labor Party introduced a quota system in 1994, which is seen as significant progress. The Coalition government has increasingly come under fire for its lack of progress in this area. The Liberal Party is at 23 per cent representation of women and the National Party has 28 per cent. Both to date have resisted calls for quotas, preferring what they call a 'merit-based' system.

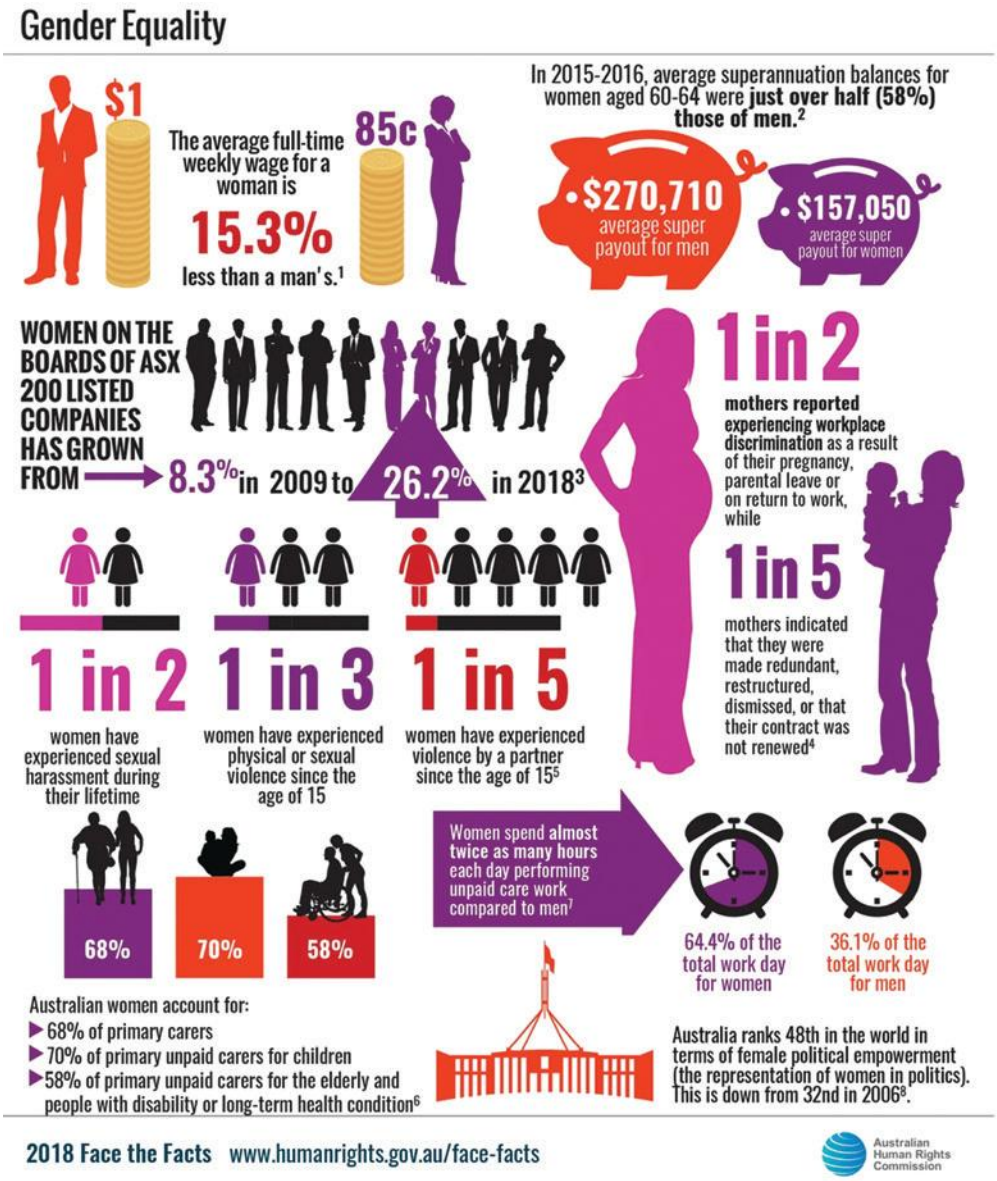

Figure 10.15 Statistics from the Australian Human Rights Commission illustrate the degree of gender inequality that still exists today.

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Pay equity

For many years the earnings of women have not matched those of men. Historically, women have always on average earned less than men, although this gap has been closing since the 1970s. For many advocates of economic equality for women, however, pay equity is an issue yet to be resolved.

Major developments in pay equity for women came about because of the following two test cases:

- equal pay for equal work case (1969)
- equal pay for work of equal value case (1972).

The equal pay for equal work case established that women doing the same work as men should receive the same pay. The equal pay for work of equal value case introduced the concept that different jobs of the same worth should get the same minimum wage. On the face of it, women's struggle to achieve equal pay had taken a quantum leap and justice had finally been achieved. What was not recognised were the explicit and implicit barriers confronting women in the workforce then and today, which prevent women from achieving pay equity with men.

Some of the reasons for a lack of pay equity with men are as follows:

- **Over-award payments** – Women are less likely to be the recipients of over-award payments than men. Women receive approximately 54 per cent of these types of payments compared to men. These payments are typically paid in occupations where there are skill shortages, usually in highly unionised, male-dominated occupations.
- **Comparative worth** – Some occupations that predominantly employ women have been deemed to require fewer skills than occupations dominated by men, even when the educational barriers for entry are clearly higher for the predominantly female occupation. This can be seen in nursing, where pay lags behind trades such as plumbing. In essence, occupations with a high proportion of women are undervalued.
- **Less overtime** – Women are generally located in occupations that receive less overtime.
- **Skills-based career paths** – Women are generally less likely to access accredited workplace training and education, even though they have the same educational qualifications and competencies as men.

Figure 10.16 Women in London at a protest for International Women's Day in 2023. The worldwide gender pay gap is consistently raised at protests held on this day.

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The pay equity gender gap is still a cause for concern for the federal government. As at 2023, the gender pay gap was 13 per cent, a small improvement from the 14.1 per cent of 2019. The *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth) introduced a requirement, starting in February 2024, for all Australian companies with 100 or more employees to publish their median pay gap between male and female employees. The Act came about as a result of salary secrecy clauses in employment contracts being abolished (meaning employees can discuss their earnings openly without the threat of being reprimanded or fired).

Gender segregation of the workforce

Australia has one of the most sex-segregated workforces in the developed world. This means that women do not perform the same work as men. Women generally work in different jobs and different industries. Hence, some occupations have come to be considered 'female'.

This becomes apparent when one considers the following statistics. In 1992, the Commonwealth Government report *Half Way to Equal* stated that 55 per cent of women worked in two occupational groups – clerks and salespeople, and personnel services – whereas men were spread over a range of occupations. Evidence also suggested that sex segregation was increasing. For example, women comprised 98 per cent of typists and 1 per cent of tradespersons in the fields of electrical and metal fitting and machining at the time of the report.

Thirty years later in 2022 in New South Wales, there was still a significant gender imbalance, with most nursing professionals and teachers being women, and most people working in the science, building and engineering professions being men. This gender imbalance continues in the home, with Australian women currently spending about 36 hours per week on unpaid work in the home, compared to 14.5 hours for men.

On getting women to enter non-traditional areas of employment, it is suggested there is what is known as a 'threshold of normality'. When women comprise at least 15 per cent of an industry workforce, this becomes sustainable because young women have sufficient role models to encourage their participation in that industry.

Patterns of employment

More women than men are likely to work part-time. This means that women earn less and are less likely to access work benefits. This affects their superannuation contributions and hence their retirement benefits. It also affects their capacity to save.

Women often work in industries that are poorly unionised and they tend not be represented in the union structure. The enterprise bargaining system set up under the *Fair Work Act 2009* (Cth) assumes that all workers approach the bargaining table on a level playing field. However, a concentration of women in lower paid jobs requiring fewer skills has made women vulnerable in respect to pay and conditions. The continuing deregulation of the workplace in the name of flexibility and choice will further influence pay equity for women and seriously undermine equality of opportunity in the workplace.

Childcare is an example of an industry where the employees are predominately women who are poorly paid. In recent years, there have been mounting calls to improve the pay of child-care workers.

Review 10.7

1. Define 'pay equity'. Identify the extent to which women experience pay inequity on a proportional basis to men.
2. Explain, with examples, at least three reasons why pay equity for women is still an issue in Australia today.
3. Define what is meant by the phrase 'gender segregation of the workplace'.
4. Outline reasons why gender segregation contributes to pay inequity for women.
5. Explain what is needed to get women into areas of employment that are not traditionally 'women's jobs'.

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Equal opportunity in the workplace

The *Workplace Gender Equality Act 2012* (Cth) is the main piece of federal affirmative action legislation. The main provisions of the Act and the overseeing of the Act by the Workplace Gender Equality Agency (WGEA) were discussed earlier. Affirmative action legislation has been in place since 1996. The extent to which it has made a difference to the equality of opportunity of women in the workplace can be gauged by the real choices that women have.

The *Workplace Gender Equality Act 2012* (Cth) encourages organisations to design workplace programs that promote 'the elimination of discrimination on the basis of gender'. One measure of success is the proportion of women who are in company board and executive management positions. In 2011, the WGEA census results showed that any significant change was melting away. It found that only three per cent of the top companies had a female chief executive officer. Anna McPhee, a previous WGEA director, told the *Daily Telegraph* in 2008 that 'there was systematic discrimination against women in the workplace and that the top companies were still boys' clubs'. She also stated that women who were trying to get to the top faced a hostile culture, were belittled and harassed, and their skills were not taken seriously: 'the white male that could work 100 hours a week was still the most desired manager in an inflexible workplace'.

It is clear that women are still confronted by the glass ceiling. They can see a career path, but they are unable to progress past a certain level for a variety of reasons. Evidence suggests that indirect discrimination contributes to this effect, as it creates barriers to equal employment opportunities, and that it is rife in both the private and public sectors. However, as discussed earlier some progress has been made, more significantly in political leadership as opposed to corporate leadership (refer to the statistics provided by the Workplace Gender Equality Agency in Figure 10.12).

It was also suggested that most of the employers who reported to WGEA were doing the minimum to meet their obligations under the *Workplace Gender Equality Act 2012* (Cth). They still saw equality of opportunity as an additional expense to be carried by them. The reality is that when effective equal employment opportunities programs are introduced they can deliver real savings.

While the rate of affirmative action progress to date has been uneven, it appears that organisations with a history of workplace segregation, where women are paid lower awards, and where women have less access to training and promotion, still need sustained affirmative action if real change is to occur.

At the same time, the *Workplace Gender Equality Act 2012* (Cth) enjoys sufficient community support to ensure that companies comply. The naming sanction ensures a high rate of compliance and the newly introduced positive obligations (reporting of pay equity) will produce insightful data by the end of 2024 that until present has been hidden.

This support for the Act, however, is not matched by a good working knowledge of the issues facing women in the workplace and hence the development of programs that genuinely try to address these issues. One of the challenges faced by WGEA is to continually educate organisations and the wider community about the invisible barriers that inhibit women from being given opportunities to fill senior management and leadership roles. Given that women now make up 46 per cent of the workforce, and comprise 56 per cent of university graduates, they are well under-represented in many areas.

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One of the biggest challenges we face in making the labour market more equitable remains how best to make workplaces family friendly. This includes some flexibility in allowing women and their partners to juggle work and family through more flexible hours of work, access to working conditions in part-time and casual employment etc. It is also about developing policy and practices that support and acknowledge that the stage in a family's life when raising children, especially in the early years, is short term in the context of a person's working life and allowances need to be made to allow families to better manage this.

Human Rights and Equal Opportunity Commission, 2002, *Paid maternity leave submission*, July.

Paid maternity leave is beneficial for minimising the separation that women experience from the workplace after childbirth. Australia's reservation to paid maternity leave under the CEDAW meant that the federal government for many years resisted such a scheme. A national paid maternity leave scheme finally appeared on the political agenda of the Rudd Labor government. The 2008 economic crisis caused this to be again delayed – just as community support for such a move was gaining momentum. It was introduced in 2011 and is a positive step forward for women who interrupt their careers to have a family. The 2011 scheme is still in operation in 2024.

Figure 10.17 In many parts of the country, child-care costs are out of reach for many families.

Quality, affordable childcare is critical for people in finding the balance between work and family. However, the high costs of having children in long day-care is an economic hurdle that women and their families weigh up before deciding whether or not one parent returns to the workplace after having children.

Nationally, there are calls to arrest the declining birth rate, which is at 1.77 children per couple, below the replacement level of 2.1. An ageing workforce also presents challenges in maintaining a skilled workforce and our tax base. At present these two issues are mutually exclusive and only a radical rethink of workplace practices will provide workable solutions. The 'Fertility Decision Making Project' (2003) conducted by the Australian Institute of Family Studies found that 95 per cent of respondents wanted children. It also found that they generally desired a larger family than what they would have in reality. The reasons given for this were concerns such as job insecurity and difficulties in managing work and family responsibilities.

In 2023, the Federal Government established the National Strategy to Achieve Gender Equality.

The Strategy will guide whole of community action to help make Australia one of the best countries in the world for equality between women and men. It is an important mechanism to elevate and prioritise actions that will achieve gender equality.

The Strategy will complement other efforts across Government to achieve gender equality, including:

- the National Plan to End Violence against Women and Children 2022–32 (National Plan)
- the Government's response to the Australian Human Rights Commission's Respect@Work Report
- the National Women's Health Strategy 2020–2030.

Department of the Prime Minister and Cabinet, 2023, 'Migrant and refugee women'.

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The extent that the actions of such a strategy will bridge the gap in gender equality on a range of measures and across a number of groups for women remains to be seen. It is, however, a positive development for a more coordinated approach.

In Court

***Australian Iron & Steel v Banovic* [1989] HCA 56**

This landmark case involving indirect discrimination revolved around Australian Iron and Steel's retrenchment policy of 'last on, first off' (i.e. the last employees to be hired are the first to be retrenched). On the face of it, this seems a reasonable policy to adopt; however, it adversely affected women because the company had only begun to employ women after many years of only employing men. The High Court found this policy imposed a condition 'in which a substantially higher proportion of one sex can comply than the other sex'.

It was also argued that discriminatory hiring policies in the past meant that more men were in senior positions that were immune to the retrenchment policy. The High Court deemed this to be discriminatory. It concluded that 'retrenchment policies that kept alive the effects of past employment discrimination constituted, themselves, sex discrimination'.

Review 10.8

1. Explain the principles of 'equality of opportunity' in the workplace.
2. Define the term 'affirmative action'.
3. Explain what is meant by the 'glass ceiling'.
4. Assess how effective the Workplace Gender Equality Agency has been in achieving attitudinal change in the organisations that report to it.
5. Outline why paid maternity leave and quality affordable childcare are important issues for women in the workplace.
6. Discuss to what extent progress has been made in Australia with regard to 'affirmative action' in the workplace.

Research 10.6

1. View the website of the Workplace Gender Equality Agency and find the media releases section. Select two recent media releases and construct a short fact sheet to present to the class.
2. On the internet, look up 'gender quota systems in the workplace'. Outline what quota systems are in relation to equal opportunity. Brainstorm the advantages and disadvantages of having a quota system and the extent that they work.

Review 10.9

Draw a table with two columns headed 'strengths' and 'weaknesses', then construct a list of the strengths and weaknesses of the *Sex Discrimination Act 1984* (Cth).

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Chapter summary

- Women historically were treated as second-class citizens. They were explicitly discriminated against in the areas of marriage, property, the right to vote, the ability to sue and enter contracts, and jury service.
- Today women enjoy the same rights as men in most of these areas, but still experience economic, legal and social disadvantage.
- Women from non-English-speaking backgrounds and First Nations women face additional barriers to equality of opportunity.
- The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) is the international treaty specifically addressing the many areas in which women experience discrimination.
- In Australia, anti-discrimination and equal opportunity legislation have been passed at the federal and state levels. The chief Acts discussed in this chapter are the *Sex Discrimination Act 1984* (Cth), the *Anti-Discrimination Act 1977* (NSW) and the *Workplace Gender Equality Act 2012* (Cth).
- The Australian Human Rights Commission is a statutory body set up to administer the five federal anti-discrimination laws, one of which is the *Sex Discrimination Act 1984* (Cth).
- The Workplace Gender Equality Agency is a statutory body. One of its main functions is to oversee the development of equality of opportunity programs within organisations that are required to report under the *Workplace Gender Equality Act 2012* (Cth).
- Two legal mechanisms that exist to promote the rights and equality of women are the federal Office for Women and Women NSW. These bodies attempt to influence legislation and policy as it applies to women.
- The Australian Council of Trade Unions and the Women's Electoral Lobby are non-government groups that campaign on issues concerning women, especially in the workplace.
- The effectiveness of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) is limited by the many reservations by states. The strength of this convention is dependent on states affirming its principles in domestic legislation.
- The effectiveness of the *Sex Discrimination Act 1984* (Cth) is limited by factors such as lack of knowledge of rights, reluctance to exercise rights and the difficulty of proving discrimination.
- The *Sex Discrimination Act 1984* (Cth) has been strengthened by amendments that extend its scope and remove certain exemptions and defences. The only requirement in sexual harassment cases is to prove that the offensive behaviour actually took place. The onus is on the employer to show why indirect discrimination was 'reasonable'.

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Multiple-choice questions

1 Which of the following statements about women's historical status is NOT true?
   - **a** Women have been seen as essentially different from men and therefore expected to have different social roles.
   - **b** Women's jobs have been valued less and paid less.
   - **c** Events such as wars, despite their enormous social cost, have sometimes also provided opportunities for women.
   - **d** Women have not always had the same rights as men because in the past, most women preferred traditional social roles.

2 Which of the following statements relating to women's workforce participation is true?
   - **a** Part-time and casual workers usually have the same work conditions as full-time workers, and they are paid the same, proportional to hours worked.
   - **b** Workplace relations laws relating to pay and conditions are enforced more strictly in relation to labour hire firms and companies contracting labour hire firms.
   - **c** Many migrants to Australia have difficulty getting jobs suited to their qualifications, which may not be recognised, and they may face the additional challenge of having to learn English.
   - **d** First Nations and migrant women have a lower unemployment rate than other Australian women, but they often have trouble getting part-time or casual work.

3 The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) contains:
   - **a** anti-discrimination laws that can be adapted to suit a country's cultural traditions.
   - **b** provisions condemning discrimination against women and setting out ways in which states are to combat and prohibit sexual discrimination.
   - **c** provisions that can be enforced by the UN Security Council or the UN General Assembly.
   - **d** a preamble stating that women are biologically the same as men and therefore not entitled to special treatment such as safety precautions at work when pregnant.

4 The *Sex Discrimination Act 1984* (Cth) prohibits:
   - **a** unwanted touching and dirty jokes at work.
   - **b** indirect discrimination at work unless it is part of a 'reasonable policy'.
   - **c** discrimination against doctors' wives because of their husbands' profession.
   - **d** all of the above.

5 Australia's signing the optional protocol for the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) allows which of the following to happen?
   - **a** The federal government can pass legislation prohibiting discrimination.
   - **b** The Committee on the Elimination of Discrimination against Women advises states on how best to implement the treaty.
   - **c** Individual Australians can complain directly to the Committee on the Elimination of Discrimination against Women.
   - **d** The Committee on the Elimination of Discrimination against Women can recommend trade sanctions against states in breach of the treaty.

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Short-answer questions

1 Explain why women were treated as inferior to men in early Australian society.
2 Explain the particular barriers experienced by First Nations women and migrant women.
3 Define the term 'equal opportunity'. Outline how it is provided for in Australian law.
4 How is Women NSW different from its Commonwealth counterpart?
5 Assess the effectiveness of non-legal mechanisms in improving the rights of women in the workplace.
6 Explain the limitations that exist for the more effective implementation of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).
7 Discuss the strengths and weaknesses of the *Sex Discrimination Act 1984* (Cth). What reforms have taken place through amendments?

Extended-response question

Evaluate the effectiveness of the legal system in dealing with discrimination against women. Read the following quote, then answer the following questions.

> [The ideal worker] works full time and overtime and takes little or no time off for childbearing or child rearing. Though this ideal-worker norm does not define all jobs today, it defines the good ones: full-time blue-collar jobs in the working-class context and high-level executive and professional jobs for the middle class and above. When work is structured in this way, caregivers often cannot perform as ideal workers.

Joan Williams, 1999, *Unbending gender: Why family and work conflict and what to do about it*, Oxford University Press, New York, p. 1.

1 What consequences do these expectations of the 'ideal worker' have for women?
2 Do these consequences also apply to men? If your answer is 'no', would your answer be different if more men took a more active role in parenting?
3 Suggest some legal and non-legal mechanisms for addressing these consequences.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Issue 1

Groups or individuals suffering disadvantage

Chapter 11

Migrants

This chapter is available in the digital versions of the textbook.

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Issue 1

Groups or individuals suffering disadvantage

Chapter 12

Aboriginal and Torres Strait Islander peoples

This chapter is available in the digital versions of the textbook.

GO

Teachers are advised to consider their student cohort when deciding whether to choose this topic, as some sections are culturally unsafe for First Nations students.

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Issue 1

Groups or individuals suffering disadvantage

Chapter 13

People who have a mental illness

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Themes and challenges for Part III – Law in practice: Issue 1

The relationship between justice, law and society

- Women still lag behind men in regard to pay equity and representation in parliament and executive leadership. With the aim to better align the law with the needs and views of society, legislation has been introduced that requires all Australian companies with 100 employees or more to publish their median pay gap between male and female employees.

The development and reform of law as a reflection of society

- As the rights of children and young people became recognised in areas such as education, medical treatment, legal status and the right to be safe, the law has been reformed to reflect this, both through statute and case law (common law).
- As the role of women in society has shifted over time, the law has reflected these changes through reforms to voting rights, property ownership and legal status, as well as through legislation ensuring equal access to education and the workforce.

The importance of the rule of law

- The legal system struggles to apply the rule of the law for migrants who have not entered Australia through formal channels. However, it does try to apply procedural fairness in the way that both legal and non-legal migrants can appeal decisions. Despite this, isolation, cultural issues, income and education levels, and the time taken to carry out legal processes can interfere with the application of procedural justice.
- The rule of law is supposed to provide procedural justice to the citizens of a country, but in the case of First Nations peoples there has been a lack of effectiveness. The concept of *terra nullius* eroded the rights of First Nations peoples and remedial action has been very slow. Although there have been legal and non-legal solutions put in place to deal with the issues faced by First Nations peoples, there is still a long way to go.

The responsiveness of the legal system in dealing with issues

- The law has been slow to respond to issues relating to children and young people. For example, despite calls to lift the age of criminal responsibility (*doli incapax*) from 10 to 14, based on substantial evidence of the harm contact with the criminal justice system in its current form can have on children and young people, governments have been slow to act. An exception is the *Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023* (ACT).
- The law has been slow to respond to and has failed to completely address the issue of sexual harassment in the workplace. Further, there has been insufficient improvement in the representation of women in senior management and on the boards of Australia's top 200 companies. This is despite three decades of legislation aimed towards achieving better representation.

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- The law has been reactive in dealing with mental health issues. This is further complicated by the fact that stigma around mental illness means that issues that require a legal response can remain hidden. In addition, mental health issues can prevent individuals from accessing the legal system or taking advantage of legal and non-legal avenues to deal with their problems.

The effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society

- The effectiveness of legal mechanisms for achieving justice for children and young people in Australia has been mixed. Improvements have been seen in responding to child abuse, but practices continue that place children and young people at risk, such as strip searches at festivals, or that infringe on their rights, such as move-on powers that limit their use of public spaces.
- Although migrants are covered by the legal and non-legal mechanisms for justice that apply to all Australian residents, their access to these is limited by financial, cultural, language and education barriers. This makes achieving justice more difficult for migrants.
- First Nations peoples also face barriers to achieving justice. Their access to legal and non-legal mechanisms for achieving justice can be limited where they do not have the money, language skills or educational background to use these mechanisms effectively.
- People with a mental illness do not always have the capacity to take advantage of legal and non-legal mechanisms for achieving justice. In this case, a certain level of proactivity is required in lawmaking; but this is not something the legal system appears capable of.

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Issue 2

Events that highlight legal issues

Chapter 14

The Bali Nine

Chapter objectives

In this chapter, you will:

- describe the key features of the investigation of transnational crime
- identify the relevant legal terminology in investigating and discussing Australian and Indonesian law in regard to transnational crime
- evaluate the effectiveness of Australia's legal system in achieving justice in fighting transnational crime
- investigate the relationship between society and the Australian and Indonesian legal systems
- recognise differing perspectives on issues related to the death penalty
- locate quality information from authoritative sources using the internet.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Death Penalty Abolition Act 1973 (Cth)
Treaty between Australia and the Republic of Indonesia on Mutual Assistance in Criminal Matters (1999)
Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005 (Cth)
Agreement with the Republic of Indonesia on the Framework for Security Cooperation (2006)
Extradition Treaty between Australia and the Republic of Indonesia (2007)

RELEVANT INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights (1948)
International Covenant on Civil and Political Rights (1966)
Second Optional Protocol to the *International Covenant on Civil and Political Rights* (1989)
Indonesia Law on Psychotropic Substances, Law No 5 of 1997, art 59 (11 March 1997)

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14.1 A brief history of the Bali Nine

Overview of the case

On 17 April 2005, the Indonesia National Police (INP) arrested four Australians at Bali's Ngurah Rai International Airport: Michael Czugaj, Renae Lawrence, Scott Rush and Martin Stephens. The Indonesian police found heroin strapped to the bodies of these four people. Soon after, Andrew Chan was arrested by INP officers at the airport in Denpasar; Chan's suitcase had 0.01 grams of heroin residue in it. Later that same day, in a hotel in Kuta, Myuran Sukumaran, Tan Duc Thanh Nguyen, Matthew Norman and Si Yi Chen were arrested. The INP found nearly 350 grams of heroin in a bag at the Kuta hotel. This group of nine Australians was planning to smuggle a total of eight kilograms of high-grade heroin into Australia. From this time on, they were known as the 'Bali Nine'. Each of the nine Australians was charged with trafficking heroin and faced the possibility of receiving the maximum penalty of death by firing squad, or a lesser penalty of a life sentence or 20 years in jail.

transnational crime crime that occurs across international borders, either in origin or effect

Figure 14.1 Andrew Chan (left) and Myuran Sukumaran (right) arrive at the Denpasar District Court on 14 February 2006.

On 29 April 2015, Andrew Chan and Myuran Sukumaran were executed by firing squad. This act was condemned by many Australians and pleas for clemency were made by the then Prime Minister Tony Abbott and Foreign Minister Julie Bishop. Despite being characterised as the 'kingpins' or 'ringleaders' of the Bali Nine's smuggling operation, Chan and Sukumaran had distinguished themselves as model prisoners during their 10 years in jail. Their executions shocked the nation and had a serious impact on Australia–Indonesian relations.

The international community places a high priority on cooperation in dealing with **transnational crime** and many agreements and treaties have been made between nations to facilitate cooperation. However, the international community is also committed to human rights. Sometimes, there is a clash between international cooperation in combating crime and commitment to human rights. In the case of the Bali Nine, there was a clash between Australia's cooperation with Indonesia in combating drug trafficking and Australia's commitment to abolishing the death penalty.

Though the execution of Andrew Chan and Myuran Sukumaran occurred over a decade ago, this case is still relevant today because the death penalty continues to exist in many parts of the world. Capital punishment continues to be a significant global human rights issue that relates to Articles 3 and 5 of *The Universal Declaration of Human Rights* (1948).

In Rome, on 13 May 2002, the World Coalition Against the Death Penalty was created. This was an alliance of 160 non-government organisations, bar organisations, unions and local authorities. Its aim was to seek a reduction in the death penalty in the countries that have it and to work towards its eventual total abolition. The alliance also designated 10 October each year as the World Day Against the Death Penalty. On 10 October 2023, the UN Special Rapporteur on extra-judicial summary or arbitrary executions, Morris Tidball-Binz, reiterated his call for the complete abolition of the death penalty.

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Figure 14.2 On 10 October 2023, the UN Rapporteur on extra-judicial summary and arbitrary executions, Morris Tidball-Binz, called for the complete abolition of the death penalty.

This study of the execution of Andrew Chan and Myuran Sukumaran gives an appreciation into the real human dimension of this issue. This is particularly the case for these two men who accepted that they had done wrong, and since their imprisonment in Bali had turned their lives around and had done everything that they could to make a positive contribution to society. The application of the death penalty to these two men can be considered a waste when they had so much to offer.

Figure 14.3 Photos of the Bali Nine from February 2006. Top row, left to right: Myuran Sukumaran, Scott Rush, Tan Duc Thanh Nguyen and Renae Lawrence; bottom row, left to right: Si Yi Chen, Matthew Norman, Michael Czugaj, Martin Stephens and Andrew Chan.

Table 14.1 The Bali Nine

Name	Age in 2005	From	Role	Sentence (after appeals)
Andrew Chan	21	Sydney	Ringleader	Execution
Si Yi Chen	20	Sydney	Drug mule	Life imprisonment
Michael Czugaj	19	Brisbane	Drug mule	Life imprisonment
Renae Lawrence	27	Newcastle	Drug mule	20 years' imprisonment; sentence commuted and released and deported to Australia in November 2018
Tan Duc Thanh Nguyen	21	Brisbane	Financier	Life imprisonment (died in June 2018)
Matthew Norman	18	Sydney	Drug mule	Life imprisonment
Scott Rush	19	Brisbane	Drug mule	Life imprisonment
Martin Stephens	29	Wollongong	Drug mule	Life imprisonment
Myuran Sukumaran	24	Sydney	Ringleader	Execution

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Planning

The nine young Australians had been recruited by contacts they had made in nightclubs in Australia. The heroin was sourced from Thailand and the group was to pick it up in Indonesia and smuggle it into Australia.

drug mule
a person who transports drugs; either by concealing drugs in their luggage, by ingesting drugs in pouches, strapping drugs to their body, or concealing them in some other way

Andrew Chan, Myuran Sukumaran and Tan Duc Thanh Nguyen were in charge of this smuggling operation. The other six were to be **drug mules**, carrying the drugs from Indonesia to Australia. The drug mules were organised into separate teams and did not know of each other's existence until their arrest. All nine went on a 'holiday' to Bali, Indonesia, which is a very popular destination for Australian tourists.

Before leaving for Bali, Andrew Chan met Martin Stephens and Renae Lawrence who were staying in room 126 at the Formule 1 Hotel in the Sydney suburb of Enfield. Matthew Norman and Si Yi Chen were staying in the same motel, in room 129. Their suitcases were repacked with items needed for attaching bags of heroin to their bodies, such as bandages, fabric bands and tight shorts. Chan flew to Bali on 3 April 2005. The others stayed at the Sydney motel for a few more days, and then on 6 April, they also flew to Bali.

Meanwhile, Scott Rush and Michael Czugaj had flown to Sydney from Brisbane and were staying at the Spanish Inn Motor Lodge at Strathfield. They had been invited to Sydney by Tan Duc Thanh Nguyen. They were joined at the motel by Myuran Sukumaran who gave them cash and told them to book a holiday to Bali. Rush and Czugaj flew to Bali on 8 April 2005. Sukumaran and Nguyen were on the same plane.

Indonesia National Police
in Indonesia, the police force is called the Kepolisian Negara Republik Indonesia (POLRI)

Unbeknown to these nine young Australians, the Australian Federal Police had been following their movements with great interest.

Cooperation between law enforcement agencies

Australian Federal Police

In 2005, the Australian Federal Police (AFP) considered Indonesia to be one of the main places from which drugs would be smuggled into Australia. Also, there had been a recent crackdown on the importation of drugs into Australia and the AFP knew that drug lords were trying every trick in the book to keep up the supply of drugs into Australia. One way of smuggling drugs into the lucrative Australian market was by using drug mules.

The AFP had been watching the group of young Australians for six months, ever since they had received a tip-off from an informant in Brisbane. The AFP was not sure whether the nine Australians were part of a drug-smuggling operation. It took months of surveillance to build profiles and put together information about friendships and travel plans. By 8 April 2005, when all nine Australians were in Bali, the AFP had gathered a large amount of information about this group. All their intelligence pointed to Andrew Chan being the organiser. The AFP decided to contact their counterparts in Indonesia.

Legal Links

For more information about the Australian Federal Police (AFP) see the AFP's website at http://cambridge.edu.au/redirect/10401.

Indonesia National Police

The AFP's cooperation with the **Indonesia National Police** (INP) began in the late 1990s when Indonesia transitioned to a full democracy after the downfall of President Suharto's regime. From this time, the AFP provided training and support for the INP's enforcement activities regarding drug smuggling and transnational crime. AFP–INP cooperation intensified in the aftermath of the Bali Bombings of 2002 when the AFP formed a permanent investigative team in Indonesia called Operation Alliance.

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AFP officers in Operation Alliance worked closely with Indonesian police in response to the Marriott Hotel bombing in 2003, the bombing of the Australian Embassy in 2004 and the Bali Bombings of 2005.

On 8 April 2005, the AFP's senior liaison officer in Bali, Paul Hunniford, sent a letter to the INP, which stated that, '[the] AFP in Australia has received information that a group of persons are allegedly importing a narcotics substance (believed to be heroin) from Bali to Australia'. Four days later, on 12 April 2005, Hunniford again wrote to the INP listing the passport numbers, birth dates and likely flight dates of eight young Australians (at this point the AFP had no knowledge of Myuran Sukumaran). The INP would soon transmit information about the ninth Australian to the AFP.

After receiving the two letters from the AFP, the INP began surveillance of the nine young Australians in Bali. They focused particularly on Andrew Chan, who had been to Bali twice in the previous six months; one of those visits had been with Renae Lawrence. Chan and Lawrence had managed to smuggle heroin into Australia without a hitch in October 2004.

Legal Links

Further information about the relationship between the Australian Federal Police and the Indonesia National Police can be found in a report written by David Connery, Michael McKenzie and Natalie Sambhi and published by the Australian Strategic Policy Institute in March 2014. This report can be downloaded at the following link: http://cambridge.edu.au/redirect/10402.

The crime

On 8 April 2005, Andrew Chan collected a specially constructed silver suitcase containing five kilograms of heroin from Cherry Likit Bannakorn, a 22-year-old woman from Thailand. Chan was not under surveillance, as the AFP had not yet sent the first of their letters to the INP.

From 12 April 2005, INP officers were stationed at the hotels where the young Australians were staying; the INP officers began taking photos and tracking their movements. The original plan was for the nine Australians to return to Australia on 9 April with the heroin. However, Andrew Chan wanted to wait for another shipment of heroin before the drug mules returned home. Bannakorn had not brought enough on her first trip so they had to wait until she could deliver more. This gave the INP officers more time to continue their surveillance and compile more evidence.

At 9 pm on 16 April 2005, Chan again met Bannakorn and collected the rest of the heroin. This time, INP officers were filming Chan. As well as visual surveillance, which included numerous photos and some videos, the INP was also monitoring the phone conversations between the nine Australians. Even though they spoke in code with each other on the phone, the metadata alone connected the Bali Nine, which made it difficult for them to claim, as they later did, that they did not know the other members of the group.

On 17 April 2005, Andrew Chan checked out of his hotel and went to another hotel where he and Myuran Sukumaran met Scott Rush and Michael Czugaj, and taped packages of heroin to their bodies. Then Chan and Sukumaran met and set up the drug mules from the other group: Renae Lawrence and Martin Stephens. The two groups of drug mules (Rush and Czugaj; Lawrence and Stephens), unaware of each other's existence, left in separate taxis to travel to the Ngurah Rai International Airport in Denpasar. Then Nguyen and Sukumaran headed to the Melasti Bungalows where they met Si Yi Chen and Matthew Norman. Meanwhile, Chan got a taxi to Ngurah Rai International Airport. During all of this time, every move had been observed and recorded by the INP.

Arrest

At 8 pm on 17 April 2005, Renae Lawrence and Martin Stephens arrived at the airport in Denpasar. From the moment they got out of the taxi, every move they made was watched. However, they were unaware of this as they passed through security without any problems, not even being picked up by the sniffer dogs. Then the pair was approached by a customs officer, who asked them to follow him so they could be searched. This search revealed the packages of heroin.

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Meanwhile, at 8:30 pm, Scott Rush and Michael Czugaj left the hotel for the Ngurah Rai International Airport. At the immigration counter at the airport, the two men were detained by customs officials and escorted into an office where they found Renae Lawrence and Martin Stephens. Rush and Czugaj were searched. Between them, the four drug mules were found to be carrying 8.2 kilograms of heroin worth around $4 million on the streets of Sydney.

Unaware that the four drug mules had been detained by customs, Andrew Chan arrived at the airport and checked into the same flight as Lawrence and Stephens. Soon after, customs officials and police officers asked Chan to come with them.

INP officers then went to the Melasti Bungalows where Myuran Sukumaran, Matthew Norman, Si Yi Chen and Tan Duc Thanh Nguyen were celebrating Sukumaran's twenty-fourth birthday. The four men did not know that they had been under surveillance. The police officers searched the hotel room; in a rucksack, they found 334.26 grams of heroin. The four men were handcuffed and taken to Polda police station.

Figure 14.4 Renae Lawrence, 27 years old, from Newcastle, sitting in an interrogation session in Denpasar on 4 April 2005.

Review 14.1

1. Identify what made the Bali Nine's crime a transnational crime rather than a domestic crime.
2. Describe the content of the letters that the Australian Federal Police (AFP) sent to the Indonesia National Police (INP) on 8 April and 12 April 2005.
3. Outline the methods used by the AFP and INP to gather intelligence on the Bali Nine before their arrest.
4. Recall how each member of the Bali Nine was arrested.

14.2 Legal responses

inquisitorial system
a legal system in which the court or a part of the court (e.g. the judge) is actively involved in conducting the trial and determining what questions to ask; used in some countries that have civil legal systems rather than common law systems

adversarial system
a system of resolving legal conflicts that relies on the skill of representatives for each side (e.g. defence and prosecution lawyers) who present their cases to an impartial decision-maker; used in common law countries such as the United Kingdom and Australia

Trials

The Indonesian justice system is based on Dutch law, inherited from when Indonesia was part of the Dutch empire. As a result, Indonesian law follows the European system, which is an **inquisitorial system**, rather than **adversarial system** like that followed in Australia. There are no juries and each case is presided over by a panel of three to five judges. As well as leading the questioning of witnesses and suspects, the judges also decide the guilt or innocence of the accused.

In court, the Indonesian prosecutors had decided to bring the same charge against all Bali Nine defendants, regardless of their role: the charge of 'exporting narcotics as part of an organisation'. This charge carried the death penalty. Once the trials were under way in the Denpasar District Court, the prosecutors followed the same strategy in each case of trying to get the co-accused to give evidence

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against each other. The four mules – Lawrence, Czugaj, Rush and Stephens – all followed the same story that they had told from the day of their arrest: they had no idea of the true reason they were in Bali until it was too late and that they had been threatened by the ringleaders, Chan and Sukumaran. When the four drug mules testified, they backed up each other's stories. When the prosecutors made their sentence request, they asked for 20 years for Lawrence, but life for Czugaj, Rush and Stephens. The judges did not agree and imposed life sentences for all four of the drug mules.

The ringleaders, Chan and Sukumaran, along with Norman, Chen and Nguyen, followed the same strategy of denying any involvement or any knowledge about the drugs. When these five were called to testify, they all said that they did not wish to give evidence because they were also suspects in the same case. When asked about their responses to the drug mules' accusations against them, they all issued denials.

The judges were visibly displeased, and they were particularly annoyed with the testimonies of Chan and Sukumaran, despite the glowing personal references that were presented on their behalf during the trials. Sukumaran's defence lawyer, Mochamad Rifan, portrayed his client as being a scapegoat for the mules, who had tried to absolve themselves of all blame by putting all responsibility onto Sukumaran and Chan.

The prosecutors were harsh in their condemnation of Chan and Sukumaran. The prosecutors at Sukumaran's trial said that he had been evasive during the trial, that he was guilty and that not a shred of leniency should be given. They demanded the death penalty. Similarly, Chan was described as being the 'driving force' behind the Bali Nine operation; they said he had failed to cooperate and had given confusing and convoluted evidence. Therefore, the prosecutor demanded the death sentence for Chan. In both cases, Judge Supratman said that there were no mitigating factors that might lessen the sentence and commented that a drug dealer was as bad as a terrorist. As a result, the judge found the two men guilty and sentenced them to death by firing squad. Chan and Sukumaran were the first Australians in history sentenced to death in Indonesia. Meanwhile, Norman, Chen and Nguyen were given life sentences.

The last of the Bali Nine to be tried were the men who made up the so-called 'Melasti Group'. These were the men arrested at the Melasti Beach Bungalows. Even though the evidence against the Melasti Group was more circumstantial, it pointed to Chen and Norman being next in line to be the drug mules to transport heroin to Australia once they received the next shipment of heroin from Thailand. Each of the three men said that they had been in the wrong place at the wrong time. When each was asked by the judge whether they had regrets, they all said that they did. But when they were asked if they acknowledged guilt, they said they did not. They too were given life sentences.

Review 14.2

1. Identify the arguments the four drug mules used in their defence at their trials.
2. Describe the strategy Andrew Chan and Myuran Sukumaran used in their defence.
3. Describe the outcome of the trials for each member of the Bali Nine.

Imprisonment and rehabilitation

After their arrest, the nine young Australians were held in cells at the Polda Jail. However, Chan and Sukumaran were split from the other seven due to claims by some that they feared the two 'ringleaders'. Eventually though, all nine ended up in Kerobokan Prison on 28 July 2005.

Kerobokan Prison

Kerobokan Prison came to the attention of the Australian public with the arrest of Schapelle Corby on 8 October 2004 for smuggling 4.2 kilograms of cannabis into Bali. By the time the Bali Nine were arrested, Corby had already spent six months in Kerobokan Prison. Corby attracted a lot of attention from the Australian media and as a result the Australian public got to learn a lot about the Bali prison. On 27 May 2005, Corby was convicted for smuggling cannabis into Bali and was given a 20-year sentence. In addition, until October 2005, death row in Kerobokan Prison had been home to the three Bali Bombers who had been responsible for the 2002 bomb attacks.

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With a population of nearly 800 people, Kerobokan Prison was overcrowded in 2005, but compared to other prisons in neighbouring countries like Thailand or the Philippines, it was not too bad. However, Kerobokan Prison has received bad press through books like Kathryn Bonella's *Hotel Kerobokan*. About half of the population of the prison was there for drug crimes.

The eight male members of the Bali Nine were lodged in the maximum-security block. Renae Lawrence was housed with the female prisoners in another block.

In 2005, Kerobokan Prison had a bad reputation, but since then it has been transformed. This is largely due to Ilham Djaya, who was the head of the prison until April 2008. Djaya's number one priority was to clean up corruption in the prison. Under Djaya's watch, gangs and drug dealers no longer ran the prison, the drab grounds of the prison were revamped and there are now gardens and lawn, which are tended to by the prisoners. Djaya's other priority was to rehabilitate the inmates. He sacked many of the guards and difficult prisoners were moved to other jails.

Within the maximum-security block, the eight male members of the Bali Nine were given some freedom to reconfigure and redecorate their cells. They set up some gym equipment in their cells and Myuran Sukumaran installed a screen-printing machine. They were allowed out of the block into the rest of the prison during the day.

Despite the fact that the four drug mules had testified against Chan and Sukumaran, they all got on well. In fact, reports indicated that Chan and Sukumaran had demonstrated kindness to their fellow Bali Nine prisoners. Chan had become a motivator, always insisting that the men keep active and not just sit around. Chan also had many repeat visitors who spoke of his engaging personality.

Sukumaran developed a talent for art and became a mentor to other prisoners.

Figure 14.5 In 2017, a friend of Myuran Sukumaran's, Ben Quilty, co-curated the 'Another Day in Paradise' exhibition in Sydney. The exhibition displayed artwork that Sukumaran had painted while in prison.

In 2008, Ilham Djaya was replaced by Siswanto as governor of the prison; Siswanto was governor for three years. Under his guidance, the Bali Nine prisoners in Kerobokan Prison were able to continue their rehabilitation. In 2010, he gave character evidence supporting Chan and Sukumaran.

Legal Links

Source online SBS's 2010 interview with Andrew Chan and Myuran Sukumaran, called *The Condemned*. It originally aired in November 2010, just days before the final hearing on whether Chan's and Sukumaran's death sentences for drug trafficking would be carried out. The interview gives an insight into Chan's and Sukumaran's living conditions in Kerobokan Prison and their rehabilitation. The interview also provides the perspective of the men's lawyer.

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Analysis 14.1

Read Jewel Topsfield's article 'Bali Nine executions: How Chan and Sukumaran's road to redemption changed Kerobokan jail' (*The Sydney Morning Herald*, 2015) at http://cambridge.edu.au/redirect/10403.

1. Describe how Kerobokan Prison has changed since 2005.
2. Describe Chan's and Sukumaran's reaction when they arrived at the prison in 2005.
3. Outline the initiatives taken by Chan and Sukumaran to improve life in the prison for all the inmates.
4. Outline how Topsfield describes Sukumaran.
5. Discuss why the other inmates and the prison guards feared life in Kerobokan Prison once Chan and Sukumaran had gone.

Appeals

The appeals process available to the Bali Nine commenced when they appealed their sentences, given in the Denpasar District Court, in the Bali High Court. Appeals of decisions made in the Bali High Court go to the Indonesian Supreme Court. The Indonesian Supreme Court oversees 68 high courts across Indonesia. The Supreme Court only considers questions of law, not fact. Another avenue that can be taken is to appeal to the Constitutional Court. This court has the same standing as the Supreme Court.

All members of the Bali Nine appealed their sentences and exhausted the appeals process. Appealing a conviction can be risky as sentences can be increased as well as decreased, as members of the Bali Nine found out.

At the end of the appeals process, the sentences for the members of the Bali Nine were:

- six members (Si Yi Chen, Michael Czugaj, Tan Duc Thanh Nguyen, Matthew Norman, Scott Rush and Martin Stephens): life imprisonment
- one member (Renae Lawrence): 20 years' imprisonment
- two members (Andrew Chan and Myuran Sukumaran): death.

Since 2015, Chen, Czugaj, Norman and Stephens have continued to submit applications to have their life sentences changed to fixed-term prison sentences. To be successful, these applications need to be personally approved by the Indonesian president; to date, all such applications have been denied. In June 2018, Tan Duc Thanh Nguyen died in prison of cancer. In November 2018, Renae Lawrence's sentence was commuted, and she was released and deported to Australia.

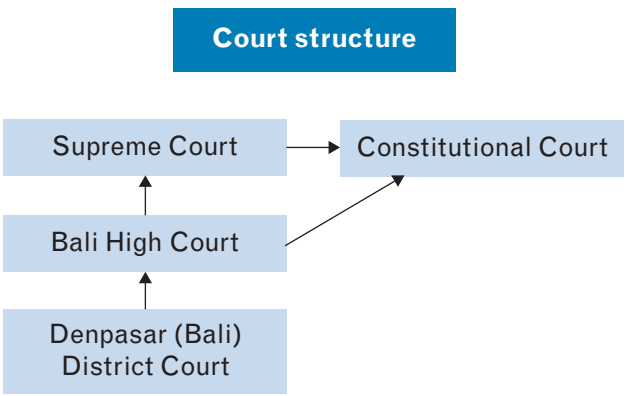

Figure 14.6 The court hierarchy in Bali, Indonesia

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Table 14.2 The Bali Nine's appeals process

Date	Appeal authority	Decision
26 April 2006	Bali High Court	Chan and Sukumaran's death sentences confirmed
27 April 2006	Bali High Court	• Life sentences reduced to 20 years' imprisonment for Chen, Czugaj, Lawrence, Nguyen and Norman • Life sentences upheld for Rush and Stephens
6 September 2006	Supreme Court	• Convictions upheld for Nguyen, Chen, Norman and Rush, and death penalty imposed, rather than the lighter sentences granted by the Bali High Court (in response to the prosecution appealing the sentence reductions given by the Bali High Court) • Death sentences upheld for Chan and Sukumaran • Life sentence upheld for Stephens • Life sentence reinstated for Czugaj
3 May 2007	Constitutional Court	Ruled that Indonesian law permitted the death penalty for the crime of drug trafficking; this was in response to Chan, Rush and Sukumaran lodging a constitutional challenge against the death penalty
6 March 2008	Supreme Court	Final appeal to the court (called a Peninjauan Kembali or 'PK'); death sentences reduced to life imprisonment for Nguyen, Chen, Norman
10 May 2011	Supreme Court	Death sentence reduced to life imprisonment for Rush
10 May and 6 July 2011	Supreme Court	Appeals against death penalty dismissed for Chan and Sukumaran
13 May and 9 July 2012	Indonesian President Susilo Bambang Yudhoyono	Appeals for a pardon rejected for Chan and Sukumaran
December 2014 and January 2015	Indonesian President Joko Widodo	Appeals by Chan and Sukumaran for clemency rejected
January 2015	Denpasar District Court	Application by Chan and Sukumaran for a judicial review into their cases rejected
9 February 2015	Indonesian Court	Challenge against President Widodo's refusal to grant pardons dismissed
6 April 2015	Indonesian Administrative Court	Appeal against the ruling that they could not challenge the Indonesian president's refusal to grant clemency rejected

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Figure 14.7 Nusakambangan Island in Central Java, Indonesia

Execution of Andrew Chan and Myuran Sukumaran

On 3 March 2015, Andrew Chan and Myuran Sukumaran were moved from Kerobokan Jail and transferred to the island prison of Nusakambangan in Central Java, which was to be their place of execution.

The method of execution at Nusakambangan was as follows:

- A special firing squad was recruited from the national police force.
- Inmates were moved to isolation cells 72 hours before the execution.
- Family members and religious counsellors were permitted to visit up to a few hours before the execution.
- Prisoners had their hands and feet tied, but chose whether they stood, knelt or sat before the firing squad.
- 12 marksmen aimed rifles at each prisoner's heart, but only three marksmen had live ammunition in their rifles.
- Medical personnel were present, and they pronounced the prisoners dead after execution.
- Family members waited outside the prison; the bodies were cleaned and handed over to them after the execution.

In the early hours of 29 April 2015, Andrew Chan, 31, and Myuran Sukumaran, 34, were on the island prison of Nusakambangan, along with six other death row prisoners. They were all led outside and made ready for the execution. All eight prisoners decided to not be hooded or blindfolded. They had made a promise to each other that they would all look their executioners in the eyes. The firing squad used laser pointers on their rifles and aimed their rifles at the prisoners' hearts. After a volley of shots, all eight men were dead.

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Review 14.3

1 Discuss why Kerobokan Prison had a bad reputation when the Bali Nine arrived there.
2 Outline the different avenues of appeal taken by Chan's and Sukumaran's lawyers.
3 Identify the outcomes of the appeals for the other members of the Bali Nine.

Analysis 14.2

Read the article 'Death for Bali ringleaders' by Mark Forbes and Neil McMahon (*The Age*, 15 February 2006) at http://cambridge.edu.au/redirect/10404. This was published just after Chan and Sukumaran were given death sentences.

1 Identify which court heard the case.
2 Outline the reasons the judge, Arief Supratman, gave for giving the two men the death penalty.
3 Outline how prominent Australians reacted to the news of Chan's and Sukumaran's death sentences.
4 Identify the comment made by the Australia Federal Police Chief, Mick Keelty.

14.3 Non-legal responses

Public campaign

Although their July 2012 appeal had failed, there did not seem to be a rush to execute Andrew Chan and Myuran Sukumaran. This changed in October 2014, with the election of President Joko Widodo, who had run on a campaign of being tough on drug smugglers.

Public opinion in Australia about Chan and Sukumaran had changed significantly since 2005; the Australian public now saw two quietly spoken and thoroughly reformed men. Following President Widodo's December 2014 statement that no mercy would be shown to drug dealers, supporters of Chan and Sukumaran strengthened public campaigns to pressure the Indonesian president to pardon Chan and Sukumaran. The Mercy Campaign put together a petition – which received over 200 000 signatures – that asked President Joko Widodo for clemency. Along with other newspapers, *The Sydney Morning Herald* added their plea to the cause, with an editorial on 23 February 2015 stating that 'two men who have apologised and atoned from their crimes, [who are] pioneers of rehabilitation in Indonesia's prison system, will be killed senselessly'.

Figure 14.8 Indonesian lawyer Todung Mulya Lubis (centre) displays paintings done in prison by Myuran Sukumaran at the Nusakambangan port in Cilacap across from the Nusakambangan maximum security prison island in 2015. The families of Andrew Chan and Myuran Sukumaran left from here to pay them a final visit before their execution.

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Figure 14.9 The then Foreign Affairs Minister, Julie Bishop (left), and then Deputy Opposition Leader, Tanya Plibersek (right), during a candlelight vigil for Andrew Chan and Myuran Sukumaran in 2015.

Then NSW Premier Mike Baird added his voice to the cause stating that, 'We all understand the need for justice – but not like this. I stand for mercy.' Radio broadcasters, news commentators, journalists, actors and musicians also added their voices to the Mercy Campaign.

On 29 April 2015, when all hope was gone, people gathered in Australia and in Bali in all-night vigils until the time of execution.

International diplomacy

There were various diplomatic attempts to prevent the executions:

- In January 2015, then Prime Minister Tony Abbott made a direct appeal to Indonesian President Widodo to show mercy.
- On 5 March, the Foreign Minister Julie Bishop again attempted to stop the executions by offering to repatriate three Indonesian drug criminals to their homeland in return for sparing the lives of Chan and Sukumaran.
- United Nations Secretary General Ban Ki-Moon directly appealed to President Widodo.

There was a diplomatic fall-out between Australian and Indonesia after the executions. The then Prime Minister Tony Abbott announced that Australia would withdraw its ambassador from Indonesia, and relations between the two countries soured.

Memorials

Many people tried to take something positive from the lives of these young men or tried to honour their memory in some way. Others were motivated to campaign for an end to the death penalty altogether.

One attempt to memorialise the men for a good cause was the Australian Catholic University's (ACU) creation of two scholarships to be made available to Indonesian undergraduate students. The scholarships offer the equivalent of full tuition for four years at any ACU campus. The scholarships are awarded on the basis of an essay on the sanctity of human life.

Analysis 14.3

Read the article 'Bali Nine: Julie Bishop, Tanya Plibersek plead for clemency for Andrew Chan and Myuran Sukumaran' (by James Bennett and Louise Yaxley, *ABC News*, 12 February 2015) at http://cambridge.edu.au/redirect/10405.

1. Outline what occurred in federal parliament and why this was unusual.
2. Identify the arguments that Tanya Plibersek used in her address to federal parliament.
3. Identify the arguments that Julie Bishop used in her address to federal parliament.
4. Describe how the Indonesian Foreign Minister reacted to Bishop's plea for mercy.

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Professor Gregory Craven, the Vice-Chancellor of the ACU, was one of the founders and co-spokesmen of the Mercy Campaign. Professor Craven has said that:

> While our calls for mercy for Mr Chan and Mr Sukumaran were ultimately rejected, we strongly believe that hope remains for prisoners around the world who face a similar fate. In memory of Mr Chan and Mr Sukumaran, each of us can take action to end this punishment.

Professor Gregory Craven, 2015, Vice-Chancellor Australian Catholic University.

Review 14.4

1. Identify some of the public figures who publicly supported Andrew Chan and Myuran Sukumaran.
2. Describe the Mercy Campaign.
3. Outline the offer Julie Bishop made to the Indonesian Government.
4. Describe the initiative Professor Craven announced in honour of Chan and Sukumaran.

14.4 Effectiveness of responses

The case of the Bali Nine is a significant example of transnational crime affecting Australian citizens. It brings to the fore two competing interests of the Australian legal system: the protection of its citizens abroad and the fight against transnational crime. Political leaders and the legal system need to find the right balance between these two priorities. This study raises the issue of the sanctity of life and the extent to which international law, with its clear statements against the death penalty, can deliver certainty in the protection of this principle in practice.

This case also raises the issues that confront Australians abroad who have to navigate the legal system of a foreign country, which is a situation that a growing number of Australians who live or work overseas have to face. Therefore, it is important that Australia has good relations with as many countries as it can and has understandings in place with those countries on how they should treat Australians in their justice systems and how we should treat their nationals in the Australian justice system.

Figure 14.10 A funeral service was held for Myuran Sukumaran in Sydney in 2015.

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The Bali Nine case also concerns the purpose and effectiveness of punishment. Is punishment in the legal system only about retribution and deterrence? To what extent should rehabilitation have an impact on a prisoner's sentence? Both Andrew Chan and Myuran Sukumaran were considered to be rehabilitated in the 10 years they were in prison, yet it appears this was not taken into account in regard to their death sentence.

Andrew Chan and Myuran Sukumaran were the first Australians ever to be executed in Indonesia. Is the Australian public and the government comfortable with the idea that this could happen again? So, the question is: how effective is the law in dealing with the tension between international cooperation while dealing with transnational crime and Australia's own anti-death penalty stance, as well as our international obligations in regard to human rights law? If Australia is serious about working for the international abolition of the death penalty, then is it prepared to be consistent in its opposition to the use of the death penalty in Indonesia in all circumstances?

Australian–Indonesian cooperation

In the case of the Bali Nine, it seems that the AFP's actions gave preference to cooperating with Indonesian police over Australia's human rights obligations.

From the early days of the case, the AFP was under fire for its role in facilitating the arrest of the Bali Nine by the INP in Bali. The two letters sent by Paul Hunniford of the AFP on 8 and 12 April 2005 handed over all the key information to the INP. The AFP left it up to their Indonesian counterparts to decide whether the INP would intercept and arrest the young Australians in Bali or let them leave Bali for the AFP to make the arrests when they arrived in Australia. The AFP claimed that fighting transnational crime demanded close cooperation between countries, and that they could not put conditions on the release of information to their Indonesian counterparts.

In fact, in their letter of 8 April 2005, the AFP did indicate their preference that the Bali Nine be allowed to return to Australia for arrest (although it was not a precondition of sharing the information). However, after the INP had arrested the Bali Nine, the INP then asked the AFP to send on the evidence that they had compiled in Australia; the AFP sent this information without requesting that the young Australians be exempted from the death penalty.

Most commentators agree that the AFP's actions in this matter were lawful, and that there are benefits to having a good relationship with Indonesia; for example, terrorist plots have been foiled and threats to both countries have been removed.

However, others feel that by sharing information with the INP, while knowing the death penalty was almost certain, the AFP may have failed to act morally. It is arguable that the AFP's actions did not comply with Australia's obligations under international law.

Arguments for and against sharing information without conditions

A report by the Australian Strategic Policy Institute (ASPI) in March 2014, called *Partners against Crime: A Short History of the AFP–POLRI Relationship*, concluded with the following:

> The assistance given by Australia to Indonesia to develop police capacity is not charity. There is a clear expectation that such assistance will allow both forces to better deter, disrupt and prosecute transnational crime. Nor is this a one-way street ... Indonesia has and continues to provide Australia with direct assistance and benefits. These benefits include foiled terrorist plots, the removal of mutual threats and help with combatting transnational crime. Without that assistance, it's plausible to assert that more Australians could have been killed by terrorists, that Australia's border security challenges would be even greater, and even more crime would make its way to Australia. So the relationship between the AFP and INP is in the direct interest of both countries, and benefits of this cooperation can be seen at the police-to-police, bilateral, and regional levels.

David Connery, 2014, Natalie Sambhi and Michael McKenzie, *Partners against Crime: A Short History of the AFP–POLRI Relationship*, Australian Strategic Policy Institute, March.

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For the authors of the ASPI report, there is no doubt that the current policy of the AFP not putting any conditions on intelligence given to its Indonesian counterparts is satisfactory.

Although Lorraine Finlay's 2011 article 'Exporting the death penalty? Reconciling international police cooperation and the abolition of the death penalty in Australia' questioned why, after the arrests, the AFP sent information without requesting an exemption from the death penalty, she ultimately argued that the AFP could not put conditions on the information:

> Restricting police-to-police cooperation by the application of the extradition framework to potential death penalty matters would prevent the sharing of a significant volume of useful and important information, and have the counter-intuitive effect of allowing information about relatively trivial criminal activity to be freely shared while at the same time restricting cooperation aimed at preventing and prosecuting the most serious offences ... [Also] it would significantly restrict counter-terrorism cooperation with both Indonesia and the United States of America, and would prevent the exchange of drug-trafficking intelligence with countries such as Indonesia, Singapore and Vietnam.

Lorraine Finlay, 2011, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia', *The Sydney Law Review,* vol. 33(1), pp. 95–117.

Others believe that the AFP could have done better, and that Australia can and should put conditions on the information shared with other countries. Ronli Sifris' 2007 article 'Balancing abolitionism and cooperation on the world's scale: The case of the Bali Nine' argues that the AFP was negligent in sharing the information with the INP in full knowledge that if the young Australians were arrested in Bali, they would face the death penalty. Sifris says that this may have been lawful, but it was not moral. The AFP prioritised cooperation above Australia's commitment to the abolition of the death penalty. As Sifris explains:

> Each human being has a moral right to life. By placing members of the Bali Nine in a position where the violation of their right to life was a clear possibility, the AFP violated their rights. ... Consequently, in accordance with the moral paradigm expounded in this section, even if the actions of the AFP in providing information to the INP were not illegal, they were surely immoral.
>
> ...
>
> In light of this growing global trend [towards the abolition of the death penalty], it is difficult to understand why, in the case of the Bali Nine, the AFP voluntarily provided information to the INP with the knowledge that there was a real risk that the provision of this information would result in Australians being subjected to death by firing squad and did not seek assurances that the death penalty would not be imposed.

Ronli Sifris, 2007, 'Balancing Abolitions and Cooperation on the World's Scale: The Case of the Bali Nine', *Federal Law Review*, 35 (1).

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The death penalty

Cindy Wockner, one of the authors of the comprehensive book *Bali 9: The Untold Story*, had this to say about the execution of Chan and Sukumaran:

> For years I interviewed them in jail and visited and interacted with them. As I watched their transformation there was no doubt their rehabilitation was genuine. They had become decent and honourable young men who were trying, every day, to make amends for their crime. They knew they deserved to be in jail ... Sukumaran and Chan were not the same people who were arrested on 17 April 2005. They had reformed and helped reform so many other lives. By killing them Indonesia lost its best chance yet to fight the scourge of drugs. The world is a poorer place. RIP Andrew Chan and Myuran Sukumaran.

Cindy Wockner, 2015, 'How Indonesia lost its best chance to fight drugs by killing Andrew Chan and Myuran Sukumaran', https://cindywockner.wordpress.com, 2 June.

Australian law

Australia's position on the death penalty in domestic law has been crystal clear for many years. In 1967, Ronald Ryan was the last person to be executed in Australia.

Figure 14.11 Protests against imposing the death penalty continue around the world. In 2021, anti-death-penalty activist Glenda Breeden held a lamp while protesting against the execution of Lisa Montgomery in the United States.

The *Death Penalty Abolition Act 1973* (Cth) states that 'a person is not liable to the punishment of death for any offence'. No Australian jurisdiction uses the death penalty today. In parliament, there is a bipartisan approach to the death penalty with the major parties opposed to any return of capital punishment.

International law

The situation regarding the death penalty in international law is unresolved. While it is not illegal, we can see a movement towards its global abolition. The *International Covenant on Civil and Political Rights* (1966) does allow for it, but only in limited circumstances, as listed in Article 6.2:

> ***International Covenant on Civil and Political Rights***
> **Article 6.2**
>
> In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

However, the Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989) leaves no doubt as to the United Nations' position on the death penalty. In Article 1, the Protocol states:

> **Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989)**
> **Article 1**
>
> No-one within the jurisdiction of a State Party to the present Protocol shall be executed.
>
> Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

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Analysis 14.4

Scan the QR code to watch Video 14.1.

1 Discuss why Geoffrey Robertson describes the executions as 'operatic barbarity'.
2 Identify the three major rules of international law being breached by the Indonesian Government.

Video 14.1 In a rally in Martin Place, the day before the executions of Chan and Sukumaran, human rights lawyer Geoffrey Robertson QC spoke about the death penalty. (02:14)

Numerous other treaties and covenants enshrine opposition to that the death penalty. It is also to be noted that the *Rome Statute of the International Criminal Court* (1998), which led to the creation of the international Criminal Court, excludes the use of the death penalty. So it is clear that there is a movement towards the global abolition of the death penalty. Since 1990, it has been abolished in over 40 countries and has generally not been reintroduced.

At the same time, the increased amount of transnational crime means that cooperation between national police forces in the fight against transnational crimes is steadily increasing. This has resulted in many mutual assistance treaties between governments, which in turn has led to tension in the international sphere between the recognition of human rights in the extradition process and the need for cooperation when dealing with international crime. Currently, the balance is tipping in the direction of human rights being given the priority in the extradition processes between countries. In extradition cases, it seems that countries are able to resolve the tension between international cooperation and the commitment to the abolition of the death penalty. The question is whether cooperation between national police forces should also move in this direction.

Australia's policy on global abolition of the death penalty

If Australia wants to work towards the abolition of the death penalty in countries in which large numbers of Australians work or holiday, then it needs to follow a consistent and long-term approach. Australia's position on the death penalty in regard to the Bali Nine was compromised by its support for the execution of the Bali Bombers in 2008. To effectively pressure the Indonesian Government for the abolition of the death penalty, the Australian Government needs to maintain a principled and consistent policy. No advocacy will be effective if Australia continues to equivocate on capital punishment.

In a 2002 report for the Lowy Institute, Dr Dave McRae argued that Indonesia is the key to achieving the abolition of the death penalty in the south-east Asian region. In comparison to other countries in the region (e.g. Malaysia and Singapore), Indonesia is in fact moderate in its use of the death penalty. There are strong lobby groups within Indonesia both for and against the death penalty. However, the one factor that could tip Indonesia in the direction of abolition is the fact that there are many Indonesian nationals on death row in other countries and the Indonesian Government has been working hard in opposing the imposition of the death penalty on these people. Indonesia could be won over by the argument that if they abolished the death penalty at home, it would be easier to plea for mercy for Indonesians facing execution in other countries.

Dr McRae also argues that the abolition of the death penalty in Indonesia would contribute to the protection of Australians in Indonesia and would minimise the threat to relations between the two countries.

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Also, it would build momentum towards death penalty abolition in the south-east Asian region.

Legal Links

View the following international instruments online:

- *International Covenant on Civil and Political Rights* (1966), Article 6.2
- Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989), Article 1.

Since the execution of Chan and Sukumaran in 2015, it seems that no progress has been made in regard to abolishing the death penalty in Indonesia. Since the re-election of Joko Widodo as president in 2019, the Indonesian Government has been pursuing more hard-line policies in a number of areas. Widodo's new Attorney-General, Sanitiar Burhanuddin, has vowed to resume executions in Indonesia (an unofficial moratorium has been observed since 2016). At the end of 2018, there were 308 people on death row in Indonesia and around 70 people had been executed by the end of 2019. This was at the same time that Indonesia was appointed to the UN Human Rights Council. By 2020, it was clear that the death penalty had returned as a possibility for any Australian, or any foreigner, caught breaking the law in Indonesia.

Legal Links

Search online for the article 'A key domino? Indonesia's death penalty politics' (by Dr Dave McRae, *Lowy Institute*, March 2012).

Research 14.1

Find the website of Amnesty International and locate the section about the campaign to end the death penalty. Access the latest report.

1. Find out how many executions have taken place in each of Australia's south-east Asian neighbours.
2. Identify which countries have carried out the death penalty in recent years and how many executions have taken place.
3. Outline what the report identifies as the trends for the death penalty in our region.
4. Compare this with the global trends on executions.
5. Describe what concerns the report expresses and if there are any signs of hope that the death penalty could be ended worldwide.

Figure 14.12 On 23 July 2019, two Australians, William Cabantog (centre) and David Van Iersel – who had been arrested in Bali for possessing cocaine – were paraded in front of local media.

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In 2003, former High Court judge Justice Michael Kirby said the following concerning the death penalty:

> We have set ourselves upon a path to a higher form of civilisation. It is one committed to fundamental human rights. Such rights inhere [*are invested*] in the dignity of each human being. When we deny human dignity we diminish ourselves. We become part of the world of violence. Judges and lawyers stand for the rational alternative to a world of terror and violence. The law will often fail. But inflicting the death penalty is the ultimate acknowledgment of the failure of civilisation.

Justice Michael Kirby, 2003, 'The High Court and the Death Penalty: Looking Back, Looking Forward, Looking Around', *Australian Law Journal*, vol 77, December, pp. 811–19.

By 2022, there were still five members of the Bali Nine in prison. Sadly, Tan Duc Thanh Nguyen had died of cancer in a hospital in Jakarta in June 2018, but by November 2018, Renae Lawrence had been released after serving 13 years. In February 2020, when Indonesian President Joko Widodo made a visit to Australia, Renae Lawrence used her freedom to make a plea for clemency for the remaining five members of the Bali Nine left in prison. In August 2021, three of those, Matthew Norman, Si Yi Chen and Scott Rush, were recommended for release by prison authorities, prompting Bali's Correctional Board to look favourably at having their sentences cut. In the *Catholic Leader* on 13 April 2022, Bishop Harris, who had kept in touch with Michael Czugaj and Scott Rush since he visited them in 2008, urged the release of the pair. Bishop Harris believed that 'enough was enough' and that it had been demonstrated that their rehabilitation was a success. The story of the Bali Nine is not yet over.

Review 14.5

1. Assess why the executions of Andrew Chan and Myuran Sukumaran are significant for Australia.
2. Outline the criticism of the AFP's role in the Bali Nine case.
3. Assess if the AFP's actions in regard to the Bali Nine were lawful:
   - **a** in domestic law
   - **b** in international law.
4. Describe Cindy Wockner's opinion of the execution of Chan and Sukumaran.
5. Identify the domestic actions and laws that have ended the death penalty in Australia.
6. Outline how the death penalty is viewed in the:
   - **a** *International Covenant on Civil and Political Rights* (1966)
   - **b** Second Optional Protocol of the *International Covenant on Civil and Political Rights* (1989).
7. Discuss the current situation in regard to ending the death penalty globally.
8. Outline Australia's policy on the death penalty.
9. Recall what Dr McRae recommends should be Australia's policy and actions concerning the death penalty.
10. Reflect on Justice Michael Kirby's view of the death penalty.

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Chapter summary

- The Bali Nine case is an example of a transnational crime involving different national police forces.
- The Australian Federal Police (AFP) and the Indonesian National Police (INP) have been cooperating since the late 1990s.
- Information the AFP gave to the INP made it possible for the Bali Nine to be arrested in Bali, Indonesia.
- Indonesia has a mandatory death sentence for drug smugglers.
- The Bali Nine had to navigate a totally different legal process in Indonesia that is based on the inquisitorial system.
- Andrew Chan and Myuran Sukumaran were considered to be reformed after 10 years in prison, but it appears this carried no weight in their appeals for clemency to the Indonesian president.
- If Australia is serious about working towards the abolition of the death penalty internationally, it needs to have a far more consistent approach to this issue.

Multiple-choice questions

1 The Australian Federal Police was established after:
   - **a** the bombing of the Hilton Hotel in 1979.
   - **b** World War II.
   - **c** the September 11 terrorist attacks in 2001.
   - **d** the Bali Bombings in 2002.

2 The highest court in the Indonesian judicial system is the:
   - **a** High Court.
   - **b** District Court.
   - **c** Supreme Court.
   - **d** Administrative Court.

3 Since 2005, Kerobokan Prison has been:
   - **a** riddled with corruption and dominated by gangs.
   - **b** reformed and focused more on rehabilitation.
   - **c** closed down.
   - **d** expanded.

4 The Australian Federal Police's role in the Bali Nine case has been criticised for:
   - **a** prioritising cooperation with Indonesia above human rights concerns.
   - **b** failing to work effectively with the Indonesian National Police against transnational crime.
   - **c** involving themselves in Indonesian politics.
   - **d** being too slow to act when tipped off about the Bali Nine in Australia.

5 The death penalty has not been used in Australia since:
   - **a** 1967.
   - **b** 1975.
   - **c** 1990.
   - **d** 2005.

Short-answer questions

1 Outline the Bali Nine's plan to smuggle heroin into Australia.
2 Recall the surveillance methods the Indonesian National Police used to gather evidence on the Bali Nine before their arrest.
3 Describe the conditions in Kerobokan Prison.
4 Outline the structure and processes of the Indonesian judicial system.
5 Describe the role Australian politicians played in the attempt to save Andrew Chan and Myuran Sukumaran.
6 Discuss how the existence of the death penalty in Indonesia poses an increased threat to Australians.
7 Recall what the international covenants state about the death penalty.

Extended-response question

Evaluate the argument that the Australian Government needs to take a far more proactive role in working towards the abolition of the death penalty.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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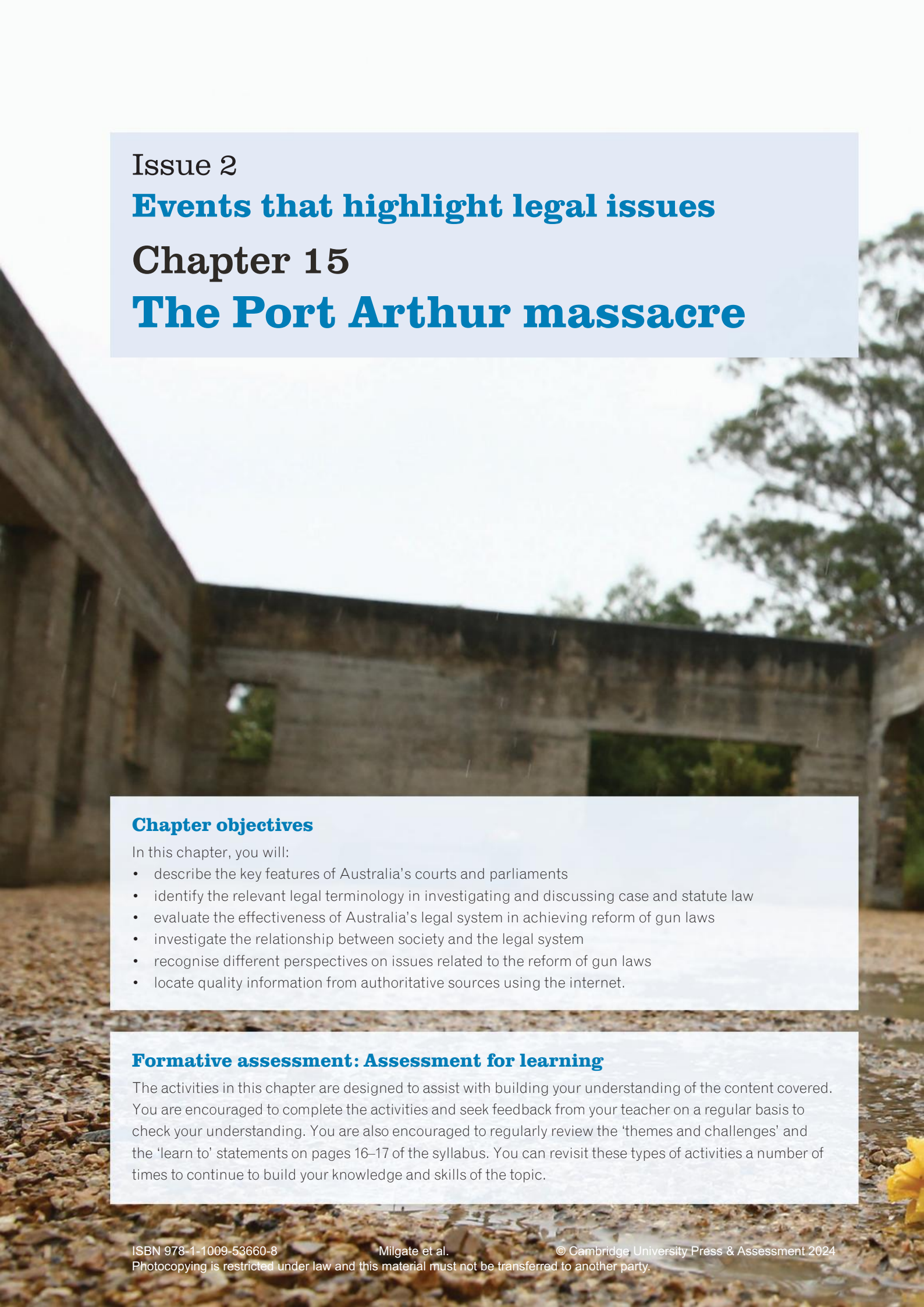
Issue 2

Events that highlight legal issues

Chapter 15

The Port Arthur massacre



Chapter objectives

In this chapter, you will:

- describe the key features of Australia's courts and parliaments
- identify the relevant legal terminology in investigating and discussing case and statute law
- evaluate the effectiveness of Australia's legal system in achieving reform of gun laws
- investigate the relationship between society and the legal system
- recognise different perspectives on issues related to the reform of gun laws
- locate quality information from authoritative sources using the internet.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Firearms Act 1996 (NSW)
National Firearms Agreement (1996)
National Firearms Program Implementation Act 1996, 1997 & 1998 (Cth)
Weapons Prohibition Act 1998 (NSW)
National Firearm Trafficking Policy Agreement (2002)
National Handgun Control Agreement (2002)

RELEVANT INTERNATIONAL INSTRUMENTS

United Nations Security Council, Resolution 2117 (2013)
Arms Trade Treaty (2014)

SIGNIFICANT CASES

R v Bryant [1996] TASSC

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15.1 A brief history of the Port Arthur massacre

On Sunday 28 April 1996, a Tasmanian man called Martin Bryant ate a meal on the deck of the Broad Arrow Café located at the Port Arthur historical site. When he was finished, he entered the café, took a rifle from his bag and started indiscriminately shooting. He then moved to the gift shop and then on to the car park, where he pulled out an automatic weapon, firing at the people there. Driving up the road, he continued shooting. By the time he was finished, he had killed 35 people.

massacre
the intentional killing of a large number of people

Although this was around 30 years ago, the event still has enormous historical and legal significance, at both the domestic and international level. The **massacre** at Port Arthur sent shock waves around the nation and set in motion a chain of events that eventually led to a complete reform of Australia's gun laws. The swift response of the Australian legal system to the problem of automatic weapons still stands in stark contrast to the abysmal response of the political and legal system in the United States to mass shootings since the 1990s and up to the present time. In 2019, after the Christchurch massacre, New Zealand's government followed Australia's example and responded swiftly with a ban on automatic weapons (see Chapter 20).

Both the Australian and New Zealand responses to mass shootings provide encouragement to anti-gun coalitions in the United States in their efforts to reform their gun laws.

This topic is about more than domestic gun legislation in a few countries. The problem of gun control is very much a global problem. The constant fear of being shot strikes at the heart of human rights. Article 3 of *The Universal Declaration of Human Rights* (1948) states that: 'Everyone has the right to life, liberty and the security of person.' Gun deaths and mass shootings are a problem in many places in the world today. It is the responsibility of governments to design laws and legal mechanisms to protect their citizens' right not to be shot. The positive examples of Australia and New Zealand in dealing with this issue, and the negative examples from the United States, provide a starting point for a wider global conversation on guns. To an extent, this global conversation has already started with the Arms Trade Treaty.

Figure 15.1 David Hogg, survivor of the 2018 Stoneman Douglas High School shooting, attends a national vigil for victims of gun violence on 6 December 2023 in Washington DC, United States. The vigil marked the 11th anniversary of the Sandy Hook Elementary School shooting in Newtown, Connecticut, which left 26 people dead.

In the international context, the trade in small arms used for illegal activity remains a current issue. Just over a decade ago, some progress was made with the Arms Trade Treaty that entered into force in 2014. Australia played an active role in the adoption of the treaty while a temporary member of the UN Security Council, where it participated in negotiations on the first ever resolution on small arms (UNSC 2117). However, small arms and light weapons continue to proliferate around the globe and threaten the peace and security of many societies. Dealing with the threat of guns to human security is an ongoing concern and the law plays a central role in this campaign. In its legal responses to the Port Arthur Massacre, Australia has shown the world that it is possible to minimise the

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threat of guns to civilian populations, and Australia showed in its time on the UN Security Council (2013–2014) that it was willing to play a global role on this issue.

The events

The facts of the Port Arthur massacre reveal the deliberate and intentional nature of Bryant's crimes. On the morning of the massacre, Bryant left his home in Hobart and drove to Port Arthur, approximately one hour's drive to the east. Port Arthur is one of Australia's most significant historic sites, as it was the site of one of Australia's most notorious convict colonies in the early 1800s. As was common, Port Arthur was overflowing with tourists that day.

On his drive to Port Arthur that day, Martin Bryant stopped off at a guesthouse called Seascape Cottage, where he entered and killed the owners, David and Noelene Martin. Bryant then drove to Port Arthur, arriving at about 1:10 pm. He parked his car and entered the Broad Arrow Café, where he purchased a meal and ate it on the deck. After eating, Bryant returned the tray and went back to his table where he pulled an AR-15 semi-automatic rifle from his bag. Entering the café, he began indiscriminately shooting people at close range. He moved into the gift shop and did the same. Returning to his bag for additional ammunition, he reloaded and returned to shoot the people in the gift shop who had taken cover behind tables and furniture. In the first 90 seconds, 20 people were killed and 12 people were injured.

Bryant continued into the car park behind the café. People had heard the commotion and had taken cover behind the buses. He shot and killed another four people, wounding others. Bryant continued shooting people on the grounds of the historic site, killing seven more people, including Nanette Mikac and her two young daughters, Madeline and Alannah, aged three and six. Bryant had chased Alannah behind a tree in order to kill her. He then got into his car, drove past the tollbooth and up the main road to a service station located at a general store. He used the BMW he was driving – he had killed the driver and passenger and stolen it – to block a Toyota Corolla from leaving the pump area. He forced the male occupant into the boot of the BMW, shot the female occupant of the Corolla, dragged her body out of the car, got into the driver's seat of the BMW and took off down the road with the male hostage locked in the boot. A police officer arrived soon after and within minutes was in chase of Bryant.

Bryant returned to the Seascape guesthouse where he had begun his murderous killing spree earlier that morning. At the house, he took his hostage inside and set fire to the stolen BMW. At around 2 pm police officers arrived, but they were forced to take shelter for a few hours in a ditch while Bryant fired on them with an automatic weapon. At 9 pm, a Special Operations police team arrived from Hobart. An 18-hour standoff ensued because Bryant claimed he had hostages. The following day, Bryant set fire to the house, taunting the police to come in and get him. Eventually, Bryant ran from the house with his clothes alight and was captured by police officers.

During the initial period of his police questioning, Bryant admitted to hijacking the BMW car, but denied having shot anyone. He stated that he had not visited Port Arthur that day. Bryant also claimed that the guns found by police were not his. During a bedside hearing in hospital, where he was being held because of his burns from the fire, Bryant was charged with just one murder. Police said additional charges would follow. On 22 May, Bryant appeared via a video link from Risdon Prison to the Magistrates Court of Tasmania for a remand hearing.

During the following weeks, the police investigated all the events of the day, which resulted in the final charges being laid against him: 35 counts of murder, 20 counts of attempted murder, four counts of aggravated assault, eight counts of wounding, three counts of causing grievous bodily harm, one count of arson and one count of unlawfully setting fire to property. He was convicted on 13 November 1996 and received multiple sentences of life imprisonment without parole.

The Port Arthur massacre attracted considerable media attention and debate because of the magnitude of the killings in a place that was popular with Australian and international tourists.

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Figure 15.2 The smoking remains of the guesthouse after Bryant had emerged and been captured by police.

There was interest also in Bryant himself. What kind of person would do this? Was he of sound mind? Those who knew Bryant were questioned by journalists eager to paint a picture for the public of who Martin Bryant was. A number of conflicting stories emerged. Distant relatives provided an album full of photographs. Two of Bryant's ex-girlfriends provided some more. On 30 April, the first photos of Bryant appeared on the front pages of the nation's press. *The Australian* newspaper enhanced a photograph of Bryant that exaggerated the whiteness of his eyes to give him an eerie, spaced-out look. Debate about Bryant's early life, history of gun use, state of mind and motivations continues today, as does curiosity about his life in prison.

conspiracy theory speculation that there is a cover-up of the information surrounding a significant event by the government or other authorities

Motive

Since the day of the Port Arthur massacre, there has been speculation about Bryant's motivation for the killing spree, focusing in large part on his childhood and his sanity. In 2006, Bryant's lawyer, John Avery, was reported to be writing a book about his former client. Extracts were published in *The Bulletin* magazine, along with transcripts of conversations between Bryant and Avery, school reports and psychiatric assessments.

The legal community and many in the media condemned Avery's behaviour and the magazine's publication of the material as being both professionally questionable and inconsiderate of the feelings of victims and their families.

In 2009, journalists Robert Wainwright and Paola Totaro published the book *Born or Bred? Martin Bryant – The Making of a Mass Murderer*, which delved into his past.

One of the ideas about Bryant's motives, put forward by the defence psychiatrist, Paul Mullen, was that Bryant was inspired by a lone gunman's massacre of 16 children and one adult on 13 March 1996 in the Scottish town of Dunblane. Other speculation has focused on Bryant's below-normal intellect and resulting social isolation and anger, desire for attention, and a long-term grudge against his first victims, who had bought the Seascape property that he had wanted to buy.

Conspiracy claims

From the beginning, **conspiracy theories** surrounded the Port Arthur massacre. These suggested that the massacre was actually carried out by special operatives who framed Bryant. According to some of the proponents of these conspiracy theories, particularly those who are strong opponents of gun control, the purpose of the massacre was to provide a platform for the federal government to bring about gun control law reform.

A more recent conspiracy theory is that the Port Arthur massacre was a plot: it would make it easier for terrorists to take over Australia if all of our guns have been confiscated. These theories do not enjoy any credibility in legal or scholarly circles.

Review 15.1

1. Construct a timeline of events from the day of the Port Arthur massacre until Bryant's arrest.
2. Discuss whether you think people will ever know why Martin Bryant did what he did. Assess why a murderer's motives are a source of fascination and justify your response.

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Media

Forgetting Martin Bryant: What to remember when we talk about Port Arthur

Robert Clarke

The Conversation

28 April 2016

Many Australians wish for nothing more than to forget Martin Bryant, the perpetrator of the Port Arthur massacre. Others insist that remembering both Bryant and the massacre is necessary if a proper reckoning is to be made with the events of 28 April 1996.

No matter where you stand, this is an important debate. How Bryant and, more importantly, the dead and survivors of the massacre are remembered is vital if we're to appreciate the impact of it.

The scale of the atrocity, the enigma of the perpetrator, the mystique of the setting, the dramatic public consequences, and local protocols for referencing the event and the murderer have, in different measures, traumatised and gripped many in Australia and beyond.

They've also served a series of myths about the massacre and the murderer. Common to many renditions of the story is the idea that the national psyche and identity were violently altered by Bryant's vicious rampage. Indeed, the event's power over the nation is such, it is often claimed, that the story of that day demands constant retelling.

Looking at a monster

Consider the recent episode of Channel 7's weekly current affairs program, *Sunday Night*. 'Martin Bryant: The interview' (6 March 2016) opens with a dramatic montage of images and statements emphasising Bryant's demonic nature.

Acknowledging 'Australia was scarred forever by the horrors at Port Arthur 20 years ago', the program promises 'unseen' video footage of Bryant's police interviews that supposedly provide insight into the murderer's grip over the popular consciousness.

The health of the national psyche is again invoked to justify a planned film about the massacre. Of his proposed venture, *Bryant: The Port Arthur Massacre*, producer Paul Moder is quoted as saying it will be 'balanced and respectful' while nevertheless 'hard hitting … very confronting and … horrific'.

Responding to the – understandable – lack of support from survivors of the massacre, Moder apparently complains:

'I am being warned off by those sympathetic to the desire by many to bury the event in Australia's collective memory.'

Every retelling of a catastrophic event includes certain elements while excluding others. But retelling the unfolding of the massacre with the focus strongly on Bryant and the 'national psyche' risks sensationalising the murderer as the epitome of evil. Rendering the story as a gothic drama risks marginalising the voices of actual victims and survivors.

A different view

Other examples of retelling the Port Arthur massacre go some way to rectifying this. And, in doing so, they remind us that there's no single story here.

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Media—Continued

Earlier this month, the ABC's *Australian Story* series presented an episode on Port Arthur. It focused on stories of the suffering and resilience of people who were at the massacre, such as Carolyn Loughton.

Loughton was visiting Port Arthur with her 15-year-old daughter Sarah when Bryant attacked people in the Broad Arrow Café. Carolyn survived; Sarah was killed.

Bryant certainly features in the story. But the primary focus is stories of those who died and those who survived, witnessing the shooting and its aftermath, as well as those who helped them. Here the themes of solidarity and of community fashioned in response to the atrocity prevail.

Figure 15.3 Carolyn Loughton in her hospital bed, 13 August 1997, with a sculpture dedicated to her daughter, Sarah.

In its retelling of the Port Arthur massacre, *Australian Story* downplays the significance of the event in the national psyche while accentuating the theme of 'compassionate citizenship'.

It returns constantly to the reactions of those who found themselves under fire, those who attended to the dead and the wounded, and those who sought to change gun laws in the wake of the disaster.

Viewer attention is directed away from the menace and the mystery of Bryant. Instead, his victims are presented as active and central. And they invite a compassionate response.

Understanding history

The theme of compassionate citizenship is evident in other representations of the massacre. In works such as 'Port Arthur' and 'Port Arthur triptych', artist Rodney Pople brings together images of the historic site's convict and indigenous pasts, as well as acknowledging Martin Bryant and his actions. Pople links the history of violence associated with Port Arthur to the European invasion of Tasmania. His paintings create a confronting sense of empathetic unsettlement in the viewer.

In their deployment of images of Bryant, Pople's re-visionings of the Port Arthur massacre invite reflection on those other Australians, specifically Tasmanian Aboriginals, who've been subjected repeatedly to acts of indiscriminate and brutal violence.

The retelling of the Port Arthur massacre in Pople's work and *Australian Story* seek to reframe what happened 20 years ago. But they are not without their limitations. Like other stories of what happened at Port Arthur 20 years ago, they remain partial and incomplete.

Still, they try to refashion the memory of the massacre and invite audiences to shift their focus from Bryant and idealistic notions of a national psyche or identity that prevail in other accounts.

They challenge us to renew our understanding of the impact of the event on the victims and survivors. And they place the story of Port Arthur within a broader context of the history of violence in Australia, and of our responses to it.

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Analysis 15.1

Read the media article on pages 339–40.

1. Identify why Robert Clarke says it is important to debate how we remember the Port Arthur massacre.
2. Outline the main ways of remembering the Port Arthur massacre put forward in the article.
3. Discuss whether speculation about a murderer's motivations serves any useful purpose.
4. Critically analyse the merit of focusing on the experiences of victims in recounting the Port Arthur massacre.

15.2 Legal responses

Indictment and sentencing

On 5 July 1996, 72 criminal charges were filed against Martin Bryant in the Supreme Court of Tasmania in Hobart. Bryant did not enter a plea to any of these charges.

The police obtained 551 statements from witnesses in their investigations into the events of that day in Port Arthur. In September 1996, Bryant's lawyer convinced him to plead guilty, and Bryant was convicted on 13 November 1996 of a long list of crimes. The judge commented that he found it difficult to imagine a more chilling catalogue of crimes that were carried out in a coldly premeditated way, yet whose victims were selected randomly. The judge remarked on the continuing effects of the killings on survivors, the families and friends of those whom he had killed; the eyewitnesses; and the Port Arthur workers, ambulance officers and police officers who had to cope with the injured and dead.

On 22 November 1996, Bryant received 35 sentences of life imprisonment without parole for the murders, plus 21 years for each of the other counts in the **indictment**. The In Court box below shows the judge's comments on passing sentence.

indictment information presented for the prosecution of one or more criminal offences; a formal written charge

In Court

R v Martin Bryant [1996] TASSC

Justice Cox's comments on handing down Martin Bryant's sentence included:

In consequence of the tragic events at Port Arthur on 28 and 29 April of this year and of his plea of guilty to the unprecedented list of crimes contained in the indictment before me, the prisoner stands for sentence in respect of:

- the murder of no less than 35 persons
- 20 attempts to murder others
- the infliction of grievous bodily harm on yet three more and
- the infliction of wounds upon a further eight persons.

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In Court—Continued

In addition, he is to be sentenced for:

- four counts of aggravated assault
- one count of unlawfully setting fire to property, namely a motor vehicle which he seized at gun point from its rightful occupants, all of whom he murdered
- the arson of a building known as 'Seascape', the owners of which he had likewise murdered the previous day.

After having heard the unchallenged account of these terrible events narrated by the learned Director of Public Prosecution and his Junior, an account painstakingly prepared by them from the materials diligently assembled by the team of police and forensic investigators charged with that task, it is unnecessary for me to repeat it in detail or to attempt more than a brief summary. The prisoner, it is clear, a lengthy period of time before the day on which it was carried into effect, formed the intention of causing the deaths of Mr and Mrs Martin, against whom he had long harboured a grudge, and at the very least of causing mayhem among the large group of residents and visitors he anticipated would be present at the Port Arthur Historic Site, by shooting at them. Indeed he seems to have contemplated mayhem of such a drastic kind that it would in all probability provoke a response which would result in his own death. In furtherance of his intention, he acquired high-powered weapons and embarked with three of them, a very large supply of ammunition and accessories such as a sports bag to conceal the weapons, a hunting knife, two sets of handcuffs and rope. In addition, he carried large quantities of petrol in containers, fire starters and acquired a cigarette lighter en route. As he was not a smoker, the inference is that he intended to arm himself with the means of igniting the petrol and that this was intended to be used in unlawfully causing damage to some property in the course of his expedition.

Arrived at the Martins' home, he shot both of them dead and continued on to Port Arthur. There, at the Broad Arrow Café, he consumed a meal on the balcony outside and then, re-entering the café, placed the bag on an unoccupied table. He produced from the bag an AR-15 rifle fitted with a 30-shot magazine and commenced to fire at close range at patrons who were complete strangers to him. In the first 15 seconds he discharged 17 rounds, thereby causing the deaths of 12 people, the infliction of grievous bodily harm to a thirteenth; wounds to five more; and injuries to an additional four whom he attempted unsuccessfully to murder. Moving through the café to the gift shop annexed to it, he continued to discharge the weapon at close quarters before leaving the premises approximately one minute after firing the first shot. In that period of 90 seconds, 29 rounds were fired, causing the deaths of 20 people and injuries, many of them severe, to another 12 who fortunately escaped with their lives. In addition, the spectators who escaped physical injury were subjected to emotional trauma of the most stressful kind. Although not the subject of any count in the indictment, this form of injury was clearly a by-product of the prisoner's wrongful conduct.

In the café he changed magazines and leaving it, he fired indiscriminately at various parts of the historic site intending to hit and kill those who were within range. In the car park, where there were a number of buses, he shot the driver of one in the back, killing him; and fired at groups of people seeking shelter in them or in their vicinity. Here he killed another person and caused injuries to a further three. He then exchanged the Armalite rifle for a semi-automatic .308 FN rifle or SLR, which was in the boot of his car parked nearby, and fired across the water towards the ruins and back towards the café. Still in the car park, the prisoner killed two further visitors and by firing at them shots which, in some cases, connected, attempted to murder six others. From here he moved up the

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road in his car and en route encountered Mrs Mikac and her two daughters, murdering all three in the heartrending circumstances already described by the Director of Public Prosecutions.

At the toll booth, he murdered the four occupants of a BMW, pulling the two female passengers seated in it from the car and shooting them at close range. He then commandeered the car, transferring from his own car some of the items in it, including the AR-15 rifle, a quantity of ammunition, the two handcuffs and some petrol. Thereafter, he fired two shots at a car which had been reversed by the driver on appreciating the situation. Near the toll booth, 11 spent cartridges fired by the prisoner were later recovered.

A short distance from the toll booth, a white Corolla occupied by Mr Glen Pears and Miss Zoe Hall was parked at the service station. The prisoner brought the vehicle he was driving to a halt on the wrong side of the road and blocked the passage of the Corolla. He alighted with the SLR and tried to extract Miss Hall from the passenger seat. When Mr Pears attempted to intervene, he was forced into the boot of the prisoner's stolen vehicle. Miss Hall was then murdered in a series of three rapid shots from the hip and the prisoner moved on, returning to Seascape. On the way, and after his arrival, he fired at a number of vehicles causing very grievous harm to the occupant of one of them and endangering the lives of nine other people, including two police officers called to the scene.

[After he] arrived at Seascape, the prisoner forced Mr Pears, whom he was treating as a hostage, to enter the house, placed handcuffs on his wrists and immobilised him by attaching a second set of handcuffs to the first and some fixture in the premises. He then set fire to the stolen vehicle and retreated to the house where, at some time before his apprehension, he murdered Mr Pears by shooting him. Throughout the night he continued to discharge a number of weapons, his own arsenal augmented by weapons belonging to the Martins, and kept at bay the police who were surrounding the house, their response restricted by the belief that both the Martins and Mr Pears could still be alive. Clearly the Martins were not alive at that stage, but the prisoner deceitfully conveyed the impression that they were in telephone conversations with police negotiators. The following morning he set fire to the house, destroying it and, while fleeing from it in an injured condition due to burns, was apprehended.

Objectively, it is difficult to imagine a more chilling catalogue of crime. The prisoner, having had a murderous plan in contemplation and active preparation for some time, deliberately killed two persons against whom he held a grudge, and then embarked on a trail of devastation which took the lives of a further 33 other human beings who were total strangers to him and which caused serious injury, distress and grief to literally thousands more. The repercussions of these crimes have been worldwide. His selection of victims was indiscriminate. He killed and injured men, women and even children. He killed, or attempted to kill, local residents, visitors from other parts of this state, from other parts of Australia and visitors from a number of overseas countries. He killed individual family members, married couples and, in one case, all the members of one family save the bereaved father left to mourn them. The learned Director of Public Prosecutions has mentioned the impact these crimes have had on individuals immediately affected by the loss of a family member or members, or who suffered physical injury in the course of this shooting rampage. He has also mentioned the effect it had on eyewitnesses who experienced the nightmare as it ran its course, or who came upon the scene or otherwise had to cope with the injured and dead.

This is not the place to acknowledge the contributions made by groups or individuals in dealing with the aftermath of these crimes. No doubt that will be acknowledged elsewhere. Suffice to say that there were many, many people who were severely affected by their distressing experiences

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In Court—Continued

and who will continue to be so affected for many years to come. It is proper to record also the anguish no doubt caused to the prisoner's mother and immediate family. Then there is the effect on the community at large: the shock and disbelief that criminal conduct on this scale could occur in Australia, let alone Tasmania; the feelings of outrage, anger, grief and frustration at not being able to do more to redress the wrong suffered by so many innocent victims. Though no way comparable to the human suffering endured by those directly affected, very considerable financial loss has also been occasioned to individuals and to the community at large. In the sentencing process, the impact upon the victims of crime cannot be ignored. In this case, more than any other I have ever experienced, they demand recognition.

In determining an appropriate punishment, the court is required to have regard to a great many factors:

- the gravity of the offence or offences
- the moral culpability of the offender so far as that lies within the limited province of human assessment
- the effect upon the victims
- the need to protect society from similar conduct by others, or repetition of it by the offender himself
- his background and antecedents
- any contrition or remorse on his part
- a host of other considerations.

In the forefront of this case is the prisoner's mental condition. The law recognises that if a person is afflicted by a mental disease to such an extent that he is unable to understand the physical character of what he is doing in, for example, firing a weapon at another person, or that he is rendered incapable of knowing that such an act is one which he ought not to do, or if he acts under an impulse which, by reason of mental disease, he is in substance deprived of any power to resist, then he should not be held criminally responsible for an act which, in a sane person, would clearly amount to a crime. Society is entitled to be protected from such a person, but he may not be held criminally responsible.

The great Australian jurist, Sir Owen Dixon, once observed that it was perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds. There is no utility, he said, in punishing people if they are beyond the control of the law for reasons of mental health. Nevertheless, a great number of people who come into a criminal court are abnormal. They would not be there if they were the normal type of average, everyday, person. Many of them, he said, are very peculiar in their dispositions, but are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts and they are held in check by the prospect of punishment. It is clear on the materials before me that the prisoner falls into the latter category. He is not suffering from a mental illness – certainly not one which rendered him incapable of knowing what he was doing or of knowing that what he was doing was wrong, or one by virtue of which he was deprived of any power to resist an impulse to do the things he did. He knew what he was doing and that it was something he ought not to do.

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Nevertheless, he clearly has a mental condition which rendered him less capable than those of normal healthy mind of appreciating the enormity of his conduct or its effect upon others. I accept the psychiatric evidence that he is of limited intellectual ability, his measured IQ being in the borderline intellectually disabled range, but with a capacity to function reasonably well in the community. From an early age, he has displayed severe developmental problems, being grossly disturbed from early childhood. Whatever its precise diagnosis, as to which the psychiatrists differ, he suffers from a significant personality disorder. Professor Mullen said of him that his limited intellectual capacities and importantly his limited capacity for empathy or imagining the feelings and responses of others left a terrible gap in his sensibilities which enabled him not only to contemplate mass destruction, but to carry it through. Without minimising the gravity of his conduct or denying his responsibility for it, it would appear to me that the level of his culpability is accordingly reduced by reason of his intellectual impairment and the disorder with which he has been afflicted for so long, notwithstanding his parents' earnest endeavours to correct it, which the medical records acknowledge. That the prisoner, through these handicaps, in combination with a number of external factors beyond his control such as the loss of stabilising influences, has developed into a pathetic social misfit calls for understanding and pity, even though his actions demand condemnation.

The prisoner has shown no remorse for his actions. Though he has ultimately pleaded guilty, it has clearly been done in recognition of the undoubted strength of the evidence against him and amounts to little more than a case of bowing to the inevitable. That his change of plea has saved considerable distress, inconvenience and cost to those who would have had to be called as witnesses and to the victims and community at large by the prolongation of the proceedings is a factor which should be considered in his favour when weighing all the relevant considerations, but in the overall scheme of things, it is, in my view, overwhelmingly outweighed by the factors militating against him.

Having regard to the nature and extent of his conduct, I cannot regard it as anything other than falling within the worst category of cases for which the maximum penalty is prescribed. Taking account of the medical evidence and of his lack of insight into the magnitude and effect of his conduct apparent in all his appearances before this court, I have no reason to hope [otherwise] and every reason to fear that he will remain indefinitely as disturbed and insensitive as he was when planning and executing the crimes of which he now stands convicted. The protection of the community, in my opinion, requires that he serve fully the sentences which I will shortly impose. That consideration, as well as my belief that service of the whole of such sentence is the minimum period of imprisonment which justice requires that he must serve having regard to all the circumstances of his offences, leads to the conclusion that he should be declared ineligible for parole.

MARTIN BRYANT – on each of the 35 counts of murder in this indictment you are sentenced to imprisonment for the term of your natural life. I order that you not be eligible for parole in respect of any such sentence.

On each of the remaining counts in the indictment, you are sentenced to imprisonment for 21 years to be served concurrently with each other and with the concurrent sentences of life imprisonment already imposed. In respect of each sentence of 21 years, I order that you likewise not be eligible for parole.

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Analysis 15.2

Read the In Court on pages 341–5 and write a report that addresses the following questions.

1. Identify the comments made by the judge about Martin Bryant's intellectual ability and mental health.
2. Evaluate whether the judge's observations about Bryant's upbringing, his social isolation, his intellectual ability and his mental health had any effect on the sentence.
3. Identify the comment made by the judge about remorse on the part of Bryant.
4. Identify the judge's comments about Bryant having pleaded guilty. Assess whether this affected Bryant's sentence.
5. Summarise the final sentence.

Analysis 15.3

View the ABC's broadcast 'Survivors, emergency responders recount their memories of the Port Arthur massacre' (*ABC News*, 27 April 2016) at http://cambridge.edu.au/redirect/10406.

1. Identify some of the different groups of people impacted by the Port Arthur massacre.
2. Outline some of the ways these people have been impacted by the Port Arthur massacre.
3. Assess whether Justice Cox reflected the impacts on survivors and victims in his sentencing comments. Justify your response.
4. Outline some of the survivors' views on Martin Bryant's capture.

Imprisonment

After his arrest, Bryant was held in hospital under police guard while he was treated for his burns. While **on remand** for seven months, until the conclusion of his trial, he was kept in near-solitary confinement in a specially built cell at the medium to maximum-security Risdon Prison. In 1997, Martin Bryant began his formal prison sentence at the old Risdon Prison hospital and became one of its most notorious inmates. He spent most of his time up to 2006 alone in his cell. Though the prison authorities did not consider Bryant mentally ill, they held the view that the prison hospital was the safest place for him because he was the most hated prisoner among the inmates. Apparently, he had been the target of a number of assaults while in the prison and many of the inmates had made death threats against him.

on remand
(of an accused) in custody pending and/or during their trial

In 2006, the Tasmanian Government moved Bryant into the newly constructed Wilfred Lopes Centre, a mental health facility a few hundred metres from the prison. There are no guards inside the 35-bed unit, only nurses, doctors and support staff, and most inmates are not confined to cells but are free to wander around the complex. The centre was substantially a hospital with a therapeutic environment.

Some relatives and friends of Port Arthur victims were outraged that Bryant would be serving his sentence in such a facility. They objected because they felt they should have been told of the move prior to its occurrence. Further, they believed that it was inappropriate for someone who had not been declared insane at the time of conviction to be hospitalised. The previous year, the state's chief forensic psychiatrist, Dr John Crawshaw, had stated that Bryant did not meet the criteria for admission to the Wilfred Lopes Centre.

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Their biggest objection, however, was the idea that Bryant would be able to move around hospital freely: they believed that he should be confined to a prison cell for the rest of his life.

In a leaked letter from Tasmania's Director of Prisons, Graeme Barber, to Dr Crawshaw, the reasons for transferring Bryant to the Wilfred Lopes Centre were stated as concerns for Bryant's health, wellbeing and safety, and the need to protect other inmates. Those opposed to the move questioned the validity of these concerns, given the recent $90 million redevelopment of Risdon Prison. Bryant has been transferred back to maximum security Risdon Prison on at least one occasion, in response to the public outcry about his being housed in the Wilfred Lopes Centre. From May 2009, he was held at the Wilfred Lopes Centre, but in isolation.

On 25 February 2011, Martin Bryant's mother was interviewed on the television program *60 Minutes*, in which she discussed her son's condition in prison. In the interview, she also made the controversial claim that she now thought that her son did not commit the crime, despite having believed he had done so at the time. The video and full transcript of the 2011 interview can be found on the *60 Minutes* website.

In September 2015, a News Corp publication reported that 48-year-old Martin Bryant was in a very depressed state and was a danger to his guards. Bryant, it was reported, weighed about 160 kg and was nicknamed 'Porky Pig' by fellow inmates.

Figure 15.4 Martin Bryant in Risdon Prison in Tasmania in September 2015.

He was continually drugged and practically a 'vegetable', spending most of his time in his cell. He was held in contempt by his fellow prisoners and had tried to commit suicide on a number of occasions.

Review 15.2

1. Identify the arguments for and against Bryant serving part of his sentence in a mental health facility rather than in a prison. Discuss in small groups.
2. Recall the issues raised by the 2015 News Corp report on Martin Bryant in prison at 48 years of age.
3. If a convicted murderer is found to be sane, describe the aims of the criminal sentence.

Gun-law reform in Australia

Before 1996

By the 1980s there were approximately four million privately owned guns in Australia and about 700 gun deaths each year. These guns were owned primarily for hunting and by farmers who used them to kill pests such as rabbits and feral animals. The majority of gun deaths occurred due to misuse of rifle-type guns rather than handguns. The gun laws were fairly weak and varied greatly among the states and territories.

The gun debate in Australia started in Victoria after two separate incidents in which 14-year-old girls were accidentally killed by sporting shooters. As a result, the Victorian Government introduced a shooter's licence, which, while weak by today's standards, was nevertheless the first serious attempt to place some control on guns.

Then, in 1987, Australia experienced six gun-related massacres over the course of the year that resulted in 32 deaths. Each of these incidents was premeditated and committed by people who legally owned guns. The best known of these occurred in Melbourne: the Hoddle Street massacre and the Queen Street massacre. The Victorian Government acted swiftly to introduce tougher gun laws.

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The Sporting Shooters Association of Australia (SSAA), an organisation formed to promote sports such as target shooting and hunting and which represents the interests of gun owners, opposed this action. The SSAA organised a protest march by 27 000 of its members through the streets of Melbourne. However, public sentiment against weak gun laws meant that the Victorian Government persevered with its reforms.

These state reforms were complemented at the federal level by the Hawke government's establishment of the National Committee on Violence, which produced a report in 1990 containing 30 recommendations. Among these recommendations was registration of high-powered rifles. The reforms that followed represented a significant step towards gun control in Australia.

In 1991 there was a massacre in a shopping mall at Strathfield, New South Wales, by a man armed with a knife, a machete and an ex-military semi-automatic rifle that he had easily obtained. He killed seven people (six by shooting), and seriously injured six others, before turning the gun on himself. Widespread outrage and debate followed. In 1992, the NSW Government introduced tougher gun laws.

Many pro-gun groups bitterly opposed these laws, particularly since before the Strathfield massacre, the NSW Liberal government had been ready to introduce softer laws. The tougher gun laws led to the formation of the NSW Shooters' Party. Since then, the party, now known as the Shooters, Fishers and Farmers Party, has held a seat in the NSW upper house. Also, in reaction to the tougher laws, the SSAA began looking to the National Rifle Association (NRA) in the United States for ideas on how to counter the tougher legal regime for guns that was taking root in Australia. The NRA is a powerful lobby group with the goal of promoting firearm ownership rights, relying on a broad interpretation of the Second Amendment of the US Constitution, which gives people the right to keep and bear arms.

Figure 15.5 Flowers were left on 19 August 1991 next to The Coffee Pot café in Strathfield at which the gunman began his rampage.

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Overall, the effect of the gun massacres that occurred in Australia between 1987 and 1991 was the development of public concern about guns, which coincided with leaders who were willing to enact the necessary legal reforms to put the nation on the path of a sensible gun control regime.

Tougher gun laws after the Port Arthur massacre

By the 1990s, Tasmania was the odd state out in terms of gun-law reform. This made it quite easy for Martin Bryant to purchase the guns that he used to kill 35 people. In response to the public outcry about gun control after the massacre, the then Prime Minister, John Howard, initiated a discussion on tougher gun-law reforms. The then Deputy Prime Minister, Tim Fischer, backed him.

On 10 May 1996, a special meeting of the Australasian Police Ministers Council agreed to some resolutions that evolved into the *National Firearms Agreement* (1996) in which all the states and territories agreed to a 'uniform system of firearms licensing and registration'.

The state governments and federal government signed the *National Firearms Agreement* (1996). Some of the key parts of this document stated that:

- gun ownership is a privilege and not a right
- semi-automatic weapons must be strictly controlled
- all guns must be registered
- guns must be stored securely
- there must be a 28-day cooling-off period when buying guns.

The *National Firearms Program Implementation Acts* of 1996, 1997 and 1998 (Cth) followed this up.

Such proposals seemed sensible to the average Australian; however, some National Party parliamentarians and pro-gun lobby groups, such as the SSAA, were horrified and did everything they could to stop the proposed new laws. It was in this context that conspiracy theories about the Port Arthur massacre sprouted. Some gun enthusiasts began to argue that the Port Arthur massacre was a government conspiracy and that Martin Bryant was set up, all with the aim of using it as an excuse to take guns away from all the law-abiding gun owners in the country.

The government buy-back scheme

As part of the reform of gun laws and culture in Australia, the Howard government in the aftermath of the Port Arthur massacre introduced a buy-back scheme and amnesty. Money was given to people who willingly handed over guns that appeared on a list of prohibited weapons – in particular, semi-automatic rifles and shotguns. Approximately one million guns were collected under the scheme.

Review 15.3

1. Construct a list of the reforms to gun law that occurred in Australia from 1980 to 1997.
2. Investigate the massacres (involving guns) that occurred in Australia in 1987 and how the government responded to these.
3. Outline the reforms to gun law that occurred in Australia from 1997 to 2007.
4. Evaluate the effectiveness of the government's response to public concern about gun use both before and after 1996.

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15.3 Non-legal responses

Alannah and Madeline Foundation

The deaths of 35 people at the hands of Martin Bryant shocked Australians. Of the stories that emerged from that day, the murder of Nanette Mikac and her two young daughters, Alannah and Madeline, aged six and three respectively, was particularly devastating. Walter Mikac lost his wife and daughters, and Australians were reminded of the fragile nature of human life and the destructive potential of guns.

These events had a profound effect on another Australian father of two young girls, Phil West, who, along with a small group of volunteers, established the Alannah and Madeline Foundation. The Foundation's goal is to keep children safe from violence. It does not receive government funding, but relies on fundraising events, private grants and individual donations to continue its work. The Foundation runs programs to assist with the recovery of children who have witnessed or experienced violence, and to prevent violence and bullying in schools. It also acts as a children's advocate before federal, state and local governments. Her Majesty Queen Mary of Denmark is the International Patron of the Alannah and Madeline Foundation.

Publicity

On 10 March 2012, Martin Bryant appeared in the headlines again ('Bryant painting prize outrage', *The Mercury*) when a controversial painting of Bryant at the site of the killings was awarded a prize. This was a challenge to the attitude of many people in Tasmania, who felt that the best way of dealing with the events on that day at Port Arthur in 1996 was to give the killer no publicity at all, particularly since this is what Bryant seems to have craved. Since 1996, many Tasmanians, particularly those affected in some personal way by the massacre, have refused to even utter Bryant's name. Nowhere on the site of Port Arthur is there any mention of his name.

In 2021, the Cannes Film Festival saw the premiere of *Nitram*, a film based on the life of Martin Bryant ('Nitram' is 'Martin' spelled backwards). The film was nominated for the Cannes Palme d'Or, and actor Caleb Landry Jones, who plays Nitram, won the award for Best Actor. The film also gained recognition at the Australian Academy of Cinema and Television Arts Awards.

Figure 15.6 Donation collectors for the Alannah & Madeline Foundation pose during the 2023 AFL Round 19 match between the Richmond Tigers and the Hawthorn Hawks.

Figure 15.7 Screenwriter Shaun Grant, Director Justin Kurzel, actor Caleb Landry Jones and producer Nick Batzias arrive for the screening of the film *Nitram* at the Cannes Film Festival on 16 July 2021.

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Analysis 15.4

Read the article 'Nitram review – deeply disturbing drama about mass killer Martin Bryant' by Peter Bradshaw (*The Guardian*, 1 July 2022) at http://cambridge.edu.au/redirect/10407.

1 Describe what the film *Nitram* is about. Identify what it leaves out.
2 Outline the writer's view of *Nitram*.
3 Seek other articles on the film. Evaluate the extent that this film generated controversy.

Scan the QR code to watch Video 15.1.

4 Outline how the director, Justin Kurzal, views the controversy surrounding his film.
5 Explain why Justin Kurzal was drawn to doing a film on the Port Arthur gunman.
6 Outline the concerns that Justin Kurzal has about guns today.

Either watch the film yourself or watch scenes from *Nitram* on YouTube.

7 Discuss the impact that the film had on you.
8 Evaluate the appropriateness of this non-legal response by the director of *Nitram* to the events in 1996.

Video 15.1 Director Justin Kurzel talks about *Nitram* (02:33)

15.4 Effectiveness of responses

Gun deaths

From 1998, Australia experienced a marked decrease in gun deaths when compared with the 1970s and 1980s. Handguns, however, appeared as a new menace in 2002. In a shooting that occurred at Monash University in Victoria that year, a student, who was a licensed pistol shooter, fired handguns in an econometrics class, killing two students and injuring four students and a lecturer.

After the Monash shootings, the Australian Crime Commission (now known as the Australian Criminal Intelligence Commission) was formed. This is a statutory body that develops strategies for dealing with serious and organised crime. One of the first things on its agenda was illegal trafficking in handguns. It had become apparent that there was an increase in illegal handgun use.

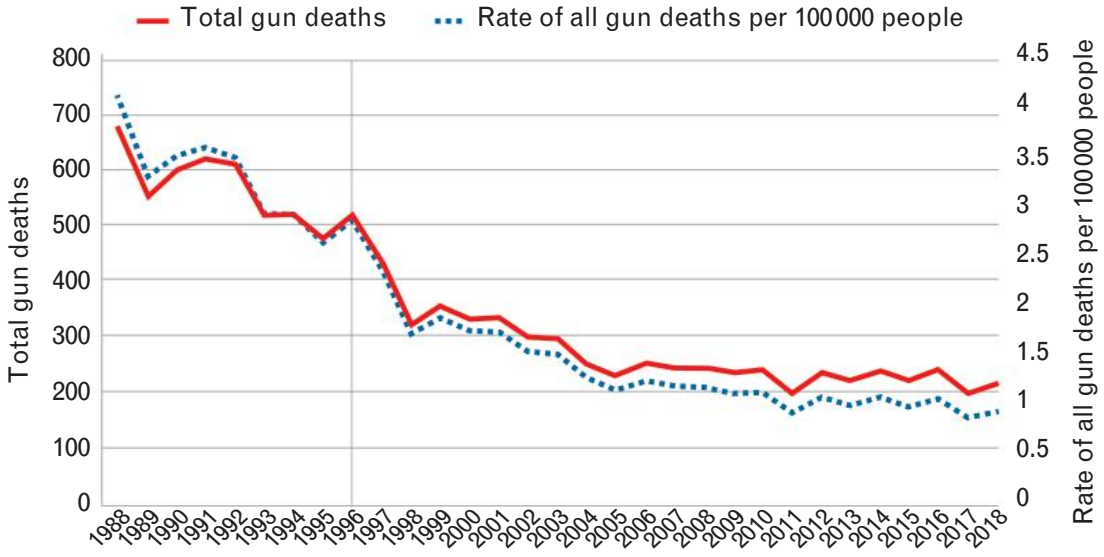

Figure 15.8 Gun deaths in Australia, 1988 to 2018

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suicide
the intentional taking of one's own life

homicide
the act of killing another human being

While handguns were emerging as the new threat in crime, the total number of deaths per year from **suicide**, unintentional killings and **homicide** dropped dramatically. There were 614 firearms deaths in 1990 while in 2016 there were 274.

Research 15.1

It has been around thirty years since the Port Arthur massacre. There have been many studies on the impact of the 1996 gun-law reforms and suggestions that these reforms are under threat.

Search the internet for the following three articles from Australian newspapers and then answer the questions below:

- 'Australia 20 years after gun reform: No mass shootings, declining firearm deaths' (by Dan Gaffney, *University of Sydney News*, 23 June 2016)
- 'Australia slipping backwards on *National Firearms Agreement*' (by Dan Gaffney, *University of Sydney News*, 5 October 2017).
- 'As Port Arthur anniversary approaches, let us never speak his name' (by Andrew Leigh, *The Sydney Morning Herald*, 25 April 2021).

1. Gaffney provides evidence of the success of gun-law reform in Australia since 1996. Outline this evidence.
2. Discuss why the *National Firearms Agreement* (1996) is under threat according to Dan Gaffney.
3. Search for recent articles about the *National Firearms Agreement* (1996) and assess the level of threat to our gun laws today.
4. Outline Andrew Leigh's view on how the 1996 massacre should be commemorated. Propose what you think is the best response.
5. Seek out more contemporary views about the 1996 massacre. Assess to what extent, if any, the public perception of the 1996 massacre has shifted.

The buy-back scheme

The long-term effectiveness of this scheme has been closely monitored. While the post-1996 laws and the gun buy-back scheme have been widely hailed as a success, there were concerns emerging from 2015 that the gun lobby in Australia was exerting considerable pressure on the government to weaken the gun laws by reviews to the *National Firearms Agreement* (1996). In 2015, an article, 'After 20 years, Australia's gun control debate is igniting once again', appeared in *The Guardian* newspaper. The author, Lenore Taylor, argued that the gun lobby has been steadily winning concessions since Port Arthur and pointed out that though one million guns were handed in after 1996, the national gun inventory has crept back to 1996 levels due to imports. Taylor concluded with this ominous warning: 'These things have happened while we rested on our laurels, thinking the Howard government's gutsy stand would continue to keep us safe, while the pesky detail of the [*National Firearms*] *Agreement* was discussed in obscure working groups and relegated to the shadows. But after 20 years, Australia's gun control debate is igniting again.' Search for the full article on *The Guardian* website.

In 2017, there was a three-month national firearms amnesty, during which time 51 000 unregistered guns were handed in. Prompted by events such as the Lindt Café siege in 2014, this was the first national amnesty since 1996, although there had previously been some state-based amnesties. New South Wales had amnesties in 2001, 2003 and 2009, with 67 000 handguns surrendered.

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Comparison: Firearms in the United States and New Zealand

While Australia has directly addressed the problem of gun deaths, other countries, such as the United States, have not been as effective in meeting this challenge. Political leaders in the United States have not been successful in countering the strong pro-gun culture supported by the extremely effective lobbying of the NRA. Gun massacres remain a feature of life in the United States, and the sale of firearms continues to grow every year. Websites set up to track gun crime and mass shootings in the United States reveal startling statistics on the extent and cost of gun crime. In 2023, there were 627 mass shootings recorded in the United States.

On 15 March 2019, tragedy struck in New Zealand. A lone gunman killed 51 people in attacks on two mosques in Christchurch. This was one of the worst mass shootings in recent history. The Christchurch attack had two connections to Australia. First, it was an Australian terrorist who committed the act, and second, the New Zealand Government followed the Australian example from 1996 and brought in tough gun laws and a gun buy-back scheme.

On 28 April 2021, *The Age* newspaper, reporting on the 25th anniversary of the massacre in 1996, said it was time to remember the people who tragically lost their lives on that day and that lessons learned about guns should never be forgotten. *The Age* editorial declared that gun laws do make a difference, demonstrated by the fact that Australia has not witnessed another mass shooting on that scale. On the other hand, 'the result of lax gun laws in America all too often makes for horrendous headlines'. However, this does not mean that Australia can be complacent. There has been some concerning use of loopholes in gun legislation in recent years, and there are still 3.5 million Australians who own registered guns.

Analysis 15.5

View the television program 'How Australia stopped mass shootings after the Port Arthur massacre in 1996' (*Democracy Now*, 19 March 2019) at http://cambridge.edu.au/redirect/10408.

1. Identify who Rebecca Peters is and where Democracy Now is based.
2. Identify the recent event that prompted this interview.
3. Discuss why Americans are interested in Port Arthur. Construct a list of the actions that the Australian Government took after the Port Arthur massacre, according to Rebecca Peters.
4. Assess whether Rebecca Peters makes a good case for the success of gun-law reforms in Australia.

Research 15.2

1. View the 2002 documentary *Bowling for Columbine*. Outline the main points it makes about guns in the United States.
2. Investigate the Second Amendment to the US Constitution. Discuss why gun-law reform might be difficult to achieve in the United States in light of this clause.
3. View the website of the US National Rifle Association (NRA). See what information you can find about how the NRA can continue to justify opposing gun-law reform even in the face of massacres like the one at Columbine High School.
4. Analyse the responses of the Trump administration to gun violence.
5. Discuss why the United States has been unable to tighten its gun-control laws.
6. Investigate whether there have been any recent significant changes on gun-law reform in the United States.

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Chapter summary

- The Port Arthur massacre on 28 April 1996 was the worst gun massacre in modern Australian history.
- The Port Arthur massacre set in motion a chain of events that led to gun reform in Australia at both the state and federal levels.
- The Australian Government – in comparison to the governments of other countries, especially the United States – acted quickly and decisively to reform Australia's gun laws.
- The Sporting Shooters Association of Australia opposed these reforms.
- Media coverage of the Port Arthur massacre was concerned with trying to understand why Martin Bryant would indiscriminately kill 35 people.
- On 22 November 1996, Bryant was sentenced to 35 life sentences without the possibility of parole.
- Before 1996, gun laws varied greatly among Australia's states and territories.
- After the Port Arthur massacre, state and federal governments signed the *National Firearms Agreement* (1996).
- From 1998, Australia has experienced a decrease in gun deaths.
- The United States has failed to deal with the issue of rising gun violence.

Multiple-choice questions

1 The high-powered semi-automatic weapons that Martin Bryant used on 28 April 1996 were:
- **a** imported from the United States.
- **b** bought legally in Tasmania.
- **c** acquired illegally.
- **d** illegal under existing Commonwealth legislation.

2 Martin Bryant's motive for his crime:
- **a** was that he had been bullied and abused as a child.
- **b** was that he had a hatred of foreign tourists.
- **c** was that he was insane and did not really know what he was doing.
- **d** is not known for sure.

3 The most probable reason for the growth of conspiracy theories about the Port Arthur massacre is that:
- **a** Australian political leaders have refused to speak publicly about the massacre.
- **b** Martin Bryant was denied natural justice.
- **c** pro-gun groups in Australia and overseas oppose attempts by governments in Australia to toughen the laws on guns.
- **d** Martin Bryant was not capable of using a gun.

4 The toughening of gun laws in Australia since 1996 has led to:
- **a** no change in the number of deaths from firearms each year.
- **b** a doubling of the number of deaths from firearms each year.
- **c** a decrease of the number of deaths from firearms each year.
- **d** the elimination of all deaths from acts of homicide using a gun.

5 Achieving reforms of the gun laws in the United States is extremely difficult because:
- **a** many politicians are against making tougher laws.
- **b** the National Rifle Association has enormous cultural power and political clout.
- **c** arms manufacturers successfully lobby politicians against tougher laws.
- **d** all of the above.

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Short-answer questions

1 In your own words, summarise the events of 28 April 1996.
2 Outline how Martin Bryant was brought to justice.
3 Identify why Martin Bryant has been the subject of controversy since his imprisonment.
4 Identify why there are conspiracy theories about the Port Arthur massacre.
5 Outline some of the events that prompted gun-law reform in Australia before 1996.
6 Outline the legal responses to gun-related deaths in Australia before 1996.
7 Describe the Tasmanian Government's attitude to gun-law reform before 1996.

Extended-response question

Evaluate the effectiveness of the Australian legal system in dealing with the problem of gun-related deaths.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your response.

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Themes and challenges for Part III – Law in practice: Issue 2

The relationship between justice, law and society

- Achieving justice for Australians caught up in the legal system of another country is difficult. There are many barriers to operating effectively in another country's legal system. There are also differing views as to what constitutes justice.
- There was a strong correlation between justice, the legal system and societal expectations in the case of the Port Arthur massacre. The federal government and all state governments worked together to deliver what most people thought was a just outcome – the outlawing of semi-automatic weapons in Australia.

The development and reform of law as a reflection of society

- There has been law reform regarding the death penalty in Australia and in many other countries, and this reform is supported by UN treaties and conventions.
- However, some countries retain the death penalty for political reasons and are slow to adhere to international standards.
- The reform of gun laws by the Australian state and federal governments was in response to the widespread reaction of horror, both domestically and around the world, to the rise in gun violence of the 1990s.

The importance of the rule of law

- Although Indonesia has a different type of legal system, the rule of law is adhered to in terms of process, legal representation and basic prisoner rights.
- In harsh and authoritarian regimes, there is the danger of arbitrary behaviour on the part of the authorities.
- Each of the branches of the legal system – the judiciary, the executive and the legislature – worked in an appropriate way in the aftermath of the Port Arthur massacre.

The responsiveness of the legal system in dealing with issues

- The Indonesian legal system was unable, or unwilling, to respond to the changed conditions of the two ringleaders of the Bali Nine, who evidence shows had been rehabilitated during their time in prison. Despite pleas from Australian government officials and others, which included a strong case that the men had much to offer society, the Indonesia court carried out its harsh sentence.
- The legal system in Australia was very effective in dealing with the issue of gun violence in the aftermath of the Port Arthur massacre. This is in stark contrast to how the issue of gun violence is dealt with in the United States' legal system.

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The effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society

- The various means of support to the two men on death row in Bali from family, friends and community groups in Australia were effective in keeping up their morale.
- The Australian Government provided effective consular support to the two men on death row in Bali, despite the fact that pleas for clemency were ultimately rejected.
- The legal system was effective in dealing with the issue of access to semi-automatic weapons by banning them and initiating a gun buy-back scheme.
- Non-legal initiatives such as the Alannah & Madeline Foundation have been effective in promoting the cause of children and their right to live free from violence and trauma.
- The practice of many Tasmanians of not mentioning the mass murderer from the Port Arthur incident has been effective in keeping the focus on the victims and away from the perpetrator.

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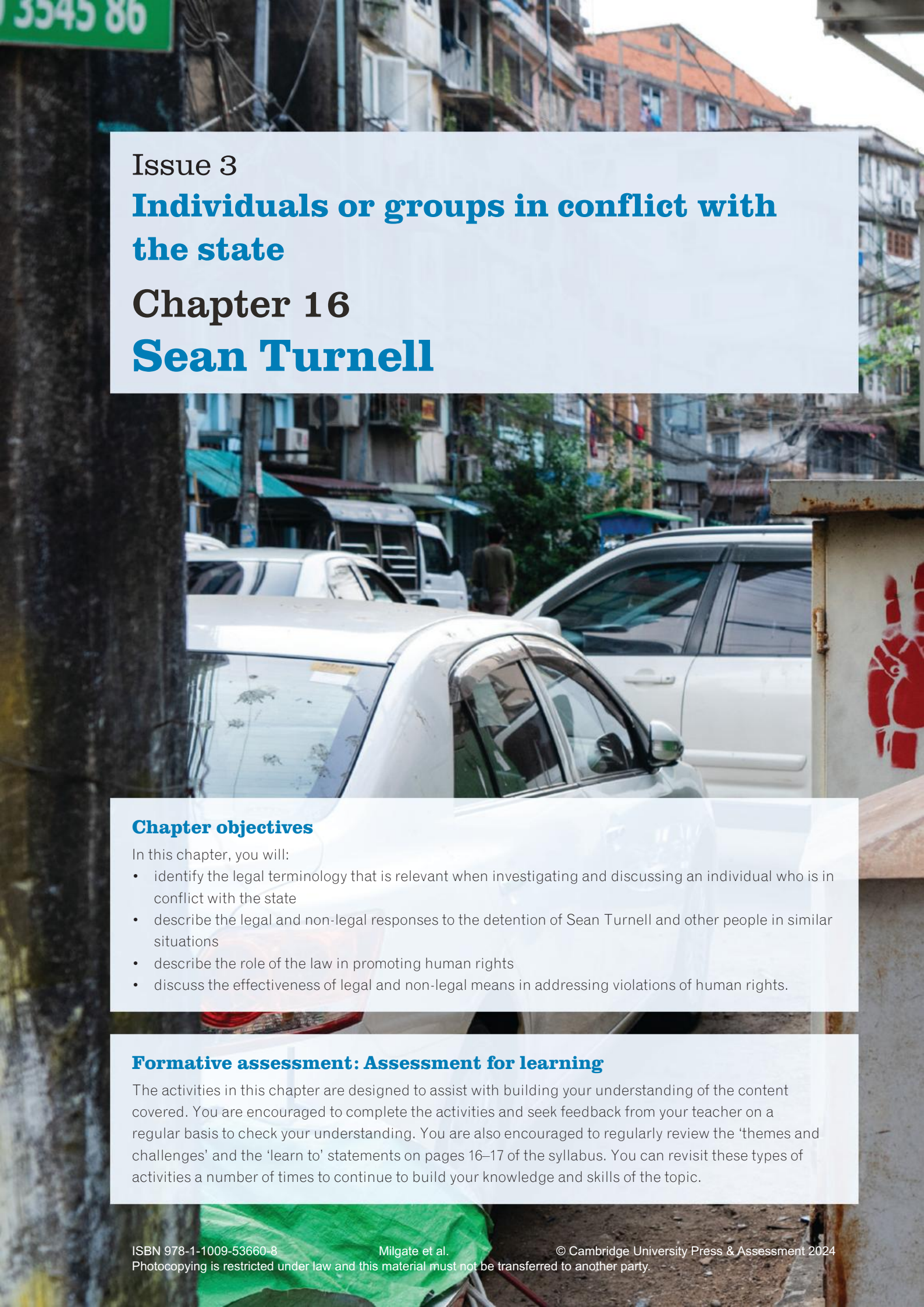

Issue 3

Individuals or groups in conflict with the state

Chapter 16

Sean Turnell

Chapter objectives

In this chapter, you will:

- identify the legal terminology that is relevant when investigating and discussing an individual who is in conflict with the state
- describe the legal and non-legal responses to the detention of Sean Turnell and other people in similar situations
- describe the role of the law in promoting human rights
- discuss the effectiveness of legal and non-legal means in addressing violations of human rights.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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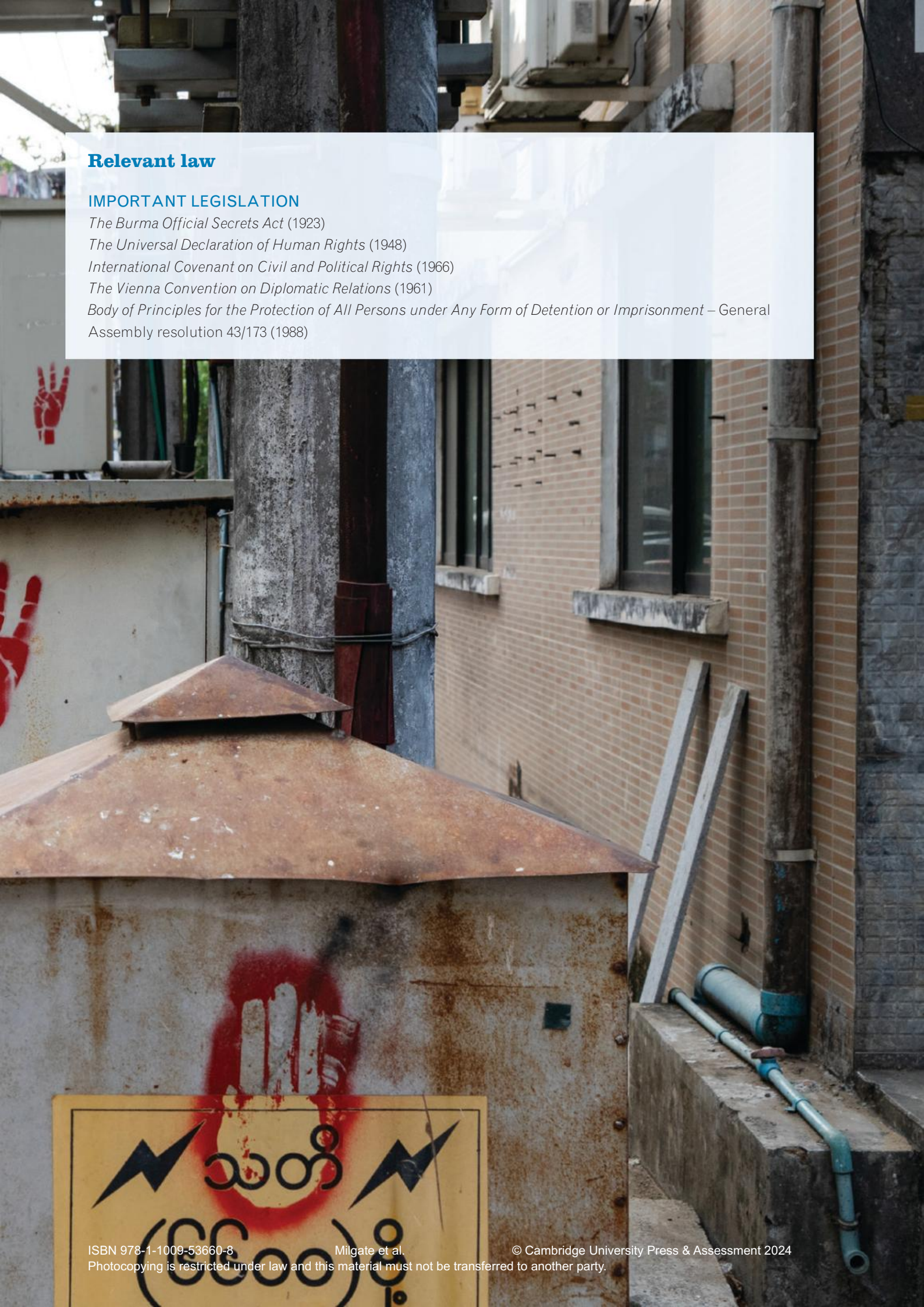

Relevant law

IMPORTANT LEGISLATION

The Burma Official Secrets Act (1923)
The Universal Declaration of Human Rights (1948)
International Covenant on Civil and Political Rights (1966)
The Vienna Convention on Diplomatic Relations (1961)
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment – General Assembly resolution 43/173 (1988)

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16.1 From professor to prisoner

military junta
an authoritarian style of government led by a group of military leaders who seized power by force

coup d'état
a sudden violent overthrow of government by a small group that usually consists of members of the armed forces

This is the story of an Australian who was imprisoned in a foreign country by a **military junta** that after seizing power in a ***coup d'état*** had scant regard for human rights, the rule of law or international law. Engaging with such a regime is fraught with difficulty. The law cannot be expected to run its course and achieve a just outcome. Securing the release of someone in this situation requires patience, persistent effort, lobbying, media publicity, diplomacy and international pressure. All these things were required to finally secure the release of Dr Sean Turnell after he had spent 650 days in horrific conditions in the prison system in Myanmar.

Figure 16.1 Sean Turnell with Aung San Suu Kyi and his wife and daughter in happier times before the coup on 14 January 2021 in Myanmar. At this time, Aung San Suu Kyi was the State Counsellor in the National League for Democracy government, which had been in power in Myanmar since 2016. Dr Sean Turnell was Aung San Suu Kyi's 'favourite economist'. When her political party won the November 2015 election, she asked Sean to come to Myanmar to advise her government on economic policy.

Professor Sean Turnell

In 2021, Sean Turnell was a 57-year-old economics professor from Macquarie University who had been working in Myanmar since the election of the democratic government in 2015. He was from the south-west of Sydney and had gone to James Meehan High School. He studied economics at Macquarie University and after graduating he worked for the Reserve Bank of Australia as an analyst. From 1990, Turnell was employed at Macquarie University where he completed his PhD. His thesis was on the economist John Maynard Keynes. Dr Turnell became an associate professor in economics and spent many years researching Myanmar.

In 2001, he established a blog called Burma Economic Watch, which provided reliable economic data and expert commentary about what was happening under the military regime. He was also involved in doing some broadcasts about Myanmar's economy on the BBC Burmese Service. Burmese politician and diplomat Aung San Suu Kyi listened to Dr Turnell's broadcasts while she was under house arrest by the ruling military government. She was impressed by what she heard, and later went on to read some of his articles, and his 2009 book *Fiery Dragons*. This book traced the history of Burma's financial system and explained how the richest country in Asia in the early 1900s became the poorest in the twenty-first century and, more importantly, what was needed to turn things around.

Dr Turnell first met Aung San Suu Kyi after her release from house arrect in 2010, and he joined with her economic team in crafting a vision for economic reform of the country. After the 2015 elections, Aung San Suu Kyi asked Turnell to come to Myanmar and help the National League for Democracy, which had just won government. Apart from some time spent back in Australia due to the COVID-19 pandemic, Dr Turnell spent most of the following five years, from 2016 to 2021, in Myanmar helping the government with its economic programs. This all came to an end in February 2021.

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Case Study

Aung San Suu Kyi

Aung San Suu Kyi is a Burmese politician who has spent much of her life being imprisoned by the military in Burma. In 1998, she co-founded the **National League for Democracy** (NLD). In 1989, Suu Kyi was placed under house arrest by the military, but despite this, the NLD won more than 80 per cent of seats in the 1990 elections. The military ignored these election results, formally annulling them in 2010, and continued to harass and place restrictions on Aung San Suu Kyi. In 1991, her international profile rose when she won the Nobel Peace Prize.

In 2010, the NLD boycotted the general elections and the pro-military **Union Solidarity and Development Party** (USDP) won power and installed a civilian–military hybrid regime led by a former general, Thein Sein. The new government introduced some reforms, relaxed censorship laws, and freed hundreds of political prisoners, including easing the restrictions placed on Aung San Suu Kyi. This was welcomed be Western governments, who ended their sanctions on Myanmar.

Freed from political restrictions, Aung San Suu Kyi contested the 2012 elections. The NLD party won 43 out of the 44 seats it contested and she took her place in Myanmar's parliament in the capital, Naypyitaw. Three years later, the NLD had a landslide win in the November 2015 general election, and the role of **State Counsellor** was created for Suu Kyi.

National League for Democracy
a political party co-founded in 1988 that promoted democracy in Myanmar; despite winning elections, the military prevented it from governing until 2015; from 2016 to 2020, it ran a democratic government, but after winning the 2020 election, it was forced out by the military's seizure of power on 1 February 2021

Union Solidarity and Development Party
the military-aligned political party in Myanmar, which gives the seats it wins to the military; the military are guaranteed 25 per cent of the seats in the parliament under the 2008 Constitution

State Counsellor
the position of de facto head of government; a special position created for Aung San Suu Kyi, who had been banned from holding the position of president by a rule put in place by the military specifically to prevent her from holding power

In the position of State Counsellor, Suu Kyi played a crucial role as Myanmar made its transition from a military junta to a partial democracy. Myanmar's most democratic government was in power from 2016 to the November 2020 elections, which the NLD won in a landslide winning 83 per cent of the votes.

Figure 16.2 On 12 November 2018, Aung San Suu Kyi delivered the keynote address during the Asian Business and Investment Summit 2018 in Singapore. This was halfway through the term of her democratic government, which took power in 2016.

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Figure 16.3 On 9 October 2020, Dr Sean Turnell, speaking from Myanmar, was interviewed on the economic situation ahead of the upcoming election in November.

The military coup

In a move that shocked the world, a military junta led by General Min Aung Hlaing seized power in Burma on 1 February 2021.

The military had ruled the country from 1962 to 2011, and the 2008 Constitution guaranteed that the military would always have 25 per cent of the seats in parliament. In addition, they ran a vast web of companies linked to banking, transport, mining, manufacturing, tobacco, alcohol and even tourism.

The military should have felt secure, but it seems likely that they felt their influence starting to decline, while the charismatic Aung San Suu Kyi was very popular. Added to this, General Min Aung Hlaing was due to retire from the army in 2021 and had ambitions to become President: he did not state this publicly, but military officials close to him have said it was his 'aim and dream'. However, this could only happen if his USDP won the November 2020 election. As noted in the Case Study on Aung San Suu Kyi, this election was won convincingly by the NLD, while the USDP performed poorly.

The military leadership did their best to undermine the legitimacy of the elections, and then on 1 February 2021 they seized power in a *coup d'état*.

Analysis 16.1

Scan the QR code to watch Video 16.1.

1. Describe why the military seized power.
2. Evaluate how firm the military's grip on power was.
3. Explain what happened to the NLD leaders.
4. Outline how the military used the legal system to bolster their position.
5. Propose whether there will be another election.
6. Suggest what the world might be able to do.
7. Propose whether Myanmar's divisions can ever be healed.
8. From your own knowledge of what has happened in Myanmar since 2021, describe how accurate Dr Melissa Crouch's assessment of the situation was just after the military coup.

Video 16.1 Dr Melissa Crouch from the Law faculty at the University of New South Wales is an expert on the legal system of Myanmar. In this video, recorded three days after the military coup, she explains how the coup unfolded. (09:45)

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Analysis 16.2

Read 'Myanmar coup: How the military has held onto power for 60 years' by Michael W. Charney (*The Conversation*, 4 February 2021) at http://cambridge.edu.au/redirect/10457. This article was written by historian Michael W. Charney just days after the coup. Michael teaches international security studies and Asian history. In this article he looks at the history of Myanmar military's intervention in politics since independence.

1 Outline the history of military control in Burma/Myanmar.
2 Describe the pattern that seizing military control can take.
3 Explain the factors that motivate the military in Myanmar.

General Min Aung Hlaing declared a state of emergency and promised to hold elections after a year. However, a brutal crackdown began to suppress all opposition to the military's rule. Protestors, journalists, lawyers, human rights activists and health workers found themselves subject to criminal cases and arbitrary detention. Over the following years, these political prisoners were denied their right to a fair trial according to international legal standards.

Sean Turnell would later identify two other factors for the coup. The first was what he called Myanmar's 'original sin': the printing of money to finance excessive military spending. The military did not operate within government finances; they financed their own military campaigns and criminal enterprises. This included campaigns of terror and persecution against the Muslim Rohingya people, the most recent being from 2016 to 2017. This led to over a million Rohingya people fleeing over the border, with most going to neighbouring Bangladesh, where the world's largest refugee camp was created.

The military's excessive spending diverted resources away from the rest of the economy, leading to inflation and debt. The lack of transparency and accountability in the economy also discouraged foreign investment.

Figure 16.4 Portraits of Myanmar's armed forces chief, Senior General Min Aung Hlaing, plastered on the ground of a street in Yangon during a 2021 demonstration against the military coup. The protesters believed the portraits could slow security forces reluctant to step on a photograph of their general.

Figure 16.5 Rohingya refugees in Moiner Ghona Camp on 17 October 2017. Moiner Ghona Camp is a Rohingya refugee camp near the Bangladesh and Myanmar land border. More and more Rohingya crossed the Bangladesh border via land and sea, with over one million fleeing Myanmar.

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However, from 2016 to 2021, the economic policies of the NLD government were achieving success. One measure that worked in bringing down inflation and limiting military spending was progressively reducing the printing of money over the five years. However, this measure did not please the rich and powerful people connected to the junta.

The second but related factor Turnell identified for the coup was that the economic team of the NLD government was implementing a plan to reform Myanmar's banking system, which was a central factor holding back the country from developing a sustainable and thriving economy. Turnell was an adviser to this economic team on financial reform, though he was not actually employed by the government. These two factors, both of which would have financially impacted the military, could have contributed to the decision to launch the coup.

Arrest

In the first few days after the coup, the military arrested over 130 parliamentarians and government officials, and 14 activists. Aung San Suu Kyi, now 75 years old, was charged with four offences. One of these was under a colonial era law known as the *Official Secrets Act* (1923) or OSA. Section (1)(c) of the OSA states that it is a crime to collect, record, publish or share state information that might be directly or indirectly useful to the enemy. This offence carries a maximum penalty of 14 years in prison. Suu Kyi already had four other charges against her, which greatly increased the potential sentence.

ambassador
the highest-ranking official who is an accredited representative of a government appointed to work in another country for a specific period of time

embassy
the official residence of the ambassador and their staff

In the days after the coup, Sean Turnell suspected that he might be a target because on the day of the coup he posted an old photo of himself and Aung San Suu Kyi on Facebook. The post had gone viral, and he feared that it might get him into trouble. He had made enquiries about getting out of the country, but all flights were booked. At 4 am on the morning of 6 February 2021, Dr Turnell received a text from someone in his hotel advising him that military intelligence and police were in the hotel and that they had his room under surveillance.

Figure 16.6 On the day of the coup, Sean Turnell posted a comment on Facebook stating that in Myanmar he had found the 'bravest, kindest people' and that 'they deserve so much better'. Along with this comment, he posted this photo graph of himself with Aung San Suu Kyi, taken at the Lowy Institute in Sydney a few years earlier. His comments would not have pleased the military junta.

After the warning, he decided to vacate his hotel room, but before leaving he contacted Andrea Faulkner, the Australian **Ambassador** to Myanmar. When he went to check out, however, he was surrounded by police who said they wanted to question him.

Fortunately, Ambassador Andrea Faulkner arrived in her **embassy** car with the Australian flag prominently displayed and sat with Sean Turnell as he was questioned by the police. During this time, Turnell was on his phone talking to someone on the BBC World Service program about what was happening when he was forced to hang up. This dramatic phone call went viral, and news of his arrest spread around the world. The police confiscated Dr Turnell's passport, computer, iPad and phone, and then took him away without informing Ambassador Faulkner or anyone else where he was being taken.

Dr Turnell had a few things in his favour. The Australian Ambassador had been alerted, the global media were aware, and most importantly, he had been able to text his wife in Sydney. His quick-thinking wife subsequently alerted a whole range of people and institutions, including Macquarie University. However, Dr Turnell had now disappeared and was in the hands of military intelligence and police.

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Legal Info

The role of ambassador

In dealing with a regime that does not observe the rule of law, the role of ambassador is crucial for foreigners in conflict with the state. One of the core duties of an ambassador is to protect the rights of its citizens who happen to be in the country where the ambassador is stationed. This extends to helping any of its citizens who are in legal trouble, and being an advocate for any of its citizens who are mistreated.

In carrying out their duties, ambassadors are protected by the *Vienna Convention on Diplomatic Relations* (1961), which entered into force generally in 1964, and entered into force for Australia on 25 February 1968. The specific clauses of this declaration that would have been relevant for Ambassador Faulkner were:

- Article 29 – The person of a diplomatic agent shall be inviolable. This means that the ambassador should be treated with respect and cannot be arrested or detained.
- Article 31 – The ambassador has immunity from any laws in the country where they are posted.
- Article 37 – Anyone working for the ambassador also has immunity in respect to any actions they undertake as part of their duties.

The only thing a host government can do to an ambassador who they dislike is to expel them from the country.

Figure 16.7 The Australian Embassy in Myanmar is located in Yangon, the country's largest city and most important commercial centre. Yangon was the capital until 2006 when the military moved the seat of government inland to Naypyitaw.

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Jailed

From the hotel, Sean Turnell was taken to the closest police station for further questioning. On arrival, forms were filled out, photos taken and all his possessions were confiscated, including his watch. He refused to give up his wedding ring but was forced to surrender it later. He was placed on his own in a tiny cell which had a floor covered in 'primordial muck' and contained one 'enormous rat' that he could not get rid of. A few hours later he was dragged out and forced to give his passwords so the intelligence officers could access his laptop. The laptop contained documents relating to his advisory work with the economic team in the NLD government. He was concerned these would be used to manufacture a case against him. After this interrogation, he was placed back in his cell, before being woken again at 2 am, moved into a police minivan and driven in the dark to an undisclosed destination.

Figure 16.8 Outside Insein Prison in Yangon, people wait to inquire about relatives and friends who had been detained. Thousands of people were jailed for protesting against the coup that ousted the civilian government to which Sean Turnell had given economic advice.

The Box

As it turned out, Turnell was being taken to the headquarters of the Criminal Investigation Department and Special Branch. He spent the next two months living in what he called 'The Box': a small shipping container type room within another room. It was claustrophobic, hot, stuffy and had no natural light. The room was totally bare except for a steel chair bolted to the floor with wrist and leg chains and manacles dangling from it. When his interrogators came to question him, he was placed in the chair, and the chains and manacles were usually placed on him. Over his two months in The Box, Sean Turnell lost 20 per cent of his body weight.

In terms of why he was being held, Dr Turnell was given no details of any legal action against him. In the interrogations, his captors were trying to get him to implicate Aung San Suu Kyi in a conspiracy. He would later say that he felt that his interrogators displayed a lack of knowledge about the world and a willingness to believe in conspiracy theories shared on social media.

Insein Prison

In late April 2021, Sean Turnell was transferred to the notorious Insein Prison in Yangon. His cell was tiny at about two by three metres, with just iron bars and no glass, leaving it open to the elements. The inmates were only allowed out of their cells for four hours a day. The food was very poor quality, and there was never enough. Many prisoners were able to get people outside to send food to them in the prison. Others relied on trading whatever they could find or make, while others just wasted away. Turnel was fortunate to have food sent in for him, though he still lost a lot of weight.

The positive thing about this section of Insein Prison was that Turnell's fellow prisoners welcomed him and looked after him in many practical ways, such as helping make his cell habitable. One Muslim man named Jacoob took it upon himself to be Turnell's protector and on one occasion physically stopped a guard from beating him.

Dr Turnell developed survival strategies such as pacing around in the small yard and counting his steps, and having regular political and economic discussions with fellow prisoners. Deliveries of food and books, organised by people outside and channelled through embassy contacts to the prison, were important in keeping up his morale.

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Hazards were everywhere in the prison, including disease, lack of hygiene, polluted water and lack of window coverings which meant the cells were exposed to other elements. One thing in Turnell's favour was that the military did not want him to die in prison. He was given the Chinese COVID-19 vaccine on several occasions, although he still caught COVID-19 five times over the course of his imprisonment.

Communication with the outside

Sean Turnell's first communication with the outside was via a message sent through a prisoner friend who had been given an amnesty and released. Finally, after a month in Insein Prison, the Australian Embassy got permission to conduct phone calls with Turnell. These calls continued for the rest of his imprisonment and were facilitated by Ambassador Andrea Faulkner. The phone calls lasted for 20 minutes, with the time split between Dr Turnell speaking with his wife and speaking with Ambassador Faulkner. He also began receiving mail from his wife and from family and friends. These were important for keeping up his morale and for discussing the progress of his case, though they had to be careful what they wrote.

Naypyitaw Detention Centre

The first remand hearing was held on 12 May 2021, at Yangon Eastern District Court. Ambassador Faulkner was at all of Turnell's hearings, though she was never allowed in. During his time Insein Prison, these remand hearings were supposed to happen every two weeks.

On 21 September 2021, Sean Turnell was transferred to Naypyitaw Detention Centre (NDC). In his book, written after his release, Turnell would refer to Naypyitaw (the capital city since 2006) as 'terror-central of Min Aung Hlaing's junta'. The conditions in NDC were even worse than in Insein Prison. Initially, he was locked in his cell for a week, with no time outside. The rain came into the cells, the food was delivered in old paint buckets, and there were many arbitrary restrictions, such as not being allowed to wear shoes.

Figure 16.9 Sean described the dreadful conditions under which Daw Aung San Suu Kyi was held in Naypyitaw Jail. Her cabin can be seen (inside the small red circle) in this Google Earth image.

In NDC, Turnell was imprisoned with many distinguished former government ministers and other political prisoners.

Aung San Suu Kyi was also a prisoner at NDC, but she was kept away from the other political prisoners in a separate hut. She was also a co-defendant in all of the cases of the other political prisoners.

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The trial

Sean Turnell's trial started on 23 September 2021 and dragged on for over a year. For the first six months, the trial was held outside NDC in a courthouse in a residential area of the capital.

Six months later, the trial hearings were moved to a makeshift courtroom in NDC. This was because Aung San Syu Kyi was there, and all the NLD prisoners were co-defendants with her in the same conspiracy case. She appeared in the court on the same days. Just as when he was in remand, Australian Embassy staff were never allowed contact with Turnell on these days or to be in the courtroom. Nevertheless, embassy staff turned up to every hearing and he was often able to see Ambassador Faulkner from a distance.

The case for the prosecution

It was six months before Sean Turnell was told the charges against him, although he had already guessed it might involve the *Official Secrets Act* (1923). It is possible he was targeted as part of a junta plan to portray foreigners in Myanmar as puppet masters in control of the NLD government. As there were not many foreigners left in Myanmar due to the COVID-19 pandemic, Turnell became a convenient target. Another possibility is that the military leadership may have been following conspiracy theories on social media and wanted to portray themselves as being defenders of Myanmar from outside forces. Whatever their motives, the regime was determined to use the legal system to silence their opposition. Immediately after the coup, the regime appointed new judges to the courts for this purpose.

The trial process began on 25 September 2021 and lasted for 13 months. Rather than a fair legal process, it had all the hallmarks of a show trial, enacted to serve the purposes of the junta. The two judges were often sleepy and sometimes turned up drunk, and the defence was unable to get a suitable interpreter who understood legal terminology, with the result that Dr Turnell often had no idea what was going on.

The prosecution's case against Sean Turnell was based on two charges. One was an immigration charge, and the other was a charge that he was in breach of the OSA.

The prosecution attempted to portray Sean Turnell as a spy and as being involved in a conspiracy – that he was part of a foreign interference campaign to influence the NLD government in Myanmar. The prosecution called some police officers as witnesses who told lies that were easily refuted by the defence lawyers. Documents from Turnell's laptop were presented to the court with very obvious signs of being tampered with, and absurd claims were made about them.

Given this situation, there was no point in Turnell's lawyer calling their own witnesses or mounting much of a defence, other than to cross-examine the prosecution's witnesses and question the evidence presented. This was also the attitude of Aung San Syu Kyi and the other NLD political prisoners. Towards the end of the trial, Dr Turnell was allocated three minutes to make a statement. Finally, he would have his say. He began reading his carefully prepared statement, but the judge cut him off before the three minutes were up. The hearings were over. Only the verdict and sentencing remained.

Judgment

Two weeks later, on 29 September 2022, the judgment was delivered. To everyone's surprise in the courtroom, the judge entered the court, delivered the judgment at great speed, then got up and left. Turnell had no idea what he had said. Later, on reading the judge's statement, it was clear that he had been found guilty. The judge had not addressed any of the arguments that the defence had put forward in the trial, except for rejecting the defence lawyer's claim that the OSA did not even apply to Sean Turnell as he was not an employee of the Myanmar government. The judge said that even though Turnell may not have violated the letter of the law, he violated the 'spirit of the law'. He was found guilty and sentenced to three years hard labour.

Convicted prisoner

Now a convicted prisoner, Sean Turnell was transferred to Yamethan Prison, which was in a more remote location, and which he described as being a miserable place in the heart of the Junta's dystopia. However, on arrival at the prison, Turnell tested positive for COVID-19 for the fifth time, and he and three other prisoners were quarantined in a large disused building.

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Analysis 16.3

Scan the QR code to watch Video 16.2.

1 Outline why Sean Turnell called the legal process a sham.
2 Describe the more bizarre aspects of the case against him.
3 Outline what he recounts about his talks with Aung San Suu Kyi.

Video 16.2 On 21 November 2022, Sean Turnell reflected on the trial process in this interview in Sydney. He had been released from his 650-day imprisonment in Myanmar and deported to Australia just a week earlier. (02:12)

At the end of his quarantine, Dr Turnell was surprised to learn that he was to be taken back to Insein Prison.

The five-hour trip back to Insein Prison was an unpleasant one. He had a heavily armed escort and his hands and feet were manacled. He recalls seeing the once-flourishing urban centre of Yangon, now turned bleak, through the window, as the van passed through the former capital. Still, he was looking forward to seeing his fellow prisoners from before. When he arrived, however, he found his old friends were gone. Worryingly, the prisoners he was housed with this time all had orange uniforms, which meant they were on death row.

Once back in Yangon, the regular phone calls organised by the Australian Embassy resumed. Back in Australia, Foreign Minister Penny Wong released a statement condemning the continued imprisonment of Dr Turnell, and his wife and his supporters redoubled their efforts.

Release and homecoming

Finally, on 17 November 2022, Sean Turnell was told he was being released, and that he had 10 minutes to pack. He soon found out that this was part of an amnesty given to 5000 prisoners to celebrate National Day, which is a holiday celebrating independence from the British. Dr Turnell was being given a pardon, with the condition that he must not publicly criticise the regime and that he may never return. He was deported along with some other previously imprisoned foreigners. He was taken to the airport and put on a flight to Bangkok, followed by another flight to Melbourne. Before leaving Myanmar, Turnell was able to speak to Foreign Minister Penny Wong and Prime Minister Anthony Albanese.

Analysis 16.4

After watching the following video, https://cambridge.edu.au/redirect/10770, answer the questions below.

1 Describe the circumstances of Sean Turnell's arrest.
2 Describe the prison conditions and Turnell's treatment.
3 Identify who worked for Turnell's release in Australia.
4 Outline the impact that the Australian Government had on Turnell's release.
5 Describe Turnell's feelings on his return to Australia.

Review 16.1

1 State why Sean Turnell was in Myanmar.
2 Describe the NLD. When was it in government?
3 Who is Aung San Suu Kyi?
4 Describe the conditions in Insein Prison.
5 Explain why Sean Turnell was transferred to Naypyitaw Detention Centre.
6 Describe the trial process.
7 State what the verdict was in Sean Turnell's case.
8 Outline how Sean Turnell came to be released and deported.

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16.2 Legal responses

Legal experts

One early response to the junta's seizure of power was from legal experts around the world, who assessed the military's claims that they were operating in accordance with the state of emergency provisions of the 2008 Constitution.

According to legal expert Dr Melissa Crouch, from the University of NSW, the Constitution had been written by the military with the clear intention of continuing to play a central role in politics. For example, included a provision that the military should control over 25 per cent of the seats in parliament. They had also made the Constitution very hard to amend, with any amendments needing to be approved by 75 per cent of parliamentarians. Though the junta justified their seizure of power by calling it a 'state of emergency' under the Constitution, Dr Crouch does not accept this. The only reason that a 'state of emergency' can be declared is if there is an insurrection. The only thing that the military stopped was the sitting of the new parliament. Therefore, the seizure of power was a coup and does not fit the criteria for a 'state of emergenct', making it a violation of the rule of law.

hostage diplomacy where a host country uses the citizens of another country as diplomatic tools through of arbitrary detention, conviction of a crime or imprisonment, with the aim to extract concessions from their country of origin or to achieve some other political purpose

Figure 16.10 Then Foreign Minister Marise Payne was quick to condemn the arrest and imprisonment of Sean Turnell on 7 February 2021.

Since the coup, the Junta has used a raft of legal mechanisms to cement their position, prevent protests and silence opposition. According to Dr Crouch, the military's actions have exposed the undemocratic nature of the 2008 Constitution, and demonstrate that there can be no turning back as far as the people of Myanmar are concerned. 'No political system can afford to have a military that is unaccountable.' She thinks that the people will no longer want the military to be part of the political system of Myanmar.

Legal Links

For further in-depth analysis of the coup and the rule of law, see the interview with Melissa Crouch reported in the article 'Melissa Crouch on Myanmar's Coup and the Rule of Law' (*The Diplomat*, 23 March 2021, by Sebastian Stangio) available at the following link: http://cambridge.edu.au/redirect/10409.

Diplomacy

The main legal response to Sean Turnell's imprisonment was diplomacy. He was convicted after a trial in closed court without proper access to legal representation. This was clearly a case of **hostage diplomacy**, and so the only viable legal pathway to secure Turnell's release was to use the mechanisms of diplomacy.

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This involved efforts on the ground in Myanmar by the Australian Ambassador, assisted by embassy staff. The legal rights of embassies and ambassadors are contained in the *Vienna Convention on Diplomatic Relations* (1961). Using these legal rights under international law, the Australian Embassy did all that it could to support Sean Turnell in prison, to keep the channels of communication open and to liaise between Australia's Foreign Minister and the military regime in Myanmar.

Government leaders in Australia were also quick to act. Foreign Minister Marise Payne issued a statement on 8 February 2021 stating that Dr Turnell was a highly regarded member of the academic community in Australia and that the government would do all it could to press for his release. The Foreign Minister called in the Myanmar ambassador to the Foreign Ministry in Canberra to make clear that the government regarded this as a very serious matter. This high-level pressure from the Australian Government continued under the newly elected Labor government in May 2022. Over the course of 2022, both the Australian Foreign Minister Penny Wong and the Prime Minister Anthony Albanese kept the pressure on Myanmar's military regime for Sean Turnell's release.

The military leadership probably calculated that once the legal process had run its course and Sean Turnell had been found guilty, their goal would have been achieved. The appearance of a successful prosecution vindicated their claims that Sean Turnell was part of a sinister foreign interference operation. They could now allow the diplomatic intervention, issue a deportation order and order him never to return to Myanmar.

Other forms of diplomatic support came from:

- the day-to-day support Sean Turnell received while in prison from the Australian Embassy in the form of letters from friends and family in Australia, parcels containing food and books, and regular phone calls with his wife and Ambassador Faulkner. Dr Turnell said that, due to this support, he never felt abandoned
- the UK and US embassies also sent Dr Turnell parcels containing books and other things.

Figure 16.11 Strong statements from Prime Minister Anthony Albanese and Foreign Minister Penny Wong were crucial in putting pressure on the military regime in Myanmar to secure Sean Turnell's release.

Review 16.2

1 Investigate the views that legal experts and historians have about the coup.
2 Outline the significance of the 2008 Constitution.
3 Describe how the Australian Embassy supported Sean Turnell.
4 Discuss the significance of the actions of the Australian foreign ministers.

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16.3 Non-legal responses

Academic support

Academics and experts on Myanmar around the world gave their assessments of the military coup and Sean Turnell's imprisonment. In Australia, Dr Turnell's own academic institution, Macquarie University, was a constant source of support, along with other universities. After his arrest, the Vice Chancellor of Macquarie University spoke out, highlighting the university's commitment to the economic advising that Dr Turnell was doing for the benefit of the people of Myanmar. The National Tertiary Education Union and the Australian Council of Trade Unions also issued statements supporting Dr Turnell and calling for his immediate release.

A group of academics created a website called Free Sean Turnell. It contained many useful links for people wanting to find out about Turnell's situation and what they could do to help. Included on the website was an open letter signed by 500 academics calling for Sean's release.

Analysis 16.5

Visit the website set up as part of the campaign to free Sean Turnell at http://cambridge.edu.au/redirect/10411.

1. List the materials this website contains.
2. Describe how each of these materials might appeal to different groups.
3. List the high-profile people who supported Sean Turnell.

Non-profit organisation

One of the links on the Free Sean Turnell website was to the Assistance Association for Political Prisoners (Burma), which is an organisation giving support to political prisoners in Myanmar (which was officially known as Burma until 1989). This organisation was founded and is mainly staffed by former political prisoners from Myanmar giving support to those still imprisoned. In this way Turnell's campaign is linked to the wider campaign for political prisoners in Myanmar.

Figure 16.12 On 13 March 2023, in Grote Kerk, Vlaardingen, The Netherlands, the Geuzen Medal was received by Min Min of the Myanmar human rights organisation *Assistance Association for Political Prisoners* (AAPP). This award was due to the organisation's reliability in collecting, recording and exposing human rights violations to both the people of Myanmar and the global community. The AAPP was established in 2000 on the Thai–Myanmar border, with the objective of providing support and encouragement to secure the release of all political prisoners, as well as improving their quality of life during and after incarceration.

Analysis 16.6

Explore the website of the Assistance Association for Political Prisoners (Burma) at http://cambridge.edu.au/redirect/10412.

1. Outline the means that this group uses to support people imprisoned by the military regime.
2. Discuss how effective you think this organisation's approach is.

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Personal support

Keeping Sean Turnell's morale up and caring for his needs as much as possible in the terrible conditions of the prisons that Turnell was held in was provided by a variety of people:

- Ha Vu – Turnell's wife – was a powerhouse of support in multiple ways. Ha was unceasing in contacting influential people in government, academia and the media among others. She even wrote a letter directly to the wife of the military leader of Myanmar, Min Aung Hlaing. Ha wrote over 100 letters to her husband in jail, although not all got through. She was in regular phone contact with the Australian Ambassador and Sean. The cookies and cakes that she baked and sent in vacuum-sealed bags via diplomatic pouch to her husband were a great morale booster and helped keep him from wasting away. Ha was the lynchpin for much of the support for Turnell.
- Other friends and family were also of enormous support. One friend in particular, Curtis, who remained in Myanmar for much of Sean Turnell's imprisonment, was important for his ability to get parcels over the last stretch to the gates of the prison, which was always a risky endeavour.
- A lot of attention was focused on Turnell in social media – a video of his arrest on 6 February 2021 immediately went viral. The attention of many people around the world was sustained throughout his detention and right up to his release, and after.

Sean Turnell's book

The writing of a book about his experiences in prison in Myanmar was Turnell's non-legal response to the injustice of the military regime that falsely imprisoned him and many other people in Myanmar whose only crime was caring for their fellow citizens of Myanmar and for democracy. Also, one of the things that sustained Turnell in prison was reading many books that friends and embassy staff were able to get to him. One of these was Kylie Moore-Gilbert's account of her imprisonment by the government of Iran, *The Uncaged Sky: My 804 Days in an Iranian Prison*. He was deeply impressed by this person who suffered in the same way he was and lived to tell of her experiences.

From the early days of his 650 days of imprisonment, Sean Turnell was determined that if he got out, he would write a book and tell his story. In his book, he wanted to thank all those people who had helped him, and in some cases saved his life. But he also wanted to pay tribute to the courage of his fellow political prisoners, from Aung San Suu Kyi to all her cabinet members and ministers in her government who had been imprisoned with their leader. On returning to Australia, Dr Turnell followed through on his pledge to write a book about his experience. His book, *An Unlikely Prisoner: How an eternal optimist found hope in Myanmar's most notorious jail*, was published on 14 November 2023.

Sean Turnell believes that even with Myanmar back under the control of a junta, his knowledge of the Myanmar economy and its history could still be put to good use in helping to improve the lives of the people of Myanmar. He believes that the military junta has failed. The economy is a mess, opposition military forces are making significant progress, and that in the long term, only a return to democracy will improve things. Turnell believes that the international community will not want to invest in Myanmar with the corrupt military junta still in control. Since his release, Dr Turnell has been actively speaking at international forums giving commentary on the situation in Myanmar from an economic perspective.

> Turnell's story stands as a stark reminder of the harsh realities faced by political prisoners around the world. Even as he remains technically a wanted man in Myanmar, Turnell's voice, captured in the pages of his book, continues to resonate, shedding light on a world often shrouded in darkness.
>
> Muhammad Jawad, 2023, 'Sean Turnell: An unlikely prisoner in Myanmar's junta-run prison', *BNN Breaking*, 14 November.

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Sean Turnell is not the only Australian to have written about the experience of being a political prisoner in another country. In addition to academic Kylie Moore-Gilbert, whose book Turnell read while imprisoned, journalist Peter Greste has also written of his time imprisoned, along with two fellow journalists, in Egypt from December 2013 to February 2015.

Protests

Protest movements in Myanmar and overseas have kept up pressure on the military junta to end their illegal seizure of power and reinstate democracy to Myanmar. They also call for the release of political prisoners and those arrested during protests.

Figure 16.13 This picture, taken on 15 November 2023, shows former Myanmar national football team goalkeeper Pyae Lyan Aung, who was granted refugee status in Japan in 2021. He is with a three-fingered gesture – a popular symbol of protest against Myanmar's 2021 military coup. Pyae Lyan Aung fears for his safety if he returns home to Myanmar, but he says he has no regrets about raising an anti-junta salute before a football match two years ago.

Analysis 16.7

Read the following articles online:

- 'Kylie Moore-Gilbert spent 804 days in prison in Iran. She says without public attention she'd still be there', *ABC News*, 10 May 2022, by Ian Coomb and Anna Kelsey-Sugg at the following link: http://cambridge.edu.au/redirect/10410.
- 'Press freedom champion Peter Greste seeking greater protections for journalists and whistleblowers', *ABC News*, 17 October 2023, by Evelyn Manfield at the following link: http://cambridge.edu.au/redirect/10413.

Compare the experiences of Kylie Moore-Gilbert and Peter Greste with Sean Turnell's experiences.

1. Contrast the regimes under which each was imprisoned.
2. Describe what each person was accused of.
3. Explain how each person was treated while in prison.
4. Outline the extent that the principles of the rule of law were followed in each case.
5. Discuss how significant non-legal means were in contributing to their release.
6. State the role that diplomacy played in their release.
7. Explain the motivation for each person writing a book after their release.
8. Describe the similarities between their experiences and Sean Turnell's.

Review 16.3

1. Describe the support that Sean Turnell received from academics.
2. Evaluate the usefulness of the Free Sean Turnell website.
3. Outline Sean Turnell's reasons for writing his book.
4. Describe the non-legal forms of support that Sean Turnell received.
5. Outline what Sean Turnell wants to see happen in Myanmar now.

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16.4 Effectiveness of responses

Given that Sean Turnell was arrested and imprisoned by a brutal military junta, the responses to his imprisonment were highly effective in the end. The use of diplomacy was the primary mechanism in securing Turnell's release, but the role of the Australian ambassador and the embassy in supporting Dr Turnell throughout, plus the tireless efforts of family, friends, and professional colleagues all had an important role to play.

Sean Turnell's story also highlights the ineffectiveness of the arbitrary use of force to deal with Myanmar's problems. The military's response in Myanmar has always been to shut down democracy, prevent free speech, attack journalists, reject experts and to violate human rights. From Sean Turnell's story it is evident that the military leadership is incapable of solving Myanmar's economic, social, political or ethnic problems. Turnell stated that he saw few 'true believers' in the military junta among the many prison guards, police and other officials in the legal system. Many were just going through the motions, with no great faith in the junta.

Sean Turnell's story fits within a backdrop of a bigger story: the struggle between forces of autocracy and forces of democracy being played out around the world today. For those on the side of democracy and human rights, what happens in Myanmar is important.

A UNICEF report in May 2024 said that within Myanmar over 3 million people had been internally displaced as a result of armed conflict, with fighting, landmines and airstrikes also leading to civilian injuries and deaths. As at 4 July 2024, the Assistance Association for Political Prisoners reported that 26 984 people had been arrested on political charges since the coup, of whom over 20 000 were still detained. On religious and other holidays, the military junta follows tradition and announces an amnesty for thousands of prisoners, but very few of these tend to be political prisoners: in January 2024 (Independence Day) 9652 prisoners were pardoned, but The Associated Press reported that only around 120 of these were political detainees.

For the good of the people of Myanmar, and for the health of the international rule of law in the region, our hopes should be for the ultimate triumph of democratic forces in Myanmar.

Figure 16.14 Prisoners being released under the amnesty on 4 January 2024. Very few of those released were political prisoners.

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Chapter summary

- Sean Turnell is an economist and expert on Myanmar. In 2016, he was invited to come to Myanmar to advise the new democratic government.
- A military coup was launched on 1 February 2021. The newly elected parliament was prevented from sitting, and key members of the NLD government, including Aung San Suu Kyi, and her cabinet were arrested and imprisoned.
- On 6 February 2021, Sean Turnell was arrested at his hotel and taken for interrogation.
- Over the following months, Sean Turnell was held in prison in Myanmar by the military government, awaiting trial.
- During his imprisonment, the Australian Embassy did a great deal to support Dr Turnell and work towards his release.
- Many prominent individuals, including government officials and academics from Australia and around the world, actively campaigned for Dr Turnell's release.
- The trials lacked any sense of natural justice. No effective defense could be mounted by any of the accused, including Sean Turnell. In the end, he was found guilty of conspiracy.
- After 650 days in prison, Sean Turnell was released from prison and deported to Australia on 17 November 2022, where he remains active in speaking about the struggle for democracy in Myanmar, and advocates for the release of the political prisoners who remain in prison, including Aung San Sui Kyi.
- Sean Turnell returned to Australia and remained active in speaking about the struggle for democracy in Myanmar.
- In November 2023, Sean Turnell published a book on his experiences in prison in which he highlighted the many political prisoners still in prison in Myanmar, including Aung San Suu Kyi.

Multiple-choice questions

1 Why was Sean Turnell in Myanmar in 2021?
- **a** The Myanmar military requested his assistance in reforming their finances.
- **b** He was a spy for the CIA.
- **c** He was appointed to the Australian Embassy in Myanmar.
- **d** Aung San Su Kyi requested that he assist the government with economic reform.

2 Sean Turnell was arrested by the Myanmar police because:
- **a** he wrote anti-government articles in the international press.
- **b** he was connected to the democratic government that had been overthrown in the military coup.
- **c** he had failed to pay his hotel bill.
- **d** of all of the above.

3 Which international treaty gave the ambassador the legal right to give assistance to Sean Turnell while in prison?
- **a** *Charter of the United Nations* (1945)
- **b** *The Universal Declaration of Human Rights* (1948)
- **c** *Vienna Convention on Diplomatic Relations* (1961)
- **d** *International Covenant on Civil and Political Rights* (1966)

4 Which of the following helped maintain Sean Turnell's morale while in prison?
- **a** The friendship of fellow prisoners
- **b** The contact with his wife through her letters and packages
- **c** The constant supply of books that his friends were able to get to him
- **d** All of the above

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5 Why did Sean Turnell decide to write a book about his experiences in prison?
   - **a** To inform the Australian Government about his poor treatment in prison
   - **b** To pay the legal fees for his defence
   - **c** To attack the military junta for their suppression of democracy
   - **d** To pay tribute to the courage of his fellow political prisoners

Short-answer questions

1 Outline the recurring problems plaguing Myanmar since independence.
2 Identify some of the achievements of the NLD government between 2016 and 2020.
3 Identify the expertise Sean Turnell brought to his work in Myanmar.
4 Identify the ways the military junta's actions in seizing power were a violation of the rule of law.
5 Explain how a fair trial would differ to the trial process that Sean Turnell was subjected to.
6 Discuss the role and responsibilities of the ambassador and the embassy.
7 Assess the effectiveness of the various types of support that Sean Turnell received.
8 Outline the precautions Australians should take when working in or travelling in countries that do not uphold the rule of law.

Extended-response question

Identify what needs to change in Myanmar to place the country back on the road to democracy, the rule of law, social harmony and economic prosperity. Outline the role the legal system needs to play in this.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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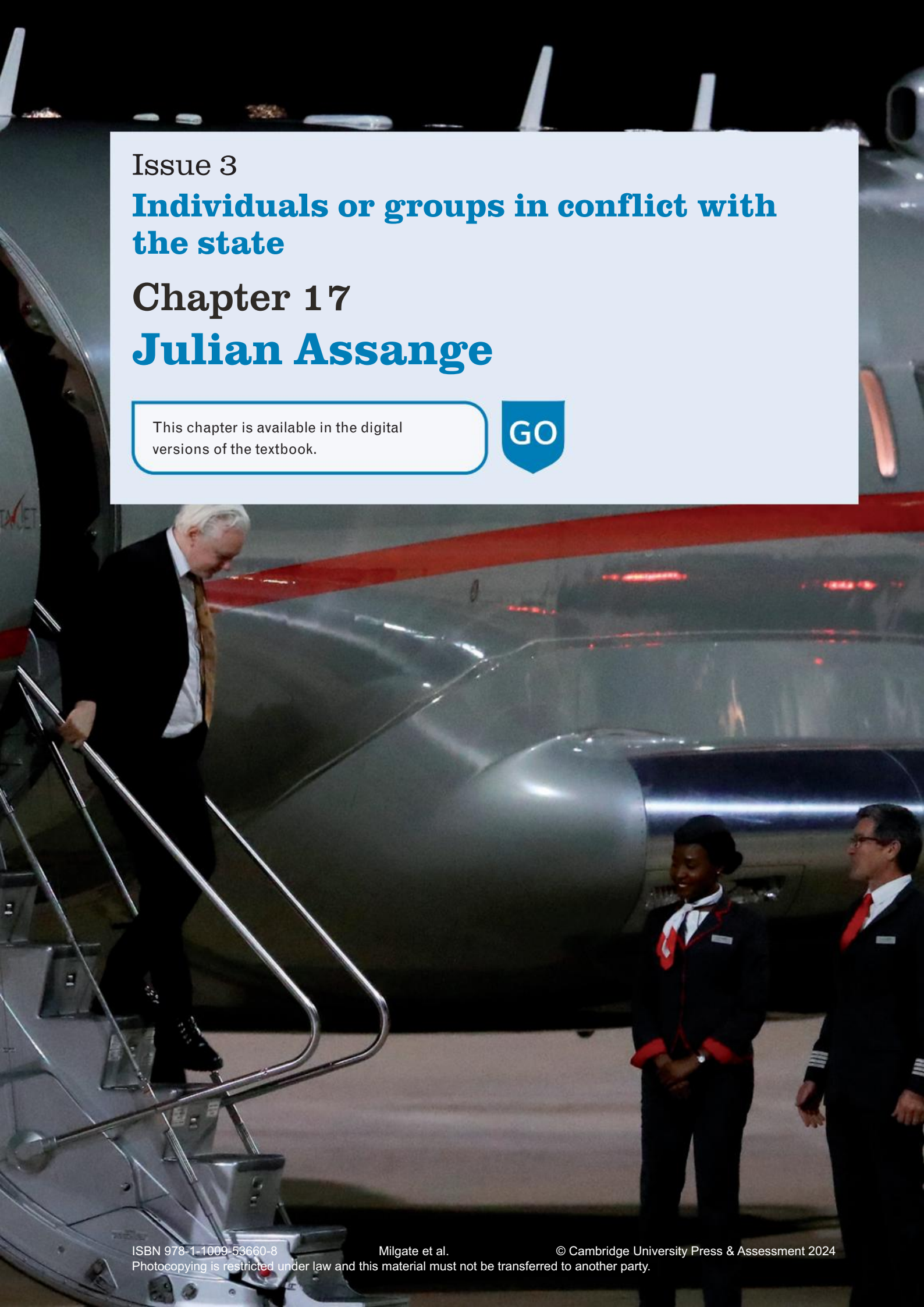

Issue 3

Individuals or groups in conflict with the state

Chapter 17

Julian Assange

This chapter is available in the digital versions of the textbook.

GO

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Issue 3

Individuals or groups in conflict with the state

Chapter 18

Outlaw motorcycle gangs

This chapter is available in the digital versions of the textbook.

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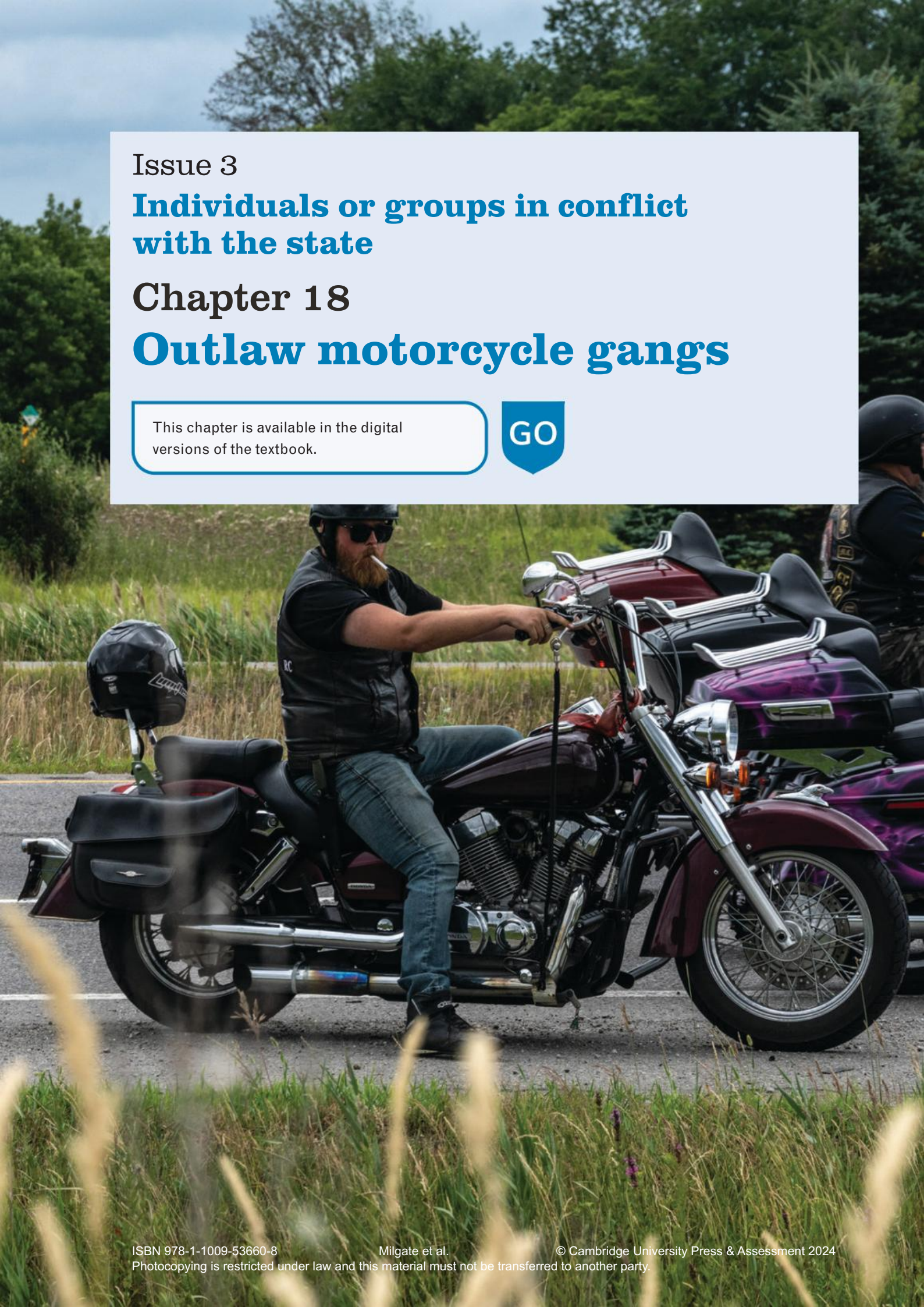

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Issue 3

Individuals or groups in conflict with the state

Chapter 19

Behrouz Boochani

Chapter objectives

In this chapter, you will:

- identify the legal terminology that is relevant when investigating and discussing an individual who is in conflict with the state
- describe the legal and non-legal responses to the detention of Behrouz Boochani and other people seeking asylum
- describe the role of the law in promoting human rights
- discuss the effectiveness of legal and non-legal means in addressing violations of human rights.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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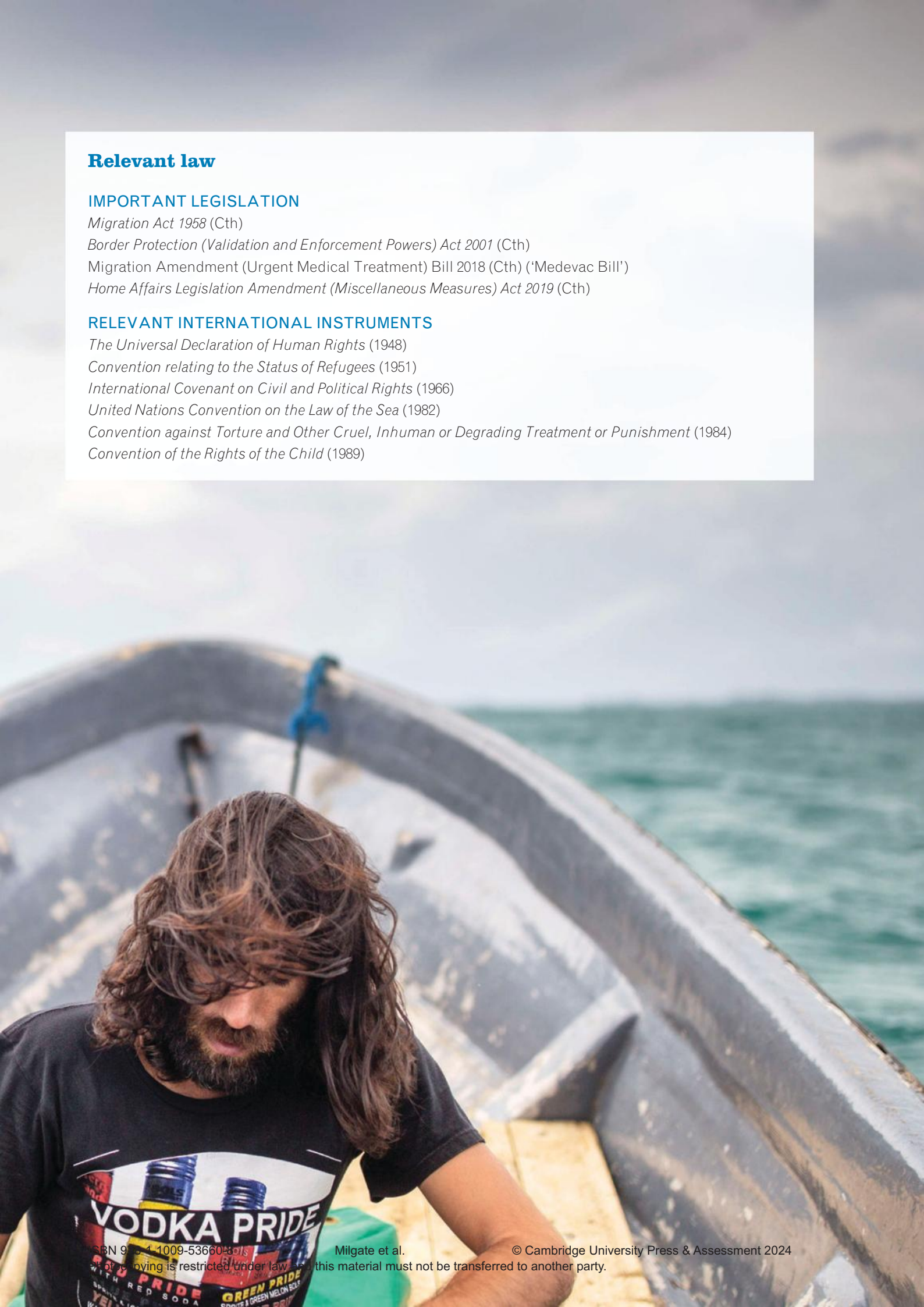
Relevant law

IMPORTANT LEGISLATION

Migration Act 1958 (Cth)
Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)
Migration Amendment (Urgent Medical Treatment) Bill 2018 (Cth) ('Medevac Bill')
Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019 (Cth)

RELEVANT INTERNATIONAL INSTRUMENTS

The Universal Declaration of Human Rights (1948)
Convention relating to the Status of Refugees (1951)
International Covenant on Civil and Political Rights (1966)
United Nations Convention on the Law of the Sea (1982)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
Convention of the Rights of the Child (1989)



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19.1 From seeking asylum to an Australian detention centre

Overview of the case of Behrouz Boochani

This is the story of Behrouz Boochani, a Kurdish Iranian **refugee** who was caught between international human rights law and Australian domestic migration law. His story is one of courage and determination. Using his skills as a journalist, he was able to give voice to hundreds of asylum seekers held in indefinite detention on Manus Island and Nauru in what Boochani and his supporters considered to be an inhumane system.

refugee
a person who has been forced to leave their home area due to a well-founded fear of persecution based on religion, race, political opinion, nationality, ethnic or social group

asylum
protection granted by a state

asylum seeker
someone who is seeking protection as a refugee

Behrouz Boochani survived six years in Australia's offshore detention system, which was created specifically for people seeking **asylum**. In November 2019, he managed to make his way to New Zealand where he was invited to give a lecture at a conference in Christchurch. In New Zealand he received a one-month visa. On 23 July 2020, on his 37th birthday, Behrouz was given official notification by the New Zealand government that his claim for asylum had been accepted. This was also exactly seven years since his arrival in Australia as an **asylum seeker**. By this time, Behrouz was in demand globally as a speaker due to his courageous journalism while imprisoned on Manus Island.

One of the laws of the island prison system was that inmates were not allowed to freely communicate with anyone in the wider world. To the Australian public, the inmates were to remain nameless and their suffering was to remain unknown. Many critics of Manus Island and Australia's immigration detention policies argued that they were designed to dehumanise and degrade inmates.

Behrouz Boochani's story is significant as he managed to break though these barriers and get his story about the violation of his and his fellow inmates' human rights out to the Australian public and the world. Driven by a sense of mission, in what for him was an act of resistance, he ended up writing full-length articles in the press, appearing by video on the ABC's *Q+A* program, making a full-length film on his mobile phone, *Chauka, Please Tell Us the Time* (2017), and writing an award-winning book, *No Friend but the Mountains* (Picador, 2018). Boochani's creativity and activism kept him sane over his six years of imprisonment.

In November 2019, then Home Affairs Minister Peter Dutton declared that Behrouz Boochani would never set foot in Australia. Yet, in February 2023, Behrouz entered Australia to promote his latest book, *Freedom Only Freedom* (Bloomsbury, 2023), appeared live on *Q+A* and appeared in Parliament House, Canberra, where he gave a talk to supporters. Though most of his work is based in Australia, he enjoys living as a free person in New Zealand, enjoying the scenery, cycling and playing an occasional game of soccer. His work involves speaking and writing about issues around the marginalisation of indigenous cultures and refugees. Both in imprisonment and as a free person, Behrouz Boochani has remained a champion of universal human rights.

Figure 19.1 On 8 February 2023, Behrouz Boochani visited Parliament House in Canberra. In this photo he appears with a number of Independents and Greens MPs and senators, who welcomed him and were there to hear him speak.

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Life in Iran

Behrouz Boochani is the oldest of five children and was born in the Kurdish Ilam region in western Iran in 1983. He was born in the middle of an eight-year long war between Iran and Iraq, which was fought mainly across his Kurdish homeland. Some of Boochani's earliest childhood memories are of fighter planes in the sky. After completing his studies at Tarbiat Moallem University and Tarbiat Modares, he achieved a master's degree in political science, political geography and geopolitics. After university, Boochani got a job as a journalist, writing for a student newspaper. He regularly wrote articles about politics in the Middle East, Kurdish struggles to keep their culture alive, and the rights of other minorities in Iran. In secret, Boochani taught the Kurdish dialect to children. Boochani also co-founded *Werya*, a Kurdish-language magazine that promoted Kurdish culture and politics. In February 2013, the Iranian Revolutionary Guard raided the *Werya* office and arrested 11 of his colleagues. Boochani went into hiding for three months.

Research 19.1

1. On a map, locate the city of Ilam in Iran.
2. Describe Ilam's geographical location.
3. Identify other areas in the Middle East where the Kurds live. What countries do the Kurds live in?
4. Access the website 'The Kurdish Project'. Using the information on this website, discuss why the Kurdish people are a persecuted minority.
5. Find the article 'The Kurds: A bitter history of betrayal' (by Michael Safi, *The Guardian*, 13 October 2019). Describe what further information this article gives about the problems of the Kurdish people up to the current time.

Fleeing Iran

On 23 May 2013, Boochani got on a plane and fled Iran. The young Kurdish journalist arrived in Indonesia, where he paid $5000 to a people smuggler for a place on a boat to Australia. After a harrowing journey during which the boat's engine failed and the pump stopped working, the asylum seekers on the boat were rescued and taken back to Indonesia. In the second chapter of his book *No Friend but the Mountains*, Boochani details the difficult boat journey and how close they all came to death. Two weeks after being returned to Indonesia, in July 2013, Boochani boarded another boat bound for Australia along with 65 people seeking asylum. They were at sea for a week after they lost their way. They were at the point of starvation when they were spotted by the crew of a British cargo ship, who gave them some supplies. The British also notified the Australian Navy and waited with the boat of asylum seekers until an Australian Navy boat arrived.

In detention: Christmas Island

In August 2013, an Australian Navy boat transferred everyone from Boochani's boat and took them to Christmas Island where they were detained for a month. In Chapter 5 of his book, Boochani recounts the rude shock at being taken to a detention centre and tells of being placed in cages, strip searched and observed by CCTV continuously, even in the toilet. The people seeking asylum were then given the news that they had arrived four days after a new law had been enacted that declared that no-one who arrives in Australia by boat will ever be allowed into the country.

Boochani and the other refugees were then informed that they would be taken to Manus Island in Papua New Guinea (PNG). Immigration officials gave briefings about how bad conditions were on Manus Island, especially about the island's malaria-carrying mosquitoes. Of the experience, Boochani recounted, it felt like a 'club that has been raised above my head for a whole month and is waiting to bash down on me' (*No Friend but the Mountains*, p. 89). The asylum seekers from Boochani's boat were then flown to Darwin, where they were put through what Boochani referred to as a de-humanising process. Boochani was given the number that he would now be known by – MEG45.

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Figure 19.2 Christmas Island, Manus Island and Nauru were key locations for Australia's policy of processing asylum seekers offshore.

From the perspective of the immigration officials, the people seeking asylum were 'nothing more than numbers' (*No Friend but the Mountains*, p. 96). The refugees were then put on a plane to Manus Island.

In detention: Manus Island

The detention centre on Manus Island is located on the eastern tip of the island, on the PNG naval base at Lombrum. The Australian authorities named the detention facility the Manus Island Regional Processing Centre. Once on Manus Island, Boochani quickly concluded that they were political hostages who were 'being made examples to strike fear into others, to scare people so they won't come to Australia' (*No Friend but the Mountains*, p. 107). Soon after arriving, Boochani met Reza Berati, someone who he came to admire deeply and who he nicknamed the 'gentle giant' in his book.

When riots erupted at the detention centre in February 2014, 23-year-old Iranian inmate Reza Berati was beaten to death by up to 15 guards and contractors. From this point, Boochani began making contact with two newspapers, *The Guardian* and *The Sydney Morning Herald*.

Boochani started briefing journalists, particularly about the murder of his friend, Berati. Boochani became the voice for the men imprisoned in the Foxtrot section of the detention centre. He documented life

Figure 19.3 People attend a candlelight vigil in Sydney on 23 February 2014. The vigil was held in response to the death of a 23-year-old Iranian man, Reza Berati, who died in a detention centre on Manus Island on 18 February 2014.

in the detention centre and compiled information on what he viewed as human rights abuses, which he sent (using a secret mobile phone) to journalists. Over a period of five years, Boochani also transmitted thousands of WhatsApp text messages, in his native Farsi language, which would later form the basis of his 2018 book *No Friend but the Mountains*.

According to Boochani, the way the authorities organised the daily routines was a further example of the regimentation and humiliation inflicted on the people in detention. The asylum seekers had to queue for hours for everything (meals, the toilets, the showers, medicine).

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No food could be taken out of the meal area. To get medical attention, the prisoners had to fill out a request form. A few days later, someone would see them, but seldom could they have their medical conditions dealt with properly. In an atmosphere of what Boochani saw as absolute despair, self-harm became a 'cultural practice'. In some instances, the electricity generator was mysteriously turned off, and 'Within minutes the prison is transformed into a living hell' (*No Friend but the Mountains*, p. 171). Detainees were also subject to solitary confinement; Boochani described being in solitary confinement for three days in the 'Chauka', which was made out of shipping containers.

Boochani catalogued a 'twisted system' governing the prison and a 'deranged logic that confines the mind of the prisoner' (*No Friend but the Mountains*, p.208). He described the detention centre as being run according to a '**kyriarchal** system' (referring to an idea coined by Elisabeth Schüssler Fiorenza in 1997). From a legal perspective, Boochani asserted that Australia's management of the Manus Island detention centre routinely went against both international humanitarian law and international conventions.

Analysis 19.1

Access 'A speech from Manus Island – Behrouz Boochani' (6 December 2018) at http://cambridge.edu.au/redirect/10421.

1. Assess what Boochani means when he says asylum seekers are both outside the law and a victim of the law.
2. Identify the evidence Boochani provides to back up his opinion that Australia's relationship with Manus Island is colonial in nature.
3. Recall what happened to the people who murdered Reza Berati in February 2014.
4. Recall the propaganda the asylum seekers were subjected to on Manus Island.
5. Discuss why Boochani considers the following to be forms of humiliation:
   a. queuing
   b. medical treatment.

The campaign to free the asylum seekers on Manus Island

In September 2015, an international campaign was launched on Boochani's behalf to pressure Australia to abide by Article 33 of the *Convention relating to the Status of Refugees* (1951), which prohibits the expulsion or return of refugees. Boochani had asked repeatedly to be handed over to the United Nations. In February 2016, he penned his first full article for *The Guardian*, 'This is Manus Island, my prison, my torture, my humiliation'.

On 20 June 2016, Prime Minister Malcolm Turnbull was surprised to receive a question via video-link on the ABC's *Q&A* program from Boochani. He asked Turnbull, 'What is my crime? I am a refugee who fled injustice, discrimination and persecution. Why am I still in this illegal prison after three years?' The prime minister failed to directly answer Behrouz's question, prompting Boochani to pen an article that appeared in *The Guardian* the following day. The article detailed what had been been happening at Manus Island.

kyriarchy
a social system based on domination, oppression and submission

Boochani pointed out that on 26 April 2016, the Supreme Court of PNG had found the Manus Regional Processing Centre to be illegal because it breached the right to personal liberty enshrined in PNG's Constitution. Later that month, PNG Prime Minister Peter O'Neill announced he would immediately ask the Australian Government to make alternative arrangements for people seeking asylum. Australia's Immigration Minister Peter Dutton responded in August 2016 that the centre would close but gave no timeline. Meanwhile, Boochani asserted in his article, the treatment of inmates was harsher than ever.

In late 2016, Boochani and Netherlands-based Iranian filmmaker Arash Kamali Sarvestani began communicating via WhatsApp, and ultimately created a documentary about Manus Island. The two were credited as co-directors, with Boochani using a secret mobile phone to record footage, and Sarvestani mentoring him and editing the material. The film, *Chauka, Please Tell Us the Time*, was an investigation

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Analysis 19.2

Read the article 'Malcolm Turnbull, why didn't you answer my question on *Q&A* about Manus Island?' (by Behrouz Boochani, *The Guardian*, 21 June 2016) at the following link: http://cambridge.edu.au/redirect/10422.

1. Recall what Boochani accuses Prime Minister Turnbull of doing.
2. Identify the court decision that Boochani accuses Prime Minister Turnbull of ignoring.
3. Identify the recent adverse changes.
4. Describe the injustice and double standards attested to by Boochani.
5. Critically analyse the complaints system.
6. Identify the 2014 event that Boochani accuses the Australian Government of failing to address.

into the 'Chauka', a prison within a prison on Manus Island where inmates were placed in solitary confinement. The film also highlighted other aspects of life in the detention centre and the mental torture caused by the deprivation of hope. The film took six months to make, and had its world premiere at the Sydney Film Festival in June 2017.

In 2017, Papua New Guinea's riot squad stormed the prison, and one of the people they were after was Boochani. They seized his phones but they did not touch him. By this time, he was well-known and had a strong network of support.

US refugee swap deal

In November 2016, the Australian Government appeared to have a solution for the imprisoned asylum seekers who they said could never come to Australia. The government had made a deal with the US Government in the last days of the Obama administration. According to the deal, the United States would resettle the refugees from Manus Island and Nauru in return for Australia taking refugees from the United States. However, the US Government would be able to choose who they took by using 'extreme vetting' procedures. This deal was tested in January 2017 when Donald Trump was inaugurated as the new US president. In the now famous phone call between Prime Minister Malcolm Turnbull and President Donald Trump on 28 January, the new president was highly critical of the refugee swap arrangement and stated that the United States has become a 'dumping ground' for 2000 'troublesome' people coming from Manus Island and Nauru. In August 2017, Greens MP Adam Bandt questioned Prime Minister Turnbull about a leaked transcript of the January phone call. In the account, Turnbull attempted to explain to Trump why these people seeking asylum could not be let into Australia:

> 'The only people that we do not take are people who come here by boat. So, we would rather take a not very attractive guy [from the United States] that helps you out than to take a Nobel Prize winner that comes by boat. That is the point.' To this, Trump replied: 'That's a good idea. We should do that too. You are worse than I am.'

Ben Jacob, 2019, '"You're worse than I am," Trump told Turnbull he admired offshore detention', *The Guardian*, 4 August.

The closure of a detention centre

On 31 October 2017, the Manus Island detention centre on the PNG naval base at Lombrum was closed. However, the 600 men detained there refused to move, claiming they feared for their safety from some hostile locals. The Australian authorities shut off the power and cut off food and water supplies. The PNG military then laid siege to the centre for 23 days. During this harrowing time, Behrouz Boochani kept in constant communication via WhatsApp with Omid Tofighian, a Sydney University academic who had been acting as Boochani's translator. In the constant urgent messaging, and in some longer articles, Boochani detailed the resistance of the refugees during the siege.

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However, the men were gradually worn down and overpowered by the PNG military and were forcibly transferred to three new detention facilities close to the town of Lorengau in PNG.

At the new facilities, the men had limited freedom. The asylum seekers could visit the nearby town of Lorengau, but they could only travel there by official bus and were searched getting on and off the bus. They also could not leave Manus Island without travel documents.

At this time, Boochani was placed in the Lorengau jail for eight days as punishment for reporting on the 23-day siege. On his release, he was ordered to stop reporting. However, after all these years of resistance, Boochani was not deterred. It was now harder for the authorities to control his actions and harder for them to confiscate his phones, which they had done on many occasions before.

Legal Links

The article 'The last days in Manus Prison', written by Behrouz Boochani and Omid Tofighian, is available on the *Meanjin Quarterly* website at the following link: http://cambridge.edu.au/redirect/10423.

Figure 19.4 Behrouz Boochani stands outside the abandoned naval base on Manus Island in June 2018. This is where he and other asylum seekers were locked up for three years.

On 28 November 2017, Boochani sent a message to the Asylum Seeker Resource Centre thanking them for their support and he again described the 23-day protest that had been stopped by force. The Asylum Seeker Resource Centre published this account on their website, which included Boochani's claim that Immigration Minister Peter Dutton was incorrect in saying that the refugees wanted to come to Australia only – they just wanted freedom.

No Friend but the Mountains

On 31 July 2018, after five years of collaboration with his translator, Omid Tofighian, via WhatsApp, Boochani's book *No Friend but the Mountains* was released to wide acclaim both in Australia and around the world. In his book, Boochani claims to have witnessed deaths, riots and suicide attempts, as well as murders and gun violence by intoxicated PNG soldiers. Importantly, Boochani's book is a piece of resistance and an analysis of the kyriarchal system, which is designed to bring people to their breaking point. Boochani said the Manus Island system was designed to take away a person's dignity. Writing helped him to keep his humanity.

In January 2019, Behrouz Boochani won a literary award for his book *No Friend but the Mountains*. He could not attend the Victorian Premier's Literary Award ceremony in Melbourne because he was still being held on Manus Island. Boochani communicated to the event via text message as the internet connection was slow. He said his main aim in writing the book was to show the people of Australia and around the world how Australia's system of offshore processing had tortured innocent people on Manus Island and Nauru for the last six years. When accepting the award on Boochani's behalf, Omid Tofighian, said that:

> This is one of the most vicious forms of neocolonial oppression that is taking over the world at the moment – and to address this book in this way and to recognise it and draw attention to the narrative it is presenting will have repercussions for many generations to come.

Calla Wahlquist, 2019, 'Behrouz Boochani: Detainee asylum seeker wins Australia's richest literary prize', *The Guardian*, 31 January.

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Legal Links

On 1 April 2019, Boochani's story was broadcast to the Australian people via the ABC television program *Australian Story*. The story was a celebration of a life of resistance and hope in the face of despair and horror. The aim was also to explain how a stateless refugee from the Middle East fleeing persecution was placed in indefinite imprisonment on a distant island. This *Australian Story* episode can be viewed on ABC iview.

Research 19.2

Access one of the following on YouTube:

- 'How refugee Behrouz Boochani challenged a system, one text at a time' (*Australian Story*, 1 April 2019)
- 'Writing is an act of resistance' (Behrouz Boochani, *TEDxSydney*, 30 July 2019).

1 Identify what further information can be obtained about Boochani's six years on Manus Island.

2 Identify the legal and non-legal means used by the Australian Government, the PNG Government, and by supporters of the asylum seekers to address the situation on Manus Island.

Freedom

On 14 November 2019, Behrouz Boochani left PNG and travelled to New Zealand to speak at the WORD Christchurch literary festival. This was the result of careful negotiations by the UN Refugee Agency (UNHCR) and Amnesty International with the PNG Government, which finally secured Boochani a one-month visa to speak at the festival. Thus began his journey to freedom.

When he arrived in Christchurch, Boochani just wanted to enjoy life as a free man. After spending 2269 days in an Australian detention centre, he was free. However, since he only had a one-month visa, his future remained uncertain. Boochani had been accepted by the United States in the refugee-swap deal, but he did not know whether that would still hold now that he had left PNG. Thankfully, in 2020, Boochani was granted a protection visa by the New Zealand government.

Through his tireless activism, Behrouz Boochani has been able to shine a light on the Australian offshore processing system, be a voice for all his fellow detainees, and keep the world and the Australian public informed about the realities of life on Manus Island.

He feels a deep sense of duty to the men he left behind on Manus Island and to the other refugees held in Australia's detention system. He particularly feels a duty to the 12 men who had died in detention and the over 1000 people who had been left psychologically and physically damaged.

In 2022, there were a few positive developments. In the lead-up to the federal election in Australia, the Coalition government accepted a New Zealand offer, originally made in 2013, to resettle some asylum seekers from offshore detention. About 450 refugees would benefit from this arrangement. In March 2022, Boochani declared this an achievement for civil society, although he also expressed dismay at the nine long years these people had spent in detention. Further, in April 2022, the Coalition government released around 26 refugees from onshore detention, leaving fewer than 10 refugees in detention across Australia.

The situation continues to develop in Australia. In 2023 the High Court found that indefinite detention to be unlawful, and in response the government has been considering new legislation to give itself alternative options. During this process, in 2024, a second High Court case found that indefinite detention is lawful under certain circumstances.

Boochani's direct involvement in Australia's refugee discussions appears to be at an end. However, his legacy is the story of an individual who resisted the power of the state, documented what he perceived as an inhumane system and made a difference.

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Review 19.1

1 Outline Behrouz Boochani's family and life in Iran.
2 Recall why Boochani left Iran.
3 Describe Boochani's journey from Indonesia to Manus Island.
4 Identify what features of the Manus Island detention centre created a sense of despair in the inmates.
5 Outline the human rights abuses Boochani documented.
6 Discuss how Boochani resisted the detention system.
7 Recall how Boochani took his resistance to the highest level of political leadership.
8 Identify what sort of people outside Australia supported Boochani.
9 Identify the legal decision in PNG that started the gradual unravelling of Australia's detention centre system on Manus Island.
10 Describe the revelations that emerged as a result of the refugee swap with the United States.
11 Outline some of the awards won by Boochani.
12 Discuss how Boochani eventually gained his freedom.

19.2 Legal responses

Competing legal responses to asylum seekers

It is difficult to understand how the Australian Government could detain an innocent man fleeing persecution and treat him inhumanely. It is even more difficult to understand how the Australian Government could create a whole system for detaining thousands of people like Boochani. This system is unique in the world. Three questions need to be asked here:

- Why was such a policy created?
- How was this policy legally justified in domestic law?
- How was this policy in conflict with key international treaties that the Australian Government has voluntarily signed up to?

To seek the answers to these questions, we need to consider key developments that have occurred since World War II (1939–1945).

Figure 19.5 Australia helped to establish the United Nations and was a strong supporter of United Nations treaties in the decades after the end of World War II.

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ratify
to formally confirm that the country intends to be bound by the treaty

In the years after World War II, Australia was a strong supporter of the United Nations and the values encapsulated in a number of its key treaties. Australia voluntarily **ratified** several United Nations treaties, including some relevant to the issue of refugees and asylum seekers:

- *The Universal Declaration of Human Rights* (1948)
- *International Covenant on Civil and Political Rights* (1966)
- *United Nations Convention on the Law of the Sea* (1982)
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)
- *Convention on the Rights of the Child* (1989).

Until 2001, there was a bipartisan policy towards refugees and asylum seekers in Australia. Racism had effectively been removed as a factor in regard to migrants and immigration. In 1966, then Prime Minister Harold Holt (PM from 1966–1967) introduced changes to the *Migration Act* (1958), officially ending the White Australia Policy. Then in 1973, Prime Minister Gough Whitlam (PM from 1972–1975) introduced legislation to totally remove race as a factor in immigration. The Whitlam government also began radically changing the culture surrounding race by introducing the policy of multiculturalism. This was then capped off by the passing of the landmark *Racial Discrimination Act 1975* (Cth). In theory, Whitlam ended race as a factor in immigration. However, it was his successor, Malcolm Fraser, who ended racism in immigration in practice.

border protection
the name given to the policy of preventing asylum seekers arriving in Australia for the reason that they represent a threat to national security

Liberal Prime Minister Malcolm Fraser (PM from 1975–1983) was faced with the issue of 'boat people' arriving on Australian shores from Indochina. In the years after the Vietnam War, which ended in 1975, waves of people seeking asylum fled from Vietnam, Cambodia and Laos. They were fleeing persecution from the newly installed communist governments and some Vietnamese of Chinese descent fled because of ethnic persecution. Between 1976 and 1982, the Fraser Coalition government admitted approximately 70 000 refugees from Indochina, with 2500 of these arriving by boat. Another 80 000 people followed in later years from Indochina through an immigration program. This bipartisan commitment to multiculturalism continued under the Labor governments of Bob Hawke (PM from 1983–1991) and Paul Keating (PM from 1991–1996).

Changed approach since 2001

The *MV Tampa* incident, 2001

In 2001, two events occurred that, in combination, set Australia on the path of creating a system for processing asylum seekers that was increasingly at odds with international law. The first of these events was the *MV Tampa* incident in 2001. On 24 August 2001, a boat carrying 433 mainly Hazara asylum seekers from Afghanistan was stranded in international waters 140 kilometres north of the Australian territory of Christmas Island. A Norwegian container ship, the *MV Tampa*, came and rescued the people seeking asylum – this was the expected procedure under international law, as outlined in the *United Nations Convention on the Law of the Sea* (1982). The captain of the ship took the people to Christmas Island. However, Australian authorities refused to allow them to leave the ship.

On 29 August 2001, Prime Minister John Howard ordered Australian Army troops to capture the *MV Tampa* and take control of the people seeking asylum. On the same day, the prime minister attempted to create a new law via the **Border Protection** Bill 2001 (Cth). However, the Senate knocked the Bill back on 30 August. Undeterred, Prime Minister Howard made arrangements with the governments of Nauru and New Zealand to send the asylum seekers there. Australian Navy ships transported 131 of the asylum seekers to New Zealand and 302 to Nauru. On 27 September 2001, the Howard government successfully passed the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).

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Figure 19.6 This photo, taken on 28 August 2001, shows some of the 433 refugees, including pregnant women, children and sick people, who had been rescued the previous day by the Norwegian cargo ship *MV Tampa* from a ferry stranded in the Indian Ocean. Australia defied growing pressure to allow the shipload of asylum seekers to land on its territory. The asylum seekers went on a hunger strike aboard the *MV Tampa*.

The Pacific Solution 2001–2007

September 2001 marked the beginning of a new policy that became known as the Pacific Solution. First, the *Migration Act 1958* (Cth) was amended to excise Christmas Island and other islands from the migration zone so that people arriving there by boat seeking asylum could not apply for visas to enter Australia and were denied access to legal representation or to the protections of Australian law. The Australian Defence Force then started intercepting boats carrying asylum seekers and transporting them to the enlarged Christmas Island detention centre. From here, they were then sent to Manus Island or Nauru to have their claims as refugees processed. In 2001 alone, 43 boats carrying 5000 people seeking asylum had arrived in Australia. However, during 2002–2007, following the implementation of the Pacific Solution, only 23 boats arrived. The Howard government used these figures to claim the Pacific Solution was a great success in deterring people from making the journey to Australia by boat.

Portraying asylum seekers as a security threat and people of poor character

On 11 September 2001, terrorists flew planes into the two World Trade Center towers in New York and into the Pentagon located outside Washington DC. Prime Minister Howard was in Washington DC when these attacks occurred. He immediately pledged Australian support in assisting the United States to respond to these acts of terrorism.

Meanwhile, back in Australia, the Coalition had been flagging in the opinion polls during 2001. In the federal election campaign, which commenced on 8 October 2001, John Howard made border protection and national security the centrepieces of the Coalition's election policy.

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During his speech on the night of 28 October 2001, Prime Minister Howard made this statement, 'We will decide who comes here and the circumstances in which they come.' This statement was then printed on thousands of Liberal how-to-vote pamphlets.

This was a major turning point in Australian politics. Some political commentators have suggested that, for their own political gain, the Howard government purposely linked two very separate issues: the fear of terrorists on the one hand and the concern that asylum seekers arriving by boat were a threat to national security on the other.

This link implicitly suggests that some asylum seekers could be terrorists and, therefore, terrorists could come to Australia as asylum seekers. This link was made despite there being no facts to support this notion and despite the fact that people seeking asylum are fleeing persecution by people who use violence (e.g. terrorists).

Unfortunately, the fact that many people seeking asylum were Muslim – the same religion as the September 11 terrorists – added to these fears in the minds of some Australians.

Further insinuations made about people arriving in Australia by boat seeking asylum were that they:

- tried to 'intimidate' the Australian people
- 'threw their children overboard' to be rescued
- deliberately sunk their boat to be rescued
- were a 'pipeline for terrorists'
- were 'illegal immigrants' and there was 'an undeniable link between illegals and terrorists'
- were 'queue jumpers' taking the place of refugees who had applied to come to Australia.

In the years after the launch of the Border Protection policy, the Howard government continued to link asylum seekers to terrorism. This is despite the fact that in May 2002 the Director-General of ASIO, Dennis Richardson, said there was no evidence that terrorists were trying to come to Australia as asylum seekers. Richardson questioned why terrorists would do this if they knew they would be subject to mandatory detention.

'Border Protection' since 2001

Howard government: 2001–2007

The Howard government's response to asylum seekers in the *MV Tampa* incident, the Pacific Solution, combined with his government framing the situation as a national security matter, was a key factor in the Liberal/National Party winning the November 2001 federal election. The Coalition government believed that they had a winning formula with this policy and so continued with their harsh treatment of people seeking asylum over the following years. The Labor opposition as well as human rights groups were highly critical of this policy. Following intense lobbying, the government did stop the mandatory detention of children as of 2005; however, they continued to frame the debate on asylum seekers attempting to travel to Australia by boat in terms of national security and 'border protection' for the next two decades.

Figure 19.7 Former Australian prime minister John Howard launched the Liberal Party federal election campaign on 28 October 2001.

Offshore processing discontinued under the Labor government: 2007–2012

After winning the federal election in December 2007, Prime Minister Kevin Rudd ended the Pacific Solution and closed the Nauru detention facility. However, a subsequent increase in asylum seekers coming by boat meant the Labor government, first under Rudd, and then under his successor Julia Gillard, started to seek other solutions. Tragedy struck when a boat carrying 90 asylum seekers sank off the coast of Christmas Island, causing the deaths of 48 people. Under pressure from the opposition for being 'soft' on border security, the Gillard Labor government attempted to negotiate a system of regional processing of asylum seekers in Malaysia. However, when this failed, they returned to the Pacific Solution.

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Labor's PNG solution: 2012–2013

In late 2012, the Gillard Labor government re-opened both the Nauru and Manus Island detention facilities. Following a 2013 leadership coup in which Kevin Rudd returned to his role of Prime Minister, ousting Julia Gillard, and with only a few months until the next federal election, Prime Minister Rudd turned up the get-tough policy on asylum seekers to the highest level so far, by pledging that no-one who came to Australia by boat would be eligible for asylum. The major reasons given were to stop people drowning at sea (in reference to the Christmas Island boat disaster of 2010, among others) and to stop people smuggling. Behrouz Boochani arrived at Christmas Island three days after this announcement.

Political expediency greatly influenced both sides of the political spectrum in the treatment of asylum seekers arriving by boat with their continued detention offshore for processing.

Operation Sovereign Borders: 2013–present

The Liberal opposition leader, Tony Abbott, ran a 'Stop the Boats' policy as one the major components of his election campaign. Immediately after winning the federal election on 7 September 2013, the Abbott Coalition government implemented 'Operation Sovereign Borders'. Operation Sovereign Borders is a militarised border-protection policy that involves the Australian Defence Force preventing people who are seeking asylum from reaching Australia.

Figure 19.8 On 23 September 2013, at a press conference in Sydney, the then Australian Government Minister for Immigration and Border Protection, Scott Morrison, spoke about the federal government's Operation Sovereign Borders policy. He promised a tougher approach on asylum seekers arriving by sea as part of the government's promise to 'stop the boats'.

The immigration minister (first Scott Morrison, then Peter Dutton) trumpeted a 'zero tolerance' policy, in which any means would be used to stop boats coming to Australia (including not only turning boats back to Indonesia but also towing them back). This policy also made all 'on water matters' secret so there could be no scrutiny of any of the tactics used. The Coalition government pledged that no asylum seeker held in Australia's offshore detention facilities would ever be allowed to come to Australia. At the time of writing, Operation Sovereign Borders remains the government's policy, having been retained by the incoming Albanese Labor government (2022–current).

The Medevac debate: February to December 2019

Medevac Bill passed, 12 February 2019

The Australian Government's hard-line policy towards asylum seekers has been challenged by many groups that have consistently advocated for human rights and for compliance with the international treaties Australia has ratified.

Dr Kerryn Phelps proposed a Bill (the Migration Amendment (Urgent Medical Treatment) Bill 2018 (Cth) ('Medevac Bill')) that would allow doctors to have a greater say in bringing asylum seekers from Manus Island or Nauru to Australia for medical treatment. On 12 February 2019, with the support of the Labor Party (then in opposition), the Greens and Independents, the Bill was passed in parliament against the wishes of the Coalition government (under Prime Minister Scott Morrison). Human rights supporters hailed this breakthrough, and the majority of public opinion seemed to support the idea of giving treatment to sick asylum seekers.

The Morrison government's response to the Medevac Bill was one of hostility, particularly as it was the first time in many years that legislation had passed parliament with the support of the opposition and the minor parties. This Bill was contrary to government policy and was also an affront to their mandate to govern. There were incidences of regrettable commentary. Home Affairs Minister Peter Dutton claimed that people on waiting lists in public hospitals and those living in public housing would be disadvantaged if sick asylum seekers were brought to the mainland. Some government ministers also suggested there were potential terrorists, paedophiles and criminals

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Figure 19.9 Independent members of parliament (L to R) Cathy McGowan, Adam Bandt, Andrew Wilkie, Kerryn Phelps, Julia Bank and Rebekha Sharkie vote and pass the Medevac Bill in the House of Representatives on 12 February 2019 in Canberra, Australia. It is the first parliamentary sitting day for 2019. This is the first government since 1929 to lose a substantive vote on the floor of the House.

among the remaining refugees held on Manus Island and Nauru.

Prime Minister Morrison used these justifications to reopen the Christmas Island detention centre, at a cost of $185 million. The government said that any sick asylum seekers would be taken to Christmas Island instead of to the mainland, as the Medevac Bill had intended. Despite this, the Christmas Island detention centre was shut again in April 2019 without receiving a single sick refugee – sick refugees from Manus Island and Nauru were transferred temporarily to Australia for medical treatment throughout 2019. The Morrison government remained determined to repeal the Medevac Bill and began pressuring independent members of parliament to vote accordingly. The Medevac Bill was repealed on 5 December 2019.

Legal Links

To read the Refugee Council of Australia's view of the Medevac legislation, visit the council's website and access this media release: 'Australians demand the humane treatment of people seeking asylum and refugees as historic vote passes parliament' (Refugee Council of Australia, media release, 13 February 2019) at the following link: http://cambridge.edu.au/redirect/10424.

Repeal of the Medevac Bill, 5 December 2019

On 5 December 2019, the Medevac Bill was repealed. Dr Kerryn Phelps was scathing in her condemnation of the repeal of the Medevac Bill: This repeal signals a return to the government's unambiguously cruel and inhumane policy in the treatment of a small cohort of people seeking asylum. These are among the most vulnerable people on the planet. This decision to repeal medevac is an absolute violation of Australia's obligations under international law to provide these refugees with safe asylum and medical care. It also strikes at the heart of our medical training and ethical principles.

Kerryn Phelps, 2019, 'To those stuck in offshore detention: We will keep fighting for you. The medevac repeal is not the end', *The Guardian*, 6 December.

The United Nations High Commissioner for Refugees was also critical of the repeal of the Medevac Bill. They released a statement saying that the medevac mechanism had 'proven to be a timely, effective and often life-saving programme' and that they were concerned that the 'health situation of asylum seekers and refugees will continue to deteriorate'.

Legal Links

Dr Kerryn Phelps's scathing condemnation of the repeal of the Medevac legislation can be read online in full at the following link: http://cambridge.edu.au/redirect/10425.

High Court finds indefinite detention unlawful, 8 November 2023

In the case *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37, the High Court judges unanimously found that if a person in immigration detention has no prospect of deportation in the foreseeable future, then they must be released.

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This overturned a previous case, *Al-Kateb v Godwin* [2004] HCA 37, where a 3-4 majority ruled that the Constitution allowed indefinite detention.

This ruling required the release of over 100 people from detention, and also to moves by the government to initiate new legislation.

A further case, *ASF17 v Commonwealth of Australia* [2024] HCA 19, found that under some circumstances, asylum seekers can be kept in immigration detention indefinitely.

Research 19.3

Using media reports from December 2023 until the present, construct a timeline of the key developments concerning indefinite detention and removal of asylum seekers.

1. Identify and comment on any legal developments.
2. Assess the effectiveness of any non-legal developments.

Review 19.2

1. Identify the international treaties that Australia has signed that relate to refugees and asylum seekers.
2. Describe the *MV Tampa* incident.
3. Outline the Pacific Solution.
4. Assess the effectiveness of the US refugee-swap deal.
5. Describe the aim of the Medevac legislation.

19.3 Non-legal responses

For over two decades, the Australian Government has implemented what many consider to be harsh policies towards people seeking asylum who travel to Australia by boat. There have been sustained campaigns by many people, groups and organisations to bring refugee policies in line with human rights and with Australia's international obligations.

Media

Print media has played an important role in informing the Australian public about the situation of asylum seekers in offshore processing facilities. However, this was made very difficult after the implementation of Operation Sovereign Borders in September 2013.

The government placed a veil of secrecy over all components of its offshore processing system. The media was not able to access information about boat arrivals as the immigration minister claimed these were 'on water matters'. Similarly, journalists and politicians were denied free access to Manus Island or to Nauru.

Nevertheless, throughout this period, journalists have sought to do their job and seek the facts about Australian Government policies and the plight of asylum seekers in offshore detention centres. Behrouz Boochani, a journalist himself, in his six years of imprisonment was able to develop relationships with journalists in Australia and overseas. Various media organisations – such as *The Guardian Australia*, *The Saturday Paper*, *The Financial Times*, *The Sydney Morning Herald* and *The Huffington Post* (now *HuffPost*) – published articles written by Behrouz Boochani. In this way, the media has played a strongly positive role in agitating for change in how the Australian Government treats asylum seekers.

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Research 19.4

Access the profile of Behrouz Boochani in *The Guardian* newspaper.

1. Identify the range of topics that Boochani wrote about.
2. Read any two of Boochani's articles. Discuss the main points or arguments made in these articles.
3. Assess the effectiveness of this type of journalism in bringing about legal reform.
4. Explore Behrouz's X (formerly Twitter) feed. What are his interests and concerns as a journalist, writer and artist today?

Writers and filmmakers

Video 19.1 Samantha Ratnam, leader of the Victorian Greens, speaks about Boochani's advocacy. (01:30)

Behrouz Boochani has won awards for his book *No Friend but the Mountains*, and for his film *Chauka, Please Tell Us the Time*, and he has been invited to participate in many public forums and conferences. People working in the publishing and film industries became strong supporters of Boochani and of all asylum seekers in offshore detention centres. For instance, one campaign launched in April 2019 included signatories from a Nobel laureate, several Booker Prize winners and multiple Walkley award winners. A letter signed by these people wanted to acknowledge the fact that Behrouz Boochani and his story are now an integral part of Australia's history. (See Arnold Zable, 2019, 'Bring Behrouz home to Australia: He is one of us', *The Age*, 4 April.)

Universities

Behrouz Boochani was appointed an adjunct associate professor at the University of New South Wales in the Faculty of Arts and Sciences. In this position, it was envisaged that he could participate in lectures and events as part of the Forced Migration Research Network. At the time, Boochani was still in detention in PNG. During his six years of imprisonment, using a contraband mobile phone, he maintained an active presence at conferences and workshops run by various universities.

Civil society groups

Many civil society and human rights groups have waged determined campaigns to humanise the detainees within the government's offshore processing centres. The following are a selection of these groups:

- Australian Human Rights Commission
- Asylum Seeker Resource Centre
- Refugee Council of Australia
- Catholic Alliance for People Seeking Asylum
- Welcome to Australia
- Save the Children
- Amnesty International New Zealand.

Medical professionals

Numerous doctors and other medical professionals have voiced their concerns about the impact of the offshore processing system on the health and wellbeing of people seeking asylum. In November 2019, over 5000 doctors signed a petition urging senators to not repeal the medevac legislation.

Protests

Over the years, there have been numerous protests in support of the asylum seekers locked up on Nauru and Manus Island.

Figure 19.10 On 19 July 2019, demonstrators from the Refugee Action Collective marched through the streets of Brisbane to protest the permanent detainment of refugees and asylum seekers in Australian-run and funded facilities.

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Review 19.3

1 Explain how Behrouz Boochani's own journalism has contributed to highlighting the plight of people in offshore detention.
2 Outline some of the difficulties the media has faced since 2013 in keeping the public informed on this issue.
3 Identify the role that each of the following has played in advocating for the humane treatment of asylum seekers:
   a doctors
   b universities
   c writers
   d mass protests.

19.4 Effectiveness of responses

There are a number of perspectives to consider when assessing the effectiveness of the various responses to people seeking asylum, like Behrouz Boochani, who were caught up in Australia's offshore processing system.

Mental, psychological and physical toll on asylum seekers

One perspective is that of the people seeking asylum who have been directly affected by this system. From their perspective, they were fleeing persecution and going to another country to legally seek asylum under international law. Some of the detainees were also aware that their inhumane treatment in detention violated human rights law and a number of international conventions. However, others were not aware of their rights.

Within the detention centres, these people were allowed no legal rights or legal representation, and many suffered mentally, psychologically and physically as a result of their lengthy imprisonment. For the detainees of Manus Island and Nauru, the Australian Government's refusal to abide by international human rights law left them with no hope.

Cost

The cost of offshore processing over the last two decades has been in the billions; $9 billion was spent on offshore processing between 2016 and 2019 alone. In his *Q+A* appearance on 6 February 2023, Behrouz bristled at a question about homelessness in Australia, reflecting on the billions wasted in contracts to companies to create a cruel and inhumane system to lock up him and his fellow asylum seekers for years. In an article by Ben Doherty in *The Guardian* on 24 October 2023, an Australian whistleblower claimed that Australian taxpayer funds under the PNG Humanitarian Program, meant to be for asylum seeker welfare, had gone missing.

Legal Links

The following sources are available online:

- 'Offshore detention costs taxpayers up to $573 000 each person a year, report finds' (Sarah Martin, *The Guardian*, 3 December 2019)
- 'The cost of Australia's refugee and asylum policy: A source guide' (Kaldor Centre, 12 September 2019)
- 'Whistle-blower claims Australian funds for asylum seeker welfare in PNG "gone missing"' (Ben Doherty, *The Guardian*, 24 October 2024).

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Damage to international law

International law is based on mutual respect. Treaties are voluntary agreements that govern how nations agree to treat each other and how governments agree to treat their people. In international forums, Australia regularly invokes the importance of respecting international law and promoting a rules-based order.

Over the last two decades, as it has pursued a policy that the United Nations Human Rights Committee has said violates international human rights, Australia has come to be seen by some in the international arena as a hypocrite. The more that countries violate key aspects of the liberal international order, the more damage is done to the legitimacy of the international rule of law.

Damage to international reputation

By and large, Australia has a track record of positive action in many areas, but this has been overshadowed in the minds of many people and organisations by the Australian Government's harsh treatment of some of the most vulnerable people on the planet. It must be recognised that Australia is the only country in the world with an offshore processing system for asylum seekers. Many other countries, often far poorer than Australia, accommodate refugees in the hundreds of thousands.

Legal Links

To read more about the Global Compacts, source online the article, 'The global compacts on refugees and migration' (Kaldor Centre, 23 January 2019).

Figure 19.11 Refugee supporters and communities participate in a Justice for Refugees rally in Sydney

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Figure 19.12 Taken on 22 November 2019, this photo shows Behrouz Boochani in Christchurch, celebrating life 'as a free man' in New Zealand.

Damage to social cohesion

Finally, many critics of Australia's two-decade long policy of offshore detention point to the damage to the social cohesion of Australian society. These critics argue that political rhetoric portraying people seeking asylum as representing threats to national security has been deceptive to say the least; it's the classic political sleight of hand: create a problem and then provide the solution in order to look like a hero. This tactic has inflicted a high price in terms of Australia's social cohesion. The irresponsible branding of asylum seekers as potential jihadists has so infected our collective psyche that we now feel threatened by the mere presence of Middle Eastern men or Islamic accoutrements like the Burqa.

Paula Matthewson, 2015, 'How we're exploiting the terrorism threat', *The Drum, ABC*, 29 September.

A closing statement

Finally, in the words of Behrouz Boochani:

Do not give up. The refugees have no choice but to persevere. We cannot stop resisting. Until we are free our struggle will never end. Never forget that we have endured all these years, the consequences of physical, emotional and psychological pain and affliction will never end. We cannot stop resisting.

Behrouz Boochani, 2018, 'Human Rights Dinner – Keynote address', Human Rights Law Centre, 18 May.

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Chapter summary

- Behrouz Boochani fled from persecution in Iran in 2013 and was imprisoned on Manus Island in PNG for six years.
- The Australian Government had changed its policy on asylum seekers three days before Behrouz Boochani arrived on Christmas Island.
- Behrouz Boochani clandestinely documented his six years of imprisonment on Manus Island in a film, a book, in newspaper articles and via online talks with various organisations.
- Behrouz Boochani came to the attention of the world and the Australian public – even challenging then Prime Minister Malcolm Turnbull directly on television.
- In November 2019, Behrouz Boochani secured passage to New Zealand and a one-month visa. In 2020, he was granted asylum in New Zealand, and in 2023 he visited Australia.
- The Howard government radically reframed Australia's policy on asylum seekers who arrived by boat and enacted the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).
- There has been criticism that people seeking asylum have been wrongly associated with the threat of global terrorism.
- Many civil society groups have opposed the Australian Government's policies on people seeking asylum because these policies undermine human rights and fail to meet Australia's obligations under various international treaties.
- Behrouz Boochani has influenced the debate about asylum seeker policies though his writing and journalism.
- The repeal of the Medevac legislation in December 2019 ensured the continuation of Australia's offshore processing policy.
- Australia's legal system has been criticised as being ineffective in ensuring the wellbeing of asylum seekers in offshore locations.
- Australia's policies have damaged its international reputation and credibility on human rights matters.

Multiple-choice questions

1 Behrouz Boochani was persecuted in Iran because he:
- **a** was a Kurdish freedom fighter.
- **b** was promoting Kurdish language and culture in his publications.
- **c** was caught in a war zone between Iran and Iraq.
- **d** was born in a Kurdish region in Iran.

2 Behrouz Boochani claimed that Manus Island functioned according to a 'kyriarchal system'. A 'kyriarchal system' is:
- **a** a system that used to exist in medieval times.
- **b** based on domination, suppression and submission.
- **c** one in which only those with money are treated well.
- **d** all of the above.

3 In June 2016, Behrouz Boochani challenged the Australian prime minister with a question on the ABC's *Q&A* program. Which prime minister did he challenge?
- **a** Scott Morrison
- **b** Malcolm Turnbull
- **c** Tony Abbott
- **d** Julia Gillard

4 Behrouz Boochani's book *No Friend but the Mountains* was written via:
- **a** Facebook.
- **b** Instagram.
- **c** WhatsApp.
- **d** a desktop computer.

5 The Australian Government's policy on asylum seekers was radically transformed by the:
- **a** *MV Tampa* incident.
- **b** US refugee-swap deal.
- **c** repeal of the Medevac legislation.
- **d** PNG's High Court decision.

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Short-answer questions

1 Identify the three locations where Behrouz Boochani was held in detention.
2 Identify how much time Behrouz Boochani spent in each of the three detention locations.
3 Describe Operation Sovereign Borders.
4 Outline the daily routine experienced by inmates imprisoned on Manus Island.
5 Identify the Australian prime ministers who have played a role in Australia's asylum seeker policies.
6 Identify the international treaties that Australia's offshore protection policies were at odds with.

Extended-response question

Assess the extent of any change in asylum seeker policy during the period of the Albanese Labor government.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Themes and challenges for Part III – Law in practice: Issue 3

The relationship between justice, law and society

- Myanmar descended into a state of lawlessness when the military overthrew the democratic government in a coup. The will of the people that had been expressed in recent national elections was subverted, and the legal system was transformed into a tool of the military junta.
- Julian Assange's situation raises a number of important socio-legal challenges concerning freedom of speech, freedom of the press and the right of society 'to know.' While Assange's supporters believe that he is an outstanding investigative journalist, US government officials are of the view that his publishing of military documents and films on WikiLeaks compromised the security of US citizens. The interesting thing about this case from a legal perspective is whether he, as an investigative journalist and whistleblower, has broken any laws.
- Assange's use of technology to obtain information has been central to this case. He is a highly skilled computer hacker. His creation of WikiLeaks as a platform for publishing 'mildly embarrassing' to 'highly sensitive' information has led some governments to censor or ban their citizens' access to it. The problem for the law is that the illegal exchange of information is difficult to enforce. Australia's *Anti-Terrorism Act 2005* (Cth) and the *National Security Legislation Amendment Act 2010* (Cth) aim to fight terrorist activity and deal with national security, but they do not appear to have been breached by Assange.
- Australian society has been divided on the issue of asylum seekers. Successive governments were able to win elections on the issue of tough border protection policies, and related laws were instituted as a result.
- In Australia, under the Pacific Solution and now Operation Sovereign Borders, the right to asylum under international law is denied to people arriving by boat. Thus, it can be argued that the people imprisoned as part of Australia's offshore processing system failed to receive justice.

The development and reform of law as a reflection of society

- The democratically elected government to which Sean Turnell was providing assistance had been trying to respond to the wishes of the people for reform. The military coup put an end to this, and it does not seem likely that reform under the junta will reflect the wishes of society in Myanmar.
- Australian law was 'reformed' to make it illegal for asylum seekers to enter Australia by boat. In some ways, this reflected the ideas in society at the time.
- However, these reforms violate the letter and spirit of *The Universal Declaration of Human Rights*, the *International Convention on Civil and Political Rights* and the *Convention relating to the Status of Refugees* (1951). In addition, the treatment of asylum seekers in detention has often violated their human rights and, in some cases, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).
- The short-lived Medevac law of 2019, which was made possible by crossbench action in parliament, was effective in saving some lives until it was repealed.

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The importance of the rule of law

- The military claimed to be operating in accordance with Myanmar's 2008 Constitution, but according to many legal experts, they were in blatant violation of it.
- The importance of the rule of law has been significant in the Assange case. When he sought political asylum in the Ecuadorian Embassy to avoid being extradited to Sweden, many observers questioned whether the British Government could have legally seized Assange from within the embassy itself. The British Government was put in the position of having to respect two conflicting rules of law: the international law governing consular premises and Sweden's arrest warrant.
- The existence of the rule of law is currently minimal in Myanmar due to the military crackdown on opposition. Only with the reinstatement of the rule of law can the economy and society function freely.
- In the case of the offshore processing of asylum seekers, Australia did follow legal processes, since court cases could be lodged. However, these processes were not the same as would normally apply to people in Australia.
- Basic human rights were violated in detention centres. Detainees were known by numbers rather than their names, and they were forbidden from sharing their stories with the wider world.

The responsiveness of the legal system in dealing with issues

- The legal system in Myanmar under the control of the military junta was, in the end, responsive to the Australian government's ongoing requests, pressure and persuasion to release and repatriate Sean Turnell.
- The Australian legal system has failed to deal robustly with the issue of asylum seekers. This can be attributed to the absence of a Human Rights Charter and successive governments pursuing policies harmful to asylum seekers for political reasons.

The effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society

- The huge support that Sean Turnell received from family, friends, universities and civil society groups was instrumental in bolstering his morale and placing pressure on the military junta.
- The Australian Ministry of Foreign Affairsl' use of diplomatic channels under *The Vienna Convention on Diplomatic Relations* (1961) was effective in keeping the channels of communication open and in finally securing Sean Turnell's release.
- Behrouz Boochani used non-legal methods to cope with his situation and to advocate for his fellow detainees. He used his skills as a journalist to communicate the plight of detainees with Australian media outlets, among others.
- Behrouz's book *No Friend but the Mountains*, penned via text messages and published while he was still in detention, won a literary award and shone further light on the situation of those held in offshore processing facilities.
- Many people in Australia lobbied the government on behalf of Behrouz.
- Behrouz managed to escape from the detention system and travel to New Zealand, where he was granted a protection visa and later permanent residency.
- Australia maintains its laws and policies regarding asylum seekers. Behrouz Boochani's situation was eventually resolved by another legal system – New Zealand's.

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Issue 4

Criminal or civil cases that raise issues of interest to students

Chapter 20

The Christchurch terror attacks

Chapter objectives

In this chapter, you will:

- identify the relevant legal terminology used in investigating and discussing an Australian citizen who is subject to New Zealand law
- describe the legal and non-legal responses, both in New Zealand and Australia, to a terrorist attack
- describe the role of the law in encouraging international cooperation in dealing with the underlying causes of extremism and hate
- discuss the effectiveness of legal and non-legal means in addressing hatred, terrorism and gun violence.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Terrorism Suppression Act 2002 (New Zealand)

Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (New Zealand)

SIGNIFICANT CASES

New Zealand Police v Tarrant [2019] NZDC 4784

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20.1 The crime: Friday 15 March 2019

The mass shooting of 100 people at two mosques in Christchurch, New Zealand, on the afternoon of Friday 15 March 2019, sent shockwaves around the world. The gunman killed 51 people, wounded 49 people, and left a community in fear and a nation in crisis. This crime is significant for Australia because the killer was an Australian citizen and a self-declared white supremacist. Not only was this one of the worst mass shootings in recent times – surpassing even the Port Arthur **massacre** of 1996 – but it was also a calculated act of **terrorism** aimed at appealing to extreme **far-right** groups and encouraging others to carry out similar attacks.

massacre
the intentional killing of a large number of people

terrorism
violence, or the threat of violence, directed at an innocent group of people for the purpose of coercing another party, such as a government, into a course of action that it would not otherwise pursue

far right
(politics) similar to 'extreme right' – this describes right-wing political groups that are willing to institute extreme measures to deal with the perceived ills of society

The 29-year-old Australian man, Brendan Tarrant, responsible for this act of terrorism was part of a movement that experts call the Global Far Right. Though the attacker claimed that he acted alone, he identified himself as part of the larger movement. Just before carrying out his attack, the killer emailed a 74-page manifesto titled 'The Great Replacement Theory' to 30 recipients, which included the New Zealand Prime Minister's office and several media organisations. He also posted links to his manifesto on X (formerly Twitter) and 8chan (an online forum where members can post anonymously and the posts vanish after a short time). This manifesto outlined his far-right world view, which was based on a framework of conspiracy theories, a mythical view of the past and white supremacist beliefs.

In the wake of the terrorist attack, the manifesto was banned in New Zealand by the Office of Film and Literature Classification because it was 'deliberately constructed to inspire further murder and terrorism' against identifiable people and justified 'acts of tremendous cruelty, such as the deliberate killing of children'. In New Zealand it was an offence to download, print, duplicate or distribute the manifesto. However, since 2019, 'The Great Replacement Theory' manifesto has been studied by experts to understand the mindset of the killer and how he fashioned a cold hard ideology from his connections with the Global Far Right. This ideology is widespread today and the issue here involves much more than banning certain types of firearms. No-one is safe from the ideas of these types of extremists, who convert online hate in to real-world violence. Such extremist ideologies are the common enemy of civilised society.

On 15 March 2019, the terrorist armed himself with semi-automatic rifles, including an AR-15. The weapons had been modified with high-capacity magazines so they could hold more bullets. Brandishing these weapons, the terrorist entered the Al Noor Mosque in central Christchurch at 1:41 pm during Friday prayers. Within minutes, he had shot 42 people. By the time police arrived six minutes later, the terrorist had gone to another mosque in a nearby suburb, where he shot more people. After three minutes, he left the second mosque and, according to his manifesto, he was on his way to a third target, a mosque on the outskirts of Ashburton.

Before he reached his next destination, two police officers – after a radio call out – intercepted him. When they spotted the terrorist's 2005 Subaru Outback, the police officers forced the car to pull over and arrested him. He was taken to the Central Police Station in Christchurch for questioning. The terrorist's rampage had lasted no more than 20 minutes, yet bodies were strewn at two mosques and countless lives had been shattered.

All 16 minutes and 55 seconds of the massacre were live streamed by the gunman. This footage was then shared by likeminded people on YouTube, Facebook and Twitter. In the first 24 hours after the massacre, Facebook removed 1.5 million videos of the terrorist attack.

The terrorist

The terrorist was born in 1990 in the town of Grafton in northern New South Wales. When his father died of a lung disease in 2010, the son received $500 000 in insurance compensation. He then quit his job at a gym and travelled around Australia during 2013 and 2014.

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Figure 20.1 Tributes for victims of the Christchurch massacre in front of the Jamia Masjid mosque on 22 March 2019.

After possibly spending some time in Asia, he went to Europe in 2014, visiting sites of historical significance for far-right groups in Serbia and France. References to these sites appear in his manifesto.

Back in Australia, he participated in a number of online far-right groups such as the United Patriots Front (UPF) and expressed support for the UPF's leader, Blair Cottrell. In May 2016, he posted violent language online directed at a critic of the UPF. The terrorist was also familiar with the far-right white nationalist group Lads Society. According to an ABC *Background Briefing* report on 23 March 2019, he livestreamed via Facebook a celebratory video with Tom Sewell, leader of the Lads Society, from Melbourne's Federation Square. 'Simply one of the most important events in modern history', he commented in the livestream. He went on to declare that 'Globalists and Marxists on suicide watch, patriots and nationalists triumphant – looking forward to Emperor Blair Cottrell'.

In August 2017, he moved to New Zealand, where he started planning a terrorist attack on Muslim people. In 2018, he travelled to Pakistan, North Korea and Austria. It was while he was in Austria that he had online contact with Martin Sellner, the leader of a far-right, **identitarian** group. It is unclear whether they ever met face-to-face. However, Sellner did receive a donation of €1500 from the terrorist. Authorities in both Austria and Germany have been investigating any possible links between identitarian groups in their countries and the Christchurch terrorist.

Once back in Dunedin, New Zealand, the terrorist returned to his small duplex, but he did not appear to have a job. He regularly visited the shooting range at the Bruce Rifle Club. In October 2017, he applied for a gun licence and bought four guns and ammunition at the Gun City store.

At some point, the terrorist began working on his manifesto, 'The Great Replacement Theory'. He claimed that his first draft was 250 pages long but then he cut it back to 74 pages. This document was full of the racist ideas of identitarianism and neo-Nazism, such as white supremacy and hate speech directed at immigrants. He took the title from a 2012 book by a French white nationalist conspiracy theorist, Renaud Camus, who drew on existing traditions of racism directed at migrants and merged them with the **Eurabia** conspiracy theory.

identitarianism
a recent extreme right-wing ideology that slickly repackages old fascist ideas into more socially acceptable forms; often espouses the exclusion of Muslims and other minority groups

Eurabia
a conspiracy theory that claims globalists are trying to 'Islamise' Europe

fascism
(contemporary context) an anti-democratic ideology that promotes ultra-nationalism, hatred of immigrants and the redemptive qualities of war and violence

Some Australia journalists had this to say about the terrorist's manifesto:

> What was most disconcerting was its clarity. Stripped of the memes, chan gags and patchy grammar, it [the manifesto] was a direct statement of mangled history, vile ideology and deadly intent. Online plagiarism software checks suggested that his writing was original ... Crucially, he intended to inspire further atrocities and help foment broader conflict.

Nick O'Malley, Tim Barlass and Patrick Begley, 2019, 'White bred terrorist', *The Sydney Morning Herald*, 10 August, p. 24.

It was clear that the terrorist was part of an online community that promoted fascist views, conspiracy theories and the use of violence. He also had links with **fascist** groups both in Australia and in Europe. The Christchurch massacre was a carefully planned terrorist attack that was designed to go viral and influence people in dark online far-right communities.

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Response from the New Zealand Prime Minister

Ten minutes after the shooting began on Friday 15 March 2019, New Zealand Prime Minister Jacinda Ardern received a call telling her the news. Police had only just arrived at the first mosque and the gunman was on his way to his second target. Ardern and her staff immediately went to the police station in New Plymouth. Over the next 90 minutes, the full horror of what had happened became apparent, including the livestreaming of the terrorist attack on Facebook.

Video 20.1 Prime Minister Jacinda Ardern in her second press conference on 15 March 2019 (00:51)

At 4 pm, barely two hours after the attack, Prime Minister Ardern made her first public statement:

> Many of those who will have been directly affected by this shooting may be migrants to New Zealand, they may even be refugees here. They have chosen to make New Zealand their home, and it is their home. They are us. The person who has perpetuated this violence against us is not. They have no place in New Zealand. There is no place in New Zealand for such acts of extreme and unprecedented violence, which it is clear that this act was.

Jacinda Ardern, 2019, 4 pm, 15 March.

In a second media address four hours later, Prime Minister Ardern labelled the massacre as a terrorist attack (see Video 20.1). She went on to say:

> We, New Zealand, we were not a target because we are a safe harbour for those who hate. We were not chosen for this act of violence because we condone racism, because we are an enclave for extremism. We were chosen for the very fact that we are none of these things.

Jacinda Ardern, 2019, 8 pm, 15 March.

Figure 20.2 Prime Minister Jacinda Ardern exits after the first press conference at Parliament on 15 March 2019.

Legal Links

Read Prime Minister Ardern's speeches at http://cambridge.edu.au/redirect/10426.

Prime Minister Ardern's 2018 speeches about kindness

A few months earlier, in September 2018, Prime Minister Ardern had given a speech at the United Nations. This speech stands out for its analysis of where the world is today and what we need to do to make things better. Ardern said that the world needs to pursue kindness. This is consistent with her whole approach to leadership since taking office:

> Perhaps then it is time to step back from the chaos and ask what we want. It is in that space that we'll find simplicity. The simplicity of peace, of prosperity, of fairness. If I could distil it down into one concept that we are pursuing ... it is simple and it is this. Kindness.
>
> In the face of isolationism, protectionism, racism – the simple concept of looking outwardly and beyond ourselves, of kindness and collectivism, might just be as good a starting point as any. So let's start here with the institutions that have served us well in times of need, and will do so again.

Jacinda Ardern, 2018, Speech to the United Nations, 28 September.

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The New Zealand Prime Minister reiterated her approach in an interview on the *Today Show* on 24 September 2018:

> I really rebel against the idea that politics has to be a place full of ego and where you are constantly focused on scoring hits against one another. Yes, we need a robust democracy but you can be strong and you can be kind.

Jacinda Ardern, 2018, *Today Show*, 24 September.

The funerals and vigils

In response to the Christchurch massacre, there was a wave of support from around the world for New Zealand and its Muslim community. Vigils were held to remember the victims. A vigil was held in the Auckland Domain on 22 March. Another vigil held in North Hagley Park in Christchurch on 24 March was attended by 3000 people. This vigil was called the 'March for Love' and was organised by the same students who had organised the School Strike for Climate march. Incidentally, the School Strike for Climate march on 15 March 2019 was the same day as the shooting in Christchurch and was cut short by the massacre.

A week after the massacre, funerals were held in New Zealand and in the countries of origin for some of the victims. More than 1000 people gathered at Christchurch's Memorial Park cemetery for the burial of 26 of the victims in accordance with Islamic Law. An imam from the Al Noor Mosque said that the attacks had left the country 'broken but not broken-hearted' and he thanked the people of New Zealand for their support, love and compassion. Many women in New Zealand wore headscarves in solidarity with Muslim women, including the Prime Minister.

Review 20.1

1. Outline the evidence that the Christchurch terrorist had spent some time planning the attack.
2. Describe how the New Zealand Police and the New Zealand Government responded to the Christchurch massacre.
3. Identify the far-right sentiments the terrorist displayed before 2019.
4. Describe how New Zealand Prime Minister Jacinda Ardern responded to the terrorist attack. Assess why she responded this way.
5. Outline the support the Muslim community in New Zealand received from the wider New Zealand community.

Figure 20.3 Prime Minister Jacinda Ardern embraces a Muslim woman as they arrive at the Kilbirnie Mosque on 17 March 2019 in Wellington, New Zealand.

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20.2 Legal responses

The terrorist's manifesto

On 23 March 2019, the Chief Censor of New Zealand declared that the terrorist's manifesto, 'The Great Replacement Theory', was 'objectionable' and that it was unlawful to possess or distribute the manifesto in New Zealand. However, in August 2019, New Zealand Police discovered that copies of the manifesto were being printed and sold outside the country.

Websites

In September 2019, Australian internet service providers (ISPs) were told by the Australian Government to block eight websites hosting videos of the Christchurch massacre. Back in March 2019, Australian ISPs had taken a proactive approach and had begun blocking 43 websites that were on a list provided by Vodaphone New Zealand. The eSafety Commissioner in Australia assumed responsibility for monitoring the objectionable websites identified. It was acknowledged that this was not a 'silver bullet' in dealing with extremism online.

Court appearances

On 16 March 2019, the terrorist was taken to court and was charged (initially) with one count of murder. This was because the court only needed evidence of one killing to keep the terrorist in prison. As he was brought into the courtroom, he made a white supremacist gesture with his hand. He was remanded without bail until his next court appearance on 5 April.

On Friday 5 April 2019, the terrorist appeared in the Christchurch High Court via video-link from prison. Many victims and relatives were present. The judge ordered that two assessments be carried out to determine the terrorist's mental health. The terrorist listened intently to the judge and made no comments. He was remanded in custody at the maximum-security Auckland Prison until his next court date (14 June).

Figure 20.4 The Christchurch High Court, where the terrorist faced 50 murder charges, and 39 attempted murder charges.

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In the lead-up to the suspect's court appearance on 14 June 2019, media organisations in New Zealand took the unprecedented step of agreeing to a voluntary set of principles that were designed to limit the exposure of the terrorist's ideals and beliefs. The media agreed to limit coverage of statements that promote white supremacy or terrorism and not to quote from the terrorist's manifesto or broadcast imagery of white-supremacist symbols. The media pledged to adhere to these principles during the terrorist's trial.

On 14 June 2019, the terrorist again appeared in court via video-link from prison. He pleaded not guilty to all 92 charges, which included:

- 51 counts of murder
- 40 counts of attempted murder
- one count of terrorism under the *Terrorism Suppression Act 2002* (New Zealand).

On 26 March 2020, the defendant changed his plea to guilty of all charges. This came as a surprise. Prime Minister Jacinda Ardern said the guilty plea was a relief for the families of the victims. However, the trial, which had been due to start in the High Court of New Zealand on 2 June 2020, had to be cancelled due to New Zealand's nationwide lockdown during the COVID-19 pandemic.

This case now shares a similar conclusion to that of the mass killer Martin Bryant, who also pleaded guilty in 1996 (see Chapter 15). This guilty plea spared the families of the victims the harrowing experience of a lengthy court case.

The fact that the defendant changed his plea to guilty meant that there was no jury trial and no need for evidence to be provided to prove his guilt. Finally, on 27 August 2020, a judge gave him a life sentence without parole. Details of the sentencing can be found with the title '*R v Tarrant*' at the Courts of New Zealand website.

Research 20.1

Search for the podcast 'Life without parole: The sentencing of the Christchurch Mosque gunman', 20 October 2023. This is a podcast from the *Moment in Crime* series and can be found in several locations online.

Listen to the account of the attacks carried out that day by the terrorist and to the courtroom proceedings. Also, search for media articles about the trial. Links to some articles are located in the show notes for the *Moment in Crime* episode on their website.

After you have listened to the podcast and read several articles, complete the following tasks.

1. Identify significant moments in the trial of the Christchurch terrorist.
2. Outline what the survivors and the relatives of victims thought about the trial.
3. Outline how the trial was viewed by the public in New Zealand, Australia and in other parts of the world.
4. Identify to what extent the discussion in court and in the media was about the terrorist's ideological motivation, and the danger of white supremacist and other hate groups.
5. Read the sentencing judgment. Identify what aspects were highlighted.
6. Identify if there was any discussion about the fact it was an Australian who carried out this act of terrorism.
7. Compare the trial with the 1996 trial of Martin Bryant for the Port Arthur massacre (see Chapter 15).
8. Assess if it was a good idea for the survivors and the victims' relatives to have their day in court and if this trial provided closure for these people.

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Reform of New Zealand's gun laws

On 21 March 2019, just six days after the Christchurch terrorist attack, Prime Minister Jacinda Ardern announced that New Zealand would ban all types of semi-automatic weapons. She said that 'our history has changed forever. Now, our laws will too.' The ban also covers accessories that enable semi-automatic weapons to be loaded with high-capacity magazines. Prime Minister Ardern announced an amnesty for those who already owned these weapons so they could hand them in under a weapons buy-back scheme. At the end of the amnesty period, anyone caught with a banned weapon would face a fine of up to NZ$4000 and three years in jail. Prime Minister Ardern said that a later round of amendments would legislate for a register of all firearms and their owners, and other issues of licencing and registration.

Ardern said gun-reform legislation would be introduced into parliament in the first week of April 2019 and she expected the laws would be in effect by 11 April. On 10 April, the NZ Parliament passed the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (NZ) and it received royal assent from the NZ Governor-General on 12 April. The vote for the Bill was 119–1. In a speech to parliament, Prime Minister Ardern talked about the horrendous physical and psychological injuries suffered by the survivors, who would carry disabilities for the rest of their lives. She said she 'could not fathom how weapons that could cause such destruction and largescale death could be obtained legally in this country'.

New Zealand's gun-law reform drew reactions from around the world. US Senator Bernie Sanders tweeted that, 'This is what real action to stop gun violence looks like'. However, unsurprisingly, the US National Rifle Association (NRA) did not welcome the reforms – the NRA has been trying for years to discredit Australia's gun laws (enacted in 1996 in response to the Port Arthur massacre). Dana Loesch, from the NRA, tweeted, 'The US isn't New Zealand. While they do not have an inalienable right to bear arms and to self-defence, we do.'

Figure 20.5 In an otherwise light-hearted and humorous interview on 18 November 2019 by *The Late Show* host on a visit to New Zealand, Stephen Colbert turned serious and asked about New Zealand's response to the Christchurch massacre. Colbert said, 'You immediately passed laws outlawing semi-automatic weapons. That was inspiring for us living here in the United States. How did you do it? I'm asking for 315 million friends of mine.'

Research 20.2

1 Access the website of the NZ Police.
   - a The gun amnesty only applied to certain types of weapons. Identify these types of weapons.
   - b Outline the conditions for handing in weapons to the NZ Police.
   - c Describe what would happen to the weapons that were handed in to the NZ Police.
   - d Outline the conditions for receiving compensation for any weapons surrendered.

2 Read the article 'New Zealand gun buyback: 10 000 firearms returned after Christchurch attack' (by Eleanor Ainge Roy, *The Guardian*, 12 August 2019). Then search for recent articles that discuss the effectiveness of the gun buy-back scheme.

3 Evaluate the effectiveness of the 2019 gun buy-back scheme, from the perspective of today.

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Arming New Zealand Police officers

In the months after the Christchurch massacre, the proposal that all New Zealand Police officers should be armed at all times was considered. Up to 2019, New Zealand was one of the few countries in the world (together with the UK and Norway) where police officers did not carry guns on their person. Instead, their handguns, rifles and tasers were locked in their vehicles and could only be used with the permission of a superior officer. In late 2019, trial of police armed response teams was run in Manukau (South Auckland), Waikato and Canterbury. The trial ended on 26 April 2020, and a decision was taken not to proceed with the program. This was based on findings from the trial evaluation and community feedback.

Figure 20.6 On the night of 16 March 2019, the sails of the Sydney Opera House commemorated the victims of the Christchurch terror attacks.

Concern in Australia

During October 2019, there was a concern in Australia about the perceived complacency of our government in the wake of this terrorist attack committed by an Australian citizen. There has been little soul-searching or sense of responsibility about the fact that this attack was carried out by an Australian far-right white supremacist terrorist. Labor member of parliament Anne Aly said the idea that the shooter was not 'one of us' was wrong. 'No actually, he is one of us', she said. Aly said this sort of attack was bound to happen eventually due to the upsurge in brazen extreme white supremacist activity in recent years. She also cited ASIO reports that a future terrorist attack would most likely be committed by a lone person, or a small group mobilised via social media or some online forum. Furthermore, Aly said that Australia needed to tackle the rhetoric used to justify and embolden far-right extremism. Aly gave evidence at the New Zealand Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain.

It has been over five years since the terrorist attack in March 2019. However, concerns in Australia about the possibility of a similar terrorist attack here have only increased. In March 2022, on the third anniversary of the attack, a report from the Islamophobia Register Australia showed an alarming increase in verified anti-Muslim hate crimes. In its recommendations, the report highlighted the need for internet platforms and social media organisations to do far more to deal with online hate. The report also said that political leaders could do more in standing up to online hate and giving legal consequences for those guilty of promoting it. The ongoing conflicts in the Middle East since 2023 have also heightened the risk of hate crimes.

Royal Commission

On 13 May 2019, the New Zealand Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain was established to find out:

- what government agencies knew about the terrorist before the attack
- what actions they took (if any)
- what could have been done to prevent the attack
- what can be done to prevent similar attacks in the future.

The Royal Commission had to sift through highly classified information. For this reason, many of the hearings were held behind closed doors. The Royal Commission's hearings looked at:

- the terrorist's activities before the attack
- his life in Australia
- the time he spent in New Zealand
- his overseas holidays
- the people he mixed with
- his use of social media
- how he obtained his gun licence, weapons and ammunition.

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Research 20.3

Locate the website of the New Zealand Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain (places of worship).

Also locate media reports about this Royal Commission's findings.

1 Summarise the Royal Commission's main findings.
2 Discuss how the findings were received by:
   a the media
   b the New Zealand Government
   c the Muslim community.
3 Identify any reforms or changes to government policy that occurred as a result of the Royal Commission's findings.

Figure 20.7 On 24 October 2023, a man still suffering from injuries from 2019, arrived for the first day of the coronial inquest into the Christchurch terror attack.

Video 20.2 Extract from Jacinda Ardern's response to the findings of the Royal Commission (01:58)

Judging by the 1100 public submissions received by the Royal Commission, there is significant public interest in the commission's findings. The commission's final report was originally due on 10 December 2019. However, there were concerns that this date was too early, that the December deadline did not allow enough time for the survivors and the Muslim community to be properly consulted, and that the commission's conclusions would be rushed. In response to these concerns, on 30 November 2019, the New Zealand Government extended the due date for the commission's final report to 30 April 2020 and provided an extra NZ$3 million in funding.

Coronial inquest

From 24 October 2023, a seven-week long coronial inquest was held. The 10 issues that the inquest focused on were:

- the chronology of events on the day of 15 March 2019
- the police and ambulance response times at the two mosques
- the triage and medical response at both mosques
- the steps taken to arrest the terrorist
- the role of the Christchurch Hospital and the processes it followed in responding to the attack
- whether the terrorist received any direct assistance on 15 March 2019
- the final movements and time of death for each of the deceased
- the cause of death for each victim
- whether any deaths could have been avoided
- whether an emergency exit door at the Al Noor Mosque failed to function during the attack and the reasons this occurred.

Research 20.4

Locate media reports about the coronial inquest in 2023.

1 What were the main findings of the coronial inquest?
2 What changes occurred as a result of these findings since 2023?

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Review 20.2

1 Outline how the terrorist's court appearances were handled.
2 Outline the action taken by the New Zealand Government on the issue of firearms.
3 Identify the task of the New Zealand Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain (places of workship).
4 Describe the changes made to policing in New Zealand.
5 Discuss the concerns raised in Australia about the perceived complacency of the Australian Government in the wake of this terrorist attack committed by an Australian citizen.

20.3 Non-legal responses

Christchurch Call

The Christchurch terror attacks were livestreamed and then went viral; and despite attempts to remove it from the web, the video footage remains online. In response to this, on 15 May 2019, Prime Minister Ardern met with French President Emmanuel Macron to launch an initiative to deal with terrorist and violent extremist content online. Together, Macron and Ardern launched the Christchurch Call, which is a commitment by governments and tech companies to eliminate violent extremist and terrorist content online. The tech companies were asked to pledge to enforce their terms of service and re-evaluate their algorithms that directed users to extremist content. Tech companies that signed the pledge in 2019 included Amazon, Facebook, Google, Microsoft, Twitter and YouTube.

The Christchurch Call acknowledges that the right to free expression is fundamental. However, no-one has the right to create or share violent extremist content. The Christchurch Call also asked national governments to adopt and enforce laws banning extremist material online. Governments were asked to give media outlets guidelines on how to report terrorist acts without giving the atrocities too much publicity. The meeting between Ardern and Macron dovetailed with an initiative launched by Macron called 'Tech for Good' that brought together 80 tech leaders to explore ways in which new technologies could be made to work for the common good.

On 4 April 2023, some months after her resignation as New Zealand Prime Minister, Jacinda Ardern was appointed as special envoy for the Christchurch Call by the new Prime Minister. She serves in the role in a voluntary capacity.

Figure 20.8 On 15 May 2021, in Wellington, New Zealand, Prime Minister Jacinda Ardern addressed a virtual meeting of the Christchurch Call international leaders' summit.

Research 20.5

Locate the website of Christchurch Call. Explore the website and read the information about Christchurch Call.

1 State the aims of the Christchurch Call.
2 List the two countries that provide the leadership for this organisation.
3 Outline what support the Christchurch Call has.
4 Describe the work that this organisation does.
5 Find some recent media reports about the Christchurch Call. Assess the effectiveness of the Christchurch Call in its ability to convince governments and tech companies to eliminate violent extremist and terrorist content online since 2023.

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Community concern about the rise of far-right extremism

In Australia and New Zealand, there is concern about the rise of far-right extremism and the risk of further acts of violence. A worrying aspect of the Christchurch attack is that the terrorist hoped to inspire others to commit similar atrocities. This is why he livestreamed the attack on Facebook and disseminated his 74-page manifesto.

These concerns were validated by a spate of similar extremist attacks in the months after the Christchurch massacre:

- **Arson attack on a mosque – Escondido California, United States, 24 March 2019**
  A fire was started at 3:15 am, while seven people were inside the mosque, but it was put out before anyone was injured. There was no significant damage to the building.
- **Shooting at a synagogue – Poway, California, United States, 27 April 2019**
  One person was killed and three others injured. The killer claimed responsibility for this attack and for the fire in Escondido. Disturbingly, this killer also left a manifesto, and in it he praised the Christchurch terrorist. Both were users of 8chan.
- **Shooting at a Walmart store – El Paso, Texas, United States, 3 August 2019**
  Twenty-two people were killed and 24 people were injured. On 8chan, the killer claimed that he was inspired by the Christchurch massacre.
- **Shooting at a mosque – Bærum, Norway, 10 August 2019**
  One person was injured. The offender attempted to livestream the attack on Facebook. He described himself online as being chosen and said, 'We gotta bump the race war threat into real life.'

On 6 August 2019, while on an official trip to New Zealand, Jens Stoltenberg, the NATO Secretary General, stated that the Christchurch massacre had similarities to a 2011 attack in Norway in which a far-right extremist killed 77 people. Stoltenberg rejected the view that terrorist attacks are always organised from outside the country in which they are carried out – they can be home-grown too. Stoltenberg also argued said recent attacks were increasingly connected, and that unmoderated message boards such as like 4chan, 8chan and Endchan are a key factor in the spread of extremism. Like 8chan, 4chan and Endchan are online forums on which members can post anonymously, and the posts vanish after a short time. These forums foster a toxic culture and are favoured by people seeking to promote extremist views and conspiracy theories.

Figure 20.9 A memorial to the victims of the 2019 Poway synagogue shooting

On 14 August 2019, geopolitical and strategic risk expert Paul Buchanan warned that the Christchurch massacre has become a touchstone for far-right white supremacists around the world. According to Buchanan, there are three reasons for this:

- the location of the attack in a house of worship gave it a higher status than random attacks in shopping malls
- the attacks were livestreamed
- a large number of people were killed.

Buchanan said that he was monitoring the 8chan website while the shootings occurred and noted that there were users urging the gunman on. Significantly, the Christchurch massacre was the first mass murder livestreamed for ideological reasons. In the words of Buchanan, 'To this generation of sociopaths, that really rung a bell because they are an audio-visual generation.'

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Understanding far-right extremism

The Australian terrorist was a member of what author Cynthia Miller-Idriss calls the New Global Far Right. In her 2020 book, *Hate in the Homeland*, Miller-Idriss warns that the structure of social media platforms 'have amplified the exposure to extreme content' through their algorithms, echo chambers and filter bubbles. She warns that there is a vast amount of hatred on social media platforms and that increasingly this is translating into real-world acts of violence.

Miller-Idriss urges communities to develop a better understanding of such issues as:

- the shifting of far-right extremist narratives and conspiracy theories from the fringes of society to mainstream political debate
- new possibilities for intervention and prevention work, rather than continuing to rely solely on law enforcement approaches.

Early and ongoing education of young people is essential. She advocates embedding counter-extremism education into schools, religious groups, sporting groups and other organisations. In schools, teachers need to be equipped to help students develop an awareness of the dangers of extremist rhetoric and hate speech. Students need to be given role models and helped to identify pathways to being active and informed citizens.

It is important that we understand far-right extremism because it represents a serious threat to Australia, New Zealand and the world. Whenever political leaders leverage racial hatred and bigotry to attract support, this creates an environment in which far-right extremism thrives. To dampen far-right extremism, terrorism experts advocate limiting media exposure for far-right extremists in the same way they do for jihadists.

Statements by right-wing populist politicians or commentators provide fuel for the growth of right-wing groups. One example was Andrew Bolt's assertion in August 2018 that there was a 'tidal wave of immigrants flooding the country [Australia]' and that these immigrants refused to assimilate. In response, the president of the Australian Jewish community, Jennifer Huppert, warned that, 'There is a rise in ultra-right-wing activity in Victoria and this type of activity can fuel anti-Semitic, anti-Islamic and general racist debate and language in our community.' This can undermine cohesion in society.

Figure 20.10 Cynthia Miller-Idriss gives a lecture on far-right youth culture in Germany at the Boston University Center for the Study of Europe.

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Media

Christchurch attacks show Islamophobia is real, deadly and spreading around the world

Imran Awan

The Conversation

20 March 2019

When I woke up to the news that 50 people had been killed and at least 20 wounded in shootings at two mosques in Christchurch, I couldn't help but reflect upon the words of those who refuse to accept that **Islamophobia** exists. In the United Kingdom, the columnist, Melanie Phillips, has argued that Islamophobia is a fiction used to shut down debate. Douglas Murray called it the Islamophobia 'problem', arguing that it was created by fascists.

Islamophobia the fear of, and hatred towards, the Islamic region and Muslim people generally, which has grown in the wake of the 'war on terror' since 2001; it is a form of xenophobia, and shares common elements with anti-Semitism; many groups that espouse Islamophobia are also anti-Semitic

Islamophobia is the fear, prejudice and hatred of Muslims and people perceived to be Muslim that leads to provocation, hostility and intolerance. A working definition, published in late 2018 by a group of British MPs, defined is as: 'Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness.'

It is motivated by institutional, ideological, political and religious hostility, and can merge with racism to target the symbols and markers of a being a Muslim.

I've been researching Islamophobia for more than a decade and found it has a devastating effect on victims, their families and wider communities. Such hatred is very real, and it has become globalised.

A string of attacks targeting muslims

The past few years have seen a number of deadly Islamophobic attacks in Europe and North America. In 2015, Zack Davies was sentenced for life after he attacked Sarandev Bhambra with a claw hammer and a 30 cm-long machete at a supermarket in Wales. A witness told the court that during the attack Davies had said it was for Lee Rigby – the soldier murdered by Islamist extremists in south-east London in 2013.

In 2017, Jeremy Joseph Christian became enraged when he saw a young Muslim woman wearing a hijab on a commuter train in the United States. He began verbally abusing her and used a knife to kill two passengers who tried to intervene. Christian defended the killings in a courtroom rant that included the following, 'Death to the enemies of America. Leave this country if you hate our freedom,' he said. 'You call it terrorism, I call it patriotism.'

The same year, Darren Osborne carried out a van attack against Muslim worshippers in Finsbury Park in London. At his trial, it was revealed he had previously threatened to kill all Muslims and had searched for material posted online by both far-right group Britain First and the far-right activist known as Tommy Robinson. In court, it was reported that Osborne had received a group email from Robinson in reference to the recent Manchester arena attack, which read: 'There is a nation within a nation forming just beneath the surface of the United Kingdom. It is a nation built on hatred, violence and on Islam.'

In the United Kingdom, extreme right-wing activity jumped by 36% in 2017–2018, according to data from Prevent, the country's terrorism-prevention program. Statistics released by the Home Office showed more than half of religiously motivated attacks in 2017–2018 were directed at Muslims.

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Rhetoric that breeds hatred

In the US, between January and September 2017, the Council for American-Muslim Relations recorded 1656 so-called 'bias incidents' and 195 hate crimes, an increase in both cases on the previous year. The council suggested President Donald Trump's 'toxic campaign rhetoric' towards Muslims was a contributing factor.

Trump has singled Muslims out as a suspect community. In his campaign for the presidency, he proposed a total and complete shutdown of Muslims entering the United States. Despite concerns raised about these statements, the US Supreme Court ruled in mid-2018 that a Trump administration travel ban aimed predominantly at people from Muslim-majority countries could come into full effect.

In the wake of the Christchurch attacks, security services are investigating whether the man charged with the attack had links to far-right groups in Europe. Details have begun to emerge of how the manifesto he published was influenced by the far-right ideology of Anders Behring Breivik, who murdered 77 people in Norway in 2011, and carried passages that praised Trump as a 'symbol of white identity'.

The view that all Muslims are dangerous and not part of society – amplified by politicians such as Trump and the radical far-right in Europe – has the ability to ignite further racial and faith-based schisms.

The attack in New Zealand outlines the international spread of Islamophobic hate crime, which becomes highly pertinent in a globalised world. There is a fear that what happened in Christchurch could spill over, and those with radical right sympathies could feel emboldened by the incident in order to promote their own warped version of what Islam is. In the days following the attack, two people were charged in Rochdale in northern England after a taxi driver was 'abused and threatened' with references to the Christchurch shootings, though this case has still to be tested in court.

So please don't tell me Islamophobia doesn't exist. It does and it can kill. What happened in New Zealand was not an isolated attack against Muslims. It is about time we started to hold the media, and those that peddle far-right hatred, to account.

Jeff Sparrow, a journalist from *The Guardian* newspaper, has been commentating on the issue of far-right groups for many years. Quoting from his 2019 book *Facists Among Us: Online Hate and the Christchurch Massacre* he had this to say about the nature of contemporary fascism:

> If racial murder were gamified murder, terrorism itself could become a meme, a concept that would replicate and spread online, so that fascist gun murders became a constant temptation for the damaged young men already committed to far-right ideas.

Jeff Sparrow, 2019, 'The internet SS: How the Halle murders follow a template established in Christchurch', *The Guardian*, 16 October.

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Analysis 20.1

1 Read 'Terror and rage: What makes a mass murderer different to a terrorist?' (by Jeff Sparrow, *The Guardian,* 4 August 2016) at http://cambridge.edu.au/redirect/10427.
   - **a** Explain the autogenic massacres, according to Paul Mullens.
   - **b** Compare the similarities between 'lone wolf' terrorists and 'deranged shooters'.
   - **c** Identify the role war has played in driving both Islamic terrorism and Islamophobia.
   - **d** Identify the 'burning moment' in Julian Grenfell's poem from the Great War.

2 Read 'What induces man to imitate the Christchurch massacre?' (by Jeff Sparrow, *The Guardian*, 5 August 2019) at http://cambridge.edu.au/redirect/10428.
   - **a** Identify the effect of the ongoing 'war on terror'.
   - **b** Identify the main beneficiaries of the new racism.
   - **c** Outline what made fascists decide to move from online to real-world activism.
   - **d** In the author's view, identify what is needed to genuinely counter fascist violence.

Review 20.3

1 Explain the purpose of the Christchurch Call.
2 Identify two terrorist attacks that were inspired by the Christchurch massacre.
3 Outline the concerns expressed by experts about the Christchurch massacre.
4 Discuss what we need to understand about far-right extremism.
5 Describe how the Christchurch massacre has increased the threat of far-right terrorism.

Figure 20.11 Flowers and messages outside the Al Noor mosque, two days ahead of the first anniversary of the Christchurch mosque shootings, in Christchurch on 13 March 2020.

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20.4 Effectiveness of responses

New Zealand's response

In assessing the effectiveness of the responses to the Christchurch terrorist attack, we need to review the actions of the New Zealand Government led by Prime Minister Jacinda Ardern. Ardern showed admirable leadership in shaping the response of her government and of the people of New Zealand. She took a moral stance from the outset with the following four key elements:

- **Showing empathy for the victims** – From her first actions and words, Ardern demonstrated empathy for and solidarity with the Muslim community. To counter any possible 'othering' of the victims, in her first press statement she said of the terrorist, 'this is not us' and of the Muslim victims, 'they are us'. Within hours, she identified the massacre as an act of terrorism and went to visit the survivors and relatives. In all of this, Ardern was seeking to ensure that the division the terrorist was seeking to make would not happen. At the funerals and at public gatherings for the first two weeks, Ardern wore a hijab and many women in New Zealand copied this. The New Zealand Government also paid for relatives of the victims to travel from overseas to attend the funerals.
- **Identifying racism as the cause of the attack** – Ardern recognised the need to head off a potential culture war in which some may attack New Zealand's immigration policies or criticise the Muslim community. She sought to ensure that the terrorist would fail in his attempts to sow division and promote hate.
- **Denying publicity to the terrorist** – From the outset, Ardern chose to never utter the terrorist's name. The New Zealand and Australian governments took measures to shut down websites hosting videos and the terrorist's livestream video. The terrorist's manifesto was also banned in New Zealand. Ardern was successful in directing the media coverage. The media agreed to abide by a code that meant that they would limit coverage of the terrorist at his trial.
- **Identifying New Zealand as the target** – In saying 'they are us', Ardern identified New Zealand as the target of the attack alongside its Muslim community. This was to counter the prospect of any revenge attacks, at least in New Zealand.

Figure 20.12 On 11 April 2019, Prime Minister Jacinda Ardern spoke to students at Hutt Valley High School in Wellington. She asked the students to make New Zealand a place with no tolerance for racism and extremism. On this day, the law banning all military-style semi-automatics and assault rifles came into effect.

The New Zealand Government then took practical measures to deal with the aftermath of the attack and the ongoing threat, which included:

- enacting gun-law reform to ban semi-automatic weapons
- initiating a gun buy-back scheme
- establishing a Royal Commission
- initiating the Christchurch Call, which was taken to international forums, gaining strong support from many world leaders, the United Nations and global tech companies
- directing forceful words to the heads of social media companies to reign in far-right groups that promote hatred and violence.

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Australia's response

The response in Australia has lacked the unity of the New Zealand response. There was no rallying around Prime Minister Scott Morrison's response, and within the community, there was fierce debate about the underlying causes of this terrorist attack and how Australia should respond.

Prime Minister Scott Morrison offered full support to New Zealand, and Australian intelligence and police cooperated with their counterparts in New Zealand to deal with the ongoing terrorist threat.

A 20-year-long culture war in Australia over Islamophobia, asylum seekers and immigration was fanned by the terrorist attack. For instance:

- Former One Nation senator Fraser Anning blamed the attack on Muslims.
- Waleed Aly, from Channel Ten's *The Project*, said 'we all knew this was coming'; Aly criticised Prime Minister Morrison because while he was immigration minister in 2010, he had used anti-Muslim sentiment for political gain.
- Many people were concerned with the racist xenophobic language used within mainstream political debate and by certain sections of the media; there were calls for the Australian Government to do more to counter Islamophobia and divisive speech.
- There were calls for the Coalition to do more to counter racism within its own ranks.
- There were many protests and rallies against racism and in support of the Muslim community both in New Zealand and Australia.

Global response

The global response has been a mixture of strong and lukewarm support for preventative action:

- Many countries supported the Christchurch Call. It received strong support from the United Nations, and protocols and mechanisms were established to deal with any future attacks and to counter online groups that promote violence and hatred.
- From global technology companies like Facebook and Google, there were expressions of good intentions and promises to take action. However, although they have successfully been able to counter Islamic extremism on their platforms, they have only just started working to counter the use of their platforms by far-right and extremist groups.
- US President Trump refused to back the Christchurch Call. Earlier, in 2017, he had also refused to condemn an attack by a far-right terrorist in Charlottesville in the United States.
- Many people around the world and in the United States admired the response of Jacinda Ardern and her government to the Christchurch attacks. New Zealand has attracted a lot of goodwill from other countries because of this approach.

The victims

In determining the effectiveness of the responses to the Christchurch terrorist attack, it must be recognised that for the victims, while they are appreciative of what the government has done, life will never be the same and they will always be affected in some way by this horrific experience.

In an article published in *The Guardian* on 27 November 2019, titled 'Anxious and in pain, survivors of Christchurch massacre call for new approach', journalist Charlotte Graham McLay explained some of the ongoing effects of the Christchurch massacre on the people who survived it.

- Some of the survivors were paralysed and will live the rest of their lives in wheelchairs, requiring specialised services and accessible housing.
- Some of them have to live with bullet fragments in their bodies and the constant fear that a fragment may shift and they will need emergency surgery.
- Many cannot sleep properly, have panic attacks and suffer from depression.
- Many have lost income through being forced to stop work or close their businesses; financial stress is now a constant factor for most of the survivors and their families.

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- Some of the survivors may have experienced difficulty navigating through the government agencies that had to deal with due to language barriers and a lack of familiarity with New Zealand's system of government.
- It will take time to rebuild trust and rebuild supportive communities.

In all of our thinking about the Christchurch massacre, we must never forget the victims.

Figure 20.13 Temel Atacocugu (left), a survivor of the twin mosque shootings, thanks and celebrates with members of the public outside the High Court after the conclusion of the sentencing hearing for the Australian-born white supremacist who committed the shootings in Christchurch on 27 August 2020.

Review 20.4

1. Describe Jacinda Ardern's response in the first days after the Christchurch massacre.
2. Identify the measures taken to ensure safety and security in New Zealand.
3. Outline the debates in Australia following the Christchurch massacre.
4. Discuss how Jacinda Ardern's response to the Christchurch massacre has influenced the way the world sees New Zealand.
5. Assess what New Zealand learned from Australia.
6. Assess what Australia can now learn from New Zealand.

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Chapter summary

- The Christchurch terrorist was a self-confessed fascist who aimed to encourage others to carry out similar attacks.
- The Christchurch terrorist had links with far-right groups in Australia and Europe.
- New Zealand Prime Minister Jacinda Ardern responded with empathy for the Muslim victims and showed a determination to take the necessary steps to prevent future attacks.
- At the funerals and vigils for the victims of the massacre, there were massive outpourings of support for the Muslim community.
- The New Zealand media agreed to a voluntary set of principles to limit the exposure of the terrorist in their coverage of the terrorist's trial.
- The Ardern government quickly passed laws to ban semi-automatic weapons and to implement a buy-back scheme.
- There was concern in Australia that the government was not doing enough to tackle far-right extremism.
- The Christchurch Call attempts to deal with the promotion of hatred and violence on global internet platforms.
- There have been a number of massacres that were inspired by the Christchurch massacre.
- Understanding far-right extremism is important to be able to counter this type of terrorism.
- The survivors and relatives of the victims of the Christchurch massacre will be affected for the rest of their lives by this terrorist attack.
- The response of the New Zealand Government to the Christchurch massacre was seen as appropriate, effective and a good example for the rest of the world.
- The Australian Government struggled to deal effectively with the implications of the Christchurch massacre being carried out by an Australian.

Multiple-choice questions

1 The high-powered semi-automatic weapons used by the terrorist on 15 March 2019 were:
   - **a** brought with him from Australia.
   - **b** bought legally in New Zealand.
   - **c** acquired illegally.
   - **d** banned in New Zealand at the time.

2 The terrorist's motive for the Christchurch massacre:
   - **a** was that he had been bullied and abused as a child.
   - **b** was that he had a hatred of foreign tourists.
   - **c** was to encourage others with far-right views to commit similar attacks.
   - **d** is not known for sure.

3 Reforms to New Zealand's gun laws were passed after the Christchurch massacre. These reforms:
   - **a** banned semi-automatic weapons and instituted a gun buy-back scheme.
   - **b** were passed by a small majority in the New Zealand Parliament.
   - **c** were supported by pro-gun groups in the United States.
   - **d** did not follow the example set by the Australian Government after the Port Arthur massacre in 1996.

4 The Christchurch Call:
   - **a** was supported by users of the forums 4chan and 8chan.
   - **b** was totally rejected by Facebook and Google.
   - **c** was strongly supported by the United Nations.
   - **d** was supported by all countries.

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5 Contemporary fascism and far-right groups:
   a are no longer a threat after the Christchurch massacre.
   b reject the use of violence to achieve their aims.
   c thrive in an environment where there is Islamophobia.
   d all of the above.

Short-answer questions

1 Summarise the events of 15 March 2019 in your own words.
2 Outline the stages in the court process in the prosecution of the terrorist.
3 Discuss what about the Christchurch massacre makes it attractive to other extremists.
4 Outline the role of the internet in radicalising the Christchurch terrorist.
5 Identify the key features of the gun reforms instituted in New Zealand after the Christchurch massacre.
6 Outline the main features of contemporary fascism.
7 Describe the international measures taken to deal with the threat posed by far-right groups.

Extended-response question

Assess the role of the leadership of Jacinda Ardern in creating an effective response to the Christchurch massacre.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing.

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Issue 4

Criminal or civil cases that raise issues of interest to students

Chapter 21

Facebook and social media privacy issues

Chapter objectives

In this chapter, you will:

- explore the legal concepts and terminology relating to Facebook and social media privacy and the law
- investigate the legal system's ability to address issues relating to Facebook and social media privacy
- explore the differences between Australian and international law on privacy issues
- investigate the role of the law in addressing and responding to changes in relation to social media privacy
- describe the legal and non-legal responses to social media privacy infringements
- evaluate the effectiveness of legal and non-legal responses to social media privacy infringements.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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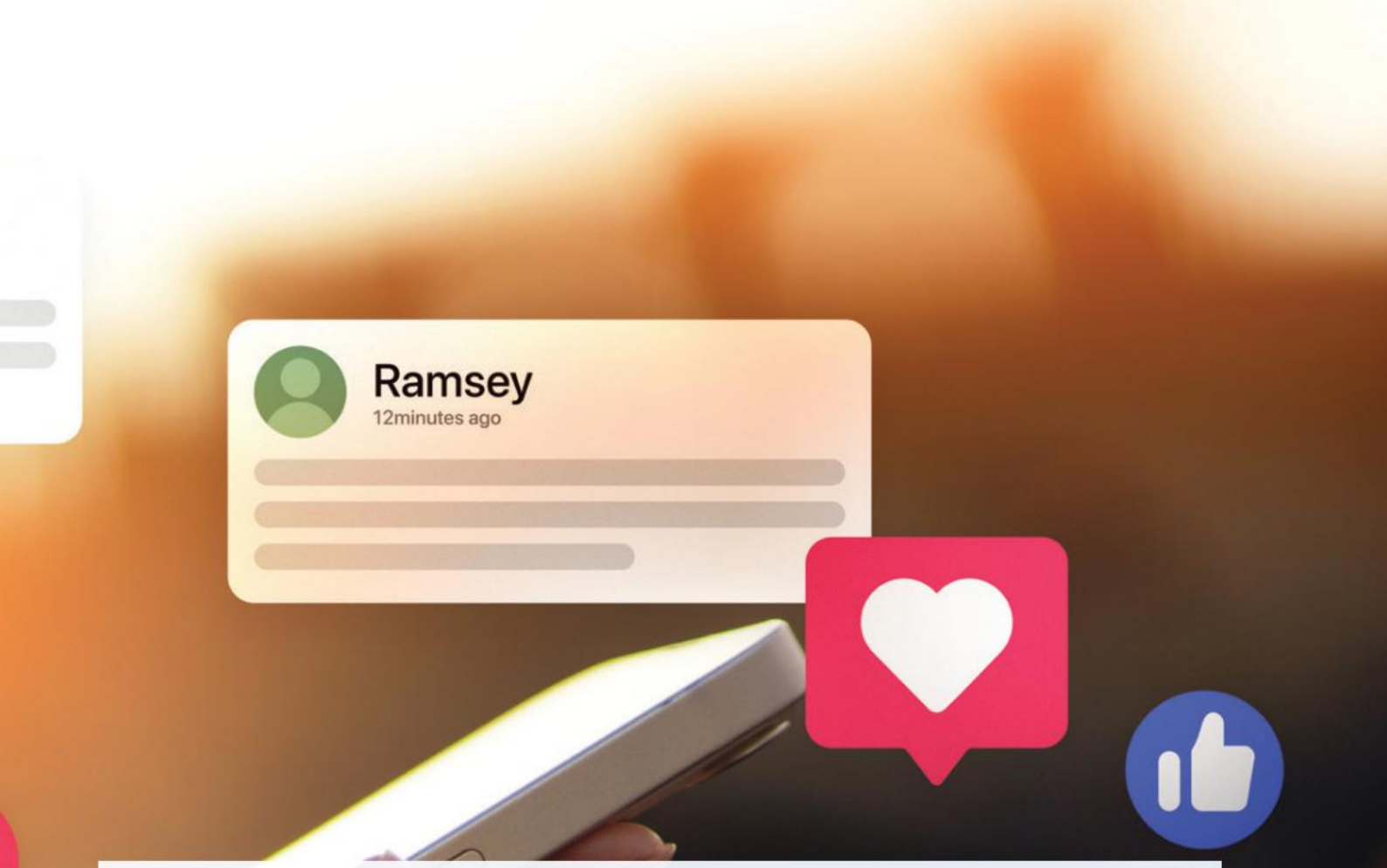

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1914 (Cth)
National Health Act 1953 (Cth)
Freedom of Information Act 1982 (Cth)
Australia Act 1986 (Cth)
Telecommunications (Interception and Access) (New South Wales) Act 1987 (NSW)
Privacy Act 1988 (Cth)
Data-matching Program (Assistance and Tax) Act 1990 (Cth)
Criminal Records Act 1991 (NSW)
Telecommunications Act 1997 (Cth)
Privacy and Personal Information Protection Act 1998 (NSW)
State Records Act 1998 (NSW)
Access to Neighbouring Land Act 2000 (NSW)
Crimes (Forensic Procedures) Act 2000 (NSW)
Health Records and Information Privacy Act 2002 (NSW)
Workplace Surveillance Act 2005 (NSW)
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
Surveillance Devices Act 2007 (NSW)
Government Information (Public Access) Act 2009 (NSW)
Healthcare Identifiers Act 2010 (Cth)
Health Records and Information Privacy Regulation 2017 (NSW)

SIGNIFICANT CASES

Stutsel v Linfox Australia Pty Ltd [2011] FWA 8444
Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311
Facebook Inc v Australian Information Commissioner [2022] FCAFC 9

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21.1 Social media and the law

What is social media?

social media
a web-based form of social interaction where users can share and comment on content, and discuss topics

content community
a group of people who upload, share, comment on and discuss content online; for example, YouTube and Tumblr

The term **social media** is heard a lot these days, but what does it mean? Two researchers of social media, Andreas Kaplan and Michael Haenlein, define it as 'a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content'.

Figure 21.1 Digital influencer Nicole Warne has built a business posting her outfits and promoting her personal blog on Instagram.

Types of social media include blogs, collaborative projects such as Wikipedia, **content communities** such as YouTube and Instagram, and social networking sites such as Facebook and X (formerly known Twitter). According to the website *The Global Statistics*, in 2024 Australia's most popular social media platforms were Facebook (with 18.63 million active users), Instagram (14.05 million active users) and TikTok (10.5 million active users). Although Facebook remains dominant, usage has been dropping, particularly among younger Australians, who prefer Instagram and TikTok.

Social networking has become a powerful source of news updates, and a way to influence decision making. Businesses and politicians use social media platforms to sell products and their ideas, while musicians, actors and sportspeople use them to build their personal brands and maintain a high public profile.

However, social media began as – and continues to be – a tool for individuals. Snapchat, a popular video and photo-messaging app, is widely used to share daily experiences with friends and family, and to stay in touch with both loved ones and world events. The messages are intended to be private and are deleted shortly after they are viewed, although external apps can be used by recipients to save messages without the sender knowing. Instagram also allows users to share videos and images, but posts are intended to be shared widely in order to get more 'likes' and all content is displayed on the creator's profile. Followers are able to 'like' photos and videos, and comment and direct-message anyone on their feed. Instagram carries weight because users with a large number of followers can be extremely influential (hence the term 'influencers'). Brands have caught on to the power of these influencers and many Instagram users have made careers out of promoting brands and products through their photos. For example, digital influencer Nicole Warne built a business posting her outfits and promoting her personal blog on Instagram. Her page, Gary Pepper Girl, now has over 1.8 million followers and she is reportedly paid up to $8000 for featuring a product or brand on her Instagram account.

Despite the explosion of different types of social media, Facebook has been one of the dominant platforms, worldwide. An analysis by eBusiness guide eBizMBA found that, as at January 2016, Facebook's estimated number of unique monthly visitors was more than three times that of the next placed site. In Australia, the use of social media has been very popular; in April 2017, Facebook stated that an average of 12 million people accessed it on a daily basis. Facebook remains popular, with a social media study by consulting firm OOSGA showing that in December 2022, an estimated 79.2 per cent of Australians actively use the platform.

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Table 21.1 Top 10 most popular social networking sites in Australia by usage

Social media platform	Estimated unique monthly Australian visitors
1 Facebook	19 000 000[1] (steady)
2 YouTube	18 000 000[2]
3 WhatsApp	12 000 000[3]
4 Instagram	10 000 000[1] (FB/ Instagram data)
5 LinkedIn	6 500 000[1] (approx.)
6 Snapchat	6 400 000[1] (Snapchat data)
7 X, formerly Twitter	6 000 000[1] (approx.)
8 WordPress	5 100 000
9 TikTok	4 200 000
10 Tinder	4 000 000 (approx.)

Statistics compiled by SocialMediaNews.com.au for July 2024. Source: Vivid Social – Social Media Agency. Figures correct as at 1 August 2024.

1 Monthly active Australian users
2 Unique Australian visitors per month
3 Active Australian users

The Facebook story

An American college student, Mark Zuckerberg, founded Facebook with fellow Harvard University students Eduardo Saverin, Andrew McCollum, Dustin Moskovitz and Chris Hughes. It was originally limited in use to only Harvard students, but soon expanded to other colleges in the Boston area. As other university students heard about it, they were also allowed to join. It was eventually opened up to high school students and then to anyone over 13 years of age (which is the minimum user age for most social media platforms). In September 2012, Facebook had over one billion members and over 800 million active users worldwide.

As it grew, Facebook became increasingly **commercialised**. In 2007, Microsoft paid $240 million to acquire a 1.6 per cent share in the company, including the rights to place ads on Facebook. In 2012, Facebook listed on the stock exchange and became a public company. Over the last decade, an increasing number of businesses have started using Facebook to advertise and sell their products.

Social media law

As with many things to do with technology, changes to social media have been occurring at a faster rate than the law has been able to develop to protect users. It is very hard for law-makers to be proactive in many areas of society, but it is especially difficult when it comes to the internet.

For the Australian legal system, where these companies are not based in Australia or owned by Australians, making laws to effectively govern their behaviour is almost impossible, as is enforcing such laws or the outcomes of court cases. Often, Australian law-makers and government bodies have to resort to 'naming and shaming' and calling out bad behaviour in an attempt to pressure these platforms to act in an ethical way.

Privacy issues

One of the biggest areas of concern about social media, and especially Facebook, is how to protect the privacy of users.

Most social media platforms, including Facebook, are operated by companies beholden to shareholders, who expect a return on their investment. This means that the management of these organisations needs to meet owner expectations, which does not always lead to the best ethical or legal practices.

As noted, the fact that Facebook is not an Australian-based business owned by Australians means that making and enforcing laws to cover actions carried out by and on Facebook is very difficult. In addition, the ability of an individual to take **civil action** against an **infringement** of their **privacy rights** is extremely limited in the international arena.

The legislation that is most relevant to social media is that relating to privacy; however, as is the case with most legal action in Australia, it can be costly in terms of time and money for an individual to prove that their privacy has been compromised. It is often even harder to prove this when an intangible entity such as the internet is involved.

commercialise
to have financial gain as the main focus when developing a product or service

civil action
a lawsuit brought by a collective or a large group of people affected by the same crime

infringe
to disregard or violate an agreement

privacy rights
the natural right of individuals to keep their own affairs private

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Review 21.1

1. Define the term 'social media'. Identify four different types of social media.
2. Explain the popularity of social media in Australia and identify which site is the most popular.
3. Discuss the issues involved in social media use.
4. Assess why it is difficult for the law to protect social media users.

Data breaches

In 2018, Facebook experienced two very public data breaches. In March, it was revealed that consulting firm Cambridge Analytica had mined the personal data of over 80 million Facebook users without their consent (see Chapter 8).

e-communication (electronic communication) any transmission of communication using computers or other digital products

This was followed in September by a discovery that unknown hackers had exploited a vulnerability in the system to steal 'access tokens', which would let them take over other people's accounts. Facebook confirmed that the data of at least 50 million users was at risk, with another 40 million potentially affected. Facebook logged all of these people out of their accounts: when they logged in again, this reset the access token and the previous one could no longer be used. Another data breach occurred in April 2021 when the personal data of around 533 million Facebook users was made public on an online forum.

Social media and privacy in the workplace

As technology progresses, more and more employees have access to the internet as part of their job. It is only natural that many will access their social media sites in the course of their workday. Just as in the past, when workers would use the office phone to make a call to family or friends, they now use the office computer or their own phone or tablet to make or get social media updates.

Businesses also love social media, finding it to be an excellent vehicle for promoting their products. These new areas of **e-communication** have provided invaluable channels for information to flow both into and out of the workplace. However, while there are benefits to having an increasingly connected workforce, there are also potentially negative consequences.

Figure 21.2 More and more employees have access to the internet as part of their job and many will access their social media sites in the course of their workday.

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As the boundary between the workplace and personal activities is increasingly blurred, there are concerns that the ability of employers to monitor their staff could become invasive.

Problems arise when businesses are seen to infringe on their workers' rights by accessing the information and messages sent by them through electronic media. Employers may be able to access messages sent by staff to friends and family, and this may affect a manager's opinion about the worker. These actions can constitute an **invasion of privacy**.

What is appropriate professional conduct in and out of the workplace is also complicated in this environment, such as when workers are seen to use social media in a manner that brings their employer's reputation into disrepute. For example, a worker may post a defamatory comment after a bad day at work. Similarly, supervisors may connect with employees on social media and then take exception to comments made or make inappropriate comments themselves. This can damage workplace relationships and affect future employment opportunities.

invasion of privacy
to violate an individual's privacy by intruding into their private affairs

Research 21.1

Investigate one social media site, and then complete the following tasks.

1. Identify the owner of the site.
2. List how many users access the site.
3. Assess how easy it is to join the site.
4. Outline the rules that cover its members.
5. Identify how your privacy is protected.
6. Discuss whether you would join this social media site. Justify your response.

21.2 Legal responses

Federal and state privacy laws

As is the case with many areas of law in Australia, not all federal **privacy legislation** regulates state or territory agencies, except for the Australian Capital Territory. Each state has its own laws for these purposes.

privacy legislation
laws to set, uphold and protect the privacy rights of individuals

In Australia and New South Wales, the following laws cover privacy:

- **Commonwealth:**
  Crimes Act 1914 (Cth)
  National Health Act 1953 (Cth)
  Privacy Act 1988 (Cth)
  Data-matching Program (Assistance and Tax) Act 1990 (Cth)
  Telecommunications Act 1997 (Cth)
  Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
  Healthcare Identifiers Act 2010 (Cth)
- **New South Wales:**
  Telecommunications (Interception and Access) (New South Wales) Act 1987 (NSW)
  Criminal Records Act 1991 (NSW)
  Privacy and Personal Information Protection Act 1998 (NSW)
  State Records Act 1998 (NSW)
  Access to Neighbouring Land Act 2000 (NSW)
  Crimes (Forensic Procedures) Act 2000 (NSW)
  Health Records and Information Privacy Act 2002 (NSW)
  Workplace Surveillance Act 2005 (NSW)
  Surveillance Devices Act 2007 (NSW)
  Government Information (Public Access) Act 2009 (NSW)
  Health Records and Information Privacy Regulation 2017 (NSW).

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extraterritorial application the ability of a government to exercise authority outside its borders

trans-border beyond the border

jurisdiction the powers of a court, depending on its geographic area, the type of matters that can be decided, and the type of remedies that can be sought

Australian privacy law tries to protect Australian users of global social media in two ways:

- giving **extraterritorial application** to the *Privacy Act 1988* (Cth)
- regulating **trans-border** data flow.

Extraterritorial jurisdiction

Extraterritorial **jurisdiction** is where a government can legally exercise authority outside its normal boundaries. In Australia, extraterritorial jurisdiction of the state parliaments is authorised by section 2 of the *Australia Act 1986* (Cth).

The extraterritorial operation of the *Privacy Act 1988* (Cth) (s 5B) is aimed at regulating acts done, or practices engaged in, outside Australia by an organisation seeking personal information about an Australian citizen or permanent resident. It also aims to stop organisations avoiding their obligations under the Act by transferring the handling of personal information to countries with lower privacy protection standards. The Act cannot override the privacy laws of another country. This Act serves as a watchdog, reminding businesses to behave in an ethical way; however, it is yet to be tested in an international court of law.

Trans-border data flows

Embodied within the *Privacy Act 1988* (Cth) are 13 Australian Privacy Principles (APPs). These APPs are the baseline privacy standards for organisations that hold personal information. All private sector health service providers, as well as some other private sector organisations, need to comply with these principles.

Principle 8 covers the sharing of personal information across borders; however, as most of the principles relate to the collection of personal data, it can be argued that they are all applicable, because these days most people share extensive personal details on their social media pages. Businesses can then access this information for the purposes of marketing their products.

Figure 21.3 Most people share extensive personal details on their social media pages, which has allowed businesses to access a great deal of information about individuals for the purposes of marketing products to them.

Legal Links

The website of the Office of the Australian Information Commissioner (OAIC) has a Privacy Law section, which contains details of the *Privacy Act 1988* (Cth) and other relevant legislation.

The OAIC's website provides advice to people about the appropriate use of social media, their rights in regard to this use (and abuse) and actions to take in dealing with issues. There is an underlying message that caution and common sense should be used.

However, once again, these legal instruments only serve as a deterrent, and they only apply to businesses that operate in Australia. They have not yet been tested in an Australian or international court.

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Review 21.2

1 Australian federal and state privacy laws cover many areas. Identify the laws that are relevant to social media.
2 Outline which areas of privacy are covered by laws in all Australian states and territories. Assess if it would be more relevant to just have federal laws. Justify your answer.
3 Describe how the Australian Government has tried to make the *Privacy Act 1988* (Cth) relevant to social media use. Assess the practicalities of this.

Research 21.2

1 View the website of the Office of the Australian Information Commissioner (OAIC). Outline the responsibilities of the OAIC. Discuss how easy it is to make a privacy complaint.
2 Investigate two privacy laws and then complete the following tasks:
   a Outline the actions covered by these laws.
   b Identify what penalties are incurred for disobeying these laws.
   c Identify if there are any reported prosecutions under these laws. If there are, write a brief summary of one case.

Workplace social media policies

Business owners and managers can ban their staff from using social media at work, but if the business is using platforms such as Facebook, YouTube or Instagram to promote products such a ban could be controversial with staff. Just as with all other areas of law, a proactive approach to employee use of social media is the best policy. Most human resource experts agree that having a workplace policy on social media is the most appropriate way to handle this issue.

SmartCompany, an online business website based in Melbourne, reported that a 2012 survey carried out by Hays Personnel showed that workers wanted access to social media while at work. Of 840 workers surveyed, 19.7 per cent said they would turn down a job if told that 'reasonable access' to social media was not allowed.

Of the businesses surveyed, 44 per cent stated that they felt allowing access to social media promoted staff satisfaction and thus retention.

The report stated that the workplace policy needs to 'not only detail how social media can be used during work hours, and if it will be monitored, but if employees can use their work emails for social media accounts and how complaints about the company should be handled'. A solid policy, containing appropriate grievance procedures and an adequate training program, should be able to resolve many social media usage problems in the workplace.

While this survey is now quite old, there is nothing to suggest that workers have changed their habits. The shift towards work-from-home arrangements that accompanied the response to the COVID-19 pandemic means that many employees now enjoy greater freedom to use social media during their workday, without the scrutiny of their employer. It can be argued that, when working within their own homes, employees have the right to access social media should they choose. This is an area that employers and employees will need to navigate, ensuring that any policy implemented instils correct workplace practices (no matter where the work takes place). This includes reminding employees about the legal consequences of using social media for harmful practices such as harassment and bullying.

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Figure 21.4 With the increased number of employees working from home, it is important to be aware of the consequences of using social media for harmful practices such as harassment and bullying.

This is especially needed now in light of employee complaints about bullying and harassment by work colleagues on social media. The Fair Work Commission has adjudicated on several such matters within the commission's anti-bullying jurisdiction, which began on 1 January 2014. This allows a person who believes they have been bullied or harassed at work to apply for an order to stop the behaviour. Interestingly, the posts do not need to have been made during work hours or at the workplace to be considered workplace bullying.

Another issue of concern to employers is that, where an individual's social media profile includes the name of their employer, their online behaviour and the personal values this demonstrates may reflect back on the employer.

This is also something that could be included in the company social media policy, for example by asking employees not to include their place of work on social media profiles.

In Court

***Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444**

In this case, a disgruntled employee had vented his anger at his supervisors on his Facebook page. Unfortunately, some of his colleagues who were his Facebook friends were not happy with these comments and reported him to their employer. His employer argued that the employee's use of derogatory terms was discriminatory and brought the business into disrepute and so dismissed him.

The worker took the case to Fair Work Australia (FWA) and was successful in his complaint of unfair dismissal. FWA upheld the employee's complaint because, among other reasons, the company did not have a social media policy. Thus, the company's employees had no guidelines to follow in regard to their use of social media, especially when discussing issues related to the company using this platform.

Another relevant case is *Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311.

Case Study

NSW Police Force policy

The NSW Police Force has taken a strong approach to the use of social media by its employees, as shown by its 'Personal Use of Social Media Policy and Guidelines' and 'Official Use of Social Media Policy' documents (both of which are publicly available online). The NSW Police Force does not ban employees from using social media but it does set out what they can and cannot comment on. The NSW Police Force has realised that social media can play a vital part in carrying out police work.

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Media

Israel Folau's rugby union contract terminated as punishment for players' code of conduct breach

Shaun Giles and staff

ABC News

17 May 2019

Israel Folau's Australian rugby union career appears over, after a three-person panel ordered that the Wallabies star's four-year contract be terminated as punishment for his breach of the players' code of conduct.

The panel, which this month ruled that Folau was guilty of a 'high-level breach' of the players' code over his controversial Instagram posts, including one proclaiming hell awaits 'drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters', decided to rip up the 30-year-old's four-year, $4 million contract.

Rugby Australia chief executive Raelene Castle said the decision had not been directly communicated to Folau.

'Rugby Australia did not choose to be in this situation, but Rugby Australia's position remains that Israel, through his actions, left us with no choice but to pursue the course of action resulting in today's outcome,' Castle said.

'People need to feel safe and welcomed in the game, regardless of their race, background or sexuality.'

Castle confirmed Folau has 72 hours to appeal the decision, but would not comment on reports he plans to take the case to the Supreme Court.

She said the Wallabies star knew his social media posts would have wider implications 'when he pressed that button'.

'This is a decision that will change the landscape for sport across Australia and perhaps internationally', she said.

'It will be landmark, it will be important, and it is a big decision.'

'He is a very important player in our game and he has been for a long period of time and we wanted to make sure we took the time to get it right.'

Analysis 21.1

Read the above media article.

Explain why the Rugby Union panel terminated Israel Folau's contract.

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Review 21.3

1 Discuss the issues associated with employees using social media in their workplaces.
2 Explain why it is important that a company/organisation has a social media policy. Identify some key components you believe should be in such a policy. What needs to be included to keep up with changing work conditions?
3 Many sporting codes have put social media policies in place to stop their players from making outrageous comments on social media sites. Investigate the social media policy of one sporting code (such as Rugby League) and write a summary of its main points.

21.3 Non-legal responses

Electronic Frontier Foundation

The Electronic Frontier Foundation (EFF) is a non-profit organisation that was established in the United States in 1990, initially to protect freedom of speech. However, with the growth of the internet, it has moved into the protection of privacy. It runs campaigns to educate users on how to protect themselves when using the internet, including social media. EFF also 'names and shames' businesses that are seen to use the internet inappropriately to gain information about users.

Figure 21.5 The Electronic Frontier Foundation has a focus on protecting privacy, free expression and innovation.

Research 21.3

View the website of the Electronic Frontier Foundation and complete the following tasks.

1 Outline the activities carried out by the Electronic Frontier Foundation.
2 Go to the 'Our work' section of the site and view their legal cases. Choose a case and describe why it was nominated.

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21.4 Effectiveness of responses

Taking legal action in Australia against Facebook is very difficult and so, as with much consumer law, it is a case of 'let the buyer beware' when it comes to protecting individual rights.

There have only been a few cases of legal action being taken in other countries against Facebook, and they have had little success. However, where legal action has been threatened, the owners of Facebook have responded by fixing the source of the complaint.

In 2011, the US Federal Trade Commission investigated privacy complaints against Facebook. It found Facebook to be seriously lacking in this area – there were eight serious complaints – and demanded that the problems be remedied. Although it did not fine the owners of Facebook, it noted that any future violations of the terms of the settlement would see Facebook liable for a penalty of $16 000 per day for each count.

Figure 21.6 Laws regarding the surveillance of employees in Australia are quite patchy, but all employers and employees should be aware of their organisation's social media policy.

Employer–employee privacy

The law regarding the surveillance of employees in Australia is quite patchy, but in New South Wales and the Australian Capital Territory there is legislation that regulates the surveillance of workers. Under the *Workplace Surveillance Act 2005* (NSW), before an employer undertakes any surveillance of workers, it must provide at least 14 days' notice, with specific details about what type of surveillance is to be carried out. The legislation has some specific requirements relating to recording visual images of employees: this can only be done while the employee is 'at work', with the 'workplace' being broadly defined to capture any place in which work is carried out.

An employer is not allowed to undertake any covert surveillance without a court order, which can only happen in cases where the employee is suspected of unlawful activity. The court will not grant a covert surveillance order if it believes that it will unduly intrude on the employee's privacy. The legislation specifically prohibits covert surveillance being used to monitor work performance.

Thus, employers can legally monitor their employee's use of social media while at work but would have to consider the effect on workplace culture and employee–employer relations if carrying out this action.

It is difficult to garner accurate numbers on worker use of social media during work hours as many employees will not admit to using it, and if they do use it, many will use their own devices. However, a Google search of 'social media in the workplace' indicates that more and more organisations are implementing policies in this area. In order to have harmonious workplace relations, it is essential that workplaces have a social media policy and employees are made aware of this policy as part of their workplace induction.

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Figure 21.7 In 2011, Austrian law student Max Schrems took Facebook to task over its privacy policy. The 24-year-old requested Facebook provide him with a record of the personal data that they hold on him. He received 1222 pages of information.

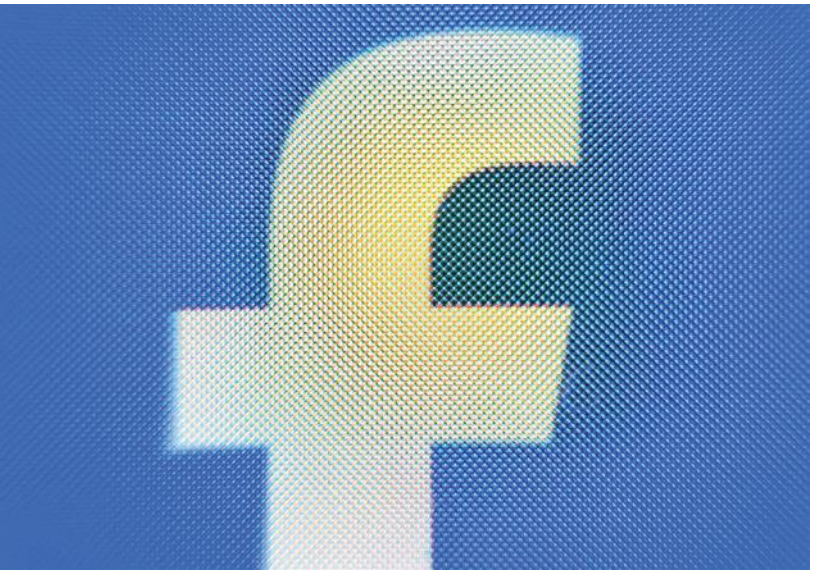

Figure 21.8 Facebook has been criticised for its privacy breaches.

Personal privacy

Sale of data

It is important to be aware that online, every conversation, every photo uploaded, every item shared and even every web search goes into a **database**.

database
the place or program where collected data is organised and stored

Businesses will pay for this data, and sites such as Google and Facebook make money by giving advertisers access to their enormous databases. With this information, advertisers can target people making certain searches or discussing certain topics. Facebook has been globally criticised for the fact that its settings allow access to personal information and thus invasion of privacy.

However, legal authorities are getting tougher with social media platforms such as Facebook. In July 2023, the Australian Federal Court ordered Facebook owner Meta to pay fines totalling A$20 million for failing to tell users of its free security app that it was collecting and sharing user data. Following court action taken by the Australian Competition and Consumer Commission, Meta subsidiaries Facebook Israel and Onavo Inc. were each ordered to pay A$10 million for engaging in conduct liable to mislead, in breach of Australian Consumer Law.

Risks to young people

It is important for parents and caregivers to be aware of the dangers that can arise for young people, in particular, when using social media. Young people's nonchalance about posting information about their everyday activities on Facebook makes them especially vulnerable to being targeted by businesses, stalkers, cyberbullies and identity thieves. However, if appropriately supervised, young people can safely have a social media presence.

Use of images

In recent times, high profile people have taken action against their images being used by advertisers to make unfounded claims on Facebook. For example, in 2022 Australian businessman

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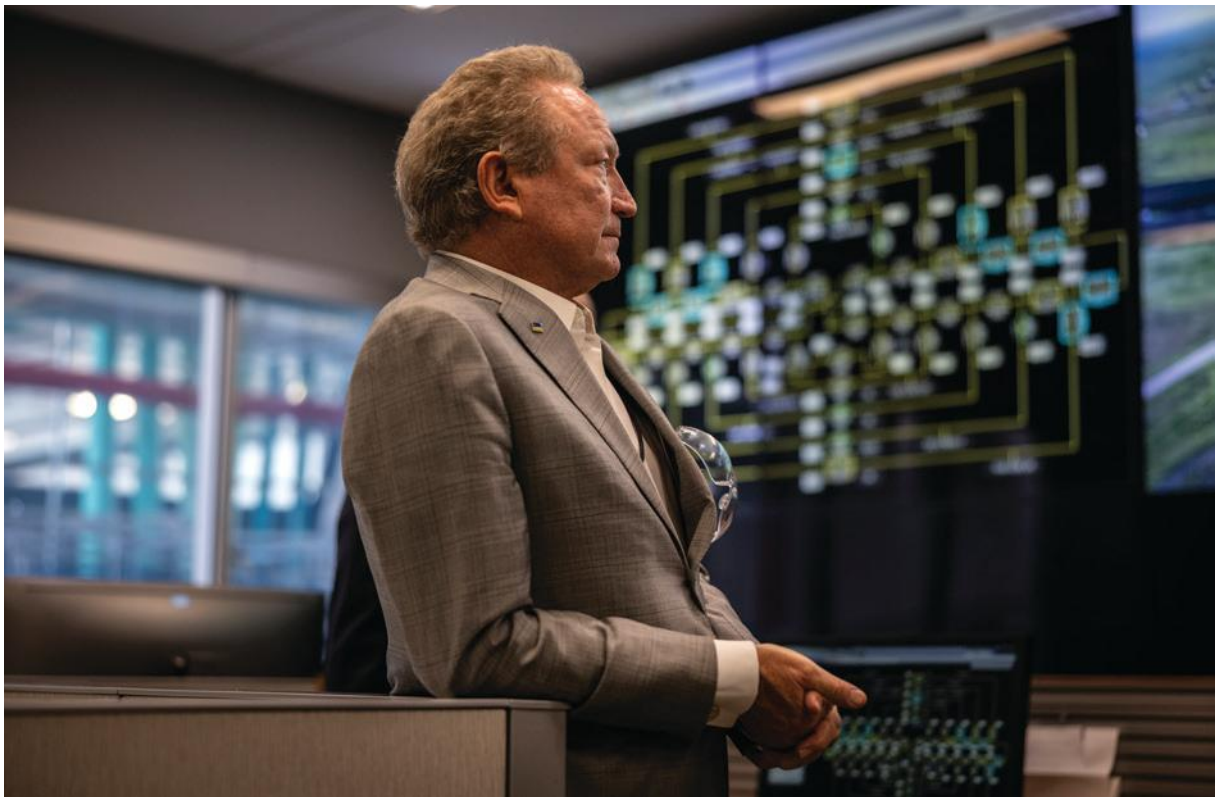

Figure 21.9 Mining billionaire Dr Andrew Forrest sued Facebook over false advertisements bearing his likeness.

Dr Andrew Forrest launched both criminal and civil court proceedings in Australia and the United States to take Meta (the owners of Facebook) to task over advertisements bearing his likeness that contained deceitful information. These advertisements had been created by scammers to swindle users of their cash.

Individual responsibility

Users of Facebook and other social media must remember the Latin expression ***caveat emptor***. Consumers must use common sense if they do not want businesses and other groups that use information gathered via social media to be able to market to them. Part of this involves users of social media making sure their privacy settings are high, so that only those they want to see their information can access it. Alternatively, they could take a deep breath and not post the information at all, because if it is not on Facebook, no one can use Facebook to find it.

Following the Cambridge Analytica scandal in March 2018, the hashtag #DeleteFacebook started trending on X, and users around the world made the decision to completely shut down their accounts. This included a number of public figures, including Elon Musk, Cher and Brian Acton (founder of WhatsApp, which had been acquired by Facebook in 2014). Websites began giving step-by-step instructions on how to completely close a Facebook account (as distinct from deactivating it), as this is not a straightforward process.

caveat emptor
(Latin) 'buyer beware'; buyers are responsible for their actions

Review 21.4

1. Define *caveat emptor*. Explain why this term is important for users of social media.
2. Describe all the ways that an individual can place themselves at risk by using social media sites such as Facebook.
3. Construct a list of five important personal rules for someone using Facebook.

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Chapter summary

- The use of social media is growing, with Facebook being the most popular site.
- Because of the fast rate of change in the area of social media, and the international nature of the internet, it is difficult to create and enforce laws related to its use.
- Privacy laws go some way to protecting users of social media.
- The use of social media in the workplace has created new problems that need to be addressed by workplace policies.
- Consumer awareness provides the best protection for those using social media.

Multiple-choice questions

1 Which social media platform is the most dominant, both in Australia and worldwide?
- **a** TikTok.
- **b** Facebook.
- **c** X (formerly Twitter).
- **d** Instagram.

2 Why is it difficult for Australia to make and enforce laws capable of regulating social media companies?
- **a** The owners of the social media companies tend to be based in Australia.
- **b** Technology moves too slowly.
- **c** Most social media companies are not based in Australia or owned by Australians
- **d** The internet is highly regulated.

3 How has the Australian Government tried to deal with the international dimension of privacy and social media?
- **a** They gave the *Privacy Act 1988* (Cth) extraterritorial application and regulate trans-border data flow.
- **b** They signed an agreement with the United Nations and gave the *Privacy Act 1988* (Cth) extraterritorial application.
- **c** They signed an agreement with the United Nations and regulate trans-border data flow.
- **d** They have made all international businesses sign an agreement that they will do the right thing.

4 What do most human resource experts agree is the most appropriate way to manage employee use of social media?
- **a** Ban staff from using social media at work.
- **b** Encourage staff to use social media to promote the business.
- **c** Allow staff to use social media on lunch and other breaks.
- **d** Have a workplace policy on the use of social media.

5 What event prompted the hashtag #DeleteFacebook to start trending in 2018?
- **a** The news that Cambridge Analytica had mined the data of Facebook users.
- **b** The acquisition of WhatsApp by Facebook.
- **c** Action by high profile people against their images being used by advertisers on Facebook.
- **d** Facebook's failure to advise users of its free security app that it was collecting and sharing their data.

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Short-answer questions

1 Identify the domestic and international protection that is provided for Australians in relation to social media privacy.
2 Discuss as a class why there are issues with social media in the workplace.
3 List other sectors where social media and privacy could be an issue.
4 Define the term *caveat emptor*.
5 Discuss the way *caveat emptor* allows social media networks to deny or refuse any responsibility concerning the distribution of their users' personal details.
6 Assess why the use of social media and workplace privacy is likely to be a growing area of conflict between employees and their employers.
7 Discuss why making and enforcing laws to cover actions carried out by and on Facebook is very difficult.

Extended-response question

'"Let the buyer beware" is the best form of legal redress for social media users.' Discuss this statement with reference to the responsibility of the law in relation to social media and privacy issues.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Issue 4

Criminal or civil cases that raise issues of interest to students

Chapter 22

Drugs and the law

Chapter objectives

In this chapter, you will undertake a research task in which you will develop and investigate a research question related to an aspect of drugs and the law. In the process of completing the research task, you will:

- explore the legal concepts and terminology relating to drugs and the law
- investigate the legal system's ability to address issues relating to the aspect of drugs and the law you are researching
- investigate the role of the law in addressing and responding to changes in relation to the aspect of drugs and the law you are researching
- describe the legal and non-legal responses to the aspect of drugs and the law you are researching
- evaluate the effectiveness of legal and non-legal responses to the aspect of drugs and the law you are researching.

Formative assessment: Assessment for learning

This chapter has a 'formative assessment' focus to provide you with an opportunity to develop your skills in assessing and evaluating the legal issues inherent in the regulation of drugs in Australia. It provides a brief overview of the nature of drugs, how they are regulated and some of the issues that emerge from this. Sample research-based questions are provided at the end of the chapter to allow you to further research, critically analyse and communicate the effectiveness of the law in providing justice through legal and non-legal measures. Allowing you to construct your own research questions provides a further opportunity to think more deeply about a topic or issue and the challenges that may present in providing a response that balances the interests and rights of individuals against those of the community.

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Relevant law

IMPORTANT LEGISLATION

Drug Misuse and Trafficking Act 1985 (NSW)
Poisons and Therapeutic Goods Act 1996 (Cth)
Customs Act 1901 (Cth)
Customs Act and the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth) (CTNDPS Act)
Confiscation of Proceeds of Crime Act 1989 (NSW)

SIGNIFICANT CASES

R v Fillipetti (1984) 13 A Crim R 335
Ridgeway v The Queen (1995) 184 CLR 19
R v Chan [1999] NSWCCA 103
R v Solway (1984) 11 A Crim R 449
Zahrooni v R [2010] NSWCCA 252 at [60]

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22.1 Drug use in Australia

The use of drugs has been commonplace throughout history, across cultures, age groups and social status levels. These drugs were initially restricted to those found in the natural world and propagated for their medicinal effects. However, now, drugs can be found as solutions, powders and extracts, in tablet form and as injectable liquids. There has also been an exponential rise in the number of synthesised chemicals created for their properties as drugs. The motivations for using these drugs have been as varied as the drugs themselves.

Since the beginning of recorded history, there is evidence that people have sought ways to alter how they think, feel and behave. Alcohol was in use in Ancient Egypt as far back as 3500 BCE, while people in ancient China used cannabis (the source of marijuana) from around 3000 BCE. Opium was also used in many ancient civilisations (Roman) and in medieval times across modern-day Europe. Opium alone was known for its analgesic (pain relief), antitussive (cough suppressant) and soporific (to induce sleep) properties.

Drugs in Australia are predominantly regulated as follows:

- Medicines are controlled through the Australian Register of Therapeutic Goods. The Therapeutic Goods Administration (TGA) is responsible for approving new drugs for use in Australia. The rules around this vary according to the safety of the ingredients in the drug. The TGA gives approval for drugs to be used with or without a prescription and identifies substances that should be prohibited.
- The criminal code at the federal and state levels identifies and regulates a number of prohibited substances and offences, including drug possession, use, supply and production.
- Legally available drugs, such as alcohol and nicotine, although available for use in Australia, are regulated in regard to access and use.

The extent to which the law regulates and prohibits drugs within a society is reflective of

Figure 22.1 Opium has been used as a drug for centuries across continents.

the cultural values and beliefs surrounding each drug at the time, the pharmacological evidence for the short- and long-term effects of the drug, and the likely impact on individuals and society. For example, alcohol has well-documented, long-term health implications, as well as impacts on the community, such as a significant correlation with incidences of domestic violence and car fatalities, yet it is legal to access and use in Australia. Likewise, the health impact of nicotine is serious enough that it raises questions as to why nicotine is legal, yet certain prohibited drugs, such as cannabis, are not. These examples illustrate the challenges faced by law-makers to find a balance between determining which drugs should be outlawed and which drugs should be available within guidelines to safeguard individuals and the community.

The effectiveness and on going costs of enforcing drug laws is constantly being questioned in the media, including by experts such as the National Drug and Alcohol Research Centre. Prohibiting some substances provides the conditions for a black market and enhanced profit margins for supplying and selling these substances, which attracts criminal elements. Criminalising certain substances also has significant implications for individuals, particularly recreational drug users, who may end up with a criminal record.

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Table 22.1 National Drug Strategy Household Survey reports, 2001–2019

Proportion of recent illicit drug use, alcohol use, tobacco use, people aged 14 and over (per cent)							
Drug use	2001	2004	2007	2010	2013	2016	2019
Tobacco – current smokers	23.2	20.7	19.4	18.1	15.8	14.9	14.0
Alcohol – recent use	83.6	84.3	82.9	80.3	79.1	77.7	76.6
Illicit drugs (excluding pharmaceuticals)							
Cannabis	12.9	11.3	9.1	10.3	10.2	10.4	11.6#
Ecstasy	2.9	3.4	3.5	3.0	2.5	2.2	3.0#
Methamphetamines	3.4	3.2	2.3	2.1	2.1	1.4	1.3
Cocaine	1.3	1.0	1.6	2.1	2.1	2.5	4.2#
Hallucinogens	1.1	0.7	0.6	1.4	1.3	1.0	1.6#
Inhalants	0.4	0.4	0.4	0.6	0.8	1.0	1.4#
Heroin	0.2	0.2	0.2	0.2	0.1	0.2	*<0.1
Ketamine	n.a.	0.3	0.2	0.2	0.3	0.4	0.9#
GHB	n.a.	0.1	*0.1	0.1	*<0.1	*0.1	*0.1
Injectable drugs	0.6	0.4	0.5	0.4	0.3	0.3	0.3
Any illicit excluding pharmaceuticals	14.2	12.6	10.9	12.0	12.0	12.6	14.1#
Pharmaceuticals							
Pain-killers/analgesics	n.a.	n.a.	n.a.	n.a.	n.a.	3.6	2.7#
Tranquillisers/sleeping pills	1.1	1.0	1.4	1.5	1.6	1.6	1.8
Steroids	0.2	*<0.1	*0.1	0.1	*0.1	*0.1	0.2
Methadone or buprenorphine	0.1	*<0.1	*<0.1	0.2	0.2	0.1	0.1

* Estimate has a relative standard error of 25% to 50% and should be used with caution.
# Statistically significant change between 2016 and 2019.
Source: Australian Institute of Health and Welfare, National Drug Strategy Household Survey 2019

Governments make decisions influenced by public sentiment, the evidence available at the time and the potential harm to the community in determining the illegality of particular drugs and the extent of the resources allocated to enforce related laws. As such, some sections of the community call for tougher approaches to illegal drug use, while others argue that the evidence for prohibiting some drugs does not make sense and that a harm-minimisation or decriminalisation approach would be more effective and a better use of government resources.

The penalties for drug crimes vary considerably between jurisdictions. In Indonesia, the death penalty can be imposed (see Chapter 14), while in Australia, imprisonment is the heaviest sentence available. The law continues to evolve as new evidence, either pharmacological or in terms of social impact, informs and shapes public morality regarding certain drugs and influences the criminal justice system and the TGA.

There are also many non-legal approaches to responding to the issue of drugs in society. Harm-minimisation is one such approach. A number of harm-minimisation initiatives have been trialled over the last 20 years with the aim of reducing the impact of drugs on individuals and the community. Results of these initiatives have been mixed, but some harm-minimisation strategies, such as safe injecting rooms, have subsequently been enshrined in legislation.

At times, governments in Australia get locked into a law-and-order contest with other political parties that generally impedes more evidenced-based approaches to the regulation of drugs. It can be argued that a harsher, more punitive approach to drug use, particularly to illegal drug use, fails to recognise the broader social impacts in the community. There are also disagreements about the efficacy of resources utilised to reduce or limit drug use.

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What is a drug?

According to the World Health Organization, drugs are 'substances that, when taken in or administered into one's system, affect mental processes, e.g., perception, consciousness, cognition or mood and emotions'. The WHO also states that 'drugs can affect how the brain and the rest of the body work and cause changes in mood, awareness, thoughts, feelings, or behaviour'.

The Australian Government Department of Health and Aged Care defines drugs as 'substances that change a person's mental or physical state. They can affect the way your brain works, how you feel and behave, your understanding and your senses'.

How are drugs classified?

The regulation of drugs is determined by whether they are classified as being legal drugs or illegal drugs.

Legal drugs

Legal drugs include drugs such as alcohol, caffeine and nicotine. They also include over-the-counter drugs and drugs prescribed by your doctor. There are restrictions on legal drugs in Australia such as:

- **age limitations** – such as buying and selling alcohol and cigarettes
- **how legal drugs are sold** – including health warnings and alcohol content
- **where a person can use legal drugs** – such as designated smoking areas in pubs and clubs, no smoking on planes or in restaurants
- **driving limitations** – such as limits on blood alcohol concentration and drug use.

Illegal drugs

Drugs are deemed illegal because using them is considered dangerous to your health, your life or the life of another. Using or supplying heroin, for example, is considered dangerous as the purity is unregulated and puts people at risk of overdosing and dying. Examples of illegal drugs include cannabis (marijuana), heroin, amphetamines and ecstasy (MDMA). There can be variants of these types of drugs, particularly with the manufacture of synthetic drugs in illegal laboratories.

Illicit drug use

Illicit drug use includes the use of illegal drugs, inappropriate use of other substances such as sniffing petrol or glue, and the misuse or non-prescribed use of prescription drugs (also called pharmaceuticals), such as selling drugs prescribed to you to other people.

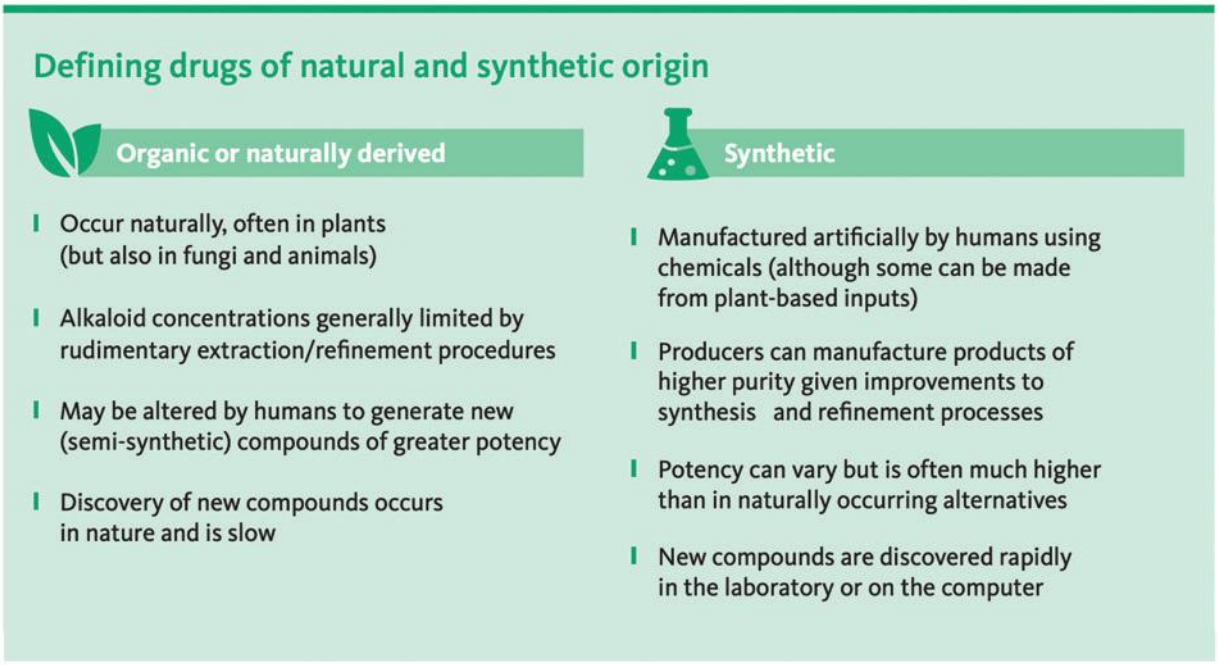

Figure 22.2 Natural and synthetic drugs
Source: United Nations Office on Drugs and Crime

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Regulation of drugs in Australia

Legislative framework

The regulation of drugs within Australia can be viewed through the legislative framework that exists within each state and territory and nationally across the country.

Drug Misuse and Trafficking Act 1985 (NSW)

The *Drug Misuse and Trafficking Act 1985* (NSW) is the main piece of legislation in New South Wales for classifying the extensive range of drugs that are considered 'prohibited drugs'. This includes prohibited plants such as cannabis, opium and coca (the plant from which cocaine is derived). The drugs prohibited by the Act are listed in the schedule, which makes clear the extent of these drugs.

The Act also creates and outlines the range of offences, which depend on the type of activity undertaken and the quantity of drugs involved. It also provides for four main types of offences stemming from activities related to illegal drugs, which are:

- **use** – such as smoking, inhaling, injecting and swallowing
- **possession** – the possession of illegal drugs (usually defined by quantity) or the possession of legal drugs that a person is not allowed to possess, such as a prescription drug that you do not have a prescription for
- **cultivation and manufacture** – taking part in any growing or cultivation of a drug such as cannabis (marijuana); according to Youth Law Australia, this can include planting the seeds, watering the plants, shading them from the sun and picking the leaves
- **trafficking** – selling or giving away drugs or agreeing to do so even if you have not carried out the act.

These offences include synthetic drugs, which are also criminalised under the *Poisons and Therapeutic Goods Act 1996* (Cth).

Some relevant legal cases are:

- *R v Fillipetti* (1984) 13 A Crim R 335 (Possession)
- *Ridgeway v The Queen* (1995) 184 CLR 19 (Entrapment)
- *R v Chan* [1999] NSWCCA 103 (Supply)
- *R v Solway* (1984) 11 A Crim R 449 (Possession).

Commonwealth Criminal Code

The Commonwealth Criminal Code primarily concerns itself with drug offences involving the importation and exportation of illegal drugs. The two main pieces of Commonwealth Legislation that relate to these offences are:

- *Customs Act 1901* (Cth)
- *Customs Act and the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) (CTNDPS Act).

Poisons and Therapeutic Goods Act 1996 (Cth)

The *Poisons and Therapeutic Goods Act 1996* (Cth) regulates therapeutic goods to ensure they are of high quality, safe to use and work as intended. The TGA is the Australian regulatory authority for therapeutic goods, including medicines (both prescription and non-prescription) and medical devices (ranging from simple items such as gloves, masks and bandages through to complex machinery such as X-ray machines). Section 16 of the Act provides offences relating to prescribed restricted substances. It is under this Act, for example, that the prescription of medicinal cannabis and psychedelics is allowed, with certain restrictions.

Continuum

Another way to view the regulation of drugs in Australia is through a continuum that ranges from full prohibition to legalisation. Such a range recognises that the seriousness of the offence and the extent of the harm that the behaviour may cause the community varies. For example, as of 2023, simple possession of cannabis is dealt with by an on-the-spot fine, as opposed to having to attend the local court. This change will save the court's time and resources and remove the impact that a recorded conviction may have on a person's reputation and future employment.

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In a 2016 article in The Conversation, academics Nicole Lee and Alison Rutter outlined a continuum of four different legal frameworks for the use and supply of drugs:

Full prohibition: drug use, possession and supply are criminal offences and result in a criminal record and sometimes prison sentence

Depenalisation: drug use and possession are still criminal offences but with lighter penalties (referral for assessment, education and/or treatment); drug supply remains a criminal offence

Decriminalisation: the removal of criminal penalties for drug use or possession. Illicit drugs remain illegal but criminal penalties are replaced with civil penalties (such as fines). People who use or possess drugs can still be charged, especially if they do not comply with paying the fine or attending the assessment. Drug supply remains a criminal offence

Legalisation: use of a drug is legal as is drug supply.

Nicole Lee and Alison Ritter, 2016, 'Australia's recreational drug policies aren't working, so what are the options for reform?', *The Conversation*, 2 March.

Harm minimisation

Apart from a legislative and predominantly criminal approach to minimising and negating the impact of drugs in Australian society, there have long been calls for a harm-minimisation approach to reducing the impact that drug use has on individuals and the community.

Harm minimisation is an approach that focuses on strategies to reduce harm to the individual and society that are associated with the use of alcohol and other drugs. The International Harm Reduction Association defines harm minimisation as 'the policies, programmes and practices that aim to reduce the harms associated with the use of psychoactive drugs in people unable or unwilling to stop. This focuses on the prevention of harm, rather than on the prevention of drug use itself and focuses on people who continue to use drugs.'

Examples of Harm Minimisation

Harm reduction strategies can include:

- Not driving if you plan on drinking alcohol or using drugs.
- Using plastic cups to serve alcohol.
- Switching from high alcohol content drinks to low alcohol content drinks.
- Staying away from waterways and beaches if you plan on drinking alcohol, to reduce the risk of drowning.
- Creating supervised settings for people who inject drugs, so they can be revived if they overdose or receive information about local treatment options, including referral. Injecting rooms are an example of this.
- Distributing sterile injecting equipment to reduce the spread of blood-borne viruses like HIV and Hepatitis C.
- Consuming nicotine in the form of gum and patches instead of smoking cigarettes.
- Making sure you know where to get help before you consume drugs, in case something goes wrong.
- Ensuring you know what drugs you're taking and whether the combination of drugs you're planning to use could be dangerous.
- Avoiding drugs that might interact with other medications prescribed by your doctor. A large number of fatal overdoses are caused by people taking a combination of prescription and non-prescription drugs

NSW Health – Alcohol and other drugs

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Figure 22.3 A balanced approach across the three pillars of harm minimisation

The *National Drug Strategic Framework 2017–2026* takes a preventative and harm-minimisation approach to building 'safe, healthy and resilient Australian communities through preventing and minimising alcohol, tobacco and other drug related health, social and economic harms among individuals, families and communities'. It advocates a balanced approach using what it identifies as the 'three pillars of harm minimisation', as outlined in Figure 22.3.

Drug testing

Many drugs, both legal and illicit, can alter perception, emotion, judgement or behaviour and as a result can interfere with the way a person carries out tasks such as playing sport, driving a car or completing work duties. Driving a car under the influence of alcohol or operating heavy machinery under the influence of cannabis, for example, can endanger both the person and others. This is one of the reasons that law enforcement agencies, employers and others have begun to test individuals for the presence of drugs in particular circumstances, in order to deter or penalise their use.

The drugs for which people may be tested include legal drugs such as alcohol, prescription drugs and over-the-counter pharmacy drugs, and illegal drugs such as cannabis, cocaine, amphetamines and heroin. Some examples include:

- law enforcement testing for the presence of alcohol or drugs following a motor vehicle accident
- Sport Integrity Australia, Australia's national anti-doping organisation, testing elite athletes for the presence of performance-enhancing drugs
- employers testing employees for the presence of alcohol or other drugs that may affect the health and safety of the workplace
- schools testing students for the presence of illegal drugs.

The decision on what tests are carried out will depend on the reason for the testing, any practical limitations of the equipment being used and the costs involved in doing the tests. The methods used have varying levels of accuracy and intrusiveness.

They include:

- surveys or questionnaires
- interviews or clinical observation
- assessment of a person's clothes or belongings, using sniffer dogs or scanning equipment
- testing of body tissue (skin, hair or nails)
- testing of bodily fluids (breath, saliva, blood, urine or sweat).

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Technological advances in drug-testing methods now enable more accurate results than in the past.

The legal implications of testing will depend on the method used and the reasons that justify the testing. This can touch on areas of both criminal and civil law, which raises issues of consent, necessity, privacy and broader social policy. Through the court system, trade unions have been challenging the rights of employers to test workers. In August 2012, a full bench decision by Fair Work Australia deemed that Endeavour Energy could not urine test its employees as this was 'unjust and unreasonable'; only oral swab testing was allowed. This decision was a blow to organisations that had wanted to use urine testing as part of workplace health and safety frameworks.

Review 22.1

Look at Table 22.1 and complete the following tasks.

1. Describe the general trends shown in the survey.
2. Which drugs have shown a consistent decline? Why do you think this has occurred?
3. Which drug category has shown a rise in use? Why do you think this has occurred?

22.2 Legal responses

The Drug Court of NSW

The Drug Court of NSW is a specialist court that supervises community-based rehabilitation of offenders who are dependent on drugs, as part of what is often referred to as the 'Drug Court program'. Not all drug-dependent offenders will be eligible for the program. The aim is to keep people out of the prison system. The Drug Court program takes a more holistic approach as appropriate to drug offending by working together with community health. The aim is to reduce offending and drug dependency and reintegrate offenders back into the community. There are four Drug Courts in NSW and evidence to date suggests that these courts have been more effective than the traditional methods used to punish drug offenders.

Participants of the program must remain drug free and crime free and report to the court approximately twice per week. For more information go the NSW Drug Court fact sheet.

Confiscation of the proceeds of crime

Dealing with property suspected of being the proceeds of crime can be found under section 193(C) of the *Crimes Act 1900* (NSW). However, due to the complexity and sophistication at the time of the criminal behaviour and the people involved, the NSW Government introduced the *Confiscation of Proceeds of Crime Act 1989* (NSW). This Act allows the proceeds of crime, such as cash, property, other assets or benefits gained through criminal activity, to be confiscated. The confiscation order does not require a criminal conviction to have been made, or even for a suspect to have been identified. The main aim is to remove the financial gain associated with crime.

The NSW Court of Criminal Appeal considered the nature and elements of the offence in *Zahrooni v R* [2010] NSWCCA 252 at [60], where the judges stated that the 'primary purpose of the Act is to make crime unrewarding and unproductive'. Explore the provisions of the Act further at https://cambridge.edu.au/redirect/10782.

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22.3 Non-legal responses

There is a range of non-legal responses to enhance the effectiveness of the response to the issue of drug use in Australia. Non-government organisations conduct research and advocate to reform the law where they believe better outcomes can be achieved. They also, along with the media, play an important educative role to inform the public where the law is not working or where injustices are occurring. Another key role played by these organisations is to provide support for people seeking to get off drugs or avoid becoming entangled with the legal system.

Examples of non-government organisations include:
- The Network of Alcohol and other Drugs Agencies (NADA)
- Alcohol and Drug Foundation
- National Drug and Alcohol Research Centre
- Family Drug Support
- Drug Policy Australia.

Figure 22.4 There are a range of non-legal responses to the issue of drugs in Australia

22.4 Independent or depth study

You are to undertake a research project, either independently or collaboratively in a small group, on an aspect of drugs and the law that interests you.

You will need to complete the following:
- Develop a research question that is both meaningful and achievable.
- Consider your research method: depending on your question it may be appropriate to focus on documentation (legislation, policies, case law, media reports), or you may wish to undertake surveys or interviews of relevant parties.

Figure 22.5 Now it's time for you to conduct your own study!

- If you are working collaboratively, ensure each member of the group has a clearly defined role.
- Synthesise your findings to support a legal argument, evaluating the effectiveness of the legal and non-legal responses to the issue. Possible criteria you could use to measure the effectiveness include:
  - efficiency in use of resources
  - level of accessibility
  - ease of enforceability
  - whether individual rights are protected
  - whether the needs of society are met
  - whether it is an appropriate application of the rule of law
  - whether justice is being achieved.

Come to an agreement with your teacher on the form of your final presentation: it may be an essay, a report, a speech, a video or other format. Your response should incorporate the themes and challenges the syllabus lists for the Law in Practice topic.

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Sample research-based questions

The following are examples of research-based questions. You may use one of these or develop your own question that allows you to research an area of particular interest.

1 Assess the impact of drugs in Australian society and evaluate the effectiveness of legal and non-legal responses to the regulation of drugs in the community.
2 'The medicinal use of cannabis has recently been made available to people through their doctor.' Outline the issues that led to this and evaluate the extent that existing responses to personal use of drugs are effective.
3 'Decriminalisation and legalisation of many drugs towards a community health approach to drug use would better meet the needs of the community and be more resource efficient.' Discuss.
4 'Harm-minimisation as opposed to a tougher law-and-order approach to illegal drug use would be more responsive to the needs of the community.' Assess this statement by evaluating the effectiveness of current approaches to drugs regulation in Australia.
5 'Enforcement of drug laws is failing.' Assess the effectiveness of laws regulating the importation of drugs into Australia.

Other areas of research could include (but are not limited to):

- drugs in sport
- the impact on the community of legally available drugs such as alcohol and nicotine
- organised crime in Australia and its links to the drug trade
- drug testing and individual rights.

Resources

A range of resources have been provided here. These raise issues and highlight strengths and challenges of current issues emanating from the regulation of drugs in Australia.

Media articles

- Decriminalisation in Australia – Alcohol and Drug Foundation, https://cambridge.edu.au/redirect/10433
- A health-based approach to alcohol and other drugs – Alcohol and Drug Foundation, https://cambridge.edu.au/redirect/10434
- Australia's recreational drug policies aren't working, so what are the options for reform? – *The Conversation*, 2 March 2016, https://cambridge.edu.au/redirect/10435
- Australia legalises psychedelics to treat some mental health conditions, but therapists warn it is no miracle cure – *ABC News*, 26 July 2023, https://cambridge.edu.au/redirect/10436
- The synthetic drug phenomenon – United Nations World Drug Report 2023, https://cambridge.edu.au/redirect/10437
- NSW on-the-spot fines for drug use and possession a 'double-edged sword', expert says – *ABC News*, 13 October 2023, https://cambridge.edu.au/redirect/10438
- New laws 'just say that drugs are OK' – *The Telegraph*, 26 March 2024, https://cambridge.edu.au/redirect/10439

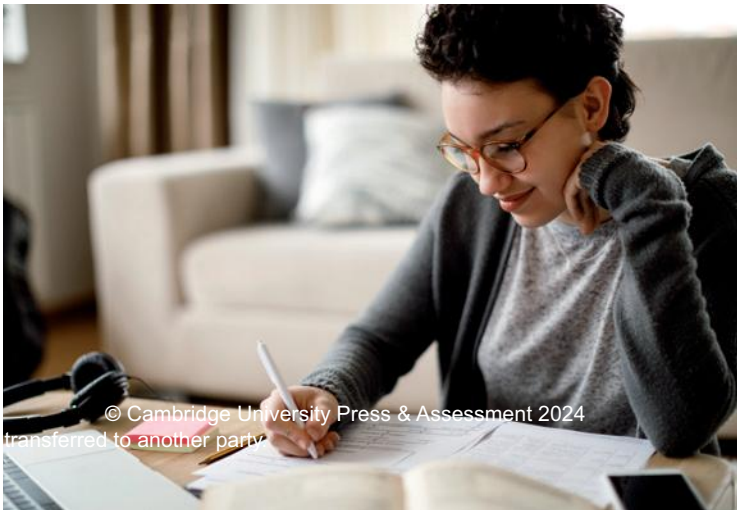
Videos

- NSW Drug Court Opens in Dubbo
- Major Overall in Drugs Laws in NSW 2023.

Additional resources

- A quick guide to drugs & alcohol – National Drug and Alcohol Research Centre (NDARC)
- Drug & Alcohol Policy – NSW Police Force

Figure 22.6 There are a range of sources available to you for your research



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Chapter summary

- Drugs are defined by the Australian Government Department of Health and Aged Care as 'substances that change a person's mental or physical state. They can affect the way your brain works, how you feel and behave, your understanding and your senses'.
- Drugs can be classified as legal or illegal.
- Legal drugs include alcohol, caffeine, nicotine, over-the-counter drugs and drugs prescribed by your doctor.
- Illegal drugs include cannabis (marijuana), heroin, amphetamines and ecstasy (MDMA).
- Drugs are regulated under legislative frameworks within each state and territory and nationally across the country.
- The four main types of offences related to illegal drugs are use, possession, cultivation and manufacture, and trafficking.
- Harm-minimisation is an approach that focuses on strategies to reduce the harms associated with the use of alcohol and other drugs for the individual and society.

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Themes and challenges for Part III – Law in practice: Issue 4

The relationship between justice, law and society

- There was a strong correlation between justice, the legal system and societal expectations in the case of the Christchurch massacre. The New Zealand Government worked to deliver what most people thought was a just outcome – the outlawing of semi-automatic weapons in New Zealand.
- Governments around the world are working to better regulate social media, in order to protect users' privacy, but this is made difficult by the global nature of the internet.

The development and reform of law as a reflection of society

- The reform of gun laws by the New Zealand Government was in response to a widespread reaction of horror in New Zealand and around the world.
- The extent to which the law regulates and prohibits drugs reflects the cultural values and beliefs at the time, and the pharmacological evidence that informs the effects of the short- and long-term impact on individuals and society.

The importance of the rule of law

- Each of the branches of the legal system – the judiciary, the executive and the legislature – worked in an appropriate way in the aftermath of the Christchurch terrorist attacks.
- Regulation of the internet is made more difficult by the lack of robust international instruments capable of enforcing such laws.

The responsiveness of the legal system in dealing with issues

- The legal system in New Zealand was very effective in dealing with the issue of gun violence in the aftermath of the Christchurch terrorist attack. This is in stark contrast to how the issue of gun violence is dealt with in the United States' legal system.
- The legal system has been slow to respond to issues concerning social media, such as privacy and use in the workplace. This is often the case for legal issues involving technology, which is evolving so quickly that the legal system is constantly playing catch up.
- Drug law reform can fail to be responsive to the needs of society when it is politicised into a law-and-order debate.
- The introduction of on-the-spot fines, rather than a court appearance, for the possession of cannabis for personal use is an example of law reform acknowledging the detrimental long-term impacts on an individual of a recorded conviction for a minor offence.

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The effectiveness of legal and non-legal mechanisms in achieving justice for individuals and society

- New Zealand's legal system was effective in dealing with the issue of access to semi-automatic weapons by banning them and initiating a gun buy-back scheme in New Zealand.
- The widespread support given to the survivors and the families of the victims of the attack sent a strong message that racially motivated violent acts would not be tolerated by the people of New Zealand.
- The practice of the New Zealand prime minister of not mentioning the name of the Australian perpetrator of the Christchurch terror attack was an attempt to keep the focus on the victims and to deny publicity to the terrorist.
- The current legal and non-legal mechanisms available in Australia for addressing issues relating to social media lack effectiveness in providing justice. In particular, the owners of the major social media platforms and not subject to Australian law and since the abuses of these platforms tend to originate from outside Australia, they cannot be brought before the Australian justice system.
- Despite significant drug busts in recent years, the effectiveness of the Australian legal framework for preventing the importation of illegal drugs into the country is limited. Despite the legislation around trafficking, it appears that people continue to risk arrest as the potential financial advantages from drug trafficking are so high.
- Non-legal harm-minimisation initiatives can significantly reduce the impact on the individual and society of drug use. These initiatives range from making safe injecting rooms available to diverting people away from drug use through education and other social supports.

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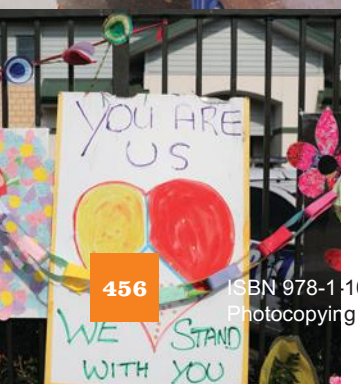

Answers to multiple-choice questions

Part I

Chapter 1
1 a, 2 b, 3 c, 4 c, 5 c

Chapter 2
1 d, 2 a, 3 b, 4 b, 5 c

Chapter 3
1 b, 2 b, 3 a, 4 a, 5 c

Chapter 4
1 c, 2 b, 3 b, 4 b, 5 c

Chapter 5
Topic 1: 1 a, 2 b, 3 b, 4 a, 5 b

Topic 2: 1 c, 2 d, 3 b, 4 b, 5 d

Topic 3: 1 d, 2 a, 3 c, 4 b, 5 b

Topic 4: 1 b, 2 a, 3 d, 4 b, 5 b

Part II

Chapter 6
1 c, 2 a, 3 c, 4 c, 5 d

Chapter 7
1 b, 2 a, 3 c, 4 c, 5 a

Chapter 8
1 b, 2 b, 3 d, 4 b, 5 d

Part III

Chapter 9
1 c, 2 c, 3 c, 4 c, 5 c

Chapter 10
1 d, 2 c, 3 b, 4 d, 5 d

Chapter 11
1 a, 2 d, 3 c, 4 b, 5 a

Chapter 12
1 a, 2 a, 3 a, 4 c, 5 c

Chapter 13
1 c, 2 a, 3 b, 4 d, 5 a

Chapter 14
1 a, 2 c, 3 b, 4 a, 5 a

Chapter 15
1 b, 2 d, 3 c, 4 c, 5 d

Chapter 16
1 d, 2 b, 3 c, 4 d, 5 d

Chapter 17
1 a, 2 a, 3 a, 4 b, 5 b

Chapter 18
1 a, 2 c, 3 a, 4 d, 5 d

Chapter 19
1 b, 2 b, 3 b, 4 c, 5 a

Chapter 20
1 b, 2 c, 3 a, 4 c, 5 c

Chapter 21
1 b, 2 c, 3 a, 4 d, 5 a

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Glossary

access
the right or opportunity to make use of something

Act of Parliament
statute law, resulting from a Bill successfully passing through parliament and gaining royal assent

adoption order
a court order that establishes a new legal relationship between potential adoptive parents and a child eligible for adoption; an adoption order also severs the legal relationship that existed between the adoptive child and their natural or legally recognised parents or guardians prior to the adoption process

adversarial system
a system of resolving legal conflicts – used in common law countries such as the United Kingdom and Australia – that relies on the skill of representatives for each side (e.g. defence and prosecution lawyers) who present their cases to an impartial decision-maker

affirmative action
a policy designed to address past discrimination and thus improve the economic and educational opportunities of women and minority groups

algorithm
a series of instructions telling a computer how to transform facts and data into an executable form to accomplish a task or solve a problem; these are key to any computer application, such as navigation systems, search engines, social media platforms, and music streaming services

alternative dispute resolution
dispute resolution processes, such as mediation, arbitration and conciliation, that do not involve the courts

ambassador
the highest-ranking official who is an accredited representative of a government appointed to work in another country for a specific period of time

anarchy
the absence of laws and government

appeal
an application to have a higher court reconsider a lower court's decision, on the basis of an error of law

appellate jurisdiction
the ability or power of a court to hear appeals of the decisions of lower courts and to reject, affirm or modify those decisions

Apprehended Domestic Violence Order
a court order used for the protection of a person involved in an intimate, spousal or de facto relationship

Apprehended Violence Order
a court order to protect a person who fears violence or harassment from a particular person; in New South Wales, Apprehended Personal Violence Orders prohibit violence between members of the public and Apprehended Domestic Violence Orders prohibit violence between family members

arbitration
a form of alternative dispute resolution in which the disputing parties present their cases before an arbitrator, who makes a decision that is binding on the parties

assimilation
a policy based on the idea that the minority group should adopt the language and traditions of the majority group

asylum
protection granted by a state

asylum seeker
someone who is seeking protection as a refugee

Australian Federal Police
the federal police agency of the Commonwealth of Australia, set up to enforce federal laws and to protect the interests of Australia both domestically and internationally

balance of power
the power held by the political party whose vote is needed to pass legislation; under the Westminster system of government in Australia, usually determined in the upper house of Parliament

balance of probabilities
the standard of proof required in a civil case for a plaintiff to succeed in proving the case against the defendant

beyond reasonable doubt
the standard of proof required in a criminal case for the prosecution (the state) to obtain a conviction against the accused

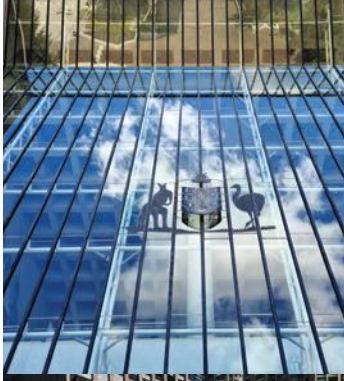
bicameral
containing two chambers or Houses of Parliament

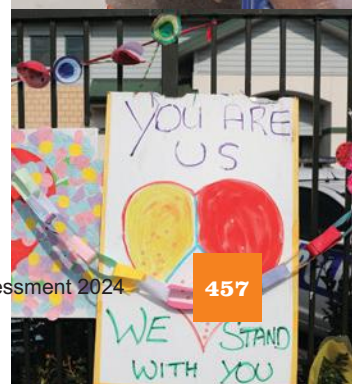
Bill
a drafted law that has not yet been passed by parliament

bipartisan
having the support of the two major political parties

bookmaking
the activity of calculating odds on sporting and other events and taking bets

border protection
the name given to the policy of preventing asylum seekers arriving in Australia for the reason that they represent a threat to national security





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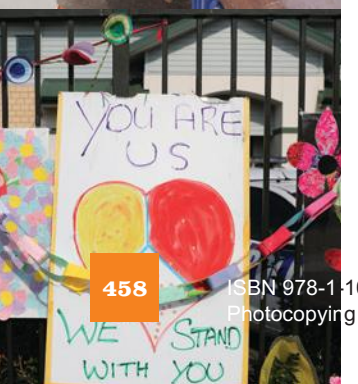

bridging visa
a permit to stay in Australia for a temporary period of time so that arrangements can be made either to leave the country or to apply for permanent residency

burden of proof
the responsibility of a party to prove a case in court

capital punishment
the practice of sentencing a person to death by judicial process; also referred to as the 'death penalty'

caution
a formal notice given to a young offender where the offence is more serious than one appropriately dealt with by a warning

caveat emptor
(Latin) 'buyer beware'; buyers are responsible for their actions

C-class licence
'C' stands for car; an unrestricted driver licence often known as a 'black' or 'full' licence in terms of restrictions on speed, mobile phone use, passengers carried and blood alcohol readings

chapter
a local branch of a motorcycle club

Charter of Rights
also referred to as a Bill of Rights; a legal document or charter, setting out the most important rights of citizens in relation to their country

children
generally, persons aged 15 years and younger, depending on the legal context

civil action
a lawsuit brought by a collective or a large group of people affected by the same crime

civil jurisdiction
the power of a court to hear matters involving disputes between private individuals and to award civil remedies

civil liberties
basic rights of individuals that are protected by law; for example, freedom of religion and freedom of speech

coercive powers
special powers sometimes given to a commission or police task force that allow it to summon any witness to give evidence or produce any documents – these powers are usually only vested in courts

collateral
(damage) in a military context, damage to or destruction of things other than the intended target such as civilian property and civilians

colours
a motorcycle club's standard vest showing the club's patches on the back as a mark of identification

commercialise
to have financial gain as the main focus when developing a product or service

committal hearing
an inquiry held in the Local Court or Magistrates Court to determine whether there is enough evidence against the defendant to warrant a trial in a higher court (this is called establishing a *prima facie* case)

common law
law made by courts; historically, law common to England

complainant
a person making a formal complaint in a court of law

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes an active role, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for the parties

concurrent powers
existing at the same time; powers held by both state and federal parliaments

consent
free and voluntary agreement by a rational person who is able to understand and make a decision about the matter to which they agree

conspiracy theory
speculation that there is a cover-up of the information surrounding a significant event by the government or other authorities

content community
a group of people who upload, share, comment on and discuss content online; for example, YouTube and Tumblr

control order
an order made by a court, government official or police officer to restrict an individual's liberty; for example, from doing a specified act or being in a specified place

conveyancer
a person who deals professionally with the legal and practical matters involved in the transfer of titles to property when real estate is sold and purchased

copyright
an exclusive right to publish, copy, publicly perform, broadcast or make an adaptation of certain forms of expression; namely, sounds, words or visual images

coronial inquest
an investigation into a death that has occurred in unusual circumstances, held in the Coroners Court and overseen by a magistrate called the coroner

corporal punishment
the physical punishment of people, especially of children, by hitting them

corporations law
legislation that regulates corporations and the securities and futures industry in Australia; it is administered by the Australian Securities and Investments Commission

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correctional patient
someone on remand, or serving a term of imprisonment, who is transferred to a mental health facility, who is not a forensic patient, and who the NSW Mental Health Review Tribunal has not classified as an involuntary patient

coup d'état
a sudden violent overthrow of government by a small group that usually consists of members of the armed forces

credibility
trustworthiness, reliability, believability

cross-examination
questioning of a witness called by the other side to produce information relevant to one's case or to call the witness's credibility into question

customary law
the body of rules, values and traditions which are accepted by the members of an Aboriginal or Torres Strait Islander community as establishing standards or procedures to be upheld in that community

customs
collective habits or traditions that have developed in a society over a long period of time

cyberbullying
harassment using digital media, such as websites, email, chat rooms, social networking platforms or instant messaging

cyberspace
the 'environment' in which electronic communication occurs; the culture of the internet

cyberstalking
repeated harassment using email, text messaging or other digital media with the intention of causing fear or intimidation

damages
monetary compensation for harm or loss suffered

database
the place or program where collected data is organised and stored

de facto relationship
(Latin) 'existing in fact'; a relationship between two adults who are not married but are living together as a couple

declaration
a formal statement of a party's position on a particular issue; a declaration is not legally binding under international law

defamation
the act of making statements or suggestions that cause damage to a person's reputation in the community

defendant
the person who is accused of a crime or a civil wrong; in a criminal case, the defendant is also referred to as 'the accused'

deinstitutionalise
to remove people from long-stay psychiatric hospitals and provide outpatient mental healthcare for them in their communities (they visit the health professional and then return home, rather than staying in a hospital)

delegated legislation
laws made by authorities other than parliament, which are delegated the power to do this by an Act of Parliament

digital dossier
all the types of information about a person that they have deliberately or unintentionally put onto the internet, held in multiple locations

digital piracy
unauthorised reproduction and distribution of digital music, software, videos or other material, often for profit

digital technology
computerised devices, connected to the internet, that are used to generate, store and process data

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of sex, race, national or ethnic origin, age, sexuality or other characteristic

disability
mental or physical impairment that can limit a person physically, emotionally and psychologically

Disability Support Pension
financial support for people who suffer from mental illness and/or intellectual disability

discrimination
the unjust treatment of a person or a particular group of people based on their race, sex, sexuality, marital status, disability and other factors

disinhibition effect
the tendency to say and do things in cyberspace that the person would not ordinarily say or do in the face-to-face world

dispersal
the distribution of people over a wide area

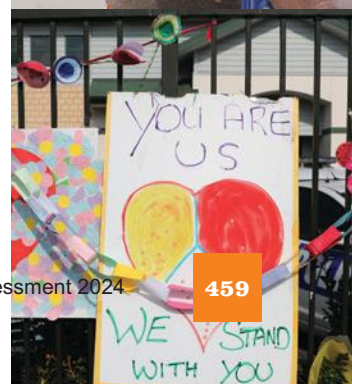
dispossession
the removal or expulsion of people from their traditional lands

doli incapax
(Latin) 'incapable of wrong'; the presumption that a child under 10 years of age cannot be held legally responsible for their actions and cannot be guilty of a criminal or civil offence

domestic environment
the household a person lives in

domestic law
the law of a state

draconian laws
laws that are excessively harsh or severe – from Draco, a Greek legislator (seventh century BCE) whose laws imposed cruel and severe penalties for crimes



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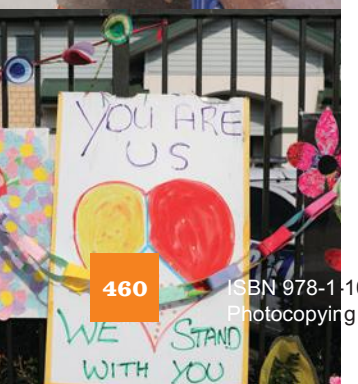

drug mule
a person who transports drugs; either by concealing drugs in their luggage, by ingesting drugs in pouches, strapping drugs to their body, or concealing them in some other way

e-communication
(electronic communication) any transmission of communication using computers or other digital products

elder abuse
an act or failure to act to the disadvantage of an older person occurring in a relationship of trust

Elders
older people of recognised wisdom and authority, who are the keepers of traditional knowledge within First Nations communities; they are responsible for such things as initiations and the handing down of punishments when community laws are broken

embassy
the official residence of the ambassador and their staff

entered into force
(of a treaty) having become binding on those states that have consented to be bound by it

equal opportunity
the right to equivalent opportunities regardless of race, colour, sex, national origin, and so on

equitable
treating everyone in the same way

equality
the state or quality of being equal; that is, of having the same rights or status

equity
the body of law that supplements the common law and corrects injustices by judging each case on its merits and applying principles of fairness

espionage
the use of spies or spying to obtain information

estate
all of the property that a person leaves upon death

ethics
(1) rules or standards directing the behaviour of a person or the members of a profession; (2) a major branch of philosophy that investigates the nature of values and of right and wrong conduct

Eurabia
a conspiracy theory that claims globalists are trying to 'Islamise' Europe

examination in chief
questioning of a witness by the barrister who called that witness

exclusive powers
powers that can be exercised only by the federal parliament

exemption
being immune from certain duties and obligations

ex-nuptial children
children born of parents who are not legally married

express consent
consent given directly, either orally or in writing

express rights
civil and political rights that are clearly and absolutely outlined in the *Australian Constitution*

external affairs power
the power of the Commonwealth to legislate on international matters involving Australia; interpreted by the High Court to mean that when the Commonwealth signs an international treaty or convention, it has the authority to enact laws to give effect to this international law within Australia

extortion
obtaining money or property from a person or group by force, intimidation or illegal power

extradition
the handing over of a person accused of a crime by the authorities of the country where they have taken refuge, to the authorities of the country where an alleged crime was committed

extraterritorial application
the ability of a government to exercise authority outside its borders

fairness
freedom from bias, dishonesty or injustice; a concept commonly related to everyday activities

far right
(politics) similar to 'extreme right' – this describes right-wing political groups that are willing to institute extreme measures to deal with the perceived ills of society

fascism
(contemporary context) an anti-democratic ideology that promotes ultra-nationalism, hatred of immigrants and the redemptive qualities of war and violence

Federation
the process of uniting several states to form a single national government

feme sole
(French) a single woman

feminism
the advocacy of rights for women on the basis of the equality of men and women; there are many varieties of feminist ideas in political and social thought

feudalism
a western European social system from the Middle Ages, in which the ruler owned all the land and allowed others to occupy and use it in return for money, goods or services

forensic
relating to the detection and investigation of crime

forensic patient
a person who is confined in an institution such as a mental health facility or correctional centre, or who is released from custody subject to conditions

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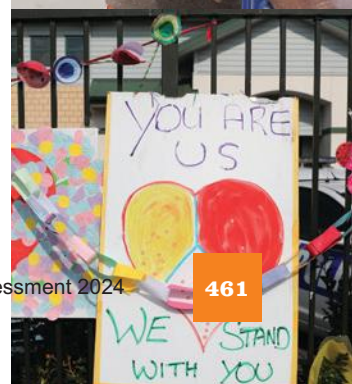

foundling
a deserted infant whose parents' identity is unknown

fraud
a dishonest act, done intentionally in order to deceive

freedom of information
the principle that people should be able to have access to information relating to the administration of government decision-making and information held by the government; the legislation governs the processes of obtaining this information, at state and federal levels

freedom of speech
where citizens of a country are not restricted or controlled by government censorship regarding what they say (except in terms of vilification, incitement and defamation)

freedom of the press
where the news services and media outlets of a country are not restricted or controlled by government (except in terms of vilification, incitement and defamation)

gender segregation
the separation of people according to their gender

General Assembly
the main body of the United Nations, made up of all of the member states

glass ceiling
an invisible barrier that prevents women from rising in an organisation through promotion; on the face of it, a company may not directly discriminate, but subtle practices may still discourage women or prevent them from being promoted to more responsible and better-paid positions

graduated licensing system
a licensing system in which drivers pass through stages leading up to the granting of a full C-class licence

grey zone operations
operations that are meant to cause significant harm to an opponent without crossing the threshold for all-out war

guarantor
a person who gives a formal promise that someone else's contract will be fulfilled, often backed by some form of asset that will stand as collateral to secure the promise

guardian
a person who is legally responsible for another person who is unable to take care of themselves

guilt by association
criminal liability imposed for associating with another person who commits a crime, rather than for committing that crime oneself

Hansard
a full account of what is said in parliament or in parliamentary inquiries; named after the English printer T.C. Hansard (1776–1833), who first printed a parliamentary transcript

harmonisation
agreement among the laws of different jurisdictions

healthcare system
the network of facilities and other agencies that organise and meet the healthcare needs of people

homicide
the act of killing another human being

hostage diplomacy
where a host country uses the citizens of another country as diplomatic tools through arbitrary detention, conviction of a crime or imprisonment, to extract concessions from their country of origin or to achieve some other political purpose

hung jury
a jury that is unable to reach agreement

hybrid war
a type of war that involves launching simultaneous attacks using multiple methods to disrupt an opponent, but without launching all-out war; this usually includes a cyberspace dimension such as disinformation campaigns or hacking into critical infrastructure or business systems

identitarianism
a recent extreme right-wing ideology that slickly repackages old fascist ideas into more socially acceptable forms; often espouses the exclusion of Muslims and other minority groups

identity theft
obtaining or using the identity of another person in order to commit a range of fraudulent activities, usually to obtain financial gain

implied rights
civil and political rights that can be inferred from the *Australian Constitution*, rather than being expressly stated

in camera
(Latin) 'privately'; only specified persons (e.g. a judge) can be present during the testimony or proceeding

incarceration
being detained or imprisoned as punishment for committing a crime

indictable offence
a serious criminal offence that requires an indictment (a formal, written charge) and a preliminary hearing; it is typically tried before a judge and jury and is subject to greater penalties than non-indictable offences

indictment
information presented for the prosecution of one or more criminal offences; a formal written charge

indirect discrimination
a practice or policy that appears to treat everyone in the same manner, but which adversely affects a higher proportion of people from one particular group

Indonesia National Police
in Indonesia, the police force is called the Kepolisian Negara Republik Indonesia (POLRI)

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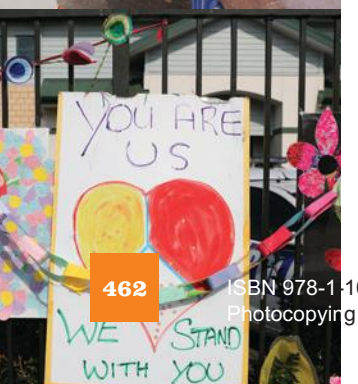

infringe
to disregard or violate an agreement

injunction
a court order requiring an individual or organisation to perform, or (more commonly) not to perform, a particular action

inquisitorial system
a legal system where the court or a part of the court (e.g. the judge) is actively involved in conducting the trial and determining what questions to ask; used in some countries that have civil legal systems rather than common law systems

intellectual property
intangible property that has commercial value and can be protected by law; for example, text, images, designs, inventions and computer programs

internet
a global network of interconnected computer networks that allows users to obtain and share information in a number of ways

invasion of privacy
to violate an individual's privacy by intruding into their private affairs

Islamophobia
the fear of, and hatred towards, the Islamic region and Muslim people generally, which has grown in the wake of the 'war on terror' since 2001; it is a form of xenophobia, and shares common elements with anti-Semitism; many groups that espouse Islamophobia are also anti-Semitic

jurisdiction
the powers of a court, depending on its geographic area, the type of matters that can be decided, and the type of remedies that can be sought

jury
a group of people who listen to all of the evidence in a court case and decide on the verdict

justice
the legal principle of upholding generally accepted rights and enforcing responsibilities, ensuring that equal outcomes are achieved for those involved

juvenile
a child or young person, generally under 18 years of age, although this may vary depending on the context

kinship
family relationships, including all extended family relationships; an important part of First Nations cultures and values, which dictate how all people in the group behave towards each other

kyriarchy
a social system based on domination, oppression and submission

laissez-faire
(French) 'allow to do'; may be used in a broad sense of minimal government intervention in most aspects of society

larceny
taking another person's property with the intention of permanently depriving them of it; also known as stealing

law
a set of rules imposed on all members of a community that are officially recognised, binding and enforceable by persons or organisations such as the police and/or courts

law enforcement agencies
those bodies that have the role of enforcing the law; they are created by Acts of Parliament and include the police and some government departments

legal system
the system of courts, prosecutors and police within a country

legislative power
the legal power or capacity to make laws

mandamus
a court order compelling a government official or organisation to perform a particular task

mandatory reporting
a person working in child-related employment must, by law, report to care and protection agencies a child who they believe to be at 'risk of harm'

martial law
law enforced by the military over civilian affairs; overrides civilian law

massacre
the intentional killing of a large number of people

mediation
a form of alternative dispute resolution designed to help two (or more) parties, in the presence of a neutral third party, to reach an agreement

mental illness
an illness of the mind that affects the psychological, emotional and behavioural state of a person

merits review
analysis of the facts presented in a case, and often the policy choices that led to the decision

military junta
an authoritarian style of government led by a group of military leaders who seized power by force

mitigation
making the severity of an offence or a sentence milder or less severe

money laundering
disguising money obtained from illegal activities to make it appear legal

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mule recruitment
the attempt to procure a person (the 'mule') to receive and deliver illegal funds to criminals abroad or at home without the knowledge of the 'mule'; this is usually done through a fake company and may involve getting an unsuspecting employee to sign a contract and transfer funds on behalf of organised criminals

National League for Democracy
a political party co-founded in 1988 that promoted democracy in Myanmar; despite winning elections, the military prevented it from governing until 2015; from 2016 to 2020, it ran a democratic government, but after winning the 2020 election, it was forced out by the military's seizure of power on 1 February 2021

native title
the right of First Nations peoples to their traditional lands

negligence
carelessness; a tort that involves breach of a duty of care resulting in harm that could have been foreseen

negotiation
any dialogue intended to resolve disputes and/or produce an agreement on further courses of action

nomadic
a term used to describe people who tend to travel and change settlements frequently

obiter dicta
(Latin) comments from a judge in a case that are not directly relevant to the case and, therefore, not legally binding (singular: *obiter dictum*)

on remand
(of an accused) in custody pending and/or during their trial

onus
the burden or duty of proving a case to a court

opened for signature
(of a treaty) negotiations have concluded and the treaty is ready for parties' signatures; many treaties, especially those convened by the United Nations, will be open for signature only until a certain date; others, such as the Geneva Conventions, are open for signature indefinitely

operational area
a local government area that can apply for police to be given additional powers under the *Children (Protection and Parental Responsibility) Act 1997* (NSW)

opinio juris sive necessitatis
(Latin) 'opinion that an act is necessary by rule of law'; the principle that for the practice of a state to be customary international law, the state must believe that international law requires it

optional protocol
an addendum to a treaty, agreed to by the parties at a later date, to create enforcement provisions or to interpret the treaty in light of later developments

organised crime
illegal activities organised by criminal groups or enterprises, most commonly for the purpose of generating financial profit

original jurisdiction
the ability or power of a court to hear a case in the first instance

outlaw motorcycle gangs
organisations whose members use the structure of a motorcycle club as a front for criminal activity

over-stayer
a person who comes to Australia on a temporary visa but continues to stay when their visa expires

P1
red provisional plates

P2
green provisional plates

pastoralists
farmers raising sheep or cattle, usually on large areas of land

patch
a symbol or club logo attached to the back of a motorcycle club member's vest

patents
rights granted for a device, method, substance or process that is new, inventive or useful

penalty unit
a statutory financial penalty for an offence, arrived at by multiplying a monetary amount by the number of penalty units for the offence; the monetary amount can change over time without requiring amendments to the statute

people smuggling
the organised illegal movement of people across international borders, usually for a fee

plaintiff
the person who initiates a civil action

plea bargain
an agreement that a person will plead guilty to a lesser charge, and in exchange will not be tried for a more serious charge

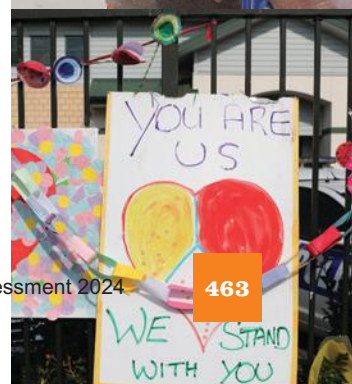
plea in mitigation
any type of information that can help the court decide on an appropriate sentence

pleadings
written statements of the parties to a civil dispute that set out the issues to be decided by the court

political asylum
a fundamental human right affirmed by Article 14 of *The Universal Declaration of Human Rights* (1948), 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'

political autonomy
self-determination, independence

portfolio
a key area of government responsibility headed by a minister



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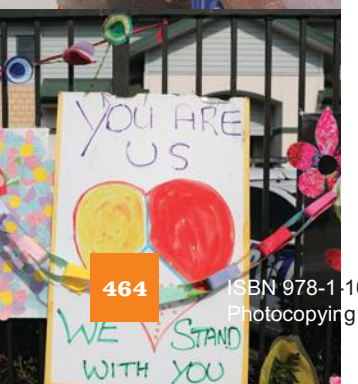

poverty line
the minimum level of income needed to meet basic necessities below which a household is defined as poor; the poverty line is different in different countries

precedent
a judgment that is authority for a legal principle and that serves to provide guidance for deciding cases that have similar facts

presumption of parentage
outlines a specific condition whereby a man and/or a woman are presumed to be the parents of a child

prima facie
(Latin) 'on the face'; at first sight, having sufficient evidence established against a defendant to warrant a trial in a higher court of law

privacy legislation
laws to set, uphold and protect the privacy rights of individuals

privacy rights
the natural right of individuals to keep their own affairs private

private law
the body of law governing relationships between individuals; for example, contract law, torts, family law and property law

pro bono [publico]
(Latin) 'for the public good'; the shortened phrase is used to describe work that is done by a lawyer or barrister on a voluntary basis and without payment, where there are issues of community concern or significant effect on disadvantaged groups

procedural fairness/natural justice
the body of principles used to ensure the fairness and justice of the decision-making procedures of courts; in Australia, it generally refers to the right to know the case against you and to present your case, the right to freedom from bias by decision-makers and the right to a decision based on relevant evidence

prohibited person
a person prohibited from working in child-related employment because of a conviction of a serious sex offence, murder of a child, or an offence involving violence towards a child

prohibition
a court order that forbids a lower-level court from hearing or taking further action in a case or matter

prosecutor
the person formally conducting legal proceedings against someone accused of a criminal offence; the prosecutor acts on behalf of the state or the Crown

public law
the body of law governing relationships between individuals and the state, and the structure and operation of government itself; for example, criminal, administrative and constitutional law

public morality
standards of behaviour generally agreed upon by the community

public space
areas set aside in which members of the community can associate and assemble

question of law
a disputed legal contention that is left for the judge to decide; for example, whether certain evidence is admissible

racial vilification
a public act based on the race, colour, national or ethnic origin of a person or group of people that is likely to offend, insult, humiliate or intimidate; types of behaviour can include racist graffiti, speeches, posters or abuse in public

rail gauge
the distance between the inner sides of the two rails of a train track

ratification
(of a treaty) is a formal ceremony after a treaty has been signed, whereby the parties to the treaty exchange solemn confirmations of it

ratify
to formally confirm that the country intends to be bound by the treaty

ratio decidendi
(Latin) the legal reason for a judge's decision

real property
property consisting of land and the buildings on it

reconciliation
getting two parties to correspond, or make peace

red notice
a request for the arrest and extradition of an individual for whom an arrest warrant has been issued in the requesting country; distributed by Interpol, the international police authority

referendum
the referral of a particular issue to the electorate for a vote

refugee
a person who has been forced to leave their home area due to a well-founded fear of persecution based on religion, race, political opinion, nationality, ethnic or social group

reservation
a statement made by a state when signing or ratifying a treaty that allows it to exclude certain provisions or modify them as they apply to the state's own practice

residual powers
those matters on which the states can legislate, as they are not referred to in the *Australian Constitution*

responsibilities
legal or moral obligations to others

rights
legal or moral entitlements or permissions

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risk of harm
concerns about the safety, welfare and wellbeing of a child or young person because of sexual, physical or emotional abuse and/or neglect

rule of law
the principle that nobody is above the law; this can be seen in the requirement that governmental authority must be used in line with written, publicly disclosed laws, for which established procedural steps (due process) have been taken in the adoption and enforcement

rules
regulations or principles governing procedure or controlling conduct

sanction
a penalty imposed on those who break the law, usually in the form of a fine or punishment

Security Council
the arm of the United Nations responsible for maintaining world peace and security

self-determination
the right of people to determine their political status or how they will be governed based on territory or national grouping, as well as the right to pursue their own economic, social and cultural development

self-executing
(of a treaty) automatically becoming binding on a state party to the treaty as soon as the treaty has been ratified

serf
a person who worked the land in feudal times, and had to obey the landowner

sexual assault
a general term for criminal offences involving unwanted sexual contact; acts include unwanted touching or groping, indecent acts of other kinds, and rape

sexual harassment
any unwelcome sexual behaviour, such as sexual advances, suggestive comments, unwanted touching, written communications or gestures, especially in the workplace

social media
a web-based form of social interaction where users can share, comment on and discuss topics

social values
ethical standards that guide people in their thinking about aspects of their society

special leave
where the High Court grants approval for the case to come before it in its appellate jurisdiction

specific performance
an order requiring the defendant to perform the acts that the contract obliged them to perform

sponsorship
the support of an individual, event or organisation financially or through the provision of products or services

standard of proof
the degree or level of proof required for the plaintiff (in a civil case) or the prosecution (in a criminal case) to prove their case

stare decisis
(Latin) 'the decision stands'; the doctrine that a decision must be followed by all lower courts

state
a politically independent country

State Counsellor
the position of de facto head of government; a special position created for Aung San Suu Kyi, who had been banned from holding the position of president by a rule put in place by the military specifically to prevent her from holding power

state police
law enforcement agencies with state-wide jurisdiction

statute law
law made by parliament

suffrage
the right to vote, guaranteed by the law

suffragette
a term used to describe a supporter (whether male or female) of the suffrage movement

suicide
the intentional taking of one's own life

summary offence
a criminal offence that can be dealt with by a single judge without a jury and does not require a preliminary hearing

surveillance capitalism
the name given to the new reality of the online world in online internet platforms that have created a mass surveillance system to capture and use our personal data for commercial purposes

table
to begin consideration or discussion

tariff
a tax that must be paid on imports or exports

task force
a special group or committee of experts formed for the express purpose of studying a particular problem

terms of reference
a set of guidelines used to define the purpose and scope of an inquiry

terra nullius
(Latin) 'land belonging to no-one'; the idea and legal concept that when the first Europeans came to Australia, the land was owned by no-one and thus was open to settlement; this concept has been judged to be legally invalid

terrorism
violence, or the threat of violence, directed at an innocent group of people for the purpose of coercing another party, such as a government, into a course of action that it would not otherwise pursue

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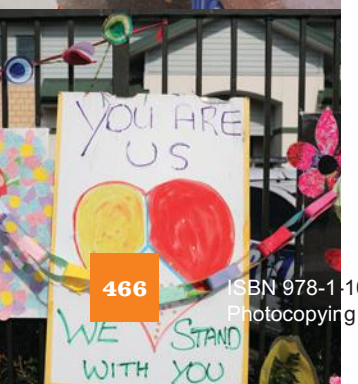

The Dreaming
the source of Aboriginal peoples' customary law

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

tort law
the body of law that deals with civil wrongs including negligence, defamation, trespass and nuisance

tortious
wrongful; constituting a tort or breach of duty to others

trademarks
words, names, symbols or devices, used individually or in combination, to identify and distinguish the goods or services of one company from those of another

trans-border
beyond the border

transnational crime
crime that occurs across international borders, either in origin or effect

treaty
defined by the *Vienna Convention on the Law of Treaties* (1969) as 'an international agreement concluded between states in written form and governed by international law'; treaties may also be referred to as conventions or covenants

trespass to the person
a tort involving direct contact with a person's body without that person's consent

tyranny
rule by a single leader holding absolute power in a state

ultra vires
(Latin) beyond the power or authority legally held by a person, institution or statute to perform an act

Union Solidarity and Development Party
the military-aligned political party in Myanmar, which gives the seats it wins to the military; the military are guaranteed 25 per cent of the seats in the parliament under the 2008 Constitution

United Nations
a world organisation dedicated to world peace and the sovereignty and equality of all its members

unito caro
(Latin) 'one in flesh'; meaning that when a woman married, in the eyes of the law, she assumed the legal identity of her husband

values
principles, standards or qualities considered worthwhile or desirable within a society

warning
a formal notice given to a young offender, usually for a first minor offence

whistleblower
a person who exposes or brings to public attention, any misconduct and/or breaches of the law occurring within an organisation, company or government department

White Australia Policy
the government policy of allowing only Europeans and English-speaking people to immigrate to Australia; so-called 'undesirables' were kept out by use of the infamous 'Dictation Test'

WikiLeaks
an international organisation (originating in Australia) committed to anonymously publishing documents that are unavailable to the public

working with children check
a check by the NSW Office of the Children's Guardian on the appropriateness of a person in New South Wales to work in child-related employment

World Wide Web
also known as WWW, a user-friendly information system that enables the sharing of text, images, audio and video across the internet using web browsers that access public websites or webpages

young people
in New South Wales, persons aged between 16 and 18 years

Youth Justice Conference
a meeting of all the people who may be affected by a crime committed by a young offender; used to help the offender to accept responsibility for their actions while avoiding the court system

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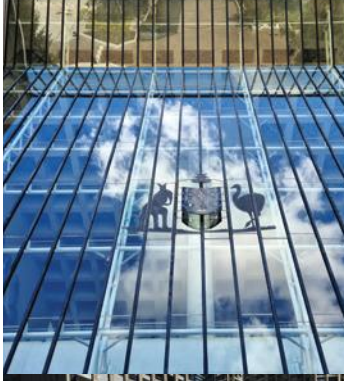

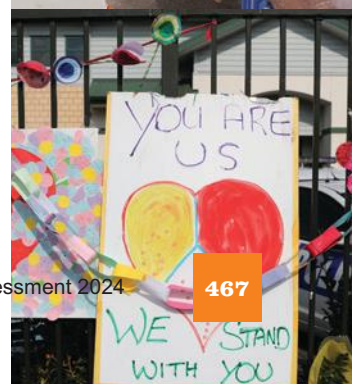

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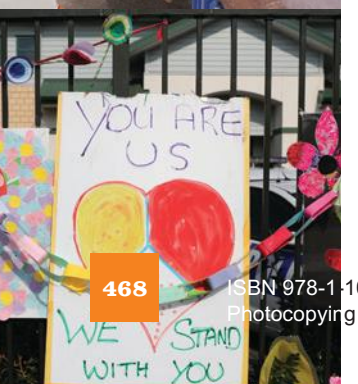

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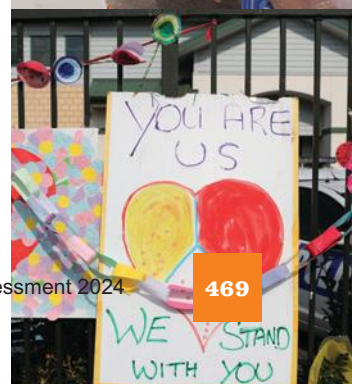

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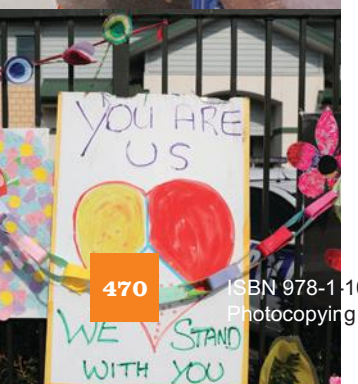

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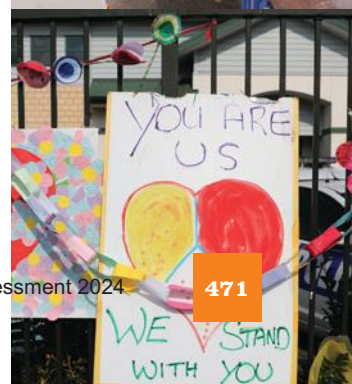

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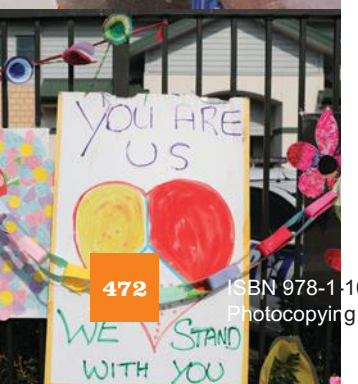

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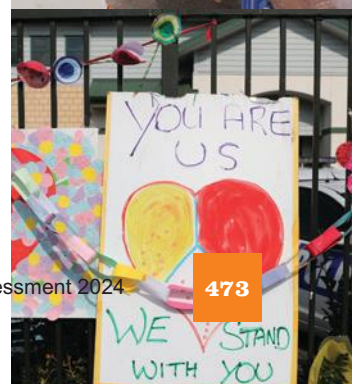

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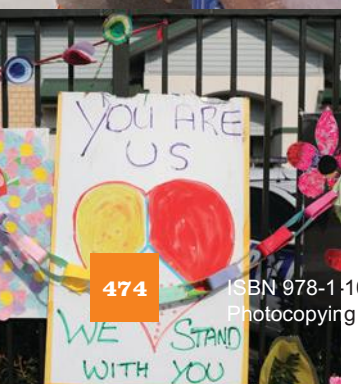

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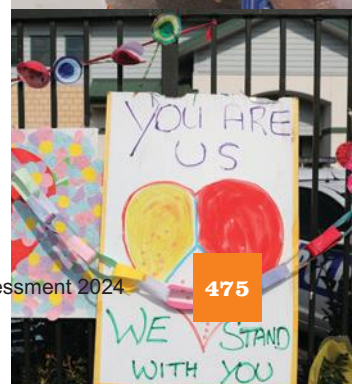

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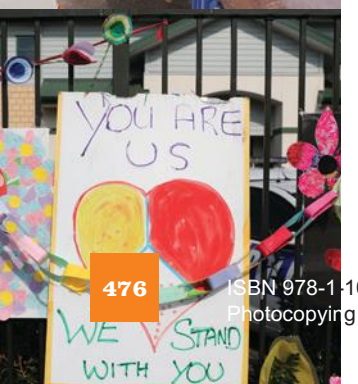

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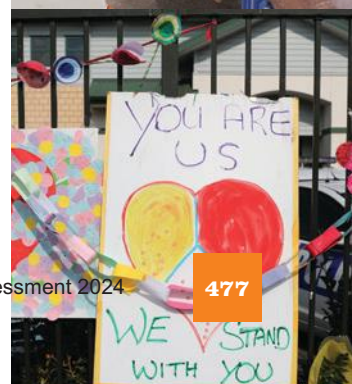

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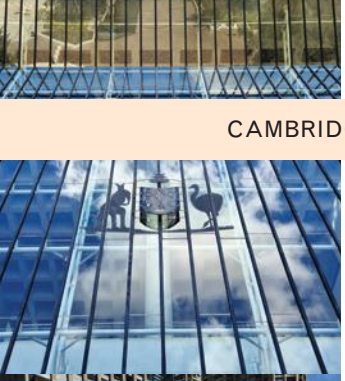

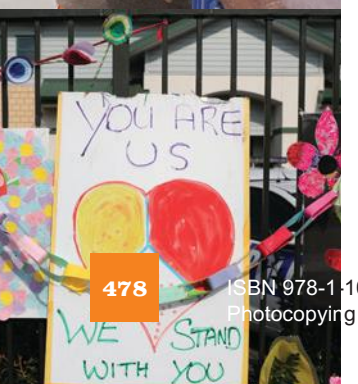

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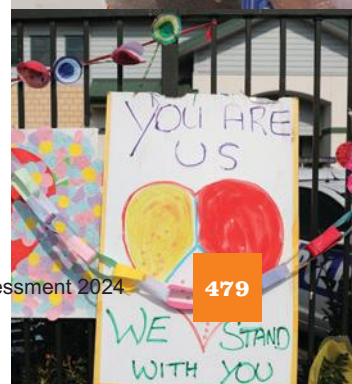

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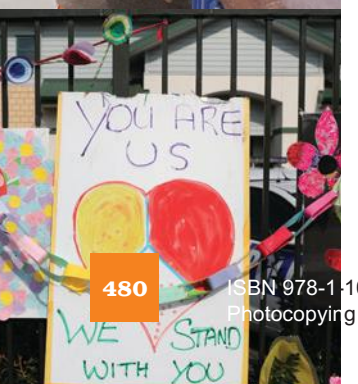

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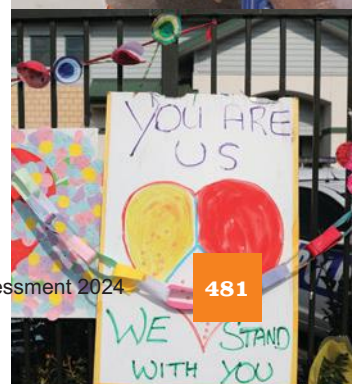

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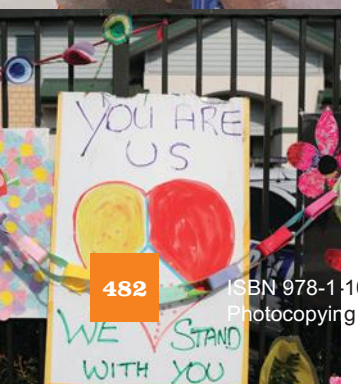

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Issue 1

Groups or individuals suffering disadvantage

Chapter 11 (Digital-only chapter)

Migrants

Chapter objectives

In this chapter, you will:

- explore the legal concepts and terminology related to migrants
- investigate the place of the law in encouraging cooperation and resolving conflict with respect to migrants
- investigate the role of the law in addressing and responding to change with respect to migrants
- find and use legal information from a range of sources
- develop the ability to effectively communicate legal information and issues.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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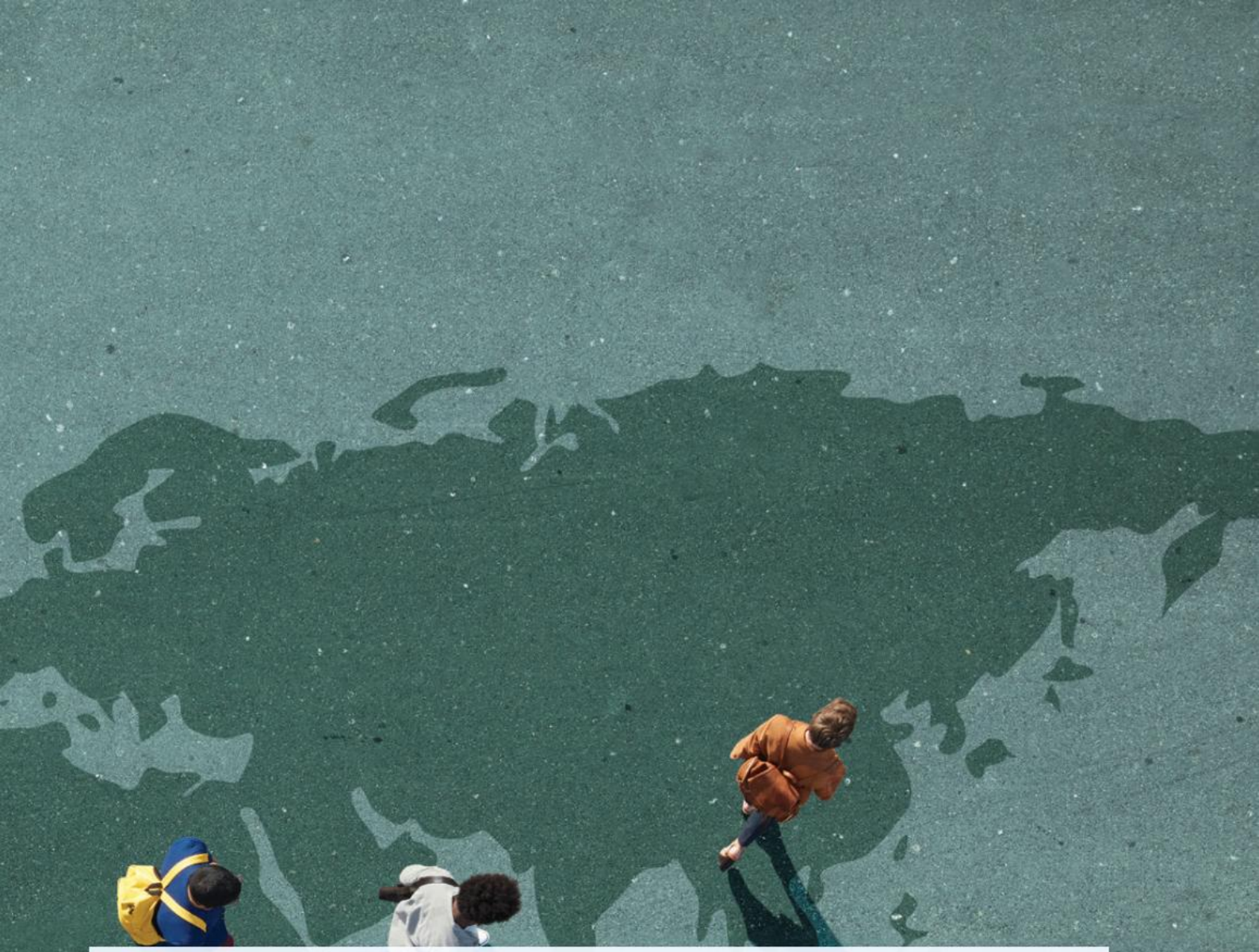

Relevant law

IMPORTANT LEGISLATION

Migration Act 1958 (Cth)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Australian Human Rights Commission Act 1986 (Cth)
Extradition Act 1988 (Cth)
Discrimination Act 1991 (ACT)
Migration Regulations 1994 (Cth)
Racial Hatred Act 1995 (Cth)
Australian Citizenship Act 2007 (Cth)
Australian Citizenship Amendment (Citizenship Testing) Act 2007 (Cth)

RELEVANT INTERNATIONAL INSTRUMENTS

Convention relating to the Status of Refugees (1951)
International Convention on the Elimination of All Forms of Racial Discrimination (1965)

SIGNIFICANT CASES

A v Australia (1997) CCPR/C/59/D/560/1993
SZKCQ v Minister for Immigration and Citizenship [2008] FCAFC 119
NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (Case no S28/2023)

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11.1 Migrating and multiculturalism

Australia has a long history of migration. Events such as the arrival of the First Fleet in 1788, gold rushes and world wars have seen Australia's migrant intake swell. This has changed the nature of Australian society.

Like other countries, Australia has restrictions on the types and numbers of people who can enter the country and settle permanently here. In 2021–2022, 395 000 new migrants settled permanently in Australia.

For 2023–2024, the permanent Migration Program had a planning level at 190 000 places with an emphasis on skilled migrants. There were 52 500 places for family migrants, who are people with family members already in Australia who will sponsor them. Four hundred places were set aside for special eligibility migrants, including people who were previously citizens or permanent residents of Australia, and who have maintained close personal, cultural or business connections with Australia.

Australia also has a humanitarian program that provides entry into Australia for people who cannot live in their own country for a range of extreme reasons. In 2020–2021, there were 17 875 places in the humanitarian program (with 4125 additional places included for Afghan refugees). In late 2023, the Australian Government announced that in response to environmental issues facing the Pacific island of Tuvalu, it will implement a special visa arrangement for Tuvaluans. This is not a refugee visa: rather it is a visa that will enable up to 280 Tuvaluans to migrate to Australia each year.

It needs to be noted that not all these people settle permanently in Australia; for example, a skilled migrant may return to their original country when their work visa expires. It is also important to think about the effects of such things as COVID-19 on migration figures. For example, due to restrictions placed on travel around the world, the migration figures for the period 2020 to 2022 are different to those of previous timeframes, which does not necessarily reflect government policy.

Despite a history of migration and multiculturalism, newcomers to Australia have not always been treated equally under the law and have suffered many disadvantages. Authorities believe that to maintain a harmonious, healthy and well-balanced society, the law must attempt to balance the rights and needs of migrants with public opinion relating to the numbers and types of migrants who are granted visas and residency. These laws and processes are covered by an area of law known as immigration law.

Section 51(xxvii) of the *Australian Constitution* gives the federal parliament the power to make laws about immigration. The federal government allows people to travel to, enter and remain in Australia. This permission comes in the form of a visa. For those who wish to come to Australia for a temporary period, visas are issued for studying, short work placements and tourist travel.

Current migration law is contained in the *Migration Act 1958* (Cth). This Act has been amended many times and contains over 500 sections and 200 regulations. In Australia, the federal Department of Home Affairs assesses all applications from people who wish to migrate to Australia. The Home Affairs portfolio was created in December 2017, when the Australian Government combined many of its agencies into this one portfolio. To quote its website:

> The Department of Home Affairs continues to deliver immigration and customs border policy functions previously delivered by the Department of Immigration and Border Protection. It also includes national security from the Attorney-General's Department; the Office of Transport Security from the former Department of Infrastructure and Regional Development; multicultural affairs from the Department of Social Services; and the counter-terrorism coordination and cyber security policy functions from the Department of the Prime Minister and Cabinet.
>
> 'Our history', Department of Home Affairs website

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Multiculturalism

Multiculturalism, which involves the existence of many different cultures in one place, has had an enriching effect on Australian society. It has given the Australian people access to a diverse range of arts, literature, food and music that is widely appreciated. However, true multiculturalism needs to go further than this to produce a cohesive and equal society.

Multiculturalism, as we know it today, has developed over many years. First came the official policy of assimilation, where migrants were expected to adopt the 'Australian way of life' and give up their own cultural practices. This policy operated from Federation in 1901 to the mid-1960s. From then until the mid-1970s, the guiding principle was integration. This change was partly because migrants who felt excluded, even while living in Australia, made their views known at the polls, and the government paid attention. Reforms included some softening of the **White Australia Policy**, and more resources dedicated to assisting people settling in Australia. Under integration, migrants were not expected to abandon their own languages and cultural practices; these were seen as enhancing their full participation in an integrated Australian culture.

In the 1970s, the term 'multiculturalism' came into common use. Multiculturalism celebrates the cultural diversity of a society and the benefits that migration has brought to this society. In 1972, the serving Minister for Immigration, Al Grassby, called for the abandonment of the policies of assimilation and integration. He called for a more tolerant approach to the cultures that existed in the community. The Australian Government investigated the needs of migrants and its findings were released in the *Galbally Report* (1978), named after the chair of the committee that produced it, Frank Galbally. The report declared that migrants were socially, economically and politically disadvantaged and that the only way to overcome this discrimination was to adopt a policy of multiculturalism.

Figure 11.1 Multiculturalism has given the Australian people access to a diverse range of arts, literature, food and music. In previous years, the Sydney Opera House has been lit up red as part of Lunar New Year festivities across the city.

White Australia Policy
the government policy of allowing only Europeans and English-speaking people to immigrate to Australia; so-called 'undesirables' were kept out by use of the infamous 'Dictation Test'

For people wanting to come to Australia on a permanent basis, there are two programs designed to help them in this move: the migration program and the humanitarian program.

Research 11.1

View the website of the Australian Government's Department of Home Affairs and complete the following tasks.

1. Outline the types of information this website offers.
2. Navigate to or search for the page 'Explore visa options', which will be listed in the 'Immigration and citizenship' tab under the heading 'Portfolio functions', and write a review evaluating its ease of use for a prospective applicant.

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11.2 The migration program

Streams

The migration program is made up of three streams:

- **Skilled stream** – This stream has several categories for people with particular work-related or business skills. There are certain occupations that at different times will be in high demand in Australia due to a domestic shortage. These are listed on the 'Skilled occupation list' on the Department of Home Affairs website. In 2024, these occupations included accountants, aeroplane pilots, interpreters, architects, dental occupations, engineers and those involved in building trades.
- **Family stream** – This is the category for people who can be sponsored by a relative who is an Australian citizen or permanent resident.
- **Special eligibility stream** – This allows former citizens or residents, and certain New Zealanders, to migrate to Australia.

Skilled stream

Prospective migrants who can contribute to the economic wellbeing of Australia are accepted under the *Migration Act 1958* (Cth) as skilled migrants under a number of different types of work visa. The following information was current as of 2024, but details may change at any time, particularly with a change of government.

For some of these visas, applicants must pass a points test which allocates points according to factors such as the age, qualifications, work experience and language ability of the applicant. For example, as of 2024, an age limit of 45 years applies to independent migrants and they must have proficient English skills. Thus, the points test favours younger English-speaking professionals and tradespeople. There are several other types of work visa for migrants, including business migration, employer nomination, investment-linked and distinguishing talent.

Different states and regions of Australia have different economic focuses and so experience different skills shortages. States may nominate certain occupations in their state migration requirements, and the same happens for regions.

The 2023–2024 skilled migration program was set at 137 100 places. The number of visas provided will go up and down each year depending on the state of the economy.

Family stream

The family stream, or family-sponsored immigration, covers people who are sponsored by relatives to come and live in Australia. The sponsor must be an Australian citizen or a permanent resident of Australia. Generally, people who are sponsored by Australian citizens will be favoured over those who are sponsored by permanent residents.

In 2023–2024, there were 52 500 family stream visas provided with an overarching aim of reuniting families. Under the family migration program, certain people can apply to migrate to be with family members. These include spouses, people who are engaged, carers, dependent children and other relations under certain circumstances.

Spouses or de facto spouses of Australian permanent residents can apply for a provisional visa. They may be granted permanent residency two years after arrival in Australia if their relationship is ongoing. Fiancés/fiancées are granted a nine-month conditional visa, in which time they are expected to marry. Permanent residence may be granted two years after the marriage.

Figure 11.2 Under the family migration program, applicants who meet certain criteria can apply to migrate to be with family members, including spouses and children.

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Carers are allowed to come to Australia to care for a relative with special needs. Dependent children are allowed to come to Australia to be cared for by their parents. Orphaned children and unmarried relatives under the age of 18 are allowed to migrate to be with family members if they have no one else to care for them.

Parents of Australian permanent residents may migrate to Australia if they pass the 'balance of family' test. Under this criterion, half of their children (including stepchildren) must live in Australia, or there must be more of their children living in Australia than anywhere else. Aged dependent relatives are allowed to migrate to Australia if they are over retirement age and have been dependent on their Australian relative for a period (usually three years). If a person has their parents, siblings and children living in Australia, they can migrate to Australia under the remaining relative category.

Applicants in all of the mentioned categories must meet the general requirements. For most categories of family migration, the Australian relative sponsoring them must give an assurance of support. This means that the relative must sign a contract agreeing to provide financial support to the new resident for two years. However, this assurance does not apply to dependent children, fiancés/fiancées or sponsors, as it is expected that the family member will support them anyway. With the exception of dependent children and spouses, any person applying for family migration must pay a bond and a Medicare levy before their application will be considered. Australian residents who sponsor applicants under the family migration program can appeal to the Migration and Refugee Division of the Administrative Appeals Tribunal if the application is rejected.

A fee is charged for each type of visa. The amount differs depending on the visa. For example, the cost of a student visa as at 1 July 2023 was $710 and a prospective marriage visa was $8850.

Special eligibility stream

This stream provides an opportunity for eligibility if a person has:

- been an Australian permanent resident for nine of their first 18 years
- served in the Australian Armed Forces for three months at any time before 19 January 1981.

Spouses and dependent family members who meet certain requirements may be included in the application. In 2023–2024, there were 400 places offered in the special eligibility stream.

Review 11.1

1. Briefly describe the three streams of Australia's migration program.
2. Identify which applicants may have their migration sponsored by a relative who has permanent residency in Australia.
3. Discuss why the Department of Home Affairs may make it easier for some family members to reunite than others. Assess whether you agree or disagree with this policy. Justify your answer.
4. Describe the legal and social problems that prospective migrants encounter when trying to gain residency in Australia.

General requirements

To be allowed to come to Australia, a person must meet certain requirements. Whether they are intending to stay for a short period of time or an extended stay, all visa applicants must meet the requirements of being of good character. A person who wishes to live in Australia on a permanent basis must also meet health requirements and in most cases pass the points test.

Character requirements

All applicants must be of good character. The character requirements are set out in the *Migration Act 1958* (Cth). A visa can be denied to any person who has been sentenced to at least a year in prison for a criminal act, who has been involved in criminal activities or associates with known criminals, who will likely commit a crime in Australia or who will behave or encourage others to behave in a way that will bring contempt or hatred to members of Australian society.

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Health requirements

Australia has strict health standards that all applicants must meet. This is to protect Australia from high health costs and risks. These health standards are set out in the *Migration Regulations 1994* (Cth). To ensure that Australia's health requirements are met, applicants and dependent family members must have a medical examination, an X-ray (if aged 11 or older) and an HIV/AIDS test (if aged 15 or older).

Points test

People who wish to become permanent residents of Australia must complete a number of application forms and answer a range of questions. The answers are awarded points which, when added up, measure the desirability of the candidate in comparison to other applicants. Different categories of migration are assessed on different features. Some of the areas that are assessed in the points test are:

- the applicant's education level
- the skills possessed by the applicant
- the applicant's English proficiency
- the qualities of the sponsor (such as the sponsor's citizenship, employment and relationship to the applicant).

The Citizenship Test

In the mid-2000s, after much public comment about the eligibility of permanent residents wishing to become Australian citizens, the government announced that all migrants who wished to take out citizenship would have to undergo a test. This test would enable prospective citizens to demonstrate their knowledge and understanding of being 'Australian'. The conditions of citizenship were set out in the *Australian Citizenship Act 2007* (Cth). It was amended by the *Australian Citizenship Amendment (Citizenship Testing) Act 2007* (Cth) in September 2007 to allow the testing of prospective citizens.

In 2008, the Australian Government reviewed this Act and the tests. In a report titled *Moving Forward … Improving Pathways to Citizenship*, it was found that although there is a need for some form of test, 'the present test is flawed, intimidating to some and discriminatory. It needs substantial reform.' Because of the review, the test has undergone several changes to eliminate weaknesses.

The conditions of becoming an Australian citizen can be viewed on the website of the Australian Government Department of Home Affairs. Changes to the requirements and practice tests are found on this site.

Case Study

What happens if your character does not pass the test?

David Irving is a British historian who has regularly been denied a visa to enter Australia because of his views. Irving has outraged Jewish communities and historians throughout the world with his denial that the Holocaust took place. He was refused entry to Australia in 1993, 1996 and 2003 due to failing the character test.

In denying his visa application in 2003, the Australian High Commission in London cited Irving's defiance and contempt for the law of other countries that he had visited, and that he had been deported and excluded from these countries. It could not be assumed that he would behave differently in Australia.

In 1991, following several public speeches in Germany, Irving was convicted for Holocaust denial: in 1992 his appeal failed and he was banned from the country. In 1992, Canada deported him for lying to an immigration adjudicator. His previous unsuccessful appeals for an Australian visa meant that he owed the Australian Government $35 140.

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Review 11.2

1 Outline the requirements that a person wanting to obtain a visa to come to Australia must meet.
2 Describe the points test and what types of areas are assessed.
3 Read the Case Study on the previous page and complete the following tasks.
   a Identify who has been denied a visa to enter Australia and describe the reasons why he is well known.
   b Identify who denied him the visa and what reasons were given.
   c Outline some of the problems he has met with around the world.
   d Discuss whether we should allow someone to enter Australia when we disagree with their views.

11.3 The refugee and humanitarian program

Offshore component

The refugee and humanitarian program comprises the following two categories for persons offshore (outside Australia) and also outside their home country:

- **Refugee category** – people needing resettlement because they are subject to persecution in their home countries
- **Special Humanitarian Program category** – people who, although not meeting the criteria for refugee status, are subject to substantial persecution or discrimination in their home country, which amounts to gross violation of human rights; they must demonstrate family or other connections with Australia.

To meet the criteria for either of these categories, a person must be outside Australia. The refugee program allows migration to Australia on the basis that the applicant is a refugee. To be considered a refugee, the applicant must meet the definition in the *Convention relating to the Status of Refugees* (1951), also known as the 'Refugee Convention', and its 1967 protocol: a person who is outside their country of origin and has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' if they return to that country of origin. Refugees are different from migrants. Migrants can choose when they are leaving their country, where they are going and when they are returning. Refugees seek **asylum** in another country for their own safety, and cannot return to their own country unless there is an improvement in the circumstances that forced them to leave. The humanitarian program is meant for refugees and others deemed to be in special humanitarian need.

asylum
protection granted by a state

Figure 11.3 Hazara refugee Ali cooking kebabs in his 'Afghan Friendship Restaurant' in the town of Griffith in New South Wales

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Those in special humanitarian need who wish to come and live permanently in Australia can apply to be allowed to migrate on humanitarian grounds. A person who can prove refugee status or meet other humanitarian criteria is given a protection visa, which allows them permanent residency in Australia.

Under its refugee program, the Department of Home Affairs seeks to help people overseas in humanitarian need to resettle in another country in situations where this is the only option available. It also aims to meet Australia's international obligations onshore under the Refugee Convention. In addition to the offshore resettlement program, there is also onshore protection.

The Australian Government's humanitarian visa quota is kept updated to reflect issues in other countries. For example, in 2021 when a new regime took over the running of Afghanistan, the government announced that it would provide 4125 places a year for Afghan nationals through its Humanitarian and Family Visa programs until 2026. Similarly, as mentioned, the Australian Government announced in late 2023 that, in response to environmental issues, up to 280 people from Tuvalu would be able to migrate to Australia each year.

Offshore resettlement

The offshore resettlement program was implemented for refugees and other 'humanitarian entrants' who applied for a visa from outside Australia, while already outside their home country. The main categories of visa given under this program includes the following:

- **Refugee visa** – This visa relates to people who fall under the definition of 'refugee' in the Refugee Convention, who are in need of resettlement because they can neither return to their home country nor stay where they are.
- **Special humanitarian program visa** – This visa relates to people who have experienced substantial discrimination in their home country, to an extent that amounts to a gross violation of human rights. Someone who is an Australian citizen, permanent resident, or eligible New Zealand citizen must support their application.
- **Temporary offshore humanitarian visas** – In September 2001, two new types of temporary offshore humanitarian visas were created by changes to the *Migration Act 1958* (Cth). The goal was to make people who had left their home country remain in the first country in which they could gain protection. These visas were only available to people who had spent fewer than seven days in a country where they could have requested and gained asylum. The two types of visas under this category were:
  - **Secondary movement relocation visa** – This visa relates to people who had left a safe first country of asylum but had not yet entered Australia. The visa lasts for five years – after four-and-a-half years, the holder may apply for a permanent protection visa if they continue to need protection.
  - **Secondary movement offshore entry visa** – This visa relates to people who entered Australia somewhere outside our migration zone (such as Christmas Island, Ashmore Reef or the Cocos Islands). The visa lasts for three years. Holders are not entitled to permanent residence; however, they may be able to get a further temporary protection visa if they continue to need protection.

Offshore processing

Between 2001 and 2008, people who arrived without a visa at an excised offshore place were detained on Christmas Island or moved to offshore processing centres, established in September 2001 in Nauru and in October 2001 in Manus Island (Papua New Guinea). The governments of Nauru and Papua New Guinea cooperated in the establishment of these facilities, with the promise of assistance by the Australian Government.

People seeking asylum were not detained under Australian law nor the laws of Nauru or Papua New Guinea. Instead, they were granted special purpose visas by the countries while waiting to be processed and then resettled or returned. The claims of people seeking asylum in Nauru and Manus Island were assessed by either the UN High Commission for Refugees (UNHCR) or the Australian Government.

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The result saw resettlement in countries such as Australia, New Zealand, Sweden, Canada, Denmark and Norway.

In 2008, the Rudd Labor government wound up the 'Pacific Solution' and the remaining people seeking asylum on Nauru were relocated to Australia. However, the processing of asylum seekers has remained a problem for the Australian Government and evokes much political and social debate in Australia. In 2011, there were discussions held between the Gillard Labor government and the Malaysian Government about refugees being processed in Malaysia, but this did not make it through parliament and the entire concept of offshore processing resulted in a stalemate.

Under a High Court challenge, the 'Malaysian solution' was deemed 'unconstitutional'. While these debates were occurring in parliament and the court system, more and more boats were arriving in Australian waters. In late 2012, the Gillard government and the opposition were finally able to reach an agreement, and offshore processing was reinstated in Nauru and Manus Island. Following the 2013 election, the Liberal government implemented tough border protection measures under its policy of removing unauthorised maritime arrivals. While this controversial policy has stemmed the flow of migrants arriving to Australia by boat, it has incited much discussion and even condemnation within Australia and from overseas.

In addition, there has been much condemnation of the conditions of the offshore centres. The detention centre on Manus Island was ruled unconstitutional by the Papuan New Guinean courts and closed down in 2017. One of the newer solutions is an agreement with the United States to take some of the refugees. It is highly recommended that students keep up-to-date with changes in migration policy (especially in regard to onshore and offshore processing), as it is such a political and evolving issue.

Onshore component

People who are already in Australia, either on temporary visas or without a visa, and who are found to be entitled to protection by Australia in terms of the Refugee Convention, are covered by the onshore protection component. They can apply for a protection visa. The application will be assessed to determine whether the person meets the definition of a refugee under the Refugee Convention, under Australia's domestic laws, and taking into account all information about the conditions in the person's country of origin. If the application is refused, the person can seek a **merits review** of that decision from the Administrative Appeals Tribunal. The reviewing tribunal may exercise all of the powers of the original decision-maker. It may then agree with the decision, make changes to it, send back certain matters for reconsideration, or set the decision aside and substitute a new one.

Figure 11.4 Protests in Sydney against immigration detention in the Pacific

merits review
analysis of the facts presented in a case, and often the policy choices that led to the decision

Proving refugee status can be difficult. The Department of Home Affairs considers each application separately; however, children will not be granted refugee status just because a parent has been classified as a refugee, and a spouse cannot assume that they will be given asylum with their partner.

Certain segments of the Australian community have expressed concerns about a 'flood' of arrivals fraudulently claiming refugee status or otherwise entering Australia illegally. In late 2001, the federal government under John Howard responded to these concerns by making a number of amendments to the *Migration Act 1958* (Cth). These changes made it harder not

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bridging visa
a permit to stay in Australia for a temporary period of time so that arrangements can be made either to leave the country or to apply for permanent residency

only for fraudulent claims, but also for genuine claims for refugee status. The legislation and the policies adopted by the Howard government to deter people entering Australia without authorisation will be discussed in the following content.

Onshore protection

When a person has arrived in Australia, they can apply for a protection visa to be recognised as a refugee. The asylum seeker must show that they satisfy the definition of 'refugee' and that there is an obligation by Australia to protect them. There is only an obligation if:

- the person has a well-founded fear of being persecuted and they are covered by the Refugee Convention
- the person cannot be given protection that is effective in another country
- the person is excluded from the Refugee Convention's operation (e.g. because of concerns about security).

Figure 11.5 Mridula Amin Jhaidul, 45, a Bangladeshi refugee, sings Bollywood songs on Starmaker, a karaoke app on his phone, at his home in Dandenong. Jhaidul was released from immigration detention in Melbourne in 2023 after spending 10 years in detention in Australia. He lives bridging visa to bridging visa, working in a nearby factory, unsure if he will be granted permanent residency.

Whether the person gets a permanent or a temporary visa will depend on how they entered Australia.

Permanent protection visa

Permanent protection visas (PPVs) are for people who came to Australia on a valid temporary visa (e.g. a student visa or a tourist visa) and then asked for refugee status. When they lodge their PPV application, they will receive a **bridging visa**, which normally allows them to remain in the community while their PPV application is being processed. Some bridging visas allow the person to work in Australia. While the application is being processed, the applicant is eligible for financial assistance for basic living costs and healthcare.

If they are granted a PPV, they will have access to social services such as the Adult Migrant English Program, age or disability pensions and family tax benefit. They can also sponsor their families through the offshore humanitarian program.

Temporary protection visa

In 1999, the Howard government introduced a three-year temporary protection visa (TPV) for people who arrived in Australia without a valid visa and asked for refugee status. Applicants had to meet health and character requirements. Under a TPV they had three years of temporary residence, after which they could reapply for another TPV – or in some cases, apply for a PPV. Unlike other protection visas, a TPV only provided limited access to government assistance for settlement, and holders did not have an automatic right to sponsor their families to join them in Australia. If they left Australia, they needed special approval to re-enter.

In 2008, the Rudd government abolished TPVs, meaning that all border applicants who were found to meet the criteria for refugee status received a PPV. However, the number of applications received was greater than the number of available visas; for example, in 2013–2014, more than 54 000 people applied but only 13 750 were granted visas. If someone did not meet

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the conditions for refugee status, they could be removed from Australia.

In 2014, the Abbott Liberal government sought to reintroduce the TPV. Despite much opposition from the other political parties, the TPVs were reinstated in December 2014 and continue at the time of writing.

In 2018–2019, the Australian Government granted approximately 18 750 refugee and humanitarian visas. This was higher than in the previous year, but applications always outnumber the places provided. COVID-19 has slowed down the application process, but in 2021–2022 there were 13 770 visas offered, with the government maintaining this number in 2023.

Review 11.3

1 Identify who the offshore component of the humanitarian program is designed for and the two categories of people it covers.
2 Outline the criteria that a person must meet to be classed as a refugee.
3 Migration and border security is a very political issue in Australia. Discuss two to three of the issues that are raised around migration (authorised and unauthorised) in Australia.

Research 11.2

Unauthorised migrants travel to many countries. Find a media item about another country that has unauthorised migrants.

11.4 Unlawful non-citizens

Under section 14 of the *Migration Act 1958* (Cth), people who are in Australia without the correct visa are called 'unlawful non-citizens'. If they do not leave Australia voluntarily, they can be detained (s 189) and removed from Australia (s 198). Under these circumstances, there are strict time limits on further application for a visa to re-enter Australia (s 195). There are two types of unlawful non-citizens in Australia: over-stayers and asylum seekers.

Over-stayers

Over-stayers are those who enter Australia on temporary visas but do not leave when the visa expires. This group makes up the largest number of unlawful non-citizens in Australia.

Border applicants and people seeking asylum

There are also people who arrive in Australia with no form of entry permit at all. Because a large proportion of these people have travelled by boat to the northern shores of Australia, they are sometimes called 'border applicants' or 'boat people'. Since the 1990s, the majority of these unauthorised entrants have come from Afghanistan and Iran, and arrivals that are more recent have been from Sri Lanka. Many arrive because of **people smuggling**. This number slowed down during the COVID-19 pandemic.

over-stayer
a person who comes to Australia on a temporary visa but continues to stay when their visa expires

people smuggling
the organised illegal movement of people across international borders, usually for a fee

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To many people, the term 'people seeking asylum' is preferable to 'illegal immigrants' when referring to border applicants – especially as people fleeing their countries may face a death sentence if they stay, and there are a variety of reasons why someone might not be able to obtain the necessary documentation to be considered under the offshore component of Australia's refugee and humanitarian program. Applying for a passport or visiting an Australian Embassy may simply be too dangerous, so they hope to get to Australia and be considered under the onshore component of the program.

Media

Refugees alleging horrific treatment in Australian detention centres face lengthy court delays

Christopher Knaus

The Guardian

3 March 2023

Fifty refugees who allege they endured horrific treatment in now-defunct South Australian detention centres are facing vast and unexplained delays to their cases against the government, which threaten to languish in the courts for more than a decade.

Documents filed in the 50 cases before the South Australian district court paint a disturbing picture about the treatment of detainees in the Port Hedland, Woomera and Baxter onshore detention centres in the early 2000s.

The documents allege detainees were beaten by guards with batons, subjected to frequent and unnecessary strip-searches, called by numbers rather than names, and placed in restraints and handcuffs to attend medical appointments.

Most of the 50 refugees allege they directly witnessed fellow detainees self-harming and attempting suicide. Many, including children, spoke of starving themselves in protest. Some sewed their lips together to do so.

In one case a former detainee of Baxter and Curtin detention centres alleges he was beaten by guards and said his children had to witness 'men attempting to hang themselves from a tree'.

Another spoke of being beaten by guards while a bystander in a detention centre riot in mid-2000.

'The plaintiff was in the kitchen watching the riot when a guard entered the kitchen and accused the plaintiff of being involved and pushed the plaintiff causing his head to strike the steel bars on the walls knocking him unconscious and injuring the plaintiff's neck,' his lawyers said in court documents.

In another the detainee said he had seen a fellow detainee climb to the top of a perimeter fence and jump into razor wire.

'Guards used a water cannon on the detainee who fell from the fence to the ground,' court documents allege. 'After he landed, guards beat him with batons before he was taken away.'

Many of the refugees fled situations of violence, torture and persecution, including in Iraq and Iran, and their lawyers allege the government knew they were at risk of psychiatric injury. Despite their

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history of trauma, and clear signs that many were suffering in detention, their cases allege the government was negligent in failing to provide proper psychiatric care or treatment.

Most of the civil claims were lodged in 2014 in the district court. Just one of the 50 cases has made it to trial in the nine years since.

Shine Lawyers, which is representing all the SA refugees, says it fears the cases will languish in the courts for another decade.

'The first trial went for more than 150 days and the remaining trials could take anywhere up to 100 days each to complete,' a Shine special counsel, Mal Byrne, told Guardian Australia.

'Our clients will never truly be free from detention until their claims are resolved, they have gone from immigration detention to litigation detention, a fact which didn't seem to concern the previous government.'

The home affairs department said that it was 'aware of the cohort of claims in South Australian courts'.

'As the matters are currently before the court, it would not be appropriate to comment,' a spokesperson said.

The Howard-era policy of mandatory and indefinite detention in onshore centres like Woomera and Baxter, including of children, prompted widespread criticism from human rights groups and precipitated the notorious Pacific Solution.

Cabinet documents from 2000, released two years ago, show how the Howard government canvassed ways to deal with what it described as 'an increasingly non-compliant population' in centres like Woomera.

The situation was so volatile, cabinet was warned, that it threatened to 'go beyond the capacity' of Australasian Correctional Management, the private-sector company to which the government had contracted out detention centre management. Cabinet countenanced using the Australian defence force as a last resort.

In March 2000, the cabinet documents show, the then immigration minister Philip Ruddock sought additional sanctions for immigration detainees who engaged in 'inappropriate behaviour'.

These included a new 'non-warrant strip search power', something the Department of Foreign Affairs and Trade opposed outright, telling cabinet that Australia's mandatory detention and temporary protection visa regimes had already 'taken us close to the minimum standards of treatment the Refugee Convention, international and domestic law, and human rights standards will bear'.

Analysis 11.1

Read the media article above.

Describe the issues faced by the residents and administrators of the detention centres.

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Review 11.4

1 Outline the avenues that are available to someone who has entered Australia without a visa, but who fears persecution in their country of origin.
2 Describe what happens if a border applicant does not meet the criteria for refugee status.
3 Discuss why someone might not obtain the correct visa if they want asylum in Australia.

Laws and policies relating to border applicants

Ongoing government concerns

In 2000 and 2001, the Australian Government under John Howard expressed concerns about large numbers of border applicants coming to Australia by boat, and in particular those brought by people-smuggling operations from Indonesia to Australia (6640 people arrived on 83 boats). Some of the concerns were:

- they are a criminal risk and may pose a threat to national security, a threat that could include terrorism
- processing costs are high
- they pose a health and quarantine threat to persons and agriculture
- they infringe Australia's sovereignty
- people smugglers are criminals, often with links to organised crime.

The legal responses of the Howard government to these concerns will be discussed in the following pages. Whether or not these responses were justifiable ways of addressing these concerns is a separate issue. It is clear, however, that some of the ideas expressed or suggested in the media at the time relied on misconceptions and stereotypes. These include:

- attempting to enter Australia without the proper entry permit is unfair to asylum seekers who do go through the legal channels and 'wait their turn in the queue'
- by voluntarily paying people smugglers, would-be immigrants contribute to the continuation of this exploitative and illegal activity
- if they can afford to pay people smugglers, they have money and are not genuinely needy
- economic opportunities in Australia and limited prospects in their home countries are the main factors behind illegal immigration.

Whether these attempted arrivals were perceived as wealthy 'queue jumpers' making a lifestyle choice or 'economic migrants' looking for a better life, a 2001 poll indicated that 77 per cent of Australians agreed with the government that they should be prohibited from entering Australian waters, as occurred in the *MV Tampa* incident (see the Case Study on the following page). In 2014, a poll found that 59 per cent of Australians surveyed believed that most boat arrivals were not genuine refugees and 60 per cent thought that the government should be harsher on these arrivals.

However, more recent surveys indicate that public opinion is softening. A survey conducted by the Australian Institute in 2016 indicated that of the 1400 people polled, 63 per cent thought that true refugees arriving by boat should be allowed to stay in Australia. Little research into public opinion occurred in the immediate ensuing years as COVID-19 and its aftermath slowed down the arrival of migrants and refugees to Australia.

Figure 11.6 People-smuggling operations are a worldwide issue. Here, wreckage from a shipwreck was found on a beach in southern Italy in February 2023. Dozens of migrants died after the boat in which they were travelling smashed onto the rocks.

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Case Study

The *MV Tampa* incident

In August 2001, a Norwegian tanker called the *MV Tampa*, sailing in international waters between Indonesia and Australia, saved 433 asylum seekers from a sinking boat.

The Australian Government told the *MV Tampa* that it could not enter Australian waters. Despite this, the captain headed in the direction of Christmas Island. The Special Armed Services was ordered to board the vessel, there was an increase in naval and air force patrols of the waters between Australia and Indonesia, and federal legislation was pushed through quickly to give the government more definite legal backing for these actions.

The government refused to accept the asylum seekers, saying that as they had left from Indonesia they either should go back to that country or be taken to Norway. The government declared that as Australia was a sovereign state and had a right to protect its borders, it should be allowed to decide who could enter Australia. The world watched as the stand-off lasted for 10 days. Eventually, Nauru and New Zealand took the group of people.

Research 11.3

View the website of the UN High Commissioner for Refugees and carry out the following research.

1. Identify the work this agency does.
2. Outline its work in one of the identified geographic regions.
3. Describe how it helps: a) asylum seekers; and b) refugees. Write a summary about one of the 'Our Stories' issues.

Legislation and efforts to target people smugglers

Following the *MV Tampa* incident, a large number of amendments to the *Migration Act 1958* (Cth) were passed. Chief among these were amendments in 2001 and 2005 that changed the status of some Australian islands such as Christmas Island and Ashmore Island to 'excised offshore places'. This means that they are not included as part of Australia for purposes of immigration law. If people land on an excised offshore place in order to enter Australia, they will be ineligible for a permanent Australian visa.

Other amendments limited the power of the courts to use the common law in favour of asylum seekers. Section 474 of the *Migration Act 1958* (Cth) declares decisions made under that Act to be final; that is, not subject to judicial review. Section 166 states that persons arriving in Australia must present identification, and section 190 states that they can be detained if they fail to do so.

It is not clear how making it more difficult for people seeking asylum to gain entry to Australia, or measures against them such as detention (discussed later in this chapter), can be considered a reasonable means of deterring people smugglers. Unscrupulous people taking advantage of others' fear and desperation do not care what conditions the others are sent to. As for the people seeking asylum themselves, most do not know the content of Australia's domestic policies, and others are willing to take the risk given the conditions they are fleeing in their countries of origin. It has been suggested that international cooperation and joint policing efforts against people smugglers has a greater chance of success and is a more just method than taking action against people seeking asylum.

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Figure 11.7 The problem of illegal immigration into Australia was brought up in 2019 by then Home Minister Peter Dutton when he met in Colombo, Sri Lanka, with the navy commanders from both Sri Lanka and Australia who were tasked with stopping people smuggling.

One such international collaborative initiative began in February 2002. The then Foreign Ministers of Australia and Indonesia, Alexander Downer and Dr N. Hassan Wirajuda, co-hosted a conference for regional ministers on 'People Smuggling, Trafficking in Persons and Related Transnational Crime' in Bali, designed to build regional cooperation on this issue. The 'Bali Process' has been ongoing, with a Regional Support Office set up in Thailand in 2012 to help facilitate ongoing efforts. Ministerial meetings are held every two years with the Eighth Ministerial Conference and Third Government and Business Forum of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process) held in Adelaide in February 2023.

penalty unit
a statutory financial penalty for an offence, arrived at by multiplying a monetary amount by the number of penalty units for the offence; the monetary amount can change over time without requiring amendments to the statute

Some amendments to the *Migration Act 1958* (Cth) do target people smugglers. Sections 233A–233E provide for criminal penalties of 10–20 years' imprisonment or 1000–2000 **penalty units**, or both, for bringing people to Australia.

Review 11.5

1. Provide a recount of the *MV Tampa* incident.
2. Outline how the *MV Tampa* incident changed Australian migration laws.
3. Describe the outcome for an asylum seeker who is processed offshore.
4. Describe the 'Bali Process'. Explain why it came about.

Research 11.4

Information about people smuggling is available on the websites for Amnesty International and the Australian Federal Police.

1. Outline the points that the Australian Federal Police and Amnesty International agree on with respect to people smuggling.
2. Outline the points that they disagree about. Why do you think these differences occur?
3. Write a one-page report summarising the points made and evaluating the arguments.

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11.5 Consequences of breaching immigration laws

Deportation and removal

Deportation is the forcible removal of a permanent resident person from Australia. Under the *Migration Act 1958* (Cth), this can only be done legally if the person falls into the Australian constitutional law definitions of 'immigrant' or 'alien'.

Section 200 of the *Migration Act 1958* (Cth) gives the Department of Home Affairs the power to deport a migrant who is convicted of a criminal act and sentenced to more than one year in jail. Those migrants who pose a threat to the security of Australia can also be deported. The Department of Home Affairs only deports people under extreme circumstances. A person who is being deported can appeal the decision to the Administrative Appeals Tribunal. A migrant who has become an Australian citizen cannot be removed.

The reasons that permanent residents are deported can be divided into three areas:

- They have been imprisoned for certain crimes.
- They have several convictions for crimes over a period of time.
- They are considered a threat to the security of Australia.

A person cannot be deported without an order made by the Minister for Home Affairs. Amendments made to the *Migration Act 1958* (Cth) in 2014 gave the minister greater powers to cancel visas. As a result, between November 2014 and February 2015, more than 200 permanent residents had their visas cancelled and were given notice that they must return to their place of birth. With a focus on disrupting organised crime, the minister had, by August 2017, cancelled the visas of 147 senior 'bikies' who were born overseas. In 2021–2022, over 600 visas were cancelled on character grounds: as well as 'bikies', these visa cancellations included drug dealers, sex offenders, organised criminals and people who pose a national security threat. Some of these people were overseas at the time of the cancellation, but most were still living in Australia. Many are still in the process of appealing against their deportation. The deportation of New Zealand-born Australian residents to New Zealand has caused some friction between the Australian and New Zealand governments. It is recommended that students follow the media reporting of this issue.

Under the *Migration Act 1958* (Cth), a person who is not given legal permission to stay in Australia must be removed as soon as is practicably possible. Thus, those applying for refugee status must successfully prove their claim or they will be removed.

A person who is removed must meet the costs of the removal or owe the Australian Government that amount. The person is not allowed to re-enter Australia for up to three years. A person cannot be removed until all visa applications have been fully determined. This can be a lengthy process, and applicants will often reside in Australia for many years as they pursue all avenues. They may have formed relationships and had children during their time in Australia. As a result, the removal can have severe impacts, both emotionally and financially.

Removal from Australia does not necessarily mean that the person will be accepted into other countries. To stay in Australia, people should apply for a bridging visa, as they are available to unlawful non-citizens. This visa will allow the applicant to stay in Australia while their application is assessed.

Deportation is a political issue in Australia and leads to much emotional debate. An example of this occurred in August 2019 when a Sri Lankan Tamil husband and wife and their two Australian-born children (referred to in the media as 'the Biloela Tamil family') were put on a plane in Melbourne to be deported to Sri Lanka. The couple had separately arrived in Australia by boat via people smugglers in 2012 and 2013, met, married and settled in the Queensland town of Biloela. A legal challenge against their deportation was mounted, and the family was taken off the plane in Darwin.

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Public protests were held around the country with demands that the family be allowed to stay. The federal government claimed that allowing them to stay would undermine migration policy; the federal opposition wanted an exception to be made. Further public action was taken in 2021 against their deportation. On 21 May 2022, a few days after the federal election, the family was granted a bridging visa by the interim home affairs minister, and they returned to Biloela on 10 June. On 5 August 2022, the Department of Home Affairs advised that the family had been granted permanent visas. This was met with much joy by many Australians who had followed the case.

Research 11.5

There has been much media coverage of the government's ability to deport long-term permanent residents of Australia (including the Biloela Tamil family). Many of these residents came to Australia when they were very young and know no other life. Discuss the fairness of these actions. You will need to carry out some research to assist you with your answer.

Figure 11.8 Detective Superintendent Greg Williams speaks to the press in Auckland, New Zealand, in 2020 following raids on homes linked to members and associates of the Mongols motorcycle gang. The Mongols motorcycle gang had been at the centre of gang conflict since high-ranking members were deported from Australia and established chapters in New Zealand.

Extradition

Extradition happens when a person who is currently residing in one country and accused of a crime in another country is handed over to that other country for trial or punishment. In Australia, the laws controlling extradition are contained in the *Extradition Act 1988* (Cth). The Act covers everyone who lives in Australia. A person will only be extradited if the crime of which they are accused carries a punishment of at least one year in both Australia and the country where it was carried out. The Australian Government will detain the person to be extradited and hand them over to the officials of the other country, to be taken there for trial (and punishment if found guilty).

The only person in Australia with the power to order an extradition is the federal Attorney-General, and the Attorney-General will not do so if they have reason to believe that the accused will be tortured or sentenced to death. Extradition is also unlikely if a person is seeking refugee status in Australia because of political considerations.

Detention

The *Migration Act 1958* (Cth) allows for the immediate detention of any person who is in Australia without a valid passport. This covers unauthorised arrivals, people who stay beyond the expiry of their temporary visa and those who breach their visa conditions (e.g. by working when the terms of their visa prohibit it).

Between 1992 and 2008, asylum seekers who came to Australia without a visa were held in mandatory detention – both adults and children. For most, the detention ended only when they were found to be refugees and given a protection visa, or when they were deported. The government brought in its detention policy in 1992 for the following reasons:

- It is easier to question a person about their application if the person is kept in detention.
- Applicants are less likely to become lost in the community if they are detained during the application process.
- It is easier to remove an unsuccessful applicant from a detention centre.

Between 2000 and 2008, the majority of people held in detention centres were Afghani, Iraqi, Iranian,

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Chinese, Indonesian, Sri Lankan, Palestinian, Korean, Vietnamese and Bangladeshi. This is reflective of issues (natural disasters, political events and so on) that have occurred in these countries.

The current federal government retains detention centres as an 'essential component of strong border control', but it does not automatically detain asylum seekers who do not have a visa. Instead, detention centres are mainly used for unlawful non-citizens who are considered to be a threat to the community, those who will not observe visa conditions, or those who need to be held so that health, identity and security checks can be conducted.

In recent years, both Labor and Liberal governments have revisited the 'Pacific Solution' of carrying out offshore processing of unauthorised migrants at detention centres in Nauru and Papua New Guinea. This has caused much discussion and debate in society, which was exacerbated by riots at the Nauru detention centre.

Figure 11.9 Tamil refugee Mridula Amin Reeta Arulruban packs goods into a bag to take to her son Dixtan who has spent over five years in a detention centre.

Table 11.1 People in immigration detention centres (IDC) and alternative places of detention (APODs) as at 30 April 2024

Place of immigration detention by State	Men	Women	Children	Total
NSW				
Villawood IDC	363	3	0	394
APODs	<10	<5	0	8
VIC				
Melbourne IDC	<170	<15	0	178
APODs	<5	0	0	<5
QLD				
Brisbane IDC	92	0	0	92
APODs	<10	<5	0	<10
SA				
Adelaide IDC	18	0	0	18
APODs	0	<5	0	<5
WA				
Yongah Hill IDC	13	0	0	1
Perth IDC	<10	<10	0	1
APODs	0	0	0	0
NT				
APODs	10	0	0	<10
Total IDCs	**<815**	**<50**	**0**	**87**
Total APODs	**<20**	**<5**	**0**	**2**
Total IDCs/APODs	**89**	**50**	**0**	**8**

Source: Department of Home Affairs

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Australia's main types of detention centres are the following:

- **Immigration detention centres** – used to hold people who are refused entry at Australian international airports, people who have breached their visa conditions, and over-stayers. The Department of Home Affairs website lists detention facilities in Australia while the 'Immigration detention statistics' page on the website provides statistics on the number of people held in each one.
- **Immigration residential housing** – family-style accommodation available to people required to stay in immigration detention. There are residential housing facilities in Perth and in Sydney.
- **Immigration transit housing** – houses people considered a low security risk.

In Court

***NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (Case no S28/2023)**

In November 2023, the High Court of Australia ruled that it is unlawful and unconstitutional for the Australian Government to detain people indefinitely in immigration detention. The plaintiff in this case, known as NZYQ, had been convicted of child sex offences, and as a result had his visa cancelled. His legal team successfully argued that as the plaintiff was stateless and so had no prospect of leaving Australia, it was unconstitutional for the Commonwealth to continue to hold him.

In the days following the High Court ruling, 80 detainees were released from detention centres. This caused concern in the community as some of the people released had criminal records for severe crimes.

Analysis 11.2

Read the In Court above.

1. Outline the facts of the High Court's November 2023 ruling.
2. At the time of writing, the federal government was still looking at ways to deal with this situation. Research to find out the current situation.

Review 11.6

1. Identify the circumstances under which a person can be deported from Australia.
2. Write a definition of 'extradition' and outline under what circumstances extradition takes place.
3. Identify which gender makes up most of the population in detention centres and discuss why this may be the case.
4. Identify the types of detention centres.

Research 11.6

The majority of people held in detention centres up to mid-2024 have been Afghani, Iraqi, Iranian, Chinese, Indonesian, Sri Lankan, Palestinian, Korean, Vietnamese and Bangladeshi. Investigate one of these groups and find out what has happened in their country of origin to make them leave, how easy it would have been to leave their country of origin, and the ways that they came to Australia.

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11.6 Issues faced by migrants

When people legally migrate to Australia, it is expected that they will be afforded the basic rights of all other Australian residents. However, in reality this does not always happen. For a number of reasons, migrants in Australia may face limited access to services such as housing and social services. Many also find themselves subject to unfair treatment because of their race, colour, descent, national origin or ethnic origin. This behaviour can take the form of **direct discrimination** or **indirect discrimination**.

Under the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), the government is obliged to stop racist behaviour. State and federal governments have tried to meet this obligation by passing legislation that prohibits racially discriminatory behaviour and by establishing legal processes and institutions to address these inequalities. However, access to these legal processes is limited by availability, funding and language problems.

Migrants may experience discrimination in their search for somewhere to live and in their dealings with the suppliers of other goods and services.

Access to housing and other services

When renting accommodation, landlords have the right to choose tenants but are not allowed to discriminate because of race. However, it is often difficult to prove that someone was refused tenancy because of race.

New migrants are usually low-income earners and, as such, have difficulty renting adequate accommodation, especially in expensive cities such as Sydney and Melbourne. Finding enough money to pay bond and other costs is a hurdle. They have even greater difficulty in saving and borrowing the money necessary to purchase a home.

direct discrimination a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of sex, race, national or ethnic origin, age, sexuality or other characteristic

indirect discrimination a practice or policy that appears to treat everyone in the same manner, but which adversely affects a higher proportion of people from one particular group

Poor English skills and lack of legal knowledge often mean that migrants are unaware of their rights as renters and buyers. Waiting lists for public housing are very long, adding to the problems faced by migrants trying to gain adequate housing.

Figure 11.10 Waiting lists for public housing are very long, which adds to the problems faced by migrants trying to provide adequate housing for themselves and their families. Public housing in Sydney is also under threat from private redevelopment, with buildings such as the Sirius – which sits near Sydney Harbour – sold off to property developers and residents moved out by 2018.

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Social security

Social security is available to migrants in Australia; however, aspects of the law regarding social security payments have undermined the effectiveness of this measure. With the exception of refugees, most migrants have to wait two years from the time of arrival before they can access welfare payments, including unemployment, sickness and student allowances. A 10-year wait applies to aged pensions and disability allowances. Some visa types are exempt from waiting periods for some payments. More information about these can be found at the Department of Human Services website.

Independent migrants are expected to support themselves and their sponsor must support family-sponsored migrants. A migrant can only claim social security payments during this waiting period if their circumstances have undergone unforeseen change that was out of their control; for example, if they are injured in an accident. This waiting period has been criticised as discriminatory, as it restricts access for those in need and only serves to further isolate migrants from society.

Legal understanding and court access

While the courts should be a mechanism by which all Australian citizens and residents access justice, certain factors render the court system less accessible to migrants. When dealing with legal issues, migrants face a range of problems, including language barriers, unfamiliarity with the Australian legal system, fear of police and authority figures, ignorance of the law and their rights, and financial issues.

Often the rights a migrant is entitled to in Australia are different from the rights that they had in their country of origin. This ignorance of the law often means that migrants will not try to enforce their rights. Language difficulties not only add to this lack of knowledge; they also increase the reluctance to pursue their legal rights.

On the other hand, this ignorance of the law can result in unintentional breaking of the law. Although ignorance is no excuse for breaking the law, the punishment applied can be a harsh penalty for someone who was unaware of the law and whose language and cultural barriers prevented them from finding out about it.

Taking a case to court can be expensive and many migrants are socio-economically disadvantaged and cannot undertake a court case without financial assistance. Like other members of society, migrants have access to legal aid, but resources are limited, and they may not necessarily get a lawyer who can bridge the cultural and language barriers. As a result, many migrants are reluctant to take their case to court.

Negative experiences that they may have encountered with the court system in their home country only add to this reluctance. Attending court can be an intimidating experience for anyone, especially someone who is yet to gain a full understanding of the Australian legal system and is still coming to terms with the language. The use of interpreters helps to alleviate the problem, but it can also draw out the frightening process, especially as legal terms are very hard to translate into different languages.

Migrants will often be disadvantaged during police investigations. Language barriers may cause some migrants to incriminate themselves if they do not understand the questions being asked. Some ethnic groups say that the police discriminate against them; for example, Arabic and Asian groups have complained that police target them.

Everyone living in Australia is subject to Australian law. Migrants, however, are also subject to other consequences of the Australian legal system, including deportation, extradition and immigration detention.

Migrants have the same rights as other people in Australia to take a case to court. However, as discussed previously, limited knowledge of legal rights and court processes, fear of police and financial issues will often mean migrants will not pursue their rights in court. This has led to criminal actions and civil injustices against migrants (and other minority groups) being allowed to occur without penalty.

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Review 11.7

1 Outline what is meant by 'indirect' discrimination. Provide an example.
2 Identify the factors that contribute to the difficulty migrants experience when seeking court access.
3 Discuss how the difficulty of accessing courts can affect life as a migrant in Australia.

11.7 Legal responses

Legal responses to migrants include state and federal laws as well as international treaties. Some of these are discussed in the following pages.

Commonwealth legislation

The *Racial Discrimination Act 1975* (Cth) prohibits any behaviour that discriminates against a person because of race. Note that this Act was not only a response to migration, but also to discrimination against Indigenous Australians and existing Australian citizens. In addition, this Act was amended in 1995 by the *Racial Hatred Act 1995* (Cth) to outlaw any act done because of a person's or group's race, colour or national or ethnic origin and that is likely to offend, insult, humiliate or intimidate the person or group. A person who has been the victim of racially discriminatory behaviour must prove that they have been treated differently or unequally because of their race, colour or ethnic origin. As with most cases of discrimination, it is a lot easier to prove direct discrimination than indirect discrimination.

The *Australian Human Rights Commission Act 1986* (Cth) established the Human Rights and Equal Opportunity Commission (HREOC); now called the Australian Human Rights Commission (AHRC). The Act sets out how a person can make complaints to the commission, and other forms of legal redress for discriminatory conduct. It defines 'unlawful discrimination' as acts, omissions or practices that are unlawful under the relevant parts of the federal Acts prohibiting discrimination on the basis of race, sex, age or disability. Migrants who believe they have suffered discrimination should contact the AHRC.

If there is sufficient evidence that racial discrimination has occurred, the Race Discrimination Commissioner will carry out an investigation. The Commissioner does not have the power to force people to stop their discriminatory behaviour and can only make recommendations and mediate to resolve disputes. If a dispute cannot be resolved, it is referred to the Federal Court, which will make a legally binding decision and award compensation.

New South Wales legislation

The *Anti-Discrimination Act 1977* (NSW) prohibits direct and indirect acts of discrimination in the areas of employment, the provision of goods and services, education, and entry to or membership of a registered club. For example, in the area of employment, the Act provides that no person should be denied promotion because of their race.

A migrant who feels that they have suffered discrimination as covered by the *Anti-Discrimination Act 1977* (NSW) can contact the Anti-Discrimination Board. The Board will investigate the claim and organise mediation between the two parties. If the claim is particularly serious and is proved to have occurred, compensation will be awarded.

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International treaties

International law protects the basic human rights of all people, and as such offers protection to migrants. This is important as ethnic minorities, who often make up migrant groups in a country, may lack the political power to assert their rights. Human rights are protected under a number of treaties to which Australia is a party, including:

- *International Covenant on Civil and Political Rights* (1966), which asserts the right to vote, freedom of expression and the right to a fair trial
- *International Covenant on Economic, Social and Cultural Rights* (1966), which protects the basic needs that must be met (shelter, education and employment) for a person to live a dignified existence
- *Convention on the Elimination of All Forms of Discrimination against Women* (1979), which is discussed in Chapter 10
- *Convention relating to the Status of Refugees* (1951), which is discussed previously
- *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), which gives special protection to ethnic minorities, including migrants.

The UN Human Rights Committee or other UN committees can hear complaints relating to abuse of human rights. For example, the Human Rights Committee hears complaints relating to the *International Covenant on Civil and Political Rights* (1966) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) and has its own supervisory committee that can hear complaints. Each of these treaties contains an optional procedure that, if acceded to by a particular state, can be used by individuals to lodge a complaint that their rights (under the treaty) are being breached by that state. In 1991, Australia acceded to the First Optional Protocol to the *International Covenant on Civil and Political Rights* (1966), which contains that procedure, and in 1993 recognised the complaints process under the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965). Australia has also acceded to the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

Recourse to UN committees is only available when all domestic avenues have been exhausted. In Australia, this may mean taking the matter before the High Court. The decisions of the UN committees are not enforceable. However, they carry considerable persuasive force. See, for example, the discussion in Chapter 7 on the Human Rights Committee's decision in *Toonen v Australia*.

Figure 11.11 The *Anti-Discrimination Act 1977* (NSW) prohibits direct and indirect acts of discrimination in the areas of employment, the provision of goods and services, education, and entry to or membership of a registered club.

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Review 11.8

1. Define 'racial discrimination'.
2. Distinguish between direct and indirect discrimination. From your knowledge, give examples of both forms of discrimination.
3. Identify the state and federal legislation that covers discrimination.
4. Outline in what ways migrants are limited in their access to social security benefits.
5. State the conditions that must be satisfied before an individual in a particular country can take a claim of racial discrimination before the UN Committee on the Elimination of Racial Discrimination.

11.8 Non-legal responses

Government action

Federal, state and local governments have undertaken different ways to help migrants minimise the difficulties of adapting to a new society. These include the following actions:

- printing important information in many different languages
- providing this information in different languages on the internet
- providing interpreters where possible – a telephone interpreter service is available
- providing special English classes for children and adults (although with funding cutbacks, many of these are provided by volunteers)
- providing for recognition of overseas qualifications
- developing multicultural policies and principles
- providing settlement programs to assist newly arrived migrants.

There are also a number of government bodies and associations that support migrants.

Australian Human Rights Commission

As stated previously, the Australian Human Rights Commission (AHRC) is a national government body, set up under the *Australian Human Rights Commission Act 1986* (Cth) and forming part of the federal Attorney-General's responsibilities. It runs educational and public awareness programs for the government and business sectors, as well as the general community. This gives it an important role in ensuring Australia remains a tolerant, equitable and democratic society. The key message is that the human rights of all Australians make it essential to eliminate harassment and discrimination. A core responsibility of the AHRC is to provide education about human rights. The AHRC is also responsible for investigating, and attempting to resolve, complaints about human rights breaches under anti-discrimination legislation.

In 2002, the National Inquiry into Children in Immigration Detention examined whether Australian laws on detaining children, and how they were treated in detention, were in line with our obligations under international law, in particular the *Convention on the Rights of the Child* (1989). The inquiry visited all immigration detention centres in Australia, and over 340 submissions were sent to it. It held public hearings in Victoria, Western Australia, South Australia, New South Wales and Queensland, and oral testimony was given by experts who had experience in dealing with children in detention. The inquiry also ran confidential focus groups with former detainee children and young people. In its *National Inquiry into Children in Immigration Detention Report – A Last Resort?* (May 2004), the AHRC (then known as HREOC) found that Australia's immigration detention policy failed on a number of levels, including protection of the mental health of children, provision of adequate healthcare and education, and protection of unaccompanied children and those with disabilities.

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The recommendations of the report centred on the following principles, summarised by the AHRC:

- children can only be detained as a measure of last resort and for the shortest appropriate period of time
- the best interests of the child must be a primary consideration in all actions concerning children
- unaccompanied children must receive special assistance so that they are in a position to enjoy the same rights as all other children
- children have the right to family unity
- children must be treated with humanity and respect for their inherent dignity
- children enjoy – to the maximum extent possible – the right to development and recovery from past torture and trauma
- asylum-seeking children must receive appropriate assistance to enjoy their rights, including the right to be protected under the Refugee Convention.

pro bono [publico] (Latin) 'for the public good'; the shortened phrase is used to describe work that is done by a lawyer or barrister on a voluntary basis and without payment, where there are issues of community concern or significant effect on disadvantaged groups

The Howard government was slow to respond to the recommendations of the report, drawing criticism from HREOC. In fact, it was not until the end of July 2005 that all children had been released from detention centres. This only came about because Prime Minister Howard was put under pressure from his fellow members of the Coalition to release all children who were still detained. Despite this still being a controversial issue, at the end of June 2015, there were still 215 children being detained in immigration centres. Figures from the Department of Home Affairs stated that less than five children were detained in Australian detention centres as at 30 September 2019, and on 30 April 2022, there were no children in detention centres.

Legal assistance

Pursuing legal rights is expensive for everyone; however, there is very little legal or financial assistance available to migrants, prospective migrants and asylum seekers to pursue their applications or legal rights. The NSW Refugee Advice and Casework Service provides free, specialist legal services for people seeking asylum and refugees. Due to a lack of government funding, however, the service mainly relies on donations and the work of volunteers. The Immigration Advice and Application Assistance Scheme does provide advice to asylum seekers during their application process, but it cannot assist during appeals.

Migrants in New South Wales who use the courts to settle non-migration disputes are able to apply for legal aid if they meet the eligibility criteria. These criteria include a means test regarding income and may include a merits test (whether the case is likely to succeed). The independent government agency Legal Aid NSW runs a telephone service, LawAccess NSW, providing information, referral and advice, including how to apply for legal aid. Legal Aid NSW can also represent persons who claim they have experienced racial discrimination. Migrants can also seek legal advice and assistance from community legal centres and, in some matters, from **pro bono** legal services.

Supporting multiculturalism

Many associations have been established at both state and national levels to promote the cultural heritage of different ethnic groups. The federal government has also established several bodies to raise awareness of multiculturalism and promote tolerance.

The Commonwealth Parliament established the Australian Institute of Multicultural Affairs (AIMA) in 1979. Its purpose was to raise awareness of cultural diversity and to promote social cohesion, understanding and tolerance. The Office of Multicultural Affairs replaced AIMA in 1986. It was part of the Department of the Prime Minister and this meant that multiculturalism was given national prominence. This office has since closed.

In 1989, the federal government produced a statement of policies and goals titled *National Agenda for a Multicultural Australia*. All political parties support it to this day. The agenda introduced many measures to help recognise the cultural diversity of Australia, including the expansion of SBS television services and the establishment of the National Office of Overseas Skills Recognition.

The Australian Multicultural Advisory Council (AMAC) was established in 1994 with the task of recommending policies for the implementation of multiculturalism in Australia. It ceased its operations in 1999. Before it stopped operating, AMAC released a report called *Australian Multiculturalism for a New Century: Towards Inclusiveness* (1999).

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The federal government responded to this report with the release of its own multicultural statement in 1999, *A New Agenda for Multicultural Australia*.

The Council for Multicultural Australia was established in June 2000 to assist with the implementation of the New Agenda. It was given a three-year period to meet its goals. The Australian Multicultural Council has superseded this body and is overseen by the Minister for Home Affairs.

The idea of multiculturalism has lost some of its force over the years, with cuts to government spending in some areas such as English language classes. Some Australians have argued that because legislation currently lacks sufficiently severe penalties for racist behaviour, Australia's multicultural policy has been limited in its effectiveness.

Use of interpreters

The Translating and Interpreting Service (TIS) is provided 24 hours a day by the Department of Home Affairs. It provides a free telephone interpreting and document translation service. It also provides free face-to-face translation services for certain organisations such as medical practices and trade unions. For a fee, other people can also access a three-way interpreting service, which involves the English-speaking and non-English-speaking parties and the TIS interpreter. This can be done face-to-face or by using telecommunications.

Group action

Often migrants can only force action by forming groups that will organise demonstrations to protest unfair actions. They can also ask for help from non-government bodies such as Amnesty International, which will in turn lobby governments and the United Nations on their behalf. This is very difficult because some cultures only have very small numbers in Australia, separated by large distances, and so cannot create a very loud protest. Also, national and international organisations have many demands on their time and financial support.

Figure 11.12 Teachers and students from the Northern Melbourne Institute of TAFE help migrant groups, refugees and those struggling with English to fill in their census forms for the Australian Bureau of Statistics.

Other organisations

Non-government bodies such as religious institutions and community groups and migrant organisations also offer support and provide networks to assist new migrants. For example, migrant resource centres run by sponsored community groups supply information and assistance to new migrants. St Vincent de Paul, the Salvation Army and other charitable organisations provide emergency shelter, food and clothing.

Review 11.9

1. Outline the arguments for and against the detaining of children in detention centres. Assess the arguments for keeping children in detention centres.
2. Outline the Australian Human Rights Commission's response to the outcry over children in detention centres.
3. Discuss the findings of its report.
4. Describe some informal (non-legal and non-governmental) responses to issues faced by migrants in Australia and discuss their effectiveness.

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11.9 Effectiveness of responses

Migrants can use the legal system to appeal decisions about their migration applications or status. As in all cases, the legal system is limited in its ability to come to a solution that is acceptable to all parties. For various reasons, migrants are at a comparative disadvantage in relation to the government. Thus, the responsiveness of the legal system to migrants can be questioned.

Administrative review of immigration decisions

Prior to 1989, it was very difficult for prospective migrants to appeal decisions made about their applications. Challenging a government decision in court was a lengthy and expensive process. However, in 1985, a review of the *Migration Act 1958* (Cth) was carried out by the Human Rights Commission, chaired by Commissioner Fitzgerald. The resulting report, *Human Rights and the Migration Act 1958*, was critical of the limited availability of independent review of migration decisions.

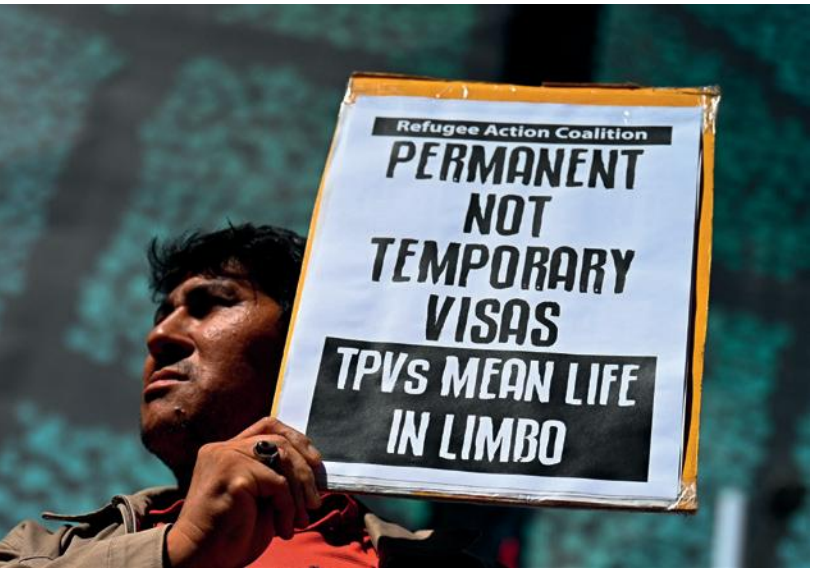

Figure 11.13 Migrants are at a disadvantage when it comes to navigating the legal system in Australia

Under its recommendations, a system of merits reviews by independent tribunals was established. In a merits review, a tribunal with the relevant jurisdiction will look afresh at the facts of a case, consider whether the final decision was correct and change the decision if appropriate. The new review system consisted of two tiers: the Migration Internal Review Office, whose role was to provide independent internal review of a decision; and the Immigration Review Tribunal, which reviewed decisions by the Migration Internal Review Office and had the power to review on merits.

A review of the new system was followed by a 1992 report that affirmed that it was working, but recommended that refugee decisions should be handed over to an independent body. Thus, the Refugee Review Tribunal (RRT) was created in 1993 to review decisions regarding refugee applications. Appeals from the RRT were heard by the Administrative Appeals Tribunal (AAT) or the Federal Court, but only on matters of law.

In 1999, the Immigration Review Tribunal and the Migration Internal Review Office were amalgamated and became the Migration Review Tribunal (MRT) in an effort to make the review processes more efficient and economical.

In 2015, the RRT and the MRT became the Migration and Refugee Division of the AAT. Appeals from the AAT can be heard by the Federal Circuit and Family Court of Australia, but only on matters of law. This means that only the question of whether the law has been correctly applied in the case can be reviewed, as opposed to whether a different view based on the facts could have been reached.

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The review process

If prospective family-sponsored and independent migrants feel that their applications have been decided incorrectly by the Department of Home Affairs, they can lodge a claim for further review in the AAT. The AAT was established to hear appeals against Commonwealth ministers, officers and authorities. In this capacity, the AAT hears appeals on decisions made by the Department of Home Affairs. The AAT has the power to conduct merits reviews and allows the parties involved to have legal representation. They must pay a fee to do this. A court-like hearing will be conducted by the AAT. Written submissions and any evidence presented by the applicant and the Department of Home Affairs will be considered.

If an applicant fails in an appeal to the AAT, they may choose to challenge the decision in the Federal Circuit and Family Court of Australia. This is not an avenue open to most unsuccessful applicants, as it is time-consuming and expensive, and not advisable without legal representation. The In Court case below reflects the steps and arguments taken in a review.

The Federal Circuit and Family Court of Australia cannot make a decision based on a merits review. It can only consider whether the correct decision-making process was followed. (Chapters 2, 3 and 7 contain more information on the differences between judicial review and merits review.)

In Court

SZKCQ v Minister for Immigration and Citizenship [2008] FCAFC 119

SZKCQ, a Pakistani national, said that he feared persecution because of his membership of, and profile within, the Pakistani People's Party (PPP). He had applied to the Federal Circuit and Family Court of Australia to review a decision made by the Refugee Review Tribunal (RRT), but this was dismissed on the basis that Australia did not have protection obligations towards him. He then appealed to the Federal Court of Australia.

At the original hearing, the RRT had asked the appellant, SZKCQ, to obtain confirmation from PPP officials of his standing and situation in the party. On receiving two letters from officials, Mr A and Mr K, the RRT sent the documents to the Australian High Commission in Islamabad, asking, among other things, for information from the letters' authors as to how the appellant suffered because of his work for the party. The RRT wrote to SZKCQ under section 424A of the Migration Act 1958 (Cth), stating that based on this information it was not satisfied that he faced a real chance of harm. SZKCQ was given 14 days to provide comments on the information. In the RRT's opinion, the letter from Mr A was not genuine and, as Mr K did not refer to the appellant's claim of imprisonment, the evidence suggested he had exaggerated his role and the harassment he suffered. They wrote to the appellant of their decision but the time between the date of the letter and the date it arrived was quite lengthy.

In his appeal, SZKCQ contended, among other things, that the RRT had delayed the sending of its refusal by post so that he did not have enough time to respond and had not ensured that he understood why the information referred to was relevant to the review. The Federal Court judged that the RRT had failed to give enough time for the appellant to appeal the initial decision and had not properly informed him. SZKCQ's appeal was upheld and the RRT decision was set aside.

Analysis 11.3

Read the In Court above.

1 Summarise the case *SZKCQ v Minister for Immigration and Citizenship*.
2 Assess if this was a merits review or a judicial review of the Refugee Review Tribunal decision.

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Media

The Biloela Tamil asylum seeker family and their fight for protection in Australia

Erin Semmler

ABC News

10 June 2022

It's been a long time coming and today the family caught for four years in a tug-of-war over Australia's hardline asylum seeker policy on boat arrivals finally gets to go home – home to Biloela.

Priya Nadaraja, Nades Murugappan and their daughters Kopika, 7, and Tharnicaa, 4, have long been the desperate faces at the centre of the country's 'stop the boats' asylum seeker policy.

But today, after a community-driven campaign that started when the family were removed from their home in the central Queensland town, those faces will be back in Biloela beaming with the prospect of resuming lives interrupted.

The fight against deportation by the Sri Lankan couple and their Australian-born daughters is not over yet. And their experience has helped define Australia in the eyes of the world for its treatment of asylum seekers.

Their struggle sparked debate from dinner tables to federal parliament and united half a million ordinary Australians in support of the campaign to bring them back to Biloela.

The former Coalition government was unmoved in its belief the family was owed no protection by Australia, setting off protracted and complex legal cases over their visa statuses and cases for asylum.

But when the new Albanese government, which backs offshore processing and boat turnbacks, ordered the family be allowed to return to Biloela, this chapter of their ordeal was over.

Here is how their story has unfolded.

Priya and Nades arrive in Australia

Priya Nadaraja and Nades Murugappan arrived in Australia separately by boat in 2012 and 2013.

Both fled Sri Lanka, saying they feared persecution in the aftermath of war.

The couple met and married in 2014.

They moved to the central Queensland town of Biloela on bridging visas. Nades worked at the meatworks and Priya did volunteer work.

Both were embraced by the rural community.

Their eldest child Kopika was born in May 2015, followed by her sister Tharnicaa in June 2017.

The family is known as the Murugappans but goes by Nades' full first name, Nadesalingam, in line with cultural practice.

According to court documents from June 2018, Nades claimed he was forced to join the militant Tamil Tigers (LTTE) in 2001 and was harassed by the Sri Lankan military.

However, he frequently travelled between Sri Lanka, Kuwait and Qatar between 2004 and 2010 for work.

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He returned to Sri Lanka after the war was officially over in 2011, but said he was 'taken and tortured'.

It was then Nades fled on a boat and arrived at Christmas Island in April 2012, seeking asylum.

Family removed and detained

The couple lived in Biloela for about three years.

By March 5, 2018, their visas had expired.

Tharnicaa was nine months old when immigration officials removed the family from their Biloela home at dawn.

They were flown to the Broadmeadows detention centre in Melbourne where Tharnicaa spent her first and second birthdays.

The abrupt detainment shocked locals and spurred a grassroots fight, now known as the prominent Home to Bilo campaign.

Over the past four years, the family's plight has polarised the nation.

Supporters pleaded for government intervention to return the family to Biloela.

'People just want them back,' Biloela resident and social worker Angela Fredericks said in 2018.

But the Department of Home Affairs said their case had been comprehensively assessed over many years, and the family did not meet Australia's protection obligations.

'They were considered boat people and they have to leave Australia,' then-federal Member for Flynn, Ken O'Dowd, said.

Deportation halted mid-air

The Federal Circuit Court rejected the family's appeal against deportation in June, 2018.

Justice Caroline Kirton found the initial assessment by the Immigration Assessment Authority, which denied refugee status, had been properly conducted.

A separate application to have their case reviewed by the High Court was also dismissed in May, 2019.

Three months later, on August 29, 2019, the Nadesalingams were removed from detention and put on a plane bound for Sri Lanka.

The deportation was halted mid-air and the plane landed in Darwin at 3:00am, after a last-minute court-injunction.

They were then taken to the immigration detention centre on Christmas Island, which had closed earlier that year.

Then-prime minister Scott Morrison categorically ruled out ministerial intervention to stop the family's deportation.

He was immigration minister in 2013 when the Abbott government introduced its 'stop the boats' policy.

In October, 2019 the United Nations Human Rights Committee asked Australia to end the 'existing situation of detention' for the family.

(Continued)

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Media—Continued

Supporters, once again, pleaded for the family to return to Biloela while the protracted legal battle over their immigration status continued.

'They are the only children in an Australian immigration detention centre,' the family's lawyer Carina Ford said.

Medical evacuation from Christmas Island

In June 2021, Tharnicaa was flown to Perth with a suspected blood infection – accompanied by Priya.

It sparked more public outrage and intense media coverage.

More than a week after being separated, Nades and Kopika were also flown to Western Australia, reuniting the family.

Then-immigration minister Alex Hawke intervened, allowing the family to live in community detention in Perth.

Prior to and during the 2022 election, then-opposition leader Anthony Albanese promised the family would return to Biloela should Labor form government.

Acting Home Affairs Minister Jim Chalmers granted all four family members bridging visas days after the election.

Home to Bilo

After about 12 months of living, working and going to school in Perth, the Nadesalingams arrived in Brisbane this week.

Biloela supporters will welcome the family when they land at Thangool Airport this afternoon.

Banana Shire Mayor Nev Ferrier congratulated the Home to Bilo founders and said the community was ready to welcome the Nadesalingams back.

'The remarks we're getting, people are just coming to see where Biloela is and know it's the home of the Biloela family,' he said.

The family will make the most of their first weekend in town.

Priya plans to give a speech at the Flourish Multicultural Festival on Saturday.

Friends and family will then celebrate Tharnicaa's fifth birthday – her first in Biloela – on Sunday.

While the Nadesalingams are still on temporary bridging visas, the ABC understands the Albanese government is considering permanent residency for the family.

Figure 11.14 The Nadesalingams arrive in Biloela on 10 June 2022.

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In August 2022, the family members were granted permanent visas.

Analysis 11.4

Read the media article on the previous page.

Construct a timeline of the Nadesalingam family's bid to stay in Australia.

Review 11.10

1 Outline the system of administrative review of immigration decisions.
2 Discuss the limitations of the review process.
3 Describe the role played by the Federal Court of Australia in the review process.

Research 11.7

Research decisions made by the Administrative Appeals Tribunal on its website at https://cambridge.edu.au/redirect/10398. Review two of the migrant and refugee decisions and outline the arguments for or against granting a visa to the applicant.

Criticism of detention

It is important to remember that the reason for keeping applicants in detention centres is as a form of immigration control and not as punishment. More recently, these detention centres have also been a way to encourage potential applicants to use different channels to apply to live in Australia. However, there has been much criticism both in Australia and internationally about the conditions in the detention centres and the government's right to keep people in them for extended periods.

One criticism is that, in practice, border applicants are more likely to be subjected to detention, whereas other unlawful non-citizens such as over-stayers are generally allowed to stay in the community while their applications to remain in Australia are assessed. Another criticism is that only in certain circumstances are bridging visas available to people in detention. They are only granted to those people who have applied for refugee status, and then only for children, people over 75 years of age, spouses of Australians, and victims of trauma and torture.

Figure 11.15 There has been much criticism both in Australia and internationally about the conditions in detention centres and the government's right to keep people in them for extended periods. In 2017, protesters in Sydney urged the Australian Government to end the refugee crisis on Manus Island during tense days-long stand-offs between refugees and authorities.

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There have also been criticisms relating to the fact that border applicants who are detained only have the right to appeal to the Administrative Appeals Tribunal if they claim refugee status. In addition, people in detention are often unaware of their legal rights. Although all people in detention must be given the opportunity to obtain legal assistance upon request, immigration officers do not always inform them of this right.

Many see detention as an abuse of human rights under international law. The UN Human Rights Committee has criticised such things as the lack of review rights for those in detention. In its decision in *A v Australia* (1997) CCPR/C/59/D/560/1993, the committee found that Australia had breached Article 9(4) of the *International Covenant on Civil and Political Rights* (1966). Article 9(4) provides for the rights of people in detention to seek a determination on the legality of that detention immediately.

Australia's response to the committee's finding in this case was to reject the findings, as well as the committee's view that compensation should be paid to Mr A. This response was criticised both nationally and internationally. In January 2008, in its annual inspection report of detention centres, HREOC (now known as the Australian Human Rights Commission) stated that there had been improvements, but there was still work to do.

Australia has also been criticised for its detention of children of border applicants. From 1999, there was a significant increase in the number of children in detention, and a great deal of community concern about their treatment. In response to criticism from such bodies as the UN Committee on the Rights of the Child, HREOC launched a National Inquiry into Children in Immigration Detention in November 2001. Its report, *A Last Resort*, was released in 2004. The inquiry found that Australian laws requiring the detention of children had led to many and repeated breaches of the *Convention on the Rights of the Child* (1989), and that children so detained were at high risk of serious mental harm. It recommended the release of children and their parents, and the amendment of Australia's laws to comply with the Convention. It also recommended that any unaccompanied child should be given an independent guardian, that legislation should codify minimum standards of treatment for children in detention, and that the amendments to the *Migration Act 1958* (Cth) should be reviewed to assess their impact on children.

With increasing public protest and pressure, changes were slowly brought about, and the federal government elected in 2007 took measures to rectify some of these issues. However, a subsequent change in government meant that these measures have not been carried through. The AHRC launched its National Inquiry into Children in Immigration Detention in 2014, and its report, *The Forgotten Children*, was published the same year. The report was damning in its appraisal of the psychological and physical impact on children when they were held indefinitely in the centres. At first, the government dismissed the report as politically motivated, but since then the government has made some changes in response. These include providing funds to set up a school on Christmas Island.

Research 11.8

Research the progress that has been made on the issue of mandatory detention of border applicants and their children. Use a search engine to research news articles from 1 January 2008 to the present.

Key search terms could include various combinations of the following keywords:

- mandatory detention
- Australia
- children
- asylum seekers
- human rights.

Review 11.11

1. Outline some of the criticisms of Australia's detention policies.
2. Provide details on the international convention that was the benchmark against that HREOC's 2001–2004 inquiry measured Australia's treatment of the children of border applicants.

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Legislative sanctions against discriminatory behaviour

The very existence of anti-discrimination laws indicates a recognition that discriminatory behaviour exists and should be eliminated. The introduction of federal and state legislation prohibiting hate speech and racial vilification strengthened these laws; for example, the *Racial Hatred Act 1995* (Cth), discussed previously; section 20C of the *Anti-Discrimination Act 1977* (NSW); and section 67A of the *Discrimination Act 1991* (ACT).

The legislation also sends a message that racist attitudes and behaviour are not acceptable in Australian society.

Limitations of the law

Despite these laws, several factors limit their effectiveness. Slow processing of complaints reduces the effect of the legislation. It can take several years for a complaint to be finalised. As a result, some migrants feel that it is not worth taking their complaint to the Anti-Discrimination Board.

Many people are also dissatisfied with the outcome of their complaint and believe that the remedies available are not strong enough to stop further discrimination or send a strong message to the public. The New South Wales legislation provides heavy fines and imprisonment, but these penalties are rarely used. The AHRC has the power to make determinations but is not empowered to make them binding on the parties involved. However, the AHRC will investigate and conciliate when a dispute exists to try to bring about a satisfactory resolution.

Difficulty in proving that the discrimination took place, and that the treatment was based on race, also means that migrants are reluctant to bring a complaint. Problems continue in the elimination of racial discrimination because of limited government authority and continued racist attitudes in the community, as well as language barriers and migrants' ignorance of their rights.

Future directions

Although federal and state governments have done much to recognise the needs of migrants and to minimise the difficulties that they face in establishing permanent residency in Australia, inequalities still exist and there is still a need for greater reform. Possible reforms include the following:

- increasing funding for English language programs
- promoting public education about multiculturalism to reduce racially discriminatory behaviour and racist speech
- increasing the availability of, and access to, legal aid for migrants
- providing greater access to social security for migrants
- providing greater access to legal assistance for people in detention and increased availability of review of immigration decisions
- streamlining application processes for migration so that they are the same for all migrants coming from around the world
- reforming the rules regarding mandatory detention.

Research 11.9

View the website of the Australian Human Rights Commission. Choose one of the areas that is relevant to migrants. Prepare a fact sheet or brochure for migrants letting them know how their rights are protected in this area. Remember that many migrants are not wholly fluent in the English language, so your presentation of information should consider this.

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Chapter summary

- There are different categories of immigration available to people who want to come to live permanently in Australia. These include family-sponsored, work-related, refugee and humanitarian categories.
- Prospective applicants must go through certain procedures in their bid to migrate to Australia.
- New arrivals in Australia face disadvantages related to finances, employment opportunities, isolation and access to legal services.
- After the policies of assimilation and integration, multiculturalism developed in the 1970s. This was a response to the identification of the advantages brought to Australia by migrants.
- Australia's refugee program allows immigration to Australia if the person meets the definition in the *Convention relating to the Status of Refugees* (1951).
- Unlawful non-citizens include over-stayers and border applicants.
- Concerns about 'illegal immigrants' led to changes in legislation and policy from 2000 to 2013. The most significant of these involved amendments to the *Migration Act 1958* (Cth), some of which allowed for the mandatory detention of unauthorised arrivals.
- There are procedures that must be followed before a person can be deported, removed or extradited from Australia.
- Detention of unauthorised arrivals in Australia, especially children, has attracted strong criticism from human rights advocates and organisations.
- Prospective migrants can have decisions on their applications reviewed under certain conditions.
- Responses to migrant issues include state and federal legislation and international treaties. The legislation includes the *Australian Human Rights Commission Act 1986* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

Multiple-choice questions

1 Which of these statements about migration in Australia is true?
- **a** Migration has been an important part of Australia's history.
- **b** Migration has only been occurring since 2001.
- **c** Migration to Australia from Asia and Africa was encouraged by federal governments in the 1940s and 1950s.
- **d** The Australian migrant population is made up mostly of illegal immigrants who managed to jump the queue.

2 Which of the following treaties is Australia a party to?
- **a** *International Convention on the Elimination of All Forms of Racial Discrimination* (1965)
- **b** *Convention on the Rights of the Child* (1989)
- **c** *Convention relating to the Status of Refugees* (1951)
- **d** All of the above

3 Which of these statements about racial discrimination law is true?
- **a** Racial discrimination law falls under federal jurisdiction.
- **b** Racial discrimination law only covers discrimination in the workplace.
- **c** Racial discrimination law prohibits discriminatory behaviour based on race.
- **d** Racial discrimination law dates from the colonial period.

4 Which of these statements about the *Anti-Discrimination Act 1977* (NSW) is true?
- **a** It only applies to Australian citizens.
- **b** It prohibits discrimination in the areas of employment, provision of goods and services, education and entry to or membership of a registered club.
- **c** It prohibits discrimination on the basis of race or national origin, but not sex.
- **d** It was repealed in 2005.

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5 What does the merits review system involve?
   - **a** An unsuccessful candidate can seek a merits review from the Migration Review Tribunal if their application is rejected by the Department of Home Affairs.
   - **b** An unsuccessful candidate can appeal to the High Court if their application is rejected by the Migration Review Tribunal.
   - **c** An unsuccessful candidate can appeal to the Federal Court if their application is rejected by the Department of Home Affairs.
   - **d** An unsuccessful candidate can appeal to the Migration Review Tribunal, but only on questions of law, not merits.

Short-answer questions

1 Outline what refugee status means and who determines it.
2 Discuss the amendments made to the *Migration Act 1958* (Cth) in 2001.
3 Analyse how you think the *MV Tampa* incident affected Australia's international reputation. Justify your opinion in one to two paragraphs.
4 Outline in what ways migrants face discrimination in the following areas:
   - **a** employment opportunities
   - **b** finding housing
   - **c** being granted refugee status.
5 Summarise the review process for immigration decisions.
6 Make a judgement about how effective legislative sanctions have been against discriminatory behaviour. Justify your opinion.
7 Propose other action, legal and non-legal, which could be taken to eliminate racial discrimination.

Extended-response question

Outline the legal issues facing refugees and border applicants. Evaluate the effectiveness of the legal system in responding to the needs of each.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Issue 1

Groups or individuals suffering disadvantage

Chapter 12 (Digital-only chapter)

Aboriginal and Torres Strait Islander peoples

Reader advice

Teachers are advised to consider their student cohort when deciding whether to choose this topic, as some sections are culturally unsafe for First Nations students.

This chapter contains information about colonial violence that may be traumatising to Aboriginal and Torres Strait Islander students. The chapter also contains historical material that includes racist ideas, practices and terminology.

Chapter objectives

In this chapter, you will:

- identify and apply legal concepts and terminology
- discuss the effectiveness of the legal system in addressing issues
- provide an explanation of the nature of the relationship between the legal system and society
- describe the role of law in encouraging cooperation and resolving conflict, and in initiating and responding to change
- locate, select and organise legal information from a variety of sources including legislation, cases, media reports, international instruments and documents
- account for different perspectives and interpretations of legal information and issues
- communicate legal information using well-structured responses.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Commonwealth of Australia Constitution Act 1900 (UK)
Racial Discrimination Act 1975 (Cth)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)
Anti-Discrimination Act 1977 (NSW)
Aboriginal Land Rights Act 1983 (NSW)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)
Native Title Act 1993 (Cth)
Racial Hatred Act 1995 (Cth)
Native Title Amendment Act 1998 (Cth)
Native Title Amendment Act 2007 (Cth)
Native Title Amendment (Technical Amendments) Act 2007 (Cth)
Northern Territory National Emergency Response Act 2007 (Cth) (repealed)
Aboriginal Land Rights Amendment Act 2014 (NSW)

INTERNATIONAL INSTRUMENTS

United Nations Declaration on the Rights of Indigenous Peoples (2007)

SIGNIFICANT CASES

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 ('Gove land rights case')
R v Williams (1976) 14 SASR 1
Mabo v Queensland (No 2) [1992] HCA 23 ('Mabo case')
Walker v New South Wales [1994] HCA 64
Wik Peoples v Queensland [1996] HCA 40 ('Pastoral leases case')
Fejo v Northern Territory (1998) 195 CLR 96
Yanner v Eaton (1999) 201 CLR 351
McMahon v Bowman [2000] FMCA 3
Commonwealth v Yarmirr (2001) 208 CLR 1
Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422
Barkandji Traditional Owners #8 v Attorney-General of New South Wales [2015] FCA 604

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12.1 Aboriginal and Torres Strait Islander peoples and the law

History of government policy

Since colonisation of the continent now called Australia, First Nations peoples have been treated unequally, inequitably and unfairly. In this topic you will look at the role of the legal system in this treatment.

The AIATSIS Map of Indigenous Australia (see Figure 2.16 in Chapter 2) depicts the diversity of First Nations groups of Australia. These diverse groups maintained cultural practices and relationships between groups for tens of thousands of years before the arrival of the British colonisers. Upon arrival, the colonisers did not recognise First Nations people's long-standing and reciprocal custodianship of their lands. When they couldn't see physical evidence of land ownership that aligned with European legal definitions, they wrongly declared the land ***terra nullius***, or land belonging to nobody. This declaration gave them British legal power to steal and colonise the land.

terra nullius
(Latin) 'land belonging to no-one'; the idea and legal concept that when the first Europeans came to Australia, the land was owned by no-one and thus was open to settlement; this concept has been judged to be legally invalid

A range of government policies as well as laws in relation to First Nations peoples have been in place since 1788; these are summarised in Table 12.1. Many of these laws and policies were discriminatory, as was the public attitude encouraged by them. This can be seen in a quote that appeared in a 1901 edition of *The Bulletin* magazine:

> If this country is to be fit for our children and their children to live in, we must keep the breed pure. The half-caste usually inherits the vices of both races and the virtues of neither. Do you want Australia to be a community of mongrels?

The Bulletin, 1901.

Each state government appointed a Protector of Aborigines. This role resulted from a recommendation of the British House of Commons coming out of a report entitled *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)*, which was published in 1837 and sent to Governor Gipps in January 1838. The report argued generally for the 'protection' of indigenous peoples, and its specific recommendations for the Australian colonies (pages 125–8) outlined the duties of a Protector, beginning with the expectation that they would 'cultivate a personal knowledge' of the First Nations peoples, which would require them to 'acquire an adequate familiarity' with the language (the report did not recognise that there are many different Aboriginal languages). Their duties would be to watch over the rights of First Nations peoples by guarding against encroachment on their property and protecting them from acts of cruelty, oppression and injustice. However, what often resulted was the forced removal of Aboriginal people from their lands, families and communities, indentured servitude, missionisation and assimilation. For example, consider the statement made in 1937 by Mr A.O. Neville, Commissioner for Native Affairs (formerly Chief Protector of Aborigines) in Western Australia:

> We have power under the Act to take any child from its mother at any stage of its life ... Are we going to have a population of one million blacks in the Commonwealth or are we going to merge them into our white community and eventually forget that there were ever any Aborigines in Australia?

A.O. Neville, 1937, Commissioner for Native Affairs in Western Australia.

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Figure 12.1 Today many people are prepared to protest against injustice. Here we see people in Sydney in 2024 protest to 'change the date' of Australia Day from 26 January.

When considering the laws and their outcomes, as outlined in Table 12.1, we can see that the term 'protection' had a very different meaning in the eyes of colonial and past Australian law than it does today.

dispossession
the removal or expulsion of people from their traditional lands

dispersal
the distribution of people over a wide area

assimilation
a policy based on the idea that the minority group should adopt the language and traditions of the majority group

Table 12.1 State and federal laws and policies relating to First Nations peoples

Policy or law	Effect or outcome
Dispossession and **dispersal** (1788–1800s)	
Since First Nations peoples were not recognised as citizens, it was not a criminal offence to hunt, shoot and kill them. The general belief was that First Nations peoples would eventually 'die out'.	There was a massive reduction in the First Nations population. Country was converted to farming lands.
Martial Law 1816 (NSW) *Martial Law 1824* (Tas)	If a First Nations person was armed with a spear, or unarmed but within a certain distance of settlements or houses, they could be shot on sight. Settlers had the authority to shoot First Nations peoples.
Vagrancy Act 1835 (NSW)	Citizens could be imprisoned with hard labour for 'lodging or wandering in company with any of the black natives of the colony'.
Protection (1869–1909)	
Aboriginal Protection Act 1869 (Vic) *Aborigines Protection Act 1909* (NSW)	These Acts allowed the appointment of a 'protector' of First Nations peoples. This 'protector' had the power to remove children from their homes and place them in missions.
Assimilation and integration (1900–1970s)	
By this time, First Nations populations were a long way from 'dying out'; the policy was to 'Europeanise' them. This meant leaving behind their language, culture, artefacts and traditions, and becoming 'similar' and 'integrating' into mainstream society.	The European majority attempted to teach the First Nations population to be 'white'. This was met with both submission and resistance. The 1967 referendum recognised that First Nations peoples should be counted in the Census numbers and transferred responsibility for First Nations affairs to the federal government.

(Continued)

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Table 12.1 *(Continued)*

Policy or law	Effect or outcome
Self-determination (1970s onward)	
Self-determination is defined in the *International Covenant on Economic, Social and Cultural Rights* (1966) and is also explicitly mentioned in the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).	The policy of self-determination is founded on the recognition that First Nations peoples are Australia's First Peoples, and that much of their current disadvantage arises from the loss of a right to live by their cultural values. This is reflected in **native title** legislation and Kevin Rudd's 2008 apology to First Nations peoples.
Northern Territory National Emergency Response Act 2007 (Cth) (repealed)	The Act appeared to overturn decades of law reform and has been widely criticised locally and globally. The Act ignored the policy of self-determination for First Nations peoples living in the Northern Territory.
Closing the Gap framework (since 2008)	An Australian Government strategy that aims to reduce disadvantage among First Nations peoples. It was originally based on seven targets, but in 2020 a new agreement was signed, with a revised framework and 16 new targets. These include life expectancy; education (including early childhood education); employment; housing; not being over-represented in the criminal justice or child protection systems; social and emotional wellbeing; and cultural, spiritual, physical and economic relationship with their land and waters. Initially, the Department of the Prime Minister and Cabinet produced a report at the end of each year analysing progress on each of the targets; since 2021 reports have been issued by the Productivity Commission.

self-determination
the right of people to determine their political status or how they will be governed based on territory or national grouping

native title
the right of First Nations peoples to their traditional lands

Legal status

Before the 1967 referendum

The doctrine of *terra nullius* meant that in the eyes of the law, First Nations peoples did not exist as citizens of their own country for hundreds of years. In fact, the statements made by *The Bulletin* magazine and the Chief Protector of Aborigines reflected the legal status of First Nations peoples since 1788. There were no criminal laws for European people to abide by in terms of harming or killing First Nations peoples and, in the first 50 years or so after colonisation, the government policy of dispossession and dispersal tended to condone violence.

One of the most significant and tragic events of the 1800s occurred in New South Wales at Myall Creek, near Bingara. In May 1838, 40 Wirrayaraay people set up camp on a cattle station. Not long after, on 10 June 1838, they were brutally attacked and killed by stockmen who were angry about the alleged theft of their cattle. Twenty-eight men, women and children were slaughtered. In what was probably the first legal response of its kind in Australia, the Governor of New South Wales ordered an investigation into the massacre. Initially, 11 men were found not guilty of the crime. However, a second trial sent seven men to their death by hanging.

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This was a clear indication that the killing of Aboriginal people was considered illegal and should not happen again. But in practice, the effect seems to be that people simply started to hide any evidence of violence against First Nations peoples.

Legal Links

Research by the University of Newcastle, first released in 2017, found that massacres of First Nations people continued into the twentieth century. Due to the lack of reporting, this research drew on primary sources such as diaries, letters, photographs and oral histories.

The Colonial Massacres Map at https://cambridge.edu.au/redirect/10771 shows the sites of attacks in which more than six First Nations people were killed. This map is a living document, updated as further attacks come to light.

In the ensuing years, state governments passed laws such as the *Aboriginal Protection Act 1869* (Vic) and the *Aborigines Protection Act 1909* (NSW), which gave wide powers to govern where First Nations peoples could live and work, what jobs they could do and with whom they could marry and associate. In New South Wales, this also allowed for the removal of children from homes to missions. These children are now known as the Stolen Generations.

First Nations peoples had no recognised legal status under Australian law until 1838 and only limited recognition for the rest of the century. Until the 1967 referendum, the *Australian Constitution* referred to First Nations peoples in only two sections: sections 51 and 127. Section 51 gave the responsibility for Aboriginal affairs to state governments. Since there were no federal laws governing the welfare of First Nations peoples, different states interpreted their rights and legal status in various ways. For example, as noted above, the New South Wales authorities sentenced seven white men to death for the Myall Creek massacre; but in contrast, during a similar historical period the Tasmanian government allowed First Nations peoples to be killed or removed.

Section 127 of the *Australian Constitution* excluded First Nations peoples from the Census. They were also denied fundamental citizenship rights. These citizenship rights involved being able to enjoy individual freedoms such as freedom of speech, the right to stand for election and the right to education.

By the 1960s, as attitudes, beliefs and policies began to change, so too did the legal status of First Nations peoples. For example, the right to vote in federal elections was granted in 1962 and in all state elections by 1965. The 1967 referendum asked the non-Indigenous population to change section 51 and to totally remove section 127 of the *Australian Constitution*. Over 90 per cent of the population voted 'yes' to these requests and, from this point on, the affairs of First Nations peoples became a federal issue and First Nations peoples' data was recorded in the Census.

After the 1967 referendum

Despite the referendum, progress on the legal status of First Nations peoples was slow. For example, in 1968, Yolngu people from the Gove Peninsula, in eastern Arnhem Land, sent a bark petition to the Commonwealth Government protesting the removal of 300 hectares of their land for bauxite mining without their permission. The petition failed to move the federal government to recognise the rights of the Yolngu people and so the Gove land rights case (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141) commenced in the Northern Territory Supreme Court in 1971. In his ruling, Justice Blackburn stated that if the Yolngu people did have any type of native title rights, they would have been extinguished under common law. Thus, the doctrine of *terra nullius* prevailed and they could not prevent mining on the land.

In 1972, the Australian Labor Party, led by Gough Whitlam, was elected after 23 years in opposition. In response to the failure of the Gove land rights case, the new government established a Royal Commission into Aboriginal land rights under Justice Woodward. The Royal Commission's findings led to the drafting of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This legislation established a procedure for land claims, which meant that land listed as available could be claimed by Traditional Owners.

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Figure 12.2 The Murray Islands with Mer, home of Eddie Mabo, in the background. For a decade, Eddie Mabo and four other men challenged the Queensland Government in legal action over their people's rights to access Mer.

Also in 1972, the Whitlam government established the Department of Aboriginal Affairs, as the referendum had given the federal government a responsibility to make laws for First Nations peoples.

Between 1982 and 1992, Eddie Koiki Mabo and four other people challenged the Queensland Government in legal action that eventually made its way to the High Court (*Mabo v Queensland (No 2)* [1992] HCA 23) over their people's rights to access Murray Island (Mer Island). Although Eddie Koiki Mabo and one of his fellow plaintiffs died during this time, this did not stop the case and in June 1992, the High Court ruled (by six judges to one) that Australia was not *terra nullius* and that the Meriam people clearly held native title to their land. This meant that Australian law now contained a legal doctrine of native title. Recognition of the Meriam people's traditional rights to their islands in the eastern Torres Strait meant that all First Nations peoples in Australia before 1788 had native title.

This decision altered the foundation of land law in Australia. The federal government responded to this decision by passing the *Native Title Act 1993* (Cth). The Mabo case and the ensuing legislation, including the *Native Title Amendment Act 1998* (Cth), significantly changed the legal status of First Nations peoples in relation to native title and allowed some people to access parcels of land throughout Australia to practise their traditional way of life. It did not allow First Nations peoples to 'own' these lands, as this could mean restricting the use of current owners.

In 1993, during the passage of the Native Title Bill through parliament, Prime Minister Paul Keating said:

> ... as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the Indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent, the standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women – as a defining element in the character of this nation – and the standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.
>
> Paul Keating, 1993.

Review 12.1

1. Table 12.1 outlines the main stages in state and federal laws and policies relating to First Nations peoples. Summarise each stage.
2. Outline the outcomes of the Gove land rights case and the Mabo case. Explain why these cases are significant.
3. Evaluate the significance of native title legislation for First Nations peoples.

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12.2 Areas of disadvantage and marginalisation for Aboriginal and Torres Strait Islander peoples

Compared to non-Indigenous people, First Nations peoples in Australia experience significant disadvantage and marginalisation. When looking at the data on this, you should bear in mind the extent to which differences may arise from complex sociocultural factors, including colonial dispossession and racism.

First Nations people have, on average, lower levels of health, education, employment and housing than non-Indigenous Australians. The Royal Commission into Aboriginal Deaths in Custody drew attention to this disadvantage, with Commissioner Elliott Johnston QC stating:

> ... the consequence of the history of Aboriginal people (since European settlement) is the partial destruction of Aboriginal culture and a large part of the Aboriginal population and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal and non-Aboriginal people.

Elliott Johnston QC, Royal Commission into Aboriginal Deaths in Custody.

Figure 12.3 A nurse gets ready to examine an Aboriginal girl named Barolina in Utopia, Northern Territory. In 2021, about 25 per cent of First Nations people reported their health as 'fair or poor' (22%), which is at least twice as many as non-Indigenous Australians.

Health

Life expectancy

In February 2023, the life expectancies for First Nations peoples were:

- males: 71.6 years (compared to all Australian males: 80.2 years)
- females: 75.6 years (compared to all Australian females: 83.4 years).

General health

In 2021, about 25 per cent of First Nations people reported their health as 'fair or poor' (22%), which is at least twice as many as non-Indigenous Australians.

In 2018–2019, 74 per cent of First Nations people aged 15 years and over were overweight or obese. This was an increase from the 2011–2016 figure. First Nations adults were 1.2 times as likely to be overweight or obese as non-Indigenous adults. This has led to an increase in other health issues such as diabetes, with 7.9 per cent of the First Nations population reported to have diabetes compared to 4.9 per cent of the whole Australian population.

In terms of other chronic disease, nearly twice as many First Nations people as non-Indigenous Australians reported suffering from asthma. There was also a higher prevalence of hearing conditions for First Nations children.

In 2023, the Australian Institute of Health and Welfare (AIHW) reported that First Nations people over the age of 40 have six times the rate of blindness of other Australians; and that 94 per cent of vision loss in First Nations peoples is preventable or treatable. Cataracts were the most common cause of blindness in First Nations adults (32%).

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Education

Attendance and retention rates for First Nations students remain an issue. While the AIHW found that school attendance rates for First Nations and non-Indigenous students in Years 1 to 10 were relatively stable between 2014 and 2019, with only a slight decrease in the trend. Between 2019 and 2022 attendance rates decreased by 7 percentage points for First Nations students (from 82% to 75%) and by 5 percentage points for non-Indigenous students (from 92% to 87%).

The Australian Curriculum, Assessment and Reporting Authority reported that the 'national apparent retention rate from Year 10 to Year 12 decreased by 2.6 percentage points to 79.0 per cent in 2022. The apparent retention rate from Year 10 to Year 12 for Aboriginal and Torres Strait Islander students decreased by 4.1 percentage points, from 60.5 per cent in 2021 to 56.4 per cent in 2022.'

Care and protection of children

The rate of removal of First Nations children from their families still exceeds the removal of non-Indigenous children per head of population. According to the Australian Institute of Family Studies, there are 10 times more First Nations children in care than non-Indigenous children. Removal of children from their communities results in removal from their cultures, in addition to the other disadvantages that are sometimes faced by children in care (such as social and economic disadvantage and abuse).

Legal Links

View online the article, '10 impacts of the NT Intervention' (by Paddy Gibson, NITV, 21 June 2017). This article discusses the *Northern Territory National Emergency Response Act 2007* (Cth) (repealed), which is also referred to as the 'Northern Territory intervention'.

Employment

The National Aboriginal and Torres Strait Islander Social Survey, which was conducted from September 2014 to June 2015, found that less than half (46%) of First Nations people aged 15 years and over were employed – 27.7 per cent working full-time and 18.3 per cent working part-time. Men were twice as likely to be employed than women. The 2016 Census reflected little change in these statistics and the *Closing the Gap Report* (2020) stated that in 2018, the First Nations employment rate was around 49 per cent compared to 75 per cent for non-Indigenous Australians. The 2021 Census showed that 52 per cent (253 600) of First Nations people aged 15–64 were employed, compared with 75 per cent for non-Indigenous Australians. The employment rate was generally lower in more remote areas. The employment rate for First Nations people of working age was highest in large cities at 58 per cent and lowest in very remote areas at 32 per cent.

Criminal justice system

The Australian Human Rights Commission reported in 2021 that First Nations peoples continued to be over-represented in prisons, especially children and young people and those with intellectual or psychosocial disabilities. The report states that First Nations peoples were 12 times more likely to be in prison than non-Indigenous people, and that First Nations women are the fastest growing prisoner population, being 19 times more likely to be in prison than non-Indigenous women.

An Australian Institute of Health and Welfare report stated that:

> over half (56%, or 461 of 818) of all young people in detention on an average night in the June quarter 2022 were Aboriginal or Torres Strait Islander people. Indigenous Australians made up just 6% of the Australian population aged 10–17.

Australian Institute of Health and Welfare, 2022, 'Youth detention population in Australia 2022', 13 December.

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Racial vilification

The *Racial Discrimination Act 1975* (Cth) was amended in 1995 to include the *Racial Hatred Act 1995* (Cth). This allows citizens to complain about offensive, abusive or racially motivated behaviour. This legislation aims to balance two rights: the right to communicate freely and the right to live free from **racial vilification**. The Act prevents public offence, insult, humiliation or intimidation of people of a particular race, colour or national identity.

A case that highlights the intent of this legislation is *McMahon v Bowman* [2000] FMCA 3 (13 October 2000). Bowman shouted abuse from his front veranda to his neighbour, McMahon, because he tried to retrieve his children's ball from Bowman's front yard. The magistrate noted that passers-by could have heard them. Bowman was ordered to pay $1500 in compensation, in addition to the complainant's (McMahon's) legal costs.

There are exceptions to the *Racial Discrimination Act 1975* (Cth), including:

- an artistic work (e.g. a book or a film in which a character expresses racist attitudes)
- a publication, discussion or debate made for an academic, artistic or scientific purpose (e.g. a publication about policies on immigration, multiculturalism or **affirmative action** for migrants)
- a fair and accurate report on a matter of public interest (e.g. a news story about a person behaving in a racially offensive manner)
- a fair comment on a matter of public interest if it expresses the person's genuine belief.

In the case of *McMahon v Bowman*, none of these exceptions applied.

Closing the Gap

In 2008, the Australian governments introduced a framework to 'close the gap' in health and life expectancy between First Nations peoples and non-Indigenous Australians. Seven targets were set in areas that included education, employment and health. Starting in 2009, there was an annual report to parliament on the progress made in closing the gap around the key indicators. Improvements were made in some areas, but not all.

In 2019, the National Indigenous Australians Agency was created, and in 2020 a new National Agreement on Closing the Gap was signed. The new agreement had a revised framework and 16 new targets.

In July 2022, the Productivity Commission began releasing an annual report on progress under the National Agreement. This annual report can be accessed from the Productivity Commission website.

racial vilification a public act based on the race, colour, national or ethnic origin of a person or group of people that is likely to offend, insult, humiliate or intimidate; types of behaviour can include racist graffiti, speeches, posters or abuse in public

affirmative action a policy designed to address past discrimination and thus improve the economic and educational opportunities of women and minority groups

Figure 12.4 Labor MP Linda Burney during then Prime Minister Scott Morrison's delivery of the Closing the Gap Ministerial statement in the House of Representatives in Canberra in February 2019. Burney was the first Aboriginal woman to be elected to the Australian House of Representatives.

Research 12.1

Find three cases of racial vilification. Cases can be found on the websites of Anti-discrimination NSW, the Australasian Legal Information Institute and Queensland Human Rights Commission.

1 For each case, describe the events of the case and how the discrimination was dealt with.
2 Discuss the effectiveness of the law in dealing with racism.

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In addition to the annual report monitoring progress on the agreed target outcomes and supporting indicators, there is also a three-yearly report of progress. The three-yearly review considers the specific actions proposed to improve these outcomes and the adequacy of these actions. The 2023 report was quite damning about the progress made, with an *ABC News* headline stating 'Productivity Commission report finds Australian governments are still making Indigenous disadvantage worse'.

Media

Productivity Commission report finds Australian governments are still making Indigenous disadvantage worse

By Kate McKenna

ABC News

26 July 2023

State and territory governments are still making decisions that exacerbate disadvantage for Indigenous Australians three years after a landmark national agreement on Closing the Gap, a new report warns.

The Productivity Commission's first review of the 2020 national agreement says some governments continue to make choices that 'disregard or contradict' their commitments.

The draft report cites the Queensland government's tightening of bail laws as one such example.

'The Queensland government made changes to bail laws that will mean more Aboriginal and Torres Strait Islander young people are incarcerated for longer periods of time,' the report found.

'This is in the context of Queensland having one of the highest rates of Aboriginal and Torres Strait Islander young people in detention (40.9 per 10 000 young people aged 10–17 years were in detention on an average day in 2021–22, compared to 22.3 per 10 000 nationally)', the report said.

Other examples raised in the report include the Northern Territory government's changes to alcohol restrictions in July 2022 'without adequate consultation with Aboriginal communities'.

It also pointed to concerns from a UN committee that Western Australia did not consult properly before passing its Aboriginal Cultural Heritage Act 2021.

'It is too easy to find examples of government decisions that contradict commitments in the (Closing the Gap) agreement that do not reflect Aboriginal and Torres Strait Islander people's priorities and perspectives and that exacerbate, rather than remedy, disadvantage and discrimination' the report stated.

'This is particularly obvious in youth justice systems.'

When asked about the draft report on Wednesday, Queensland's Deputy Premier Steven Miles said the state government took its Closing the Gap responsibilities seriously, but defended bail law changes.

'We have a real focus on Closing the Gap, on achieving those targets,' he said.

'But we also make no apology for keeping the community safe, and the actions that we took in introducing those laws were on the basis of expert advice from our police and from the justice system.'

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The national agreement on Closing the Gap was signed in July 2020 by federal, state and territory governments, and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations.

It focuses on four key reforms:

- Strengthening and establishing formal partnerships and shared decision-making
- Building the Aboriginal and Torres Strait Islander community-controlled sector
- Transforming government organisations so they work better for Aboriginal and Torres Strait Islander people
- Improving and sharing access to data and information to enable Aboriginal and Torres Strait Islander communities to make informed decisions

There are also numerous socio-economic targets.

While there are 'pockets of good practice', overall progress on implementing the priority reforms 'has been slow, uncoordinated and piecemeal,' according to the commission's report.

'Current implementation raises questions about whether governments have fully grasped the scale of change required to their systems, operations and ways of working to deliver the unprecedented shift they have committed to,' it said.

Too many government agencies are consulting with First Nations people on a pre-determined solution rather than 'collaborating on the problem and co-designing a solution'.

The report also warned current accountability mechanisms 'lack bite'.

'Without stronger accountability for its implementation across all government organisations, the agreement risks becoming another broken promise to Aboriginal and Torres Strait Islander people,' it said.

The report acknowledged that 'much has changed' since the national agreement was signed three years ago, noting the upcoming referendum on the Voice to Parliament and a number of states setting up or starting Voice, treaty or truth-telling processes.

'These initiatives may result in new decision-making and accountability structures that could provide a further catalyst for changes to the way governments work with Aboriginal and Torres Strait Islander people,' the report said.

'Regardless of the outcomes of these processes, governments still have a responsibility to implement what they committed to in the agreement.'

The commission has made several draft recommendations including appointing a senior leader or leadership group to drive change in each jurisdiction.

In a statement, Minister for Indigenous Australians Linda Burney said the government was carefully considering the recommendations in the draft report.

'There is much work to be done to meet all four priority reforms of the national agreement,' she said.

'This report shows once again that the status quo is not working. We have to do better.

'The report demonstrates why an Aboriginal and Torres Strait Islander Voice is a once-in-a-lifetime opportunity that we must take to help close the gap and improve the lives of Aboriginal and Torres Strait Islander Australians.'

The commission's final report will be handed to the Joint Council on Closing the Gap by the end of the year.

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Analysis 12.1

Read the media article on the previous page.

Outline the ways mentioned in the article that Australian governments are increasing First Nations disadvantage.

Review 12.2

1 Discuss the reasons for the disadvantages experienced by First Nations peoples, as outlined by Commissioner Elliott Johnston QC.
2 Propose why attempts to reduce the gap between First Nations peoples and non-Indigenous people have had little positive effect.

12.3 Legal responses

Criminal law

As with all law, First Nations peoples have not been treated well by criminal law. In the cases of *R v Ballard* (1829) and *R v Murrell* (1836), in which Aboriginal men (Ballard and Murrell) were charged with murdering other Aboriginal men, the defence counsel argued:

> The natives were not protected by [the laws of Great Britain], they were not admitted witnesses in Courts of Justice, they could not claim any civil rights, they could not obtain recovery of, or compensation for, those lands which had been torn from them, and which they had held probably for centuries. It therefore followed they were not bound by laws which did not at the same time afford them protection.

Sydney Stephen, 1836, *R v Murrell* (1836), quoted in *The Sydney Gazette and New South Wales Advertiser*, 23 February.

In both cases, the prisoners were acquitted. However, in the latter case, Justice Forbes reversed his decision and found the defendant guilty after consulting with three other judges. Throughout the twentieth century and into the twenty-first century, First Nations peoples are arrested by police, charged and jailed by the courts at significantly higher rates than other Australians. It is estimated that First Nations peoples are between nine and 15 times more likely to be arrested, charged and jailed for offensive language/behaviour, resisting arrest and assaulting police, and hindering police ('the trifecta' of offences). Indeed, in 2004, First Nations peoples in New South Wales appeared in criminal courts four times more frequently than non-Indigenous people. In terms of incarceration, 16 per cent of First Nations peoples who appeared in court received jail sentences, compared to just 6 per cent of non-Indigenous people.

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A government report, *Youth Justice in Australia 2021–2022*, reported that on an average day in 2021–2022:

> 1.2% of Indigenous young people aged 10–17 [were] under youth justice supervision [and of these] there were
>
> - 1,781 (52%) Indigenous young people under youth justice supervision
> - 1,381 (51%) Indigenous young people under community-based supervision
> - 416 (60%) Indigenous young people in detention.

Australian Institute of Health and Welfare, 2023, 'Youth justice in Australia 2021–22', 31 March.

A 2017 Productivity Commission report, *Indigenous Disadvantage*, found that, 'About four in five Indigenous teenage boys and three in five Indigenous teenage girls return to jail within a year of being released from youth detention'. The Australian Health and Welfare Institute's 'Youth detention population in Australia 2020' data shows that Indigenous youth detention is an ongoing issue.

Furthermore, it has been estimated that if all First Nations people who were sentenced to jail for fewer than six months were released, First Nations jail population numbers would fall by 56 per cent over 12 months. The Royal Commission into Aboriginal Deaths in Custody 1987 found that:

> ... the more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society – socially, economically and culturally.

Royal Commission into Aboriginal Deaths in Custody, Volume 1, 1.7.1, 1987.

In recent years, a range of measures and policies have been put in place, including circle sentencing, which tries to identify a more appropriate form of punishment after a First Nations person has been found guilty in an ordinary court. Circle sentencing is currently in use in Dubbo and Nowra; however, there continues to be criminal cases in which a First Nations offender is not excused from punishment under the mainstream criminal justice system.

Civil law

Australia's adversarial legal system means that taking civil action against another person or company can be an extremely costly experience. The chances of winning a case with self-representation are extremely low and, as a consequence, very few First Nations people or non-Indigenous people can afford to act as plaintiffs in civil cases. However, in 1996, as a result of the Mabo decision, the Wik peoples of Cape York challenged, in the High Court, the legality of pastoral leases or land formerly under pastoral leases (*Wik Peoples v Queensland* [1996] HCA 40 ('Pastoral leases case')).

The major difference between the Mabo and Wik cases was that the Wik people were fighting against farmers who also felt they had legal rights and ownership. The High Court found in favour of the Wik people. The court found that native title could 'co-exist' with pastoral leases. This effectively meant that the Wik people could access their land for customary purposes and that this should not interfere with farmers or pastoralists. The court also determined that, should native title and pastoral leases come into conflict, the pastoralists' rights would prevail. The court found that although pastoralists did not have exclusive rights to possession of the land, they did have an exclusive right to pasture. Following this judgment, the federal government introduced the 10-point plan for native title, with the *Native Title Amendment Act 1998* (Cth).

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Anti-discrimination legislation

Discrimination in this legal meaning refers to treating someone unfairly because they belong to a particular group of people. Discrimination includes harassment – unwanted and unasked for behaviour that offends, intimidates or humiliates. The *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW) make this behaviour towards First Nations peoples unlawful. The Anti-Discrimination Board of NSW (ADB), which is part of the Attorney-General's Department, was established under the *Anti-Discrimination Act 1977* (NSW) to administer that Act. The ADB's role is to further principles and policies for anti-discrimination and **equal opportunity** throughout New South Wales.

equal opportunity the right to equivalent opportunities regardless of race, colour, sex, national origin, and so on

The ADB provides information about people's rights and responsibilities under anti-discrimination laws, and explains how they can prevent and deal with discrimination. This is achieved through consultations, education programs, seminars, talks, participation in community functions, and the production and distribution of information, through printed publications and the ADB's website. The ADB also takes complaints of discrimination.

In May 2005, some amendments were made to this legislation that allowed lawyers to lodge complaints to the ADB within 12 months of the offence, rather than the previous six-month complaint period.

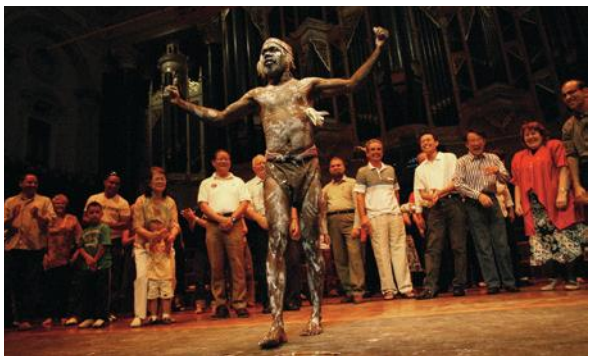

Figure 12.5 An Aboriginal traditional dancer performs on stage at the Australian Harmony Day in Sydney in 2007. Harmony Day (now known as Harmony Week) is celebrated on March 21 to coincide with the International Day for the Elimination of Racial Discrimination.

In addition, the ADB will be able to hear part of a complaint rather than a complaint in total. This is designed to allow parts of a complaint to be dismissed if not covered by legislation, but remaining parts of the complaint will stand. Previously, whole cases have been dismissed because some of the behaviour of the respondent had not been covered by legislation.

Legal aid

'Legal aid' is the provision of legal services to socially and economically disadvantaged people at no or very little cost. The government provides legal aid so that people who cannot afford to hire a solicitor are still able to access the legal services they require. A number of different organisations provide legal aid in New South Wales, including Legal Aid NSW, community legal centres generally and the Aboriginal Legal Service. All of these are funded by either or both the Commonwealth and NSW governments.

Legal aid helps people who are economically or socially disadvantaged to understand and protect their rights. The only way the legal system can perform this protective role is if there is equitable access to it. Socially and economically disadvantaged people, including many First Nations people, may experience particular difficulties in accessing the justice system due to lack of education and isolation, among other factors. Legal aid plays an important role in improving access to justice by providing a range of legal services to First Nations peoples.

The Aboriginal Legal Service (NSW/ACT) Limited (ALS) provides legal aid services to Aboriginal and Torres Strait Islander peoples in New South Wales and the Australian Capital Territory in the areas of criminal and family law. It started operation on 1 July 2006 and has 23 offices across New South Wales and the Australian Capital Territory. The ALS replaced the six Aboriginal and Torres Strait Islander Legal Services and their peak body, the Coalition of Aboriginal Legal Services. The ALS won the government contract to provide legal services to First Nations peoples in New South Wales and the Australian Capital Territory on 28 April 2006, and receives government funding to do so.

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Commissions

Aboriginal and Torres Strait Islander Commission

In 1989, the Commonwealth Government legislated the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) to establish the Aboriginal and Torres Strait Islander Commission (ATSIC). The purpose of ATSIC was to grant greater political power to First Nations peoples by allowing them greater participation in First Nations affairs.

Government funding was provided to establish head and regional offices for providing services such as health care, substance abuse programs, and housing and economic development programs. In March 2005, after a range of criticisms from the federal government and some personal issues with the chairman, Geoff Clark, ATSIC was officially abolished. The Liberal/National coalition government replaced ATSIC with the National Indigenous Council, but this body was widely denounced for its ineffectiveness, and the Labor government after 2007 did not continue member contracts. At the time of writing, no independent national body (funded by the government) exists.

Government inquiries

Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody was established in 1987 in response to the unacceptable number of First Nations deaths in police custody and jail in Australia.

In summary, the Royal Commission found that there was no evidence of foul play by police officers in each of the deaths. However, suspicions were raised and this caused serious damage to relationships between First Nations peoples, the police and the wider community. The Royal Commission made 339 recommendations to assist in the reduction of custodial deaths. There is more on this topic later in this chapter. You can read the Royal Commission's findings at the Australasian Legal Information Institute website.

Land councils and trusts

The *Aboriginal Land Rights Act 1983* (NSW) set up a mechanism to compensate First Nations peoples for the theft of their land. The Preamble of the Act (as edited by the *Aboriginal Land Rights Amendment Act 2014* (NSW)) stated that:

***Aboriginal Land Rights Act 1983* (NSW)**

Preamble

1. Land in the State of New South Wales was traditionally owned and occupied by Aboriginal persons.
2. Land is of spiritual, social, cultural and economic importance to Aboriginal persons.
3. It is fitting to acknowledge the importance which land has for Aboriginal persons and the need of Aboriginal persons for land.
4. It is accepted that as a result of past government decisions the amount of land set aside for Aboriginal persons has been progressively reduced without compensation.

Figure 12.6 Dunghutti Elder Leetona Dungay (right) addresses the crowd during a rally against Black Deaths in Custody in July 2020 at The Domain in Sydney. The rally was organised to protest against First Nations deaths in custody and in solidarity with the global Black Lives Matter movement. Leetona's son, David Dungay Jr, was killed in Long Bay Prison Hospital after being restrained and forcibly held down by six guards.

The aim of the Act was to compensate New South Wales First Nations peoples for the historic removal of their family from their lands.

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It established a network of New South Wales Aboriginal land councils with three tiers: the NSW Aboriginal Land Council, 13 regional land councils and 120 local land councils.

Interestingly, this Act came into effect at about the same time that Eddie Koiki Mabo was challenging the Queensland Government and highlights the nature and operation of the Australian legal system with respect to First Nations peoples' land rights and native title. At this point it is worth differentiating between these two terms.

Land rights

Land rights granted to First Nations peoples gives legal rights to a parcel, but usually not exclusive rights to develop such land as the owners see fit. A legal document or 'title deed' is handed over to a community or land organisation, and this land is usually passed down to future generations, as it would have been prior to 1788.

Native title

Native title is not a grant by a government to land. Rather, it is the legal recognition of First Nations peoples' rights in Australian law and allows access and co-existence for customary lifestyles and traditions to be practised.

The NSW Aboriginal Land Council (NSWALC) works for the return of land that is both culturally significant and economically viable. It is pro-active in seeking cultural, social and economic independence for Aboriginal people by expressing the position of Aboriginal people on issues that affect them. Some of the activities that the NSWALC may engage in include administering funds from mining royalties, acquiring new lands from the Crown and allowing or rejecting mining activities on Aboriginal land.

Review 12.3

1. State the difference between land rights and native title. Assess why this distinction is important.
2. Outline why the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) was problematic for First Nations communities.
3. Explain why extending the time period (from six months to 12 months) where lawyers can lodge complaints to the Anti-Discrimination Board will benefit lawyers and their clients.
4. Assess why the chances of winning a case are so low when the defendant self-represents.

12.4 Non-legal responses

Political power

Political power refers to the ability to influence and directly control government policy. One of the most obvious ways to control and influence policy is to have First Nations peoples as members of parliament.

In 2003, Linda Burney became the Member for Canterbury in New South Wales. She was the first Aboriginal or Torres Strait Islander person to be voted into the 158-year-old New South Wales Parliament. Burney became the eleventh Aboriginal MP and only the fourth Aboriginal woman elected to Australian Parliament. In 2016, she resigned from New South Wales Parliament to contest the federal seat of Barton for Labor. On winning the seat, she became the first Aboriginal woman to be elected to the Australian House of Representatives. Her inaugural speech was memorable and moving in raising awareness about the difficulties faced by First Nations peoples in reaching successful outcomes.

Another way of wielding political power has been through bodies such as the NSWALC and ATSIC. While ATSIC was an arm of the federal government, it was able to determine a range of strategies, policies and programs for First Nations communities. However, since the abolition of ATSIC in 2005, a number of questions have arisen.

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According to Jody Broun, Director General of the NSW Department of Aboriginal Affairs:

> The Commonwealth Government is now using SRAs [shared relationship agreements] with Aboriginal communities to deliver funding for projects that do not involve core services. SRAs are voluntary written agreements around particular projects or activities that Aboriginal communities have identified as a priority. SRAs set out the outcomes to be achieved, and the agreed roles and responsibilities of the governments and Aboriginal communities involved in the activity. While the primary objective of SRAs should be to bring benefits to Aboriginal communities, some Aboriginal leaders and state government representatives have expressed concerns that SRAs may require Aboriginal people to do things to get services that non-Aboriginal people do not have to do. There is no clear evidence, yet, that this is the case. Aboriginal communities should be able to obtain benefits from SRAs, but this is dependent upon communities having good leadership and resources, and being able to negotiate on an equal footing with government officials. Finally, the power of protest can sway political parties to change policy or legislation, depending on the issue and the timing of elections.

Jody Broun, Director General of the NSW Department of Aboriginal Affairs.

Self-determination, including treaties

Article 1 of the *United Nations Covenant on Economic, Social and Cultural Rights* (1966) states that:

> ***United Nations Covenant on Economic, Social and Cultural Rights* (1966)**
> **Article 1**
> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The following extract written by social commentator and journalist Tim Rowse offers an opinion about First Nations peoples' rights to self-determination in Australia:

treaty
defined by the *Vienna Convention on the Law of Treaties* (1969) as 'an international agreement concluded between states in written form and governed by international law'; treaties may also be referred to as conventions or covenants

> Citizens who are Indigenous are bearers of a right to self-determination which cannot be honoured by putting in their hands merely those instruments of self-determination that were afforded to all Australian citizens through the *Australian Constitution*. That is because Indigenous Australians were not parties to the federal compact of 1901. Giving Indigenous Australians the vote since federation cannot in itself redress their omission from the founding processes of nationhood. To admit them as parties to nation building, it would be necessary to negotiate changes to the *Constitution* that acknowledge their collective interests in some way. This should have been the main business of the Centenary [of Federation] in 2001. Thus, some advocates of a **treaty** now argue for constitutional recognition of an Indigenous order of government – the instrument of their self-determination as a distinguishable people within the Australian nation.

Tim Rowse, 2022, 'Treaty talk 2002', *Arena Magazine,* 62, December.

Analysis 12.2

Read the extract written by Tim Rowse. Discuss with your class whether you agree or disagree with these sentiments in relation to self-determination.

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Figure 12.7 The Waka leave the Waitangi treaty grounds in February 2021 as part of celebrations for Waitangi Day, which commemorates the signing of the treaty of Waitangi on 6 February 1840 by Māori chiefs and the British Crown. The treaty granted the Māori people the rights of British Citizens and ownership of their lands and other properties.

Treaty

reconciliation getting two parties to correspond, or make peace

Many First Nations peoples have debated and discussed having a treaty between First Nations peoples and non-Indigenous Australians. Such a treaty could take many forms, such as a Bill of Rights, or an agreement on a range of issues. The Treaty of Waitangi in New Zealand between Māori and the colonial powers settles the differences that existed over land occupation, and there is still a possibility in Australia of a treaty being signed. In 2000, the former chairman of ATSIC, Geoff Clark, made the following comments about a treaty:

> In fact what it can do is resolve all outstanding issues left in terms of **reconciliation**. Proper recognition of Indigenous people's rights, equality and fairness are all wrapped up in the treaty. At the end of the day a treaty is a settlement.
>
> Geoff Clark, 2000.

Case Study

Uluru Statement from the Heart

Video 12.1 Kaurareg and Torres Strait Islander man Thomas Mayo reads the Uluru Statement from the Heart. (02:49)

In 2015, Malcolm Turnbull and Bill Shorten (then prime minister and leader of the opposition) appointed a Referendum Council to investigate and advise the government on steps towards providing constitutional recognition of First Nations peoples. The Council, which included both First Nations and non-Indigenous members, spent six months engaging in regional dialogues with over 1200 First Nations peoples' representatives across the country. Coming out of this discussion was a consensus document: the Uluru Statement from the Heart.

In May 2017, a four-day First Nations National Constitutional Convention was held at Uluru. The 250 delegates included 17 representatives from each of the 13 regional dialogues, together with members appointed by the Referendum Council. The delegates agreed to adopt the Uluru Statement from the Heart.

The Statement is addressed not to the Australian parliament, but to the Australian people, asking them to allow First Nations peoples to have a voice in the laws that are made about them.

There are three key elements proposed:

- **Voice** – amend the Constitution to allow for a body of First Nations Traditional Owners to advise parliament on areas of policy that affect First Nations peoples.
- **Treaty** – formal recognition by government of First Nations sovereignty. The Statement uses the Yolngu word *Makarrata*, which is the concept of two parties addressing the divisions of the past, by acknowledging wrongdoing and aiming to make things right.
- **Truth** – enabling a shared understanding of the colonial history of Australia, and the injustices experienced by First Nations peoples.

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Figure 12.8 Prime Minister Anthony Albanese sits with First Nations women and a copy of the Uluru Statement from the Heart in the Uluru Kata Tjuta National Park in October 2023.

Media

What actually is a treaty? What could it mean for Indigenous people?

Harry Hobbs, Heidi Norman and Matthew Walsh

The Conversation

3 April 2023

The Uluru Statement from the Heart calls for Voice, Treaty and Truth. These aspirations are intended as a sequence of reforms, that advance towards a just settlement with First Peoples.

The federal government is committed to holding a referendum later this year to put an Aboriginal and Torres Strait Islander Voice in the Australian Constitution. The government has also agreed to implement the Uluru Statement 'in full'.

Media—Continued

Following the referendum, it's expected attention will shift towards a Makarrata Commission to 'work on a national process of treaty-making and truth-telling'. In fact, reports suggest the government might move even faster.

For generations, Aboriginal and Torres Strait Islander peoples have called for a formal treaty or treaties to recognise their sovereignty 'and set out mutually agreed terms for our relationship with the Australian government'.

(Continued)

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Media–Continued

But while Treaty has long been part of the political landscape, it is not well understood. Many Australians wonder what a Treaty is, what it would achieve, who it would be negotiated with, or for whom, and how. We'll explore some of these questions here (in brief).

Why does Australia not have a Treaty?

When European colonial powers encountered Indigenous peoples, they often negotiated treaties. These agreements dealt with a range of matters, including trade and military alliances. They also set out rules to share the land and maintain peaceful relationships.

These colonial-era treaties were regularly broken. However, they recognised Indigenous peoples had the right to deal with land and exercised sovereignty over that land.

The British did not engage in treaty talks in Australia. They never sought to negotiate with the owners of this land. Instead, they claimed the land belonged to no one and took it for themselves.

Historians have debated why the British took this approach. Some have argued as a penal colony with a substantial military force there was no need to negotiate trading relationships with the original owners. Others have argued the racist attitudes of the day were influential.

Whatever the reason, the result is Australia is an outlier. As a result, many Aboriginal and Torres Strait Islander peoples believe the moral and legal basis of the nation is 'a little legally shaky'.

What is a Treaty?

The absence of a Treaty is one of the major challenges facing the Treaty debate in Australia. Without a history of treaty-making, the concept of what a treaty is or involves remains vague for many people, including government.

It means some people can argue a Treaty is dangerous or it would lead to the breakup of the nation. This makes little sense because a Treaty is a marriage not a divorce. It's about bringing communities together and building strong relationships based on self-determination.

Governments might argue they're already engaged in treaty-making. There are many examples of bureaucracy adapting its policy formulation and delivery to reflect community aspirations for a greater say in the delivery of services.

Such 'partnerships', 'co-design' and local decision-making with government are valuable. They mark an important shift in promoting Aboriginal and Torres Strait Islander peoples' participation in policy development and service delivery. But simply calling an agreement a 'treaty' doesn't make it a treaty.

Australia has signed up to a range of international legal instruments that concern the rights of Indigenous peoples. These legal instruments set a clear standard for what makes an agreement a treaty. A treaty must satisfy three conditions.

1. A treaty acknowledges Indigenous peoples are a distinct political community different to other Australians. This is because Indigenous peoples are the only group of Australians who owned, occupied, and governed the continent before colonisation. This recognition also acknowledges the historic and contemporary injustices that invasion has caused

2. A treaty is a political agreement reached by a fair process of negotiation between equals. Negotiation helps ensure everyone's interests can be considered. But securing a fair negotiation process can be difficult. In Victoria, the First Peoples Assembly and State government have agreed to a Treaty Negotiation Framework that sets out principles to guide Treaty talks

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3. Treaties involve both sides committing to responsibilities, promises and principles that bind the parties in an ongoing relationship of mutual obligation and shared responsibility. Most importantly, while the outcomes of any negotiation will differ according to the parties, a treaty is built on the recognition of Indigenous peoples' inherent sovereignty. As part of this, a treaty will provide for some degree of self-government. What this looks like in practice will be worked out in negotiations.

A treaty will also include a range of other elements. It could include financial compensation, return of land, formal recognition of historic wrongs, and symbolic gestures of reconciliation, such as apologies.

Treaties are unique agreements. As Professor Megan Davis explains, they are aimed at 'settling fundamental grievances, and establishing binding frameworks of future engagement and dispute resolution'.

Modern treaties are different from historic treaties

There is a long history of treaty-making all over the world from which Australia can draw lessons. But it's important to note modern treaties differ from those negotiated in colonial periods. They are more technical and legally complex. They are also negotiated against a long history of inequitable relationships.

They will also be subject to Australian law. While colonial-era treaties were international agreements between two sovereign communities, modern treaties will be subject to Australian law.

Treaty is happening now

Treaty is a longstanding aspiration of First Peoples in Australia. It is only in recent years, however, governments have decided to talk treaty.

Progress has been slow, but important steps have been taken at the state and territory level. For instance, in February this year, the Queensland government introduced the Path to Treaty Bill 2023 into the state parliament. The bill will establish and finance an independent First Nations Treaty Institute to 'help prepare and support First Nations people for treaty negotiations with the state'.

That same month, the South Australian government introduced a bill to establish a Voice to the Parliament, with a treaty process to follow.

In Victoria, after several years of patient work, negotiations between the First Peoples Assembly and state government are expected to begin by the end of the year. Similar processes are underway in the Northern Territory, Tasmania and the ACT.

Every treaty process has its own challenges and complications and it's too early to tell whether these processes will result in meaningful settlements. Nevertheless, they demonstrate two key things.

First, Treaty is a matter of political will, not legal impossibility. Second, looking towards the referendum later this year, the existence of treaty processes across the country suggests Australians may be willing to deal with the unfinished business of colonisation and its consequences.

Analysis 12.3

Read the media article above.

1. Outline the arguments against a treaty.
2. Outline the arguments for a treaty.
3. Based on what you have read in the article and throughout this chapter, discuss the need for a treaty with First Nations peoples in Australia.

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The Voice referendum

When the Albanese Labor Government was elected in May 2022 one of the first matters addressed was the need to change the *Australian Constitution* to give First Nations peoples of Australia a voice in parliament, as a response to the Uluru Statement from the Heart. Indeed, in his victory speech Prime Minister Albanese had committed to holding a referendum on this matter.

In May 2023, the Australian Government settled on the text of the question on the ballot and the actual amendment. These were formally approved by parliament through the passage of the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023 (Cth). What followed was much debate and many rallies about the need for the change.

In the lead up to the Voice referendum, statistics regarding the health, education and living conditions of First Nations peoples were highlighted to raise awareness about these issues.

There was also discussion about whether the Australian Government needed to make a treaty with the First Nations peoples of Australia. The referendum was held in October 2023 and was defeated. Discussion continues at the national level how best to respond to the issues raised in the Uluru Statement from the Heart.

Research 12.2

Carry out research to see the arguments that exist for and against the need for a treaty.

Analysis 12.4

Read the article 'Why the Voice failed' (Kirstie Wellauer, Carly Williams and Bridget Brennan, *ABC News*, 16 October 2023) at the following link: http://cambridge.edu.au/redirect/10399.

1 What was the outcome of the Voice referendum?
2 Outline the reasons mentioned in the article for the failure of the referendum.

Review 12.4

1 Outline the advantages and disadvantages of a treaty between the Australian Government and First Nations peoples.
2 What was the Voice referendum?

Figure 12.9 Voice to Parliament referendum information boards were displayed in October 2023 in Melbourne.

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12.5 Effectiveness of responses

Misunderstandings due to ignorance and differences in points of view

First Nations peoples have lived on the Australian continent for at least 65 000 years and, prior to colonisation, there were approximately 500 different cultural and language groups. To categorise First Nations peoples into a single ethnic group would be similar to categorising Caucasian, Asian and Arab people into one group. The European colonists did not grasp the concept that there were significant differences between these groups in terms of language, religion and culture. This misunderstanding continues today.

The colonists also assumed that all First Nations people were **nomadic**, but there is evidence to suggest that this was not the case. Some groups lived a sedentary lifestyle, with permanent dwellings and clear physical boundaries. Indeed, as Eddie Koiki Mabo successfully demonstrated, the Meriam people (on the Torres Strait island of Mer) had a system of land ownership with identifiable boundaries, and land was passed down through generations.

First Nations peoples have a strong connection to the land and the physical environment; they believe that life comes from the land and returns to it upon death. They see themselves as custodians of the land, looking after it for future generations. This is in stark contrast to the non-Indigenous view of land as an asset that can be bought and sold for profit and changed or developed to suit the needs of people at the time.

Their strong relationship with the land means that placing a First Nations person within four walls (such as in a prison) for an extended period may be viewed as crueller and more inhumane than for a non-Indigenous person.

The Australian legal system is based on an adversarial process, whereby opposing sides argue their cases with a judge acting as a 'referee'. This adversarial system does not sit well with the traditional legal approach of First Nations peoples, which is based on a customary system of law and justice in which Elders settle disputes and hand out punishments (see the In Court box on the following page).

Generally, First Nations cultural beliefs emphasise the group rather than the individual. Customary law involves discussion, mediation and direct action, and a physical punishment may be administered. While physical punishment may be viewed as cruel or harsh, it means punishment is dealt with quickly and does not involve incarceration. The 1976 case of *R v Williams* highlights the recognition of customary law by a South Australian judge.

nomadic
a term used to describe people who tend to travel and change settlements frequently

The adversarial system is complex, expensive, time consuming and foreign to First Nations cultures in Australia. Indeed, many would argue that it is difficult for any person without legal training to comprehend all of its rules and processes. Misunderstandings due to ignorance of the system are common.

This is compounded by the fact that for First Nations peoples living in rural and remote parts of Australia today, English may not be their first language and interpreters are often needed if an individual faces police and court proceedings.

A further barrier to First Nations peoples gaining justice within an adversarial system for some of their concerns is the views of mainstream Australia. While some people consider First Nations peoples to be the proper owners of all land in Australia, others argue that First Nations peoples should have no special rights. Thus, it is not easy for First Nations peoples to gain the sympathy and support of 'everyday Australians' in some of their claims.

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Figure 12.10 First Nations women fishing in Arnhem land. First Nations peoples have a strong connection to the land and the physical environment.

In Court

***R v Williams* (1976) 14 SASR 1**

During this criminal trial in South Australia, Justice Wells heard evidence that a woman taunted Williams in relation to customary secrets. They had been drinking together and an argument broke out between them, during which Williams killed the woman. He was convicted of manslaughter.

The court decided that the provocation by the woman was sufficient to reduce the original charge of murder to the lesser charge of manslaughter. Justice Wells agreed to suspend a two-year custodial sentence if Williams returned to his lands for customary punishment. He later gave the following reasons:

> The fact was that he had very little English; it would have been impossible for him to have communicated with the staff of the prison or with any fellow prisoners, or to have related to them in any way ... To condemn a tribal Aborigine to such a fate was something which I wished, if possible, to avoid.

Williams was later speared through the legs as required by Elders.

Review 12.5

1. Outline First Nations peoples' systems of justice and punishment.
2. Explain how non-Indigenous systems of law and punishment may be harmful to First Nations offenders.
3. Justify the court's decision in the *R v Williams* (1976) case. In your answer, consider whether being speared by Elders is sufficient punishment for manslaughter.

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Customary law and self-determination

In relation to the issues of customary law and self-determination, while some judges have recognised the social, cultural and legal differences between Australian law and First Nations customary law, this is not always the case. For example, the High Court dismissed the 1994 appeal by Denis Walker that he should not be required to adhere to Australian criminal law, as explained in the In Court box, below.

Native title and land rights

What if gold, oil or some other precious resource was to be discovered in your backyard or house? Would you automatically want to sell your house and allow this resource to be extracted for huge profit? Perhaps you and your family were so attached to your house that you would not dream of selling. Imagine, for example, that your home had been in your family for generations. It was where your grandfather and mother grew up. This situation has some similarity to the issue of native title and land rights. Some citizens see the practising of First Nations culture to be far less important than the economic gains of farming, forestry, fishing and mining. How do we decide whether access (or how much) should be granted to First Nations peoples?

Now consider the case of a major deposit of a mineral being discovered on land owned by a First Nations community. What if they do not wish mining to occur, despite being offered large sums of compensation or royalties? The Gove land rights case, which commenced in the Northern Territory Supreme Court in 1971, is an example of this situation. The court followed earlier precedents and so found that even if the Yolngu people did have any type of native title rights, the doctrine of *terra nullius* prevailed and they could not prevent mining on their land.

In response, the Whitlam government established the Department of Aboriginal Affairs in 1972. The *Aboriginal Land Rights Act 1976* (NT) established a land claim process for Traditional Owners. The Mabo decision of 1992 demolished the notion of *terra nullius* and subsequently the *Native Title Act 1993* (Cth) was established.

Since 1992, there have been a number of land rights and native title cases.

Some successful cases include:

- *Yanner v Eaton* (1999) 201 CLR 351 – Yanner, a member of the Gunnamulla clan of the Gangalidda tribe, had caught two juvenile crocodiles with a harpoon, and been charged under the *Fauna Conservation Act 1974* (Qld). The High Court found that his clan's native title rights to the land were not extinguished by the Fauna Act.
- *Commonwealth v Yarmirr* (2001) 208 CLR 1 – This was the first native title case to deal with waters rather than land – an area of sea and sea-bed around Croker Island. The High Court found that native title did exist but held that it was non-exclusive due to common law rights of boating and fishing.
- *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 – In the sixth successful native title claim in New South Wales, the Federal Court recognised the Barkandji people as Traditional Owners of 128 000 square kilometres of land – the largest to date in New South Wales. It took almost 18 years for the matter to be resolved.

In Court

***Walker v New South Wales* [1994] HCA 64**

Denis Walker appealed a conviction for assault, arguing that as an Aboriginal Australian, he was not accountable under Commonwealth or state criminal law, and therefore could not be guilty of the crime. He claimed that the Australian Government needed the consent of Aboriginal Australians before they could make laws for them. However, the High Court was not influenced by Walker's counsel's submissions and dismissed the appeal on 16 December 1994. Chief Justice Mason stated that it is 'a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle.'

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There have also been many unsuccessful claims, including:

- *Wik Peoples v Queensland* [1996] HCA 40 – The court found that native title could 'co-exist' with pastoral leases.
- *Fejo v Northern Territory* (1998) 195 CLR 96 – This case confirmed that native title is permanently extinguished if freehold title has been granted.
- *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 – The High Court held that a break in observance of traditional customs and laws meant that native title ceased to exist.

The Wik case and the government's 10-point plan (*Native Title Amendment Act 1998* (Cth)) now mean that while First Nations peoples can be consulted on a land-use issue, they have no legal power to veto a decision about land.

Deaths in custody recommendations

The 1987 Royal Commission into Aboriginal Deaths in Custody was established in response to the unacceptable number of First Nations deaths in police custody and jail. The Royal Commission handed down 339 recommendations, some of which will be discussed here.

It is worth noting that the number of deaths in police custody has fallen because of a range of changes made to police cells, one of which reduces the possibility of suicide. While the number of deaths in custody has remained steady, of concern is the fact that, since the Royal Commission over 20 years ago, the proportion of First Nations prisoners tends to be between 18 per cent (2013–2014) and 26 per cent (2011). This is a significant increase from 1991, when it was 14 per cent (*Australian Institute of Criminology Monitoring Report No. 20* (2013); *Statistical Report No. 05* (2018)). The Australian Bureau of Statistics stated that in 2018 First Nations prisoners accounted for just over a quarter (28%) of the total Australian prisoner population. The Australian Government Productivity Commission reports of 2021 and 2022 stated that this figure had worsened. In June 2023, the NSW Bureau of Crime Statistics and Research reported that there were currently 3633 Aboriginal adults in prison in New South Wales (representing 29.6% of the adult prison population).

One of the main recommendations of the Royal Commission for reducing deaths was to decrease the number of First Nations people going to jail in the first instance. A diversionary program was suggested that involved punishment or rehabilitation rather than jail. Yet the message has been slow to filter through to all authorities. In 1997, a 15-year-old boy died in juvenile custody in the Northern Territory; he had committed minor property offences, but was not placed in a diversionary program.

In 1992, federal parliament created the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This was in reply to the findings of the Royal Commission and the National Inquiry into Racist Violence, but was also a response to the large amount of economic and social disadvantage being suffered by First Nations peoples. In his *Social Justice Report* (2000), Aboriginal and Torres Strait Islander Social Justice Commissioner Dr William Jonas stated that the past 10 years had seen First Nations issues become highly publicised and discussed, and the wider community had become more aware of the history of injustice.

Dr Jonas highlighted the reports of the Royal Commission into Aboriginal Deaths in Custody and the recognition of native title as exposing the foundational myths of our history; that is, Australia was not *terra nullius* and First Nations peoples did suffer at the hands of our custody system.

Forcible removal of children from their families

In his Social Justice Report (2000), Dr William Jonas also identified of particular importance was the documenting of the impact of the forcible removal of First Nations children from their families, which occurred as government policy up until 1972. Many non-Indigenous Australians were unaware of the policy and the horrendous impacts on families and individuals who were removed.

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Figure 12.11 Crowds of people gather during Sorry Day in May 2007 in Melbourne. The first National Sorry Day was held on 26 May 1998 – one year after the tabling of the *Bringing them Home* report.

The Chief Protector of Aborigines in Western Australia commented in 1937 that Australia had the power to take any child from its mother so that the nation could merge its 'black' population into the 'white'. This history of forcible removal was largely forgotten by the public until key First Nations agencies and communities began efforts to gain recognition of the needs of the victims and their families, with the aim of securing the provision of services for them. As a result, in May 1995 the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was begun.

There were four key 'terms of reference' for the inquiry. They were:

- trace the past and ongoing effects of the separation of First Nations children from their families
- examine the laws, policies and practices offering services to these people, and identify where changes were needed, including assistance towards reuniting families
- consider the principles involved in justifying compensation for affected individuals and communities
- examine current laws, policies and practices involving the placement and care of First Nations children, and take into account the principle of self-determination when advising any changes.

The final report, *Bringing them Home* (1997), made a range of recommendations, including:

- compensation for the individuals and families affected, including reunion and counselling services. An apology from all organisations involved in this policy.
- The enacting of legislation ensuring that Australia abides by the *United Nations Convention on the Prevention and Punishment of the Crime of Genocide* (1948). Article II of that convention states that genocide includes the forced transferring of children of a group to another group. It could therefore be argued that for many years, Australia was in breach of a UN convention.

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Government recognition

In November 2007, the Australian Labor Party, under the leadership of Kevin Rudd, was elected to power in Australia. One of the government's earliest moves was to apologise to First Nations peoples for their treatment by non-Indigenous Australians in the past. In an emotional address to a packed House of Representatives on 13 February 2008, Kevin Rudd apologised on behalf of the parliament for laws and policies that had 'inflicted profound grief, suffering and loss on these, our fellow Australians'.

Although the Rudd government was criticised by First Nations leaders for the slow rate of its policy change, this apology led the way in officially recognising inequalities and injustices and began to heal the breach between First Nations peoples and non-Indigenous Australians.

The Gillard Labor government proposed an 'Act of Recognition' to acknowledge First Nations peoples in the *Australian Constitution*, for, as it currently stands, it contains no recognition of Aboriginal and Torres Strait Islander peoples. When it was drafted at the end of the nineteenth century, First Nations peoples were not consulted; nor were they mentioned in the final document. However, for the *Australian Constitution* to be changed, a national referendum must be held.

In 2017, there were a series of events to commemorate the anniversary of the 1967 vote, but there was no formal move to have a referendum that would allow recognition of Aboriginal and Torres Strait Islander peoples in the *Australian Constitution*. In March 2018, the Australian Parliament established a Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples. The committee's final report was presented to parliament on 29 November 2018. As stated earlier, the referendum of 2023, which aimed to change the *Australian Constitution,* was not successful.

Case Study

Kevin Rudd's apology to Australia's Aboriginal and Torres Strait Islander people

On 13 February 2008, in the Australian Parliament, Prime Minister Kevin Rudd formally apologised to Australia's Aboriginal and Torres Strait Islander people.

I move:

That today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history. We reflect on their past mistreatment. We reflect in particular on the mistreatment of those who were stolen generations – this blemished chapter in our nation's history. The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future. We apologise for the laws and policies of successive parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say sorry. To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry. And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

We, the parliament of Australia, respectfully request that this apology be received in the spirit in which it is offered, as part of the healing of the nation. ...

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> Growing from this new respect, we see our Indigenous brothers and sisters with fresh eyes, with new eyes, and we have our minds wide open as to how we might tackle, together, the great practical challenges that Indigenous Australia faces in the future.
>
> Let us turn this page together: Indigenous and non-Indigenous Australians, government and opposition, Commonwealth and state, and write this new chapter in our nation's story together. First Australians, First Fleeters, and those who first took the oath of allegiance just a few weeks ago. Let's grasp this opportunity to craft a new future for this great land: Australia. I commend the motion to the House.

View the full transcript of Kevin Rudd's speech online at http://cambridge.edu.au/redirect/10400.

Figure 12.12 Members of Australia's Stolen Generation listen to Prime Minister Kevin Rudd deliver an apology to the thousands of First Nations people who were forcibly taken from their families as children.

Conclusion

The problems faced by First Nations peoples in accessing the legal system to achieve justice are very complex, and an improvement in a range of statistics is not necessarily satisfactory. First Nations cultures have social and spiritual needs, and while legislation, case law and policy over recent decades has shown increased recognition of this, the response have not yet been fully effective.

Review 12.6

1. Identify the basis of Denis Walker's appeal to the High Court in 1994.
2. Describe one or two of the 'foundational myths' referred to by Dr William Jonas.
3. Outline why the federal government was asked to make an official apology to the Stolen Generations.
4. Research the incarceration rates of First Nations peoples over time and how many have died in custody. Discuss if the numbers have increased or decreased and the possible reasons that might have caused this change.

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Chapter summary

- The Mabo cases of the 1980s and 1990s were the first successful land rights challenges in Australia and led to the abolition of the concept of *terra nullius*. The *Native Title Act 1993* (Cth) was passed as a result of the High Court decision in the Mabo case.
- The pastoral leases case (*Wik Peoples v Queensland* [1996] HCA 40) was also important for First Nations peoples. This case introduced the idea that the practices of pastoralists and First Nations peoples could co-exist.
- The *Native Title Amendment Act 1998* (Cth) – passed in response to the Mabo and Wik cases – reduces the power and rights of First Nations peoples.
- First Nations peoples experience a range of disadvantages in areas such as health, education, employment and the criminal justice system.
- Legislation has existed for over 20 years that outlaws racial discrimination and vilification, yet conflict continues between First Nations and non-Indigenous people.
- The Aboriginal and Torres Strait Islander Commission (ATSIC) was established in 1989 and abolished in 2005.
- The Anti-Discrimination Board of NSW and legal aid programs offer assistance for First Nations peoples in dealing with the legal system.
- The *Aboriginal Land Rights Act 1983* (NSW) recognised that land was owned by Aboriginal and Torres Strait Islander peoples prior to 1788. Currently, the NSW Aboriginal Land Council administers land held on behalf of First Nations peoples.
- Self-determination involves the recognition of First Nations peoples' customary law and rights to practise their traditional way of life, language and culture.
- The different languages and cultures of First Nations peoples may or may not be recognised by the law. Some court cases, such as *R v Williams*, demonstrate recognition of customary rights.
- In 1991, the Royal Commission into Aboriginal Deaths in Custody handed down 339 recommendations in response to the unacceptable number of First Nations deaths in police custody and in jail. There has not been a significant improvement in this area since the report was published.
- In 1995, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was established to investigate the policy of forcible removal of First Nations children. The resulting report, *Bringing them Home* (1997), called for compensation, and reunion and counselling services for the victims, as well as an apology from the federal government.
- In 2023, a referendum was held with the aim of providing First Nations peoples with a greater voice to parliament. The Indigenous Voice to Parliament referendum was not successful, although a range of reconciliation efforts continue.

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Multiple-choice questions

1 What does *terra nullius* mean?
   - **a** Land owned by no-one
   - **b** Land occupied
   - **c** Legal systems in place
   - **d** Land owned by colonial powers

2 What was the outcome of the Gove land rights case?
   - **a** It was dismissed on the doctrine of *terra nullius*.
   - **b** First Nations peoples were granted land rights for the first time.
   - **c** It allowed the *Australian Constitution* to be changed.
   - **d** It allowed the co-existence of pastoral leases.

3 What is racial vilification?
   - **a** Any behaviour designed to humiliate on the basis of race
   - **b** Condoning violence between racial groups
   - **c** Proving that one race is superior to another
   - **d** A workplace quota system

4 How does native title differ from land rights?
   - **a** Native title delivers exclusive access to land.
   - **b** Native title does not recognise the existence of non-Indigenous people.
   - **c** Land rights usually involve a title deed to land.
   - **d** Land rights enforce co-existence with pastoralists.

5 When was the Department of Aboriginal Affairs established?
   - **a** 1959
   - **b** 1969
   - **c** 1972
   - **d** 1989

Short-answer questions

1 Outline the significance of the cases of *R v Ballard* and *R v Murrell*.
2 Discuss the possible causes of the over-representation of First Nations peoples in the criminal justice system.
3 Explain the meaning of the term 'co-existence' in relation to First Nations peoples and pastoral leases.
4 Describe the major difference between the Mabo case and the case involving the Wik peoples.
5 Explain two ways in which First Nations peoples can gain political power.
6 Describe the different outcomes of the Williams and Walker cases.
7 Explain the reasons for the establishment of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. List some of the inquiry's main findings.

Extended-response question

Evaluate the effectiveness of the legal system in achieving justice for First Nations peoples since 1967.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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Issue 1

Groups or individuals suffering disadvantage

Chapter 13 (Digital-only chapter)

People who have a mental illness

Chapter objectives

In this chapter, you will:

- explore the legal concepts and terminology used in relation to mental illness and the law
- investigate the legal system's ability to address issues relating to mental illness
- explore the differences between the laws relating to mental illness
- investigate the role of the law in addressing and responding to change in relation to mental illness
- describe the legal and non-legal responses to mental illness
- evaluate the effectiveness of legal and non-legal responses in achieving justice for people who experience mental illness.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Anti-Discrimination Act 1977 (NSW)
Australian Human Rights Commission Act 1986 (Cth)
Mental Health (Forensic Provisions) Act 1990 (NSW)
Disability Discrimination Act 1992 (Cth)
Mental Health Act 2007 (NSW)
Australian Charter of Healthcare Rights (2008)
Public Health Act 2010 (NSW)
Public Health Regulation 2012 (NSW)
National Disability Insurance Scheme Act 2013 (Cth)

SIGNIFICANT CASES

Adam Quddus Salter File # 3333/09
Roberto Laudisio Curti File # 2012/00086603
Danukul Mokmool File # 2017/228552

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13.1 People with mental illness and the law

Incidence of mental illness in Australia

mental illness an illness of the mind that affects the psychological, emotional and behavioural state of a person

disability mental or physical impairment that can limit a person physically, emotionally and psychologically

incarceration being detained or imprisoned as punishment for committing a crime

domestic environment the household a person lives in

deinstitutionalise to remove people from long-stay psychiatric hospitals and provide outpatient mental healthcare for them in their communities (they visit the health professional and then return home, rather than staying in a hospital)

An ABS National Health Survey (2020–2022) estimated that 42.9 per cent of people aged 16–85 years had experienced a mental disorder at some time in their life. It also reported that 38.8 per cent of young people aged 16–24 had experienced a mental health disorder in the last 12 months. **Mental illness** is one of the leading causes of **disability** in Australia.

So, where does this issue sit within the legal framework? In 2018, the Australian Institute of Health and Welfare (AIHW) reported that 40 per cent of people entering prison reported that a medical professional had told them they had a mental health disorder (this includes drug and alcohol abuse). The AIHW report also found that 23 per cent of prisoners took medicine to help manage a mental illness. This chapter examines the responsiveness of the law to people experiencing mental health issues, especially those who experienced some legal action and possibly **incarceration**. COVID-19 and lockdowns has impacted the AIHW's ability to collect data, thus it is important that students carry out research to find current statistics.

Changing attitudes to mental health

Although mental health is not a new issue in Australia, society's understanding of mental illness has grown in the last 20 years. There is now wide recognition of the incidence of mental illness in the Australian population and the impact mental ill health can have on people's lives. This greater understanding and recognition has led to a wider acceptance of mental health issues, which has fuelled a change in community attitudes and behaviour towards mental health and towards people experiencing mental illness. Luckily, the tendency to lock up or hide away anyone who shows signs of mental illness is now a practice firmly lodged in the past.

The current stance on looking after people with a mental illness is to treat them as much as possible in their own **domestic environment**; that is, to **deinstitutionalise** them. Although this is acceptable to most people in society, many people still have a 'not in my backyard' attitude when it comes to the treatment of people experiencing mental illness. This is not helped by the limited funds available for looking after people with disabilities in Australia – some people with mental health issues do not get enough support to help them cope in their domestic environment.

Figure 13.1 To inspire conversations around mental health on International Men's Day, November 2022, performers from Haka For Life took to Sydney's tallest stage, Skywalk at the Sydney Tower Eye.

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Research 13.1

SANE Australia is a national charity that supports Australians affected by mental illness. SANE runs campaigns, provides education and conducts research to better understand mental illness in an effort to improve the lives of those affected by mental illness. SANE has compiled statistics to help Australians be more aware and accepting of mental illness.

1 View the fact sheets and guides on the website of SANE Australia.
2 Identify five different mental health issues. Assess which mental illness or mental disorder is the most common in Australia.

Definitions of mental illness

The legal definition and the medical definition of 'mental illness' are not the same; the medical definition is far broader.

Legal definition of mental illness

In New South Wales, the legal definition of mental illness is in the *Mental Health Act 2007* (NSW).

Mental Health Act 2007 No 8 (NSW)
4 Definitions

Mental illness means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

a delusions
b hallucinations
c serious disorder of thought form
d a severe disturbance of mood
e sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs a–d.

Medical definition of mental illness

The medical definition of mental illness is wider than the legal definition. The medical definition is based on the definition in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, fifth edition (DSM-5). According to the DSM-5, a person is mentally ill if their behaviour is not an 'expectable' response to a particular situation or event; unexpectable responses are viewed as the expression of a behavioural, psychological or biological dysfunction.

Some people suffer from mental illness for many years; others experience a one-off, shorter bout of mental illness. It is likely that we all know someone who has experienced mental illness in their lifetime.

Application of definitions in court

When a crime has been committed, the courts must decide whether the defendant (i.e. the person accused of the crime) is suffering from a mental illness. The onus to prove this (i.e. the burden of proof) lies with the defendant, and the mental illness test is very rigorous.

Review 13.1

Outline the difference between the legal and medical definitions of mental illness.

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13.2 Legal responses

Access to the healthcare system

Australian Charter of Healthcare Rights

In July 2008, each state and territory's health minister, and the federal health minister, agreed to the *Australian Charter of Healthcare Rights* ('Charter'). Although this charter is not a law and thus is not legally enforceable, it is a first step towards having a legally binding set of healthcare rights in Australia. Since all levels of government in Australia – state, territory and federal – have agreed to the Charter, this makes it a strong starting point when trying to guarantee rights in the **healthcare system**.

healthcare system the network of facilities and other agencies that organise and meet the healthcare needs of people

Under the *Australian Charter of Healthcare Rights* (2008), everyone living in Australia has the right to:

- access safe, high-quality healthcare
- be shown respect, dignity and consideration when getting healthcare
- be informed about healthcare services, treatment, options and costs in a clear and open way
- be included in decisions and choices about their healthcare
- privacy and confidentiality of their personal information
- comment on the healthcare they receive and to have their concerns addressed.

(Summary from the *NSW Mental Health Rights Manual*, fourth edition; available at https://cambridge.edu.au/redirect/9041.)

In New South Wales, the Charter is embodied in the *Public Health Act 2010* (NSW), which came into force in September 2012 and is supported by the *Public Health Regulation 2012* (NSW). The provisions of the *Mental Health Act 2007* (NSW) also cover people with mental health issues.

Problems with accessing quality healthcare

While it may be a fair assumption that a person who is educated and of 'sound mind' may understand their right to quality healthcare, we cannot assume that someone who has limited literacy or who is suffering a mental illness has the same understanding. Will they be able to demand their rights as set out in the Charter, and seek resolution if there are problems?

The main aim of the *Mental Health Act 2007* (NSW) is to ensure the 'care, treatment and control' of people in New South Wales who are 'mentally ill' or 'mentally disordered' (as we have seen, these terms are defined in the Act and these definitions may not be the same as elsewhere). The Act also refers to hospital treatment, both voluntary and involuntary, and how individuals and their carers are involved in decisions about 'care, treatment and control'.

Figure 13.2 The main aim of the *Mental Health Act 2007* (NSW) is to ensure the 'care, treatment and control' of people in New South Wales who are 'mentally ill' or 'mentally disordered'.

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What is meant by 'control'?

In the *Mental Health Act 2007* (NSW), the word 'control' refers primarily to when and how compulsory treatment and care can be given to a person with a mental illness. The Act also allows authorities to suspend some of the rights of the patient. Thus, if it is decided that a person has a mental illness or is 'mentally disordered', as defined in the Act, that person can be:

- taken to a hospital or psychiatric unit against [their] will for further assessment
- treated in hospital without [them] agreeing to this
- stopped from leaving a hospital that [they have] been taken to, including being kept behind locked doors and forcibly taken back to hospital if [they] leave
- placed on a Community Treatment Order when [they] are not in hospital care, and made to have regular treatment, usually medication.

(Summary from the *NSW Mental Health Rights Manual*, fourth edition; available at https://cambridge.edu.au/redirect/9041.)

Access to the law

Criminal proceedings

In New South Wales, the *Mental Health (Forensic Provisions) Act 1990* (NSW) lays down:

- how courts must manage criminal proceedings where the defendant is suffering from a mental illness
- in what circumstances mental illness can be used as a legal defence in criminal cases
- rules relating to **forensic patients** and **correctional patients**
- the role of the NSW Mental Health Review Tribunal and its powers to review forensic and correctional patients.

How different courts deal with defendants with mental illness

The New South Wales District Court and Supreme Court can decide that an accused is 'not guilty due to mental illness' or is 'not fit to plead'. However, if the question has been raised as to whether the accused's mental illness makes them unfit to stand trial, or if they have been found 'not guilty by reason of mental illness', the court may refer the case to the NSW Mental Health Review Tribunal. The District Court and Supreme Court can also decide that an accused becomes a forensic patient.

The New South Wales Local Court does not have a process for dealing with people who are 'not fit to plead' in criminal cases. This means that an accused person cannot plead 'not guilty by reason of mental illness'. However, magistrates in the Local Court usually deal with defendants with mental illness by making a section 32 order or a section 33 order.

A section 32 order allows a magistrate to release a defendant. The magistrate will have been given a treatment plan that a healthcare professional, or other suitably qualified person, has put together for the defendant. The defendant's release is usually conditional on the defendant agreeing to attend a specified facility for treatment or to go into the care of a particular person (called a **guardian**). Under these conditions, no conviction is recorded. A section 32 order also allows a magistrate to release the defendant with no attached conditions. If the defendant does not follow the conditions of a section 32 order, they can be brought back before the court to face the original criminal charges.

A section 33 order only applies if the defendant is found to be mentally ill as defined by the *Mental Health Act 2007* (NSW). Under a section 33 order, the defendant is referred to a psychiatric unit or hospital for further assessment. Depending on the result of the assessment, they may become an involuntary patient, or if they are found not to be mentally ill, they may be returned to the Local Court.

If a magistrate does not deal with a defendant under sections 32 or 33, the details of the mental illness can be used as part of a **plea in mitigation**. Healthcare professionals and community mental health services can provide reports to be included in the plea. Before making a sentencing decision, a magistrate may also

forensic patient
a person who is confined in an institution such as a mental health facility or correctional centre, or who is released from custody subject to conditions

correctional patient
someone on remand, or serving a term of imprisonment, who is transferred to a mental health facility, who is not a forensic patient, and who the NSW Mental Health Review Tribunal has not classified as an involuntary patient

guardian
a person who is legally responsible for another person who is unable to take care of themselves

plea in mitigation
any type of information that can help the court decide on an appropriate sentence

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ask for a pre-sentence report (usually prepared by the Probation and Parole Service), which can also include information from healthcare professionals and community mental health services.

Legal advice and representation

People with mental illness who face criminal charges have the same right to access legal advice and legal representation as everyone else in the community. However, as noted previously, they may not be in a position to find or use legal representation because they may have limited funds or suffer from a mental illness that affects their ability to think rationally, and so they may even reject legal advice.

Free or low-cost legal help is available from several sources:

- **Legal Aid NSW** offers free legal advice and legal representation in criminal matters. All New South Wales Local Courts have 'duty solicitors' from Legal Aid NSW, who help people who have a matter at court that day and who do not have their own lawyer.
- The **Aboriginal Legal Service NSW/ACT** (ALSNSW) provides free legal advice and legal representation for Aboriginal and Torres Strait Islander peoples. The ALSNSW provides legal advice and representation in criminal matters, **apprehended violence order** matters, and care and protection matters (advice to people who have a genuine concern for the safety, welfare or wellbeing of a child or young person).
- Some **law firms** provide ***pro bono*** legal services. Justice Connect provides information about, and access to, these pro bono services.
- Most **Community Legal Centres** have lawyers who provide free or low-cost legal advice and representation.
- **LawAccess NSW** is a free NSW Government telephone service that provides legal information, advice and referrals.

Apprehended Violence Order
a court order to protect a person who fears violence or harassment from a particular person; in New South Wales, Apprehended Personal Violence Orders prohibit violence between members of the public and Apprehended Domestic Violence Orders prohibit violence between family members

pro bono [publico]
(Latin) 'for the public good'; the shortened phrase is used to describe work that is done by a lawyer or barrister on a voluntary basis and without payment, where there are issues of community concern or significant effect on disadvantaged groups

Figure 13.3 In New South Wales, the *Mental Health (Forensic Provisions) Act 1990* (NSW) lays down how courts must manage criminal proceedings where the defendant is suffering from a mental illness and in what circumstances mental illness can be used as a legal defence in criminal cases.

Community legal centres

Community legal centres (CLCs) provide free and low-cost legal advice and legal representation to members of their local communities, and especially to the disadvantaged and people with special needs. The specialist CLCs that work with legal problems related to mental illness are the:

- Australian Centre for Disability Law
- Intellectual Disability Rights Service
- Public Interest Advocacy Centre
- Homeless Persons' Legal Service
- Seniors Rights Services.

For more information about CLCs in New South Wales, visit the website of Community Legal Centres NSW, which is the peak representative body for the 40 CLCs in the state.

Protection of individual's rights

Discrimination

People with mental health issues are part of society and their rights are protected by the same laws that protect all members of the community.

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For example, **discriminating** against someone because of their mental health is against the law under the *Disability Discrimination Act 1992* (Cth) and the *Anti-Discrimination Act 1977* (NSW). Those who feel that they have been discriminated against can take legal action.

Centrelink

People with mental illness often find that they need to deal with Centrelink, the Commonwealth Government agency that manages social security payments and benefits. Some people with a mental illness are entitled to receive the **Disability Support Pension**.

If someone is unhappy with a decision made by Centrelink, they can ask for it to be reviewed. At an internal review, the original decision-maker explains the decision. This is a chance to address misunderstandings, provide new information and try to change the decision. If the person is still unhappy with the decision, they can apply for a senior Centrelink officer to review it. This Authorised Review Officer is separate from the Regional Office. They will talk to the people involved in the decision and take any new evidence into account. They will then tell the person the outcome of their review, and let them know what their appeal rights are, if necessary. Although these procedures exist, it could be difficult for someone with an illness, limited funds or limited education to navigate the appeals process.

NSW Civil and Administrative Tribunal: Guardianship Division

People with mental health issues can be placed in the care of a guardian (as noted earlier). In 1989, the Guardianship Tribunal of NSW was established to ensure fairness in this area. In 2014, these functions were taken over by the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT).

discrimination the unjust treatment of a person or a particular group of people based on their race, sex, sexuality, marital status, disability and other factors

Disability Support Pension financial support for people who suffer from mental illness and/or intellectual disability

NCAT can appoint guardians for people over the age of 16 who are not capable of making their own lifestyle decisions. If an individual is unhappy with their guardian, they can appeal to NCAT. However, NCAT generally only hears cases if there are not suitable arrangements already in place, or if no appropriate alternative to an application can be found.

NCAT may make a range of other orders, including appointing guardians and financial managers, and providing consent to medical and dental treatment. A person's appointed guardian may be a member of their family or a friend, or the NSW Public Guardian, who is a statutory official within the NSW Government Department of Communities and Justice.

Review 13.2

1. Identify the health legislation that covers people experiencing mental illness in New South Wales.
2. Describe what happens if a person is placed under 'control'.
3. List the specific laws that apply to a person who is accused of committing a crime and who also has a mental illness.
4. Describe the ways that different courts deal with accused people who have a mental illness.
5. Explain the difference between a section 32 order and a section 33 order.
6. Outline why accessing legal advice can be problematic for people who have a mental illness. Identify the support that is available to help these people access legal advice.
7. Outline the role of Community Legal Centres.
8. Discuss what issues a person who has a mental illness may face in trying to obtain government assistance (i.e. Centrelink). Describe how this can be resolved.
9. Describe the role of the Guardianship Division of the NSW Civil and Administrative Tribunal.
10. Construct a table showing the different agencies that are available to assist people experiencing mental illness. Include information about what each of these agencies does.

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Research 13.2

1 Access the website of the NSW Civil and Administrative Tribunal (NCAT), then find information about the Guardianship Division and complete the following tasks.
   a Identify some of the Guardianship Division's responsibilities.
   b Choose one responsibility and describe its role in the mental health area.
2 On the NCAT website, find the digest that publishes significant decisions made by the Guardianship Division. Choose one decision and complete the following tasks.
   a Identify the dispute.
   b Outline the parties involved.
   c Describe NCAT's decision and the reasons for the decision.
   d Assess if it was a fair decision. Justify your response.

13.3 Non-legal responses

Funding for people experiencing mental illness

Despite all the good intentions around integrating people with mental health issues into society, if there is not adequate funding, this policy will fail. Initiatives since 2011 indicate that policymakers are aware that greater funding is required in the area of mental health. Most of these initiatives are long-term plans, so it remains to be seen whether they are efficient and effective in addressing the issue. The NSW Government has a 10-year plan, which started in 2014, to improve the lives of those living with mental health issues. The 2018–2019 budget allocated $2.1 billion for this purpose. The aim is to improve services in conjunction with non-government organisations. This plan is based on recommendations made in the Mental Health Commission of NSW's report, *Living Well* (2014).

This plan is reviewed on a periodic basis. For example, a review in 2019 set 2020–2024 targets as:

1 strengthen community recovery and wellbeing
2 strategically invest in community wellbeing and mental health
3 ensure the right workforce for the future.

The Commission has carried out regular reviews, including taking into account the impact of COVID-19 on the community. It is recommended that students keep up to date on these reviews, especially as the plan nears its 2024 end date.

COVID-19 and mental health

State governments and the federal government have acknowledged the impact of COVID-19 and its effects (sickness, job losses, working from home and isolation, to name a few) on the mental health of the population. The Australian Government in 2021 provided an additional $12.25 million to ensure access to mental health support. This funding was to complement the $5.15 million provided by the NSW Government at the same time.

Personal helpers and mentors service

In the past, governments have recognised the problems faced by people with disabilities. For example, the 2011–2012 federal budget allocated $154 million over five years to a Personal Helpers and Mentors Service (PhaMs). This service assists around 3400 people with severe mental illness. This funding allowed for 425 new personal helpers and mentors to be employed. Also, $50 million of the funding was allocated to assist 1200 people with a mental illness who receive government income support payments (e.g. Disability Support Pension) but who are looking to gain employment. With assistance from PhaMs, people are more able to overcome any personal or non-vocational issues that are preventing them from participating in work or training.

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Figure 13.4 Governments around the country acknowledged the impact of COVID-19 and its effects on the mental health of the population by providing additional funding. In May 2020, the National Mental Health Commission CEO Christine Morgan and Australian Chief Health Officer Brendan Murphy spoke to the press following the announcement of a $48 million commitment by the federal government for mental health support.

While this funding was a step forward, recent budgets have only maintained the funding and not increased it.

In 2016, PhaMs was integrated into the National Disability Insurance Scheme (NDIS) with its funding to come from this area. The process of applying for funding under the NDIS to gain access to PhaMs has meant that some people with a disability have not been able to access this service.

In 2019, the PhaMs program was discontinued and transitioned into the National Disability Insurance Scheme, Continuity of Support or the National Psychosocial Support program.

Research funding

In October 2012, the federal minister for mental health and ageing announced $68.2 million in new funding for research into anxiety, eating disorders, depression and other mental health conditions. There were 13 specific grants, totalling $13.7 million, for research into mental illness among young people. The aim was to '[build] the evidence base for a stronger and better mental health system.'

Despite this acknowledgement of the issue and the need for research in this area, funding was not substantial, with the 2017 federal budget only adding $115 million in new funding for mental health research and in the 2018 budget only increasing this to $338.1 million, with much of this provided over four to 10 years.

In the 2023–2024 budget, the federal government announced $586.9 million for improved mental health and said that it will provide $8.7 million over three years from 2023–2024 to establish and operate two independent national mental health lived-experience peak bodies to advise on mental health policies and programs and to support lived-experience research.

It is recommended that students keep aware of current funding provided by both federal and state government budgets.

National Disability Insurance Scheme

In May 2013, the Australian Prime Minister, Julia Gillard, announced that she had gained the support of all the state and territory governments for the introduction of the National Disability Insurance Scheme (NDIS). The NDIS started to be rolled out across Australia on 1 July 2014; it is funded by an increase in the Medicare levy from 1.5 per cent to 2 per cent.

This nationwide scheme aims to provide lifetime support to people affected by disability, with support based on a person's individual needs. As well as taking a lifetime approach to care, the NDIS also provides for early intervention, particularly when it can be identified that receiving support from a young age will make a substantial difference to a person's life. The NDIS aims at providing greater choice about healthcare for people with disability, their families and carers. For more information about this scheme, go to the NDIS's website.

Four years on, a stakeholder report by the University of Sydney, *Mind the Gap* (2018), found that the NDIS is failing people with severe mental health issues due to their difficulty accessing the scheme. Another issue with the NDIS is that of rorting, with fraudulent claims being made. In 2023, Bill Shorten, Minister for the National Disability Insurance Scheme of Australia, promised to stamp out this behaviour. In October 2023, a fraud task force was set up to investigate rorts of the scheme.

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Figure 13.5 In May 2013, then Prime Minister Julia Gillard announced that the federal government would increase the Medicare levy on income tax to help fund the National Disability Insurance Scheme.

The role of non-government organisations

In Australia, much of the work of raising awareness of mental health has been done by non-government charitable organisations. Some receive government funding. These organisations include SANE Australia, Beyond Blue and the Black Dog Institute.

Review 13.3

1 Outline the role played by the Personal Helpers and Mentors Service. What has replaced it?
2 Justify the importance of funding for research into anxiety, eating disorders, depression and other mental health conditions.

Research 13.3

View the website of a non-government organisation that deals with mental healthcare and awareness.

1 Identify the type(s) of mental illness the organisation deals with.
2 List the services and activities the organisation offers.

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13.4 Effectiveness of responses

Overview

As we have seen in this chapter, some people experiencing mental illness are distanced from their families, do not make it to medical appointments, and have problems navigating the system to get the assistance they need. Thus, it is realistic to assume that, while the NDIS will provide long-term benefits, too many people suffering from mental health issues have already 'slipped through the cracks' and may be unable to take advantage of the scheme.

In addition, in many ways, the legal system has not provided justice for people with mental illnesses. This can be seen both in the response of police officers to people who exhibit signs of mental illness and in the number of people suffering mental illness who are incarcerated.

On 4 April 2019, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (this includes people living with mental illness) was initiated. The terms of reference were broad and included the experiences of people with a disability in both institutional and residential settings.

The findings of the Royal Commission were made public in September 2023 and included recommendations on how to make life better for people with disabilities, their families and their carers. For more information about this Royal Commission, go to https://cambridge.edu.au/redirect/9042.

Police officers

Police officers across Australia regularly have to deal with people behaving in a violent or threatening manner who are showing signs of being mental ill. When the policy of deinstitutionalising people with mental illness was brought in during the late 1970s, police officers in some states were not given proper training on how to deal with people with mental illness. The media drew the community's attention to this problem by reporting incidents between police officers and offenders who were suffering mental illnesses. An example of this was the fatal shooting of Roni Levi in 1997. Levi was seen on Bondi Beach, behaving in a threatening manner while carrying a knife, and the police were called. Police officers surrounded Levi and shot him four times, killing him.

This type of incident response has not only occurred in New South Wales. In Victoria, seven people with a mental illness were shot dead between 1990 and 1995 (Source: Jude McCulloch, 2000, 'Policing the mentally ill', *Alternative Law Journal*, 25(5), October). Police officers in Victoria are now trained to negotiate with people who display signs of mental illness.

The NSW Police Force has tried to be proactive. In 2007, it established the Mental Health Intervention Team (MHIT) as a two-year pilot project, with the aims of:

- reducing the risk of injury to police officers and to people experiencing mental illness when dealing with mental-health-related incidents
- improving awareness among front-line police officers of the risks involved in the interaction between police officers and people experiencing mental illness
- improving collaboration with other government and non-government agencies in the response to, and management of, mental health crisis incidents
- reducing the time taken by police officers to handover people experiencing mental illness to the healthcare system.

Following the success of the pilot, the MHIT became a permanent unit of the NSW Police Force. By 2019, over 2600 officers had attended its four-day training program. Officers who have attended the training wear a MHIT badge above their name plate and act as first responders if a mental-health-related incident occurs in their area. In addition, every police district has a trained mental health contact officer.

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Training in how to deal with people experiencing mental illness has been added to the core curriculum at the NSW Police Force Academy.

Further guidance for police officers is provided by the NSW Police Force Memorandum of Understanding (2018), which sets out how staff from NSW Health and NSW Police will work together when responding to and delivering care and treatment to people accessing mental health services.

The NSW Police Force continues to review how its officers should deal with people whose behaviour suggests they may be experiencing mental health problems. The Case Study below looks at the deaths of mentally ill men Adam Salter (2009), Brazilian student Roberto Laudisio-Curti (2012) and Danukul Mokmool (2017) at the hands of NSW police officers. The more recent death of Jesse Deacon (2023) shows that there is still work to be done.

Case Study

Adam Salter

In November 2009, police officers in Sydney received a call that 36-year-old Adam Salter was stabbing himself with a knife. A member of the response team shot Salter in the back and killed him. The police officer later said she had seen Salter threatening another officer with the knife and felt that her only option was lethal force. However, before firing she had shouted, 'Taser, taser, taser'. A coronial inquest found that there was strong evidence that the police officer had intended to use her taser but had fired her gun by mistake.

Roberto Laudisio-Curti

In March 2012, Roberto Laudisio-Curti died after seven police officers chased him down Pitt Street in Sydney, tasered him several times, sprayed him with almost three cans of capsicum spray, handcuffed him and restrained him on the ground.

In a coronial inquest into this death, NSW Coroner Mary Jerram condemned the police officers for the chaotic and violent apprehension of Laudisio-Curti. Jerram recommended that the NSW Police Force review its procedures to ensure that if police officers are called to deal with someone who is showing signs of mental disturbance, this fact should be communicated, and the officers should be trained so that they can react in an appropriate manner.

Danukul Mokmool

On 26 July 2017, the usually gentle Danukul Mokmool, aged 30, was experiencing a psychotic episode when he ran at police officers with scissors in each hand outside a florist at the Central Railway Station in Sydney. Four police officers had rushed to the scene after numerous 000 calls had been received about Mokmool, including reports that the florist was being held with a knife at his neck. The officers unsuccessfully tried to subdue Mokmool using capsicum spray. When Mokmool rushed at the officers with the scissors, two officers opened fire. Mokmool died from a wound to the head.

A subsequent coronial inquest found that the police officers were justified in opening fire but recommended that in the future, uniformed officers performing front-line duties should be required to carry a taser. At the inquest, it was disclosed that one of the police officers at the scene had called for a taser, but none were available at the scene.

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Figure 13.6 The inquest into the death of Danukul Mokmool recommended that uniformed officers performing front-line duties should be required to carry a taser. However, Roberto Laudisio-Curti had been tasered before his death.

Figure 13.7 The Psychiatric Alcohol and Non-Prescription Drug Assessment (PANDA) Unit at St Vincent's Hospital in Sydney was set up in 2020. It provides specialist care to patients experiencing drug or alcohol-related psychotic episodes and cares for patients who may be detained involuntarily under the Mental Health Act. More treatment centres like these would help people with a mental illness to stay healthy while living in the community.

Analysis 13.1

Read the Case Study on the previous page.

1. Outline the findings of the coronial inquests into the deaths of Adam Salter, Roberto Laudisio-Curti and Danukul Mokmool.
2. Research the findings of the inquest into Jesse Deacon's death and outline the main points.

Mental illness and prisoners

Why are there so many people with a mental illness in prison? In 2010, an Australian Institute of Health and Welfare (AIHW) study proposed a number of reasons.

The closure of large psychiatric institutions in New South Wales has not seen a corresponding rise in resources, funding and support services to help people with a mental illness to stay healthy while living in the community. This has led to issues such as homelessness and offending behaviour – all of which mean that people with a mental illness are more likely to come under police surveillance.

Unemployment and poverty only increase these problems.

In ruling on these crimes, magistrates and judges usually have very limited options. Prison may be the only option, as there is no alternative system and no special facilities to address the needs of offenders with mental illness.

As stated above, the public mental health system has limited resources, and can be unwilling to take on the complicated issues of a person with mental illness arrested for criminal behaviour. So even when a judge recommends that a person with a mental illness be treated by a health service, they may be denied the treatment, and very soon appear in court again.

The AIHW study also highlighted the fact that people with mental health problems tend to have lower levels of education. The inability to complete school usually results in poorer literacy levels (and other skills) and, therefore, reduced employment opportunities. In many cases, this makes the problem worse: people without a job have very limited funds for housing, food and medicine.

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Analysis 13.2

Scan the QR code to watch Video 13.1.

1. Describe the effects that Grant's mental illness were having on him that resulted in him being arrested and imprisoned at the age of 18.
2. Compare the differences between the management of a forensic patient and a regular prisoner.
3. Discuss the supports Grant received in re-entering the workforce. Outline which was the most successful, and which was the least successful.

Video 13.1 Grant suffers a mental illness and was placed in a maximum security prison following a psychotic episode. (05:17)

National Disability Insurance Scheme impacts

The impacts, positive or negative, of the NDIS have come under scrutiny. In reaction to this, the Australian Government promised to develop an NDIS Participant Service Guarantee to increase positive participant experiences with the NDIS.

To bring about this guarantee, in 2019 the Australian Government commissioned a review of the NDIS laws and rules to focus on opportunities to make the NDIS process simpler and more straight-forward. This review – led by an independent expert (David Tune) – looked at what changes needed to be made to the NDIS to support the guarantee.

In March 2022, the NDIS Amendment (Participant Service Guarantee and Other Measures) Bill 2022 passed in both houses of Parliament and on 1 April 2022 it received Royal Assent.

While this may involve amendments to the *National Disability Insurance Scheme Act 2013* (Cth) and the NDIS rules, it does not change the design or intent of the NDIS.

The following news article discusses some of the current challenges facing the NDIS.

Media

NDIS treated as a 'Magic Pudding' by governments and disability service providers, review co-chair says

Nas Campanella

ABC News

22 August 2023

One of the original architects of the National Disability Insurance Scheme (NDIS) says it is being treated as a 'limitless Magic Pudding' and local, state and territory governments need to do more to support all people living with disability.

Bruce Bonyhady, who is co-chairing a review of the scheme, spoke in Newcastle today and said governments expected the scheme to take full responsibility for Australians with disability, making it an 'oasis in the desert'.

While he described the NDIS as a 'policy miracle', change was 'necessary'.

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'We must stop thinking of the NDIS as though it is a limitless Magic Pudding,' Professor Bonyhady said.

'What has become clear is that – often without intending to – governments, service providers, and some people with disability and their families, have all started to treat the NDIS as a limitless resource.

'Ironically, governments – while funding the NDIS and worrying about its increasing costs – keep helping themselves to new slices of the NDIS.'

Professor Bonyhady referenced the classic children's book, which depicts the story of a never-ending pudding, ahead of handing down a review into the NDIS later this year.

Work still needed on the NDIS

The federal government commissioned an independent review of the $35.1 billion scheme last year, and has repeatedly warned that its growing cost was making it unsustainable.

The NDIS was established in 2013 to fund support for people with disability, with the goal of helping participants build their skills and independence to achieve their goals and participate in society.

More than 600 000 Australians participate in the NDIS, but the Disability Advocacy Network Australia (DANA) said this represented a portion of the more than 4 million Australians who lived with disability.

Advocates have warned a focus on the cost downplayed the enormous benefit it provided to society, as well as the economic benefit it provided by enabling more people to participate in the workforce.

DANA director of policy and advocacy El Gibbs said cuts to disability support in state, territory and local governments amid the NDIS rollout saw 'huge gaps' in services.

'All governments have also failed to make sure that public mainstream services are accessible and inclusive of people with disability – transport, health, housing, education and more,' she said.

'The original design of the NDIS included work to make sure the rest of our public services are fully accessible and inclusive, but this work hasn't happened.

'Now is the time for ensuring people with disability can go to school, to work and spend time with their friends, just like other Australians.'

In his speech, Professor Bonyhady said for some, decisions on supports had been 'unfair and inconsistent' and a 'combination of line-by-line planning and participant demands for control and choice have blurred the definition of 'reasonable and necessary supports''.

'Urgent rethink' of children's NDIS support

Professor Bonyhady said the NDIS supported far more children than it was intended to and flagged that the review could recommend that governments set up more community-based services to help families.

As of June, about 100,000 children younger than seven were receiving funding through the NDIS, data released by the NDIA this week revealed.

The data also showed that 6.1 per cent of children aged between seven and 14 in the general population were NDIS participants.

(Continued)

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Media—Continued

Professor Bonyhady said there needed to be a 'complete and urgent rethink' when considering early intervention and highlighted the need for mainstream services to provide support.

He said 20 per cent of children experienced learning difficulties, developmental concerns, developmental delay or were found to have disabilities, making it a 'mainstream issue'.

'We want children with developmental concerns and delays to be identified as early as possible in mainstream settings through vaccinations and other check-ups,' he said.

'Early intervention needs to be based on best-practice evidence and principles; needs to be built around a key worker; and – unless there is a need for clinical intervention – needs to be delivered mainly in homes, early childhood settings and schools.'

Professor Bonyhady said it was important that any changes following on from the review were carefully staged and clearly communicated.

'I deeply understand that every person with disability, their families and carers crave certainty,' he said.

At a separate speech in Melbourne, NDIS Minister Bill Shorten called for unscrupulous providers to 'stop taking the scheme for a ride' by overservicing or charging unnecessary fees.

'I happen to believe that if we run the scheme in the best interest of participants, some of the legitimate sustainability issues and the too rapid growth [will] resolve itself,' he said.

'Disability doesn't start and end with the NDIS'

Professor Bonyhady delivered his speech at a community forum in Newcastle, as part of the NDIS review's consultation process.

Attending the forum to learn more about the review was Lake Macquarie man Dave Belcher, who has been on the scheme since its inception.

The wheelchair user said he had a positive experience receiving supports like specialised technology, but was aware that was not the case for everyone.

'There's still many, many people who cannot access the scheme and those people are basically left to fend for themselves,' he said.

Mr Belcher, who is with the Community Disability Alliance Hunter, said he felt optimistic, and the team overseeing the review had 'real skin in the game' with people like Professor Bonyhady at the helm and Kurt Fearnley as the NDIA Chair.

'This review isn't getting done by nameless, faceless bureaucrats somewhere,' he said.

'The scheme was drifting off the course that we as participants had hoped it would be on, so I think a review was very much needed.'

And he hoped all people with disability outside the scheme would eventually have access to inclusive services and supports.

'Disability doesn't start and end with the NDIS,' he said.

'It has to be an all of society, all of government approach to disability support, so even those that may not be experiencing an individual plan on the NDIS still are supported, still have opportunity within their community to live the lives that they choose.'

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Figure 13.8 The Australian Government commissioned a review of the NDIS laws and rules to focus on opportunities to make the NDIS process simpler and more straightforward.

Analysis 13.3

Read the media article on the previous pages.

1. Who is Professor Bonyhady?
2. List all of the issues with the NDIS mentioned in the article.
3. Identify some possible solutions.

Review 13.4

1. Describe the measures that the NSW Police Force has implemented so that its officers deal appropriately with people suffering from mental illnesses.
2. Explain why people with mental health issues may end up in prison.
3. It is difficult to find up-to-date information about the mental health issues experienced by prisoners. Provide two or three reasons why you think this is the case.

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Chapter summary

- Mental illnesses have gained wider awareness and acceptance in Australia.
- Laws and policies are in place to protect and support people with mental illness in New South Wales.
- Many people with a mental illness find themselves in court, being placed in care or sent to prison.
- A lack of funding has exacerbated the problem that people with a mental illness are more likely than other people to be incarcerated.
- The National Disability Insurance Scheme aims to give greater choice of care to people with a disability, their families and their carers.
- The NSW Police Force has policies and training in place to improve how police officers deal with people with mental illness; however, recent incidents and coronial inquest criticisms suggest that more is needed in this area.

Multiple-choice questions

1 Which of the following reasons mean that people with a mental illness are more likely than other people to be incarcerated?
- **a** Lack of funding, a healthy lifestyle and low literacy levels
- **b** Silly behaviour, lack of funding and a refusal to access health services
- **c** Lack of funding, homelessness and low literacy levels
- **d** Lack of funding, criminal tendencies and low literacy levels

2 What is the *Australian Charter of Healthcare Rights* (2008)?
- **a** The Charter is the main legislation that covers healthcare in New South Wales.
- **b** The Charter is a United Nations Charter accepted by Australia.
- **c** The Charter is the main legislation that covers healthcare for people with mental illness in Australia.
- **d** The Charter sets out the rights to healthcare for all people living in Australia.

3 Which of the following Acts are the main anti-discrimination laws in New South Wales?
- **a** *Disability Discrimination Act 1992* (Cth)
- **b** *Disability Discrimination Act 1992* (Cth), *Anti-Discrimination Act 1977* (NSW) and *Australian Human Rights Commission Act 1986* (Cth)
- **c** *Anti-Discrimination Act 1977* (NSW) and *Australian Human Rights Commission Act 1986* (Cth)
- **d** *Anti-Discrimination Act 1977* (NSW)

4 What is a community legal centre?
- **a** A local legal centre that provides free advice and court representation
- **b** A local court centre where the magistrates provide advice
- **c** The law book section of the local library
- **d** A legal service provided by Legal Aid

5 What is the role of NCAT's Guardianship Division?
- **a** To protect all minors under 18 years of age
- **b** To enforce the rights of minors to pocket money
- **c** To represent people with mental illness in court
- **d** To appoint guardians to people aged 16 years and older who are not capable of making decisions about their own lives

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Short-answer questions

1 Outline the differences between the legal and medical definitions of 'mental illness'. Propose some reasons for these difference.
2 Discuss the purpose of the *Australian Charter of Healthcare Rights* (2008) and how it benefits people with mental illness and their families.
3 Outline how the individual rights of people with mental illness are protected. Construct a list of any Acts or organisations that help ensure people with mental illness have an equal opportunity for a good life.
4 In a paragraph, outline the role of the Personal Helpers and Mentors Service.
5 In your own words, explain why there is a connection between people with mental illness and prisons.
6 Recall why the stakeholder report carried out by the University of Sydney, *Mind the Gap* (2018), found that the National Disability Insurance Scheme is failing people with severe mental illness.
7 In New South Wales, the District Court and Supreme Court can decide that an accused is 'not guilty due to mental illness' or is 'not fit to plead'. Discuss why a court may refer an accused person to the NSW Mental Health Review Tribunal.

Extended-response question

Critically analyse why justice for people suffering mental illness has been difficult to achieve.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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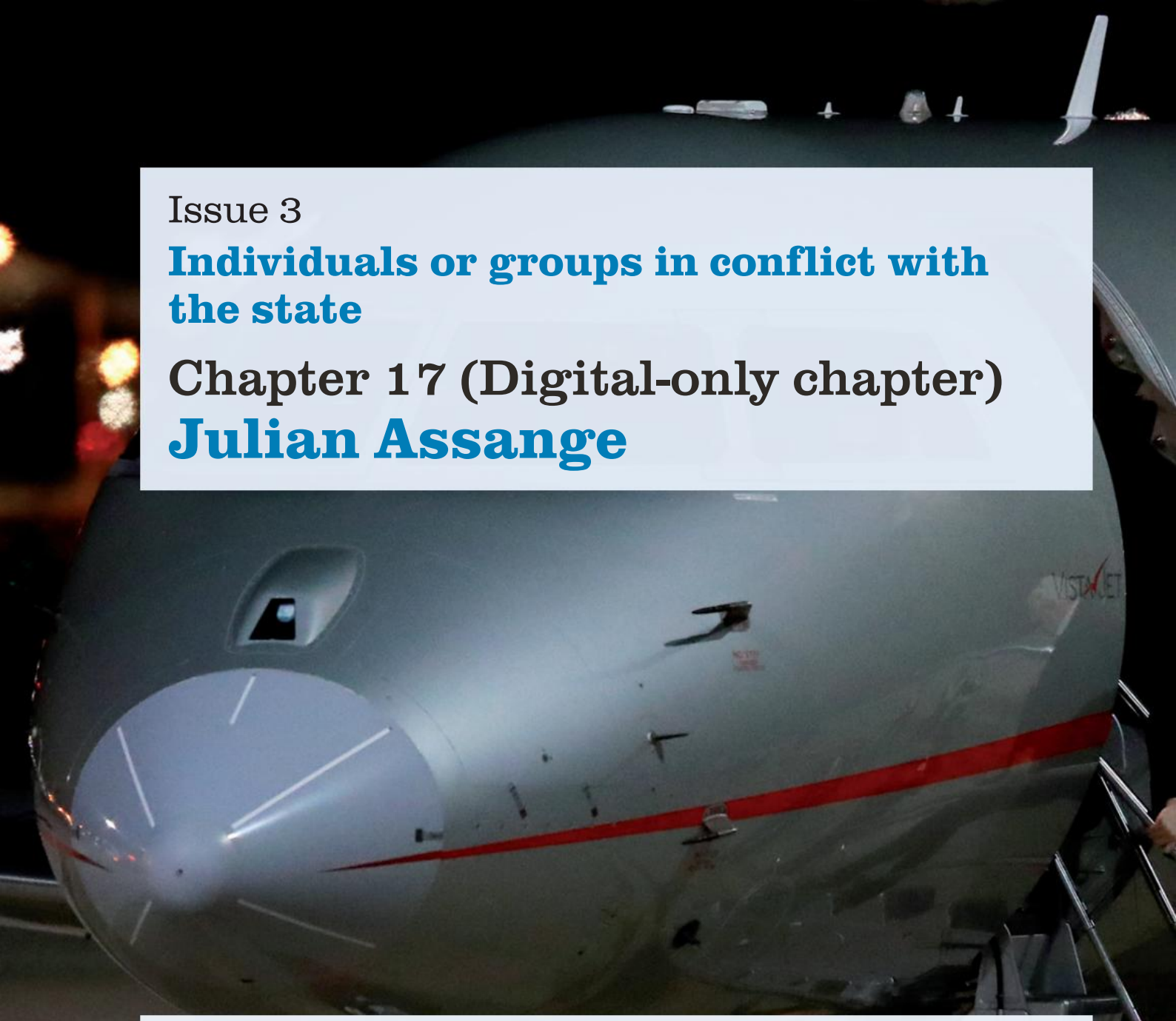

Issue 3

Individuals or groups in conflict with the state

Chapter 17 (Digital-only chapter)
Julian Assange

Chapter objectives

In this chapter, you will:

- explore legal concepts and legal terminology in relation to Julian Assange and the law
- investigate the legal system's ability to address issues relating to Assange
- explore the differences in the laws relating to Assange
- investigate the role of the law in addressing and responding to change in relation to freedom of speech
- describe the legal and non-legal responses to the Assange case
- evaluate the effectiveness of legal and non-legal responses in achieving justice for Assange.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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Relevant law

IMPORTANT LEGISLATION

Espionage Act 1917 (US)
The Universal Declaration of Human Rights (1948)
Vienna Convention on Diplomatic Relations (1961)
Computer Fraud and Abuse Act 1984 (US)
Diplomatic and Consular Premises Act 1987 (UK)
Criminal Code Act 1995 (Cth)
Extradition Act 2003 (UK)
Uniform Code of Military Justice (US)

SIGNIFICANT CASES

The New York Times Co v United States (1971) (403 US 713)
Julian Assange v Swedish Prosecution Authority (2011)
United States v Bradley Manning (2013) (court martial)

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17.1 A brief history of the Julian Assange case

whistleblower
a person who exposes or brings to public attention, any misconduct and/or breaches of the law occurring within an organisation, company or government department

WikiLeaks
an international organisation (originating in Australia) committed to anonymously publishing documents that are unavailable to the public

extradition
the handing over of a person accused of a crime by the authorities of the country where they have taken refuge, to the authorities of the country where an alleged crime was committed

plea bargain
an agreement that a person will plead guilty to a lesser charge, and in exchange will not be tried for a more serious charge

freedom of speech
where citizens of a country are not restricted or controlled by government censorship regarding what they say (except in terms of vilification, incitement and defamation)

Julian Paul Assange (pronounced ah-sonje) is an Australian **whistleblower** widely known as the founder, editor-in-chief and director of **WikiLeaks**, a website established in 2006 to 'whistleblow' on a range of corporate and government activities.

From 2010 through to 2024, Assange was involved in a highly publicised and politicised legal case of international significance, involving Sweden, the United States, the United Kingdom and Australia. It related to a series of releases of highly sensitive information about the behaviour of the US military in Iraq. The information consisted mostly of communications between staff and departments that were classified as 'secret'. The US Government alleged that this release threatened national security and placed many lives in danger.

Assange is an Australian citizen, but in 2012 he sought refuge inside the Ecuadorian Embassy in the United Kingdom, in order to resist a Swedish **extradition** request relating to sexual assault charges. Ecuador granted him asylum because Assange believed the US Government would seek his extradition from Sweden in order to face espionage charges. If found guilty, he could have faced up to 175 years in prison, or even the death penalty. The Swedish arrest warrant was rescinded in 2017, but Assange remained in the embassy. In late 2018, it was revealed that US prosecutors had a sealed indictment (formal accusation by a grand jury) against him.

In April 2019, Assange was ejected from the Ecuadorian Embassy, and taken to Belmarsh Prison in London due to his failure to attend court in 2012. This sentence ended in September, but he continued to be held due to an extradition request from the United States.

Over the ensuing five years, Assange continued to be held in Belmarsh Prison as he made multiple appeals to the High Court in London to block his extradition.

On 24 June 2024, he agreed to a **plea bargain** deal with US prosecutors. This involved pleading guilty to one felony charge in exchange for immediate release, as he had already served the necessary amount of time. Assange arrived back in Australia on 26 June 2024.

Assange's situation raises a number of important socio-political issues relating to **freedom of speech**, freedom of the press and information, and the fine line between the government's wish to keep some political and strategic information confidential versus the right of news services or individuals to publish such information and individuals' right to know. To some, Assange is intellectually brilliant and an outstanding journalist. Indeed, in 2011, he won the prestigious Martha Gelhorn prize for journalism. However, others have labelled him a traitor, a vandal and an irresponsible journalist whose actions have compromised the ability of national governments to maintain secrecy and the security of their citizens.

Assange has been in conflict with at least four countries, which have ranked his status as anywhere from the 'most dangerous person in the world' to a 'bail jumper' who refused to face accusations of sexual assault. His health deteriorated after seven years living inside the Ecuadorian Embassy (2012–2019).

Hacking

Julian Assange has highly sophisticated knowledge and skills in computer technology, software design and encryption. However, he has a history – dating

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back to the 1990s – of computer hacking company databases and government departments, to seek out information that would not legally be available to him. His activities during this time have been described as 'kind hacking', in that his intention was not to destroy databases or sabotage companies, but to find information that related to his personal affairs and family.

In 1995, Assange was arrested and charged for hacking into the computer systems of Nortel, a now defunct Canadian telecommunications company. He pleaded guilty to 25 charges and was fined $2100. Assange could have been jailed for up to 10 years, but the judge took into account his disrupted childhood. Later, Assange created a group called 'Parent Inquiry into Child Protection', setting up a type of database where protected legal records related to child custody issues in Australia could be accessed. The group enabled parents involved in child custody disputes to get information from the Children's Court and allowed them to raise issues of child protection with government agencies. Court records also show that in 1993 Assange provided technical advice to the Victoria Police Child Exploitation Unit and helped in prosecutions. Assange has often put his computer technology skills to good use.

Whistleblowing

WikiLeaks

Julian Assange set up the website/news service WikiLeaks in 2006. He believes in publishing primary sources of information because he believes in the public's right to know.

Wikileaks.org originally began as a 'wiki'; that is, a website that allows multiple users to post, edit and delete content. Wikipedia is probably the most well-known example of a 'wiki'. The 'Leaks' in WikiLeaks refers to information being 'leaked' (secretly given out), with the identity of the leaker remaining anonymous. It is a long-held tradition for journalists, news services and individuals to 'not disclose their sources' so that they cannot be punished for passing on information that may be considered confidential.

Many of us are placed in situations in where we have information about others that may be important.

Figure 17.1 The WikiLeaks logo

You may know something about a neighbour, school friend or teacher. Even when you know the information is true, it is still difficult to know whether to share the information and in what circumstances. Do we become a 'whistleblower' or not? The definition of whistleblowing revolves around wrong or wrongdoing, but it is not always easy to know whether something is wrong or whether the information should be shared.

Review 17.1

Outline Julian Assange's background and behaviour from the 1990s to 2006.

Release of US military documents

In 2010, WikiLeaks released a number of US military documents. A US army soldier stationed in Iraq, Specialist Manning, accessed databases and downloaded secret information about US Government operations in Iraq and Afghanistan. It is alleged that over 700 000 documents or cables were downloaded with intent to leak them to WikiLeaks.

One of the most crucial leaks related to a video of a horrific slaying of Iraqi citizens by US soldiers, now known as '**Collateral** Murder'. Viewed from the gunsights of a military helicopter, it includes disturbing footage of an apparent ambush of civilians who do not appear to pose a threat to anyone.

collateral
(damage) in a military context, damage to or destruction of things other than the intended target, such as civilian property and civilians

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The clip can now be accessed on the internet, but it was a highly secret piece of military information not meant for publication.

Later in 2010, WikiLeaks posted another embarrassing set of documents, entitled 'Afghan War Diary', covering the period between January 2004 and December 2009. Most of the 75 000 documents are classified as secret. The documents reveal how coalition forces have killed hundreds of civilians in unreported incidents; they were subsequently published by three major news publications including *The New York Times*.

There are so-called SHIELD laws (Securing Human Intelligence and Enforcing Lawful Dissemination) in many Western nations that are designed to protect journalists' sources from prosecution and incarceration: journalists are not required to reveal their sources. In New South Wales, this law is found in the *Evidence Amendment (Journalist Privilege) Act 2011* (NSW). Laws and principles are part of how countries protect freedom of speech and **freedom of the press**, both of which are fundamental to Western democracies. Without freedom from fear of persecution for publishing potentially damaging information, journalists and news services may not be able to present a balanced view of the news and of politics. The weaknesses or faults of a government and of an opposition, as well as of businesses and other groups, can be exposed by news services – this helps the public decide on their future behaviour, such as how to vote or shop. The subjects of this reporting usually have a right of reply, to explain their behaviour or apologise for perceived mistakes.

freedom of the press where the news services and media outlets of a country are not restricted or controlled by government (except in terms of vilification, incitement and defamation)

As mentioned in Chapter 7, the Australian Federal Police (AFP) raided the offices of the Australian Broadcasting Corporation (ABC) in 2019 to investigate potential criminal behaviour by two journalists, Sam Clark and Dan Oakes. The AFP claimed that the journalists had illegally obtained information to use in a story about the behaviour of Australian Special Forces in Afghanistan between 2009 and 2013.

There are distinct similarities between these events and the plight of Julian Assange, who has always maintained he was a journalist and publisher of information that he considered to be of public interest. Both the United States and Australian governments beg to differ.

Consider this in light of Assange's belief that citizens have a right to know what governments have done. This knowledge ensures their accountability and, in democratic societies, can inform voting behaviour at elections.

Many governments have blocked the WikiLeaks website from their citizens. The US Government remains in conflict with Julian Assange and appears to be pursuing him in order to prosecute him for criminal offences related to his publication of classified diplomatic cables on WikiLeaks.

Legal Links

To learn more about WikiLeaks, how it works and why it was created, view the WikiLeaks website.

Free speech

'This is a free country and I have a right to free speech' is a statement that most Legal Studies students will recognise. We can express our opinions about our leaders, religions, government decisions and a range of other situations or issues without fear of persecution. Article 19 of *The Universal Declaration of Human Rights* (1948) enshrines this right.

If your information is factual, and your opinion does not incite violence, hatred or defame another person or organisation, you are free to: speak your mind in public, publish material and use legal avenues to challenge authority (see the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW)). Julian Assange and WikiLeaks maintain that they have a right – sometimes a duty – to publish information if it is the truth.

On the other hand, governments argue that some of their communications between agents and departments must be confidential to keep citizens and military personnel safe and military information secret. This includes the protection of the identities of

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civilians or informants in war zones who have secretly passed information to the US military. Indeed, governments do have a responsibility to protect citizens and allies and withhold information that may be to the detriment of their citizens.

Opinions differ on what constitutes both a country's need to protect its citizens and the potential national security threats they may face. In late 2019, then US President Donald Trump tweeted a reportedly classified photograph of a failed missile launch in Iran. This is not the first time a world leader has used images for political gain. Some believe that such practices highlight the hypocritical nature of the charges that Assange may face in the United States.

The information published by WikiLeaks over the past few years has ranged from 'mildly embarrassing' to 'highly sensitive'. Some governments are simply embarrassed by what WikiLeaks has published and have moved to censor or ban their citizens' access to WikiLeaks. However, laws regarding the illegal exchange of information are difficult to enforce. Australia's *Anti-Terrorism Act 2005* (Cth) and the *National Security Legislation Amendment Act 2010* (Cth) aim to fight terrorist activities and deal with other issues of national security, and they do not appear to have been breached by Assange's behaviour. However, the plea bargain Assange finally made with the United States in June 2024 saw him pleading guilty to the charge of conspiracy to obtain and disclose national defence information, a felony under the ***Espionage*** *Act* 1917 (US).

Figure 17.2 Supporters of WikiLeaks founder Julian Assange protest outside the Royal Courts of Justice in London, United Kingdom, on 27 October 2021.

Review 17.2

Consider to what extent military documents should be shared by private citizens or journalists. Assess whether the public has a right to know about conflicts in overseas countries.

Analysis 17.1

Read the article 'Trump tweets photo of Iran rocket site and says US "not involved" in failed launch' at the following link: http://cambridge.edu.au/redirect/10414.

Discuss whether US President Trump was justified in releasing military photographs of Iranian missile bases.

US response

Crucial to Julian Assange's conflict with the state is the US Government's treatment of Manning, who was arrested in July 2010. Facing 22 charges, Manning was willing to offer a guilty plea to some of the lesser charges in return for a reduced sentence. The most serious accusation was that of 'aiding the enemy', which carries a life sentence under the *Espionage Act 1917* (US). The basis for this accusation was that information passed to WikiLeaks was therefore available to Al-Qaeda. Manning alleges that there was no type of relationship with Julian Assange, and that WikiLeaks allowed material to be uploaded secretly without revealing the identity of the provider. This was later disputed.

espionage
the use of spies or spying to obtain information

In early 2013, Manning's sentence was reduced by 112 days by a military judge because Manning suffered mistreatment in confinement: under Article 13 of the *Uniform Code of Military Justice* (US), prisoners awaiting trial are to be protected from punishment on the grounds that they are innocent until proven guilty. However, Manning was sentenced to 35 years in jail in 2013 with an eight-year non-parole period. The day after sentencing, Manning, who had been diagnosed with gender identity disorder, announced

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Figure 17.3 Chelsea Manning (left) at the 2017 New Yorker Festival

red notice
a request for the arrest and extradition of an individual for whom an arrest warrant has been issued in the requesting country; distributed by Interpol, the international police authority

political asylum
a fundamental human right affirmed by Article 14 of *The Universal Declaration of Human Rights* (1948), 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'

the intention to transition from male to female, asking that female pronouns be used, and that she now be referred to by the name Chelsea.

In January 2017, President Obama announced that Manning's sentence would be commuted to seven years – he emphasised that this was not a pardon – and on 17 May 2017, she was released. Manning appealed her original conviction, but on 31 May 2018, the US Army Court of Criminal Appeals upheld the first court's decision.

On 16 November 2018, the US Department of Justice (DoJ) accidentally revealed that prosecutors had an indictment against Assange, although at this time the document was sealed. The exact nature of the charges was not made public until May 2019 when the DoJ released an 18-count indictment charging Assange with offences relating to illegally obtaining, receiving and disclosing classified information.

Sexual assault allegations

In 2010, WikiLeaks moved its head office to Sweden, and in August of that year, two women, Sophia Willen and Anna Ardin, reported Julian Assange for sexual assault involving non-consensual sexual relations. Assange was interviewed by the Swedish police, but was not detained. He has always maintained that his encounters with both women were consensual. Later that year, when Assange was in London, the Swedish authorities issued a European Arrest Warrant (EAW) for him. He surrendered to British police and was detained for 10 days. He was released on bail of A$300 000, which was posted by a number of notable friends. Interpol issued a **red notice** on him.

Assange fought the EAW through the British legal system for over a year, with a number of appeals through the lower courts. On 14 June 2012, the UK Supreme Court ruled that he must be extradited to Sweden. Julian Assange sought **political asylum** and entered the Ecuadorian Embassy in London on 19 June 2012 after breaking his bail conditions in the United Kingdom. He was granted political asylum by the Ecuadorian Government and resided inside the embassy for seven years.

Political asylum

The key factor in Assange's request for – and subsequent granting of – asylum was the treatment of Manning. Assange feared similar treatment and believed that his extradition to Sweden was a guise for a subsequent extradition to the United States to face the US justice system. Having been granted asylum, Assange was allowed to remain within the embassy, where the UK authorities could not arrest him.

Research 17.1

1. Make an assessment of whether Australian journalists Sam Clark and Dan Oakes were in a similar position to Julian Assange.
2. Find the *Espionage Act 1917* (US) online. Read the Act and use it to evaluate whether Julian Assange's actions are espionage.

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However, he would not be protected if he left the embassy grounds. On 19 November 2019, the Swedish authorities decided, after a review of the evidence, to discontinue its rape investigation against Assange.

Assange remained in the embassy, as he was still subject to arrest by UK police for breaching his bail conditions. He gained Ecuadorian citizenship in December 2017, but in April 2019 the political asylum was withdrawn, and Assange was ejected from the embassy. He was immediately taken to Belmarsh Prison in London to serve a sentence for his failure to attend court in 2012.

Plea bargain

This prison sentence came to an end in September 2019, but Assange continued to be held as a prisoner ahead of extradition to the United States, where he would face 18 criminal charges.

He launched a series of appeals to the High Court in London to block his extradition, but in June 2023 Justice Jonathon Swift rejected all grounds of the appeal.

Assange's legal team responded to Justice Swift's decision via a 'last ditch' application for appeal to the UK High Court. On 26 March 2024, a judgment was issued, but not a final decision, as the judges sought assurances from the US government that Assange would be granted all First Amendment rights, that his nationality would not affect the process, and that, should he be found guilty, the death penalty would not be imposed. In a diplomatic note, the US Embassy in London gave certain assurances, but the judges found the response insufficient, and gave Assange permission to appeal.

On 24 June 2024, Assange agreed to a plea bargain deal, which involved pleading guilty to the felony charge of 'Conspiracy to Obtain and Disclose National Defence Information' under the *Espionage Act 1917* (US). For this, he would be sentenced to 62 months in prison, but released immediately on the basis that he had already served this long, and more. The deal was signed in the US District Court on Saipan, one of the Northern Mariana Islands, a territory far from the American continent and relatively close to Australia. Assange was accompanied by Australia's US Ambassador Kevin Rudd, High Commissioner to the UK Stephen Smith, and lawyer Jennifer Robinson.

From Saipan, Assange was able to fly directly to Australia, landing in Canberra on the evening of 26 June 2024.

Table 17.1 Timeline of events

Date	Event
2006	WikiLeaks is founded as a wiki edited by a number of anti-government individuals. Julian Assange is listed as a director of the organisation.
2009	WikiLeaks establishes its head office in Iceland, a country with liberal internet censorship laws. The US Embassy in Iceland's capital city of Reykjavík becomes one of the first 'targets' of leaked information.
2010	'Collateral Murder' (allegedly leaked by US Army intelligence analyst, Specialist Manning) shows shocking footage of Iraqi civilians being gunned down by a US helicopter. Manning is arrested in the United States on 22 charges of treason and aiding the enemy.
June 2010	WikiLeaks moves its head office to Sweden.
Early August 2010	Sexual assault allegations against Assange emerge.
Late August 2010	Confusion surrounds the nature of the complaint to police by one of Assange's sexual partners. Assange goes to the Swedish police but is not detained and is free to leave the country.
September 2010	Assange flies to London for a number of WikiLeaks-related conferences.
October 2010	WikiLeaks launches another embarrassing set of documents, entitled 'Afghan War Diary'.
December 2010	Swedish authorities issue a European arrest warrant for Assange. He surrenders to British police and is detained for 10 days. He is released on bail of A$300 000. A red notice is issued by Interpol.

(Continued)

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Table 17.1 *(Continued)*

Date	Event
2011–2012	A 500-day legal process that involves fighting the European arrest warrant ends on 14 June 2012. After a number of lower court appeals, the UK Supreme Court rules that Assange must be extradited to Sweden.
2012–2013	There are unconfirmed reports that a US Grand Jury (a panel of prosecutors) has decided to prosecute Assange under the *Espionage Act 1917* (US).
June 2012	Assange takes refuge in the Ecuadorian Embassy in London claiming diplomatic asylum.
August 2012	Ecuador grants Assange diplomatic asylum.
2012–August 2015	Assange lives inside the Ecuadorian Embassy. London police guard the embassy 'around the clock'.
September 2015	London police stop guarding Assange.
December 2015	Ecuador and Sweden reach a bilateral agreement for Assange to be interviewed inside the Ecuadorian Embassy rather than be extradited to Sweden.
March 2016	Assange releases thousands of emails of US presidential candidate Hilary Clinton. Clinton used her private email address to send and receive top secret information when she was Secretary of State.
May 2017	Swedish arrest warrant rescinded; Swedish authorities no longer seeking extradition on sexual assault charges.
December 2017	Assange gains Ecuadorian citizenship.
October 2018	Ecuadorian president threatens to evict Assange from the embassy in London.
November 2018	It is revealed that US prosecutors have a sealed indictment against Assange.
April 2019	Assange is evicted from the Ecuadorian Embassy; he begins a 50-week UK jail term for skipping bail in 2012. UK's home secretary, Sajid Javid, approved an extradition request from the United States for Assange to face criminal charges.
July 2022	Assange is ordered to be extradited to the United States but appeals to the British High Court.
June 2023	The UK High Court dismisses Assange's appeal against his extradition to the United States to face 18 charges related to the leaking of classified information. Assange's legal team immediately appeals this decision.
February–May 2024	Following a new appeal by Assange, the UK High Court seeks assurances from the US regarding the nature of a potential trial and penalty. The court is not satisfied by the assurances, and grants Assange leave to appeal against extradition.
June 2024	Assange is transported to the island of Saipan, where he pleads guilty to a single charge of espionage, in return for his freedom. He is sentenced to time served and allowed to return home to Australia.

Review 17.3

1. Describe the events leading up to the granting of asylum to Assange by the Ecuadorian Government in 2012.
2. Using the timeline in Table 17.1, identify in chronological order the three most important events that occurred between 2009 and 2019. Justify your selection.
3. Assess the fate of Julian Assange at the present time.

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17.2 Legal responses

Political asylum

If an individual feels threatened by living in a country, they may seek asylum in another country. Julian Assange sought political asylum in the Ecuadorian Embassy in London – technically, embassies are a part of their country, not their host country, so the Ecuadorian Embassy is part of Ecuador, not the United Kingdom.

There are many examples of countries granting asylum to individuals who fear political and physical persecution from their governments. Cardinal Joszef Mindszenty spent 15 years living in the US Embassy in Budapest, from 1956 to 1971. He was given a life sentence in Hungary in 1949 for treason and conspiracy to overthrow the communist government. He sought political asylum during the 1956 Soviet invasion of Hungary and is possibly the most famous of all political asylum cases since World War II. It is not unprecedented for a foreign embassy to grant asylum under *The Universal Declaration of Human Rights* (1948).

Julian Assange and his legal team used a range of legal avenues to avoid his extradition to Sweden; seeking asylum in the Ecuadorian Embassy was a successful one. He was legally entitled, under the *Vienna Convention on Diplomatic Rights* (1961), to stay within the confines of the Ecuadorian Embassy. Because British authorities were unable to enter the premises of the Ecuadorian Embassy, police kept a 24-hour guard outside the embassy up until August 2015, with the apparent intention of arresting Assange the moment he stepped onto UK soil. In 2019, Assange was evicted from the Ecuadorian Embassy arrested and sent to London's Belmarsh Prison.

Many observers of the Assange case ponder whether the British Government could have legally seized Julian Assange from within the embassy itself. Under the *Diplomatic and Consular Premises Act 1987* (UK), ministers have the power to withdraw recognition from diplomatic premises.

***Diplomatic and Consular Premises Act 1987* (UK)**
Section 1(3–5)

(3) In no case is land to be regarded as a State's diplomatic or consular premises for the purposes of any enactment or rule of law unless it has been so accepted or the Secretary of State has given that State consent under this section in relation to it; and if:
  (a) a State ceases to use land for the purposes of its mission or exclusively for the purposes of a consular post or
  (b) the Secretary of State withdraws his acceptance or consent in relation to land; it thereupon ceases to be diplomatic or consular premises for the purposes of all enactments and rules of law.

(4) The Secretary of State shall only give or withdraw consent or withdraw acceptance if he is satisfied that to do so is permissible under international law.

(5) In determining whether to do so he shall have regard to all material considerations, and in particular, but without prejudice to the generality of this subsection:
  (a) to the safety of the public
  (b) to national security and
  (c) to town and country planning.

The British Government could have determined that the asylum granted to Julian Assange was not the intended purpose of the Ecuadorian Government's mission and withdrawn the consent or acceptance of using that land for that purpose. In any event, the government's dilemma was resolved when Assange was ejected from the embassy to waiting police. They would not need to go against international law in order to carry out the warrants for Assange's arrest.

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Figure 17.4 Television crews outside the Ecuadorian Embassy in London in 2012. Police kept a 24-hour guard outside the embassy until 2015 in the hope of arresting Julian Assange if he stepped foot outside.

United States espionage law

As previously mentioned, a hearing or 'grand jury' took place in the United States to prepare for the prosecution of Julian Assange. The hearing investigated 'possible violations of federal criminal law involving, but not necessarily limited to, conspiracy to communicate or transmit national defense information in violation of the Espionage Act'. The *Espionage Act 1917* (US) was introduced to protect the United States from traitors or spies undermining the government's attempts to defend its territories.

President Woodrow Wilson, on 7 December 1915, asked Congress to pass this law because:

> There are citizens of the United States ... who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our government into contempt ... to destroy our industries ... and to debase our politics to the uses of foreign intrigue ... We are without adequate federal laws ... I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out.

President Woodrow Wilson, 1915, State of the Union address, 7 December.

The legislation has been challenged and amended since 1917 but was most famously applied, albeit unsuccessfully, in a 1971 case against Daniel Ellsberg (see *The New York Times Co v United States* (1971) (403 US 713)), who leaked secret documents known as the Pentagon Papers. The Pentagon Papers revealed that the US Government knew from a very early stage that the Vietnam War could never be won, and that if they continued with the war there would be many more casualties than were ever openly admitted to. In addition, as an editor of *The New York Times* would later write, the Pentagon Papers:

> ... demonstrated, among other things, that the Johnson Administration had systematically lied, not only to the public but also to Congress, about a subject of transcendent national interest and significance.

R.W. Apple Jr, 1996, '25 years later; Lessons from the Pentagon Papers', *The New York Times*, 23 June.

Daniel Ellsberg came into possession of the Pentagon Papers in much the same way as Manning came into possession of the documents she passed to Assange. He then passed the documents on to *The New York Times* correspondent Neil Sheehan, who gave him a promise of confidentiality. However, Sheehan broke this promise, and wrote a major story built on material he had received from Ellsberg and from other contacts. The US Government was furious and obtained an injunction to prevent *The New York Times* publishing further articles based on the papers. *The New York Times* appealed the injunction, but in the meantime, *The Washington Post* gained access to the papers and began publishing its own articles. After this, 15 other newspapers received copies of the Pentagon Papers and began publishing. In *The New York Times Co v United States*, the Supreme Court found that the press had a right to publish the papers. This ruling has been described as one of the 'modern pillars' of US citizens' First Amendment rights in relation to freedom of the press.

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The Daniel Ellsberg case from over 40 years ago – which pre-dates the internet and digital forms of technology – has remarkable similarities to Julian Assange's and WikiLeaks' conflict with the US Government. It has been argued that by releasing sensitive and important US Government information without prior consent or appropriate authority, Assange is a traitor and a spy. Interestingly, Daniel Ellsberg was not convicted of espionage.

In 2013, another high-profile whistleblower, Edward Snowden, received widespread media coverage for his actions in revealing secret documents to the public in much the same manner as Julian Assange. Snowden has been charged on two counts of breaching the *Espionage Act 1917* (US), and in June 2013 his passport was cancelled.

At the time, he was travelling to the Republic of Ecuador (it is believed to seek asylum) via Russia, but the lack of a valid passport meant that he was unable to leave the transit area of Moscow airport. The Russian authorities subsequently granted him asylum, enabling him to leave the confines of the airport.

Review 17.4

1 Discuss your understanding of the term 'political asylum'. Outline some examples from overseas.
2 Outline the main factor that led to Ecuador's granting of political asylum to Julian Assange.
3 Justify the actions of the UK and US governments in pursuing Julian Assange.
4 Discuss the validity of a US grand jury in bringing Assange to justice.
5 Explain the reasons given for the passage of the *Espionage Act 1917* (US).

Analysis 17.2

Read the article 'Yes, Julian Assange actually is a criminal' by Michael Lind, *Salon*, 22 December 2010 at http://cambridge.edu.au/redirect/10415.

1 Describe the main arguments for the prosecution of Julian Assange in comparison with the exoneration of Daniel Ellsberg in the Pentagon Papers case of 1971.
2 Explain the argument in the article that news organisations should be able to publish information but private citizens may not. Consider what you personally post on social media.

Diplomacy

The Assange case received widespread attention internationally, particularly in the United States, the United Kingdom, Sweden and Australia. For much of the time, the Australian Government remained relatively inactive in the case. While Julian Assange remained within Ecuadorian territory, there appeared to be little the Australian Government could do via international law.

Law professor Natalie Klein states that while Julian Assange is an Australian citizen, there was a limit to the legal actions the federal government could take, because a person's nationality does not mean the laws of another country can be ignored when a person is overseas.

From 2022, the incoming Albanese Government began raising its concerns with the US government, both publicly and privately, about their pursuit of Assange. They made it clear that the Assange case had dragged on for too long and that they would like to see it brought to a conclusion.

In response, US Secretary of State Antony Blinken stated, in July 2023, that Assange was charged because of his 'alleged role in one of the largest compromises of classified information in the history of our country [which] risked very serious harm to our national security'. These comments did little to instill confidence in the campaigners striving to see Julian Assange freed.

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Legal Links

A news article outlining an attempt by a group of Australian politicians to lobby the US government to drop its legal pursuit of Julian Assange can be found at: http://cambridge.edu.au/redirect/10416.

A similar news article regarding two American politicians who urged their colleagues in the US House of Representatives to sign a letter calling on President Biden to drop the prosecution of Julian Assange can be found online at: http://cambridge.edu.au/redirect/10417.

In October 2023, Australian Prime Minister Anthony Albanese spoke to United States President Joe Biden about Julian Assange.

Media

'Enough is enough': Albanese talks to Biden about Assange

David Crowe

The Sydney Morning Herald

27 October 2023

Albanese discussed Assange in his private talks in Washington DC after making public calls in recent months for a resolution to the US charges against him for releasing state secrets.

The talks came as Assange's brother, Gabriel Shipton, told this masthead that he feared for his brother's life because of the impact of the detention on his mental health.

Shipton joined protestors outside the White House this week to raise awareness of the case at the same time Biden hosted Albanese at the residence.

Albanese confirmed to this masthead that he raised his concern about Assange in his discussions with the president during meetings that included an informal dinner, a discussion in the Oval Office at the White House and a formal meeting with Biden and his cabinet secretaries.

While he would not discuss his private talks with Biden or the president's view of the matter, he made it clear he believed the detention had gone on too long.

'I've made it clear that enough is enough – that it's time it was brought to a conclusion,' he said.

Shipton said Assange should be released because his work at WikiLeaks had been in the public interest.

The Wikileaks disclosures included the 'collateral murder' video that showed US forces killing civilians in Iraq and the release of a trove of US diplomatic cables.

'We want the government to do more than just make representations to the Biden administration,' Shipton said.

'Ideally, we would like the government to act as it does for other Australians who are imprisoned overseas.'

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Assange, who is currently in London's Belmarsh prison, is facing a maximum jail sentence of 175 years after being charged with 17 counts of breaching the US Espionage Act plus a separate hacking-related charge.

Shipton, who saw Assange last week, said a visit to his brother was always 'full of anxiety' about his brother's condition.

'He's still fighting, he's hanging in there despite what he's been through and despite the adversary he's taken on,' he said.

'He's not the same man he was a year ago or even before that — it's really taken its toll on him.'

Shipton said it would be unacceptable for Assange to face trial in the US given the case is set down for a Virginia court where the community — and the jury pool — included defence and security workers.

'I don't believe that Julian would receive a fair trial in the United States,' he said. 'It's a bit of a fairytale, to be honest, this idea that Julian would receive a fair trial or a fair deal that wouldn't see him suffering more.'

When Australian journalists asked US National Security Council spokesman John Kirby about the case this week, Kirby said it was an extradition matter for the Department of Justice.

Biden faces the risk of a domestic political blowback if he intervenes in the case to drop the extradition request, with conservatives such as former Donald Trump using it against the president at the next presidential election.

Former president Barack Obama commuted the sentence of another person involved in the WikiLeaks disclosures, Chelsea Manning, after she had faced trial and gone to jail.

A cross-party delegation of MPs, including Nationals' former leader Barnaby Joyce and Kooyong independent Monique Ryan, travelled to Washington in September to plead for Assange's liberty.

Shipton said people cared about the issue because it was becoming a sign of the 'inequality' in the relationship between Australia and the US.

'Julian is an Australian — he's an Australian father, he's an Australian son,' he said.

'He's an Australian citizen who's been unjustly imprisoned and it's up to the Australian government to defend their citizens overseas.

'People don't really understand what he even did wrong. He published truthful material,' Shipton said in Washington.

'So the other aspect to it is our right to know what governments do in our name, and that is important when we are in such a close relationship with the power that is imprisoning Julian for publishing national defence information about what they are doing behind closed doors.'

Analysis 17.3

Read the media article above. Outline the central arguments put forward by Gabriel Shipton on why Assange should be released.

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Research 17.2

Research the Australian Government's response to the Julian Assange case and consider the impact this had on Assange's final release.

Figure 17.5 US President Joe Biden (right) with Australian Prime Minister Anthony Albanese at a meeting in the Oval Office of the White House during a state visit in October 2023. Albanese discussed Assange during his private talks with US officials after making public calls for a resolution to the charges against him for releasing state secrets.

17.3 Non-legal responses

Media

The Australian Broadcasting Corporation (ABC) closely covered the issues in the Julian Assange case as they developed. An episode of its current affairs show *Four Corners*, aired on 12 August 2012, discussed the issues in the case. Network Ten broadcast the telemovie *Underground: The Julian Assange Story* in 2012, which traced the early life and activism of Assange.

The 2013 film *The Fifth Estate* was a biographical thriller starring Benedict Cumberbatch as Assange. There have also been a number of documentary films on the subject, including *Mediastan* (2013), *We Steal Secrets: The Story of WikiLeaks* (2013), *Risk* (2016) and *Hacking Justice* (2017).

In 2022, the ABC showed a two-part documentary series entitled *Ithaca*. Filmed over two years across the United Kingdom, Europe and the United States, the series is about Assange's father, John Shipton, and his tireless campaign to save his son and family as he awaits the results of the British government's decision to extradite Assange to the United States.

Figure 17.6 On the occasion of Julian Assange's 51st birthday, 1 July 2022, his supporters ride an open top bus around Westminster landmarks, in London, to demand his release.

Politics

In 2012, Julian Assange announced that he would run for the Australian Senate in the 2013 election.

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The WikiLeaks Party was formed, and several candidates, including Assange, were fielded, but none received enough votes. Had Assange been successful in winning a seat, there is some question as to whether his relationship with Ecuador would have disqualified him.

Community support

There were a number of internet-based support groups that attempted to raise the profile of Julian Assange and encourage support for him in a number of ways. Individuals were invited to make donations to help fund Assange's living and legal expenses. There was also encouragement to spread the word about his situation and raise more support through social media pages.

Research 17.3

Source and view different websites devoted to Julian Assange. Investigate the purpose of each of these sites. Discuss each organisation's contribution to the Assange case.

17.4 Effectiveness of responses

Assange's release and return to Australia in June 2024 was effected by way of the plea bargain struck with the US courts. However, given the many years of opposition to such an arrangement from the US government, it seems likely that the agreement to a plea deal was influenced by the diplomatic work of Australian Prime Minister Anthony Albanese, US ambassador and former Prime Minister Kevin Rudd, and other high officials. Other significant factors may have been the ongoing media attention, the amount of community support, and the tireless work of Assange's UK lawyer, Jennifer Robinson.

In a post-September 11 world, with higher alerts from governments genuinely concerned about the safety and welfare of their citizens, Julian Assange could be considered a threat to national and international government security. Those who opposed Assange branded him a highly dangerous criminal: for them, capturing and shutting down WikiLeaks was paramount.

Conversely, Assange could be perceived as a champion of international relations. Perhaps if all governments were subject to scrutiny by news organisations like WikiLeaks, they may be more inclined to act responsibly. In addition, when information about activities such as covert military action is revealed, this may lead governments to apologise for mistakes and/or pay compensation to past victims.

Figure 17.7 WikiLeaks editor Kristinn Hrafnsson (left) and Jennifer Robinson, Julian Assange's UK lawyer (centre), give a statement outside Westminster Magistrates' Court, London, in May 2019.

Review 17.5

1. Identify the laws that applied to Julian Assange's asylum in the Ecuadorian Embassy and his extradition from the United Kingdom.
2. Discuss the idea that if Assange was successfully prosecuted in the United States, an important precedent would be set for journalists worldwide.
3. Construct a table with two columns, with 'for' and 'against' as headings. From your own perspective, list points under each heading in relation to Julian Assange's actions since 2009.
4. Evaluate the national and international community response to Julian Assange's case. Have the responses been negative or positive? Choose one opinion from each side and explain why each person or organisation holds that view.

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Chapter summary

- Julian Assange created WikiLeaks as a way to 'whistleblow' on a range of corporate and government activities of public interest.
- Some think Assange is an outstanding journalist. Others label him a traitor, saying his actions compromise the ability of national governments to keep their citizens safe.
- Interpol issued a red notice against Assange after he turned himself in to the British police and then skipped bail. He then applied for political asylum in the Ecuadorian Embassy.
- A free press is important for journalists and news services. Without it, the media may not be able to present a balanced view of the news.
- WikiLeaks was built on the hope that the publication of otherwise unavailable documents would encourage governments to behave more ethically and/or to apologise or pay compensation to those who deserve it.
- Assange was held in a UK prison from July 2022 awaiting extradition to the United States under appeal.
- In June 2023, the UK High Court dismissed Assange's appeal against his extradition to the United States to face 18 charges related to the leaking of classified information. Assange's legal team immediately appealed this decision.
- On 24 June 2024, Assange agreed to a plea bargain deal with US prosecutors. He was sentenced to time served and arrived back in Australia on 26 June 2024.

Multiple-choice questions

1 WikiLeaks established itself in Iceland initially because:
- **a** Iceland has few censorship restrictions on internet activities.
- **b** the Australian Government strictly controls internet traffic.
- **c** internet data prices are cheap in Iceland.
- **d** the Director of WikiLeaks is Icelandic.

2 Julian Assange was convicted of criminal charges in:
- **a** the Victorian Supreme Court in the 1990s.
- **b** a NSW Magistrates Court in 2010.
- **c** the British Supreme Court in 2012.
- **d** a Swedish local court in 2010.

3 The US Government:
- **a** detained Chelsea (then known as Bradley) Manning on 22 charges.
- **b** detained Julian Assange on 22 charges.
- **c** requested that Julian Assange be extradited from Sweden.
- **d** requested that Julian Assange be extradited from Australia.

4 The Ecuadorian Embassy granted Julian Assange asylum because:
- **a** his passport had expired.
- **b** he was likely to be treated unfairly by Swedish authorities.
- **c** the British Government is unable to grant political asylum to Australians.
- **d** Ecuador and Australia have a bilateral agreement on political asylum.

5 The case of the Pentagon Papers is similar to the case of Julian Assange and WikiLeaks because:
- **a** both cases involve *The New York Times*.
- **b** both cases involve government secrets being released without authorisation.
- **c** both cases led to criminal convictions.
- **d** both Daniel Ellsberg and Julian Assange sought political asylum.

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Short-answer questions

1 Define the term 'whistleblowing'.
2 Discuss how whistleblowing applies to the Julian Assange case.
3 Discuss when you or others should 'blow the whistle'.
4 Define the terms 'freedom of speech' and 'freedom of the press'. Assess whether Australia has a free press. In your assessment, refer to a media article that criticises a government.
5 Comment on the Ecuadorian Government's decision to grant diplomatic asylum to Julian Assange. Discuss the reasoning behind the decision. Assess whether it was justified.
6 Explain why Julian Assange was evicted from the Ecuadorian Embassy in London.
7 Explain why Julian Assange was given a red notice. Identify another individual/s who have received red notices.
8 Assess whether we need different laws for government information. Explain your response using the Assange case as an example.

Extended-response question

Evaluate the effectiveness of the law in resolving conflict between individuals and the state. Use the Julian Assange case to illustrate your response.

Marking criteria for extended-response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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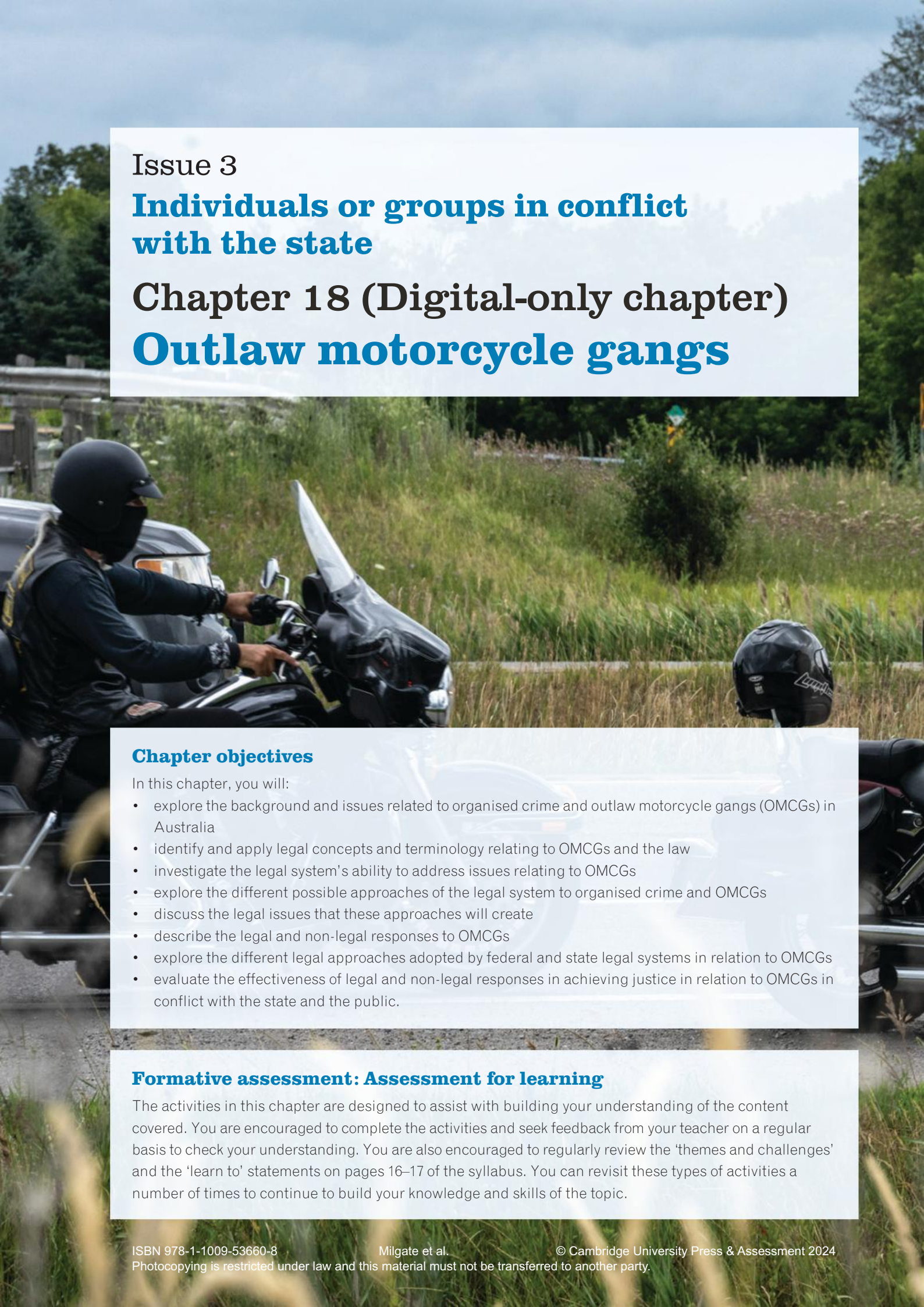

Issue 3

Individuals or groups in conflict with the state

Chapter 18 (Digital-only chapter)

Outlaw motorcycle gangs

Chapter objectives

In this chapter, you will:

- explore the background and issues related to organised crime and outlaw motorcycle gangs (OMCGs) in Australia
- identify and apply legal concepts and terminology relating to OMCGs and the law
- investigate the legal system's ability to address issues relating to OMCGs
- explore the different possible approaches of the legal system to organised crime and OMCGs
- discuss the legal issues that these approaches will create
- describe the legal and non-legal responses to OMCGs
- explore the different legal approaches adopted by federal and state legal systems in relation to OMCGs
- evaluate the effectiveness of legal and non-legal responses in achieving justice in relation to OMCGs in conflict with the state and the public.

Formative assessment: Assessment for learning

The activities in this chapter are designed to assist with building your understanding of the content covered. You are encouraged to complete the activities and seek feedback from your teacher on a regular basis to check your understanding. You are also encouraged to regularly review the 'themes and challenges' and the 'learn to' statements on pages 16–17 of the syllabus. You can revisit these types of activities a number of times to continue to build your knowledge and skills of the topic.

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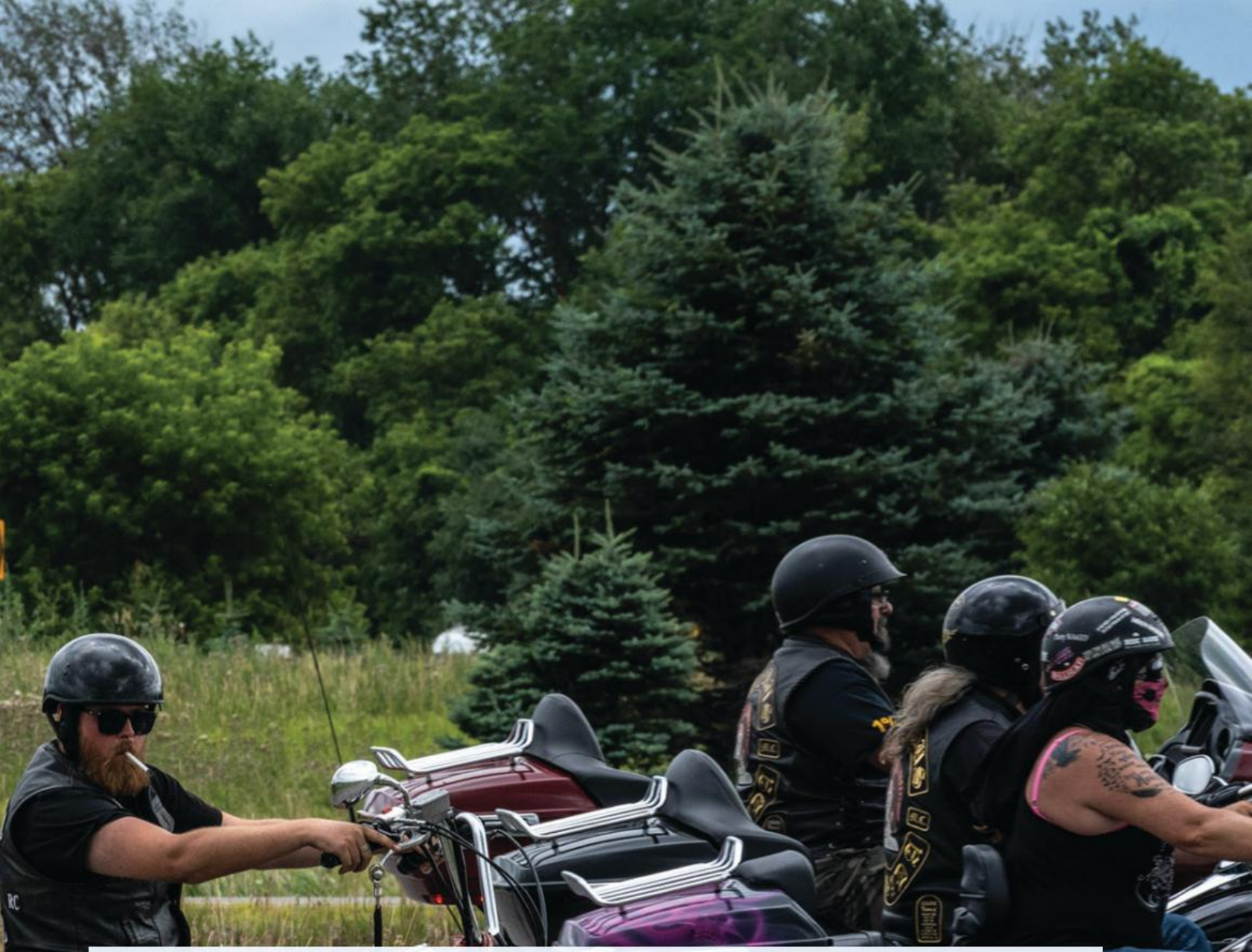

Relevant law

IMPORTANT LEGISLATION

Restricted Premises Act 1943 (NSW)
Proceeds of Crime Act 2002 (Cth)
Crimes Legislation Amendment (Gangs) Act 2006 (NSW)
Serious and Organised Crime (Control) Act 2008 (SA)
Criminal Organisation Act 2009 (Qld)
Crimes (Criminal Organisations Control) Act 2009 (NSW) (repealed)
Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW) (repealed)
Crimes (Criminal Organisations Control) Act 2012 (NSW)
Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013 (Qld)
Tattoo Parlours Act 2013 (Qld)
Vicious Lawless Association Disestablishment Act 2013 (Qld)
Bail Amendment Act 2014 (NSW)
Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)

SIGNIFICANT CASES

The Milperra Massacre Trials
South Australia v Totani [2010] HCA 39
Wainohu v NSW [2011] HCA 24
R v Hawi [2012] NSWSC 332
R v Hawi [2014] NSWSC 837

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18.1 Outlaw motorcycle gangs in Australia

outlaw motorcycle gangs organisations whose members use the structure of a motorcycle club as a front for criminal activity

money laundering disguising money obtained from illegal activities to make it appear legal

extortion obtaining money or property from a person or group by force, intimidation or illegal power

Members of **outlaw motorcycle gangs** (OMCGs) in Australia have been, and continue to be, involved in incidents that draw the attention of the media, law enforcement bodies and legislators across Australia.

Ongoing incidents dating over 10 years continue to fuel public debate about the danger of crime associated with outlaw motorcycle gangs in Australia, and the potential for all-out war between members of rival motorcycle gangs. The main crimes associated with OMCGs are, drive-by shootings, the manufacture and distribution of drugs, including 'ice', and the illegal use of firearms. Many states of Australia have made amendments to legislation seeking to ban OMCGs and reduce their presence and profile in public places.

The Australian Criminal Intelligence Commission (ACIC) (previously the Australian Crime Commission), a federal statutory body that investigates and combats serious crime, has identified OMCGs as a 'real and present danger to the Australian community'.

The ACIC estimates that there are currently over 40 active OMCGs in Australia, with approximately 6000 'patched' members (those with full status within the gang), and with strong and complex criminal networks that operate in many illicit markets throughout Australia. Reports suggest that the groups' main areas of criminal operations are manufacturing and distributing illicit drugs, **money laundering** and **extortion**.

OMCGs are not specific to Australia; they are present in many countries around the world.

Case Study

Mahmoud 'Mick' Hawi

In March 2009, 29-year-old Anthony Zervas was killed at Sydney Airport, the result of a brutal bashing. The incident involved an attack by members of the Sydney-based Comanchero motorcycle club against members of the widely known Hells Angels club. The man killed was returning to Sydney from a party in Melbourne with his brother and a friend, both of whom were Hells Angels members. Zervas was brutally bashed with a metal bollard and stabbed several times in the chest and abdomen.

In 2011, Mahmoud 'Mick' Hawi was sentenced to 28 years' jail for the murder of Zervas. The sentencing judge stated that Hawi displayed 'flagrant disregard' towards law and for the memories of so many innocent bystanders, forced to witness the brutal incident. However, in 2014, Hawi was released from jail and granted a retrial under the *Bail Amendment Act 2014* (NSW). The appeal court judge stated that it could not be established beyond reasonable doubt that Hawi was solely responsible for the death of Zervas. The court upheld Hawi's appeal and allowed him to plead to the lesser charge of manslaughter.

As a result of the legislation, Hawi was released on bail, in the midst of a public outcry. The community protested on the grounds that convicted murderers were a danger to the community if not behind bars. In 2015, despite being granted bail, Hawi was re-sent to jail for three years for the manslaughter of Zervas, with the judge commenting that Hawi had shown remorse for the death of Zervas and was capable of being rehabilitated.

In February 2018, members of a rival gang shot Hawi dead in an apparent revenge attack. Two men, alleged to be members of the Lone Wolf motorcycle club, were charged with murder, and a third with being an accessory after the fact, for helping to move the getaway car. When the case came to trial, the two charged with murder were found not guilty; the third man had previously pled guilty, and was sentenced to four and a half years imprisonment.

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Some of the best-known OMCGs internationally include the Hells Angels and the Bandidos. In New South Wales alone, 19 groups are estimated to operate; some of the most well-known include the Comancheros, the Finks, the Rebels and the Gypsy Jokers.

This chapter investigates some of the issues relating to OMCGs and organised crime in general and discusses some of the complex legal mechanisms that have attempted to deal with these issues.

Organised crime

Organised crime can be defined as illegal activities organised by groups of criminals, most commonly for the purpose of generating financial profit. The most well-known organised crime groups in existence today are the Mafia (Sicily, Italy and the United States), the Japanese Yakuza and the Mexican drug cartels. The Mafia has been popularised in television shows like *The Sopranos* and movies like *The Godfather*. In Australia, the television series *Underbelly* and *Bikie Wars* recounted the gangland wars in Melbourne in the 1990s and the Milperra (bikie) massacre in 1984 in Sydney, respectively.

Organised crime has a long history worldwide. Throughout history pirates, highwaymen and bandits have attacked trade routes and roads to steal and profit from the goods being transported. Many people are familiar, for example, with the stories of the Kelly Gang in nineteenth-century Australia. Smuggling and organised drug-trafficking rings are also common in many countries. Some of the current criminal organisations in Italy and Japan can be traced back over many centuries.

Today, organised criminal groups operate in various areas of illegal business. The most common of these are:

- drug manufacture and distribution
- extortion and money laundering
- prostitution
- **people smuggling**
- environmental crimes, such as the dumping of toxic waste
- counterfeiting of money
- **digital piracy**
- illegal **bookmaking** and gambling.

organised crime illegal activities organised by criminal groups or enterprises, most commonly for the purpose of generating financial profit

people smuggling the organised illegal movement of people across international borders, usually for a fee

digital piracy unauthorised reproduction and distribution of digital music, software, videos or other material, often for profit

bookmaking the activity of calculating odds on sporting and other events and taking bets

OMCGs have been identified in Australia as operating in some of these areas of organised crime. However, it is important to note that simply belonging to, participating in or associating with one of these groups does not necessarily mean that a person has committed any crime. It may only be a small number of individuals in such a group, rather than the organisation as a whole, who are involved in any illegal activities. This means, there is a serious danger that all members might be 'tarred with the same brush', without justification or fair process. With motorcycle gangs in particular, this can be a significant problem: simply being a member of one of the many legitimate motorcycle clubs may arouse unfounded suspicion from the public, or even the police, that an individual is involved in some kind of wrongdoing.

Figure 18.1 Atmosphere created for the launch of the television series *Underbelly* in Melbourne in 2008.

Motorcycle clubs

Motorcycle clubs are not new. The first motorcycle was invented in 1885 in Stuttgart, Germany and motorcycles were commercially available by 1894. One of the oldest motorcycle clubs, the Yonkers Motorcycle Club, was founded in Yonkers, New York in 1903.

There is nothing inherently wrong or criminal about belonging to a motorcycle club. Many people join motorcycle clubs to share a common interest in motorcycles, or for recreational riding or competition, and members of clubs come from all walks of life.

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Today, the largest motorcycling organisation worldwide is the American Motorcyclist Association (AMA), which was founded in 1924. It represents people with an interest in motorcycling – or as described by the AMA, 'freedom on two wheels'. The AMA currently claims to have close to 300 000 members and promotes various motorcycling events in the United States and around the world. The AMA also acts as an advocate for motorcyclists before governments, local and international law-makers, and the public.

chapter
a local branch of a motorcycle club

There are hundreds of motorcycling organisations in Australia. Clubs in New South Wales include the Ulysses Club, the Ambassadors and the Vietnam Veterans.

Figure 18.2 A member of the Vietnam Veterans Motorcycle Club Australia – Gippsland Chapter. There are hundreds of similar motorcycling organisations in Australia.

The organisational structures of clubs vary, but they often have elected officers and directors, annual fees and a regular publication. The clubs often sponsor social events and organise recreational or competition rallies. One of the biggest motorcycling events in Australia is the Australian Motorcycle Grand Prix, an international event held annually on Phillip Island in Victoria.

Outlaw motorcycle gangs

OMCGs represent only a very small percentage of motorcycle groups. Some OMCGs have a long history, with one of the largest international clubs, the Hells Angels, first formed in 1948 in Fontana, California.

OMCGs began to emerge in Australia in the 1960s and spread quickly across all states, with New South Wales now home to the greatest number of clubs and club branches, known as **chapters**. The largest gang in Australia is believed to be the Rebels, with an estimated 2000 members.

The history of OMCGs is different from that of mainstream motorcycling clubs, and their roots can be traced back to the late 1940s, following the end of World War II. A number of motorcycling clubs began to emerge in the United States when service members returned from the war. They formed clubs to mix with other returned service members, to share their interest in popular motorcycling, and possibly to escape the routine of returning to full-time work.

One of the first criminal incidents attributed to OMCGs was on 4 July 1947, US Independence Day, when the AMA sponsored a series of motorcycle races in the small town of Hollister, California.

Legal Links

- View the website of the Motorcycle Riders Association of Australia at the following link: http://cambridge.edu.au/redirect/10418. This is a non-profit organisation founded in 1978. It aims to promote fair and sensible laws, road safety and a better image for Australian motorcyclists.
- View the website of the American Motorcyclist Association (AMA) at the following link : http://cambridge.edu.au/redirect/10419. The AMA promotes the interests of motorcyclists generally and organises various motorcycling events.
- View the website of the Australian Motorcycle Grand Prix at the following link: http://cambridge.edu.au/redirect/10420.

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One of the motorcycle groups involved was reported to have initiated drag racing on the main streets of town, as well as drunken brawling. When one rider was arrested and locked in a police cell, an estimated 750 riders challenged the local seven-man police force to release their friend. The event became known as the Hollister riots. In a now famous statement, an AMA spokesperson clarified that it was only '1%' of the riders who had caused the trouble that weekend, and that the other 99% were law-abiding citizens. This distinction between '1%' and '99%' is still used by OMCG commentators today, and '1%' is sometimes even used by OMCG members themselves as a mark of their identity. It represents 1% of bikies who operate outside the law.

Identity

Identity is important to OMCGs. Many motorcycle clubs, both mainstream clubs and OMCGs, have unique club **patches** on the back of their members' vests. These patches feature the club's logo, name and often the initials 'MC' (motorcycle club), together with the club's local branch or chapter. These patches form what is known as the club's **colours**. For OMCGs, the club's colours are very important to both the club and its members.

patch
a symbol or club logo attached to the back of a motorcycle club member's vest

colours
a motorcycle club's standard vest showing the club's patches on the back as a mark of identification

Review 18.1

1. Identify what outlaw motorcycle gangs are and how widespread they are in Australia.
2. Describe what organised crime is and how it relates to OMCGs.
3. Explain the difference between OMCGs and everyday motorcycle clubs using an example such as the Mick Hawi case.

Figure 18.3 A Mongols patch and vest is put on display during a press conference in Los Angeles. A patch is a symbol or club logo attached to the back of a motorcycle club member's vest.

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Sometimes, for a member to earn the club's patch, the club might require a vote and a swearing of allegiance to the club, or the performance of tasks. A member losing their colours, for example, to the police or a rival gang, might result in some form of penalty or even expulsion from the club. Some OMCGs even have an additional patch with '1%', to clearly distinguish themselves from the norms and values of mainstream clubs; other patches include symbols such as a skull and crossbones. The colours also act as a crucial identifier for law enforcement agencies seeking to prove OMCG involvement.

Structure

The structure of an OMCG is often another important factor for the law in identifying the group and its levels of membership under the defined legal terms for such organisations. The history and organisation of one such club, the Hells Angels, is discussed in the following Case Study.

Case Study

The Hells Angels

The Hells Angels Motorcycle Club started in Fontana, California, in 1948. Initially, it attracted soldiers returning from World War II, and later from the Vietnam War. The name 'Hells Angels' had been used by several US air-fighting squadrons during both World War I and II.

The fact that many of the club's founding members came from military backgrounds influenced the structure of the club and formed the basis of the military-style hierarchy and notions of territory or 'turf' that still exist today.

Over time, the Hells Angels grew from a small club in California to an international organisation with approximately 475 charters in 62 countries in 2024.

An article published by Neal Hall in *The Vancouver Sun* in 2005 provided insight into the hierarchy of the Hells Angels Club and the social structure of its individual chapters. In his article, Hall cited the expert opinion of Sergeant Jacques Lemieux, an Ottawa-based expert on the Hells Angels.

According to Lemieux, each chapter holds weekly meetings known as 'church'. The president is the absolute leader, and makes key decisions about the chapter's activities. If he is absent, a vice president replaces the president.

The sergeant-at-arms is responsible for the behaviour of members at meetings and special events such as funerals.

The secretary-treasurer controls the finances, with duties such as collecting fees and paying club expenses, and may sometimes act as an intelligence gatherer if operations by police are pending.

The road captain organises and navigates mandatory bike rides, including rest stops for food and petrol.

It is believed that there is a code of conduct governed by the sergeant-at-arms, which may differ slightly from chapter to chapter. The code of conduct lays down three major rules that apply to all members:

- no sexual assault
- no use of heroin
- no 'burning' of drug deals (that is, attempting to 'rip off' a buyer or seller).

In Australia, the official Hells Angels website displays a range of activities based around the riding of motorcycles with prizes and giveaways. It features notices of events, email contacts and photo galleries. It does not list any rules for club members.

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OMCGs and organised crime

According to the Australian Criminal Intelligence Commission, OMCGs present a visible threat of complex and highly functional criminal networks. Although estimates vary, the cost of OMCG activities has been estimated at around $2.2 billion per annum.

They are reputed to be involved in:

- the manufacture and distribution of illegal drugs
- money laundering and extortion
- trade in illegal firearms
- trade in stolen goods
- violent crimes and motor vehicle offences.

On the other hand, OMCG members claim that their clubs are legitimate motorcycle organisations and are not used as fronts for organised crime, as claimed by law enforcement agencies. Outwardly, legitimate businesses, such as in the areas of entertainment, private security, finance, transport and construction, may be involved with outlaw motorcycle gangs.

One of the most important Australian cases in which OMCGs received widespread media exposure for violent criminal activity was also one of the largest criminal court cases in Australian history. The incident, which occurred in a Sydney suburb in 1984, became known as the 'Milperra massacre' (see the In Court box below).

In Court

The Milperra massacre trials

The Milperra massacre court case was one of the largest criminal trials held in Australia: 43 people were charged with seven counts of murder.

The Milperra massacre took place on 2 September 1984 in the Sydney suburb of Milperra. It involved two rival gangs, the Bandidos and the Comancheros. The main source of the conflict was the animosity between Anthony 'Snoddy' Spencer (who had left the Comancheros to become a Bandido leader) and William 'Jock' Ross (the president of the Comancheros). The Comancheros, Bandidos and other outlaw gangs were competing to control the manufacture and supply of amphetamines (speed), as well as the cocaine trade.

The heavily armed gangs clashed in the car park of the Viking Tavern in Milperra during a motorcycle swap meet. During the resulting violence, there was a murderous shoot-out that killed four Comancheros, two Bandidos, and a 14-year-old girl who was caught in the crossfire. More than 20 other people were wounded.

The judge in the case, Justice Adrian Roden of the New South Wales Supreme Court, named Ross as the 'supreme commander' of the Comancheros, and said that he had instigated the violence by making the decision that his club members would go in force and armed to Milperra.

Ross was given a life sentence for his part in the massacre, but served only five years and seven months. Life sentences were also given to seven other Comancheros. Sixteen Bandidos were convicted of manslaughter and served 14 years each. No 'bikie' testified in the case and many of the details of the Milperra massacre are unknown to this day.

Due to the massacre, amendments were made to the *Firearms and Dangerous Weapons Act 1973* (NSW), including the introduction of a new licensing firearms regime. (The legislation currently in force in New South Wales is the *Firearms Act 1996* (NSW).)

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Figure 18.4 Comanchero bikie member Pomare Pirini outside Central Local Court in Sydney on 9 July 2009. Pirini and two others were charged with riot and affray following a fatal brawl at Sydney Airport in March 2009.

Since the Milperra massacre, there have been many public and violent incidents involving OMCGs across Australia. OMCG-related businesses are also engaged in black-market criminal activities, such as the trade in illegal drugs or firearms and illegal financial activities like money laundering and extortion. This is often not as well known to the public.

However, reports from Australia's intelligence agencies suggest that crime associated with OMCGs is on the rise, and that OMCGs are moving into the maritime and security industries. OMCGs are becoming more sophisticated. As with legitimate businesses, the competition for profit and territory can result in friction and rivalry, and the reports suggest that there may be a consolidation of the smaller groups into larger and more powerful organisations controlling criminal operations in Australia.

As an issue of public and political concern in all Australian jurisdictions, OMCGs have received much attention from law-makers. Some of the attempts by law-makers and members of the public to address the problems, and some of the implications of those attempts, are discussed in more detail in the next section.

The legislative responses to these violent OMCG-related incidents have been unprecedented, largely because of the amount of media attention and public concern the incidents have raised.

One of the main difficulties is that OMCG activities are a nationwide problem, but the problems often occur and are dealt with on a state-specific basis; that is, each jurisdiction in Australia has elected to address the issue in different ways. In addition to the legislative difficulties, the approach to OMCGs around the country has been affected by the reactions of interest groups and the public.

Review 18.2

1 Recall how OMCGs developed and their history.
2 Outline some of the characteristics of OMCGs and their structure.
3 Outline some of the recent cases involving OMCGs and the issues they present.

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18.2 Legal responses

The legal responses to OMCGs have included:

- passing laws that mean individuals can be prosecuted for particular crimes such as money laundering, drug offences or assault
- establishing police task forces or increasing police powers to collect intelligence and target the activities of OMCGs
- passing laws with the intention of criminalising the clubs themselves or participation in them.

The implications of these different approaches are subject to intense debate by politicians, law interest groups and other interested parties.

Laws targeting individual crimes

All Australian states and territories have statutory offences under which the members of OMCGs can be prosecuted for criminal acts. For example, prosecutions of participants for the violent incidents previously mentioned would have been under standard criminal laws like those covering assault, murder, firearms offences or offences of dealing in illegal drugs.

One of the biggest issues is that the widespread nature of OMCG criminal activities means prosecuting for individual crimes can seem an inadequate way of dealing with the problem. Each individual crime requires time-consuming and resource-intensive police work. Further, gathering evidence to convict OMCG members can be very difficult, as club members tend to have a 'code of silence', while victims and others associated with the clubs may be afraid to speak out.

Convicting the relatively small proportion of individual members who can be proven to have committed crimes does not have much effect on the broader organisation of OMCG activities. Therefore, Australian jurisdictions have preferred to focus on the types of activities OMCGs might be involved in and set up legislative frameworks that criminalise these activities and target their businesses and profits.

This legal framework includes:

- money laundering offences
- trafficking and smuggling offences
- orders for reporting of financial transactions
- legislation whose object is to deprive criminals of the proceeds or benefits derived from their offences, to prevent reinvestment of the proceeds in further criminal activities, and to enable law enforcement agencies to trace those proceeds; for example, the *Proceeds of Crime Act 2002* (Cth).

Task forces and intelligence

task force
a special group or committee of experts formed for the express purpose of studying a particular problem

coercive powers
special powers sometimes given to a commission or police task force that allow it to summon any witness to give evidence or produce any documents – these powers are usually only vested in courts

Increasing the powers law enforcement agencies have to investigate, disrupt and prevent organised crime activities is another response to the problems cause by OMCGs. Special law enforcement agencies, or **task forces**, are set up and given special powers for the investigation and prosecution of more serious crimes. These powers can include:

- intercepting telecommunications
- using surveillance devices
- search warrants
- special **coercive powers**
- inter-agency intelligence sharing across state, national and international areas.

This can be controversial, as some of these powers extend beyond the traditional boundaries of government and law-enforcement agencies. Some things, such as using coercion to force witnesses to give evidence, are options normally only available to the courts. There needs to be a lot of oversight to make sure the task forces do not abuse these powers. However, this represents a challenge the doctrine that the powers and functions of the judiciary are separate from those of the other two branches of government (separation of powers, as discussed in Chapter 2).

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In 2006, the Australian Crime Commission (now known as the Australian Criminal Intelligence Commission) responded to an increase in reports of OMCG activity by listing OMCGs as a 'high-risk crime group'. The OMCG National Intelligence Task Force was established to investigate the membership and activities of OMCGs, and to establish national policies to deal with any matters found. In 2008, this task force was replaced by the Serious and Organised Crime National Intelligence Task Force, which has a strong focus on OMCGs but also on other areas of organised crime. It also works with agencies in different Australian jurisdictions and encourages collaboration.

Since December 2013, the Australian Gangs Intelligence Coordination Centre (AGICC) – a central intelligence hub responding to the escalating threats of OMCGs in Australia – has been operating under 'Project Legion'. The AGICC manages an intelligence-led response to OMCGs and other known gangs by building a broad strategic picture of the issues, and referencing this when new intelligence is gathered.

In addition to the federal government, a number of states have set up operations and task forces to deal with organised crime activities.

Examples of state-based operations and task forces include:

- In New South Wales, Operation Ranmore was set up in 2007 as part of a crackdown on OMCGs, enabling police to raid the clubhouses of the Finks, Rebels, Lone Wolf and Fourth Reich and obtain evidence to lay charges.
- In 2012, there were a number of drive-by shootings in Sydney's southwest by the Hells Angels and Nomads OMCGs. In response, law enforcement conducted raids simultaneously on 18 different properties in the Sydney metropolitan area, covering the suburbs of Cranebrook, Georges Hall, Auburn, Granville, Parramatta, St Marys, Blackett, Merrylands, Rosehill, Constitution Hill, Guildford, Pemulwuy, Pennant Hills and Bella Vista. This coordinated action included police officers from Operation Kinnarra, as well as Strike Force Raptor, other State Crime Command squads, the Metropolitan Region Commands, the Riot Squad, the Police Dog Unit and the Rescue and Bomb Disposal Unit.
- In Queensland, Task Force Hydra was established to target OMCGs, resulting in a number of charges for criminal activities.
- In the Northern Territory, Operation Morley was set up in 2021 to investigate the Mongols OMCG, who were allegedly involved in supplying and distributing methamphetamine in the Darwin region. By 2023, there had been over 40 arrests, including the president, vice-president and sergeant-at-arms of the gang's Darwin chapter.
- In New South Wales, Task Force Erebus was formed in 2022 following a rash of gangland shootings; its first week saw the arrest of members of the Finks, Rebels and Comanchero OMCGs.
- In 2023, a joint operation between New South Wales and Victoria – Operation Blue Ember – targeted OMCGs and organised criminal networks in the Riverina and Albury-Wodonga regions. The multi-agency operation ran for four days, with 27 people arrested and 11 firearms seized.

A national anti-bikie gang task force called Operation Morpheus has been operating since September 2014, and includes officers from all state and territory police agencies as well as the Australian Criminal Intelligence Commission, the Australian Federal Police and other bodies.

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Case Study

Raptor Squad

In March 2009, the NSW Police Force established Strike Force Raptor to target the illegal activities of OMCGs. By the end of April, more than 50 arrests had been made and 120 charges laid, and substantial quantities of amphetamines and firearms had been seized.

In 2018, the NSW Crime Command's Gangs Squad launched an online facility that allows people to report OMCG activity directly to Strike Force Raptor investigators. It has always been possible to report OMCG activities direct to police or via Crime Stoppers, and members of the public are still encouraged to use these methods. However, Strike Force Raptor investigators believe the new 'direct-to-detectives' reporting capability will maximise opportunities for members of the public to work in real time with police to reduce OMCG-related crime and violence.

Also in 2018, a new arm called Raptor South, based in the Illawarra region, was set up. In the first two months of operation, Raptor South conducted almost 20 operations, arrested eight people, laid over 40 charges, seized 20 prohibited weapons and confiscated illicit cash and drugs worth tens of thousands of dollars.

In 2021, Strike Force Raptor became a standalone unit, Raptor Squad, and in January 2023 another regional arm was set up – Raptor North, based in the Hunter region.

Police say that the reason for setting up Raptor South and Raptor North is because more than half of outlaw motorcycle gang members are based in the Hunter and Illawarra regions, many of them having left Sydney to avoid attention from Raptor Squad.

As at January 2023, Raptor Squad had approximately 150 members, of whom 29 were in Raptor North and 25 in Raptor South. Since its inception in 2009, Raptor had made 7500 arrests, laid 19 000 charges, and seized both guns and drugs.

Media

OMCGs targeted during national Taskforce Morpheus week of action

Australian Criminal Intelligence Commission media release

8 August 2023

With the sole aim of causing maximum disruption to outlaw motorcycle gangs (OMCGs) police across the country arrested 159 people, laying 693 charges and seizing 43 firearms and $1M in cash last week as part of a national week of action.

Focussing on enhanced national coordination and collaboration, Taskforce Morpheus is a joint initiative through which all Australian state and territory police, New Zealand Police, Australian Federal Police, Australian Border Force, Australian Criminal Intelligence Commission, Australian Defence Force, Australian Taxation Office, Australian Transaction Reports and Analysis Centre and Services Australia collaboratively target the highest threat outlaw motorcycle gangs impacting Australia.

With their propensity for violence, established transnational serious and organised crime networks and significant footprint in the illicit drug and firearm market, OMCGs are ranked as the largest serious and organised crime cohort impacting Australia and New Zealand.

This year's week of action ran from 31 July to 6 August.

(Continued)

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Media—Continued

With a particular focus on drugs, firearms, weapons and explosives, each state and territory proactively targeted their own highest priority issues, with concentrated disruption, enforcement and compliance activity undertaken.

Leveraging shared capability and technology, national Taskforce Morpheus also targets criminal assets and unexplained wealth of key OMCG members, protects vulnerable people and develops national strategies to deter gang recruitment, reduce membership and target recidivism and enablers to organised crime.

Utilising almost 2100 police officers from around the country, the week of action led to:

- 159 arrests
- 693 charges
- The seizure of 43 firearms and 22 weapons
- Seizures of varying drugs in various quantities, and
- Approximately $1M in cash seized and 11 vehicles.

In total, 71 search warrants were executed nation-wide, alongside 252 Firearm Prohibition Order (FPO) compliance searches.

A further 15 FPOs were served.

…

Detective Superintendent Jason Kelly from the Victoria Police State Anti-Gangs Division [said] 'Our message to OMCGs and their facilitators is clear – we are working together, and we will be relentless. We will not stop.'

…

New South Wales Police Force Raptor Squad Commander, Detective Superintendent Andrew Koutsoufis, said Operation Morpheus is a great example of how Australian law enforcement is collaborating to target OMCGs.

'By coordinating cross-border and cross jurisdictional operations, we enhance our capabilities to disrupt OMCG networks, who we know are not confined to one particular city or state,' Det Supt Koutsoufis said.

Research 18.1

Research a task force that has recently been established to examine the activities of OMCGs.
Identify the following elements of the task force:

1. Who established the task force?
2. For what purpose was the task force established?
3. Is the task force funded by the federal or state government?

Laws targeting organisations and membership

Introducing legislation that targets and criminalises the motorcycle clubs themselves, instead of individual crimes, is perhaps the most controversial approach to dealing with the issue of OMCGs.

The most contentious approach is where legislation is enacted with the intention of criminalising individual membership of clubs, or association with them. Civil liberties groups argue that criminalising people's association with illegal groups would

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create unnecessary police powers and may start the cycle of police arresting other protest groups, such as environmentalist groups, which may engage in illegal activity such as trespass.

This approach has legal difficulties at a fundamental level, and Australian jurisdictions deal with the issues in different ways. In particular, there are questions around the method and process by which a group can be defined as criminal, and what level of individual involvement is criminalised. For example, would a group of four teenagers going into a store to shoplift a DVD be a 'criminal organisation'? Would all four be equally guilty? Who should determine this and what crimes should be covered?

The four main issues that must be determined are:

- **defining an organisation** – how many people can form a group (e.g. two or more; three or more) and what activities or objectives make it illegal (e.g. committing a serious offence or obtaining some profit or advantage from it)?
- **what is the criminal link** – what level of criminal activity is required (e.g. committed a past offence, intends to commit an offence or comes together to commit an offence, or simply poses a risk or threat of committing an offence)?
- **process for determining** – who can make the decision on whether a particular group is a criminal organisation (e.g. the courts only, a government official, or simply the police)?
- **individual involvement** – what involvement with the group must a person have to be considered criminal (e.g. leading the group, being a member of it, recruiting others, participating in it, supporting it, or simply associating with a member of it)?

Many commentators have acknowledged the risks that the criminalisation approach may pose to fundamental and accepted interpretations of the criminal law, and especially to an individual's civil rights. Some of the serious questions raised are:

- Should an organisation be criminalised if its members only appear to be potential offenders, rather than committing or intending to commit an offence?
- Should government officials or the police have the power to declare an organisation criminal, or should this only be determined by a court?
- Should the organisation's members be given an opportunity to respond?
- Should a person be criminally liable for participating in such an organisation when they have not committed any other offence?
- Should a person be criminally liable for simply associating with a member of such an organisation?

Two central concepts of the law are brought into question by this approach. The first is the **rule of law**, introduced in Chapter 1; that is, the principle that laws should be applied in the same way to all individuals. The danger of criminalising organisations, especially where police officers or government officials can make the determination without court oversight, is that the law may be used to target individuals or individual associations, rather than being applied equally to all.

rule of law
the principle that nobody is above the law; this can be seen in the requirement that governmental authority must be used in line with written, publicly disclosed laws, for which established procedural steps (due process) have been taken in the adoption and enforcement

guilt by association
criminal liability imposed for associating with another person who commits a crime, rather than for committing that crime oneself

The second problem with the approach is that it affects a person's fundamental freedom to associate by introducing laws of **guilt by association** – under which a person may be found criminally liable simply by associating with another person who commits a crime, even though that person has committed no crime themselves.

Three Australian states have attempted to enact laws with elements of the approaches previously outlined. In Queensland, the first Bill failed to pass in the Queensland Parliament but a second Bill was passed in 2009. In South Australia and New South Wales, the Bills were passed and enacted into law. Some of their provisions and associated issues are outlined in the following pages.

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Figure 18.5 A demonstration by members of the Hells Angels in Berlin in September 2017 protesting against the ban of their badges. Since 2017, Hells Angels club badges such as the winged skull cannot be displayed in public by law.

Queensland approach

In 2007, the Queensland state opposition introduced into the state parliament the Criminal Code (Organised Criminal Groups) Amendment Bill 2007 (Qld). The Bill's purpose was to amend existing laws to extend their coverage beyond parties to offences, and to make it an offence to 'participate' as a member of an organised criminal group. Its provisions included:

- defining an organised criminal group as three or more people with an 'objective' of committing a serious crime for material benefit or of committing a serious violent offence
- penalties of up to five years' imprisonment for participation as a member of that organisation, if the person knew it was a criminal organisation and their participation contributed to the occurrence of criminal activity
- defining 'member' to include anyone identifying themselves as a member; for example, by wearing the club's insignia, patches or colours.

control order
an order made by a court, government official or police officer to restrict an individual's liberty; for example, from doing a specified act or being in a specified place

Critics of the Bill questioned the lack of connection between participation and actual criminal activity. The then Queensland Attorney-General and Minister for Justice, Kerry Shrine, described the Bill as 'ill conceived, unnecessary and [aiming] to extend the basic principles of criminal liability to guilt by association … No specific act or omission by the accused is necessary'.

The Bill did not receive enough support to pass. However, following the violent killing of Anthony Zervas at Sydney Airport in 2009, the Queensland Government announced that it would prepare new laws enabling police to apply to the Supreme Court for an order prohibiting identified members of an outlaw motorcycle gang from associating with one another. This was subsequently enacted in the *Criminal Organisation Act 2009* (Qld). In June 2012, Queensland Police applied to the Supreme Court under the *Criminal Organisation Act 2009* (Qld) to ban members of the Finks club from associating with each other. By 2013, the Queensland Government had introduced three new Acts designed to curb the power and criminal activity of bikies with the *Vicious Lawless Association Disestablishment Act 2013* (Qld), the *Tattoo Parlours Act 2013* (Qld) and the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld). New tougher penalties were also included such as fines of up to $1000 per day and mandatory prison.

South Australian approach

Following numerous violent incidents involving OMCGs, including the death of a gang member at an Adelaide nightclub, the South Australian Government enacted the *Serious and Organised Crime (Control) Act 2008* (SA). The South Australian laws aimed to disrupt the activities of OMCGs and other criminal organisations and protect the public from their violence. By 2015, the *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) was in force.

The Act banned the wearing of gang logos in bars and pubs and effectively banned the club as a legal entity. It gave unprecedented new powers to the government, allowing it to declare an organisation a criminal organisation and allowing police officers to make **control orders** preventing individual members of that organisation from doing specified acts or being in specified places. The laws are similar to some of the special terrorism laws introduced by

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the federal government following the September 11 terrorist attacks. For example, the *Anti-Terrorism Act 2005* (Cth) introduced two new divisions into the *Criminal Code Act 1995* (Cth) allowing control orders and preventative detention orders to be made against individuals.

The South Australian Act is not restricted to OMCGs but can apply to any declared organisation. A 'declared organisation' is one whose members associate for the purpose of organising or engaging in serious criminal activity, and that represents a risk to public safety and order, according to the South Australian Attorney-General.

Some of the most critical provisions of the South Australian Act are:

- The Attorney-General can declare any organisation a criminal organisation without stating grounds and without right of appeal or court review. For example, the Finks have now been declared a criminal organisation.
- The Act creates an offence with a penalty of five years' imprisonment for anyone who associates more than five times a year with a member of a declared criminal organisation. This means a person can be deemed guilty by association as a result of any contact or meeting, even though that contact could be entirely innocent.
- The Police Commissioner can apply to the South Australian Magistrates' Court for control orders prohibiting a person from associating with, communicating with or being in the vicinity of specified people. These orders can be made without the standard criminal onus of proof beyond reasonable doubt.
- A 'senior police officer' can prohibit a person or class of people, without court oversight, from being at a specified place or area or attending a specified event.

The Act has attracted much criticism for its severe restrictions and lack of adherence to long-standing principles of the criminal law. For example, the Law Society of South Australia argued that the legislation went too far, in that it 'undermines the presumption of innocence; restricts or removes the right to silence', and does not allow courts to 'challenge possibly biased, unfounded, or unreasonable decisions of the Attorney-General or Commissioner of Police'. Individuals may have no right to know the reasons for an order or to challenge the truth or reliability of those reasons. In 2009, provisions of the Act were appealed to the Supreme Court of South Australia by members of the Finks who had been charged under the Act. The Supreme Court of South Australia declared the provisions of the Act invalid and the South Australian Government appealed this ruling to the High Court of Australia. In 2010, the South Australian laws were thrown out by the High Court in a 6–1 verdict ruling that found the criminal association laws to be unconstitutional: *South Australia v Totani* [2010] HCA 39.

New South Wales approach

In New South Wales, relevant legislation has been amended many times since the 1984 Milperra massacre. In 2005, after several gang-related incidents, including the Cronulla riots in December 2005, the NSW Government introduced the *Crimes Legislation Amendment (Gangs) Act 2006* (NSW). This Act introduced a series of reforms specifically aimed at organised crime and OMCGs. These included:

- increased penalties for activities connected to organised crime
- increased police powers in applying for search and seizure warrants, including the power to remove fortifications or surveillance cameras designed to stop police entry, and powers to pacify guard dogs and even to block drains (to prevent the flushing of drugs down the sink or toilet)
- new offences for involving another person in performing or helping in criminal activity
- new offences for knowingly taking part in a criminal organisation. (The definition of a criminal organisation was almost identical to the one contained in the Queensland Bill described previously. Significantly, the New South Wales Act did not include an offence for simply being a member of the organisation.)

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Figure 18.6 The Rebels bikie gang clubhouse was used for a media conference for the NSW Bikers Council in April 2009. The event was held following anti-biker legislation passed by the state government.

As an immediate response to the 2009 killing of Anthony Zervas at Sydney Airport, NSW Premier Nathan Rees introduced new laws that were even stricter than those in South Australia. The *Crimes (Criminal Organisations Control) Act 2009* (NSW), which more specifically dealt with OMCGs, was quickly passed through parliament. Some of the important changes were:

- Police officers can make an application to the Supreme Court to have an organisation declared criminal. This provision for court oversight stands in stark contrast to the South Australian law, where it is the Attorney-General who can make the declaration.
- Membership of a declared organisation is an offence, as is 'association' between members of a declared organisation who are under control orders. 'Association' includes either being in company with someone or communicating with someone by any means. Declared gang members who continue to associate can face two years' imprisonment for a first offence or five years for a second.
- The Act contains new offences for recruiting members of a declared organisation, said to prevent establishment of younger 'feeder groups' for the organisations.
- It authorises new search warrants to make it easier for police to seize items connected to criminal organisations.

As with the South Australian Act, some of the main concerns expressed were the potential for immediate charges and control orders to undermine the presumption of innocence, and concerns about rights to freedom of association. On the other hand, Australian Federal Police Commissioner Mick Keelty, in an interview, stated:

> 'New South Wales does have a particular problem ... of the number of outlaw motorcycle gangs that we're aware of, 19 of them are situated in New South Wales ... So of the nearly 40 gangs, nearly half of them are in New South Wales.'

The High Court of Australia handed down a decision in 2011 that invalidated the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The court found that the law was contrary to the separation of powers by undermining the institutional integrity of the state's Supreme Court (see *Wainohu v NSW* (2011)). The court also held that the law was outside of the legislative powers of the New South Wales Parliament. As the law conferred quite wide-ranging powers to enforcement authorities within the state and pre-empted decisions that could be

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made in the Supreme Court, it has been criticised as infringing fundamental civil liberties.

The New South Wales Parliament responded by enacting the *Crimes (Criminal Organisations Control) Act 2012* (NSW). This Act is very similar to the 2009 Act, but makes amendments to overcome the constitutional shortcomings of that Act. For instance, this new Act requires that if an eligible judge makes a declaration or decision under the Act, this eligible judge must provide reasons for the making of the declaration. In addition, the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) was introduced to increase the penalties for those involved in firing a weapon at a dwelling or house as part of an organised criminal activity.

In 2018, following the NSW Ombudsman's report on the *Restricted Premises Act 1943* (NSW), a number of amendments were made to the Act. As a result, the police gained greater powers to conduct raids on OMCG clubhouses, including the ability to:

- search anyone on the site
- compel anyone to provide their name and address
- compel anyone present at the venue to move on.

Review 18.3

1. Identify the three main legal responses to OMCGs and organised crime.
2. Outline some of the advantages and disadvantages of each legal response.
3. Discuss how the legislation differs between Australian jurisdictions. Assess each approach and recommend which one is the best in your view. Justify your response.
4. Research the 2018 amendments to the *Restricted Premises Act 1943* (NSW). Evaluate the effectiveness of these changes.
5. Research up to three media reports from the past two years in relation to OMCG violence. Highlight the time and circumstances of each incident and comment on the nature of the media reports and any reference to Strike Force Raptor or Raptor Squad.

18.3 Non-legal responses

In addition to the responses of law-makers and law enforcement agencies discussed previously, there are a number of other responses to consider. These include those of the public, the media, politicians, interest groups and the OMCGs themselves. Some of these responses are explored in the following pages.

Media and politics

A key aspect of the political responses to OMCGs has been the way in which public opinion is shaped by media reports. The media gives wide coverage to violent incidents, including those related to OMCGs, and politicians are usually eager to convince the public that they are being 'tough on crime'. This can be seen in cases such as the NSW Government's action to strengthen organised crime laws immediately after the Sydney Airport murder. The media enables public discussion of proposed laws, including their advantages and disadvantages, and can significantly influence how legislatures and the police deal with issues.

Demonstrations

Various sectors of the public have voiced their opinions on OMCGs and the law's response to them through demonstrations. In March 2009, a number of motorcycle clubs, including the Hells Angels, Gypsy Jokers, Rebels and Finks, organised a ride through the towns of South Australia's Barossa Valley. Over 700 motorcyclists participated in the ride, accompanied by a police escort, to protest against the *Serious and Organised Crime (Control) Act 2008* (SA).

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The protest took place in conjunction with the Gypsy Joker's annual ride, which had never before been open to other clubs. In a second peaceful protest in May 2009, about 300 members of different motorcycle clubs converged on Parliament House in Adelaide and presented a petition against the new legislation. In response, South Australian Premier Mike Rann described the laws as the 'world's toughest anti-bikie legislation' and stated, 'We are talking about drug dealers on wheels and we are not going to bend or break because of [a] protest.'

In another interesting form of protest, in response to Queensland's Operation Hydra, aimed at curbing criminal OMCG activities, a number of OMCGs met to discuss tactics to fight fines issued to motorcyclists. One of the tactics was a campaign to fight all fines in court to create backlogs in the system, with the aim of forcing police to reduce fines for traffic infringements.

Forming political parties

In one unique response to the OMCG issue, members of the South Australian public who were strongly opposed to the *Serious and Organised Crime (Control) Act 2008* (SA) and its implications for civil rights decided to make their voice and concerns heard by politicians by establishing a new political party, the F.R.E.E. Australia Party: Freedom, Rights, Environment and Education (FREE).

Among its members were a number of motorcyclists concerned about the introduction of the Act, although party spokesperson Paul Kuhn said that the party was concerned about a number of other issues as well.

The party obtained formal political status on 19 March 2009, and ran in the 2010 and 2014 South Australian state elections, without significant results. The party no longer exists.

Review 18.4

1 Describe some of the non-legal responses to organised crime. Outline how these non-legal responses can influence legal responses.
2 Assess which non-legal responses you believe are the most effective in dealing with OMCG issues. Justify your response.

18.4 Effectiveness of responses

Public order and safety are usually cited as the chief reasons for changing the law to address OMCGs. Due to the violence often associated with many of their activities, OMCGs receive widespread media attention, which results in emotive public discussion. The political responses of some Australian jurisdictions have focused on 'ramping up the laws', being 'tough on crime' and 'smashing criminal gangs'.

The three main types of legislative responses to OMCGs and other organised crime are laws targeting their activities, laws establishing police task forces and special police powers, and laws that criminalise the organisations or their members. Not all jurisdictions in Australia have introduced laws in the third category.

Following the Sydney Airport incident, both Victoria and the Australian Capital Territory stated that current laws were sufficient, and they did not intend to introduce new laws. Other states and commentators claimed that this would create 'safe havens' and 'legislative gaps' for OMCGs to exploit, but there has been no evidence of this to date.

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In New South Wales, it was reported in March 2023 that since the formation of Raptor Squad in 2021 there had been an approximately 20 per cent decline in OMCG membership – from approximately 2500 to 2000 members.

Legal responses need to be carefully weighed and their implications considered to avoid creating **draconian laws** or sacrificing fundamental principles (such as the rule of law, the separation of powers and the presumption of innocence) or individual rights (such as freedom of association and freedom of movement). Laws departing from these principles require mechanisms for review. While it is too soon to assess the effectiveness of these laws – both in reducing the criminal activities and violence associated with OMCGs, and in ensuring justice for all parties concerned – they will be judged on the facts over time.

draconian laws laws that are excessively harsh or severe – from Draco, a Greek legislator (seventh century BCE) whose laws imposed cruel and severe penalties for crimes

Figure 18.7 Public order and safety are usually cited as the chief reasons for changing the law to address outlaw motorcycle gangs. However, the effectiveness in reducing the criminal activities and violence associated with these gangs is yet to be determined.

Review 18.5

1 Compare the responses of different jurisdictions to OMCG-related activities. Assess which legal responses are the most effective and why.
2 Discuss how far the law should go to address the activities of OMCGs and other organised criminal groups. Assess if the legal responses so far have been appropriate.
3 Outline to what extent members of the public are safer under the 2018 legislative changes to the *Restricted Premises Act 1943* (NSW). Find two media articles to support your response.

Research 18.2

Search online for recent news articles about OMCGs and complete the following tasks.
1 Outline if there have been any recent incidents involving OMCGs in New South Wales or in other parts of Australia.
2 Describe any recent arrests or charges laid against OMCG members. Identify if the articles suggest that the new laws in New South Wales have been used or have been effective.
3 Identify if there have been any problems or court challenges associated with the new laws in New South Wales.

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Chapter summary

- Organised crime is a problem for Australian society and for the law. Organised crime operates in many different areas of business and is associated with many different illegal activities.
- Motorcycle groups have formed alongside the rise in popularity of the motorbike, and the purpose of most is to share a common interest in motorcycles.
- Outlaw motorcycle gangs (OMCGs) are a growing problem in Australia.
- There have been many public incidents involving OMCGs.
- There are different legal approaches to OMCGs, each with its own advantages and disadvantages.
- Legal approaches to OMCGs include introducing laws to prosecute individuals for specific crimes, establishing task forces and increasing police powers, and introducing laws that criminalise being a member of an OMCG or associating with them.
- Some of these legal approaches encroach on the fundamental principles of criminal law and individual rights.
- Different Australian jurisdictions have adopted different approaches to deal with OMCGs.
- The media, politicians, the public and OMCGs themselves have voiced their views on the issues and on the legal responses.
- The law needs to balance the interests of all parties involved.
- It is too soon to assess the effectiveness of recent legal responses to OMCGs.

Multiple-choice questions

1 Organised crime can be defined as:
- **a** illegal activities carried out by organised groups, usually for financial gain.
- **b** illegal activities carried out by more than one person in a single incident, where timing is important.
- **c** activities such as rallies and protests organised by motorcycle gangs without a permit.
- **d** the exercise of certain police powers without authorising legislation.

2 The largest area of organised crime activity is:
- **a** digital piracy.
- **b** extortion.
- **c** drug trafficking.
- **d** drunken brawling.

3 'Draconian' laws are:
- **a** harsh, strict and punitive.
- **b** enforced by both state and federal governments.
- **c** enforced by state but not federal governments.
- **d** enacted by the United Nations.

4 Under the South Australian *Serious and Organised Crime (Control) Act 2008* (SA), who can declare an organisation to be criminal?
- **a** Police Commissioner
- **b** Supreme Court judge
- **c** Premier
- **d** Attorney-General

5 What is one reason for enacting controversial laws outlawing motorcycle gangs?
- **a** To encourage competition between state premiers for the toughest anti-bikie laws
- **b** To give greater powers to police to compensate for their low pay
- **c** To limit motorcycle transport, which has a high degree of road fatalities
- **d** To target organised crime, which can be difficult to fight under ordinary laws against criminal acts

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Short-answer questions

1 Discuss why organised crime is a problem in Australia.
2 Describe the types of activities related to organised crime and how widespread they are in Australia.
3 Outline the origins of motorcycle gangs and OMCGs. Assess if they are different.
4 Outline the different legal approaches to OMCGs.
5 Describe some of the recent changes made to Australian laws to deal with OMCGs.
6 Discuss how some of the recent changes made to Australian laws that relate to OMCGs differ from previous laws made about OMCGs.
7 Assess whether some organisations should be criminalised.

Extended-response question

'Bikie gangs are like any other organisation or club. There are criminals in all walks of life.' Discuss this statement with reference to the law and at least one OMCG.

Marking criteria for extended response questions can be found on the Cambridge GO website. Refer to these criteria when planning and writing your responses.

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